

accept if they choose. However, taking this evidence in connection with all the other circumstances of the case, we have no doubt that there was evidence to justify the jury in inferring that Brown was one of the party who committed the assault.

F.C.  
 1889  
 REGINA  
 v.  
 BROWN.

*Conviction affirmed.*

*Williams, J.*

Solicitor for the Crown : *E. Sandford*, Acting Crown Solicitor.

W. H. M.

[IN CHAMBERS.]

BALLANTYNE AND OTHERS v. RAPHAEL AND OTHERS.

WRIGHT AND OTHERS v. SAME.

WALKER AND OTHERS v. SAME.

1889  
 May 17.  
 Holroyd, J.

“*Rules of the Supreme Court 1884*”—*Order XLIV., r. 8—Consolidation of actions—Conduct of test case, who is entitled to.*

Two persons, A and C, members of a land syndicate, brought actions, each on his own behalf, against the same defendants with reference to a contract for the sale of land. A third person, B, afterwards commenced an action on behalf of himself and all the other members of the syndicate against the same defendants. This third action was commenced in pursuance of a resolution arrived at by the majority of the members of the syndicate. Subsequently the first two plaintiffs amended their actions by stating that they each sued on behalf of himself and all other members of the syndicate. The action in which B was plaintiff had proceeded further than the other actions, and was set down for trial. Upon an application by the defendants to have the actions consolidated, or that two of the actions should be stayed pending the trial of the third,

*Held*, that the action of B and others should proceed, and that the other two actions should be stayed.

APPLICATION for consolidation of actions.

This was an application by the defendants that three actions brought against them should be consolidated, or that two of the said actions be stayed pending the trial of the third. It appeared that the solicitor for the plaintiffs, Wright and Walker, issued two writs on the same day, on 9th February 1889, on behalf of each plaintiff against the defendants. On the 23rd February the plaintiff Ballantyne commenced an action against the same defendants, on behalf of himself and all other members of the syndicate; other

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names were set out in the claim. This last-mentioned action was commenced in pursuance of a resolution arrived at by the majority of the members of the syndicate. In April 1889 the plaintiffs, Wright and Walker, amended their actions by adding that they sued on "behalf of all other members" of the syndicate. The proceedings in each case were brought in respect of land transactions, and it was sought to rescind the contract of sale and for return of money paid. The relief sought in each action was practically the same. The proceedings in Ballantyne's action had reached a further stage than the others. The further facts material to the report are set out in the judgment.

*Topp* in support of the application—The defendants are entitled to have these actions consolidated, or to have two of them stayed pending the trial of the third. They should be protected from a series of cases, which are practically for one and the same purpose. The pleadings in the action brought by Wright and Walker are drawn by the same counsel, and are word for word identical.

*Isaacs* for the plaintiffs Ballantyne and others—The defendants are undoubtedly entitled to be protected, but the question is, which plaintiff is entitled to have the conduct of the test action. It is in the discretion of the Court to choose the action which should proceed: *Amos v. Chadwick (a)*. The plaintiff Ballantyne sues on behalf of himself and all the other members of the syndicate, while the other two plaintiffs originally commenced their actions on their own behalf.

*Wasley* for the plaintiffs Wright and Walker—These two plaintiffs were first in the field, and one of them should have the conduct of the test case.

[HOLROYD, J. One of these two actions must be stayed, because they are in every respect identical.]

Then I should ask that Wright's action be proceeded with. In the case of *In re Swire (b)*, Jessel, M.R., lays down the rule thus: "The general rule is that the plaintiff in the first action shall have

(a) 9 Ch. D. 459.

(b) 21 Ch. D. 647, p. 652.

the conduct of the proceedings, although the decree or judgment is first obtained in the second action. This is the general rule, a rule made for the best of reasons to discourage racing, as it is called, and to prevent double or treble costs being incurred by solicitors or parties." Counsel also cited *The Never Despair* (c).

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HOLROYD, J. I think that in this case I ought to allow the action of *Ballantyne and others v. Raphael* to proceed, and to stay the other actions. It is perfectly true that there are other suits besides administration suits, in which one person is allowed to sue on behalf of himself and other persons; and when a number of different actions are commenced for the same purpose, and against the same defendants, the first action has priority as a rule; but that rule is subject to exceptions. In this particular case it appears that the majority of members who complain of fraud having been perpetrated upon them, met together and resolved upon what proceedings they should take, and came to that resolution before any action had been commenced by anybody. An action was then commenced by Wright, in February, on his own account, and immediately afterwards by Walker on his own account, against the two persons who are defendants in all three actions. Then the plaintiffs in the action of "Ballantyne and others" start their action in pursuance of their resolution before arrived at. Some time afterwards, in April, Wright and Walker think proper to convert their actions, commenced on their own account, into actions on behalf of all members of the syndicate, taking upon themselves to represent the rights of other persons who did not wish to be represented by them at all, and who had already commenced proceedings on their own account. If I let the action of "Ballantyne and others" go on I shall be consulting the wishes of the greater number of persons aggrieved. I think that Walker and Wright are really the persons who have been racing to get the conduct of the suit against the wish of the other members. They have instituted two consecutive actions, and appear here by the same counsel as if they were working in the same boat, and are willing that either should get the conduct of the suit so long as one of them does so. It

(c) 9 P.D. 34.

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seems a curious thing that two actions should have been commenced by the same solicitor for two persons. For these reasons I think I should best promote the progress of the cases, by allowing "Ballantyne and others" to proceed, and staying the other actions. I merely stay the other actions until I see what becomes of the first. If that is not properly conducted, or does not try the same issues as are raised in the other actions, the others may come on. I am not sure that this is not an action in which all the parties should be before the Court. I am not prepared to say that it would be convenient that one person should be allowed to sue on behalf of all the others. Finally, the action of "Ballantyne and others" is the one which has proceeded the furthest, and in which the matters are likely to be soonest disposed of.

Solicitor for Ballantyne and others: *Lazarus.*

Solicitor for Wright and Walker: *Coburn.*

Solicitors for defendants: *E. L. Vale & Sons.*

W. H. M.

1889  
May 23.  
Holroyd, J.

[IN CHAMBERS.]

IN RE McCracken's City Brewery.

*Regulæ Generales, 15th August 1876, r. 11—Memorandum of satisfaction on a bill of sale—Practice—Corporate seal to be affixed.*

For the purpose of obtaining a judge's order for the entry of a memorandum of satisfaction on a bill of sale, it is necessary that the satisfaction piece should be signed by one of the parties to the bill of sale. It is not sufficient in the case of an incorporated company that the managing director should sign on behalf of the company, at least unless he is proved to be the authorised agent of the company for that purpose; otherwise it is necessary that the seal of the company should be affixed.

APPLICATION for an order for the entry of a memorandum of satisfaction on a bill of sale.

This was an application made *ex parte* to enter a memorandum of satisfaction on a bill of sale. The satisfaction piece was signed by the managing director of the company. There was no evidence to show that the managing director was the attorney of the company for this purpose.