In the Privy Council.

No. 31 of 1896.

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA.

BETWEEN

EDISON GENERAL ELECTRIC COMPANY . . *Appellants*,

AND

WESTMINSTER AND VANCOUVER TRAMWAY COMPANY, BANK OF BRITISH COLUMBIA, DAVID OPPENHEIMER and BENJAMIN DOUGLAS . . . . . *Respondents.*

RECORD OF PROCEEDINGS.

INDEX OF REFERENCE.

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RECORD OF PROCEEDINGS.

(Seal of Supreme Court). 45/94. E.

RECORD.

No. 1. Registrars' Certificates, 13th May, 1896.

In the Supreme Court of British Columbia.

Between

Edison General Electric Company . . . . . *Plaintiffs*

and

Westminster and Vancouver Tramway Company, Bank of British Columbia, David Oppenheimer, and Benjamin Douglas . . *Defendants*.

For the purpose of an appeal which has been allowed by this Court to the Privy Council and in pursuance of rule 4 of the Privy Council Orders made on the 12th day of July, 1887, This Court doth certify that the following pages 1 to 266 contain a true and exact copy of all evidence, proceedings, judgments, decrees and orders had or made in Edison General Electric Company *versus* Westminster and Vancouver Tramway Company, Bank of British Columbia, David Oppenheimer and Benjamin Douglas, commenced on January 17th, 1894, by a writ of

RECORD.

No. 1. Registrars' Certificates, 13th May, 1896 —*continued.*

summons issued out of the Vancouver registry and numbered 45/94 E. so far as the same have relation to the matter of such appeal.

By the Court

B. H. TYRWHITT DRAKE
Registrar of the Supreme Court.

A. E. BECK
District Registrar at Vancouver.

And I, the said A. E. Beck, the District Registrar of the Supreme Court of Vancouver further certify that the portions of the evidence of David Oppenheimer and William Murray which are not erased herein are such portions of the examination of David Oppenheimer and William Murray which were put in in evidence on the hearing of this action.

And I further certify that the Plaintiffs' statement of claim herein has been omitted for the reason that the Plaintiffs' amended statement of claim contains the whole of the same matter as appeared in the original statement of claim.

(Sd.) A. E. BECK.

(Seal of Vancouver Registry.)

No. 2. District Registrar's Amended Certificate, 20th May, 1896.

To the Registrar of
Her Majesty's Privy Council Whitehall

In the matter of an appeal to Her Majesty in Her Privy Council wherein Edison General Electric Company are Appellants and Westminster and Vancouver Tramway Company, Bank of British Columbia and others are Respondents—

I, Albert E. Beck, District Registrar of the Supreme Court of British Columbia at Vancouver do hereby certify,—

1. That I did on the twelfth day of May 1896 certify to a record of all proceedings in the above-mentioned cause for the purpose of an appeal to Her Majesty in Her Privy Council.

2. That in the last line on the first page of the said certificate the word "not" which should have been inserted between the words "were" and "put" in the said line was inadvertently omitted.

3. That the word "not" should be inserted in the last line of the first page of the said certificate between the words "were" and "put,"—so that the said line may read as follows,—"Oppenheimer and William Murray which were not "put in evidence on."

4. That all portions of the examinations of David Oppenheimer and William Murray which are erased by blue pencil in the said record are such portions as were not put in evidence on the trial of the action and that the portions of the examinations not so erased are the portions which were put in evidence as appears from the transcript of proceedings at the trial.

A. E. BECK,
District Registrar.

(Seal, Vancouver Registry, May 20 1896.)

45/94.E RECORD.

No. 3.
Order allowing Appeal to Her Majesty in Council, 9th March, 1896.

In the Supreme Court of British Columbia.
In the Full Court.

Victoria
Mar 13 1896
Registry

Present,—

The Honourable the Chief Justice
The Honourable Mr. Justice McCreight
The Honourable Mr. Justice Drake

Between,—

Edison General Electric Company . . . . *Plaintiffs (Appellants)*

and

Westminster and Vancouver Tramway Company, Bank of British Columbia, David Oppenheimer and Benjamin Douglas, ... *Defendants (Respondents)*

Monday the ninth day of March A.D. 1896.

Whereas the Plaintiffs (Appellants) did on the 13th day of February 1895 apply to the Honourable Mr. Justice McCreight sitting in Court by motion for leave to appeal to Her Majesty, her heirs and successors, in her or their Privy Council, from the judgment of this Court, dated the 30th day of January 1896 affirming the judgment of the Honourable Mr. Justice Crease, dated the 7th day of March 1895, in favour of the Defendants, and dismissing the Plaintiffs' (Appellants) appeal therefrom and refusing a new trial, with costs; and the said motion having stood adjourned, after hearing what was alleged by counsel on both sides, until the first day of the present sitting of this Court;

And the same coming on this day, and upon hearing Mr. A. E. McPhillips, of Counsel for the Plaintiffs (Appellants) and Mr. E. P. Davis, Q.C. of Counsel for the Defendants (Respondents); and upon reading the judgment of this Court dated the 30th day of January 1896; and upon hearing what was alleged by counsel aforesaid.

THIS COURT DOTH ORDER that the Plaintiffs (Appellants) do have leave to appeal from the said judgment of this Court, dated the 30th day of January 1896, to her Majesty, her heirs and successors, in her or their Privy Council.

AND IT IS ORDERED that the Plaintiffs (Appellants) do give security in a bond, mortgage or personal recognizance, in the sum of three hundred (300) pounds, sterling; (or by payment into Court of three hundred (300) pounds sterling or, fifteen hundred (1,500) dollars to the satisfaction of the Registrar of this Court, for the due prosecution of the said appeal, and the payment of all such costs as may be awarded by Her Majesty, her heirs and successors, in her or their Privy Council, to the Defendants (Respondents) such security to be entered into within three months from the 13th day of February, 1896, the date when motion was

RECORD.

No. 3. Order allowing Appeal to Her Majesty in Council, 9th March, 1896 —*continued.*

made unto this Court for leave to appeal; and then and not otherwise this Court shall admit the appeal and the Plaintiffs (Appellants) shall be at liberty to prefer and prosecute their appeal to Her Majesty, her heirs, and successors, in her or their Privy Council in such manner and under such rules as are or may be observed in appeals made to Her Majesty from Her Majesty's Colonies and plantations abroad.

AND IT IS FURTHER ORDERED that the costs of both parties of and incidental to the motion for leave to appeal and the preparation of the transcript record be taxed and that such costs be costs in the cause and do abide the judgment of Her Majesty in Council in the said appeal in that behalf or the result of the said appeal in case the appeal shall be dismissed for want of prosecution.

By the Court

HARVEY COMBE

Deputy Registrar.

45/94.E.

No. 4. Order admtting Appeal, 4th May, 1896.

In the Supreme Court of British Columbia.

In the Full Court.

Present;—The Honourable the Chief Justice, the Honourable Mr. Justice McCreight, the Honourable Mr. Justice Drake.

Entered Ordered Book
Vol. 19. Fol. 241
R.R.P.
Vancouver May 6 1896.
Registry.

Between

Edison General Electric Company . . *Plaintiffs* (*Appellants*),

and

Westminster and Vancouver Tramway Company, Bank of British Columbia, David Oppenheimer, and Benjamin Douglas . . *Defendants* (*Respondents*).

Monday the fourth day of May A.D. 1896.

Upon hearing Mr. A. E. McPhillips, of counsel for the Plaintiffs (Appellants), and Mr. E. P. Davis, Q.C. of counsel for the Defendants (Respondents), upon motion to this Court this day made, that the appeal herein to Her Majesty, Her heirs and successors, in Her or their Privy Council, be admitted; upon reading the order of this Court, made herein on the ninth day of March 1896, granting leave to the Plaintiffs (Appellants) to prefer and prosecute an appeal to Her Majesty, Her heirs and successors, in Her or their Privy Council, from the judgment of this Court, dated the 30th day of January 1896, affirming the judgment of the Honourable Mr. Justice Crease, dated the 7th day of March 1895, in favour of the Defendants (Respondents), and dismissing the Plaintiffs' (Appellants) appeal therefrom and refusing a new trial, with costs; upon reading

No. 4.
Order admitting Appeal, 4th May, 1896
— *continued.*

the affidavit of Henry George Sanders Heisterman, sworn and filed herein this day; and upon it appearing that the security required to be given by the said order of the ninth day of March 1896 before the said appeal should be admitted, has been given by the Plaintiffs (Appellants) in pursuance of the said order made herein on the ninth day of March 1896, in the value of three hundred (300) pounds sterling by payment into court of three hundred (300) pounds sterling, viz., fifteen hundred ($1500) dollars, for the due prosecution of the said appeal and the payment of all such costs as may be awarded by Her Majesty, Her heirs and successors, in Her or their Privy Council, to the Defendants (Respondents).

THIS COURT DOTH ORDER that the Plaintiffs' (Appellants) appeal be and the same is hereby admitted, and the Plaintiffs (Appellants) are at liberty to prefer and prosecute their said appeal to Her Majesty, Her heirs and successors, in Her or their Privy Council, in such manner and under such rules as are or may be observed in appeals made to Her Majesty from Her Majesty's colonies and plantations abroad.

AND THIS COURT DOTH FURTHER ORDER that the costs of both parties incidental to the motion to admit this appeal be taxed, and that such costs do abide the judgment of Her Majesty, Her heirs and successors, in Her or their Privy Council, in the said appeal in that behalf, or the result of the said appeal in case the same shall be dismissed for want of prosecution.

By the Court.
(Sd.) B. H. TYRWHITT DRAKE,
Registrar.

(Seal of Court.)

No. 5.
Amended Statement of Claim.

45/94. E.

In the Supreme Court of British Columbia.

Between

Edison General Electric Company . . . . . *Plaintiffs*

and

Westminster and Vancouver Tramway Company, Bank of British Columbia, David Oppenheimer, and Benjamin Douglas . . *Defendants.*

Amended Statement of Claim.

1. The Plaintiffs sue as well on behalf of themselves as all other creditors of Westminster and Vancouver Tramway Company.

2. The Defendants Westminster and Vancouver Tramway Company are a company duly incorporated under the statutes of British Columbia and are the owners of and operate a line of electric railway between the City of Vancouver and the City of New Westminster including right of way, stations, power houses and lands.

3. The Defendant David Oppenheimer resides in the City of Vancouver and is president of the said Westminster and Vancouver Tramway Company; the

RECORD.

No. 5. Amended Statement of Claim —*continued.*

Defendant Benjamin Douglas resides in the City of New Westminster and is vice-president of the said company.

4. The Plaintiffs on the 29th day of December 1893 recovered judgment in this Honourable Court against the Defendants the Westminster and Vancouver Tramway Company for the sum of $18,470.12 for debt and costs to be taxed, and on the 8th day of January 1894 said costs were taxed at $31.84.

5. On the 13th day of January 1894 a summons was taken out by the Westminster and Vancouver Tramway Company to set aside the said judgment of the Plaintiffs and all proceedings on said judgment were stayed until the return of said summons which said summons was afterwards dismissed with costs.

6. The said summons came on for hearing on the 24th day of January 1894 and on the said 24th day of January 1894 the Defendants the Bank of British Columbia entered judgment against the said Westminster and Vancouver Tramway Company for $261,217.67 debt, and costs taxed and allowed at $32.50 on a writ of summons which had been issued out of the Supreme Court on the 17th day of January 1894 while the Plaintiffs were stayed from proceeding on their said judgment.

7. The said judgment of the Defendants the Bank of British Columbia against the Defendants the Westminster and Vancouver Tramway Company was obtained on an order of a Judge of this Honourable Court on a written consent signed by a solicitor on behalf of the said Westminster and Vancouver Tramway Company and the said consent and order were given and made prior to entry of appearance for Defendants to the said writ of summons of the 17th day of January 1894.

8. All documents and proceedings connected with said judgment of the Bank of British Columbia against the Westminster and Vancouver Tramway Company were entered on the morning of the day on which the said chamber summons of the 13th day of January 1894 was disposed of except the writ of summons of the 17th January 1894.

9. On the said 24th day of January 1894 a certificate of the judgment of the said Bank of British Columbia against the Westminster and Vancouver Tramway Company was registered in the offices of the District Registrar of Deeds for the Westminster and Vancouver Land Registry Districts.

10. On the 31st day of January so soon as the said stay of proceedings was removed, the Plaintiffs issued and delivered to the Sheriff of the County of Vancouver and to the Sheriff of the County of Westminster writs of *fieri facias* against the goods of the said Westminster and Vancouver Tramway Company under their said judgment of the 29th day of December 1893 and the said sheriffs informed the Plaintiffs that the said Westminster and Vancouver Tramway Compay had not in their respective bailiwicks any goods or chattels whereof they could cause to be made the amount of the said judgment or any part thereof and the said judgment debt is still in force and wholly unpaid.

11. On the said 31st day of January 1894 so soon as the said stay of proceedings was removed, a certificate of said judgment of the 29th day of December 1893 was duly registered in the office of the District Registrar of Deeds for the Vancouver Land Registry District in the City of Vancouver and

in the office of the District Registrar of Deeds for the New Westminster District in the City of New Westminster.

12. The said judgment of the Bank of British Columbia against the Westminster and Vancouver Tramway Company of the 24th day of January 1894 was recovered by the Defendants the Bank of British Columbia by collusion with the Defendants the Westminster and Vancouver Tramway Company.

13. On the said 24th day of January 1894 the said Defendants Westminster and Vancouver Tramway Company, being at the time in insolvent circumstances and unable to pay their debts in full, as the Defendants the Bank of British Columbia well knew, by their solicitor voluntarily and by collusion with the Bank of British Columbia at that time a creditor of the said Westminster and Vancouver Tramway Company, gave a confession of judgment with intent thereby to defeat and delay the Plaintiffs herein and with intent thereby to give the said Bank of British Columbia a preference over the Plantiffs and the other creditors of the said Westminster and Vancouver Tramway Company and by reason of such confession the Bank of British Columbia entered their said judgment for $261,217.67 debt and costs taxed and allowed at $32.50 on the said 24th day of January 1894 against the Westminster and Vancouver Tramway Company.

14. By reason of such confession of judgment the said Bank of British Columbia was enabled to enter their said judgment and to have certificates of such judgment registered prior to the registration of the Plaintiffs' certificate of judgment, whereby the Plaintiffs lost the benefit of their said judgment and have been delayed in realising the amount due thereon.

15. The Defendants David Oppenheimer and Benjamin Douglas are the registered owners of the following lands

Sub-divisions 11, 12, 21 and 22 of lot 98 group I

Sub-divisions 15, 21 and 43 of sub-divisions 1 and 3 of lot 95 group I.

Block "A" part of middle portion of lot 28 group I.

Sub-divisions 1, 5, 9, 13, 17, 21, 25, 30, 33, 37, 44, and 45 of north portion of lot 28 group I all in the new Westminster district.

16. Although the said Defendants Benjamin Douglas and David Oppenheimer are the registered owners of the lands described in paragraph 15 they have no beneficial interest therein but hold the same in trust for the Westminster and Vancouver Tramway Company.

The Plaintiffs claim,—

1. That the judgment of the Bank of British Columbia against the Westminster and Vancouver Tramway Company be declared null and void and that the executions issued thereon and the certificates thereof registered as a charge against the lands of Westminster and Vancouver Tramway Company be set aside and cancelled.
2. That the Plaintiffs' Judgment be declared a first charge on the lands of the said Westminster and Vancouver Tramway Company.
3. That the lands of the said Westminster and Vancouver Tramway Company be ordered to be sold and the proceeds applied in satisfaction of the Plaintiffs' judgment.
4. That the Defendants, David Oppenheimer and Benjamin Douglas be

RECORD.

No. 5. Amended Statement of Claim — *continued.*

declared trustees of the lands described in paragraph 15, and that the said lands be ordered to be sold to satisfy the Plaintiffs' judgment.

5. An injunction restraining all proceedings on the part of the Defendant, the Bank of British Columbia, under the several executions issued on their said judgment of the 24th day of January 1894.

6. The costs of this action.

And such further and other relief as to the Court may seem meet.

The Plaintiffs propose that this action should be tried at the City of Vancouver.

No. 6. Statement of Defence of Westminster and Vancouver Tramway Company.

STATEMENT of Defence of the Westminster and Vancouver Tramway Company Limited.

1. The said Defendants admit paragraphs 1, 2, 3, 4, 5, and 6 of the Plaintiffs' statement of claim.

2. In answer to paragraph 7 of the Plaintiffs' statement of claim the Defendant Company denies that the consent and order therein mentioned were given and made prior to entry of appearance for them to the writ of summons of the said Bank of British Columbia, dated the 17th day of January, A.D. 1894.

3. The said Defendants deny each and every allegation of fact contained in paragraph 8 of the said statement of claim.

4. In answer to paragraphs 10 and 11 of said statement of claim, the said Defendants deny that on the said 31st day of January A.D. 1894 the said stay of proceedings was removed, and say that the said stay of proceedings was not removed until the 5th day of February A.D. 1894.

5. In answer to paragraphs 12, 13 and 14 of the said statement of claim, the said Defendants say that the judgment of the Bank of British Columbia in the said paragraphs referred to was not recovered by collusion between the said Bank and these Defendants and further that these Defendants did not give to the said Bank of British Columbia a confession of judgment voluntarily or by collusion, or with intent to defeat creditors, or to prefer the said Bank of British Columbia or at all, but on the contrary, that the said judgment of the Defendants the Bank of British Columbia was obtained under the following circumstances,—On and long prior to the 17th of January 1894 these Defendants had been justly and truly indebted to the said Bank of British Columbia in the sum of $261,217.67 being the amount of the said judgment, and on the said 17th day of January 1894 the said Bank of British Columbia issued a writ of summons out of this Honourable Court against these Defendants for the said amount, and on the said 24th day of January 1894 the said Bank of British Columbia applied to a Judge of this Honourable Court in Chambers for a judgment under order XIV. of the rules of the Supreme Court, striking out the appearance in the said action which had been entered by these Defendants, and giving leave to the Plaintiffs to sign final judgment against these Defendants for the said sum so sued for as aforesaid, with costs and on such application these Defendants appeared by their solicitor, and waived the taking out of the summons and due service thereof and the filing of an affidavit, as required by the said order, by means of a written

consent to the obtaining of said judgment, and the said consent was not given to the said Bank of British Columbia by these Defendants voluntarily or by collusion, but was obtained by pressure exercised upon these Defendants by the said Bank of British Columbia.

No. 7. Statement of Defence of Bank of British Columbia to amended Statement of Claim

STATEMENT of Defence of Bank of British Columbia to amended Statement of Claim.

1. The said Defendant Bank admits paragraphs 1, 2, 3, and 9 of the said amended statement of claim.

2. The Defendant Bank denies each and every allegation of fact contained in paragraphs 4, 5, and 6 of the said statement of claim, except the allegations in paragraph 6 of the judgment obtained by the Defendant Bank against the Westminster and Vancouver Tramway Company, and of the date on which the writ of summons upon which the said judgment was based was issued.

3. In answer to paragraph 7 of the said statement of claim, the Defendant Bank denies that the consent and order therein mentioned were given and made prior to the entry of appearance for the above-named Defendants the Tramway Company to the writ of summons of the Defendant Bank dated the 17th day of January A.D. 1894.

4. The Defendant Bank denies each and every allegation of fact contained in paragraph 8 of the said statement of claim.

5. In answer to paragraphs 10 and 11 of said statement of claim, the Defendant Bank denies that on the said 31st day of January A.D. 1894, the said stay of proceedings was removed and says that the said stay of proceedings was not removed until the 5th day of February A.D. 1894 and in further answer to the said paragraphs the Defendant Bank denies each and every allegation of fact contained in the said paragraphs.

6. In answer to paragraphs 12, 13 and 14 of the said statement of claim, the Defendant Bank says that its judgment in the said paragraphs referred to was not recovered by collusion between it and the said Defendant Company, and further that the said Defendant Company did not give to the Defendant Bank a confession of judgment voluntarily, or by collusion, or with intent to defeat creditors, or to prefer the Defendant Bank, or at all, but on the contrary, that the said judgment of the Defendant Bank was obtained by pressure and under the following circumstances:—On and long prior to the 17th of January 1894 the said Defendant Company had been justly and truly indebted to the Defendant Bank in the sum of $261,217.67 (being the amount of the said judgment), and the Defendant Bank had pressed the said Defendant Company for payment or judgment, and on the said 17th day of January 1894 the Defendant Bank issued a writ of summons out of this Honourable Court against the said Defendant Company for the said amount, and on the said 24th day of January 1894 the Defendant Bank applied to a Judge of this Honourable Court in Chambers, for an order under Order XIV. of the rules in the Supreme Court, giving leave to the Defendant Bank, notwithstanding the appearance in the said action which had been entered by the said Defendant Com-

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No. 7. Statement of Defence of Bank of British Columbia to amended Statement of Claim —*continued.*

pany, to sign final judgment against the said Defendant Company for the said sum so sued for as aforesaid with costs, and on such application the said Defendant Company appeared by their solicitor, and waived the taking out of a summons and due service thereof, and the filing of an affidavit as required by the said order, by means of a written consent to the granting of the order applied for and the said consent furthermore was not given to the Defendant Bank by the said Defendant Company voluntarily or by collusion, but was obtained by pressure exercised upon the said Defendant Company by the Defendant Bank.

7. The Defendant Bank denies each and every allegation of fact contained in paragraphs 15 and 16 of the said statement of claim.

No. 8 Statement Defence of Oppenheimer and Douglas.

STATEMENT OF DEFENCE of David Oppenheimer and Benjamin Douglas.

1. These Defendants admit that they are the registered owners of the property mentioned in the 15th paragraph of the statement of claim delivered herein, with the exception of sub-divisions 25 and 44 of north portion of lot 28, group 1 in the district of New Westminster.

2. These Defendants will object at the trial of this action that the statement of claim herein does not disclose any cause of action whatever against these Defendants.

No. 9. Proceedings at trial. Case for the Prosecution.

In the Supreme Court of British Columbia.

(Before Crease, J.)

Vancouver, Dec. 5th 1894.

Edison General Electric Co., *vs.* Westminster and Vancouver Tramway Co., Bank of British Columbia, *et al.*

Writ issued 5th Feby., 1894.

Amended 30th March, 1894.

Mr. L. G. McPhillips, Q.C. and Mr. E. V. Bodwell for the Plaintiffs, Mr. E. P. Davis, Q.C. and Mr. C. B. Macneill for the Defendants Bank of B. C. ; Mr. Jno. Campbell for the Tramway Co. ; Mr. L. P. Eckstein for the Defendants Oppenheimer and Douglas.

Mr. E. V. Bodwell having opened, tenders as exhibit, Plaintiffs' judgment for $18,417.00 in full and costs taxed. (Admitted, subject to same being exact copy of original, and marked "A")

Also summons dated 13 Jany. 1894 to set aside judgment (marked exhibit "B.")

Mr. Davis objects that the affidavit read upon the return of the summons should also go in ? Mr. Bodwell refusing to put it in as part of his case, Mr. Davis objects to the judgment going in, and says he would have objected to the summons also, it it had not been understood the affidavits were to go in.

Mr. Bodwell tenders reasons for judgment, (marked exhibit "C.")

Mr. Davis : I ask your lordship to have it noted that I objected my learned

friend should not file these unless he filed the rest of the material. I asked him to file the affidavit upon which the summons was taken out, and he refused to.

Mr. Bodwell : I now tender your lordship the certified copy of the proceedings, I gave your lordship a list of them, and they will all go in as one exhibit. (Marked exhibit " D.")

Mr. Davis : Those are the ones I consented to going in subject to their being correct copies.

J. C. Dockerill, *called and sworn. Examined by* Mr. McPhillips:—

J. C. Dockerill.

1 *Q.* You are a clerk in the office of the registrar of this Court, Mr. Dockerill? *A.* I am.

2. *Q.* You were an officer in the office of the registrar of this Court on this on the 24th day of Jany.? *A.* Yes.

3. *Q.* 1894? *A.* Yes.

4. *Q.* You made some entries in the book in that office on that date, didn't you? *A.* Yes.

5. *Q.* Regarding a suit of the Bank of British Columbia against the Westminster and Vancouver Tramway Co.? *A.* I did.

6. *Q.* Have you got that document with you? *A.* I have the book here. (Record 21/94.)

Objected to by Mr. Davis as immaterial.

7. Mr. McPhillips (to witness); This is page 589 of the Supreme Court Cause Book, No. 1. Are there any entries in your handwriting in that book? *A.* Yes, most of them are in my writing; the first ones are.

8. *Q.* That is the style of cause? *A.* The style of cause is my writing.

9. *Q.* And the entries? *A.* The entries of the 17th and 24th Jan. and one on the 25th.

10. *Q.* And these other entries are in the handwriting of someone else. How many different handwritings are there on that page? *A.* Two.

11. *Q.* Yours, and who else's? *A.* Mr. Thicke's; he added a few particulars to some of my entries.

12. *Q.* What is Mr. Thicke's position? *A.* He is deputy registrar of this Court.

13. *Q.* When did you make those entries of the 24th day of January 1894? On what date? *A.* I made them on the 24th January.

14. *Q.* When did you receive those papers mentioned in those entries? *A.* On the 24th January.

15. *Q.* From whom did you receive them? *A.* From Mr. Marshall, of the firm of Davis, Marshall and Macneill.

16. *Q.* How many papers did you receive? *A.* Eight.

17. *Q.* What were those papers? *A.* There is the appearance for the Westminster and Vancouver Tramway Co., consent to judgment, order for final judgment, bill of costs, copy of the judgment, fi. fa. directed to sheriff at Vancouver, and another one to New Westminster, and certificate of judgment.

RECORD.

No. 9.
Proceedings at trial.
Case for the Prosecution.
J. C. Dockerill
—*continued.*

18. *Q.* At what hour did you receive them? *A.* Early in the day. It must have been soon after 10 o'clock; very soon after the office opened.

19. *Q.* For what purpose were they presented?

Objected to by Mr. Davis.

20. *Q.* State what took place between you and Mr. Marshall? *A.* They were handed over the counter in the usual way for filing.

21. *Q.* He handed them to you in a bundle I suppose? *A.* Well, they were all brought up to the counter together, as far as I remember, but whether one was presented before the other, I can't exactly say. I don't remember the exact order in which they were actually given to me.

22. *Q.* You made all these entries together, did you, after? *A.* Oh, yes, during the day

23. *Q.* At the time what took place between you and Mr. Marshall—when he handed the papers to you? *A.* I don't know of anything very extraordinary—oh, yes,—I remarked to him that he was acting for both sides.

24. *Q.* Where did Mr. Marshall come from when he handed you those papers? *A.* He came from Mr. Beck's room, but it is just possible he may have given them to me before he went in there. I can't swear to that.

25. *Q.* How long had he been in there? *A.* Well, I could not say, exactly; not more than a few minutes, perhaps it might have been 10,—perhaps not so much.

26. *Q.* Did anybody else come in the office in the meantime? *A.* I don't remember that.

27. *Q.* When did he tax the costs? *A.* I don't know; the bill was brought to me, already taxed.

28. *Q.* You have got the original papers there, have you? *A.* Some of the papers filed in the office are original, and some copies.

22. *Q.* Is that the appearance which was handed to you? *A.* That is the appearance which was handed in to me.

(Original appearance, dated 24 Jany., 94 put in and marked exhibit "E.")

30. *Q.* Mr. McPhillips (to witness): Do you know the handwriting in that? *A.* No, I have seen it before, but I could not say whose it is. I know the signature.

31. *Q.* Whose signature is that? *A.* That is Mr. Jenns' signature.

32. *Q.* The body of the document is not in his handwriting? *A.* The body of the document is not in his handwriting.

33. *Q.* What is that? *A.* It is consent to an order being made—consent to judgment signed by Mr. Jenns.

34. *Q.* That is one of the papers you filed? *A.* Yes, this is one of the papers.

35. *Q.* Whose handwriting is that—in the body? *A.* It looks like Mr. Marshall's writing.

36. *Q.* Have you any doubt about it?

Mr. Davis: It is Mr. Marshall's, we admit that.

37. Mr. *Q.* McPhillips (to witness): And the signature is Mr. Jenns? *A.* The signature is Mr. Jenns.

38. *Q.* Who is Mr. Marshall? *A.* He is a member of the firm of Davis, Marshall & Macneill.

39. *Q.* He is one of the solicitors who issued the writ in the bank's case—in this case? *A.* Yes, solicitor for the bank.

(Consent to judgment, dated 24 Jan. /94, marked exhibit "F.")

Cross-examined by Mr. Davis:—

40. *Q.* There was a great deal of business in the registrar's office at that time, was there not—of the Supreme Court Registrar? *A.* Oh, yes.

41. *Q.* And how many were there in the office. There were Mr. Beck, yourself, and who else? *A.* Mr. Thicke, and Atwell King.

42. *Q.* There were only four of you in the office. You had a great many papers to enter—you, yourself—hadn't you, during each day? *A.* Oh, yes, quite a number.

43. *Q.* And you had no special reason for paying attention to this particular matter. had you, at the time? *A.* Yes, I did pay particular attention to it at the time.

44. *Q.* Why? *A.* There was a good deal of conversation going on about these papers.

45. *Q.* Conversation between you and whom? *A.* Oh, general conversation in the office.

46. *Q.* Conversation of what kind? *A.* That the judgment might be disputed.

47. *Q.* Who said that? *A.* I really could not say who actually I heard first say it.

48. *Q.* Are you sure you heard anybody say it at that time—afterwards, I am perfectly aware, it might have been said? *A.* Well, I had reasons to pay particular attention to this.

49. *Q.* What was the reason? *A.* On account of this case being talked about, I really could not say what was said.

50. *Q.* But can you swear it was said at that particular time? *A.* On that day.

51. *Q.* No, but up to the time this was entered? Afterwards, I know, we all know—there was quite a lot of talk? *A.* There was no talk before I took the papers.

52. *Q.* Nor at the time? *A.* During that day there was, I could not exactly say during what part of the day.

53. *Q.* You do not wish to mislead the Court, nor I you, but what I understand is this—that things turned up subsequently on the same day? *A.* Subsequently.

54. *Q.* Which would draw your attention? *A.* Exactly, yes.

55. *Q.* But at the time this was put through? *A.* Oh, at the actual time, —no.

56. *Q.* With reference to whether or not the appearance had been entered before the other papers were brought in, I notice you do not speak as to that positively; and it is only fair for me to state to you that Mr. Marshall, who entered them, tells me differently also Mr. Macneill, who was present, that the appearance had

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— *continued.*

been entered before, and was not at the time the others were. I merely mention them so as to call your attention closely to that particular point? *A.* Yes.

57. *Q.* Would you say positively that the appearance had not been entered prior to the rest of the papers being handed in? *A.* It is just possible that they may have been entered before Mr. Marshall went into Mr. Beck's room. I would not speak positively on that, but it was all about the same time; Mr. Marshall didn't leave the office.

58. *Q.* But will you swear positively that that appearance—because this is the point, not as to whether he went into the room,—prior to the order being obtained, and prior to Mr. Marshall's going into Mr. Beck's room? *A.* It may have been prior to his going into Mr. Beck's room—oh, yes—it may have been.

59. *Q.* But what I am getting at, still, is this: my instructions are the appearance was entered at one time, and some 15 minutes or more after—probably 10 minutes, or half an hour, the other papers were entered altogether. Mr. Marshall was out of the office and got them and came in a second time and handed the other papers in. What I want to know is this: looking back—it is something like a year ago, and as I understand, you have a great many entries to make, and naturally, as you said, it did not impress itself upon you at that time—would you state positively from your recollection that Mr. Marshall did not enter this appearance prior to the judge signing the order for judgment, as you call it? *A.* I don't think he could have had the order signed after the appearance was entered, as far as my recollection goes.

60. *Q.* Will you swear positively, Mr. Dockerill, that the appearance was not entered before the order was signed by Judge Walkem? *A.* Oh, I could not swear positively that. He might have left the office and gone off, but there were a very few minutes between, and my impression was, he didn't.

61. *Q.* Who entered the judgment? By the way you only attended to a part of these particular proceedings? *A.* I took the papers in after they had been signed by the registrar.

62. *Q.* Took them in where? *A.* Over the counter, and stamped them, and sealed the judgment.

63. *Q.* So when the ones you are speaking of now were handed to you they had already passed through the hands of the registrar? *A.* Oh, yes.

64. *Q.* And judgment had been signed? *A.* Yes.

65. *Q.* The papers I suppose you are referring to now would be in connection with the judgment? *A.* In connection with the judgment.

66. *Q.* At the time they were received by Mr. Beck, this stamp would be put on, would it—the Vancouver registry stamp? *A.* That would be put on when they were handed over the counter.

67. *Q.* Would it be put on by you or by Mr. Beck? *A.* I should put that on at the counter.

68. *Q.* When the papers first came from his hands they would have the stamp on? *A.* It is not likely; they are generally put on last.

69. *Q.* But when the registrar enters judgment, he frequently stamps the paper? *A.* Oh, yes.

70. *Q.* In fact, as a rule, he does? *A.* As a rule, but in this instance, he was in his room, and would not have the stamp there.

71. *Q.* And that is the only reason for your saying that you don't think he put the stamp on. Of course, naturally, you can't be expected to remember a matter of this sort, a year ago. And as I understand, you could not really speak as to the time that the papers came into the office even these papers for judgment, because they might have been in some time before—a short time or a long time? *A.* They could not have been.

72. *Q.* You did not see them handed to Mr. Beck? *A.* No, I did not.

73. *Q.* With reference to the time when judgment was signed, I want to ask you, are you speaking from anything more than general recollection when you say it was only a short time after 10? I am instructed it was about 11. *A.* Thinking over it during the day that was the impression I had at that time.

74. *Q.* I will recall something to your mind which will show you that it was a good deal later than that. Chambers sat at half-past 10? *A.* As a rule.

75. *Q.* They do not sit before? *A.* No.

76. *Q.* On that particular day chambers were late—that is, Judge Walkem was waited for quite a while? *A.* I don't remember that.

77. *Q.* So it is certain, Mr. Dockerill, that that order signed by Judge Walkem would not have reached you before half-past 10, so considering that, would you pretend to state positively as to what particular time between 10 and 11 those papers were first seen by you? *A.* My impression is it was not later than half-past 10. Of course, I might be mistaken in half-an-hour.

Re-examined by Mr. McPhillips.

78. *Q.* As a matter of fact, you were not up at chambers? *A.* No.

79. *Q.* You remember a conversation with me, Mr. Dockerill, shortly after this? *A.* Yes, I do.

80. *Q.* And I suppose at that time,—that was only a few days after the occurrence, was it not? *A.* As far as I remember it might have been the next day; it would have been very shortly after.

(Objected by Mr. Davis that witness cannot state what conversation he had with Mr. McPhillips on the subject. Mr. McPhillips contends that any statement made by the witness as to the occurrence whether to himself or anyone else is admissible, if made shortly after the occurrence when the event would be fresher in his mind.)

81. Court (to witness); Do you recollect having made any statement with regard to it? *A.* I remember telling Mr. McPhillips that those papers were practically brought in at the same time, but there might have been a difference of a few minutes; that is my recollection.

82. Mr. McPhillips: You say that Mr. Marshall came out of Mr. Beck's room? *A.* Yes.

83. *Q.* He had those papers with him in Mr. Beck's room? *A.* I presume so; I think he brought them out.

84. Mr. Davis: What papers are those? *A.* The papers in connection with signing judgment.

Court: I may as well tell you at once, when you are talking of the question

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of signing judgment, and you talk of papers, I take it to mean the papers specially relating to the signing of judgment, and my thoughts do not wander beyond that.

85. *Q.* Mr. McPhillips (to Court): The papers I refer to, my Lord, are the papers this witness particularly refers to.

Mr. Davis: Is it the appearance that is referred to?

Mr. McPhillips: Yes, it is the first document.

Mr. Davis: As I understand from this witness, he does not include that.

86. Court (to witness): What papers are you alluding to, Mr. Dockerill? *A.* The papers I was particularly referring to were those in connection with the signing of judgment.

87. Mr. McPhillips: At the time those papers were brought to you, costs had been taxed? *A.* Yes.

88. *Q.* Had they been filed previous to that time? *A.* No; they were brought to me for filing.

89. *Q.* And were handed to you by Mr. Marshall and not by Mr. Beck? *A.* By Mr. Marshall.

90. From outside the counter? *A.* Outside the counter.

Mr. Davis: I understand these still are the papers connected merely with the signing of judgment.

Mr. McPhillips: He refers to all those papers on the 24th.

91. (To Witness) You refer to the appearance, do you? *A.* Well, I am doubtful about the appearance.

92. *Q.* In what respect? *A.* It may possibly have been put in a few minutes before.

93. *Q.* By whom? *A.* It was handed to me because I remember handing the appearance book to Mr. Marshall for him to enter.

94. *Q.* Have you got that appearance book? *A.* Yes.

95. Mr. Bodwell: Is it the custom for the solicitor to enter the appearance? *A.* It is the custom in this office.

96. *Q.* Mr. McPhillips: And that appears on page 26 of the appearance book of the Supreme Court. Is that the entry? *A.* That is the entry; yes.

97. *Q.* Entry of Jan. 24/94. The first entry on that date in whose handwriting is that? *A.* That is Mr. Marshall's handwriting.

98. *Q.* Is the whole thing in Mr. Marshall's handwriting? *A.* Yes, it appears to be.

99. *Q.* Then he wrote the name of Mr. E. A. Jenns? *A.* Yes.

Mr. Davis: I am not going to object to the appearance book, but I might say this—it is not under the rules of Court, but it is simply a custom of this particular office.

100. *Q.* Mr. McPhillips (to Witness): Mr. Jenns did not come in at all, did he? *A.* Not at that particular time.

Mr. Davis: The witness has stated that they were brought to him for filing, I understand you to mean by that, Mr. Dockerill, the stamping? *A.* I put the law stamps and the seal on the judgment, and the office data.

101. *Q.* Of course you do not pretend to speak of the effect of papers being first handed to the registrar, passing through his hands, whether that would amount to filing, or not? *A.* Oh——

102. *Q.* You mean, when you speak of filing, when they were put into your hands? *A.* When they came into the office and I put the seal on them.

103. *Q.* This appearance book which you produced here. At the time that Mr. Marshall entered the appearance, I understand you to say you handed the book to him to write it in here? *A.* Yes.

104. *Q.* But that was not at the time that he brought these papers in from Mr. Beck in connection with signing the judgment, was it? *A.* Well, I can't swear positively as to that; very close to it.

105. Mr. Bodwell: You say "very close to it"—how long?

(Mr. Davis objects to one counsel conducting examination in chief and another re-examining. Also that upon this point the witness has been examined, cross-examined, re-examined and re-cross-examined.)

106. Court (to witness): How long was it? *A.* I could not say positively how long it was.

107. *Q.* What do you mean by very close to it? Don't hurry your answer. *A.* I could not give you any particular time, my lord.

After Recess.

Certificate of Pltffs'. judgment signed 31 Jany. 1894 and filed in the Land Registry Office at New Westminster on the same day admitted by Mr. Davis.

W. J. Thicke, *called and sworn.*

Examined by Mr. McPhillips.

108. *Q.* Registrar Your name? *A.* Walter James Thicke.

109. Mr. McPhillips: You are the deputy registrar of this Court? *A.* I am.

110. *Q.* You were deputy registrar in January last? *A.* I was.

111. *Q.* You attend sometimes as deputy registrar in chambers with the judge, do you not? *A.* I do.

112. *Q.* You act as clerk in chambers? *A.* Yes.

113. *Q.* You keep a record of the proceedings? *A.* Yes.

114. *Q.* Do you produce a record of proceedings before Mr. Justice Walkem in chambers on the 23rd and 24th days of Jany. last? *A.* I do.

115. Court: Did you produce them before Mr. Justice Walkem—the record?

116. *Q.* Mr. McPhillips: Made them? *A.* They were made before him, my lord.

117. Mr. Davis: They are both of the 23rd? *A.* One is for the judge and the other is for the registrar.

118. Mr. McPhillips: What is that, Mr. Thicke? *A.* That is a record of the proceedings in chambers on the 24th day of Jany. 1894.

119. *Q.* That is your handwriting? *A.* My handwriting.

120. *Q.* You were present in court on that day? *A.* I was.

121. *Q.* In chambers? *A.* In chambers.

Mr. McPhillips: My lord, I tender this in evidence.

(Objected to by Mr. Davis as purporting to be a record of all chamber proceedings on the 24th Jany. on the ground that it is not necessarily a full record, it being well known from the established practice it is not necessary that a matter in order to be made or done in chambers should be made or done at the

regular sitting of chambers; and more strongly, there has already been filed a chamber order made by Mr. Justice Walkem on the 24th, and which cannot be contradicted.)

Record put in, *valeat quantum*, and marked exhibit "G."

122. Mr. McPhillips (to witness): These are all the motions that were made while the judge was in open chambers aren't they ?

Same objection by Mr. Davis as before.

123. Mr. McPhillips : What other chamber courts were held in the court house in Vancouver between the 13th and the 24th of the month of January, 1894, if you know ? *A.* I don't know without looking at the minutes.

124. *Q.* Well, look at the minutes—you have them there ? *A.* You have one there.

Same objection by Mr. Davis.

A. The 12th Jany. before Mr. Justice Walkem, the 13th Jany. before Mr. Justice Walkem, the 22nd Jany. before Mr. Justice Walkem, the 23rd before Mr. Justice Walkem and the 20th day of Jany. before Mr. Justice Walkem.

125. Court : Is not that all January ? *A.* All January, my lord.

126. *Q.* You have interposed the 20th between the 13th and 22nd ? *A.* None between the 13th and 22nd.

127. *Q.* Then where does the 20th come ? *A.* I beg your pardon, my lord; it was out of order—the 12th, 13th, 20th, 22nd and 23rd.

128. *Q.* Mr. McPhillips : In any of those documents, does there appear an entry of an order or a summons having been applied for or argued before Mr. Justice Walkem in the case of the Edison General Electric Company against the Westminster and Vancouver Tramway Co. ?

Same objection by Mr. Davis.

A. Yes.

129. *Q.* On what day? *A.* On the 23rd Jany. 1894.

130. *Q.* What appears on the 23rd? *A.* To stand to the 24th inst.

131. *Q.* That is the only entry? *A.* The only entry.

132. *Q.* The summons is dated on the 13th, there appears no entry of that summons having being issued in that paper? *A.* No.

133. *Q.* On the morning of the 24th you attended in chambers Mr. Thicke? *A.* I did.

134. *Q.* Mr. Justice Walkem was on the bench in chambers? *A.* Yes.

135. *Q.* What time did you leave the office below to come up to the Chamber Court ? *A.* I suppose between a quarter and half past 10; half past ten is the chamber hour.

136. *Q.* What time did chambers open on that day ? *A.* Very little before 11 o'clock. I think the judge was late in coming on the bench.

137. *Q.* Where did he come from? *A.* The judge's chambers in the old Court room.

138. *Q.* The library ? *A.* Which is the library now.

139. *Q.* It was the library then you mean ? *A.* No; the right hand room.

140. Court. Coming this way ? *A.* Yes, my lord.

141. *Q.* It used to be called the judge's private room? Mr. Davis. I think it was called judge's chambers. Witness; yes, the other was the private room.

142. Mr. McPhillips (to witness) And no other motions were made except those mentioned in your list? *A.* None in the court room.

143. *Q.* It is your duty to make entries of all motions that come up? *A.* Yes.

144. *Q.* Then a motion for judgment was not made in the open court room before Mr. Justice Walkem on that day for judgment in the case of the Bank of British Columbia *vs* The West'r & Vanc'r Tramway Company? *A.* No, there was not.

145. *Q.* Of your own knowledge, I presume, you don't know whether it was made? *A.* No, I do not.

Cross-exam. by Mr. Davis.

146. *Q.* You spoke, Mr. Thicke, about it being your duty to make entries of all matters coming up—I am not sure about the word, whether it was "in chambers" or "in the open court room,"—which was it? I didn't quite catch it? *A.* In chambers or in the court room?

147. *Q.* I did not quite catch which you said. My learned friend said "it is your duty to make an entry of all matters coming up in——" and what was said afterwards, I don't remember, but you said "yes"—what was it? *A.* I presume it was in chambers. Mr. Evans can say. I don't remember.

148. *Q.* As a matter of fact is it your duty to make an entry of all matters coming up in chambers? *A.* Certainly it is in the absence of the registrar.

149. *Q.* That is, regular chambers, where matters are set down on the list, is not that what you confine your answer to? *A.* Yes, certainly.

150. *Q.* As a matter of fact, are not orders again and again and again made by the judge in his private room when neither you nor the registrar are present? *A.* Continuously.

151. Court (to witness). Do you mean "continuously" or "continually"? *A.* Continually, I meant, and it is continuously, too.

152. *Q.* Mr. Davis: This is a certified copy. I think that those are certified by yourself? *A.* Yes.

153. *Q.* I show you now letter "D" of exhibit "D." It is a certified copy of an order for judgment purporting to have been made in chambers by Mr. Justice Walkem on the morning of the 24th Jany., at least, on the 24th Jany. Looking at that, Mr. Thicke, is it not evident that the Hon. Mr. Justice Walkem held chambers at some place other than the one you have spoken of, so far? *A.* Certainly, he didn't hold it in the court room where chambers took place.

154. *Q.* I say is it not apparent that he held chambers at other than that place on that day? *A.* According to the date of it.

155. *Q.* And from the judgment itself? *A.* Yes.

156. *Q.* Apparently that is so, if this is correct? *A.* Yes if that is a correct copy of the original.

157. *Q.* And as a matter of fact Mr. Thicke, that is not the only judgment or order for judgment by a very long way that has been signed without the registrar or deputy registrar? *A.* Certainly it has been done every week, I may say, as you know yourself.

Re-examined by Mr. McPhillips:—

158. *Q.* On this date in chambers, the summons to set aside the Edison

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No. 10. Proceedings at trial. Case for the Prosecution. W. J. Thicke. —*continued.*

Co.'s judgment was argued before Mr. Justice Walkem? *A.* Is that mentioned in the——?

159. *Q.* Yes? *A.* Yes, you were present.

160. Court: That is on the 24th? *A.* The 24th, my lord.

Mr. Bodwell (to Mr. Davis): I suppose it may be taken down you issued your execution on the 24th Jany. and placed it in the sheriff's hands?——

Mr. Davis: On the 24th—yes.

Mr. Bodwell: And that our execution was put in the sheriff's hands on the 31st Jany.?

Mr. Davis: Well, I don't know about that at all.

No. 11. Proceedings at trial. Case for the Prosecution. T. J. Armstrong.

Thos. J. Armstrong *called and sworn. Examined by* Mr. Bodwell:—

161. Registrar A. Your name? *A.* Thomas Joseph Armstrong.

162. Mr. Bodwell: You are the sheriff for the County of Westminster? *A.* Yes sir.

163. You have an execution in your hands against the Vancouver Tramway Co., at the suit of the Edison Electric Light Co.? *A.* Yes; I had an execution placed in my hands on the 24th Jany. of this year.

164. *Q.* At the suit of the Edison Co.? *A.* At the suit of the Edison Co.

165. *Q.* What was done with that execution? *A.* It was withdrawn by Plaintiffs' solicitors on the 31st Jany. of this year.

166. *Q.* And then, on the 31st Jany, an execution was placed in my hands.

167. Court. When was it withdrawn? *A.* On the 31st Jany. of this year, and on that same date a second execution was placed in my hands, same Plaintiff and Defendants—same amount.

168. *Q.* What is the amount? *A.* $18,501.00 if I recollect right, and 96,—It was over $18,000.00.

169. *Q.* And that writ is still in your hands unexecuted? *A.* No; that writ was returned by me on the 4th October of this year *nulla bona* and on the 22nd another writ was placed in my hands, on the 22 Oct.

170. *Q.* For the same amount? *A.* For the same amount.

171. *Q.* Unexecuted? *A.* Unexecuted.

172. *Q.* You have a writ in your hands, or did have a writ in your hands of the Bank of British Columbia against the tramway company.

173. *Q.* Do you remember what time of the day you received that writ? *A.* At 12 o'clock noon, on the 24th January of this year.

174. *Q.* Delivered to you by special messenger, or how did you receive it? Where did you receive it, in the first place? *A.* I received it in my office at New Westminster.

175. *Q.* How? *A.* Through Mr. Marshall.

176. Did you have any conversation with Mr. Marshall as to how he had come to New Westminster? *A.* No, nothing at all.

177. Do you know what the hours of the tramway service between Vancouver and New Westminster were at that time? *A.* Well, I would not like to state positively, but to the best of my recollection the trams ran every hour.

178. *Q.* You received it at 12? *A.* I received it at 12.

179. *Q.* That is, the tram started from each end every hour? *A.* From each end every hour, if I recollect right.

Cross-examined by Mr. Davis.

180. *Q.* By the way, sheriff, you say you have an execution there, issued in the suit of the Edison Co., against the tramway company on the 24th January? *A.* Yes Mr. Davis, on the 24th January.

181. Are you sure about that? *A.* Yes sir.

182. *Q.* Because there is a stay of proceedings in that suit until the 27th? *A.* Well, what fastens it in my memory is at 12 o'clock on the 24th I received the Bank of British Columbia writ, at 2 p.m. on the same day I received an Edison Electric Company writ against the tramway.

183. That is very funny; it must have been issued in contempt of Court. But at any rate there was one on that date, and another, you say, on the 31st December (?) *A.* Yes sir.

184. *Q.* Do you know why the one issued on the 24th Dec.(?) was withdrawn? *A.* No.

185. *Q.* Do you know why the one issued on the 31st Jany.—why there was a new one substituted for that? *A.* No, I don't know. I was asked for a return and I made the return.

186. *Q.* And then the new writ was given? *A.* And then the new writ was given.

187. *Q.* At the time you received this writ of the 24th December (?) the Edison Company against the bank, were you aware of the fact that there was a stay of proceedings granted by Mr. Justice Walkem in that suit? *A.* Isn't that the 24th Jany.?

188. *Q.* Yes? *A.* No, I was not aware at that time.

189. *Q.* You heard of it afterwards? *A.* Well, I can't say I heard of a stay of proceedings afterwards.

190. *Q.* Never mind. As a matter of fact, sheriff, of course you have had a good deal of experience as to what can be seized and what cannot under a writ of execution issued for fi fa goods or lands? *A.* Fi. fa. goods.

191. *Q.* Could you seize the property of the Westminster and Vancouver Tramway Company under fi. fa. goods? *A.* Very little of it.

Objected to by Mr. Bodwell as being a question of law.

192. Mr. Davis. I ask you then, now, did you try to levy on the Westminster and Vancouver property under that writ? *A.* Yes.

193. *Q.* How much of it? *A.* What happened was this—I made the formal seizure on the office of the tramway at Westminster, the office furniture, and I was then notified by the secretary of the company that there was a mortgage.

194. *Q.* Covering that office furniture? *A.* Covering that office furniture and all other chattels.

195. *Q.* Did you attempt to levy on any of the real estate under that fi fa? *A.* No I did not.

196. *Q.* Did you attempt to levy on the right of way or the rolling stock or that sort of thing? *A.* No sir.

197. *Q.* Or under any of these fi fa goods that were placed in your hands by

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No. 11. Proceedings at trial. Case for the Prosecution. T. J. Armstrong —*continued.*

the Edison Company? *A.* No, after I discovered the mortgage—

198. *Q.* And the reason why you did not do it was what?

Objected to by Mr. Bodwell.

199. Mr. Davis. What was the reason, sheriff? *A.* I satisfied myself that there was a mortgage, and that was the reason I did not go on with the levy.

200. *Q.* Supposing there had been no mortgage; under that writ would you have levied on the right of way, the rolling stock, and the track, and so on? *A.* No, not as chattels.

201. *Q.* I am speaking now of fi fa goods which I understand was the only writ issued to you by the Edison people in that suit. Is that right? *A.* Yes; that is the only writ.

202. Under that fi fa goods what were the reasons—and I want all your reasons—why you did not levy on the rolling stock and right of way, and the track and the rails, and other property of that description of the company? *A.* Because I considered the right of way, and the rolling stock—

Objected by Mr. Bodwell that witness can only state whether he did or did not levy upon them and cannot give his reasons.

203. Mr. Davis (to witness). As a matter of fact, this company had considerable real estate, hadn't they? *A.* Yes.

204. *Q.* They have as a matter of fact, and have a right of way and rolling stock, and so on? *A.* Yes.

205. Mr. Bodwell. How do you know they have? *A.* Because I can see it.

206. *Q.* How do you know it belongs to them? *A.* Well, their secretary admitted to me that it did belong to them.

Murray's examination put in.

Mr. Bodwell tenders the following portions of the examination of William Murray, manager of the Bank of British Columbia at Vancouver, taken on the 1st August 1894.

Q. 1-8 with the answers inclusive; from *Q.* 16 to the end of *Q.* 26 with the answers inclusive. *Q.* 37 and answer to the end of 43. *Q.* 47, 48, 49 and 50 with the answers. *Q.* 52 to 56 inclusive: 59 and answer to 60; 63 to end of 75; 78 to the end of 82, 86, 93 to the end of 102; 107 to the end of 109; 114 to the end of 117.

Mr. Davis asks that under marginal rule 725 the balance of the examination be put in.

Court Questions 50, 51 and 52 go in.

Mr. Davis: I ask that all the others, my lord, go in.

Court: I think from 26 to 38 should be admitted.

Mr. Bodwell: I object to that going in, on the ground that that is a distinctly different subject.

Objection noted.

Court: I admit 44 to 44 to 47, do you object?

Mr. Bodwell: No.

Court: 57 and 58 are out, and 61 and 62. After 72 from there inclusive to 75—which is right enough; omit 76 and 77; 83 and 84 to go in (by Mr.

Davis's request.) From 102 down it is merely a repetition to 107; those may be omitted. (Objected by Mr. Davis.) 110 to 113 omitted; from 116 down to go in.

Mr. Bodwell: I wish to put in some portions of Mr. Oppenheimer's evidence. *Ques.* 1 and 2, 18, 23 to 27, 39 to the end of 41, 75 and 76, 77, referring to quotation from 352 and 354 of former examination, 95 to 98, 150 to 153 inclusive, 158 to 160, 178 to the end of 184, 193 to the end of 200, 208 to 211, 256 to 258.

Mr. Davis says that it is impossible for him without going carefully through the whole of the examination to say what other answers he thinks bear upon those put in. That under the rule it is apparently not a question for argument at all, but for the judge to look over the questions and answers and put in those which he considers are connected in any way with those already put in, and suggests that the Court look over the examination after adjournment; but in the meantime asks to mention what are only a few of those he wishes to put in—ques. 78 and following, ques. 153, 161 and 185 and 99.

Mr. Bodwell again objects, taking the same ground as before—that only the questions which are so connected with those he has already put in as to render it impossible for them to be understood without reading the others should go in.

Mr. Bodwell: I don't think I will call any more witnesses, but if your lordship is going to read that evidence, I would wish not to close my case.

SECOND DAY.

Upon court reassembling, his lordship read out the following list of questions and answers upon examination of David Oppenheimer, admitted, or omitted respectively:—

Admitted	All inclusive	Omitted.
		3—7
		8
9—15		
		16—17
19—22		
28		
		29—31
		32
33—34		35—37
43—47		
		48—49
50—53		54—56
57—59		60—61
62—65		66
67—74		78
79—80		81
82—85		86—90
91—93		94
		99—101
102		103—110

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No. 11.
Proceedings at trial.
Case for the Prosecution.
T. J. Armstrong
—*continued.*

Admitted	Omitted.
111—118	119—124
125—130	131 and part of 132 which includes " however (to witness) explain it if you want to.
132 from " what do you want ? down to 136	137—140
	141—143
144	145
147—149	154—157
161—176	177
185	186—190
191—192	193—200
201, 202	203—207
	That portion of 211 beginning with the words " Mr. Jenns has instructions " down to 211.
209, 212—216	217—218
219	220—221
222—224	225—231
232, 233	234
235, 236	237—246
	247
248, 249	250, 255
261—264—277	278, 279
280—285	286—288
289—295	296—323
324, 325	326
327, 328	329
330—332	333 to the end.

Mr. Bodwell : I think your Lordship has a note of my objection to the principle?

Court: Yes.

Mr. Bodwell: It would now be in order to formally make objection that the questions your Lordship has admitted are not so connected with those put in by the Plaintiff as will make it necessary to read them in order to understand the true import and meaning of that part of the examination of Mr. Oppenheimer put in as part of the Plaintiffs' case.

Objection noted.

Mr. Bodwell: That closes our case, my Lord.

Mr. Eckstein—on behalf of the Defendants Oppenheimer and Douglas states that in their defence they admit all that the Plaintiffs claim with the exception of two lots, namely sub-divisions 25 and 44 of the north portion of lot 28, group 1,

New Westminster district; that it is with reference to those two lots that an issue now exists between the Pltff. Company and these two Defendants, and the Pltff. Company having given no evidence, he moves for a nonsuit, asking that the case be dismissed with costs.

Mr. Bodwell, contra. The real issue unless it had been admitted by the Defdts. would have been whether they were trustees of certain lands for the company or not and Court would have ordered a reference. As to the two particular lots, the Pltffs. did not claim them now, as by a mistake in the registry office, the wrong numbers had been given, and question of costs might very well be reserved.

Mr. Eckstein: So long as there is any issue between the Pltiffs. and Defdts., my clients appear upon the record and have the right and are bound to come to trial, because we are not supposed to know that at the trial the Pltffs. would admit what is stated in our defence.

Nonsuit as to the two said lots granted.

Costs reserved.

CASE FOR THE DEFENCE.

E. A. Jenns, *called and sworn—examined by* Mr. Davis.

207. *Q.* Registrar: Your name? *A.* Eustace Alvaney Jenns.

208. Mr. Davis: You reside in New Westminster, and are a barrister and solicitor of the Supreme Court of British Columbia? *A.* Yes.

209. *Q.* During the whole of the year 1893 and we will say the first half of the year 1894, who was solicitor for the Westminster and Vancouver Tramway Co.? *A.* Well, I don't remember about the beginning of 1893.

210. *Q.* We will say from the middle? *A.* From the middle on to the present date, I am solicitor for the company.

211. *Q.* You have been and are. In November, or we will say on the 1st Jany. 1894 and prior thereto, both the bank and the Edison Co. I believe, had claims against the Tramway Co.? *A.* Yes, both.

212. *Q.* The amount of the bank's being about what?—and the Edison Co., what? *A.* The Edison Company was about $19,000.00 and the bank was about $275,000.00 or in that neighbourhood.

213. Court: Against the tramway company? *A.* Against the Westminster and Vancouver Tramway Company. I merely mentioned that, because both companies were mixed up to a certain extent.

214. *Q.* Mr. Davis: There were two writs issued, I believe, by the Edison Company against the Tramway Company? *A.* Yes, two writs.

215. *Q.* The first one was issued about when? *A.* In October, I think.

216. *Q.* And that one, I believe there was some arrangement or other by which the writ was not proceeded with—I don't care about what it is, just at present? *A.* The writ was dropped.

217. *Q.* And then another writ was issued? *A.* In November.

218. *Q.* Do you remember the date? *A.* The 27th.

RECORD.

No. 12.
Proceedings at trial.
Case for the Defence.
E. A. Jenns
— *continued.*

219. *Q.* That is the writ on which judgment was finally got? *A.* Yes, that is the writ.

220. *Q.* That, I believe was stayed on some arrangement or other between yourself, or between the tramway company, and the Edison Company? Never mind the details of that at present, but I believe it was stayed on certain terms? *A.* Well, I certainly understood so, because you understand Mr. Davis, as I was saying at the time, we were bound to avoid judgment being signed.

221. *Q.* With reference to what the arrangement was, I believe there was a misunderstanding between yourself and the solicitor for the Edison people? *A.* Yes.

222. *Q.* Finally, as the evidence shows, there was a judgment signed by the Edison people on the 29th December? *A.* I first heard of the judgment having been signed on the 5th Jany. 1894.

223. *Q.* Have you any entries in your blotter in connection with these matters? *A.* Yes.

224. *Q.* You might look at them if they will assist your recollection—the entries were made at the time? *A.* The entries were made at the time.

225. *Q.* When you speak of first knowing of this judgment on the 5th Jany. 1894 have you any entry with reference to it? *A.* Yes, the entry I have here is——

226. *Q.* You have an entry in your blotter of the 5th Jany. 1894—page what? *A.* Page 454.

227. *Q.* From which, as I understand, you state that on the 5th Jany., you first knew of this Edison Company judgment? *A.* Yes.

228. *Q.* In consequence of that judgment being signed, what did you do? or did you do anything, and when? *A.* Well, on that date I was just on my way down to Victoria, and I think I returned some five days later and I telephoned Mr. McPhillips.

229. Court. You telephoned Mr. McPhillips with reference to what? *A.* With reference to judgment having been signed, because as I understood, judgment was not to be signed; there were certain arrangements.

230. Mr. Davis: Have you any entry in your blotter on Jany 11? If so, look at it, and state what was done on that day. *A.* I have an entry on the 10th, page 458.

231. *Q.* From looking at that entry, was there anything took place, or did you do anything on that day with reference to the matter in question here, the Edison judgment? *A.* I attended on that day on Mr. Oppenheimer at the tramway office and also telephoned to Mr. McPhillips, and wrote the tramway company a letter.

232. Court. What office did you attend? *A.* At the tramway office in New Westminster.

233. *Q.* And wrote to Mr. McPhillips? *A.* No, I telephoned to Mr. McPhillips, and I wrote to the tramway as to the result of what I had done. I first attended at the tramway office on Mr. Oppenheimer, who had come over.

234. *Q.* And then what did you do? *A.* Then I telephoned Mr. McPhillips and I afterwards wrote the tramway company a letter, addressed to Mr. Smith, the secretary, as to the result of the telephone.

235. Mr. Davis. Have you any entry on the 11th? *A.* I don't see any entry on the 11th. There is a further entry, but it is under the same date, the 10th. No,—that is on the 11th,—I beg your pardon.

236. *Q.* From looking at the entry which you have in your blotter on the 11th, what can you say took place? *A.* I was instructed to retain Mr. McColl, to consult with him, and move to set aside the judgment that had been signed. This entry is not my handwriting, except a little one dictated—and I attended Mr. McColl, I have got the figures here in my own handwriting,—I think it was from 5.30 to 7, the discussion on that matter.

237. *Q.* You acted on this under these instructions, I presume? *A.* Yes, that is page 461.

238. *Q.* Was there any interview between yourself and anybody else, either on that day or the next? Did you have any consultation? who was present? *A.* I had seen—I don't remember—I have no entry of it—I had seen Mr. Wyld on either that day or the next.

239. *Q.* Look at January 11th Mr. Jenns. You have an entry of it—you have given it to me. See if you did not have on that day a consultation with somebody? *A.* No; I think that is all that took place on that day.

240. *Q.* I think there is Mr. Jenns, because you gave me a copy of it. I refer to the entry which you say is in your handwriting, and the entry following the one with instructions to set aside the judgment? *A.* That is the only entry I think on the 11th, on the 12th there are more entries.

241. *Q.* There is the entry I refer to? *A.* That is the one I have spoken about,—page 461.

242. *Q.* That is a mistake in the copy I see. You have mentioned what took place on the 11th—you were instructed to move to set aside the judgment, to retain Mr. McColl, and had a consultation with him in connection with the matter. Now, had you instructions from anybody else than the tramway company in connection with the matter? *A.* No.

243. *Q.* I put these questions generally at first? *A.* My instructions came entirely from the tramway company.

244. *Q.* Had you any communication, direct or indirect——

Objected to by Mr. Bodwell as leading.

245. Mr. Davis: I wish to put it in a form as little leading as possible, and will put it in any way my learned friend suggests (to witness)—with anyone other than the tramway company in reference to setting aside the judgment, prior, of course, I mean, to moving to set it aside? *A.* No; I had no communication with anyone else—that is, in the sense of having received instructions from them. Of course, I telephoned Mr. McPhillips about it.

246. Mr. Davis. I propose now to ask this question, my lord whether or not the Bank of British Columbia had anything to do whatever, directly or indirectly, with the application to set aside the Edison Company's judgment? Witness: Certainly not through me.

247. *Q.* That is, so far as you know? *A.* So far as I know.

248. *Q.* Did you ever have any communication with the solicitors for the bank in connection with the matter at all, prior to moving to set aside the judgment? *A.* No, it was after moving to set aside the judgment that I first learned the

bank's standing in the matter. (To Court) It was after moving—that is, taking the first steps to set aside the judgment that I first heard of the bank's standing in the matter.

249. Mr. Davis. Why was the motion made to set aside the judgment? that is, were there any grounds ? You need not go into what the grounds were ? *A.* The grounds were decided upon at the consultation between Mr. McColl and myself, and are set out in the summons filed in support.

250. *Q.* I merely wish to know whether in your opinion at that time the grounds were sufficient to move on, or not? *A.* I considered them so.

251. *Q.* And I presume that opinion was conveyed to the tramway people ? *A.* That opinion was conveyed to the tramway people.

252. *Q.* In making that application, did you or did they so far as you know, proceed on any other ground or for any other reason than what you have now stated ? *A.* No, the reason for setting the judgment aside—at least—simply was as long as judgment stood against them it would injure their credit.

253. *Q.* Those grounds you thought good you mentioned to them ? *A.* Yes.

254. And which were set out in the summons and affidavit and no other. We now tender the affidavit of Mr. Jenns in which the grounds are set out.

Objected to by Mr. Bodwell that the statement of the witness made at some other time cannot be put in as his evidence now, he being in the box. Mr. Davis presses for the admission of the affidavit. Pltff's objection sustained.

255. Mr. Davis (to witness): Have you any entry on the 18th Jany in your blotter ? *A.* Yes.

256. *Q.* What took place on that day or prior to that day between the 11th and 18th ? *A.* I had a consultation on that day with Mr. Oppenheimer, the president of the Company, the vice-president and Mr. McColl as to the position of the bank. (P. 468.)

257. *Q.* And what was the position of the bank ? *A.* The position the bank were taking then was—practically they intended to wind up the company unless they had judgment prior to judgment having been signed by the Edison Company.

258. *Q.* What relation to the Edison judgment did that bear ? before or after? *A.* I don't think on that day the matter was really discussed ; the real thing was the bank wanted judgment at once.

259. Court (to witness): What was that subject matter you say was not discussed ? *A.* As to whether judgment should be before or after the Edison judgment.

260. Mr. Davis. At any rate, at that consultation you became aware of the fact—at least, not necessarily at that time, but some time prior to the 11th and that time, that the bank insisted upon certain things. What was it decided to do as to the bank's demands, whatever they were in that connection ? *A.* Well, it was either that day or the next—I have no entry as to that—it was decided to accede to the demands of the bank.

261. *Q.* And did you receive any instructions accordingly ? *A.* Certainly; my instructions were received either that day or the next as I said a moment ago, to do what the bank wanted. The company wanted time——

262. *Q.* You say the company wanted time. Go on and give your reasons why it was decided to accede to the demands of the bank?

Objected by Mr. Bodwell that while evidence of what was said or done may be given in evidence the witness cannot give the inference he drew therefrom.

Mr. Davis replies that he is not asking for the inference the witness may have drawn from them but the reasons that were expressed--not the reasons which worked in their minds.

Court:—Then formulate your question.

263. Mr. Davis (to witness). During the course of the consultation that you are referring to, or at the time when you received the instructions which you mentioned from the company, or any other conversation with these parties or any of them, at or about that time, what were the reasons expressed why the company should decide to accede to the demands of the bank.

Mr. Bodwell objects that while what took place between debtor and creditor may be admissible in evidence of what was said or done, and that it is for the Court to draw the inference, yet evidence of what took place at a consultation at which the creditor (in this case the bank) was not present, is not admissible.

Mr. Davis. I tender it on the point of intent.

Objection withdrawn.

264. Mr. Davis (to Witness): During the course of the consultation that you are referring to, or at the time when you received the instructions which you mentioned from the company, or any other conversations with these parties or any of them at or about that time what were the reasons expressed why the company decided to accede to the demands of the bank?

Objected by Mr. Bodwell that the last part of question is too leading, and that it should stop after asking as to the action of the company.

Mr. Davis: I am perfectly willing to frame the question in that way.

Mr. Bodwell: And what were the reasons expressed for the action of the company?

Mr. Davis: It must shew in what action?

Mr. Bodwell: Then I will not consent to that.

Mr. Davis then presses the whole question, to which Mr. Bodwell thereupon objects *in toto.*

Mr. Davis: After thinking it over, it is a matter more immaterial than material, and I am willing to let it go at that.

(The question is thereupon put by Mr. Davis as follows): 265. During the course of the consultation that you are referring to, or at the time when you received the instructions which you mentioned from the company, or any other conversations with these parties or any of them at or about that time, what were the reasons expressed for the action of the company? *A.* The Bank were the holders (as collateral security) of about $460,000.00 worth of bonds of the company, and the company was practically in their hands, they had to do what they were told. The reason was felt all through and expressed.

266. *Q.* You spoke a little while ago of the company wanting time. Just go on and explain why they wanted time at that particular juncture? *A.* Their bonds were on the market at Montreal and were at that time selling, and they

hoped to have a sufficient number of the bonds bought before long to have paid both the Bank and the Edison Company.

267. Court: At Montreal? *A.* Yes, my lord—well, in the east. They were being floated there by Hanson Bros.

268. Mr. Davis: Go on, and explain fully as to their wanting time? *A.* If they could get time, and preserve their credit, their bonds could be sold.

269. Court (to witness): I suppose no great undertaking can ever be achieved except on, partially, borrowed money? *A.* Not out here apparently, my lord.

270. Mr. Davis (to witness): Did you have any conversation at any time between the 18th and the day on which these instructions were given you, or at least, we will say about that time and the day when judgment was signed, the 24th, with the solicitor or solicitors for the Bank of British Columbia? *A.* I believe I had a conversation with you about the 20th.

271. *Q.* Will you look at your memoranda and see whether you are sure or not? *A.* I had another one with you on the 24th.

272. *Q.* Yes, but prior to the 24th. Look at the entry under the date of the 22nd? *A.* I have an entry here under the date of the 22nd, but speaking from recollection it refers to a matter that was done on Saturday afternoon—the 20th.

273. *Q.* But, looking at the entry, do you know whether or not you had a conversation with me? *A.* Yes I had (page 471).

274. *Q.* With reference to what was that conversation? *A.* My entry does not show that; I have to speak from memory. My recollection is that it was requesting, having, the company having decided to allow the bank to take, judgment. I spoke to you about it, and you said you would prefer to wait and take judgment by default.

275. *Q.* What else did I tell you? *A.* I don't remember.

276. *Q.* Is that all? *A.* Yes, that is all.

277. *Q.* Now, think a minute Mr. Jenns. What if judgment was not got by default? *A.* Oh, of course, the company had to consent to judgment.

278. *Q.* What took place in reference to that? *A.* The company must consent to judgment.

279. *Q.* And what took place? *A.* I don't remember whether it was that particular time or not.

280. *Q.* Did you know prior to the 24th when you came over by what means judgment was going to be obtained in case it was not obtained by default? *A.* No, I think I heard first on the 24th.

281. *Q.* When you were speaking now of how it was to be obtained, you are speaking of merely the details, you know generally it was to be by consent? *A.* Oh, by consent, if judgment was not obtained by default but the details I did not hear until the 24th, and even on the 24th the bank was not to sign judgment at least, that is the arrangement I understood in the event of the Edison judgment being set aside.

282. *Q.* When you were told what the bank demanded from the company what position did you take?—what did you say about it? *A.* I simply had my instructions that I was to consent.

283. *Q.* And having those instructions, what did you do? What did you say when it was laid down to you that the bank insisted upon such and such being done, as your evidence shows what position you took? *A.* Simply followed the instructions I received and consented.

284. *Q.* But I am speaking of what you said at the time. Mr. Jenns does not exactly understand what I mean, and I suppose my learned friend would object if I told him. (To witness) What I am asking is this—you have already shown that the bank required the company to do so and so,—things you have mentioned. When I told you that, what position did you take about it? In other words, did you refuse? did you agree to it you see what I mean? *A.* I agreed, unwillingly certainly.

285. *Q.* On the night of the 23rd Jany.—that would be the night before judgment was signed—that would be Tuesday night—did you have any communication with anyone on the part of the bank? *A.* I was telephoned to by Mr. Wylde to come over to Vancouver the first thing in the morning with Mr. Wylde of New Westminster.

286. *Q.* The manager of the New Westminster branch. Just give the purport of what he telephoned you? *A.* He merely telephoned to me to say I had to go over to Vancouver in the morning. I objected, the night was very snowy, and the line was blocked. He said I had to go and catch the 7 tram, and if the tram was blocked, that I would have to drive over.

287. *Q.* Did you go over on the morning of the 24th? *A.* Yes.

288. *Q.* And went where when you got over? *A.* I went to your office.

289. *Q.* And you signed, I believe, certain papers? You signed the consent, that is, the appearance, and so on, I believe? *A.* Yes.

290. *Q.* The appearance is one and the order for judgment is another. And what arrangement was made, or what was arranged with reference to the judgment? *A.* Well on that morning the motion came up to set aside the Edison Company's judgment—Is that what you are asking about?

291. Court (to witness): Do you mean the Edison judgment? *A.* No; the bank judgment. On that morning a summons which had been taken out was returnable to set aside the Edison Co. judgment and was coming up to be argued. I asked then that the bank judgment should not be signed until some decision was arrived at in the other, as in the event of the Edison judgment being set aside, there was no use in injuring the company any further, and that then was agreed to.

292. *Q.* You might just explain that. You say agreed to? *A.* Well, you were to have a man waiting watching the argument, but of course you would sign judgment if you thought it was going against you.

293. *Q.* The matter was left in my discretion? *A.* The matter was left in your discretion.

294. *Q.* But you did not want it if you could help it? *A.* I did not want it if possible. I urged you not to sign judgment if it could be avoided.

295. *Q.* Then what happened next? You went where from the office? *A.* I attended Mr. Walkem's chambers after that on a summons for judgment on behalf of the bank.

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296. *Q.* Who else was there? *A.* I don't recollect. It was someone from your office. I don't recollect whether it was Mr. Macneill or Mr. Marshall.

297. Court: You say you attended Justice Walkem's chambers? *A.* Yes.

298. *Q.* For what? *A.* There was an application for judgment on behalf of the bank.

299. Mr. Davis: Who appeared with you before Judge Walkem? *A.* Someone from your office. I don't remember, it may have been yourself.

300. *Q.* Do you remember whether Mr. Justice Walkem was early or late getting down that morning? *A.* He was rather late. I think it was about half past ten.

301. *Q.* In fact, I believe we talked of calling him up by telephone or something in consequence of his being late? *A.* Yes, I was speaking of going up.

302. Court. Half-past ten is the regular time? *A.* I think he was expected at that time. I know he was late, at all events.

303. *Q.* Unless he had made an agreement before, he could not have been expected? *A.* I cannot answer for that, only for what I was told.

304. *Q.* Mr. Davis. When Judge Walkem came, what happened? *A.* Application for judgment was made, and I answered there was no defence.

305. *Q.* Was anything stated as to the amount—as to whether the amount was correct or not?—whether the amount was due, or not? *A.* I think I stated myself that the amount was due.

306. *Q.* And the order was made and what happened as soon as the order was made? How long after the order was made was it before we went out of the room? *A.* Immediately.

307. *Q.* By the way, from whom did you receive your instructions in connection with the bank suit to do as the bank demanded? *A.* From the directors of the company.

308. *Q.* Which one, or who were they? *A.* Mr. Oppenheimer and Mr. Douglas I remember distinctly speaking to.

309. *Q.* Who were the others? *A.* I don't know that I received definite instructions from any others but those.

310. *Q.* Were any of the others present during the time the matter was discussed? *A.* Mr. Smith the secretary was present. I don't think the other directors were present at that time when I was there.

311. Court: What is Mr. Smith's name? *A.* P.N.—Percy Nevile I think it is, I am not sure.

Cross-examined by Mr. Bodwell.

312. *Q.* You say Mr. Justice Walkem was late that morning? *A.* He was later than I expected him down.

313. *Q.* And you proposed to go for him?—to bring him down? *A.* Yes.

314. *Q.* Were you in a hurry? *A.* Not particularly.

315. *Q.* Why were you anxious to get Judge Walkem there, then? *A.* Well, his chambers were going on at 11. I mean, there was this motion to set aside the other judgment.

316. *Q.* You were afraid Judge Walkem would not get down in time to sign

the other judgment before the chambers were heard? *A.* No, I can't say I was afraid.

317. *Q.* Why did you wish to go for him? *A.* Well, when once a thing is arranged the sooner it is carried through, the better.

318. *Q.* That is the only reason? *A.* That is the only reason.

319. *Q.* And when Justice Walkem did come, I suppose he was in a hurry to get into chambers? *A.* No, I don't think so.

320. *Q.* Well you do not appear to have had very much time. Did you remind him of the fact that he had given a stay of execution on the Edison Company's judgment? *A.* I don't think so.

321. *Q.* And that he was now being asked to order a judgment which would prevent them realizing upon their judgment? *A.* No.

322. *Q.* There was no time to tell him that? *A.* There may have been time, but I don't think he was told.

323. *Q.* Why didn't you tell him, Mr. Jenns? *A.* I did not consider it my duty.

324. *Q.* You obtained this stay of execution? *A.* Yes, and I expected to have the judgment set aside, too.

325. *Q.* Then why were you in such a hurry getting this other judgment signed? *A.* I was not in a hurry; the bank's solicitors were.

326. *Q.* You were going for Judge Walkem to get him down here, in case he would not be down here in time? *A.* No, I think you misunderstood me. I certainly suggested he should be sent for.

327. *Q.* I understood you were going for him, too? *A.* I suggested telephoning.

328. *Q.* You made the suggestion? *A.* I made the suggestion.

329. *Q.* And the reason was in case he should not get here in time to sign judgment? *A.* No, I don't think so.

330. *Q.* Although you expected to get the other judgment set aside? *A.* Yes.

331. *Q.* You did not tell him about it? *A.* No.

332. *Q.* And you did not bring any of its facts to his notice? *A.* No.

333. *Q.* Did you explain why this application came on before him in this peculiar form? *A.* It was no part of my duty to explain it to him.

334. *Q.* Did you waive the taking out of the summons? *A.* I waived he taking out of the summons.

335. *Q.* Did you ever do that before? *A.* Yes.

336. *Q.* The application was under Order XIV. *A.* Yes, when I got my instructions.

337. *Q.* Tell me any occasion on which you ever did that thing? *A.* I can't Mr. Bodwell, as far as that is concerned. I know I have done it.

338. *Q.* Were you ever present when an application on it was made? *A.* Yes.

339. *Q.* Here, in Vancouver? *A.* In New Westminster.

340. *Q* Did you explain to the judge why that was necessary? *A.* No, it was no part of my duty to explain.

341. *Q.* Did the judge ask any questions? *A.* The judge asked no

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questions. In fact, I think, I am just remembering one thing, I did start to make certain explanations, and the judge said it was not necessary, because he said where money was due, judgment should go.

342. *Q.* Then you went into chambers didn't you, Mr. Jenns? *A.* Yes.

343. *Q.* And you argued this motion in chambers? *A.* I argued the motion in chambers.

344. *Q.* And as part of your argument you said that if the Edison Company obtained judgment against the tramway company it would injure their credit? *A.* I may have said so.

345. *Q.* Although you had just consented to judgment against them for $261,000.00? *A.* Yes, but I asked that judgment be not signed in the event of the Edison Company's judgment being set aside.

346. *Q.* Was there a binding agreement to that effect? Do you swear to that?

Mr. Davis: As a point of law, he had better ask him what the agreement was.

347. Mr. Bodwell: Was there an agreement then that the Bank's judgment was not to be signed in case the Edison Company's judgment was set aside? *A.* Well that was what I asked.

348. *Q.* I know; but was it assented to? *A.* It was so far as this: the matter remained entirely in Mr. Davis's discretion; at the same time, he was not going to sign judgment unless in the exercise of that discretion it was necessary in behalf of his clients.

349. *Q.* Then the arrangement was this proceeding was not to be taken unless it was necessary to get in ahead of the Edison Company? *A.* I don't know that they were getting in ahead of the Edison Company; the Edison Company had judgment.

350. *Q.* But then you say if the Edison Company's judgment was set aside the bank's judgment was not to be signed? *A.* I had every reason to believe it would not be at that time.

351. *Q.* Then the arrangement was that the bank's judgment was not to be signed unless it was necessary to get in ahead of the Edison Company? *A.* How could they get in ahead?

352. *Q.* Well, if you did not get the Edison's Company's judgment set aside, you wanted to get execution for the bank? *A.* If the Edison Company's judgment was set aside, and the bank's was not registered, the company's credit would have been good.

353. *Q.* That is not the question. If the Edison Company's judgment was not set aside, then you wanted to get first execution for the bank? *A.* Certainly not.

354. *Q.* But that was the arrangement that was to be effected? *A.* That was the arrangment the bank insisted upon and which was carried out.

355. *Q.* The arrangement was, was it not, that if it was necessary to get the bank's judgment in first, that their judgment was to be signed? *A.* Their judgment was to be signed——

356. *Q.* If the Edison Company's judgment could be set aside their judgment was not to be signed? *A.* If the Edison Company's was not to be signed, and I

hoped it was not to be, but I could not say actually it was not to be, that is the request I made.

357. *Q.* And you say you had every reason to expect that Mr. Davis would carry out that arrangement? *A.* I believe he endeavoured to carry it out.

358. *Q.* You went there with the expectation that he would carry it out? *A.* If he could he would have.

359. *Q.* Then the only arrangement was that the bank was to get in at all hazards? *A.* Yes, the bank was to get in first.

360. *Q.* At all hazards. Now, that was a matter which had obviously been arranged by you with Mr. Davis? *A.* It had been arranged by me with Mr. Davis that I was to consent to judgment on the instructions I got from the directors of the company; those were my instructions.

361. *Q.* And in pursuance of those instructions you went to Mr. Davis? *A.* In pursuance of those instructions I went to Mr. Davis.

362. *Q.* And you placed the affairs of your clients entirely in his hands? *A.* No, I didn't think that.

363. *Q.* What did you do? *A.* In what way more than I have told you already?

364. *Q.* You say you went there, and Mr. Davis told you what he wanted you to do? *A.* I went there, and Mr. Davis told me the Bank meant to have judgment.

365. *Q.* You went there with the idea of consulting Mr. Davis as to the manner—— *A.* No.

366. *Q.* In which this plan was to be carried out? *A.* No.

367. *Q.* Let's get at the beginning. You had your instructions to consent to judgment? To do anything the bank asked? *A.* The bank asked for judgment.

368. *Q.* With reference to this transaction to do anything the bank asked—those were your instructions? *A.* Well, you can say so, practically.

369. *Q.* Were they, or not? *A.* My instructions were to consent to judgment.

370. *Q.* I understood you to say in your examination-in-chief your instructions were to do anything the bank asked. Did you say that? *A.* The bank was asking for judgment.

371. I ask you now, if you did not say in your examination-in-chief that your instructions were to do anything the bank asked? *A.* In reference to allowing the bank to have judgment.

372. *Q.* Then you went to see Mr. Davis as to the details of the arrangement by which the bank's wishes were to be effected? *A.* I saw Mr. Davis.

373. *Q.* Did you go for that purpose? *A.* I don't—I can't remember.

374. *Q.* Did you have any other purpose? *A.* Well, when I come over here—I may have had other business, but I certainly saw Mr. Davis about that.

375. *Q.* Was that one of your purposes? *A.* Yes.

376. *Q.* To consult with Mr. Davis as to the details of the arrangement? *A.* Simply to ask, not to consult—to ask what he wanted with instructions to agree to what he did want.

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No. 12. Proceedings at trial. Case for the Defence. E. A. Jenns —*continued.*

377. *Q.* When you came over, what was arranged? *A.* Well, when I came over, I was simply told that the bank preferred to take judgment by default if possible; otherwise, if they wanted a consent to judgment, they would let me know.

378. Court (to Witness): What was that you said? *A.* I was told, my Lord, by Mr. Davis that the bank would prefer to take judgment by default; if they wanted a consent, they would let me know.

379. *Q.* Mr. Bodwell: And you arranged that if they did wish this consent and would let you know, you would come over and give it? *A.* I would go over and give it.

380. *Q.* When do you say this arrangement took place? *A.* I think it was on Saturday the 20th January.

381. *Q* Was anything said then? I suppose it was talked of between you and Mr. Davis that the bank must get in ahead? *A.* It may have been.

382. *Q.* If they could get in ahead by default judgment, all right? *A.* Yes.

383. *Q.* And if they could not, why, you would consent? *A.* If they could not, I was to consent to judgment.

384. *Q.* Did you see Mr. Davis after that? *A.* Not until the 24th.

385. *Q.* And you came over then at the instigation of Mr. Wylde? *A.* I was telephoned by Mr. Wylde.

386. *Q.* Your only objection to going was on account of the weather? *A.* I didn't think I could get over.

387. *Q.* But your objection to going was because the weather was bad? *A.* Yes.

388. *Q.* It was not about consenting to the judgment? *A.* No, because I had my instructions before that.

389. *Q.* And these documents were they already prepared for you? *A.* That I can't remember, Mr. Bodwell. I signed, I think, an appearance, and a consent to judgment, if I recollect rightly. I have never seen them since.

390. *Q.* Those documents are not in your handwriting, anyway? Mr. Davis: We admit they were all ready to be signed. I don't know whether they were drawn at the time, or whether they were drawn after he came.

Witness: There is an appearance and consent to judgment.

391. *Q.* Court (to witness): Were they written out ready? *A.* I think they were ready at the time, I did not draw them.

392. *Q.* Did you consult with Mr. Davis as to how the matter was to be arranged in the morning? *A.* When do you mean? On Saturday or that morning?

393. *Q.* On the morning on which the order was obtained, did you consult the night before as to the manner in which it was to be done? *A.* No; you see, the night before I was in New Westminster.

394. *Q.* Then from Mr. Davis's office, you went right straight to the court house? *A.* Yes.

395. *Q.* With Mr. Davis? *A.* With Mr. Davis.

397. *Q.* And you waited for the judge? *A.* And waited for the judge.

398. *Q.* This application was made in the judge's private room? *A.* Yes.

399. *Q.* You did not wait for open chambers to do it? *A.* No.

400. *Q.* You did not wait for open chambers to do it? *A.* No.

401. *Q.* Why didn't you? *A.* Well, I am sure I don't know. It was not my motion.

402. *Q.* Did you suggest that you should wait until open chambers? *A.* No.

403. *Q.* Why didn't you? *A.* Never thought about it.

404. *Q.* It did not occur to you? *A.* It didn't occur to me.

405. *Q.* Did you think Mr. Jenns that if that application had been made at a time when the judge's attention was drawn to the stay of execution upon the other summons he would have made the order at all? *A.* I didn't think so.

406. *Q.* You don't think he would? *A.* No, I don't think he would not.

407. *Q.* Then why didn't you tell him about it? *A.* Well, if you will pardon me, I can only repeat again, it is no part of my business.

408. *Q.* Don't you think it is part of your duty to tell him of facts relative to a matter coming before him? *A.* I think the most important fact was, the money was owing, and we had to give judgment.

409. *Q.* But here is a case in which one creditor by the advice of a solicitor was coming in to sweep away the fruits of another creditor's judgment—the other creditor's judgment having been stayed by affidavit and so on, by you, and did you think you had no duty at all? *A.* As a matter of fact, unless the mortgage was set aside as well as the judgment, I don't see that the fruits of the Edison Company's judgment were set aside.

410. *Q.* Don't you think you had a duty to perform to the judge under those circumstances? *A.* I think I had no further duty to perform than I have performed.

411. *Q.* That is your idea of things? *A.* That is my idea certainly.

412. *Q.* And upon that idea you acted? *A.* Upon that idea I acted.

413. *Q.* And as a matter of fact, this thing was not called to the attention of the judge, at all? *A.* What thing?

414. *Q.* The circumstance that he was about to hear a motion upon the other summons? *A.* No, not by me at all events.

415. *Q.* Well, by anybody? *A.* Not that I know of.

416. *Q.* And you don't think he would have made that order if it had been called to his attention? *A.* I think he would have made the order, certainly.

417. *Q.* The bank were the holders of the debentures, you say? *A.* Of part of the debentures—the unsold balance of the debentures—somewhere about $440.000 There were about $58,000.00 sold, I believe.

418. *Q.* There was a trust deed, too, covering all the property of the company to secure the debentures, wasn't there? *A.* Yes.

Mr. Davis: If he wants to prove what it covers, it ought to be produced, but it practically covers all.

419. Mr. Bodwell: There was a deed assigning the uncalled capital of the company? *A.* That was afterwards.

420. *Q.* Can you swear to the execution of the deed? *A.* Yes, t is witnessed by me.

421. *Q.* It is simply an assignment of the uncalled capital? *A.* Called and uncalled, there was some called and not paid.

422. *Q.* It is dated 22nd January, 1894, and assigns all the called and uncalled capital of the company ?

(Copy to be put in afterwards.)

423. *Q.* And the bank then had this deed, the assignment of the uncalled capital, and they took the judgment? *A.* I don't think the bank had the deed. I could not answer for that, I think the deed was in the possession of the Montreal Safe Deposit Company, but the bank held the unsold bonds, and still hold them. As they were sold the money was being paid into the bank at that time.

424. *Q.* There was no doubt about the Edison Company's debt being due was there? *A.* Well, there is a suit still going on. The tramway company have a claim against the Edison Company.

425. *Q.* That is the counter-claim; there is no doubt about the amount? *A.* Oh, about the amount, no. The amount was $1,625.00. I think an open account and the balance was on notes.

426. *Q.* Court: Is it on a counter-claim? *A.* Subject to the counter-claim, yes, my Lord.

427. Mr. Bodwell: And there was bound to be a large balance in their favour under any circumstances? *A.* Oh, there would be a balance in their favour, a large balance certainly.

428. *Q.* They had at that time signed judgment for the amount of their debt? *A.* Yes, they had signed judgment.

429. *Q.* What time did you come over from Westminster that morning? *A.* I left on the 7 tram.

430. *Q.* And what time did you see Mr. Davis? *A.* I don't know what time. The reason I left so early was that if I had had to drive over with the tramway being blocked, it would have taken two hours to drive, anyway.

431. *Q.* And you wanted to be sure and get here? *A.* I was told I had to be here.

432. *Q.* By Mr. Wylde? *A.* By Mr. Wylde.

433. *Q.* And your instructions from your directors were you were to be here? *A.* I don't think my directors spoke about that at all.

434. *Q.* There is no question about whether you had to come or not. It is no use pressing you about that. It is not necessary to say that you had to come? *A.* I know, but what it meant was simply this, unless I came and obeyed instructions I had received it would be very bad for my company.

435. *Q.* But your instructions from your company were to do it? *A.* My instructions from my company were to consent to the bank's judgment.

436. *Q.* And of course your instructions were to do what the instructions called for? *A.* Yes.

437. *Q.* So there is no use telling you had to come, because your instructions were all arranged beforehand

438. *Q.* Mr. Wylde is the manager of the bank, isn't he? *A.* At New Westminster.

439. *Q.* What time did you get down to the court house that morning? *A.* I don't know—half-past nine or ten.

440. *Q.* How long were you here? *A.* I was in the court house altogether about two and a half hours.

441. *Q.* How long were you here before the judge came? *A.* About half an hour—three-quarters of an hour, maybe.

442. *Q.* What time did the argument come on, on the summons? *A.* At eleven I believe.

443. *Q.* Did you begin the argument? *A.* Yes, I believe so.

444. *Q.* It was the first summons argued? *A.* That I could not answer. There may have been something before it or not.

445. *Q.* You can't give the time then with accuracy? *A.* No, there was an adjournment about half-past eleven.

446. *Q.* What was the occasion of the adjournment? *A.* Well, I think the Judge was suggesting the matter should be arranged.

447. *Q.* It was with reference to this summons. This summons occupied all the time, did it? It had been in argument? *A.* The summons to set aside the Edison Company's judgment?

448. *Q.* Yes? *A.* It had then been about half an hour on.

449. *Q.* And you think the adjournment took place at 11? *A.* I think the adjournment was about half-past 11. I cannot be absolutely accurate.

450. *Q.* You could not swear whether it was half-past or a quarter-past 11? *A.* No, I could not.

451. *Q.* Or whether it was not eleven o'clock? *A.* Oh yes, it was past 11.

452. *Q.* How do you know? *A.* Because I think the summons came on for hearing about 11, and it was argued about half an hour.

453. *Q.* And you don't know whether it was a quarter past 11 you adjourned? *A.* It might have been a quarter past or half past.

454. *Q.* So you don't know very much about it? *A.* I think I remember sufficiently to be able to say as far as that goes.

455. *Q.* How do you remember? Did you look at your watch or anything to impress it on your mind? *A.* No; summonses usually come on about 11 o'clock, I think.

456. *Q.* It might have been half-past 10? *A.* I don't think this came on at half-past 10.

Re-examined by Mr. Davis.

457. *Q.* In speaking of time, Mr. Jenns, I suppose you do not pretend to speak within a quarter or perhaps half-an-hour? *A.* I am simply giving to the best of my recollection.

458. *Q.* This assignment of uncalled-for capital, I see it is dated the 22nd, and the acknowledgment was taken on the 30th January. As a matter of fact, was it signed before the judgment was obtained on the 24th? *A.* No; it was signed after the judgment was obtained.

459. *Q.* You said in answer to my learned friend that this application was made in the judge's private room. I think it has been in evidence already; it was in the judge's chambers. If that is down, I don't care to ask. I think the room in which it was signed was the judge's chambers. I think it was Mr. Thicke who gave that evidence. At any rate, there was a sign upon the door—a

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plate on that door there—"Judge's Chambers." There were two rooms you know—one is the judge's library? *A.* Two rooms. One; it was marked Judge's Chambers. It was on the right hand side. When I said in his private room, I meant in his room as distinguished from the courthouse.

460. *Q.* And it was the room which was referred to by Mr. Thicke as being marked "Judge's Chambers"? *A.* Yes.

(Adjourned for one hour.)

No. 13. Proceedings at trial. Case for the Defence. A. J. McColl.

(After Recess.)

A. J. McColl, *called and sworn.*

Examined by Mr. Davis.

461. *Q.* Registrar: Your name? *A.* Angus John McColl.

462. *Q.* Mr. Davis: You reside at New Westminster, Mr. McColl, and are a practising barrister and solicitor of the Province? *A.* Yes.

463. *Q.* Along in November and December, 1893, had you any connection with the Westminster and Vancouver Tramway Company in a professional way? *A.* I had no permanent connection—I was standing counsel, when I was sometimes consulted, along with Mr. Jenns, as solicitor of the company, and sometimes independently of him——

464. *Q.* In or about the last of November had you any conversation with reference to the tramway company matters with Mr. Ward, of the Bank of British Columbia, when Mr. Oppenheimer and myself were present? *A.* I had, on the 30th November.

465. *Q.* In what way were you connected with the Westminster and Vancouver Tramway Company at that time, if at all? *A.* I had been advising the company as counsel with reference to certain matters, or a certain matter, which formed the subject of the conversation to which you refer.

466. *Q.* What was that conversation? *A.* That was explaining to Mr. Ward a proposed arrangement between the tramway company and the Edison Company, with a view to inducing Mr. Ward to delay proceedings against the tramway company on the part of his bank.

Objected to by Mr. Bodwell as being evidence of what took place prior to the arrangements which are the subject matter of this action, and as being in connection with something not referred to in the pleadings. Mr. Davis, contra. One of the allegations is pressure, and this is to lay a foundation to show pressure. Plaintiff's objection over-ruled, objection noted.

467. Mr. Davis (to witness): What was that conversation? *A.* The exact words of the conversation I cannot recall, the substance and purport I recollect very clearly. It was with reference to an action then pending of the Edison Company against the tramway company, and the object of it was to delay an action which would otherwise, it was understood, be brought by the Bank of British Columbia against the tramway company, and what I did or tried to do was to explain to Mr. Ward, in the presence of yourself, as solicitor of the bank Mr. Davis, that the object of the proposed agreement between the tramway company and the Edison Company was simply to obtain a delay on the part of

the Edison Company of the action then pending by it against the Tramway Company, and preserve the positions of the Edison Company and of the Bank—in the same position in the like position as if the bank would take proceedings at the time to which I refer, and pressed for judgment.

468. Court: When you say like position, do you mean relative position? *A.* Yes, my lord, in the like position relatively. To put it in another way, my recollection is that the writ had been issued by the Edison Company in that action against the tramway company only some two or three days before this 30th November; that is, it would have been possible at that time in the usual course for the bank to get judgment before the Edison Company in case the bank should start a suit at that time, and the object was to assure Mr. Ward that some arrangement was in course of negotiation and was practically sure of completion, by which the position of the bank would not be prejudiced, nor would the position of the Edison Company, the same positions would be maintained relatively to each other whatever those positions might be as regards the contest for priority of judgment—that was the object.

469. *Q.* And what undertaking, if any, was given Mr. Ward at that time? *A.* I had.

Same objection by Mr. Bodwell.

Witness: I had a written document there; either the document itself which was proposed to be completed with the solicitors of the Edison Company, or a copy of it, I can't say which, but the document itself was there——

470. *Q.* What arrangement was proposed to be given by the Edison Company?

471. *Q.* Mr. Davis: I asked him what undertaking, if any, was given by him to Mr. Ward on behalf of the bank? given to Mr. Ward by Mr. McColl acting for the tramway company to Mr. Ward acting for the bank at that time with reference to the position of priority of the bank over the Edison Company? *A.* The position to which I have referred, or rather the relative positions would be maintained.

472. Court: But the tramway company could not arrange for the Edison Company?

Mr. Davis: No, my Lord; the tramway company were merely arranging for themselves. Witness (to Court): No, my Lord, pardon me, the undertaking went further than that, because it was practically,—as I understood, at all events,—that time,—and I was speaking from that basis, that the arrangement with the Edison Company would be completed, and therefore it was part of my undertaking to secure that continuation of the then relative positions—that the Edison Company would be settled with upon the basis which was discussed, or at all events, if that fell through, that the bank would be informed of that, so that they would have time to proceed——

473. Court: That is rather too involved? *A.* I think I can clear it up, my lord, in this way, in putting it in a slightly different way. At that time, my recollection is there were five days yet to expire of the eight days limited for appearance, and the understanding being that if Mr. Ward was satisfied with the position, that the agreement with the Edison Company would be completed at once; that is, on that day or the following day; or if not, that Mr. Ward and Mr. Davis would have notice of it, the bank would then substantially be in the same

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No. 13. Proceedings at trial. Case for the Defence. A. J. McColl —*continued.*

position as regards proceedings by action with a view to judgment, as if the action were not delayed on that 30th November at that time, at the instance and by the request of the tramway company.

474. Mr. Davis: *Q.* To put it still more clearly, Mr. McColl, what did you tell Mr. Ward in the presence of—If I understand, Mr. Oppenheimer was present at that time? *A.* Certainly; I was speaking for him; he ratified it.

475. *Q.* What did you tell Mr. Ward would be the position of the bank as far as getting first judgment was concerned? *A.* I believe I went so far as to state there could not be the slightest legal difficulty in the way. Mind you, I was acting, of course, not for the bank, but was speaking of my view of the position, and of course was putting the case as strongly as I could for the tramway company; but I remember I did say to Mr. Ward, as far as my legal opinion was worth anything, I did think there was no legal difficulty at all in the way of the bank securing judgment.

476. Court: If the relative positions were not to be altered, how was it you were going to give the bank a priority over the Edison Company who had already issued a writ? *A.* Well, my lord, that was not discussed, but as showing what was in my mind I can very easily answer that question.

Objected to by Mr. Bodwell. Objection sustained.

77. Mr. Davis: But the undertaking that was given to Mr. Ward was that the bank should have judgment ahead of the Edison Company, if they insisted on it? *A.* Most undoubtedly; and more than that, from my knowledge of the position of each company, of the stage to which the suit of the Edison Company had advanced, that it was my opinion for what it was worth—I was trying to secure what I was working for Mr. Ward—that there was no legal impediment in the way of securing that result, beyond any serious question; that I wish to be understood most emphatically as stating—I thought Mr. Ward must have placed some little reliance upon it, although he might not be guided altogether by it.

478. *Q.* Perhaps it might make it a little more clear to his lordship if I ask this question: Apart from this arrangement which I believe was finally entered into between the tramway company and the Edison Company, was there or not in your opinion as counsel for the tramway company a defence to the Edison Company's action; that is a defence to a certain extent, at any rate? *A.* Oh, it depends as far as I know on the counter-claim which I had spoken with Mr. Jenns about as part of the action. I never heard there was any other defence with the exception of signing judgment. I wish to guard myself there.

479. *Q.* So that, whatever might be the effect of it, you have explained, Mr. McColl, what you have understood—whatever might be the effect of it, what you told Mr. Ward was that if this arrangement with the Edison Company was carried out still the bank should have judgment first? *A.* Yes, whether it was carried out or not, that was the distinct and positive assurance, that is, so far as I was in a position to give it, and it was given in the presence of the president of the company, and on the most perfect good faith of myself particularly, as I have no doubt it was accepted upon his.

480. Court: Did I understand you to imply that this was on the part of the Edison Company also? *A.* Oh, no, my lord—I was not acting for the Edison Company—I was acting for the tramway company.

481. *Q.* I thought you said there was some arrangement with them which would enable you to undertake for them as well as the other? *A.* A pending arrangement which would be completed if Mr. Ward would be satisfied with the position he would be left in at that time, or rather the bank would be left in.

482. *Q.* I suppose underlying all this as far as we have gone was the desire to sell the bonds and clear the liabilities? *A.* Yes, my lord; but a stronger position than that. I was not aware there was any sound, any reasonable, expectation of selling the bonds in the then position of the company, but there was then pending, my lord, a proposed reconstruction of the company.

483. *Q.* Then my question is of no use? *A.* Yes, if your lordship will pardon me, but it goes further than your lordship supposes; there was then a reconstruction pending in charge of Mr. Marwick.

Mr. Bodwell: Unless this is being brought out by your lordship, I object.

Court: Yes, I don't care for that.

484. *Q.* Mr. Davis: I will now ask it. What was the reason why the undertaking was given?

Objected to by Mr. Bodwell.

Objection over-ruled.

Witness: Because it was thoroughly understood at that time and had been to my knowledge, acquired in my capacity of counsel consulted by the tramway company, that the tramway company's salvation was really dependent upon the bank for several reasons. Do you wish me to give those?

485. Mr. Davis: Yes *A.* Well, there was a number of reasons. One was—

Mr. Bodwell objects that they are going in over his objection.

Witness: I will only say, my Lord, they were very serious.

Objection sustained.

486. Mr. Davis (to Witness): Now, Mr. Jenns spoke of a consultation with you, Mr. McColl, at which Mr. Oppenheimer was present, and I think he said Mr. Douglas, sometimes he puts it on the 18th fixing the date from a memorandum in his blotter. Do you remember that conversation? *A.* I have no distinct recollection of it; it is quite likely I had. There was some consultation or conference with reference to the subject matter which he says was the question discussed then but I cannot say it was at that time.

487. *Q.* Did you make any note of it at the time? *A.* I did not search in my blotter with reference to it. I understood I was to be called as to what occurred in Mr. Davis office on the 30th November.

488. *Q.* Do you know of more than one consultation between yourself and Mr. Jenns at which Mr. Oppenheimer and Mr. Douglas were present with reference to the subject matter that Mr. Jenns spoke of? that is giving the bank a prior judgment to the Edison Company? *A.* Yes, there were several.

489. *Q.* What took place at those several consultations? *A.* The purport of them was that inasmuch as the bank insisted upon having judgment before anybody else, that some means of averting this Edison execution must be found, or otherwise, the bank would get such a judgment. I don't remember any specific discussion of any such agreement with the bank, but there either was a statement of that kind, but it was understood, pre-supposed that at all events was a thing

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No. 13. Proceedings at trial. Case for the Defence. A. J. McColl —*continued.*

that nobody questioned at the time to which I refer in my consultations with reference to that matter that occurred. That was the one thing that was conceded.

490. *Q.* That is, that the demands of the bank had to be met? *A.* Yes, and that the bank inevitably would get judgment before the Edison Company's judgment must be saved. I wish to be distinctly understood the effect, on the credit of the Edison Company's judgment alone, as far as my knowledge is concerned, was not at all a serious factor in the problem. Speaking for myself, my understanding was that the real danger the Edison——

Mr. Bodwell: All this is not evidence.

Witness: Yes, arising from what occurred at that time.

Mr. Bodwell objects to any impressions, or understandings or conclusions at which the witness arrived from statements of fact that were made.

491. *Q.* Mr. Davis: What I am asking is the effect of those conversations? *A.* That is what I meant.

492. *Q.* Mr. Davis: I did not mean the understanding in his mind at all, but the understanding arrived at from the conversation—— Witness: The substance, my lord, of the whole thing was this; To avert the action by the bank which would inevitably follow failure to secure delay on the part of the Edison Company. I don't know that I can put it in any different way than that; to avert action on the part of the bank by delaying the further continuation of the Edison suit.

493. *Q.* And when you refer to action on the part of the bank, what are you referring to? *A.* Priority of execution, stopping the account current of the company with the bank which was necessary in the daily operation of the road, and averting the possible winding up of the company, and the sale under the mortgage. In fact, it was ruin all round.

494. *Q.* Which date are you referring to now? *A.* I am not speaking now with reference to any particular time, because the danger was as great at one time as another, there were two suits. There was one suit pending. That was at every conversation. I don't think there were more than two or three, but I am not distinguishing one more than the other as regard that.

495. *Q.* So far as you know, had the bank anything to do, directly or indirectly, I mean, as to any request coming from them, or instructions coming from them, or anything of that kind—of course indirectly it might have had some effect on the minds of the tramway company—but as far as any instructions or directions or request are concerned, had the bank anything to do with the setting aside of the Edison judgment? *A.* Not that I know of.

Cross-examined by Mr. Bodwell:—

496. *Q.* Of course, you were only acting then as counsel in consultation with Mr. Jenns? *A.* Yes, Mr. Bodwell, I don't remember that I had any conversation with any of the directors apart from Mr. Jenns in that particular.

497. *Q.* That is what I understood? *A.* Yes.

498. *Q.* In the first place, the Edison Company had issued a writ? *A.* That is my recollection.

499. *Q.* And that writ had been served about five days? *A.* No, two or three days.

500. *Q.* And then you and Mr. Oppenheimer saw Mr. Davis, and Mr. Ward is that it? *A.* The way it came about—I didn't see them, but if you will allow me, I am not certain, I went over—came over—to Vancouver for that purpose, as I had another object altogether different (it did not concern any of these parties) for seeing Mr. Ward and Mr. Oppenheimer and I think he took advantage——

501. *Q.* Of the opportunity? *A.* At Mr. Oppenheimer's request that is my recollection.

502. *Q.* You took occasion to talk it over? *A.* Yes.

503. *Q.* And at that time you gave Mr. Ward not simply the undertaking of Mr. Oppenheimer, but to a great extent your own personal assurance that the matter would be arranged in good faith on the basis which you have stated? *A.* Well, I confess I am a little enthusiastic when I go into anything, and I did try to induce Mr. Ward to place some little reliance on my assurance that he could trust——

504. *Q.* That what you promised would be carried out? *A.* To trust that the assurance, the agreement made with him would be observed.

505. *Q.* That you were committed to it as far as you had any influence or power over these men in your professional capacity? *A.* I don't think it went down to particulars.

506. *Q.* That was the idea in your mind? *A.* That was rather taken for granted; the effect in me was the legal possibility of successfully assuring.

507. *Q.* At any rate, you gave Mr. Ward a general assurance in the most positive way? *A.* In the most positive way, yes.

508. *Q.* And subsequently the agreement with the Edison Company to which you refer was reduced into writing and executed under the seal of the company? *A.* I think it had been reduced into writing before, either the proposed one or a copy of it with me at that time.

509. *Q.* I suppose the details of the execution were left with the solicitor for the company? You did not personally look after that? *A.* I did not.

510. *Q.* And when judgment was signed by the Edison Company and the effect of it might be to prejudice the bank's position, you still found bound in honour to endeavour to put the bank in the place where they would have been if they had taken action at the time when the writ was first issued? When Mr. Jenns came to talk it over with you, prior to the issue of that summons to stay proceedings, you still felt in some sort responsible for the assurance you had given to Mr. Ward? *A.* No; there was no undertaking for any action on my part.

511. *Q.* But you still felt that any steps which the company could take to carry out that agreement, ought to be taken? *A.* I don't know I concerned myself at all—I don't blame myself for anything that occurred.

512. *Q.* But you still felt the company should keep faith with the bank to the utmost extent of their power? *A.* I could not say I was called upon to feel that they were——

513. *Q.* It was impossible for you not to have some thought upon it; you had been an active agent in arranging that matter, and for reasons we need not

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No. 13. Proceedings at trial. Case for the Defence. A. J. McColl —*continued.*

go into, didn't you feel that steps ought to be taken by the company to keep faith with Mr. Ward? *A.* Pardon me, I was not an active agent, but only present at an interview which had for its primary object something else altogether, and I took advantage of knowing Mr. Ward to some extent, and Mr. Oppenheimer being there, to put in my word——

514. *Q.* But you did put in your word, and it was largely upon the effect of it, that it was made? *A.* I don't know that, at all—I thought it would have some effect.

515. *Q.* Didn't you think the company were bound to carry out the agreement even to the extent of taking out a summons to stay execution? *A.* No; that was entirely in the hands of the solicitor for the company——

516. *Q.* You simply acted as counsel and gave your professional opinion upon the facts as stated to you? *A.* When?

517. *Q.* When Mr. Jenns came to consult you with reference to taking out a summons to set aside the judgment? *A.* That most distinctly——

518. *Q.* Without any reference to what had taken place? *A.* Most undoubtedly.

519. *Q.* You knew, of course, the object of that summons—of the attempt to stay execution and set aside the Edison judgment? *A.* I am not entitled to say —to speculate now upon the subject at all—all that occurred was this——

520. *Q.* Well, but you don't answer my question—(to Court) I have not asked what occurred, but if he knew the object?

Witness (to Court). May I answer the question?

521. Court (to Mr. Davis). Yes—he was really intending to cut him short——

522. Mr. Davis. It looked to me like it. Witness. The only objection I know was the setting aside of the judgment; to the best of my recollection there was no such proceeding contemplated, as far as I can recollect because I won't be positive about that, but I have tried to recall as to this—as to obtaining stay of execution——

523. *Q.* That was not contemplated? *A.* Speaking to the best of my recollection, without meaning to be positive, it was not——

524. *Q.* Then how was it a summons was taken out with a stay of execution? *A.* My work was limited to advising Mr. Jenns upon a certain state of facts which he alleged before me, and settling his form of affidavit which he drafted. That was the first and last of my connection with that summons.

525. *Q.* Then so far as you know, at the time Mr. Jenns came to you, a stay of execution was not contemplated? *A.* No, I didn't say that; you are asking me to affirm one side of the proposition; To the best of my recollection, there was nothing one way or the other; I don't recollect now being told about obtaining stay of execution——

526. *Q.* You were not asked to advise upon that? *A.* That is my recollection——

527. *Q.* You were simply asked to advise Mr. Jenns as to what he was to depose to? *A.* No, but whether upon a certain state of facts he laid before me, the judgment would or would not be set aside, and I thought it would——

528. *Q.* And that is what you mean by settling his form of affidavit? *A.* Yes,

the very common way of settling, as in bills of costs—I mean it in that sense.

529. *Q.* Was not the settling of the summons discussed with Mr. Jenns? *A.* I think I have said it was not—I was very busy and could not go over to argue the summons.

530. *Q.* You did not? *A.* I did not.

531. *Q.* And you were consulted afterwards with reference to the proceedings that were being taken in order to expedite the bank's judgment? *A.* No, in no particular whatever.

532. *Q.* Then the only consultation you had afterwards was one at which it was agreed that whatever the bank should require, would be done? *A.* After when?

533. *Q.* After the summons? after this arrangement with Mr. Jenns? *A.* But I had no consultation afterwards.

534. *Q.* I understood you to say between that date—because Mr. Jenns has fixed the date—he has said the summons was taken out, and then after that there was an arrangement by which it was decided, the arrangement was to give the bank judgment? *A.* The date given by Mr. Jenns was subsequent? yes, well, it may be so.

535. *Q.* The only interviews you had were those at which it was arranged that what the bank wished should be carried out to the letter with reference to their judgment? *A.* I can't answer that question. I was in the habit of attending directors' meetings to consult about other things; my advice I limited to the litigation here.

536. *Q.* Were you present at any interview at which it was arranged that the bank's wishes should be agreed to? *A.* I can't say that; only I know it was stated, or the agreement was taken for granted, that the bank should get priority of judgment.

537. *Q.* And any steps taken to attain that end, should be taken? *A.* What do you mean? I was present when statements to that effect were made?

538. *Q.* I understood you to say so. Mr. Jenns says so, and I understood you to say so? *A.* I thought I had answered in this way,—that there may have been statements of such an arrangement having been made, but I was not certain, but either that would be so, or the existence of an agreement to that effect—the effect referred to—was presupposed or taken for granted at these consultations to which I refer. The inclination of my opinion was they were understood and taken for granted rather than discussed.

539. *Q.* And the object was to prevent the winding up of the company? *A.* Not that alone, that was one of the things.

540. *Q.* That would be enough—it would be like a man who had no powder with which to fire a salute? *A.* Well, I am answering your question—it was not the only way in which ruin might come.

Mr. Davis objects that the witness should be allowed to state the other reasons. Sustained.

Witness: The main object, my lord, was this, as I understood to permit time for Mr. Marwick's endeavours to reconstruct the company to be accomplished, when everybody would be paid in full, or satisfactorily arranged with.

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No. 13. Proceedings at trial. Case for the Defence. A. J. McColl —*continued.*

541. Mr. Bodwell: If the Edison Company got judgment, you anticipated the winding up, did you? *A.* I don't think, Mr. Bodwell, that I entered into any particular expectation as to the precise *role* (?) by which the ruin of the company would be brought about; it was so thoroughly in the hands of the Bank of British Columbia that it was very much a matter of choice whether to wind-up or proceed under mortgage, and stop the account current. I think what I said was this—this was the position in which the tramway stood with reference to the bank, that these or any of them might be brought about at the mere will of the bank. That is what I intended.

542. *Q.* That is to say, the company might be wound-up, was that it. *A.* Yes, I thought so, yes.

543. *Q.* And if the company was wound up, of course it was no use trying to sell the bonds? You know of no defence to the electric company's claim? *A.* Excepting as to a portion of it——

544. *Q.* That was only a small matter of damages which was after given up? *A.* My recollection is that was one of the prices paid for delay on the part of the Edison Company——

545. *Q.* That question of damage was only $500.00? *A.* I think $5,000.00.

546. *Q.* That is $5,000.00 out of $18,000.00,—so there would be about $11,000.00 or $12,000.00 to which there was no defence? *A.* Yes.

547. *Q.* And you did not expect the Edison Company would be prevented from getting judgment for the proper amount of their claim, in any event? *A.* I formed no expectation of that kind, certainly.

548. *Q.* How was the winding-up to be prevented then, even if the bank did get judgment? *A.* The winding-up was to be prevented if at all by delaying the Edison Company so that the bank would consent to delay.

549. *Q.* Then part of that contemplated delay was the getting in of the bank's judgment? *A.* No; the understanding was to maintain the relative positions.

550. *Q.* Of the Edison Company? *A.* As regards the commencement.

551. *Q.* Relative positions at the commencement were that the bank should get first judgment? *A.* I thought so.

552. *Q.* And the Edison Company was to maintain that position? *A.* Precisely.

553. *Q.* With the object of delaying the Electric Company so that the winding-up of the company could be prevented? *A.* No, pardon me, will you repeat that again?

554. *Q.* With the object of delaying the Electric Company so that the winding-up of the company could be prevented? Their scheme was to delay the Edison Company? *A.* I was not speaking about any scheme whatever; you are inventing it—delay on the part of the Edison Company was the first thing in order to induce the bank to delay.

555. *Q.* And if that could not be done, then delaying the Edison Company by giving the bank the first judgment? *A.* If that could not be done, that the bank would get first judgment.

556. *Q.* And the company would see that they got it to the utmost of their ability? *A.* As I have told you before, that was——

557. *Q.* Quite outside your jurisdiction? *A.* Was conceded——

E. A. Wyld, *called and sworn.*

Examined by Mr. Davis.

558. *Q.* Registrar. Your name? *A.* Ernest Alfred Wyld.

559. *Q.* Mr. Davis: You live at the City of New Westminster, and are manager of the Branch Bank of British Columbia in that city I believe? *A.* Yes.

560. *Q.* Do you remember the night of the 23rd January last? Perhaps I had better describe it this way—the night prior to the day on which the judgment of the Bank of British Columbia against the tramway company was obtained? which is referred to in this suit? Yes, sir.

561. *Q.* Did you have any communication with Mr. Jenns on that night? *A.* Yes, I telephoned to Mr. Jenns.

562. *Q.* How did you come to telephone him? *A.* I had a message from you. I was to get Mr. Jenns; you could not telephone for him yourself.

563. *Q.* Never mind telling me what I said, because that is not strictly evidence, but in consequence of a telephone message received from me you telephoned Mr. Jenns. Tell his lordship what you telephoned Mr. Jenns, the gist or purport of it? *A.* Mr. Jenns has no telephone, so I had to telephone to a friend to get Mr. Jenns in.

564. *Q.* At any rate, finally? *A.* Finally I got Mr. Jenns.

565. *Q.* And what did you finally telephone Mr. Jenns? *A.* I told him he would have to get over to Vancouver the following morning in the interests of the company. Mr. Jenns objected; I said he would have to go. It was a very snowy night and he said probably the line would be blocked. I said he would have to go if he stayed there all night.

566. *Q.* What do you mean by the interests of the company? *A.* Mr. Jenns was solicitor for the company. I was simply communicating a message from the bank; I was representing the bank.

567. *Q.* You mean by the interest of the company—what? *A.* The shareholders that he was representing.

Cross-examined by Mr. Bodwell.

568. *Q.* When you told Mr. Jenns he had to get over in the interests of the company, you were telephoning in the interests of the bank? *A.* I was passing a message on I had received from Mr. Davis.

569. *Q.* As solicitor for the bank? *A.* Mr. Davis was solicitor for the bank.

570. *Q.* And as solicitor for the bank he told you to tell Mr. Jenns he would have to get over to Vancouver in the interests of the company? *A.* No, I don't say that.

571. *Q.* Well, that is what you told Mr. Jenns? *A.* I told Mr. Jenns that —telephoned imperatively.

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No. 14. Proceedings at trial. Case for the Defence. E. A. Wyld —*continued.*

Re-examined by Mr. Davis.

572. *Q.* My learned friend asked a question with reference to the interests of the company; he asked witness if he telephoned in the interests of the bank. Now I ask you to explain, Mr. Wyld, what was meant by the interests of the company?——

Objected to by Mr. Bodwell as improper re-examination, not arising out of the cross-examination.

Mr. Davis: As long as my learned friend objects, I do not——

573. *Q.* Wish to press it, and it is on the notes. (To Witness): What would you have done, Mr. Wyld, had not Mr. Jenns obeyed your instructions? *A.* I should either have let you know, or gone over myself to Vancouver and let you know personally that Mr. Jenns refused.

574. *Q.* Why would you let me know? *A.* Because I presume you were acting in the interests of the bank and that you would have taken steps to close the mortgage.

No. 15. Proceedings at trial. Case for the Defence. W. C. Ward.

Wm. C. Ward, *called and sworn.*

Examined by Mr. Davis.

575. *Q.* Registrar. Your name? *A.* William Curtis Ward.

576. *Q.* You are an officer, I believe, in the Bank of British Columbia, Mr. Ward? *A.* Yes.

577. *Q.* Residing at Victoria. What is your official position in that bank? *A.* Superintendent of the British Columbia branch.

578. *Q.* Along in January, 1894, and for a considerable time previous, I believe, the Westminster and Vancouver Tramway Company had been indebted to the bank? *A.* Yes.

579. *Q.* In about what amount? *A.* About $260,000.00 I think.

580. *Q.* The amount of the judgment, I believe, is the correct amount? *A.* Yes, that must be the correct amount.

581. *Q.* For about how long had there been a large indebtedness owing by the Tramway Company to the bank? *A.* I can't say with any——

582. *Q.* Just roughly? *A.* Oh, over 18 months, two years probably.

583. *Q.* I believe the Bank of British Columbia had been their bankers from the time of their commencement? *A.* Yes.

584. *Q.* From whom did they get advances of money during latter part of 1893, the beginning of 1894, in fact ever since, to carry on their business? *A.* From the bank.

585. *Q.* If the bank shut down on advances what would happen to the Company? *A.* If the bank shut down on the company, the company would shut down too.

586. *Q.* Do you remember a conversation at which Mr. McColl, Mr. Oppenheimer and myself were present—I think in my office, the one that Mr. McColl has referred to? *A.* I remember that meeting you had.

587. *Q.* You remember the one that he referred to in his evidence? *A.* Yes.

588. *Q.* Did Mr. McColl give you any undertaking on the part of the company at that time with reference to the bank's judgment? *A.* I can't say exactly what the—what really took place, except that it was strongly argued—that we were threatening to take proceedings. The position that I took was this—that if anybody, any other creditor of the company took any proceedings the bank would immediately take proceedings for the purpose of keeping their position intact. They could not afford—the position, the account had got into was one which had given us—would not allow us any sort of—nothing being done which would prejudice the position—we were bound to see our position was always fortified as strongly as it could be.

589. *Q.* To put it in short—if anybody was to get an execution, the bank would be first? *A.* That was the purport of the conversation we had then. I had been talking of commencing suit over and over again, and all this from the understanding if any creditor of the company commenced proceedings, we were to be at once informed so there should be no doubt of our being first in the field.

590. *Q.* Later, I believe, you learned of the judgment obtained as mentioned by the Edison Company as against the Tramway Company? *A.* When do you mean?

591. *Q.* I mean later. Judgment was signed on the 29th December, and when did you first hear of that judgment—about when? *A.* I can't say, but I think it was about—it must have been about the middle of January.

592. *Q.* Sometime along there. When you heard of that, did you do anything? *A.* When I heard of that, I insisted upon a suit being commenced on behalf of the bank.

593. *Q.* Did you see any of the tramway people? *A.* I think so—Mr. Oppenheimer.

594. *Q.* And what did you say to him? *A.* I told him that we should of course have to commence proceedings and that we should insist upon our judgment getting in first, as it had always been our understanding that way, and always have information which would give us the opportunity of being first.

595. *Q.* And you insisted to him that the bank must have the first judgment? *A.* I insisted that the bank must have the first judgment.

596. *Q.* Had the bank at that time any particular ways, you may say of seeing that the tramway company paid some attention to what the bank insisted upon? *A.* Well, unfortunately, the position the account was in was such that we held the tramway company entirely in our hands, and if they did not do as we insisted, of course we would immediately put our remedies in force; we had a mortgage over everything they had. Our object in being first in any judgment was we should be able to protect them if possible so as to carry the company on. They were expecting at that time to pay us off—to pay everybody off. A man of the name of Marwick had been here negotiating with the company for the purpose of reconstructing the company, and finding enough money to satisfy the creditors, and the object of the tramway company in endeavouring to get the

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No. 15. Proceedings at trial. Case for the Defence. W. C. Ward — *continued.*

bank to hold off from proceedings was to enable them to have sufficient time to ascertain whether that could be carried out successfully.

597. *Q.* In fact, to put it briefly, the bank had the tramway company, as it were, in a vice, and wanted to force them? *A.* Till they cracked.

Objected to by Mr. Bodwell as leading.

598. *Q.* But at any rate you saw Mr. Oppenheimer and insisted your judgment should be got first? *A.* I had been persistent in that for months.

597. *Q.* But after the time I am speaking of now was after you learned of this other judgment—this Edison judgment. Then what did you do, apart from seeing Mr. Oppenheimer? *A.* I gave instructions all round—instructions to Mr. Murray to see that proceedings were taken. I saw you, myself, saw the firm.

598. *Q.* The bank's solicitors? *A.* Of Davis, Marshall and Macneill, and instructed them to take every measure in their power to get our proceedings brought to a successful issue.

599. *Q.* To get what you wanted. So far as you know, Mr. Ward, did the bank directly or indirectly have anything whatever to do with the application of the tramway company to set aside the Edison Company's judgment? *A.* We had nothing to do with that.

Cross-examined by Mr. Bodwell.

600. *Q.* Your object, at any rate, was to put the bank in the first place? That was your idea? *A.* Yes.

601. *Q.* And if in order to do that it was necessary to get the judgment, you intended to get it? *A.* Yes.

602. *Q.* And there had been an understanding that that should be allowed, you say, for some time? *A.* Yes.

603. *Q.* Ever since you had the conversation with Mr. McColl? *A.* Yes, and before; the conversation with Mr. McColl was——

604. *Q.* You did not want to wind up the company? *A.* We did not want to wind up the company.

605. *Q.* And you did not want anybody else to wind up the company? *A.* No.

606. *Q.* Mr. Oppenheimer fell in with your views? *A.* Yes.

607. *Q.* He did not say "Well, this electric company has got a judgment, and I don't think you ought to stand in the way of their reaping the benefit of it? *A.* On the contrary he was like ourselves, very much annoyed to find that they had not kept their agreement, to remain, as Mr. McColl says,—that each position was to be maintained.

608. *Q.* And he felt very annoyed with them at that? *A.* Yes, he did.

609. *Q.* And resolved to punish them for it, if he could? *A.* I don't know about punishing.

610. *Q.* At any rate he was annoyed, and when you went to him he did not raise any such objections as that I have mentioned? *A.* He knew very well that——

611. *Q.* Wait—I am asking you if, as a fact, that he did? *A.* He acquiesced?

612. *Q.* Yes? *A.* He had no alternative.

613. *Q.* Did he or did he not? *A.* I should like you to put the question again.

614. *Q.* Did he or didn't he acquiesce?—you used the word yourself? *A.* In what?

615. *Q.* In your request? *A.* I didn't ask him; he——

616. *Q.* Raised no objection? *A.* He may have said "I don't know where you are going to get it."

617. *Q.* And he didn't raise any objection? *A.* No—it would not have made any difference if he had.

618. *Q.* Where did you have the conversation? *A.* I think it was in the Hotel Vancouver.

619. *Q.* You have been doing Mr. Oppenheimer's business for a long time? *A.* Yes.

620. *Q.* And your relations have always been friendly—the bank with Mr. Oppenheimer? *A.* No.

Re-examined by Mr. Davis.

621. *Q.* By the way, was Mr. Oppenheimer, representing the tramway company, in a position to do anything else than do what the bank wanted? *A.* I don't think he was.

622. Court: When did you first know of the Edison judgment? *A.* I think it was about the middle of January, early in January.

623. *Q.* What steps did you take immediately upon that? What form did your action take? *A.* I immediately instructed our solicitors to take the same—to issue a writ.

624. *Q.* Did you have any direct communication with the Edison Company as to any understanding with them not to take precedence? *A.* No direct agreement; that was in November.

Mr. Bodwell: That agreement in writing, my Lord, we will put in. It is a very short document.

Mr. Davis: Of course, my learned friend will put that in in rebuttal. The only thing there, the agreement mentioned by Mr. Ward, was not an agreement to which the bank was a party at all.

Court: No; it is only the evidence of Mr. McColl made me think of that now.

William Murray, *called and sworn.*

Examined by Mr. Davis.

625. *Q.* Registrar: Your name? *A.* William Murray.

626. Mr. Davis: You are manager of the Bank of British Columbia at Vancouver, Mr. Murray, I believe? *A.* Yes, sir.

627. *Q.* And reside there? About when did you first become aware that the Edison Company had obtained a judgment against the Tramway Company? *A.* I think it was January—about the middle of January.

628. *Q.* Did you or any one on behalf of the bank so far as you know

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Proceedings at trial.
Case for the Defence.
William Murray
—*continued.*

directly or indirectly have anything whatever to do with the application to set aside the Edison Company's judgment? *A.* No nothing.

629. *Q.* I believe the last witness, Mr. Ward, spoke about having seen you at the time—I believe Mr. Ward was in Vancouver about the 15th January. I suppose you and he talked about the matter. I will not ask you what was said, but you and he had a conversation about this judgment? *A.* I don't think at that time.

630. *Q.* At which time—I am not speaking of the judgment of the Edison Company—but you talked about your position after learning of the Edison judgment? *A.* Oh, yes.

631. *Q.* You had a conversation of that kind? *A.* Well, not a particular conversation.

632. *Q.* But with Mr. Ward. You heard what Mr. Ward said? he gave certain instructions with reference to it? *A.* Yes.

633. *Q.* But after that, what did you do? *A.* Well, when I was informed of this judgment I called upon you.

634. *Q.* And did what? *A.* And then I sent for Mr. Oppenheimer.

635. *Q.* What did you do? *A.* I called upon you to see the best necessary steps to take in the matter, finding out whether this judgment— —

636. Court: What was that? *A.* I communicated with Mr. Davis, and went to his office. I asked his advice on the subject and then I communicated with Mr. Oppenheimer and told him that we had to have judgment.

637. Mr. Davis: Anything more than merely have judgment? *A.* Well, I said he would have to confess judgment his company would have to confess judgment.

638. *Q.* But what I mean is this—as to the priority of the bank to the the Edison Company, did you say anything to Mr. Oppenheimer and if so, what? *A.* I told him we would have to get in ahead of the Edison judgment that was the object in communicating with him.

639. *Q.* After having— —? *A.* Discovered this.

640. *Q.* Got advice from the bank solicitors? *A.* It was to secure first judgment.

641. *Q.* And you told Mr. Oppenheimer that you had to have this? *A.* Yes.

642. *Q.* Was the bank in a position at that time to enforce this?

Objected to by Mr. Bodwell as being a question of law.

643. Court (to witness): What position were you in with regard to the tramway company? *A.* Well, they owed us a large sum of money which was due and payable and we could enforce our demands at any time.

644. Mr. Davis: Anything else than that? *A.* Well, we were in a position —as I have already stated, they were negotiating for the sale of their bonds, and they hoped to get time to carry through these negotiations.

645. *Q.* And further? *A.* They were in that position that they had to do it; if we insisted upon securing our demand, we were in such a position that we could compel them.

646. *Q.* This mortgage that was mentioned? *A.* Yes, that mortgage.

647. *Q.* After having consulted the bank's solicitors in the matter, and

after having seen Mr. Oppenheimer, as you have mentioned, with whom did you leave the working out of what you insisted Mr. Oppenheimer and the bank should get? *A.* I left it with our own solicitors.

Cross-examined by Mr. Bodwell.

648. *Q.* How did you first know of the judgment of the Electric Company? *A.* I believe I heard it from Mr. Marshall, of Davis, Marshall, & Macneill.

649. *Q.* How long after the judgment was signed? *A.* I could not say.

650. *Q.* In the ordinary course, if you had not heard it from him, you would have got it from the "Mercantile Post"? *A.* Yes possibly.

651. *Q.* It is a publication issued by the Board of Trade? *A.* Dun, Wiman.

652. *Q.* Wouldn't you have got it any way by private slip? A judgment of that size would be reported at once? *A.* No, not always.

653. *Q.* When are these publications issued? *A.* Weekly.

654. *Q.* What day of the week? *A.* I can't say.

655. *Q.* Surely you must know—don't you remember? *A.* No; I can tell you by reference, of course.

656. *Q.* Was it the latter end of the week, or the early part? *A.* I can't tell you. We have one sent from Victoria, and by mail—one sent by Dun, Wiman from Victoria, and the Board of Trade here, by mail.

657. *Q.* You don't know whether it was sent specially? *A.* No I looked it up, and could not find the slip.

658. *Q.* But you would have got it by mercantile slip? *A.* Probably.

659. *Q.* And having heard it you immediately consulted with Mr. Davis? *A.* Yes.

660. *Q.* And he advised you as to the law upon the subject? *A.* Yes.

661. *Q.* And having consulted with him, you went out and found Mr. Oppenheimer? *A.* Yes.

662. *Q.* And you said to Mr. Oppenheimer that you had to have judgment? *A.* Yes.

663. *Q.* Mr. Davis: Judgment first? *A.* Yes, that is it.

664. Mr. Bodwell: And you said in your examination that your object was to get that judgment in any event and by any possible means? *A.* Yes.

665. *Q.* When you say you had nothing to do directly or indirectly in taking out this summons to stay execution, you mean you left all those matters in the hands of your legal advisers? *A.* I don't know what you mean. What matters do you mean.

666. *Q.* You intended to leave, and did in fact leave, the details to be arranged by your solicitors? *A.* What details?

667. *Q.* As to the steps which were to be taken in order to obtain first judgment for the bank? *A.* Yes.

668. *Q.* And you understood that your solicitors were to communicate with the tramway company's solicitors upon the subject? *A.* Well, I understood that they were to take all necessary steps.

669. *Q.* But you understood that your solicitors were to communicate with the tramway company's solicitors upon the subject? *A.* With reference to the issuance of this writ?

RECORD.

No. 16. Proceedings at trial. Case for the Defence. William Murray —*continued.*

670. *Q.* With reference to the issuance of the writ? *A.* To this confession of judgment?

671. *Q.* Well, but you said in your examination in the first instance Mr. Davis explained to you that he wanted to get judgment by default? *A.* Yes.

672. *Q.* So, you could not have understood——

Mr. Davis: What are you referring to?

673. Mr. Bodwell: To his examination (to witness). Did you understand that your solicitors were to communicate with the tramway company's solicitors?

Mr. Davis: With reference to what?

674. *Q.* Mr. Bodwell: Did you understand that your solicitors were to communicate with the tramway company's solicitors? Witness: I want to know with reference to what?

675. *Q.* Did you understand there was to be any communication? Mr. Davis: At what time?

676. Mr. Bodwell: Well, say at any time? *A.* Well, naturally in the case of a lawsuit, there are certain communications, and these communications I understood he would take care of.

677. *Q.* Did you understand that your solicitors were to communicate with the tramway company's solicitors? *A.* With reference to what?

678. *Q.* Any communication I am asking you just now? *A.* Certainly.

679. *Q.* What communication? *A.* With reference to the usual communication that takes place when it is served.

680. *Q.* What are the usual communications? *A.* I don't know,—to carry through the usual proceedings, whatever they may be, or might be. I am not a lawyer Mr. Bodwell.

681. *Q.* The proceedings you had in view were to get in the bank's judgment, first? *A.* Serving this writ, and getting in first.

682. *Q.* And you understood they were to communicate with the Tramway Company's solicitors on that point? *A.* I understood so.

683. *Q.* And you had already had a conversation with Mr. Oppenheimer? *A.* Yes.

684. *Q.* And there was an understanding between you and him that the bank should get in? *A.* There was no understanding.

685. *Q.* You said so? *A.* No I told him the bank had to get judgment.

686. *Q.* That was understood, you say, between yourself and Mr. Oppenheimer? *A.* It might have been understood.

687. *Q.* Was it, as far as you know? *A.* As far as I know it was not.

688. *Q.* Well, but you have said so. And it was understood between you and Mr. Oppenheimer you were to get it? *A.* Get what?

689. *Q.* Judgment? *A.* Yes.

690. *Q.* That was understood? *A.* Yes.

691. *Q.* You should get judgment? *A.* Certainly.

692. *Q.* At the interview you had with Mr. Oppenheimer after seeing Mr. Davis? *A.* Well, I told him we had to get judgment, and he didn't say yes or no.

693. *Q.* Were you satisfied with his simply saying nothing? *A.* I was

perfectly satisfied. I went to our solicitor and told him to take all the necessary steps I presumed that Mr. Oppenheimer would not give me a positive assurance without consulting his other directors.

694. *Q.* Then did you hear from him, afterwards? *A.* No.

695. *Q.* The arrangements, then, were left with the solicitors and—— *A.* Yes.

696. *Q.* And as far as you know, Mr. Oppenheimer gave instructions to his solicitors? *A.* As far as I know.

697. *Q.* So all that took place at the time you saw Mr. Oppenheimer was you told him you had to get judgment? *A.* Yes.

698. *Q.* And he said nothing? *A.* He did not give me an affirmative, or negative.

699. *Q.* He said nothing? *A.* Practically nothing.

700. *Q.* You understood afterwards from Mr. Davis that it was not likely that you would get judgment by default? *A.* Yes.

701. *Q.* I suppose you also understood from him it had been arranged to get judgment by confession? *A.* Yes.

Re-examined by Mr. Davis.

702. *Q.* There were some questions asked you with reference to whether or not it was not really the bank that took out, although in the name of the tramway company, the application to set aside the judgment, to which you said it was, and you now state positively that the bank had nothing whatever to do with it. Will you state to his lordship how those two statements which are very contradictory, in point of fact come to be made by yourself? *A.* Well, I mixed up the two questions, but I understood that Mr. McPhillips was examining me entirely on our judgment —our writ. I knew nothing about this stay of proceedings as far as this Edison company judgment was concerned until after the summons had been issued, and you yourself informed me, that is all I know.

703. Court: You did not know of the application to stay proceedings? *A.* No, not at that time.

704. *Q.* Mr. Bodwell: Was there any conversation between you and Mr. Oppenheimer at the time about the manner in which the Edison Company had obtained their judgment? *A.* Well, there was a general conversation nothing particular.

705. *Q.* Did he express any annoyance or dissatisfaction? *A.* He did not express either, but thought that they had not acted up in accordance with agreement with the company—that the Edison Company had not acted in accordance with the understanding and agreement that his company had with them.

706. *Q.* In your examination you say this, speaking of your conversation with Mr. Oppenheimer "Well, you think this was some days after the judgment "was obtained? I think so. *Q.* Did he tell you he had taken any—done any- "thing in consequence of the judgment being signed against him? He had done "nothing. *Q.* Did he say he was going to do anything? No. *Q.* Did he say "he was going to set it aside? No, not at that time." That is correct, isn't it, Mr. Murray? *A.* That is correct.

RECORD.

No. 17. Proceedings at trial. Case for the Defence. D. G. Marshall.

David G. Marshall. *Called and sworn.*

Examined by Mr. Davis.

707. *Q.* Your name? *A.* David Gordon Marshall.

708. *Q.* You reside in Vancouver, Mr. Marshall? *A.* Yes.

709. *Q.* You are a practising solicitor in the Province of British Columbia, I believe? *A.* Yes.

710. *Q.* And a member of the firm of— *A.* Davis, Marshall & MacNeill.

711. *Q.* You remember, of course, this matter of the bank judgment and the Edison judgment? *A.* Yes.

712. *Q.* Was there any communication direct or indirect so far as your knowledge goes, with the tramway company, the solicitors of the tramway company, or any one on behalf of the tramway company, from our office, or on the part of the bank with reference to the application to set aside the Edison judgment prior to that motion being made? *A.* Not that I am aware of.

713. *Q.* As a matter of fact, so far as you know, or speaking positively for yourself and as far as you know, for the rest of the firm, was our firm aware of that application having been made until after the intention of making it—until after it had been made? *A.* Not as far as I am concerned.

714. *Q.* And so far as you know, with reference to your partners? *A.* And with reference to my partners.

715. *Q.* It was you who entered the appearance in the suit of the bank *versus* the tramway company—entered this appearance which was signed by Mr. Jenns? *A.* Yes.

716. *Q.* And you also I believe, entered up the judgment? *A.* Yes.

717. *Q.* Was the appearance entered before the order was signed by the judge? *A.* The appearance was entered immediately after 10 o'clock. I waited some time for the order before I got it, before it was handed me.

718. *Q.* Ten o'clock is the hour of the office? *A.* For the Supreme Court.

719. *Q.* And you had to wait some considerable time before you could get the order from me? *A.* When I got upstairs after entering it, the judge had not arrived.

720. *Q.* And you got the order, you say, from me. Do you remember whereabouts it was you got it? *A.* It was either in the room or the hallway.

721. *Q.* Where was I coming from? *A.* From the judge's room.

722. *Q.* The room referred to by Mr. Jenn's ?—the judge's chambers it is called? *A.* Yes.

Cross-examined by Mr. Bodwell.

723. When did you hear of the judgment of the Edison Company. *A.* The morning Mr. Oppenheimer searched for the judgment.

724. *Q.* You don't remember when that was? *A.* I do by reference to the *præcipe* Mr. Oppenheimer put in at that time. I was present in the courthouse when Mr. Oppenheimer came to seach that. It was on the 9th January.

725. *Q.* Then you told Mr. Murray immediately? *A.* Yes.

No. 17.
Proceedings at trial.
Case for the Defence.
D. G. Marshall
—*continued.*

726. *Q.* You say you did not know of this stay of proceeding? *A.* No, I did not.

727. *Q.* How was it proposed to get the bank in first at that time? *A.* That I don't know; I didn't take any part in that.

728. *Q.* Did you conduct negotiations between your office and Mr. Jenns? *A.* No, I did not.

729. *Q.* You did not have anything to do with Mr. Jenns in the matter? *A.* Well, I saw him on the morning of the 24th, but that was after.

730. *Q.* But up to that time, you had not taken any part in the proceedings? *A.* I had the morning before issued and drew the writ out.

731. *Q.* That is, merely the clerical work. You did not take any part in the negotiations by which the confession of judgment was to be obtained? *A.* I didn't take any part in it at all. I was present when the appearance and consent were signed, that is all.

732. *Q.* Court (to witness): Was the appearance in your handwriting? *A.* The appearance was in the handwriting of Grant, a clerk in our office. The consent was in my writing.

No. 18.
Proceedings at trial.
Case for the Defence.
D. Oppenheimer.

David Oppenheimer. *Called and sworn.*

Examined by Mr. Davis.

733. *Q.* You reside in Vancouver, I believe, Mr. Oppenheimer? *A.* Yes.

734. *Q.* You are a shareholder, a director, and president of the Westminster and Vancouver Tramway Company? *A.* Yes.

735. *Q.* Along in the beginning of January, 1894, the company were indebted to the bank in a very large sum —$260,000.00, I believe? *A.* Yes, sir.

736. *Q.* Do you remember the conversation which Mr. Murray stated? You heard Mr. Murray's evidence, didn't you? *A.* Yes.

737. *Q.* You heard him refer to a conversation with you in which you insisted upon certain things? Do you remember that conversation? *A.* Yes, insisted on the company giving a consent judgment.

738. *Q.* What further than that? What was said? *A.* He said they wished that the bank must have judgment prior to the Edison judgment.

739. *Q.* In consequence of this intimation from the bank had you, by the way, any conversation with Mr. Ward about the same time with reference to the same matter? *A.* Oh, something similar to this.

740. *Q.* In consequence of this intimation received from Mr. Murray and Mr. Ward, which you have mentioned, did you do anything? *A.* Yes, I tried to arrange with the Edison Company on a basis to drop the first judgment—the first writ they issued.

741. *Q.* I am speaking now later to what you are thinking of. About the middle of January would be about a day or so before the bank's writ was issued, or sometime round the time; having received from Mr. Murray and Mr. Ward the intimation that the bank insisted upon having judgment prior to the Edison Company, did you give any instructions to anybody, and if so, what? *A.* Told the solicitor to give first judgment.

742. *Q.* Were the instructions to the solicitor simply in that bald way—to confess judgment or to do what was necessary? *A.* No, general instructions, that was the sum and substance.

743. *Q.* Court (to Witness) : And what was the sum and substance? *A.* They were instructed to give the bank first judgment.

744. *Q.* Mr. Davis : To get in ahead of the Edison Company—is that it? *A.* Yes.

745. *Q.* It is correct what Mr. Jenns says?—to do what was necessary to get the bank's judgment in first? *A.* Yes.

Objected to by Mr. Bodwell as leading.

746. *Q.* Before going to Mr. Jenns had you seen any of the other directors of the company to talk the matter over with them at all? *A.* Well, I think I must have. I didn't remember in my first deposition when it was taken, that I had any conversation with them, but since Mr. Jenns reminded me of it, I came over to Westminster and had a discussion, that is, an informal discussion, and gave instructions.

747. *Q.* And what was their idea? The same as yours? *A.* Yes, the same.

748. *Q.* What was the reason why the company acceded to the demands of the bank in this respect? When the bank insisted on getting first judgment why did the company consent to allow them to get first judgment? *A.* Well, the company was in the hands of the bank—the mortgage, they had they could have taken possession at any time under the conditions of the mortgage and of course if the bank insisted upon it, to a certain extent we were compelled.

749. Court (to witness): You were compelled to do what? *A.* To instruct the solicitor to confess judgment, to give the bank judgment before the company.

750. *Q.* Mr. Davis: Had the Bank of British Columbia anything to do directly or indirectly, Mr. Oppenheimer so far as you know, with the application by the tramway company to set aside the judgment of the Edison Company? *A.* Nothing whatever.

Cross-examined by Mr. Bodwell.

751. *Q.* Your conversation with Mr. Murray was about the 9th January? *A.* I don't think so.

752. *Q.* Mr. Murray says so?

Mr. Davis: No, he did not say so. He said, if anything, about the 15th.

753. Mr. Bodwell: Well, you searched for judgment on the 9th?—that is the record of the Court? *A.* Yes, certainly I did.

754. *Q.* So that you knew of the judgment on the 9th? *A.* Yes, I heard a rumour of it a day or two before, I think. I can hardly explain it to you in a minute.

755. *Q.* The execution was not issued on that judgment because there was some question of damages which it had been arranged should be settled between your company and the Edison Company? *A.* There was no arrangement.

756. They were going to give you a certain allowance off the claim? *A.* No, not on the bank (?) That was on two armatures only.

757. *Q.* And they were waiting for Mr. Wise to come out here? *A.* Yes.

Mr. Davis objects that it has not been shown yet that the witness knows why the Edison Company did not issue execution, and that he should be asked, as his answers may be merely from conjecture.

758. *Q.* Mr. Bodwell: As a matter of fact, however, you knew that Mr. Wise was coming out, and that when he got here the question of the armatures would be settled? *A.* Yes.

759. *Q.* And he had not arrived at that time. Mr. Wise was——? *A.* An electrician.

760. *Q.* You knew him? *A.* Yes.

761. *Q.* At any rate, he was the man to settle the price of that loss, whatever it was? *A.* No, It was between him and our superintendent to arrange the price.

762. *Q.* Well, negotiations were going on at that time as to how much you were to be allowed for those? *A.* For those two pieces of work, yes.

763. *Q.* And then judgment was signed, but in the meantime an execution had not been issued? *A.* No; there was no execution issued.

764. *Q.* When you saw Mr. Jenns you instructed him to confess judgment, you say? *A.* Yes, sir.

765. *Q.* And did you instruct him to take out a summons to set aside the other judgment? *A.* Yes, sir.

766. *Q.* At the same time? *A.* No, sir.

767. *Q.* And when did you instruct Mr. Jenns to confess judgment? *A.* After the writ was issued by the bank.

768. Why didn't you instruct him when you found out about the judgment, and after you had your conversation with Mr. Murray? *A.* I thought we had a good claim, the right to set that judgment aside—that we had good grounds.

769. *Q.* You were very much annoyed? *A.* I think so; yes. I thought we had good grounds to set it aside.

770. *Q.* You were annoyed at the Edison Company for signing that judgment? *A.* Yes, I was annoyed at it, certainly. They had no right to sign it according to the agreement and arrangement we made, they had no right to sign it.

771. *Q.* That was your opinion? *A.* No; it was the understanding—the solemn grounds.

772. *Q.* That understanding was contained in an agreement? *A.* Yes. But the latter part we had to take Mr. McPhillips' word that he would not sign judgment—that is not in it.

773. *Q.* That (producing document) is the agreement, isn't it? *A.* Yes, that is it. I signed that; that is my signature.

774. *Q.* And that (handing another document). *A.* This has been a little prior to this; this was the first arrangement; it had nothing to do with the last arrangement.

775. *Q.* What I am asking you now is, if you identify that document? *A.* Well, I could not say.

776. *Q.* Did you ever have a copy of that? *A.* I might have.

777. *Q.* You don't deny that you didn't. *A.* I don't, certainly not. I could not.

778. *Q.* Court (to witness): Do you identify the other document? *A.* The agreement I do. I can't very well this letter.

779. *Q.* Which one do you identify?—the one that Mr. Davis has? *A.* That Mr. Davis has—yes.

780. *Q.* What is it called? *A.* It is an agreement between the Edison Company and the Westminster and Vancouver Tramway Company.

781. Mr. Bodwell: Let me just refresh your recollection a minute. Don't you remember you and Mr. Douglas coming into Mr. McPhillips' office on or about the date that letter was written and requesting him to arrange with you not to proceed upon the Edison Company's claim? *A.* Yes.

782. *Q.* Don't you remember that he wrote that letter, had it copied and handed it to you, and you and Mr. Douglas would not take it because you and Mr. Douglas would not consent to these terms? *A.* I was at Mr. McPhillips' office.

783. *Q.* And afterwards you came back and he took this letter and agreed to give a written agreement, signed and executed by the Company? *A.* Yes.

784. *Q.* And is not that the agreement you gave in consequence? *A.* Not in reference to that letter. That is given on the last writ that was issued against us on the 27th November, I think.

785. *Q.* Is not that the agreement which you agreed to give when you finally assented to the arrangement which is embraced in the words of that letter? *A.* No, sir.

786. *Q.* You are sure about that, now? *A.* Yes. This was the action, after this letter was dropped—there was a writ issued.

787. *Q.* Let me refresh your memory again. This letter you and Mr. Douglas agreed to the terms of, but you did not give the agreement for some considerable time, and then another writ was issued—was not that the case? *A.* No.

788. *Q.* That was not the case. The letter is dated the 18th October. Now, on the 19th October, you and Mr. Douglas assented to its terms, didn't you? *A.* No, I don't think I did.

789. *Q.* Within a day or two? This is it—what we assented to.

790. *Q.* You remember that letter that you and Mr. Douglas would not assent to at the time? *A.* There might have been a document afterwards.

791. *Q.* Do you remember it, or don't you? *A.* I don't.

792. *Q.* You don't remember this, at all? *A.* There might have been a letter but I can't identify it.

793. *Q.* Just look at it and see if you remember anything about it. Do you remember going in to Mr. McPhillip's office? *A.* Yes.

794. *Q.* And a letter being shewn to you which you refused to take? *A.* Yes.

795. *Q.* And you came back the next day with Mr. Douglas and did take it? *A.* I was several times in Mr. McPhillip's office.

796. *Q.* Did you or did you not come back the next day with Mr. Douglas

and agree to the terms contained in that letter? *A.* I could not swear that was the letter.

797. *Q.* Was there a letter written to the terms of which you did not consent? *A.* I suppose there was several written there to which I did not consent.

798. *Q.* Was there a letter written in Mr. McPhillips' office read over to you and Mr. Douglas to the terms of which you would not at the time assent? *A.* There was some document, I don't know whether it is that or not.

799. *Q.* Did you come in a day or two afterwards with Mr. Douglas and consent to the terms? *A.* I could not say whether that day.

800. *Q.* Did you a few days afterwards consent? *A.* To that letter? I don't know.

801. *Q.* To any letter? *A.* I don't remember.

802. *Q.* You say you did not? *A.* I don't know. If I was in the office and looked over the correspondence I might.

803. *Q.* — remember the mistake? *A.* Yes.

804. *Q.* And there was an arrangement under the terms of which Mr. McPhillips was not going to proceed? *A.* Yes, certainly.

805. *Q.* And the company did not execute the agreement which they had agreed to execute? *A.* I think we did.

806. *Q.* Not until some months or some weeks? *A.* It was quite a different transaction.

807. *Q.* It was a long time afterwards? *A.* Yes, it was a long time.

808. *Q.* This was a document they did execute? *A.* This was a document we did execute.

809. *Q.* And the reason why was that another writ had been issued? The Edison Company had issued a writ in the meantime? *A.* Yes.

810. *Q.* You did not execute the document, and the Edison Company issued a writ, and then you did execute the document, and that is the one you did execute? *A.* I did execute that marked exhibit "H").

Document objected to by Mr. Davis on the ground that the witness has already stated that it is only part of the agreement in question, and consequently it does not show what the agreement really was, and in the second place it is not a matter which is in issue in this suit, at all; that pltffs' counsel is now apparently desirous of going into the question of this agreement and the rumpus which took place at one time in the court room which he so vigorously objected to his (Mr. Davis) going into and which he (Mr. D&) had not gone into. Pltffs could not in cross-examination file this document in defdts case.

Mr. Bodwell, contra,—The object in producing the agreement was Mr. McColl had stated in his evidence there was either an agreement, the draft of which he had with him at the time, or he explained the terms of it to Mr. Ward and Mr. McColl had said he believed that agreement was afterwards executed under the seal of the company, and Mr. Oppenheimer now says this was an agreement executed under the seal of the company.

811. *Q.* Mr. Bodwell; I ask Mr. Oppenheimer if there ever was any other agreement? *A.* This is the last one.

812. *Q.* Was there ever any other? *A.* No—that was the final agreement.

RECORD.

No. 18.
Proceedings at trial.
Case for the Defence.
D. Oppenheimer
—*continued.*

813. *Q.* Was there ever any other written agreement? *A.* Yes there were draft agreements. This is the final one with the exception of——

Court; I think that agreement relates to the subject matter of the action, and that it ought to go in evidence.

Mr. Davis: It is immaterial to me, only I ask that the objection should be noted.

814. *Q.* Mr. Bodwell: This is a resolution under seal of the company? *A.* This is the only agreement that Mr. McPhillips would accept.

815. *Q.* Court: That explains that $1,623.00? *A.* Yes, we had to pay them $1,623.00.

816. *Q.* Mr. Bodwell: This agreement says that the arrangement made with Messrs. McPhillips and Williams, solicitors for the Edison company on Oct. 18th 1893 made by our president and vice president be carried out? *A.* Yes.

817. *Q.* Now, I ask you if the arrangement set out in that letter dated October 18/1893 addressed to D. Oppenheimer, president of the Westminster & Vancouver Tramway Company is not the arrangement spoken of in that resolution? *A.* I don't think so, I don't know; there is quite a difference; read that again.

818. *Q.* I call your attention to the fact that that is dated on October 18th, addressed to you as president of the Tramway Company? *A.* Yes.

819. *Q.* And I ask you if that typewritten document does not contain the terms of the arrangement referred to in that resolution? *A.* No sir.

820. *Q.* You say it does not? Does it, or does it not? *A.* It does not.

821. *Q.* At the time that you saw Mr. Murray you were in a state of annoyance at what you considered to be a breach of faith on the part of the Edison Company? *A.* I don't remember.

822. *Q.* You have said so, a few minutes ago, in your examination? *A.* I said I was annoyed at the Edison Company.

823. *Q.* At the time? *A.* I don't know.

824. *Q.* Had you got over your annoyance? *A.* No, not yet.

825. *Q.* So, on the 9th January it is perfectly clear you were annoyed? *A.* I had a perfect right to be annoyed.

826. *Q.* I am not denying or arguing that, but I am asking you if you were? *A.* Yes.

827. *Q.* And at that time Mr. Murray came to you and said that the bank wanted first judgment? *A.* No, Mr. Murray didn't come to me that day, at all.

828. *Q.* Within a day or two? *A.* Well, a few days later; I don't think I had seen Mr. Murray until instructions were given to set the judgment aside.

829. *Q.* When he did come to you, that is what he said? *A.* Yes.

830. *Q.* You acquiesced in that? *A.* For the bank to get first judgment? —yes sir.

831. *Q.* When he requested it, you said nothing, Mr. Murray says? *A.* I don't suppose I did say much.

832. *Q.* You were examined as a judgment debtor in an action against the company? *A.* Yes.

833. *Q.* That examination took place on the 11th June 1894 it is an

examination as a judgment debtor in the case of the Edison Company against the Tramway Company—the suit in which judgment was obtained.

(*Q.* 352 and the following questions.)

" Well, why did you authorise Mr. Jenns to consent to judgment—in order " that judgment could be obtained quicker than it would be in the ordinary course? " *A.* Well, the bank favoured us very much, and it was likely—— *Q.* And they " asked you to assist them to get them in first? *A.* No, they didn't ask me at all. " *Q.* Did they threaten you, if you didn't get them in first? *A.* No, the general " way is always to keep with the party that treats me right and proper. If we " didn't assist him—— *Q.* You don't think the Edison Company treated you right? " *A.* No sir. *Q.* And the bank did? *A.* Yes. *Q.* Therefore, you wished the " bank to be secured? *A.* Not particularly."

Mr. Davis objects that the witness cannot answer to the evidence in the voluminous form in which it is being read, but should be cross-examined upon it, *seriatim*. Mr. Bodwell presses his right to ask the question before any objection is taken, and that as a part of his question he is going to read all these questions and answers down to 364.

Court: I rule that he can first read over those questions and answers, and make his examination upon them afterwards.

Mr. Davis: That is, he can first read questions 352 to 364 and then ask questions with reference to them, and read them over and so get them to appear on the stenographer's notes?

Court: He need not take them down.

Mr. Davis: Then will your Lordship direct the stenographer not to take them down?

Court: Do not take them down, but mention the figures.

Mr. Davis: But that will incorporate them with the notes.

Court: That cannot be helped. These can be read over the same as any other statement that can be brought in, and taken down by the stenographer as 352 to 364.

Mr. Bodwell: Without its being put in, as yet, but the stenographer must take down my questions.

Court: He puts those in.

Mr. Davis: In what way?

Court: He puts them in as evidence.

Mr. Davis: But this examination was in an entirely different suit—the suit of the Edison Company against the tramway company, and my learned friend has no right to put it in. He is trying to do indirectly by reading it over, what he would have no right to do by reading it as evidence.

Court: Well, I don't think I can allow the whole of that, such a long string of questions there, to be asked at one time.

Exception by Mr. Bodwell.

(*Cross-examination continued.*)

834. *Q.* I want "yes" or "no" in answer to this question; Were you asked this question and did you give this answer: "Why did you authorize Mr. Jenns

"to consent to judgment in order that judgment could be obtained quicker than "it would be in the ordinary course ? *A.* Well, the bank favoured us very much "and it was likely——Did you say that? *A.* Yes.

835. *Q.* Were you asked this question, and did you give this answer? "And they asked you to assist them to get them in first ? No they did'nt ask "me at all ? " Did you say that? *A.* If it is there, I said it.

836. *Q.* "Did they threaten if you did'nt get them in first? "No, the "general way is always to keep with the party that treats me right and proper; "if we didn't assist him"——

Witness: That is where Mr. McPhillips would not let me explain.

837. *Q.* But did you say that? *A.* Yes, I suppose so.

838. *Q.* "You don't think the Edison Company treated you right? No "Sir." Did you say that ? *A.* Yes, I suppose so.

839. *Q.* "And the bank did?—Yes sir. *Q.* Therefore you wished the "bank to be secured ? Not particularly ? *Q.* What reason had you, Mr. "Oppenheimer, for assisting the bank to get their judgment different from the "ordinary course ? Oh, I don't know that I had any particular reason. Of "course the mortgage was just as good as a judgment." Did you say that? *A.* Yes.

840. *Q.* "Was not your reason for it because it did not make much differ- "ence?" Witness. Exactly.

841. *Q.* "Then you did not care whether the Edison Company got in first, "or the bank ? No; that didn't make much difference whether you got in or "the bank." Did you say that? *A.* Yes.

842. *Q.* "Why did you then authorise Mr. Jenns to go on and consent to "judgment at all? It would be simpler if they took possession under their mort- "gage. Did the bank give you any reason why you should consent ? The talk "was with the solicitors. *Q.* Is it not a fact that they wanted to get in ahead "of the Edison Company ? I suppose they did. You haven't any doubt that "was the reason ? I have no doubt, I didn't place anything in the way sir." Did you say that? *A.* Yes.

843. *Q.* Were those answers true? *A.* Yes.

844. *Q.* Now, as a matter of fact, you at the time were not threatened with any proceedings on the part of the bank—you did not know any particular reason why the bank should want judgment—you wished to keep in with the party that treated you right, and therefore, when they asked you for judgment, you acquiesced in it? *A.* You will find later on in my examination, where the bank told me——

845. *Q.* Is that so, or is it not? Answer "yes" or "no." *A.* Repeat it to me.

846. *Q.* Did you at the time know any particular reason why the bank should want judgment? You wished to keep in with the party that treated you right, and therefore when Mr. Murray asked you for judgment, you assented to it—that is the case, is it not? *A.* Yes.

847. *Q.* And you immediately then went, or shortly after that you went to Mr. Jenns and gave him instructious and after that the matter was left to your solicitors? *A.* Yes.

Re-examined by Mr. Davis.

848. *Q.* As a matter of fact, do you know the reason why Messrs. McPhillips and Williams did not issue execution upon their judgment when they obtained it on the 29th Dec.? *A.* No sir.

849. *Q.* My learned friend referred to some allowances they were to make. Have they ever made any allowance on the judgment? *A.* No sir, they never made any allowance.

850. *Q.* This exhibit "H." It is not an agreement exactly. It is a copy of a resolution apparently passed by the tramway company. Isn't that it? *A.* Yes, it was to be formed into an agreement, but it was a resolution of the board.

851. *Q.* Stating what the tramway company would do? *A.* Yes.

852. *Q.* And this evidently is only one side of the agreement. What were the other people to do? Did the Edison people make any agreement? *A.* Yes, —if we would not place any other creditors in a different position to the position on that date, they would not take action. Mr. McPhillips says, "No, he would not take any proceedings." Seven days afterwards he signed judgment.

853. *Q.* As I understand, the company paid a certain sum of money? *A.* Sixteen hundred and twenty-three dollars—something like that, and then had to coax the bank to advance that money for the tramway company.

854. *Q.* And in addition to that, they were also paid a certain sum for costs? *A.* Seventy-five dollars.

855. *Q.* And after that was all done, seven days afterwards, judgment was signed? *A.* Yes, I think so. I think it is that. It was from either the 2nd or 22nd; it might have been a little later during that month. I forget exactly what the date is.

856. *Q.* So as I understand you considered they had broken their agreement with you? *A.* Decidedly so.

857. *Q.* Weren't there some other things besides this? There was a verbal arrangement between the solicitors for the Edison people and whom? *A.* I think it was the secretary, Mr. Smith, was present and myself. I don't know who else.

858. *Q.* This question which my learned friend has read over to you—"352—"Why did you authorise Mr. Jenns to consent to judgment in order that "judgment could be obtained quicker than it would be in the ordinary course?" and the answer is "Well, the bank favoured us very much, and it was likely"—and there you were interrupted—broken off by another question I don't suppose you can remember now what you were going to say when you were interrupted, but I presume you were going to give a full explanation? *A.* An explanation.

859. *Q.* "And they asked you to assist them to get in first? No, they didn't ask me at all." *A.* I qualified that later on, I think.

860. *Q.* In what way? *A.* I stated that Mr. Murray asked me to confess judgment, or something like that, if I remember right.

861. *Q.* I see this is a very long examination, and this is pretty nearly the end of it. How many hours did that last? *A.* Oh, I don't know; it was about 10 or 11 o'clock when we got through.

862. *Q.* Then the next question is, "Did they threaten if you didn't get

RECORD.

No. 18. Proceedings at trial. Case for the Defence. D. Oppenheimer —*continued.*

them in first ? No, the general way is always to keep with the party that treats me right and proper. If we didn't assist him—" and then you were interrupted by the counsel examining you, Mr. McPhillips ? *A.* Yes.

863. *Q.* I presume again you were going to give an explanation ? *A.* Yes.

864. *Q.* At the time you were interrupted and another question was asked, you had not completed your answer ? No sir.

865. *Q.* Now, " 357,—Therefore, you wished the bank to be secured ? *A.* Not particularly." You have already told my learned friend that that is correct, and there is nothing which conflicts with any of the rest of your evidence, so far as I can see. " 358. What reason had you, Mr. Oppenheimer, for assisting the bank to get their judgment different from the ordinary course ? Oh, I don't know that I had any particular reason. Of course, the mortgage was just as good as a judgment ; no particular reason." Have you any explanation to give in connection with that, Mr. Oppenheimer ? *A.* I had no particular reason myself, only that the bank wished it."

866. *Q.* So far as you were concerned, you had no particular reason? *A.* No, so far as I was concerned.

867. *Q.* As a matter of fact, did the bank or any of the bank officials ever threaten you, in the sense of " threaten " ? *A.* Not very often.

868. *Q.* I suppose they were always very polite and courteous to you, weren't they ? *A.* That is one of the private affairs that I don't like to have anything to do with.

869. *Q.* My learned friend asked you finally this question: " Now as a matter of fact, you at the time were not threatened with any proceedings on the part of the bank—you did not know any particular reason why the bank should want judgment—you wished to keep in with the party that treated you right, and therefore when they asked you for judgment you acquiesced in it." Now, Mr. Oppenheimer, my learned friend insisted upon getting an answer, " yes " or " no," which was like the whole strain of that examination throughout that he recapitulates to you—that the bank had treated you right—that the bank hadn't threatened you, you knew no particular reason why the bank should get judgment, and then asked you if that was the reason why you consented to judgment? Now, have you any qualification or explanation to make to your answer ? My learned friend wished you to answer yes or no—you could not answer it by one of those very well. Go on, and explain your answer? *A.* The tramway company owed the bank a large amount of money on mortgage, and of course when they asked us to confess judgment to make their debt anyway secure, we were bound to do so. If we would not, why, they could have taken possession of the road and run it themselves, or have done whatever they liked, and we were really forced to do that in order to give us an opportunity to make some financial arrangement to pay all our liabilities—that is the tramway company.

870. *Q.* Was it, Mr. Oppenheimer, merely because, or at all virtually because the bank had treated you rightly and fairly that you consented to the demand of the bank as to getting judgment in, first?

Objected to by Mr. Bodwell as not being properly re-examination, and also as leading. Objection over-ruled. Question repeated.

Witness: Not particularly for that one reason. Of course, that was one of the reasons, but still there were others connected with it as well.

871. *Q.* What was the controlling reason? *A.* The controlling reason was, as I have stated before, to give us time, mostly, so we could make financial arrangements.

872. *Q.* Had you not acceded to the demand of the bank, what would have happened to the company?

Objected to by Mr. Bodwell. Objection sustained on the ground that it is repeating evidence in chief. Exception by Mr. Davis.

Mr. Davis having stated that he would rather leave the closing of his case until next morning, Mr. Bodwell tenders to the other side for inspection a certain document which they will not admit, and he thereupon asks to put Mr. McPhillips in the box in rebuttal of Mr. Oppenheimer's evidence upon it.

Objected to by Mr. Davis on the ground that any question in connection with the agreement is irrelevant, and the proposed evidence is to rebut what was said on cross-examination by a witness for the defence upon an immaterial issue.

Mr. Bodwell contends that part of the agreement has gone in as exhibit "H" and that the document he proposes to tender is complementary to it; that it was the one which Messrs. Oppenheimer and Douglas saw, and was the arrangement dated Oct. 18th which is referred to in the agreement.

Mr. Davis disputes the correctness of this statement and adds that the Plaintiffs did not put it in in their case, or cross-examine any of the witnesses upon it excepting Mr. Oppenheimer. Further that he (Mr. Davis) had strenuously objected to exhibit "H" going in as being immaterial to the issue; that the witness had stated positively it was not the arrangement referred to, and it was now proposed to call evidence to rebut him on that point.

873. *Q.* Court: Let me ask Mr. Oppenheimer what it was he said. (To witness). Just look at this paper (tendering document). You say that is not the letter tendered? *A.* No, sir, the agreement we made with Mr. McPhillips was that (?) agreement.

874. *Q.* What was the letter before that? *A.* I could not tell you.

875. *Q.* There was one? *A.* There might have been several, we had correspondence with Messrs. McPhillips & Williams which came over to this office, and the only agreement I know anything about and that we settled finally on is that agreement that is handed in—whatever it is marked.

876. *Q.* Were there any written preludes? *A.* There were discussions and drafts.

877. *Q.* No written preludes? *A.* Yes, I suppose there was some written.

878. *Q.* Was not that one? *A.* No, I don't think so.

879. *Q.* Turn to the back of that and read? *A.* I don't know. This (referring to exhibit) is the agreement, and that is all I know about it. There might have been a good many memorandums.

880. *Q.* Was not that the one shewn you when you went to Mr. McPhillips office? *A.* I could not say, your lordship.

881. *Q.* There was one shewn you? *A.* Oh, yes, I think so. We brought one over, and Mr. McPhillips changed something about it right in his office.

882. *Q.* And that? *A.* That is the one that Mr. McPhillips drew himself instead of the one we brought over a few days before that.

RECORD.

No. 18. Proceedings at trial. Case for the Defence. D. Oppenheimer — *continued.*

883. *Q.* But that other was the final agreement? *A.* That was the final. The others was only just preliminary.

Ruling upon Plaintiffs' application reserved until the next day's sitting of the Court.

THIRD DAY.

Vancouver, Dec. 7/94.

Upon the case being called, the Court said: "I think that there is no "further need of any contest as to the admission of that paper. I quite forgot "last night that Mr. Oppenheimer has clearly admitted it himself on oath in his "evidence. I don't know the value of it, or that it is worth anything whatever, "but the admission allows the paper to be put in."

Mr. Davis: Subject, of course, to my objection, my Lord.

Court: Subject, of course, to the objection.

(Marked Exhibit "I.")

Case closed.

EXTRACT FROM REGISTRAR'S CERTIFICATE.

4. That all portions of the examinations of David Oppenheimer and William Murray which are erased by blue pencil in the said record are such portions as were not put in evidence on the trial of the action and that the portions of the examinations not so erased are the portions which were put in evidence as appears from the transcript from proceedings at the trial.

[NOTE—THE PARTS ERASED IN MS. RECORD IN BLUE ARE HERE PRINTED IN ITALICS.]

No. 19. Examination of David Oppenheimer, taken before the Trial.

Vancouver, June 11, 1894.

Edison General Electric Co. *vs.* Westminster and Vancouver Tramway Co., the Bank of B.C., David Oppenheimer and Benjamin Douglas.

Examination of the Defendant, David Oppenheimer, under appointment dated 6th June, 1894.

Mr. L. G. McPhillips, Q.C., for the Plaintiff Company; Mr. E. P. Davis, for the Bank of B.C.; Mr. E. A. Jenns for the Defdt. Tramway Co.

David Oppenheimer, *sworn.*

Exam. by Mr. McPhillips.

1. *Q.* You are the President of the Westminster and Vancouver Tramway Co.? *A.* Yes.

2. *Q.* You have been President for a number of years, I believe? *A.* Yes.

3. *Q. The company, in the fall of* 1893, *was in debt to a number of people, and among those, to the Bank of British Columbia, and to the Plaintiffs in this action, were they not? A. Yes.*

4. *Q. In August of* 1893, *was there any amount of money due to the Bank of British Columbia? A. Yes.*

5. *Q. When was it payable? A. I suppose it was payable most any time; it was an overdraft principally I think.*

6. *Q. What length of time had you to pay that overdraft? A. No specific time.*

7. *Q. What agreement was there respecting it? A. There was no agreement particularly that we had that date; there was no special agreement what day it should be repaid.*

8. *Q. But they had securities for it, hadn't they? A. Well, yes, we had issued some bonds—the company had issued bonds, and they went to the bank as security for the amount.*

9. *Q.* The company did not expect the bank to demand immediate payment of this amount of money? *A.* They were in that position at any time, if they wanted to take action.

10. *Q.* The company expected the bank might take action any day? *A.* Any day, yes.

11. *Q.* Because, I suppose, the company was not able to meet its liability? *A.* The company was not able to meet the wishes of the bank, to a certain extent.

12. *Q.* That is, the wishes to pay the money? *A.* Yes.

13. *Q.* But at that time the bank had not demanded payment, had they? *A.* Yes, they often demanded payment very often.

14. *Q.* How was it you were unable to pay? *A.* Well, probably we didn't make the money.

15. *Q.* Had not the money? *A.* No.

16. *Q. And what would have happened if the bank had demanded payment? A. Oh, I don't know what the bank would have done; I could not tell you;—just like it is usual with regard to other companies—go into the hands of a receiver.*

17. *Q. They would go and wind you up and you could not help yourself? A. They would go and wind you up and you could not help yourself at all.*

18. *Q.* Then as a matter of fact at that time you were insolvent as a company? *A.* I suppose; I don't know.

19. *Q.* You were not able to pay your debts? *A.* What you might call it.

20. *Q.* But that is what it amounts to, I suppose? *A.* Of course we had ample assets, more than we owe, by a great deal.

21. *Q.* That is, you thought you had? You could not realise? *A.* It was unfortunate—we might have realised any time.

22. *Q.* You had lots of other debts, besides the Bank of British Columbia? *A.* Not so very many, we had some.

23. *Q.* You owed these Plaintiffs—the Edison General Electric Light Co.? *A.* Oh yes.

24. *Q.* And you were not able to pay them? *A.* No.

25. *Q.* And put them off from time to time? *A.* Yes.

26 *Q.* This state of things, I suppose extended up to the time of the issue of the writ by the Bank of British Columbia didn't it? *A.* Yes.

27. *Q.* You were in no better position then that you were before? *A.* No.

28. *Q.* As a matter of fact, you were in a somewhat worse position? *A.* No; I don't think so. I think the road always was in a better position. We paid up small amounts right along. The company at that date was in a very fair position with the exception of your company and the bank.

29. *Q. You think you were in a better position when this writ was issued by the bank than you had been? A. To a certain extent; the small amounts were paid.*

30. *Q. What amount, do you think? A. Oh, I don't know; a few thousand dollars.*

RECORD.

No. 19. Examination of David Oppenheimer, taken before the Trial —*continued.*

31. *Q. But that would not have enabled you to pay your debts in full at that date? A. No—except this—we could have sold our bonds.*

32. *Q. But as a matter of fact, you found great difficulty in selling your bonds, didn't you? A. Well, I don't think we have; it was only a matter of personal reports that prevented us selling the bonds, and we perfectly satisfied if granted the money we could have paid everybody, but they sent out reports—reports were sent out very often varying, in every instance parties here wrote against it, not to touch it.*

33. *Q.* You mean to say people here who were asked to give reports? *A.* Were prejudiced against the company.

34. *Q.* I suppose they reported the company was not good for this amount of bonds? *A.* They would not touch it at all.

35. *Q. That is what you mean, don't you? A. No. I mean to say that they did it from their own motives, not looking into the property of the company. If they had looked into the books and had seen the management and the running of it, and the receipts and expenditures, I don't think they could have made the reports that they did.*

36. *Q. Without looking into it, you mean to say, they gave unfavourable reports of the security upon which the bonds were issued? Don't you mean to say these men advised the security for the bonds was not good? A. Those men advised they should not touch the road at all.*

37. *Q. When you say "don't touch it" you mean that the bonds were not good security? A. I say the bonds were good security.*

38. *Q. But these men advised them not to touch it? A. Yes, I suppose so; I didn't see the report, but that is what I was given to understand. If it had not been for that we would not have owed you or the bank or anybody else a cent., because the property is good enough.*

39. *Q.* Your company has no money now with which to satisfy the Plaintiffs' judgment? *A.* No sir.

40. *Q.* You had not at the time that they issued their writ? *A.* No sir.

41. *Q.* Nor at any time between that and this date? *A.* No sir.

42. *Q. And as a matter of fact I understand you to say on a former examination that even as to payments which you made since that date it was simply on the indulgence of the Bank of British Columbia you were able to pay those? A. That is so.*

43. *Q.* By the indulgence of the Bank of British Columbia they allowed you to overdraw your account? *A.* Yes sir.

44. *Q.* When you were owing the Bank of British Columbia a very large amount? *A.* Yes.

45. *Q.* And you pay all moneys into the Bank of British Columbia, don't you? *A.* Yes.

46. *Q.* Pay everything in by cheque and draw everything out by cheque? *A.* Yes sir.

47. *Q.* Sometime in January, Mr. Oppenheimer, a writ was served upon the secretary of your company at the suit of the Bank of British Columbia, is that so? *A.* I suppose so, sometime; I forget now the date myself.

48. *Q. Yes, well, I don't care particularly about the date; we have the dates down. The writ was issued on the 7th day of Jany* 94 *as set out in the pleadings. You know the date it was served? A. I don't; I don't remember unless I see the writ, you know.*

49. *Q. Well, you recollect somewhere about there there was a writ and it was served? A. Yes.*

50. *Q.* It was not served on you, I believe? I think you said it was served on the secretary? *A.* I don't know now, whenever it was served on me, I sent it to the secy.

51. *Q.* For what cause of action was that Mr. Oppenheimer. I suppose that was for all moneys due by your company to the bank? *A.* Yes, I think so.

52. *Q.* This was the debt which you say was always due from some time in August and perhaps before that? *A.* This is the debt for the overdraft we had from the bank, and I think $60,000,00 odd which we paid the Edison Coy.

53. *Q.* Had you any agreement, Mr. Oppenheimer, with the bank or any officials of the bank as to what time this debt shall be payable? *A.* I think so; it is in the application we made for the overdraft.

54. *Q. When did you make that application? A. Before we commenced the road—that application.*

55. *Q. Some years before? A. No it was immediately we started construction—immediately.*

56. *Q. That was some years, though, before the fall of* 1893*? A. Before the action, yes.*

57. *Q.* If this is the agreement which governs this overdraft, when was the overdraft to be payable? *A.* I think it was in the option of the bank; I am not sure of it. The letter explains itself.

58. *Q.* At any rate, there is such a document as this in existence? *A.* Oh, yes.

59. *Q.* Have you got it with you? *A.* Got the letter? I think we have. It is a letter as near as I can remember. It is a long time ago. We wrote a letter to the bank asking for an overdraft of $175,000.00 secured for a certain amount of bonds at the time—$250,000.00.

60. *Q. Coming just to the point I want, to save time. Did that document say when this overdraft was to be paid? A. I think so; of course it is a long time; I have not read that letter since, but I thiuk it was in the option of the bank it had to be paid whenever they thought a reasonable time—something like that.*

61. *Q. A reasonable time? A. Yes; because whenever you make an overdraft it is always due at once.*

62. *Q.* Was this a letter of yours to the bank, or a letter from the bank to you, or a document signed by you both? *A.* It was a letter by us to the bank to do this.

63. *Q.* And they consented? *A.* Yes.

64. *Q.* A letter to the manager? Who? *A.* Mr. Keith; he replied I think something like that, but really to refresh my memory thoroughly I would want to look at the letter; I have no objection to show it to you.

65. *Q.* Then between that time and the fall of 1893, or I suppose up to this date there has been no change in that agreement? *A.* There has only been a change—no—yes, there has been a change.

66. *Q. I mean as to the terms of payment, the time when the payment was made? A. Oh, no; it was always the option of the bank to collect their money.*

RECORD.

No. 19. Examination of David Oppenheimer, taken before the Trial — *continued.*

67. *Q.* You mean I suppose, it was payable upon demand at any time? *A.* Upon demand at any time.

68. *Q* The whole of the indebtedness then was always in that way? *A.* Yes.

69. *Q.* You were always at the mercy of the bank? *A.* Yes, from the beginning to end; because if it had not been for that I think your company would not have got the $62,000.00.

70. *Q.* Before issuing the writ, did the bank make a demand upon you? *A.* They asked me every time, every week almost, to meet this amount.

71. *Q.* Just prior to this time was I suppose the particular time? *A.* Since Mr. Murray came to me one day. I believe now that he came to me and told me that they must have money. "Well," says I, "I can't pay you, you know how things are. "Well," he says, "we will have to issue a writ." "Well," I says, "all right, go ahead."

72. *Q.* How long was that before the writ was issued? Do you remember? *A.* Well, I don't know. Not very long. I think it was Friday or Saturday afternoon; I was just coming out of the bank when he followed me out; told me right before the bank.

73. *Q.* At this time, I suppose, you had informed him that the writ had been issued—that judgment had been signed by the Edison Co.? *A.* I could not say whether I had or not.

74. *Q.* You knew at that time yourself that judgment had been signed? *A.* Oh, yes, certainly. I could not say whether I informed him or not. I might have told him so and might not.

75. *Q.* I think you told me in the former examination—I have it here somewhere and can turn it up—that you were quite willing the bank should get judgment? *A.* Well, as I explained it then, he could sell us out, or allow him to get judgment, could just as well sell us out under the mortgage which I (he?) held—under the agreement of mortgage as well as judgment, and we were entirely in the hands of the bank and I was forced to consent. You know when you owe a man $262,000.00——

76. *Q.* You did not put it in that way—on this ground before? *A.* Perhaps I didn't. I remember nearly what I said. This is something I wish to explain in that way.

77. *Q.* "*Q.* 352. Well, why did you authorise Mr. Jenns to consent to "judgment in order that judgment should be obtained quicker than it would be "in the ordinary course? *A.* Well, the bank favoured us very much, and it "was likely"—you end there, and then on 354 you say "Did they threaten if you "didn't get them in first?—No; the general way is always to keep with the party "that treats me right and proper," and you go on "if we didn't assist them" but that is broken off? *A.* You stopped me then. If you had let me go on I would have explained to you as I am explaining now.

78. *Q. You might just as well stick to the point, because it is easy to see you led me to believe on your last examination it was because the bank treated you well you wanted them to get judgment? A. Well, to a certain extent you can take it that way, Mr. McPhillips; the bank always treated us well; there is no question about it. What I mean by treating us well is this, they often threatened to take proceedings and go*

ahead, but still by talking in the way of showing them that the property was ample security and so forth, finally sometimes they held off and perhaps didn't put that threat into execution, but I was always afraid, every day almost that they would try and sell us out; of course us having money invested in that, as I have, I didn't wish particularly to be sold out, and certainly I could not refuse and Mr. Murray at the time was very forcible in his demand on me, and so I certainly made no other remarks to him.

79. *Q.* Yes, but to come back to the point again I understand from this former examination that you were willing and anxious that the bank should obtain judgment against you? *A.* Certainly not. A man can't be anxious for a man to get judgment against him. That is unreasonable.

80. *Q.* Was that so, or was it not, after the Edison Co. obtained judgment against you? *A.* No, I said the Edison Co.'s matter didn't cut any figure at all——

81. *Q. Then it was? A. Let me talk a little bit—that is the reason you stopped me that time. It was like this; we were anxious to pay off, all along, the little outside people, and having, the last transaction with the Edison Company, for hundreds of thousands of dollars and paid them everything up with the exception of this amount that was there, we thought they will wait and we would pay up such small amounts as really were allowed to be paid by the bank. We often would send a cheque to the bank —going to pay an account—and they refused to honour it; we were so thoroughly in the hands of the bank, and they could dictate what we were to do. I wanted to be in a position that we could pay off everybody, the Edison Company and everybody else; and I think if we had got into that position there would not have been trouble to the same extent. I don't say, pay it all, but you see at one time when I made a settlement when I gave you* $1,625.00 *I was told——*

82. *Q.* I don't want to stop you, but it has nothing to do with the question what others told you. What I want to know now, from what you say now, you were exasperated with the Edison Co. because they obtained judgment against you? *A.* No, I was not. I am never offended at a man that I owe a dollar to, if he forces me to pay it.

83. *Q.* Do you mean to tell me, Mr. Oppenheimer——? *A.* That is so.

84. *Q.* That you did not say on your former examination that you were not exasperated with this Edison Co.? *A.* Yes; you read my evidence before. I think they didn't treat us properly certainly, but I was not exasperated.

85. *Q.* You thought the bank should have judgment first? *A.* No; I didn't think the bank should have judgment first, or anybody else. I think it was a pity—a great annoyance to me and all the directors that judgment was got out at all.

86. *Q. At any rate you had a conversation with Mr. Murray about consenting to judgment for the bank hadn't you? A. I don't remember of any.*

87. *Q. Well, you won't deny you had one, will you? A. With Mr. Murray? I don't know whether with Mr. Murray or not.*

88. *Q. I think you must remember that, Mr. Oppenheimer? Didn't you have a conversation with Mr. Murray, the manager of the Bank of British Columbia, regarding the consent judgment, prior to the judgment being given? A. I could not say. I had so many conversations with him.*

RECORD.

No. 19. Examination of David Oppenheimer, taken before the Trial —*continued.*

89. *Q. It is most likely you did, is it? A. I might have had that conversation, yes.*

90. *Q. You have a pretty good idea when that conversation was, haven't you, Mr. Oppenheimer, if you had it? A. No, I could not say that I have.*

91. *Q.* Didn't you have a conversation with him in the bank regarding this matter, and the manner in which you would get judgment ahead of our company? *A.* No sir, I never told him that.

92. *Q.* You had no such conversation? *A.* No sir.

93. *Q.* Did you have one outside of the bank, Mr. Oppenheimer? *A.* Not about getting ahead of you; I don't think so.

94. *Q. Are you clear on that point? A. Well, I think so. I don't think I am naturally inclined to do anything like that.*

95. *Q.* Do you know when this summons was issued staying the proceedings upon the Edison Co.'s judgment? *A.* I know that was the case, but I don't know what time it was.

96. *Q.* Do you know the date? *A.* No I do not.

97. *Q.* When did you give Mr. Jenns instructions? *A.* I don't know—a few days—somewhere near the day of the trial, I forget what date it was.

98. *Q.* About the middle of January, was it not? The 13th day of Jan. the summons was taken out. It was prior to that you gave him instructions? *A.* Prior to the date of judgment, yes.

99. *Q. What date was it you saw Mr. Murray? A. That must have been between the summons being issued and the judgment.*

100. *Q. Which summons?—to set aside the judgment? A. The summons of the bank, I think, the judgment of the bank.*

101. *Q. You saw Mr. Murray before the summons of the bank was issued? A. Yes, but you refer now to——*

102. *Q.* Did you give Mr. Jenns instructions that time or afterwards to set aside the judgment of the Edison Co.? *A.* I gave—I remember that now—I think after—no, I gave him instructions immediately when you served the summons, because I was very much annoyed at the action you had taken in that matter, after making the agreement to pay the $1,625.00 after my giving you our agreement, and to extend our time after paying the cash and giving the agreement for damages that we (?) were entitled to by the company, after paying you the cash that you should go and send in a summons, I was very much annoyed and told Mr. Jenns to stay judgment, and set it aside on those grounds.

103. *Q. Do you remember what date that was? A. No, I don't remember the date; somewhere near the time.*

104. *Q. Before the bank issued their summons? A. No, it was before.*

105. *Q. How much before? A. Immediately after you served the writ.*

106. *Q. Served the writ? A. Yes—or the summons.*

107. *Q. That could not be, because the writ was served away back in* 1893*? A I think you will find it will correspond nearly with the time.*

108. *Q. As soon as you found out that judgment had been signed against you? A. No; after you sent out the writ to sue the company for the amount you got your judgment I think, I told him to go ahead and stay judgment, set it aside.*

109. *Q. I do not understand you, Mr. Oppenheimer, the judgment was signed on the 31st Dec.? A. Yes.*

110. *Q. Do you mean to say that on that date or shortly after that you gave him instructions to set it aside? A. I think so, after the papers were—the writ was got—I forget the exact circumstances now, but I think it was about that time.*

111. *Q.* The summons was not taken out until the 13 Jan.? *A.* Well, there might have been delay on the solicitor's part—I don't know—but he had full instructions to go ahead and so on.

112. *Q.* It was long after that you gave instructions to Mr. Jenns? *A.* To stay judgment—set it aside?

113. *Q.* Yes? *A.* I don't know; I think it was done almost immediately after.

114. *Q.* After the 31st Dec.? That could not be so? *A.* You got what I call a snap judgment you see. I don't know how long that was, but as soon as we heard of that I told Mr. Jenns to go and set the judgment aside because I thought we had ample grounds for doing it, that is all.

115. *Q.* Did you give him those instructions before you saw Mr. Murray? *A.* I think so.

116. *Q.* Are you sure about that Mr. Oppenheimer? *A.* I could not say; it is hard now to give the exact dates, but I think so.

117. *Q.* How long do you think? *A.* I think that as soon as I heard that I immediately went over to New Westminster and gave Mr. Jenns instructions.

118. *Q.* And you think that was shortly after this judgment was signed, and that was signed on the 31st December? *A.* I don't know.

119. *Q. And you can't account from the 31 Dec. to the 13, Jan.? A. Well, there might be a lapse of two or three days in the matter, but soon afterwards.*

120. *Q. You did not know there was a judgment against you for a long time after the judgment was signed? A. It was a few days afterwards.*

121. *Q. It was a good many days—I have no doubt Mr. Jenns got it out as soon as he could? A. As soon as I heard I gave him instructions.*

122. *Q. But you do not know exactly whether it was much prior to the 13th Jan. or not? A. Well, I could not exactly remember the dates.*

123. *Q. I don't think Mr. Jenns would let the grass grow under his feet under the circumstances? A. As soon as I heard judgment was got, I told Mr. Jenns.*

124. *Q. Do you know what date it was you saw Mr. Murray—that could not have been after the 13th Jany.? A. I can't remember. I really don't know what date it was. You know you get talking with people, like that, and can't remember the dates. I could not anyway.*

125. *Q.* At any rate you had a conversation with Mr. Murray about judgment? *A.* About the matter; he asked me in regard to paying, as I told you before, or the bank would sue.

126. *Q.* Yes, and you mentioned about the Edison Co.'s judgment? *A.* I don't know whether I knew then of the judgment, or not.

127. *Q.* Will you tell me then Mr. Oppenheimer, why it was that a consent judgment was given at all? *A.* Well, we were afraid that if we would not consent to judgment that the bank would sell our property.

128. *Q.* The bank would sell your property? *A.* Yes; most of it.

RECORD.

No. 19. Examination of David Oppenheimer, taken before the Trial —*continued.*

129. *Q.* Weren't you by consenting to judgment just giving them the opportunity to sell your property? *A.* No; I think they could do it under their mortgage just as well.

130. *Q.* Then why did you consent to judgment? *A.* Because they wished it.

131. *Q. They asked you for it? A. In fact there was——*

132. *Q. Who asked you for it?*

Mr. Davis. Let him finish his answer.

Mr. McPhillips. I am not asking him for it.

Mr. Davis. But he was going to say something in answer to the question.

Mr. McPhillips. He says a good many things I am not asking for. However (to witness) explain if you want to.

What do you want to say, Mr. Oppenheimer? *A.* Well, I explained that I—that they got judgment; and of course really they were the parties. The company—it was life and death to them. You could not say either yes or no.

133. *Q.* Who do you mean by "they"? *A.* Well, the bank. Perhaps Mr. Murray, perhaps Mr. Ward—I don't know.

134. *Q.* Why did they not wait for the ordinary process and obtain judgment by default at the ordinary time? *A.* Well that is their look out; I didn't ask them that.

135. *Q.* Were you given any reason why they wanted the consent, instead of waiting the usual time for default? *A.* No, I think not.

136. *Q.* Did you know of any reason? *A.* No, they did not tell me of any reason, particular.

137. *Q. Did you know of any reason? A. No, I can't guess at reasons. Of course they might have many a reason.*

138. *Q. I want to know if you knew of any reasons, or if you know of any reasons now? A. They didn't tell me any.*

139. *Q. Not what they told you, but what you, yourself know. Did you know any reason why you should go and consent to judgment instead of waiting the ordinary course of proceedings? A. The reason is, as I stated before, if I would not consent to it, that they would have sold our road.*

140. *Q. I have already shown you that that can be no reason, and you go back on that when I cross-examine you, so there must be some other reason. Was there any other reason? A. I don't know of any.*

141. *Q. Do you know of any other reason why judgment should be got by consent instead of waiting for the ordinary process of law? A. Not that I know of; I don't know of any.*

142. *Q. And you did not know of any then? A. No sir.*

143. *Q. Do you know of any now? A. No. It is the usual way of banks doing business. As I told you before I can't explain any better, if we hadn't come to the wishes of the bank—the company—we would not be in the company to-day; our road would have been sold out; and I think that a sufficient reason—good reasons. I can't make it any more explicit.*

144. *Q.* I understand you to say, then, Mr. Oppenheimer, that even at the present time you know of no reason why that judgment should have been signed

upon consent instead of the usual process having been gone through with ? You know of no reason at present? *A.* I know of no reason why the bank should not have got judgment ?

145. *Q. By consent? A. Consent; it was simply consent.*

146. *Q. Don't you know that consent gave them judgment for a considerable time before they could have obtained it otherwise? A. Eh?*

147. *Q.* Don't you know that consent gave them judgment for a considerable time before they could have obtained it—than what they would have had it under the ordinary process ? *A.* Not as I know of.

148. *Q.* Don't you know that now ? *A.* No, I don't.

149. *Q.* Didn't you know it then ? *A.* No, I didn't.

150. *Q.* Why do you think they asked for consent ? *A.* Well, I don't know ; they wanted judgment and of course I gave it to them.

151. *Q.* They wanted judgment and you gave it to them? *A.* Yes.

152. *Q.* You knew at this time that a summons was issued to set aside the Edison General Electric Light Co. judgment ? *A.* Yes.

153. *Q.* You knew that execution had not issued on that judgment? *A.* Yes.

154. *Q. You knew there was no certificate of judgment issued on it? A. What do you mean by certificate of judgment?*

155. *Q. No certificate of judgment in the registry office? A. No; I didn't know that.*

156. *Q. You knew we had no security under the judgment? A. No, I didn't know anything about that in getting your judgment. The only thing I know was you got judgment.*

157. *Q. Without execution? A. I didn't know that.*

158. *Q.* Did you know there was stay of proceedings in that summons? *A.* Yes.

159. *Q.* You knew it was to be argued the day upon which consent was given, didn't you ? *A.* Yes.

160. *Q.* And you were present on the argument afterwards? *A.* Yes.

161. *Q.* Were you aware if judgment was signed for the Bank of British Columbia prior to the time that that summons was argued, the Bank of British Columbia would get in ahead of us ? You thought so, didn't you ? *A.* Well, I was not conversant enough for that. I didn't know what you had done with your judgment.

162. *Q.* You were informed so, weren't you? *A.* Afterwards, yes.

163. *Q.* Were you informed so at the time ? *A.* No sir.

164. *Q.* Do you mean to tell me that you did not know that ? *A.* No sir.

165. *Q.* You say you did not know that ? *A.* I said I was only informed afterwards.

166. *Q.* Who informed you? *A.* I don't know now. There was quite a few talking about it. That is the only time I knew you hadn't registered your judgment. I didn't know whether you had registered it, or not.

167. *Q.* Mr. Jenns never told you? *A.* I could not say who told me, who informed me.

168. *Q.* I mean, beforehand? *A.* No sir; there was nothing before the trial.

RECORD.

No. 19. Examination of David Oppenheimer, taken before the Trial —*continued.*

169. *Q.* You mean the argument on the summons when you say "trial"? *A.* Well, that is, between you and Mr Jenns, when we were in Court to set aside judgment.

170. *Q.* You did not know then that the Bank of British Columbia by obtaining judgment that morning would get priority over us? *A.* No sir.

171. *Q.* Had you known that, Mr. Oppenheimer, would you have consented? *A.* I don't know; that is a hard question to tell you just now. I could not say what I would have done then.

172. *Q.* Had you given your solicitors instructions to take such proceedings as would give the Bank of British Columbia priority to us? *A.* No; I gave him instructions to confess judgment.

173. *Q.* Was that all you gave him? *A.* I think so.

174. *Q.* Did you not give him instructions to set aside our judgment? *A.* Oh, that was before that, I think so. Wasn't it (to Mr. Jenns)?

175. *Q.* And you gave your solicitor no instructions about getting the Bank of British Columbia in ahead of the Edison Co.? *A.* No, sir; I only told him to confess judgment, I think.

176. *Q.* Then he acted contrary to your instructions? did he? *A.* Certainly, yes sir.

177. *Q. It was not intended then there should be a stay of proceedings in that order so that the Bank of British Columbia could come in first? A. That was done before.*

178. *Q.* I said, Mr. Oppenheimer (if you did not understand that last question) I said then you did not give your solicitor instructions—he was acting contrary to your instructions when he took proceedings to get the Bank of British Columbia's judgment in ahead of ours by putting in a stay of proceedings in the summons? *A.* No; the stay of proceedings was taken before judgment was obtained.

179. *Q.* Whose judgment? *A.* The bank's.

180. *Q.* Yes—do you know what that stay was for? *A.* Well, I think it was to stay proceedings on account of our suit to set the judgment aside.

181. *Q.* You knew, didn't you that that would prevent us from issuing execution? *A.* You had your judgment.

182. *Q.* Execution, I say—you knew that would prevent us getting execution? *A.* Oh, yes.

183. *Q.* And you knew it would prevent us taking any proceedings in execution, if we got any? *A.* Yes.

184 *Q.* When you gave your solicitor authority to consent to judgment? *A.* Yes.

185. *Q.* —for the Bank of British Columbia. You must have known that that would give them priority to us? A. Well, you had judgment before that. I didn't suppose, I didn't think it would give the bank priority.

186. *Q. Mr. Oppenheimer, you are a man of business, you must know that judgment is no good without execution or some proceeding taken upon it? A. Yes, sir, I think so, and it proved itself afterwards—proves itself now; I don't know why it is. I think if a man gets judgment first it certainly comes in prior to another man.*

187. *Q. That is your idea then? A. Idea, at least it was my impression any way. I thought that that first judgment comes in first.*

188. *Q. At the present time, you know that you were wrong, don't you? A. Yes, well, I didn't know. It was registration, wasn't it? You hadn't registered the judgment.*

189. *Q. Then it all comes down to this: As far as you are concerned, outside of your solicitor, your idea was not to get the Bank of British Columbia in ahead of us, but to set our judgment aside? A. To set aside your judgment, because it was obtained different from our agreement.*

190. *Q. As far as you are concerned, and now you know also that that is not exactly what happened? A. Yes.*

191. Q. You know also that the Bank of British Columbia got priority over us? *A.* Well that is your fault, I have nothing to do with that; it is your fault.

192. *Q.* How our fault? *A.* Well, you did not register your judgment, as far as I can make out.

193. *Q.* I suppose you are responsible for the action of your solicitor? *A.* I suppose so—should be.

194. *Q.* Did you have any meeting of the directors of your company before authorising Mr. Jenns? *A.* I don't know as we had.

195. *Q.* You swear in this, that you didn't. You gave those instructions to your solicitor yourself? *A.* Yes, Sir.

196. *Q.* As President of the company? *A.* I did.

197. *Q.* But without any meeting of the directors? *A.* I think so.

198. *Q.* And without any authority from them in the meeting? *A.* I think so; I don't know whether they confirmed it afterwards or not, I am not sure.

199. *Q.* I think you told me in the former examination that there was nothing in the books regarding it? *A.* Not at that time.

200. *Q.* This refers to both matters; that is, the summons to set aside our judgment, and the instructions to consent to the other judgment of the Bank of British Columbia, doesn't it, Mr. Oppenheimer? *A.* Well, it may be; I am not very sure; of course our books are here to show for it. At any rate, I had authority to do that under my office; I have authority to carry on the business.

201. *Q.* I would like to know from you whether it is in your books? *A.* I don't know; I am not sure.

202. *Q.* Aren't you sure? *A.* At that time there was not.

203. *Q. There was not at the time of this other examination of yours of the 23rd February, 1894, was there? A. I could not say for certain; I don't know; I don't think so.*

204. *Q. Don't you know there was not? A. I could not say for certain. I don't think there was, but still I am not certain.*

205. *Q. Are you as certain about either one or the other that there was nothing in your books regarding your authority to Mr. Jenns to consent to judgment on the writ issued by the Bank of British Columbia? A. I think so, as far as I am able to say, there was not anything in our books.*

206. *Q. Do you think there was anything in your books as to the authority*

RECORD.

No. 19. Examination of David Oppenheimer, taken before the Trial — *continued.*

which you gave him to set aside the Edison Company's judgment? A. I could not say whether there was, or not. I am not certain.

207. *Q. Are you more certain of the other one? A. I just answer it the same as the other one. I might and might not; I am not quite certain. I don't think there was, still there might have been.*

208. *Q.* When was it you gave Mr. Jenns authority to consent to judgment? *A.* A day or two prior—previous to the time the signing was given. I am not certain of the day.

209. *Q.* Are you sure it was some time previous? *A.* Yes, that is what it was, I think.

210. *Q.* Wasn't it the day before? *A.* No, I don't think so. I think it was—must be two or three days.

211. *Q.* What instructions did you give him?

Objected to by Mr. Jenns as between solicitor and client.

Mr. Jenns: *A.* I told him to confess judgment; that is what I told him, as near as I can remember.

Mr. Jenns: Instructions given by a client to his sol'r.

Mr. McPhillips: I don't think the objection would apply in this case; in others, of course it would.

Mr. Jenns: Under any circumstances, anything as between solicitor and client.

Mr. McPhillips: If you instruct him not to answer, of course, I cannot help it, but as long as you do not, I shall insist upon an answer.

Mr. Davis: He has answered it already.

Mr. Jenns: It is only getting a little out of the ordinary course. It is not that I object to his answering at all, and moreover, he has answered it.

212. *Q.* Mr. McPhillips (to witness): And it was because Mr. Murray asked you to consent, that you gave him those instructions? *A.* Yes, just as I have stated before.

213. *Q.* And you did this of your own notion without the authority of the directors? *A.* I think so; I might have had—I don't remember all these things. I might have discussed it with the directors—I generally do, I don't think there was any motion passed in the minutes, but I think the directors were quite cognisant of the matter.

214. *Q.* There was no meeting of the directors? You were present on the morning that the judgment was consented to, weren't you—in Court? *A.* Yes.

215. *Q.* But were you not present in the room with the judge? *A.* No sir.

216. *Q.* Did you sign any authority to Mr. Jenns? *A.* I don't think so.

217. *Q. Nothing in writing. What time was it you came to the Court-house? A. In time for the opening of Court.*

218. *Q. It was before the opening of the Court, wasn't it? A. No, just about the time, I think.*

219. *Q.* You know that the consent was not obtained in open court? *A.* No certainly not; not while I was there.

220. *Q. The order for judgment, I mean, was not obtained in open Court, it was obtained in the library, wasn't it? A. I don't know where it was obtained.*

221. *Q. In this room in the corner—the south-east corner of the Court-house? A. I don't know. I was not there.*

222. *Q.* What time did you come to the court house? *A.* When it was open, at the time the judge came.

223. *Q.* You were not there until the judge came in? *A.* Yes.

224. *Q.* Do you remember what time that was in the day? *A.* I don't remember exactly. I was there in time for the trial to come off.

225. *Q. Do you remember what time that was? A. I don't know. I could not say just exactly.*

226. *Q. Just about* 10 *o'clock, wasn't it? A. I could not say.*

227. *Q. You don't remember? A. I don't remember.*

228. *Q. At that time you were told, I suppose that the order had gone for judgment? A. Not till after the adjournment of the trial, because I was sitting in Court.*

229. *Q. Why were you there? A. Just to watch.*

230. *Q. What I would say? A. Your case and our case I think I was interested in it, and should be there.*

231. *Q. It was not to look after the other case at all? A. No sir.*

232. *Q.* It had nothing to do with the judgment obtained? *A.* No sir.

233. *Q.* By the Bank of British Columbia against you? *A.* No sir.

234. *Q. In Ques.* 347 *in this examination down to* 349—"*What authority had "you from the company to consent?—I am authorized under our bye-laws to conduct "all the business of the company." Then I say "I beg your pardon? I am authorized "to conduct the business of the company generally. Q. It is only on the general "authority that you instructed Mr. Jenns? A. Yes." That is right? You mean it was only under your general authority you instructed Mr. Jenns? A. General authority under my power to conduct all the business of the company.*

235. *Q.* Your instructions to Mr. Jenns were only to consent to the judgment? *A.* Yes sir.

236. *Q.* And they were not in writing? *A.* No I think not.

237. *Q. You knew at the time this summons was argued and at the time judgment was obtained that the Edison General Electric Co. and their solicitors were very much annoyed over the stay of proceedings which your solicitors had obtained on their judgment? A. They might have been, but they should not have been.*

238. *Q. But you know they were? A. No, I don't know particularly; the company had no more right than the Edison Co.*

239. *Q. You remember attending in the sheriff's office in the Court house one day to be examined on the affidavit you made upon which the summons was obtained staying proceedings in our cause of action? A. I don't know whether I was—whether I attended in the sheriff's office or not.*

240. *Q. Across the hall? A. I know where his office is. I was in the office on this examination.*

241. *Q. No; it was not this examination that examination was prior to the argument, wasn't it?—the trial you speak of? A. I don't remember the circumstances, just now.*

RECORD.

No. 19. Examination of David Oppenheimer, taken before the Trial —*continued.*

242. *Q. Don't you remember there were a good many hot words over the matter —over the question as to whether you should be examined first, and the question whether Mr. Smith should come into the room? A. Oh, yes.*

243. *Q. You remember that? A. Yes.*

244. *Q. That was some days prior to this argument on the summons? A. I don't know whether I was examined on that day. If you will explain it?*

245. *Q. You were not examined. It was postponed, you remember about it? A. Yes, there was something left to the judge.*

246. *Q. An objection? A. Yes.*

247. *Q. That was some days prior to the argument on this summons? A. In Court? I think so. I could not really say. That examination there seems pretty well eliminated from my mind.*

248. *Q.* Were your instructions to Mr. Jenns given before or after that examination, or after that attendance rather? *A.* I think—what was that examination about? I forget.

249. *Q.* I have told you—upon an affidavit made by you upon which the summons staying our proceedings was based? *A.* Oh, then it must have been after that I gave Mr. Jenns.

250. *Q. After you had given him instructions to consent to judgment? A. After that, I think so. It strikes me if it was in reference to the suit staying judgment—to set aside, that must have been before, I had given him the instructions.*

251. *Q. The instructions must have been given? A. Afterwards.*

252. *Q. Which instructions are you referring to? A. The instructions to confess judgment.*

252. *Q. You think they were given before? A. Afterwards.*

253. *Q. After that? A. Yes.*

254. *Q. How long after? A. Oh, I don't know. I can't remember the instance, at all.*

255. *Q. Well, Mr. Oppenheimer, I want to get your recollection? A. Well, I will give it to you. I think it was done afterwards.*

256. *Q.* Do you recollect where you gave those instructions? *A.* Where I gave it to him?

257. *Q.* Yes? *A.* I think in New Westminster, if I recollect right.

258. *Q.* In his office? *A.* That I could not say; at our office very likely.

259. *Q. How many times were you over at New Westminster between these times? A. Well, I could not tell you; nearly every day. I don't know how often I go over. I go over very often.*

260. *Q. So you cannot fix it by the times you went over there? A. No, I could not.*

261. *Q.* Had the writ of summons in the bank's action been served upon you the day that you attended for examination that I referred to, in the sheriff's office? *A.* I don't remember.

262. *Q.* You do not remember whether it was served after or before that date? *A.* I don't know, perhaps afterwards, I am not sure.

263. *Q.* How long after the writ was served upon you did you give Mr. Jenns these instructions? the bank's writ? *A.* Oh, I don't know. I think

No. 19. Examination of David Oppenheimer, taken before the Trial —*continued.*

I gave him instructions as soon as I learnt you had judgment. I didn't know anything about the bank's writ at that time.

264. *Q.* You gave him instructions to confess judgment as soon as you learned we had judgment. *A.* Yes, I didn't believe it.

265. *Q.* That was before the bank had issued their writ wasn't it? *A.* How?

266. *Q.* That was before the bank had issued their writ wasn't it? *A.* Very likely it might have been. I found out, I know from parties that came to the registry office I heard of the result, and went and found out and went immediately over to New Westminster, and gave Mr. Jenns instructions. I remember the circumstances now, very well.

267. *Q.* Speaking about being annoyed, Mr. Oppenheimer about the signing of this judgment; it was not necessary for you to refer to it at all, but you have referred to it so often it is almost necessary I should, too. Do you remember giving the Edison Co. an agreement by which you agreed not to defend their action? *A.* Eh?

268. *Q. Do you remember giving the Edison Company an agreement by which you agreed not to defend their action? A. When was that?*

269. *Q. When was that? A. Yes.*

270. *Q. You surely have not got such a short memory as that, Mr. Oppenheimer? A. The agreement I gave you with the* $1,625 *?*

271. *Q.* Yes? *A.* Of course I would not have defended if you would not have sued—if the Edison Co. had carried out their promise, I would not.

272. *Q.* Answer the question; don't you remember giving the Edison Co. an agreement under seal, being a release by resolution, or in which you agreed not to defend their action? *A.* Yes.

273. *Q.* Did you say yes, or no? *A.* Well, I don't know whether it refers to the action of the company. I know it refers to a certain arrangement.

274. *Q.* Do you remember what time you asked the Edison Co., to give you on their cause of action? *A.* It was left to yourself—to your honour; we had that much.

275. *Q.* No, do you remember what time you asked for when you were first asked for the money? *A.* Until the bonds were sold, I think.

276. *Q.* Now, Mr. Oppenheimer, didn't you ask for 90 days, ask for 90 days' renewal? *A.* Well, we generally renew notes for 90 days. If you come to pin me right down to the matter, I am going to tell you the arrangement.

277. *Q.* I don't want to know about that agreement; I wan't you to tell me what time you asked for? *A.* We done it in the usual way.

Objected to by Mr. Davis as not being matter which arises out of the defence. Finally Mr. Davis consents to the agreement being put in afterwards.

278. *Mr. McPhillips: But the point I am asking you now is not regarding that agreement. You remember when you were first asked to pay this money, you asked for a renewal of* 90 *days from the days the other notes were due, didn't you? A. Yes, hold on, let me explain.*

279. *Q. I will let you explain afterwards? A. Well, I will take this out—I won't say yes. I can't say it. It is not the right question to put.*

280. *Q.* Go on and explain it then; only it will take much longer? *A.* I

RECORD.

No. 19. Examination of David Oppenheimer, taken before the Trial —*continued.*

say this—we had an understanding with the Edison Company, when we gave them these notes, I would renew them from time to time—understand a renewal means 90 days, when I came to you and had it in hand we spoke of 90 days, but I did not expect I would have to pay if I should not sell the bonds, and would get another renewal of 90 days.

281. *Q.* Nothing was said about that, was there? *A.* That is what I said; then we made that agreement, made the agreement and everything satisfactory, if we would carry on things right and the company would see the other creditors had not a preference over anyone, and if they had you would be at liberty to go on with your action, and the conditions of that was we were to pay you $1,625.00 in cash, and also foregoing our damages we had against the company to a very large amount. That condition was embodied in the agreement.

282. *Q.* This agreement you are speaking about now is the one in writing under the seal of the company? *A.* You have got that, yes.

283. *Q.* That can be easily proved. What I want to find out is you asked us for 90 days? *A.* No not up to——

284. *Q.* Did you get 90 days time? *A.* Not from the date of the agreement.

285. *Q.* But from the time when the notes came due you got 90 days? *A.* I don't know, it might have been more.

286. *As a matter of fact you got* 10 *days more? A. It might have been. I don't think a man of any business would come in in* 10 *days—give you* 10 *days and come and pay in cash, and then get sued upon it—it is not reasonable to suppose so.*

287. *Q. Do you know if you ever came to see me at the expiration of that* 90 *days? A. I have seen you quite often.*

288. *Q. Do you know if you ever came to see me at the expiration of that* 90 *days and asked for any further time? A. I didn't ask for any further time. That agreement was the last thing we done; I think so.*

289. *Q.* But you did not come to me and ask for any further time? *A.* Not after that agreement.

290. *Q.* You know judgment was signed on the 31 Dec.? *A.* Your judgment?

291. *Q.* Yes? *A.* I don't know what date it was signed.

292. *Q.* You recollect well enough it was 10 days after the expiration of the 90 days? *A.* Ten days after the company's agreement, after giving you $1,625.00 we would forego all our claims.

293. *Q.* Don't make rash statements like that? *A.* That agreement was, the company would give us——

294. *Q.* Did you or anyone on behalf of the company come to me between the end of that 90 days and the 31 Dec. to ask for any further concessions? *A.* I don't remember of any.

295. *Q.* If you were entitled to those concessions, didn't you neglect your duty to come and ask for something? *A.* Then we completed that agreement, that finished it.

296. *Q. You thought so? A. That was the end of it as far as you were concerned? You are willing to be bound by that agreement? A. Yes, I left it to you—we would not put in any defence—you told me, you says "you need not be alarmed if you leave it to me I will do nothing that will be unjust.*

297. *Q. There was a condition in the agreement, wasn't there? if I ever thought my clients in danger of losing their claim, I was right to go ahead? A. Not without informing us, certainly not.*

298. *Q. There is nothing about notice in the agreement? A. You made it yourself; you would not take it any other way.*

299. *Q How? Did I force you to make that agreement? A. Why it was not done willingly; we brought you over an agreement and you did not like it.*

300. *Q. When did you agree to give me that agreement? A. That I could not tell you.*

301. *Q. Wasn't that early in the fall—some time in September that you first agreed to give me that? A. I don't know; it was a long time.*

302. *Q. It was a long time before you gave it to me, wasn't it, a long time before I got it?*

Objected to by Mr. Jenns as being cross-examination upon a written document.

Mr. McPhillips: I am not asking him the contents of the document. Wasn't it a long time before you gave it to me? A. It was not very long. As I told you, il was agreed.

303. *Q. Don't tell me the contents.*

Mr. Jenns objects as before.

Witness: I told you the contents. As I understand the agreement you were to receive——

304. *Mr. McPhillips: Excuse me, your solicitor objects to your stating the contents of that document. Didn't you agree to give me that document a long time before you did give it to me? A. What do you call a long time?*

305. *Q. A month, two months? A. No, I don't think it was.*

306. *Q. How long was it? A. Well, I went down to Victoria, and suppose I must have been away 10 or 12 days—two weeks. I went to Victoria and a cheque was sent while I was in Victoria, and when I came back——*

307. *Q. You found another writ issued? A. I beg your pardon?*

308. *Q. You found another writ issued? A. I forget now; a writ was issued.*

309. *Q. Do you remember now the reason why it was issued? Wasn't it because you didn't keep your agreement? A. No.*

310. *Q. Didn't I say it was because? A. No, because the bank would not honour the cheque; the cheque came over here and it was not paid.*

311. *Q. That was the first time? A. The time I went to Victoria you got your cheque.*

312. *Q. After we got your cheque you still neglected to give us that agreement? A. I don't think so. As soon as we possibly could. There might have been delay in getting a quorum together. I think you got it just as soon as it was possible to get a cheque.*

313. *Q. If we did, we didn't get it as soon as we thought we ought to get it? A. You got a portion of it.*

314. *Q. Didn't we object? A. I suppose you wrote some letters.*

315. *And we objected? A. That is all right, but you got the most essential point of it—you got cash* $1,625.

316. *Q. You thought the agreement had nothing to do with it? A. No, Sir, I don't do business in that way.*

RECORD.

No. 19. Examination of David Oppenheimer, taken before the Trial —continued.

317. *Q. At any rate, we issued another writ before you gave your agreement which you agreed to give a long time prior to that? A. I don't know about that.*

318. *Q. Isn't that so? A. There was a writ issued, but I don't know it was the reason of giving the agreement.*

319. *Q. What reason did we give you? A. Just the same reason you gave as when you issued the writ after we gave you this last agreement in January or December or whenever it was.*

320. *Q. We didn't sue after that, it was before? A. Well, you let it lay over—did not sign judgment, or something like that; that agreement was $75 and promised not to sue that, and would let us know.*

321. *Q. Is not that agreement in writing as you said a good many times? A. So it is.*

322. *Q. Well there is no need to refer to it. You say that agreement is in writing? A. Yes, you have got it.*

323. *Q. Well, there is no necessity of referring any further to it?*

To Mr. Davis.

324. *Q.* You stated in your examination to Mr. McPhillips that the company —I think the language you used "was in the hands of the bank." That is you were obliged to do anything they wished? *A.* Yes.

325. *Q.* And that the judgment was given because they asked for it? *A.* Yes.

326. *Q. Now reading from your cross-examination as president of the company, in the other suit that Mr. McPhillips read from:—Q.* 62 "*Why did you then "authorise Mr. Jenns to go on and consent to judgment at all? It would be simpler "if they took possession under their mortgage. Did the bank give you any reason "why you should consent? A. The talk was with the solicitors.*" *Now, by whom were the details of what was to be done arranged? You say the talk was with the solicitors? A. Well, talk with the solicitors from time to time. I don't understand it very plainly. Just read it again.*

327. *Q.* You may say here the talk was with the solicitors—the details of how the bank's wishes were to be satisfied were arranged, I understand, between the solicitors of the bank and the solicitors of the company? *A.* I don't know of the bank—what I meant by solicitors was our own solicitor.

328. *Q.* But I say the details of what was to be done to satisfy the wishes of the bank were left to the solicitors of the bank respectively and of the company, Mr. Jenns? *A.* Yes that certainly was.

329. *Q. You say you gave instructions. To use your own language, what position did the bank take when they knew of the Edison judgment and knew of the stay of proceedings which had been obtained? What I mean is with reference to which judgment should be first—the judgment of the bank or the judgment of the Edison Co. What position did the bank take in that matter? A. I don't know what you mean—what position.*

330. *Q.* What position as to the bank getting judgment—which would it be, a judgment after the Edison judgment before, or at the same time, or what? *A.* That I didn't know, but that was a matter for the bank's solicitors; they wanted judgment and we consented. I don't know whether it was to be ahead or not.

No. 19. Examination of David Oppenheimer, taken before the Trial — *continued.*

331. *Q.* Then as I understand you simply did what the bank requested? *A.* Asked us to do.

332. *Q.* Without any regard to the result? How many conversations, or can you remember how many conversations you had with Mr. Murray in reference to the matter prior to the bank signing the judgment? *A.* No, I cannot.

333. *Q. Did you have some with Mr. Ward too, as well? A. Yes, we always talk on tramway matters whenever he comes up. He often comes up on that account. That is nothing new; he often comes up every day—every week you know.*

To Mr. Jenns:

334. *Q. The question was asked you about the judgment of the Edison Co. Has or has not the tramway company a large contra account against the Edison Co.? A. Yes, it has.*

335. *Q. Which is now in suit, I believe? A. We have not put in our counter-claim. We are suing the company.*

Concluded.

I hereby certify the foregoing to be a true and accurate report of the said proceedings.

F. EVANS,
Official Stenographer.

No. 20. Examination of William Murray.

Vancouver Aug 1/94

Examination of Wm. Murray under appointment by Examiner.

Mr. L. G. McPhillips Q.C., for the Pltff. Company.

Mr. E. P. Davis for the Defdt. Bank of British Columbia.

Wm. Murray, *sworn. Examined by* Mr. McPhillips.

1. *Q.* You are the manager of the Bank of British Columbia in the City of Vancouver? *A.* Yes.

2. *Q.* And you have been the manager for a year or so? *A.* Over a year, a year and a half.

3. *Q.* You remember that you commenced action against the Westminster and Vancouver Tramway Company? *A.* Yes.

4. *Q.* And that the action was commenced on the 17th Jan, don't you? *A.* I can't remember the exact date.

5. *Q.* Some time in Jany, you remember? *A.* Yes.

6. *Q.* Do you remember if you had any communication with the Tramway Company, or any of the officers prior to the commencement of that action? *A.* Yes.

7. *Q.* At that time you were aware that the Edison General Electric Co., had a judgment, weren't you? *A.* Is that before they began this action?

8. *Q.* Yes? *A.* Yes.

9. *Q. Did you know the date they recovered judgment? A. No.*

10. *Q. Can you remember how long it was before the writ was issued before you gave instructions that the writ be issued—that is, the Edison Co.'s judgment? A. No.*

11. *Q. Do you remember that the judgment was obtained an the 29th Dec.? A. I can't remember the date.*

RECORD.

No. 20.
Examination of William Murray
—*continued.*

12. *Q. You remember it was about the last of the year? A. It was about the last of the year.*

13. *Q. Who was it informed you of the Edison Co.'s judgment? A. I forget. I either saw it in the list*——

14. *Q. Bradstreet, I suppose? A. Yes, or I was advised by Mr. Marshall.*

15. *Q. Do you know how often lists are sent to you? A. Weekly. In special cases they send in a special advice, you know; they send us in a slip in special cases.*

16. *Q.* Did you have any communication with the tramway company after you found out about the judgment? *A.* Yes.

17. *Q.* Was that immediately after you found out? *A.* Yes.

18. *Q.* Do you remember who it was you had the communication with? *A.* Mr. Oppenheimer.

19. *Q.* Do you remember what Mr. Oppenheimer said? *A.* No.

20. *Q.* Do you know if he did anything in consequence? *A.* Do anything in consequence?

21. *Q.* Yes. Was he aware at the time you spoke to him of the judgment? *A.* Yes.

22. *Q.* Well, you think this was some days after the judgment was obtained, I suppose? *A.* I think so.

23. *Q.* Did he tell you he had done anything in consequence of judgment being signed against him? *A.* He had done nothing.

24. *Q.* Did he say he was going to do anything? *A.* No.

25. *Q.* Did he say that he was going to set it aside? *A.* No, not at that time.

26. *Q.* Did he express any opinion as to its being signed? whether it should have been signed, or whether it should not have been signed? *A.* Well, the conversation was on my part, not his.

27. *Q.* You were bringing pressure to bear upon him? *A.* Yes.

28. *Q.* I suppose you were angry that this judgment should have been signed against him? I suppose that was the way, was it? *A.* I was not angry.

29. *Q.* But pressure was brought to bear in consequence of that? *A.* Certainly.

30. *Q.* But Mr. Oppenheimer did not say at that time that judgment should not have been signed? *A.* Not that I recollect.

31. *Q.* Well, after that at any time did you see him again? *A.* Oh, I saw him several times, repeatedly.

32. *Q.* At these times—was this before the 17th day of Jany. when your writ was issued you saw him again? *A.* Oh, I saw him a number of times before then.

33. *Q.* Well, at any time before the 17th day of Jany. did he tell you he was going to set this judgment aside? *A.* No, I told him.

34. *Q.* You told him to set it aside? *A.* I used pressure to bear upon him to set it aside.

35. *Q.* But how did you get your information? Why did you think it should be set aside? *A.* I immediately upon receiving this information that this judgment had been entered I consulted with our solicitors, and then communicated with Mr. Oppenheimer as President of the Company.

36. *Q.* Was that after the first interview you had with him? *A.* No; it was before the first interview.

37. *Q.* Prior to the first interview, you had consulted with your solicitors as to the setting aside of the Edison Co's judgment? *A.* To get our judgment in first.

38. *Q.* At the time you consulted your solicitors, before you saw Mr. Oppenheimer, did you know of any reasons why the Edison Company's judgment should be set aside? And remember, this was before you saw Mr. Oppenheimer? *A.* "Could" or "should."

39. *Q.* Yes, either one or the other? *A.* Yes.

40. *Q.* What grounds had you for supposing you could set it aside? *A.* Well, we thought that to prevent the Edison Co. doing anything to hamper us and the management of the road, in running of the road, and preventing us negotiating and foreclosing the road in any way, or causing any delay, we thought it advisable under advice of our solicitors to use any means to get our judgment.

41. *Q.* To set aside their judgment? *A.* To get our judgment in first.

42. *Q.* Did you know of any grounds upon which you could set aside the prior judgment of the Edison Co.? *A.* Well we left that in the hands of our solicitors.

43. *Q.* You did not know, but you wished to take every step to do so? *A.* Every step we possibly could.

44. *Q.* That would be they would have to take their action through the Westminster Tramway Co. You did not intend to take any action in your own name? *A.* I left that matter entirely in my solicitors' hands.

45. *Q.* At that time did you know there was any execution by the Edison Co.? *A.* I know there was none.

46. *Q.* Wasn't it to get rid of the execution you intended to set aside the judgment? *A.* Well, I am not acquainted with all your technical terms, but our position was to place ourselves in the most secure position we possibly could.

47. *Q.* And were your solicitors to communicate with the company's solicitors—that is the tramway company's solicitors? in regard to getting your execution in ahead. *A.* I believe so.

48. *Q.* Then the summons which was taken out to set our judgment aside was taken out partly at your instance? *A.* Yes.

49. *Q.* And that was on the 13th day of July 1894? *A.* I can't say as to the date. I placed the matter in our solicitors' hands with instructions.

50. *Q.* That summons was taken out by Mr. Jenns on behalf of the tramway company, at least in Mr. Jenns name, but it was at your instance—the solicitors of the tramway company. *A.* It was through Mr. Davis.

Mr. Davis: If you do not mind my saying so, that summons was not. He is getting mixed up. We had nothing to do with taking out the summons to set aside the judgment. The summons Mr. Murray is thinking of is application for the judgment.

51. *Q.* Mr. McPhillips (to Witness): Is that so, Mr. Murray? *A.* Well, to tell you the facts of the case the matter was placed entirely in our solicitors'

RECORD.

No. 20.
Examination of William Murray
—*continued.*

hands to do the best that they could in the matter, and what steps they took were with the intention to protect our interests as far as possible.

52. *Q.* At any rate, it was understood he was to communicate with the Tramway Company and the Tramway Company's solicitors? *A.* He got definite instructions to follow.

53. *Q.* You had talked with Mr. Oppenheimer? *A.* Yes.

54. *Q.* Bearing on the matter? Then it was understood between you and Mr. Oppenheimer, I suppose, your solicitors would communicate with him and his solicitors? that is what got this into my head is it? *A.* I presume so.

55. *Q.* That is the understanding you had with Mr. Oppenheimer, and then you spoke to your solicitors? *A.* I spoke to my solicitors before I spoke to Mr. Oppenheimer.

56. *Q.* And then you spoke to him about it? *A.* And then I spoke to him about it.

57. *Q. And then it was understood between you and Mr. Oppenheimer that this course should be pursued? A. What course?*

58. *Q. That your solicitors and his should speak to the company? A. After communicating with our solicitors and after the communication with Mr. Oppenheimer, I wanted to let the matter drop.*

59. *Q.* But you understood that your solicitors would speak to the Tramway Company's solicitors and with the Tramway Company? *A.* Yes.

60. *Q.* And from what took place between you and Mr. Oppenheimer was it understood between you and Mr. Oppenheimer that that would be the course that would be pursued? *A.* Yes, it was understood, mutually understood.

61. *Q. You told your solicitors this, I suppose? A. No, I didn't tell our solicitors this.*

62. *Q. You didn't think you did? A. No.*

63. *Q.* How did you understand then that they would do that? *A.* Well, Mr. Davis had entered into communication with Mr. Jenns. I knew that they were in correspondence, in communication on the subject and consequently the matter went on in the usual course.

64. *Q.* Do you know when that correspondence commenced? *A.* Immediately after I had this conversation with Mr. Davis.

65. *Q.* Do you know what the date of that was? *A.* It was prior to the—immediately after this conversation that I was notified that the judgment had been entered—whatever date that may be.

66. *Q.* That must have been in the first week of Jany., I suppose? *A.* I presume so; I know it was early in the month of Jany.

67. *Q.* Then you know I suppose, that a summons was taken out? to set aside the Edison Co.'s judgment? *A.* Yes.

68. *Q.* And you gave the instructions for the action to be commenced on behalf of the bank against the tramway company? *A.* Yes.

69. *Q.* With the intention of getting your execution in first, if possible? *A.* Yes.

70. *Q.* And the Westminster Tramway Company officials and the president had no objection to that, if you could do so? *A.* I told them they had to.

71. *Q.* And they were doing their best to assist you, as far as you knew? *A.* I should think so. I pressed it upon them forcibly enough to do it.

72. *Q.* You know, don't you, that they consented to your judgment? that consent was given? *A.* Yes, I understand that.

73. *Q.* By their solicitor, Mr. Jenns? *A.* Yes, I suppose it was understood that that should be done.

74. *Q.* That is, a consent to an order was given by Mr. Jenns? *A.* Yes.

75. *Q.* And it was understood that that should be done I suppose? *A.* I understood so.

76. *Q. Between you and Mr. Oppenheimer?* *A. Between me and Mr. Davis.*

67. *Q. I suppose he said he would see Mr. Oppenheimer or some of the officials?* *A. I forget; I don't remember.*

78. *Q.* Did you know that there was going to be an argument on the summons to set aside the Edison's Co.'s judgment on the day on which you obtained judgment? *A.* Yes.

79. *Q.* How did you become aware of that? *A.* Mr. Davis informed me that we wanted to get judgment if possible by default, and we put off that, at least he put off that until the last moment.

80. *Q.* Do you know what means were taken to put that off? *A.* Stay of proceedings wasn't it?

81. *Q.* Yes, on our judgment? *A.* On your judgment.

82. *Q.* And didn't you hear that that stay of proceedings was not long enough and the argument was going to come off before the time was up on your writ? *A.* Yes.

83. *Q.* Well, what was it decided to do in consequence of that? *A.* To compel them to confess judgment, I believe.

84. *Q.* How could you compel them to confess judgment? *A.* Oh, by threatening to foreclose under a mortgage—sell out the road.

85. *Q. Didn't you know that the summons for setting aside the Edison Company's judgment would naturally have come on a couple of days prior to the day it did come on?* *A. I don't exactly understand.*

86. *Q.* Didn't you know that the summons was returnable in chambers two days before the day that it actually was argued? *A.* I know that the stay of proceedings, it was not long enough to enable us to get judgment by default.

87. *Q. Didn't you know it was lengthened out a day or two as it was?* *A. No.*

88. *Q. You didn't know that?* *A. No.*

89. *Q. Didn't you know that Mr. Oppenheimer got me to consent to stand it over a day or so?* *A. No.*

90. *Q. You know that Mr. Oppenheimer was to be examined upon his affidavit made in support of that summons, didn't you?* *A. I heard about the examination afterwards—at the time it was going on.*

91. *Q. And you heard there was some trouble over it, didn't you?* *A. In court?*

92. *Q. No, I don't mean the matter in Court, I mean his examination, like your*

RECORD.

No. 20.
Examination of William Murray —continued.

examination here, on his affidavit? *A. No, I didn't know there was any trouble then.*

93. *Q.* Without the stay upon that judgment—the Edison General Electric Company, you never could have got your execution in ahead of theirs could you? You didn't expect you could? *A.* Well, that matter was left entirely to our solicitors.

94. *Q.* But what did you think yourself? *A.* Oh, I think not.

95. *Q.* And it was that stay that enabled you to get your execution in first? *A.* Probably.

96. *Q.* Was the amount due at the time you sued upon your claim? *A.* Yes.

97. *Q.* Was it always an open account that you could sue on at any time? *A.* Yes.

98. *Q.* Secured by deposit of bonds as collateral security? *A.* Yes.

99. *Q.* Those were the bonds of the West'r and Vanc'r Tramway Company? *A.* Yes.

100. *Q.* And these bonds were secured by a trust deed as security for the bond holders? *A.* To whom?

101. *Q.* There was a trust deed in favour of the trustee as security for the bond holders? *A.* Yes.

102. *Q.* Of all the line, and everything connected with it? *A.* Yes.

103. *Q. This was the mortgage you threatened to foreclose?* *A. We threatened to foreclose?*

134. *Q. That is what you refer to when you state you threatened to foreclose this, if the tramway company would not get your judgment in first?* *A. No, it was the amount due to us.*

105. *Q. Had you another mortgage for that besides this trust deed?* *A. We had these bonds deposited for collateral security against advances made to the West'r and Vanc'r Tramway Company, the interest on which had not been paid, and we were in a position to sue them under the mortgage or in the ordinary course.*

106. *Q. When you speak of mortgage, you mean this trust deed?* *A. That trust deed.*

107. *Q.* At the time of this judgment being signed, in fact at the time that our judgment was signed and prior to that—that is, the 29th day of Dec., you knew that the West'r & Vanc'r Tramway Co. was in a bad way? financially? *A.* Yes.

108. *Q.* As a matter of fact, they were entirely in your hands? *A.* Yes.

109. *Q.* That is, as a matter of fact, they were not in a solvent condition? You, as a business man, would not call them solvent? *A.* I would not.

110. *Q. As a matter of fact, I presume you would say they were insolvent?* *A. I would not exactly say that. They were practically in our hands; they owed us so much money, and we were anxious to get it, and could not get it.*

111. *Q. And they owed other people money? for instance the Edison General Electric Company?* *A. Yes.*

112. *Q. And more than that, they could not pay it when they were asked?* *A. Could not pay it.*

113. *Q. And therefore they were not able to meet their——?* *A. Obligations.*

114. *Q.* And if the Edison Genl. Elec. Co., got in ahead of you, there might have been danger to your securities, I suppose? *A.* There might have been complications.

115. *Q.* There might have been doubt whether you would be able to collect your money, or not? *A.* I don't know.

116. *Q.* You apparently thought there was some, from the action you took? *A.* Yes.

117. *Q.* You were very anxious to get in ahead of them? *A.* We were anxious to get in as soon as possible.

118. *Q.* And therefore you did everything you could to get the company to assist you? *A.* They had to.

119. *Q.* In answer to par. 10 of the statement of claim which is on the 31 Jany. you say that the said stay of proceedings was not removed until the 5th day of Feby. 94. Do you know anything at all about that? *A.* No.

120. *Q.* That is only pleading by your solicitors, I suppose. You never were told anything about that? *A.* Not that I remember.

121. *Q.* Have you any documents in this matter to produce? *A.* Nothing. I have looked through my papers and found nothing.

122. *Q.* No letters to the tramway company, and no letters from the tramway company to you? *A.* No.

123. *Q.* No letters from Mr. Jenns, and no letters to Mr. Jenns from you? It was practically done through our solicitors.

Concluded.

I hereby certify the foregoing to be a true and accurate report of the said proceedings.

F. EVANS,
Official Stenographer.

EXHIBITS.

"A"

No. 21.
Exhibit A, Copy Judgment 29th Dec., 1893.

E. 47/393.

In the Supreme Court of British Columbia.

Between

Edison General Electric Company . . . . . *Plaintiffs,*

and

Westminster and Vancouver Tramway Company, Limited . *Defendants.*

The 29th day of December 1893.

The Defendants not having delivered any defence it is this day adjudged that the Plaintiffs recover against the said Defendants $18,470.12 and costs to be taxed.

WALTER J. THICKE,
D.D.R.S.C.

Entered
29/12/93
W.J.T.
Seal of the Court.

Vancouver.
Dec. 29/1893.
Registry.

RECORD.

No. 21. Exhibit A, Copy Judgment, 29th Dec., 1893 —*continued.*

The above costs have been taxed and allowed at the sum of thirty-one dollars and eighty-four cents. ($31.84).

Dated this 8th January 1894.

WALTER J. THICKE.
D.D.R.S.C.

No. 22. Exhibit B, Copy Summons to set aside Judgment, 13th Jan., 1894.

Exhibit "B."

E. 473/93.

In the Supreme Court of British Columbia.

Between

Edison General Electric Company . . . . . *Plaintiffs*

and

Westminster and Vancouver Tramway Company Limited *Defendants.*

In Chambers.

Let all the parties attend the Judge in Chambers at the Court House Vancouver on Tuesday the 23rd day of January A.D. 1894 at 10.30 o'clock in the forenoon on the hearing of an application on the part of the Defendants to have the judgment entered by the Plaintiffs herein on the 29th day of December A.D. 1893 set aside upon the following among other grounds:—

1. That it was entered in breach of faith.
2. That it is vexatious.
3. That it was entered in breach of agreement.
4. Or in the alternative the Defendants have a good defence upon the merits on grounds disclosed in the affidavits.

The affidavits of E. A. Jenns, D. Oppenheimer, and P. Smith filed herein will be read. In the meantime let all proceedings be stayed.

By special leave,

GEO. A. WALKEM, J.

Dated the 13th day of January 1894.

Vancouver
January 13/1894
Registry.

This summons was taken out by E. A. Jenns of 40 Lorne Street New Westminster B.C., Solicitor for the above-named Defendants.

To A. WILLIAMS, Esq.,
Solicitor for the above-named Plaintiffs.

Service admitted this 13th day of January, 1894.

McPHILLIPS & WILLIAMS,
Solicitors for Plaintiff.

"C."

RECORD.

No. 23. Exhibit C, Copy Judgment thereon, 27th Jan., 1896.

In Chambers, Vancouver.

The Edison General Electric Company

vs.

New Westminster and Vancouver Tramway Company Limited.

JUDGMENT.

This is an application on behalf of the defendants for an order to set aside a judgment entered against them on the 29th of December last for default of a statement of defence on the ground that it was entered in breach of faith.

With respect to the alleged breach of faith the evidence is so very conflicting that I have been unable to decide whether it occurred or not. It was however agreed between the parties or their respective solicitors that in the event of time being given to the Defendants the Plaintiffs' action should not be prejudiced thereby and that if any proceedings should be instituted against the Defendants by any of their other creditors the Plaintiffs should be notified thereof so as to enable them to protect themselves.

Upon the hearing of this application at 11 a.m. on Wednesday the 24th inst., it was proved—that the defendants had about an hour previously and without notice to the plaintiffs consented to judgment being entered against them at the suit of the Bank of British Columbia for $261,217.67 and costs. In view of these circumstances I consider that the present application should be dismissed with costs. The stay of proceedings which was granted pending this application will of course lapse.

GEO. A. WALKEM, J.

Vancouver
Jany. 27/94.
Registry.

Seal of the Court.

Certified a true copy of the original document received from the Honourable Mr. Justice Walkem this day.

Dated this 27th day of January 1894.

WALTER J. THICKE
Deputy District Registrar.

"D"

No. 24. Exhibit D, Copy Proceedings *re* Bank, &c.

Copy of Proceedings in Bank of British Columbia *vs.* Westminster and Vancouver Tramway Company—

"A" Writ
"B" Appearance
"C" Consent
"D" Order for judgment

RECORD.

No. 24.
Exhibit D,
Copy
Proceedings
re Bank, &c.
— *continued.*

"F" Judgment
"G" Præcipe for fi fa to Sheriff of Vancouver
"H" Præcipe for fi fa to Sheriff of New Westminster
"I" Præcipe for certificate of Judgment

(E) (J) (K) (L) (M) being omitted as merely formal.

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a

B. 21/94 "J.C.D." 1894 B.

In the Supreme Court of British Columbia.

Between

Bank of British Columbia . . . . . *Plaintiffs,*

and

The Westminster and Vancouver Tramway Company . *Defendants.*

Vancouver
Jan. 17 1894.
Registry

Victoria, by the Grace of God of the United Kingdom of Great Britain and Ireland, Queen Defender of the Faith.

To
The Westminster and Vancouver Tramway Company of the Province of British Columbia.

We command you that within eight days after the service of this writ on you, inclusive of the day of such service, you cause an appearance to be entered for you in an action at the suit of Bank of British Columbia and take notice that in default of your so doing, the Plaintiff may proceed therein, and judgment may be given in your absence.

Seal.

Witness—Sir Matthew Baillie Begbie Knight, Chief Justice the 17th day of January in the year of our Lord one thousand eight hundred and ninety-four.

N.B.—This writ is to be served within twelve calendar months from the date thereof, or, if renewed, within six calendar months from the date of such last renewal, including the day of such date, and not afterwards.

Appearance is to be entered at the office of the District Registrar of the Court at Vancouver.

DAVIS, MARSHALL and MCNEILL
Plaintiffs' Solicitors.

Statement of Claim.

The Plaintiffs' claim is for the sum of $192,664.35 for moneys lent to the Defendants by the Plaintiffs' branch at Vancouver on current account and entered in the Defendants' pass book and for interest on same at the rate of seven per cent. per annum being the rate agreed to be paid by the Defendants.

The Plaintiffs' claim is further against the Defendants for the sum of $34,276.66 upon a promissory note for $31,000.00 and interest at six per cent. per annum, made by the Defendants in favour of the Edison General Electric Company dated April 14th, 1892, payable fourteen months after date and indorsed to the Plaintiffs, which note was duly presented for payment, and was dishonoured.

And the Plaintiffs' claim is further against the Defendants for the sum of $34,276.66 upon a promissory note for $31,000.00 and interest at six per cent. per annum made by the Defendants in favour of the Edison General Electric Company dated April 14th 1892 payable eight months after date and indorsed to the Plaintiffs which note was duly presented for payment and was dishonoured.

Particulars—

1894 January 17th.	Balance due for moneys lent Defendants by Plaintiffs and for interest thereon as agreed at seven per cent. to this date and entered in the Defendants' pass book in current account with the Plaintiffs' branch at Vancouver . .	$192,664.35
	Principal due on first mentioned note	31,000.00
	Interest at six per cent. from 14th April 1892 to date	3,276.66
	Principal due on second mentioned note .	31,000.00
	Interest at six per cent. from 14th April 1892 to date	3,276.66
		$261,217.67

And the plaintiffs also claim interest on $192,664.35 at 7 per cent. from this date until judgment, such rate being the rate agreed to be paid by the defendants, and the plaintiffs also claim interest on $62,000 at 6 per cent. from this date until judgment.

Place of trial, City of Vancouver.

DAVIS, MARSHALL, MCNEILL
Plaintiffs' Solicitors.

And the sum of $50,000 (or such sum as may be allowed on taxation) for costs. If the amount claimed be paid to the plaintiffs or their solicitors or agents within four days from the service hereof further proceedings will be stayed.

RECORD.

No. 24.
Exhibit D,
Copy
Proceedings
re Bank, &c.
—*continued.*

b. 1894. 21/94. B.

In the Supreme Court of British Columbia.

Between

Bank of British Columbia . . . . . *Plaintiffs,*

and

The Westminster and Vancouver Tramway Co. . . . *Defendants.*

Enter an appearance for the Defendants the Westminster and Vancouver Tramway Company in this action.

Dated the 24th day of January 1894.

E. A. JENNS
Solicitor for the Defendant.

The place of business and address for service of E. A. Jenns is Lorne Street New Westminster.

The said Defendants require statement of claim to be delivered.

---

c.

B. 21/94.

In the Supreme Court of British Columbia.

Between

Bank of British Columbia . . . . . *Plaintiffs.*

and

The Westminster and Vancouver Tramway Company . . *Defendants.*

As solicitor for the Defendants in this action I hereby consent to an order being made giving leave to the Plaintiffs to sign final judgment in this action for the amount indorsed on the writ of summons in this action together with interest, if any, and costs to be taxed.

Dated 24th, January 1894.

Witness:—

(Sgd.) D. G. MARSHALL.
(Sgd.) E. A. JENNS,
Solicitor for Defendants.

"d"

In the Supreme Court of British Columbia.

B. 21/94.

Mr. Justice Walkem
In Chambers.

Between

Bank of British Columbia . . . . . *Plaintiffs,*

and

The Westminster and Vancouver Tramway Company . . *Defendants.*

Upon the application of the Plaintiffs, upon reading the writ of summons

herein and the affidavit of service thereof and the consent signed by the solicitor for the Defendants filed herein and upon hearing Mr. Davis of counsel for the Plaintiffs and Mr. Jenns of counsel for the Defendants

IT IS ORDERED that the Plaintiffs be at liberty to sign final judgment in this action for the amount endorsed on the writ of summons herein together with interest if any and costs of this action including the costs of and incidental to this application.

Dated at Chambers this 24th day of January A.D. 1894.

GEO. A. WALKEM,
J.

Entered 24 Jan 1894
J.C.D.

"f."

Judgment.

In the Supreme Court of British Columbia

Between

Bank of British Columbia . . . . . *Plaintiffs*

and

The Westminster and Vancouver Tramway Company . . *Defendants.*

The 24th day of January 1894.

The Defendants having appeared to the writ of summons in this action and the Plaintiffs having by an order of Mr. Justice Walkem dated the 24th day of January A.D. 1894 obtained leave to sign final judgment in this action for the amount claimed in the endorsement on writ of summons in this action together with interest, if any, and costs to be taxed, it is this day adjudged that the Plaintiffs recover against the Defendants $261,217.67 and costs to be taxed.

A. E. BECK,
District Registrar.

The above costs have been taxed and allowed at $32.50 as appears by my certificate dated this 24th day of January A.D. 1894.

A. E. BECK
District Registrar.

Entered
24th day of January 1894.

A. E. B.
D. R. S. C.

Vancouver
Jany 24/1894.
Registry

RECORD.

No. 24.
Exhibit D,
Copy
Proceedings
re Bank, &c.
— *continued.*

g.

B. 21/94.

In the Supreme Court of British Columbia.
Bank of British Columbia
vs.
The Westminster and Vancouver Tramway Company.

Seal a Writ of *Fieri Facias* directed to the Sheriff for Vancouver to levy of the goods of The Westminster and Vancouver Tramway Company $261,217.67 debt and $32.50 taxed costs, and interest on both said sums from the 24th day of January 1894 at 4 per centum per annum.

Judgment dated 24 Jany. 1894.
Costs taxed 24th Jany. 1894.
Dated 24th Jany. 1894.

DAVIS, MARSHALL & MACNEILL,
Plaintiffs' Solicitors.

"h."

21/94.

In the Supreme Court of British Columbia.
Bank of British Columbia,
versus
The Westminster and Vancouver Tramway Company.

Seal a Writ of *Fieri Facias* directed to the Sheriff for the County of Westminster to levy of the goods of the Westminster and Vancouver Tramway Company $261,217.67 debt and $32.50 taxed costs and interest on both said sums from the 24th day of Jany. at 4 per centum per annum.

Judgment dated 24th Jany. 1894.
Costs taxed 24th Jany. 1894.
Dated 24th Jany. 1894.

DAVIS, MARSHALL & MCNEILL,
Plaintiffs' Solicitors.

"i."

In the Supreme Court of British Columbia.
Between
Bank of British Columbia,
versus
The Westminster and Vancouver Tramway Company.

Required Certificate of Judgment herein.
Dated 24 January 1894.

DAVIS, MARSHALL & MCNEILL,
Plaintiff's. Solicitors.

"E."

No. 25. Exhibit E, Appearance for Tramway Company, 24th Jan., 1894.

In the Supreme Court of British Columbia.

Between

Bank of British Columbia . . . . . *Plaintiffs*

and

The Westminster and Vancouver Tramway Company . . *Defendants.*

Enter an appearance for the Defendants the Westminster and Vancouver Tramway Company in this action.

Dated the 24th day of January 1894.

E. A. JENNS,
Solicitor for the Defendant.

The place of business and address for service of E. A. Jenns is Lorne Street New Westminster.

The said Defendants require statement of claim to be delivered.

"F."

No. 26. Exhibit F, Consent to Judgment, 24th Jan., 1894.

In the Supreme Court of British Columbia.

Between

Bank of British Columbia . . . . . *Plaintiffs*

and

The Westminster and Vancouver Tramway Company . . *Defendants*

As solicitor for the Defendants in this action I hereby consent to an order being made giving leave to the Plaintiffs to sign final judgment in this action for the amount endorsed on the writ of summons in this action together with interest if any and costs to be taxed.

Dated 24th January 1894.

E. A. JENNS.
Solicitor for Defendants.

Witness
D. G. Marshall.
Vancouver Registry.
January 24th 1894.

"G."

In the Supreme Court of British Columbia.

List of Summonses.

In Chambers.

To be heard before the Honourable Mr. Justice Walkem, at Vancouver, on the 24th day of January, 1894

No.	Style of Cause.	Solicitor for Plaintiff.	Solicitor for Defendant.	Nature of Application.	Remarks.
$\frac{473}{93}$ 1	Edison Electric Light Co. *vs.* West. & Van. Tram. Co.	A. Williams.	Eustace A. Jenns.	For order setting aside judgment.	Adjourned for half hour. Judgment reserved.
$\frac{68}{93}$ 2	Yorkshire Guarantee Co. *vs.* Grant *et al*	A. Williams.	Davis Marshall & MacNeill.	For leave to add parties.	Next Chamber day.
$\frac{177}{93}$ 3	*In re* Northern Shipping Co.	Wilson Campbell & Buell.	W. J. Bowser.	To settle list of Contributories.	. . .

"H"

No. 28. Exhibit H, Agreement, 18th Oct., 1893.

Resolved that the arrangement made with Messrs. McPhillips and Williams, solicitors for the Edison General Electric Company on October 18th 1893 made by our president and vice-president be carried out ;

And we hereby agree to waive and give up any defence or counterclaim which this company may have to the action commenced against us by the Edison General Electric Company on the 27th day of November A.D. 1893 or any other defence or counterclaim or action which we have or might have at this date against them excepting the two armatures last received if any ; and this company hereby declares that it has not placed the Bank of British Columbia or any other creditor or creditors in any better position or given the said Bank or any other creditor or creditors any better or further or other security since the said 18th day of October 1893.

And this company hereby agrees not to place the said bank or any of its creditors in any better or other position or give them any further or better security without the consent or approval of the said McPhillips and Williams solicitors for the said Edison General Electric Company until the payment of all the present indebtedness of this company to the Edison General Electric Company.

This agreement is understood not to cover the general running accounts and expenses of the said company incurred from day to day.

And the secretary and president are hereby authorised to give the said Edison General Electric Company an agreement covering this resolution signed in the manner in which this company is authorised and under the seal of this company.

Westminster and Vancouver Tramway Company Limited hereby agrees to the foregoing.

D. OPPENHEIMER, President
P. N. SMITH, Secy Treas.

(Seal)

"I."

No. 29. Exhibit I, Letter, 18th Oct, 1893.

McPhillips & Williams
Barristers, Solicitors
Notaries &c.
L. G. McPhillips A. Williams B.a

P.O. Box 237 Telephone 145
Over Bank of B. C. Corner
Hastings & Richards Sts.

Vancouver, B. C., Oct. 18/1893.

D. Oppenheimer, Esq.,
President New Westr. &
Vancr. Tramway Co.
City.

Dear Sir,—

We cannot and will not bind the Edison General Electric Company by any agreement to give your company any definite time for the payment of the balance of your indebtedness to them, but if the sum you say you can pay is paid at once and you agree to waive any claim which you allege you have against the

RECORD.

No. 29. Exhibit I, Letter, 18th Oct., 1893 —*continued.*

company, we are satisfied that no action will be brought against your company to recover the balance due within ninety days from September 18th, 1893 unless it is necessary to do so to protect our client's claim. We cannot say just exactly what state of circumstances would necessitate our taking action but we may say generally that if no alteration for the worse takes place in the state of your company from now until that date no action will be commenced.

We wish to state again however that we write this letter at your request with no intention of binding our company to anything. You must trust to us to act reasonably and leave us free to act on our own judgment so that we can protect our company's interest should we consider them in jeopardy.

Yours truly,

(Memo on back of letter, exhibit "I")

October 19th 1893

Letter drawn to send N. W. & Van Tramway Co., but they did not want it after reading it as it did not bind us, but it expresses the only terms on which we then would agree and to-day Oppenheimer, Douglas and Webster agree to them

L. G. McP.

No. 30. Judgment of Mr. Justice Crease, 11th Feb., 1895.

In the Supreme Court.

Vancouver.

Before the Hon. Mr. Justice Crease.

The Edison Electric Company, for themselves and the other creditors . . . . . *Plaintiffs.*

vs

Westminster and Vancouver Tramway Company, The Bank of British Columbia, and David Oppenheimer and Benjamin Douglas . . . . . *Defendants.*

JUDGMENT.

Dated 11th February 1895 (Victoria).

This is an action under Section 1 of Chapter 51 of the British Columbia Consolidated Statutes, 1888, respecting the fraudulent preference of creditors by persons in insolvent circumstances.

It is brought on behalf of themselves and other creditors, by the Edison General Electric Company, who had obtained a judgment on the 29th December 1893, against the Defendant Westminster and Vancouver Tramway Company, hereinafter for brevity called "the Tramway Co." for $18,470.12 and costs.

The object of the action is to set aside a judgment subsequently obtained by the Bank of British Columbia against the said Tramway Company for $261,217.67 and costs as is alleged in violation of Section 1 of Chapter 51, B.C. Consolidated Statutes which reads, as follows,—

"In case any person being at the time in insolvent circumstances or unable "to pay his debts in full,——, voluntary or by collusion with a creditor or "creditors gives a confession of judgment, *cognovit, Actionem* or warrant of "attorney to confess judgment——with intent by giving such confession——to

" defeat or delay his creditors, wholly or in part or with intent thereby to give " one or more of the creditors of such person a preference over his other " creditors, every such confession, &c., shall be null and void as against the " creditors of the party giving the same; and shall be invalid to support any " judgment or writ of execution."

It was tried before me, without a jury, on the 6th of December 1894, and following days;

It is a case of considerable importance, not only on account of the amount of money at stake, and the somewhat involved condition of the facts, but from the points of law which have arisen under it.

A great mass of evidence was taken and many days consumed in the trial. But by a close and impartial study of the evidence and by disentangling the facts from the veil of law which the legal skill and acumen of some of our first counsel have thrown around them, during the examination of so many professional men as witnesses—and which would have puzzled a jury—I think a clear and satisfactory conclusion can be attained.

The facts are as follows,—

As the dates are of some importance, and have been misplaced in the pleadings, I will classify them in order of time.

On the 29th December 1893 the Plaintiffs obtained a judgment against the Tramway Company for $18,470.12 and costs.

On the 13th January 1894 a summons was taken out by the Tramway Company to set aside Plaintiffs' judgment with a stay of proceedings until the return day of the summons the 24th January 1894.

On the 17th January 1894, during the above stay of proceedings, the bank issued a writ of summons against the tramway company for $261,217.57 and costs.

On the 24th January 1894 the tramway company entered an appearance; and before the hearing of the summons to set aside the Plaintiffs' judgment on the application of the bank's solicitors—to the judge in chambers—and the written consent of the tramway company's solicitor judgment was obtained by the bank against the tramway company for $261,217.57 debt and costs.

Afterwards on the same 24th January 1894 the summons of the tramway company to set aside the Plaintiffs' judgment against them came on for hearing in the Chambers Court, and was dismissed with costs.

The stay of proceedings was not removed until, it is alleged, the 5th February 1894.

On the same 24th January 1894, but before the summons to set aside the Plaintiffs' judgment was heard and disposed of all documents and proceedings (except the writ of summons of 17th January) connected with the bank judgment had been entered in the registry office, Vancouver. On the 31st January 1894, a fi fa issued to the Sheriff of Vancouver and New Westminster Counties under the Plaintiffs' judgment of the 29th December 1893—and "*nulla bona*" returned—so that the Plaintiffs' judgment still remains unsatisfied—and the bank judgment comes out ahead.

On the 30th March 1894 a *lis pendens* was filed in this case in the land

RECORD.

No. 30.
Judgment of Mr. Justice Crease, 11th Feb., 1895
—*continued.*

registry office of Vancouver against all the Vancouver lands of the tramway company.

On the 31st January 1894 a certificate of the Plaintiffs' judgment was duly registered in the Vancouver land registry office.

Such being the facts partly admitted and the rest proved in evidence.

The claim as formulated in the Plaintiffs' pleadings, denied by the Defendants, states in effect.

That the Bank's judgment was obtained by collusion with the insolvent Tramway Co. by their solicitor voluntarily and by collusion with the Bank, then a creditor of that company, giving what the plaintiffs call a confession of judgment —with intent to defeat and delay the Plaintiffs herein—and to give the Bank a preference over the Plaintiffs and other creditors of the tramway company.

And that by reason of such so-called confession of judgment the Bank entered their judgment on the 24th January 1894 against the tramway company.

And so the Plaintiffs aver they have lost the benefit of their own prior judgment.

The Plaintiffs' claim substantially is to annul the Bank judgment and proceedings for the alleged violation of section 1, and to substitute themselves in the bank's place, as regards priority of judgment, and all its beneficial consequences, with the sale of the lands and appropriation of the proceeds to the payment of the Edison Company's own debt and costs.

From this it will be seen that the interest of the case centres in the construction of section 1, and whether the bank judgment under the circumstances under which it was obtained falls, or not, within the category of a judgment voluntarily and collusively obtained, with or without a confession of judgment, within the meaning of that section of the Act—

I now proceed to the discussion of the case—

The position the bank took up, briefly stated is this,—

They denied the collusion—or that the defendant company gave a confession of judgment voluntarily or by collusion, or with intent to defeat creditors, or to prefer the bank, or at all—

But on the contrary, maintained that the judgment was obtained by pressure; —and under circumstances, and a state of facts, which altogether precluded the construction which was now sought to be put upon them by the Plaintiffs but made the bank's judgment and all proceedings thereunder, good and valid in every respect;

What these facts and circumstances were to avoid repetition I propose to introduce and discuss in a subsequent portion of my judgment—

Now, before engaging in a discussion of the case, a few salient general points appear to call for observation.

The Edison Company, now Plaintiffs, complaining of the preference given to the bank against themselves, and all other creditors, as a sort of grievous injustice, and coming for equity, are now moving to get a preference for no other creditors but themselves—

It is not apparent in the proceedings, and in the present position of the property, with a *lis pendens* standing over it—what benefit they or any of the parties

are to derive from the preference now sought, the effect of which, if attained, would inevitably be to put an end to a convenient mode of conveyance, now kept up by the bank, between the two large neighbouring cities and especially adapted to the wants of their respective inhabitants, and effectually to prevent a prospect of the resuscitation of that Company and who knows?—the payment of their own debt and so bring nothing but additional loss to both parties.

But this is a matter for their own consideration.

It must also be remembered, as a rule of construction in considering the evidence, and the application to it of the law, suitable to this case, that this is not a proceeding under the Bankruptcy Act or the Absconding Debtors Act, to be judged under either of those statutes.

It is simply under the Fraudulent Preference Act which is a statute by itself.

Although this Act draws its analogies at times, especially in Ontario, during the gradual growth of the laws thereon, indeed, not only there, but in England, from the cases under the law of bankruptcy, and absconding debtors it specially does so with great reserve, and warns that fraudulent preferences under Chapter 51 are not to be governed either by bankruptcy or absconding debtor law, but the Fraudulent Preference Act itself. Mr. Justice A. Wilson points out this when he says in Gotwalls *v.* Mulholland 15 U. C.C.P. 66 *et seq.* "The cases upon this "subject are very numerous and not quite in accordance with each other (of "that we have an instance in this case) so that a very careful perusal of them is "necessary to discover what rule or principles can be said to be finally or satis-"factorily determined."

In England the cases have heretofore arisen and still continue to arise upon the 13 Eliz Ch 5, Sec 2, unless when the act of transfer or sale is contended to have been brought within the Bankruptcy Acts.

Both the Statutes Elizabeth and Chapter 51 expressly render void all transfers of property made "to the end purpose and intent to delay, hinder or "defraud creditors" making, therefore, the intent of the prohibited act or purpose.

Chapter 51 also prohibits every such transfer which is made with the intent of giving a preference to one creditor over the other.

The same learned Judge says—

"The multitude of cases bearing on this question is more calculated to "confuse the mind than to satisfy it" and this is spoken as far back as 1878—since which that branch of law has been in a transition and growing state, but always in the same direction.

The object which the learned Counsel for the Plaintiffs set before himself to establish was, that it being admitted that the Tramway Co. at the time of the transactions which gave rise to the case, was in insolvent circumstances.

Then that the Tramway Company had fulfilled the second branch of section 1, and voluntarily or collusively given to the Bank—with the intent to defeat or delay creditors a "confession of judgment" and incurred the penalty of the Act.

In effect he was driven to contend that an appearance of a party in Court in the ordinary way and assenting to a judgment was the evil aimed at by

RECORD.

No. 30. Judgment of Mr. Justice Crease, 11th Feb., 1895. —*continued.*

the Act under the words "confession of judgment" and that the English cases supported him, citing

Andrews *vs.* Deekes, 20 L. J. Ex. 127—a bankruptcy case under Geo. IV. ch. 16, sec. 108 which avoided a judgment obtained by default confession or *nihil dicit.*

The cases which the learned counsel advances in support of the principle he contends for are all, as I understand them, rather against than for his contention.

Young *vs.* Christie, 7 Grant 32.

McKenna *vs.* Smith, 10 Grant 40.

Labatt *v.* Bixell, 28 Grant 593.

The learned counsel asks me to take the view of the Act which Mr. Justice Armour wished to take had it been *res integra* namely, that if a debtor actively interfered to aid a plaintiff, his creditor, to recover a judgment against him, sooner than he could otherwise have recovered by due course of law and without such interference he (Mr. Justice Armour) should call that a confession of judgment.

In Labatt *vs.* Bixel this is how, as if by anticipation the Court (Chancellor Spragge) answers him.

The statute avoids a judgment, the recovery of which is frustrated by the debtor in order to gaining priority but not all such judgments—

There are several ways in which the recovery of a judgment may be facilitated by confession, *cognovit actionem*, or warrant of attorney, that is one class, by abstaining from making any defence in the one suit.

By entering an appearance and making no further defence. That is another class.

Only the first class in terms is prohibited—It might have been reasonable to have made a provision against one debtor preferring a creditor where two suits are pending against him—The statute did remedy one evil—It might have gone further, but it did not.

In this case the Defendant had actively interfered to aid the plaintiff creditor to obtain a judgment against himself sooner than he could have recovered it.

If the Courts go further in the same direction where the Legislature has stopped—what would it be but legislation?" And that is beyond the province of a Court.

So King and Duncan 29 Grant 113.

Davis *vs.* Wickson 1 O. R, 360.

A short notice of this latter case will serve as an illustration—

On the 4th November in a certain year Defendant commenced an action in the Common Pleas against Foster (the mutual debtor) the same day an appearance was entered and statement of claim and defence delivered, and an order made in Chambers by consent, striking out the defence, and allowing judgment to be entered, which was done, and writs placed in the Sheriff's hands—

In a subsequent action Davis obtained a judgment by default against Foster.

Chancellor Boyd's comment on this was, "I don't think the Plaintiff could at any time have successfully attacked this prior judgment."

Judicial decisions have thus limited the words of the Act "confession of judgment" *cognovit actionem* and warrant of attorney to confess judgment—strictly to the instruments technically known as such at the time of the passing of the Act—

Mr. Bodwell remarked in that case the judgment was not expedited by the debtor—

But in cases where it was, the construction of the Court as to the meaning of the instruments was the same.

Turning to the other branch of the case.

The learned counsel for the Plaintiffs—assuming that a judgment by confession were not void—He contended that a judgment obtained voluntarily or by collusion was void.

For this purpose he defined collusion as a secret fraudulent agreement and for the purpose of aiding his conclusion that collusion merely means a secret agreement by means of which a man obtains judgment—He omits fraudulent from his consideration as not applying to this statute, citing

White *vs.* Long 2 U. C. Com. Pl. 292 (a case under the Absconding Debtors' Act) before Draper, C.J. in support

and Meriden Silver Co *vs.* Lee 2 Ont. also under the Absconding Debtors' Act—before Chancellor Boyd.

The words of this Act, says the learned judge, import collusion with an evil mind to commit a moral wrong.

But this intent must have always reference to the Act then under discussion (the Absconding Debtors' Act).

Another contention of Plaintiffs' counsel was that the pressure used on Oppenheimer and the tramway company is not the pressure which would support the judgment.

It should be a pressure which made Oppenheimer do what he did. It should contain more of the element of violence—not physical or actual force, but certainly not the slim force actually applied to him. It should have been an overpowering of the will and the predominant motive—unmistakably not anger or irritation—to avenge himself for an alleged breach of faith—which the learned counsel considered he might rightly feel but actual pressure of a substantial kind which would compel him to do what he did.

Referring to Wodehouse *vs.* Murray L. R. 2 Q. B. (the only English case he quoted throughout as authority) he said that under the English Bankruptcy Laws a debtor might shew that it was not his real intention to commit a fraudulent act—an act of bankruptcy —when he is not conveying away the whole of his property.

That conveying a part of his property was not necessarily with intent to commit an act of bankruptcy, and defraud creditors, but it was otherwise if he conveyed away the whole of it.

Therefore, he considered the English cases never applied the doctrine of pressure. Then he contended the whole of the Tramway Company's property was conveyed. Under the debentures when fortified by the judgment thus obtained, were was nothing left for the other creditors, he contended there was nothing to show what influenced Oppenheimer's mind when told by Murray "I

RECORD.

No. 30. Judgment of Mr. Justice Crease, 11th Feb., 1895 —*continued.*

must have it," when Oppenheimer said nothing but went away, and ordered the solicitor to assent to the judgment.

The learned Counsel gave more weight to Oppenheimer's earlier evidence (that collected in his early examination as a judgment debtor) than his latest—at the trial.

He would not say that Oppenheimer did not give evidence according to his conscience—but it was impossible he should not colour his evidence with feelings of irritation.

Incensed (the learned Caunsel proceeded to say) at the action of the Edison Company—he had paid the money $1,236 as damages for the delay, in the belief that no judgment would be signed against his Company, was very angry when it was signed, and he could not be otherwise; meets Murray and jumps at the chance of injuring the Edison Company. The bank had been his friend and was still carrying him—why should he not give them their judgment if they wanted it?

In "*Q.* 352 No, they did not press me." "I did not place anything in their way."

So Counsel concludes he must be considered to have acted voluntarily.

"Murray made no threat." On this he observed the idea of the bank taking possession was no threat.

After all did this power exist?

(His comment on this point I omit, as there was no foundation whatever laid for it.)

Again as to collusion the learned counsel considered the visit of McColl and Oppenheimer to Ward with the object of delaying the Edison Company and to let the Bank have the first judgment as the result of their combined consultations as the inception of the transaction—and when the Edison Company failed the Tramway Company to place the Bank first. The rest that followed was merely the completion of the "scheme."

All these he construed as indicating a secret agreement to give the Bank first judgment.

The learned counsel then putting a very free interpretation on the actual evidence—propounds this theory that the Tramway Company go and deceive the Edison—another creditor—assuring them that no creditor was to be preferred secretly before them;—intending all the while to give a first judgment for the Bank.

Then comes Jenns with summons and a 10 days stay. On the 13th it is taken out. Finding they can't get in by default Jenns comes and slips in with the Bank judgment.

The learned counsel then on the authority of

10 L.J.N. S. Exch. 469. Baker *v.* Flower.

contended that as a consent is of no force unless the Judge gives an order. That the two taken together in this case might be construed (as the consent was in writing) as a confession of judgment within our Act.

Dealing with the presumed contention that this judgment was made under Order XIV. the learned counsel contended that this was impossible for Rules 454, and the consent to enter judgment by solicitors under Rule 455 are merely an

adaptation of an order of the Judges in Exchequer of Pleas—only for the Judge's own guidance, not for practitioners.

15 L.J. 284. Dixon *v.* Leyden.

This he contended is not under Order XIV., but consent having been filed, the Judge has jurisdiction to enter judgment. In his view (he continued) he has a confession of judgment different from a *cognovit actionem*, yet one which falls within the B.C. Act. Defendant he contended expedited the action of the law—and therefore, said the learned Counsel (concluding an address in which he faced the facts and the law), *a fortiori* there is collusion here.

Mr. Davis, Q.C., for the defence adopted a line of argument which may be classified under two heads.

1st Pressure.

(a) Is there pressure in this case ?

(b) If so, is it a good defence in law to section 1 Chapter 51, the Fraudulent Preference Act.

2nd—Do the proceedings constitute a confession of judgment within section 1 Chapter 51 ?

The answer which Mr. Davis gives to the sub-head (a) brings to the front the circumstances and state of facts, "to which in an earlier part of my judgment I referred—purporting to show that the bank judgment was obtained by legitimate pressure.

Now whether there was, or was not, pressure, is a question of fact on which the Judge, sitting as a Jury, is called upon to find.

Now what were these facts?

In the latter part of 1893 and early in 1894 the bank had advanced to the Tramway Company 260,000 dols.

The Edison Company 60,000 dols.

Away back in November, 1893, a writ was issued against the Tramway Company on the part of the Edison Company.

Then comes the evidence of Mr. McColl of what took place then.

Reviewing the evidence of McColl we see how the bank stood with the Tramway Company.

The bank had the Tramway Company in their hand.

It lay with them to let the Tramway Company go on—negotiate the bonds successfully and pay off all the debts of the company.

Jenns expected to pay off all the creditors in full and have a running concern left.

It lay with the bank to put it beyond any possibility of pulling through a financial crisis such as does not occur in North America in 100 years.

It appears from McColl's evidence—though Mr. Bodwell did not gather the same idea of the position of the bank as Mr. Davis does—it was stated beyond all question in evidence that McColl and Oppenheimer approached Mr. W. C. Ward on their own motion on the 30th November, 1893.

Plaintiff's Counsel made a strong point of the fact that later in the year, Oppenheimer was incensed and glad to give the bank the opportunity of getting in first, and gave a most touching description of Oppenheimer's exasperation at the Edison Company signing judgment first.

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No. 30. Judgment of Mr. Justice Crease, 11th Feb., 1895 —*continued.*

Unfortunately for the learned Counsel's description this irritation did not exist on the 30th November.

Then it is asked, why the tramway approach *mero metu* to ask Mr. Ward what they did.

Mr. Davis could not think that Mr. Bodwell could draw the presumption he did and attempt to support it in the face of the evidence of Mr. Ward, Wyld, Murray and others.

No question of veracity was raised. No shadow of doubt had been advanced as to the veracity of the different witnesses.

And with reference to Oppenheimer, Counsel has not insinuated that Oppenheimer said anything that conflicted with the other witnesses, or even with himself.

On the 30th November the evidence is that McColl understood that the bank would take proceedings against the Tramway Company unless arrangements were made that the Edison Company would not get ahead of them.

But for that they might have gone *mero motu* to the bank?

They had other business to attend to. When they had finished that they broached the subject of the prior judgment in the bank.

It was understood by the tramway company—it does not appear how—but presumably by officials—that proceedings would be taken unless the money was paid.

McColl broached the subject, especially knowing the facts.

They knew that certain proceedings would be taken, if not settled beforehand.

McColl's opinion was that the bank would have had judgment under Order XIV.

On the faith of these representations he obtained a stay of judgment from the bank.

The evidence runs on that, contrary to the expectation of the tramway people on the 29th November, they learn, that judgment had been signed by the Edison Company as to the how or why—Mr. Davis did not explain; but contented himself with saying—contrary to what was expected contrary to what the tramway company alleges was right. I am mistaken if Oppenheimer did not say "agreed."

Thereupon the tramway company sought to set aside that judgment.

It was at this stage of the evidence that Mr. Davis considered his learned friend stretched the evidence when he had said "consider the facts—They knew of the judgment"—evidently by inuendo, to give the impression that he (his learned friend) thought that the bank were at the bottom of the above proceedings.

And this in the face of the sworn evidence which proves that Marshall did not even know that a stay of proceedings was to be obtained.

"To arrive at his learned friend's conclusion" (Mr. Davis said) "the Judge must disbelieve the direct evidence of Jenns, Marshall, and the solicitor of the Bank."

There was another reason advanced by Plaintiffs' Counsel in a later portion of his address—which Mr. Davis wished to set right, and this by an argument outside of the evidence. He did not suppose that his learned friend, however

little he might think of the evidence of the witnesses, would accuse the solicitors of absolute want of common sense—which would have been the case, if the bank had been, or been advised to be parties to setting aside that judgment.

But to return to the facts and circumstances of the case.

On the Tramway Company's application of the 13th January a stay of proceedings for 10 days was obtained.

Now a judgment by default could be obtained in 8 days.

By a writ of summons on the same day, judgment could have been obtained 2 days before the Tramway Company or the Edison Company, or anyone else could prevent it.

In all these cases Mr. Davis said he would prefer the evidence of common sense to any other possibly erroneous evidence.

As to what happened next, from the evidence of Ward and Murray we came to this conclusion.

Ward was in Vancouver about the middle of January, probably a day or two before the writ was issued, learned of the Edison judgment—he arranged with the bank's solicitors, and gave instructions forthwith to issue a writ.

Therefore Ward probably heard of the judgment on the 15th not later.

The matter was so important that no steps were taken until he arrived, when he instructed the bank's solicitors and saw Oppenheimer and Murray told Oppenheimer.

What he said was not vulgar as ordinary threats. Plaintiff's counsel argues unless particular power were used against Oppenheimer there could be no pressure.

Such a violent course quite unnecessary.

Murray said to Oppenheimer "You must allow the Bank to get ahead of the Edison Company."

That was quite enough. That sufficiently impressed them.

He understood perfectly what the power of the Bank over them was, and what would follow a refusal.

Plaintiff's counsel stated that "Really after all there was not anything the Bank could do which could affect them."

McColl in his evidence showed half a dozen ways in which the Bank could effect the ruin of the company.

First, stop supplies; what would be the effect?

The country is in depression. No one thought that they could last longer. They were struggling as if for life. Meantime they were busy preserving an honest name and giving the company the prospect of a small fortune.

Secondly, by foreclosure—or other ways, and the company was gone.

Next as to the Oppenheimer questions and answers.

Plaintiffs say they show clearly there could not have been any pressure.

What does he make of Oppenheimer's answer when asked the real reason why he acceded to the views of the Bank?

"Because the company wanted time to turn them into a prosperous instead of a bankrupt company—and to get dividends instead of contributories."

This counsel considered the most awful position a man could be placed in.

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No. 30.
Judgment of Mr. Justice Crease, 11th Feb., 1895
—*continued.*

As to 352 "The Bank did not ask me at all." Plaintiffs' counsel candidly said Oppenheimer stated the truth.

If parts of his evidence should seem contradictory it is not right to say the statement is wrong, if they, as here, are reconcilable—if there be difference—if part appears untrue and the rest true.

His "No" must be true—if "Yes" would have been a falsehood.

The fact is all spoke the truth. There was no need for vulgar threatening.

Oppenheimer says I don't think the Edison Company treated me properly.

It does not follow because they disliked or were angry with the company that they wished to set aside the judgment.

The answer is true, when asked.

Q. You wished the bank should be secured first? *A.* Not particularly.

The tramway Company did not care if the Edison Company or the bank were first.

These were entrapping questions for a man who did not know English law.

Q. Had you any reason for the bank coming in first? *A.* No particular reason. The mortgage covered everything. It was as good as a judgment. It was no difference if the bank got in first "except perhaps in avoiding a possible litigation of five years."

Another answer "I did not put anything in their way." The learned Counsel's comment was "foolish if he had." But the answer implied this, that he did not act of his own notion, came forward and give the Bank the first judgment.

Defendant's Counsel observed that when Plaintiff's Counsel cited a case he turned round and apologised, as instance when quoting the judgment of Mr. Justice Street.

Referring to Wodehouse *vs.* Murray 2 Q. B. especially 638 and 639.

In considering the case it is necessary to consider the statute. Being insolvent at the time of the conveyance he (Defendant) was within the Bankruptcy Act at that time.

That is what the Court proceeded upon (*vide* Baron Park's judgment as to an act of bankruptcy without actual fraud), when the trader gets an equivalent the question would not be an actual fraudulent preference, as the creditors at large could have interfered and taken their property.

3 Chancery Appeals—as to *ex parte* Forcelar.

In that case, the bill of sale was not required—more, there was no question of pressure. There, pressure was not in point at all.

The learned counsel for the Defendants argued that the rule in the Ontario cases is the same.

As to what was conveyed away by the judgment.

The evidence showed as far as the judgment went it covered nothing. The assignment after the arrangement of the bank getting ahead—dated the 22nd—was not signed for a week after that.

Also at the time the judgment was signed, the agreement for the remainder of the uncalled capital a substantial offset was not made—only 4 or 5 days later.

As to the effect of the judgment—Plaintiffs' counsel stated if the bank got a judgment—it would have the effect of winding up the company.

As to the mortgage the bank took possession long ago.

It is not shewn the company is wound up.

It is right to say the company is not wound up.

This argument the learned counsel when speaking on the point compared to "whipping the bank over the shoulders of the tramway company."

The learned counsel for the Defendant stated that the Edison Company had a judgment against the tramway company on 29th December 1893.

There was no stay of execution.

For 15 days they could have had execution—had and registered execution.

And they did not do so.

If the Edison Company is behind the bank, it is by the act of the Edison Company themselves, not by any action taken by the bank or the tramway company.

As to an arrangement with McColl a secret agreement made in breach of faith, and of an undertaking with the Edison Company.

If the pressure from the bank induced him to break an agreement—then that of itself showed how great that pressure must have been.

The evidence showed that the agreement could not have been entered into without the previous sanction of the bank.

The bank on the 13th November 1893 was in a position to get a first judgment.

That relative position it considered should be maintained.

That bank judgment was obtained after the Edison Company broke their agreement with the tramway company and relieved them from any previous obligation—Assuming pressure.

Is pressure a good defence?

Plaintiffs' contention is—that it is not.

To constitute that it is necessary to go back to the first statute as to fraudulent preferences.

There are only two in British Columbia and here it must be borne in mind in considering the cases. At common law where any other deed can be set aside, so can fraudulent preferences be set aside.

Chapter V., sections 1 and 2 of 13 Eliz. sets out—avoiding fraudulent preferences—to hinder, delay or defraud creditors overthrows confidence &c.

Enacting that every bargain and conveyance &c., bond, suit, judgment, execution—to or for intent or purpose to delay or defraud, declared or express, &c., shall be void.

Now Mr. Bodwell did not cite one case absolutely binding on this court—none from the Supreme Court of Canada or the House of Lords in England.

The only difference between the provincial statute and the statute of Elizabeth is,

That our statute makes such a judgment applicable also to cases of attempt to prefer one creditor over another—by a preferential judgment.

In arguing the case the learned counsel for the defendants contended that if such a judgment was only with intent to defeat creditors plaintiffs would have had no footing under the B—C—Act—

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No. 30.
Judgment of Mr. Justice Crease, 11th Feb., 1895 —*continued.*

One of the cases cited was, The Molson's Bank *vs* Halter, 18 S C R

Patterson, J— dissenting (but not on the point defendants' counsel referred to)

The Ontario Act 1887—under which the judgment is made is not called in question in this case as it goes further than the B—C—Act for it adds the words at the end of the clause "or has such effect"—words which at first caused much diversity of opinion among Canadian judges.

15 U C C P 62, Gottwall *v* Mulholland was cited. From this we extract that we can rely on English cases (under the statute of Elizabeth)—except as to fraudulent preference.

In the Canadian cases we have to look out for the meaning of "intent to prefer."

Under the English cases it must be a colourable transaction.

If a *bona fide* transaction it is not avoidable at all.

4 Ch—App—Alton *v* Harrison.

This was to set aside a deed executed by a man when he knew a writ of sequestration would be issued against him.

There the deed being executed *bona fide*—that is not a mere cloak for retaining a benefit to the grantor—it was a good deed under the statute Elizabeth.

There Lord Justice Giffard then said. The object of the Bankruptcy Act and the statute of Elizabeth are quite different. The bankruptcy laws are for the purpose of obtaining an equal distribution of assets. The statute of Elizabeth had no such object.

The Canadian Statute has added to the Statute of Elizabeth the words "intent to prefer"—we have therefore to gather from the authorities the meaning of "intent to prefer."

The 21 Ont 431 Davies *vs.* Gillard (Judgment June 1892) has been cited in support of the Plaintiffs' contention.

The reason given by the Judges of the Divisional Court, (Street, J. and Falconbridge J.) were that admitting the binding authority of the then recent Canadian decision of Gibbon *vs.* Macdonald 18 Ont A R 159 and Molson's Bank *vs.* Halter 18 S C R 88, on which Chief Justice Armour based his decision—that there was no honest pressure it was merely a sham.

But on appeal by the Defendant to the Full Court—reported in 19 Ontario Appeal Reports—Hagarty C J—presiding in a short judgment the appeal was unanimously allowed with costs,—the Court holding that on the finding of the Chief Justice as to pressure, the transaction ought not to be set aside, and that it was immaterial that the conveyance was of the whole of the debtor's property.

In 12 S C R. Long *vs.* Hancock 532—the doctrine of pressure was not then fully evolved.

It was not a case of preference, if the intent of the debtor was not merely an intent to give preference over the other—but some other intention—any other intention than the intention to prefer.

The question was;—What was the controlling intention? The doctrine of pressure was then being gradually evolved.

In discussing this case the learned counsel for the Defendants referring to

the appeal in Long *vs.* Hancock considered it as exactly in point with the case of the Tramway Company. The question in the present case to ask was Did the Company *bona fide* believe that if they could get time they would be able to pay off all the creditors?

That the learned counsel advanced as the controlling reason why they acceded to the demand of the bank—and that whether considered as under pressure, or that they could pull through.

From 20 S.C.R. 587 Gibbon *vs.* Macdonald—a decision which followed the previously settled decisions—it appeared that if given under *bona fide* pressure for a *bona fide* debt it was good. This was decided by all the 5 judges except Ritchie, and follows the English cases under the Bankruptcy Act.

It may here be noted that in the Molson case 18 S.C.R. 1890, already cited, Mr. Justice Strong, after commenting on the English cases, 18 Ch. D. 83 and 19 Q.B.D. 295 which he considers precisely in point, adds—There is still another reason why even in the absence of those English cases I should, on a different ground, have come to the same conclusion, as Lord Cairns in (7 H.L. 839) Butcher *vs.* Stead, has laid it down the word "preference" imports "a voluntary preference" that is to say "a spontaneous act of the debtor."

Patterson, J.—dissented chiefly on the ground that the words in the Canadian Act—"or which have that effect" (words which are not found in our B.C. Act) related back to both branches of the section and therefore does not affect the present case.

Gwynne, J. (pp. 97, 98, 99, 102) in his judgment gave as his opinion that a conveyance such as the one in question by a defaulting trustee to make good a fund to a *cestui que trust*, which had been misappropriated by him in breach of his trust, and made him liable to a criminal prosecution was pressure enough to sustain the validity of the deed.

In 10 S.C.R. Stephens *vs.* MacArthur (under the Manitoba Act) held (Patterson J. dissenting). It was settled that preference means a voluntary preference without pressure. Also that mere demand by a creditor without a threat of legal proceedings is sufficient to rebut the presumption of preference.

Strong J. followed the English cases and also as to what constitutes "pressure."

I next come to a consideration of the English cases which relate to fraudulent preference.

Here we have to deal with the Statute Elizabeth, combined with section 92 of Bankruptcy Act of 1869 and of 1863, sec. 92 of 1869.

Section 92 is the Provincial Act. It runs "Every conveyance and every "judicial proceeding in favour of a creditor with a view of giving a preference is "void."

Section 92 leaves out "voluntarily"—or by collusion.

19 Ch D 580—the first case on section 92—*ex parte* Hall, In *re* Cooper—as this was the strongest case against the Defendants. On this counsel met the Plaintiffs. The circumstances were, as follows,—

On the 19th February Cooper who was about to become bankrupt informed a creditor, Hall, of it—gave Hall Bills of Exchange for his debt upon a threat of instant proceedings.

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No. 30. Judgment of Mr. Justice Crease, 11th Feb., 1895 —*continued.*

On the 24th was made bankrupt. Now looking at the facts and what the judges decided, we find, Jessel M. R. said—The threats of instant proceedings by a man who knew all his affairs to a man about to become bankrupt could have no influence on him. (The Bank of B. C. were not in the same position.)

Jessel, M. R. "The preference must be a real *bona fide* pressure—Here all was a sham."

In this case therefore the test is—Is the creditor in a position to do damage—a *bona fide* real pressure?

There it was mere sham and amounted to nothing.

Not so here with the bank, for it was in their power at any moment to ruin the tramway company.

17 Ch Div p 58 *ex parte* Stubbins—was a case very much like the Molson's Bank case. A debtor on the eve of bankruptcy makes good a deficiency caused by his applying money to his own use. That was held—not a fraudulent preference—

In 8 Ch. App. 614—*ex parte* Copham—decided on Sec. 92 Bankruptcy Act 1869—V. C. Bacon said "The preference must be entirely voluntarily."

It was the life and essence of the enactment. The debtor's sole motive to prefer. The act of the debtor alone is to be considered. That Defendant's counsel contended is a perfectly accurate description of the state of the present case.

(The law of fraudulent preference was not altered by the Act.)

In 18 Q. B. D. *ex parte* Taylor 295—it was decided by the English Court of Appeal (Lord Esher, Lindley L. J. and Lopes) on a transfer within three months of bankruptcy—to hold water when given as a preference, the real or dominant motive must be to save from criminal prosecution. That was the real motive—therefore was not a fraudulent preference.

Lindley L. J. in an Act "intent" implies stronger word than the words "with a view."

To prevent exposure was the sole motive of preference. The predominant motive (p. 297) "with a view" the same as "with the intent." Both mean the same thing.

11 Ch. D. 306—*ex parte* Kelly—follows on the same lines.

6 Ch. App. 70 was a case which is on all fours with the present case as to arrangement of 30th November 1893, and section 92.

A conveyance in pursuance of an agreement previously made with the bankrupt—got within three months—which is the same thing.

The preference must be the spontaneous act of the debtor.

If he was actuated by a mixed motive—this case goes to show (it was never over-ruled) the enquiry should be which of them predominates. I can find no case which goes to say pressure must be the sole motive—indeed there are motives more or less mixed in every human act. The question is which is the predominant motive?

L R—I P C Cases 348, Murne *vs.* Carter—gives a definition of fraudulent preference within the Bankruptcy Act—Disregarding the head-note—that is the test in the present case—A bankrupt debtor *ex mere motu* makes a conveyance to his creditor without pressure or demand—.

Other cases may be cited such as,

Moores P C Cases Vol. 15, p. 97, Bank of Australasia *vs.* Harris, Lord Justice Knight Bruce's judgment on the New South Wales Insolvent Act 1861 5 Vic. No. 17—Sec. 8—is a strong case—

There must not only be a preference but a fraudulent preference; and fraudulent preference is settled by the Bankruptcy Act—

Butcher *vs.* Stead L R 7 H L 846 (cited in the Molson Supreme Court case by Strong J).

Lord Cairns on the words "voluntarily" or "by collusion" says—Immaterial as added to each of those with a certain intent—Defendants' counsel claims they have a good defence with those words left out—

White *vs.* Lord, cited by the Plaintiffs' Counsel was a case under the Absconding Debtors Act—This Act does not apply to the present case or cases under the B C Act.

In support of this view the learned Counsel for the Defendants cited during his argument—

1 Law Times 122, where in a case of collusive judgment R—S—O—1887, Vol. 1, Chapter 118—it was held that cases under the Absconding Debtors' Act do not apply to R S O 1887, Chapter 118—

Therefore White *vs.* Lord does not apply to the present case.

As to 2 Ont, R p. 455, Meriden Silver Co. *vs.* Lee the learned Counsel says —"That does not bear out Mr. Bodwell's contention."

Chancellor Boyd said : "No part of the creditors claim was due and payable "—the first of the number of bills was not due and payable until 3 days after "the date of the confession, and one day after judgment was signed thereon." There the case shows they were hopelessly insolvent—Here counsel says—The Tramway Company expected to be reconstructed and to pay off or satisfy all creditors.

Chancellor Boyd speaks of collusion as a secret agreement for a fraudulent preference, *i.e.*, a fraudulent purpose under the Bankruptcy Act and refers to *Ex parte* Hall to bear out his decision—characterising the agreement there as the voluntary act of the bankrupt. Commenting on 8 Ont. App. Martin *v.* McAlpine (1883) though not over-ruled, the law is since altered by a long list of authorities and by some means or other has escaped citation among other Canadian authorities on the same point. It is practically over-ruled—the balance of the authorities on that point over bears it—

41 Ont. App. Brailey *v.* Ellis 1884—shows that the law was unsettled at that time— The doctrine of fraudulent preference was in its infancy—

Mr. Davis argued, that the intent to delay only refers to colourable conveyances and called this Martin case a case in his favour—

Although it is a case never referred to (p. 677) as to intent— There, there was a mutual advantage— "We (the learned counsel said) the bank proposed no "advantage to Oppenheimer the debtor. He may have thought it would be an "advantage but we never suggested a word of that to him—"

The Supreme Court of Canada, the House of Lords and the Privy Council all declared that a judgment given under pressure is good—

So that the Martin judgment has lost all weight in this case.

Judgment of Mr. Justice Crease, 11th Feb., 1895 —*continued.*

Moreover, in this case none of the English cases already reviewed were ., only Brown *vs.* Tanna—

If it can't be distinguished from the cases already cited then this Martin case ..es its authority—

Five years later it would have been differently decided.

Next.

Is this judgment a judgment within the Statute?

On this Plaintiffs' Counsel says the Ontario cases have all gone wrong—Citing,

10 Grant 40, McKenna *vs* Smith.

28 Grant, Labatt *vs* Bixel. Thinks,

28 Grant 113, Wilson *vs* Kyle

But Plaintiffs' Counsel did not cite 29 Grant 278 Hayman *v* Seale.

This was a stronger case.

There they filed a *relicta verificatione* which is equivalent to a confession of judgment.

McKeny *vs* Watt.

1. Ont. 369, Davis *v* Wickson *et al*—a case of fraudulent preference.

Chancellor Boyd's decision and language on this case is followed and approved.

I have gone through all the evidence, the authorities and the arguments of Counsel with a close analysis and care suited to the importance of the subject, and the interests involved, and have also had the advantage of studying the demeanour of the witnesses.

They were all gentlemen of unquestioned honour and veracity and though there was occasional weakness in the evidence of Oppenheimer arising from a double difficulty that of not understanding English legal questions and natural inability to make the idiom in which he gave his answers easily understood by his hearers, he gave his testimony in all material matters in such a clear and substantial manner as to convince me as a jury that he was an intelligent witness of the truth.

It was stated in the argument of Plaintiffs' Counsel that the summons to set aside judgment and obtain a stay of proceedings was simply a continuation of a scheme—it was all a scheme got up between all the Defendants.

But this is contradicted by the evidence of Ward, Wyld, Jenns, Oppenheimer and Marshall, who all say positively in positive language that the pressure was exercised and the bank and its officers and solicitors knew nothing of such a stay of proceedings as was made here until after it had been made. After such conclusive testimony there is nothing more to be said.

After a full and impartial consideration of the facts and law of the matter, I have come to the following conclusions—

1. I find from the evidence that *bonâ fide* pressure was exercised by the Bank of British Columbia on the tramway company and that the consent of the company to the proceedings of the bank throughout this case was by reason of that pressure.

2. I also find that pressure, *bonâ fide* pressure, is a good defence in law to section (one) 1, chapter 51, the Fraudulent Preference Act, B.C. Consolidated Statutes 1888.

3. I also find that the proceedings taken by the bank to secure their judgment do not constitute a confession of judgment within section 1, chapter 51.

No. 30.
Judgment of Mr. Justice Crease, 11th Feb., 1895 —*continued.*

4. I also find—although it is a branch of my first finding—that the judgment obtained by the bank from the debtor was neither collusive, nor voluntary, nor a fraudulent preference within section 1, chapter 51.

And I give judgment generally, in favor of the Defendants, but inasmuch as I am not clear that the question which has come up in its present shape, is not somewhat new in our B. C. Courts—I reserve the question of costs—so also the costs of the non-suit which I declared during the trial.

"HENRY P. PELLEW CREASE J."

Dated 11th February 1895 Victoria.

No. 31.
Decree dismissing action, 7th March, 1895.

E. No. 45/94.

In the Supreme Court of British Columbia.

Between

Edison General Electric Company . . . . . *Plaintiffs*

and

Westminster and Vancouver Tramway Company Bank of British Columbia, David Oppenheimer and Benjamin Douglas . . . . . *Defendants.*

The 7th day of March 1895.

This action having on the 5th, 6th, 7th, 8th days of December 1894 been tried before Mr. Justice Crease in the presence of counsel for the Plaintiffs and the Defendants, and the said Mr. Justice Crease on the 11th day of February 1895 having ordered that judgment be entered for the Defendants and that the question of costs be reserved, and the said Mr. Justice Crease on the 27th day of February 1895 having ordered that the Plaintiffs do pay to the Defendants the Bank of British Columbia their costs to be taxed.

Therefore it is adjudged that this action do stand dismissed out of this Court, and that the Defendants the Bank of British Columbia recover against the Plaintiffs their costs of defence to be taxed.

By the Court

Sgd. A. E. BECK,
District Registrar.

Vancouver
Mar. 7 1895
Registry.

Amended 21st March, 1895, pursuant to order dated 20th day of March, 1895.

Vancouver
March 21st 1895
Registry.

The above costs of the Defendants Bank of British Columbia have been taxed and allowed at the sum of $ as appears by the taxing officer's certificate dated the day of A.D. 1895.

D. R. S. C.

RECORD.

No. 32.
Notice of Appeal, 11th April, 1895

Notice of Appeal.

Take notice that this Honourable Court will be moved on Monday the 8th day of July 1895, at the court house in the city of Victoria at the hour of eleven o'clock in the forenoon or so soon thereafter as counsel can be heard by counsel for the above named Plaintiffs on their behalf that the judgment of the Supreme Court of British Columbia delivered herein by the Honourable Mr. Justice Crease on the 11th day of February A.D. 1895 may be reversed and that judgment be ordered to be entered for the Plaintiffs as prayed for in the statement of claim or that a new trial be ordered to be had between the parties and that the costs of this appeal and the costs in the court below be ordered to be paid to the Plaintiffs by the Defendants as to the court shall seem meet on the following among other grounds,—

1. The judgment of the learned judge is against the evidence and against the weight of evidence.

2. The evidence showed that the judgment of the Bank of British Columbia against the Westminster and Vancouver Tramway Company was obtained by an agreement between the said Defendant the Bank of British Columbia and the Defendant the Westminster and Vancouver Tramway Company to assist the Defendant the Bank of British Columbia to obtain their said judgment prior to that of the Plaintiffs and with intent to give the said Bank of British Columbia a preference over the Plaintiffs who were at that time and still are creditors of the Westminster and Vancouver Tramway Company and the learned judge should therefore have declared that the said judgment of the Bank of British Columbia against the Westminster and Vancouver Tramway Company so obtained was a judgment obtained by collusion within the meaning of chapter 51 of the Consolidated Statutes of British Columbia intituled "An Act Respecting the Fraudulent Preference of Creditors by Persons in Insolvent Circumstances," and should have declared the said judgment null and void and should have ordered the same to be set aside and vacated.

3. The learned judge should have found that in case of a judgment obtained by collusion the intent to prefer is conclusively established by the fact of collusion.

4. In order to uphold the transaction between the Defendants the Bank of British Columbia and the Defendants the Westminster and Vancouver Tramway Company which resulted in the said judgment being obtained it must be shown that the Defendants the Westminster and Vancouver Tramway Company were compelled against their will to enter into the said agreement to prefer the Defendants the Bank of British Columbia.

5. The onus of proving the said pressure was upon the Defendants the Bank of British Columbia, and having regard to the ordinary rules of evidence the said fact of pressure was not established for the following reasons:—

(a.) It was not proved that the Defendants the Bank of British Columbia were in a position to influence the directors of the Westminster and Vancouver Tramway Company by any action they might take in the premises.

(b.) If such influence existed as a possibility there was no evidence of its having been exercised.

(c.) The evidence of the witness Oppenheimer shows that the dominant

No. 32.
Notice of Appeal, 11th April, 1895
—*continued.*

influence on his mind was to prefer the Defendants the Bank of British Columbia and the learned judge was in error in holding that the transaction was brought about by pressure upon the slight evidence which was given of the existence of power to coerce which was not exercised, and the learned judge should have declared the said judgment of the Bank of British Columbia against the Westminster and Vancouver Tramway Company null and void and should have ordered the same to be set aside and vacated and judgment to be entered for the Plaintiffs.

6. The learned judge erred in holding that the proceedings taken by the Bank of British Columbia to obtain their said judgment did not constitute a confession of judgment within the meaning of chapter 51 of the Consolidated Statutes of British Columbia intituled "An Act respecting the Fraudulent Preference of "Creditors by Persons in Insolvent Circumstances," and the said judgment should have been set aside as null and void.

7. The judgment of the Bank of British Columbia against the Westminster and Vancouver Tramway Company is not a judgment under Order XIV. of the Supreme Court Rules 1890 but is a judgment by consent under Order XLI. Rules 7 and 8 of the Supreme Court Rules 1890 and the judgment referred to in the last mentioned rules is a confession of judgment within the meaning of chapter 51 of the Consolidated Statutes of British Columbia intituled "An Act "Respecting the Fraudulent Preference of Creditors by Persons in Insolvent "Circumstances."

8. The learned judge should have ordered the judgment of the Bank of British Columbia against the Westminster and Vancouver Tramway Company to be set aside on the ground that the judge's order on which the said judgment was obtained together with an affidavit of the time of such consent being given had not been filed within twenty-one days after such order had been made pursuant to the provisions of the imperial statute 12 and 13 Victoria chapter 106 section 137 and the learned judge should have directed judgment to be entered for the Plaintiffs.

And upon other grounds.

Dated this 11th day of April A.D. 1895.

A. WILLIAMS
Solicitor for Plaintiffs.

No. 33.
Materials used on application of Jan. 24th, 1894, read on Appeal, by direction of Court of Appeal.

In the Supreme Court of British Columbia.

In Chambers.

Between

The Edison General Electric Company Limited . . . *Plaintiffs,*

and

The Westminster and Vancouver Tramway Company Limited *Defendants.*

Let all the parties attend the Judge in Chambers at the Court house, Vancouver, on Tuesday the 23rd day of January A.D. 1894 at 10.30 o'clock in the forenoon, on the hearing of an application on the part of the Defendants to have the judgment entered by the Plaintiffs herein on the 20th day of December

RECORD.

No. 33. Materials used on application of Jan. 24th, 1894, read on Appeal, by direction of Court of Appeal —*continued.*

A.D. 1893 set aside upon the following among other grounds.

1. That it was entered in breach of faith.
2. That it is vexatious.
3. That it was entered in breach of agreement.
4. Or in the alternative the Defendants have a good defence upon the merits on grounds disclosed in the affidavits.

The affidavits of E. A. Jenns, D. Oppenheimer and P. Smith filed herein will be read.

In the meantime let all proceedings be stayed.

By special leave.

"GEO. A. WALKEM."

Dated the 13th day of January 1894.

This summons was taken out by E. A. Jenns, of 40 Lorne Street New Westminster, E.C., solicitor for the above named Defendants.

To, A. WILLIAMS, Esq.,
Solicitor for the above named Plaintiffs.

In the Supreme Court of British Columbia.

Between

The Edison General Electric Company . . . . . *Plaintiffs,*

and

The Westminster and Vancouver Tramway Company Limited *Defendants.*

I, Eustace Alvanley Jenns of the City of New Westminster solicitor make oath and say,—

1. I am the solicitor for the Westminster and Vancouver Tramway Company, Limited, the Defendants herein.

2. On the 23rd of October last, a writ of summons out of this Honorable Court was issued by Messrs. McPhillips & Williams at the suit of the North West General Electric Company against the said Defendants endorsed with a claim upon several promissory notes and the interest thereon alleged to be made by the Defendants in favor of the above named Plaintiffs and by them endorsed to the North West General Electric Company, and upon a certain open account alleged to be due from the above named Defendants to the above named Plaintiffs and by them assigned to the said North West General Electric Company, the total amount of such claim being $19,925.77.

3. On or about the 29th day of October Mr. A. J. McColl and myself were instructed to attend Mr. McPhillips and arrange a settlement of the action, as the said Defendants had a large claim for damages against the Edison General Electric Company for the non-delivery of certain baggage cars and for defective armatures and other breaches of contract which claim, as I am informed by P. N. Smith the secretary of the said company and verily believe amounts to $5,000.00 and upwards.

4. On or about the 31st day of October last Mr. McColl attended Mr. McPhillips and reported to the directors of the company that he had effected a settlement. Some dispute however having arisen as to its exact terms on the

No. 33. Materials used on application of Jan. 24th, 1894, read on Appeal, by direction of Court of Appeal —*continued.*

22nd day of November A.D. 1893 I telephoned Mr. McPhillips personally when he stated that if the said Defendants would pay in cash $1,625 supply him with a statement of their affairs and relinquish any claim they might have for damages and if I would give a personal undertaking to inform him of any proceedings, if any should be taken, that would endanger his clients' claim, in time for him to enter up judgment and keep himself in the same position as he there was, he would stay the action. No definite time was fixed but it was tacitly understood to be until the following spring or until certain negotiations then pending in England should come to a close or for a reasonable time. In any event no further proceedings were to be taken without my being notified. These conditions I reported to the directors and they agreed to them on the distinct understanding that no judgment was to be signed or other proceedings taken without due notice.

5. Such undertaking as mentioned was given by me and the $1,625.00 paid, as I am informed by the said secretary to the Defendant company and verily believe, also a statement of the Defendant Company's affairs was furnished, but up to the 27th day of November A.D. 1893 the said resolution relinquishing the claim to damages had not been passed.

6. On the said 27th day of November A.D. 1893 Messrs. McPhillips & Williams issued out of this Honourable Court a writ at the instance of the above-named Plaintiffs for the same cause of action save that the sum of $1,625.00 paid was omitted, against the above-named Defendants and the said writ was served the same day.

7. On the 29th day of November at an extraordinary general meeting of the Defendant Company a resolution approving of the settlement and relinquishing in consideration of such settlement any claim of the said Company might have for damages against the said Edison General Electric Company, a true copy of which resolution is hereunto annexed and marked " A."

8. I am informed by D. Oppenheimer the President of the Defendant Company and verily believe that on the second day of December, he together with Mr. Smith the secretary, called upon Mr. McPhillips with the resolution sealed but not signed and asked whether on giving him such resolution, the action would be stayed and no further proceedings taken without notice, or words to that effect, to which Mr. McPhillips assented, but demanded a sum to cover the costs of the second suit in addition to $75.00 already agreed on. This was not acceded to and he accepted the $75.00 in full whereupon Mr. Oppenheimer signed the resolution and handed it to him.

9. Judgment was nevertheless on the * day of A.D. 189 signed without any notice to the said company or to me as their solicitor either, first that any further step was to be taken, or secondly that the time agreed on for delay had elapsed or would expire at any set time.

* *Sic.*

10. On the 5th day of January A.D. 1894 I telephoned Mr. Mc.Phillips, having then first heard that judgment had been signed and expostulated with him to which he replied that he had got an advantage and intended to keep it.

11. On the 10th day of January A.D. 1894 I again telephoned Mr. McPhillips and recapitulated our agreement of the 22nd November last and pointing out that the signing of judgment without notice was a distinct breach of faith with both the Defendant Company and myself; as they had only agreed to his terms

RECORD.

No. 33. Materials used on application of Jan. 24th, 1894, read on Appeal, by direction of Court of Appeal —*continued.*

on the express understanding that judgment should not be signed. To this he replied that it would have been a breach of faith if they had carried out the arrangement effected by me, but alleged that they had refused to do so but had come to a subsequent and different arrangement under which he had acted. I asked by whom and when such different arrangements had been made and he informed me that he could not remember by whom but that it was made on or about the 7th day of December last.

12. I am solicitor for the Defendant company and as such solicitor would in the ordinary course of events know of any change in the arrangement being made, or a new arrangement being come to, but I know of no such new or changed agreement. I have inquired of the Defendant company's secretary and of its president and they both inform me and I verily believe that no other agreement or arrangement than the one I effected on the 22nd of November last and that all the steps they both took were merely in the way of carrying my said arrangement out and closed on the 30th day of November aforesaid, save the payment of the $75,000 costs which was paid a little later.

13. The Plaintiffs reside out of the jurisdiction of this Honourable Court.

17. I am informed and verily believe that the Defendants have a good and substantial counter-claim for damages aforesaid.

"E. A. JENNS."

* *Sic.*

Sworn before me at New Westminster this * day of January A.D. 1894.

"J. A. FORIN."

A commissioner for taking affidavits for use in the Supreme Court of B.C.

Moved by D. Oppenheimer.

Seconded W. H. Edmonds.

And resolved that the arrangements made with Messrs. McPhillips and Williams solicitors for the Edison General Electric Company on October 18th 1893 made by our president and vice-president be carried out and we hereby agree to waive and give up any defence or counterclaim which this company may have to the action commenced against us on the 27th day of November A.D. 1893 or any other defence counterclaim or action which we have or might have at this date against them, except the last two armatures received (if any).

And this company hereby declares that it has not placed the Bank of British Columbia or any other creditor or creditors in any better position, or given the said bank or any other creditor or creditors any better or further or other security since the said 18th day of October 1893.

And this company hereby agrees not to place the said bank or any of its creditors in any better or other position, or give them any further or better security without the consent or approval of the said McPhillips and Williams solicitors for the said Edison General Electric Company until the payment of all the recent indebtedness of this company to the Edison General Electric Company.

The agreement is understood not to cover the general running accounts and expenses of the said company incurred from day to day.

And the secretary and president are hereby authorised to give the said

No. 33. Materials used on application of Jan. 24th, 1894, read on Appeal, by direction of Court of Appeal —*continued.*

Edison General Electric Company an agreement covering this resolution signed in the manner in which this Company is authorised and under the seal of this company.

"A."

This is the paper writing marked "A" referred to in the annexed affidavit of E. A. Jenns, sworn before me this 12th day of January A.D. 1894.

"J. A. FORIN."
A Commissioner in S.C. of B.C.

In the Supreme Court of British Columbia.

Between

Edison General Electric Company . . . . . *Plaintiffs,*

and

The Westminster and Vancouver Tramway Company Limited . *Defendants.*

I, David Oppenheimer of the City of Vancouver in the Province of British Columbia make oath and say:—

1. I am the President of the Westminster and Vancouver Tramway Company Limited.

2. I have read the affidavit of E. A. Jenns sworn herein and the allegations therein contained are true in substance and in fact.

3. Acting under the arrangement made by the said E. A. Jenns on the 22nd day of November I did in company of the secretary of the company P. N. Smith attend on Mr. McPhillips with an unsigned resolution a copy of which is attached to Mr. Jenns' affidavit and asked him whether if we gave him that, he would stay proceedings in the action and take no further steps without due notice as we were anxious not to have judgment entered against us, or words to that effect. He assented but said we should pay $75.00 to cover his costs. This I agreed to do. I then as President of the Company signed the resolution and handed it to him.

4. No different or other arrangement has been made either on the 7th December or at any other time in reference to the said claim of the Plaintiffs or the actions thereon, save the one made by Mr. Jenns on the 22nd November last and afterwards ratified by the company and carried finally into effect by me on the 20th day of November last.

5. No notice was served on the company or upon me either that the Plaintiffs intended to proceed with the action or that the time agreed upon for delay had elapsed or would expire at any given time.

"D. OPPENHEIMER"

Sworn before me at New Westminster this 12th day of January A.D. 1894.

"J. W. MCCOLL."

A Commissioner for taking affidavits to be used in the Supreme Court of B.C.

RECORD.

No. 33. Materials used on application of Jan. 24th, 1894, read on Appeal, by direction of Court of Appeal —*continued.*

In the Supreme Court of British Columbia.

Between

Edison General Electric Company . . . . . *Plaintiffs.*

The Westminster and Vancouver Tramway Company Limited . *Defendants.*

I, Percy Nevile Smith of the City of New Westminster in the Province of British Columbia, Secretary to the Westminster and Vancouver Tramway Company Limited, make oath and say,—

I have read the affidavits of E. A. Jenns and D. Oppenheimer made and sworn herein this 12th day of January A.D. 1894 and I say that the allegations contained therein are true in substance and in fact.

"P. N. SMITH."

Sworn before me at New Westminster this 12th day of January A.D. 1894.

"J. A. FORIN."

A Commissioner for taking affidavits in the Supreme Court of B.C.

In the Supreme Court of British Columbia.

Between

Edison General Electric Company . . . . . *Plaintiffs*

and

Westminster and Vancouver Tramway Company . . . *Defendants*

I, Lewis Griffith McPhillips, of the City of Vancouver in the Province of British Columbia, barrister-at-law, make oath and say—

1. On the twenty-first day of October, 1893 my firm received from the Bank of Montreal the notes sued upon in this action. And from an entry in my diary on the nineteenth day of September 1893 I believe that on that day we first received instructions regarding the collection of the said notes.

2. That from that date until the ninteenth day of October 1893 I had numerous interviews with Mr. Oppenheimer and other officers and members of the said company regarding the settlement of the said notes.

3. That I was always pressing for a settlement of the Plaintiffs' claim and those acting for the Defendants kept putting me off from time to time. I had an interview with Messrs. Oppenheimer and Smith on the 17th day of October; on the eighteenth I drafted a letter, a type written copy of the original of which is now produced and shewn to me and marked Exhibit "A"; And on the nineteenth day of October I had a long interview with Messrs. Oppenheimer and Benjamin Douglas who I believe were directors of the said company and Mr. Webster, when an arrangement was arrived at.

4. That from the date which appears by endorsement upon the said letter I believe I endorsed the memo upon the said letter on October nineteenth 1893 and as it appears by the said endorsement, Messrs. Oppenheimer, Douglas and Webster agreed to the terms expressed in that letter.

5. That upon the said letter being handed to Mr. Oppenheimer in my office he refused to accept the same because it did not bind us to any specified time, but I stated to him at the time that expressed my meaning and that I would not give him a letter which bound me or my clients to refrain from proceeding with the suit for any specified time.

6. That on the twentieth day of October 1893 Mr. Smith was telephoned to for a cheque for $1,625.00. We received the same and on the same day we wrote to the Defendants asking for the resolution of the Board of Directors releasing all claims of damage or other defence or counter-claim.

7. On the twenty-first day of October 1893 the said cheque was presented at the Bank of British Columbia and dishonoured and on the same day the Defendants were notified of the dishonour of the same. On the same day we were waited upon by Mr. Webster who asked us* until Monday noon to provide funds for the cheque.

8. On the twenty third day of October 1893 I had an interview with Mr. Douglas and Mr. Smith, when Mr. Douglas gave his personal cheque for $1,625.00 on the Bank of British Columbia at New Westminster, and we found upon telephoning to the bank that they would not honour the cheque.

9. On the said twenty-third day of October a writ was is sued against the said company. The said writ was issued in the name of the Northwest General Electric Company because I was under the impression that the notes sued on had been assigned and endorsed over to the said company by the Edison General Electric Company. But I afterwards found that this was not the case.

10. That on November second Mr. Oppenheimer called and said he had arranged for payment of the cheque now in our hands and on that day the said cheque was paid.

11. That the arrangement made to accept the cheque paid on the second day of November was made by me personally with Mr. Oppenheimer in the Hotel Vancouver and the conversation had by me with Mr. McColl was subsequent to my conversation with Mr. Oppenheimer and I believe I informed Mr. McColl at that time that I had so arranged with Mr. Oppenheimer.

12. That the acceptance of the cheque and the agreement with Mr. Oppenheimer was simply a carrying out of the agreement mentioned in exhibit "A" and there was no intention on my part to vary from that agreement nor did I state to Mr. Oppenheimer, nor was it agreed that I should do so.

13. That from this time forward up to the twenty-eighth day of November, although the company were pressed to give the agreement mentioned in the letter exhibit "A," yet they always neglected to do so.

14. That any conversations which I may have had with Mr. Jenns or anybody else on behalf of the tramway company were with reference to the carrying out of the said agreement and I never in any way intimated to Mr. Jenns that I was willing to give any definite time or vary the agreement which I had entered into with the Defendants.

15. I never agreed with Mr. Jenns, or with anybody else that I would give the said company "until the following spring" as stated by him, or until, as he also states in his affidavit "certain negotiations then pending in England should come to a close, or for a reasonable time." I never agreed with the said company to give them any definite time.

16. I may have told Mr. Jenns that I would not take any further proceedings without notifying him, but if I told him that it was taken in connection with the agreement which only covered the space of time within ninety days from

* *Sic.*

RECORD.

No. 33. Materials used on application of Jan. 24th, 1894, read on Appeal, by direction of Court of Appeal — *continued.*

September sixth 1893, and such conversation was prior to the twenty-eighth day of November.

17. That the conversation by telephone with Mr. Jenns was not sought by me but he called me up at the request, as he stated, of the Defendants, who, he said, wanted to know what I wanted and I told him that I wished the agreement of October 18th carried out. He asked me what that was and I then stated from my recollection what the terms of that agreement were, but I did not tell him that I had agreed to wait for any definite time.

18. On the twenty-seventh day of November the said Defendants not having delivered to us the agreement to waive any claims against the company mentioned in the letter of October eighteenth I was compelled in the interest of my clients to issue a writ. The writ was served the same day and after service of the writ, on the twenty-eighth day of November Mr. Oppenheimer and, I think, three other gentlemen on behalf of the said company called upon me.

19. They asked me at this time to draw a resolution for them to pass which would be in accordance with the agreement entered into on the nineteenth day of October and which is mentioned in the letter of October eighteenth. In pursuance of that request I drew a resolution, had the same copied on the typewriter and delivered to Mr. Oppenheimer to have executed by his company.

20. That on or prior to the second day of December 1893 Mr. Oppenheimer handed to me in my office, the said agreement signed and sealed on behalf of his company.

21. I do not remember Mr. Oppenheimer saying to me that on his giving me the agreement referred to that I would stay the action and take no further proceedings without notice.

22. That if he did say anything of that nature I did not consent to it.

23. That notwithstanding the agreement contained in the agreement of twenty-eighth of November, on the fifth of December, Mr. Jenns entered an appearance for the Defendants and on the seventh day of December we received notice from Mr. Jenns that he had entered an appearance on the fifth day of December 1893 and on the twelfth day of December 1893 we received a notice requiring a statement of claim to be delivered.

24. That the three months mentioned in the letter of October eighteenth 1893 expired on the nineteenth day of December 1893.

25. That judgment was entered on the twenty-ninth day of December 1893.

26. That said agreement of the 28th day of November 1893 is now produced and shown to me and marked exhibit "B" to this my affidavit.

27. That the $75.00 costs paid by the company included besides the costs of the suit the costs of numerous interviews and time taken up by me for the benefit of the said Defendants and I told them at the time of payment and prior thereto, and they were aware and agreed to pay for such time so spent by me in trying to arrange a settlement and for work so done by me in connection with the said suit.

28. That Mr. Jenns telephoned to me on two occasions since the said judgment was entered regarding it. That on the first occasion on which he telephoned me he did not appear to be surprised that the judgment was entered, but upon the second occasion he appeared to have somewhat changed his mind.

29. That I never told him that I had got an advantage and intended to keep it, but that I did convey to him that if it had not been for the peculiar circumstances of this case that I would have notified him before entering judgment.

30. That the agreement to which I referred and which is mentioned in paragraph 11 of Mr. Jenns' affidavit is the agreement of the 28th day of November 1893 which was delivered to me on the 2nd day of December 1893.

"L. G. McPHILLIPS."

Sworn before me at the City of Vancouver in the Province of British Columbia this 24th day of January A.D. 1894.

(Sgd.) D. G. MARSHALL
A Commissioner for taking affdts.
for use in the S.C.B.C.

Exhibit "A" to Affidavit.

McPhillips & Williams,
Barristers, Solicitors, &c.
L. G. McPhillips Q.C. A. Williams, B.A.
P.O. Box 237. Telephone 145.
Offices: over Bank of B.C. Corner
Hastings & Richards Sts.
Vancouver, B. C. Oct. 18/1893.

D. Oppenheimer, Esq.,
President New West'r & Vancr. Tramway Co.
City.

Dear Sir,—

We cannot and will not bind the Edison General Electric Company by any agreement to give your company any definite time for the payment of the balance of your indebtedness to them, but if the sum you say you can pay is paid at once, and you agree to waive any claim which you allege you have against the company, we are satisfied that no action will be brought against your company to recover the balance due, within ninety days from September 18th 1893 unless it is necessary to do so to protect our client's claim.

We cannot say just exactly what state of circumstances would necessitate our taking action, but we may say generally, that if no alteration for the worse takes place in the state of your company from now until that date, no action will be commenced.

We wish to state again however, that we write this letter at your request, with no intention of binding our company to anything. You must trust to us to act reasonably and leave us free to act on our own judgment, so that we can protect our company's interest should we consider them in jeopardy.

Your truly,

(Memo. on back of letter.)

Oct. 19th, 1893.

Letter drawn to send N. W. & Van. Tramway Co., but they did not want it after reading it as it did not bind us, but it expresses the only terms on which we would agree, and to-day Oppenheimer Douglas and Webster agree to them.

L. G. McP.

B.

RECORD.

No. 33. Materials used on application of Jan. 24th, 1894, read on Appeal, by direction of Court of Appeal — *continued.*

Resolved that the arrangement made with Messrs. McPhillips & Williams solicitors for the Edison General Electric Company on October 18th 1893, made by our president and vice-president be carried out, and we hereby agree to waive and give up any defence or counter-claim which this company may have to the action commenced against us by the Edison General Electric Company on the 27th day of November A.D. 1893 or any other defence, counter-claim or action which we have or might have at this date against them, except the two armatures last received (if any).

And this company hereby declares that it has not placed the Bank of British Columbia or any other creditor or creditors in any better position, or given the said bank or any other creditor or creditors any better or further or other security since the said 18th day of October 1893.

And this company hereby agrees not to place the said bank or any of its creditors in any better or other position or give them any further or better security without the consent or approval of the said McPhillips & Williams, solicitors for the said Edison General Electric Company until the payment of all the present indebtedness of this company to the Edison General Electric Company.

This agreement s understood not to cover the general running accounts and expenses of the said company incurred from day to day.

And the secretary and president are hereby authorised to give the said Edison General Electric Company an agreement covering this resolution, Signed in the manner in which the company is authorised and under the seal of this company.

The Westminster and Vancouver Tramway Company, Limited hereby agrees to the foregoing.

D. OPPENHEIMER
President.

P. N. SMITH,
Secy Treas.

(Seal)

In the Supreme Court of British Columbia.

Between

Edison General Electric Company . . . . . *Plaintiffs*,

and

Westminster and Vancouver Tramway Company, Limited . *Defendants.*

I, John Francis Henry Wyse of the City of Portland in the State of Oregon, one of the United States of America make oath and say:—

1. I am inspector for the Edison General Electric Company.

2. I was sent up from Portland by Mr. Mitchell the manager of the Edison General Electric Company at Portland on December 7th, 1893 to make settle-

No. 33. Materials used on application of Jan. 24th 1894, read on Appeal, by direction of Court of Appeal —*continued.*

ment with the Defendants regarding two armatures which they notified the company were burnt out.

3. On or about the 12th day of December I saw Mr. D. Oppenheimer in Vancouver at the Vancouver Hotel and spoke to him regarding the armatures.

4. I told him that Mr. Mitchell wanted me to inquire into the trouble his company had with the armatures and that I thought the best way would be for us to allow them sufficient to cover the costs of repairing and putting them in good shape.

5. He said he wanted to wait until a new man (Lupki) came up from the Sound and he would be governed by what Lupki said regarding putting the armatures in repair as he, Mr. Oppenheimer, did not understand the technical part of the work.

6. Then I went down to see Mr. Oppenheimer at his warehouse on the 27th December.

7. I then informed him that I was going to Victoria and I did not know when I would return. I said I would like to make him an allowance for repairing the armatures which would cover it without doubt, say $250.00 but he then said he preferred to wait until Mr. Lupki came.

8. I went away to Victoria and returned to Vancouver some time before the 11th of January 1894.

9. On the 11th Jan. on my way to New Westminster I met Lupki, the Defendants' superintendent, and returned with him to Vancouver to see Mr. Oppenheimer and arrange about settlement in regard to armatures, but found that Mr. Oppenheimer was busy with the elections and could not give us time.

10. We returned to New Westminster to take the matter up with Mr. Smith, secretary of the company.

11. Mr. Lupki said that the costs of rewinding the armatures putting on all new wire would be $125.00 each or $250.00 for both. Mr. Smith claimed he had paid out some $62.00 for freight on armatures and asked for an allowance of $300.00 covering the entire claim.

12. Mr. Smith wrote at my dictation a letter to me stating that the Westminster and Vancouver Tramway Company accepted the $300.00 which I allowed and he told me that he would present that letter to the board of directors the next day and get them to act upon it and sign it and mail it to me at Vancouver. He said he had no doubt that this arrangement would be entirely acceptable to the board of directors as it was to him. He also agreed in this letter to return to me at Vancouver two damaged armatures belonging to my company which were at their power house.

13. He made no claim for any other damage or loss on account of the said armatures burning out or on any other account although he made some indefinite remarks about the inconvenience caused by the burning out of the armatures.

14. The letter he agreed to give was to be a release to my company for all loss the tramway Company had suffered by reason of the burning out of the said armatures.

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No. 33. Materials used on application of Jan. 24th, 1894, read on Appeal, by direction of Court of Appeal —*continued.*

15. A copy of the said draft letter copied from a copy made by me at the time is hereunto annexed marked exhibit " A."

Sgd. J. FRANK H. WYSE.

Sworn before me at the city of Vancouver in the province of British Columbia, this 17th day of January A.D. 1894.

Sgd. D. G. MARSHALL.

A commissioner for taking affidavits for use in the S.C.B.C.

D. Oppenheimer, President.
B. Douglas, Vice-President.
P. N. Smith, Secretary-Treasurer.
G. F. Gibson, Traffic Manager.

Westminster and Vancouver Tramway Co., Limited.

New Westminster, B.C., 1894.

J. F. H. Wyse,
Edison Genl. Elec. Co., Van.

Dear Sir,

Referring to armatures for freight car, in conformance with your offer to allow us the sum of three hundred dollars to put the said armatures in good working order we agree to accept the said three hundred dollars in full settlement of our claim against the Edison General Electric Co. for defective armatures and freight charges on armatures furnished and further agreed to return to the Edison General Electric Co. the two armatures now in our possession.

S. C. B. C.

Edison Genl. Elec. Co. *vs.* Westminster & Van. Tramway Co.

This is exhibit " A " referred to in the affidavit of John Francis Henry Wyse sworn before me herein this 7th day of Jany. A.D. 1894.

(Signed) D. G. MARSHALL,
A Com. in S. C. B. C.

In the Supreme Court of British Columbia.

Between

Edison General Electric Company . . . . . *Plaintiffs*

and

Westminster and Vancouver Tramway Company Limited . *Defendants.*

I, Henry C. Shaw of the City of Vancouver in the Province of British Columbia barrister-at-law make oath and say as follows,—

1. On the 24th day of January 1894 I searched in the office of the District Registrar of this Honourable Court at Vancouver and found that a writ of summons for $261,217.67 has been issued out of this Honourable Court at the

No. 33. Materials used on application of Jan. 24th, 1894, read on Appeal, by direction of Court of Appeal —*continued.*

suit of the Bank of British Columbia against the above named defendants by Messrs. Davis, Marshall and McNeill.

2. On the 24th day of January 1894 an appearance was entered by E. A. Jenns for the said Defendants.

3. On the 24th day of January 1894 the Defendants' solicitor consented in writing to judgment being entered and on the said 24th day of January 1894 judgment was entered in the said suit of the Bank of British Columbia against the said Defendants for $261,217.67 and $32.50 for costs upon an order made by Mr. Justice Walkem on the said 24th day of January 1894.

(Sgd.) H. C. SHAW.

Sworn before me at the City of Vancouver in the Province of British Columbia this 24th day of January 1894.

(Sgd.) A. E. BECK
A Commissioner for taking affidavits
for use in S.C.B.C.

Vancouver
Jan. 24 1894
Registry.

No. 34. Judgment in Court of Appeal. His Lordship Chief Justice Davie, 30th Jan., 1896.

Edison General Electric Company
vs.
The Bank of British Columbia.

Judgment, Davie, C.J.

January 30th, 1896.

The statement of claim in an action brought by the Edison Electric Company on behalf of themselves and all other creditors of the Westminster and Vancouver Tramway Company, alleges that the Westminster and Vancouver Tramway Company being at the time in insolvent circumstances and unable to pay their debts in full, as the Defendants the bank well knew, by their solicitor voluntarily and by collusion with the bank, at that time a creditor of the tramway company gave a confession of judgment with intent thereby to defeat and delay the Plaintiffs, and with intent thereby to give the bank a preference over the Plaintiffs and the other creditors of the Westminster and Vancouver Tramway Company, and by reason of such confession the bank entered judgment against the tramway company on the 24th January, 1894, for $261,217.67 for debt, besides costs, and the Plaintiffs claim that the judgment of the bank against the tramway may be declared null and void, and the execution issued thereon and the registration of a charge in respect of such company judgment against the tramway company may be set aside and cancelled.

The material facts are that the tramway company, a running concern, operating between the Cities of Vancouver and New Westminster. being in insolvent circumstances, were indebted to their bankers on account current in the amount for which judgment was recovered, and were also indebted $18,470.12 to the Edison Company, who on the 27th November 1893, issued a writ and on the

RECORD.

No. 34. Judgment in Court of Appeal. His Lordship Chief Justice Davie, 30th Jan., 1896 —*continued.*

29th December entered up a judgment by default of a defence for that sum.

It would appear from the evidence that the Bank had been pressing for their money and threatening to wind the company up, but, in the hope that negotiations then pending for reconstruction and the formation of a syndicate to take it over would be successful, the bank had not only refrained from carrying their threat of winding up into execution but had recently advanced some $1,600.00 towards pacifying the Edison Company, and, at the time of so doing, had received an express promise that in the event of suits against the tramway company, they should have first judgment.

The only hope of those connected with the tramway company was the formation of the new syndicate, which, if successful, would not only pay off all debts in full, but realise to the stockholders something upon their shares, and such affords the principal motive so far as the tramway company is concerned for the events giving rise to this action. It was of vital importance to the success of these negotiations to keep the bank from closing the account current for, to close the account, to say nothing of the more forcible remedies of a winding up proceeding would have at once ruined all chance of reconstruction.

The delay between the time of the Edison Company issuing their writ and obtaining judgment was due principally to a disputed cross-claim of the tramway company for $5,000.00 but also upon some hope held out to them by the Edison Company for time, and consequently in that hope it would seem the tramway company waived their cross-claim, and moreover committed themselves to an undertaking repugnant to their agreement with the bank to afford them first judgment. This waiver and undertaking took the form of a resolution of the tramway company, dated shortly after the 30th November and is as follows:—

"Resolved that the arrangement made with Messrs. McPhillips and Williams, "solicitors for the Edison General Electric Company on October 18th 1893, made "by our president and vice-president be carried out;

"And we hereby agree to waive and give up any defence or counter- "claim which this company may have to the action commenced against "us by the Edison General Electric Company on the 27th day of "November A.D. 1893, or any other defence or counter-claim or action which we "have or might have at this date against them excepting the two armatures last "received, if any; and this company hereby declares that it has not placed the "Bank of British Columbia or any other creditor or creditors in any better "position or given the said bank or any other creditor or creditors any better or "further or other security since the said 18th day of October 1893. And this "company hereby agrees not to place the said bank or any of its creditors in a "better or other position or give them any further or better security without the "consent and approval of the said Edison General Electric Company until the "payment of all the present indebtedness of this company to the Edison General "Electric Company.

"This agreement is understood not to cover the general running accounts "and expense of the said company incurred from day to day.

"And the secretary and president are hereby authorised to give the said "Edison General Electric Company an agreement covering this resolution signed

" in the manner in which this company is authorised and under the seal of this " company."

The Edison Company did not sign judgment until the 29th December, and upon or shortly after discovering the judgment a dispute seems to have arisen between the solicitors, resulting in a summons to set aside judgment on the grounds;

1. That it was entered in breach of faith;
2. That it was vexatious;
3. That it was entered in breach of agreement; or in the alternative,
4. That the Defendants had a good defence on the merits.

At that time as not*, it should be remarked, the judges hold weekly chamber sittings at Vancouver; the judge on the *rota* at Vancouver, was also attending court work at New Westminster. The summons was not issued as of course out of the registry, but was issued by special leave of the judge at New Westminster and signed by him, calling upon the parties to attend the judge in chambers at the court house, Vancouver on Tuesday (the next but one ordinary chamber day) the 23rd January 1894 at 10.30 a.m. on the hearing of an application on the part of the Tramway Company to have the judgment set aside (stating the grounds). The summons wound up as follows,— " The affidavit of E. A. Jenns, D. " Oppenheimer and P. Smith herein will be read. In the meantime let all " proceedings be stayed. By special leave. 'Geo. A. Walkem J' dated this " 13th day of January 1894."

* *Sic.* now.

Whatever may have been the object of the unusual course pursued in obtaining this summons, and whether in point of practice the summons operated as a stay of proceedings in the interim between its issue and return, as to which I think there is much doubt, although it seems to have been treated as a stay by the Edison Company and by the Judge (*vide* his remarks on dismissing the summons) it is not shown, or suggested for a moment, that the bank or their solicitors, in any way procured the issue of the summons, or were even aware of it. On the 17th January however the bank who, although aware of the Edison Company having issued proceedings seemed unalarmed (relying evidently upon assurances made them by the Tramway Company) issued a writ for recovery of their debt; and, after this time, the bank becoming aware of the status of matters between the Edison Company and the Tramway Company, were resolved to get first judgment, and in this were facilitated by the Tramway Company.

The hearing of the summons to set aside the judgment was delayed owing to the non-arrival of the Judge, until the 24th January, and at the hour of (10.30 a m.) the return of the summons on that day, the time for appearance to the bank's writ had not expired, but, to expedite their getting judgment the Tramway Company's solicitor entered an appearance early on the morning of the 24th, and then upon a consent to judgment for the bank's claim, the Judge upon hearing the solicitors, and without a summons signed an order empowering the bank to take judgment for their claim. The Edison Company's solicitors knew nothing of what was going on, but immediately after the order for judgment was signed, the Judge, and the parties to the summons, went into the Chamber Court where the Judge heard argument upon the summons to cancel the Edison judgment, reserving his decision thereon, which he rendered on the 27th January, dismissing the application with costs.

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No. 34. Judgment in Court of Appeal. His Lordship Chief Justice Davie, 30th Jan., 1896 —*continued.*

In the meantime, in fact before the argument upon the summons was concluded, the bank's solicitors had perfected their judgment, registered it, and placed their execution in sheriff's hands, thereby gaining the priority over the Plaintiffs in this action which is now sought to be displaced.

The Plaintiffs' claim is that the bank's judgment be declared null and void, and that the execution issued thereon and the registration thereof against the lands of the Tramway Company may be set aside and cancelled, and that the Plaintiffs' judgment (which they afterwards entered and perfected) may be declared a first charge.

Mr. Bodwell's contention upon the argument was that the bank's judgment, under these circumstances, was a judgment by confession, obtained by collusion and signed with intent of defeating and delaying the Edison Company, and as such was void under Section 1 of the Fraudulent Preference Act, which enacts that in case any person being at the time in insolvent circumstances, or unable to pay his debts in full, or knowing himself to be on the eve of insolvency voluntarily, or by collusion with a creditor or creditors, gives a confession of judgment, *cognovit actionem*, or warrant of attorney to confess judgment, with intent in giving such confession, *cognovit actionem*, or warrant of attorney to defeat or delay his creditors either wholly or in part, or with intent thereby to give one or more of the creditors of any such person a preference over his other creditors or over any one or more of such creditors, every such confession—*cognovit*, or warrant of attorney shall be deemed and taken to be null and void as against the creditors of the party giving the same and shall be invalid and ineffectual to support any judgment or writ of execution.

There can I think be no question of the insolvency, nor—bearing in mind the decision of Andrews *vs.* Deeks 20 L. J. Ex. 127, that what took place amounted to a confession of judgment. Now, to come within the statute that confession has to be given either;

(a) With intent to defeat or delay creditors, or

(b) With intent to give a preference.

So far as an intent to defeat or delay creditors, the statute carries the law no further than does the statute of Elizabeth (Molson's Bank *vs.* Halles, 18 S.C.R. 105) and, under that statute, following the rule of Lord Gifford in Alton *vs.* Harrison, L R. 4 Ch. 622, if the judgment is *bona fide*, that is to say if it is not a mere cloak for retaining a benefit for the person against whom it has been obtained, it is a good judgment under the statute of Elizabeth. Here there is no question of the *bona fides* of the debt upon which the bank's judgment was founded. It has not been attacked in any way, and there is no suggestion that the judgment was a mere device for retaining a benefit for the Tramway Company. On the contrary it was an effort, and a determined effort on the part of the bank to prevent their being postponed to another creditor. There was no fraud in obtaining the confession, and in the absence of fraud it is unassailable whether under the statute of Elizabeth, or under the first branch of section 1.

See Gotwalls *vs.* Mulholland, 15 U.C.C.P. 67; Union Bank *vs.* Douglas 20 Mane 10; Molson's Bank *vs.* Halles, 18 S. C.R. 105; Holbird *vs.* Anderson 5 T.R. 535.

Neither under the statute of Elizabeth, nor at common law is the judgment

assailable merely because given with intent to prefer. But for our local statute, a debtor may prefer any creditor over another. *Ex parte* Stubbins 17 Chan. Div.

Was the confession then given with intent to prefer the bank over the Edison Company within the intent of the Local Act? In this connection we have to consider the doctrine of pressure. Numerous authorities have decided that to avoid the transaction, the intention on the part of the debtor must be merely to prefer. But any such intent is negatived, in fact displaced, when it is shown that there has been *bona fide* pressure by the creditor. The "prefer" involves "free will" and hence in Stephens *vs.* McArthur 19 S.C.R., the mere demand of the creditor was held to take the case out of the statute. How much more then is the case taken out of the statute here, in view of the threats to wind the company up, the insistance upon first execution, and the demand of Mr. Murray, the manager, that the bank have judgment. Moreover it is clear upon the evidence, as before remarked, that the dominant idea of the Tramway Company, was the formation of the new syndicate and the reconstruction of the company, which would have paid everyone, and of which there was hope by giving the Bank judgment and so gaining time, but none of the Edison Company stepped in. In Long *vs.* Hancock 12 S.C.R. where a mortgage had been given and the company bona fide believed that by giving it and so getting an extension of time for payment of Plaintiffs' debt they would be able to carry on their business and extricate themselves it was held that the transaction was unassailable.

I am therefore of opinion that in this case there was neither intent to defeat or delay creditors, nor to prefer, and that the action fails.

It has been suggested in the judgment of Mr. Justice McCreight which I have had the advantage of perusing that although as he admits, the action as presented in the pleadings, as directed by the Court, and as argued before the Court of Appeal fails, yet that possibly the Plaintiffs might by reforming their pleadings and directing their attack in a different way—being themselves within the principle of Lumley *vs.* Gye 2 E1 and B1 216. Bewe *vs.* Hall and other cases, showing that where one man persuades another to break his agreement to the detriment of a third, the party injured has a cause of action against the persuader; and the learned judge, on the footing of the resolution amounting to a binding agreement not to give the Bank a preferential judgment, thinks that the Edison Company might succeed upon proof that the Bank persuaded the Tramway Company to break this alleged agreement. I do not wish to be considered as holding that such an action could or could not be maintained, but, in the meantime, I think it is sufficient to say that no such cause of action has been raised or suggested either in the Court of first instance or of appeal, nor was the evidence directed to any such issue at the trial.

If (not having raised the issue in the Court below) the Plaintiff had urged such a point for the first time in the Court of Appeal, it would have been held not open to him, Connecticut Fire Ins. Co. *vs.* Kavanagh L R. 1892 App. Cas. 473. If not open to the party it cannot, I think be taken by the Court.

I am therefore of opinion that the appeal must be dismissed with costs.

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19/10/95.

No. 34. Judgment in Court of Appeal. Mr. Justice McCreight, 19th Oct., 1895.

Judgment of McCreight, J.

Edison Company *vs.* Bank of B.C. and Vancouver Tramway Co.

This is an action brought to set aside a judgment of the Bank of B.C. *v.* The New Westminster and Vancouver Tramway Co. obtained on the 24th of January 1894.

The statement of claim alleges (paragraph 3) that the Tramway Company "being at the time in insolvent circumstances and unable to pay &c. by their "solicitor voluntarily and by collusion with the Bank of B.C at that time a "creditor of the said Westminster and Vancouver Tramway Company gave a "confession of judgment with intent thereby to defeat and delay the Plaintiffs "and with intent thereby to give the Bank of B.C. a preference over the Plaintiffs "and the other creditors of the said Westminster and Vancouver Tramway "Company and that by reason of such confession the Bank entered their judgment "for $261,217.67 against the Tramway Company on the said 24th January "A.D. 1896."

It also states in substance that the Plaintiffs previously *i.e.*, on the 29th December 1893 had recovered judgment against the Defendant Tramway Company, for $18,470.12—but that on the 13th January 1894 a summons was taken out by the Westminster and Vancouver Tramway Company to set aside the said judgment of the Plaintiffs and that all proceedings on said judgment were stayed by order in the summons until the return of the said summons which was on the said 24th January 1894.

The statement of claim (see paragraph 14) further alleges in substance that by reason of the premises the Bank of B.C. was enabled to enter their said judgment and to have certificates of such judgment registered prior to the registration of the now Plaintiffs' certificate of Judgment whereby the Plaintiffs lost the benefit of their said judgment and have been delayed in realising the amount. The substance of the Plaintiffs ground of complaint appears to be that by the stay of proceedings from the 13th January till the 24th January or really till the 27th 1894 (the day on which Mr. Justice Walkem gave judgment refusing to set aside the judgment of the Edison Company) their hands were tied so that they could not realize on their judgment and the Bank of B. C. got prior execution and registration. Now a judgment creditor who obtained his judgment on the 29th December 1893 can not *prima facie* have any interest or claim to set aside a judgment entered on the 24th January following under C. 51. of the Consolidated Statutes, nor would it even be right to have it declared null and void as prayed for, subject at all events to the judgment of the Edison Company the judgment of the bank is *prima facie* correct, and the amount not disputed, but it is in the antecedent and the surrounding circumstances set out in the statement of claim and more fully as might be expected appearing on the evidence, that the real ground of complaint appears. I have thought it right to point this out because the main, if not the whole contention before the trial judge was whether or not the bank's judgment was collusive or given with intent to prefer under section 1 of C. 51 and the same line of argument was in the main adopted before us in the Full Court. But quite independently of the Act a very grave question arises. The Edison Company

obtained judgment on the 29th day of December. On the 13th January following a summons is taken out by the tramway company to set it aside returnable on the 23rd of January and it contained the following words, "in the meantime let all "proceedings be staved." Now no doubt under R. R. S. Ct. 472 a judge may stay execution under certain circumstances but it is more than questionable whether this can be done *ex parte*, see Chitty's Practice pp. 789 and 792 Edition 14 and Annual Practice 1895 p. 800 and in an ordinary summons, and whilst a rule is a stay of proceedings at once, a summons is only so from the time at which it is attendable, see Chitty's practice 1407. The judge's order on the summons was made on the 27th January dismissing the summons along with the stay of proceedings, and as I gather he disapproved of the conduct of the tramway company—and he observed also on the advantage the bank had gained by the conduct of the tramway company in consenting to judgment "about an "hour previously and without notice to the Edison Company." . . .

The contention of the Plaintiffs or at least their real ground of complaint seems to me to be that without any fault on their part they have in substance lost the benefit of their judgment, in other words that by the action of the courts and the conduct of parties concerned, such benefit has been taken from them and given to another.

I think there must be a new trial in this case as it seems to me not to have been worked out on the true lines, and evidence has been in several instances ruled out which was important—and some other important questions (as with great respect they seem to me to be) lost sight of; and as the case will probably be taken down to a new trial I shall avoid making comments further than to say that I hope my silence will not be construed as an approval of all that has taken place. I shall then proceed to state briefly some questions which seem to me worthy of further consideration. It is observable that the judgment of Walkem, J. delivered on the 27th January 1894 was not appealed from, it must therefore be taken as binding between the Edison Company and the tramway company at all events to the extent that the former had a good judgment of ascertained amount against the latter and that there was no reason for restraining execution Whether this holds good also against the bank is perhaps a more complicated question. The course to be pursued by a party interested in setting aside a judgment obtained by default is discussed in the judgment of the C.A. in Jacques *v.* Harrison 12 Q.B.D. 165 C.A. There appears to be evidence that the advisers of the bank were to say the least well aware of the order of Walkem J. on the 24th January and so might themselves have appealed against it, or adopted the course pointed out in Jacques *vs.* Harrison. Whether the bank can now raise the objection of alleged breach of faith by the Edison Company, or insist on a reduction of the amount of the judgment for any cause is a question which I will not now discuss and it possibly may be thought worthy of further consideration. The learned trial judge in his judgment appears to think it of importance that the bank authorities "knew nothing of "such a stay of proceedings as was made here until it had been made." It will be well to consider whether an obvious fallacy is not involved in this view. Turning to the questions and answers in Murray's evidence (see margin and *passim* as well as pp. 32 and 33 of his examination before the trial) supposing

See cases cited. Annual Practice 95, p. 1026.

Questions 635, 638, 640, 647, 659 to 663,

RECORD.

No. 34. Judgment in Court of Appeal. Mr. Justice McCreight, 19th Oct., 1895 —*continued.* 664, 668. 681, 741, 756 and *passim*, as also pp. 32 and 33 of examination before the trial, and see Questions 593 and 595, and see Ward's evidence and Wyld's.

the bank anxious to "get their" execution in "ahead of the Edison Company" they would of course give general directions and make general arrangements in that behalf, leaving the details to their lawyers, and whatever was done accordingly by their legal advisers it might be fairly contended that the bank was responsible for it, especially if they subsequently invoked a benefit arising from such operations. The stay of proceedings had hitherto been an effectual way whether legal or not, of getting "execution" in ahead against the tram company —and less questionable machinery might have failed to produce the desired effect. Mr. Davis in his skilful argument complains that Ward was not questioned by Mr. Bodwell as to whether the resolution of the tramway company or agreement (30th November) see p. 136 of the appeal book—was shown to Ward or not on 30th November 1893 (see p. 74 appeal book) but it is to be observed that such questioning should more properly come from the bank's counsel, who must know the facts rather than from Mr. Bodwell who was on the other side and not likely to be informed on the subject. Such information however seems to be important, for if the bank authorities knew of the agreement between the tram company and the Edison Company and gave general directions which resulted in the proceedings taken between the 13th and 24th January, the doctrine of Bowers *vs.* Hall 6. Q.B.D. 333—8. C.A. and Flood *vs.* Jackson 95. 2. Q.B. pp. 24—41 C.A. And the cases there cited dealing with the question of one man persuading another to break his agreement with a third party to his detriment or for the benefit of the party exercising the persuasion may have a serious bearing upon the case. It should be remembered also that for many purposes and especially as regards notice, the principal and his agent are to be considered as identified the one with the other; and that equity can find a remedy in addition to or as a substitute to that more appropriate to a common law jurisdiction.

These last remarks may apply to the contention that the bank authorities did not personally direct the order for the stay of proceedings to be inserted in the summons, as the trial judge claims, as well as to the circumstances if such is the case, that the bank authorities had no actual knowledge of the tram company's resolution of the 30th November 1893 (or about that date) see appeal book p. 136, or of the agreement alleged to ensue thereupon—of all this the knowledge of the agent may perhaps be sufficient for many purposes.

The maxim "*Actus curiae nemini facit injuriam*" may also be important, for if Walkem J's order had been made instanter on the A.M. of the 24th the Edison Company might still have got the first execution, and (see conclusion of the report in Cumber *v.* Wane Smith L. cases and the notes.) further it may be contended that the Edison Company should not be injured by obedience to the order of a judge even though contained in an ordinary summons E.C. It is pointed out by Cotton L.J. in Richmond *v.* White 12 C.D. 364 C. A. "that "court never allows an order for payment of money into court to prejudice the "rights of the person paying it in."

Whether a judgment obtained under a judge's order, is a judgment by confession was decided in the affirmative in Andrews *v* Deeks 20 L.J. Exchequer p. 127. Probably if the attention of the trial judge had been called to this case and the judgments at greater length, he would have felt himself governed by it.

No. 34. Judgment in Court of Appeal. Mr. Justice McCreight, 19th Oct., 1895 —*continued.*

For in the Court sat at least two very eminent law lords, Barons Puhe and Rolfe, afterwards distinguished law lords, and the Judicial Committee pointed out in Trimble *vs.* Hill 5. Appeal cases at p. 344 and 345 that Colonial judges should defer to the high authority of English judges of eminence. However in the view I take of this case I think the point has but little application.

I have already said that a good deal of evidence was ruled out, as it seems to me erroneously, and upon the whole I think there must be a new trial. I think no order should be made as to costs. The trial judge has to use an expression of Mr. Justice Maule misdirected himself and moreover ruled out evidence where it should have been admitted, as it seems to me. There are perhaps other reasons, to which I will not now allude, for making no order as to costs.

Archibald, 14th edition, pp. 750, 751.

I have discussed points not raised by counsel for Lord Esher says in Emden *v.* Carte 19 Ch D. at p. 323 that "it is the duty of the judge to take "all the points which the case fairly raises"

If the judge at the new trial decides in favor of the Plaintiff the amount of damages which the plaintiffs have really sustained will require careful consideration owing to the existing mortgages &c and securities to the bank, and so will the distribution of such damages among creditors. I think there should be a new trial both parties to be at liberty to amend their pleadings as they may be advised.

Edison Electric Light Company *vs.* Westminster Tramway Company and Bank of British Columbia.

Mr. Justice Drake.

The contention in this case which was heard before a judge alone is that the judgment obtained by the Bank is void, and that the judgment of the learned judge who tried the case is wrong.

In appeals of this nature the presumption is that the decision of the Court below is right, which presumption must be displaced by the Appellant, and he must satisfactorily make out that the judge is wrong before the judgment will be reversed, but if the case is left in doubt it is the duty of the Court of Appeal not to disturb the decision of the Court below. Savage *vs.* Adam June 21st 1895. I allude to this ruling as guiding this Court, as the evidence is rather more remarkable for its omissions than for its assertions.

The facts which I think are proved, are as follows,—The Tramway Company was heavily involved, chiefly to the Bank of British Columbia, the Edison Company were also pressing them.

On the 15th October 1893, a letter was written to the Tramway Company by the solicitors of the Edison Company, apparently in answer to an application for time to pay, stating that they were satisfied the Edison Company would bring no action to recover the balance due, for ninety days from 13th September, unless it was necessary to protect the Edison Company's interests, and the letter expressly stated that the Edison Company were not to be bound by it.

This letter, if there was no other agreement, falls within the class of illusory contracts, dependent on the will of the solicitors.

The Tramway Company, however, paid the Edison Company $1,625.00,

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No. 34. Judgment in Court of Appeal. Mr. Justice Drake —*continued.*

which they obtained from the bank, apparently as a consideration for the delay mentioned in the letter.

On the 27th November the Edison Company issued process against the Tramway Company, who, some time after the 30th November, caused a resolution to be entered on their books, and communicated to the Edison Company to the effect that the Tramway Company had not at the date it was passed, placed the bank in any better position than it occupied on the 18th October, and agreed not to place the bank in any better position than it occupied on the same 18th October without the consent of the Edison Company; and the Tramway Company agreed to waive a claim for damages which they had against the Edison Company; —the consideration of this waiver does not appear in evidence.

This resolution, it was strongly urged, must have been given in consequence of some other promise on behalf of the Edison Company; and Oppenheimer's evidence clearly intimates that further time was promised.

In order to prevent the bank, who were pressing for their debt, from commencing an action against the Tramway Company, Mr. McColl, as Counsel for the Tramway Company, and Mr. D. Oppenheimer, President of the Company, on the 30th November (at which time the bank were aware that process had been issued by the Edison Company) informed the bank that they should under any circumstances have first execution. At this time it was clearly shown that if the bank sued, they could have obtained a judgment in priority to the Edison Company, if the Tramway Company did not defend, and this promise of Mr. McColl was equivalent to an undertaking not to defend.

The Edison Company signed judgment on the 29th December but this fact was not known apparently to the Tramway Company or the bank for more than a week afterwards.

The Edison Company did not issue execution or register their judgment. This to me appears as an indication that there was some agreement for delay, but the evidence on this head was excluded.

The Tramway Company considered this signing judgment a breach of the verbal agreement whatever it was, and took out a summons on the 13th day of January to set aside the judgment and stay proceedings. The summons to set aside the judgment is dated the 13th January, it is in the usual form calling upon all parties to attend on Tuesday, the 23rd January, on hearing an application on the part of the Defendants to set aside the judgment obtained therein, on certain grounds. It then states what affidavits will be read in support, and then goes on: "In the meantime let all proceedings be stayed." "By special leave."

"GEO. A. WALKEM," J.

Both parties have treated this summons as a stay of proceedings ordered by the court. This is not an order of a judge in any sense of the word.

A summons acts as a stay of proceedings from the return day until finally disposed of, Morris *vs.* Dant 2 B. and Ald. Glover *vs.* Watmore 5 B. and C. 769.

A summons need not be proceeded with; if served it need not be attended by any party.

Special leave is usually given to accelerate the hearing under Rule 587, and

not to postpone the hearing unless it has been found impossible to serve the summons in proper time before the return day.

If the mere fact that a judge has signed a summons containing a variety of statements makes the contents an order of the Court, it will be a very dangerous practice and one which will establish a new procedure not contemplated by our rules. If parties desire a stay of proceedings or execution, the usual course is by motion or summons returnable forthwith, Walford *vs.* Walford L. R. Ch. 812.

Rule 589 indicates the form in which an order should be drawn up. The summons in this case is not in form of an order.

But, even if it had the effect of an order, what is there to prevent the Edison Company registering their judgment in the Land Registry Office. That is not a proceeding in the action which would be affected by an order to stay; and, in my opinion, all that was affected by the summons was an intimation that the parties would apply for a stay of proceedings on the return.

It is to be remarked that there are several alterations in dates in the summons unmarked, and in consequence it is impossible to say whether these alterations were made before or after the signature was attached. Every alteration or erasure in a summons should be authenticated, according to the practice, before it is issued.

However, the Bank on the 17th day of January 1894 commenced their action, and the tramway company appeared and agreed to a judgment on the 24th day of January for the amount of the Bank claim, and on that day judgment was signed and registered and execution issued.

The Edison Company had from the 29th December to register their judgment and issue execution. They were not delayed by any step taken by the tramway company or the bank. The fact that they mistook the operation of the summons as an actual stay, is a matter which I do not think the Court has anything to do with. They could have gone on with their remedies in spite of the summons, and thus have raised the question of stay or no stay if they thought proper; but the Court will not relieve against a mistake of law.

The Edison Company contend that under any circumstances the Bank judgment is void because it was given either voluntarily or by collusion.

Their action is brought on behalf of all the creditors of the tramway company to set aside the judgment obtained by the bank and to declare the Plaintiffs' judgment a prior charge on the tramways company's land, and that the said lands be applied in satisfaction of the Plaintiffs' judgment and for an injunction. The other creditors are ignored in the relief asked, and if it was not for the statement that the application is brought on behalf of the creditors, it would have to be dismissed, as under the statute cap. 51 1888, there is no preference of the bank over the Edison Company. The Edison Company had their judgment, and giving a judgment to the bank did not prefer the bank, but only placed both parties on the same footing. A preference means an advantage over another. There was no advantage given the bank here as between the Edison Company and the bank, and unless it could be shown that the bank were parties to preventing the Edison Company from obtaining the fruits of their judgment by some unlawful act there is no cause of action.

RECORD.

No. 34. Judgment in Court of Appeal. Mr. Justice Drake —*continued.*

On the question of voluntarily giving the judgment, the evidence is very strong to show the judgment was given under pressure and it is only necessary to refer to Mr. Jenns' evidence in which he says the bank intended to wind up the company unless they had a prior judgment ; the bank insisted upon getting first execution ; and Mr. Ward says "I had been talking of commencing proceedings over and over again, and insisted the bank must have first judgment, and there was an understanding that such should be allowed, both before and after the conversation with McColl, which was on the 30th November, and otherwise the company would have to be wound up;" and Mr. Murray says he told Mr. Oppenheimer the bank must have judgment.

The company were negotiating for the sale of some bonds which, if carried out, would relieve the company of all pressing liabilities and enable them to continue the business, and the bank were anxious that the company should have time to carry out their negotiations.

The whole tenor of this evidence shows that the bank were pressing for their money and only refrained from sueing on the express understanding they were to have first execution if any one else attempted to forestall them.

The next question is, was the judgment obtained by the bank, given by collusion. Collusion is an agreement to deceive or, in other words, two or more persons conspiring to take some improper advantage of some one else. There is no evidence to show that the bank had any knowledge of the resolution of the tramway company, or that they instigated it; the inference is that if it had been brought to their notice they would not have delayed a day in commencing action.

The definition of collusion in Churchward *vs.* Churchward P.D. 1895, 15. will not help, as collusion there refers to proceedings in the Divorce Court. Dr. Lushington says collusion does not mean consent, but it is keeping back a just defence or allowing a false case to be substantiated, and the result of the case referred to by the President in that case is that if a divorce suit is provided for by agreement, as to its initiations or its conduct, it is collusion. A mere consent is not collusion, there must be an intent to deceive some one else. It has to be remembered that the Edison Company had a free hand to take any steps they thought fit to reap the fruits of their judgment from the 29th December up to the 14th January, on which day they fancied they were stopped by a stay of proceedings. Therefore if there was any collusion, it did not arise until after the Edison Company had had ample time to enforce their rights.

But a judgment given for a *bona fide* debt, in answer to pressure, is not a collusive judgment, although it may, in effect, postpone someone else.

It is quite clear that the summons taken out by the tramway company to set aside the Edison judgment, was a proceeding taken quite independently and apart from the bank action. Neither the bank's solicitor, nor any of the managers of the bank knew of it, still less suggested it. If this step had been agreed upon between the bank and the tramway company in order to assist the bank in obtaining priority and deceive the Edison Company, it would be collusion. An intention to deceive is a necessary ingredient of fraud. I see no intention to deceive on the part of the bank. They apparently had an opportunity arising from the supineness of the Edison Company and they took advantage of it. I see

no evidence of any concerted plan between the tramway company and the bank, or of any knowledge of the bank of any action by the tramway company to upset the Edison judgment. Without some such evidence, it cannot be said that there was a collusion of such a nature as to render the bank judgment void under the statute. But there must be intent to prefer; a judgment is not void without the intent to prefer. If there is a demand then there is no volition, and a judgment asked for and given, whether by confession or otherwise, is not void unless there is also an intent to prefer; the gist of the offence aimed at by the Act is voluntary preference, if this does not exist then a voluntary judgment is not void.

But apart from this criticism on the first section of the Act, I do not see how the cases on the second section of the Act can be distinguished in principle from the cases which arise under the first section.

The first section is aimed at judgments voluntarily or collusively given, with intent to delay or prefer. The second section deals with gifts, conveyances and transfers made with similar intent.

This second section has practically been wiped out of the statute book by a series of judicial decisions, and the only rag left is where the debtor without any request of the creditor gives him security.

In Stevens *vs.* McArthur 19 S.C. 446, a mere request by a creditor for payment was held sufficient to take the case out of the statute.

The difference in language in the two sections, it was contended, places voluntary judgments on a different footing from assignments made with intent to defeat or prefer. An assignment, to be void, must be voluntary, and if the words " voluntary or by collusion " were eliminated from the first section, and all judgments were rendered void that were given with intent to prefer, the principle on which the cases under the second section have been decided could not be distinguished. Retaining the words " voluntary or by collusion " does not add force to the statute, the governing principle being the intent with which the act is done, couple with the voluntariness of it, as distinguished from the willingness to do " the act in pursuance of a demand."

For these reasons I think the appeal should be dismissed with costs.

M. W. Tyrwhitt Drake J.

RECORD.

45/94. E.

No. 35.
Order of Court of Appeal, dismissing Appeal, 30th Jan., 1896.

In the Supreme Court of British Columbia.
In the Full Court.

Entered
Order Book
Vol. 19, Fol. 64
"R. R. P."

Victoria
Feb. 1 1896
Registry.

Present,

The Honourable the Chief Justice.
The Honourable Mr. Justice McCreight,
The Honourable Mr. Justice Drake.

Between

Edison General Electric Company . . . *Plaintiffs*, (*Appellants*),

and

Westminster and Vancouver Tramway Company, Bank of British Columbia, David Oppenheimer and Benjamin Douglas . . . . . *Defendants*, (*Respondents*).

Dated Thursday the 30th day of January, A.D. 1896.

Upon motion made unto this Honourable Court on the fifteenth (15th) sixteenth (16th) and seventeenth (17th) days of July, A.D. 1895, by counsel for the Plaintiffs by way of appeal from the judgment of the Honourable Mr. Justice Crease, and the order thereon which was perfected on the 7th day of March, A.D. 1895, and by way of motion for new trial, upon hearing read the notice of appeal and the appeal books filed by the said Appellants and the pleadings and proceedings herein, and upon hearing Mr. E. V. Bodwell and Mr. L. G. McPhillips Q.C. of counsel for the Appellants, and Mr. E. P. Davis, Q.C. of counsel for the Respondents the Bank of British Columbia, no one appearing on behalf of the other Respondents,

THIS COURT DID ORDER That the said appeal should stand for judgment, and the said appeal coming on this present day for judgment.

THIS COURT DOTH ORDER AND ADJUDGE That the said appeal by the Plaintiffs be and the same hereby is dismissed.

AND THIS COURT DOTH FURTHER ORDER AND ADJUDGE That the costs of and incidental to the said appeal be paid by the said appellants to the respondents the Bank of British Columbia, forthwith after taxation.

THIS COURT DOTH FURTHER ORDER AND ADJUDGE that this Order is made without prejudice to any fresh action that the Plaintiffs may hereafter be advised to institute against any of the Defendants in respect of the matters referred to in the pleadings or proceedings, but not so as to raise any cause of action based on either the Statute 5 Eliz. or Chap. 51 of the Consolidated Acts B.C. intitled "An Act respecting the Fraudulent Preference of Creditors by Persons in "Insolvent Circumstances."

By the Court.
ARTHUR KEAST
Dep. Registrar.

Seal of Court.

In the Privy Council.

No. 31 of 1896.

On Appeal from the Supreme Court of British Columbia.

BETWEEN

EDISON GENERAL ELECTRIC COMPANY . . . . *Appellants,*

AND

WESTMINSTER AND VANCOUVER TRAMWAY COMPANY, BANK OF BRITISH COLUMBIA AND OTHERS . *Respondents.*

RECORD OF PROCEEDINGS.

J. CORNELIUS WHEELER,
6, New Inn, Strand, W.C.,
for Appellants.

FRESHFIELDS & WILLIAMS,
5, Bank Buildings, E.C.,
for Respondents.