REPORTS

— OF THE —

EXCHEQUER COURT

— OF —

CANADA.

CHARLES MORSE, D.C.L., BARRISTER-AT-LAW,

REPORTER.

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TABLE OF CONTENTS.

JUDGE

OF THE

EXCHEQUER COURT OF CANADA.

THE HONOURABLE GEO. W. BURBIDGE,

Appointed on the 1st day of October, 1887.

LOCAL JUDGES IN ADMIRALTY OF THE EXCHEQUER COURT OF CANADA

During the period of these Reports.

The Honourable	A. B. ROUTHIER, - - - - -	Quebec	District.
do	JAMES McDONALD, C.J.S.C. - -	N. S.	do
do	EZEKIEL McLEOD, - - -	N. B.	do
do	WILLIAM W. SULLIVAN, C.J.S.C.	P. E. I.	do
do	THEODORE DAVIE, C.J.S.C. - - (DIED 7th March, 1898.)	B. C.	do
do	A. J. McCOLL, C.J.S.C. - - - (APPOINTED 23rd August, 1898.)	B. C.	do
do	James Craig, J.T.C. - (APPOINTED 5th May, 1900.)	Yukon Territory	District.
His Honour	JOSEPH E. McDOUGALL - -	Toronto	District.

ATTORNEYS-GENERAL FOR THE DOMINION OF CANADA

During the period of these Reports.

THE HONOURABLE SIR OLIVER MOWAT, G.C.M.G.; P.C.; Q.C.

THE HONOURABLE DAVID MILLS, P.C. Q.C.

SOLICITOR-GENERAL FOR THE DOMINION OF CANADA:

THE HONOURABLE CHARLES FITZPATRICK, Q.C.

A TABLE

OF THE

NAMES OF THE CASES REPORTED

IN THIS VOLUME.

A.

B.

C.

D.

F.

G.

G.

H.

I.

J.

K.

L.

M.

Mc.

O.

P.

Q.

NOTE:—Errors in Cases Cited are corrected in the Table of Cases Cited.

TABLE OF CASES CITED.

A.

B.

B.

C.

C.

D.

E.

F.

G.

H.

H.

I.

J.

K.

L.

M.

Mc.

N.

O.

P.

Q.

R.

S.

T

U.

V.

W.

Y.

Z.

CASES

DETERMINED IN THE

EXCHEQUER COURT OF CANADA.

A. E. D. McKAY'S SONS AND OTHERS.....SUPPLIANTS; 1896

June 15.

AND

HER MAJESTY THE QUEEN.....RESPONDENT.

ST. LAWRENCE SUGAR REFINING COMPANY (LTD.).....} SUPPLIANTS;

AND

HER MAJESTY THE QUEEN.....RESPONDENT.

Liability of Crown—Government canal—Accident to vessel using same—Negligence of Crown servant—Petition of right.

Under the provisions of *The Exchequer Court Act*, sec. 16 (c), the Crown is liable in damages for an accident to a steamer and cargo while in a Government canal, where such accident results from the negligence of the persons in charge of the said canal.

THESE were claims arising out of an accident to the steamer "Acadia" while carrying freight through the Morrisburg Canal. The steamer, while navigating the waters of the said canal struck upon a boulder or stone lying upon the bottom of the canal and was injured so that she sprang a leak and her cargo was damaged. The companies holding insurance upon the ship and cargo paid the claims arising upon their policies by reason of such accident, and became subrogated to the

1896

McKAY'S SONS v. THE QUEEN.

ST. LAWRENCE SUGAR REFINING COMPANY v. THE QUEEN.

Reasons for Judgment.

policy-holders in respect of their right of action against the Crown for negligence in allowing the said boulder or stone to be in the canal.

The case turned in law on the provisions of clause (c.) of section 16 of *The Exchequer Court Act* which gives the court exclusive original jurisdiction in respect of "every claim against the Crown arising out of any death or injury to person or to property on any public work, resulting from the negligence of any officer or servant of the Crown, while acting within the scope of his duties or employment."

The cases were tried at Montreal on the 18th, 20th and 21st March, 1896.

B. B. Osler, Q.C., for the suppliants;

W. D. Hogg, Q.C., for the Crown.

THE JUDGE OF THE EXCHEQUER COURT now (June 15th, 1896) delivered judgment.

There will be judgment for the suppliants with costs.

There will also be a reference to the Registrar to assess the damages in accordance with the agreement at the trial.

I shall not hand any written reasons to the Registrar, but I may say that the judgment proceeds upon this: that there is no doubt that the steamer was injured by running on a rock or boulder in the canal. I think that this boulder, while not in the centre line of the channel, was well within the part of the canal where vessels might reasonably go, and that it could not have been there unless through some carelessness or negligence of the officers and servants of the Crown. Either the superintendent of the canal or the resident engineer was at fault in not giving proper instructions to their men with respect to the means to be

taken to keep the channel clear, or the men themselves failed to carry out their instructions. In either case the injury would be the result of the negligence of the officers or servants of the Crown (1) while acting within the scope of their duties or employment, for which the Crown would be liable under the provisions of subsection (c) of section 16 of 50-51 Vict. c. 16.

Judgment accordingly.

Solicitors for the suppliants: *McCarthy, Osler, Hoskin & Creelman.*

Solicitors for the respondent: *O'Connor & Hogg.*

1896

McKAY'S SONS v. THE QUEEN.

ST. LAWRENCE SUGAR REFINING COMPANY v. THE QUEEN.

Reasons for Judgment.

(1) REPORTER'S NOTE.—For other cases of negligence decided under this section, see *City of Quebec* v. *The Queen*, 2 Ex. C. R. 252; *Brady* v. *The Queen*, Ibid. 273; *Gilchrist* v. *The Queen*, Ibid. 300; *Martin* v. *The Queen*, Ibid. 328; *Martial* v. *The Queen*, 3 Ex. C. R. 118; *Dubé* v. *The Queen*, Ibid. 147; *Leprohon* v. *The Queen*, 4 Ex. C. R. 100; *Filion* v. *The Queen*, Ibid. 134.

1897
Oct. 11.

HER MAJESTY THE QUEEN ON THE INFORMATION OF THE ATTORNEY-GENERAL FOR CANADA..... PLAINTIFF;

AND

WILLIAM J. POUPORE, JOHN G. POUPORE AND JOHN B. FRASER DEFENDANTS.

Contract—Public works—Damages—Negligence—Sufficiency of proof.

In an action by the Crown for damages arising out of an accident alleged to be due to the negligence of a contractor in the performance of his contract for the construction of a public work, before the contractor can be held liable the evidence must show beyond reasonable doubt that the accident was the result of his negligence.

THIS was an action for damages for negligence in the performance of a contract for the construction of a public work.

The facts are stated in the reasons for judgment.

The case came on for hearing on the 6th and 7th days of May, 1897.

B. B. Osler, Q.C. and *E. L. Newcombe*, Q.C., D.M.J., for plaintiff;

A. B. Aylesworth, Q.C., *W. D. Hogg*, Q.C. and *J. Christie*, for the defendants, relied on *The Montreal Rolling Mills Co.* v. *Corcoran* (1).

THE JUDGE OF THE EXCHEQUER COURT now (October 11th, 1897) delivered judgment.

The information is exhibited to recover from the defendants a sum of forty-four thousand nine hundred and nine dollars and forty cents, which after judgment therefor in this court the Crown paid as damages to the owners of the steam propeller "Acadia" (2)

(1) 26 Can. S. C. R. 595. (2) See ante p. 1.

injured while navigating the Rapide Plat Division of the Saint Lawrence Canals, and to the owners of the cargo with which the steamer was laden at the time of the accident.

1897

THE QUEEN v. POUPORE.

Reasons for Judgment.

The steamer was injured by running upon a rock or boulder in the canal, and the principal question in the former cases was whether the injury resulted from the negligence of an officer or servant of the Crown while acting within the scope of his duties or employment. That issue was found against the Crown, it being clear that there had been carelessness or negligence in not discovering the presence of the boulder in the channel used by vessels.

The issue in this case is different. The accident happened at a place adjacent to where the defendants, who were contractors for deepening the canal, had been carrying on their work. It was the duty of the contractors to see that none of the material used by them was allowed to fall into the channel of the canal and obstruct it. That would, I think, have been their duty apart from their contract. But they had also thereby stipulated that their operations should be so conducted during the season of navigation as not for any continuous length of time to interrupt or interfere in any way with the passage of vessels through the canal; that any loosened stones or material the top of which was higher than the bottom of the canal should be at once removed; and that this condition as to keeping the channel-way free and uninterrupted and the bottom clear should be strictly carried out. It was contended for the Crown that this imposed upon the contractors the duty of keeping the channel clear of all obstructions irrespective of how such obstructions were occasioned. With that contention I do not agree. The undertaking to keep the channel of the canal clear of stones and other material applies to stones and

1897

THE QUEEN v. POUPORE.

Reasons for Judgment.

other material moved or loosened by the contractors in carrying on their work of dredging and does not apply to stones or boulders that were in the channel of the canal when they commenced their operations, or that were dropped or deposited there by other persons or carried there by the action of the ice while the work was being carried on.

That being the case, the issues in this case, and the former cases are by no means the same. In the former cases it was not necessary to come to any conclusion as to how the boulder that occasioned the accident came to be in the channel of the canal. The fact that it was allowed to remain there was sufficient to render the Crown liable. It was the duty of its officers to take the necessary means to discover it, and then to remove it. But here before the defendants can be made liable it is necessary to go further and to find that the defendants or their servants were in some way responsible for the boulder being in the channel of the canal. Were they so responsible? It is possible that they were. One may go further and say that according to the evidence it is in a measure probable that this boulder was part of the material loosened during the work carried on by the defendants, and that they were responsible for its being where it was when the accident happened. But there is not, it seems to me, that degree of certainty about the matter to justify a judgment against them. The particular boulder may have been in the channel before the defendants commenced their operations. The enquiry, which if it had been made at the time of the accident, might have afforded the means of coming to a conclusion as to that, was neglected; and it is also possible that the boulder may have been placed where it caused the accident by other persons using the canal, or it may

perhaps have been carried there by the action of the ice.

There will be judgment for the defendants, and with costs.

Judgment accordingly.

Solicitor for the plaintiff: *E. L. Newcombe.*

Solicitors for the defendants: *Christie, Green & Green.*

1897

THE QUEEN v. POUPORE.

Reasons for Judgment.

1897
Oct. 27.

JOHN M. BALDERSON .....SUPPLIANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

Civil servant—Superannuation—R. S. C. c. 18—Discretion of Governor in Council—Reviewing same—Jurisdiction—Petition of right.

Where under the provisions of *The Civil Service Superannuation Act* (R. S. C. c. 18), the Governor in Council exercises the discretion or authority conferred upon him by such Act to determine the allowance to be paid to a retired civil servant, his decision as to the amount of such allowance is final, and the Exchequer Court has no jurisdiction to review the same.

PETITION of Right claiming a further superannuation allowance to a civil servant retired under the provisions of R. S. C. c. 18.

The facts appear in the reasons for judgment.

The case came on for hearing, at Ottawa, on the 27th October, 1897.

W. D. Hogg, Q.C. and *J. M. Balderson*, for the suppliant, contended that under the 11th section of the Superannuation Act, R. S. C. c. 18, where a person is retired from the civil service ostensibly for the purpose of promoting economy in such service, it is obligatory upon the Governor in Council to add ten years to the length of time they have been regularly employed by the Government in order to arrive at a fair compensation for the deprivation of office. (*Julius* v. *The Bishop of Oxford* (1); *Hardcastle on Statutes* (2); *The Queen* v. *The Bishop of Oxford* (3); *McDougall* v. *Paterson* (4); *Endlich on Statutes* (5).) The court should declare the suppliant's right to the additional allowance.

(1) 5 App. Cas. 225.
(2) 2nd ed. 316.
(3) 4 Q. B. D. 245.
(4) 6 Exch. 387.
(5) Sec. 306.

1897

BALDERSON v. THE QUEEN.

Argument of Counsel

The Solicitor General of Canada (with whom was *E. L. Newcombe*, *Q. C.*, *D. M. J.*).—The court has no jurisdiction to interfere with the Governor in Council when he has exercised his discretion as to the amount to be allowed to a retired civil servant. The civil servant is expressly denied by the 8th section any absolute right to a retiring allowance. He has to depend upon the bounty of the Crown; and whether he be given a small allowance or none the courts cannot aid him. (*Cooper* v. *The Queen* (1); *Bell* v. *The Queen* (2); *Matton* v. *The Queen* (3); *Dunn* v. *The Queen* (4); *Shenton* v. *Smith* (5).)

Mr. *Hogg* replied, citing *Gould* v. *Stuart* (6).

At the conclusion of the argument THE JUDGE OF THE EXCHEQUER COURT delivered judgment:—

I do not think that anything is to be gained by delaying the judgment of the court in this case, as I entertain no doubt myself as to what that judgment should be.

The court has jurisdiction to give relief in two views of the case only: first, that the action is based upon a contract; secondly, that it arises under some law of Canada. Section 15 of *The Exchequer Court Act* provides: "The Exchequer Court shall have "exclusive original jurisdiction in all cases in which "demand is made or relief sought in respect of any "matter which might, in England, be the subject of "a suit or action against the Crown, and for greater "certainty, but not so as to restrict the generality of "the foregoing terms, it shall have exclusive original "jurisdiction in all cases in which the land, goods "or money of the subject are in the possession of the

(1) 14 Ch. D. 311.
(2) [1896] 1 Q. B. D. 121.
(3) 5 Ex. C. R. 401.
(4) [1896] 1 Q. B. 116.
(5) [1895] A. C. 229.
(6) [1896] A. C. 575.

1897

BALDERSON v. THE QUEEN.

Reasons for Judgment.

" Crown, or in which the claim arises out of a contract " entered into by or on behalf of the Crown."

Now, I think we may put aside without further discussion the question as to whether there was a contract or not. There is no express contract to pay or provide on retirement of the public officer any certain, or any retiring allowance, and I think there is no such contract to be implied from his employment in the civil service.

Then with reference to the second view of the case, namely, as to whether the action may be maintained under clause (*d*) of the 16th section of *The Exchequer Court Act*, it will be seen that the provision gives the court jurisdiction in respect of "Every claim against the Crown arising under any law of Canada or any regulation made by the Governor in Council." Now I do not doubt that by virtue of that provision the court would have jurisdiction, if, as contended by Mr. Hogg, the statute itself determined the amount of the retiring allowance and the allowance had not been paid. But the statute does not itself determine the amount of the superannuation allowance; it prescribes the rule by which the amount is to be ascertained and empowers His Excellency in Council to determine it.

That raises then two questions: First, is the authority given to the Governor in Council to grant the retiring allowance in accordance with the statute, coupled with a duty in a proper case to exercise that authority? and, secondly, if it is, and the duty has not been performed as prescribed by the Act, has this court jurisdiction to enforce the performance of such duty?

As to the first question, it is not, in the view I take of the second, necessary to express any opinion. It is unnecessary to decide whether or not it is the duty of the Governor in Council in the particular case to grant any retiring allowance, or in granting it to add

1897

BALDERSON v. THE QUEEN.

Reasons for Judgment.

one or two, or ten years to the term of the suppliant's service. Of this I am well satisfied that this court has no authority either to enforce the performance of any such duty, or when the Governor in Council has exercised his discretion to grant a retiring allowance (1), to review the exercise of such discretion. It is clear, I think, that this court has no jurisdiction to control or review the exercise of the authority or discretion vested in His Excellency in Council by the statute. Therefore, I think the petition will not lie, and I am of opinion to dismiss it with costs against the suppliant.

I may add that I expressed much the same view as I do here in the case of *Matton* v. *The Queen* (2), and having had an opportunity of considering the question before giving judgment in that case I feel that there is no good reason for me to take any time before coming to a conclusion on the present petition.

Judgment accordingly.

Solicitors for the suppliant: *O'Connor, Hogg & Magee.*

Solicitor for the respondent: *E. L. Newcombe.*

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(1) 1 R. S. C. c. 18, s. 11. (2) 5 Ex. C. R. 401.

1898
Jan. 17.

ALEXANDER S. WOODBURN.. .....SUPPLIANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

Petition of right—Contract—Statutory requirements—Informality—Ratification by Crown.

A contract entered into by an officer of the Crown empowered by statute to make the contract in a prescribed way, although defective in not conforming to such statutory requirements, may be ratified by the Crown.

PETITION OF RIGHT seeking damages against the Crown for breach of a contract for departmental binding.

The contract relied on by the suppliant was impugned by the Crown for not conforming to the requirements of 32 & 33 Vict. c. 7, sec. 6, viz:—

"The printing, binding, and other like work to be "done under the superintendence of the Queen's "Printer, shall, except as hereinafter mentioned, be "done and furnished under contracts to be entered "into under the authority of the Governor in Council, "in such form and for such time as he shall appoint, "after such public notice or advertisement for tenders "as he may deem advisable, and the lowest tenders "received from parties of whose skill, resources, and "of the sufficiency of whose sureties for the due per-"formance of the contract the Governor in Council "shall be satisfied, shall be accepted."

The contract is set out in the reasons for judgment.

April 16th, 1896.

At the hearing of the case this day, the Judge of the Exchequer Court directed a reference for the purpose

of enquiry and report as to the damages sustained by the suppliant, reserving the questions of law.

June 11th, 1897.

The Referee now reported in favour of the suppliant for the amount of $38,829.03 as representing in the Referee's opinion the amount of the damages sustained.

September 14th, 1897.

The matter now came before the court upon two motions, one by the Crown by way of appeal from the Referee's report, the other by the suppliant to confirm the report. The motions were consolidated as to the hearing.

R. V. Sinclair for the suppliant:

With Reference to the correspondence between Woodburn and the Secretary of State's Department, the fair view is that Woodburn takes the position that he is ready to do the work, but he wants the proper price for it under his contract.

Then your Lordship will have to construe the schedule to see if "The Revised Statutes" come within the meaning of the term "Statutes," as there used.

The referee was inclined to think upon the argument that it was a "future arrangement," within the meaning of the order in council, that they entered into in giving "The Revised Statutes" to some one else The letter of the Queen's Printer of 30th October, 1886, which we claim to contain the evidence of our contract, says: "Pending future arrangements, the binding will be sent to you."

Then we claim that the Referee should not have deducted the men's wages from the profit. We say they had been paid already in doing the work we actually got. We had staff enough to do all the work that came to us and all that was taken away from us. The Government was bound to send us all the work

1898

WOODBURN v. THE QUEEN.

Argument of Counsel.

it had to do. If Woodburn had not kept the men on hand he would have been subject to a penalty under his contract.

[PER CURIAM.—You say that this work would have been all profit except the material ?] Yes.

The evidence shows that the work was taken away from day to day during the whole period. Some weeks there was much to do, some little, some weeks a good deal more than others. So at times they were slack. Our contention is that if they had been given this extra work they could have done it during the slack times when wages were accruing to them which were then paid. Two days of the week they were slack as a general rule, and then rushed on the last two days.

[PER CURIAM.—Is that prudent? You could not say you kept men there to do work you were not getting. There is no contract that would compel you to do six days work in four.]

We had only enough men to answer the requirements of the contract. He cites *Waters* v. *Towers* (1).

W. D. Hogg, Q.C., for the Crown :

The whole theory of the suppliant's case in estimating his damages proceeded upon the view that the proper amount of wages applicable to each individual item which other persons than contractor had received, should be so applied. That, I submit, is the proper basis, and it having been so limited it ought not to be extended now. The schedules filed by the suppliant show the contract rates and the profits which would have accrued to the contractor had he done this particular work, deducting first the proper expenses—wages among the rest. Now the suppliant wishes to be paid back these wages on the theory that he would have paid out no wages at all to do this extra work.

(1) 8 Exch. 401.

1898

WOODBURN v. THE QUEEN.

Argument of Counsel.

[PER CURIAM.—They did not present their case that way first?]

No, and very naturally, because the way we pursued was the way all these references have been conducted. The test is what would it cost to produce this particular work? Not a calculation of how it could have been done for nothing by men in their slack time.

[PER CURIAM.—That doesn't take away the force of the argument that he would have had more profit if he had had this extra work to do.]

It must be admitted that the evidence establishes that the work done outside was of a more profitable character.

As to "The Revised Statutes," there was a contract prior to 9th November, but on that date it was absolutely put an end to and there was nothing beyond "negotiations" between the parties after that date with reference to "The Revised Statutes." The contractor refused to do them, and never did them.

The suppliant is only entitled to damages for five years. That is not questioned by the Crown, but my argument is that on 1st December, 1884, the contract was at an end, and never revived afterwards. This is established by the order in council of 30th October, 1886.

The fact is that after 1st December, 1884, there was no sort of dealings between the parties which would give the suppliant a right to damages for a breach of contract. This is distinguishable from the case of an executed contract for work done and goods sold and accepted. There is no authority to show that the Crown can be made liable for the breach of an executory contract. The facts show that the only contractual relations between Mr. Woodburn and the Government were those subsisting in the odd jobs that were sent him from time to time to do and which he

1898

WOODBURN v. THE QUEEN.

Argument of Counsel.

has been paid for. There was no contract in respect of a breach of which he could recover damages.

[PER CURIAM.—You distinguish between a contract for work and labour done, and a contract to give labour?]

Yes, and I say the principle of the one cannot be applied to the other in extending the liability of the Crown. Before the suppliant could recover for a breach of an executory contract he must have a good and valid contract made according to the requirements of the statute. A valid formal contract is the foundation of his case, and without it he is out of court after December, 1884.

Mr. Sinclair in reply cited the Queen's Printer's Act of 1869.

[PER CURIAM.—You must go further and show that the Secretary of State had power to make a contract of his own motion to give labour for breach of which the Crown would be liable.]

The statute is only directory and a contract may be valid even while its form does not satisfy sec. 6 of the Queen's Printer's Act of 1869. The statute does not say that by failure to comply with its provisions a contract will be penalized or rendered null. It is merely directory. Then there was a ratification by the Crown. The parties went on under this letter from the Secretary of State, and Mr. Woodburn was led to believe that he had the right to do all this work. The Queen's Printer's office was attached to the Secretary of State's Department at that time, and he acted for the Secretary of State. Unless your Lordship construes this section as *imperative*, the contract was validly made.

Then the order in council is a ratification of the contract.

1898

WOODBURN v. THE QUEEN.

Reasons for Judgment.

THE JUDGE OF THE EXCHEQUER COURT now (January 17th, 1898.) delivered judgment.

This matter comes before the court on motions by way of appeal against the findings of the learned Referee, and for judgment.

In the first place the respondent contends that the Referee was wrong in allowing damages for breaches of contract occurring between the first day of December, 1884, and the ninth day of November, 1886. It is conceded that during this period there was a contract between the Crown and the suppliant; but it is contended that it was to do such work of the kind mentioned in the contract of the 22nd of November, 1879, that had expired, as the Crown might send the suppliant to do, and not all the work of that kind that was required to be done. That question is, I think, to be determined by reference to the terms of the letter of the Queen's Printer to the suppliant of the 9th of December, 1884, as it was acted upon by the parties, and the contract, whatever it was, that arose therefrom and from the acts of the parties, was ratified by the Government. By that letter the suppliant was informed by the Secretary of State "that pending future arrange-"ments the binding work of the Government would "be sent to him for execution under the same rates "and conditions as under the contract which had just "expired." Construing that contract as like contracts have been construed in other cases in this court, and in the Supreme Court, one of such conditions was that the contractor was entitled to have sent to him all the work of the class mentioned in the contract that the Government required to be done. There was, it is admitted, a breach of that condition, and for such breach the suppliant is, I think, entitled to damages. I agree with the learned Referee that such damages should be allowed.

1898

WOODBURN v. THE QUEEN.

Reasons for Judgment.

Another objection the respondent takes to the Referee's report is that he was wrong in allowing damages to the suppliant for not being allowed to do the work of perforating sheets of Inland Revenue labels. The question, which is not free from difficulty, arises upon the construction to be put upon the words "Perforating, any size per 100 cuts," ".01," occurring in schedule A to the contract to which reference has been made. The schedule is headed "Departmental Binding, etc.," and under the words "Blank Books, etc.," is included a description in general terms of the work to be done, with the prices therefor. The larger portion of this work has to do with the binding of books of some kind, but some of it has no connection therewith, other than this, that it is work that is commonly done by book-binders. Among other things included in this list of things to be done is "Perforating, etc.," and the question is whether these words should be limited to such perforating as might be required to be done in respect of books sent to the contractor to be bound, or should be held to include other perforating, such as the perforating of sheets of labels used by the Department of Inland Revenue. It is not now contended for the suppliant that such perforating would include the perforating of postage stamps and revenue stamps, work that could not, without some inconvenience and risk, be done by any other person than the contractor for the engraving of such stamps, but only such perforating as not being within any other contract, the Queen's Printer was accustomed to send to the suppliant to be done under the contract in question here. To the latter contention the Referee gave effect, and it seems to me that the construction he has put upon the words mentioned is under all the circumstances of the case fair and reasonable.

1898

WOODBURN v. THE QUEEN.

Reasons for Judgment.

The first objection that the suppliant takes to the report is that he has not been allowed damages for not being given the binding of "The Revised Statutes of Canada."

The suppliant's right to have sent to him for execution all the work mentioned in the contract of November 22nd, 1879, came to an end on a day not later than the 9th of November, 1886. The proclamation bringing "The Revised Statutes of Canada" into force was not published until the twenty-fourth day of January, 1887, and they did not come into force until the first day of March following. It seems clear that the binding of these statutes was not work that the Government required to have done during the pendency of the suppliant's contract.

There is but one other matter of controversy to which it is necessary to refer. The damages that have been allowed have, as I understand the matter, been assessed by finding the profits that would have accrued to the suppliant had he been called upon to do all the work mentioned in his contract. In ascertaining such profits the actual cost of the labour necessary to do the work has been deducted. To that course the suppliant now objects. He says he could have done all the additional work without any extra outlay for labour. That is something which one does not readily understand, if the suppliant's business was carried on with prudence, and one naturally asks: How could that happen? and the suppliant answers in effect, "I had six men to do four men's work." But why do you keep six men to do four men's work? one replies; and the suppliant answers that he was bound to keep a staff large enough to do all the work that the Government required him to do under the contract. I do not agree that he could so increase the damages for which the Crown would be liable. He

1898

WOODBURN v. THE QUEEN.

Reasons for Judgment.

knew well enough that he was not getting the work to do, in respect of which the claim now under consideration is made, and he had no right to keep men idle waiting for work to come to him that he knew well enough would never come to him. It is also suggested that the work came to him in such a way that his men would do it in four days of the week, leaving them with little to do on the other two days. Well, all one need say as to that is that it was not a prudent way to carry on his affairs. He was under no obligation to do six days' work in four days, and if he saw fit to manage his business in that way, he must now bear any loss thereby incurred. It is very clear of course that it is usual that the percentage of profits would be greater on a large amount of work than on a small amount of work, and in such a case as this the proportion of work attributable to any given piece of work should be calculated with reference to the whole work that the suppliant was entitled to do. But there is no complaint on that score put in that way, but a bald demand that the total expense for labour referable to the doing of the work in respect of which damages are now asked and given should be eliminated and the damages increased by that amount. To that proposition, put in that way, I cannot agree. I do not believe it to be possible that the additional work in this case could have been done without any extra cost for labour if the work sent to the suppliant and executed by him had been done in a prudent and careful business manner.

The motions by way of appeal will be dismissed with costs, the report of the Refereee affirmed, and the judgment entered in accordance therewith, with costs.

Judgment accordingly.

Solicitor for the suppliant: *R. V. Sinclair.*

Solicitor for the respondent: *D. O'Connor.*

THE QUEEN ON THE INFORMATION OF THE ATTORNEY-GENERAL FOR THE DOMINION OF CANADA ..... PLAINTIFF;

1897
Nov. 16.

AND

THE HONOURABLE A. W. OGILVIE.. DEFENDANT.

Contract—Conflict of law—Appropriation of payments—Receipt—Error —Rectification.

The doctrine that where a contract is made in one Province in Canada and is to be performed either wholly or in part in another, then the proper law of the contract, especially as to the mode of its performance, is the law of the province where the performance is to take place, may be invoked against the Crown as a party to a contract.

2. While both the English law and the law of the Province of Quebec give to a debtor owing several debts the option of appropriating any payment he may make to any particular one of such debts, provided he exercise his option at the time of such payment, yet under the Quebec law where the debtor does not exercise such option and thus give a right to the creditor to appropriate the payment, the creditor must exercise his option immediately upon payment being made, and cannot delay exercising it up to the time of trial as he may do under the doctrine of the modern English cases.

3. Where a person owing several debts has accepted a receipt from his creditor by which a specific imputation is made, he may afterwards have the payment applied upon a different debt by showing that he had allowed the former imputation to be made through error, unless the creditor has been thereby induced to give up some special security.

CLAIM for a balance due under a contract of guaranty The facts of the case are fully stated in the reasons for judgment of Mr. Justice Davidson, Judge *pro hâc vice.*

J. N. Greenshields, Q.C. for the plaintiff: There was no specific imputation by the bank of the payment in favour of the second call of $50,000, a debt in respect of which the defendant here was surety; but it

1897

THE QUEEN v. OGILVIE.

is claimed that it was an oversight of the president of the bank that no imputation was made. The court cannot now hold that the imputation may be rectified to carry out any intention of the bank.

Argument of Counsel.

E. L. Newcombe, Q.C., followed for the plaintiff: The debtor's right to appropriate a payment when he owes several debts must be exercised at the time of payment, otherwise a right accrues to the creditor to appropriate. Further, where one of two debts is not more onerous than the other, the presumption of law is that the payment is made on account of the earlier debt. *Clayton's Case, De Vaynes* v. *Noble* (1); *Tudor's Leading Cas. in Merc. Law* (2); *Thompson* v. *Hudson* (3); *Re Accidental Death Insurance Company* (4).

The Solicitor General of Canada: The bank was insolvent, and it is submitted under the authorities in the civil law that an insolvent debtor cannot make an imputation of payments. There is a distinction between *décomposition* and insolvency, and the authorities I have collected refer to cases of insolvency. 17 Laurent, No. 630; Dalloz, *Juris. Genl.*, 1858, 1st pt., 501; Massé, *Droit Commercial*, 4th vol., p. 130; Dalloz, *Juris. Genl. Supplément*, vo. "*Obligation*," 855.

Against the contention that the imputation made by the creditor should now be rectified on the ground of error, I cite arts. 1161 and 1048 C. C. *Petry* v. *La Caisse d'Economie* (5); *Kershaw* v. *Kirkpatrick* (6).

J. S. Hall, Q.C., for the defendant: The guaranteed debt was the most onerous, and by law the payment would be applied to that. *Walton* v. *Dodds* (7); arts.

(1) 1 Meriv. 530, 611.
(2) 3rd ed. p. 1, and notes p. 19.
(3) L. R. 6 Ch. App. at pp. 320, 331.
(4) 7 Ch. D. 568.
(5) 16 Q. L. R. 197; and 19 Can. S. C. R. 713.
(6) 3 App. Cas. 345 and Beauchamp Juris. P.C. 605.
(7) 1 L. C. L. J. 66.

1160 and 1161 C. C.; *The Ætna Life Ins. Co.* v. *Brodie* (1) *Doyle* v. *Gaudette* (2); *Green* v. *Clark* (3).

W. D. Hogg, Q.C., followed for the defence, citing: *In re Sherry* (4); *Pearl* v. *Deacon* (5); Smith's *Equity* (6); *Young* v. *English* (7); *City Discount Co.* v. *McLean* (8). 3 *English Ruling Cases* (9).

1897

THE QUEEN v. OGILVIE.

Reasons for Judgment.

DAVIDSON, J. now (November 16th, 1897,) delivered judgment.

This case was heard before me some time ago, but it was not found possible to complete the record until the beginning of the present month.

The Crown by information, dated September, 1895, prayed judgment for $77,337.03, as balance due under a letter of guarantee signed by defendant on the 11th of May, 1883. At the trial the claim was reduced to $65,820.88.

Defendant pleads that he stands wholly discharged by payments made by the principal debtor subsequent to, and imputable in extinction of, his suretyship.

Financial difficulties, which ultimately resulted in liquidation, compelled the Exchange Bank of Canada to apply to the Finance Department of Canada for assistance. This was granted on three several occasions, in the hope of saving the institution from insolvency. On the 12th of April, the 21st of April, and the 12th of May the Government made deposits of $100,000 each, and in acknowledgement thereof were delivered receipts bearing the numbers 323, 329 and 346. The first of these was returned to the bank under circumstances which are of vital interest to the

(1) 5 Can. S. C. R. 1.
(2) 20 L. C. J. 134.
(3) Cass. Dig. p. 614.
(4) 25 Ch. D. 692.
(5) 1 DeG. & J. 461.
(6) 14 ed. Ch. VII. p. 465.
(7) 7 Beav. 10.
(8) L. R. 9 C. P. 692.
(9) P. 329.

1897

THE QUEEN v. OGILVIE.

Reasons for Judgment.

present controversy; the second and third are of record. No. 329 reads as follows:—

"$100,000. MONTREAL, 17th April, 1883. No. 329.

"The Exchange Bank of Canada acknowledges "having received from the Hon. the Receiver-General "the sum of one hundred thousand dollars, which "sum will be repaid to the Hon. the Received-General "or order, only on surrender of this certificate, and "will bear interest at the rate of five per cent. per "annum, provided thirty days' notice be given of its "withdrawal.

"The bank reserves the privilege of calling in this "certificate at any time on written notice to depositor, "after which notice all interest on the deposit will "cease.

"If, when notice be given by the depositor of with-"drawal, the bank elects to pay immediately, it shall "have the right to do so.

"T. CRAIG,
"*President.*

"Entered. ERNEST P. WINTLE,
"*For Accountant.*"

Receipt No. 346 is in like form, with the exception that the following words are struck out:

"The bank reserves the privilege of calling in this "certificate at any time on written notice to the "depositor, after which notice all interest on the "deposit will cease."

The third deposit, to which I have made brief reference, was not obtained without difficulty. In the course of a letter to the Receiver-General, dated 21st April, 1883, the president of the bank wrote:

"I find that I shall require another sum of $100,000 "to place me in an independent position. Therefore, "I shall have to trespass on your kindness once more.

1897

THE QUEEN v. OGILVIE.

Reasons for Judgment.

"I take the liberty of sending you in advance the "third deposit receipt."

To this application the following answer came:

"I am in receipt of your letter of the 21st, and I at "once telegraphed you that the Government had fixed "the limit at $200,000 and I could not exceed my "instruction. I am under the necessity of returning "herewith the receipt for $100,000, which you enclosed, "and at all events for the present, I can do no more."

This refusal was subsequently withdrawn, and the deposit made, upon the Department being placed in possession of the following letter from defendant, who was at the time one of the directors of the bank:

"OTTAWA, 11th May, 1883.

"MY DEAR SIR,—I beg that the Government will "place a further sum of $100,000 at deposit with the "Exchange Bank on the same terms as the former "deposits of $200,000, and on the Government agree-"ing to comply with the request I hereby undertake "to hold myself personally responsible for the further "deposit of $100,000.

"Yours very truly,

"A. W. OGILVIE,

"J. M. COURTNEY,

"*Deputy Minister Finance.*"

The cheque covering this deposit, for which a receipt bearing the number 346 issued, was delivered to defendant and by him brought to Montreal. Verbal evidence was made at the trial to the effect that it was an express condition and agreement precedent to the cheque being delivered over to the bank authorities, that all future payments to the Government should be first applied in extinction of the amount for which the defendant had thus become surety. This proof was under objections, which I reserved and have presently to determine.

1897

THE QUEEN v. OGILVIE.

Reasons for Judgment.

On the 31st of May, Mr. Courtney notified the managing director that on the 1st of July then next, the Dominion Government would "require the sum of $50,000 to be transferred from the special deposit account with your bank to the general account."

In reply to a request made by the bank's president on the 29th of June, that this transfer might be postponed until the 20th of August, Mr. Courtney answered as follows:

"FINANCE DEPARTMENT,
"OTTAWA, 30th June, 1883.

"MY DEAR SIR,—I am sorry to say I must have "the $50,000 turned into ordinary cash on Tuesday. "I had intended to have drawn it out immediately in "order to meet the payments on account of subsidies, "but this I will do, I will only draw $5,000 a day for "ten days. I may as well inform you that we shall "want another $50,000 to be turned into cash on the "1st August.

"Your truly,
"J. M. COURTNEY,
"*Deputy Minister of Finance,*

"THOS. CRAIG, ESQ.,
"*President Exchange Bank, Canada.*"

The 4th of July brought another letter from the deputy minister, wherein he requested that the president might "be good enough to place to the credit of the Receiver-General the amount of interest due to the 30th June, the end of the fiscal year, on the special deposit in your hands bearing interest, and forward a receipt for the same to this department." And then follows this post scriptum, "I have not turned into cash yet the $50,000, of which notice was given."

Three days later the deputy minister wrote as follows:—

1897

THE QUEEN v. OGILVIE.

Reasons for Judgment.

"FINANCE DEPARTMENT,

"OTTAWA, 7th July, 1883.

"SIR,—Referring to previous correspondence, I "have now the honour to request that you will be "good enough to forward to me (at your very earliest "convenience), a receipt for the $50,000 which was to "be turned into cash on the 1st instant, and also a "fresh receipt for $50,000 at interest and I will return "you one of the receipts for $100,000 which we now "hold. Pray attend to this without delay.

"I have, etc.,

"J. M. COURTNEY,

"*Deputy Minister of Finance.*

"THOS. CRAIG, Esq.,

"*Managing Director Exchange Bank, Montreal.*"

Much, if not the whole of the controversy existing between the parties, results from the terms in which answer was made on behalf of the bank. These are its words:—

"EXCHANGE BANK OF CANADA,

"MONTREAL, 9th July, 1883.

"*The Deputy Minister of Finance, Ottawa.*

"DEAR SIR,—As requested in your letter of the 7th "instant, I now forward the deposit receipt of this "bank, No. 358, in favour of the Hon. the Receiver-"General for $50,000, and enclose our receipt for "$50,000, placed to the credit of the Finance Depart-"ment account. Please return deposit receipt No. "323, $100,000, now in your possession, and oblige.

"Yours, etc.,

"JAMES M. CRAIG,

"*Pro Manager.*"

James M. Craig was the accountant of the bank. It will be remembered that No. 323 was the earliest in date of the three receipts held by the Government. It was returned to the bank, as requested.

1897

THE QUEEN v. OGILVIE.

Reasons for Judgment.

In accordance with the notice of the 30th June, the bank on the 10th of July transferred a second amount of $50,000. from deposit to current account. Its letter of advice, also signed by James M. Craig for the manager, requested and obtained the return of the receipt No. 358. Neither this nor the receipt No. 346 issued in connection with defendant's letter of record can be found. It is supposed that they shared in the destruction of a large quantity of the books and papers of the bank which was authorized when its liquidation came to an end.

Aware of the payment of $100,000. and in the apparent belief that his liability had been discharged, defendant pressed the bank for the return of his letter of guarantee. So on the 10th of November, the president wrote to Mr. Courtney in these terms:—

"Concerning the loans we obtained from you last "spring for the last $100,000. which you gave us, "you obtained from Mr. Ogilvie his guarantee for the "pavment of the $100,000. As we paid you this last "amount, and the deposit receipts have been returned "to us, I will be obliged to you if will kindly return "to me Mr. Ogilvie's guarantee letter."

A second request of like nature was forwarded on the 19th of November:—

"I beg to call your attention to my letter of a few "days ago, concerning the guarantee which Mr. "Ogilvie gave you for the last $100,000. you gave "and which has since been paid."

Mr. Courtney took the opinion of the Department of Justice and refused to return the letter of guarantee. The present action was only entered twelve years later.

The bank suspended payment on the 17th of September, 1883. It took advantage of the ninety days grace provided by the Banking Act. A winding-up order

1897

THE QUEEN v. OGILVIE.

Reasons for Judgment.

was granted and liquidators appointed on the 5th of December.

The Crown filed a claim for $237,840.24 with interest upon $200,000. at the rate of five per centum, from the 30th of June previous. In support of the claim, pro tanto, the deposit receipts numbers 329 and 346 were filed. The balance of $37,840.24 represented an account unconnected with the transactions under consideration. The claim made no reference to the existence of a suretyship, although by section 62 of *The Winding Up Act* a creditor holding security is to specify the nature and amount thereof and put a specified value thereon.

Under reserve of an asserted right of payment by privilege over all other creditors and in priority to them, the Government received in dividends a sum of $160,503.21.

It is the plaintiff's pretension that the two payments made by the bank of $50,000 each must be wholly imputed to the first deposit of $100,000. which was represented by the returned deposit receipt No. 323, and that as to the dividends defendant is only entitled to credit in the proportion which the amount of his guarantee, with interest added, bears to the total claim of the bank. This view of the case is reduced to actual figures by an account of record which may be summarized thus:—

" To amount of loan.....$100,000.00
" To interest as detailed (*i.e.*, on
" the balances as they existed
" after the payment of each divi-
" dend) from the 11th of May,
" 1883, (*i.e.*, the date of the letter
" of guarantee), to the 14th of

1897

THE QUEEN v. OGILVIE.

Reasons for Judgment.

" February, 1893, (*i.e.*, date of
" the last dividend)..... 33,513.46

$133,513.46

" By proportion of dividends on
" $101,986.30.....$ 67,693.38

$ 65,820.08"

for which balance judgment is sought.

The defendant, on the other hand, contends that any amount in which he was ever responsible towards Her Majesty has been paid; that the sums received on her behalf ought to have been imputed on the sum of $100,000, in connection with which he gave his guarantee; that James M. Craig in asking for the return of the first receipt, No. 323, in connection with the repayment of $100.000. acted in contravention of the agreement between the bank and the defendant, in error, and without the knowledge of and contrary to the instructions of his employers; that the claim is prescribed.

The plea of prescription was not seriously argued at the trial. Prescription has not inured.

English and French authorities were cited at the Bar, on either side, in sustainment of the legal principles relating to imputations or appropriation of payments and to other features of the case which it was desired to uphold.

In case of conflict, which is to prevail as to the issues before me—the law of Ontario or of this province? The common or the civil law? The question needs a definite reply, because defendant signed and delivered his letter to Mr. Courtney, at Ottawa, and there received in return the cheque for $100,000.

But the place of the bank's applications, of the payment of the Government cheques, of the deposits, of the giving of the receipts and of the repayments, was

Montreal. When a contract is made in one country and is to be performed either wholly or partly in another, then the proper law of the contract, especially as to the mode of performance, is the law of the country where the performance is to take place (1).

I must therefore give dominant weight to the law of suretyship as it exists in this province. As both systems, however, boast a common parentage and retain many points of similarity, it will be useful to point out the leading differences which have come to exist between them. The English rules as to imputation of payments are in part these:

1. When one person is indebted to another on various accounts, the debtor is at liberty to pay in full whichever debt he likes first; this right can only be exercised at the time of payment, not afterwards.

2. The debtor has no right to insist on paying a debt partly at one time or partly at another; if, however, the creditor accepts the payment, the debt is, to its extent, extinguished.

3. Where the debtor, having the opportunity so to do, makes no appropriation, express or tacit, at the time of payment, the creditor is entitled to appropriate the payment to whichever debt he pleases, and he may exercise this right at any time he likes.

4. If neither debtor nor creditor apply the payment, the law usually makes the appropriation on the earliest items of an entire unbroken account.

Clayton's Case (2); *Tudor's L. C. Merc. and Maritime Law* (3); *De Colyar on Guarantees* (4); *Shirley's L. C.* (5); *Lindley on Partnership*, (6)

The civil law rules as regards imputation of payments are clearly defined.

(1) Dicey, Conflict of Laws, 570.
(2) 1 Meriv. 530, 611.
(3) P. 25.
(4) 3rd ed. p. 453.
(5) 3rd ed. p. 180.
(6) 6th ed. p. 234.

1897

THE QUEEN v. OGILVIE.

Reasons for Judgment.

1. A debtor of several debts has a right of declaring, when he pays, what debt he meant to discharge; C. C., 1158. He cannot, however, discharge capital in preference to arrears of interest; C. C., 1159. He cannot compel the acceptance of a payment on account of a particular debt; C. C. 1149.

2. If the debtor makes no imputation the creditor may do so, but it must be made at the instant of payment; C. C., 1161. Rolland De Villargues, Vo. *Imputation*, v. 8, p. 169.

3. If the receipt makes no special imputation, then—

(*a*) The payment must be imputed in discharge of the debt actually payable which the debtor has at the time the greater interest in paying:

(*b*) If of several debts one alone be actually payable, the payment must be imputed in discharge of such debt, although it be less burdensome than those which are not actually payable:

(*c*) If the debts be of like nature and equally burdensome, the imputation is made upon the oldest:

(*d*) All things being equal, it is made proportionately on each. C. C., 1161. Ponsot, *Traité du Cautionnement* no. 343; 4 *A. & R.* 167; Rolland de Villargues, *Vo. Imputation*, v. 5 p. 16.

Thus, both English and civil law give the option in the first place to the debtor; but he must optate at time of payment. The like restriction as to immediate option in the event of the creditor coming to exercise his secondary right is preserved by us, but overthrown by comparatively recent decisions in England. The courts there, perhaps giving expression to long continued usage, have reversed the original principle of decision, enabled the creditor to make his election even up to time of trial, and in the absence of express appropriation determine that it is his, and not, as with us, the debtor's presumed intention which is to govern.

1897

THE QUEEN v. OGILVIE.

Reasons for Judgment.

I cannot adopt, in the case before me, the common law authorities cited at the bar as determining the law upon these conflicting doctrines.

The special deposit account, or accounts, into which went the Government's three loans of $100,000. each, was not an ordinary current account which might be added to or drawn upon in the usual course of daily business. A single account has been spoken of as "one single open current account," "one entire debit and credit account," an "entire unbroken account." (Lindley *on Partn.* 2nd Am. Ed. sec. 229, p. 300; *Pandectes Françaises, Vo.* "*Compte Courant,*" p. 579.)

To preserve interest, thirty days' notice was required to be given of all proposed demands upon it. The bank became bound to pay only from the date and to the extent of the special call. When, on the 10th of July, payment was made of $50,000, this did not constitute a partial payment. It discharged in full all that was on that day exigible in relation to the deposits, and gave the bank the right to make imputation on the amount covered by the guarantee. This right became more emphatic at the second payment of $50,000, because it completed the sum of $100,000, and thus, in amount at least, ran equal with defendant's letter. Instead of asserting or utilizing its power of electing to get back No. 346, the accountant asked for the receipt first issued, and when the second payment was made asked for No. 358, which bore the last date of all.

The defendant asserts that in all this there was flagrant error. If so, can it be invoked by him? Is it susceptible of proof by oral testimony, and if thus proven is relief now possible?

The court is of the affirmative opinion upon all these points, and for these reasons: When a debtor of several debts has accepted a receipt by which a specific imputation is made, he can afterwards require the payment

1897

THE QUEEN v. OGILVIE.

Reasons for Judgment.

to be made upon a different debt upon any ground for which a contract might be avoided. (C. C. 1160.) Error is one of these grounds. (C. C. 991.) So is surprise. (Rolland de Villargues, Vo. *Imputation*, V. 8, p. 169, No. 19, bis.) It would not be proper to correct the error if the creditor had been thereby induced to deliver up some special security. The surety is the *ayant-cause* of the debtor; he can exercise the rights and plead the exceptions, not purely personal, which belong to the latter; he can urge the error with which the consent of his debtor was infected. (C. C. 1031, 1958; Fuzier-Herman *Rep. Vo. Cautionnement*" T. 9, Nos. 433, 459.) Of the error oral testimony may be made. *Ætna Insurance Co.* v. *Brodie* (1).

I do not know of any reason which bars the present giving of relief, if sufficient proof of error is before us. The Finance Department was not induced, by reason of the alleged mistake, to part with or discharge any special security. All that it gave up was a written acknowledgement of an undisputed debt.

Full consideration of the objection taken leads me to the conviction that what took place between the surety and the debtor is, to the extent sought in this case, provable. It does not make in contradiction of the letter of guarantee. It is relevant by way of confirming the intention of the bank in the exercise of a lawful and then existing right—to apply first payments to the discharge of defendant, and to strengthening the existence of error. Had the bank agreed with the Government to discharge, or of deliberate purpose discharged, one of the unsecured deposits, I imagine that the defendant would have been concluded of any after remedy (2). The evidence as to the agreement with defendant, and as to the error made by the

(1) 5 Can. S. C. R. 1.

(2) *In re* Sherry and London and County Bank. Co., 25 Ch. Div. 692.

accountant, is precise. I read some brief extracts from the testimony taken under commission of Thomas Craig, president of the bank:—

"Q. Mr. Ogilvie held this cheque or document "and refused to hand it over until he was personally "guaranteed by the directors to protect him against the "guarantee which he had given to the Government; "what took place? A. The directors agreed to give "him that guarantee, and it was not reduced to writ-"ing, but simply, as far as I can recollect, on the "minute book of the bank. I cannot recollect whether "it was placed on the minutes or not, but there is no "question but they agreed to do it.

"Q. Anything else?—A. The understanding being "that the first money that the bank repaid to the "Government should release that guarantee, when it "reached the amount of $100,000.

"Q. Do I understand that he refused to do it until "this guarantee was given, and the assurance made "that the first money paid back should go against this "last $100,000?—A. Yes.

"Q. I understand you to say that the cor-"respondence, in connection with these matters, was "entrusted to you as the officer of the bank?—A. Yes. "I should have carried on the whole correspondence.

"Q. Then these two letters, written by Mr. James. "N. Craig, in connection with the return of the "receipts, were not authorized by the bank?—A. No. "Not specially authorized by the bank? He did it as "a matter of routine, against my instructions."

In cross-examination he says:

"(Q. You do not pretend to say that you gave "positive instructions to your accountant, not to "apply that first $50,000 in payment of the first loan? "—A. His instructions were to apply those $50,000 "on account of the last loan.

1897

THE QUEEN v. OGILVIE.

Reasons for Judgment.

"Q. Did you give him those instructions yourself?
"—A. Yes. I remember perfectly well.
"Q. You never notified the Government at any
"time, in any correspondence, that the first $50,000.
"paid back had been wrongly applied?—A. No.
"Q. Nor notified the Government, when the second
"$50,000. were paid, what the application should
"be?—A. But the accountant was instructed to apply
"it that way."

The letters of witness dated the 10th and 19th of November, which I have read, did, however, in effect and fact, notify the Government that the bank considered the letter of guarantee discharged, and ask for its return. Craig's evidence is corroborated by that of the defendant. I understand that the minute book is not in existence.

With error held to be established, in respect of the acts of James Craig, what comes to be the position of the parties?

In neither of the two calls of $50,000. each did the Government seek to elect on which deposit-receipt they were to be applied. When suggesting the issuance of a current account receipt for $50,000. and a deposit account receipt for a like amount, it was not proposed to have these stand in lieu of the earliest receipt, No. 223. What the departmental letter of the 7th of July offered was the return of "one of the receipts which we now hold."

Whether it is held that the specific imputation in favour of the surety, which was intended by the bank, ought to replace the unauthorized and mistaken acts of James Craig, or that the plaintiff and defendant are to be left to the application of legal imputation, makes no difference as to results. For if neither party made election as to the specific debt on which the payments

1897

THE QUEEN v. OGILVIE.

Reasons for Judgment.

were to be applied, they would go in discharge of the one which was the most onerous. The civil law deems that debt to be most onerous to which a suretyship is attached, for the reason that the debtor by one payment discharges two creditors representing principal and accessory obligations. (Ponsot, *Cautionnement*, no. 343; 17 Laurent, no. 619; Roll. de Vill. vo. *Imputation*, v. 5, p. 170, no. 33. Pothier: *Obligations* No. 530.)

These two points are conceded by the Crown.

There is one other feature of the case which deserves a brief reference. Even if I were not for the total dismissal of the action, I could not adopt the figures for which judgment is sought on behalf of the Crown.

The defendant, if liable at all, is entitled to a credit from the dividends, in the proportion which the amount due under his suretyship bears to the total claim of the bank. This principle can only be stated with absolute certainty if the three deposits are not treated as representing one entire current account in which the several items are absolutely blended together. (Ponsot, *Du cautionnement* no. 346; *Martin* v. *Brecknell* (1); Lindley *On Companies* (2); 17 Laurent, no. 630; *Clayton's case* (3); *Thompson* v. *Hudson* (4).

In this respect the Crown concedes that defendant is entitled to a credit of $67,693.38 Against this amount, however, it makes a charge of $33,513.46 for interest from the date of the bank's insolvency, which I do not think is sustainable.

Defendant's letter promised, in consideration of the Government making a third deposit on the same terms as previous ones, "to hold himself personally responsible for the further deposit of $100,000." It did not add "with interest thereon," or "and interest."

(1) 2 M. & S. 38.
(2) P. 200.
(3) (1) Mer. 530.
(4) L. R. 6 Ch. App. 321.

1897

THE QUEEN v. OGILVIE.

Reasons for Judgment.

Suretyship cannot extend beyond the limits within which it is contracted. Unless indefinite, it does cover the accessories of the principal obligation; it is essentially a contract *de droit strict*, and like other contracts is to be interpreted in favour of him who has contracted the obligation. C. C., 1935, 1936, 1019. *Pandectes Françaises*, Rep. vo. *Caution*, p. 203, No. 421. "For the law", says De Colyar, p 350, "favours a surety "and protects him with considerable vigilance and "jealousy."

If the surety has expressly determined the sum for which he is to be obliged he is not liable for interest thereon unless he can be held to have tacitly engaged to pay it. *Pan. Fr.* Rep. Vo. *Caution.* Nos. 427, 440.

As so regarded, the bank interest on the deposits ceased with insolvency. Massé, *Droit Commercial*, v. 4, No. 2172.

There was, as a result, no accumulating fund of interest which could claim priority of interest. I do not need to express the resulting effect to defendant in exact figures. The action is dismissed in its entirety with costs.

With reference to an amendment to the pleadings obtained by the defendant, I fix the costs at $15 in favour of plaintiff.

Judgment for defendant, with costs.

Solicitor for plantiff: *E. L. Newcombe.*

Solicitor for defendant: *J. S. Hall.*

DAVID H. HENDERSON AND NORMAN B. T. HENDERSON..... } PLAINTIFFS ; 1897 Sept. 10,

AND

HER MAJESTY THE QUEEN.....DEFENDANT.

Crown—Executory contract—Liability—Goods sold and delivered—Acceptance—R. S. C. c. 37, s. 23—Interest.

Notwithstanding the provisions of the 23rd section of the Railways and Canals Act, R. S. C. c. 37, where goods have been purchased on behalf of the Crown by its responsible officers or agents without a formal contract therefor, and such goods have been delivered and accepted by them, and the Crown has paid for part of them, a ratification of the informal contract so entered into will be implied on the part of the Crown, and, under such circumstances, the plaintiffs are entitled to recover so much of the value of the said goods as remains unpaid.

Held also, following *St. Louis* v. *The Queen*, 26 Can. S. C. R. 649, that interest was payable by the Crown on the balance due to the plaintiffs in respect of such contract from the date of the filing of the reference of the claim in the Exchequer Court.

THIS was a reference of a claim for goods sold and delivered, made under the provisions of sec. 23 of *The Exchequer Court Act.*

The following are the provisions of the statute governing the formal requirements of contracts entered into for the purposes of the Department of Railways and Canals:

23. "No deed, contract, document or writing relating to any matter under the control or direction of the Minister shall be binding upon Her Majesty, unless it is signed by the Minister, or unless it is signed by the deputy of the Minister and countersigned by the Secretary of the department, or unless it is signed by some person specially authorized by the Minister, in writing for that purpose: Provided always, that

1897

HENDERSON v. THE QUEEN.

" such authority from the Minister, to any person pro-
" fessing to act for him, shall not be called in question
" except by the Minister, or by some person acting for
" him or for Her Majesty."

Statement of Facts.

The following are the material allegations in the statement of claim :—

1. The claimants have been for many years and still are lumber merchants carrying on business in the City of Montreal, under the name and style of " Henderson Bros."

2. That on, to wit : the 9th day of December, 1892, Her Majesty the Queen, acting by and through her proper officers in that behalf, entered into a written contract with the claimants, whereby the claimants agreed to supply and furnish the timber and lumber required for the building and construction of a certain public work of the Dominion of Canada, to wit : the new Wellington Bridge over the Lachine Canal, at Montreal

3. That the said contract contained a description of the several kinds and dimensions of the timber and lumber required to be supplied and furnished by the claimants, for the said bridge, and the prices which the claimants were to be paid therefor, and which were set out as follows :—[Here follows a statement of particulars].

4. That subsequent to the date of the said contract, Her Majesty, acting by and through the officers aforesaid, commenced the construction of the Grand Trunk Railway Bridge over the said Lachine Canal, at Montreal.

5. That during the construction of the said bridges, the claimants received requisitions from the said officers from time to time for the supply and delivery of timber and lumber, and in compliance with the said requisitions, they supplied and delivered to Her

Majesty's said officers, during the month of December, 1892, and the months of January, February, March and April of the year 1893, a large quantity of timber and lumber of various kinds and dimensions, to wit: 3,613,600 feet, board measure.

6. That the claimants from time to time, during the construction of the said bridges, rendered accounts to Her Majesty's said officers, of the timber and lumber so supplied and delivered as aforesaid, which accounts were received, approved and duly certified by the said officers for payment by Her Majesty.

7. That the total amount of the accounts, for the timber and lumber so delivered as aforesaid, was the sum of $67,474.43, on account of which Her Majesty paid and the claimants received the sum of $43,862.06, leaving a balance due and payable to the claimants of $23,612.37, for which balance and interest thereon Her Majesty is indebted to the claimants.

8. The claimants have requested payment of the said balance, and interest thereon from the 9th day of May, 1893, the date of the last payment on account of the said lumber; but Her Majesty, acting through the Department of Railways and Canals, being the department having charge of the said accounts, has declined and refused to pay the said balance or any part thereof.

CLAIM.

1. The claimants therefore pray for judgment against Her Majesty, for the sum of $23,612.37, and interest thereon from the 9th day of May, 1893.
2. That the claimants may be paid their costs of this action.
3. That the claimants may receive such further or other relief, as the nature of their claim may entitle them to.

1897

HENDERSON v. THE QUEEN.

Statement of Facts.

The following are the material allegations of the statement in defence:

The Honourable Sir Oliver Mowat, Her Majesty's Attorney-General for the Dominion of Canada, on behalf of Her Majesty, says that:

1. Her Majesty did not order any of the timber or lumber the price of which is claimed herein.

2. The claimants did not, nor did either of them, deliver to Her Majesty, or any of Her Majesty's officers the timber and lumber the price of which is claimed herein, or any part thereof.

3. Her Majesty did not on the 9th day of December, 1892, nor at any time, acting by or through Her proper officers in that behalf or otherwise, enter into any written or other contract with the claimants whereby the claimants agreed to supply the timber and lumber required for the building and construction of the new Wellington bridge over the Lachine Canal, at Montreal.

4. It was agreed between Her Majesty and the claimants that the claimants should furnish in connection with the said bridge at certain specified prices the following quantities of timber of the kinds and dimensions hereinafter mentioned, namely:—[Here follows a statement of the goods supplied.]

5. Her Majesty's officers did not, nor did any of them, make any requisitions on the claimants for the supply and delivery of timber or lumber as alleged, nor at all, nor did the claimants receive any such requisitions.

As to the alleged requisitions for the supply of timber and lumber, Her Majesty did not authorize the engineer in charge of the work, nor the superintendent thereof, nor any other officer of Her Majesty, to contract for or order or give requisitions for timber or lumber, except as and when authorized by the Minister of Railways and Canals acting on behalf of Her Majesty, and the alleged requisitions if any were given, which Her

Majesty does not admit but denies, were not in fact authorized by the said Minister of Railways and Canals.

6. The claimants did not, nor did either of them, supply or deliver any timber or lumber to Her Majesty's officers, or any of them, during the month of December, 1892, or the months of January, February, March or April, 1893.

7. The accounts rendered by the claimants for the timber and lumber alleged to have been supplied and delivered were not, nor was any of them, approved or certified for payment by Her Majesty's officers, or by any of them.

8. The officers who approved and certified said accounts had no authority from Her Majesty to approve or certify the same.

9. Her Majesty's officers who approved and certified the said accounts did so without any enquiry or information as to whether the timber and lumber charged for in the said accounts had been supplied and delivered by the claimants to or ordered by Her Majesty or any of Her Majesty's officers, or whether the prices charged therefor were reasonable or proper, and the said approval and certificates were so negligently and improvidently given by the said officers as to be of no value, of all which the claimants were and are well aware

In the alternative, if it should appear on the evidence that Her Majesty's officers did in fact duly certify and approve of some of the accounts, which Her Majesty does not admit but denies, then Her Majesty avers that the accounts so certified and approved amounted to the sum of $43,862.06, and that the said accounts were duly paid by Her Majesty and the said sum was received by the claimants in satisfaction and discharge of the claimants, said accounts so certified and approved, and Her Majesty avers that, except as

1897

HENDERSON v. THE QUEEN.

Statement of Facts.

to the said accounts so satisfied and discharged, no accounts rendered by the claimants were delivered to Her Majesty, or were any of the said accounts approved or certified for payment by Her Majesty's officers, or by any of them.

10. The total amount of the accounts for the timber alleged to have been delivered was not $67,474.43 but $60,017.71.

11. The balance, if any, due and payable by Her Majesty to the claimants is not $23,612.37.

12. Before action was brought Her Majesty satisfied and discharged claimant's claim herein by payment.

13. Her Majesty did not agree, nor is Her Majesty otherwise liable, to pay interest upon the balance sought to be recovered herein.

COUNTER-CLAIM.

By a lease under seal from Her Majesty to the claimants, dated 4th of November, 1885, of a certain storage lot located between St. Gabriel Basins number two and three, in St. Ann's ward, in the City of Montreal, forming part of the lands of the Lachine Canal, lying on the north-west side thereof to the west of St. Gabriel Basin, number two, containing an area of 33,560 feet, more or less, for and during the pleasure of Her Majesty to be signified to the lessee by the Minister of Railways and Canals of Canada for the time being, the claimants covenanted to yield and pay, invariably in advance on the first day of November in each year and every year during which the said claimants should continue and remain in possession of the said lands, to Her Majesty through the Honourable the Receiver-General of the Dominion for the time being, a yearly rent or sum of $300, and the claimants have since the date of the said lease been and continued and remained in possession of the said lands, but four of the

1897

HENDERSON v. THE QUEEN.

said annual payments of rent are now in arrear and unpaid, and the sum of $1,200 is now due by the claimants to Her Majesty for four year's rent reserved under the said lease, together with interest thereon.

Her Majesty counter-claims the sum of $1,326, according to the following particulars: [Here follows statement of particulars of the counter-claims amounting to $1,326.]

Argument of Counsel.

September 8th, 9th and 10th, 1897.

The case was heard at Montreal.

W. D. Hogg, Q.C. for the plaintiffs:

The evidence discloses that this was a case where the plaintiffs observed *uberrima fides* in their performance of the contract. Further than this, every facility has been afforded the Crown to sift the honesty of the plaintiffs all through the transaction. Books and papers have been freely placed at the disposal of the Crown, and the evidence so far from showing bad faith on the part of the plaintiffs shows that the Crown did not employ the care and attention necessary, and that extravagance prevailed all through on its behalf. It is also to be noticed that Mr. Parent, the engineer in charge, was not called by the Crown.

The Government used all the lumber ordered; the fact that some of the materials were taken away from the works by thieves, does not affect the plaintiffs' claim. We have proved by all available methods the delivery of our materials, and that evidence remains uncontradicted. The work was rushed. Kennedy, the superintendent, actually took the direction of the work, although Parent was the superior officer on the works, and he ordered the lumber and timber necessary, and directed Lavery and Huot to get any such materials they required. The plaintiffs, who were anxious to do business, supplied the materials

1897

HENDERSON v. THE QUEEN.

Argument of Counsel.

ordered. That was sufficient to create a contractual obligation. The officer in charge ordered the wood and it was supplied. No Minister of the Crown, or any subordinate officer declined to accept the same. Such objection should have been taken before to-day. The Government was doing the work, and not Messrs. Henderson. Not only the Minister but the Government confirmed this state of things. The agency of Mr. Kennedy was confirmed by the fact that the accounts for over $43,000 were approved by the Deputy, affirming and recognizing all that was done. Every act that Kennedy had done up to that time was approved both by Mr. Schreiber and the Government. Kennedy had authority to purchase the lumber and timber and such authority was confirmed by the Deputy and the Minister for an amount over $43,000. Mr. McLeod and Mr. Lavery say there was great extravagance and Mr. Schreiber stopped everything, stopped paying; and what we now ask is to be paid. On the April account the same course of conduct took place. The plaintiffs were justified in acting as formerly in view of doing what had been done in the past. They were acting in the same manner as formerly, when they were duly paid, and they had no reason to believe that that course would be changed. They were acting honestly and continued doing so. If some of the officers of the Crown were doing things they should not have done it was not the plaintiff's business. The plaintiffs kept their accounts as they had done before, and they had no reason to expect any change or to be refused payment. *The Commissioners of Sewerage and Water Supply of the City of St. John* v. *The Queen* (1); *Hall* v. *The Queen* (2).

(1) 2 Ex.C.R.78; 19 Can. S. C.R. 125 and "Audette's Practice," p. 103.

(2) Ex. C. R. 373.

1897

HENDERSON v. THE QUEEN.

Argument of Counsel.

The new materials were ordered during the progress of the work, and it would be absurd to say that every time a piece of timber outside the contract would be required that tenders would have to be issued. (*Hall* v. *The Queen*, *supra*). The timber was ordered and it went into the whole work, that is to say on the two bridges.

When a course of conduct has been established by a principal and an agent from week to week and from month to month for five months, and the act of the agent has been confirmed by the principal, it is proper to say that a contractual obligation resulted therefrom. I know of no law that would put the Crown in a different position from that of a subject in this respect. The goods have been sold and delivered and received by the Government, and if not all used in connection with the works it was kept for other purposes, as the evidence shows. The amount of the account is $60,208.18, deducting $478.80 therefrom for timber returned.

I ask for interest on the amount from the date of the demand, 22nd June, 1894, citing *St. Louis* v. *The Queen* (1).

Chrysler Q.C. for the defendant: The claim was only filed six months after the reference, and interest should not run before that date. (Cites R. S. C. ch. 37, sec. 11.) The course of conduct appearing during April was not ratified. In April the accounts were not communicated to the Crown, and when they were they were not affirmed or ratified. The officers had perhaps authority to purchase all the timber required for the works, but they had no authority for ordering any lumber over and above what was required and which was left over when the works were finished.

(1) 25 Can. S. C. R. 649.

1897

HENDERSON v. THE QUEEN.

Argument of Counsel.

Then as to the delivery we have the signed accounts. The McKinley signature is worth nothing and the ticket-book is not what should be referred to, as it does not tally with the receipts given. The plaintiffs cannot change the accounts supplied and rendered. The error was not identified, it was not made clear whether it had occurred in April or December, January, February or March. The accounts for the months of December, January, February and March are now finally closed.

Mr. Hogg replied.

At the conclusion of the argument, judgment was pronounced by the JUDGE OF THE EXCHEQUER COURT.

[For the purpose of an appeal to the Supreme Court, the following note of his reasons was handed to the Registrar by the learned Judge :]

I have been asked some weeks after the delivery of judgment in this case to give a statement of the reasons upon which the judgment proceeded, no note of such reasons having been made or taken down at the time the judgment was delivered. I cannot undertake at so great a distance of time to give with exactness the reasons as they were then briefly stated, but I can give, in a general way, the grounds upon which I disposed of the case. These were that the plaintiffs had shown to my satisfaction that the lumber and materials, the price of which they sought to recover, had been sold and delivered to the Crown; that such lumber and materials had been ordered and accepted by its officers and agents, and as the works that were being constructed could not be proceeded with without such lumber and materials, and no other provision had been made for procuring them, and part of them so ordered and accepted had been paid for by the Crown, it must be taken to have ratified what in this respect its officers and agents had done. It was

1897

HENDERSON v. THE QUEEN.

Reasons for Judgment.

objected that the plaintiffs could not recover because of the 23rd section of "The Railways and Canals Act" (1) which provides that: "No deed, contract, docu- "ment or writing relating to any matter under the "control or direction of the Minister shall be binding "upon Her Majesty, unless it is signed by the Minister, "or unless it is signed by the deputy of the Minister, "and countersigned by the secretary of the depart- "ment, or unless it is signed by some person specially "authorized by the Minister, in writing, for that pur- "pose." This provision I did not think to be applicable to the case then under consideration, following the views expressed by Sir William B. Richards, C. J. in the case of *Wood* v. *The Queen* (2), and the views I had before expressed in the same direction in the cases of *Hall* v. *Queen* (3), and *Quebec Skating Club* v. *The Queen* (4). Having stated briefly the grounds upon which the judgment proceeded, I then directed it to be entered, with a reference to the registrar to settle the amount, the object of which was to make sure that the proper amount was duly ascertained. Interest was allowed upon the authority of the case of *St. Louis* v. *The Queen* (5), and not because I had myself formed any decided view that the plaintiffs were entitled to it. Apart from that case I should not be at all sure that the Crown is bound by the practice prevailing in Quebec to allow interest from the service of the writ.

[The judgment was directed to be entered in the terms following:]

There will be judgment for the plaintiffs with costs of the claim, and judgment for the Crown on the counter-claim for the sum of $988.34, with interest

(1) R. S. C. c. 37.
(2) 7 Can. S. C. R. 634.
(3) 3 Ex. C. R. 373.
(4) Ibid. 387.
(5) 25 Can. S. C. R. 649.

1897

HENDERSON v. THE QUEEN.

Reasons for Judgment.

thereon from the 1st day of February, 1897, date of the filing of the counter-claim, and costs of the counter-claim. There will be a reference to the Registrar of the court to ascertain the actual amount due plaintiffs, starting with the April accounts at $16,155 65, to which shall be added the cost of any lumber and timber sold and delivered by the plaintiffs to the defendant, and which may have been obmitted in the statement of accounts rendered for the months of December, 1892, January, February, March and April, 1893, which lumber and timber are to be charged, 1st, at contract rates, if coming within the contract; 2ndly, if not coming within the contract rates, then at the rates paid for similar material during December, 1892, January, February, March and April, 1893; and, 3rdly, if not coming within the contract rates, or rates established by such previous rate, then at a *quantum meruit* rate or fair rate as established by witnesses. There shall also be deducted from the amount coming to the plaintiffs the sum of $478.80, or such other sum as may be found to be the actual amount due, for the timber returned.

The plaintiffs will have interest on the amount found due them from the 1st October, 1896.

Judgment accordingly.

Solicitor for the plaintiffs: *W. D. Hogg.*

Solicitor for the defendant: *F. H. Chrysler.*

WILLIAM BROMBY DAVIDSON.....SUPPLIANT ;

AND

HER MAJESTY THE QUEEN.....RESPONDENT.

1897
Nov. 29.

Petition of Right—Damages from public work—Liability of Crown—Assessment of damages once for all—50-51 *Vict. c.* 16, *s.* 16 (*b*).

The Dominion Government constructed a collecting drain along a portion of the Lachine Canal. This drain discharged its contents into a stream and syphon-culvert near the suppliant's farm. Owing to the incapacity of the culvert to carry off the large quantity of water emptied into it by the collecting drain at certain times, the suppliant's farm was flooded and the crops thereby injured. The flooding was not regular and inevitable, but depended upon certain natural conditions which might or might not occur in any given time.

Held, that the Crown was liable in damages ; that the case was one which the court had jurisdiction under clause (b) of section 16 of *The Exchequer Court Act*, and that in assessing the damages in such a case the proper mode was to assess them once for all.

PETITION OF RIGHT for damages arising from the construction of a public work.

June 6th, 1896.

The case was referred to the Registrar of the court for the purposes of enquiry and report.

The following extracts from the Registrar's report contains a sufficient statement of the facts of the case :

" The Petition of Right herein is brought to recover " damages occasioned by the flooding of some farming " land lying along the Lachine Canal, a public work of " the Dominion of Canada, constructed many years ago, " but in connection with which some new works were " done in the years 1878 and 1879 in the enlargement " of the said canal. Through this new work, accord- " ing to some witnesses, for want of proper puddle- " bank, the leakage increased to such an extent that the " Government decided to construct, running parallel

1897

DAVIDSON v. THE QUEEN.

Statement of Facts.

" and alongside of the canal for a long distance, with " the view of getting rid of this leakage, a collecting " drain. The drain, however, does not only carry the " leakage water from the canal, but carries also in ad- " dition the surface water of the town of Lachine, " adding thus a considerable volume of water to what " formerly flowed opposite the suppliant's property. " The collecting drain discharges into the new course " of the little river St. Pierre, running opposite the sup- " pliant's property, and the water flowing from the " said collecting drain passes, opposite the suppliant's " farm, into the river St. Pierre leading to a syphon- " culvert underneath the canal. It is the concensus " of opinion of the witnesses speaking on this subject " that the culvert is not sufficient for the quantity of " water flowing into it.

* * * * *

" It is also in evidence that the river St. Pierre is " obstructed, and has not been yearly cleaned opposite " the suppliant's property.

" In view of the new work done upon the Lachine " Canal in 1879 and since, and the above-mentioned " circumstances, I find the suppliant entitled to recover.

* * * * *

" There was great stress laid by suppliant's counsel " upon the fact that a sum of $2,500 was at the time " voted by Parliament to pay suppliant ; and he con- " tended that on account of this vote by parliament " the Crown was liable. But it seems well established " that the mere fact that Parliament votes certain " monies in connection with any claim or otherwise " does not create any liability ; this vote only places " such moneys at the disposal of the Crown to satisfy a " liability, if any exist. I would cite in support of this " view the following cases : *The Jacques Cartier Bank* " v. *The Queen* (1) ; *The Queen* v. *Lavery* (2).

(1) 25 Can. S. C. R. 84. (2) Q. O. R. ; 5 Q. B. 310.

1897

DAVIDSON v. THE QUEEN.

Statement of Facts.

"Then, there is this further question to be de-
" cided: At the opening it appeared to me that this
" was a case in which the damages should be assessed
" once for all. The suppliant's senior counsel con-
" tended that as the damages were contingent and
" 'spasmodic,' to use a word on record, it was im-
" possible to assess them once for all, but only when
" they actually occurred. He accordingly conducted
" his case on this view of the law and adduced no
" evidence on that point. Were I now to decide that
" the damages, under the present circumstances, were
" to be assessed once for all, I would require evidence
" to be taken in that behalf as there is no evidence at
" all under which I could make a finding in that
" direction. In this connection it might be said that
" were I to allow damages for all time to come, such
" assessment might be made for damages which might
" not actually arise; and yet it is quite possible that
" they may. On the other hand would not the cause
" of the damage be removed if the Crown were to
" build a large culvert in the place of the present
" syphon-culvert and deepen and clean the little River
" St. Pierre?

"Under the circumstances I find it advisable, fol-
" lowing the provisions of Rule 191 (1), to reserve to
" the court the decision of the question as to whether
" such damages are to be assessed once for all Were
" I, indeed, to decide that the damages were to be
" assessed once for all, I would require to have a con-
" siderable amount of evidence adduced, involving
" great expense; and therefore, I think it proper and
" expedient to have the question decided by the court
" before proceeding further with it."

* * * * *

November 29th, 1897.

The case now came before the JUDGE OF THE EXCHEQUER COURT on motions, on behalf of each

(1) P. 280 Audette's Practice.

1897

DAVIDSON v. THE QUEEN.

party, by way of appeal from, and to confirm, the Registrar's report.

J. U. Emard for the suppliant;

J. S. Hall Q.C. for the respondent.

Reasons for Judgment.

THE JUDGE OF THE EXCHEQUER COURT now (November 29th, 1897), delivered judgment.

I think the learned Referee, the Registrar of this court, was right in his expression of opinion not acted upon that this was a case in which the damages should be assessed once for all. As I understand the facts, it is a case in which the court has jurisdiction under clause (*b*) of the 16th section of *The Exchequer Court Act*, and not under clause (*c*) of that section. In such a case the proper mode of proceeding is, without doubt, to assess the damages occasioned by the construction of the public work once for all. If the Crown should, under the authority given by the Act 52 Victoria, Chap. 38, sec. 3, cause the injury to be removed wholly or in part by any alteration in, or addition to, the public work mentioned in the report, or should give an undertaking to make the same, such alteration or addition should, of course, be taken into account in assessing the damages so far as they are likely to occur in the future.

In this view of the case the question of prescription which was argued upon the motion by way of appeal against the Registrar's report does not arise, and it is unnecessary to express any opinion in respect of such question.

The matter will be referred back to the Registrar for the taking of further evidence and for a report.

Order for reference accordingly.

Solicitor for suppliant: *J. U. Emard.*

Solicitor for respondent: *John S. Hall.*

THE AUER INCANDESCENT LIGHT MANUFACTURING CO. (LIMITED.) PLAINTIFF;

AGAINST

HERMAN DRESCHEL AND MARY VAIL MELICK DEFENDANTS.

1898
Jan. 24.

Patent of invention—Canadian patent—Foreign patent—Expiration of—Effect of.

The expression "any foreign patent" occurring in the concluding clause of the 8th section of the Patent Act, viz.: "Under any circumstances if a foreign patent exists, the Canadian patent shall expire at the earliest date on which any foreign patent for the same invention expires" must be limited to foreign patents in existence when the Canadian patent was granted.

THIS was an action for the infringement of a patent of invention.

The following are the averments in the statement of claim:—

"1. The plaintiff is an incorporated company, having its head office in the City of Montreal, in the Province of Quebec, duly authorized to carry on business in the Dominion of Canada, and carrying on business throughout the said Dominion.

2. The defendant, Mary Vail Melick, is a trader residing at St. Stephen, in New Brunswick, and doing business in the City of Montreal, in the Province of Quebec, under the name of the "Drexel Medical Co.", and the defendant, Herman Dreschel, is her agent and manager, and conducts said business, at Montreal, where he resides.

3. One Dr. Carl Auer von Welsbach, of the City of Vienna, in the Empire of Austria, was the inventor of a certain new and useful illuminant appliance for gas and other burners, and of the method of making the

1898

THE AUER INCANDESCENT LIGHT MANUFACTURING CO. v. DRESCHEL.

Statement of Facts.

same, as more fully described in the letters-patent hereinafter referred to; and letters-patent for the Dominion of Canada were granted to one Frederick de la Fontaine Williams, of the City of London, in England, as assignee of the said Dr. Carl Auer von Welsbach, bearing date the 2nd day of March, 1886, registered in the patent office at Ottawa, under the No. 23,523, granting to the said Frederick de la Fontaine Williams, his executors, administrators and assigns, the exclusive right of making, constructing, using and vending to others to be used, in the Dominion of Canada, the said invention.

4. The said letters-patent were duly assigned to the Welsbach Incandescent Gas Light Company (Limited), an incorporated company now having its head office in the said City of Montreal.

5. The said letters-patent were duly renewed on or about the 13th day of July, A.D. 1892, in pursuance of an Act of the Parliament of the Dominion of Canada, 55-56 Vic., chap. 77.

6. The said Welsbach Incandescent Gas Light Company (Limited), being entitled to the said patent, applied to the commissioner of patents for a reissue thereof, and a reissue of the said patent was granted to the said Welsbach Incandescent Gas Light Company (Limited), the same bearing date the 1st day of September, 1894, registered in the patent office at Ottawa, under the No. 46,946.

7. By assignment under seal dated the 8th day of September, 1894, and duly recorded in the Patent Office, at Ottawa, on the 10th day of the same month, the said Welsbach Incandescent Gas Light Company (Limited), sold and assigned all its rights, title and interest in and to the said patent of Canada, No. 46,946, to the plaintiff in so far as the same relates to the Provinces of Quebec, New Brunswick, Prince Edward

1898

THE AUER INCANDESCENT LIGHT MANUFACTURING CO. v. DRESCHEL.

Statement of Facts.

Island and Nova Scotia, save and except that portion of said territory which is included within the limits of the City of Halifax, in the said Province of Nova Scotia.

8. The plaintiff is entitled to the whole legal and beneficial interests in the said patent for the Province of Quebec, and has within the said province, the exclusive right, privilege and liberty of making, constructing and using, and vending to others to be used, the said invention.

9. The said reissued letters patent No. 46,946, of the Dominion of Canada, is a good and valid subsisting patent, and is and has been since the granting thereof in full force and effect.

10. The defendants have no license or consent from the plaintiff to make, construct, use or vend to others to be used, the said invention.

11. At divers times, since the first day of January, 1896, the said defendants have infringed, are now infringing, and are about to infringe the said letters-patent, and have made, constructed and put in practice, and are now making, constructing and putting in practice, incandescent lamps and incandescent devices manufactured according to the invention in respect of which the said letters-patent were granted, and said defendants threaten and intend to continue so to do unless restrained by order of this honourable court.

12. At divers times, since the first of January, 1896, the said defendants have manufactured, had in their possession, used, offered for sale, and sold to others for use, and are now manufacturing, using, offering for sale and selling to others for use, incandescent lamps and devices manufactured according to the invention in respect of which the said letters-patent were granted, or upon the principle thereof, or in any manner only colourably differing therefrom, and the said

1898

THE AUER INCANDESCENT LIGHT MANUFACTURING CO. v. DRESCHEL.

Statement of Facts.

defendants threaten and intend to continue to do so, unless restrained by order of this honourable court.

13. The said defendants have infringed the said letters-patent by having in their possession, offering for sale, and selling lights, and incandescent devices for lights, manufactured in Europe, according to the invention in respect of which the said letters-patent are claimed, the same having been imported into this country without the leave or license of the above named plaintiff.

The plaintiff therefore claims:

1. That the defendants, their servants, workmen, agents and employees may be restrained by injunction of this honourable court, during the continuance of the said letters-patent, from importing into this country, manufacturing, using, offering for sale, and selling to others for use, incandescent devices manufactured according to, or in the manner prescribed by, the said letters-patent, or according to or in any manner only colourably differing therefrom, and generally from infringing the rights of the plaintiff in respect to said letters-patent.

2. That the said defendants may be ordered to deliver up to the plaintiff all such lights or incandescent devices as aforesaid as are now in the possession of said defendants.

3. That an account may be taken of all gains and profits made by the defendants by the manufacture, sale, letting or hire, supply or user of such lights or devices for lights by the defendants, or by any person or persons by the order, or for the use of, the said defendants, and that the defendants may be ordered to pay the amount of such gains and profits to the plaintiff.

4. That the defendants may be ordered to pay damages to the plaintiff for the infringement of the said patent right.

1898

THE AUER INCANDESCENT LIGHT MANUFACTURING CO. v. DRESCHEL.

Statement of Facts.

5. Such further and other relief as to this honourable court seems meet, or the nature of the case may require.

6. The costs of this action."

The statement in defence was as follows:

The defendants for plea to the action and demand of plaintiff herein say:

" 1. That the letters-patent for the Dominion of Canada, No. 23,523, granted on the 2nd day of March, 1886, and reissued on the 1st day of September, 1894, under the number 46,946, were not at the time of the institution of the present action and are not now valid and subsisting patents.

2. That the invention covered by said letters-patent was patented in foreign countries before a patent therefor was applied for or obtained in Canada, the said invention having been patented in France and Belgium on the 14th of November, 1885, and in England on the 12th of December, 1885, which said foreign patents still exist.

3. That a patent for the said invention was applied for and obtained in Spain on the 10th of August, 1886, which patent by the laws of Spain remained in force and existence for ten years from said 10th day of August, 1886.

4. That the said Spanish patent expired on the 10th day of August, 1896.

5. That by reason of the fact that a foreign patent for the said invention was taken out prior to the obtaining of the said letters-patent for the said invention in the Dominion of Canada, the said letters-patent for the Dominion of Canada referred to in the statement of claim herein, expired at the earliest date on which any foreign patent for the same invention expires, to wit, on the 10th day of August, 1896, the date of the expiry of the said foreign patent issued in Spain for the same invention.

1898

THE AUER INCANDESCENT LIGHT MANUFACTURING CO. v. DRESCHEL.

Argument of Counsel.

The defendants therefore claim that the said alleged letters-patent of the plaintiffs and the alleged reissue thereof may be declared to have expired on the said 10th day of August, 1896.

That this action be dismissed with costs.

Issue joined.

The following admissions of facts were made by the parties for the purposes of this suit:

"The defendants admit that the incandescent lights and devices manufactured, used, leased, sold and offered for sale by said defendants are made according to a similar process to that set forth and claimed in plaintiff's letters-patent of invention No. 46,946 of the Dominion of Canada, and if plaintiff's patent is still in force are an infringement on said patent.

The plaintiff admits:

1. That patents for the said invention were issued in France and Belgium on the 14th of November, 1885, and in England on the 12th of December, 1885.

2. That the exhibit herein filed by the said defendants marked "one" is a true copy of a patent granted in Spain on the 10th of August, 1886.

3. That the said Spanish patent expired on the 10th of August, 1896."

An interim injunction was granted on the 18th day of May, 1897, restraining the defendants from infringing the patent in question until the trial of their action.

Ottawa, October 11th, 1897.

C. A. Duclos for the plaintiff:

This case involves a very important point in our patent law, arising upon the construction of the concluding clause of section 8 of *The Patent Act*. That enactment is as follows:

"And under any circumstances, if a foreign patent "exists, the Canadian patent shall expire at the earliest "date at which any foreign patent for the same "invention expires."

1898

THE AUER INCANDESCENT LIGHT MANUFACTURING CO. v. DRESCHEL.

Argument of Counsel.

The Act 55 & 56 Vict. c. 54 sec. 8 re-enacts this provision, and it is the law to-day. The way in which this provision is invoked in this case is this: A Spanish patent for the same invention was taken out after the Canadian patent for the Auer light was granted. The Spanish patent has ceased to exist, and the defendants claim that the enactment referred to causes the Canadian patent to lapse with the defunct Spanish patent. Now our contention is that the words "any foreign patent" in the latter clause must be held to be limited to some foreign patent in existence at the time the Canadian patent was granted. The word "existing" should be read into the section before the words "foreign patents." It can be readily understood that no inventor would allow an unimportant foreign patent to lapse if he imagined that the construction of this is the one contended for by the defence. The court should protect vested rights and not allow them to be overthrown by any forced construction of the statutes. It ought not to be presumed that the legislature intended to enact such hardship. Such a question could not be raised under the United States law; there, the matter is settled beyond all manner of doubt, and an American patent cannot be in any way affected by the lapse of a foreign patent unless such foreign patent has been granted previous to the date of the American patent.

I refer in this connection to section 4887 of the Revised Statutes of the United States. It will be observed that the words of the American statute, although their intendment is clear enough, do not establish a radically different policy from that deducible from our own Act. *O'Reilly* v. *Morse*, 15 Howard, 62. At page 127 of that case, Mr. Justice Grier says:

"Now the Act of 1836, as we have shown, had "given a privilege to foreign patentees to have a patent

1898

THE AUER INCANDESCENT LIGHT MANUFACTURING CO. v. DRESCHEL.

Argument of Counsel

" within six months after date of such foreign patent. " It had not affected, in any manner, the right previously enjoyed by American citizens, to take out a " foreign patent after filing their applications here. " This section gives additional rights to those who " had first taken out patents abroad, and holding out " an additional encouragement to foreign inventors to " introduce their inventions here, subject to certain " conditions contained in the proviso. Neither the " letter, spirit, nor policy of this Act, have any reference to, or bearing upon, the case of persons who " have just made their applications here. To construe " a proviso, as applicable to a class of cases not within " its enacting clause, would violate all settled rules of " construction. The office of a proviso, is either to " except something from the enacting clause, or to " exclude some possible ground of misinterpretation, " or to state a condition to which the privilege granted " by the section shall be subjected.

" Here the proviso is inserted to restrain the general " words of the section and impose a condition on those " who accept the privileges granted by the section. It " enlarged the privileges of foreign patentees, which " had before been confined to six months, on two conditions: 1st. Provided the invention patented abroad " had not been introduced into public use here; and " 2nd, on condition that every such patent should be " limited in its terms. The general words, 'in all " cases,' especially when restrained to every such " patent cannot extend the conditions of the proviso " beyond such cases as are the subject matter of " legislation in the section. The policy and spirit of " the Act are to grant privileges to a certain class of " persons which they did not enjoy before; to encourage the introduction of foreign inventions and discoveries, and not to deprive our own citizens of a

1898

THE AUER INCANDESCENT LIGHT MANUFACTURING CO. v. DRESCHEL.

Argument of Counsel.

" right heretofore enjoyed, or to affect an entirely dif-
" ferent class of cases, when the applications had been
" filed here before a patent obtained abroad."

J. E. Martin for the defendants: It must be borne in mind that the English, French and Belgian patents are the same as the Canadian patent. These were all granted prior to the taking out of the Canadian patent. The Canadian patent is therefore not the parent patent, and whatever weight might be attached to the argument that the courts should protect to the utmost the interests of any parent patent, it does not obtain here.

Then coming down to the simple question of the statute, it is to be said that the plain words of the statute are indisputably in favour of the defendants' contention. The Spanish patent is the "foreign patent" to which this clause is referable so far as this case is concerned. Upon the expiry of the foreign patent, the Canadian patent *ipso facto* expired. The word "any" means and covers "every" foreign patent.

[PER CURIAM.—The question is whether we should read into the enactment the word "such" or "existing."]

In that connection we can obtain no assistance from the American statute that has been cited; because the phraseology used is entirely different from the Canadian Act. The precise wording of section 4887 of the Revised Statutes of the United States is as follows:—

" No person shall be debarred from receiving a
" patent for his invention or discovery, nor shall any
" patent be declared invalid, by reason of its having
" been first patented or caused to be patented in a
" foreign country, unless the same has been intro-
" duced into public use in the United States for more
" than two years prior to the application. But every
" patent granted for an invention which has been

1898

THE AUER INCANDESCENT LIGHT MANUFACTURING CO. v. DRESCHEL.

Argument of Counsel.

"previously patented in a foreign country shall be so "limited as to expire at the same time with the foreign "patent, or, if there be more than one, at the same "time with the one having the shortest term, and in "no case shall it be in force more than seventeen "years."

It will be seen that this has reference only to that class of cases in which patents have been previously taken out in foreign countries. Nor does the English statute 15 & 16 Victoria, chapter 23, section 85, give us any assistance in interpreting the enactment in question in this cause. In a number of English cases decided under this section (sec. 85) it was held that "any such patent" must be taken to refer to the first class of cases referred to in the Act, and such cases were those involving foreign patents in existence at the time the domestic patent was granted. Admitting, as the counsel for the plaintiff contends, that the word "exists" as used in the last clause of section 8 of the Canadian Patent Act governs the interpretation of the words "any foreign patent," so that they should be taken to refer to any foreign patent existing at the time that the Canadian patent is taken out, it is not conclusive of the question of the validity of the plaintiff's patent in Canada; because as a matter of fact there were foreign patents in existence at the time a Canadian patent was issued, and these patents were identical with each other, with the defunct Spanish patent as well as with the Canadian patent. So it seems to me that the argument is of very little force when such a consideration is applied to it.

[PER CURIAM.—If the Spanish patent had been the first taken out, and it had expired there would in such a case be no question under our Act.]

No.—Referencet o *Higgins's Digest of Patent Cases* (1st Eng. ed.) at pp. 302 and 303 will be useful in this

case not so much in the direction of affording any special assistance in the interpretation of our Canadian Act, but as showing the general policy of the English legislature in enacting, and that of the English courts in enforcing, enactments upon the same subject. It seems to me that that policy may be stated fairly as follows: that where a foreign patent is allowed to expire the courts at least will not protect the inventor who has been careless enough to prejudice the parent patent by allowing the expiry of such foreign patents. I think that this is the *ratio decidendi* of *In re Blake's* Patent and *In re Johnston's* Patent to be found at p. 303 and 304 of *Higgins's Digest.* I rely on these cases also because the patent in question in this case is not the invention of a Canadian but of a foreigner, and it is to be said that the case of *O'Rielly* v. *Morse*, in 15 Howard 62, cited by counsel for the plaintiff, puts forward the "domestic side" of the reason for protecting the patent. The case seems to proceed upon the theory that domestic patentees should be protected more strenously than foreign patentees; and it would appear that the court there acted upon the distinction between the two classes of patentees as regards the measure of protection it should afford. Where the parent patent is a domestic invention, then the courts will afford the largest possible measure of protection.

But it is submitted that our own statute is *sui generis*, and that any cases decided under the English and the American statutes are not very helpful in reaching a right conclusion in its interpretation. Then, the statute being plain and unambiguous in its phraseology the words used must be taken in their plain and ordinary meaning. An artificial sense should not be attached to the words used when they can be reasonably interpreted in their ordinary sense.

1898

THE AUER INCANDESCENT LIGHT MANUFACTURING CO. v. DRESCHEL.

Argument of Counsel.

It being established that the Spanish patent was for exactly the same invention as the Canadian patent, and that the Spanish patent has expired, it must be held that, under the provisions of the 8th section of our Patent Act, the Canadian patent is no longer in force.

Mr. Duclos replied:—I draw an entirely different conclusion from the English cases than the view put forward by counsel for the defence. The cases cited by him from the English reports all arose upon the question of extending the patent, and not upon the question whether they were void or not. It has always been the policy of the English patent office to be governed in their determination in reference to extending patents, by the fact of the inventor's action in regard to any foreign patents he may have taken out. The cases referred to by the defence all turn upon the question of the extension or the enlargement of a patent; and as a general rule where the foreign patent has expired before application is made to enlarge or extend the patent, the application is refused. Of course that is not the case here. I would refer to *Hall's Infringement Outline* as presenting an exhaustive summary of the rule governing the policy of the courts in questions of this sort. Beginning at page 71 will be found a summary of all the Supreme Court cases in the United States illustrative of the principles that govern similar questions adjudicated upon in that court.

THE JUDGE OF THE EXCHEQUER COURT (now January 24th, 1898) delivered judgment.

The question in this case is as to the meaning of the concluding clause of the eight section of *The Patent Act* as re-enacted in the first section of the Act 55–56 Vict. ch. 24. That clause which was first enacted as part of the seventh section of *The Patent Act*, 1872, is as follows:—

1898

THE AUER INCANDESCENT LIGHT MANUFACTURING CO. v. DRESCHEL.

Reasons for Judgment.

"And under any circumstances if a foreign patent "exists, the Canadian patent shall expire at the "earliest date on which any foreign patent for the "same invention expires."

If the expression "foreign patent" where it last occurs in the clause has reference to a foreign patent existing at the time when the Canadian patent is granted, the plaintiff is entitled to judgment in this case. If, on the contrary, it means *any* foreign patent, and includes a foreign patent taken out after the date of the Canadian patent as well as one obtained prior to such date, the Canadian patent on which the plaintiff relies has expired and the defendants are entitled to judgment.

In 1872 when the provision in question first found a place in the Canadian patent law, a similar provision existed in the patent laws both of England (15-16 Vict, c. 83, s. 25 repealed by 46-47 Vict. c. 57) and of the United States (Act of 1870, s. 25, the Revised Statutes, s. 4887), but expressed in the statutes of both countries in terms that made it clear that the English patent in the one case, and the United States patent in the other, did not expire at the expiration of the foreign patent unless such foreign patent had been in existence when the English or the United States patent, respectively, was taken out. If in the Canadian statute the expression "the foreign patent" or "such foreign patent" had been used instead of "any foreign patent" it would be clear, I think, that the Parliament of Canada had intended to adopt the rule on this subject then in force in England and in the United States.

By the English Statute, 15-16 Vict. c. 83, s. 25, it was provided that the English patent should be void immediately upon the expiration or determination of the foreign patent obtained prior to the English patent, or where there were more than one such foreign pat-

1898

THE AUER INCANDESCENT LIGHT MANUFACTURING CO. v. DRESCHEL.

Reasons for Judgment.

ent, then immediately upon the expiration or determination of the foreign patent that should first expire or be determined; and by the statute of the United States, *The Consolidated Patent Act* of 1870 s. 25 (see also the Revised Statutes, s. 4887) it was provided that the United States patent should expire at the same time with the foreign patent, or if there were more than one, at the same time with the one having the shortest term. In both cases the context makes it clear that the foreign patent, by the expiration of which a domestic patent was to become void, must have been in existence prior to the granting of the domestic patent. And it may be that the expression "any foreign patent" used in the 7th section of *The Patent Act*, 1872, was meant to be subject to a like limitation; and I am inclined to think that it was. The earlier part of the section deals with the subject of foreign patents existing at the date of the Canadian patent, and it is not unreasonable to construe the words in the concluding clause as having reference to the same class of foreign patents. And then if it had been the intention of Parliament to adopt a rule on the subject different from that then in force in England and in the United States, that intention would, I think, have been clearly expressed. I think the expression "any foreign patent" in the clause with which the seventh section of *The Patent Act* of 1872 concluded and the eight section of *The Patent Act* (R. S. C. c. 61, 55-56 Vict. c. 24, s. 1) concludes should be limited to foreign patents in existence when the Canadian patent was granted.

There will be judgment for the plaintiff with costs, and the injunction granted herein will be continued.

Judgment accordingly.

Solicitors for plaintiff: *Atwater, Duclos & Mackie.*

Solicitors for defendants: *Foster, Martin & Girouard.*

ALEXANDER SMYTH WOODBURN.....SUPPLIANT; 1898

AND Jan. 17.

HER MAJESTY THE QUEEN.....RESPONDENT.

Practice—Appeal—Extension of time—Order of reference—Amendment of record—Laches.

An order of reference had been settled in such a way as to omit to reserve certain questions which the court expressly withheld for adjudication at a later stage of the case. Both parties had been represented on the settlement and had an opportunity of speaking to the minutes. The order was acquiesced in by the parties for a period of some eighteen months; the reference was executed and the referee's report filed. After final judgment in the action, the Crown appealed to the Supreme Court. Subsequent to the lodging of such appeal, an application was made to the Exchequer Court to amend the order of reference so as to include the reservations mentioned, or, in the alternative, to have the time for leave to appeal from such order extended. Under the circumstances, the Court extended the time to appeal but refused to amend the order of reference as settled.

APPLICATION to extend the time for leave to appeal from an order of the court referring a case to a Referee for the purpose of enquiry and report as to damages; or, in the alternative, to amend the order as settled. The circumstances under which the application was made are stated in the head-note.

10th January, 1898.

E. L. Newcombe, Q.C., D. M. J. in support of motion: One of the matters in controversy in this case is as to whether or not the suppliant is entitled to damages for an alleged breach of contract, covering the period elapsing between the 1st of December, 1884, and the 9th of November, 1886. When the whole case came before the court, no adjudication was made upon the question of liability either in respect of the period

1898

WOODBURN v. THE QUEEN.

Argument of Counsel.

covered by the formal contract or in respect of the period I have just mentioned. When your Lordship made the order of the 16th April, 1896, you said from the Bench that you did not intend to deal with the question of liability at that time ; that your then intention was to refer the question of damages only to the learned Referee, and that after the Referee had made his report the question of liability could come up either upon a motion to confirm, or upon a motion to appeal from such report. In settling the order of reference the Registrar has made no reservation of the questions of law arising in the case. The order as settled, without purporting to be a judgment, simply refers the question of damages to the Referee. Perhaps, under ordinary circumstances, we should have no fault to find with the manner in which the order or reference was formally settled ; but in view of the judgment of the Supreme Court of Canada in the case of *Clark* v. *The Queen*, (1) the Attorney-General for Canada fears that the interests of the Crown on appeal to the Supreme Court in this case might be prejudiced, unless your Lordship extends the time in which an appeal might be taken from the judgment of this court. It is not the intention of the Attorney-General to appeal from the judgment of this court so far as it relates to the question of damages for the period subsisting between 1879 and 1884, but an appeal has been lodged against such judgment so far as it allows damages for the period between the 1st December, 1884, and the 9th November. 1886. *Ex debito justitiae* the Attorney-General may ask the court to prevent any possible prejudice to the appeal of the Crown by reason of any mistake or oversight in the records of the court. It being obvious that under the decision of the Supreme Court in *Clark* v. *The Queen*, (*Supra*) it may very properly be argued that the order

(21) Can. S. C. R. 656.

1898

WOODBURN v. THE QUEEN.

Argument of Counsel.

of reference was a final judgment; then unless your Lordship consents to either extend the time for appealing from such order, or, in the alternative, reforms the record of it in your own court so that the reservation of the question of liability will appear upon the face of it, the Crown may be precluded from raising the question on the appeal in this case. Of course considerable time has elapsed since the making of the order, but I submit that the material upon which I make this motion shows that the Crown has not been guilty of undue delay. As soon as it was advised by its solicitor as to the fact of the order of reference being framed as it is, steps were immediately taken to have it corrected. Further than this, there is a short-hand note of what your Lordship said from the Bench in directing the order of reference of the 16th of April, 1896, to issue; and in that memorandum or note your Lordship is made to say that you expressly reserved the questions of law arising in the case until after the Referee has made his report. Under such circumstances the authorities show that the court will not hestitate to reform the record so as to make it conform to the actual judgment or order pronounced, but will take all such other steps as may be necessary to prevent the party appealing from being prejudiced in any way.

In *re Swire*, *Mellor* v. *Swire* (1), *Cotton* L.J. says, at page 243:—"Although it is only in special circum-
"stances that the court can interfere with an order
"that has been passed and entered, except in cases
"of mere slip or verbal inaccuracy; yet in my opinion
"the court has jurisdiction over its own records, and
"if it finds that the order as passed and entered con-
"tains an adjudication upon that which the court in
"fact has never adjudicated upon, then in my opinion
"it has jurisdiction which it will in a proper case

(1) 30 Ch. Div. 239.

1898

WOODBURN v. THE QUEEN.

Argument of Counsel.

" exercise to correct its record that it may be in accord-" ance with the order really pronounced."

Bowen L.J., at page 247 says : " An order, as it seems to me, even when passed and entered, may be amended by the court so as to carry out the intention and express the meaning of the court at the time when the order was made, provided the amendment be made without injustice or on terms which preclude injustice."

See also *Tucker* v. *New Brunswick Trading Co. of London* (1) ; *Lawrie* v. *Lees* (2).

R. V. Sinclair contra : The appeal having been lodged in the Supreme Court before this application was made, this court has no jurisdiction to grant the extension of time for leave to appeal asked for. That has been decided over and over again by the Supreme Court. He cites *Walsmley* v. *Griffith* (3); *Lakin* v. *Nutall* (4) ; *Starrs* v. *Cosgrove Brewing and Malting Co.* (5).

Furthermore, the Crown is too late in its application to have the record reformed. The minutes of the order of reference were spoken to by the solicitor for the Crown, and this point not having then been raised, the Crown is not at liberty to raise it now. Again, the reasons for judgment ordering the reference herein did not expressly direct that a clause should be inserted in the order of reference reserving for further consideration the question of liability between 1884 and 1886. Such a clause could only be inserted on the express direction of the court. *Bird* v. *Heath* (6); *Holmstead and Langton's Ontario Judicature Acts*, at page 654.

No mere clerical error has been made by the Registrar in settling the order; nor was the clause which the

(1) 44 Ch. Div. 249.
(2) 7 App. Cas. at p. 35.
(3) 13 Can. S. C. R. 434.
(4) 3 Can. S. C. R. 685.
(5) 12 Can. S. C. R. 571.
(6) 6 Hare 236.

1898

WOODBURN v. THE QUEEN.

Reasons for Judgment.

Crown now wishes to insert in it omitted through inadvertence. The amendment asked for should not be allowed. He cites *Port Elgin Public School Board* v. *Eby* (1); in *re Suffield & Watts, ex parte Brown* (2); *Daniel's Chancery Practice*, 6th edition, at page 819; *Attorney-General* v. *Tomline* (3); *King* v. *Savery* (4); *Willis* v. *Parkinson* (5). No alteration can however be made in a judgment except where there has been a matter of clerical error, or where the matter to be inserted is clearly consequential on the directions as actually made from the Bench.

THE JUDGE OF THE EXCHEQUER COURT now (January 17th, 1898) delivered judgment.

One of the matters in controversy in this case is as to whether or not the suppliant is entitled to damages for breaches of the contract set up occurring between the 1st of December, 1884, and the 9th of November, 1886. When that question first came before me at the trial on the 16th of April, 1896, I was inclined to think that the suppliant was entitled to recover damages for such breaches, but I refrained at that time from determining the question. When the question came again before me upon a motion by way of appeal from the Referee's report I came to the conclusion that the suppliant was entitled to recover for such breaches during the period mentioned, and on the 29th of November last I directed judgment to be entered for such damages, and other damages which the Referee had reported that the suppliant had sustained. From that judgment an appeal has been taken to the Supreme Court. It appears, however, that the Attorney-General for Canada fears that the appeal may be prejudiced by reason of the terms in which the formal order of refer-

(1) 17 Ont. P. R. 58.
(2) 20 Q. B. D. 697.
(3) 7 Ch. D. 388.
(4) 8 De G. M. & G. 311.
(5) 3 Swanst. 233.

1898

WOODBURN v. THE QUEEN.

Reasons for Judgment.

ence of the 16th April, 1896, was stated. The judge's direction, of which a note has been preserved, is clear and is not complained of; but it is feared that the formal order, the minutes of which were settled before the Registrar by counsel for the parties, goes beyond the direction, and the Attorney-General now applies either to have the order of reference amended or that the time for appealing therefrom be extended.

I am not disposed, after the long lapse of time, to amend the order that was taken out and acted upon without objection, but if the application to extend the time for appealing from that part of the order of April 16th, 1896, which has reference to damages for breaches of contract occurring between the 1st of December, 1884, and the 9th of November, 1886, had been made to me before the appeal was taken to the Supreme Court I should have thought the application should be granted. Should I refuse it now because that appeal has been asserted? I think not. It is argued that the Supreme Court will not take into consideration any order that I may now make, the appeal having been instituted in that court; but that is an objection that may be renewed before the Supreme Court, and with which the Supreme Court itself will be able to deal, and so I shall not in any way prejudice the position of the suppliant with regard to that objection by extending the time, and under the circumstances it seems to me that by so doing I shall, so far as that may now be done, be placing the parties in the position in which it was intended from the first they should occupy and which they would now occupy, but for some inadvertence in settling before the Registrar the minutes of the order that I made on the 16th of April, 1896.

There will be an order extending the time for appealing from the order of this court of the 16th April, 1896, until the 1st day of February, 1898,

so far, and so far only, as that order deals with that portion of the suppliant's claim which is based upon breaches of the alleged contract occurring between the 1st of December, 1884, and the 9th of November, 1886,—the costs of this application to be costs to the suppliant in any event.

1898

WOODBURN v. THE QUEEN.

Reasons for Judgment.

1898
Jan. 17.

THE ALLIANCE ASSURANCE COMPANY ..... } SUPPLIANTS.

AND

HER MAJESTY THE QUEEN.....RESPONDENT.

Negligence of Crown's Servant—The Exchequer Court Act, sec. 16 (d)—Accident occurring on a public work.

A suppliant seeking relief under clause (c) of section 16 of *The Exchequer Court Act* must establish that the injury complained of resulted from something negligently done or negligently omitted to be done on a public work by an officer or servant of the Crown while acting within the scope of his duties or employment.

Quære, whether the words "on any public work" as used in clause (*d*) of section 16 of *The Exchequer Court Act* may be taken to indicate the place where the act or omission that occasioned the injury occurred, and not in every case the place where the injury was actually sustained? *The City of Quebec* v. *The Queen* (24 Can. S. C. R. 420), referred to.

PETITION OF RIGHT for damages against the Crown for the negligence of its servants.

The suppliants alleged that they were insurers of buildings and property at Levis, P.Q., which had been destroyed by fire occasioned by the carelessness of the engineer of a train on the Intercolonial Railway. The evidence showed that the Halifax express of the Intercolonial Railway was the only train that passed the buildings in question on the day of their destruction by fire (Sunday) but it was not sufficiently established that the fire originated on the railway track or was communicated from the locomotive of the express when passing.

A. Ferguson Q.C. for the suppliants. The suppliants had a right of action prior to the passing of *The Exchequer Court Act*, 50-51 Vict., c. 16 under the

provisions of sections seven, eight and ten of R.S.C. c. 40. It could have been referred to and dealt with by the Official Arbitrators had their jurisdiction remained. *The Exchequer Court Act*, section fifty-eight, confers all the jurisdiction of the Arbitrators upon the court.

It is not necessary, under section 16, sub-sec. (*a*) of 50-51 Vict. c. 16, that the damage complained of should occur *on* a public work. It is sufficient if the *negligence* causing the damage occurs *on* the public work; otherwise you could never recover for the destruction of immoveable property. That is clearly the view of the judges of the Supreme Court in the *City of Quebec* v. *The Queen* (1).

The only reasonable theory of the accident is that it arose from the negligence of the servants of the Crown. *McGibbon* v. *Northern Railway Co.* (2); *American & Eng. Ency. of Law* (3); *Piggott* v. *Eastern Counties Railway Co.* (4).

G. G. Stuart Q.C. followed: The Crown is liable under the law of the Province of Quebec upon the general principle that where damage is done by anyone to another he must make good the loss. *Grand Trunk Railway Co.* v. *Meegan* (5); *Leonard* v. *Canadian Pacific Railway Co.* (6); *Jodoin* v. *La Compagnie du Chemin de fer du Sud-Est* (7).

W. Cook, Q.C. for the respondent: If negligence cannot be proved against a railway company, when attributing to them an accident from fire, you cannot succeed. In France their liability is determined by special legislation in no way similar to ours; and therefore the French authorities are no assistance here.

(1) 24 Can. S. C. R. 420.
(2) 14 Ont. A. R. 91.
(3) Vol. 8, p. 7.
(4) 4 Dor. Q. B. R. 228.
(5) 15 Q. L. R. 93.
(6) 3 C. B. 229.
(7) M. L. R. 1 S. C. 316; Sirey: Recuiel Generale (1889) 2nd part, p. 187.

1898

THE ALLIANCE ASSURANCE COMPANY v. THE QUEEN.

Argument of Counsel.

Negligence must not only be proved here, but it must be proved to have been negligence of a servant of the Crown while acting within the scope of his duty or employment. The Crown cannot be adjudged in default by mere inferences of fact. Besides this the engineer has sworn that his ash-pan was in good condition, and not likely to drop live coals. Furthermore, engines of the Quebec Central Railway pass over the same tracks at this point. Under such circumstances the Crown cannot be held liable.

The accident or fire did not occur or happen *on* a public work, and therefore under the words of the statute (50-51 Vict. c. 16, sec. 16 (*c*)) the Crown is not liable.

Mr. Ferguson replied.

THE JUDGE OF THE EXCHEQUER COURT, now (January 17th, 1898) delivered judgment.

The suppliants must, to succeed, bring their case within clause (c) of the 16th section of *The Exchequer Court Act*, under which the court has jurisdiction, among other things, to hear and determine every claim against the Crown arising out of any injury to property on any public work, resulting from the negligence of any officer or servant of the Crown while acting within the scope of his duties or employment. It is clear that the injury complained of in this case did not occur on a public work, and if the jurisdiction of this court is limited to cases in which the injury actually occurs upon the public work, as two of the learned judges of the Supreme Court held in *The City of Quebec* v. *The Queen* (1), the suppliants must fail on that ground. If, however, a construction of the clause less literal is permissible, and the word "on" may be taken to indicate the place where the act or omission that occasion-

(1) 24 Can. S. C. R. 420.

1898

THE ALLIANCE ASSURANCE COMPANY v. THE QUEEN.

Reasons for Judgment.

ed the injury occurred, and not in every case the place where the injury is actually sustained, I still think the judgment should be entered for the respondent. In that view of the law the suppliants must establish that the injury complained of resulted from something negligently done on a public work or negligently omitted to be done on a public work, by an officer or servant of the Crown while acting within the scope of his duties or employment, and that, I think, has not been established in this case. It is not at all certain under the evidence submitted that the fire that caused the damage was communicated from the engine of the Halifax express train, as the suppliants sought to prove. There is not that degree of probability about the matter to justify a finding on that issue of fact in the suppliants' favour; and as to the question of negligence of the officers or servants of the Crown by which the injury might have been occasioned, no case has in my opinion been made out.

On the issues of fact on which the case comes to be disposed of I find for the respondent, for whom there will be judgment, with costs.

Judgment accordingly

Solicitor for the suppliants: *N. N. Ollivier.*

Solicitor for the respondent: *W. Cook.*

1897
Nov. 16.

THE QUEEN ON THE INFORMATION OF THE ATTORNEY-GENERAL FOR THE DOMINION OF CANADA ..... PLAINTIFF;

AND

LAWRENCE KILROE.....DEFENDANT.

Practice—Information of intrusion—Possession and mesne profits—Joinder of claims—Judgment—Costs.

Rule 21 of the General Rules of Practice on the Revenue Side of the Court of Exchequer in England made on the 22nd June, 1860, providing that the mode of procedure to remove persons intruding upon the Queen's possession of lands or premises shall be separate and distinct from that to recover profits or damages for intrusion, governed the practice of the Exchequer Court of Canada in such matters until May 1st, 1895, when a general order was passed by that court permitting the joinder of such claims.

Rule 36 of the English rules above mentioned providing that in cases of judgment by default either for non-appearance or for want of pleading to informations of intrusion no costs are to be allowed to the Crown, is still in force in the Exchequer Court of Canada.

MOTION for judgment by default of pleading to an information of intrusion upon the lands of the Crown.

The information was dated on the 25th May, 1895. To the claim for possession in the information was joined a claim for issues and profits and costs.

November 16th, 1897.

W. E. Hodgins, for the plaintiff, moves for judgment by default against the defendant and establishes by affidavit the fact of the service of the information, the further fact that there had been no plea filed to the information, and asks for judgment against the defendant, both for possession and for the issues and profits, and with costs.

Per Curiam.—Under Rule 21 of the General Rules of Practice on the Revenue Side of the Court of Ex-

1897

THE QUEEN v. KILROE

Judgment.

chequer in England (1), which remained in force in the Exchequer Court of Canada until the 1st of May, 1895, when a Rule was made by this court, allowing proceedings to recover profits or damages for intrusion to be joined to proceedings to remove persons intruding upon the Queen's possession of lands and premises,—the Crown could not join in an information of intrusion a claim for possession and a claim for profits or damages. The information in this case having been exhibited in this court before the 1st of May, 1895, it must be governed by the old Rule on the Revenue Side of the Court of Exchequer in England, and accordingly the order for judgment will be for possession only.

Costs will also have to be refused, as Rule 36 of the above-mentioned General Rules of Practice on the Revenue Side of the Court of Exchequer in England which is still in force in the Exchequer Court of Canada, provides that "In case of judgment by default in "intrusion, for the removal of persons intruding, either "for non-appearance, or for want of pleading, no costs "are to be allowed" There will be judgment for possession only, and without costs.

(1) 6 H. & N. v.

1898
March 7

IN THE MATTER OF AN APPLICATION TO REGISTER A TRADE-MARK.

J. J. MELCHERS, Wz .....APPLICANTS ;

AND

JOHN DE KUYPER & SON.....OPPOSANTS.

Trade-marks—Resemblance between—Refusal to register both—Grounds of.

The object of section 11 of the Act respecting Trade-marks and Industrial Designs (R. S. C. c. 63) as enacted in 54–55 Victoria, c. 35, is to prevent the registration of a trade-mark bearing such a resemblance to one already registered as to mislead the public, and to render it possible that goods bearing the trade-mark proposed to be registered may be sold as the goods of the owner of the registered trade-mark.

2. The resemblance between the two trade-marks, justifying a refusal by the Minister of Agriculture in refusing to register the second trade-mark, or the court in declining to make an order for its registration, need not be so close as would be necessary to entitle the owner of the registered trade-mark to obtain an injunction against the applicant in an action of infringement.

3. It is the duty of the Minister to refuse to register a trade-mark when it is not clear that deception may not result from such registration. (*Eno* v. *Dunn*, 15 App. Cas. 252 ; and *In re Trade-mark of John Dewhurst & Son, Ltd.*, [1896] 2 Ch. 137, referred to).

THIS was a reference by the Minister of Agriculture under the provisions of the Trade-mark Amendment Act, 54 & 55 Vict., c. 35, sec. 11.

The terms of the reference were as follows :—

DEPARTMENT OF AGRICULTURE.

COPYRIGHT AND TRADE-MARK BRANCH,

OTTAWA, Canada, 14th April, 1897.

Reference to the Exchequer Court of Canada :

In the matter of Messrs. Melchers' application to register a trade-mark.

1898

In Re
MELCHERS, Wz.
AND
DE KUYPER & SON.

Statement of Facts.

An application having been made on the 16th February last, by Messrs. Bisaillon, Brosseau & Lajoie, Advocates, of Montreal, on behalf of Messrs. Melchers, of Schiedam, in the Kingdom of the Netherlands, for the registration of a trade-mark consisting of certain signs and devices upon a label, intended to be affixed to bottles containing gin, described in the application as being a "Cerf-volant."

And Messrs. Abbotts, Campbell & Meredith, Advocates, also of Montreal, on behalf of Messrs. John de Kuyper & Son, of Rotterdam, Holland, protesting against the granting of the said application, which they hold to be an interference with their clients' trade-mark (heart-shaped label) No. 5415, I beg to refer the said application to the Exchequer Court, to hear and determine the matter, and to decide whether the label claimed by Messrs. Melchers should be admitted to be registered, pursuant to section 11 (*a* and *b*) and (2) of 54 & 55 Vict., c. 35.

(Sgd.) SYDNEY FISHER,
Minister of Agriculture.

To the Exchequer Court,
Ottawa.

The following is a copy of the description of the proposed trade-mark transmitted to the court with the reference:

Au Ministre de l'Agriculture,
Branches des Marques de Commerce et de fabriques.
Ottawa.

Nous, L. Irénée Boivin, et Joseph Marcelin Wilson, de la cité de Montréal, dans le district de Montréal, faisant affaires sous le nom de "Boivin, Wilson & Compagnie," représentants en Canada de la maison "J. J. Melchers, Wz.," de "Schiedam," Hollande, et autorisés par eux, transmettons ci-jointe copie en

1898

In Re MELCHERS, WZ. AND DE KUYPER & SON.

Statement of Facts.

double d'une marque de commerce spéciale, conformément aux clauses de l'acte des marques de commerce et dessins de fabriques, dont je réclame la propriété, parce que je crois sincèrement qu'ils en sont les véritables propriétaires.

Cette marque de commerce spéciale consiste en une étiquette en forme de cerf-volant, la base placée en haut étant formée par une demi-circonférence raccordée aux côtés latéraux rectilignes, rappelle ainsi la forme d'un cerf-volant.

L'encadrement, de même forme que l'étiquette, se compose d'un trait noir simple.

Sur une bande noire circule, concentrique au haut du cadre se lit, en lettres blanches sur fond noir : "The largest gin distillery ;" puis au dessous, en lettres noires sur le fond de l'étiquette : "Genuine Hollands" et enfin en plus gros caractères "Geneva."

Le centre de l'étiquette est occupé par une vignette représentant un éléphant tourné vers la droite.

Immédiatement audessous de l'étiquette "J. J. M. Wz.," puis, sur une bande circulaire, concave vers le haut, "J. J. Melchers, Wz." Enfin, audessous "Schiedam," et au bas "Registered." Un fleuron en cul-de-lampe termine l'étiquette.

Nous demandons par ces présentes l'enregistrement de cette marque de commerce spéciale, conformément à la Loi.

Nous incluons, en mandat de poste, n°—, le montant de la taxe de vingt cinq piastres ($25) requise par la clause douzième de l'acte précité.

En foi de quoi nous avons signé, en présence de deux témoins soussignés, au lieu et à la date ci-dessous mentionnés.

Montréal, 12 février, 1897.

Témoins :
H. G. Bisson.
M. Boivin.

LÉONARD IRÉNÉE BOIVIN.
JOSEPH MARCELIN WILSON.
BOIVIN WILSON ET CIE.

1898

In Re
MELCHERS, WZ. AND DE KUYPER & SON.

Statement of Facts.

The following notice of the application to register the trade-mark was given by the Registrar in *The Canada Gazette* in four consecutive issues thereof, in pursuance of an order made in that behalf:—

IN THE EXCHEQUER COURT OF CANADA.

IN the matter of Messrs. Melchers' application to register a trade-mark, and in the matter of the Reference made therein to this court dated 14th April, 1897, by the Minister of Agriculture.

Notice is hereby given that Messrs. Melchers, of Schiedam, in the kingdom of the Netherlands, and residing and carrying on business at Schiedam aforesaid, under the firm name of "J. J. Melchers Wz." who, alleging in substance that they are the proprietors of the trade-mark hereinafter described, have applied to the Minister of Agriculture to have the same registered in the register of trade-marks kept in the Department of Agriculture, as a specific trade-mark to be applied to the sale of Hollands Gin manufactured and sold by them.

That the said specific trade-mark is in the said application described to consist of certain signs and devices upon a label intended to be affixed to bottles containing gin, described in the said application as a kite (cerf-volant).

This specific trade-mark consists of a label in the form of a kite, the base placed above being in the form of a semi-circumference joining the lateral rectilineal sides, thus suggesting the design of a kite.

The border consists of a single black scroll in the same alignment as the label.

On a black curving concentric band at the top of the border one reads, in white letters on a dark back-ground: "The Largest Gin Distillery;" and below in black letters on the back-ground of the label:

1898

In Re MELCHERS, WZ. AND DE KUYPER & SON.

Statement of Facts.

"Genuine Hollands;" and lastly, in larger letters: "GENEVA." In the centre of the label is a vignette (design) representing an elephant turned to the right. Immediately underneath the label: "J. J. M. Wz.," and on a circular band, concave towards the top: "J. J. Melchers Wz. Finally underneath: "Schiedam," and at the bottom: "Registered." A pendant ornament completes the label.

This trade-mark in question is, in the application for registration, described as follows, to wit: (Here follows a specific description of the trade-mark to be found *ante* p. 83.)

The following is a fac-simile of the duplicate copy so furnished:—

That the Minister of Agriculture has seen fit to refer the matter to the Exchequer Court for the determination of the following question:—

1898

In Re MELCHERS, WZ. AND DE KUYPER & SON.

Statement of Facts.

Whether the label claimed by Messrs. Melchers should be admitted to be registered pursuant to section 11 (*a* and *b*) and (2) of 54-55 Victoria, chapter 35 ?

That the present notice is to be inserted in four consecutive issues of *The Canada Gazette* ; and that if any person desire to oppose the registration of such specific trade-mark he should, not later than fourteen days from the last insertion of such notice in *The Canada Gazette*, file a statement of his objections with the Registrar of this court and serve a copy of the same upon Messrs. Bisaillon, Brosseau & Lajoie, Place d'Armes Hill, in the City of Montreal.

That if no one appears to oppose the registration of such trade-mark the applicants may file with the Registrar of the court an affidavit in support of the application, and upon ten days notice to the Minister of Agriculture, and upon serving him with a copy of any affidavit so filed, may move the court for an order to allow the registration of such trade-mark.

That if any person appear to oppose the registration, and file and serve a statement of his objections as hereinbefore mentioned, such person shall become a party to these proceedings and shall be liable to pay any costs the court may direct him to pay.

That the applicants shall, within fourteen days after service upon their solicitors of any statement of objections, file and serve an answer thereto, whereupon the said matter shall be, and be deemed ripe, for trial, and any issue or issues so raised by such statement of objections and answer may be set down for trial in like manner as any action in the court, and notice of such trial shall be given as well to the Minister of Agriculture as to the opposite party.

Dated at Ottawa, this 21st day of June, A.D. 1897.

(Signed), L. A. AUDETTE,
Registrar Exchequer Court.

1898

In Re MELCHERS, WZ. AND DE KUYPER & SON.

Statement of Facts.

The following opposition to the registration was filed by the opposants herein :—

Title of Proceeding.

Johannes de Kuyper and Anna Maria de Kuyper *née* Amtmann, carrying on business at Rotterdam, in the Kingdom of the Netherlands, under the firm name of John de Kuyper & Son, hereby declare that they oppose the application of the said Messrs. Melchers, and say :

1. That heretofore, to wit, on the fourteenth day of September, eighteen hundred and ninety-five, the opposants registered in the Department of Agriculture, in Trade-Mark Register number twenty-three, fyle 5,415, in accordance with *The Trade-Mark and Design Act*, a specific trade-mark to be applied to the sale of Hollands gin and consisting of a white heart-shaped piece of paper used as a label and of the following words, devices and designs depicted thereon, to wit :—Along close to and parallel with the edge of the said heart-shaped paper or label there runs a scroll, consisting of one oval link alternating with two round links. Within the space enclosed by said scroll on one side at the top is the word " Genuine " and on the other side at the top the word " Hollands ; " the letters composing each of said words being aligned upon a curve and beneath which is a scroll curving parallel with the alignment of the word. Below these words and across the upper central space of the label is the word " Geneva " and beneath it an anchor inclined to one side and on each side of the anchor an ornamental scroll or flourish. The letters J, D. K. & Z. in capitals appear just beneath the anchor. Across the lower central space of the label is designed a ribbon upon which appear the words " John De Kuyper & Son " and below this is the word " Rotterdam " whilst in the apex of the heart is a vine or scroll. The whole as more fully appears

1898

In Re MELCHERS, WZ. AND DE KUYPER & SON.

Statement of Facts.

by a certified copy of the said registration, to which the opposants crave leave to refer.

2. That the said label or trade-mark is used by the opposants in connection with the sale of Hollands Gin and is applied on square faced bottles of dark glass, and is well known to the public.

3. That the trade-mark proposed for registration by the said Messrs. Melchers resembles the trade-mark of the opposants already registered as aforesaid.

4. That the trade-mark proposed to be registered by the said Messrs. Melchers is calculated to deceive and mislead the public, especially when applied to the sale of Hollands gin in connection with the dark square faced bottles in which the same is usually sold.

CLAIM.

The opposants pray that this honourable court may be pleased to reject the said application (*a*) because the said mark proposed for registration resembles said trade-mark of the opposants already registered; and (*b*) because the same is calculated to deceive and mislead the public, and the opposants pray for costs

Montreal, 14th August, 1897.

The following answer to the above opposition was filed by the applicants:—

Title of Proceeding.

Messrs. Melchers, for answer to John de Kuyper & Son's opposition in this matter, say:

I. That the heart-shaped label claimed to have been registered by opposants, and also the words and device printed or written upon it, had been in use for years in Europe and in Canada upon the same class of goods and was common to the trade long prior to the opposants alleged registration of same, and the heart-shape of the label has been and is one of the essential features, and the designs thereon were subordinated to the shape, and any originality or exclusiveness in

1898

In Re MELCHERS, WZ. AND DE KUYPER & SON.

Statement of Facts.

the arrangement of said design or label or any part thereof, excepting the anchor, exist only by reason of such heart-shape.

2. That the registration alleged to have been obtained by opposants was obtained without sufficient cause, should have been refused and the registration of the alleged trade-mark should be cancelled and the entry thereof expunged from the registry.

3. That it is not true that the trade-mark proposed for registration by Messrs. Melchers resembles the trade-mark alleged as having been registered by opposants, but on the contrary among the striking differences between the two labels or trade-marks are the following: The opposants' label is heart shaped, your petitioner's is in the form of a kite. The scroll along and parallel with the edge of opposants' label is corrugated or rope-like, while that of your petitioners is a plain band or border. At the top of the plain band or border in white letters on a dark back-ground are the words, "The Largest Gin Distillery," while under the scroll on the over-links of the heart-shaped label are the words "Genuine Hollands," the letters being aligned upon a curve beneath which is a scroll curving parallel with the alignment of the words. The words "Genuine Hollands" are more prominently set out in the heart-shaped label than in the kite form one. Beneath the word "Geneva" on the heart-shaped label is an anchor inclined to one side, and on each side of the anchor an ornamented scroll or flourish; while in the centre of your petitioners, label is a design representing an elephant turned to the right. Immediately under this design are the letters J. J. M. Wz., and a circular band towards the top on a scroll with the name J. J. Melchers, Wz., while in the heart-shaped label, in corresponding position, are the letters J. D. K. Z. inclined to the right and underneath a rib-

bon instead of a scroll with John de Kuyper & Son. The word "Rotterdam" is on the heart-shaped label and under the name of such city is a vine or scroll; while in the corresponding place on the kite-shaped label is the word "Schiedam," and under this name the word "registered," and there is a "pendant" where in the heart-shaped label, is the scroll or vine.

4. It is not true that the trade-mark proposed to be registered by Messrs. Melchers is calculated to deceive or mislead the public.

The applicants, Messrs. Melchers, pray for the reasons above mentioned that this honourable court, may be pleased to reject the opposition of Messrs. John de Kuyper & Son, and declare that the registration of their trade-mark, as set out in paragraph no. 1 of their statement of objections, be set aside and declared null and void and be ordered to be erased from the Trade-Mark Register in the Department of Agriculture; and that the application of Messrs. Melchers for registration of this trade-mark be allowed with costs against the said John de Kuyper & Son.

Montreal, December 1st, 1897.

REPLY OF OPPOSANT TO ABOVE ANSWER.

Title of Proceeding.

The opposants reply to Messrs. Melchers' answer to their opposition, and say:—

1. As to paragraphs one and two of the said answer, opposants say that the allegations therein contained are irrelevant and do not constitute in law any answer to the opposition fyled herein, nor can effect be given thereto herein, and opposants claim the benefit of this objection as if they had demurred.

2. Subject to the foregoing, the opposants deny the allegations of paragraphs one, two, three and four of the said answer.

January 11th, 1898.

The matter was heard at Montreal.

1898

In Re MELCHERS, WZ. AND DE KUYPER & SON.

Argument of Counsel.

T. Brosseau, on behalf of the applicants: There is not such a similarity between the trade-mark of the opposants and that which the applicants seek to register, as to deceive the public in any way. The distinctive feature of the trade-mark proposed for registration by the applicants is the elephant, while that of the other is the anchor. The gin manufactured by the applicants is known to the trade and to consumers as the "Elephant Brand." There is no substantial reason for refusing the registration asked for. (He cites Eugène Pouillet: *Des Marques de Fabrique* p. 79.)

C. S. Campbell, for the opposants: The applicants are in the same position before the court as if they had never used their trade-mark. The heart-shaped label cannot be the subject of a trade-mark in Canada. (He cites *De Kuyper* v. *Van Dulken* (1); *Eno* v. *Dunn* (2); *Re Dewhurt's Trade-mark* (3); *The Queen* v. *Authier* (4).) The authorities show conclusively that if there is any possible similitude the registration of the second trade-mark ought to be refused.

A. Ferguson, Q.C. followed for the opposants. This is a case of first instance, and according to the English doctrine it ought to be decided upon the lines of analogy to cases already decided bearing the closest resemblance thereto. The case of *De Kuyper* v. *Van Dulken* (*ut supra*) decides that the opposants are the owners of the heart-shaped label as applied to the manufacture of gin. In view of that decision, and in view of the fact that the Minister is in doubt as to the propriety of granting the application in this case, the court ought not to order registration. The mere label itself is not the proper subject of a trade-mark, because, as was established in the case referred to, the use of a heart-shaped label was common to the trade.

(1) 4 Ex. C. R. 71.
(2) 15 App. Cas. 252.
(3) [1896] 2 Chan. 137.
(4) Q. R. 6 Q. B. 146.

1898

In Re MELCHERS, WZ. AND DE KUYPER & SON.

Reasons for Judgment.

We have by means of the use of our trade-mark upon a heart-shaped label, built up an important trade in this country; and our rights should not be lightly interfered with. (He cites *Speers'* Case (1).)

As to the question whether the resemblance between the two marks is such as to justify the Minister in refusing to register, I would refer to *In re Australian Wine Importers* (2). The only difference between the two marks is that in the case of the heart-shaped label there is an indentation that does not appear in the case of the kite. The resemblance is close enough to deceive the public. The second trade-mark is an interference with a vested right, and should not be protected by the court. (He cites *Crossmith's Trade-mark* (3).

Mr. Brosseau replied.

THE JUDGE OF THE EXCHEQUER COURT now (March 7th, 1898) delivered judgment.

This matter comes before the court on a reference by the Minister of Agriculture in which after reciting that an application had been made on the 16th of February, 1897, on behalf of Messrs. Melchers of Schiedam, in the Kingdom of the Netherlands, for the registration of a trade-mark, consisting of certain signs and devices upon a label intended to be affixed to bottles containing gin, described in the application as being a "cerf-volant," and that Messrs. John De Kuyper & Son, of Rotterdam, in the same kingdom had protested against the granting of the said application, which they held to be an interference with their trade-mark, consisting of a heart-shaped label No. 5415, the Minister referred the application to the court "to hear and determine the matter and to decide whether the label claimed by Messrs. Melchers should be admitted to be registered

(1) 55 L.T. N.S. 850. (2) 41 Ch. D. 278.
(3) 60 L. T. N. S. 612.

1898

In Re MELCHERS, WZ. AND DE KUYPER & SON.

Reasons for Judgment.

pursuant to section 11 (*a* and *b*) and (2) 54–55 Vict., chap. 35."

The 11th section of the *Act Respecting Trade-marks and Industrial Designs* (1), as enacted in 54–55 Vict., chap. 35, is as follows :—

"11. The Minister of Agriculture may refuse to register any trade-mark in the following cases:—

(*a.*) If he is not satisfied that the applicant is undoubtedly entitled to the exclusive use of such trade-mark.

(*b.*) If the trade-mark proposed for registration is identical with or resembles a trade-mark already registered.

(*c.*) If it appears that the trade-mark is calculated to deceive or mislead the public.

(*d.*) If the trade-mark contains any immorality or scandalous figure.

(*e.*) If the so-called trade-mark does not contain the essentials necessary to constitute a trade-mark, properly speaking.

2. The Minister of Agriculture may, however, if he thinks fit, refer the matter to the Exchequer Court of Canada, and in that event such court shall have jurisdiction to hear and determine the matter, and to make an order determining whether and subject to what conditions, if any, registration is to be permitted."

The questions to be determined on this reference are:—

1. Are the applicants entitled to the exclusive use of the trade-mark which they propose to register; and

2. Is it identical with or does it resemble, a trade-mark already registered?"

As to the first question there is no controversy. The applicants are undoubtedly entitled to the exclusive use of the trade-mark they propose to register if otherwise they are entitled to register it. Then, too, it is

(1) R. S. C. c. 63.

1898

In Re MELCHERS, WZ. AND DE KUYPER & SON.

Reasons for Judgment.

clear that the proposed trade-mark is not identical with any trade-mark already registered. The only question for determination is as to whether or not it so resembles the registered trade-mark of John De Kupper & Son that registration ought to be refused ?

The further question as to whether or not it is calculated to deceive or mislead the public has not been directly referred to the court, though so far as such deception may depend upon the resemblance of such trade-mark to one already registered, the question is involved in that which has been submitted to the court. If the trade-mark proposed to be registered so resembles one already on the register that the owner of the latter is liable to be injured by the former being passed off as his, then a case is presented in which the proposed trade-mark is calculated to deceive or mislead the public. Whenever the resemblance between two trade-marks is such that one person's goods are sold as those of another the result is that the latter is injured and some one of the public is misled. To prevent these things from happening the legislature has given the Minister of Agriculture a discretion to refuse to register a trade-mark proposed for registration where it is identical with or resembles a trade-mark already registered. If, as in the present case, he refers the question to the court, the court should, I think, exercise its discretion and determine the matter upon the same principles as should guide the Minister in the exercise of his discretion.

The trade-mark that the applicants propose to register is described in their application as follows :

" Cette marque de commerce spéciale consiste en une étiquette en forme de cerf-volant, la base placée en haut étant formée par une demi-circonférence raccordée aux côtés latéraux rectilignes, rappelle ainsi la forme d'un cerf-volant.

" L'encadrement, de même forme que l'étiquette, se compose d'un trait noir simple.

1898

In Re MELCHERS, Wz. AND DE KUYPER & SON.

Reasons for Judgment.

"Sur une bande noire circule, concentrique, au haut du cadre, se lit, en lettres blanches sur fond noir : 'The largest gin distillery;' puis au-dessous, en lettres noires sur le fond de l'étiquette : 'Genuine Hollands,' et enfin en plus gros caractères 'Geneva.'

"Le centre de l'étiquette est occupé par une vignette représentant un éléphant tourné vers la droite.

"Immédiatement au-dessous de l'étiquette 'J J. M. Wz.,' puis sur une bande circulaire, concave vers le haut, 'J. J. Melchers Wz.' Enfin, au-dessous, 'Schiedam,' et au bas 'Registered.' Un fleuron en cul-de-lampe termine l'étiquette."

The following extract from the certificate issued by the Minister of Agriculture, on the 12th of September, 1895, to John de Kuyper & Son gives a description of their registered trade-mark :

"This is to certify that this trade-mark (specific) to be applied to the sale of Hollands gin, and which consists of a white heart-shaped piece of paper used as a label, and the following words, devices and designs depicted thereon, to wit: Along close to and parallel with the edge of the said heart-shaped paper or label there runs a scroll consisting of one oval link alternating with two round links. Within the space enclosed by said scroll on one side, at the top, is the word 'Genuine,' and on the other, at the top, the word 'Hollands;' the letters composing each of said words being aligned upon a curve, beneath which is a scroll curving parallel with the alignment of the word. Below these words and across the upper central space of the label is the word 'Geneva,' and beneath it an anchor inclined to one side, and on each side of the anchor an ornamental scroll or flourish. The letters J. D. K. & Z., in capitals, appear just beneath the anchor. Across the lower central space

of the label is designed a ribbon, upon which appear the words, 'John de Kuyper & Son,' and below this is

1898

In Re MELCHERS, WZ. AND DE KUYPER & SON.

Reasons for Judgment.

the word 'Rotterdam,' whilst in the apex of the heart is a vine or scroll, as per the annexed label and application, has been registered in the Trade-Mark Register No. 23, folio 5415, in accordance with *The Trade-Mark and Design Act.*"

It will be seen from the description of the two trade-marks, and more especially by an inspection of the two labels that the differences in detail between the two are many, and as to their general appearance no one of ordinary intelligence and education would be likely to mistake the one for the other. The resemblance, such as it is, lies in the colour and shape of the label. In the one case the label is heart-shaped, in the other it takes the form of a kite, and in both the colours are white and black.

Messrs. de Kuyper & Son, who have for a long time had a well established business in Quebec and elsewhere in the Dominion, have for many years used the heart-shaped label on bottles containing gin made by them. After litigation and proceedings in this court, to which it is not necessary to refer more particularly, that label was registered in 1895. Messrs. Melchers are also distillers of gin. They have, too, for a number of years done business in Quebec and elsewhere in Canada. Formerly they used a label the colour and shape of which were very dissimilar to that used by de Kuyper & Son, as well as to that which they now seek to register. Then for a while they used a white heart-shaped label having, in general appearance, a somewhat close resemblance to de Kuyper & Son's label. That label they have abandoned in favour of the one now in question. These labels are in use attached to bottles of a similar shape and like general appearance. It will be seen, however, by an inspection of the exhibits in this case, that in the glass of the bottles used by Messrs. Melchers are impressed the

1898

In Re MELCHERS, WZ. AND DE KUYPER & SON.

Reasons for Judgment.

word and letters "J. J. Melchers, Wz." Of course they are not bound to use such bottles and may whenever they care to do so use bottles without any such distinguishing mark. And the fact is not material except as showing what is, I think, otherwise clear from the evidence, that they are not, so far as they are concerned, attempting to sell their gin as gin made by de Kuyper & Son. Why, then, have they changed their labels, and in the one case somewhat closely followed that used by de Kuyper & Son, and in the other come as near to it apparently as they thought it safe to do? The wholesale dealers, the retail dealers, the saloon-keepers, and the inn-keepers, all know the difference. None of them are misled or deceived by any resemblance between de Kuyper & Son's label and that which the applicants seek to register. None but the incautious and unwary among the customers of the retailers would be likely to be misled, and some of the witnesses appear to think that even with these the thing is not likely to happen. I am inclined, however, to take a different view. Although the resemblance between the two labels is not marked, yet there is a resemblance and one which it seems to me might in some cases mislead ignorant persons not on their guard. I fail to see why the applicants, who do not themselves attempt to sell their gin as that made by de Kuyper & Son, would care to have a label in any way resembling that used by the latter, if it were not that the retail dealers, the saloon-keepers and inn-keepers, or some of them, did not prefer to buy gin in bottles bearing labels with some such general resemblance, and did not buy more of it because the bottles bear such labels; or why the retailers would the more readily buy, and buy more, gin in bottles with such labels if the labels did not in some way enable them in selling to get some advantage from the reputation that

1898

IN *Re* MELCHERS, WZ. AND DE KUYPER & SON.

Reasons for Judgment.

John de Kuyper & Son have obtained as distillers of gin. Mr. Langlois, a travelling agent for the sale of groceries and liquors being asked in cross-examination which gin it was that he "pushed," answered that there is always one they need not push and that is the de Kuyper mark. If they took another mark they had to push it, but so far as de Kuyper's is concerned it is always asked for. And though this witness had not sold Melchers' gin I have no reason to think that his testimony does not fairly present the state and condition of the trade in gin in Quebec and other places where he travelled. And that shows us why it is that other distillers of gin, or their customers, find it an advantage, or think it to be an advantage, to use a label resembling that used by the de Kuypers. But there can be no advantage unless some persons are misled by the resemblance between the labels and buy gin made by others when they think they are buying De Kuypers'.

That, it seems to me, is a fair inference to draw from the facts of the case, and though not in itself conclusive, it strengthens the view which I have formed from an inspection of the two labels that there is on the whole such a resemblance between them as would justify the Minister of Agriculture in refusing to register the trade-mark in question, and the court in declining to make an order for its registration. It is always to be borne in mind in applications of this kind that the question is not the same as that which arises in an action for an infringement of a trade-mark. It does not follow that because the person objecting to the registration of a trade-mark could not get an injunction against the applicant, the latter is entitled to put his trade-mark on the register. [*Re Speer* (1); *In Re The Australian Wine Importers, Lt.* (2).] With

(1) 55 L. T. 880. (2) L. R. 41 Ch. Div. 278.

1898

IN *Re* MELCHERS, WZ. AND DE KUYPER & SON.

Reasons for Judgment.

reference to the exercise by the Comptroller of the discretion given him by *The Patent, Designs and Trade-Marks Act*, 1883, to register or to refuse to register a trade-mark, the House of Lords has held that he ought to refuse registration where it is not clear that deception may not result. [*Eno* v. *Dunn* (1); *See also in Re Trade-mark of John Dewhurst & Sons, Lt.* (2).] And that, I think, is a rule which the Minister of Agriculture and this court should follow in disposing of applications made under the Canadian Act.

The common sense view of cases of this kind is well stated in the Law Quarterly Review for 1896, vol. 12, p. 12:—

"The world is wide," said Lord Justice Bowen once in a trade-mark case, "and there are many names. The world is wide, and there are many designs. There is really no excuse for imitation in a cathedral stove or anything else, and when we find such a stove selling largely, and another enterprising trader producing a similar article, only with different tracery, his conduct is only explicable on one hypothesis, and that is a desire to appropriate the benefit of another person's business. [*Harper & Co.* v. *Wright & Co.* (3); reversed on appeal (4).] The argument of undesigned coincidence is one which may be commended to Judæus Apella, and the other argument—the stock argument—as to the proprietor of a design or trade-mark not being entitled to monopolize art or the English language, is about equally deserving of respect. In such cases, as Lord Westbury said in *Holdsworth* v. *McCrea* (5), and Lord Herschell in *Hecla Foundry Co.* v. *Walker* (6) repeated, the appeal is to the

(1) 15 App. Cas. 252.
(2) [1896] 2 Ch. D. 137.
(3) [1895] 2 Ch. 593; 64 L. J. Ch. 813.
(4) [1896] 1 Ch. 142.
(5) L. R. 2 H. L. at p. 388.
(6) 14 App. Cas. 550.

1898

IN *Re* MELCHERS, WZ. AND DE KUYPER & SON.

Reasons for Judgment.

eye, and rightly. It is the eye by which the buyer judges, and by which, if colourable imitations are by law allowed, he will be deceived and defrauded."

I am of opinion that in this case the registration of the proposed trade-mark should not be permitted, but should be refused, and there will be an order of the court to that effect.

Judgment accordingly.

Solicitors for applicants : *Bisaillon, Brousseau & Lajoie.*

Solicitors for opposants: *Abbotts, Campbell & Meredith.*

1898

April 4.

IN THE MATTER OF THE PETITION OF RIGHT OF
WILLIAM ANDREW YULE, LIEUTENANT-COLONEL IN HER MAJESTY'S MILITARY SERVICE NOW STATIONED AT HAMILTON, BERMUDA, THE SOLE SURVIVING EXECUTOR, AND AS SUCH NOW VESTED WITH THE ESTATE TO THE LATE WILLIAM YULE, IN HIS LIFETIME OF CHAMBLY, IN THE PROVINCE OF QUEBEC, ESQUIRE, AND CHARLES W. E. GLEN, DOCTOR OF MEDICINE; MYRA LALAISE DUPUY, SPINSTER, BOTH OF CHAMBLY CANTON, IN THE PROVINCE OF QUEBEC; FRANCES JANE DUPUY AND CHARLOTTE A. DUPUY, SPINSTERS, BOTH OF THE CITY OF KINGSTON, IN THE PROVINCE OF ONTARIO, } SUPPLIANTS;

AND

HER MAJESTY THE QUEEN.....RESPONDENT.

Constitutional law—8 Vict. (P.C.) c. 90—British North America Act, 1867, s. 111—Liability of Province of Canada existing at time of Union—Jurisdiction—Arbitration—Condition precedent to right of Action—Waiver.

By the Act 8 Vict. (P.C.) c. 90, Y. was authorized at his own expense to build a toll-bridge with certain appurtenances over the River Richelieu in the Parish of St. Joseph de Chambly, P.Q., such bridge and appurtenances to be vested in the said Y., his heirs, etc., for the term of fifty years from the passing of the said Act; and it was enacted that at the end of such term the said bridge and its appurtenances should be vested in the Crown and should be free for public use, and that it should then be lawful for the said Y., his heirs, etc., to claim and obtain from the Crown the full and entire value which the same should at that time be worth exclusive of the value of the tolls, such value to be ascertained by three arbitrators, one of which to be named by the Governor of the Province for the time being, another by the said Y. his heirs, etc., and the third by the said two arbitrators.

The bridge and its appurtenances were built and erected in 1845, and Y. and his heirs, maintained the same and collected tolls for the

1898

YULE
v.
THE QUEEN.

Statement of Facts.

use of the said bridge until the year 1895, when the said property became vested in the Crown under the provisions of the said Act.

Held, that upon the vesting of the bridge and its appurtenances in the Crown the obligation created by the said statute to compensate Y. and his heirs, etc., for the value thereof was within the meaning of the 111th section of *The British North America Act*, 1867, a liability of the late Province of Canada, existing at the Union, and in respect of which the Crown, as represented by the Government of Canada, is liable.

2. That the Exchequer Court had jurisdiction under clause (d) of the 16th section of *The Exchequer Court Act* in respect of a claim based upon the said obligation, it having arisen under the said provisions of *The British North America Act*, 1867, which, for the purposes of construction of the said 16th section of *The Exchequer Court Act*, was to be considered a law of Canada.

3. That under the wording of the said Act 8th Vict. (P.C.) c. 90 no lien or charge in respect of the value of the said property existed against the same in the hands of the Crown.

4. Where both the Governments of Ontario and Quebec, on one or both of which the burden of the claim would ultimately fall, had expressed a desire that the matter should be determined by petition of right and not by arbitration, and where the suppliants, with knowledge thereof, had presented their petition of right praying that a fiat thereon be granted or, in the alternative, that an arbitrator be appointed by the Crown, and naming their arbitrator in case that course were adopted, and the Crown on that petition had granted a fiat that "right be done," even if the appointment of arbitrators for the purpose of ascertaining the value of the said bridge and its appurtenances, as provided in 8th Vict. (P.C.) c. 90, constituted a condition precedent to a right of action accruing for the recovery of the same, such a defence must, under the above circumstances, be held to have been waived by the Crown.

PETITION OF RIGHT for the recovery of compensation for property passing into the hands of the Crown by operation of law.

The facts of the case are stated in the reasons for judgment.

February 14th and 15th, 1898.

The case was heard at Ottawa.

1898

YULE
v.
THE QUEEN.

Argument of Counsel.

E. Barnard, Q.C., *W. D. Hogg*, Q.C., *E. Lafleur* and *R. V. Sinclair* for the suppliants;

The *Solicitor-General* for Canada and *E. L. Newcombe* Q.C. (D.M.J.) for the respondent.

E. Barnard Q.C., for the suppliants:

There are only two salient questions of law arising in this case, 1st: Whether the suppliants have a claim at all against the Dominion Government under section 111 of *The British North America Act*, 1867; and 2ndly: If they have, is there any unfulfilled condition precedent to the right of action arising by reason of a failure to proceed to ascertain the value of the bridge by arbitration as pointed out in the Act 8 Vict. (P.C.) c. 90?

In answer to the first question we say there was a claim in respect of this bridge existing at the time of the Union against the Government of the old Province of Canada. That claim subsisted in the right of the heirs of John Yule, the younger, to be compensated for the value of the bridge and its dependencies which were to surely and certainly vest in the Crown in the year 1895. (He cites the Indian Treaties case *sub nom. Attorney-General for Canada* v. *Attorney-General for Ontario*, [1897] A. C. 199.) The bridge did not belong to Quebec at the time of Confederation, as the property was then vested in the suppliants. It is, therefore, not a question of the operation of section 109 of *The British North America Act*; for that section undoubtedly only refers to property belonging to Canada at the time of Confederation. Of course, if it had been property belonging to Canada at that time, it would have become the property of Quebec under sec. 109. We have produced our charter—the Act of 1845. We have proved that we have built the bridge in 1845 and that we have maintained it all along up to 1895,

1898

YULE v. THE QUEEN.

Argument of Counsel.

when the condition precedent to our right to compensation was fulfilled. As to the character of the property in John Yule and his heirs, I do not know of any stronger term in English law than "vest" to convey the fee. It is true it was limited as to time, but during the currency of the fifty years the Yules' title was paramount; and under the provisions of French law and section 407 of the Civil Code of Quebec the owner cannot be divested until he is paid. It is against the policy of our law that the owner be deprived of his property until paid. This case has to be decided under the law of the Province of Quebec. Yule became the proprietor of the bed of the river for fifty years at the point where the bridge was erected, by virtue of his charter. The local legislature of Quebec, of late years has not attempted to deal with the bed of this river as if the fee were in the Crown; dams have been erected on it from time immemorial, and when conferring any powers with respect to the waters of the river on new manufacturing companies, the legislature requires them to expropriate in the usual way. (He cites *The Queen* v. *Moss* (1).

As to the question of arbitration to settle the value of the bridge, we say that if it were a condition precedent to our right to recover, the condition has become impossible of performance by law, and not through our fault. The constitution of the country has been changed, and there is now no Governor of the Province of Canada, and no person representing him who could appoint an arbitrator. Again, the provision for reference to arbitration does not oust the court of jurisdiction. That is the rule of Quebec law. Even if it were otherwise the Crown has waived its right to insist on the arbitration by granting a fiat on the petition of right. If the Crown intended to insist

(1) 26 Can. S. C. R. 322.

on the arbitration, it should not have granted the fiat for the case to proceed in this court.

W. D. Hogg Q.C. followed for the suppliants:

If there is no express contract to pay the suppliants the value of the bridge, there is clearly an implied contract to do so. (He refers to section 3 of 8 Vict. (P.C.) c. 90).

There can be no question about the competence of this court to entertain the petition. Under the 111th section of *The British North America Act*, 1867, the Crown in respect of the Dominion of Canada is primarily liable for a debt or liability of the old Province of Canada existing at the Union. That this was an outstanding liability of old Canada cannot be disputed. It is true the amount of liability was not then ascertained, but it was ascertainable on the happening of an event that was inevitable—namely the expiry of the term of fifty years, and *certum est quod certum reddi potest.* This court has not to worry itself over the consideration as to upon which of the two Provinces of Ontario and Quebec the burden of the claim will ultimately fall; the Dominion is primarily liable in any event and the jurisdiction of this court over the claim is undoubted.

It is also clear that the legislature did not intend to make the reference to arbitration to ascertain the value, a condition precedent to the right of action. The undertaking to pay is severable from the provision to refer to arbitration. (He cites *Ulrich* v. *National Insurance Co.* (1); *Collins* v. *Locke* (2); *Dawson* v. *Fitzgerald* (3). If the arbitration is insisted upon as a condition precedent to action, the liability to pay must be taken to be admitted and all other defences abandoned.

(1) 42 U. C. Q. B. 141 and 4 Ont. A. R. 84.
(2) 4 App. Cas. 674.
(3) 1 Ex. D. 257.

1898

YULE v. THE QUEEN.

Argument of Counsel.

Hughes v. *Hand-in-Hand Insurance Co.* (1); *Goldstone* v. *Osborn* (2). There is no doubt upon the facts and evidence that whatever right the Crown might have had to set up the failure of arbitration as a bar to the action, it waived it before action brought by refusing our request for the appointment of an arbitration as provided by the statute, and the granting of a fiat to proceed by petition of right. The Governor-General of the Dominion represents the Governor-General of the late Province, and waiver by the former may properly be taken advantage of by the suppliant where the Crown relies upon a purely technical defence. (Cites sections 12 and 55 of *The British North America Act*, 1867). It is absurd to contend that where the Crown has taken possession of our property we are not entitled to be paid for it. Under the statute 8 Vict. c. 90 we were entitled to be paid for the property the moment it vested in the Crown.

E. L. Newcombe Q.C., for the Crown:

Upon the evidence, the suppliants have not made out a claim against the Crown in right of the Dominion of Canada. This bridge has been shown to be "land," and it has been claimed by Counsel for the suppliants that the approaches and the bed of the stream were vested in the Yule estate for fifty years, subject to be divested and become the property of the Crown at the expiry of that period. Now this is "land" situate in the Province of Quebec, and when it reverts under the provisions of the Act to the Crown, it reverts to the Crown in right of the Province of Quebec. It was not a liability existing at the Union within the meaning of the 111th section of *The British North America Act*, 1867. It was land which was intended by the statute to become the property of Can-

(1) 7 Ont. R. 615. (2) 2 C. & P. 552.

1898

YULE
v.
THE QUEEN.

Argument of Counsel.

ada at the expiry of a certain period, and as such it passed to the province of Quebec. Clearly that is the state of affairs which is brought about by the wording of the 109th section of *The British North America Act*, 1867. The words "belonging to" as used in the 109th section are not to be construed in any technical sense. They cannot be narrowed to refer only to lands then in the possession of the Provinces, but should properly be held to include lands in respect of which the Crown would come into possession in right of the Province at the expiry of any given time. You have to read sections 109 and 117 together. *Mercer* v. *The Attorney-General* (1) establishes the principle that an escheat which takes place after the Union in respect of lands within a particular Province enures to that Province. Then again under the decisions of their lordships of the Privy Council in the case of *Attorney-General for the Dominion of Canada* v. *Attorney-General for Ontario* (2), it was held that the beneficial interest in the Indian Reserves passed to the provincial governments, subject to a liability to pay certain annuities, and this view is arrived at upon a construction of section 109. To put it shortly, their lordships hold that the lands passed to the provinces, subject to a charge or trust. Lord Watson at p. 205 says: "The effect of "these treaties was that whilst the title to the lands "ceded continued to be vested in the Crown all bene- "ficial interest in them, together with the right to dis- "pose of them, and to appropriate their proceeds, "passed to the Government of the Province, which "also became liable to fulfil their promises and agree- "ments made on its behalf, by making due payment "to the Indians of the stipulated annuities, whether "original or increased." I submit that the construction of the 109th section enunciated by their lordships

(1) 8 App. Cas. 767. (2) [1897] A. C. 199.

1898

YULE
v.
THE
QUEEN.

Argument of Counsel.

in the case just referred to applies to the case of the suppliants here. The claim of the suppliants is against the Province of Quebec primarily and not against the Dominion Government. The lands —that is, the bridge and its approaches—passed to the provincial government on the expiration of the term of fifty years, subject to a lien or charge for the payment of the compensation money to be ascertained in the manner provided by the statute. There is no alternative right against the Dominion Government. I submit that it is not a tenable argument under *The British North America Act* that a party has the right to sue both Governments—the Dominion and the Provincial—at the same time.

[BY THE COURT: But you must admit that if it were a liability or debt it could be recovered against the Dominion?]

Of course if you get within the wording of section 111, then the Dominion is liable; but I contend that the facts of this case exclude any possible application of section 111. We say that this liability to make compensation for the bridge logically falls within the provisions of the 109th section in the way of a trust or charge. We say that it is the fair interpretation of section 109—that it is the interpretation placed upon it by the Privy Council that these lands vested in the Province subject to a legal or contractual duty on the part of the Province to pay for the same. If the moneys constituting the subject of the trust are to come out of the lands, then I say that under the case above referred to in the Privy Council, the Province is responsible for the claim in the first instance. The Province of Quebec stands in the place of the old Province of Canada in respect of this case, and is subject to the same rights and the same liabilities.

1898

YULE
v.
THE
QUEEN.

Argument of Counsel.

We submit as a reasonable conclusion that when the Province is chargeable under section 109 the Dominion is not chargeable under section 111. In construing the statute you have to seek for a leading principle of construction, and when you find that principle you give effect to it. If you find a specific provision which applies to a particular case then that excludes all general provisions. We say that section 109 properly controls this case.

Furthermore, I submit that the power of appointment of an arbitrator in this case is not a power that can be exercised by the Governor-General in Council under the provisions of section 12 of *The British North America Act*, 1867. It is rather a power that would devolve upon the Lieutenant-Governor of Quebec under the provisions of section 65. The force of this contention subsists in the fact that the subject is entirely a provincial one. It is a matter of civil rights, and of local and provincial concern. The matter is one that is properly a subject of provincial legislation. It is not within the legislative authority of Canada in any way. The statute 9 Vict. (P.C.) could not have been enacted by the Dominion Parliament since the Union. The river which the bridge crosses is not navigable at that point; and even if it were it would be possible for the Province to authorize the construction of the bridge subject to the exercise of the Dominion's power to regulate navigation. The Act of the old Province of Canada vests the property in the Province at the end of fifty years and it enacts that the property should be paid for in a certain way, and provides the means of obtaining payment. On these grounds I submit that the power of appointing an arbitrator in this matter is not in any way vested in the Governor-General of Canada.

It cannot be said that this was a debt or liability "existing at the time of the Union" so as to fall within

1898

YULE v. THE QUEEN.

Argument of Counsel.

the operation of section 111 of *The British North America Act*, because there was no debt until the bridge vested in the Crown.

[BY THE COURT: It might not have been a debt, but it was a liability existing at the time of the Union.]

I submit that there was no liability existing until the fifty years had elapsed. There was no obligation of any kind that could be enforced at the time of the Union. There was a liability which would enure at a given time in the future; but it was a liability *in posse* but not *in esse*—not "existing." A man cannot be said to be liable in respect of any matter until he is bound to discharge some legal duty concerning it. Therefore, section 111 of *The British North America Act* does not apply to this case.

With reference to the point that the appointment of an arbitrator is a condition precedent to the right to recover, I rely upon the following cases:—*Murray* v. *Dawson* (1); *Hepburn* v. *Township of Orford* (2); *Vestry of St. Pancras* v. *Batterbury* (3); *Berkeley* v. *Elderkin* (4); *Dundalk Western Railway Company* v. *Tapster* (5); *Stevens* v. *Evans* (6); *Bishop of Rochester* v. *Bridges* (7); *Colley* v. *London and North Western Railway Company* (8); *Handley* v. *Moffatt* (9); *Babbage* v. *Colburn* (10); *Elliott* v. *Royal Exchange* (11); *Scott* v. *Liverpool* (12); *Scott* v. *Avery* (13).

The law of the Province of Quebec on this point is the same as that of England. *Mayor of Montreal* v. *Drummond* (14).

(1) 17 U. C. C. P. 588.
(2) 19 Ont. R. 585.
(3) 2 C. B. N. S. 477.
(4) 1 El. & B. 805.
(5) 1 Q. B. 667.
(6) 2 Bur. 1157.
(7) 1 B. & Ad. 859.
(8) L. R. 5 Ex. D. 277.
(9) 21 W. R. 231.
(10) 9 Q. B. D. 235.
(11) L. R. 2 Ex. 242.
(12) 3 DeG. & J. 361.
(13) 5 H. L. Cas. 823.
(14) 1 App. Cas. 384.

1898

YULE
v.
THE
QUEEN.

Argument of Counsel.

Equity will not enforce an agreement to refer to arbitration. *Street* v. *Rigby* (1); *Milnes* v. *Gery* (2); *Wilks* v. *Davis* (3); *Vickers* v. *Vickers* (4).

With reference to the suppliants' claim for interest, they are clearly not entitled to it here. Interest is not payable by the Crown except by statute or contract. *In re Gosman* (5). Even between subject and subject interest would not be payable in such a case. *London, Chatham and Dover Railway Company* v. *South Eastern Railway Company* (6). It is submitted that the judgment of the Supreme Court in *St. Louis* v. *The Queen* (7), in so far as it allows interest to the suppliant, is in contravention of the Statute 50-51 Vict., c. 16, sec. 33, and is bad law. We rely upon this provision as against the claim for interest put forward here.

Mr. Lafleur for the suppliants in reply:

I submit that under the law of the Province of Quebec there can be no doubt whatever as to the liability for interest, the moment the party has been put in default. Arts. 1067 and 1077 C. C. L. C.—The Crown was put in default by the commencement of this suit beyond a doubt, and it is arguable that the Crown was in default from the time of the demand made by the suppliants to appoint an arbitrator.

As to the unfulfilled condition that arbitrators should be appointed to fix the value being a bar to suit, I submit the jurisprudence of the Quebec courts is unanimously against it. You cannot by private agreement oust the courts of Quebec of their jurisdiction. *Anchor Marine Insurance Company* v. *Allen* (8). The law of Scotland impresses one as being very similar to our Quebec law. *Hamlyn* v. *Talisker Distillery*

(1) 6 Ves. 817.
(2) 14 Ves. 400.
(3) 3 Mer. 507.
(4) L. R. 4 Eq. 529.
(5) 17 Ch. D. 771.
(6) [1893] A. C. at p. 434.
(7) 25 Can. S. C. R. at p. 665.
(8) 13 Q.L.R. 4; Art. 177 C.C.P.

1898

YULE v. THE QUEEN.

Argument of Counsel.

Company (1). That was a case similar to this, and Lord Watson there shows that such an agreement would not oust the Scotch courts of their jurisdiction. It is a mere matter of procedure, and not one of substantive right.

As to the proper authority to appoint an arbitrator since there is now no Governor-General of the Province of Canada, I do not think it could be claimed that this was one of the powers which were transferred to the Lieutenant-Governor of the Province of Quebec under *The British North America Act*. The Governor-General of the Province of Canada as referred to in the Act was only *persona designata* for a particular purpose, and such a statutory power or privilege or duty is not transferable. Then if this be admitted, the condition has lapsed, and there can be no possible reason in such a case for the court to decline to exercise its jurisdiction. But I submit it would be quite possible for a case to arise in which the Lieutenant-Governor of Quebec might have the power to appoint an arbitrator to fix a liability of the Dominion of Canada. I submit that that is possible under our constitutional Act. The power of appointment having lapsed, the courts will treat the matter as *casus omissus* and supply the remedy. There can be no denial of a remedy under Quebec law—*ubi jus, ibi remedium* is a maxim that never fails the person who is injured by any act or omission or failure to perform a promise, in the Province of Quebec.

There is no doubt that if the appointment of an arbitrator were a condition precedent to the right of action, such a condition has been waived by the acts of the Crown. Not only did the Dominion Government grant a fiat on the petition of right, but it entered into negotiations with the provincial Governments with a

(1) [1894] A. C. 202.

1898

YULE
v.
THE
QUEEN.

Argument of Counsel.

view to having all the issues in the case disposed of by a court of law. Under the circumstances the court ought not to give effect to this ground of defence.

There is another constitutional aspect of the case, and that is that the lands referred to in the provisions of section 109 of *The British North America Act* are to be taken to mean ungranted lands. The *Fisheries* Case (1). It was only the ungranted lands that became vested in the provinces of the Union.

[BY THE COURT: Would the charter be a grant of lands?]

ANSWER: It would be under our code; it would be a grant of whatever lands our piers rested on. The Yules could have hypothecated the property, and for fifty years they were the absolute owners of it. It was a resolutive condition that at the end of fifty years the property was to go to the Crown. They have been regarded by our courts as owners of the fee. *Corporation of Chambly* v. *Yule* (2) The Yules had the fee, a reversion subsisting in favour of the Crown.

[BY THE COURT: The charter makes a destination of the bridge to the public?]

That is no concern of the suppliants. I wish to emphasize my view that section 109 of *The British North America Act*, 1867, simply regulates the ultimate incidents of a liability between provinces. There is no trust or charge attaching to the present transaction within the meaning of section 109. The observations of Lord Watson in the *Indian Treaties* case (3) with reference to the character of the charge or trust in that case are *obiter dicta*. There is no authorative pronouncement of the Privy Council positively defining the word "trust" as used in the 109th section; and there was no decision as to the primary liability

(1) 26 Can. S. C. R. pp. 514, 515. (2) 2 Steph. Dig. 122.
(3) 1897 A. C. 199.

1898

YULE v. THE QUEEN.

Argument of Counsel.

of the provinces, but it was decided only with reference to the ultimate liability between the provinces. I know of no reason why the creditor is bound to pursue his remedy against the province primarily. It would seem to me that the creditor may go against the one or the other as he may elect. He may proceed against the Dominion as guarantor of the province.

Then again there is no "trust" in respect of the lands. It is in no sense a payment to be made out of the lands. The lands become vested in the Crown before the liability arises. Suppliants have only a bare claim against the Dominion Government for compensation. There is nothing but a personal liability created by the statute. In no sense can it be said that the vendors in this case have a lien for the purchase or compensation money.

Mr. Newcombe in reply:

In Caledonian Insurance Co. v. *Gilmour* (1) Lord Herschell says there is no difference between the English law and Scots law where ascertainment is made a condition precedent of the obligation to pay. This renders *Hamlyn* v. *Talisker Distilling Company* unimportant in the consideration of this case. See also *Caledonian Railway Company* v. *Greenock &c. Railway Company* (2).

The case of *Yule* v. *The Corporation of Chambly* (3) decides that the bridge is "real estate." This being so a vendor's lien arises for the unpaid purchase money. See articles of the Civil Code of Lower Canada, Nos. 2014, 1983 and 2009. *Evans* v. *Missouri, Iowa and Nebraska Railway Company* (4). *Walker* v. *Ware, Hadham and Buntingford Railway Company* (5).

(1) [1893] A.C. at p. 90.
(2) H.L. 2 Sc. App. 350.
(3) 2 Steph. Dig. p. 122.
(4) 64 Mo. 453; Lewis on Eminent Domain, sec. 620.
(5) 35 L.J., N.S., Ch. at p. 96

1898

YULE v. THE QUEEN.

Reasons for Judgment.

Cosens v. *Bognor Railway Company* (1). *Bishop of Winchester* v. *Mid-Hants Railway Company* (2).

The jurisdiction of the court in this case depends upon section 101 of *The British North America Act*, and section 16, paragraph 4 of *The Exchequer Court Act*. This is not a claim arising under any law of Canada.

THE JUDGE OF THE EXCHEQUER COURT (April 4th, 1898) delivered judgment.

The claim presented by the petition of right filed in this case has its origin in the Act of the Legislature of the late Province of Canada, 8 Victoria, Chapter 90, whereby one John Yule, the Younger, was authorized and empowered at his own cost and charges to erect and build a good and substantial toll-bridge over the River Richelieu, in the Parish of St. Joseph de Chambly, in the Province of Quebec, and to erect and build a toll-house and turnpike with other dependencies on or near the said bridge. By the 3rd section of the Act it was provided, amongst other things, that the said bridge, toll-house, turnpike and dependencies to be erected thereon or near thereto, and also the ascents or approaches to the bridge, and all materials which should be from time to time provided for erecting, building, maintaining or repairing the same, should be vested in the said John Yule, the Younger, his heirs and assigns, for the term of fifty years from the passing of the Act, that is, from the 29th of March, 1845; and that at the end of such term of fifty years the said bridge, toll-house, turnpike and dependencies and the ascents and approaches thereto, should be vested in Her Majesty, Her heirs and successors, and be free for public use, and that it should then be lawful for the said John Yule, the Younger, his heirs, executors, curators or

(1) L.R. 1 Ch. 594. (2) L.R. 5 Eq. 17.

1898

YULE
v.
THE
QUEEN.

Reasons for Judgment.

assigns to claim and obtain from Her Majesty, Her heirs and successors, the full and entire value which the same should at the end of the said fifty years bear and be worth exclusive of the value of any toll or privilege; such value to be ascertained by three arbitrators, one to be named by the Governor of the Province for the time being, another by the said John Yule, the Younger, his heirs, successors, curators or assigns, and the third by the said two arbitrators.

The bridge was built within the time prescribed by the Act to which reference has been made, and has since been maintained by the said John Yule, the Younger, or his representatives. In the year 1891 its superstructure was destroyed by fire, leaving only the piers upon which the superstructure had rested, and the persons then interested in the property brought the matter to the attention of the Government of Canada, stating that they were then willing instead of re-building the bridge, to accept from Her Majesty's Government the value of the piers, to be determined by arbitration, and a fair allowance for their privileges under the said Act. This proposition was communicated by the Government of Canada to the Lieutenant-Governor of the Province of Quebec, but nothing came of the proposal, and the owners of the bridge rebuilt it, as they had a right, and were required by the Act 8 Victoria, Chapter 90 to do. The fifty years mentioned in the Act expired on the 29th of March, 1895, and the suppliants presented to His Excellency the Governor-General in Council a petition to have the amount of the compensation to which they were entitled determined, expressing their willingness to proceed either by way of arbitration as specified in the Act, or by petition of right; or to take any steps whatever which the Government of Canada might suggest as advisable for a fair and equitable adjust-

1898

YULE
v.
THE
QUEEN.

Reasons for Judgment.

ment of their claim. The matter having been brought to the attention of the Governments of the Provinces of Ontario and Quebec, the Government of the Province of Ontario, while denying any liability, expressed a desire that if there was supposed to be any ground for holding that province liable, or to be possibly liable conjointly with the Province of Quebec, the matter should be settled by petition of right; and not by the Dominion Government or by arbitration. The Government of the Province of Quebec also expressed a preference for the submission of the questions at issue to the courts. The views of the two Provincial Governments having been communicated to the suppliants, they filed their petition of right in which they stated that they were ready and willing to proceed with the prosecution of their claim by petition of right, or by way of arbitration, if Her Majesty should desire to refer the claim to arbitration under the Act, and they prayed that Her Majesty might be pleased to grant Her fiat for the petition or that Her Majesty might be pleased to name an arbitrator in the event of it being desired to proceed by arbitration, and they named an arbitrator to act if the latter course were adopted. On that petition of right a fiat was granted by His Excellency the Governor-General.

The questions to be determined on the facts stated and the defences set up by the Crown are, first, whether this court has jurisdiction of the matter; and secondly, if it has jurisdiction, whether the amount of compensation not having as yet been determined by arbitration the petition may be maintained.

And first, it is to be observed that in 1845 when the Act 8 Victoria, chapter 90, was passed there was no court having by petition of right or otherwise jurisdiction to hear and determine claims against the Crown; and the proceeding prescribed by the statute

1898

YULE v. THE QUEEN.

Reasons for Judgment.

for determining the value of the bridge and its dependencies was one that could not have been invoked without the Crown's consent. If the Crown failed to appoint an arbitrator there was no way of compelling it to do so, and no forum in which the claim could be enforced. The question is not therefore whether the special proceeding or remedy given by the statute excluded some other proceeding or remedy that would otherwise have been available, but whether by the Acts relating to this court it has been given jurisdiction in respect of the claim created by the statute in question. That depends, it seems to me, upon the construction to be put upon clause (d) of the 16th section of *The Exchequer Court Act* whereby it is provided that the court shall have original exclusive jurisdiction to hear and determine every claim against the Crown arising under any law of Canada; that is to say, taking the Act as a whole, every claim against the Crown as represented by the Government of Canada arising under any law of Canada.

Now that this is a claim against the Crown does not, it seems to me, admit of any question. That is exactly what the statute gives to John Yule, the Younger, and to his legal representatives, for it states in terms that at the end of the fifty years mentioned therein he or they may claim and obtain from Her Majesty, Her heirs and successors, the full and entire value of the said bridge, toll-house, turnpike and dependencies, exclusive of the value of any toll or privilege.

The second question arising upon the construction of the clause of *The Exchequer Cour Act* to which reference has been made, is as to whether or not it is a claim against the Crown as represented by the Government of Canada; and that depends upon the construction of the 109th and 111th sections of *The British North America Act*, 1867. By the 111th

1898

YULE
v.
THE
QUEEN.

Reasons for Judgment.

section thereof it is provided that Canada shall be liable for the debts and liabilities of each province existing at the Union. Was the obligation created by the statute 8 Victoria, chapter 90, to compensate, in the event that has happened, John Yule, the Younger or his representatives for the value of this bridge and its dependencies a liabilitiy of the late Province of Canada existing at the Union? That question must, it seems to me, be answered in the affirmative. But it is argued that under the 109th section of *The British North America Act*, 1867, the bridge and its dependencies passed to the Province of Quebec subject to some interest or lien of the suppliants therein or subject to some trust on the part of the Government of Quebec to compensate the suppliants for the same; and that therefore the Government of the Province of Quebec is, and the Government of Canada is not, liable for this claim. With that conclusion I do not agree. The statute in terms says that on the expiry of the term of fifty years, the bridge, toll-house, turnpike and dependencies and the ascents and approaches thereto shall be vested in Her Majesty, Her heirs and successors and be free for public use. No lien or interest of any kind is by the Act reserved to the said John Yule, the Younger, or his representatives. All that he is given is a right to claim and obtain from Her Majesty the value of the bridge and its dependencies exclusive of the value of any toll or privilege. It is not necessary in this case, to decide whether or not the bridge and its dependencies passed to the Province of Quebec under the 109th section of *The British North America Act*, 1867, or to determine whether or not under some provision of that Act the Province of Quebec is, or the Provinces of Ontario and Quebec conjointly are, liable to make good to the Government of Canada any sum which it may pay in

1898

YULE v. THE QUEEN.

Reasons for Judgment.

discharge of the claim created by the statute. What seems clear is that the suppliants have by virtue of the statute of the late Province of Canada 8 Victoria, chapter 90, and section 111 of *The British North America Act*, 1867, a claim against the Crown as represented by the Government of Canada. But to come within that part of clause (d) of the 16th section of *The Exchequer Court Act* now under discussion, the claim must not only be against the Crown as represented by the Government of Canada, but it must arise under a law of Canada. Does this claim arise under a law of Canada? Now I am inclined to the opinion that the Act 8 Victoria, chapter 90 is not as a whole one that could be called a law of Canada. The River Richelieu at the point where the bridge is constructed is not navigable, and even if it were, it is possible that the local legislature might give authority to construct such a bridge as that in question subject to any interference with navigation being sanctioned and made lawful by the Parliament of Canada or by His Excellency the Governor in Council acting under an Act of Parliament making provision therefor. There is, however, as I have stated, no question of navigation here, and the work is local and provincial; one that would now be within the legislative authority of the Legislature of Quebec. In that sense the statute is, as a whole, provincial, and cannot, it seems to me, be said to be a law of Canada. But if I am right that the obligation created by the statute to compensate in the event that has happened, John Yule, the Younger, or his representatives for the value of the bridge and its dependencies was within the meaning of the 111th section of *The British North America Act*, 1867, a liability of the late Province of Canada, existing at the Union, then it is by virtue of the latter Act that the claim arises, and the Crown, as

represented by the Government of Canada, becomes liable, and that section is, I think, in that respect, a law of Canada.

I am, therefore, of opinion that on the true construction of clause (d) of the 16th section of *The Exchequer Court Act* this is a claim against the Crown as represented by the Government of Canada, arising under a law of Canada.

That brings us to the question raised by the third paragraph of the statement of defence as to whether or not the ascertainment by arbitration of the value of the bridge and its dependencies is an unfulfilled condition precedent to the suppliants' right to claim or obtain any compensation from Her Majesty, or to maintain this action. It is of course the duty of the court to say whether a defence pleaded is good or bad in law, and not to say whether it is one that ought in fairness or good conscience to be pleaded. But I may perhaps be permitted to add that in a case such as this, where the Crown's faith has been solemnly pledged by an Act of the legislature, and where the suppliants have at all times been ready to proceed either in the manner prescribed by the Act, or by petition of right, and where the governments of the provinces on one or both of which the burden of the claim may ultimately fall have expressed a desire that the matter may be determined by petition of right, and not by arbitration, and where the suppliants with knowledge thereof, have presented their petition of right and have prayed that a fiat be granted, or in the alternative that an arbitrator be appointed by the Crown, and have named their arbitrator in case that course should be adopted, and the Crown on that petition has granted its fiat that "right be done," I should deem it an unhappy state of the law, if, under such a state of facts, the court were compelled to de-

1898

YULE
v.
THE
QUEEN.

Reasons for Judgment.

clare that the Crown could now successfully invoke against the suppliants' petition the fact that the amount of the claim had not been determined by arbitration. Whether but for what has taken place between the parties that defence could have been successfully set up need not now be considered. That is a question as to which there might be room for some difference of opinion. But it does not now arise. While the parties could not by consent give the court jurisdiction of the matter, if otherwise it had not jurisdiction, yet it was open to them in respect of a claim over which the court has jurisdiction, to waive a proceeding prescribed by the statute for determining the value of the bridge and its dependencies, and this, it seems to me, has been done; and it is now too late for the Crown to object that the petition may not be maintained because there has been no reference to arbitration. It will, however, be proper, I think, to take such steps as will practically give the same proceeding as that prescribed by the statute. There will be judgment for the suppliants with costs; but the question of the value on the 29th of March, 1895, of the bridge, toll-house, turnpike and dependencies, and the ascents and approaches thereto, exclusive of the value of any toll or privilege will be referred for enquiry and report to three special referees, whose names I will give to the parties before the minutes of judgment are settled.

I have not considered the question of title, because subject to the production of certain original documents, the Crown seems to be satisfied that the suppliants have title; but if any question arises as to that, or as to the share of any one of the suppliants in the amount of the compensation to be ascertained, there will be a reference to the Registrar of the court for enquiry and report as to that.

1898

YULE
v.
THE
QUEEN.

Reasons for Judgment.

There is also a question of interest, but I shall reserve it until the case comes again before the court on a motion for judgment upon the report of the special referees, and I shall extend the time for appealing from this judgment until thirty days after the entry of final judgment upon their report.

Judgment accordingly.

Solicitor for suppliants: *R. V. Sinclair.*

Solicitor for respondent: *E. L. Newcombe.*

1898
May 23.

THE ALLIANCE ASSURANCE COMPANY..... } SUPPLIANTS;

AND

HER MAJESTY THE QUEEN.....RESPONDENT.

Appeal—Extension of Time—Grounds of refusal—Solicitor's Affidavit—Practice.

Judgment against suppliants was delivered on the 17th of January, and the time allowed for leave to appeal by the 51st section of *The Exchequer Court Act* expired on the 17th of February. On the 22nd of April following, the suppliants applied for an extension of the time to appeal on the ground that before judgment the suppliants' solicitor had been given instructions to appeal in the event of the judgment in the Exchequer Court going against them. There was no affidavit establishing this fact by the solicitor for the suppliants, but there was an affidavit made by an agent of the suppliants stating that such instructions were given and that he personally did not know of the judgment being delivered until the 27th of March.

Held, that the knowledge of the solicitor must be taken to be the knowledge of the company, that notice to him was notice to the company, and that as between the suppliants and the respondent the matter should be disposed of upon the basis of what he knew and did and not upon the knowledge or want of knowledge of the suppliant's manager or agent as to the state of the cause. Order refused.

APPLICATION for extension of time for leave to appeal.

The grounds upon which the application was made appear in the reasons for judgment.

May 2nd, 1898.

A. Ferguson Q.C., in support of motion, cited *Collins* v. *Vestry of Paddington* (1); *Clarke* v. *The Queen* (2); *Annual Practice* (1897) p. 1116.

(1) 5 Q. B. D. 368. (2) 3 Ex. C. R. 1.

1898

THE ALLIANCE ASSURANCE COMPANY v. THE QUEEN.

Reasons for Judgment.

E. L. Newcombe Q.C., *contra* relied on *Cusack* v. *London & North Western Railway Company* (1).

THE JUDGE OF THE EXCHEQUER COURT now (May 23rd, 1898) delivered judgment.

This is an application by the suppliants to extend the time for an appeal to the Supreme Court of Canada from a judgment of this court of the 17th of January last. The application was made on the 22nd of April, on the ground that the general manager, in Canada, of the Alliance Assurance Company did not know of the judgment until the 27th of March, and that before judgment the company's solicitor had been given instructions to take the necessary steps to appeal to the Supreme Court in the event of the judgment in this court being against the company. Mr. Hanson, an insurance adjustor, who acted as agent for the suppliants in the prosecution of the petition, states that such instructions were given by him, and that he did not know of the judgment until the 27th of March. There is no affidavit from the solicitor, but it was stated by the suppliants' counsel in explanation of that fact, that the solicitor had no recollection of any such instructions having been given to him, or of being aware whether the suppliants intended to appeal or not. That the solicitor had notice of the judgment is not denied. At the time the judgment was given there were petitions of right by two other assurance companies pending in the court, which it had been agreed should abide the result of the present action, the suppliants' solicitor being the solicitor in the three actions. After the time for appealing herein had expired the two other petitions were dismissed after notice to the suppliants' solicitor, and the costs in the three cases were duly taxed.

1) [1891] 1 Q. B. 347.

1898

THE ALLIANCE ASSURANCE COMPANY v. THE QUEEN.

Reasons for Judgment.

Now it is clear that the knowledge of the solicitor must be taken to be the knowledge of the company, that notice to him was notice to the company, and that as between the suppliants and the respondent the matter should be disposed of upon the basis of what he knew and did, and not upon the knowledge or want of knowledge of the suppliants' manager as to the state of the cause. If the application were supported by an affidavit of the solicitor showing that there had been some misunderstanding or offering some explanation for the delay, the matter would perhaps stand in a different position. As it is I do not think sufficient grounds are shown to justify the order asked for.

The application will be refused, but, under the circumstances, without costs.

Application dismissed.

TORONTO ADMIRALTY DISTRICT.

1897

Oct. 29.

JOSEPH A. McELHANEY AND OTHERS..PLAINTIFFS;

AGAINST

THE SHIP "*FLORA*".....DEFENDANT.

Seamen's Wages—Lien—Musician.

In the absence of a contract to pay him wages a musician is not a "seaman" within the meaning of *The Merchant Shipping Act*, and therefore is not entitled to a maritime lien for his services.

THE plaintiff and five others were musicians and had an arrangement with the Master of the boat that they should have the privilege of meals and staterooms on the boat, and the right to collect from passengers gratuities for musical entertainment furnished.

The owner did not dispute the claim, but other claimants intervened and objected that the plaintiffs had no maritime lien and were not seamen within the Act.

The trial of the case took place at St. Thomas on the 29th day of October, 1897.

J. A. Robinson for plaintiffs.

W. K. Cameron for other claimants intervening.

McDougall L.J., delivered judgment as follows:—

This is a claim by Joseph McElhaney and five other plaintiffs to recover for their services on the *Flora* as musicians during part of the season of 1897.

The evidence shows that they had an arrangement with the Master of the boat that they should have the privilege of meals and staterooms on the boat and the right to collect from passengers gratuities for musical entertainment on board the boat. No evidence was

1898

McELHANEY v. THE SHIP FLORA.

Reasons for Judgment.

given to show that there was any contract to pay them wages, and I must therefore hold that they are not seamen within the meaning of *The Merchant Shipping Act*, and are not entitled to claim any sum for their services on the said boat nor are they entitled to set up a maritime lien.

Judgment accordingly.

TORONTO ADMIRALTY DISTRICT.

1898

Jan. 22.

MATTIE CONNOR.....PLAINTIFF;

AGAINST

THE SHIP "*FLORA*".....DEFENDANT.

Wages—Saleswoman—Seaman.

Held:—The word "seaman" as used in the 2nd section of *The Merchant Shipping Act*, 1854, and *The Inland Wathers Seamen's Act* (R. S. C. c. 75) includes a person in charge of a confectionery stand on board a vessel, and who was engaged by the owner of the boat to perform these services.

THIS was an action brought by the plaintiff to recover against the boat for services rendered her on board the vessel, as in charge of the confectionery stand. The evidence showed an engagement between her and the owner of the boat.

The claim was disputed at the trial on the ground that no lien existed for the claim.

The trial of the case (consolidated with others) took place at Windsor, on the 13th day of November, 1897.

J. Hanna, for plaintiff;

W. K. Cameron, for claimants intervening.

McDougall, L.J. now (22nd January, 1898) delivered judgment.

The plaintiff was engaged to look after the confectionery stand, and performed services for about six weeks. I think I must allow her something. This vessel was an excursion and passenger boat, and as such had to employ persons in various capacities to enable the ship to successfully carry on the line of business she had entered upon. The language of section 2 of

1898

CONNOR v. THE SHIP FLORA.

Reasons for Judgment.

The Merchant Shipping Act, 1854, is very broad; for the purposes of the Act it is declared that "seaman" shall include every person (except masters, pilots and apprentices duly indentured and registered) employed or engaged in any capacity on board any ship. Our own *Inland Water Seamen's Act*, R. S. C. chap. 75, in the interpretation clause defines "seaman" as every person employed or engaged in any capacity on board any ship, except masters or pilots. There appears, therefore, to be no reason why this young woman should not rightfully claim a maritime lien for any wages due her. She was engaged by the owner of the boat to perform these services on board the boat, and to the extent of a just amount will be entitled to rank along with the other members of the crew.

I have considered the evidence as to the alleged contract for $25 per month; it is not entirely satisfactory. I shall allow her, however, the sum of $25 in all for her services and disbursements in returning to Detroit.

Costs will be reserved to be settled in the final decree.

Judgment accordingly.

TORONTO ADMIRALTY DISTRICT.

1898
Jan. 22.

WALTER W. BROWN..... PLAINTIFF;

AGAINST

THE SHIP "*FLORA*".. .....DEFENDANT.

Seamen's Wages—Watchman—Lien.

The caretaker of a ship not in commission is not a "seaman," and has no lien for his wages.

THIS is an action brought by the plaintiff for services as watchman upon the above named boat during the winter of 1896-7, while such boat was lying dismantled at her dock in Detroit.

The owner did not dispute the claim, but other claimants intervening objected that no maritime lien existed in respect of it.

The facts of the case are set out in the reasons for judgment.

The trial of the action took place at Windsor on the 13th day of November, 1897.

J. Hanna for plaintiff;

W. K. Cameron for other claimants intervening.

MCDOUGALL, L.J. now (January 22nd, 1898) delivered judgment.

This is a claim by the plaintiff for acting as watchman upon the *Flora* during the winter of 1896-7, while such vessel was lying dismantled at her dock in Detroit. The duties performed were keeping the vessel clear of snow and pumping out any water that accumulated in the hull. He states he visited the ship every day for some months, and he claims that he is entitled

1898

BROWN
v.
THE SHIP
FLORA.

Reasons for Judgment.

to a maritime lien for his wages, no portion of which has been paid to him.

I do not think that for these services he can claim to rank as a seaman, even within the broad lines laid down in the cases. I regard his services as being those of a landsman or shore laborer engaged by the owner to perform the duties of a watchman. The vessel was not in commission or even preparing for a voyage; she was dismantled, portions of her machinery had been removed; she had neither master nor crew and though still a ship in a legal sense was little better than a hulk.

I have been unable to find any express English decisions upon the status of a watchman under these conditions, but have been referred to several American cases, in all of which such claims are declared not to be maritime liens (1).

I must therefore disallow this claim.

Costs will be reserved to be settled in the final decree.

Judgment accordingly.

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(1) The *Harriet*, Olcott, (U.S.) 229; the *John T. Moore*, 3 Wood. (U.S.) 61; *Phillips* v. The *Thomas Scattergood*, 1 Gilp. (U.S.) 1; *Gurney* v. *Crockett*, Abb. 490; *The Island City*, 1 Lowell (U.S.) 375.

TORONTO ADMIRALTY DISTRICT.

1897
Dec. 11.

THE SHIP OWNERS' DRY DOCK COMPANY, &c., AND J. T. WING & COMPANY..... PLAINTIFFS;

AGAINST

THE SHIP "*FLORA*" AND ROSE D. BROWN..... DEFENDANTS.

Necessaries—Maritime Lien.

In the absence of a contract expressed or implied to build, equip or repair within the meaning of section 4 of 24 Vict. 10 (Imp.), the court cannot entertain a claim for necessaries against a foreign vessel, when such necessaries are supplied in the home port of the ship where the owner resides.

THIS is a claim by one of the plaintiffs in the above action for supplies furnished to the ship *Flora* consisting of oils, rags, lamps, paints, hose, hardware, carpets, bed linen, table linen, &c.—all articles coming within the meaning of the term "necessaries." No express or implied contract was shown to exist on the part of the plaintiffs to build, equip or repair within the meaning of the statute.

The owner did not dispute the claim but other claimants intervened and objected on the ground that the court had no jurisdiction, the supplies having been furnished in the home port of the ship, and in the city where the owner resided.

The trial of the case took place at Windsor on the 13th day of November, 1897.

W. K. Cameron for plaintiff;

C. J. Leggatt for other claimants intervening.

1897

WING & CO. v. THE SHIP FLORA.

Reasons for Judgment.

McDougall, L.J., now (December 11th, 1897) delivered judgment.

This is a claim by J. T. Wing & Co., one of the plaintiffs in the above action for articles supplied the *Flora* consisting of paints, oils, rags, lamps, hardware, hose, carpets, bed linen, table linen, chinaware, &c., &c. These are all articles coming within the meaning of the term "necessaries." They are therefore recoverable only under section 5 of *The Admiralty Court Act* 1861, and being supplied to the owner in Detroit, the home port of the *Flora* where the plaintiffs J. T. Wing & Co. also reside and carry on business, they come within the express exception stated in the statute, and there is no jurisdiction in this court to entertain the claim. The plaintiffs were not in possession of the ship at any time nor did they possess any lien upon the vessel recognized by this court. They were simply merchants supplying on the order of the owner from day to day the various goods and articles enumerated in the bundle of invoices filed. There was no contract express or implied on the part of the plaintiffs to build, equip or repair within the meaning of section 4 of the Act of 1861.

Such a claim cannot be allowed.

Judgment accordingly.

TORONTO ADMIRALTY DISTRICT.

1897

Dec. 11.

R. S. WILLIAMS AND THE LAKE ERIE AND DETROIT RIVER RAILWAY COMPANY..... PLAINTIFFS;

AGAINST

THE SHIP "*FLORA*" AND ROSE D. BROWN..... DEFENDANTS.

Maritime Law—Lien—Necessaries—Home Port—24 Vict. Ch. 10 (Imp.).

A claim for money advanced to a foreign ship to pay for repairs, equipment and outfitting is a claim for necessaries, but where the work is done in the home port of the ship the court has no jurisdiction, the same coming within the exception contained in section 5 of *The Admiralty Court Act* 1861 [24 Vict. ch. 10 (Imp.)].

Payment by the agent of the owner satisfies and discharges any lien in respect to the original claim of workmen or supply-men to the extent of such payments.

THIS was an action by the plaintiffs to recover money advanced to the owner of the ship to pay for repairing, equipping and fitting out the ship prior to the placing of the steamer, in the season of 1897, upon a route agreed upon between the plaintiffs and the owner.

No special contract was made for these repairs, or for the equipping, but the owner employed all the workmen by the day and purchased and supplied all material required.

The agent of the owner disbursed all the moneys advanced by the plaintiffs and instead of taking receipts, procured from the parties what purported to be assignments of their various accounts or claims to one Williams, one of the plaintiffs in the action, and who it is admitted was the agent of the plaintiff railway company who advanced the moneys.

1897

WILLIAMS v. THE SHIP FLORA.

Reasons for Judgment.

The owner made no defence, but other claimants against the ship intervened and disputed the claim of the plaintiffs. The facts of the case, the grounds of objection by the intervenors and the arguments of counsel are set out in the reasons for judgment.

The trial of the case was commenced at St. Thomas, on the 29th day of October, 1897, and concluded at the City of Windsor, on the 12th day of November, 1897.

W. K. Cameron for plaintiffs;

C. J. Leggatt for claimants intervening.

McDougall, L.J. now (December 11th, 1897) delivered judgment.

This action is brought against the ship and the owner, for an alleged claim on the part of the Lake Erie and Detroit River Railway Company to recover money advanced to the owner to pay for repairing, equipping and fitting out the *Flora* prior to the placing of the steamer in the season of 1897, upon the route between Port Stanley and Cleveland on Lake Erie. The facts of the case are briefly as follows:

The *Flora* was an American passenger steamer registered at the port of Detroit. The plaintiffs, a railway company, operating a road in Canada and having connections at Port Stanley and Windsor, were desirous of making traffic arrangements for freight and passengers with the owner of the *Flora* whereby that vessel would ply between Port Stanley and Cleveland in connection with the plaintiffs' railway. The owner of the *Flora* was without means to properly fit out the vessel. A traffic agreement was formally entered into between the parties and also an agreement in writing between the owner and the plaintiffs in pursuance of which the plaintiffs were to advance to the owner one thousand dollars (subsequently increased to two thousand dollars) for fitting

out the *Flora* for the season of 1897. It was stipulated in this agreement that all the earnings of the *Flora* after payment of running expenses were to be handed over to the plaintiffs and credited from time to time in repayment of the aforesaid advances. The $2,000 was expended in painting, repairing, furnishing and outfitting the steamer. No contract was made for these repairs or for the equipping, but the owner employed carpenters, painters and other workmen by the day and purchased and supplied all material required. The agent of the owner disbursed all the moneys in making payments to the various individual workmen employed or merchants supplying goods, but instead of taking receipted bills, he procured the parties to sign documents purporting to be assignments of their various accounts or claims to one E. S. Williams, a plaintiff in this action. It is admitted that E. S. Williams was the agent and representative of the railway company, and that such assignments were intended to inure to the benefit of the railway company.

The present action was commenced by the plaintiffs after the arrest of the *Flora* in a suit for wages by some of the seamen. The *Flora* was arrested at Port Stanley, Ontario. Several objections were taken to the plaintiffs' right to recover: first, that the money was advanced solely on the credit of the owner in the home port and its repayment specially secured by pledging the earnings from freight and passengers. Such advances it is claimed, therefore, were not made on the credit of the ship itself. The express agreement it is argued supports this contention.

A second objection is that the *Flora* is a foreign ship proceeded against in a British Court of Vice-Admiralty and that this claim for money advanced in the home port to pay for such repairs, equipments and

1897

WILLIAMS v. THE SHIP FLORA.

Reasons for Judgment.

outfitting also executed in such home port, is a claim for necessaries, and no action therefore can be maintained by the plaintiffs, the same coming within the exceptions contained in section 5 of *The Admiralty Court Act* 1861 (24 Vict. c. 10 Imp.) That section reads as follows: "The High Court of Admiralty shall have jurisdiction over any claim for necessary supplied to any ship elsewhere than in the port to which the ship belongs unless it is shown to the satisfaction of the court that at the time of the institution of the cause any owner or part owner of the ship is domiciled in England or Wales."

The *Heinrich Björn* (1), determines that a claim for necessaries under section 5 does not constitute a maritime lien, and therefore where the owner of a ship had parted with his interest in the ship after contracting for necessaries, the purchasers took the ship free from any lien for such necessaries.

The plaintiffs' action was dismissed with costs. The *Mecca* (2) decides that an action *in rem* may be maintained against a foreign ship if found in this country in respect of necessaries supplied to such ship in a foreign port (not being the port to which the ship belongs) whether or not such foreign port be on the high seas. Lindley, L.J. in his judgment, at page 109, says: "If the ship whether English, colonial or foreign is supplied with necessaries in her own port, the probability is that there are persons there to whom credit is given and who can be sued there, but if the ship is supplied in some other place the supplier of the necessaries (if he does not obtain cash on delivery, which may be impossible) is very likely never to get paid at all." Section 4 of our Admiralty Act of 1891 defines the jurisdiction of the ad-

(1) 10 P. D. 44; 11 App. Cas. 270.

(2) [1895] P.D. at p. 109.

miralty side of the Exchequer Court and declares that "such jurisdiction, powers and authority shall be exercisable and exercised by the Exchequer Court throughout Canada and the waters thereof whether tidal or non-tidal, or naturally navigable or artificially made so," &c., &c.

The term "necessaries," may include money advanced for necessaries. In the case of the *Albert Crosby* (1) it was held that where A being master and sole owner of a vessel put in a shipwright's dock for repair and the shipwright refused to give up possession till paid his claim, money advanced by B to pay for these repairs can be recovered back in a suit for necessaries. See also the *Sophia* (2) and also as to a definition of necessaries the case of the *Riga* (3). I do not attach importance to the so-called assignments held by the plaintiff Williams for the plaintiffs, the railway company. It is admitted that the actual cash was supplied to the owner, and that his agent paid the workmen employed and also paid a number of merchants for a portion of the supplies furnished. Such payments satisfied and discharged any original claims existing in favor of such workmen or merchants supplying goods to the extent of such payments. The assignments to Williams in my opinion do not alter the nature of the transaction between the real plaintiffs, the railway company, and the owner of the *Flora*.

That arrangement was to advance money to the extent of $2,000 to enable the owner to pay for painting, repairs, furnishing and otherwise fitting out the *Flora*. The owner executed all work that was required by hiring workmen and purchasing from several merchants all materials needed. The wages were paid in

(1) 3 A. & E. 37.
(2) 1 W. Rob. 368.
(3) 3 A. & E. 516.

1897

WILLIAMS v. THE SHIP FLORA.

Reasons for Judgment.

cash by the owner, and so also were accounts for material as far as the $2000 would permit. Wages expended in this way and materials so supplied, come within the meaning of the term "necessaries."

The $2,000 being advanced by the plaintiffs to the owner in the port to which the *Flora* belonged, and being recoverable only as a claim for necessaries, the express terms of sections 5 of 24 Vict. c. 10 (Imp.) prevent the claim being sued for in this court.

The plaintiffs' action will be dismissed with costs.

Judgment accordingly.

WRIGHT, CROSSLEY & CO.....PLAINTIFFS;

AND

THE ROYAL BAKING POWDER COMPANY .....DEFENDANTS.

1898
June 28.

Action to expunge a trade-mark—Plaintiffs out of jurisdiction—Costs—Refusal to order security for—Particulars.

On an application by the plaintiffs to expunge defendants' trade-mark from the register, the defendants, resident out of the jurisdiction, applied for and obtained an order for security for costs against the plaintiffs, also resident out of the jurisdiction; plaintiffs thereupon applied for a similar order upon the ground that the matter was within the discretion of the court.

Held, that security should not be ordered against the defendants.

THIS was on application by plaintiffs for an order for security for costs against the defendants in a proceeding to expunge a trade-mark from the register.

Both the parties to the proceeding were resident without the jurisdiction of the court. After the service of the statement of claim, an application was made on behalf of the defendants for an order compelling the plaintiffs to give security for the defendants' costs, and this order was granted. Plaintiffs then applied for a similar order against the defendants.

June 28th, 1898.

C. J. R. Bethune for the application: The English practice is to grant an order for security against either party living out of the jurisdiction. (*James* v. *Lovel* (1); *In re Compagnie Générale d'Eau Minérales et de Bains de Mer* (2). Under the Ontario practice the court has no discretion; as soon as it is shown that the party against whom the order is sought is with-

(1) 56 L. T. at p. 742. (2) [1891] 3 Ch. D. at p. 458.

1898

CROSSLEY v. THE ROYAL BAKING POWDER COMPANY.

Reasons for Judgment.

out the jurisdiction of the court, the order will be made of course. This is a case where the court should exercise its discretion to grant the order asked for in the interests of justice. Both parties being domiciled abroad they ought to be treated on an equal footing. This case may be likened to a matter of interpleader or replevin. It is the practice in Ontario in interpleader proceedings to grant security against any party who is out of the jurisdiction. (*The Knickerbocker Trust Company of New York* v. *Webster* (1).)

J. F. Smellie, *contra*, relied upon the *Annual Practice* 1897, at p. 1152, and cases there cited.

Mr. *Bethune* replied.

THE JUDGE OF THE EXCHEQUER COURT.—I feel that I cannot entertain the application made by the plaintiffs for an order calling upon the defendants to give security for costs to the plaintiffs simply because the former are resident without the jurisdiction; and the application, therefore, must be dismissed. But as this is the first occasion when the question has been raised before me, I will dismiss the application without costs.*

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*REPORTER'S NOTE.—Upon application by the defendants in this case, an order was made directing the plaintiffs to give particulars of the date of the first user in England of the word "Royal" as applied to Baking Powder, and the names of the places, other than England, where it had been used, together with the dates of user in such places.

(1) 17 Ont. P. R. 179.

THE QUEEN ON THE INFORMATION OF THE ATTORNEY-GENERAL FOR THE DOMINION OF CANADA..... PLAINTIFF;

1898
May 30.

AND

FANNY HALL AND ROBERT WOOD..DEFENDANTS.

Title to land—Mistake—Lessor and lessee—Estoppel.

Where a person is in possession of land under a good title, but, through the mutual mistake of himself and another person claiming title thereto, he accepts a lease from the latter of the lands in dispute, he is not thereby estopped from setting up his own title in an action by the lessor to obtain possession of the land. In such a case the Crown being the lessor is in no better position in respect of the doctrine of estoppel than a subject.

INFORMATION of intrusion to recover possession of certain lands.

The facts of the case are stated in the reasons for judgment.

May 11th, 1897.

The case came on for trial this day.

June 21st, 1897.

The case was referred to a special referee for enquiry and report as to the title. He subsequently reported the title to be in the defendant Fanny Hall.

February 21st, 1898.

The case was argued on a motion by way of appeal by the plaintiff from the referee's report, and on a further motion by the defendant, Fanny Hall, to confirm the same.

F. A. Magee in support of the appeal:

The learned referee erred in finding the issue of title in favour of defendant Fanny Hall. The defend-

1898

THE QUEEN v. HALL.

Argument of Counsel.

ant Hall's predecessor in title having accepted a lease from the Crown and paid rent under it, it is not now open for her to set up her title as against the Crown. Charles McCaffrey, under whom the defendant Hall claims, was not satisfied with the imperfect title which he had to the lands in dispute, and so in order to retain possession of them he applied for and obtained a lease from the Crown. I submit, therefore, that under the authorities his successor in title is estopped from setting up any title in McCaffrey anterior to the date of the lease from the Crown. McCaffrey's possession at the time he conveyed, or attempted to convey, the lands in dispute to the husband of Mrs. Hall was referable solely to the lease from the Crown. The defendant's husband was aware of the flaw in title, and it is in evidence that at the time McCaffrey executed the deed to David Hall, he handed Hall the lease to him from the Crown. Clearly, then, there are no equities subsisting in favour of the defendant Fanny Hall. He cites *Cababé on Estoppel* (1); *Malone* v. *Wiggins* (2); *Doe d. Bullen* v. *Mills* (3); *Van Deusen* v. *Sweet* (4); *Cooke* v. *Loxley* (5); *Cole on Ejectment* (6).

As to the equitable interference of the court on the ground of mistake, the utmost good faith was observed on the part of the Crown, and the acceptance of the lease was not brought about by any misrepresentation or suppression of facts. The evidence shows that it was McCaffrey himself who first applied for the lease. Under these circumstances, the court will not lend the aid of its equitable jurisdiction to the defendant Fanny Hall. (*Snell on Equity* (5). Furthermore, I submit that under the reservations in the grant to the Canada

(1) Page 25.
(2) 4 Q. B. 367.
(3) 2 A. & E. 17.
(4) 51 N. Y. 378.
(5) 5 T. R. 4.
(6) P. 213.

(5) P. 537.

Company, the Crown properly resumed possession of the lands in dispute in 1847 by setting up boundary stones indicating that it must be regarded as Ordnance lands. I submit that, under 7 Vict. c. 11, sec. 2, the lands were properly revested in the Crown by the setting up of Ordnance stones in the year 1847, long prior to the lands having become vested, as is alleged, in the defendant Hall's predecessor in title.

[BY THE COURT.—Did the Crown exercise any act of possession after the setting up of the boundary stones in the year 1847 ?]

There is no evidence of possession except the giving of the lease. No doubt the Ordnance officers considered that the setting up of the boundary stones was sufficient to vest the lands in the Crown under the Act.

A. E. Fripp, contra: I submit that where a party is in possession of land and such possession is referable to a good title, the mere fact of him taking a lease under mistake of his title from another person claiming the land does not preclude him from setting up his former title in an action for possession. He cites *Everest and Strode on Estoppel* (1); *Bigelow on Estoppel* (2); *Smith* v. *Modeland* (3).

With reference to the Ordnance Vesting Act passed in 1843, that Act simply empowered the principal officers of Her Majesty's Ordnance to take possession of lands for the purposes of the canal which had not been previously granted by the Crown. Now these lands had been conveyed to the Canada Company by the Crown prior to 1847, and therefore did not come within the operation of that Act.

Then, the stipulation in the grant to the Canada Company for arbitration, in case the Crown resumed possession of the lands, has not been observed.

(1) Pp. 252, 257. (2) P. 527.
(3) 11 U. C. C. P. 387.

1898

THE QUEEN v. HALL.

Reasons for Judgment.

But even if the provisions of the Ordnance Vesting Act could be applied to the lands in question, they have not been so fulfilled as to give the Crown possession of such lands. Under section 14 of the Act they should have entered and surveyed the lands and duly treated for them. Furthermore, section 17 required an enrollment of all lands that had been taken. There is no evidence to show that these provisions have been complied with. I submit that the only way that these lands could have been taken was in the manner set forth in the Act.

Mr. Magee replied: We rest our case upon the planting of the posts or boundary stones in 1847.

THE JUDGE OF THE EXCHEQUER COURT now (May 30th, 1898) delivered judgment.

Two questions are presented for decision by this case. First: Is the title to the lands described in the information as being part of the south half of lot No. 4 in the second concession of the Township of Nepean, in the County of Carleton, and Province of Ontario, in the Crown or in the defendant Fanny Hall? And, secondly: If the title to such lands is in the defendant Fanny Hall, is she estopped, as against the Crown, from setting up such title?

On the 12th of October, 1841, lot No. 4 in the second concession of the Township of Nepean in the County of Carleton, including, as has been said, the lands in question in this case, together with other lots, was granted by the Crown to the Canada Company in pursuance, it appears, of an agreement made as early as the year 1826. There was in the grant no reservation of any portion of the said lot or any description of it except as has been stated, viz.: "Lot "No. 4 in the second concession of the Township of "Nepean and County of Carleton." There was, how-

1898

THE QUEEN v. HALL.

Reasons for Judgment.

ever, a condition attached to all the lands including lot No. 4, that passed by the grant, viz.: "Provided "always that if any of the several lots or parcels of "land hereby granted by us to the said company, "their successors or assigns, or any part thereof, shall "be required for canals, roads, the erection of forts, "hospitals, arsenals, or any other purpose connected "with the defence or security of our said province, "then all and every the said lands which may be so "required for any or either of the purposes aforesaid, "shall revert to and become vested in us, our heirs "and successors, upon a requisition for the same being "made, either by an Act of the Legislature of our "said province, or by the Governor, Lieutenant-"Governor or person administering the Government "of our said province or by his direction—AND this "our grant of such lands, as shall be so required, shall "upon and after such requisition be made be null and "void and of none effect, anything herein contained to "the contrary in any wise notwithstanding.

"And we do hereby declare that in any such event "we, our heirs and successors, shall name and "appoint one arbitrator who shall in concurrence with "an arbitrator to be appointed by the said Canada "Company or their grantees, or lessees, and a third "arbitrator to be chosen by such arbitrator as afore-"said, determine what price it is reasonable should be "paid by us our heirs and successors to the said "Canada Company, their grantees or lessees, for any "lands that may be so resumed by us, our heirs and "successors, which determination shall be made by "the voice of the majority of the said arbitrators."

On the 9th of December, 1843, was passed the Act 7 Vict. c. 11 intituled, "An Act for vesting in the prin-"cipal officers in Her Majesty's ordnance, the estates "and property therein described, for granting certain

1898

THE QUEEN v. HALL.

Reasons for Judgment.

"powers to the said officers, and for other purposes "therein mentioned." By this Act there was vested in the principal officers of Her Majesty's ordnance the canal commonly called the Rideau Canal, made and constructed under and by virtue of the powers and authorities contained in the Act of the Parliament of the late province of Upper Canada, passed in the eighth year of the reign of His late Majesty, King George IV, and intituled "An Act to confer upon His Majesty certain powers and authorities necessary to the making, maintaining, and using the canal intended to be completed under His Majesty's directions for connecting the waters of Lake Ontario with the River Ottawa, and for other purposes therein mentioned," and the lands and other real property, lawfully purchased and taken, or set out and ascertained as necessary for the purposes of the said canal, from the Crown lands or reserves, or clergy reserves, under the authority of the said Act, and more especially those marked and described as necessary for the said purposes on a certain plan lodged by the late Lieutenant-Colonel By, of the Royal Engineers, the officer then employed in superintending the construction of the said canal, in the office of the Surveyor-General of the said late province, and signed by the said Lieutenant-Colonel By, and now filed in the office of Her Majesty's Surveyor-General for this province, and all the works belonging to the said canal, or lying or being on the said lands.

There was, however, a proviso to the first section of the Act by which such lands were vested in the principal officers of Her Majesty's Ordnance, to the effect that nothing in the Act should extend to or be construed to extend to vest in the said principal officers any lands which might before the passing of this Act, have been granted by Her Majesty, or Her Royal predeces-

sors, to any other person or party, unless the same should have been, subsequently to such grant, lawfully purchased, acquired or taken for the purposes of the Ordnance Department, nor to impair, diminish or affect any right, title or claim, vested in or possessed by any person or party at the time of the passing of the Act, to, in or upon any lands or real property whatsoever, nor to give the said principal officers any greater or better title to any lands or real property than was then vested in the Crown or in some person or party in trust for the Crown. This proviso applies to the lands in controversy.

On the 9th of June, 1851, the Canada Company conveyed lot No. 4 in the second concession of the township of Nepean, above referred to, to James O'Rourke, of the Township of Nepean and County of Carleton. On the 11th of October, 1856, James O'Rourke and Honora O'Rourke by deed of indenture conveyed to Charles McCaffrey, of the Township of Nepean, the south half of lot No. 4, aforesaid. On the 18th of May, in the year 1888, Charles McCaffrey conveyed to David Hall, of the Township of Nepean, in the County of Carleton, the said south half of lot No. 4, and it is admitted that the defendant Fanny Hall is in possession of the lands in question under the last will and testament of her late husband, the said David Hall. Against this title it appears that some time prior to the 1st of September, 1843, the lands in question had been set off for the puposes of the Rideau Canal, but when this was done does not appear. It is, however, obvious that any such setting off in order to be effective against the grant of the Canada Company of the 12th of October, 1841 would have to have been made in accordance with the terms of that grant, and this does not appear to have been done. In October, 1847, the officers of the Ordnance Department believing

1898

THE QUEEN v. HALL.

Reasons for Judgment.

no doubt that the portion of the south half of lot No. 4, which is in question in this case, had been duly set off for the purposes of the Rideau Canal, set up boundary stones upon the same which have remained there until this day. There is no evidence, however, that the Canada Company or its assigns were ever put out of possession of the land, and later and for some years prior to the date of the lease to which reference is about to be made, Charles McCaffrey was in possession of the whole of the south half of lot No. 4, and occupied it down to the river. On the 30th of January, 1877, Charles McCaffrey being, as has been stated, then in possession of the south half of lot No. 4, accepted from the Crown a lease of the portion now in dispute. By this lease the said Charles McCaffrey was to have and hold the said piece of land during the pleasure of Her Majesty, the lease being determinable at any time by Her Majesty, and the lessee covenanted, amongst other things, not to assign or sublet without leave. McCaffrey paid rent for two years, and when he conveyed the land to David Hall he handed Hall a copy of the lease; but there has been no assignment of the lease in accordance with its terms, and there is no evidence that the Crown has assented to any such assignment or subletting, or has waived the effect of the covenant therefor.

It is clear, I think, that the setting up of the boundary stones in October, 1847, was not sufficient, under the circumstances, to give the Crown title to the land in question, and there is no evidence of any other steps or proceedings being taken to acquire it or to divest the title of the Canada Company or its assigns. On this branch of the case the defendant Fanny Hall is, I think, entitled to succeed.

With reference to the question of estoppel, it is clear no doubt that if McCaffrey had been put in pos-

1898

THE QUEEN v. HALL.

Reasons for Judgment.

session of the lands under the lease from the Crown he could not now dispute the Crown's title, and that the defendant, Fanny Hall, is not in any better position in this respect than her predecessor in title would have been. But McCaffrey being at the time in possession, and the lease having been taken by him under a mistaken view on the part of the Crown and of himself as to their respective rights in the lands now in dispute, McCaffrey would not have been, I think, estopped from setting up his own title, and in a like manner the present defendant Fanny Hall is not estopped from setting up a title which has come to her through him. If the possession had come to Mr. McCaffrey and his successors through the mutual mistake made, then, of course, the defendant Fanny Hall ought not to be allowed to plead the mistake without the possession being restored to the Crown; but the defendant and her predecessors in title having been in possession prior to the time when by mutual mistake the lease was entered into, the Crown is not put to any disadvantage by the defendant being left in possession, while on the other hand to put the defendant out of possession would be to give the Crown an advantage from a mistake that was mutually made. I am, therefore, of opinion to confirm the report of the learned referee and to dismiss the information against the defendant, Fanny Hall, and with costs.

The other defendant, Robert Wood, did not appear, and the Crown is entitled to judgment against him by default, but without costs.

Judgment accordingly.

Solicitor for plaintiff: *D. O'Connor.*

Solicitor for defendant Hall: *A. E. Fripp.*

TORONTO ADMIRALTY DISTRICT.

1898

July 14.

ARTHUR HEMINGER.....PLAINTIFF;

v.

THE SHIP "*PORTER.*"

Maritime law—Collision—Wrecking-tug at anchor—Watch and lights—Negligence.

A wrecking steamer was lying at anchor during the night over a sunken wreck in mid-channel, about a mile and a quarter north from Colchester Reef lighthouse, on Lake Erie. The existence of the wreck was well known to mariners sailing upon the lake. While the steamer was working on the wreck, there was no light exhibited at that point by the lighthouse keeper, but it was his custom to put a light there during the absence of the wrecking steamer. Upon the night in question the wrecking-steamer had a white light burning on the top of her pilot-house. The night was clear with a light breeze from the north-north-east. The *Porter*, a three-masted sailing vessel of seven hundred and fifty tons burthen, was pursuing her voyage, light, up the lake from Buffalo to Detroit. She had all her canvas set and was making between two and a half and three and a half miles an hour when she collided with the wrecking steamer so lying at anchor. It was proved that the wrecking steamer had no anchor-watch on deck at the time of the collision, and there was some contradiction upon the evidence as to whether the light on the top of her pilot-house was burning brightly at the time. It was also proved that the *Porter* was slow in answering her helm when light, and that the look-out on the *Porter* did not see the wrecking steamer until it was too late to so manœuvre the *Porter* as to avoid a collision.

Held, 1, That the wrecking steamer's light satisfied the regulations.

2. That there was no duty upon the wrecking steamer to maintain an anchor-watch under the circumstances, and that the sailing ship was solely responsible for the collision which was to be attributed to the negligence of those on board of her.

THIS was an action for damages by collision brought by the owner and master of the steam tug *Fern* against the ship *Porter*.

1898

HEMINGER v. THE SHIP PORTER.

Argument of Counsel.

The case was tried at the city of Windsor, before His Honour Judge McDougall, Local Judge of the Toronto Admiralty District, on the 25th day of March, A.D. 1898.

H Clay for the plaintiff;

The affirmative of the issue is really on the defendant. The collision is admitted. The plaintiff's ship was resting, and the defendant's ship was moving, and the main question is whether there were lights on the resting ship or not.

[His Honour having ruled that the burden of proof was on the moving ship, the defendant's evidence was gone into, and afterwards the plaintiff's.]

J. E. O'Connor for the defendant ship:

The evidence shows clearly, and in fact it is admitted, that the tug *Fern* did not comply with the requirements of the regulations as to the light to be carried by a vessel under 150 feet in length when at anchor. It is also admitted by the *Fern* that she had no anchor-watch set on deck at the time of and one half-hour previous to the collision, and consequently no effort was made by the ringing of a bell or otherwise to warn the *Porter* of the whereabouts of the *Fern*. It is also in evidence that it was, what is called in nautical language, a "dark night," inasmuch as there was no moon. The *Fern*, therefore, on the admissions of her own witnesses was at fault in both these particulars. Although it is true that the rule is, between a moving vessel and one at anchor, where a collision occurs, that the onus is upon the moving vessel to show that the collision was not caused by its negligence, yet I submit that the moment it is shown by the evidence that the light of the *Fern* was not placed where the regulations required it to be, and that the *Fern* had not a lookout on deck as required by the regulations,

1898

HEMINGER v. THE SHIP PORTER.

Argument of Counsel.

the onus was shifted from the ship *Porter* to the owner of the tug *Fern*, and that it was for him to show in what particular the negligence of those on board the *Porter* either caused or contributed to the collision. It is submitted that there is no affirmative evidence showing that the lookout on board the *Porter* was not attending to his duty. The evidence of the mate and wheelsman shows clearly that he was on the alert.

I submit that on the cases, which I will cite, the element of negligence completely fails, and the whole case against the *Porter* rests upon the fact that the watch on board the *Porter* did not see the light until close upon the *Fern*.

I submit that it being admitted that the *Fern* was in fault in two respects, namely, as to the position of her light and the absence of the lookout on deck, if the plaintiff seeks to hold the *Porter* liable for all the damage he must show that notwithstanding his negligence in both these particulars such negligence did not in part directly cause the accident, but that it was due solely to the negligence of the *Porter*. If he seeks to hold the *Porter* liable for part of the damage he must show that while his negligence partly caused the accident the negligence of the *Porter* also partly directly contributed to that result, and that the plaintiff could not, by the exercise of reasonable care, have avoided the consequence of the *Porter's* negligence. The *Vernina* (1): *The Cuba* v. *McMillan* (2); see also *Cayser* v. *Carron Company* (3).

I submit that there is not sufficient evidence before the court on behalf of the *Fern* establishing affirmatively that the negligence of the *Porter* or those on

(1) L. R. 12 P. D. p. 61.
(2) 26 Can. S. C. R. 651, & pp. 651 & 662.
(3) L. R. 9 App. Cases, pp. 881 887.

board of her was wholly or partly the cause of the collision, and even if the plaintiff had established negligence beyond a reasonable doubt, the evidence shows that the negligence, if any, of the *Porter*, was not wholly or partly responsible for the accident; but that the negligence that directly caused the collision in the last result was the omission of the *Fern* to have a lookout on deck, in other words, there were "means open to the *Fern* of preventing the collision after the *Porter's* lookout failed to discern the *Fern's* light." *Cuba* v. *McMillan* (1).

Where damage is occasioned by unavoidable accident, or there is reasonable doubt as to which party is to blame, loss must be sustained by the party on whom it falls. The *Catharine of Dover* (2); *Pritchard Admiralty Practice* (3) the *Grace Girdle* (4); The *Rockaway* (5).

The rule as to the division of damages will not be applied where the fault on one side is flagrant, and on the other so trivial as to leave it in doubt whether it at all contributed to the accident. The *M. Densman* (6); *Ralston* v. *The State Rights* (7); the *Baltic* (8).

As to the necessity of a boat at anchor having a light hoisted to mark her position, and an anchor-watch on deck, see the *Miramichi* (9).

Having disobeyed the nautical rule as to the position of the light, the *Fern* had no right to allow the watch to go below on assumption that the light must be seen. The *Mary Bannatyne* (10); the *Pacific* (11); the *Breadalbane* (12).

Where the evidence conflicts, greatest credit is to be given to the crew on the alert; the *Dahlia* (13).

(1) 26 Can. S.C.R. 662.
(2) 2 Hagg. 154.
(3) P. 156.
(4) 7 Wall. (U. S.) 196.
(5) 2 Stu. 129.
(6) 1 New. Adm. 239.
(7) Crabbe (U. S.) 22.
(8) 30 L. T. N. S. 475; 43 J. Adm. 17.
(9) Stu. V. Adm. Rep. vol. 1 at p. 240.
(10) 1 Stu. V. Adm. R. at p. 354.
(11) L. R. 9 P. D. 124.
(12) L. R. 7 P. D. 186.
(13) 1 Stewart, p. 242.

1898

HEMINGER v. THE SHIP PORTER.

Argument of Counsel.

A person in the agony of collision is not negligent because he does not do what a cool spectator would do in the circumstances. (The *Niagara-Elizabeth* (1); *Wharton on Negligence* (2); the *Bougainville* and the *James C. Stevenson*. *Beal* v. *Marchais* (3); the *Byewell Castle* (4); *Desty's Admiralty Law* (5), and the numerous cases cited in notes thereto.

As to infringement of regulations see the *James McKenzie* (6); the *Khedive* (7); the *Aurora* (8).

Old rule as to both ships to blame now qualified by the regulations:—*Germany* v. *City of Quebec* (9); the *Martha Sophia* (10); [where Black J. at p. 17 remarks "if the people on board the steamer and brigantine had not seen the *Diligence*, then the non-compliance with the regulation might have been a defence to the action."] The *Arabian* (11); the *Englishman* (12); the *Tirzah* (13); the *Magnet* (14).

The fact that the *Fern* had a light does not render the *Porter* liable because her watch did not see it in time to avoid collision, if the *Fern's* was not the light required by the regulations. The *Mary Hounsell* (15).

As to what is a dark night and as to conflicting evidence, as to how clearly objects could be seen, see the *Dahlia* (16).

H. Clay for the defendant.—The evidence clearly shows that at the time of the collision the *Fern* was carrying a regulation white light which could have been clearly seen by the *Porter* if a proper lookout had been kept on the vessel. The evidence of the lighthouse keeper shows that it could be seen on the

(1) 1 Stu. at 1, 318.
(2) 2nd Ed. p. 304.
(3) L. R. 5 P. C. 316.
(4) L. R. 4 P. D. 216.
(5) Ed. 1879, p. 381.
(6) 2 Stu. p. 87.
(7) L. R. 5 App. cases p. 876.
(8) 2 Stu. p. 52.
(9) 2 Stu. 158.
(10) 2 Stu. 14.
(11) 2 Stu. p. 72.
(12) L. R. 3 P. D. 13.
(13) L. R. 4 P. D. 33.
(14) 4 A. & E. 417.
(15) L. R. 4 P. D. 204.
(16) 1 Stu. at p. 343.

1898

HEMINGER v. THE SHIP PORTER.

Reasons for Judgment.

night in question for more than a mile. It is quite evident that the lookout of the *Porter* did not properly discharge his duty and that the collision is due to his neglect of duty. If a moving ship is proved to have been negligent in not keeping a proper lookout she is answerable for all the reasonable consequences of her negligence. The *Viola* (1); the *Clarion* (2); the *George Murray* (3).

The evidence on the whole clearly shows that the *Porter* was wholly to blame for the collision and is answerable for the damages.

The facts of the case are stated in the reasons for judgment.

McDOUGALL, L. J. (July 14th, 1898), now delivered judgment.

On the 2nd of September, 1897, the steam tug *Fern*, with the plaintiff, her owner, on board as master, was lying at anchor over the wreck of a sunken schooner, *The Grand Traverse*, in mid-channel, about a mile and a quarter north from Colchester Reef lighthouse, in Lake Erie.

The plaintiff was engaged with his vessel in removing this obstruction to navigation, and had been working upon the said wreck from the previous April. The existence of the wreck was well known to mariners sailing upon Lake Erie. A light had been kept on the wreck by the lighthouse keeper at Colchester Reef, and this was always placed there at sunset. The light so maintained was on a small raft or buoy and elevated about four feet above the level of the water. When the *Fern* was working at the wreck, no independent light was shown there at night except the light on the *Fern* at anchor over the wreck, which

(1) 59 Fed. Rep. (U.S.) 732. (2) 27 Fed. Rep. 128.
(3) 22 Fed. Rep. 117.

1898

HEMINGER v. THE SHIP PORTER.

Reasons for Judgment.

was placed on the top of her pilot house, at an elevation which would be about fourteen feet above the level of the water. On the night of the 2nd September, the *Fern* was thus lying at anchor over the wreck. She had the regulation white light, burning brightly placed on the top of her pilot house. This light, according the evidence of the lighthouse keeper, could be seen on a clear night at a distance of three or four miles. The lighthouse keeper saw it from his lighthouse burning brightly at 10 p.m., on the night of the 2nd September, when he was trimming his lamp at that hour. He was distant from it about 1½ miles. The night was clear with a light four or five knot breeze from the north-north-east. The defendant's ship, the *Porter*, a three-masted sailing vessel of about 750 tons measurement, was pursuing her voyage (light) up the lake, from Buffalo to Detroit. She had all her canvas set and was making between 2½ and 3½ miles per hour.

As in all collision cases there is a considerable conflict of testimony upon the facts, and as to the incidents occurring immediately preceding the collision.

The witnesses on the defendant's ship, the onus being upon them, adduced their evidence first and swore that there was no light displayed upon the *Fern* that could be seen and they also say that there was no lookout upon the *Fern*. They say that they only became aware of the proximity of the *Fern* when within 150 to 200 feet of it. On the deck of the *Porter* at the time of the collision there were three men, the man at the wheel, the mate and a lookout in the bow.

According to the mate who was about amidships, he suddenly saw the spar of the *Fern* loom up about 100 to 150 feet away. At the same moment that he saw it, the lookout called out "there is something ahead."

1898

HEMINGER v. THE SHIP PORTER.

Reasons for Judgment.

The mate called to the wheelman to put the helm hard astarboard; but before the vessel obeyed the wheel she struck the *Fern* a little abaft of amidship and carried her away from her anchor and moorings and did considerable damage to her by the impact. After the collision, when it was found that the *Fern* would float, the *Porter* took her in tow and towed her up to Detroit at the request of the plaintiff. The *Porter's* mate says there was no light that he could see on the *Fern*, except the lanterns brought out of the cabin by the crew of the *Fern* immediately after the collision. He admits, however, that the sheer of the bow and the sails of the *Porter* would interfere with his view to port and forward. The lookout of the *Porter* was not called. The defendant procured an adjournment of the hearing for several months upon the suggestion that they might be able to find the lookout, who had left their service shortly after the collision; but the case was finally closed without his testimony being given, the defendant informing the court that he was unable to discover his whereabouts. The wheelsman of the *Porter* says that the night was clear, a little haze near the water; but not enough to prevent seeing an object or vessel at a safe distance to avoid it; though he doubts if the *Fern* had been discovered when even 500 feet away, if the collision could have been avoided, as the *Porter*, he says, being light and the wind very light, did not answer her helm very promptly. He also states that from his position at the wheel, near the stern, his view to port and forward was obstructed by the sails and the sheer of the bow.

Now, the account given by the crew of the *Fern* is very different. The plaintiff and master swears that the collision took place about 10.40 p.m.; that at that time, he, the master, was in bed; but before retiring at

1898

HEMINGER v. THE SHIP PORTER.

Reasons for Judgment.

about nine o'clock he had seen that the light was burning brightly on the top of the pilot house. After the collision the light was still burning; but not so brightly, as the concussion of the collision had broken the chimney and the lamp continued burning but the lense speedily became somewhat smoky. He says the lamp continued to burn till the vessels reached Bar Point next morning at daybreak; when he himself put it out. He says the night was very clear, and affirms that when he came on deck immediately after the collision and looked about he could make out quite distinctly the abutment of the lighthouse a mile and a quarter away.

The man who was detailed as lookout on the *Fern* was not on deck at the time of the collision. He was in the cabin getting something to eat. He says about half an hour after he went below he observed a schooner coming up the channel. He could only see her port light and concluded that she was going by. He swears that the lamp was burning brightly on top of the pilot house when he went below. The schooner may, he says, have been several miles off when he first observed her. He went below and had just finished eating his lunch when the collision occurred. He swears that the light was burning immediately after the collision and that one of the men on the *Porter* called out, "Where is your light," and that he pointed it out to him and the man said "Oh, I see it now." He also swears that the collision broke the chimney of the lamp, but that the lamp continued to burn though the lense speedily became somewhat smoked, and he saw the captain put it out in the morning at daybreak when they arrived at Bar Point.

The engineer of the tug says that he was below at the time of the collision and turned out at the shock. He swears that the light was burning when he turned

in between eight and nine, and was burning after the collision when he rushed on deck.

Another man, the diver employed on the tug, says that he retired about 8 p.m.; the light was then burning brightly. He says he heard some one enquire from the *Porter*, immediately after the collision, "Where is your light," and that he pointed out to him the light on the pilot house, and that it was burning brightly when he came on deck immediately after the collision; but shortly after the collision it became smoked through, the chimney being broken, and that it was kept burning until daybreak.

The lighthouse keeper swears it was a clear night and no haze, and that one could see lights three or four miles off; that he saw a light on the *Fern* at 10 p.m., and saw lights about two miles off from the wreck at about 11.30; but no light then was visible at the wreck. He states that a man could have easily seen the hull of the *Fern* 1,000 feet away or more, even if she were showing no light, and could easily have avoided her. He states also that a lookout on the *Fern* would have seen the *Porter* with her sails set more than 1,500 feet away, and that if he had been on deck and thought a collision imminent he should have made a noise.

Captain Hackett, a master mariner, called by the defendant ship, gave his opinion that the *Fern's* lookout should have been on deck and called out or given some signal if a collision appeared likely to take place. He, however, states that the order to put the wheel hard astarboard was an improper order; that the order should have been to put the wheel hard aport, as that would have brought the *Porter* up in the wind, and that the *Porter* would have come up in the wind much more rapidly than she would have paid off, and therefore if that order had been given she might have

1898

HEMINGER v. THE SHIP PORTER.

Reasons for Judgment.

avoided colliding, or at most, in such a case, would have struck a glancing blow only on the *Fern's* bow which would probably have produced little or no injury. He states that a vessel sailing in a four mile breeze with all canvas set, if the helm should be put hard down either way, ought to clear within twice her own length a vessel 70 feet long, lying across her course, and which she was making for on a course which would be likely to strike her amidships. The foregoing is a brief summary of the evidence.

Now, the defendant's ship contends that the *Fern* was guilty of such negligence that there should be no recovery for any damage sustained by her and resulting from the collision, even if it be held that the *Porter* was so negligently navigated that it led to the collision.

The negligence, it is said, consisted in:

1. Breach of statutory rule in not carrying, as a vessel at anchor, the regulation light properly displayed.

2. Not having a lookout or watch on deck to give a verbal warning or display some signal to warn the *Porter*, upon her approach, of the likelihood of a collision.

Article 11 of the regulations for preventing collisions, &c., reads as follows: (11) "A vessel under 150 feet in length when at anchor shall carry forward *where it can best be seen*, but at a height not exceeding 20 feet above the hull, a white light in a lantern so constructed as to show a clear uniform and unbroken light visible all around the horizon at a distance of at least one mile."

I find as a fact that on the night in question at the time of the collision the *Fern* was carrying a regulation white light, upon the top of her pilot house, which would be about nine feet above her hull "where

it could best be seen," and where it could clearly be seen by the *Porter* if a proper lookout had been kept on that vessel; because the *Fern* was lying directly across the course of the *Porter*, and the view of the light so displayed was, so far as the *Porter* was concerned, unobstructed. It was visible on the night in question for more than a mile. This is shown by the evidence of the lighthouse keeper, an independent witness, who saw it distinctly one and a quarter miles away.

The only conclusion to be drawn from these facts is that the lookout of the *Porter* did not properly discharge his duties and that the collision is due to his neglect of duty. If a moving ship is proved to have been negligent in not keeping a proper lookout, she will be answerable for all the reasonable consequences of her negligence.

It has been held in the American courts that, even though the other ship has no lights it is negligence not to see and avoid her on a clear night (the *Viola* (1); but if the absence of a lookout clearly had nothing to do with the collision it will not be deemed to be a fault contributing to the collision (the *Clarion* (2); the *George Murray* (3); the *Farragut* (4).

The general rule of law is that a vessel under way is bound to keep clear of another at anchor. It applies though the ship at anchor is brought in the fair way or elsewhere in an improper berth.

"It is the bounden duty of a vessel under way, whether a vessel at anchor be properly or improperly anchored, to avoid, if it be possible with safety to herself, any collision whatever" (the *Batavier* (5). "If one ship properly lighted (at night) is fast to the shore

(1) 59 Fed. Rep. 632.
(2) 27 Fed. Rep. 128.
(3) 22 Fed. Rep. 117.
(4) 10 Wall. 334.
(5) 2 W. Rob. 407.

1898

HEMINGER v. THE SHIP PORTER.

Reasons for Judgment.

or laying at established moorings, it can scarcely happen that the other would not be held in fault for a collision." (The *Secret* (1); the *Bridgeport* (2); the *Granite State* (3).

Great stress was laid upon the absence of the look-out on the *Fern* at the time of the collision, it being urged that had he been on deck at the time attending to his duty he might have called out or given some signal to have attracted the attention of those on board the *Porter* to the danger of a collision, and that if this had been done the collision might have been avoided. Now, the question of the necessity of an anchor-watch upon a vessel at anchor seems to be a question depending upon the position of the anchored vessel. A vessel brought up in a frequented channel should keep an anchor-watch ready to sheer her clear of an approaching vessel or to give her chain.

Marsden on *Collisions*, 4th edition, p. 540, says: "But if not in a frequented channel the absence of a watch, with proper lights up, does not appear to be essential."

In the present case the *Fern* was anchored over a wreck in mid-channel between the Colchester reef and the main shore, a channel two and a half miles wide. The existence of the wreck and its position and the fact that a light was kept upon it, and also the fact that the *Fern* had been engaged most of the season in attempting to remove it, was well known to all mariners sailing in Lake Erie. The master of the *Porter* admitted this in his testimony. Yet on a clear night, when the light on the *Fern* could be seen at a distance of several miles, the *Porter* ran her down. I cannot hold upon these facts that, under article 29 of the regulations for collisions, the temporary

(1) 1 Asp. M. L. C. N. S. 318. (2) 7 Blatch. 361.
(3) 3 Wall. 310.

absence of the lookout from the *Fern* under the special circumstances detailed in evidence was "the neglect of a precaution which would be required by the ordinary practice of seamen."

The necessity of keeping a watch on a vessel at anchor is not a statutory rule unless it be required by the ordinary practice of seamen. No doubt here if the weather had been thick or stormy the ordinary practice of seamen would demand the constant vigilance of a watchman; but, as I have said before, the *Fern* anchored over a wreck, the position of which was well known to those navigating Lake Erie, carrying on a clear night a proper light, and in an open lake channel with sea room of over a mile on each side of the wreck, could not be charged with negligence contributing to the collision by reason of the temporary absence of the lookout at the time of the collision. In the case of *The Cuba* v. *McMillan* (1), at page 662, it was held that the non-observance of one of the statutory rules by one of the vessels was not to be considered as in fact occasioning the collision if the other vessel, *The Cuba*, could, with reasonable care exerted up to the time of the collision, have avoided it. This is not a case of unavoidable accident, nor to my mind is there any reasonable doubt as to which party is to blame.

Difficult questions of that nature more commonly arise in a case of two moving vessels; but the case of a moving vessel running into an anchored vessel upon a clear night in a fair way two and a half miles wide, even if no light had been displayed by the anchored vessel, raises an almost irrebuttable presumption of negligence and responsibility upon those in charge of the moving vessel. In the case of the *Indus* (2), speaking of the relative duties and responsibility of a moving vessel and a vessel at anchor, Lord Esher says:

(1) 26 Can. S. C. R. 651. (2) 12 P. D. 46.

1898

HEMINGER v. THE SHIP PORTER.

Reasons for Judgment.

"It was encumbent on the plaintiffs to make out a *primâ facie* case, one which, if unanswered, would entitle them to judgment. They, therefore, gave evidence that their vessel was at anchor and was showing a proper light. Under these circumstances, the defendant's vessel being in motion, in my opinion, as has been frequently held, the plaintiffs had established a *primâ facie* case of negligence against the defendant's vessel. It is the duty of a vessel in motion to keep clear of one at anchor, if the latter can be seen, and if she does not keep clear, then she must show good cause for not doing so."

I do not think in this case the defendant has shown good cause for not keeping clear of the *Fern*. The *Porter* is therefore answerable for the injury to the *Fern*. There is no dispute as to what sum should be allowed for damages if the *Porter* is liable. Mr. Chamberlain, one of the owners of the *Porter*, stated very frankly that he considered the amount claimed by the plaintiff not unreasonable if the *Porter* was liable. The plaintiff makes up his claim at $252, which includes a claim of $15 for towage. The receipt for this latter sum was not produced at the trial. The plaintiff is entitled to a decree against the defendant ship *Porter* for damages, and I assess these damages at the sum of $252. The said sum, however, is to be reduced by $15, unless a proper receipt for the towage is filed in the registry before issuing the decree.

I see no reason why the plaintiff should not also be allowed his costs of suit.

Judgment accordingly.

FRANK H. TYRRELL.....CLAIMANT; 1898
Nov. 3.
AND
HER MAJESTY THE QUEEN.....DEFENDANT.

Customs law—Reference—The Customs Act, secs. 182, 183—*Minister's decision—Appeal—Practice.*

Where a claim has been referred to the Exchequer Court under sec. 182 of *The Customs Act*, the proceeding thereon, as regulated by the provisions of sec. 183 of the Act, is not in the nature of an appeal from the decision of the Minister; and the court has power to hear, consider and determine the matter upon the evidence adduced before it, whether the same has been before the Minister or not.

THIS was a reference of a claim for property seized for an alleged infraction of *The Customs Act*.

The facts of the case are stated in the reasons for judgment.

The case was heard at St. John, N.B., on October 27th, 28th and 29th, and November 1st, 2nd and 3rd, 1898.

W. Pugsley Q.C. and *J. M. Stevens* for the claimant;

A. G. Earle and *E. H. McAlpine* for the defendant.

At the conclusion of the argument, judgment was delivered by

THE JUDGE OF THE EXCHEQUER COURT:

This case comes before the court upon a reference by the Controller of Customs exercising the power of the Minister of Customs given by the 182nd section of "The Customs Act," which provides as follows:—

"If the owner or claimant of a thing seized or de-
"tained, or the person alleged to have incurred the
"penalty, does not, within thirty days after being
"notified of the Minister's decision, give him notice

1898

TYRRELL v. THE QUEEN.

Reasons for Judgment.

" in writing that such decision will not be accepted, " the Minister may refer the matter to the court." Then section 183 provides that the " court shall hear " and consider such matter upon the papers and evi- " dence referred, and upon any further evidence which " the owner or claiment of the thing seized or detained, " or the person alleged to have incurred the penalty, " or the Crown, produces, under the direction of the " court, and shall decide according to the right of the " matter." It will be observed in regard to this section that the case may not be, and in practice is not usually, decided upon the same evidence as that before the Minister, because the parties have leave to adduce new evidence. The proceeding is not in the nature of an appeal from the decision of the Minister, the court having to deal with the matter upon the evidence before it whether such evidence had been before the Minister or Controller or not.

Now, coming to the facts of this case, it appears that a seizure was made on the 15th of January, 1898, of a gray mare with harness, robes and pung attached, of the probable value of $250 duty paid, for an infraction of the revenue laws of the Dominion of Canada, that is for having been engaged by Frank H. Tyrrell to convey smuggled goods from Milltown to St. Stephen at different times. The circumstances which led to the seizure are given by the seizing officer as follows : " I personally saw Wm. Tyrrell driving and in posses- " sion of said mare now under seizure conveying " smuggled whiskey from Milltown to Frank H. " Tyrrell's place of business at St. Stephen's, and while " so engaged I called upon said William Tyrrell to stop " said team in the Queen's name, which he refused to " do, and spirited said mare to the United States." This apparently sets forth the grounds or reasons for the seizure ; and upon this we have the following recom-

1898

TYRRELL v. THE QUEEN.

Reasons for Judgment.

mendation made by the Assistant Commissioner of Customs to the Minister for the forfeiture of the articles seized: "No evidence having been submitted by or "on behalf of the party from whom the seizure was "made in rebuttal of the charge,—the undersigned "would respectfully recommend that the seizure be "confirmed and the property seized having become "forfeited to the Crown remain so forfeited and be "dealt with accordingly, and as the mare seized is "now a source of increasing expense for her keep, it is "recommended that the collector at St. Stephen be "authorized to sell the animal immediately." Then on April 7th, 1893, this recommendation was approved by the Controller of Customs. Now, in the first place, there is no evidence or contention that the harness, robes or pung were ever used in committing an offence against the Customs Laws, and the claimant is clearly entitled to judgment in respect of these articles. With respect to the gray mare it is in evidence, and I find that it was on one or two occasions used to convey whiskey from Milltown, New Brunswick, to Saint Stephen in the same province, but there is no evidence to justify the conclusion that such whiskey had been smuggled into Canada. On the contrary the fair conclusion to be drawn from the evidence is that the whiskey in question was not smuggled, and I so find. It will be observed, however, that while the offence for the commission of which the articles in question in this case were seized and forfeited is stated to be the conveyance of smuggled goods from Milltown to Saint Stephen, both places being within the Province, in the notice to the claimant of the Minister's decision it is stated "that the horse, harness and robes were con-"demned for an infraction of the Customs Laws for "having been used to convey smuggled goods into "Canada," and some evidence has been adduced to

1898

TYRRELL v. THE QUEEN

Reasons for Judgment.

support a condemnation of the goods for that offence. That evidence is not, it seems to me, sufficient to warrant the seizure or condemnation of the mare. Without discrediting, to the extent I am asked to do so, Mr. Bonness, the officer who made the seizure, and on whose testimony this branch of the Crown's case rests, it is clear that under the circumstances detailed by him he may be mistaken as to the gray horse he saw being the one now in question, and in any event there is no satisfactory evidence that the one he saw was being used to convey goods into Canada contrary to law. This issue of fact also I find in favour of the claimant and against the Crown.

If the goods seized were now in the possession of the Crown there would be judgment that they be restored to the claimant, with costs; but as they have been sold by the Crown, there will be judgment for the claimant for the value thereof, which I assess at three hundred and ten dollars ($310.00), and for his costs of the action.

Judgment accordingly.

Solicitor for claimant: *W. Pugsley.*

Solicitor for defendant: *E. H. McAlpine.*

NEW BRUNSWICK ADMIRALTY DISTRICT.

FREDERICK C. LAHEY, PATRICK EGAN, CARL KEMP AND RICHARD CALLAGHAN ..... } PLAINTIFFS;

1898
Feb. 26.

AGAINST

THE YACHT "MAPLE LEAF."

Yacht dragging anchor in public harbour—Salvage—Jurisdiction—R. S. C. c. 81 sec. 44—Application.

A yacht, with no one on board of her, broke loose from anchorage in a public harbour during a storm, and was boarded by men from the shore when she was in a position of peril, and by their skill and prudence rescued from danger.

Held, that they were entitled to salvage.

2. The plaintiffs claimed the sum of $100 for their services.

Held, that inasmuch as the right to salvage was disputed, the provisions of sec. 44 (*a*) of R. S. C. c. 81 did not apply, and that the court had jurisdiction in respect of the action.

THIS was an action for salvage.

The yacht *Maple Leaf* on October 17th, 1897, was lying at anchor off Rodney Wharf, in the harbour of Saint John. A heavy northwest gale of wind came up during the early part of the day increasing rapidly in violence and reaching a velocity of sixty miles an hour. At about eleven o'clock in the forenoon, when the gale was at its highest, the yacht broke loose from her anchorage, and commenced to drift out of the harbour, no person being on board. After the yacht had moved about three quarters of a mile, and when nearly opposite the beacon light at the harbour entrance an anchor she was dragging caught and she was brought to. At this time the plaintiffs who had put off to salve the yacht were a short distance from her, and regarding

1898

LAHEY
v.
THE YACHT
MAPLE
LEAF.

Statement of Facts.

her still in a position of danger kept on and boarded her. In about half an hour's time, the yacht meanwhile pounding very heavily and straining at her anchor, the anchor rope broke. The plaintiffs then sailed the yacht to a wharf at Partridge Island outside the harbour, where she was made fast. The plaintiffs were unable to return to the city until the morning of the next day. On the evening of the 17th the owner of the yacht came to the island and was given possession by the plaintiffs, a conversation having first been had between them as to an allowance to the plaintiffs for their services, and they having expressed a willingness to take $25 he assented to it as fair. This sum he subsequently declined to pay, but offered $10. The salvors thereupon commenced this action and claimed by their writ $100. The value of the yacht was at the time of her salvage about $400. The case was heard without pleadings. At the trial the defence was set up that the yacht was not in a position of peril at the time the salvors boarded her and that the plaintiffs had been guilty of misconduct and negligence in taking the yacht to the island wharf, and that while there she had grounded and had been injured, and had also been injured from exposure to the action of the high wind and seas, that she could have been beached without damage at the flats inside of the breakwater at the mouth of the harbour, or that there were other convenient and safe places to which she could have been navigated, or that she could have been brought back into the harbour, and that the salvors had needlessly and with wrongful intent, cut the yacht adrift when lying at the beacon light. These defences the learned judge negatived, and held that the merits of the action were in the plaintiffs' favour. He reserved judgment, however, for further argument on a question raised by counsel for the owner that the court had no

jurisdiction to try the action, the amount claimed not exceeding $100, and therefore that the claim should have been made before the receiver of wrecks under *The Wrecks and Salvage Act*, R. S. C. c. 81, s. 44.

February 21st, 1898.

J. R. Dunn, for the yacht: I submit that under *The Wrecks and Salvage Act*, R. S. C. c. 81, s. 44, there is no jurisdiction in this court to try the action. The language of the section is susceptible of this construction. If I cannot go this far, since sec. 56 appears to save the court's jurisdiction, I am clearly entitled to ask that the plaintiffs be refused costs, and that they be condemned in costs.

W. H. Trueman, for the plaintiffs: The Act cited has no application where negligence or misconduct are charged against the salvors. Where a contest is made involving an inquiry into the judgment and seamanmanship of the salvors, and the propriety of their conduct in addition to the grave criminal imputation made against them, the action must be heard before a competent tribunal and not entrusted to the decision of a layman. In England, under Acts similar in their provisions to the Act relied on, the jurisdiction of the Admiralty Court has always been upheld where the charges of negligence and misconduct are made. (*The John* (1); *The Fenix* (2); *The Comte Nesselrood* (3). Rule 224 of the Admiralty rules, 1893, contemplates that an action may be brought in this court though the sum claimed or the value of the *res* is small. Rules 132 and 133 having left costs in the discretion of the court s. 44 (2) of c. 81 R. S. C. has been repealed so that the question is now entirely whether the plaintiffs should be allowed costs. (See *Garnett* v. *Bradley* (4). Attention

(1) Lush. 11.
(2) Swa. 13.
(3) 31 L. J. Ad. 77.
(4) 3 App. Cas. 944.

1898

LAHEY
v.
THE YACHT MAPLE LEAF.

Reasons for Judgment.

is also called to the *W. J. Aikens*, (1) which supports the view that c. 81 R. S. C is repealed by *The Colonial Courts of Admiralty Act* (2), 1890 (Imp.), and *The Admiralty Act* 1891 (3). Costs now being in the discretion of the court, it is submitted they should be allowed the plaintiffs. Though the amount claimed is small this court was alone open to us, for had the action been brought before the receiver of wrecks it could have been successfully contended that he had no jurisdiction. The owner has made grave and unfounded charges, and has offered an unreasonable contest. That the Act R. S. C. c. 81 could not have been intended to apply to the case, or be given the construction sought for, it is clear from the fact that its provisions could be evaded by the plaintiffs placing their claim in excess of $100.

McLEOD, L.J., now (February 26th, 1898) delivered judgment.

I reserved my decision in this case as I wished to consider the question raised as to the court's jurisdiction. The amount to which the salvors would be entitled must be very small, and as the expenses to suitors in this court is heavy I would have been very glad to accede to the contention made by counsel for the owner that a less expensive procedure could have been employed for enforcing the claim made here. I find myself, however, unable to give the reading to the Act R. S. C. c. 81 that he has contended for. I think the Act must be taken to apply where there is no question in dispute between the parties except as to the amount of the salvage to be awarded. If the right to salvage is disputed the Act has no application. In this action the owner contested the

(1) 4 Ex. C. R. 7.
(2) 53 & 54 Vict. 27.
(3) 54 & 55 Vict. c. 29.

1898

LAHEY
v.
THE YACHT
MAPLE
LEAF.

Reasons for Judgment.

right of the plaintiffs to salvage, claiming that they had forfeited it by their improper seamanship and defective judgment, and also denying that the claim for salvage could be made, on the ground that the yacht was not in a position of danger when boarded by the plaintiffs. He also made a very serious charge against them of having cut the yacht adrift. These defences I have had no difficulty of disposing of as being without foundation. It has been established to my satisfaction that the yacht was in peril, and that the salvors acted with prudence and skill. The question as to whether the yacht should have been taken to some other place than the wharf at Partridge Island is at the most a question of speculation about which experts examined before me have differed. The plaintiffs are experienced sea-faring men, well acquainted with the harbour, and capable of exercising a sound judgment as to the safest place of refuge for the yacht under the circumstances in which they were acting. But while I am bound to find the facts in the plaintiffs' favour and to award them salvage and costs, I desire to keep the expense to the owner as low as possible. The yacht has been run by him in the interests of aquatic sports and without profit to himself. He is not a man of means and, as he must make a loss, I desire to make it as light as I possibly can for him. I, therefore, will award the plaintiffs the amount they originally asked, namely $25, and will also award them costs in a like sum.

Judgment accordingly.

ADMIRALTY DISTRICT OF NOVA SCOTIA.

1898
Oct. 26.

THE INCHMAREE STEAMSHIP CO.. (LTD.) ..... } PLAINTIFFS;

Against

THE STEAMSHIP "*ASTRID.*"

Admiralty law—Collision—Rules 16 *&* 20 *in force before July,* 1897.

Held (following *The Franconia,* L. R. 2 P. D. 8) that where two ships are in such a position, and are on such courses, and are at such distances, that, if it were night, the hinder ship could not see any part of the side lights of the forward ship, and the hinder ship is going faster than the other, the former is to be considered as an overtaking ship within the meaning of rule 20 of the Collision Rules in force before July, 1897, and must keep out of the way of the latter.

2. No subsequent alteration of the bearing between the two vessels can make the "overtaking" vessel a "crossing" vessel so as to bring her within the operation of rule 16 in force before July, 1897. (See now rule 24 of the Collision Rules adopted by order of the Queen in Council on 9th February, 1897, and which came into force on the 6th July, 1897).

THIS was an action arising out of a collision on the high seas.

The facts of the case are stated in the reasons for judgment.

R. C. Weldon for the plaintiffs;

A. Drysdale, Q.C. for the ship.

McDonald, C.J.; L. J. now (October 26th, 1898,) delivered judgment.

On the 27th June, 1897, at about 12 o'clock noon, about latitude 38° 56′ N. and longitude 38° 37′ W., the two vessels *Inchmaree* and *Astrid* came into collision, and each suffered serious damage.

1898

THE INCHMAREE STEAMSHIP COMPANY v. THE STEAMSHIP ASTRID.

Reasons for Judgment.

The *Inchmaree* is a British steamship of 3134 tons register, and was on a voyage from Liverpool, England, to New Orleans, in ballast, and had a crew all told of thirty-six hands.

The *Astrid* is a Norwegian steamer of 975 tons net, and was on a voyage from Antwerp to St. John, N.B. She had a full cargo on board and was manned by a crew of twenty men all told. The *Inchmaree* in this action claims that the collision and consequent damage to her were caused by the fault of those navigating the *Astrid*. First, because, as alleged by the *Inchmaree*, the vessels were at the time of the collision crossing ships, so that the *Astrid*, having the *Inchmaree* on her starboard side, was bound to keep out of the way. This it is alleged she failed to do and thus was in fault. Secondly, the *Inchmaree* alleges that, when the collision became imminent, her helm was put hard to port; that if the *Astrid* had then kept her course no collision could have taken place, as the *Inchmaree* answered her helm, and the two ships were running parallel with each other; but that the *Astrid* wrongfully ported her helm immediately after the *Inchmaree* had ported and ran across the bows of the *Inchmaree*, thus causing the accident.

The contention of the *Astrid* is that she was not a crossing ship but an overtaken ship, that she was therefore, under the rule, entitled and bound to keep her course, and the *Inchmaree*, as the overtaking ship, was bound to keep out of the way. And as to the second contention of the *Inchmaree*, the people of the *Astrid* deny that the helm of the *Astrid* was ported when the collision became imminent, and allege that she kept her course unchanged until she stopped her engines after the accident. Our first inquiry then is were these vessels crossing ships under rule 16 of the regulations for preventing collisions at sea, or was

1898

THE INCHMAREE STEAMSHIP COMPANY v. THE STEAMSHIP ASTRID.

Reasons for Judgment.

the *Inchmaree* an overtaking ship under article 20 of the same regulations. In giving the judgment of the Court of Appeal in *The Franconia* (1), Lord Esher, then Lord of Appeal, gave a definition of the words "overtaking ship" the first and only attempt at a judicial definition of the words of which I am aware. The learned judge said: "It seems to me that this may "be a very good definition. I will not say that it is "exhaustive, or that it may not on some occasion be "found to be short of comprising every case, but I "think it is a very good rule that if the ships are in "such a position, and are on such courses, and at such "distances, that if it were night, the hinder ship could "not see any part of the side lights of the forward "ship, then they cannot be said to be crossing ships, "although their courses may not be exactly parallel. "It would not do, I think, to limit the angle of the "crossing too much, but a limit to that extent it "seems to me is a very useful and practical rule. And "then if the hinder of the two ships is going faster "than the other she is an overtaking ship. Now if "the *Strathclyde* was a mile or a quarter of a mile "distant from the *Franconia*, and the *Franconia* was "two points on the quarter of the *Strathclyde*, then "the *Franconia* could not have seen any part of her "side lights, and that, I think, is the opinion of the "gentlemen who advise us."

It is true that in the subsequent case of *The Peckforton Castle* (2), some of the judges composing the court made observations in some measure qualifying their previously expressed assent to Lord Esher's definition. That definition has not to my knowledge been over-ruled or seriously questioned in any subsequent case, and it has been adopted in terms in the new rules confirmed by the Queen in Council on the

(1) 2 P. D. 8. (2) 3 P. D. 11.

9th February, 1897. Article 24 of these rules is as follows: "Nothwithstanding anything contained "in these rules every vessel overtaking any other "shall keep out of the way of the overtaken "vessel." And then the rule thus defines what shall be considered an overtaking ship. "Every vessel "coming up with another from any direction more "than two points abaft her beam, that is, in such a "position in reference to the vessel she is overtaking, "that at night she would be unable to see either of that "vessel's side lights, shall be deemed to be an over-"taking vessel, and no subsequent alteration of the "bearing between the two vessels shall make the "overtaking vessel a crossing vessel within the mean-"ing of these rules, or relieve her of the duty of keep-"ing clear of the overtaking vessel until she is finally "past and clear, as by day the overtaking vessel can-"not always know with certainty, whether she was "forward or abaft this direction from the other vessel. "She should if doubtful assume that she is an over-"taking vessel and keep out of the way" Although this definition was not a part of the rules in force when the collision in question took place, its adoption in terms by the revisors of the then existing regulations justifies me, I think, in assuming it to be the recognized construction put upon the words since the judgment in the *Franconia* case was delivered.

James Nelson, the third mate of the *Inchmaree* was in charge of the bridge on that vessel from 8 o'clock a.m. till 12 o'clock noon on the day of the collision. The course of his ship was then W., or two points S. of W., and she was making seven knots an hour when he went on deck at 8 a.m. He describes the weather as "fine, a light swell and a light breeze." Nelson says that about 9 o'clock he saw the smoke of a steamer, and with the glasses made out the two

1898

THE INCHMAREE STEAMSHIP COMPANY v. THE STEAMSHIP ASTRID.

Reasons for Judgment.

masts and funnel of a ship which afterwards turned out to be the *Astrid*. The *Astrid*, he says, then bore about a point before the beam of the *Inchmaree*, and was ten or eleven miles distant from her. He went to his breakfast and returned to the bridge about 9.40, when he found they had got closer to the *Astrid*. About 10.15 the master of the *Inchmaree* came on deck and the position of the *Astrid* was pointed out to him by Nelson, which was then as Nelson says, "about a point or so before the beam, perhaps a little more, about eight miles distant, and apparently steering W. by N". The master of the *Inchmaree*, who appears to have seen the *Astrid* for the first time at or about 10.20 a.m., says that she was a little "before the port beam at six or seven miles distant," and being asked for his definition of the word "little," answered "probably a point." The *Inchmaree* was then making seven knots an hour. The master of the *Inchmaree* did not again see the *Astrid* till twenty to twenty-five minutes before 12 o'clock noon. He says the *Astrid* was then a little further forward of the beam, perhaps a couple of points, about a mile and a quarter distant, and appeared to him to be stearing northward of W. true, while the *Inchmaree* was steering two points S. of W. true. He then left the deck and did not appear there again till at or near 12 o'clock, on being called by the officer of the bridge, when he found the ships within one hundred yards of each other with the *Astrid* about three points on his port beam. The master and first officers of the *Astrid* who were examined on the part of the defence did not materially differ from the evidence of the third officer of the *Inchmaree*, who is in reality the only witness called on behalf of the plaintiffs who appeared to know much concerning the facts pertinent to the decision of the contest between the parties. The master of the *Astrid*

says he first saw the *Inchmaree* between 8 and 9 o'clock a.m. He was on and off the bridge occasionally from that time till 11 a.m., but remained on the bridge continuously from the latter hour till the collision took place, and the second officer who was in charge of the bridge had never left his post from 8 o'clock till the collision occurred. The master says he first sighted the *Inchmaree* between 8.30 and 9 o'clock, that his ship was then heading W. $\frac{3}{4}$ N. true, and going $6\frac{1}{2}$ knots. That the *Inchmaree* bore then two to three points on his starboard beam, abaft the beam, and the *Inchmaree* appeared to be stearing a W. S. W. course, true, and to be about twelve miles distant. That he came on the bridge again at 11 o'clock when he took the bearings by compass and found the *Inchmaree* to be bearing from two to three points abaft the beam of the *Astrid* and distant five or six miles. The *Astrid*, according to these witnesses, continued on her course without deviation up to and until the collision occurred. The second officer, who was in charge of the bridge all the morning, corroborates the evidence of the master as to the bearings and distances of the two ships relative to each other and the courses steered, but he puts the speed of the *Astrid* at six knots instead of six and a half as computed by the master. The third officer of the *Inchmaree* was asked on his examination whether on the course he was steering that morning, he could, if it were night, have seen the lights of the *Astrid*, and he answered yes. The question was not put to any of the other witnesses; and I am advised by the gentleman who assists me with his advice, that serious weight should not be attached to that statement considering the differences of opinion as to the actual bearings of the vessels in relation to each other, and the uncertainty necessarily attending such opinion under the circumstances in evidence. On the whole

1898

THE INCHMAREE STEAMSHIP COMPANY v. THE STEAMSHIP ASTRID.

Reasons for Judgment.

evidence, I have come to the conclusion that the *Astrid* has established the contention that the *Inchmaree* was an overtaking ship, and was therefore bound to give way and keep clear of the overtaken ship—while the *Astrid* had a right to keep her course. The great weight of evidence is, I think, in favour of the contention that the *Inchmaree* was, from the time when her position could be first correctly ascertained on board the *Astrid* till immediately before the collision, between two and three points abaft the starboard beam of the *Astrid*, and that she was a following ship. This I understand to be also the opinion of Captain Smith, R.N.R., whose advice I am glad to have as assessor. Did the matter rest here, the *Inchmaree* would in my opinion be held in the wrong. But the owners of the *Inchmaree* say that at the last moment, but in time to save a collision between the two ships, the helm of the *Inchmaree* was put hard to port—that as a result of this she changed her course northward eight or ten points, and, had the *Astrid* kept her course, no collision could have occurred; but that the *Astrid*, instead of keeping her course, put her helm to port, thereby crossing the bow of the *Inchmaree* and causing the collision. If it be established by the evidence that this allegation of the *Inchmaree* is true, I have no hesitation in saying that it would be my opinion that the *Astrid* ought to be held liable. The evidence on this point is absolutely contradictory, and this is to be the more regretted, inasmuch as on other questions where differences or discrepancies appeared in the evidence, they could be reconciled on considerations arising from the difficulty of forming absolutely correct conclusions under the circumstances. But, on the point I am now considering, I fear I must come to a conclusion as to which of the two sets of witnesses I ought to believe.

1898

THE INCHMAREE STEAMSHIP COMPANY v. THE STEAMSHIP ASTRID.

Reasons for Judgment.

The master of the *Inchmaree* was called to the bridge by the officer on the bridge after the latter had ordered the helm of the *Inchmaree* hard to port, and when he arrived on the bridge he had barely time to give the order to stop and reverse before the collision occurred. A man in that position, unless of exceptionally strong nerve and great presence of mind, would likely be somewhat disturbed by the difficulties in which he suddenly found himself involved, and his judgment of events then passing may reasonably be supposed to be less clear and correct than on ordinary occasions.

Captain Simpson as to the point of dispute says: "Our vessel was heading north at the time of the col- "lision, when I was called I saw the *Astrid;* she was "then on our bow and apparently trying to cross from "port to starboard—about one hundred yards off—pos- "sibly inside of that. Her midships would be about "three points on our bow and appearing to be crossing "from port. When I ran full speed astern, the *Astrid* "seemed to be coming flying round on our bow as we "were going off to starboard under the port helm and "then the vessels came together, our port bow with "her starboard side just abaft the bridge." The second mate and the man at the wheel of the *Inchmaree* also say that the latter vessel appeared to follow the *Inchmaree* round from west to north, and then both headed north when the collision took place. On the other hand the master, second mate and steersman of the *Astrid* swear distinctly and positively that the *Astrid* continued under full speed till after she got clear of the other ship. That her course was not altered in the slightest degree from west to three-quarters north till she stopped after getting rid of the other vessel. The statements of the witnesses are absolutely irreconcilable. The evidence was all taken under commission and I have no means of determining the merits

1898

THE INCHMAREE STEAMSHIP COMPANY v. THE STEAMSHIP ASTRID.

Reasons for Judgment.

of the testimony on either side. I may say, however, that I find it very difficult to reconcile some of the acts attributed to the men on board the *Astrid* with conduct we might reasonably expect from men in their profession and their condition of life. They are Norwegian sailors, a class of men who, I have reason to believe, are as a rule as competent in their profession, honest in their dealings and moral in their conduct as the same class of men in our own country, and to convict these men of untruth we must believe them to be either incompetent or dishonest or both. The question is this: It is admitted that when the *Inchmaree* ported her helm immediately before the collision, the course of that vessel was changed so that she ran on a line parallel with the *Astrid*, and that if both vessels kept that course, a collision would be impossible, yet it is said that with the knowledge of that fact patent before him, instead of keeping his course, which was rendered a safe one by the porting of the *Inchmaree*, or putting his helm to starboard and thus getting further from danger, he put his helm hard to port and chased the other vessel over a circle of eleven or twelve points of the compass from west to north, or beyond that in the effort to get out of the way. Perhaps I do not sufficiently understand the position technically, but it would appear to me that, keeping in mind the evidence that the *Astrid* continued the full speed of her engines till after she had got rid of the other vessel in collision, the fact that the vessel pointed to the north after the collision may be more reasonably explained by the effect which the force of the *Astrid* at full speed would have on the position of both vessels. The *Astrid* going west is struck well aft on the starboard side of the other vessel whose way had been stopped by her reversed engines, but still having force enough to crush in the side of the *Astrid* and *a fortiori* with

1898

THE INCHMAREE STEAMSHIP COMPANY v. THE STEAMSHIP ASTRID.

Reasons for Judgment.

impetus enough to force her stern to the south; and thus with the steam power of the *Astrid* full steam ahead carrying the bow around with her, the position of both vessels bearing north may be accounted for without supposing that the master wilfully sought the most dangerous position into which he could, in the emergency as it existed, possibly port his vessel. At any rate I am willing to rest my judgment on this point in the absence of preponderating evidence in favour of the plaintiffs, in the presence of the denial of all the plaintiffs' witnesses that the *Astrid* changed her course as alleged. In the result my opinion is that the *Inchmaree* was to blame for the collision, that the *Astrid* is not to blame; that the action must be dismissed with costs; and that a decree do pass accordingly.

*Judgment accordingly.**

Solicitor for the plaintiffs: *W. H. Henry.*

Solicitors for the ship: *Drysdale & McInnes.*

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* REPORTER'S NOTE,—An appeal from the above judgment has been taken to THE JUDGE OF THE EXCHEQUER COURT.

1898

Nov. 28.

BRITISH COLUMBIA ADMIRALTY DISTRICT.

HER MAJESTY THE QUEEN.....PLAINTIFF;

AGAINST

THE SHIP "OTTO."DEFENDANT.

Admiralty law—Behring Sea Award Act, 1894—Illegal sealing—Unintentional offence—Nominal fine.

Where the owner of a ship employs a competent master, and furnishes him with proper instruments, and the master uses due diligence, but for some unforeseen cause against which no precaution reasonably necessary to be taken can guard, is found sealing where sealing is forbidden, the court may properly exercise its discretion and impose a nominal fine only.

THIS was an action *in rem* against a ship for condemnation for an alleged infraction of the regulations respecting the taking of seals in Behring Sea.

By the statement of claim it was alleged as follows:

1. The British ship *Otto*, Josiah F. Gosse, Master, was seized by Captain Frank Finnis of Her Majesty's ship *Amphion*, on the 10th day of September, 1898, in latitude 57° 8′ N., longitude 171° 49′ W., from Greenwich, at a point within the prohibited zone of 60 miles around the Pribiloff Islands, as defined in article one of the first schedule to *The Behring Sea Award Act*, 1894.

2. The said ship *Otto* at the time of the seizure aforesaid was fully equipped for fur seal hunting and was employed in killing, capturing and pursuing the animals commonly called fur seals within the prohibited zone of 60 miles around the Pribiloff Islands, as defined in article one of the first schedule to *The Behring Sea Award Act*, 1894, and the master, hunters and crew of the said ship did capture and kill a

number of the animals commonly called fur seals within the said prohibited zone.

3. The said ship *Otto* is a British ship registered at the port of Victoria, in the Province of British Columbia.

4. The said ship *Otto*, with the said Josiah F. Gosse as master, set sail from the port of Victoria, British Columbia, on a sealing voyage on the twentieth day of June, 1898.

5. At the time of the seizure aforesaid the said ship *Otto* had 770 fur seal skins on board, and when she arrived at the port of Victoria after her said seizure she had 790 fur seal skins on board.

6. The said Captain Frank Finnis after the seizure of the said ship *Otto*, as aforesaid, endorsed the ship's certificate and directed the said ship to proceed to Victoria, British Columbia. The said ship arrived at the port of Victoria on the 1st day of October, 1898.

Captain Frank Finnis, of Her Majesty's ship *Amphion*, claims the condemnation of the said ship *Otto*, and her equipment and everything on board of her and the proceeds thereof on the ground that the said ship was at the time of the seizure thereof within the prohibited zone of 60 miles around the Pribiloff Islands, as defined by article one of the first schedule to *The Behring Sea Award Act*, 1894, fully manned and equipped for killing, capturing, and pursuing the animals commonly known as fur seals, and that the said ship was employed in killing, capturing and pursuing within the prohibited zone aforesaid the animals commonly called fur seals, and did within such prohibited zone capture and kill a number of the animals commonly called fur seals.

The statement of defence was as follows;—

1. The defendants admit the allegation contained in paragraph one of the statement of claim.

1898

THE QUEEN v. THE SHIP OTTO.

Statement of Facts.

2. The defendants admit the allegations contained in paragraph two of the statement of claim; but say that the master, hunters and crew of the said ship *Otto*, at the time mentioned in paragraph two of the statement of claim, were engaged in the sealing operation referred to in said paragraph in the *bonâ fide* belief that the ship *Otto* was not within the prohibited zone of sixty miles around the Pribiloff Islands.

3. The defendants admit the allegations contained in paragraphs 3, 4, 5 and 6 of the statement of claim.

4. In answer to the plaintiff's claim, the defendants say that on the 8th day of September, 1898, the master of the said ship took observations for the purpose of ascertaining his position, which showed the said vessel to be in 56° 59′ north latitude, and 172° 30′ west longitude, being outside of the prohibited zone.

5. On the following day, namely, the 9th day of September, 1898, the master of the ship *Otto* was unable to take observations to ascertain his exact position on account of the cloudy state of the weather; but calculated, "by account" or dead reckoning, that his position was 57° 20′ north latitude, and 172° 24′ west longitude, being outside of the prohibited zone.

6. On the night of the 9th of September, 1898, the said ship *Otto*, being then approximately in the position mentioned in paragraph five hereof, set all sail and stood off in a south by westerly direction, which was calculated to increase the said ship's distance from the said prohibited zone; but, by reason of a heavy swell from the west, and of a current setting in to the eastward, unknown to the master of said ship, the said ship was placed in the position mentioned in the statement of claim.

7. The current mentioned in paragraph six hereof was, according to the chart in the possession of the master of said vessel, setting in a westerly direction;

1898

THE QUEEN v. THE SHIP OTTO.

Reasons for Judgment.

but, on the arrival of H. M. S. *Amphion*, it was ascertained that the current was actually setting to the eastward, which would tend to drive said ship *Otto* within said prohibited zone.

8. The defendants further say that prior to the said *Otto* setting sail from the port of Victoria, express instructions were given by the owners to the captain of said ship *Otto* to keep outside of the said prohibited zone, and under no circumstances whatever to disobey said instructions

Issue joined.

The case came on for trial at Victoria, B.C., on the 28th day November, 1898, before the Honourable A. J. McColl, Chief Justice, Local Judge for the Admiralty District of British Columbia.

C. E. Pooley, Q.C. for the plaintiff.

E. V. Bodwell for the ship.

Mr. Pooley cited *The Queen* v. *Minnie* (1); *The Queen* v. *Ainoko* (2); *The Queen* v. *Beatrice* (3); *The Qaeen* v. *Viva* (4); *The Queen* v. *Shelby* (5).

McColl, C.J.; L. J. now (November 28th, 1898) delivered judgment.

The mere fact, which is admitted, that the ship was engaged in sealing in prohibited waters constitutes an offence under the Act. (The ship *Minnie*) (1).

Mr. Pooley stated that he could only ask for a fine, Captain Finnis, the seizing officer, having attributed carelessness only to the master.

Where the owner of a ship employs a competent master, and furnishes him with proper instruments, and the master uses due diligence, but for some unfore-

(1) 23 Can. S. C. R. 484.
(2) 5 Ex. C. R. 366.
(3) 5 Ex. C. R. 369.
(4) 5 Ex. C. R. 360.
(5) 5 Ex. C. R. 1.

1898

THE QUEEN v. THE SHIP OTTO.

Reasons for Judgment.

seen cause, against which no precaution reasonably necessary to be taken can guard, is found sealing where sealing is forbidden, I think that the discretion permitted the court would be well exercised by the imposition of a nominal fine only.

But in this case the master for eight days immediately preceding the day of seizure was knowingly sealing in the close vicinity of the prohibited zone; and while I am desirous of making every allowance for him because of his having been misled as to the current by the chart upon which he relied, and in the difficulties owing to bad weather, and to his men not being well under control, I cannot acquit him of great carelessness in not taking a sight on that day before allowing his men to leave the ship.

Having regard to the limit of £500, I think the justice of the case will be met by the infliction of a fine of £200, upon payment of which within one month, the ship, equipment and cargo will be released.

Judgment accordingly.

BRITISH COLUMBIA ADMIRALTY DISTRICT.

1898

Oct. 13.

W. H. COOK .....PLAINTIFF;

against

THE STEAMSHIP "*MANAUENCE.*"

Ship—Breach of contract to carry passengers—Action in rem.

The plaintiff, for an alleged breach of a contract to carry him from Liverpool to St. Michaels and thence to the Yukon gold-fields, took proceedings against the ship and obtained a warrant for her arrest.

Held, that even if the breach alleged were established, the plaintiff was not entitled to a lien on the ship.

THIS was an action brought to recover the sum of $777.50 passage money from Liverpool to Dawson, N.W.T., and for damages for breach of contract.

The facts of the case are stated in the judgment.

The case was tried before the Honourable A. J. McColl, Chief Justice, Local Judge for the British Columbia Admiralty District, on 13th October, 1898.

J. A. Russell, for plaintiff;

J. M. Bradburn and *D. G. Marshall*, for the ship.

Bradburn for ship cites: *The Bold Buccleugh* (1); *The Plover* (2); *City of Manitowoc* (3); *The Mary Jane* (4); *The Pieve Superiore* (5); *Maude and Pollock* on Shipping (6); *The Theta* (7); *The Hercyna* (8).

Russell for plaintiff cites: *The Cella* (9); *The Henrich Björn* (10); *The Two Ellens* (11); *American and English Encyclopædia of Law* (12); *The Aberfoyle* (13).

(1) 7 Moo. P. C. 267.
(2) Stockton's Adm. Dig. 129 and 134.
(3) Cook, 179.
(4) 1 Stuart, 267.
(5) L. R. 5 P. C. 483.
(6) Vol. 1 p. 85 (4th ed.).
(7) [1894] P. D. 280.
(8) 1 Stuart, 274.
(9) 13 P. D. 82.
(10) 11 A. C. 270.
(11) 4 L. R. P. C. 161.
(12) Vol. 22, p. 776.
(13) 1 Blatch. 360.

1898

COOK v. THE STEAMSHIP MANAUENCE.

Reasons for Judgment.

McCOLL, (C.J.) L. J. now (October 13th, 1898,) delivered judgment.

The plaintiff alleges breach of a contract for his passage in the steamship from Liverpool, England, to St. Michaels, and thence by steam-launch and house-boat to the Yukon gold-fields. The contract was also that he should be supplied with provisions during the open season of 1898 if he remained in touch with the steamer and the steamer's boats and should be carried back to Victoria at the end of the season.

The breach complained of was the failure to carry the plaintiff from St. Michaels, beyond which the steamer could not go and was not supposed to go, to Dawson.

The contract was made with Captain Edwards the master and owner of the ship which was subject to a mortgage.

The plaintiff claims the condemnation and sale of the ship, and the application of the proceeds to the payment of the damages claimed and costs.

The action is brought against the ship itself, and the owner, having appeared, recently applied to set aside the arrest on the ground that it was unwarranted by the procedure of the court. At that time the contract was not before me and the parties differed about its terms, the plaintiff insisting that he would be able to prove the contract to be for such a special use of the ship as that upon breach from that moment a lien upon the ship was by law created for the damages sustained, of the same nature and enforceable in the same way as a maritime lien.

The plaintiff offered to go down to trial at once and to accept the owner's bond in release of the ship and an order was made accordingly.

The plaintiff repeated and insisted in his contention throughout the trial, during which some very interest-

1898

COOK v. THE STEAMSHIP MANAUENCE.

Reasons for Judgment.

ing questions were raised as to the rights of the parties because of the literal performance of the contract in the manner originally intended having become impracticable from no fault of either party; but I have to decide the preliminary question whether the plaintiff is, in the circumstances stated, entitled to the lien claimed assuming the breach alleged.

I have examined, I think, all the material decisions from *The Bold Buccleugh* to the present time, in some of which the original history and extent of the jurisdiction in Admiralty are exhaustively discussed, and all the authorities then existing are minutely examined and I think that I cannot usefully say more of them than that whatever may be left in doubt, they seem to shew clearly that the lien claimed does not exist by the law of England. I need only refer to *Pieve Superiore* (1); *The Heinrich Björn* (2); *The Cella* (3); *The Queen* v. *Judge of City of London Court* (4); *The Zeta* (5); and *The Theta* (6.)

I have not considered the cases cited from the United States Reports because the jurisdiction in Admiralty is exercised there upon principles differing from English law.

The action is dismissed with costs including those reserved.

Solicitors for plaintiff: *Russell & Russell.*

Solicitors for ship: *Davis, Marshall & Macneill.*

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(1) L. R. 5 P. C. 483.
(2) L. R. 10 P. D. 44.
(3) L. R. 13 P. D. 82.
(4) [1892] 1 Q. B. 273.
(5) [1893] A. C. 468.
(6) [1894] P. D. 280.

1898

Nov. 30.

QUEBEC ADMIRALTY DISTRICT.

RICHARD COORTY AND OTHERS...PLAINTIFFS;

AGAINST

THE STEAMSHIP "GEORGE L. COLWELL."

Maritime law—Necessaries supplied to Foreign Ship in Foreign Port—Owners domiciled out of Canada—International law—Commercial matter—Action in rem—Jurisdiction.

The Exchequer Court of Canada, under the provisions of 24 Vict. c. 10, s. 5, may entertain a suit against a foreign ship within its jurisdiction for necessaries supplied to such ship in a foreign port, not being the place where such ship is registered, and when the owners of the ship are not domiciled in Canada: *Cory Bros.* v. *The Mecca* (1895) P. D. 95 followed.

2. Under the principles of International Law, the courts of every country are competent, and ought not to refuse, to adjudicate upon suits coming before them between foreigners. This doctrine applies with especial force to commercial matters; and is declared in the provisions of Art. 14 C. C. P. (L. C.) and Arts. 27, 28 and 29 C. C. (L. C.)

THIS was an action *in rem* for necessaries.

The matter now came before the court on two motions by defendant,—one to set aside the arrest of the ship, and the other to dismiss the action for want of jurisdiction.

The facts are stated in the reasons for judgment. They may be summarized as follows: the ship was registered in the United States; the owners were not domiciled in Canada; the plaintiffs were foreigners residing at Marblehead, Ohio, U.S.A.; the necessaries sought to be recovered for were supplied at that place.

November 19th, 1898.

The case was heard this day before Mr. Justice Routhier, Local Judge in Admiralty for the District of Quebec.

1898

COORTY
v.
THE STEAMSHIP GEORGE L. COLWELL.

Reasons for Judgment.

C. Pentland Q.C., for defendant, cited and relied on *The India* (1); *The Ella A. Clark* (2).

These authorities are conclusive against the jurisdiction of the court in the present proceedings.

A. Taschereau, for the plaintiffs, argued that the High Court of Justice in England, under sec. 5 of the Imperial Act of 1861, and this court under sec. 2 of *The Colonial Courts of Admiralty Act*, had jurisdiction in this case. The expression "any ship" in the former enactment, which the latter statute applies to Canada, means any ship, whether foreign, British or colonial.

ROUTHIER, L. J. now (November 30th, 1898) delivered judgment.

La même question de juridiction est soulevée dans ces deux causes qui sont absolument identiques.

Les demandeurs dans les deux causes sont domiciliés à Marblehead, dans l'Etat d'Ohio. Les deux actions sont *in rem* contre le même steamer, pour recouvrer le prix et valeur de choses nécessaires (necessaries) fournies par eux au dit steamer à Marblehead, dans le cours de l'été dernier, lequel steamer est enregistré dans les Etats-Unis et n'a aucun propriétaire en Canada. Il a été arrêté par les demandeurs le 2 novembre courant, alors qu'il était dans le Bassin Louise, à Québec.

C'est dans ces circonstances que le défendeur plaide à la juridiction et demande l'annulation de l'arrêt pratiqué contre lui. Il soutient que la Cour d'Amirauté siégeant à Québec n'a aucune juridiction dans cette cause où les demandeurs sont étrangers et alléguent une dette créée en pays étranger, contre un steamer étranger.

Deux textes de lois mis en présence et se rapportant à cette question de juridiction, ont donné lieu à de longues controverses et à des décisions contradictoires.

(1) 32 L. J. Ad. 185. (2) Br. & L. 32.

1898

COORTY
v.
THE STEAMSHIP GEORGE L. COLWELL.

Reasons for Judgment.

Le premier est la section 6 de l'Acte de la Cour d'Amirauté de 1840, 3 & 4 Vict, ch. 65. Je n'en cite que les mots relatifs à la question soumise :—

"The High Court of Admiralty shall have jurisdiction "to decide all claims.....for necessaries supplied to "any foreign ship.....whether such ship may have "been within the body of a country, or upon the high "seas, at the time when the.....necessaries..... "were furnished....."

Le second texte à rapprocher du premier est la section 5 de l'Acte de 1861, 24 Vict. ch. 10 qui dit:—

"The High Court of Admiralty shall have juris- "diction over any claim for necessaries supplied to "any ship elsewhere than in the port to which the "ship belongs, unless it is shown to the satisfaction of "the court that at the time of the institution of the "cause any owner or part owner of the ship is domi- "ciled in England or Wales....."

Ces deux textes ont été plusieurs fois soumis à l'interprétation des tribunaux anglais et voici quelle a été la jurisprudence pendant longtemps sur la portée qu'il fallait leur donner :—

On décidait :—

1. Qu'en vertu du premier de ces textes la Cour d'Amirauté n'avait pas juridiction quand les *necessaries* avaient été fournies à un vaisseau étranger dans un port étranger ;

2. Que le second texte ne s'appliquait qu'aux navires de nationalité britannique ou coloniale.

Un jugement rendu en 1863 par le Dr Lushington dans la cause *The India*, rapporté au 32ème Vol. du Law Journal (Adm) p. 185, parut fixer la jurisprudence sur ces deux points. C'est tout particulièrement sur ce précédent que le défendeur appuie son plaidoyer à la juridiction et il ne paraît pas y en avoir eu d'absolu-

1898

COORTY
v.
THE STEAMSHIP GEORGE L. COLWELL.

Reasons for Judgment.

ment contraire jusqu'en 1894, c'est-à-dire pendant plus de trente ans.

Mais en cette année là, la Cour d'Appel en Angleterre fut appelée à se prononcer formellement sur cette question de juridiction, soulevée de nouveau *in re The Mecca*. (Law Reports, Probate Division, 1895, p. 95).

Les demandeurs dans cette cause étaient Cory Brothers and Company et ils avaient fourni au navire turc, le *Mecca*, du charbon à Alger, à Alexandrie et à Port Saïd. Il s'agissait donc de *necessaries* fournies à un navire étranger, dans des ports étrangers et le défendeur plaida à la juridiction.

En Cour d'Amirauté, le Juge Bruce maintint le plaidoyer et cassa le bref *in rem*, s'appuyant sur la décision du Dr Lushington *in re The India* et affirmant que c'était la jurisprudence. "I think," dit il, "I am bound by the decision of Dr. Lushington as to the statute of 1840, and I am also bound by a long series of decisions with reference to the statute of 1861."

Mais la Cour d'Appel, à l'unanimité, a renversé cette décision et les raisons données par ses Juges me semblent irréfutables.

Le texte du dernier statut 24 Vict, ch. 10, sec. 5 est clair et très compréhensif. On se demande pourquoi les mots "*any ship*" voudraient dire un navire anglais et non pas tout navire, anglais ou étranger. On reconnaît que les mêmes mots "*any ship*" de la section 7 veulent dire 'tout navire' de n'importe quel pays; alors, pourquoi les mêmes mots auraient-ils un autre sens dans la section 5? Quand le législateur a voulu exclure les navires 'étrangers' et n'appliquer ses dispositions qu'aux navires britanniques il l'a dit, comme la chose apparaît dans les sections 8, 9 et 11 du même statut.

Les juges de la Cour d'Appel sont allés plus loin dans cette cause et ils paraissent d'avis que même

1898

COORTY
v.
THE STEAMSHIP GEORGE L. COLWELL.

Reasons for Judgment.

sous l'empire de la loi de 1840 (3 & 4 Vict., ch. 65, sec. 6) la Cour d'Amirauté aurait juridiction relativement au charbon fourni à Alexandrie et à Alger, parce que ces deux ports seraient au sens du statut considérés comme étant la haute mer (*high sea*)—les navires y pouvant flotter même au-dessous de la ligne de plus basse marée—tandis qu'à Port Saïd le port est formé de bassins creusés dans les terres et alimentés par des eaux territoriales.

Ce dernier port ne pouvant pas être assimilé à la haute mer la Cour d'Amirauté n'aurait pas eu juridiction pour le charbon qui y aurait été fourni au navire *Mecca* en vertu du statut de 1840.

Mais elle a cette juridiction en vertu du statut de 1861 qui l'a étendue à tout vaisseau "*any ship*" pour "*necessaries*" fournies ailleurs qu'au port auquel appartient le vaisseau "*elsewhere than in the port to which the ship belongs.*"

Que le navire soit étranger ou anglais, ou colonial, peu importe; la cour a juridiction pourvu que les choses n'aient pas été fournies dans le port même auquel le vaisseau appartient. C'est la seule exception, en ce qui concerne le lieu de la livraison des "*necessaries.*"

La 2nde exception qui n'est pas invoquée dans cette cause a lieu lorsque le propriétaire du navire, ou l'un des propriétaires, est domicilié en Canada.

Car dans ce cas le créancier peut poursuivre ce ou ces propriétaires devant les tribunaux civils du pays; et quand il a l'action personnelle contre quelqu'un qui est dans le pays le remède de l'action *in rem* contre le navire n'est pas nécessaire.

Les juges de la Cour d'Appel ont tous motivé leur jugement dans cette cause de *The Mecca* d'une façon tout à fait convaincante; et cette décision fait jurispru-

dence ici comme en Angleterre puisque la loi est la même.

S'il était nécessaire d'ajouter quelque chose, je dirais que c'est aujourdhui l'opinion des auteurs les plus accrédités en droit international que les tribunaux de chaque pays sont compétents, et ne doivent pas se refuser, à juger les procès qui surgissent devant eux entre étrangers; les repousser est commettre un déni de justice.

En matière commerciales on reconnaît presque partout la compétence des tribunaux dans les causes entre étrangers.

Enfin la doctrine de la compétence est reconnue par nos codes—C. P. C. Art. 14 et C. C. Arts. 27, 28, 29.

Les motions du défendeur doivent donc être rejetées avec dépens.

Judgment accordingly.

Solicitors for the plaintiff: *Fitzpatrick, Taschereau & Roy.*

Solicitors for the ship: *Caron, Pentland & Stuart.*

1897
June 14.

THE QUEEN ON THE INFORMATION OF THE ATTORNEY-GENERAL FOR THE DOMINION OF CANADA..... } PLAINTIFF;

AND

JOHN A. FINLAYSON, ALEXANDER GRANT AND JOHN ESDON..... } DEFENDANTS.

Customs export bonds—Penalties—Enforcement—Law of the Province of Quebec.

The provisions of section 8 of 8 and 9 Wm. III, c. 11, affecting actions upon bonds, do not apply to proceedings by the Crown for the enforcement of a penalty for breach of a Customs export bond.

Two Customs export bonds were entered into by warehousemen at the port of Montreal, P.Q. Upon breach of the conditions of the bonds the Crown took action to recover the amount of the penalties fixed by such bonds :

Held, that the case must be determined by the law of the Province of Quebec, and that under that law (Arts. 1036 and 1135) judgment should be entered for the full amount of each bond.

INFORMATION to recover the amount of the penalties of two Customs export bonds.

The facts of the case are stated in the reasons for judgment.

May 20th, 1897.

J. M. Ferguson (with whom was *F. H. Gisborne*) for the plaintiff, contended that the defendants were liable for the full amount of the bonds under Art. 1135 C. C. L. C.

W. D. Hogg, Q.C. for the defendants, contended that by the provisions of 8 & 9 Wm. III. c. 11, the defendants were only liable for the amount of the duty mentioned in the bonds.

THE JUDGE OF THE EXCHEQUER COURT now (June 14th, 1897), delivered judgment.

1897

THE QUEEN v. FINLAYSON.

Reasons for Judgment.

The information is exhibited in this case to recover the sum of $6,480.00, being the amount of two bonds given by the defendants to Her Majesty, conditioned for the exportation of a certain quantity of spirits, and to enter the same for consumption or for warehouse at the port of St. Pierre, Miquelon, and to make proof of such exportation and entry in accordance with the requirements of the warehousing regulations in that behalf within thirty days from the date of the bonds, to the satisfaction of the Collector of Inland Revenue for the division of Montreal, or to account for such goods to the satisfaction of such collector. The sum for which the bond was in each case taken amounted to double the Customs duties upon the goods proposed to be exported. There is no question that the conditions of the bonds have been broken; but the defendants seek to obtain the benefit of the provisions of 8 and 9 Wm. III, chap. 11, sec. 8. That, I think, is not possible, for two reasons: First, that the statute invoked does not apply to the Crown (1); and, secondly, the bonds were made at Montreal in the Province of Quebec, and the question is to be disposed of in conformity to the laws of that province, under which the judgment should be entered for the full amount of each bond. (C. C. L. C. Arts. 1076 and 1135.)

There will be judgment for the Crown for the sum of six thousand four hundred and eighty dollars ($6,480.00) and costs.

Judgment accordingly.

Solicitor for plaintiff: *J. M. Ferguson.*

Solicitor for defendants: *W. D. Hogg.*

(1) *Rex* v. *Peto*, 1 Y. & J. 171.

1898
Mar. 14.

WILLIAM DRURY, TRUSTEE OF THE ESTATE OF CHARLES DRURY (DECEASED) ..... SUPPLIANT;

AND

HER MAJESTY THE QUEEN.....RESPONDENT.

Expropriation—Compensation—Interest—When it begins to run.

Interest may be allowed from the date of the taking of possession of any property expropriated by the Crown, even if the plan and description be not filed on that date.

PETITION OF RIGHT for compensation for lands taken for a public work.

By his petition of right the suppliant alleged *inter alia* the following facts:—

"On the twentieth day of June, A.D. 1884, and from that time down to the day of the date of this petition, Her Majesty the Queen was the owner and in possession of certain lands and tenements, railway tracks, sidings, railway yards and other works situate in the then cities of Saint John and Portland, now the City of Saint John, in the city and County of Saint John and Province of New Brunswick, being a portion of the Intercolional Railway, a public work of the Dominion of Canada."

"On the said twentieth day of June, A.D. 1884, and from that time till the day of the date of his death, Ward Chipman Drury, as trustee under the last will and testament of the said late Charles Drury, was the owner in fee simple of three certain lots, pieces and parcels of land situate in the said parish of Portland, now the City of Saint John."

On the twenty-first day of February, A.D. 1880, the said late Charles Drury departed this life seized in fee simple of the land in question.

1898

DRURY v. THE QUEEN.

Statement of Facts.

That the said Ward Chipman Drury departed this life on the ninth day of August, A. D. 1891, having first by his last will and under and by virtue of the powers and provisions contained in the last will and testament of the said late Charles Drury, appointed your suppliant, the above named Charles William Drury, trustee of the last will and testament of the said late Charles Drury, and did devise and bequeath to him the Trust estate of the said late Charles Drury, to hold the same to him the said late Charles William Drury, his heirs, executors, administrators and assigns, upon the trusts in said will of the said late Charles Drury, expressed and contained, or such of them as were then subsisting and capable of taking effect."

Some time previous to the said twentieth day of June, A. D. 1884, Her Majesty, the Queen entered upon and took possession of a portion of the three lots and land and premises above mentioned, and afterwards to wit, on the nineteenth day of December, in the year of our Lord, 1888, Her Majesty the Queen, under and by the provisions of *The Expropriation Act*, duly and regularly took for the use of Her said Majesty the Queen the portion of the said lands and premises so occupied or in possession of Her said Majesty the Queen, as aforesaid, and did deposit as of record, in the office of the Registrar of Deeds in and for the county of the said City and County of St. John, a plan and description of said land and premises so taken as aforesaid and has since maintained and operated on the lot of land, so taken as aforesaid, a railway or siding being a part of the said Intercolonial Railway of Canada.

By reason of the taking of the lands mentioned and the laying, maintaining and operating of said railway or siding by Her said Majesty the Queen, as aforesaid, the remaining portions of the said three lots of land

1898

DRURY v. THE QUEEN.

Reasons for Judgment.

of your suppliant have been injuriously affected and thereby a claim for damages has accrued to your suppliant."

These allegations were established by the evidence

March 1st, 1897.

J. D. Hazen Q.C. and *E. P. Raymond* for the suppliant;

H. A. McKeown for the respondent.

THE JUDGE OF THE EXCHEQUER COURT now (March 14th, 1898) delivered judgment.

Apart from the question of interest the sum of one thousand dollars which the respondent has offered to pay in satisfaction of the suppliant's claim for damages in this action, is I think sufficient compensation for the lands taken and for damages. Although it is not so stated in the pleadings, the offer to pay that sum was, I understand, intended to cover interest to the date of the offer to pay. That would in round numbers represent $650 for damages, and $350 for interest, or $550 for damages and $450 for interest, according as to whether interest was calculated from December, 1888, or May, 1884. In neither case, according to my appreciation of the evidence, would the damages be sufficient. I am satisfied that the sum of one thousand dollars, apart from interest, represents very fairly the compensation that should be paid in this case. There are higher estimates by witnesses whose opinions are entitled to consideration, and there are lower, but that sum seems to me to be fair and reasonable.

As to the interest it is claimed in the petition from June 20th, 1884, but an amendment was allowed by which a claim was made on part of the compensation money from 1876. I am of opinion to allow it from May 1st, 1884, the date when the city gave up posses-

1898

DRURY v. THE QUEEN.

Reasons for Judgment.

sion of the lot of land on which the railway formerly ran. That will give the suppliant one thousand dollars for compensation for the lands taken and for damages to other lands formerly held therewith, and eight hundred and thirty-two dollars and eleven cents for interest to date.

There will be judgment for the suppliant for $1832.11 and for costs.

Judgment accordingly.

Solicitors for the suppliant: *Hazen & Allen.*

Solicitor for the respondent: *H. A. McKeown.*

1898

Dec. 14.

ON APPEAL FROM THE TORONTO ADMIRALTY DISTRICT.

THE SHIP "*PORTER*" (DEFENDANT)...APPELLANT;

AND

ARTHUR HEMINGER (PLAINTIFF).....RESPONDENT.

Collision—Ordinary care—Contributory negligence—Evidence.

Where a ship could with ordinary care, doing the thing that under any circumstances she was bound to do, have avoided the collision, she ought to be held alone to blame for it although the other ship may have been guilty of some breach of the rules, but which did not contribute to the collision.

2. Where the defence of contributory negligence is set up by the defendant in an action for collision, he must show with reasonable clearness not only that the other ship was at fault, but that her fault may have contributed to the collision.

APPEAL from the judgment of Macdougall, Local Judge of the Toronto Admiralty District, reported ante (1).

The facts of the case are stated in the report of the case below.

October 3rd, 1898.

The appeal was now argued.

J. E. O'Connor for the appellant, cited the following cases: The *Benin* (2); The *Gordon* (3); The *Oriental* (4); The *McLeod* (5); The *Oliver* (6); The *Davis* (7); The *Oscar Towsend* (8); *Buzzard* v. *Scow Petrel* (9); The *Granite State* (10); *Cayzer* v. *Carron Company* (11); *Cuba* v. *Macmillan* (12); The *Miramichi* (13); The

(1) P. 154.
(2) L. R. 12 P. D. 58.
(3) 2 Stu. 198.
(4) 2 Stu. 144.
(5) 2 Stu. 140.
(6) 22 Fed. Rep. 848.
(7) 19 Fed. Rep. 836.
(8) 17 Fed. Rep. 93.
(9) 6 MacL. 491.
(10) 3 Wall. 310.
(11) 9 App. Cas. 873.
(12) 26 Can. S. C. R. 638.
(13) 1 Stu. 318.

1898

PORTER v. HEMINGER.

Reasons for Judgment.

Ella B. (1); The *Bywell Castle* (2); *Desty's Admiralty Law* (3); *Marsden on Collisions* (4).

Henry Clay for the respondent, cited the following: The *Pleiades* (5); The *Margaret* (6); The *Duke of Buccleugh* (7); The *Fire Queen* (8); *Owen* v. *Odette* (9); The *City of Antwerp* (10).

THE JUDGE OF THE EXCHEQUER COURT now (December 14th, 1898), delivered judgment.

This is an appeal on behalf of the owners of the ship *Porter* against a judgment pronounced on the 14th day of July, 1898, by the learned judge of the Toronto Admiralty District, whereby he maintained the plaintiff's action for damages to the steam tug, the *Fern*, occasioned by the *Porter*, a three masted schooner, coming into collision with the *Fern* on the night of the 2nd of September, 1897. The plaintiff was the owner and master of the *Fern*, which at the time of the collision was lying at anchor in Lake Erie about mid-channel between Colchester Reef and the main shore,—the channel at this place being about two miles and one half wide. She had been engaged for some four months in removing the cargo and wreck of a sunken schooner, and was at the time anchored over the wreck. The night was clear and fine, with a light breeze from the northeast, or as some of the witnesses say, from the north northeast. The *Porter's* course at the time of the collision was west northwest, and she was making about four miles an hour. Her lights were lit and burning brightly. The *Fern* was lying with her head to the wind and across the *Porter's* course. Whether she was at the time carrying an

(1) 19 Fed. Rep. 792.
(2) L. R. 4 P. D. 216.
(3) P. 381.
(4) 3rd Ed. 497.
(5) [1891] App. Cas. 259.
(6) 8 P. D. 128; 9 P. D. 47.
(7) L. R. 15 P. D. 85.
(8) L. R. 12 P. D. 147.
(9) Cass. Dig. p. 519.
(10) L. R. 2 P. C. 25.

1898

PORTER v. HEMINGER.

Reasons for Judgment.

anchor light is a question in dispute. On the conflicting testimony presented by the case the learned judge has found "that on the night in question at the "time of the collision the *Fern* was carrying a regula- "tion white light upon the top of her pilot house "which would be about nine feet above her hull "where it could best be seen, and where it could "clearly be seen by the *Porter* if a proper look-out had "been kept on that vessel;" and that "it was visible "on the night in question for more than a mile." This finding I accept in the main as justified by the evidence. The light according to the regulation then in force should have been carried forward. It was as a matter of fact carried on the pilot house a few feet aft of midships; and I see no reason to believe that it would be better seen when so set or carried than it would have been had it been carried in the position prescribed by the regulation. But I agree that the *Porter* has nothing to complain of in that respect. The fact that the light was carried on the pilot house and not forward did not in any way occasion or contribute to the collision. To a vessel approaching the *Fern* on the course the *Porter* was steering the light was as distinctly visible where it was placed as though the regulation had been in terms complied with, and it is obvious that the persons in charge of the *Porter* could not have been misled as to the position of the *Fern* by a light which they failed to see. The contravention of the statutory rule will not prevent the plaintiff from succeeding in his action if otherwise he is entitled to succeed, unless it occasioned or contributed to the collision. The Act respecting the navigation of Canadian waters (R. S. C. c. 79, s. 5, re-enacting 43 Vict. c. 29, s. 6) follows in this respect the Act of the United Kingdon, 25th & 26th Victoria, c. 63, s. 29, and not the later Act, 36th and 37th Victoria, c. 85, s. 17, the

1898

PORTER v. HEMINGER.

Reasons for Judgment.

provisions of which are now in substance to be found in *The Merchant Shipping Act*, 1894, s. 419. So that the question that arises under the Canadian statute is as the question under the earlier English Act was, whether or not the non-observance of the rule occasioned or contributed to the collision; and in the present case, as I have said, it seems to be clear that it did not.

Perhaps it is unnecessary, but I should like to add something to guard against being understood to hold the view that it is immaterial whether that part of the rule that requires a vessel of the size of the *Fern* to carry her anchor light forward is infringed or not. It may or may not be material according to the circumstances of the case, and the person who contravenes the rule takes the risk of it being found to be material. There has been a change in the rule which indicates that some importance should be attached to the position in which in this respect the light should be carried. By the 11th article of the regulations approved by His Excellency in Council on the 9th of February, 1897, and which came into force on the first day of July, 1897, it is provided that a vessel under 150 feet in length when at anchor shall carry forward where it can best be seen, but at a height not exceeding 20 feet above the hull a white light in a lantern so constructed as to show a clear uniform and unbroken light visible all round the horizon at a distance of at least a mile; and that a vessel of 150 feet or upwards in length, when at anchor shall carry in the forward part of the vessel at a height of not less than 20 feet, and not exceeding 40 feet above the hull, one such light, and at or near the stern of the vessel, and at such a height that it shall not be less than 15 feet lower than the forward light, another such light. The regulations in which this provision occurs are in

1898

PORTER v. HEMINGER.

Reasons for Judgment.

conformity with the regulations for preventing collisions at sea approved by Her Majesty in Council on the 27th of November, 1896, and which also came into force on the 1st of July, 1897. By the 8th article of the regulations in force in Canada prior to that date it was provided that a ship, whether a steam-ship or a sailing ship, when at anchor, should carry, where it could best be seen, but at a height not exceeding twenty feet above the hull, a white light in a globular lantern of not less than eight inches in diameter and so constructed as to show a clear uniform and unbroken light visible all around the horizon at a distance of at least one mile (1). The later article omits the requirement about the shape and size of the lantern, but provides that a vessel under 150 feet in length shall carry her light not as provided in the earlier article where "it can best be seen," but "forward where it can best be seen," and that a larger vessel must carry two lights in the manner provided in the regulation; and it is obvious that a case might arise in which the position in which the light was carried might be very material. In the present case I think it was not material.

For the *Porter* it is also contended that the *Fern* was to blame for not having an anchor watch at the time of the collision, and that if both vessels are found to be in fault the damage should be divided according to the rule that prevails in Admiralty in such cases. There is no dispute as to what happened. Up to about half an hour before the collision the watch on board the *Fern* was on deck. He saw the *Porter* when she was two or three miles away, her port light being then visible, and he concluded that she was going clear of the *Fern*. Then he went below to get something to eat and remained there until the collision. The *Fern* being anchored in

(1) R. S. C. c. 79, s. 2, Art. 8.

a place near which vessels were constantly passing, it was her duty to keep a competent person on watch. (1).

In the case of the *Meanatchy* it is said that their "Lordships entertain no doubt that in the case of a "vessel at anchor there is an obligation to keep a com- "petent person on watch; and that it is his duty not "only to see that the anchor light or lights are pro- "perly exhibited but also to do everything in his power "to avert or to minimize a collision. Many such things "may no doubt be done, and it is necessary also to be "prepared to summon aid for any needful purpose" (2). In the present case the person whose duty it was to keep the watch left his post and neglected his duty, and if it were reasonably clear that his absence continuing as it did up to the time of the collision may have contributed thereto, then I should think that the *Fern* as well as the *Porter* ought to be held to be in fault. That the absence of the anchor-watch did not actively contribute to the collision is of course clear, and it is not suggested that if he had remained on deck he could have done anything to avert it or to minimize its effect, by changing the position of the *Fern*. What is suggested is that when he saw that a collision was imminent he could have rung the tug's bell or shouted, and in that, or some such, way have attempted to attract the attention of those on board the *Porter* to the position of the *Fern* and to their own carelessness in not noticing her anchor light. A number of witnesses have said that he ought to have done that, and I have no doubt that it was his duty; but no witness has said or has been asked to say that in his opinion such a warning would probably have been effectual to

(1) The *Miramichi*, 1 Stuart 237; The *Masters and Raynor*, 1 Brown Ad. 342; The *Clara*, 102 U. S. 200; The *Rigaud*, 11 Q. L. R. 382; The *Guyandotte*, 39 Fed. Rep. 575; The *Meanatchy*, [1897] App. Cas. 351.

(2) [1897] A. C. 356.

1898

PORTER v. HEMINGER.

Reasons for Judgment.

avert the collision. The wind at the time was blowing across the *Porter's* course and not in her direction, and it appears that she was slow to answer her helm. To be of any use the warning should have been given when she was at a considerable distance from the *Fern*; and whether it would likely have been effectual or not is left to conjecture. This defence of contributory negligence is set up by the owners of the *Porter*, and it is for them to make out their case, and to show with reasonable clearness not only that the *Fern* was at fault, but that her fault may have contributed to the collision. On the whole I think that they have failed to make out such a case.

The *Fern's* light was exhibited where it could have been seen by the look-out of the *Porter*, if he had been attentive. He ought to have seen it, and if he had, the collision could have easily been avoided by the *Porter* whether an anchor watch was kept on the *Fern* or not. The *Porter* was the moving vessel and it was her clear duty to keep a good look out and to avoid the anchored vessel. And though the latter was in fault in that a sufficient watch was not kept, the *Porter* could with ordinary care, doing the thing that under any circumstances she was bound to do, have avoided the collision and ought I think to be held alone to blame (1).

The appeal will be dismissed and with costs.

Judgment accordingly.

Solicitor for appellant: *J. E. O'Connor.*

Solicitor for respondent: *H. Clay.*

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(1) The *Margaret*, 9 App. Cas. 873.

THE QUEEN ON THE INFORMATION OF THE ATTORNEY-GENERAL FOR THE DOMINION OF CANADA.... ..... PLAINTIFF;

1899
Jan. 16.

AND

ARCHIBALD STEWART AND OTHERS..DEFENDANTS.

Expropriation—Filing new plan—Information—Crown's right to discontinue—Costs—Fiat.

Where issue has been joined and the trial fixed in an expropriation proceeding, the Crown maytobtain an order to discontinue upon payment of defendants' costs; but the court will not require the Crown to give an undertaking for a *fiat* to issue upon any petition of right which the defendant may subsequently present.

MOTION to amend the information in an expropriation proceeding, or, in the alternative, to discontinue the action.

The facts upon which the motion was based appear in the reasons for judgment.

January 10th, 1899.

S. H. Blake Q.C. and *H. W. Lawlor* in support of motion;

M. O'Gara Q.C. and *B. B. Osler Q.C.* contra.

THE JUDGE OF THE EXCHEQUER COURT now (January 16th, 1899) delivered judgment.

The affidavits by which the motion to amend the pleadings herein is supported and opposed disclose an important issue of fact which must be disposed of before the respective rights of the parties can be determined, and that question, stated briefly and in substance, is, it seems to me, this:

Do the plan and description of the lands taken deposited of record in the office of the Registrar of Deeds for the County of Russell, on the 27th day of

1899

STEWART. v. THE QUEEN

Reasons for Judgment.

December, 1898, describe and show the lands which the Minister of Railways intended in January, 1898, to take, and which but for some omission, misstatement or erroneous description in the plan and description deposited on the 13th day of January, 1898, he would have taken ?

On the proper answer to that question, which no doubt might be stated in other terms, but to the same effect, depends, it seems to me, the further question, which is one of law, whether the deposit of the corrected plan and description is within the statute and therefore valid ?

The question of fact indicated is not one which I ought in my opinion to determine either way on this application. It will, I have no doubt, constitute one of the main issues between the parties in whatever form the present controversy is continued, and one can readily see that it may be necessary to have more evidence than is now before the court, before it can be properly determined. I do not wish to say more than that. I do not care to discuss the facts now.

But while I ought not, I think, to find on the question of fact at this stage of the proceeding, I ought to afford the Crown an opportunity to raise the question by an amendment made on proper terms, if that may be done without prejudice to the defendants.

As to the proposed amendment I am unable to allow it. It seems to me that it would if made greatly prejudice and embarrass the defendants, not so much for what is added, as for what is struck out. It strikes out of the information the allegations that show what was done in reference to the deposit of the plan and description on the 13th of January, 1898. I should not—I say it subject to argument, however—see the same difficulty if the information as filed were allowed to stand, and an amendment were made by an addition

1899

THE QUEEN v. STEWART.

Reasons for Judgment.

thereto that would show that since the filing thereof Her Majesty's Attorney-General for Canada had learned that the lands referred to therein had been erroneously described, and that the proceedings represented by the deposit of the corrected plan and description were taken; and with such other allegations and conclusions as might be necessary fairly to raise the issue between the parties. That is the only amendment that I should feel justified in allowing, and that of course upon terms as to costs, and as to affording the defendants an opportunity to answer.

If that should not be satisfactory I should be brought to the question of discontinuance, which I should allow upon payment to the defendants of their costs. I should not impose any terms as to the granting of a fiat. That would not, it seems to me, be fitting or proper.

Order accordingly.

1899
Jan. 16.

ON APPEAL FROM THE NOVA SCOTIA ADMIRALTY DISTRICT.

THE INCHMAREE STEAMSHIP COMPANY, LIMITED, (APPELLANTS) } PLAINTIFFS;

AND

THE STEAMSHIP "ASTRID," (RESPONDENT) ..... } DEFENDANT.

Maritime law—Collision—Burden of proof—Findings of Trial Judge—Appeal.

In this case there was a conflict of testimony on two questions of fact material to the decision of the case, both of which were found by the Local Judge in Admiralty in favour of the defendants; the burden of proof being in each case upon the plaintiffs, and there being evidence to support the findings, the court on appeal declined to interfere with the same.

APPEAL from a judgment of the Local Judge of the Nova Scotia Admiralty District (1).

November 25th, 1898.

R. C. Weldon, for the appellants, cited *Marsden on Collisions* (2); *The Franconia* (3); *The Main* (4); *Cuba* v. *McMillan* (5); *The Ceto* (6); *The Jesmond* (7).

A. Drysdale, Q.C., for the respondent, relied on *Bland* v. *Ross* (8); *The Picton* (9); *The Sisters* (10); *The Assyrian* (11); *The Seton* (12); *The Molière* (13); *The Imbro* (14); *The City of London* (15).

(1) Reported, ante, p. 178.
(2) P. 506.
(3) 2 P. D. 12.
(4) 11 P. D. at p. 139.
(5) 26 Can. S. C. R. 656.
(6) 14 App. Cas. 696.
(7) L. R. 4 P. C. 1.
(8) 14 Moo. P. C. 210.
(9) 4 Can. S. C. R. 648.
(10) 3 Asp. M. L. C. N. S. 122.
(11) 6 Asp. M. L. C. 525.
(12) 9 P. D. 1.
(13) [1893] P. D. 217.
(14) 14 P. D. 73.
(15) Swab. at pp. 248, 302.

1899

THE INCHMAREE STEAMSHIP COMPANY v. THE STEAMSHIP ASTRID.

Reasons for Judgment.

Mr. Weldon, in reply, cited: *The Jesmond* (1); *Wilson* v. *Currie* (2); *The Khedive* (3); *The Ceto* (4).

THE JUDGE OF THE EXCHEQUER COURT now (January 16th, 1899) delivered judgment.

This is an appeal from a decree pronounced, on the 3rd day of November last, by the learned Judge for the Admiralty District of Nova Scotia dismissing the action of the plaintiff company for damages sustained by the steamship *Inchmaree*, in a collision with the steamship *Astrid*, and condemning the plaintiff company in costs. The learned Judge was assisted by Captain W. H. Smith, R.N.R., as nautical assessor.

The case presents two principal questions of fact, both of which have been found in favour of the defendants:

First, whether at the time when the two ships came into such relation to each other that each could ascertain the position and course of the other, the *Inchmaree* was in the position of an overtaking ship or not; and, secondly, whether, when the collision was imminent, the *Astrid*, as stated by her master, second officer and helmsman, kept her course at full speed, or whether, as stated by the master and third officer, corroborated by the helmsman of the *Inchmaree*, the *Astrid* altered her course by porting her helm so that she crossed the bow of the *Inchmaree*, thereby defeating an attempt which, by porting her helm and reversing her engines, the *Inchmaree* had made to keep clear of the *Astrid*.

The learned Judge had to decide the case upon evidence taken under commission, none of the witnesses having been examined before him.

With reference to the second of the two questions mentioned, he rested his finding upon the absence of preponderating evidence in favour of the plaintiff.

(1) L. R. 4 P. C. 1.
(2) [1894] A. C. 116.
(3) 5 App. Cas. 876.
(4) 14 App. Cas. at p. 679.

1899

THE INCHMAREE STEAMSHIP COMPANY v. THE STEAMSHIP ASTRID.

Reasons for Judgment.

The conflict of testimony was irreconcilable, the manœuvre attributed to the *Astrid* by the officers of the *Inchmaree* was so extraordinary that it could only be accounted for by supposing that some mistake had been made in giving the order, or in understanding the purport of an order given, and the burden of proof of making out that such a manœuvre was adopted was on the plaintiffs. Under the circumstances the learned Judge thought he ought to find for the defendants, and it seemed to me that he was right.

Then in regard to the question as to whether or not the *Inchmaree* was an overtaking vessel, the definition of what constitutes an overtaking vessel as given by the learned judge on the authority of Lord Esher in the *Franconia* case (1) is admitted to be correct; and the only question is one of fact as to what the courses and bearings of the two ships were at the time when they each could make out the position of the other. Now, in regard to this I am asked by Dr. Weldon, the learned counsel for the plaintiff company, to assume that from nine o'clock of the morning of the collision to twelve o'clock, the two ships being then in sight of each other, the *Inchmaree* steered continuously and uniformly a course of south sixty-eight degrees west true, and that the *Astrid* steered uniformly and without variation a course of west eight degrees north true, making the angle of their converging courses thirty degrees, that the speed of each was such that a collison would take place at twelve noon if there was no alteration in the course or speed of either ship and that the same rate of speed was uniformly maintained by each vessel, and that on these hypotheses I should test the statements made by the witnesses of the respective parties and

(1) L. R. 2 P. D. 8.

1899

THE INCHMAREE STEAMSHIP COMPANY v. THE STEAMSHIP ASTRID.

Reasons for Judgment.

say whether the bearing of the *Astrid* as given by the officers of the *Inchmaree* or that given by the officers of the *Astrid* as to the bearing of the *Inchmaree* from the *Astrid* is more consistent with such hypotheses. Now I have been at some pains to do that with the result that I have not been able to harmonize the evidence of either of the parties with the hypotheses upon which I am asked to act, and that I am afraid to rely with any confidence upon the proposed test. To take an instance from the evidence of each of the parties; the third officer of the *Inchmaree* says that about nine o'clock the *Astrid* was one point before the *Inchmaree's* port beam. The master of the *Inchmaree* gives the same bearing for the *Astrid* at ten o'clock. If that were true, and the angle of their converging courses was thirty degrees, the *Astrid* would have the greater distance to travel to come into collision with the *Inchmaree* and her rate of speed would have to be greater, which seems to be contrary to the admitted facts. Taking, on the other hand, the bearing of the *Inchmaree* from the *Astrid* at nine o'clock as given by the master and second officer of the *Astrid* to be between two and three points abaft the starboard beam of the *Astrid* and taking that to mean, say, two and a half points, and testing the matter by the hypotheses suggested, the rate of speed of the *Astrid* being six and a half knots an hour, we would find that the *Inchmaree* would at nine o'clock have nearly thirty-two miles to make to the point of collision, and that she would then be distant from the *Astrid* about eighteen miles, and these are conclusions that cannot be easily reconciled with all the evidence. So after all it seems to me that the question must be settled by reference to what the witnesses say as to the bearing of the two vessels from each other. The learned judge has, with the concurrence of the nautical assessor, found that the *Inchmaree* was an

1899

THE INCHMAREE STEAMSHIP COMPANY v. THE STEAMSHIP ASTRID.

Reasons for Judgment.

overtaking vessel, and in consequence bound, under the rule, to keep out of the *Astrid's* way. There is ample evidence, if it is believed, to support that view, and his finding ought, it seems to me, to be sustained on this appeal.

The appeal will be dismissed, and with costs.

Judgment accordingly.

Solicitor for appellant: *W. A, Henry.*

Solicitor for respondent: *Drysdale & McInnes.*

THE AMERICAN DUNLOP TIRE COMPANY..... } PLAINTIFFS;

AND

THE GOOLD BICYCLE COMPANY, (LIMITED), THE BRANTFORD BICYCLE SUPPLY COMPANY, (LIMITED), EDWARD L. GOOLD, WILLIAM JAMES KNOWLES, AND W. H. SHAPLEY..... } DEFENDANTS.

1899
Jan. 16.

Patent for invention—Infringement—Pioneer discovery—Evidence.

Where one who says he is the inventor of anything has had an opportunity to hear of it from other sources, and especially where delay has occurred on his part in patenting his invention, his claim that he is a true inventor ought to be carefully weighed.

ACTION for infringement of a patent for invention.

The facts of the case are stated in the judgment.

October 20th to 24th.

Z. A. Lash, Q.C.; *W. Cassels, Q.C.*; and *A. W. Anglin* for the plaintiffs, cited *Pneumatic Tire Company* v. *East London Rubber Company* (1); *Pneumatic Tire Company* v. *West London Tire Company* (2); *Thompson* v. *Moore* (3).

B. B. Osler, Q.C., *J. Ridout*, and *J. Ross* for the defendants, cite *Erie Rubber Company* v. *American Dunlop Tire Company* (4); *Aitcheson* v. *Mann* (5); *Ridout on Patents*, nos. 146, 276; *Maxwell on Statutes*, p. 218; *Gaylor* v. *Wilder* (6); *Perkins* v. *Nashua Company* (7); *Smith* v. *Goldie* (8); *Nordenfeldt* v. *Gard-*

(1) 14 Cutl. Pat. Cas. 573.
(2) 15 Cutl. Pat. Cas. 129.
(3) 6 Cutl. P. C. 626; 7 Cutl. Pat. Cas. 325.
(4) 74 U. S. Off. Gaz. of Patents 1443.
(5) 9 Ont. P. R. 253.
(6) 10 How. 477.
(7) 2 Fed. Rep. 451.
(8) 9 Can. S. C. R. 46.

1899

THE AMERICAN DUNLOP TIRE CO. v. GOOLD.

Reasons for Judgment.

ner (1); *Holste* v. *Robertson* (2); *Clark Thread Company* v. *Wilimantic Linen Company* (3); *Walker on Patents*, (4); *American Roll Paper Company* v. *Weston* (5); *Consolidated Fruit Jar Company* v. *Wright* (6); *Ellithorpe* v. *Robertson* (7).

Mr. Cassels replied.

THE JUDGE OF THE EXCHEQUER COURT now (January 16th, 1899), delivered judgment.

The plaintiff company brings this action against the defendants for an injunction to restrain them from infringing Letters Patent numbered 38284; granted on the 15th day of February, 1892, to Thomas Fane and Charles F. Lavender, for improvements in tires for bicycles, and for damages for the infringement of such letters-patent. The plaintiffs, to whom the letters patent have been assigned, rely upon the first claim in the specification attached thereto, by which the patentees claimed as new:—

A pneumatic tire consisting of an outer tube having an endless wire along each edge thereof. An air tube partially enclosed by the outer tube provided with the usual means of inflation, and a rim the sides of which are so formed as to grip the wired edges of the outer tube, and securely hold all parts in place when the air tube is inflated to its fullest capacity, substantially as set forth.

The defences set up are: (1) that what is here claimed as new was anticipated by an English patent, numbered 14563, granted to Charles Kingston Welch, for an improvement in rubber tires and metal rims or felloes of wheels for cycles and other light vehicles; and (2) that the defendants have not infringed.

Welch's provisional specification is dated on the 15th of September, 1890. His application was made

(1) 1 Cutl. Pat. Cas. 61.
(2) 4 Ch. D. 9.
(3) 140 U. S. 481.
(4) (3 ed.) sec. 55, 61.
(5) 45 Fed. Rep. 691.
(6) 94 U. S. 96.
(7) 2 Fish. Pat. Cas. 83.

on the 16th of the same month. His complete specification was presented on the 16th of June, 1891, was accepted on the 25th of July of that year, and was published in England about the 19th of August, 1891. Figure 15 of the sheet of drawings accompanying the complete specification shows a cross-section of a tire identical practically with that described in Fane and Lavender's specification and shown in Figure 1 of the tracing attached thereto. This tracing is dated of the 2nd of November, 1891, and the specification of the third day of the same month, and it is conceded that the Fane and Lavender patent must be defeated unless it can be shown that the improvement covered thereby was invented prior to the publication of the Welch patent. The plaintiffs, to meet that view of the case, allege that the improvement was discovered by Fane and Lavender as early as August, 1890. If that can be made out the validity of the patent is, in respect of the matter now in discussion, established; and the burden of making it out is, as Mr. Osler contended, on the plaintiffs.

This issue of fact was first raised in this court in the case of *The Queen* v. *Fane and Lavender*, in which the present plaintiffs sought to have the patent in question set aside. This case came on for trial in October, 1893, and was settled by the parties, the plaintiffs paying Fane and Lavender eleven thousand dollars, and taking an assignment of the patent. The same issue of fact was in 1896 raised in the case of the *American Dunlop Tire Co.* v. *The Anderson Tire Co.*, (1) a large part of the evidence taken in which has, by consent, been read as evidence in this case. The witnesses who testify to the invention having been made in the summer of 1890, as early at least as the last of August of that year, are Fane and Lavender, the patentees, Horace Pease, who at that

(1) 5 Ex. C. R. 194.

1899

THE AMERICAN DUNLOP TIRE CO. v. GOOLD.

Reasons for Judgment.

time had charge of their business at Buffalo, New York, and Mrs. Fane. Fane and Lavender describe how in July or August of 1890 Lavender was experimenting with pneumatic tires, the experiments being made in the shop or factory in the evening, and directed in the first instance to attaching an outer covering to a crescent shaped rim by an annular plate; and how in the course of such experiments they found that by putting wires in the edges of the outer covering, so as to make the edges inextensible, the outer covering would, when the inner tube was inflated, remain in position without any such plate. And they say that they made two rims with pneumatic tires attached in this way, and put them in a frame and rode them a few times to satisfy themselves that they were all right. The rims, or at least one of them, said to have been used for these experiments were produced at the trial in 1893, and were afterwards returned to Fane and Lavender and disposed of with other scrap. They were not produced at the trial in 1896. The tires had, it was said, been destroyed some nine or fourteen months after they were made, and were not produced at the first trial. Until destroyed the tires and rims were kept in the enamelling room in their workshop or factory covered with some old sacks or material of that kind. The reason given by Fane and Lavender for the delay in applying for a patent for their invention in 1890, is that the opinion of two of the English correspondents, Harry James and William Smith, of Birmingham, was adverse to the pneumatic tire, and that they did not care then to incur the expense. James' letter dated August 28th, 1890, and Smith's letter dated September 16th, 1890, are produced. In the summer of 1891 Fane went to England and was there, it would appear, at the time when the Welch specifications were published. He left Canada in

1899

THE AMERICAN DUNLOP TIRE CO. v. GOOLD.

Reasons for Judgment.

July and returned on the 19th of September. In November following, as has been seen, he and Lavender applied for a patent, and they then and subsequently took steps to manufacture bicycles according to the improvement described in their specification, and to which reference has been made. Then as to corroboration, Horace Pease says that after a bicycle meet at Niagara Falls, which he says was held about the 19th or 20th of August, Fane and Miss Creed (afterwards Mrs Fane) came to their place of business at Buffalo, and that Fane then told him of their discovery and made for him two sketches on the back of a receipted account showing the improvement now in question, and also the mode of attaching the outer cover to the rim by an annular plate or bend. Fane says the meet was towards the end of August and that his conversation with Pease, and the drawing of the sketches, took place on the 27th or 28th of August, 1890. The account which is produced bears date of the 25th of August, 1890. Mrs. Fane recalls the occasion though she cannot fix the date, and she identifies the sketches then made. Pease also says that in the latter part of September, or the first of October, of the same year he went to the Toronto Bicycle Club's Race Meet, and while at Toronto, in the enamelling room in Fane and Lavender's factory, he saw the tire and rim that Fane and Lavender had made; that it was at the time deflated and that he pushed the cover to one side and could see that there were endless wires.

In the *Anderson case* I found the issues raised by the defences for want of novelty and anticipation in favour of the plaintiffs. In the present case there is evidence which was not before me in that case, and which it is contended should lead me to a different conclusion. The object of this additional evidence is to show that as to some of the statements Fane and Lavender are

1899

THE AMERICAN DUNLOP TIRE CO. v. GOOLD.

Reasons for Judgment.

manifestly in error, that the experiments that they say they made in 1890 were really made in 1891, and that there was in short a conspiracy between Fane, Lavender and Pease to fabricate the evidence by which in 1893 they sought in the first case to support their patent. The only direct evidence of any such conspiracy is that of Henry W. Birch whose testimony as to that is not, I think, worthy of belief. Neither am I able to give credit to his evidence in other particulars in which it is in conflict with that of Fane or Lavender or Pease. As to the other witnesses who speak of the experiments being made by Lavender in 1891, I do not doubt that he was making experiments then, and what they say may be true, and yet it may also be true that he made the experiments in July or August, 1890, that he and Fane testify to. Then some of the witnesses with more or less opportunity for observation say that they did not see in the enamelling room of the factory any tires such as Fane and Lavender speak of. But that does not prove that the tires were not there, though it is, I think, clear that they could not have been there during a period of nine to fourteen months, as stated by Fane and Lavender. There are some other discrepancies in their evidence to which I need not refer in particular. These and the delay in applying for the patent to a date subsequent to the publication of the Welch patent throw a measure of doubt on the story by which it is sought to supplant the impeached patent. That delay is however accounted for, and I think in a reasonable and satisfactory way. Then, having regard to the state of the art, there is nothing in itself improbable in the story that the improvement mentioned was discovered in 1890. There is nothing improbable in the statement that a man of Lavender's skill, experience and bent of mind should make the discovery; nothing it seems to me in itself more improbable than that Welch, in Eng-

land, or Brown and Stillman, in the United States, should in the same year, or early in the next, hit upon the same device. Of course, where one who says that he is the inventor of anything has had an opportunity to hear of it from other sources, and especially where there has been delay such as has occurred here, his claim that he is a true inventor and not a pirate, ought to be carefully weighed; but after all it is a question of evidence, and the credit under all the circumstances ought to be given to the witnesses by which the claim is supported. In this case it depends upon the credit to be given to the testimony of the four witnesses, Fane, Lavender, Pease and Mrs. Fane. If, in the main, credit is to be given to their evidence the impeached patent stands, if not it falls. And as to that it is clear of course that the story they tell is, in the main, correct, or else it is fabricated for the purpose of supporting the patent when first attacked. Now, as to that, I do not think that it is fabricated. I have had the opportunity on more occasions than one of watching very closely the demeanour of these witnesses when giving their evidence on the question now in issue, and whatever discrepancies there may be in their evidence—and no doubt there are some—and whatever comment it may be open to—and there is no doubt it is open to some comment—they have appeared to me desirous of telling the truth as far as they knew it. There was nothing in the demeanour of either of them, or in the manner in which they gave their evidence, to lead me to the conclusion that either of them was wilfully giving false testimony. I accept the evidence of Fane, Pease and Mrs. Fane, of what took place in the office at Buffalo as substantially true, and I attach great importance thereto. I do not understand it to be suggested that Mrs. Fane is telling what she knows to be untrue. If she is not, then some

1899

THE AMERICAN DUNLOP TIRE CO. v. GOOLD.

Reasons for Judgment.

sketches of tires were made on that occasion to which she and Fane and Pease testify. She identifies those that are produced on the back of the account of August 25th, 1890; and is it not more probable that these are the sketches then made than that those made were lost or destroyed, and the sketches now produced made by Fane or Pease on a paper carefully selected by them for the purpose of the trial of 1893. Such a thing is of course possible, and sketches having been made it would be possible for Mrs. Fane to be deceived or mistaken as to those now produced; but I see no good reason to believe that such a fabrication of evidence has taken place. If then we have the sketches that Fane made on that occasion it is clear that he then had a very distinct conception of the invention for which he and Lavender subsequently obtained a patent. Having got that far it is not difficult to believe that he acquired his knowledge from the experiments that he and Lavender say they made in the early part of that month, that is of August, 1890, or in the latter part of July of that year.

On this branch of the case I find that Fane and Lavender were inventors of the improvement in tires for bicycles mentioned in the first claim of the specification attached to Letters Patent numbered 38284, issued to them on the 15th of February, 1892; that such improvement was not, within the meaning of the 7th section of *The Patent Act*, known or used by any other person before their invention thereof, and that the letters patent issued to them therefor are good and valid.

That brings us to the question of infringement, in dealing with which it is necessary to come to some conclusion as to what the invention or discovery was for which the patent issued, and whether it is to be given a broad or narrow construction. The Welch

1899

THE AMERICAN DUNLOP TIRE CO. v. GOOLD.

Reasons for Judgment.

patent has in England, in the cases on which the plaintiffs rely, been given a wide construction (*Pneumatic Tire Co.* v. *The East London Rubber Co.* (1), and *Pneumatic Tire Co. Ltd.* v. *The West London Rubber and Tire Co Ltd.* (2)); while a similar patent granted in the United States to Brown and Stillman has in the case of the *Erie Rubber Co.* v. *The American Dunlop Tire Co.* (3), been given a much narrower construction and limited to a combination in which the improved tire is attached to rims provided with annular recesses, or some equivalent therefor. The particular point in controversy here is whether or not a like limitation is to be put upon the Fane and Lavender patent, or whether so far as the first and more general claim of the specification is concerned, it is open to a construction which would include the use of the improved tire upon any rim to which it was found to be adapted. In the *Anderson* case, to which reference has already been made, I had to construe the claim of the specification now in question, and I there came to the conclusion that it was not to be limited to a combination in which rims with annular recesses were used. It seemed to me that, having regard to the state of the art at the time, the substance of the improvement in tires for bicycles that Fane and Lavender discovered was that by using an outer covering, the edges of which were made inextensible by wires, and of a diameter less than the diameter of the outer edges of a crescent shaped rim, the tire, when the inner tube was inflated, would be securely held to the rim; and that they were entitled to a patent for their discovery irrespective of the form of the rim to which it might to found to be adapted. That far my view has, I think, been supported by the

(1) 14 Cutl. Pat. Cases, 77 and 573. (2) 15 Cutl. Pat. Cases, 129.
(3) 74 U. S. Off. Gaz. of Patents, 1443.

1899

THE AMERICAN DUNLOP TIRE CO. v. GOOLD.

Reasons for Judgment.

English cases to which reference has been made. The more doubtful question is as to whether or not Fane and Lavender applied for and were given a patent for all that they were entitled to. That depends upon the construction of the specification, and the question is, I think, not free from difficulty. The second and third claims made in the specification are in terms limited to combinations in which rims having annular recesses are used. The first claim which has already been quoted is in more general terms and open to a wider construction, unless the concluding words "substantially as set forth" are to be read as involving a like limitation. These words refer to the preceding description of the improvement, in which and in the figures shown in the tracing attached thereto are mentioned and shown rims with annular recesses and, with reference to the claim now in question, no other form of rim. But notwithstanding that it seems to me that in a case of this kind where there is great novelty and merit in the discovery the claim is not to be limited to the form of rim described unless that is essential; and that the description must be taken to include not only the form of rim described and shown, but any form of rim to which the actual discovery may be adapted; that is, in short, that where the mode or manner of attaching the outer covering to the rim is essentially and in substance the same as that invented and described, then such mode or manner is in the concluding words of the claim "substantially as set forth." Is a rim with annular recesses, or some equivalent therefor, an essential feature of the invention? That it affords the best and most convenient form of rim for the class of tire in question appears to be clear, and there is some evidence, including that of the inventors, which goes to show that such a rim is essential. It seems to me, however, that the better view is that the annular

1899

THE AMERICAN DUNLOP TIRE CO. v. GOOLD.

Reasons for Judgment.

recesses are not an essential. As to that I agree with Dr. Benjamin, whose opinion has the support of successful experiments made with rims in which there were no such recesses, nor any equivalent therefor.

Then further as to the infringement, it is necessary to see what the defendants have done. In the first place they made a few wheels in which through the edges of the outer covering of the tire was placed a coil of wire "consisting of a plurality of convolutions." The ends of the coil were not joined together or fastened to the rim, but were held in place by friction and the pressure of the inner tube when inflated. Only a few of these were made, and the plaintiffs have for that reason not pressed that part of the case. Then they adopted another mode of attaching the covering to the rim. They put a wire through the edges of the cover, the wire having two convolutions. The cover was then placed on the rim and the ends of the wire drawn together and fastened with a cord. Then the inner tube was inflated and the tire held in place in the same manner substantially as that described in the Fane and Lavender patent. This mode of attaching the tire to the rim was not however found to work well, and the defendants adopted another plan, which consisted in turning a short piece at each end of the wire so as to form hooks, which after the outer covering was placed on the rim and the wires drawn up tightly were inserted in holes made in the rim to receive them. First one turned end of the wire or hook was placed in the hole made for it in the rim, then the wire was drawn up by hand as tightly as possible and the other turned end or hook inserted in the hole in the rim provided for it. In some cases more than two holes were provided so that if anyone in taking off the tire could not draw the wire as tightly as it was at first

1899

THE AMERICAN DUNLOP TIRE CO. v. GOOLD.

Reasons for Judgment.

drawn he would find a second hole ready for use. In general two convolutions of the wire were used, and the ends overlapped each other a few inches. The wires were lubricated so that they could be more tightly drawn together. It was contended for the defendants that an outer covering put on in the manner briefly described was held in place by the wires being in two places actually attached to the rim and by the pressure of the edges of the covering against the rim; that there was no motion or practically no motion of the edges of the cover when the inner tube was inflated, and that the same relative position of cover and rim was maintained throughout; that in fact the cover was clamped to the rim by the wires. That contention cannot, it seems to me, on the evidence submitted, be sustained. It seems clear that there is some motion of the edges of the outer cover under the inflation of the inner tube, and that is practically held on the rim in the same manner as the Dunlop or Fane and Lavender tire is held on. No doubt there are differences In the mode adopted by the defendants the wires are not made inextensible until the cover is placed on the rim. But the moment the ends of the wires are fastened in the holes provided in the rim the wires become inextensible. Not being endless or otherwise inextensible the outer covering is put on and taken off the rim in a manner different from that followed with the Fane and Lavender tire, and the covering may be put on a rim that would not be suitable for such a tire. Of course detachability is one of the things aimed at; one of the advantages of the Fane and Lavender and similar tires. But detachability is useless unless the tire is firmly held in position when in use, and the fact that by making the edges of of the outer cover inextensible and with diameters less than the diameters of the outer edges of the rim the

1899

THE AMERICAN DUNLOP TIRE CO. v. GOOLD.

Reasons for Judgment.

cover will under the inflation of the inner tube remain securely attached to the rim is the leading feature of Fane and Lavender's invention. It is no use, it seems to me, for the defendants to say we put the outer cover on the rim and take it off in a way different from that described by Fane and Lavender's specification if in fact it is when on held in position, as I think it is, in substantially the mode or manner protected by their patent. If I am right in the view I have taken that the latter is not to be limited to a combination of which a rim with annular recesses forms part, I have in this matter of the infringement the support of the decision of Mr. Justice Romer in the *Pneumatic Tyre Co. Ltd.* v. *The West London Rubber and Tyre Co. Ltd.* (1) in which he held that a similar mode of attaching the outer cover to the rim was an infringement of the Welch patent.

Of wheels in which the tires were attached to the rims by fastening the ends of the wires with a cord in the manner described the defendants made over a thousand, and of these in which the device lastly described was used they made a great number. As to both they have, I think, infringed the plaintiffs' patent, and the latter are in my opinion entitled to an injunction and to damages for the infringement. There will be judgment for the plaintiffs with costs, and upon application therefor there will be a reference to take an account of such damages.

Judgment accordingly.

Solicitor for suppliants: *Blake, Lash & Cassels.*

Solicitor for respondents: *John G. Ridout.*

(1) 15 Cutl. Pat. Cas. 129.

1899
March 6.

THE QUEEN ON THE INFORMATION OF THE ATTORNEY-GENERAL FOR THE DOMINION OF CANADA ..... PLAINTIFF;

AND

HENDERSON BLACK, AND HENDERSON BLACK AND MARY JANE BLACK, BENEFICIARY HEIRS OF JOHN BLACK, DECEASED ..... DEFENDANTS.

Postmasters' bond — Validity — Breach — Primary obligation — Release of sureties — Laches of government officials — Estoppel — Effect of — 33 Henry VIII, chap. 39, sec. 79 — Trial — Adjournment — Terms.

In a case arising in the Province of Quebec upon a postmaster's bond, it appeared that the principal and sureties each bound themselves in the penal sum of $1600, and the condition of the obligation was stated to be such that if the principal faithfully discharged the duties of his office and duly accounted for all moneys and property which came into his custody by virtue thereof, the obligation should be void. The bond also contained a provision that it should be a breach thereof if the postmaster committed any offence under the laws governing the administration of his office. It was objected by the sureties against the validity of the bond that it contained no primary obligation, the principal himself being bound in a penal sum, and that the sureties were therefore not bound to anything under the law of the Province of Quebec.

Held; (1) That there was a primary obligation on the part of the principal insomuch as he undertook to faithfully discharge the duties of his office, and to duly account for all moneys and property which might come into his custody. (2.) That as the bond conformed to the provisions of *An Act respecting the security to be given by officers of Canada* (31 Vict. c. 37; 35 Vict. c. 19) and *The Post Office Act*, (38 Vict. c. 7.) it was valid even if it did not conform in every particular to the provisions of Art. 1131, C. C. L. C.

It was also objected that the bond did not cover the defalcations of the postmaster in respect of moneys coming into his hands as agent of the savings bank branch of the Post Office Department: *Held*, that it was part of the duties of the postmaster to receive the savings bank deposits and that the sureties were liable to

make good all the moneys so coming into his custody and not accounted for.

The sureties upon a postmaster's bond are not discharged by the fact that during the time the bond was in force the postmaster was guilty of defalcations, and that such defalcations were not discovered or communicated to the sureties owing to the negligence of the Post Office authorities. Nor is the Crown estopped from recovering from the sureties in such a case by the mistaken statement of one of its officers that the postmaster's accounts were correct, and upon the strength of which the sureties allowed funds of the postmaster to be applied to other purposes than that of indemnifying themselves.

The Crown is not bound by the doctrine of *Phillips* v. *Foxall* (L. R. 7 Q. B. 666) inasmuch as it proceeds upon the theory that failure by the obligee to communicate his knowledge of the principal's wrong-doing amounts to fraud, and fraud cannot be imputed to the Crown.

The statute 33 Hen. VIII c. 39, s. 79, respecting suits upon bonds is not in force in the Province of Quebec.

Where defendants, expecting certain witnesses, whose evidence was material to defence, would be called by the Crown, did not subpœna such witnesses and they were not in court, an adjournment of the hearing was allowed after plaintiff had rested, so that such witnesses might be subpœnaed by the defendants, upon terms that plaintiff have costs of the day, and that the same be paid before the case with on adjournment.

INFORMATION at the suit of the Attorney-General for the Dominion of Canada upon a postmaster's bond.

The facts of the case are stated in the reasons for judgment.

December 14th, 1898.

The case, having been entered for trial by plaintiff, was called this day.

E. L. Newcombe, Q.C. for the plaintiff, produced the bond and rested his case.

J. A. C. Madore, for defendants, said he was taken by surprise: that he had expected the Crown would call certain witnesses, officers of the Government, on whose testimony he was relying, and those witnesses

1899

THE QUEEN v. BLACK.

Argument of Counsel.

not being present in court, he moved for an adjournment until January 10th, 1899.

Mr Newcombe opposed the motion.

Adjournment granted upon terms that plaintiff have costs of the day, and that the same be paid to plaintiff before the case be proceeded with.

January 10th, 1899.

The hearing of the cases was now proceeded with.

E. L. Newcombe, Q.C. (with whom was *F. H. Gisborne*), for the plaintiff;

W. D. Hogg, Q.C. and *J. A. C. Madore*, for the defendants.

Mr. Newcombe contended that even if the facts showed that the post office authorities ought to have known of the defalcations, and ought to have communicated them to the sureties, the latter were not thereby discharged. Even between subject and subject the mere omission by the obligee to make inquiry into the conduct of the principal will not excuse the sureties. (Cites *Shepherd* v. *Beecher* (1). Fraud cannot be imputed to the Crown; nor is the Crown responsible for the laches of its servants in not discovering the postmaster's defalcations.

Mr. Hogg relied upon upon *Phillips* v. *Foxall* (2), and argued that clearly upon the facts of this case the sureties were discharged by the Crown withholding from them knowledge of the postmaster's first act of wrongdoing, and so preventing them from releasing themselves from further liability on their bond. He also cited *Enright* v. *Falvey* (3).

Mr. Madore took the following grounds for the defendants: First, the bond was a nullity, because it

(1) 2 P. Wm. 287.

(2) L. R. 7 Q. B. 666.

(3) 4 L. R. Ir. 397.

1899

THE QUEEN v. BLACK.

Reasons for Judgment.

was neither in conformity with *The Post Office Act*, sec. 49, nor fulfilled the requirements of Art. 1131 C. C. L. C. Secondly, there was no primary obligation in the bond, and it was a mere gaming contract within the meaning of Art. 1927 C. C. L. C. Thirdly, the bond did not cover defalcations in the Savings Bank Branch of the Post Office Department, because it only mentioned the duties of a postmaster. Fourthly, there was no evidence of any defalcations being communicated to the sureties, although they were known to the officers of the Crown.

Mr. Newcombe, in reply, contended that the defendants were liable for the full penalty in the bond. *The Queen* v. *Finlayson* (1); *Phillips* v. *Foxall* proceeds upon the theory that it is fraudulent to withhold from the surety a knowledge of the principal's breach of trust.* Clearly such a doctrine cannot be applied to the Crown. He also cited *United States* v. *Van Zant* (2); *United States* v. *Nicholl* (3); *United States* v. *Boyd* (4).

THE JUDGE OF THE EXCHEQUER COURT now (March 6th, 1899,) delivered judgment.

The information is exhibited to recover from the defendant, Henderson Black, the sum of sixteen hundred dollars, and from the defendants, Henderson Black and Mary Jane Black, beneficiary heirs of John Black, deceased, a like sum of sixteen hundred dollars, for which by a bond dated the ninth day of September, 1882, John Black and Henderson Black, as sureties for one James McPherson, "severally and not jointly

(1) Ante p. 202.
(2) 11 Wheat. 184.
(3) 12 Wheat. 505.
(4) 15 Pet. 187.

*REPORTER'S NOTE: See judgment of Quain, J. at pp. 673, 674 of L. R. 7. Q. B.; and the passage from Story's Commentaries on Equity Jurisprudence there cited.

1899

THE QUEEN v. BLACK.

Reasons for Judgment.

"or each for the other," bound themselves to Her Majesty, her heirs and successors. The bond was given as security to the Crown for the due performance by McPherson of the duties appertaining to the office of postmaster at Saint Johns, in the Province of Quebec; to which office he had then lately been appointed, and which he continued to hold until his death, on the 26th of August, 1896. At the date of his appointment to the office and during the time that he held it, it was one of his duties, as such postmaster, to receive deposits for remittance to the Central Savings Bank established as a branch of the Post Office Department at Ottawa. (38 Vict. c. 7, s. 60; and R. S. C. c. 35, s. 66.) After his death it was discovered that he was in respect of such deposits a defaulter in sums amounting in the aggregate to four thousand two hundred and eighty-eight dollars. The earliest of these defalcations occurred on the 3rd of November, 1890, and the latest on the 9th of July, 1896. There were discovered in all twenty-eight instances in which the whole or part of the deposit had been misappropriated by McPherson, one in the year 1890, four in 1891, eight in 1892, five in 1893, five in 1894, two in 1895, and three in 1896. The system on which the Post Office Savings Banks is carried on is such, that the ordinary inspection of a post office where such deposits are received affords little if any opportunity for the discovery of such defalcations as those referred to. For that the post office authorities depend in general, not on an inspection of the office, but on the vigilance and activity of the depositor, and the direct communication of the latter with the head or central office at Ottawa. On several occasions, however, the ordinary inspection of the post office at Saint John's found McPherson short in his accounts. On the 16th day of February, 1891, he was found to be short in the sum

1899

THE QUEEN v. BLACK.

Reasons for Judgment.

of $539.85, of which one item was a Savings Bank deposit of $100, as to which the inspector had been asked to make a special enquiry. The inspector says that on this occasion he advised the sureties through Henderson Black, who said he would tell his brother John Black. This, Henderson Black denies. On the 30th day of May, 1895, the inspector found McPherson to be short in his cash in the sum of $19.61, including a Savings Bank deposit of $10; on the 6th of November, 1895, in the sum of $298.97, including Savings Bank deposits of $241; and on the 22nd of May, 1896, in the sum of $135.72, including Savings Bank deposits of $42. In all these cases his excuses were accepted, and he was allowed to make good the shortages, and to remain in office. There was also an investigation of the affairs of the office in June, 1894, when the postmaster was found to be short in his accounts, the blame for which appears, however, to have been thrown upon a clerk in his employ. In this case also McPherson made good the amount; and no notice appears to have been given to the sureties. When in August, 1896, McPherson died, Mr. Gervais, a deputy inspector of post offices, was placed in charge of the post office at Saint John's. With the exception of a small sum afterwards deducted from the salary due to the postmaster at his death, the cash and stamps were found to be correct, and the ordinary accounts and affairs of the office satisfactory. This fact was communicated to the defendant, Henderson Black, by Mr. Gervais. The latter did not discover the defalcations now in question. As explained it was not possible by any such inspection as is ordinarily made to discover them. They were not found out until later, when the suspicion of the Superintendent of Post Office Savings Banks at Ottawa having been aroused, all the books of depositors who had made deposits at the Saint John's

1899

THE QUEEN v. BLACK.

Reasons for Judgment.

Post Office were called in. It was then that the number and magnitude of the defalcations became known, and the means that the postmaster had taken to avoid discovery. In the meantime, however, his widow, as his legal representative, had been paid the balance of his salary after deducting the amount by which his cash was short at his death, and also a sum of $1,406.37 on two policies of insurance on her husband's life, and had distributed these amounts and had left Canada. The defendant, Henderson Black, believing that if anything had been wrong with McPherson's accounts the inspectors of the Post Office Department would have found it out, and relying upon Gervais' assurance that everything was all right, took no steps to make the sums mentioned available as a protection against any possible liability on the bond now in suit, as otherwise he might have done. When the defalcations were discovered it was too late for him to do anything.

For the defendants it is argued:

1. That the bond is bad, in that it is not in conformity with Article 1131 of the Civil Code;

2. That even if it is good, it does not cover the misappropriation of Savings Bank deposits;

3. That the postmaster having, without the consent of the sureties, been continued in office after it had been discovered that he had been guilty of dishonesty, the sureties are discharged as to any subsequent losses arising from his dishonesty; and

4. That the sureties are, under the circumstances that have been stated, entitled to relief to the amount of the salary and insurance money paid to and distributed by the postmaster's widow.

These mattersof defence are not all raised by the pleadings as they stand, but if good in law, it would be right on proper terms, to allow any necessary amendment to

1899

THE QUEEN v. BLACK.

Reasons for Judgment.

be made. But before considering these matters it will, I think, be convenient to look for a moment at the provisions of the Acts in force with respect to official bonds at the time the one now in question was given. By 31st Victoria, Chapter 37, section 2, (1) certain public officers were required to give security for the due performance of the trust reposed in them, and for duly accounting for all public money intrusted to them or placed under their control. By the 7th section of the Act (2) it was, among other things, provided that any surety to the Crown for the due accounting for public moneys or for the proper performance of any public duty, by any such public officer, might, when no longer disposed to continue such responsibility, give notice to his principal and to the Secretary of State of Canada, and that all accruing responsibility on the part of the surety should cease at the expiration of three months from the receipt of such notice by the Secretary of State, or on the acceptance by the Crown of the security of another surety, whichever should first happen. By the 12th section of the Act (3) it was further provided that no neglect, omission or irregularity in giving or receiving the bonds or other securities, or in registering the same within the periods or in the manner prescribed by th Act should vacate or make void any such bond or security, or discharge any surety from the obligations thereof. The Act referred to was amended in 1872, by 35th Victoria, chapter 19, intituled "An Act further "to amend an "Act respecting the security to be "given by Officers of Canada."" The latter Act (4) prescribed a form of official bond, and provided that certain words given in column one of the schedule should have the meaning set out at length

(1) R. S. C. c. 19, s. 5.
(2) R. S. C. c. 19, s. 14.
(3) R. S. C. c. 19, s. 19.
(4) R. S. C. c. 19, ss. 6-9.

1899

THE QUEEN v. BLACK.

Reasons for Judgment.

in the second column (s. 2); and among other things that any additions made in the first column should be taken to be made in the corresponding form in the second column (s. 3). In 1882 *The Post Office Act of* 1875 (38 Vict. c. 7) with some amendments not material to the question now under discussion was in force (1). By the 43rd section of that Act, postmasters were required to give bonds with good and approved security for the faithful discharge of their duties; and provision was made whereby a surety could by giving the Postmaster-General notice relieve himself from future liability; and it was also provided that no suit should be instituted against any surety of a postmaster after the lapse of two years from the death, resignation or removal from office of such postmaster, or from the date of the acceptance of a new bond from such postmaster. By the 78th section of the same Act (2) it was enacted that any bond or instrument of guarantee which might after the passing of the Act be given to Her Majesty by any person or body corporate, and whether under the Act 31st Victoria, chapter 37, and the Acts amending the same, or otherwise, as security for the due performance of the duties of his office by any officer, employee, clerk or servant employed by or under the Postmaster-General, might be expressed to extend to and include as a breach of the conditions thereof any theft, larceny, robbery, embezzlement loss or destruction by such officer, employee, clerk or servant, of money, goods, chattels, valuables or effects, or any letter or parcel containing the same that might come into his custody or possession as such officer, employee, clerk or servant.

The bond now in question purports to be given in pursuance of the Act 35 Vict. chap. 19, and conforms thereto with an addition such as that provided for by

(1) R. S. C. c. 35, s. 117. (2) R. S. C. c. 19. ss. 6-9.

1899

THE QUEEN v. BLACK.

Reasons for Judgment.

the 78th section of *The Post Office Act*, 1875. The principal and sureties are each bound in the penal sum of sixteen hundred dollars, and the condition of the obligation is stated to be such that if "the principal" faithfully discharges the duties of the office and duly accounts for all moneys and property which may come into his custody by virtue thereof the obligation shall be void, and then follows a provision that it shall be a breach of the bond if the postmaster commits any offence such as that mentioned.

The objection urged against the validity of the bond is that there is no proper primary obligation, the principal himself being bound in a penal sum. In Article 1131 of the Civil Code it is declared that "a penal "clause is a secondary obligation by which a person, "to assure the performance of a primary obligation, "binds himself to a penalty in case of its inexecution." If there is no primary obligation, the surety is not bound to anything. As stated in Pothier (1): "As the obligation of sureties is, according to our "definition, an obligation accessory to that of the "principal debtor, it follows that it is of the essence "of this obligation that there should be a valid "obligation of a principal debtor; consequently if "the principal is not obliged, neither is the surety, as "there can be no accessory without a principal obli-"gation, according to the rules of law, *cum causa prin-"cipalis non consistit, ne ea quidem quae sequuntur locum "habent.*" Now, by the bond in question the principal and the sureties are each bound in a penal sum of sixteen hundred dollars, and this it is argued is fatal to the validity of the bond. That, however, is not, it seems to me, the result. For in the first place there is the primary obligation on the part of the principal faithfully to discharge the duties of the office to which

(1) Obligations: (Evan's Ed.) vol. 1, p. 300.

1899

THE QUEEN v. BLACK.

Reasons for Judgment.

he had been appointed and duly to account for all moneys and property which might come into his custody, by virtue of the said office. And in the second place the bond was given in accordance with the Acts of Parliament to which reference has been made, and if good within their provisions, as I think it is, it must be held to be valid notwithstanding that it does not conform in every particular to the Article of the Civil Code relied upon by the defendants.

Then in regard to the second objection, it seems clear that it was part of the duties of the postmaster of Saint John's, Quebec, to receive Savings Bank deposits, and as these moneys came into his custody by virtue of his office and have not been duly accounted for, they are within the terms of the obligation, and the sureties are liable.

That brings us to the third and principal ground of defence, namely: That the sureties are in whole or in part discharged from liability because without their consent the principal was continued in office with the knowledge that he had been guilty of acts of dishonesty in matters relating to his office.

In *Story's Equity Jurisprudence*, section 215 (1), it is said that if a party taking a guarantee from a surety conceals from him facts which go to increase his risk, and suffers him to enter into a contract under false impressions as to the real state of the facts, such a concealment will amount to a fraud, because the party is bound to make the disclosure; and the omission to make it under such circumstances is equivalent to an affirmation that the facts do not exist. So if a party knowing himself to be cheated by his clerk, and concealing the fact, applies for security in such a manner and under such circumstances as holds the clerk out to others as one whom he considers as a trustworthy

(1) Vol. 1, p. 234.

person, and another becomes his security acting under the impression that the clerk is so considered by his employer, the contract of suretyship will be void; for the very silence under such circumstances becomes expressive of a trust and confidence held out to the public equivalent to an affirmation. The principle thus stated and illustrated by Story is recognized both by the law of England and by the law of Quebec, by which the rights of the parties are in the present case to be determined. In England the principle has been carried even further. In *Phillips v. Foxall* (1) a majority of the court (Cockburn, C. J., and Lush and Quain, JJ.) state it to be their opinion that in the case of a continuing guarantee for the honesty of a servant, if the master discovers that the servant has been guilty of acts of dishonesty in the course of the service to which the guarantee relates, and if instead of dismissing the servant, as he may do at once and without notice, he chooses to continue in his employ a dishonest servant without the knowledge or consent of the surety, express or implied, he cannot afterwards have recourse to the surety to make good any loss which may arise from the dishonesty of the servant during the subsequent service. From this proposition Mr. Justice Blackburn dissented. Agreeing that the concealment of known acts of dishonesty on the part of the servant before the obligation was entered into, would be evidence in support of a plea of fraud, he declined to go further. "I cannot concur" he says "in the conclusion "from these premises that therefore there is a condition "implied by law on every contract of suretyship for a "servant that it shall become void if the servant after- "wards commits a fraud, and the principal on hearing "of it does not inform the surety of it. It is quite clear "that misconduct of the servant does not alone put an

(1) L. R. 7 Q. B. 672.

1899

THE QUEEN v. BLACK.

Reasons for Judgment.

"end to the contract, for the very object of the surety-"ship is to afford protection against the misconduct of "the person for whom good conduct is guaranteed" (1). He agreed, however, with the majority in the result of the judgment, but for a different reason, which he states as follows:—

"But there is a ground on which I think he may "have a ground for being discharged in equity, which "I will now state. A surety, as soon as his principal "makes default, has a right in equity to require the "creditor to use for his benefit all his remedies against "the debtor; and as a consequence, if the creditor has "by any act of his deprived the surety of the benefit "of any of those remedies, the surety is discharged. "The authorities for this, as far as known to me, are "collected in the judgment to *Bailey v. Edwards* (2) and "this equitable principal has at least in the case where "time has been given to the principal without the con-"sent of the surety, been adopted to some extent at least, "although whether to its full extent, has been doubted: "See *Pooley* v. *Harradine* (3). But it is not now "material to decide that. Now the law gives the "master the right to terminate the employment of a "servant on his discovering that the servant is guilty "of fraud. He is not bound to dismiss him, and if he "elects, after knowledge of the fraud, to continue him "in his service, he cannot at any subsequent time dis-"miss him, on account of that which he has waived "or condoned. This right the master may use for his "own protection. If this right to terminate the em-"ployment is one of those remedies which the surety "has a right to require to have exercised for the "surety's protection, it seems to follow that, by waiv-"ing the forfeiture and continuing the employment

(1) P. 679. (2) 4 B. & S. 770; 34 L.J.Q.B. 41.
(3) 7 E & B. 431; 26 L. J. Q. B.156.

1899

THE QUEEN v. BLACK.

Reasons for Judgment.

" without consulting the surety, the principal has " discharged him." (1).

No case or authority has been cited, and I am not aware of any, that would tend to show that the rule of law established by *Phillips* v. *Foxall* finds any place in the law of Quebec. And if such a rule were adopted or followed there, it would, I think, be on the ground upon which Mr. Justice Blackburn rests his judgment, and not upon that given by the majority of the court. His reasons are, it seems to me, more consistent than theirs with the principles of the civil law. In *Sanderson* v. *Aston* (2), the court applied the rule established in *Phillips* v. *Foxall* to a case where the default of the clerk to account for the moneys did not of necessity involve dishonesty, but only such a breach of duty as would entitle the employer to dismiss him. That case has, however, been the subject of some adverse criticism. In the *Watertown Insurance Co.* v. *Simmons* (3), the court say that they are not able to agree with the decision in *Sanderson* v. *Aston*, deeming it to be in conflict with the general current of authorities and not " sustained by *Phillips* v. *Foxall*, which was a case of " criminal embezzlement by the servant " (4).

But assuming that the decision of *Phillips* v. *Foxall* on one ground or the other represents the law of the Province of Quebec in cases of this kind between subject and subject, the question arises at once as to whether or not the decision is applicable to cases in which the principal is a public officer or servant of the

(1) P. 680.

(2) L. R. 8 Ex. 73.

(3) 131 Mass. 85.

(4) See also *The Atlantic and Pacific Telegraph Co.* v. *Barnes*, 64 N. Y. 385; *Enright* v. *Falvey*, 4 L. R. (Ir.) C. L. 397; *Roper* v. *Cox*, 10 L. R. (Ir.) C. L. 200; and *The Mayor of Hull* v. *Harding*, L. R. 2 Q. B. D. 494; and for cases earlier than *Phillips* v. *Foxall*: *Shepherd* v. *Beecher*, 2 P. Wm. 287; *Wright* v. *Simpson*, 6 Ves. Jr. 733; *Dawson* v. *Lawes*, Kay, 280; *The North British Assurance Co.* v. *Lloyd*, 10 Ex. 523; *Lee* v. *Jones*, 17 C. B. N. S. 482; and *Burgess* v. *Eve*, L. R. 13 Eq. 450.

1899

THE QUEEN v. BLACK.

Reasons for Judgment.

Crown; and on principle, it would appear to me to be very clear that it does not. Taking the rule of law as stated by Story, "that if a party taking a guaranty "from a surety conceals from him facts which go to "increase his risk and suffers him to enter into the "contract under false impressions as to the real state "of the facts, such a concealment will amount to a "fraud, because the party is bound to make the dis-"closure; and the omission to make it under such cir-"cumstances is equivalent to an affirmation that the "facts do not exist" (1) it is clear, I think, that the rule is not applicable to cases arising upon bonds given for the faithful performance of their duties by officers or servants of the Crown; because fraud cannot be imputed to the Crown, and the Crown is not to suffer loss because a public officer contrary to his duty conceals the truth or fails to disclose it. And it is obvious that the Crown would suffer loss equally by losing its remedy upon the bond in such a case, as it would by being held liable in an action brought against it for the negligence or wrongful conduct of its officer or servant. For like reasons the decision in *Phillips* v. *Foxall*, on whatever ground it may be supported, is not applicable to bonds given to the Crown for the performance by its officers or servants of their duties and for the due accounting for moneys that come into their possession by virtue of their office or employment.

With reference to authority, I am not aware of any decisions in England or in Quebec or France bearing upon the point immediately under discussion. None have been cited and I have not found any. There are, however, two Irish cases in which it was held that the rule in *Phillips* v. *Foxall* is not applicable to such obligations: *Lawder* v. *Lawder* (2), and *Byrne* v. *Muzio*

(1) Story Eq. Jur. s. 215. (2) 7 L. R. (Ir.) 57.

1899

THE QUEEN v. BLACK.

Reasons for Judgment.

(1). In the case of *The Corporation of Adjala* v. *McElroy* (2) Mr. Chancellor Boyd said that he had no reason to doubt that the principles of law now well established by *Phillips* v. *Foxall* and *Sanderson* v. *Aston* are applicable to municipalities and to all cases where the master or employer has the power to dismiss the servant or official employed; and I think it may be said that the cases of *Frontenac* v. *Breden* (3); *Corporation of East Zorra* v. *Douglas* (4); *Peers* v. *Oxford* (5) and *Meaford* v. *Lang* (6) proceed upon the view that such principles are applicable to cases in which the officer or servant is in the employ of a municipal body. In the United States the general current of authority is the other way, but however that may be in cases arising upon the bonds of officers and servants of municipal bodies, there is a long and consistent line of decisions by the highest courts in that country that the principle stated is not applicable to public officers and servants of the State. The earlier case of *The People* v. *Jansen* (7) was to the contrary, but that case has been overruled, and it is well settled that the principle of *Phillips* v. *Foxall* is not applicable to a bond given to the State for the due performance by a public officer of the duties of his office (8).

To refer to one of the later cases, Waite, C J., delivering the judgment of the court, says: (9) "The Govern-

(1) 8 L. R. (Ir.) C. L. 410.
(2) 9 Ont. R. 580.
(3) 17 Gr. 645.
(4) 17 Gr. 462.
(5) 17 Gr. 472.
(6) 20 Ont. R. 42.
(7) 7 Johns. 331.
(8) *The People* v. *Berner*, 13 Johns. 382; *The People* v. *Foot*, 19 Johns. 57; *United States* v. *Kirkpatrick*, 9 Wheat, 735; *Locke* v. *Postmaster General*, 3 Mason 446; *United States* v. *Vanzandt*, 11 Wheat. 189; *United States* v. *Nicholl*, 12 Wheat. 509; *Dox* v. *Postmaster General*, 1 Pet. 326; *The People* v. *Russell*, 4 Wend. 571; *United States* v. *Boyd*, 15 Pet. 208; *Looney* v. *Hughes*, 26 N. Y. 514; *McKecknie* v. *Ward*, 58 N. Y. 549; *Jones* v. *United States*, 18 Wall. 662; *Hart* v. *United States*, 95 U. S. 318; *Frownfelter* v. *State*, 66 Md. 80; *Palmer & Seawright* v. *Woods*, 75 Iowa 402.
(9) *Hart* v. *United States*, 95 U. S. 318.

1899

THE QUEEN v. BLACK.

Reasons for Judgment.

" ment is not responsible for the laches or the wrong-
" ful acts of its officers..... ....Every surety upon an
" official bond to the Government is presumed to
" enter into his contract with a full knowledge of
" this principle of law, and consent to be dealt with
" accordingly. The Government enters into no con-
" tract with him that its officers shall perform their
" duties. A Government may be a loser by the negli-
" gence of its officers, but it never becomes bound to
" others for the consequences of such neglect unless it
" be by express agreement to that effect. Here the
" surety was aware of the lien which the law gave as
" security for the payment of the tax. He also knew
" that in order to retain this lien the Government must
" rely on the diligence and honesty of its agents. If
" they performed their duties and preserved the
" security, it enured to his benefit as well as that of
" the Government; but if by neglect or misconduct
" they lost it the Government did not come under
" obligations to make good the loss to him, or, what is
" the same thing, release him *pro tanto* from the obli-
" gation of his bond. As between himself and the
" Government, he took the risk of the effect of official
" negligence upon the security which the law pro-
" vided for his protection against loss by reason of the
" liability he assumed."

It may happen, of course, in the Province of Ontario and other provinces where the Act 33 Henry VIII, c. 39, s. 79 is in force, that a question may arise as to whether or not the court should give relief upon a bond given to secure the performance of his duty by a public officer where under like circumstances in an action between subject and subject the defendant would be discharged (1); *Reg.* v. *Bonter* (1); *Reg.* v.

(1) 6 U. C. Q. B. (O. S.) 551.

1899

THE QUEEN v. BLACK.

Reasons for Judgment.

Pringle (1); and *The Queen* v. *Hammond* (2), but the power of the court to give relief in such cases depends upon a statute not in force in the Province of Quebec and cannot be invoked in the present case.

For like reasons it seems equally clear that the fourth defence referred to, namely, that the sureties, under the circumstances that have been stated, are entitled to relief on the ground of the postmaster's salary and insurance money being paid to and distributed by the postmaster's widow will not avail the defendants, for the defence must rest upon one or two grounds; either that the Crown is liable for the laches or neglect of the post office authorities in not discovering the postmaster's defalcations, or upon the ground that the Crown is estopped by the assurance given by Inspector Gervais that everything in the postmaster's office at Saint John's was correct, and it is clear that the Crown is neither bound by the laches of its officers nor estopped in such case by their representations.

I am of opinion, therefore, that the Crown is entitled to judgment against the defendant Henderson Black for the sum of sixteen hundred dollars, and against the defendants Henderson Black and Mary Jane Black, beneficiary heirs of John Black, deceased, for a like sum of sixteen hundred dollars. In the information the Crown asks for interest upon these amounts, but that demand was abandoned at the hearing. The costs, as usual in such cases, will follow the event.

Judgment accordingly.

Solicitor for the plaintiff: *E. L. Newcombe.*

Solicitors for the defendants: *Madore, Guerin & Perron.*

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(1) 32 U. C. Q. B. 308. (2) 1 Hannay, 33.

1899
April 4.

HAROLD HARDING COLPITTS.....SUPPLIANT;

AND

HER MAJESTY THE QUEEN.....RESPONDENT.

Petition of right—Government railway—Accident to the person—Liability of Crown—Negligence—50-51 Vict. c. 16 s. 16—Undue speed.

It is not negligence *per se* for the engineer or conductor of a train to exceed the rate of speed prescribed by the time-table of the railway. If the time-table were framed with reference to a reasonable limit of safety at any given point, then it would be negligence to exceed it; but, *aliter*, if it is fixed from considerations of convenience and not with reference to what is safe or prudent.

In an action against the Crown for an injury received in an accident upon a Government railway, the suppliant cannot succeed unless he establish that the injury resulted from the negligence of some officer or servant of the Crown while acting within the scope of his duties or employment upon such railway. The Crown's liability in such a case rests upon the provisions of 50-51 Vict. c. 16, s. 16 (c.)

Semble:—In actions against railway companies the obligation of the company is to carry its passengers with reasonable care for their safety; and the company is responsible only for accidents arising from negligence.

PETITION OF RIGHT for damages for bodily injuries received by the suppliant on a Government railway.

The facts of the case are stated in the reasons for judgment.

October 28th to 31st and November 1st to 4th, 1898.

The hearing of the case was begun at St. John, N.B., and ordered to be continued at Ottawa.

December 28th, 1898.

The case was now resumed and argued at Ottawa.

Skinner, Q.C., and *A. W. McRae* for the suppliant, contended that there was negligence shown on the

part of the Crown's officers and servants sufficient to bring the case within 50-51 Vic., c. 16, s. 16 (c.) They cited *Beven on Negligence* (1). The accident itself bespoke negligence. The Crown must rebut that presumption.

W. Pugsley, Q. C. and *E. H. McAlpine*, for the respondent, relied on the case of *Dubé* v. *The Queen* (2), as establishing the non-liability of the Crown in such a case. Further, they contended that in view of *Daniel* v. *Metropolitan Railway Company* (3), the burden of proof was not shifted upon the Crown by the suppliant establishing that an accident occurred. It is not a case of *res ipsa loquitur* where the Crown is defendant; that doctrine does not apply. They cite *Blyth* v. *The Company of Proprietors of the Birmingham Waterworks* (4); 5 *Eng. & Am. Ency. of Law* (5).

THE JUDGE OF THE EXCHEQUER COURT now (April 4th, 1899) delivered judgment.

The suppliant, by his petition of right, seeks to recover damages for injuries sustained in an accident that happened on the 26th of January, 1897, to an express train on the Intercolonial Railway, at a place called Palmer's Pond, near Dorchester, in the Province of New Brunswick. The suppliant was a passenger by this train, which, on a down grade and on a curve at the place mentioned, left the rails, and going down the embankment was completely wrecked.

The action is brought under clause (c) of the 16th section of *The Exchequer Court Act*, by which it is enacted that the Exchequer Court shall have exclusive original jurisdiction to hear and determine every claim against the Crown arising out of any death or injury to the

(1) 2nd ed. pp. 140-142.
(2) 3 Ex. C. R. 147.
(3) L. R. 3 C. P 216 & 5 H. L. 45.
(4) 11 Exch. 781.
(5) P. 627.

1899

COLPITTS v. THE QUEEN.

Reasons for Judgment.

person or to property on any public work, resulting from the negligence of any officer or servant of the Crown while acting within the scope of his duties or employment. During the argument some stress was laid upon the fact that the suppliant had a ticket, and, though it was not strongly pressed, it was suggested that the contract thereby created carried the Crown's liability further than the words of the statute. To that suggestion or contention I am not able to accede. It is not to be forgotten that apart from the statute a petition of right in cases such as this cannot be sustained. *McLeod's* case (1) settles that beyond all controversy. And so if one recovers against the Crown in such cases he must recover under and by virtue of the statute. Even railway companies are not liable to the passengers they carry for injuries the latter may receive unless there is negligence of some kind. They do not insure the safety of their passengers. Their obligation is to use reasonable care to carry their passengers safely; and they undertake to do all that can be reasonably done or expected of them to prevent accidents. In actions against the Crown, however, we must look to the statute that gives the injured passenger his remedy, and we are not to go outside of it, or to give him relief unless his case falls within its terms In other words, it is upon the suppliant to show that the injury of which he complains resulted from the negligence of an officer or servant of the Crown while acting within the scope of his duties or employment.

Different cases will of course present different questions and difficulties. It will happen in some cases that the cause of the accident may be easily ascertained; and then the question will arise as to whether what happened resulted from the negligence of the Crown's officers or servants. In another case it may be per-

(1) 8 Can. S. C. R. 1.

fectly clear that there has been some negligence on the part of some such officer or servant, and the question to determine will be whether in fact such negligence caused, or may have caused, the accident. In other cases it may not be possible to ascertain the cause of the accident, and no case of negligence may be made out.

The present case falls, it seems to me, within the third class, and not within either the first or second classes mentioned. After the most careful consideration of the facts proved I am unable to form any conclusion as to the cause of the accident. The theory set up for the respondent to account for it rests upon the finding of a piece of a broken equalizing bar bearing evidence of having come in contact with one of the ties or sleepers This bar it is probable came from a truck under the dining carriage, or under the drawing room carriage; but from which there is nothing to show, and whether, through some latent defect it broke before and so may have been the cause of the derailment of the train, or whether it was broken in the accident, it is impossible to determine. It appears that the carriages of which the train was composed were well and strongly built; and that care had been taken to have them fit and safe for the traffic for which they were being used. It is suggested by counsel for the Crown that this equalizing bar broke through some latent defect therein, and the end of the broken piece falling down and catching upon one of the ties caused the derailment of the train. Another view is put forward by Mr. Gregory, a civil engineer of great experience who was examined for the Crown, and who formed the opinion, to state it very briefly, that the effect of the breaking of this equalizing bar was to so derange the automatic brakes with which the the train was provided, that they were instantly

1899

COLPITTS v. THE QUEEN.

Reasons for Judgment.

applied to all the carriages except the drawing room carriage, the momentum of which would cause the other carriages to be thrown from the rails. I am not able myself to adopt either of these theories. It is possible of course that in some way the breaking of this equalizing bar, if it broke before and not by reason of the accident, was in some way the cause thereof; but there is, it seems to me, no such certainty of this, or probability even, to justify me in finding that the accident was in fact occasioned thereby.

We come then to consider the evidence to see if any negligence on the part of any officer or servant of the Crown has been proved, and which may have been the cause of the accident.

The carriages of which the train was composed belonged to the Canadian Pacific Railway Company; but the train, as a whole, was, while it was running between Halifax and Saint John, under the control of the officers of the Intercolonial Railway. In that part of the postal and express carriage used by the Dominion Express Company eighty boxes of copper coin, weighing eleven thousand two hundred pounds, were being carried. For the suppliant it is contended that this quantity of coin ought not to have been carried in this part of the carriage, that the weight was too great, and that the boxes were not properly loaded; that in short this load of coin was a menace to the safety of the train and, taken in conjunction with the rate of speed at which the train was moving when it reached the curve at Palmer's Pond, was the cause of its derailment. These boxes of coin were loaded upon the carriage at Halifax by the servants of the express company and not by the servants of the Crown. There was, however, at Halifax an inspector, an officer in the employ of the Crown, whose duty it was to examine this and the other carriages

1899

COLPITTS v. THE QUEEN.

Reasons for Judgment.

of the train before the train left the station, to see that everything about them was in proper and safe condition. If these boxes of coin, either from their weight, or from the manner in which they were loaded, would in any way endanger the safety of the train it was his duty not to allow the carriage in which they were laden to go out of the station. This carriage was examined by the inspector before, but not after the coin was put on board thereof. He did not know how it was loaded, or the weight of it. He was busy elsewhere and this escaped him. So that if the weight were greater than was prudent, or the manner of loading improper, and this caused or contributed to the accident that happened, the Crown would, I think, be liable. The evidence, however, is all one way. Witnesses of experience say that the load was a proper one, that its weight was not unusual or excessive; and there is no one who testifies to the contrary. And with respect to the manner of loading, those who put them upon the carriage say that the boxes were evenly and properly distributed in the compartment of the carriage used by the express company.

It is also contended for the suppliant that the permanent way at the place where the accident occurred was not in a proper and safe condition; but here again it seems to me that the testimony of those competent to express an opinion is, substantially, all the other way. It is not possible, I think, on the evidence submitted to find that there was any negligence on the part of any officer or servant in respect of the construction or maintenance of the permanent way.

It is further contended for the suppliant that having regard to the train, the load it was carrying, and the grades and curve where the accident occurred, the rate of speed, for which the conductor and driver, both officers in the employ of the Crown, were responsible,

1899

COLPITTS v. THE QUEEN.

Reasons for Judgment.

was unusual and excessive; that the conductor and driver were in this respect careless and negligent, and the accident having happened by reason thereof, the Crown is liable.

The train in question left Sackville at twelve o'clock noon, eleven minutes late. From Sackville to Dorchester the distance is eleven miles, and the time prescribed for this train by the time-table then in force, twenty-two minutes. Palmer's Pond, the place of the accident, is about nine miles from Sackville. If credit is given to the testimony of Alfred Wood, the fireman on the train that day—and I see no reason for not giving credit to it—the accident happened at twenty minutes after twelve o'clock. So that the train had only made nine miles in the twenty minutes next before the accident. Between Sackville and Dorchester, and about six miles from Sackville is a station called "Evans" at which this train did not stop. But it was none the less the duty of the agent there to report the time at which the train passed. From Sackville to Evans there is an up grade, and the time prescribed for this train for the six miles between the two stations was thirteen minutes. From near Evans to Dorchester there was a down grade, the time prescribed for the five miles between the two points being nine minutes. In mentioning the time given in the time-table for this train I am not to be understood as holding the view that it would, as a matter of course, be negligence on the part of the conductor or driver to exceed the prescribed rate of speed. That would depend largely upon other considerations. If the rate of speed were fixed with reference to the reasonable limit of safety at any given point, then of course the conductor and driver ought not to exceed it, and it would be negligence on their part to do so. But if the time allowed is fixed or prescribed from considerations of convenience or other-

wise, andnot with reference to what is safe or prudent, the conductor and driver would not be guilty of negligence simply because they made up time, any more than they could excuse themselves by saying that they did not exceed the prescribed rate of speed at some point where for any reason they ought in prudence to have gone more slowly. It must, I think, be in each case a question of whether under all the circumstances the rate of speed is in excess of that which is safe and prudent.

On the day of the accident the agent at Evans station reported this train as passing there at sixteen minutes after twelve. It is, however, satisfactorily established that his clock was on that day two minutes fast; and if he reported the passing of the train, as he says he did, by reference to his clock, it would appear that the train passed Evans at fourteen minutes after twelve, and was six minutes in going the three miles from there to the place of the accident. That would give a rate of speed well within what witnesses of experience say is safe and prudent, as well as within that prescribed for that portion of the road. Under ordinary circumstances a record such as this kept by a careful and attentive person would afford about as satisfactory evidence as one could expect to have, and might reasonably be taken to be conclusive on that point. But where, as here, that conclusion has to be reached by relying upon the memory and attention of one who in another particular has admittedly been inattentive and at fault, one hesitates to accept the evidence as conclusive. Apart from this evidence as to the time when the train left Sackville, when it passed Evans, and when it was wrecked, we have the opinions and impressions of the rate of speed at which the train was moving of a number of witnesses who were officials of the railway, or passengers, or who

1899

COLPITTS v. THE QUEEN.

Reasons for Judgment.

happened to see it passing. These impressions or opinions differ considerably. The weight of the evidence, however, goes to show that the rate of speed before and at the time of the accident was not unusual or excessive. In saying that I wish to disclaim any intention of throwing any discredit upon the testimony of witnesses whose impressions and opinions are to the contrary. The train, shortly before the accident, had passed what has been spoken of as a double curve—reverse curves without any tangent between them—and at that point the brakes had been applied to steady the train. But no doubt there would at such a place, notwithstanding the application of the brakes, be some oscillation or swaying of the train. To those who knew the reason therefor this would not seem unusual or greatly to be noticed; but others who did not know would receive a different impression and might reasonably attribute to the speed of the train the oscillation which to them seemed unusual and out of the ordinary. Taking the evidence as a whole, the case of negligence sought to be established against the conductor and driver is not, it seems to me, made out.

There being nothing to show how the accident happened and no negligence that may have caused it being established the case falls, as has been said, within the third class of cases mentioned. In such a case, the action, it seems to me, fails. The case is not within the statute. As has been said already, unless the suppliant is able to show that the injuries he has suffered, by an accident on a Government railway or other public work, are the result of some negligence on the part of one or more officers or servants of the Crown while acting within the scope of his or their duties or employment, the judgment of the court should, under the statute, go in favour of the Crown. I do not

think that in the present case that has been established and the judgment will be that the suppliant is not entitled to any portion of the relief sought by his petition.

Judgment accordingly.

Solicitor for suppliant: *A. W. McRae.*

Solicitor for respondent: *E. H. McAlpine.*

1899
April 5.

HER MAJESTY THE QUEEN ON THE INFORMATION OF THE ATTORNEY-GENERAL FOR THE DOMINION OF CANADA ..... } PLAINTIFF;

AND

JAMES WALLACE, WILLIAM A. ROSS, JOHN O'LEARY AND MARY KELLY..... } DEFENDANTS.

Expropriation—Tender—Sufficiency of—Costs—Mortgagees.

Where the amount of compensation tendered by the Crown in an expropriation proceeding was found by the court to be sufficient, and there was no dispute about the amount of interest to which the defendant was entitled, but the same was not tendered by the Crown although allowed by the court, costs were refused to either party.

2. Where mortgagees were made parties to an expropriation proceeding and they had appeared and were represented at the trial by counsel, although they did not dispute the amount of compensation, they were allowed their costs.

INFORMATION for the expropriation of certain lands, at Ottawa, for the purposes of a Dominion Rifle Range.

The facts of the case are stated in the reasons for judgment.

March 6th, 7th and 8th, 1899.

J. M. Clarke and A. W. Fraser, for the plaintiff, cited the following cases and authorities: *The Queen* v. *Fowldes* (1); *Vézina* v. *The Queen* (2); *Cripps on Compensation* (3); *Penny* v. *Penny* (4); *Boom Company* v. *Patterson* (5); *Benning* v. *Atlantic and North West Railway Co.* (6); *McLeod* v. *The Queen* (7).

(1) 4 Ex. C. R. 1
(2) 17 Can. S. C. R. 1.
(3) 3rd ed. pp. 112-113.
(4) L. R. 5 Eq. 235.
(5) 98 U. S. R. 403.
(6) 5 M. L. R. (S. C.) 136.
(7) 2 Ex. C. R. 106.

1899

THE QUEEN v. WALLACE.

Reasons for Judgment.

M. O'Gara, Q.C. and *W. Wyld* relied on the following: *Burton* v. *The Queen* (1); *The Queen* v. *Moss* (2); *Straits of Canseau Marine Railway Co.* v. *The Queen* (3); *The Queen* v. *Barry* (4); *Kearney* v. *The Queen* (5); *Mayor of Montreal* v. *Brown* (6); *Stebbing* v. *Metropolitan Board of Works* (7); *Paint* v. *The Queen* (8); *James* v. *Ontario and Quebec Railway Co.* (9); *Crandall* v. *Mott* (10); *Burritt* v. *Corporation of Marlborough* (11); *Metropolitan Board of Works* v. *McCarthy* (12); *Brown* v. *Commissioner of Railways* (13); *McCauley* v. *City of Toronto* (14); *Cowper Essex* v. *Acton* (15); *The Queen* v. *Brown* (16); *Aitken* v. *McMeckan* (17); *Re Bush* (18).

THE JUDGE OF THE EXCHEQUER COURT now (April 5th, 1899), delivered judgment.

On the 16th of May, 1898, the Crown took, for the purposes of a Rifle Range, a portion of lot number 24, in the first concession, Ottawa front, of the township of Gloucester in the County of Carleton and Province of Ontario, of which the defendant, James Wallace, was owner, subject to a mortgage to the other defend ants. The lot contained in all about eighty acres, or a little more than that. The part taken for the Rifle Range contained according to the plan and description filed sixty-one acres and twenty-seven hundredths of an acre, and the Crown offered to pay the defendants $6,127.00, or a hundred dollars an acre for the land

(1) 1 Ex. C. R. 87.
(2) 5 Ex. C. R. 30.
(3) 2 Ex. C. R. 113.
(4) 2 Ex. C. R. 355.
(5) 2 Ex. C. R. 21.
(6) 2 App. Cas. 168.
(7) L. R. 6 Q. B. 37.
(8) 2 Ex. C. R. 149 and 18 Can. S. C. R. 718.
(9) 15 Ont. A. R. 11.
(10) 30 U. C. C. P. 63.
(11) 29 U. C. Q. B. 119.
(12) L. R. 7 H. L. 243.
(13) 15 App. Cas. 240.
(14) 18 Ont. R. 416.
(15) 14 App. Cas. 153.
(16) L. R. 2 Q. B. 630.
(17) [1895] App. Cas. 310.
(18) 14 App. Cas. 73.

1899

THE QUEEN v. WALLACE.

Reasons for Judgment.

taken for its value and for damages to the remaining portion of the land. On the eighteen or nineteen acres left to this defendant is a barn, worth, it is said, in connection with the whole lot about a thousand dollars, and now, it being larger than is necessary for what is left, about five hundred dollars. The defendant, Wallace, alleges that a true measurement of the lands in his possession that were taken for the Rifle Range would show that more has been taken than what has been mentioned, the difference being something near an acre. With reference to the compensation he declines to accept the amount offered by the Crown, and claims a sum of $20,000. This is the main question in controversy. With reference to the principle on which that compensation should be assessed, the case presents nothing unusual or of any difficulty. There is of course the inevitable conflict of opinion as to values; but what I am well satisfied of is that the property as a whole was not in May, 1898, worth more than eight thousand dollars. That, with all the improvements, and having regard to any use that could be made of it, and its situation and any reasonable prospective value, would be, I think, an outside figure at that time. Now if from that sum we take the amount of $6,127 that the Crown offers to pay we have the sum of $1,873 to represent the present value of the eighteen or nineteen acres of land left with the barn thereon; and it would seem that making any necessary allowance for the depreciation of this portion of the lot by reason of the proximity of the rifle range it would in the state of cultivation it is in and with the barn be worth that amount at least, so that it seems to me that the amount offered by the Crown is sufficient even if the portion expropriated should happen to be about an acre in excess of that for which the offer was made, a matter which is not perhaps very clearly established

1899

THE QUEEN v. WALLACE.

Reasons for Judgment.

one way or the other. To the sum of $6,127 should be added $331.88 for interest from the 16th of May, 1898, making in all the sum of $6,458.88.

There will be a declaration :—

(1). That the lands mentioned in the information are vested in the Crown.

(2). That the sum of $6,127 with interest from the 16th day of May, 1898, is sufficient compensation to the defendants for the lands taken and for all loss or damage mentioned in the fifth paragraph of the information ; and

(3) That out of such compensation money is to be paid in the first instance the amount of the mortgage mentioned in the information and the interest thereon, the actual amount to be determined when the minutes of judgment are settled ; and the balance is to be paid to the defendant James Wallace.

The defendants, the mortgagees, are, I think, entitled to their costs.

With reference to the defendant Wallace I ought not, I think, to give him costs, as I have found the amount offered to him sufficient compensation at the time of the taking, and there was no controversy apparently about the interest subsequent to that date to which I have also found him entitled. At the same time I do not see how I can give costs against him, as he was entitled to such interest, and there has been, so far as I see, no tender or offer on the part of the Crown to pay it. As between the Crown and the defendant James Wallace there will be no costs ; each party bearing its and his own costs.

Judgment accordingly.

Solicitor for plaintiff: *A. W. Fraser.*

Solicitors for defendant: *O'Gara, Wyld & Gemmell.*

Solicitor for defendant mortgagees : *J. Bishop.*

1899
April 10.

WILLIAM SCHULZE & CO..... ..... CLAIMANTS;

AND

HER MAJESTY THE QUEEN.....DEFENDANT.

Customs law—Breach—Importation—Fraudulent undervaluation—Manufactured cloths—Cut lengths—Trade discounts—Forfeiture.

Claimants were charged with a breach of *The Customs Act* by reason of fraudulent undervaluation of certain manufactured cloths imported into Canada. The goods were imported in given lengths cut to order, and not by the roll or piece as they were manufactured. The invoices on which the goods were entered for duty showed the prices at which, in the country of production, the manufacturer sells the uncut goods to the wholesale dealer or jobber, instead of showing the fair market value of such goods cut to order in given lengths when sold for home consumption in the principal markets of the country from which they were imported. The values shown on the invoices were further reduced by certain alleged trade discounts for which there was no apparent justification or excuse.

Held, that the circumstances amounted to fraudulent undervaluation; and that the decision of the Controller of Customs declaring the goods forfeited must be confirmed. [Leave to appeal to Supreme Court of Canada refused.]

REFERENCE by the Department of Customs of a claim under the 182d section of *The Customs Act* for the return of certain goods seized for fraudulent undervaluation for duty.

The facts are stated in the reasons for judgment.

March 28th, 1899.

The case was heard at Montreal.

W. D. Hogg, Q.C. and *T. Dickson* for claimants;

The Solicitor-General of Canada, E. L. Newcombe, Q.C. and *J. O'Halloran, Q.C.* for the defendant.

Mr. Hogg contended that the goods were in every sense invoiced at their fair market value in the country

1899

SCHULZE v. THE QUEEN.

Argument of Counsel.

of production. It had been urged that the claimants could not make a larger profit on their goods than others in the trade if they paid the proper amount of duty on them; this is a question with which this court has nothing to do. If the claimants get the amount of the duty out of their customers the propriety of that cannot influence the decision here. It is simply *res inter alios acta*. The issue here is: Were the goods entered at a proper valuation for duty? The facts show that they were.

Mr. Dickson took the following grounds: If Schulze & Co. are the importers, and that is so, they are in precisely the same position as the purchaser in this country. He is entitled to have his discount deducted from the value of the goods. The evidence taken in Great Britain shows that the valuation made by the claimants is the proper one for duty; the difference between the invoices sent to customs and the invoices submitted to their customers has no legal bearing on the case.

The Solicitor-General of Canada: The solution of the question lies in this fact that it is impossible to get the cloths in the shape the claimants imported them from the mill. The cut lengths are the result of the cloths passing through the middlemen or jobbers' hands, and of necessity the cut lengths involving the additional labour in this way are proportionately higher in price than the goods in the piece as they came from the loom. The intermediary's profit has to be paid in addition to the first cost, and the whole cost is thus increased.

Again, claimants have not proved that the discount they claim is allowed in Scotland.

THE JUDGE OF THE EXCHEQUER COURT now (April 10th, 1899), delivered judgment.

1899

SCHULZE v. THE QUEEN.

Reasons for Judgment.

This matter comes before the court on a reference by the Controller of Customs and the Minister of Trade and Commerce exercising the powers to make such a reference given to the Minister of Customs by the 182nd section of *The Customs Act* as enacted in the 34th section of *The Customs Amendment Act*, 1888.

By a decision of the Controller of Customs rendered in June, 1896, upon a report of the Acting Commissioner of Customs dated 7th May, 1896, certain goods of the claimants that had been seized were declared to be forfeited to the Crown for the fraudulent undervaluation thereof in the invoices by which the same had been entered for duty, at the Port of Montreal. The report of the Acting Commissioner, approved by the Controller, also recommended that the claimants be called upon to pay the sum of $787.50 in respect of certain other fraudulent undervaluations mentioned in the report and that "in default thereof proceedings " be instituted for the enforcement of the same and the " imposition of such other penalties as the law allows."

By the 183rd section of *The Customs Act*, as enacted in the amending statute referred to, it is provided that " on any reference of any matter by the Minister to the " court, the court shall hear and consider such matter " upon the papers and evidence referred, and upon any " further evidence which the owner or claimant of the " thing seized or detained, or the person alleged to have " incurred the penalty, or the Crown, produces under " the direction of the court, and shall decide according " to the right of the matter; and judgment may be " entered upon any such decision, and the same shall " be enforceable and enforced in like manner as other " judgments of the court."

With reference to the charge of undervaluation for which the goods in question here were seized and for-

feited to the Crown, it is perfectly clear that the claimants sent into Canada and caused to be used for customs purposes invoices of such goods in which the latter were entered and charged at a less price than that actually charged to the purchasers in the invoices sent to them; and so far from being able to meet the *primâ facie* case which the law under such circumstances raises against them (*The Customs Act*, ss. 201-203), the evidence before me shows clearly, I think, that the goods were entered for duty on invoices that did not represent the true value for duty.

There is no question of mistake or inadvertence. What the claimants did, they did with intention and deliberation. The two sets of invoices were prepared with an object. Under their arrangement with their Canadian customers the latter were to pay the duty and the double invoices enabled the claimants to pay one sum for duty at the custom house, and to collect another and a larger sum therefor from their customers. The duty was paid on invoices made specially for use in passing the goods through the customs. It was collected from the customers calculated upon the higher value shown in the invoices sent to the latter. The claimants say that that was their affair; that if in that way they took an advantage of their customers it is no concern of the customs authorities; and they allege that the invoices on which duty was paid show the true value of the goods for duty. It is with the last proposition that I have to deal; and if I pass the others over without further reference than this, it is not because I concur in the views expressed. If in order to get the better of their customers the claimants first get the better of the customs officers, the latter, it seems to me, have a very direct interest in the matter. The invoices on which the goods were entered for

1899

SCHULZE v. THE QUEEN.

Reasons for Judgment.

duty show, it would appear, the prices at which in the country of production the manufacturer sells such goods in full length pieces to the wholesale dealer or jobber, and not, as under the circumstances of the case they should, I think, show the fair market value of such goods cut to order in given lengths when sold for home consumption in the principal markets of the country from which they were imported. But that is not all; the values as shown were further reduced by discounts for which there appears to have been no justification or excuse. The case appears to be a clear one of fraudulent undervaluation, and I think the decision of the Controller of Customs declaring the goods forfeited to the Crown was the proper decision to render, and I confirm it.

The remainder of the Acting Commissioner's report, which was approved by the decision of the Controller, deals, as has been seen, with certain penalties which it is alleged the claimants incurred in respect of other goods, and for the recovery of which it is recommended that proceedings should be instituted. Nothing of course would be gained by affirming that recommendation. It is equally effective without any approval of the court. And I am in doubt as to whether it was in the minds of the parties that in the present proceeding the court might deal with the matter and impose or not impose such penalties as the claimants appeared to have incurred. That question was not discussed. And as there may be considerable doubt as to the authority of the court on this reference to impose any such penalties I shall refrain from disposing of the matter, reserving to the Crown the right to move for judgment for such penalties if it is advised that they may be recovered in the present proceeding.

1899

SCHULZE v. THE QUEEN.

Reasons for Judgment.

The claimants will pay the Crown its costs of the reference so far as the latter has been proceeded with.

*Judgment accordingly.**

Solicitor for claimant: *W. D. Hogg.*

Solicitor for defendant: *E. L. Newcombe.*

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* On the 6th day of May, 1899, an application was made to the Honourable Mr. Justice Gwynne, in the Supreme Court of Canada, for leave to appeal from the judgment herein. W. D. Hogg Q. C. supported the application, E. L. Newcombe Q. C. contra.

At the conclusion of the argument the learned Judge gave the following oral judgment:

I think in all applications to this Court for leave to appeal from the Exchequer Court, when the amount involved is under $500, leave should not be granted unless the judge before whom the motion is made is of the opinion that the judgment of the Court below is so clearly erroneous that there is reasonable ground for believing that a court of appeal should reverse the judgment upon a point of law, or upon the ground that the evidence does not at all warrant the conclusions of fact arrived at. In the present case no such grounds appear, and the motion for leave will, therefore, be refused with costs.

1899

April 17.

BRITISH COLUMBIA ADMIRALTY DISTRICT.

A. J. BJERRE AND OTHERS.....PLAINTIFFS;

AGAINST

SHIP "*J. L. CARD.*"

Admiralty law—Action for wages—Assignment—Rights of assignee—Action in rem.

The right of action *in rem* for wages cannot be assigned. *Rankin* v. *The Eliza Fisher*, 4 Ex. C. R. 461 followed.

THIS was an action for wages earned by the plaintiffs, one of whom was the master, and the others engineers, of the ship, "*J. L. Card.*" The Bank of Montreal, the mortgagees of the ship, appeared and intervened.

At the trial, evidence was produced to show that the claims for wages had been assigned to one Mellon before action brought.

The action came on for trial on 8th April, 1899, before the Hon. A. J. McColl, Chief Justice, Local Judge of the British Columbia Admiralty District.

F. Peters, *Q.C.* and *W. A. Gilmour* for plaintiffs;

C. Wilson, *Q.C.* and *G. E. Corbould*, *Q.C.* for Bank of Montreal (intervening).

Mr. Peters contended that the assignment not being absolute, but by way of security only for advances, the lien was not lost but could be asserted by plaintiffs for the benefit of the assignee.

MCCOLL, C.J., L.J. now (17th April, 1899), delivered judgment.

The plaintiffs before action, but after their wages had accrued due, assigned them to one Mellon by assignments absolute in form.

1899

BJERRE v. THE SHIP J. L. CARD.

Reasons for Judgment.

Evidence was given to show that Mellon or his firm had advanced to the plaintiffs, in different sums at various times, the full amount of their wages; and it was contended that because the plaintiffs are liable personally in respect of these advances, the assignments are not a bar to recovery in this action.

The right of action *in rem* for wages is personal and cannot be assigned. *Rankin* v. *The Eliza Fisher* (1).

And I do not see how I can give effect to the plaintiffs' contention. The assignee, as it seems to me, is a necessary party to the action. It is admitted that he has indemnified the plaintiffs against the costs of this action and that it is for his sole benefit.

I find, lest it should be considered material in appeal, that the advances were made as claimed.

There will be judgment for the Bank of Montreal, intervening, with costs.

Judgment accordingly.

Solicitors for plaintiffs: *Tupper, Peters & Gilmour.*

Solicitor for mortgagees (intervening): *G. E. Corbould.*

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(1) 4 Ex. C. R. 461.

1899

April 4.

IN THE MATTER OF THE PETITION OF RIGHT OF

DAME EMELY GRENIER.....SUPPLIANT;

AND

HER MAJESTY THE QUEEN.....RESPONDENT.

Government railway—Death resulting from negligence of fellow-servant—Common employment—50-51 *Vict. c.* 16, *s.* 16 *(c.)*—*Art.* 1056 *C. C. L. C.*—*Widow and children—Right of action—Bar—Liability—Contract limiting—Measure of damages.*

The doctrine of common employment is no part of the law of the Province of Quebec. *Robinson* v. *Canadian Pacific Railway Co.* ([1892] A. C. 481); and *Filion* v. *The Queen* (4 Ex. C. R. 134; and 24 Can. S. C. R. 482) followed.

2. The widow and children of a person killed in an accident on a Government railway in the Province of Quebec have a right of action against the Crown therefor, notwithstanding that the accident was occasioned by the negligence of a fellow-servant of the deceased.

3. The right of action in such case arises under 50-51 Vict. c. 16 s. 16 (c) and Art. 1056 C. C. L. C., and is an independent one in behalf of the widow and children, which they may maintain in case the deceased did not in his lifetime obtain either indemnity or satisfaction for his injuries.

4. Under the provisions of section 50 of *The Government Railways Act*, while the Crown may limit the amount for which in cases of negligence it will be liable, it cannot contract itself out of all liability for negligence. *The Grand Trunk Railway Co.* v. *Vogel* (11 Can. S. C. R. 612); and *Robertson* v. *The Grand Trunk Railway Co.* (24 Can. S. C. R. 611) applied.

5. In cases such as this it is the duty of the court to give the widow and children such damages as will compensate them for the pecuniary loss sustained by them in the death of the husband and father. In doing that the court should take into consideration the age of the deceased, his state of health, the expectation of life, the character of his employment, the wages he was earning and his prospects; on the other hand the court should not overlook the fact that out of his earnings he would have been obliged

1899

GRENIER v. THE QUEEN.

to support himself as well as his wife and children, nor the contingencies of illness or being thrown out of employment to which in common with other men he would be exposed.

Statement of Facts.

PETITION of right for damages for injury to the person on a Government railway.

By her petition the suppliant alleged as follows:

1. Que la dite requérante était légitimement mariée avec feu Xavier Letellier, en son vivant, chauffeur à l'emploi du chemin de Intercolonial, et résidant à Fraserville;

2. Que de ce mariage sont nés deux enfants, savoir; Martha, actuellement âgée de deux ans et Alfred âgé de neuf mois—et Marie Anne Clara, née le cinq Decembre dernier (1898).

3. Que la dite requérante a, le six mai 1898, duement été nommée, en justice, tutrice aux dits deux enfants mineurs;

4. Que la dite requérante a accepté la dite charge, a été assermentée comme telle, et le dit acte de tutelle a été duement enregistré;

5. Que, le ou vers le 2 mai courant (1898), le dit feu Xavier Letellier a été tué dans une collision, sur le chemin de fer Intercolonial, dans le district de Kamouraska, à King's Sidings, entre les stations de la Rivière Ouelle et Sainte Anne de la Pocatière;

6. Que le dit chemin de fer Intercolonial est un ouvrage public qui appartient à Sa Majesté, et dont Elle a le contrôle et la direction;

7. Que la dite collision a eu lieu entre un train irrégulier (special train), savoir l'engin N° 3, montant allège (light engine) et conduit par l'ingénieur A. Boisvert et le chauffeur Charles Dion, et un train régulier, N° 48, appelé *market train*, conduit par l'ingénieur Jolivet et le chauffeur feu Xavier Letellier;

8. Que la dite collision et la mort du dit Xavier Letellier sont dues à la négligence coupable, la faute

1899

GRENIER v. THE QUEEN.

Statement of Facts.

grossière et à l'ignorance des employés de Sa Majesté, sur le dit chemin de fer, pendant qu'ils agissaient dans les limites de leurs fonctions ou de leur emploi, et spécialement des dits Boisvert et Dion ;

9. Qu'il existe pour le service du dit chemin de fer Intercolonial des règlements généraux adoptés le 16 août 1876,—et aussi des règlements spéciaux pour la marche des trains,—imprimés à la suite des *time tables* et qui font partie des règlements généraux ;

10. Qu'entr'autres choses, il est ordonné par les dits règlements, " que seules les personnes reconnues pour " avoir des habitudes régulières et être sobres "—seraient employés pour la direction des trains ; " que " toute personne reconnue pour être ivrogne, ou pour " fréquenter les buvettes en devoir ou non,—sera " renvoyée du service, que l'ingénieur en charge d'un " engin allège (light engine) aura les mêmes devoirs " et responsabilités qu'un conducteur (Art. 60, 63, 64 " des règlements spéciaux) ; que les chauffeurs seront " soumis aux mêmes ordres que les ingénieurs, lors- " qu'ils seront sur les engins, et qu'ils devront assister " et remplacer l'ingénieur quand cela sera nécessaire " (Art. 204 & 205 des règlements généraux) ;

11. Que le dit ingénieur Boisvert avait l'habitude de fréquenter les buvettes et de s'enivrer, qu'il avait pris de la boisson et était en boisson lorsqu'il est parti de la Rivière du Loup, le 2 mai courant (1898), et ce, à la connaissance des employés du dit chemin qui avaient le contrôle du dit ingénieur ;

12. Que le dit chauffeur Charles Dion était un novice à l'emploi du dit chemin de fer depuis un mois seulement, ayant remplacé des employés compétents ; qu'il n'avait jamais appris ce métier de chauffeur ; qu'il n'avait alors fait que deux ou trois voyages comme tel, et qu'il ne connaissait aucunement les devoirs de sa position, ni les règlements du dit chemin de fer ; et

1899

GRENIER v. THE QUEEN.

Statement of Facts.

ce, à la connaissance des employés du dit chemin qui en avaient le contrôle ;

13. Que lors de leur départ de la Rivière du Loup, l'ordre suivant a été donné aux dits Boisvert & Dion :

" L'engin No. 3 suivra Wilson spécial jusqu' à Saint " Charles, sur un signal blanc, marchera en avant du " No. 143—Rapportez-vous à Sainte Anne pour des " ordres.—Rencontrez le No. 50 à Saint Alexandre."

14. Qu'il est ordonné aux ingénieurs et chauffeurs par les règlements du dit chemin de fer Intercolonial—" de prêter attention aux signaux et d'arrêter quand " un signal est au danger (signal rouge, la nuit)—No. " 23, 35 et 173 des règlements généraux ; No. 41 des " règlements speciaux— ; que les trains spéciaux " doivent s'approcher avec précaution des stations " (Art. 18 des règlements spéciaux) ; que chaque fois " qu'un ordre est donné de rencontrer un train à une " station, ils doivent arrêter à cette station (Art. 42 des " règlements spéciaux) ;

15. Que malgré cet ordre et ces règlements et les signaux rouges (au danger) placés à la station de Saint Alexandre, les dits Boisvert & Dion n'y sont pas arrêtés, mais ont dépassé la station d'environ un mille, et ce n'est qu'après cela qu'ils y sont ensuite retournés pour prendre la voie d'évitement ;

16. Que cette conduite anormale et cette violation flagrante des règlements du dit chemin de fer—ont été connues des employés du dit chemin qui avaient le contrôle des dits Boisvert & Dion (Art. 168 des règlements généraux) ;

17. Qu'il est ordonné impérativement par les règlements du dit chemin de fer : (Art. 15, règlements spéciaux) "Special and working trains must keep at " least fifteen (15) minutes clear of the time of all " regular trains."

1899

GRENIER v. THE QUEEN.

Statement of Facts.

Art. 19 (règlements spéciaux). "No irregular train "shall leave or pass a station unless it has time to "arrive at the next siding, at least fifteen (15) minutes "before the time fixed by the time table for the depar- "ture from there of a train coming in the opposite "direction."

Art. 148 (règlements généraux). "Irregular train "must be in a siding at least fifteen (15) minutes "before regular trains are due.....

18. Que le train No. 43 (market train) était dû en vertu du *time table*, à Sainte Anne à 21.31 (standard time);—à la Rivière Ouelle à 21.53—à Saint Philippe de Néri à 22.07;—à Saint Paschal à 22.28;

19. Que le train spécial (irregular train) conduit par Boisvert et Dion est passé à Saint Paschal, vers 22.04; —à Saint Philippe de Néri, à 22.08; à la Rivière Ouelle vers 22.18,—sans arrêter à aucune de ces stations et marchant sur le temps d'un train régulier, contrairement et en violation flagrante des règlements du dit chemin de fer, et ce, à la connaissance des employés et officiers supérieurs du dit chemin qui avaient le contrôle des dits Boisvert et Dion;

20. Que c'est cette négligence coupable et l'ébriété du dit Boisvert, l'incapacité et l'ignorance grossière du dit Chs. Dion et leur violation criminelle des règlements du dit chemin de fer qui ont été la cause directe et immédiate de la dite collision et de la mort du dit feu Xavier Letellier, le mari de la requérante, ainsi que cela a été reconnu à l'enquête du Coroner sur le corps du dit Letellier, le 3 mai 1898;

21. Que les dits Boisvert et Dion et les autres employés en devoir, le soir du 2 mai courant (1898), qui en avaient le contrôle, sont des employés de Sa Majesté sur le dit chemin de fer Intercolonial, et tous, ils agissaient alors dans l'exercice de leurs fonctions ou emplois; ce qui rend Sa Majesté responsable de la

mort du dit Xavier Letellier, tant en vertu de la loi en force dans la Province de Québec (1053-1054 C C.),—qu'en vertu de la 50 et 51 Vic., ch. 16, secs. 15 et 16 qui donnent juridiction à la Cour de l'Echiquier pour la connaissance de ces causes;

22. Que le dit Xavier Letellier était un jeune homme d'environ 27 ans, plein de force et de santé, promettant une longue vie;

23. Que le dit Letellier gagnait $1.85 par jour, faisait une semaine de six jours et demi à sept et huit jours, et son salaire sur le dit chemin de fer Intercolonial, ou tout autre chemin de fer pouvait, vû ses capacités et l'augmentation régulière des salaires, atteindre dans deux à cinq ans—$2.50 à $2.75 par jour, soit environ $100.00 par mois, et même au-delà;

24. Que la requérante est jeune, faible, pauvre, incapable de gagner sa vie par elle même, et de subvenir à son entretien, ni à l'entretien, l'élevage et l'éducation de ses deux enfants mineurs qui sont dépourvus de tous moyens, soit par eux-mêmes, soit de leurs parents;

25. Que la vie et l'entretien de la requérante, la vie, l'entretien et l'instruction des dits deux enfants, coûteront environ $1000.00 par année;

26. Que la requérante a beaucoup souffert dans sa santé, son repos et son bien-être par suite de la mort subite de son dit mari;

27. Que les dommages causés à la requérante et à ses dits deux enfants, par la mort du dit Xavier Letellier—s'élèvent à au moins la somme de $25,000.00;

28. Qu'une demande d'indemnité a déjà été faite au Surintendant du chemin de fer Intercolonial qui n'a donné aucune réponse satisfaisante.

C'est pourquoi, votre requérante, tant personnellement que comme tutrice à ses dits deux enfants mineurs,—demande à Sa Très-Excellente Majesté la

1899

GRENIER v. THE QUEEN.

Statement of Facts.

Reine et la prie de vouloir bien accorder la présente pétition de droit et de lui payer une indemnité de $25,000.00 pour les dommages à eux causés par suite de la mort du dit Xavier Letellier, arrivée comme il est dit ci-dessus.

Her Majesty's Attorney-General for the Dominion of Canada pleaded to the petition as follows :

"1. Her Majesty does not admit the allegations set forth in the 3rd, 4th, 5th, 6th and 7th paragraphs of the petition of right, or any of them."

"2. Her Majesty denies that the alleged collision or death of the said Xavier Letellier were due to any negligence, fault or ignorance of the said engineer Boisvert, or the fireman Dion, or any other of Her Majesty's officers, servants or employees."

"3. Her Majesty denies the allegations set forth in the 9th, 10th, 11th, 12th, 13th, 14th, 15th, 16th, 17th, 18th, 19th, 20th, 21st, 22nd, 23rd, 24th, 25th, 26th, 27th and 28th paragraphs of the petition of right and each of them."

"4. The alleged collision took place on the 2nd May, 1898, between a light engine in charge of engineer Boisvert and fireman Dion and an accommodation train driven by engineer Jolivet and the said Xavier Letellier, fireman, and in the collision the said engineer Boisvert and the said fireman Letellier were instantly killed. The said engineer and fireman heretofore mentioned were fellow employees of Her Majesty in the service of the Intercolonial Railway of Canada, each properly qualified and skilled in the duties which he had to perform; and the accident causing the death of the said Letellier was due to the negligence of the said engineer Boisvert and fireman Dion, or one of them, and the death of the said Letellier was occasioned in the ordinary discharge of his duties as fireman through the negligence of his fellow

servants the said engineer Boisvert and fireman Dion while acting in the ordinary discharge of their duties, and the Attorney-General on behalf of Her Majesty avers that the alleged accident in which the said Letellier was killed, arising as it did from the negligence of his fellow-servant in the common employment, was one of those accidents the risk of which the said Letellier as between Her Majesty and himself contracted to bear."

" 5. The death of the said Xavier Letellier was not caused by any negligence on the part of Her Majesty or any of Her Majesty's officers, servants or employees."

" 6. The said Xavier Letellier being a permanent employee of Her Majesty in the service of the Intercolonial Railway of Canada, was a member of an association known as The Intercolonial Railway Employees' Relief and Insurance Association, which is an association composed of the employees of Her Majesty in the said railway service, to which the employees make certain contributions, and from the funds of which association certain allowances in accordance with the rules and regulations thereof are made to the members in case of accident or illness, or to their families in case of death. Her Majesty, through her Government of Canada, in order to enable the said association to pay such allowances, contributes annually to the fund of the said association the sum of $6,000.00, and such contribution had been made annually by Her Majesty throughout the term of the employment of the said Xavier Letellier, and was so made in consideration of the stipulations on the part of the said association set out in the rule or regulation hereinafter quoted. It is one of the rules and regulations of the said association that "in consideration of the annual contribution of $6,000.00 from the railway department" (thereby meaning Her Majesty in the

1899

GRENIER v. THE QUEEN.

Statement of Facts.

right of Her Government of Canada) "to the association, the constitution, rules and regulations and future amendments thereto, shall be subject to the approval of the chief superintendent and the railway department," (thereby meaning Her Majesty in Her right aforesaid) "shall be relieved of all claims for compensations for injuries or death of any member." The said rule or regulation was in force at the time the said Xavier Letellier became an employee of Her Majesty and a member of the said association, and has ever since continued to be in force. The said rule or regulation was well known to the said Xavier Letellier, and he sought and accepted employment in Her Majesty's service and membership in the said association upon the stipulation among others that he should be bound by the said rule or regulation above set out.

"7. The Attorney-General on behalf of Her Majesty repeats the several allegations in the last preceding paragraph set forth, and says that the said Xavier Letellier by becoming a member of the said association and sharing in the benefits thereof, and by reason of the other facts in the said paragraph stated was in his lifetime estopped from setting up any claim against Her Majesty for compensation for any injury sustained by him in Her Majesty's said service, and that for the same reasons the suppliant and those on behalf of whom she sues are likewise estopped from setting up against Her Majesty the claim herein sued for."

"8. It was one of the terms of employment of the said Xavier Letellier by Her Majesty that Her Majesty should be relieved of all claims for compensation for injury or death of the said Xavier Letellier in anywise caused in the service of Her Majesty, and the death of the said Letellier, on account of which this action is brought, was caused while he was performing his duties in the service of Her Majesty."

"9. The Intercolonial Railway Employees' Relief and Insurance Association was and is an association of the permanent employees of Her Majesty in the service of the Intercolonial Railway, the principal object of which association is to provide allowances for members of the association in case of accident or illness or for their families in case of death. The funds of the association are derived entirely from regular contributions made thereto by members, and the sum of $6,000.00 annually contributed thereto by Her Majesty, through Her Government of Canada. The said contribution so made by Her Majesty was and is made in consideration of the agreement between Her Majesty and each of the members of the said association that Her Majesty shall be relieved of all claims for compensation for injuries or damages sustained by any member of the association, and the Attorney-General avers that at the time of the employment by Her Majesty and the said Xavier Letellier it was agreed between Her Majesty and the said Xavier Letellier that in consideration of the payment by Her Majesty annually to the said association of the said sum of $6,000.00 he the said Xavier Letellier should not have any claim against Her Majesty for compensation for injuries or death sustained by him in the said service of Her Majesty. Her Majesty has during each year of the employment of the said Xavier Letellier duly paid and contributed to the said association the said sum of $6,000.00, and the said Xavier Letellier as a member of the said association has had the benefit thereof, and the suppliant and those on behalf of whom she sues has since the death of the said Xavier Letellier received or become entitled to the sum of $250 to be paid out of the funds of the said association on account of the death of the said Xavier Letellier."

1899

GRENIER v. THE QUEEN.

Statement of Facts.

"10. At the time of the employment by Her Majesty of the said Xavier Letellier, the said Xavier Letellier agreed with Her Majesty that in consideration of the payment of a sum of money by Her Majesty for the benefit of the said Xavier Letellier, which sum of money Her Majesty did pay as so agreed, the said Xavier Letellier should not in any case have any claim against Her Majesty for any damages for injuries or death sustained by him in the service of Her Majesty."

"11. The suppliant on her behalf and on behalf of those for whom she sues herein has received from the said Employees' Relief and Insurance Association on account of the death of her said husband Xavier Letellier his death indemnity of $250, which amount the Attorney-General claims should be set off against any damages which may be recovered herein."

"12. The Attorney-General on behalf of Her Majesty repeats the several allegations set forth in the 6th paragraph hereof, and says that the suppliant on her own behalf and on behalf of those for whom she sues herein has accepted and received from the said Employees' Relief and Insurance Association out of the moneys so contributed thereto by Her Majesty the death indemnity of her husband the said Xavier Letellier, payable according to the rules and regulations of the said association amounting to the sum of $250, and that the suppliant is thereby estopped from setting up against Her Majesty the claim sued for herein."

"13. The damages caused to the suppliant and to her children by the death of Xavier Letellier do not amount to the sum of $25,000."

The suppliant replied to the defence, as follows: —

"1. La requérante nie les allégations Nos 1. 2, 3, 5, 7, 8, 9, 10, 11, 12 et 13, de la dite défense.

2. En réponse à l'allégué No 4 de la dite défense, la requérante dit que le chauffeur Dion n'était, lors de

l'accident du 2 mai 1898, aucunement qualifié comme chauffeur; que Boisvert, l'ingénieur, était sous l'influence des liqueurs enivrants quand il a pris charge de son engin, le même jour; que le fait que feu Xavier Letellier aurait été un co-employé de Boisvert et Dion (ce que la requérante nie) cela n'aurait pas pour effet de libérer Sa Majesté de sa responsabilité au sujet de la mort du dit Letellier."

" 3. En réponse aux allégués Nos 6, 7, 8, 9, 10 de la dite défense, la requérante dit: Que feu Xavier Letellier n'a jamais connu que Sa Majesté pouvait se libérer par suite de sa contribution de $6,000 au fonds d'assurance du chemin de fer Intercolonial de toute responsabilité pour les accidents causés par la faute de ses employés; que le dit feu Xavier Letellier n'a jamais accepté, ni reconnu, ni souscrit à aucune condition ou engagement pouvant limiter cette responsabilité; que Sa Majesté, en vertu de l'acte des chemins de fer du Canada, en force lors de l'accident du 2 mai, " ne peut " être dégagée d'aucune responsabilité, par aucun avis, " condition ou déclaration, pour les dommages causés " par la négligence, l'omission ou le manquement d'un " officier, employé ou serviteur du ministre "; que les dits Boisvert & Dion étaient, lors du dit accident, des employés, officiers et serviteurs du ministre, c'est-à-dire du ministre des chemins de fer et canaux."

" 4. La requérante, en réponse à l'allégué No 12 de la dite défense, dit: qu'elle répète l'allégué No 3 ci-dessus; que le paiement d'une assurance de vie, du dit feu Xavier Letellier ne peut, en aucune manière, affecter le recours en dommage de la requérante contre Sa Majesté, laquelle est responsable de ces dommages, malgré toute stipulation contraire; que la requérante, qui ne s'entend pas en affaires, ne peut avoir renoncé, en connaissance de cause, à son présent recours contre Sa Majesté; que toute telle renonciation, en supposant

1899

GRENIER v. THE QUEEN.

Statement of Facts.

qu'elle existe, n'a été donnée que par erreur de la part de la requérante, qui n'a pas lu ni eu la lecture de ce qu'on a pu lui faire signer, et dans l'ignorance des règlements de l'association d'assurance du chemin de fer Intercolonial."

" C'est pourquoi la requérante conclut au renvoi de la dite défense de Sa Majesté, avec dépens."

The following admissions of fact were made by the parties before trial:

" The parties hereto admit paragraphs 1, 2, 3, 4, 5, 6, 7, 9, 10, 13, 14, 15, 17 and 18 of plaintiff's Petition of Right."

" The plaintiff admits that paragraph 8 of said Petition of Right be read as follows :

" Que la dite collision et la mort du dit Xavier Letellier sont dues à la négligence, à la faute et à l'ignorance des employés de Sa Majesté, sur le dit chemin de fer, pendant qu'ils agissaient dans les limites de leurs fonctions ou de leur emploi, et spécialement des dits Boisvert et Dion ;"

" Paragraph 12 to be read as follows :

" Que le dit chauffeur Charles Dion était à l'emploi du dit chemin de fer depuis un mois seulement ayant remplacé des employés compétents ; qu'il n'avait jamais appris ce métier de chauffeur; qu'il n'avait alors fait que deux ou trois voyages comme tel ;"

" Paragraph 19 to be read as follows :

Que le train spécial (irregular train) conduit par Boisvert et Dion est passé à St. Paschal vers 22.04 ;—à Saint Philippe de Néri à 22.08—à la Riviere Ouelle vers 22.18—sans arrêter à aucune de ces stations et marchant sur le temps d'un train régulier, contrairement et en violation des règlements du dit chemin de fer et ce devait être à la connaissance des employés et officiers supérieurs du dit chemin qui avaient le contrôle des dits Boisvert et Dion ;"

Paragraph 21 to be read as follows :

" Que les dits Boisvert et Dion et les autres employés en devoir le soir du 2 Mai courant (1898) qui en avait le contrôle sont des employés de Sa Majesté sur le dit chemin de fer Intercolonial, et tous, ils agissaient alors, dans l'exercice de leurs fonctions ou emplois ;"

" Paragraph 22 to be read as follows :

Que le dit Xavier Letellier était un jeune homme d'environ 27 ans, plein de force et de santé ;"

Paragraph 23 to be read as follows :

" Que le dit Letellier était un bon chauffeur, gagnait à l'époque de sa mort, quand il était employé, $1.60 par jour et dans le cours régulier des promotions il aurait pu se présenter en juin suivant,—époque à laquelle des promotions ont été faites,—pour subir l'examen comme ingénieur et en cas de succès et s'il avait continué d'être à l'emploi du Gouvernement, son salaire alors comme ingénieur aurait été de $2.10 pour la première année, $2.30 pour le deuxième, $2.50 pour la troisième et $2.75 pour la quatrième et les années subséquentes."

" Le dit Letellier est entré au service du Gouvernement en 1889 et depuis lors il a gagné les montants suivants :

1889	$380 11
1890	453 43
1891	487 64
1892	388 52
1893	361 82
1894	339 59
1895	347 68
1896	266 47
1897	395 94
1898	170 96

Les parties pour les fins de cette cause consentent à ce que le tribunal consulte les tables de mortalité

1899

GRENIER v. THE QUEEN.

Statement of Facts.

(actuary tables) de la Compagnie New York Life, si nécessaire, pour fixer les dommages."

The parties hereto further admit:

"1. That A. Boisvert, Charles Dion, Jolivet and Xavier Letellier, mentioned in the seventh paragraph of the Petition of Right, were in their respective positions fellow servants in the employ of the Intercolonial Railway and all under the control of the same superior officers, and working, at that time, as stated in said paragraph 7."

2. "That the deceased Xavier Letellier was a member of the association known as the Intercolonial Railway Employees' Relief and Assurance Association, which association is composed of the employees of Her Majesty in the railway service, and to which the employees make certain contributions and from the funds of which association certain allowances, in accordance with the rules and regulations thereof, are made to the members in the case of accident or illness, or to their families in the case of death, in the manner set forth in said rules and regulations."

"3. That the Government of the Dominion of Canada contributes six thousand dollars annually to this association, in consideration of which it was made a rule of the association that the Government should be relieved of all claims for compensation for injuries or death of any member, as stated in said rules."

"4. That Exhibit D (1) is a copy of the constitution and rules and regulations of the society, as approved by the chief superintendent therein mentioned; that the deceased Letellier was a member of the society; that he had received a copy and was aware of the said rules and regulations and that the plaintiff by virtue of said rules and regulations received the indemnity of two hundred and fifty dollars, being the amount mentioned in Exhibits D (7) and D (8)."

1899

GRENIER v. THE QUEEN.

Argument of Counsel.

"5. The defendant produces as Exhibit D (2) and D (3) two documents admitted to be certificates of membership of the said deceased Xavier Letellier in the said society and bearing his signature, and as D (4), D (5) and D (6) three receipts admitted to have been signed by him for copies of the revised constitution and rules and regulations."

The facts appearing upon the evidence are stated in the reasons for judgment.

January 31st, 1899.

The case was argued at Quebec before Mr. Justice Burbidge, upon questions of law reserved by the Registrar, to whom the case had been referred for enquiry and report.

G. G. Stuart, Q.C. and *N. C. Riou* for the suppliant.

The *Solicitor-General of Canada, E. L. Newcombe, Q.C., J. Dunbar, Q.C.* and *C. Pouliot* for the Crown.

Mr. Stuart stated there were in reality only two grounds upon which the Crown defended the action; first, that the accident by which the husband of the suppliant was killed was caused by the negligence of his fellow servants, and, secondly, that the deceased's membership in the railway insurance association, and the payment of the amount of the insurance to the suppliant, were facts which estopped the suppliant from recovering anything under her petition. Thus negligence on the part of the Crown's servants is admitted; and as to the effect of such negligence, I refer to the cases collected in the reporter's note to the case of *McKay's Sons* v. *The Queen* (1), and Art. 1056 of the Civil Code.

It has been decided over and over again in the Province of Quebec, and the principle has been affirmed in Quebec cases in the Exchequer Court and in the Supreme Court of Canada, that where the accident has

(1) 6 Ex. C. R. at p. 3.

1899

GRENIER v. THE QUEEN.

Argument of Counsel.

been caused by the negligence of a fellow servant, the person injured has nevertheless a right of action against the employer. *Filion* v. *The Queen* (1).

In answer to the second ground of the defence, we say that the suppliant's right of action is not in her capacity as representative of her deceased husband, but in her own right as provided for by Art. 1056 of the Civil Code. It was simply impossible for the deceased to have renounced a right on behalf of his wife which did not accrue until after his death. The right of action of the widow and children is a substantive one, and is never under the disposition of the father to the extent that it may be renounced by him. He cannot release the action.

Again, even if the action were by the legal representatives in right of the deceased, the receipt of the insurance money and the regulations of the insurance association would not be a bar. *Robinson* v. *Canadian Pacific Railway Company* (2).

Anything that was done between the deceased and the Government touching the insurance in question here, was, so far as the action at the suit of the widow and children is concerned, *res inter alios acta*.

Then, as to the question of contributory negligence, it is to be said that whatever effect contributory negligence would have under the circumstances of this case according to the principles of English law, under Quebec law such a condition would only affect the amount of damages recovered, and does not operate as a bar to the action.

The clause in the regulations of the I. C. R. Relief and Insurance Association is not binding on the suppliant even if she has her right of action in a representative capacity, for it contravenes section 50 of R. S. C. c. 38. *Lavoie* v. *The Queen* (3): *Roach* v. *Grand*

(1) 4 Ex. C. R. 145; 24 S. C. R. 482.

(2) [1892] A. C. 481.

(3) 3 Ex. C. R. 96.

1899

GRENIER v. THE QUEEN.

Argument of Counsel.

Trunk Railway Co. (1); *Farmer* v. *Grand Trunk Railway Co.* (2).

The receipt for the money received by the suppliant from the insurance association contains no release or discharge of any claim against the Crown, and cannot under any circumstances be taken into account in reduction of damages here. *Bradburn* v. *Great Western Railway Co.* (3); *Grand Trunk Railway Co.* v. *Jennings* (4).

The suppliant is entitled to a sum in damages which would compensate her for the loss of her husband's support of herself and children during his reasonable term of life.

S. C. Riou contended that the admission of facts narrows the issues down to two principal questions:— 1st. Whether the doctrine of common employment obtains in the Province of Quebec; 2nd. Whether the Crown is discharged by reason of its contribution to the funds of the insurance association, and the clause in the regulations of the association relieving it from liability.

Admitting that the deceased was in the employ of Her Majesty, as well as Boisvert and Dion, it cannot be established that the work the three of them were engaged in at the time of the accident was common. They were on different trains. *Pollock on Torts* (5). The doctrine of common employment is no longer in force in England since the enactment of 38 & 39 Vict. c. 90. Nor does it exist in France, or in the Province of Quebec. 2 *Boitard* (6). *Dalloz*: Rep. Suppl. vo. "*Responsabilité*"; *Belanger* v. *Riopel* (7); *Dupont* v. *Quebec S. S. Co.* (8); *Filion* v. *Queen* (9).

(1) Q. R. 4 S. C. 392.
(2) 21 Ont. R. 299.
(3) L. R. 10 Ex. 1.
(4) 13 App. Cas. 800.
(5) P. 90.
(6) No. 911 p. 155.
(7) M. L. R. 3 S. C. 198, 258.
(8) Q. R. 11 S. C. 188.
(9) 24 Can. S. C. R. 482.

1899

GRENIER v. THE QUEEN.

Argument of Counsel.

The deceased's fellow servants, Boisvert and Dion, were incompetent for the work they were entrusted to do, and the Crown employing them is responsible for their negligent acts. 2 *Boitard* no. 884 pp. 124, 125 ed. 1887; *Dalloz*, Rep. Suppl. vo. "*Responsabilité*" no. 750; 20 *Laurent*, no. 570; 31 *Demolombe* no. 610 p. 530.

The French law ignores stipulations entered into to renounce damages for future wrongs.

Again, the insurance association is a private undertaking and distinct from the public administration of the Intercolonial Railway. Every permanent male employee is obliged to become a member of it. It is a general and unilateral condition of *immunité* benefiting the Crown as against its employees. It must be strictly construed. *Glengoil S. S. Co.* v. *Pilkington* (1); *Robertson* v. *Grand Trunk Railway Co.* (2); *Vogel* v. *Grand Trunk Railway Co.* (3); *Roach* v. *Grand Trunk Railway Co.* (4).

The Solicitor General argued that an unbroken line of decisions in the Province of Quebec from the earliest reports down to *Robinson* v. *The Canadian Pacific Railway Co.* (5) affirmed the doctrine that the rule of *respondeat superior* did not apply in the case of common employment. A settled rule of law ought not to be considered as set aside by the casual observations of two judges. In the case of *The Queen* v. *Filion* (6), Taschereau, J. dissents from the majority of the court, holding that the rule of *respondeat superior* did not apply to the Crown in such a case. Unless the suppliant can bring herself within the provisions of Art. 1053 C. C. she has no case. This Article provides a remedy for any stranger who suffers

(1) 28 S. C. R. 159.
(2) 24 Can. S. C. R. 611.
(3) 11 Can. S. C. R. 612.
(4) Q. R. 4 S. C. 392.
(5) M. L. R. 2 Q. B. 25.
(6) 24 Can. S. C. R. 482.

damage, but not in the case of injury suffered by a person resulting from the negligence of a fellow servant. This article must be construed strictly. *Sirey*, 38 no. 270; 39 no. 2432.

The wife, under the certificate issued by the insurance association, is a beneficiary, and so is a party to the agreement to waive all claims against the Government. *Farmer* v. *Grand Trunk Railway Co.* (1) is distinguishable on this ground.

If deceased had received indemnity from the association his discharge would have been valid. *Bourgeault* v. *Grand Trunk Railway Co.* (2); *Glengoil S. S. Co.* v. *Pilkington* (3). Arts. 13 and 990 C. C. L. C.

J. Dunbar, Q.C., followed for the Crown, citing, *American and English Ency. Law* (4); *Bliss's Life Insurance* (5); *Smith on Negligence* (6); *Vogel* v. *Grand Trunk Railway Co.* (7); *Bourdeau* v. *Grand Trunk Railway Co.* (8); *Roach* v. *Grand Trunk Railway Co.* (9); *Abbott's Railway Law* (10).

By special leave *Mr. Pouliot* was next heard on behalf of the Crown. On the point of the deceased's insurance contract relieving the Crown from all liability, he cited *Dalloz*, 45, 126, Pt. II. As to the doctrine of common employment he cited *Morgan* v. *Vale of Neath Railway Co.* (11); *Tunney* v. *Midland Railway Co.* (12); *Fuller* v. *Grand Trunk Railway Co.* (13); *Hall* v. *Canadian Copper and Sulphur Co.* (14); 39 *Journal du Palais* (15); Art. 1384 French Civil Code; 1054 C. C. L. C. As to *quantum* of damages, he cited: *Pollock on Torts*, (16); *Cooley on Torts*, (17).

(1) 21 Ont. R. 299.
(2) M. L. R. 5 S. C. 249.
(3) 28 S. C. R. 156.
(4) 2nd ed. vol. 3, p. 1080 *et seq.*
(5) p. 734.
(6) p. 77.
(7) 11 Can. S. C. R. 612.
(8) 2 L. C. L. J. 186.
(9) 1 Man. R. 158.
(10) p. 388.
(11) L. R. 1 Q. B. 149.
(12) L. R. 1 C. P. 291.
(13) 1 L. C. L. J. 68.
(14) 2 L. N. 245.
(15) p. 12.
(16) 4th ed. p. 524.
(17) 2nd ed. sec. 274.

1899

GRENIER v. THE QUEEN.

Mr. Stuart replied.

Reasons for Judgment.

THE JUDGE OF THE EXCHEQUER COURT now (April 4th, 1899) delivered judgment.

The suppliant, Emely Grenier, brings this action for herself and for her infant children to recover damages for the death of her husband, Xavier Letellier, who was employed in his life-time as fireman upon the Intercolonial Railway, and who was killed in an accident that, on the 2nd of May, 1898, happened on that railway. At the time of Letellier's death there were two children living, issue of his marriage with the suppliant Emely Grenier, viz.: Martha, aged two years, and Alfred, aged nine months. Since his death another child has been born of the marriage, and has been made a party to this petition.

The matter having been referred to the registrar of this court for enquiry and report, and the parties upon that enquiry having agreed upon the facts, the registrar, under rule 163 of the general rules of the court, submitted a question of law arising thereon for the consideration of the court. That question coming on for hearing, it was agreed by all parties that the argument should be treated as a motion by the suppliant for judgment, and that judgment should be rendered on the facts as admitted by the parties.

The action is based in the first place on clause (*c*) of the 16th section of *The Exchequer Court Act* which provides that the Exchequer Court shall have exclusive original jurisdiction to hear and determine, amongst other things, every claim against the Crown arising out of any death or injury to the person or to property, on any public work, resulting from the negligence of any officer or servant of the Crown while acting within the scope of his duties or employment. That section has frequently been the subject of con-

1899

GRENIER v. THE QUEEN.

Reasons for Judgment.

sideration in this court and the Supreme Court of Canada, and it is now well settled that in cases falling within its terms a petition of right will lie against the Crown; and it has been suggested on more occasions than one that the Crown is liable if, in a like case, the subject would be liable. To meet that view of the statute the suppliant further relies on Article 1056 of the Civil Code of Lower Canada, which provides that in all cases where a person injured by the commission of an offence or a quasi-offence dies in consequence, without having obtained indemnity or satisfaction, his consort and his ascendant and descendant relations have a right, within a year after his death to recover from the person who committed the offence or quasi-offence, or his representatives, all damages occasioned by such death. It has been held that this provision of the Code gives a direct right of action to the widow and relations of the deceased person to recover the damages occasioned by the death from the person liable for the offence or quasi-offence from which it resulted, provided they can show, first, that the death was due to this cause; and, secondly, that the deceased did not during his lifetime obtain either indemnity or satisfaction for his injuries. *Canadian Pacific Railway Co.* v. *Robinson* (1).

It appears from the pleadings and admissions in the present case that the death of Letellier resulted from the negligence of servants of the Crown while acting within the scope of their duties or employment, and there is no doubt that in that respect the case is within the statute to which reference has in the first place been made. It is also conceded that it is in this court no answer to the petition to say that the injury was caused by the fellow servants of the deceased, it

(1) 14 S. C. R. 105; and, on appeal to the Privy Council, [1892] App. 488.

1898

GRENIER v. THE QUEEN.

Reasons for Judgment.

having been decided that the doctrine of common employment has no place in the laws of the Province of Quebec (1). But it is argued for the Crown that by the law of Quebec in such a case there is no right of action where the injury or death is occasioned by the negligence of a fellow servant, and that the question as to whether common employment affords a good defence does not arise. I am not able to accept that view. It appears to me that it comes in the end to the same thing, and I think I must take it to be settled by the *Filion* case and the *Robinson* case that in the Province of Quebec there is, in the class of cases mentioned, a right of action notwithstanding the death or injury has been caused by the negligence of a fellow servant of the deceased.

In addition to the fact that the deceased and those through whose negligence he lost his life were fellow servants in the employ of the Crown, the admissions of the parties show that he was at the time of his death a member of an association known as the Intercolonial Railway Employees' Relief and Assurance Association, which is composed of the employees of Her Majesty in the railway service and to which they make certain contributions and from the funds of which certain allowances in accordance with the rules and regulations thereof are made to the members of the association in the case of accident or illness or to their families in case of death. To the funds of this association the Government of Canada contributes six thousand dollars annually, in consideration of which it was made a rule of the association that the Government should be relieved of all claims for compensation for injuries to or for the death of any member of the

(1) Per Strong, J. in *Canadian Pacific Railway Co.* v. *Robinson*, 14 S. C. R. 114; *Filion* v. *Queen*, 4 Ex. C. R. 134; *Queen* v. *Filion*, 24 S. C. R. 482.

1899

GRENIER v. THE QUEEN.

Reasons for Judgment.

association. All permanent male employees of the railway are members of the association and contribute to its funds as an incident of their employment, and without any option or choice on their part; and the fees and assessments payable by them are deducted on the pay-roll from the amounts due to them for salary or wages. The object of the association is to provide relief to members while suffering through illness or bodily injury, and in case of death to provide a sum of money for the benefit of the family or relatives of deceased members. With reference to the insurance against death or total disablement there are three classes of members. In Class A the member when totally disabled, or his heirs or assigns, in case of death, are entitled to one thousand dollars; in Class B to five hundred dollars; and in Class C to two hundred and fifty dollars. Upon the death or total disablement of a member every surviving member pays an assessment proportionate to the amount of his insurance. Those in Class A pay four times as much as, and those in Class B twice as much as, those in Class C. In this way the amount to be raised is divided among and borne by the surviving members, and it is provided that the insurance money collected from death and total disability levies or assessments shall be paid to the person totally disabled, or to the person named by the deceased member. If no person is named it is to be paid to his widow, and if there is no widow, to the executors or administrators of the deceased member. Letellier belonged to Class C. He had received a copy of the constitution, rules and regulations of the association, and had signed the certificate of membership in force at his death, directing all insurance money accruing thereon to be paid to his wife. It is admitted that he was aware of the rules and regulations mentioned, but it is said that the admission was made through

1899

GRENIER v. THE QUEEN

Reasons for Judgment.

inadvertence, and I have been asked to strike it out. Receipts for copies of the constitution, rules and regulations of the association signed by the deceased are produced, and if the fact is material he must, I think, be taken to have been aware of them; and so I have not thought it necessary to decide whether I have or not the power to amend the admissions signed by the solicitors of the parties, or whether, granting the power, I ought in the present case to exercise it. It also appears that the suppliant Emely Grenier has been paid the sum of two hundred and fifty dollars, to which, under her husband's certificate of membership and the rules and regulations of the association, she became at his death entitled; and it is contended for the Crown that in view of these facts the present petition cannot be maintained.

To this contention two replies are made. In the first place in support of the petition reliance is placed, as has been stated, upon Article 1056 of the Civil Code of Lower Canada, and the case of *Robinson* v. *The Canadian Pacific Railway* (1), as showing that the suppliants have an independent and not a representative right of action, which is maintainable as the deceased did not in his lifetime obtain either indemnity or satisfaction for his injuries. And it is argued that this right of action is one which as against the suppliant the deceased could not discharge the Crown unless in his lifetime he obtained such indemnity or satisfaction; that he could not agree with the Crown in advance that it should be relieved from any such action by his widow and children.

Then, in the second place, it is said in support of the petition that any agreement to relieve the Crown from all claim for compensation for injury or death where the same arises, as it does here, from the negligence of

(1) [1892] App. Cas. 487, 488.

1899

GRENIER v. THE QUEEN.

Reasons for Judgment.

a servant of the Crown would be bad under the 50th section of *The Government Railways Act*, and could not be invoked by the Crown in answer to the petition. That section, so far as it is material to the present case, provides that Her Majesty shall not be relieved from liability by any notice, condition or declaration in the event of any damage arising from any negligence, omission or default of any officer, employee or servant of the Minister, meaning, as I understand it, any one employed by the Crown and under the direction of the Minister of Railways and Canals. Prior to 1871 there was in the statutes of Canada no provision of law such as this applicable to any railway. In that year by the Act of Parliament 34th Victoria, chapter 43, section 5, sub-section four, of section twenty of *The Railway Act of* 1868 was amended by adding thereto, the following provision:—"From which "action the company shall not be relieved by any "notice, condition or declaration if the damage arises "from any negligence or omission of the company or "of its servants." The action to which reference is made was for the neglect or refusal of the company to do certain things incident to their business as carriers. The provision of section 20 of *The Railway Act of* 1868 applied to the Intercolonial Railway so far as it was applicable to the undertaking, and in so far as it was not inconsistent with or contrary to the provisions of *An Act respecting the construction of the Intercolonial Railway* (1). In the same way and with a like limitation section 25 of the Consolidated Railway Act of 1879, in which the provision cited from the Act of 1871 again occurs, was applicable to the Intercolonial Railway. This was followed by *The Government Railways Act*, 1881, the clause in question finding a place in the 74th section of that Act, in these terms:—"The De-

(1) 31 Vict. c. 38, s. 2 and 31 Vict. c. 13.

1899

GRENIER v. THE QUEEN.

Reasons for Judgment.

partment [that is the Department of Railways and Canals] shall not be relieved from liability by any "notice, condition, or declaration in case of any "damage arising from any negligence, omission or "default of any officer, employee or servant of the "department." Then the provision occurs again in the 50th section of *The Revised Statutes*, chapter 38, (*The Government Railways Act*), now in force, in terms that have been mentioned. As applicable to railway companies the meaning and effect of the clause was discussed in *The Grand Trunk Railway Co.* v. *Vogel* (1) and in *Robertson* v. *The Grand Trunk Railway Co.* (2). In *Vogel's* case it was held by a majority of the court that the provision, as it occurs in the 25th section of *The Consolidated Railways Act*, 1879, prevented a railway company to which it applied from contracting itself out of liability for negligence; and in *Robertson's* case it was decided that the same provision in the *Railway Act*, 1888, (3) did not disable a railway company from entering into a special contract for the carriage of goods by which it limited its liability as to the amount of damages to be recovered for loss or injury to such goods arising from negligence. That is, that the company cannot contract itself out of all liability for negligence, but it may limit the amount for which in cases of negligence it will be liable. I take that to be the law as now established with respect to railway companies subject to *The Railway Act*, and as indicating the construction to be put upon the similar clause occurring in *The Government Railways Act*; for I entertain no doubt that it was the intention of Parliament in this matter to put the Crown in respect of Government railways on the same footing as a railway company.

(1) 11 S. C. R. 612. (2) 24 S. C. R. 611.
(3) 51 Vict. c. 29, s. 246 (3).

1899

GRENIER v. THE QUEEN.

Reasons for Judgment.

Now, it is obvious that the money that the widow of the deceased received from the association to which he belonged was paid by the association and not by the Crown. and so far as the immediate payment was concerned it was a matter of no importance whether the Crown made an annual contribution to the funds of the association or not. By its rules the amount was to be raised by assessments leviable upon the surviving members of the association, and in the particular case any benefit that may have arisen from the Crown's contribution accrued to such surviving members and not to the deceased and his widow. The sum that she received from the assurance fund of the association cannot in any sense, I think, be said to be an indemnity or satisfaction from the Crown for the injury that caused the death of her husband. The benefit that he received from the Crown's contribution consisted in this that the assessments payable by him for the expenses of the association, and for the payment of other claims during his lifetime were presumably less than they otherwise might have been. In that way he may perhaps be said to have received in advance some "indemnity or satisfaction" against the accident or injury that caused his death; but it is doubtful if it falls within the true meaning of these words as used in Article 1056 of the Civil Code. But that question is of the less importance in the present case, because it seems to me that I am bound on the authority of *Vogel's* case to hold that the agreement to relieve from all claims for compensation on which the Crown relies is against the statute to which reference has been made, and cannot be set up in answer to the present action, the death of the husband and father having been occasioned by the negligence of the servants of the Crown.

Then in regard to the damages, it seems clear that the insurance money paid to the widow should be

1899

GRENIER v. THE QUEEN.

Reasons for Judgment.

taken into consideration in assessing the damages to which she is entitled. In saying that, I do not wish to suggest that I entertain the view that in such cases as this the damages can be assessed with anything approaching mathematical accuracy. What one should strive to do is to give the suppliants such damages as will compensate them for the pecuniary loss sustained by the death of the husband and father; to make good to them the pecuniary benefits that they might reasonably have expected from the continuation of his life and which by his death they have lost. In doing that one has to take into account the age of the deceased, his state of health, the expectation of life, his employment, the wages he was earning, and his prospects; and on the other hand one is not to forget that the deceased in such a case as this must out of his earnings have supported himself as well as his wife and children, and that there were contingencies other than death, such as illness or the being out of employment, to which in common with other men he was exposed. All the surrounding circumstances are to be taken into account. In the present case the deceased was about twenty-seven years of age, in good health, employed as a fireman on the Intercolonial Railway and earning about four hundred dollars a year, with fair prospects of advancement in position and salary. Under all the circumstances I am of opinion to allow the widow the sum of one thousand seven hundred and fifty dollars, and the three children five hundred dollars each, making in all the sum of three thousand two hundred and fifty dollars, for which there will be judgment with costs. The question as to the disposition to be made for their benefit of the amounts awarded to the infant children is reserved.

Judgment accordingly.

Solicitor for the suppliant: *S. C. Riou.*

Solicitor for the respondent: *E. L. Newcombe.*

BRITISH COLUMBIA ADMIRALTY DISTRICT.

1899
May 4.

SUNDBACH v. SHIP *SAGA*.

CARLSSON v. SHIP *SAGA*.

Practice—Costs—Appeal from Registar's ruling.

McColl, C.J., L.J., in Chambers.

4th May, 1899.

MOTION by way of appeal from the ruling of the District Registar as to certain costs in an action *in rem*.

The facts upon which the motion was made are as follows:

The Marshall had been inpossession of the ship under warrants issued simultaneously in each case, and on taxation of his costs it was contended that he was entitled to a double set of possession fees. The Registrar only allowed one set of fees, and the matter was referred to the judge.

Per Curiam:—In view of the decision of Sir Robert Phillimore in the case of *The Rio Lima* (1) the Registrar's ruling must be held to be correct.

Order accordingly.

(1) L. R. 4 Ad. & Ecc. 157.

1899
June 14.

THE GENERAL ENGINEERING COMPANY OF ONTARIO (LIMITED) ..... PLAINTIFFS;

AND

THE DOMINION COTTON MILLS COMPANY, LIMITED, AND THE AMERICAN STOKER COMPANY ..... DEFENDANTS.

Practice—Motion to re-open trial—Affidavit meeting evidence produced at trial—Grounds for refusal.

An application was made after the hearing and argument of the cause but before judgment, for the defendants to be allowed to file as part of the record certain affidavits to support the defendants' case by additional evidence in respect of a matter upon which evidence had been given by both sides. It was open to the defendants to have moved for leave for such purpose before the hearing was closed, but no leave was asked. It also appeared that the affidavits had been based upon some experiments which had not been made on behalf of the defendants until after the hearing.

Held, that the application must be refused. *Humphrey* v. *The Queen* and *DeKuyper* v. *VanDulken* (Audette's Ex. C. Pr. 276) distinguished.

MOTION for leave to re-open the case after trial and argument but before judgment.

The grounds upon which the motion was based appear in the reasons for judgment.

May 6th, 1899.

F. S. Maclennan, Q.C. for the motion, cited *Humphrey* v. *The Queen* (1); *DeKuyper* v. *VanDulken* (1); *Trumble* v. *Horton* (3).

J. L. Ross, contra.

(1) 2 Audette's Ex. C. R. 276. (2) 3 Ex. C. R. 88.
(3) 22 Ont. A. R. 52.

1899

THE GENERAL ENGINEERING CO. OF ONTARIO v. THE DOMINION COTTON MILLS CO. AND THE AMERICAN STOKER CO.

Reasons for Judgment.

THE JUDGE OF THE EXCHEQUER COURT now (June 14th, 1899) delivered judgment.

This is an application to re-open the trial of this action, so far as may be necessary to file as part of the record the affidavits of Dr. Henry Morton and John Wolfe, with reference to a test and experiment made in the City of Brooklyn, in the State of New York, on the 22nd of April, 1899, of a furnace erected in accordance with the particulars and specifications of the United States Patent No. 310,110 issued to Amasa Worthington, dated 30th December, 1884, filed as defendants' Exhibit "D" in this case. This evidence is intended, no doubt, to meet the view expressed by Professor Nicholson at the trial that the Worthington Stoker made according to the patent mentioned would not work successfully. This case was heard, at Montreal, on the 11th, 12th, 13th and 14th days of April last, and Professor Nicholson was first called on the 11th, and in his evidence, given on that and the succeeding day, expressed the view that has been referred to. He was again called on the 13th and gave expression to the same view. After the trial the defendants appear to have had some experiments made which they no doubt think tend to prove that Professor Nicholson was mistaken, and which they now seek to have submitted to the court. I think, however, that the application, made as it is, after the taking of the evidence has been closed and the case argued, is made too late. If I should re-open the case to permit the defendants to give evidence of this kind, I could not well refuse a like indulgence to the plaintiffs. Such a practice would, I think, be found to be very inconvenient and undesirable.

Reference was made on the argument of the motion to the cases in this court of *Humphrey* v. *The Queen*

1899

THE GENERAL ENGINEERING CO. OF ONTARIO v. THE DOMINION COTTON MILLS CO. AND THE AMERICAN STOKER CO

Reasons for Judgment.

(1), and *DeKuyper* v. *VanDulken* (1). But *Humphrey* v. *The Queen* was a case in which there had been a preliminary judgment and a reference for assessment of damages; besides there could be no final judgment without the case coming again before the court. In the case of *DeKuyper* v. *VanDulken* a motion to re-open was allowed and a commission issued to take evidence upon a point as to which no evidence had been given, and in respect of which it was left optional to both parties to produce evidence. In the present case there is evidence before the court as to whether the Worthington Stoker, made in accordance with the patent above referred to, would work successfully or not, and the re-opening of the case would not be for the purpose of taking evidence upon that point, but to answer evidence already given. That is something, I think, which ought not, under the circumstances of this case, to be permitted,

The application will be refused, and with costs.

Judgment accordingly.

Solicitors for the plaintiffs: *Rowan & Ross.*

Solicitors for the defendants: *Macmaster & Maclennan.*

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(1) Audette's Ex. C. Pr. 276

THE GENERAL ENGINEERING COMPANY OF ONTARIO, (LIMITED) ..... PLAINTIFFS;

1899
June 14.

AND

THE DOMINION COTTON MILLS COMPANY (LIMITED), AND THE AMERICAN STOKER COMPANY DEFENDANTS.

Patent of invention—Furnace stoker—Combination—Infringement.

On the 15th October, 1892, Jones obtained a patent in Canada for alleged new and useful improvements in boiler furnaces. The distinctive feature of Jones' invention was that instead of using a fuel chamber or magazine bowl-like in shape, such as that claimed in Worthington's United States patent, he employed an oblong trough or bath-tub shaped fuel chamber with upwardly and outwardly inclined closed sides. This form of fuel chamber was suggested in the Worthington patent; but was not worked out by its inventor, it being his view apparently that several magazines or chambers bowl-like in shape could be used within the trough-shaped chamber. The Worthington patent was not commercially successful. Jones, using an oblong or trough-shaped chamber, was the first to manufacture a mechanical stoker that was commercially successful. Between Worthington's and Jones' there was all the difference between failure and success.

Held, that Jones' patent was valid.

ACTION for infringement of a patent of invention.

The facts are stated in the reasons for judgment.

The case was heard before the JUDGE OF THE EXCHEQUER COURT, at Montreal, on the 11th, 12th, 13th and 14th days of May, 1899.

J. L. Ross and *C. A. Duclos* for the plaintiffs, cited *American Dunlop Tire Company* v. *Anderson Tire Company* (1); *Incandescent Gas Light Company* v. *De Mare* (2).

(1) 5 Ex. C. R. 194. (2) 13 Cut. Pat. Cas. 301.

1899

THE GENERAL ENGINEERING CO. OF ONTARIO v. THE DOMINION COTTON MILLS CO. AND THE AMERICAN STOKER CO.

Reasons for Judgment.

D. Macmaster, *Q.C.* and *F. S. Maclennan*, *Q.C.* relied on *Brooks* v. *Lamplough* (1); *Thompson* v. *Moore* (2).

THE JUDGE OF THE EXCHEQUER COURT now (June 14th, 1899,) delivered judgment.

This is an action for the alleged infringement by the defendants of certain patents for improvements in mechanical stokers, of which the plaintiff company is the owner. The patent upon which the company principally rely, and the only one to which it is necessary to refer, is numbered 40,700, and was granted on the 15th day of October, 1892, to Evan William Jones, of Portland, Oregon, for alleged new and useful improvemen s in boiler and other furnaces.

It will, I think, be convenient before referring more particularly to this patent to examine one that was issued by the United States Patent Office on the 31st of December, 1884, to Amasa Worthington, of Chicago, Illinois, for a new and useful improvement in Self-feeding Gas Burning Furnaces. In his specification, Worthington states that:

"It is a universally admitted fact among furnace "builders and users that to obtain the best results "from coal as a fuel, it should be supplied in small "charges, or, better still, fed into the furnace continu- "ously in quantities or at a rate corresponding to the "rate of combustion. Numerous attempts have been "made, with more or less success, to accomplish this "result; but the experiments have proceeded upon "the theory that it is necessary to throw the fresh "coal upon that which is partially consumed or in an "incandescent state, or to deposit it at the side or in "front of the fire, and thus permit the hydrocarbon "gases to distill or partially distill from it before "spreading it over the fire, both of which methods

(1) 16 Cutl. Pat. Cas. 41. (2) 6 Cutl. Pat. Cas. 426.

1899

THE GENERAL ENGINEERING CO. OF ONTARIO v. THE DOMINION COTTON MILLS CO. AND THE AMERICAN STOKER CO.

Reasons for Judgment.

" are attended with loss, not only in the direct absorp-
" tion of heat by the coal, but in the sudden arrest of
" combustion (caused in a measure thereby) of the
" fixed-carbon or coke, as well as the equally sudden
" liberation of the volatile gases in the fresh charge,
" amounting often to thirty or forty per cent. of the
" total heating power of the coal, which passes off
" unconsumed, a large volume of smoke being an
" attendant result. Aside from this, the loss in the
" latter plan arises largely in the difficulty in main-
" taining an even fire, and in the fact that certain
" varieties of coal containing a large per cent. of non-
" combustible matter are liable to become " puddled "
" when the coke is moved in an incandescent state.
" Moreover, it is difficult, if not impossible, in either
" of these ways to diffuse the air throughout the mass
" of coals and mix the same in a sufficiently even
" manner with the evolving gases, while the same are
" at a sufficiently high temperature to form a chemical
" union therewith. The purpose of my invention is
" to overcome these difficulties and to produce an
" automatic feeding smokeless furnace, preferably
" adapted to the use, without direct loss, of bituminous
" coals of varying grades of fineness; said furnace being
" arranged to so distribute said coals that combustion
" may be uniform in its progress and intensity, and
" that the principal heat-producing elements of the
" coal—viz. the hydro-carbons and the fixed carbons—
" may be so treated therein as that the combustion of
" one may assist that of the other, each receiving the
" required proportion of oxygen at the proper time
" and in the proper place to support combustion.

" A further object is to so arrange said furnace that
" the ashes and clinkers may be readily and easily
" removed from the grate, and the fire broken up, if
" necessary, without subjecting the latter to excessive

1899

THE GENERAL ENGINEERING CO. OF ONTARIO v. THE DOMINION COTTON MILLS CO. AND THE AMERICAN STOKER CO.

Reasons for Judgment.

" and cooling drafts of air, the advantages and economy " of which are obvious. I accomplish said object by " feeding the coal from beneath the grate into a bowl- " shaped receptacle situated at or near the centre of " said grate, which is perferably round, and the bars of " which radiate from the periphery of said bowl. The " top, or periphery of the bowl, is provided with slots " or openings, preferably made in a radial form, which " communicate with a chamber beneath the bowl, " into which a volume of air is forced either by means " of a blower or a jet of steam. Said slots are so con- " structed as to direct the jets of air, or air and steam, " therefrom into and through the fresh coal at the " earliest stage of combustion, in order to drive out " the hydro-carbon and other volatile gases and reduce " it to coke as rapidly as it is forced up into the fur- " nace, and before it begins to spread out on the grate- " bars, and to thus maintain the incandescence of the " fire at the point on the surface from which the hydro- " gen gases must escape, thereby reducing them to a " thorough state of combustion as they leave the sur- " face. As an auxiliary to this process I place an arch " above, which serves as an accumulator to radiate its " heat back upon the burning mass and maintain it " in an incandescent condition. Openings above the " grate in the usual way admit air, which, with that " ordinarily passing through the grate, serves to com- " plete the combustion of the coke by combining with " the carbonic oxide that might otherwise escape and " converting it into carbonic acid. As the coal is " forced up at a given point from beneath, it tends to " form a dome-shaped mass, the residue from the top " rolling toward the base, at the outer circumference " of which the ashes are deposited upon the grate-bars " where the latter are the most widely separated from " each other, thus lessening the waste of fuel through

1899

THE GENERAL ENGINEERING CO. OF ONTARIO v. THE DOMINION COTTON MILLS CO. AND THE AMERICAN STOKER CO.

Reasons for Judgment.

"the grate by retaining the unconsumed coals upon "that more central portion of the grate where the bars "are closer together. The coal is fed upward by "means, preferably, of a single Archimedean screw or "conveyor, which I prefer to place at angle of about "forty-five degrees from the plane of the horizon, the "lower end communicating with a hopper or recep- "tacle containing the coal supply, while the upper "end communicates with the bottom of the bowl or "receptacle, forming a part of the grate. When the "screw is revolved, as hereinafter shown, the coal is "carried into the bottom of the bowl, and thence "forced upward until it overflows the top and is "pushed out upon the grate, the supply being in pro- "portion to the required rate of combustion, all of "which is hereinafter more fully stated, and definitely "pointed out in the claims."

And again with reference to the shape of the fuel receptacle chamber or magazine, the question on which the present controversy, it seems to me, turns, we find the following: –

"It is clearly apparent that when a large grate- "surface is required two or more conveyers placed "side by side, with corresponding receptacles, D, "may be used either with a like number of revolving "grates, or a stationary grate, in which latter case, "instead of two or more circular receptacles, a single "oblong trough may be used, with which the several "conveyers may connect. I do not limit myself, "therefore, to the use of a single conveyer, nor to the "form of receptacle shown, as it is evident that the "same may be modified to produce substantially the "same results."

There is no Canadian patent for this stoker. It does not appear to have come into use, certainly not into general use, and the evidence of Professor Nichol-

1899

THE GENERAL ENGINEERING CO. OF ONTARIO v. THE DOMINION COTTON MILLS CO. AND THE AMERICAN STOKER CO.

Reasons for Judgment.

son shows that in the form in which it is particularly described in the specification, it is a failure in comparison with the stoker manufactured by the plaintiffs under the patents held by them, or with that manufactured by the defendant, The American Stoker Company. The difference between failure in the one case and success in the other, depends principally on the shape of the fuel chamber or magazine, an oblong trough or bath-tub shaped chamber, with the sides upwardly and outwardly inclined being that which best lends itself to the proper relation and adjustment of the elements that are combined to produce a mechanical stoker that may be worked successfully. All the elements of the Jones' stoker, or of that manufactured by The American Stoker Company, which is alleged to be an infringement of the former, are old. They, or their equivalents, are all to be found in the Worthington stoker, and different elements are to be found in various earlier patents What Jones did was to work out Worthington's suggestion about the oblong trough. Instead of using a screw to feed the coal he used a ram or plunger; but the success of his stoker in no way depends upon that. The other elements being properly adjusted, it depends, as has been stated, on the shape of the fuel chamber or magazine. That is something which Worthington suggested, but did not work out. Jones was the first to work that out, and the first, in consequence, to manufacture a mechanical stoker, in which the best results are attained, that is, one in which the green fuel is reduced to coke before it reaches the zone of combustion, the gases distilled in the process of coking being burned and utilized without waste. Jones having succeeded Mr. Fullerton, who for over a year was selling the Jones stoker, and who is now the general manager of The American Stoker Company,

devised, so it appears by a letter of his in evidence, the stoker now manufactured by the latter company; he followed the Worthington stoker in using a screw to feed the coal, but improved upon it by placing it in a horizontal position, and in other ways, but in respect to the shape of the fuel chamber or magazines he adopted substantially that which Jones had found to be the best and most successful, and which he had used in the stoker or improvements for which he had obtained in Canada a patent.

This is what Jones himself in his specification, attached to Letters Patent No 40,700, says of his invention

"My invention relates to an improvement in boiler "and other furnaces, and it consists in a novel con- "struction, combination and arrangement of means in "which the fuel is forced into the mass of burning "coals from a point below said mass, instead of being "discharged on top of said mass, of burning fuel, said "means serving to force the supply of air directly over "the fresh or green fuel, and at the same time under "the mass of burning fuel, thereby causing the gases "from the green fuel, and the air supplied, to become "thoroughly mixed before they pass through the "burning fuel and off into the flue or flues; said "means also serving to regulate the supply of air, and "thus ensure complete combustion; said means also "serving to prevent inconvenience from the formation "of clinkers, and avoid the waste of fine coal, they "also providing for the destruction of clinkers, in the "event of such being formed; and the construction "and combination being such that the fire can be run "for a very long period without ashes or clinkers "interfering with its perfect operation, and all the "fuel shall be practically burned before it reaches the

1899

THE GENERAL ENGINEERING CO. OF ONTARIO v. THE DOMINION COTTON MILLS CO. AND THE AMERICAN STOKER CO.

Reasons for Judgment.

"grates proper of the furnace; and the quantity of "fuel regulated."

Then after a long and detailed description he adds: "In the furnace herein described, the fresh or green "fuel is forced up into the body of the fire, and the gases "which are liberated from this fuel pass through the "body of burning coal which is above the fresh fuel, "and the air for promoting combustion is supplied at "the points where the fresh fuel is supplied to the "mass of burning fuel above; and the said furnace, "herein described differs essentially from other fur-"naces which are provided with fuel forcing means "which do not constitute both a supporting fire bed "for the underlying mass of fuel as well as the super-"incumbent mass, and do not serve for conducting "the fresh fuel directly up within the fire chamber "amidst the masss of burning coal during the oper-"ation of forcing the fresh fuel from the fuel box into "the fire chamber by the ram."

And in his claim, among other things, he claims, not in itself, of course, but in combination with other elements, a fuel chamber with upwardly and outwardly inclined closed sides This, under the evidence, appears to be the distinctive feature of the stoker made by Jones, and it is more especially in reference to this feature or element of the combination that infringement is alleged.

Now I confess that at first, and during the greater part of the trial, I was strongly inclined to the view, that having regard to the Worthington patent, and other patents that are in evidence, it was in Canada open to any one, and so of course, open to the defendant, The American Stoker Company, to manufacture and set up and use the mechanical stoker of which the plaintiff company complain. It seemed to me that it was but a fair and reasonable development of the

1899

THE GENERAL ENGINEERING CO. OF ONTARIO v. THE DOMINION COTTON MILLS CO. AND THE AMERICAN STOKER CO.

Reasons for Judgment.

Worthington stoker that might have been made by men skilled in the matter, and without invention. On that branch of the case I was inclined to differ with Professor Nicholson. But on further consideration I have come to the conclusion that he is right; that between the Worthington stoker and the Jones stoker there is a gulf, the gulf that lies between failure and success—that has not been bridged without invention, or that happy discovery or hitting upon things which pass therefor. And having come to that conclusion, I think the plaintiff company entitled to protection for the improvement which Jones made, and for which he obtained a patent.

There will be judgment for the plaintiff company, with costs.

Judgment accordingly

Solicitors for plaintiffs: *Rowan & Ross.*

Solicitors for the defendants: *Macmaster & Maclennan.*

1899

July 28.

QUEBEC ADMIRALTY DISTRICT.

WILFRED HINE.....PLAINTIFF;

AGAINST

THE OWNERS OF THE STEAM-TUG "*THOMAS J. SCULLY*"..... DEFENDANTS.

Admiralty law—Towage—Salvage—Sufficiency of tender—Costs.

The steam-tug *T. J. S.*, of 111 tons burthen, bound from New York, U.S.A., to St. Johns, P.Q., was prosecuting her voyage off Cape Chatte, in the Lower St. Lawrence, when a slight accident happened to her boiler in consequence of which her fires had to be extinguished so that the boiler might cool and allow the engineer to make the necessary repairs. At the time she was in the ordinary channel of navigation, and the weather was fine and the sea calm. The accident happened at 8 p.m. Three hours afterwards, and before repairs could be made, the steamship *F.*, of 2407 tons burthen, bound from Maryport, G.B., to Quebec, approached the tug, and at the request of her captain, took the tug in tow. The towage covered a distance of some 230 miles, and continued for a period of thirty hours, during which neither ship was in a position of danger, nor were the crew of the *F.* at any time in peril by reason of the services rendered to the disabled tug.

Held, that as the service to the disabled tug was rendered under the easiest conditions, without increase of labour or delay to the *F.*, it was clearly a towage and not a salvage service.

2. It not being a case of salvage, the officers and crew of the *F.* were not entitled to participate in the amount awarded for the towage, but it belonged to the owners of the ship.

3. The defendants having paid into court an amount sufficient to liberally compensate the plaintiff for the service rendered, they were given their proper costs against the plaintiff.

ACTION for alleged salvage services.

The following is the statement of claim by plaintiff:

"1. The *Forestholme* is a steel screw steamer, the property of the plaintiff Hine, of 2407 gross tonnage

1899

HINE
v.
THE STEAM-TUG THOMAS J. SCULLY.

Statement of Facts.

by register, of the value of £19,000 sterling. At the time of the circumstances herein stated she was manned by a crew of twenty-two hands, all told, and was bound on a voyage from Maryport, in England, to Quebec, with a cargo of steel rails and fish plates of great value."

"2. At about eleven o'clock on the night of the 19th day of May last, the *Forestholme* was about eight miles to the eastward of Cape Chatte, in the lower St. Lawrence. The weather was then hazy and there was little or no wind. Her people then saw, at a distance of about a mile and a half, two bright lights, one over the other, which on nearer approach proved to be those of the steam-tug proceeded against in this cause. Subsequently the people of the steam-tug informed the master of the *Forestholme* that they were in distress, their machinery having broken down and requested him to tow them to Quebec with his vessel, which he agreed to do."

"3. The *Forestholme* then took the tug in tow and towed her up to Quebec, which they reached on Sunday morning between four and five o'clock in the morning, where a tug came out and towed the *Thomas J. Scully* into the basin. The total distance of the towage was about two hundred and thirty miles."

"4. During the night the weather changed and it came on to blow from the north-east with fog. At two o'clock it was blowing hard, and by four o'clock in the morning there was a strong breeze. The current sets from Pointe des Monts on the north shore of the St. Lawrence to the south shore, the current in that direction being about two and a half to three knots an hour. There is no anchorage on the south coas in a north-east gale."

"5. In her disabled condition, in view of the weather, the current and the position of the tug when

1899

HINE
v.
THE STEAM-TUG THOMAS J. SCULLY.

Statement of Facts.

picked up, about two miles off the south coast, she would have gone ashore and been totally lost with her crew had it not been for the services of the *Forestholme*."

"6. The value of the *Thomas J. Scully* has been agreed at $17,000 currency."

"The plaintiff claims:

(*a*) The condemnation of the defendants and their bail in such an amount of salvage remuneration as to the court may seem just, and in the costs of this action.

(*b*) Such further and other relief as the nature of the case may require."

The statement of defence was as follows:—

" 1. The defendants say that on the 4th day of May last, (1899) their steam-tug *Thomas J. Scully*, of about 60 tons register, propelled by engines of about 350 nominal horse-power, navigated by a crew of nine hands all told, including her master, left the port of New York, bound for St. Johns, in the Province of Quebec."

" 2. At about 8 p m., on the 19th day May aforesaid, while the said tug *Thomas J. Scully* was prosecuting her voyage off Cape Chatte in the Lower St. Lawrence, a slight accident happened to her boiler, in consequence of which she was stopped to repair the damage; the weather at the time was fine and perfectly calm. The tug *Thomas J. Scully* was at this time in the ordinary channel used by vessels of all kinds navigating the Gulf of St. Lawrence."

" 3. About 11 o'clock on the night of the said 19th day of May, the *Forestholme* hove in sight and shortly afterwards approached the *Thomas J. Scully* close enough for those on board of her to hail the *Forestholme*; whereupon, the people of the tug asked the master of the steamship to take them in tow of his vessel, which he agreed to do."

1899

HINE
v.
THE STEAM-TUG THOMAS J. SCULLY.

Statement of Facts.

"4. The defendants admit the 3rd paragraph of plaintiff's statement of claim."

"5. The defendants deny the 4th paragraph of the plaintiff's statement of claim."

"6. The defendants deny the 5th paragraph of the plaintiff's statement of claim and allege that the *Thomas J. Scully* was not in any danger whatsoever, she was well equipped with sails and had good ground tackle; that the service for which the plaintiff's claim salvage was performed in fine weather, without difficulty or danger to their vessel the *Forestholme* or her crew; that the wind which sprung up during the night was from the north-east, blowing up the river, favourable to vessels bound to Quebec, whereupon the *Thomas J. Scully* set her sail by reason of which there was very little or no strain on the *Forestholme*, which vessel proceeded on her voyage to Quebec without any loss of time."

"7. The service rendered by the *Forestholme* to the *Thomas J. Scully* was nothing more than an ordinary towage service, for which the plaintiffs would be entitled to a sum not exceeding $200, and the defendants declare that they are ready to pay the plaintiff, for this service, the sum of $600 and his costs, which sum they have paid into court and submit that the same is ample and sufficient.

July 19th, 1899.

The case was heard by Mr. Justice Routhier, Local Judge in Admiralty for the Quebec Admiralty District.

A. H. Cook, Q.C. for the plaintiff: The services were unquestionably salvage. The tug-boat was in distress and had signalled for assistance. Her machinery had broken down and she was helpless within two miles of a dangerous coast towards which the current sets. Possibly by means of her sails and

1899

HINE
v.
THE STEAM-TUG THOMAS J. SCULLY.

Argument of Counsel

ground tackle she might have been prevented from drifting ashore, but there was certainly considerable risk and, as a matter of fact, the weather two hours after she was picked up by the steamer became bad and a strong wind sprung up from the north-east, which would have aided the current in putting the tug ashore. It is true that the service was effected without much risk or danger on the part of the steamer; still there was the chance of risk and danger. Taking into account the value of the steamer and her cargo and the great value of the tug ($17,000), it is submitted that the tender of $600 should be pronounced against and a decree entered for a reasonable remuneration at least double the amount deposited in court.

C. A. Pentland, Q.C. for the defendants, cited: *Stewart* v. *Bernier* (1); the *Clifton* (2); *Cushing's U. S. Admiralty Practice.* vo. "Salvage" (3); the *Graces* (4); the *Glenduror* (5).

ROUTHIER, L. J. now (July 28, 1999), delivered judgment:—

L'action est *in rem* au montant de $5,500 pour sauvetage (salvage). La défense se résume à dire qu'il n'y a pas eu un vrai *sauvetage*, mais un simple *touage* et la somme de $600 est offerte et déposée. Voici les faits: Le 19 Mai, 1899, vers les 8 h. p. m., le *Scully* (111 tonneaux) se trouvait un peu en bas du Cap Chatte, remontant le fleuve, lorsqu'un rivet de la bouilloire fut brisé L'ingénieur pouvait réparer cette petite avarie: mais il fallait pour cela vider la bouilloire et la laisser refroidir. La mer était calme—il n'y avait pas de vent. Le captaine décida d'attendre au matin pour faire la réparation.—Mais vers 11 hrs. parut

(1) 1 App. C. (Dor.) p. 321.
(2) 3 Hagg. p. 123.
(3) Vol. 1, p. 355.
(4) 2 W. Rob. 300.
(5) L. R. 3 P. C. 589.

le *Forestholme* (un steamer de 2407 tonneaux). Le *Scully* le héla en sifflant. Le *Forestholme* s'approcha, et, à la demande du capitaine, prit le *Scully* à la remorque et le remorqua jusqu'à Québec, où ils arrivèrent le 21 à 4.30 a.m. (le dimanche), c'est-à-dire après environ 30 heures de navigation.

Pas de contestation sur les faits—et la question est de savoir si ces faits constituent en loi un vrai sauvetage (salvage) ou un simple touage. Il s'agit d'appliquer aux faits prouvés les principes de droit qui régissent cette matière.

Posons d'abord les principes et nous en ferons ensuite l'application aux faits établis.

1o. Il est bien reconnu que dans les cas où il y a sauvetage, le service doit être très largement rétribué afin d'encourager et de stimuler le dévouement des marins, dans l'intérêt du commerce et de la navigation. Le touage simple, au contraire, est payé suivant la valeur exacte du travail.

2o. On sait aussi que le plus souvent aucun contrat n'intervient dans le cas de sauvetage. C'est un quasi-contrat, c'est-à-dire un fait d'où nait une obligation légale

3o. Mais quand y a-t-il sauvetage? Quels éléments le constituent?

Beauchamp's Jurisprudence of P. C., page 737:

"The ingredients of the salvage service are, first, enterprise in the salvors in going out in tempestuous weather to assist a vessel in distress, risking their own lives to save their fellow creatures and to rescue the property of their fellow subjects; secondly, the degree of danger and distress from which the property is rescued, whether it were in eminent peril, or almost certainly lost, nothing out of it rescued and preserved; thirdly, the degree of labour and skill which the salvors incur and display, and the time occupied.

1899

HINE v. THE STEAM-TUG THOMAS J. SCULLY.

Reasons for Judgment.

Lastly, the value. Where all those circumstances concur a large and liberal reward ought to be given. But where none, or hardly any, then the thing ought to be *pro opere et labore*.

Cette expression d'opinion est reproduite dans plusieurs causes, et je la retrouve dans la cause du *Clifton* (1).

Il semblerait, si nous prenions à la lettre cette autorité, qu'il faut dans le cas de sauvetage: 1re. que le navire sauvé soit exposé à périr; 2e. que les sauveteurs courrent eux-mêmes du danger à opérer le sauvetage; 3e. qu'ils apportent beaucoup de temps, d'habilité, de travail, à l'opérer.

Mais ce serait là une exagération.

Voici comment s'exprime Jones, *The Law of Salvage* p. 1, sur ce qu'il appelle *les ingrédients requis* pour qu'il y ait sauvetage: "It may be laid down as a "general rule * * * that the plaintiffs in a salvage "suit will be required to establish: 1st., the fact that "the vessel proceeded against was in danger or dis-"tress; 2nd., that the salvors rendered assistance; 3rd., "that their efforts were successful." id. page 2, "Dis-"tress is essential."

Le mot *salvage* l'indique lui-même. On ne sauve que ce qui est en danger. On rend seulement *service* aux choses et gens qui ne sont pas en péril: *In re The Sargeant* (2). "No danger, no salvage." Même principe in *The Strathnaver* (3).

Mais faut-il que le danger soit *absolu*, c'est-à-dire sans aucune chance de salut? Non.

Faut-il qu'il soit imminent ou actuel? Je ne le crois pas et c'est l'opinion que j'exprimais *in re Chabot* vs. *Q. S. S. Co.* (4).

(1) 3 Hagg. at p. 121.
(2) 3 Ex. C. R. 332.
(3) 1 App. Cas. 58.
(4) 6 Q. R. C. S. p. 215.

Mais il faut tout de même qu'il y ait un danger sérieux bien constaté. Voici quels étaient les faits dans le cas du Miramichi :

" La preuve établit que le 4 mai, 1892, le Miramichi, descendant de Québec à Pictou, a cassé son arbre de couche, auprès du Cap Rosier, côte de Gaspé, qu'il s'est approché de terre à la voile et y a jeté l'ancre, et qu'il a signalé au Cap Rosier, où il y a un phare, qu'il avait besoin d'un remorqueur. Le lendemain, 5 mai, *l'Admiral*, averti, a rebroussé chemin depuis la Pointe St. Pierre et est venu demander au Miramichi s'il avait besoin d'assistance. Sur réponse affirmative, il l'a pris à la remorque et l'a remorqué jusqu'au Bassin de Gaspé, environ 21 milles."

" Ce touage a duré environ 10 heures. Dans la nuit du 5 au 6 il y a eu un vent très violent, accompagné de neige, et plusieurs témoins de l'endroit même ont juré que le Miramichi n'aurait pu tenir et aurait été jeté à la côte, s'il ait resté à l'ancre. *L'Admiral* essuya la tempête, ne put faire la connexion avec le chemin de fer et ses malles et ses passagers furent ainsi retardés de 24 heures."

Comme on le voit :

1er. Il n'y avait pas de réparation possible. 2e Le mouillage était dangereux. 3e. Une tempête était imminente et elle eut lieu. 4e. Le bateau sauveteur eut beaucoup à souffrir du temps et encourut des dommages.

Ici 1o. l'accident est léger et facilement réparable. Les témoins Samson, l'ingénieur, et Mackay (qui a réparé l'avarie pour $13) le prouvent. 2o. Le vaisseau a une bonne voile et de bonnes ancres ; il a déjà marché à la voile. Le temps est calme. Le lendemain le vent est favorable. Pas le moindre travail de plus à bord du *Forestholme*. La haussière généralement *lâche*, pas de danger, pas même de retard.

1899

HINE v. THE STEAM-TUG THOMAS J. SCULLY.

Reasons for Judgment.

Les demandeurs ont cité le cas *The Carmona* (1), mais ce steamer était *à la côte*, échoué, très-exposé à périr, et c'est le travail du Miramichi qui l'avait fait flotter et remis en mer.

J'arrive ainsi à la conclusion que *l'élément essentiel* au sauvetage fait ici défaut : il n'y a eu aucun *danger sérieux*.

Dès lors ce qui est intervenu entre les parties, c'est un *louage de service* dont le prix n'a pas été fixé. Les paroles échangées n'indiquent pas autre chose : "Will you tow us up?" Et là-dessus le "steam-tug" lui remet le câble de remorque sans préciser ni prix, ni endroit de destination et sans aucune explication.

Le touage s'accomplit dans les conditions les plus faciles, sans danger, sans surcroît de travail, sans retard. C'est évidemment un *touage* et non un *sauvetage*. Qu'elle en est la valeur? Quatre ou cinq témoins disent environ $200. Mais c'est le prix d'un *touage ordinaire*. Ici, il vaut plus, parce qu'il est fait par un navire de fort tonnage et de grande valeur qui n'en a pas fait métier.

Les défendeurs l'ont compris et ils ont offert $600 c'est-à-dire trois fois le touage ordinaire. *In re Chabot* (2) je disais :

"Dans l'estimation, il faut considérer * * * "1er. le mauvais temps et le danger couru par les "sauveteurs ; 2e. le danger couru par le navire sauvé ; "3e, le travail et l'habilité des "salvors" et le temps "employé ; et 4e. la valeur de la propriété sauvée. "Quand tous ces éléments concourent, la valeur du "sauvetage peut atteindre un chiffre énorme ; quand "quelques éléments manquent, la somme est beau-"coup moindre, suivant les éléments manquants. "Quand il n'y en a aucun, ce n'est pas un sauvetage,

(1) Cook 350.

(2) 6 Q. R. C. S. at p. 215.

" et l'on ne doit accorder que le prix d'un touage " ordinaire."

Ici rien de tel. Les offres me paraissent dans cette cause amplement suffisantes.

Maintenant, cette somme doit-elle être divisée entre le propriétaire, le capitaine et l'équipage? Non, puisque ce n'est pas un sauvetage. Le touage est dû au demandeur W. Hine qui est propriétaire du vaisseau *sauveteur*.

Sur la question de frais les demandeurs ont cité le cas du "*Lotus*," comme leur donnant droit aux frais même dans le cas ou les offres sont jugées suffisantes (1). C'était un cas *exceptionnel*. Le juge déclara les offres *strictement suffisantes mais pas libérales*; il accorda les frais *jusqu'aux offres et consignation*, et ne décida rien quant aux frais *subséquents*, c'est-à-dire qu'il ne les accorda pas aux défendeurs contre les demandeurs.

Mais ici les offres me semblent suffisamment *libérales* et dès lors, il n'y a pas de raison pour mettre de coté la règle 136ème. de cette cour qui condamme aux dépens la partie qui a refusé des offres jugées suffisantes.

Judgment accordingly.

Solicitors for plaintiff: *W. & A. H. Cook.*

Solicitors for defendants: *Caron, Pentland & Stuart.*

(1) 7 P. D. 199.

1900
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HER MAJESTY THE QUEEN *ex rel.* THE AMERICAN STOKER COMPANY ..... PLAINTIFF;

AND

THE GENERAL ENGINEERING COMPANY OF ONTARIO (LIMITED) ..... DEFENDANTS.

Practice—Scire facias to repeal patent—The Patent Act sec. 6, sec. 34, sub-sec. 2—Expiry of foreign patent—"Cause as aforesaid"—Jurisdiction.

Upon a proceeding by *scire facias* to set aside a patent for invention because of an alleged expiry of a foreign patent for the same invention under the provisions of sec. 8 of *The Patent Act.*

Held, that there was so much doubt as to that being one of the clauses included in the expression "for cause as aforesaid" in clause 2 of sec. 34 of the Act that the action should be dismissed.

SCIRE FACIAS to repeal a patent for invention.

The facts of the case are stated in the reasons for judgment.

The case was heard before THE JUDGE OF THE EXCHEQUER COURT, at Montreal, on the 8th November, 1899.

B. B. Osler, Q.C. for the defendants: The writ of *scire facias* does not lie to repeal a patent in this country simply because a foreign patent for the same invention has expired. That is not one of the causes within the meaning of sec. 34, sub-sec. 2 of *The Patent Act.* (Cites *Hindmarch on Patents* (1).

It would be manifestly inequitable for us to lose the protection of the grant from the Crown in Canada because a foreign patentee, over whom we have no control whatever, has not carried out the provisions of

(1) P. 384.

1900

THE QUEEN v. THE GENERAL ENGINEERING CO. OF ONTARIO.

Argument of Counsel.

the foreign law respecting the continuity of the patent there. The result of a judgment for plaintiff in an action of *scire facias* is to declare the patent void from the beginning. That is a most radical penalty for a breach of foreign law by a party over whom we have no control. Parliament could not have intended such an injustice. (Cites 22 Vict. (Prov. Can.) c. 34 sec. 5; 32 & 33 Vict. c. 11 sec. 7; 35 Vict. c. 26 sec. 7; 55-56 Vict. c. 24 sec. 1; U. S. *Acts of Congress*, 1839, sec. 6; 1870, c. 230 sec. 25; 1884, sec. 4887; 15 & 16 Vic. (U. K.) c. 83 sec. 25; 46 & 47 Vict. (U. K.) c. 57. In re *Blake's Patent* (1); In re *Betts' Patent* (2); *French* v. *Rogers* (3); *O'Reilly* v. *Morse* (4); *Auer Light* v. *Dreschel* (5); *Hull* v. *Hull* (6).)

J. L. Ross followed for the defendants: With reference to the meaning of the word "expiry" in the Canadian Patent Act, sec. 8, I would cite *Burns* v. *Walford* (7). There it was held that the term "expiration" did not cover termination by forfeiture, but only termination by lapse of time. The meaning of the word "expiry" as applied to letters patent for inventions has also been considered by the United States Supreme Court. (Cites *Pohl* v. *Anchor Brewing Co.* (8); *Bate Refrigerating Co.* v. *Hammond* (9); *Consolidated Roller Mills* v. *Walker* (10); Re *Mann* (11); *Holmes Electric Protection Co.* v. *Metropolitan Alarm Co.* (12)).

As to the particular meaning of the words "foreign country" as applied to this case, I would cite *The Consolidated Statutes of Canada*, c. 34 sec. 1. It says that the expression "foreign county" includes any country

(1) L. R. 4 P. C. 535.
(2) 1 Moo. P. C. N. S. 59.
(3) 1 Fish. P. C. 136.
(4) 15 How. 127.
(5) 6 Ex. C. R. 68.
(6) 4 Ch. D. 97.
(7) W. N. (1884) 31.
(8) 20 Brodex 190.
(9) 19 Brodex 231.
(10) 43 Fed. R. 575.
(11) 17 Off. Gaz. 330.
(12) 22 Fed. R. 341.

1900

THE QUEEN v. THE GENERAL ENGINEERING CO. OF ONTARIO.

Argument of Counsel.

not under the British dominion or subject to the Crown of Great Britain.

[*By the Court.*—The interpretation would not apply to the Dominion statutes.]

Not expressly, but impliedly. The section of *The Patent Act* has not materially changed since then.

D. McMaster, Q.C. for the plaintiff: The chief question arising in this case is answered by the provisions of section 34 of *The Patent Act.* I take it that under that section you may attack a patent directly by the aid of the writ of *scire facias* for the same causes as you may plead against the validity of a patent in an action of infringement. The words "for cause as aforesaid" include the cause for which we claim the patent here in question is void. Then again, take the provisions of the 8th section of *The Patent Act:* "under any circumstances if a foreign patent exists the Canadian patent shall expire at the earliest date on which any foreign patent for the same invention expires." The meaning of the enactment is this, viz.: that if there has been a foreign patent at all for the same invention, the Canadian patent shall expire simultaneously with the expiry of the foreign patent.

F. S. Maclennan, Q.C. followed for the plaintiff: The writ of *scire facias* is a remedy provided by English law for the repealing of any Crown grant that has become void or was improvidently granted. (Cites *Comyn's Dig.*, 5, vo. "Patent" F. 3 and vo. "Officer" K II; *R.* v. *Tolly* (1); *R.* v. *Eston* (2); *Sir Robert Chester's Case* (3); *R.* v. *Eyre* (4); *Reg.* v. *Cutler* (5); *Stephen's Com.* (6); *Broom's Constitutional Law* (7); *The Queen* v. *Prosser* (8); *The Queen* v. *Hughes* (9);

(1) 2 Dyer 197*a*.
(2) 2 Dyer 197*b*.
(3) 2 Dyer 211.
(4) 1 Strange 43.
(5) 3 C. & K. 227.
(6) II p. 33; III p. 668.
(7) 2nd ed. 238.
(8) 13 Jur. 71.
(9) L. R. 1 P. C. 87.

Eastern Archipelago Co. v. *The Queen* (1); *Fonseca* v. *Attorney-General of Canada* (2); *Foster on Scire Facias* (3); *Hindmarch on Patents* (4); *Edmunds on Patents* (5); *Agnew on Patents* (6).)

The meaning for the purposes of this case of the term "obtaining" in the 8th section of *The Patent Act* is its plain and ordinary meaning. It means when a patent is *obtained*, not when it is *applied* for. If the Canadian patent is *obtained* after the foreign patent, then the expiry of the latter puts an end to the former, no matter if the Canadian patent was *applied* for before the foreign patent was obtained. (Cites *Gramme Electric Company* v. *Arnoux Electric Co.* (7); *Edison Electric Light Co.* v. *United States Electric Light Co.* (8).

The Italian patent is identical with the Canadian patent. The differences between the two specifications are immaterial and merely verbal. (Cites *Siemens* v. *Sellars* (9); *Ridout on Patents* (10); *Commercial Mfg. Co.* v. *Fairbanks Canning Co.* (11))

The failure to pay the fees due upon the Italian patent operated an absolute forfeiture under the Italian patent laws. (Cites *Abbott's Patent Laws* (12)). It is only upon paying the fees from year to year that an Italian patent can be kept in existence for fifteen years. (Cites *Bonesack Machine Co.* v. *Smith* (13)).

The provisions of Art. 4887 of the United States Patent Act are instructive to show what our legislature probably intended to enact on the same subject. The French law is to the same effect. The French courts have unanimously held that the

(1) 2 El. & B. 856.
(2) 17 Can. S. C. R. 612.
(3) P. 246.
(4) P. 385.
(5) P. 356.
(6) P. 340.
(7) 25 Of. Gaz. 193.
(8) 43 Of. Gaz. 1456.
(9) 123 U. S. 276.
(10) P. 83.
(11) 135 U. S. 176.
(12) P. 283.
(13) 73 Of. Gaz. 963.

1900

THE QUEEN v. THE GENERAL ENGINEERING CO. OF ONTARIO.

Argument of Counsel.

termination by forfeiture of a foreign patent also operated a forfeiture of a French patent for the same invention. (Cites *Jour. du Pal.* (1); *Dalloz, Jur. Gen.* 1864 (2); *Dalloz, Jur. Gen.* 1882 (3); *Rendu: Code de la Propriété Industrielle* (4); *Gouget & Merger: Dictionnaire du Droit Commercial* (5); *Blanc: Traité de la contrefaçon en tous genres* (6); *Nouguier: Traité des actes de commerce* (7); *Dalloz, Rep.* vol. 6 (8); *Bédarride: Commentaire des lois sur les Brevêts d' Invention* (9); *Daw* v. *Ely* (10).)

Mr. Osler replied: I would refer to *Abbott's Patent Laws*, Art. 59 p. 294, to show that by the non-payment of fees the Italian patent was voidable only and not void.

THE JUDGE OF THE EXCHEQUER COURT now (January 10th, 1900,) delivered judgment:

This is a proceeding by *scire facias* to repeal letters patent, numbered 40700, granted to Evan William Jones, on the 15th day of October, 1892, for alleged new and useful improvements in boiler and other furnaces. The grounds on which it is sought to impeach the patent are that the Italian and British letters patent for the same invention have expired within the meaning of the 8th section of *The Patent Act.*

The questions raised and debated are:

1. Whether the Italian and English patents, one or both, are for the "same invention" as the Canadian patent referred to?

2. Whether the expression "if a foreign patent exists", in the last clause of the 8th section of *The Patent Act*, has reference to a foreign patent existing

(1) [1894] p. 727.
(2) Pt. 1, p. 146.
(3) Pt. 1, p. 253.
(4) Vol. 1 sec. 62
(5) Vol 3, p. 551.
(6) P. 313.
(7) P. 137.
(8) P. 10.
(9) Vol. 1, pars. 348 and 360.
(10) L. R. 3 Eq. 496.

when the Canadian patent is granted, or to one existing when the Canadian patent is applied for?

3. Whether the expression, in the said section, "at the earliest date on which any foreign patent for the same invention expires" is to be limited to the expiration by lapse of time of the potential term of the foreign patent, or whether it includes any determination of such term?

4. Whether a British patent is a "foreign patent" within the meaning of the said section? and—

5. Whether a writ of *scire facias* will lie in this court to repeal Canadian letters patent which have, by reason of the expiry of a foreign patent, expired before the end of the term for which they were granted?

In an action for infringement brought by the defendant company on the letters patent referred to against the company at whose relation this proceeding is instituted, there was judgment for the former company. It was not made a matter of defence in that action that such letters patent had expired. The defendants therein say that at the time of the trial they had no knowledge that such was the fact. On learning of it they applied for a new trial of that action and obtained an order *nisi* which is now pending. In the meantime this proceeding has been taken to determine the question whether the Canadian patent referred to has expired or not. That is the substantial controversy between the parties and in it are involved four of the five questions stated. The fifth question is raised by the defendant company. While contending that their Canadian patent has not expired, they say that assuming it has transpired, a writ of *scire facias* will not, for that reason, lie for its repeal. If that contention is maintained it is obvious that no opinion ought to be expressed in reference to the other questions, although both parties profess to desire it.

1900

THE QUEEN v. THE GENERAL ENGINEERING CO. OF ONTARIO.

Reasons for Judgment.

That the court has power for sufficient cause to revoke letters patent for an invention is not in doubt. The question in issue is one of procedure, not of jurisdiction. By the 17th section of *The Exchequer Court Act*, (1) the court is given jurisdiction, among other things, in all cases in which it is sought, at the instance of the Attorney-General of Canada, to impeach or annul any patent of invention. By the 21st section of the same Act it is provided that the practice and procedure in suits, actions and matters in the Exchequer Court shall, so far as they are applicable and unless it is otherwise provided by the said Act, or by rules made in pursuance thereof, be regulated by the practice and procedure in similar suits, actions and matters in Her Majesty's High Court of Justice in England at the time of the coming into force of the Act (October 1st, 1887). Prior to that date the proceding by *scire facias* to repeal a patent had in England been abolished, and the procedure then in force there for the revocation of a patent was by a petition to Her Majesty's High Court of Justice (2) By the 11th section of *The Patent Act* (3), the applicant for a patent has, for the purposes of the Act, to elect his domicile at some known and specified place in Canada,—and to mention the same in his petition for the patent; and by the 34th section of the Act, as enacted in *The Revised Statutes* (1887), it was provided that any person who so desired to impeach any patent issued thereunder might obtain a sealed and certified copy of the patent, and of the petition, affidavit, specification and drawings thereunto relating, and might have the same filed in the office of the clerk of certain Superior Courts therein named, according to the domicile elected by the patentee, which

(1) 50-51 Vict. c. 16, s. 17 (*b*).

(2) *The Patents, Designs and Trade-Marks Act* 1883, 46 & 47 Vict. c. 57, ss. 26 and 117.

(3) R. S. C. c. 61.

courts respectively should adjudicate on the matter and decide as to costs. It was further provided (s. 34, ss. 2) that the patent and documents mentioned should then be held as of record in such courts respectively, so that a writ of *scire facias*, under the seal of the court, grounded upon such record, might issue for the repeal of the patent, for cause as aforesaid, if after proceedings had upon the writ in accordance with the meaning of the Act the patent should be adjudged void. In 1890, by an amendment of *The Patent Act* (1), the Exchequer Court was added to the courts by which this jurisdiction could in a proceeding by *scire facias* be exercised. By the second section of the Act of 1890 the Exchequer Court was also given jurisdiction upon information in the name of the Attorney-General, and at the relation of any person interested, to decide whether or not the patent had become void for failure to manufacture the invention as provided in the Act, or for importation thereof contrary to the Act; and in 1891 the provision was further amended by striking out the words "at the relation of any person interested" and substituting therefor the words "or at the suit of any person interested" (2). In the same year by an amendment of *The Exchequer Court Act* (3) the court was, among other things, given jurisdiction as well between subject and subject, as otherwise, in all cases in which it is sought to impeach or annul any patent of invention. By the general order of court of the 13th day of November, 1891, it was provided that the rules of the court, then in force in the court in other matters, should apply to any proceeding under *The Exchequer Court Amendment Act*, 1891 (4), and that otherwise such proceeding should follow the practice of the

(1) 53 Vict. c. 13, s. 1.
(2) R. S. C. 61, s. 37; 53 Vict. c. 13, s. 2; 54-55 Vict. c. 33; and 55-56 Vict. c. 24, s. 6.
(3) 54-55 Vict. c. 26, s. 4.
(4) 54-55 Vict. c. 26.

1900

THE QUEEN v. THE GENERAL ENGINEERING CO. OF ONTARIO.

Reasons for Judgment.

High Court of Justice in England. The effect of that was to provide that any proceeding between subject and subject to impeach or annul any patent of invention should be instituted by filing a statement of claim according to the ordinary practice of the court (1).

By another general order made on the 5th of December, 1892, it was provided that in any proceeding to impeach any patent under the 34th section of *The Patent Act*, the practice and procedure which in like proceedings were in force in Her Majesty's High Court of Justice in England immediately prior to the passing of *The Patents, Designs and Trade-Marks Act*, 1883, should be followed as near as might be, and that in any such proceeding the person seeking to impeach the patent might in addition to the grounds mentioned in the 34th section of *The Patent Act* set up and rely upon any breach of the conditions to manufacture, and not to import, mentioned in the 37th section of the Act. It was further provided (2) that where it was sought to impeach a patent on the grounds mentioned in section 37, and for no other cause, proceedings to have the same declared null and void might be taken by information in the name of the Attorney-General of Canada, or by a statement of claim at the suit of any person interested, in accordance with the ordinary practice of the court.

The result of all this appears to be that at present and until it is otherwise provided:

1. A petition, according to the practice now in force in England, will lie at the instance of the Attorney-General to revoke a patent upon any sufficient ground, excepting perhaps those mentioned in the 37th section of *The Patent Act*;

(1) Rule 7 of the Exchequer Court Rules.

(2) Rule 3.

2. An information in the name of the Attorney-General will lie to revoke a patent for non-manufacture, as provided in the 37th section of *The Patent Act*, or for importation of the invention in contravention thereof;

3. That a statement of claim in accordance with the ordinary practice of the court will lie at the suit of any person interested to impeach or annul a patent, or to have the same declared null and void on any good ground, and

4. That a writ of *scire facias* will lie to impeach a patent "for cause as aforesaid" (whatever that may include) mentioned in the 34th section of *The Patent Act*, and that where it will so lie the grounds stated in the 37th section of the Act may also be relied upon.*

It is, however, with the proceeding by writ of *scire facias* that one is concerned in this case. The other proceedings are mentioned because they help us to a better understanding of the matter, and show, I think, that a writ of *scire facias* will not lie to impeach a patent, except for the cause mentioned in the 34th section of *The Patent Act*. What is the cause therein referred to? Does it include as one of such causes the expiration of a Canadian patent under the provisions of the 8th section of *The Patent Act*?

To answer either of these questions it is necessary, I think, to have in mind the history of the provision in which the words "for cause as aforesaid" occur. In 1824, by the 8th section of an Act passed by the Legislature of Lower Canada to promote the progress of useful arts in the province, (1) it was provided that by a proceeding by motion made before a judge of the

* REPORTER'S NOTE:—These rules were rescinded on the 25th day of January, 1900, and a new practice established by the rules published in this volume.

(1) 4 Geo. IV. ch. 25.

1900

THE QUEEN v. THE GENERAL ENGINEERING CO. OF ONTARIO.

Reasons for Judgment.

Court of King's Bench, within three years after the issuing of a patent, but not afterwards, a rule might be obtained calling upon the patentee to show cause why process should not issue for the repeal of the patent. The grounds upon which such a rule could be granted were that the patent had been obtained surreptitiously or upon false suggestion; and if no sufficient grounds were shown to the contrary, or if it appeared that the patentee was not the true inventor or discoverer, judgment was to be rendered for the repeal of the patent. The 6th section of the Act dealt with defences to an action for infringement. These provisions were adapted from the Patent Act of the United States of 1793. The provision in respect to the revocation of the patent, which in that country first occurred in the Act of 1790, remained in force there until 1836, when it was repealed. The corresponding provision was continued in Lower Canada by 6 Wm. IV. c. 34, s. 9 (1836), until 1849, when by an Act of the Province of Canada (1) a proceeding by *scire facias* to repeal a patent was substituted for that by motion to a judge of the court. The Act last referred to followed in this respect the Act of the Province of Upper Canada, 7 Geo. IV. chapter 5 (1826); by the 8th section of which it was in substance provided that at any time within three years after the issuing of any patent any person desiring to impeach the same because it had been fraudently or surreptitiously obtained, or had issued improvidently or upon false suggestion, might obtain an exemplification of such patent under the great seal of the province, and have the same filed with the Clerk of the Crown and Pleas, and thereupon such letters should be considered as remaining of record in the Court of King's Bench, so that a writ of *scire facias*,

(1) 12 Vict. c. 24, s. 17.

1900

THE QUEEN v. THE GENERAL ENGINEERING CO. OF ONTARIO.

Reasons for Judgment.

under the seal of the court, might issue grounded upon the said record for the purpose of repealing the same for legal cause as aforesaid, if upon the proceedings which should be had upon the writ of *scire facias*, according to the law and practice of the Court of King's Bench in England, the same should be declared void. The 6th section of 7 Geo. IV, chapter 5, dealt with certain defences that might be pleaded in an action of infringement, but it is clear that in this statute in which we find in its earliest form in Canada the provisions corresponding to the 34th section of *The Patent Act* now in force, the "legal cause as aforesaid," referred to the grounds enumerated in the 8th section of the Act. The same is true of the same words where they occur in the 17th section of the Act of the Province of Canada, 12 Vict. chapter 24, before referred to, and in the 20th section of *The Consolidated Statutes of Canada*, chapter 34. There can be no question that the "legal clause aforesaid" for which a patent might be repealed in proceedings by *scire facias* according to these statutes was limited to the grounds mentioned, namely: where the patent had been fraudulently or surreptitiously obtained, or where it had issued improvidently or upon false suggestion.

When we come to the Act of 1869 (1) which applied to the Dominion of Canada, we find considerable change and the matter is not so clear. By the 26th section of that Act it is provided that a defendant in an action of infringement might specially plead, as matter of defence, any fact or default which by the Act or by law would render the patent void. By the 27th section it was enacted that a patent should be void, if any material allegation in the petition or declaration of the applicant were untrue, or if the

(1) 32-33 Vict. c. 11.

1900

THE QUEEN v. THE GENERAL ENGINEERING CO. OF ONTARIO.

Reasons for Judgment.

specifications contained more or less than was necessary for obtaining the end for which they purported to be made, such omission or addition being wilfully made for the purpose of misleading. By the 28th section it was provided that every patent granted under the Act should be subject to the conditions therein expressed as to manufacture and importation of the invention, and should be void for breach of such conditions. And then comes section 29 by which a proceeding by writ of *scire facias* is given to repeal a patent "for legal cause as aforesaid," no cause being stated in the section itself, differing in that respect from the earlier provisions that have been referred to. If the question was to be determined by the Act of 1869 alone, there would, I think, be very good reason to think that the writ would lie to repeal the patent for any fact or default that renders it void. The only argument to be raised against that view arises from the fact that in the divisions of the Act, the 26th section occurs with those that relate to the "assignment and infringement of patents," while the 27th, 28th and 29th sections are under the heading: "Nullity, Impeachment and Voidance of Patent." But that clearly is not conclusive.

In *The Patent Act of* 1872 (1) the arrangement and number of the corresponding sections are the same as in the Act of 1869. But there is added to section 28 a proviso that any disputes which might arise as to whether or not a patent had become void for non-manufacture or for importation contrary to the statute, should be settled by the Minister of Agriculture or his deputy, whose decision should be final. From which it would follow that the "cause aforesaid" for which, by the 29th section, *scire facias* would lie to repeal a patent, would not include the breach of the

(1) 35 Vict. c. 26.

conditions prescribed by the 28th section; and it would not be true that it would lie for any fact or default which by the Act or by law rendered the patent void. If the words cited from the 29th section had any reference to the 26th section, the terms of the latter must, at least to the extent mentioned, be qualified. Before leaving this statute it will be convenient to notice that in it first occurs the provision that: "under any circumstances where a foreign patent "exists, the Canadian patent shall expire at the earliest "date at which any foreign patent for the same inven- "tion expires" (1). Here is a new ground for determining a patent. Clearly it might be pleaded as a defence to an action for infringement; but it is not at all clear that it could be invoked as a ground upon which a patent could be repealed by *scire facias*.

The Revised Statutes, chapter 61, (*An Act respecting Patents of Invention*), does not, I think, throw any new light on the question, or remove any of the difficulty. The division of the chapter, and the arrangement of the sections are altered. Section 27 of the Act of 1872 becomes section 28 of *The Revised Statutes*; section 26 becomes section 33; and section 29 becomes section 34, and all these occur under the heading of "Impeachment and other legal proceedings in respect to Patents." Section 28 as to non-manufacture and importation of an invention occurs as section 37 under the words "Forfeiture of Patents," and the jurisdiction of the Minister of Agriculture and of his deputy is continued. The result is that the section (2) enabling a defendant in an action of infringement to plead any fact or default that renders a patent void, immediately precedes that (3) which gives the writ of *scire facias* "for cause as aforesaid;" while several

(1) Sec. 7.
(2) Sec. 33.
(3) Sec. 34.

1900

THE QUEEN v. THE GENERAL ENGINEERING CO. OF ONTARIO.

Reasons for Judgment.

sections intervene between the latter and section 28 which reproduces the provision of section 27 of the Act of 1872, that a patent should be void for certain stated reasons. Again under this statute it seems to me to be doubtful whether the words cited refer to the causes mentioned in the 33rd section, or to those mentioned in the 28th section, or to both. The same difficulty exists as that mentioned in connection with the Act of 1872. The 37th section of the Act shows clearly that there are facts and defaults that render a patent void which are not grounds for a writ of *scire facias*; and that the latter will not lie for all, but only for some of, the causes stated in the 33rd section of the Act. By several amendments of section 37 of *The Patent Act* (1) the Exchequer Court has, as we have seen, been given jurisdiction in the place of the Minister of Agriculture and his deputy to decide any question as to a patent being void for non-manufacture, or for importation contrary to the statute (2); but that does not remove the difficulty, as the jurisdiction is to be exercised by the court upon information in the name of the Attorney-General of Canada, or at the suit of any person interested, and not in a proceeding by *scire facias*.

In the earlier Acts that have been referred to, the words " for legal cause as aforesaid " had reference to certain specified causes, and not to the defences that might have been set up in an action for infringement. In the later statutes the corresponding expression " for cause as aforesaid " does not include all the defences that may be set up in an action for infringement, and it is doubtful whether or not it should be extended beyond the grounds upon which patents are in certain cases declared void by the 28th section of *The Patent*

(1) R. S. C. c. 61.
(2) 53 Vict. c. 13, s. 2; 54-55 Vict. c. 33; and 55-56 Vict. c. 24, s. 6.

1900

THE QUEEN v. THE GENERAL ENGINEERING CO. OF ONTARIO.

Reasons for Judgment.

Act now in force. These grounds, as will be seen by reference also to sections 7, 8 and 10 of the Act, are, to state them briefly:—

(1.) That the grantee had not invented the art, machine, manufacture or composition of matter, or the improvement therein, for which the patent had been granted;

(2.) That the alleged invention was not the proper subject matter for an invention;

(3.) That it was not new; but had been known and used by other persons before his invention;

(4.) That it had been in public use or on sale with the consent or allowance of the inventor for more than one year previously to his application for a patent therefor in Canada;

(5.) That it was not useful; and

(6.) That the specifications were insufficient and misleading.

It certainly is not at all clear that the words mentioned include the defence created by the 8th section of the Act of 1872 on which the prosecutor relies, and that being the case it seems to me that there should be judgment for the defendant company. There will, under the circumstances, be no costs to either party. And the right of the Crown or prosecutor to set up in any other proceeding as a ground of defence or attack that the letters patent herein referred to have expired and become void is reserved.

Judgment accordingly.

Solicitors for the plaintiff: *Macmaster & Maclennan.*

Solicitors for the defendants: *Rowan & Ross.*

1900
Mar. 2.

IN THE MATTER OF THE PETITION OF RIGHT OF

S. M. DAVIES..... SUPPLIANT;

AND

HER MAJESTY THE QUEEN..... RESPONDENT.

Highway—Agreement between Crown and city to maintain same—Negligence—Accident from ice—Liability—Public work—50-51 *Vict. ch.* 16, *sec.* 16 (*c*).

Under an agreement between the City of Ottawa and the Dominion Government, the latter undertook, amongst other things, to maintain an addition to the Sappers' Bridge over the Rideau Canal, built by the city and forming part of a public highway. On the 23rd February, 1898, the sidewalk on the said addition was in a slippery condition, and the suppliant in passing over it fell and sustained a fracture of one of her arms. She filed a petition of right seeking damages against the Crown under 50-51 Vict. ch. 16, sec 16 (*c*).

Held, that while it was the duty of certain employees of the Crown to go and see that the bridge was in a safe condition for pedestrians every morning, between six and seven o'clock, the suppliant upon whom the burden of proof of negligence rested, had not shown that they had failed in their duty on the morning of the accident.

2. In this climate it is not possible in winter to have the sidewalks of the highways always in a safe condition to walk upon; and negligence in that respect when it is actionable consists in allowing them to remain an unreasonable time in an unsafe condition.

PETITION OF RIGHT for injury to the person alleged to have arisen through negligence on a public work.

The case was heard before the Judge of the Exchequer Court on the 22nd January, 1900.

The facts are stated in the reasons for judgment.

A. E. Fripp, for the suppliant: It is submitted on behalf of the suppliant that the Crown is liable for

1900

DAVIES v. THE QUEEN.

Argument of Counsel.

the accident under the provisions of sub-section c. of sec. 16 of 50-51 Vict. ch. 16.

The facts show that the officer or servant of the Crown charged with the duty of keeping the Sappers' Bridge in a safe condition for pedestrians was negligent in the performance of his duty. The foreman, Leblanc, of the gang of labourers who was employed to remove the snow and ice, is the person whose negligence fixes the Crown with liability.

There is no doubt that the Sappers' Bridge is a public work of Canada, having been constructed by the Imperial authorities. (Cites 7 Vict. (P. C) ch. 11.) The city exercises no rights of ownership over it, and it is maintained by the Dominion Government. Even if the city exercised acts of ownership over it for some time in the past, that would not alter its character as a public work.

The weight of evidence is that the officer or servant of the Crown charged with the duty of removing the ice and snow had been negligent on this particular morning. The fact that ice in a dangerous condition is there between ten and eleven o'clock in the morning shows that he had not properly done his duty in respect to it earlier in the day. If the action were against the city, the city would be liable. (Cites *Corporation of Kingston* v. *Drennan* (1)).

E. L. Newcombe, Q.C. for the respondent: The evidence is that this bridge had been constructed by the Imperial Government at the time the Rideau Canal was built, and was afterwards maintained by the city down to 1885, when an agreement was entered into between the city and the Dominion Government whereby, amongst other things, the Government undertook to maintain the bridge upon certain conditions for the city. Now if the city had continued

(1) 27 S. C. R. at p. 54.

1900

DAVIES v. THE QUEEN.

Argument of Counsel.

to maintain that bridge, I submit that the Crown would not have been liable for the negligence of those *de facto* in charge of the bridge. The city would only be liable, if it were maintaining it, in pursuance of its common law obligation to maintain its highways If a bridge is built by a Government or a private individual which forms a connecting link between two ends of a street, and it is used by the public, the city is under common law obligation to keep the bridge in repair. Suppose that the Crown represents the city in respect of its liability to repair, it should not be held to a larger measure of liability that the city would be at common law. But it seems to me that there is a more radical question than this in the law of the case, and it is this: Suppose that for the sake of argument the Dominion Government had not fulfilled its obligations to the city under the arrangement of 1885, would a private individual have any action against the Government arising out of its breach of contract, although he may have suffered injury by reason of the Government not doing what it had undertaken to do? I submit that in such a case the proper remedy is for the injured person to proceed against the city, and then if he is successful, for the city to seek indemnity from the Government I submit that the whole tenor of the agreement is that it was contemplated that between the individual and the city, the city should be liable, the question of the Crown's breach of contract to be determined in a subsequent proceeding between the city and the Crown. (Cites Municipal Act of Ontario, R. S. O. 1897 c. 223, sec. 606.)

There is not only no evidence of "gross negligence" within the meaning of the Canadian cases, but there is no evidence of any negligence at all. The evidence shows that those in charge of the work of removing

1900

DAVIES v. THE QUEEN.

Reasons for Judgment.

the ice and snow had been diligent in taking precautions against accident on this particular morning. Looking at the climatic conditions prevailing on that day, the omission to put sand on the street was not negligence. It had been snowing before the accident, and after snow it is not customary to put on sand. (Cites *Ringland* v. *The City of Toronto* (1); *Forward* v. *City of Toronto* (2); *Bleakley* v. *Town of Prescott* (3); *Corporation of Kingston* v. *Drennan* (4); *Derochie* v. *Town of Cornwall* (5)).

If the Crown is responsible for the maintenance of the bridge as a part of a highway it is responsible merely because the statute has imposed upon the Government the maintenance of it. As neither the words "misfeasance" or "nonfeasance" are mentioned in the statute, it must be taken that under 50-51 Vict. c. 16, s. 16 c. the Crown's liability is the same as that of a municipal corporation at common law. (Cites *Municipality of Pictou* v. *Geldert* (6); *Leprohon* v. *The Queen* (7).

Mr. Fripp replied.

THE JUDGE OF THE EXCHEQUER COURT now (March 2nd, 1900), delivered judgment.

The suppliant, whose husband is an inmate of an asylum, supports herself and her two daughters by her earnings as a canvasser for the sale of books. She is said to be a good canvasser and successful. On the 23rd of February, 1898, she fell on the Sappers' Bridge, in the City of Ottawa, and broke her left arm. The injury was a severe one, and will, it appears, be permanent. For damages for this injury she brings her petition.

(1) 23 U. C. C. P. 93.
(2) 15 Ont. R. 370.
(3) 12 Ont. A. R. 637.
(4) 27 S. C. R. 46.
(5) 24 S. C. R. 301.
(6) [1893] A. C. 524.
(7) 4 Ex. C. R. 100.

1900

DAVIES v. THE QUEEN.

Reasons for Judgment.

It appears that apart from the expense to which she was put by reason of the injury, and the loss of time occasioned thereby, the injury interferes, to some considerable extent, with her work as a canvasser; and if she could maintain her petition she would, I think, be entitled to substantial damages

In any case of this kind the suppliant, to succeed, must bring her case within clause (*c*) of the 16th section of *The Exchequer Court Act*, which gives the court jurisdiction in respect of "every claim against "the Crown arising out of any death or injury to the "person or to property on any public work result-"ing from the negligence of any officer or servant of "the Crown, while acting within the scope of his "duties or employment." It is a debated question whether that part of Sappers' Bridge on which the accident occurred is a public work of Canada. This part of the bridge was built by the City of Ottawa, but is maintained by the Government of Canada under an agreement with the city. If it is a public work, it is such because of that agreement, and the spending of public money upon it. But assuming for the purposes of this case, without deciding the question, that it is a public work, the question arises as to whether or not the case is otherwise within the statute.

The fall which occasioned the injury of which the suppliant complains, was no doubt due to the slippery condition of the sidewalk at the time of the accident; and it is alleged that in permitting it to remain in that condition there was negligence on the part of certain men employed by the Government to keep the sidewalks under their charge in a state reasonably safe for persons to walk on it. These men are under the direction of witness Cyprien LeBlanc, who says that it is his duty to see that there is no

1900

DAVIES v. THE QUEEN.

Reasons for Judgment.

accumulation of snow or ice on the sidewalks under his charge. When there is snow it is removed with a snow plough, and when there is ice they put sand on it. They go to the Sappers' Bridge every morning, he says, and if the sidewalk is slippery it is covered with sand. They take, he says, (and in that he is corroborated by the men under him) greater care than the city exercises in respect of the sidewalks under its control. Neither he nor any of the men under him can speak particularly of the 23rd of February, 1898, the day on which the accident happened; but he and they say that they went to the bridge every day, and if the sidewalk was slippery sand was put on it. Sometimes this was done more than once a day. In general it would appear that these men took all reasonable care to keep the sidewalks under their charge in a safe condition; but the evidence of Captain Shaver and some of the other witnesses leaves, I think, no room to doubt that at the time of the accident the sidewalk on Sappers' Bridge was in a slippery condition, and that there was no sand on it. There is, however, no evidence to show how long it had been in that condition. It was, it appears, the duty of the men who have been mentioned to go to the bridge on the morning of that day between five and seven o'clock, and to see if the sidewalk was in a state reasonably safe for foot passengers or not, and if that were needed to put sand on it. If there was evidence from which I ought to infer that the sidewalk was in the same condition that morning that it was at ten or eleven o'clock, then probably it would be reasonable to conclude that notwithstanding their usual carefulness, the men whose duty it was to keep this sidewalk in a safe condition had, on that day in some way, neglected their duty. On the 22nd of February nine inches of snow had fallen. That apparently had been

1900

DAVIES v. THE QUEEN.

Reasons for Judgment.

removed. The 23rd was overcast, mild and with light snow. The maximum temperature was 33 degrees, the minimum 26 degrees. Captain Shaver says that it had snowed a little the night before and it was warm, moderate weather in the morning so that the snow was slippery. So that it is possible that the slippery condition in which the sidewalk was at ten or eleven o'clock of that day may not have existed earlier in the morning, when it was the duty of the men in charge to examine it. In this climate it is not possible always in winter to have the sidewalks in a safe condition to walk on. Negligence in that respect, where it is actionable, consists in allowing them to remain an unreasonable time in an unsafe condition.

The Crown if liable in such a case as this is not liable because there is any duty on it to keep the sidewalks in repair, for the neglect of which an action would lie. It is liable only when the case falls within the statute, that is when in some way the duty to keep the public work in repair or in a safe condition for travel has been imposed upon some officer or servant employed by it, who has been guilty of some negligence while acting within the scope of his duty or employment. In this case the burden of establishing negligence is on the suppliant, and I do not think she has made out a sufficient case.

The judgment of the court will be that she is not entitled to the relief sought by her petition.

Judgment accordingly.

Solicitor for suppliant: *A. E. Fripp.*

Solicitor for respondent: *E. L. Newcombe.*

IN THE MATTER OF THE APPLICATION OF THE METROPOLITAN RAILWAY COMPANY TO CONNECT ITS TRACKS WITH THE TRACKS OF THE CANADIAN PACIFIC RAILWAY COMPANY BY MEANS OF A SWITCH IN THE CITY OF TORONTO.

1900
April 10.

Railways—Order of Railway Committee of Privy Council—Making same rule of Exchequer Court—Condition—Ex parte order—Practice.

By section 29 of the Railways Act, 51 Vict. c. 17, the Exchequer Court is empowered to make an order of the Railway Committee of the Privy Council a rule of court; but where there are proceedings depending in another court in which the rights of the parties under the order of the Railway Committee may come in question, the Exchequer Court, in granting the rule, may suspend its execution until further directions.

2. The court refused to make the order of the Railway Committee in this case a rule of court upon a mere *ex parte* application, and required that all parties interested in the matter should have notice of the same.

MOTION to make an order of the Railway Committee of the Privy Council of Canada a rule of court.

The following is a copy of the order of the Railway Committee:

"THE METROPOLITAN RAILWAY COMPANY, hereinafter called "the applicant," having applied to the Railway Committee of the Privy Council of Canada, for permission to connect its tracks with the tracks of the Canadian Pacific Railway Company hereinafter called the "C. P. R." by means of a switch in the City of Toronto, as shown on the plan submitted and filed under No. 8369."

"The said committee, having heard counsel for the applicant, the Corporation of the City of Toronto, the Town of North Toronto, the County of York and the C. P. R., respectively, and duly considered the evidence

1900

METRO-POLITAN RAILWAY COMPANY.

Statement of Facts.

submitted, the counsel on behalf of the Corporation of the City of Toronto consenting thereto, hereby approves of the applicant connecting its tracks with the tracks of the C. P. R. by means of a switch in the City of Toronto, as shown on the plan hereunto annexed, in the following conditions, that is to say:

"That the connection is to be made at the east, not the west side of Yonge Street, at the place shown on the said plan hereunto annexed, the applicant to pay all the cost of the change of location shown on the last mentioned plan, up to two thousand five hundred dollars ($2,500). Should the cost exceed this amount, the excess to be borne by the applicant and the Corporation of the City of Toronto, so that the said city shall not be liable for more than one half of such excess."

"The point where the line of the applicant shall connect with the tracks of the C. P. R. to be on the property of the C. P. R., between its present northerly track and the southerly building north of said track.

"The applicant shall not run freight trains of more than three cars, exclusive of the motor, on Yonge Street, and shall not run freight trains at a greater speed than six miles an hour through the towns, incorporated villages, the unincorporated village of Thornhill, and that part of Yonge Street south of the town of North Toronto, or any other part of Yonge Street at a greater speed than fifteen miles an hour."

"The applicant shall not operate its railway by any other power than electricity on Yonge Street; and in its operation shall be subject to such agreements as may be, or have heretofore been, entered into between the County Council of York and the applicant."

"This order is subject to the reservation of the right by the said committee and the recognition of such right by the applicant to make such orders as may

1900

METRO-POLITAN RAILWAY COMPANY.

[Argument of Counsel.

hereafter be deemed expedient respecting the time and mode of running such freight cars and trains."

"Truck cars run in connection with a passenger car or cars, shall not be considered freight cars within the meaning of this order."

(Signed) ANDW. G. BLAIR,
Chairman.

Ottawa, November 23rd, 1899.

Certified true copy.

(Signed)

COLLINGWOOD SCHREIBER,
Secretary, Railway Committee, P.C.

December 14th, 1899.

Glynn Osler applied, on behalf of The Metropolitan Railway Company, for an *ex parte* order to make the above order of the Railway Committee a rule of court.

PER CURIAM.—The order ought not to go without previous notice to all parties interested in the matter that the application is to be made; so that they may have an opportunity of being heard. An order *nisi* may be issued.

April 10th, 1900.

An order *nisi* was applied for, and issued, returnable on April 14th, 1900.

Glynn Osler (with him *Walter Barwick Q.C.*) for the motion to make the order *nisi* absolute;

H. L. Drayton for the City of Toronto contra;

W. H. Curle appeared to watch the interests of the Canadian Pacific Railway Company.

Mr. Osler.—There is no doubt as to your lordship's jurisdiction to make the order asked for under section 17 of "The Railway Act." There was no doubt about the jurisdiction of the Railway Committee to make the order in the first instance, and your lordship will probably hold it not within your province to review any

1900

METROPOLITAN RAILWAY COMPANY.

Argument of Counsel.

question decided by the committee. Your lordship's duty with respect to the matter is the very simple one of confirming the order of the committee. I think my learned friend will not be able to show any sufficient ground under the statute why your lordship should not make an absolute order at the present time.

[*Mr. Drayton.*—I think it is very doubtful if your lordship should assume jurisdiction when the whole matter before you is open in proceedings before the High Court of Ontario at the present time.]

Mr. Osler.—There is no doubt about the jurisdiction of the Railway Committee to make this order. (Cites sections 11 and 173 of The Railway Act as amended by 55-56 Victoria, chapter 27, section 1.) It is true that when the Metropolitan Railway Company attempted to connect their tracks with the tracks of the Canadian Pacific Railway Company, the City of Toronto instituted an action, and upon application to Mr. Justice Falconbridge, obtained from him an injunction to restrain the crossing until the Metropolitan Railway Company had secured what he considered to be the necessary consent of the City of Toronto. It is also true that we have yet to obtain that consent before we can make our physical crossing, but that is no reason why the order of the Railway Committee of the Privy Council should not be made a rule of the Exchequer Court.

Mr. Drayton.—With reference to the jurisdiction of the Railway Committee we only admit it to this extent —that the Metropolitan Company could not cross without first having obtained the order of such Committee. But we say that it was necessary for the Metropolitan Company before they attempted to cross to have obtained something else, viz., the consent of the City of Toronto. If the order of this court were so framed as to make it necessary for the Metropolitan Company

1900

METRO-POLITAN RAILWAY COMPANY.

Argument of Counsel.

to obtain this consent before acting on the order, it would be satisfactory to us. If your lordship would be pleased to direct a clause to be inserted in the formal order to the effect that no steps may be taken under the order of the Privy Council until the consent of the City of Toronto is obtained, we would have no objection then to the order.

[*Mr. Osler.*—We have the order of the Privy Council, but in the opinion of Mr. Justice Falconbridge we are not entitled to act on it until we have obtained the consent of the City of Toronto. That point will have to be ultimately settled in the proceedings in the High Court, but surely that is no reason why the order of the Privy Council should not be made a rule of this court in the meanwhile.]

Mr. Drayton.—I submit that under the Dominion Railway Act it is necessary for a railway to obtain the consent of the Municipal Council before the Railway Committee of the Privy Council can authorize a crossing to be made. The exercise of the jurisdiction of the Railway Committee depends upon this condition being fulfilled. (Cites *In re* Canadian Pacific Railway Co. (1). Then, the order of the Railway Committee assumes to alter or vary documents under seal between the municipality and the Metropolitan Railway Company. What the Privy Council really does in this connection is to give one municipality the right to make new regulations governing another municipality. Then again, the deputation from the City of Toronto had no right to make the consent which was embodied in the order of the Privy Council. They acted in so doing in excess of their authority. Another objection is, as I before pointed out, with reference to this court exercising jurisdiction when another court of concurrent jurisdiction is seized of the matter. (Cites *The Queen*

(1) 25 Ont. A. R. 65.

1900

METROPOLITAN RAILWAY COMPANY.

Reasons for Judgment.

v. *Fisher* (1); *Wharton's Law Lexicon* (2); *Brooks* v. *Delaplain* (3); *The Queen* v. *Hurteau* (4); *Hawes* v. *Orr* (5).

Mr. Osler replied: The city could not withdraw the authority of the deputation, especially after its consent had been communicated to the Railway Committee.

THE JUDGE OF THE EXCHEQUER COURT now (April 17th, 1900) delivered judgment.

The order of the Honourable the Railway Committee of the Privy Council, dated the 23rd day of November, 1899, set out in the proceedings herein, is made a rule or order of this court.

But until further direction is given no step is to be taken to enforce such rule or order by the authority of this court.

This condition is attached to the order at present, because it appears that in a cause instituted in the High Court of Justice in Ontario, wherein the Corporation of the City of Toronto are plaintiffs and the Metropolitan Railway Company are defendants, proceedings are now depending in which the rights of the said parties under the said order of the Railway Committee may come in question.

Judgment accordingly.

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(1) 2 Ex. C. R. 371.
(2) 8th ed. vbo. "Concurrent Jurisdiction."
(3) 1 Myld. Ch. Dec. 351.
(4) Audette's Practice, p. 84.
(5) 10 Ky. 431.

1900

May 7.

BETWEEN

THE GENERAL ENGINEERING COMPANY OF ONTARIO, LIMITED ..... } PLAINTIFFS;

AND

THE DOMINION COTTON MILLS COMPANY, LIMITED, AND THE AMERICAN STOKER COMPANY ..... } DEFENDANTS.

Patent—Expiry of foreign patent—R. S. C. c. 61, s. 8—55-56 Vict. c. 24 s. 1—Construction—"Foreign Patent"—"Exist."

By the Patent Act, R. S. C. c. 61, s. 8 (as amended by 55-56 Vict. c. 24, s. 1) it is enacted that "under any circumstances if a foreign patent exists, the Canadian patent shall expire at the earliest date on which any foreign patent for the same invention expires."

J. filed an application for a Canadian patent for new and useful improvements in boiler and other furnaces on the 1st of March, 1892. On the same day he applied for a British patent and also for an Italian patent in respect of the same invention. The British application was accepted on the 30th April, 1892, and the patent issued on the 12th July but was dated, as is the practice in England, as of the date of the application, viz. 1st March, 1892. The Italian patent was issued on the 19th March, 1892, and was granted for a term of six years from that date. The Canadian patent was granted on the 15th October, 1892. The British patent became forfeited for non-payment of certain fees and annuities due thereon on the 1st March, 1897. The inventor was in default in respect of payment of fees on the Italian patent in 1895, and while there was some doubt whether such default operated a forfeiture *ipso facto* under the Italian law, there was no doubt that it expired at the expiry of the six years when no steps were taken by the inventor for its renewal.

Held, that the Canadian patent was void.

2. *Held* that the words "foreign patent" as used in the above enactment include all patents that are not Canadian.

3. That the word "exists" has reference to the date or time when the Canadian patent is *granted* not when it is *applied for*.

1900

THE GENERAL ENGINEERING CO. OF ONTARIO v. THE DOMINION COTTON MILLS CO. AND THE AMERICAN STOKER CO.

Argument of Counsel.

4. That the words "shall expire at the earliest date on which any foreign patent for the same invention expires" are not to be limited to the expiration by lapse of time of the potential term of the foreign patent, but include any ending at a time earlier than the end of the term for which the patent is granted.

ACTION for infringement of a patent for invention.

The case originally came on to be heard by the Judge of the Exchequer Court on the 11th day of April, 1899, and, after trial and argument, judgment on the merits was delivered on the 14th day of June, 1899. This judgment will be found reported *ante* at p. 309. Prior to such judgment the defendants had moved for leave to supplement the evidence at trial by certain affidavits. This motion was refused. A report of the judgment on such motion will be found *ante* p. 306. On the 19th September, 1899, defendants obtained a writ of *scire facias* to set aside the plaintiffs' patent, on the ground of the lapse of a foreign patent for the same invention. On the 8th November, 1899, the sci. fa. case was argued and on the 10th January, 1900, judgment was delivered dismissing the writ, but allowing a motion previously made by defendants for a new trial of the first case on the merits. See this judgment *ante* p. 328. On the 28th March, 1900, the new trial was had.

Mr. Riddell, Q.C. for the plaintiffs: The position of this patent is, perhaps, a little different from that of most patents. The Act 55-56 Victoria, c. 24, came in force on the 9th July, 1892. By section 9 it is provided that the Act shall only apply to patents issued after the passing thereof. The Act which had previously been in force is *The Revised Statutes of Canada*, c. 61. The application was made by the plaintiffs' predecessors in title and everything was done which at that time was necessary to be done on the 1st of March, 1892; and, if there be any difference

between the two Acts, if there be any difference as regards the rights the plaintiffs would have under the two Acts, I venture to argue that the Act of 1886, (R. S. C. c. 61,) is the Act which will govern, and not the Act 55-56 Vict. c. 24. This statute, when I say this statute I mean the corresponding statute, has been in other countries a matter of investigation. Under the law in England when it was provided there that a patent taken out in a foreign country had effect, nothing done in such foreign country after the application in England had any bearing upon it. I am desiring to argue that the turning point is the filing with the Minister, in the proper office, of the application upon which a patent is subsequently granted. I say then that when the law in England was that a patent in a foreign country had any effect, nothing that was done in the foreign country in the way of taking out the patent or allowing the patent to expire, had any force whatever in England. Of course since the Imperial Act of 1884, the taking out of a foreign patent has no effect in any event; but I am speaking of the time at which the taking out of a patent in a foreign country had some force in England. So too in the United States. In the United States before the law of 1870 there was no question whatever as to what the law was. That will be found in the case of *O'Reilly* v. *Morse* (1); and also *French* v. *Rogers* (2); and it was so considered even after the passing of the Act of 1870. The Act of 1870 is slightly different from the previous legislation, and I say that even after the passing of the Act of 1870 it was considered that the same was the law. (Cites *Bate Refrigerating Co.* v. *Hammond* (3); *Bate Refrigerating Co.* v. *Sulzberger* (4). In the case last cited it was finally decided that

(1) 15 How. p. 127.
(2) 1 Fish. P. C. p. 136.
(3) 19 Brodix, 231.
(4) 157 U. S. 1.

1900

THE GENERAL ENGINEERING CO. OF ONTARIO v. THE DOMINION COTTON MILLS CO. AND THE AMERICAN STOKER CO.

Argument of Counsel.

a patent taken out in a foreign country, before a patent actually issued in the United States, came within the meaning of the statute of 1870.

My argument, so far as that is concerned, is this: In England there is no question as to what was the law. In the United States, until long after the passing of this legislation in Canada, it was supposed to be the law. It was supposed to be the law that it was the application which was the turning point, and not the real issue of the patent. Then, I venture to submit, that, taken in connection with another case which I will cite, shows that the date of the application is the important point, and that therefore the Canadian Act of 55-56 Vict., called the Act of 1892, has no application here. And, it is well known of course that no Act is retroactive unless it is so stated. (*Gillmore* v. *Executor of Shooter*) (1).

Then I refer also to the judgment in *Dash* v. *Vankleek* (2), and *Society for the Propagation of the Gospel* v. *Wheeler* (3). *Maxwell on the interpretation of Statutes* (4); *In re Pulborough School Board* (5)

It does not, however, occur to me that in reality it makes a very great deal of difference as to whether the Act of 1892 applies, or the Act of 1886; the wording is a little different. That part of the section upon which my learned friend must rely is the same in both statutes. The section introduced by the Act of 1892 is substituted for section 8 in the Act of 1886, and they would therefore both be under the heading of "Application for Patent." The wording in the latter part of the section in each is the same, and it is that upon which defendants must rely. That reads thus: "And under any circumstances, if a foreign patent exists the

(1) 2 Mod. 310.
(2) 7 Johns. 502.
(3) 2 Gallison, p. 139.
(4) Pp. 277 to 299.
(5) [1894] 1 Q. B. 737.

Canadian patent shall expire at the earliest date on which any foreign patent for the same invention expires." That I say is the same in both.

Now of course this court has already decided in the *Auer Light* v. *Dreschel* (1) that it does not mean if there be any foreign patent for the same invention. Such foreign patent, along with the Canadian patent, comes within the purview of the previous part of the section.

If the Act of 1886 applies then I take it there is no doubt as to our position, because that reads thus: "No inventor shall be entitled to a patent for his invention if a patent therefor, in any other country, has been in existence in such country for more than twelve months prior to the application for such patent in Canada." If that Act applies, then it is quite clear that a patent not having subsisted for twelve months, or any time prior to the application, will not be a patent which comes within the meaning of section 6 of the Act of 1886. Then there is something about the manufacture. The whole section is intended to apply to the same state of facts. It is intended to apply to the state of facts of an inventor electing to go and obtain a patent for his invention in a foreign country, doing that in the first place, and then having done that, making up his mind that he wants to get a patent in Canada, and then applying for a patent in Canada. The application for the patent is part of the obtaining of the patent. The application is followed by the patent. The application is followed by the grant of a patent in the ordinary course.

Then I say where the person does not elect, where he does not make up his mind, that he is going to get one patent before he gets the other; but where he makes up his mind he will make his application upon the

(1) 6 Ex. C. R. 55.

1900

THE GENERAL ENGINEERING CO. OF ONTARIO v. THE DOMINION COTTON MILLS CO. AND THE AMERICAN STOKER CO.

Argument of Counsel.

same day for both patents, he cannot be said to be electing to obtain one patent before he obtains the other. It may be that according to the practice in different countries, according to the state of business in two patent offices, that one patent applied for on the 1st of March would be issued before the same patent applied for in another country upon the 1st of March; but that is a matter of routine, something with which the applicant has nothing to do, something in respect of which he has no election, and, therefore, a person who does what was done in this case, applies in two countries for a patent at the same time, does not elect to obtain a patent for his invention in one country before he obtains it in the other.

If I am correct in that argument, then this particular case does not come within the meaning of the statute of 1892, and it is abundantly manifest it does not come within the meaning of the statute of 1886.

Then, there is a further point. "Under any circumstances if a foreign patent exists." Does that mean a foreign patent exists at the time of the application? I venture to think that that is so. The statute does not interpret itself. Something must be inserted in the statute. A patent does not exist when it expires. It must exist, if it exists at all, before it expires. It cannot be that it means if a foreign patent exists concurrently with the Canadian patent alone. It must mean more than that. Then I say that "if a foreign patent exists" means if a foreign patent exists at the time of the application in Canada for a Canadian patent, then when does the patent expire? A foreign patent expires at the time, not when it becomes void as such, but under the authorities, and one's common sense would so teach him—a foreign patent expires at the time at which it could under no circumstances possibly longer be in existence. If for instance the

laws of a country permitted no patent to be granted for longer than ten years, the patent would expire at the termination of the ten years.

(Cites *Consolidated Roller Mills Company* v. *Walker* (1); *Bate Refrigerator Company* v. *Hammond* (2); *Pohl* v. *Anchor Brewing Company* (3); *Burns* v. *Walford* (4).

Under the old Patent Act, Consolidated Statutes of Canada, c. 34, a foreign country meant a country not under the British Crown.

Let us examine the history of legislation in this behalf. In *The Consolidated Statutes of Canada* of 1859, chapter 34, section 1, the word "foreign" is used with a definition, that having been taken from a previous Act, 12 Victoria, chapter 24. In 1869 the word "foreign" is dropped, and the word "other" is used. That is the statute of Canada of 1869, chapter 11, section 7. Then we come on to 35 Victoria, which is the Act of 1872, where we have the same words "other country." Proceeding onwards, then to *The Revised Statutes of Canada*, 49 Victoria, the section I have just read, again we have the words "other country." Then a change is made in 1892, and we go back to the original wording which was to be found in the statute of 1859. Now then what is the presumption? A word is used to which a definition is given by the statute itself. By succeeding legislation that word is taken out of the statute, and other words introduced; the legislature having in view no doubt the whole legislation on the subject, we must give them, theoretically, credit for that. The legislature, I say, having that in their mind, begin again to use the word that has been used in the first statute. Now then, these statutes are *in pari materia*, so far as they go. They are upon the same subject. If we find the

(1) 43 Fed. R. 578 and 581.
(2) 19 Brodix 231.
(3) 20 Brodix, p. 190.
(4) W. N., 1884, at p. 31.

1900

THE GENERAL ENGINEERING CO. OF ONTARIO v. THE DOMINION COTTON MILLS CO. AND THE AMERICAN STOKER CO.

Argument of Counsel.

word "foreign" or any other word used in the first statute, with a definition given to it, then the presumption is that the word is used in the same sense when introduced into the last statute. Cites *Hull* v. *Hill* (1)).

Then we have to consider whether the Italian patent is a patent for the same invention. It is not the law that because a machine is described the same in both specifications, as apart from the claim, that therefore the patents are the same, or that the patents are for the same invention. (Cites *Barter* v. *Howland* (1); *Holmes* v. *Metropolitan* (2)).

J. L. Ross followed for the plaintiffs, arguing that the object of the Canadian legislation of 1892, which is in accord with the previous legislation, is that if a man published an invention in a foreign country by taking out a patent therefor, and some person learning of that invention, presumably from that foreign patent, begins to manufacture, the Canadian inventor who afterwards comes and makes application in Canada shall have no right to stop that manufacture. He pays the penalty for having published his invention in a foreign country before the date of his Canadian application. The object is to induce a man to make early application in Canada before it has been patented elsewhere. That object appears from the earliest patent Act we have, which declared that if it had been published in Canada or patented in any other country, and the specification published, that were fatal to his Canadian application. The original of section 8 was passed for the purpose of making it clear that no man should be deprived of obtaining a Canadian patent for his invention by reason of his having obtained, before the date of his Canadian application, a foreign patent, and of

(1) 4 Ch. D. 97. (2) 26 Grant 139.
(3) 22 Fed. R. 341.

1900

THE GENERAL ENGINEERING CO. OF ONTARIO v. THE DOMINION COTTON MILLS CO. AND THE AMERICAN STOKER CO.

Argument of Counsel.

the specification of that foreign patent having been published, giving to the world a knowledge of his invention.

F. S. Maclennan, Q.C. for the defendants. My first point in connection with our view of the interpretation of section 8, and its application to the Italian and British patents, is that the date of the application for the Canadian patent is immaterial, that the controlling date is the date of the grant in each case.

(Cites *Gramm Electric Co.* v. *Arnoux & Hockhausen Electric Co.* (1); *Edison Electric Co.* v. *United States Electric Co.* (2); *Electrical Accumulator Co.* v. *Julien Electric Co.* (3).)

With the statutory provisions practically identical, so far as this question is concerned, we find that the United States courts unanimously from 1883 up to 1895, and in all cases which have occurred since, have interpreted their law to mean that the controlling date is the date of the grant of the domestic patent, and not the date upon which the application for the patent was made.

Counsel for the plaintiffs argue that the word "elect" to obtain a patent must be considered with reference to the application, that the application is part of the election. I do not agree in respect to the construction of the word "elect." "Elect" there means taking the patent, taking the patent when it is granted. A patent is not issued on the date of the application. Many patents may be applied for and never issued, and in that case a man could not be said to have elected to obtain a patent.

Take the full words used: "Elects to obtain." That is another reason why we say that this section should be read, not with reference to the date of the appli-

(1) 25 U. S. Off. Gaz. 193. (2) 43 U. S. Off. Gaz. 1456.
(3) 64 U. S. Off. Gaz. 559.

1900

THE GENERAL ENGINEERING CO. OF ONTARIO v. THE DOMINION COTTON MILLS CO. AND THE AMERICAN STOKER CO.

Argument of Counsel

cation, but with reference to the date on which the patent is granted. Then it is "obtained."

To give any other construction to the latter portion of section 8, so far as the expiration is concerned, we would require to give a different meaning to the word "expire" when it occurs twice. This portion of the section is applicable plainly to the view that the Canadian patent expires by reason of the forfeiture or expiration by forfeiture of the British patent. It is admitted the British is identical with the Canadian patent, and apart altogether from the question of the Italian patent, if expiry by forfeiture of the British patent is to be recognized by this court as an expiry of a foreign patent such as would terminate the life of the Canadian patent, then section 8 applies, and the Canadian patent must be limited by the expiry of the British patent. The word "expire" where it last occurs in the section has reference, not to the effluxion of time, or to the duration of the term for which the patent has been issued, but it has reference to a premature termination, to a premature ending, before the full period or term, for which the Canadian patent had been issued, had expired or run out. And when we give that interpretation to the word "expire" at the end of section 8, I submit we must give the same meaning to the word when it occurs in the earlier portion of the section.

What reason has my learned friend shown in this particular case that this Court should be asked to go further than it went in the Auer Light Case? The court's interpretation in respect of that part of the section agrees exactly with what the courts in the United States have held. Their legislation was in terms which indicated that that was the intention, that that was what Congress intended to do. The Parliament of Canada probably was not quite so

express, but the court has put that construction upon it. Now the court is asked to put a further construction upon it, to extend this part of the section in order to meet the particular case of my learned friend's client. I submit there is no authority for it, that it is not in keeping with the interpretation of legislation of this character in the United States or in England, and it would be doing violence to the Act if the court were to go to that extent.

1900

THE GENERAL ENGINEERING CO. OF ONTARIO. *v.* THE DOMINION COTTON MILLS CO. AND THE AMERICAN STOKER CO.

Argument of Counsel.

Now, with regard to the expiration of the foreign patents by forfeiture, operating a forfeiture on the domestic patent, I would refer to the French authorities which were cited in the *sci. fa.* case (1). The jurisprudence of France upon this question I may say is uniform, the highest court there, the Court of Cassation, has held a number of times, the lower courts also have held, that the French patent is limited by the expiry of a foreign patent when that expiry is brought about, either from any accidental cause, or from the non-payment of annuities, or from any other reason whatsoever. So that the construction there placed by the French courts upon similar legislation to what we have now before your Lordship is that the French patent is limited and terminates and expires at the same moment as the foreign patent, no matter how that termination of the foreign patent has arisen; whether the term for which it was granted has run out, or whether it has terminated prematurely by reason of forfeiture for non-payment of annuities, or from any other cause, which is referred to, in one of the cases, as being accidental. The French law upon this question is the law of Article 29 of the 5th July, 1844, and I would cite Dalloz, 1864, part 1, 46, and also Dalloz 1882, part 1, 253.

(1) Ante p. 328.

1900

THE GENERAL ENGINEERING CO. OF ONTARIO v. THE DOMINION COTTON MILLS CO. AND THE AMERICAN STOKER CO.

Reasons for Judgment.

That the words "country" and "foreign country," indicate that "country" may have two meanings; one being a political meaning where it would mean and include the whole of the realm of the British Empire, and the other the legal meaning, where it would refer to legal jurisdiction.

With regard to the question as to whether the Italian is a six year or a fifteen year patent, I cited two cases or three cases in the *scire facias* action to the effect that, under circumstances such as we have here, or according to the Italian law, the patentee in applying for his patent was entitled to make an option, and to take a portion of the term, to which he would afterwards be entitled to an extension. That in the event of his not taking the advantage of the privilege of extending the patent, the full term the law would justify him in taking it out, his patent must be construed as a patent for the limited term for which he made the option, that is for the term designated in the grant of the patent itself.

Counsel for plaintiffs have devoted considerable attention to the question of Great Britain not being a foreign country. I think it is hardly necessary to refer to authority upon that question. The matter was gone into on the *scire facias*, and I would refer again to Dicey on *Conflict of Laws*, at pages 64, 66, 67 and 68,

Mr. *Riddell* replied.

THE JUDGE OF THE EXCHEQUER COURT now (May 7th, 1900,) delivered judgment.

The question now to be decided in this case is whether the plaintiffs' patent, numbered 40700, and granted to one Evan William Jones, of Portland, Oregon, United States of America, Manufacturer, for alleged new and useful improvements in boiler and other furnaces, has expired under the provision of the

Patent Laws of Canada, by which it is enacted that "under any circumstances, if a foreign patent exists, "the Canadian patent shall expire at the earliest date "on which any foreign patent for the same invention "expires" This provision first occurs in the concluding paragraph of the 7th section of *The Patent Act* of 1872. It is repeated in *The Revised Statutes*, chapter 61, section 8, and in the amendment of that section enacted in 1892. (55-56 Vict. c. 24, s. 11.)

The application for the Canadian patent in question was filed by Jones in the Patent Office on the first day of March, 1892. On the same day he applied for a British patent and for an Italian patent. The British application was accepted on the 30th of April, 1892, and the patent was issued on the 12th day of July following, and numbered 4014. In accordance with the practice in force there, it bears the date of the application, March 1st, 1892, and was to continue for fourteen years from that date. The Italian patent was issued on the 19th of March, 1892, and was granted for a term of six years from the 31st day of March, 1892. The Canadian patent was granted on the 15th of October, 1892, for a period of eighteen years. The British patent was subject, among other conditions, to one by which it was provided that it should determine and become void if the patentee should not pay all fees by law required to be paid in respect of the grant of the letters-patent at the time provided. The annual fees and annuities on the patent for the year 1897 were not paid when due, or since, and the patent became forfeited therefor on March 1st, 1897. The Italian patent although granted for a term of six years from the 31st of March, 1892, might by the laws of Italy, have been prolonged for one or more years to a term of fifteen years. The annual tax and annuities on this patent for the year 1895 were not

1900

THE GENERAL ENGINEERING CO. OF ONTARIO. v. THE DOMINION COTTON MILLS CO. AND THE AMERICAN STOKER CO.

Reasons for Judgment.

paid when due or at any time since, and no renewal or extension of the patent has been obtained. There may be some question as to whether or not this patent expired in the year 1895 without any proceeding being taken under the laws of Italy to have it declared void; but there can, I think, be no doubt about its expiring on the 31st of March, 1898. If it had not expired at an earlier date, it certainly expired then. The Canadian Patent was granted subject, among other things, to adjudication before any court of competent jurisdiction and to the conditions contained in *The Patent Act* and the Acts amending the same.

One question that arises on this state of facts, and the clause of *The Patent Act* referred to whereby it is provided that the Canadian patent shall expire at the earliest date at which any foreign patent for the same invention expires, is as to whether or not all the patents are for the same invention. It is conceded that the British and Canadian patents are; but it is contended that the Canadian and Italian patents are not. The drawings accompanying the specifications of the two patents are identical, and the description of the invention in the two specifications are similar and in substance the same; but in the claims the invention is not described in the same terms in both. There cannot, however, be any doubt, I think, that the two patents were granted for the same invention. It is to be borne in mind that none of the elements or things combined in Jones' Canadian patent are new. They, or their equivalents, are all to be found in the United States patent issued to Amasa Worthington on the 30th of December, 1884 (No. 310110), and the manner of combining the various elements does not differ substantially, except in respect of the shape of the fuel chamber or magazine. As I understand the evidence, Worthington's stoker failed to be commercially suc-

cessful for the reason that when then the circular and bowl-shaped fuel chamber, described by him, was made large enough to give the necessary superficial area of fire, the distance from the sides of the chamber to the centre of the fuel was so great that the air could not be effectually forced the whole distance but would escape upwards. As I had occasion to state when giving judgment on the first trial of this case, the best results are attained in a mechanical stoker in which the green fuel is reduced to coke before it reaches the zone of combustion, the gases distilled in the process of coking being burned and utilized without waste. These results, for the reason mentioned, were not attainable, it appears, with the Worthington stoker when the fuel chamber adopted by him was made large enough for practical use. By adopting an oblong or bathtub-shaped fuel chamber, Jones succeeded in producing a mechanical stoker in which the requisite area of fire was obtained, and at the same time every part of the fuel within the zone of combustion was within reach of, and in effective contact with, the air supplied to the furnace. That was, I think, the substance of his invention or discovery. In that lay the difference between his success and Worthington's failure commercially; and it was because of that feature of the combination that his patent was upheld in this case. In this respect Jones' Italian and Canadian patents are undoubtedly the same, and notwithstanding some minor differences in the claims made in the specifications appertaining to the two patents, both are, I think, for the same invention.

The question as to whether a British patent is a foreign patent within the meaning of that expression, as used in the 8th section of *The Patent Act*, is also in controversy. The words "foreign patent" are there used in contradistinction to the words "Canadian

1900

THE GENERAL ENGINEERING CO. OF ONTARIO. v. THE DOMINION COTTON MILLS CO. AND THE AMERICAN STOKER CO.

Reasons for Judgment.

patent," and are, I think, intended to include, and do include, all patents that are not Canadian.

Then a question is raised as to whether the expression "if a foreign patent exists," occurring in the provisions referred to, has reference to a foreign patent existing when the Canadian patent is granted, or to one existing when the Canadian patent is applied for. While the application is pending, and before the patent is granted, there is no "Canadian patent" to expire or to be affected by a foreign existing patent, and it seems to me that the most natural construction of the provision is to read the word "exists" as having reference to the date or time when the Canadian patent is granted.

There is one other question to which it is necessary to refer. For the plaintiffs it is contended that the expression "shall expire at the earliest date on which "any foreign patent for the same invention expires" should be limited to the expiration by lapse of time of the potential term of the foreign patent; the defendants on the other hand contending that it includes any determination of such term. The plaintiffs' contention is supported, to a great extent, by decisions of the United States courts; but in the corresponding provision of the patent laws of that country, a reference is made to the "term" of the foreign patent, it being provided that a United States patent "shall expire at "the same time with the foreign patent, or if there be "more than one, at the same time with the one having "the shortest term" (1). Here we have no such reference or anything to indicate that the word 'expire' is used otherwise than with its natural and ordinary meaning. It means primarily to emit the breath, and then to emit the last breath, to die, to come to an end, to close or conclude as a given period, to come to

(1) Act of 1870, s. 25, R. S. s. 4887.

nothing, to cease, to terminate, to fail, to perish or to end. Where first used in the provision in question, the word certainly has reference to an ending at a time earlier than the end of the term for which the patent is granted, and I see no reason for giving to it in either case the limited and qualified meaning for which the plaintiffs contend.

I come to the conclusion that the defence now set up must prevail, and that there should be judgment for the defendants. The costs will follow the event.

Judgment accordingly

Solicitors for the plaintiffs: *Rowan & Ross.*

Solicitors for the defendants: *Macmaster & Maclennan.*

1900

May 7.

IN THE MATTER OF THE PETITION OF RIGHT OF

JOHN J. McHUGH .....SUPPLIANT;

AND

HER MAJESTY THE QUEEN.....RESPONDENT.

Public work—Bridge—Injury to person—Maintenance—Minister of Public Works—R. S. C. c. 36—50-51 Vict. c. 16, s. 16c. (c).

There is nothing in *The Public Works Act* (R. S. C. c. 36) in relation to the maintenance and repair, by the Minister of Public Works, of bridges belonging to the Dominion Government, which makes him "an officer or servant of the Crown" for whose negligence the Crown would be liable under sub-sec. (*c*) of sec. 16 of *The Exchequer Court Act.*

PETITION OF RIGHT for damages for an injury to the person alleged to have been caused by the negligence of an officer or servant of the Crown on a public work of Canada.

The material facts of the case are stated in the reasons for judgment.

The case came on for trial before the JUDGE OF THE EXCHEQUER COURT at Calgary, N.W.T., on the 25th, 26th and 27th days of September, 1899.

March 13th, 1900.

The case was argued at Ottawa, this day.

J. A. Lougheed, Q.C. for the suppliant: The evidence shows that the bridge was in a bad state of repair. There is no disputing this fact; it appears both by the evidence of the suppliant and the Crown. It is almost unnecessary to review the oral evidence because the exhibits filed show that the bridge was in a most unsafe state. The accident happened within fifteen days after Superintendent Saunders' report as to the

1900

McHUGH v. THE QUEEN.

Argument of Counsel.

unsafe character of the bridge. The Mayor of McLeod wired to the Chief Engineer shortly before the accident. The evidence taken orally and the exhibits themselves irresistably show that the bridge was unsafe for traffic. The disrepair of the bridge was the proximate cause of the accident. The suppliant had been drinking, but was able to take care of himself. It in no way contributed to the accident. We must bring ourselves within clause (*c*) of sec. 16 of *The Exchequer Court Act.*

The Minister of Public Works is as much an officer or servant of the Crown as any subordinate officer of the department. Under *The Public Works Act* (1) the minister has the charge, management and direction of, *inter alia*, the "roads and bridges now belonging to Canada." (Sec. 7.) The minister is thus not only a constitutional adviser of the Crown in his political capacity, but under the enactment I have cited he is also a ministerial officer or servant of the Crown. There is nothing in the law preventing him from being regarded as holding the dual capacity. Parliament has simply seen fit to constitute one of the constitutional advisers of the Crown, an officer or servant of the Crown for certain specific purposes. Sec. 3 of *The Pnblic Works Act* creates the department; sec. 4 provides a deputy minister and a secretary of the department; sec. 5 fixes the duties of the chief engineer and the chief architect. Clearly clause (*c*) of sec. 16 includes negligences on the part of such an officer or servant as the Minister of Public Works is under these enactmen t.

[*By the Court.*—Suppose you concede that the minister is an officer or servant of the Crown, what particular duty had he here in respect of which he was negligent?

(1) R. S. C. c. 36.

1900

McHUGH v. THE QUEEN.

Argument of Counsel.

Section 9 of *The Public Works Act* provides that he must keep the bridges in repair. Sec. 10 compels him to make repairs on bridges and other public works whenever the necessity of the public service demands it. He has not to wait under this section for parliamentary appropriations for such a purpose. The negligence on the part of the minister consisted in this that he had no one there to look after this bridge. There was negligence in not making repairs promptly, when the minister had knowledge of the unsafe condition of the bridge.

(Cites *The City of Quebec* v. *The Queen* (1); *Attorney-General of the Straits Settlement* v. *Wemyss* (2); *Farnell* v. *Bowman* (3); *The Queen* v *Williams* (4).)

The statutes upon which these cases are decided do not materially differ from the provisions of *The Exchequer Court Act* in question.

(Cites *City of Quebec* v. *The Queen* (5); *Lancaster Co.* v. *Parnaby* (6); *Mersey Docks* v. *Gibbs* (7); *Coe* v. *Wise* (8); *White* v. *Hindley* (9); *Elliott on Roads* (10); *Leprohon* v. *The Queen* (11).

In this case it is needless to say that we are considering a public highway. There is an obligation upon the Crown's servants to keep it in repair. They invited the public to use that bridge and they were bound to see that it was in a reasonably safe condition. They failed to do so, and they are liable in this action. As to contributory negligence, I would cite *Pollock on Torts* (12). The test is what was the proximate cause of the accident. It was the unsafe condi-

(1) 2 Ex. C. R. 270.
(2) 13 Ap. Cas. 192.
(3) 12 App. Cas. 643.
(4) 9 App. Cas. 418.
(5) 24 S. C. R. at p. 429.
(6) 11 A. & E. 223.
(7) L. R. 1 H. L. 93.
(8) L. R. 1 Q. B. 721.
(9) L. R. 10 Q. B. 219.
(10) Pp. 444-7.
(11) 4 Ex. C. R. 100.
(12) Pp. 434 and 438, and cases cited.

tion of the bridge. (Cites *Ridley* v. *Lambe* (1); *Beven on Negligence* (2).

As to damages the suppliant is entitled to compensation for the loss of the sale of his horses, the loss he sustained by being prevented from going about his business for three months, and the permanent injury to his shoulder. (Cites *Queen* v. *Williams* (3).

E L. Newcombe, Q.C.—The exhibits have no effect in view of the oral evidence. Superintendent Saunder's report only embodies his judgment concerning the condition of the bridge at the time it was made. The oral evidence shows that his judgment of the condition of the bridge at the time of the accident was that the bridge was safe. The bridge was not dangerous for horsemen. The suppliant has exaggerated the condition of the bridge. There was no negligence in reference to the maintenance of the bridge. It was the policy of the Government to rely upon the sense of the community as to making repairs. The fact that complaints were made so soon after repairs had been done shows that the Government might very well pursue such a policy with respect to this particular bridge. Mr. Bright, the engineer employed to make the repairs, says that in any event he could not have got the material to repair the bridge under a week. This shows that there was no negligence at all in making the repairs.

[*By the Court.*—If this bridge was not repaired it was not because there was no money available to repair it.]

No, but it might have been that if this bridge had been repaired some other bridge would have had to suffer, because there was not sufficient money to repair all the bridges requiring repair in the North-West

(1) 10 U. C. Q. B. 354. (2) Vol. I. p. 176.
(3) 9 App. Cas. 357; 5 Q. B. D. 78.

1900

McHUGH v. THE QUEEN.

Argument of Counsel.

Territories. So you see it would involve your lordship's reviewing the discretion of the minister, if you were to hold that there was negligence in not repairing this bridge.

Secondly, I submit the accident was due to McHugh's contributory negligence. He was familiar with the condition of the bridge, having already crossed the bridge four times before on the day of the accident. He admits he knew it was dangerous. It was contributory negligence for him to cross there as he did after night. Kellock, a disinterested witness, says that he told McHugh between 9.30 and 11 o'clock that night, that if he undertook to ride home in the condition he was in that night he would break his neck. McHugh was not in that state that his instinct of self-preservation would be as acute as it would be in a man not in liquor. The statement of the witness Kellock is therefore of very great probative effect in this case. (Cites *Ency. Laws, Eng.* (1); *Falsom* v. *Underhill* (2); *Wilson* v. *Charlestown* (3); *Beach on Contributory Negligence* (4). McHugh should have got off and led his horse over the bridge. *Illinois Railway Co* v. *Craigen* (5); *Strahan* v. *Chicago Railway Co.* (6).)

The suppliant did not fall on the bridge but at a wash-out, over which the Government had no control. It is impossible from McHugh's evidence to say where he fell.

Thirdly, as to the permanent injury to the suppliant's shoulder, that must be held to be attributable to the defendant's own conduct. He went about when he should have laid up. Dr. Kennedy who first

(1) Vol. 9 p. 97.
(2) 36 Vt. 591.
(3) 8 Allen 138.
(4) 2nd ed. 327, 329.
(5) 71 Ill. 184.
(6) 31 Am. & Eng. Ry. Cas. pp. 54, 58.

attended him was not called. He calls Dr. Rouleau who came to see him some weeks afterwards. Dr. Rouleau found the bones not articulating, which implies the absence of reasonable care after the accident. (Cites *York* v. *Canada Atlantic S. S. Co.* (1).) Dr. Rouleau says there is no permanent injury to the leg but to the shoulder, and his shoulder might be remedied even now according to the evidence of the medical experts. What did McHugh do immediately after the accident? Kellock says he helped him out of a bar two or three days after the accident the worse of liquor, early in the morning.

I submit, first, there is no negligence, secondly the accident was caused by contributory negligence; thirdly, there is no evidence upon which to find that he fell on the bridge, the weight of evidence being that he fell off the bridge altogether; fourthly, no evidence that the accident caused any permanent injury to McHugh.

As to the law upon the point whether there was a servant or officer of the Crown negligent within the scope of his duty, I would refer to the recent judgment of this court, *Davies* v *The Queen* (2) as very pertinent to this case. (Cites *City of Quebec* v. *The Queen* (3).)

As to the minister being an officer of the Crown sec. 4 of R. S. C. c. 36, makes the deputy the "chief officer" of the department. In no statute are the ministers of the Crown described as public officers. In R. S. C. c. 4 they are called public "functionaries." (See *Todd's Parliamentary Government in England*, vol. 1, 2nd ed. p. 499; *Gidley* v. *Lord Palmerston* (4); *McBeath* v. *Haldimund* (5); *Hearne's Parliamentary*

(1) 22 Can. S. C. R. 167.
(2) 2 Ex. C. R. 344.
(3) 2 Ex. C. R. 269-270.
(4) 3 B. & P. 236.
(5) 1 T. R. 172.

1900

McHUGH v. THE QUEEN.

Argument of Counsel.

Government (1) lays down a proposition which does not appear to be supported by authority.

There is no statute requiring the Government to repair this bridge. The minister as well as the Government may let a public work go into disrepair if they see fit. My learned friend's argument would prevent them ever doing this without being guilty of negligence. (Cites *Beven on Negligence* (2). Section 27 of *The Public Works Act* renders an officer of the Crown criminally liable for injury to person or property on a public work through his negligence. Why should not the minister be made also liable if my learned friend's argument is to prevail?

Section 16 of *The Exchequer Court Act* does not intend to impose any greater liability on the Crown than a municipality at common law is charged with in respect to a highway. (*Beven on Negligence*, 360.) A corporation is exempt from liability for nonfeasance unless by statute. That was the Common Law of Canada at the time of the passing of *The Exchequer Court Act*. I submit that *The Exchequer Court Act* should not be held to give a remedy where a municipal corporation would not be liable at common law. *Beven on Negligence* (3); *Maxwell on Statutes* (4); *Hardcastle on Statutes* (5); *Taylor* v. *Newman* (6); *Gaunt* v. *Fynney* (7); *Mayor of Colchester* v. *Brooke* (8); *Baron de Bode Case* (9); *Wallace* v. *Assiniboia* (10); *Beven on Negligence* 445; *The Queen* v. *Ely* (11); *King* v. *Darby* (12).)

(1) P. 101.
(2) [1895] A. C. p. 439.
(3) P. 371.
(4) Chapters 2 & 3 and p. 95, 2nd ed.
(5) 2nd ed. p. 77 & 102.
(6) 4 B. & S. 89.
(7) L. R. 8 Ch. App. 8.
(8) 7 Q. B. 361.
(9) 8 Q. B. 233.
(10) Man. Rep. 89; p. 1; [1895] A. C. p. 444.
(11) 15 Q. B. 840.
(12) 3 B. & A. p. 147.

1900

McHUGH v. THE QUEEN.

Reasons for Judgment.

Mr. Lougheed in reply cites *The Queen* v. *Williams* (1); *Pollock on Torts* (2).

THE JUDGE OF THE EXCHEQUER COURT now (May 7th, 1900), delivered judgment.

The suppliant's petition is brought to recover damages for personal injuries that he suffered by falling from his horse while crossing the bridge over the Old Man's River, at McLeod, in the North-West Territories. It is alleged that the bridge was out of repair and that the horse, having put his foot into a hole in the bridge, stumbled and fell with and upon the suppliant, causing him very serious injury. There are issues of fact as to whether or not the bridge was out of repair; and that the fall took place on the bridge, or because of its condition, is denied. The Crown also relies upon the defence of contributory negligence on the part of the suppliant. I do not find it necessary to determine any of these issues. There is no evidence that the injury resulted from the negligence of any officer or servant of the Crown while acting within the scope of his duties or employment, so as to bring the case within clause (*c*) of the 16th section of *The Exchequer Court Act*. It was contended for the suppliant that the Minister of Public Works is an "officer or servant of the Crown" within the meaning of that provision; and that under *The Public Works Act* (3) it was his duty to keep this bridge in repair; and that for his negligence in that respect the Crown is liable. It was not suggested, of course, that the minister was under any duty himself from time to time to inspect the bridge and to see that it was repaired, if repairs were needed; but that he should have taken care that there was some one charged with that duty. It is not for

(1) 9 H. L. 418.

(2) P. 437.

(3) R. S. C. c. 36.

1900

McHUGH v. THE QUEEN.

Reasons for Judgment.

me, I think, to express any opinion as to whether the minister ought or ought not under the circumstances existing in this case to have appointed, or to have recommended the appointment of, an overseer or caretaker for this bridge. That was, it seems to me, a matter within his own discretion which is not to be reviewed in this court, and for the proper exercise of which he is answerable to Parliament alone.

There is no duty on the Crown, or any minister of the Crown, to keep a public work, such as this bridge was, in repair for the failure of which a petition of right will lie against the Crown at the suit of one injured by reason of non-repair. In such a case the suppliant cannot recover against the Crown unless the case falls within the terms of the provision of *The Exchequer Court Act* to which reference has been made. This case is not, I think, within the statute.

There will be judgment that the suppliant is not entitled to any portion of the relief sought by his petition.

Judgment accordingly.

Solicitors for suppliant: *O'Gara, Wylde & Osler.*

Solicitor for respondent: *E. L. Newcombe.*

THE QUEEN ON THE INFORMATION OF THE ATTORNEY-GENERAL FOR THE DOMINION OF CANADA..... PLAINTIFF;

1900
May 16.

AGAINST

FITZGIBBON & COMPANY.....DEFENDANTS.

THE QUEEN ON THE INFORMATION OF THE ATTORNEY-GENERAL FOR THE DOMINION OF CANADA..... PLAINTIFF;

AGAINST

THOURET AND OTHERS.....DEFENDANTS.

Revenue laws—The Customs Act, sec. 192—Penalties—Jurisdiction of Exchequer Court—Discretion of judge—Remission of penalty.

The penalty enforceable under the provisions of sec. 192 of *The Customs Act* in the Exchequer Court is a pecuniary one only, the other remedies open to the Crown thereunder cannot be prosecuted in this court.

2. The court has no discretion as to the amount of the penalty recoverable under such enactment.

THESE were two actions for penalties for alleged infraction of *The Customs Act*, by fraudulent undervaluation of goods for the purpose of Customs entry at the port of Montreal.

To the informations filed by the Attorney-General, defences were pleaded in which the defendants denied the charge of infringing the law and their liability in respect of the penalties sought to be recovered.

8, 9, 10, 11, 12, 14, 15, 16 May, 1900.

The actions came on for trial before the JUDGE OF THE EXCHEQUER COURT, but the parties arrived at a settlement during the process of the trial and before argument.

1900

THE QUEEN v. FITZGIBBON & COMPANY.

E. L. Newcombe, Q.C. and *N. Charbonneau, Q.C.* for the plaintiff;

F. R. Latchford, Q.C., J. A. C. Madore and *E. Guerin* for defendants.

THE QUEEN v. THOURET.

Reasons for Judgment.

THE JUDGE OF THE EXCHEQUER COURT now (May 16th, 1900), delivered judgment.

Under these circumstances I think it would be proper for me to say that the first and most important consideration in such matters is that the law should be upheld, and that irregular and improper methods of transacting business with the Customs should be replaced by regular and proper methods.

I understand it to be the fact that since 1895 there has been no ground of complaint against the manner in which the business of the Customs has been carried on by this firm, and so far one object is gained.

Then of course it is also in the public interests that if any one has broken the law he should suffer a just punishment for it. That is right in itself, and it is necessary in order to deter others from offending under like or similar circumstances.

The information is filed to recover penalties under the 192nd section of *The Customs Act*. The penalty there, so far as it may be enforced in this court, is a pecuniary penalty, which in cases where the value of the goods is ascertained is twice the value of the goods. There are other penalties and another form of punishment provided, but these are not recoverable or enforceable in this court, in which the punishment must always be inflicted by the imposition of a pecuniary penalty.

To illustrate that: If you take the case of an invoice of goods amounting to $1,000 in which there was an undervaluation of 10 per cent. and the Customs duties should happen to be, say 30 per cent. the importer

1900

THE QUEEN v. FITZGIBBON & COMPANY.

THE QUEEN v. THOURET.

Reasons for Judgment.

who made the undervaluation would do so to gain $30, but he would put in peril a sum or penalty amounting to $2,000. So that you see the penalty is certainly very great indeed in comparison with anything that any importer can gain by any such undervaluation as that which I have mentioned. In regard to these penalties, it is to be observed that the judge has no discretion; that if the case goes against the defendants he must impose the whole penalty, no matter what the results may be. I am not now referring to the present case, because I do not wish to express any opinion as to it one way or the other, but in such a case, under such circumstances, it might very well happen that a judgment would go against defendants which no firm could well be expected to answer, and while it might ruin the defendants it might be of no advantage to the public treasury. I do not say that there might not be a case in which it would be for the public interest that that thing should happen, but I have no idea that this is a case of that kind.

But while the court has no discretion, the Governor in Council has. You will find the provision in *The Audit Act* (1). The Governor in Council may remit any forfeiture or pecuniary penalty in whole or in part, conditionally or unconditonally. He may do that either before, or pending, or after proceedings in a court for the recovery of the forfeiture or penalty.

That being the state of the law, of course it is quite reasonable for those who act for the Crown during the pendency of a suit to agree upon terms of settlement and when they come to settle the terms; when they come to agree upon these terms they are in a position to exercise a reasonable and wise discretion as to the amount for which any judgment should be entered and what they have to see to is that the law,

(1) R. S. C. ch. 29.

1900

THE QUEEN v. FITZGIBBON & COMPANY.

THE QUEEN v. THOURET.

Reasons for Judgment.

as I have said, is vindicated and that the judgment is for a sum which, being paid, will uphold the law, will vindicate the law and will conserve the public interests.

I have no reason to think that this settlement which is now proposed is anything but a fair and reasonable settlement in view of the circumstances of the case. I think it is fair and reasonable, and I have no hesitation in giving effect thereto.

In this case then that is now pending the judgment will be for duties $2,000, for penalties $8,000, and for costs.

Then in the other case of *The Queen* v. *Thouret et al.*, judgment will be, for duties, $10,000, and for costs.

Judgment accordingly.

Solicitor for plaintiff: *E. L. Newcombe.*

Solicitors for defendants: *Madore & Guerin.*

THE NEW BRUNSWICK ADMIRALTY DISTRICT. 1899

May 8.

ERNEST M. WYMAN.....PLAINTIFF;

AND

THE STEAMSHIP "*DUART CASTLE*"..DEFENDANT.

Personal injury done by ship—Jurisdiction—Negligence—Sufficiency of machinery—Fellow-workmen—Evidence—Hospital expenses—Practice.

An engineer while working on a steamer was injured by the breaking of a stop valve:

Held, That the Admiralty Court has jurisdiction to try a suit for damages done by a ship to a person.

2. Adequacy of construction is to be determined by the generally approved use at the time of manufacture; and the absence of the best possible construction is not of itself conclusive evidence of negligence.

3. The officers of the ship as well as the men are fellow-workmen, and for the negligence of the one the steamer is not liable to the other.

4. Improving machinery after an accident is not evidence of insufficiency of its former state.

5. A seaman shipped in Canada and injured in Canada has no claim for hospital expenses under *The Merchants Shipping Act*, 1894.

6. A plaintiff's claim is confined to the particulars indorsed on the summons.

ACTION for damages to the person of a seaman on shipboard arising out of alleged defective machinery.

The following is a brief statement of the facts of the case:

The steamship *Duart Castle* was built some twenty years ago. She was fitted with two boilers, which were connected with a steam superheater by separate steam-pipes, each of such pipes being fitted with a section stop-valve. The main steam-pipe leading from the superheater had a throttle and main stop-valve

1899

WYMAN v. THE STEAMSHIP DUART CASTLE.

Statement of Facts.

next the engine, but none next the superheater. The main stop-valve was fitted with a cast iron bracket.

The plaintiff being second engineer on board, while lying in the harbour of St. John, N.B., was making some repairs in the high pressure valve casing, and being aware that steam was on for the purpose of running the donkey engines, and therefore up to the valve next to the one at which he was working, he went to the stoke-hole and turned off the steam from the superheater. He then returned to his work in the steam case, when some one (none but fellow-workmen of the plaintiff having access thereto) turned on the steam, when the cast iron bracket broke, thereby severely scalding the plaintiff.

The plaintiff arrested the steamer for $20,000 personal injuries.

The case was heard before Mr. Justice McLeod, Local Judge in Admiralty for the New Brunswick Admiralty District.

J. R. Armstrong Q.C. for the defendant:

The fact of the accident taking place is not evidence of negligence. *Smith on Negligence* (1).

It is not evidence of antecedent negligence or improper construction if a change be made in the construction of machinery subsequent to an accident. *Columbia & Puget Sound Railway Co.* v. *Hawthorne* (2).

The difference in build or superior mode in more modern steamers is not evidence against the defendant steamer. *Sherman & Redfield on Negligence* (3).

Even if it would have been a better device to have had a different style of stop-valve, the defendants would not be liable unless the one which broke was clearly defective. *Carey* v. *Boston & Main Railway Co.* (4).

(1) 2nd Eng. ed. p. 250.
(2) 144 U. S. 202.
(3) Secs. 186 & 195.
(4) 158 Mass. 228.

If some one improperly turned on the steam, no stranger being permitted to enter the stoke-hole where the steam was turned on, it must have been the act of a fellow-workman of the plaintiff. A servant who engages to serve a master implicitly undertakes to run all the ordinary risks of the service including the negligence of his fellow-servants, and the master is not bound to compensate him for injuries received through the act of a fellow-workman while in the discharge of work for which he was hired. *Priestley* v. *Fowler* (1).

The master of a ship and seamen are fellow-servants, so is the chief engineer and second engineer. *Hedley* v. *Pinkney & Sons S. S. Co. Ltd.* (2).

It may be fairly presumed that a servant knows the condition of machinery which he has the constant opportunity to inspect. *Sherman & Redfield on Negligence* (3).

Defendants are not bound to furnish best known or best conceivable appliances. *Burke* v. *Witherbee* (4).

A master does not insure his servants against risks incident to the business. *Sherman & Redfield on Negligence* (5).

The maxim *Volenti non fit injuria* applies (6):

The defendant steamer traded between Canadian and British West India ports, and she had not at the time of the accident been brought within the Canadian Acts relating to inspection of steamers by order in council. The rules for inspection of steamboats, therefore, are only evidence to show what the compilers thought desirable, and should have no more weight than the evidence of practical engineers and machinists.

There was evidence of contributory negligence on the part of the plaintiff, and it is to be presumed that

(1) 3 M. & W. 1.
(2) [1892] 1 Q. B. Div. 58; 7 Asp. Mar. App. Cases N.S., pp. 158 & 483: [1894] Appeal Cases, 222.
(3) Sec. 216.
(4) 98 N. Y. 562.
(5) 4 ed. sec. 184.
(6) Broom's Legal Maxims, 267.

1899

WYMAN v. THE STEAMSHIP DUART CASTLE.

Argument of Counsel.

had he not improperly turned off the steam, the water ram, or whatever caused the accident, would not have happened.

As to the plaintiff's application that judgment should be given in his favour for his hospital expenses, the Admiralty Rules 1893, No. 5, provide that the writ of summons shall be endorsed with a statement of the nature of the claim (1). The endorsement of the summons is in the nature of a declaration. There is no claim endorsed for hospital expenses, neither does the affidavit to arrest mention such claim, the plaintiff, therefore, cannot recover such expenses. There is no common law obligation on the part of an employer to pay the hospital expenses of a man injured in his employ. *The Merchants Shipping Act*, 1894, sec. 207, places this obligation upon the owner, until the injured man is cured, or dies, or is brought back, if shipped in a British possession, to a port of that possession. Here the plaintiff shipped at Halifax, N.S., and is injured at St. John, N.B., a port in the same possession, Canada. As a matter of fact the actual expenses of the hospital, etc., were paid by the ship through the tonnage dues paid by it to the Dominion Government, the Government providing all necessary hospital expenses.

A. A. Stockton Q C. and *J. C. Coster Q.C.* for plaintiff: The plaintiff raises two objections to plaintiff's right to recover. (1) The court has no jurisdiction. (2) That as plaintiff at the time of the injury was a fellow-servant on board the steamer he cannot recover for the negligence or default of any of those on board, including the master and chief engineer.

As to the first point there can be no doubt as to the jurisdiction of the court to entertain the action. The

(1) See also form No. 10.

case of the *Enrique* (1) was decided on the authority of the *Robert Pow* (2); but Judge Watters in the *Maggie M.* (3) refused to follow it. The *Robert Pow* may be considered overruled. See judgment of Lord Herschell. *Mersey Docks and Harbour Board* v. *Turner* (4). The enlarged jurisdiction given to the court by *The Imperial Acts* of 1840 and 1861 was to remedy a grievance, and should be liberally construed so as to afford the utmost relief which the fair meaning of the language will allow. The *Pieve Superiore* (5). The Act of 1861, 24th Vict. c. 10, sec. 7, gives jurisdiction to the court over any claim for damages done by the ship. This is sufficiently comprehensive to include damage to a thing or to a person. See *The Teddington* (6).

The *Sylph* (7); the *Beta* (8); the *Clara Killam* (9); the *Czar* (10); the *Max Morris* (11); the *Daylesford* (12). As to the liability of owners although the vessel was inspected and passed, see *Sherman & Redfield on Negligence* (13); *Simonds* v. *New Bedford & Steamboat Co.* (14).

McLEOD, L.J. now (May 8th, 1899) delivered judgment.

The plaintiff claims damages for injuries done him on board the steamship *Duart Castle* under the following circumstances:

The steamer was running between St. John, Halifax, and the West Indies, and the plaintiff was second engineer on board of her She arrived in St. John on the thirteenth day of March, 1897, and proceeded to

(1) Stockton's Ad. D. 157.
(2) Br. & L. 99.
(3) Stockton's Ad. D. 188.
(4) [1893] A. C. 468.
(5) L. R. 5 P. C. 482.
(6) Stockton's Ad. D. 45.
(7) L. R. 2 A. & E. 24
(8) L. R. 2 P. C. 447.
(9) L. R. 3 A. & E. 161.
(10) Cook 9.
(11) 137 U. S. 1.
(12) 30 Fed. Rep. 633.
(13) P. 315, Vol. 2.
(14) 97 Mass. 361.

1899

WYMAN v. THE STEAMSHIP DUART CASTLE.

Reasons for Judgment.

discharge and take in cargo. On the morning of the eighteenth of March, while the plaintiff was in the steam-chest making some repairs to the high pressure valve, the stop-valve burst, and the plaintiff was badly scalded by the rush of steam. The plaintiff says that before going to work in the steam-chest he went to the boiler and shut the steam off from the superheater. His object in doing this, he says, was twofold, one to get up more steam for the winches on deck that were working the cargo (as the chief engineer, John Mutch, had told him the steam was going down and they did not have enough), and the other was for the purpose of draining the main steam-pipe. He says he intended to open the valve on the drain pipe and then turn the steam on gradually and thus drain the main steam-pipe through the drain pipe. The latter pipe led from the main steam-pipe to the exhaust tank which was a few feet above it. Before, however, he opened the valve for the purpose of draining the pipe he went to work in the steam-chest and had only been in there a few minutes when the stop-valve on the main pipe burst, as has been said, and the accident occurred.

The steamer was built in Scotland a number of years ago, and was purchased by the present owners, and for some years has been running on her present route. She was fitted with two main boilers which were connected by two more pipes with a superheater sitting on top of the boilers. (One of the questions in contention is whether this superheater is a part of the boiler or not) The main steam-pipe ran from the superheater to the steam-chest which is in the forward end of the engine. Plan No. 2 filed in evidence shows the relative positions of the boilers, superheater, main steam-pipe, steam-chest and engine. There were two valves close to the engine and the main steam-pipe.

The one next the engine I will call the butterfly-valve. (It is sometimes in the evidence called a stop-valve), and the one next to it, or between it and the superheater, I will call the stop-valve. (It is sometimes in the evidence called a throttle valve.) The latter valve, the one I call the stop-valve, is the one that broke and caused the injury. On the morning of the accident the stop-valve was closed, and the plaintiff says the butterfly-valve was also closed, that he himself closed it. After the accident, however, the butterfly-valve was found open, but was not broken, and the witnesses on behalf of the defendants say that if it had been closed it could not have been forced open, that it would break first. The plaintiff on his part says that it might be and was forced open with the rush of steam. There was no valve between the superheater and the main steam-pipe.

The defendants claim in the first place that this court has no jurisdiction over a claim for a personal injury of this kind. As to this point, sec. 10 of *The Vice Admiralty Act* of 1863 gives this court jurisdiction in "claims for damages done by any ship" and are the same words as are used in sec. 7 of *The Admiralty Act* of 1861, and I think the result of the authorities is, that these words give this court jurisdiction to entertain a suit for damage done by a ship to persons. They have been held to give the court jurisdiction in the widest and most general terms. In this case the damage was done by the ship, and it cannot make any difference in what way the ship did the damage, or what part of the ship did the damage. A number of cases may be cited, but I refer to the *Beta* (1); the *Sylph* (2), and *Turner* v. *Mersey Docks & Harbor Board* (3). I think, therefore, this court has jurisdiction over the claim.

(1) L. R. 2 P. C. 447. (2) L. R. 2 A. & E. 24.
(3) [1892] P. 285.

1899

WYMAN
v.
THE STEAMSHIP DUART CASTLE.

Reasons for Judgment.

The plaintiff contends that the steamship is liable to him by reason of negligence in connection with the machinery. 1st. He says there should have been a stop-valve between the superheater and the main steam-pipe so that the steam could have been turned off at the superheater. 2nd. He says that the stop-valve that broke was not sufficiently strong; that it was a cast iron valve where it should have been either wrought iron or brass. He also says that the steam was improperly and negligently suddenly turned on at the main boilers by some one after he turned it off, thus causing what is called a "water ram" bursting the valve. In order to render the steamship liable the plaintiff must produce reasonable evidence of negligence causing the accident. As to the machinery itself, this steamship, as I have said, was built some years ago in Scotland and equipped with the machinery she now has. No stop-valve was put between the superheater and the steam-pipe, and she has always been run without one, and has in that way at different times passed the Government inspection. The plaintiff claims that the fact that a stop-valve was not put there was such negligence as would render the steamship liable in damages for the accident. I do not think so. In the first place the machinery so far as the evidence shows is now the same as it was when it was built, no change was made by the present owners. No stop-valve has been put between the superheater and the main steam-pipe. The pntiff when he went to work in the steamer, and all the time he worked there, knew there was no stop-valve there. And further, if a stop-valve had been there, the plaintiff must still go further and say he would have closed that valve instead of the one he did close, and still the same thing that did occur might have occurred if some one had suddenly turned the steam

1899

WYMAN
v.
THE STEAMSHIP DUART CASTLE.

Reasons for Judgment.

on at the superheater, just as he alleges they turned it on at the boiler.

As to the stop-valve that broke, it was made of cast iron and had been used about a year, and had always been sufficient for the purpose for which it was used, and the witnesses who saw and examined it after the accident said that the break was a clear clean break and showed no flaw in the iron. But the plaintiff says it was negligence to use a cast iron valve at all, it should have been of wrought iron or brass. As to that a number of expert witnesses were called and they all said that cast iron valves were largely used on engines and steamers of this size, and that they were sufficiently strong and safe. Among the witnesses called were Mr James Fleming, of Fleming & Son, machinists; Mr. Oscar White, of Waring, White & Co., machinists; Thos. Irwin, John P. Esdale, (who is steamboat inspector for the Dominion Government), Charles M. Lang and John J. Ewing, all engineers; and they all say that cast iron valves are very largely used and that they are sufficiently strong and safe, and, being given the size of the valve that broke in this case, they said that it was amply sufficient for the purpose for which it was used. The only witnesses called by the plaintiff as to the sufficiency of the valve were Mr. Wm. G. Gray and Wm. J. Barton, neither of whom gave very much evidence in regard to it; the most was given by Mr. Barton who when asked whether the bracket or the valve would have been less liable to break if made of wrought iron or some material other than cast iron, replied: "If it had been made of wrought iron or brass, that is composition, it would have been less liable to break than cast iron." and again when asked, "Would you yourself put a cast iron one in this place?" He answers, "I would use a wrought iron or brass, the best composition." I

1899

WYMAN v. THE STEAMSHIP DUART CASTLE.

Reasons for Judgment.

do not think this evidence shows that it was negligence to use cast iron. The question is not could a stronger valve have been made, but was the one used sufficiently strong for the purpose. It had proved to be sufficiently strong while the steamer was running on its route It broke while the steamer was lying in port, and when there should have been no extra pressure on it. Two suggestions were made during the progress of the trial as to the cause of the accident, one was that the plaintiff, while lowering the door of the steam-chest in order to enable him to work there might have struck the bracket of the valve and broke it, but the evidence does not seem to support that view. The other is after the plaintiff had, as he alleges, turned off the steam at the superheater, some one suddenly turned it on thus causing what is called a water ram in the pipe and bursting the valve. All the expert witnesses who were called said if there was a little water in the pipe and the steam was suddenly turned on it would be liable to burst the pipe or valve. The plaintiff says he turned off the steam at the superheater, but Mutch, the chief engineer, and some of the other witnesses say that if it had been turned off, the winches that were working the cargo would have ceased working, and they say they did not stop working, and therefore the steam could not have been turned off. But assuming that the plaintiff did turn the steam off at the superheater and then some one suddenly turned it on, and thus caused the accident, it would not be such negligence as would render the steamship liable. The captain, chief engineer and other employees on board the steamship are all fellow-workmen with the plaintiff, and negligence by any one of them would not render the owners liable. *Hedley* v. *The Pinkney & Sons Steamship Co., Ltd.* (1);

(1) [1894] App. Cas. 222.

1899

WYMAN v. THE STEAMSHIP DUART CASTLE.

Reasons for Judgment.

Wilson v. *Merry* (1). The engines themselves appear to have been good and substantial engines, and the valve had proved to be sufficient while the steamer was running on its route, and, as I have said, nearly all the witnesses said cast iron valves were good and sufficient valves, and were largely used on steamers such as this, and that a cast iron valve of the size of the one that broke was sufficient to bear all the pressure that would be put on it in the working of the steamer. The fact, therefore, that it was broken in some way while the steamer was in port is not sufficient to create a liability at all events with reference to the valve itself. The simple fact that the accident happened is not enough to create a liability, there must be some reasonable evidence of negligence. *Moffatt* v. *Bateman* (2).

It does not appear that any of the men employed on the steamer were incompetent, indeed it appears that they were all competent, and the master is not liable for the management of the machinery by servants not incompetent; (See *Beven on Negligence* (3), and *Bastinville & Co.* v. *Reid* (4) and if that is so the owners would not be liable, so that if it is said the accident occurred through the mismanagement of the officers on board the steamer (of which there is no evidence), there would not be a liability.

The owners put a brass valve on in place of the one that was broken, and it is claimed that this is some evidence of negligence in using the cast iron one. But this is not so, putting in improved machinery is not evidence that using the former machinery was negligence. *Hart* v. *Lancashire & Yorkshire Railway Co.* (5). We know that improve-

(1) L. R. 1 H. L. (Sc.) 326.
(2) L. R. 3 P. C. 115.
(3) P. 336.
(4) 3 MacQ. 226.
(5) 21 L. T. N. S. 261.

1899

WYMAN v. THE STEAMSHIP DUART CASTLE.

Reasons for Judgment.

ments in machinery are being continually made. Practically every new steamer is an improvement over the old ones, some new improvement in machinery or elsewhere is made, yet it cannot be said to be negligence to use and run the old ones. A man would not dare to make improvements in the machinery of his engines if that fact was to be evidence that he had been negligent in using what he previously had. It is true that a most serious accident happened by which the plaintiff was terribly injured; but having heard the evidence, and having since carefully gone over it, I am unable to find that it occurred through any negligence or want of care on the part of the owners, so that the claim for damages will be dismissed. The plaintiff, however, claims that in any event whether it is negligence or not so as to render the steamship liable for the damages, he is entitled to recover in this action, the amount of a bill of $280 presented to him by the Commissioners of the Public Hospital, and also the costs of this action, and in those questions I will hear further argument.

June 14th, 1899.

This case was further argued before me as to whether the plaintiff was entitled to recover in this action, under sec. 207 of *The Merchants Shipping Act* of 1894, for an account of $280 that was rendered him, by the Commissioners of the General Public Hospital, as expenses while in the said hospital. The plaintiff was shipped at Halifax, N.S. He received his injuries at St. John, N.B., and was sent to the Public Hospital there. That hospital has taken the place of the Marine Hospital, and all sailors have a right to be sent there for treatment in case of accident or sickness. This steamer, as well as other steamers and vessels, paid what are called sick mariners fees. The writ of

1899

WYMAN
v.
THE
STEAMSHIP
DUART
CASTLE.

Reasons for Judgment.

summons by which this action was commenced was endorsed as follows: "Plaintiff claims $20,000 damages for personal injuries sustained by him and caused to him by the steamship *Duart Castle*."

Rule 5 of the Admiralty Rules, 1893, requires that the writ of summons "shall be endorsed with a statement of the nature of the claim and of the relief or remedy required, and of the amount claimed, if any," and by Rule 9, "The judge may allow the plaintiff to amend the writ of summons and the endorsements thereon in such manner and on such terms as to the judge shall seem fit." No application was made to amend the summons or endorsement, and the case was tried out for damages for personal injuries received on board the steamer. It appeared during the trial that the plaintiff had been sent to the hospital, and that a bill had been sent him for $280, and this amount he claims he is entitled to recover in this action in any event. The defendants contend that as there is no separate endorsement on the summons for this claim, and as the steamer is not liable for the accident, the plaintiff cannot recover under the present endorsement; 2ndly: That as the injury was received and the plaintiff discharged in the same British possession in which he was shipped, he cannot recover; and 3rdly. That the necessary surgical and medical advice and attendance and medicine were provided. The plaintiff, as I have said, was sent to the hospital, and it does not appear but that he could have been treated in the public ward without any additional expense, but as a matter of fact he was given a private room, for which an extra charge was made, and it is for this extra charge that this claim arises. No case was cited to me as to the effect of this endorsement. But looking at the rule requiring an endorsement of the nature of the claim, and also the rule providing that it may be

1899

WYMAN v. THE STEAMSHIP DUART CASTLE.

Reasons for Judgment.

amended in such manner and on such terms as to the judge may seem fit, I think it must be taken to be in the nature of particulars to which the plaintiff is confined. The object being to let the defendant know the nature of the claim he is to defend. In this case it being for damages done him on board the steamer, and not a claim arising under sec. 207 of *The Merchant Shipping Act* of 1894. This action, therefore, being for damages for injury done through alleged negligence, the only way this claim could be included in this endorsement would be as a part measure of the damages arising out of the negligence. But I have held that there was not negligence and that the steamer is not liable, so that on that ground the plaintiff could not recover because he could only get it in the assessment of damages for the injuries received; and I having held that there is no legal liability for the accident, there is no assessment of damages. The plaintiff, however, claims that he is entitled under said sec. 207 to recover these expenses in this action whether negligence has been proved or not. If that contention is correct, and these expenses can be so recovered, without negligence having been proved, it can only be by virtue of that section, that is, that section must have created the liability, and made the owners liable when the accident happened on board the vessel whether there was negligence or not. Without now deciding whether the claim arising that way could be recovered in this action or not, it seems to me that if it could be recovered it should be endorsed on the summons so that the defendants may know what they are to defend. The question then would not be whether or not there was negligence, but whether the injury was received in the service of the ship, and whether the services had been rendered and were necessary. In this case there is not much evidence

1899

WYMAN v. THE STEAMSHIP DUART CASTLE.

Reasons for Judgment.

given as to this claim; but so far as I can tell from what evidence was given and what was said, the necessary surgical and medical advice and attendance and medicine were provided, this claim being for the extra amount charged for a private room, and I think it cannot be recovered. Under *The Interpretation Act* of 1899, sec. 18, sub-sec. 2, "British Possessions" means "Any part of Her Majesty's Dominions exclusive of the United Kingdom, and where parts of such Dominions are under both a central and a local legislature, all parts under the central legislature shall for the purpose of this definition be deemed to be one British Possession"; so that the plaintiff was injured in the port of the possession in which he was shipped, and the defendants, if liable at all, would only be liable for the necessary surgical and medical advice, &c. And as I have said, it appears, so far as I can tell from the evidence, this was provided.

I feel myself, therefore, forced to the conclusion that the plaintiff cannot succeed in any claim in this action and the suit must be dismissed with costs.

Solicitor for the plaintiff: *C. J. Coster.*

Solicitor for the defendants: *J. R. Armstrong.*

1900
May 18.

ADMIRALTY DISTRICT OF PRINCE EDWARD ISLAND.

ANGUS BRINE .....PLAINTIFF;

AGAINST

THE STEAMSHIP "*TIBER*".....DEFENDANT.

Collision--Steamer and sailing vessel—Collision Arts. 20, 22, 23 and 25—*Liability.*

The *J. M.*, a sailing vessel, was proceeding in the day time, out of Charlottetown harbour by tacking, according to the usual course of navigation. The *T.*, a steamship was on her way into the harbour. When the *T.* was first seen by the *J. M.* the latter was on a course of W.S.W., standing across the harbour, towards, and to the northward and eastward, of Rocky Point black buoy. From that time until a collision occurred between the two vessels, they were in full view of each other. While the *J. M.* was underway on the starboard tack and going about three knots an hour, the *T.* was coming straight up the harbour at nearly full speed. The latter did not change her course, nor execute any manœuvre, nor make any attempt by slackening speed or stopping or reversing to keep out of the way of the *J. M.* The bow of the *T.* struck the *J. M.* on the starboard side aft of the fore-rigging and nearly amidships, cutting her almost through from her hatches to her keel, and causing her to become a total wreck.

Held, that the *T.* had infringed the provisions of Arts. 20, 22, 23 and 25 of the rules for preventing collisions at sea, and was responsible for the collision.

THIS was an action for damages by collision.

The facts are fully recited in the reasons for judgment.

The case was heard before The Honourable William Wilfred Sullivan, Chief Justice, Local Judge in Admiralty of the Exchequer Court for the Admiralty District of Prince Edward Island, on February 21st, 22nd, 23rd, 24th, 26th and 27th, and March 22nd, 28th, 29th and 30th, 1900.

1900

BRINE v. THE STEAMSHIP TIBER.

Reasons for Judgment.

A. Peters, Q.C. and *A. A. McLean*, Q.C. for plaintiff.

F. L. Haszard, Q.C. and *W. A. O. Morson*, Q.C. for defendant.

SULLIVAN (C.J.) L. J. now (May 18th, 1900) delivered judgment.

This is a case of collision between a schooner called the *Janie M*, of sixty-five tons, owned by the plaintiff, of which Alexander McLellan was master, and the *Tiber*, a steamship of one thousand seven hundred and thirty-six tons, gross tonnage, owned by "The Tiber Steamship Company of Montreal," of which John Delisle was master.

The collision took place about eight o'clock in the morning of the 30th of May, 1899, near Alchorn Point, in the harbour of Charlottetown. The weather was clear and bright. The wind was about south-south-west and of a velocity of between three and four knots an hour. The tide was ebb, nearly run out, and moving between two and three knots an hour.

The *Janie M.* left her wharf at Charlottetown about seven o'clock in the morning, in light ballast, intending to proceed to ports in New Brunswick and Nova Scotia for a cargo of lumber. She was tacking out of the harbour according to the usual course of navigation. The *Tiber* was on her way into Charlottetown. When the *Tiber* was first seen by the *Janie M.* the latter was on a course of west-south-west, standing across the harbour, towards, and to the northward and eastward, of Rocky Point black buoy. The *Tiber* was then outside the entrance of the harbour, and about two miles distant from the *Janie M.* From that time until the collision took place the vessels were in full view of each other. The *Janie M.* tacked close to the wind. On her way out she passed a schooner called the *Florence May*, which was also

1900

BRINE v. THE STEAMSHIP TIBER.

Reasons for Judgment.

tacking out, and which, at the time of the collision, was about one hundred and fifty yards in the rear, and to the northward and westward of the *Janie M.* She also met the steamship *Halifax*, which passed her when on her last starboard tack before the collision. The *Halifax* changed her course, and passed to the stern of the *Janie M.* After the *Halifax* passed the *Janie M.* the latter stood across to the westward on the western side of the harbour and came about inside Alchorn Point. At that time the *Tiber* was coming in near the Blockhouse, heading straight up the harbour. The sails of the *Janie M.* had filled, and she was underway on the starboard tack going about three knots an hour for between three and five minutes when the collision took place. The master of the *Janie M.* says he was at the wheel at the time steering by the wind about south-east by south. The bow of the *Tiber* struck the *Janie M.* on the starboard side aft of the fore-rigging and nearly amidships, cutting almost through her from her hatches to her keel, driving her forward in the water about one hundred yards, and she became a total wreck.

In the plaintiff's preliminary act the fault or default attributed to the *Tiber* is stated as follows:—

"The plaintiff alleges that the steamship *Tiber* was proceeding at too high a rate of speed.

"The plaintiff alleges the steamship *Tiber* was on the wrong side of the channel. It being a narrow channel, she should have kept to the eastern side of the channel, but she improperly kept to the western side.

" The steamship *Tiber* was in the wrong in not keeping out of the way of the *Janie M.*, she being a sailing ship.

" The steamship *Tiber* was in the wrong in not stopping and reversing when she perceived there was any risk of a collision.

1900

BRINE
v.
THE
STEAMSHIP
TIBER.

Reasons for Judgment.

"The steamship *Tiber* was wrong in not porting her helm and thereby avoiding or lessening the collision."

It was admitted at the trial that up to the time immediately preceding the collision the *Tiber* was going at the rate of eight knots an hour, nearly her full speed, which was alleged to be eight and one-quarter knots an hour. It was admitted that she did not change her course, nor execute any manœuvre, nor make any attempt to keep out of the way of the *Janie M.* It is in evidence that she did not slacken her speed, nor stop or reverse, until at the moment the collision was consummated. When about half a mile outside the Blockhouse the usual order on entering a harbour to "stand by" was given, but it was stated it had little if any effect upon the steamer's speed up to the time of the collision, and that it was not given for that purpose.

The channel of the harbour being about five hundred yards wide, is a narrow channel, and the master of the *Tiber* says he kept his ship in the centre of it, and that it was in mid-channel the collision took place. The master and crew of the *Janie M.* says that the *Tiber* was proceeding on the western side of the centre of the channel, and that it was on the western side of mid-channel the collision took place. In this view the latter are supported by the evidence of Bryant Rogers, a pilot, who said he was well acquainted with the harbour, and who was then acting as mate of a schooner called the *James Semple*, which was coming in the harbour a short distance behind the *Tiber*. He said he had from his position a full view of the *Tiber*, and that she came in on the western side of the centre of the channel. The evidence of Captain John McLean who resides at the Blockhouse, who possessed local knowledge of the place, and who was standing on the

1900

BRINE v. THE STEAMSHIP TIBER.

Reasons for Judgment.

ground viewing the *Tiber* coming in, is to the same effect. Besides this evidence there is a circumstance in this case which tends to support the contention that the collision took place on the western side of the mid-channel. That is the respective distances traversed by the *Tiber* and the *Janie M.* from where they both were when the *Janie M.* came about on the west side to the place of collision, as located by the master of the *Tiber*. The distance each had to go would appear from the evidence to be nearly the same, and to accomplish it the *Janie M.* would require to go at about the same rate of speed as the *Tiber*, namely, eight knots an hour, which, in view of the evidence, it is impossible to believe she did, or could do. The inference, therefore, is that the *Tiber* was proceeding some distance to the westward of mid-channel.

This state of the evidence shows that the *Tiber* violated several of the statutory rules for preventing collisions at sea.

Article 20 says that:

"When a steam-vessel and a sailing vessel are proceeding in such direction as to involve risk of collision, the steam-vessel shall keep out of the way of the sailing vessel."

Article 22 is that:

"Every vessel which is directed by these rules to keep out of the way of another vessel shall, if the circumstances of the case admit, avoid crossing ahead of the other."

Article 23 says:

"Every steam-vessel which is directed by these rules to keep out of the way of another vessel shall on approaching her, if necessary, slacken her speed or stop or reverse."

Article 25 is:

1900

BRINE v. THE STEAMSHIP TIBER.

Reasons for Judgment.

"In narrow channels every steam-vessel shall, when it is safe and practicable, keep to that side of the fairway or mid-channel which lies on the starboard side of such vessel."

The *Tiber* did not keep out of the way of the *Janie M.*, and she did not avoid crossing ahead of her. She did not slacken her speed, nor did she stop or reverse until such action was unavailing. She did not keep to the starboard side of the fairway or mid-channel, and it was not shown that it was unsafe or impracticable for her to have done so, in fact the contrary appeared. She, therefore, violated all the rules I have cited.

It is provided by section 5 of chapter 79 of *The Revised Statutes of Canada* (*An Act respecting the navigation of Canadian waters*) that:

"If in any case of collision, it appears to the court before which the case is tried, that such collision was occasioned by the non-observance of any of the rules prescribed by this Act, the vessel or raft by which such rules have been violated shall be deemed to be in fault; unless it can be shown to the satisfaction of the court that the circumstances of the case rendered a departure from the said rules necessary."

Article 27 provides that:

"In obeying and construing these rules due regard shall be had to all dangers of navigation and collision, and to any special circumstances which may render a departure from the above rules necessary in order to avoid immediate danger."

Now, if the *Tiber* had in time executed a proper manœuvre and had avoided crossing ahead of the schooner the collision would not have occurred. If she had slackened her speed by even less than half what it was the collision would not have occurred. If she had kept to the starboard side of the fairway or

1900

BRINE v. THE STEAMSHIP TIBER.

Reasons for Judgment.

mid-channel the collision would not have occurred. Therefore the collision was occasioned by the non-observance of the rules, and the *Tiber* must be deemed to be in fault, unless it appear that the circumstances of the case rendered a departure from the rules necessary.

In this case no circumstance was shown or attempted to be shown which rendered necessary a departure from the rule which provides that every steam-vessel which is directed by the rules to keep out of the way of another vessel shall, on approaching her, if necessary, slacken her speed; nor of the rule that in narrow channels every steam-vessel shall, when it is safe and practicable, keep to that side of the fairway or mid-channel which lies on the starboard side of the vessel; therefore these two rules at least were unjustifiably violated, and if they had been observed the collision would not and could not have happened.

In the *Arklow* (1) the principle which applies to such cases is thus stated by Sir James Hannan in delivering the judgment of the Privy Council. He says:

"The principle in cases of this kind where there has been a departure from an important rule of navigation is this:—That if the absence of due observance of the rule can by any possibility have contributed to the accident, then that the party in default cannot be excused."

In the present case I am clearly of the opinion that the absence of due observance of the rules which I have quoted not only contributed to, but actually caused, the collision.

On behalf of the *Tiber* it was argued at the trial that the *Janie M.* was alone to blame for the collision, and

(1) L. R. 9 A. C. 13.

1900

BRINE v. THE STEAMSHIP TIBER.

Reasons for Judgment.

the fault or default attributed to her is that set forth in the preliminary act filed for the *Tiber* :—

"1. When the *Janie M.* stayed or tacked immediately before the collision she should have remained until the *Tiber* went by, as there was not sufficient time to cross the bow of the *Tiber* without an almost inevitable collision.

"2. When the *Janie M.* tacked she should have seen that it was impossible to cross our bow without danger of collision, and after shaking out her jib she should have luffed and been shaken up in the wind, and if necessary should have let go her anchor until the steamer went by, to avoid a collision.

"3. The attempt to cross our bow in the narrow water where we then were at such close quarters rendered it out of our power to get by her under any circumstances, and the fault was hers in courting danger of a collision instead of avoiding it, as was her duty under the circumstances."

The answer of the master of the *Janie M.* to the first of these charges is that having tacked as closely to the western side as he could safely go, he could not have held his vessel there without immediate risk of going ashore. As to that part of the second charge which alleges that the *Janie M.* should have luffed—(which I construe to mean that she did not luff)—at the trial the evidence of the master of the *Tiber* and of his crew, so far as the crew testified on that point, was directed to show, not that the schooner did not luff, but that she did luff, which luffing, it was alleged, misled the steamer and led to the collision.

The evidence for the plaintiff, the weight of which in my opinion greatly preponderated, was directed to show that the schooner did not luff. That question, however, is concluded in favour of the plaintiff's con-

1900

BRINE v. THE STEAMSHIP TIBER.

Reasons for Judgment.

tention by the preliminary act filed on behalf of the *Tiber*, by which she is bound.

Article 21 of the rules intended to prevent collisions at sea, provides that :

"Where by any of these rules one of two vessels is to keep out of the way, the other shall keep her course and speed."

"Keeping her course," under Article 22 of the English rules of 1884, which corresponds to Article 21 of the Canadian rules, means keeping her course by the wind; and if in so doing a vessel comes to or breaks off a little she does not thereby infringe that article. (*Marsden on Collision at Sea*, p. 412.)

In the *Velocity* (1) it was held that according to the true interpretation of "keeping her course" under this rule a vessel was at liberty to hold on upon the course which she would have pursued had no vessel been in sight.

The *Janie M.* may have fallen away a little, and judging by the angle at which she was struck, it would appear that she did fall away somewhat, but, sailing as she was by the wind, the evidence shows that she kept her course by the wind.

In view of the position in which the *Janie M.* was placed by the action of the *Tiber*, I have asked the Nautical Assessor who sat in this case, whether as a question of good seamanship there was any manœuvre which the schooner should or could have executed to avoid the collision, and his answer, which meets my entire approval, is that there was not, and that her proper action was to keep her course as she did.

In the *William Frederick* v. *The Byfoged Christensen* (2), it was held that where a collision had occurred owing to one colliding vessel having failed to observe (as its duty was) the rule of the road, by keeping out

(1) L. R. 3 P. C. App. 44. (2) L. R. 4 A. C. 669.

1900

BRINE v. THE STEAMSHIP TIBER.

Reasons for Judgment.

of the way, of the other, that in the absence of proof as to the particular time at which an intention to violate that rule was clearly manifest, the other colliding vessel, being *primâ facie* bound to observe the rule requiring her to keep on her course, would not have been justified in departing therefrom. Sir James W. Colville, in delivering the judgment of the Privy Council, says:—

"The question raised by the cross appeal arises upon the finding of the learned judge that both vessels were to blame, on the ground that although the duty of keeping out of the way lay upon the *Christensen*, those on board the *William Frederick*, when they found that the other vessel was not going to perform its duty, ought not to have pertinaciously adhered to the eighteenth rule of the road by keeping on their course, but should have adopted some manœuvre in order to avoid the collision which afterwards took place. The learned judge in so deciding relied upon the case of the *Commerce* (1) before Dr. Lushington. Their lordships desire to remark that though the principle involved in that case may be in itself a sound one, it is one which should be applied very cautiously, and only where the circumstances are clearly exceptional. They conceive that to leave to masters of vessels a discretion except in a very clear case of necessity, is hard upon the masters themselves, inasmuch as the slightest departure from these rules is almost invariably relied upon as constituting a case of at least contributory negligence;" and the decision of the court below in favour of the non-adherence to the rule of keeping her course was reversed. In the present case there is no *constat* at what particular time the master of the *Janie M.* ought to have come to so distinct a conclusion that the *Tiber* was not about to obey the rule as to justify his departure from what was his *primâ facie* duty.

(1) 3 W. Rob. 287.

1900

BRINE v. THE STEAMSHIP TIBER.

Reasons for Judgment.

In the *American* and the *Syria* (2) the same principle was thus pronounced by Sir Robert Phillimore :—

"I have also considered whether there were any special circumstances which required the *American*, on her part, to execute any manœuvre whereby this collision might have been avoided, and I take it to be a sound principle of law which cannot be too carefully or uniformly applied in cases of this description, that the vessel which is ordered by the regulations to pursue a certain course has a right to presume up to the last moment that the other vessel will do her duty, and also observe the regulations."

In this case it is quite clear that if the *Tiber* had done her duty the collision would not have happened.

But the master of the *Tiber* says he concluded from the movements of the schooner that she intended to wait and allow him to go ahead. In the circumstances he was not justified in entering into calculations of this kind, because he had it in his power, and, as the evidence shows, he had ample time and space to adopt, long before the collision, measures which would have rendered it impossible.

On a full consideration of all the evidence and circumstances, I have come to the conclusion that the steamship *Tiber* was alone to blame for the collision, and that the defendant must be held liable for the damages that ensued. I therefore pronounce in favour of the plaintiff.

The only remaining question is as to the amount of the damages sustained by the plaintiff. The counsel on both sides desired that in the event of damages they should be assessed by the court.

Of the items respecting which evidence was given there are only three that I can allow, namely, the value of the schooner *Janie M.* at the time of the col-

(2) L. R. 4 Adm. & Eccl. 226.

lision, the wages of the crew with the disbursements for their board during the time they were employed in caring for the wreck and securing the sails and other appurtenances that were saved, and the amount paid for the towage of the schooner from the place of the collision to where she was finally landed.

Under the evidence which I have fully considered on this branch of the case I value the *Janie M* as she stood at the time of the collision at $1,500. The proceeds of the sails and other articles of the vessel's furniture saved and sold at auction realized $164.83, which sum, less $30, the cost of towage, leaves $134.83 to be deducted from the $1,500,

Making the net damages in respect of the vessel	$ 1,365 17
On which I allow as interest at 6 per cent from the 13th of May, 1899	78 50
Wages of Captain Alexander McLennan for ten days at $25 per month	8 34
Wages of James McInnis for ten days at $16 per month	5 34
Wages of Abel Benjamin for ten days at $15 per month	5 00
Disbursements for board	10 75
	$1,474 10

thus assuming the damages due to the plaintiff in respect of the collision at $1,474.10, for which sum, with full costs of suit to be taxed, I decree against the defendant.

Judgment accordingly.

Solicitor for plaintiff: *A. Peters.*

Solicitor for defendant: *F. L. Haszard.*

1900

June 7.

IN THE MATTER OF THE PETITION OF RIGHT OF

THOMAS GEORGE BRIGHAM.....SUPPLIANT;

AND

HER MAJESTY THE QUEEN.....RESPONDENT.

Grant of ferry—Breach of—Subsequent lease to railway companies—Damages—Liability of Crown—R. S. C. c. 97.

Under the provisions of R. S. C. c. 97 and amendments, the Governor in Council duly issued to the suppliant a ferry license within certain limits over the Ottawa River between the cities of Ottawa and Hull. Subsequently the Crown leased certain property to two railway companies to be used for the construction of approaches to the Interprovincial Bridge across the said river between the said cities, and also granted permission to the Ottawa Electric Railway Company to extend its tracks over certain property belonging to the Dominion Government on the Hull side of the river, to enable the latter company to make closer connection with the Hull Electric Company. The suppliant claimed that the construction of the said approaches interfered with the operation of his ferry, and enabled the said company to divert traffic from his ferry, and constituted a breach of his ferry grant for which the Crown was liable.

Held, that the granting of the said leases and permission did not constitute a breach of any contract arising out of the grant or license of the ferry; and that the Crown was not liable to the suppliant in damages in respect of the matters complained of in his petition. *Windsor & Annapolis Railway Co.* v. *The Queen* (10 S. C. R. 335; 11 App. Cas. 607), and *Hopkins* v. *The Great Northern Railway Co.* (2 Q. B. D. 224) referred to.

Semble: That if the said leases and permission prejudiced the rights acquired by the suppliant under his ferry license, he would be entitled to a writ of *scire facias* to repeal them.

PETITION OF RIGHT asking for damages against the Crown for an alleged breach of the grant of a ferry.

The facts of the case may be summarized as follows:—Chapter 97 of R. S. C. provides that the Governor in

Council may issue "ferry licenses" between any two provinces upon public competition therefor.

On the 6th April, 1896, by letters patent under the great seal of Canada, the suppliant duly obtained the license of a ferry across the Ottawa River between the cities of Ottawa and Hull. By the license the ferry was to be operated within the following limits: "On the Ontario side of the river the limits shall be coterminous with the limits of the City of Ottawa; on the Quebec side the limits shall extend from the Union Bridge to the point known as Haycock's Point." By the said license it was, *inter alia*, stipulated and provided that the suppliant should pay to Her Majesty the sum of $155 per year for his said franchise; that he should provide certain wharves and landings for the public using his ferry; that he should provide a suitable steamer for the purposes of the ferry between the 15th of April and the 25th November in each year; and that a certain number of trips should be made daily.

The suppliant complied with these requirements; but during the currency of his franchise the Crown leased certain lands to the Pontiac and Pacific Railway Company and the Ottawa and Gatineau Railway Company for the purpose of constructing thereon approaches to a bridge to cross the Ottawa River at Nepean Point, to be known as the Interprovincial Bridge. In addition to this the Dominion Government granted permission to the Ottawa Electric Railway Company to extend their tracks from the Union Bridge (between Ottawa and Hull) across certain Government property into the City of Hull, thereby enabling said electric railway to make closer connection with the Hull Electric Railway. The suppliant contended that the work of construction of the said Interprovincial Bridge interfered with the oper-

1900

BRIGHAM v. THE QUEEN.

Argument of Counsel.

ation of his ferry; and that by the extension of the Ottawa Electric Railway into Hull, so authorized by the Dominion Government as above stated, passenger traffic was diverted from his ferry.

He filed a petition of right for damages against the Crown, contending that the license which he had obtained under the provisions of R. S. C. c. 97, was a grant of a ferry, and relying upon the acts of the Crown above set out as constituting a breach of contract arising out of such grant.

April 11th, 1900.

The case was heard at Ottawa.

H. Aylen Q.C. for the suppliant:

The Crown in pursuance of its undoubted right, under R. S. C. c. 97, granted the ferry to the suppliant. Section 8 provides for penalties for infringement of ferry rights by third persons. The Crown is liable for breach of contract if it does anything to interfere with the rights arising under the grant. In the case of *Globensky* v. *Lukin* (1), it was held that the proprietor of a toll-bridge may prevent passengers from being carried over the water by a ferry, within a reasonable distance of his bridge; and the same reasoning would apply to the present case. Aylwin J. there said, (p. 150):

"The privilege thus accorded was the case of a contract between the grantee and the legislature. The former was to make and keep up the bridge, and the latter gave him the exclusive right to receive tolls from persons who crossed."

The Crown having granted the suppliant an exclusive right of ferriage for a valuable consideration was bound to stay its hand from doing anything to interfere with the profits derivable from the ferry. It was

(1) 6 L. C. J. 145.

1900

BRIGHAM v. THE QUEEN.

Reasons for Judgment.

guilty of a tortious breach of contract, and is liable in this court.

He cites *Galarneau* v. *Guilbeault* (1); *Corporation of Aubert-Gallion* v. *Roy* (2); *Mason* v. *Harper's Ferry Co.* (3).

The *Solicitor-General* of Canada and *E. L. Newcombe Q.C.* for the respondent, were not called upon.

THE JUDGE OF THE EXCHEQUER COURT now (April 11th, 1900) delivered judgment.

With reference to the lease to the Pontiac and Pacific Railway Company, and the Ottawa and Gatineau Railway Company, I am unable to see how by making it the Crown can be held responsible for the acts of the two railway companies, or of their officers or servants. It may be that the suppliant can recover from these companies compensation or damages for the interference with the access to the ferry proved in this case. That is a different question from the one decided in *Hopkins* v. *The Great Northern Railway Company* (4) in which it was held that the owner of the ferry could not, under the circumstances existing in that case, maintain an action against a railway company for loss of traffic caused by the use of a railway and foot bridge constructed by the railway company to accommodate new traffic. In that case there was no interference with access to the ferry. But whether or not the suppliant might, on the facts proved, recover damages or compensation from the railway companies mentioned, is a question as to which I express no opinion. It is clear, I think, that the making of the lease was not a breach of any contract arising out of the license or lease of the ferry between Ottawa and Hull on which the suppliant relies; and that for the

(1) 16 Can. S. C. R. 579.
(2) 21 Can. S. C. R. 456.
(3) 17 W. Virg. 396.
(4) 2 Q. B. D. 224.

1900

BRIGHAM v. THE QUEEN.

Reasons for Judgment.

acts of the railway companies and of their servants the Crown is not in any way responsible.

And the same may, I think, be said of the permission given to the Ottawa Electric Railway Company to extend their track from the bridge over the Ottawa River at the Chaudière into the City of Hull, using a right of way over the reserves and waterways adjoining the roadway leading to the bridge. There can, I think, be no doubt that the closer connection which that company was thereby enabled to make with the Hull Electric Railway Company has diverted traffic from the suppliant's ferry, and that he has suffered damage. But I do not see how he can recover therefor against the Crown. The granting of the permission mentioned to a company having authority, with such consent, for the public convenience, to make the extension, does not, it appears to me, constitute any breach of any contract existing between the suppliant and the Crown.

If the license or permission given to the Ottawa Electric Railway Company referrred to, or the lease to the Pontiac and Pacific, and Ottawa and Gatineau Railway Companies, prejudice the rights acquired by the suppliant under his license of the Ottawa and Hull Ferry, as to which no opinion is expressed, he would, it seems to me, be entitled to a writ of *scire facias* to repeal the same (1). But I am not aware that the Crown must itself answer in damages to its grantee where a subsequent grant is made to his prejudice; and the Crown does nothing beyond making the grant. If the suppliant's case came within the principle of the *Windsor and Annapolis Railway Company* v. *The Queen and the Western Counties Railway Company* (2), he would of course, as I have already intimated, be

(1) *Chitty's Prerogatives of the Crown*, 331.

(2) 10 S. C. R. 335; 11 App. Cas. 607.

1900

BRIGHAM v. THE QUEEN.

Reasons for Judgment.

entitled to judgment. But so far as I can see it does not. In that case the Crown not only made a lease of the railway in question there to the Western Counties Railway Company to the prejudice of the plaintiffs' rights under an earlier lease, but by its officers it actually dispossessed the plaintiffs and put the Western Counties Railway Company in possession of the railway. Here there has been no dispossession of the suppliant, and no direct interference by the Crown or any of its officers under its direction with the exercise by the suppliant of his rights.

There will be judgment for the respondent, and a declaration that the suppliant is not entitled to any portion of the relief prayed for.

Judgment accordingly.

Solicitors for suppliant: *Aylen & Duclos.*

Solicitor for respondent: *E. L. Newcombe.*

1900
June 11.

THE QUEEN ON THE INFORMATION OF THE ATTORNEY-GENERAL FOR THE DOMINION OF CANADA..... PLAINTIFF;

AND

HENRY S. HARWOOD AND OTHERS.....DEFENDANTS.

Expropriation of land for canal purposes—Damage to remaining lands—Access—Undertaking to give right of way—52 Vict. ch. 38, sec. 3—Effect of in estimating damages—Future damages—Agreement as to—Increased value by reason of public work.

Defendants owned a certain property situated in the counties of Vaudreuil and Soulanges, a portion of which was taken by the Crown for the purposes of the Soulanges Canal. Access to the remaining portion of the defendants' land was cut off by the canal, but the Crown, under the provisions of 52 Vict. ch. 38, sec. 3, filed an undertaking to build and maintain a suitable road or right of way across its property for the use of the defendants. The evidence showed that the effect of this road would be to do away with all future damage arising from deprivation of access; and the court assessed damages for past deprivation only.

2. It having been agreed between the parties in this case that the question of damages which might possibly arise in the future from any flooding of the defendants' lands should not be dealt with in the present action, the court took cognizance of such agreement in pronouncing judgment.

3. In respect to the lands taken the court declined to assess compensation based upon the consideration that the lands were of more value to the Crown than they were to the defendants at the time of the taking. *Stebbing* v. *The Metropolitan Board of Works* (L. R. 6 Q. B. 37), and *Paint* v. *The Queen* (2 Ex. C. R. 149; 18 S. C. R. 718) followed.

THIS was an information filed by the Attorney-General for the Dominion of Canada concerning the expropriation of certain lands for the purposes of the Soulanges Canal.

March 15th, 16th and 17th, 1900.

1900

THE QUEEN v. HARWOOD.

Argument of Counsel

The case was tried at Montreal.

N. Charbonneau for the defendants: The Potsdam sandstone on this property makes it of great future value. The Government has already found it so, and has used a large quantity of this stone for the manufacture of cement for the walls of the canal. This element of value ought to be taken into consideration by the court in assessing the compensation for the land taken.

The value does not subsist entirely in the present, but it is to be assessed in respect of the prospective capabilities of the property. *Mills on Eminent Domain* (1).

C. A. Harwood, following for the defendants, cited *Burton* v. *The Queen* (2).

N. Hutchison Q.C. and *A. Globensky Q.C.* for the plaintiff, contended that the land was only valuable as a quarry, and that it was its value as such at the time of the expropriation that should be considered.

Mr. *Harwood* replied.

THE JUDGE OF THE EXCHEQUER COURT now (June 11th, 1900) delivered judgment

The questions in controversy have to do with the amount of compensation to which the defendants are entitled for the value of certain lands taken for the Soulanges Canal, and for damages to other lands owned by them, occasioned by the construction thereof. The parties are very far apart. The Crown offers the defendants the sum of $3,030 for the land taken and for damages, and asks, among other things, that that sum be declared to be a just and sufficient compensation to the defendants. The following are the particulars of the defendants' claim:

(1) Sec. 173. (2) 1 Ex. C. R. 87.

1900

THE QUEEN v. HARWOOD.

Reasons for Judgment.

1. Value of 7 arp. 61 perches, 4 yards deep at 10 cents per cubic yard.....$ 12,446 40
2. Value of 20 arp. 23 perches, same depth and price 33,087 20
3. Damages through the balance of the lot being injuriously affected 50,000 00
4. Ten per cent. of real value of land taken, for compulsory taking..... 4,553 46

$100,087 06

With reference to the damages, the Crown on the trial, and under the authority of 52 Vict. ch. 38, s. 3, gives the following undertaking, that is to say:

To give a right of way from the property of the defendants not expropriated to the entrance pier of the Soulanges Canal, by means of a road thirty feet wide, to be built and maintained by the Government of Canada, said road to cross the Government property east of the east end of the lower reservoir as indicated on plan "A" of the defendants filed in this cause, from letter "X" to letter "Y," including the right to use the pier as loading docks along its north side.

The effect of carrying out this undertaking will be to do away wholly with any future damages arising from the taking of the defendants' land and the construction of the canal, assuming always that the canal is so constructed, or will, when it is fully completed, be so constructed, that the lands which the defendants now hold adjacent to the canal will not be flooded by water therefrom. As to that it was at the trial agreed that the defendants' right to damages for any flooding of their lands (if any should hereafter occur) by reason of the canal, should be reserved. That leaves then to be considered, in determining the compensation to which the defendants are entitled, the question of the value of the lands taken and the damages hitherto

sustained by them by reason of the taking of such lands and the construction of the canal.

Whatever value the lands in question have arises from the fact that they contain a large deposit of Potsdam sandstone. The value depends upon the demand for this stone and the cost of getting it to market. During the construction of the canal a large quantity excavated from the prism of the canal where it passes through lands taken from the defendants, was used for the purpose of making concrete, for which purpose it was very suitable. And it is on this circumstance that the very large claim made by the defendants is based. But it is clear, it seems to me, that the court cannot give effect to any such consideration. Any demand there was for this stone for this purpose was temporary and occasioned by the construction of the canal. Having taken the defendants' land the Crown was of course entitled to use the material excavated therefrom, in and for the construction of the canal, in any way it saw fit. What the defendants are entitled to on this branch of the case is the value of the land at the time of the taking (1). If adjoining lands of the defendants are made more valuable by the construction of the public work, that may in a proper case have to be taken into account by way of set-off in determining the compensation to which they are entitled. (*Idem.* s. 31). But there is no authority for giving the defendants larger damages because the lands taken may be of more value to the Crown than they were to the defendants at the time of taking. *Stebbing* v. *The Metropolitan Board of Works* (2); *Paint* v. *The Queen* (3).

On the evidence submitted and in view of the undertaking given, and the reserve made, I assess the

(1) The Exchequer Court Act, s. 32.

(2) L. R. 6 Q. B. 37.

(3) 2 Ex. C. R. 149; 18 S. C. R. 718.

1900

THE QUEEN v. HARWOOD.

Reasons for Judgment

compensation to be awarded to the defendants as follows:

Value of the lands taken	$ 4,000.00
Damages for the past	1,000 00
Interest on $1,089.83, value of the part of the land first taken, from February 23rd, 1891, to June 11th, 1900, at six per cent..	607 55
Interest on $2,910.17 (being the balance of the $4,000) from August 8th, 1892, to June 11th, 1900, at six per cent.....	1,369 12
	$6,976 97

There will in other particulars be judgment as prayed for, and there will be a declaration that the defendants are entitled to have the undertaking mentioned carried out and the question of any future damages that may arise from the flooding of the defendants' lands adjacent to the canal by reason thereof, is reserved.

The defendants will have their costs.

Judgment accordingly.

Solicitor for plaintiff: *A. Globensky.*

Solicitor for defendants: *C. A. Harwood*

IN THE MATTER OF THE PETITION OF RIGHT OF 1900

June 11.

JOSEPH LAROSE ..... SUPPLIANT;

AND

HER MAJESTY THE QUEEN.....RESPONDENT.

The Exchequer Court Act, sec. 16 sub-sec. (c)—Rifle range—"Public work" —Injury to person.

The suppliant was wounded by a bullet fired, during target practice, from the rifle range at Côte St. Luc, in the District of Montreal. He filed a petition of right claiming damages for the injury he thereby sustained.

Held, that the rifle range was not a "public work" within the meaning of clause (c) of sec. 16 of *The Exchequer Court Act* (50-51 Vict. c. 16), and that the Crown was not liable. *City of Quebec* v. *The Queen* (24 S. C. R. 448) referred to.

PETITION OF RIGHT to recover damages arising out of an accident to the person on a Rifle Range belonging to the Dominion Government. The facts are stated in the reasons for judgment.

May 6th, 1900.

The case was tried at Montreal.

N. Charbonneau for the suppliant: The officers or servants of the Crown knew that the range was in a dangerous condition, and it was negligence for them to allow further shooting on it until it was made safe. The range is a public work, and the officers in charge of it have been guilty of negligence. The Crown is, therefore, liable.

E. L. Newcombe, Q.C. for the respondent; The case does not fall within the provisions of section 16 of *The Exchequer Court Act*, for two reasons: First, the accident complained of did not happen *on* the rifle

1900

LAROSE v. THE QUEEN.

range; secondly, the *locus in quo* was in no sense a public work. The statute does not give a claim for injuries sustained "on the property of the Crown," but *on a public work*.

Argument of Counsel.

A. Globensky followed for the respondent: In order to support the petition three things must have occurred: (1) An injury on a public work. (2) Negligence causing the same by an officer or servant of the Crown. (3) The negligence having happened while the officer or servant was acting within the scope of his duties or employment.

N. Charbonneau replied.

THE JUDGE OF THE EXCHEQUER COURT now (June 11th, 1900) delivered judgment:

The suppliant was wounded by a bullet fired during target practice, from the rifle range at Côte St. Luc, in the District of Montreal. For the personal injuries thereby occasioned he brings his petition.

It is necessary always in cases of this kind to have in mind in the first place that the suppliant has no remedy by action unless his case falls within the terms of some Act of Parliament. The Crown is not liable for the wrong done unless expressly made so by statute. In this case the suppliant is without remedy unless it falls within clause (*d*) of the 16th section of *The Exchequer Court Act*, which gives the court jurisdiction in respect of every claim against the Crown arising under any law of Canada; or within clause (*c*) of that section which gives the court jurisdiction to hear and determine any claim arising, among other things, out of injury to the person on any public work resulting from the negligence of any officer or servant of the Crown while acting within the scope of his duties or employment.

1900

LAROSE v. THE QUEEN.

Reasons for Judgment.

The Militia Act (R. S. C. c. 41 secs. 69-71) contains certain special provisions with respect to rifle ranges. By the 69th section it is provided, among other things, that at, or as near as possible to the head quarters, of every regimental division there may be provided a rifle range; that Her Majesty may order the appropriation of such land as is necessary for the same at a proper valuation; may stop, at such time as is necessary during the target practice of the Active Militia, the traffic on any roads, not being mail roads, that cross the line of fire; and may make such other regulations for conducting target practice and for the safety of the public, as are necessary. And the section concludes with a provision that the owners of private property shall be compensated for any damages that accrues to their respective properties from the use of any such rifle range. It will be observed that in this case compensation is limited to damages accruing to property, and does not extend to personal injuries.

It is argued, however, that this rifle range is a public work, and that the necessary facts being established the suppliant is entitled to succeed. As to that, the 7th section of the Act referred to provides that the Governor in Council may declare any work, for or connected with the defence of Canada, a public work within the meaning of *The Public Works Act*; and that all powers conferred by *The Expropriation Act* and the *Act respecting the Official Arbitrators* shall thereupon, with regard to such work, be conferred upon the Minister of Militia and Defence; and that all the powers conferred upon the official arbitrators, or any of them, by the Act lastly cited, shall then extend and apply to such work and to lands and property required for the same. The powers conferred on the official arbitrators are now exercisible by this court (*The Exchequer Court Act*, s. 58). By the second

1900

LAROSE v. THE QUEEN.

Reasons for Judgment.

section of *The Expropriation Act*, clause (*d*), it is provided that the expression "public work", as used in that Act, includes, among other things, fortifications and other works of defence, and all other property belonging to Canada acquired and maintained at the expense of Canada.

Now it is clear, of course, that the rifle range is not a fortification. Neither can it be said to be a work of defence. Whether or not it could be said to be "a work for or connected with the defence of Canada," and so within the provision of *The Militia Act* (R. S. C. c. 41 s. 7) whereby the Governor in Council might declare it to be a public work may, perhaps, admit of some debate. If it were necessary for me to determine the question I would answer it in the affirmative. But there is no evidence of any such order in council having been made in respect of the rifle range at Côte St. Luc and it is not necessary now to express any opinion on that question. It is clear, however, that the rifle range in question is property, that it belonged to Canada and was acquired and maintained at the public expense; and that it is, using them in the largest sense, within the words of *The Expropriation Act* "and all other property which now belongs to Canada." But this general expression must, I think, be read in connection with words that precede it, and when one comes to deal with a rifle range with reference also to the special provisions of *The Militia Act* in respect to rifle ranges, so reading them I am not able to find that the rifle range at Côte St. Luc is a public work within the meaning of that term as used in *The Exchequer Court Act*, sec. 16, clause (*c*). In the case of *The City of Quebec* v. *The Queen* (1) Mr. Justice Taschereau expressed the opinion that the rock on which the Citadel of Quebec rests is not a public work or a work

(1) 24 S. C. R. 448.

1900

LAROSE v. THE QUEEN.

Reasons for Judgment.

at all within the meaning of the statute. That rock was property belonging to and maintained by Canada, and the argument in favour of holding it a public work was stronger, it seems to me, than any that can be urged in the present case. There was in that case some ground for saying that the rock formed in some sense part of a fortification or work of defence. Parliament has made provision for compensating persons for damages accruing to their properties from the use of a rifle range; but not for personal injuries, and it is not for the court to add to or to extend the remedies that Parliament has provided.

I am glad to know, however, that while the Crown contests any legal liability it has procured the sanction of Parliament to an appropriation with which to compensate the suppliant for his injuries.

By reference to the *Appropriation Act*, 1898 (Acts of 1898, p. 21) it will be seen that a sum of one thousand dollars was voted as a gratuity to "Joseph Larose shot at Côte St. Luc." This sum the Crown, without admitting legal liability, was willing to pay; but the suppliant thought it insufficient and brought his petition. The real controversy between the parties is as to the amount of compensation as to which I had hoped the parties would come to terms, as the case is one in which it seems to me the suppliant is deserving of the Crown's consideration.

Judgment accordingly.

Solicitors for the suppliant: *Charbonneau & Pelletier.*

Solicitor for the respondent: *E. L. Newcombe.*

1900

June 28.

IN THE MATTER OF THE PETITION OF RIGHT OF

JAMES S. GIBBON AND CHARLES H. GIBBON ..... SUPPLIANTS.

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

AND

THE SAINT JOHN TERMINAL RAILWAY COMPANY ..... THIRD PARTY.

Lease—Expropriation of demised property—Lessees' loss of profits—Increased cost of carrying on business—Measure of damages.

The suppliants were lessees of certain land and premises expropriated for the Intercolonial Railway. The premises had been fitted up and were used by them for the purposes of their business as coal merchants. By the terms of the lease under which they were in possession the term for which they held could at any time be determined by the lessors by giving six months' notice in writing, in which event the suppliants were to be paid two thousand five hundred dollars for the improvements they had made.

Held, that the measure of compensation to be paid to the suppliants was the value at the time of the expropriation of their leasehold interest in the lands and premises.

Apart from the sum payable for improvements there was no direct evidence to show what the value was. But it appeared that the suppliants had procured other premises in which to carry on their business, and that in doing so they had of necessity been at some loss and that the cost of carrying on their business had been increased.

The amount of the loss and of increased cost of carrying on business during the six months succeeding the expropriation proceedings was in addition to the sum mentioned taken to represent the value to them or to any person in a like position of their interest in the premises.

The suppliants also contended that if they had not been disturbed in their possession they would have increased their business, and so have made additional profits, and they claimed compensation for the loss of such profits, but this claim was not allowed.

1900

GIBBON v. THE QUEEN.

THE SAINT JOHN TERMINAL RAILWAY COMPANY.

Argument of Counsel.

PETITION OF RIGHT for damages resulting from the expropriation of property whereof the suppliants were lessees.

The suppliants were lessees of certain premises in the City of Saint John, N.B., which were required for the purposes of the Intercolonial Railway. During their tenancy, and while their term had six months more to run, they received notice to quit on behalf of the Dominion Government; and, acting on such notice, they left the property and secured other premises wherein to carry on their business. They brought a petition of right for loss of profits and incidental damages. The other material facts are stated in the judgment.

June 14th and 16th, 1900.

The case came on for trial at St. John, N.B. before the JUDGE OF THE EXCHEQUER COURT. At the conclusion of the trial counsel asked that the argument be postponed to be heard at Ottawa.

June 28th, 1900.

The argument of the case was proceeded with at Ottawa.

C. N. Skinner, Q.C. for the suppliants, contended that the suppliants were entitled to the loss of the profits they would have been entitled to if they had been allowed to carry on their business on the premises taken. In addition to this they were entitled to the increased cost they were put to by reason of carrying on their business elsewhere during the remainder of the term.

H. A. McKeown, for the Crown, argued that the suppliants were not entitled to loss of profits which they might never have earned.

A. P. Barnhill replied.

A. A. Stockton, Q.C. appeared for The St. John Terminal Railway Company (Third Party).

1900

GIBBON v. THE QUEEN.

THE SAINT JOHN TERMINAL RAILWAY COMPANY.

Reasons for Judgment.

At the conclusion of the argument judgment was given for the suppliants in the sum of $8,296 and costs.

Reasons for judgment having been subsequently asked for, His Lordship handed the following to the Registrar:—

It was thought by the court that in view of the expropriation proceedings of the 20th August, 1898, the telegram of the Acting Minister of Railways and Canals, of August 19th, 1898, to Mr. A. A. Stockton, Mr. Stockton's notice to the suppliants of August 25th, 1898, and Mr. W. B. Mackenzie's notice, as Chief Engineer, to the suppliants, of the 3rd of September, 1898, the suppliants were fully justified in securing other premises in which to carry on their business of coal merchants, and in selling out as quickly as possible, and in the manner in which it was done, the coal stored at the time in the premises at the Long Wharf. It was not possible for them even at an increased charge for rent to get premises as suitable as those they had had for their business, and in consequence the business was carried on at an increased expense to them.

It was thought that what the suppliants were entitled to as compensation was the value at the time of the expropriation proceedings of the leasehold interest held by them in the Long Wharf property. Under their lease they were entitled to be indemnified for their improvements to the extent of twenty-five hundred dollars, and to the possession of the premises for six months after notice. But for Mr. Mackenzie's notice, the effect of which was to make the possession which the Crown permitted the suppliants to retain of very little value, the suppliants might have been put to very little loss, if any. Nor was the effect of this letter in any way destroyed by the notice subsequently given to terminate the lease. The Crown

1900

GIBBON v. THE QUEEN.

THE SAINT JOHN TERMINAL RAILWAY COMPANY.

Reasons for Judgment.

was entitled to take possession of the premises immediately the plan and description were filed. (*The Expropriation Act*, secs. 8 and 21.) The possession that Mr. Mackenze's letter left to the suppliants was temporary and for a limited object; a possession that did not permit the latter to store on the premises coal arriving was not worth much.

With reference to the value of the six months' possession of the premises in question there is no direct evidence. There is in fact no evidence except that of James S. Gibbon, one of the suppliants. His evidence has not, in the proceedings before the court, been in any way challenged either by a demand for the production of his books or by calling other witnesses. What he states, therefore, as to his losses or the increased cost of carrying on his business the court accepts as being true. He does not directly express any view as to the value of the six months possession of the premises to any one, in a like situation with the suppliants; but he gives figures to show the increased cost at which the business was carried on during these six months, because the suppliants were deprived of the beneficial possession of the premises. He also sets up that he lost profits that otherwise he might have made. These have not been taken into consideration. But the actual increased cost by reason of the expropriation proceedings and what followed thereon, of carrying on the business for the six months, has, in the absence of any other evidence, been taken as the measure of what the value of the six months' possession would have been to any one in the suppliants' position.

The following are the items of such increased cost of carrying on business and of the losses as claimed by the suppliants:

1900

GIBBON v. THE QUEEN.

THE SAINT JOHN TERMINAL RAILWAY COMPANY.

Reasons for Judgment.

Expenditure for improvements.....		$ 7,600 00
(Of this sum $2,500.00 was allowed under the terms of the lease, and an allowance of ten per cent. because of the compulsory proceedings. But for the expropriation proceedings the suppliants might have had a much longer enjoyment of the improvements they had made.)		
Rent paid for new places during the six months were as follows :		
Morrison	$ 800 00	
De Bury.....	162 00	
	962 00	
Less half year's rent under the lease, $450.00		
Loss on rent for six months.....		512 00
(This item was not objected to by counsel for the Crown.)		
Loss on slack coal		500 00
Loss on soft coal.....		200 00
15 per cent. loss on reasonable increase of $20,000.....		3,000 00
(These three items were objected to by counsel for the Crown, and were withdrawn by counsel for the suppliants on condition that judgment should be entered up at the time for them for other items.)		
25 cents a ton loss on handling 10,000 tons of coal because of losing Long Wharf facilities.....		2,500 00
(Counsel for the Crown objected to this item that there was no evidence that the suppliants actually handled 10,000 tons of coal during the six months. But the evidence being pointed out, the objection was not pressed. The evidence shows		

clearly how there might be this increased cost of handling the coal, because the suppliants could not use the very modern appliances with which they had provided themselves.)

Loss on cross hauling 300 00

(The cost of hauling was increased by reason of change of premises.)

New scale..... 50 00

(Not objected to by counsel for the Crown.)

Loss on increased freight..... 600 00

(This, like the preceding item of $300, represents an increase in the cost of carrying on business that the suppliants would not have been put to if they had retained possession of the premises. Counsel the Crown did not, and I think rightly, press its objection to these two items.)

Loss on telephones..... 60 00

(Not objected to by counsel for the Crown.)

Loss on selling coal to get out of building on Long Wharf, 35 cents per ton on 1,500 tons. 525 00

(Counsel for the Crown objected to this item on the ground that under Mr. Mackenzie's letter the suppliants might have sold out in the usual way and without lowering the price to make quick sales. But because of the additional expense and trouble of carrying on business in several places at the one time I thought the suppliants had acted reasonably and prudently in taking the means they did of selling out the coal stored at the Long Wharf as quickly as possible, and allowed the item.)

1900

GIBBON v. THE QUEEN.

THE SAINT JOHN TERMINAL RAILWAY COMPANY.

Reasons for Judgment.

Loss on coal compelled to sell from vessels because they could not get storage.....	375	00
(Objection to this was not pressed.)		
Interest		
(Interest as allowed not objected to by counsel for the Crown.)		
Extra men at each delivery.		
(Abandoned by the suppliants.)		
Total claim	$ 16,472	00

Of which the following items as stated above were allowed, as constituting under the evidence the compensation to which the suppliants were entitled:

Improvements	$ 2,500	00
Ten per cent. on that.....	250	00
Half year's rent.....	512	00
Loss on handling 10,000 tons of coal at 25 cts.	2,500	00
Loss on cross hauling.....	300	00
New scale	50	00
Loss on increased freight.....	600	00
Loss on telephone.....	60	00
Thirty-five cents on 1,500 tons.....	525	00
Loss on coal sold on vessels.....	375	00
Compensation assessed at.....	$ 7,672	00
Interest on same from 20th February, 1899....	624	00
	$ 8,296	00

Judgment for suppliants for $8,296 and costs.

The case between the Crown and the third party was reserved.

Judgment accordingly.

Solicitor for suppliants: *A. P. Barnhill.*

Solicitor for respondent: *H. A. McKeown.*

Solicitor for third party: *L. A. Stockton.*

APPENDIX A.

APPENDIX A.

RULES OF PRACTICE IN THE EXCHEQUER COURT OF CANADA MADE AND PUBLISHED DURING THE PERIOD COVERED BY THIS VOLUME.

IN THE EXCHEQUER COURT OF CANADA.

GENERAL ORDER.

In pursuance of the provisions contained in the 55th section of "*The Exchequer Court Act*" (50-51 Vict. ch. 16, as amended by 52 Vict. ch. 38) it is ordered that the following Rule in respect of the matters hereinafter mentioned shall be in force in the Exchequer Court of Canada :—

1. The Registrar of the Court shall have authority, at the request of the Minister of Justice, or his deputy, to tax any bill of costs made against the Crown by any one acting for the Crown in any proceeding in the court, and in such cases may allow counsel fees in excess of those prescribed in the tariff now in force.

Dated at Ottawa, this 23rd day of November, A.D. 1896.

GEO. W. BURBIDGE,
J. E. C.

IN THE EXCHEQUER COURT OF CANADA.

GENERAL RULES AND ORDERS.

In pursuance of the provisions contained in the 55th section of "*The Exchequer Court Act,*" it is hereby ordered that the following Rules in respect of the matters hereinafter mentioned shall be in force in the Exchequer Court of Canada :—

1. Rule 36 of the Exchequer Court of Canada is hereby repealed, and the following substituted therefor :—

RULE 36.

WHEN AN ALLEGATION OF FACT IN A PLEADING IS TO BE TAKEN AS ADMITTED.

Every allegation of fact in any pleading in an action, if not denied specifically or by necessary implication, or stated to be not admitted in the pleading of the opposite party, shall be taken to be admitted, except as against an infant, lunatic, person of unsound mind not so found by inquisition, or other person judicially incapacitated.

2. Rule 38 of the Exchequer Court of Canada is hereby repealed, and the following substituted therefor :—

RULE 38.

NO PLEADING TO BE INCONSISTENT WITH PREVIOUS PLEADINGS OF SAME PARTY.

No pleading shall, except by way of amendment, raise any new ground of claim or contain any allegation of fact inconsistent with the previous pleadings of the party pleading the same.

3. Rule 83 of the Exchequer Court of Canada is hereby repealed, and the following substituted therefor :—

RULE 83.

DEFAULT IN REPLYING OR DEMURRING WITHIN TIME LIMITED, EFFECT OF.

If the Attorney-General, petitioner or plaintiff, does not deliver a reply or demurrer, or any party does not deliver any subsequent pleading, or a demurrer, within the period allowed for that purpose, the pleadings shall be deemed to be closed at the expiration of that period, and all the material statements of fact in the pleading

last delivered shall be deemed to have been denied and put in issue.

Dated at Ottawa, this 24th day of January, A.D. 1898.

GEO. W. BURBIDGE,
J. E. C.

IN THE EXCHEQUER COURT OF CANADA.

GENERAL RULES AND ORDERS.

In pursuance of the provisions contained in the 55th section of "*The Exchequer Court Act*," it is hereby ordered that the following Rules in respect of the matters hereinafter mentioned shall be in force in the Exchequer Court of Canada:—

1. Rule 105 of the General Rules and Orders of the Exchequer Court of Canada of the 4th March, 1876, is hereby rescinded and the following Rule enacted in lieu thereof:—

RULE 105.

USING AT TRIAL EXAMINATION FOR DISCOVERY.

Any party may, at the trial of an action or issue, use in evidence any part of the examination for the purposes of discovery of the opposite party; but the Judge may look at the whole of the examination, and if he is of opinion that any other part is so connected with the part to be so used that the last mentioned part ought not to be used without such other part, he may direct such other part to be put in evidence.

Where any departmental or other officer of the Crown, or an officer of a corporation, has been examined for the purposes of discovery, the whole or any part of the examination may be used as evidence by any party adverse in interest to the Crown or corporation; and

if a part only be used, the Crown or corporation may put in and use the remainder of the examination of the officer, or any part thereof, as evidence on the part of the Crown or of the corporation.

2. The 129th Rule of the General Rules and Orders of the Exchequer Court of Canada of the 4th March, 1876, is hereby rescinded and the following Rule enacted in lieu thereof:—

RULE 129.

PRINTED COPIES OF PLEADINGS TO BE FURNISHED FOR USE OF JUDGE.

The party who gives notice of trial shall furnish for the use of the Judge a printed copy of the pleadings, issues and order for trial; and where the trial is holden at any place outside of the City of Ottawa the same shall be certified by the Registrar of the Court.

3. The 138th and 139th Rules of the Rules and Orders of the Exchequer Court of Canada of the 4th March, 1876, are hereby rescinded and the following Rules enacted in lieu thereof:—

RULE 138.

APPLICATION FOR A NEW TRIAL OR TO SET ASIDE OR VARY A JUDGMENT.

Any party who desires to obtain a new trial of any cause, or to set aside or vary any judgment, must apply for the same to the Court by motion for an order calling upon the opposite party to show cause why a new trial should not be directed, or why such judgment should not be set aside or varied. The motion shall be made within thirty days after the judgment is given, or within such extended time as the Court may allow. The order, if made, shall be returnable at such time as the Court may direct, and if no such direction is given, then in *fourteen days*.

RULE 139.

ORDER FOR, WHEN TO BE SERVED.

A copy of such order shall be served on the opposite party within such time as the Court may direct, and if no such direction is given, then within *eight days* from the time of the same being made.

4. The 150th Rule of the said Rules and Orders of the 4th of March, 1876, is hereby rescinded.

DEPUTY REGISTRAR.

5. Any Officer of the Court whom the Registrar of the Court, with the approval of the Governor in Council, may appoint to be his deputy shall, subject to the direction of the Registrar, perform the duties of Registrar and shall for that purpose have and exercise the authorities and powers of the Registrar.

ACTING REGISTRARS OF THE EXCHEQUER COURT OF CANADA.

6. (*a*) The Judge of the Court may from time to time, by General Order, name and appoint a person at any place who shall, if the Registrar, or his Deputy, is not present thereat, act as Registrar of the Court at any sitting held at such place.

(*b*.) The District Registrars on the Admiralty side of the Exchequer Court shall, within their respective Admiralty Districts, be Acting Registrars of the Exchequer Court.

(*c*.) Until further order, the following persons shall be Acting Registrars of the Exchequer Court for sittings of the Court to be held at the following places, that is to say : —

Louis H. Collard, Esquire, Deputy Prothonotary of the Superior Court for the District of Montreal, in the Province of Quebec, for sittings of the Court to be held at the City of Montreal;

Godfrey Henry Walker, Esquire, Prothonotary of the Court of Queen's Bench for the Province of Manitoba, for sittings of the Court to be held at any place in the Province of Manitoba;

Dixie Watson, Esquire, Clerk of the Supreme Court of the North-West Territories for the Judicial District of Western Assiniboia, for sittings of the Court to be held at the town of Regina, in the North-West Territories;

Lawrence John Clarke, Esquire, Clerk of the Supreme Court of the North-West Territories for the Judicial District of North Alberta, for sittings of the Court to be held at the town of Calgary, in the North-West Territories; and

Albert Edward Beck, Esquire, District Registrar of the Supreme Court of British Columbia for the Vancouver Judicial District, and Deputy District Registrar of the British Columbia Admiralty District, for sittings of the Court to be held in the cities of Vancouver and New Westminster, in the Province of British Columbia.

(*d.*) Whenever any sitting of the Exchequer Court is held at any place other than the City of Ottawa, and the Registrar of the Court at Ottawa, or his Deputy, is not present, the Acting Registrar for the District or place shall act as Registrar at such sitting, and if there be no such Acting Registrar, or if he be not in attendance, the Court may appoint any other person to act as Registrar at such sitting, and in any case the person so acting as Registrar at such sitting shall, for the purposes thereof, have all the powers and authorities of the Registrar of the Court.

(*e.*) The General Order of the Court of the 28th of February, 1877, and Rule 264, as contained in the 36th Rule of the General Rules and Orders of May 1st, 1895, are hereby rescinded.

SEALS.

7. Acting Registrars of the Exchequer Court, who are at the same time District Registrars of the Court on the Admiralty side thereof, shall, in proceedings in the Exchequer Court, use respectively the seals provided for use in the several Admiralty Districts, and other Acting Registrars shall use such seals as the Judge of the Exchequer Court may from time to time direct.

SUBPŒNAS.

8. Subpœnas to witnesses to attend at any place other than the City of Ottawa, may be issued under the hand of the Registrar of the Court and the seal of the Court, according to the existing practice of the Court, or under the hand of the Acting Registrar at the place where the attendance of the witness is desired, and under the seal prescribed for the use of such Acting Registrar.

FEES.

9. The Acting Registrars shall be entitled to and shall take to their own use respectively the fees prescribed in the schedule hereto marked Z.

REFERENCES.

INTERPRETATION.

10. Unless the context otherwise requires, the expression "Judge," as hereinafter used, means a Local Judge in Admiralty of the Exchequer Court; and the expression "Referee" includes any such Judge and the Registrar or any officer of the Court, or any official or special referee to whom any cause, matter or question is referred.

A CAUSE MAY BE REFERRED.

11. Whenever any cause or matter is at issue, and at any stage of the proceeding thereafter, the Court may

for the determination of any question or issue of fact, or for the purpose of taking accounts or making enquiries, refer such cause or matter, or any question therein to a Judge or any other referee for enquiry and report.

PROCEEDINGS ON A REFERENCE TO A JUDGE.

12. Whenever any cause or matter, or any question therein, is referred to a Judge, he shall, on the application of any party thereto, fix the time and place of hearing the reference, of which due notice shall be given to the opposite party, and he shall proceed with the hearing thereof in like manner as at a trial before the Judge of the Exchequer Court. Officers of the Court in attendance at such hearing, and the Solicitors and Counsel of the parties shall be entitled to the like fees on such hearing as at a trial before the Judge of the Exchequer Court.

PROCEEDINGS ON A REFERENCE TO OTHER REFEREES.

13. Whenever any case or matter, or any question therein, is referred to any referee other than a Judge, the referee shall, on the application of any party thereto, make an appointment to proceed with the hearing of the reference, of which due notice shall be given to the opposite party. At the time and place appointed such hearing shall be proceeded with *de die in diem*, but may, for good cause, be from time to time ajourned to some other day.

COPY OF PLEADINGS AND ORDER OF REFERNECE TO BE FURNISHED.

14. The party who applies to a referee to fix a time and place, or to make an appointment, for the hearing of any reference, shall furnish to the referee for his use a copy of the pleadings, issues and order of reference, certified by the Registrar of the Court.

EVIDENCE TAKEN ON REFERENCE.

15. Evidence shall be taken upon a reference before the referee, and the attendance of witnesses may be enforced by *subpœna* in the same manner as nearly as may be as at a trial before the Judge of the Exchequer Court. In any case of a reference to a Judge, and in other cases when so provided in the order of reference, the testimony of any witness may be taken down in shorthand by a stenographer, who shall be previously sworn to faithfully take down and transcribe the same.

POWER OF REFEREE.

16. A referee shall have the same authority in the conduct of any reference as the Judge of the Exchequer Court when presiding at any trial before him; but nothing herein contained shall authorise him to commit any person to prison, or to enforce any order by attachment.

REFEREE MAY RESERVE QUESTIONS FOR DECISION OF COURT.

17. A referee may, before the conclusion of any hearing before him, or by his report under the reference made to him, submit any question arising therein for the decision of the Court, or state any facts specially with power to the Court to draw inference therefrom, and in any such case the order to be made on such submission or statement, shall be entered as the Court may direct, and the Court shall have power to require any explanations or reasons from the referee and to remit the cause or matter, or any part thereof, for further enquiry to the same or any other referee.

REPORT, &C., TO BE FILED.

18. The report of a referee, with a copy of the evidence taken on the reference, and the exhibits and

other papers and documents filed with the referee, shall be transmitted by him to the Registry of the Court as soon as possible after the report is signed, and the Registrar, on receipt of the same, shall forthwith give notice to all the parties. Thereupon any party to the proceeding may cause such report, evidence, exhibits and other papers and documents to be filed, and shall give notice of such filing to the other parties to the proceeding.

APPEAL FROM REPORT.

19. Within *fourteen days* after service of the notice of the filing of any report, any party may, by a motion of which at least *eight days'* notice is to be given, appeal to the Court against any report, and upon such appeal the Court may confirm, vary or reverse the findings of the report and direct judgment to be entered accordingly or refer it back to the referee for further consideration and report.

JUDGMENT ON THE REPORT.

20. At any time after the lapse of *fourteen days* after service of the notice of the filing of any report, any party may, if no appeal has been taken against the report, set the action down on motion for judgment, of which motion at least *eight days'* notice shall be given.

RIGHT TO BEGIN AND REPLY AS TO QUESTIONS OF COMPENSATION AND TITLE IN PROCEEDINGS BY INFORMATION.

21. Whenever on the trial of any proceeding by information in respect of land or property acquired or taken for, or injuriously affected by, the construction of any public work, any question of compensation or

title arises, the defendant shall in respect of such questions begin and give evidence in support of his claim, and if in respect thereof evidence is adduced on the part of the Crown the defendant shall be entitled to the reply.

REPEAL OF RULES.

22. Rules numbered 128, 147, 159, 160, 161, 162, 163, 164 and 165 of the General Rules and Orders of the Exchequer Court of the 4th of March, 1876, are hereby rescinded.

APPLICATION OF RULES.

23. These Rules shall apply to all proceedings in the Court.

SCHEDULE Z.

FEES TO ACTING REGISTRARS.

1. For attendance at the trial of an action (to be paid by the party whose case is proceeding), per hour.	$ 1 00
2. Swearing each witness (to be paid by party producing witness).....	0 20
3. Marking each exhibit (to be paid by party filing same).....	0 10
4. On issuing each writ of subpœna.....	1 00
5. For copy of any document, per folio of 100 words.....	0 10
6. Each certificate required from the Acting Registrar. (The certificates required under Rule 125 to be paid by plaintiff).....	1 00

Dated at Ottawa, this 12th day of December, A.D. 1899.

GEO. W. BURBIDGE,
J. E. C.

IN THE EXCHEQUER COURT OF CANADA.

GENERAL RULES AND ORDERS.

In pursuance of the provisions contained in the 55th section of "The Exchequer Court Act" it is hereby ordered that the following Rules in respect of the matters hereinafter mentioned shall be in force in the Exchequer Court of Canada:—

COMMENCEMENT OF PROCEEDINGS.

GENERAL.

1. Any proceeding in the Exchequer Court of Canada on behalf of the Crown may be instituted by filing an information in the name of the Attorney-General of Canada.

2. Any proceeding in the Exchequer Court against the Crown is to be instituted by filing a Petition of Right, or where there is a reference by the Head of any Department of a claim against the Crown, by filing a Statement of Claim.

3. Any other proceeding in the Exchequer Court may, unless otherwise specially provided, be instituted by filing a Statement of Claim.

IMPEACHMENT OF LETTERS PATENT OF INVENTION.

4. Any proceeding to impeach or annul any patent of invention may be instituted,—

(*a*) By information in the name of the Attorney-General of Canada; or

(*b*) By a Statement of Claim filed by any person interested; or

(*c*) By a writ of *scire facias* as provided in the 34th section of "The Patent Act."

5. With any Information or Statement of Claim filed to impeach or annul a patent of invention there

shall be filed, with the Registrar of the Court, a sealed and certified copy of the patent and of the petition, affidavit, specification and drawings relating thereto.

6. In any proceeding by Statement of Claim to impeach or annul a patent of invention, the plaintiff shall give security for the defendant's costs therein in a sum of one thousand dollars.

7. A writ of *scire facias* to impeach or annul a patent of invention may be in the form "AA" in the schedule hereto. It shall be tested of the day on which it is issued. It may be served in any manner in which an Information or a Statement of Claim may be served, and shall be returnable immediately after service thereof.

8. An appearance shall be entered for the defendant within *fourteen days* from the day of service of the writ, inclusive of the day of service.

9. If the defendant does not appear according to the exigency of the writ the Court may, on motion thereof, give such Judgment, as upon the writ, it considers the plaintiff entitled to.

10. If the defendant appears before judgment is signed, he shall be served with a Statement of Claim, and thereafter the action shall proceed in accordance with the practice of the Court in proceedings commenced by a Statement of Claim.

11. On the trial of any action to impeach or annul a patent of invention the defendant shall be entitled to begin and give evidence in support of the patent, and if the plaintiff gives evidence impeaching the validity of the patent the defendant shall be entitled to reply.

PARTICULARS IN ACTIONS TO IMPEACH A PATENT, OR FOR INFRINGEMENT.

12. With an Information or Statement of Claim to impeach or annul a patent the plaintiff must deliver

particulars of the objections on which he means to rely.

13. In an action for infringement of a patent the plaintiff must deliver with his Statement of Claim, or by order of the Court or a Judge at any subsequent time, particulars of the breaches complained of.

14. The defendant must deliver with his Statement in defence, or by order of the Court or a Judge at any subsequent time, particulars of any objections on which he relies in support thereof.

15. If the defendant disputes the validity of the patent, the particulars delivered by him must state on what ground he disputes it, and if one of those grounds is want of novelty, he must state the time and place of the previous publication or user alleged by him.

16. Particulars delivered may be from time to time amended by leave of the Court or a Judge.

17. At the hearing no evidence shall, except by leave of the Court or a Judge, be admitted in proof of any alleged objection or infringement of which particulars are not so delivered.

18. On taxation of costs regard shall be had to the particulars delivered by the plaintiff and by the defendant, and they respectively shall not be allowed any costs in respect of any particular delivered by them, unless the same has been proven or appears to the Court or a Judge to have been reasonable and proper, without regard to the general costs of the case.

ORDER FOR INJUNCTION, INSPECTION OR ACCOUNT.

19. In an action for infringement of a patent the Court or a Judge may, on the application of either party, make such order for an injunction, inspection or account, and impose such terms and give such

directions respecting the same and the proceedings thereon as the Court or Judge may see fit.

COPYRIGHTS, TRADE-MARKS AND INDUSTRIAL DESIGNS.

20. Any proceeding in the Exchequer Court for the registration of any copyright, trade-mark or industrial design, or to have any entry in any register of copyrights, trade-marks or industrial designs made, expunged, varied or rectified, may be instituted by filing a petition in the Court.

21. A notice of the filing of the petition, giving the object of the application and stating that any person desiring to oppose it must, within *fourteen days* after the last insertion of the notice in the *Canada Gazette* file a statement of his objections with the Registrar of the Court and serve a copy thereof upon the petitioner, shall be published in four successive issues of the *Canada Gazette*.

22. A copy of such petition and notice shall be served upon the Minister of Agriculture and upon any person known to the petitioner to be interested and to be opposed to the application.

23. If no one appears to oppose the application, the petitioner may file with the Registrar an affidavit in support of the application, and upon *ten days' notice* to the Minister of Agriculture, and upon serving him with a copy of any affidavit so filed, may move the Court for such order as upon the petition and affidavit he may be entitled to.

24. If any person appears to oppose the application he shall within *fourteen days* after the last publication of the said notice in the *Canada Gazette*, file with the Registrar, and serve upon the petitioner, a statement of his objections to the application.

25. The petitioner may within *fourteen days* after service of the statement of objections file and serve

a reply thereto; and thereupon any issue or issues raised may be set down for trial or hearing in accordance with the practice of the Court.

26. Notice of trial shall be given as well to the Minister of Agriculture as to the opposite party.

GENERAL.

27. In any proceeding in the Exchequer Court respecting any patent of invention, copyright, trade-mark or industrial design, the practice and procedure shall in any matter not provided for by any Act of the Parliament of Canada or by the Rules of this Court (but subject always thereto) conform to and be regulated, as near as may be, by the practice and procedure for the time being in force in similar proceedings in Her Majesty's High Court of Justice in England.

28. The General Rules of Court of the 5th of December, 1892, respecting the impeachment of patents, and of the 13th of November, 1891, are hereby repealed.

29. These Rules shall apply to proceedings in the Court irrespective of where the cause of action may arise.

Dated at Ottawa, this twenty-fifth day of January, A.D. 1900.

GEO. W. BURBIDGE,
J. E. C.

SCHEDULE "AA".

[Writ of *Scire Facias*].

VICTORIA, by the Grace of God of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith.

To the Sheriff of the County of Carleton, or any other of our Sheriffs in the Dominion of Canada. —GREETING:

Whereas we lately by our letters patent sealed with the seal of our Patent Office, in the City of Ottawa, in our Dominion of Canada, and signed by the Honourable.....our Commissioner of Patents [*or as the case may be*], and bearing date the.....day of..... A.D. 19....., and registered in our said Patent Office, at Ottawa aforesaid, as No ..... reciting that whereas A.B. [*residence and occupation*] had petitioned the Commissioner of Patents praying for the grant of a patent for an alleged new and useful.....[*as the case may be*] a description of which invention is contained in the specification of which a duplicate is thereunto attached and made an essential part thereof, and had elected his domicile at.....[*as the case may be*], and had also complied with the other requirements of "The Patent Act", ch. 61 of "The Revised Statutes of Canada" and the Acts amending the same, did, by our said letters patent grant to the said A.B., his executors, administrators, legal representatives and assigns, for the period of.....years from the date thereof, the exclusive right, privilege and liberty of making, constructing, and using and vending to others to be used in our Dominion of Canada the said invention,—subject nevertheless to adjudication before any Court of competent jurisdiction, and to the conditions contained in the Acts aforesaid.

And whereas [*set out assignments if any*].

And whereas E. being desirous, for the reasons hereinafter mentioned, to impeach the recited letters patent bearing date the.....day of.....A.D. 19 , granted to the said A.B [*if assignment*, and assigned to the said.....] as aforesaid, has obtained a sealed and certified copy thereof, and of the petition, affidavit, specifications and drawings relating thereto, and has, in accordance with the provisions in that behalf contained in the said Act and the Acts amending

the same, filed the said sealed and certified copies of said letters patent, petition, affidavit, specifications and drawings, in the office of the Registrar of our Exchequer Court of Canada, and the said letters patent and documents aforesaid are now of record in the said Court.

[*Then set out reasons for impeachment, as for example* :]

And whereas we are given to understand that our said letters patent bearing date the.....day of..... A.D. 19 , and numbered.....issued to the said A.B. [*if assigned*, and assigned to the said.....] as aforesaid, were and are contrary to the law, in this: that whereas the said A.B. did in the said petition state that he had invented a certain new and useful .....(*as the case may be*) not known or used by others before his invention thereof, as set forth in the said specification and drawings accompanying said petition.

And whereas the said A.B. in the said affidavit did swear that he verily believed that he was the inventor of the alleged new and useful..... .....(*as the case may be*) described and claimed in the said specification, and did swear that the several allegations contained in the said petition were respectively true and correct.

And whereas we are given to understand and be informed that the said A.B did not invent the said alleged invention in the said petition and letters patent No.....mentioned and claimed.

And also, etc., etc.

By reason and means of which said several premises the said letters patent so granted as aforesaid to the said A.B. were, are and ought to be void and of no force and effect in law.

And we, being willing that what is just in the premises should be done, command you our Sheriff of our said County of Carleton or other our said Sheriffs, that

you give notice to the said A.B. (*or.....as the case may be, if assigned*) that before us, in our said Exchequer Court of Canada he be and appear within *fourteen days* from the service upon him of a copy of this writ, inclusive of the day of such service, to show if he has or knows anything to say for himself why the said letters patent No. ..... as aforesaid so granted to him (*as the case may be*) ought not, for the reasons aforesaid, to be adjudged to be void, vacated, cancelled and disallowed, and further to do and receive those things which our said Court shall consider right in that behalf, and that you return this writ immediately after the execution thereof, stating how you have executed the same and the day of the execution thereof.

Witness the Honourable George W. Burbidge, Judge of our Exchequer Court of Canada, at Ottawa, the ..... day of ... . in the year of our Lord one thousand nine hundred ..... and in the .....year of our reign.

L. A. A.,
Registrar.

APPENDIX B.

APPENDIX B.

LEGISLATION OF DOMINION PARLIAMENT, AND IMPERIAL DESPATCH, BEARING UPON THE JURISDICTION OF THE EXCHEQUER COURT OF CANADA DURING THE PERIOD COVERED BY THIS VOLUME OF THE EXCHEQUER COURT REPORTS.

62-63 VICTORIA.

CHAP. 44.

An Act respecting the jurisdiction of the Exchequer Court as to railway debts.

[*Assented to* 10*th July*, 1899.]

Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:—

[WHEN EXCHEQUER COURT MAY ORDER SALE OR FORECLOSURE AT INSTANCE OF MORTGAGEES OF RAILWAY.—POWERS OF COURT AS TO PROCEEDINGS.]

1. The Exchequer Court of Canada shall have jurisdiction, at the instance of mortgagees, or of holders of mortgage bonds or debentures, to order or decree a sale of any railway not wholly within the limits of any one province, or any section of a railway where such section is not wholly within such limits, or of any railway otherwise subject to the legislative authority of the Parliament of Canada, or to order or decree the foreclosure of the interest of the person or company owning or entitled to such railway or such section, or the equity of redemption therein, whenever in the like circumstances of default the High Court of Justice in England can at the time this Act comes

into force so order or decree with respect to mortgaged premises situate in England; and the Exchequer Court in any such case shall have all the powers for the appointment of a receiver, either before or after default, the interim preservation of the property, the delivery of possession, the making of all necessary inquiries, taking accounts, settling and determining claims and priorities of creditors, taxation and payment of costs, and generally the taking and directing of all such proceedings requisite and necessary to enforce its order or decree and render it effective, as in mortgage actions the said High Court of Justice in England, or any division, judge or officer thereof may exercise.

[APPLICATION OF ACT.]

2. This Act shall apply to all existing as well as future mortgage bonds or debentures of railways now or hereafter subject to the jurisdiction of the Parliament of Canada.

62-63 VICTORIA.

CHAP. 45.

An Act to amend the Act passed at the present session of Parliament, intituled "An Act respecting the jurisdiction of the Exchequer Court as to Railway Debts."

[*Assented to* 11*th August*, 1899.]

Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:—

[SUSPENSION OF OPERATION OF ACT OF PRESENT SESSION.]

1. The operation of the Act passed during the present session of Parliament, intituled *An Act respecting*

the Jurisdiction of the Exchequer Court as to Railway Debts, is hereby suspended until the first day of August, in the year of Our Lord one thousand nine hundred.

62-63 VICTORIA.

CHAP. 39.

An Act to amend the Expropriation Act.

[*Assented to* 11*th August*, 1899.]

Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:—

[1899, c. 13, s. 3 (*f*) AMENDED.—POWERS OF MINISTER. AMENDMENT RETROACTIVE IN CERTAIN CASE.]

1. Paragraph (*f*) of section 3 of *The Expropriation Act*, chapter 13 of the statutes of 1899, is hereby repealed and the following substituted therefor:—

"(*f.*) alter the course of any river, canal, brook, stream or watercourse, and divert or alter, as well temporarily as permanently, the course of any rivers, streams of water, railways, roads, streets or ways, or raise or sink the level of the same, in order to carry them over or under, on the level of, or by the side of the public work, as he thinks proper; but before discontinuing or altering any railway or public road or any portion thereof, he shall substitute another convenient railway or road in lieu thereof; and in such case the owner of such railway or road shall take over the substituted railway or road in mitigation of damages, if any, claimable by him under this Act, and the land therefore used for any railway or road, or the part of a railway or road so discontinued, may be transferred by the Minister to, and shall thereafter

become the property of, the owner of the land of which it originally formed part;"

2. This section shall be held to apply to the St. John Bridge and Railway Extension Company and to that portion of its property which has been taken possession of by the Minister of Railways and Canals for the purposes of the Intercolonial Railway in the city of St. John, as fully as if it had been enacted and in force at the time of the taking possession of such property; but otherwise this Act shall not be retroactive.

63-64 VICTORIA.

CHAP. 22.

An Act to amend the Expropriation Act.

[*Assented to 7th July*, 1900.]

Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:—

[1889, c. 13, s. 29 AMENDED.—RATE OF INTEREST FIVE PER CENT.—PROVISO.]

1. Section 29 of chapter 13 of the statutes of 1889 is hereby repealed and the following substituted therefor:—

"29. Interest at the rate of five per centum per annum may be allowed on such compensation money from the time when the land or property was acquired, taken or injuriously affected to the date when judgment is given; but no person to whom has been tendered a sum equal to or greater than the amount to which the court finds him entitled shall be allowed any interest on such compensation money for any time subsequent to the date of such tender."

SECTION 30 AMENDED.—INTEREST MAY BE REFUSED OR DIMINISHED IN CERTAIN CASES.

2. Section 30 of the said chapter 13 is hereby repealed and the following substituted therefor:—

"30 If the court is of opinion that the delay in the final determination of any such nature is attributable in whole or in part to any person entitled to such compensation money or any part thereof, or that such person has not, upon demand made therefor, furnished to the Minister within a reasonable time a true statement of the particulars mentioned in section 25, it may, for the whole or any portion of the time for which he would otherwise be entitled to interest, refuse to allow him interest, or it may allow the same at any rate less than five per centum per annum that to it appears just."

[APPLICATION NOT TO BE RETROACTIVE.]

3. This Act shall not apply to any case where the land has been expropriated or injuriously affected prior to the passing of this Act.

63-64 VICTORIA.

CHAP. 45.

An Act to amend the Admiralty Act, 1891.

[*Assented to* 14*th June*, 1900.]

Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:—

[1891, C. 29, S. 5 AMENDED.—ADMIRALTY DISTRICTS.—REGISTRIES.]

1. Section 5 of *The Admiralty Act*, 1891, being chapter 29 of the statutes of that year, is hereby repealed and the following substituted therefor:

"5 The Governor in Council may from to time—

"(*a.*) constitute any part of Canada an Admiralty district for the purposes of this Act;

"(*b.*) assign a name to any such district and change such name as he may think proper, and

"(*c.*) fix and change the limits of any such district.

"2. The Governor in Council may also from time to time—

"(*a.*) establish at some place within any Admiralty district a registry of the Exchequer Court on its Admiralty side, and

"(*b.*) divide the territory comprised in any Admiralty district into two or more registry divisions, and establish a registry of the Exchequer Court on its Admiralty side at some place in each of such divisions."

SECTION 8 AMENDED.—OFFICERS AND CLERKS.

2. Section 8 of the said Act is hereby repealed and the following substituted therefor:—

"8. The Governor in Council may from time to time appoint for any district or for any registry division of any district a registrar, a marshal and such other officers and clerks as are necessary."

SECTION 13 AMENDED.—WHERE SUITS MAY BE INSTITUTED.

3. Section 13 of the said Act is hereby repealed and the following substituted therefor:—

"13. Any suit may be instituted in any registry when—

"(*a.*) the ship or property, the subject of the suit, is at the time of the institution of the suit within the district or division of such registry;

"(*b.*) the owner or owners of the ship or property, or the owner or owners of the larger number of shares in the ship, or the managing owner, or the ship's

husband reside at the time of the institution of the suit within the district or division of such registry ;

" (*c.*) the port of registry of the ship is within the district or division of such registry ; or

" (*d.*) the parties so agree by a memorandum signed by them or by their attorneys or agents.

PROVISO.

" Provided always that when a suit has been instituted in any registry no further suit shall be instituted in respect of the same matter in any other registry of the court without the leave of the judge of the court, and subject to such terms as to costs and otherwise as he directs."

AS TO PROCEEDINGS.

4. Where in any district there are more registries than one all proceedings in any suit shall be carried on in the registry in which the suit is instituted, unless the judge shall otherwise order.

COMING INTO FORCE OF ACT.

5. This Act shall not come into force until Her Majesty's pleasure thereon has been signified by proclamation in *The Canada Gazette*.

IMPERIAL DESPATCH, COMMISSION AND WARRANT TO THE JUDGE OF THE EXCHEQUER COURT RESPECTING JURISDICTION IN PRIZE MATTERS.

(Circular.)

DOWNING STREET, 30th August, 1899.

SIR,—With reference to my circular despatch of the 19th October, 1898, respecting the constitution of Prize Courts in the Colonies, I have the honour to

transmit to you a Warrant addressed to the Exchequer Court, Canada, requiring it, upon any proclamation being made by the Vice-Admiral of the Colony that War has broken out between Her Majesty and any Foreign State, and not otherwise, to take cognizance of and judicially to proceed in Prize matters as therein indicated. The Warrant is accompanied by a copy of Her Majesty's Letters Patent authorising the issue of such Warrants by the Admiralty and a copy of the form of Proclamation to be issued by the Vice-Admiral as to War having broken out.

I have to request that the Warrant and a copy of the Letters Patent may be forwarded to the Chief Judicial Officer of the above mentioned Court.

The Lords Commissioners of the Admiralty have suggested Halifax and Victoria, B.C., as places within the jurisdiction of the Court at which it would be convenient for Prize Courts to sit.

Their Lordships have also suggested that the Court may be recommended to appoint its bailiffs or other suitable officers to the posts of Marshals of the Prize Courts in cases where no such officers already exist.

I have the honour to be, sir,

Your most obedient humble servant,

J. CHAMBERLAIN.

The Officer Administering
The Government of Canada.

(L.S.)

BY THE COMMISSIONERS for executing the Office of Lord High Admiral of the United Kingdom of Great Britain and Ireland, &c.

HER MAJESTY having been pleased by Her Commission under the Great Seal of the United Kingdom of Great Britain and Ireland bearing date at Westminster

the tenth day of July in the sixty-third year of Her reign to authorize us to the effect following as by such Commission (a copy of which Commission is hereto annexed) doth more at large appear. These are in Her Majesty's name and ours to will and require the Exchequer Court of Canada and you the Judge of the said Court and all others the Judges or Judge for the time being of the said Court or other the persons or person executing the duty of the office of Judge of the said Court for the time being and you are hereby authorized and required from time to time upon any proclamation being made by the Vice-Admiral for the time being of Canada that War has broken out between Her Majesty and any Foreign State and not otherwise to take cognizance of and judicially to proceed upon all and all manner of Captures, Recaptures, Seizures, Prizes and reprisals of all Ships, Vessels and Goods which shall on the outbreak of any such War have been already seized and taken, and which shall thereafter be seized and taken and which are or shall be brought within the limits of the said Court and all other matters of prize falling within the jurisdiction of the said Court, and to hear and determine the same according to the course of Admiralty and the law of Nations and the Statutes, Rules and Regulations in that behalf for the time being in force to adjudge and condemn all such Ships, Vessels and Goods as shall belong to the Foreign State named in such Proclamation, or to the Subjects of such State or to any others inhabiting within any of the Countries, Territories or Dominions of the same, or which are otherwise condemnable as Prize and which shall be brought before the said Exchequer Court of Canada for adjudication and condemnation. And for doing the acts hereinbefore mentioned this shall be your Warrant until the same is withdrawn or revoked.

Given under our hands and the Seal of the Office of Admiralty this seventeenth day of August one thousand eight hundred and ninety-nine.

(Sgd.) WALTER T. KERR.
(Sgd.) A. W. MOORE.

To The Judge of the Exchequer Court of Canada and all others the Judges or Judge for the time being of the said Court or the persons or person duly executing the duties of the Office of Judge of the said Court for the time being.

By command of their Lordships.

(Sgd.) H. J. VAN SITTART NEALE.

VICTORIA by the Grace of God of the United Kingdom of Great Britain and Ireland Queen Defender of the Faith Empress of India.

To Our right trusty and well beloved Councillor George Joachim Goschen, Our trusty and well beloved Sir Frederick William Richards, Knight Grand Cross of Our Most Honourable Order of the Bath, Admiral of Our Fleet, Sir Walter Talbot Kerr, commonly called Lord Walter Talbot Kerr, Knight Commander of Our Most Honourable Order of the Bath, Vice-Admiral in Our Navy, Arthur Knyvet Wilson, Esquire, Companion of Our Most Honourable Order of the Bath, Victoria Cross, Rear Admiral in Our Navy, Arthur William Moore, Esquire, Companion of Our Most Honourable Order of the Bath, Companion of Our Most Distinguished Order of Saint Michael and Saint George, Rear Admiral in Our Navy, and Joseph Austen Chamberlain, Esquire, Our Commissioners for executing the Office of Lord High Admiral of

Our United Kingdom of Great Britain and Ireland and the Dominions thereunto belonging and to Our Commissioners for executing that office for the time being,—GREETING.

Whereas it is expedient that upon the outbreak of War between us and any Foreign State there shall be found or forthwith constituted throughout Our Dominions Possessions and Colonies Prize Courts duly commissioned to take cognizance of captures recaptures seizures prizes and reprisals of ships, vessels and goods to which Prize Courts Our Fleets and Ships may bring to judgment all ships, vessels, and goods seized by them. These are, therefore, to authorize and We do hereby authorize and enjoin you Our said Commissioners now and for the time being or any two or more of you by Warrant from time to time notwithstanding the existence of Peace to will and require any such Courts or persons as follows, that is to say Vice Admiralty Courts which shall be duly commissioned within Our Dominions Possessions or Colonies (other than Our United Kingdom of Great Britain and Ireland) and Courts of Law or Persons being Colonial Courts of Admiralty within the meaning of The Colonial Courts of Admiralty Act 1890 as you Our said Commissioners now and for the time being, or any two or more of you shall select upon proclamation being made in that part of our Dominions Possessions or Colonies within which such Court or person has jurisdiction in Admiralty by Our Vice Admiral thereof that War has broken out between Us and some Foreign State or States and not otherwise to take cognizance of and judicially to proceed upon all and all manner of captures recaptures seizures prizes reprisals of all ships vessels and goods then already seized and taken and which thereafter

shall be seized and taken and all other matters of prize falling within the jurisdiction of Prize Courts and to hear and determine the same and according to the course of Admiralty and the Law of Nations and the Statutes Rules and Regulations in that behalf for the time being in force to adjudge and condemn all such ships vessels and goods as shall belong to the State or States named in the Proclamation aforesaid or to the subjects of such State or States or to any other persons inhabiting within any of the Countries territories or dominions of such State or States or be otherwise condemnable as Prize and such Courts or Persons are hereby authorised and required to proceed accordingly. And we do hereby further authorize you Our said Commissioners now and for the time being and any two or more of you by Warrant to revoke or alter any Warrant which shall have been issued granted or made by you or any two or more of you as aforesaid. In witness whereof we have caused these Our Letters to be made patent. Witness ourselves at Westminster. the tenth day of July in the sixty-third year of Our reign.

By warrant under the Queen's sign manual.

MUIR MACKENZIE.

I

(Governor and) Vice Admiral of

being satisfied thereof by information received by me do hereby proclaim that War has broken out between Her Majesty and

INDEX – DIGEST.

INDEX.