IRVING, J. 1900. June 28.

Sir C. H. Tupper, Q.C. (*Hunter* with him), objected and argued that the jury should be present during the whole trial.

Bodwell, Q.C., and *McPhillips, Q.C.*, were not called on.

BANK OF B. C. v. OPPENHEIMER

IRVING, J., remarked that this was his practice, and he saw no reason why the jury should not be excused as the question to which the proof was being adduced was for him alone to decide and excused the jury accordingly.

HENLEY v. THE RECO MINING & MILLING COMPANY, LIMITED LIABILITY.

FULL COURT At Victoria. 1900. March 6.

Practice—Adding parties—Third party notice—Rule 101 (a).

HENLEY v. RECO

In an action against a Company for a declaration that plaintiff was the owner of certain shares in the Company, the Company applied to have its President added as a third party on the ground that he was the real defendant and was responsible for the action.

Held, by the Full Court, affirming DRAKE, J., who dismissed the summons, that the defendant's remedy was by third party notice.

Statement.

APPEAL from an order of DRAKE, J., refusing an application of the defendant Company, that one J. M. Harris, the President of the Company, be added as a party defendant.

The facts as set out in the affidavit of the defendant's solicitor used on the application were:

"This action is in respect to the refusal of the defendant Company to transfer to the plaintiff certain shares or scrip which the said Company allege to have been obtained from them by means of fraudulent representations.

"The defendant Company allege that the said shares or scrip were obtained from them by various fraudulent representations made by L. E. Hauk, L. Peterson and S. T. Arthur, that one J. M. Harris, the President of the defendant Company, was then indebted to them in certain sums, whereas the said J. M. Harris was not indebted to the said L. E. Hauk, L. Peterson and S. T.

FULL COURT At Victoria.

1900.

March 6.

HENLEY v. RECO

Arthur or to any of them in the sums then specified or in any sums, but that the alleged indebtedness of the said J. M. Harris was arising out of certain gambling transactions between the said J. M. Harris, L. E. Hauk, L. Peterson and S. T. Arthur.

"I am advised and verily believe that it is necessary that the said J. M. Harris be added as a defendant to this action, and the solicitors for the defendant Company undertake to appear for the said J. M. Harris, and I refer to the pleadings filed in this action as shewing the nature of the defence."

The appeal was argued on 6th March, 1900, before McCOLL, C.J., IRVING and MARTIN, JJ.

Argument.

Peters, Q.C., for appellant, relied on *Montgomery* v. *Foy, Morgan & Co.* (1895), 2 Q.B. (C.A.) 321. We wish to counter-claim to get the shares fraudulently obtained cancelled. Harris has caused all the trouble and he ought to come in and bear the brunt. Harris is the real defendant and wishes to defend and has given an undertaking by solicitor to appear.

Duff, for respondent: The defendant is now attempting to bring his case within *Montgomery* v. *Foy, Morgan & Co.* There is no suggestion in the affidavit of defendant's solicitor as to a counter-claim. It is not necessary in order to bind Harris that he be added as a party. The proper procedure is by third party notice. We have no claim against Harris and if he is added our action will inevitably be dismissed as against him. The rule is that a defendant will not be added to suit his own convenience, see Annual Practice (1900), pp. 157 and 158; *In re Harrison* (1891), 2 Ch. 353. See also *Peterson* v. *Fredericks* (1893), 15 P. R. 361.

Peters replied.

The judgment of the Court was delivered 6th March, 1900, by

Judgment.

McCOLL, C.J. who [after stating the facts] proceeded: The shares were issued by arrangement between Harris and the Company. No other question than that of the alleged fraud is raised by the pleadings.

Mr. *Peters*, for the appellants, relied upon *Montgomery* v. *Foy, Morgan & Co.* (1895), 2 Q.B. (C.A.) 321. That case decided in the words of Lord Esher, M.R., at p. 324:

"Here the matter before the Court is the contract of affreightment, and there are disputes arising out of that matter as between the plaintiff and the defendants, and the Company whom it is sought to add as defendants, and who were the defendants' principals in the matter. I can find no case which decides that we cannot construe the rule as enabling the Court under such circumstances to effectuate what was one of the great objects of the Judicature Acts, namely, that, where there is one subject-matter out of which several disputes arise, all parties may be brought before the Court, and all those disputes may be determined at the same time without the delay and expense of several actions and trials."

And as I understand the decision the question is one of discretion to be decided according to the circumstances of the particular case as said by Kay, L.J., at p. 325:

"I wish to guard myself against being supposed to decide that in all cases it would be a sufficient reason for joining a person as defendant, that, if joined, he would have a counter-claim against the plaintiff."

In the present case there is only one thing in dispute, the claim to the shares or their value. The right, if any, of Harris against the persons mentioned in the affidavit referred to does not arise out of contract, but out of the fraud alleged to have been committed by them to which the Company is not alleged to have been a party, and may not be affected by the result of this action.

Judgment.

I am of opinion that the proper course of the defendant Company as regards Harris, so far as he is concerned with the present action is to serve him with a third party notice. In *Hutchison* v. *Colorado United Mining Company* (1884), W.N. 40, the same learned Judge who made the order in *Montgomery* v. *Foy, Morgan & Co., supra*, doubted whether the procedure by a third party notice was applicable where the plaintiffs claimed against a Company the right to be placed upon the register in respect of certain shares which were claimed by a third person, but it does not appear how the third party claimed. Here, Harris procured the defendant Company to issue the shares in question, and having afterwards notified it not to register them because of the alleged

FULL COURT At Victoria. 1900. March 6.

HENLEY v. RECO

fraud it seems to me to be clear that the defendant Company has the right to be indemnified by Harris against the consequences of the position which he himself has thus brought about, and that the third party notice is therefore applicable.

Judgment.

Since the argument I have consulted Mr. Justice DRAKE with reference to the ground upon which he proceeded, there having been no written reasons given by him, and he has handed me his notes, from which it appears that he decided upon similar grounds, and that he referred to the cases of *Pilley* v. *Robinson* (1887), 20 Q.B.D. 155 and *Horwell* v. *London General Omnibus Company, Limited* (1877), 2 Ex. D. 365.

Appeal dismissed.

MARTIN, J. 1900. March 30.

FULL COURT At Vancouver. Sept. 20.

JONES v. DAVENPORT

JONES v. DAVENPORT.

Practice—Pleading Statute of Limitations—Amendment first asked for in Full Court—Terms on which allowed—Costs.

The Full Court has power to allow, on terms, an amendment for the first time of a pleading by setting up a fact which would if proved be a good answer to a plea of the Statute of Limitations.

There is no fixed rule that in all cases costs of interlocutory proceedings shall not be payable until the conclusion of the litigation.

ACTION on a foreign judgment recovered in the State of Minnesota in 1888. The trial took place at Nelson on 16th February, 1900, before MARTIN, J.

R. M. Macdonald, for plaintiff.
Wheatler, for defendant.

30th March, 1900.

Judgment of MARTIN, J.

MARTIN, J.: This is an action on a foreign judgment, recovered in the State of Minnesota more than six years ago, and it is admitted that such an action would come within the first paragraph of section 3 of the Statute of Limitations, Cap. 123, R.S. B.C. 1897, were it not for Part IV., of said Statute which con-

J. M. Harris, Pres. F. T. Kelly, Sec.

J. M. Harris Investments &c.

The Reco Mining and Milling Co. Limited Liability

Capital Stock $1.000.000.00 Fully Paid. Non-Assessable.

Sandon Waterworks & Light Co Capital Stock $50.000.

Sandon, B.C. Nov. 18, 1898

Captain W. Cleather Gordon,

General Manager,

Grosvenor Club West,

London, England.

Dear Sir:-

This letter will introduce to you Mr. J. M. Harris, of Sandon, British Columbia. While in London I know that you will do all you can to make it pleasant for him while there. Please introduce Mr. W. H. Longsdorf and Mr. Herbert W. Hooper to Mr. Harris, as they may be able to benefit him in any financial transactions he may seek to make.

With kind regards, and hoping that you are well, I remain,

Yours very truly,

L. Ericsen Hauk

JMH SOUS FONDS, BOX 1, FILE 3