REPORTS

OF THE

EXCHEQUER COURT

OF

CANADA

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JUDGES

OF THE

Exchequer Court of Canada

During the period of these Reports:

THE HONOURABLE SIR WALTER G. P. CASSELS.

Appointed 2nd March, 1908.

THE HONOURABLE LOUIS ARTHUR AUDETTE.
Appointed 4th April, 1912.

LOCAL JUDGES IN ADMIRALTY OF THE EXCHEQUER COURT OF CANADA

The Honourable Sir A. B. Routhier	. .	Quebec District.
do. F. S. Maclennan	. .	do. do.
do. F. E. Hodgins	. . .	Toronto do.
do. Arthur Drysdale	. .	N.S. do.
do. J. D. Hazen, C.J.	. .	N.B. do.
do. W. S. Stewart	. .	P.E.I do.
do. Archer Martin	. . .	B.C. do.
do. Charles D. Macaulay	.	Yukon Territory District

ATTORNEY-GENERAL FOR THE DOMINION OF CANADA

The Honourable Charles Joseph Doherty, K.C.

SOLICITOR-GENERAL FOR THE DOMINION OF CANADA

The Honourable Hugh Guthrie, K.C.

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OF THE

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EXCHEQUER COURT OF CANADA.

IN THE MATTER OF THE PETITION OF RIGHT OF

1916
April 17

DAME MARIE LOUISE RAYMOND,
and Others ... ... SUPPLIANTS;

AND

HIS MAJESTY THE KING .. .. .. RESPONDENT.

Expropriation—Water-lot—Compensation—Basis of assessment—Actual and potential value—Permission to make erections beyond low-water mark not sought before expropriation—Effect of—"Special adaptability"—Allowance for compulsory taking.

Where property is taken by the Crown for a proposed public work, in assessing compensation to the owner, it is not proper to treat the value to the owner both of the land, and rights incidental thereto, as a proportional part of the value of the proposed work or undertaking when realized; but the proper basis for compensation is the amount for which such land and rights could have been sold had there been no scheme in existence for the work or undertaking. On the other hand, regard must be had to the adaptability of the property for such a use and the possibilities of the same being realized.

Cunard v. The King, 43 S.C.R. 99; *Lacoste v. Cedars Rapids Company* (1914) A.C. 569; *Lucas v. Chesterfield Gas and Water Board* (1909) 1K.B., 16; and *The King v. Wilson* 15 Ex. C.R. 282, referred to.

2. Where water-side property is expropriated by the Crown before the owner has asked for or obtained statutory permission to build wharves or other erections upon the *solum* beyond low-water mark, in the absence of evidence to show that the possibility of obtaining such permission had increased the value of the property in the market, such possibility ought not to be taken into consideration in assessing the compensation.

The King v. Gillespie, 12 Ex. C.R. 406; and *The King v. Bradburn*, 14 Ex. C.R. 437.

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3. "Special adaptability" as used in expropriation cases does not denote something detached or separable from the value of the land in the market, but on the contrary signifies something that enters into and forms part of the actual market value.

Sidney v. North Eastern Railway Co. (1914) 3 K.B., 629 applied.

4. In letters-patent for a water-lot in the River St. Lawrence, granted by the Crown in the right of the Province of Canada in the year 1848, the Crown reserved the right to resume at any time possession of the property upon paying to the grantee the value of any improvements and erections thereon. The right so reserved was never exercised before Confederation.

Held, that the right so reserved was indivisible, and could only be exercised in respect of the whole of the land mentioned in the grant and not a part thereof.

Quaere: Whether the right to resume possession enures now to the Dominion Crown, or to the Crown in the right of the Province of Quebec.

Samson v. The Queen, 2 Ex. C.R. 30 referred to.

5. The allowance of 10% upon the market value in view of the compulsory taking of property ought not to be made when the property was acquired with the open purpose of speculating on the chances of the property being expropriated.

EDITOR'S NOTE: See commentary on the *10%* allowance for compulsory taking in the annotated case of *The King v. Courtney*, 27 D.L.R. 247; also *Re Watson and City of Toronto* (1916) 11 O.W.N. 111.

PETITION OF RIGHT to recover the alleged value of certain land or part of a beach-lot, at Lauzon, P.Q., expropriated by the Crown for a public work.

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

The case was heard at Quebec on March 9th, 10th, 11th and 13th, 1916.

E. Belleau, K.C. and *N. Belleau* for the suppliants; *G. G. Stuart*, K.C. for the respondent.

AUDETTE J. now (17th April, 1916) delivered judgment.

This petitition of right is brought to recover the sum of $390,000.00, as representing the alleged value of certain land or part of a beach-lot, expropriated by the Crown, and the damages resulting from such expropriation.

The Crown, acting under the provisions of *The Expropriation Act*, expropriated at Lauzon, P.Q., part of a certain beach lot, belonging to the suppliants, for the purposes of a graving dock, a public work of Canada, by depositing, both on the 15th January, 1913, and the 16th July, 1913, plans and descriptions of the said lands, in the office of the Registrar of Deeds for the County of Levis, P.Q., where the same are situate.

It is admited and agreed upon by both parties that under the plan and description deposited on the 15th January, 1913, the area expropriated is 272,000 feet and under the plan and description deposited on the 16th July, 1913, the further area expropriated is..... 317,000 "

making in all..... 589,000 feet which is the whole area admitted to have been expropriated by the Crown from the suppliant's property.

The Crown, by the statement of defence, avers *inter alia*, that the land, taken herein under the Expropriation Act, was originally granted by His Majesty The King's letters-patent, in favour of one Duncan Patton, whose successors in title the suppliants purport to be, and that the grant made under the said Letters-Patent, which bear date the 9th February, 1848, and are filed herein as Exhibit "D," is so made subject to the following proviso, viz.:—

"Provided further and we do hereby expressly "reserve to us our heirs and successors full power, "right and authority upon giving twelve months' "previous notice to our said grantee—his heirs and "assigns in possession of the said lot or piece of "ground, beach and premises to resume, for public

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"improvements, the possession of the said lot or "piece of ground and premises on payment to him "or them of a reasonable indemnity in that behalf "for the ameliorations and improvements which "may have been made on the said lot or piece of "ground, beach and premises, to be ascertained and "determined by experts to be nominated and "appointed by our governor of our said Province "for the time being and our said grantee respect-"ively in default of an offer of the fair value of "the same being accepted."

The Crown further alleges in its statement in defence, —and it is admitted by both parties in the course of the trial,—that there are no ameliorations or improvements upon the said land so expropriated, and the respondent therefore concludes its plea by contending that the suppliants are not entitled to any compensation in respect of the value of the lands so expropriated.

At the trial, counsel for the Crown stated that no notice had been given as provided by the terms of the above recited proviso. Therefore it must be taken that the Crown, in the present issues, proceeded under the provisions of *The Expropriation Act*, with respect to the taking of the suppliants' land.

Having disposed of the question that the present case must be treated as one coming within the ambit of *The Expropriation Act*, it is perhaps well to offer a passing remark upon the question raised at trial as to whether or not the power to exercise the rights under the proviso of the Grant is in the Crown, as representing the Provincial Government or in the Crown as representing the Federal Government.

The Crown grant in question was given in 1848, that is by the old Province of Canada. And in view

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of the possibility of the right of redemption upon notice, as above mentioned, being in the Province of Quebec, notice of trial was given by the suppliants to the Attorney-General for the Province of Quebec, and to the Minister of Crown Lands for the said Province,—and a copy of the pleadings served upon them, as will more clearly appear by reference to Exhibit No. 1. Nothing came out of this, and the trial went on without anyone appearing on behalf of the Province of Quebec. In the case of *Samson v. The Queen* (1), it was held, upon a similar Grant before Confederation on the south shore of the Harbour of Quebec, that the property being situated in a public harbour, the power of resuming possession for the purpose of public improvement, would be exercisable by the Crown, as represented by the Government of Canada.

However, in the view I take of this case it becomes unnecessary to decide the question.

The parties in a case instituted by Petition of Right stand in a different position from those in a case instituted by Information under *The Expropriation Act*, where by sec. 26 thereof, it is enacted that such information shall set forth "the persons who, at the "date of the expropriation, had any estate or interest "in such land or property and the particulars of any "charge, lien or incumbrance to which the same "was subject."

In a case instituted by Petition of Right it would seem the suppliant is entitled to have his own right and interest adjusted without calling in any other parties who may have any right in the same property.

The suppliants, by their answer in writing, to the Crown's statement in defence, have raised a formidable

(1) 2 Ex. C.R. 30.

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array of questions of law, such as the following, viz:—

1st. That the registration of the said Crown grant has not been renewed since the coming into force of the Cadastre in 1877:—See, however, Art. 2084, C.C.

2nd. That the right of redemption invoked by the Crown has been long prescribed.

3rd. That the suppliants are the owners of the land in question under a Sheriff's title, which has liberated the land of all charges or real right which might originally affect it.

4th. That the Government of the Province of Quebec is alone possessed of the right of the old Province of Canada, and that the Government of the Dominion of Canada has no right whatsoever under the said grant.

5th. That the said lands in question are outside the Harbour of Quebec, and that the Crown has renounced the right it is now setting up.

While some of these contentions set forth by the suppliants are full of interest, it has obviously become unnecessary to decide any of them because of the view I take of the case.

Indeed, this right of redemption under the provisions of the grant, if at all exercisable, can only be exercised for the whole of the land mentioned in the grant, and not for only a part thereof. It is a right which is indivisible although the object of the right is physically subject to a division, yet from the character given to it by the grant, the object becomes insusceptible not only of performance in parts, but also of division. (1) It is a right which might be exercised with respect to the whole property, but not in part, and it cannot be invoked in this case when only about one-quarter of the property is expropriated. If there were wharves

(1) Art. 1124 C. C. P. Q.

and buildings on certain parts of the property, could it be contended that the proviso in the grant would give the right to redeem only such part upon which there would be no amelioration or improvements,— destroying thereby the value of the parts improved? The terms and conditions of this power may very well be compared and assimulated to the *Droit de réméré*, right of redemption, provided for by the C.C.P.Q., wherein *inter alia* by Art. 1558 the redemption may be exacted for the whole and denied for part only.

Therefore, for the purposes of this case, it is sufficient to find that the Crown proceeded under *The Expropriation Act*,—that it did not give the notice provided by the grant, and had it given such notice the rights thereunder are not divisible and could only be exercised for the whole property.

The whole property contains an area of 2,148,600 sq. feet, of which the Crown expropriated 589,000 sq. feet, and the suppliants are entitled to the value thereof at the date of the expropriation, that value, however, is to be determined with reference to the nature of the title as decided in the case of *Samson v. The Queen* (1).

On the question of value, the following witnesses were heard on behalf of the suppliants:

Witness *A. Gobeil* values the land taken at 40 cents a square foot. In that price he reckons 30 cents for the land taken and 10 cents for damages to the balance of the property, because more land is taken on the front than at the back. He bases his valuation upon the capabilities of the land to be used for a graving dock, wharves, marine railway and ship-building. He would value the whole of the suppliants' property at 25 cents a sq. foot, adding that his whole theory

(1) 2 Ex. C.R. 30.

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is based upon the fact that the graving dock could not be built anywhere else.

Witness *E. A. Evans,* values the land taken at 50 cents a square foot, or 40 cents a square foot for the whole lot, but taking only part values it at 50 cents.

Witness *Auger,* who being ill at the date of the trial, was examined at his residence, before the Acting Registrar, testified that the destination of the suppliants' property was to be used for graving dock, ship-building, or industries of that kind and placed a value upon it at between 40 to 50 cents. per square foot, including damages, these being approximative figures, he says. He also says he was called by the engineers who had something to do with the selection of the site of this dock and advised that it should not be at right angles with the river, as the old dock,—but that it should have a diagonal to the *east* or the *west.*

This diagonal, it will be seen by referring to the plan, was given to the east;—had it been given to the west, it would seem no part of the suppliants' property would have been necessary for the building of the new dock.

Witness *Charland,* taking into consideration the adaptability of this property for ship-building and dry dock, values it at 40 cents a square foot, including damages; adding, it is not a disadvantage to have the dry dock on the suppliants' property with respect to the balance of the property. The Dry Dock is an advantage for ship-building.

Witness *Ernest Roy* places a value of 35 cents to 40 cents a square foot for the piece taken.

On behalf of the Crown, witness *Ogilvie* testifies he offered to the Crown the Davie property right adjoin-

ing the dock at two cents a square foot, for the purposes of this graving dock.

Witness *Couture* values the land taken at 1½ cents. per square foot, and adds that the result of the expropriation is to enhance the value of the balance of the property by the prospective improvements which will be realized by the operation of the dry dock.

Witness *Giroux*, taking into consideration the advantage or *plus value* given to the balance of the suppliants' property by the graving dock, and the sales in the neighbourhood, values the land taken at 1 to 1½ cents a square foot—adding that 1½ cents. would be the maximum.

Witness *Shanks*, basing his valuation upon the Kennedy sale of the adjoining property at two cents per square foot, with wharves and buildings, values the land expropriated at 1½ cents a square foot.

Witness *Davie* contends that before the date of expropriation, the suppliants' property had no commercial value.

Now, the land expropriated herein is part of a water lot lying exclusively between high and low water marks, at Lauzon, on the south shore of the River St. Lawrence, on the Levis side of the Harbour of Quebec, and is almost facing the Montmorency Falls. As already stated, 589,000 sq. feet are taken from a total area of 2,148,600 sq. feet, and which originally came out of the hands of the Crown under the Letters Patent of 1848. The lot is of irregular shape and depth, as may be ascertained by reference to plan, Exhibit E, referred to in the said Letters Patent.

This property must be assessed, as at the date of the expropriation, at its market value in respect

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of the best uses to which it can be put, taking in consideration any prospective capabilities or value it may obtain within a reasonably near future, subject, however, to the title, power and franchise possessed by the suppliants.

Great stress is laid on behalf of the suppliants, upon the assumption of the exclusive adaptability of their land for the purposes of the public work in question, namely the present graving dock. It is, however, now clearly settled that in assessing the compensation for property taken under compulsory powers, that it is not proper to treat the value to the owners of the land and rights as a proportional part of the value of the realized undertaking proposed to be carried out; but the proper basis for compensation is the amount for which such land and rights could have been sold, had the present scheme carried on by the Crown not been in existence,—but with the possibility that the Crown or some company or person might obtain those powers. *Cunard v. The King* (1); *Lucas v. Chesterfield, etc.* (2); *Lacoste v. The Cedars Rapids Co.* (3); and *The King v. Wilson* (4).

Now this assumption that the suppliants' land to the exclusion of all other lands at Lauzon, is alone adaptable for this public work is not supported by the evidence. Witness *Valiquette*, a civil engineer of great experience and in the employ of the Government for a number of years, who has been, during ten years, superintendent of the old dry dock at Lauzon, and whose business, since 1900, is in connection with all the dry docks in Canada, says he prepared some few years ago a plan filed as Exhibit "K," in connection with a tender to build a dry dock, at Levis, by the St. Lawrence Dry Dock and Ship Building Co., and

(1) 43 S. C. R. 99
(2) 1909, 1 K. B. 16.
(3) 1914, A. C. 569.
(4) 15 Ex. C. R. 283.

that under that plan the whole of the dock was to be built outside the suppliants' property. The construction of the present graving dock has been somewhat changed, in that it was placed in another direction as referred to in Auger's evidence. This contention of the suppliants in respect of exclusive adaptability, may well be bracketed with that class of evidence on record, that the Harbour Commissioners' property, known as the Kennedy property, could not be used for any other purposes than those for which it has been bought by the Commissioners—and that is you could not there build a marine railway, or establish a ship-yard, etc., notwithstanding that the contrary is clearly testified to by two engineers, Evans and Laflamme, one heard on behalf of the suppliants and the other on behalf of the Crown. Mr. Evans says that the suppliants' property for ship building, is just as suitable, just as advantageous as other places; but for dry dock purposes, the most advantageous. This witness further adds that there is more space between the long wharf, on the Kennedy property, and the suppliants' property than the size of the suppliants' property, and that the long wharf on the Kennedy property serves as a protection to the Kennedy property, and even to a certain extent to the suppliants' property. All of this part of the evidence is mentioned in connection with the extraordinary contention by some witness that the Kennedy property which is adjoining and which has been sold recently at two cents a sq. foot, with wharves thereon erected, is not to be compared to the property in question, because you could not build ships, marine slips, etc., thereon. The topography of the two properties is practically identical,—they are both open beach lots. Witness engineer *Laflamme* states

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also that a ship-yard for the purpose of building ships could have been established equally well on the Kennedy property as on the suppliant's property. We have also in evidence that there was competition in the selection of Lauzon for the building of the graving dock. Such sites as Beauport, Wolfe's Cove, Lampson's Cove and the Island of Orleans; but Lauzon was preferred and duly selected.

The suppliants under the patent of 1848, had the right to erect wharves upon the land so granted,—that is between high and low water; but for the purposes of the graving dock—and the same may be said with respect to wharves, marine slips and ship-yard—that right to extend beyond low water mark was absolutely necessary. The present dry dock has two guide piers, one of them extending 600 feet out from low water mark, and the river has to be dredged for a long distance from low water mark to a depth of 30 feet. For all of this the suppliants had no title and no franchise. They have no franchise to build or put erections of any kind beyond low water mark, and that right, the property being in a public harbour, can only be obtained from the Federal Crown under the provisions of Ch. 115 of the Revised Statutes of Canada, 1906, as amended by 9-10 Ed. VII. Ch. 44. Also the fee in the bed of the river would have to be acquired. And as witness *Gobeil* put it,—a beach or foreshore would have very little value if it cannot be used for the purposes of building wharves, docks and marine railways, it is useful but for that purpose. In *Lucas v. Chesterfield Gas and Water Board* (1) and other cases in which the question of special adaptability is invoked to give the property an enhanced value, there was a complete title vested in the owners of the

(1) (1909) 1 K.B. 16.

lands expropriated which enabled the promoters to construct the works without obtaining any other or further title or franchise. In *Gillespie v. The King*, (1), confirmed on appeal to the Supreme Court of Canada, the defendant was owner on a harbour of a piece of land which was a natural site for a wharf. The Crown expropriated his land and erected a wharf thereon, and the Court in assessing the compensation, declined to entertain the view of the possibility, by the defendant, of obtaining the right to erect a wharf thereon as an element of compensation. See also *The King v. Bradburn* (2).

In the case of *The Central Pacific Railway Co., of California v. Pearson* (3) where the defendant was owner of land with riparian rights and suitable for wharf purposes, and where it was claimed that the compensation should be allowed on the basis that a wharf franchise might be given to the owner of the land, the Court at p. 262, states the law as follows:—

"The testimony in relation to the value of wharf "privileges on the shore of the Sacramento River, "where the tide ebbs and flows, given for the purpose "of enhancing the value of some of the land sought "to be appropriated, was improperly received for the "obvious reason that the party *claiming the compen-* "*sation had no wharf franchise.* The mere fact that "the party might at some future time obtain from "the State a grant of a wharf franchise if allowed "to remain the owner of the land, is altogether too "remote and speculative to be taken into consider- "ation. The question for the Commissioners to "ascertain and settle was the present value of the "land in its condition and not what it would be

(1) 12 Ex. C.R. 406.
(2) 14 Ex. C.R. 437.
(3) 35 Cal. 247.

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"worth if something more should be annexed to it "at some future time."

And as stated in *Corrie v. MacDermott* (1) by Lord Dunedin, "The law of compensation being as they "have stated, namely, the value to him as he holds." See also *Benton v. Brookline* (2) and *May v. Boston* (3).

There is also the case of *Lynch v. The City of Glasgow* (4), where it was decided that the hope of obtaining the renewal of a lease should not be taken into consideration in assessing compensation in expropriation proceedings.

See also *Cunard v. The King* (5) and *Wood v. Esson* (6), two well known cases bearing upon the same point.

Therefore in the present case there was no obligation on the part of the Crown to grant the suppliants the right or franchise to build wharves or put other erections beyond the line of low water mark, and it is not even rational to expect that the Crown would have granted such franchise in view of the fact that the construction of this new graving dock was mooted, as witness *Gobeil* said, as far back as between 1900 and 1905. The suppliants had no legal right to such franchise and nothing but a legal right could form an element of compensation. The suppliants had not that right at the date of the expropriation, and it is as the property stood on that date that it is to be valued.

The element of "special adaptability" has been pressed and argued at considerable length, and upon

(1) (1914) A. C. 1065.
(2) 151 Mass. 250.
(3) 158 Mass. 21.
(4) (1903) 5 C. of Sess. Cas. 1174.
(5) 12 Ex. C. R. 414,—43 S.C.R. 88.
(6) 9 S.C.R. 239.

this question, in addition to that which has already been said, it must be admitted that the compensation which should be awarded is in no sense more than the price that the legitimate competition of purchasers would reasonably force it up to. *Sidney v. North E. Ry.* (1). This element of special adaptability is after all, nothing but an element in the general value, and as such it is admissible as the true market value to the owner and not merely value to the taker. This element of special adaptability existed and formed part of the price paid by the owners, both at the time of the Sheriff's sale and at the date of the execution of the Leclerc conveyance, because at those dates the property had hardly any other value than its prospective potentiality in its adaptability for such purposes as mentioned above.

In the case of *Sidney v. North Eastern Railway* a very instructive discussion on this question of special adaptability will be found. In that case, at page 637, Rowlatt, J. says:—

"Now, if and so long as there are several com-
"petitors, including the actual taker who may
"be regarded as possibly in the market for purposes
"such as those of the scheme, the possibility of
"their offering for the land is an element of value
"in no respect differing from that afforded by the
"possibility of offers for it for other purposes. As
"such it is admissible as truly market value to the
"owner and not merely value to the taker. But
"when the price is reached at which all other com-
"petition must be taken to fail, to what can any
"further value be attributed? The point has been
"reached when the owner is offered more than the
"land is worth to him for his own purposes and

(1) (1914) 3 K.B. 641.

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"all that any one else would offer him except one "person, the promoter, who is now, though he "was not before, freed from competition. Apart "from compulsory powers the owner need not sell "to that one and that one would need to make "higher and yet higher offers. In respect of what "would he make them ? There can be only one "answer—in respect to the value to him for his "scheme. And he is only driven to make such "offers because of the unwillingness of the owner "to sell without obtaining for himself a share in "that value. Nothing representing this can be "allowed."

And at page 576 of the *Cedars Rapids Case* (1) Lord Dunedin lays down the following rule for guidance upon the subject of special adaptabilities in the following language:

"For the present purpose it may be sufficient "to state two brief propositions:—(1) The value "to be paid for is the value to the owner as it "existed at the date of the taking, not the value "to the taker. (2) The value to the owner consists "in all advantages which the land possesses, present "or future, but it is the present value alone of such "advantages that falls to be determined.

"Where, therefore, the element of value over "and above the bare value of the ground itself "(commonly spoken of as the agricultural value) "consists in adaptability for a certain undertaking "(though adaptability as pointed out by Fletcher "Moulton, L. J., in the case cited, is really rather "an unfortunate expression), the value is not a "proportional part of the assumed value of the "whole undertaking, but is merely the price,

(1) (1914) A. C. 569.

"enhanced above the bare value of the ground "which possible intended undertakers would give. "That price must be tested by the imaginary "market which would have ruled had the land been "exposed for sale before any undertakers had "secured the powers, or acquired the other subjects "which made the undertaking as a whole a realized "possibility."

Indeed in the present case the lands expropriated would be of very little value but for this prospective potentiality, residing in its special adaptability. While this property in the days of wooden ships, and when the timber trade was flourishing at its best in Quebec, commanded perhaps a high price and was worth a good deal of money for the purposes of such trade, but when the latter disappeared, the value of that property went down to almost nothing and there was no market for it.

It appears from the evidence that this property was unoccupied and not used for between 25 to 27 years prior to the beginning of the building of this graving dock. The property had been lying idle for a number of years when it was bought, by some of the suppliants, on the 18th May, 1900, for the sum of $800, and it has never yielded any revenue of any kind ever since. On the 5th April, 1907, Mrs. Belleau deeded to Moise Leclerc one undivided half of the property,—the evidence establishing that Leclerc was actually one of the purchasers at the Sheriff's sale and that this conveyance of 1907 was only to give him title to his undivided half.

Then on the 3rd December, 1912, barely a month before the date of the expropriation, Leclerc sells his undivided half-interest in the whole of the suppliants' property, composed of 2,148,600 square feet

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for the sum of $30,000, to four of the above named suppliants. The conveyance recites that out of the $30,000.00, the sum of $15,000.00 is paid in cash, and that the balance will be paid to the vendor as soon as the said land, or part thereof, will have *been sold or expropriated for private or public purposes.* In the meantime the said purchasers are to pay interest on the said balance, unless they prefer liberating themselves of their debt before the said sale, either by paying this balance, or by surrendering to the vendor the land so purchased; but in so surrendering they will be barred from recovering the amount already paid on account which will be forfeited to the profit of the vendor and which will be considered as the rent of the said property. The sale of the 3rd December, 1912, is made at the rate of $0.027, that is two cents and seven-tenths of a cent, if one takes into consideration that the whole property is of an area of 2,148,600 feet, and that the sale of half of it, at $30,000, under the easy conditions above mentioned, would represent that amount for the half.

To this sale reference will be hereafter made when dealing with the compensation monies, which should be paid the suppliants, as it is indeed the best illustration of the market value of these lands in December, 1912 when the purchase was made by one not pressed to buy and not at a forced sale. There is further, no evidence to show the market value of the property could and would be different on the 3rd December, 1912, from the 15th January, 1913, the date of the expropriation.

On the 27th March, 1913, after the expropriation of part of the lands in question, in this case, the property adjoining to the east of the suppliants' beach lot, was sold at two cents a foot, and upon

it is a wharf of 1,500 feet long; containing 94,000 cubic yards, three small piers, shed office and a forge etc., coupled by the statement of the chief engineer of the Quebec Harbour Commission, that after purchasing the Commissioners erected a mill and tracks on the wharf, without having to make repairs to it. Adding that the wharf was in good condition at the time of the purchase and had been in use by the vendors up to the date of the sale. Deed filed as Exhibit "A."

We have, further, the offer by the Davie Company to the Government of some of their land, at two cents a foot, at Lauzon, adjoining the dock, for the purposes of the present public work.

We have also upon this question of sale of property in the neighbourhood, the purchase on the 25th January, 1916, for $4,685 of 1,413,284 sq. feet, forming what has been called the Glenbury Cove and the St. Lawrence Cove. This property was resold on the 24th February, 1916, for $7,565, taking care of a mortgage of $5,500. It is, however, well to mention that these two coves, situated at some little distance west of the suppliants' property, are not as desirable properties as that of the suppliants, the railway severing their hilly part from their shallow shore. While these two coves may be considered of the same class of property because they are beach lots, their respective value is not the same and the great balance of advantage is in favour of the suppliants' land.

By reference to exhibit "H," it will be found the whole of suppliants' property at Lauzon was assessed in 1912, at $2,000, and in 1913, the year of the expropriation, at $4,000.

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Under the provisions of sec. 50 of *The Expropriation Act*, the Court in determining the amount of compensation must take into account and consideration, by way of set-off, any advantage or benefit, special or general, accrued or likely to accrue by the construction and operation of the public work, to such person in respect of any land held by him with the lands so taken.

There can be no doubt whatsoever, notwithstanding some isolated contention to the contrary found in the evidence,—and I so find without any hesitation,—that the balance of the property now remaining to the suppliants has been and will be greatly benefited by the present graving dock, and that in arriving at the proper compensation to be paid them, such advantage and benefit must be taken into consideration by way of set off.

In this case, as is customary in most all expropriation cases, there exists a great conflict between the evidence adduced on behalf of the suppliants and the evidence adduced on behalf of the respondent. What can help us out of this difficulty, what can reconcile the testimony of witnesses who are so far apart, if not sales of property in the neighbourhood? Is not, indeed, the amount at which owners of neighbouring property selling and buying *de gré à gré*, the best evidence of the market value of lands in that locality? Because, after all, the market value of property is as defined in *The King v. Macpherson* (1):—"The "value that a vendor not compelled to sell, not selling "under pressure, but desirous of selling, is to get from "a purchaser not bound to buy, but willing to buy."

We have the advantage in this case, as a determining element to be guided by, not only sales in the neigh-

(1) 15 Ex. C. R. 216.

bourhood, but the sale of half of the undivided interest in the very property expropriated, barely a month before the expropriation. The prices paid under these circumstances afford the best test and the safest starting point for the present inquiry into the market value of the present property. The best method of ascertaining the market value of property is to test it by sales in the neighbourhood. *Dodge v. The King* (1); *Fitzpatrick v. The Town of New Liskeard* (2).

Moreover, the evidence of value arrived at based upon the sales of property in the neighbourhood is obviously more cogent than the opinion evidence built upon unwarranted optimism and sometimes amounting but to mere lip-service reaching the nadir of reasonableness.

Part only of this property has been expropriated and where part only of a property is sold or expropriated, a higher price should be paid than when the whole property is taken. Then by the present expropriation a larger part is taken on the river front than on the land side; that is the piece taken is of irregular shape with more taken of the more valuable part. These two elements must be thrown in the scale in fixing a fair compensation.

Taking into consideration all that has been above set forth, making fair allowance for the fact that part only is taken and also the manner in which the expropriation is made, together with the accrued advantage and benefit to the balance of the property accruing to the owners from the public work in question, I have come to the conclusion, for the reasons above mentioned, to allow as compensation not the bare market value but a liberal value of the lands

(1) 38 S.C.R. 149. (2) 13 Ont. W.R. 806.

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expropriated, which I fix at the sum of four cents a square foot—amounting to the sum of $23,560.00 the whole in satisfaction of the land expropriated and for all damages, if any, resulting from the expropriation.

This is a case where the customary 10% upon the compensation monies for compulsory taking should not be allowed. The original purchasers at the Sheriff's sale in 1900 never, up to the date of the expropriation, made any use of the property. They derived no revenue therefrom. They did not use it for themselves or for any purposes of development whatsoever. The other four parties who bought in 1912, did so buy at a speculative price, with the open and distinct object of speculating on an expropriation, as set forth in the deed of purchase itself. This Court must guard against fostering such speculation at the expense of the public and must discourage the same. While ten per cent. may be allowed the owner of premises where he, and sometimes his father, has lived upon the property for years, and is forced to sell, is dispossessed against his will in the interest of the public, and has to face the expense of moving, and should be recouped for certain contingent items,—the present case offers none of these elements, no such analogy and does not come within the class of cases where the 10% can be allowed. *The King v. Macpherson* (1); *Cripps on Compensation* (2); and *Brown & Allen on Compensation* (3).

Therefore, there will be judgment as follows: 1st. The lands expropriated herein are hereby declared vested in the Crown from the respective dates at which they have been expropriated, namely, the 15th January, and the 16th July, 1913.

(1) 15 Ex. C. R. 232. (2) 5th Ed. 111.
(3) 2nd Ed. 97.

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2nd. The compensation for the land and real property so expropriated, with all damages arising out or resulting from the expropriation, is hereby fixed at the sum of $23,560.00, with interest on the sum of $10,880.00, from the 15th January, 1913, to the date hereof, and on the sum of $12,680.00 from the 16th July, 1913, to the date hereof.

3rd. The suppliants are entitled to recover from and be paid by the respondent the said sum of $23,560.00 with interest thereon as above mentioned, upon giving to the Crown a good and sufficient title, free from all hypothecs, mortgages, charges, rents and incumbrances whatsoever, the whole in full satisfaction for the land taken and for all damages whatsoever resulting from the said expropriation.

4th. The suppliants are also entitled to their costs of the action.

Judgment accordingly

Solicitors for the suppliants:

Belleau, Baillargeon & Belleau.

Solicitors for the respondent:

Pentland, Stuart, Gravel & Thomson.

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HIS MAJESTY THE KING, ON THE INFORMATION OF THE ATTORNEY-GENERAL OF CANADA,

PLAINTIFF;

AND

THE CARSLAKE HOTEL COMPANY, LIMITED, AND GEORGE T. O. CARSLAKE,

DEFENDANTS.

Expropriation—"Quantity survey method" and intrinsic value—Compensation—Valuation—"Davies Rule"—Costs.

An appraisal of a building by the "quantity survey method, while it may disclose the intrinsic value of the property, does not necessarily establish its market value.

2. Intrinsic value is the value which does not depend upon any exterior or surrounding circumstances.

3. The "Davies Rule" of valuation ought not be applied in its narrowest sense, which destroys its practical use. There are two essentials preliminary to applying the rule: 1st. The basic value of a standard lot in the locality must be established beyond peradventure; 2ndly The conditions of the lot must be normal.

4. Where no tender or offer is made by the party expropriating, the compensation may carry interest and costs.

THIS is an Information exhibited by the Attorney-General of Canada, for the expropriation of certain lands for a post office building in the City of Montreal, P.Q.

The facts are stated in the reasons for judgment.

April 27th, 28th, 29th, 30th, 1915.

The case now came on for hearing before the Honourable Mr. Justice Audette at Montreal.

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Peers Davidson, K.C., and *L. H. Boyd*, K.C., for the plaintiff;

H. A. Montgomery, K.C., for the defendant.

AUDETTE, J. now (September 7th, 1915) delivered judgment.

This is an Information exhibited by the Attorney-General of Canada, whereby it appears, *inter alia*, that certain lands, belonging to the Defendant Company, were taken and expropriated, under the authority and provisions of *The Expropriation Act* (R.S.C. 1906, Ch. 143) for the purposes of a Post Office Building, in the City of Montreal, by depositing a plan and description of such property, on the 7th April, 1914, in the office of the Registrar of Deeds for Montreal West.

The defendant's title is admitted.

The Crown by the information tendered the sum of $325,532. However, at the opening of the trial, on the application of Counsel for the Attorney-General, the information was by leave amended by withdrawing this offer of $325,532. or any sum as compensation to the defendants, the Crown intimating its willingness to pay for the property in question such sum as the Court might determine to be sufficient and just. In the result the case is to be treated as if no offer or tender were made on behalf of the Crown, the whole matter being entirely left to the Court for determination.

The defendant, The Carslake Hotel Company, Limited, by its defence, claims it is alone entitled to recover the compensation for the lands taken—the other defendant, George T. O. Carslake, who—by a declaration filed of record submitted himself to justice —having assigned all his rights to the defendant company.

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The defendant Company by its defence further claims the sum of $712,330. as compensation for the property taken. However—in the course of the trial—it having been made clear that the $60,000. deed of December, 1910, covered part payment of the land and property in question, the defendant company withdrew, as part of their claim, the sum of $53,000. mentioned in their particulars filed on the 18th December, 1914. In this amount of $712,330.—as shown by the particulars—there is also a sum of $64,757. for a 10% allowance for forceable deprivation—and that 10% is taken on an amount including the $53,000. so withdrawn, as above mentioned. Therefore, the defendant Company's claim is as follows, viz.:

Lands taken, 20,394 sq. ft. at $25. per foot	$	509,850.00
Buildings, including fixtures		84,723.00
	$	594,573.00
Forceable deprivation		59,457.30
Their claim as amended then stands at the total sum of	$	654 ,030.30

Now this property must be assessed, as of the date of the expropriation, at its market value in respect of the best uses to which it can be put, namely, as a hotel-site—taking into consideration any prospective capabilities that the property may have for utilization in a reasonably near future.

On behalf of the owners, witness Dorsey following the Davies rule, placed a value upon the property at $535,000.; witness Ogilvie at $536,215. for the lands and buildings; and witness Findlay, for the first time using the Davies rule, at $438,723 for the land only. On behalf of the Crown witness Brown placed a value

at $219,000.; witness Ross at $240,000.; witness Ferns considers the assessed value at $160,000. to be the actual value of the property as between any one desiring to buy and one desiring to sell, but not the speculative value; and witness McBride values the whole property at $284,000.

On behalf of the proprietors there is also this additional evidence in respect of the value of the surrounding small shops and shacks, returning comparatively very high rents. Together with the evidence of witness Maxwell, who proceeding to value the building, inclusive of permanent fixtures, at $84,000. upon the replacement or intrinsic value without allowing any depreciation. This witness obviously proceeded on a wrong principle or basis.

Indeed, this replacement value, without taking any depreciation into consideration, is an appraisal of the building under what is called the "quantity survey method," which, while undoubtedly it may disclose the intrinsic value of the property, does not necessarily establish its market value. The intrinsic value is the value which does not depend upon any exterior or surrounding circumstances. It is the value embodied in the thing itself; the value attaching to the objects or things independently of any connection with anything else. For instance, had we to fix a proper compensation upon a discarded shipyard, formerly used in the building of wooden ships, we would be facing launch-ways, logs and piers of perhaps great intrinsic value; but, if the property were thrown upon the market for sale it would have, indeed, very little commercial or market value. *The King v. Manuel* (1)

A great deal has been said with respect to the "Davies Rule" for valuing a piece of property—a rule which was explained by witness Davies himself, the

(1) 15 Ex. C.R. p. 381.

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person who formulated it. The rule is based on the true fact, I must admit, that every square foot of a lot has a different value. This rule may be followed with advantage for a normal lot—a lot of an ordinary shape. Two necessary elements, or two paramount essential requirements must first be established to work out the rule in a satisfactory manner. (1) The basis value of a standard lot in that locality must first be established beyond peradventure or uncertainty. (2) It must be applied to a lot, the conditions of which are normal. That is to a lot with a certain defined frontage, the depth of which to be ascertained with common sense and ordinary business acumen. The fallacy of applying the rule to the valuation of the present property is that in doing so one would overlook the shape or natural conformation of the lots. While the property has a frontage of 63.11 feet on St. James Street, and 65.06 feet on Windsor Street—the corner lot between St. James and Windsor intervening between them—one cannot overlook on glancing at the plan, that the small Windsor Street lots of 56.3 in depth, on the northwest, upon which small shops and buildings are erected, were not full lots. That is when these 56.3 feet lots were sold, part of them only were required and the back part—or the yards of these 56.03 feet lots were not purchased—as not required for the small purpose for which they were acquired and that, in the result, all that piece of property, to the back of these lots, cannot, consistent with common sense—be tacked on and added to the St. James Street lot. That would be working the "Davies Rule" in the narrowest sense of which it can admit and thereby destroy its practical use. The fallacy of adding these back premises of the small 56.03 lots on Windsor Street to the St. James Street lot has been made

possible to induce some of the witnesses to use the "Davies Rule," from the fact that the St. James Street lot is situate one lot removed from the corner, and that very fallacy has obviously made the Davies rule unreliable in a case like the preesnt one. The Davies rule, like every other rule, is subject to the ever necessary good judgment, common sense and business acumen of an honest valuator, reckoning also with exceptions. It is like an ordinary syllogism, your premises must be true and sound, before you can draw your conclusion, before your conclusion can follow.

Much has been said in comparing the respective value of St. George's Church property with the Carslake Hotel. The former has a frontage of 329 feet on Windsor Street, 310 feet on Stanley Street, and 182 feet on Osborn Street, and was recently sold at $20 a foot—$1,180,000.

This property faces Windsor Station on one street, is surrounded by three streets giving it light and air, and it is situate in a good locality which caters to surroundings of a higher class. Besides the locality, the conformation or shape of the lots must be taken into consideration before arriving at a conclusion on the relative value of the two properties. The Carslake property has no corner. It has a frontage of 63.11 feet on St. James Street, and a frontage of 65.06 feet on Windsor Street, with the back premises of the properties adjoining to the north—that is a large wedge running in along these back premises. There is no comparison between the two properties, there is no similarity in both locality and shape and the St. George's Church property is most decidedly of greater value and very much more advantageous to build upon. The balance of the commercial advantage of the respective properties is also in favour of the

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St. George property. While the Carslake hotel is opposite the Bonaventure Station—the St. George is opposite the Windsor Station, without any street railway intervening between the station and the property, but with the advantage of the street railway on Windsor Street, and the neighbourhood of the Canadian Northern railway station within a very near future would also turn the scale in favour of the St. George property in that respect.

Without going into the details of the negotiations which preceded the sale of this property to witness Dorsey by defendant Carslake, it may be stated that in the result this property was, on the 1st December, 1910, sold for the sum of $150,000., this sum to cover the land, the buildings, the furniture, the good-will of the hotel business as a going concern, and the transfer of the license—subject to the proportional payment of its unexpired life. Of this amount of $150,000. the sum of $60,000. was paid in cash, but the purchaser had up to the 1st May, 1916, to pay the balance if he exercised his right to purchase under the deeds.

During the time this property was run as a hotel from the date of that sale, or from the beginning of 1911, to the delivery of possession under the expropriation proceedings, namely, during three years and ten months and a half, the returns of this property, valued in the light of great optimists, only apparently returned the net sum of $10,648.79. But this return is obtained without making any allowance for any interest on the sum of $60,000. part payment of the $150,000. under one of the deeds of the 1st December, 1910, fully explained in the evidence. In the result this hotel ever since its purchase by witness Dorsey was run at a loss. It would therefore not be quite fair to assess its value on a revenue basis.

Witness Dorsey states that the present building is too small for the size of the land and he caused to be prepared, for the purposes of this case, filed as Exhibits "O," plans of a large hotel which could be erected upon the whole area of the land taken, containing 400 or 480 rooms, at a cost of.....$ 1,485,000.00 represented as follows:

Land	535,000.00
Building	800,000.00
Furniture	150,000.00
	$ 1,485,000.00

Whether any business-man would venture in such a scheme and risk the sum of $1,485,000. in such an enterprise, with a building lighted by the 9 feet wells in question, giving also very unsatisfactory air, taking in consideration the returns of the former Carslake hotel, is a question beyond the sane comprehension of the ordinary person gifted with common sense.

The best answer to such a scheme is perhaps found in the evidence of witness Painter, who was chief architect for the Canadian Pacific Railway during 6 years, who has had experience in remodelling and readjusting hotels for the latter company. Speaking of these plans, exhibits "O," he says that they are apparently a set of preliminary studies and he does not think the question has been gone into to the bottom, and he does not consider them as final designs. From an investment standpoint it is an impossibility to erect a hotel according to these plans. A hotel, ten stories high with only 8 to 10 feet of a well for light and air, is inadequate where the adjoining property is built up to the same height—adding you must have enough air and light to make the place "*livable.*" He would not advise a client to build on these lines—he would not

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advise building more than four or five stories high, and would try and persuade him to buy the corner lot and make a real building out of it. The most he would advise would be to put up a medium price hotel, not more than $300,000. on the whole venture, with not more than 200 rooms.

There is also the question of the options given from time to time by the witness Dorsey. On the 19th October, 1911, he gave an option to one Tabatchnick at $15. a square foot, which on 20,394 square feet represented $305,910, with the additional sum of $10,000. for the contents of the hotel. Then there is the option to witness Brown on the 30th January, 1912, for $315,000. inclusive of contents of hotel, extending to the 30th April, 1912, but kept alive, as shown by the June telegram from witness Dorsey, and to September, 1912, by the latter's letter, and according to witness Brown kept alive up to the time the negotiations were started with the Government, and under which only one offer was made of $10. a foot by one Mr. Vannier and refused by Mr. Dorsey. Then witness Brown adds that witness Dorsey was always open to an offer, indicating he was willing to take a price less than that mentioned in the option—this left the matter an open question, although the so-called option or agreement was for a definite period. It is well to bear in mind that these two so-called options are given to real estate agents who were to deduct their commission from the purchase price—a commission of 2½% in the case of witness Brown is specified in the agreement, and it must be inferred that the other agent was not selling without any commission.

There is a material conflict in the evidence respecting the appreciation of the market fluctuations from 1910 or 1911, up to the time of the expropriation. Some

witnesses contend that while property in certain parts of Montreal, went up in value to a great extent, some contend the property within that period did not appreciate to any degree in the locality of the Carslake Hotel. Witness Ogilvie, heard on behalf of the owners testified that within that period or rather from December, 1910, to the beginning of 1913, when the boom was at its height in the business district of the Carslake, there was an increase of 50 to 100 per cent. If this view be accepted in favour of the defendants, taking the property at $150,000. on the 1st December, 1910, although that amount covered the furniture, good-will, license, etc., and allowing the average increase of seventy-five per cent on the purchase price, we will arrive at the sum of $262,500. To this amount should be added the usual ten per cent for compulsory taking, for, although it may be said that Mr. Dorsey was willing to dispose of the property, it was not sold to the Government but expropriated, and the question is one of compensation and not of price under a purchase. More especially should this ten per cent be added here, because the value of the good-will, an important factor in determining the compensation payable, is not susceptible upon the evidence of being moneyed out with precision, although its substantial character is beyond dispute. The allowance of this additional ten per cent. also covers any loss and all other expenses incidental to the closing down of a going concern.

I have had the advantage of viewing the premises in question accompanied by Councel for both parties, and I am of opinion that if the sum of $288,750, figured on that basis as a whole, *en bloc* is allowed, a fair, sufficient and very liberal compensation will have been paid to the proprietors, taking into further considera-

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tion the price at which properties in the neighbourhood were sold.

The sum of.....$ 175 ,000 .00
was paid on account of the expropriation on the 21st September, 1914, and the further sum of..... 45 ,000 .00
was also paid on the 3rd December, 1914, making the total sum of.....$ 220 ,000 .00
paid on account of the compensation.

The defendants gave up possession of the premises between the 15th and the 20th October, 1914, when the keys of the building were handed over to the Crown. The date will be fixed as of the 15th, since the profits were calculated for that year at 10½ months.

This is an expropriation matter wherein the Defendant's property has been compulsorily taken from them and where no tender or offer of any amount has been made as compensation therefor. In such a case the defendants are entitled to both costs and interest on the compensation money.

Therefore, there will be judgment as follows, viz.:

1st.—The lands and property expropriated herein are declared vested in the Crown from the 7th April, 1914, the date of the expropriation, including all such rights the Defendants had in the passage in common from Windsor Street, as shown on plan filed herein.

2nd.—The compensation is assessed at the sum of $288,750. with interest and costs.

3rd.—The defendant the Carslake Hotel Company, Limited, is entitled to be paid, upon giving to the Crown a good and sufficient title, free from all encumbrances and hypothecs, the balance of the said compensation, (it having already received the sum of $220,000. as above mentioned) namely:—

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The sum of $68,750. with interest thereon from the 15th October, 1914, to the date hereof, together with interest on the said sum of $45,000. from the 15th day of October, 1914, to the 3rd December, 1914, when the same was paid to the defendants.

4th.—The defendants are also entitled to their costs.

Judgment accordingly.

Solicitor for the plaintiff: *Leslie H. Boyd.*

Solicitors for the Carslake Hotel Co.: *Brown, Montgomery & McMichael.*

Solicitor for the defendant Geo. T. O. Carslake: *T. P. Butler.*

EDITOR'S NOTE :—Affirmed on appeal to the Supreme Court of Canada, June 13th 1916.

IN THE MATTER OF THE PETITION OF RIGHT OF

1915
Sept. 7.

BERTHA I. HILYARD AND AMELIA G. GROSVENOR,

SUPPLIANTS;

AND

HIS MAJESTY THE KING,

RESPONDENT.

Railway Bridge—Work for general advantage of Canada—Mortgage—Conveyance of lands affected thereby—Surplus land.

The F. & St. J. Bridge Company, operating a work for the general advantage of Canada, and to which the general Railway Act applies, obtained under a special Act a loan of $300,000 from the Crown, for which a mortgage was duly created under the provisions of the said Act. Subsequently the company, under the pretence of disposing of surplus land, sold some of the land so mortgaged to one of the directors of the company.

Held, that nothing passed under the said conveyance.

PETITION of Right to recover the value of land, together with the rent during the time the same is alleged to have been in possession of the Crown.

The facts are stated in the reasons for judgment.

The case was heard before the Honourable Mr. Justice Audette, at Fredericton, N.B., on the tenth day of June, 1915.

P. J. Hughes, for the suppliants.

R. B. Hanson, for the Crown.

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Argument of Counsel.

Mr. *Hanson* contended that with respect to lot "A," the Crown claims under the legislation, the mortgage and by possession. The main cause of action lays with respect to the lot of land upon which the station is situate, that is with respect to lot "A."

With respect to lot "B" the Crown is not in possession although it claims title, and asks for a declaration in respect of that lot.

In regard to lot "C," the Crown is not in possession and he did not think the Crown was in a position to lay claim to it.

With respect to lots "B" and "C," he would ask the Court to find for the Crown on the action as laid, that is to say, the Crown is not liable in damages.

He would ask the court to find in regard to the question of title in respect to lot "B"—the Crown owns the land and the suppliant is wrongfully in possession.

The first question involved in the action is to determine what lands are conveyed by the mortgage and thereby subject to its provisions? The broad question involved is whether or not the conveyances made subsequent to the execution of the mortgage from the Company to the Crown, conveyed the lands free from the provisions of the mortgage, and whether or not the lands now belong to the Crown under the mortgage, the legislation of 1904 and the entry made in 1905.

It is necessary to decide whether or not the lands come within the description contained in the mortgage, viz.: "All and singular its bridge and approaches "thereto hereinbefore mentioned and described, "whether made or to be made; also its right, title "and interest in and to all and singular its property, etc."

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Argument of Counsel.

The property is said to be "hereinbefore mentioned "and described," but in the mortgage there is no mention or description other than the general description above recited. At the time the mortgage was given the Bridge Co. was possessed of no lands. Is this general description wide enough to cover all lands which afterwards was conveyed to the Bridge Co.? It can hardly mean that, *but it undoubtedly covers all the real property which had been acquired or was to be acquired for the purposes of the erection of the Bridge, its approaches and its connection with adjacent lines such as the C.P.R. and lands necessary for the erection of station houses, sidings and other railway appurtenances.*

The courts have drawn a distinction between lands required for the "undertaking" and "surplus lands." The latter may be sold or mortgaged without special legislative authority, or they may be seized in execution; but the "undertaking" of the Company could not be sold or mortgaged or seized on execution. (1)

In England on a petition for sale of surplus lands belonging to a railway company, the Court has ordered an inquiry as to what were surplus lands, and what were necessary for the undertaking. (2)

It is submitted that the best evidence that can be obtained of what the Bridge Co. and the Dominion Government considered necessary and proper to be acquired for the purposes of the undertaking, is not what the Company subsequently did; but what the company said it required by its official plans and maps and book of reference submitted by the Company and approved by the Department of Railways and Canals and filed as required by the statute.

(1) See *Stagg v. Medway Navigation Co.* 72 L.J., Ch. D., 177; L.R. 1903, 1 Ch. D., 169. *Gardner v. London, Chatham & Dover Railway*, 36 L.J., Chan. p. 323, at pp. 328–9.

(2) See *Ex parte Grissell*, L.R. 2 Ch., 385.

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Argument of Counsel.

The Company could not have conveyed this land even if it had not been subject to the mortgage, as it would be *ultra vires* of the company.

It is submitted that a railway company obtains its franchises for the use of the public and it cannot convey away any portion of its property acquired for that purpose or for the use of the railway without Legislative authority.

This question was decided in England in 1879 in the case of *Mulliner v. Midland Railway Co.*(1)

Mr. *Hughes* contended that the suppliants were entitled to the fee simple in lot "A" by reason of the deed from the Bridge Company.

The mortgage is a mortgage which purports to convey property. They had nothing at the time, and this mortgage was never recorded until years afterwards. Under *The Registry Act* the mortgage should have been recorded. The question of whether this lot comes within the terms of the mortgage is of course material. He submitted that if this lot were not acquired in its entirety for the purposes of the undertaking, that if any portion were surplus lands, that the railway company had perfect freedom to convey away surplus lands free from the mortgage. The company was quite free to divest itself of these lands, free and clear from the terms of the mortgage given to the Dominion Government. He submitted that the Pennyfather lot outside the 30-foot strip was surplus lands as conveyed by this company. The Pennyfather lot, lot "A," is really divided in three distinct sections on the plan. There is a 30-foot strip occupied by the railway which the company retains under its deed. He would make no mention about that. There is the triangular piece lying immediately adjacent Univer-

(1) 48 L.J. Ch., 258; II Chan. Div. 611.

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sity Avenue and Sunbury Street. That latter piece was acquired in 1888 and has never, up to the present time, been acquired by the railway, and in fact it was fenced in for the greater part of the time. As to the balance of the lot we have contradictory evidence.

The book of reference is only approved with respect to the part in green, and there are no green lines about the Pennyfather lot on the plan. As to the triangular piece, he submitted there was never any possession by the Crown.

[THE COURT. If ever there was a case in which the Statute of Limitations should apply, it is a case like this.]

The Statute of Limitations, in order to prevail, must be proved in a certain way. The possession must be complete, must be continuous, and it must be a possession which is entirely in the party claiming the title through it. It must be absolute in that respect. It would have to be such a complete possession, such an exclusive possession in the Government or the Canada Eastern Railway, as would fall within the terms of the rule conferring title in such cases.(1)

Temple was exercising control over the lot, not as a member of the Bridge Company or as a Director of the Bridge Company, but in his individual capacity He had employed a man frequently to keep up the fence.(2)

Under the *General Railway Act*, surplus lands could be alienated—see sec. 9, sub-sec. 40. And there are decisions that surplus lands do not come within the terms of a mortgage which is given on an undertaking.

(1) See *The Mayor of St. John v. Littlehale*, 5 Allen, p. 121; *Humphries v. Samuel Helmes*, 5 Allen, p. 59.

(2) See *Estabrooks v. Towse*, 22 N.B. R.L., 10.

With respect to the fact that surplus property is not covered by the mortgage—see *Hamlin v. European & North-American Railway Co.*(1)

Mississipi Valley Railway v. Chicago.(2)

Jones v. Habersham.(3)

The court will not take private property away and convert it to public use without paying for it.(4)

Now these cases abundantly support the contention that this Act will not be construed as creating a forfeiture.

AUDETTE, J. now (September 7th, 1915) delivered judgment.

The suppliants, by their Petition of Right, seek to recover, as residuary legatees under the last Will and Testament of their father, the late Honourable Thomas Temple, the sum of $15,800, as representing the value of the land described in the second and fourth paragraphs of their Petition of Right, together with the rent during the time the same is alleged to have been in the possession of the Crown.

For convenience of reference the piece of land described in the second paragraph of the Petition has been, all through the evidence, called *Lot "A"*; and the piece of land first described in paragraph 4 thereof, *Lot "B"*; and the land secondly described in said paragraph 4, *Lot "C."* The same course is adopted herein.

As a prelude to the consideration of the facts involved in this case, it is well to state that under 48-49 Vic. Ch. 26 (Dom.) (1885), the "Fredericton and Saint

(1) 4 Am. & Eng. Railroad Cases, 503, and notes at page 512.

(2) 2 Am. & Eng. Railroad Cases, p. 414.

(3) 107 U.S. R., p. 174.

(4) *Harrod v. Worship*, 1B. & S., 381. *Ex parte* Sheil, 4 Ch. Div. 789. *Ex parte* Jones, L.R. 10 Ch. App., 663. *Wells v. London, Tilbury*, 5 Ch. Div. 126. *Randolph v. Milman*, L.R. 4 C.P., 107.

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Mary's Bridge Company" was duly incorporated with full powers to construct a bridge across the river St. John, between the City of Fredericton, in the County of York, in the Province of New Brunswick, and the Parish of St. Mary's or across the river St. John, between the parish of Kingsclear and the Parish of Douglas, in the said County and Province. And the said undertaking was by the said Act, declared to be a work for the general advantage of Canada. By section 1 of the said Act it also appears that *Thomas Temple*, M. P. Egerton, R. Burpee, Alexander Gibson, the elder, *Alexander Gibson*, the younger, and *Fred. S. Hilyard*, were the original incorporating shareholders.

The Company having applied to the Government of Canada for an advance of money to aid them in the construction and completion of the said bridge and works, the Government of Canada was authorized, by 50-51 Vict. Ch. 26 (1887) to make such advance in the manner therein mentioned.

The suppliants filed the following admission, for the purposes of the trial of this case only, viz.:—

"(11) That the lands and premises mentioned and "referred to in the second paragraph of the Suppliants' "Petition of Right were by Deed bearing date the "eighth day of June, A.D. 1888, conveyed to the "Fredericton & St. Mary's Railway Bridge Company, "a Body Corporate under and by virtue of the provi- "sions of Chapter 26, 48-49, Victoria, Statutes of "Canada, 1885, by one Richard Pennyfather, and "remained vested in said Company from the said "eighth day of June, A.D. 1888, to the date of the "conveyance referred to in the second paragraph of the "Suppliants' Petition of Right.

"(2) That the lands and premises firstly mentioned "and referred to in the fourth paragraph of the said

"Petition of Right, were by Deed bearing date the "thirtieth day of June, 1900, conveyed to the said "Fredericton & St. Mary's Railway Bridge Company "by one Archibald F. Randolph, and remained vested "in said company from that time to the date of the "conveyance referred to in the said fourth paragraph "of the Petition of Right.

"(3) That the said the Fredericton & St. Mary's "Railway Bridge Company applied to the Government "of Canada for an advance of money to aid the said "company in the construction and completion of its "work, that is to say—the Railway Bridge across the "River St. John, at the City of Fredericton, and the "approaches thereto and works connected therewith "under the Provisions of Chapter 26, 50–51, Victoria, "Statutes of Canada, 1887, and in consequence of such "application, and in pursuance of the powers given in "said last mentioned Act, an Order of the Governor-"in-Council of Canada was passed on or about the "twenty-fifth day of August, A.D. 1887, relating to "the aid to be granted to the said Company for the "construction of its said works.

"(4) That the Governor-in-Council, under the "authority of the said Act, and of the said Order-in-"Council, agreed to make, and did make, advances to "the said Company to the extent of $300,000, and that "the said Company in pursuance of said Act and "Order-in-Council, and in order to secure the repay-"ment of the said sum of money, did make, execute "and deliver to Her Majesty, the Queen, the Mortgage "Deed bearing date the twelfth day of October, A.D. "1887; and the said Indenture is recorded in the office "of the Registrar of Deeds in and for the County of "York in Book Y—4, pages 492 to 507 inclusive, "under Official Number 44250, on the fourteenth day

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"of June, A.D. 1895. Suppliants admit in evidence "the copy of said Mortgage now in possession of the "Respondent.

"(5) That the said Fredericton & St. Mary's Railway "Bridge Company located its line of Railway which it "was authorized to do through the lands and premises "mentioned and described in the second paragraph of "the Suppliants' Petition of Right, and acquired by "purchase from one Richard Pennyfather by Deed "dated the eighth day of June, 1888, the said lands "and premises so mentioned and described in the "second paragraph of the Suppliants' Petition of "Right, and laid out and located its line of Railway "across same as aforesaid, and subsequently laid out "and located a station and station grounds on a part "thereof.

"6. That the said Fredericton & St. Mary's Railway "Bridge Company failed to pay the amount of prin- "cipal and interest due His Majesty on the said "Mortgage Deed hereinbefore referred to within one "year from the tenth day of August, 1904, as provided "by Chapter 4, 4 Edward VII, Statutes of Canada, "1904; and that an officer or agent of the Governor- "in-Council on behalf of His Majesty did enter and "purport to take possession of the property of the "said Fredericton & St. Mary's Railway Bridge "Company described in the said Mortgage, as pro- "vided by the last mentioned Act."

By the 6th section of 50–51 Vict. Ch. 26, which came into force on the 23rd June, 1887, it is enacted that:

"The said advances and interest thereon shall be a "first charge and lien on, and shall be secured by a "mortgage on all the property, real and personal, of "the Company, and on all their rights, franchises,

"easements and privileges; and in case the Company "make default in payment of the interest on the said "advances for the space of one year after the same "becomes due, or in case they fail to repay to the "Government of Canada the said advances within "fifteen years from the date of the advance of the "first sum, then and in either case all their property, "real and personal, and all their rights, franchises, "easements and privileges shall be and become by the "default, and without any proceedings for condemna-"tion, foreclosure or possession, forfeited to the Crown, "and Her Majesty, by Her officers or agents, may "thereupon enter and take possession of the same, and "the same shall thenceforth be the property, rights, "franchises, easements and privileges of Her Majesty, "as represented by the Government of Canada."

Pursuant to the Act of 1904 (4 Ed. VII, Ch. 4) which came into force on the 10th August, 1904, following the default of the Company and the forfeiture of its property in favour of the Crown, as recited in the preamble of the said Act, an Order-in-Council was passed, on the 20th August, 1904, whereby authority is given for entering upon and taking possession of the said property. And it is admitted, by both parties, that the Crown, in pursuance of the said Act and Order-in-Council, took possession of the said property, on the 19th April, 1905, as further evidenced by posting up a copy of Exhibit "H," on the said date, by an officer of the Intercolonial Railway.

Under the provisions of sections 7 and 8 of *The Consolidated Railway Act, 1879*, Ch. 9 and the amending Acts, which are incorporated in the special Act of 1885, the Company was authorized to purchase, hold and take land, and (sec. 8) a map and plan of such land, with general description of the same, with the names

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of the owners and occupiers thereof, were duly made, examined, certified and filed in the office of the Department on the 21st May, 1888, amending a previous one bearing date 27th February, 1888, and a copy of the former appears to have been deposited with the Clerk of the Peace on the 26th May, 1888. These plans and book of reference cover the whole of the Pennyfather lot "A," and portions of lots "B" and "C."

Following the passing of the Act of 1887 an Indenture or deed of mortgage was executed on the 12th October, 1887, whereby the said Company, "granted, bargained, "sold, released, transferred and conveyed unto Her "Majesty, Her Successors and Assigns, all and singular "its said bridge and approaches thereto thereinbefore "mentioned and described, whether made or to be "made, also all its right, title and interest in and to, "all and singular its property, real and personal, of "whatsoever nature and description, now possessed, or "to be hereafter acquired in connection with and "including its said bridge and approaches thereto "made or to be made, and other works to protect the "same and its appurtenances, all its rights, privileges, "franchises and easements, all buildings used or to be "used in connection with the said bridge and "approches thereto, and other works or the business "thereof, and all lands and grounds on which "the same may stand or connected therewith "now owned, possessed or contracted for, or which "may hereafter be owned, possessed or contracted for "by the Company; also all locomotives, tenders, cars, "rolling stock, machinery, tools, implements, fuel, "materials, and all other equipments for the construct-"ing, maintaining, operating, repairing, and replacing "the said bridge, approaches thereto, and other works,

"or appurtenances, or any part thereof now owned, "possessed or contracted for or which may be hereafter "owned, acquired, possessed or contracted for by the "company."

This Indenture was made under statutory authority and was registered on the 14th June, 1895. And section 1 of the Act of 1887 provides that such mortgage *creates a first lien and charge upon the property* real and personal, franchises, rights, easements and privileges of the said Company. And by section 6 of the same Act, it is further provided that all the said property, etc., shall be and become by the default, and without any proceedings for condemnation, foreclosure or *possession*, forfeited to the Crown, and Her Majesty, and Her Officers or Agent, may thereupon enter and take possession of the same and the same shall thenceforth be the property of the Crown.

Lot "A" was duly purchased by the Company on the 8th June, 1888. Can it be contended that the Company could, on the 28th July, 1888, in direct violation of the above-mentioned statutory enactments and the mortgage deed, ignore the rights of the party who had advanced the Company the $300,000, and convey these mortgaged lands to Thomas Temple, not only an ordinary shareholder of the Company, but one of the incorporating shareholders under the Act of 1885, and moreover the Manager of the Company, under the pretext that the mortgage deed was not registered or recorded until the 14th June, 1895. That question must be answered in the negative. Why! Temple, as an officer of the Company cannot on the one hand receive and take the $300,000, and on the other say I am a third party without notice, and I am buying from my company Lot "A" which I have mortgaged as an officer of the company. It is not equitable, to

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use a mild word, and I know of no law to support such a proposition, as he had due notice of the transaction. The statute of 1887 is a public statute of which the people at large must take notice. And, moreover, Thomas Temple (or his heirs who claim under him and who cannot be in a better position than he was) is estopped from setting up the plea of want of registration, because he had notice of the mortgage. Indeed, it appears from the evidence of Mr. Alexander Gibson, Jr., who was also one of the incorporating shareholders mentioned in the Act of 1885, that Mr. Temple was a Director of the Company till he died—that his father and Mr. Temple were the whole company. His father was the President and Mr. Temple was the General Manager from whatever time the Company was incorporated until he died.

It must be found under the evidence that Lot "A" belonged to the Company on the 28th July, 1888; that it had no right or power to transfer the same after having given the mortgage above referred to. Mr. Thomas Temple, in view of the public Act of 1887, under which he and his heirs had notice of the mortgage, is precluded from invoking the want of registration of the said deed, if under the Act registration were necessary. Moreover, that position is strengthened by the fact that Mr. Temple was one of the original shareholders, a Director, and the Manager of the Company. The books of the company could not be produced, notwithstanding searches made.

It is true the Company, under the provisions of sub-sec., 40 of sec. 9, of *The Consolidated Railway Act, 1879,* had the right to sell surplus land acquired under the circumstances mentioned in that section; but it must be found that the Company held these lands subject to the provisions and conditions mentioned in

the statute of 1887 and the mortgage, and that while it had the power to sell or alienate under ordinary circumstances, that is when it had a clear and unincumbered title, it could not do so under the circumstances created by the statute and the mortgage. There was a statutory transfer of the fee to the mortgagee, vesting the property in the Crown before the alleged conveyance was made to Thomas Temple.

There can be no doubt either that the whole of Lot "A" was required for the purposes of the undertaking—that it had been so used in different ways, with perhaps some doubt with respect to the small triangular piece which the evidence established to have been in use or occupied by no one. However, such fact would not take it out of the hands of the Company which could not part with it for the reason above mentioned. The suppliants have no title to it or to any part of Lot "A."

Having so found it is unnecessary to discuss the questions of possession and statute of limitations, in respect of which a deal of evidence has been adduced and from which it is shown the Company practically and for all purposes needed all of Lot "A" for the purpose of the undertaking, and none of it could be called surplus land. It is now all used. No part of Lot "A" can be called surplus land, and were it surplus land it could not be conveyed without the interference of the mortgagees in the deed. The power of alienation had gone under the Act. And there is no evidence that the Company bought any surplus land. This is all surmise and inference brought in on the argument, but there is not a tittle of evidence that the Company ever bought lands that are surplus lands.

Coming now to the consideration of lots "B" and "C" it may be *in limine* stated that it is admitted,

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after evidence adduced in that respect, that the Crown was not in possession of either of these lots. It is further admitted that since 1905 certain lots in part "B" were at one time offered for sale by public auction, and that the federal government did claim them, and forbid the sale. Before the forfeiture they were in the Bridge Company.

Lot "B" was conveyed by the Company on the 9th August, 1905, to the Temple estate, long after the mortgage deed had been registered. It will be noticed that the 9th of August was the day before (under sec. 4 of the Act of 1904) the expiry of the extension of one year within which they were given the right by payment to be relieved of the forfeiture already existing. Indeed under sec. 6 of the Act of 1887, it is provided that the "said advances and interest thereon should be a first "charge and lien on all the property real and personal "of the company." And further that "by the default" of the company to pay, and without any proceedings for condemnation, foreclosure or possession, all its property, etc., shall be forfeited to the Crown.

Following this enactment of the Act of 1887, comes the recital in the preamble of the Act of 1904, where it is stated that by reason of the default in payment, all the property, etc., became forfeited to the Crown. And Lot "B" was subsequently sold by the Company, on the 9th August, 1905, when these enactments were in full force and effect—subject, however, to an extension of time for payment until the 10th August, 1905. This deed, it will be noticed was executed one day before the expiry of the further delay of one year, or the extension of payment, and after the entry by the Crown on the 19th April, 1905. Was that done with the intention to endeavour to defeat the Crown's interest in the said lands?

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The Company had no legal authority to make such conveyance under the circumstances, and nothing passed under the deed.

Coming now to the consideration of Lot "C," it will be sufficient to say that, as above stated, the Crown was never in possession of the same, and Counsel for the Crown having stated that the Crown was not in a position to lay claim to it—limiting his demand to a finding only upon the title to Lot "B," Counsel for the Crown further stating that Lot "C" was never vested in the Bridge Company.

Therefore there will be judgment, as follows:

1. With respect to Lot "A," nothing passed under the conveyance of the 28th July, 1888, from the Company to Thomas Temple, and the lands therein mentioned are declared vested in the Crown, as formerly forming part of the Company's land, under and by virtue of the Act of 1887, the mortgage made thereunder and by the legislation of 1904 and the entry of 1905. Therefore the suppliants are not entitled to any portion of the relief sought by their Petition of Right in respect to Lot "A."

2. With respect to Lot "B," this Court doth declare that the title to it is in the Crown, and that the Crown has never been in possession of the same. Therefore the suppliants are not entitled to any portion of the relief sought by their Petition of Right in that respect.

3. With respect to Lot "C," there will be judgment pursuant to the consent or admission of Counsel, declaring that the Crown is not in possession of the same, and that the claim for rents and profits in respect of the same is dismissed. And further, as the Crown is declaring, by Counsel, not to lay claim to the same and that it never vested in the Company, there will be judgment pursuant to the admission and

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declaring the suppliants entitled to recover or lay title to the same.

4. There will be no costs to either party.

Judgment accordingly.

Solicitor for suppliants: *Percy A. Guthrie.*

Solicitors for respondent: *Slipp & Hanson.*

BETWEEN:

HOWARD HERBERT VICTOR OLMSTED, SUPPLIANT;

1915
Nov. 12.

AND

HIS MAJESTY THE KING, RESPONDENT:

AND

HOWARD HERBERT VICTOR OLMSTED AND WILLIAM ATCHISON OLMSTED, SUPPLIANTS;

AND

HIS MAJESTY THE KING, RESPONDENT.

Rideau Canal—Damage to lands from flooding—8 Geo. IV, c. 1, sec. 26—Limitation of actions.

Suppliants filed their petitions of right for damages arising out of the flooding of their lands, alleged to have been caused by the negligence of certain officers of the Rideau Canal in keeping the waters of the Rideau Canal at an improper level at divers times.

Held, that the claims for damages (if any) arose more than six months before the petitions were filed and that the same were barred by the limitation prescribed in sec. 26 of 8 Geo. IV, c. 1.

THESE where two petitions of right seeking damages for the flooding of lands alleged to be due to the negligence of the Crown's officers in charge of the Rideau canal.

The facts are stated in the reasons for judgment.

Ottawa, 15th and 16th September, 1915.

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The case now came on for hearing before the Honourable Mr. Justice Cassels.

R. V. Sinclair, K.C., for the suppliants;

W. D. Hogg, K.C., for the respondent.

CASSELS, J., now (November 12th, 1915) delivered judgment.

These two cases were tried together before me at Ottawa.

In the first case the petitioner claims as owner of the rear half of lot 5 in the fourth concession in the township of Kitley.

In the second case the petitioners claim as owners of lot No. 4, Kitley.

Lots 4 and 5 in Kitley adjoin each other and border on Irish creek.

Irish creek empties into the Rideau river about 7 to 8 miles below the lands in question.

Merrickville is situate on the Rideau river below the confluence of Irish creek with the Rideau river. As part of the construction of the Rideau canal, there was constructed at Merrickville, a dam for the purposes of controlling the waters for navigation purposes.

This control was effected by means of stop logs and flash or bracket boards, by means of which the waters of the Rideau canal were raised or lowered as the requirements of navigation necessitated.

The effect of the putting in of the stop logs and placing the flash boards on the dam was to pen back the waters of the Rideau river and also the waters of Irish creek.

Irish creek as it flows past the lands in question is a sluggish stream. The lands in question bordering on Irish creek are low lying lands and a comparatively

small rise in the waters of the dam at Merrickville above the 6 feet at the sill of the lock has the effect of flooding portion of the lands of lots 5 and 4 owned by the petitioners.

These petitions are filed claiming damages occasioned to the lands of the petitioners by reason of the alleged flooding.

There are allegations of fact in the petitions, and also in the statements of the defence, which are not in accordance with the facts as proved.

Owing to the lapse of time and the death of persons who could have testified with greater accuracy, counsel for the petitioners and for the Crown have experienced considerable difficulty.

The Rideau canal and the dam in question were constructed about the year 1830.

In the first case relating to lot 5 in the 4th concession of Kitley, the petitioner alleges in paragraphs 7, 8 and 9, as follows:—

"7. At the time of the construction of the said "canal a depth of about 5 feet 3 inches of water on the "lock sill at the Merrickville locks was established "and was practically maintained from the year 1830 "to about the year 1890.

"8. During the period last aforesaid, your suppliants' "lands aforesaid were not affected or flooded by the "waters of the Rideau canal or those of Irish creek "aforesaid.

"9. In or about the year 1890, the depth of the "water on the lock sill of the said lock was raised to 6 "feet which minimum depth has since been main- "tained, while during a very considerable period of "each summer since 1890, the depth of the water on "the sill has not been less than 6 feet 6 inches."

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The defence of His Majesty's Attorney-General on behalf of His Majesty admits the allegations in paragraph 8 of the petition, but does not admit the allegations of fact in the 9th paragraph of the petition.

This allegation in the 9th paragraph of the petition is of importance, as it is clear on the evidence that when the waters are maintained on the lock sill at Merrickville at not less than 6 feet 6 inches, a considerable acreage of both lots is flooded.

In the petition of the two petitioners relating to lot 4 in the 4th concession aforesaid, there is a paragraph less than in the former petition, owing to a different allegation as to title and paragraphs 7, 8 and 9 in the first petition are the same as paragraphs 6, 7 and 8 in the second petition.

The pleader evidently copying the defence to the first petition admits the facts alleged in paragraph 8 of the petition, which I have inserted in full as being the same as the allegations in paragraph 9 of the first petition.

The Crown by its defence pleads title by lost grant also prescription, and also claims a right to flood by reason of a purchase from one Gideon Olmstead of his rights to pen back the waters as the owner of an old mill and mill dam.

The respondent also pleads the provisions of the statutes relating to prescription, and claims a right to flood the lands in question by virtue of title acquired under these statutes.

Howard Herbert Olmstead is the witness who testifies with knowledge more accurate than any of the other witnesses in the case. In both of the petitions, the suppliants limit themselves to a claim since the year 1890.

In paragraph 6 of the petition relating to lot 5 (being paragraph 5 of petition relating to lot 4) it is alleged as follows:—

"6. At the time of and as part of the construction "of the Rideau canal a dam was built at or near the "village of Merrickville, in the county of Grenville, "which controls the level of the water in the reach "between the said village of Merrickville and the "village of Kilmarnock, in the county of Lanark, and "also the level of the water in Irish creek aforesaid.

Paragraph 7 of the petition relating to lot 5 (being paragraph 6 of the petition relating to lot 4) is as follows:—

"7. At the time of the construction of the said "canal a depth of about 5 feet 3 inches of water on "the lock sill at the said dam was established and was "practically maintained from the year 1830 to about "the year 1890."

Paragraph 8 relating to lot 5 (being 7 of the petition relating to lot 4):—

"8. During the period last aforesaid your suppliant's "lands aforesaid were not affected or flooded by the "waters of the Rideau canal or those of Irish creek "aforesaid."

Then follow the allegations quoted above, paragraph 8 in one petition and 9 in the other.

Phillips, the only witness for the Crown, states that, "for the last 20 years (he thinks) it has been kept at "the same level as it is to-day. That is to say the "minimum depth to which the water is kept on the "sill has been changed from 5 feet 3 inches to 6 feet. "That has been accomplished by means of stop logs "in the regulating weirs of the dam."

He is giving his evidence I think, based upon the statements in the petitions but apparently concludes

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that the records of the returns of the Lockmasters would show the fact.

In the report of Mr. Wise of the 19th of March, 1889, (Ex.D), he states that the general height the water is maintained at to give navigation is 5 feet 9 inches on the sill and this allegation is more in accordance with the heights given in the returns.

There is no contention on the part of the petitioners that any flooding of the lands at the time of freshets is made a claim. Howard Olmstead in his evidence states as follows:—

"Q. At what time in the spring of the year do the "freshets occur?—A. Well, that is pretty hard to say, "but I would say perhaps the last of March and the "first two weeks of April, possibly three weeks, the "freshet lasts. There is no special time, it varies from "year to year.

"Q. But you would say roughly speaking, in the last "week of March or the first three weeks of April?— "A. Yes.

Further on he states:—

"Q. Do I understand you to say that you are not "damaged at all by the freshets?—A. No, Sir. The "freshets are a great benefit to our land.

"Q. The flooding is not caused by freshets?—A. No, "Sir, we do not blame the Government for that what- "ever.

"Q. Have you any idea what the depth of water on "the sill at Merrickville is when the freshets are on?— "A. I would suppose an ordinary freshet would be 7 "feet.

"Q. Did you say it would go as high as 9 feet?—A. "Yes, but that would be exceptional, it depends on the "heights there somewhat and the way the water gets "away."

Then he states "that if the dam at Merrickville was "left as it is during a freshet the water would be off of "our land altogether, we would have no flooding."

"Q. It would never be on your land at all?—A. In "the freshet it would, but that is a thing that Provi- "dence does. We cannot help that.

"Q. But in the time of a freshet there is water on "your land?—A. Is that on most of the land?

"Q. There is water on this 40 acres on lot 4 during a "freshet?—A. Yes, up to 7 and 8 feet high. The "freshet might rise as high as 8 feet at Merrickville.

"Q. I am talking of 8 feet on the sill at Merrickville. "When there is a freshet in the spring of these months "or at some time during them, your land is flooded?— "A. Yes.

"Q. And it remains flooded you say as long as the "freshets last.—A. Well, it goes down naturally, it "falls perhaps three or four inches a day.

Phillips refers to the freshets as follows:—

"How do the freshets affect the water on the lock "sill?—A. It rises it tremendously.

"Q. At what months?—A. The freshet occurs gener- "ally speaking about the first week in April. It may "occur earlier or later but it is usually about the "beginning of April and it lasts about two weeks, and "during that period the water rises very much over "the navigation height on the sill of the lock on account "of the freshet and during that time all our stop logs "are out in both of the weirs at Merrickville in order "to allow the freshet to go away, and they are not "replaced until about the last two or three days in the "month so as to have navigation height on the sill for "the first of May to commence the season, that is 6 "feet."

A further point of considerable importance is that it is considered by Herbert Olmstead that if the water at

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the sill at Merrickville is maintained at 6 feet (after the freshets) there is no damage.

He states:—

"Q. Then they wait until the water has run away "before they put on the flash boards?—A. It is im- "possible to put on the flash boards with a very high "freshet of water.

"Q. You find if there is a depth of 6 feet of water at "Merrickville that your land is not flooded?—A. It "does not overflow at 6 feet.

"Q. When you say overflow, you mean the water is "backed up in Irish creek?—A. The water will not "overflow the bank at 6 feet level."

The dam was recovered in 1887—not in 1890—as alleged, and it is clear that while the dam was partially renewed, the flash boards were shorter so as to compensate for any extra height of the dam.

In any event, it is of no consequence how high the dam was, as by means of the stop logs, the waters could be controlled.

A further point to be considered is that the lands in question are low lying. The old map produced would indicate that there was a considerable quantity of swamp lands. The petitioner, Howard Olmstead, admits that between the years 1880 and 1890, a considerable quantity of the land was allowed to grow up with bush and under-brush.

In the record of the evidence the following appears:— "[His Lordship to Mr. Sinclair]:—If you limit your "claim to six years before action, then you are proving "the Crown's case by going back."

Mr. Sinclair: "I do not think necessarily, because I "will only prove it is flooded particular years, and I "will show it was intermittent."

Mr. Olmstead is then asked:—

"Q. Then after 1883, were there years when you "were not flooded?—A. Yes, sir, in 1884, and up to "and including 1888, we were not flooded to any "extent, possibly a few days.

"Q. Up to 1888?—A. Yes."

Then he says further on:—"Our protests of 1889 "seem to have had an effect, for some years—I think "in 1890, 1891, 1895, 1911 and 1914—there could "scarcely be said to be any flooding."

"Q. But so far as the land which you have had under "cultivation in the early years of 1876 and on, were "you able in these other years to do anything with it? "A. No.

"Q. Why?—A. Well, it had grown up in bushes in "those three years and it would be an exceedingly hard "job to bring it under cultivation in the first place and "we did not think there was any guarantee for us to go "through the same work if we did not know the water "was going to be raised. If it would be in the same "condition as it was in 1880, we could have worked it "in 1885, 1886, 1887 and 1888.

"Q. And subsequent years?—A. Yes.

"Q. What I want to ask you is this, was there any "year, we will say after the first of June that you were "in possession of the whole property so that you could "go over it?—A. I think there were three or four years "with the exception of 1903, 1904, 1905 and 1906, the "water was never held continuously as high as 6 feet "and a great deal of the time very much lower.

"Q. When the water at Merrickville is not higher "than 6 feet, how far can you to on your land, dry "towards the creek?—A. We can go to the creek."

Now if in point of fact no claim arises between 1830, and 1890 as alleged, the flooding must have arisen from causes additional to the retention of the water at too

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high a level at the sill at Merrickville, and no doubt the fact that the petitioners allowed a considerable portion of the land to grow up in bush and under-brush, would have the effect of retarding the draining of the land after the spring freshets, and in addition as pointed out by Mr. Wise, Irish creek would probably be choked to a certain extent, and should be cleaned out.

To my mind an important point is that between 1890 and the time of the filing of the petition, the instructions to the lockmasters were that the waters of the dam should be kept not higher than 6 feet at the sill of the lock.

See the evidence of Phillips. The allegations in the petition also supports this statement, and I would refer to the evidence of Olmstead previously quoted.

Olmstead states: "That during the year 1914 the "farm was cropped." He states: "Q. During 1914 "did you crop the farm?—A. Yes.

"Q. How much of it?—A. Three-fifths of lot 5 and "all of the two-fifths of lot 5 and all of lot 4 that is still "cleared, and of course we had pasture.

"Q. You had pasture?—A. Yes, we are getting the "use of it all.

"Q. That was in 1914?—A. Yes."

Norman Kinch, a witness for the petitioners was called to substantiate the statement that there was no flooding during the year 1914 that would interfere with the enjoyment of the lands.

As to the year 1914, in respect to which no claim is made, it might be well to refer to the returns of the lockmaster in order to ascertain the heights at which the water was raised at the sill.

On the	21st	of April,	the height was	5	feet 1	in.
"	22nd	of April,	"	6	" 3	"
"	23rd	of April,	"	6	" 8	"
"	24th	of April,	"	6	" 8	"
"	25th	of April,	"	6	" 8	"
"	27th	of April	"	6	" 8	"
"	28th	of April,	"	6	" 9	"
"	29th	of April,	"	6	" 9	"
"	30th	of April,	"	6	" 9	"
On	May 1st		the height was	6	feet 9	inches.
"	May 2nd		"	6	" 7	"
"	May 3rd		"	6	" 6	"
"	May 4th		"	6	" 4	"
"	May 5th		"	6	" 2	"

Down to this period no doubt, the heights given were owing to the freshets.

From the 8th of May inclusive down to the 31st of May, the height was maintained at 6 feet and during the month of June at a lower height, and during July and the greater part part of August, it was never maintained at a height greater than 6 feet. I mention these returns as Olmstead's statement is that no damage is occasioned when the height of the water, excepting during freshets, is maintained at a height of not greater than 6 feet at the sill, and no claim is made for 1914.

I think it is quite apparent that the respondent never intended that the water at the dam (excepting during freshets) should be maintained at a greater height than 6 feet at the sill. There is no complaint so long as the water is kept at this height.

Any retention of the waters at various times at a greater height, would be contrary to the orders of those in authority.

If it were necessary to pass on the right of the Crown to retain the water at the height of 6 feet, I would

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think the Crown had acquired such right by prescription.

The petitions were filed on the 28th of May, 1914, and it is clear from the data which I have given, the water was maintained up to the time of the filing of the petition at this height or over.

I do not see how the Crown can prescribe for a greater height than 6 feet, in view of the provision of the statutes relating to prescription and the evidence.

In the view I have formed of the case, it is not necessary to pursue this question or to comment on the various authorities bearing on the construction of the statutes relating to prescription cited by counsel.

As I pointed out no claim is made for damages by reason of any flooding during the year 1914. This is shown by the evidence of Olmstead and Klinch.

I am referred by counsel to three statutes relating to the Rideau canal. The first (8 George IV, Chap 1, U.C.), is "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 direction, for keeping "the waters of lake Ontario out of the river Ottawa "and for other purposes therein mentioned. This "statute, section 4, provides 'and by it is further "enacted by the authority aforesaid that if before the "completion of the canal *through the lands of any* "*person* or persons, no voluntary agreement shall be "made, etc." and then there follows a provision for arbitration to ascertain the amount of the compensation.

There is no reference under this section except where the canal is constructed through the lands. There appears to be no provision for damages for flooding.

Section 9 provides "and be it further enacted by the "authority aforesaid, that in estimating the claim for "compensation for property taken or for damage done "unto the authority of this Act, etc."

The second statute (Chap. 16, 6 Wm. IV, U.C.) supplements the earlier statute and provides a method of compensation to be given to the owner of any mill site, by reason of the damming back of the water. This does not, however, cover the case of injury by flooding other than of a mill site. The only other provision of this statute that has any bearing would be section 3, which refers to the right of purchaser claiming for damages to the land prior to his purchase. This section has no bearing, except the effect it may have coupled with the previous statute, that perhaps the proper forum for ascertaining compensation for permanent expropriation of the lands, may be by arbitration and not by suit in this Court.

It is not necessary for me to deal with this question, as I do not think it arises in the present case, but the cases of *Williams v. Corporation of Raleigh*, (1) *Water Commissioner of the City of London v. Saunby*, (2); and *Yule v. The Queen*, (3), may be referred to.

The only other statute cited to me is Chap 19, 2nd Victoria, which I think has no bearing on the case.

The section of the statute (8 George IV, chap. 1) which I think governs this case is section 26, which is as follows:—

"And be it further enacted by the authority afore-"said that if any plaint shall be brought or commenced "against any person or persons for anything done or "to be done in pursuance of this act or in execution of "the powers and authorities or the orders and direc-"tions hereinbefore given or granted, every such suit

(1) 21 S.C.R. p. 104; A.C. (1893) p. 540.
(2) A.C. 1906, pp. 8, 15.
(3) 30 S.C.R. p. 34.

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"shall be brought or commenced within six calendar "months next after the fact committed, or in case there "shall be a continuation of damages, then within six "calendar months next after the doing or committing "of such damages shall cease and not afterwards."

I am of the opinion that all the acts of damage (if any such exist) fall within the provisions of this section, and that if an action lies, all right of action on the part of either petitioner has been barred. As Mr. Sinclair has pointed out the acts complained of were not continuous but acts of trespass committed at various times and committed contrary to the instructions of those having authority over the canal, I think the petition should be dismissed and with costs.

Judgment accordingly.

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

Solicitors for respondent: *Hogg & Hogg.*

HIS MAJESTY THE KING, on the information of the Attorney-General of Canada,

PLAINTIFF;

AND

SUSAN HAMILTON AND OTHERS,

DEFENDANTS.

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Nov. 22.

Title to land—Adverse possession against Crown—Acknowledgment.

Defendants were claiming title to certain real property by adverse possession of 60 years against the Crown. During the ripening of their statutory title two of defendants' predecessors in possession, under whom they claimed, wrote a letter to the Minister of Public Works, under whose control the property in dispute fell at the date of such letter, in which it was stated that the property had then been in possession of the writers' family for 39 years, and the following request made:—"We most urgently and respectfully solicit that the aforesaid lot be sold to us, as we consider we have the prior right and are willing to pay any reasonable amount for a deed of the same."

Held, that the above letter was an acknowledgment of the Crown's title and interrupted the operation of the statute in defendants' favour.

Semble: That a judgment for the Crown in an information of intrusion must be followed up by possession before a statutory title by adverse possession accruing at the time, can be interrupted.

INFORMATION of intrusion.

The facts are stated in the reasons for judgment.

May 11, 1915.

The case came on for hearing before the Honourable Mr. Justice Cassels.

W. D. Hogg, K.C., for the plaintiff;

A. E. Fripp, K.C., for the defendants.

CASSELS, J., now (November 22, 1915) delivered judgment.

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An Information of intrusion exhibited on behalf of His Majesty to have it declared that the plaintiff is entitled to possession of the lands and premises in the Information described, and that the plaintiff be paid the issues and profits of the lands and premises in question, from the first day of January, 1914, until possession be given.

The defendants deny the title of the plaintiff, and by the third paragraph of their defence they allege, as follows:

"The Defendants say that the title to the said lands "is vested in them and that they have been in unin- "terrupted, actual, visible and continuous possession "and enjoyment of the said lands and premises since "the year 1832 and are now in full possession and "enjoyment of the said lands and premises and every "part thereof."

The Crown filed a reply to the said statement of defence, in which they allege, as follows:

"2. His Majesty's Attorney-General in further "reply to the said Statement of Defence says that "heretofore to wit, on the Thirteenth day of February, "1890, an Information of Intrusion was filed in this "Honourable Court by the Attorney-General of Canada "on behalf of Her late Majesty Queen Victoria against "James J. Hamilton, Susan Hamilton, John Sevigny "and John Roberts as defendants, for the possession "of the land mentioned and described in the Informa- "tion herein and other lands, the said James J. Hamil- "ton, Susan Hamilton, John Sevigny and John "Roberts being at the said date the persons who "claimed possession and ownership of the said lands. "That the said Information was duly served upon the "said James J. Hamilton, Susan Hamilton, John "Sevigny and John Roberts, who made default in

"defending the said action and judgment was moved "for and entered against them for recovery of the "possession of the said lands, and a writ of possession "was subsequently issued out of this Court directed "to the Sheriff of the County of Carleton to take and "have in the name of Her said late Majesty the Queen "the lands and premises aforesaid, whereby and by "reason whereof the Crown became entitled to posses- "sion of the said lands, and the title thereof has "remained undisturbed in the Crown since the date of "the said judgment: and the Attorney-General on "behalf of His Majesty says that the defendants either "as defendants in this action, or claiming under the "defendants in the former action, are now estopped "from pleading and ought not to be allowed to plead, "as a defence to the Information of His Majesty the "statements which are alleged and set out in the "second and third paragraphs of the Statement of "Defence in this action."

The land in question in this Information is a small piece of land on the South West corner of Rideau and Mosgrove Streets upon which was erected in the year 1832 a small log cottage, which still remains upon the premises—the log cottage having been, at a subsequent period, covered over.

It is proved that the defendants and their predecessors in title have been in possession and occupation of the premises in question from the year 1832, down to the date of the filing of the Information in this action; and if in point of fact there had been no interruption of this possession the defendants would have acquired title by adverse occupancy.

The facts set up in the replication by the Crown have been proved before me by the production of a certified copy of the pleadings and proceedings and

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judgment in the information of intrusion commenced in the year 1890 against James J. Hamilton, Susan Hamilton his wife, John Sevigny and John Roberts.

It also appears from the evidence before me that while judgment was pronounced in this information of intrusion the defendants to that information who were then in occupation of the premises were not dispossessed. There was some attempt to prove that the writ had been handed to the Sheriff, but if so it was not executed.

During the trial I had considerable doubt as to whether or not the informants had proved their title, in other words whether it was proved that the building in question was erected on the 60 feet around the basin and the By-wash.

On further consideration, having regard to the facts as proved, and the subsequent letter to which I will have to refer later, and the judgment in the information of intrusion recovered in the year 1890, I have come to the conclusion that the title of the informant has been sufficiently proved to enable them to sustain this action.

The Rideau Canal was constructed under the Statute of 8 George IV, Cap. 1.

In the case of *Magee v. The Queen*, (1) the late Mr. Justice Burbidge in very comprehensive reasons for judgment, has referred to the various statutes bearing upon the construction of the Rideau Canal. It will be noticed that in that case, in the argument for the suppliants, (at page 315) suppliants counsel submitted that: "we are entitled to a declaration as to the By-"wash, that part of the property has been abandoned "by the Crown."

The house in question in this action was built

(1) 3 Ex.C.R., 304.

apparently upon the tract of 60 feet around the basin and the By-wash. The By-wash in question is probably best described by the witness John Litle, a witness in his 84th year, and who has lived all his life on the bank of the By-wash. He remembers the old log-house which had been built by one James Cuzener, being the house in question. It is conceded by the Crown as alleged by the defendant in the defence that this house was erected as I have stated in the year 1832. Litle is asked:

"Q. Where did James Cuzener live?—A. Right on "the bank of the By-wash.

He is asked:

"Q. How long do you remember the old log house? "Was it there the time the canal was built?—A. I "remember it over 70 years ago.

He is asked:

"Q. How close was the Creek? It passed his "house?—A. His house was up on the height of the "street, and the water running from the Canal would "be some few yards down from the house."

Further on he is asked on cross-examination:

"Q. The water ran through the Hamilton property? "—A. Right past.

"Q. It ran alongside of it?—A. Yes, it ran parallel "down by Mosgrove down that way."

The By-wash in question is no doubt the Creek which was referred to by this witness, and the cottage in question would be erected on the 60 feet.

It would appear from the Statutes referred to in the report of the judgment of *Magee v. The Queen*, that in 1856, the Rideau Canal and its adjuncts were transferred to the Crown for the benefit, use and purposes of the Province.

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The Ordnance Vesting Act was enacted in 1843, 7th Victoria, Cap. II. This Statute vested the property—and the same statute provided that all lands taken from private owners at Bytown under the authority of the Rideau Canal Act for the uses of the Canal which had not been used for that purpose should be restored to the party or parties from whom they were taken. Mr. Justice Burbidge then proceeds to refer to disputes which had arisen, and refers to the enactment of the statute of 1846, Chapter 42, 9 Victoria. This statute, as pointed out at page 320 of the judgment in the Magee case, made clear what was intended by the previous Act and provided that the provision of the previous Act should be construed to apply to all lands at Bytown set out and taken from Nicholas Sparks under the provisions of the Rideau Canal Act, except—

"(1) So much thereof as was actually occupied as "the site of the Rideau Canal, as originally excavated "at the Sappers' Bridge, and of the Basin and By-wash, "as they stood at the passing of *The Ordnance Vesting "Act;* excepting also—

"(3) A tract of 60 feet around the said Basin and "By-wash."

The result is that the Basin and By-wash and the 200 feet along the canal, and the 60 feet along the Bywash were retained by the Crown.

I think the evidence before me shows that the cottage in question was erected within the 60 feet along the By-wash. The evidence of the witnesses is necessarily somewhat vague.

Mr. Justice Burbidge in the *Magee* case (1) referred to an official plan produced from the office of the Rideau Canal dated and signed on the 9th July, 1847. This

(1) 3 Ex.C.R. at p. 323.

plan has been produced before me as Exhibit Number 1, and evidence has been produced to identify the lands in question with the lands shown on this plan to have been reserved and that the lands in question in the action before me formed part of the reserved lands.

It has to be borne in mind that in order to prove title under the Statute of Limitations (in this case, *The Nullum Tempus Act*), it is not sufficient to prove that the true owner has been out of possession for a period of 60 years, but it is essential that 60 years of actual adverse possession must be established. If there was an interruption of possession and a vacancy during a period in which the lands were not adversely occupied, the title of the true owner would in law place him as being in possession. (2)

It is also essential that in order to establish the defence of title by adverse possession, the possession must be that by successive occupants claiming in some sufficient way under each other. (3)

In the particular case before me it has been shown that Samuel Cuzener and his wife, and after their death the children remained in the occupancy of the premises. The present occupants claim through the original James Cuzener and his wife Hannah Cuzener.

On the death of James Cuzener, Hannah Cuzener and her daughters remained in occupation, and by the will of Hannah Cuzener which bears date the 1st December, 1869, it is provided as follows:

"Second—I give to my daughter, Susan Hamilton, "all my household furniture, and wearing apparel, for "her sole and only use, besides all my right, title, "claim, interest and demand which I now have, or "may have, of the House and premises which I now "occupy and reside in, situate in Rideau Street, in the

(1) See *Agency Company v. Short*, 13 A.C. p. 793.

(2) See *Simmons v. Shipman*, 1[illegible] Ont. R. p. 301.

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"said City of Ottawa, Township, County, Province "and Dominion aforesaid, in rear of the House rented "by me to Thomas Dowsley, to her and to her only "for her sole use and benefit. Third—I like give and "devise to my said Daughter, Susan Hamilton, two-"thirds of the rents and profits of the House and "premises in Rideau Street, in the said City of Ottawa, "now rented by me to Thomas Dowsley, and the "remaining Third to my Daughter Sarah, wife to "John Thomolson . . .

After the death of Hannah Cuzener a letter was written on the 17th April, 1871, which is signed by Susan Cousins and Sarah Cousins. The Susan Cousins referred to was subsequently married to one Hamilton, and then became known as Susan Hamilton. This letter is as follows:

"Ottawa City,
17th October, 1871.

"Sir:

"We the undersigned (being sisters) beg to inform "you that having understood that the small property "or lot situated on the southern side of Rideau Street "and adjoining the By-wash (leading from the Canal) "on the west side of it, on which there is a wooden "building, has been applied for by the St. George's "Society for the purpose of erecting a Hall thereon. "We would hope that the same might not be sold, as "we consider our right to it cannot be alienated from "the length of time said lot has been possessed by our "family, namely 39 years. Our Father, the late "James Cousens, in his lifetime settled upon this lot "in 1832 with permission of the Ordnance Department, "our Mother outlived our Father and resided upon "this property for a number of years and at her "decease bequeathed it to us, and we have continued

"upon it ever since. Our father's name was entered "upon the Books of the Department at the time of his "settling down here which was then called Bytown, "these facts are known to many of the citizens.

"The Corporation taxes levied from time to time "have been duly paid all along to this date, and we "most urgently and respectfully solicit that the afore- "said *lot be sold to us, as we consider we have the prior "right and are willing to pay any reasonable amount for "a deed of the same.*

"We remain,

"Your most obedient servants,

"Hon. H. L. Langevin, C.B.

"(signed) Susan Cousens,

" " Sarah Cousens."

I think that this letter is a sufficient acknowledgement of title within the meaning of the Statutes relating to Limitation to stop the running of the statute.

The law is expounded in *Darby & Bosanquet on Limitations*(1); and in *Halsbury's Laws of England.*(2)

Darby & Bosanquet state: "It does not seem that "any particular form of acknowledgment is necessary, "but anything from which an admission of ownership "in the party to whom it is given may be fairly implied "would be sufficient," etc.

Now, this letter while setting up a moral right to have the property sold to them, points out that "we "would hope that the same might not be sold" as it had been in the occupation of the family for 39 years. It further proceeded "and we most urgently and "respectfully solicit that the aforesaid lot be sold to "us, as we consider we have the prior right and are "willing to pay any reasonable amount for a deed of "the same."

(1) 2nd ed. p. 383. (2) vol. 19, p. 132.

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This letter is addressed to the Honourable Sir Hector Langevin, the Minister of Public Works.

The cases referred to by Mr. Fripp seem to me do not support the contention put forward by him. In *Beigle v. Dake,*(1) the title had ripened by possession and the offer of the defendant was an offer for a paper title which might be worth to him the sum of $100, although he might have a perfect title by statute. See page 261 of the reasons for judgment. And in that case also it was pointed out by the learned Judge, that there was no writing signed as required by the Statute.

The case of *Drake v. North,* (2) is a judgment of the late Chief Justice Robinson. At page 478, he points out as follows:

"This is not the case of a party who being in posses-
"sion under an imperfect title, or at least under some
"claim of right, has endeavoured to strengthen his
"title by getting in some outstanding claim. In such
"cases it would not be fair to infer that he intended to
"acknowledge the right of the party to dispossess him
"if he pleased, if he declined to confirm his title.
"Nor is this case the same as if Montgomery had gone
"to the defendant and stated himself to be the owner,
"and persuaded the defendant to recognize his title.
". . . But here according to the evidence, the
"defendant appears to have sought out Montgomery
"as the owner, and endeavoured to purchase from him
"or to get him to sell to him." etc.

I think that the letter which I have quoted in full is a clear admission of the title, and is a request upon the part of these two devisees of Susan Cuzener to purchase the property in question.

(1) 42 U.C. 250.

(2) 14 U.C. Q.B. at p. 476.

It would appear from this case of *Drake v. North* that such a letter would be sufficient proof of title to enable the plaintiff in ejectment to assert title as against the defendant who was admittedly a trespasser.

I am of opinion, therefore, that this letter was an acknowledgment of title sufficient to interrupt the running of the statute. If this be the correct view, then the 60 years would not have run as against the Crown at the time of the commencement of the present proceedings.

As I have stated, there was the subsequent proceeding in ejectment in the year 1890. On the argument before me, it was contended on behalf of the Crown that the effect of this judgment was to interrupt possession, and that the statute ceased to operate at the time of the recovery of this judgment. Mr. Fripp on the other hand, on the part of the defendants, claimed that the judgment in ejectment had not the effect of giving possession to the plaintiff, and that without actually having removed defendants from occupation there was no interference of the running of the statute. Both Counsel seem to have made diligent search for authorities bearing on this point and have cited numerous authorities.

After the best consideration I can give to the case, I am of opinion that if the judgment in an information of intrusion has merely the same effect as a judgment in ejectment the contention put forward by Mr. Fripp is the correct view, and that unless the judgment in ejectment be followed up by possession the running of the statute would not be stopped.

In *Doe v. Wright*, (1) it was held that judgment in ejectment does not give possession but gives only a right to the possession, etc.

(1) 10 A. & E., p. 763.

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In *Sterling v. Penlington*, (1) it is stated that confession of lease, entry or delivery in ejectment, "would not "be a good actual entry to avoid a fine, or the Statute "of Limitations, unless upon a proceeding in the same "action on the ejectment; but in another action after "the 20 years it would not."

In *Bampton v. Birchall*, (2) Lord Langdale's language would lead to the same result. In that case there had been a proceeding in ejectment which had been stayed for non-payment of costs. It is pointed out how long the parties had been left in possession by any effectual proceeding. There is no doubt that the mere making of an entry is insufficient. This is covered by the statute.

In *Piper v. Stevenson*, (3) will be found an elaborate collection of authorities.

In the case of *Doe Perry v. Henderson*, (4) the head note is as follows:

"Held also, that a judgment in ejectment recovered "by B. against A. after the 20 years had expired, "would not save the statute. *Aliter*, if recovered "within the twenty years, and A. within the twenty "years *had been dispossessed upon such judgment.*" The Chief Justice Sir John Beverley Robinson, at page 500 puts it as follows:

"Thirdly—As to the effect of the recovery in eject- "ment. It has been decided in England repeatedly, "that a recovery in ejectment is no estoppel; and upon "the second trial the same question is only brought a "second time, as it may be in this form of action, "before the court."

He proceeds: "If within the twenty years Robert "Perry or his assignees had set up their title and

(1) 9 Mod. p. 247 (1739).
(2) 28 Ont. L.R., 382.
(3) 5 Beav. p. 67.
(4) 3 U.C. Q.B., 486.

"recovered, *and the possession had been changed*, then "of course the operation of the statute would have "been prevented," assuming, apparently, that a change of possession under the judgment is essential.

In the case of *Thorp v. Faccy*, (1) at page 350, Wills, J. puts it as to a declaration in ejectment, its utmost effect is that of an entry, a mere entry—and by section 10, has no effect. The judgment does *not give possession unless it be executed.*

There are numerous other cases cited before me which I think it needless to refer to.

As I pointed out, if the letter which I have quoted be an acknowledgment, this question as to the necessity for a following up of the judgment by obtaining possession is not of moment.

The case was argued before me as if the judgment of 1890 was one in ejectment. I am not by any means satisfied that the same rule should apply to a judgment in an information of intrusion as in ejectment.

It is true the procedure in intrusion is made similar to the proceeding in ejectment, but it must be borne in mind that the Crown is assumed to be always in possession. That the information becomes necessary by reason of the defendant having been in actual occupation for more than 20 years, and therefore the defendant has the right to call upon the Crown to make their title which he could not have done at law within the 20 years, although probably a different rule prevailed in equity. (2)

The reasons and effect of requiring the Crown to prove the title where the defendant has been in occupation for more than 20 years are fully dealt with in the case of *Emmerson v. Maddison.* (3) It is stated there

(1) (1866) L.J. N.S., 349.

(2) See *Attorney-General v. Corporation of London*, 2 Mac. & G., p. 258—Lord Cottenham's judgment.

(3) 34 S.C.R., 533; (1906) A.C. 575.

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Reasons for Judgment.

that possession as well as the right had always been in the Crown notwithstanding the occupation of the plaintiff and his predecessors—and it may well be that the Crown having established their title in 1890 by the judgment in the information of intrusion it was not necessary as in ejectment to follow up the judgment by actually obtaining possession. I can find no authority on the point. It is in my opinion not necessary for the plaintiff to rely on this point, and I refrain from further dealing with it.

I think that having regard to the evidence and facts which I have quoted including the letter and the judgment of 1890, the Crown has sufficiently proved its title, and that the defendants have failed in the defence set up.

The Crown is entitled to the judgment asked for, and to the costs of this proceeding.

Judgment accordingly.

Solicitors for plaintiff: *Hogg & Hogg.*

Solicitors for defendants: *Fripp & McGee.*

BETWEEN:

THE KING, on the information of the Attorney-General of Canada,

PLAINTIFF;

1916
March 13.

AND

JAMES WILLIAM MURPHY and ROBERT SEDGWICK GOULD,

DEFENDANTS.

Yukon Placer Mining Acts—6 Edw. VII. c. 39—7 & 8 Edw. VII. c. 77—Construction of Statutes—Gold Commissioner acting as Mining Recorder—Grant of Water Rights—Validity.

By sec. 3 of the statute 7 & 8 Edw. VII. c. 77 it is provided that "mining recorders" shall be appointed by the Commissioner of the Yukon Territory, such appointment being subject to the approval of the Governor in Council. By sec. 5 of the last-mentioned enactment it was provided that an officer, called the "Gold Commissioner" should have jurisdiction within such mining districts as the Commissioner directed, and within such districts should possess also the power and authority of a mining recorder or mining inspector. By sec. 9 it is enacted that no person shall be granted or acquire a claim or any right therein, or carry on placer mining, except in accordance with the provisions of the Act.

On the 8th day of October, 1909, a certain grant of water rights was issued to the defendants. Although the grant purported to be regularly signed by the Mining Recorder of the Yukon Territory, it was admitted on behalf of the defendants that it was signed by him upon the order and direction of the Gold Commissioner of the said Territory without any adjudication thereon by the said mining recorder.

Held, that a mining recorder could only be appointed in the manner and by the authority mentioned in the Act referred to, and that as the grant in question was signed by a person who was neither *de facto* nor *de jure* a mining recorder, the grant was void.

2. In such a case the Crown is entitled to take proceedings to avoid the grant in order that the public property may not be wrongfully alienated.

THIS was an information by the Attorney-General for the Dominion of Canada, seeking the cancellation

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Argument of Counsel.

of a water grant for mining purposes in the Yukon Territory.

The facts are stated in the reasons for judgment.

December 15th, 1915.

The case was now heard at Ottawa before Mr. Justice CASSELS.

W. D. Hogg, K.C., for the plaintiff, contended, that the grant was issued improvidently and inadvertently, because the adjudication which is required under the *Yukon Placer Mining Act* was not complied with. Sections 54 to 58 of the *Yukon Placer Mining Act* deal with the question of water rights. A report or recommendation is made by the Recorder, which is placed before the Commissioner and he approves or disapproves. The judgment of the Recorder does not become final until it is approved by the Commissioner.

The judgment or recommendation or report of the Mining Recorder, is submitted to the Commissioner with the grant, and the Commissioner of the Yukon Territory then approves or disapproves as the case may be, it being stated in the evidence that they had no knowledge of any grant having ever been disapproved.

He submitted that the adjudication here, according to the evidence was taken before the Gold Commissioner who has, under the Statute, a number of special jurisdictions entirely apart and separate from the work set out in those several sections from 54 to 58. That the Gold Commissioner has a very large jurisdiction under this Act, but he was in reality usurping the jurisdiction of the Mining Recorder when he sat as a judge upon a water grant.

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On the 1st of August, 1906, a new state of things arose. Prior to that time the Gold Commissioner and the Mining Recorder were acting upon orders in council and regulations that were made, but he submitted they were all put an end to by the Statute that was passed in 1906, by the *Yukon Placer Mining Act.*

He was not a Gold Commissioner for a particular district. If the Statute gave him jurisdiction in other matters as Gold Commissioner that is one thing; but he was never directed to act in this particular district which is the Dawson District, and therefore, he had not the power of a Mining Recorder. Now, the Order in Council of the 7th of July, 1898, gave the officers different offices of jurisdiction in the matter they were to attend to. The Gold Commissioner sat in what is known as the Gold Commissioner's Court, and protests or objections were lodged before him and decided by him. By the Act of 1906, that was abolished and a new code was established, a new method of dealing with claims.

F. T. Congdon, K.C., on behalf of the defendants, contended that until the coming into force of the *Yukon Placer Mining Act*, on the 1st of August, 1906, they had, with respect to mining matters, which include water rights, a system of administration and a system of judicature. He submitted that the old system was not wiped out but it was continued and only slightly varied by the new Act. The Act expressly refrained from making any repeal.

If it was a fact that there were none of these *officers de jure*, they existed *de facto*, and that is just as good as though they were *de jure*. Their acts as *de facto* officers were as valid as though they had been *de jure* officers.

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Argument of Counsel.

He submitted that the Order in Council of the 7th of July, 1898, provided that the Gold Commissioner shall be the Mining Recorder at the Headquarters of the Government of the Territory and shall appoint such officials or Mining Recorders as may be necessary. That Order in Council was in force up to the time of the passing of the Act in 1906, and under that he had the power and was required to act as Mining Recorder at the headquarters of the Government, Dawson. Section 5 was not intended to confer jurisdiction but to distribute jurisdiction. Up to August 6th, 1906, there was but one Gold Commissioner for the Yukon Territory. The design of this act was the appointment of a number of Gold Commissioners as shown in section 3. The object of section 5 was to confer on the Commissioner of the Territory the ability to distribute between these various Commissioners the jurisdiction to act as Gold Commissioner and as Mining Recorder. It was never intended that where a Gold Commissioner acting as Gold Commissioner, was appointed as Gold Commissioner for the whole Territory, that the Gold Commissioner who was that official, appointed for a specific purpose by the Governor in Council, should not act within the jurisdiction given him by the Governor in Council until the Commissioner said he could not.

[BY THE COURT.—You could say his powers were unlimited until they were limited by the proceedings of this Act.]

Supposing there had been three Gold Commissioners appointed within the authority under this Act, then we could have distributed between them the territory assigned to them.

[BY THE COURT.—And that would limit the power of the Gold Commissioner as it existed up to that time. That is your contention.]

Yes; territorially limited his jurisdiction and his right to act as Mining Recorder.

[BY THE COURT.—But it was never intended to take away the jurisdiction of the Gold Commissioner until appointments were made under the Statute?

Yes. And under this Act under the proceedings of Section 4, the Commissioner may divide the Territory. The Commissioner never divided the Territory after the Act came into force. It was divided before, and I am submitting that it was never done up to the time of this Grant. We have but one Gold Commissioner, as in 1896.

[BY THE COURT.—You contend, if in point of fact the Gold Commissioner does not continue Gold Commissioner, all these provisions requiring the consent of the Gold Commissioner would be null and void, and the Statute would be unworkable?]

And everything in the Territory would be wrong since 1906, because the Gold Commissioner has gone on as though he had authority whereas he had not, until a very recent time when Mr. Black (The Commissioner of the Yukon) did give direction. The Commissioner could not give direction until he divided the territory under section 4.

He submitted that the evidence showed in this very case shows that all these applications were heard by the Gold Commissioner who exercised his jurisdiction, and who sent his memorandum with regard to his adjudication on them to the Commissioner of the Territory. In this case that was approved and afterwards the Grant was issued in accordance with the approved recommendations, and the Commissioner approved of that.

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Argument of Counsel.

At all events, it is amply sufficient if not to make the act of the Gold Commissioner *de jure* correct, to make him in the exercise of the office of Mining Recorder a good *de facto* officer.

[BY THE COURT.—Was this adjudication by the Gold Commissioner or the Mining Recorder?]

By the Gold Commissioner acting as Mining Recorder.

[BY THE COURT.—What you say is that the office of Gold Commissioner was not done away with by this Statute, and that until he chose to define the jurisdiction and appoint others he still continued to act. That so long as he acted as Gold Commissioner he had equal powers with the Recorder, and had the same power to try cases as the Recorder would have, and that his judgment has been approved by the Commissioner.]

That is the fact.

The office was there and the only officer filling it was the officer who acted in this case, who was, if not *de jure, de facto.*

A *de facto* officer is:

"One who has the reputation of being the officer "he assumes to be, and yet is not a good officer in "point of law."

That is Lord Ellenborough's definition of an officer *de facto* given in *Rex v. Bedford Level.*(1)

Colour of title implies an election or an appointment which is at least colourable.

An officer may be one *de facto,* even while there is an officer *de jure.*(2)

The title of a *de facto* judicial officer is not collaterally assailable. (3)

(1) 6 East 356 at p. 368. *See* also *Throop on Public Officers* at par. 625 and 628, 625, 627 and 628.

(2) *Constantineau's De Facto Doctrine,* p. 113.

(3) *Constantineau,* pp. 552, 565, 566. *State v. Carroll,* 38 Conn. 449; 9 Am. Rep., 409; *Adams v. Mississipi State Bank,* 75 Miss., 701; and *Throop,* 622 and 649.

Mr. *Hogg* in reply submitted that his contention was that the Act of 1906 was a new beginning of all matters, and that it must be strictly observed is more than corroborated by section 90. There were Mining Recorders all along appointed after the Act.

Cites *British Wagon Company v. Grey* (1); *The Queen v. Shopshire County Court Judge*, (2) *Halsbury's Laws of England* (3); *Penn v. Baltimore.*(4)

CASSELS, J., now (March 13th, 1916) delivered of judgment.

This is an information exhibited on behalf of His Majesty the King by the Attorney-General of Canada. The information alleges as follows:—

"1. That on, to wit, the 8th day of October, 1909, "a grant to divert and take for mining purposes one "hundred inches of water from Independence Creek "in the Yukon Territory was issued by the Mining "Recorder of the Dawson Mining District in the "Yukon Territory to the defendants, the said grant "to take effect on the 3rd day of August, 1915, and to "continue for a period of ten years from the said "date in priority after the said date to all other grants "of water rights from the said Creek.

"2. The said water grant although signed by the "Mining Recorder of the said Dawson Mining District "was so signed by him upon the order and direction "of the Gold Commissioner of the said Territory "without any adjudication thereon by the said Mining "Recorder, contrary to the provisions and require-"ments of the *Yukon Placer Mining Act*, Revised "Statutes of Canada, Chapter 64 and amendments, "and the said grant was made and issued through

(1) (1896), 1 Q.B. 35.
(2) 20 Q.B.D., 242-248.
(3) Vol. IX., p. 13.
(4) 1 Ves. Sr. 446.

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"improvidence, inadvertence and error, and should "be cancelled and set aside."

In answer to the allegations in the information the defendants plead as follows:—

"3. The Defendants say that the said Gold Com- "missioner at the time said Grant was applied for, "and also when it was issued, and for many years "previous to such issue, had and exercised jurisdiction "as such Gold Commissioner throughout the whole "of the Yukon Territory, and as such Gold Com- "missioner possessed, and openly and notoriously "exercised the powers and authority of Mining "Recorder to the exclusion of any and all other "Mining Recorders, and he so acted under the direction "and with the knowledge and consent of the Com- "missioner of said Territory, and of the Minister "of the Interior of Canada, and of the Government "of Canada, and his acts and decisions as such Com- "missioner exercising such powers and authority "in relation to applications for water grants, were "from time to time approved by the said Commissioner "of said Territory, and the application of defendants "for said water grant was adjudicated upon by the "Gold Commissioner exercising such powers and "authority as aforesaid after hearing the applicants "for such Grant and all parties interested in opposing "such application, and all such parties submitted "to the jurisdiction of the Gold Commissioner exer- "cising such powers and authority, and acquiesced "in the same, and the decision of the Gold Com- "missioner upon such application was approved by "the Commissioner of the Territory and the said "Grant was issued by the Mining Recorder as a "ministerial officer subordinate to the said Gold "Commissioner, and its issue was approved by the

"Administrator of the Territory, acting between "the resignation of one Commissioner and the appoint- "ment of his successor.

"4. The application for said Grant was made to "the Mining Recorder and was heard and adjudicated "upon by the said Gold Commissioner exercising such "powers and authority as aforesaid without any "choice on the part of the defendants as to whether "such application should be heard and adjudicated "upon by the said Gold Commissioner, exercising "such powers and authority aforesaid, or by the "Mining Recorder, and the said application was "heard and adjudicated upon in the usual way adopted "and in force in the Yukon Territory from the begin- "ning of its Government to the present time."

The evidence was taken under a Commission, and the case argued before me at Ottawa.

There is no dispute as to the facts. The determination of the rights of the parties depends on the true construction of the *Yukon Placer Mining Act* and amendments and whether the Gold Commissioner had the powers claimed for him by the defendants.

Before considering in detail the statutes governing the determination of the case it may be well to refer to certain facts. *The Yukon Placer Mining Act* was assented to on the 13th July, 1906, and came into force on the 1st August, 1906. It is to be found in the Revised Statutes of Canada, 1906, cap. 64. Amendments were enacted by the Parliament of Canada as follows: 6 & 7 Edw. VII. cap. 54 (27th April, 1907); 7 & 8 Edw. VII., cap. 77 (20th July, 1908); 2 Geo. V., cap. 57 (1st April, 1912). This latter subsequent to the grant impeached. The grant

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impeached is dated 8th October, 1909. (Exhibit No. 32 attached to the Commission).

This grant is signed by G. P. McKenzie, Mining-Recorder. There is nothing on its face to indicate that the Mining Recorder had not adjudicated on the questions involved. It is admitted, however, that the Gold Commissioner adjudicated on the questions in dispute and that the Mining Recorder merely signed his name on the direction of the Gold Commissioner and had no part in the adjudication on the merits.

The grant as alleged in the information among other rights granted the defendants the right from the 3rd August, 1915, for a period of 10 years from that date to divert and take for mining purposes one hundred (100) inches of water from Independence Creek, in priority to all other grants of water rights from the said Creek.

The information was filed on the 9th January, 1915. On the 28th May, 1907, by order of the Governor General in Council, F. X. Gosselin was appointed Gold Commissioner. On the 1st February, 1912, Geo. Black was appointed Commissioner of the Yukon, and on 1st April, 1912, he appointed the Gold Commissioner a Recorder for the Dawson District. This is the earliest date since the enactment of the *Yukon Placer Mining Act* that the Gold Commissioner was appointed a Mining Recorder. Previously, and on the 27th June, 1909, the then Commissioner Alex. Henderson appointed George Patton McKenzie, Mining Recorder for the Dawson District, and he was such Mining Recorder at the time of the application for the grant and adjudication. His appointment was approved of by the Governor in Council (Exhibit 62).

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After a careful consideration of the statutes and the arguments of counsel, I am of opinion that the Gold Commissioner had no authority in the premises. He was not a Mining Recorder as contemplated by the statute and had no status as such to allow the grant in question. I will subsequently deal with Mr. Congdon's argument that he was acting *de facto* as Recorder and that his decision cannot be questioned.

Turning to the statutes: For convenience, I have been furnished with a copy of the *Yukon Placer Mining Act* as consolidated with the amending Acts. Section 90 of 6 Edw. VII. cap 39 (cap. 64 of R.S.C., 1906) enacts as follows: "No person shall be granted or "acquire a claim or any right therein, or carry on "placer mining in the Territory except in accord- "ance with the provisions of this Act.

By the interpretation of the statute sec. 2, sub-sec. (h), it is provided as follows: " 'mining' or 'placer "'mining,' includes every mode and method of working "whatsoever whereby earth, soil, gravel or cement "may be removed, washed, shifted or refined or other- "wise dealt with, for the purpose of obtaining gold "or such other minerals or stones, but does not include "the working of rock in situ."

Sub-section (a) of section 2 is as follows: 'claim' "means any parcel of land located or granted for "placer mining, and 'mining property' includes, "besides claims, any ditches or water rights used "for mining thereon, and all other things belonging "thereto or used in the working thereof for mining "purposes."

Sub-section (e) of section 2 is as follows: 'gold "commissioner,' 'mining recorder' and 'mining inspec- "tor' mean, each of them, the officer so named,

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"appointed under this Act and acting within the limits "of his jurisdiction."

I am of opinion that since this enactment came into force its provisions govern and that the Gold Commissioner appointed as such cannot under earlier statutes, if any such exist, confer upon himself jurisdiction not conferred by this statute. By section 3 of the Statute (1908) Mining Recorders shall be appointed by the Commissioner subject to the approval of the Governor in Council. As stated, George Patton McKenzie was appointed Recorder on the 27th January, 1909.

Section 5 of the statute is as follows: "The Gold "Commissioner shall have jurisdiction within such "mining districts as the Commissioner directs, and "within such districts shall possess also the powers and "authority of a mining recorder or mining inspector." This was part of the original statute 6 Edw. VII. As stated, the Gold Commissioner was not appointed Mining Recorder until the 1st April, 1912.

An analysis of the statute shows that the Gold Commissioner had certain duties to perform as Gold Commissioner, but was not clothed with the powers of a Mining Recorder until appointed by the Commissioner. Under the statutes and the authority conferred upon him he had power to enter into and upon and examine any claim or mine (Sec. 16).

Where a survey is protested (sec. 39), and in 1908 an appeal was given from his decision (sec. 39 s.s. 6) an appeal is given to the Gold Commissioner from the action of the Mining Inspector (sec. 59 s.s. 2). Under section 61, an appeal lies to the Gold Commissioner. An appeal also lies to the Gold Commissioner from the decision of the Mining Recorder under section 66. Section 74 was enacted in 1912. Under section 88 an appeal is given.

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When the application is for a water grant, under sections 54 and following sections, the Recorder (with the approval of the Commissioner) has to pass upon the question. *Commissioner*, by the Interpretation Act, is to have the same meaning as it has in the Yukon Act. The Yukon Act, cap 63, R.S.C., 1906, defines Commissioner as follows: "The Commissioner of the Yukon Territory"—and *see* sec. 4 of cap. 63.

It was strenuously argued by Mr. Congdon that the Gold Commissioner having acted *de facto* as Mining Recorder, his action cannot be questioned by third parties. I have read the various citations referred to, but do not agree with the contention. The Crown, in the present case, is not a third party—within the meaning of any of the cases cited. It is primarily interested in protecting public property from being through error wrongfully alienated.—Moreover there was a *de jure* Mining Recorder; and a *de facto* and a *de jure* Mining Recorder can hardly exist together.

The contention that the action of officers of the Crown in acquiescing in the assumption of powers by the Gold Commissioner cannot prevail as against the statute. See *Booth v. The King* (1), and authorities cited. Laches form no defence. *Ontario Mining Co. v. Seybold* (2). *Black v. The Queen* (3).

I am of opinion that the grant in question was issued in error and improvidently and should be declared null and void. *See King v. Powell* (4); *Attorney General v. Contois* (6); *Attorney General v. Garbutt* (6); *Attorney General v. McNulty* (7), and *Fonseca v. Attorney General* (8).

(1) 14 Ex. C.R. 146; 51 S.C.R. 20.
(2) 31 O.R. 386: L.R. (1903) App. Cas. 83-84.
(3) 29 S.C.R. 699.
(4) 13 Ex. C. R. 300.
(5) 25 Gr. Ch. 346.
(6) 5 Gr. Ch. 181.
(7) 11 Gr. Ch. 281.
(8) 17 S.C.R. 612, at 650.

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The defendants must pay the costs of the action.

Solicitors for the plaintiff: *Messrs. Hogg & Hogg.*

Solicitor for the defendant: *F. T. Congdon.*

IN THE MATTER OF THE PETITION OF RIGHT OF

ANTOINE GIRARD, OF THE CITY OF QUEBEC, MECHANIC, ACTING IN HIS QUALITY OF TUTOR DULY APPOINTED TO ANTONIO GIRARD, OF THE SAME PLACE, A MINOR OF FOURTEEN YEARS,

SUPPLIANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

1916
March 17.

Negligence—Crown's servant—Accident—Proximate cause—Infringement of instructions—Liability.

G., a boy aged 13, but who represented himself as being older, was employed on a folding machine in a Government arsenal. He was given a position at the back of the machine with special instructions to watch the same and, if a charger should be ejected, to immediately notify the operator to stop the machine. On the occasion of the accident, G. while at his post observed that a charger had jumped out and fallen into the machine. He called out to the operator to stop the machine, and instead of leaving the operator to remove the charger with his hook, he himself negligently placed his hand in the machine to remove it. By special instructions known to G., the duty of removing the charger devolved on the operator alone who was provided with a hook for that purpose. Shortly afterwards, the operator having asked whether it was all right, an answer came from behind repeating the words "all right" and the machine was started again. G. had his finger caught in the machine and so badly damaged that it had to be amputated.

Held, that the petition would not lie as the accident was not attributable to the negligence of any office or servant of the Crown while acting within the scope of his duties or employment under sec. 20 of the *Exchequer Court Act*, nor did it happen to G. while he was engaged in the discharge of his duties as defined by his instructions. The proximate or effective cause of the accident was the act of G. himself in doing something which he knew was not his duty and the risk of which he voluntarily accepted.

PETITION OF RIGHT for damages arising out of an accident to a workman while employed in the Dominion Arsenal in the City of Quebec.

1916

GIRARD v. THE KING.

Reasons for Judgment.

The facts are stated in the reasons for judgment.

February 24th and March 3rd, 1916.

The case now came on for hearing before the Honourable MR. JUSTICE AUDETTE, at Quebec.

A. Fitzpatrick, for the suppliant, argued that Girard, a mere boy, was placed at work with specific instructions. The operator in charge of the machine could not see him. There could not be any *faute commune* in any way. The Civil Code of this Province applies to the Crown. Anything coming under Articles 1053 and 1054 applies to the Crown. I submit that the *Factories Act* applies. It is a *primâ facie* case of negligence. An employer for obvious reasons employs a minor. He does not pay him as high wages as a more competent man of 18 or 21. He could employ a boy and pay him less, and that is what was apparently done in this case. The *Factories Act* will be found in the Quebec *Revised Statutes* for 1909, section 3829. In subsection 7, the word "child" means a boy under 14 years of age.

By sec. 3833 in establishments classified by the Governor in Council as dangerous, the ages of employees shall not be under 16 for boys and 18 for girls. I produce an order-in-council passed on the 27th March, 1902, which states in the list of places as dangerous, that the stamping of sheet metals is dangerous employment.

My contention is that if the Crown comes under Articles 1053 or 1054 of the C.C.P.Q., the *Factories Act* applies. It is undoubted law when the employer does not comply with the *Factories Act*, that is to say, when he employs a minor, or when he does not protect his machinery, there is a *prima facie* case against him. Under the Civil Code it would be negligence.

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If Articles 1053 and 1054 C.C.P.Q. apply, then the *Factories Act* applies; and if the *Factories Act* applies, it has been held there is a *primâ facie* case of negligence. (1).

The rule of common employment does not apply to the Province of Quebec.

On the question of the employee's knowledge of the risk, see *Montreal Park and Island Railway v. McDougall.* (2) *Ross v. Langlois* (3). *Lariviere v. Girouard* (4).

C. Smith, for the respondent, argued that if the suppliant had obeyed his instructions, the accident would not have happened. It is his disobedience which is the determining cause of the accident. The onus to prove negligence is on the suppliant, and he has failed to do that. It is true Girard was not 14 years old when he was first engaged, but he did state that he was over 14 years at the time of his engagement. However, his age is not the determining cause of the accident, the cause of the accident being the failure of Girard to comply with his instructions.

AUDETTE, J., now March 17th, 1916,. delivered judgment.

The suppliant, in his quality of tutor to his minor son, Antonio, brought this petition of right to recover the sum of $6,420. which he claims as damages, arising out of the loss of the index finger of the said Antonio Girard's right hand, resulting from the unsafe and

(1) See *Caron v. The Standard Shirt Co.*, Q.R. 28, S.C., 211. *Belanger v. Cie. Desjardins*, Q. R. 29 S.C. 1. *Kirk v. Canada Paint Co.*, Q. R. 29 S.C. 500. *Desrosiers v. St. Lawrence Furniture Co.*, 4 Q.R. 27 S.C. 73. *Grignon v. Chambly Manuf. Co.*, 7 R.J. 125. *Gibbons v. Skelton*, 7 R.J. 232. *Martel v. Ross*, Q.R. 16 S.C. 118. *Ibbotson v. Trevethick*, Q.R. 4 S.C. 318. *Lamoureaux v. Fournier*, 33 S.C.R. 675. 21 *Halsbury's Laws of Eng.*, p. 366.

(2) 36 S.C.R. 1.

(3) 36 S.C.R., 1.

(4) M.L.R., 1 Q.B. 280.

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defective condition of a piece of machinery, and from the negligence of a fellow workman in the course of their employment in the Dominion Arsenal, in the City of Quebec, a public work of Canada.

Counsel for the suppliant, in the course of the trial, withdrew the claim for $420. for medical attendance, as having been wholly paid by the Crown. It was also admitted that Girard was paid his wages from the time of the accident up to the 9th January, 1915, when he left the Arsenal.

The accident happened on the 9th September, 1914, and the petition of right was filed in this Court on the 9th November, 1915,—that is more than one year after the accident, a delay within which the right of action would be prescribed and extinguished under the laws of the Province of Quebec. However, it appears, from Exhibit No. 2, that the petition of right was, under the provisions of sec. 4 of *The Petition of Right Act* (R.S. 1906, Ch. 142), left with the Secretary of State on the 9th day of August, 1915. Following the numerous decisions of this Court upon the question, it is found that such deposit with the Secretary of State interrupted prescription within the meaning of Art., 2224, C.C.P.Q.—See *Saindon v. The King.* (1.)

Briefly stated, freed from numerous and unnecessary details, the accident happened under the following circumstances:—

On the evening of the 9th September, 1914, the night shift of the men employed at the Dominion Arsenal, at Quebec, began work at about 6.30 p.m. One young Ruel resumed his work on No. 2 folding machine, shown on the photograph filed herein as exhibit "A." Ruel at that time was employed in making what is called "chargers." To manufacture

(1) 15 Ex. C.R. 305.

a charger three operations are necessary. The first one gives him in the result, the perforated plate marked Exhibit "D"; the second operation produces Exhibit "C"; and the third and last operation gives Exhibit "B".

Now when a new *block* or *die* was being used in that machine with respect to the third operation, the "charger" was so much pressed against the block, that when working its way out of the block and coming to the end thereof, it would at times jump, instead of falling directly in the box marked "D", underneath the machine. When a charger would thus jump it was liable to fall in the bed of the machinery of the folding instrument, and was thus liable to block or break the machine.

On the day in question Morin, who was in charge of the plant at the Arsenal at the time, watched the folding machine for a while, and then at about 7 o'clock, in the evening, he placed Antonio Girard, sitting on a box, at the back of the folding machine, with specific instructions to watch the machine and see if any charger would jump, and when any did jump to tell Ruel to stop the machine; and that Ruel, *who had a wire hook would remove them.* Morin further contends he told Girard that he had nothing to do with the machine, and that he forbade him to put his hands in or upon the machine. All of this was done, it will be noticed, not to protect any employee from any imminent danger but solely to protect the machine and to prevent the blocking of the same.

After the folding machine, had that evening been in operation for about one hour and a half and when,—it is well to notice,—Girard was at his post behind the machine; but engaged in talking with both young Gagne and Thibault,—one "charger" jumped and fell

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into the machine. Then Girard called out to Ruel, who was the operator, to stop the machine and it was immediately stopped. Ruel had a wire hook for the very purpose of removing the charger; but Girard, who was behind the machine and whom Ruel could not see, came to the machine, in direct contravention to his orders, placed his hand in it and started to remove the charger. Shortly after the order to stop had come Ruel asked if it was "All right," and some one answered: "All right." He then set his machine anew in operation, when Girard, who still had his hand in the machine, had the index finger of the right hand so badly cut, that it had to be amputated.

Having thus related the salient facts of the accident, the next question which presents itself is, what was the proximate, the determining cause of this accident?

As a prelude thereto, however, it is well to state the suppliant to succeed must bring the present case within the ambit of sec. 20 of *The Exchequer Court Act*, and find:—1st., A public work; 2nd, An officer of the Crown who has been negligent when acting within the scope of his duties and employment; and, 3rd, That the accident was the result of such negligence.

It is admitted that the Arsenal, at Quebec, is a public work. Now, has there been any such negligence on behalf of an officer of the Crown, from which the accident resulted?

It must obviously be found that had the suppliant complied with his instructions that no accident would have happened. The proximate and determining cause of the accident is clearly the result of his disobedience because he had been derelict in the performance of his duty. The act upon which the risk of injury attended and from which the injury sustained

resulted, was clearly done outside the scope of his employment by Girard who suffered the injury. *C. P. R. v. Frechette* (1). Whatever negligence could be charged here against any employee of the Crown, could not be an *incuria dans locum injuria;* since the negligence which determined the accident was that of Girard. His own negligence was the sole effective cause of the injury he sustained. His duty or his work had been clearly assigned to him, guarding him against the danger of putting his hands in the machine and it was voluntarily that he encountered the danger whereby he sustained the injury complained of.

If the injury is occasioned outside the sphere of the duties of the employee, the infliction of injury does not raise a duty.

In *Herbert v. Samuel Fox & Co.*, (2), decided by the House of Lords, where an employee whose duty had been assigned to walk in front of the wagons when being shunted, and who instead of so walking in front of them, sat on the front buffer of the leading wagon, and while so placed fell and was injured,—it was held that the accident did not arise "out of" the employment, and that the employee by his conduct had exposed himself to a risk, which by express prohibition, was placed outside the sphere of his employment and he was not therefore entitled to compensation. See also *Jebb v. Chadwick*, (3).

In the present case it is clearly when Girard was acting outside the scope of his duties or employment, when he was transgresssing his instructions by disobedience, that the accident happened and he therefore cannot recover.

It is further contended that Girard was 13 years of age at the time of the accident, and that he should not,

(1) (1915) A.C. 880. (2) (1915) 2, K.B. 81.
(3) (1915) 2 K.B. 94.

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under secs. 3829 and 3833 (R.S.Q., 1909) have been employed in the Arsenal. The present case, if at all affected by the Provincial Statutes, a matter unnecessary to decide here, could only come under sec. 2 of sec. 3833, and as the evidence establishes that when he was engaged, Girard was astute enough to give his age to foreman Redding as 14, he cannot now invoke his own turpitude. After having done so, he cannot turn around and say, I deceived you when I told you I was only 13, and you should not have employed me. No,—he who seeks equity must come into Court with clean hands.

Girard is a well developed youth, and not so young, or of such tender age or inexperience, as being unable to understand his instructions and the danger of putting his hand in the machine; and it is not beyond the proportion of his age to exact from him such care and diligence as was required to allow him to understand his instructions. Specific easy work was assigned to him, the scope of his employment was clearly defined and resided in the obedience to the express command of his employer.

At the time of the accident he was engaged in conversation with two other young employees, and when he got up from his box and went to the machine and extracted the charger therefrom, he was acting beyong the scope of his employment.

Ruel says he received the order to resume the operation of his machine and that the words "all right" came from behind the machine where the three boys were; but he could not say who said so. The three boys denied having said it. Even Girard goes as far as that. However, witness Gagne says he is certain some one cried " All right," in answer to Ruel as to whether he should start his machine again; but

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he says he did not say so and he does not know who did it. Thibault says he did not speak. The most interested to deny having said it is the suppliant and it is established some one said it.

I regret to have to come to the conclusion that Girard was the unfortunate victim of his own negligence and disobedience to his orders and instructions, and that he has no legal claim against the Crown since the latter has done him no legal wrong. No negligence on behalf of an officer of the Crown from which the accident resulted has been proved or established.

The suppliant is therefore not entitled to any portion of the relief sought herein and the petition of right is dismissed.

Judgment accordingly.

Solicitor for the suppliant: *A. Fitzpatrick.*

Solicitor for the respondent: *C. Smith.*

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May 18.

HIS MAJESTY THE KING, on the information of the Attorney-General for the Dominion of Canada,

PLAINTIFF,

AND

WILLIAM POWER, of the City of Quebec, Merchant; DAME MARGARET ALLEYN, widow of the late Honourable John Sharples, GUSTAVUS G. STUART, K.C., and GEORGE H. THOMSON, all three in their quality of joint executors and trustees of the estate of the late Honourable John Sharples; DAME MARY VALLIERE GUNN, of Quebec, widow of the late R. Harcourt Smith, ARTHUR C. SMITH, of Quebec, bank manager, in their quality of joint executors and trustees of the estate of the late R. Harcourt Smith; THE RECTOR AND CHURCH WARDENS OF ST. PAUL'S CHURCH, QUEBEC (ANGLICAN); and THE QUEBEC HARBOUR COMMISSIONERS.

DEFENDANTS.

Expropriation—Water-lot—Quebec Harbour Act—22 Vict. (Prov. Can.) c. 32.—Interpretation—Crown Grant—Construction—Harbour Commissioners—Prior Expropriation—Offer of Compensation—Abandonment—Evidence.

In a grant from the Crown (in right of the Province of Canada) of a water-lot on the River St. Lawrence made in the year 1854, it was provided that upon giving twelve months previous notice to the grantee and paying a reasonable sum as indemnity for the ameliorations and improvements, the Crown could resume possession of the same for the purposes of public improvement.

Held, that the right of the Crown under the above mentioned provisions passed to and became vested in the Quebec Harbour Commissioners under 22 Vict. (Prov. Can.) c. 32.

Samson v. The Queen, 2 Ex. C.R. 32 considered.

2. By sec. 2 of 22 Vict. (Prov. Can.) c. 32, vesting certain Crown property in the Quebec Harbour Commissioners, it was provided that "every riparian

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and other proprietor of a deep water pier, or any other property within the said boundaries, shall continue to use and enjoy his property and mooring berths in front thereof, as he now uses the same, until the said corporation shall have acquired the right, title and interest, which any such proprietor may lawfully have in and to any beach property or water-lot within the said boundaries, nor shall the rights of any person be abrogated or diminished by this Act in any manner whatever."

Held, that after the passage of this statute, title by adverse possession to the *ripa* subject to the above provision could not be established by a user which, so far as the evidence disclosed, was referable to the exercise of statutory rights.

Quebec Harbour Commissioners v. Roche, Q.R. 1 S.C. 365 considered and distinguished.

3. That the market value of the property in question was enhanced by the statutory rights above mentioned.

4. Where a previous expropriation had been abandoned by the Crown, the amount offered in the information then filed as compensation to the owner and accepted by him in his statement of defence, is not to be treated as conclusive of the value of the land, but may be considered along with the evidence adduced in the second expropriation proceedings.

Gibb v. The King, 52 S.C.R. 402, referred to.

THIS was an information filed by the Attorney-General for the Dominion of Canada for the expropriation of certain lands required for the construction of the National Transcontinental Railway, a public work of Canada.

The facts are stated in the reasons for judgment. January 17th, 18th and 19th, 1916.

The case was heard at Quebec, before the Honourable Mr. JUSTICE CASSELS.

G. F. Gibsone, K.C. appeared for the Crown; *A. C. Dobell* for the Harbour Commissioners; *G. G. Stuart*, K.C. for the defendants other than the Harbour Commissioners and the Rector and Church Wardens of St. Paul's Church; and *R. Campbell*, K.C for the Rector and Church Wardens of St. Paul's Church.

Mr. *Stuart:* In this case the Crown has deliberately made an offer in the shape of a previous information and tendered that as being the value. It therefore stands as a naked admission on the part of responsible

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persons representing the Crown. In the defence in the previous action we accepted and said, "it is not the real value, but we are willing to accept it".

[BY THE COURT.—There is no evidence before me at all of any increase in shipping in Quebec. These properties are only of value for shipping purposes.]

That is perfectly true, and the reason of that is this, that the increase in value was to some extent due to the expectation rather than to the absolute realization at the time of this considerable increase, but that is a perfectly legitimate increase in value. If people are willing to give a large sum of money for property because they anticipate in the near future that there is going to be an advantageous and profitable use for it, that is as much market value as if it were actually at the time converted or realized.

As to the water lot, the defendants have had possession in good faith since 1901. There is an absolute prohibition under the law of Quebec against acquiring an easement, what is called a servitude by prescription. In France you can acquire an easement by prescription, but there is an article of our Code which says you cannot. There is an old maxim "Nulle servitude sans titre", which is embodied in an article of the Code. Art. 549, C. C. P. Q.

The defendants claim they have the riparian rights, because they are the owners of the ripa independent of prescription. The Crown could not grant to anybody the right to block access to the lands of the defendants.

With respect to riparian rights see *Lyons v. Fishmongers*(1), and *Pion* v. *North Shore Ry. Co.* (2).

See also *Quebec Harbour Commissioners v. Roche,*(3) and also *Montreal Harbour Commissioners v. Record Foundry & Machine Co.*(4)

(1) 1 A. C. 662.
(2) 14 A. C. 612.
(3) Q. R. 1 S. C. 365.
(4) Q. R. 38 S. C. 161.

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Mr. *Dobell* contended that the Statute 22 Vict., c. 32, shows clearly that the property which had not been granted belongs to the Crown, and as there is no title to this property by grant he submitted, therefore, that the Harbour Commissioners own that piece. Mr. Power has the foreshore and the right beyond that out into the St. Lawrence. He agreed with Mr. Stuart that the Crown has not the right to put up any building or interfere with his right of egress and ingress on that particular lot. These grants were made practically for the right of building a wharf on them.

[Mr. *Stuart*.—Since the earliest days they have been granting in deep water lots, with the right to build wharves in the harbour of Quebec.]

See Articles 2213 and 2220 C.C. (P.Q.). Sec. 2 of Cap. 32, 22 Vict., vests all of these lands in the Harbour Commissioners in trust.

He contended that in the case of the *King v. Ross*(1) in relation to property at Wolfe's Cove, a very similar thing happened as in this case. Mr. Roche, who owned the Wolfe Cove property before Mr. Ross, had the property down to low-water mark. The mortgage was foreclosed and the property was brought to sale. The property was described in the Sheriff's description by the cadastral numbers of the lots. The cadastral description gave these lots out as far as the Harbour Commissioners' line, and Mr. Ross claimed that he was the owner in good faith, and had a title because of the Sheriff's sale—he had acquired out to the Harbour Commissioners' line, as that was where the cadastral gave him to.

The easement which defendants have been using and enjoying has been a general public easement. They have no rights beyond that. The only question now

(1) 15 Ex. C. R., 33.

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is whether they are entltied to compensation for being deprived of the easement upon that little strip of water. He would maintain that they have not a right to such compensation. While it was a strip of water they only had a right to use it in common with the public.

Without the ripa they cannot have any riparian right.

Where there is a title and possession has been taken in virtue of that title, that possession is confined to what is expressed in that title until or unless there is some proof showing an absolute active separate possession. Now, in the present case all that Monsignor Begin intended to transfer was what he set out in the title deeds recited in the deed to Sharples, so what Sharples took possession of was what Monsignor Begin handed over to him, namely, the portions shaded in yellow on the map Exhibit No. 3, and that Sharples did not take possession of and never took possession of the intervening space.

With regard to the sum offered as conpensation on the first expropriation the Crown made a mistake, and they receded from it which was the best thing they could do. They found that by an unexplainable error on the part of some representative a very large amount of money had been offered beyond the value of the property, and they straightway set to work to withdraw the offer, and now they are taking these proceedings on a more appropriate basis as they think.

In *Yule v. The Queen*(1), a right to make a bridge had been granted before Confederation, and at the expiration of 50 years or something like that the Crown was held to have a right to take it back on paying a certain indemnity, and it was held that the right accrued to the Dominion of Canada.

(1) 30 S. C. R. 24.

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[BY THE COURT.—If the public harbour was vested before Confederation, I suppose under the Confederation Act it would pass to the Dominion.]

Mr. STUART.—That was held in *Holman v. Green*(1). But the Privy Council threw so much doubt on *Holman v. Green* that it is no longer considered an authority.]

[BY THE COURT.—All the Privy Council did was this. It said it does not follow that because you have a public harbour the foreshore around that public harbour becomes part of the harbour.]

Mr. STUART.—I think they went further than that, that only such parts of the foreshore as were in actual use at that time or were appropriated as part of the harbour passed to the Dominion. This could not possibly have passed to the Dominion.

[BY THE COURT.—The question to my mind is whether this formed part of the public harbour. That is, the line of the public harbour having been thrown out into the St. Lawrence, and this being within the line which would be granted, the question is whether it passed to the Dominion or to the Province?]

I think it is clearly inside the limits laid down by the statute. It is right out in the middle of the river, it is some considerable distance beyond low water.

In 1842 the Commissioner of Crown Lands instructed a surveyor, Mr. Ware, to take into consideration the different circumstances and to advise the government to what extent out into deep water grants from the Crown should be limited. This surveyor made a plan at the time in 1842, and that plan was subsequently approved in the year 1852 or 1853, by the Commissioner of Crown Lands, the Commissioner of

(1) 6 S. C. R. 707.

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Crown Lands thereby deciding by way of order in council, I believe, that no grants of beach or deep water lots in the Harbour of Quebec should extend beyond this line. That is what the state of affairs was and has been ever since. It was the establishment of the Harbour Commissioners' line, so called. It was not always called by that name—it used to be called the "Blue line," the line of blue water.

Subsequent to that, in 1859, the statute was passed which has been recited to the Court. It declares the Harbour of Quebec to be bounded by the high water mark on both sides of the river and on the east side by the line of the Montmorency River and Indian Cove, and on the west side by a line from Cap Rouge to the Chaudiere. So the harbour is equivalent to the high-water mark on one side and the other, and the so-called Harbour Commissioners' line does not in any way affect the boundaries of the Harbour of Quebec. It was a line laid down purely for administration purposes in the Crown Lands Department, and to cover the extent to which grants in deep water might be made by the Crown to individuals.

The only point I wish to make from the *Fisheries* case is that the holding of the Privy Council was, I think, that "Public Harbour" within the meaning of the *B.N.A. Act*, is to include everything that may properly be included in the term "public harbour" depending upon the circumstances of the case.

On the question of limited ownership see *Corrie v. MacDermott*,(1).

Mr. *Stuart*, in reply:—What is the effect of the reservation in favour of the Crown in the patent of 1854? Two questions arise there. First of all, in whose favor, that is, in favour of the Crown *qua*

(1) (1914) A. C. 1056.

Dominion or *qua* Province, is that reservation effective now if effective at all? Secondly, has the Crown taken the proper steps under the patent to avail itself of the stipulation, if it belonged to the Dominion at all? It can only belong to the Dominion if it forms part of the public harbour.

[BY THE COURT:—Assuming the harbour as defined by the first statute embraced these lands, and that was the position of matters at the time of Confederation, would not the *British North America Act* vest the harbour as it existed at the time of Confederation in the Dominion?]

Insofar as any lands ungranted were concerned, but not insofar as any lands vested in anybody else were concerned. The effect of the Act was not to vest in the United Province of Canada any properties which had been previously granted to private persons. On the contrary there is an express provisio that these rights were reserved.

[BY THE COURT:—Then does that statute exclude these particular lands from the boundaries of the harbour as defined?]

While it leaves them within the boundaries of the harbour, it exlcudes them because they were not part of the property of any one of the provinces at the time, they were not public works and property of any province.

[BY THE COURT:—But they were a public harbour?]

But they were not a public work. What was vested in the Dominion was only such public works and property of the Province as the Province owned at that period, and this they did not own, it was the property of the defendants. I really do not think there can be any doubt about that. That being so, this property

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never was a public work at any time and never passed to the Dominion.

The Transcontinental Railway which expropriated the land is a separate corporation entirely, it is not the Crown.

The word "improvement" is to be interpreted *ejusdem generis*. It is the same kind of improvement as was contemplated when they gave us the grant.

It is admitted that we own part of the property opposite this, and therefore the description which said that the whole piece sold to defendants was bounded by the Harbour Commissioners' line clearly included the piece of land which is in dispute. In order to get it by prescription I need a title and possession, I need to add the two together. See Art. 2251 C.C. (P.Q.).

Now, I admit on investigation of those titles this piece of land in dispute would not be included in any of the titles referred to as being the titles of the vendor; but I say it is incontrovertible that my vendor distinctly sold me this piece of land.

So far as the Allan sale is concerned it is on the face of the deed shown that they sold without warranty with respect to a large part of their property. The most valuable part of the property which they occupied did not belong to them but to the Crown and was held under a yearly lease arrangement. Evidently in view of the large extent of the land sold by the Allans and the comparatively small sum which they got there seemed to be in the case what the French call *anguille sous roche*—there seemed to be something which was not disclosed on the face of the proceedings.

CASSELS, J., now (May 18th, 1916), delivered judgment.

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This was an information exhibited on behalf of His Majesty the King to have it declared that certain lands described in the information are vested in His Majesty and to have the compensation therefor ascertained.

The lands expropriated are shown on the plan Exhibit No. 3. The plan expropriating the lands in question was deposited on the 8th November, 1913, and it is as of this date that the compensation has to be ascertained. The Crown offers by the information the sum of $12,000, as sufficient and just compensation for the lands expropriated. The defendants other than the Harbour Commissioners and the Church claim the sum of $79,608.95.

Before dealing with the question of compensation I will consider some of the questions in dispute. That portion of the lands in question shown on the plan and lying to the south side of the parcel marked "2415" and bounded on the north by a line south of the end of the wharf having number "60" marked on it and extending south to the Harbour Commissioners' line is not claimed by the defendants other than the Harbour Commissioners. A small parcel of land shown on the plan to the north of the piece coloured yellow and marked on the plan "Leased to Messrs. Atkinson Usborne Co. 25th April 42 (99 years) Area; 720 sq. ft." is held by the defendants Power *et al.* under an emphyteutic lease from the Rector and Church Wardens at a nominal rental of one penny a year.

I am relieved by counsel of the task of deciding the question of the separate amounts to be paid Power *et al* and the Church as it has been agreed between counsel that the land shall be assessed as if owned by Power *et al*, the Church and Power *et al* agreeing to adjust their rights in respect to the compensation

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outside of Court. In reference to the property on the south end of that portion of lands marked "2411" on the east side of the property and designated on the plan: "Grant to R. C. Bishop, 29th November, 1854; area 6335 Eng. Feet." As alleged on behalf of the Crown, the patent contains the following provision:

"Provided further and we do also hereby expressly "reserve unto us, our heirs, and successors full power "and authority, upon giving twelve months previous "notice to the said Corporation to resume for the "purpose of Public improvement the possession of the "said lot or piece of ground hereby granted, or any part "thereof upon payment to the said Corporation of a "reasonable sum as indemnity for the ameliorations "and improvements which may or shall have been made "on the said lot or piece of ground or such part thereof "as may be so required for public improvements, and "in default of the acceptance by the said Corporation "of such sum, so as aforesaid tendered, the amount of "indemnity, whether before or after the resumption of "possession by us, our heirs or successors, shall be "ascertained by two experts, one of whom shall be "nominated and appointed by our governor of our "said province for the time being, and the other by the "said Corporation, or in the event of a difference of "opinion arising between the said experts, by either of "them, the said experts, and the Tiers-Expert or "Umpire chosen by them."

The date of this patent is the 16th day of November, 1854. It is claimed by Mr. Gibsone on behalf of the Crown that no compensation should be allowed for this piece of property, the reason put forward being that the Crown has notified the owner of its intention to take back this piece, and as no improvements or ameliorations have been placed on this particular piece

of land the Crown contends there is no value in them to the defendants. I am not aware of any such notification by the Crown except the statement of Mr. Gibsone which is no doubt correct.

In a case of *Samson v. The Queen* (1), Mr. Justice Burbidge dealt with a case similar in respect to the one in question. The view of the learned judge was to the effect that proceedings having been taken under *The Expropriation Act* and not under the terms of the grant, compensation had to be arrived at: but that in assessing compensation regard must be had to the provision in question which no doubt would seriously affect the value of the land to the grantee. The property in question in the Samson case was situate on the south side of the St. Lawrence (Levis side) and was not vested in the Harbour Commissioners. The case was decided in 1888.

In the case before me I am of opinion that the rights of the Crown in respect to this particular piece of land is vested in the Harbour Commissioners under the provisions of the statute 22 Vict. c. 32, to which I will have to refer later. The result is, in my opinion, that the compensation to this particular piece of land must be paid to the defendants Power *et al* for their interest under the grant in question and to the Harbour Commissioners for whatever their interest may be in respect of having the right to resume the parcel of land. I will deal later as to the method of apportionment.

A further question arises in respect of the piece of property shown on plan Exhibit 3 lying between the two portions of Lot 2411 and marked on the plan "2411" and not coloured yellow. It runs from low water mark to the Harbour Commissioners' line. This parcel of land contains 6,503 sq. ft. It has

(1) 2 Ex. C. R. 32.

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never been conveyed and is vested in the Harbour Commissioners, unless Power and Sharples have acquired a title by adverse possession. It is claimed on behalf of Power *et al* by Mr. Stuart that they had proved a title of possession of more than 10 years and that the property in question is the property of his clients. He relies in support of his contention on a case of *Quebec Harbour Commissioners v. Roche*(1), a case decided by Andrews, J., in 1892. That was a case in which it was held that the prescription of five years barred the right of the Harbour Commissioners as to rents payable in respect of the property in question in that action. I may mention that in most of these cases and also when dealing with the Quebec Harbour Act, "rent" means interest on the purchase money the lands having been sold out and out, the purchase money not paid down but allowed to stand as a charge, the interest thereon being paid. In the case before Mr. Justice Andrews the property in question in respect of which a claim was made for the rents was not within the harbour of Quebec. Without further consideration I am not prepared to hold that the rule adopted in the case of Roche would be applicable to the case before me. As this particular piece of property is unquestionably part of the harbour and is vested in the Harbour Board on the trusts specified in the Act.

I have not considered this question as I think the evidence falls short of any proof of title acquired adversely by Power *et al.* I think, moreover, that the question of whether or not a title by possession had become vested in the owners of these two parcels on either side thereof is considerably weakened by the terms of the statute of 1858. This statute reserves to the owners of the ripa fronting this particular lot

(1) Q. R. 1 S. C. 365.

certain rights of user. These lands had been granted to low water and any user of the open water would be a user sanctioned by the statute.

The statute 22 Vict. (1858) is intituled "An Act to provide for the improvement and management of the Harbour of Quebec". It also defines the boundaries of the harbour. Clause 2 provides that "All land below the line of high water on the north side of the River St. Lawrence within the said limits". It is admitted that under clause 1 these limits are high water mark on the north side of the St. Lawrence and comprise the lands in question. This clause 2 declares that all the lands below the line of high water on the north side within the said limits *now belonging to* Her Majesty whether the same be or be not covered with water are vested in the Corporation.

This lot in which the claim is made for a possessory title had never been granted at the time of the passing of the statute in question. It belonged to Her Majesty at the date of the enactment and passed to the Harbour Commissioners, under the provisions of this clause 2. I think also that on a fair reading of the statute the right of resumption of the other parcel of land to which I have referred on the east side of 2411 and marked on the plan "Grant to R. C. Bishop, 29th November, 1854", also passed to the Harbour Commissioners. The right was certainly an interest in land. This clause 2 also provides that "all rents and sums of money now "due or hereafter to become due to Her Majesty, and "not already by law appropriated or directed to be "applied exclusively to any other purpose, either for "interest or principal, or in any other way, in respect of "any land below the line of high water within said "limits heretofore granted by Her Majesty, whether the "same be or be not covered with water, shall be vested

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"in the Corporation hereinafter mentioned". This therefore vests in the Harbour Commissioners lands belonging to Her Majesty and also rents and sums of money due or to become due in respect of lands theretofore sold, which would vest the rentals due by Power *et al* in the Harbour Board.

Then comes the provision which I think is of importance as showing preservation of the riparian rights over the lot in question; "Provided always that "every riparian or other proprietor of a deep water "pier, or any other property within the said boundaries, "shall continue to use and enjoy his property and "mooring berths in front thereof, as he now uses the "same, until the said Corporation shall have acquired "the right, title and interest which any such proprietor "may lawfully have in and to any beach property or "water lot within the said boundaries; nor shall the "rights of any person be abrogated or diminished by "this Act in any manner whatever."

If any user were proved it would be a user as authorized by the statute and could hardly be claimed as an adverse user. As I have stated, I think the evidence falls short of what would be required to make a title by possession. I agree, however, with Mr. Stuart's argument that the riparian right exists and any further rights given by the statute and that the Harbour Commissioners could not utilize the property in question in such a manner as to deprive the owner of the ripa of his right. This would necessarily add an additional element of value to the lot to the north of this water and also to the properties on either side.

In 1889, 62-63 Vict. c. 34, a statute intituled: "An "Act to amend and consolidate the Acts relating to "the Quebec Harbour Commissioners" was enacted. By clause 6, the harbour of Quebec is defined and by

s.s. 2 it is provided: "But for the purposes of this Act, "except as the application of by-laws, etc., the harbour "of Quebec does not comprise: (a) Any lands, build- "ings, wharfs, quays, piers, docks, slips, or other "immovables, in respect of which the Quebec Harbour "Commissioners have not acquired the right, title and "interest of the owner and proprietor, or a right to "the possession, occupation or use thereof."

This statute contains various provisions amongst others, sec. 20, "to take, acquire and purchase such "immovable property as it considers necessary for the "purposes of extending and improving the harbour of "Quebec or the accommodations thereof, including "the construction for such purpose of wet and dry "docks, wharfs, piers, slips and other such works" etc. And there is a provision authorizing the Harbour Commissioners to dispose of the said immovables.

It is contended by Mr. Gibsone that this only conferred power on the corporation to sell and dispose of such lands as they acquired and did not extend the lands vested in them by the statute. I do not see the materiality of this question. I should think, however, that the right of the corporation is not so limited. Sub-sec. 2 provides "that the sale of any deep water "lot forming part of the property vested in the Cor- "poration shall not be valid or effectual until sanc- "tioned by the Governor in Council." This provision would negative the contention put forward by Mr. Gibsone. Section 21 re-enacts the provisions in respect to the vesting in the corporation of the property acquired in respect of which the corporation could sue or be sued.

The question of compensation to be allowed is one of considerable difficulty. There is a great divergence of opinion on the part of the various witnesses. Some

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facts in connection with the case stand out prominently. The property in question is situate at a considerable distance west of what is known as the Queens wharf off Champlain Street.

It has to be borne in mind that the end of the wharf on Lot 2415 and the right to build the wharf is at a very considerable distance to the north of the Harbour Commissioners' line. The lot on the westerly part of 2411 and immediately to the west of the vacant lot vested in the corporation has a frontage of 70 feet 3 inches. The lot forming part of 2411 on the east part of the property in question and immediately to the west of the vacant property contains a frontage of about 88 feet and the wharf in question is about 71 feet north of the Harbour Commissioners' line. This property could hardly be utilized for the mooring of large steamers, there not being a sufficient wharf frontage. Another matter to my mind of importance is the fact that these properties were conveyed to the defendants Power and Sharples on the 5th October, 1901, the one parcel to Sharples, viz., 2411 for the sum of $9,326 and the other to Power, viz., 2415 for $3,000, the whole property having been purchased for the sum of $12,326.

I was informed at the trial that the Harbour Commissioners' line dated back to the year 1842. Mr. Gibsone stated that at the time there was some question of grants along the harbour front and the then Commissioner of Public Works, the Government, instructed a Mr. Ware, a land surveyor, to lay out a plan in which he should take into consideration all the circumstances and recommend to the Government a line beyond which concessions were not to be made.

Prior to the purchase in 1901 for a considerable time and right down to the date of expropriation these

lands had never been utilized. The timber trade was a thing of the past in Quebec. The owners received no return in the way of revenue therefrom. The wharves were depreciating in value. At least five feet from the top would have to be removed and to put the wharves in proper order, it would cost at least $20,000 for the wharves on lot 2411 alone. Evidence giving the value of properties further east in the lower town of Quebec, one bought by the Imperial Bank, to my mind have but little bearing on the value of properties such as the one in question in this action. All this evidence tends to show unquestionably that between 1901 and the date of the expropriation there was a marked advance in the value of property in Quebec. Speaking of Quebec in a general way this is no doubt correct. It by no means follows because the value of properties in certain parts of Quebec had considerably increased that the same relative increase applied to the property in question.

Mr. Gignac, one of the witnesses for the defendants placed the advance at about 40 per cent. Having regard to what was paid in the year 1901 and to the amounts paid for the Lampson and other adjoining properties and to the evidence of Mr. Couture whose opinion is entitled to weight, my opinion is that the offer Mr. Gibsone made on the argument of what he considered to be a fair value and which he was willing to allow on the part of the Crown is about correct and I think ample.

On the 2nd day of October, 1911, His Majesty exhibited an information in this Court asking to have it declared that certain lands therein described being a portion of lot 2411 described in the present information should be declared vested in His Majesty and offering as compensation $42,597 therefor. By the

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defence to that information the defendants accepted this amount. This information was discontinued and the lands revested in the defendants in the same manner as the lands were revested in *Gibb v. The King*(1).

Mr. Stuart claims this offer should be treated as conclusive of the value of that portion of the lands in question in this action. I do not agree with this contention. The officials of the Crown who made the valuation upon which the tender in the previous information was based were not called as witnesses and the offer may have been based on altogether erroneous information and basis as to the value. The Crown discontinued that information and I have to determine the value on the evidence before me, of course not losing sight of the previous offer.

On behalf of the Harbour Commissioners for the land not coloured yellow and situate between the two parts of 2411, Mr. Dobell on behalf of the Harbour Commissioners is willing to accept 25 cents a square foot which I think is reasonable. I make the area of this land 6,503 square feet which at 25 cents a square foot would amount to $1,625.75.

In regard to the piece of land on the east side of 2411 to which I have referred marked "Grant to R. C. Bishop, etc,". the area as I make it is 6,335 square feet. Mr. Gibsone for the Crown places the sum of $2,000 as the value of this piece, an amount which the Crown is willing to pay and I think this amount is a fair sum to allow. I am not prepared to divide this amount between the Harbour Commissioners and the owners, their being no evidence before me. Failing an agreement between counsel, there will have to be a reference to ascertain the relative proportions. I figure the area of all the lands owned by Sharples &

(1) 52 S. C. R. 402.

Co., including the small piece containing the 742 square feet leased to the Church and excluding the piece to the south of the east part of lot 2411 as amounting to 55,751 square feet. For this land, I would allow the sum offered by Mr. Gibsone on behalf of the Crown at an average of 30 cents per square foot which would amount to the sum of $16,725.30. As to the wharf properties as they stand, Mr. Gibsone on behalf of the Crown offers the sum of $1.50 per cubic yard which I think under the circumstances of the case, is ample. I figure out the contents of the various wharves to be 13,366 cubic yards which at $1.50 would amount to $20,049.

To this sum of $36,774.30 which is payable to the defendants Power, Sharples *et al.*, should be added whatever proportion of the $2,000 (the amount the Crown is willing to pay) for the 6,335 feet for the lot on the south of the east side of lot 2411 marked "Grant to R. C. Bishop, etc." that may be determined as being properly payable to the defendants Sharples & Co. I would suggest this $2,000 should pass ½ to Sharples & Co. and ½ to the Harbour Corporation, but it is merely a suggestion. Interest should be allowed from the 8th November, 1913, on the total amount.

I am of opinion that the defendants Power *et al.*, will be fairly and fully compensated for all claims in respect of their interest. If the Harbour Corporation enforce their claim against the Crown, they are entitled to the proportion of this lot on the south of the east part of lot 2411 and to 6,503 feet for the water lot between the two portions of lot 2411 and to 2,220 feet being the water lot on the south side of 2415, namely, 6503 and 2217 equal 8,720 square feet at 25 cents—$2,180, to which will be added their portion of the lot to the south

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of the eastern portion of lot 2411 and interest on their claim from the 8th November, 1913.

The defendants are entitled to their costs of the action.

Counsel can put me right as to the area of the different parcels if I have erred and I will be glad to have their views. Counsel facilitated the trial materially by their manner of conducting the trial and I have no doubt they can agree on the quantities—the price being found.

Judgment accordingly.

Solicitors for plaintiff: *Gibsone & Dobell.*

Solicitor for the defendants, other than the Harbour Commissioners and Rector and Church Wardens of St. Paul's Church: *G. G. Stuart.*

Solicitor for the Quebec Harbour Commissioners: *A. C. Dobell.*

Solicitor for the Rector and Wardens of St. Paul's Church: *R. Campbell.*

IN THE MATTER OF THE PETITION OF RIGHT OF.

1916
June 26.

LAKE CHAMPLAIN AND ST. LAWRENCE SHIP CANAL COMPANY, A BODY POLITIC AND CORPORATE HAVING ITS HEAD OFFICE IN THE CITY AND DISTRICT OF MONTREAL.....SUPPLIANT.

AND

HIS MAJESTY THE KING.....RESPONDENT.

Company incorporated for construction of canal—Charter—Plans—Failure of approval by Governor in Council—Lapse of Charter—Damages—Liability of Crown.

The suppliant was incorporated by 61 Vict. (Dom.) chap. 107. By section 22 thereof it was enacted that "before the Company shall break ground, or commence the construction of any of the canals or works hereby authorized the plans, locations, dimensions and all necessary particulars of such canals and works shall be submitted to and approved by the Governor in Council. Certain plans were prepared by the suppliant and submitted for the approval of the Governor in Council, but the same were not so approved. Owing to such approval being withheld the suppliant alleged that it was unable to comply with the statutory requirements of its charter and that the same lapsed. By its petition of right the suppliant claimed damages against the Crown for breach of contract to approve the plans.

Held, that as there was no contract or undertaking by the Crown in the statute incorporating the suppliant, or otherwise, that the Governor in Council would approve of the plans, the same being left to the discretion of that body, the Crown was not liable in damages for such failure to approve of the plans.

PETITION OF RIGHT for damages for an alleged breach of contract by the Crown.

June 17th, 1916.

The facts are stated in the reasons for judgment.

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Argument of Counsel.

The case was now heard before the Honourable Mr. Justice CASSELS at Ottawa.

Mr. *Brosseau*, K.C. (with whom was Mr. *R. V. Sinclair*, K.C.), for the suppliants, argued that in as much as section 22 of Ch. 107 of 61 Vict. enacted that the plans of the canals and works "shall be submitted to and approved by the Governor in Council" that there was a clear contract between Parliament and the company that the Governor in Council would approve of the plans. The word "shall" imposes an obligation on the Governor in Council in the nature of a contract, which the Governor in Council is obliged to fulfil. The five years have elapsed in which the company were expected to finish the canal, and the charter expired since the petition of right was filed. The power given to the Governor in Council in respect of the plans is not a power to destroy the charter of the company, but purely and simply a power to regulate the way in which the company shall proceed with the works, and if the Governor in Council does not act the company has an action against the King.

He cites *Bouvier's Law Dictionary* (1), *Covington v. Sandford* (2). It is laid down in *Broom's Common Law* (3) "that wherever a statute enacts anything, "or prohibits anything for the advantage of any "person, that person shall have a remedy to recover "the advantage given him, or have satisfaction "for the injury done him, contrary to law." The charter is a contract and I have a right to invoke the aid of the Court unless Parliament otherwise directs. (Cites *Trustees of Dartmouth College v. Woodward* (4). I think it clear that the company would have a right of mandamus to enforce the approval of the Government to the plans. The company has an

(1) Vol. 1 p. 986; (2) 164 U.S. 578.
(4) 4, Wheaton, 518.

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action for damages also for breach of contract. The contract is an executed one and the company is entitled to recover whatever damage it has been put to arising out of the loss of its charter. He cites *McKay v. The King* (1); *Tobin v. The Queen* (2); *Clode on Petition of Right* (3). It is laid down in *Bouvier's Law Dictionary* at p. 840 as follows: "Grants or franchises cannot be impaired or diminished without the consent of Parliament."

Mr. *Newcombe*, K.C., for the Crown. Now when we examine the act of incorporation of the suppliant company we see that it is a corporation receiving legislative power and capacity to construct certain works. This power is given conditionally. There are statutory restrictions and statutory conditions which are imposed here, in the public interest, upon compliance with which and not otherwise the concern thereby incorporated is authorized to proceed with the construction of its works. This is an Act in the nature of a private Act. The Crown is not bound because it is not mentioned in the Act. Moreover, the rights of the Crown are not affected by anything in this Act because there are no adequate terms used for the purpose. It is not the slightest use for the suppliant in the case before the Court to cite cases in the United States Courts. There they have constitutional provisions which expressly forbid the impairment of contracts. In Canada there is no case where the Crown is liable in damages by virtue of a statute except when the statute provides that the Crown is to respond in damages. Cites the *Dominion Interpretation Act*, Sec. 34, par. 7, also par 10.) Now the claim here, if any, should be, I submit, in the nature of a mandamus directed to the Governor in Council. The Court

(1) 17 Q.L.R. 337 (2) 33 L.J.C.P 199.
(3) p. 137.

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Argument of Counsel.

cannot review the discretion of the Governor in Council. That discretion is expressly derivable from the phraseology of the statute in question. For the purposes of this case the Governor in Council are acting in a judicial or quasi-judicial capacity in considering and approving these plans. Consequently although their conclusions may be erroneous, although they, in the exercise of their authority, may not consider the plans, they are not liable to any action for failure to approve. On reference to *Hudson on Building Contracts* (1), it will be found that: "No mandamus will issue to a corporation to approve the plans of a proposed building which are in accordance with their by-laws, as the corporation ought not to be compelled to sanction operations which, in their honest opinion, would interfere with anything under their charge, even though their by-laws do not deal with the matter." It is not possible for the court to review the discretion of the Governor in Council. The Governor in Council did not give any reason for their refusal to approve the plans. There is no allegation in the petition of right, that they did not consider them. No action for damages can be maintained upon the petition of right, as there is nothing between the parties giving rise to any obligation in favour of the suppliants in case the plans submitted by them were not approved.

Mr. *Brosseau* replied.

CASSELS, J., now (June 26th), 1916, delivered judgment.

The case came on for argument on the questions raised by the respondent, as to whether or not on the allegations in the petition, the suppliant is entitled to succeed. I suggested that the evidence might be taken

(1) Vol. 1 p. 51.

and the questions argued after the completion of the evidence.

Mr. *Newcombe*, K.C., on behalf of the Crown stated that they were unprepared to proceed with the evidence, as the understanding with counsel for the suppliant was that the question of law should be first argued; and that if the Court should be of opinion that a right of action existed, the trial might proceed on a subsequent day to be agreed upon. This course was adopted.

On the argument of the case I was strongly of the opinion that on the facts alleged, no liability attached as against the Crown for breach of contract. I reserved judgment in order to investigate the authorities which Mr. Brosseau cited, and any other authorities which he might refer me to at a later date.

I have considered these authorities and am still of the opinion the suppliant's case against the Crown fails.

The case presented is a novel one, and so far as I have been able to investigate the authorities, it is the first case of the kind which has been before the courts.

The allegations on behalf of the suppliant company are:—

That the corporation was incorporated by an Act of Parliament of Canada, 61 Vic., Cap. 107. There are subsequent statutes referred to in section 4 of the petition of right, extending the time for the commencement of the work on the canal.

By section 22 of Cap. 107, 61 Vic., it is enacted "that before the company shall break ground or "commence the construction of any of the canals or "works hereby authorized, the plans, locations, "dimensions, and all necessary particulars of such "canals, and works, shall be submitted to and approved "by the Governor in Council."

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The meaning of this section is, I think, that the company shall submit their plans, and before commencing construction obtain the approval of the Governor in Council.

The suppliant alleges that on or about the 30th May, 1911, the plans, locations, dimensions, and all necessary particulars of such canals and works, were submitted to be approved by the Governor in Council, and duplicates of same were deposited with the Department of Railways and Canals and the Department of Public Works in Ottawa.

" 11. That since the 30th May, 1911, your suppliant " has repeatedly requested the approval of the plans " by the Governor in Council.

" 12. That all the information requested by the " Department of Railways and Canals, and the Depart- " ment of Public Works, at Ottawa, have been duly " furnished.

" 13. That in granting a charter to your suppliant " for the construction of the said Canal, the Crown " took the engagement and obligation to approve the " plans made in conformity with the charter.

" 14. That the plans, locations, dimensions, and all " necessary particulars of such canals and works were " made in conformity with the charter, and in con- " formity with the requirements of the Secretary of " War of the United States, and notwithstanding the " repeated and incessant requests of your suppliant for " approval, the Crown without any reason has refused " to do so."

The words in the latter part of section 14, "the Crown without any reason has refused to do so", may mean the Crown without any reason furnished to the suppliants has refused to do so.

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The suppliant then alleges that the refusal of the Crown to carry out its engagement and obligation according to the said charter to approve the said plans has caused the lapse of the company's charter and that the suppliant has suffered great and irreparable damage which it has the right to claim.

The suppliant claims five million dollars for damages for breach of the contract, the contention being that the rights of the company to commence the canal terminated by reason of clause 38, in the said Statute, Cap. 107, 61 Victoria.

Mr. Brosseau's contention is that there was a contract entered into by and on behalf of His Majesty the King to approve of the plans in order to enable the company to proceed with its completion, and that by reason of the failure of the Governor in Council to approve of the plans, and the consequent lapse of the time, the company is entitled to claim damages for breach of the contract.

I fail to see how His Majesty the King can be liable on the allegations referred to.

Mr. Newcombe referred to section 16 of the Interpretation Act, Revised Statutes, which is as follows:—

"No provision or enactment in any Act shall affect in "any manner whatsoever the rights of His Majesty, "his heirs, or successors, unles it is expressly stated "therein that His Majesty shall be bound thereby."

There is nothing in Chapter 107 which refers to the Crown or makes the statute binding upon the Crown.

I think it may be conceded that in an ordinary case where a contract is entered into by and on behalf of His Majesty by those authorized by statute to execute such a contract, there would be a liability in damages based upon a breach of contract.

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After the best consideration I can give to the case, I fail to see where any case of contract has been proved as against the Crown. If the allegations in the petition are to be read as if the Governor in Council had wilfully refused to sanction the plans, in order to destroy the charter of the company, some right of action may exist against the Governor in Council, to compel them to grant their approval. Proceedings by a mandamus may be a remedy, although I do not wish to commit myself to the proposition that such a remedy does exist. The Crown certainly would not be liable for the tort or wrong of the Governor in Council. It is too clear for argument that the Crown is not liable for damages in tort, except in cases where a specific remedy is conferred upon the subject by statute. Such cases as *Tobin v. The Queen* (1); *Feather v. The Queen* (2); and the *Windsor & Annapolis Railway* case (3) may be referred to.

The petition is dismissed with costs.

Judgment accordingly.

Solicitors for suppliants: *Brosseau & Brosseau.*

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

(1) 16 C.B.N.S. 356; 33 L.J.C.P. 199. (2) 6 B. & S. 257.
(3) 11 App. Cas. 607; 10 S.C.R. 335.

Between:

ROBERT PRESTON MOODIE,.....PLAINTIFF;

1916
April 19.

AND

THE CANADIAN WESTINGHOUSE COMPANY, LIMITED, } DEFENDANT.

Patent for invention—Infringement—Strict Construction—Discretion of Court to discriminate between claims as to validity.

In an action for the infringement of a patent for electric toasters, it appeared that the plaintiff's patent contained five separate claims. At the opening of the trial the first claim was abandoned, and the case confined to infringement of the balance of the claims.

Held, that the patent was one requiring strict construction, and that as an element specifically claimed by the patentee as essential to his invention was omitted from defendant's machine, there was no infringement.

Quaere: Whether where three out of five claims are held void the Court should discriminate and sustain the patent under the remaining claims?

THIS was an action for the infringement of a patent of an electric toaster.

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

The case was now heard at Ottawa before the Honourable Mr. JUSTICE CASSELS, April 10th, 11th, 12th and 13th, 1916.

R. S. Smart (with whom was *H. Fisher*) for plaintiff, contended that the Court should look at the patent to see whether plaintiff covered the invention, and whether the invention, as he patented it, covers the defendant's patent.

The defendant has a bar which is equivalent to plaintiff's. That is the real crux of the case as far as claim 2 is concerned. The defendant has taken the

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Argument of Counsel.

U-shaped frame and projected the top of the frame upwardly a distance above the bar. If these wires were kept in position is some way, there would be no reason why he should not raise the top, the horizontal portion of the U-shaped frame upwardly, and if he does that he infringes the structure of the defendant (1).

When the plaintiff claims the base and plate and makes no disclosure in the drawings, it must be understood that what he has made is the kind of base and plate he means. We rely on *Ide v. Trorlicht, Duncher & Renard Carpet Co.*(2) and *Adam v. Folger*(3), in which a very narrow claim was construed.

[BY THE COURT: Suppose your patent is narrowed down to a very strict construction patent, what then could you establish that the defendant infringes?]

If you narrow it down, there is only four words in claim 2 that you have to leave out in order to have that claim covered in the defendant's structure, but those words only relate to the position of the bar and not to its function.

[BY THE COURT: You do not claim any new function for any of your elements. You claim a better method of obtaining a result which was well known.]

The drawings are explanatory of the specification but you cannot enlarge them.(4).

The fourth claim covers the heating element, which is wound on plates of suitable material.

[BY THE COURT: There is nothing at all in that claim so far as I can see except that method of winding the

(1) *Incandescent Gas Light Company v. De Mare Incandescent Gas Light System, Limited*, 13 R.P.C. 330; *Consolidated Car Heating Company v. Came* (1903) A.C. 509; *Proctor v. Bennis*, 36 Ch. D., 740; *Clark v. Adie*, L.R. 2 App. Cas. 315; *Continental Paper Bag Co. v. Eastern Paper Bag Co.*, 210 U. S., 405; *Miller v. Eagle Manufacturing Co.*, 151 U.S. 186; *and National Hollow Brake-Beam Co. v. Interchangeable Brake-Beam Co.*, 106 Fed. Rep. 693.

(2) 115 Fed. Rep., 137;

(3) 120 Fed. Rep. p. 260.

(4) *Johnson v. Oxford Knitting Co.*, 15 Ex. C.R., 340, *Walmsley v. Eastern Hat and Cap Company*, 43 N. S. R. 432.

wire on the mica plate. It is a curious thing, supposing the fifth claim were bad, what is the effect on the rest of your patent?]

There is section 33 of *The Patent Act* which permits you to distinguish between the good and the bad. The plaintiff is entitled to have a fair and beneficial construction applied to the specification.

Now the fourth claim covers the completed winding. The heating elements are wound on plates of suitable material. The winding being in the form of a double helix and the claim describes the manner in which it is wound, although that may be regarded, not so much as a description of the manner it is wound, as a description of the element itself.

The question of the effect of an invalid claim comes under section 29 of *The Patent Act*, see *Copeland-Chatterson Co. v. Hatton* (1). It is a question of costs only.

In any case the ambiguity introduced into the specification must be specific for the purpose of misleading the public.

There is one recent English case, a very narrow construction patent, in which a reasonable range of equivalent was allowed. *Estler v. Adjustable Shelving and Metal Construction Co., Ltd.* (2).

On the question of clerical errors and misleading statements of the patentee, see the case of *Short v. Federation Brand Salmon Canning Co.* (3).

A. W. Anglin, for the defendants, contended that the plaintiff had not satisfied his obligation in respect of manufacture. It does not seem to have ever been determined that non-manufacture of one claim of the patent will entail avoidance of all the claims of the patent because the Court has not, in that case,

(1) 10 Ex. C.R., p. 224.
(2) 32 R.P.C., 501.
(3) 7 B.C.R. 197.

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a power to discriminate. But he submitted that under the Act no such power to discriminate is given in a case of the avoidance of a claim, by reason of non-compliance with the provisions of the Act as to manufacture.

I do not think it will be necessary to decide it here. I propose taking up claim one which has been dropped from the case so far as any endeavor to hold us under that claim is concerned. I do not want it out of the case for other purposes. I propose arguing very shortly, however, that there has been non-manufacture here in the case of every claim of the patent.

Referring to claim one, I want to direct attention first, to the fact, that it is not in words, but in substance identical with claims four and five, except that in four and five there is the addition of what I may refer to as the method element or process element, which has been hitched on to the claim. Claim one, under which nothing is sought against us, is identical in substance with four and five, if you leave out of consideration the question of winding.

Now the absence of those toast supporting wires from claim one, and the absence of any specific description of them or terms dealing with them in the wording of the claim, leaves it open to the patentee under that claim, to do something which, when he comes to his actual construction, he cannot do.

When he comes to claim 2, he introduces for the first time his toast supporting wires, then it is no longer possible for him to say that the tops of the heating elements are suitably secured to the horizontal portion of the frame and he does not do it, and the reason will be quite obvious on looking at his construction.

Now, that being so, I say he has never manufactured that claim. The only construction he has ever made was produced under the construction of Exhibit 2, in which the heating elements are not secure to the horizontal portion of the frame and insulated therefrom.

Claims two and three are subsidiary, or more limited claims, or more peculiarly construction claims than claim one, and the limitations are of course, what my learned friend relies on to give validity to two and three as against one which he has concluded to be invalid and which, of course, is invalid.

Now, when he comes to the claim we are dealing with, claim 2, he says, towards the close, that the wires for supporting the toast, the lower ends are sprung into holes in the base; and, I say, that having regard to his specification, the base must mean the metallic surrounding portion and cannot be at all events, whatever else it may be, the insulating plate. His only actual construction is the construction of Exhibit 2. In Exhibit 2 the wires are, in fact, inserted not in the base but in the insulating plate.

In claim 3 it is even more emphatic a case than in claim 2, that his wires, in order to be constructed according to the claim, must be sprung into the base as he defines, viz., the metallic portion and not into the insulated plate.

He has wound his wires around the insulating plate and he has secured the insulating plate to his cross-bar and he has secured the cross-bar by means of a screw to the horizontal portion of the U-shaped frame so that in these claims he is further away than ever from manufacture.

The plaintiff never used the process of winding he claimed.

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Then the whole patent is void because of what is disclosed by the specifications in claims 4 and 5, and the Patent Office record or file wrapper. And I submit, further, that the case is not one that the Court either can or should exercise its discretion and discriminate to save the other claim.

Mr. *Smart* replied.

CASSELS, J., now (19th April, 1916) delivered judgment.

This was an action brought by Robert Preston Moodie against the Canadian Westinghouse Company, Limited, claiming that the defendants have infringed certain letters patent granted to the plaintiff, bearing date the 11th of March, 1913.

The case came on for trial before me on Monday, the 10th April, instant, and the three following days.

During the progress of the trial I had an opportunity of becoming familiar with the different questions that were raised, and I think it better while the matter is fresh in my mind to give judgment and avoid any extra expense to the parties of having a transcription of the evidence.

The patent in question, of the 11th March, 1913, contains five separate claims. The plaintiff sued in respect of all of these claims. At the opening of the trial, plaintiff's counsel stated that they did not intend to proceed upon the first claim, and the plaintiff's case was confined to the 2nd, 3rd, 4th and 5th claims, all of which claims, he alleges, had been infringed by the defendant.

I am of the opinion that the 1st, 4th and 5th claims are invalid claims for reasons which I will give later.

If the 2nd and 3rd claims can be upheld, they can only be upheld as very strict construction claims,

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and, I am of opinion that so construed the defendants do not infringe either of these claims.

I propose to deal with the construction of the patent in the way pointed out in the case of *Edison-Bell Phonograph Corporation v. Smith*, quoted in a judgment of my own in *Johnson v. The Oxford Knitting Co.* (1).

According to the evidence produced before me showing the state of the art, numerous electric toasters had been on the market prior to the alleged invention of the plaintiff Moodie. Taking up the specification of the patent, the patentee claims to have invented certain new and useful improvements in electric toasters, and he declares that the following is a full, clear and *exact* description of the same. He alleges that his invention consists of "a suitable base, a plate "of insulating material, an inverted U-shaped frame, "having rectangular upper corners, the said frame "being secured at its lower ends to the base, heating "elements secured at the top to the horizontal bar "of the frame, and at the bottom by means of the "wires of the heating elements, extending through "holes in the aforesaid plate, a bar having cross "slots in its upper surface designed to be secured "to the cross bar of the frame, and inverted V-shaped "wires of the like, having upper ends extending "through the aforesaid slots in the bar, and being "provided with outwardly extending projections "near their lower ends designed to serve as rests for "the toast, the lower ends of the said wires or the "like being sprung into suitable holes in the plate "of insulating material secured to the aforesaid base."

He then refers in detail to the drawings and he describes in detail the bar which is suitably secured

(1) 15 Ex. C.R. 342.

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to the horizontal portion of the frame. This bar has cross slots on the upper surface. He proceeds to point out that No. 6 of the drawing are wires of inverted U-shape. The apex 6a being designed to be held in the cross slots. He shows outwardly extending projections formed near the lower ends of the wires designed to form rests for the toast. The lower ends of the wires being designed to be sprung into holes in the insulating plate.

He then proceeds to describe the wires of the heating elements stating that they extended down through holes in the plate. The plates 2 of the heating elements have apertures 2x extending through the same near the top, and also toothed side edges 2y. And he goes on and describes the manner in which the wires are wound, as follows:—"The upwardly "wound wires of the heating elements fit into spaces "between alternate teeth at the side edges, and at "the top extend through the apertures 2x in the plates "2, and are then wound down the plate in the opposite "direction to the direction in which they are wound "up, and fit into the spaces between the teeth 2y "left by the upwardly wound wire."

This method of winding the wire was apparently adopted by the patentee at the instance of one of the examiners in the patent office, in order to avoid a previous patent referred to in the letter. According to the evidence, it is a method which is useless compared to the proper method of winding the wire and a method which the patentee himself in his evidence points out was never used by him. In his specifications, however, he has expressly laid stress upon that method of winding. The defendants, in the toaster manufactured by them, never adopted that method of winding.

According to the evidence the method of winding described in the specifications is old, having been disclosed in the art,—and in fact the prior art discloses both the process of winding claimed by the plaintiff, and also the method of winding adopted by the defendant. The evidence before me also shows that the double helical winding is not as useful as the single helical one.

Now, turning from the specifications to the claim In his first claim the patentee claims an electric toaster comprising (1) a base; (2) heating elements and a frame of inverted U-shaped extending longitudinally to the base—the lower ends of the frame being suitably secured to the base—the tops of the heating elements being suitably secured to the horizontal portion of the frame and insulated therefrom.

There is no claim in regard to the method of affixing and holding in position the wires used for the support of the bread to be toasted.

Having regard to the productions as to the prior art, this claim is absolutely void. It is forestalled by several of the productions of toasters in existence prior to the alleged invention of the patentee. He lays no stress in this claim to any particular kind of heating elements. There is no provision for the toasting wires, an essential feature of a toaster,—no claim for any particular method of holding these wires in position.

I am of opinion that this claim is bad. If it be a valid claim without the other elements which are requisite to a valid combination, every element is shown in the prior art in combination.

No. 4 claim is practically the same claim as No. 1, except that it describes the specific method of winding the wire as described in his specification,

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namely the wire at the top of the heating element extending through an aperture in the insulating plate in the opposite direction to the direction in which it is wound up. That method of winding has never been adopted by the defendant. It is shown in the prior art. It is also shown that it is a useless method of winding compared to the one used in practice both by the patentee and the defendant. Placing what is practically a useless element into what is claimed by the first claim of the patent does not, in my opinion, make it a valid claim. If it did the defendant has never used the heating element wound in the manner described by the patentee.

The 5th claim is the same, except he introduces into the plates around which the wire is wound two side edges. These edges form a guide as well as preventing the wires slipping.

Both of these claims in my opinion are met by the prior art, and if in point of fact they could be upheld, the defendant does not use them. In my opinion both of these claims are invalid for lack of patentable invention or utility, and in any event neither of them does the defendant infringe. The patentee has deliberately described the particular method of winding so as to avoid if possible the prior art, and at the instance of the patent examiner. The specification was amended in order to cover the suggestion of the examiner, and the patentee is now confronted with a patent prior to his invention, disclosing the exact method of winding, so that he has inserted an element into claim "1" which is old and practically useless as compared with the method of winding both adopted by the patentee in the manufacture of his toaster and the defendant.

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Turning to the 2nd and 3rd claims, in my opinion, having regard to the prior art referred to by Mr. Beam in his evidence, and exhibited to me by means of previous patents, previous models of toasters in use and on the market and the catalogues showing toasters, all of which were known and described prior to the alleged invention, the only manner in which the patent could be upheld is by construing these two claims, numbers 2 and 3, as strict construction claims, and, in my opinion, they are neither of them infringed by the defendant.

The second claim is for "an electric toaster com-"prising a base, heating elements, a frame of inverted "U-shape having rectangular upper corners and "extending longitudinally of the base, a bar secured "to the horizontal portion of the inverted U-shaped "frame, said bar having depending tongues, and "cross slots in its upper surface, the upper portion "of the heating elements being designed to be secured "to the said tongues, the ends of the wires thereof "extending through holes in the base, wires bent "into inverted V-shape, and having outwardly ex-"tending projections for supporting the toast, the "lower ends of the wire being sprung into holes in the "base."

This word "sprung" is an error in the language. The ends of the wires for supporting the toast are all according to the plaintiff's evidence formed by a bender.

The ends of the wire are pushed into the holes in the base. In point of fact they are not pressed into the base, but into the insulating material. The wires are placed in these holes to prevent any lateral movement, but these holes form no support to the wires themselves. The wires are held in place by the bar which is described as being secured to the

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horizontal portion of the inverted U-shape frame. This bar has as indicated cross slots. Into the slots the wire fits so that when fastened in place to the horizontal portion of the U-shape frame, it forms a close connection. To my mind, this method of construction is an essential feature of the plaintiff's claim. The defendant's toaster does not contain this bar. The wire supporting the toast in the defendant's is held from a lateral motion by a notch and obtains its rigidity by the particular method of fastening shown in the toaster by means of passing the ends of the wires through the insulated part of the base. I think it is quite obvious, if construing the plaintiff's patent in the way in which it has to be construed, as a strictly construction patent, there is no infringement.

I have had occasion to deal with these questions in *Barnett-McQueen Co., Ltd. v. Canadian Stewart Co., Ltd.* (1). In the Privy Council case of *The Consolidated Car Heating Co. v. Came* (2), it was held the defendant did not infringe, where an element specifically claimed by the patentee as an essential element was omitted from defendant's machine. This element of the bar with the slots was admitted by the plaintiff's counsel to be an essential element.

The first claim of the patent being void, the whole patent falls to the ground unless the provisions of the Patent Act, Cap. 69, R.S. of Canada, 1906, sections 2 and 33, which permits the court to discriminate are invoked.

Arguments were addressed to me by the counsel for both parties,—on behalf of the plaintiff that the provisions of these sections should be invoked,—on the part of the defendants that under the circum-

(1) 153 Ex. C.R. 186. (2) (1903) A.C. 509.

stances disclosed the Court should not discriminate. As I have come to the conclusion that the defendants do not infringe the second and third claims of the patent, I do not consider it necessary to determine this question. There is no decision in our courts, as far as I know, placing a construction upon these sections, and deciding in what class of cases the court should exercise its discretion, and I prefer to reserve my views until a case arises in which it is necessary to give a decision.

In the case of *Johnson v. The Oxford Knitting Co.*, to which I have previously referred, I followed the precedent set by the Privy Council and did not pass upon the validity or non-validity of the patent as a whole, coming to the conclusion as I did that there was no infringement.

The action is dismissed with costs to be paid by the plaintiff to the defendants.

Judgment accordingly.

Solicitors for the plaintiff: *Fetherstonhaugh & Smart.*

Solicitors for the defendant: *Blake, Lash, Anglin & Cassels.*

BETWEEN:

1916
May 6.

HIS MAJESTY THE KING, on the information of the Attorney-General for the Dominion of Canada,

PLAINTIFF;

AND

JOHN G. HEARN, JOSEPH A. COLLIER, OSCAR Roy, all of the City of Quebec, in their quality of Executors and Trustees under the last will of the late Honourable John Hearn, THE QUEBEC HARBOUR COMMISSIONERS and THE CITY OF QUEBEC,

DEFENDANTS;

Expropriation—Assessment—Water lots—Wharves—Prospective value—Market value—Harbour Commissioners' Line—Sheriff's sale—62-63 Vic. Ch. 34, sub-sec. 2 of sec 6.—Possession—Prescription—Power to sell—Want of registration—Deed—Interpretation.

Compensation for land taken should not exceed the amount which legitimate competition among purchasers would reasonably force the price up to; nor should it regard the enhanced value of the land arising from the public work or undertaking for which the expropriation is made.

2. The element of potential value or prospective capability is a constituent of the market price of the property.

3. Under the Quebec Harbour Commissioners' Act, (1899) (62-63 Vict. Ch. 34, sub-sec. 2, sec 6) the rights of the wharf owners are protected and excluded from the Harbour of Quebec, and therefore do not belong to the Harbour Commissioners. While these wharves may be built below low-water mark without a grant, and the owners could not be ordered to remove them. *Secus* as against a trespasser.

4. The owners of such wharves have the right to maintain the same and to use them, and under the earlier Act of 1858 that right cannot be interfered with without compensation.

5. The ownership of a parcel of land below low-water cannot be claimed as resulting from a possession consisting in the mooring of boats at the adjoining wharf,—the bottom of such boats resting on the water above the bed

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or by pulling these boats ashore and unloading thereon or on the wharf, cargoes of wood picked up in the current in the open, or cargoes brought in by schooners or otherwise—because such possession cannot be construed to have been *animo habendi, possidendi, et appropriandi.*

6. The Quebec Harbour Commissioners on the 10th June, 1864, had the power to sell as well what they held at that time; as well as what they acquired subsequently.

7. Where property yields practically no revenue and is not occupied, no allowance for compulsory taking should be allowed.

8. Under the Code of Procedure of the Province of Quebec, a deed from the Sheriff of immoveable property after seizure and sale only conveys the rights and titles of the judgment-debtor; and if through clerical error or otherwise, the deed purports to convey more land than the judgment-debtor had at the time of the sale, the title to such additional land does not pass by the deed,—the sale being made *super non domino et non possidente.* (*The King v. Ross*, 15 Ex. C.R. 38 followed).

9. The want or registration of the deed of sale by the Harbour Commissioners to the defendant in an expropriation case where the interest of all parties have to be determined, cannot be set up by the Crown,—the Harbour Commissioners' grantor,—as against the defendant, their legal grantee. The question of registration of such deed would have to be taken into consideration in a case where the question of priority had to be determined.

10. The expression in a deed of sale of some water front property in the Harbour of Quebec in the following words, "extending in depth to *low water line*, bounded in front towards the north by Champlain Street, *in rear "by the Commissioners' line,"*—held to mean the Commissioners' northern property, and not the southern line, which would take in all of the Harbour Commissioners' property immediately opposite.

THIS was an information filed by the Attorney-General for the Dominion of Canada for the expropriation of certain lands required for the construction of the National Transcontinental Railway, a public work of Canada.

The facts are stated in the reasons for judgment.

November 30th, December 11th, 13th, 14th, 15th, 16th and 17th, 1915.

The case was heard at Quebec, before the HONOURABLE MR. JUSTICE AUDETTE.

G. F. Gibsone, K.C. and *A. C. Dobell* appeared for the plaintiff; *G. G. Stuart,* K.C. for the general defendants; and *J. E. Chapleau* for the City of Quebec, added defendant.

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MR. *Stuart:* Two principal questions arise with respect to our title; how far has the defendants proved a title to the land the Crown has taken, and for which it declares its willingness to pay,— and how far have the Harbour Commissioners controverted that title or shown a good title to what the defendants claim?

The first consideration in view of the attack of the Crown, is to know what are the powers of the Harbour Commissioners, and to know how far the titles from them to the defendants are good. There is no demand to have any of these deeds in favour of the defendants set aside, but there is a third person, the Dominion Crown, stepping in between two other contracting parties, to say: I do not claim the property, but the deeds, by which you, the vendor, have conveyed it to the purchasers are void.

Practically the only statue of importance in determining the rights and powers of the Harbour Commissioners, is 22 Vict. cap. 32. A great many of the statutes are contained in the supplementary volumes of the *Revised Statutes of Canada*, 1886. This statute will be found at page 27 of this supplementary volume; 36 vict. cap. 62 at page 812; and 38 Vict. Cap. 65 at page 858. The Acts were consolidated in 62 and 63 Vict. Cap. 34.

Now the only matter of importance arising between the consolidations and the original Act is that somewhere, either in 1873 or later, a provision was introduced that the Harbour Commissioners would require the sanction of an order-in-council to any sales which they made. Prior to that date, there was no such provision, and all of the defendants titles are anterior to any such provision existing.

The Act (22 Vict. Cap. 32), is an act to provide for the improvement and management of the Harbour of

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Quebec. The recital to that acts says:—"Whereas it is expedient to provide for the improvement and management of the Harbour of Quebec, therefore, by and with the advice and consent of the Legislative Council in the Assembly of Canada enacts: Section 1 defines the limits of the harbours and section 2 vests the harbour in the Commissioners, the land."

[BY THE COURT: This came up in the other case, the *Ross* case.] (1)

Quite so, since that there has been a unanimous decision of the Court of Appeal with regard to the powers of The Harbour Commissioners. The court held for the purposes of the Act, which is specific, that they could borrow money to improve the harbour of Quebec.

[BY THE COURT: The Harbour Commissioners are appointed by The Crown.]

Not all, some are elected. Some are appointed by the Crown, some are elected by the shipping people, and some by the Board of Trade. It is a composite body.

The words of the Statute are, "it is vested in the "Corporation, hereinafter in trust for the purposes "of the Act." The purposes of the Act are the improvement and management of The Harbour of Quebec;—and the constitution of the Corporation as originally made, is this:—"It shall be lawful "for the Governor, by an instrument under the "great seal of this Province, to constitute and appoint "three persons, to be, together with the Mayor "of the City of Quebec, for the time being, and the "President of the Quebec Board of Trade for the "time being, Commissioners for the improvement "and management of the Harbour of Quebec, etc."

(1) 15 Ex. C.R. 33

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Then there is a proviso that no Commissioner shall be interested. So that the scheme of the Act is an incorporation for the purpose of improving and managing the harbour. The Commissioners have power to purchase, hold and sell movable and immovable property as often as they deem fit, and they have certain other powers not necessary here to discuss.

We have got an authoritative and conclusive decision by the Court of Appeal in the case of *The Montreal Harbour Commissioners, v. The Record Foundry and Machine Company*(1). It is not reported in the Court of Appeal, but it was confirmed unanimously.

[BY THE COURT: What did they hold there?]

They held that such bodies have all the powers necessary to attain the object of their existence.

[BY THE COURT: Would you contend that the Harbour Commissioners have such powers as are not subject to the jus publicum?]

I say they are private persons, as far as the right to deal with them, so far as prescription is involved.

[BY THE COURT: But here they are in possession of the foreshore on a navigable river. Are they in a better position than the Crown, than the King acting in trust for the nation, would be in?]

They are in a far worse position. I cannot prescribe against the Crown, but I can against them. They can do anything which the statute authorizes them to do, just exactly as the Crown could do. The statute authorizes them to do what was necessary for the improvement of the Harbour of Quebec, and for that purpose to sell and dispose of the land in the Harbour.

(1) Q.R. 38 S.C. 161.

The question has come up over and over again in England where certain trusts have been constituted like the Mersey Board and various Harbour Boards for the improvement of property. They have been held to be private corporations, not representing the Crown, but corporations created for a special purpose as every corporation is by the terms of the statutes, yet, in no respect representing the Crown.

Whenever a portion of the public domain is demised to them in trust, they hold it independently, hence they have the power to alienate it.

In the case of *The Quebec Harbour Commissioners v. Roche*, (1) it was held: "The Quebec Harbour "Commissioners are a body corporate distinct from "the Crown and cannot claim the privileges of the "latter in respect to the limitation of actions for "ground rents and dues, vested in them in trust "on immovables originally granted by the Crown."

The corporation owns certain properties, has certain revenues, which are to be applied and used for the purposes of the statute. It stands absolutely in the same position as a private corporation. It is bound by the terms of its statute—any person dealing with it is dealing with a private corporation.

A judicial proceeding under our system is binding upon the person who makes it, unless it be alleged and shown to be made in error, and if it was followed by a judgment as it was in this case, then it is a presumption *de jure*, binding upon all the parties, and specifically binding upon those who made the declaration. (2)

But in addition to the sheriff's title, we claim by prescription at thirty years and ten years.

(1) Q.R. 1 S.C. 365.

(2) See Article 1241 C.C.L.C.

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[BY THE COURT: You claim the part covered by the wharf?]

Yes there cannot be any question about that.

Now as to the land between high and low water. I submit we have shown such possession as puts that particular kind of property, exclusively in our hands.

Now I would refer your Lordship to a very curious case which arose with respect to the right of fishing in Loch Neigh in Ireland. It is the case of *Johnston v. O'Neil*,(1) and one of the most curious things in connection with it is that there was a lease for 5,000 years. The importance of the case is on how little basis the possession was held to be established in that case.

Not being navigable waters, the fishing was never public. Here we have the case of one man claiming the sole right of fishing in this enormous body of water, practically by possession.

The sales by the Harbour Commissioners are absolutely in the same terms, subject to a rent constituting a capital which is payable at the will of the grantee or purchaser.

We come to lot 2381, and there again we claim right down to the Harbour Commissioners line, and I don't think, that the Harbour Commissioners in their defence, have laid claim to any part of that lot—whether they have or not the sheriff's sale was on the 26th of August, 1892.

We need very little to rely on prescription so far as this lot is concerned, and so far as the other lots go, we claim by prescription. We claim in most instances down to the line of the wharf, and there can be no question there whatever as to our possession.

(1) L.R. (1911); A.C. 552.

There is the case of *Patton v. Morin.* (1) It is a judment of the Court of Appeal. The Judges of the Court of Appeal, there expressly state the law of the Province of Quebec. The rights of every person who does not make opposition are extinguished providing the person is met by a person apparently in possession as owner. The only exception is where the immovable is *super non domino.*

The case of *Patton v. Morin* was followed in the Court of Appeal, by the case of *LeClerc v. Phillips,* (2) and it was approved in the Supreme Court of Canada in the case of *MacGregor v. Canada Investment Company.*(3)

For these reasons, I submit that we have made out an absolute title to everything we have claimed. In most instances the title from the owner, in a great many instances a judicial title, and if there be a possibility of those titles being defective, and I see no reason whatever why they should be as any defect has been cured by a prescription of thirty years which operates practically with respect to all of them, and certainly by a prescription of ten years, for any that are not covered by the thirty years.

He cites Art. 1010 C.C.L.C.

Mr. *Gibsone* —The two subjects in controversy and upon which the Court will have to pass, are, first, as to the extent of the defendant's title; and, secondly, as to the compensation which they should receive for whatever their rights prove to be.

Ellis, the defendant's predecessor in title, went to the Quebec Harbour Commission and asked for a deed of the beach lot from high water mark to low water mark—the very land he bought from Jamieson, he buys again from the Harbour Commissioners.

(1) 16 L. C. R. 267. (2) Q. R. 4., Q. B., 288.
(3) 21 S.C.R., p. 511.

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It is recited in the deed: "And, whereas, the vendors "of the aforesaid two lots of ground could have and "had no right of property beyond the high water "mark, since the beach lot commencing from high "water mark to low water mark was the property "of the Government to whose rights the Quebec "Harbour Commissioners have succedeed by virtue "of an act of the Legislature of the Province of Canada, "passed in the 22nd year of Her present Majesty's "Reign, Chap. 32 &c."

The Quebec Harbour Commissioners conveyed to Ellis the beach lot in front of the Jamieson and Turner lot, at the extreme easterly end of lot 2376 on the terms mentioned therein, and they more especially say that the exact extent of the beach thus conveyed from the Harbour Commissioners to Ellis is set out on the plan prepared by Mr. Baillargeau annexed to the deed.

I produced a copy of the plan annexed to the deed, and you will there see that what Ellis bought from the Harbour Commissioners was from high-water mark to low-water mark, and that his wharf extends considerable beyond the low-water mark.

The argument which I draw from this, and the fact I consider established by us, is so far as this east section is concerned, that all that Mr. Ellis possessed, or pretended to possess, was down to low-water mark. He had a piece of wharf extending out into deep water shown on this plan and it is mentioned in his deed of acquisition, but it is especially mentioned in the deed, that all Ellis acquires from Jamieson or from The Harbour Commissioners is down to the low-water mark.

So far as his wharf extends beyond low-water, it was tolerated, first by the Government, and after-

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wards by the Quebec Harbour Commissioners. It is by tolerance that the Ellis wharf was there, and it is by tolerance that that wharf is there now.

I must also say that no claim was made in this case on any other title, and I am certain that none existed in favour of Ellis beyond low-water mark.

The tolerance granted by the Quebec Harbour Commissioners in 1861 for this wharf to lie on their land below low-water mark continues to exist, the situation is exactly today what it was then, viz., that this wharf lies by tolerance on the Harbour Commissioners land. The wharf belongs to the defendant, I do not deny that. I am quite willing they should be compensated for it, but they cannot ask compensation for the land, it does not belong to them.

Whether against the Crown or against the Quebec Harbour Commissioners, that possession began precariously. If possession is taken by tolerance as in this case, it is always deemed to be continued, and not possession animo domini, unless in intervention of title. In this case there is none. There is a stock example of this in France, where a forest was possessed for 700 years by a community, and it being proved that they were precarious possessors, it was held that no prescription could be acquired, as no intervention of title had been begun. All that Mr. Ellis pretended to have as to the soil, was down to the low-water mark, so far as this eastern section is concerned.

In order to prescribe by thirty years one must possess as proprietor with the intention of being the proprietor. The rule is, however a possession commences it continues that way. If possession commences as by tolerance it continues as by tolerance

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and it can have no effect at all in acquiring prescription. It is only possession animo domini which has that effect. Of course the rule of the *Code* is that everyone is presumed to possess as proprietor. I combat that by going back to Ellis' title and show it was not a possession beyond low-water mark. He acknowledges in this deed he has no title to it. Section 2196 of the *Code* says:—"Acts which are "merely factulative or of sufferance, cannot be "the foundation, either of possession or of prescrip- "tion."

I quite admit that if Mr. Ellis had no title whatsoever and had been in possession with the wharf built upon the property, the presumption would be that he was possessing animo domini, but if I go back and find that in the title, the deeds by which he got possession, there was an acknowledgment, express or implied, on his part, that it was only a sufferance that he was exercising, I thereupon establish, I contend, there was no legal possession and there can be no prescription—regardless of whether the property belongs to the Crown or The Quebec Harbour Commissioners, or anybody else. If he did not have possession animo domini, he cannot prescribe, and I will show by his deeds by which he entered into possession he acknowledges that he had no claim or rights to the property whatever.

[BY THE COURT: Do you give him the wharf by benevolence or by title?]

I think he is entitled to it by law. He was allowed to put his wharf there, it was allowed there by sufferance, but it belongs to him. We cannot take the wharf away from him without compensation, perhaps the Crown at the time could have forced him to remove it, as a nuisance, but to take it from him without

compensating him, is another thing, and I admit we are bound to compensate him for the wharf.

With regard to the title of lot 2381, that depends on whether the Harbour Commissioners had a right to sell or not. If the Harbour Commissioners had a right to sell that land; if they had a right to sell below high-water mark, the sale exists and the defendants in this case own the whole thing.

The Doherty lot, No. 2385 is the only one in which they claim to go as far as low-water mark. There is nothing really between us there except as to whether the Doherty's or the present defendants can claim title to a beach lot—can claim ownership of a beach lot in this public harbour without any title to it, either from the Crown or from anybody.

The only title they can show is from individuals, the Doherty Estate, but for this property to go out of the domain of the Crown or to leave the Harbour Commissioners, there should be some title. They cannot prescribe against the Crown, and in case of the land belonging to the Harbour Commissioners, I say that the Harbour Commissioners had no right to sell.

Now with regard to 4402. William Wall who gave this title died and left a number of heirs, Jean Wall, Marie Wall, Joseph Wall and another, and these individuals sold to Hearn.

Now what was it they sold? They sold their quarter share each in succession to the late William Wall, so that the late Mr. Hearn and the defendants here, are here merely as representing William Wall. They acquired what rights he had and continued his rights. Whatever William Wall had, the present defendants have and we have this titre nouvelle granted by their immediate auteur, declaring what he possessed was down to the low-water mark, on the old John

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Baptiste Larue plan. How they can come forward and say their possession went beyond low-water mark, I fail to see.

[BY THE COURT: Their wharf is built beyond.]

It is a matter of tolerance. The Harbour Commissioners are not so litigious as to call in question an act of possession or use of the beach.

The defendants want to set up possession to a beach because some of their tenants left their boats there, and to set up possession to the deep water because the Harbour Commissioners did not prevent them putting a boom there. I think they are over shooting the mark, both in law and in fact.

Because the property is described as cadastral number 2403 in the sheriff's sale and because the cadastral description declares that the lot goes out as far as the Harbour Commissioners line, then they claim a title. I think it is clear and undoubted law that the cadastre does not create title; the cadastre is the supposed description of different lots lying within limits, but it does not create title. What was sold and what was conveyed was the rights that were owned by Mrs. Charlton. Mrs. Charlton was the defendant. Elizabeth Doyle and Mrs. Charlton were the defendants in the suit of the property sold by the sheriff, and what was actually conveyed was only what rights Mrs. Charlton had, as far as any surplus was concerned, Mrs. Charlton was not in possession animo domini. Mrs. Charlton only claimed to own and only possessed down to low-water mark. With regard to any other property, nothing beyond low-water mark was animo domini.

The descriptions contained in 12-E (Lot 2409) shows with perfect clearness that all that is intended to convey, and all that was conveyed, was down

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to low-water mark, and the expression of the Harbour Commissioners' line is not to be used as contended for in the present case on behalf of the defendants. Our title deed to 1839 was down to low-water mark, and was established by the plan which is in the exhibits in the case.

We took the property over by a deposit of the plan and we became the absolute purchasers from the fact that the Harbour Commissioners accepted our tender.

I submit the court should hold that at the time of the expropriation, the title was in the Quebec Harbour Commissioners and they are entitled to receive the money.

The technical title of ownership is in the Harbour Commissioners and in the Harbour Commissioners alone, the registered owners.

The very terms of the sheriff's deeds themselves, every one of them, state exactly what they purport to convey. If there be a description mentioned, that is not to be consisdered very seriously because the deed itself states that there is no warranty of contents.

I have listened with a great deal of interest to the authorities Mr. Stuart has cited, but they do not apply to this case. The cases concern an entirely different matter and are, not applicable. What is applicable are the words of the statute.

[BY THE COURT: Would you contend under section 2, of the Act that the Harbour Commissioners would have no right to lease.]

What is contemplated is that they should build wharves and develop them, they cannot part with the fee.

Mr. *Dobell* followed on behalf of the Crown and submitted that the Harbour Commissioners are the

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Crown's representatives and the Crown owns the soil of the river.

Taylor v. The Montreal Harbour Commissioners.(1) I think that case will clearly show the soil of the river still remains in the Crown.

As long as the solum belongs to the Crown, defendant cannot prescribe. See *La Chapelle v. Nault* (2). The court there says prescription cannot be invoked against the lands belonging to the Crown, as long as these lands have not passed out of the public domain.

Counsel for defendants, referred to the case of *Quebec Harbour Commissioners v. Roche,*(3) that was a case with respect to arrears of rent. I quite agre that in that case there is a prescription against the Harbour Commissioners, because their charter distinctly says that all rents that have been previoulsy paid to the Crown, shall belong to them, but these lands that are not given away by previous title are vested in the Harbour Commissioners in trust.

[BY THE COURT: "Possess" would cover what they have under section 2.]

Mr. *Stuart,* in reply. My contention is that the Harbour Commissioners were given power to dispose of all the property that they were vested with.

Now, with respect to non-registration (See Article 2098 of the Code).

Mr. Gibsone's argument is this: that the title deed has not been registered. We have made an offer, the Harbour Commissioners have accepted that offer, that makes a binding bargain between us. The Harbour Commissioners could no more accept the offer to purchase the land of which they were not the owners than anybody else could. They did

(1) Q.R., 17 S.C. 275.
(2) 6 Rev. de Jv. 5.
(3) 12 R.S.C. 365.

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not purport to sell. They said in the pleadings, we do not own the land but are willing to accept your offer.

One other point of law with respect to the sheriff's sale is submitted. Mr. Gibsone argues as to Mr. Ellis and those other persons to whom this property was sold, that they were in possession to the extent of having wharves—they were there by tolerance, therefore the man who buys acquires only the rights which the owner had. I look upon that view directly contrary to the holdings of all of our Courts. He is the apparent owner,—they seized upon him. The real owner must come in and say that property is mine and stop the sale. If he does not do that, he loses all his rights against the purchaser, but he would go a good deal further. It extinguishes absolutely his rights and every authority cited is in those terms. Mr. Gibsone's argument would go to reduce the value of the sheriff's title, and you would be bound to investigate what was the title of the defendant. Our law is distinctly the reverse. If a property is sold with a person in possession, the real owner must come in, and, if he pretends he is the real owner and the man who held the property was a tenant, he must take proceedings to have the sheriff's sale vacated. As long as the sheriff's sale stands, it is good.

AUDETTE, J. now (May 6th 1916) delivered judgment.

This is an amended information exhibited by the Attorney-General of Canada whereby it appears, *inter alia*, that, at two different dates hereinafter mentioned, certain lands belonging to the defendants, were taken and expropriated by the Crown, under

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the authority of 3 Ed. VII Ch. 71, for the purposes of the National Transcontinental Railway, a public work of Canada, by depositing plans and descriptions of the same, on the 8th November 1913 and the 30th November 1915, respectively, in the office of the Registrar of Deeds of the Registration Division of Quebec.

The lands expropriated herein are parts of the defendants' properties respectively known and referred to herein under their cadastral numbers, 2376, 2381, 2385, 2393, 2394, 2402, 2403, 2404, 2409 and 2410.

The Crown, by the amended information, offers the sum of $27,079.49 in respect of the lands described in paragragh 2 of the said information, together with 40 cents a superficial foot in respect of the land described in paragraph 6B thereof.

The defendants representing the John Hearn Estate aver by their plea that they are owners of all the lands expropriated herein, and claim therefor the sum of $254,560.

The defendants, The Quebec Harbour Commissioners, claim the ownership of the property described as Lots 102A, 104B, 107A, 107B, 105B, 107C, 108B, 109A, 110F, 110E and 110C, on the plan deposited on the 30th November 1915,—and also all land below low-water mark on cadastral lots 2385, 2402, 2403, 2404, 2409 and 2410, in virtue of 22 Vict. Ch. 32. And they further declare they accept the Crown's offer of 40 cents per superficial foot for the same, as stated in the amended information.

The defendant, The City of Quebec, claims the small passage or land on 2376 and the street known as Phillips' Lane between 2389 and 2392 and also the street called by them "McInenly" lying between Lots 2398 and 2402 and with respect to the indemnity

to be paid therefor, they leave that matter in the hands of the Court.

While these several lots or parcels of land will have to be treated separately and a special compensation fixed in respect of each of them, I wish as a prelude, to offer some general observations respecting the character of the properties and their location in the City of Quebec. A reference to plan Exhibit No. 3 is necessary to properly understand their location and their relative juxtaposition. All these properties are situate on Champlain street, in "Lower Town" in the City of Quebec, and extend back of that street towards the River St. Lawrence, in the Harbour of Quebec.

The Crown has expropriated from these properties the right of way for the National Transcontinental Railway, coming into the city on the water front as far as the old Champlain Market, and took all the land, belonging to the defendants, on the river side from the north line of the right of way. Thus leaving the defendants with a certain piece of land on the northern side of the right of way to Champlain street. The part or piece of land so left to the defendants is, with the exception which will be hereafter mentioned, covered with dwelling houses with a small yard at the back. These buildings are being used for residential purposes and are subdivided into several small lodgings to the one house and are occupied by tenants of the labouring class, yielding very small net revenues. The back part of their property, that is the part on the water front, is in some cases partly covered by old wharves running out at various distances. These wharves were built many years ago for a trade which no longer exists and for a number of years back have practically remained unused and indeed show the

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result of wear and tear occasioned by time and age. While indeed, these properties at some time back, when the timber business and ship building were at their best in Quebec and when large rafts of timber were being towed down the River St. Lawrence to Quebec and placed in the several coves adjoining the city, and while the water front of some of these properties were then used for retaining the logs and timber by booms stretched in front of them,—these properties then commanded quite a value;—on the other hand this trade has now almost completely vanished and disappeared from Quebec since a number of years, with the result that this water front property had gone down to very little value on the market at the present time and at the date of the expropriation. In fact, it is a qusetion as to whether there would now be a market for such property at Quebec, but for the public works now going on.

By reference to the title deeds respecting these properties, it will be found that most of them were sold by the Sheriff and bought for trifling amounts. Some of the witnesses, however, looking probably at the prospect of Quebec in the future, taking into consideration the prospective potentialities of these properties, when the harbour will have been completely developed and possibly a large trade created, have placed a large value upon this water front property at the present time which I am of opinion is not justifiable under the present circumstances while admitting they have a certain value; but this potential adaptability is too far in the future to be given it that value to which they testify. Indeed, the compensation which should be awarded is in no sense more than the price that legitimate competition of purchasers would reasonably force it up to. Why

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should the Crown be charged with this enhanced value to these properties which is to be derived from the very public work for which the expropriation has taken place? Who besides the Crown could undertake these gigantic works? There would seem to be no competition. And when the owner of such property is given more than the price or market value of his property to him for his own purposes and all that any one else would offer him, except the taker, what else can he ask, if not part of the value of that land to the taker after the latter has given it this enhanced value by the expenditure of large sums of money in the performance of the works under development? Why should the public Exchequer be charged with this enhanced value? This element of potentiality or prospective capability, call it what you may, is after all nothing but an element in the market price itself.

I cannot refrain citing here again the admirable observations upon this point by Rowlatt, J. in the case of *Sidney v. North Eastern Railway*, (1) at page 637, where he says, viz:—

> "Now, if and so long as there are several com-
> "petitors including the actual taker who may be
> "regarded as possibly in the market for purposes
> "such as those of the scheme, the possibility of
> "their offering for the land is an element of value
> "in no respect differing from that afforded by the
> "possibility of offers for it for other purposes. As
> "such it is admissible as truly market value to the
> "owner and not merely value to the taker. But
> "when the price is reached at which all other competi-
> "tion must be taken to fail to what can any further
> "value be attributed? The point has been reached

(1) (1914) 3 K. B. 637.

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"when the owner is offered more than the land is "worth to him for his own purposes and all that "any one else would offer him except one person, "the promoter, who is now, though he was not "before, freed from competition. Apart from com- "pulsory powers the owner need not sell to that "one and that one would need to make higher "offers. In respect of what would he make them. "There can be only one answer—in respect to the "value to him for his scheme. And he is only "driven to make such offers because of the unwil- "lingness of the owner to sell without obtaining "for himself a share in that value. Nothing repre- "senting this can be allowed."

And at page 576 of the *Cedars Rapids Case* (2) Lord Dunedin lays down the following rule for guidance upon the subject of special adaptabilities in the following language:

"For the present purpose it may be sufficient "to state two brief propositions:—(1) The value "to be paid for is the value to the owner as it existed "at the date of the taking, not the value to the "taker. (2) The value to the owner consists "in all advantages which the land possesses, present "or future, but it is the present value alone of "such advantages that falls to be determined.

"Where, therefore, the element of value over "and above the bare value of the ground itself "(Commonly spoken of as the agricultural value) "consists in adaptability for a certain undertaking "(though adaptability as pointed out by Fletcher "Moulton, L. J., in the case cited, is really rather "an unfortunate expression) the value is not a "proportional part of the assumed value of the

(2) (1914) A. C. 569.

"whole undertaking, but is merely the price, en-
"hanced above the bare value of the ground which
"possible intended undertakers would give. That
"price must be tested by the imaginary market
"which would have rules had the land been exposed
"for sale before any undertakers had secured the
"powers, or acquired the other subjects which
"made the undertaking as a whole a realized pos-
"sibility".

Then the use made of these properties at the time of the expropriation must be taken into consideration. *Bailey v. Isle of Thanet* (1).

Under the provisions of sec. 2 of 22 Vict. Ch. 32 (1858), all land below the line of high water on the north side of the River St. Lawrence, within the boundary of the harbour of Quebec, as defined by Sec. 1 of the same Act, became vested in the Corporation of the Harbour of Quebec in trust for the purposes of that Act; reserving, however, to every riparian and *other proprietor of a deep water pier*, or of *any other property* within the harbour, the right to continue to use and enjoy his property and mooring berths in front thereof,—until such right, title or interest shall have been acquired by the Corporation of the harbour of Quebec. In other words, whatever riparian right and rights of moorage existed at the date of the Act, were duly respected and reserved. Therefore these rights so preserved by the Act, would prevent the Corporation of the Harbour of Quebec from building opposite these lands without first acquiring such rights.

Then in 1899, by 62-63 Vict. ch. 34 Sec. 6, the Consolidation Act, the harbour of Quebec is again defined and are excluded therefrom the lands and

(1) (1900) 2 K. B. 722.

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certain rights in respect of which the Harbour Commissioners had not acquired title,—and by Sec. 21 thereof, all the lands defined as forming the harbour, subject to the reservation just mentioned, are also declared vested in the corporation and the fee is in the trustees for the purposes of the Act,—for the purposes of their trust.

Having offered these general observations, I will now deal with each lot separately.

Lot 2376.

The two principal questions to decide with respect to this lot are first the extent of the land to which each defendant's title will show him entitled to and secondly the amount of compensation for the rights and interest in the property to which the defendants are respectively entitled to.

The counsel for the Crown, in his argument, practically recognized defendant Hearn's title down to low water mark, together with the rights in the wharves but not in the land upon which the wharves are erected south of low water mark.

The chain of title in respects to this lot being somewhat long, it is found unnecessary to refer to it in full details, it will be sufficient to say that all these lands below high water in the harbour left the lands of the Crown either by grants from the Crown or under the statute above referred to, (the Act of 1858) and whereby what had not already been sold, became vested in the Harbour Commissioners. The Harbour Commissioners have made the sales referred to at trial, the deeds for the same being filed herein as exhibits, upon the usual reservation of ground rents and the capital thereof guaranteed by the privilege of *bailleur*

de fonds, and as further secured by their *oppositions afin de charge* and the judgments thereon, at the time of the Sheriff's sale. The Harbour Commissioners are also entitled to the ground rents,—or the capital representing the same, under the Crown Grants issued before 1858 as in the case of the Maxham Grant. Some of the wharves built below low water mark were in existence as far back as 1853 and while the Crown declares its willingness to pay for the wharf, it declines to pay for the land upon which such wharves are resting for that part below low water. It was held by Andrews, J., in re *The Quebec Harbour Commissioners v. Roche*, (1) that "The Quebec Harbour Commissioners "(created by the Statute 22 "Vic. Ch. 32) are a corporate body, distinct from "the Crown, and cannot claim the privileges of the "latter in respect to the limitations for ground rents "and dues, vested in them in trust, on immoveables "originally granted by the Crown"; and if adopting that view, it would be necessary to decide that, the possession of the solum, below low water mark, by the erection of these wharves has given title to the owners thereof as against the Harbour Commissioners, in whom the harbour, as defined by Sec. 1 of the statute referred to, is vested. See also in support of the same proposition, the case of *The Montreal Harbour Commissioners v. Record Foundry & Machine Co.*, (2) confirmed on appeal,—*Johnston v. O'Neil*, (3) *The King v. Tweedie*, (4).

But are not, indeed, the rights of the wharf owner conceded and protected by the proviso of Sec. 2 of 22 Vict. Ch. 32 which reads as follows:—

"Provided always that every riparian and other "proprietor of *a deep water pier*, or any other pro-

(1) Q. R. 1 S. C. 365.
(2) Q. R. 38 S. C. 161.
(3) (1911) A. C. 583.
(4) 52 S. C. R. 197.

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"perty within the said boundaries, shall continue "to use and enjoy his property and mooring berths "in front thereof, as he now uses the same, until "the said corporation shall have acquired the "right, title and interest which any such proprietor "may lawfully have in and to any beach property "or water lot within the said boundaries; nor shall "the rights of any person be abrogated or diminished "by this Act in any manner whatever."

Then the Consolidation Act of 1899 (62-63 Vict. Ch. 34), by sub-section 2 of sec. 6 excludes these wharves from the harbour of Quebec, and they therefore do not belong to the Harbour Commissioners.

Counsel for the Crown further contends these wharves so built below low water mark, without a grant and allowed to be there by tolerance, could be ordered to be removed as a nuisance. That might be so as against a trespasser, but not as against the owner of the wharf, who is protected by the statute. And after all, what tangible interest or right would be left, after the right to maintain such wharf is recognized by statute, the ownership of the same being in the present occupants of the soil?

But for the expropriation proceedings, these rights would never have been questioned. And the interest in and the right to have these wharves where they stand, so protected by the two statutes above mentioned, are substantial and any interference therewith should be compensated. And after all, is it not only reasonable and just to concede the ownership or the equivalent thereof, of this land upon which rests these wharves,—with rights or moorage and all other valueable rights attached thereto,—which had been in the possession and enjoyed by the defendant Hearn and *his auteurs* for years and years back,—more than

would be necessary to acquire them by prescription. The owners have the right to maintain their wharves and to use them and that right cannot be interfered with without compensation, under the Act of 1858.

It is, however, otherwise respecting the small piece of land below low water mark claimed by the defendants and which lies at the south eastern extremity of this lot within the area marked by letters U, X and Z on plan 3. This small piece of land or beach is claimed by possesion consisting in the mooring of boats at the wharf, the bottom of such boats resting on the water above the bed, or by pulling these boats ashore and unloading thereon or on the wharf, cargoes or small pieces of wood picked up in the current in the open. Such possession was not and cannot be construed to have been done *animo habendi, possidendi et appropriandi.*

Having said so much, we have now to consider the question of the quantum of the compensation which should be paid the defendants in respect of this lot 2376. A difficult question, indeed, in a case of this kind in view of the fact, mentioned in the beginning, that there was practically at the date of the expropriation, no market for that class of property in that neighbourhood, but for the consideration of the public works in question in this case.

On the north eastern part of this lot, there is a building yielding very small revenues. There is no building on Champlain street to the west of Lot 2377. The net revenue of the dwelling has been in 1910-1911,—the sum of $132.51; in 1911-12, the sum of $145.11; in 1912-13, the sum of $26.51 and in 1913-14, the sum of $185.32,—and this has been the average revenue of the property during the preceding 20 years. The wharves gave a barely nominal

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revenue. The assessment of the lot in 1903-04 was $4,600; in 1908-09, $10,000 and in 1913-14, $10,000. Therefore, from the northern line of the right of way to Champlain street the estate of Hearn is left, for the eastern part, with a building and a small yard at the back and for the western part with a vacant lot.

In accordance with an understanding between the Court and counsel, it being realized at the argument that I had not upon plan 3 the several areas measured, I have procured from Mr. A. Tremblay the engineer who has measured all these lots—and whose measurements have been readily accepted,—the measurement of the area for which compensation should be, in my opinion, allowed and it has been marked in yellow on a copy of plan Exhibit No. 3, which copy I have placed on record as No. 3b. The total area should be 25,280 sq. feet, to which should be added the area of the Gore, namely 1,529 sq. feet,—but the Gore not running down to the Commissioners' line. From this area should be deducted 641 feet, the area covered by the small lane which belongs to the City of Quebec; leaving a net area of 26,168 sq. feet for which compensation should be given the Hearn Estate.

I have had the advantage, accompanied by counsel, of visiting and viewing the premises in question, and after giving due consideration to the evidence and to all the circumstances of the case, I have come to the conclusion to fix as a fair and liberal compensation, the sum of $51,373.57, inclusive of the usual 10% for compulsory taking. This amount to cover the value of the land taken, the wharves, all riparian or other rights of every kind whatsoever, together with the damages to the balance of the property

remaining in the hands of the Hearn Estate. This sum however, is to be paid to the said Estate, upon giving the to Crown a release of the capital, rents or interest remaining due the Quebec Harbour Commissioners under the several grants or sales in respect of Lot 2376. Failing the production of such release, the capital of the said rents, with all arrears and interest, are to be paid the Harbour Commissioners and then the balance paid over to the Hearn Estate.

Lot 2381.

This lot, as will be seen by reference to plan Exhibit No. 3, extends from Champlain street to the Harbour Commissioners' line. The only legal objection raised by the Crown in respect of this lot is the contention that the Harbour Commissioners had not, under the Act, the power to sell at the date they sold, on the 10th June, 1864; they could only sell what they had acquired by purchase subsequent to the passing of the Act. I must hold against that view from the reading of the Act; and indeed it is hardly proper for the Quebec Harbour Commissioners in an action of this kind, to come and say to the defendant Hearn, (who claims under their auteurs Gregg, the vendees of the lot):—True I sold you this beach lot, but I had no power to do so, and in the distribution of the compensation monies here I claim the same. That is a right to be ascertained under the Expropriation Act as hereinafter mentioned under the observations made in respect of lots 2404 and 2410, and as between the Harbour Commissioners and the Estate of Hearn. It is unnecessary to repeat herein in support of my view, all is said under lots 2404 and 2410, which will all apply to this lot so far as applicable.

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There is a dwelling on Champlain street with a small yard at the back. Here as in respect to all the lots expropriated, the Crown has taken everything south of the northern line of the right of way leaving the defendants with a building on Champlain street and a small yard at the back. No revenue was ever derived from the wharf and the house yielded a net revenue in 1910-11 of $82.66 and in 1914-15—$128. The revenues since 1890 have been about the same.

I have had the advantage of viewing these premises and giving due consideration to the evidence and all the circumstances of the case, I have come to the conclusion to fix the compensation at the sum of $9,450.49, inclusive of the usual 10% for compulsory taking. This amount to cover the value of the land taken, the wharf, all the riparian rights of every kind whatsoever, together with the damages to the balance of the property remaining in the hands of the Hearn Estate. Out of this sum the capital, rent and interest, which may remain unpaid to the Quebec Harbour Commissioners shall have to be deducted and paid over to them.

Lot 2385.

This property which runs down to low water mark was acquired by the Honourable John Hearn on the 10th December, 1884, more than 30 years ago. The beach lot between high water and low water left the hands of the Harbour Commissioners on the 15th October, 1867. The Estate of John Hearn is entitled to the whole of the compensation, upon paying to the Harbour Commissioners the capital, rents and interests, which may remain due upon this lot. The total

area taken is 2,529 square feet upon which there are 523 cubic yards of wharf.

The Crown has expropriated from this property the right of way for the National Transcontinental Railway taking all the land belonging to the estate of Hearn, on the river side from the north line of the right of way, which extends to low water mark. Thus leaving the defendant with a certain piece of land on the northern side of the right of way to Champlain street, and upon this piece of land so left to the defendant, there is a dwelling house with a small yard at the back. This dwelling house yielded a net-revenue in 1910-11 of $121.43 and in 1914-15, $133.75, this being the average for the ten preceding years. No special revenue was derived from the wharf which was for the use of the tenants.

I have had the advantage, accompanied by counsel, of viewing this property and taking the evidence into consideration and all the circumstances of the case, I am of opinion to fix the compensation at $5,134.14,—inclusive of the usual 10% for compulsory taking, with interest thereon from the 8th November 1913 to the date hereof. This amount to cover the value of the land taken, the wharf, all the riparian rights of every kind whatsoever, together with the damages to the balance of the property remaining in the hands of the Hearn Estate. Out of this sum, the capital, rents and interest which may remain unpaid to the Quebec Harbour Commissioners shall be deducted and paid over to them.

Lots 2393 and 2394.

These two adjoining lots will be treated together. The Crown has expropriated from this property,

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the right of way for the Transcontinental Railway, taking all the land, belonging to the defendant, the Hearn Estate, on the river side, from the northern line of the right of way; thus leaving the defendant with a certain piece of land between the northern line of the right of way and Champlain street, composed of two adjoining piedes of vacant land.

The southern boundary of these two lots is admitted down to low water mark. The total area of land expropriated is 8,552 sq. feet upon which there is 2,078 cubic yards of wharf.

These two vacant lots yielded practically no revenue, excepting perhaps some years about $20. The wharves were not leased.

The municipal assessment in	1903-04 was	$ 200.
" "	1908-09 was	200.
" "	1913-14 was	2,700.

I have had the advantage, accompanied by counsel, of visiting and viewing these premises, after giving due consideration to the evidence and to all the circumstances of the case, I am of opinion to fix the compensation at the sum of $10,841. Considering that these properties yielded practically no revenue and were not occupied, there is no reason why there should be any allowance for the compulsory taking. This amount will carry interest from the 8th November, 1913.

Lots 2402, 2403, 2404, 2409 and 2410.

These five adjoining lots will be treated together, with respect to ascertaining the conpensation for the same. The title to each and their respective area will, however, have to be approached separately,

but the value of the five lots will be fixed en bloc, for the five, as was done in adducing the evidence.

Lot 2402.

Coming first to lot 2402, it may be said that the Crown concedes title to low water mark only, and the defendant, the Hearn Estate claims down and out to the southern Harbour Commissioners' line. The wharf built upon this lot goes south beyond low water mark for a certain distance. The Hearn Estate has no grant or title for that part below low water mark; but claims by prescription down to the Harbour Commissioners' southern line. The possession invoked by them is not such as would give title by prescription, and for the reason given in respect of lot 2376, I will allow down to the end of the wharf, subject to what has already been said under No. 2376.

In Exhibit 33, we have an Order in Council passed on the 22nd April, 1837, authorizing the issue of letters patent to one Peter Murphy, upon the latter producing satisfactory titles to the Attorney-General that his property extends to low water. We have no evidence of any such compliance with the requirements of this Order in Council, and it was never proved that any grant did ever issue.

The net revenues derived from the dwelling upon this lot has been in 1910-11, $162.91, and in 1914-15 $208.46. The revenues having been about the same for the ten preceding years.

The area for which recovery can be made will be down to the end of the wharf, there being no title or proof of any kind showing that the deep water lot ever passed out of the hands of the Harbour Commissioners as vested in them under the Act 22 Vict.

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Ch. 32. The compensation will also cover all riparian rights, including that of stretching booms in front, subject to the paramount right of navigation.

Lot 2403.

The claim made by the Hearn Estate in respect of this lot is down to the Harbour Commissioners' southern line. They have a wharf built out some small distance below low water mark. The Crown concedes title to low water mark.

There has been no grant proved for the area between low water and the said Harbour Commissioners' line; but the defendants having bought at the Sheriff's sale on the 28th November, 1890, the property sold on Edward J. Charlton, and the Sheriff's title describing the lot by the cadastral No. 2403, instead of a description by metes and bounds, they claim that the whole cadastral No. 2403, carries them down to the Commissioners' southern line.

We will now have to ascertain what did actually pass under this sheriff's title, and to what area did the fee in the defendant Charlton extend at the time of such sale.

This lot was sold by Coffin to Doyle, on the 1st February, 1826, down to low water mark. Doyle died and his widow Johanna Nolan married Miles Kelly. On the 7th February, 1856, Mrs. Miles Kelly gave *titre nouvel* to the Coffin Estate, and in that titre the property is described again by metes and bounds down to low water mark. Mrs. Miles Kelly died leaving her property to her daughter of the first marriage, Elizabeth Doyle, who married Charlton, and on the 14th October, 1868, she, Mrs. Charlton, gave again *title nouvel* wherein this property

is still described down to low water mark. After the cadastre became in force, the registration of this lot was renewed on the 23rd January, 1873, and therein again the property is described down to low water mark. There is also the sale by the Sheriff on the 4th August, 1884, to Bolger, and the sale of the latter to Charlton, subject to the hypothecs in favour of John Hearn. These two deeds speak clearly for themselves. Then comes the sale by the Sheriff in 1890 to John Hearn, above referred to.

What was vested in the Hearn Estate's predecessors in title is clearly what, down to the time the cadastre came in force, namely in 1872, is described by metes and bounds to low water mark. True the Sheriff's sale to Hearn, in 1890, described the property sold by its cadastral number; but the cadastre does not constitute title. It is merely descriptive, and it may be said it is very often erroneous in its description, as it has been my experience to ascertain in respect of a number of properties a little higher up the river.

Be that as it may, the question now to be decided is whether or not, by the Sheriff's sale of 1890, that part,—between low water mark and the Harbour Commissioners' southern line, did pass, and whether notwithstanding the title to the same held by the Quebec Harbour Commissioners under the statute of 1858 and 1899, the ownership of this space passed to the defendant under the Sheriff's title.

Under Article 699, C.P.C., the seizure of immovables can only be made against the judgment debtor, and he must be, or reputed to be, in possession of the same *animo domini*. Under Article 779, the purchaser takes the immovable in the condition in which it is at the time of the adjudication,—and under Article

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780, the adjudication is always without warranty as to the contents of the immovable.

An important fact must also be borne in mind and not lost sight of, and it is that this Sheriff's sale of 1890 is upon Charlton who always knew the contents of the property since he was a party to several of those deeds in which this property is always described down to low water mark. As I have already said in the case of *The King v. Ross* (1) there is here no question of a third party who never had anything to do wiith this property, and who might have to be put upon his enquiry. Charlton knew what he was possessed of, and John Hearn must have known this property, as he had a mortgage or hypothec upon the same; but I regret to say that deed in favour of John Hearn which is referred to in the Bolger deed has not been filed herein. That deed might have thrown much more light upon the subject.

However, it is obvious from all that has been said that the sale of the area of that property below low water mark was made *super non domino et non possedente* and that therefore there was no transfer of the property. The Sheriff's seizure and sale were made contrary to the provisions of Article 699, C.P.C. above referred to. The adjudication only transferred the rights possessed by the person upon whom the immovable was seized and sold.

If the Sheriff, through clerical error or otherwise, in drawing and making his judicial title, included in the title a parcel of land which he did not sell or did sell *super non domino et non possedente*, the title to such parcel of land did not pass.

(1) 15 Ex. C. R. 38.

The net revenues derived from the dwelling upon this lot has been in 1910-11, $89.37, and in 1914-15, $134.52.

Having said so much, there now remains the question of ascertaining the amount of compensation for this piece of land expropriated down to low water mark and the damages resulting from such expropriation in respect of the balance of the property, held in unity by the Hearn Estate. Following the mode of valuation adopted at the trial, the compensation will be hereafter fixed for the lots 2402, 2403, 2404, 2409 and 2410 at the same time, and for the reasons mentioned herein in respect of lot 2376, the compensation will extend to the end of the wharf, in the manner hereinbefore set forth.

Lots 2404 and 2410.

These two lots standing in the same legal position will be treated together.

The Crown concedes title in the Hearn Estate down to low water mark. The Hearn Estate claims down to the Quebec Harbour Commissioners' southern line, under deed from the latter, bearing date the 13th July, 1867. However the Crown pleads that as these deeds have not been registered, they have no effect as against the Crown, the latter only recognizing the Quebec Harbour Commissioners as proprietors of the same.

The plaintiff in this contention relies upon part of Article 2098 C. C. which reads as follows, viz:—

"All acts *inter vivos* conveying the ownership "of an immoveable, should be registered at length, "or by memorial. In default of such registration, the "title of conveyance cannot be invoked against any

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"third party who has purchased the same property "from the same vendor, for a valuable consideration "and whose title is registered. Registration has "the same effect between two donees of the same "immoveable."

The palintiff's contention with respect to want of registration, would have to be given effect in a case where the question of priority of claims would have to be established. But it is otherwise in a case of expropriation where the rights and interest of all parties in the lands taken, must be determined. The Court here has to determine the adverse contentions of all parties before diciding to whom the compensation moneys are to be paid by the Crown.

Indeed, under Sec. 26 of The Expropriation Act, the Information of the Attorney-General must set forth the persons who, at the date of the expropriation, had any estate or interest in the land taken and the particulars of such estate or interest and of any charge, lien or encumbrance to which the same was subject.

In compliance with this enactment, we have now before the Court, all parties who have any right or interest in the land. We have the Quebec Harbour Commissioners and the Hearn Estate before the Court. And because the deeds of sale of the Harbour Commissioners in favour of Hearn have not been registered, they will come and say, as between Hearn and themselves, it is true we sold you this property under good and valid deed, but it has not been registered and we will claim the compensation for the same.

Why, this would be mere irony of law and justice.

It is not in the mouth of the Commissioners to speak in this manner to their legal grantee. And I

advisedly say "legal grantee" because the deeds of transfer are absolutely good and valid. The arm of the law cannot be extended to help and maintain such contention.

The Hearn Estate are the legitimate and true proprietors of these water lots and as the rights of the parties to be here determined in respect of these lots are between the grantors and the grantees of the same,—and both parties are before this Court, there is no question of third parties,—the question of registration does not practically come up. The Crown cannot be treated as a third party. By the Information, the plaintiff takes and expropriates certain real property, and declares his readiness to pay the compensation to whomsoever will be declared entitled thereto and it is between such parties that the question of title is to be determined.

I therefore find that the Hearn Estate is the true owner of this property down to the Quebec Harbour Commissioners' southern line, and is entitled to the compensation moneys in respect of the same.

Having so found, there now remains the question of ascertaining the amount of compensation in respect of the two lots 2404 and 2410 down to the Harbour Commissioners' southern line and the damages resulting from the expropriation in connection with the balance of the property held in unity by the Hearn Estate. Following the mode of valuation adopted at trial, the compensation will be hereafter fixed for the lots 2402, 2403, 2404, 2409 and 2410 at the same time.

The net revenues derived from the dwelling on 2404 in 1910-11 was $130.35 and in 1914-15—$61.25. The net revenues derived from the dwelling on 2410 were in 1910-11, $92.25 and in 1914-15—$122.50.

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The revenues from the wharves have been very small.

Lot 2409.

The Estate of Hearn claims this lot down to deep water extending as far as the Harbour Commissioners' southern line.

The Crown admits title down to low water mark.

The defendants claim title both under a Sheriff's sale of one-eighth of the property, bearing date the 1st May, 1877, and under the sale of seven-eighths by John Walsh on the 18th May, 1878.

In both these titles, the description of the property makes use of the following expression in speaking of the southern boundary, "extending in depth to "*low water line,* bounded in front towards the north "by Champlain street, in rear by the Commissioners' "line."

What is the fair and reasonable construction and interpretation to be placed upon this description under the circumstances, as will best ensure the attainment of the object of these deeds and of such description according to its true intent, meaning and spirit?

It is obvious, and it could not be more clearly worded that the sales of this property cover the land extending "*in depth to low water mark*". Then when the deeds proceed to give the boundaries, they say that in the rear it is bounded by the Harbour Commissioners' line. The Harbour Commissioners' line therein mentioned means obviously the line of division between the property sold and what remained in the hands of the Commissioners. It is too clear indeed that when the Commissioners sell down to low water line,—in so many words, and they being

the owners of what is south of low water; they would call it their line, and in this case it cannot mean anything else and could not be construed to extend to the southern end of their property. Just as much as one would, in the description of two adjoining properties. The line of the adjoining owner could not be meant to take his whole property, to extend to the far end of the property belonging to the vendors; but read in a reasonable manner, it could only mean the line adjoining the two properties, and in the present case the line adjoining this property to the south of the low water mark, the Commissioners being proprietors of the land to the south of low water mark.

There is no sale by the Harbour Commissioners in respect of the deep water lot. However, the defendant endeavours to further construe the ownership thereof from the description in the deeds of sales for Lots 2404 and 2410, because that description mentioned Hearn as the proprietor on the eastern and western boundaries, concluding that it is an acknowledgment in the ownership of the present lot. It is unnecessary to go into the detail of this contention, I find against the defendants upon this ground.

And after all when there is possible ambiguity resulting from the fact that the description for one part does not seem consistent with another part, I do not think there is any general rule by which one can be guided. However, *ceteris paribus*, the reasonable conclusion which is more likely to accord with the real intention of the parties, should in preference be accepted. It seems that the Court must in every case do the best it can to arrive at the true meaning of the parties upon a fair consideration

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of the language used and the facts in evidence. I must, however, add that it is without any hesitation I come to the conclusion the obvious meaning and intention of the parties in question was to fix the southern boundary by the low water mark.

I therefore find that the Hearn Estate is the true owner of this property down to low water mark and is entitled to the compensation in respect thereto.

The net revenues derived from the dwelling upon this lot has been in 1910-11, $75.80 and in 1914-15 $157.00.

Having so found, there now remains the question of ascertaining the quantum of the compensation in respect of this lot down to low water mark and the damages resulting from the expropriation in connection with the balance of the property held in unity by the said Estate. Following the mode of valuation adopted at trial, the compensation will be hereafter fixed for lots 2402, 2403, 2404, 2409 and 2410 at the one and same time. And for the reasons mentioned herein, is respect of Lot 2376, the compensation will extend to the end of the wharf in the manner hereinbefore set forth in respect of the other lots.

Assessment of Lots 2402, 2403, 2404 2409 and 2410.

The area for which compensation is hereby made in respect of each of these lots, is as follows, viz:—

	sq. ft.
Area taken to low water mark on all these lots.	12,749
Area between low water mark to red line of first expropriation on all these lots.....	1,592
Lot 2402, Area from said red line to end of wharf.....	544
Lot 2403, Area from said red line to end of wharf.....	182

	sq. ft.
Lot 2404, Area from said red line to end of wharf	840
Lot 2404, Area from end of wharf to Commissioners' southern line	7,282
Lot 2409, Area from said red line to end of wharf	704
Lot 2410, Area from said red line to end of wharf	1,640
Lot 2410, Area from end of wharf to Commissioners' southern line	6,100
Total area	31,633

On these several lots, there are 4,079 cubic yards of wharves.

As already mentioned, the Crown in expropriating the right of way for the National Transcontinental Railway, has taken all the land belonging to the defendant on the river side of the northern line of the said right of way, leaving the defendant with a certain piece or parcel of land on the northern side of the right of way to Champlain Street. On this piece of land so left to the defendant, as part of each of these lots, are dwelling houses with small yards at the back, as will be seen by referring to plan Exhibit No. 3.

The revenue derived from such residential buildings has already been referred to under the separate head of each lot.

The restricted area left to the defendant in connection with these properties and the damages resulting from the expropriation in respect of the buildings, such as the decrease in their value, the difficulty in renting the same and all other elements of damages resulting from the close proximity of the railway,

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will also be assessed and compensation made therefor to the defendant.

As already mentioned, I have had the advantage accompanied by counsel, of visiting and viewing the premises in question, and after giving due consideration to the evidence and to all the circumstances of the case, I have come to the conclusion to fix as a fair and liberal compensation the sum of $56,396.83 in respect of the said lots 2402, 2403, 2404, 2409 and 2410. This amount to cover the value of the land so taken, as parts of the said lots, the wharves, all riparian or other rights of every kind whatsoever, together with the damages to the balance of the property remaining in the hands of the Hearn Estate. This amount, however, is to be paid to the said Estate, upon giving to the Crown a release of the capital, rents and interest remaining due to the Quebec Harbour Commissioners under the several grants or sales in respect of the said lots. Failing the production of such release, the capital of the said rents, with all arrears and interest are to be paid the Quebec Harbour Commissioners and then the balance paid over to the Hearn Estate.

Interest.

There were, in this case, two expropriations, of distinct and separate pieces or parcels of land, made at two separate and distinct dates, namely on the 8th November, 1913 and on the 30th November, 1915.

It would be somewhat intricate and difficult to separate the several areas to be allowed, in respect to all the lots expropriated herein, under each expropriation and would involve further detailed measurements.

And furthermore, in view of the fact that under the first expropriation, the damages to be paid in respect of the lands expropriated on the second date, would have been practically the value thereof,— and with the further object of making the compensation more liberal, I will allow interest upon the total amount recovered from the date of the first expropriation, namely, the 8th November, 1913.

Claim of the City of Quebec.

The City of Quebec, as mentioned at the beginning of these reasons for judgment, has filed a plea whereby they leave the matter of their interests in the hands of the Court.

Under Article 2213 C. C., the roads leading to the sea or a navigable river are not subject to prescription.

Pursuant to the plea filed by the City of Quebec, the following agreement has been filed reading as follows, viz:—"The plaintiff and the City of Quebec, "one of the defendants, hereby agree that the said "city shall have the right to cross with its fire ap- "paratus over the tracks on that part of the property "marked 104A and 104B and 109A and 109C, on the "plan deposited and filed on the 29th November, "1915, in this case and shall also have the right to "pass its fire hose under the tracks on the said pro- "perty in all cases of fire where necessary."

It is found in this case that the City of Quebec is proprietor of the small lane marked 110E, and the two streets marked respectively 109A and 104B, and the compensation in respect of the same should be paid to them.

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These streets or lanes were used by the public and the adjoining proprietors and they are still available down to the northern line of the expropriated right of way.

The matter of the compensation for the expropriation of such street having been left by the City of Quebec, to be determined by the Court without adducing any evidence and the Crown having acquiesced in this course,—there now remains the question of fixing the amount of the compensation.

While the undertaking above recited is a substantial advantage given to the city, it is found it does not cover all the city is entitled to,—over and above the several advantages derived fron the undertaking, the City of Quebec is further entitled to receive from the Crown the sum of $600.00 with interest and costs.

The Quebec Harbour Commissioners' Claim.

These claimants have filed a plea setting forth what area they claim upon this water front, on the Harbour of Quebec, in connection with this expropriation, as hereinbefore set forth.

They have accepted the amount tendered by the Crown.

There is no occaiosn to make any pronouncement upon the rights of these defendants as between themselves and the Crown in respect of such land in view of what has been said by their counsel in the course of his argument. This is a matter which will be adjusted between these two parties.

There will be no costs to any of the parties herein on this issue.

The Quebec Harbour Commissioners will however be entitled to recover the capital, and the arrears,

if any, of rents and interest mentioned in both the Crown Grants and the Quebec Harbour Commissioners' Deeds of Sale, under which the Hearn Estate are claiming, as hereinafter set forth.

Therefore, there will be judgment as follows, viz:—

1st. The lands expropriated herein are declared vested in the Crown as of the respective dates of expropriation, namely, of the 8th November, 1913 and the 30th November, 1915.

2nd. The compensation for all the lands so taken, and for all damages whatoever resulting from these two expropriations is hereby fixed at the sum of $133,796.03, with interest thereon from the 8th November, 1913, to the date hereof.

3rd. The defendants, the Estate Hearn, are entitled to be paid and recover from the plaintiff the sum of $133,196.03 with interest thereon from the 8th November, 1913, upon giving to the Crown a release of the capital, rent and interest due the Quebec Harbour Commissioners, under the several Crown Grants and Deeds of Sale referred to herein and affecting the said properties; furthermore, upon giving to the Crown a good and sufficient title free from all hypothecs, mortgages, rents and incumbrances whatsoever upon the said properties.

Failing by the said Hearn Estate to give a release of all incumbrances, the same shall be first discharged and paid out of the said compensation moneys and the balance of the moneys be paid over to the said Hearn Estate.

4th. The Corporation of the City of Quebec is declared entitled to the several casements and servitudes mentioned in the undertaking given by the Crown and further is entitled to recover from the

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plaintiff the said sum of $600.00 with interest thereon from the 30th November, 1915 and costs.

5th. The defendants, the Estate Hearn, are entitled to their costs on the issue with the plaintiff.

6th. There will be no costs to any of the parties herein on the issue with the Quebec Harbour Commissioners.

Judgment accordingly.

Solicitors for the plaintiff:
Gibsone & Dobell.

Solicitors for the defendants:
Pentland, Stuart, Gravel & Thompson.

Solicitors for the City of Quebec, added defendant:
Chapleau & Morin.

1916
March 27.

IN THE MATTER OF THE PETITION OF RIGHT OF

ANTOINE L'HIRONDELLE, AN INDIAN HALF-BREED, SUPPLIANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

Indian lands—Scrip—Disposal of—Gift—Recovery—Laches.

On October 20, 1900, a scrip, in satisfaction of half-breed's claim arising out of the extinguishment of Indian title, was issued to the suppliant who gave it to his father. The latter sold the same for consideration, and the scrip, after acreage had been located, apparently in due form, found its way into the hands of the Crown, and the suppliant now, 13 years after, sues the Crown to have the scrip certificate returned to him and that failing to do so, he asks to recover the value thereof.

Held, as there was no covenant running with the scrip and the suppliant having parted with the same, there was no privity as between the Crown and himself, and furthermore he is barred by his laches having, by a period of 12 to 13 years, acquiesced in what had taken place.

PETITION OF RIGHT to recover from the Crown certain scrip or the value thereof.

The case was heard before the Honourable Mr. JUSTICE AUDETTE, at Edmonton, January 17 and 18, 1916.

E. B. Edwards, K.C., for suppliant; *H. L. Landry*, for Crown.

AUDETTE, J. (March 27, 1916) delivered judgment.

This suppliant brought his petition of right seeking to have returned to him, by the Crown, Scrip Certificate No. 2070, issued to him on October 20, 1900, in satisfaction of half-breed's claim arising out of the extinguishment of Indian title, entitling him to 240 acres of Dominion Lands, under the provisions of the Act 62–63 Vict. ch. 16. He further alleges that the Crown is in possession of this scrip, which he values at $6,000, and he asks that should the Crown fail to return the same, it should pay the value thereof.

As appears by Exhibit A, on October 20, 1900, Antoine L'Hirondelle, son of Jean Baptiste L'Hirondelle, then 22 years of age, received from the Half-Breed Com-

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mission, the original Certificate No. 2070, entitling him to the 240 acres of Dominion Lands, as above mentioned.

His father asked him to give him this scrip to pay a debt he owed Messrs. McDougall & Secord, and the suppliant gave it to him. The father, Jean Baptiste L'Hirondelle, then sold it to McDougall & Secord for $150, the price that was being paid for such scrips at the time. The father then owed about $500 to McDougall & Secord, who gave him credit *pro tanto*.

Jean Baptiste L'Hirondelle sold the scrip with guarantee —that is he undertook to locate when necessary. McDougall, who was dealing extensively in his purchase and sale of scrip at the time says that while he purchased with guarantee, he sold without any warranty.

The suppliant testified he expected to get something when locating. Witness McDougall says they were in the habit of giving $10 and sometimes they gave as high as $15 but never more, to the half-breed who would locate, with the object of compensating him for travelling, and displacement, etc. But there was no legal claim to any such money, the scrip had been sold at a given sum with guarantee of location.

Under a transfer of the suppliant's rights to the 240 acres and an application to locate, both dated on July 11, 1902, and purported to be signed by the suppliant, a patent was issued. The suppliant contends he never signed these two documents, and whether he did or not has no effect upon the issues of the case. The documents are filed as exhibits and respectively marked B and C. He therefore, in 1913, by the present petition of right, asked for the return of his scrip or the value thereof, which he places at $6,000.

Now from the above it appears clearly that the Crown discharged all duties cast upon it, when it delivered the scrip certificate or the scrip notes. It did not give such scrip with any warranty or further obligation attached to it. After the suppliant did obtain his scrip, he gave it to his father to discharge part of a debt due by him (the father) to the firm of McDougall & Secord. The suppliant therefore parted with his interest in the scrip and the father used it in the manner agreed upon between them.

There is now no interest in the scrip which the suppliant could claim. He parted with it when giving it to his father and there is now no privity as between the Crown and the suppliant in respect of this scrip, in which now he has no legal interest,—*Donner et retenir ne vaut* (*You cannot give and retain*) according to the French legal maxim. It is true the scrip has now found its way into the hands of the Crown, but it did so find its way in due course after the suppliant had parted with all his interest in it. After it so came in the possession of the Crown in due course, it was duly cancelled and is now non-existent, or has no value whatsoever in its present state.

The suppliant obtained his scrip in 1900 when he gave it to his father, and now comes 12 or 13 years after to make a claim in respect of the same. The least that can be said is that he is barred by his laches, having acquiesced for so long a period in what has taken place. He cannot annul his gift of this scrip to his father after this long failure to assert his rights, if he had any. The action appears like a tardy afterthought.

If there had been any wrongful conversion of the scrip, it would however be prescribed by 6 years, and the Crown could not be charged with wrongful conversion and is not liable in tort. See the unreported case of *MacKay v. Secord*, decided in a similar action by the Appellate Division of the Supreme Court of Alberta, on September 23, 1913, and produced as part of the argument.

The suppliant cannot succeed in the action as framed, and he is declared not entitled to any portion of the relief sought by his petition of right. The action is dismissed with costs.

Petition dismissed.

Solicitor for suppliant: *E. B. Edwards.*

Solicitor for respondent: *H. L. Landry.*

1916
March 27.

IN THE MATTER OF THE PETITION OF RIGHT OF

JOSEPH L'HIRONDELLE, AN INDIAN HALF-BREED, SUPPLIANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

Indian lands—Scrip—Gift—Estoppel—Infant.

The suppliant, when a minor of 18 years of age, gave to his father a scrip in satisfaction of half-breed claim arising out of the extinguishment of Indian Title, which was issued to him in November, 1900. In 1913, he filed his petition of right to recover the scrip which in due course had found its way back into the hands of the Crown after location, and failing the Crown to return the same he asked the value thereof.

Held, that although an infant he had full power to dispose by gift of this scrip to his father. The gift might be voidable but not void. He could for cause, repudiate within a reasonable time after having attained majority. A period of 10 years having elapsed since then he is now estopped by his laches having acquiesced by his conduct in all that has taken place.

PETITION OF RIGHT to recover from the Crown certain scrip or the value thereof.

The case was heard before the Honourable Mr. JUSTICE AUDETTE, at Edmonton, January 19, 1916.

E. B. Edwards, K.C., for suppliant; *H. L. Landry*, for Crown.

AUDETTE, J. (March 27, 1916), delivered judgment.

The suppliant brought his petition of right seeking to have returned to him, by the Crown, Scrip Certificate No. 2292, issued to him on November 3, 1900, in satisfaction of half-breed claims arising out of the extinguishment of Indian title, entitling him to 240 acres of Dominion Lands, under the provisions of the Act 62–63 Vict. ch. 16. He further alleges that the Crown is in possession of this scrip, which he values at $6,000, and asks that failing by the Crown to return the same that it should pay the value thereof.

This case is practically identical with that taken by his brother Antoine in this Court under No. 2443, in which

Antoine L'Hirondelle is suppliant and His Majesty The King, respondent,[1] and in which judgment has also been delivered this day. All that is stated in the reasons for judgment in the case under No. 2443 is to be taken, *mutatis mutandis*, and so far as applicable, to form part of the present judgment.

The only material difference between the present case and that under No. 2443, is that Joseph L'Hirondelle, was only 18 years of age when his father took his scrip, the suppliant not objecting to it, but acquiescing. The father also sold it to McDougall & Secord.

The suppliant became of age in 1903 and did nothing whatsoever in respect of this scrip until 1905, when he was asked to sign the transfer to McNamara filed as Exhibit C herein, and a patent was subsequently issued.

As in the other case, there is some contest as to whether or not he did actually sign an application to locate in 1905, but that has nothing to do with this case, as already stated in case No. 2443.

Although an infant, the suppliant had full power to dispose by gift of this scrip to his father: 17 *Halsbury's Laws of England*, 78. The property of this chattel, because this scrip was nothing but a chattel, passed when he gave it to his father. The most that can be said is that it was voidable but not void. It was indeed subject to his repudiation. However, he became of age in 1903, and the present petition of right is filed in 1913, ten years after he became of age. He could repudiate within a reasonable time after attaining the age of twenty-one; but he did not do so, and he is now estopped by his laches, having acquiesced by his conduct in all that has taken place.

This case, like the case of his brother Antoine, is nothing but the result of tardy afterthought.

In arriving at my conclusions in the present issues, I rely with more satisfaction upon the unreported case of *MacKay v. Secord*, decided by the Appellate Division, of the Supreme Court of Alberta, on September 23, 1913; because in the MacKay case, as in the present one,

[1] Ante, p. 193.

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the half-breed parted with his scrip under similar circumstances and was only 18 years of age.

Taking in consideration what has just been said above and the reasons for judgment in the case (No. 2443) of *Antoine L'Hirondelle v. The King*,[1] I have come to the conclusion that the suppliant cannot succeed in the action as framed and the suppliant is declared not entitled to the relief sought by his petition of right. The action is dismissed with costs.

Petition dismissed.

Solicitor for suppliant: *E. B. Edwards.*

Solicitor for respondent: *H. L. Landry.*

[1] Ante, p. 193.

IN THE MATTER OF THE PETITION OF RIGHT OF

1917
March 3.

PIERRE FONTAINE SUPPLIANT;

AND

HIS MAJESTY THE KING,.....RESPONDENT.

Railways—Expropriation—Farm crossing—Contract—Servitude—Impossible to exercise —Value.

Apart from any statute the suppliant was entitled, under indenture with the Crown, to a crossing from one part of his farm to another. The land expropriated from the suppliant having been converted into a railway yard with, at the date of the trial, eighteen tracks, it became impossible to give the crossing contracted for.

Held, it having become practically impossible to give the crossing and to exercise such servitude, the suppliant was declared entitled to the value thereof, upon releasing and discharging the Crown from the obligation of constructing the same.

PETITION OF RIGHT to recover damages for the deprivation of a crossing on the Intercolonial Railway.

The case was heard before the Honourable Mr. JUSTICE AUDETTE, at Quebec, February 6, 8 and 9, 1917.

V. DeBilly, for suppliant; *E. Belleau*, K.C. and *M. Dupré*, for Crown.

AUDETTE, J. (March 3, 1917) delivered judgment.

The suppliant is the owner of a certain piece of land which at the time of his purchase, May 16, 1899, formed part of lot 254 of the parish of St. Jean Chrysostome, in the County of Levis, P.Q., less a certain portion thereof which had previously been sold for the right of way of the Intercolonial Railway.

His residence and barn are situate on the northern side of the King's highway, at about 150 feet from the same. The piece of land to the south thereof, that is between the highway and the Drummond County Railway, (what the suppliant called in his evidence the Grand Trunk) has been subdivided in building lots and has been all sold, and between the Grand Trunk and the Intercolonial Railway to

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the south, the land has also been subdivided and partly sold with the exception of 18 to 20 lots remaining unsold. At the southern end of this piece of land, as will more clearly appear on the plan filed herein as Exhibit No. 6, there is a certain piece of land between the yellow lines which never belonged to the suppliant, such piece having been excepted from his deed of purchase as having been at that time sold for railway purposes. However, when he purchased there was a farm crossing over that piece of land appearing between the yellow lines.

On January 19, 1903, the suppliant sold to the Crown that piece of land to the south of this land between the yellow lines, as more fully described in the deed of sale filed herein as Exhibit No. 4. That piece of land so sold extended south from the yellow line to the white line on the plan, to the south of which the suppliant still owns 40 to 45 acres, out of which almost half is now under cultivation and the balance is wooded.

In this indenture of January 19, 1903, there is a reservation which reads as follows:—"The vendor expressly "reserves for himself and assigns the right to a crossing "or a right of passage on foot and with vehicles *when it* "*shall be needed* through the lot of land presently sold to "communicate through the railway track from one side of "the railway line to the other, from one side of his property "to the other part thereof for all the ends and purposes "of his land, as the whole is provided by section 191 of the "Railway Act of Canada, 1888."

For two years following this sale to the Crown the suppliant made use of the crossing which already existed between the yellow lines, thus connecting the piece so sold to the northern part of his property. However, since that time the crossing has disappeared and is not in existence, and the railway authorities having turned the piece of land so expropriated from the suppliant into a railway yard, with about 18 tracks, upon which a number of loaded and empty cars are allowed to remain for long periods, with the result that the old crossing has disappeared and would be absolutely blocked, and the Crown is unable to give the suppliant a level practical crossing. A viaduct would be financially prohibitive. See Art. 559, C.C. Que.,

which reads as follows:—"A servitude ceases when the "things subject thereto are in such a condition that it can "no longer be exercised."

Under these circumstances, the suppliant, brought his petition of right to recover the sum of $1,500. The amount of $500 as representing alleged damages suffered in the past by the deprivation of a crossing, and the amount of $1,000 as representing the decrease in the value of his property for the entire deprivation of such crossing, stating further that upon the payment of the sum of $1,000 the suppliant will abandon his right to the crossing.

To get from his house to these 40 or 45 acres to the south, the suppliant has to travel about one mile or three-quarters of a mile more than he would otherwise do if he had the crossing in question. Nearly half of that land to the south is under cultivation and the carting and drawing in respect of the working of the same has been given in the evidence, and it included the yearly drawing of about 50 loads of round boulders picked up from that part under cultivation, thereby establishing, beyond controversy, that the land is not at least of the very best quality.

It is unnecessary in the present case to give any consideration to the statutory rights of a crossing or as to whether or not the several areas forming the present property are disjoined or held in unity, under the decision of *Holditch v. Canadian Northern Ry. Co.*[1]

The case rests upon contract and the rights of the parties must be found and determined within the provisions of the contract which is filed herein as Exhibit No. 4.

Under that contract the suppliant is entitled to the crossing when *needed*, "to communicate through the railway "track from one side of the railway line to the other, from "one side of his property to the other part thereof for all "the ends and purposes of his land." He exercised his contractual right and declared his "need" before applying for his petition of right. His right to such a crossing is manifest and obvious. The Crown is unable to give it to him, and does not intend to do so in view of its practical

[1] [1916] 1 A.C. 536, 27 D.L. R. 14.

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impossibility, as I may say, and that should be the end of that branch of the case. What is then the fair compensation for the deprivation of such a crossing, for the past, present and future, taking all the circumstances of the case into consideration, and assessing the damages once for all? The value of the crossing is to be assessed as of the date of the deed of sale, and interest upon that amount in lieu of damages for the past should be allowed as representing the loss for the deprivation of the same in the past.

Taking the above circumstances into consideration, I hereby assess the value of the said crossing, of the damages resulting from the deprivation of the same, once for all, at the sum of five hundred dollars, with interest thereon from January 19, 1905. The interest is allowed from the date at which the suppliant had no crossing, as mentioned in the evidence.

Therefore, there will be judgment declaring that the suppliant is entitled to recover in lieu of the crossing, as above mentioned, the said sum of $500 with interest thereon, at the rate of five per cent. per annum from January 19, 1905, and costs, upon giving to the Crown a good and satisfactory release and discharge from the obligation of constructing the crossing mentioned in the deed of January 19, 1903.

Judgment for suppliant.

Solicitors for suppliant: *Bernier, Bernier & DeBilly.*

Solicitors for respondent: *Dupré & Gagnon.*

IN THE MATTER OF THE PETITION OF RIGHT OF

EUGENE LAMONTAGNE.....SUPPLIANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

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March 3.

Expropriation—Plan and description—Sufficiency—Expropriation Act, sec. 8—Sheriff's sale after expropriation.

Where a large area of land, composed of several cadastral lots, has been expropriated by the Crown for the purposes of a military training camp, the deposit of a plan and description giving the number of lots in severalty, the concessions and parishes in which such lands are situate, together with a red line upon the plan shewing the external boundary and mete of the camp, and the description referring to the same, in the following words: "this is a plan and description of certain lands, as shewn on the plan "within lines marked in red."

Held, such plans and descriptions are satisfactory compliance with the requirements of sec. 8 of *the Expropriation Act* (R.S.C. 1906, c. 140), identifying with certainty the lands taken and conveying such notice both to the owners thereof and the public.

2. A sale upon the owner at the date of the deposit of such plan and description made by the sheriff several months thereafter is to be treated as made *super non domino*, the lands being vested in the Crown, and the sale declared null and void.

PETITION OF RIGHT to recover the alleged value of certain real property expropriated by the Crown for the purposes of the Valcartier training camp.

The case was heard before the Honourable Mr. JUSTICE AUDETTE at Quebec, Nov. 23, 1916, and Feb. 9 and 10, 1917.

E. Belleau, K.C., and *M. Dupré*, for Crown; *F. O. Drouin*, K.C., for petitioner.

AUDETTE, J. (March 3, 1917), delivered judgment.

The suppliant, by his petition of right seeks to recover the sum of $10,800, the alleged value of certain real estate or immoveable property expropriated by the Crown and claimed by him under the circumstances hereinafter set forth.

On September 15, 1913, the Crown, requiring for the purposes of the Valcartier training camp—a public work

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of Canada—a large area of land, including lot 17 in question herein, deposited in pursuance of sec. 8 of *the Expropriation Act*, a plan and description of the lands so taken in the Registration Division of Quebec.

A certified copy of this plan and description, filed herein as Exhibit No. 2, shows in severalty the cadastral numbers of the lots taken, together with the concessions and parishes in which they are situate. On the plan appears the description of the lands so taken, and as the question of the validity of this description constitutes the main issue in this case, it will be recited herein in its entirety. It runs as follows:—

"All those lots, pieces or parcels of land situate, lying "and being in the Parish of St. Gabriel De Valcartier "County of Quebec, Province of Quebec, and more particu- "larly described as follows:—Consisting of Lots 1 to 43 "inclusive: Concession 1 (new and old); Lots 54 to 95 "inclusive: Concession 2 (new and old); Lots 96 to 154 "inclusive: Concession 3 (new and old). This is a plan and "description of certain lands, *as shewn on plan within lines* "*marked in red*, taken for the use of His Majesty the King, "and to be used for military purposes, and made and de- "posited of record in the office of the Registrar of Deeds, "for the County of Quebec, in the Province of Quebec, "pursuant to the provisions of *The Expropriation Act*."

The plan is dated August 28, 1913, and is signed by the Secretary of the Department of Militia and Defence.

When the plan and description were so deposited in the registry office, one Arthur Giguere was the owner of lot 17 therein included. He had had part of the lot subdivided in November, 1912, and having failed to pay this survey, he was sued for the same and the lands were, in November, 1913 (after the said plan and description had been so deposited) seized under a writ of *fieri facias* and the sheriff, ignoring the expropriations by the Crown, sold the same for the sum of $1,850 on January 10, 1914, to Eugene Lamontagne, the suppliant, who now claims, by his petition of right, the sum of $10,800 as compensation for this lot 17.

To complete the narration of the facts of the case in a chronological order, it may be well to mention, although immaterial for the purpose of deciding the matters under

consideration, that the Crown only took physical possession of the lands in question, through its officers and servants, some time after the war was declared, and that is during August, 1914. Furthermore, the Crown, on August 31, 1914, deposited in the registry office a second plan and description of the lands required for the Valcartier training camp. In the last plan and description of August, 1914, the whole of the lands taken and expropriated in September, 1913, are included together with an additional area to the South of what had already been taken, in the result enlarging the area required for the camp; but the lands in question herein were included in the plan and description deposited on September 15, 1913.

When, before trial, the case was mentioned in court I directed and ordered that the trial be first proceeded with only upon the questions of law, leaving out for the present the consideration of the value of the property in question and the quantum of the compensation. In other words ordering that the questions of law be first disposed of before venturing upon the question of value and compensation.

The whole question now at Bar is as to whether or not the deposit of the plan and description of September 15, 1913, was sufficient and in compliance with sec. 8 of *the Expropriation Act*, and whether the sale made by the sheriff, in January, 1914, upon Arthur Giguere, is of any legal value.

The material part of sec. 8, of *the Expropriation Act* reads, as follows:—

"8. *Land taken for the use of His Majesty shall be laid "off by metes and bounds;* and when no proper deed or "conveyance thereof to His Majesty is made and executed "by the person having the power to make such deed or "conveyance, or, when a person interested in such land is "incapable of making such deed or conveyance, or when, "for any other reason, the minister deems it advisable so "to do, *a plan and description of such land signed by* the "minister, the deputy of the minister or the secretary of the "department, or by the superintendent of the public work, "or by an engineer of the department, or by a land surveyor "duly licensed and sworn in and for the province in which "the land is situate, *shall be deposited* of record in the office

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"of the registrar of deeds for the county or registration "division in which the land is situate and such land, by "such deposit, shall thereupon become and remain vested "in His Majesty.

"2 * * * * * * * * * *

"3. All the provisions of this Act shall, so far as they "are applicable, apply to the acquisition for public works "of such right of possession and such limited estate or "interest."

Now counsel at bar for the suppliant contends that sec. 8 of *the Expropriation Act* requires that the description of the land expropriated by the Crown should be given by metes and bounds, and that the description filed on September 15, 1913, does not comply with such statutory enactment, and that therefore the sale by the sheriff was made upon Giguere and not when the Crown was vested with the land, and that the suppliant's title is good and valid and that he is entitled to the compensation money for such land so expropriated.

It will have, therefore, to be sought what is meant by this enactment of sec. 8, requiring that the "land for the "use of His Majesty shall be laid off by metes and bounds," * * * and also " a plan and description of such "land" shall be deposited in the Registry."

It may be said *en passant* that it is not necessary that the boundaries of such land so expropriated, should be established in the manner provided by sec. 7 of the said Act—the last paragraph of that section stating it clearly.

What is the meaning of the words "metes and bounds"?

The definition of "metes and bounds" is given, by Bouvier's Law Dictionary; Cyclopedia Law Dictionary; Shumaker & Langsdorf and Black's Law Dictionary, as "The boundary-lines of land, with their *terminal points* "*and angles*. Courses and distances control, unless there "is a matter of more certain description, e.g., natural "monuments." But natural monuments are dispensed with by sec. 7 above referred to.

English's law dictionary gives also the following description:—"Mete—*A boundary line or mark.*" "Metes and "Bounds—Butts and Bounds—Bound, *The utmost limit*

"*of land.* Bound—a Limit, *A visible line designating a "limit.*"

And in "Words and Phrases Judicially Defined" under verbis, "Metes and Bounds," are defined as meaning the "boundary *line or limit of a tract*—which boundary may be "pointed out and ascertained by rivers or objects, either "natural or artificial * * * * Where a lot was in "rectangular form, a description in a levy of execution on a "certain number of acres off the *east end* was a sufficient "description by metes and bounds."

In *Cripps on Compensation* (5th ed.) p. 16, dealing with the question of plan and description, is found the following: "In *Dowling v. Pontypool & C. Rail. Co.* [1] the meaning of "the words, 'lands delineated' upon the deposited plans "was considered at great length, and it was held that they "were not limited to mean lands surrounded by lines on "every side, but included lands so sketched, represented "or shown that the owners would have notice that their "property might be taken. Hall V. C., says (p. 740) "And it must be borne in mind what the object of depositing "the plans and books of reference is, *such object being to "give notice to the public* and *landowners in particular* "where the promoters of the company propose to acquire " * * * I say, *enter upon the land with the map "and book of reference in hand;* observe the line of the "railway as laid down, the *limits* of deviation, the *several "numbers on the map* * * * * and ask yourself "the question whether the piece of land in question is "*delineated and described.* My answer is in the affirmative."

In *People v. Guthrie*[2] wherever statutory term of *metes and bounds* are discussed, it is found to be understood thereby to mean the *boundary line or* limit of tract, it being unnecessary to describe by monuments, &c., &c.

And in *Rollins v. Mooers*[3]: "The plaintiff contends that "the levies were void; that they should have set off the "estate, in the language of the statute, by metes and bounds. "This he contends by measure and by monuments . . . "The object of the legislation doubtless was, that the

[1] (1874) L. R. 18 Eq. 714; 43 L. J. Ch. 761.
[2] 46 Ill. App. 124–128.
[3] 25 Maine Rep. 192 at 195–6.

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"description of land set off *should be such as would identify* "it. Certainly to a common intent, as to such particulars, "was all that could have been intended. That which can be "rendered certain is in law considered as certain. The "lots in our township are often known and designated "by numbers. If *set off on execution by such numbers it "would be setting off by metes and bounds;* for it would be "presumable that the metes and bounds were well known, "or easily ascertainable. *It would be no more certain*, if it "were said, that it was bounded by lots numbered, &c., on "the different sides. These views are much strengthened "by the language of Mr. Justice Weston, in delivering the "opinion of the court in *Birch v. Hardy*.[1] He says: "By "metes, in strictness, may be understood the exact length "of each line, and the exact quantity of land in square "feet, rods and acres. It would be going too far to require, "that this should be set forth in every levy. The legis- "lature intended the land should be described with such "certainty that there should be no mistake as to its location."

It is useless to accumulate references to books and cases to establish and decide such a clear question as the one under advisement.

The principle of construing special acts adversely to the promoters where the language is ambiguous has not been applied in the case of a public body on which powers have been conferred to carry out works of a public character. This distinction is founded on the difference in aim between a public body carrying out a scheme for public purposes only and a company incorporated for the construction of an undertaking from which profit is intended to be derived. *Cripps' Compensation* (5th ed.), p. 23. This, however, is not said in aid of arriving at a conclusion on the plain language of the wording of the section above referred to, which, indeed, should receive a fair and just interpretation on the face of it. And though the statute must be complied with, a substantial compliance is sufficient. The substance and not the form will be looked to. *Lewis on Eminent Domain*.[2]

[1] 6 Greenl, 162.

[2] (3rd ed.) 547.

Now sec. 8 of *the Expropriation Act* should receive a fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act and of such provision and enactment, according to its true intent, meaning and spirit. (Interpretation Act, sec. 15). And the language of the section ought not to be construed with such technical narrowness as would both defeat its very purpose and be refractory to common sense.

The object of the deposit of the plan and description is to give notice to the public in general, and to the owner of the land in particular, of the expropriation of such lands. Anyone taking plan No. 2 and the description going with the same, as above recited, would have not the slightest difficulty, or a moment of hesitation, in ascertaining what the Crown has actually expropriated. Indeed the number of each cadastral lot is to be found in the description and is also indicated upon the plan itself and in juxtaposition with all the other lots of the same parishes. The concessions in which lay these lots as well as the names of the parishes are also indicated both upon the plan and the description. And for greater certainty and in order to remove any possible doubt that might exist after having gone so far, the description proceeds, "this is a plan and "description of certain lands, as shown *on the plan within "lines marked in red.*" Could anything be clearer and more definite? I certainly fail to see. The red line gives the metes and bounds of what is taken, and the description of the outer boundaries of the lands so taken for the purposes of such camp, and the description must be read conjointly with the plan. On both the plan and description are found a visible red line designating the limits of the camp, the boundary line or limit of the tract of land expropriated.

The whole of each lot is taken—this lot 17 is expropriated in its entirety—and can it be seriously contended that the description would have been any better or more certain if it had been said that each lot was bounded by lots numbered so and so on the different sides. A description by cadastral numbers would seem to be a description by metes and bounds, for it would be presumable that the metes and bounds were well known or easily ascertainable.

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And as said in *Rollins v. Mooers* (supra), that which can be rendered certain is in law considered as certain. It would of course be otherwise in a case where the expropriation is for the right of way of a railway or for a small piece or parcel of land of irregular shape or carved out of a cadastral lot; but where the whole lot or the whole property is taken, and where therefore the detailed description of the same appears upon the book of reference of the cadastre, the description in its intricate details would be mere verbiage and surplusage.

The object and intention of the legislation doubtless was that the description of the land taken should be such as would identify it, and that the description should be of such certainty, that there should be no mistake as to its location and identity. Certainty to a common intent as to such particulars was all that could have been intended. And it has not been contended at bar that there was any difficulty in identifying the lot in question. Indeed it has been conceded that it was not necessary to give the description to each lot by metes and bounds, but that the Crown *doit donner quelque chose qui nous fait distinguer ce qu'elle prend.*

I must find that the Crown has given as clearly as possible, free from unnecessary details, the full, clear description of the lands taken, and any objection taken to such plan and description must be found faulty in its technical narrowness.

This case has arisen in the Province of Quebec, but this finding applies to all the Provinces of the Dominion. And, if any difference, with much more force does it apply to the Province of Quebec, where the law which there obtains is so clear on a matter of this kind. Indeed, where the cadastre is in force, as in the present case, under Art. 2168, C.C.P.Q., "*the number given to a lot upon the plan and in the book of reference is the true description of such lot, and is sufficient as such in any* document whatever." Could any thing be clearer and more rational? And with this provincial law, the intent of the federal law absolutely agrees, and the one is cited in support of the other by way of illustration and comparison.

Therefore it is found the deposit of such plan and description has been so made in compliance and in due conformity and satisfaction with the provisions of *the Expropriation Act*, and that the lands therein described became vested in the Crown on September 15, 1913, the date of the deposit of such plan. No *nuda detentio* or physical occupation was necessary for the vesting of such land in the Crown in addition to the deposit of the plan and description which by mere operation of law implied a symbolical possession—and under the provisions of sec. 22 of *the Expropriation Act*, from the date of the deposit of such plan (September 15, 1913), the compensation money stood in the stead of the land and any claim thereto was converted into a claim to such compensation. The *Queen v. McCurdy*;[1] *Partridge v. Great Western Ry. Co.*;[2] and *Dixon v. Baltimore & Potomac R. Co.*[3]

On September 15, 1913, the lands in question herein became the property of the Crown and the sale of the same, made by the sheriff, upon Arthur Giguere, on January 10, 1914, was obviously made *super non domino*, and such sale made by the sheriff was and is absolutely null and void and nothing passed thereunder. The Sheriff's title is a thing of naught that must be ignored. The suppliant, Lamontagne, the purchaser at such sale took nothing by that deed from the sheriff, as the lands were at that time vested in the Crown. *Dufresne v. Dixon*;[4] *The King v. Ross*;[5] *Hope v. Leroux*;[6] *Lafortune v. Vezina*;[7] *C.C.P. (Que.) Art. 699 and Nos. 14, 17 and 22 in Beauchamp's ed. Beauchamp's Rep. Gen.*[8] *Doutre v. Elvidge.*[9]

The owner of lot 17 at the date of the expropriation, Arthur Giguere, did not file an opposition to the sheriff's sale, which was a thing of naught; but an intervention was filed in the present case by his heirs, he appearing to have died some time in 1915. This intervention which claimed the compensation for the lands expropriated was, however, for reasons unnecessary to mention here, necessarily abandoned and withdrawn.

[1] 2 Can. Ex. 311.
[2] 8 U. C. C. P. 97.
[3] 1 Mackey (D.C.) 78.
[4] 16 Can. S.C.R. 596.
[5] 15 Can. Ex. 33.
[6] 25 Que. K. B. 130.
[7] 25 Que. K. B. 544.
[8] Vol. 4, p. 259.
[9] 7 L. C. J. 257; 9 Rep. Jud. M. 140.

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The suppliant was heard as a witness before the court and I regret to say his testimony was not given with that candour and frankness that ought to have been expected. In the first part of his testimony he says he had heard the Government had deposited plans and descriptions, but he said he did not know if it was before the sale. Yet, later on, in the course of his evidence, he says he had heard, about eight days before the sheriff's sale, that a plan had been deposited.

The suppliant was, undoubtedly, at the date of the sheriff's sale, aware of the expropriation by the Crown and yet he chose to purchase. He therefore did so at his own risk and peril, and assumed both the responsibility and consequences of such course, thus waiving in advance any right he might have had to complain. *Caveat emptor.*

How, indeed, could Lamontagne, a real estate dealer, of Quebec, ignore in January, 1914, the project of this Valcartier training camp, when the same was of such notoriety in Quebec that as far back as September 16 and 17, 1913, the Quebec papers announced the undertaking and openly described it, as will attest exhibits "A" to "A. 6" filed herein.

The date of the sheriff's sale is January 10, 1914, the date of his title is January 15, 1914, and on January 21, 1914, the suppliant had already subdivided the land, and on the 23rd of the same month was deposited the plan of such subdivision in the Department of Colonization, Mines and Fisheries, and in the Registry Office on January 27, 1914. There would appear therefore peculiar haste, which can only be explained by his anxiety to become the owner of expropriated land with a special value acquired under a subdivision. The intention underlying all of these acts is so apparent, that no more need be said in that respect.

It was proved by witnesses Matte and McBain that Giguere, the owner of the land in question in 1913, was before his death, aware of the expropriation as far back as September, 1913; and witness Lavigne, says the expropriation of 1913 was pretty well known to the public at the time and especially to those interested in the lands taken.

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I have taken under advisement the two motions to amend made at trial by counsel on behalf of the suppliant. Granting the prayer of such motions as formulated would be to allow conflicting allegations in the petition of right as between paragraphs 3 and 4 thereof, followed by the necessity for the Crown to amend its statement in defence. Both matters are found to be unnecessary, as I have decided the case upon the evidence on record. And it is not so much what is alleged as what is proved that has to be passed upon and decided. It is not the shadow we are after, but the substance. Take nothing by the two motions.

Therefore the lands in question herein and embodied in the plans and descriptions deposited on September 15, 1913, as above mentioned, are declared vested in the Crown as of September 15, 1913;

2nd. The sale by the sheriff being made *super non domino* is declared null and void; and

3rd. The suppliant is not entitled to the compensation sought by his petition of right, and he is declared not entitled to any portion of the relief so sought thereby, and the petition of right is dismissed with costs.

Petition dismissed.

Solicitors for suppliant: *Drouin, Sevigny & Drouin.*

Solicitors for respondent: *Dupré & Gagnon.*

1917
Jan. 24.

IN THE MATTER OF THE PETITION OF RIGHT OF

EDOUARD RUEL.....SUPPLIANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

Expropriation—Easement—Damages—Prospective profits.

After R. had acquired the easement of laying pipes for an aqueduct and sewers upon certain lands, the Crown expropriated part of the same which stood at an extremity. R. claimed the full value of the aqueduct together with the sum of $20,000, representing the alleged decreases for the future of the benefits he would have derived from private buildings he claims he had a right to expect would be erected on the side of the lands taken by the Crown.

Held, that R. had no estate or interest in the lands taken, save the easement above mentioned, and as there was no covenant from his grantor to stipulate with his lessee and grantee that they would take water from such aqueduct and drain from such system, he could not recover such prospective profits. All he was entitled to was the value of the piece of aqueduct expropriated and the value of the easement upon the same.

THIS was a petition of right seeking compensation for an easement of an aqueduct and sewerage system upon certain lands taken for the construction of a dry dock at Lauzon, P.Q.,

The case was tried at Quebec, on November 22–23, 1916.

F. Gosselin and *F. Roy*, for suppliant; *W. Amyot*, for Crown.

AUDETTE, J. (January 24, 1917) delivered judgment.

The suppliant, by his amended petition of right, seeks to recover the sum of $25,000 as alleged damages, resulting from certain expropriations by the Crown in connection with the new dry dock, at Levis, P.Q. This amount is made up of the value of a system of aqueduct and sewerage, which he reckons at the

sum of.....$5,000

together with the further sum of.....20,000

arising out of the construction of the dry dock, which it is

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alleged, decreases, for the future, the benefits he would have derived from private buildings he had a right to expect would be erected on the site of the dry dock.

As a prelude, before coming to the actual facts of the case, it is well to state one must guard against a number of the allegations in the petition of right which do not, by any means, disclose the true facts of the case. This improper behaviour of deliberately drawing misleading and reckless pleadings with respect to questions of fact cannot be condoned, or cannot be met with too severe condemnation at the hands of the courts, with the object that such condemnation might tend much towards maintaining the high ethics and good traditions of the bar. The Court has a right to expect utmost good faith in its relations with the Bar.

Paragraph 3 of the petition of right for instance alleges, on the one hand, that since 1914 the system of aqueduct ceased to be operated, and yet the suppliant's son who manages this system of aqueducts produces, on the other hand, among other evidence, statements filed as exhibits, numbers 7 and 8, showing the revenues derived from the aqueduct from the Davis firm alone from 1914 to November, 1916, amounting to $1,921.72, and this is besides the other general revenues of the aqueduct.

Paragraph 5 alleges there were 10 dwellings on the part taken by the Crown, while the evidence discloses only 5; and paragraph 9 alleges that the Government has expropriated all the lands (terrains) where the system of aqueduct and sewerage are. Now these are not the facts of the case, and to the suppliant they were better known than to anyone else.

Indeed, the case freed from all these erroneous allegations resolves itself in the simple fact that prior to the expropriation, by the Crown, the suppliant had acquired upon lots Nos. 5 and 6, for the sum of $30.00 the easement of laying the pipes of a system of aqueduct and sewerage, as the whole more clearly appears by reference to Exhibits 1, 2 and 3, filed herein. Subsequent to the expropriation, whereby a certain portion only of these lots was expropriated, the Government in the course of the works of excavation for the purpose of the dry dock, tore up and

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took away a small portion of the pipes of this aqueduct, destroying the cesspools, and sewerage thereto in connection with the five buildings in question between points "A" and "F" hereinafter mentioned. To properly understand the matter reference should be had to plan, Exhibit "A." From the letter "A" to the Letter "F" on the plan, a distance of about 1,170 feet, the Crown took away this aqueduct and destroyed the cesspools above mentioned, and for such damages and the value of the easement in question, the suppliant should be compensated. The suppliant, it will be noticed, is not the owner of the land taken, the only interest he has therein is what was conferred by the deeds giving said easements or servitude.

The aqueduct also crossed the respondent's land from point "C" to "D," where the suppliant has, under his title, the right by easement to lay his pipes. At the trial the Crown filed an undertaking whereby the suppliant is given the same right upon these lands between "C" and "D" as he formerly had.

A deal of conflicting evidence has been offered with respect to the compensation which should be awarded the suppliant in respect of the damage to his aqueduct between points "A" and "F." The Crown in that respect has adduced the evidence of its engineer in charge of the works of the dock who has seen the pipes, and he values the whole matter at the sum of $423.90, as set out also in the respondent's plea. On behalf of the suppliant a deal of so-called expert evidence is given by men who were not there at the time of the building or the tearing up of the aqueduct; but who prepared their statement upon the information supplied by the manager of the aqueduct, the suppliant's son. The latter has no data of the original cost, no evidence of the original cost has been offered, but estimates prepared in the most optimistic manner.

The easement upon the whole area of these lots has cost the suppliant $30. Arriving at the compensation with respect to the damages between said points "A" and "F", which the Crown's evidence establishes at $423.90, if the suppliant were allowed the double of that, say $847.80, he would be more than generously compensated, especially in view of the value of the whole system. Then

allowing the sum of $60 for the easement on points between "A" and "F", an easement upon the whole area of such lots costing the suppliant only $30, as set forth in the deed filed herein, he would also be amply compensated.

Coming now to the claim of $20,000 which is alleged as representing the decrease in the future of the benefits the suppliant alleges he would have derived from private buildings he had a right to expect would be erected on the site of the dry-dock, it must be readily and obviously found he has no right to such claim.

Indeed, when the suppliant purchased the easement enabling him to construct the system of aqueduct and sewerage, there was no contract with the owner who granted him the easement that the latter would stipulate with his lessees or grantees of the land in question that they would take water from the aqueduct, and in the absence of such contract or covenant running with the land, the claim to such a right is at large—in fact there is no right. He could not, moreover, recover for loss of profits under the circumstances, the damages being too remote.

The lands in question could have been sold to any one instead of being expropriated, and the purchaser would always have the right to use that land in a perfectly untrammelled manner with unfettered control subject to the easement only. He could refuse to take water from the suppliant, or take it from whomsoever he cared. He could use the land for manufacturing purposes, pump his water from the River St. Lawrence or use no water. The matter, indeed, is too clear and too obvious to say any more in that respect.

The suppliant had no estate or interest in the lands in question, save the easement to lay the pipes of his aqueduct and sewerage; and he cannot be compensated for more than that easement and the damages arising out of the same, in the manner above mentioned.

The Crown by its undertaking filed at trial has granted the easement to lay pipes between the points "C" and "D" and has offered the suppliant the sum of $1,200 in satisfaction of his claim. The same has not been accepted, and this offer of $1,200 must have been previously made, since it is alleged in paragraph 14 of the petition of right

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but would not appear to cover the continuation of the easement mentioned in the undertaking. By the time the undertaking was so filed, the evidence was practically all adduced; but there is in this case a deal of unnecessary evidence adduced by the suppliant in respect of his claim for the value of the whole of his system of aqueduct and sewerage and for his prospective damages, upon which he fails and which would entitle the Crown to its costs. However, taking into consideration that this is a matter of expropriation where the easement is taken away compulsorily by the Crown, there shall be no costs to either party.

There will be judgment as follows:

1st. The easement on the land in question herein from points "A" to "F" on Plan Exhibit "A", filed herein, is declared vested in the Crown from the date of the expropriation.

2nd. The suppliant is entitled to the easement conferred in his favour between points "C" and "D," on said plan "A," as set forth in the said undertaking.

3rd. The suppliant is further entitled, upon giving to the Crown a full discharge of all his interest in the land between points "A" and "F," to recover from the respondent the said sum of $1,200 without interest and without costs.

Judgment for suppliant.

Solicitors for suppliant: *Dorion and Gosselin.*

Solicitors for respondent: *Drouin, Sevigny and Amyot.*

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Feb. 3

IN THE MATTER OF THE PETITION OF RIGHT OF

JAMES D. LEBLANC.....SUPPLIANT,

AND

HIS MAJESTY THE KING.....RESPONDENT

Damages—Injurious affection—From change of level of street—Subway—Loss of business.

The Crown having substituted for the level crossing on Main Street, in the City of Moncton, a permanent subway which resulted in a material change in the level of the street opposite the suppliant's property, who claimed both damages to his property and loss of business.

Held, That where no land is taken, the owner of property on such street is precluded from recovering for loss of business. The only damages he is entitled to recover are such only as are referable to the land itself and not to the person or to his business.

Where no portion of the land of the proprietor is taken, but his lands are injuriously affected by the construction of the works, causing special damages to the property differing from that to the rest of the public, then the claim for damages is let in; but it is restricted to the damages to the land and cannot be extended so as to let in any personal damages or loss of business.

PETITION OF RIGHT for the recovery of damages against the Crown on account of the substitution of a subway for a level crossing.

The case was heard before the Honourable Mr. JUSTICE AUDETTE, at St. John, N.B., December 12–13–14, 1916.

M. G. Teed, K.C., and *E. A. Reilly*, for suppliant; *H. A. Powell*, K.C., and *R. W. Hewson* for respondent.

AUDETTE, J. (February 3, 1917) delivered judgment.

The suppliant is the owner of certain land and premises in the City of Moncton, N.B., in close proximity to the Intercolonial Railway station, and more particularly shown on plan, Exhibit No. 1, herein.

In the course of the years 1914-15, the Crown, acceding to the request of several petitions presented by the citizens of the City of Moncton, decided to do away with the level crossing on Main Street of the said city, and to substitute

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therefor a permanent subway. The works began sometime in the Autumn of 1914 and were completed during the following Autumn.

As a result of these works, Main Street was, for a certain distance on both sides of the subway lowered from the former level, leaving the suppliant's building upon a fairly high elevation over the level of the street. Before the construction of the subway there was a slight grade from east to west opposite the suppliant's property, while there is now a grade of about 5% in the other direction, with the result that this building is now on the eastern end thereof 3·6 feet above the level of the new sidewalk, and the western end 6·18 feet; and at the western end of the lot, from points B to C, on Plan Exhibit "B," there would be a difference of level of about 7 feet. The suppliant's property has been injuriously affected by these works, and the building has to be taken down to a new level, consistent with the present level of the street. The ground floor of the building is used as a fruit and candy store business, where fruit, confectionery, soda water, soft drinks, pipes and cigars are sold, and the upper stories rented as offices.

During the construction of the works the traffic on Main Street, opposite the suppliant's property, was seriously interfered with. The street was closed for a short period and the general traffic was very much disturbed and affected during the whole time of the construction. The original sidewalk was about 13 feet wide, and the Crown with the view and object of maintaining access to these properties and in some cases to avoid endangering the solidity of the building, left along the front of the building a strip of earth of about six feet wide, with a railing on the outer edge. However, by the undertaking filed at trial, the respondent has undertaken among other things, to remove this strip whenever it will be convenient to the owners of the adjoining properties.

Under the circumstances the suppliant is claiming, 1st, Damage to his property; and 2nd, Damage to his business.

Dealing first with the question of loss of business, it must be found that where no land is taken, as in the present case, the suppliant is precluded from recovering for any loss of business. The only damages he is entitled to recover

are such only as are inherent in the land itself, and not to the person or to his business. As I have already said, in the case of *The King v. Richards*[1] the damages which the suppliant can recover are only those which would affect or would go to decrease the market value of the property. The damages must refer to the land or to some interest in the land and do not include personal damages. The damage for loss of business purely and simply depend on the commercial ability and industry of the individual and are, therefore, too remote. They are not an element inherent in the land.

Cripps on Compensation[2] states that where no land has been taken, the words "injuriously affected," or words of a similar import, refer to damages that are limited to loss and damages which are an injury to land, and not a personal injury or an injury to trade. The same view is taken by *Browne and Allan, on law of Compensation.*[3]

Of course, where no portion of the land of the proprietor is taken, but his lands are injuriously affected by the construction of the works, causing special damage to the property differing from that to the rest of the public, then the claim for damages is let in; but it is a claim restricted to the damages to the land which cannot be extended so as to let in any personal damages or loss of business. *Cowper Essex v. Local Board of Acton*[4]; *Lefebvre v. The Queen*[5]; *McPherson v. The Queen*[6]; *The King v. London Dock Co.*[7]; *Ricket v. Metropolitan Ry.*[8]; *The Queen v. Barry*[9]; *Paradis v. The Queen*[10]; *Metropolitan Board of Works v. McCarthy*[11]; and *Caledonian Ry. Co. v. Walker's Trustees*[12].

However, while the suppliant, under the pronouncement of the above authorities, is not entitled to any loss of business resulting from the construction of the subway, he is entitled to damage to his property as resulting from the same, and in that respect as well as upon the value of the property we have very conflicting evidence, as is, however, usual in cases of this kind.

[1] 14 Can. Ex. 365 at 372.
[2] (5th Ed.) p. 136 and seq.
[3] (2nd Ed.) p. 113 and seq.
[4] 14 A.C. 161.
[5] 1 Can. Ex. 121.
[6] 1 Can. Ex. 53.
[7] 5 Ad. and E. 163.
[8] L.R. 2 H.L. 175.
[9] 2 Can. Ex. 333.
[10] 1 Can. Ex. 191.
[11] 7 L.R. (E. & I. Ap.) 243.
[12] 7 A.C. 259.

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The suppliant's property is of irregular shape, more or less of a triangular shape, which indeed renders it less valuable and more difficult to value as compared with the other lots of standard sizes and shapes in the city. In any case the building must be lowered to a certain extent to make it accessible from the level of the new sidewalk, consistent with the allowance of a cellar, with proper ventilation above the level of the sidewalk and proper sewerage facilities, and this can be easily obtained, according to the lengthy evidence on the record, and without running to excesses one way or the other.

On the question of the cost of lowering the building we have estimates from different contractors. The one heard on behalf of the suppliant gives us such extreme figures and assumes such extreme occurrences, that the figures on their face defeat their very purpose. Attempting to prove too much proves nothing. On behalf of the Crown, two contractors of considerable experience made estimates for the lowering of the building at figures almost two thirds less than those adduced on behalf of the suppliant.

There can be no doubt that the level crossing that existed before the subway was of a great disadvantage. That it interfered seriously with the traffic which was at times absolutely tied up on Main Street, because the railway used their tracks not only for the purpose of through traffic but also for shunting. The subway is of a great advantage and benefit to the City of Moncton generally, and when the suppliant's property is brought down to proper elevation, it must be taken that it will also share in the general advantage; but, he should be compensated for the damage, within legal elements, he has suffered.

The Crown at the trial filed the following undertaking:

"The respondent undertakes:

"I. To remove the strip of earth mentioned in the "sixth paragraph of the respondent's statement of defence, "down to the level and grade of the new sidewalk in front "of the suppliant's land and to complete the sidewalk in "conformity with the grade of the portion of the new side-"walk already constructed thereat.

"2. If the suppliant desires the respondent will make "the necessary excavation for and construct and maintain "a good and sufficient concrete retaining wall over the land "or right of way of the Intercolonial Railway along and "continuous to the south-easterly line thereof—said "retaining wall to connect with the north-eastern wing "of the subway as now constructed and extend along the "said line to the northerly corner of suppliant's land and to "be of proper width and height and of a depth such that "the level of the bottom of said retaining wall shall be at the "level of 83.00 above datum according to the datum used "by the Intercolonial Railway in the construction of the "subway.

"3. The respondent will construct a branch sewer "pipe line from and connected with the present "Y" "opposite the suppliant's lands on the (18) eighteen inch "sewer leading from Archibald Street to the man-hole "at or near the junction of Foundry and Main Streets "The said branch sewer pipe line to extend from said ""Y" to such point at the street line in front of suppliant's "land as the suppliant may desire and to have a grade of "not less than one quarter of an inch to the lineal foot."

The property in question was purchased by the suppliant in 1908 for $4,000, some repairs and alterations were subsequently made to it, but we have no satisfactory statement of the cost of the same, the suppliant stating that no actual account was kept of such expenditure although he claims having spent something in the neighbourhood of $4,000 in such repairs. For municipal assessment the value of the property is placed at $8,000, and that is $2,000 for the building and $6,000 for land, and the suppliant in his testimony, before the court, values the whole property at $16,000 to $17,000.

The suppliant by his petition of right, claims the sum of $12,000, and the Crown avers by the defence that he is not entitled to any compensation.

Upon the land is a wooden building without any cellar, which is heated with gas.

It is, indeed, obvious the suppliant has suffered serious damage resulting from the construction of the subway, and a fair and generous compensation should be paid to

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him. A reasonable amount should be allowed for lowering the building, fixing up the land, the slope, together with a certain amount for repairs occasioned by the lowering of the building and to cover all incidental expenditure in respect of the same but within the legal elements of compensation; taking into consideration the substantial advantage derived in favour of the suppliant, from the undertaking filed by the Crown, and not overlooking either the general advantage derived from the public work in which the suppliant will in some degree share when his building is lowered and settled down to its final position.

Therefore, taking all the circumstances of the case into consideration, I hereby assess the compensation which the suppliant is entitled to recover from the Crown, at the sum of $2,500, with interest thereon from January 1, 1915, the approximate date at which substantial injurious affection originated.

The suppliant is further entitled to the performance, execution and advantage conveyed by the Crown's undertaking filed of record herein.

The suppliant is entitled to the costs of the action.

Judgment for suppliant.

Solicitor for suppliant: *E. A. Reilly.*

Solicitor for respondent: *R. W. Hewson.*

1916
Dec. 30

IN THE MATTER OF THE PETITION OF RIGHT OF

WARREN PEARSON ..... SUPPLIANT;

AND

HIS MAJESTY THE KING ..... RESPONDENT.

Contract—Building contract—Assignment—Subletting—Consent—Priority.

Under a building or construction contract the Crown is not bound to pay any claim asserted by a mere sub-contractor, although the Crown has consented to the contract being sublet.

2. Where the Crown declines to assent to any assignment there can be no implied assignment raised upon a consent to sublet so as to establish privity between the Crown and a third person to whom the original contractor has sublet the execution of the contract.

PETITION OF RIGHT for damages alleged to have arisen on account of improper classification and estimates in a sub-contract for a highway in the Rocky Mountain Park, in the Province of Alberta.

The case was heard before the Honourable Mr. JUSTICE AUDETTE, at Calgary, October 3, 1916.

M. B. Peacock, for suppliant.; *J. Muir, K.C.*, for respondent.

AUDETTE, J. (December 30, 1916), delivered judgment.

The suppliant, by his petition of right, seeks to recover the sum of $15,000 for loss and damage alleged to have been suffered by him as the result, *inter alia*, of improper classification and estimates allowed by the chief engineer upon his (Pearson) works while engaged in the performance of his sub-contract for the construction of part of a highway known as sec. 4 of the Castle-Vermillion Highway, in the Rocky Mountain Park, from Station 120 + 90 to Station 478 + 60, in the Rocky Mountains in the Province of Alberta.

In the course of the year 1914, B. J. Reddick of Calgary, tendered for the works in question herein, and his tender

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being accepted, entered into a contract with the Crown to perform the same under the indenture filed of record herein as Exhibit No. 1.

Reddick had also another contract in respect of what he called the Banff road or Banff section, and he made a deposit of $1,000 with respect to the two contracts.

Subsequently to signing his Castle-Vermillion contract with the Government, Reddick applied to the Crown for leave to assign that contract. The Crown while refusing him this leave to assign, as it had the right under the contract, allowed him to sublet the same.

Therefore, on July 30, 1914, Reddick did sublet the contract to the suppliant herein, as appears by Exhibit No. 3 filed herein. And it is here well to note that the contract was so sublet upon the suppliant paying Reddick 15% of the net profits on the work. In other words, giving that profit when realized on the performance of the contract, the price of remuneration as between Reddick and himself, would be different from that of the original contract. A clause indeed which will also tend to show, at least under one aspect, the difference between the assignment and the subletting of a contract.

All moneys paid by the Crown monthly or otherwise under the progress estimates, were so paid to Reddick with whom alone the Crown was dealing.

Reddick, in his evidence, states he received all the cheques from the Crown, coming as payment under the present contract. He cashed the cheques at a bank, and deposited the proceeds thereof at the Union Bank to the credit of the suppliant, and he adds, Pearson did all the work and he received all the moneys.

There is a balance still due under the contract, as returned and certified to by the chief engineer and Reddick exacts that that amount be paid over to him, as in the past he being the party to the contract with the Government. He further says that the balance should come to him, to protect himself under his contract with Pearson, and he is satisfied to pay the suppliant that balance, without exacting his 15% out of the profits—without asking any profit.

Now, for one to sublet or to allow another to do all or part of the work which he had contracted to do, is indeed

quite different from an assignment where the liabilities imposed or rights acquired thereunder are transferred to a person who was not a party to the original contract. And Reddick by his contract with the Crown was prohibited from assigning without written consent of the Minister. And, indeed, a transfer or assignment of liabilities constitutes, in reality, a new contract and strictly, is not an assignment at all. *Halsbury's Laws of England*[1].

The prices in subletting a contract might be entirely different from those of the contract, while in the case of an assignment they must be the same.

In the case where the contractor sublets while he can lawfully claim payment for the work so sublet, if properly done, on the other hand he is liable for the defaults of the sub-contractor.

The Crown paid back to Reddick the sum of $1,000, the security deposited by him under both contracts. All of this going to show that all relations, with respect to this contract, was directly as between Reddick and the Crown. The suppliant was not known or recognized. The bond was given by Reddick who remained liable and answerable to the Crown for the due performance of the contract.

Under the circumstances above mentioned, I must come to the conclusion that there is no privity of contract as between the suppliant and the Crown and his action fails. *Hampton v. Glamorgan County Council*[2].

Having so found it becomes unnecessary to decide the other questions raised by the pleadings herein.

There will be judgment declaring that the suppliant is not entitled to the relief sought by his petition of right, which stands dismissed.

Petition dismissed.

Solicitors for suppliant: *Messrs. Peacock, Skene & Skene.*

Solicitors for Crown: *Messrs. Muir, Jephson & Co.*

[1] Vol. 7, p. 494, et seq.
[2] 33 T.L.R. 58.

1917
Jan. 24

IN THE MATTER OF THE PETITION OF RIGHT OF

DUSSAULT AND PAGEAU, CONTRACTORS, SUPPLIANTS;

AND

HIS MAJESTY THE KING.....RESPONDENT.

Contract—Building contract—Default—Forfeiture—Recovery—Exchequer Court Act, sec. 49.

The suppliants entered into a contract with the Crown for the construction and completion of a landing pier, and before completion threw up their contract, making themselves thereby guilty of a breach of contract. The Crown had the pier constructed at a saving of $1,568.41 and the suppliants brought suit to recover this sum of $1,568.41, together with the further sum of $3,600, the amount of their deposit at the time of the signing of the contract.

Held, 1st, That the suppliants having become defaulting contractors are not under the terms of the contract entitled to the benefit of the saving on their contract price, when the works had been completed by others at a lower figure to the Crown.

2nd, That under the terms of the main contract and the subsidiary contract in respect of the deposit, where the Crown in the case of defaulting contractors has the works contracted for completed at a saving, the original contractors are entitled to recover their deposit.

Semble: That where the Crown at the time the contractors defaulted, availed itself of the forfeiture clause of the contract, as construed under sec. 49 of The Exchequer Court Act, (R.S.C. 1906, c. 140) after the works had been completed at a saving, it could not treat the deposit as forfeited under said sec. 49.

PETITION OF RIGHT to recover $20,390.34 on a contract for the construction of a Pier at Pointe aux Trembles, P.Q.

The case was tried at Quebec, before the Honourable Mr. JUSTICE AUDETTE, May 9 and Nov. 17, 1916.

I. N. Belleau and *A. Marchand*, for suppliant, and *F. O. Drouin*, K.C., for respondent.

AUDETTE J. (January 24, 1917) delivered judgment.

By an indenture bearing date June 28, 1904, the suppliant entered into a contract with the Crown, for the construction and completion of a landing pier, at Pointe aux Trembles, P.Q., "within 12 months of the signature" of the said contract as provided by paragraph three thereof;

and, by their amended petition of right they now seek to recover the sum of $20,390.34 in connection with the said contract under the circumstances hereinafter set forth.

At the end of the season of 1904, through alleged difficulty in obtaining timber, among other reasons relied upon by the suppliants, only a portion of the works had been performed, and during the winter of 1904-05 part of these works were damaged by the ice,—the whole as can be ascertained by reference to plan, Exhibit No. 10. This damage by the ice was, however, assigned, in the opinion of the engineer in charge, to improvidence and want of proper care or construction, but it has no bearing upon the case and is only mentioned as one link in the chain of facts.

Under the terms of the contract the works in question had to be constructed and completed by June 28, 1905, and by paragraph 18 thereof, time was deemed to be of the essence of the contract.

A few days before the expiry of this date within which the works had to be completed, namely on June 17, 1905, the suppliants requested the Minister to allow them to June 30, 1906, to complete and deliver the works. In answer to this request, on July 17, 1905, an extension of time was given them until November 25, 1905.

A second extension was given. On November 25, 1905, (Exhibit No. 13) the suppliants again asked for a further extension of time, within which to complete the work, to November 25, 1906. And in reply to this request, on November 27, 1905, an extension was given them to June 30, 1906. And it is well to note at this stage, that June 30, 1906, was the date mentioned by them in their first request for extension. They, therefore, did receve what they were asking on June 17, 1905, amounting to a complete year over and above the date mentioned in the contract. Upon the merits of the application reference should also be had to the views expressed by the local engineer, in Exhibit No. II.

A third extension was given on March 30, 1906, to August 1, 1906, as would appear by Exhibit "B." Furthermore, on June 23, 1906, Mr. Breen, the resident engineer, as will appear by Exhibit No. 16, acquaints the suppliants

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with the communication received on the 19th from the Chief Engineer, which reads as follows:

"My attention is called to the fact that the con-"tractors, Messrs. Dussault and Pageau, for the building "of the wharf at Point aux Trembles, have not yet resumed "work this Spring, would you kindly inform them in "*writing* that *unless they proceed with the work without* "*any further delay* the contract will be taken off their "hands, and their security deposit forfeited to the Crown. "Kindly attend to this matter at once, as the work must be "completed before the first of August next."

On July 7, 1906, the suppliants wrote the chief engineer (See Exhibit "A") acknowledging receipt of Mr. Breen's letter of June 23, 1906, and state: "En réponse, nous en "sommes venus à la conclusion que si le contrat doit nous "être enlevé le 1er août prochain, vaut autant cesser de "suite les travaux, et nous avons donné instruction a "Mr. Pageau de suspendre les travaux ce soir."

The suppliants had thrown up their contract and abandoned its completion.

A very unfortunate and injudicious course for them to have taken under the circumstances, especially in view of what had in the past happened between them and the Crown when they had asked extensions, which true were not at first granted to the full extent, but which were from time to time granted for delays longer than those previously requested. However, if the suppliants, on being urged to go on with their work, and asked to complete the pier more than one full year after the time assigned by their contract, felt offended and threw up and abandoned their contract, they will have also to take and assume the full responsibility of such a course amounting to a breach of their contract.

We have therefore to face the situation as it stands. It is perhaps unnecessary to say that while time was of the essence of the contract, and the works had to be completed within the year, by June 28, 1905, that that had been waived by giving the suppliants extensions of time within which to complete the works. And under such circumstances it would have been necessary to find whether or not that extension was reasonable, whether the contractors

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had reasonable time within which to complete their works. However, upon this point there is evidence in the affirmative both by the resident engineer, and by Poliquin. But this is a point which has become unnecessary to decide in view of the position taken by the suppliants in throwing up their contract. *Stewart v. The King*;[1] *Walker v. London & N.W. Ry. Co.*;[2] *Berlinquet v. The Queen*[3]. The suppliants have abandoned the work and left it unfinished and cannot be entitled to any further compensation. *Dakin v. Lee*[4]; See also *Beck v. Township of York*.[5] The contract is not at an end, and they cannot recover on a *quantum meruit*. The suppliants at the time they abandoned the contract left upon the premises materials consisting of lumber and iron to the value of $10,183.30, as set forth at page 12 of the specifications of Poliquin's contract and referred to in clause 18 thereof.

The suppliants have been paid the total sum of $15,300 together with the sum of $4,949.89 which the Crown paid to F. R. Morneault & Cie for lumber at the request and in discharge of the suppliants' liability, for lumber bought by them. This sum of $4,949.89 forms part of the $10,183.30 above referred to, and was paid *pro tanto* for part of the lumber left by the suppliants when they abandoned the works.

Now, at the argument, the suppliants' counsel rested his case upon the following contention. He says the contract price for the whole works, as between the suppliants and the Crown was.....$33,775.00
and the Crown has now received that wharf completed, and it is represented by that amount.

The Crown has also in its hands the suppliants deposit amounting to.....3,600.00

$37,375.00

[1] 7 Can. Ex. 55; 32 Can. S.C.R. 483.
[2] L.R. 1 C.P.D. 518.
[3] 13 Can. S.C.R. 26.
[4] [1916] 1 K.B. 566.
[5] 5 Ont. W.N. 836.

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To amount brought forward.....$37,375.00
The Crown confiscated our materials which are valued at..... 10,183.30
as shown in the specification of Poliquin's contract.
Then, Poliquin, the second contractor had extra work for the sum of..... 350.00

Making in all the sum of.....$47,908.30
which he contends is in the possession of the Crown and for its benefit.
Then he pursues, on the other branch of his argument, and says the suppliant received in cash.....$15,300.00
together with the further sum of..... 4,949.89
paid by the Crown, to their credit to Morneault & Cie, at their request

$20,249.89

And the Crown paid Poliquin to complete the works the sum of (contract price)..... 22,490.00

making in all.....$42,739.89
and he concludes by saying the Crown received$47,908 30
and paid..... 42,739.89

leaving a balance in our favour of.....$ 5,168.41
which the suppliant should recover.

Recapitulating counsel's figures, they would stand as follows:

As received by the Crown.

Pier.....$33,775.00
Extra work..... 350.00
Materials..... 10,183.30
Deposit..... 3,600.00

$47,908.30

As paid by the Crown.

To suppliant	$15,300.00
" credit of suppliant for lumber bought by them from Morneault & Cie	4,949.89
Contract price of Poliquin for completion of work	22,490.00
	$42,739.89
Concluding by saying the Crown should pay us the sum of	5,168.41

the difference between $42,739.89 and the sum of $47,908.30

The obvious fallacy of this argument lies in the fact, you cannot say the Crown received the completed pier, representing $33,775, together with the $10,183.30, because the latter sum is in the pier when it is representing the sum of $33,775.

There is double appropriation (double emploi) in stating on the one hand the Crown in the result received a pier of the value of $33,775, and on the other hand to say that the Crown over and above this $33,775 pier (contract price) it also received $10,183.30 of materials which have to go into the pier before it is completed and before it has acquired the value of $33,775.

Then on the other branch of his contention with respect to what the Crown has paid, he is again in error, because the Crown did not actually pay $22,490 to Poliquin to complete the works, because under the contract, the materials to the amount of $10,183.30 was used as part payment of the sum of $22,490 and in the $10,183.30 was also included the sum of $4,949.89 paid by the Crown to Morneault, at the request of the suppliants, being in part payment of the materials represented by the total sum of $10,183.30.

The true transaction would really stand, as follows:

The Crown received

Complete Pier	$33,775.00
" plus extras	350.00
	$34,125.00

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The Crown paid.

To the suppliants.....		$15,300.00
" Morneault & Cie at request of suppliants for lumber supplied.....		4,949.89
To Poliquin, the 2nd contractor who completed pier, the contract price being.....$22,490.00		
Less the sum of..... 10,183.30 representing the value of the materials left on the premises by the suppliants, and of which the Crown had already paid $4,949.89.....		
	$12,306.70	12,306.70
(The $350 extra shown on the credit side is included in the $22,490.00)		
		$32,556.59

Therefore, if from the total assets or the total sum received by the Crown, viz.....$34,125.00
is deducted, what the Crown actually paid..... 32,556.59

there would remain the sum of.....$ 1,568.41
showing that the Crown is to the good by that amount.
And if the amount of the deposit, viz..... 3,600.00
is added thereto, it would represent the total sum of.....
$ 5,168.41

Now the question which remains to be decided is whether, under the terms of the contract, the suppliants are entitled to recover this sum of $5,168.41.

The contract entered into by the suppliants is a contract substantially identical in terms to those commonly in use in undertakings of this sort, whereby the contractors are, if the literal terms of the contract be adhered to, handed over, bound hand and foot, to the other party of the contract, or to the engineer of the other party, and are absolutely without any resource or remedy.[1]

[1] Bush v. Whitehaven Trustees, Hudson on Building Contracts (4th ed). Vol. II, p. 122.

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But in this case the suppliants themselves created the breach by throwing up the contract and by failing to complete the works, and it would be contrary to justice that a party should avoid his own contract by his own wrong.

It is unnecessary to review the several clauses of this contract into which the suppliants entered, with their eyes open. They must be held to them notwithstanding that they might appear oppressive., *Modus et conventio vincunt legem.* The law to govern as between the parties herein is to be found within the four corners of the contract. The form of agreement and the convention of parties overrule the law.[1] The suppliants cannot reject the terms of the contract and claim remuneration as upon a *quantum meruit.*

Under clause II. of the contract all the materials provided by the contractors became the property of the Crown for the purposes of the pier, and upon the completion of the works only such materials which have not been used and converted in the work, upon demand may be delivered to the contractors. And this clause is by no means unusual, it is referred to in all the text books. It is a security to the building owner for the performance of the works, subject to this condition of defeasance if the builder fails to complete his works.[2] This is the law that must govern with respect to the materials and to this agreement and condition the contractors have bound themselves by their signature to the contract. And indeed, *Nullus commodum capere potest de injuria sua propria.*

The same principle is to be found enunciated in *Emden's Building Contracts* (4th ed.) p. 125, citing cases in support of the following proposition:

"Where the contract contains a clause vesting the materials "in the employer as they come on the land, it would seem "that, inasmuch as such a vesting clause is in effect a "security that the builder shall perform his contract, he "will be precluded from recovering such materials when "he has not completed." *Idem* also at pp. 121-124.

[1] Broom's Legal Maxims (8th ed.) p. 537.
[2] Hart v. Porthgain Harbour Co. [1903] I Ch. D. 690.

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And in the case of *Quinn v. United States*,[1] where the contractors were dismissed and others employed who did the work on much lower terms than those of the contract, it was held that the contractors were not entitled to either the profits they would have made if they had completed the contract or to the difference between the contract price and the actual cost of the work.

The case of *Hammond v. Miller*[2] is also authority for the principle that a defaulting contractor would not be entitled to the benefit of the saving on his contract price where the works had been completed by others at a lower figure to the employer.

I have come to the conclusion that the suppliants are not entitled to recover this sum of $1,568.41, the balance above referred to.

Coming now to the question of the deposit or security for the sum of $3,600 dealt with both under the specifications which are part of the main contract and under the subsidiary contract or agreement, with respect to the security, bearing same date as that of the original contract, it appears that the suppliants have delivered to the Crown certain securities and money, valued in the whole at $3,600, and more particularly described as two accepted cheques for the above named sum, dated Quebec, May 9th and June 10th, 1904, drawn on La Banque Nationale, signed Dussault & Pageau, and made payable to the order of the Honourable the Minister of Public Works for Canada. There is no evidence showing whether or not the cheques have been cashed, although it is to be assumed.

Paragraph 3 of clause 41 of the specifications which forms part of the contract, reads as follows: "Each tender "must be accompanied by an accepted bank cheque made "payable to the order of the Honourable the Minister of "Public Works for the sum of $3,600 which will be forfeited "if the party declines to enter into a contract when called "upon to do so, or if he fails to complete the work contracted "for. If the tender is not accepted the cheque will be returned."

[1] (1878) 99 U.S. 30.

[2] (1884) 2 Mackey (D.C.) 145; U.S. Dig. 1884, p. 141, cited in Hudson on Building Contracts (4th ed.) p. 617.

Clauses 3 and 4 of the subsidiary contract, which must be read together, are as follows:

"3. That upon full performance and fulfillment by the "contractors, of the said contract, and of all the covenants, "agreements, provisos and conditions as aforesaid the "parties hereto of the first part shall be entitled to receive "back the value of said security, together with the interest, "if any, which may have accrued out of the deposit whilst "in the hands of the Finance Department;

"4. But if at any time hereafter the said contractor "should make default under the said contract, or if His "Majesty acting under the powers reserved in the said "contract, shall determine that the said works, or any "portion thereof remaining to be done, should be taken "out of the hands of the contractors, and be completed "in any other manner or way whatsoever than by the "contractors, His Majesty may dispose of said security and "of the interest which may have accrued thereon for the "carrying out of the construction and completion of the "work of the contract and for paying any salaries and "wages that may be left unpaid by the said contractors."

Then sec. 49 of the Exchequer Court Act, enacts as follows:

"49. No clause in any such contract in which a draw-"back or penalty is stipulated for an account of the non-"performance of any condition thereof, or on account of "any neglect to complete any public work or to fulfil any "covenant in such contract, shall be considered as com-"minatory, but it shall be construed as importing an assess-"ment by mutual consent of the damages caused by such "non-performance or neglect."

Now paragraph 3 of clause 41 of the main contract and clauses 3 and 4 of the subsidiary contract must be considered together.

Under clause 41, and especially if read in the light of sec. 49 of the Exchequer Court Act, the moment the contractors defaulted and failed to complete the work contracted for, it would seem the Crown would have the right to say to the contractors, you having defaulted we treat your deposit of $3,600, under section 49 of the Act, not as a forfeiture but as *an assessment of the damages* by

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your default or neglect, and having done so much, no more no less could be done. That is the assessment of the damages was then made once for all, taking all prospective damages into consideration.

Then the Crown, in the present case, having failed to avail itself of clause 41, must then be taken to fall under clauses 3 and 4 of the subsidiary contract, whereby again in case of default by the contractor we fail on an actual assessment of the damages, when the Crown has a right to *dispose* of that security for the carrying out of the construction and completion of the work of the contract and for satisfying unpaid salaries and wages.

In the latter case, there is no assessment of the damages as provided by the statute—it is an actual assessment which takes place. The parties are to some extent at large, and the Crown would have, I suppose, its right of action for any loss (even for more than the $3,600) suffered by it from the contractor's default, and the pendulum of justice could then be swung both ways, and do actual and untrammelled justice between the parties according to the actual facts of the case, taking into consideration the position of the parties after the full completion of the works.

In the result the Crown having suffered no loss, but being to the good by $1,568.41, is bound to return the deposit.

Would it not on the other hand seem that sec. 49 of the Exchequer Court Act, only applied to cases in which the Crown has suffered damages. If, indeed, effect were given to sec. 49 where there be no damages, it clearly would defeat the very purpose and spirit of such section; because then, that is if we enforce the remedy provided by the section where there is no damages, but a gain, it would mean nothing else but a penalty or forfeiture in cases where there is no damages. It would clearly become a penalty as against the contractors if enforced against them in case the Crown suffered no damages.

And should not in any event this sec. 49, consistent with reason, receive a fair, large and liberal construction and interpretation as could best insure the attainment of the object of the Act and of such provision or enactment,

according to its true intent, meaning and spirit? *The Interpretation Act*, R.S.C. 1906, ch. I, sec. 15.

In the case of *Quinn v. United States* (*Ubi supra*) where the engineer in charge terminated the contract on the ground of undue delay, the court held that the State having suffered no loss by the failure of the contractors, that the latter was entitled to recover the ten per cent. retention money payable on completion of the works.

Moreover, if claim 41 of the main contract and clauses 3 and 4 of the subsidiary contract should be read together, the necessary meaning or inference would be that these $3,600 are to be returned to the contractors under two different circumstances. First, where under clause 3 of the subsidiary contract he has completed his work, this deposit is returned to him. And it is well to note that clause 41 of the main contract makes no provision as to the return of this money. And 2ndly, Where under clause 4 of the subsidiary contract the contractors have defaulted, and the Crown has not at the time of the default and before the completion of the works availed itself of the so-called forefeiture, qualified by sec. 49 of the Act, then it may dispose of this security for carrying out the construction and completion of the works and for paying any salaries or wages that may be left unpaid. But where the contractors have so defaulted and after the works have been completed by others and duly paid for, and furthermore where no salaries or wages remain unpaid, the same having been paid and satisfied out of the original contract price without any extra expense or loss to the Crown, but even at a small benefit—the contractors, it would seem, become entitled to their deposit under the view taken in respect to sec. 49 of *the Exchequer Court Act*, as above referred to.

Therefore, I must confess it is with some satisfaction I feel enabled to arrive at the conclusion, not without some hesitation, that the contractors are entitled to recover the amount of their deposit; because, after all in the result the works have been performed and completed without any loss to the Crown, but with a net gain of $1,568.41 which they have a right to retain under the contract. Further, because this security of $3,600 was in any event

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paid only as a guarantee for the due performance and completion of the works without any loss to the Crown. The Crown having the completed pier, and having suffered no loss but made a gain, the money should go back to the depositors or contractors.

Therefore, there will be judgment declaring that the suppliants are entitled to recover the sum of $3,600 and costs.

*Judgment for suppliant.**

Solicitors for suppliant: *Belleau, Baillargeon & Belleau.*

Solicitors for respondent: *Drouin, Sevigny & Amyot.*

*NOTE.—On appeal to Supreme Court of Canada, this judgment was varied by the allowance of interest to the suppliants on the amount of the security deposited.

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IN THE MATTER OF THE PETITION OF RIGHT OF

J. ALPHONSE LEFEBVRE.....SUPPLIANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

Contract—Sale of land—Option—Third party—Privity.

Wherein a deed of sale of certain lands and property that had previously been under option, and where there was in the mind of some of the interested parties doubt as to whether or not all the rights under their option had actually lapsed and come to an end, a clause was inserted in the deed of sale, as between the Crown and its vendors, whereby the former would not hold their vendors responsible for any trouble which might arise from the said option.

Held, that the clause only established a recourse against the Crown on behalf of the vendors alone, and did not establish any privity of contract as between the Crown and third parties or the bearer of the said option.

PETITION OF RIGHT to recover compensation under an option, with respect to certain land taken by His Majesty, for the construction of a barrier or dam on the River St. Charles, P.Q.

The case came on for hearing before the Honourable Mr. JUSTICE AUDETTE, at Quebec, on April 25, 26 and 27, and Sept 11, 1916.

G. A. Marsan and *Armand Lavergne*, for suppliant; *A. Bernier*, K.C., and *Joseph Bedard*, for respondent.

AUDETTE, J. (January 29, 1917), delivered judgment.

After a brief statement of the case had been made by counsel at the opening of the trial at bar, I ordered, and the parties agreed thereto, that the case be then proceeded with only upon the hearing of the questions of law and all the questions raised by the written pleadings herein—leaving out for the present the consideration of the question of the value of the property in question herein and of the *quantum* which might finally be ordered to be paid to either party. In other words that the questions of law

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were to be disposed of before venturing upon the questions of value and compensation.

In the course of the months of April and July, 1912, the owners of the lands in question in this case consented and gave several options to different persons at prices and conditions therein mentioned.

On October, 7, 1912, a deed of agreement (acte d'accord—Exhibit No. 21) was entered into between the owners of the lands in question and the parties holding the options; however, the suppliant contends he is not affected by this deed, as the mandate given by him to his solicitor, before leaving for a long absence; to sign a deed of agreement on his behalf did not purport to be the deed as entered into and perfected. However, in this respect it is well to note that the suppliant is not claiming under the option given to himself personally in his name; but that he is claiming under the option given in the name of Roch *who* signed such agreement unconditionally.

It may also be mentioned that this mutation of property or these options were entered into in view of a prospected expropriation by the Crown of the property in question as part of its public works now under construction in the River St. Charles at Quebec. The evidence discloses it was talked of at the time of the negotiations or obtaining the options.

Following all expectations, on January 13, 1913, the Crown, as representing the Government of Canada, expropriated the lands in question by depositing a plan and description of the same in the registry office of the Registration Division of Quebec and from that day on the property was vested in the Crown.

Subsequent to this expropriation, the Crown having failed to make any tender or offer for the said lands so taken, a fiat for a petition of right was granted the owners whereby they claimed the value of the said lands. However, in view of arriving at a settlement between such owners and the Crown without any litigation, on the 27th day of June, 1914, the parties came together and entered into an agreement which appears in the deed of sale of that date and filed herein as Exhibit No. 31. This deed, after reciting the chain of facts leading to the *habendum* clause

fixing the price, contains the following clause, upon which the present action rests. The clause reads as follows:—

"The Government of Canada will not hold the vendors "responsible for any trouble which may arise in connection "with the said immovable properties by reason of the coven- "ants entered into by them as they appear in a certain no- "tarial deed of October of the seventeenth, nineteen "hundred and twelve, before Joseph Sirois, Notary of "Quebec (copy of which is delivered to the Government) "with the said Messrs. F. A. Roch, J. F. Lacasse, J. A. "Leblanc, and Alleyn Taschereau, and from the following "options or covenants prior to the said notarial deed, viz.:—

"(*a*) Option by Alexandre Gauvreau to Alleyn Tasche- "reau and Alphonse Lefebvre, dated April 4, 1912, before "Yves Montreuil, Notary at Quebec;

"(*b*) Option by Alleyn Taschereau and Alphonse Le- "febvre to J. F. Lacasse and J. A. Leblanc, dated April 4, "1912, before Yves Montreuil, Notary at Quebec;

"(*c*) Option by Alexandre Gauvreau to J. F. Lacasse "and J. A. Leblanc, dated April 12, 1912;

"(*d*) Option by Alexandre Gauvreau to F. A. Roch "dated July 18, 1912; or

"(*e*) From an alleged option from Alexandre Gauvreau "to J. A. Lefebvre, dated April 11, 1912."

Subsequently thereto, namely on September 15, 1914, the suppliant took out an action in the Superior Court of the District of Quebec against the owners of the land in question for the same amount, viz.: $664,985.40, the pleadings in that case covering, *inter alia*, the same grounds of the present cause of action. The action in the Provincial Court was settled under a notarial agreement bearing date October 20, 1916, and is filed herein as Exhibit No. 77, to which effect was given under a judgment obtained in that court under a discontinuance of suit by the plaintiff Lefebvre and the action, pursuant to the said discontinuance, was dismissed, each party paying his own costs. Art. 275 to 278, C.C.P. (Que.).

While this case may appear to be involved in numerous and intricate facts, in the view I take of the same, it becomes unnecessary to delve into the details of this long catena of facts respecting each option and the general

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circumstances bearing upon them all, since the action obviously *in limine* rests upon the paramount question as to whether or not there is, under the circumstances of the case, any privity of contract as between the suppliant and the Crown.

And since that question must be answered in the negative, it becomes unnecessary to enter into the consideration: 1. Of the value and effect of an option and as to whether or not the options in question herein have lapsed; 2. As to the value of an option given by a fictitious person who never existed. And, indeed, while the primary duty of the Court is to administer the laws of the State, it will always be loath to exend the strong arms of law or equity, as one of the old chancellors said, in aid of persons trafficking in options obtained under false and fictitious names and persons. 3. As to whether or not Lefebvre, the suppliant, is bound by the acte d'accord of October 7, 1912, signed by Roch and Lacasse, under whom he really claims. Did not the holders of these options, by this deed, renounce all rights attached thereto? The owners of the land were also parties to that deed. If the suppliant claims, as he does, under the option given in favour of Roch or Lacasse who have renounced all their rights therein and declared, under the acte d'accord, the options void, how can there be a right of action still extant so long as that deed is in full force and effect as between the owners of the land and Roch and Lacasse? 4. As to whether or not there was multiplicity of action in taking out a suit against the Crown in this court and against the owners of the land in the Provincial Court for, *inter alia*, one and the same amount and cause of action, and further whether the settlement of the provincial suit is not for all practical purposes a settlement of the present action?

The suppliant relies upon the clause above recited in Exhibit No. 31 (the deed of June 27, 1914), to endeavour establishing a legal obligation as between himself and the Crown. There is no foundation for such a contention. The deed of sale is one in the result, without covenant on behalf of the vendors. The vendors sell without covenant or warranty and the vendee covenant not to hold the ven-

dors responsible for any trouble, etc., as mentioned in the deed.

It is obviously clear that an agreement entered into between two persons cannot, in general, affect the rights of a third party who is a stranger to it. This deed, Exhibit No. 31, is a contract between the vendor and the vendee and the suppliant, relying upon this deed to establish privity as between himself and the Crown, must fail. This deed has effect only between the parties to the same. There is no privity of contract between the Crown and the suppliant as resulting from this deed Exhibit No. 31. No contractual relationship, no relation as between the Crown and the suppliant.

Furthermore one cannot overlook the very important fact that the suppliant claims under the option of Roch or Lacasse, and that the latter in the deed of October 7, 1912, as between the owners of the land and themselves, declared these options null and as if they had never existed. He would therefore appear to be estopped from invoking any right flowing from the option of Roch or Lacasse.

Under the circumstances, there will be judgment declaring that the suppliant is not entitled to any portion of the relief sought by his petition of right, which stands dismissed with costs.

Petition dismissed.

Solicitors for suppliant: *Marsan & David.*

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

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IN THE MATTER OF THE PETITION OF RIGHT OF

FERDINAND LEMIEUX.....SUPPLIANT;

AND

HIS MAJESTY THE KING.....RESPONDENT;

AND

MICHAEL LAWRENCE DOHAN, THIRD PARTY, BROUGHT IN AT REQUEST OF CROWN;

AND

JOSEPH TELESPHORE DUSSAULT, THIRD PARTY, BROUGHT IN AT REQUEST OF DOHAN;

AND

JOSEPH BUTEAU, THIRD PARTY BROUGHT IN AT REQUEST OF DUSSAULT.

Easement—Deed—Interpretation—"Vaquer"—Third party.

Third party B. sold with covenant a certain piece of land but omitted to mention a certain easement mentioned and guaranteed in the deed from his predecessor in title. An action was taken by the beneficiary in that easement against the Crown who had become, after some further mutation of the property, the owner of the same.

Held, that while the beneficiary had a right of action, in respect of the same against the crown, the latter had its recourse against its *auteurs* who in turn had similar recourse and remedy.

2nd. That in construing an easement, guaranteed by a duly registered deed, where the meaning of the same may appear doubtful, it is the common intention of the contracting parties that must be sought and the same must be determined by interpretation rather than by an adherence to the literal meaning of the words of the contract.

PETITION OF RIGHT to recover the value of an easement taken by the Crown in the Province of Quebec.

The case was heard before the Honorable Mr. JUSTICE AUDETTE, at Quebec, November 24, 1916.

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A. Bélanger, for suppliant; *A. Bernier*, K.C., and *V. DeBilly*, for Crown.; *J. E. Gelly*, for third party Buteau; *W. LaRue*, for mis en cause Dussault; *J. A. Gagne*, for third party Dohan.

AUDETTE, J. (January 29, 1917), delivered judgment.

The suppliant, by his petition of right seeks to have the Crown acknowledge his easement or servitude consisting of a right to *circulate*, or right of way by a private roadway, across a certain piece or parcel of land bought by the Crown from third-party Dohan on July 29, 1913. The private road in question runs from his dwelling house in a south easterly direction to the King's highway, as shewn on plan filed as Exhibit No. 1.

By a certain indenture bearing date July 11, 1912, the suppliant sold with covenant (*franc et quitte*) to third-party Buteau *inter alia*, the lands in question herein, with, among others, the following reservation, viz.:—

"Le vendeur se réserve sa vie durant pour lui et son frère "Olivier, sa vie durant, le droit d'habiter quatre chambres "dans la maison, à son choix; le droit de vaquer dans la "dite maison à son besoin.

"2. L'usage d'une partie du verger, étant la partie qui "se trouve à l'ouest du chemin conduisant à la grange et la "partie qui se trouve à l'ouest d'une ligne suivant le pan "est de la grange et se prolongeant dans la même direction "jusqu'au bout du dit verger, *avec en outre le droit de vaquer "sur le reste du dit lot* et dans les bâtisses à son besoin."

The decision of the present case depends upon the interpretation of the words above italicized:—viz.:—"*avec en outre le droit de vaquer sur le reste du dit lot.*"

On June 30, 1913, the said third-party Buteau sold and conveyed with covenant and free of all hypothecs to third-party Dussault, the same lot of land as having acquired it from the suppliant; but without making any mention, in the said deed of sale, of the above reservation, as contained and recited in the title from his *auteur* or predecessor in title, and this omission is the cause and origin of the present action.

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Again on July 25, 1913, the said third-party Dussault sold and conveyed with full covenant (avec garantie contre tous troubles et éviction, franc et quitte), to third-party Dohan, *inter alia*, the same lot of land as having acquired it from third-party Buteau. The easement, servitude or reservation above referred to being again omitted in the said deed.

Then on July 29, 1913, the said third-party Dohan, among other pieces of land, sold and conveyed to the Crown, with full covenant (avec garantie contre tous troubles et éviction, *franc* et *quitte*) the piece of land in question herein as having acquired it from third-party Dussault on July 25, 1913.

Therefore it appears clearly that the suppliant sold to Buteau the piece of land in question, subject to the easement above set forth; and that Buteau without mentioning this easement sold the same piece of land to Dussault, who, in turn, sold it in similar manner to Dohan who sold to the Crown.

There can be no doubt that the easement or servitude exists. It was converted into writing, forming part of a deed which was duly registered and the suppliant is entitled to the same.

The question to decide is first; What does this easement consist of, and secondly, what is its value?

The language used in the deed of July 11, 1912, is not perhaps the best the notary might have made use of in drawing the conveyance; and the expression or verb "vaquer" may at first sight appear odd. What we are concerned with here is what was in the mind of both parties at the time of the signature of the deed. The meaning in the mind of the contracting parties was never doubtful and were it so their common intention must be determined by interpretation rather than by an adherence to the literal meaning of the words of the contract. Art. 1013 C.C. Que. In endeavouring to appreciate the true meaning and value of this reservation the intention of the contracting parties may be sought outside of the literal meaning of the contract in the circumstances of the case. *Sirey*, 1890, 1, 112; 4 *Aubry et Rau*, 5th ed. p. 569; *Montpetit v. Brault*, Q.R. 50 S.C. 518. It is said in *Halsbury's Laws of*

England, vol. 10 p. 472, with respect to the reservation of a right of way: "In this case the reservation operates as a "regrant of the right of the grantee to the grantor, and it is "not effectual unless the deed in which it is contained is "executed by the grantee; and if the deed is so executed, "then the regrant may operate in favour of a person who "is not a party to the deed."

What is the meaning of the word "vaquer." Turning to Quicherat, Dictionnaire Français Latin at verbo "vaquer" we find that "vaquer" means: s'occuper de—vaquer à ses fonctions, munia obiré—vaquer à ses affaires, res suas obiré. Il nous empêche de vaquer à nos affaires. Detinet nos de nostro negotio—and vaquer à autre chose, navare aliam operam.

Littré, Dictionnaire de la langue Française, gives the following meaning to the word "vaquer": Vaquer à, se livrer à, s'adonner à, s'occuper de. Vaquer à son ouvrage etc., etc.

And Bescherelle, Dictionnaire National, at verbo *vaquer* has the following: Vaquer à, s'occuper de quelque chose, s'y appliquer. Vaquer à ses affaires. On ne peut vaquer à tant de choses à la fois, etc.

Going to Spiers & Surenne's Dictionary under verbo "vaquer" we also find that "vaquer" means to apply one's self to—to attend—vaquer à ses affaires—to attend to one's business.

Therefore, the word "vaquer" is not without meaning, as was contended in the case at bar. Furthermore reasoning under the rule of *ejusdem generis* we find this reservation in the deed covers also the right to occupy four rooms in the house with *"le droit de vaquer dans la dite maison à son besoin."* There can be no doubt that, in common parlance, these words would mean a right to go about in the house, besides that of occupying exclusively four rooms. The reservation indeed is not meaningless and he who established a servitude is presumed to grant all that is necessary for its exercise. Art. 552 C.C. Que. And the suppliant is entitled both for himself and his brother, during his lifetime, to this servitude or reservation and to the right de *"vaquer"* upon the lot in question. There is no reversion and that right dies with both of them. The suppliant is

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65 years of age, while his brother is 72 years old. The meaning of this easement ought not to be strained with such technical narrowness as to attempt making it meaningless, when it was not the intention of the original contracting parties.

It is obvious that the origin of the present action resides in the mischievous omission by Buteau to mention the reservation in his deed to his grantee. He is, therefore, the *fons and origo malorum*. He deliberately suppressed the knowledge of the reservation at the date of the sale, with the necessary object of procuring a larger price for the property and he must now reckon with the result of such intentional omission.

Buteau in his evidence says that this reservation, the private road, in his own estimation is worth nothing. The Lemieux live on their income and he does not see any use for them of this reservation. He, however, cannot take advantage of his own omission and it is not in his mouth to say the reservation granted by him to the suppliant is worthless; he cannot thus take advantage of his own wrong in suppressing the mention of the reservation in his deed to Dussault with the object of gaining a favourable interpretation of its value. *Nullus commodum capere potest de injuria sua propria.*

The contention appearing in the pleadings with respect to the sale of lots 550 and 520 being obviously unsound and unfounded at its face, I need not say more in that respect.

What is the value of this easement or servitude, taking into consideration the age of the two beneficiaries, their occupation and their manner of living? And there is no doubt, under the evidence, that the respondent cannot now allow the suppliant upon these lands which are held by the Crown for a cattle quarantine. No. one, indeed, is allowed now upon these premises without business and without leave and this is done in the public interest, because of contagious diseases that are at times treated thereon.

The deprivation of the easement does not deprive the suppliant of a road to any given place, that access to the property in question being only superabundant, supererogatory, so to speak; because he has the King's highway

leading to his property which takes him to any place he chooses to go. The access to the property in question may in some cases be a short cut to some place, or travelling through it the distance to a given place might be shorter and more convenient.

The suppliant, in his evidence, says he asked Buteau the sum of $3,000 for all the reservations under the deed of sale. He has the exclusive use of four rooms—with the right to circulate all over the house. That alone would be worth at least $10 a month.....$120.00

The use of the stable, barn, garden, etc., at $4 a month..... 48.00

The orchard—he said he made as much as $150 a year out of it; but allowing..... 100.00

That would represent for the year the sum of....$268.00

The interest at 6% on $3,000 would only give him $180. I would infer from this alleged valuation of $3,000 for all the reservations that a very small amount must be placed upon the easement in question which, after all, is indeed worth to him much less than any of the other privileges mentioned in the deed.

Taking all the circumstances into consideration and that is that the servitude is only for the lifetime of two old men, that they are practically retired farmers living on their money, with very little occupation and not much work to do, I hereby fix the value of such easement at the sum of $350. This servitude has been duly created by a notarial deed, and given effect with respect to third parties by its registration and the Crown as a third-party is bound thereby. The Expropriation Act, secs. 25 and 26. Arts. 2082, 2116a C.C. Que.

Therefore, there will be judgment as follows:—

The suppliant is entitled to recover from the Crown the sum of $350 with interest thereon from July 5, 1915, to the date hereof and costs.

Furthermore the Crown do hereby recover as against third-party Dohan the said sum of $350 with interest as above set forth and with all costs, including costs upon the issues with the suppliant and with Dohan.

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The said third-party Dohan do recover as against third-party Dussault the said sum of $350 with interest as above set forth with all costs on the three issues.

And the said third-party Dussault do recover judgment against the said third-party Buteau the said sum of $350, with interest as above mentioned and with all costs on all the issues herein. The said Buteau in the result paying the said sum of $350 with interest as above set forth and with all the costs resulting from all the issues herein, which were occasioned by him.

Judgment for suppliant.

Solicitor for suppliant: *Arthur Bélanger.*

Solicitors for respondent: *Bernier, Bernier & DeBilly.*

1917
Feb. 3

IN THE MATTER OF THE PETITION OF RIGHT OF

ERNEST THERIAULT.....SUPPLIANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

Negligence—Railways—Public work—Highway—Exchequer Court Act, sec. 20 (c.)

The suppliant while engaged measuring lumber on the King's highway was injured by a passing train of the Transcontinental Railway, and by his petition of right seeks to recover damages in respect of the same.

Held: An action in tort does not lie against the Crown, except under special statutory authority, and the suppliant to succeed must bring the facts of his case within the ambit of sub-sec. (c) of sec. 20 of the Exchequer Court Act. (R.S.C. 1906, c. 140). As the accident happened on the highway and not on a public work, as required by the Act, his action fails.

PETITION OF RIGHT to recover damages for injuries received as the result of a train on the Transcontinental Railway striking a cattle guard, which said cattle guard was broken and thrown into a pile of deals, which in turn struck the suppliant thereby severely injuring him.

The case was heard before the Honourable Mr. JUSTICE AUDETTE, at Fraserville, P.Q., January 16-17, 1917.

A. Stein, K.C., and *D. Levesque*, for suppliant; *E. H. Cimon* and *L. Berubé*, for respondent.

AUDETTE, J. (February 3, 1917) delivered judgment.

The suppliant, by his petition of right, seeks to recover the sum of $15,000 for damages suffered by him as the result of an accident which happened on October 23, 1914, while he was engaged in counting and measuring three-inch deals piled alongside the King's highway, which is crossed or intersected by the Transcontinental Railway.

The accident happened on October 23, 1914, and the petition of right was filed in this court on June 5, 1916, more than a year after the accident; but evidence was

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produced showing it had been left with the Secretary of State on October 13, 1915, thus interrupting prescription.

On the date of the accident, the railway was still in the hands of the contractors, and the lumber that the suppliant was then measuring had been by him sold to one Michaud, who in turn had sold it to the contractors of the railway.

When the survey was originally made for the right of way, the track intersected the highway diagonally running along the same for quite a space. To obviate such a dangerous crossing the railway expropriated some land and diverted the highway, in the manner shown upon plan, Exhibit "A," by crossing the railway at right angles from north to south, the whole in conformity with sec. 3 of The Expropriation Act and sec. 15 of the Government Railway Act. This new piece of road became part of the King's highway and dedicated to the public.

Although at the date of the accident the Government had not taken the railway off the hands of the contractors, however, by leave of the latter, a few Intercolonial Railway trains had carried some freight over it, and on the day of the accident a special train of three or four cars, drawn by an engine and manned by employees of the Intercolonial Railway travelled, after obtaining leave from the contractors, on an inspection trip with officials on board. It was when that train travelled down that the suppliant was engaged measuring the lumber, at about six feet from the track, that hearing the train coming he moved ten to twelve feet away from the track, when the accident happened. No one actually saw how the accident happened, but it is rightly surmised that the steps of the engine and tender struck the bracket or triangle piece of the cattle guard, threw it into the deals which were sent flying and a short while after the accident the suppliant was found unconscious, lying in the middle of the highway with ten to twelve deals over him. Hence the present action.

The action is in its very essence one in tort, and such an action does not lie against the Crown, except under special statutory authority, and the suppliant to succeed must necessarily bring the facts of his case within the ambit of sub-sec. (c) of sec. 20 of *The Exchequer Court Act.* In

other words the accident must have happened, 1st, *on* a public work; 2nd, There must be a servant or officer of the Crown who has been guilty of negligence while acting within the scope of his duties or employment; and 3rd, The accident complained of must have been the result of such negligence.

Assuming for the sake of argument, that the railway in question, before it had been taken over from the contractors by the Government, was a public work, yet that does not establish the suppliant's claim because it must be found as a fact—following and applying the decisions in the cases of *Chamberlin v. The King*;[1] *Hamburg American Packet Co. v. The King*;[2] *Olmstead v. The King*;[3] *Piggott v. The King*;[4] *Montgomery v. The King*;[5] and *Despins v. The King*;[6] that the accident did not happen on a public work. Having so found it is unnecessary to consider, among other questions raised at bar, whether or not the accident resulted from the negligence of an officer or servant of the Crown while acting within the scope of his duties or employment.

Having so found, judgment will be entered declaring that the suppliant is not entitled to any portion of the relief sought by his petition of right.

Petition dismissed.

Solicitor for suppliant: *Adolphe Stein.*

Solicitor for respondent: *Leo Bérubé.*

[1] 42 Can. S.C.R. 350.
[2] 33 Can. S.C.R. 252, 39 Can. S.C.R. 621.
[3] 53 Can., S.C.R. 450, 30 D.L.R. 345.
[4] 53 Can. S.C.R. 626, 32 D.L.R. 461.
[5] 15 Can. Ex. 374.
[6] *Post*, p. 256, 32 D.L.R. 448.

1916
Dec. 23

IN THE MATTER OF THE PETITION OF RIGHT OF

PIERRE DESPINS.....SUPPLIANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

Negligence—Exchequer Court Act—Sec. 20,(c)—"Public work."

The suppliant sought damages against the Crown for the death of his son by drowning, alleged to have been caused by the negligence of a servant of the Crown on a steamtug engaged in serving dredges, employed in improving the ship channel between Montreal and Quebec.

Held, (following *Paul v. The King*, 38 Can. S.C.R. 126) that the tug in question was not a public work within the meaning of sec. 20 of *The Exchequer Court Act*, (R.S.C. 1906, c. 140), and therefore the suppliant was not entitled to the relief sought by the petition.

PETITION OF RIGHT for damages arising out of a fatal accident to an employe of the Crown on the Steamer "Becancour," in the Province of Quebec.

The case was heard before the Honourable Mr. Justice AUDETTE, at Three Rivers, P.Q., on December 5, 1916.

L. P. Guillet, for suppliant; *F. Lefebvre*, for defendant.

Mr. Guillet relied on the following cases:

Canadian Northern Railway v. Anderson, 45 Can. S.C.R. 355; *Paul v. The King*, 38 Can. S.C.R. 126; *Piggott v. The King*, 38 Can. S.C.R. 501; *Chamberlain v. The King*, 42 Can. S.C.R. 350; R.S. 1906, ch. 39, sec. 3.

Mr. Lefebvre cited:

Price v. The King, 10 Can. Ex. 105; *Paul v. The King*, 38 Can. S.C.R. 126.

AUDETTE, J. (December 23, 1916) delivered judgment.

The suppliant, by his petition of right, seeks to recover the sum of $5,000, as representing alleged damages suffered from the death of his son by accident while in the employ of the Government of Canada.

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On September 6, 1915, the tug "Becancour" was engaged serving Government dredges employed in digging the ship channel between Montreal and Quebec. The tug had been at anchor during the night about opposite Lanoraie, and in the early morning raised anchor and steamed to a scow which was also at anchor close by. The anchor of the tug had been raised by means of a winch and was hanging at the bow of the tug, the officer in charge of the same, having directed that the anchor would be placed on deck after mooring at the scow. After mooring at the scow and while the crew was in the act of starting to heave the anchor on deck, Carpentier, one of the sailors who was usually attending to such work, had a block in his hands and was preparing to hook it to the anchor, when Despins, the suppliant's son, rushed up on deck and coming to Carpentier took the block from him and said, "I will attend to that work." He went over the railing, stood on the anchor and while in that position one of the sailors slightly loosened the winch to test it, and the pawl being off, the anchor went down to the bottom carrying Despins with it. Despins was drowned despite the crew immediately throwing out a boat to rescue him.

This action is in its very essence one in tort for damages and such an action does not lie against the Crown, except under special statutory authority and the suppliant to succeed must necessarily bring his action within the ambit of sub-sec. (c) of sec. 20 of The Exchequer Court Act (R.S.C. 1906, c. 140). In other words the accident must have happened Ist, on a public work; 2nd, there must be a servant or officer of the Crown who has been guilty of negligence while acting within the scope of his duties or employment; and 3rd, the accident complained of must be the result of such negligence.

Following the decision in the case of *Paul v. The King*,[1] I must come to the conclusion that the accident did not happen *on* a public work. Having so found it is unnecessary to consider whether or not the accident resulted from the negligence of an officer or servant of the Crown while acting in the scope of his duties or employment.

[1] 38 Can. S.C.R. 126.

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See also *Chamberlin v. The King*;[1] *Hamburg American Packet Co. v. The King*;[2] *Olmstead v. The King*;[3] *Piggott v. The King*;[4] *Montgomery v. The King*.[5] Having so found, I have come to the conclusion that the suppliant, under the circumstances of the case, is not entitled to the relief sought by his petition of right.

Petition dismissed.

Solicitor for suppliant: *L. P. Guillet.*

Solicitor for respondent: *F. Lefebvre.*

[1] 42 Can. S.C.R. 350.
[2] 39 Can. S.C.R. 651.
[3] 53 Can. S.C.R. 450.
[4] 53 Can. S.C.R., 626, 32 D.L.R., 461.
[5] 15 Can. Ex. 374.

1917
Jan. 8

IN THE MATTER OF THE PETITION OF RIGHT OF

ALPHONSE NOEL ..... SUPPLIANT;

AND

HIS MAJESTY THE KING ..... RESPONDENT.

Waters—Navigable river—Erection of wharf without Crown's approval—Obstruction to navigation—Nuisance—Abatement.

The suppliant, without having obtained the Crown's approval as required by R.S.C. 1906, c. 115, (as amended by sec. 4, 9-10 Ed. VII, c. 44) erected a small wharf, partly on the foreshore and partly extending into deep water in a navigable and tidal river. He had no riparian rights, nor any grant of the *solum* upon which the wharf was erected. He had made no use of the wharf for about 2 years before the works complained of were undertaken by the Crown, and part of the wharf had been carried away by the sea. For the purpose of preventing serious erosion of the shore at the point where the wharf was built, and in the interest of navigation, the Crown built a retaining wall which had the effect of interfering with the suppliant's wharf.

Held, that the Crown had the right to construct the works in question without giving the suppliant any claim to damages, as the wharf built by him interfered with navigation, and by so doing amounted to a nuisance which might have been abated at any time if the Crown so desired.

PETITION OF RIGHT to recover the value of a wharf constructed in navigable and tidal waters at the mouth of the Bonaventure River, in the Province of Quebec.

The case was heard at Quebec, on November 14, 1916, before the Honourable Mr. JUSTICE AUDETTE.

F. O. Drouin, for suppliant; *W. LaRue*, for respondent.

AUDETTE, J. (January 8, 1917), delivered judgment.

The suppliant, by his petition of right, seeks to recover the sum of $1,408.70, as representing the value with interest, of a wharf constructed by him at the mouth of the Bonaventure River, County of Bonaventure, and Province of Quebec.

He further contends that previous to starting work he went to Quebec and obtained from Mr. E. E. Tache, the Deputy Minister of the Crown Land and Forests Department, the verbal permission to erect his wharf,

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Mr. Tache saying to him: "Build on, and you will never be disturbed."

However, when he started to work upon this wharf, both Messrs. W. C. Edwards and R. N. LeBlanc complained to the Quebec Government of the building of same, and asked to have it stopped. (See Exhibits Nos. 31 and 32). Mr. E. E. Tache, the Deputy of the Lands Department, then wrote to Noel, on August 27, 1907, the letter marked Exhibit "C," calling his attention that he was neither riparian owner nor owner of the bed of the river where he was constructing his wharf, and requested him to stop immediately the works already started, and to remove everything from the land, and that Noel failing to do so the Department would take legal proceedings to protect itself. Noel contends he then went to Quebec a second time, saw Mr. Tache with respect to the letter, Exhibit "C," and that Mr. Tache again told him "*Laissez donc faire, continuez et ne dites rien.*" Mr. Tache is now dead, and there is no corroboration of Noel's evidence respecting what Mr. Tache might have said to him, although Mr. Vien is alleged to have been present on the occasion of Noel's second visit to Mr. Tache, but he was not called as a witness. In face of the letter, Exhibit "C" written by Mr. Tache, Noel's contention as to Mr. Tache's verbal utterance is indeed liable to make one more than perplexed on this branch of the evidence, but it has no bearing upon the merits of the case.

Now, to properly appreciate the merits of this case, it is well to state *in limine* that Noel was not a riparian owner, that is he did not own the land on the shore abutting the wharf. Further, he was not the owner of the portion of the river upon which he erected his wharf, the foreshore having been sold by the Quebec Government under the Crown Grant filed herein as Exhibit "D"; and further, he never obtained from the Federal Government leave to put up a wharf, as provided by ch. 115, R.S.C. 1906, as amended by 9–10 Ed. VII., ch. 44, the wharf being erected in navigable and tidal waters.

Then after the wharf had been out of use for about a couple of years, and had been partly swept away by the sea, the Government of Canada at the request of citizens

of the locality, in the interests of navigation, and to protect the shore from serious erosion, built on each side of the wharf a retaining wall which would have almost enclosed the suppliant's wharf and for which he claims.

Now this is the case of a stranger, a trespasser taking possession of the foreshore, and part of the bed of the river navigable at low tide, and while perhaps a wrongdoer not in privity with Noel could not be heard to raise the question of Noel's right, it is otherwise with respect to the Crown holding for the public the paramount right of navigation and here to protect the *jus publicum*.

The suppliant, as already mentioned, never obtained leave from the Federal Government to put up the wharf, and had he applied, in view of the works done by the Crown, such application would, it must be inferred, have been refused, since it is clearly established that his wharf is an interference with navigation, and also interfered with the works the Federal Crown had thought necessary to undertake for the improvement of navigation in the Bonaventure River, a river both navigable and tidal at the place in question.

Therefore, the suppliant as a trespasser was maintaining a nuisance at the time the Crown started its works, and it is well said by Mr. Justice Strong in the case of *Wood v. Esson*,[1] "that nothing short of legislative sanction can "take from anything which hinders navigation the char- "acter of a nuisance." This language is also quoted with approval by Mr. Justice Martin in the case of *Kennedy v. The "Surrey."*[2] There can be no interference with public rights without legislative authority. It was also held in the case of *The Queen v. Moss*,[3] "that an obstruction to navigation "cannot be justified on the ground that the public benefits "to be derived from it outweigh the inconvenience it causes . . . . It is a public nuisance though of very great public benefit and the obstruction of the slightest possible degree."

In the *Thames Conservators v. Smeed*,[4] A. L. Smith, L.J., expressed the opinion "that *prima facie* the words the 'bed of the Thames,' denote that portion of the river which in the ordinary and regular course of nature is

[1] 9 Can. S.C.R. 239 at 243.
[2] 10 Can. Ex. 29 at 40.
[3] 26 Can. S.C.R. 322.
[4] [1897] 2 Q.B. 334 at 338.

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covered by the waters of the river." And see per Chitty, L.J., at p. 353. If that definition is adopted here, the suppliant is in no better position than an encroacher upon a highway whose right has not ripened into adverse possession under the statute and whose erections are therefore nuisances which can be abated.

In the case of *Dimes v. Petley*,[1] it was held that the defendant could not maintain an action for damages against the owner of a ship which damaged his wharf, the wharf being an obstruction to navigation, although it was held that the plaintiff could not abate the nuisance unless it did him a special injury. Applying the first principle to the suppliant's case, can it not be said that if the suppliant built out his wharf so as to interfere with navigation, his own act was the *fons et origo malorum?* How can the court give damages to a suppliant who comes into court as a confessed trespasser whose grievance arises from his own original wrong in encroaching upon the rights of the public? See on this point the later case of *Liverpool, &c., S.S. Co. v Mersey Trading Co.*[2]

Could it be contended that the Crown, in the right of the Dominion of Canada, would be liable as against a person having no riparian right, no right to the bed of the river which is in the hands of third parties, and further having no permission or authority to so erect a wharf in navigable waters, for interfering with such a wharf by the erection of works performed in the interest of navigation and to improve the same? The question must be answered in the negative.

There is the further contention that the Crown gave a subsidy towards the erection of Noel's wharf. But there was no subsidy. As explained by witnesses Belle-Isle and Amyot, on one occasion Noel met the latter and told him it would be advantageous to have a landing on the River Bonaventure. Amyot then wrote to the assistant chief engineer at Ottawa, who authorized him to spend $150 on such a landing, under the circumstances more especially detailed in the evidence with the understanding it would not be permanent work. And when Noel had

[1] 15 Q.B. 276.

[2] [1908] 2 Ch. D. 460 at 473.

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spent that amount, Amyot certified for work to the amount of $150 which were subsequently paid to Noel. In any event no subsidy could be properly paid without the authority of Parliament, and without order-in-council. And as above related, when the Government started its works the Noel wharf had been in disuse and abandoned for quite a while at that time, says witness Belle-Isle who was in charge of the Government works, and he says it was in a state of non-existence and consisted in a gathering of stones and could not be used as a wharf. And he adds the only benefit the Government could derive from it was the stones Noel placed in his wharf, and that stone was amply paid for by the $150 spent on his wharf.

This is a pure action of tort for which there is no statutory remedy, and moreover, the Crown had the right to abate the nuisance under the circumstances.

Therefore, the suppliant is not entitled to the relief sought by his petition of right.

Petition dismissed.

Solicitors for suppliant: *Messrs. Drouin, Sevigny & Amyot.*

Solicitor for respondent: *W. LaRue.*

1915
Sept. 7

IN THE MATTER OF THE PETITION OF RIGHT OF

WILLIAM C. MOORE AND ROBERT KENNEDY,
SUPPLIANTS;

VS.

HIS MAJESTY THE KING.....RESPONDENT.

Waters—Canal—Grant of surplus water—Priority—Navigation—Liability of Crown for negligence—Repairs.

Under an order in council and grant from the Crown, the suppliant's predecessors in title were given, subject to the requirements of the public service, the right to draw off, take and use so much of the *surplus water* of the Bobcaygeon Canal as may be sufficient to drive their grist mill, subject, however, to the Crown being relieved and discharged, under a provision of the grant, from any liability in damages resulting from any loss or damage to the grantees in respect of the erection, construction, maintenance and performance of any works by the Crown.

Held, the surplus water mentioned in the grant is what is not required for navigation, the interest of navigation having a prior claim to any right to surplus water. The paramount right to all waters flowing in the canal is in the Crown for the purposes of navigation.

2nd. The Crown is not under the circumstances of the case bound to keep the canal in repair. To so hold would amount to a charge of personal negligence that cannot be imputed to the King, and for which, if it occurred, the law affords no remedy, for the doctrine of the Crown's immunity for personal negligence is in no way altered by the Exchequer Court Act.

PETITION OF RIGHT to recover damages for the shutting off of water from the mill of the suppliants, and damages resulting from the raising of Buckhorn Dam.

The case was heard by the Honourable Mr. JUSTICE AUDETTE at Lindsay, Ontario, May 4-5, 1915.

A. J. R. Snow, K.C., and *C. B. Naismith*, for suppliants; *I. E. Weldon* and *F. N. Stinson*, for respondent.

AUDETTE, J. (September 7, 1915) delivered judgment.

The suppliants by their petition of right, seek from this Court an order declaring their rights under the orders-in-council, the letters patent and grant hereinafter mentioned; also an order restraining the Crown from shutting off the water from the flume of their grist mill or from cutting

off or limiting in any way their supply of water. And they further claim from the Crown damages alleged to have been sustained by them from the shutting off their water supply during the past summer, together with the amount of damages suffered by them in the past by reason of the raising of the level of Buckhorn Lake and Pigeon Lake.

In the result, apart from the declaration as to the nature of their title and injunction against the Crown, their claim is twofold. 1st, damages resulting from the shutting off the water from the flume of their mill; and 2nd, damages resulting from the raising of Buckhorn dam.

For the purpose of the trial of this action the solicitor for the Attorney General put in the following admissions, in writing:

"1. That the copies of the orders-in-council dated "June 19, 1872, and August 15, 1873, produced, are also "copies of the original order-in-council and that same "shall go in as evidence without further proof.

"2. That copy of the patent or lease dated September 1, "1874, from Her Majesty Queen Victoria to Mossom Boyd "produced by the suppliants is a true copy and that same "shall be admitted as evidence in the same manner as if "the original patent under the Great Seal had been tendered "by the suppliants.

"3. That the copy of instrument dated September 13, "1910, between Robert Kennedy and William C. Moore of "the first part and His Majesty the King of the second "part produced by the suppliants is a true copy of the "original release and shall be received as evidence in "the same manner as if the original release had been put "in.

"4. It is also admitted that the suppliants Robert "Kennedy and William C. Moore are the owners in fee "simple free of encumbrances of the grist mill property "referred to in the statement of claim.

"5. For the purposes of this action it is admitted that "the suppliants have acquired and are entitled to all the "rights and privileges which Mossom Boyd acquired from "the Crown and are entitled to the rights, privileges "and benefits thereof and to exercise the same to the same "extent as the said Mossom Boyd could have exercised the

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"same in so far as the same appertain to the premises of "the suppliants.

"6. For the purposes of this action it is also admitted "that Robert Kennedy and William C. Moore the suppliants "in this action are the assignees of the patent dated Sept- "ember 1, 1874, from the Crown to Mossom Boyd in so far "as said patent grants the said Mossom Boyd the use of "water to run his grist mill on the Bobcaygeon Canal."

Dealing first with the shutting off of the water from the flume of their mill, it will be seen that from deeds and transfers filed herein that their claim is based and founded upon the grant from the Crown of September 1, 1874, and the orders-in-council therein referred to. Under this grant, the suppliants or their predecessors in title, *subject to the requirements of the public service, are given the right to draw off, take and use so much of the surplus water of the Bobcaygeon Canal as may be sufficient to drive their grist mill.*

This grant is, however, made subject further to the following proviso recited in the grant, and which reads as follows, viz:

"Provided always and these presents are granted upon "this express condition, that we, our successors or assigns, "shall not nor shall our Dominion of Canada or any depart- "ment of the Government or public service thereof be, "or be deemed, held or taken as liable to the said Mossom "Boyd, his heirs, or assigns, or to any person or persons "claiming by through or under him or them for any loss, "costs, damages, injury, detriment or expenses to which "the said Mossom Boyd, his heirs, or assigns, or any person "or persons as aforesaid may be put, or which he or they "may pay, bear, sustain, incur or expend, by, or by any "means, or in consequence or arising out of the erection, "construction, maintenance or performance of any works "or operations at any time hereafter, by us, our successors "or assigns, or our Dominion of Canada, or any department "of the Government or public service thereof in or upon the "Bobcaygeon canal nor shall any claim or demand for "compensation, in any of the respects aforesaid be hereafter "made against us, our successors or assigns, or our Dominion "of Canada, or any department of the Government or "public service thereof."

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Now, it has been established beyond controversy, that the Bobcaygeon Canal of late years is leaking very much, that such leakage is increasing all the time, resulting in a serious current rendering it very difficult to take boats and cribbs through the canal. Some of the suppliants' witnesses even stated that, the waste resulting from such leakage might be as great and more than the surplus waters, adding that the waste for the last 3 or 4 years has been about equal to the surplus waters. For a number of years past a deal of money has been spent by the Government in repairing the canal; but on account of the nature of the ground or soil, upon which the canal works have been erected, it has been found impossible to make a "tight job" of it. The Crown's officers, heard as witnesses, also admit that the Canal is in a leaking condition and the superintendent engineer of the Trent Valley Canal, states that he would not recommend any repairs to the locks, as it would be a waste of money, the locks being in too bad a condition. The south wall has subsided 6 inches and it slopes inside, &c., &c. He has recommended the building of a new canal at a cost of $220,000 and tenders for the same were received on August 17, 1914, but the war stopped the works.

It is unnecessary to go into further details to show the bad condition of the canal, which is conceded by the Crown. As the result of such condition it has been found necessary, by the proper officer in that behalf, to off and on shut off the flume taking the water to the suppliants' mill, all such waters being found necessary for the purpose of navigation, as the closing of this flume helps to quite an extent in decreasing the current.

What is this surplus water to which the suppliants are entitled subject to the conditions of their letters patent? The interests of navigation have a prior claim to any rights of the suppliants to surplus water. The paramount right to all the waters flowing in that canal is obviously in the Crown for the purposes of navigation, and the surplus water mentioned in the grant is what is not required for navigation.

Under the grant the Crown has an absolute right to so shut off this so-called surplus water when required for the

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purposes of navigation, and it has been clearly established, under the evidence, that this right has been exercised under not only justifiable, but necessary circumstances. Moreover, under the provisions of the grant as above recited, the Crown has the power to exercise such right, under the circumstances, with perfect and unqualified immunity, and such immunity results from the grant which is nothing but a contract as between the grantee and his assigns on the one hand and the Crown on the other.

It is contended on behalf of the suppliants that the Crown is bound to keep the canal in repair, a question which has been passed upon at different times but which has been clearly defined by the Supreme Court of Canada in the case of *Hamburg Packet Co. v. The King*;[1] See also *Board of Water of Fenelon Falls v. The King*;[2] *McHugh v. The Queen*;[3] *Harris v. The King*;[4] *Municipality of Pictou v. Geldert*;[5] and *City of Quebec v. The Queen*.[6]

The Crown is not bound to keep this canal in repairs, under the above decisions and under the present circumstances. It has done all it could do, and had even decided to rebuild when this nefarious war stopped it. To hold the Crown liable for want of repairs under the circumstances would practically be a charge of personal negligence that cannot be imputed to the King, and for which, if it occurred, the law affords no remedy, for the doctrine of the Crown's immunity from liability for personal negligence is in no way altered by the Exchequer Court Act: *City of Quebec v. The Queen* (Ubi supra).

Moreover, under the very wording of the provisions of the grant of 1874, as above recited, the Crown is absolutely relieved from any liability with respect to this surplus water thereby granted to the suppliants predecessors in title. Indeed, the grant specifies that all rights given thereunder (these presents) are so granted upon the *express condition* that the Government shall not be deemed liable for any loss, costs, damages, injury, detriment or expenses to which the grantee may be put, or which he may bear, sustain, incur or expend by, or by any means, or in conse-

[1] 33 Can. S.C.R. 252, 7 Can. Ex. 150.
[2] 12 Can. Ex. 217.
[3] 6 Can. Ex. 374.
[4] 9 Can. Ex. 206.
[5] [1893] A.C. 524.
[6] 2 Can. Ex. 252; 24 Can. S.C.R.420.

quence or arising out of the erection, construction, *maintenance* or performance of any works or operations at any time thereafter &c. It is obvious that the grant was made under the express condition that the Crown be relieved of any liability from any damages arising from the same.

The suppliants are not entitled to recover under the head respecting the shutting off of the surplus water whenever the requirements of navigation calls for it.

Coming now to the consideration of the second branch of the case, that is respecting the damages claimed from the raising of the Buckhorn Dam.

The Buckhorn Dam, which is part of the Trent Valley Canal System, having become old and worn out, in 1907 a contract was entered into to rebuild it and it was completed in 1908. This new dam is 1 foot and 3 inches higher than the flush board of the old dam. After this new construction, witness Hill says the water rose quicker and took a longer time to get away. Two new sluices of about 18 feet wide were put in by the Government last year, and it is contended that the sluices are large enough now to control the water.

There can be no doubt that if the suppliants have suffered damages from *these new works* in the reconstruction of the Buckhorn Dam, that they are entitled to recover. Damages have already been paid to the land owners in the neighbourhood, including the suppliants who recovered $300 for damages suffered during the years 1906, 1907, 1908, 1909 and up to March 31, 1910, as appears by the instrument of release, dated September 13, 1910, and filed herein as Exhibit No. 9d.

The suppliants would therefore be entitled to damages resulting, from such reconstruction of the dam, by the backing up of the water in his mill, interfering with his head of water, and stopping the operation of the mill.

In arriving at a proper amount of compensation in that respect, once for all, for all time to come, as resulting from such new works, it must not be overlooked that it was stated by witness Moore that there has always been damages every year through the Buckhorn Dam for two to three weeks, and that in such case it becomes a question of degree. Furthermore, he further stated that sometimes

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the closing or shutting of his mill, was the result of the combined interference by flood and want of water coming from the flume.

Under all the circumstances of the case I think that the suppliants should recover the total sum of $1,200, in respect of all damages, past, present and future, that is as an assessment once for all. But as they have already recovered in this respect the sum of $300, they should now recover the balance thereof, namely the sum of $900. The whole representing a capital at 5% with a return about equal to the yearly compensation already allowed.

The yearly rent of $5 had not been claimed by the pleadings, and therefore I have no jurisdiction to adjudicate upon that question in the case as framed. It is a matter that is left to the officers of the Crown to be hereafter adjusted.

Therefore the suppliants are entitled to recover from the respondent the sum of $900 in full settlement of all claims once for all, for damages past, present and future, resulting from the reconstruction of the Buckhorn Dam in 1907-1908, and it is further adjudged that they are not entitled to any of the other reliefs sought by their petition of right.

The suppliants are further entitled to their full costs of action upon the issue of damages resulting from the reconstruction of the Buckhorn Dam and there will be no costs to either party on the other issues.

Judgment for suppliant.

Solicitors for suppliant: *Snow and Naismith.*

Solicitor for respondent: *I. E. Weldon.*

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IN THE MATTER OF THE PETITION OF RIGHT OF

JOHN ARSENAULT, OF ALDER POINT, IN THE COUNTY OF CAPE BRETON,

SUPPLIANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

Waters—Navigable river—Damage to wharf—Obstruction to navigation—Nuisance—Public work.

Suppliant brought his petition to recover damages sustained in respect of a wharf built between high and low-water mark in navigable water, without authority from the Crown therefor.

Held, following *Piggott v. The King* (53 Can. S.C.R. 626, 32 D.L.R. 461), that the case was not one falling within the classes of cases cognizable under sub-sections "a" and "b" of sec. 20, of *The Exchequer Court Act*, which only deal with questions of compensation for land taken, and injurious affection resulting therefrom.

2. That the damages complained of did not occur on a public work, as provided by sub-sec. "c" of sec. 20 of *The Exchequer Court Act* (R.S.C. 1906, c. 140).

Semble, that where a small wharf, not costing more than $1,000, and built without the approval of the Governor-in-Council, interferes with navigation, it becomes a nuisance, and may be removed and destroyed under secs. 4 and 5 of ch. 115, R.S.C. 1906, as amended by 9-10 Ed. VII. c. 44.

PETITION OF RIGHT for damages alleged to have arisen out of the negligence of the Crown servants whilst engaged dredging the channel at Little Bras d'Or Gut, Cape Breton.

The case was heard at Sydney, C.B., May 30, 31, 1916.

N. A. Macmillan, K.C., for suppliant and *J. A. Gillies*, K.C., for respondent.

MR. MACMILLAN: The suppliant claims damages for the destruction of his wharf property at Alder Point in the County of Cape Breton, by reason of a dredge belonging to the Public Works Department excavating a channel so near his wharf, that the ballast of the wharf subsided into the channel, with the result that the superstructure was entirely carried away, leaving only portions of the upper tiers of timber suspended above the water. The bucket

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of the dredge came in contact with the structure and tore away some of the timber, thus making the work of destruction complete.

He submitted that the facts of the case came within the wording of sub-sec. (*b*) of sec. 20 of *The Exchequer Court Act*. *Létourneux v. The Queen*.[1]

In regard to the suppliant's title, he was in undisturbed and continuous possession of the locus for over 20 years and his predecessors in title, almost from time immemorial, and that *McGee v. The King*,[2] holds "That the possession of a predecessor in title may be invoked in order to complete the term of prescription."

He maintained that half of the wharf was on the foreshore, that is the space between ordinary high and ordinary low tides, and the other half was on dry land. The latter part is covered by the suppliant's title deed. The title to the foreshore is by the decisions of the Privy Council, vested solely and entirely in the Crown as represented by the Provincial Government. The Federal authorities could not oust the suppliant or deprive him of his possession, except through the representatives of the Local Government, and if the Department of Public Works required the land, it would be obliged to purchase it in the ordinary way from the Government of Nova Scotia.

The suppliant felt secure in his title, since a grant could issue to no other person than himself.

Sec. I, R.S.N.S. 1900, ch. 25, reads as follows:

"The Governor-in-Council, may, upon application there-
"for in writing to the Commissioner of Crown Lands:

"(*a*) Give a grant from the Crown to any persons of
"the ungranted.....beach or foreshore upon the
"coast of the Province."

and sec. 3 reads :

"No grant of water front shall be issued to any other
"persons than the owner of the land on which such water
"front abuts, without the consent in writing of such owner."

He maintained that the Crown, as represented by the Federal Parliament, has no property whatever in the locus

[1] 7 Can. Ex. 1; 33 Can. S.C.R. 335. [2] 7 Can. Ex. 309.

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as it does not constitute navigable water, this structure barely skirting the shore and not being in any way in the track of shipping, the channel being also 20 feet distant.

The suppliant's possession is undisputed, and an action for trespass at common law would lie against any person unlawfully entering upon it—See *Topham v. Dent.*[1] *Halsbury's Laws of England.*[2]

The Crown, as represented by the Federal Government, has no property in the bed, and has only property in the part of the water that is navigable. But the matter is settled beyond question by ch. 44, Statutes of Canada, 1910, being an *Act to amend the Navigable Waters Protection Act*, which provides that any wharf, except small wharves, costing less than one thousand dollars, "may be removed and destroyed."—but only—"under the authority of the Governor in Council."

There was no evidence that this structure interfered with navigation, and it was not claimed at the trial that any order-in-council had been passed for its removal. Even if the suppliant was a trespasser, the respondent's servants could not wantonly destroy his property.[3]

The dredging was the primary cause of the accident, the district engineer having admitted that the natural slope would have extended within the wharf and caused the ballasting to empty into the channel.

The suppliant was not bound to put his property in repair upon discovering the damage.

Even if ice-floes were responsible for part of the injury, if it were not for the unlawful acts of the respondent, in deepening the space between the channel and the shore, it would have been impossible for ice of a size sufficient to injure the structure to reach it without grounding.

Mr. Gillies contended that as the King can do no wrong at common law, the suppliant had no conceivable action except by statute, and the subject of this action does not come within the provisions of Sec. 20 of *The Exchequer Court Act*, and therefore the court had no jurisdiction.

[1] (1830) 6 Bing. 515
[2] Vol. 27, p. 851.
[3] *Brochu v. The King*, 15 Can. Ex. 50

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He submitted that these dredging operations at Little Bras d'Or are not "public works." That *Paul v. The King*[1] is a case directly in point. See also *Hamburg American Packet Co. v. The King*,[2] which confirmed a judgment of the Exchequer Court, and which decided that the channel of the St. Lawrence River, although made a great commercial and navigable highway through being deepened by the Department of Public Works by dredging operations, is not a "public work". This was an analagous case. He cites *Piggott v. The King*;[3] *Paul v. The King*;[4] *Chamberlin v. The King*;[5] *King v. Le Francois*;[6] *LaRose v. The King*.[7]

Mr. Macmillan, in reply, referred to sec. 3 of ch. 39, R.S.C. 1906. He submitted that the damage in question was committed while a Government dredge, under the charge of Government officials, was performing a work for the public benefit and in the interests of the public under the control and direction of the minister.

See definition of "public work" in Audette's Practice.[8]

He maintained that in ascertaining the jurisdiction of the court in cases of this kind, sec. 20 of *the Exchequer Court Act* and the provisions of chapter 142 of the Act respecting proceedings against the Crown by petition of right must be read together.

In *Price v. The King*, 10 Can. Ex. 105, it was distinctly held that it is sufficient to bring a case within the statute if the cause of the injury is or arises on a public work.

See the case of *Cleland v. Berberick*,[9] also *Tweedie v. The King*.[10]

In regard to the suppliant's neglect to immediately make repairs after the injury to his wharf was discovered, he submitted that the process of sliding or subsiding of the bank into the channel was a slow and gradual one, and it was impossible to ascertain to what length the sliding or subsiding would reach, and it would be only a waste of

[1] 38 Can. S.C.R. 126.
[2] 33 Can. S.C.R. 252
[3] 38 Can. S.C.R. 501.
[4] 38 Can. S.C.R. 126
[5] 42 Can. S.C.R. 350.
[6] 40 Can. S.C.R. 431.
[7] 31 Can. S.C.R. 206.
[8] Pp. 124, 128, 131, 244.
[9] 36 O.L.R. 357, 29 D.L.R. 72.
[10] 27 D.L.R. 53, 52 Can. S.C.R. 197.

money to make repairs before the slope had become permanently formed.

AUDETTE, J. (December 23, 1916) delivered judgment.

The suppliant, by his petition of right, seeks to recover the sum of $1,900 as representing certain alleged damages to his wharf, at Alder Point, on the shore of Little Bras d'Or, Cape Breton, N.S.

He alleges that, in 1912, while the Government dredge "Cape Breton" was engaged dredging the channel at Little Bras d'Or Gut, in close proximity to his wharf, through the negligence of the respondent's servants and agents in charge of the dredge, his wharf was damaged, *inter alia*, by the bucket of the dredge coming into contact therewith and hooking some timber of the outer wall of the wharf, the whole resulting in his suffering damage to the amount claimed.

The action is in its very essence one in tort, and such an action does not lie against the Crown, except under special statutory authority; and, the suppliant, to succeed, must bring his case within the ambit of either sub-sec. (*b*) or sub-sec. (*c*) of sec. 20 of the Exchequer Court Act.

If the suppliant seeks to rest his case under sub-sec. (*b*) of sec. 20, I must answer his contention by the decision in the case of *Piggott v. The King*,[1] wherein His Lordship the Chief Justice of Canada, says : "Paragraphs (*a*) and "(*b*) of sec. 20 are dealing with questions of compensation "not of damages."

"Compensation is the indemnity which the statute "provides to the owner of lands which are compulsorily "taken under, or injuriously affected by, the exercise of "statutory powers."

Therefore, it obviously follows that the case does not come under sub-sec. (*b*) of sec. 20.

Does the case come under sub-sec. (*c*) repeatedly passed upon by this Court and the Supreme Court of Canada ?

To bring this case within the provisions of sub-sec. (*c*) of sec. 20, the injury to property must be : 1st, On a public work; 2nd, There must be some negligence of an officer or

[1] 53 Can. S.C.R. 626, 32 D.L.R. 461.

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servant of the Crown acting within the scope of his duties or employment; and 3rd, The injury must be the result of such negligence.

The wharf in question, taking the measurement from the suppliant's written argument, is given at 126 feet long, with a width of 40 feet, half of which is built on the foreshore, the suppliant's title taking him to the high water mark only.

The damaged part of the suppliant's wharf is erected on the foreshore between high and low water mark. He has no grant from the Provincial Government for the bed of the foreshore, and he has no permission to build a wharf, or to put up erections of any kind between high and low water mark; and that right, the property being in tidal and navigable waters, can only be obtained from the Federal Crown under the provisions of ch. 115, R.S.C. 1906, as amended by 9-10 Ed. VII, ch. 44.

The question of prescription or of the Statute of Limitations does not arise, the suppliant not having been in possession long enough as against the Crown.

Furthermore, the suppliant who by his petition of right claims damages to his wharf to the amount of $1,900 cannot contend as he does, that his case is "*settled*" by the last paragraph of sec. 4, of 9-10 Ed. VII, ch. 44, (above cited as amending ch. 115, R.S.C. 1906) which reads as follows:

"The foregoing provision of this section shall not apply "to small wharves not costing *more than $1,000*, or groynes "or other bank or beach protection works, or boat houses, "*which do not interfere with navigation.*"

This is mere irony. It is not in the mouth of the suppliant who has been heard as a witness, and adduced evidence by other witnesses, to prove on the one hand that he suffered damages to his wharf in the sum of $1,900, and on the other hand say I do not come within the ambit of ch. 115, R.S.C. 1906, as amended by 9-10 Ed. VII, because my wharf did not cost more than $1,000. *Qui approbat non reprobat.*

However, this last objection is also unfounded in view of the words of the statute in respect of these small wharves, "*which do not interfere with navigation*". And assuming the Crown did damage this wharf in the course of enlarging

the channel opposite the suppliant's property, on the space between high and low water mark, these works and such damage, if any, would establish beyond question that the wharf is an interference with navigation, which is a right paramount and superior to all on navigable waters.

It is well said by Mr. Justice Strong, in the case of *Wood v. Esson*,[1] "that nothing short of legislative sanction can "take from anything which hinders navigation the charac- "ter of a nuisance." This language is quoted with approval by Mr. Justice Martin in the case of *Kennedy v. Surrey*.[2]

Is the Crown liable as against a person having no permission or authority from the Federal Government, to erect a wharf in navigable and tidal waters between high and low water, for undermining, by work done in the interests of navigation, such wharf, an unauthorized erection on the foreshore?

In the *Thames Conservators v. Smeed*,[3] A. L. Smith, L.J., expressed the opinion that *prima facie* the words "the 'bed of the Thames,' denote that portion of the river which in the ordinary and regular course of nature is covered by the waters of the river". And see per Chitty, L. J., at p. 353. If that definition is adopted here, the suppliant is in no better position than an encroacher upon a highway whose right has not ripened into adverse possession under the statute and whose erections are therefore nuisances which can be abated. Lord Justice Smith at p. 343 of the case last mentioned says that dredging powers were given to the Thames Conservators for navigation purposes without compensation to private owners for having their rights interfered with. *A fortiori* would it not appear that if *lawful owners* cannot claim compensation for damage done under an act not giving them compensation, one whose asserted right has not ripened into possession cannot? In short, can one who is still in the category of a trespasser or maintainer of nuisance claim damages for the removal of the nuisance?

In the case of *Dimes v. Petley*,[4] it was held that the defendant could not maintain an action for damages against the owner of a ship which damaged his wharf, the

[1] 9 Can. S.C.R. 239 at 243.
[2] (1905) 10 Can. Ex. 29 at 40.
[3] [1897] 2 Q.B. 334 at 338.
[4] 15 Q.B. 276.

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wharf being an obstruction to navigation, although it was held that the plaintiff could not abate the nuisance unless it did him a special injury. Applying the first principle to the suppliant's case, can it not be said that if the suppliant built out his wharf so near the channel as to make it liable to injury whenever the channel required to be dredged, his own act was the *fons et origo malorum*? How can the court give damages to a suppliant who comes into court as a trespasser whose grievance arises from his own original wrong in encroaching upon the rights of the public? See on this point the later case of *Liverpool, &c. S.S.Co. v. Mersey Trading Co.*[1]

In the result it must be found that the wharf in question suffered from toredo worms, from the large clampers of ice hitting it, as shown in the evidence, and also that the dredging made by the Crown, for the want of a longer slope, has provoked sliding of earth which has undermined the front of the wharf, that part erected between high and low water.

This injury caused by undermining is a damage that is recoverable against the Crown only if it can be brought within the provisions of sub-sec. (*c*) of sec. 20 of the Exchequer Court Act, as above mentioned.

The injury complained of did not happen *on* a public work, and following the decisions in *Chamberlin v. The King*;[2] *Paul v. The King*;[3] *The Hamburg American Packet Co. v. The King*;[4] and *Olmstead v. The King*[5] I must find that the suppliant is therefore not entitled to recover.

The case of *Letourneux v. The King*[6] and *Price v. The King*[7] relied upon by the suppliant's counsel have since been overruled by the decisions of the Supreme Court of Canada cited above.

For judicial observations upon the merits of sec. 20 of the Exchequer Court Act, see comments by Mr. Justice Idington, Mr. Justice Brodeur, and Mr. Justice Sir Louis Davies in *Piggott v. The King*;[7] and *Chamberlin v. The King*.[8]

[1] [1908] 2 Ch. D. 460 at 473 affirmed in [1909] 1 Ch. 209.
[2] 42 Can. S.C.R. 350.
[3] 38 Can. S.C.R. 126.
[4] 33 Can. S.C.R. 252.
[5] 53 Can. S.C.R. 450, 30 D.L.R. 345.
[6] 33 Can. S.C.R. 335.
[7] 10 Can. Ex. 105.
[8] 53 Can. S.C.R. 626, 32 D.L.R. 461.
[9] 42 Can. S.C.R. 350 at 353 & 354.

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This narrow construction of sub-sec. (*c*) of sec. 20 of the Exchequer Court Act is now finally accepted, and may be the whole trouble arose in the confusion and error of the draughtsman who undertook the drawing of the section. Should not the words "on any public work", in sub-sec. (*c*) of sec. 20, have been placed at the end of paragraph c. instead of where they are? In the result the Crown would in such a case have been liable in a rational manner for damages resulting from the negligence of its servants acting within the scope of the duties and employment *on* a public work, and it would not be necessary that the injury be suffered *on* the public work.

Under the circumstances, following the decisions above cited, the damages claimed not having been suffered *on* a public work, it must be found the suppliant is not entitled to the relief sought by his petition of right.

Petition dismissed.

Solicitor for suppliant, *N. A. Macmillan.*

Solicitor for respondent, *J. A. Gillies.*

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Dec. 23

QUEBEC ADMIRALTY DISTRICT.

IN THE MATTER OF

ADELARD BEAUDETTE, PLAINTIFF APPELLANT;

AND

S.S. "ETHEL Q,".....DEFENDANT RESPONDENT;

AND

QUINLAN & ROBERTSON, LIMITED,
OPPOSANT;

AND

DAME EUGENIE LABELLE,
CLAIMANT INTERVENING;

AND

WILLIAM ALBERT SHEPPARD,
CLAIMANT INTERVENING;

AND

QUINLAN & ROBERTSON, LIMITED, THE GUARANTEE COMPANY OF NORTH AMERICA;
GARNISHEES IN COURT BELOW;

AND

ADELARD BEAUDETTE,
PLAINTIFF CONTESTING OPPOSITION AND INTERVENTION.

Admiralty—Garnishee order from Provincial Court—Effect on Admiralty Court—Unnecessary Proceedings—Costs—Bail—Deposit.

The Admiralty Court, in Canada, is bound to recognize garnishee proceedings in other courts of the Province.

The Court should not encourage or countenance unnecessary proceedings and costs; its duty being to administer the law between the parties and not be influenced by mere technicalities occasioned by a welter of proceedings and costs which may in the circumstances of any particular case operate as a denial of justice.

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The plaintiff in an action by accepting bail, where a vessel is released upon bail, must not be taken to be in a worse position than if the vessel, the *res* itself, had remained under or within the control of the court.

Semble, the provisions of art. 1486 and 1487 R.S.Q. 1909, whereby one may deposit with the Provincial Treasurer any sum of money demanded of him by contending claimants, do not apply to cases where the contestation between the parties has been decided by the judgment of a Court of competent jurisdiction.

APPEAL from the judgment of the Deputy Local Judge of the Quebec Admiralty District, sitting in Montreal, 30 D.L.R. 529, 22 Rev. de. Jur. 450, upon an opposition *afin d'annuler* to a writ of fi. fa., issued against the Guarantee Company of North America, bail on the release of the vessel arrested herein, because of garnishee attachment made in the hands of the said company under judgment from the Provincial courts. The appeal also covers two issues upon the contestation by the plaintiff of the judgment creditor's claim followed by garnishee proceedings.

The hearing of the appeal took place at Ottawa before The Honourable Mr. JUSTICE AUDETTE, on October 31, 1916.

Sir Auguste Angers and *Mr. Delorimier*, appeared for the plaintiff appellant Beaudette; *Mr. A. Vallee* for the "Ethel Q."; *Mr. Tucker* for the intervenant Sheppard; and *Mr. Powell* for the intervenant Labelle.

Sir Auguste Angers and *Mr. Delorimier*, K.C., for the plaintiff, opened in support of the proposition that the Admiralty Court could not recognize garnishee proceedings and judgment thereon in the provincial courts.

Sir Auguste Angers: This case is an opposition taken by Messrs. Quinlan & Robertson, Limited, to the execution issued by the plaintiff, Adelard Beaudette, against the Guarantee Company of North America to satisfy the judgment obtained by him in the Exchequer Court of Canada, acting as a Colonial Court of Admiralty, Quebec Admiralty District, against the steamer "S.S. Ethel Q.", owned by the opposants. The opposant has had two seizures by garnishment taken in its hands by creditors of the said Adelard Beaudette, and it has been ordered by the Superior Court for the District of Richelieu to pay out of the judgment rendered against the S.S. "Ethel Q." certain sums to the judgment creditors of the said Adelard

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Beaudette. The opposants are directly interested inasmuch as they are responsible to the Guarantee Co. of North America, should the latter be obliged to pay this judgment to Adelard Beaudette. The plaintiff, Adelard Beaudette, contests the two seizures by garnishment made in the hands of Messrs. Quinlan & Robertson, Ltd., on the ground that the Superior Court for the Province of Quebec has no right to interfere, by judgment on a seizure by garnishment, in any proceedings of the Exchequer Court of Canada in Admiralty.

He submitted that the Colonial Courts of Admiralty Act 53-54 Vic. C. 27. Imperial, declared that the legislature (sec. 3) of any British possession may by any colonial law declare any court of unlimited civil jurisdiction to be a Colonial Court of Admiralty, and may provide for the exercise of such court of its jurisdiction under that act and limit territorially or otherwise the extent of such jurisdiction. The Act declares in sec. 2 that the jurisdiction of a Colonial Court of Admiralty shall be the same as that of the Admiralty jurisdiction of the High Court in England. The Act further states in section 3 that no Colonial Law shall confer any jurisdiction upon the court which is not by the Act conferred upon a Colonial Court of Admiralty. In other words the jurisdiction of a Colonial Court of Admiralty cannot be greater than that enjoyed by the Admiralty jurisdiction of the High Court in England. The Dominion Parliament has by the Act 54-55 Vic. c. 29, s. 3, declared that the Exchequer Court of Canada shall be within Canada a Colonial Court of Admiralty, and as such shall have within Canada all the jurisdiction, powers and authority conferred by the said Act, and by this Act. In sec. 4, the Canadian Act declares that all persons shall have the same rights and remedies in the Exchequer Court of Canada as may be had in any Colonial Courts of Admiralty under the Imperial Act. In order, therefore, to find out what is the extent of the jurisdiction of the Exchequer Court of Canada in Admiralty, we must refer back to the laws in England governing the extent and power of the English Admiralty Courts. Now, since time immemorial there has always been in England a conflictof jurisdiction between the High Court of Admiralty and the Common

Law Courts; and on reference to Roscoe's "Admiralty Practice" it will be found that the jurisdiction of the Common Law Courts has practically always prevailed over that of the Admiralty Court. This was admitted by Lord Gorell in the British Columbia case of *Bow, McLachlan v. Ship "Camosun,"*[1] who declared: The history of the long contest between the civilians of the Admiralty Court and the Courts of the Common Law is well known and need not be gone into now. It resulted in the Admiralty jurisdiction being confined within certain well defined limits, which were however extended by the legislature in more modern times, but not sufficiently to include a suit to enforce such a claim as that made by the respondents.

He maintained this conflict of jurisdiction was finally settled by the Supreme Court of Judicature, Acts 1873-1875, which finally merged the High Court of Admiralty with the Courts of Common Law, Equity and Exchequer into a single court called the High Court of Justice. Although the effect of this Act was declared by Kay, L. J., in the Court of Appeal in the case of *The "Recepta,"*[2] to alter the position of the Court of Admiralty by making it a Superior Court of equal jurisdiction with other branches of the High Court, the Privy Council in the later case of *Bow, McLachlan* v. *S.S. "Camosun"* (*ubi supra*) declared that the Judicature Acts of 1873 and 1875, conferred no new Admiralty jurisdiction upon the High Court and that the expression "Admiralty jurisdiction of the High Court" did not include any jurisdiction which could not have been exercised by the Admiralty Court before its incorporation into the High Court or which may be conferred by statute giving new Admiralty jurisdiction. In England a garnishee order of the Common Law Judges has always been respected by the Admiralty Court. See the case of *The "Olive,"*[3] also *"Jeff Davis,"*[4] *The "Leader."*[5]

He submitted that these cases would show that the Admiralty Court of England always respected the garnishee orders of the Common Law Courts. What lends force to these decisions is the fact that they all occurred when the

[1] [1909] A.C. 597; Can. Rep. (1909) A.C. 306 at 339.
[2] 7 Asp. 359.
[3] 5 Jur. (N.S.) 445.
[4] 17 L.T. (N.S.) 151.
[5] 18 L.T. (N.S.) 767.

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Court of Admiralty in England was a court distinct from the Common Law, Exchequer and Equity Courts of England. The situation would not arise now, inasmuch as the High Court of Admiralty is now merged in the Probate, Divorce and Admiralty Division of the High Court of Justice.

He maintained that the Common Law Courts of Great Britain have always maintained that the Courts of the Colonies had the right to restrain, if necessary, the local Admiralty Courts. Previous to the Colonial Courts of Admiralty Act there were in the different colonies of Great Britain, when the colonies were less self-governing than they are now, certain Vice-Admiralty Courts. The Common Law Courts of Great Britain have alway sheld that the early Colonial Courts had the same right to restrain the Vice-Admiralty Courts as the Common Law Courts of England had to restrain the Admiralty Court in England.

In the case of *Key v. Pearse*,[1] Lord Chief Justice Lee is reported by Lord Mansfield to have declared that the Colonies take all the Common and Statute laws of England applicable to their situation and condition. See *Lindo v. Rodney*.[2]

In *Hamilton v. Fraser*,[3] it was held that a prohibition may issue from the Court of King's Bench to stay the proceedings in the Court of Vice-Admiralty.

Following these decisions prohibitions have been issued by the Court of King's Bench, Quebec, in the case of *Murphy v. Wilson* (1822), *Willis v. Soucy*, (1827), *Garret v. Morgan* (1834), and *Hurley v. Short* (1834). Although these cases are not in point they show the principle that a Vice-Admiralty Court is not of itself, unless clearly stated to be so by any act of the legislature, independent of the restraining orders of the Civil Courts. The exclusive jurisdiction, if any, of the Admiralty Court flows from the subject matter of the suit, and not from the constitution of the court itself. This was decided in the case of *Key v. Pearse*, *supra*, in regard to the jurisdiction of the Vice-Admiralty Courts in questions of prize money.

[1] Referred to in 2 Doug. 606 (99 E.R. 381).
[2] Referred to in 2 Doug. 613, n. (99 E.R. 385).
[3] Stu. K.B.R. (Que.) 21.

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He submitted that the contention that the Exchequer Court of Canada is superior to any Provincial Court is not supported either by the Acts of Parliament relating to the Exchequer Court or by the decision of the Privy Council. The jurisdiction of the Exchequer Court depends upon different statutes, it has exclusive jurisdiction only where an Act of Parliament specifically confers it, as in the case of the Exchequer Court Act. By that Act the Exchequer Court has exclusive jurisdiction between the Sovereign and the subject. Its jurisdiction is concurrent in the case of trade-marks, because the Trade-marks Act does not touch the Common Law right of the owner of an infringed trade-mark to seek his remedy in the Common Law courts.

The jurisdiction of the Exchequer Court in admiralty matters is limited by the Colonial Courts of Admiralty Act, see *Bow, McLachlan v. S.S. "Camosun."*[1] As the Imperial Colonial Courts of Admiralty Act allows the Dominion Parliament to only confer upon the Exchequer Court the same jurisdiction which the Imperial Parliament has conferred upon the Admiralty Division of the High Court of Justice, and as the English Admiralty Courts were and are obliged to respect the garnishee orders of the other divisions of the High Court of Justice, it therefore follows that the Dominion Parliament cannot, even if it was specifically so stated in the Canadian Admiralty Act, or any other Dominion Act, render the Exchequer Court of Canada in Admiralty immune by any stay of proceedings, or judgment upon seizure by garnishment rendered by any court of civil jurisdiction.

In the case of *Hodge v. Beique*[2] the Superior Court of Quebec held that it could not interfere in a case before the Exchequer Court, but that case happened to be a case within the exclusive jurisdiction of the Exchequer Court, and not a case in which both the Exchequer Court and the Superior Court had concurrent jurisdiction.

To contend that the Imperial Parliament intended by *the Colonial Courts of Admiralty Act* to set up in the Empire tribunals superior to the other courts in the different portions of the Empire is to take a point of view utterly

[1] [1909] A.C. 597; Can. Rep. (1909) A.C. 306 at 339.
[2] 33 Que. S.C. 90.

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opposed to the policy of the Imperial Parliament, which has been endeavouring during the latter part of the nineteenth century to give the overseas Dominions as much autonomy as possible, and such a step on the part of the Imperial Parliament would be quite incompatible with its whole policy.

He contended that after all there is really here no conflict of jurisdiction, inasmuch as the Exchequer Court has ordered the S.S. "Ethel Q." to pay to Beaudette a certain sum, and the Superior Court has ordered Beaudette to pay it to certain other parties and has seized the money in the hands of the persons ultimately responsible for its payment to Beaudette. The plaintiff might have contested the *saisie-arrets*.

His declaration that he was never notified of the issue of the writs of saisie-arrets-apres judgment is disproved first of all by the proces verbaux of the bailiffs charged with the service of the writs, and then again by the fact that the Superior Court for the district of Richelieu would not have rendered judgment on the saisie-arrets unless the writs had been properly served. The fact that the Superior Court rendered judgment on these saisie-arrets raises in this case the presumption against the plaintiff contestant, that they were served upon him. He must in this case be taken to have been served with them. The burden of proof was upon the plaintiff contestant to show that we had been served with the writs of saisie-arrets. By contesting these writs at Sorel he would have had a decision on the question of law now raised against the proper parties, and not against an innocent party, the tiers-saisie. *Vigilantibus non dormientibus jura subveniunt.* At the time of the issue of the writ of execution against the Guarantee Company of North America there were undoubtedly de facto, the judgments of the Exchequer Court in Admiralty and of the Superior Court. Even it if were to be decided now that the two judgments of the Superior Court were irregular, the opposant, at the time of the issue of the writ of execution could not have disregarded them, and decided on his own responsibility that they were ill-founded. The opposant could not then have taken justice summarily in his own hands. To have paid over the money to the

plaintiff-contestant in disregard to the judgments on the *saisie-arrets* would have rendered the opposant guilty of contempt of the Superior Court for the District of Richelieu. The opposant was therefore justified at the time of the issue of the writ of execution, in taking the stand that they (Quinlan & Robertson, Limited) could not pay the debt, and as the judgment of this honourable court was being executed upon the Guarantee Co. of North America the only recourse open to the opposant was to make this opposition.

The opposant therefore submits that as the plaintiff-contestant, Adelard Beaudette, did not contest the writs of *saisie-arrets*, at the proper time, at their issue, he has lost all rights to contest them as far as regards the opposant and its ship, the S.S. "Ethel Q."

In conclusion he maintained that in view of the interest of the other parties the least that could be done would be to order Dame E. Labelle and W. A. Sheppard, the seizing creditors, to intervene in this case, so that a final judgment be rendered, which would be binding on all parties.

Mr. Tucker followed, and said that the Superior Court did not do anything to infringe upon the jurisdiction of the Exchequer Court. All the Superior Court in the District of Richelieu did was to render a judgment to pay Sheppard some $700, and in execution of that judgment ordered the issue of a writ of attachment after judgment, a seizure by garnishee. Cites provisions of art. 1486, R.S. Que. 1909.

When this petition was presented to Mr. Justice Lafontaine in Quebec, the Judge said, "File a copy of the proceedings and let me see the claims," and when he saw the proceedings he said, "I have no jurisdiction, I cannot judge upon that matter." And it was perfectly reasonable. Cites art. 1487, R.S. Que. 1909.

It has been urged that the costs caused by the issue of the garnishee attachments was a useless expense. He could not understand that either, because in Dec. 1914, Sheppard obtained a judgment for some $700 against Beaudette. It was only in December, 1915, that the seizure was taken in the hands of Quinlan & Robertson.

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If Beaudette had got hold of this money, they could never have got a cent. Their only chance of being paid was to put a seizure in the hands of the person who had this money. Beaudette was condemned in the Superior Court to pay Sheppard. Beaudette did not satisfy that judgment; and the costs of this seizure Beaudette was condemned to pay which was perfectly legal and proper. Cites art. 1490 R.S. Que. 1909, also art. 940, C.C.P. (Que).

Mr. Powell submitted that there was nothing irregular or improper in the procedure followed, and that it was not competent for this court to review the judgment of the Superior Court.

Mr. Delorimier in reply submitted that the whole matter is really one of costs, and as to whether the right proceedings were taken. He could submit that they do not contend that there is any conflict of jurisdiction.

AUDETTE, J. (December 23, 1916) delivered judgment.

This is an appeal from the judgment of the Deputy Local Judge of the Quebec Admiralty District pronounced on June 9, 1916.

The facts of the case are set forth in detail in the judgment appealed from; they are somewhat complicated and intricate. However, when properly analyzed they resolve themselves into a very small compass upon which turns this appeal.

It is well as a prelude to state that counsel at bar for the appellant, Mr. Delorimier, abandoned his contention with respect to the question of conflict of jurisdiction—which indeed, was rightly decided by the local judge—the question remaining to be adjudicated upon being now in the result only a question of procedure and costs. And, indeed, than in this case, there is no greater exhibition of unnecessary costs.

Suffice it to say here that this was an action *in rem* against the vessel which under the provisions of the Admiralty Rules was released upon bail.

The plaintiff in such an action, by accepting bail, or when the vessel is so released upon bail, must not be taken to be in a worse position that if the vessel, the *res* itself remained

under or within the control of the Court. The bail or the security stands in lieu and stead of the *res*.

After bail had been furnished and the vessel released the case was proceeded with and finally the vessel-defendant was condemned, and here began the difficulties.

In the meantime the plaintiff, whose vessel had been damaged in the collision with the "*Ethel Q*", the defendant, proceeded to have his vessel repaired and for that purpose purchased timber from and had his vessel repaired by the claimants Labelle and Sheppard, who subsequently obtained judgments against him for the same and after judgment for such capital and costs seized in the hands of Quinlan and Robertson, Limited, who then and then *only* appeared to be the owners of the "*Ethel Q.*", the defendant herein. A seizure by garnishment was also subsequently issued in the hands of the bail, the Guarantee Company of North America.

A judgment was first obtained on September 24, 1915, in the District of Richelieu, P.Q., in the case of Sheppard against the garnishees Quinlan and Robertson, Limited, whereby the seizure was declared in force and whereby the garnishees were ordered to declare *de novo* after final pronouncement upon the judgment appealed from and to *deposit*. In the meantime after the judgment in Admiralty had been confirmed and the execution in question issued on October 1, 1915, the plaintiff Sheppard issued on October 5, 1915, another writ by garnishment in the hands of the Guarantee Company of North America, and judgment was obtained upon the same *only* on October 15, 1915.

In the Labelle case the first writ of garnishee was issued on May 11, 1915, against the garnishees Quinlan and Robertson, Limited, and on September 17, 1915, a similar order was made, namely, declaring the seizure good, ordering the garnishee to declare *de novo* after the disposition of the judgment in appeal in the Admiralty Court and to deposit (au greffe de cette cour) in the prothonotary's office, in the District of Richelieu. Subsequently, on October 5, 1915, another seizure by garnishment was issued against the Guarantee Company of North America and judgment was given upon the same only on October 15, 1915, ordering the

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garnishee to pay within 8 days from the service of such judgment.

It is important to note that the execution was issued in this case on October 1, 1915, that the seizure was made thereunder on October 4, 1915, and the opposition by Quinlan and Robertson, Limited, to stop this seizure, was also made on that date, October 4, 1915.

At that time there was no final judgment against either garnishees, these judgments in both cases being obtained only on October 15, 1915, against the Guarantee Company, and the writ by garnishment against the Guarantee Company had only been issued on October 5, 1915. after the writ of execution had been issued in this case.

What privity was there on the face of the record, at that date, as between Quinlan and Robertson, Limited, and the plaintiff, did not appear in the Admiralty Court.

As I have already said the *res* was in the Admiralty Court or was represented by the bail. What justification was there for Quinlan and Robertson, Limited, to file this opposition, I fail to see, unless a defendant debtor could be justified in filing an opposition against all executions, in case he had other creditors. Instead of filing his opposition he should have paid or deposited or caused the bail, the Guarantee Company, to deposit the amount of the bail in the Court already seized with the *res*, or deposit in the Provincial Court as ordered, *the same acting as an assignment pro tanto* and deposit the balance in the Admiralty Court. What justification have Quinlan and Robertson, Limited, to have entirely ignored the judgments given in September, 1915, in the District of Richelieu, ordering them to deposit with that Court? Did they so ignore them to make further costs by filing this opposition?

The opposants, Quinlan and Robertson, Limited, ignoring both the execution issued herein on October 1, 1915, and the judgments of the District of Richelieu, ordering them in September, 1915, to deposit in that district the amount of the liability in the cases of Sheppard and Labelle, under the provisions of art. 1486 and 1487 R.S.Q., 1909, deposited on October 13, 1915, with the Provincial Treasurer, P.Q., the amount of the condemnation herein against the vessel "*Ethel Q.*". Why was not

that done at the beginning instead of filing an opposition—the multiplication of proceedings and unnecessary costs would have been saved, and the Court should not encourage or countenance them; its duty being to administer the law between the parties and not to be influenced by mere technicalities of procedure which may in the circumstance of any particular case operate as a denial of justice. The bail or the opposants were avowed debtors and had either to pay or deposit in this Court and in pursuance to previous judgment, and not to resort to unnecessary proceedings and costs.

And can art. 1486 and 1487, R.S.Q. 1909, apply to a case like the present? Indeed the English version of art. 1486 says, that whenever any person desires to pay any sum of money which is demanded of him by *contending claimants*, he may deposit with the Provincial Treasurer. However, the French version, which must prevail in case of doubt, is much clearer and says: "Lorsqu'une personne désire "payer une somme d'argent qui lui est demandée *pour* "*des réclamations en contestations*, etc., elle peut déposer "au bureau du Trésorier."

That is, where claims are not finally settled and in course of contestation such deposit may be so made, but would that apply to cases where there is no more contestation and where judgment has been given thereby putting an end to any contestation? Could arts. 1486 and 1487 apply to cases where there has been judgment? It would seem from the reading of art. 1487 that it would not, since the amount is to be paid over by the Treasurer to the party entitled to it upon filing with him a copy of judgment to that effect.

At the date the opposants deposited there were two judgments in the Provincial Court ordering them to deposit with that Court the amount due in the cases of Sheppard and Labelle respectively. There was also the judgment in this Court under which execution issued on October 1, 1915.

It would seem that art. 1486, R.S.Q. 1906, did not apply to cases wherein the contestations had been decided by courts of competent jurisdiction.

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By choosing to deposit with the Provincial Treasurer as they did, on October 13, 1915, the opposants established thereby, it was absolutely unnecessary to file an opposition *afin d'annuler* and occasion costs without justification. The opposition *afin d'annuler* had no practical result except that of making costs and complicating matters, since the opposants finally deposited.

Furthermore since the local judge has held—and that holding is concurred in by this Court in the present judgment—that the Admiralty Court is bound to recognize garnishee proceedings in the other courts in the Province, the opposant had no other course to follow than to deposit in the local court the amount and the amount only of the condemnation pursuant to the judgments of such Provincial Court ordering such deposit which had been ignored by the opposants and further to deposit in the Admiralty Court the balance of such monies with copies of judgments of the Provincial Court. There never was any occasion to file the opposition.

However, this matter righted itself later on by the order of the deputy local judge in Admiralty ordering the monies to be deposited in the Admiralty Court and calling in the two judgment creditors as he had the right to do under the rules of this Court. What justification can there be for filing the opposition? I am at a loss to understand. What was actually and eventually done was so done in a circuitous manner through the opposants' unnecessarily multiplying and occasioning a welter of proceedings and costs and finally landing where they should have started from. Indeed they should have deposited as above mentioned, both in the Provincial and the Admiralty Courts and not with the Provincial Treasurer.

The opposition *afin d'annuler* is dismissed with costs, both in this Court and in the Court below.

Coming now to the two claims made by Labelle and Sheppard who, rightly or wrongly, are herein called *intervenants*, it must be found they were both merely judgment creditors and there was no reason for the plaintiff to contest their claim upon the grounds set forth in his plea to the intervention which is purely technical, formal, without substance and unfounded. These two claimants were

entitled to be paid; and the place for a contestation of these claims, if they had any, was before the Provincial Court.

The contestation of these two interventions was not made, under the circumstances, upon justifiable grounds and should be dismissed with costs in this Court and in the Court below.

Therefore, with such modification and variation, the following judgment should be entered:

1. The court and judges fees shall be paid by the respective parties liable therefor, under the tariff of the Court.

2. The opposition *afin d'annuler* should be dismissed with costs in both courts against the opposants Quinlan and Robertson, Limited, including costs of seizure, and such costs shall not be paid out of the monies deposited in court.

3. The contestations of the two interventions shall also be dismissed with costs in both courts to be paid out of the monies deposited in court.

4. The claims of the two *intervenants* with costs to be paid out of the monies deposited in court.

5. The balance, if any, of the monies so deposited herein shall be paid to the plaintiff, reserving all his rights under his judgment obtained in the Court for any portion thereof remaining unsatisfied.

*Judgment varied.**

* Affirmed on appeal to Supreme Court of Canada, June 2nd, 1917.

Solicitors for Adelard Beaudette, plaintiff appellant: *Angers, Delorimier & Co.*,

Solicitor for *S.S. "Ethel Q."* and Quinlan and Robertson, opposant : *A. Vallee.*

Solicitor for Dame Eugenie Labelle, claimant intervening: *Hibbard, Gosselin & Moyse.*

Solicitor for William Albert Sheppard, claimant intervening : *Henry Tucker.*

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Jan. 15

TORONTO ADMIRALTY DISTRICT.

CANADIAN SAND AND GRAVEL COMPANY, LTD., PLAINTIFFS.

AND

THE "KEYWEST".....DEFENDANTS.

Collision—Narrow Channel—Canal—Rules and Regulations—Negligence—Apportionment of damage—Costs—Discovery.

The captain of a ship must strictly obey the Regulations prescribed for the navigation of Canadian Waters and Canals.

The only exception to a rigid compliance with the Rules is when it appears with perfect clearness amounting almost to a certainty, that adhering to the rule would have brought on a collision and violating the rule would have avoided it.

When a ship is on the "wrong" side in a narrow channel, and has a current to deal with, she must proceed with more than the usual caution.

Principle affirmed that when a ship with ordinary care, doing the thing that under any circumstances she was bound to do, could have avoided the collision, she ought to be held alone to blame for it, even though another ship may have been guilty of some breach of the Rules, but which did not contribute to the collision.

The Rules of the Department of Railways and Canals, except where they indicate the contrary, govern vessels using the Canals, and are not intended merely for the preservation and safety of the Canals.

No costs can be allowed for examinations for discovery unless preceded by an order of the Judge.

ACTION by the plaintiffs against the ship "Keywest" to recover damages for injuries to the plaintiff's scow "Helena Battle," as the result of a collision which took place in the Welland Canal.

The trial of the case took place at St. Catharines, on January 15, 1917, before Hodgins, L. J., and judgment was delivered at the close of the argument dealing with the facts, but reserving for further consideration the effect of the signal given by the captain of the tug "Battle" as to which written arguments were submitted by counsel.

W. M. German, for plaintiffs: *R. H. Parmenter*, for defendants.

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Reasons for Judgment.

The following judgment was delivered at the close of the trial by HODGINS, L.J.:

The accident out of which this action arose occurred in the Welland Canal just below the lock that has been spoken of and in a reach or level which is known as the long level. The "Keywest" was a single screw steel built steamer, 250 feet long with a beam of 42 feet 6 inches, 1,300 tons register, with a speed of 10 miles an hour, and was going southward towards Lake Erie. She was light, in ballast. Seeing the tug "Battle" with a tow, "Helena Battle", coming down (northward) the "Keywest" tied up at a point which, according to the map put in as Exhibit "3", would be 800 feet north of the point of the pier which forms the west side of the lock, and just opposite the storehouse known as the cement storehouse. The tug and tow came through the lock, and the tug had got beyond the point of the pier going north and had turned towards the west bank, the object being to go down on the west side and straighten the tow after her for the purpose of passing the "Keywest".

Now, the situation at that point was that the "Keywest" was tied up fast to the eastern bank, and the tug and tow were moving towards her. It is said that the "Keywest" signalled to cast off her line by blowing a single blast just at that moment and that the captain of the tug on hearing it gave two blasts with his whistle, indicating that he was intending to pass on the starboard side, and that the "Keywest" answered with two signals accepting that notice and therefore intending herself to keep to the east side of the channel, which is apparently, according to the Regulations, the wrong side for her to have been on. I find as a matter of fact upon the evidence that no signal was given by the "Keywest" originally, so that the matter must be taken as if the first signal came from the tug. The result of what happened was the collision, a collision which the captain of the "Keywest" thinks might have been averted if he had remained tied up, and what I have to decide is whether the captain of the tug failed in his efforts within a reasonable distance to straighten up his tow so that it would clear the "Keywest" on her upward course, she going against the

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current, or whether the accident happened as a result of the "Keywest" moving from her position where she was tied up, contrary to the provisions of Rule 22 of the Rules which are put in as Exhibit "5". That rule is that "All vessels approaching a lock, while any other vessel going in the contrary direction is in or about to enter the same, shall be stopped and be made fast to the posts placed for that purpose, and shall be kept so tied up until the vessel going through the lock has passed. Any violation of this provision shall subject the owner or person in charge of any such vessel to a penalty of not less then 4 dollars and not exceeding 20 dollars". Counsel have agreed that the tug and tow are to be treated as one vessel, and I have so noted it, so that the tug and tow treated as one vessel were within the meaning of the rule in or about to enter the lock when sighted and the tow had not yet fully emerged beyond the point of the pier, when the tug sounded its 2 blasts. The "Keywest", recognizing her duty, was tied up, and under that rule should have remained tied up until the vessel going through the lock passed her. It is true she tied up on the wrong side of the canal, because her proper side was the other, but it is in evidence that there were no posts upon that side and that the posts, for that purpose, are placed on the east side. It is also said by one of the witnesses that that is the practice at all events over his experience of nine years.

Now, I have to find in the first place where this collision occurred. The "Keywest" tied up 800 feet from the point of the pier and is said by her captain to have moved some 200 feet. That, of course, like all other figures in these cases is approximate. Nobody measured it, and it is always a difficult question to decide as to the exact distance. The length of the "Keywest" is 250 feet, and she is said to have gone her length, which would make the distance 250 feet. That would leave 550 feet from the point where she was tied up, but one must remember that if she was tied up at 800 feet outside the cement dock or cement warehouse, that that after all is to a certain extent approximate. The assumption is made that she was tied up exactly opposite the middle of it, and her bow would be nearer than 800 feet and that would reduce the distance of 550

feet somewhat. Roughly speaking, however, 500 feet is about the distance from the end of the pier to where the "Keywest" says she was when the collision occurred.

The result of the other evidence is, roughly speaking, that the collision occurred 300 feet south of the point of the pier. I might mention that the tug is 70 feet long with a tow line of 20 feet, said to be taut and straightened out as she came along, and the tow is 125 feet long. That makes a total length of 215 feet, so that if the collision occurred 300 feet south of the point it must have occurred after the tug and tow had got clear of the end and were proceeding down the canal.

I cannot help thinking and I find upon the evidence that the "Keywest" must have gone farther than 200 feet. The evidence that has been given as to her speed is that she went about a mile an hour. If that were exactly accurate both as to time and speed it would make her progress about 186 feet. That is said to have been done in a minute. The engineer who was called speaks of giving her full speed ahead, that she got her speed gradually during half a minute and then ran for half a minute at full speed, traversing the ship's length, and then he got a signal to go full speed astern which he gave the vessel, but he cannot tell how far she ran after he reversed. The captain of the "Keywest" said that she was moving when the impact occurred, and this would carry her in my judgment a good deal nearer to the end of the pier than 500 feet. It is said that as soon as the captain of the "Keywest" realized that there might be a collision he reversed his propeller and that while that would have thrown his bow to starboard under ordinary circumstances he thinks the current affected him there so that what was usual did not as a matter of fact occur. Two of the witnesses for the plaintiff say that the reversal of the propeller would and did throw the bow to starboard and in that was caused the collision. I think there is little doubt, as I have said, that the "Keywest" was moving. The effect of the evidence as to the damage convinces me that the collision must have been between two moving objects because the effect of it upon the tow was such as to open the seams to a very large extent, something that would not have happened

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had the blow been a mere glancing blow between a vessel coming down stream and brushing against another one that was stationary. So far as the "Keywest" is concerned, and apart from the question of invitation which I will deal with in a moment, the captain of the "Keywest" admits that it is always difficult in going north to deal with the current which is there found. That he was aware of the current is clear and I think it must be taken that when he cast off his line and moved up he did so with the consciousness that the tug and tow coming down were in a difficult position owing to the current, and particularly so because the channel here is extremely narrow, being only from 100 to 125 feet. The beam of the "Keywest" is 42 feet 6 inches. There is said to be a boom or float along the east side of the canal extending out about 5 feet, so that if the vessel had been tied up and remained there she would have occupied very nearly 50 feet, leaving from 50 to 75 feet for the manoeuvering of this tug and tow coming down and straightening up.

I think under those circumstances and as the "Keywest" was upon the wrong side the captain knowing he was on the wrong side, although as I have pointed out he probably had very little option as to where he would tie up, that with such an extremely narrow channel and the current to deal with he should have proceeded with perhaps more than the usual caution, especially as he himself admits that he knew nothing of towing.

Apart then from the question of the effect of the signal I should hold that the "Keywest" was negligently navigated in casting off at that time contrary to Rule 22 and in proceeding towards the lock while the tug and tow were in the act of passing out of it and were affected by the current, and had not yet reached a position where the captain of the "Keywest" ought to have seen they had reached, namely of being straightened out to pass on the proper side. But that does not wholly dispose of the case because it is quite possible that the tug and tow may have been guilty of negligent navigation or negligence of some sort which would require me to apportion part of the blame to them and if Mr. Parmenter's point is well taken it may be that what was done in giving the signal which he

spoke of entirely absolved the "Keywest," or at all events it may result in my having to find that the tug and tow were partly responsible and in that way I would have to apportion the blame between the two. I propose, however, to reserve judgment upon the point as to the effect of giving the signal so that either party may put in any authorities they may have, but I will deal with it so far as I can subject to that.

The captain of the tug, whether a signal to cast off was made or was not made, was the one who first made the signal that he intended to pass upon the starboard side, and that in itself was something which I think he had in his own hands to determine. In coming out of the lock with a vessel 800 feet away he had I think a right to signal which side he would pass on, whether he would go to his own side or not. That is assuming that the "Keywest" were afloat. If the "Keywest" were tied up and came within Rule 22 then his signal might be an indication to that vessel to untie and proceed, and it is on that point I am somewhat doubtful. All I can say about it now is the signal is the only means of communication between two vessels and is a very important fact in dealing with the rights and wrongs of this case. It is the only way one vessel can speak to another, and it was given at a time when the captain of the tug had not yet got his tow clear of the lock, or of the pier, and therefore was given at a time when there still remained something for him to do before the channel would be left clear for the "Keywest" to use. He admits that he knew the scow would swing to the east, and he said that he thought the scow would straighten up and he did not expect the "Keywest" so quick. He also says that he would expect to straighten his tow out about halfway down. Now, halfway between himself and the "Keywest" would be about 400 feet, probably just about where the collision occurred, and he therefore, it seems to me, took chances in a case where he need not have taken any chances, and gave a signal which might possibly mislead. Of course the signal he gave is one primarily intended for two vessels afloat and approaching one another, and whether those two blasts would indicate, to a captain who was fast to the side of the canal under Rule 22—when he

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knew he must wait till the vessel passed—anything more at that time than that as the "Keywest" was tied up on the wrong side of the canal the captain of the tug intended to pass him on the starboard side, in other words assuring the captain of the "Keywest" that the captain of the tug was satisfied with the situation and would continue down upon what would otherwise be his wrong side is a question which I shall have yet to decide upon. I must satisfy myself as to the effect of the giving of a signal which under those circumstances is not appropriate to the situation and which is somewhat calculated to mislead.

Therefore my findings will be that the "Keywest" was, subject to the effect of that signal, negligently navigated and I will reserve the other question as to whether the effect of the signal given in the way and at the time when it was, is such as to either entirely absolve the tug and tow, or whether it leaves the matter so that both parties are to blame, in which case I have to apportion the damages.

As to the damages, the $674.78 will be reduced to $670. I have not heard any objection to any item except the one of about $5 which I disallow. As to the profits lost on the 4 or 5 trips I do not think I can allow more for that then the amount claimed originally, $200. While I think those lost profits are properly recoverable they are always indefinite and indeterminate, they are what might have been made, and in this case the contract in fact was ultimately completed without loss, so that these damages are based upon the idea that if he had had the vessel and had completed his contract at an earlier date he would have made out of other possible trips the sum he has stated. The $90 which is claimed will also be allowed, so that I fix the damages at $960. How this is to be borne is subject to the determination of the question I have mentioned, and the costs will probably follow in accordance with my finding upon that point.

Mr. Parmenter: Might I direct your Lordship's attention to one fact in connection with the width of the canal. Mr. Smith said it was 130 feet, and I understand he measured it. If your Lordship will scale it on the map, you will find it is more than 100 feet.

HIS LORDSHIP: I think I have to go upon the evidence, but if I take the scale it is in one place 130 feet, or about 125 feet as nearly as one can gather. Even if I am wrong in assuming there was only 50 or 52 feet, I do not know that that affects the position. It is understood that this map which has been put in is drawn to scale of 100 feet to 1 inch, and anybody can have the benefit of the scale.

The learned Judge (January 27, 1917), delivered judgment upon the point reserved for further consideration.

At the close of the case I gave judgment finding that the "Keywest" had been negligently navigated and had caused damage to the extent of $960. I reserved for consideration the effect upon that finding of the signal given by the tug "Battle", which it was argued was misleading to such an extent that the "Keywest" should be absolved in whole or in part from the consequences resulting from her action thereafter. I did not find that apart from that signal and the time of its being given the navigation of the tug and tow was faulty. I do not see that there is, in the canal regulations, anything requiring the "Keywest" to tie up upon the west side, and what I have said about being on the wrong side must be understood as in relation merely to navigation in the canal when one vessel is meeting another. The tying up on the east side was not considered by me when giving judgment at the trial as in any sense a negligent act. It produced a situation which would require the tug "Battle" to take the west side if the "Keywest" remained where she was.

The signal given was two blasts which, under the regulations in force, as published in the Canada Gazette of March 25, 1916, is defined in Rule 21 as follows:

"In all weathers every steam vessel under way in taking "any course authorized or required by these rules shall "indicate that course by the following signals on her "whistle, to be accompanied, whenever required, by "corresponding alteration of her helm; and every steam "vessel receiving a signal from another shall promptly "respond with the same signal or sound the danger signal as "provided in Rule 22:—

"Two blasts mean, 'I am directing my course to port.'"

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In Rule 25 there is a provision that in all narrow channels where there is a current, the descending steamer shall when two steamers are meeting have the right of way, and shall before the vessels have arrived within the distance of one half mile of each other give the necessary signal to indicate which side she elects to take.

Rule 29 which deals with all channels less than 500 feet in width requires vessels meeting each other to slow down to a moderate speed according to the circumstances.

Rule 31 is as follows:

"When two steam vessels are meeting end on, or nearly "end on, so as to involve risk each shall alter her course "to starboard, so that each shall pass on the port side of "the other."

Rule 37 requires that in obeying these rules attention is to be paid to the dangers of navigation and collision and to any special circumstances which may render a departure from them necessary in order to avoid immediate danger. The case was argued on the assumption that the Navigation Rules of April 20, 1905, were applicable, but they were superseded on March 1, 1916, by those I have mentioned.

I have already noted the Canal Rule No. 22 (*b*). The signal given being, as defined, "I am directing my course to port" was properly answered by a like signal. Read literally it was a reasonable signal to give, and it is a mistake to read it as an invitation to cast off. It in no way suggested that. If it did, then under Rule 23, if the master of the "Keywest" deemed it injudicious to comply with it, he sould have sounded the danger signal.

The "Keywest" was directly in the way of the tug and tow, if Rule 31 applies to the case of a stationary vessel. If it does not, then the usual rule is that the moving vessel must keep out of the way of one that is tied up. Hence the tug was bound or entitled to give and indicate its course (see Rule 24), a thing that could do no harm and might be of assistance to the "Keywest" by stating exactly what the tug and tow intended to do, *i.e.*, to cross to and come down alongside the west bank of the canal.

After giving the situation the best consideration that I can, I am unable to see anything in what was done by the

tug master in signalling as he did that would afford a reason for the master of the "Keywest" disobeying the explicit terms of Canal Rule 22 (*b*) which required him to remain fast till the tug and tow had passed. I should add to what appears in the judgment given at the close of the case that in the "Keywest's" preliminary act it is stated that the collision occurred some 300 feet below the lock and that there is a strong current running from a waste weir on the west side of the lock.

In the "*Heather Belle*,"[1] a learned local judge expresses the opinion that signals such as used here applied when the vessels were in sight of each other, and that, if inapplicable to the circumstances, the master of the "Fastnet" was not bound to govern himself by them. This last is putting it, I think, a little more strongly than is warranted. But in this case the signal, if applicable, did not cast any duty on the "Keywest". That was already determined by the rule.

The principle laid down in *Porter and Heminger*,[2] is reasonable and should be followed. It is that where a ship with ordinary care, doing the thing that under any circumstances she was bound to do, could 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. I am unable to conclude, under the circumstances of this case, that even if the master of the tug may have expected the "Keywest" to move, his view is of any importance, if the signal given was, in itself, a proper one.

Adherence to the rules is insisted on in every case unless it appears with perfect clearness "amounting almost to certainty that adhering to the rule would have brought on a collision, and violating the rule would have avoided it." *Boanerges* v. "*The Anglo-Indian*,"[3] *S.S. "Cape Breton" and Rich. & Ont. Nav. Co.*[4]

It was objected that the Rules of the Department of Railways and Canals were not binding upon these vessels in the sense that violation of them was not equivalent to disobeying navigation rules, and that these canal rules were

[1] (1892), 3 Can. Ex. 40 at 48.
[2] (1898) 6 Can. Ex. 208.
[3] 2 Asp. Mar. L. Cas. 239.
[4] 36 Can. S.C.R. 564 at 574, [1907] A.C. 112.

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only intended for the preservation and safety of the canal and its works.

I think these rules govern those using the canals except where they indicate the contrary, and are within the competence of the Department to pass as dealing with the proper use of the canal. They have been so treated in the recent case in the Supreme Court of Canada, of *Bonham* v. *The "Honoreva,"*[1] where Mr. Justice Anglin points out that Rule 22 (*b*) clearly governs vessels using the canal. The violation of this rule 22 (*b*) is unlawful and is subject to a penalty. Even if there were no Rule 22 (*b*), and the "Keywest" under the circumstances detailed cast off and became therefore a vessel under way (see Preliminary Definitions and Rule 27), and subject to the passing rules, my opinion would be that the tug and tow having the right of way, the navigation of the "Keywest" was negligent in not remaining where she was instead of forging ahead, in view of the obvious position of the tow and the current which was then slewing it round.

For these reasons I cannot find that the tug and tow were to blame. Judgment must therefore be entered for the plaintiffs for $960 and costs. I should point out that no costs for examinations for discovery can be allowed in Admiralty cases unless preceded by an order of the Judge. Indeed it is doubtful if there is any warrant for this procedure.

Judgment for plaintiff.

Solicitors for plaintiff: *German and Marwood.*

Solicitors for defendant: *Thomson, Tilley and Johnston.*

[1] (1916), 54 Can. S.C.R. 51, 32 D.L.R. 196.

BRITISH COLUMBIA ADMIRALTY DISTRICT.

1913
Feb. 28

PATERSON TIMBER CO., LTD.....PLAINTIFF;

v.

THE S.S. "BRITISH COLUMBIA".....DEFENDANT.

Collision—Tug and tow—Boom of logs—Lights.

In an action against defendant ship for having run through and scattered a boom of logs belonging to the plaintiff while being towed by plaintiff's steam tug, the collision having occurred at night at a difficult point of a channel:

Held, that the collision was occasioned by the tug's negligence (1) in showing misleading lights; (2) having too long a tow; (3) displaying insufficient lights on the boom; (4) and losing control of the boom and blocking the channel.

Also, that a boom of logs is not a vessel within the meaning of the regulations

ACTION *in rem* to determine liability of defendant ship colliding with and scattering a boom of logs belonging to plaintiff company.

Tried before Mr. JUSTICE MARTIN, Local Judge of the British Columbia Admiralty District, at Vancouver, November 4, 1912.

Craig, for plaintiff; *W. B. A. Ritchie*, K.C., for defendant.

MARTIN, L. J. (February 28, 1913) delivered judgment.

This is an action against the cargo s.s. "British Columbia" (Gustave Foellmer, master; length 170 feet) for having run through and scattered a boom of logs belonging to the plaintiff company while being towed by its steam-tug "Erin" (Robert W. McNeill, master), at the northerly entrance to Porlier Pass from the Gulf of Georgia about one o'clock a.m. on December 15, 1911. The weather was clear, occasionally overcast; wind, light S.E.; tide on the last of the flood about ¼ or ½ hour before high water slack, setting out towards the Gulf at about one and a half knots an hour. The boom was of 22 swifters, 1,500 feet in length with a tow line of 240 feet, total length, exclusive of tug, 1,740 feet, and the tug and boom had been in the neighbourhood and a little to the east of the red bell buoy at the entrance to the channel since about 11.30,

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holding that position waiting for the strong tide to slacken, the tug being past the buoy, and the boom stretching behind, considerably beyond the buoy, on to which the tide sets, both flooding and ebbing. As the tide slackened the tug gradually crept up till at the time of the collision the boom was about half way past the buoy. The towing lights carried by the tug were 2 bright white lights in a vertical line, ostensibly under art. 3, and a white light 6 feet high about 40 feet from the end of the boom. This last light was not "a bright white light" within the definition of art. 2 (*a*), but merely an ordinary ship's lantern with a range of visibility not deposed to exceed 1½ miles instead of "at least five" as the article requires a bright white light to have.

A boom of logs is admittedly not a vessel within the meaning of the regulations, and there is unfortunately no article, strictly speaking, which provides for the lights that should be carried when a steam vessel has such a tow, and, apart from the boom light, the proper inference to be drawn from such lights as were here displayed would be that the tug had in tow a vessel or vessels not exceeding 600 feet in length. The nature of the scene of the accident may best be gathered from the following extract from the Admiralty "British Columbia Pilot," 3rd ed., 1905, p. 130, put in by consent:—

"Porlier Pass into Georgia Strait, though short (not "exceeding one mile from its southern entrance until fairly "in the strait) is narrow, and is rendered still more so by "sunken rocks; the tidal streams run from 4 to 9 knots, "and overfalls and whirling eddies are always in the north-"ern entrance.

"CAUTION:—In consequence of the numerous dangers "existing in Porlier Pass, mariners are advised to avoid "that passage."

This being admittedly a locality to be avoided it was incumbent upon those who elected to use it to exercise a degree of caution commensurate to the circumstances, and obviously it was a place where it would be difficult to handle a long boom, and only a few booms a year are taken through it, though used constantly by tugs with barges. The master of the "Erin," who on two prior occasions had fouled the

bell buoy with a boom, seems to have realized this because on approaching the bell buoy he shortened the scope of his tow line from 120 to 40 fathoms, but even at the reduced length I am satisfied that the tug and tow were still far too long for safety; even 1,200 feet would have been unsafe in the circumstances.

When the "British Columbia" opened the pass at its southern end she saw the tug, about 1½ miles off, apparently heading across the channel behind Race Point on the west side thereof showing the two towing lights (in addition to the customary lights which were duly shown by both vessels), but did not see the boom light, and proceeded at a speed of 7½ knots (her full speed being 9½) on the usual course, keeping a little to the westward of the two fixed "leading lights" bearing S. 5°E, on Galiano Island set up for the purpose of leading a vessel through the northern entrance into the Gulf a little to the east of the bell buoy. Keeping a little to the westward of that range course so as to be sure to clear the tug, and after exchanging certain signals, which do not affect the matter, she came up to the "Erin" and passed between her and the bell buoy, in the belief, as the master and first officer testify, that the tug was towing a vessel or vessels not longer than 600 feet, and never expecting to encounter a boom, the light on the end of which they did not observe till after they had passed the "Erin," which by this time had advanced a little with the boom so that about half of it was past the bell buoy. They were keeping a proper look out, and when they saw the boom light it showed as beyond and to the westward of the bell buoy, and broad on the port bow, about 4 points, and was taken to be that of a fishing boat, and as they thought they had passed the tow they proceeded and did not notice the boom till they were almost upon it, the logs not being visible for more than 50 feet or so in the water, and had only time to stop the engines before crashing through it.

The evidence was somewhat conflicting as to the position of the boom, the master of the "Erin" contending that no part of it was within 300 feet of the bell buoy, but his evidence is contradicted by one of his own seamen, William Macdonald, who on cross examination admitted that the

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tail of the boom had become twisted in towards the bell buoy, and as this important statement corroborates the evidence of the "British Columbia's "officers I accept their contention that the channel had become blocked by the boom. It was urged that even so, the "British Columbia" was in fault for not having slackened her pace, or stopped, or gone to the westward of the bell buoy, and I was at one time impressed by this submission, and for that reason have given this matter much attention, with the result that having regard to the condition of affairs that really existed, and that which the "Erin" led the "British Columbia" to believe existed, no blame can be attributed to her. If the boom light had been of such a description and so situated, or if the vertical lights had been of such a description that it or they conveyed a reasonable intimation to the "British Columbia" of the true state of affairs, then I should have found that she had negligently contributed to the collision, but as the matter stands I am forced to the conclusion that she was misled as to the nature and length of the tow, and also that the channel was, unknown to her, improperly and dangerously blocked against her. The point is that the officers of the "British Columbia" were never placed in the position of being compelled to consider the taking of any other steps than those they did take on the facts as they were unfortunately made to appear to them. I can only reach the conclusion that this collision was occasioned by the "Erin's" negligence in four particulars, viz.: (1) showing misleading lights (cf. The *Devonian*);[1] (2) too long a tow; (3) insufficient lights on the boom; and (4) losing control of the boom and blocking the channel, as to which this case is stronger against her than that of the *"Athabasca;"*[2] wherein that vessel was held justified in breaking through a raft 1,200 feet long, in daylight, in the River Ste. Marie. Some apt cases on this question of the duties and responsibilities attendant upon the towing of booms, rafts and low lying craft, are: the *"Alicia A. Washburn;"*[3] The *"John M. Hay,"*[4] The *"Gladiator;"*[5] *Consolidation Coal Co. v. The "Admiral Schley;"*[6]

[1] (1901), P. 221.
[2] (1890) 45 Fed. 651.
[3] (1884) 19 Fed. 788.
[4] (1892) 52 Fed. 882.
[5] (1897) 79 Fed. 445.
[6] (1902) 115 Fed. 378.

The "Patience";[1] *N.Y.O. & W. R. v. Cornell Steamboat Co.;*[2] *Harb. Commrs. of Montreal v. The "Universe."*[3]

As to the light that was carried on this boom, I have decided only that it was insufficient and have said nothing as to the number of lights that should have been carried on it, or on booms or rafts of varying lengths in these waters, because that is not a matter for me to decide, but is one to be brought to the attention of the Federal Government by those interested, and this case shows the importance, and indeed urgency of the matter, not only for the benefit of mariners, shipowners and lumbermen, but for the protection of the travelling public.

Judgment for defendant.

Solicitor for plaintiff: *Craig.*

Solicitor for defendant: *W. B. A. Ritchie*, K.C.

[1] (1908) 167 Fed. 855.
[2] (1911) 193 Fed. 380.
[3] (1906) 10 Can. Ex. 352.

1915
June 18

BRITISH COLUMBIA ADMIRALTY DISTRICT

HIS MAJESTY THE KING.....PLAINTIFF.

v.

THE "DESPATCH".....DEFENDANT.

(No. 1)

Admiralty—Practice—Crown—Security—Stay of Proceedings—Consolidation of Actions.

In an action by the Crown against a ship for damages for a collision and a cross-action *in personam* by the owner of the ship against the master of a government tug for damages resulting from the same collision, the Admiralty Court will entertain a motion under Sec. 34 of the Admiralty Courts Act, 1861, for a stay of proceedings until security for judgment is given by the Crown, and for a consolidation of the actions.

Where the Crown invokes the jurisdiction of the Court as a plaintiff, the Court may make all proper orders against it.

MOTION under sec. 34 of the Admiralty Courts Act, 1861, for a stay of proceedings in an action by the Crown until security is given.

Heard by Mr. Justice Martin, Local Judge of the British Columbia Admiralty District, at Victoria, June 18, 1915. *R. C. Lowe*, for plaintiff; *E. C. Mayers*, for defendant.

MARTIN. L. J. (June 18, 1915) delivered judgment.

This is a motion under sec. 34 of the Admiralty Courts Act, 1861, by the owners of the defendant ship to suspend the proceedings in this cause by the Crown against said ship for damages by collision to the Canadian Government tug "Point Hope" until the Crown has given security to answer a judgment which the defendants hope to recover in a cross cause *in personam* begun by them against one W. D. McDougal the master of the said tug "Point Hope", and servant of the Crown, for damages alleged to have been caused by said tug under his command to the said

ship "Despatch" in the same collision upon which this action is brought, and also that it may be ordered that the two actions shall be tried at the same time and upon the same evidence. The defendant ship "Despatch" has been arrested and bailed, but the "Point Hope" being a King's ship cannot be arrested[1], nor the Crown sued for damages caused thereby, so the officer in charge has been sued *in personam*[2]. I pause to observe that in the case of the *Lord Hobart*[3], a packet in the service of H. M. Post Office, but belonging to private individuals, was arrested, to answer a claim for wages, the Post Office having no objection to such a course in cases of that kind, and having dispensed with the customary notice.[4]

The Crown has refused in this action to give security after demand therefor.

If the Crown were not a party there could be no answer to the application, and indeed it was only opposed on the point on which I desired further argument and authority, *viz.*: as to whether or no it was proper to stay an action by the Crown and so in effect to compel it to give security in its own court. Counsel have been unable to direct my attention to any case exactly in point, but have referred me to the following authorities:[5] I extract from them the general rule, well stated by Osler, J. A., in *Regina v. Grant*, *supra*, (where the question was one of dispensing with a jury), that as regards procedure "the Crown, coming into the High Court is in the same position as the subject" just as, on the other hand, as Burton, J. A. put it[6] when in that Court "The Queen.....cannot be entitled to less rights than those of the meanest of her subjects,"

[1] *The Comus* (1816) 2 Dod, 464; *The Athol* (1842), 1 W. Rob. 374.

[2] Roscoe's Adm. Prac. 3d. ed. 178 (note l), 302; Williams & Bruce Adm. Prac.. 3d. ed. 89, 262; *Hettihewage v. The Queen's Advocate* (1884) 9 A.C. 571, 586; *H.M.S. Sans Pareil* [1900] P. 267; *H.M.S. King Alfred* (1913) 30 T.L.R. 102; *H.M.S. Hawke* (1913) 29 T.L.R. 441; [1913] P. 214.

[3] (1815) 2 Dod. 100.

[4] id. p. 103.

[5] Adm. Rules 33 & 34; Howells Adm. Prac. 26; Roscoe's Adm. Prac. (3d. ed.) 178,324; Williams and Bruce's Adm. Prac. (3d. ed.) 370-2; *Atty.-Genl. v. Brooksbank.* (1827), 1 Y. & J. 439; *The King of Spain v. Hullet* (1833) 1 Cl. & F. 333; *The Cameo* (1862) Lush. 408; *Prioleau v. United States* (1866) L.R. 2 Eq. 659; *The Charkeih* (1873) L.R. 4 A. & E. 120; *Secretary of State for War v. Chubb* (1880) 43 L.T. (N.S.) 83; *Hettihewage v. The Queen's Advocate, supra; The Newbattle* (1885) 10 P.D. 33; *Regina v. Grant* (1896) 17 Prac. (Ont.) 165; and *Carr v. Fracis Times & Co.* [1902] A.C. 176 (The Sultan of Muscat's case).

[6] p. 167.

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and, "I do not think the rights of the defendants are abridged or enlarged by reason of the plaintiff in this case being the Sovereign." Osler, J. A. further remarked[1]:—

"It might have been thought that without the aid of "any special enactment, the mode in which the remedy of "the Crown would be pursued and the relief sought ad- "ministered would be in accordance with the course and "constitution of the forum selected as between subject and "subject, so that the Crown, coming into a forum in which, "as between subject and subject, trial by jury had ceased "to be the general mode of disposing of issues of fact, "except in certain specified cases, would be bound to follow, "or would have the right to take advantage of, the pres- "cribed practice in order to obtain a jury or to deprive "the defendant of his claim for one."

There is an exception, of course, where the dignity of the Crown might be affected, as in the case of the Attorney-General not being required to make discovery on oath, cited in *Prioleau v. United States*, *supra*,[2]. But in my opinion no question of that kind arises here, and by analogy I cite this language of their Lordships of the Privy Council in the *Hettihewage Case*, *supra*,[3].

"The Crown suffers no more indignity or disadvantage by "this species of defence than it would suffer by defences of "a more direct kind, which yet would be clearly admissible; "as, for instance, if a breach of contract sued on by the "Crown were excused on the ground that the wrongful "action of the Crown itself had led up to that breach." This was held even in a case where it was said.[4]

"It is true that the course taken by the Courts below "does practically give an effective execution against the "Crown to the extent of the Crown's claim against the "defendants. But though the Crown is thereby prevented "from recovering its debt, it is not exposed to the indignity "attendant upon process of execution."

In the case of the *Attorney General v. Brooksbank*, *supra*, the courts stayed proceedings on an information filed by the Attorney General against army agents to account to the Crown for certain moneys until certain documents were

[1] p. 169.
[2] p. 664.
[3] p. 589.
[4] p. 588.

produced by the War Office, and in the *Secretary of State for War v. Chubb, supra*, the Court refused to grant the plaintiff an injunction unless the Crown gave the usual undertaking in damages, Jessel, M.R. saying, in answer to the objection "that the Crown could not be bound in such an undertaking:"

"I can see no reason for making an exception in favour "of the Crown in a matter of common and universal prac- "tice. If the Crown cannot give the usual undertaking in "damages, I cannot grant the interim injunction."

If this case had been one brought by a foreign prince instead of by our own Sovereign I should not have reserved judgment, because the former when he comes as a suitor is only acknowledged as a "private individual": *Prioleau v. United States, supra;* and as Brett, M.R. said in *The Newbattle, supra*,[1]

"It has always, however, been held that if a sovereign "prince invokes the jurisdiction of the Court as a plaintiff, "the Court can make all proper orders against him. The "Court has never hesitated to exercise its powers against a "foreign government to this extent."

It was said in *The King of Spain v. Hullet, supra*,[2] that "the practice of the Court is part of the law of the Court", and in *The Cameo, supra*, Dr. Lushington said "the intention of the Act was to put the two contending parties on a fair footing", and this can only be done in the present circumstances by allowing the present application, with costs to the defendant in any event, as the request for security was refused. It is desirable to add that quite apart from the statute the matter is obviously one where the two actions should be consolidated under rules 33 and 34, and as a matter of precaution I make an order to that effect it having been conceded that the cases should be tried together.

Motion granted.

[1] p. 35.

[2] p. 353.

1915
Dec. 2

BRITISH COLUMBIA ADMIRALTY DISTRICT.

HIS MAJESTY THE KING.....PLAINTIFF

v.

THE "DESPATCH".....DEFENDANT

(No. 2).

Admiralty—Jurisdiction—Practice—Crown—Action in rem or personam—Cross-cause—Security—Stay of proceedings.

The Exchequer Court of Canada has jurisdiction under sec. 34 of the Admiralty Courts Act, 1861, to vary or rescind proceedings in admiralty. Rule 228 provides the practice in respect of admiralty proceedings, in cases not specially provided for by the rules, to be that of the High Court of Justice in England.

An action *in personam* against the master of a Government tug, for his negligence in a collision with the plaintiff's ship, is neither an action *in rem* nor *in personam* against the Crown; nor can it be considered a "cross-cause" to a proceeding *in rem* by the Crown against the plaintiff's ship, so as to permit a stay of the Crown's proceedings, under sec. 34 of the Admiralty Courts Act, 1861, until it furnishes security to answer the judgment which may be obtained in the cross-cause.

MOTION by plaintiff under rule 84 of the Admiralty Rules to vary or rescind the order in this action made by MARTIN, L. J., on June 18, 1915, ante, p. 310.

Heard by Mr. Justice Martin, Local Judge of the British Columbia Admiralty District, at Victoria, September 9 and October 7, 1915.

Moresby, for plaintiff; *Bodwell*, K.C., for defendant.

MARTIN, L. J. (December 2, 1915) delivered judgment.

Under Rule 84 the plaintiff moves to "vary or rescind" the order made herein on June 18, last[1], on the ground of lack of jurisdiction to make the same. This objection was not raised upon the former motion which, as is noted in the reasons, was only opposed on the one point therein mentioned, and in an ordinary case it would not be proper to re-open the matter, but as a question of jurisdiction is now

[1] Ante, p. 310, 23 D.L.R. 351, 21 B.C.R. 503.

raised which could be raised at the trial, it is conceded that in the circumstances of this case it would be convenient and desirable to dispose of it at the outset, and the defendant offers no opposition to this being done.

It is first objected that sec. 34 of the Admiralty Courts Act, 1861, has no application to this Court because it is submitted to be a section relating to practice only and one which does not confer jurisdiction, with respect to which it is conceded that this Court possesses the same as the High Court of Admiralty, "to extend the jurisdiction and improve the practice" whereof is stated in the preamble to be the object of the said Act of 1861. Assuming the matter to be one of practice, it is urged that since, in our Rules (made under Sec. 7 of the Colonial Courts of Admiralty Act, 1890, and sec. 25 of the Admiralty Act 1891) there is none corresponding to said sec. 34, therefore there is nothing empowering this Court to exercise the practice jurisdiction conferred thereby. In my opinion, however, that section is one which "gives or defines the right" (as Lord Justice Lush puts it in *Poyser* v. *Minors*,[1] now under consideration, which is one of those "more extensive powers conferred upon the" High Court of Admiralty which it did not formerly possess,[2] and therefore this Court falls heir to the same jurisdiction. It is no objection to the conferring of jurisdiction that the statute which does so, at the same time "denotes the mode of proceeding by which (the) legal right is enforced:" per Lush L. J., *supra*.[3]

But if I should be wrong in this and the matter is to be considered as one of practice then reliance is placed on our Rule No. 228 as follows:

"In all cases not provided for by these Rules the practice "for the time being in force in respect to Admiralty pro- "ceedings in the High Court of Justice in England shall "be followed."

In my opinion this covers the case and I am justified in this view by the decision of my learned predecessor in this

[1] (1881) 7 Q.B.D. 329 at 333.

[2] *Williams & Bruce's* Adm. Prac. (3d. ed.) 370–1 and cases there cited, particularly *The Seringapatam* (1848) 3 W. Rob. 38 and *The Rougemont* (1893) P. 275.

[3] p. 333.

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Court in *Williamson* v. *The Manauense*,[1] and in *Williamson* v. *Bank of Montreal*.[2]

Then the further objection is taken secondly, that in any event said sec. 34 is inapplicable to the present situation because in the true sense of the expression, the defendant has "not instituted a cross cause" against the plaintiff. This also is a change of front on the part of the Crown since the order now complained of was made, because then the matter was argued and disposed of on the obvious assumption that the Crown in Canada was following the established practice of the Crown in England of assuming responsibility in the Admiralty Court for the act of its servant (McDougal), the master of its ship, under circumstances similar to these, as set out in the cases cited in my judgment. The Crown now takes the position that as there is no action here against it, either *in personam* or *in rem*, but only one *in personam* against its servant, the master, whose actions even if negligent it is not liable for, and now repudiates, on the authority of *Paul v. The King*[3] and *cf. Imperial Japanese Government* v. *Peninsular & Oriental S.N. Co.*,[4] consequently there is no "cross cause" and so it is in strict law a stranger to the proceedings of the defendant against said McDougal. Such an unusual position required corresponding consideration, and after the examination of a large number of authorities, I am forced to the conclusion that the objection must prevail. The expression "cross cause" has been often considered, *e.g.*, in *The Rougemont*, *supra*, wherein the scope of the section is in one respect defined and wherein there is a very instructive argument: *The Charkieh*[5] and see *Williams and Bruce's Adm. Prac. supra*, and whatever else may be said of it, it is clear, to my mind, that there cannot be a "cross cause" unless one at least of the plaintiffs in the principal cause is a defendant in the cross cause. On the other hand the mere fact that a party is a co-plaintiff does not of itself entitle the defendant in the cross cause to obtain security, as is shown by *The Carnarvon Castle*[6], wherein the owners of the cargo, who to save multiplicity and expense had joined in

[1] (1899) 19 C.L.T. 23.
[2] (1899) 6 B.C.R. 486.
[3] (1906) 38 Can. S.C.R. 126.
[4] [1895] A.C. 644.
[5] (1873) L.R. 4 A. & E. 120.
[6] (1878) 3 Asp. M.C. 607.

an action with the owners of the ship, were absolved from liability to give bail. It must be borne in mind that, as Lord Watson said in *Morgan* v. *Castlegate S.S.Co.*,[1] "every proceeding *in rem* is in substance a proceeding against the owner of the ship." The contention that the section applies only to cases where both the principal and cross cause are *in rem* was rejected in *The Charkieh*, *supra*. The exact point raised herein has not come up before; at least no similar case has been cited, and I have been unable to find any. In, for, example, *The Charkieh*, the cross cause was instituted by the Foreign Sovereign Prince, and in *The Newbattle*,[2] the action was brought by "the owners, master, and crew of the Louise Marie," and though that ship was admittedly the property of the King of the Belgians, yet the question was raised by a counterclaim in the same action, and in such circumstances the point now in question did not require consideration. Lord Justice Cotton said,[3]

"It is a reasonable principle that a plaintiff whose "ship cannot be seized, and against whom a cross action "has been brought, shall put the defendant in the same "position as if he (the defendant) were a plaintiff in an "original action, etc."

This brings out the force of the objection now taken: *viz.*, that in fact no cross action has been, brought against the plaintiff herein.

The result is that as the case now presents itself the order which was properly made on the facts then before me must now be rescinded as it appears the case is not within said section 34.

I am fully alive to the injustice which it was strongly pressed upon me might result from this refusal of the Crown to adhere to "the well-established practice in England" in cases of this description (*cf Eastern Trust Co. v. McKenzie Mann & Co.*,[4] on the duty of the Crown in general to ascertain and obey the law), but in the face of the decision in *Paul v. The King*, *supra*, I am powerless to adopt any other course, though my attention has been directed to the apt remarks of Idington J. at p. 136 of that case:

[1] [1893] A.C. 38 at 52.
[2] (1885) 10 P.D. 33.
[3] p. 35.
[4] [1915] A.C. 750 at 759, 22 D.L.R. 410.

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"It certainly seems at this time of day unsatisfactory to "find that one of the vessels, the property of which is in the "Crown, engaged in the business of the Crown, can destroy "through grossest negligence the property of a subject and "he have no remedy at law unless against the possibly "penniless man who has been thus negligent."

With respect to the costs of this motion the plaintiff must pay them in any event of the cause, because the application has been made necessary solely by the omission of the plaintiff to raise these new questions at the outset and an unusual indulgence was granted in opening up the matter. In the very unusual circumstances it is impossible now to dispose of the costs of the original motion upon any fixed principle, so I think the most appropriate course to adopt is not to make any order regarding them.

Motion granted.

1916
March 20

BRITISH COLUMBIA ADMIRALTY DISTRICT.

HIS MAJESTY THE KING

v.

THE "DESPATCH" (No. 3)

THE BORDER LINE TRANSPORTATION CO.

v.

McDOUGAL

Collision—Vessels in channels—Fixing liability—Evidence—Naval charts—Depositions.

A vessel which fails to keep to the starboard side of the fairway or mid-channel, when entering a harbour, in violation of art 25, and crosses at an excessive speed to the wrong side of the channel, without excuse, is liable for collision with a tug prudently proceeding out of the harbour, at a very low speed, with a heavy scow lashed to her starboard bow; under such circumstances the latter cannot be blamed for her failure to reverse her engines to avoid the collision.

The Kaiser Wilhelm der Grosse (1907) P. 259; *Richelieu & Ont. Nav. Co. v. Cape Breton* [1907] A.C. 112, 76 L.J.P.C. 14, referred to.

2. Canadian Naval charts, issued under the orders of the Minister of the Naval Service of Canada, are accepted as *prima facie* evidence to the same extent as Imperial Admiralty charts.

3. Depositions of the mate of a vessel in proceedings of a judicial nature before the Court of Formal Investigation, to inquire into a collision under secs. 782–801 of the Canada Shipping Act (R.S.C. 1906, ch. 113), cannot be received in evidence in the main action to determine the liability for the collision, the plaintiff having been a party to and represented by counsel at such proceedings.

ACTION for damages arising out of a collision of ships.

W. C. Moresby, for the Point Hope; *E. V. Bodwell*, K.C., for the Despatch.

MARTIN, L. J. (March 20, 1916), delivered judgment.

This is an action brought by His Majesty the King, against the steamship "Despatch" (170 feet long; R. N. McKay, Master), and her owners, the Border Line Transportation Co., for damage done to the Canadian Govern-

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ment tug "Point Hope" by collision in Victoria Harbour, on October 25, 1913, at 4.25 a.m. There is also an action, tried at the same time, by the said Border Line Transportation Co. against W. D. McDougal, master of the "Point Hope," for damages to the "Despatch" arising out of the said collision which is alleged to be due to the negligence of the said McDougal.

At the time of the collision, the "Point Hope" was going out of the harbour with a scow (about 93 feet long), laden with about 250 tons of dredged-up mud and silt, lashed to and projecting ahead of her starboard bow, the intention being to dump the load in deep water beyond Brotchie Ledge. It is agreed that the weather was calm and clear; and the water at the end of an ebb tide, almost low water, with no appreciable current; and that the proper lights were shewn by both vessels.

The contention, in brief, of the "Point Hope" is that, while she was keeping on her proper side of the fairway or mid-channel in navigating this narrow channel (as this part of Victoria Harbour is admitted to be), off Shoal Point, she was negligently run into by the "Despatch" which, it is alleged, in entering the harbour and rounding said point at too high a rate of speed, had got over into the wrong or port side of the channel instead of keeping to her starboard side of it. The "Point Hope" invokes arts. 19 and 25, but in so far as the former is concerned, I think it may, in the circumstances of this case, be dismissed from further consideration, because it cannot be said that within the true meaning of that article these were "crossing vessels." Both were in the channel and what each was attempting, properly, to do in rounding Shoal Point, across which they could see one another, was to follow the winding reaches of a narrow channel in the manner directed by art. 25, and there was nothing to indicate that there was any other intention, either to cross the channel for any legitimate purpose (such as to call at a port there, or make for a pilot station, as in "*The Perin*," cited in *Marsden on Collisions*),[1] or otherwise, so in the sense that the word is used in art. 21, there was no other "course" that either vessel could properly keep. There are, undoubtedly, cases

[1] 6th ed., 1910, p. 444.

where the crossing rule should be applied in narrow channels, but this is not one of them, *e.g.*, the "*Ashton*,"[1] and cases therein cited. Most of the cases on this subject are collected in Marsden, *supra*, at pp. 441, 443–6, and particularly at 26 Halsbury 438–9, where I find, after examining many authorities, that the following deductions from the decisions are well stated at p. 439, and are directly applicable to this case:—

"First, it appears that the crossing rule can only apply "when the lines of the courses to be expected with regard "to the two vessels will in fact cross, and when there is "risk of collision, that is to say, when both vessels will "come to the point of crossing at or nearly at the same "moment. Secondly, it appears that the two vessels will "not come within the crossing rule, whatever their bearings "from one another while rounding the bend may be, when "there is no indication that either vessel is in fact crossing "the river, and when they are keeping on opposite sides "of the channel or one is keeping in mid-channel, so that "the vessels, on the courses to be reasonably attributed "to them, will pass clear of each other."

Since that was written, the leading case of *The "Olympic" and the "Hawke,"*[2] has come before the House of Lords and been affirmed, and the last word on the point now under consideration was spoken by Lord Atkinson, who, after referring to the judgment of the Privy Council in *The "Pekin,"*[3] (cited in particular by Lord Justice Kennedy below in connection with and as adopted by the Privy Council in *The "Albano" v. Allan Line SS. Co.*)[4] and quoting Sir Francis Jeune's observation that "vessels may no doubt be crossing vessels within art. 22 in a river: it depends on their presumable courses," goes on to say:—

"But all that is meant by this last expression would appear to me to be this: Where two ships are navigating a narrow channel so winding in its course that the physical features necessitate, or the rules of good seamanship require, that either should relatively to the other take for a time a course which if continued would intersect the course of

[1] [1905] P. 21, at 28.
[2] [1913] P. 214; 83 L.J.P. 113; 84 L.J.P. 49; [1915] A.C. 385.
[3] [1897] A.C. 532; 66 L.J.P.C. 97. [4] [1907] A.C. 193, 76 L.J.P.C. 33.

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that other so as to involve risk of collision, and it can be reasonably assumed by the one that the other will change her course so as to avoid this risk as soon as those physical features will, consistently with the rules of good seamanship, permit, the article as to crossing ships does not apply: but the circumstances of each case must determine whether this necessity exists or this assumption can reasonably be made. This is, I think, clearly brought out in the judgment of Lord Justice James in *The "Oceano"*[1] where, in commenting on the case of *he "Velocity"*[2] The said, "What was decided really was, that in such a river the particular direction taken for a moment, or a few moments, in rounding a corner or avoiding an obstacle was not such an indication of the real course of the ship as to justify another ship in saying, 'I saw your course, I saw that if you continued in that course we should be crossing ships, and I left to you, therefore, the entire responsibility of getting out of my way under the rule.' "

It follows from this that, according to the collision rules and good seamanship, the submission of counsel for the "Despatch" that art. 19 (and consequently art. 22) does not apply to the situation at bar, is sustained.

It remains then to consider art. 25, as follows:—

"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 of the vessel."

It was said by Lord Alverstone in *The Kaiser Wilhelm der Grosse*[3]

"I would point out that art. 25 is not merely a rule "which is to be obeyed by one vessel as regards another "vessel, but is a positive direction that a steam vessel "shall be kept as far as practicable on the starboard side "of the channel."

And Fletcher Moulton, L.J., said, p. 270:—

"It is the imperative duty of ships to get to the right "hand in passing through such a channel."

Kennedy, L. J., concurred, and said, p. 274:—

"It is quite clear that the only possible excuse for dis- "regarding the rule would be that there was something

[1] (1878), 3 P.D. 60, at 63.
[2] (1869), L.R. 3 P.C. 44, 39 L.J. (Adm.) 20.
[3] [1907] P. 259, at 264.

"which rendered it neither safe nor practicable to follow "that rule."

This "excuse" might, of course, arise "in special circumstances" under the "departure from the above rules necessary in order to avoid immediate danger," authorised by art. 27, but as to the caution and limit to be observed in its application, and the burden of proof, see *e.g.*, the observations in 26 Halsbury 366 *et seq.*, and 468-71, and on the history of preceding statutes on the point see the remarks of Dr. Lushington in *The "Sylph."*[1] The decision also of this Court on *The "Charmer" v. The "Bermuda"*[2] is in point.

Here, however, both vessels contend that they were on their proper, *i.e.*, starboard, "side of the fairway or mid-channel," and the "Point Hope" places the point of collision well up to the northern edge of the channel, while the "Despatch" places it well to the south of mid-channel. The expressions "fairway and mid-channel" and "fairway" *solus*, as used in various statutes and rules, have been considered in several cases, such as *The "Panther;"*[3] *The "Sylph," supra*; and *Smith v. Voss*[4] (on "fairway and mid-channel" under former statutes); *The "Blue Bell,"*[5] (on the Thames by-law re "fairway"); *The Clutha Boat*, 147[6] (on the Medway by-law re "fairway"); and *The "Glengariff,"*[7] on "fairway and mid-channel" under the present article, wherein Bargrave Deane, J., says:—

"What is a fairway? A fairway is practically defined "by this article to be mid-channel. There is no rule "which says that you must keep in the fairway, but the "rule says that you must keep to the starboard side of the "fairway or mid-channel in narrow channels.

This view of the fairway as being practically the same as mid-channel is in accord with the direction of Chief Baron Pollock to the jury in *Smith v. Voss*, *supra*, which was upheld *in banc*. It is true that in the *"Blue Bell"* case, *supra*, the Divisional Court gave a wider scope to the term "fairway," but the word there was used alone, from the Thames by-law, and not in conjuction with "or mid-channel," so if anything should turn here on the exact

[1] (1854), 2 Sp. Ecc. & Ad. 75, at 79.
[2] 15 B.C.R. 506.
[3] (1853), 1 Sp. Ecc. & Ad. 31.
[4] (1857), 2 H. & N. 97.
[5] [1895] P. 242, at 246.
[6] [1909] P. 36, at 40–1.
[7] [1905] P. 106; 10 Asp. M.L.C. 103.

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construction I should feel obliged to follow the *Glengariff* decision, which is exactly in point. But in the present case it makes no difference, because if the "Despatch" had kept to the starboard side of the fairway, however viewed, or mid-channel, the collision would have been averted. I say this because after very careful consideration of the evidence and the assistance of the assessors in laying out the various positions and courses on the chart and harbour plan before us, the only conclusion to reach is that the collision occurred at a point which, while not so far to the west or so near to the north edge of the channel as is claimed by the "Point Hope," is yet well to the north of mid-channel, and approximately on the line deposed to by Fletcher, master of the "Petrel," viewed from his position at the stationary dredge "Ajax" (which he was alongside of), at the point indicated by A on the plan, to the point he marked at H, and which line he was in the best position to determine as regards direction though not the length of it, yet the weight of the whole evidence warrants the conclusion that the "Point Hope" was at the time of the collision well on her proper side of the channel. The result of this is that the "Despatch" must be taken to have got over to the wrong side of the channel in the water of the "Point Hope" without excuse, in which case, as their Lordships of the Privy Council said in *Richelieu & Ont. Nav. Co. v. Cape Breton.*[1]:—

"the sole question left is whether anything was done or "omitted to be done on board the (other ship) for which "she ought to be held responsible.

Here it is alleged that, in accordance with good seamanship under art. 29, the "Point Hope" should have stopped her engines before she did (about 2 seconds before the collision, her engineer says), and reversed them. These contentions have received our very careful attention, with the result that I am advised by the assessors that in all the circumstances, bearing in mind that the "Point Hope" had always been going at a slow speed, not over three knots, with a heavy scow lashed to her starboard bow, and the proximity of shoal water to starboard in a narrow channel, and that signals

[1] [1907] A.C. 112 at 118, 76 L.J.P.C. 14 at 18.

for a starboard crossing had been given and answered, that she could not reasonably be expected to act otherwise than as she did in regard to stopping, and that, in continuing to port her helm as far as was prudent, more should not be required of her, seeing that she was justified in assuming that the "Despatch" could and would pass her port side to port side; and as to reversing, that it would have been inadvisable in the circumstances as tending, owing to the position of the heavy scow, rather to have aided than averted the collision by bringing the bow of the "Point Hope" to port. My independent view of the matter is in accordance with this advice which I adopt. The difficulty of handling a tug with scow attached in a narrow channel is well known to mariners and to this Court—*cf. The "Charmer" v. The "Bermuda," supra.* The "Point Hope" was placed in a position of doubt and uncertainty by the action of the "Despatch" in apparently taking a course in the channel which did not correspond with her signal, and was entitled to expect almost up to the last that she would take such action as would avoid the collision, and which could have been done if the "Despatch" had ported her helm earlier or harder than she did. My view of the real cause of the accident is that the "Despatch" had got further out into the channel than she intended, owing to trying to round Shoal Point at too a high rate of speed.

It is said in *The "Tempus,"*[1] that:—

"It has been pointed out over and over again that one "ought to be careful not to be too ready to cast blame "upon a vessel which is placed in a difficulty by another "vessel".

The circumstances in which this language was used and applied were much more in favour of a liability being imposed than they are here. It must be remembered that as Lord Justice Fletcher Moulton put it, in *The "Kaiser Wilhelm der Grosse"* case, p. 272, the signals given by the "Point Hope" should "have recalled the other vessel to her duty. Not only was that possible, but it was what ought to have occurred." And other observations follow which are largely appropriate to this case; and also those of Lord

[1] (1913) 12 Asp. 396 at 398.

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Justice Kennedy on p. 275. Lord Alverstone says in the same case, pp. 266-7, "if art. 25 applies . . . . then there is no article which gives any direction with regard to the course or speed of the 'Orinoco' " (which vessel was charged with the same errors in seamanship as are charged here against the "Point Hope"), and so "it must depend upon the provisions of art. 29," requiring good seamanship in all cases, and the advice given to the Court of Appeal by the assessors (p. 268) was the same as that which is given to me.

Upon the whole case, I can only reach the conclusion that the sole blame for the collision must be laid upon the "Despatch" and therefore, there will be judgment for the plaintiff in the main case, with a reference to the registrar, assisted by merchants, to assess damages. The cross action will be dismissed.

It is desirable to put upon record two rulings on evidence.

First. The practice of this Court respecting the admission in evidence of Canadian Naval charts issued under the orders of the Minister of the Naval Service of Canada was stated and confirmed, viz.: that such charts are accepted as *prima facie* evidence to the same extent as Imperial Admiralty charts.

Second. The depositions of the mate of the "Despatch," Haskins, deceased since they were given in December, 1913, before the Court of Formal Investigation, so styled, held to inquire into the collision now in question, under secs. 782-801 of the Canada Shipping Act, by the Commissioner of Wrecks, with assessors, with powers not only of "full investigation" (sec. 789) into the casualty, and of awarding costs (sec. 794), but of "charges of incompetency and misconduct on the part of masters, mates, pilots or engineers" (sec. 791), and of inflicting penalties by way of cancellation or suspension of their certificates (sec. 801), should now be received in evidence herein, in the main case, the plaintiff (the Crown), having been a party to and represented by counsel at such proceedings, which on the authorities which follow were held to be judicial in their nature: *Cole v. Hadley;*[1] *Baron de Bode's case;*[2] *Re Brun-*

[1] (1840), 11 A. & E. 807.

[2] (1845), 8 Q.B. 208.

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ner;[1] *The Queen v. London County Council;*[2] *Re Grosvenor etc. Hotel Co.;*[3] *Roscoe's Nisi Prius Evidence;*[4] *Taylor on Evidence;*[5] *Phipson;*[6] *and Best.*[7]

Judgment for plaintiff.

[1] 19 Q.B.D. 572.
[2] (1895), 11 T.L.R. 337.
[3] (1897), 13 T.L.R. 309, 76 L.T. 337.
[4] (18th ed.), p. 201.
[5] (10th ed.), 354 *et seq.*, 545–6(n. 6); 1,268.
[6] (1911), 416–21.
[7] (11th ed.), 468.

1915
June 29

QUEBEC ADMIRALTY DISTRICT.

ELECTRIC REPAIR & CONTRACTING CO., LTD., PLAINTIFF.

v.

SS. "PREFONTAINE".....DEFENDANT

AND

FRANCIS C. LABERGE.....INTERVENANT.

Contract—Work on ship—Lighting apparatus—Rights in rem.

Where a contract for the installing of a lighting apparatus in a vessel has been performed, and the work has been accepted and a promissory note given for the contract price, the defendant, in an action for the contract price, cannot, certainly where he retains the apparatus, set up defective installation or that the work was not performed according to contract. The plaintiff's right in the res is not affected by a judicial sale of the vessel subsequent to his seizure.

ACTION against a ship for work done and materials furnished. Tried before Mr. Justice Dunlop, D.L.J., Quebec Admiralty District, at Montreal, June 21, 22, 1915.

Blair, Laverty & Hale, for plaintiff; *L. C. Meunier*, K.C., for SS. "Prefontaine"; *A. Decarie*, K.C., for intervenant.

DUNLOP, D. L. J. (June 29, 1915) delivered judgment.

In this case, the plaintiff by its statement of claim, alleges: That on April 1, 1914, the defendant, acting through one J. M. Malo, engaged plaintiff to install on the defendant steamer 1 engine, dynamo, 55 lights, and the necessary wiring to connect the same, the whole for the sum of $300; that on or about April 3, 1914, plaintiff began the said work and finished same on May 11, 1914, the engine, dynamo, lamps and wiring being all properly installed and in good order and condition, after actual test made by plaintiff; that on or about May 28, 1914, defendant, acting through said J. M. Malo, accepted said

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work and tendered to plaintiff his personal note for the said sum of $300 payable 3 months after date, which plaintiff accepted, and plaintiff granted defendant 3 months' delay to pay said indebtedness; that on August 21, 1914, when said note matured, it was not paid and was protested and plaintiff returned said note to said Malo in whose hands it now is, and plaintiff prays for judgment against defendant for $300, with interest and costs of suit.

The defendant, by his defence, in effect denies the material allegations of said statement of claim alleging that the works in question were not done according to the rules of art and that said installation had never worked properly; that defendant admits having given its note at a time when said works were not finished; that plaintiff has never finished its contract and that defendant had put plaintiff *en demeure* to do so and that under such circumstances plaintiff has no right to expect payment of the work done and materials furnished; that defendant has never accepted said work and offered to return the electric installation to plaintiff and reiterated said offer by its said plea;

For answer to the defendant's plea, plaintiff denies the material allegations thereof, and alleges that after the installation of the said lighting apparatus upon the defendant steamer, in the month of May last, plaintiff made a thorough test of said apparatus and it was found to be in perfect working order and giving sufficient light, that if defendant met with trouble in operating said apparatus, which is denied, the same was not due to any cause for which plaintiff was responsible, but to the fault and negligence of those who had charge of the vessel; that, in any event, the owners of the defendant steamer have not acted with the necessary diligence to justify the conclusions of its plea and to entitle defendant to refuse payment of plaintiff's claim, especially while retaining said lighting apparatus in its possession; that defendant's offer to return said apparatus cannot serve as a defence as defendant is not in a position to return same; that defendant's plea is unfounded in fact and in law and plaintiff prays for its dismissal, the whole with costs.

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Defendant furnished further particulars but plaintiff denies same, as amended.

The intervenant, by his intervention herein, alleges that on November 19, 1914, in a certain case bearing No. 4047 of the records of Superior Court, wherein the Westmoreland Company was plaintiff and said Malo was defendant, one of the officers of said Court sold to one J. B. Peloquin the said steamer "Prefontaine," who, on November 25, 1914, resold the said steamer to the intervenant herein; that said intervenant has an interest to intervene in the present cause and to continue it according to the last proceedings and prays that he should be allowed to do so, costs to follow suit.

Plaintiff contested said intervention at the trial.

Adjudicating, first, on said intervention, and considering that said alleged sale was made long after the institution of the present action against defendant and the seizure herein under said proceedings issued in the Admiralty Court; and further considering that said alleged sale cannot effect in any way the present proceedings and that the plaintiff has the right to proceed with its claim to judgment against the defendant steamer and its bail, in the present cause, as instituted, notwithstanding the said intervention, which is unfounded and must be dismissed, and is so dismissed by the present judgment, with costs.

Adjudicating on the merits of this cause, I find that the very voluminous evidence in this cause taken clearly establishes plaintiff's claim, and that plaintiff duly carried out and fulfilled the terms of its said contract and installed the said electric apparatus in the defendant steamer, and has the right to be paid for the same.

A very important fact is the giving of the note to plaintiff by defendant, acting through said Malo, who accepted said work, and in any event, the defendant has not acted with the necessary diligence to justify the conclusions of its plea, and to entitle it to refuse payment of plaintiff's claim, especially while retaining said lighting apparatus in its possession, and in my opinion, defendant's plea is unfounded in fact and in law and must be rejected.

And after a very careful examination of the evidence in this cause taken, I am of opinion that plaintiff's action is

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well founded. The defendant steamer and its bail must pay to the plaintiff the sum of $300 with interest and costs of suit, and an additional sum of $10 further costs entailed by the re-opening of defendant's enquete, defendant having totally failed to prove any material facts after its enquete has been re-opened.

Judgment for plaintiff.

Solicitors for Plaintiff: *Blair, Laverty & Hale,*

Solicitor for ss. "Prefontaine;" *L. C. Meunier*, K.C.

Solicitor for Intervenant: *A. Decarie*, K C.

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Dec. 16

NOVA SCOTIA ADMIRALTY DISTRICT.

HIS MAJESTY THE KING.....PLAINTIFF;

v.

THE SCHOONER "JOHN J. FALLON."..DEFENDANT.

International law—Fisheries—Boundaries—3 mile limit—Coast—Island.

The term "coast" in the treaty of 1818, by which the United States renounced the right to fish within 3 marine miles from the coast of any British territory, is not confined to the coast of the mainland, and a United States vessel is therefore liable to seizure for illegal fishing or setting out to fish in violation of the Canada Customs and Fisheries Protection Act (R. S. C. 1906, c. 47, as amended in 1913, c. 14) within 3 marine miles from the shore of an island of the Dominion of Canada situated 15 miles from the mainland. St. Paul's Island forms part of the coast of Nova Scotia for the purpose of the 3 mile limit defined in the Act and the treaty bearing thereon.

ACTION for the condemnation and forfeiture of an American vessel for violating the Customs and Fisheries' Protection Act (R.S.C. 1906, c. 47, Acts 1913, c. 14).

J. A. Macdonald, for plaintiff, contended: The proceedings in this case are taken under ch. 14, of the Dominion Act 1913, which repeals ch. 47, of the Revised Statutes of Canada 1906, which reads as follows:—

"Every fishing vessel or boat which is foreign not navigated according to the laws of the United Kingdom or of Canada which,—

"*a.* Not being thereto permitted by any treaty or con-"vention or by any law of the United Kingdom or of "Canada for the time being in force has been found fishing "or preparing to fish, or to have been fishing in British "waters within three miles (marine) of any of the coasts, "bays, creeks or harbors of Canada, or in or upon the "inland waters of Canada; or,

"*b.* has entered such waters for any purpose not per-"mitted by treaty or convention or by any law of the "United Kingdom or of Canada for the time being in force, "or

"*c.* having entered such waters for a purpose permitted "by treaty or convention or by any law of the United "Kingdom or of Canada for the time being in force, and "not being thereto permitted by such treaty, convention or "law, fishes or prepares to fish, purchases or contains bait, "ice, seines, lines or any other supplies or outfit or tran- "ships any supplies, outfit or catch or ships or discharges "any officer, seaman, fisherman or other part of her crew, "or ships or lands any passengers, shall together with the "tackle, rigging, apparel, furniture, stores and cargo "thereof, be forfeited."

The vessel was seized on July 13, by captain of the C.G.S. "Canada", a Dominion Patrol boat, for fishing within 3 miles of St. Paul's Island. The captain practically admitted, but excused himself by saying that the weather was foggy and that he drifted in.

The evidence of Captain Oliver, master of the "Fallon" proved the following facts:

"*a*, That he is an American citizen.

"*b.* That the vessel is owned by Gorton Pew, of Gloucester.

"*c.* That the vessel is registered in Boston.

"*d.* That she is engaged in prosecuting the fisheries.

"*e.* That he took no precaution whatever to ascertain his position before setting his trawls.

He left Gloucester on June 26, with 18 of a crew and sailed for Bathe, Maine, for ice and bait, and after getting supplies, fished in the Gulf of St. Lawrence. On July 11 went to Miscou Island, near the Bay Chaleur and then to the Quero Banks, and on the 12th, arrived near St. Paul's Island, where he drifted and jogged along, between Cape North and St. Paul's Island, that afternoon and night. About 3.30 a.m., he called to his crew to set the trawls for fish. He says, he thought he was about 4 or 5 miles from St. Paul's Island. To show that he was not deliberately doing wrong with knowledge of where he was he says that he saw government boats or patrol the day before, and that he knew they were around and for that reason would not fish within the 3 mile limit. He did not appear to do anything to find out how far he was from the island until the officers came on board.

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Argument of Counsel.

On cross-examination, he admitted that with the compass or instruments he had on board, he could have known how near he was to the land.

He took no precautions whatever to ascertain his position. His only excuse was that he drifted in. The officers after taking observations found that some of his trawls were within a mile to a mile and a quarter from the land and the furthest away from it was only $2\frac{1}{2}$ miles from the island.

Lieutenant H. C. MacGuirk, of the "Hochelaga" says: On July 13, was on the north side of St. Paul's Island on patrol duty. Saw the "Fallon" about 8 a.m. on the north side of St. Paul's Island, wind blowing slightly from the south. Saw some boats off St. Paul's Island about $1\frac{1}{4}$ to $1\frac{1}{2}$ miles from the Island, did not know to who they belonged, saw the schooner put out 8 dories to go to the buoys about 9 o'clock. I went alongside of the buoys and took a bearing of each dory as one went along and took sextant altitude of St. Paul's Island, to confirm the distance off. I found the dories to be distant of about $1\frac{1}{4}$ to $1\frac{3}{4}$ miles from shore. Plan A.R.M.L. was made from my observation and shows the position of the dories. The schooner and trawls were being taken into the dories at that time, B.R.M.L. is in my own handwriting and was made at the time the observations were made. I took bearings from captain Oliver's schooner, from his own compass and in his presence and showed him that by these bearings he was only $2\frac{1}{4}$ miles from shore. The captain admitted that he had not taken precaution that he usually judged by his eyesight. The "Hochelaga" towed the "Fallon" to North Sydney and delivered her to the Customs there.

I arose at 6.20 on July 13. We were patrolling the Cabot Straits, the night of July 12, The evidence of Captains Stewart and Webb confirms the evidence of MacGuirk. A copy of the observations made by MacGuirk are herewith annexed together with a plotting or plans of the position of the patrol boats, schooner, dories and trawls.

These opinions of the captain and crew of the schooner cannot be put against the evidence of the officers of the patrol boats.

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Patrol boats use the most modern instruments for measuring distances at sea. See case of *"Kitty D"*[1] Even if the schooner did drift in, that would be no excuse as they were taking fish within the 3 mile limit. See *The Frederick Gerring, Jr.*[2] The responsibility was upon the captain or officers to ascertain their position and if through error, want of care or inability to ascertain their true position, they drifted within the prohibited zone and fished there, they committed a breach of the act. See *The "Beatrice."*[3]

It is the captain's duty to know the exact position of his ship before he attempts to fish. If he is found contravening the Act, it is no excuse to say that he could not ascertain his position by reason of the unfavorable weather conditions. See *The "Ainoko."*[4]

In the case of the *"Frederick Gerring"* the fish were caught outside the 3 mile limit, but seines drifted within. It was held a violation of the Act.

The Queen v. Henry L. Philips,[5] The burden of proving a license to fish is on the defendant ship.

Rex v. "Francis Cutting,"[6] *King v. Carlotta T. Cox,*[7] *The King v. The "Somoset":*[8] Taking fish without a license in the territorial waters of Canada constitutes the offence. *The "Annandale,"*[9] *The "Ainoko,"*[10] *The Beatrice,"*[11] *The "Grace."*[12]

An American vessel without a license upon the Canadian side of the boundary line in one of the great lakes is subject to seizure and condemnation under the provisions of ch. 47, of the Revised Statutes of Canada.[13]

[1] 34 Can. S.C.R. 673; 22 T.L.R. 191.
[2] 5 Can. Ex. 164, 27 Can. S.C.R. 271.
[3] 5 Can. Ex. 378; 5 B.C.R. 171.
[4] 5 Can. Ex. 366; 5 B.C.R. 168.
[5] 4 Can. Ex. 419, 25 Can. S.C.R. 691.
[6] 9 W. L. R. 402.
[7] 11 Can. Ex. 312.
[8] 9 Can. Ex. 348.
[9] L. R. 2 P. D. 179.
[10] 4 Ex. Can. 195;
[11] 5 Can. Ex. 9.
[12] 4 Can. Ex. 283.

[13] The "Wampatuck" Youngs Adm. (N.S.R.) 75; The "A.H. Wanson," Young's Adm. (N.S.R.) 83; The "A. J. Franklin," Young's Adm. (N.S.R.) 89; The "J. H. Nickerson," Young's Adm. (N.S.R.) 96; Thé "Samuel Gilbert", 2 Stuart Adm. (Queb.) 167; The "Franklin S. Schenck," 2 Stuart Adm. (Queb.) 169; Mowatt v. McPhee, 5 Can. S.C.R. 66; The King v. "Kitty D." 34 Can. S.C.R. 673; 22 T.L.R. 191; The "North," 37 Can. S.C.R. 385; The "E. B. Marvin," 4 Can. Ex. 453; The "Aurora," 5 Can. Ex. 372; The "Viva," 5 Can. Ex. 360; The "Minnie" 4 Can. Ex. 151; The "Shelby," 5 Can. Ex. 1.

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Argument of Counsel.

There are statutes showing that St. Paul's Island forms part of Victoria County.[1]

G. A. R. Rowlings, for defendant, contended: It is not shown that St. Paul's Island is within the 3-mile limit, or where it is situated with regard to the adjacent coast.

The disposition of the courts is to strictly construe such a penal statute as this and to require undoubted proof of an offence: The *A. J. Franklin*;[2] *Hardcastle's Statute Law*.[3]

"In the case of any real doubt the decision must be "against the subjection of a ship to a territorial sovereignty. "The hull of the ship presents at once to the mind the "notion of the subjection of that ship to the law of her "flag. We cannot regard that subjection as removed "unless some sensible and unmistakable cause for its "removal has intervened. Any other determination of "the question would involve legal relations in uncertainty "and confusion."[4]

Sir W. Scott in *Twee Gebroeders*:[5] "An exact measurement "cannot be easily obtained, but in a case of this nature, "in which a Court would not willingly act with an un- "favorable minuteness towards a neutral state, it will be "disposed to calculate the distance very liberally. At p. 338 he says, the facts on which the right to forfeit "depends must be *completely established*. Approved by "U.S. Courts in *Soult v. L'Africaine*.[6]

One of the grounds I took on behalf of the defendants in this action at the argument of this case at Halifax was:

(*a*) that St. Paul's Island referred to in the evidence was not shown to be Canadian territory and

(*b*) that St. Paul's Island was not shown to be within British territorial waters, known as the 3 mile limit. Leave was granted the Crown to put in evidence to meet these contentions if possible

(*a*) As to (*a*) the Crown must, of course, prove that St. Paul's is Canadian territory.

[1] Nova Scotia Acts, 1852, c. 17; R.S.N.S., 3d. series, c. 23; Statutes of Canada, 1868, c 59; R.S.N.S., 5th series, appendix, c. 23, p. 9.
[2] Young's Adm. (N.S.R.) 89 at 95-96;
[3] (3d. ed.) p. 454.
[4] Bar's Private Int. Law (2d. ed.) pp. 1067-8.
[5] 3 Rob. Adm. 162 at 163.
[6] "Bee's Adm. Rep. 204."

(*b*) Now, assuming for the sake of argument only, that it can be shown that St. Paul's Island is an island under British Dominion it cannot, as a matter of international law, be shown that, under the true interpretation of the treaty of 1818, the waters around this island are "territorial waters of Canada." To show that it is under the municipal jurisdiction of the laws of Nova Scotia or Canada is not sufficient, as there are hundreds of rocks such as St. Paul's found in the Atlantic Ocean the waters around which are not to be regarded in any sense as territorial waters, either under the accepted principles of international law or under the terms of the treaty of 1818.

Charts and gazetteers and official documents and admissions show that the facts regarding St. Paul's Island are as follows:

(*a*) It is a barren rock or islet situated 15 miles from the nearest mainland in the open sea.

(*b*) It has no inhabitants or settlers other than the men who are employed to look after the lights there and who are attached to the government service. No buildings or dwellings are owned or erected by any private owners or settlers. It is not a habitable place or one capable of being settled.

(*c*) It has "no bays, harbours or creeks" of any description, and supplies have to be landed from ships lying out at sea.

(*d*) It is completely isolated and does not form one of any group of islands.

It has been established clearly in international law that "territorial waters" so called extend merely 3 miles seaward from the mainland at low water, and the bays, harbours and gulfs thereof; and where there are groups of islands (not barren rocks) adjacent to or sensibly connected with the mainland in some continuity, the limit of territorial waters probably runs 3 miles seaward from such islands. To take a single, unsettled or isolated rock, 15 miles from the mainland in the open sea, and run the 3 mile limit along the mainland to a point opposite such an island and then project it out 15 miles into the open sea around the rocks, and back again to the mainland is absurd. If such a device were adopted for all the scattered rocks along the

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Nova Scotia coast, the 3 mile limit would be a complicated affair. It would be even more absurd to attempt to surround each of these rocks or barren islets with a 3 mile limit of its own. Such a course would be contrary to the well defined principles of international law, which now establish that this line must follow the *general* coast line of the mainland including bays and harbours and other indents in the coast, without regard to the many rocks and islets lying off in the open sea. Of course, it is clear that a group of islands of some significance and size having settlers or at least capable of settlement by private owners lying more or less connected with and adjacent to the mainland, such as Brier Island, Long Island and others on the north side of St. Mary's Bay in Digby County, would fall within the territorial limits referred to, and probably also within the words of the treaty of 1818; but a barren rock or islet like St. Paul's, without harbour, bay or creek is not to be regarded as in any sense falling within those principles or the words of the treaty.

The Dominion statute under which the seizure in this case is sought to be legalized, must be confined in its application to the terms of the said treaty made between the United States and Great Britain in October 1818.

It cannot contravene that treaty in any respect. That must be admitted at the outset.

Before pursuing this argument further I wish to refer to the treaty relations outstanding between Great Britain and the United States at the time this Dominion statute was passed and at the present time, and by way of making clear these treaties, so far as fishing is concerned, I shall make some reference to the negotiations leading up to them.

In the negotiations preceding the treaty of 1783 the proposal of the British plenipotentiaries re fishing was as follows:—

"Article III. The citizens of the United States shall have "the liberty of taking fish of every kind on all the banks of "Newfoundland, and also in the Gulf of St. Lawrence; and "also to dry and cure their fish on the shores of the Isle of "Sables and on the shores of any of the unsettled bays,

"harbours and creeks of the Magdalen islands, in the "Gulf of St. Lawrence, so long as such bays, harbours and "creeks shall continue and remain unsettled; on condition "that the citizens of the United States do not exercise the "fishery, but at the distance of 3 leagues from all the coast "belonging to Great Britain, as well those of the continent "as those of the *islands* situated in the Gulf of St. Lawrence. "And as to what relates to the fishery of the coast of the "Island of Cape Breton out of the said Gulf, the citizens "of the United States shall not be permitted to exercise the "said fishery, but at the distance of fifteen leagues from the "coasts of the Island of Cape Breton."

This article drafted as above, was emphatically rejected by the American Commissioners, and then abandoned by the British.

The article finally accepted was as follows:—

"It is agreed that the people of the United States shall "continue to enjoy unmolested the right to take fish of every "kind on the Grand Bank, and on all the other banks of "Newfoundland; also in the Gulf of St. Lawrence, and all "other places in the sea where the inhabitants of both "countries used at any time heretofore to fish. And also "that the inhabitants of the United States shall have "liberty to take fish of every kind on such part of the coast "of Newfoundland as Britannic fishermen shall use (but "not to dry or cure the same on that island) and also on the "coasts, bays and creeks of all other of His Britannic "Majesty's dominions in America; and that the American "fishermen shall have liberty to dry and cure fish in any of "the unsettled bays, harbours and creeks of Nova Scotia, "Magdalen Islands, and Labrador, so long as the same shall "remain unsettled; but as soon as the same or either of "them shall be settled, it shall not be lawful for the said "fishermen to dry or cure fish at such settlements, without "a previous agreement for that purpose with the inhabitants, "proprietors or possessors of the ground."

The restriction as to the islands at first proposed which would necessarily include fishing on the high seas, was abandoned, and the Americans were allowed by the treaty (1783) to fish to the very shores of the British mainland.

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Argument of Counsel.

By the treaty of 1818 the Americans renounced certain of these rights. What were they? Only such as were expressly mentioned.

Article 1 of the treaty of 1818 reads as follows:—

"Whereas the differences have arisen respecting the "liberty claimed by the United States for the inhabitants "thereof, to take, dry and cure fish on certain coasts, bays "and harbours and creeks of His Britannic Majesty's "Dominions in America, it is agreed between the High "Contracting Parties, that the inhabitants of the said "United States, shall have forever, in common with the "subjects of His Britannic Majesty's the liberty to take "fish of every kind on that part of the southern coast of "Newfoundland which extends from Cape Bay to the "Rameau Islands, on the western and northern coast of "Newfoundland, from the said Cape Bay to the Quirpon "Islands on the shores of the Magdalen Islands, and also "on the coasts, bays, harbours and creeks from Mount "Joly on the southern coast of Labrador, to and through "the Straits of Bellisle and thence northwardly indefinitely "along the coast, without prejudice however, to any of the "exclusive rights of the Hudson Bay Company: and that "the American fishermen shall also have liberty forever, to "dry and cure fish in any of the unsettled bays, harbours and "creeks of the southern part of the coast of Newfoundland "hereabove described, and of the Coast of Labrador; but "as soon as the same, or any portion thereof, shall be "settled, it shall not be lawful, for the said fishermen to dry "or cure fish at such portion so settled, without previous "agreement for such purpose with the inhabitants, pro- "prietors or possessors of the ground. And the United "States hereby renounce forever, any liberty heretofore "enjoyed or claimed by the inhabitants thereof, to take, "dry, or cure fish on, or within thr e marine miles of any of "the coasts, bays, creeks or harbours of His Britannic "Majesty's Dominions in America not included within the "above mentioned limits; provided however, that the "American fishermen shall be admitted to enter such bays, "or harbours for the purpose of shelter and of repairing "damage therein, or purchasing wood, and of obtaining "water, and for no other purpose whatever. But they

"shall be under such restrictions as may be necessary to "prevent their taking, drying or curing fish therein, or in "any other manner whatever abusing the privileges hereby "reserved to them."

For the true construction of this article we have some light in the proposed Article 3 of the treaty of 1783. By this proposed article the British sought to exclude the Americans from fishing in the territorial waters of the Gulf of St. Lawrence and also at the islands therein (St. Paul's being one of these islands). It is to be noted therefore that mention of the waters of the Gulf of St. Lawrence alone was not deemed sufficient in the proposed article of the treaty of 1783 to exclude the Americans from fishing at the islands in that Gulf. It was deemed necessary by the British to express the word "islands" also. In the final draft of this article the whole restriction was abandoned and these words do not appear at all. But the first draft referred to, and which appears in the official report of the proceedings shows what was the view of this matter in the minds of the negotiators.

As stated above certain of these fishing privileges or rights were renounced in 1818. In the latter treaty, the right to fish within 3 miles of the "British coasts, bays, harbours and creeks" was renounced by the Americans—nothing more. If the *islands* outside of this 3 mile limit, in the Gulf of St. Lawrence (or elsewhere) especially those not having bays, harbours or creeks (like St. Paul s) were to be included by the terms of this treaty was it not to be deemed equally necessary to have them expressly mentioned as was done in 1783, in order to exclude Americans from fishing to-day at such islands, or in the waters adjoining these islands. It is only reasonable to suppose so.

The right to fish at and around these islands in the sea off Nova Scotia was expressly reserved to the fishermen of the United States as well as the right to fish up to the mainland or coasts by the treaty of 1783. The latter right was expressly renounced by the treaty of 1818, but not the former.

More light is thrown on this same matter, as showing the views of these able and capable negotiators and experts, by the treaty made between Great Britain and France and

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Argument of Counsel.

Spain in 1763 relating to fishing. It is clear, from a perusal of that treaty that in order to exclude the French and Spanish fishermen from fishing in the waters adjoining the islands separated by some distance from the mainland it was necessary to expressly mention islands as such.

Article 5 of that treaty reads as follows:—

"And His Britannic Majesty consents to leave to the "subjects of the Most Christian King the Liberty of "fishing in the Gulf of St. Lawrence, on condition that the "subjects of France do not exercise the said fishery but that "the distance of three leagues from all the coasts belonging "to Great Britain, as well as those of the continent *as those* "*of the islands* situated in the said Gulf of St. Lawrence. "And as to what relates to the fishery on the coasts of the "Island of Cape Breton, out of the said Gulf, the subjects of "the Most Christian King shall not be permitted to exercise "the said fishery but at the distance of 15 leagues from the "coasts of the Island of Cape Breton; and the fishery on the "coasts of Nova Scotia or Acadia, and everywhere else out "of the said Gulf, shall remain on the foot of former treaties."

In further elaboration of the point that it was never contemplated by jurists, treaty makers or legislators to dignify an isolated rock or islet 15 miles off the coast with a 3-mile limit of its own, I submit that the law writers and authorities in discussing territorial jurisdiction or sovereignty by states over the sea have clearly indicated the accepted extent of such sovereignty.

For certain purposes under municipal law such jurisdiction may extend to the remotest and most insignificant bits of land wheresoever situate; but the jurisdiction of the state under civil or municipal or admiralty law is no criterion or parallel for the applieation of the principles of international law (so called) or treaty provisions. Perhaps if a crime were committed on a British ship, by a British subject within 3 miles of St. Paul's or any other of the hundreds of isolated rocks off the coast regardless of distance from the coast the state would have jurisdiction to punish the offender. That would be by virtue of the civil or admiralty jurisdiction of the state owning such islands; but the consideration of the 3 mile zone as expressed in treaties is international in character and depends on different principles

altogether. Sovereignty gives a state control over its own citizens within a 3 mile zone of any kind of land over which such sovereignty is exercised, but control over the rights of others may be regulated in an entirely different way by international precepts or law or by the terms of treaties. The treaty of 1818 referred to above contains the expression "coasts, bays, harbours or creeks." What does the expression actually mean in the light of international law?

It is generally admitted that the word "coast" refers to a shore of some magnitude or significance. The word "coast" in the general acceptation of the term, practically and usually includes bays, harbours, creeks, etc. Moreover, being associated with the words "bays, harbours and creeks" in this treaty, it is evident that the word "coast" means only such a coast as actually comprises "bays, harbours and creeks." At. St. Paul's Island there is no semblance of a bay, harbour or creek, there is merely the iron bound isolated and barren rock. It is not and cannot be used by man for settlement or for any industry whatever. The expression, "coasts, bays, harbours or creeks" means the general configuration of the mainland or such portions (islands) as are contiguous or sensibly connected or industrially used therewith. It is exclusive of rocks, ledges or islets. Give every rock off Nova Scotia a circumscribed 3 mile zone and chart them on a map, and you would have a labyrinth of circles which would make a marvellous design. Such an interpretation of the treaty would be extravagant, unreasonable and pretentious and was never in the mind of any jurist or plenipotentiary.

Ferguson in his Manual of International Law[1] says:—

"This distance (territorial sea) is presumed to be the range of the coast defences, but on the maxim that *terrae dominum finitur ubi finitur armorum vis*, it should be stated to extend to any point on the sea to which the cannon of actual *coast defences* on shore can carry a projectile. But as the carrying power of any given cannon is such a vague measure, the 3 mile radius is generally adopted."

The 3 mile limit is therefore based on the range of actual coast defences that is, defences as were actually erected on

[1] (1884) Vol. 1, p. 399.

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Argument of Counsel.

the mainland of such islands as were conceived to be large enough to have a coast; not an insignificant islet like St. Paul's, without coast, bays, harbours or creeks and more than 3 miles from the mainland.

It must be borne in mind that the defences contemplated were such as would likely be erected at the end of the 18th century when cannon defences were first devised.

Calvo, "Le Droit International," citing from the French edition of 1896, sect. 356:—

"From these general principles it is easy to draw the conclusion that territorial waters should include only the space capable of being defended from the mainland."

In the edition of 1767,[1] Bynkershoek stated:—

"My opinion is that the territorial sea should extend only as far as it can be considered subject to the mainland."

This would exclude a "territorial limit" around small islands or rocks in the sea, more than 3 miles from the mainland. Sir Travers Twiss in the Law of Nations.[2]

"That distance (territorial domain), by consent, is now taken to be a maritime league seawards along all the coasts of a nation. It would tend to greater clearness, if jurists were to confine the use of the term Maritime Territory to the actual coasts of a nation."

It is submitted that the very fact that the treaty of 1818 uses the words "coasts," "bays," "harbours" and "creeks" together, indicates, by all the rules of construction, that the land contemplated as that from which the 3 mile limit extends is such land as has coasts, bays, harbours and creeks, that is the mainland and such islands as have these characteristics.

On September 7th, 1910, the permanent Court of Arbitration at the Hague (under the provisions of the general treaty of arbitration of April 4th, 1908, and the special agreement of Jan. 27th, 1909, between the United States of America and Great Britain) decided the North Atlantic Fisheries Case, and in that decision laid down the following award:—

"In case of bays, the 3 marine miles are to be measured from a straight line drawn across the body of water at the

[1] Book 2, ch. 2, p. 127.

[2] Part 1, pp. 249–250.

place where it ceases to have the configuration and characteristics of a bay. At all other places 3 marine miles are to be measured following the sinuosities of the coast."

St. Paul's Island is not in any bay under this rule and is more than 3 miles from the nearest point on the sinuosity of the coast.

In addition to the points already taken, it is contended for the defendants that the national character of the schooner "John J. Fallon" has not been proved.

According to the principles of maritime law, a vessel's national character must be proved by the production of the ship's papers. That is the only proper evidence. The papers of this schooner were in the custody of the seizing officers and government authorities, but were never produced in evidence. The vessel's national character is not proved. It is not shown that the schooner "J. J. Fallon" is an American or foreign vessel.

If a 3 mile territorial limit is to be drawn around St. Paul's Island and if from the evidence it is concluded that the schooner "Fallon" and her trawls were seized within that limit then it is clear from the statement of the Crown's witnesses, that the trawls of the schooner "Fallon" had been set well outside of the limit on the morning of July 13, and that they had drifted inside that limit at the time of seizure.

In this respect this case would resemble, to some extent, the case of the "*Frederick Gerring*[1] tried in the Admiralty Court at Halifax on August 28, 1896, and appealed on September 1, 1896, to the Supreme Court of Canada, with this material difference, namely, that in the Geering case the fish caught were enmeshed in a "purse seine," and being alive, were not completely caught, while in this case the fish were caught, if at all, on trawls outside the limit and were dead, thus completing the act of fishing outside the 3 mile limit.

The judgment of the trial Judge in the *Gerring* case was affirmed in May, 1897, by a divided Court at Ottawa, three of the justices concurring in the decision, and two, one of whom was Chief Justice Strong, dissenting.

[1] 5 Can. Ex. 146; 27 Can. S.C.R. 271.

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Gwynne, J. (in whose opinion the Chief Justice concurred) said:—

"To construe the act of bailing fish out of seine in which they had been caught and secured outside of the 3 mile limit, into the hold of a vessel, which after the fish had been so caught, and while the parties employed on her were so securing the fish by transferring from the seine to the hold of the vessel, had drifted by force of currents outside of the 3 mile limit, as a violation of the treaty rights of the citizens of the United States, or of the Acts of Parliament passed in relation thereto, would be altogether too hypercritical a construction to put upon the treaty securing such rights and the said Acts of Parliament, and can not, in my opinion, have the sanction of this Court, and is not warranted by any of the cases referred to on the argument.

One of the majority judges—King, J.—stated that he affirmed the trial decision with "hesitation and doubt". It also appears from Judge King's judgment that as the fish were still alive in the seine, in his opinion, the "fishing" was not completed; for he says: "An operation at sea of taking several hundred, or one hundred barrels (as here) of loose and live fish from a bag net, is attended with such obvious chances of some of them at least regaining their natural liberty, that the act of fishing cannot be said to be entirely at an end in a useful sense until the fish are reduced into actual possession."

In a case like the "Fallon" where the fish were caught on hooks and were dead, they were reduced into actual possession, before the drifting took place. This differentiates the case materially from the *Gerring* case.

In July, 1897, the government of Great Britain notified the government of U.S. that in view of all the circumstances of the case, the Canadian Government had decided that the Gerring should be restored to her owner, on payment of a nominal fine, together with the costs incurred in her prosecution.

This fine was $1. (See minute of the Privy Council of Canada approved by His Excellency March 31, 1898.)

The owner of the Gerring rejected this compromise; and his claim for reparation was included in the schedule of

claims attached to the special agreement of August 18, 1910, creating the "American and British Claim's Arbitration", and was presented to this Arbitral Tribunal for determination.

The decision of this Board of Arbitrators was unanimously rendered in favor of the owner of the Gerring in 1912, (Sir Charles Fitzpatrick representing Canada on the Board), and is on file in the Department of Justice at Ottawa.

It is further to be noted that at the request of Lord Pauncefote made in July, 1899, the U.S. Government released 6 Canadian fishing boats which had been seized by an American cutter for fishing within the imaginary boundary line at Pt. Roberts opposite Vancouver Island. The fishermen stated that they had no light to guide them and the trespasses were unintentional. Vessels released and action dismissed August 25, 1899.

In 1891, the Canadian Government released 6 U.S. fishing boats seized in Passamaquoddy Bay, as they had drifted there in a fog and had unintentionally trespassed.

DRYSDALE, L. J. A. (December 16, 1916) delivered judgment.

This action seeks condemnation and forfeiture of the above-named fishing schooner on the ground that she violated ch. 47 of the Revised Statutes of Canada, "The Customs and Fisheries Protection Act" and amending Acts, particularly ch. 14 of the Acts of 1913.

The allegation is that the schooner named being a foreign ship or vessel was found fishing in British waters within 3 marine miles of the coast of Canada. It seems the schooner was fishing within 3 miles from the coast of the Island of St. Paul's, an island situate 15 miles from Cape North, Nova Scotia, in Cabot Straits. Although the schooner was found with her trawls and dories out and set for fishing within two miles of the shore of said island, the only answer made by the officers is that such officers thought they were further off shore and were not within 3 miles, and that it was not their intention to fish within the 3 mile limit.

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The vessel is a Gloucester fisherman registered in Boston and I do not think the intention of the officers of said vessel is a matter that requires consideration from me apart from their acts. I find as a fact that the schooner in question was on July 13, when arrested, in the act of fishing within 3 marine miles of the coast of St. Paul's Island, and that on that day she was fishing in British waters within 3 miles of such coast in a direction westerly from such Island.

The question remains for consideration, should I treat St. Paul's Island as part of the coast of Nova Scotia for the purpose of the 3 mile limit as defined in ch. 14 of the Act of 1913, and in the treaties bearing thereon. The prohibited line is within 3 marine miles of any of the "coasts, bays, creeks or harbours of Canada". I find that St. Paul's Island was, in very early times and long before confederation of the provinces now forming Canada, by express legislative enactment, made part of the County of Victoria, and by express legislation still remaining unrepealed, appearing as early as the 3d Series of the Nova Scotia Statutes, a declaration to the effect "that in all proceedings in any Court St. Paul's Island shall be held within the County of Victoria". It may be that some islands apart from statute from their character situation and formation may or may not be considered part of a coast line. Apart from long user and statutes I would be inclined not to consider St. Paul's Island as part of the coast line of Nova Scotia, but I think in view of its long occupation as part of Victoria County and the statute governing it, I am obliged to consider the island as part of the coast line.

I accordingly hold that the vessel was fishing when caught within 3 marine miles of the coast of Canada and contrary to the express provisions of ch. 14 of the Acts of 1913, and I feel obliged to condemn the said schooner with her tackle, rigging apparel, furniture, stores, and cargo as violating the said Act and to decree her forfeiture.

*Judgment for plaintiff.**

*Affirmed by the Supreme Court of Canada: 55 Can. S.C.R. 348, 37 D.L.R. 659.

1917
Jan. 8

IN THE MATTER OF THE PETITION OF RIGHT OF

DAME ROSE-ANNA JACOB, OF THE PARISH OF NOTRE-DAME DE LA VICTOIRE, WIDOW OF FERDINAND BEGIN, AS WELL PERSONALLY AS IN HER QUALITY OF TUTRIX TO HER MINOR CHILDREN,

SUPPLIANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

Crown—Negligence of Crown's Servant —"Upon, in or about railway"—Death—Measure of Damages.

Sub-sec. (f) of sec. 20 of the Exchequer Court Act (R.S.C. 1906, ch. 140, as amended by 9–10 Edw. VII, ch. 19) does not require, in order to recover against the Crown, that the death or injury occur on a public work, but it is sufficient that the injury complained of be caused by the negligence of the Crown's servant acting within the scope of his duties "upon, in or about the construction, maintenance or operation of the Intercolonial Railway or the Prince Edward Island Railway." The Crown is liable for an accident in the course of unloading coal for the Intercolonial Railway from a steamer moored at a wharf, belonging to the Crown and used as part of the Intercolonial railway, such accident being occasioned by the negligence of an officer or servant of the Crown.

In an action to recover for death by negligent act the plaintiffs are entitled to such damages as will compensate them for the pecuniary loss sustained thereby, together with the pecuniary benefits reasonably expectant from the continuation of life, taking into account the age of the decesaed, his state of health, his expectation of life, his earnings and his future prospects. Insurance money received or about to be received by plaintiffs should also be taken into consideration when making the assessment.

PETITION OF RIGHT to recover for the death of suppliant's husband occasioned by the negligence of the Crown's servants.

Tried before the Honorable Mr. Justice Audette, at Quebec, November 11 and 23, 1916.

E. Belleau, K.C., for suppliant; *E. Gelly*, for respondent.

AUDETTE, J. (January 8, 1917) delivered judgment.

The suppliant brought her petition of right, on her own behalf and as tutrix to her minor children, to obtain relief from the Crown for the death of her late husband which occurred as the result of an accident, in October, 1914,

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at Levis, P.Q., while he was engaged unloading coal for the Intercolonial Railway. And it is further alleged that the accident has been occasioned by the negligence of the Crown's servants while acting within the scope of their duties or employment.

The accident occurred under the following circumstances. The steamer "Wacona" was moored at the Princess Pier, at Levis, and her cargo of coal for the Intercolonial Railway was being unloaded at that pier, a wharf belonging to the Crown, and upon which spur lines of the Intercolonial Railway are constructed up to the crane trestle, at the edge of the wharf. This crane trestle, which is operated by steam, is composed of three clams working on booms, under the direction of three separate hatchmen superintending three separate gangs of men. The clam, which caused the accident, and which weighs about 3,000 lbs., goes down in the hold of the steamer and grips coal which it takes up and dumps in the Intercolonial Railway cars for distribution, or deposits the same on the wharf when there is no car available.

On the morning of the day of the accident Begin, the suppliant's husband, was working with Hatchman Dumont's gang at bunker or hold No. 3, when at about 9.30 a.m., Dumont ordered his gang to quit working at No. 3 and go and work at bunker or hold No. 2. This kind of shift was customary, being adopted in order to unload the ship evenly, and to prevent a list or disturbance of the cargo. Dumont's gang was composed of from 12 to 15 men. This gang of men then started from No. 3 and worked their way towards the bow to No. 2, and to reach that bunker, as will be seen by reference to plan, Exhibit No. 2, they had to get out of No. 3, walk on deck a piece and then go down a ladder to that hold, near the place marked "M" on the plan, and work their way back across or past the hatchway of No. 2 hold where Dickson's gang of men of also about 12 to 15 were working at gathering coal for the clam that was dropped through the hatchway in question.

Hatchman Dickson, in charge of the men working at hold No. 2, and under whose control the clam in question was operated, was stationed on deck, on the starboard side

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of the hatchway. His duty or employment consisted in directing the work of his gang, and especially in directing the clam by signalling to Paquet, the driver of the crane locomotive standing on the trestle on the edge of the wharf in question. And indeed, Paquet very clearly defines the scope of Dickson's work, as far as it was concerned with respect to the operation of the clam, by stating that Hatchman Dickson *is there all the time, he watches every dip of the clam, and if Dickson is not there, I do not work the clam.*

To take the ladder leading to Bunker No. 2, Dumont's gang had to pass through the hold or aperture leading to the ladder in question at point "M" on the plan, and that hold was only a few steps from where Dickson was stationed. After quite a number of Dumont's gang had already gone down the ladder, had travelled on the coal and passed by the hatchway through which Paquet's clam was working, Begin, the suppliant's husband, in turn got down the ladder and ran towards the stern on the port side of the steamer, following, as stated by most of the witnesses, nine or ten of his gang who had already passed the same way, and when reaching about the middle of the port side of the hatchway, he was struck on the head by the clam and knocked down, dying a few hours afterwards. Dickson, who was at his post, saw the clam which was coming down under his direction, and at the time when the accident was inevitable and before striking the coal, but not in time to save Begin's life—he put his hands up and ordered it to stop. The clam was stopped at four feet odd from the coal, with the effect of striking Begin with the spring or bounce produced by the sudden jerk of stopping, only making matters worse.

This case, it is contended, comes within the ambit of sub-sec. (*f*) of sec. 20 of *The Exchequer Court Act*[1], as amended by 9-10 Ed. VII, ch. 19, which reads as follows:

"(*f*) Every claim against the Crown arising out of any "death or injury or loss to the person or to property caused "by the negligence of any officer or servant of the Crown "while acting within the scope of his duties or employment "upon, in or *about* the construction, maintenance or opera-

[1] R.S.C. 1906, c. 140.

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"tion of the Intercolonial Railway or the Prince Edward "Island Railway."

It is well to note here that this new sub-sec. (*f*) is very different from sub-sec. (*c*), repeatedly passed upon both by this court and the Supreme Court of Canada. Sub-sec. (*f*) does not require that the death or injury occur on a public work, but it is sufficient that the negligence complained of be caused by the negligence of the Crown's servant acting within the scope of his duties *upon, in or about* the railway, a public work of Canada.

Therefore, to bring the case within the provisions of sub-sec. (*f*) and recover against the Crown, the damages resulting from the death of her husband, it is sufficient for the suppliant to establish that his death was caused by the negligence of a Crown servant while acting within the scope of his employment, *upon, in, or about* the construction, maintenance or operation of the said railway.

Does the evidence in the present case disclose such negligence as would give a right of action, as above mentioned?

There can be no doubt that Hatchman Dickson was derelict in his duties and guilty of very serious negligence in allowing a gang of 12 to 15 men to pass and meet, under the hatchway, upon coal whereupon they were also liable to stumble; another gang of men of about the same number, without first stopping the operation of the clam during the space of time necessary to perfect such shift. It was his obvious duty to stop the clam which indeed was part of and attached to the crane trestle, a public work, itself in turn part of the Intercolonial Railway, and the clam is a piece of machinery which travels and works very fast. It is true the evidence discloses that while Ryan, the general foreman, says he would not stop the clam under such circumstances, but the other Hatchman Dumont states he has already stopped the clam under such circumstances, when he had ordered the shift of a gang. This diversity of opinion between these two witnesses may only go to show the difference between sound judgment and prudence, reckoning with consideration of the value of men's lives, as against recklessness, often acquired as the result of getting familiarized with dangerous work which too often

proves fatal. Ryan, however, added that the hatchmen are supposed to take care, and that he never gave orders to the hatchmen to stop the clam when men are passing; that, he says, is left to the judgment of the hatchmen.

However, in neglecting to stop the clam under the circumstances, Dickson obviously failed to do what should be expected of a reasonably prudent hatchman, careful of the limbs and lives of his fellow-men working with him: *Filion v. The Queen*[1].

The accident happened on board the steamer which was moored at the Government wharf, the Princess Pier, upon which extended the Intercolonial Railway trains or cars as far as the crane trestle, from which they were loaded, by means of the clams—and it must be found that the negligence of the Crown's servant, which caused the accident, happened upon, in or about the operation of the Intercolonial Railway, a public work of Canada.

It is found unnecessary to go into further details with respect to the circumstances of the accident.

With regard to the insurance moneys which the suppliant has already recovered, and the $250 she will ultimately receive, they should be taken into consideration in assessing the damages to which she is entitled. I have already discussed this point in *Saindon v. The King*,[2] and will content myself with a reference to that case.

The suppliant's husband was a ship-laborer, 45 years old, earning 37½ cents an hour in the intermittent work of unloading these colliers, during the season of navigation, and was also earning outside of that work; but the evidence, both with respect to his earnings on board the vessels and otherwise is very unsatisfactory, and the amount he earned each year cannot be ascertained with any degree of even proximate certainty. There was an average of one vessel a week or so, and it took from 2 to 3 days, or so, to unload them.

However, in estimating the compensation to which the suppliant is entitled under the circumstances, while it is impossible to arrive at any sum or amount with any mathematical accuracy, several elements must be taken into

[1] 4 Can. Ex. 134; 24 Can. S.C.R. 482.
[2] 15 Can. Ex. 305.

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consideration. One must strive, however, to give the suppliant and her children such damages as will compensate them from the pecuniary loss sustained by the death of a husband and father; to make good to them the pecuniary benefits that they might reasonably have expected from the continuation of his life, which by his death they have lost. In doing so one must also take into account the age of the deceased, which at the date of the accident was about 45, his state of health, the expectation of life, the nature of his employment, a laborer, the wages he was earning and his prospects. But, on the other hand we must not overlook 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 are contingencies other than death, such as illness, as the being out of employment, to which in common with other men he was exposed.

All of these considerations are to be taken into account, and under all the circumstances of the case, I am of opinion to allow the widow the sum of $1,400, and the children the sum of $2,400, to be equally divided among them—making in all the sum of $3,800 for which there will be judgment with costs.

Judgment for suppliant.

Solicitors for suppliant: *Belleau, Baillargeon & Belleau.*

Solicitors for respondent: *Gelly & Dion.*

1916
Nov. 4

IN THE MATTER OF THE PETITION OF RIGHT OF

RONALD J. McNEIL, PRESENTLY OF BADDECK, IN THE COUNTY OF VICTORIA, RAILROAD BRAKEMAN,

SUPPLIANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

Crown—Negligence of Crown's servants—Railways—Injury to brakeman.

A brakeman on the Intercolonial Railway has no recourse against the Crown for injuries sustained in the course of his employment in the absence of proof of any negligence on behalf of any officer or servant of the Crown giving rise to the accident.

PETITION OF RIGHT to recover for the loss of a leg by a brakeman on the Intercolonial Railway.

Tried before the Honourable Mr. Justice Audette, at Sydney, N.S., May 31 and June 1, 1916.

Hugh Ross, K.C., and *N. A. Macmillan*, for suppliant; *T. S. Rogers*, K.C., and *J. A. McDonald*, K.C., for respondent.

AUDETTE, J. (November 4, 1916) delivered judgment.

The suppliant brought his petition of right to recover the sum of $10,625 for the loss of a leg, resulting from an accident while engaged in the discharge of his duties as brakeman on the Intercolonial Railway, a public work of Canada.

The suppliant, on the evening of December 14, 1914. the date of the accident, was engaged in working as a brakeman on a train, which arrived at North Sydney Terminal about 7.30 o'clock in the evening. After the passengers had been taken off the cars the train started for the end of the pier to take away the freight cars lying on the east side of the shed erected on the wharf. The freight cars were, some of them, touching one another, and others were two or three feet apart, and the coupling had to be done accordingly. The accident happened at about

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Reasons for Judgment.

eight o'clock in the evening when the train-hands were engaged in the coupling of the last car. McPhee, the senior brakeman, who was working with the suppliant, went down to the ground from the top of the car to open his coupling, and on coming back to the top of the car, where the suppliant was, told him to signal for backing. The suppliant then by swinging his lantern all the way around several times, signalled the engineer to back up. The train started to move only after he had so signalled, and while so signalling his lamp went out, and the engineer not seeing any more light or signal stopped his train, which was going at about one mile an hour, and had at the time covered a distance of about two or three feet.

The suppliant was at the time in question walking on the foot-board on the top of the car—he was, he says, walking sidewise so as to see McPhee and the engineer—and when his lamp went out he continued walking in a northerly direction, and miscalculating the distance between the cars, placed his foot in the open space between the cars and fell to the ground where he met with the accident in question. If some cars were only 2 or 3 feet apart and some were touching, there was no occasion or necessity to walk any distance on the top of the car. Furthermore, he had gone several times over the foot-board at night at the very same place before the accident. The *locus in quo* is one where similar work is done 4 or 5 times every week.

It was a dark, bleak night, raining and blowing hard, and it is no wonder, as appears from the evidence, that his lamp went out in such weather. The charge that the oil was the cause of the lamp going out has not been substantiated by the evidence.

It appears that it is a common practice to work on the foot-board on top of the cars, that it is a matter of routine work, and every brakeman must undertake such work as being within the scope of his employment and duties.

The suppliant, to succeed in the present case, must bring the facts of his case within the ambit of subsecs. (*c*) and (*f*) of sec. 20 of the Exchequer Court Act,[1] as amended by 6-7 Geo. V, ch. 16. In other words, the accident must have

[1] R.S.C. 1906, c. 140.

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happened, 1st, upon a public work; 2nd, there must be a servant of the Crown who has been guilty of negligence while acting within the scope of his duties and employment; and 3rd, the accident complained of must be the result of such negligence.

Under all the circumstances of the case, it is unnecessary to say any more than that the suppliant has failed to establish, under the evidence adduced, any negligence on behalf of any officer or servant of the Crown which would have occasioned the accident in question.

It is, indeed, a sad case to see a man crippled for life, at such an early age, and he is entitled to one's deepest sympathy. It is to be hoped some employment within the scope of his capacity will be procured for him.

The suppliant is not entitled to any portion of the relief sought by his petition of right.

Petition dismissed.

Solicitors for suppliant: *McKenzie & Macmillan.*

Solicitor for respondent: *J. A. McDonald.*

1917
Oct. 16

NEW BRUNSWICK RAILWAY COMPANY,
SUPPLIANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

Crown—Liability for negligence—Railways—Fires—Leased road.

The Crown is liable under s. 20 (*c*) of the Exchequer Court Act (R.S.C. 1906, c. 140, as amended in 1910, c. 19), for an injury resulting from the negligent setting out of fires by section men on a railway track leased by the Crown and operated as part of the Intercolonial Railway system.

PETITION OF RIGHT for damages arising out of the destruction of property by fire, alleged to have been caused by negligence of servants of the Crown on a Government railway.

F. R. Taylor, K.C., for suppliants; *D. Mullin*, K.C., for respondent.

CASSELS, J. (October 16, 1917) delivered judgment.

The petition alleges that on August 1, 1916, the sectionmen in the employ of His Majesty the King on the said International branch of the Intercolonial Railway, negligently started fires for the purpose of burning grass, brush and refuse along the railway right of way. The suppliant claims that 600 acres of land owned by it were burnt over and the timber thereon destroyed, and asks that it should be paid the sum of $6,600 as damages.

Among other defences His Majesty the King by the Attorney-General of Canada denied that the injury to the suppliant's property, of which the suppliant complains, happened on a public work.

The case was called for trial before me at St. John, and counsel for both the suppliant and the respondent asked that the case should be adjourned to Ottawa, and that the issue raised that the damage did not occur on a public work should be first tried. Both counsel were of opinion that

this branch of the case could be better tried in Ottawa where the documents material to the case were filed.

It was also agreed by counsel that in the event of my coming to the conclusion that the International Railway referred to in the petition was a public work, that the evidence in the case as to whether there was negligence, and if so the petitioner entitled to damages and the quantum of damage should be taken in St. John, and both counsel agreed that such evidence should be taken before Mr. Sanford.

The course suggested by counsel was adopted, and the trial of this question as to whether or not the International Railway formed part of the Intercolonial Railway was proceeded with.

Since the argument I have carefully considered the question and am of the opinion that, assuming the petitioner can establish its case so as to bring the same within sec. 20 of the Exchequer Court Act, as amended, it will be entitled to succeed. Sec. 20 was amended by c. 19 of 9-10 Edw. VII., assented to on April 8, 1910. It reads as follows:—

Section 20 of the Exchequer Court Act is hereby amended by adding thereto as par. (*f*) the following:—

(*f*) Every claim against the Crown arising out of any death or injury or loss to the person or to property caused by the negligence of any officer or servant of the Crown while acting within the scope of his duties or employment upon, in or about the construction, maintenance or operation of the Intercolonial Railway or the Prince Edward Island Railway.

Prior to this amendment it had been decided by the Supreme Court in the *Chamberlin* case,[1] and other cases, that unless the damage arose on a public work no action would lie as against the Crown.

By c. 16 of 5 Geo. V., s. 2, being An Act to amend the Government Railway Act, and to authorise the purchase of certain railways, it is provided that the indenture of August 1, 1914, between the International Railway of New Brunswick, Thomas Malcolm and His Majesty the King,

[1] 42 Can. S.C.R. 350.

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a copy of which is set out in Schedule "A," was thereupon ratified and confirmed. This agreement provides that "pending the completion of the purchase, as hereinbefore provided, the company shall demise and lease, and does hereby demise and lease, to his Majesty and His Majesty does hereby lease from the company, for a period not exceeding 5 years the said railway," etc.

By clause 6 of the agreement the lease had to be approved by the Lieutenant-Governor of New Brunswick in Council, as provided by the statute.

An order of the Lieutenant-Governor in Council approving the lease was produced and is on file.

It is shown in evidence that the International Railway at the time of the alleged negligence was being operated as part of the Intercolonial Railway.

Certain Orders-in-Council, namely, of April 30, 1909, of May 5, 1913, and of February 15, 1916, were produced with the object of showing that the Intercolonial Railway had apparently passed out of existence, and a new series of railways taken its place under the name of the Government Railways

I do not think that these Orders-in-Council in any way affect the question. They are merely passed with a view to a public management of the system as a whole.

Having regard to the decision of the Supreme Court of Canada in the case of the *King* v. *Le François*,[3] I am of opinion that the road in question at the time the injury complained of is alleged to have been sustained formed part of the Intercolonial Railway, and that the provisions of the statute of 1910 are applicable.

The question will therefore be referred to Mr. Sanford, to take the evidence in the case, and report the same to the Court, and when this is done an appointment can be obtained for the hearing of the argument.

Reference ordered.

Solicitors for suppliant: *Weldon & McLean.*

Solicitor for respondent: *Daniel Muelin.*

[3] 40 Can. S.C.R. 431.

1917
Oct. 25

IN THE MATTER OF THE PETITION OF RIGHT OF

GERTRUDE S. NORTHRUP.....SUPPLIANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

Crown—Liability for negligence—Uncovered basin—Public building—Trespassers.

A pedestrian falling into an uncovered catch-basin constructed by the Crown, on property not owned by it, to protect a post office building against accumulation of surface water, at a place not used for public travel, is a trespasser, and has no redress against the Crown for injuries sustained thereby.

PETITION OF RIGHT for damages for any injury sustained from falling into an uncovered basin constructed by Crown.

N. R. McArthur, for suppliant: *T. S. Rogers*, K.C., for respondent.

CASSELS, J., (October 25, 1917) delivered judgment.

The petitioner, S. Gertrude Northrup, lives at Glace Bay, in the County of Cape Breton. She alleges that on or about April 11, 1915, while walking to the public buildings (the post office), she suffered damages by falling into a catch-basin which she alleges was uncovered and unprotected and in a dangerous condition, because of the negligence and unworkmanlike construction of the same by the respondent, its agents, servants and workmen, etc.

The allegation is that she fell into the catch-basin and was seriously injured, and she prays that the Crown be condemned to pay the petitioner the sum of $22,235 with costs.

The case came on for trial before me at Halifax on September 13 last. The evidence, with the exception of that of William Bishop, was taken by consent by a commissioner agreed to by all parties. By consent it was used at the trial. I had no opportunity, therefore, of personally seeing or hearing any of the witnesses, except Bishop.

The public building in question is the post office. It fronts upon Main St. Exhibit No. 2, filed at the trial, shows roughly the situation of the property. The post office was constructed about the year 1910. It appears

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from the evidence that the land sloped from the north towards the building, with the result that the surface water which drained from the ground on the north soaked into the northerly side of the post office—and thereupon, under directions of the Government, a catch-basin was constructed in order to catch the waters, and, by means of a drain, the water from this catch-basin is conducted into drains which drain the post office into the main sewer on Main St.

On the west of the public building and on the Government land there was a passageway leading from Main St. and to the north of the building. It would appear that this passageway was utilized for the passage of teams and persons travelling on foot, and led to the houses situated on the north of the post office, This passageway had a width on Main St. of about 9 ft., and became wider towards the northern end. It was a beaten path like a public street, and was used by the public. This passageway, while utilized by the public, was in part on Government property. The people passing by this western passageway walked clear of the catch-basin in question.

On the easterly side there was an open piece of ground between the Government building, which at Main St. was about the width of 12 ft. At the north-east corner of the building the width was about 3 ft. There was no beaten path on this westerly piece of land. This is conceded by the petitioner and also by the witnesses. The catch-basin in question was constructed on lands owned by the late Senator McDonald, and was at some distance from the northerly boundary of the land owned by the Crown.

The allegation of the petitioner is that she was going to Rice's Gents' Furnishings when, she says, I was taking a short cut through Senator McDonald's field when I got injured near the post office. She is asked:—

Q—Were you on the beaten path? A.—No. Q—Were you passing a place where apparently nobody else passed? A.—I noticed no tracks and there was no road.

The case was presented before me on behalf of the petitioner by Mr. McArthur with great ability. He informed me at the trial that he had made a very careful search of authorities, but could find none in point.

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In my opinion, the action does not lie against the Crown. Mr. Bishop seems to think that in Glace Bay people were in the habit of crossing any commons promiscuously. The land in question to the east of the post office building and to the Commercial Hotel is the property of the Crown. In utilizing this land with a view of taking a short cut the petitioner was a trespasser, and there was no duty on the part of the Crown towards the petitioner. Had she chosen to take the beaten road on the west passage, the question of a different character might arise—but for her own convenience she chose to take this short cut through grounds of Senator McDonald, upon whose lands the catch-basin in question was situate, with a view of passing down on Government lands to the east of the post office.

The case of *Lowery* v. *Walker*,[1] reversed a decision of the Divisional Court,[2] and a decision of the Court of Appeal.[3] It is stated on page 11:—

"The contentions on both sides were so clearly and fully set forth in the report of the decision of the Court of Appeal that it is unnecessary to repeat them here. In this House their Lordships expressed no opinion upon the authorities, their decision turning on the construction of the learned County Court Judge's findings."

By referring back to the decision of the Court of Appeal it will be found that the judges dealt exhaustively with the principles that should govern the case of a trespasser. As their Lordships pointed out, there are authorities, perhaps, not all in harmony, but the general principles of law governing such cases are fully dealt with.

Reference may also be had to Pollock on Torts,[4] *Leprohon* v. *The Queen*,[5] may also be referred to, although in some respects this case may be modified by the law as enunciated by the Supreme Court of Canada in the case of *Leger* v. *The King*,[6]. The case of *Brebner* v. *The King*[7], may also be referred to, and the collection of authorities therein cited.

I am sorry for the petitioner, as she seems to have suffered considerably. I would have preferred that she had

[1] [1911] A.C. 10,
[2] [1909] 2 K.B. 433.
[3] [1910] 1 K.B. 173.
[4] 10th ed. (1916), at p. 544.
[5] 4 Can. Ex. 100.
[6] 43 Can. S.C.R. 164.
[7] 14 Can. Ex. 242, 14 D.L.R. 397.

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been examined in open court before me. Looking at the doctor's evidence, the same injury might have been caused by slipping without getting, as she alleges, into this hole.

Another serious defence has been raised on the part of the Crown which I have not considered it necessary to investigate, namely, that the accident in question did not arise on any public work, and the Crown invokes the law as decided in the *Chamberlin* case[1] and the *Piggott* case,[2] and numerous other authorities.

Any amendments to the Exchequer Court Act[3] remedying the law as decided in the *Chamberlin* case would not apply to this case; and the legislation in the last Parliament, namely, the statute passed in 1917, would not be retroactive.

The petition is dismissed, and, if the Crown exacts them, with costs.

Petition dismissed.

Solicitor for suppliant: *N. R. McArthur.*

Solicitors for respondent: *Henry, Rogers, Harris & Stewart.*

[1] 42 Can. S.C.R. 350.
[2] 32 D.L.R. 461, 53 Can. S.C.R. 626.
[3] R.S.C. 1906, ch. 140.

THE KING, ON THE INFORMATION OF THE ATTORNEY-GENERAL OF CANADA,

PLAINTIFF;

AND

WILLIAM H. STUDD, AND THE NOVA SCOTIA PERMANENT BENEFIT BUILDING SOCIETY AND SAVINGS FUND AND ARTHUR C. THEAKSTON.

DEFENDANTS.

1916
Nov. 17

Expropriation—Railways—Compensation for severance—Dedication.

A severance of development land occasioned by an expropriation by the Crown for railway purposes, whereby the owner is prejudiced in his ability to dispose and use certain lots thereof, entitles him to compensation for the damage caused by the severance; the measure of damages is the market value of the land at the time of the expropriation.

Holditch v. Canadian Northern Ry., [1916] 1 A.C. 536, 27 D.L.R. 14, distinguished; *Cowper Essex v. Acton Local Board*, 14 A.C. 153, followed.

A dedication of highways by registered plan, approved by the municipality, does not, until they are accepted as highways, divest the owner from the fee therein, so as to be considered in any pecuniary advantage to the land as a whole.

INFORMATION for the vesting of land and compensation in an expropriation by the Crown.

Tried before the Honourable Mr. Justice Cassels, at Halifax, N.S., September 22, 23, 25 and 30 and October 2, 1916.

T. S. Rogers, K.C., and *J. A. McDonald*, K.C., for plaintiff; *L. A. Lovett*, K.C., for defendants.

CASSELS, J. (November 17, 1916) delivered judgment.

An information exhibited on the part of the Crown to have it declared that certain lands expropriated for the use of the Terminal Works in the city of Halifax are vested in the Crown and to have the value thereof and of any damages the owner thereof may be entitled to ascertained. The lands were expropriated on March 7, 1913. The value has to be ascertained as of that date.

For a proper understanding of the questions involved a knowledge of the location of the property and its general

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situation is required. In April, 1911, the defendant Theakston purchased a block of land containing about 13 acres and a conveyance was executed granting him these lands on May 12, 1911. The consideration paid by him for these lands was the sum of $15.000. The block so purchased was bounded on the east by Oxford street and on the south by Cobourg Road.

The land was vacant land, well situate and in a good residential district. Oxford street is a street running north and south. Cobourg Road runs east and west and is a continuation of Spring Garden Road. Its western end terminates on the North West Arm. The next through street north of Cobourg and running parallel thereto is Jubilee Road which also extends to the North West Arm. There is an extensive piece of land lying to the south of Jubilee Road intervening between Jubilee Road and the property of Theakston and bounding the property in question on the north.

To the west of the property in question and adjoining is a piece of property and immediately west of that the grounds of the Waegwoltic Club which extend to the waters of the Arm. On Cobourg Road south side and opposite the Waegwoltic Club grounds is the Birchdale Hotel property comprising about 10 acres and also extending to the Arm. On the easterly front of the Birchdale property and extending from Cobourg Road to what is known as the Kenny property is a road the private property of the Birchdale Company with an easement over it in favour of the Kenny property. A portion of this road has been expropriated as I will explain later.

Further to the north of Jubilee Road and running parallel thereto is Quinpool Road referred to in the evidence. Oxford street extends from South Street which is further south from Cobourg Road and running parallel thereto from the centre of the city to the North West Arm. Oxford Street runs from South Street north to beyond Quinpool Road. The Halifax Street Railway have tracks extending down Spring Garden Road and Cobourg Road as far as Oxford Street. The street railway runs as far as Oxford Street and then runs both north and south along Oxford Street.

In 1911, at the time of Theakston's purchase Oxford Street was partly paved on both sides of the street, was well lighted by electric lamps and with a good roadway. Cobourg Road was well lighted and also had a good roadway. With the exception of the piece of land fronting on Oxford Street on the west side purchased by Theakston a good class of residential houses had been erected on a considerable portion of Oxford Street on both the east and west sides. Although sewers for the purpose of draining were ordered by the City Council on May 18, 1911, on Oxford Street and Cobourg Road, they were not actually laid on the streets until 1912. Both streets were supplied with water from the city water works. An important consideration in this case is that from Oxford Street west down Cobourg Road and also on the 13 acres in question there is a decline until Connaught Avenue is reached of about 20 feet. This makes it impossible to give sewage facilities to the Oxford Street drain to any of the houses that may be erected on Waegwoltic Avenue with the exception of the lots fronting on Oxford Street, and possibly 2 or 3 lots fronting on Waegwoltic Avenue immediately adjoining the Oxford Street lots. If city sewage is required it must be by connections down Waegwoltic Avenue and along Connaught Avenue to the Cobourg Road drain.

Shortly after his purchase Theakston prepared and registered a plan sub-dividing the 13 acres purchased by him into building lots. A copy of this plan is Exhibit A filed in this case. By his plan 2 streets were laid out. Connaught Avenue to the west is a street of 120 feet in width extending from the northern side of the block to Cobourg Road. A tier of lots were laid out on the plan on the west side of Connaught Avenue being lots 20 to 27 both inclusive and on the east side of Connaught Avenue lots 17-18-19-34-35-33. Waegwoltic Avenue a street 60 feet wide extends from Connaught Avenue to Oxford Street. The southerly side of lot 19 and the northerly side of lot 35 are bounded by Waegwoltic Avenue. On either side of Waegwoltic Avenue a tier of lots are laid down 16 to 10 inclusive on the north side and 36 to 42 inclusive on the south side. A tier of lots from 1 to 9 inclusive were laid

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out on Oxford Street and on Cobourg Road lots 28 and 29-30-31-32 and 48 to 43 inclusive.

Prior to the expropriation on March 7th, 1913, Theakston had sold all the lots fronting on Oxford St. and lots 43 to 48 inclusive on Cobourg Road, also lot 30 on Cobourg Road. This lot 30 has been acquired by the Crown. A small corner of lot 31 on Cobourg Road was expropriated. This small corner of lot 31 has been reconveyed and is not in question in this action. The lots sold fronting on Oxford St. and Cobourg Road were with a few exceptions sold during the year 1911, the exceptions comprise 1 or 2 lots in the early part of 1912.

On September 6th, 1911, the defendant Theakston granted and conveyed to the defendant Studd the lots on the west side of Connaught Avenue. This conveyance was executed to enable Theakston through Studd to obtain a loan from the Building Society. No beneficial interest in the said lots ever passed or was intended to pass to Studd. He was merely a bare trustee for the purpose of raising a loan for Theakston. At the time of the filing of the plan of expropriation on the registry Studd appeared to be the owner and was made defendant to these proceedings. Subsequently Theakston was added as a party, and prior to the trial, the mortgage having been paid off, Studd reconveyed to Theakston and has no further interest. Counsel for the Crown and for the defendant are eminent counsel and familiar with the laws of Nova Scotia and do not disagree as to the effect of the registration of this plan so far as it is a dedication of Waegwoltic Avenue and Connaught Avenue as streets. The plan was approved by the City Council but the streets have not yet been accepted by the city and therefore the fee in the street is still vested in Theakston. I have considered the statutes relating to the city of Halifax and agree with the conclusions of counsel on this question. Theakston having sold lots according to this plan cannot it is conceded by counsel change the plan, and while at present the fee in the streets is vested in Theakston, any pecuniary advantage for the land occupied by these streets is small outside of the benefit arising therefrom to the lots fronting thereon. See *Pugh* v.

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Peters.[1] No work has been done or expenditure made on either of these streets. There is no drainage, no water, no lighting on either Waegwoltic or Connaught Avenue.

Such being the position of matters on the ground the expropriation plan was filed. The railway cuts through a field on the east side of the Road owned by the Birchdale Company, crosses Cobourg Road, cuts through the southerly end of Connaught Avenue and the Crown expropriates a large portion of lot 29 fronting on Cobourg Road and a small portion of lot 28 fronting on Cobourg Road, the whole of lots 25 and 26 on the west side of Connaught Avenue and portions of lots 27-24-23-22 and 21 on the west side of Connaught Avenue. The lands expropriated are shewn marked yellow on plan A.

The total area of these lands is 32,060 square feet. The railway right of way is 150 feet in width. The depth of the roadway cutting is between 20 and 26 feet as it crosses Cobourg Road and the lands expropriated from the defendant Theakston. That portion of Connaught Avenue expropriated by the Crown was not included in the description in the information as filed, the Crown advisers reasonably assuming Studd to be the owner. At the trial, however, counsel for all parties agreed that the information be amended by including the area of that portion of Connaught Avenue expropriated. It is said to contain 26,000 square feet.

The Crown recognizes Cobourg Road as a public road and as required by the Expropriation Act has provided temporary bridges over the cutting of the railway and has also made provisions for a permanent bridge over the railway cutting so as not to interfere with Cobourg Road and has also made provision for the construction of a sewer on Cobourg Road under the railway crossing. The fall towards the west permits this to be done and I am informed the city council are satisfied with the proposed plans for a bridge and drainage. The Crown has, by its undertaking, agreed that any sewer that may be constructed along Connaught Avenue to receive the sewage from Waegwoltic Avenue or Connaught Avenue properties may connect

[1] 2 Russell & Chesley, 11 N.S.R. 139.

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under the tracks on the property of the Crown with the sewer down Cobourg Road. They decline however to erect or permit to be erected any bridge over their railway to connect Connaught Avenue with Cobourg Road. I have no reason to doubt that this decision has been arrived at after due consideration by their engineers.

Practically Connaught Avenue is closed as a street connecting with Cobourg Road and damage is occasioned by destroying this right of access to a portion of the property.

A question of considerable importance arises as to whether the case is governed by the principles enumerated in *Holditch* v. *Canadian Northern*,[1] or by the decision in *Cowper Essex* v. *Acton Local Board*.[2] If the reasons in the *Holditch* case govern a considerable portion of the defendants' claim for damage by severance, smoke, noise, vibrations, etc. disappear. While there would probably be a cause of action to the owners of a number of the lots by reason of the access to Cobourg Avenue being destroyed the fact that these lots are owned by Theakston would not entitle him to counterclaim in this action as any proceeding on his part would require a fiat.

At the trial I suggested to counsel that this question would probably arise and while at the time I was inclined to the view that the decision in the *Holditch* case governed, I suggested, in order to avoid any mistrial, that all the evidence should be adduced as if the claim was let in under the reasons of the *Cowper Essex* case. Counsel for both parties assented to this course. Further consideration has convinced me that the *Holditch* case does not govern and that the defendant Theakston is entitled to claim for damages by severance—smoke, etc., if damages can be shown. There are material differences between the facts as stated in the *Holditch* case and the present. In the head note in the case[3] before the Lords of the Privy Council it is stated as follows:—

"Upon the compulsory taking of lands under the "Railway Act of Canada the owner is not entitled to com- "pensation for severance from other lands owned by him

[1] 50 Can. S.C.R. 265, 20 D.L.R. 557; [1916] 1 A C. 536, 27 D.L.R. 14.
[2] 14 A.C. 153.
[3] [1916] 1 A.C. 536.

"unless the lands taken are so connected with, or related to, "the lands left that he is prejudiced in his ability to use or "dispose of the latter."

The facts in the *Holditch* case show that the streets were numerous They were public highways. The total number of building lots was great. All had access to a street and some to two streets. Numerous lots had been sold scattered over the property. In the case before me, excluding Oxford Street and Cobourg Road, there are but two streets laid out on the plan, viz. Waegwoltic Avenue and Connaught Avenue. Neither of these streets have become public highways. Owing to the fall in the level of the land from Oxford Street to Connaught Avenue it would be impossible to provide sewage for the greater number of the lots except by drainage down Waegwoltic Avenue and along Connaught Avenue to Cobourg Road. By the expropriation and nature of the cutting, were it not for the undertaking of the Crown as to drainage, it would be a great prejudice in the owners ability to use or dispose of the lots. It has also to be borne in mind that the statute under which the land is expropriated in this case is not the same as the statute under which the land was taken in the *Holditch* case. I therefore deal with the case as if the owner is entitled to damages under the principles which govern the decision in the *Cowper Essex* case.

In considering the value to be allowed for the lands actually taken and the damages to be allowed for lots part of which have been expropriated and any damage to the other lots by severance there are certain points which have to be kept in mind. First it must be remembered that neither Waegwoltic Avenue nor Connaught Avenue are streets that have been accepted by the city and while it is likely they may be so accepted if buildings are erected thereon of a sufficient number to warrant it the land at present lies vacant. Second. There are no sewers, no water, no electric lighting on either of these avenues. These things may come in time. Third. As I have pointed out, lots on Oxford St. and Cobourg Road were sold in 1911 and the early part of 1912. These streets were roads well lighted, well paved and sewers provided for by

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the city council in 1911 and constructed in 1912. Oxford Street is fairly well built up by a good class of residences.

I have as far as I am able to assess the market value as of March 9, 1913. I cannot come to the conclusion that lots on Waegwoltic Avenue and Connaught Avenue having regard to the rule that governs, viz., that market value is the test, should be considered as of the same value as lots on Oxford St. and Cobourg Road. I accept the view that property had increased in value between the date of the purchase in 1911 and the date of the expropriation, March 9, 1913. I think probably an increase of 25% is reasonable. A further point that I consider important is this. I am of Mr. Longard's opinion that in dealing with outside residential property the basis of valuing building lots by so much per square foot is not a satisfactory method. Of course the extra depth of a lot must give some additional value and if the lot be deep enough to give a frontage on two streets with sufficient depth for a sale of a lot on each street as is the case in respect of some of the properties referred to in the evidence then the depth is of importance. Nothing of this nature arises in regard to the properties in question.

Theakston when selling lots on Oxford St. and Cobourg Road sold them as lots regardless of the square feet. With the exception of the lot on the north west corner of Cobourg Road and Oxford St. the price at which the lots were sold was $1,000 a lot and these lots had the advantages I have described.

Lots 7-8-9 on Oxford St. contain in square feet 10,522-10,675-10,236 respectively. The increase in square feet made no difference. Taking the total area of the three lots they would average about 9¼ cents per square foot. Lots 1 to 6 on Oxford St. each contained 8,200 square feet, an average of 12⅕ cents a square foot. Lots 43 to 48 Cobourg Road 7,650 to 7,875 an average for each lot of about 13 cents a square foot. Each of these lots with the exception of the corner lot realized $1,000 a lot.

When Mr. Theakston comes to value the lots in question he places a value as of the time of the expropriation on lots 20 to 27 on the west side of Connaught Avenue before expropriation of 25 cents a square foot. These lots have a

frontage of 50 feet by a depth of 110 feet and would make the value of the lots about $1,375. An acre contains 43,560 square feet. At 25 cts. a square foot the value given would be $10,890 per acre for property purchased in April 1911 for $1,154 an acre showing what magic there is in a plan. Lots on the east side of Connaught Avenue 17-18-19-33-34-35 he also values at 25 cents a square foot. Lots 28 and 29 Cobourg Avenue he values at the time of the expropriation at 30 to 35 cents a square foot.

Mr. Langard a witness called by the defence is a gentleman of large experience. He places a value on lots 28 and 29 fronting on Cobourg Road as of March 7th, 1913, of from $1,200 to $1,400 each. The lots fronting on Connaught Avenue of about $1,000 each.

Mr. Clarke for the Crown when placing a value on lots 28 and 29 at the time of expropriation for the purpose of tender put it at 20 cents a square foot or $1,770 per lot. He places the market value at $1,400 per lot on March 7, 1913, the outside value placed on the lots by Mr. Langard. Mr. Clarke values the lots on Connaught Avenue at 15 cents a square foot or $841.50 a lot. His view is that $168.30 should be allowed for damages to lot 20 and $2,000 allowed for salvage on 21-22-23-24 and 28 and 29 on Cobourg Road. The result would be an allowance of $3,540 for the two lots 28 and 29 fronting on Cobourg Road and $841.50 a lot for 8 lots on the west side of Connaught Avenue which would amount to $6,732, with the $3,540 added $10,272. To be deducted from this amount would be salvage for the 8 lots on the west side of Connaught Avenue estimated by Mr. Clarke at $2,000, leaving a balance of $8,272.

I think the value allowed for lots 28 and 29 and for the 8 lots on the west side of Connaught Avenue ample and I also think the salvage allowance is very liberal in favour of the land owner. Lot 28 with what is left of lot 29 on Cobourg Road will make a reasonably good lot and lots 20-21 and 22 with portion of 23 also three reasonably good lots. Having regard to the peculiar method of the crossing by the railway, the width and depth of the cut, the probable vibration, noise, etc, I am not disposed to interfere with the amounts. I do not think lots 31-32 and 34 fronting on

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Cobourg Avenue are appreciably injuriously affected. Lot 31 may be slightly affected but the liberal allowance for the other properties more than compensate. Lots 33-34-35 are I think damaged by reason of the access to Cobourg Road being cut off and also by reason of vibration, noise, smoke, etc. I should think an allowance of $500 would be ample. Lot 33 is more seriously injured than 34 or 35. Lot 34 more than 35. I make no allowance for any damages to 17-18-19 on Connaught Avenue or the lots on Waegwoltic Avenue.

It was conceded by Mr. Lovett that these lots were not particularly damaged having regard to the undertaking as to the sewer. It was also conceded that having regard to what has been stated as to the title to Connaught Avenue there is no practical value to Theakston in that portion of the street expropriated. The allowance of 10% which I propose to add will cover any loss for this. On behalf of the Crown Mr. Rogers offered $200 to cover any additional expense by reason of the deepening of the drain.

The result is that judgment will issue for $8,272 plus $500 and $200, in all $8,972 with 10% added $897, in all $9,869 together with interest from March 7, 1913, to judgment. The defendants are entitled to the costs of action and the judgment should refer to the undertaking as to drainage.

Judgment accordingly.

Solicitors for plaintiff: *Silver & McDonald.*

Solicitors for defendants: *Studd & Theakston*; *Lovett & Roper.*

Solicitor for Nova Scotia Permanent Benefit Society: *W. L. Payzant.*

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THE KING, ON THE INFORMATION OF THE ATTORNEY-GENERAL OF CANADA..... PLAINTIFF;

AND

BIRCHDALE, LIMITED, THE CANADA LIFE ASSOCIATION AND JOHN W. REGAN, J. FRED FRASER, J. FRANK COLWELL, JAMES FARQUHAR, FREDERICK BOWES, CHARLES BUTCHER AND W. ERNEST THOMPSON.....DEFENDANTS.

Expropriation—Compensation—Railways—Hotel property—Easement.

Upon an expropriation by the Crown of a portion of a hotel site for railway purposes, compensation should be allowed on the basis of a building lot, for injury to the property from the construction and operation of the railway, and for an easement of a right of way over a street affected by the expropriation.

INFORMATION for the vesting of land and compensation in an expropriation by the Crown.

Tried before the Honourable Mr. JUSTICE CASSELS, at Halifax, N.S., September 28, 29 and October 2, 1916.

J. A. McDonald, K.C., and *T. S. Rogers*, K.C., for plaintiff; *Humphrey Mellish*, K.C., for defendants.

CASSELS, J. (December 7, 1916) delivered judgment.

An information exhibited on behalf of the Crown to have it declared that certain lands expropriated for the terminal works in the City of Halifax, are vested in His Majesty, and to have the amount of compensation ascertained by this Court.

Before dealing with the question of value, it may be well to describe the property owned by the Birchdale Company, Ltd. In a recent case in which I delivered judgment *The King v. Studd*,[1] I have set out in considerable detail the character of the surrounding properties in the district in which these lands are situate. I do not propose

[1] Ante. p. 365.

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to repeat what I there stated. The property in question, namely, the Birchdale property is situate facing on the North West Arm. It is a property comprising an area of about 10 acres. The actual quantity is not definitely fixed. It is said to contain with the water-lot over 11 acres, but Mr. Bowes, who is the manager of Birchdale, is of the impression that the area of the land is less than 11 acres. The exact quantity is not of moment in this action. The whole area is composed of one lot on which is erected, what is called, the Birchdale Hotel. This hotel is situate not far from the waters of the North West Arm, and overlooks the waters of the Arm.

The property is bounded on the north by Cobourg Road which runs from the centre of the City to the waters of the Arm. Running from Cobourg Road, and along the easterly front of Birchdale is a private road said to be owned by the Birchdale Company. This road extends from Cobourg Road to what is known as the Kenny property or "Thorndale," which adjoins Birchdale on the south. This Kenny property comprises a large number of acres with a large frontage on the North West Arm on its western side. Over this street on the east side of the Birchdale property there is an easement in the perpetuity of a right of way from Cobourg Road to the Kenny property. East of the Kenny property is what is known as the Sandford Fleming house. To the east of this road there is a large field owned by Kenny, extending north and south along the whole of the Birchdale eastern front. It runs from Cobourg Road on the north southerly to the Kenny property. The railway had expropriated a right of way through this field and have excavated their cutting to a depth of over 20 feet. Before reaching Cobourg Road the railway company have expropriated a portion of this street and also have expropriated a triangular piece of land from the Birchdale Company. The land taken from the Birchdale Company exclusive of the street comprises a triangular piece of land with 53 feet frontage on Cobourg Road and extending back 128 feet to the side of the triangle parallel to the street in question. The land expropriated from the street and also that portion of the Birchdale property expropriated (exclusive of the street) are now vested in the

Dominion Crown. Out of the lands so expropriated by the Crown, the Crown has opened a street of about 30 feet in width, and the balance forms part of the right of way of the railway. The cutting of the railway is about 150 feet in width. The Crown have opened a continuation of the street on the east of the Birchdale property so as to make it a continuous street running to Cobourg Road, and they have granted an easement in perpetuity to the Birchdale property over this new portion of the street so laid out by them in substitution for that portion of the street expropriated. The result is, that while the fee in that particular portion of the street expropriated is vested in the Crown, an easement in perpetuity is granted to the Birchdale Company over this new portion of the street substituted for that portion closed. Temporary bridges have been constructed, and a permanent bridge of 42 feet in width will be erected, and will thus make a continuous street of Cobourg Road as formerly, except that where the cutting now is, it will be crossed by a bridge acceptable to the city.

In addition to the expropriation of the portion of the street running along the east side of the Birchdale property from Cobourg Road the Crown has expropriated an easement over this street in favour of what is called the Fleming property. This is done with the object of providing a right of way to the Fleming property over this street from Cobourg Road on the north. By reason of the expropriation through the Fleming land this easement becomes necessary in order to give that property a means of ingress and egress. It is needless to state that prior to the expropriation the street in question to the east of the Birchdale property extending from Cobourg Road to the Kenny property, while vested in fee in the Birchdale property, could never be alienated or disposed of. It had to remain there on account of the easement granted to the Kenny property, and while a portion of the road has been expropriated in fee, and additional easements granted over this road in favour of the Fleming porperty, the same right of ingress and egress from Cobourg Road to the Birchdale property exists now as before the expropriation. The Crown have also expropriated a right to lay down, construct and repair water pipes under the street in question.

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The complaint is made that the entrance to the street from Cobourg Road over the new portion of the street so dedicated is not as good as it was by the old road prior to the expropriation. It is said to enter from the Cobourg Road at a more acute angle. The Birchdale Company unquestionably are entitled to some compensation for the piece of road which has been absolutely expropriated and for the extra burden imposed upon this road in favour of the Fleming property and for constructing water pipes. None of the witnesses seem able to place a sum in dollars and cents which would compensate for this changed entrance from Cobourg Road, and for the additional burden which has been cast upon the Birchdale street, and it is altogether a matter of surmise. That something should be allowed I think goes without saying. The exact amount is difficult to determine. According to Mr Bowes, the chief matter of complaint would be the extra cost of maintaining this street.

A considerable amount of evidence was furnished at the trial to show injury done to the Birchdale property during the construction of the railway through the Kenny field immediately east of the Birchdale property and east of the street in question. It would appear that considerable damage was done through careless blasting by the contractors for the work. Any damages of this nature have been compensated for.

The question arises as to the value of the 53 feet which has been expropriated from the north east corner of the Birchdale property. This piece as I have said contains a frontage running west from the corner of Cobourg Road and the street along the east side the Birchdale property extending 53 feet on Cobourg Road. If instead of being a triangular piece it was a lot 53 feet fronting on Cobourg Road, with a depth running through the whole of the 53 feet with parallel sides, it would make a good building lot. It must be borne in mind that while in point of fact $\frac{1}{2}$ of the lot only has been expropriated, the other $\frac{1}{2}$ has been seriously injured by the taking away of the Cobourg Road frontage and an allowance should be made for the depreciation of that particular piece.

It is said by Mr. Bowes that he is not valuing it for building purposes, the whole property being held as one property for hotel purposes. I do not think myself that the hotel property as such is appreciably damaged by the taking away of this small corner, a fraction of an acre. I think compensation for that particular piece of land should be allowed on the basis of a building lot.

A complaint was made that several trees standing on this particular piece of ground had been destroyed and had to be removed. The absence of these trees have not appreciably affected the balance of the property. I am familiar with this particular property, and in my opinion there are still too many trees left—and it must be borne in mind that if the particular piece of land is valued as a building lot, nearly all the trees destroyed would necessarily have to be removed in order to permit of buildings being erected thereon.

Mr. Clarke places the value of the property at 20 cents a square foot. I am not inclined to the idea of valuing residential property in outlying parts by the square foot. The lot in question is a very desirable lot. It has a frontage on Cobourg Road of 53 feet. Cobourg Road is well drained and lighted and with city water. If the lot had the same width on the rear as on the front I think $40 a foot frontage on Cobourg Road would not be unreasonable although a large sum as prices run in Halifax. At $40 a foot this would amount to $2,120. The lot being triangular ½ of it is not taken. The frontage, however, is all taken and what is left is damaged 50% at least by the taking of the front on Cobourg Road. I would therefore allow off for the salvage ¼ of the $2,120 equal to $530 leaving $1,590 for the land expropriated.

In regard to the injury of the property by reason of the operation of the railway, this is difficult to arrive at. Had the matter rested until the completion and the operation of the road, it would have been easier to ascertain. I think it evident that the operation of the railway, the vibration, noise, smoke, etc., is a matter of considerable injury to a property of this nature, forming a block admirably situated for a hotel site. Mr. Bowes' evidence as to the receipts for the past few years coupled with the fact

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that all the accommodation for the winter of 1916 and 1917 has been applied for would indicate that the hotel is not likely to suffer as much damage as he anticipates. That there will be damage I have no doubt.

I think that if the compensation to the Birchdale Company for the value of the land taken on Cobourg Road, for any value which they are entitled to be compensated for, for the expropriation of the fee or a portion of this street, and also for the compensation of the right or easement over this street in favour of the Fleming property and for water pipes and also for the damage caused by the operation of the railway from the vibration, noise, smoke, etc., were fixed at $5,000, and any interest and contingencies, fair justice would be meted out. As I have pointed out, it is extremely difficult to arrive at an exact sum in respect of the several heads of damage.

Judgment will issue allowing $5,000 with costs to the Birchdale Company. The undertaking should be referred to in the formal judgment.

Judgment accordingly.

Solicitors for plaintiff: *Silver & McDonald.*

Solicitors for defendants: *McInnes, Mellish, Fulton & Kenny.*

THE KING, ON THE INFORMATION OF THE ATTORNEY-GENERAL OF CANADA.....PLAINTIFF.

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Feb. 7

AND

WILLIAM KYLE FARLINGER, ISABELLA KYLE FARLINGER, AND JOHN CLINTON CASSELMAN, EXECUTORS AND PERSONAL REPRESENTATIVES OF THE LATE ISABELLA F. FARLINGER, DECEASED.....DEFENDANTS.

Expropriation—Compensation—Canal—Riparian rights—View—Water.

Upon an expropriation of land by the Crown for the enlargement of a canal, compensation will not be allowed for an obstruction of view to property fronting thereon, by earth left piled up in the course of construction, not necessarily incidental to the expropriation ,nor for the loss of the use of the canal for watering purposes, to which there are no riparian rights as such in the ordinary sense.

INFORMATION for the vesting of land and compensation in an expropriation by the Crown.

Tried before the Honourable Mr. Justice Cassels, at Ottawa, September 15, 16, 1916.

I. Hilliard, K.C., and *E. E. Fairweather*, for plaintiff; *J. A. Hutcheson*, K.C., and *R. F. Lyle*, for defendants.

CASSELS, J. (February 7, 1917) delivered judgment.

An information exhibited on behalf of His Majesty to have it declared that certain lands expropriated for the enlargement and straightening of the Rapide Plat Canal are vested in His Majesty, and to have the compensation payable therefor ascertained.

The expropriation plan was filed on December 7, 1911. The lands expropriated comprise 6·362 acres. The Crown offers as full compensation the sum of $1,673.60. The defendant by her defence claims the sum of $8,016.50.

The action came on for trial on September 15, 1916. Counsel were to send in written arguments. Subsequently, the defendant Isabella F. Farlinger died, and the suit has

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been revived by making the executors and trustees of the estate of Isabella F. Farlinger, defendants.

There are certain legal propositions which may be of importance in arriving at the amount of compensation to which the defendants are entitled.

Exhibit No. 1 shows the lands in question. There is a large block of land comprised within the parcel marked in red, which embraces 5·759 acres. The small parcel immediately east, surrounded by green, marked Isabella Farlinger, is stated as containing ·039 acres, and the small portion on the north of what is called the public highway is marked on the plan Isabella Farlinger, as containing 0·213 acres.

The canal in question was constructed a great many years back, and was subsequently enlarged, the contract work for such enlargement being executed by Poupore and Fraser, as contractors, referred to in the evidence

A further enlargement of the canal is proposed, and for the purposes of such further enlargement the present expropriation plan was filed in 1911. The situation of the property is as shown on the map. The canal is south of the highway. The defendants have a large farm situated to the north of this highway, and a residence situate a considerable distance from the north side of such highway.

The claims amounting to $8,016, are set out in the defence. Two of these claims are for damage for loss of water and water front $2,000, and damage for interfering with the view of the river, $1,000.

Stress is laid upon the damage to the defendants by reason of the obstruction of the view from the house, and also by reason of the right to watering the cattle in the old canal being taken away. In my judgment neither of these claims can be entertained.

First with regard to the view. One reason, in my judgment, why the claim should not be entertained is that I do not think the view has been materially interfered with. One witness refers to the fact that seated outside of the house they are unable to see the hull of any vessels which pass up the canal.

Now, in point of fact, Mr. Sargeant points out that prior to the present expropriation the surface of the water in the

canal was about 20 feet below the top of the bank. When the second enlargement of the canal was proposed, the Crown obtained from Mrs. Farlinger a conveyance of a certain portion of the lands, the consideration money being $5,200. In that conveyance the following appears : "The "above sum includes payment for all lands composed of "three and three-quarter acres off the front of the west, "three -fourths of Lot No. 4, and the east quarter of lot No. "5, both in the first concession of the township of Matilda— "all buildings damaged or taken, apple trees, well, and all "other damages of whatsoever kind, and also for the "removal from the three and three-quarter acres, the said "sum to be in full."

The lands referred to in the deed as the west three-quarters of Lot No. 4, and east one-quarter of Lot No. 5, are all north of the highway in question.

After this expropriation the Governemnt piled a large amount of earth on the lands expropriated between the canal and the highway. On the centre 100 feet the bank was as high as at present. It now continues further east and west.

If in point of fact any injury was occasioned to the farm property by reason of the view being interfered with by any of the works proposed to be executed, it was taken into account at the time of the purchase referred to.

There was nothing to prevent the Government under the earlier expropriation, when constructing the new canal, to have raised the northerly bank of the canal 40 or 50 feet if they chose to do so, in which case the view would have been obstructed. The present bank is but little higher than the former bank, and I think the witnesses who testify to the loss of view and the injury caused thereby cannot be depended upon. Moreover, there is a further reason in my opinion which negatives any such claim as that put forward. The so-called obstruction to the view is caused, as alleged, by the Government officials having dumped earth excavated in the course of the construction of the canal on the land owned by the government immediately north thereof. Now, this in no sense forms any necessary part of the construction of the canal. The earth might have been carted away or spread in a different manner so as to

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form no obstruction at all. It was in no sense a necessary incident to the construction of the canal that this earth should be placed, as it has been contended it has been placed. If any injury arises therefrom of an actionable kind, it is not an incident to the expropriation. It is something done subsequent to the expropriation which was in the year 1911, and how in these proceedings could a claim of this nature be put forward. If any action could lie it would have to be an action in the nature of a tort, some injury done to the defendant by reason of the wrongful act of the servants of the Crown in so depositing the earth as to cause a detriment to the defendant. I do not think such an action would lie. It would certainly not lie as against the Crown.

The next cause of complaint is for damage for the loss of watering places and water front for which the defendant claims the sum of $2,000. The defendant has no riparian rights, in the ordinary sense, which entitled her to the use of the Canal for watering purposes. There is no reservation in her favour of any such right. If she exercised such a right prior to 1911, it would merely be a matter of tolerance on the part of the Crown. The Crown in forming the enlarged canal have made what is called a riprap wall which effectually prevents the cattle reaching the waters of the canal. The Crown had the right to do so, and there is no right in the defendant to prevent that kind of construction.

The damage for loss of the boat house site is also without any legal right in the defendants. Without the privilege claimed, it seems to me that $100 an acre would be ample compensation for the land taken. This would come to the sum of $636. Even if $150 were allowed it would amount to only $954.

The house which is the subject matter of contention I do not think could be placed at a value of more than $200. This would make for the land and the house about $1,154. The Crown has offered $1,673.60. Deducting the $1,154, from the $1,673.60 would leave $519 to cover the claims outside of the value of the land, and I think the defendant is fully compensated.

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There is conflicting evidence as to the value of 12 gooseberry bushes, 6 blackberry bushes, 3 raspberry bushes, 20 apple trees, etc. Without analyzing the evidence in detail, I am of opinion, as I have stated, that the defendants are amply compensated by the amount which the Crown has tendered.

I understand there was no tender by the Crown prior to the tender by the information. This being the case, I think the proper disposition of the costs is that the defendants should receive the costs up to and inclusive of the service of the information. The costs subsequent should be paid by the defendants to the Crown. There should also be allowed on the amount of compensation interest at 5% from the time of the expropriation until the date of the service of the information.

I have waited a considerable time for the written arguments of counsel. None have been sent. Also as to the plan of the expropriation if there is one at the date of the deed. I think it material. The Crown were certainly in occupation of land North of the Canal —see the evidence of Sargeant and Frederick Robertson as to the previous dump. The Crown was certainly the owner of the North bank of the former canal and could have raised it to any height, view or no view.

Judgment accordingly.

Solicitor for plaintiff : *I. Hilliard.*

Solicitor for defendant : *R. F. Lyle.*

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Jan. 31

THE PREST-O-LITE COMPANY[1].....PLAINTIFF.

AND

THE PEOPLE'S GAS SUPPLY COMPANY
DEFENDANT.

Trademark—Jurisdiction—Infringement—Passing off—Registrable words.

The Exchequer Court of Canada has no jurisdiction in "passing off" cases; its jurisdiction is limited purely to cases of infringement of trademarks. Utilizing the containers of the product of a process patent after covering or obliterating the trademark thereon, by one having the right to use the process, does not constitute an infringement.

The word "Prest-O-Lite" may be validly used as a trademark in connection with the distribution of acetylene gas for lighting motor vehicles.

Kirstein v. Cohen, 39 Can. S.C.R. 286, distinguished.

ACTION to restrain the infringement of a trade mark. Tried before the Honourable Mr. Justice Cassels, at Ottawa, November 15 and 16, 1916.

F. H. Chrysler, K.C., for plaintiff; *R. V. Sinclair*, K.C., for defendant.

CASSELS, J. (January 31, 1917) delivered judgment.

This action is brought by the plaintiffs to restrain the defendants from infringing the trade mark of the plaintiffs. The plaintiff company is an incorporated company having its head office at the City of New York, in the State of New York, one of the United States of America. The defendants are a corporation with their head office at Ottawa, in the Dominion of Canada.

The contention of the plaintiffs is shortly, as follows: Apparently, in the United States patents were issued to them which covered not merely the process patent, but also the tank in which the product of the process was stored. In Canada the only patent which the plaintiffs have is a patent for the process. There was no patent in Canada protecting the tank.

[1] Affirmed by the Supreme Court of Canada: 55 Can. S.C.R. 440, 38 D.L.R.

The Prest-O-Lite Company are manufacturers and distributors of acetylene gas for lighting automobiles and other vehicles. The plaintiff stores its gas in portable steel cylinders lined with asbestos, which absorbs a quantity of acetone which in turn is saturated with acetylene gas introduced under pressure, the outflow for consumption being valve controlled.

It is conceded that the defendants have by virtue of the second section of Chapter 103, of the statutes of 1913, the right to manufacture, use or sell the said process product in Canada. Their rights in this respect are not contested. It is also conceded by the plaintiffs that the tanks manufactured and sold by them have become the property of the purchasers; and it was stated by Mr. Chrysler, on the argument of the case, the purchasers might utilize these tanks in any manner in which they chose, provided the trade mark "Prest-O-Lite" was removed from the tank. In other words, if it were feasible to remove the trade mark, plaintiffs concede that the defendants have a perfect right to fill the tank with the acetylene gas manufactured by them and to sell the same.

The contention, however, is that the defendants have no right to fill the gas into tanks containing the trade mark of the plaintiffs, and to sell them to others with the trade mark "Prest-O-Lite" on the tank.

Two classes of cases arise. One are cases in which the purchasers from the Prest-O-Lite Company in the United States take their tanks to the defendants to be refilled. This comprises the larger number of what the plaintiffs contend are infringements of their trade mark. The other class of cases, are cases in which the defendants purchase the tanks out and out with the name Prest-O-Lite on them, refill them and sell them to others or give them in exchange for empty tanks for a consideration.

The plaintiffs contention is that the defendants are infringers of their trade mark.

Since the argument I have gone very carefully through all the authorities cited to me, and numerous other authorities, and have come to the conclusion that the plaintiffs' action fails. The cases are so numerous and the principles so clearly settled that it would be useless labour to comment in detail on these authorities.

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Reasons for Judgment.

It has to be clearly understood that the Exchequer Court has no jurisdiction in what are called "passing off" cases. The jurisdiction is limited purely to questions of infringement of trade mark. This is conceded by counsel for the plaintiffs. It is also, as I have stated, conceded that the defendants have an absolute right to use the process and sell the product described in the Canadian patent.

It is proved before me clearly that in no case except one or two of trifling importance, have the defendants ever refilled any of the tanks and let them go from their premises without the word "Prest-O-Lite" being completely covered over. A notice is posted over the word "Prest-O-Lite," this notice showing on its face that the tank so refilled was refilled by the Ottawa Company.

The contention is that the defendants have covered them over with a substance which might be removed by a wrongdoer. In point of fact no evidence has been adduced to show any such erasures of the covering placed on the tanks by the defendants, and I am not prepared to adopt the reasoning of some of the American authorities cited before me, in which comment is made upon the fact that the wrapper placed over the word "Prest-O-Lite" is capable of being removed.

As I have said, "It has to be kept clearly in mind this is not the case of 'passing off,' or wrongfully attempting to steal the trade of the plaintiffs."

In the cases in the United States, it is quite evident that the court were influenced by the fact that the defendants were endeavouring to steal the plaintiff's trade.

In one case, the *Searchlight Gas Co.* v. *Prest-O-Lite Co.*[1] before the Circuit Court of Appeals, Baker J., at page 696, uses the following language : "Appellee is entitled to have "its lifeblood saved from leeches and its nest from cuckoos."

The Judges in these cases do dwell upon trade mark, but it is so mixed up with the passing off, that evidently from a perusal of these particular cases the court was much influenced by the fraud of the defendants in seeking to rob the plaintiffs of the benefit of their trade. There is nothing in the case before me corresponding in any way to the facts of these cases.

[1] 215 Fed. Rep. 692 at 696.

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The defendants as far as they can effectually covered the word "Prest-O-Lite," when refilling the tanks and sending them out of their premises. There is no evidence whatever of any combination between the parties bringing the tanks to be refilled and the defendant company. Under the patent law there may be cases where a defendant may become what is commonly known as a contributory infringer. The term is a misnomer. If the circumstances are such that it is proved the party connives with another to defraud the patentee, he becomes an infringer, but to be an infringer he must be a party to inducing another to break a contract or inducing him to infringe a patent. The law on the subject is very fully discussed by the late Mr. Justice Burbidge in the case of *Copeland-Chatterson Co. v. Hatton.*[1] This case was taken to the Supreme Court of Canada,[2] and the judgment of the Exchequer Court was affirmed. The question there discussed was the right of a patentee to enter into a bargain for the use of a patented article. The point of contributory infringement does not seem to have been discussed, but evidently the views of the learned Judge were sustained.

In the case before me there is no pretence whatever of any dealings on the part of the defendants similar to the dealings in the *Copeland-Chatterson* case, referred to. I find no law under the Trade Mark Acts which refers to contributory infringement.

It has to be borne in mind that the case before me is not brought for infringement of a patent. Some point is made that some of the tanks which were brought to the defendant or filled by the defendant, had the word "patented" on them. No doubt these were American tanks, and probably very rightly had this stamp upon them. It is of no consequence, and has no bearing as far as I can see on the case before me.

In the Ontario Courts the case of *Prestolite Co. v. London Engines Supplies Co.*[3] came up before Chief Justice Falconbridge. This case was taken to the Court of Appeal.[4] As far as the reasons would show this case rested to a very great extent on passing off. The contention was that

[1] 10 Can. Ex. 224.
[2] 37 Can. S.C.R. 651.
[3] 10 Ont. W.N. 454.
[4] 11 Ont. W.N. 225.

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PREST-O-LITE CO. v. PEOPLE'S GAS SUPPLY CO.

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there was unfair competition. I have looked at the pleadings in this case, and the claim of the plaintiff was not confined to passing off but the plaintiffs in that action also relied upon the infringement of their trade mark Prest-O-Lite.

I am unable to bring my mind to a conclusion that what the defendants have done, having regard to the circumstances as detailed in the evidence, amounts to an infringement of the plaintiffs trade mark. One or two trifling instances have occurred in which the defendants may have sold the tank filled by them without obliterating the name. There is considerable doubt about this. In any event the amount is trifling.

No claim has been pressed that the tanks have not been sold out and out. Any notice such as is set out in the defence is a notice under the American patents not in force in Canada.

It was argued by Mr. Sinclair that the word "Presto-O-Lite" is not the subject matter of a trade mark, but that it became the generic name of the article sold. I cannot agree with this contention. The trade mark was adopted for use by a company other than the company which had the patents under which the tanks and the compound in question was manufactured. It was the trade mark first used by a company with another name—this company subsequently changing its corporate name into the name of the Prest-O-Lite Company. It is open to argument that the name may not be susceptible of a valid trade mark under the principles laid down in the case of *Kirstein v. Cohen*.[1] My own personal view is that it is a valid trade mark and not governed by the principles decided in the Kirstein case. It is, however, unnecessary to follow up this line of thought as after the best consideration I can give to the case I am of opinion that the plaintiffs are not entitled to succeed for the reasons I have given.

The action is dismissed with costs.

Action dismissed.

Solicitors for plaintiff: *Chrysler & Higgerty.*

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

[1] 39 Can. S.C.R. 286.

HUTCHINS CAR ROOFING COMPANY AND ROBERT E. FRAME.....PLAINTIFFS; 1916 May 3

AND

RICHARD WEBB BURNETT.....DEFENDANT.

Patents—Conflicting claims—Jurisdiction—Arbitration—Stay of proceedings.

The Exchequer Court has jurisdiction under sec. 23 of the Exchequer Court Act (R.S.C. 1906, c. 140) to determine conflicting applications for patents notwithstanding the pending of a similar proceeding before the Commissioner of Patents, by way of arbitration, under sec. 20 of the Patent Act (R.S.C. 1906, c. 69); where jurisdiction is assumed the other proceedings will be stayed.

APPLICATION to stay proceedings in an action in the Exchequer Court to determine conflicting claims for patents.

Tried before the Honourable Mr. JUSTICE CASSELS, at Ottawa, November 27, 28, 1916.

A. W. Anglin, K.C., for plaintiffs; *A. R. McMaster*, K.C., for defendants.

CASSELS, J. (May 3, 1916), delivered judgment.

This was a statement of claim filed on behalf of the plaintiffs, by which the plaintiffs allege that they presented a petition to the Commissioner of Patents for Canada, under the serial No. 178043 for the granting of certain letters patent. The statement of claim further alleges that in regard to the claims Nos. 25 to 36, inclusive, there was a conflict between the plaintiffs and the defendant, as to whether the plaintiff company as assignee of the plaintiff Frame, were entitled to a patent for these claims, or whether the defendant who had made application for a patent was or was not entitled to the patent.

The statement of claim also alleges that the Commissioner declared a conflict between claims Nos. 25 to 36 inclusive of the plaintiffs' said specification, and claims 12 and 14 to 24 of the defendant's said specification.

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By the plaintiffs' statement of claim they ask that it might be declared that the plaintiff, Robert E. Frame, was the first and true inventor of the invention described in the plaintiffs' said specification, and asked for an order requiring the issue of letters patent to the plaintiffs.

The defendant by his statement of defence pleads, as follows:—

"1. The defendant pleads that the present proceedings "are wrongfully and illegally instituted in this Court.

"2. That the issue raised between the parties hereto in "the present proceedings has already been begun before "the Honourable the Commissioner of Patents at Ottawa "under and by virtue of Sec. 20 of the Patent Act, and in "virtue of said section the defendant named as arbitrator "William P. McFeat, of the City of Montreal, in the "Province of Quebec, patent solicitor, but the plaintiffs "failed to appoint their arbitrator.

"3. That the defendant has a right to demand and does "demand that this Court do declare that it has no juris- "diction to entertain at the present time the application "of the plaintiffs, and that the present proceedings insti- "tuted by them be dismissed."

By sec. 20, of the Patent Act,[1] it is provided as follows:—

"In case of conflicting applications for any patent, the "same shall be submitted to the arbitration of three skilled "persons, two of whom shall be chosen by the applicants, "one by each, and the third of whom shall be chosen by the "Commissioner; and the decision or award of such arbi- "trators or of any two of them, delivered to the Commissioner "in writing, and subscribed by them or any two of them, "shall be final, as far as concerns the granting of the patent.

"2. If either of the applicants refuses or fails to choose "an arbitrator, when required so to do by the Commissioner, "and if there are only two such applicants, the patent "shall issue, to the other applicant.

These clauses were enacted prior to the provision of the Exchequer Court Act.[2]

[1] R.S.C. 1906, c. 69.

[2] 54–55 Vict., c. 26; R.S.C. 1906, c. 140.

Sec. 23 provides as follows:—

"The Exchequer Court shall have jurisdiction as well "between subject and subject as otherwise—(*a*) in all cases "of conflicting applications for any patent of invention.

It is alleged by the defendant, who is a resident of the Province of Quebec, as I have stated, that he named as his arbitrator William P. McFeat. It is admitted he is the patent solicitor for the defendant to prosecute his claim in the patent office,

It is open to question whether Mr. McFeat is competent to act as arbitrator, and whether the appointment is a valid one.

The Quebec Code of Procedure, sec. 8 provides, as follows:—

"Experts, Viewers, References in Matters of Account, "and Arbitrators.

"397. The grounds for recusing an expert are:

"7. Being a party in a similar suit, or the attorney or "agent of a party in the cause;

"8. And, generally, the grounds of exclusion applicable "to witnesses."

"412. The preceding provisions relating to experts "apply to arbitrators, in so far as they are compatible with "those of the present paragraph; nevertheless, arbitrators "need not be sworn unless the order appointing them "requires it."

This alleged appointment by the defendant was apparently made prior to the filing of the present statement of claim. The arbitrator being named by the defendant on April 9, 1915. The statement of claim was filed on May 21, 1915.

On the opening of the case I was of the opinion that this question of law as presented could not be upheld. There is undoubtedly jurisdiction, I think, in the Exchequer Court to entertain the action. I suggested to the counsel that in my opinion the proper form of application would be an application to stay the proceedings in the suit commenced in the Exchequer Court on the ground that a proceeding had been instituted under the Patent Act of a similar nature. See *Re Conolly Bros.*[1]

[1] [1911] 1 Ch. D. 731 at 740.

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It was thereupon agreed that the motion should be treated as an application to stay the proceedings in the suit commenced in the Exchequer Court.

Certain admissions of facts were thereupon made which are set out in the statement filed before me.

Subsequently an agreement was produced by Mr. Anglin bearing date February 27, 1913, and executed between Richard Webb Burnett, the present defendant, and the plaintiff, whereby Burnett agreed to grant to the plaintiffs an exclusive license under the patents set out in the agreement, and a provision was inserted, as follows:—

"2. Party of the first part further agrees, for the con-"sideration herein expressed, to sign any and all papers "and to do any and all things necessary to complete said "pending applications, and to obtain patents in any "foreign countries that said second party may desire, all "of such matters to be under the direction and control of "the second party, copies of all Patent Office letters, "amendments, etc., to be promptly sent to the first party "and to disclose to said second party any further inventions "which he may make, covered by this license, and to do "all acts and things necessary to obtain letters patent "thereon, all further patent expenses under this contract "to be borne by the second party as well as the responsi-"bility for the proper promotion of said patent matters."

The contention of Mr. Anglin acting for the plaintiff, in the statement of claim, was to the effect that his client had the direction and control, as the present plaintiffs have to prosecute the claims to the patent, and have to bear all the expenses of the obtaining of the patents.

Mr. Anglin claimed on behalf of his clients that this being so, he had the right to elect the tribunal to determine the questions.

Counsel for the defendant objected to the receipt of this document, but as the whole character of the so-called demurrer or point of law had been changed into an application to stay proceedings, I gave leave to the plaintiff to put in this document.

The case presents a peculiar anomaly. There is no practical pecuniary gain or loss to the defendant whether he is declared entitled to the patent or whether the plaintiff

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is declared entitled to it. By the agreement in question whatever he gets passes to the plaintiff as his licensee; and certain sums are to be paid by way of royalty no matter whether Burnett, the defendant, succeeds on the contest or not—but it is rightly said by Mr. Anglin, it becomes a matter of considerable moment to ascertain which of them is the inventor, as if it were held that the defendant on his application be entitled to a patent for the claims in respect to which a patent is asked, and it were to turn out that the defendant was in fact not the inventor but that the true inventor were the plaintiff, then the defendant's patent might be held void, and of no effect for want of invention—and Mr. Anglin rightly contends that it becomes a matter of importance to have the question determined either under the provisions of the Patent Act or by this Court.

I cannot accede to the proposition that where the contest is one between the plaintiff and the defendant, the plaintiffs claiming adversely to the defendant, that the plaintiffs should be the proper persons to prosecute the defendant's application. It would be manifestly unfair that he should be acting in the proceedings, asserting the defendant's rights as against his own claim. I think, however, that on the question of staying proceedings, it is important to bear in mind that all the costs incurred in the prosecution of these claims must be borne by the plaintiffs, the plaintiffs should have some say in having the case determined in the cheapest manner. I think it is manifest that the Exchequer Court is equally competent to decide the question as a Board of Arbitrators, and it is apparent that the costs in the Exchequer Court should be very much less than if it were decided by arbitration.

On May 27, 1915, the Chief Clerk of the Patent Office, wrote the following letter:—

"Patent Office,
"Department of Agriculture,
"Ottawa, May 27, 1915.

"No. 178043.

"Gentlemen:—

"I have the honour by direction to acknowledge the "the receipt of your letter of the 22nd instant on the subject

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"of the application of Hutchins Car Roofing Company, "assignee of R. E. Frame, Serial No. 178043 for "Car "Roofs" conflicting with R. W. Burnett's application, "Serial No. 171810 for Car Roofs.

"In reply I am to respectfully inform you that the "Office has noticed that the applicant, Hutchins Car "Roofing Company, has decided to have the matter of the "conflict determined by the Exchequer Court of Canada, "under the jurisdiction conferred upon that Court by "the Exchequer Court Act, and further advising that you "have filed a statement of claim with the Registrar of said "Court.

"You are therefore advised, in view of the foregoing, "that no further proceedings will be taken by the Patent "Office in connection with this matter until after the "Exchequer Court has rendered its decision.

"Your obedient servant,

W. J. LYNCH,
Chief Patent Office.

"Messrs. Blake, Lash, Anglin & Cassels,
Toronto, Ont."

I gather from this letter that the Patent Office prefers the matter determined by the Exchequer Court. I presume they would have the right on an application to them to stay the proceedings pending in their own tribunal, and they have done so. I do not read the letter of June 11, 1915, in any way as receding from the position adopted by them

The Patent Commissioner having stayed the proceedings until a decision by the Exchequer Court, I think the application fails.

The costs of the application to decide the questions of law and also the motion to stay proceedings to be costs to the plaintiffs in the cause in any event.

*Application dismissed.**

Solicitors for plaintiff: *Blake, Lash, Anglin & Cassels.*

Solicitors for defendants: *Campbell, McMaster & Papineau.*

*Motion to quash appeal to Supreme Court of Canada dismissed: 54 Can. S.C.R. 610,36 D.L.R. 45.

ON APPEAL FROM BRITISH COLUMBIA ADMIRALTY DISTRICT.

THE UNION STEAMSHIP CO.

1917
Oct. 31

v.

THE "WAKENA."

Collision—Rule of road—Narrow channel—Fog.

Where a vessel, finding herself on the wrong side of a narrow channel during a fog, improperly steers out of her course to get to the proper side of the channel in order to extricate herself from a dangerous position, she is liable for a collision with another ship which is properly on her course.

APPEAL from the judgment of Martin, L. J., of the British Columbia Admiralty District, dismissing an action for damages caused by a collision.

The appeal was head before the Honourable Mr. Justice Audette on July 30, 1917.

F. E. Meredith, K.C., and *A. R. Holden*, K.C., for appellant; *Aimé Geoffrion*, K.C., for respondent.

The judgment appealed from is as follows:—

MARTIN, L. J. (March 22, 1917). This is an action arising out of the collision which took place shortly after midnight on February 24, 1916, between the Steamship "Venture," 579 registered tons (John Park, master) and the gasoline barge "Wakena," 316 registered tons (John Anderson, master) near the entrance to Burrard Inlet, in the First Narrows, inside Prospect Bluff. The night was calm with a dense fog and the tide on the ebb (for nearly 2 hours) at about 1½ knots. The result of the collision was that considerable damage was done to the port bow of the "Venture" which was struck by the stem of the "Wakena," but the damage to the latter was of so slight a nature that it was not the subject of address to me by counsel during the argument, and, therefore, I am entitled to disregard it.

The only fault attributed to the "Wakena" is that she was out of her course and steering across the Narrows: the allegation that she had also violated art. 19 was withdrawn.

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As against the "Venture" it is alleged that she did not enter the Narrows with caution, or so navigate after entry thereof, and that she ran at an excessive speed, and did not take proper efforts to avoid collision after hearing the "Wakena's" fog-signals. It is conceded that neither ship is at fault as regards fog-signals, lights, or lookout, or for anything that occurred after they came in sight.

I shall first deal with the charge against the "Wakena" because if that is not sustained it will be unnecessary to consider those against the "Venture."

By some misadventure in the fog the "Wakena," after passing the light at Prospect Bluff, in endeavouring to pick up the fog-bell at Brockton Point on a supposed E. by S. course, found herself at midnight over on the north shore of the Narrows, near the water pipe line there, close to the dolphins, and touching the ground. It has been held by me and approved by their Lordships of the Privy Council that "the First Narrows from Prospect Point to Brockton Point (a distance of approximately one and a quarter sea miles) must be deemed to be a narrow channel within the meaning of said art, 25." *Bryce* v. *Canadian Pacific Ry. Co.*[1] Consequently, the "Wakena" was on the wrong side of the channel and directly in the track of any outgoing vessels. Under these circumstances the master determined to get over to the right (south) side of mid-channel as quickly as possible and then proceed on her proper course towards Brockton Point, and after manœuvring about a few minutes, so as to get clear from her dangerous position on the beach, she proceeded cautiously to cross over to her proper side, and in so doing crawled, literally, through the fog at a dead slow speed—just sufficient to keep steerage way on her, having regard to the tide. (Vide *The Zadok*[2]). I do not think that, from the time she started from the beach at a stand-still until she first heard the "Venture's" signal on her starboard bow, she was going more than a knot an hour, if so much. This first signal gave no intimation of immediate danger to her master, and the second one, which did indicate that the vessels were coming closer, was followed up so instantly by the sighting of the "Ven-

[1] 13 B.C.R. 96, at 103; 15 B.C.R. 510, at 514.
[2] (1883), 9 P.D. 114.

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ture's" lights that he had only time to do what he did—viz: reverse his engines. The engineer of the "Wakena," who was a satisfactory witness, explained that with her flat bottom and spoon shaped bow she is very easily affected by wind or tide when light and on that occasion she was down by the stern, and I have no doubt that "so far as the circumstances of the case admitted," art. 16, she was navigated with due caution. It was not, indeed, alleged against her that there was any lack of caution in the method of her navigation other than the fact that she should not have crossed the channel. This is recognised by the master of the "Venture" (which was undoubtedly proceeding at a much faster rate than the "Wakena") when he said in his examination: "We were going as slow "as we could, and with the tide running out if we had "stopped altogether we would have gone ashore with the "tide running. We had to go slow, and keep our steering "way on her and in a proper position in the channel."

In this attempt to get back as soon as possible into her proper side of the fairway the "Wakena" within about 2 minutes from the time she left the beach (the engineer says 1½ minutes before he got the reverse signal) came into sudden collision with the "Venture," while both vessels were sounding the proper signals, at such a short distance that though the engines of both ships were reversed after their lights were seen, the impact could not be averted.

It is urged by the plaintiff's counsel that the "Wakena" had no right to thus cross the Narrows back into her proper channel on the starboard side of the fairway (as to which see *The King* v. *The Despatch*,[1] and that she should have taken a diagonal inbound course, approximately E.S.E., from where she grounded, to Brockton Point. But this would also involve her crossing the channel, at a long angle, and in the attempt to do so she would be proceeding for at least half a nautical mile on the wrong side of the channel, before she could get into her proper water, and for this long distance she would not only be in a position of danger herself but to other vessels, whereas by crossing at once to the south side she would get into her proper water very quickly because the width of the fairway at the water pipe

[1] Ante p. 319, 28 D.L.R. 42, 22 B.C.R. 496.

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line is only about a cable and a quarter and she would only have half that distance to go in a direct line to be in her proper position. As the Privy Council said in the *Bryce* case (p. 514) speaking of a collision in the same channel, which has frequently been before this Court (*cf.* also *The "Charmer* v. *The "Bermuda,"*)[1] "the configuration of the locality and the circumstances with regard to tide, etc., have to be considered," and I have come to the conclusion that "the course taken by the "Wakena" was justified by the circumstances." She was in a dangerous position and it was her duty to extricate herself from it in a manner which would cause as little danger to other vessels as was possible and I feel myself quite unable to say, after very careful reflection, that in so doing her master did not conduct himself as a prudent navigator. The position taken by the plaintiffs' counsel is that judging by the signals the "Venture" was entitled to assume that the approaching vessel on her port bow was an outbound one on the north side of the fairway, and reliance was placed upon the case of *"The Saragossa,"*[2] but that collision took place in the North Sea when the weather was "fine and clear and moonlight," and the principal point of the case at bar is that events were happening in a tideway in a narrow channel in a dense fog and in such circumstances those in charge of a vessel are not entitled to make and act upon assumptions which would be otherwise justifiable. The point was precisely dealt with by Mr. Justice Gorell Barnes in the *"Germanic,"*[3] wherein he laid it down as follows:—

"It was argued by counsel for the "Germanic" that taking "the precautions which were adopted with regard to lookout "and with a speed of 7 knots through the water and only "5 over the ground, she was not going too fast under the "circumstances, and that those on board of her were entitled "to expect to meet nothing if they were on the right side "of the channel. But I must observe that the speed through "the water is that which has to be considered with regard to "vessels in motion, and that the argument as to not expect- "ing to meet anything, if pressed to its extreme, would justify

[1] 15 B.C.R. 506.
[2] (1892), 7 Asp. M.C. 289.
[3] (1896), Smith's Leading Collision Cases, 104.

"the vessel in going at full speed. Morover, it is fallacious, "for in addition to vessels which may possibly be on the "wrong side of the channel, owing to the difficulty of keeping "on the right side in thick weather, there may be sailing "vessels working up and crossing the channel, and vessels at "anchor, or being overtaken, any of which might be in the "way of the vessel."

In the case of "*The Tartar*" v. "*The Charmer*"[1] I have cited some leading authorities upon the uncertainty of sounds in a fog, and in my opinion the unfounded assumption by the "Venture" of the course of the "Wakena" is the real cause of the collision. In this view of the case it becomes unnecessary to consider the charges brought against the "Venture" because in the special circumstances of the case I hold the "Wakena" is not to blame and, therefore, the action should be dismissed with costs.

The appeal was heard before the Honourable Mr. Justice Audette on July 30th, 1917.

AUDETTE, J. (October 31, 1917) delivered judgment.

This is an appeal from the judgment of the Local Judge of the British Columbia Admiralty District pronounced on March 22, 1917.

I may say that I approach the determination of this case with some diffidence, inasmuch as it is an appeal from the decision of a judge whose learning and experience in such cases are everywhere acknowledged. To state this much is to recognize the wisdom and justice of Lord Langdale's observation in *Ward v. Painter*,[2] viz.—

"A solemn decision of a competent judge is by no means to be disregarded, and I ought not to overrule it without being clearly satisfied in my own mind that the decision is erroneous."

In reaching my conclusions upon the facts in this case I have had the assistance of Captain Demers, a gentleman of high standing and of experience in nautical matters, who sat with me as assessor, and I am pleased to know that his views as such assessor are in accord with my findings.

This is an action arising out of a collision which took place shortly after midnight, on the morning of February

[1] (1907), reported in Mayers Adm. Law, 536, 538.
[2] (1839), 2 Beav. 85.

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25, 1916, viz., 12.08 a.m., between the steamship "Venture" (579 registered tons, 182 ft. length, 32 ft. beam) and the gasoline barge "Wakena" (316 registered tons, 116.5 ft. length, 25.7 ft. beam) in Burrard Inlet, in the Province of British Columbia, and near the first narrows, inside of Prospect Bluff.

Both vessels were inward bound for Vancouver harbour.

It is common ground that the collision happened in a narrow channel: *The King v. The Despatch*,[1] and that the weather was perfectly calm but foggy at the time of the collision.

From the testimony of Captain Park, Master of the "Venture," it would appear that at about 11.15 o'clock on the evening of February 24, 1916, the "Venture" came past Point Atkinson, about 5 miles west of the Narrows. After passing Point Atkinson the captain states that it cleared up nicely and he could see "clear up to Prospect Bluff," where he observed a vessel going into the Narrows. The "Venture" was then going full speed, which was maintained until about a mile from the Narrows, when the fog shut down thick, and she then went on a "slow" bell. He kept his ship at "slow" for a while, stopped "and one thing and another," coming to Prospect Bluff, until he got into a good position off the light-house, and before coming there he put on half-speed owing to the tide running out. When well inside of Prospect Bluff he put her on slow-speed again, while his fog-whistle was kept blowing at proper intervals. Before going into the Narrows, at Prospect Bluff, he heard a gasoline whistle, from the "Wakena," right over on the north Vancouver side and this whistle was kept on being sounded by her. This fog whistle was on the port bow of the "Venture" and kept broadening as they were coming in. When the "Venture" came up to the water-works, the boat that had been blowing over on the north Vancouver side seemed to those on board the "Venture" to be coming closer; and all of a sudden her mast-head light came out on the port bow of the "Venture," and immediately afterwards the captain saw her green side-light only about 60 ft. away from the "Venture." Then he put his helm hard aport, both engines full steam astern,

[1] Ante, p. 319, 28 D.L.R. 42; 22 B.C.R. 496.

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when, he says, the "Wakena" struck her abreast of the fore-hatch, head on, which swung the head of his ship in towards the south shore.

The lights on board the "Venture" were in perfect order. She had two men on the look-out, and the first officer was down on the fore-deck, while the captain stood on the bridge by the telegraph doing the signalling. Morover, there was a man at the wheel. She was proceeding at a "moderate speed" allowing her to keep her headway in a falling tide: *The Campania.*[1]

Now, the captain of the "Wakena" states that when he took the Narrows he picked up the light on Prospect Bluff, the fog having not set very thick at the time; and that he ran his course right for Brockton Point by his compass, leaving Prospect at full speed. After running her thus for about ten minutes, he slowed her down to half speed with the object of picking up the bell at Brockton. The fog was pretty thick by that time. He ran her at half-speed for a short while and then ran full speed for five minutes, slowed down again, ran very slow for a little while, and then stopped her. The first thing he then knew, he says, "we fetched over against the dolphins on the north shore." He then says he backed her away from the dolphins, and that brought the *stern in shore.*

From the pilot-house of the "Wakena," where the captain was at that time, he could not, on account of the noise from her engine, hear the whistle of a steamer for any distance. When the "Wakena" thus fetched over against the dolphins on the north shore, Glasscock, the mate, who was then in bed, was called up by the captain, as he puts it, "*in a case of emergency* to keep a look-out"—it was foggy weather—"to help the master." The mate says he told the captain where he thought they were—it was not the regular place. The stern was touching bottom and her bow was headed south. The captain gave the signal to go ahead and she moved very slowly past the dolphins. Then the mate says he heard a fog-whistle, which he located on the *starboard* bow, and reported it to the captain; and before the collision he heard several short toots, he heard the whistle several

[1] 9 Asp. M.C. 177.

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times at regular intervals before the collision took place. The "Wakena," the mate says, was moving slowly at the time of the collision, but he had no definite means of knowing how fast; and adds that from the dolphins he would have run the "Wakena" *far enough to get off from the shore, "on a falling tide, line her up in the channel,"* and that "if they had *not gone so far over to the south there would have been no collision.*" It was not necessary to run to the southern danger line of the fairway. To these statements I will refer hereafter.

Coming back to the evidence of the captain of the "Wakena" he says, that up to the time he started to get away from the dolphins, on the north shore, he had not heard any whistle or heard any report of any whistle. That may be quite true, and yet does not displace the fact that signals were actually given which ought to have been heard either by him or by some one on board the "Wakena." As far as the captain is concerned, we have it in evidence that, on account of the noise of the engine, he could not hear the whistle when he was in the wheel-house; and if the signals from the "Venture" were not heard on the "Wakena," through the want of a proper look-out, it cannot be invoked as an excuse. Now, it was at the time he fetched his vessel on the north shore, near the dolphins, that he called out for the mate whose summary version we have above. The captain says, after they left the dolphins the mate reported to me a boat was *coming in the Narrows*, and he added, "That is some boat coming in, look out." Then the captain stopped and listened, put his head out of the pilot house to enable him to hear, "to try and locate that," and then he heard the whistle whereby he could tell she was coming.

It is well to note here that the evidence discloses that the first whistle he heard was the one reported by the mate when they were leaving the dolphins. The evidence does not shew whether or not there was any look-out on the fore-deck before the mate came up; and if no fog-whistle had been reported to the captain, who was inside the pilot-house where he could not hear, it must have been because there was no look-out, or if there was one he was manifestly not attending to his duty.

In a moment the headlights of each ship suddenly loomed in the fog, the vessels being about 60 ft. away from one another. Danger signals were given and both vessels reversed full-speed astern and the collision took place—the "Wakena" coming across the Narrows with her bow at a slight angle to the east, striking the "Venture" a glancing blow, but end on.

Speaking of the compass on board the "Wakena" the captain says it was not magnetic, and he could not say when it had been last corrected. He was further asked in that respect and answered, as follows:—

Q. Have you any idea how much out your compass was?

A. Why in some courses is *probably* a quarter of a point, and another course is half a point.

Q. And you ventured to come into the Narrows on a foggy night, where you can't pick up the echo, and you have a compass that you don't know how far it is out, on that course?

A. That is because you see in a few trips if you steer the same course, I had my course, steered the same course that she always goes in. She goes in on the E. by S.

Now it must be found that the "Venture," properly equipped, travelling by her compass entered the narrow channel and pursued her course therein with proper seamanship; that she was going at slow speed at the time of the accident, going through the water at a speed about equal to the pace of a man walking leisurely, at $2\frac{1}{2}$ to 3 knots. She was going in against an ebb tide estimated at $1\frac{1}{2}$ to 2 knots by witness Tollefsen. and at $1\frac{1}{2}$ knots by Captain Park. I therefore find that the "Venture" complied with Art. 16, and was going at a "moderate speed," and that "as far as the circumstances of the case admit" (having to travel against a tide which would have thrown the vessel to a close shore had he not kept her under way) she was manoeuvring with proper seamanship. She was travelling, being an in-going vessel, on the starboard side of the narrow channel, on the southern danger line of the fairway, as she should do, and that she had every reason to believe the signals given by the "Wakena" on the north side of this narrow channel were from an outgoing vessel on her proper course.

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Now let us examine the course of the "Wakena" after she found herself on the wrong side of the channel. Did she proceed properly to extricate herself from that position? That brings us to an inquiry into the cause of the collision, and the negligence or fault from which the collision resulted.

It was held in *The "Cape Breton,"*[1] that if a steamer is following a course which may possibly appear unusual to other steamers, although she is justified by special reasons, she does so at her own risk and *ought to signal her intentions, for the others have the right to assume that she will conform her course to the ordinary rules.* See also *The "Lancashire."*[2]

Counsel for the defendant contends that the "Wakena" had a right to be on the north shore—that may be true in the abstract; but as an in-going vessel in a narrow channel (Art. 25) she must be held to blame for the very grave fault of navigating on the wrong side of the channel, 37 American Law Review, 865. All of that, indeed, seems to be but one link in the long chain of mismanagement on board of the "Wakena" in the course followed by her before the accident. She had an unreliable compass, and the capain thought that because he had gone up the Narrows before in clear weather, he could still do so in the fog with such a compass and moreover he does not impress me as if he really did understand his compass. Had he a proper compass he did not use it properly; had he an unreliable compass he was negligent in navigating with it under such circumstances. From the time he went by Prospect Bluff on the south shore to the time he fetched up aground on the north shore, his vessel seems to have gone all over the points of the compass. Had the captain fallen asleep at the wheel? Then the first whistle he says he heard from the "Venture" is the one noted by the mate who was called on deck when the "Wakena" was on the north shore among the dolphins. From the reading of the evidence the view has impressed itself upon me that Captain Anderson did not know much about the deviation of his compass, which seems to be the principal factor in placing his vessel next to the dolphins on the wrong side of the channel, and his testi-

[1] 9 Can. Ex. 67 at 116. and 36 Can. S.C.R. 564 at 579, [1907] A.C. 112.

[2] 2 Asp. M.C. 202.

mony does not convey the impression that he was a reliable navigator.

While the "Venture" had a right to assume with a fog-whistle on her port bow and broadening there, that such whistle was from a vessel going out of the Narrows on the north shore, her proper side of the channel, the "Wakena" had warning from the blasts of the "Venture" that the latter was coming up on the south shore. The "Wakena" knew she was off her course and she had to navigate with extra caution, and with proper signals and keep out of the path of this inbound vessel properly signalled to her as an incoming vessel.

All of these facts, coupled with the want of evidence establishing a proper look-out, although perhaps the latter did not contribute to the accident, lead to the presumption that there was also careless management of the vessel before the accident, before she fetched up aground on the north shore; and that from the time the vessel left the dolphins on the north shore, her manoeuvring was also marked with the same carelessness and want of good seamanship. Is not the management of the "Wakena" before she found herself on the north shore enlightening as to her management thereafter?

Moreover, as put by one of the nautical experts:—

A. Yes, If I heard the regular navigation whistle of a steamer, fog signal, going in or out, and the tide easy, I would go—I would consider it safe to go in, because I would look on it as only being a parallel course could be steered there in the Narrows, that is, South 74, East, or North 74 West would be the courses out and in. I would not expect any other course except in a parallel course with my own, going out or in at the Narrows.

And also:—

We expect that the vessel going either way and steering a parallel course with your own, and no other.

A nautical expert heard on behalf of the "Wakena," gives the following testimony:—

Q. Now as a navigator, coming in at the Narrows, would you be thinking for a moment that you would find a boat crossing, a steamer crossing right from the Stanley Park shore to the south? A. Oh, I wouldn't.

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Q. You would never expect that, would you? A. It would be a pretty hard thing to assume, but——

Q. A pretty rank thing to assume, wouldn't it? A. No, I wouldn't want to assume that a boat was coming "right across."

His reckless and careless manœuvring up to the time she went aground on the north shore implies a continuance of similar poor seamanship from that time on to the collision. Applying the decision in the case of the "*Cape Breton*" (*ubi supra*) she followed an unusual course—she had transgressed Art. 25—and she had at *her own risk* and with proper signals, under the circumstances, to right herself back into the fairway or middle of the channel: the "*Glengariff*."[1] The blundering navigation which took her to the north shore without proper signals did not justify her in becoming a menace to the safety of other vessels navigating these Narrows, and she did not become excused from the responsibility involved in such manœuvring because through such want of seamanship, she had lost her way for a time before she went aground on the north shore.

Therefore, the "Wakena" having found herself on the wrong side of a narrow channel, Art. 25, came within the provisions of Art. 15 (*e*), being "*a vessel under way unable to manœuvre*" as required by these rules, and should, under the circumstances of being on the wrong side of the channel and travelling across the channel, "*instead of the signals prescribed in sub-divisions* (*a*) *and* (*c*)" of Art. 15, "*at intervals of not more than 2 minutes, sound three blasts in succession*, viz., *one prolonged blast, followed by two short blasts.*" Now, had the "Wakena" given such signals when crossing over from north to south, the "Venture" which was under perfect management would have understood the position and would not have been misled in taking the "Wakena" for an outgoing vessel on the north side and would have guided herself accordingly.

If the contention be correct no fault should be found in the manner the "Wakena" was trying to extricate herself from a false position, she should at least have notified the other vessels navigating in the Narrows.

[1] 10 Asp. M.C. 103, [1905]. P. 106.

Then the collision took place on the southern danger line of the fairway. If the "Wakena" was leaving the north shore to come on the proper side of the channel, there was no necessity for her to follow her course right across to the other shore of the channel and, to ascertain she was there, by going aground on the south shore. When in the fairway or middle channel after leaving the north shore she should have lined up the fairway and followed a parallel course to that of the "Venture," and before endeavouring to get beyond the southern danger line of the fairway. Had she followed this reasonable course, the collision would not have taken place.

And what does the mate of the "Wakena" say, when asked what was the proper navigation to get away from the dolphins to the proper channel? He says, "We had to get back into midchannel to get on our course." A manœuvre he could very well have executed with a proper compass. Then he says: "I would run into the channel far enough to get off from the shore on a falling tide and I would line up into the channel," and the "Wakena" would not have collided with the "Venture" had she not gone so far over.

Again, from the mouth of Erasmus Johnson, a nautical expert, with an experience of 20 years running in and out of Vancouver, heard on behalf of the "Wakena," we find an actual condemnation of the latter's course. He says, he "should not think there was any difficulty after the 'Wakena' had picked up the lights at Prospect Bluff to take her course for Brockton." Then he is asked:—

Q. Well, having got over among the dolphins, supposing you were navigating her, coming from there for some reason or other—you know where the dolphins are? A. Yes.

Q. And you know the depth of the water in front of them? A. Yes, I know.

Q. Now suppose you got over there with a boat such as the "Wakena," a flat bottomed boat, and you wanted to get into Vancouver. A. Yes.

Q. In a dense fog? A. Yes.

Q. —and you started to go out? A. Yes.

Q. Your boat is stern to the shore and you are headed out in the channel, and just as you start you hear a boat

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coming in on the starboard side of the channel, as a careful navigator would it be careful navigation to run your boat straight across channel? Would you think of doing it? A. Well, I would *line her* up for her course going in.

Q. Yes, you would line her up but you wouldn't go across channel would you? A. Not if I could help it.

Q. Well, you could help it you know, there would be nothing to take you across. All you would have to do would be to run your boat out from the shore far enough to get into deep water, wouldn't it? A. Yes.

Q. And then when you got into deep water, now captain, what would you have done, hearing a boat going in, what would you have done? A. Well, I would—

Q. I want to shorten it. A. If you have got the position coming west——

THE COURT:—What? A. I would try to locate her coming in, that is by the sound of the position.

Q. You would try to locate her? A. Yes, and then steer my course for the Narrows you know, providing for the way that was running.

Mr. Macneill:—Q. You would be turned round the same direction as the approaching boat was running? A. Yes, providing she was going in.

Mr. McLellan:—Q. What did you mean, captain, by lining the boat up? A. Well, shaping my course for—suppose I was going in, you know, I would shape my course —I would line her up for Brockton Point.

Q. Yes, to get on your course? A. To get on my course, yes, that is the idea.

All of this evidence, taken from the testimony of witnesses brought in by the defendant ship goes to show that while the "Wakena" (admitting she was going slow—not against the tide but across—was leaving the north shore, where she should not be as an ingoing vessel), had no reason, if properly managed, to go right across the whole fairway to pick up her courses again; but had only with the help of her compass to get into the fairway and line up. Moreover, having heard the whistle of the "Venture" on her starboard bow (a vessel coming up on the south, from the very place towards which the "Wakena" was manœuvring) and thus being apprised of an approaching vessel (she

being herself on a wrong course) had reason to take her to be an incoming vessel on her right course, and had no excuse or justification in pursuing her own course towards such incoming vessel, and should at least have lined up in the fairway until she had ascertained from the whistle of the "Venture" that the latter had gone by. Therefore, it must be found:

1. That the "Wakena," as an ingoing vessel, was to blame for being on the wrong side of the channel.

2. Whether the captain of the "Wakena" had a reliable compass, and did not use it properly; or whether he had an unreliable compass in either case he was guilty of negligence in navigating as he did, in a narrow channel in foggy weather.

3. That, being an ingoing vessel on the wrong side of the channel, the "Wakena" became unable to navigate as required by Art. 25; she had to signal under the provisions of Art. 15 (*e*) her course across the channel, because otherwise the vessels navigating the Narrows had a right to assume that she would conform to the ordinary rules, and to take her for an outgoing vessel, on the north or starboard side of the channel. She had to right herself at her own risk. The "*Cape Breton*,"[1]

4. That it was unnecessary for the "Wakena" to run across this narrow channel so far as the ordinary southern danger line thereof, a course which would perhaps have taken her aground again, but on the south shore.

5. That the captain of the "Wakena" exhibited careless seamanship in persisting in running the "Wakena" across the channel and towards the signals and whistles of an incoming vessel on her proper side of the channel, and failing to line up his own vessel, under compass, in the fairway until the whistles or blasts of the "Venture" would have carried the information that the latter had gone by, allowing the "Wakena" to then take a parallel course or to follow in the wake of the "Venture."

From mismanagement and want of proper seamanship in her course from the dolphins to the time of the collision, as above set forth, the "Wakena" became the sole cause of the accident and is solely to blame. Therefore the appeal is allowed with costs.

Appeal allowed.

[1] 9 Can. Ex. 67 at 116, 36 Can. S.C.R. 564 at 579, (1907) A.C. 112.

1917
April 23

IN THE MATTER OF THE PETITION OF

FRANCIS KEEGAN.....SUPPLIANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

Crown—Negligence—Public work—Post office—Elevator—Measure of damages.

An injury sustained in the course of repairing an elevator-switch in a post office building, the elevator not being for the use of the public, is one happening on a "public work," and having been occasioned by the negligence of a servant of the Crown acting within the scope of his employment becomes a claim under sec. 20 of *The Exchequer Court Act*, for which the Crown is liable.

Damages in the amount of $4,500, and an extra allowance for medical expenses may be fairly allowed for a spinal injury to an electrician, incapacitating him, at the age of 27, from pursuing his avocation.

PETITION OF RIGHT to recover damages for personal injuries.

Tried before the Honourable Mr. JUSTICE AUDETTE, at Montreal, Que., March 23, 1917.

H. N. Chauvin and *H. E. Walker*, for suppliant; *F. J. Laverty*, K.C., for respondent.

AUDETTE, J. (April 23, 1917) delivered judgment.

The suppliant, by his petition of right, seeks to recover the sum of $25,000 for injuries, loss and damage suffered by him as the result of an accident, in the General Post Office Building, at Montreal, P.Q.

On December 21, 1914, the suppliant was engaged, with Charles Gylche, in repairing the limit-switch in the pit of the freight and passenger elevator at the post office, an elevator which is not in use by the public. Some work had been done in the morning and they resumed work in the afternoon.

Witness Donovan states in his evidence that in the absence of superintendent Morrison, who has charge of all the buildings and public works he, himself, has charge of the

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elevators in the post office. At 3 o'clock in the afternoon, Tisdale, who does not speak English, was to take charge of the elevator. A few minutes before 3, after taking the power off, Donovan, in the presence of Keegan and Gylche, told Rochon, who speaks the French and English languages, to tell Tisdale that he could operate the elevator, but not to take it down to the basement, where the men were working:—that he was to operate above only, and both Keegan and Gylche declared themselves satisfied with this arrangement. Gylche said he did not like the idea of having the elevator operated while they were working; but on representations being made that the elevator was wanted, they all agreed to the above arrangement.

Donovan said that he then reconnected the electricity which he had shut off.

Tisdale says the accident in question occured between 3.25 and 3.30 in the afternoon, he having taken charge of the elevator at 3 o'clock; and that between 3 o'clock and the time of the accident, he had been asked, by the men working in the pit, to come down five times to see how the elevator would work, and that each time, both Keegan and Gylche were out of the pit, standing on the floor of the cellar close by the elevator

Now, immediately before the accident both men were in the pit underneath the elevator, engaged in the repairs in question, and while Keegan was in a bending position, his elbow resting on a projecting ledge of 15 to 18 inches in width at the back of the pit, leaning over this ledge or wall, holding a piece of wood into which he was running a screw to hold the limit switch, the elevator suddenly came down upon him and he was very severely injured.

Gylche, who was at the time in the pit with Keegan, says they were not expecting the elevator down, as it had been arranged it was not to be operated down to the basement. He was standing away from the wall, and the first intimation of the coming elevator was the feeling of a draft, made by the displacement of the air, as it was coming down rapidly. He then heard Keegan crying out "Oh!" before being struck. As soon as Gylche realized this predicament, he stooped down on his knees and kept his head clear of the car, and afterwards crawled out between

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the bottom of the car at the front, and the floor, through a space of 15 to 18 inches. The bottom of the pit is about 4 feet lower than the floor of the basement, and the ledge in question is about 23 to 24 inches from the floor.

Keegan moaned. He was caught between the edge of the ledge and the bottom of the car—he could not move—he was pinned down. When the car moved up, he slid to the bottom and moaned considerably.

He was afterwards moved to the hospital and placed under medical care.

Tisdale, the operator, says he took the elevator down, because he heard some one call "come down." A clerk in the post office, who happened to be in the basement at the time of the accident, says that when some distance from the elevator pit, he heard the words "come down;" and *he thinks the sound appeared to him as coming* from the pit. Another clerk who was in the act of going up, from the basement to the ground floor, in a small stairway open all around, with a door at the top, says he also heard the words "come down." The sound to him appeared to come from the basement. However, when he reached the ground floor, he found the elevator there, flush with the ground floor. There is, therefore, a conflict between Tisdale and this witness, because Tisdale said when he heard "come down" he was at the 3rd story, and that he came down direct from the 3rd story. Some one is in error.

It is proved beyond peradventure that these words "come down" were spoken by some one, but who did really pronounce them? Gylche denies absolutely that either Keegan or he did say "come down" at that moment. He said when he wanted the elevator to come for testing purposes he would ring and call; and unless both Keegan and Gylche had plotted to commit suicide, they would certainly not have called the elevator when they were in this dangerous position.

While the words "come down" were actually spoken, it must be found they were not pronounced by either Keegan or Gylche, and that it is quite possible they were pronounced by some one on the ground floor, where the elevator was found to be when witness Fauteux came up from the base-

ment, or possibly even at some other flat. Sound indeed, controlled by walls, pits and draughts, will travel in a very capricious manner and will often prove very deceiving. The laws of reflection of a sound are the same as those of the reflection of light and heat, and curved surfaces will give rise to acoustic focuses analogous to luminous and calorific focuses which are produced before concave reflectors. As long as the waves of a sound are not interfered with in their development, they will propagate in the shape of concentric spheres; but when they meet an obstacle, they follow the general rule of elastic bodies, that is to say they come back upon themselves in forming new concentric waves which seem to emanate from a second centre situate on the other side of the obstacle and this is what is called reflected waves. Therefore, it is obvious a sound is materially affected by its surrounding obstacles, and while on first impression it may appear to come from one direction, it can as a fact, have emanated from the very opposite direction.

If the elevator was at the third story when these words "come down" were pronounced, they might have come from the first or the second story, the sound striking the bottom of the elevator as an obstacle to the development of its waves, and may have bounced back to the cellar, and appear to many as having originated there. Such a call was, however, made, but it is under the evidence impossible to accurately locate it. But even if such a call has been made there was obviously great want of care and diligence in the manner in which Tisdale answered it, that is by rushing his elevator down to the basement notwithstanding the arrangement above mentioned respecting the service of the elevator in the basement. He knew the men were working in the pit, he knew he was not to run his elevator down to the basement—this was a departure from his usual run—and if he thought he was called to the basement he was bound under the circumstances, to use such care and diligence as an ordinary prudent man would use on such an occasion. There is no excuse or justification for taking his car down in such a reckless manner, oblivious of all sense of responsibility and sane behaviour. He probably

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had momentarily forgotten about the men in the pit and of the understanding about the service to the basement.

The accident having occurred on a public work, the General Post Office Building, at Montreal, and it being the result of the negligence of an officer or servant of the Crown acting within the scope of his duties and employment, the suppliant is entitled to recover. See *The Exchequer Court Act*, sec. 20.

Quantum.

Coming now to the question of quantum, the evidence establishes that when Keegan was brought to Notre Dame Hospital, after the accident, he was suffering from a fracture of the spine, in the last dorsal vertebrae, from a tear of the perineum and of the rectum, that his legs were paralysed, and the suppliant adds that he was struck on the head and several of his teeth were knocked out. He was placed by Dr. Mercier in a plaster jacket and the paralysis began to improve. In March, 1915, the fracture of the spine had partly consolidated, but he was still an invalid. A few weeks after leaving Notre Dame Hospital he went to the General Hospital, at Montreal, where he was treated by Dr. Nutter, who testified that when he first saw Keegan, he was still in a badly crippled condition with forward curvature, although one could see he had been still worse. He had a bad deformity of the spine, a hunch back, evidently due to the accident, and the X-Ray he had taken showed a fracture of the last dorsal vertebrae. He will always remain in a crouched condition and be permanently disfigured. The force of the elevator had crushed the bone. He had recovered the use of his legs and was then able to go about with care in a feeble manner, but could not stand for any time. He was happier sitting than standing, but happier on his back, and could not sit more than from one to two hours at a time. The solidification of the spine was not complete, and he went to England wearing a steel and leather jacket. And he further adds that the last time he saw him, he (Keegan) had lost 75% of his capacity, and that he would never be able to handle heavy work, and while he should find something to earn his living, he could not be an electrician having in that capacity to handle weights of 15 to 20 pounds.

Arrived in England he was under Dr. Miller's treatment, who says that his ability to work is practically nil, owing to his difficulty of remaining in an upright position for more than 3 hours a day, and his powers of locomotion very limited. He further says that the tendency of recovery is bad and that he will probably require close observation and be under medical treatment all along.

Keegan was 27 years of age at the time of the accident, and was earning, he says, an average of about $22.50 a week. F. Lawson, the book-keeper, at the Otis Fensom Elevator Co., says that at 30 cents an hour Keegan would average about $70 a month, and that in the 41 weeks preceding the accident Keegan earned $750.

The suppliant's life is practically wrecked, his prospects blighted, his earning power is materially decreased, and he has suffered very much pain. He cannot follow or pursue his avocation as an electrician, a walk of life fairly remunerative in our days. His earning capacity is decreased by 75 per cent., says one medical gentleman; but, being intelligent it is quite probable that in the near future he will be able to find some suitable employment that will keep him busy yielding him some remuneration. He has some doctors' bills to pay and will have to meet some further expenditure in this respect.

In estimating the compensation to which the suppliant is entitled, under all the circumstances, bearing in mind all the legal elements under which he is entitled to recover, some consideration should be given to the fact that while he may not be entirely prevented from earning, his chances of employment in competition with others are very much lessened and his earning power consequently reduced to very, very little.

While, in assessing damages in a case of this kind, it is impossible to arrive at any amount with mathematical accuracy, several elements, however, must be taken into consideration and one must strive to compensate the suppliant for his loss generally, to make good to him the pecuniary benefits he might reasonably have expected had he not met with the accident. In doing so one must take into account the age of the suppliant, who at the time of the accident was 27, his state of health, his expectation of

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life, his employment, the income he was earning or had reason to expect to earn and his prospects, not overlooking, on the other hand, the several contingencies to which every one in his walk of life is necessarily subjected, such as being out of employment, to which in common with other persons, he was exposed, and his being also subject to illness. All of these surrounding circumstances must be taken into account.

In the present case the suppliant was in his prime, in good health, a steady worker and good electrician, and with work and good conduct he had the right to expect fair earnings.

Under all the circumstances of this case, I am of opinion to allow the sum of $4,500 together with a further extra allowance of $200, for medical expenses, past, present and future, making in all the sum of $4,700, and with costs.

Judgment for suppliant.

Solicitors for suppliant: *Heneker, Chauvin, Baker & Walker.*

Solicitors for respondent: *Blair, Laverty & Hale.*

1917
March 10

IN THE MATTER OF THE PETITION OF RIGHT OF

WILLIAM J. HOPWOOD.....SUPPLIANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

Crown—Negligence—Public work—Canal—Flooding—Release.

An action does not lie against the Crown for an injury to land from the overflow of a government canal, "occasioned by spring floods and freshets" within the terms of a deed releasing the Crown from liability upon such contingencies; nor does it come under sec. 20 of the Exchequer Court Act (R.S.C. 1906, c. 140), subsecs. (*a*) and (*b*), which deal with compensation for a compulsory taking or injurious affection of land, nor under sub sec. (*c*) thereof, as an injury on a "public work," the property being situated about 25 miles from the canal route, and the injury not being shown to have resulted from the negligence of an officer or servant of the Crown acting within the scope of his duties or employment.

PETITION OF RIGHT to recover damages alleged to have been caused by an overflow of the Trent canal.

Tried before the Honourable Mr. JUSTICE AUDETTE, at Peterborough, Ont., February 26, 1917.

J. H. Burnham, for suppliant; *G. W. Hatton*, for respondent.

AUDETTE, J. (March 10, 1917), delivered judgment.

This case came up for trial before me at Peterborough, Ontario, and at the conclusion of the suppliant's evidence, the respondent moved for judgment of non-suit. This motion was taken under advisement.

The suppliant, by his amended petition of right, seeks to recover the sum of $150 for alleged damages suffered in 1912 (although in his evidence he said his claim was for 1912 and 1913) to his property, as resulting from the flooding of the same "by reason of the unlawful and improper "handling of the waters known as the Trent Canal waters," at the Buckhorn Dam.

This property, which he acquired on September 10, 1900, is described in the deed of purchase as a small island in

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Chemong lake. At low water it becomes a peninsula; but when the waters are high it is entirely surrounded by water, and he has therefore constructed a small foot-bridge from the mainland to the island.

As appears by an indenture of August 29, 1910, filed herein as Exhibit No. 3, the suppliant was paid at that date the sum of $150 in full satisfaction and discharge of all claims for damages to his property in consequence of the construction, maintenance and operation of the Trent Canal, so long as the waters of the said canal are held no higher than they were in the seasons of 1906, 1907, 1908, and 1909, and in consideration of the same he further grants, releases, indemnifies and discharges the Crown from and against all damages of any nature and kind whatsoever which have been heretofore caused or may hereafter be caused or done so long as the waters of the said canal are held no higher than they were in the seasons of 1906, 1907, 1908 and 1909.

And this indenture further recites: "That for the con-"sideration aforesaid the said party of the first part for "himself, his heirs, executors, administrators and assigns "doth grant confirm and assure to and unto His Majesty "his successors and assigns forever the right to flow, flood, "and submerge such part of the said lands hereinbefore "mentioned to such an extent as may be found necessary "to flow, flood and submerge the same by the raising and "increasing the height or level from time to time of the "waters of the said Trent Canal System in so far as they "affect the lands and premises hereinbefore mentioned to "the greatest level or height to which the said waters were "brought at any time during the years of 1906, 1907, 1908 "and 1909, as indicated by the records kept from time to "time by the proper officers of the Government of the "Dominion of Canada or by maintaining or supporting "at all times the waters of the said Trent Canal System "in so far as they affect the said lands to the said height "or level and *such further increase thereof as may be occasioned "by spring floods and freshets..*"

A new Buckhorn Dam was built in 1907, and completed in October, 1908, and much stress is placed on behalf of the suppliant, upon the difference of the 1907 dam and the

1908 dam. But no meritorious argument can apparently be set up from this comparison since that from the deed of August, 1910, it appears the release thereunder is valid provided the waters are held no higher than they were in the seasons of 1906, 1907, 1908 and 1909, that is under the state of things obtaining under both old and new dams in the years above mentioned, and all of these years are the point of comparison with 1912.

Furthermore, the height of the waters in the years 1906, 1907, 1908 and 1909, is to be ascertained "from the *records kept from time to time* by the proper officers *of the Government.*" and to the height of the waters so ascertained in the years 1906, 1907, 1908 and 1909, there is still a further margin allowed the Crown by the following words of this deed of 1910, viz.: "and such further increase thereof "as may be occasioned by spring floods and freshets."

Now, we have uncontroverted evidence that there was a very heavy freshet in the spring of the year 1912, and that heavy rain and deep snow occasioned an extremely high precipitation. The highest point the waters reached at the dam in 1912 was on April 24, when it reckoned 9.11 on the upper gauge. Then the waters dropped down till they again rose to 7·07 on May 17, and around June 5 it reached 9·08. In 1912 the water rose up to 9·11, that is 6 inches higher than in 1909, when it went up to 9·05. But even if the case were to be decided exclusively upon the facts, as controlled by the deed of August, 1910, the action would fail, because to whatever height the water did go in 1912, over and above the years 1906, 1907, 1908 and 1909, must obviously and reasonably be taken to be due to the unusual spring floods and freshets of 1912, and that would be only 6 inches of leeway or margin allowed by the 1910 deed over the highest point reached between 1906 and 1909.

Approaching now the case under its legal aspect it must be said that this action is in its very essence one in tort, and that apart from special statutory authority such an action does not lie against the Crown. The suppliant to succeed, must bring his case within the ambit of sec. 20 of *The Exchequer Court Act.*

If the suppliant seeks to rest his case under subsec. (*b*) of sec. 20, as was mentioned at trial, I must answer that

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contention by the decision of the Supreme Court of Canada in *Piggott v. The King*[1] where His Lordship the Chief Justice of Canada, says: "Paragraphs (*a*) and (*b*) of sec. 20 "are dealing with questions of compensation not of damages.

"Compensation is the indemnity which the statute "provides to the owner of lands which are compulsorily "taken under, or injuriously affected by, the exercise of "statutory powers."

Therefore, it obviously follows that the present case does not come under subsec. (*a*) and (*b*) of sec. 20.

Does the case come under sub-sec. (*c*) of sec. 20, repeatedly passed upon by this court and the Supreme Court of Canada?

To bring this case within the provisions of subsec. (*c*) of sec. 20, the injury to property must be: 1st. On a public work; 2nd. There must be some negligence of an officer or servant of the Crown acting within the scope of his duties or employment; and 3rd. The injury must be the result of such negligence.

The suppliant's property is situate 20 or 25 miles south of Buckhorn Dam, a dam which is part of the Trent Canal System, which undoubtedly under sec. 108 of the B.N.A. Act and the third schedule thereof is the property of Canada. The canal route, however, runs through the north western part of Buckhorn Lake and does not go through Chemong Lake at all. Buckhorn Lake on the east connects with Chemong Lake through a passage, and the suppliant's property is on the south east shore of the latter lake, as the whole appears upon a general plan exhibited at trial.

Under the circumstances and under the decisions in *Macdonald v. The King*;[2] *Hamburg American Packet Co. v. The King*;[3] *Paul v. The King*;[4] and *Olmstead v. The King*,[5] it is impossible to find that the suppliant's lands in question in this case, so situate 20 to 25 miles from Buckhorn Dam and entirely out of the canal route, are *on a public work*.

Were this question of *on a public work* answered in favour of the suppliant there would still be missing from the case

[1] 53 Can. S.C.R. 626, 32 D.L.R. 461.
[2] 10 Can. Ex. 394.
[3] 7 Can. Ex. 150; 33 Can. S.C.R. 252.
[4] 38 Can. S.C.R. 126.
[5] 53 Can. S.C.R. 450, 30 D.L.R. 345.

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the evidence that an officer or servant of the Crown, while acting within the scope of his duties or employment, had been guilty of such negligence that would have caused the damages complained of. There is not a tittle of evidence in this respect in the case.

In the result it must be found, following the decisions of *Chamberlin v. The King*;[1] *Paul v. The King* (*supra*), *The Hamburg American Packet Co. v. The King* (*supra*), *Macdonald v. The King* (*supra*), and especially *Olmstead v. The King* (*supra*), that the injury complained of did not happen on a public work, and moreover that it did not result from the negligence of any officer or servant of the Crown, while acting within the scope of his duties or employment.

Therefore, both under the facts, as controlled by the deed of August, 1910, and under the law the suppliant fails.

The motion for non-suit made at trial, by counsel on behalf of the respondent, at the conclusion of the suppliant's evidence, is granted and the suppliant is declared not entitled to any portion of the relief sought by his petition of right.

Action dismissed.

Solicitors for suppliant: *Ruddy & Burnham.*

Solicitor for respondent: *G. W. Hatton.*

[1] 42 Can. S.C.R. 350.

1917
March 6

THE KING, ON THE INFORMATION OF THE ATTORNEY-GENERAL OF CANADA.....PLAINTIFF;

AND

GEORGE LEE.....DEFENDANT.

Expropriation—Compliance with statute—Description—Curative statute—Constitutionality—Jus Tertii.

No title passes to land taken under an expropriation proceedings in which the statutory requirements as to the description of the land were not complied with. The curative provisions of Act 1881 (R.S.C. 1906, c. 36, s. 82) only apply where the lands are taken possession of.

Where the Dominion parliament has power to authorize the expropriation of provincial lands for a Dominion railway, it has the like power to enact a curative statute relieving *nunc pro tunc* for a non-compliance with the strict provisions of the statute under which the expropriation is made.

Setting up a conveyance to show that the plaintiff had no title does not involve the *jus tertii*.

INFORMATION to declare a piece of land the property of the Intercolonial Railway vested in the Crown.

Tried before the Honourable Mr. JUSTICE CASSELS, at Halifax, N.S., May 22, 1914, June 9, 10, 1915.

H. W. Sangster, for plaintiff; *R. T. McIlreith*, K.C., and *C. F. Tremaine*, for defendant.

CASSELS, J. (March 6, 1917) delivered judgment.

An information exhibited on behalf of the Crown for the purpose of having it declared that a certain piece of land, shown on the plan attached to the information, is part of the lands, the property of the Intercolonial Railway, and vested in His Majesty.

The action is one in trespass, and is instituted against the defendant, representing the municipality, to have the question of title adjudicated.

A great mass of evidence has been adduced, and as promised I have carefully perused all of it and considered it with the various exhibits. Counsel are to be congratulated on the immense amount of time they must have di-

rected to the consideration of the case, and the production of the evidence a considerable portion of which has been more than duplicated. In the view I take of the case a considerable portion of it is irrelevant.

In 1854 (Cap. I, 17 Vict.) a statute was passed by the Governor, Council and Assembly of the Province of Nova Scotia, which in part recites, as follows:

"1. The lines of railway to be constructed under the "provisions of this act, shall be public provincial works . . . Sec. 10 provides:

"The commissioners or contractors are authorized to "enter upon and take possession of any lands required "for the track of the railways, or for stations, and they "shall lay off the same by metes and bounds, and record "a description and plan thereof in the registry of deeds "for the county in which the lands are situate, and the "same shall operate as a dedication to the public of such "lands; the lands so taken shall not be less than four "rods nor more than six rods in breadth for the track, "exclusive of slopes of excavations and of embankments, "except where it may be deemed advisable to alter the "line or level of any public or private carriage road, or "divert any stream or river, in which case it shall be "competent for the commissioners to take such further "quantity as may be found necessary for such purposes; "also, at each station a sufficient extent for depot and other "station purposes; provided always, that, excepting at the "termini or junction of the railways, the quantity so appro- "priated shall not exceed five acres."

In intended pursuance of the provisions of this statute, in the year 1855 the Commissioners laid out the route of the railway at the point in question, and a map (Exhibit No. 12) was duly recorded in the Registry of Deeds. No description of the lands by metes and bounds was recorded.

The lands in dispute are near Windsor Junction. The track of the railway where the dispute arises, is situate north west of the station, and the railway is now part of the main line of the Intercolonial Railway from Halifax to Truro.

The railway was constructed in the year 1856, and on each side of the railway right of way, which comprises a

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piece of land 99 feet in width, a fence was constructed, and such fences have continued with renewals from time to time on the same location as the original fences constructed in 1856.

While there is a controversy as to whether the main right of way of the railway was located on the line as laid out by the Commissioners, there is no question raised as to the lands comprised within the fences erected in 1856; and considering the continuous occupation from 1856 to the present time, no contention as to the title to this main right of way could now be successfully maintained. It is claimed by the Crown that a strip of land to the west, and adjoining the westerly fence of the railway and comprising a piece of land of about 900 feet in length with a width of from 22 to 28 feet wide was expropriated for the railway at the same time as the main right of way. This land is shown on the plan attached to the information. The letters "A," "B" on the north west, and "C," "D" on the south east show the northern and southern boundaries of the land. The eastern boundary is the western fence of the railway right of way, and the western boundary a fence erected to mark the eastern boundary of the adjoining lands. The land is shown enclosed in red lines on the plan annexed to the information.

In 1902, the land enclosed between the fences forming the western boundary of the railway right of way, and the fence on the west side of the road in question was, pursuant to the statutes of Nova Scotia in that behalf, dedicated as a highway. The validity of the proceedings to have this highway dedicated is attacked, but in my opinion the right to question the validity of the proceedings is not open to the Crown.

The railway constructed by the Province of Nova Scotia, pursuant to the statute of 1854, at the time of Confederation became Dominion property and part of the Intercolonial Railway of Canada.

It is conceded by counsel for both parties that if in fact the land in dispute was properly expropriated and vested in the Crown under the proceedings taken in 1855, it would require 60 years adverse occupation to oust the title of the Crown. The proceedings taken under the Statutes of

Nova Scotia in that behalf to form a highway would be void if an attempt were made to expropriate lands the property of the Crown represented by the Dominion. It is unnecessary to elaborate this proposition. I would merely refer to the case of *The King v. Burrard.*[1] Therefore, if the lands are vested in the Crown, the claim of the municipality would fail. On the other hand, if the Crown is not entitled to the land in dispute, then there is no right on its behalf to question the validity of the proceedings taken to dedicate this highway. So with regard to the old Hopkins Road, I fail to apprehend the bearing of the contest in regard to this road, except perhaps as regards the topography of the surrounding lands. Whether it was a public highway or a private road is of little consequence. With the exception of the southern end of this road, for a distance of perhaps 200 feet next to the McGuire crossing this Hopkins road was away from the lands in dispute. What difference can it make whether it was a public road or a private road if in fact the Crown owns the lands in dispute. The title of the Crown could not be ousted by occupation for a less period than 60 years, and there is no contention that the road was used for any such period; and, on the other hand, if the Crown does not own the lands in dispute, of what concern is it whether the old Hopkins Road was dedicated and became a public highway or not.

The real question in issue and to be decided in this action is whether the piece of land in question, and described on the plan attached to the information by the letters A, B, C and D, ever became vested in the Crown by virtue of the proceedings taken pursuant to the statute of Nova Scotia referred to.

In my judgment the Crown has failed to prove its title. Certain facts are I think beyond dispute. 1st. When Exhibit No. 12, the original plan was recorded in the Registry Office, no description by metes and bounds was filed. 2nd, There is no starting point shown on this plan from which any measurements can be made. The scale is so minute that it is almost impossible to arrive at any

[1] 12 Can. Ex. 295; 43 Can. S.C.R. 27; [1911] A.C. 87.

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measurements with accuracy. If Exhibit No. 3 is taken as a correct copy of Exhibit No. 12, made before the practical destruction of Exhibit No. 12, any measurements are merely conjectural depending on disputed starting points and at best it becomes a matter of guess work

3rd. At the time of the expropriation the railway right of way was fenced in on both sides and has continued to be fenced on the same lines to the present day.

4th. The railway has never been in possession of the lands now claimed. These lands were never fenced in, nor were they ever shown to be the property of the railway by any marks on the ground, nor has the railway ever asserted any acts of ownership over the said lands until shortly before the commencement of the present action.

If ever there were a case in which the provisions of the statute as to giving a description by metes and bounds should have been complied with, the present is one. The statute provides that a plan and description shall be recorded. It states, "and they shall lay off the same by "metes and bounds, and record a description and plan "thereof in the registry of deeds for the county in which "the lands are situate, *and the same shall operate as a "dedication to the public of such lands.*" This provision never was complied with, and the result, according to my judgment is, that if the lands in dispute are the lands intended to be expropriated they have never been legally expropriated, and no title thereto ever passed to the Crown.

Where a statute provides for certain formalities to be followed, if it is desired to exercise the right of eminent domain, the statute must be strictly complied with, and a court cannot say that compliance with such conditions precedent can be dispensed with. *The Queen v. Sigsworth*;[1] *The King v. Justices of Surrey*;[2] *Lewis on Eminent Domain*;[3] *Nichols on Eminent Domain*;[4] *Mills on Eminent Domain*[5] and *Lamontagne v. The King*[6] a decision of Mr. Justice Audette.

In the year 1881 a statute was enacted which has been carried into the various revisions and now is sec. 82 of ch. 36, R.S.C. 1906. The original of this section was, as I

[1] 2 Can. Ex. 194. [2] [1908] 1 K.B. 374. [3] 3rd Ed. (1909) sec. 387. [4] (1909) sec. 295. [5] 2nd ed. (1888) sec. 115. [6] Ante . 203.

have stated, enacted in 1881–44 Vic. cap. 25, sec. 10. This statute is only a curative statute where the lands are in *possession* of His Majesty. The possession evidently means occupation. The tenth section of the original statute of Nova Scotia, 1854, provides that the Commissioners are authorized to enter upon and take *possession* of any lands required.

In the 2nd series of Judicial and Statutory Definitions of Words and Phrases, at pages 1,098, 1,099 will be found a collection of decisions on the meaning of this word "possesssion." It never could have been in contemplation that parliament would have passed such an enactment in reference to lands which had never been taken possession of by the railway. It is argued by Mr. McIlreith that this statute was *ultra vires* of the Dominion parliament as an encroachment on provincial rights. It is unnecessary to discuss this question, but I would refer to the case of the *Grand Trunk Railway Co. v. Attorney General of Canada*[1] in reference to the Railway Amendment Act of 1904.

It may well be that parliament which has power to authorize a railway to expropriate provincial lands for a Dominion railway, has also power to enact a curative statute relieving *nunc pro tunc*, for failure to comply with the strict provision of the statute under which the expropriation was intended to be made. It must also be borne in mind that the curative statute was enacted in 1881. The road in question became vested in the Crown of Nova Scotia in 1902. I do not think this statute covers the case before me. The railway never was in possession of the lands in dispute.

The plaintiff relies upon the conveyance made by one Wier. This deed was executed on November 1, 1893. At this time Wier had no title to the lands in question. He had previously on July 9, 1888, conveyed the lands to James Adams. It is argued by Mr. Sangster that this conveyance cannot be referred to on the alleged ground that the defendant is not at liberty to set up what he calls the *jus tertii*. There is no question of *jus tertii*. It is put in to show that no title passed from Wier to the Crown

[1] 36 Can. S.C.R. 136; [1907] A.C. 65.

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by reason of the fact that Wier had already conveyed whatever interest he had in the lands.

I am of opinion that if the lands in dispute ever were a portion of the lands intended to be expropriated for the railway, the title thereto had never been legally acquired by the Crown and the action should be dismissed with costs.

Action dismissed.

Solicitor for plaintiff: *H. W. Sangster.*

Solicitors for defendant: *McIlreith & Tremaine.*

1917
April 26

IN THE MATTER OF THE PETITION OF RIGHT OF

PIERRE MOISAN.....SUPPLIANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

Expropriation—Compensation—Railways—Flooding from ditches.

The Commissioners of the National Transcontinental Railway had expropriated a certain portion of a farm while in the possession of the suppliant's predecessor in title and paid him compensation therefor and for all damages resulting from the expropriation—the deed of sale stating that the compensation paid comprised *"tous les dommages de quelque nature que ce soit."* After the suppliant acquired the farm flooding occurred, and the suppliant claimed that it was due to the construction of a new drain by the railway authorities. The evidence showed that the flooding was occasioned by the failure of the suppliant to open and complete his boundary ditches.

Held, that the injury even if it arose from anything done by the railway authorities was covered by the compensation paid to the suppliant's auteur, and that no claim for damages would lie unless another expropriation had been made or some new work performed, causing damages of a character not falling within the scope of those arising from the first expropriation. *Jackson v. The Queen*, 1 Can. Ex. 144, referred to.

PETITION OF RIGHT for damages for flooding suppliant's land alleged to be caused by the construction of the National Transcontinental Railway.

Tried before the Honourable Mr. JUSTICE AUDETTE, at Quebec, April, 4, 5, 1917.

Paul Drouin, for suppliant; *H. LaRue*, for respondent

AUDETTE, J. (April 26, 1917) delivered judgment.

The suppliant by his petition of right claims damages for the flooding of a portion of his farm, adjoining the National Transcontinental Railway, known as lot No. 17, of the Official Cadastre for the Parish of Pointe-aux-Trembles, in the County of Portneuf, Province of Quebec.

Three pieces or parcels of land are described in severalty, in the petition of right as parcels A, B and C; and perhaps it is well to say that under the evidence, only parcel A would have been affected by the flooding in question, in the spring of the year or by occasional freshets.

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There is a rock cut, varying from 14 feet down, on lot No. 17 where it is intersected by the said railway running practically east and west across lot No. 17, which is about one acre in width.

The farm is hilly where it is intersected by the railway, and its topography, as ascertained by the engineer, gives us a slope of 30 per cent., from north to south, and a slope of 6 per cent. to 7 per cent., from east to west. It would further appear from plan Exhibit "D", that upon a distance of 285 feet south of the top of the rail elevation, there is a slope of 45 feet.

The flooding complained of is at the south of the railway. There are good deep ditches on each side of the track, on the land taken for the right of way, and the southern ditch is at about 39 feet from the southern fence of said right of way. At the point A, on plan Exhibit "B", a trifle to the west of the centre of lot 17, the railway ditch ends and the water then spreads upon the ground. From A to H there is no ditch on suppliant's land, and it is alleged that in the spring the water spreads and has thus caused surface erosion for about 300 feet, that is for 100 feet by 3 feet, between H and B. And the damages claimed herein are alleged to result from such erosion, the washing away of soil, carrying away some manure and delaying the sowing and the crops at that place.

Now it is contended that at point A on plan Exhibit "B," which is point N on diagram, Exhibit No. 3, that the Crown has built or continued in a curved southerly direction its railway ditch for 6 to 7 feet, according to some witnesses, and for slightly longer according to others. The suppliant contends this 6 or 7 foot ditch has been built since he purchased, and some say during the fall of 1916. In respect of the construction of this ditch the suppliant's evidence is very vague, meagre and conflicting, and while the Resident Engineer of the Transcontinental Railway says he never ordered any work at this point N, his assistant, when heard as the suppliant's witness, states that when he went upon the premises in May and August, 1916, with the very purpose of making his report upon the present claim, he did not see the piece of ditch (ce bout de fossé) claimed to exist at N on Exhibit No. 3. One of the suppliant's witnesses

suggests that this small curve or *bout de fossé* might have been made by the running of the water itself.

While it is claimed by one witness that some of the waters running on the northern railway ditch, crosses opposite lot No. 17, under the farm crossing to the southern ditch, the resident engineer says physical conditions there lead him to believe that the waters from the northern ditch do not pass to the southern ditch, and that part of the bed of the track is rock and the balance gravel and sand through which the water does not run.

These railway ditches, both north and south respectively, take care of the water as well coming from the north as coming from the east, that is the northern parts of lots 18, 19 and part of 20, and while perhaps it might gather more water than formerly at the end of the blind south ditch, the intersection of the railway materially relieves the southern part of lot No. 17 of northern waters, which run in the northern railway ditch, and thereby acts as a set off as compared with the past. And lands on a lower level are subject, under art. 501 of the Civil Code towards those of a higher level to receive such waters.

Before leaving the questions of fact, it may be permissible to add that if there were a desire on the part of the suppliant and his neighbour on the east to avoid litigation with the Crown and its contingent profit, the desire could be easily achieved. Indeed, it is too obvious upon looking at the plan, and it is conceded by all the witnesses to whom I have put the question, that if the boundary ditches between lots 17 and 18, which at the present time extend only to a few feet of the railway fence were duly completed and opened, this boundary ditch would easily take care of all the waters coming from the railway ditches. A matter which should have been attended to ever so long before today and which also might be adjusted under the provisions of art. 198 and 694 of the Municipal Code.

There is no doubt and the matter is too apparent that if the boundary ditch between lots 17 and 18 were only continued to the southern railway ditch, that the waters would run freely without the flooding of any land. And as it has been held in the case of *Filiatrault vs. Corporation of Coteau*

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Landing[1] "When there is, in the power of the person com-"plaining, an obvious and inexpensive method of reducing, "diminishing, or wholly doing away with the damages com-"plained of. . . . it is his duty to adopt it, and in "default of his doing so, he is only entitled to recover such "loss as he would have suffered if he had taken proper 'measures to prevent or diminish the damages,"

Coming now to the merits of the case on its legal aspect, we find that the Commissioners of the Transcontinental Railway, on December 26, 1907, purchased from one Olivier Darveau, who was then proprietor and owner of lot 17 in question, an area of (0.43) forty-three hundredths of an acre for the right of way, and the said commissioners paid him the sum of $240 for the said piece of land and for all damages of any nature whatsoever (y compris tous les dommages de quelque nature que ce soit). The deed of sale contains this further clause, viz.:

"Et en considération de ce que dessus les vendeurs renon-"cent envers l'acquéreur à toutes réclamations qu'ils et "leurs représentants légaux pourraient avoir sur le dit ter-"rain et déchargent de plus les acquéreurs de toutes de-"mandes et réclamations pour dépréciation ou provenant "de l'expropriation et de la prise de possession du dit terrain "par les acquéreurs, ou encore provenant de la construction, "de l'entretien et de la mise en opération sur le dit terrain "de la ligne du chemin de fer National Transcontinental,"

Darveau sold the lands to Guillaume Morissette, on July 24, 1913, and Morissette in turn on May 5th, 1914, as appears by Exhibit No. 1, sold the same to the suppliant. In this last deed it appears that the sale is made, "tel que "le tout est actuellement avec les servitudes actives et pas-"sives sans exception ni réserve, circonstances et dépen-"dances."

It has been contended on behalf of the suppliant that this alleged construction of a 7 or 8 foot drain at the end of the blind southern railway drain or even the removal there of one shovel full of soil constituted new work which would give rise to this action. With this contention I am unable to agree. The new works must consist in some-

[1] 23 Que. S.C. 62; 9 R.L. (N.S.) 309.

thing substantial and real, and the damages must be of a different character than those arising under the expropriation. And the damages complained of are such that may have been foreseen at the time of the expropriation. Moreover, the flooding of the land is not occasioned by any defect or want of repair in the railway ditches, but happens because the proprietors have not kept their boundary ditches open and in repair.

Furthermore, the evidence in respect of the nature and extent of the damages claimed is meagre, vague and intangible.

Inasmuch as compensation for all damages whatsoever, obviously resulting from the expropriation by the Transcontinental, has been paid Darveau, who sold to Morissette, the suppliant's predecessor in title (auteur) while in possession, no right of action for damages as claimed in this case accrued to the suppliant unless (as was not the case here) another expropriation had been made or some new work performed, causing damages of a character not falling within the scope of those arising from the first expropriation. *Jackson v. The Queen.*[1]

Under the terms of the deed of purchase for the right-of-way by the Transcontinental, the suppliant, who is bound thereby, cannot recover the damages claimed herein. The whole trouble can be perfectly remedied by completing his boundary ditch, between Nos. 18 and 17 to the right-of-way. The flooding is the result of his negligence in not attending to these necessary works, and the Crown is not bound in law or otherwise to dig or maintain his boundary ditches. *Morin v. The Queen*;[2] and *Simoneau v. The Queen.*[3]

Moreover this action is in its very essence one in tort and such an action does not lie against the Crown, except under special statutory authority, and to succeed, the suppliant would have to bring his case within the ambit of subsec. (*c*) of sec. 20, of *The Exchequer Court Act.* The injury or damages complained of did not happen *on* a public work, but upon the suppliant's land, and following

[1] 1 Can. Ex. 144.
[2] 2 Can. Ex. 396; 20 Can. S.C.R. 515. [3] 2 Can. Ex. 391.

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the decisions in *Chamberlin v. The King*;[1] *Paul v. The King*;[2] *The Hamburg American Packet Co. v. The King*;[3] *Piggott v. The King*;[4] and more especially *Olmstead v. The King*,[5] I must find that the suppliant is therefore not entitled to recover.

Under the circumstances, following these decisions, it must be found, the damages claimed not having been suffered *on* a public work, the suppliant is not entitled to any portion of the relief sought by his petition of right.

Petition dismissed.

Solicitors for suppliant: *Drouin, Sevigny & Amyot.*

Solicitor for respondent: *W. La Rue.*

[1] 42 Can. S.C.R. 350.
[2] 38 Can. S.C.R. 126.
[3] 33 Can. S.C.R. 252.
[4] 53 Can. S.C.R. 626; 32 D.L.R. 461.
[5] 53 Can. S.C.R. 450; 30 D.L.R. 345.

1917
May 3

HIS MAJESTY THE KING, ON THE INFORMATION OF THE ATTORNEY-GENERAL OF CANADA,
PLAINTIFF;

AND

PHILORUM BONHOMME AND DAME RACHEL DAOUST, HIS WIFE..... DEFENDANTS.

THE ATTORNEY GENERAL OF QUEBEC
INTERVENING PARTY;

AND

HIS MAJESTY THE KING.....CONTESTANT.

Indian lands—B.N.A. Act, secs. 91 (24), 109—Crown grant—Construction—Advers possession.

The Crown, in right of the Dominion Government, as having the management, charge and direction of Indian affairs, claimed the ownership of St. Nicholas Island as part of the Seigniory of Sault Saint Louis as conceded in the year 1680 by the King of France and the Governor of Canada to the Jesuit Order for the Indians. Neither in the grant by the King nor in that by the Governor was the island conveyed by express words to the Jesuits.

Held, (applying the rule that a Crown grant must be construed most strictly against the grantee and most beneficially for the Crown, so that nothing will pass to the grantee but by clear and express words) that the Dominion Government, as representing the Indians, had no title to the island in question.

2. *Held*, (following *St. Catherine's Milling & Lumber Co. v. The Queen*, 14 A.C. 46) that only lands specifically set apart for the use of the Indians are "lands reserved for Indians "within the meaning of sec. 91, item. 24, of *The British North America Act.*"

3. The evidence showed that some of the Indians residing on the Caughnawaga Reserve had erected a small shack and sown at different times some patches of corn and potatoes on the island.

Held, that no title by adverse possession could be founded upon such facts, as no ownership or property can be founded upon possession of land or prescription by Indians. *Corinthe v. Séminaire de St. Sulpice*, 21 Que. K.B. 316; [1912] A.C. 872, 5 D.L.R. 263, referred to.

4. The island in question in this case having been the property of the province at the time of Confederation, under the provisions of sec. 109 of *the British North America Act*, 1867, it must be held to belong to the province subject to the provisions of the said section.

INFORMATION of intrusion to have St. Nicholas' Island declared part of Indian Reserve.

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THE KING v. BONHOMME AND DAOUST.

Reasons for Judgment.

Tried before the Honourable MR. JUSTICE AUDETTE, at Montreal, April 18, 1917.

Paul St. German, K.C., for plaintiff; *F. L. Béique*, K.C., for defendant Daoust; *Chas. Lanctot*, K.C., and *N. A. Belcourt*, K.C., for Attorney-General of Quebec.

AUDETTE, J. (May 3, 1917) delivered judgment.

This is an information of intrusion exhibited by the Attorney-General, whereby it is claimed that the Island of St. Nicholas, situate in navigable waters on the River St. Lawrence, in Lake St. Louis, be declared a portion of the Caughnawaga Indian Reserve; that the possession of the island be given the Indians, and that the defendant be condemned to pay the plaintiff the sum of $1,000 for the issues and profits of the said island from June 1, 1907, till possession of the same shall have been given the said plaintiff.

The Province of Quebec, on the other hand, claiming and assuming the ownership of the said island of St. Nicholas, sold the same for the sum of $400 on December 19, 1906, to the said Dame Rachel Daoust, wife of the said Philorum Bonhomme, as appears by the Crown Grant filed herein as Exhibit No. 3.

The action was originally taken only as against the defendant Philorum Bonhomme, who by his plea declared the island had not been sold to him but to his wife, and asked that the action as against him be dismissed with costs. His wife, Dame Rachel Daoust was subsequently added a party defendant, The said Philorum Bonhomme has, since the institution of the action, departed this life, as appears by the certificate of burial filed as Exhibit No. 4.

The defendant Daoust's grantor, the Province of Quebec, who had sold this Island of St. Nicholas to her, with covenant, intervened in the present case and took (*faitet cause*) upon itself the defence of the said defendant Daoust as her warrantor.

The Crown, in the right of the Federal Government, as having the management, charge and direction of Indian Affairs in Canada, claims the ownership of St. Nicholas Island as forming part of the Seigniory of Sault Saint

Louis, as conceded by the King of France, to the Jesuits for the Indians on May 29, 1680, and under the augmentation thereto by the further concession of October 31, 1680, by Louis de Buade, Comte de Frontenac, Governor and Lieutenant General for His Majesty in Canada.

By the first concession bearing date May 29, 1680, a copy of which is filed herein as Exhibit No. 1, a certain parcel of land is so granted, together with *deux isles, islets et battures*—two islands, islets and flats which are situate in front thereof.

It is proved and admitted that St. Nicholas Island is not opposite this first concession and among the islands therein mentioned.

Then by the second concession, bearing date October 31, 1680, a certain piece and parcel of land, immediately adjoining the first concession to the west is further granted, but without any mention in this latter grant of any island, islet or flats. The Island St. Nicholas is opposite the second concession.

Therefore this St. Nicholas Island obviously did not pass to the Jesuits under the last mentioned concession, unless expressly included in the same in terms specific and unmistakable. No proprietary rights in the said island passed without a specific grant to that effect.

Truly, as I have said in *Leamy v. The King*,[1] it would be a singular irony of law if the rights to this island could thus be taken away or disposed of by such a grant which is absolutely silent in respect thereto. This Island St. Nicholas did not under either of these two grants pass out of the hands of the King to the Jesuits for the Indians, and there is no evidence that this island was vested in the plaintiff before Confederation, or taken in any other manner within the scope of sec. 91, sub-sec. 24 of the B.N.A. Act, and the Crown as representing the Federal Government has no title thereto, and the land is vested in the Crown, as representing the Province of Quebec. *Wyatt v. Attorney General*;[2] *Leamy v. The King, supra; Bouillon v. The King*.[3]

[1] 15 Can. Ex. 189, 23 D.L.R. 249; 54 Can. S.C.R. 143, 33 D.L.R. 237.
[2] [1911] A.C. 489.
[3] Post, p. 443; 31 D. L.R. 1

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The trite maxim and rule of law for guidance in the construction of a Crown grant is well and clearly defined and laid down in *Chitty's Prerogatives of the Crown*,[1] in the following words :

"In ordinary cases between subject and subject, the "principle is, that the grant shall be construed, if the mean- "ing be doubtful, most strongly against the grantor, who is "presumed to use the most cautious words for his own advant- "age and security, but in the case of the King, whose grants "chiefly flow from his royal bounty and grace, the rule is "otherwise; and Crown grants have at all times been "*construed most favourably for the King*, where a fair doubt "exists as to the real meaning of the instrument. . . . "Because general words in the King's grant never extend to "a grant of things which belong to the King by virtue of "his prerogative, for such ought to be expressly mentioned. "In other words, if under a general name a grant compre- "hends things of a royal and of a base nature, the base only "shall pass."

Approaching the construction of the second grant with the help of the rule above laid down, it must be found that in the absence of a special grant especially expressed and clearly formulated, the Island of St. Nicholas obviously did not pass.

Had it been the intention by the second concession to grant the island opposite the lands mentioned in the same, the same unambiguous course followed in the first concession would have been resorted to, and the island would have been mentioned in the grant.

A Crown grant must be construed most strictly against the grantee and most beneficially for the Crown so that nothing will pass to the grantee, but by clear and express words. The method of construction above stated seeming, as judicially remarked,[2] to exclude the application of either of the legal maxims, *expressio facit cessare tacitum* or *expressio unius est exclusio alterius*. That which the Crown has not granted by express, clear and unambiguous terms, the subject has no right to claim under a grant[3].

[1] p. 391–2.

[2] Per Pollock, C.B., *East Archipelago Co. v. Reg.* 2 E. & B. 856 at 906, 7; 1 E. & B 310.

[3] Broom's Legal Maxims (8th ed.)pp. 463–464.

The plaintiff endeavouring to show title by possession called a number of Indians who were heard as witnesses to prove possession by them, showing that the Indians of the Caughnawaga Reserve had always considered St. Nicholas Island as part of the reserve. The evidence discloses that some of the Indians residing on the reserve, had at times a small shack and had sown patches of potatoes and corn on the island, and it is contended they thereby acquired title by possession, (Arts. 2211 et seq., C.C. Que.) This contention must be dismissed from consideration, because possession of ungranted land by roaming Indians could not remove the fee from the hands of the Crown. There cannot be any ownership of any territory acquired by possession or prescription by Indians because *les uns possèdent pour les autres. Corinthe vs. Séminaire de St. Sulpice.*[1] And I further find that no help could be found in favour of the plaintiff, in respect of the title to the said island in the Royal Proclamation of 1763, as mentioned at p. 70, *Houston Const. Doc. of Canada*, because the lands therein referred to as reserved for the Indians are outside of Quebec, and the territory in question herein. In fact they are lands outside the four distinct and separate Governments, styled respectively Quebec, East Florida, West Florida, and Grenada.[2] Moreover, the Indians have not and never had any title to the Public Domain.

These contentions have also been considered in the *St. Catherine's Milling & Lumber Co. vs. The Queen.*[3] The Crown had all along proprietary right on these lands upon which the Indian title might have been a burden, but which never amounted to a fee. And while not desirous of repeating here what was so clearly stated in the *St. Catherine's* case in respect of the Indian title, yet I wish to draw attention to the fact that it was decided beyond cavil in that case, that only lands *specifically* set "apart and reserved for the "use of the Indians are lands reserved for Indians within "the meaning of sec. 91, item 24, of the B.N.A. Act." See also *Attorney General v. Giroux.*[4] The Island of St.Nicholas never fell within the term "Lands reserved for Indians," and therefore never came within the operation of the B.N.A. Act, sec. 91, sub. sec. 24.

[1] 21 Que. K.B. 316; [1912] A.C. 872, 5 D.L.R. 263. [3] 13 Can. S.C.R. 577; 14 A.C. 46.
[2] 14 A.C. 46 at 53-54. [4] 53 Can. S.C.R. 172, 30 D.L.R. 123.

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The island of St. Nicholas, as part of the lands belonging to the Province of Quebec at the Union, passed to the Province of Quebec, at Confederation, under the provisions of sec. 109 of the B.N.A. Act, 1867. The rights retained to the federal power under secs. 108 and 117 being always safeguarded. Therefore the plaintiff has no fee in the island, and the Province of Quebec had obviously the right to grant the same to the defendant Daoust, as it did.

It is not without some sentiment of regret that I feel bound to find against this alleged Indian title, and I trust that the Indians, the wards of the State, will realize and understand there never existed any title giving them St. Nicholas Island. The fact that they were not prevented from frequenting it (and some of the white men as appears by the evidence did also from time to time visit the island) was indeed perhaps more referable to the grace, bounty and benevolence of the Crown, as represented by the Province of Quebec, and cannot now constitute an acknowledgment of an erroneous and unfounded right or title to the island.

There will be judgment dismissing the action with costs against the plaintiff on all issues.

Action dismissed.

Solicitors for plaintiff: *St. Germain, Guérin & Raymond.*

Solicitors for defendants: *Béique & Béique.*

Solicitors for intervenant: *Belcourt, Ritchie, Chevrier & Leduc.*

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Nov. 2

IN THE MATTER OF THE PETITION OF RIGHT OF

ALFRED BOUILLON.....SUPPLIANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

Waters—Test of navigability—Fisheries—Grant—Crown domain—Action against Crown

A river is navigable and floatable *a trains et radeaux*, when, with the assistance of the tide, small craft or rafts of logs can be navigated for transportation purposes in a practical and profitable manner; it, therefore, forms part of the Crown domain.

2. A right of fishing in a navigable river is not to be construed as an exclusive right unless made so by specific words in the grant.

3. An action for having illegally occupied a fishing right, and for the revenues derived therefrom, is one in tort, and is not maintainable against the Crown except under special statutory authority.

PETITION OF RIGHT seeking recovery of revenues from fishing right in the River Matane, P.Q., of which the suppliant alleged he was deprived by the Dominion government.

Case tried at Matane, Que., July 4, 5, 1916, before the Honourable MR. JUSTICE AUDETTE.

Louis Tache, K.C., for suppliant; *G. G. Stuart*, K.C., for Crown.

AUDETTE, J. (November 2, 1916) delivered judgment.

The suppliant brought his petition of right to recover from the Crown, as representing the Dominion of Canada, the sum of $2,400, he having at trial abandoned his claim for the sum of $540 mentioned in paragraphs 15 and 16 of the petition.

By his petition of right, he sets forth, *inter alia*, that he is proprietor of a certain piece of land, at Matane, abutting on the River Matane, which he says is neither *navigable nor floatable*, and therefore claims his proprietary rights extend to the centre of the river, *usque ad medium filum*

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aquae:—That the Federal Government, from the year 1884 to 1896, took hold of his fishing rights opposite his property and rented the same to different parties up to the date of the judgment of the Supreme Court in the *Fisheries Case*, in 1896,[1] which was followed by the decision of the Judicial Committe of the Privy Council in 1898,[2] and he concludes by asking by paragraph 13:—"Que le dit Gouver-"nement Fédéral a occupé *illégalement* le dit droit de pêche "et en a retiré des rançons pendant douze ans;" and by paragraph 14 he further claims: "Que le dit Gouvernement "Fédéral d'Ottawa a privé ainsi votre pétitionnaire d'un "revenu de deux cents piastres par année pendant douze "ans, formant une somme de $2,400.00 que votre péti-"tionnaire a droit de réclamer du Gouvernment Fédéral "d'Ottawa."

These two paragraphs are here recited in full with the object of enabling us in arriving at the true understanding of the nature of the present action. Indeed, counsel at bar, contends on behalf of the suppliant that the present action is in revendication of a real right (un droit réel, immobilier) consisting in a fishing right, of which the substance and the enjoyment are the object of a right. He adds that *the substance having disappeared* it cannot be claimed, and this action is the only course left to him; that is, to claim the value thereof by paragraph 14 above recited.

The respondent's plea alleges, among other things, that the River Matane opposite the suppliant's property is *navigable et flottable*, and that the latter's rights do not extend to the middle of the river, and therefore has no right of fishing in the same; and that while the Crown, in the right of the Dominion of Canada granted, without warranty, up to 1896, the right of fishing in the estuary of the River Matane as might belong to the Crown, if the suppliant had any rights to such fishing he was at all times at liberty to exercise them, and if such recourse exist it is against the lessees of such right; concluding that if he had such rights they are prescribed and that the cause of action is unfounded in fact and in law.

[1] 26 Can. S.C.R. 444.

[2] [1898] A.C. 700.

The issues involved in the present case may be said to be resolved in the solution of the three following questions, viz:

1st. Is the River Matane, opposite the suppliant's property, *navigable et flottable en trains ou radeux*? and did the *Seigneur* by his grant have the exclusive right of fishing in the same and so transferred such right to the suppliant?

2nd. Do the issues herein disclose an action in tort, and does it lie against the Crown?

3rd. Does an action lie against the Crown for the recovery or repetition of the monies received in good faith under an error of law and under the circumstances of the case. Is there privity between the suppliant and the respondent?

FIRST QUESTION.

It may be stated, as a general and recognized principle that if the river is *navigable ou flottable à trains et radeaux* opposite the suppliant's property that the action fails,—unless he has such rights as are derived from a Crown grant giving the *Seigneur* an *exclusive* right of fishing in the *locus in quo*.

The River Matane was, on two recent occasions, the subject of two distinct judicial pronouncements with respect to its navigability. One by the late Mr. Justice Larue in the case of *Irwin v. Bouillon* (unreported) in which the learned Judge pronounced the river navigable and floatable, and the other by Mr. Justice Lemieux (now Sir François) in the case of the Attorney-General of *Quebec v Bouillon*, in which he adjudged the river neither navigable nor floatable.

This question of navigability is obviously one of fact which has to be decided under the circumstances and the evidence submitted to the Court in each case.

Therefore having been made aware in the course of the trial of these two conflicting judgments or findings, I ordered *une descente sur les lieux* (the object of the litigation —Pigeau, Procédure Civile (2nd Ed.) p. 227) that is a visit to, and examination of the river, at high tide on the next day at five o'clock in the morning of the 5th July last, and directed both parties to be there represented. McKinnon, a witness heard on behalf of the suppliant stated that the

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season at which the river is lowest is July and August. At the time so appointed for the visit, I crossed from north to south upon the bridge, which appears on the plan Exhibit 15, filed herein, walked to the suppliant's property, and in company of both the suppliant and respondent's counsel we walked down from the King's highway opposite the suppliant's place to his floating landing, where two boats sent by the Crown's counsel were in readiness for us. Before embarking I ascertained that between the highway and the river there was a small piece or parcel of land belonging to the suppliant which made him a riparian proprietor on the river, small as the piece might be. Accompanied by the suppliant and two men we started in a twenty-foot boat, travelled from this place to about the centre of the river, over the pass (or goulot) in the rapids and travelled west passed the bridge indicated on the plan. The whole of the river presented then the appearance of a large lake, without any indication whatever of any rapids below the bridge in question. In the river, slightly above the church, there was a schooner moored at a wharf, notwithstanding some evidence at the trial that it was impossible for a schooner to go up beyond the Price wharf at the mouth of the river

Now, the evidence adduced in this case discloses that the suppliant is and has been the owner for a number of years, of a gasoline launch, which up to two years ago was $25\frac{1}{2}$ feet long, drawing 28 inches, and two stories high, as put by the suppliant, meaning, I suppose, an upper deck, and on which yacht he crosses over to the north shore. Two years ago he lengthened this launch by eight feet, making it $33\frac{1}{2}$ feet long. Now, while this launch on the date of the trial was kept some short distance below the suppliant's property, it appears from the general evidence that the launch, while at times kept closer to the mouth of the river, was usually and for most of the time kept opposite the suppliant's property. That this launch was also seen, on several occasions, running up to, or within a few yards of the bridge.

That transatlantic vessels lying in the current in the St. Lawrence, opposite the estuary of the River Matane or thereabouts, are from time to time during the summer,

being loaded with lumber taken in *bateaux*, from Price's wharf at the mouth of the river; and that ever and anon, while these vessels were being loaded, boats of 20, 25 and 30 feet keel, drawing from 18 to 20 inches, manned by two, three and four men, came up the river with on some occasions two puncheons and one barrel, to fetch fresh water for the vessels; and that such water was procured at the rapid above the bridge, and that they would go up as far as the slab-wharf marked "D" on the plan. Some of the suppliant's witnesses say that the salt water runs up with the tide to the foot of the dam, beyond the bridge. Vaillancourt, a man on the river all the summer, says that in small tides the salt water runs up like 50 to 60 feet beyond the bridge, but does not cover the small rapid above the bridge.

Then a schooner on one occasion came up beyond Bouillon's property. The evidence is conflicting as to whether she went up to point "C" or "D," marked on plan Exhibit 15.

However, the most important point of the evidence bearing upon the subject in question, is that for a number of years the Price people, proprietors of the saw-mill above the bridge, took their lumber from the mill in rafts down the River Matane to Price's wharf at the mouth of the river. The rafts were made at the foot of the mill above the bridge and were 60 feet in length, 12 feet in width, with a depth varying from 18 to 27 inches. This lumber is now carted down from the mill to Price's wharf. The floating of rafts, as well as the taking of lumber in sluices at one time, were abandoned, not for the reason mentioned in the case of Mr. Justice Lemieux above referred to, but for the reasons in evidence in the present case, because the owners of the vessels refused to load wet lumber. And that is too obvious, because ships loaded with such lumber are liable to take a list. The floating by rafts was carried on for at least ten years, and it is in evidence that the river was in the same state then as it is today, therefore the River is obviously *flottable en trains ou radeaux.*

In *Bell v. Corporation of Quebec*,[1] it was held that "According to the French Law the test of navigability

[1] L.R. 5 A.C. 84.

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"of a river is its possible use for transport in some practical "and profitable manner." And that decision is followed in the case of *Atty-General of Quebec v. Fraser* [1] by the Supreme Court of Canada, where it is held that: "A river "is navigable when, with the assistance of the tide, not-"withstanding that at low tides, it may be impossible for "vessels to enter the river on account of the shallowness of "the water at its mouth." See also *Wyatt v Atty-General of Quebec.*[2]

The distinction between rivers *flottable à trains et radeaux* and those *flottables à bûches perdues* is clearly stated by the Chief Justice of the Supreme Court, of Canada, Sir Charles Fitzpatrick, in the case of *Tanguay v. Canadian Electric Light Co.*[3] At page 8 thereof His Lordship says: "In "France, before the Code, there was a broad distinction "between streams that were floatable in the sense that they "could be used for the transport of boats, flats or rafts "(the words used are "*portant bateaux, trains ou radeaux*") "and those streams that were floatable for loose logs only; "and since the Code, as Laurent says, the distinction is uni-"versally admitted."

"Dalloz, Rep. Jur. Eaux, No. 61 :

"Il est vrai (dit-il), que le code civil n'a établi aucune "distinction entre les deux sortes de flottage ; il a même "gardé un silence absolu à cet égard ; mais la distinction se "trouve *dans toutes les anciennes lois*, comme dans *tous les "monuments de la jurisprudence.*"

Then further on he cites *Proudhon, Domaine Public* [4] where the difference of *flottage par trains ou radeaux* and *flottage à bûches perdues* is established, and where a description is given of what is meant by a *train* or *train de bois.*

And in Sirey[5] is found a reported case holding that: "Les rivières ne doivent être considérées comme dépendant "du domaine public que lorsqu'elles sont *flottables à trains "ou à radeaux.*"

"Beaudry-Lacantinerie[6] says: "*Les fleuves et les "rivières navigables ou flottables.* Ce sont des chemins qui "marchent dit Paschal. . . . Il n'y a que les rivières

[1] 37 Can. S.C.R. 577.
[2] [1911] A.C. 489.
[3] 40 Can. S.C.R. 1.
[4] Vol. 3, Nos. 857-860.
[5] (1823) L. 317.
[6] Des Biens, p. 134, No. 174.

"flottables avec trains ou radeaux qui fassent partie du "domaine public."

See also 2 Plocque, Législation des Eaux,[1] and Fuzier-Herman, vbo. *"Rivières."*[2]

The judgment of Mr. Justice Girouard in *Tanguay v. Canadian Electric Light Co.* (supra) cites also a number of authorities in support of the same proposition—*inter alia*—Isambert,[3] where he says that : "Arrêt du conseil qui juge "que ce n'est point par la force des bateaux que l'on doit "juger si les rivières sont navigables, mais seulement par "la navigation qui s'y fait."

In *Bell v. Corporation of Quebec*[4] Chief Justice Dorion says : "It is not so much the volume of the water that "the river carries, as the fact that its course is devoted to "the public service, which gives it its legal character."

See also *Lefaivre v. Attorney-General P.Q.*;[5] *Gouin v. McManamy*;[6] *The King v. Bradburn*;[7] and *The Fisheries Case*.[8]

There is also the case of *Hurdman v. Thompson*[9] wherein Bosse, J. at p. 434 says: "What is a navigable or "floatable river?" And he answers: "Les rivières por-"tant bateaux ou transportant des trains de bois étaient "navigables ou flottables, disent les anciennes ordon-"nances, de même que la jurisprudence constante de l'an-"cien et du nouveau droit." It was further held in the "same case that: "Une rivière est navigable et flottable "nonobstant que la navigation en soit en plusieurs en-"droits interrompue par des chutes et rapides."

As appears by Exhibit "E" and "F", on October 19, 1877, a Port has been created at Matane, under the provisions of 37 Vic. ch. 34, and the Acts amending the same, and the Port is declared to extend from the Parish Church situate in the village of Matane, a distance easterly of two miles and a similar distance westerly from the same point.

Flowing from the doctrine expounded in the numerous cases above cited, coupled with the fact that the tide backs from the River St. Lawrence some distance beyond the bridge in question, thus forming a large lake or river upon

[1] No. 174.
[2] Nos. 80 *et seq.*
[3] Vol. 20, p. 232.
[4] 7 Q.L.R. 103; 5 A.C. 84.
[5] 14 Que. K.B. 115.
[6] 32 Que. S.C. 19.
[7] 14 Can. Ex. 433.
[8] 26 Can. S.C.R. 444, [1898] A.C. 700.
[9] 4 Que. K.B. 409.

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which boats and rafts of timbers have been for years transported for commercial purposes, the necessary conclusion is that the river is necessarily navigable and especially *flottable à trains ou radeaux*.

It was a moot question at one time, before the decision in *the Fisheries Case*, as to whether fishing rights on rivers which were Crown property belonged to the Crown in the right of the Dominion, or in the right of the Province. However, up to the time of the decision in the *Fisheries Case*, the Federal Government was considered as vested with the control of such waters, and did exercise it. After the decision in the latter case, the Crown in the right of the Province of Quebec, must have assumed, as the Federal powers had previously done, that the Matane River was part of the Crown domain as a navigable and floatable river, since both governments have at one time and the Quebec Government is now leasing the fishing right upon the same.

The suppliant himself must have shared that opinion after the decision of the *Fisheries Case*, since he filed with or handed to the Quebec Government, the following admission, filed herein by the Crown, as Exhibit "D" and which reads as follows:

"Je soussigné Alfred Bouillon, de la paroisse de St-"Jérome de Matane, médecin, reconnais que le club in-"corporé sous le nom de 'The Matane Fishing Club' a le "droit exclusif de faire la pêche dans la rivière de Matane en "vertu d'un bail consenti à ce club par le Commissaire des "Terres, Forêts et Pêcheries de la Province de Québec.

"Je reconnais la validité de ce bail à toutes fins et je "m'engage à ne pas pêcher dans la dite rivière et à ne pas "troubler les membres de ce Club dans l'exercise de leurs "droits de pêche et à n'intervenir en aucune façon à l'en-"contre de leurs droits de pêche au saumon dans la dite "rivière pendant la durée de leur bail. St-Jérome de "Matane, 19 juin, 1899.

A. BOUILLON, M.D.,
L. TACHÉ,
PROC. DE M. ALF. BOUILLON."

On the face of the admission, again the suppliant would be out of Court.

TITLE

The suppliant's property, acquired by him on September 5, 1893, originally formed part of a grant or concession of land made, on May 29, 1680, in the name of the King of France, by His Intendant Duchesnau, to Sieur Mathieu Damours.

By this grant two pieces of land were granted to Damours, as appears in the recitals of the deed. First, in the middle of the first page of the deed, he asks for "une lieue de front "sur une lieue et demie de profondeur située sur le fleuve "St-Laurens, à prendre sur une demye' lieue de chaque "costé de la dite Rivière,"

And secondly, but further on at the foot of the second page of the deed: "et de luy donner et accorder par *aug-* "*mentation* de concession une lieue de terre sur le dit fleuve "à prendre joignant la demye lieue du costé de la rivière "Mitis sur pareille profondeur d'une lieue et demye comme "aussi le droit de pesche sur le dit fleuve,"

Then in the *habendum* clause of the deed we find the following: "Avons accordé et accordons au dit Sieur Damours "la ditte lieue et demye de terre de front, et une lieue de "profondeur, scavoir une demye lieue au deça, et une demye "lieue au delà de la rivière Matane."

"Et pour augmentation une autre lieue de terre de front "aussy sur une lieue et demye de profondeur y joignant, à "prendre du costé de la rivière Mitis, avec le droit de pesche "sur le dit fleuve St. Laurens, pour en jouir par luy, ses suc- "cesseurs ou ayant cause en titre de fief et seigneurie."

From the reading of these descriptions in the grant would it not clearly appear that two separate pieces of land are granted as described in the recitals, and as repeated in the habendum clause? Indeed, it appears, Damours asks first for a defined piece of land, and secondly, by augmentation for another piece of land, with the right of fishing upon the River St. Lawrence, and the habendum clause grants as asked. If that is the case, it is obvious the right of fishing, as described in the grant, only relates to the second piece of land which is not opposite the land in question herein but starts half a league up the St. Lawrence from the

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western shore of the River Matane. *Expressio unius est exclusio alterius.*

Be that as it may, assuming the right of fishing as mentioned in the grant has been given for the whole area of the seigniory on the St. Lawrence, the right given is not an *exclusive* right, Therefore, under the decision of the case of *Cabot v. Attorney General of Quebec*,[1] affirmed on appeal by the Judicial Committee of the Privy Council[2], on the true construction of the grant, the claim flowing from the seigneur's title for exclusive fishing could not pass, and at page 513 of the report of that case, their Lordships, adopting the view of the court appealed from, cite the following passage from the judgment of the court below, and approve of it, viz:

"Le droit de pêche formait partie du fonds commun de la "colonie, mais sous la garde du roi, pour l'avantage de tous, "et ne pouvait devenir *exclusif* sans quelque concession "spéciale exprimée dans des termes plus formels que ceux "qui se trouvaient dans la simple formule mentionnée plus "haut," and the "simple formula," in that case, (as in the "present) was exactly that which is now under considera- "tion. While the question is thus discussed under some- "what abstract terms, it is always to be remembered that "the exclusive right claimed . . . implies a grant by "the Crown of the exclusive use of the foreshore so far as "fishing is concerned."

A specific grant, especially expressed and clearly formulated, was necessary to allow an exclusive right of fishing to pass: *Leamy v. The King.*[3]

I may also repeat here what I have said in that case (at p. 192): How should such a grant be construed and interpreted? The trite maxim and rule of law for our guidance in such a construction or interpretation is well and clearly defined and laid down in Chitty's Prerogatives of the Crown[4] in the following words:

"In ordinary cases between subject and subject, the prin- "ciple is, that the grant shall be construed, if the meaning "be doubtful, most strongly against the grantor, who is

[1] 15 Que. K.B. 124. [2] [1907] A.C. 511.

[3] 15 Can. Ex. 189, 196, 200, 23 D.L.R. 249, affirmed in 54 Can. S.C.R. 143, 33 D.L.R. 237.

[4] p. 391–2.

"presumed to use the most cautious words for his own "advantage and security, but in the case of the King, whose "grants chiefly flow from his royal bounty and grace, the "rule is otherwise, and Crown grants have at all times been "*construed most favorably for the King*, where a fair doubt "exists as to the real meaning of the instrument . . .
"Because general words in the King's grant never extend "to a grant of things which belong to the King by virtue of "his prerogative, for such ought to be expressly mentioned.
"In other words, if under a general name a grant com- "prehends things of a royal and of a base nature, the base "only shall pass."

See also *Wyatt v. Attorney-General of Quebec*[1] and *Fraser v. Fraser*,[2] and Arts. 1019 et seq. C.C.P.Q.

It is also well to bear in mind that the right of fishing mentioned in the grant is in the *St. Lawrence*, and not in the *River Matane*.

Before leaving this question of title, it may be said that on perusing the chain of the suppliant's titles, filed by him at trial, I came across Exhibit No. 8, which is a deed by Jane McGibbon, then proprietress of the Seigniory of Matane, whereby she grants and *concedes* to Mme Widow John Grant, (sic) on June 22, 1824, a tract of land, covering the lands in question herein, together *with the right unto the said grantee her heirs and assigns of fishing and hunting in front thereof*. The grant is made free from all annual and seignorial rents during the grantee's life time and the lifetime of her then living children and as long as the said tract of land shall remain her property and her children's property. The deed also provides, as follows: "It is further agreed between "the said parties that she the said grantee and her said "children shall not sell, exchange or bargain the said tract "of land without giving to the said seignioress the privilege "of the same previous to sign any deed of sale or exchange "and that in case the said property should in any manner "or form fall into stranger's possession, the purchaser, or "then the owner of the same, shall and will be bound and "obliged to exhibit his title to the said seignioress or her "representative and then take a deed of concession for the

[1] [1911] A.C. 489.

[2] 2 Que. S.C. 61; 2 Que. K.B. 215.

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"said land the same as the other tenants in the said Seig-"niory of Matane, *otherwise all and every title or deeds trans-"ferring the property aforesaid shall be null and void*, with the "right unto the said seignioress to take full possession of the "same without any form of justice and without compensa-"tion on her part for whatever improvements that shall "then have been made on the said land."

From the date of this deed, the property changed hands several times before it came into the suppliant's possession on September 5, 1893, without any evidence of the compliance with the conditions, restrictions and reserve mentioned in this deed of June 22, 1824.

One feature of this deed of June 1824, which should not be passed without some notice, is that the suppliant's counsel seems to attach some importance to it, and he relies upon it as transferring to the suppliant this right of fishing in the river. This is the only deed, between 1824 and the present day, in which the question of fishing and hunting is mentioned, This fishing privilege is not repeated in the chain of titles from that date (1824) down to the date of the suppliant's title (1893).

Can the suppliant now on the one hand invoke and rely upon that deed (which is part of the chain of his title) for this alleged right of fishing, and on the other hand derogate from it? *Qui approbat non reprobat.* And a person is said to "approbate and reprobate" when he endeavours to take advantage of one part of a document and rejects the other. This rests on no artificial rule but on plain fair dealing. Therefore, is there then a flaw in the suppliant's title? In view of the case of *Labrador Company v. The Queen*[1] deciding that inasmuch as a claimant had disclosed *the true root of his title*, he could not hold his land by prescription and immemorial possession, and that the law of prescription did not apply. Can the suppliant now set up interversion or prescription? Are the several deeds, subsequent to that of June 22, 1824, with the above conditions, restrictions and reserve absolutely ignored, good or bad, and have they transferred any proprietary rights? *Quod initio vitiosum est lapsu temporis convalescere non potest. Mignault, Droit Civil Canadien.*[2]

[1] [1893] A.C. 104.

[2] Vol. 9. p. 388.

However, in view of the important questions raised in the present issues it is unnecessary to consider what is the effect of such documentary evidence adduced by the suppliant himself upon his own title.

SECOND QUESTION.

CAUSE OF ACTION.

Do the issues herein disclose an action in tort and does it lie against the Crown?

What is a tort? "Tort is an act or omission giving rise, "in virtue of the common law jurisdiction of the Court, to a "civil remedy which is not an action of contract.[1]

"The very essence of a tort is that it is *an unlawful act*, "*done in violation of the legal rights of some one.* Per *Miller*, *J. in Langford v. United States.*[2]

"A tort in its legal sense is a wrong independent of contract." *Milledgeville Water Co. v. Fowler*[3]

Pothier,[4] says: "On appelle *délits* et *quasi-délits* les faits "illicites qui ont causé quelque tort à quelqu'un . . . . "Si ce fait procède de malice et d'une volonté de causer ce "tort, c'est un *délit* proprement dit. . . s'il ne procède "que d'imprudence, c'est un *quasi-délit.*

And at page 57:[5] "On appelle *délit*, le fait par lequel une "personne, par dol ou malignité, cause du dommage ou "quelque tort à un autre. Le *quasi-délit* est le fait par "lequel une personne, sans malignité, mais par une impru- "dence qui n'est pas excusable, cause quelque tort à un "autre."[6]

By paragraphs 13 and 14 of the petition of right, recited above, the suppliant claims that the Crown has *illegally occupied* (occupé) the fishing right and had drawn therefrom revenues during 12 years, and that by so doing the suppliant has been deprived of yearly revenue of $200 during that period, making in all the sum of $2,400. And by the prayer of his petition of right, he asks that the Crown be condemned to pay him the sum of $2,400 and costs.

[1] Pollock on Torts (6 Ed.) p. 5.
[2] 101 U.S. 341 at 345.
[3] 58 S.E. 643.
[4] Bugnet, 2nd Ed. Vol. 1 p. 43.
[5] Vol. 11, No. 116 (Idem.).
[6] Laurent, Vol. 20. p. 384.

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This is not an action claiming a real right against the Crown in any sense of the word. It is of the essence of a real right that it should be referable to immovables, a right recognizable in face of the world, and as against every one. This action does not claim the substantive right of fishing as against the Crown in the right of the Dominion, but it claims the loss of revenues through the *illegal* deprivation of the same by the Dominion Crown during a certain period. It is not *une action réelle* asking the Crown to recognize a real right; but it is a personal action arising in damages against the Crown for having interfered with his alleged right of fishing, a pure action in tort. In other words he does not claim any fishing right, as against the Crown, but he assumes he has that right, and his action is against the Crown for trespassing upon such right by collecting rents for the same, and for such trespass he concludes in condemnation against the Crown for $2,400 damages. The petition of right asks for a condemnation in money founded upon an alleged illegality by the Crown.

The suppliant does not either claim the amount which the Crown collected under its leases, but a larger amount, assuming he would have collected as much as he claims, and his damages are reckoned by him on that basis. He does not claim the rents actually collected by the Federal Government, but an amount which in his estimation would represent the damages he suffered.

This case is not a disguised claim of damages, but it is clearly a claim sounding in tort, and an action in tort will not lie against the Crown, except under special statutory authority. This doctrine is too well known and accepted to necessitate the citing of authorities in support thereof.

Therefore whether the River Matane be navigable or *flottable à trains ou radeaux* or not, the action as instituted cannot lie against the Crown.

There are a number of other questions raised both by the pleadings and by the oral argument. For instance, can it be said there is any privity as between the Crown and the suppliant with respect to the amount of these rents paid by the tenants up to 1896? Is not the recourse of the suppliant, if he has any, against the tenants; and is not such recourse extinguished by prescription? Further-

more, under the English law, the doctrine is, says Mr. Justice Middleton in *O'Grady v. City of Toronto*[1] that "Equity has never yet gone so far as to afford relief by "maintaining an action brought, directly or indirectly, to "recover money paid under mistake of law," citing a number of authorities in support of the same. Does the same doctrine obtain in the Province of Quebec, under the 2nd paragraph of Art. 1047 of the Civil Code?

However, these are all questions upon which it is unnecessary to pass in view of the decision arrived at in answering question number one, and especially number two above referred to.

Under the circumstances, I have come to the conclusion that the suppliant is not entitled to any portion of the relief sought by his petition of right.

Petition dismissed.

Solicitor for suppliant : *L. Taché.*

Solicitors for respondent : *Pentland, Stuart, Gravel & Thompson.*

[1] 10 Ont. W.N. 249. 37 O.L.R. 139, 31 D.L.R. 632.

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Oct. 20

HIS MAJESTY THE KING, ON THE INFORMATION OF THE ATTORNEY-GENERAL OF CANADA.....PLAINTIFF;

AND

CHARLES H. CAHAN, AND THE EASTERN TRUST COMPANY.....DEFENDANTS.

Expropriation—Compensation—Amount offered—Court's power to reduce—Amendment.

Where the Crown in expropriation proceedings, and under the terms of the Expropriation Act, offers a definite sum as compensation by the information, and when there is no request to amend the information, and counsel for the Crown at the trial adheres to such offer, it is not for the Court to reduce the same notwithstanding that the evidence may establish a smaller sum as the proper amount of compensation.

(See *The King* v. *Likely*, 32 Can. S.C.R. 47.)

INFORMATION on behalf of His Majesty's Att'y-Gen'l for Canada, to have it declared that certain lands the property of the defendant C. H. Cahan are vested in the Crown.

Case tried at Halifax, N.S., September 29, 1916. before the Honourable MR. JUSTICE CASSELS.

T. S. Rogers, K.C. and *J. A. McDonald*, K.C., for Crown.

H. Mellish, K.C., for defendant.

CASSELS, J. (October 20, 1916) delivered judgment.

The property in question expropriated comprises 140,830 sq. ft. (approximately 3¼ acres). A strip of land has been taken across the property for the purpose of the terminal works, and the excavation for the railway has been constructed.

In addition to the land taken for the right of way another small piece of ground comprising 2,880 ft. has been taken for the purpose of the construction of a driveway, and the Crown offers by their information to give an undertaking to construct a bridge over the railway cutting in accordance

with the plan annexed to the information and to furnish a connection from the entrance east of the right of way to the bridge.

The Crown offers as compensation for the land taken the sum of $9,925.65, and in addition undertakes to open the street referred to and construct the bridge.

The right of way at the point where the bridge is to be constructed is said to be 25 ft. in depth and the approaches to and across the bridge will be an easy ascent.

The whole property prior to the expropriation comprised an area of 14 acres. The right of way as stated takes about $3\frac{1}{4}$ acres and 2,880 sq. ft. for the proposed road. To the east of the right of way will be left 110,430 sq. ft. (about $2\frac{1}{2}$ acres). To the west of the right of way and partly on the arm is left about 9 acres having a frontage on the arm of about 750 ft. The house is distant from the westerly side of the right of way 180 ft. The house is now supplied with city water and no question of allowance for wells arises.

While unquestionably the property has been injured by the expropriation and the construction and operation of the railway, I am of opinion that the amount offered by the Crown is a liberal allowance coupled with their undertaking to give a new entrance as described. The house is not interfered with in any way. Mr. Cahan has about 9 acres and the house and the whole of the waterfront left to him, besides the portion to the east.

Mr. Cahan occupied the premises during 1911 as a tenant for a year, and the lease contained an option giving him the right to purchase at the sum of $20,000. The following year, 1912, he purchased the whole property for the sum of $17,500. The land was expropriated on March 7, 1913. He retains the greater part of the property including the house and 9 acres fronting on the arm and gets for the lands expropriated more than one-half of what he paid for the whole property, comprising about 14 to 15 acres and including the house.

I have to deal with these cases on the evidence before me. Properties situate on the north-west arm in Halifax do not seem to realize in the market prices that one would have expected, considering the beauty of the location.

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On the argument of the case I asked the counsel for the Crown whether they adhered to their tender, and was informed that the Crown offered and were willing to pay the sum mentioned. I thought and still think the amount erred on the side of liberality, but I have always been of opinion that where the Crown in expropriation proceedings and under the terms of the Expropriation Act offers a definite sum as compensation by the information, and where there is no request to amend the information and Crown counsel at the trial still offers the amount, it is not for the Court to reduce such sum.

I therefore find that the sum offered is ample, and the judgment will embody the undertaking.

I understand that the Eastern Trust Co. have been settled with. If not, their rights can be adjusted and the parties can speak to the question in chambers.

The Crown made no legal tender prior to the filing and service of the information. The defendant asks an unreasonable amount. Under the circumstances there should be no costs to either party.

Judgment for plaintiff.

Solicitors for plaintiff : *Silver & McDonald.*

Solicitors for defendants: *McInnes, Mellish, Fulton & Kenney.*

HIS MAJESTY THE KING, ON THE INFORMATION OF THE ATTORNEY-GENERAL OF CANADA, PLAINTIFF;

AND

JOHN COURTNEY AND ELLEN COURTNEY, DEFENDANTS.

1916
March 15

Expropriation—Compensation—Grocery and liquor business—License—Valuation.

The defendant J. C. had been carrying on for a long period a grocery and liquor business in the premises expropriated. The liquor side of the business was being operated at a profit, while the grocery did not yield large returns. The liquor license was only good for one year, and its renewal was dependent upon a petition being endorsed by a certain number of the ratepayers. Moreover, it was granted to the individual only so long as he continued in business in the same premises; and the defendant was an old man. At the time of the expropriation it was also shown that prohibition legislation was impending which would have put an end to the defendant's sale of liquor.

Held, that under all the circumstances the Court, in determining the amount of compensation, was not called upon to decide whether the license was an interest in land and value the same separately, but that the proper principle to follow was to compensate the defendant for the value of the premises to him and the loss of his business as a whole.

INFORMATION exhibited by the Attorney-General of Canada, seeking to have compensation assessed by the Court for certain premises in the City of Halifax used at the time of expropriation for the purposes of a grocery and liquor business.

Case tried at Halifax, N.S., June 3, 1915, before the Honourable MR. JUSTICE CASSELS.

T. S. Rogers, K.C., and *T. F. Tobin*, K.C., for plaintiff, *H. McInnes*, K.C., and *H. Mellish*, K.C., for defendants.

CASSELS, J. (March 15, 1916) delivered judgment.

This is an information exhibited on behalf of His Majesty the King to have it declared that certain lands are vested in His Majesy and to have the compensation assessed. The case was tried before me at Halifax on June 3 last.

It was agreed at the close of the case in Halifax that a memorandum should be put in setting out the various

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statutes relating to the licensing of public houses, shops, etc., in Halifax, and a written argument by counsel on the question whether in assessing compensation any regard should be had to the fact that Courtney held a license permitting him to sell liquors. This statement and arguments of counsel were received towards the middle of January last.

The expropriation plan was registered on February 13, 1913, and the compensation has to be assessed as of that date. The property in question is situate on Pleasant St., in the City of Halifax, having a frontage of 64 ft. 7 in. on the east side of Pleasant St. On the south side of the property is a lane, called Gas Lane, with a width of about 20 ft., extending from Pleasant St. This lane forms the southern boundary of the property. The lot has a depth of 177 ft. and a width at the rear of 87 ft.

The defendant Courtney purchased this lot in 1883 or 1884 and erected thereon at the time the buildings now on the lot. The front part of the lot on Pleasant St. is used as a grocery store. The rear part is utilized as a store for the sale of liquors, and is entered from Gas Lane. Prior to moving into the present premises the defendant Courtney carried on a similar business on premises situate on the opposite corner, commencing in 1874 and continuing until 1884, when he removed to the present site.

During all the years from 1874 to the present time, Courtney had a shop license to sell spirituous liquors. The Crown offers $12,800. The defendant claims $30,300. The offer of the Crown is made up as follows: Land $3,300; house $8,400 and 10% is added for compulsory taking. Nothing has been allowed for good will, loss of business, value of the license, etc. The defendant acquiesces in the allowance for the house of $8,400 but claims, according to Mr. Roper's evidence, $4,000 as the value of the land, a difference of $700.

If the sole question for determination were the value of the premises, the land as it stands with the buildings, and no question of good will, loss of business, or value of the license came in question, I would consider the offer of the Crown of $11,700 a very liberal one. The way in which the valuator approached the subject is certainly a favour-

able one from the landowners' point of view. To value the land as if it were vacant and the house for what it would cost to replace it is hardly arriving at the market value of the premises as they stand. The government valuator was in a difficult position as he had nothing to guide him in the way of sales of similar property.

I do not think the valuation has been made on a proper basis. The defendant, as far as I could judge, is a respectable man. He has continuously carried on business at the premises in question and the opposite corner since the year 1874—about 39 years. During all this time he has had a shop license (which has been continued during 1914 and 1915 after the expropriation). In addition, a point not referred to, he has had his home since 1884 above the shop. His returns from the grocery business for an average of 15 years prior to expropriation have netted him an average between $400 to $500 per annum and from the liquor business an average of from $2,000 to $2,500 per annum. Altogether, in addition to his residence, he has had from $2,500 to $3,000 net receipts from the premises per annum.

It seems that a shop license is only good for one year and then can only be renewed on a petition endorsed by a certain number of the ratepayers and is granted to the individual and only so long as he continues in business in the same premises. I do not think I am called upon to deal with this case as if the sole question were: Is a license of the character of the one in question an interest in real estate for which compensation can be allowed?

The defendant is entitled to be compensated for the value of the premises to him and the loss of his business. Here are premises occupied since 1884 in which the defendant has carried on a prosperous business. He had the grocery business and the liquor business continuously carried on since 1873 and his license continuously renewed.

What compensation is he entitled to for the loss of this business? The question of compensation is a difficult one. It must be more or less conjectural. The defendant is a man well advanced in years and lately has not been in very good health, necessitating the employment of an extra clerk. On his death the license would no longer be an asset. Moreover, the temperance agitation and probable

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prohibition is something not to be lost sight of. A considerable number of beer drinkers would leave the vicinity when the works now under construction are finished

On the whole I think if the defendant is allowed $17,000 to include everything, including compensation for compulsory taking, he will be fairly compensated. I understand the Crown makes no claim for rent or for occupation of the premises since February, 1913. I therefore allow no interest as the occupation is of more value to defendant than interest. The defendant is entitled to the costs of the action

If the defendants fail to agree as to the settlement for dower, a reference will be necessary, the costs to be borne by defendants, and the money can be paid into Court.

Judgment accordingly.

Solicitor for plaintiff: *T. F. Tobin.*

Solicitors for defendants: *McInnes, Mellish, Fulton and Kenney.*

J. C. GROENDYKE COMPANY.....SUPPLIANT; 1917 June 14

AND

HIS MAJESTY THE KING.....RESPONDENT.

Customs—Prison-made goods—Seizure and detention—Recovery.

Item 1206, Schedule C, of the Customs tariff (Can. Stat. 1907, ch. 11), prohibiting the importation of "Goods manufactured in whole or in part by prison labour," applies to goods similar in character to the prison-made goods, if sought to be imported by one having at any time a contract to purchase prison-made goods.

A failure by the owner or claimant of a thing seized or held under the provisions of the Customs Act (R.S.C. 1906, c. 48 ss. 172-8-9), to proceed for the recovery thereof within the period prescribed by statute, forms a complete bar to his recovery.

PETITION OF RIGHT filed on behalf of the J. C. Groendyke Company, having its head office at No. 8 South Dearborn St., Chicago.

R. R. Hall, for suppliants; *W. D. Hogg*, for the Crown.

Case tried at Ottawa, March 8, May 11, 1917, before the Honourable MR. JUSTICE CASSELS.

CASSELS, J. (June 14, 1917) delivered judgment.

The allegations in the petition of right are, that in or about the month of June, 1914, the said Groendyke company, for its sole use and benefit, entered into negotiations with Mr. Green, who represented the Saskatchewan Grain Growers Association, for the sale of 300 tons of binder twine, with an option to increase the said sale by 450 tons more—all of which twine was to be manufactured and produced by the said Groendyke company at Miamsbury.

The allegation is that in pursuance of the said contract, the said Groendyke company caused to be shipped to the order of the Saskatchewan Grain Growers Assoc. 15 cars of the said binder twine so manufactured by them at Miamsbury as aforesaid containing 527,750 lbs., which in or about the month of July, 1914, entered the Province of Saskatchewan.

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Par. 9 of the petition of right reads as follows:—

"That on or about the 19th day of August, 1914, the "Commissioner of Customs notified the said Groendyke "company that the inspector of customs, Port of Preventive "Service, having reported on the 3rd day of August, 1914, "that the following facts have been ascertained upon in- "spection, namely, that since the first of June, 1914, the "said Groendyke company exported to Canada 15 cars of "binder twine, containing about 527,750 pounds, valued at "$48,289, more or less, and the following charges for infrac- "tion of the customs laws having been made against said "Groendyke company, namely, that the said goods were "imported into Canada contrary to law, the same being "prohibited importation (item 1206, schedule "C," Customs "Tariff), wherefore the said Groendyke company was given "notice that if such seizure or charges be maintained the "said goods or moneys, if accepted on deposit in respect "thereof, become liable to forfeiture and each party con- "cerned in such infraction of the law subject to penalties "under the provisions thereof.",

The petition further alleges that in or about the month of August, 1914, the Commissioner of Customs released the said 15 cars of twine, and received a deposit from the said Groendyke company of $2,500 which was accepted by the said Commissioner of Customs in lieu of the said 15 cars of twine.

The 17th, 18th and 19th paragraphs of the said petition, read as follows:—

"17. That under and by virtue of a certain notice bearing "date on or about December, 1915, the Commissioner of "Customs, pursuant to sec. 177 of the Customs Act, notified "the said Groendyke company that said deposit of $2,500 "made in this matter remained forfeited to the Crown."

"18. That pursuant to sec. 178 of the Customs Act the "said Groendyke company duly gave notice in writing that "such decision to forfeit the said sum of $2,500 would not "be accepted and respectfully requested the Honourable "the Minister of Customs, pursuant to sec. 179 of the "Customs Act, to refer the matter to the Court. "

"19. That under and by virtue of a certain notice bearing "date January 13, 1915 (1916 intended), the Commissioner

"of Customs notified the Groendyke company that the "Honourable the Minister of Customs declined to refer the "matter in question in this petition to the Exchequer Court. "Court."

Item 1206 of schedule "C" of the Customs Tariff, as contained in ch. 11 of the Statutes of Canada of 1907, is as follows:—

"Goods manufactured or produced wholly or in part by "prison labour, or which have been made within or in con- "nection with any prison, jail or penitentiary; also goods "similar in character to those produced in such institutions "when sold or offered for sale by any person, firm or cor- "poration, having a contract for the manufacture of such "articles in such institutions or by any agent of such person, "firm or corporation, or when such goods were originally "purchased from or transferred by any such contractor."

By sec. 11 of the said Customs Tariff Act of 1907 it is provided as follows:—

"The importation into Canada of any goods enumerated, "described or referred to in schedule "C" to this Act is "prohibited; and any such goods imported shall thereby "become forfeited to the Crown and shall be destroyed or "otherwise dealt with as the Minister of Customs directs; "and any person importing any such prohibited goods or "causing or permitting them to be imported, shall for each "offence incur a penalty not exceeding $200.

It is contended by the petitioner that it has not been proved that the goods which were seized had been manufactured by prison labour.

The contention, however, on the part of the Crown is that under this provision, item 1206 of schedule "C" of the Customs Tariff, that if "goods similar in character to those produced in such institutions when sold or offered for sale by any person, firm or corporation, having a contract for the manufacture of such articles in such institutions or by any agent of such person, firm or corporation" whether the goods were imported into Canada or not, would bring the importing company within the provisions of the statute.

Mr. Hall, acting for the petitioner, in his elaborate and able argument conceded that if the Groendyke company, through their agent, had contracted for binder twine similar

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in character, although such binder twine so manufactured was not the binder twine shipped to Canada, nevertheless the petitioner would come within the meaning of this particular provision.

I apprehend that the provision is intended to prohibit any person, firm or corporation, who had at any time a contract by themselves or by their agent for prison-made twine, whether such twine were sold in the United States or shipped to Candaa, sending any such goods similar to those produced in such institutions into Canada.

It would be extremely difficult if not impossible to prove that the particular twine brought into Canada had been manufactured by prison labour; and, therefore, to guard against any such importation no doubt the provisions of this section were enacted.

I have not the slightest doubt that the Groendyke company, acting through their agent, Mr. Groendyke, had a contract for the manufacture of binder twine with the prison authorities. It would appear from the contract filed that Groendyke was an agent for the prison authorities. It would also appear that he had contracts with companies other than the Groendyke company for the manufacture of twine in the prison. According to his own evidence these contracts were procured by him, and the labels of the various purchasers were placed upon the twine in the prison warehouse, and were sent out with the representation that they had been manufactured by the various companies by whom they were ordered.

It is proved beyond question that binder twine was manufactured for and on behalf of the Groendyke company in the prison. They were labelled with the trade label of the Groendyke company. This is conceded by Mr. Groendyke in his evidence. They were beyond question manufactured for the Groendyke company in the prison, and at the direction of Groendyke were labelled with the trade label of the Groendyke company, and no doubt were paid for by the Groendyke company.

Moreover, Mr. Kirk gives evidence of his visit to the Michigan State Prison at Jackson, Michigan. He gives detailed evidence of what was taking place—shews that the balls of twine were being put into bags, and these bags

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had stencilled on the outside of the bag the same mark as that placed upon the balls of twine similar in character "a circle 'G'" and "Manufactured by J. C. Groendyke Company, Chicago." With the morality of this method of dealing I am not at present concerned.

It is admitted by Groendyke that the twine manufactured by the company at their own factory at Miamsbury was of a superior quality to prison-made twine, although similar in character to prison-made twine.

They deliberately placed upon the prison-made twine their own trademark which would enable them to represent to their customers that the twine had been made by themselves at their own works.

The Groendyke company is apparently composed of three members. Groendyke the witness was the owner of 85% of the shares, and his wife and son owned the remaining 15%. Groendyke was the president and manager of the company, and as such manager was in receipt of a salary, and in addition his share of whatever dividend may have been paid by the company. He admits he had no factory of his own. In his evidence he states, as follows:—

"Q. Is your time entirely given up to the management "of the Company? A. No. Q. Have you any other "private business of your own? A. No, I have nothing "private. Q. Any dealings you have, in binder twine, is "for and on behalf of the company? A. Yes. Q. There "is no question about that? A. Yes."

It is asking too much of the Court under the facts as proved in this case to conclude that this prison-made twine labelled was not manufactured by the prison authorities under a contract made by the agent of the Groendyke company.

I think there is no question whatever that the Groendyke company had obtained twine manufactured at the prison, and such twine was manufactured for the Groendyke company, and that such contract was entered into by the agent of the Groendyke company.

I think the judgment of the Minister is correct.

Were it not for the case of *Julien* v. *The Queen*,[1] decided by Burbidge, J., I would have thought that after the

[1] 5 Can. Ex. 238.

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Minister had heard the parties, as provided by sec. 174 *et seq.*, and had given his decision, it would be too late for the petitioner to assert his rights by petition of right. Burbidge, J., apparently, came to a different conclusion, and I think it only right to leave it to an appellate Court to say whether such decision is correct:

Sec. 178 of the Customs Act (R.S.C. 1906, ch. 48) provides:—

"If the owner or claimant of the thing seized or detained, "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 in writing that such decision "will not be accepted, the decision shall be final."

Supposing no notice had been given, could a petition of right lie after a decision which is final?

Sec. 179 provides:—

"If the owner or claimant of the thing seized or detained, "or the person alleged to have incurred the penalty, within "thirty days after being notified of the Minister's decision, "gives him notice in writing that such decision will not be "accepted, the Minister may refer the matter to the Court."

In this particular case the Minister declined to refer the matter to the Court. I would have thought that his decision remained final. The Court could not review the decision of the Minister, and there is no attempt in the present case to appeal from him, and I would not have jurisdiction to entertain such an appeal.

In the *Julien* case the facts were not the same as in the present case, as I understand the property in question in that case was held until the final litigation. It was not the case where the goods were released and money deposited in lieu thereof under the special provisions of sec. 171 of the Customs Act. I see no reason why a person whose goods have been seized should not present a petition of right the day after such seizure, if a fiat therefor is granted. Moreover, the Crown might file an information to have the provisions of the Customs Act enforced, and also for any penalties that were sought. It would not be necessary to await the final decision of the Minister.

The earlier clauses of the statute, namely, sec. 164, seems to me to apply to actions of a different character, namely,

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an action brought for illegal acts on the part of the officials of the Crown. The money was deposited in the case before me in August of 1914. No petition was presented for a fiat until the year 1916.

Section 172 of the Customs Act applies to the case of the money being so deposited. Sub-sec. 2 provides that no proceeding against the Crown for the recovery of any such money shall be instituted unless brought within 6 months from the date of the deposit thereof. It seems to me that this forms a complete defence to the petition. The Crown has set it up as a defence, and I think I am bound by the terms of the statute, and if otherwise the petitioner were entitled to relief his petition is too late.

The petition is dismissed with costs.

Petition dismissed.

Solicitor for suppliant: *R. R. Hall.*

Solicitors for respondent: *Hogg & Hogg.*

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March 17

QUEBEC ADMIRALTY DISTRICT.

CANADIAN PACIFIC RAILWAY CO.

v.

S.S. "STORSTAD" AND AETNA ASSURANCE CO. AND OTHER INTERVENANTS AND CLAIMANTS.

Admiralty—Collision—Priority of claims—Limitation of liability—Law governing.

In a collision between a Canadian coasting vessel and a British ship on the "high seas," more than 3 miles outside the Canadian coast, the maritime law of England, and not the Canadian law, applies and governs the rights of the parties. Under the Imperial Merchant Shipping Act (1898, sec. 503), claims for loss of life are given a preference over others, notwithstanding that a judgment limiting the liability had not been obtained.

MOTIONS heard by the Hon. Mr. Justice Maclennan, Deputy Local Judge of the Quebec Admiralty District, in Court at Montreal, on February 5, 1917, in an action *in rem* in connection with the report of the deputy district registrar dealing with claims for damages and the distribution of $175,000 deposited with the registrar representing the proceeds of the sale of the S.S. "Storstad." The ground upon which the motions were based appear in the reasons for judgment.

A. R. Holden, K.C., in support of plaintiff's motion to vary the report. *J. W. Cook*, K.C., and *W. F. Chipman*, K.C., in support of motions by certain claimants to vary the report. *George F. Gisborne*, K.C., *Errol Languedoc*, K.C., *A. H. Duff*, K.C., *Errol M. McDougall*, and *J. W. Weldon*, for life claimants on motions to confirm the report.

MACLENNAN, DEP. L. J. (March 17, 1917) delivered judgment.

This case comes before me on motions by the plaintiff and by certain intervenants and claimants to vary the report of the deputy registrar filed on May 31, 1916, settling

the amounts of the claims proved and the distribution to be made of the money in Court and asking to have the distribution made on the basis of a *pro rata* division to all claimants, and on motions by other claimants for the confirmation of the report and an order for payment of the sums collocated. The claims admitted by the deputy registrar amount to $3,069,483.94, of which $469,467.51 were for loss of life and the balance for loss of property, including over $2,000,000 claimed by the Can. Pac. R. Co. as the value of its ship "Empress of Ireland," which was sunk with all her cargo and over 1,000 passengers and crew as the result of a collision with the S.S. "Storstad." The money now in Court to be distributed on these claims is $175,000 (with accumulated bank interest) being the proceeds of the sale of the "Storstad" made under order of the Court while the action to determine the responsibility for the collision was pending before this Court. The "Storstad" was held responsible by a judgment rendered herein by Dunlop, J., on April 27, 1915, its counterclaim was dismissed and a reference was made to the deputy registrar to assess the damages. The deputy registrar's report was made and filed on May 31, 1916, and is the subject of the various motions now before me.

The fund being insufficient to satisfy all claims, the deputy registrar, after allowance for costs, collocated the balance *pro rata* in favour of the life claims so far as such funds were sufficient, and excluded all other claimants from participation in the collocation. This distribution is in accordance with the provisions of sec. 503 of the Merchant Shipping Act, 1894 (Imp.), under which, claimants for loss of life have an absolute privilege and priority over claimants for loss of property or goods to the extent of an amount equal to £7 per ton of the ship held to have been at fault, and a claim on a further amount of £8 per ton along with all other claimants. It is admitted that an amount equal to £7 per ton would exceed the amount now before this Court for distribution. Counsel for plaintiff and for other claimants for loss of property have submitted that the distribution should be made in acordance with the Canada Shipping Act, under which no preference or priority is given to claims for loss of life, and they further submit

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that even if the Imperial statute governs the preference or priority put forward for life, claims must fail, as no proceedings were taken by the owners of the "Storstad" to obtain a judgment limiting their liability on the ground that the loss occurred without their actual fault.

The first important question to be decided is: Is it the maritime law of England or the Canadian law which governs the rights of the parties in respect to the claims for damages and the distribution of the fund now in possession of the Court?

The Exchequer Court of Canada as a Court of Admiralty is a Court having and exercising all the jurisdiction, powers and authority conferred by the Colonial Courts of Admiralty Act, 1890 (Imp.), over the like places, persons, matters and things as are within the jurisdiction of the Admiralty Division of the High Court in England, whether exercised by virtue of a statute or otherwise, and as a Colonial Court of Admiralty it may exercise such jurisdiction in like manner and to as full an extent as the High Court in England

"The law which is administered in the Admiralty Court of "England is the English Maritime Law. It is not the "ordinary Municipal Law of the country, but it is the law "which the English Court of Admiralty, either by Act of "Parliament or by reiterated decisions and traditions and "principles, has adopted as the English Maritime Law: *The Gaetano and Maria.*[1]

Although the Exchequer Court in Admiralty sits in Canada it administers the maritime law of England in like manner as if the cause of action were being tried and disposed of in the English Court of Admiralty. The collision in this case took place after the "Empress of Ireland" had discharged her pilot at Father Point, her last port of call in Canada, and had put to sea on a voyage to Liverpool. It is admitted that the wreck now lies in the River St. Lawrence, $3\frac{3}{4}$ miles from the nearest coast line, and the Judge who tried this case found that the collision took place 1,200 or 1,500 ft. east of where the wreck lies, which certainly was not any nearer the coast. This was in tidal waters to the seaward of where the inland waters of Canada

[1] 7 P.D. 137, per Brett, L.J., at 143.

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end in the River St. Lawrence (R.S.C. ch. 113, sec. 72 (*g*)), at a point where the river is about 25 miles wide and on the direct route to the Atlantic. The collision having taken place more than 3 marine miles from the Canadian coast, it must be held to have occurred outside the territorial jurisdiction of the Parliament of Canada and on the high seas as that term is understood in a British Court of Admiralty.

"The expression "high seas," when used with reference "to the jurisdiction of the Court of Admiralty included all "oceans, seas, bays, channels, rivers, creeks and waters "below low-water mark, and where great ships could go, "with the exception only of such parts of such oceans, etc., "as were within the body of some country.

"A foreign or colonial port, if it was part of the high seas in "the above sense, would be as much within the jurisdiction "of the Admiralty as any other part of the high seas: *The Mecca*,[1] *The Queen v. Anderson*,[2] *The Queen v. Carr*.[3] The law applicable in England to cases of collision on the high seas is the Maritime Law of England: *The Leon*,[4] and *Chartered Mercantile Bank of India v. Netherland India Steam Navigation Co.*[5] Neither the "Empress of Ireland" nor the "Storstad" were registered in Canada and this Court obtained jurisdiction by reason of the "Storstad," after the collision, having come into the Quebec Admiralty District, when an action *in rem* was instituted and the steamer arrested at the instance of the plaintiff.

It was contended on behalf of plaintiff that the "Storstad" was found in fault by the trial Judge for failure to observe the Canadian Rules of the Road as enacted by order-in-council of February 9, 1897, and that this circumstance shewed that the Canadian law should govern. The order-in-council referred to was passed to bring into force in Canadian waters and to the notice of the owners and masters of Canadian vessels, the rules and regulations for preventing collisions at sea passed by an Imperial order-in-council on November 27, 1896, in virtue of the Merchant Shipping Act (1894). These rules are now

[1] [1895] P. 95 107, per Lindley, L.J.
[2] L.R. 1 C.C. 161.
[3] 10 Q.B.D. 76.
[4] 6 P.D. 148.
[5] 10 Q.B.D. 521, 537, 545.

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commonly known as the International Rules of the Road and cannot be changed or modified by the Canadian authorities, except for the purpose of making them conform and agree with a change or modification made by an Imperial order-in-council, while regulations for the navigation of the inland waters of Canada on the other hand may be made and modified by order-in-council without reference to Imperial action: Canada Shipping Act, sec. 913.

The trial Judge found the "Storstad" at fault in violating arts. 16, 21 and 29 of the Rules of the Road," and he further stated that "there is nothing to shew that the disaster was in any way attributable to the St. Lawrence route, and being open water, all sea rules apply." In dealing with a collision in the River St. Lawrence in the case of *Montreal Transportation Co. v. The Ship Norwalk*,[1] Dunlop, J., said:—

"It is well known that from the Victoria Bridge down we "are practically under the International Rules of the Road, "that is to say, the Canadian Government has made the "Imperial rules applicable in their entirety from the Victoria "Bridge down stream."

From this it is quite evident that the "Rules of the Road," which the trial Judge found had been violated by the "Storstad," were the Imperial or International Rules. These rules are to be followed by all vessels upon the high seas and in all waters connected therewith, navigable by sea-going vessels: *The Anselm*.[2]

Counsel for plaintiff submitted that the "Storstad" must be held to have been subject to Canadian law because she was engaged in the coasting trade between Nova Scotia and the ports of Quebec and Montreal: Canada Shipping Act, R.S.C., ch. 113, secs. 952-960. Assuming the ship to have been engaged in this trade, the provisions referred to affect only the license, entries, clearances and pilotage dues of the ship and in no way affect the rules of navigation on the high seas.

The "Empress of Ireland" was a British ship and the collision having taken place on the high seas outside the

[1] 12 Can. Ex. 434, at pp. 452–3. [2] 76 L.J.P. 54 [1907] P. 151.

Canadian jurisdiction, the maritime law of England alone applies and governs the rights of the parties originally and now before the Court. The part of that law which governs the distribution of the funds now in the hands of the Court is the Merchant Shipping Act, 1894 (Imp.), sec. 503, which gives the claimants for loss of life an absolute preference over all other claimants on the first £7 on the tonnage of the "Storstad:" *The Victoria*.[1] Her tonnage, according to Lloyd's register, was 6,028 tons and her liability for loss of life would be slightly over $200,000, an amount considerably in excess of what was realised from the sale of the ship.

The counsel for plaintiff and for certain intervenants and claimants further submitted that even if the maritime law of England did apply, sec. 503 of the Merchant Shipping Act had no effect in the present case seeing that the owners of the "Storstad" had not, under sec. 504, obtained a judgment limiting their liability. Sec. 503 provides that in the absence of actual fault or privity on the part of the owner he shall not be liable to damages beyond the following amounts, namely: when there is loss of life and also loss of property a total amount not exceeding £15 for each ton of the ship's tonnage (of which the first £7 is reserved for loss of life, if any), and when there is no loss of life and only loss of property, only £8 per ton. Sec. 504 provides that where any liability is alleged to have been incurred by the owner of a British or foreign ship, as enumerated in sec. 503, and several claims are made or apprehended in respect of that liability, then the owner may apply to any competent Court and that Court may determine the amount of the owner's liability and may distribute that amount rateably amongst the several claimants and may stay any proceedings pending in any other Court in relation to the same matter and may proceed in such manner as the Court thinks just. It will be seen that sec. 504 is permissive and does not in any way change the positive terms of sec. 503, but it gives the action in limitation of liability to a defendant when his property in excess of the statutory limit is under arrest or liable to arrest within the jurisdiction where damages are sought to be recovered in respect of loss

[1] (1888), 13 P.D. 125.

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of life or property. In this case neither the plaintiff nor the claimants, for loss of life or loss of property, were in a position to compel the owners of the "Storstad" to institute an action in limitation of their liability. The latter preferred to allow their ship to be sold and the proceeds of sale—$175,000— are admittd to be less than the liability under the statute, and as the owners of the "Storstad" had no other property within the jurisdiction of this Court subject to seizure, it was unnecessary for them to institute proceedings under the permissive provisions for limitation of their liability. Sec. 503 in positive terms provides for a preference in favour of claimants for loss of life on the first £7 of the ship's tonnage, and failure on the part of the owners to institute and obtain a judgment in their favour in limitation of liability does not take way that preference. In *The Victoria*,[1] Butt, J., said:—

"The Act interferes with the claimants' right only by "putting a limitation on the amount which they can "recover from the ship owner, and there is nothing in the "Act to shew that persons who have suffered loss have their "rights otherwise altered."

Marsden's Collisions at Sea, 6th ed., p. 165:—

"Where the amount of the fund in Court is insufficient "to satisfy in full claimants in respect of loss of life and loss "of cargo, the former are entitled to the whole of that part "of the fund which represents the seven pounds per ton."

MacLachlan's Merchant Shipping, 5th ed. (1911), p. 791:—

"The Court, in the application of equitable principles, "will marshal such assets as are within its control in that "way which best meets the just claims of competing plain-"tiffs, and best protects the relative interests of separate "defendants."

The competing plaintiffs in this case, because the claimants for loss of property and loss of life are now practically plaintiffs in the same position as the original plaintiff in the action, are urging their claims against the money now under the control of the Court and, in the application of equitable principles, the claims for loss of life are entitled to a preference over claims for loss of pro-

[1] 13 P.D. 125, at 127

perty. In dealing with the fund in Court in this way the owners are not made liable for any sum beyond the amount set forth in sec. 503. Their interests are not prejudiced and they are not concerned in the priorities existing between the respective claimants: 26 Hals' Laws of England, sec. 966.

I am therefore of opinion that the absence of any action by the owners for limitation of their liability does not prevent the Court giving effect to the preference and priority in favour of claims for life contained in sec. 503 of the Merchant Shipping Act.

I am of opinion that the law which governs this matter is the maritime law of England and the Merchant Shipping Act of 1894, and that claims arising from loss of life are absolutely privileged upon the fund in Court, and that the deputy registrar, in distributing the fund *pro rata* among the claimants for loss of life after providing for costs incurred by the different parties acted upon proper principles and that the motions on behalf of the plaintiff and the other claimants for loss of property, asking that the report of the deputy registrar should be varied and their claims collocated *pro rata* with all other claims, should be dismissed.

Since the deputy registrar made his report a number of further claims have been filed, and, on September 26, 1916, an order of the Court was made that all parties having claims against the fund, the proceeds of the sale of the "Storstad" now in the hands of the deputy district registrar, should file such claims on or before October 10, 1916, after which date no claim should be allowed to be filed.

Certain new claims have been filed with the deputy registrar under this order, and it will be necessary to remit the whole matter to the deputy registrar for further enquiry and report.

A number of motions have been made by claimants for loss of life, asking that the report of the deputy registrar be confirmed and the amounts therein collocated be paid under rules 179 and 192. These motions were probably considered necessary to support the report of the deputy registrar and to secure payment of the amounts allowed, and, in view of the fact that the report has to go back to the registrar for further enquiry and report on all claims now before the Court, these motions cannot be granted,

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but as they were all filed before the order of the Court extending the delay for the filing of further claims, I think that the parties making these motions are entitled to costs.

The costs collocated by the deputy registrar and not yet paid, as well as the Court costs on all motions to vary and confirm the report, should be paid now out of the fund in Court, and all claims filed up to October 10, 1916, are remitted to the deputy registrar for further enquiry and report on the whole matter to be filed within 2 months from the date of the present judgment.

Judgment accordingly.

PRINCE EDWARD ISLAND ADMIRALTY DISTRICT.

1917
Sept. 21

NEVILLE CANNERIES LTD.

v.

"SANTA MARIA."

Admiralty—Seizure for towage—"Ship"—Divisibility of contract—Maritime lien.

A vessel built for show and not for transportation is a "ship" within the meaning of admiralty law and is subject to seizure for towage.

A towage agreement providing for payment *per diem* is a divisible contract as to each day's services performed; but there can be no recovery under the contract in the event of a prolongation of the voyage through the plaintiff's unjustifiable delay. A bond taken as security is not evidence that the towage was performed on the credit of the master and not of the ship. There is no maritime lien for the towage, only a statutory lien, in the form of a right to seize the tow in satisfaction of the claim.

ACTION *in rem* brought by Neville Canneries, Limited, whose head office is in the City of Halifax in the Province of Nova Scotia, to recover $3,275 being balance of a claim for alleged towage services under a contract, claimed to have been entered into between the plaintiff and the captain of the ship "Santa Maria," for the towing of the said ship from Cape Cod Canal in the United States of America to the City of Quebec in the Province of Quebec at a certain rate of payment per day from the time the plaintiff's tug boat should have left Halifax in performance of this contract until she should return thereto after completion of the same.

D. D. Shaw, *A. B. Warburton*, K.C., and *C. J. Burchell*, K.C., for plaintiff.

W. E. Bentley, K.C., and *J. J. Johnston*, K.C., for defendants.

STEWART, L. J. (September 21, 1917), delivered judgment.

In terms of an order made on March 12, 1916, Charles Stephenson, of Cambridge, in the State of Massachusetts, and Andrew Kaul, Jr., of Merrill, in the State of Wisconsin,

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appeared in this case under protest. The case came on for trial on September 4, at Charlottetown, and continued for 4 days when it was adjourned for judgment.

The contract proved at the trial was made and entered into on September 14, 1916, between the plaintiff and the captain of the "Santa Maria" and is embodied in certain telegrams which passed between the plaintiff and the captain on September 13 and 14 of that year. By this contract the plaintiff undertook and agreed to tow, as expeditiously as possible, the "Santa Maria" from Cape Cod in the U. S. of America to the City of Quebec in Canada, for the consideration or sum of $75 a day from the time the plaintiff's towboat should have left Halifax for Cape Cod until she should return thereto after completing her contract. Should any accident occur to the "Santa Maria" and she be not in condition to tow, any delay which might occur in consequence should be at the expense of the "Santa Maria." On the same day that the contract was made, the payment of the *per diem* charge of $75 was guaranteed to the plaintiff by the Massachusetts Bonding and Insurance Co.

It appeared to be taken for granted by both sides, although not proved, that the "Santa Maria" was a replica of the ship on which Columbus sailed from Spain in 1492 on his famous voyage of discovery and in which he discovered America.

She appears to have arrived in America some time in 1893 and was on exhibition in Chicago at the time of the World's Fair in that year, and apparently has been there ever since until she set out on her voyage in 1914. Being at Cape Cod in September, 1916, and desiring to return to Chicago by way of Quebec the contract in question was then entered into. The plaintiff in furtherance of its contract sent its tug "Mouton" from Halifax on Sept. 17, 1916, to go to Cape Cod to meet the "Santa Maria." The "Mouton" on leaving Halifax had on board as cargo 129 bbls. and 75 half bbls. pickled fish, and 14 half cases lobsters. She arrived in Boston at 11.30 a.m. on September 19, and there discharged her cargo and took on coal and water. In addition she took on a cargo of 25 tons of anthracite coal and about 40 or 50 empty lobster crates.

This cargo, the president of the plaintiff company in his evidence stated, put the tug in good trim to do her towing. The "Mouton" had a gross tonnage of 5,321, a registered tonnage of 36.19 and 106 h.p. engine and would carry about 75 tons. She was built in Liverpool, N.S., in 1913. Length 82 ft., breadth 17 ft., depth of hold 6 ft. 18 in., and was manned by a captain and 4 men.

She left Boston at 6.30 a.m. on September 21, arriving at Sandwich at mouth of Cape Cod Canal. She left there the same day with the "Santa Maria" in tow and reached Yarmouth at 5.30 p.m. on September 24. Taking in water and coal at Yarmouth she left there on September 25, at 12.45 p.m., and arrived at Halifax at 8 a.m. on September 27. Here she discharged her cargo and took on the following new cargo, namely: 125 bbls. and 75 half bbls. pickled fish. These, the president of the plaintiff company stated, were put on to put the tug in proper trim for towing and were to be carried to Quebec. Left Halifax for Quebec at 10 pm.. on September 28, arriving at Port Hastings at 12.30 a.m. on September 30. Detained at Port Hastings until 10 a.m. of October 3, when she set sail and made for Charlottetown, arriving there at 2 p.m. on October 4. The next day she sailed at 7 a.m. and at 7 p.m. reached 5 miles from Cape Jourimain, and on account of alleged heavy head wind ran back to Charlottetown where she remained until October 12, detained, as claimed, by strong winds except on one occasion on October 7, when she was unable to depart by reason of acting Captain Cook of the "Santa Maria" not being on hand. Left Charlottetown at 5 a.m. on October 12, weather fine but had to put back at 11 a.m. on account as alleged of a strong breeze arising, and arrived at Charlottetown at 5 p.m. The tug and tow remained in Charlottetown until October 21. On October 19, which was a fine day, no start was made because, as claimed by the captain of the tug, the acting captain of the "Santa Maria" refused to leave Charlottetown until he heard from Capt. Stephenson. On October 21 Capt. Stephenson discharged the tug from the further performance of her contract and on October 25 she started on return to Halifax, arriving there on October 29 at 8 a.m.

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Mr. Bentley in the able argument which he presented to the Court rested his defence on the following grounds:— (1) The "Santa Maria," built by the Sovereign or government of Spain and presented to the government or people of the United States has been cared for and maintained, as the symbol of an important historical event, by the South Park Commissioners of the City of Chicago, who hold it as trustees for the people of that country, it would be an infringement of international comity if condemned and sold by an order of this Court. (2) That the "Santa Maria," built and designed for show purposes and not for transportation, is not a ship within the meaning of admiralty law and practice, and her seizure under warrant was illegal. (3) There is no maritime lien for towage and in the absence of personal liability on the part of the owner for services performed there can be no arrest for towage. (4) The towage was not performed on the credit of the ship or its owners but on that of Capt. Stephenson and his guarantee the Massachusetts Bonding Co. (5) The tug was not sufficient for the requirements of the contract and the plaintiff broke his agreement to perform his contract expeditiously. (6) The contract, being indivisible, must be fully performed before any liability arises. Counsel for the plaintiff, besides opposing all the defendant's grounds, contended that it was part of the contract that the tow should be in good condition, whereas she was leaky, of weak construction, covered with barnacles, had no boat, no anchors, and no hoisting gear, and could only go out in fine weather.

As to the indivisibility of the contract and the necessity of its completion before any liability can arise it seems to to me that the agreement to pay $75 a day for the services of the tug gave the plaintiff a cause of action against the tug for each day's services performed until the whole journey was completed and that he was not obliged to wait until then before enforcing his claim.

Is the "Santa Maria" a ship that can be arrested in such a proceeding as was taken in this case? She is declared to be a replica of the vessel in which Columbus crossed the Atlantic in the year 1492. She had sails, a rudder and masts,

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but was not built, I would judge, to do the work of transporting either goods or passengers.

The statute, in no manner, limits the jurisdiction of the Court. All claims in respect of towage come under it and no attempt is made to define or limit the kind of craft that towage services may be performed for.

The Admiralty Courts Act, 1861, 24 Vict. ch. 10, gives the following definition of a ship. "Ship shall include any description of vessel used in navigation not propelled by oars."

Similar definitions are given in the Vice-Admiralty Courts Act, 1863, 26 Vict. ch. 24, and the Merchants Shipping Act, 1894.

See also the following cases:—*The "Mac,"*[1] *"Mersey Docks and The "Zeta,"*[2] *The "Excelsior,"*[3] *The "Uhla,"*[4] *The "Sinquasi"*[5] *The "Malvina,"*[6] *The "Clara Killam."*[7]

The Court of Admiralty appears from early times to have exercised an inherent jurisdiction over claims for towage in cases where the services were rendered on the high seas and not within the body of a county and some cases have gone the length of holding that towage on the high seas conferred a maritime lien. *The "Isabella,"*[8] *The "Constancia,"*[9] *The "Princess Alice,"*[10] *The "St. Lawrence."*[11]

There has been considerable difference of opinion as to the nature of the inherent admiralty jurisdiction in matters of towage, especially as to whether or not it created a maritime lien.

By the Admiralty Court Act, 1840, 3 & 4 Vict. ch. 65, sec. 6, jurisdiction was given to the Admiralty Court over all claims and demands in the nature of towage in respect of services rendered whether within the body of the county or upon the high seas, and similar jurisdiction was conferred upon the Vice-Admiralty Courts by sec. 10 of the Vice-Admiralty Courts Act 1863, 26 Vict. ch. 24.

These statutes did not give a maritime lien on the ship but only enabled the plaintiff to enforce his claim in the

[1] (1882), L.R. 7 P.D. 126.
[2] [1893] A.C. 468.
[3] (1868), L.R. 2 A. & E. 268.
[4] L.R. 2 A. & E. 29 n.
[5] (1880), L.R. 5 P.D. 241.
[6] Lush. 493.
[7] (1870), L.R. 3 A & E.. 161.
[8] 3 Hagg. Adm., 427.
[9] (1846), 10 Jur. 845.
[10] 3 Rob. Adm. 138.
[11] (1880), L.R. 5 P.D. 250.

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Admiralty Court by arresting the ship. A claimant proceeding under the Act would have no right against the ship until commencement of his action.

The Court having jurisdiction over the subject-matter by virtue of the statute, the arrest in the action gives precedence to the claim over all except liens existing at the time of the arrest. This is what is known as a statutory lien and gives the claimant no lien upon but only a right to proceed against the ship.

It has been held in several cases that although jurisdiction as to towage was not created by statute but existed before, it conferred no maritime lien. See the "*Henrich Bjorn*;"[1] *Westrup v. Great Yarmouth Steam Carrying Co.*[2] As against this, counsel for the plaintiff cited a case decided in the Privy Council: *Foong Tai & Co. v. Buchheister & Co.*[3] But this authority does not question the soundness of the law as declared in the "*Henrich Bjorn*," and *Westrup v. Great Yarmouth Steam Carrying Co.* cases. The expenditures defrayed by the respondents in that case was in the nature of salvage expenditure.

Fry, L. J., in giving the judgment of the Appeal Court in the "*Henrich Bjorn*" case,[4] draws a very illuminating distinction between the right to enforce a lien against a ship and the right to arrest her to enforce a claim that the plaintiff has against the owner; in other words, between a maritime and a statutory lien.

Lord Watson discussing the same point in that case in the House of Lords uses equally apt language. He says,[5] "The former unless he has forfeited the right by his own "laches can proceed against the ship notwithstanding any "change in her ownership, whereas the latter cannot have "an action *in rem* unless at the time of its institution the "*res* is the property of his debtor."

It seems to me that the weight of authority is against the proposition of the existence of a maritime lien for towage.

[1] L.R. 10 P.D. 44; 11 App. Cas. 270.
[2] 43 Ch. D. 241.
[3] [1908] A.C. 458.
[4] 10 P.D. 44, at p. 54.
[5] 11 App. Cas. 270, at p. 277.

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A good deal of discussion arose as to the necessity of its being shewn that the towage was performed on the credit of the ship.

Language of this kind is frequently used in Admiralty cases by both Judges and counsel.

In *The "Perla,"*[1] Dr. Lushington says there is a presumption that credit is given to the ship and to rebut this presumption it must be distinctly proved that credit was given to the individual only whoever he may be.

Other cases decide that necessaries supplied to a ship are *primâ facie* presumed to have been supplied on the credit of the ship and not solely on the personal credit of her owners.

A ship can scarcely be said to be the object of credit. It certainly cannot give or refuse credit. I presume what is meant is this, that the owner of a ship either by himself or his master can so contract either for necessaries or for towage as to make himself alone personally liable; that in the contract by the use of apt words he can exclude the ship from all liability to proceedings *in rem* in Admiralty.

Where the ordinary agreement is made, the presumption is that credit is given to the ship, but this does not mean that the owner may not be rendered liable for the services performed in an action *in personam*.

Contracts of towage are interpreted and construed in the same manner as other contracts.

Where a contract of towage purports to be made on behalf of the owner he, and therefore the ship itself, can only be made liable where it has been entered into by one who was the owner's agent or servant acting within the scope of his authority.

If the owner of a ship divests himself by charterparty or otherwise of all control and possession of his ship for the time being, in favour of another who has all the use and benefit of it, and who appoints and pays the captain and crew, he will not, neither will his ship, be liable for towage performed for the ship by agreement with the charterer or his captain during such time. Before the owner can be made liable for the act of the captain they must stand in the relation to each other of master and servant, or princi-

[1] Swab. 353.

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pal and agent, or at any rate some such relationship must exist between them.

I will now come to the evidence and the merits of the case. There is no evidence that the "Santa Maria" was either built by the Sovereign or government of Spain or presented by such Sovereign or government to the government or people of the United States or that she is owned by the South Park Commissioners of the City of Chicago. Counsel for both parties at certain stages of the case appear to have assumed something of the kind, but no evidence was given at the trial. No one appeared for the United States Government or the South Park Commissioners.

When I am asked to stay the hand of the Court for fear of trespassing on international comity I would like to have something more substantial than faint assumptions of counsel which, so far as the evidence goes, appears to have no warrant for existence.

I am unable to state from the evidence who the owner of the "Santa Maria" is. I know nothing on that head except that in September, 1916, she was in charge of Capt. Stephenson at Cape Cod who entered into the contract in question with the plaintiff.

Primâ facie the master is the agent of the owner of the ship, and in the absence of evidence that he was the agent of another I find that the contract of towage then entered into bound the owner and enabled the plaintiff to enforce in this Court any claim he has for such towage against the ship.

It is claimed by Mr. Bentley that the plaintiff's counsel in opening the case admitted that Capt. Stephenson had chartered the "Santa Maria" from the South Park Commissioners. The counsel in his opening on this point spoke as follows:—

"This ship, the 'Santa Maria," is a replica supposed to "be a replica of the flag ship of Christopher Columbus with "which he discovered America. She was built by the Spanish "government in the year 1892 or '93 and was presented "to the government of the United States, and she came out "to America at the time of the Chicago exhibition in '93, "and subsequently she was presented to the City of Chicago "or rather a Commission of Chicago who are now the

"present owners. She has been lying there for some time, "I don't know how many years, and shortly before the "opening of the Panama Canal Mr. Stephenson, who "appeared as the captain of the ship, made arrangements "with the Park Commissioners to get this vessel to take "her round to Panama. . . . I don't know upon what "terms she was loaned or let or chartered by the Commis- "sioners but I believe there is an agreement which we gave "our learned friends notice to produce which was made "between the parties. But at any rate we say that at the "time we entered into this contract we did not know or have "anything to do with the owners. They were unknown to "us and we dealt with the captain upon the credit of the "then ship herself."

John A. Nevill, the president of the plaintiff company, in his evidence, stated that he was not aware as to who were the owners of the ship at the time that he dealt with Capt. C. Stephenson, the master of the "Santa Maria," and gave credit to the ship for the towage. He also stated that he knew nothing of an agreement between the South Park Commislsoners and the captain at the time the contract was made.

I would not hold, from this evidence, that the captain when he made the contract with the plaintiff had the full and complete control and possession of the ship and had no responsibility whatever to the owner whoever he might be. That he had in other words what was practically a demise of the ship.

See also on the question of the effect of remarks made by counsel in opening the comments of Pollock, C. B., in *Machell v. Ellis*.[1]

Besides I don't think the remarks of counsel were intended as an admission. I am inclined to believe that they were prompted by a perusal of a brief filed by the defendants' counsel on a preliminary motion in which similar statements were made and he probably assumed that proofs would be forthcoming at the trial.

The fact that the plaintiff took a guarantee from the Massachusetts Bonding Co. was urged as a circumstance

1 Car. & K. 682.

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that credit was given to the captain alone and not to the ship, but Mr. Nevill in his evidence stated that he took the guarantee as additional security in the event of the ship being lost on the voyage.

Having disposed of all the preliminary points it is left for me to determine the amount which the plaintiff is entitled to recover in this suit.

There was an implication in the contract that the tug boat which the plaintiff should supply should be sufficient for the performance of the work undertaken, also that each party to the contract would perform his duty in completing it, that proper skill and diligence would be used on board both the vessel and the tug, and that neither party by neglect or mismanagement would create unnecessary risk to the other or increase any risk which might be incidental to the service undertaken.

I hold on the evidence that the tug was reasonably sufficient for the requirements of the contract. I also hold as against the plaintiff that the tow was under the circumstances in reasonably good condition.

The plaintiff towed her with the tug Atlantic some time before the contract litigated here was entered into from Port Hawkesbury to Portland, Maine, a distance of 345 miles, taking 13 days.

I have the testimony of the captain of that tug who performed the service, that on that trip she pitched, rolled, and sheered badly. When the plaintiff made his contract on September 14 he evidently knew all about the kind of tow he would have and made his charge accordingly.

I also decide that the plaintiff should not have undertaken to carry freight from Halifax to Boston and from Boston to Halifax and from Halifax to Quebec, and hold him liable for all delays in consequence.

If the tug required ballast to fit her for her work it should have been put in and left there till the contract was completed. The tug arrived in Boston on Tuesday, September 19, at 11.30 a.m., and left for Cape Cod on September 21 at 6.30 a.m. The two days in Boston were fine and the only business was to replenish with coal and water for which one day would have been ample. I must conclude that the other day was spent in unloading and perhaps

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selling cargo, and taking on new cargo. I will deduct from the claim $75, being 1 day's charge.

She left Halifax on September 28 at 10 p.m. after being there over a day and a half and arrived at Port Hastings September 30 at 12.30 a.m. Capt. Paysant, the captain of the tug, states in his evidence that he called at Port Hastings for water. Port Hastings is only a few hours steam from Georgetown and about a day from Charlottetown. It only took him 1 day, 14 hours and 30 minutes, to reach Port Hastings from Halifax. He also stated, and that after careful consideration, that he could run 3 days without requiring to replenish his water supply, and that he carried 16 tons of coal, enough for 8 or 9 days. He had tank capacity for 500 gallons of water. There was no necessity for his going to Port Hastings for water. That was not performing the contract expeditiously. Besides, shortness of water is the reason he gave for being obliged to put into Charlottetown on October 4, although it was only 1 day and 4 hours since he had taken on water at Port Hastings. He said there was delay at Port Hastings on account of weather and wind, although his entry in his log states that the wind was southeast, thick, rainy. The wind was quite favourable for either Georgetown or Charlottetown. There was no mention in the log of the wind being high, and if the weather was rainy and thick that would be no obstacle to further progress unless there was a fog which he does not claim, nor does he state when or how long after he arrived it became rainy and thick; evidently not when he went in, because he gives in his evidence, as the cause of his doing so, the need of getting water. But he should have got a supply for at least 3 days at Halifax, and that would have easily carried him to Charlottetown. He further stated he was putting coal in the bunkers at Port Hastings, although, according to his own evidence, he could have taken on enough at Halifax for 8 or 9 days' use. When he was referred by counsel to the wind being favourable for a passage to Charlottetown, he said that it was liable to change any minute, and that that was the reason he remained there, because as he stated the wind was liable to change any moment "we remained there and drift us back to Port Hastings." I will have to deduct

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from the plaintiff's claim the 3 days lost around Port Hastings.

The captain of the tug remained in Charlottetown from the 4th until the 25th of October with the exception of two abortive attempts made to proceed on the voyage.

I may state here that I am not all satisfied with his evidence and the manner in which he gave it, and the record of his trip in the log book kept by him bears a somewhat suspicious appearance. He stated in his evidence that 4 miles an hour was a fairly strong breeze and that 6 miles an hour would be a strong breeze, that 6 miles an hour would be a moderate gale and 12 or 14 miles an hour would be a real gale. He also stated that the did not know of any great reason why he didn't proceed upon the trip on the evening of October 7, that the wind did not prevent him doing so.

On October 9 he stated that he had 12 hours wind astern which was favourable to his going and that he could have got up the straits 48 miles in those 12 hours if he had proceeded on his journey on that day but didn't go.

This captain was a man of some experience. He has held a master's certificate for 4 years and has had experience at sea since he was 14 years old. I am satisfied from the evidence that he failed to perform expeditiously the contract undertaken, and that the delays in Charlottetown were unjustifiable and for that reason and because the cold weather was approaching when it would be impossible to complete the towage to Quebec except at great risk both of life and property, Capt. Stephenson of the "Santa Maria" was justified in discharging the tug and laying up the tow for the winter. I am of opinion that if the tug had done her duty the contract would likely have been completed in good time and that the many days unwarrantable delays that occurred prevented such completion.

The plaintiff made an absolute and unqualified contract to tow the "Santa Maria" from Cape Cod to Quebec and was receiving good pay for the service. The contract could, I believe, have been completed, if energy, efficiency, courage, and proper expedition had been used by the tug. It should have been completed within a reasonable time. The distance given was about 1,100 miles and the estimate

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made by the plaintiff and given to Capt. Stephenson for the performance of the tow was with favourable weather 17 days. It could never have been completed by following the course which the captain of the tug took during the time he was in and about Charlottetown and Port Hastings. The defaults on the part of the tug were such as to defeat the purpose of the contract and so put an end to it.

The plaintiff has only a right to recover compensation for what he has done.

A part of the consideration was to be paid before the entire service was to be performed and a certain portion was to be paid on the completion of the contract, I mean for the days it would take the tug to return to Halifax after completing the voyage to Quebec. This rendered the service *pro tanto* a condition precedent and as this service is not completed by reason of the default and breach of the plaintiff it cannot recover for the four days claimed for the return to Halifax.

The plaintiff has already been paid $1,009.60. I will allow the plaintiff for 12 days while his tug was in Charlottetown. I allow for the days subsequent to the discharge of the tug on October 21. I have deducted 5 days from the time spent in Charlottetown previous thereto because I am satisfied that, on the evidence of the captain himself, he could have proceeded with his tow on these days.

I find that the plaintiff is entitled to recover in this action the sum of $940.40 in respect of his claim together with costs, and I condemn the ship "Santa Maria," her sails, apparel, dunnage and equipment, and other artcles of value on board, including the Columbus relics, in the said sum and in costs; and declare that the plaintiff has had and still has a valid lien and charge on the said ship, her sails, articles and equipment for the said sum and costs, since her arrest under the warrant issued in this suit, and I order that in default of payment of the said sum and costs, the said ship, her sails, apparel, equipment and other articles on board thereof be sold by public auction by the marshal of this Court, and the proceeds thereof paid into Court to abide the further order of the Court.

Judgment for plaintiff.

1916
Feb. 25

BRITISH COLUMBIA ADMIRALTY DISTRICT.

MORRISETTE

v.

THE SHIP "MAGGIE."

Seamen—Fishermen—Lien for "lay" wages.

Persons employed on a small launch on a salmon fishing "lay" and performing work thereon in the double capacity of sailors and fishermen, though most of their time is occupied in fishing and though not having any sleeping quarters on board the vessel, are nevertheless "seamen" and entitled to their maritime lien for seamen's wages; but the lien will not attach if the use of the vessel is no part of the agreement on which the "lay" is based and merely allowed by the owner as a matter of convenience.

Swinehammer v. Sawler, 27 N.S.R. 448, followed; *Farrell v. The "White,"* 20 B.C.R. 576, referred to.

ACTION to enforce seamen's liens for wages.

Tried by Martin, L.J., at Vancouver, B.C., February 23, 1916.

Wintemute, for plaintiffs.

Brydone-Jack, for defendant.

MARTIN, L.J. (February 25, 1916) delivered judgment.

These are consolidated actions by Chief Julius, an Indian, of Sechelt, and his two sons for $726.50 for seamen's and fishermen's wages, to answer which the gasoline fishing boat "Maggie" has been arrested. The wages are claimed on a salmon fishing lay of the three Indians and one H. J. Cook whereby it is alleged that the four men were to work on a lay with George Bampton who was to furnish the said launch and fishing gear and skiff, and after deducting the expenses of provisioning and running the boat the proceeds were to be divided between all parties as follows: two shares to Bampton and one share to each of the four other, based upon the following prices for various kinds of salmon, *viz*, 25 cents for cohoes, 5 cents for dogs, 3 cents for humpbacks and 40 cents for sock-eyes, which fish were to be sold

to Sherman's cannery by George Bampton and a settlement made at the end of the fishing season, which ended with the closing of the cannery on September 16. Cook also joined in the action but at the trial it was announced that he had withdrawn his claim.

This subject of seamen's wages in the form of a lay has recently been considered by this Court in *Farrell* v. *The "White*[1]," a whale fishing case, and I have nothing to add to that decision except to say that it is in general accordance with the decision of the Supreme Court of Nova Scotia *en banc* in *Swinehammer* v. *Sawler*[2]. That case was cited in answer to the contention on behalf of the owner of the "Maggie" that on the facts here the three Indians were fishermen only and therefore could not have a seaman's lien. But I am of the opinion that upon the evidence before me it must be held that each of the four lay men not only fished but took part in the working of the boat as a seaman, *e.g.*, in steering, or tending her, while fishing or taking on or discharging her cargo of fish, or cleaning her as occasion arose, or as was otherwise necessary, though most of their time was occupied in fishing, and they did not sleep on board of her but on the shore or in the Indians' rancherie near by. Much stress was laid by the defendant upon this fact of not sleeping on the vessel, but that, while important, is not the sole or true test of the capacity in which men are acting on or about a vessel either temporarily, as *e.g.* in the case of seamen camped for weeks on an island trying to salve their stranded ship from an adjacent reef, or permanently, as *e.g.* in the case of a crew of a river bot or ferry which ran only in the day time and had insufficient sleeping accommodation for all her crew. It is only a question of degree, the principle is the same in the case of mariners on a big ship on a long whaling lay or a small launch on a short salmon lay. Such being the facts, the *Swinehammer* case above cited decides that where one is "employed in the double capacity of sailor and fisherman (he is) therefore clearly a seaman under the definition given in the sub-section"—now sub-sec. (*g*) of sec. 126 of the Canada Shipping Act, R.S.C. ch. 113, and *cf.* the definition of "ship" in sec. 2 (*d*), and also sec. 294 recognizing "contracts for wages by

[1] 20 B.C.R. 576.

[2] 27 N.S.R. 448.

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the voyage or by the run or by the share." It would follow, therefore, in the absence of other objection, that these Indian seamen would be entitled to their maritime lien.

But two further objections are raised to their right to recover; first, that under this lay there was to be no payment till after the proceed had been received by George Bampton from the cannery; and second, that William Bampton, brother of George, was the owner of the "Maggie," on board of which he lived, and was also one of the lay men and as such allowed it to be used as a matter of personal convenience to himself and mere favour and friendly assistance to the others as his mates and fellow lay men, and therefore there could be no lien upon it as the use of it was *dehors* the contract with George Bampton who, it was alleged, did not agree to furnish the launch but merely the gear, skiffs, etc.

With respect to the first, it is to be noted that, as alleged, this is a different lay, in this particular, from that in *Farrell* v. *The "White"*, *supra*, wherein the wages were to be paid monthly, and according to the plaintiff's contention it is like that in *Swinehammer's* case, wherein they were to be paid on delivery to the market. But I must say I have much doubt on the point as to exactly what the lay was, the evidence being far from clear in several respects (particularly the price that was to be obtained from the cannery) and I think it better not to go into it fully now, because there are other similar claims to be tried in regard to two other fishing launches arrested in this action, the "Eva" and the "Echo." There is, however, something appreciable at least to support the defendant's contention that George Bampton was not to pay the claimants till he had been paid by the cannery, of which essential condition precedent no satisfactory evidence has been given, but as I have come to a clear decision on the second objection I do not, for the reasons above indicated, decide this point, as it is unnecessary. Then, as to the second objection, I find, as a fact, to put it briefly, after a careful consideration of the conflicting and unsatisfactory evidence, on both sides, that the plaintiffs have not discharged the onus cast upon them to prove that the use of the "Maggie" was part of the agreement on which the lay is based, and I am forced to the conclusion that, on the evidence, she must be held to be

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Reasons for Judgment.

the property of William Bampton and to have been used by him personally, apart from the lay agreement, in the manner contended for, and therefore she is not subject to the lien from which she is hereby discharged, and also released from arrest, and the action as regards the claim of the three Indians and Cook is dismissed with costs.

Action dismissed.

1916
March 22

BRITISH COLUMBIA ADMIRALTY DISTRICT.

MORRISETTE

v.

THE SHIP "MAGGIE."

(No. 2.)

Seamen—Fishermen—Lien for "lay" wages—Costs—Consolidation of actions.

Where a number of seamen, by consolidation, join in one action their individual claims for wages agasint the owner of one or more ships engaged in a common enterprise with resulting liens on different ships, each claimant is not thereby liable for costs consequent upon the failure of another claimant to establish a specific lien not set up by the former, but the costs in each case is awarded according to the discretion conferred by r. 132 (B.C.).

MARTIN, L. J. (March 22, 1916).—This is a reference by the registrar and solicitors arising out of the taxation of costs after the judgment delivered on February 25, last.[1] Nine plaintiffs joined in one consolidated action for wages alleged to be due to them by George Bampton on a fishing lay in connection with the gasoline fishing boats "Maggie," "Eva," and "Echo," and the "Maggie" was arrested under a separate warrant, issued at the instance of their joint solicitor, founded solely on an affidavit of Thomas Julius, one of the plaintiffs, claiming a lien for $281.25 for his wages. By the indorsement of claim on the writ it clearly appears that only four of the plaintiffs, *viz.*: Chief Julius and his two sons, Thomas and Patrick, and Henry James Cook, set up any claim against the "Maggie," the others "respectively" claiming against the "Eva" and the 'Echo." The various groups of claims against the respective vessels are properly segregated and alleged as being due to the respective laymen while operating the ship "Maggie," or "Eva," or as the case may be. George Bampton entered an appearance and denied that he was the owner of the "Maggie." His brother William Bampton claimed to be her owner, and was added as a defendant by consent

[1] Ante p. 494.

and appeared by separate solicitor in order to support his claim.

The action as regards the four claims for a lien upon the "Maggie" came on for trial on February 28 and it resulted in favour of William Bampton, he being declared to be the owner thereof and she was declared free from any lien and released from arrest. On my reasons for judgment it was ordered that "the action as against the claim of the three "Indians and Cook is dismissed with costs," which left the claims of the other plaintiffs against the other vessels open for future trial, as well as the claims of the present four plaintiffs against George Bampton. The formal judgment, when first submitted to me for approval, to see that it was in accord with my judgment, was marked "approved" by the solicitors, and, after setting out the full style of cause including the nine plaintiffs, read thus:—

"The Judge having heard the plaintiffs, Chief Julius, "Thomas Julius, Patrick Julius and Henry James Cook, "the witnesses on their behalf, and their counsel, and Wil- "liam Bampton, and the witnesses on his behalf, and his "counsel dismissed the action as against William Bampton "and the ship "Maggie," and set aside the arrest of the "ship "Maggie," and directed that the said ship "Maggie" "be released forthwith."

I approved this order, but later the solicitor for William Bampton applied to me, on the 9th instant, just as I was leaving the Law Courts to return to Victoria and pointed out that by an oversight the direction as to costs given in my reasons had been omitted so I added the words "and condemned the plaintiffs in costs." On taxation of costs it was urged that these words extended to the other five plaintiffs named as such in the writ and warrant in addition to those recited in the said judgment as having been concerned in the trial against the "Maggie," This contention, im my opinion, cannot be supported in the circumstances of this case, whatever might be the result in other consolidated actions where general and undefined claims are set up and persisted in by consolidated plaintiffs as a whole. From the very beginning the liens claimed against the various vessels were clearly distinguished and at no time upon the record was the "Maggie" alleged to be liable for any

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MORRISETTE v. THE SHIP "MAGGIE". (No. 2)

Reasons for Judgment.

liens except those of the four plaintiffs, and it was their claim alone against her that was in issue and adjudicated upon at the trial. Therefore it follows that they alone should be answerable for the failure of their claims and having regard to the issues, trial and context they are "the plaintiffs" who are referred to in my said addition to the judgment as being condemned in costs. This is the real "result," mentioned in r. 132, so far as they are concerned. There is, moreover, no hardship in this because if these four plaintiffs had brought this action apart from the other claimants the result would have placed the successful defendant William Bampton in no better and no worse position as regards the recovery of costs than he is now. It was quite proper, as well as convenient, to have consolidated all these claims according to the practice of this Court referred to in the judgment in *Cowan* v. *The "St.Alice,"*[1] for by so doing considerable costs might have been saved (and indeed may be so yet, as regards the other pending claims) and in any event no additional costs would have been incurred; the various parties would have been and can be protected in this respect on taxation by a proper apportionment.

The point, in principle, and put briefly, is that merely because various seamen take advantage of the said convenient practice to join in one action their individual claims for wages against the owner of one or more ships engaged in a common enterprise with resulting liens on different ships, it does not follow that each claimant is liable for costs consequent upon the failure of another claimant to establish a specific lien which the former never set up. The costs in each case would be awarded according to the discretion conferred by said r. 132. To reverse the present position; if the four plaintiffs who alone participated in the trial of this particular lien had been successful, I should not have felt justified in also awarding costs to the other five plaintiffs who were not concerned, and took no part therein, and could derive no benefit therefrom.

The result is that the submission of the four plaintiffs is upheld and they are entitled to set off any costs occasioned by this controversy.

Judgment accordingly.

[1] 21 B.C.R. 540, at 544.

BRITISH COLUMBIA ADMIRALTY DISTRICT.

1916
March 23

DONKIN CREEDEN, LTD.,

v.

S.S. "CHICAGO MARU" (No. 1).

Depositions—De bene esse—Use of interpreter.

APPEAL from the ruling of the registrar as to the employment of an interpreter upon an examination *de bene esse* of Keichi Hori, the Japanese master of the steamship Chicago Maru. The registrar ruled that if the witness said he understood the questions that were put to him in English then he should answer in that language, and as he said he did understand them the services of the interpreter were not necessary.

Robert Smith, for plaintiffs; *Mayers*, for defendant.

MARTIN, L. J. (March 23, 1916) delivered judgment.

It depends upon a question of fact as to whether or no an interpreter should be employed, and that fact is—does the witness possess a sufficient knowledge of the language to really understand and answer the questions put to him, whatever the witnesses' opinion may be? There is no one so well able to determine that question as the tribunal before which the witness is being examined, and I should hesitate long before I felt justified in disturbing such a determination, and in the present case no justification exists. But, as it is often not an easy matter to determine it, and as the question has come up before in this Court, it is desirable to point out for future guidance the course pursued in *Parratt et al* v. *Notre Dame d'Arvor*,[1] (though not reported on that point), where on the trial I finally directed that the French master of a ship should be examined through an

[1] 16 B.C.R. 381; 13 Can. Ex. 456.

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DONKIN CREEDEN v. S.S. "CHICAGO MARU." (No. 1)

Reasons for Judgment.

interpreter, after his examination had been conducted for some considerable time in English, because it became apparent to me, from my knowledge of the French language and otherwise, that he did not possess a requisite knowledge of English to warrant the conduct of his examination in that language. It would, of course, be open to the registrar, in determining the question, to call to his assistance, for example, the statement of the sworn interpreter as to the witness's knowledge, where the registrar's own knowledge of the foreign language was insufficient to enable him to decide the question. As a word of warning, I add that objection to the use of an interpreter should not be lightly taken because the result might be that the value of the testimony would be later much reduced, or otherwise rendered unsatisfactory by the introduction of an element of uncertainty. Each party is in strictness entitled to an interpreter—*Rex* v. *Walker*,[1] wherein will also be found observations upon the competency of interpreters and their selection.

Appeal dismissed.

[1] 15 B.C.R. 100 at 124–6.

BRITISH COLUMBIA ADMIRALTY DISTRICT.

1916
Nov. 24

DONKIN CREEDEN LTD.,

V.

S.S. "CHICAGO MARU." (No. 2).

Shipping—Damage to cargo—Ventilation—"Accident of the seas."

A ship properly equipped for ventilation is not liable for damage to a cargo of grain by over heating caused by decreasing the ventilation during inclement weather when good seamanship made that necessary; the damage was an "accident of the seas" within the meaning of the bill of lading.

The Thrunscoe, [1897] P. 301, followed.

ACTION for damages to a cargo of grain.

Tried before Martin, L.J., at Vancouver, B.C., March 29, 30 and July 6, 1916.

S.S. Taylor, K.C., for plaintiff; *Bodwell*, K.C., and *Mayers*, for defendant.

MARTIN, L. J. (November 24, 1916) delivered judgment.

This is an action to recover the sum of $1,793.10 for damages to a consignment of 1,112 bags of Manchurian maize shipped on or about March 30, 1915, by the Japanese S.S. "Chicago Maru," owned by the Osaka Shoson Kaisha, ((*i.e.* the Osaka Mercantile S.S. Co.), from Kobe to Vancouver. Upon arrival, on or about April 21, 1915, in Vancouver, *via* Victoria, B.C., and Seattle, U.S.A., it was discovered that 957 of the bags were in a damaged condition, being badly heated and mouldy and they had to be sold at a low price in consequence. In the plaintiffs' particulars it is alleged that "the cause of the deterioration of the cargo was the improper stowage of the same, causing insufficient ventilation." Other questions were discussed, but as this is the principal one I shall first address myself to it.

The total number of 1,112 bags were "shipped in apparent good order and condition" at Kobe as the defendant's bill

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of lading recites, and were stowed as shewn by the ship's stowage plan, in two separate loss: a small one of 155 bags at the bottom of No. 2 hold, fairly well forward, which suffered no damage, and a large one of 957 at the stern in No. 5 hold. This is deposed to be the best place on the ship because it is far from the engines and has the side of the ship on each side (as shewn on the blue print, ex. 6) and is on top of the tunnel recess and opens forward towards No. 5 'tween deck hatch. This hatch is ventilated with four ventilators, two on each side, *i.e* , two in the fore and two in the after part, which go through the 'tween decks. The cargo was loaded under the superintendence of the chief officer, who is now employed on another ship and is not available as a witness. The master, Keichi Hori, has no personal knowledge of the actual stowage of this cargo and deposed only as to the general custom of the ship. He said there were additional wood ventilators on board at the time, but could not speak as to their use on this occasion, though they were used when the ship had a full cargo of maize, or in hot climates, but there was no necessity for them in the North Pacific ordinarily. According to the evidence of John H. Ryan, the supercargo, who superintended the unloading of the cargo at Vancouver, he is positive he saw at least one set of these wooden ventilators on either side of the ship, stowed fore and aft, at the place in question, which would beyond all doubt afford sufficient ventilation. In some respects his evidence lacked particularity, but not in and this, and I do not feel justified in disregarding it. In bad weather the outer ventilators would be closed, the master testifies, and as a matter of precaution they were supposed to be always closed in the evening. The master could not say exactly how often they were closed on this voyage, but he could remember doing so "about two or three times."

In his examination *de bene esse* the master describes the voyage as "not so rough. . . Just the kind of trip I would expect," which means what would be expected at that season in those latitudes by a skilled mariner. Undoubtedly some exceptionally heavy weather was encountered at one part of the voyage as appears by the log and the protest made at Seattle on April 21, 1915, put in by the plaintiff, *viz.*: on the 5th, 6th, 8th, and 9th of April,

on which last day, after the wind force reached the maximum, 10, at midnight on the 8th, and so continued for four hours, "the sea became much higher than the ship ever experienced," though this was her 24th voyage east. The log at midnight of the 8th records, "whole gale and ugly weather, high sea causing ship to labour and strain. Shipping much water constantly and flooded at times;" and at 4 a.m. on the 9th: "Heavy seas washing over all constantly." The "rough sea" continued, the log states, up to 8 p.m. of the 9th, after which it abated for a short time, but recurred at midnight of the 9th, and prevailed on the following day gained (on Eastward voyages) of the same date, and after being fine most of the 10th, began to be rough in the evening of that day, continuing till the evening on the 11th and afternoon of the 12th (when "shipping much water at times" is noted) and midnight, and 4 a.m. and noon and afternoon on the 13th; and again most of the 14th, after which moderate seas prevailed till the arrival at Victoria on April 17.

The ship sailed from Kobe on April 1, and it is noted, in the log on April 3, 8 a.m., "Opened all hatches and ventilator cover(s) for ventilation," and 8 p.m., "Left the hatches open through the night." On April 5, at 6 a.m., "Put all hatches (on) as taking spray on deck." On the 7th, at 8 a.m., "Opened all hatches;" on the 8th, at noon, "Shut all hatches." On the 10th, at 6 a.m., "Opened all hatches for ventilation;" on the 12th, at 9 a.m., "Shut all hatches." These are the only entries relating to ventilation which I can find after a careful perusal of the log throughout the whole voyage, from which it clearly appears that there must have been many occasions which required the shutting of the hatches and covering the ventilators, with canvas covers, and appropriate action must have been taken thereon from time to time by the watch officer all of which would not necessarily be entered in the log.

After a careful consideration of the whole evidence I can only come to the conclusion that the cargo was properly stowed, and that the system of ventilation was sufficient for ordinary purposes, and that the heating of the maize, assuming it to have been in real and not merely "apparent good order and condition" when shipped was caused by

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the stoppage of ventilation which, as a matter of good seamanship, was a matter of necessity imposed by the state of the weather. This brings the case within the exception "accidents of the seas" contained in the bill of lading according to the decision in *The Thrunscoe*,[1] wherein a certain portion of the cargo, oats and maize in bulk, stowed low down in the centre of the ship and nearest to the engine had been damaged owing to the interruption, during a storm, of the ventilation which was otherwise sufficient, and it was held that the ship was not liable in such circumstances. And it was later and further held in *Rowson* v. *Atlantic Transport Co.*,[2] that the Harter Act (1893, 52nd Congress Sess. 2, ch. 105, invoked herein, under cl. 21 of the bill of lading) did not apply where the ship was "in all respects seaworthy and properly manned, equipped and supplied," as I find this ship to be.

It therefore becomes unnecessary to consider the other questions raised; such as that relating to the real condition of the maize when shipped at Kobe, and I shall only observe in regard to this that the master, whose evidence was relied upon by the plaintiff, had, it was clear, practically no personal knowledge thereof, the shipment having been left to the superintendence of the chief officer, who is not available, as already noted; and even when the bags arrived at Vancouver the damage was not apparent outwardly. The meaning of such statements in bills of lading as "shipped in good order and well conditioned," and "weight and contents unknown" (which are also to be found in this bill of lading) "and apparent good order," had been considered in *e.g.*, *The Peter der Grosse*[3] and *Crawford* v. *Allan Line S.S. Co.*,[4] to which I refer.

Action dismissed.

[1] [1897] P. 301.
[2] [1903] 2 K.B. 666.
[3] (1875), 1 P.D. 414.
[4] [1912] A.C. 130.

THE ALSOP PROCESS COMPANY OF CANADA, LIMITED.....PLAINTIFFS; 1917 June 7

AND

J.P. FRIESEN & SON.....DEFENDANTS.

Patents—Process patent—Importation—Claims and specifications considered.

The importation of apparatus to carry out a process patent is not within the prohibition of the Canada Patent Act (R.S.C. 1906, ch. 69, sec. 38). An attack on a patent on the ground of illegal importation may be made by way of defence.

Held also that a patent for a device used in the process of ageing, conditioning and bleaching flour was not invalid on the ground of prior invention or insufficiency of the specifications; nor was the process in violation of the Adulteration Act (R.S.C. 1906, c. 133, s. 3) or the Inspection and Sale Act (R.S.C. 1906, c. 85, s. 176.)

STATEMENT OF CLAIM filed on behalf of the plaintiff against the defendants, claiming an injunction to restrain the defendants, from infringing the letters patent sued upon and for damages.

Case tried at Ottawa, April 17, 18, 19, 20, 1917, before the Honourable MR. JUSTICE CASSELS.

R. McKay, K.C., and *Gideon Grant*, for plaintiff.

F. B. Fetherstonhaugh, K.C., and *Russell S. Smart*, for defendants.

CASSELS, J. (June 7, 1917) delivered judgment.

The action came on for trial before me at Toronto on April 17, and following days. The letters patent in question sued upon, is a patent dated May 20, 1902, N. 75,953. The plaintiff is the assignee of this patent.

At the trial the following admission was filed:—

"The following facts and matters are admitted and are "to be considered as if proved in the usual way by com- "petent *viva voce* evidence given at trial:

"(a) That if there is any invention described in the "said letters patent No. 75,953, which is not admitted by

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"the defendants, but denied, and if the said invention is "new, which is also not admitted by the defendants, but "denied, then said invention was made by John Andrews "and Sidney Andrews.

"(b) That the allegations as to title contained in "par. 5 of the statement of claim are as therein stated.

"(c) The defendants, since the issue of the said patent "No. 75,953, and prior to the issue of the writ in this action, "installed and had in operation at their mill at Gretna, "Manitoba, a bleaching device or machine, and shown in "Canadian Patent No. 104,114, granted on March 12, 1907, "to one McNorgan, which device or machine is used in the "process of ageing, conditioning, and bleaching flour accord-"ing to the specifications and claims of plaintiff's Canadian "Patent No. 75,953."

The specification of the patent in question, except as to the claims, is identical with the specification of the English patent granted to John Andrews and Sidney Andrews in England.

The claims of the patent in question differ in one respect from the English patent. The English patent not merely is a patent granted for the process, but there is also a grant for the machine used in carrying out process.

The Canadian patent is limited to a patent for the process merely.

As I have mentioned, the specifications of the Canadian patent, with the exception of the claims which I will have to deal with later on, are identical with the specifications of the English patent; and the claim No. 3 of the specification of the Canadian patent is identical with claim No. 2 of the English patent, in respect to which the extended litigation in England took place. I will have to refer to these English decisions.

It will be well to note that the patentee in the Canadian patent has brought himself within what are termed the licensing clauses of the Patent Act, R.S.C. 1906.

The patent is one for the process of bleaching flour. It is unnecessary for me to analyze minutely the specifications of the patent, as this has been fully gone into in the various English decisions to which I am about to refer. It would simply mean recopying the language of the various Judges

who have carefully analyzed the specifications and explained the legal meaning thereof.

The first case, which may be called the revocation case, was tried before Kekewich, J., on March 1, 2, 6, 7. 8, 13, 14, 15 and 16, 1906, and is styled "In the Matter of Andrews' Patent." A full report of this case is to be found in 23 R.P.C. 441.

A very strenuous attack was made against the patent. Very full arguments by very able counsel, and a very exhaustive judgment was given by Kekewich, J. That Judge deals very fully with the meaning of the specification. He appears to have given a broader meaning to the specification than was intended.

Construing the specification in the manner in which the Judge construed it, he came to the conclusion that the invention in question was disclosed in a previous patent granted to one Frichot, No. 21,971, of 1898, and that the patent is bad and must be revoked.

An appeal was taken from this judgment to the Court of Appeal in England, and a very lengthy argument took place before Vaughan Williams, Farrell and Buckley, L.JJ. The argument lasted for 9 days, ending on March 26, 1907, and again their Lordships dealt exhaustively with the question as to the meaning of the specifications. Their Lordships took a different view from that taken by Kekewich, J., as to the proper construction to be placed upon the specification, and came to the conclusion that Frichot's patent referred to was not an anticipation of the Andrews' patent and the judgment of Kekewich, J., was reversed, and the validity of the patent sustained. Infringement having been admitted, judgment was pronounced in favour of the patentee.

The defendants being dissatisfied with the judgment of the Court of Appeal, appealed to the House of Lords, and this appeal which occupied five days, terminating April 7, 1908, was dismissed with costs. It is reported in 25 R.P.C. 477. Counsel appearing were very prominent at the bar, and particularly versed in patent law. In this latter appeal to the House of Lords the meaning of the specifications was fully dealt with, the House of Lords coming to the same conclusion as the Judges in appeal.

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Prior to the decision of the House of Lords, an action was brought by *Flour Oxidizing Co. Ltd.* v. *Carr & Co. Ltd.*,[1] This action was tried before Parker, J., on January 20, 21, 22, 23, 24, 27, 28, and 30, and February 1 and 22, 1908. New evidence was adduced, and certain further anticipations were relied upon. The case was elaborately argued by very prominent counsel, and an exhaustive judgment was delivered by Parker, J., upholding the patent. One would have thought after these various decisions that acquiescence in the validity of the patent might have been looked for, but a further contest took place before Warrington, J., in the case of *Flour Oxidizing Co. Ltd.* v. *Hutchinson*. A lengthy trial took place lasting 22 days ending on April 28, 1909.[2] Further anticipations were produced and elaborate arguments from eminent counsel were heard, and judgment was pronounced in favour of the validity of the patent.

The reasons for judgment of Warrington, J., are voluminous and deal with the nature of the invention. A perusal of these authorities will show the views of the Judges in England, as to the construction to be placed upon the specification.

While the defendants in the present case may not be technically bound by the decisions in the cases to which I have referred, except as to questions of law, it would require a strong argument to induce me to come to a different view as to the construction of the specifications from that held by the House of Lords and these eminent Judges.

The evidence for the defence, and the arguments against the validity of the patent with two exceptions are practically the same as that given in the English cases. I find it difficult to see how the various letters patent referred to before me can possibly be treated as anticipations if the Frichot patent previously referred to was not an anticipation.

Parker, J., in his judgment referred to, at pages 458 and 459, deals with the question as to prior anticipations and what prior patents should show.

Dr. Milton Lewis Hersey, who is an analytical and consulting chemist, and whose qualifications are detailed in his

[1] 25 R.P.C. 428. [2] 26 R.P.C. 597.

evidence, was called on the part of the defendants, and he admits in his evidence that no single patent relied upon discloses the whole invention. He singles out parts from each patent as showing a portion of the invention claimed, but admits that no patent covers the whole thing. He puts it in this way. I stated to him "if you take these patents "(referring to the patents produced on behalf of the de-"fendants) up to the present time, each one describes a pro-"cess for a purpose said to be accomplished by the patentee; "none of them describes the particular process said to be "accomplished by the patentee; none of them describes "the particular process set out in Andrews' patent. (He "stated)—No one patent covers the whole thing through-"out."

On his cross-examination he is examined in detail as to each of the patents produced by the defendants relied upon as destroying the patent, and it would seem that, according to the views held by the English Courts, and according to my view of what is clear patent law, no one of these patents anticipates the patent in question.

In the case before Warrington, J., Hands, Fox, Johnston, Byrne, Bay, Hogarth and Frichot, were all dwelt upon. All of these 7 patents are the ones relied upon in the present case. The defendants in the case before me produced 9 patents of which 7 of them are the ones referred to in the particulars before Warrington, J. I think the evidence of Mr. Werner, given on behalf of the defendants, correctly distinguishes these various alleged anticipations from the patented invention of Andrews'. It is common knowledge that in most patented inventions for combinations, each element in the combination may be old; in fact in most cases this is admittedly the case, but while each element may be old, to bring them together in combination is the invention, and it is clear law that a combination of old elements, if it produces a new and beneficial result, and is not anticipated, is the valid subject matter of a patent. It has been so held by the House of Lords, and is almost elementary law in patent cases.

In my view of the case, the defendants have utterly failed to impeach the validity of the Andrews' patent on the ground of prior invention. The proof before me in favour

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of the defendants' contention is weaker than that before the English Courts.

The defendants contend that the patent is void because the specification does not in detail show the quantity of the nitrous gases required in the process. This would be a question of evidence whether a man skilled in the art could ascertain it. The point was raised in all of the English cases, and has been determined in favour of the patentee: and the defendants in the case before me adduce no evidence of any skilled miller to show that there was any difficulty in this respect.

A further point was argued by Mr. Fetherstonhaugh that the patent should be avoided because it enabled the patentee to pass off a low grade flour for a high grade flour. I think there is nothing in this contention. His own client, Mr. Friesen, puts it in this way:—"Q. Does this bleaching pro-"cess bring the low grade flour to the same appearance as "the high grade? A. No, but it improves it in appearance "a good deal. Q. But anyone would know it was a low "grade flour? A. Yes. Q. No matter whether it was "bleached or not? A. Yes.

It is also contended on the part of the defendants that the flour put through the Andrews' process becomes dangerous to health by reason of the nitrites left in the flour after the process. I think the defendants fail on this point. Their main witness, Dr. Charles F. Saunders (I give him precedence over Dr. Wiley who, while possessing a world-wide authority in matters of dietetics, gave evidence of little or no importance, so far as the questions at issue before me are concerned) is the Dominion Cerealist. He explained his duties as being in regard to the protection and testing of the different varieties of grain, as to their suitability for the very purposes for which they are intended. He details his qualifications and his titles. I may state that the flour while being treated by the particular process, is only in contact with the gas for about 11 seconds. Dr. Saunders was called as a witness for the defence. He is asked this question:—"Q. It is alleged that one advantage of this "process is that you can utilize the bleached flour imme-"diately, whereas the other you have to keep it two or three "months before it can be used?"

His answer is:—"A. So far as colour is concerned I think "that is correct."

He further states:—"From the commercial point of view "the baking-qualities are improved in regard to colour, but "not otherwise."

And on cross-examination he is asked:—"Q. That is to "say, the product as a whole when baked and handed to "the public would be regarded by the man receiving it as "as improved product? A. Yes, the average man."

He also testifies that a loaf baked from this flour "would "be a much more presentable loaf than if it had not been "bleached." He was also asked the following question:— "Q. I understand that you did consider very carefully the "question as to the use of the artificial bleaching process, "and that your conclusions were stated at least once that "I know of, that in your view at any rate so far as the "colour, the flour was improved?"

He answers:—"A. Not in my personal view, but in the "commercial view. I would not prefer it, but the public "would as a whole, provided they didn't know how it was "done."

He is asked the question in view of the contention that the object of the invention is illicit.

"Q. Then your view was that there was no harmful result "at all from it (referring to the process)? A. I couldn't "say that there was any harm in regard to anything left in "the flour. Q. It is also said that good breadmaking flours "are not lowered when they are bleached? A. That is "true. Q. And there is no amount of nitrites left or any- "thing of that kind, from a food standpoint? A. That is "my view."

Dr. McGill is the Chief Analyst of the Inland Revenue Department at Ottawa. He is also called on the part of the defendants. This last witness seems to have procured an order in Council requiring bleached flour, which contains a greater quantity of nitrites than that defined, to be marked as bleached flour, but the percentage is, as I understand, in the Andrews' process less than that defined in the order in council. Counsel undertook to furnish a copy of this order in council, but have not done so, as I am informed.

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Mr. McGill states:—"My recommendations to the de-"partment which resulted in the order in council, were "based upon the assumption that oxides of nitrogen, if they "remained in the flour, were highly objectionable material."

He is asked the question:—"Q. Assuming that these "people using the bleaching process complied with those "directions, it would be all right, would it? A. Provided "that no excess of poisonous oxides of nitrogen remain in "the flour. My recommendations were based on the con-"clusion that the changes in the flour itself were without "injury to health. Q. If they keep within your standard "it is all right? A. Yes. Anything beyond that would "be dangerous. Q. That is because the bleached flour would "be likely to absorb more; but if they keep within the "standard and bleach it, there is no harm? A. Quite so."

I think it clear that the invention is a valuable invention. I think it clearly proved that the bleached flour is in no way harmful; and, I think this is proved by the defendants' own witnesses, to whose evidence I have referred. It has been very extensively used, and it has been a commercial success. It enables the flour to be used immediately instead of having to keep it for 2 or 3 months in order to age it before it can be placed upon the market. This, of itself, is a matter of considerable importance from a commercial point of view.

I do not think the Adulteration Act, R.S.C. 1906, ch. 133, relied upon by Mr. Fetherstonhaugh, has any application. Sec. 3 is as follows:—

"Food shall be deemed to be adulterated within the mean-"ing of this act—

"(*a*) If any substance had been mixed with it so as to "reduce or lower or injuriously affect its quality or strength."

The evidence before me makes it quite clear that nothing of the sort happens by reason of this bleaching process.

"(*f*) if it contains any added poisonous ingredient or any "ingredient which may render such an article injurious to "the health of persons or cattle consuming it."

The evidence before me shows that nothing of the sort happens.

"(*h*) if it is so coloured or coated or polished or powdered "that damage is concealed, or if it is made to appear better "or of greater value than it really is."

Nothing of the sort happens through the using of this process.

Mr. Fetherstonhaugh also relied on ch. 85, R.S.C. 1906, entitled Inspection and Sale. He relied upon Sec. 176, which reads as follows:—"Every person who wilfully mixes "or blends with any foreign substance any flour or meal "by him packed for sale or exportation shall, for such "offence, be liable to a penalty, etc."

There is not the slightest evidence adduced which would bring into application this section of the statute. I think the argument based upon the alleged fraud fails.

A further defence which Mr. Fetherstonhaugh strenuously argues is that by reason of the importation by the patentee of a machine used in the process, the patent is avoided under the provision of sec. 38 of the Patent Act, R.S.C. 1906, ch. 69. This section provides:—"Every patent shall, unless "otherwise ordered by the Commissioner as hereinafter pro- "vided, be subject, and expressed to be subject, to the fol- "lowing conditions:—(*b*) If, after the expiration of twelve "months from the granting of a patent, or an authorized "extension of such period, the patentee or patentees, or any "of them, or his or their or any of their legal representatives, "for the whole or a part of his or their or any of their interest "in the patent, import or cause to be imported into Canada, "the invention for which the patent is granted, such patent "shall be void as to the interest of the person or persons so "importing or causing to be imported."

I decided the question at the trial but Mr. Fetherston- haugh has asked me to further consider it, as the question has been bothering him for several years. I thought per- haps I had better end his trouble by deciding the question at the trial and did so; but since the trial I have given it further consideration, and see no reason to change the views which I then expressed.

In the case of *Smith* v. *Goldie*,[1] the late Chancellor Spragge held that a defendant in a patent action could set up import- ation in contravention of the Patent Act as a defence. In the Court of Appeal and also in the Supreme Court, the Judges seemed to be of opinion that this defence was not

[1] 7 A.R. (Ont.) 628; 9 Can. S.C.R. 46.

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properly a matter for defence, that it was something that should be raised in an independent proceeding. At the time of the decision of *Smith* v. *Goldie*, the tribunal was the Commissioner of Patents. Since then the jurisdiction is given to the Exchequer Court.

I take it for granted that since the decision in *Power* v. *Griffin*,[1] by the Supreme Court, it is open to a defendant to raise the question as a defence to an action. The statute expressly confers upon the patentee the right to plead any defence, default, etc.

Power v. *Griffin* was not the case of importation, but a case of non-manufacture within the prescribed period required by the statute. It seems to me the effect of that decision makes it clear that it is open to a defendant to raise by way of defence that the patent has been avoided by importation of the invention. I think, however, that it is necessary for him to prove the defence.

I have pointed out before and it is a matter that has to be borne in mind, that the patentee does not claim the machine, he merely claims the process. It is open to anyone to manufacture the machine. Anyone who buys the machine would have to obtain the right to use the process before he could utilize the machine.

According to the evidence the process is valuable and extensively used. A man might invent a particular machine which would surpass all others in the market, and in that way obtain a large market from those who had the right to use the process. How could such a manufacturer be prevented by the patentees under the patent in question from manufacturing and selling such a machine? Could any Judge be asked to restrain such manufacture or sale by reason of the patented invention being covered by the process patent? I think not. If not, how can it be reasonably argued that importation of the machine not covered by the patent is the patented invention? Mr. Fetherstonhaugh states that there has never been a decision on this point, and has asked me to pass upon it, and therefore I deal with it.

The only remaining point that requires consideration is the question raised, although not dwelt upon, as of any

[1] 33 Can. S.C.R. 39.

importance, the difference between the claims in the Canadian patent and those in the English patent. In his argument before me, Mr. Fetherstonhaugh thought that this was not of much moment. He seems to agree with me that the other claims of the Canadian patent were practically the same. That is the way it struck me. I said:—"But "the question does arise, suppose a man takes a patent for "5 claims, four of which are useless, what is the effect on "his patent? *Mr. Fetherstonhaugh*—Our law here is not "the same as in England, my Lord, if one claim of the "patent fails the whole patent does not fail, it is good for "the remaining claims in any event."

Further on he stated that the question as to whether the patentee should have disclaimed does not arise in this case. In answer to a question put by me, he said:—"As far as I "can see I don't think so anyway,"

The clauses of the Patent Act referred to are secs, 29 and 33.

In the case of *Johnson* v. *Oxford Knitting Co.*,[1] I had occasion to refer to the proper method of construing the specification and claims of a patent. The case of *Edison Bell Phonograph Corp.* v. *Smith*[2] there referred to, was a case before the Court of Appeal in England, and the language quoted is that of Lord Esher, the Master of the Rolls. I think it of such importance that I quote it again in these reasons:—

"The first question was, what was the proper mode of "construing a patent? The rules of construction were the "same as would be applied in the case of any other written "instrument. It was not in accordance with the true "canons of construction to read the claim alone with-"out the specification. The whole document must be "looked at to see what the claim was. In *Arnold* v. *Bradbury*,[3] it was contended that the claim, when read "alone, was too large as including something which could "not be patented, and that therefore the patent was bad. "Lord Hatherley, however, said that the specification must "be read first to see what the inventor had described as

[1] 25 D.L.R. 658, 15 Can. Ex. 340.
[2] (1894), 10 T.L.R. 522.
[3] L.R. 6 Ch. App. 706.

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"the thing to be patented. He said:—"I do not think "that the proper way of dealing with this question "is to look first at the claims, and then see what the full des- "cription of the invention is; but rather first to read the "description of the invention, in order that your mind may "be prepared for what it is the inventor is about to claim. "Therefore, in order to construe the instrument, the descrip- "tion of the invention must be looked at to see whether the "claim went further than the specification. That rule had "been followed in subsequent cases. That was the true "rule, and it was the same as was applicable to any other "instrument. In the present case there was an elaborate "and detailed specification of what the inventor wished to "patent. It was an invention of certain improvements in "phonograph machines. He described those improve- "ments minutely. It was not suggested that the descrip- "tions in the specifications were too large. The objects and "the means of carrying out those objects were described. "Then the claims were headed with a statement that the "inventor, "having now particularly described and ascer- "tained the nature of this invention, and in what manner "the same is to be performed," claimed, etc. Claim No. 1 "was the one chiefly contested. It was said that it was too "wide. But in the specification the inventor had pointed "our the exact manner in which he would carry out the "object stated, and any one reading the claim reasonably "would come to the conclusion that all he meant to claim "was what he had previously described and shown. There- "fore the claim was not too large, and the patent was not "bad upon that ground."

Now, construing the patent in the light of this decision, it seems to me impossible to contend that the patentee was claiming by any of the other claims gases of a noxious nature. I think practically the claims mean the same thing, particularly if you import the doctrine of equivalents. The specifications as I have pointed out have been dealt with over and over again by the English Courts. The meaning of them seems now quite clear, and if there was any doubt about it, as Mr. Fetherstonhaugh conceded, the clauses of the Patent Act referred to would still leave valid and untouched the main claim in question.

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THE ALSOP PROCESS CO. v. FRIESEN.

Reasons for Judgment.

Judgment should issue in favour of the plaintiff as prayed, with a reference to the registrar to assess the damages. The defendants must pay the costs of the action.

Judgment for plaintiff.

Solicitors for plaintiff: *Johnston, Mackay, Dods & Grant.*

Solicitors for defendants: *Fetherstonhaugh & Smart.*

1916
April 28

IN THE MATTER OF THE PETITION OF

BOWKER FERTILIZER COMPANY....PETITIONERS;

AND

GUNNS, LIMITED.....RESPONDENTS.

Trade Mark—Descriptive words—Secondary meaning—Expunging from registry.

"Sure-Crop" or "Shur-Crop," as applied to fertilizers, are ordinary words descriptive of the quality of the article, incapable of acquiring a secondary meaning and not registrable as a valid trade mark, and should be expunged from the register.

PROCEEDINGS to set aside a ruling of the Commissioner of Patents refusing the registration of a trade-mark.

Case tried at Ottawa, April 17, 1916, before the Honourable MR. JUSTICE CASSELS.

H. Fisher and *R. S. Smart*, for petitioners; *W. H. Clipsham*, for respondents.

CASSELS, J. (April 28, 1916), delivered judgment.

The Bowker Fertilizer Co. commenced proceedings pursuant to the provisions of the Trade Mark and the Exchequer Court Acts to have the ruling of the Commissioner of Patents, refusing to register the words "Sure-Crop" as a specific trade mark to be applied to the sale of fertilizers set aside.

The alleged ground of refusal by the Commissioner was the existence on the trade mark register of a trade mark registered on July 27, 1912, by the contestants Gunns Ltd. This trade mark consists of "a boy pressing the muzzle of a gun against a target on which appear the words 'never misses,' above the design being the name 'Shur-Crop' as *per* the annexed pattern and 'application.'" The Bowker Fertilizer Co., in addition to their application to have their trade mark registered, pray that the trade mark of the Gunns Ltd. may be expunged from the register.

The Bowker Fertilizer Co. are a foreign company incorporated in the United States of America. Gunns Ltd. are a corporation incorporated in Ontario with headquarters in Toronto.

I will first consider the application of the Bowker Fertilizer Co. to have the words "sure-crop" as applicable to fertilizers registered as a trade mark. Dealing with this question irrespective of any secondary meaning these words may have obtained as denoting goods manufactured or sold by the Bowker Fertilizer Co., I am of opinion they are not words which should be registered. They are words merely indicative of the quality of the fertilizer. Two plain common English words without any pretence of being fancy words.

The construction of the Canadian Trade Mark Act is dealt with in *Standard Ideal Co. v. Standard Sanitary Manuf.*, decided by the Board of the Privy Council and reported in [1911] A.C. 78 at 84. A case in our own Courts is peculiarly apposite: *Kirstein v. Cohen*,[1] involving "shur-on" and "staz-on" as applicable to glasses for the eyes.

It is contended by counsel for the Bowker Fertilizer Co. that, even if these words do not come within the class of words capable of registration, yet by reason of long use they have obtained a secondary meaning as denoting the goods of the applicants. It is a question whether ordinary English words of this character ever could obtain a secondary meaning. See *Application of Joseph Grosfield & Sons Ltd.*,[2] In this case the words "sure-crop" were not used as a trade mark. They were usually used in connection with the name Bowker. The goods sold by the Bowker Co. were sold in bags which were labelled "Bowker Sure-Crop." A case of resemblance is *Perry Davis & Son v. Harbord*.[3] The application was to register the words "Pain Killer." The British Trade Mark Act of 1875 provided for the registration also of any special and distinctive word "or words or combination of figures or letters used as a trade mark before the passing of this Act may be registered as such under this Act."

[1] 39 Can. S.C.R. 286.

[2] (1909) 26 R.P.C. 854.

[3] L.R. 15 A.C. 316.

1916

BOWKER FERTILIZER CO. v. GUNNS, LTD.

Reasons for Judgment.

It was pointed out in the reasons for judgment that the words "pain-killer" had not been used as a trade mark before the passing of the statute but always in conjunction with other words, namely, "Perry Davis, etc." Registration was refused. Lords Halsbury and Morris also expressed strong views on the question whether these words were capable of registration as being merely descriptive. I think the application of the Bowker Co. to register must be refused.

The most prominent feature of the trade mark of Gunns Ltd. are the words "Shur-Crop." Douglas W. Gunn, an employee of Gunns Ltd., was a witness. He states that Gunns Ltd. ceased using any part of their trade mark except the words "Shur-Crop" on their bags at all events as early as 1914, the reasons being they could not reproduce it on their bags. He states as follows: Q. That (referring to the words "Shur-Crop") is now the only thing that marks your goods? A. Yes and the analysis. Q. And all your goods are put up in bags? A. Yes. Q. So that you do not now mark your goods as originally registered? A. No. Q. Then in your opinion the words "Shur-Crop" were the important elements of your trade mark? A. Naturally a man in asking for a brand would not ask for the boy and gun on it he would ask for Gunns "Shur-Crop" fertilizer—he would always connect the manufacturer with the words. Q. And that was your intention when you registered and proved to be the fact? A. Yes.

The Bowker Co. are a large corporation. For years prior to the commencement of business of Gunns Ltd. of the sale of fertilizer under the name "Shur-Crop" the Bowker Co. had their goods on the American and Canadian markets with the brand "shur-crop." Douglas W. Gunn may not have known about the Bowker Co. He is an employee of the company. There are other members of the company. It is not material whether they knew or not but the belief that they did not know may be commended to Judæus Apella. See *per* Burbidge, J., *Re Melchers* and *DeKuyper*, 6 Can. Ex. 83 at 101.

I think the existence of this trade mark is apt to lead to confusion and that the registration of the trade mark in question should be expunged.

1916

BOWKER FERTILIZER CO. v. GUNNS, LTD.

Reasons for Judgment.

Counsel for Bowker Co. are satisfied if the words "Shur-Crop" are removed and the registry amended accordingly, and if Gunns Ltd. prefer it, the order can issue in this shape.

As success is divided, each party should bear their own costs.

Judgment accordingly.

Solicitors for petitioners: *Fetherstonhaugh & Smart.*

Solicitors for respondents: *Douglas & Clipsham.*

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2. *"Quantity survey method" and intrinsic value—Compensation—Valuation—"Davies Rule"—Costs.* An appraisal of a building by the "quantity survey method," while it may disclose the intrinsic value of the property, does not necessarily establish its market value. 2. Intrinsic value is the value which does not depend upon any exterior or surrounding circumstances. 3. The "Davies Rule" of valuation ought not be applied in its narrowest sense, which destroys its practical use. There are two essentials preliminary to applying the rule: 1st. The basic value of a standard lot in the locality must be established beyond peradventure; 2nd. The conditions of the lot must be normal. 4. Where no tender or offer is made by the party expropriating the compensation may carry interest and costs. THE KING *v.* CARSLAKE HOTEL CO.....24

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from the Harbour of Quebec, and therefore do not belong to the Harbour Commissioners. While these wharves may be built below low-water mark without a grant,and the owners could not be ordered to remove them. *Secus* as against a trespasser. 4. The owners of such wharves have the right to maintain the same and to use them, and under the earlier Act of 1858 that right cannot be interfered with without compensation. 5. The ownership of a parcel of land below low-water cannot be claimed as resulting from a possession consisting in the mooring of boats at the adjoining wharf,—the bottom of such boats resting on the water above the bed or by pulling these boats ashore and unloading thereon or on the wharf; cargoes of wood picked up in the current in the open, or cargoes brought in by schooners or otherwise—because such possession cannot be construed to have been *animo habendi, possidendi, et appropriandi.* 6. The Quebec Harbour Commissioners on the 10th June, 1864, had the power to sell as well what they held at that time, as well as what they acquired subsequently. 7. Where property yields practically no revenue and is not occupied, no allowance for compulsory taking should be allowed. 8. Under the Code of Procedure of the Province of Quebec, a deed from the Sheriff of immoveable property after seizure and sale only conveys the rights and titles of the judgment-debtor; and if through clerical error or otherwise, the deed purports to convey more land than the judgment-debtor had at the time of the sale, the title to such additional land does not pass by the deed,—the sale being made *super non domino et non possidente.* (*The King v. Ross*, 15 Can. Ex. 38 followed). 9. The want of registration of the deed of sale by the Harbour Commissioners to the defendant in an expropriation case where the interests of all parties have to be determined, cannot be set up by the Crown,—the Harbour Commissioners' grantor—as against the defendant, their legal grantee. The question of registration of such deed would have to be taken into consideration in a case where the question of priority had to be determined. 10. The expression in a deed of sale of some water front property in the Harbour of Quebec in the following words; "extending in depth to *low water line*, bounded in front towards the north by Champlain Street, *in rear "by the Commissioners' line,"*—held to mean the Commissioners' northern property, and not the southern line, which would take in all of the Harbour Commissioners' property immediately opposite. THE KING *v.* HEARN.....146

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11. *Compensation—Railways—Flooding from ditches* The Commissioners of the National Transcontinental Railway had expropriated a certain portion of a farm while in the possession of the suppliant's predecessor in title and paid him compensation therefor and for all damages resulting from the expropriation—the deed of sale stating that the compensation paid comprised *"tous les dommages de quelque nature que ce soit."* After the suppliant acquired the farm flooding occurred, and the suppliant claimed that it was due to the construct-

NUISANCE

OPTION

PASSING OFF

PATENTS

PLANS

POST OFFICE

PRACTICE

PRESCRIPTION

PRIORITY

PRISON LABOUR

PROXIMATE CAUSE

PUBLIC WORK

QUANTITY SERVICE METHOD

QUEBEC HARBOUR ACT

WORK ON SHIP

See CONTRACT.

YUKON PLACER MINING ACTS

6. Edw. VII c. 39—7 & 8 Edw. VII c. 77—Construction of Statutes—Gold Commissioner acting as Mining Recorder—Grant of Water Rights—Validity. By sec. 3 of the statute 7 & 8 Edw. VII c. 77, it is provided that "mining recorders" shall be appointed by the Commissioner of the Yukon Territory, such appointment being subject to the approval of the Governor in Council. By sec. 5 of the last-mentioned enactment it was provided that an officer, called the "Gold Commissioner" should have jurisdiction within such mining districts as the Commissioner directed, and within such districts should possess also the power and authority of a mining recorder or mining inspector. By sec. 9 it is enacted that no person shall be granted or acquire a claim of any right therein, or carry on placer mining, except in accordance with the provisions of the Act. On the 8th day of October, 1909, a certain grant of water rights was issued to the defendants. Although the grant purported to be regularly signed by the Mining Recorder of the Yukon Territory, it was admitted on behalf of the defendants that it was signed byhim upon the order and direction of the Gold Commissioner of the said Territory without any adjudication thereon by the said mining recorder. *Held*, that a mining recorder could only be appointed in the manner and by the authority mentioned in the Act referred to, and that as the grant in question was signed by a person who was neither *de facto* nor *de jure* a mining recorder, the grant was void. 2. In such a case the Crown is entitled to take proceedings to avoid the grant in order that the public property may not be wrongfully alienated. THE KING *v.* MURPHY.....81