REPORTS

— OF THE —

EXCHEQUER COURT

— OF —

CANADA.

CHARLES MORSE, K.C.

REPORTER.

PUBLISHED UNDER AUTHORITY BY

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REGISTRAR OF THE COURT.

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1912

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JUDGE

OF THE

EXCHEQUER COURT OF CANADA

During the period of these Reports :

THE HONOURABLE WALTER G. P. CASSELS.

Appointed 2nd March, 1908.

LOCAL JUDGES IN ADMIRALTY OF THE EXCHEQUER COURT OF CANADA

The Honourable	A. B. ROUTHIER,	- - - - -	Quebec District.
do.	JOHN DUNLOP, Deputy Local Judge - - - - - - - - -	do.	do.
do.	JAMES T. GARROW - - - - -	do.	do.
do.	JAMES MCDONALD, - - - -	N. S.	do.
do.	ARTHUR DRYSDALE, Deputy Local Judge. - - - - -	do.	do.
do.	EZEKIEL MCLEOD, - - - -	N. B.	do.
do.	WILLIAM W. SULLIVAN, C.J.S.C.	P. E. I.	do.
do.	ARCHER MARTIN - - - - -	B. C.	do.
do.	JAMES CRAIG, - - -	Yukon Territory	District

ATTORNEYS-GENERAL FOR THE DOMINION OF CANADA

During the period of these Reports :

THE HONOURABLE SIR ALLEN AYLESWORTH, K.C.

THE HONOURABLE C. J. DOHERTY, K.C.

SOLICITOR-GENERAL FOR THE DOMINION OF CANADA:

THE HONOURABLE JACQUES BUREAU, K.C.

MEMORANDUM.

By the Act 2 George V, chapter 21, the constitution of the Court was amended, provision being made for the appointment of an Assistant Judge.

On the 4th April, 1912, L. A. Audette, Esquire, K.C., who had previously occupied the office of Registrar of the Court for a period of nearly twenty-five years, was elevated to the Bench as Assistant Judge of the Exchequer Court of Canada.

NOTE.

Errors in citations are corrected in the Table of Cases Cited.

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CASES

DETERMINED BY THE

EXCHEQUER COURT OF CANADA.

BETWEEN

THE ROYAL TRUST COMPANY; LAFAYETTE HOYT DE FRIESE AND GEORGE LEDGER AS TRUSTEES FOR BONDHOLDERS OF THE ATLANTIC AND LAKE SUPERIOR RAILWAY COMPANY; AND WILLARD BROWN AND CHARLES W. WELLS..... } PLAINTIFFS;

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Sept. 23.

AND

THE BAIE DES CHALEURS RAILWAY COMPANY, THE ATLANTIC AND LAKE SUPERIOR RAILWAY COMPANY, AND THE CREDITORS OF THE BAIE DES CHALEURS RAILWAY COMPANY..... } DEFENDANTS.

Railway—Insolvency — Sale — Prior enquiry into claims of creditors—Pledgee of bonds—Trustee for bondholders—Right to purchase railway—Sale of portion of road—Exchequer Court Act, sec. 26—Director—Estoppel—Reviewing judgment of another court—Comity.

An enquiry before a referee into the validity and priority of the claims of creditors of an insolvent railway may be ordered before an order for the sale of the railway is made under the provisions of sec. 26 of *The Exchequer Court Act* (R. S. 1906) c. 140.

2. A pledgee of railway bonds has a sufficient interest (in the nature of that of a mortgagee) in such bonds to institute an action for the sale of the railway under the provisions of sec. 26 of *The Exchequer Court Act.*

3. A trustee for the bondholders of an insolvent railway may become a purchaser, as such trustee, at the sale of the railway.

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4. Under the terms of sec. 26 of *The Exchequer Court Act* part of a railway may be sold when the railway is in default in paying interest on its bonds.

5. A director, being a creditor of a railway company, present at a meeting where authority is given to pledge the bonds of the company, is estopped from setting up the invalidity of such bonds in an action by the pledgee.

6. The court in exercising its jurisdiction in respect of railway debts under the said section, will not review the judgment of another court of competent jurisdiction affecting the railway, but will leave the rights of any person entitled to attack the judgment to the determination of the court which pronounced the same.

THIS was a case instituted by a statement of claim, alleging the following facts:—

1. "In virtue of the statute of the Province of Quebec, 45 Victoria, ch. 53, the Directors of the Baie des Chaleurs Railway Company, on or about the second day of January, 1889, issued mortgage bonds bearing the seal of the company, and signed by the President, and countersigned by the Secretary for an amount of £409,400 sterling, which said bonds, in virtue of the said statute created a first claim and privileged debt against the said company, its undertakings, tolls and revenues and the moveables and immoveables which it might thereafter acquire.

2. By a certain indenture or trust deed duly executed and signed by the said company, at the City of Quebec, on the second day of January, 1889, certain trustees were appointed for the holders of said bonds.

3. On the 10th day of June, instant, the petition of the directors of the said Baie des Chaleurs Railway Company for confirmation of a certain scheme of arrangement with its creditors, duly filed in this honourable court, pursuant to the provisions of section 365 of the Railway Act, was granted, and the said scheme duly enrolled in the said Exchequer Court.

4. By the said scheme of arrangement the Royal Trust Company, one of the plaintiffs herein, was duly appointed

trustee for the bondholders of the said Baie des Chaleurs Railway Company.

5. On the 19th June, 1907, at the City of Montreal, by the ministry of John Fair, Notary Public, the said Royal Trust Company duly presented for payment to the said Baie des Chaleurs Railway Company, the coupons of the bonds above mentioned and more specifically set out in a copy of the demand for payment, and produced herein as Plaintiff's Exhibit No. 1.

6. Upon such demand of payment and protest the said Company refused payment and declared that it had no funds available for the payment of the said coupons.

7. By and in virtue of the Statute of Canada, 1st Edward VII, ch. 48, the trustees for the bondholders of the Atlantic and Lake Superior Railway Company were authorized to repair and renew the roadbed and bridges upon the railway between Metapedia and Caplin, that is that part of the Baie des Chaleurs Railway extending from Metapedia to a place called Caplin, a distance of eighty miles, the said statute giving to the said trustees a first lien upon the said part of the said railway for the reasonable cost of repairs or renewals effected by the said trustees upon the said railway.

8. Under the authority of the said statute, the aforementioned trustees laid out large sums of money to repair and renew the roadbed and bridges upon the said railway between Metapedia and Caplin, which said sums amount to $70,000.

9. The said railway between Metapedia and Caplin was built, in possession of and operated by the Baie des Chaleurs Railway Company until and up to the 1st January, 1895, and is affected by the aforementioned bonds, issued in virtue of the statute of the Province of Quebec, 45 Vic., ch. 53.

10. By and in virtue of the statute of Canada, 54-55 Vic., ch. 97, it was enacted that Henry MacFarlane, or

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his legal representatives, should have, for the reasons mentioned in the said statute, a first preferential claim and charge upon that part of the railway of the Baie des Chaleurs Railway Company extending from its junction with the Intercolonial Railway at or near Metapedia, to the Cascapedia River, and upon all lands, works, buildings, materials, rolling stock and other property, moveable or immovable, to the said part of the railway at the date of the passing of the said Act, (viz., the 30th September, 1901), appurtenant or belonging.

11. At the date of the passing of the said Act, the lands, works, buildings and other property, moveable and immoveable, extended as far as Caplin aforesaid.

12. The said Henry MacFarlane having become insolvent, Alexander F. Riddell and Thomas Watson were duly appointed, under the law of the Province of Quebec, curators to the insolvent estate of the said Henry MacFarlane, and on the 18th day of February, 1897, in a certain suit bearing the No. 1339 of the records of the Superior Court of the Province of Quebec, District of Montreal, the said joint curators obtained judgment against the said Baie des Chaleurs Railway Company and one Charles N. Armstrong for the sum of $168,964 10 with interest and costs.

13. The said judgment, with accrued interest from the 28th November, 1889, and costs, now amounts to the sum of $360,000.

14. By a certain transfer, duly executed at the City of Montreal on the 2nd of December, 1904, before Mtre. John Fair, Notary Public, the said Alexander F. Riddell and Thomas Watson, in their quality of joint curators of the said insolvent estate, thereunto duly authorized by a judgment of the said Superior Court, rendered on the 4th day of October, 1904, did sell and transfer to the aforementioned Willard Brown and Charles W. Wells, for and in consideration of the sum of $35,000, duly paid,

all their right, title and interest in the said judgment against the said Baie des Chaleurs Railway Company, with all the rights, actions, privileges and hypothecs resulting to the said Alexander F. Riddell and Thomas Watson from the above mentioned judgment, the whole as more fully appears by an authentic copy of the said transfer, produced herewith as plaintiff's exhibit No. 2.

15. The said the Royal Trust Company in its quality aforesaid has a first preferential claim and privileged debt against the said Baie des Chaleurs Railway from Metapedia to Caplin, a distance of eighty miles, and is a holder of a first mortgage of and on the said railway by and in virtue of the said statute of Quebec, 45 Victoria, ch. 53.

16. The said trustees for the bondholders of the Atlantic and Lake Superior Railway Company are the creditors of the said Baie des Chaleurs Railway Company, and have in virtue of the statute of Canada, 1 Ed. VII., ch. 48, a first lien or charge upon the said railway.

17. The said Brown and Wells in virtue of the said statute of Canada 54 and 55 Victoria, ch. 97, have a first preferential claim and charge upon the said railway.

18. By the said different statutes hereinabove recited the claims of the said plaintiffs among themselves rank as follows :—

(*a*) The claim of the said trustees for the bondholders of the Atlantic and Lake Superior Railway Company for $70,000.

(*b*) The claim of the said Brown and Wells for $360,000.

(*c*) The claim of the said Royal Trust Company for £409,400 sterling.

19. The said Baie des Chaleurs Railway Company is and has been for a long time past unable to pay its debts as they became and become due, has acknowledged its

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insolvency and is insolvent within the meaning of the law.

20. The plaintiffs, joining together for the purposes hereof, claim as follows :—

(*a*) A declaration that the expenditure by the plaintiffs, the trustees for the bondholders of the Atlantic and Lake Superior Railway Company for repairs and renewals upon the railway between Metapedia and Caplin, constitutes a first charge upon the said railway between Metapedia and Caplin, a distance of eighty miles.

(*b*) A declaration that the plaintiffs, the said Brown and Wells, as the legal representatives of Henry MacFarlane, have a preferential claim and charge, ranking after the charge hereinabove mentioned in the next preceding paragraph in favour of the trustees of the Atlantic and Lake Superior Railway, upon that part of the railway of the said company, extending from its junction with the Intercolonial Railway at or near Metapedia to the Cascapedia River, a distance of sixty miles.

(*c*) A declaration that the mortgage bonds issued by the Baie des Chaleurs Railway Company and now in the hands of the plaintiffs, the said the Royal Trust Company, as hereinabove alleged, constitute a first claim and privileged debt, ranking as follows on the property of the said railway :—After the two preceding claims of the trustees of the Atlantic & Lake Superior Railway Company and the plaintiffs, Brown and Wells, on that part of the road extending from Metapedia to Cascapedia, and after the said trustees on that part of the said railway extending from the Cascapedia River to Caplin, a distance of twenty miles.

(*d*) An account of what is due to the plaintiffs under the foregoing liens and mortgage bonds for principal, interest and costs.

(*e*) That the said liens and mortgage bonds may be enforced by foreclosure or sale.

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Judgment.

(*f*) That the trustees for the bondholders of the Atlantic & Lake Superior Railway now operating the road, by virtue of the Statute of Canada, 1 Edward VII., chapter 48, may be allowed to continue operating the said railway as hitherto."

The defendant railway companies consented to judgment being entered against them as prayed in the statement of claim. Certain of the creditors of the Baie des Chaleurs Railway Company, however, filed statements in defence, opposing the judgment as prayed. The matter then came on for trial.

September 23rd, 1907.

T. Chase Casgrain, *K. C.*, and *J. W. Weldon*, appeared for the plaintiffs;

N. K. Laflamme, *K.C.*, and *A. W. P. Buchanan*, *K.C.*, appeared for certain of the creditors.

At the conclusion of the trial the learned Judge ordered that judgment be entered as prayed, the necessary conditions and terms of the judgment to be settled by the Registrar. A reference was directed to the Registrar to take accounts and ascertain what was due to the several plaintiffs and what the priorities were as between the plaintiffs, and whether there were any prior claims, and if any, for what amounts respectively.

During the trial the learned Judge orally decided the following questions, which will appear in the record of proceedings at the trial:—

An order for the sale of the railway may be preceded by a reference to the Registrar in the terms and for the purposes above mentioned.

The plaintiffs, inasmuch as they represented pledgees of bonds by virtue of a Scheme of Arrangement under the *Railway Act* (R. S. 1906 C. 37), had a *locus standi* to institute proceedings for the sale of the railway.

The plaintiffs, as trustees of the bondholders, were entitled to become purchasers of the railway at the sale.

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Judgment.

A portion of the railway could be sold under the provisions of sec. 26 of *The Exchequer Court Act.*

The directors present at a meeting of the company when authority was given to pledge the bonds ought not to be heard to dispute the validity of the bonds after they passed into the hands of the pledgees. (*)

(*) REPORTER'S NOTE :—See the report of this case on proceedings before the Registrar, *post* p. 9.

BETWEEN

THE ROYAL TRUST COMPANY, A BODY POLITIC AND CORPORATE, HAVING ITS PRINCIPAL PLACE OF BUSINESS IN THE CITY OF MONTREAL, AND LAFAYETTE HOYT DE FRIESE AND GEORGE LEDGER, BOTH OF THE CITY OF LONDON, ENGLAND, IN THEIR QUALITY OF TRUSTEES DULY APPOINTED FOR THE BONDHOLDERS OF THE ATLANTIC & LAKE SUPERIOR RAILWAY, COMPANY AND WILLARD BROWN AND CHARLES W. WELLS, BOTH OF THE CITY OF NEW YORK, IN THE UNITED STATES OF AMERICA, COUNSELLORS-AT-LAW, AND AS SUCH PRACTISING IN PARTNERSHIP IN THE SAID CITY OF NEW YORK, UNDER THE NAME AND STYLE OF BROWN & WELLS..... } PLAINTIFFS;

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AND

THE BAIE DES CHALEURS RAILWAY COMPANY, ET AL..... } DEFENDANTS;

AND

GEORGE BALL, A. P. SIMAR, DELPHINE GOULET, F. D. SHALLOW, W. H. RAPHAEL, CHARLES VEILLEUX, THE GAZETTE PRINTING COMPANY, FROTHINGHAM & WORKMAN (LIMITED), ESTATE SIMON PETERS, JACQUES PELOQUIN, CHARLES R. SCOLES AND ALEXANDER McDONALD..... } CREDITORS.

Construction of Statutes—Prescription—Interest on foreign judgment—Debt and costs.

Held, (by the Registrar, as Referee), applying to legislation regulating procedure the French doctrine of construction, namely, that a new law enlarging the period of prescription applies to a claim in respect of which prescription had begun to run under the old law, and that

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where a judgment bearing interest had been pronounced before the coming into operation of 62 Vict. (P.Q.) c. 51, such interest was prescribed by the term of thirty years and not by that of five years under Art. 2250 of the Civil Code as it stood before the passing of the last mentioned enactment.

2. In the case of a judgment obtained by a creditor in England against a railway company incorporated and being operated in the Province of Quebec, interest at the rate of four per centum per annum runs from the date of judgment on the judgment debt and costs, and may be recovered against the company.

THIS was a reference to L. A. Audette, K.C., Registrar of the Court, under the judgment of the Court, dated December 12th, 1907, whereby he was directed and empowered to take accounts and to determine the amounts due to the respective plaintiffs in the cause, the priorities of the plaintiffs amongst themselves, and to determine what other claims, if any, have priority over those of the said plaintiffs, or any of them, and to ascertain the amount of such claims and fix their priorities (*).

February 17th, 1908.

THE REFEREE:—The reference herein was proceeded with, at Montreal, on the 16th, 17th, 22nd and 27th days of January, and on and on the 6th and 7th days of February, A.D., 1908, in presence of counsel, T. C. Casgrain, Esq., K.C., appearing for the plaintiff's herein; F. S. Maclennan, Esq., K.C., and N. K. Laflamme, Esq., K.C., appearing for creditors Ball, Simar, Goulet, Shallow, Raphael, Veilleux; P. Buchannan, Esq., appearing for *The Gazette* Printing Company: and A. R. Angers, Esq., K.C., appearing for Frothingham and Workman, Limited.

The first seven creditors above mentioned filed a contestation and objections to the plaintiffs' statement of claim, and issues were joined thereon.

The first claims to be dealt with under the reference are the plaintiffs' claims which are to be found under

*REPORTER'S NOTE.—See the report of the trial of this case before the Court, *ante*, p. 1.

paragraph 18 of the statement of claim, set forth as follows :—

(*a*) The claim of the said Trustees for the bondholders of the Atlantic and Lake Superior Railway Company for $70,000.

(*b*) The claim of the said Brown & Wells for $360,000.

(*c*) The claim of the said The Royal Trust Company for £409,400.

1. Claim (a) by the trustees for the bondholders of the Atlantic and Lake Superior Railway Co., for $70,000 has been abandoned against the Baie des Chaleurs Railway Co., by plaintiffs' counsel, who, in the course of this enquiry, made the following declaration :

"In view of the fact that it would take a considerable "*enquête* to establish the right figures of the claim of the "trustees of the bondholders of the Atlantic and Lake "Superior Railway Company, and for the reason that the "plaintiffs are not prepared yet with the full figures, for "the purposes of this suit, the claim of the trustees is "abandoned with the reserve that the said claim will be "urged in the matter of the *Royal Trust Company* v. "*The Atlantic and Lake Superior Railway Company*."

Re McFARLANE'S CLAIM.

Then comes claim (b) of Brown & Wells for $360.000.

Under the provisions of sec. 6 of 54-55 Vic., ch. 97, the claim is given priority over all mortgages, hypothecs, charges and encumbrances whatsoever, created by the Baie des Chaleurs Railway Company, before or after the passing of this Act, upon that part of the railway at or near Metapedia to Cascapedia river, a distance of about 60 miles, and upon the company's lands, works, buildings, material, rolling stock, or other property moveable or immoveable. The Act further states that no registration in any manner whatsoever shall be necessary to preserve such priority.

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The company is given the option, under the same Act, to deposit the sum of $180,000 to the joint credit of the General Manager of the Ontario Bank and of the President of the Company, in trust, as security for and to be applied towards the payment of any sum which may, by any final judgment &c., be found to be due Henry McFarlane, and then and as soon as such deposit has been made, the said claim, charge and lien shall cease to exist.

The said Henry McFarlane having become insolvent, Alexander F. Riddell and Thomas Watson were duly appointed, under the law of the Province of Quebec, Curators to the insolvent estate of the said Henry McFarlane, and on the 18th day of February, 1897, in a certain suit bearing the No. 1339 of the records of the Superior Court of the Province of Quebec, District of Montreal, the said joint curators obtained judgment against the said Baie des Chaleurs Railway Company and one Charles N. Armstrong for the sum of $168,964.10 with interest and costs. There is no evidence that this amount has ever been deposited, as above mentioned.

By a certain transfer, duly executed at the City of Montreal on the 2nd of December, 1904, before Mtre. John Fair, Notary Public, the said Alexander F. Riddell and Thomas Watson, in their quality of joint curators of the said insolvent estate, thereunto duly authorized by a judgment of the said Superior Court, rendered on the 4th day of October, 1904, did sell and transfer to the aforementioned Willard Brown and Charles W. Wells, for and in consideration of the sum of $35,000.00, duly paid, all their right, title and interest in the said judgment against the said Baie des Chaleurs Railway Company, with all the rights, actions, privileges and hypothecs resulting to the said Alexander F. Riddell and Thomas Watson from the above mentioned judgment, the whole as more fully appears by an authentic copy of the said transfer, produced herewith as plaintiffs' Exhibit No. 2.

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The sum of $168,964.10 with interest and costs is now claimed by the plaintiffs Brown & Wells, with interest at 6 per cent. from the 28th November, 1889, under the judgment of the Superior Court, District of Montreal, of the 18th February, 1897, filed herein as Exhibit No. 10, and confirmed by the Court of Queen's Bench on the 30th September, 1899, and filed herein as Exhibit No. 16.

This judgment having been delivered before the passing of the Act 63-64 Vict. ch. 29, changing the legal rate of interest from 6 to 5 per cent., the said plaintiffs are clearly entitled to the interest at the said rate of 6 per cent., under the provisions of the said Act which say that this change in the rate of interest shall not apply to liabilities existing at the time of the passing of the Act. The Act came into force on the 7th July, 1900.

Now there is the further question as to whether the said plaintiffs are entitled to the interest as far back as 29th November, 1889, or whether the interest is not prescribed by five years. Under Art. 2250 of the Civil Code, in force before 62 Vic., (P.Q.) ch. 51, interest on judgments was prescribed by five years. That statute(62 Vict. ch. 51) which came into force on the 10th March, 1899, amended this Art. 2250, and ever since that date, such interest is only prescribed by thirty years.

If the prescription of five years had been acquired or had taken effect before the passing of the Act 62 Vict. ch. 51, the old law would obtain; but as the Act extending the prescription from 5 to 30 years was passed in the same year from which interest herein is declared by the judgment to run, we must adopt the French legal theory that the new law is presumed to be better than the old one, and that the legislature has made the change for the better. The French text-writers are of that opinion, and as French law obtains in this case, it must be followed. A number of authorities, both French and English, have

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Report of Referee.

been cited by the plaintiffs in support of this proposition. (1)

The undersigned therefore finds that the said plaintiffs, Brown & Wells have a claim against the Baie des Chaleurs Railway Co. for $168,964, with interest thereon at the rate of six per centum per annum from the 28th November, 1889, to the date of the sale of the said railway as ordered by this court, and costs. The said claim will moreover have a prior or preferential lien upon the first 60 miles of the said property of the said Baie des Chaleurs Railway Co., having priority over the bonds and all other mortgages, hypothecs, charges and encumbrances whatever upon the said property.

BONDS.

The first seven paragraphs of the amended statement of claim herein read as follows, viz :—

"1. In virtue of the statute of the Province of Quebec, 45 Victoria, ch. 53, the directors of the Baie des Chaleurs Railway Company, on or about the second day of January, 1889, issued mortgage bonds bearing the seal of the company, and signed by the President, and countersigned by the Secretary, for an amount of £409,400 sterling which said bonds, in virtue of the said statutes, created a first claim and privileged debt against the said company, its undertakings, tolls and revenues and the movables and immovables which it might thereafter acquire.

"2. By a certain indenture or trust deed duly executed and signed by the said company, at the City of Quebec,

(1) The following may be referred to, viz : Marcade, Art. 2281, p. 258; Baudry-Lacantinerie, Prescription, Nos. 948, 949; Aubry & Rau, Vol. 2, No. 215 bis; Troplong, 683; Dalloz, Nouveau Code Civil, 2281, No. 2; Dalloz, Jur. Gen. Prescription Civile, No. 1112; Marcadé, Sur Art. 2 No. xiii, par 56; F. Laurent, Pr. de Droit Civil, No. 233; Guillouard, Prescription, Vol. 2, No. 622; 1 Laurent, par. 234, p. 302; 1 Guillouard, Prescription, p. 54, No. 52; 1 Demolombe, No. 61; Wade on Retroactive Laws, No. 228; Ross v. Beaudry, 1905 A. C. 570: Endlich, Interpretation of Statutes, par. 281; and Maxwell, Interpretation of Statutes, 4th Ed. 339, 340.

on the second day of January, 1889, certain trustees were appointed for the holders of said bonds.

"3. On the 10th day of June, instant, the petition of the directors of the said Baie des Chaleurs Railway Company for confirmation of a certain scheme of arrangement with its creditors, duly filed in this honourable court, pursuant to the provisions of section 365 of the Railway Act was granted, and the said scheme duly enrolled in the said Exchequer Court.

"4. By the said scheme of arrangement the Royal Trust Company, one of the plaintiffs herein, was duly appointed trustee for the bondholders of the said Baie des Chaleurs Railway Company.

"5. On the 19th of June, 1907, at the City of Montreal, by the ministry of John Fair, Notary Public, the said the Royal Trust Company duly presented for payment to the said Baie des Chaleurs Railway Company, the coupons of the bonds hereinbefore mentioned and more specifically set out in a copy of the demand for payment, and produced herein as plaintiffs' Exhibit No. 1.

"6. Upon such demand of payment and protest the said company refused payment and declared that it had no funds available for the payment of the said coupons.

"7. By and in virtue of the statute of Canada, 1st Edward VII, ch. 48, the trustees for the bondholders of the Atlantic and Lake Superior Railway Company were authorized to repair and renew the roadbed and bridges upon the railway between Metapedia and Caplin, that is, that part of the Baie des Chaleurs Railway extending from Metapedia to a place called Caplin, a distance of eighty miles, the said statute giving to the said trustees a first lien upon the said part of the said railway for the reasonable cost of repairs or renewals effected by the said trustees upon the said railway."

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Considering that the facts alleged in the above mentioned paragraphs have been proved by uncontroverted evidence, it is thought quite unnecessary upon this enquiry, to go into the full history of each bond, a history, which indeed under the evidence, discloses a series of uncontroverted facts.

The bonds claimed herein are described in plaintiffs' Exhibit No. 17, and the whole issue was deposited with the Royal Trust Company within the time mentioned in the Scheme of Arrangement with the exception of £10,600, the owners of which would thereby become simply unsecured creditors.

Exhibit No. 17 reads as follows :—

"STATEMENT of Bonds of the Baie des Chaleurs Railway Company received by the Royal Trust Company under the Scheme of Arrangement confirmed by the Exchequer Court of Canada.

Amount.	Numbers.	From whom received.
£185,600	1 to 83.....83 of £500 106 " 311.....206 " £500 692 " 1102.....411 " £100	Galindez Bros.
£154,100	105..... ...1 " £500 312 to 600,289 " £500 601 " 691.....91 " £100	A. Haes (Haes & Son.)
£ 12,000	1192 " 1311.....120 " £100	Galindez Bros.
£ 12,300	1318 " 1437 1692 " 1694.....123 " £100	L. J. Riopel.
£ 11,200	84 " 104.....21 " £500 1685 " 1691.....7 " £100	Estate J. Cooper.
£ 4,700	1483 " 1529.....47 " £100	John Beattie.
£ 9,300	1591 " 1683.....93 " £100	Galindez Bros.
£ 8,900	1103 " 1191.....89 " £100	Galindez Bros.
£ 700	1312 and 1313. ... ..2 " £100 1478 to 1482. .....5 " £100	Galindez Bros.
£398,800		

The Royal Trust Company hereby certifies that the above mentioned Bonds were received from the parties whose names appear on the respective lines prior to the 15th July, 1907. The Royal Trust Company further certifies that all the said Bonds have been and are now duly stamped and sealed in the manner shewn by Schedule "A" of the Scheme of Arrangement, and that all of them are now in the vaults of the said The Royal Trust Company (except No. 1 which has been filed in the Exchequer Court of Canada as an exhibit in the suit *The Royal Trust Company et al. vs. Baie des Chaleurs Railway Company, et al.*)

THE ROYAL TRUST COMPANY,

{ Seal of Royal Trust Co. }

(Sgd.) N. MACNIDER,
Member of Executive Committee.

(Sgd.) H. ROBERTSON,
Manager.

Under the circumstances and the evidence adduced, the undersigned finds:

1. That the bonds mentioned in items 5, 6 and 7 of Exhibit No. 17 belong out and out to the plaintiffs, the Royal Trust Co. in its said capacity of trustee, as having duly and legally acquired the same, and that they are entitled to the full face value thereof.

2. That the bonds mentioned in items Nos. 1, 2, 3, 4, 8 and 9, are held by the said Royal Trust Co. as pledgees, and that they are only entitled to the amount for which they were originally given as such collateral security or pledge.

The total issue of the bonds is for the sum of $2,000,000, which at the rate of exchange of $4.88½ per £1, as provided by the Scheme of Arrangement filed herein, will give the total amount in pounds at the said sum of £409,400,—or, in other words, if £409,400 equal $2,000,000, then one pound equals $4.88½.

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Dealing with the bonds in the order set forth in Exhibit No. 17, as above mentioned, we come to Item No. 1, viz :—

Item 1. £185,600 1 to 83– 83 of £500 Dom. } Galindez
106 to 311–206 of £500 P.Q. } Bros.
692 to 1102–411 of £100 P.Q. }

Briefly stated, these bonds were originally ha d by the company to both the Dominion and Quebec Governments as a guarantee for the construction of the last 20 miles to Paspebiac within a certain delay, and failing to build the 20 miles within that delay these bonds were to be confiscated and forfeited.

Under the contracts and resolution filed of record both the Baie des Chaleurs Railway Company and the Atlantic and Lake Superior Railway Company, in view of the advances made by the firm of Galindez Bros., mostly for the building of these 20 miles, released the said bonds and authorized the said Governments to hand them over to the said Galindez Brothers. Upon the certificate of the proper officer showing that the road had been built, the bonds were released and handed to the Galindez Brothers as a pledge or collateral security for the judgment obtained by them against the company for these very advances. The judgment is filed as Exhibit No. 15, and the condemnation clause thereof reads as follows :—"Doth condemn the said defendant (The Baie des Chaleurs Railway Company) to pay and satisfy to the plaintiffs (Galindez Brothers) the said sum of $529,493.33 with interest on $529,493.33 from the 23rd July, 1906, date of service of process."

The rate of interest is not mentioned, therefore it must be the legal rate of 5 per cent. the rate in force at the time the judgment was delivered, on the 10th day of October, 1906.

The Royal Trust Company is therefore entitled to recover, under the first item, the amount for which the

bonds were pledged, viz.: The sum of $529,493.33, with interest thereon at the rate of 5 per cent. from the 23rd July, 1906.

Item No. 2: £154,000—105	1 of £500	A. Haes.
312 to 600–289	of £500	(Haes &
601 to 691– 91	of £100	Son).

Under authority given C. N. Armstrong, by the resolution passed at the meeting of the directors of the Baie des Chaleurs Railway Company during June, 1894 the said Armstrong was empowered to negotiate a loan upon the first mortgage bonds of the company (£409,400) for such an amount and upon such terms as he might consider advisable in the interests of the company.

C. N. Armstrong, presumably acting under such authority, borrowed from Haes & Son, and the bonds in question in this item were given as a pledge or collateral security.

Haes & Son on the 30th October, 1895, signed judgment by default in England against the Baie des Chaleurs Railway Company, for the sum of £21,993 10s. and costs, amounting to £8 8s. 10d., as will appear by the judgment filed herein.

On the 12th November, 1895, R. S. Gregson, Haes & Son's solicitor, writes to the Secretary of the Baie des Chaleurs Railway Company, informing him of having obtained judgment against the company, as above mentioned, and stating that he shall have to take proceedings to enforce payment in Canada, and also to sell the bonds deposited with his clients, unless their debt and costs are forthwith paid and the bonds taken out of their hands.

This is another clear case of pledge.

The Royal Trust Company is therefore entitled to recover under this second item, the amount for which the bonds were pledged, viz., the amount of the said judgment and costs, £21,993 2s. 10d. capital, equal to $107,-

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033. 28; and £8 8s. 10d. costs equal to $41.08, making the total sum of $107,074..36, with interest thereon at the rate of four per centum per annum from the 30th October, 1895.

The rate of interest under a judgment or order in England is four per cent. as stated in sec. 17 of the Judicature Act, 1883, and Order 42, r. 16, even though the debt recovered by the judgment bore a higher rate (1).

In the absence of any special rate no distinction is made between the interest on debt and the interest on costs. Both began to run from the day of the judgment (2).

The interest becomes part of the judgment debt. In re *Clagett* (3).

Item 3. £12,000—Nos. 1192 to 1311—10 of £100, De Galindez Bros.

Under three debentures bearing date the 7th June, 1907, de Galindez Brothers purchased for the consideration therein mentioned, from M. Connolly the judgment the latter had obtained against the Baie des Chaleurs Railway Co., upon its promissory note on the 18th May, 1896, for the sum of $11,448, with interest thereon from the 12th December, 1895 and costs.

The consideration for which this judgment was obtained would appear to be for advances to the amount of $10,000 made to the company as referred to in the minutes of the meeting on the 10th May, 1894.

Under paragraph 2 of the said indenture the vendor sells, transfers and assigns the said judgment together with the benefit of the security of 120 bonds of the company of the face value of £100 each, which he received from the said company as a pledge to recover the payment of the amount due under the said judgment.

(1) In re *European Central Railway Co.*, 1876, 4 C. D. 33; *Ex parte Fewings* 1883, 25 Ch. D. 338; *Arbuthnot* v. *Bunsilall*, 1890, 62 L. T. 234, *Economic Life Assurance Socy.* v. *Usborne*, 1902 A. C. 147.

(2) *Pyman* v. *Burt*, 1884, W. N. 100.

(3) (1888) 36 W. R. 653, C. A.

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This is another case of pledge, and the said plaintiffs The Royal Trust Company are accordingly entitled to recover, under Item No. 3, the amount for which the bonds were pledged, that is, the amount of the said judgment, interest and costs. No prescription acquired as it was interrupted by the holding of the bonds. (1)

No evidence has been adduced as to the costs. The amount recoverable will be the sum of $11,448.00 with interest thereon at the rate of six per cent per annum from the 12th December, 1895.

Item No. 4.—£12.300—Nos. 1318 to 1437 & Nos. 1692 to 1694—123 of £100

L. J. Riopel.

L. J. Riopel having made some advances to one James Cooper, who himself had made advances to the company from which he obtained a promissory note for $15,000 duly signed by the company and bearing date the 7th January, 1893, in favor of the said Cooper. The latter endorsed the said note in favour of the said Riopel and transferred it to him in 1892. In 1896 Riopel instituted action for the amount of this note, and this action has had the effect of interrupting prescription.

Up to this date Riopel had no dealings with the company but with Mr. Cooper alone, and this brings us to the passing of the agreement of the 27th November, 1893, between L. J. Riopel, James Cooper, The Baie des Chaleurs Railway Company and others. This agreement is filed. Under this indenture it is, *inter alia*, agreed that in consideration of the said L. J. Riopel relinquishing his right to recover the full payment of the said promissory note out of the balance of the unpaid Quebec Government subsidy, namely $48,000, which was transferred by the said company to the manager of the Bank of Toronto in trust to secure said payment, a certain proportion of

(1) See Art. 2227 C. C., and the case of *La Banque du Peuple* v. *Huot*, C.R. 1897 R. J. Q. 12 C. S. 370.

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the note would then be paid, leaving an unpaid balance out of the said note of $6,500 which would remain due with interest at 10 per cent., from the 1st of December, 1893. The company, to secure the payment of the same, placed in the hands of the said L. J. Riopel its bonds or debentures to the amount of $60,000, being the bonds above describe under the item No. 4.

The agreement further states that in default of the said $6,500 being paid before the 1st of December, 1894, then on and after that date, L. J. Riopel would have the right to keep and retain the said bonds as his own property, taking and accepting the same in full payment of the said $6,500 and interest, by giving notice to that effect to the said company; or at his option, to cause the said bonds to be sold by auction, in Montreal, after giving eight days notice &c., the proceeds of the sale to be applied by privilege to the payment of the said sum of $6,500 and interest.

The note was not paid.

There is a resolution of the Board approving of that note, and another resolution confirming it.

Those bonds were given to L. J. Riopel by the company for the consideration of granting delay and waiving his rights to the subsidy.

On the fourth of June, 1907, L. J. Riopel sold to de Galindez Brothers all his rights, title and interest against the Baie des Chaleurs Railway Company and against James Cooper, in the above mentioned note and under the said agreement executed on the 27th November 1893.

This another case of pledge. The Royal Trust Company are accordingly entitled to recover, under Item No. 4, the amount of said note and interest at the rate mentioned in the deed, viz: the sum of $6,500 with interest thereon at the rate of 10 per cent. from the 1st December, 1893.

Item No. 5 £11,200--No. 84 to 104--21 of £500 } Estate
1685 to 1690--7 of £100 } J. Cooper

These bonds were purchased on the 8th of June, 1907, as appears by the deed of sale filed herein by de Galindez Brothers, for substantial consideration and in good faith from the estate James Cooper. The latter as a member of the firm of Cooper, Fairman & Co. appears to have acquired them under indenture of the 5th December, 1890, from one Gervais, who appears to be a contractor doing work for the company, and these bonds are clearly not the same bonds which were put up with Murray Smith, as security for Gervais' claim, because those bonds were put up with Murray Smith in 1892, whereas Cooper acquired them in 1890.

There is no evidence to show, and J. de Galindez in his evidence says he does not know, how Gervais obtained these bonds, and whether he received them as security or in payment. However, Gervais under his contract with Cooper gave the latter the right to sell them, and this applies only to twenty-one bonds of the value of £10,500

Cooper in selling these bonds in 1907 to de Galindez Brothers complied with the conditions of his own contract with his pledger, who was not the company.

De Galindez Brothers also bought under this deed of sale eight other bonds of the company of £100 each, equal to £800, Numbers 1684 to 1691. Number 1684 has been lost and no claim is made therefor. J. de Galindez at p. 244 of his testimony, says he has no knowledge of the history of these seven bonds under which he is claiming. He cannot say how the Estate Cooper obtained them.

We do not know how Gervais obtained the 21 bonds from the company; but that would be a question between Gervais and the Company. Cooper, to all purposes seems to have them in good faith and de Galindez Brothers

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appear to have bought them also in good faith and for valuable consideration.

The plaintiffs The Royal Trust Company are, under the circumstances, entitled to the full face value of these bonds, viz: the sum of $54,712.00 with interest thereon at the rate of five per centum per annum from the 25th day of June A.D., 1902.

The rate of 5 per cent. is the rate fixed by the bonds. The present action has interrupted prescription from the date of service, namely, the 25th day of June, 1907. Under Art. 2250 C. C. the arrears of interest being prescribed by five years, the plaintiffs are only entitled to the interest for the five years preceding the service of the action.

Item No. 6 £4,700—Nos. 1483 to 1529—47 of £100

John Beattie.

This being a clear case of purchase, it will be sufficient to say that, as appears by a resolution of the 25th October, 1892, John Beattie was at that date a creditor of the company, and that subsequently he took an execution to realize upon his judgment. Under a writ of *venditioni exponas* issued in the said case, the bonds claimed herein were duly sold to John Beattie, the plaintiff, by the bailiff at public sale, of which due notice had been given, as appears by the *procès verbal* of sale.

Under indenture of sale of the 8th June, 1907, John Beattie, in turn, sold, transferred and conveyed to de Galindez Brothers, all right, title and interest in the said bonds, and also assigned and conveyed to the said purchasers any judgment or claim that he may have had against the company.

This is obviously a case of sale, and the plaintiffs The Royal Trust Company are accordingly entitled to recover the full face value of these 47 bonds (£4,700) viz: the sum

of $22,959.50, with interest thereon at five per centum per annum from the 25th June, 1902.

The rate of interest and the date from which interest should run are determined by the finding on the previous item.

Item No. 7– £9,300—Nos. 1591 to 1683–93 of £100 De Galindez Brothers.

This appears to be a case of sale. Briefly stated, it may be said that J. de Galindez, in his evidence, says he has a hazy notion that these bonds had been placed by the company, under the authority of a resolution, in the hands of one Murray Smith, manager of the Toronto Bank, in trust as collateral security for several creditors of the company. Murray Smith having died, his widow, to be relieved of any responsibility in respect to these bonds, would have deposited them in court in the hands of the Prothonotary. M. Connolly, who had a judgment against the company, hearing of this seized the bonds in the hands of the Prothonotary and had them sold by the bailiff in a regular manner, at a public sale, seventy-three of these bonds were sold to the plaintiff, M. Connolly, twelve to Garrand, Terroux & Cie, and eight to de Galindez Brothers.

Subsequently, these 73 bonds became the property of de Galindez Brothers under a contract between themselves and M. Connolly, of the 7th June, 1907. De Galindez Brothers also purchased from Garrand, Terroux & Cie, the 12 bonds they had purchased at the judicial sale, as will appear by the deed of sale. This placed in the hands of de Galindez Brothers the whole of the 93 bonds in the present item.

Under the circumstances, the plaintiffs the Royal Trust Company are clearly entitled to recover the full face value of these 93 bonds (£9,300), viz.: the sum of $45,430.50 with interest thereon at the rate of five per centum per annum from the 25th June, 1902.

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The rate of interest and the time for which it should run are determined by the finding on Item No. 4.

Item No. 8—£8,900—Nos. 1103 to 1191—89 of £100

De Galindez Brothers.

These bonds were acquired by de Galindez Brothers from Hogan who held them as collateral security in virtue of his contract with the company. Hogan was a contractor who built a certain portion of the road, and in December, 1893, the balance due him amounted to the sum of $2,571.57, and the bonds were under the said contract deposited in the Bank of Montreal to be held there under the terms of the said contract.

There is a clause in the contract stating that it "shall "be confirmed at a meeting of the directors of the com- "pany within eight days." There is no evidence showing whether that has been done. However, can it be said it is necessary in view of the fact that the contract is duly signed by the president and manager of the company? Moreover, the company must have acquiesced in the contract by parting with the bonds in the manner mentioned in the contract and would thus have waived this requirement, if not actually confirmed by a resolution of which there is no evidence. At any rate it must be so presumed since the bonds were at Hogan's bidding, who caused them to be delivered to de Galindez Brothers, when the latter sent the draft to the Bank of Montreal in payment of the claim, which was sent on the 17th January, 1902, for the sum of £575 6s. 0, as testified to by J. de Galindez.

The bonds passed over to the purchaser of the claim with all the privileges and rights the former possessor had, and under Art. 1156 C.C., legal subrogation of such right passed by the mere operation of law.

It was quite plausible and natural for de Galindez Brothers to purchase this claim. They themselves had

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a large claim against the company, and it was in their interest to eliminate any creditor having a privilege under the bonds.

This is a case of pledge, and the plaintiffs, the Royal Trust Company, are accordingly entitled to recover under this Item No. 8 the amount mentioned in the contract in question, and for which the pledge or collateral was given, viz.: the sum of $2,571.57.

The holding of these bonds as collateral security interrupted prescription. It is contended that interest should run on this amount from the date of the contract, namely, the 12th December, 1893. But no mention of interest is made in that contract. However, as interest is asked by the conclusion of the present action, the most that can be allowed would be interest upon this sum of $2,571.57 from the date of the service of the action, the 25th day of June, 1907, at the legal rate of five per centum per annum from that date.

Item No. 9—£700—Nos. 1312 and 1313—of £100, Nos. 1478 to 1482–5 of £100, de Galindez Brothers.

These first two bonds Nos. 1312 and 1313, were held with four others, which are now lost, by the Canadian Bank of Commerce, securing some promissory notes of the Baie des Chaleurs Railway Co, and de Galindez Brothers wishing to get the bonds away from hostile hands paid the Bank of Commerce the sum of £216.10s by a draft which became due on the 25th December, 1901, and secured from the bank the several notes, together with the bonds.

Then J. de Galindez tells us that he received from the executors of the late Mr. Thom the five bonds Nos. 1478 to 1482, which Thom held has collateral security for a note. He states he has a transfer in writing which cannot now be found, but says he paid the claim in full, about $500. Then, at page 267, in answer to Mr. Maclennan, he says

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that as regards the Thom bonds he found two payments, one of £70 and the other of £50 odd, but he asserts these were not all the payments made. As the evidence is not satisfactory on this point the undersigned finds for the purposes herein that the Thom claim was in the neighbourhood of $600, and that the bonds in question were given as a pledge for the same.

In the absence of evidence that the amounts for which the pledge was given carried interest, the claim will only carry interest from the date of the service of the present action, the 25th June, 1907.

This is another case of pledge, and the plaintiffs The Royal Trust Company are accordingly entitled to recover under this Item No. 9 the amount found as actually paid, viz.: (£216 10s.) $1,053.63 plus $600, making the total sum of $1,653.63, with interest thereon at the rate of five per centum per annum from the 25th June, 1907.

All of these bonds appear to have been regularly issued in compliance with the Special Act 45 Victoria ch. 53, sec. 13, and the resolutions of the company filed herein and attached to the Deed of Trust.

There is also a trust deed, although it is questionable as to whether or not such trust deed was necessary under the terms of the Special Act. Then in virtue of the Scheme of Arrangement duly confirmed and enrolled the Royal Trust Company were substituted as trustees in lieu and place of the trustees of the bondholders under the said deed.

The bonds extend on the full one hundred miles from Metapedia to Paspebiac, and are created, under 45 Vict. ch. 53 (Quebec), a hypothec and first claim or privileged debt against the company, without registration. The total bond issue was for £409,400, equal to $2,000,000, placing the value of the one at $4.88½, or a bonded indebtedness of $20,000 a mile.

The Baie des Chaleurs Railway Co. built and equipped the first 80 miles before 1894, and under the agreement of the 16th. April, 1894, sold to the Atlantic and Lake Superior Railway Co., the railway as at that time located and constructed from Metapedia to Caplin, a distance of about 80 miles. However, under 57-58 Vict. ch. 63 (Dom.), the Act ratifying the said agreement and sale, by sub-sec. 2 of sec. 2, the rights or priorities of the bondholders of the Baie des Chaleurs Railway Co. are duly saved and declared to be continued. The bonds are not affected by this sale, and the bondholders will therefore have their privileges as prayed by the statement of claim, on that part of the road from Metapedia to Caplin, the 80 mile section. They will come after the above mentioned claim of Brown & Wells upon the first 60 miles extending from Metapedia to Cascapedia, and will rank as a first claim and privileged debt on the other 20 miles from Cascapedia to Caplin.

Having disposed of the several claims made by the plaintiffs herein, we now come to the several creditors who have filed claims and objections or defences to the statement of claim herein. The plaintiffs' claims having been allowed with privileges and priority to such a large amount, it is questionable whether or not it is worth while going into these new claims, as it is not probable the Baie des Chaleurs would be sold for a larger amount than the two claims of McFarlane and the Royal Trust Co. added together.

However, they should, under the order of reference, be considered. Some of these claims are wholly, and some are partly, against the Atlantic and Lake Superior Railway Company. The railway sought to be sold in the present action is the Baie des Chaleurs Railway, comprising the full eighty miles from Metapedia to Caplin, as mentioned in the judgment of this court of the 12th December, 1907. It is true that under the indenture of

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sale of the 16th April, 1894, the Baie des Chaleurs Railway has been, among other railways, sold to the Atlantic and Lake Superior Railway Co., and that this deed of sale or agreement has been confirmed by the Act of the Parliament of Canada 57-58 Vict. ch. 63, under the conditions therein mentioned. But the question of the validity of this sale and as to whether a judgment against the Atlantic and Lake Superior Railway Company could be enforced against the property of the Baie des Chaleurs Railway Company is now pending before the Superior Court at Montreal in the case of *Veilleux* v. *The Atlantic and Lake Superior Railway Company and others;* and then there is another action pending before this court wherein the sale of the Atlantic and Lake Superior Railway has been ordered, and a similar reference to the present one made to the undersigned; and the above, coupled with the fact that the McFarlane claim and the bonds would more than absorb the amount the sale might realize, taking even a most optimistic view of the value of the Baie des Chaleurs Railway, it is thought idle work going into these claims against the Atlantic and Lake Superior Railway in the present case, not to say anything upon the question as to whether or not they could under the present circumstances be legally enforced against the Baie des Chaleurs Railway. Therefore it is thought sufficient for the purposes herein to deal upon this reference only with the claims against the Baie des Chaleurs Railway.

The first claim is that of

GEORGE BALL.

Turning to the objections filed by this claimant, we find it is alleged that he has a claim against the Atlantic and Lake Superior Railway Co. for the sum of $27,171.12, and one of $5,724.84 against the Baie des Chaleurs Railway Co.

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Without going into the details of the claim against the Atlantic and Lake Superior Railway Co. it would be well to say that the claimants were, on the 17th January, 1908, allowed to amend their pleadings by filing a replication showing that the account sued upon, and which appears prescribed, has not been so prescribed, prescription having been interrupted by payments made from time to time.

The leave to amend has not been acted upon and has thus become void under Rule 86 of the General Rules and Orders of this Court. Moreover, no evidence has been adduced with respect to these payments alleged to have been made from time to time, with the exception, however, of three of them.

Dealing with this claim against the Baie des Chaleurs Railway, it would appear that on the 7th March, 1900, J. A. Seybold obtained judgment against the said railway for the sum of $3,967.84 with interest thereon from the 13th March, 1900, and costs. Subsequently thereto, on the 29th June, 1907, it appears that Seybold for alleged valuable consideration assigned, transferred, and made over unto the present claimant George Ball all his right, title and interest in the above mentioned judgment. The said transfer was served upon the company. The claimant heard as a witness, declared he did not receive anything on account of the said judgment, but we have no evidence to show whether any amount had been paid Seybold before he transferred the said judgment. Leave will, however, be given claimant to establish that fact by affidavit, if the necessity ever arises for the purpose of distribution of the moneys herein. This judgment does not appear to have been registered.

Subject to the said affidavit being produced the claimant Ball will be entitled to recover *without privilege* the said sum of $3,967.84, interest and costs.

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Re CHARLES VEILLEUX'S CLAIM.

This is a claim exclusively against the Atlantic and Lake Superior Railway, and for the reasons above mentioned, it will not be gone into or dealt with upon the present reference.

Re WILLIAM HENRY RAPHAEL'S CLAIM.

This is a claim against the Baie des Chaleurs Railway Company under a judgment obtained by the said claimant against the said company, Charles N. Armstrong and Joseph R. Thibaudeau, on the 5th May, 1897 for the sum of $513.06, with interest at 6 per cent. on $510.00 from the 18th March, 1897, and $3.06 from the 22nd April, 1897, and costs.

This judgment does not appear to have been registered. The claimant Raphael will be entitled to recover the amount of the said judgment, as above mentioned, and without privilege.

Re DAME DELPHINE GOULET'S CLAIM.

This is also a claim exclusively against The Atlantic and Lake Superior Railway. For the reasons above mentioned the claim will not be gone into or dealt with upon the present reference.

Re ALEXANDER P. SIMAR'S CLAIM.

This is a claim of an ordinary unsecured creditor for the sum of $1,535.66 against the Atlantic and Lake Superior Railway Co., and for the sum of $10 against the Baie des Chaleurs Railway, representing, as alleged, good and valuable consideration for a certain number of time checks running from November 1897 to March 1899. The claimant received $129 on account of those two claims from the Department of Railways and Canals, at Ottawa, in 1904.

This claim is obviously prescribed. Therefore the claimant is not entitled to recover.

Re "GAZETTE" PRINTING COMPANY'S CLAIM.

This is another claim exclusively against the Atlantic and Lake Superior Railway Co. For the reasons above mentioned the claim will not be gone into or dealt with upon the present reference.

Re FRANCIS D. SHALLOW'S CLAIM.

This is a claim against the Baie des Chaleurs Railway Company under a judgment obtained by the claimant against the said company, C. N. Armstrong and J. A. Thibaudeau, jointly and severally, for the sum of $7,885.72 with interest at 5 per cent. from the 14th January, 1901, and costs. This judgment does not appear to have been registered.

The said claimant is entitled to recover, without privilege, the amount of the said judgment.

The three following claimants, unlike those immediately preceding, have not filed any objections or plea to the statement of claim herein, but have merely filed their claim supported by affidavit.

Re CLAIM OF FROTHINGHAM & WORKMAN, LIMITED.

This is another claim against the Atlantic and Lake Superior Railway Co. For the reasons above mentioned the claims will not be gone into or dealt with upon the present reference or enquiry.

Re CLAIM ESTATE SIMON PETERS.

This is a claim exclusively against the Atlantic & Lake Superior Railway Co. For the reasons above mentioned, it will not be gone into or dealt with upon the present reference or enquiry.

Re JACQUES PELOQUIN'S CLAIM.

This is a claim of $126 for salary against the Baie des Chaleurs Railway Co. The affidavit filed in support of this claim asks for privilege; but it is insufficient in so

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far as it does not state the period or date for which the salary is due. Without this information it is impossible to pass upon this claim, which will be denied, as it is very loosely presented. Leave will be, however, given to supplement the affidavit already filed, by giving the information above mentioned.

Re CHARLES ROBERT SCOLES'S CLAIM.

This creditor has filed no claim, but had been given leave to do so within a reasonable time, on the 16th January, 1908. He was heard as a witness upon another subject than that of his claim, and during the course of his examination his counsel, Mr. Laflamme, put in a judgment in favour of the said Scoles against the Atlantic and Lake Superior Railway Co. with certificate of registration. Were the judgment not registered, no notice would be taken of it, and no claim has been filed. However, the claim being against the Atlantic and Lake Superior Railway Co. it will not be dealt with on this enquiry.

Re ALEXANDER MCDONALD'S CLAIM.

On the 17th January, 1908, an application by Mr. Laflamme, K.C., this claimant was allowed to file his claim within a reasonable time. The case was heard and closed and no claim has ever been filed.

Therefore, the undersigned finds that the amounts due to the plaintiffs and claimants herein, respectively, according to their rank and priority, are as follows, viz:—

1. The plaintiffs, the trustees of the bondholders of the Atlantic and Lake Superior Railway Company, having abandoned their claim, as above mentioned, recover. .... Nil.

2. First preferential claim with lien upon the 60 miles between Metapedia and Cascapedia River, in favour of the plaintiffs Brown & Wells, for the sum of..... $168,964 10
with interest thereon at 6 per cent. from the 28th November, 1889, to the date of sale and costs.

3. First preferential claim, upon the 20 miles between Cascapedia River and Caplin, and second preferential claim (subject to Brown & Wells' claim) on the 60 miles between Metapedia and Cascapedia, in favour of the plaintiffs The Royal Trust Co., for the amount of the bonds as above mentioned, viz:—

Item No. 1.—The sum of..... 529,493 33
with interest thereon at 5 per cent. from the 23rd July, 1906, to the date of sale.

Item No. 2.—The sum of..... 107,074 86
with interest thereon at the rate of 4 per cent. from the 30th Oct., 1895, to date of sale.

Item No. 3.—The sum of..... 11,448 00
with interest thereon at 6 per cent. from the 12th Dec., 1895, to the date of sale and costs.

Item No. 4.—The sum of..... 6,500 00
with interest thereon at the rate of 10 per cent. from the 1st Dec., 1893, to date of sale.

Item No. 5.—The sum of..... 54,712 00
with interest thereon at the rate of 5 per cent. from the 25th June, 1902, to date of sale.

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THE ROYAL TRUST CO. v. THE BAIE DES CHALEURS RWAY. CO.

Report of Referee.

Item No. 6.—The sum of..... with interest thereon at 5 per cent. from the 25th June, 1902, to date of sale.	22,959 50
Item No. 7.—The sum of..... with interest thereon at 5 per cent. from 25th June, 1902, to date of sale.	45,430 50
Item No. 8.—The sum of..... with interest thereon at 5 per cent. from the 25th June, 1907, to date of sale.	2,571 57
Item No. 9.—The sum of..... with interest thereon at 5 per cent. from the 25th June, 1907, to date of sale.	1,653 63
Making the sum of.....	$ 781,842 89
The sum of.....	$ 950,806 99

with interest and costs, as above mentioned, form the total amount the plaintiffs are entitled to recover and rank by privilege.

UNSECURED CREDITORS.

GEORGE BALL.

Subject to the condition above mentioned, George Ball is entitled to recover against the Baie des Chaleurs Railway Company, without privilege, the sum of $3,967.84 with interest thereon at 6 per cent. from the 13th March, 1900 to the date of sale, and costs.

WILLIAM H. RAPHAEL.

This claimant is entitled to the sum of $513.06 with interest on $510 at 6 per cent. from the 18th March, 1897, and on $3.06 from the 22nd April, 1897, to date of sale and costs, and without privilege.

FRANCIS D. SHALLOW.

This claimant is entitled to recover the sum of $7,885.72 with interest thereon at 5 per cent. from the 14th January, 1901, to date of sale, and costs, and without privilege.

Charles Veilleux, Nil.
D. Delphine Goulet, Nil.
Alexander P. Simard, Nil.
The Gazette Printing Co., Nil.
Frothingham & Workman (LTD.), Nil.
Estate Simon Peters, Nil.
Jacques Peloquin, Nil.
Charles R. Scoles, Nil.
Alexander McDonald, Nil.

March, 27th, 1908.

T. Chase Casgrain, K.C., on behalf of The Royal Trust Company, no one appearing for the other parties, now moved for an order for judgment confirming the above report. Motion granted, and judgment ordered to be entered accordingly.

Judgment accordingly.

Solicitors for the Royal Trust Company: *Casgrain, Mitchell & Surveyer.*

Solicitors for the Baie des Chaleurs Railway Company: *Hickson & Campbell.*

BETWEEN

1908
Feb. 13.

THE ROYAL TRUST COMPANY, A BODY POLITIC AND CORPORATE, HAVING ITS PRINCIPAL PLACE OF BUSINESS IN THE CITY OF MONTREAL ..... } PLAINTIFF;

AND

THE ATLANTIC AND LAKE SUPERIOR RAILWAY COMPANY, A BODY POLITIC AND CORPORATE, HAVING ITS PRINCIPAL PLACE OF BUSINESS IN THE CITY OF MONTREAL, AND THE CREDITORS OF THE ATLANTIC AND LAKE SUPERIOR RAILWAY COMPANY..... } DEFENDANTS.

Railway—Insolvency — Pleading — Amendment—New issue—Application made too late—Status of creditor as mortgagee of bonds and trustee—Reference to Registrar.

In this case, certain of the defendants, who were creditors of the railway company defendant, asked leave during the progress of the trial to amend their defence by setting up non-compliance by the railway company with certain statutory requirements as to the issue of bonds.

Held, that the amendment asked would result in raising a new issue between the parties, and the application should be refused as having been made too late.

2. By its statement of claim the plaintiff company asked, among other things, that certain mortgage bonds of the defendant company held by them together with a mortgage deed in favour of the plaintiff, as trustee, made by the defendant company to secure certain bonds or debentures, be declared a "first claim and privileged debt" ranking on the property of defendant company's railway.

Held, that judgment should be entered, declaring that said mortgage bonds and trust deed constituted "a claim and privileged debt," but that their rank, amount and priority should be determined by the Registrar of the Court, to whom a general reference was directed to take accounts and ascertain what was due to the several creditors and what the priorities were as between them, and whether there were any prior claims, and, if any, for what amounts respectively.

THIS was a case instituted by a statement of claim, alleging the following facts:—

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Statement of Facts.

1. By the Statute of Canada, 56 Victoria, chap. 39, the Defendant, the Atlantic and Lake Superior Railway Company was authorized to issue bonds, debentures, or other securities to the extent of $25,000 per mile of its railway and branches, and such bonds, debentures or other securities were, in the event of their being issued, to be a first preferential claim and charge upon the company, and the franchise, undertaking tolls and income, rents and revenues, and real and personal property thereof.

2. In pursuance of the power thus given by said statute, the said company did, on or about the 31st day of December, 1894, at the City of Montreal, duly execute a certain indenture or mortgage deed in favour of certain trustees therein named to secure bonds or debentures to the amount of £500,000 sterling, duly issued by the said company defendant; the same as more specifically set up in a copy of the said indenture or Deed of Trust produced herein as Plaintiff's Exhibit No. 1.

3. By the said Indenture or Mortgage Deed, the company defendant created, in favor of the said trustees for the bondholders, a first mortgage upon the whole of its property, assets, rents and revenues, present or future; the whole as appears by the said deed.

4. On the 10th day of June last, the petition of the directors of the said company defendant, for confirmation of a certain scheme of arrangement with its creditors, duly filed in this honourable court, pursuant to the provisions of section 365 of the Railway Act, was granted, and on the 11th day of July instant, the said scheme was duly enrolled in the said Exchequer Court.

5. By the said scheme of arrangement, The Royal Trust Company, the plaintiff herein, was duly appointed trustee for the bondholders of the said company defendant.

6. On the 19th of July instant, at the City of Montreal, by the ministry of John Fair, Notary Public, the said

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Statement of Facts.

the Royal Trust Company, duly presented for payment to the said company defendant, the coupons of the bonds hereinabove mentioned, and more specifically set up in a copy of the demand for payment, and produced herein as Plaintiff's Exhibit No. 2.

7. Upon such demand of payment and protest, the said company refused payment, and declared that it had no funds available for the payment of the said coupons.

8. The said the Royal Trust Company, present plaintiff, is a holder of a first mortgage or preferential claim and charge upon the said company, its franchise, undertaking, tolls and income, rents and revenues, and real and personal property.

9. The said company defendant, the Atlantic and Lake Superior Railway Company, is and has been for a long time past unable to pay its debts as they became and become due, has acknowledged its insolvency and is insolvent within the meaning of the law.

10. The plaintiff claims as follows :—

(*a*) A declaration that the Mortgage Bonds issued by the Atlantic and Lake Superior Railway Company and the Deed of Trust mentioned in paragraph 2 of the Statement of Claim have created and constituted and constitute a first claim and privileged debt, ranking on the property of the said railway.

(*b*) An account of what is due to the plaintiff under the foregoing Mortgage Bonds and Trust Deed for principal, interest and costs.

(*c*) That the said Mortgage may be enforced by foreclosure or sale.

(*d*) That the Trustees for the Bondholders of the Atlantic and Lake Superior Railway now operating the road by virtue of the Statute of Canada, 1 Edward VII, chapter 48, be allowed to continue operating the said railway as hitherto.

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THE ROYAL TRUST CO. v. THE ATLANTIC AND LAKE SUPERIOR RWAY. CO.

Judgment.

The defendant company appeared and consented to judgment being entered as prayed in the statement of claim. Certain of its creditors, however, filed statements in defence, opposing the judgment as prayed.

February 13th, 1908.

The case now came on for trial before SIR THOMAS W. TAYLOR, acting Judge of the Exchequer Court.

T. Chase Casgrain, *K.C.*, and *J. W. Weldon*, for the plaintiff;

N. K. Laflamme, *K.C.*, and *F. S. Maclennan*, *K.C.*, for the creditors.

During the progress of the trial, as appears upon the official record, the learned Judge decided certain questions similar to those decided by Mr. Justice Burbidge in the *Baie des Chaleurs* Case (1), adopting the latter's rulings in every instance.

On a motion made at a late stage of the trial by counsel for the creditors to be allowed to amend their statments in defence by setting up that the bonds in the hands of the plaintiff were invalid in as much as they were not issued in compliance with statutory requirements, the learned Judge ruled that the application to amend involved the raising of a new issue between the parties, and was made too late. The learned Judge also refused to declare, in the terms of the prayer of the statement of claim, that the mortgage bonds of the defendant company held by the plaintiff together with a mortgage deed made by the defendant company and held by the plaintiff, as trustee, to secure bonds or debentures, constituted "a first claim and privileged debt"; but directed the matter of such priority to be referred to the Registrar of the Court, to whom a general reference in the cause was made in the same terms as the reference in the *Baie des Chaleurs* Case (2).

(1) Reported, *ante*, p. 1.

(2) REPORTER'S NOTE.—See the report of this case on proceedings before the Registrar, *post* p. 42.

BETWEEN

1908
May 14.

THE ROYAL TRUST COMPANY.....PLAINTIFF;

AND

THE ATLANTIC AND LAKE SUPERIOR RAILWAY COMPANY.. } DEFENDANTS;

AND

GEORGE BALL, CHARLES VEILLEUX, F. D. SHALLOW, W. H. RAPHAEL, A. PHIDIME SIMARD, DAME D. GOJLET, ZÉPHERIN PERRAULT AND ALFRED E. GERVAIS, R. C. SCOLES, ARCHIBALD CAMPBELL, ALEXANDER DUCLOS, MARTIAL OLSCAMP, THE GAZETTE PRINTING COMPANY, THE SHIPOWNERS AND MERCHANTS' AGENCY, LIMITED, THE NORTH-EASTERN BANKING COMPANY, LIMITED, *et al.*, JESSIE CAMPBELL ASHWORTH, ADELARD LANGLOIS, JAMES M. SHANLEY, CHARLES J. ARMSTRONG, WILLIAM OWENS, AND THE BRITISH AMERICAN BANK NOTE COMPANY, LIMITED. } CREDITORS.

Railway company—Trust deed—Registration—Trustees' salary—Prescription—Constitutional law—Cestui que trust—Salary of Director—Privilege of Bondholder—Bond as Pledge—Amendment of claim—Hypothec by registered judgment—Privilege of Trustees—Estoppel.

Held, (by the Registrar, as Referee) that the deposit of a trust deed by a railway company with the Secretary of State and notice thereof given in the *Canada Gazette*, as required by sec. 94 of 51 Vict. c. 29, satisfies the requirements of Title XVIII, C. C. P. Q., with respect to registration.

2. The holding of a railway bond by one of several trustees of a railway company as collateral security for the payment of salary to such

trustees is an interruption of prescription under Art. 2260 C. C. from the time it was deposited with such trustee.

3. The power of the Parliament of Canada to legislate upon the subject of railways extends to civil rights arising out of, or relating to, such railways.
4. A *cestui que trust* cannot act as trustee for his own trustee and recover remuneration for his services as such.
5. A director of a company is not entitled to any remuneration for his services, without a resolution of the shareholders authorizing the same.
6. The failure on the part of a bondholder to deposit his bonds within a certain period, in the hands of a named trustee in compliance with the terms of a Scheme of Arrangement, duly confirmed by the Court under the provisions of *The Railway Act*, deprives him of any privilege attached to his bonds, and he must be ranked only with the unsecured creditors.
7. Where bonds find their way into the hands of a creditor as a mere pledge for his debt, not being bought in open market, the creditor can only recover the amount of his debt and not the face value of the bonds.
8. Leave to amend under Rule 86 of the practice of the Court becomes null and void if not acted upon within the period fixed for the purpupose.
9. Under the law of the Province of Quebec a hypothec cannot be acquired by the registration of a judgment upon the immovables of a person notoriously insolvent at the time of such registration, to the prejudice of existing creditors.
10. Under the facts of this case, trustees under a debenture-holders trust deed were held to be entitled to be indemnified in preference to all other creditors out of the trust property, for all costs, damages and expenses incurred by them in the performance of the trust. In re *Accles Limited*, (1902) 17 T. L. R. 786, referred to.
11. The word "approved" written by the debtor upon an account against him, and dated, will not suffice to revive the debt already prescribed under the provisions of Art. 2267 C. C P. Q.

THIS was a case in which a reference was made to the Registrar of the Court to take accounts and to determine the amount due to the plaintiff and creditors and to fix the priority of claims against the defendant railway company, previous to an order for the sale of the railway being made by the Court (*).

* REPORTER'S NOTE.—See the report of the trial of this case before the Court, *ante*, p. 38.

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THE ROYAL TRUST CO. v. THE ATLANTIC AND LAKE SUPERIOR RWAY. CO.

Report of Referee.

The facts of the case in respect of which the order of reference was made are fully set out in the report of the Registrar, L. A. AUDETTE, K.C.

May 14, 1908.

THE REFEREE: The reference herein was proceeded with, at Montreal, on the 10th, 11th, 14th days of March, and on the 10th day of April, 1908 in the presence of Counsel, T. C. Casgrain, Esq., K.C., with whom was J. W. Weldon, Esq., appearing for the plaintiffs; N. K. Laflamme, Esq., K.C., appearing for the said creditors Ball, Veilleux, Shallow, Raphael, Simard and Goulet, Scoles, and Perrault and Gervais; C. J. Fleet, Esq., K. C. appearing for creditor Ashworth; and S. Dale Harris, Esq. appearing for the Shipowners' and Mercantile Agency, Ltd. and the North-eastern Banking Company, Ltd. *et al.*

The first seven creditors above mentioned filed a contestation and objection to the plaintiffs statement of claim, and issues were joined thereon.

The question of the validity of the bonds has been determined by the judgment of the 13th February, 1908. The question as to whether or not the registration of the trust deed in the Registry Office of the Province of Quebec, as required by the Civil Code, in addition to its registration in the office of the Secretary of State, is necessary to give the bondholders a privilege over and above the judgment creditors who have so registered their judgments has been much discussed before the undersigned.

The Atlantic and Lake Superior Railway Company was incorporated in 1893 under the Act 56 Vic. ch. 39, passed by the Parliament of Canada. The general Railway Act in force and regulating the matters in question in the present case is the Act of 1888. The Railway Act of 1903, re-enacted in the Revised Statutes of 1906, does not apply to the questions involved herein.

It is obvious that in the present case the Dominion statute must be read first and the Civil Code, as far as applicable, only next. Under section 94 of 51 Vict. ch. 57 (1888) a company may issue bonds creating a mortgage upon its property by mortgage deed, which under subsection 3 thereof must be deposited in the office of the Secretary of State for Canada and notice thereof given in the *Canada Gazette*, a condition which has been complied with in the present case as will appear by the exhibits filed herein.

Clearly such registration in the office of the Secretary of State of which notice has been given in the *Canada Gazette* must be taken to be the notice to the public which the Civil Code has in view by the registration therein required. Therefore the bonds in question must be taken to be under ordinary circumstances valid and to be a first preferential claim and charge upon the property sought to be sold herein.

It is contended by counsel on behalf of the creditors who have filed written pleadings, that as civil rights are in question, the Parliament of Canada could not in violation of the rights vested in a Province, legislate the company out of the obligation of registering its bonds, and that therefore the bonds to carry privilege must be registered in compliance with the requirements of the Civil Code. The argument goes still further and says that all legislation by the Dominion as to railways is valid, except when it interferes with civil rights, and that in so far as Dominion legislation interferes with civil rights such legislation is *ultra vires*.

It may be set down as a principle for our guidance here that the Parliament of Canada has power to legislate upon the question of railways, and that such power would extend to civil rights arising from or relating to the class of subject matter coming within its jurisdiction.

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Report of Referee.

In *Cushing* v. *Dupuy* (1) it was decided by the Privy Council that, inasmuch as bankruptcy was one of the subjects expressly reserved to the Dominion Parliament by section 91 of the British North America Act, 1867, the statute objected to as *ultra vires* was valid even though it interfered with civil rights.

And in *Tennant* v. *Union Bank* (2) where a similar question came up respecting the Bank Act of the Dominion, the following expression of opinion is to be found in the judgment of the Court delivered by Lord Watson: (p 30):—"The objections taken by the appellant to the "provisions of the Bank Act would be unanswerable if "it could be shown that by the Act of 1867, the Parlia- "ment of Canada is absolutely debarred from trenching "to any extent upon matters assigned to the Provincial "Legislatures by section 92. But section 91 expressly "declares that notwithstanding anything in this Act "the exclusive legislative authority of the Parliament of "Canada shall extend to all matters coming within "the enumerated classes, which plainly indicates that "the legislation of that Parliament, as long as it strict- "ly relates to these matters is to be of paramount "authority. To refuse effect to the declaration would "render nugatory some of the legislative powers specially "assigned to the Canadian Parliament. For example, "among the enumerated classes of subjects in section 91, "are Patents of Invention and Discovery and Copyrights. "It would be practically impossible for the Dominion "Parliament to legislate upon either of these subjects "without affecting the property and civil rights of indi- "viduals in the Provinces."

Another case cited by the plaintiff is the case of *Bourgoin, et al* v. *Montreal, Ottawa & Occidental Railway Company* (3) where it was held in effect that the Provinces

(1) L. R. 5 A. C. 409.
(2) (1894) A. C. 31.
(1) 49 L. J. P. C. 68.

were incompetent to legislate as to civil rights relating to a railway subject to the jurisdiction of the Dominion when inconsistent with its legislation. This was the case of a contract of sale of a Dominion railway situated within the Province of Quebec and ratified by the Provincial Legislature. And the Privy Council held that such sale, except under the authority or sanction of an Act of the Dominion Parliament, was *ultra vires*, and that the Legislature of Quebec was incompetent to give such sanction. (1)

While section 4617 of the Revised Statutes of Quebec requires the registration of debentures issued by municipal corporations and by companies generally, section 4626 specifically exempts railway companies from doing so.

The first claims to be dealt with under the reference are the plaintiff's claims and they arise under the bonds of the said company.

The total issue of bonds by the Atlantic and Lake Superior Railway Company is £500,000, of which £398,700 were deposited, in compliance with the Scheme of Arrangement, with the plaintiff herein on or before the 3rd day of September, 1907, leaving £101,300 which have not been so deposited, the owners of which, under the provisions of the Scheme, would simply become unsecured creditors.

Exhibit No. 18 reads as follows :—

STATEMENT of Bonds of the Atlantic and Lake Superior Railway Company received by The Royal Trust Com-

(1) See also *Toronto Corporation* v. *Bell Telephone Company* [1905] A. C. 52; *Attorney-General B.C.* v. *C.P. Railway Company* [1906] A.C. 204; and *The G. T. Railway Company* v. *Attorney General of Canada* [1907] A. C. 65.

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Report of Referee.

pany under the Scheme of Arrangement confirmed by the Exchequer Court of Canada.

Amount.	Distinctive Numbers.	From whom received.
£391,400	1-2000, 2021-2270, 2276-9, 2281-2500, 2723-50, 3589-5000, 3914.....bonds of £100	Galindez Bros.
£ 2,000	3051-70..... 20 bonds of £100	"
£ 2,000	2001-20.....20 bonds of £100	L. H. De Friese.
£ 3,000	3431-60.....30 bonds of £100	Pickford and Black.
£ 200	3582-3..... 2 bonds of £100	A. Langlois.
£ 100	3581..... 1 bond of £100	A. Lemieux.....
£398,700		

The Royal Trust Company hereby certifies that all the above mentioned Bonds were received from the parties set out, above, on or before the 3rd September, 1907.

The Royal Trust Company also certifies that all the foregoing bonds bear the Certificate and the seals of the Atlantic and Lake Superior Railway Company and of The Royal Trust Company as set out in Schedule "A" of the Scheme of Arrangement; and it further certifies that all the above mentioned Bonds are now in the possession of The Royal Trust Company as Trustees for the Atlantic and Lake Superior Railway Trust Fund (except No. 2, which has been fyled in this Court as an exhibit in The Royal Trust Company v. Atlantic and Lake Superior Railway Company *et al.*)

Montreal, 12th February, 1908.

THE ROYAL TRUST COMPANY.

{Seal of Royal Trust Co.}

(Sgd.) A. MACNIDER,
Member of Executive Committee

(Sgd.) H. ROBERTSON,
Manager.

The first claim to be dealt with is the claim of the trustees for the amount which should be charged as a first charge against the property of the company, as mortgagors (*Palmer's Company Precedents*, Vol. 3. pp. 83, 702) and these are as follows, viz:—

(*a*) The sum of..... $ 18,449 17

being the balance due C. S. Scoles, under the contract between the Company and the trustees and in virtue of the final estimates of the Chief Engineer who, under the contract, is the sole Judge of the matters therein mentioned. These moneys are also claimed by the trustees, from the Dominion Government, as being due them under the subsidy contract, and will have to be accounted for by the said trustees if the same is ever paid them by the Government.

It is true that the Government has sent engineers to place a value upon the work done and that, rightly or wrongly, they have reported the value to be less, but as between the trustees and the contractor, it is absolutely clear that the finding of the Chief Engineer mentioned in the contract must be final and prevail.

(*b*) The next item covers the trustees' expenses through their attorney or representative in Canada, the Honourable J. P. B. Casgrain, from the 15th December, 1900 to the 31st December, 1907, inclusively, upon which interest is allowed at 5 per

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Report of Referee.

cent, beginning five years from the service of the present action, i.e. from the 23rd July, 1902, the statement of claim having been served on that date. Messrs. Galindez Bros. really acted as bankers for the trustees, they having advanced all the necessary expenditure, and are accordingly entitled to the usual legal interest upon such advances. From the account originally filed, amounting, exclusive of interest, to the sum of $49,933.22, the sum of $2,000 representing the item of 23rd July, 1901, has been deducted and charged elsewhere.

The total amount so recoverable against the company is..... $ 47,933 22

with interest at 5% on $19,428.04 from 23rd July 1902 to date of sale

"	"	$ 1,580.00	"	31st Dec. 1902	"	"
"	"	$ 3,611.08	"	30th June 1903	"	"
"	"	$ 2,483.33	"	31st Dec. 1903	"	"
"	"	$ 2,683.33	.	30th June 1904	"	"
"	"	$ 2,483.33	"	31st Dec. 1904	"	"
"	"	$ 2,597.46	"	30th June 1905	"	"
"	"	$ 2,483.33	"	31st Dec. 1905	"	"
"	"	$ 2,483.33	"	30th June 1906	"	"
"	"	$ 2,483,33	"	31st Dec. 1906	"	"
"	"	$ 3,133.33	"	30th June 1907	"	"
"	"	$ 2,483.33	"	31st Dec. 1907	"	"

(*c*) This item is for legal expenses, as per the bill of costs filed by Messrs. McGibbon, Casgrain, Mitchell & Surveyer, amounting to the total sum of $28,091.24, including the interest charged by Messrs. Galindez Bros., Bankers, on the advances of the several sums. Mr. T. C. Casgrain

was heard as a witness in support of the bill, and testified that the same, amounting to the sum of $23,869.57 has been paid to his firm. From this amount should be deducted $25.00 for the reasons mentioned at pages 82 and 88 of the evidence on the reference; leaving the sum of.... $ 23,844 57

These costs are chargeable against the trustees under the provisions of the deed of trust, and as it would be rather a difficult operation to distinguish what is actually chargeable against the company and what against the bondholders, a short cut has been resorted to by consent and that is to divide the bill in half, charging one half against the company and one half against the bondholders.

Therefore the amount found to be recoverable against the company as above mentioned is the sum of $11,922.29 with interest thereon at 5 per cent. from the dates respectively mentioned to the date of sale, and upon the amounts also respectively mentioned in the statement No. 3 filed herein on the 3rd March, 1908, which said interest should also be divided in half, one half being added to the sum of $11,922.29 and the other half added to the similar sum of $11,922.-29 as chargeable and recoverable against the bondholders. Of course the interest is not payable to the

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solicitors but to the bankers who made the advances.

(*d*) This item covers both the trustees' remuneration and the fees paid the Chief Engineer of the company.

The first amount is the sum of.....	$973 33
with interest thereon at 5 per cent. from 30th January. 1902, to date of sale, together with a similar amount of.....	973 33
with interest thereon from the 4th February, 1903, at 5 per cent. to date of sale. This total sum of.....	1,946 66
represents the trustees' fee. To this should be added the sum of.....	486 67
with interest thereon at 5 per cent. from the 24th Dec. 1902 to the date of sale	
And the further sum of.....	389 33
with interest thereon at 5 per cent. from the 26th February, 1903, to the date of sale, making the total sum of.	876 00
with interest as above mentioned, representing the fees due the chief engineer, the account for the same having previously been approved by Senator Casgrain.	
Making the total sum of.....	2,822 66
with interest payable as above mentioned.	
(*e*) This item amounts to the sum of	973 33
with interest thereon from the 31st December, 1907 to the date of sale, and represents the fee payable to the plaintiff therein for their services as trustees under the provisions of	

the Scheme of Arrangement, and will be allowed as claimed.

We have now come to the expenses chargeable and payable by the bondholders.

(*a*) The first item is for the sum of..... 2,000 00
with interest thereon at 5 per cent. from the 23rd July, 1902 to the date of sale, as representing an amount paid by the trustees through their bankers Messrs. Galindez Bros. in settlement of a judgment obtained against the trustees by one Chevrier who was but a *prête-nom* for the Honourable R. Prefontaine. From Mr. J. deGalindez' evidence (p. 211 et seq.) we find that this was an action for about $50,000 defended by the said trustees. The plaintiff therein succeeded both in the Superior Court and in the Court of Appeals. After the appeal had been lodged in the Privy Council, but before the hearing, the case was settled upon the payment of the sum of $2,000, and for the reasons given by the witness the amount will be allowed as asked.

(*b*) There will be allowed here the other half of the legal fees amounting to the total sum of 23,844 57
the half being 11,922 28
with interest as above mentioned under sub-item (*d*) in item No. 1.

(*c*) The sum of $27,225.88 and interest will be allowed under the judgment recovered by Mr. Galindez, with the rank and privilege given it by the bonds he received as collateral security, and will be refused here failing to see

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any good reason why this amount should be charged to the bondholders.

(*d*) The amount charged by J. de Galindez for a living allowance of $10 per day and a salary of $2,000 a year, amounting in all to the sum of $24,567 for his alleged services to the trustees will be refused and disallowed.

Mr. deGalindez claims that he holds from the trustees, who reside in England, a power of attorney, wherein there is no question of remuneration, and that under the deed of trust the services he would render as such agent or attorney of the trustees would be entitled to remuneration. Without entering into the consideration as to whether or not a person acting in the manner Mr. deGalindez did, where the power of attorney given him did not provide for any remuneration, would be entitled to it, and whether it would or would not come under the provisions of the Article of the Civil Code 881 (*g*) which says that trustees act gratuitously, unless it be otherwise provided in the document creating the trust, and whether the class of trust contemplated by this article is to be distinguished from a commercial trust (Art. 1702 C.C.), the undersigned fails to see how the *cestui que* trust could become the trustee of his own trustees. The principle is not a sound one, and were it adopted it would carry us to absurd results. The trustees had in Canada a representative in the able person of the Honourable J. P. B. Casgrain, receiving a handsome salary, and who was quite able to perform any function the trustees themselves could be called upon to discharge. And besides the Honourable J. P. B. Casgrain, the trustees had and have still to-day a manager to whom they pay the sum of $2,000 a year. There was never any contract or arrangement with the trustees for his remuneration, and Mr. de Galindez very fairly admits in his evidence (p. 164) that all he did was to protect his investment, and not for philanthropic purposes. He did

not do all the work to benefit anyone else but himself. Mr. de Galindez is really in the position of a principal who, by preference, chooses to attend to his own business instead of allowing his paid agents to do so. When he is looking after his own business he cannot charge the other creditors for the same.

When Mr. J. de Galindez was in Canada, acting as he says for the trustees, he was looking after his own interests; he was looking after his own personal business, and as the remuneration for such class of work cannot be recovered to the detriment of the other creditors, more than the expenses of the several creditors themselves who are to-day left without any practical recourse against the company, because they have no privilege notwithstanding they have spent time and money in looking after their claims.

Moreover, Mr. de Galindez was, as I can gather from the evidence (p. 12 of evidence upon claim of Shipowners, etc.) a director of the company at the time, and as such would not be entitled to any remuneration from the company without a resolution of the shareholders.

This brings us to the claim of the bondholders. Taking them in the order set forth in Exhibit No. 18, as above recited, we will deal first with items Nos. 1 and 2, viz:—

I. £391,400—3914 bonds of £100—Galindez Bros.
II. £2,000 —20 bonds of £100— do

Under the agreement of the 14th day of September, 1897, between the Atlantic and Lake Superior Railway Co. and Messrs. de Galindez Bros. duly ratified and confirmed by a resolution of the board of directors of the said company, bearing date the 30th September, 1897, the said Messrs. de Galindez Bros. made advances to the said company for which they obtained two judgments which are guaranteed by these bonds as collateral security.

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The first judgment bearing date the 17th day of April, 1906, and duly registered respectively in the 1st and 2nd Registration Divisions for the County of Bonaventure, is for the sum of.....$ 499,579 55 with interest at 6 per cent. on $389,-333.33 from the 31st March, 1905, and on $110,246.22 from the 29th day of April, 1905, to the date of sale.

The second judgment bears date the 31st December, 1906, and has also been registered in both Registration Divisions of the County of Bonaventure, and is for the sum of $330,000, with interest at 6 per cent. from the 30th June, 1905.

Mr. J. de Galindez having discovered that the interest on $389,333.33 from the 31st March, 1900, to the 30th June, 1905, *i. e.* $330,-000, 5¼ at 6 per cent. amounting to.....$ 122,640 00 had been by mistake included in the said judgment, fairly and honestly declared it in his evidence on the reference. Therefore this sum should be deducted from the capital, leaving the sum of.....$ 207,360 00 207,360 00 with interest thereon at 6 per cent. from the 30th June, 1905, to the date of sale.

The Royal Trust Co. is therefore entitled to recover these two sums with interest as above mentioned.

Item III. £2,000—20 bonds of £100—L. H. DeFriese.

In an affidavit of L. H. DeFriese, filed herein on the 6th day of April, 1908, in support of the Ashworth claim, Mr. DeFriese states that he held, until the month of July, 1907, £1,000 nominal Atlantic and Lake Superior Railway 4 per cent. first mortgage bonds, as security for the amount due to the trustees for the bondholders of the said company, and that he now holds certificate of participation for the said amount under the provisions of the Scheme of Arrangement.

The amount claimed by the Ashworth estate is more than £1,000. There is no evidence with respect to the other £1,000. Would it mean that DeFriese held £1,000 in bonds as security for his own fees, and £1,000 in bonds as security for Ashworth's fee? That fact should be clearly established before the moneys will be distributed.

Under the circumstances the face value of the bonds will be allowed, viz: the sum of $9,733.33, with interest thereon at 4 per cent. from the 23rd July, 1902, to the date of sale.

The rate of interest is determined by the rate of the bond. Under Art. 2250 C. C. the arrears of interest being prescribed by five years, the plaintiffs are only entitled to the interest for the five years preceding the service of the action on the 23rd July, 1907.

Item IV. £3,000—30 bonds of £100—Pickford & Black.

No evidence has been adduced to determine under what circumstances Messrs. Pickford & Black came into possession of these bonds, which *primâ facie* should be paid at their face value.

Therefore the plaintiffs will be entitled to recover the face value of the said bonds, viz.: the sum of $14,600 with interest at 4 per cent. from the 23rd day of July,

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1902, to the date of sale, for the reasons above mentioned.

Item V. £200—2 of £100—A. Langlois.

Same finding as upon Item No. IV. The face value of the bonds will be allowed, viz: the sum of $973.33 with the interest thereon at 4 per cent. from the 23rd day of July, 1902 to the date of sale.

Item VI. £100—1 Bond of £100—A. Lemieux.

Same finding as upon Nos. IV and V, viz: the sum of $486.67 with interest thereon at the rate of 4 per cent. from the 23rd day of July, 1902 to the date of sale.

CLAIM OF THE ESTATE A. P. ASHWORTH.

This is a claim for £1,383-6-8, equal to $6,731.83 for remuneration as trustee, under the trust deed of 31st December, 1894, of the late Caldwell Ashworth, who died on the 15th June, 1903. The claim now presented by the representatives of the Estate of the said Ashworth is for the salary of the said trustee, amounting to the sum of £1,583-6-8 for a period of seven years and eleven months, viz: from the 19th July, 1895 to the 15th June, 1903, upon which the sums of £200-0-0 have been paid on account on the 30th January, 1902, and on the 30th January, 1903, respectively, reducing the claim to the said sum of £1,383-6-8; and it is admitted that Ashworth was trustee as alleged.

L. H. DeFriese, in his affidavit, sworn to on the 18th March, 1908, states that for upwards of seven years he held £1,000 bonds of the company as security for the amount due to the trustees, until the month of July, 1907, when the said bonds were lodged with the plaintiff herein and for which he received in exchange certificates of participation in the Trust Fund created by the Scheme of Arrangement.

If DeFriese had been in possession of the bonds for upwards of seven years on the 18th March, 1908, that

would take us back to the year 1901, and as no date is given, the undersigned finds for the purposes of this case that it would be on the 19th January, 1901. Therefore the first six months of the year 1896 were prescribed when the bonds were so received. The salary is prescribed by five years under Art. 2260 C. C., and under Art. 2267 C. C. the debt is absolutely extinguished after the delay for prescription has expired.

The holding of the bond by one of the trustees, as collateral security, for their respective salaries as such trustees has civilly interrupted prescription up to the time it was deposited with the plaintiffs in the manner above set forth. This principle was adopted in the case *La Banque du Peuple* v. *Huot*, (1) where it was held that the fact that the debtor, who gave a pledge to his creditor assuring the payment of his debt, of leaving the pledge in the hands of the creditors, constituted a constant and incessant acknowledgement of his obligation which interrupts prescription for such time as the pledge remains in the hands of the creditor.

Therefore this sum of £1,383-6-8 must be reduced by £100, as representing the first six months so prescribed, leaving the claim at £1,283-6-8, equal to $6,245.17, the prescription having been interrupted by the holding of the bonds.

Now this bond has not been given in payment of Ashworth's claim, but merely as a pledge, a collateral security for the claim, and a pledge is quite distinct from the debt it guarantees, and *vice versa*. When the debt is paid the pledge passes away, and that is the end of the transaction. The claim has not been changed by the fact that Ashworth held that bond; his claim has not been changed from one of salary to one of a bondholder. The bond has not been either given or accepted in payment, and there is no agreement by which the claimant has expressed his

(1) R. J. Q. 12 C. S. 370.

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willingness to accept a bond in payment of his claim. The claim has not become an alternative claim payable either with the salary privilege or with the bond privilege. The bond has had the effect of interrupting prescription, but not changing the nature of the claim, and if the prescription has been interrupted the claim stands on its original merit. The vendor does not throw away his privilege or vendor's lien because he accepts bonds as collateral security. Any flaw which might exist through prescription has disappeared and the claim remains on its merits.

Under Clause II. of the trust deed, in case the company makes default in paying to the trustees their remuneration either original or additional as therein mentioned, the trustees may retain the same in priority to any other claim out of any trust moneys coming into their hands. The contract cannot be extended beyond what the words import; it is a privilege strictly *de juris* upon moneys coming into the hands of the trustees. Therefore, the claimant, without his bond, would have a claim against the company without privilege under the circumstances of the case (1).

Now the bond has certainly given him a privilege, besides interrupting prescription as above mentioned, and the fact that the bond has been deposited with the Royal Trust Company does not change the position of the claimant with respect to the creditors of the company. The certificates of participation will change his right from the face value that bonds will have under the Scheme of Arrangement, and that value will only be determined by the price the railway will be sold for.

Therefore the claimant Ashworth will be entitled to recover the sum of $6,245.17, which will be paid in the following manner, viz.: (1) by privilege *pro tanto* the

(1) *Re* Accles Ltd. Hodgson v. Accles, 18 T. L. R. 786; and Palmer's Company Precedents, 9th Ed. Vol. 3, pp. 703, 704.

amount the bond will give him under the value it will ultimately have after the sale of the railway, pursuant to the terms of the Scheme of Arrangement; (2) the balance remaining unpaid will be payable by the company without privilege. There will be no costs to either party.

What has been said under Item III. in disposing of the claim made by L. H. DeFriese for £2,000 might well be repeated here, and it is that the fact as to whether the said £2,000 in bonds so held by DeFriese represent £1,000 as collateral security for Ashworth's fee and £1,000 as collateral security for DeFriese's own fee should be made clear before the final distribution of the moneys herein.

THE SHIPOWNERS AND MERCHANTS AGENCY, Limited, in voluntary liquidation; and HASTINGS BAGSHAW, Liquidator thereof, Creditors of the Atlantic and Lake Superior Railway Company; and THE ROYAL TRUST COMPANY, Plaintiff contesting.

The claimants allege they are bearers of First Mortgage Bonds of the company defendant to the amount of £22,500 sterling, and ask to be collocated herein for the said amount with the priority to which they are entitled.

It is well to preface anything to be said in connection with this claim by the statement that the claimants have not complied with the provisions of the Scheme of Arrangement duly confirmed by this court, and that these bonds have not been deposited with the plaintiffs on or before the 3rd day of September, 1904, as will appear by Exhibit No. 18 filed herein. It is unnecessary to relate here the history of the correspondence, by letters and cables exchanged between the claimants, Mr. de Galindez and the company, as the net result of it all is that the claimants of their own free will chose not to comply with the requirements of the Scheme of Arrangement, and did not deposit their bonds as required by the same.

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Clause 8 of the Scheme of Arrangement reads as follows:—"The bondholders who shall not transfer and "deliver their bonds to The Royal Trust Company within "the time stipulated in the public notices, shall remain "creditors of the company to the extent of the principal "and interest represented by their bonds, but they shall "not be entitled to any mortgage lien, charge or equity "of redemption in respect of any of the company's "property and assets, nor to any preference of payment "over other unsecured creditors of the company".

The claimants will therefore rank with the unsecured creditors.

The next question to be determined is the one of quantum.

The evidence we have to pass upon this claim is very unsatisfactory. However we have distinct testimony that the bonds in question were given as pledge or colo-lateral security, and that the amount now owing by the company to the claimants is between £4,000 and £5,000.

The claimants are therefore entitled to recover against the company the amount for which the pledge was given, and that amount will now be fixed at £4,500, and will be payable to the said claimants without privilege, upon the delivery or surrender of their bonds.

The claimants having presented their claim after the legal delays for doing so, and having been heard by indulgence after the reference had been closed, will be refused costs. There will be no costs to either party.

THE NORTHEASTERN BANKING COMPANY, Limited and THE COMMERCIAL TRUST COMPANY, Limited.

The claimants The Northeastern Banking Company, Ltd., allege they are bearers of First Mortgage Bonds of the company defendant to the amount of £10,000, and ask to be collocated herein for the said amount with the priority to which they are entitled.

The Commercial Trust Company declare by their pleadings herein that they do not desire to file any claim.

These bonds have not been deposited with the plaintiffs herein in compliance with the requirement of the Scheme of Arrangement, and the bondholders must therefore rank with the unsecured creditors.

Here again the evidence adduced is very unsatisfactory and superficial.

The bonds appear to have been given as pledge, but the amount for which they were so given is not disclosed. And beyond the fact that the Northeastern Banking Co., Ltd., received them in the ordinary course of business, we have no evidence of the circumstances under which they did come into their possession.

It is said in the argument that overdue coupons are not detached, but there is not sufficient evidence upon this point to find that the claimants were put upon inquiry.

The bonds are now in the hands of third parties, and in the absence of evidence they must be taken to be *primâ face*, good and valid in their hands.

Therefore the claimants The Northeastern Banking Co., Ltd., are entitled to recover the said sum of £10,000, equal to $48,666.67, and without privilege, upon the delivery or surrender of the bonds alleged to be in their possession. No costs to either party.

Re GEORGE BALL'S CLAIM.

Turning to the objections filed by this claimant, we find it is therein alleged that he has a claim both against the Baie des Chaleurs Railway Company and the Atlantic & Lake Superior Railway Company respectively.

The claim against the Baie des Chaleurs Railway Co., has already been disposed of in the case instituted in this Court by The Royal Trust Co. v. The Baie des Chaleurs Railway Co.

The first claim against the Atlantic & Lake Superior Railway Co., is, as alleged, for goods sold and delivered

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by the claimant to the company defendant, amounting to the sum of $17,789.92, as more fully appears in a detailed statement filed herein as Exhibit No. 1, together with interest thereon, amounting at the time of filing the said objections to the sum of $2,136.00.

This claim appears on the face of the statement of account, Exhibit No. 1, to be entirely prescribed, and will accordingly be dismissed.

As already stated in the *Baie des Chaleurs* Case (1), the claimant was, on the 17th January, 1908, allowed to amend his pleadings in a manner to show that the account sued upon and which appears prescribed has not been so prescribed, prescription having been interrupted by payments made from time to time.

The leave to amend has not been acted upon and has thus become void under the provisions of Rule 86 of the General Rules and Orders of this Court. Moreover, no evidence has been adduced with respect to these payments alleged to have been made from time to time, with the exception however of Exhibits "W","X" and "Y" filed in the case of the *Baie des Chaleurs Railway Co.*

It is true that Exhibit No. 7 filed by the claimant is a document purporting to be a copy of Exhibit No. 1, and that at the foot of each account is to be found the following: "Approved, Dec. 10th, 1904, Atlantic and Lake Superior Railway Co., signed J. R. Thibaudeau, President." But is that sufficient to revive an account which under Art. 2267 was absolutely extinguished? Under Beauchamp's annotation No. 14 following Art. 2227 of the Civil Code we find that "The limitation of five years operates a statue of repose which extinguishes the debt, and nothing less than a new promise in writing can suffice to found an action upon." Then annotation No. 48, under the same Art. says:—"La renonciation à la prescription acquise ne peut être faite que par le débiteur et doit renfermer les conditions d'une obligation nouvelle."

(1) J. Ante, p. 31.

This word "approved" does not comply with the jurisprudence established, and did not interrupt prescription. Furthermore the fact that the railway has been in the hands of the trustees of the bondholders since a number of years, and was so in 1904, must not be lost sight of. Then that the president alone, of his own free will, without any proper authorization, would have the power to bind the company under such circumstances is very questionable under the provisions of the Act of 1888.

Passing now to a more substantial claim we come to the judgment of the 7th April, 1902 which the claimant obtained against the defendant company for the sum of $4,959.20 with interest thereon at 5 per cent. from the 17th April 1900, and costs amounting to $74.70.

The judgment has been registered in the first and second divisions of the County of Bonaventure on the 17th and 18th days of June, A.D. 1907, respectively.

Therefore, the said claimant George Ball is entitled to recover against the defendant company the said sum of $4,959.20 with interest to the date of sale and costs, as above mentioned, with the privilege and rank given him under the Civil Code by the registration of the said judgment, coming immediately in rank of date after the privilege attached to the bonds.

Re CHARLES VEILLEUX'S CLAIM.

This is another judgment creditor. The claim is for $22,221.48, based upon a judgment of the Superior Court, P.Q., bearing date the 4th February, 1902, varied by the Court of King's Bench, appeal side, on the 23rd September, 1902, the latter judgment being affirmed by the Supreme Court of Canada on the 22nd June, 1903.

These three judgments appear to have been registered in the first division of the County of Bonaventure on the 20th September, 1904, as appears by the Registrar's certificate filed as Exhibit No. 25, with the exception how

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ever that no date of registration is given therein with respect to the judgment of the Supreme Court of Canada, but the fact is admitted by the admission filed of record herein on the 15th February, 1908. The same three judgments appear to have also been registered in the second Registration Division of the County of Bonaventure on the 12th September, 1904, as appears by Exhibit No. 26, the Registrar's certificate of that division.

Several of the dates in the Registrar's certificates and the allegations of the pleadings differ somewhat materially. To cite one instance, for example: The certificate says the original was judgment obtained as far back as 1892, while the pleadings state 1902. The last date would appear to be the right one, but nothing turns upon it, and for the purposes of this case, it is taken to be the same judgment.

Therefore, the said claimant Veilleux is entitled to recover against the said company defendant the said sum of $26,221.48, with interest to the date of sale, and costs, with the privilege and rank given him under the Civil Code by the registration of the said judgments, coming immediately in rank of date after the privileges attached to the bonds.

Re DAME DELPHINE GOULET'S CLAIM.

This is a claim based upon a judgment of the Superior Court of the District of Montreal, bearing date the 2nd day of April, A.D. 1908, for the sum of $1,038.30 with interest thereon from the 12th day of April, 1900.

The judgment has been registered in the first registration division of the County of Bonaventure on the 4th June, 1901, and in the second Registration Division of the same county on the 18th September, 1905.

Therefore, the said claimant Goulet is entitled to recover against the company defendant the sum of $1,038.30 with interest thereon from the 12th day of

April, 1900, to the date of sale, with the privilege and rank given her under the Civil Code by the registration of the said judgment, coming in rank of date immediately after the privilege attached to the bonds.

Re CHARLES R. SCOLES'S CLAIM.

No claim has been filed herein, excepting the certified copy of a judgment against the defendant company.

The claim is based on a judgment against the company defendant, bearing date the 11th October, 1904 for the sum of $35,691.34 with interest and costs, registered in the first and second Registration Divisions of the County of Bonaventure on the 3rd and 5th days of December A.D. 1904, respectively.

Therefore, the said claimant Scoles is entitled to recover against the said company defendant, the said sum of $35,691.34 with interest and costs, with the privilege and rank given him, under the Civil Code, by the registration of the said judgment, coming in rank of date immediately after the privilege attached to the bonds.

Re ARCHIBALD CAMPBELL'S CLAIM.

This is a claim appearing only in the Registrar's certificate for the second Registration Division of the County of Bonaventure, and for which no claim has been filed.

The debt is based on a transfer to the above claimant by James Slessor *et al.* of a judgment against the company defendant, of the 5th September, 1893, for the sum of $602.55 with interest and costs, and duly registered on the 13th June, 1899.

Therefore, the said claimant Campbell is entitled to recover against the company defendant the said sum of $602.55 with interest and costs, with the privilege and rank given him, under the Civil Code, by the registration of the said judgment, coming in rank of date immediately after the privilege attached to the bonds.

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Re ALEXANDER DUCLOS' CLAIM.

This is a claim appearing only upon the Registrars' certificates for the first and second Registration Divisions of the County of Bonaventure, and for which no claim has been filed.

The judgment was registered in the first Division on the 28th July, 1905. No date of registration appears in the second Division.

The debt is based upon a judgment against the defendant company, bearing date the 16th October, 1909, for the sum of $1,468.45 with interest, and costs of suit. The costs amount to the sum of $158.75.

Therefore, the said claimant is entitled to recover the said sum of $1,627.20 with interest, and with such privilege and rank given him under the Civil Code by the registration of the said judgment, coming in rank of date immediately after the privilege attached to the bonds.

Re MARTIAL OLSCAMP'S CLAIM.

This is also a claim appearing only upon the Registrars' certificates for the first and second Registration Divisions of the County of Bonaventure, and for which no claim has been filed.

The judgment has been registered in the second Registration Division of the County of Bonaventure on the 20th March, 1907, and in the first Registration Division of the same County on the 3rd April, 1907.

The debt is based upon a judgment of the Superior Court, bearing date the 13th March, 1900, for the sum of $250 with interest thereon at the rate of 6 per cent. from the 17th July, 1899, to the date of sale, and the costs of suit amounting to $223.41.

Therefore, the said claimant is entitled to recover the said sum of $473.41 with interest as above mentioned, with the privilege and rank given him under the Civil Code by the registration of the said judgment, coming in

rank of date immediately after the privilege attached to the bonds.

Re THE GAZETTE PRINTING COMPANY'S CLAIM.

This is a claim appearing only upon the Registrars' certificates for the first and second Registration Divisions of the County of Bonaventure, and for which no claim has been filed in this case.

The judgment has been registered in the first and second Registration Divisions of the said county, on the 29th day of June (no year given) and on the 2nd July, 1907, respectively.

The debt is based upon a judgment of the Superior Court for the District of Montreal, bearing date the 17th day of November, 1908, for the sum of $13,953.10, with interest thereon at the rate of 5 per cent. from the 2nd of November, 1906, and costs of suit taxed at $80.50.

Therefore, the said claimants are entitled to recover from the defendant company the said sum of $13,953.10, with interest thereon at the rate of 5 per cent. from the 2nd November, 1906 to the date of sale, and the costs of suit taxed at $80.50, with the rank and privilege given them under the Civil Code by the registration of the said judgment, coming in rank of date immediately after the the privilege attached to the bonds.

Re WILLIAM HENRY RAPHAEL'S CLAIM.

This is a claim exclusively against the Baie des Chaleurs Railway Co., and which has been disposed of in this Court in the case of *The Royal Trust Co.* v. *The Baie des Chaleurs Railway Co.*

Re FRANCIS D. SHALLOW'S CLAIM.

This also is a claim exclusively against the Baie des Chaleurs Railway Co., and which has been disposed of in the manner mentioned in the previous claim.

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Re ALEXANDER P. SIMARD'S CLAIM.

This is a claim for an ordinary unsecured creditor for the sum of $1,535.66 against the company defendant, representing, as alleged, good and valuable consideration for a certain number of time checks, as appears on reference to Exhibit No. 1 filed in the case of the Baie des Chaleurs Railway Company before this court, running from November, 1897, to March, 1899. The claimant has received $129 on account of the present claim, and a small one against the Baie des Chaleurs Railway from the Department of Railways and Canals, at Ottawa, in 1904.

The claim is obviously prescribed. Therefore the claimant cannot recover.

Re ZEPHERIN PERRAULT AND ALFRED ED. GERVAIS'S CLAIM.

This is a claim by unsecured creditors for the sum of $90,823.04, and for which the defendant company has been sued in the Superior Court for the Province of Quebec. It appears from the evidence adduced herein that the case has been heard by a judge of the said court and is presently under advisement. Were it only for comity of courts the undersigned cannot pass upon the merits of the case under the circumstances.

The most that can be said is that the claimants will be entitled to recover, without privilege, the amount which they will be found entitled to by the final judgment in the case now pending before the said Superior Court.

Re THE BRITISH AMERICAN BANK NOTE COMPANY'S CLAIM.

This is a claim for paper, printing and engraving, supported by the usual affidavit and amounting to the sum of $6,173.88, which the claimants are entitled to recover, without privilege.

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Re WILLIAM OWEN'S CLAIM.

This is a claim, supported by the usual affidavit, for moneys alleged to have been advanced to the company defendant for the purpose of "protecting the interests of the company in connection with the Scheme of Arrangement proposed by the Baie des Chaleurs Railway Company and rejected by the Exchequer Court".

Perhaps it is a claim that might with more propriety be made against the Baie des Chaleurs Railway Company, but if the notes are from the defendant company it should be charged herein, and on the whole, as the claim is without privilege in the hands of the present claimant, it makes no difference.

The claim is made up of two promissory notes of $585.03 and $569.87 respectively, amounting to $1,154.90.

The claimant is entitled to recover the amount of the said notes, upon surrendering the same, but without privilege, and provided the said notes are good and valid.

Re CHARLES J. ARMSTRONG'S CLAIM.

This is a claim, supported by the usual affidavit, establishing *primâ facie* evidence, for the sum of $1,500, alleged to be for salary as assistant engineer upon the construction of the Atlantic and Lake Superior Railway Company, and for which the claimant has a promissory note dated the 1st December, 1906.

The claimant will be entitled to recover the sum of $1,500 without privilege, upon surrendering the original note in question, and provided the same is good and valid.

Re JAMES M. SHANLY'S CLAIM.

This is a claim for the sum of $7,404.80, supported by the usual affidavit, and alleged to be for balance of salary as chief engineer during the year 1899.

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Were it not for this note given by the company dated the 1st December, 1906, a copy of which is filed herewith, the claim would be entirely prescribed.

Under the Railway Act, 1903, which came into force on the 1st February, 1904, and which is practically re-enacted in the Revised Statutes, 1906, the claimant would have a privileged claim, but he comes under the Act of 1888 which would give him a privilege only upon the rents and revenues of the railway.

The claimant is therefore entitled to recover without privilege the said sum of $7,404.80, upon the surrender of this original promissory note, and provided further the latter is good and valid.

Re ADELARD LANGLOIS' CLAIM.

This is also a claim for $1,500, supported by the usual affidavit, alleged to be for a salary and for a period not given or defined, but for which he allegee having a promissory note from the company defendant.

For the reasons mentioned in claim No. 22, there is no privilege.

The claimant is therefore entitled to recover the sum of $1,500 without privilege upon surrendering the original note, provided the same proves to be good and valid.

There are a number of these claims which are entirely based on promissory notes given by the company defendant at a very recent date which might be quite questionable. The undersigned has not the material allowing him to go into the merits of the claims on these promissory notes, and has to be satisfied, for the purposes herein, with the *primâ facie* evidence of the affidavits in support of the claims, which, however, go without privilege and will never come in question herein, the privileged claims absorbing, in all probability, the full proceeds of the sale.

Then with respect to the judgment creditors who have registered their judgments and are making a claim

thereunder, the undersigned, although not seized of the actual fact that the company was insolvent at the time of the registering of these judgments, or at least at the time of the registering of most of them, cannot overlook Art. 2023 of the Civil Code which says that "hypothec cannot be acquired, to the prejudice of existing creditors, upon the immovables of a person notoriously insolvent etc".

In view of the general evidence adduced herein which tends to show that the company has been insolvent from almost its origin, the undersigned will refrain from passing upon the claims of the judgment creditors with finality without having further evidence on this question of insolvency; because if the company was actually insolvent at the time of the registering of these judgments, there would be no privileges attached to the same, and those creditors would come *au marc la livre* with the other unsecured creditors.

Therefore, the undersigned finds that the amounts due the plaintiffs and claimants herein, respectively, according to their rank and priority, are as follows, viz:—

1. The plaintiffs, with first charge (*) against the property of the company as mortgagors	(b)	$18,449.17
	(c)	47,933.22
with interest as above mentioned and.....	(d)	11,922.29
with interest as above mentioned and.....	(e)	2,822.66
with interest as above mentioned, and.....	(f)	973 33
2. The following expenses are chargeable to and payable by the Bondholders, viz:.	(a)	$2,000 00
with interest as above mentioned, and do do	(b)	11,922 28

(*) See the directions of the Court on this point, *ante*, p. 41.

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THE ROYAL TRUST CO. v. THE ATLANTIC AND LAKE SUPERIOR RWAY. CO.

Report of Referee.

3. The Bondholders:—		
Items Nos. 1 and 2—the sum of.....	499,579	55
with interest as above mentioned, and	207,860	00
do do		
Item No. 3—the sum of.....	9,733	33
with interest as above mentioned		
Item No. 4—the sum of	14,600	00
with interest as above mentioned		
Item No. 5—the sum of.....	973	33
with interest as above mentioned.		
Item No. 6—the sum of.....	486	67
with interest as above mentioned.		
4. *Estate A. P. Ashworth*, the sum of....	6,245	17
in the manner hereinbefore mentioned.		

Judgment Creditors, subject to further evidence under provisions of Art. 2023 C. C.

5. *George Ball*, the sum of.....	4,959	20
with interest and costs, as above mentioned, subject to Art. 2023.		
6. *Charles Veilleux*, the sum of.....	26,221	48
with interest and costs as above mentioned, subject to Art. 2023.		
7. *De. Delphine Goulet*, the sum of..	1,038	30
with interest as above mentioned, and subject to Art. 2023.		
8. *Charles R. Scoles*, the sum of	35,691	34
with interest and costs, as above mentioned, and subject to Art. 2023.		
9. *Archibald Campbell*, the sum of.....	602	55
with interest and costs, as above mentioned, and subject to Art. 2023.		
10. *Alexander Duclos* the sum of.....	1,627	20
with interest and costs, as above mentioned, and subject to Art. 2023.		
11. *Martial Olscamp*, the sum of.....	473	41
with interest and costs as above mentioned, and subject to Art. 2023.		

12.	*The Gazette Printing Co.*, the sum of with interest and costs, as above mentioned, and subject to Art. 2023.	13,953	10
	UNSECURED CREDITORS.		
13.	*William H. Raphael* recovers.....	Nil.	
14.	*Francis D. Shallow* recovers	Nil.	
15.	*Alexander P. Simar* recovers.....	Nil.	
16.	*Zepherin Perrault and Alfred E. Gervais*, recover.....	Nil.	
17.	*The British American Bank Note Co.* recovers.....	6,173	88
18.	*William Owens*, recovers	1,154	90
19.	*Charles J. Armstrong*, recovers	1,500	00
20.	*James M. Shanly*, recovers.....	7,404	80
21.	*Adelard Langlois*, recovers.....	1,500	00
22.	*The Shipowners' & Merchants' Agency, Ltd., et al*, recovers £4,500.....	21,900	00
23.	The *Northeastern Banking Company, Ltd.*, recovers £10,000	48,666	67

In the final disposition of the several amounts recoverable herein, special consideration must be given to the several amounts also recoverable in the case of *The Royal Trust Company* v. *The Baie des Chaleurs Railway Co.*, because, while some of these amounts may be recoverable against both or either of the two companies, they are only recoverable once.

June 10th, 1908.

T. Chase Casgrain, K.C., on behalf of The Royal Trust Company, no one appearing for the other parties, now moved for an order for judgment confirming the above report. Motion granted, and judgment ordered to be entered accordingly.

Judgment accordingly.

Solicitors for the Royal Trust Company: *Casgrain. Mitchell & Surveyer.*

Solicitors for Atlantic & Lake Superior Railway Company: *Hickson & Campbell.*

IN THE MATTER of the Petition of Right of

THE ST. CATHARINES HYDRAULIC COMPANY, LIMITED..... } SUPPLIANTS;

1910
Jany. 10.

AND

HIS MAJESTY THE KING.....RESPONDENT.

Landlord and Tenant—Lease by Crown of certain mill-races and water privileges—Renewal—Compensation.

A lease, like any other document, has to be construed according to the language used within its four corners, having regard to the situation of the parties at the time of its execution and to settled rules of law.

2. The leaning of the courts is against construing a lease as one giving a perpetual right of renewal, unless the terms of the lease make it plain that such was the intention.

3. In a lease of certain mill-races on the Welland Canal, together with certain water privileges, it was stipulated between the Crown and its lessees that the lease should be "renewable as hereinafter provided." The subsequent provision as to renewal was as follows:—"And it is further agreed . . . that after the end of the term of twenty-one years as aforesaid, if the said commissioners . . . shall or do not continue the lease . . . to the said parties of the second part or their assigns, that they, the said commissioners . . . shall pay the said parties of the second part or their assigns, or any person or persons making erections under them with their consent, the full amount of their expenditure, or the value of the same, for the construction of any race or water-course, lands, mills, etc., the same to be determined by arbitrators . . .

Held, that the meaning of the lease was that after the expiry of the term of the lease (twenty-one years) the lessors or their successors might have continued the lease, and if at any time they did not do so then the right of compensation enured to the lessees.

PETITION OF RIGHT for alleged breach of covenant in a lease.

The facts are set out in the reasons for judgment.

December 8th and 9th, 1909.

The case was heard at Toronto.

H. M. Mowat, K.C., for the suppliants;

H. H. Dewart, K.C., for the Crown.

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THE ST. CATHARINES HYDRAULIC CO. v. THE KING.

Argument of Counsel.

Mr. *Mowat* contended that the lease in question must either be treated as renewable in perpetuity, in which case the suppliants would be before the court as tenants under an existing lease; or else, if it was not a lease renewable except for one term, then it never was renewed, and never having been renewed the Crown is bound to pay for the improvements. The word "continue" must be given the effect of perpetuity so long as the Government had not exercised its option of taking over the property. (Cites *Furnival* v. *Crew* (1).

The covenant, if construed as being one for perpetual renewal, would not be bad in law. (Cites *Bell on Landlord and Tenant* (2). A covenant for renewal forever is not within the rule against perpetuities and will be enforced. *London and Southwestern Railway Co.* v. *Gomm* (3); *Cooke* v. *Booth* (4).

Mr. *Dewart*, on the point of compensation, argued that the suppliants would not be entitled to recover in respect of improvements more than their value at the end of the first term of twenty-one years. As to the construction of the covenant, he contended that the word "continue" should not to be read as meaning more than a right of renewal for one term. He cited *Dawson* v. *Graham* (5); *Lewis* v. *Stephenson* (6); *Iggulden* v. *May* (7); *Hyde* v. *Skinner* (8); *Swinburne* v. *Milburn* (9); *Farley* v. *Sanson* (10); *Nudell* v. *Williams* (11); *Sears* v. *City of St. John* (12).

Mr. *Mowat*, in reply, relied on *Clinch* v. *Pernette* (13).

CASSELS, J., now (January 10th, 1910) delivered judgment.

(1) 3 Atk. 83.
(2) P. 440.
(3) L. R. 20 Ch. D. 562.
(4) 2 Cowp. 819.
(5) 41 U. C. Q. B. 532.
(6) 67 L. J. Q. B. 296.
(7) 9 Ves. 325.
(8) 2 P. Wms. 196.
(9) L. R. 9 A. C. 854.
(10) 5 O. L. R. 105.
(11) 15 U. C. C. P. 348
(12) 18 S. C. R. 702.
(13) 24 S. C. R. 385.

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THE ST. CATHARINES HYDRAULIC CO. v. THE KING.

Reasons for Judgment.

This is a Petition of Right, which was tried before me at Toronto on the 8th and 9th days of December, 1909. The petition sets out:—

"2. On or about the 14th day of May, 1851, by an indenture of lease bearing that date and made between the Hon. Joseph Bourret and Hamilton Hartly Killaly as Commissioners of Public Works of the late Province of Canada, appointed under and by virtue of an Act of the Parliament of the late Province of Canada, passed in the ninth year of the reign of Her late Majesty, Queen Victoria, and chaptered 37, acting for and in the name of Her Majesty, her heirs and successors, of the first part, and William Hamilton Merritt, of the Town of St Catharines, in the County of Lincoln, Esquire, William D. King, of the same place, Miller, Elias Smith Adams, of the same place, Esquire, and John Gibson, of the Township of Grantham, in the said County, Esquire, of the second part, the said commissioners did demise and lease to the said parties of the second part, their executors, administrators and assigns, all those several mill races lying between the waste sluice about three hundred and fifty feet south-westerly from the mills of one Calvin Phelps on the Welland Canal, commonly known as the Red Mills, and to any part of the level between locks two and three to the Old Salt Works, together with all such right of land whereon such mill races have been constructed as also all such other rights and privileges as have been conveyed by James Dittrick, Elias Smith Adams, James Fitzgerald, John Gibson and Henry Mittleberger to the Welland Canal Company by an instrument in writing bearing date the sixth day of December, in the year of our Lord one thousand eight hundred and thirty-four.

"3. The said other rights and privileges referred to in the said lease as having been conveyed by James Dittrick

and others to the Welland Canal Company were as follows, viz.:—

"Know all men by these presents that we, James Dittrick, Elias S. Adams, James Fitzgerald, John Gibson, and Henry Mittleberger, as directors of the St. Catharines Water Power Company for and on behalf of the said company, doth hereby assign to the Welland Canal Company all our right, title, interest, claim, and demand whatsoever in, to and upon the annexed instrument of writing granted by the landholders over whose premises is to pass the water race for propelling machinery.

"In witness whereof we have hereunto set our hands and seals the 6th day of December, 1834.

"Signed:—James Dittrick, E. S. Adams, James Fitzgerald, John Gibson and Henry Mittleberger.

"The instrument of writing referred to as annexed is as follows:—

"We, the undersigned, seeing the propriety of encouraging the erection of machinery in the village to be propelled by water, doth each one for himself individually consent to allow one or more not over twenty feet wide at surfaee of water race to be erected or excavated through our respective premises by the company which shall as speedily as possible be formed for that purpose as soon as the company aforesaid shall complete their arrangements; each of the undersigned for ourselves respectively doth hereby promise and bind ourselves by this agreement to execute such writing and papers to the said company (or any person on their behalf duly authorized) upon their applying for the same, which shall be in the form of a lease in perpetuity or a quit claim.

"St. Catharines, 24th October, 1833.

"Signed:—Thos. Merritt, John Stuart, T. L. Converse, E. S. Adams, John T. Mittleberger, Wm. H. Sanderson, C. Beadle, Wm. Hamilton Merritt, George Adams, Wm.

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Reasons for Judgment.

C. Chase, H. U. Camp, K. Reach, H. Mittleberger, and Silas Vandecar.

"I will allow one or more races to pass below the upper race through my lands, and give such a title to convey the same as the other individuals have along the said race or hereafter may, or who may hereafter hold the lands where the same passes, and sign the conveyance for such rate, at the same time they do.

St. Catharines, 8th December, 1834.

"(Signed) J. H. CLENDENNEN."

It will be necessary to refer to the lease in detail later on.

The petition then alleges as follows :—

"10. The said lease made between the said Commissioners and the said lessees under whom your suppliants claim, was never renewed or continued and those under whom your suppliants claim thereupon became entitled to and your suppliants now are entitled to the compensation provided for in the said lease in that event, and the said lessees and their assignees thereafter remained in possession, and they and those claiming under them continued to remain in possession of the said demised premises, and of their said mills and other property, pursuant to the terms of the the said lease by which they were entitled to hold possesion of the same until compensation therefor should have been paid, and upon which only they were obliged to assign and surrender the same to your Majesty. And your suppliants as such assignees claiming under the said original lessees were as aforesaid in possession and receipt of the rents of the same at the time of the occurrences hereinafter mentioned."

The petition then sets up the provisional agreement of the 23rd January, 1888, alleged to have been entered into.

The suppliants seek compensation for the failure to

continue the lease and ask performance of the alleged agreement of the 23rd January, 1888.

The Statement of Defence sets out in paragraphs 6, 7, 9 and 16 as follows:—

"6. The said lease under date of the 14th day of May, A.D. 1851, contained the express provision that the lease was to run 'from the first day of January in the year of our Lord 1851, for and during and until the full end and term of twenty-one years renewable' as thereinafter provided, and the proviso referred to in the sixth paragraph of the petition of right, 'in case the said Commissioners, or their successors in office should not or did not continue the said lease,' referred to and meant the renewal of the said lease for the second term of twenty-one years and no longer,"

"7. The Attorney-General admits that after the execution of the said lease under the date of the 14th day of May, A.D. 1851; the lessees executed certain sub-leases to certain sub-lessees of parts of the demised premises in each case for a term of twenty-one years running from the 1st day of January, A.D. 1851, with the proviso that in case such sub-leases should not be renewed in the same conditions and at the same rent as therein mentioned, they, the said lessees, or their executors, administrators and assigns, should pay to the said sub-lessees, their executors, administrators or assigns, or any person or persons making erections under them or with their consent, the full value of the same to be determined by arbitration. The lessees throughout the whole term of the said lease and the renewal thereof occupied simply the position of middlemen controlling important privileges which the sub-lessees improved at their own expense, while the lessees were paying a nominal and unremunerative rental to the Crown, and collecting many times as much from their sub-lessees. The said sub-lessees having attorned to the Crown as hereinafter set out, the lessees

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are not entitled to compensation or to any other legal or equitable relief in this behalf.

"9. The Attorney-General further says that the said lease was in fact renewed and continued for a second term of twenty-one years, expiring upon the first day of January, A.D. 1893, at the same rental, and the suppliants and their predecessors in title received by virtue of the said renewal and continuance of the said lease the benefit of all the rights to which they were entitled under the said lease.

"16. From and after the said first day of January, A.D. 1893, until the service of the notice to quit, referred to in the sixteenth paragraph of the petition of right, the said lessees were overholding and were tenants from year to year only, subject to the terms of the lease only in so far as the same were applicable to such a tenancy and the said lessees were in law liable to be dispossessed without compensation for improvements upon one-half year's notice to quit being given to them."

I expressed my views at the trial on the question as to the right of the suppliants to enforce the alleged agreement of 23rd January, 1888. I see no reason to change my opinion then expressed, and that portion of the claim I do not entertain.

It was admitted at the trial that all the sub-lessees of the suppliants have attorned to the Crown and that no claim on their behalf exists.

It was agreed by counsel for both the suppliants and the respondent that, in the event of the Court concluding that the suppliants are entitled to relief, the question of the quantum of damage, if any, to which the suppliants are entitled, should be referred.

A large mass of interesting material dating back to 1834 was produced. This material was for the purpose of showing the surrounding circumstances with the view to aiding in the construction of the lease.

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The case was elaborately and ably argued by counsel for both suppliants and respondent, and since the trial I have perused their arguments and also considered the authorities cited as well as numerous other authorities. The lease is peculiar in form. I set it out in full :—

"This Indenture made in duplicate this fourteenth day of May, in the year of our Lord one thousand eight hundred and fifty-one,

"Between

"The Honourable JOSEPH BOURRET and HAMILTON HARTLEY KILLALLY, as Commissioners of Public Works of the Province of Canada (appointed under and by virtue of an Act of Provincial Parliament, 9th Victoria, chapter 37) and acting herein for and in the name of Her Majesty the Queen, Her heirs and successors of the first part,

and

"WILLIAM HAMILTON MERRITT, of the town of St. Catharines, in the County of Lincoln, Esquire, WILLIAM D. KING, of the same place, Miller, ELIAS SMITH ADAMS, of the same place, Esquire, and JOHN GIBSON, of the Township of Grantham, in the said County, Esquire, of the second part.

"Witnesseth that the said Commissioners in consideration of the rents, covenants, provisos and conditions hereinafter contained have granted, demised and leased, and by these presents do grant, demise and lease unto the said parties of the second part, their executors, administrators and assigns, all those several Mill Races lying between the Waste Sluice, about three hundred and fifty feet feet southwesterly from the mills of one Calvin Phelps on the Welland Canal, commonly known as the Red Mills, and to any part of the level between locks two and three to the Old Salt Works, together with all such right of land whereon such Mill Races have been constructed, as also all such other rights and privi-

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leges as have been conveyed by James Dittrick, Elias Smith Adams, James Fitzgerald, John Gibson and Henry Mittleberger to the Welland Canal Company by an instrument in writing bearing date the sixth day of December, in the year of our Lord one thousand eight hundred and thirty-four.

"To have and to hold the same unto the said parties of the second part, their executors, administrators and assigns from the first day of January, in the year of our Lord one thousand eight hundred and fifty-one for and during and unto the full end and term of twenty-one years, renewable as hereinafter provided: Yielding and paying therefor to the said Commissioners and their successors in office, for and on behalf of Her Majesty, Her heirs and successors through the Receiver-General of the Province, or such other officer as may be appointed to receive the same, the yearly rent or sum of one hundred and twenty-five pounds, payable in half-yearly instalments to become due and payable on the first day of January and the first day of July in each and every year, the first of which to be made on the first day of July now next; Provided always nevertheless, and these presents are upon the express condition, that should the said rent shall have been demanded or not the said Commissioners or their successors in office shall be at liberty to stop the flow or supply of surplus water hereby leased, until the amount so in arrears shall have been fully paid and satisfied. And that should said rent or any portion thereof remain unpaid during a period of six calendar months after the same shall have become due, or should the said parties of the second part, their executors, administrators or assigns fail or neglect to observe and perform all or any of the provisoes and conditions herein contained, or on their part to be performed, the said Commissioners and their successors in office shall have full power and authority to re-enter in and upon the

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premises hereby leased and to resume and again hold and possess all and singular the said demised premises and every part thereof, with all such flow or supply of surplus water, and as if these presents had never been executed.

"And the said Commissioners for themselves, and their successors in office, do covenant and agree to and with the said parties of the second part, their executors, administrators and assigns, that they the said parties of of the second part, their executors, administrators and assigns, during the continuance of this lease shall be entitled to enjoy the free and full use of all the surplus water of the said canal from the head of lock number eleven to the head of lock number two as aforesaid, which is not or may not be required for canal purposes, save and except the water required and as now used in and for the Mill known as the Centreville Mills erected at lock number ten also saving and excepting the water required for the mills at lock number five known as 'Collier's Mills' and for the mills of Calvin Phelps aforesaid known as the 'Red Mills' (the latter being equivalent to six run of stones) which said surplus water so defined as aforesaid, or so much of it as the said parties of the second part may require, and which the race and aqueduct are capable of conveying, is to be delivered out of the canal at the head of lock number eleven by means of sufficient sluices to be constructed by the said Commissioners or their successors in office and to be then discharged into the present upper race near said lock number eleven leading to the said Red Mills and from thence discharging into the race built by the Welland Canal Water Power Company now in possession of John Gibson aforesaid; and also that the said parties of the second part may have and enjoy the use of such portion of said surplus water as may or shall continue to pass or be passed at locks number ten, nine, eight, seven, six, four and three, and also that the said parties of the second

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part, their executors, administrators and assigns shall have full power and authority to erect such buildings and machinery as they may require for the use of said water at each of the said Locks on the lands belonging to the Department of Public Works, where there is room for the same, so long, as the said buildings and machinery do not encroach upon or interfere with the free use and navigation of the Canal, and shall also have free access and right of way to the same, the said lands to be first marked out and designated by the Superintendent or other officer in charge of the Canal, from time to time as may be required by the said parties of the second part for the purposes aforesaid; Provided always that in all cases where Mills or other buildings or machinery shall or may be erected or built at any of the Locks ten, nine, eight, seven, six, four and three aforesaid, the necessary supply gates, weirs, sluices, flumes, and races shall be made at the expense and charges of the said parties of the second part and according to plans to be first approved of and sanctioned by the Superintendent or other officer in charge of the Canal."

"And the said Commissioners do further covenant and agree to and with the said parties of the second part, their executors, administrators and assigns that the upper race with the Banks and aqueducts, from the level between Locks number eleven and twelve to the Waste Sluice southwest of the said Phelps' 'Red Mills', shall be well and sufficiently maintained and kept in repair by the said Commissioners and their successors in office and that at any future period should the works constructed by the said parties of the second part, their executors, administrators and assigns, require an increased quantity of water to be brought down through the above mentioned upper race, the necessary enlargement thereof is to be done at the proper costs and charges of the said parties of the second part, and in the event of the present wooden

aqueduct in the line of the said race failing or becoming unsafe the same shall be rebuilt and replaced by the said Commissioners or their successors in office, by one of more durable materials and of increased dimensions."

"Provided always nevertheless, and these presents are upon their further expressed condition, that the said parties of the second part, their executors, administrators and assigns, shall and will well and sufficiently maintain and keep in repair at their own proper costs and charges all and each of the other several races with their enbankments, gates, flumes, weirs, sluices and other structures and should any of such races so constructed and to be constructed and maintained by the said parties of the second part, break or in any way cause damages either to the works of the said Canal or to the property of any party or parties owning lands, buildings or other property adjacent thereto, then and in such case the said parties of the second part, their executors, administrators and assigns shall and will pay and make good to the said Commissioners and their successors in office the amount of such damages, and further that in all cases where clay, sand, or any other material whatsoever may be washed into the Canal from any of the said races hereby leased or intended so to be, the same shall and may be dredged out or otherwise removed by the said Commissioners or their successors in office, and the cost of doing the same shall and may be added by the Commissioners or their successors in office to the then next ensuing half-year's rent covenanted to be paid by the said parties of the second part as aforesaid, and if not paid therewith they the said parties of the second part shall be subject to the same penalty as is above mentioned for the non-payment of the rent hereby reserved, and that in the event of the said parties of the second part, or their executors, administrators and assigns applying any portion of the above surplus water hereby leased to the pro-

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pulsion of any sawmill or sawmills, such mill or mills are to be constructed so as to prevent the sawdust or any other waste whatever from being carried into the canal or ponds or other waters connected therewith, in default of which it shall and may be lawful to and for the said Commissioners or their successors in office to shut off the supply of water from such mill or mills, and have the sawdust or other materials deposited in the said canal or ponds or waters connected therewith removed therefrom —the costs and charges for doing which shall be borne and defrayed by the said parties of the second part, their executors, administrators and assigns, the said costs and charges to be enforced by the stoppage by the said Commissioners or their successors in office of the supply of water to the said mill or mills, or by action or otherwise according to law; and further that the said parties of the second part, their executors, administrators and assigns shall also maintain the said works now erected or to be erected by them as aforesaid in such good and sufficient repair during the term hereby leased, as that no waste of water, or damage to the canal or to the navigation thereof shall arise from leakage therefrom or otherwise, and that in the event of the said parties of the second part, their executors, administrators or assigns refusing or neglecting to make such repairs as may in the opinion of the said Commissioners, or their successors in office, be deemed necessary for the purpose of preventing such damage, the said Commissioners or their successors in office shall be at liberty to enter upon the said premises or any part thereof and cause such repairs to be done as to them may seem proper and needful, the costs and charges whereof shall be borne and paid by the said parties of the second part, their executors, administrators or assigns, the payment of which it shall and may be in the power of the said Commissioners to enforce in the

manner hereinbefore provided with respect to the arrears of rent above reserved.

"And further that the said Commissioners and their successors in office and their officers, shall at all reasonable times either by night or by day have free access to the said premises for any purpose that they may consider necessary connected with the management of the canal or for the purpose of examining the condition of the flumes, sluices or other works of the said parties of the second part or the works of the parties holding under them, the said parties of the second part—and ascertaining the quantity of water used or supplied through such flumes, sluices or other works.

"And it is further agreed by and between the parties to these presents, that after the end and term of twenty-one years as aforesaid, if the said Commissioners or their successors in office shall or do not continue the lease of the said water and works to the said parties of the second part or their assigns that they the said Commissioners or their successors in office shall pay the said parties of the second part or their assigns or any person or persons making erections under them with their consent, the full amount of their expenditure, or the value of the same, for the construction of any race or water course, lands, mills, and mill houses, or any other tenement with their machinery and appurtenances thereto in any wise belonging, the same to be determined by arbitrators mutually approved of by the parties to these presents, each choosing one man and they the third, when the said parties of the second part and the parties making erections under them as aforesaid, or their assigns, shall upon receiving payment in full for the erections and appurtenances so arbitrated for as above, assign and surrender to Her said Majesty the Queen, Her heirs and successors, all their right, title and interest thereto, whether in lands, buildings, or other erections.

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"And this Indenture further witnesseth that the said parties of the second part for themselves, and each of them for himself, their, and each of their executors, administrators and assigns, have covenanted, promised and agreed and hereby covenant, promise and agree to and with Her said Majesty the Queen, Her heirs and successors that they shall and will from time to time and at all times hereafter well and faithfully do, perform, fulfil and keep all and singular the agreements, stipulations, provisoes, and conditions hereinbefore contained, and which on their part and behalf are to be done, performed and kept according to the true intent and meaning of these presents.

"In witness whereof the said Commissioners of Public Works, acting in that capacity, for and in the name of Her Majesty, Her heirs and successors, and the said parties of the second part have hereunto set their hands and seals in duplicate at Toronto and St. Catharines on the day and year first above written."

Both counsel for the suppliant and the respondent seem to be of opinion that under the terms of the lease if continued it should be for a further period of 21 years, counsel for the suppliants claiming a right to renewal in perpetuity, and counsel for the Crown contending that after the second renewal of 21 years no further right of renewal is given, and that no claim can be allowed for erections, etc.

The Crown admits by the defence quoted that after the expiration of the 21 years the lease was in fact continued for 21 years. No new document was executed but the tenancy continued on, if at all, under the original lease.

Were the facts as set out in the 10th paragraph of the petition of right the true state of facts, the suppliants might find themselves confronted by the statute of limitations. It might be held that from the end of the first term the holding was that of tenants from year to year

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and that the covenant for compensation was a covenant not applicable to such a tenancy.

It will be noticed that the provision that the lessees "shall upon receiving payment in full for the erections "and appurtenances so arbitrated for as above, assign and "surrender to Her said Majesty the Queen or Her heirs "and successors all their right, title and interest thereto "whether in lands, buildings or other erections" does not refer to the water leased but to property of the lessees and sub-lessees, and it might be held that such continued occupation did not, as pleaded, preserve the rights of the suppliants. (1)

I do not however decide these questions, as I do not think the facts are as stated in the 10th paragraph of the petition of right.

The provision in the lease as to renewal is at the commencement "renewable as hereinafter provided."

The only other reference as to renewal is:—

> "and it is further agreed by and between the parties to these presents that after the end and term of 21 years as aforesaid, if the said Commissioners or their successors in office shall or do not continue the lease, &c., &c."

Counsel for the suppliants argued the case as if it were a lease containing provisions for perpetual renewal from time to time. It seems to me an incorrect manner of construing the document. It is quite clear that after the expiration of the twenty-one years the Crown could determine the tenancy, the rights of the tenant being protected by the covenant for payment of expenditure.

It is quite true that the leaning of the courts is against construing a lease as one giving the right of perpetual renewal unless the terms of the lease make it plain that such was the intention. A lease, like any other document, has to be construed according to the language used

(1) See Porter v. Purdy, 41 S.C.R. 471.

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within its four corners, having regard to the situation of the parties at the time of its execution and settled rules of law.

In my opinion the meaning of the document in question is that after the 21 years the lessors or their successors may continue the lease, but if at any time they do not continue the lease then the covenant for compensation operates.

By the terms of the lease the lessees, their executors, administrators and assigns "shall have full power and "authority to erect such buildings and machinery as they "may require for the use of said waters at each of said "locks on the lands belonging to the Department of "Public Works, &c."

On the termination of the lease after a second period of 21 years, if the contention of the respondent be well founded, all these buildings would be the property of the Crown without compensation. The fact that the sub-lessees have attorned and been settled with is of no consequence in arriving at a construction of the document. To place a construction on the document which would produce such an inequitable result would be, according to my views, improper.

I think the lease continued until the 1st January, 1893.

I find nothing to take away the right of the suppliants to compensation as provided by the covenant. The covenant is in force. The suppliants are entitled to a reference. The question as to whom it shall be referred may be spoken to if the parties fail to agree.

I reserve the question of costs until after the report, as it may be (the sub-lessees being arranged with) no claim may be proved.*

Judgment accordingly.

Solicitors for the Suppliants: *Mowat, Langton & Maclennan.*

Solicitors for the Respondents; *H. H. Dewart.*

* REPORTER'S NOTE.—On appeal to the Supreme Court of Canada the appeal was allowed with costs, but only on payment of all costs subsequent to defence if appellant desired to amend by setting up the statute of limitations.

IN THE MATTER of the Petition of Right of

ADELINE PARENT .....SUPPLIANT; 1910 May 4

AND

HIS MAJESTY THE KING.....RESPONDENT.

Government railway—Injury to the person—Crossing—Vehicle on crossing—Speed of train—Sec. 34, R. S. 1906, c. 36—Faute Commune—Reckless conduct of driver of vehicle—Identification.

Held, that as the point where the accident in question occurred was not a "thickly peopled portion of a . . . village," within the meaning of sec. 34 of R. S. 1906, c. 36, the officials in charge of the engine and train were not guilty of negligence in running at a rate of speed greater than six miles an hour. (*Andreas* v. *Canadian Pacific Railway Co.*, 37 S. C. R. 1, applied.)

2. Under the law of Quebec where the direct and immediate cause of an injury is the reckless conduct of the person injured the doctrine of *faute commune* does not apply, and he cannot recover anything against the other party.

3. Where a person of full age is injured in crossing a railway track by the reckless conduct of the driver of a vehicle in which he is being carried, as between the person injured and the railway authorities the former is identified with the driver in respect of such recklessness and must bear the responsibility for the accident. (*Mills* v. *Armstrong (The Bernina)* L. R. 13 A. C. 1) referred to and distinguished.

PETITION OF RIGHT for damages arising out of the death of a person on a public work alleged to have been occasioned by the negligence of certain servants of the Crown. The facts are fully set out in the reasons for judgment.

December 3rd, 1909.

By consent of parties the case was referred to L. A. Audette, K. C., Registrar of the Court, for enquiry and report.

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February 14th, 1910.

The Referee now filed his report, in which he found that the suppliant was not entitled to the relief sought by the petition of right.

April 25th, 1910.

The suppliant appealed from the report of the Referee.

A. Lemieux, K.C, for the suppliant, supported the appeal.

F. H. Chrysler, K.C, for the respondent, *contra*.

CASSELS, J., now (May 4th, 1910,) delivered judgment.

This is an appeal from the report of the Referee, the Registrar of the Court, dated the 3rd December, 1909.

A petition of right was filed on behalf of Adeline Parent claiming, on her own behalf and also as tutrix on behalf of her infant child, damages against the Crown occasioned by the death of her husband, the late Joseph Joubert, junior. Joseph Joubert, while crossing what is known as the "Chemin Metapedia" about 5.30 a.m. on the 31st August, 1908, in a buckboard in company with his father (who was driving the horse) was struck by an Intercolonial engine proceeding to the station at St. Flavie (known as the village of Montjoli), the station in question being about 800 feet east of the Metapedia road. The said Joseph Joubert, junior, died shortly after the collision, and as the result thereof.

The suppliant alleges negligence on the part of the employees of the railway. The main charges are :—

1. That those in charge of the engine and train omitted to sound the whistle, or to ring the bell as required by the statute.

2. In allowing the I.C.R. Ocean Limited Express to pass through the district where the accident happened, and which (it is alleged) was thickly populated, at a speed greater than six miles an hour, and in not having the

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track properly and sufficiently fenced at the time of the accident.

3. In allowing the said crossing, which was at the time of the accident and still is at rail level, to remain unguarded and unprotected in any way, and without any cattle guard at the time of the accident.

4. In not erecting at the road crossing where the accident happened on each side of the highway a proper and sufficient fence.

These are the main grounds of complaint relied upon. There are other grounds set out of no materiality.

The suppliant claims that under section 20, sub-sec. (*c*) of *The Exchequer Court Act* she is entitled to recover. This sub-section reads as follows :—

> "(c) Every claim against the Crown arising out of any death or injury to the person or to property on any public work, resulting from the negligence of any officer or servant of the Crown, while acting within the scope of his duties or employment."

The statement in defence denies all liability, and sets up :—

> "3. The death of Joseph Joubert, junior, was solely caused by the negligence, imprudence, carelessness and fault of the deceased himself and his father Joseph Joubert, with whom he was driving at the time of the accident in which the deceased lost his life."

The pleadings being closed and the case at issue, counsel for the suppliant and the respondent agreed it would be proper to refer the trial of the action to a Referee, and an order was made referring it to Mr. Audette, the Registrar of the Court.

The action was tried at Rimouski, and the report of the Referee (appealed from) duly made, finding that the suppliant is not entitled to the relief sought by her petition of right.

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Various questions of interest are raised on the appeal, and although in my opinion it is not necessary for the determination of the action to deal with some of them, nevertheless, as the points have been discussed, I propose to consider and express my views thereon.

Before dealing with the various legal questions I think it well that the facts should be appreciated.

The train in question was due at the station of St. Flavie on the morning in question at 5.30 a.m.

The station immediately west of St. Flavie station is called St. Luce, a distance from St. Flavie station of about eight miles. The train in question, the Ocean Limited Express, had been running on the same time-table for some months previous to the accident, reaching St. Flavie each morning of the week (except one day) at the same hour of the morning, if on time. Montjoli or St. Flavie is a village containing 1,400 to 1,500 souls. The Metapedia road is a public highway running north and south and crossing the railway about 800 feet to the west of the station. The grade of the railway at the point of crossing is about five or six feet higher than the public highway on either side, and is reached by inclined approaches on both the north and south sides of the highway. The semaphore referred to in the evidence is situated south-west of the snow shed referred to, and is about two thousand feet west of the Metapedia road, according to the evidence of Theriault. Atkinson who measured it places it 2,470 feet west of the Metapedia highway. From the semaphore eastwards there is a considerable down grade which some distance west of the Metapedia highway crossing comes to a level, and the railway is from that point on a level grade to the station. The railway being higher than the roadway, five or six feet when on a level grade, presumably, although I am not clear that the evidence so states, the level of the track would be higher than the ground to the south as far as the station. The

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platform of the station extends from the station a considerably distance to the west.

The father of the deceased Joubert had, for from two to three weeks previously, been working at Montjoli. His home was at St. Gabriel to the south of Montjoli, about two hours drive to the crossing. His son would drive to Montjoli for his father of a Saturday and take him to his home, and on Monday morning would drive back with his father to Montjoli, and then return to his home driving the horse and buckboard. The son was 24 years of age, and looked after the farm. He was familiar with the railway crossing.

The main line of the railway, and on which the train in question was running when the accident happened, was the southerly track. On the west side of the Metapedia road at the time in question there was one siding on the north side of the right of way. East of the Metapedia road there was a yard of the railway with from six to eight tracks used for shunting purposes. To the south of the crossing was situated the house of Bourdeau, having a frontage of thirty feet on the Metapedia road, and extending backwards about fifty feet. This house was three stories in height. Atkinson in his evidence produced a plan, which was marked as Exhibit "A". I do not notice in his evidence that it was referred to as being marked. It was however used as an exhibit, and in the evidence of Raphael Lemieux it is referred to as Exhibit "A". There is no question as to its having been filed. This plan shows the surroundings of the locality.

According to the evidence of Atkinson the distance from the north corner of Bourdeau's house to the track in question was about sixty-one feet. Other witnesses place the distance at about fifty feet. On the south of the right of way and extending westerly from the Metapedia road is a fence along the southern boundary of the right of way. The commencement of this fence is mark-

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ed "F" on the plan Exhibit "A". South of this fence and between it and the Bourdeau house is a "petite ruelle" or lane, under the charge of the muncipality. This lane runs westerly from the Metapedia road parallel to the railway fence. On the northerly side of the right of way is a fence extending from the Metapedia road westerly along the boundary of the right of way of the railway. East of the Metapedia road there is a fence running easterly from the Metapedia road enclosing the right of way of the railway on the north. South of the right of way and east of the Metapedia road is a road leading from the Métapedia road to the station, and south of this road and to the north of Voyer's house (immediately opposite Dr. Ross' house) is a fence extending from the Metapedia road easterly. South of the crossing, and some little distance, is the post required with the notice in French and English "Railway Crossing."

After passing the house of one Landry about 800 feet from the crossing the view of the track to the west is obscured by the houses. On passing the corner of Bourdeau's house there is a clear view of the railway track to the west for a distance of at least two thousand feet.

The morning in question was clear and still and the track was clear, and a train coming east could be clearly seen for a distance of at least two thousand feet if the driver and son looked. The deceased and his father were driving from south to north at a trot of about, I should judge, six miles an hour. They did not slacken speed or take any precautions to see if a train was coming from the west. Had they slackened speed and looked the accident need not have happened. They drove on intending to cross the track at the same rate of speed. As the horse almost reached the track the train was approaching at a distance of about 150 to 200 feet. It was running at the rate of from 20 to 15 miles an hour,

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having slackened speed after leaving the snow-shed. It was too late then to avert the accident, and the finding of the Referee to this effect, I presume, is with the view of showing that no care on the part of the driver of the engine could then have averted the disaster.

It must not be lost sight of, however, that if the train was bound by the statute to cross the highway at the speed of six miles an hour only, the engineer would necessarily require to slacken the speed of the engine at a point much further west than he did, and the horse and buckboard would perhaps have cleared the track before the train passed.

I have read and re-read the evidence carefully, and I am of the opinion that had the officials whose duty it was to sound the whistle and ring the bell neglected to do so, the case of the suppliant under the facts disclosed in the evidence would not be bettered. I concur with the finding of the Referee that the statutory provision in regard to the whistle and ringing of the bell was complied with. I do not think the Referee could have properly reached any other conclusion.

Section 34 of the Government Railways Act (1) is as follows:—

> "34. No locomotive or railway engine shall pass in or through any thickly peopled portion of any city, town or village, at a speed greater than six miles per hour, unless the track is properly fenced."

This section is in the same language as section 69 of 44 Vict. cap. 25 (1881): "An Act to amend and consolidate the laws relating to Government Railways." A similar provision is contained in the statute relating to railways, other than Government railways, until 1892, when the section was amended. I will discuss the question of fencing later.

(1) Cap. 36, R. S. 1906.

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The Referee is of opinion that the provisions of this section apply, and that the engineer in charge of the engine was compelled to run his engine across the highway in question at a speed not exceeding six miles an hour. I do not agree with this finding. I do not think the engine and train in question was passing through "any thickly peopled portion of a village." See *Andreas* v. *Can. Pac. Ry. Co.* (1). The engine in that case was running at a speed of twenty-five miles an hour.

As I have stated the village of Montjoli or St. Flavie has a population of 1,400 to 1,500 souls—to use the expression of the witness.

I have previously explained the situation. I leave out of consideration for the present the fact that the right of way was fenced to the south, and of the existence of the "petite ruelle."

Emond, the only witness who deals with the question, points out that there are only four houses to the south of the railway. The first to the west is opposite the post marked "W," as stated by another witness. This post is 1,023 feet west of the Metapedia highway. These four houses are scattered over this length. Bourdeau's house makes the fifth. This house faces on the Metapedia road. To the north and west of the Metapedia road there is but one house.

I think the law as laid down in the case of *Andreas* v. *Can. Pac. Ry. Co.* (*sup.*) governs, and when one considers the fact that there is a municipal lane south of the right of way and a fence to the north of this lane, it would, I think be unduly stretching the meaning of the statute to apply it to a case like the present. I am of opinion therefore that there was no negligence on the part of the officials in charge of the engine and train.

These findings would dispose of the case, but as I

(1) 57 S. C. R. 1.

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stated above I will give my views on the other questions raised.

Was not the track in this case properly fenced? The question has been fully discussed and dealt with by the Supreme Court in *McKay* v. *Grand Trunk Ry. Co.* (1). That case was decided under the statutes relating to railways generally. The statute construed in that case is different from *The Government Railways Act*. The section in the Acts relating to railways generally was in similar language to the one copied above until 1892, when the statute was amended by adding the words "unless the track is fenced or properly protected" in the manner prescribed by the Act.

By cap. 37, R. S. C. 1906, section 254, it is provided that the railway fences shall "be turned into the respective cattle guards" on each side of the highway. It is unnecessary to state that a cattle guard is not a fence. It has been so decided in an American case, *Parker* v. *The Rensselaer and Saratoga Ry. Co.* (2)

The clauses of the Government Railways Act dealing with the question are as follows:—

Section 2. sub-section (k) interprets "highway":

> "'Highway' means any public road, street, lane or other public way or communication."

Section 15 of the statute, dealing with "highways and bridges," provides as follows:—

> "15. The railway shall not be carried along an existing highway, but shall merely cross the same in the line of the railway, unless leave has been obtained from the proper municipal or local authority therefor.
>
> 2. No obstruction of such highway with the works shall be made without diverting the highway so as to leave an open and good passage for carriages, and,

(1) 34 S. C. R. 81. (2) 16 Barb. S. C. N. Y. 315.

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on the completion of the works, the highway shall be replaced.

3. In either case, the rail itself, if it does not rise above or sink below the surface of the road more than one inch, shall not be deemed an obstruction."

Section 16 provides as follows :—

"16. No part of the railway which crosses any highway, unless carried over by a bridge, or under by a tunnel, shall rise above or sink below the level of the highway more than one inch; and the railway may be carried across or above any highway subject to the provisions aforesaid. R.S., c. 38, s. 11."

Section 22, dealing with "fences" provides :—

22. Within six months after any lands have been taken for the use of the railway, the Minister, if thereunto required by the proprietors of the adjoining lands, shall erect and thereafter maintain, on each side of the railway, fences at least four feet high and of the strength of an ordinary division fence, with swing gates or sliding gates, commonly called hurdle gates, with proper fastenings, at farm crossings of the railway, for the use of the proprietors of the lands adjoining the railway.

2. The Minister shall also, within the time aforesaid, construct and thereafter maintain cattle-guards at all public road crossings, suitable and sufficient to prevent cattle and animals from getting on the railway."

Sections 23 and 24 are as follows :—

"23. Until such fences and cattle-guards are duly made, and at any time thereafter during which such fences and cattle-guards are not duly maintained, His Majesty shall, subject to the provisions of this Act relating to injuries to cattle, be liable for all damages done by the trains or engines on the railway, to cattle, horses or other animals on the railway, which

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have gained access thereto for want of such fences and cattle guards. R.S., c. 38, s. 17.

24. After the fences or guards have been duly made, and while they are maintained, no such liability shall accrue for any such damages, unless negligently or wilfully caused. R.S., c. 38, s. 19."

These latter sections are not in the general Railway Act. They impose a liability against the crown for the injury to cattle if the provisions as to cattle guards are not complied with. They leave untouched the remaining question raised by section 20, sub-sec. (c) of the Exchequer Court Act.

In the case of *Grand Trunk Railway Co.*, v. *Hainer* (1) at page 190, Mr. Justice Nesbitt, who gives a very full and exhaustive resumé of the law, quotes numerous authorities for the proposition stated in the following terms:—

"Mr. Riddell argued that as section 194 only prescribes the building of a fence on each side of the railway through the organized townships, that there was no liability to fence in cities, towns or villages, and section 259 did not apply; that as the object of the Act in maintaining cattle guards and return fences so as to prevent horses, cattle, sheep or swine, &c., from getting on the track was to provide for the safety of passengers the statute having created a duty with the object of preventing a mischief of a particular kind, persons who by reason of a neglect of the statutory duty suffered a loss of a different kind were not entitled to maintain an action in respect of such loss. This doctrine is of course well recognized in such cases as *Gorris* v. *Scot*, (2) *Buxton* v. *North-Eastern Railway Co.*, (3) *Vanderkar* v. *The Rensselaer and Saratoga Railroad Co.* (4)."

(1) 36 S. C. R, 180.
(2) L. R. 9 Ex. 125.
(3) L. R. 3 Q. B. 549.
(4) 13 Barb. (N.Y.) 390.

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His reasoning for a different conclusion in that case proceeded on the ground that the statute required the "fences to be turned into the cattle guards." These words are not in *The Government Railways Act.*

The road is, I think, properly fenced, and even if there were no cattle-guards I do not think it would assist the suppliant.

The suppliant alleged the absence of cattle guards in her petition of right. She has failed to prove the truth of this allegation. The only evidence is that of Thériault who testifies to the absence of gates, and the evidence of Napoleon Aubin. He states as follows:—

> "D. A présent, sur la voie elle-même, du côté est, en partant du centre du chemin de Métapédia, voulez-vous dire s'il y a des calverts, ou quelque chose pour empêcher de passer les animaux, ou si tout est de plein pied?
>
> R. Autrefois, il y avait ces choses-là.
>
> D. L'année dernière, en mil neuf cent-huit?
>
> R. Je crois qu'il n'y a plus rien de ça; je ne voudrais pas jurer ça, mais je crois qu'il n'y a plus rien de ça; la raison, c'est qu'ils ont fait deux sidings depuis."

He is giving evidence as to the east side of the Metapedia road, and as to this is only arguing. I would not find as a fact that the provision of the statutes as to cattle guards was not complied with.

Section 25 of *The Government Railways Act* evidently applies to private roads and farm crossings. A similar provision was contained in the general Railway Acts until 1888, 51 Vic. cap. 29, when the clause was amended so as to read "At every public road crossing".

The reasoning of the Judges of the Supreme Court in the cases cited and a consideration of the clauses as to highway crossings lead to the conclusion that the highway could not be fenced without authority.

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In addition to the case of *Wabash Railroad Co.* v. *Misener* (1) cited by the Referee, and the strong language of the Chief Justice and of Sir Louis Davies' therein, the authorities collected and commented on by Mr. Justice Nesbitt in his judgment in *Grand Trunk Ry. Co.* v. *Hainer* may be referred to. The authorities there collected fully support the finding. The case of *Davey* v *London and Southwestern Ry. Co.* (2) referred to in this judgment is peculiarly apposite although I think the headnote is not quite accurate, the judgment proceeding on the ground of contributory negligence.

A case decided by the Court of King's Bench of Quebec in February, 1905 is also very much in point,—*The Quebec and Lake St. John Railway Co.* v. *Girard*, (3) This case was decided after the judgment in *McKay* v. *Grand Trunk Ry. Co.* (4)

I think if the present case is to be considered and decided by the law of England or Ontario, there can be no possibility of recovery by the suppliant.

It is sufficient under the English and Ontario law to prove the contributory negligence. Numerous authorities cited show facts taking the cases beyond that of contributory negligence. Beven in his book on Negligence (Canadian Edition) citing authority at page 633 states "carelessness is not the same as intelligent choice."

It is now settled (if there ever was a doubt) that the principle of the French law which provides that where the case is one of "faute commune" the damages are to be apportioned is part of the law of Quebec: *Nichols Chemical Company of Canada* v. *Lefebvre* (5)

Assuming the railway company in this case were guilty of neglect of the statutory provision (which as I find they were not) nevertheless the proximate cause of the injury was the reckless conduct of those in the buckboard. It

(1) 38 S. C. R. at p. 99.
(2) 12 Q. B. D. 70.
(3) Q. R. 15 K. B. 48.
(4) 34 S.C.R. 81.
(5) 42 S. C. R 402.

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is not a mere question of carelessness. It was a wilful disregard of all care required of those approaching and driving over a railway crossing: *Roberts* v. *Hawkins* (1) overruling the Court of King's Bench. At page 226 the learned Judge, Mr. Justice Girouard, pronouncing the judgment of the Court states: "But we do not share "their opinion that the fault of the boy constitutes merely "contributory negligence. We agree on the contrary "with Mr. Justice Bossé that it was the principal and "immediate cause of the accident."

This case was not decided on the ground that the boy was a trespasser.

The learned Judge cites Dalloz J. G. Sup. Vo. *Responsabilite*, n. 193.

A case in Dalloz referred to under paragraph 193, is as follows:—

> "3a. Que l'accident de voiture, qui aurait été évité si le blessé avait tenu compte du cri de gare, poussé comme avertissement par le cocher, n'engage pas la responsibilité de celui-ci, si d'ailleurs, il conduisait ses chevaux à une allure moderée; et cela encore bien que le blessé se trouverait être un viellard (Paris, 16 févr. 1867, aff. Vautier, D.P. 67. 5.371)."

And here there was a signboard indicating "Railway crossing."

I am of opinion that the reckless conduct of those in the buckboard was the principal and immediate cause of the accident. *Tooke* v. *Bergeron*. (2)

Were it otherwise, and adopting the principle of "faute commune" I proceeded to apportion the blame I would under the circumstances of the case feel compelled to allow the suppliant no sum for damages.

See De Valrogers, "De la responsabilité des accidents et

(1) 29 S. C. R. 218. (2) 27 S. C. R. 569.

dommages sur les lignes de chemins de fer" (1907) p. 14. Lamothe on Accidents, p. 69.

Fromageot "De la Faute" (1891), page 48 :—

> "La régle est que celui qui se cause à lui-même un dommage ne peut pas, en principe, prétendre qu'on l'a lésé dans son droit 'volenti non fit injuria'. Toutes les législations n'ont cependant pas résolu la question dans le même sens. Tandis, en effet que le droit anglo-américain refuse toute action en cas de faute commune, les législations issues du droit romain donnent au juge un pouvoir d'appréciation : il doit répartir la responsabilité proportionnellement à la gravité des fautes de chacun, si chacun a subi un dommage, ou examiner si la faute imputable à la partie lésée est telle qu'elle doive atténuer ou annihiler toute responsabilité de la part du défendeur."

In "Schuster's German Civil Law," 1907, it is stated as follows at page 154 :—

> "149. Under English law the plaintiff's contributory default affects the defendant's liability in the case of claims for damage done by unlawful acts ; under the rules of the present German law the liability created by a contract or other act-in-the-law is affected in the same way by the contributory default of the other party as the liability for an unlawful act. Under German as well as under English law, the proof of the plaintiff's own default is relevant only for the purpose of showing that the defendant's default was not the 'decisive' or 'preponderant' (vorwiegend) cause of the damaging event ; but while under English law the fact that the defendant's default was not the decisive cause deprives the plaintiff of his entire claim to compensation (except in cases coming under Admiralty law) German law leaves it to judicial discretion to determine whether the defendant's liability to make compensation is

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entirely destroyed or merely reduced by contributory default onthe part of the plaintiff,—B. G. B. 254. The expression 'decisive' which is used by Sir F. Pollock (see Law of Torts, 7th edition, p. 455) is clearer than the expression 'proximate' generally used in the English authorities."

A case decided by the Court of Queen's Bench in 1883, —*Richelieu & Ontario Nav. Co.* v. *Cordelia St. Jean* (1) may be referred to as being apposite.

The last point raised, namely, that of "identification" and claiming the son was not responsible for the fault of his father, although not suggested by the petition, was discussed. Reliance is placed on the "*Bernina*" case,— *Mills* v. *Armstrong*. (2)

I do not think the decision in that case affects the present one.

If it were the case of a common carrier, like an omnibus or railway, I can understand the passenger not being bound, but the case in point is entirely different. The facts have been already stated at length.

The appeal is dismissed with costs.

Judgment accordingly.

Solicitors for the Suppliant: *Fiset, Tessier & Tessier.*

Solicitor for the Respondent. *E. L. Newcombe.*

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(1) 28 L. C. Jur. 91.

(2) L. R. 13 A. C. 1.

IN THE MATTER of the Petition of Right of

BERCHMANS CLOUTIER.....SUPPLIANT; 1910 April 13.

AND

HIS MAJESTY THE KING.....RESPONDENT.

Negligence—Common employment—Arts. 1053 and 1054 C. C. P. Q.—The Exchequer Court Act, sec. 20, sub-sec. (c)—"Fault"—Liability of Crown for negligence of servant.

Applying the provisions of Art. 1054, C. C. P. Q., together with those of sub-sec. (c) of sec. 20 of *The Exchequer Court Act* (R. S. 1906, c. 140), to a case arising in the Province of Quebec, where a servant of the Crown was injured through the negligence of a fellow-servant, the Crown was held liable in damages.

2. The word 'fault' as used in Art. 1053, C. C. P. Q., is equivalent to the term 'negligence' as employed in sub-sec. (c) of sec. 20 of *The Exchequer Court Act.*

PETITION OF RIGHT for damages arising from an injury occasioned by a fellow-servant employed by the Crown in the Dominion Arsenal, in the City of Quebec.

The facts are fully stated in the reasons for judgment.

March 10th, 1910.

L. St. Laurent for the suppliant;

A. Fitzpatrick for the respondent.

CASSELS, J., now (April 13th, 1910,) delivered judgment.

This was a petition of right tried before me at Quebec on the 10th March, 1910.

The suppliant alleges that

"1. He was up to September 18th last (1908) and for several years previous thereto, in the employ of His Majesty as blacksmith at the Dominion Arsenal in the City of Quebec at a salary of $10.60 per week.

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"2. The said Dominion Arsenal and the operations carried on thereat for and on behalf of His Majesty constitute and did constitute during the whole of the said month of September last (1908) a public work within the meaning of the statutes and laws of Canada.

"3. On or about the said date of September 18th last, while the suppliant was, in the course of his said employment, engaged in cutting an iron rod with the help of one Louis Villeneuve, a servant of the Crown then and there acting within the scope of his duties or employment as such, the said suppliant holding the said rod across an anvil by means of locked tongs held tightly in his left hand and holding over said rod with his right hand a chisel or cutter ('tranche'), and the said Villeneuve striking on said chisel or cutter ('tranche') with a heavy sledge hammer swung at arms length,—at a moment when the said rod was already cut nearly through, the said Villeneuve swung his hammer much too heavily and too awkwardly striking not only the said chisel or cutter ('tranche') but also said rod and anvil.

"14. The said Villeneuve is and was an unskilled, negligent and awkward workman, was not a fit and proper person to perform the said work, which was then within the scope of his duties and employment as such servant of the Crown, and was performing it in a negligent, awkward, careless and improper manner notwithstanding repeated cautions to him both from the foreman and his co-employees."

The allegations in paragraphs 1 and 2 are admitted by the Crown to be true.

Cloutier, the suppliant, was at the date of his giving evidence 32 years of age. The injury complained of was on the 18th September, 1908.

The suppliant had been for several years employed at the Dominion Arsenal as a blacksmith. His wages, as alleged in his petition, were the sum of $10.60 a week

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for as I understand it fifty hours work per week. There were two other blacksmiths employed at the Arsenal, Grenon and Ferland. There were two "frappeurs," or helpers, Gagnon and Villeneuve. One Theophile Genest was a "mecanicien".

The blacksmiths were under the orders of Genest. The two "frappeurs," or helpers, were under the control of and subject to the orders of the blacksmiths. Villeneuve was employed by the Crown. At the time of the accident he had been in the employ of the Crown at the Arsenal as a helper, and according to the statement of the suppliant had worked with him for about one and one half, or two years, at the same class of work on which he was engaged at the time of the accident.

I think the allegations in the 14th paragraph of the petition are not proved. No complaints in regard to Villeneuve had ever been made to those in charge. He may not have been as adroit as Gagnon, and he may not have held his hammer in the proper manner, but no accident had previously occurred and the accident in question was not due to any error in the way in which Villeneuve held his hammer. I accept Col. Gaudet's evidence on the question of Villeneuve's capability.

On the day in question when the accident happened Genest ordered Cloutier to cut a piece off a rod or bar of cast steel. The rod was one inch and a quarter ($1\frac{1}{4}$) in diameter.

The work in question was very ordinary and every day work. The method of performing it was as follows:—

Cloutier, the blacksmith, would hold the rod from which a piece was to be cut by a pair of tongs. The ends of these tongs gripped the bar, and a ring was drawn up towards the ends of the tongs so as to form a tight and locked grip of the bar. The bar was then laid across the anvil, the piece to be cut off projecting beyond

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the anvil. The blacksmith Cloutier held the tongs with his left hand so as to keep the bar, in position on the anvil. In his right hand Cloutier held the chisel. This chisel was attached to a wooden rod, the whole being from 18 to 24 inches in length. The chisel itself was of a depth greater than the diameter of the cast steel to be cut and had in addition a heavy and broader head than the lower part forming the chisel, to receive the blow from the hammer.

At the time of the accident in question Villeneuve was using a hammer weighing about 16 pounds. According to his statement he had commenced with a lighter hammer, but took to the heavier hammer as he considered it was necessary to do so in order to perform the operation of cutting. The bar in question was nearly cut through when Villeneuve administered the last blow. He was aware it was nearly cut through, but instead of giving the chisel a comparatively light blow, the hammer weighing 16 pounds was raised above his head and evidently brought down with great force with the resnlt that the chisel was knocked out of Cloutier's hand and the hammer which projected on both sides came down with force on the nearest part of the rod on the anvil and forced the suppliant forward and the tongs out of his hand, and hence the accident.

I think Villeneuve was guilty of negligence in striking the chisel with the force he used.

The suppliant says he warned Villeneuve to give but a slight blow. Genest states he heard the instructions. His evidence is corroborative although it would appear as if his statement as to the warning was before any blow had been struck. In this however he may have been mistaken. Villeneuve does not contradict Cloutier. He does not recollect. See *Lefeunteum* v. *Beaudoin*. (1) In any event Villeneuve knew how deep the cut had been

(1) 28 S. C. R. 93.

made, and in using a hammer of such weight with such forcewas guilty of negligence.

The suppliant, as far as the evidence shews, performed his part of the work in the usual way and was not guilty of any negligence.

On this state of facts is the Crown liable in damages?

I have asked the counsel for the suppliant and respondent for some authorities on this point and also on the question of damages, and have been furnished with none, except *Asbestos, etc. Co.* v. *Durand* (1) and *Shawinigan Carbide Co.* v. *Doucet* (2) cited by counsel for the suppliant at the trial, neither of which has any application to this branch of the case.

The defence of common employment has no application to the law of the Province of Quebec, and for this reason it may be difficult to find direct authority in the English jurisprudence.

Sub-section (c) of section 20 of *The Exchequer Court Act* (R. S. 1906, ch. 140) is as follows:—

> "(c) Every claim against the Crown arising out of any death or injury to the person or to property on any public work, resulting from the negligence of any officer or servant ot the Crown, while acting within the scope of his duties or employment."

Article 1053 of the Civil Code is as follows:—

> "1053. Every person capable of discerning right from wrong is responsible for the damage caused by his fault to another, whether by positive act, imprudence, neglect or want of skill."

And Article 1054:—

> "1054..... .....Masters and employers are responsible for the damage caused by their servants and workmen in the performance of the work for which they are employed."

(1) 30 S. C. R. 285.

(2) Q. R. 18 K. B. 271; 42 S. C. R. 281.

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I have looked over the authorities cited by Sharp on the Civil Code, also by Beauchamp in his work, and find no case exactly similar.

In Dr. Morse's book *Apices Juris*, page 112 et. seq. will be found the meaning of the word "fault" as used in the Civil Law, and several English authorities are there cited which indicate that "fault" is equivalent to the term "negligence" in the common law.

In my opinion the case comes within sub-section (c) of section 20 of *The Exchequer Court Act*, and the Crown is liable.

As to the amount of damages: Cloutier was absent from his work four months from the 18th September to the 18th of January. He was provided with the best medical skill. The expenses were paid by the Government, and during the four months he received full wages.

Dr. Beaupre states that on the 18th May, 1909 he examined him. His right eye was perfect. He recommends the removal of the left eye for fear of sympathetic affection of the right eye, but gives it as his opinion that he is quite fitted for the post of superintendent.

Dr. Dussault details the treatment, and states the left eye is lost but expresses the opinion that he is quite competent to fill the post of superintendent.

Dr. Jinchereau gives evidence to the same effect.

On his return to the Arsenal, Cloutier was given the same work as he was employed at previously and after a few days he applied to Col. Gaudet for other work, complaining the fire was injurious. Col. Gaudet appointed him superintendent at $11.00 a week with less work. Cloutier remained two weeks. He then complained of his wages being too low, and he was appointed "mecanicien" at $12.25 a week. He worked at this for three weeks and then left and embarked in the milk business, and is clearing from $4 to $5 per week, with hopes of doubling his earnings.

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I think he is quite capable of performing either the duties of superintendent or "mecanicien." His idea of soap fumes is not reasonable. The probability is he wished to leave the service before commencing this action.

A late case under the English statute decided by the Court of Appeal in England is to be found in *Eyre* v. *Houghton Main Colliery Co., Ltd.*, (March 1st, 1910) (1) where the plaintiff lost an eye. This case also deals with the meaning of "suitable employment" under the English statute.

I think the suppliant is entitled to damages, and I assess them at $1,000. The suppliant's counsel at the trial was willing to accept $1,500.

The suppliant is entitled to his costs.

Judgment accordingly

Solicitors for the suppliant: *Pelletier, Baillargeon, St. Laurent & Alleyn.*

Solicitor for the Crown: *A. Fitzpatrick.*

(1) 26 T. L. R. 302.

BETWEEN

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April 16.

THE KING ON THE INFORMATION OF THE ATTORNEY-GENERAL OF CANADA..... } PLAINTIFF;

AND

THE CAP ROUGE PIER AND WHARF COMPANY, AND THE HEIRS OF THE ESTATE OF THE HONOURABLE ANTOINE JUCHEREAU DUCHESNAY..... } DEFENDANTS.

Expropriation—National Transcontinental Railway—Title of defendants—Prescription—Interruption of—Letter admitting tenancy—Effect of.

In an expropriation proceeding by the Crown, an issue of title in the lands taken was raised between two defendants, the Cap Rouge Pier and Wharf Co. and the Duchesnay heirs, the former asserting title, by prescription, in the lands at the date of the expropriation, viz.: 23rd May, 1906. The Duchesnay heirs, however, claimed that such prescription was interrupted by the following clause in a letter written by the manager of the Cap Rouge Co. to the Honourable A. J. Duchesnay in his life time:—

"QUEBEC, 21st June, 1877.

"Honble. A. J. DUCHESNAY,
Quebec.

SIR,—Enclosed please find cheque for $60 for use of your interest in Cap Rouge river this year. . . .

Yours obediently,
(Sgd.) J. BOWEN, Jr."

Duchesnay's interest embraced the lands in question.

Held, that under the provisions of Arts. 2227 and 2242, *et seq.* C. C. P. Q., the clause of the letter above quoted operated as an interruption of prescription. *Walker* v. *Sweet* (21 L. C. Jur. 29); and *Darling* v. *Brown* (1 S. C. R. 360.) referred to.

THIS was an information exhibited by His Majesty's Attorney-General for Canada, seeking the expropriation of certain lands in the Province of Quebec.

The facts are stated in the reasons for judgment.

March 22nd and 23rd, 1910.

The case was now heard at Quebec.

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Argument of Counsel.

L. A. Taschereau, K.C., for the Crown;

G. G. Stuart, K.C., for the Cap Rouge Pier and Wharf Company;

E. J. Flynn, K.C., and *E. T. Paquet* for the Duchesnay estate.

On the issue of title between the Cap Rouge Pier and Wharf Company and the Duchesnay estate, Mr. *Flynn* argued that title by prescription had not been shown by the company. The evidence showed that they were in possession as tenants of the Duchesnay estate, and therefore, there was no foundation for prescription. (Cites Art. 2231 C. N.; Art. 2195 C.C.P.Q., *Duranton* (1).

Mr. *Stuart* contended that the company's title by prescription was perfect if the letter of the 21st June, 1877, could not be construed as an interruption of prescription. There is nothing to show on the face of the letter that it applied to the land in dispute, and no presumption arises that it does. Our possession is not referable to a lease from Duchesnay. The burden is upon the Duchesnay heirs to show that we are in possession under them, and that burden has not been discharged. (Cites Art. 2174 C.C.P.Q.) We are in possession and all presumptions of title are in our favour.

Mr. *Flynn*, in reply, contended that the letter of the 21st June, 1877, covers all the Duchesnay interest on the river.

CASSELS, J., now (April 16th, 1910,) delivered judgment.

The information in this case was filed on behalf of His Majesty to have it declared that certain lands required for the National Transcontinental Railway (which lands are described in the information) are vested in the Crown, and to have the compensation for such lands ascertained.

(1) Vol. 21, No. 231.

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The lands in question were measured off by metes and bounds and a plan and description of same were deposited of record on the 23rd May 1906. At the opening of the trial the following consent was filed :—

"The parties, plaintiff and defendants, admit that the value of the property expropriated and in question in the present cause is the sum of Forty thousand dollars ($40,000), and that such sum, together with interest from the date of the taking possession of the property by the Crown, is a just and sufficient compensation to the owners of the said property, for the value thereof and all damages accruing by reason of the taking of the said property and the expropriation thereof."

The only questions remaining for adjudication are whether or not the Duchesnay estate were entitled at the date of the expropriation to the lands claimed by them in their statement of defence.

The defendants the Cap Rouge Pier and Wharf Co. do not admit the title of the Duchesnay state, and also claim that if the Duchesnay estate were the proprietors or owners of the lands their title thereto is now and was at the date of the expropriation (23rd May, 1906) vested in the Cap Rouge Pier and Wharf Co. by prescription.

The lands, the title to which is in controversy, comprise 60/100 of an acre. They are part of the bed of the river Cap Rouge according to the contention of the Duchesnay estate, and passed under the seigniorial grant of the 8th February, 1652, if such lands formed part of the bed of the Cap Rouge River. At low water the lands in question, 60/100 of an acre, are uncovered. At high water they are completely covered.

At the trial counsel for The Cap Rouge Pier and Wharf Co. contended that the lands in question are not and were not at the time of the seignorial grant part of the bed of the Cap Rouge river, but formed part of the bed

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of the river St. Lawrence, and therefore the said lands were not included in the seignorial grant.

If the lands in question formed part of the bed of the river St. Lawrence then they are vested in the Crown on behalf of the province.

The province is not represented in this action, and if they are Crown lands of the province no prescription has been pleaded or proved as against the Crown representing the province, and the title of the Cap Rouge Pier and Wharf Co., on the pleadings and evidence adduced before me to the 60-100 of an acre in question, would not be proved.

It was agreed at the trial by counsel for the Cap Rouge Pier and Wharf Co. and the Duchesnay estate that the value of the 60/100 of an acre should be fixed as of the time of the expropriation at the sum of $800.

If the Duchesnay estate were the owners of these lands at the date of the expropriation, then out of the $40,000 they would receive the sum of $800 and interest thereon. The 60/100 of an acre in question is now known as Cadastral No. 167. It is shown on the plan Exhibit D-3 marked (33) (E).

Mr. Taché, the agent for the Duchesnay estate, in his evidence admits that up to 1905 there had been no cadastral number for this lot. I think it clear from the evidence that if this lot now numbered 167 formed part of the bed of the river Cap Rouge it passed by the seignorial grant of 8th February, 1652, and the title of the Duchesnay estate thereto has been clearly proved, if not lost by prescription, as claimed by the Cap Rouge Pier and Wharf Co. In the information filed clause 3 of paragraph 2 is as follows:

> "3rd. A certain piece or tract of land forming part of lot No. 33 on the plan and book of reference of the Transcontinental Railway being a part of lot Cadastral No. 167 of the Parish of St. Felix du Cap Rouge, containing seventy-four (74) hundredths of an acre more

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or less, described as follows:—Commencing at the point of intersection of the eastern side of an old wharf with the southern side of the old public road, thence going in a westerly direction along the southern side of the said public road, a distance of two hundred and seventeen (217) feet more or less to a point where the public road turns at right angles towards the south, thence in a southerly direction along the eastern side of the said public road a distance of one hundred and fifty (150) feet more or less to a point where the public road turns to the south-west, thence in a south-westerly direction along the south-eastern side of the said public road a distance of twenty-four (24) feet more or less to a point situate at a perpendicular distance of one hundred and sixty (160) feet from the centre line of said railway, thence in an easterly direction along a line parallel to the centre line of the said railway and at a distance of one hundred and sixty (160) feet therefrom a distance of two hundred and sixty-two (262) feet more or less to the eastern side of the old wharf above mentioned, thence in a northerly direction along the eastern side of the said old wharf a distance of one hundred and eighteen (118) feet more or less to the point of beginning. The said piece of land is bounded as follows:—To the east by Cap Rouge river, to the north and west by the old public road, and to the south by the remainder of said lot Cadastral No. 167, belonging to the said Defendants the Cap Rouge Pier and Wharf Co." Paragraph 3 of the information is as follows:

"3. The defendants, the Cap Rouge Pier and Wharf Company, claim to have been the owners in fee simple at the date of such expropriation of the said lands and real property free and clear from all encumbrances and adverse claims, subject, however, to an annual seignioral rent of twenty-nine dollars

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payable to the said Duchesnay estate on that portion of said lands and real property firstly above described, and except that the said defendants the heirs of the said Honourable Antoine Juchereau Duchesnay claim to be the owners of, or are otherwise entitled to, a part of that portion of the lands and real property thirdly above described, which said part so claimed is described as follows:—

A certain piece of land forming part of lot 33, on the plan and book of reference of the parish of St. Felix du Cap Rouge, containing sixty (60) hundredths of an acre, more or less, described as follows:— Commencing at the point of intersection of the low water mark of the western shore of the Cap Rouge River with the southern side of the old public road, thence going in a westerly direction along the southern side of the said public road, a distance of one hundred and ninety (190) feet, more or less, to a point on the plan shown as the high water mark, thence in a southerly direction along said high water mark, as shown on plan for a distance of about one hundred and fifty-five (155) feet, more or less, to a point shown on plan where the line drawn from the point on public road intersects the high water mark, at a perpendicular distance of one hundred and sixty (160) feet from eastern line of railway, thence in an easterly direction along a line parallel to the centre line of said railway for a distance of two hundred and twenty-five (225) feet, more or less, to the line of low water mark above mentioned, and thence northerly following the said line of low water mark for a distance of one hundred and eighteen (118) feet, more or less, to point of beginning; and the said defendants claim that they have sustained loss and damage in respect of their said estate and title in the said lands and real property by reason of the

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entry and taking of the said lands and real property, and by reason of the construction and maintenance thereon of the said railway and by reason of other lands of said defendants being injuriously affected by the said expropriation."

The Cap Rouge Pier and Wharf Co. by their defence admit the allegations in clause 3 of the 2nd paragraph of the information. They also admit by paragraph 3 of their defence as follows:—

"2. The defendant, the Cap Rouge Pier, Wharf and Dock Co., admits so much of the allegations of the 3rd paragraph of the information as sets up its claim to the whole of the property described in the information, and further admits that the heirs of the said Honourable Antoine Juchereau Duchesnay claim to be the proprietor of that part of the property described in the said 3rd paragraph, but the defendant denies that the heirs of the said Honourable Antoine Juchereau Duchesnay are the proprietors or have any claim to the portion of the said land expropriated described in the 3rd paragraph of the said information."

That part of the property described in the 3rd paragraph of the information is part of the bed of the river Cap Rouge.

Moreover, as I have pointed out, if the lands in question do not form part of the bed of the river Cap Rouge but part of the bed of the river St. Lawrence, then the title of the Cap Rouge Pier and Wharf Co. by prescription would fail.

I am moreover of opinion that on the evidence adduced before me the lands in question do form part of the bed of the river Cap Rouge.

I am unable to accede to Mr. Stuart's contention that high water mark when the tide is at full height is to be taken as the banks of the St. Lawrence. If this conten-

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tion were well founded then every river flowing into the St. Lawrence whose waters are raised by the tide would, to the head of tide-water, form part of the St. Lawrence. The Saguenay, as far as Chicoutimi, and numerous other rivers would disappear. The effect of the tide is to back up the waters of the Cap Rouge river and overflow the lands in question.

The only question in my opinion is whether on the evidence adduced before me, the claim of the Cap Rouge Pier and Wharf Co., to the title of prescription is to be maintained.

The claim of the Cap Rouge Pier and Wharf Co. is in their defence put as follows:—

> "7. The Cap Rouge Pier, Wharf and Dock Co. further represents that it is the proprietor of the whole of the lands expropriated in the present case, and described in the information herein, as well that part claimed by the estate Duchesnay, as that part not claimed by such estate, for having been in the open, public, peaceable and unequivocal possession of the whole thereof, as proprietor for more than thirty years prior to the deposit of the plan by the Commissioners of the Transcontinental Railway, and they allege that any right which the Estate Duchesnay may ever have had to the land described in the 3rd paragraph of the information, and set out in the statement of defence fyled, if such estate ever did have any right thereto, which is expressly denied, has been lost, and a full and complete title to the said land acquired by the said company by the prescription of thirty years."

The conveyance to the Cap Rouge Pier and Wharf Co. (Exhibit D–28) is dated 29th November, 1850. On the 14th October, 1823 (Exhibit D–6) a conveyance was made to William and Henry Atkinson by L. J. Duchesnay of certain lands not including the 60/100 of an acre in question. On the 27th November, 1823 (Exhibit D–7) a lease

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was executed by M. J. Duchesnay, of, among other lands, the lands in question for 9 years from 1st October, at a rental of £25 per annum. On the 16th September, 1840 (Exhibit D–8) a lease was executed by A J. Duchesnay to William Atkinson of the lands in question for a term of 6 years at a yearly rental of £25. On the 4th December, 1846 (Exhibit D–27) William Atkinson conveyed certain lands to Forsythe and Stephenson. The lands in question are not referred to in this conveyance, nor is there any mention of the lease of 16th September, 1840, which expired on the 16th September, 1846.

Mr. Flynn contended that Forsythe and Stephenson obtained possession of the leased lands by virtue of this conveyance, and cited certain articles of the Code to support his contention that the statute had not commenced to run, no notice having been given, &c. Mr. Stuart on the other hand contended that Forsythe and Stephenson never were in possession under the lease. In his argument he places the commencement of his prescription title in 1857.

In the view I take of the case it is unnecessary to consider the points raised by Mr. Flynn. As I have pointed out the conveyance to the Cap Rouge Pier and Wharf Co., was in 1850. They plead their possession

It is admitted by both counsel that thirty years adverse possession is required to give title. No title by prescription had accrued in 1877.

On the 21st June, 1877, James Bowen, jr., was the manager of the Cap Rouge Pier and Wharf Co. On this date the Duchesnay Estate could, so far as the evidence before me shows, have ejected the Cap Rouge Pier and Wharf Co.

On this date the following letter was written to the Honourable A. J. Duchesnay, enclosing $60 :—

"QUEBEC, 21st June, 1877.

"Honourable A. J. DUCHESNAY,

Quebec.

SIR,—Enclosed please find cheque for $60 for use of your interest in Cap Rouge river this year.

Can you oblige me by letting me know from old deeds or otherwise where my line is between you and the property I bought on the Cap Rouge hill. I would be willing to make all the fence at my expense if you will be kind enough to have the lines hunted up.

Yours obtly.,

(Sgd.) J. BOWEN, Jr.

(Written across letters):—

"Received the sum of sixty dollars as mentioned in the note, with the understanding that the navigation of the river is not to be prevented.

22nd June, 1877.

(Sgd.) ANT. J. DUCHESNAY.

Another receipt sent:

"A. J. D."

"In a few days I shall be able to give you the description of the property which the Messrs. Atkinson had at Cap Rouge.

In haste.

Yours truly,

(Sgd.) ANT. J. DUCHESNAY."

22nd June, '77.

The payment made was for the use of "your interest in the Cap Rouge river" this year.

His interest in the Cap Rouge river embraced the lands in question. There is nothing to qualify this letter as to what is included.

Col. Forsyth gave evidence to show that what the company had been leasing were the waters further up the river.

It is contended that under Article 1233 C. C. this evidence was not admissible, not being in writing. In any event it is of no importance as Col. Forsyth was

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testifying to facts occurring during his management. He left the management in 1867 or 1868—was replaced as manager by James Bowen, and on the death of James Bowen, Amos Bowen succeeded as manager. Amos Bowen died in 1892

Reasons for Judgment.

It is in my view of the case unnecessary to consider the question of the admissibility of the entries proved by Larue.

After this letter of 21st June, 1877, and the receipt of the rent, the Duchesnay Estate during the year 1877 could not have brought ejectment successfully on the evidence adduced before me.

I think the prescription was interrupted. See Articles 2227-2242 et seq. See *Walker* v. *Sweet*, (1) *Darling* v. *Brown*, (2). The auds were expropriated on the 23rd May, 1906, before any title by prescription accrued.

I may mention that the latter part of the letter of 21st June, 1877, has no bearing on the question in dispute.

I think judgment should be entered declaring the lands described in the information vested in the Crown, and that the Cap Rouge Pier and Wharf Co. is entitled to recover from the Crown the sum of $39,200 with interest thereon to the date of judgment, and the Duchesnay Estate $800, with interest thereon to date of judgment.

The Crown should pay the costs of the defendants to the date of trial.

The Cap Rouge Pier and Wharf Co. should pay the Duchesnay Estate the costs occasioned by their contestation.

Judgment accordingly.

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

Solicitor for Duchesnay Estate: *E. T. Pacquet.*

Solicitors for Cap Rouge Pier Co.: *Pentland, Stuart & Brodie.*

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(1) 21 L. C. Jur. 29. (2) 1 S. C. R, 360.

REPORTER'S NOTE.—On appeal to the Supreme Court of Canada this judgment was reversed, 23rd December, 1910.

IN THE MATTER OF

THE ATLANTIC AND LAKE SUPERIOR RAILWAY COMPANY'S SCHEME OF ARRANGEMENT; 1908 Oct. 5

AND

THE NORTH EASTERN BANKING COMPANY, Limited, a corporation incorporated under the laws of Great Britain, and having its registered office at Newcastle-on-Tyne, England.....PETITIONER.

Scheme of Arrangement—Confirmation—Creditor applying to file claim long after date of order of confirmation—Laches—Refusal of application by Registrar—Appeal to Judge—Practice.

A Scheme of Arrangement between a Railway Company and its creditors had been confirmed by order of Court after the company had complied with all the requirements of the statute and the rules of court made thereunder, and after notice given to all parties interested. Furthermore, as the confirmation had been opposed, enrolment of the Scheme and the order of confirmation was not made until the expiry of thirty days after the date of the order confirming the Scheme, and after notice of the said order had been published in compliance with Rule 60 of the Rules and Orders regulating the practice of the court. Following upon that new proceedings were taken, and an order obtained, on behalf of the company, for the sale of the railway, and it was sold thereunder. More than fifteen months after the Scheme was confirmed, by a judgment of the court, although the fact of such confirmation had become known to him some four months before he applied, a creditor of the railway applied for an extension of time for appealing from the judgment confirming the Scheme.

The Registrar in Chambers, in view of the facts above stated, refused the creditor's application.

Held, on appeal from the decision of the Registrar, that the application was properly refused.

THIS was a motion by way of appeal from a decision of the Registrar in Chambers refusing an application for an extension of time for appealing from a judgment of the Court confirming a Scheme of Arrangement.

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October 5th, 1908.

The decision of the Registrar (L. A. AUDETTE, K.C.,) was as follows.

THE REGISTRAR:

This is an application on behalf of the North Eastern Banking Company, Limited, bearer of one hundred bonds of £100 each of the Atlantic and Lake Superior Railway Company and a creditor of the said railway company to the amount of £10,000, for an extension of time to appeal to the Supreme Court of Canada from the judgment of this court bearing date the 10th day of June, A.D. 1907, confirming the Scheme of Arrangement herein between the Atlantic and Lake Superior Railway Company and the holders of £500,000 four per cent. first mortgage sterling bonds issued by the company, upon the grounds that the said North Eastern Banking Company only became aware of the said Scheme of Arrangement and of its confirmation in the middle of the month of October, 1907, and was thus unable to deposit its bonds in the hands of the Royal Trust Company, and get in exchange therefor certificates of participation, as provided by the said Scheme.

Under *The Exchequer Court Act* any party who is dissatisfied with any judgment of this Court is given thirty days from the day on which judgment has been pronounced to appeal to the Supreme Court of Canada.

The present application is made fifteen months and sixteen days after the pronouncing of the judgment from which the petitioner wishes to appeal, although it became aware of the same about four months after the delivery of such judgment.

Now the present case is materially different from an ordinary case wherein there is one plaintiff and one defendant. Indeed, it is a matter where a railway, a public utility, is involved, and where, besides the parties

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to the case, there are a number of creditors who have been called and where a number of them appeared and contested the proceedings; and further where judgment was duly given after considering the objections of the several parties interested who have so appeared.

The proceedings taken herein for the purpose of arriving at a Scheme of Arrangement were so taken under sections 285, and following, of *The Railway Act* 1903, 3 Edw. VII, chap. 58 (now re-enacted in *The Railway Act*, chap. 37 R.S. 1906, secs. 365 and following). General Rules and Orders were under the provisions of section 289 (now sec. 368) duly made by the Exchequer Court regulating the practice and procedure of the court under the several sections of the Act dealing with Schemes of Arrangement.

Now the Scheme of Arrangement in question herein has duly confirmed after compliance with all the requirements of the statute and the Rules of Court made thereunder, and after ample notice had been given to all parties interested, as will appear by the affidavit of Mr. J. deGalindez filed herein on this application. And further, as the confirmation had been opposed, the enrolment of the same was only made thirty days after the pronouncement of the judgment confirming the same, and notices of the said judgment have been given in compliance with the following rule of practice of the court which reads as follows:—

"19. If the order for confirming a scheme is not opposed, the Scheme and such order may be enrolled forthwith. If the order is opposed notice of the order shall, at least once in every week which shall elapse between the pronouncing of such order and the expiration of thirty days from the pronouncing thereof, be inserted in the *Canada Gazette* and such two newspapers as shall have been appointed by the Judge for the insertion of advertisements under the 14th rule hereof. And such scheme and order shall not be

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enrolled until the expiration of thirty days from the day of the order having been pronounced, nor until the *Canada Gazette* and the newspapers containing such notices are produced to the Registrar."

We must therefore necessarily arrive at the conclusion that the Scheme was duly confirmed after all the requirements of the law had been complied with.

Following the enrolment of the Scheme in the manner provided both by the statute and the rules of court, an action was taken in this court for the sale of the railway and for the determination of the rights of the several creditors upon the proceeds of the sale thereof.

By the several judgments delivered in that action the railway was ordered to be sold and the rights of the creditors—including the rights of the bondholders under such scheme—were determined, and finally the railway was duly sold in the course of September, 1908, and a conveyance of the same duly executed to the purchasers.

Without going into the merits of the Scheme of Arrangement itself—an enquiry which cannot now be pursued under the circumstances—it may be well to say that no error of judgment which would amount to a miscarriage of justice, or fraud has been either alleged or shown. Indeed the Scheme is not attacked as bad or vitiated by any irregularities, but only as unfair because the petitioner having failed to comply with the provisions thereof through the want of being aware of the same in time, is not to-day in a position to exchange its bonds for certificates of participation. It is its misfortune not to have complied with its terms, and that is all. A cautious holder of such bonds would have kept himself *au fait* with the doings of the company. The majority of the bondholders could not have done more than they did, as they scrupulously complied with the law. The interest of the majority as provided by the Scheme must prevail.

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The parties attacking the Scheme to-day are seeking to come within its provisions and share with the other bondholders, who complied with the judgments of the court, the benefits which may be derived from the Scheme itself.

Then, were leave to appeal given now it could only be given on terms, that is, upon the usual condition precedent to pay all costs incurred up to date both in this case and in the case wherein the sale of the railway was ordered. And from a cursory investigation it appears that the costs which would have to be paid under such circumstances would be perhaps over and above the amount the petitioner would ultimately be entitled to recover.

There is here nothing shown why, *ex debito justitiæ*, this application should be granted, and moreover were it granted the very party who is making the application would not benefit by it, as the costs it would have to pay would likely exceed the amount it would ultimately recover. This, however is not said, and is not to be taken as being the basic ground upon which reliance is placed in arriving at the final conclusion upon the present application.

Considering that the Scheme of Arrangement has come before the court in a regular manner, and has been duly enrolled in conformity with the provisions of the statute and the rules of court made thereunder, and considering it has thus acquired a quasi-statutory effect under the provisions of sub-section 4 of section 287, where it is said that after the enrolment of the Scheme its provisions "shall have the like effect as if they had been enacted by Parliament", and considering further the negligence of the petitioner in making its application over fifteen months after the pronouncement of the judgment, when the same came to its knowledge four months after its

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pronouncement, the application cannot be favourably entertained.

A number of authorities have been cited pro and con. Perhaps, however, the most important one cited by the petitioner namely the case of *In re Irish and North Western Railway*, (1) should not be cast aside without some explanation. That case must obviously be distinguished from the present one, inasmuch as the Exchequer Court has made general rules and orders in the manner above mentioned, and in that the enrolment of the Sheme has been duly made in compliance therewith, while in the case cited such general rules had not been made, and question had arisen as to whether the enrolment was perfect without such rules, considering that such rules existed in England.

Moreover, if the present application were granted after such a long lapse of time and after such very material steps taken in the interval, there would be no finalty in the judgments delivered by the courts of this country. It is for such purpose that the legislature has placed upon the statute book a limitation of time for appeals.

Under the circumstances the application will be dismissed with costs.

October 12th, 1908.

The petitioner having appealed to the Judge in Chambers from this decision, the appeal was dismissed with costs.

Appeal dismissed.

Solicitors for the Petitioners: *Campbell, Meredith, McPherson & Hague.*

Solicitors for the Atlantic and Lake Superior Railway Company: *McGibbon, Casgrain, Mitchell & Surveyer.*

(1) Ir. R., 3 Eq. 190.

IN THE MATTER of the Petition of Right of

HAVELOCK McCOLL HART.....SUPPLIANT; 1910

Sept. 16.

AND

HIS MAJESTY THE KING.....RESPONDENT.

Railways—Siding—Undertaking in mitigation of damages in prior Suit—Right of suppliant to maintain action.

In certain expropriation proceedings between the Crown and the suppliant's predecessor in title, the Crown, in mitigation of damages to lands not taken, filed an undertaking to lay down and maintain a railway track or siding in front of, or adjoining, said lands and to permit the then owner, "his heirs, executors, administrators, assigns (and the owner or owners for the time being of the said land and premises or any part thereof and each of them) "to use the same for the purposes of any lawful business to be carried on or done on the said lands or premises." By order of Court the suppliant's predecessor in title was declared to be entitled to the execution of such undertaking. The undertaking was given in 1907, and at that time the lands in question were not being used for any particular purpose. The Crown in execution of its undertaking subsequently laid down a siding in front of or adjoining the said lands. There was, however, a retaining wall between the siding and such lands, and the Crown informed the solicitor of the suppliant on the 5th October, 1909, that "at any time you may desire, we are prepared to open a way through this retaining wall so as to give access to the siding in order that you may conduct your business in the manner contemplated in the order of the Court;" but, although the suppliant presented his claim for damages on the basis that the Crown had not given him a siding suitable for carrying on a corn-meal milling business, at the time of the institution of the present proceedings nothing had been done to utilize the property for any particular business.

Held, that upon the facts the Crown had fully complied with the terms of the undertaking mentioned, and that the suppliant had not made out a claim for damages.

Quaere, Whether the suppliant had any right to take proceedings to compel the execution of the undertaking by the Crown until the property was occupied for the purposes of some particular business?

2. Whether the suppliant would have any right to enforce a claim for damages in view of the fact that he had no assignment of any such claim from his predecessor in title?

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PETITION OF RIGHT seeking damages for the alleged non-performance of an undertaking by the Crown to furnish a railway siding.

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

June 7th and 8th, 1910.

The case was tried at Halifax. N.S.

W.B.A. Ritchie, K.C. and *E. P. Allison*, for the suppliant, contended that the benefit of the undertaking ran with the land, and that the suppliant, as devisee of the original owner, had a right to bring action for the breach of the undertaking. (*Tulk* v. *Moxhay*, (1); *Cooke* v. *Chilcott*, (2); *Heywood* v. *Brunswick Soc.* (3); *London & S. W. Ry. Co.* v. *Gomm*, (4); *Austerberry* v. *Oldham*, (5); *Spencer's Case*, (6). Secondly as to the construction of the undertaking, all the surrounding circumstances at the time it was given have to be looked at, when the terms of the document are, as here, ambiguous. (*Phipson on Evidence*, (7); *Gandy* v. *Gandy*, (8); *Bank of New Zealand* v. *Simpson*, (9); *Waterpark* v. *Fennell*, (10); *McDonald* v. *Longbottom*, (11); *Attrill* v. *Platt*, (12); *Dominion Iron & S. Co.* v. *Dominion Coal Co.* (13); *Inglis* v. *Buttery*, (14); *Krell* v. *Henry*, (15).

A track on a high level is not a track "in front of or adjoining" suppliant's land. Thirdly, it is open to the suppliant to contend that as a commercial mill is a business especially suited to the premises, to refuse to give him a siding suitable for carrying on such business is a breach of the terms of the undertaking. The evidence

(1) 2 Phil. 774.
(2) L. R. 3 Ch. D. 694.
(3) L. R. 8 Q. B. D. 403.
(4) L. R. 20 Ch. D. 562.
(5) L. R. 29 Ch. D. 750.
(6) 1 Sm. L. C., 10 ed., pp-72-89.
(7) 3rd ed. p. 538.
(8) L. R. 30 Ch. D. 67.
(9) [1900] A. C. 182.
(10) 7 H. L. C. 661.
(11) 1 E. & E. 983.
(12) 10 S. C. R. 467.
(13) 43 N. S. R. 132.
(14) L. R. 3 A. C. 552
(15) [1903] 2 K.B. 749.

shows that the property with a siding at low level would have a special value for a corn-meal business and would be worth $10,000, while with the siding at high level it would have no special value for such business.

R. T. MacIlreith, K.C., and *C. D. Tremaine*, for the respondent, contended that the undertaking in question was a personal or collateral agreement or covenant with the suppliant's predecessor in title, could only be taken advantage of by him personally, and did not run with the land. (*Doughty* v. *Bowman* (1); *Lydford* v. *North Pacific Coast Ry. Co.* (2); *Norcross* v. *James*, (3) *Bronson* v. *Coffin*, (4). Where there is no privity of estate between the parties, where they do not stand in such a relation as lessor and lessee, the covenant is purely collateral and does not run with the land. (*Webb* v. *Russell* (5); *Mygatt* v. *Coe* (6); *Hurd* v. *Curtis* (7) Assuming that there was a breach of the undertaking in the life-time of the suppliant's predecessor, the right of action on a personal covenant broken in the life-time of the covenantee passes to the personal representatives and does not run with the land. (*Ricketts* v. *Weaver* (8); *Raymond* v. *Fitch* (9). It is submitted that the covenant was not assignable, and further that even if it was assignable, as it was not a covenant running with the land, it ought to have been assigned. (*Child* v. *Douglas*, (10); *Keats* v. *Lyon*, (11).

As to the undertaking, it is clear and unambiguous when read in connection with the plan. It was an undertaking to lay a siding in front of the land which would be reasonably convenient for the carrying on of business thereon. There was no promise to lay a track at any particular level.

(1) 11 Q. B. 448.
(2) 92 Cal. 93.
(3) 140 Mass. 188.
(4) 108 Mass. 180.
3 T. R. 403.
(6) 142 N. Y. 86.
(7) 36 Mass. 459.
(8) 12 M. & W. 718.
(9) 2 C. M. & R. 598.
(10) 2 Jur. N.S. 950.
(11) L. R. 4 Ch. 218.

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What the present case amounts to is simply this: The suppliant in an action for damages for breach of an undertaking, and with no prayer therefor in the pleadings, asks the court to reform the undertaking. It is submitted that this cannot be done.

CASSELS, J. now, (September 16, 1910) delivered judgment.

This is a petition of right exhibited on behalf of the suppliant claiming the sum of $10,000 as damages alleged to have been occasioned to him by reason of the alleged failure on the part of the Crown to perform a contract entered into between His Majesty the King and one Levi Hart, now deceased, the father of the suppliant.

The claim of the suppliant is thus stated:—

"That in a certain section in this Honourable Court under *The Expropriation Act* (52 Victoria, chap. 13, of the Acts of the Parliament of Canada) in which His Majesty the King, on the information of the Attorney-General for the Dominion of Canada was Plaintiff and the said late Levi Hart, deceased, was Defendant, His Majesty the King for the purpose of reducing the amount of compensation for the lands and premises of the said late Levi Hart, deceased, expropriated by His Majesty the King therein, and the damages arising therefrom, undertook and agreed by the Honourable Allen Bristol Aylesworth, his Attorney-General for the Dominion of Canada, to lay and maintain a railway track connected with the Intercolonial Railway Service of Canada, shown and marked as 'A A' on plan annexed to plaintiff's exhibit 3 filed therein, in front of or adjoining the said lot or parcel of land described in said paragraph one hereof, and to permit the said late Levi Hart, deceased, his heirs, executors, administrators and assigns (and the owner or owners for the time being of the said land and premises or any part thereof and each of them) to use the said

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track so to be constructed and maintained for the purpose of any lawful business to be carried on or done on the said lands and premises, which said undertaking or agreement was incorporated in the final order or decree granted and issued in the said action on the 22nd day of April, A.D., 1907, and which said final order and decree is in the words and figures following .—

" In the Exchequer Court of Canada, Monday, the 22nd day of April, A.D., 1907.

PRESENT :—

The Honourable MR. JUSTICE BURBIDGE.

" BETWEEN :—

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

PLAINTIFF;

AND

LEVI HART,

DEFENDANT.

1. This action coming on for trial at the city of Halifax, Nova Scotia, on the 19th, 21st, 22nd and 26th days of January, A.D., 1907, before this court in the presence of counsel for the plaintiff and the defendant, upon hearing read the pleadings herein and upon hearing the evidence adduced and what was alleged by counsel aforesaid, and His Majesty the King having undertaken by the Honourable Allen Bristol Aylesworth, His Attorney-General for the Dominion of Canada, to lay and maintain a railway track connected with the Intercolonial Railway Service of Canada, shown and marked 'A A' on the plan annexed to plaintiff's exhibit 3 filed herein, in front of or adjoining all and singular that certain lot, piece or parcel of land situate lying and being in the city and county of Halifax and Province of Nova Scotia. and more particularly described as follows," &c.

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The judgment then describes the lands now owned by the Suppliant, and proceeds:—

"and to permit the said defendant, his heirs, executors, administrators and assigns (and the owner or owners for the time being of the said lands and premises or of any part thereof and each of them) to use the said track so to be constructed and maintained for the purpose of any lawful business to be carried on or done on the said lands and premises, this court was pleased to direct that this action should stand over for judgment and the same coming on this day for judgment."

Clause 4 of the judgment is as follows:—

"4. And this Court doth further order and adjudge that the said defendant is entitled to the fulfilment and execution by His Majesty the King of the undertaking in the first paragraph hereof mentioned."

The suppliant then claims as follows:—

"That under and by virtue of the terms, conditions and provisions of the said final order or decree and of the said undertaking or agreement made and entered into by His Majesty the King as aforesaid and incorporated in the said final order or decree and referred to and set forth in paragraph four hereof it was and became the duty of the said Minister of Railways and Canals, and of the said David Pottinger, as General Manager of the said Intercolonial Railway as aforesaid, and subsequently of the said Michal J. Butler, David Pottinger, Ephraim Tiffen and Frank P. Brady, as the Board of Management of the said Railway as aforesaid, and of the other officers or servants of His Majesty the King, as represented by the Government of the Dominion of Canada, in charge of the said railway, including the said railway yard and terminals at Halifax aforesaid, to lay and maintain a railway track connected with the Interclonial Railway Service of Canada, and to permit the persons entitled thereto,

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including your suppliant, to use the same in accordance with the terms, conditions and provisions of the hereinabove mentioned final order or decree and of the said undertaking or agreement incorporated therein, but, notwithstanding the said duty so cast upon them as aforesaid under and by virtue of the terms, conditions and provisions of the said hereinabove mentioned final order or decree, and of the said undertaking or agreement incorporated therein and entered into as aforesaid, and in direct breach thereof, although a reasonable time for so doing has elapsed, and although requested so to do by your suppliant, the said Minister of Railways and Canals, and the said David Pottinger, as General Manager of the said Intercolonial Railway as aforesaid, and the said Michael J. Butler, David Pottinger, Ephraim Tiffen and Frank P. Brady. as the Board of Management of the said railway as aforesaid, and the other officers or servants of His Majesty the King, as represented by the Government of Canada, in charge of the said railway, including the said railway yard and terminals at Halifax aforesaid, have wholly failed, neglected and refused to lay and maintain a railway track connected with the Intercolonial Railway Service of Canada shown and marked as 'AA' on the plan annexed to the plaintiff's exhibit 3 filed in the said action between His Majesty the King on the information of the Attorney-General for the Dominion of Canada, as plaintiff, and the said Levi Hart, deceased, as defendant, and referred to and set forth in said paragraph four hereof, in front of or adjoining the said lot or parcel of land described in said paragraph one hereof, or any other track or tracks or at all as required by the terms, conditions and provisions of the said hereinbefore mentioned final order or decree and of the said undertaking or agreement incorporated therein."

The suppliant further claims :—

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"That your suppliant has suffered loss and damage in the sum of $10,000 and has suffered the aforesaid loss and damage through and in consequence of the failure, neglect and refusal and breach of contract of and by the said Minister of Railways and Canals and the said David Pottinger, as general manager of the said Intercolonial Railway as aforesaid and the said Michael J. Butler, David Pottinger, Epharim Tiffen and Frank P. Brady, as the Board of Management of the said railway as aforesaid, and the other officers or servants of His Majesty as represented by the Government of Canada, in charge of the said railway, including the said railway yard and terminals at Halifax aforesaid, to lay and maintain a railway track connected with the Intercolonial Railway Service of Canada shown and marked as 'AA' on the plan annexed to Plaintiff's Exhibit 3 in the said action between His Majesty the King on the information of the Attorney-General for the Dominion of Canada, as plaintiff, and the said late Levi Hart, deceased, as defendant, in front of and adjoining the said lot or parcel of land described in said paragraph one hereof in accordance with and as required by the terms, conditions and provisions of the said hereinabove mentioned undertaking or agreement made and entered into by His Majesty as aforesaid."

"Wherefore your suppliant therefore humbly prays that he be permitted to bring suit in the Exchequer Court of Canada for the recovery from Your Majesty of the sum of $10,000 for the causes above mentioned, and that he be awarded the said sum of $10,000 and costs by the judgment to be rendered herein by the Exchequer Court."

Voluminous evidence was adduced at the trial as to the best method of utilizing the premises in question owned by the suppliant.

It is beyond question that a siding has been constructed located on the line "AA," as shown by the plan

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referred to in the judgment, and such siding is in front of or adjoining the premises of the suppliant.

There is a retaining wall between this siding and the premises of the suppliant, and it is contended that this wall being higher than the rail of the siding would prevent access to it. Prior to the filing of the petition of right and as far back as the 5th October, 1909, the solicitor of the suppliant had been notified by Mr. Butler in charge of the railway, as follows :—

"At any time that you may desire we are prepared to open a way through this retaining wall so as to give access to the siding in order that you may conduct your business in the manner contemplated in the order of the court."

On the 31st December, 1908, the suppliant had written to the chief engineer of the Intercolonial Railway as follows :—

"HALIFAX, N.S., Dec. 31, '08.

"Mr. W. B. Mackenzie,
Chief Engineer I. C. R.,
Moncton, N.B.

Dear Sir,—When the property on Water street was taken by expropriation an award affixed by the Exchequer Court in April, 1907, included an undertaking for the construction and operation of a siding along the front of the remaining property. This siding it was expected would be completed during 1907. Since the award in April, 1907, we have had no use of the remaining property awaiting the use of the siding. Will you please advise whether or not the siding is in condition to use and give us permission to open your fence for access to the siding.

Yours truly,
Executor Est. LEVI HART,
(Sgd.) H. McC. Hart."

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At this time the suppliant made no complaint that the siding as well as other tracks should be lowered about eight feet so as to bring the siding to a level with bed rock of the land in question.

The purpose for which the land was expropriated in the former action against Levi Hart was the extension of the yard accommodation of the Intercolonial Railway at Halifax. The expropriation of those lands and of parts of streets would have the effect of cutting off the lands owned by the suppliant from access to Water Street, and the purpose of the undertaking was to guarantee to the occupiers of the lands in question a siding or track for unloading and loading, and so give an inlet and outlet for material and goods and also for products manufactured in any buildings that might be erected on the premises.

The views of certain witnesses as to values of property sometimes vary much according to the circumstances of the particular case in which they happen to be giving testimony.

In this action the suppliant, Havelock McC. Hart, asks for the modest sum of $10,000 for damages by reason of not being furnished with a siding, he still retaining the lands in question.

In the former action, tried by the late Mr. Justice Burbidge in 1907, the present suppliant not then being the owner of the property in question valued these lands without a siding at a sum under $1,000. He stated, referring to the property in question:—

"We paid $7,000, because we wanted sufficient ground room for the plant. If we paid too much for it that is our fault. But if I were buying this hole to day even with a railway siding I would consider $2,500 all I would want to pay for it if I could use it. As it is to-day we could not use it under our plan."

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A perusal of the evidence of the suppliant given in the former action and set out in the transcript of his evidence in this case satisfies me that his present contention that a ladder track instead of a blind siding would be of greater value, is an afterthought. I think from the evidence adduced before me the blind siding is the better, and this has been furnished.

The claim put forward is a grossly exorbitant one. The property is as it was in 1907. No purchaser has been found for it. No excavation has been done on the property. The question as to what the property would be used for with the rock bottom in the floor on the lower part as a cellar, and the floor level with the siding furnished, is one dependent on the nature of the business to be carried on. To utilize the bed rock as the floor would require a large amount of excavation and the lower part would be damp and cut off to a great extent from light and air unless not merely the siding in question was lowered about eight feet, but the other tracks as well to the east between the retaining walls.

The plan referred to in the judgment in the former action (Exhibit No. 2 in this action) gives no levels of the various tracks. It does show to the north and between the various tracks and the property in question a retaining wall, for what purpose if the tracks were not to be elevated? It never could have been in the contemplation of the parties that the whole arrangement of the tracks in the yards of the railway—the levels of the various tracks—the numbers of the tracks—should be settled forever in the former action. All that the parties had in mind was that siding accommodation should be furnished and the location of the siding settled. The railway had and has almost as much interest as the owners in furnishing facilities for the handling of the freight. The judgment in the former action does not contemplate any particular kind of business to be carried on in any

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buildings to be erected. On the contrary it provides as follows :—

"And to permit the said defendant, his heirs, executors, administrators and assigns (and the owner or owners for the time being of the said lands and premises or of any part thereof and each of them) to use the said track so to be constructed and maintained for the purpose of any lawful business to be carried on or done on the said lands and premises."

The present siding is constructed so as to be on a level with North street, thus obviating any grade, and the evidence is overwhelming, and in my opinion correct, in favour of such a siding in lieu of one with a heavy grade.

The evidence on the part of the suppliant is given mainly with the object of proving that for a particular business the bed rock could be used as a floor and a lower siding than the one furnished be more advantageous.

Henry Flowers, the managing director of Levi Hart & Son, expressly limits his evidence to the use of the property for a corn mill business. He is asked as follows :—

"THE COURT :—Now, you must have a cellar underneath this building? A. No.

THE COURT :—You would have no cellar at all?—A. No.

Q. For any kind of business? A. Not for this business I am talking about.

Q. Take it for any other business, would you load from your cellar or from your first floor? A. You would load from the first floor.

Q. If you have your cellar seven feet in height, and you excavate it at the rear, the first floor would be almost on the level of the track? A. It would be then.

Q. Is not that the way buildings are constructed? A. Yes, but in our business there would not be any use for a cellar.

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Q. But for some other business? A. But I am giving evidence on this business, that a cellar would not be of any use.

Q. There are other business purposes for which a cellar would be used? A. But I can't see what it would be used for there.

THE COURT: For most business purposes you would build your cellar— you would want to heat your building with a furnace, and you would want to store your coal and all sorts of things—and your cellar would be on a level with the siding now? A. I don't know. I am only giving evidence as far as my own business is concerned. I will not talk about anything else."

James A. Calder, also in the cornmeal business, admits that for a large number of industries a basement would be required in which case the first floor is the one from which the loading would take place. For these industries a siding sunk to the level of the bed rock would be inappropriate besides having the disadvantage of a heavy grade.

Arthur E. Curren, also in the flour and cornmeal business, admits that if the property was used for an industry requiring a cellar the raised siding as at present would be better. This witness also points out that even for a cornmeal business if only the siding in question were lowered and the other tracks not lowered there would be no advantage. He also shews what is apparent, that even for a cornmeal business there is no disadvantage in having the corn mill built up as far as the siding is concerned.

The undertaking was not given with the view to a siding for a cornmeal business. On the contrary the provision is as quoted before :—

"And to permit the said defendant, his heirs, executors, administrators and assigns (and the owner or owners for the time being of the said lands and premises or of

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any part thereof and each of them) to use the said track so to be constructed and maintained for the purpose of any lawful business to be carried on or done on the said lands and premises."

It must also be borne in mind that in 1907 no tracks had been laid nor had the excavation been made.

I think the meaning of this undertaking is quite clear and unambiguous. Some common sense must be brought into play in considering the case. Everyone knows how a railway business is conducted, and the purpose which a siding is intended to serve. I think the railway has fully complied with their undertaking, and that no reasonable ground of complaint exists.

Since the trial very able and exhaustive written arguments have been furnished as to whether a right of action exists. I do not find it necessary to deal with these difficult and interesting questions, as on the facts I am of opinion that the suppliant fails.

I have grave doubts as to the right to compel the laying of a siding until the property is occupied. Furthermore, according to the evidence of the suppliant, the retaining wall between the siding and the property was erected in 1907, necessitating a raised siding, and it may be the breach, if any there were, took place at that time, and the present suppliant suing for damages for a complete breach the right to such damages may not have passed to him.

His title to the property was acquired in September, 1908. He has no assignment of the claim for damages. However, I do not decide these questions either for or against the suppliant.

The petition is dismissed with costs.

Judgment accordingly.

Solicitor for suppliant: *E. P. Allison.*

Solicitor for respondent: *R. T. MacIlreith.*

IN THE MATTER of the Petition of Right of

EUGENE MICHAUD.....SUPPLIANT; 1910 Oct. 3.

AND

HIS MAJESTY THE KING.....RESPONDENT.

Contract—Railway ties — Inspection — Inspector exceeding authority in respect of acceptance—Subsequent rejection of ties improperly accepted —Right to recover price.

The suppliant, in reply to an advertisement calling for tenders for ties for the use of the Intercolonial Railway, offered to supply ties to the Crown for such purpose. The Crown expressed its willingness to purchase his ties provided they answered the requirements of the specifications mentioned in the advertisement for tenders. D., an inspector appointed by the Government, in excess of his authority and contrary to his instructions, undertook on behalf of the Crown to accept ties not up to the said specifications. On this becoming known to the Crown, D.'s inspection was stopped, and other persons were appointed to re-inspect the ties, who rejected a portion of those which D. had undertaken to accept. The suppliant claimed the price of the ties so rejected.

Held, confirming the report of the Registrar, as referee, that the Crown was not liable for the price of the ties which D., as inspector, wrongfully and in excess of his authority, had undertaken to accept.

THIS was a case arising upon a claim against the Crown for the value of certain railway ties alleged to have been sold to the Crown for the purposes of the Intercolonial railway.

The facts of the case appear in the report of the Registrar, to whom the case was referred for enquiry and report.

August 31st. 1910.

The REGISTRAR, L. A. AUDETTE, filed the following report:—

"The suppliant brought his petition of right to recover the sum of $1,142.48, being the balance, as he alleges, of

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an amount due under a contract entered into between the Crown and himself to supply the former with a quantity of ties not exceeding 100,000, at the price of 36 cents each for No. 1 and 24 cents each for No. 2, and admittedly in accordance with the specification filed herein as respondent's exhibit "A". The action, the suppliant states in his evidence, is taken for the balance due under Dubé's inspection."

"After the suppliant's tender had been accepted, as shown by the correspondence produced herein, he delivered ties at certain places to be inspected in compliance with the terms of the Intercolonial Railway specifications."

"The suppliant first objected to the ties being inspected by an English speaking person, and to Mr. Hilliard, the official inspector, suggesting some one else to do the work."

"George Gallant, a section foreman, speaking both French and English and who had already inspected ties, was duly appointed. Again the suppliant objected to this person on the ground that he would take too long to inspect such a large quantity as the one in question, and Gallant's services were dispensed with."

"William Fournier was the next appointee. Again the suppliant objected to him. Fournier, however, began to inspect, but the suppliant says he was too particular, was taking too much time, and found fault with him because he was measuring the ties. Indeed a person who is not in the habit of inspecting ties will obviously take longer than a person who is in the habit of doing so daily. The official inspector should have made the first inspection notwithstanding such protest."

"When the suppliant objected to Fournier he suggested X. Dubé, a section foreman at St. Moïse. In compliance again with his request Dubé was appointed, and proceeded with the inspection, after having been called

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to Moncton and given special instructions to inspect according to the specifications of the Intercolonial Railway. He tells us candidly he received instructions to comply with the specifications, but that certainly he did not follow them. He says he did not inspect according to the specifications, but according to his conscience, a matter rather difficult to reconcile. He admits having accepted about 150 ties less than 4 inches, 500 to 600 that were not 5 by 6, and 200 to 300 that were crooked Dubé says he neither speaks nor understands English, and therefore could not understand the specifications which are in the English language; but that he had, however, understood what concerned the quality of wood."

"Wm. Patterson contradicts Dubé on that point; and says Dubé understood English and that he gave him instructions in that language. Exhibit "B" is a letter written in the English language and signed by Dubé, and Patterson says it is under the usual signature."

"It having been brought to the notice of the authorities of the Intercolonial Railway that Dubé was taking a quantity of ties which should not be accepted, he was at once stopped, and Mr. Hilliard, the official inspector, and Mr. Patterson, the roadmaster, were both instructed to re-inspect the suppliant's ties, already inspected by Dubé, which they did. Mr. Burpee, the engineer of maintenance, went over the ground and took notes of the re-inspection, and he considered it a fair inspection giving the suppliant the benefit of every doubt, and he says the inspection was not more severe than usual as made on the I. C. R., but if anything it was more lenient. Mr. Patterson tells us Dubé had accepted ties that were too short, too thick, rotten, crooked, worm-eaten and too thin. Mr. Hilliard says that Dubé took ties that were not up to the specification and that were no good. This witness says he was more lenient on this re-inspection than usual, and even if he had originally made the

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inspection quite a number of the ties accepted on the re-inspection would not have been accepted, and the roadmaster even found fault with him for accepting ties he should not have accepted. It having been hinted and suggested, without any precision however, by some witnesses, that in the course of the re-inspection, all the suppliant's ties had not been inspected. Mr. Hilliard states he inspected all the ties Dubé had already inspected, and that Dubé and the section foreman showed him the ties. Then as to the ties which had been used between the two inspections, due credit was given for them; there cannot be any doubt as to that. Take for instance, the ties mentioned by witness Laferte, at Lac au Saumon, they must necessarily be the ones mentioned by Hilliard, at page 138 of his evidence."

"Then, at the trial, it has transpired that some of the rejected ties on the re-inspection had been seen at different stations or places, but there is no evidence that the ties re-inspected by Mr. Hilliard were marked by him. However, it was the suppliant's fault if the ties went astray after the re-inspection for neglecting to comply with the specification, which says that "if any such" [not accepted] "ties are on the premises of the railway "they must be removed immediately after the inspec- "tion, as the railway department will not be responsible "for them." The suppliant admits he did not remove the rejected ties, and come what may with these ties, after their rejection, the Crown is not liable therefor."

"The review of all these facts brings us to the only serious question of law involved in this case. The suppliant contends that the Crown is bound by Dubé's inpection, and that he should recover accordingly. It clearly appears from the above that Dubé did not comply with his instructions, that he acted without authority when he did not inspect according to the specification, and that therefore the Crown cannot be bound by his inspec-

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tion, under the well known legal doctrine that the Crown is not bound by the laches of its officers. This principle of law is too well known to be discussed here at any length. (*Burroughs* v. *The Queen* (1). The rule of law that the Crown is not liable for the laches or negligence of its officers also obtains in the Province of Quebec, except when altered by statute. *Black* v. *The Queen* (2). See *Audette's Exchequer Court Practice* (3). Then the case of *Boyd* v. *Smith* (4) is authority for the doctrine that for acting without authority of law, or in excess of the authority conferred upon him, or in breach of the duty imposed upon him by law, an officer of the Crown is personally responsible to anyone who sustains damages thereby. Even under the Civil Code P. Q. Arts. 1727 *et seq.* between subject and subject the principal is only responsible towards third parties for the acts of his mandatary done in the execution and within the powers of the mandate."

"This case is a true illustration of the principle that too much leniency will inevitably create trouble. Had the inspection of the suppliant's ties been made in the usual business way, disregarding the likes and dislikes of the suppliant in the selection of an inspector—carried in this case to an extreme point amounting to abuse—this case would not have come before the Court.

For the reasons above mentioned the action should be dismissed with costs."

The suppliant appealed from the report of the Registrar.

September 30th, 1910.

The appeal from the report of the Registrar was now argued before the Judge of the Exchequer Court.

L. St. Laurent for the suppliant;

F. H. Chrysler, K.C., for the respondent.

(1) 2 Ex. C. R. 293; 20 S.C.R. 420.
(2) 29 S. C. R. 693.
(3) 2nd Ed. pp. 124, 159, 199.
(4) 4 Ex. C. R. 116.

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Mr. *St. Laurent* argued that the Crown had become bound to pay for all the ties that Dubé, the inspector, had selected and marked with the government marks. This was a taking of possession of the ties by the government, and the inspectors subsequently appointed by the government had no right to reject them. The suppliant had no right to remove them when they bore the government marks, and so they were left where they were. Then he contended some of the ties inspected by Dubé had not been reinspected and not paid for.

Mr. *Chrysler* contended that the Registrar was justified in finding that Dubé had exceeded his authority in undertaking to accept ties not up to standard, and the Crown could not be held liable for them. He further contended there was no evidence to show that the reinspection did not cover all Dubé had inspected. This new theory is a mere afterthought.

Mr. *St. Laurent*, in reply, pressed the court to find that the Crown was responsible for all the ties which Dubé had marked, and from which ot her inspectors had not removed his marks.

CASSELS, J., now (October 3rd, 1910), delivered judgment.

Since the argument of the appeal I have read over the evidence and the report of the Referee and the exhibits.

I think the Referee arrived at a correct conclusion from the evidence adduced before him.

Mr. St. Laurent while placing forcibly before me his objections on behalf of the suppliant to the finding of the Referee, frankly conceded the view-point from which the case should be considered.

He was quite right in my opinion. The real position of the parties is as follows. Michaud had a certain number of ties which he desired to sell to the Intercolonial Railway. The Department was desirous of acquiring the ties

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if up to the requirements of the railway. Changes of the inspectors took place at the request of Michaud. The railway was not bound to take any ties. There was no contract requiring them to purchase if up to a certain standard. An offer is made that a certain number of ties were ready for them if they chose to take them at a certain price. The railway wanted the ties. They, after certain persons had been objected to, sent Dubé, approved by Michaud, to inspect the ties. He completely ignored his instructions, and purported to accept on behalf of the Government ties not authorized by the scope of his employment. The Government were not bound. A new selection was made, and ties purchased. It is clear from the evidence that considerable latitude was exercised on the part of the employees of the railway in accepting ties that might otherwise have been rejected, the officers being influenced by the fact that Dubé had accepted ties not up to the requirements of the specifications. I think Michaud has been fairly dealt with. Mr. St. Laurent who presented his case with fairness, and at the same time with a considerable amount of ingenuity, claimed that at all events as to the three piles of ties, counting in all about 145 ties, the suppliant should recover. This contention is based on the argument that when Hilliard inspected [as counsel used the phrase] three piles passed by Dubé had not been inspected, and that these ties had been subsequently used by the railway.

In the first place, the evidence is too loose to warrant any finding in favour of Michaud in respect of such a claim. Then, moreover, there is no appeal on this point. The rules of Court require the grounds of appeal to be given. I find no ground of appeal supporting this contention; it is an afterthought. The appeal is based on the contention that Dubé's selection was final. The Referee has arrived at a right conclusion. The appeal should be dismissed with costs, and the action dismissed with costs.

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The suppliant should be paid the costs occasioned by the adjournment on the 27th day of September, which I fix at $10, to be set off *pro tanto* against the costs payable by him.

Judgment accordingly.

Solicitors for the suppliant: *Choquette, Galipeault & Cie.*

Solicitors for the respondent; *Lapointe & Stein.*

IN THE MATTER of the Petitions of Right of

JAMES W. JOHNSTON.....SUPPLIANT;

AND

HIS MAJESTY THE KING.....RESPONDENT;

AND

FREDERIC COUSE.....SUPPLIANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

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Oct. 6.

Commissioners National Transcontinental Railway — Contract—Services connected with construction of Eastern Division—Disputed claim—Petition of Right—Liability of Commissioners.

A petition of right will not lie in the case of a disputed claim founded upon a contract entered into with the Commissioners of the National Transcontinental Railway for services connected with the construction of the Eastern Division of such railway. Under the provisions of 3 Edward VII. chap. 71, the Commissioners are a body corporate, having capacity to sue and be sued on their contracts. Action, therefore, upon such a claim should be brought against the Commissioners and not against the Crown.

THESE were cases arising upon two petitions of right seeking payment for services alleged to have been rendered by the suppliants to the Crown in connection with the valuation of certain lands taken for the purposes of the National Transcontinental Railway.

October 28th, 1910.

The cases now came before the court for the purpose of argument of points of law before trial. The points of law raised in both cases being identical, they were argued together.

C. J. R. Bethune, for the respondent, argued that the suppliants were not employed by or on behalf of the

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Crown, nor was the Crown liable for their remuneration. (Cites sec. 22 of the National Transcontinental Railway Act, 3 Edw. VII c. 71). The National Transcontinental Railway Commissioners are a body corporate liable to be sued on their contracts; and it was never contemplated that the Crown should be liable on petition of right in respect of matters controlled directly by the Commissioners. The petitions set up no case for relief in this court. (Cites *Matton* v. *The Queen* (1); *Kimmitt* v. *The Queen* (2).

J. Travers Lewis, K.C., for the suppliants, contended that the Commissioners were merely constructing a certain portion of railway for the Crown. The Eastern Division of the National Transcontinental Railway is a Government railway. (Cites secs. 5 and 8 of 3 Edw. VII c. 71). It is true the Commissioners are a body corporate, but they are an emanation of the Crown and act for the Government, which is responsible on their contracts. The Commissioners are substantially in the same position here as the Intercolonial Railway Commissioners were in respect of that undertaking, and on their contracts petitions of right were entertained.

[CASSELS, J. I think not. It would seem as if the framer of the National Transcontinental Railway Act had purposely used language to distinguish the positions of the two boards.]

I submit there is no substantial difference between them. (Cites *Jones* v. *The Queen* (3); *Berlinguet* v. *The Queen* (4). The English cases do not help us, because the various statutory boards there are differently constituted.

I rely on *Graham* v. *Commissioners of Queen Victoria Niagara Falls Park* (5). The case at bar is closely analogous to that case.

(1) 5 Ex. C. R. 401.
(2) 5 Ex. C. R. 133.
(3) 7 S. C. R. at p. 575.
(4) 13S. C. R. at p. 29.
(5) 28 O. R. at p. 12.

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Argument of Counsel.

[CASSELS, J. Looking at sec. 22 of the Act, do you think you could sue the Crown in the absence of the certificate?]

The plain meaning of Clause I of the agreement between the railway company and the Government, read together with sec. 5 of the Act, fixes upon the Crown liability for the lawful acts and contracts of the Commissioners. The Commissioners have no funds to pay with, and it all comes round to the primary liability of the Crown. (Cites *Tait* v. *Hamilton* (1); *Tully* v. *Principal Officers of Ordnance* (2).

Mr. Bethune, in reply, contended that in any event the Crown could not be liable until the certificate of the Commissioners, under sec. 22 of the Act, had been obtained; and it was not pleaded. The present argument is proceeding on principles of demurrer, and the suppliants must plead everything that will entitle them to judgment.

CASSELS, J., now (October 6th, 1910) delivered judgment.

These are two petitions of right instituted by two different suppliants. The petitions are for the recovery against His Majesty the King of compensation for services claimed to be due under the circumstances detailed in the petitions. The services are of a similar character in each case, the amounts only differing, and the petitions are framed in identical language except as to amount. I will set out the petition in the *Johnston* case:—

"1. The Commissioners of the National Transcontinental Railway, hereinafter referred to, were constituted under the Dominion Act of 1903, 3 Edward VII, chapter 71, being an Act respecting the construction of a National Transcontinental Railway, and Acts amending the same.

(1) 6 U. C. Q. B. (O. S.) 89. (2) 5 U. C. Q. B. 6.

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"2. On the 18th day of January A.D. 1909, your suppliant was, on behalf of Your Majesty, employed by the said Commissioners of the National Transcontinental Railway to inspect and make a valuation of the several lands and properties which the line of the eastern division of the National Transcontinental Railway would cross, through the city of St. Boniface, in the province of Manitoba, and to report on the same, giving a separate valuation for each piece of land so to be crossed.

"3. Your petitioner duly accepted said employment and undertook the work; and, on or about the 13th day of April A.D. 1909, your petitioner fully completed the work of valuing the said lands and properties and reported thereon to said Commissioners.

"4. The amount of your suppliant's charges or compensation for so valuing said lands and properties and for making said report, is $10,880, your suppliant's account for which was duly rendered to the said Commissioners for Your Majesty.

"5. The said charges or compensation of your suppliant are based on a percentage of 2½ per cent. upon the total valuation of the lands and properties so inspected and valued by your suppliant as aforesaid.

"6. The amount so claimed by your suppliant is a fair, reasonable, and just charge or compensation for the work so done by your suppliant; but your suppliant has not been paid said sum, in whole or in part, by the said Commissioners on behalf of Your Majesty, for or in respect of the said work and labour so performed by your suppliant as aforesaid; but the whole amount remains due and owing to your suppliant."

Your suppliant therefore humbly prays:—

"1. That Your Majesty or this honourable court may direct payment to your suppliant of the said sum of $10,880.

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"2. That your suppliant may have judgment for the said sum of $10,880 and interest, as money due and owing to your suppliant by Your Majesty for work and labour performed, at request as aforesaid, by your suppliant for Your Majesty.

"3. That your suppliant may be awarded the costs of this petition, and of any further proceeding taken in assertion of the claims herein contained.

"4. And that your suppliant may have such further and other inquiries had and taken, and relief granted, as to this honourable court may seem meet."

To each petition the respondent filed a defence denying the allegations in the petition; and by this defence pleaded as follows:—

"The respondent objects that the petition of right discloses no cause of action against the respondent in that no facts are alleged establishing any liability upon the respondent for the obligations of the Commissioners referred to in the petition of right."

Under the rule of court a direction was made for the argument of the question of law raised by the defence.

The allegations in the petition were accepted as admitted for the purposes of the argument of the legal question.

The statutes relating to the National Transcontinental Railway were referred to. The arguments of counsel proceeded on perhaps broader lines than necessary for the consideration of the question of law, but it was desired to have my opinion on the question whether or not, a claim being disputed for services performed by a valuator under a contract with the commissioners created by the statute, an action should not be taken against the corporate body, the commissioners, to have the claim ascertained.

The contention of counsel for the suppliants is that under the statutes the commissioners act as agents for the Crown, and that the Crown is directly liable for damages for a breach of contract entered into between the suppliant and the commissioners.

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Counsel for the Crown argue that before the Crown can be called upon to pay such a claim, such claim must be "approved by the Commissioners and certified by the chairman," and then only if a sufficient appropriation has been made by Parliament for the purpose.

The case was very fully argued, and a great number of authorities, some of which I will refer to later, were cited.

It is not necessary to consider the terms of the statute 4 Ed. VII, cap. 24, and the agreement referred to, as there is nothing contained affecting the question before the court.

The statute 3 Ed. VII, Cap 71, "An Act respecting the construction of a National Transcontinental Railway" was assented to 24th October, 1903. It confirms the agreement set out as a schedule to the statute. This agreement bears date the 29th July, 1903, and is made between His Majesty the King, acting in respect of the Dominion of Canada, and the Grand Trunk Pacific Railway Company. It recites as follows:—

"Whereas, having regard to the growth of population and the rapid development of the production and trade of Manitoba and the North-West Territories, and to the great area of fertile and productive land in all the provinces and territories as yet without railway facilities, and to the rapidly expanding trade and commerce of the Dominion, it is in the interest of Canada that a line of railway, designed to secure the most direct and economical interchange of traffic between Eastern Canada and the provinces and territories west of the great lakes, to open up and develop the northern zone of the Dominion, to promote the internal and foreign trade of Canada, and to develop commerce through Canadian ports, should be constructed and operated as a common railway highway across the Dominion from ocean to ocean, and wholly within Canadian territory."

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It provides by section 5 as follows:—

"5. The said Eastern Division shall be constructed by, and at the expense of the Government, upon such location and according to such plans and specifications as it shall determine, having due regard to directness, easy gradients and favourable curves."

Section 7 is as follows:—

"7. In order to ensure, for the protection of the company as lessees of the Eastern Division of the said railway, the economical construction thereof in such a manner that it can be operated to the best advantage, it is hereby agreed that the specifications for the construction of the Eastern Division shall be submitted to, and approved of by, the company before the commencement of the work, and that the said work shall be done according to the said specifications and shall be subject to the joint supervision, inspection and acceptance of the chief engineer appointed by the Government and the chief engineer of the company, and in the event of differences as to the specifications, or in case the said engineers shall differ as to the work, the questions in dispute shall be determined by the said engineers and a third arbitrator, to be chosen in the manner provided in paragraph four of this agreement."

Section 8 is as follows:—

"8. The construction of the said Eastern Division shall be commenced as soon as the Government has made the surveys and plans and determined upon the location thereof, and shall be completed with all reasonable despatch."

Section 15 is as follows:—

"15. The expression 'cost of construction' in the case of the Eastern Division, shall mean and include all the cost of material, supplies, wages, services and transportation required for or entering into the construction of the said Eastern Division, and all expenditure for right of

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way and other lands required for the purposes of the railway and for terminal facilities, accommodation, works and damages and compensation for injuries to lands and for accidents and casualties; cost of engineering, maintenance, repairs and replacement of works and material during construction and superintendence, book-keeping, legal expenses, and, generally, costs and expenses occasioned by the construction of the said division, whether of the same kind as, or differing in kind from, the classes of expenditure specially mentioned, including interest upon the money expended; the interest upon such outlay in each year shall be capitalized at the end of such year, and interest charged thereon at three per cent. per annum until the completion of the work and until the lessees enter into possession under the terms of the said lease; and, for the purposes of this agreement, the amount of such cost of construction, including the principal and all additions for interest, to be ascertained in manner aforesaid, shall, on completion, be finally determined and settled by the Government upon the report of such auditors, accountants, or other officers as may be appointed by the Government for that purpose."

Section 20 of the agreement contains the provision for leasing the Eastern Division when completed.

It is obvious that the construction of the Eastern Division is a work of large magnitude and that a special enactment would be required in order that the right-of-way be acquired, the necessary valuations for land arrived at, the railway constructed, and the conditions of the agreement performed.

It becomes necessary to consider the various clauses of the statute 3 Ed. VII, chap. 71.

By clause 2 the agreement is confirmed and made legally binding upon His Majesty and the railway.

Section 9 of the statute reads as follows:—

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"9. The construction of the Eastern Division and the operation thereof until completed and leased to the company pursuant to the provisions of the Agreement shall be under the charge and control of three Commissioners, to be appointed by the Governor in Council, who shall hold office during pleasure, and who, and whose successors in office, shall be a body corporate under the name of The Commissioners of the Transcontinental Railway and are hereafter called 'the Commissioners'."

Reference may be had to the *Interpretation Act* (1), sec. 34, sub-sec. 30.

The corporate body thus created can sue and be sued. Section 10 of the statute provides that the Governor in Council may appoint a Chief Engineer for the Eastern Division. This section reads as follows:—

"10. The Governor in Council may appoint a secretary to the Commissioners, who shall hold office during pleasure, and may also appoint a chief engineer for the Eastern Division, who shall hold office during pleasure, and who, under the instructions of the Commissioners and subject to the provisions of the Agreement, shall have the general superintendence of the construction of the Eastern Division."

Section 11 is as follows:—

"11. The Commissioners may appoint and employ such engineers (under the chief engineer), and such surveyors and other officers, and also such servants, agents and workmen, as in their discretion they deem necessary and proper for the execution of the powers and duties vested in them under this Act."

Section 15 is as follows:—

"15. The Commissioners shall have in respect to the Eastern Division, in addition to all the rights and powers, conferred by this Act, all the rights, powers remedies and immunities conferred upon a railway company

(1) R. S. C. 1906.

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under *The Railway Act* and amendments thereto, or under any general *Railway Act* for the time being in force, and the said Act and amendments thereto, or such general *Railway Act*, in so far as they are applicable to the said railway, and in so far as they are not inconsistent with or contrary to the provisions of this Act, shall be taken and held to be incorporated in this Act."

Section 18 is as follows:—

"18. No money shall be paid to any contractor until the chief engineer has certified that the work for or on account of which it is claimed has been duly executed and that such money is due and payable, nor until such certificate has been approved by the Commissioners."

Sections 25 and 26 are as follows:—

"25. The Commissioners shall from time to time, as moneys are required for payment for work or services in the construction of the Eastern Division, issue and deposit with the Minister of Finance and Receiver-General a debenture of the Commissioners in an amount sufficient to cover such payments, which debenture shall bear date the day on which it is issued and shall be repayable in fifty years from the 1st day of July, 1903, and in the meantime shall bear interest at the rate of three per cent. per annum payable half yearly on the first days of January and July in each year."

"26. The debentures so issued shall be in such form as the Governor in Council approves, and the Commissioners may issue them as provided by the next preceding section and such debentures when issued, and the interest thereon, shall be a first lien and charge upon the Eastern Division, and upon all revenue and income derivable therefrom by the Government or by the Commissioners after payment of all necessary charges by the Government or by the Commissioners for the maintenance or running thereof: Provided always that nothing herein shall make

the Commissioners personally liable for the payment of the principal or interest of any such debenture."

Under these two latter sections the Commissioners issue debentures for such amounts as are required for payment for work or services in the construction of the Eastern Division, and these debentures form a first charge on the Eastern Division.

Reference may be made to clause 15 of the Agreement which declares the meaning of the term "cost of construction." It includes "all costs of services and all expenditures for right-of-way and other lands required" &c.

As stated, sections 25 and 26 of the statute authorize the Commissioners to issue the debentures and these become a first charge on the Eastern Division.

These debentures apparently are issued for the purpose of giving the Government a first charge, and possibly to to assist in settling the amounts due when the rental is ascertained as provided by the Agreement. The debentures are to be deposited with the Minister of Finance and Receiver-General. The monies for payment have to be provided by the Government.

Safeguards are provided in the public interest, as by section 18, which reads as follows:—

"18. No money shall be paid to any contractor until the chief engineer has certified that the work for or on account of which it is claimed has been duly executed and that such money is due and payable, nor until such certificate has been approved by the Commissioners."

Sections 22 and 23 of the statute are as follows:—

"22. The Minister of Finance and Receiver-General may, on the recommendation of the Minister of Railways and Canals, from time to time pay such claims and accounts for work done or services performed in the construction of the Eastern Division as have been approved by the Commissioners and certified by the Chairman:

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Provided, however, that no money shall be so paid until a sufficient appropriation has been made by Parliament for the purpose."

"23. The Governor in Council may, in addition to the sums now remaining unborrowed and negotiable of the loans authorized by any Act of Parliament heretofore passed, raise by way of loan such sum or sums of money as are required for the purpose of making any payment on account of the said work as provided by the next preceding section."

In the numerous authorities cited the principle laid down in the case of *Mersey Docks* etc. v. *Gibbs* (1) is followed.

As stated in *Sanitary Commission of Gibraltar* v. *Orfila* (2) the rule is "that in every case the liability of a body created by statute must be determined upon a true interpretation of the statutes under which it is created."

In the case in question, having regard to the provisions of the statute and the agreement, I am of the opinion that while the funds are to be furnished by the Government, nevertheless payments can only be recovered after the approval of the commissioners and the certificate of the chairman.

The commissioners make the contract. They are given very extensive powers. It would be difficult to carry on the business of the Commission if all claims had to be brought in the Exchequer Court by petition of right.

If the suppliant obtained judgment against the commissioners, although it might be no execution could issue, I have no doubt the commissioners would give the necessary certificate to enable the suppliant to obtain payment, or could be compelled to do so.

(1) L. R. 1 E. & I. App. 93. (2) L. R. 15 A. C. 408.

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A case to my mind very much in point is *Graham* v. *His Majesty's Commissioners of Public Works and Buildings.* (1) Ridley, J. there deals with the general principles affecting contracts made by agents. At page 788 he says :—

"It might be, therefore, that from the surrounding circumstances of the case now before us we ought, to conclude that the defendants were contracting as servants of the Crown only; but all the facts point, I think, in the opposite direction. It is a case far removed from either of the two authorities I have mentioned. The Commissioners of Works make these contracts, in the course of their duty, in all parts of the country in respect of works required for His Majesty's Government. I think the true inference is that they make them in their own capacity. There is nothing like the special appointment in *Dunn* v. *Macdonald* (2) ; nor is there any such relation between the commissioners and the contractor as existed between the defendant and the plaintiff in *Gidley* v. *Lord Palmerston* (3). I think this is a case in which the defendants have expressly contracted for themselves. If judgment be given against them when the action is tried, the judgment will, I suppose, be satisfied out of the funds granted by Parliament. Lindley, L.J's judgment *In re Wood's Estate; ex parte Her Majesty's Commissioners of Works and Buildings* (4) shows the way he regarded the position of the commissioners in that case. He said (31 Ch. D. at p. 621) :—"No authority has been cited to show that this particular corporation, incorporated by the Act of 1855 for certain public purposes, is to be treated as the Crown, and there is no ground for holding that a corporation specially incorporated in this way is in the same position as regards costs as the Crown. It is true that the precise point

(1) (1901) 2 K. B. 2 781.
(2) (1897) 1 Q.B. 401.
(3) 3 B. & B. 275; 24 R.R. 668.
(4) 31 Ch. D. 607.

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here did not arise in that case, for the decision turned on the 18 and 19 Vict. c. 95, and the Lands Clauses Act, which it incorporated. It was held that the commissioners were bound by the provisions as to costs in the incorporated Act. But the objection was taken that the Crown would not be bound to pay costs and it was dealt with by saying that there was no ground for saying that such a corporation, specially incorporated in this way, is in the same position as the Crown."

And Phillimore, J., at page 789:

"I am of the same opinion; but I prefer to put my judgment upon a somewhat different ground. I think the Attorney-General rightly treated this case as depending upon whether or not the principle applied that a servant of the Crown as such cannot be sued. The Crown cannot be sued; and, that being so, neither can the subject take action indirectly against the Crown by suing a servant of the Crown upon a contract made by the servant as agent for the Crown. A Crown servant making a contract for the Crown is no more liable than any other agent making a contract for his principal. But for facilitating the conduct of business it is extremely convenient that the Crown should establish officials or corporations who can speedily sue and be sued in respect of business engagements without the formalities of the procedure necessary when a subject is seeking redress from his Sovereign. It is desirable for the proper conduct of business that persons who contract with the Crown for business purposes should have the same power of appealing to His Majesty's Courts of Justice against a misconstruction of the contract by the head of a department as any subject might have against his fellow-subject. For that purpose the Crown has, with the consent of Parliament, in certain cases established certain officials who are to be treated as agents of the Crown but with a power of contracting as principals. The Secretary of State for

War and the Postmaster-General are known instances of this. Apparently the Commissioners of Woods and Forests are also an instance; they are a corporation incorporated for that purpose. There seems, too, to be no doubt that for certain purposes the Commissioners of Works and Public Buildings are liable to be sued. So, under the *Merchant Shipping Act* the Legislature has appointed a public official who may be sued for torts—not for his own tort, but for the tort possibly of the President of the Board of Trade, or of some official at a seaport, in detaining a ship as unseaworthy which in fact was not. In such cases the remedy is really sought against the Crown, and the judgment is declaratory only. No execution can follow upon it because there are no moneys out of which damages can be paid except moneys provided by Parliament for the purpose. The procedure amounts to obtaining a decision in the nature of a decision upon a hypothesis namely, if the person sued were a subject, what would be the decision of the Court on the case brought against him?"

And again at page 791:—

"Now, the only question for us is whether the Commissioners of Public Works and Buildings are not of the class of persons well described by Lindley, L. J. in *Dixon* v. *Farrer* (1) as a 'nominal defendant sued as representing one of the departments of the State'. There is no reason in principle why they should not be. As I have pointed out, there is nothing derogatory to the Crown, and there is very great convenience, in the establishment of such bodies. The mere fact of their being incorporated without reservation confers, it seems to me, the privilege of suing and liability to be sued. Having regard to the facts that they are made a corporation, that there is no restriction with respect to them which would prevent their being subject to the ordinary incidents of a corporation, and

(1) (1886) 17 Q.B.D. 658; 18 Q.B.D. 43.

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that in fact they have been sued in cases where their powers have been specially derived from certain Acts of Parliament, I see no reason for holding that their liability to be sued is restricted to cases coming under those Acts. I think that they have a general liability to be sued for the purpose of obtaining a decision, although, of course, no execution can go against them because their property (if they have any, and probably they have not) is Crown property, as was the case in *Reg.* v. *McCann* (1) and the judgment against them would have to be satisfied, if at all, out of moneys provided by Parliament for that purpose."

The case of *In re Wood's Estate, ex parte Her Majesty's Commissioners of Works and Buildings* (2) is also an important decision of the Court of Appeal.

I have read with a good deal of care the cases cited before me. They all are decided on the particular statutes, and the facts are different.

One case not cited, *McDougall* v. *Windsor Water Commissioners*, (3) bears on the question. I do not think this case, however, governs. In that case the decision was based upon the ground that the contract there sued upon was *ultra vires* and not binding.

I think judgment should go in favour of the Respondent in each case, dismissing the petitions with costs, including the costs of this hearing.

If the suppliants think they can better their position by amendment, and if I have jurisdiction to allow an amendment, I would give them leave to amend. This can be spoken to at any time in Chambers.

Judgment accordingly.

Solicitors for J. W. Johnston: *Elliott MacNeil & Deacon.*

Solicitor for F. Couse: *Elliott, MacNeil & Deacon.*

Solicitor for the Crown: *H. A. Robson.*

(1) L. R. 3 Q. B. 677.
(2) L. R. 31 Ch. D. 607.
(3) 27 Ont. App. Rep. 566; 31 S. C. R. 326.

THE KING, ON THE INFORMATION OF THE ATTORNEY-GENERAL OF CANADA..... } PLAINTIFF;

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Nov. 2.

AND

JANE MARY JONES.....DEFENDANT.

National Transcontinental Railway—Lands taken by Commissioners—Compensation—Arbitration—Jurisdiction of Exchequer Court—Construction of statutes.

Section 13 of 3 Edw. VII, c. 71, reads as follows :—

"The Commissioners may enter upon and take possession of any lands required for the purposes of the Eastern Division, and they shall lay off such lands by metes and bounds, and deposit of record a description and plan thereof in the office for the registry of deeds or the land titles office for the county or registration district in which such lands respectively are situate ; and such deposit shall act as a dedication to the public of such lands, which shall thereupon be vested in the Crown saving always the lawful claim to compensation of any person interested therein."

Held, that, under the terms of section 15 of the above Act (read in connection with the provisions of *The Railway Act*, R. S. 1906, c. 37), when lands have been taken and become vested in the Crown as provided by section 13, and the Commissioners cannot agree with the owner thereof as to compensation for the same, such compensation must be ascertained by a reference to arbitration, and not by proceedings taken in the Exchequer Court for such purpose.

National Transcontinental Ry. ; Ex p. Bouchard, 38 N. B. R. 346, not followed.

THIS was a case arising upon an information for the expropriation of certain lands required for the purposes of the Eastern Division of the National Transcontinental Railway.

October 11th, 1910.

J. Friel, for the plaintiff;

W. B. Chandler, K.C., for the defendants.

The case having been called for trial at a sittings of the court in St. John, N.B., the learned judge intimated

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to counsel that before proceeding with the evidence he desired to have the question of the court's jurisdiction to entertain the case argued. On motion of counsel for the plaintiff, counsel for the defendant consenting, the case was withdrawn from the docket, until the question of jurisdiction was argued and decided.

October 28th, 1910.

E. L. Newcombe, K.C., for the plaintiff, now argued the question of jurisdiction. The defendants were not represented on the argument.

Mr. Newcombe: The court, under the provisions of sec. 20 of *The Exchequer Court Act*, has undoubted jurisdiction to hear the case unless such jurisdiction is affected by the provisions of the *National Transcontinental Railway Act*, 3 Edw. VII, chap. 71. If by that statute the legislature has shewn a clear intention to create a special tribunal for the trial of these railway claims, then it must be in such tribunal and not here that compensation must be sought. But, I submit, no such intention is shewn by the statute.

[CASSELS, J: *The Expropriation Act* does not apply to this railway, and if I entertained the information upon what basis could I assess compensation?]

The court will administer its ordinary and proper procedure in a case where it is seized of jurisdiction. This is property taken for a public purpose, and the Crown must make compensation therefor in its court. (*Feather* v. *The Queen.*) (1)

[CASSELS, J: The statute says it must be a "lawful claim" to compensation. It can only become a "lawful claim" by first being ascertained by the method laid down in the general *Railway Act* of 1906.]

The court in any event may make a declaratory order. (Cites, Rules 2 and 3; *Chapelle* v. *The King.*) (2). The

(1) 6 B. & S., 294. (2) 7 Ex. C. R. 414.

information in this case alleges that the Commissioners have entered upon and taken the lands in question, and that they are vested in His Majesty; therefore, the provisions of sec. 13 of the *National Transcontinental Railway Act* apply, and compensation ought to be declared. The court ought not to refuse to make such declaration when the Attorney-General asks that it be made.

[CASSELS, J: Suppose I entertain the case, what rule am I to apply as to offsetting the enhancement of value by reason of the work constructed, is it to be the rule in the *Expropriation Act* or that in the general *Railway Act?*]

I submit that you have to regard the case as an ordinary expropriation where the lands are vested in the Crown, as the *Transcontinental Ry. Act* expressly provides. If that Act clearly provided a special tribunal, there would be an end of the matter, but that Act only invokes the provisions of the *Railway Act* "so far as they are applicable" (Sec. 15). The last part of section 15 is only an amplification of the language of the first part clothing the Commissioners with the powers of a railway company. The provisions of the general *Railway Act* are not applicable to a case of compensation where the lands are vested in the Crown. It is the Crown's prerogative to choose its courts, and the prerogative is not to be presumed to be affected by any general provisions in section 15 of the Act. The methods by which an ordinary railway corporation acquires title by expropriation differs from the case where the Crown expropriates. In the former case there is a circuitous procedure to be followed, as laid down in the general *Railway Act.* In the case of the Crown the property vests *per saltum*, so to speak, upon the filing of the plan and description.

As to the fact that the Commissioners are made a corporation by the Act, that is only a matter of convenience. The Warden of a penitentiary is a corporation sole, but

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we have never raised any question that the Crown was liable in respect of his lawful acts and contracts. (Cites Robertson's *Civil Procedure for and against the Crown* (1) I submit that upon a reasonable construction of the whole legislation governing the procedure in respect of compensation for property taken by the Crown, the conclusion must be reached that the Exchequer Court is the proper forum for the determination of the compensation accruing to the defendant in this proceeding.

CASSELS, J. now (November 2nd, 1910) delivered judgment.

The first paragraph of the information reads as follows :—

"1. The Commissioners of the Transcontinental Railway charged under and by virtue of the Act of the Parliament of Canada, 3 Edward VII, chapter 71, with the construction of the eastern division of the National Transcontinental Railway extending from the city of Moncton, in the province of New Brunswick, to the city of Winnipeg, in the province of Manitoba, have by themselves their engineers., agents, workmen and servants, entered upon and taken possession of certain lands and real property hereinafter described, the same being in the judgment of the said commissioners necessary for the use, construction and maintenance of the said railway, and for obtaining access thereto, and the said lands and real property have been taken for the use of His Majesty the King and have been measured off by metes and bounds, and a plan and description of the same, signed by the chairman of the said commissioners, and by their chief engineer, were deposited of record in the office of the registrar of deeds in and for the county of Westmorland, in the province of New Brunswick, in which county the said lands and real property are situate, on the

(1) P. 82.

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fifteenth day of May A.D. 1908; and the said lands and real property thereby became and are vested in His Majesty the King."

The second paragraph of the prayer of the information is as follows:—

"2. That it may be declared that the said sum is sufficient and just compensation to the defendant for and in respect of the above described lands and real property so taken as aforesaid, and the aforesaid claim for alleged loss and damage mentioned in the third paragraph of this information."

Special circumstances were shown as a reason why this and another case should be tried at Moncton, N. B., where all the witnesses reside, and prior to the sitting at St. John, I was asked to hear the evidence at Moncton.

I acceeded to the request, but directed the cases to be entered at St. John and the legal question argued there as to whether or not the proper method of procedure to to ascertain the compensation for the lands is, or is not, by arbitration under the provisions of the general *Railway Act*, or under the provisions of the *Exchequer Court Act*.

On the opening of the case at St. John, counsel for the suppliant and counsel for the respondent asked that this question should be argued in Ottawa, it being a question of considerable importance and affecting numerous cases.

Mr. Newcombe, K.C., argued the case at considerable length, and the view in favour of the Exchequer Court entertaining the action so far as ascertaining the compensation is concerned was presented very clearly.

I have carefully considered the question and will express my view on the subject.

It is not a technical question, but may be one of very considerable importance to the owners whose lands are expropriated.

Section 50 of the *Exchequer Court Act* reads as follows:—

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"50. The court shall, in determining the compensation to be made to any person for land taken for or injuriously affected by the construction of any public work, 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 such public work, to such person in respect of any lands held by him with the lands so taken or injuriously affected."

Section 198 of the general *Railway Act* (Cap. 37, R.S.C.) reads as follows:—

"198. The arbitrators or the sole arbitrator, in deciding on such value or compensation, shall take into consideration the increased value beyond the increased value common to all lands in the locality, that will be given to any lands of the opposite party, through or over which the railway will pass, by reason of the passage of the railway through or over the same, or by reason of the construction of the railway, and shall set off such increased value that will attach to the said lands against the inconvenience, loss or damage that might be suffered or sustained by reason of the company taking possession of or using the said lands."

By the *Exchequer Court Act* what has to be taken into account by way of set-off is any advantage, special or general, accrued or likely to accrue, &c.

Section 198 of the general *Railway Act* limits the set off to the increased value *beyond the increased value common to all lands in the locality, &c.*

Dealing with a case relating to taxation *Nicholls* v. *Cumming* (1) the late Chief Justice Ritchie (then Ritchie, J.), used the following language:—

"The principle of the Common Law is, that no man shall be condemned in his person or property without an opportunity of being heard. When a statute derogates from a common law right and divests a part of his pro-

(1) 1 S. C. R. 422.

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perty, or imposes a burthen on him, every provision of the statute beneficial to the party must be observed. Therefore it has been often held, that acts which impose a charge or a duty upon the subject must be construed strictly, and I think it is equally clear that no provisions for the benefit of protection of the subject can be ignored or rejected."

And Strong, J., at page 427:—

"Taxation is said to be an exercise by the Sovereign power of the right of eminent domain (Bowyer's Public Law, p. 227) and, as such it is to be exercised on the same principles as expropriation for purposes of public utility, which is referable to the same paramount right. Then, it needs no reference to specific authorities to authorize the proposition, that in all cases of interference with private rights of property in order to subserve public interests, the authority conferred by the Sovereign—here the Legislature—must be pursued with the utmost exactitude, as regards the compliance with all prerequisites introduced for the benefit of parties whose rights are to be affected, in order that they may have an opportunity of defending themselves (Cooley on Taxation, p. 265; Maxwell on Statutes. pp. 333, 334, 337, 340; *Noseworthy* v. *Buckland in the Moor*. L. R. 9 C. P. 233.)"

The question in that case was of course different from the one before me, but the language used is apposite.

I will have occasion later to discuss authorities dealing with the question of the jurisdiction of the courts to assess compensation where a special statutory mode of ascertaining the compensation has been provided.

In the cases of *Johnston* v. *The King* and *Couse* v. *The King*, (1) I had occasion lately to consider the statutes relating to the National Transcontinental Railway. These were cases relating to contracts entered into by the commissioners under the provisions of the statute. They

(1) Reported *ante*, p. 155.

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were not cases relating to land damages for land expropriated for the use of the railway.

I do not propose to repeat what I wrote in giving my reasons in deciding those cases.

The Statute 3 Edward VII, Cap. 71 is "An Act respecting the construction of a National Transcontinental Railway." The preamble recites:— "Whereas, &c., the "necessity has arisen for the construction of a National "Transcontinental Railway, to be operated as a com- "mon railway highway across the Dominion of Canada "from ocean to ocean and wholly within Canadian Terri- "tory, &c."

It recites the agreement of the 29th July, 1903, between His Majesty the King, of the first part, and Sir Charles Rivers Wilson, G.C.M.G., C.B., and others representing the Grand Trunk Pacific Railway Co., "making provision for the construction and operation of such a railway." ...."And whereas it is expedient that "Parliament should ratify and confirm the said agree- "ment and should grant authority for the construction in "manner hereinafter provided of the Eastern Division of "the said Railway," &c.

The statute by section 2 confirms the agreement and provides that "His Majesty and the company are here- "by authorized and empowered to do whatever is neces- "sary in order to give full effect to the agreement and "to the provisions of this Act."

The 8th section provides:—

"The Eastern Division of the said Transcontinental "Railway extending from the City of Moncton to the "City of Winnipeg shall be constructed by or for the "Government in the manner hereinafter provided, and "subject to the terms and provisions of the agreement."

The 9th section of the statute reads as follows:—

"9. The construction of the Eastern Division and the operation thereof until completed and leased to the com-

pany pursuant to the provisions of the agreement shall be under the charge and control of three commissioners, to be appointed by the Governor-in-Council, who shall hold office during pleasure, and who, and whose successors in office, shall be a body corporate under the name of 'The Commissioners of the Transcontinental Railway' and are hereinafter called 'the Commissioners.'"

It will be noticed that no mention is made as to the acquisition of land upon which to construct the railway.

The agreement, however, paragraph 15, defines the expression "cost of construction."

It includes all expenditure for right of way and other lands required for the purposes of the railway, &c.

The 10th section of the Act provides for the appointment of a chief engineer.

The 11th section reads as follows:—

"11. The commissioners may appoint and employ such engineers (under the chief engineer), and such surveyors and other officers, and also such servants, agents and workmen, as in their discretion they deem necessary and proper for the execution of the powers and duties vested in them under this Act."

The 13th section reads as follows:—

"13. The commissioners may enter upon and take possession of any lands required for the purposes of the Eastern Division, and they shall lay off such lands by metes and bounds, and deposit of record a description and plan thereof in the office for the registry of deeds, or the land titles office for the county or registration district in which such lands respectively are situate; and such deposit shall act as a dedication to the public of such lands, which shall thereupon be vested in the Crown, saving always the lawful claim to compensation of any person interested therein."

The 15th section is important; it reads as follows:—

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"15. The commissioners shall have in respect to the Eastern Division, in addition to all the rights and powers conferred by this Act, all the rights, powers, remedies and immunities conferred upon a railway company under the *Railway Act* and amendments thereto, or under any general *Railway Act* for the time being in force, and the said Act and amendments thereto, or such general *Railway Act*, in so far as they are applicable to the said rail way, and in so far as they are not inconsistent with or contrary to the provisions of this Act, shall be taken and held to be incorporated in this Act."

It may be well at this point to refer to the general *Railway Act* now found in the Revised Statutes of Canada, 1906, cap. 37. The statute was enacted in the same year as the National Transcontinental Railway Act 3 Edward VIII. cap. 71.

It provides:—

Section 2: "In this Act, and in any *Special Act* as hereinafter defined, in so far as this Act applies, unless the context otherwise requires."

"(4) 'Company'

"(a) means a railway company, and includes every such company and any person having authority to construct or operate a railway."

Clause 28 of this section defines the words 'Special Act':—

"28 '*Special Act*' means any Act under which the company has authority to construct or operate a railway, and which is enacted with special reference to such railway, and includes

(a) All such Acts.

(b) With respect to the Grand Trunk Pacific Railway Company, the *National Transcontinental Railway Act*, and the Act in amendment thereof passed in the fourth year of His Majesty's reign, chapter twenty-four, intitutled "An

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Act to amend the *National Transcontinental Railway Act*, and the scheduled agreements therein referred to."

I have no doubt that part of the duties of the commissioners was the acquisition of the lands required for the construction of the railway. They could make agreements with the land-owners, and failing an agreement can arrive at the amount payable under the provisions of the general *Railway Act*.

Under the 13th Section the lands are vested in the Crown, differing from the general *Railway Act*, and the words "saving always the lawful claim to compensation of any person interested therein" are to prevent any construction that the landowner is to be deprived of his lands without compensation.

See *Williams* v. *Corp. of Raleigh*. (1)

Hereafter it may be necessary to consider, if the case ever arises (which is not likely), whether the words have the effect of creating a vendor's lien after the compensation is ascertained by agreement or award. See *Norvall* v. *Canada Southern Ry. Co.* (2), where specific performance was decreed.

Turning to the Agreement of the 29th July, 1903, it recites that a line of railway should be "constructed and operated as a common railway highway." It proceeds to provide for the construction of the railway, leasing, &c.

Now, it seems to me quite clear that the provisions of the general *Railway Act* as to arbitration are applicable. There is nothing inconsistent between them and any provision of the *Special Act*. The fact that the lands are vested in the Crown does not affect the question. Failing to agree on a price the amount payable must be ascertained in some manner. The whole purview of the statute seems to treat the Transcontinental Railway as something different from an ordinary government rail-

(1) 21 S. C. R. 121. (2) 5 Ont. A. R. 13.

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way. I have set out in my former opinion in the *Johnston* and *Couse* cases why I think the Commissioners are not to be treated merely as ordinary agents of the Crown, and I referred there at some length to the English authorities. (1)

It is conceded that the *Government Railway Act* (2) does not apply to this railway.

Section 2, sub-sec. (c) interprets "Railway":—

"'Railway' means any railway, and all property and works connected therewith, under the management and direction of the Department."

Sub-sec. (d): 'Department' means the Department of Railways and Canals."

Section 4:—

"This Act applies to all railways which are vested in His Majesty, and which are under the control and management of the Minister".

Looking at the *Expropriation Act*, (3) we find that by section 2, sub-sec. (a):—

"'Minister' means the head of the Department charged with the construction and maintenance of the Public Work."

By sub-sec. (d): "'Public work or works' means and includes 'Government Railways'."

I have pointed out that in my opinion the Transcontinental Railway is not a Government Railway within the meaning of the *Government Railways Act*, nor do I think the provisions of *The Expropriation Act* apply.

Cap. 39 of R.S.C., 1906, relating to Public Works has no application.

The case of *National Transcontinental Ry.*; *Ex parte Bouchard* (4) is not binding on me. The court there dealt with the matter as if section 5 of the *Government Railway Act* concluded the question.

(1) See *ante p.* 166 *et seq.*
(2) R. S. C. 1906, Cap. 36.
(3) R. S. C. 1906, Cap. 143.
(4) 38 N. B. R. 346.

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In arriving at a decision in this case, the point must not be lost sight of that the *Grand Trunk Pacific Railway Company* are interested in the amount of compensation paid, as it forms an element in arriving at the rental and the manner in which such compensation is ascertained. They had stipulated in the agreement that so far as the location, construction and operation of the Western Division is concerned the *Railway Act* should apply (1).

If Parliament has provided a particular tribunal for the ascertainment of compensation the course prescribed for arriving at the amount payable must be adopted.

The section of *The Exchequer Court Act* (20) which provides that the Exchequer Court shall have exclusive original jurisdiction to hear and determine the following:—

"(a) Every claim against the Crown for property taken for any public purpose,"

and the subsequent clauses do not in my judgment affect the question. The statutes referred to were enacted long subsequent to the *Exchequer Court Act*, and, as I view it, the tribunal to ascertain the amount payable, failing an agreement, is the arbitration board provided by the statute.

It may well be that once the "lawful claim" is ascertained in the manner provided then the enforcement of it could be had in the Exchequer Court. *Yule* v. *The Queen* (2) is an entirely different case. In that case the statute conferring right to enforce:

"(d) every claim against the Crown arising under any law of Canada."

was enacted subsequently, and besides the facts in that case were peculiar.

The present case is more like *Scott* v. *Avery*, (3) and numerous other authorities of a similar character. *Williams* v. *Corp. of Raleigh* is reported in 14 *Ont. Pr. R.* 50;

(1) See clause 38 of Agreement. (2) Ex. C. R. 103; 30 S. C. R. 24.
(3) 5 H. L. C. 811.

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21 *S. C. R.* 104; *L. R. App. Cas.* 1893, *p.* 540. It is also reported in full in *Clarke & Scully's Drainage* cases p. 1. The facts in that case were rather complicated. The action included claims of different character and there was considerable divergence of opinion among the judges. The final result of that case was that so far as what is termed the claim in respect of the Bell drain the action was dismissed, the remedy being under the provisions of the *Drainage Acts* to ascertain the amount of compensation payable. This case was a strong one because a reference had been agreed to. Lord Macnaghten, in his reasons for judgment, states as follows (p. 53) :—

"Their Lordships regret that they are unable to affirm the judgment of the Supreme Court in all respects, because they cannot help seeing that the plaintiffs have been seriously injured by the construction of the Bell drain, as well as by the breach of the statutory duty imposed upon the municipality. As far as the evidence goes there is no reason to suppose that the municipality would have been able to cut down the damages if the respondents had proceeded by arbitration," etc.

The result was that the action, as regards the Bell drain, was dismissed without prejudice to any claim on the part of the respondents to have the amount of the damages to "their property occasioned by the construction of the Bell drain and consequent thereon determined by arbitration."

In *Water Commissioners of City of London* vs. *Saunby*, (1) the same result was arrived at. It is true that this case was reversed in the Privy Council (2), but the principle laid down by the Supreme Court was not questioned. The judgment was reversed because their Lordships were of opinion (see p. 115) that the provisions as to arbitration never came into force, the commissioners not having proceeded in accordance with the Act.

(1) 34 S. C. R. 650. (2) (1906) A. C. 115.

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Such cases as *Parkdale* v. *West*, (1) were invoked as authorities.

Numerous other authorities in the Ontario courts on the same lines could be cited.

It was contended that the Crown is not bound by the provisions of the general *Railway Act*.

I have cited authority in the *Johnston* and *Couse* cases to show if the commissioners are subject to the general *Railway Act*, the Crown through them is subject to its provisions.

In this case it is not necessary to rely on this authority, as the statute expressly makes the provisions of the *Railway Act* applicable.

I have dealt with the question at considerable length as it is one of importance.

Even if I did not entertain the opinion I have formed as to my jurisdiction, the question is so debatable that I would be loath to entertain jurisdiction until a decisive opinion was passed upon the question by the Supreme Court, or legislation putting the matter beyond doubt.

Judgment accordingly.

Solicitor for plaintiff: *J. Friel.*

Solicitor for defendant: *W. B. Chandler.*

(1) L. R. 12 A. C. 602.

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Nov. 18.

THE BARNETT-McQUEEN COMPANY, LIMITED ..... PLAINTIFFS;

AND

THE CANADIAN STEWART COMPANY, LIMITED..... DEFENDANTS.

Patent for invention—Combination — Construction—Infringement—Essentiality of elements claimed—Equivalents—Harmony between English and American decisions—Public use and sale outside Canada before application made—R. S. Can. 1886, c. 61, sec. 7—Interpretation—Disclosure of invention in plans for construction—Effect of.

In the case of a combination patent in construing the claim reference must be had to the preceding specification and the state of the art, and the patentee is entitled to a fair and liberal construction.

If on a proper construction of the claim and specification, having regard to the state of the art, it is determined that an element forms part of the combination, the patentee cannot get rid of this element as being an immaterial or non-essential element. No such thing as an immaterial or non-essential element in a combination is recognized in the the patent law. Having regard to the essentials of a combination, the admission that an element is not material is an admission that the combination claimed is an invalid combination and the claim is bad. It follows that if the alleged infringer omits one element of the combination he does not infringe the combination. But if instead of omitting an element he substitutes a well-known equivalent he, in fact, uses the combination.

2. There is no real distinction as regards combination claims and the infringement thereof between the decisions of the courts in England and the courts of the United States.

3. By sec. 7, chap. 61, R. S. Can., 1886, it is provided that "Any person who has invented any new and useful art, machine, &c., which was not known or used by any other person before his invention thereof, and which has not been in public use or on sale with the consent or allowance of the inventor thereof, for more than one year previously to his application for a patent therefor in Canada, "may [upon his complying with certain requirements] obtain a patent granting to such person an exclusive property in such invention."

Held, that the words "in Canada," as used in this enactment, are to be construed as referable to the application for the patent, and not to the public use or sale of the invention; and that if the invention has been

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in public use or on sale with the consent or allowance of the inventor anywhere for more than one year previously to the application for a patent in Canada, by reason of such use or sale the applicant is disentitled to a patent. *Smith* v. *Goldie* (9 S. C. R. 46) explained and distinguished; *The Queen* v. *Laforce* (4 Ex C. R. 14) not followed.

4. The inventor of certain improvements in storage elevators, more than one year before a patent was applied for in Canada, entered into contract in the United States for the construction of an elevator embodying such improvements, and prepared, and exhibited to the parties with whom he contracted, plans for such construction which were a complete disclosure of the invention.

Held, that the facts established a "sale" of the invention within the meaning of sec. 7, chap. 61, R. S. Can., 1886. *Dittgen* v. *Racine Paper Goods Co.*, (181 Fed. Rep. 394) referred to.

THIS was a case involving the infringement of a patented invention.

The facts are fully stated in the judgment.

The case was heard at Ottawa on May 25th, 26th and 27th, at Toronto on June 20th, 21st, 22nd, 23rd, 24th and 25th, and again at Ottawa on October 4th, 5th, 6th, 7th and 8th, 1910.

A. W. Anglin, K.C., and *R. C. H. Cassels*, for the plaintiffs;

R. C. Smith, K. C., and *Peers Davidson, K.C.*, for the defendants.

Mr. *Anglin*, for the plaintiffs, argued that the invention was perfected in January, 1906, and that within a year from the date of the invention a Canadian patent was applied for. The application for the first patent was in December, 1907. That satisfies the requirements of the statute as to the period within which the application for a Canadian patent must be made.

Mr. McQueen, the inventor, shews the state of the art down to the time of his invention. He shews that from the time when the use of circular masonry bins in the storage, as distinguished from the workhouse portion of the structure, developed, down to the time when he arrived at his invention, there was a generally recognized desire

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to get at such a method of construction as would enable the introduction of circular tanks of masonry into the workhouse section of the elevator; and that he did more or less, but nothing of a definite kind, until the fall of 1905, when he made an outline plan for the Chicago, Burlington and Quincy Railway Company. Prior to that one Metcalfe had prepared plans of a structure for that railway company shewing square steel bin construction in the working house, and a circular masonry bin construction in the storage annex portion of the contemplated structure, with the result that the prices were so large as to make the cost of the structure as a whole practically prohibitive. Mr. McQueen made an offer to the railway company to erect for them a structure which would be of the same capacity, but with a working house of a different character, the whole costing a considerably smaller sum than Mr. Metcalfe's estimate. Following upon this verbal offer, a contract was entered into by Mr. McQueen with the railway company for the construction of an elevator. The date of this contract is October 4th, 1905, and attached to the contract is an outline plan of the structure. Supplementary plans, showing the substructure of the masonry as well as the bins, and specifications complementary to the plans were made, the whole matter of the plans and specifications being settled at a date in January, 1906, which would be the date of the invention.

As to the question of invention. The situation prior to McQueen's design seems to have been this: There was no practical application to the working house elevator, or to the working house portion of the composite elevator consisting of the working house and storage annex, of the circular masonry bin; nor had there been provided up to that time any construction which was suitable to the introduction of the circular masonry bin into the working house. Moreover, there was not up to that time any

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structure used in which the elevator leg could be introduced into the angular portions of the intersticed bins so as to utilize and conserve the angular space not required by the leg itself for storage purposes. Then again, there was need of an arrangement which would overcome the necessity for the use of an excess of girder for the support of concrete bins. It was necessary to the whole structure that there should be such a relation between the arrangement of the elevator legs and that of their passage-ways and the substructure, that the one would not interfere with the other. It was further necessary that the substructure should be such as to leave requisite space on the so-called "working-floor" below the bins. By the method patented—the invention of McQueen—there was a saving of $135,000 on Metcalfe's proposed price of $570,000. It is not altogether, though it is very largely, in the matter of cost that the advantages resulting from the change or changes from the prior art to the patented structure consist. The construction is a better one. There is the greater durability of the concrete as against the other material. The bin is of a better class than that which had been previously admissible into the working house end of the elevator structure. There is, having regard to the leg feature, a saving of space. There is a saving on girder construction, which, perhaps, comes back to the item of expense to some extent, and there is—and it is a very important advantage—the conservation of a free working space on the working-floor permitting the introduction of the necessary machinery to properly operate the elevator, particularly with regard to the spouting of the grain.

The claim of the first patent is wide enough to apply to the use of these leg passages wherever circular bins are used.

[CASSELS, J.—The first patent seems to be confined to a storage elevator.]

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They are all storage elevators in one sense.

[CASSELS, J.—They draw an apparent distinction in the second patent, which is for a working-house elevator.]

That is a broad use of the word there, not differentiating at all between what is more properly called the storage annex and that which is known as the working-house portion. But the whole thing is a storage elevator.

As to the leg casing, that is immaterial. The evidence shows that we do not alter, neither diminish nor enlarge, in any way our leg passages by reason of the presence or absence of the leg casing. It is of no materiality whether there is or is not a leg casing through the passage.

[CASSELS, J.—Is the casing not one of the elements "in combination with bifurcated elevator legs"?]

Not necessarily. There is no word as to the casing in the claim. The elevator leg exists in every reasonable sense of the term whether or not you have the casing through the bins. By the actual meaning of the term, an elevator leg does not include a casing as a part of the leg.

As to the question of girder construction, we submit upon the first two claims of the second patent that they do not either expressly or by intendment contain any limitation to a girder construction. The second patent is not for a method of support which is to be considered detached from that which it supports. The method of support is not merely the columns. It comprises in effect the whole structure claimed in the first claim, working in harmony to one end. The underlying idea of the invention is so to arrange and construct both the substructure and the bin section of the elevator that there will be a concentration of the load at two diametrically opposite points of each bin, or rather at two diametrically opposite points of each bin where alone in respect of each bin there are ultimate supports to the ground or subfoundation. Now that concentration of the load so arrived at is not

answered by any one portion of the structure taken alone. You cannot take off the bin section, and say you have everything that goes to the solution of the problem, or everything that goes into the combination which is claimed, or into the operation of the structure from the point of view of support and concentration of load. You start with your columns, of course, but you have to get up to and include your column extensions, and you have to take those column extensions as homogeneous or integral with the circular walls of the bins. If you do not do so, then you do not get into operation the combined effect of all these parts as it is the patentee's idea that they shall combine.

In the combination of these elements I submit that there is the very highest kind of invention, because space is conserved and the load is carried in a much easier and better way.

The burden of my argument in chief is that the defendants have taken the substance and essence of our patents.

Mr. *Smith*, for the defendants:

So far as the question of subject-matter is concerned, we submit that neither of the patents in suit discloses even a scintilla of invention. The first patent deals with a method of construction which instead of possessing any novel character at all, is a system perfectly well-known to the trade for a quarter of a century and more. Two rows of cylindrical bins arranged at right angles, have nothing new about them; and that interstitial spaces would naturally and incidentally result from such an arrangement is obvious to any one. The inventor, McQueen, and the plaintiffs' chief expert witness, Wilhelm, both admit that the whole essence of the invention as disclosed in the first patent was the building of a wall—a web-wall—across an angular portion of the interstice bin so as to cut off or separate that portion for a certain purpose. The web-

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wall was not for the purpose—primarily at least—of giving additional strength or rigidity to the bin, that is only a resulting incident. That function is not claimed in either of the two claims.

We further submit for the defence that the plain and ordinary meaning of the language used in the specification to the first patent in suit is that the leg casing is part of the combination. On the second page of the specification we read: "The numeral 3 indicates a bifurcated elevator leg of the usual construction, and in which works a power driven endless cup-equipped belt 4." That establishes at once that the leg is the casing in which the cup-equipped endless belt runs. The leg is not the belt. A separate number, a separate figure is assigned to it altogether. There is no doubt at all upon the facts that McQueen, the inventor, considered the essence of his invention as disclosed in the first patent to be in the so-called web-wall as forming a leg passage. Now I suppose I am right in saying that no absolutely comprehensive definition has been given of what constitutes invention. It would seem by the jurisprudence to result from a process of elimination rather than from a clear definition by the courts. It is evident that invention cannot be predicated upon the doing of that which is obvious. That I should think would be very elementary. In the second place invention cannot be predicated upon doing that which is a deduction or an inference. Invention is not an act of reasoning. If a thing can be accomplished by reasoning, by the process of deduction from data given, data already existing, I submit there is no invention in that at all. Nor can invention be said to exist where the thing done involves anything more than might be done by a skilled mechanic, one who knows his trade. Applying this principle to the case at bar, the plaintiff cannot shew invention. The problem confronting the inventor was to place the elevator

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leg in a certain position. The space must be so cut off that the rest of the bin shall be available for grain storage. That was the problem confronting him. In what way could he do it? Can it be suggested for a moment that there was any other way in which it could be done but by building a wall? It could not be done by laying down a net. It could not be done by stringing ropes. The only possible way in which it could be done was by building a wall across the spaces, to build a fence to enclose the space he desired to enclose, be it large or small, according to the space that was required to be cut off.

[CASSELS, J.—I understand you to treat the wall as a protection to the leg.]

That is all it is; it is nothing else. It was not there for the purpose of giving space to the bin structure at all. It was for the purpose of cutting off an angular portion from the interstice bin to be used for a leg passage, leaving the rest of the bin for the storage of grain. It was so absolutely obvious that any one who wished to do it could do it, as it has always been done. There was nothing special about the shape of the wall; there was no invention in employing such a wall for the purpose required.

As to the second patent in suit, it is purely and simply a construction patent. It is not a good patent for the simple reason that it adopts ordinary every day methods of construction that are as old as the Pyramids. It is put forward by the plaintiffs that the essence of this invention consists in the placing of the columns underneath, and in alignment with, what has been called the body portions of the column extensions. That is the common practice of builders. Sometimes, it is true, you may find an arch interposed, but the natural and obvious place to put a column is over another column, and not on either side of it; and it is such an elementary principle of construction and of building that I should think it would

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be using language with very great license indeed to call that invention. When you take the whole of the structure disclosed by the second patent, what is it? It is a system of columns, old as the art of construction; then a system of girders almost as old as columns, in fact so universally used as to form part of what is common knowledge in the building art, and then a bin floor on which the bins rest—the remainder of the construction being similar to what has been constructed many times before. But we are told that because one of the columns is under one of the extended body portions, or tangential thickenings of these cylindrical bins, that there is invention in putting the pillar there. I submit that there is no invention here within any of the authorities to be found in the books. (Cites *Electric Railway Co.* v. *Jamaica Railway Co.*, (1); *Saunders* v. *Ashton*, (2); Frost on Patents, (3); *Beavis* v. *Rylands*, (4); *Carter* v. *Leyson*, (5); *McNaught* v. *Dawson*, (6); *Wisner* v. *Coulthard*, (7); *Meldrum* v. *Wilson*, (8); *Garrett's* Case ,(9); *Hennebique Const. Co* v. *Meyers*, (10); *Galvin* v. *City of Grand Rapids*, (11); *National Tooth Co.* v. *McDonald*, (12); *Voightman* v. *Weis*, (13); *London Machinery Co.* v. *Jamesville Tool Co.*, (14); *Williams'* Case, (15); *Adams E. R. Co.* v. *Lindell Ry. Co.*, (16); *Thompson-Houston Electric Co.*, v. *Nassau Electric Ry. Co.*, (17); *Sloan Filter Co.* v. *Portland Gold Mining Co.*, (18); *American Car and Foundry Co.* v. *Morton Trust*, (19); Mervin on Inventions, (20); *Reckendorffer* v. *Faber*, (21): *Wills* v. *Scranton Cold Storage Warehouse Co.* (22).

(1) 61 Fed. Rep. 655.
(2) 13 B. & Ad. 881.
(3) 3rd Ed. pp. 42, 73,74.
(4) 17. R. P. C. 704.
(5) 19 R. P. C. 473.
(6) 23 R. P. C. 219.
(7) 22 S.C.R. 178.
(8) 7 Ex. C. R. 198.
(9) 120 Of. Gaz. (U. S.) 751.
(10) 172 Fed. Rep. 869.
(11) 115 Fed. Rep. 511; 53 C. C. A. 165.
(12) 117 Fed. Rep. 617.
(13) 133 Fed. Rep. 298.
(14) 141 Fed. Rep. 975.
(15) 130 Off. Gaz. (U. S.) 1692.
(16) 77 Fed. Rep. 432.
(17) 107 Fed. Rep. 277.
(18) 139 Fed. Rep. 23.
(19) 175 Fed. Rep. 568.
(20) Sec. 115,
(21) 92 U. S. R. 347.
(22) 153 Fed. Rep. 181.

My submission on the question of invention is that the mere taking of a column and placing it in a different position from where it is usually placed but where it performs precisely the same function it performed previously, is simply aggregation. I cannot conceive of any arrangement of columns and girders at this stage of the art of construction that could be more than aggregation. (Cites Walker on Patents, (1); *Deere Co.* v. *J. I. Case Plow Works*, (2); *P. P. Mast & Co.* v. *Rude Bros*, (3); *Eagle Lock Co.* v. *Corbin Lock Co.*, (4); *Hunter* v. *Carrick*, (5); *Ball* v. *Crompton Corset Co.*, (6); *Wisener* v. *Coulthard*, (7); *Goodyear Tire & Rubber Co.* v. *Rubber Tire Wheel Co.*, (8).

We submit, in the next place, that the second patent ought to be held void for indefiniteness and misstatement in fundamental particulars. To begin with it is said to be for improvement in storage bins. There is nothing whatever done to the bins. What they have endeavored to shew here is an improvement in a working-house elevator. The specification and accompanying drawings do not agree. There is variance between them. Sec. 13 of *The Patent Act* requires that the specification must fully and correctly describe the mode of operating the invention. It must be so that a skilled workman can understand the specification and make the machine described. (Cites Frost on Patents, (9); *Moore* vs. *Eggers*, (10); *Simpson* v. *Halliday* (11). On the whole I submit that as the patentee does not distinguish between what is new and what is old, but claims everything as new, and also claims as a main feature of his invention that the columns support the bins at two diametrically opposite

(1) Pp. 43, 73.
(2) 6 C. C. A. 157.
(3) 3 C. C. A. 477.
(4) 12 C. C. A. 418.
(5) 11 S. C. R. 300.
(6) 13 S. C. R. 469.
(7) 22 S. C. R. 178.
(8) 116 Fed. Rep. 363.
(9) P. 243.
(10) 107 Fed. Rep. 491.
(11) L.R. 1 H.L. 321.

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points only, which is contrary to fact, these facts taken together with the errors and misstatements in the specification and drawings, clearly render the patent void.

In the next place, the patent is void for anticipation. As far back as the year 1859 in the history of the art we have the circular bins in two rows at right angles, and the resulting interstice bins—which could be used for legs if a working elevator were desired. In the *Johnston* patent, in the year 1862, we have bins at right angles, with a small circular bin in the interstice, leaving four spaces for ventilating flumes. We have in that patent also columns supporting the bins by means of a floor composed of arches; and that is clearly the equivalent of the latest design, and of all that succeeded it. There is nothing in principle different in any of the patents in evidence, nor is there in the structures of the plaintiffs and defendants in this suit. It is simply a question of arrangement or equivalent. Then in the *McDonald* patent of 1900 we have the nested arrangement of bins, or, as it is sometimes called, the "staggered" arrangement. There is no essential difference between the nested arrangement and the rectangular arrangement. The space which is formed by this natural arrangement of the bins is also an incident—a natural and obvious result of their being positioned in that way. In this patent of 1900 we have walls which are the counterpart of the wall in this first patent in suit. There is nothing in the name "web-wall;" mechanics will tell you that any wall which spans a space will answer to that description in the plaintiffs' structure. Then, too, we have the column extension running up through the bin structure and giving lateral stiffness against the pressure of the grain, and at the same time carrying at least a portion of the vertical load. That feature of the plaintiffs' invention was much pressed in the early part of the case. That is also anticipated. Again,

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in the *E. V. Johnston* patent of 1900 we have a similar device to the defendants structure in respect of column extension, by which the cylindrical bins are kept a certain distance apart. This disposes of the argument that ours was an ingeniously contrived difference to escaped infringement of the plaintiffs' structure. Then in the *Heidereich* patent of 1901, we have a monolithic structure composed of cylindrical bins at right angles and rigidly united at their outer surface. It does not show where the elevator legs go, but there is space enough to put the elevator leg where it is most convenient. They can be used in the interstice bin or in the cylindrical bin, or wherever convenience may dictate. The patentee does not claim the legs in combination, but he claims passages in combination through which elevator legs may be passed. There is here in one combination all the features practically of the plaintiffs' invention, with the exception of the legs and the supporting columns. Then, in the *Jamieson* patent of 1904, we have the body portion formed in identically the same way as in the patents in suit. In the Dakota structure, before the date of the first patent in suit, we have an elevator leg arrangement very much more like the defendants' structure than like the plaintiffs' structure. In the Galveston structure of 1901, which was Mr. Folwell's design, there is a great deal, particularly in the column and girder construction, which suggested all that followed in the way of column and girder construction. Then, when we come to the Montreal Harbour elevator, constructed in 1902 and 1903, we have an exact anticipation of both patents in suit. Then we have the Harlem elevator, which on the evidence is clearly shown to have been built according to the patents in suit, although the original plan was modified to a certain extent. It was built by the Barnett & Record Company on plans made by the manager, McQueen, the patentee here. These plans were accepted by

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the railway company for which the elevator was built in January, 1906. The final payment was made in January, 1907. The application for the first patent was not made before December 9th, 1907 and for the second, April 6th, 1908. So that there was disclosure of the invention by the patentee more than one year before a patent was applied for in Canada. The plans were submitted to a public consumer, and accepted by that public consumer, in June, 1906; the substructure was built previous to the 1st December, 1906, and the top of the bins previous to February 1st, 1907.

[CASSELS, J.—Am I not bound, under the decision in *Smith* v. *Goldie* (1), to hold that public use or sale in the United States would not defeat the patent in Canada?]

I submit that no matter how the decision in *Smith* v. *Goldie* is viewed, the plain meaning of sec. 7 of ch. 61, R. S. C., 1886, is that the limitation refers to public use or sale with the consent of the inventor anywhere for more than one year previous to his application for a patent in Canada. *Smith* v. *Goldie* was decided on an enactment very different in its language from the statute as it is found in R. S. C. 1886. And the French version of the earlier statute lends itself to no other construction than that public use and sale in Canada is intended only. It must be presumed that the legislature had in view the decision in *Smith* v. *Goldie* and deliberately changed the law.

The patentee had abandoned to the public his invention before he applied for a patent in Canada. (Cites Frost on Patents (2), *Humpherson* v. *Syer* (3), *Crossdale* v. *Fisher* (4), *Fearson* v. *Low* (5). Exhibition by the inventor of his invention by means of drawings or plans will amount to having it on sale. (*Dunlop Pneumatic Tire Co.*

(1) 9 S. C. R. 46.
(2) Pp. 108, 109.
(3) 4 R. P. C. 407.
(4) 1 R. P. C. 21.
(5) 9 Ch. Div. 48.

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v. *British and Colonial Motor Co.*(1); *Herrberger* v. *Squire*,(2) *United Telephone Co.* v. *Harrison* (3).

In the case of an elevator, disclosure of the design would naturally be made by a model or drawings. No one would build one before he secured a contract for it. It is the only way the inventor can induce people to buy his invention. "On sale" means offered for sale.

On the question of infringement, we submit that we have not taken all the elements of the plaintiffs' invention, and that being so we are within the rule as laid down in *Consolidated Car Heating Co.* v. *Came* (4), and so have not infringed. That case brings the English law more in harmony with the American cases.

Mr. *Davidson* followed for the defendants, contending that McQueen was not the inventor inasmuch as the plans of the Galveston elevator were not made by him, and that the plans made by him for the Harlem elevator, upon which he founds his invention in 1906, were based upon, and the ideas in them taken from, the Galveston plans. True, the Galveston elevator was not built, but the plans remained in the possession of the railway company for nine years, and are produced in evidence in this suit. I submit, then, that under the principle laid down by Burbidge, J., in *American Dunlop Tire Co.* v. *Goold Bicyle Co.*, (5) "where one who says he is the inventor of anything has had an opportunity of hearing of it from other sources, and especially where delay has occurred on his part in obtaining his patent, his claim that he is an inventor ought to be very carefully weighed."

McQueen accompanied Folwell, and others, to the railway office when the Galveston plans were submitted, and he had opportunities to see the details. (Cites Frost on Patents) (6).

(1) 18 R. P. C. 313.
(2) 6 R. P. C. 194.
(3) 21 Ch. Div. 720.
(4) (1903) A. C. 509.
(5) 6 Ex. C. R. 223.
(6) P. 7.

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As to invention, I submit that the first patent having been a patent for the bins with upper extension columns and this web-wall, leaving it open to put in any kind of foundation to support it, the second patent by merely placing the columns in a certain position for performing the function of support, is not invention. The invention in the second patent is destroyed by the first patent. We must take the fact of the patentee having left the construction of a superstructure, for either a working-house or a storehouse, to the art, as being a declaration by him that no invention would be involved in the construction of such a substructure. (Cites *American Car and Foundry Co.* v. *Morton Trust Co.* (1).

On the question of the abandonment to the public of McQueen's invention by the Harlem elevator contract, it must be remembered that there were two distinct proposals for the construction of two separate and distinct parts of the elevator, the workinghouse and the storage annex, and that the second contract was entered into some six months subsequently to the commencement of the work on the first structure. The first structure was finished prior to the 5th December, 1906, and the second structure was finished in the autumn of 1907. A structure which embodied and contained the patented elements was in fact completed under the terms of the contract prior to the 5th December, 1906, and more than one year prior to the date of the patentee's application for the first Canadian patent.

As to infringement, there is one point which I desire to lay some stress upon. In the defendants' structure it will be noticed that all the bins are not connected together by web-walls some distance from the tangential connection. Now, in that connection the defendants have utilized the principle of the *E. V. Johnston* patent (which is prior in date to the plaintiffs' first patent in Canada) namely, two

(1) 175 Fed. Rep. 568.

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walls between all bins, but yet have departed from the *Johnston* patent by separating the two walls. The result is that instead of a four-sided interstice bin, the angles of which are cut off for the purpose of providing leg passages, the defendants have one space only, the whole of which is given up to the elevator legs. In this respect the defendants' structure is similar in principle to the Montreal Harbour elevator and other earlier structures.

Mr. *Anglin*, in reply: In regard to the Galveston plan, which did not eventuate as a structure, it is only important in the light of an anticipation. It was not an anticipation. McQueen's proposal was relative to both working-house and storage annex. The railway company determined for the time not to proceed with the annex but only to go on with the working-house. That led to a severance of the two things. A composite structure was not proceeded with.

As to the question of subject-matter, I am free to admit that taking the elements of these patents separately and apart from the way in which they have been combined, they are not new. No one would contend for a moment to the contrary. It is old elements in combination, resulting in something that was not achieved before in the same way, that we rely upon for invention. The merit of a structure may lie very largely in arriving at a conception that it is desirable to arrange parts in a certain way, and that by such arrangement you will arrive at certain results. To use the language of Lindley, L. J., in delivering judgment in *Fawcett* v. *Homan* (1):—

"The merit of an inventor very often consists in clearly realizing some particular useful end to be attained, or, to use Dr. *Hopkinson's* language, 'in apprehending a *desidertum*.' If an inventor does this, and also shows how to attain the desired effect by some new contrivance, his

(1) 13 R. P. C. 405.

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invention is patentable, although his contrivance involves the use of things, or parts of things, previously used by other people. Were it otherwise, no patent for a new thing composed of well known parts would ever be sustained."

[CASSELS, J.—What do you say as to the patentee in this case 'apprehending a desideratum'?]

He gets what was never got before; he gets the ability, first of all, to put his leg passages where he likes throughout this type of structure. He gets the ability to do that in a structure, not a nested bin arrangement at all, but a bin arrangement which gives the practical four-sided square bins. He gets the ability to put those legs in any of the intersticed four-sided spaces, in the angular portions where they will take up the least room and be the most easily protected, and he gets the ablility to do that without any sacrifice of storage space beyond the amount of space which is occupied by the elevator leg. And this was never done before. The common practice in the old art was to take the square bin, build two walls across the middle section of it, slightly separated, dividing it into two rectangular spaces at the sides, and a third narrower rectangular space in the centre. Now the net result of the structure here is the conservation of space, plus the very complete protection of the leg. But there is still another feature, viz., that such arrangement is peculiarly suitable and adapted to the kind of support indicated in the first patent. By the first patent we get a structure which enables the putting of the legs where they will be suitable for the kind of support which goes into the combination of the second patent. In all this there is invention. (Cites *Fawcett* v. *Homan* (1); *Consolidated Car Heating Co.* v. *Came* (2); *Dowagiac Manufacturing Co.* v, *Minnesota Plow Co.* (3); *McSherry Mfg. Co.* v. *Dowagiac Mfg Co.* (4); *Continental Paper Bag Co.* v.

(1) 13 R. P. C. at p. 410.
(2) 1903 A. C. 509.
(3) 118 Fed. Rep. 136.
(4) 101 Fed. Rep. 716.

Eastern Paper Bag Co. (1); *Grip* v. *Butterfield* (2); *Dayton Fan and Motor Co.* v. *Westinghouse Electric and Mfg. Co.* (3); *Eastern Paper Bag Co.* v. *Standard Paper Bag Co.* (4); *Anderson* v. *Collins* (5).

As to the point of lack of invention because of the obviousness of the improvement, I would cite *Dubois* v. *Kirk* (6); *Overend* v. *Burrough Stewart & Co.* (7); *Vickers* v. *Siddell* (8); *Elizabeth* v. *Pavement Company* (9); *Luxfer Prism Co.* v. *Webster* (10); *Topliff* v. *Topliff* (11); *Anderson* v. *Collins* (12); Terrell on Patents (13); *Westmoreland* v. *Hogan* (14); *Frost* v. *Cohen* (15); *Smith* v. *Goodyear Dental &c. Co.* (16); *Lyon* v. *Goddard* (17).

On the question of error and misstatement in the specification, we have expert evidence that there was no difficulty in understanding it. The drawings are only illustrative of the specification. (Cites *Watson Laidlaw Co.* v. *Pott* (18); *Anderson Tire Co.* v. *American Dunlop Tire Co.* (19); Walker on Patents (20)).

Then, dealing with the point that the offer by McQueen to build the Harlem elevator on the patented plans amounted to putting the invention on sale, I submit that the statute of 1886 (R.S.C., 1896, c. 61, sec. 7) did not change the law as it was interpreted in *Smith* v. *Goldie* (21). If Parliament intended to change the law from what it was settled to be, apt language for such purpose would have been employed. Then, again, "sale" is a different thing from "publication" in patent law. The invention could not be said to be in "public use" upon the facts even in the United States

(1) 210 U. S. R. 405.
(2) 11 O. A. R. 145; 11 S. C. R. 291.
(3) 118 Fed. Rep. 562.
(4) 30 Fed. Rep. 63.
(5) 122 Fed. Rep. 451.
(6) 158 U. S. R. 58.
(7) 19 O. L. R. 642.
(8) 7 R. P. C. 304.
(9) 97 U. S. R. 126.
(10) 8 Ex. C. R. 59.
(11) 145 U. S. R. 156.
(12) 122 Fed. Rep. 451.
(13) Ed. 1906, p. 54.
(14) 167 Fed. Rep. 327.
(15) 119 Fed. Rep. 505.
(16) 93 U. S. R. 486.
(17) 10 R. P. C. 345.
(18) 27 R. P. C. 541.
(19) 5 Ex. C. R. 82.
(20) Sec. 175.
(21) 9 S C. R. 46.

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before the application for the Canadian patent; much less was it "on sale." Foreign use is of no consequence in England, nor is it now in the United States. It must be use in the country where the patent is applied for. When you find "publication" dealt with specially, it gives a complexion to the word "use" which it would not otherwise have. What I submit is that it must be use of the concrete thing produced and completed. It must be use of the elevator as a completed structure. That is the law in the United States. Dealing with the question of sale, an invention is not "on sale" until it is completed, delivered and accepted. Walker on Patents (1); *Campbell* v. *Mayor of New York* (2). A "sale" is an act which involves a passing of property for a price. The facts here at most would not amount to more than an agreement for sale, which is not a sale. The whole course of dealing in the Harlem elevator matter did not amount to more than an experimental use of the invention. (Cites *Elizabeth* v. *Pavement Co.* (3); *Conway* v. *Ottawa Electric Ry. Co.* (4); *Newell* v. *Elliott* (5).

Upon the whole case, we submit that the facts show that our patents are valid and subsisting and that the defendants have infringed them.

CASSELS, J., now (November 18th, 1910), delivered judgment.

This was an action by the plaintiffs asking for an injunction restraining the defendants from infringing two patents.

The case occupied, inclusive of the argument, the greater part of fourteen days, and was very ably and fully presented by counsel for both parties.

During the course of the trial I had an opportunity of considering the various questions in issue, but I thought

(1) Sec. 99.
(2) 36 Fed. Rep. 261.
(3) 97 U. S. R. 126.
(4) 8 Ex. C. R. 432.
(5) 4 C. B. N. S. 269.

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it due to counsel, as they had spent so much time in presenting their various contentions, to postpone the delivery of judgment and to peruse the evidence transcribed and consider the various authorities cited. This I have done.

The first patent in suit is one dated 14th April, 1908, No. 111,315. The application for this patent was filed on the 9th December, 1907.

The second patent in suit is one dated 18th August, 1908, No. 113,624. The application for this patent was filed 6th April, 1908.

The defences raised to the right of the plaintiffs to recover are the usual defences,—lack of subject-matter,—no invention,—no infringement, —abandonment, &c.

I propose to deal with the two patents separately.

The first patent, No. 111,315, dated 14th April, 1908, was granted to Finlay R. McQueen, for improvements in Grain Storage Elevators.

In his specification the patentee states:—

"My present invention relates to grain storage elevators and particularly to concrete or concrete steel, or other fire-proof structures, wherein a multiplicity of cylindrical bins are employed, the said bins being placed in close juxta-position with the space between the cylindrical bins arranged to serve as supplemental storage bins."

After referring to the drawings he proceeds:—

"The numeral 1 indicates the cylindrical grain bins, which bins are arranged in rows in two directions, and are formed monolithic, or otherwise rigidly united at their adjoining peripheral portions, so that there is left, between each four bins, a supplemental bin or storage space.

2. It will be noted that by arrangement of the cylindrical bins in rows in two directions, the intersecting rows extending approximately at right angles to each other, a four-sided supplemental bin is formed between

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each four adjoining cylindrical bins. The numeral 3 indicates a bifurcated elevator leg of the usual construction and in which works a power-driven, endless, cup-equipped belt 4. The branches of this elevator leg 3 are passed vertically through the adjacent supplemental bins 2; and the said supplemental bins through which the said leg passes are formed with vertical webs or partitions 5 that form leg passages 6 from top to bottom of the bins, and separate the said leg passages from the respective supplemental bins 2. Any desired number of the supplemental bins may be thus formed with the leg passages 6.

With the construction above described, the elevator leg is thoroughly protected from lateral pressure of the grain in the bins, and the said leg may be removed, at any time, or repaired without opening up any of the said grain bins. Furthermore, the vertical webs or partitions 5 increase the rigidity of the entire bin structure.

It will of course be understood that the bins above described may be constructed either of concrete, brick or other material, and the same usually will, in practice, be reinforced by embedded steel members.

The term masonry is herein used in a sense broad enough to include either concrete, brick, tile or similar material.

In the arrangement of the bins illustrated in the drawings, the said bins are assumed to be supported with their lower ends above the ground. The main bins 1, as well as the supplemental bins 2, will, of course, be provided with hopper bottoms of the usual or any suitable construction."

The claims of the patent are as follows:—

"1. A plurality of grain bins 1 arranged in rows in two directions, and having their adjoining sides rigidly united so as to form supplemental bins 2, certain of said bins 1 being tied together by vertical partitions or webs 5 that extend across angular portions of certain of said supple-

mental bins 2, and form vertical leg passages 6, in combination with bifurcated elevator legs having their branches extended vertically through adjacent passages 6 substantially as described.

2. A plurality of cylindrical grain bins forming a monolithic structure and having their adjacent peripheral portions rigidly connected, and forming supplemental storage bins in the intervening spaces, vertical webs extending through adjacent supplemental bins to form leg passages, in combination with bifurcated elevator legs extending from below said bins through adjacent leg passages, substantially as described."

It is conceded that the two claims are practically for the same invention, the difference apparently being that whereas in the first claim it is stated that the grain bins have their adjoining sides rigidly united, the words of the second claim refer to the bins as forming a monolithic structure and having their adjacent peripheral portions rigidly connected.

While contending that these claims are invalid for want of subject-matter and lack of invention, the defendants claim that the structure erected by them does not infringe, as there is absent from their structure what is called the leg casing, an element of the claims as they contend. I will deal with this latter point later.

There are other reasons put forward on the part of the defendants as grounds in support of their defence of non-infringement in addition to the one mentioned above.

It must be borne in mind that in his specification the patentee assumes that the said bins will be supported with their lower ends above the ground. No particular form of support is referred to.

Mr. Wilhelm, the main expert witness on behalf of the plaintiffs, testifies that in his opinion the essence of the invention is the cutting off of the corner so as to allow

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free space for the leg. This cutting off is by what is termed vertical webs or partitions 5.

The specification states "furthermore the vertical webs "or partitions 5 increase the rigidity of the entire bin "structure."

While it has some effect in increasing the rigidity of the bin structure it is not required for that purpose, and this becomes apparent when it is perceived how few of the bins have this web-wall. It is apparent that the only use and object of the web-wall is to protect the elevator leg from the pressure of the grain in the bin. Power driven endless cup-equipped belts were long prior to the plaintiffs' alleged invention used in the various workhouse and storage elevators, and wherever placed had to be protected from the pressure of the grain by a wall or partition of some kind.

In the plaintiffs' construction portions of two interstice bins are cut off by two walls, one in each interstice bin, forming, with a portion of the sides of the bin, protected chambers through which the elevator legs pass.

In the defendants' construction a portion of one interstice binis cut off by two walls, both legs passing up through this space and leaving on each side the remaining portion of the interstice bin for storage purposes.

It may be that the placing in position of the elevator legs where the plaintiffs place them saves some space, but to my mind this is not material from a patent standpoint.

There can be no contention that the elevator legs placed as they are by the patentee operate in any other manner or have any different function than elevator legs in other storage and workhouse elevators. It is merely a question of convenience of arrangement having regard to the class of construction. Cutting off a space by means of a wall to form a protection was well known in the art. If the claims in question are combination claims as distinguished

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from aggregations, then in my opinion there is no novelty whatever. Previous references to the art show that such a combination, if such it can be termed, was well-known long prior to the alleged invention.

To avoid repetition I will deal with the previous anticipations in considering the second patent in suit.

Before proceeding to discuss the second patent, the essential feature of which is the location of the column support, I repeat the dates. The application for the second patent was filed 6th April, 1908. The first patent was granted 14th April, 1908. The application for the second patent was prior to the grant of the first patent.

By the specification of the first patent the patentee had stated that "the said bins are assumed to be supported with their lower ends above the ground."

I agree with Mr. Anglin's view that, having regard to the dates, the patentee has the same right as a stranger would have to apply for and obtain a patent for a particular means of support, provided always that there was invention and subject-matter.

The second patent, No. 113,624, is dated 18th August, 1908. The statement in the grant is that McQueen has petitioned for the grant of a patent for an alleged new and useful improvement in "Storage Bins."

In his specification the patentee states:—

"My invention relates to so-called 'working' elevators, to wit, that type of elevator in which grain is not only adapted to be stored, but is adapted to be weighed, cleaned, graded or otherwise worked. In this type of elevator a workhouse is located below the storage bins. Particularly, this invention relates to fire-proof elevator construction in which masonry work is reinforced with steel or iron."

The specification then states as follows:—

"The storage bins 1 are cylindrical with conical bottoms having discharge passages 2 that open through a reinforced floor 3. These bins are of masonry and may be

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either monolithic reinforced concrete or of reinforced brick or tile, and they are placed in parallel row in two directions and are closely positioned so that their tangentially abutting portions are united by metal reinforced vertically extended connecting bodies of masonry 4, which, as will presently appear, constitute extensions or upward continuations of the bin supporting columns and serve to rigidly tie together the adjacent bins. The bin supporting floor 3 is preferably of monolithic concrete having formed as part thereof metal reinforced girders 5 and 6 that intersect each other at a right angle. At their points of intersection, the girders 5 and 6 unite with the upper ends of heavy metal reinforced columns 7, preferably of concrete, and the lower ends of which terminate in heavy footings 7*a*, which, as shown, rest upon a heavy concrete basement floor 8 below which, when required, piles (not shown) may be driven. These columns 7 are located directly in line one with each of the column extensions 4. As shown, they are reinforced by longitudinally extended rods 9 and hoops 10. As best shown in Fig. 4, the upper ends of the columns 7 are expanded at 7*b* so that they directly support and unite with quite large areas of the floor 3. The space under the bins is enclosed by side walls 11, preferably of concrete or other masonry, and this space is divided into a workhouse 12 and basement 13 by a suitable workhouse floor 14 shown as made up of transversely extended I-beams and a suitable flooring, the said I-beams being supported by the columns 7 and walls 11. The bin space is enclosed by walls 11*a* that constitute extensions of the walls 11."

Having described the tower, he states:—

"With this arrangement, the main weight of the machine and other load within the tower, and of the tower itself, is transmitted directly through the column extensions 4 of the bin structure to the main supporting column 7

without adding weight to or putting additional strains upon the bins proper. Furthermore, by the arrangement of the columns 7 and column extensions 4, the bins are reinforced and strengthened and are supported at their strongest portions by the said columns 7."

He then describes the bins and interspace bins with the elevator legs as described in his first patent.

Before dealing with the claims of the patent, it will be well to understand what the patentee asserts to be the invention described in the specification. Wilhelm, the main expert witness for the plaintiffs, states it in this way:—

"The bin arrangement which is shown in the second patent is the same as shewn in the first patent. The bins are arranged in two rows at right angles to each other, and they are circular bins, and they have intermediate four-sided bins between the circular bins for the storage of grain, and the principal feature of this patent consists in the way in which the bins are supported. They are supported by columns which are arranged on the two diametrically opposite sides of each bin only. The general arrangement of the working-house structure is shown in figure 1 of the patent, and the columns are there marked 7, and they are arranged as shown in figure 6. Figure 6 is a plan of the bins with the columns shown in cross-section, and they are arranged on diametrically opposite sides of each bin only, and there are no columns at any other points in the circumference of the bins. The column arrangement is shown on the larger elevation on figure 2.

"HIS LORDSHIP—Q. Is that not a patent purely for the method of support? A. It is mainly for supporting the bins in that way.

"Q. If his first patent is valid, if he has these bins and supplemental bins, with a space for the leg, it makes no difference how they are supported? A. So far as the first patent.

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"Q. Assume for the present he has a good patent, whether he chooses to utilize the space below does not make any difference; and the second patent is a method of support to give the greatest space below for that kind of structure? A. Yes; and to not interfere in any way with the elevators. What is covered by the second patent, as it appears from the four claims, is first this method of support which your Lordship has mentioned there, and that is the subject-matter of the first claim of the patent. Then the second claim of the patent combines with that method of support the construction of the elevator wells which are described in the first patent. This is an element of the second claim, and the third and fourth claims deal with that method of support in connection with the girder construction, which is also used for supporting part of the weight. The last clause of the second claim recites the tie walls, which are the subject, matter of the first patent. The first claim is for the method of support purely and simply, and the second claim is for that method of support in connection with the tie walls. The cylindrical bins, with the four-sided intermediate spaces, and the columns placed at diametrically opposite points, and furthermore there is an element in that structure, and which is identified in that claim, and which is called the column extension; that is the extension which extends upwardly from the column between the bins, and extends up to the top of the bins."

Again he states:—

"HIS LORDSHIP—Q. As I understand your evidence it is simply this: Taking the circular bin, either steel or concrete reinforced or any other material, with the supplemental bins, whether you put the leg there or not, the patent relates simply to the support? A Yes, and column extensions rising up from the—

Q. The patent simply being the method of supporting it? A. Yes, that is my idea."

In his specification the patentee states:—

"As best shown in figure 4, the upper ends of the columns 7 (the supporting columns) are expanded at 7*b* so that they directly support and unite with quite large areas of the floor 3."

It has to be borne in mind that the load which has to be carried when the bins are filled is enormous. A certain portion of the load is carried by the bottom of the bin and a very large portion by the sides of the bin. The evidence of Ezra Wardell explains this.

What are called extension columns, therefore, not merely carry the weight of the cupola, but have also to so strengthen the parts of the two bins connected by the column extensions as to enable the side of the bins with the so-called column extensions to carry a great portion of the load.

The load is transmitted to the floor and girder construction and then transmitted to the column supports.

It is not correct to state that each bin receives its sole support from two columns, and I do not understand such a contention to be put forward on the part of the plaintiffs.

The first claim reads as follows:—

"1. The combination with a multiplicity of bins having their axes arranged in rows in two directions and on lines that intersect each other approximately at a right angle and having tangentially engaging sides united by vertically extended body portions, certain of which constitute column extensions, of supporting columns below said bins vertically aligned and united with said tangential column extension portions of said bins, and supporting said bins only at two diametrically opposite points, substantially as described."

The words "and supporting the said bins only at two diametrically opposite points" are repeated in the second and third claims.

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Mr. Smith argued forcibly that this statement is untrue—that the sole support of each bin was not on two columns only; but I do not think this is the proper way to interpret the claim. I think it refers to the location of the columns. The load must be transmitted to the floor and girder arrangement. The bins each rest on at least five girders. By means of the floor and girders the load is transmitted to the column supports.

The second claim is as follows:—

"2. The combination with a multiplicity of bins having their axes arranged in rows in two directions and on lines that intersect each other approximately at a right angle and having tangentially engaging sides united by vertically extended masonry body portions, certain of which constitute column extensions, of supporting columns below said bins, vertically aligned and united with said tangential column extension portions of said bins and supporting said bins at two diametrically opposite points only, and certain of which bins are further connected by transverse tie walls that extend from top to bottom of said bins and form, on opposite sides of the tangentially connected portions of the bins, spaces through which elevator legs may be passed, substantially as described."

The third claim is as follows:—

"3. The combination with a multiplicity of masonry bins having their axes arranged in rows in two directions and on lines that intersect approximately at a right angle, said bins having their tangentially engaged sides united by masonry body portions, certain of which constitute column extensions, of transversely intersecting metal reinforced concrete or masonry girders located below said bins, certain thereof being extended directly under and united with the tangential column extension forming portions thereof, and metal reinforced concrete or masonry columns below said bins united at their upper ends to said

girders and to the said bins at points vertically below the joining portions of said girders and column extension portions of the bins, the said columns supporting said bins at two diametrically opposite points only, substantially as described."

The fourth claim is as follows:—

"4. The combination with a multiplicity of masonry bins having their axes arranged in rows in two directions and having their tangentially engaged sides united by masonry body portions, certain of which constitute column extensions, of metal reinforced concrete or masonry main girders extending tangentially below and united with the column extension forming portions of said bins, which latter are located at diametrically opposite points, and transverse metal reinforced concrete or masonry girders united with the said main girders, substantially as described."

As I understand, the rule to be adopted in construing claims of a patent is that where one combination claim embraces a particular element and a second combination claim omits the element, each claim should be construed by itself, and that the element omitted in the one claim cannot be drawn into the claim by reason of the words "substantially as described" being added to the end of the claim.

The girder and floor arrangement is omitted from the first claim. I do not think such a combination as described in this claim would be of any practical value. This claim also omits the elevator legs, assuming no doubt that they would be placed somewhere. The so called web-wall is not a feature.

The second claim also omits the floor and girder construction and inserts as an element the web-wall to cut off the space for the elevator legs.

The third claim embraces the girder and floor construction, but omits the web-wall.

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Before dealing with the prior art, it should be pointed out that nowhere in the specification are any dimensions given for the bins or for the column support. Stress is laid on the benefit of the floor space below the bins. This space must depend to a great extent upon the size of the bins and the size of the supporting columns.

The patentee McQueen has, I think, as claimed by Mr. Anglin, established the date of his invention as being some time in the fall of 1905, or January, 1906. I will discuss this point later on.

In my opinion the supposed invention of the patentee is completely anticipated by what is called in the evidence the Montreal Harbour Elevator. This elevator was constructed during the years 1902 and 1903. It was in complete working order in 1903, and has been operated ever since with success. It may be that the elevators constructed by McQueen or his company, known as the Harlem and Peavey elevators shew better workmanship than in that of the Montreal Harbour Elevator, but as far as patentable design is concerned there is no difference.

Wait, a witness for the defence, describes this Montreal Harbour elevator. He designed this elevator and superintended its construction. Plans are produced. Exhibit D-9 is a book showing the structure, prepared from photographs taken at the instance of the Public Works Department. This elevator has a capacity of one million bushels. It comprises 78 bins—38 cylindrical bins with intersticed and outside spaces. The bins are arranged in rows at right angles. The bins are in close juxtaposition. The bins so arranged form supplementary bins. These supplementary bins, with the exception of four, are used for storage purposes. The four supplementary bins not used for storage are used for leg passages for the elevator legs. The two legs, the ascending and descending legs, are in the same supplementary bin. This difference seems

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to me not material. There is a working floor under the bins. This working floor is used for the passage of two car tracks, and on the working floor is located the cleaners, and the transformer room, and the belts that distribute the grain to the various carriers. The bins are of steel. They are supported above the working floor on a series of columns and girders. There is a system of girders and reinforced concrete floor supporting the bin structure. The supporting columns are placed on opposite sides of the circular bins at two diametrically opposite points and directly under the connection between the two bins. Superimposed upon the column is a column extension. It extends up between the bins in precisely the same manner as the extension column claimed by the plaintiffs' patent. The construction of this extension column is slightly different, but is there for the same purpose and performs the same function as the column extensions in the patent in suit.

This extension column in the Montreal Harbour elevator consists of two rolled channels placed back to back, bolted through the trunk shell, connected by splice plates and angles at their joints, and running continuously from the bottom of the bin walls to the top of the bin walls, the space between the two channels being filled with concrete. The concrete between these channels rests on the bin supporting floor, and it rests directly over the centre column both ways. These column extensions of concrete and steel are utilized for carrying the column loads from the cupola structure, the cupola column coming down directly on these column extensions.

These column extensions necessarily assist in supporting the bins, and must of necessity aid the bin walls in carrying a part of the load.

Metcalfe, another witness for the defence, corroborates Wait

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Wilhelm, the expert for the plaintiffs, in giving evidence in chief at the opening of the case, asked in reference to this Montreal Harbour elevator, states as follows:—

"Q. Here is a book of plans of the Montreal Harbour Commissioners elevator, constructed by the Steel Storage Construction and Elevator Company (Exhibit 9). Will you look at the printed pamphlet, containing a reprint of the drawings for the elevator in the Harbour of Montreal, which has been fyled as exhibit D. 9, and look at sheet number 12, and tell His Lordship what you find there with regard to arrangement of bin elevator leg passages, &c..

Mr. ANGLIN. This is subject to proof of date, of course.

Mr. SMITH. Yes.

A. The bin arrangement is that of circular bins arranged in two rows at right angles to each other and of intermediate four-sided bins apparently, and apparently the elevator legs are arranged in certain of the intermediate bins. If those long rectangular figures indicate the elevator legs, and there are lines drawn across some of these, then I do not know what they represent. They may be tie plates.

Q. You observe on the exterior rows of bins a web-wall making an auxilliary bin in each case.

A. Yes.

Q. And you also observe that the elevator legs occupy the angular portions of certain of the intersticed bins?

A. Yes, if those are legs, and I suppose they are.

Q. Then in this construction of the Harbour Commissioners, is it not a fact that you have identically the same arrangement of bins, the formation of the interstice bins and the leg passages in identically the same positions as the first patent in suit? A. Well, we have the legs in the same position, but no leg passages.'

Later on in reply, Wilhelm states as follows:—

"Q. The bins in the Montreal elevator are cylindrical bins, arranged in two rows at right angles?

A. They are.

Q. They are tied together?

A. They are.

Q. And the legs are placed, as you have just told us, in the angular portion in each case between two cylindrical bins?

A. I believe they are—yes, they are in the angular portion of the interspaced bins.

Q. At each of the tangential connections of these cylindrical bins there is a thickening, is there not, in the case of the Montreal elevator—call it a column or call it anything you like?

A. Oh, there is an upright connection consisting of channel plates, which extend from one bin to the other and run up and down between the bins.

Q. Through the whole bin section? A. Yes.

Q. And they are filled with what? A. I understand some cement concrete material, some rigid material.

Q. So they form pillars or columns between the bins? A. They do.

Q. Is it not a fact that these columns are over the piers, and whatever you like to call it, below? A. They are.

Q. The foundation piers? A. Yes.

Q. Now, if you had columns the same shape as the columns in the second patent you would then call these columns, extensions would you not?

A. These connections would at least stand where the column extensions stand in the second patent, although they might not be of the same proportion as the column extension of the second patent."

I fail to see any material difference from a patent point of view between this structure of the Montreal Harbour elevator and that of the plaintiffs' patent. Stress seems to be laid on the fact that the plaintiffs' structure is monolithic. There was nothing new in the art as to monolithic

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structures. The patentee is not confined to what would be technically a monolithic structure. The Montreal structure is for practical purposes monolithic; at all events the bins are rigidly united at their adjoining peripheral portions. The load is carried in the same manner—distributed by the floor and girders in the same manner, and the load is carried by column extensions or their equivalent, placed and situated in the same relative position in line with the column extension.

I have perused all the cases cited by Mr. Anglin. Each case has to depend upon the facts of the particular case under review, and while it may be that very slight invention, especially where the result is beneficial and useful, will support a patent, I cannot think that in the case I am considering there is any invention.

I have not lost sight in considering the case, of the other previous anticipations which go a long way to destroy the plaintiffs' patent. Neither have I overlooked the contention of the defendants that having regard to the state of the art and prior disclosure the patents, even if valid, would have to receive such a restricted construction as to require me to hold that the defendants' construction is not an infringement.

In the view I take of this case it may be unnecessary to consider the other questions very fully and ably argued, but as I have been asked by counsel to do so, I will express my opinion on one or two of the points raised.

In dealing with combination claims a good deal of confusion has arisen, I think, from a misuse of language.

In England prior to 1883 a claim was not requisite to the specification, although it was usual to insert a claim as part of the specification. Under our practice a claim is required. It is also required by the English practice, although the House of Lords in one case held this provision to be declaratory only.

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It is unnecessary in this particular case to deal with the question of the effect on a specification where no claim forms part of the specification. The purpose of the claim is (according to the late Sir George Jessel) to disclaim all that is not claimed. (*See Hinks* v. *Safety Lighting Co.* (1); *Plimpton* v. *Spiller* (2). This definition of Sir George Jessel has been found fault with by later judges. The present view seems to be that the purpose of the claim is to delimit the scope of the patentee's invention. (See *British United Shoe Machinery Co., Ltd.*, v. *Fussell & Sons, Ltd.* (3).

It is not of much consequence which language is used; the result is the same. The claim in the case before me is a claim for a combination of old elements; although being for a combination it is not of materiality so far as the construction of the claim is concerned, whether one element is new or not. If an element is new, and the patentee is entitled to a patent for the novel element or elements, he should claim this separately. Any new invention which the patentee sets out in his specification, if not claimed, is given to the public. It is the fault of the inventor in not claiming it, and he must suffer. The combination of old elements is the invention, provided it is the subject-matter of a patent and the court finds invention.

In construing the claim for a combination reference must, of course, be had to the preceding specification and the state of the art, and the patentee is entitled to a fair and liberal construction. If, however, the patentee has chosen in unambiguous terms to incorporate an element as a part of his combination, then the mere fact that subsequently he may find out that he might have omitted this element does not help him.

I venture to think that a careful consideration of the English authorities shew that in reality there is no distinc-

(1) L. R. 4 Ch. D. 612. (2) L. R. 6 Ch. D. 412.
(3) 25 R. P. C. 631.

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tion between the law as regards combination claims and the infringement thereof as decided in England, from the law as decided in the United States. The first question to ascertain is what is the combination claimed as the invention. If, on a proper construction of the claim and specification, having regard to the state of the art, it be determined that an element forms part of the combination the patentee cannot get rid of this element as being an immaterial or non-essential element. No such thing as an immaterial or non-essential element in a combination is recognized in the patent law. Having regard to the essentials of a combination, the admission that an element is not material is an admission that the combination claimed is an invalid combination, and the claim is bad. It follows that if the alleged infringer omits one element of the combination, he does not infringe the combination. Of course if instead of omitting an element he substitutes a well known equivalent, he in fact uses the combination. I will deal later on with this latter aspect in considering the defendants' construction. Patent authorities are so numerous, it is impossible to cite more than a few.

Dealing first with the United States:—

Prouty v. *Ruggles*, a decision of the Supreme Court of the United States, (1). It has been followed in numerous cases.

Vance v. *Campbell* (2) decided in 1861. At page 429:—

"A combination is an entirety; if one of the elements be given up the thing claimed disappears." The patentee cannot prove any part of the combination immaterial or useless.

Eames v. *Godfrey* (3):—

(1) 16 Pet. 341.

(2) 1 Black S.C.U.S. 427.

(3) (1863), 1 Wall. 78.

There is no infringement of a patent which claims mechanical powers in combination, unless all the parts have been substantially used.

The use of a part less than the whole is not an infringement. *Gould* v. *Rees* (1).

If three elements be claimed in combination, the use of two is not an infringement. *Rowell* v. *Lindsay*., (2).

The patent being for a combination there can be no infringement unless the combination is infringed." *Adams* v. *Folger* (3).

It is well settled that there is no infringement if any one of the material parts of the combination is omitted, and that a patentee will not be heard to deny the materiality of any element included in his combination claim. If a patentee claims eight elements to produce a certain result when seven will do, anybody may use the seven without infringing the claim, and the patentee has practically lost his invention by declaring the materiality of an element that was in fact immaterial.

See Walker on Patents (4th Ed. 1904) (4).

In considering the English authorities care must be exercised in dealing with cases such as *Foxwell* v. *Bostock* (5) where there being no specific claim the patentee has set out in his specification his invention, and it is a question of fact what the invention is. If the specification be doubtful and one element might be claimed but is non-essential, the court might lean to a construction favourable to the patentee and conclude that this element being non-essential did not form part of the combination claimed.

The case of *Foxwell* v. *Bostock* is probably overruled. Mr. Terrell, in his book on Patents (6) discusses this case, and also the case of *Harrison* v. *Anderston Foun-*

(1) (1872), 15 Wall 187.
(2) (1884), 113 S. U. S. R. 102.
(3) (1903), 7th Circuit, 120 Fed. Rep. 264.
(4) Secs. 32 and 33.
(5) 4 De G. J. & S. 298.
(6) 5th Ed. 1909, p. 130.

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dry Co. (1) decided by the House of Lords in 1876. The law laid down by the House of Lords is the same as decided in the United States.

The case of *Consolidated Car Heating Co.* v. *Came* (2) has to be carefully considered. The claim sued upon in that case is as follows:—

"In a two-part hose coupling, composed of like halves or portions, each of which has a free and unobstructed passage through it from end to end, which passages co-operate together to form a longitudinal unobstructed passage directly through the hose coupling, combined with locking devices as described, upon each side to lock the said halves or portions together as set forth"

It will be noticed that the wording of the claim is "combined with locking devices as described," &c.

To get at the true meaning of the claim and what formed the locking devices as described, resort was necessarily had to the previous part of the specification (of course having regard to the previous state of the art to assist in its construction), and placing a fair construction on the claim their lordships were of opinion that certain features were embraced in and formed part of the locking device, and the defendants not having used them there was no infringement. There is nothing inconsistent between the decision in this case and the decision in the case of *Harrison* v. *Anderston Foundry Co.* (3)

Reference may also be made to the following authorities:—

Terrell on Patents (4)

Fulton on Patents (5)

and the case of *Bunge* v. *Higginbottom & Co., Ltd.* (6) This is a case holding that the plaintiff was limited by his specification. The brushes were fastened to the inner walls, and

(1) L.R. 1 App. Cas. 574.
(2) [1903] App. Cas. 509.
(3) L.R. 1 App. Cas. 574.
(4) 5 ed. pp 58, 59, 130.
(5) 4th ed. 43, 47, 53.
(6) 19 R.P.C. 187.

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the court held that the patentee had made this construction a part of his invention. The invention in this case was a meritorious one.

See also *Stone & Co.* v. *Broadfoot* (1), a decision of the Court of Sessions, Scotland.

The Canadian courts have, as a rule, invariably followed the decisions of the United States Supreme Court in dealing with this question.

There are a few decisions that give ground-work for an argument that an element in a combination which turns out to be a non-essential element may be discarded.

Generally speaking, these authorities were adjudged on the particular facts of the case under review.

There is also the case of *Gwynne* v. *Drysdale* (2). This case is referred to with approval in the case of *Consolidated Car Heating Co.* v. *Came* (supra) at page 517.

See also Thornton on Patents (1910) (3.)

I think, the patentee, McQueen, in his claim in the first patent must be held to have included as an element of his combination the leg passages 6. I do not see how any reasonable construction of the specification can lead to any other conclusion.

The drawings which are added are merely to illustrate the invention claimed. Figure 2 of the drawings makes it quite clear, and the specification on page 2 is equally unambiguous. I think, however, Mr. Anglin's contention put forward in reply is correct, and that the defendants have the leg passages or their equivalent. The model of the defendants' structure produced shews leg passages both below and above the bin, but does not shew the construction between the bins. The plan of the structure which is admitted shows a guide for any grain that may drop from the buckets directing such grain to the leg passage below. It is obvious that between the bins the only use of the leg

(1) 26 R.P.C. 379.

(2) 3 R.P.C., 65.

(3) P. 21.

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casing is to guide the grain, and I think the defendants' structure is practically the same, the change being merely a change to a mechanical equivalent affecting the same result.

Another question of considerable importance was argued before me. Counsel for the defendants contend that the patentee, McQueen, was disentitled to a patent (if otherwise entitled) by reason of the fact that his invention was in public use or on sale in the United States of America for more than one year previous to his application for a patent in Canada.

The contention of the defendants is that the law as decided in the leading case of *Smith* v. *Goldie* (1) has been changed by the revised Statutes of 1886, and that now the words "public use" or "on sale" should not be limited to "in Canada." I am informed by counsel on both sides that this question has not yet been decided by any court. I am not aware of any decision.

In approaching the consideration of this question I construe the statutes as if the punctuation were omitted. (See Maxwell on Statutes (2) *Duke of Devonshire* v. *O'Connor* (3). It is well to consider what was actually decided by *Smith* v. *Goldie*. This case is reported in 9 S. C. R. 46. Part of the head-note in this case reads as follows:—

"1. To be entitled to a patent in Canada, the patentee must be the first inventor in Canada or elsewhere. A prior patent to a person who is not the true inventor is no defence against an action by the true inventor under a patent issued to him subsequently, and does not require to be cancelled or repealed by *scire facias*, whether it is vested in the defendant or in a person not a party to the suit.

(1) S.C.R 46. (2) 4th ed. p. 62. (3) 24 Q.B.D. 478.

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2. The words in the 6th section of the Patent Act, 1872, 'not being in public use or on sale for more than one year 'previous to his application in Canada,' are to read as meaning 'not being in public use or on sale in Canada for 'more than one year previous to his application.'"

A perusal of the written opinions of the Judges who composed the Supreme Court at the time of this decision would fail to disclose the fact that these two important points stated in the head-note had been passed upon by the court. None of the Judges who then composed the Supreme Court are now members of the court.

As I was counsel in the case, and very familiar with the facts, I think it well to clear up the question.

Both the propositions of law stated in the head-note were in fact decided in the manner stated. They had to be so decided, otherwise the plaintiff Smith could not have succeeded. A careful consideration of the facts shows this.

The case was originally tried by the late Chancellor Spragge, who dismissed the suit on the ground that contrary to the terms of the statute the patentee had imported the patented invention into Canada.

The Court of Appeal dismissed the appeal on the ground that under the evidence adduced there was no invention. They were of opinion that the question of importation was not open as a defence. Apparently both in the Court of Appeal and in the Supreme Court the conclusion was that the decision of Dr. Tache was one *in rem* and not open to revision. (See *Power* v. *Griffin*) (1). While the appeal to the Court of Appeal was dismissed on the ground stated the Judges of that Court, especially Mr. Justice Patterson, discussed fully and passed upon the questions reported to have been decided by the head-note referred to.

The Supreme Court of Canada reversed thed ecision

(1) 33 S C. R. 39.

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of the Court of Appeal and pronounced judgment in favour of the plaintiff.

As I have stated, the court could not have decided in favour of the plaintiff unless they adopted the views of Mr. Justice Patterson on the two questions now under consideration. I extract the dates from the judgment of the Court of Appeal.

Smith's application for a patent in Canada was dated 11th January, 1873. His Canadian patent bears date 18th April, 1873. (1)

Sherman and Lacroix each had Canadian patents issued in 1872 (See page 635). The machine in question, the invention of Smith, was in complete working order in the United States in April, 1871. (See page 633). His application in the United States was in July, 1871. (See page 633). On page 641 Mr. Justice Patterson points out that had the law not being changed "the patentees of the rival "machines who obtained their patents at Ottawa in 1872 "must as against the plaintiff Smith have been held to be "the first inventors."

At pages 640, 641 Mr. Justice Patterson reviews the changes in the Canadian law. Referring to the Consolidated Statutes of Canada, Chap. 34, Sec. 3, it is pointed out that under that law no one was entitled to a patent except a subject of Her Majesty. This Act authorized the granting of a patent, &c., "the same not being known "or used *in this Province* by others before his discovery "or invention thereof".

In 1869, by 32-33 Vic. Chap. 11, the privilege was extended to any person who had been a resident of Canada for one year before his application. See Section 6 of this statute.

In 1872 (not 1875 as erroneously printed on page 641 of the Appeal Court report) by 35 Vic. Cap. 26 the

(1) See page 629 of 7 Ont. A.R.

restriction as to residence was removed, and quoting Mr. Justice Patterson, page 641 "thus in all respects placing "foreigners on the same footing with subjects, but at the "same time, and as a complement of this extension of the "privilege, required absolute novelty—not merely novelty "within the Dominion, in the invention."

This decision in *Smith* v. *Goldie* (supra) has been followed in all the cases subsequently decided, with the exception of one case, in which the learned Judge drew a distinction in favour of a Canadian inventor who had obtained a patent in Canada earlier in point of date than an American inventor who was held to be a prior inventor to the Canadian inventor, but who obtained his patent in Canada on a date subsequent to that of the Canadian inventor (1). There is no justification for such a decision when the law as adjudged in *Smith* v. *Goldie* is understood. The case referred to was settled prior to the hearing of an appeal taken to the Supreme Court.

In considering the Canadian statutes, care must be exercised in reviewing the English and American authorities on this question to note the differences that exist between the English and the American statutes and the Canadian law.

In *Summers* v. *Abell* (2) the language of VanKoughnet, C. and Spragge, V.C. may be referred to.

On this question of invention the Canadian Statute is very similar to that of the United States prior to 1836. The statute of 1790 of the United States reads as follows:—

"Any person setting forth that he, she or they hath or "have invented or discovered any useful art, manu- "facture, engine, machine or device, &c., not before "known or used."

This Act of 1790 was amended in 1793, which latter Act provided that the invention must have been one "not known or used before the application."

(1) *The Queen* v. *Laforce*, 4 Ex. C. R. 14.

(2) 15 Gr. 532, 536, 537,

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Under the Act of 1790 there was no limit to the time or place of user. Under the Act of 1793 there was no limit of place. Under these two statutes the courts held that the inventor must be the first inventor as to all the world in order to be entitled to a patent. This is practically what the present Canadian law requires. It was thought in the United States that this pressed hardly on inventors, and a change was made in 1836 providing that the Commissioner might grant a patent "if it shall not appear to the "Commissioner that the same had been invented "or discovered by any other person *in this country* prior to the alleged invention or discovery thereof by the applicant."

Cases in which the American courts dealt with the question of prior invention under the Acts prior to 1836 may be considered. *Gayler* v. *Wilder* (1); *Coffin* v. *Ogden*(2).

Considering now the second question, namely, whether Parliament has altered the law as laid dawn in *Smith* v. *Goldie* (supra) and whether use or sale in the United States for more than a year prior to the application for a patent in Canada disentitles the applicant to a patent : No doubt can exist that *Smith* v. *Goldie* distinctly laid down the law that use or sale under the statute then in force must be confined to use or sale in Canada. It was argued in that case that if the inventor must be the inventor the world over that use or sale with the consent of the inventor anywhere for more than a year prior to the application for a patent in Canada should defeat the right to a patent. It might be that the right of an inventor to a patent in the United States had been lost by a user or sale for more than two years in the United States. Nevertheless he might apply for and obtain a patent in Canada with the result that it was public property in the United States, but a monopoly in Canada. The determination of

(1) 10 How. .477 (2) 18 Wall. 120.

this point depended on a construction of the statute then in force, and it was held that the words "in Canada" referred to the use or sale, and not to the application for a patent. See judgment in Court of Appeal, page 641.

The words of the statute of 1872 in the English version read:—

"and not being in public use or on sale for more than one year previous to his application in Canada" &c.

The words of the French version of this statute read "et ne sera pas dans le domaine public ou en vente en Canada, du consentment ou par la tolérance de l'auteur de l'invention, depuis plus d'un an" &c., &c.

In the revision of 1886 (R. S. C. 1886) cap. 61, the English version reads:—

"and which has not been in public use or on sale with the consent or allowance of the inventor thereof for more than one year previously to his application for a patent therefor in Canada," &c.

The French version reads as follows:—

"et si elle n'a pas été d'un usage public ou en vente, de son consentment ou par sa tolérance, pendant plus d'une année avant sa demande de brevet pour cette invention en Canada," &c.

In the Revised Statutes of Canada, 1906, Cap. 69, Sec. 7, the language used in the English version is the same as quoted above from the Revised Statutes of Canada, 1886.

The French version in the Revised Statutes of Canada 1906, is identical in language with that quoted above from the Revised Statutes of Canada, 1886.

It might be argued that as the statute is only dealing with patents and applications for patents in Canada, therefore the words "in Canada" should be taken to refer to public use or sale. The statute R. S. C. 1906, Cap. 69, however, in other sections uses the words "in Canada" as referable to the application for a patent. For instance in Section 8 we find the following expressions:—

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"before obtaining a patent for the same invention in Canada"....."may obtain a patent in Canada"...."of his intention to apply for a patent in Canada"....."after the inventor has obtained a patent therefor in Canada."

Section 8 of Cap. 4, 49 Vict. respecting the Revised Statutes of Canada, 1886, reads as follows:—

"The said Revised Statutes shall not be held to operate as new laws, but shall be construed and have effect as a consolidation and as declaratory of the law as contained in the said Acts or parts of Acts so repealed, and for which the said Revised Statutes are substituted.

2. But if upon any point the provisions of the said Revised Statutes are not in effect the same as those of the repealed Acts and parts of Acts for which they are substituted, then as respects all transactions, matters and things subsequent to the time when the said Revised Statutes take effect, the provisions contained in them shall prevail, but as respects all transactions, matters and things anterior to the said time, the provisions of the said repealed Acts and parts of Acts shall prevail."

My opinion is that there is a marked difference between the provisions of the Revised Statutes of 1886 and the statute of 1872 under which *Smith* v. *Goldie* was decided. I do not think the words "in Canada" can be held under the later statute as referable to "public use or on sale", but they are referable to the application for the patent.

Parliament has continued the policy differing from both English and American legislation of requiring an inventor to be an inventor anywhere, and the same rule of construction as requires the words "not known or used by others" to be construed as applicable beyond the Dominion, I think calls for the same construction to be placed on the words "not being in public use or on sale."

There is no reason why an inventor should have a monopoly in Canada for an invention which prior to his

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application for a patent in Canada he has abandoned to the public of the United States by user or sale.

This being the view I entertain as to the proper construction of the statute, it becomes necessary to consider the question whether the invention had been in public use or on sale with the consent of the inventor in the United States of America for more than one year previous to his application for a patent therefor in Canada.

The two cases put forward on behalf of the defendants in support of their contention that the patentee had abandoned his right to obtain a patent by reason of the invention having been in public use or on sale with the consent of the inventor, are what are called in the evidence the Harlem elevator and the Peavey elevator in Duluth. The evidence in regard to the latter is meagre.

In considering this question, care must be exercised in dealing with both the English and American authorities. The law of England differs from the law of the United States, as do the laws in England and in the United States differ from the Canadian statute. In the United States the statute provides : "And not in public use or on sale in this country for more than two years prior to his application."

The following propositions are decided in *In re Mills* (1):—

1. A single unrestricted sale of the invention is a public sale and puts it on sale.

2. A single sale of the invention by the inventor for experimental purposes, where he is unable otherwise to make proper tests, does not put the invention on sale.

3. Where a clear case of "on sale" is made the onus is on the inventor to prove the sale was for the purpose of testing.

A further point must be borne in mind in considering the question, that is, the difference between what is called

(1) Off. Gaz. U.S. Pat. Off., Vol. 117, page 904.

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a "trader's" experiment and an "inventor's" experiment. *Smith and Davis Mfg. Co.* v. *Mellon* (1).

The facts in each case have to be carefully considered to ascertain whether the inventor was in fact experimenting with the view of perfecting his invention. The decision in *Elizabeth* v. *Pavement Co.* (the pavement case) is relied on (2). The court in that case held that use in public for several years did not prevent the patentee from obtaining a patent. The court in that case, however, held that there was no question as to the *bona fides* of the inventor that it was merely experimental. They found that "Nicholson did not sell it, nor allow others to use or sell it." "He did not let it go beyond his own control" &c.

In England it has been held that an offer to sell, even though no sale, is evidence of prior publication. (Terrell on Patents (3) ; *Oxley* v. *Holden* (4).

It was also decided in England that an invention may be anticipated by a drawing unaccompanied by explanation provided any machinist could understand it. (Terrell on Patents, (5) *Electric Construction Co.* v. *Imperial Tramways Co.* (6)

In a case of *Wheat* v. *Brown* (7) the words of the statute are "exposed for sale by retail" (referring to margarine). The court held that the words "exposed for sale" are well understood terms, and cannot be limited so as to only mean "exposed to view."

To deal with the facts of this case: It is contended by Mr. Anglin, and the contention is sustained, that McQueen's so called invention was not later than January, 1906. It was probably earlier by a few months. The contract for the Harlem elevator is dated 26th October, 1905. I will set out in full the evidence of McQueen

(1) 58 Fed. Rep. 705.
(2) 97 U.S.R. 126.
(3) 5th Ed. 74.
(4) 8 C.B.N.S. 704.
(5) 5th Ed. p. 80.
(6) 17 R. P. C. 539.
(7) [1892] 1 Q.B. 418.

relating to the Harlem elevator; also as to the Peavey elevator at Duluth:—

"Q. Now just to go on with your history of the development of the invention, at this time when you made this price of $360,000 to the Chicago, Burlington & Quincy Railway for a fire proof storing house of equal capacity with the square bin steel house, which was to cost $485,000 with the same machinery, did you furnish them plans with the proposition, or how was that? A. No, I made the proposition verbally to them.

Q. Just that you would do this? A. Yes.

Q. At that price? A. Yes.

Q. Did they or did they not accept the proposition? A. They accepted the proposition some days later with the outline plan.

Q. What date in 1905 was that, approximately? A. It was the latter part of the year 1905.

Q. Getting on in the fall of 1905? A. Yes.

Q. Were there any detail plans in existence? You said you had not submitted them? Were there any? A. No.

Q. How far had you got yourself with your ideas at that time A. Just far enough to know that I could place the columns under the centre of the bins in one direction and support them with two columns only, and provide a passageway for the legs up through the bins at the opposite contact point.

Q. And that progress to that point had been the result of your thinking out of the situation? A. Yes.

Q. But you had not committed that to plans at that time A. In an outline that would not disclose to anyone but myself what it meant.

Q. Have we that outline here, do you know? A. I think we have; it is attached to the contract.

Q. Just go on with the story of the Harlem construction?

A. My intention was — and our contract was drawn that way—to use a structural steel frame work of vertical

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columns and horizontal girders to support these masonry bins, but after getting into the calculations more deeply we found that it would not work good, and had our contract supplemented and changed to allow us to use a reinforced concrete column and frame work.

Q. So that down to the time of the making of this bargain with the C. B. & Q. people you had not arrived at a concrete construction below the bin floor? A. No; our first thought was steel frame.

Q. And after you had arrived at your bargain with them you got further on, and got to the concrete throughout construction? A. Yes.

Q. Did you make plans, and if so, have you got them, shewing the whole of that construction? A. Yes, sir; some time three months later than the date of the contract.

Q. That would carry us on to the midwinter of 1905-6? A. Yes.

Q. There are here three sheets? A. Yes.

(Plans Exhibits 7*a*, 7*b* and 7*c*.)

Q. In this exhibit 7 will you shortly state to the court what construction is shown? A. These plans show a reinforced concrete construction.

Q. These show a reinforced concrete construction from top to bottom? A. They show a reinforced concrete construction of columns, girders and supports for tile bins.

Q. Were the bins subsequently built of tile? A. Yes.

Q. So that what is shown here and what was afterwards built is a structure of concrete, except as to the bins, which are of tile? A. Yes.

Q. Then when were these plans 7*a*, *b* and *c*. made? A. They were made along in the first part of 1906.

Q. I see one of them has December 12th, 1906, with "January" written over; what is the fact as to that? A. January would be proper on that. There was

a mistake made in that. That lettering was done by the railway engineers. They have initialed those plans and they have corrected that.

Q. That was corrected by the railway engineers; and what is this in ink written upon the plan? A. Approved, C. H. Cartiledge, bridge engineer, C. B. & Q.

Q. What date? A. Approved, January 30th, 1906, Calvert, Chief Engineer.

HIS LORDSHIP—Q. When was that built? A. 1906 and 1907.

Q. What date were they finished? A. We got an acceptance about August, 1907.

HIS LORDSHIP—What was the date of your application for the patent?

MR. ANGLIN—There were two applications. The last of them was April, 1908; one December, 1907, and the other April, 1908.

HIS LORDSHIP—The first patent had no connection with the storage?

MR. ANGLIN—Neither patent has any connection with what is strictly called storage house. The second is for the working-house.

HIS LORDSHIP—The first is not for a working-house?

MR. ANGLIN—Yes, it is also for a working-house.

HIS LORDSHIP—It does not say so.

MR. ANGLIN—It is incidentally shown. I do not want to anticipate it.

Q. So that these plans were made in January, 1906, or December, 1905, and were approved in January, 1906?

A. Approved January 30th, 1906.

Q. All three of them? A. Yes.

Q. His Lordship asked a question as to the construction of the elevator that you mentioned, that it was accepted some time in 1907. We might get the record of that. You have here, I understand, the letter to your

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company, the Barnett & Record Company, asking for acceptance, and their letter in reply, and a subsequent letter from you, and the letter in reply to that; the last, which is the letter of the railway company, stating that "it now seems to be finished up in satisfactory shape," being dated October 11th, 1907? A. Yes.

MR. DAVIDSON—I suppose those copies will be taken under reserve?

HIS LORDSHIP—Yes; if you wish.

MR. DAVIDSON—I have not seen them. I do not know what they contain.

MR. ANGLIN—Q. Two of these are the actual original letters? A. Yes.

Q. The letter of August 23rd, 1907, and the letter of October 11th, 1907, are the original letters written by the railway company to your American company? A. Yes.

Q. And the others, I believe, are carbon copies? A. Copies of our letters to them.

Q. Are they duplicates made at the time, or are they carbon copies. A. They are carbon copies made at the time.

MR. ANGLIN—There are two original letters, with two copies. (Exhibit 8). Q. What was your reason for going into this construction of this Harlem house in the way you did, without plans or development, and then working it out later? A. I was very anxious to be given a chance to demonstrate this type of construction; that was one of the principal reasons, and I made a proposition to the railway officials that was so favourable, that they thought so favourably of, that they accepted and let me go under contract.

Q. Did they impose any special terms upon you in connection with the work? A. Yes, with our company; they made the company guarantee the construction.

Q. In what direction? A. Guarantee it as to stability and performing the services of a grain elevator for two years after their acceptance.

Q. Is that the ordinary time? A. No; we had a six months' guarantee on the machinery and equipment, and two years on the building structure governing this particular type of construction; they also exacted surety companies' bonds covering the guarantee.

Q. Why was that? A. They did not know what type of an elevator or kind of construction we proposed giving them, and went entirely on our reputation that we would do as we agreed to do.

Q. Now, as you got on with the work of this plan,—you have explained to me your change in plans from a steel construction below the bins to concrete construction—as you got on with the working out of these plans, did other changes occur, and if so, what and why? A. We did not get the house worked out in all its details for some time after the date of those plans. It required a study clear to the end of the construction, and we found it necessary or advisable to change some from this type of construction to the next design we made.

Q. That is the next work? A. Yes.

Q. But so far as the construction is concerned, that went through on these plans that are fyled, with various detail plans which were worked out, as you went to make a complete construction of it in detail? A. Yes.

Q. But the general construction is shewn by these three plans? A. Yes.

Q. And you say the changes you were referring to a moment ago, which resulted from this, were carried into other subsequent structures? A. Yes.

Q. Did these changes which were carried into subsequent structures result from observation of the results which flowed from the working out of the structure under

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the plans of the Harlem elevator and the operation of that structure when it was operated? A. Yes.

Q. What was your next design of house, or rather what house did you next design? A. The Peavey Duluth Terminal at Duluth.

Q. I understand the Peavey people are about the largest handlers of grain in the west? A. They are one of the largest.

Q. And this was their terminal elevator at Duluth? A. Yes.

Q. When was that? Have you the papers relating to that? A. The contract and outline plan.

Q. Does that plan show the Peavey Duluth construction? A. Yes, in an outline manner; some changes in it. (Contract, Exhibit 9).

Q. Does it show it sufficiently for the purpose of permitting the court to say from it that the patented inventions were embodied in the structure? A. Yes.

Q. We do not require to put in any more? A. No.

Q. This plan is dated March 6th, 1906? A. Yes.

Q. And was prepared at that time? A. Yes.

HIS LORDSHIP—Q. Where are the legs in that plan? A. They do not show in that plan. That just shows the details of the girder and column construction.

Q. Where do the legs go in the construction? A. It is shown in the Peavey plan.

HIS LORDSHIP—What is the date of the earlier patent?

MR. ANGLIN—December 7th, 1907.

Q. Look on the Peavey Duluth Plan, Exhibit 9, and point out where the legs go? A. They are here.

Q. This elevator for the Peavey Duluth Company was constructed, I believe? A. Yes.

Q. And you spoke of some changes which your experimental work on the Harlem construction induced you to introduce into the Peavey construction; what were those?

A. Principally in the girder and column frame. We found by actual calculations that we had a heavier construction at the Harlem than we required.

Q. What do you say? A. We found we had a heavier construction than we required.

Q. You found you had put a heavier substructure into the Harlem elevator than was really required? A. Yes.

Q. What changes did you make following on what your Harlem work shewed you? A. We reduced the section of girder, and I think the shape of the columns somewhat.

Q. The shape of the columns under the girder? A. Yes, and some other features of the construction.

Q. These were all structural details which, as I understand it, did not affect the question of the patented invention? A. No.

Q. Except in the working out of it in the actual practical structure? A. Yes.

Q. Nothing else that you remember of in the way of change in this? A. No.

Q. This elevator was built, I understand, but not completed, until along late in 1907? A. Some time in 1907, June or July, somewhere along 1907."

The contract for the construction of the Harlem elevator is produced. It is very specific and complete. The plans referred to, Exhibits *7a*, *7b*, *7c*, were substituted so far as material of a portion of the work was concerned. These were approved on 30th January, 1906. It is clear, and so contended, that these plans were a complete disclosure of the invention, and the elevator was to be constructed according to the plans.

The specifications refer to various matters, viz.:—

"*Commencement and completion.*

Contractor shall commence the work on being given possession of the site, and shall so conduct his work as to

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give the plant to the owner ready to operate at full capacity in receiving and shipping or cleaning of grain, on or before July 1st, 1906."

"*Testing and Accepting Elevator Plant.*

Everything necessary to make the plant complete as hereinafter described having been put in place, the plant shall be turned over to the owner for business, and he shall at once place a competent superintendent in charge with the full operating force, and proceed to operate the same or a period of fifteen days or such time as may be required to test the different parts of the plant, and the contractor shall keep an experienced man in charge of the building. During this time any reasonable test may be required by the owner to prove efficiency of the work. If everything about the plant performs its office as intended by these specifications the plant shall then be accepted. If any points of the building or machinery are found defective during the test, the contractor shall at once proceed to make such corrections as may be necessary. After such corrections shall have been properly made the plant shall then be accepted."

"The workhouse shall be 60 x 180 feet on the ground divided into fifteen bays. The construction of this house will be outside brick walls resting on the concrete foundation up to the bin bottoms. The bins will be supported with a frame work of steel columns and girders and on top of these steel girders will be a slab of reinforced concrete covering the entire area. On top of this concrete slab will start the bin walls. They shall consist of forty-eight circular tile bins and thirty-three intermediate bins, making a total of eighty-one bins and a storage capacity of 450,000 bushels."

"*Elevator Frame.*

This will consist of steel columns, beams and girders as shown on plan. The steel columns shall be provided with cast iron base-plates and have steel knee braces."

"*Leg Casings.*

Leg casings for the receiving and shipping elevators will be made of No. 14 steel and put together with angle iron at the corners. These legs will be equipped with proper openings for getting at the belts. The leg casings of the small standard elevators will be made from No. 16 steel."

"*Elevator Legs.*

There will be four stands of receiving elevator legs and four stands of shipping elevator legs. These elevators will be equipped with 20-in. x 72½-in. x 7-in. buckets, made in accordance with the detail drawings. Each one of these stands of elevator legs will be supplied with a 1,600 bushel garner and a 1,600 bushel scale. The other ten stands of small elevators will be equipped with 12-in. x 6-in. x 6-in. buckets."

Clause 5 of the contract reads as follows:—

"5. It is mutually agreed that the Chief Engineer for the owner shall be the arbitrator to decide as to the quality of material furnished and work performed by the contractor under this contract, and as to any extension of time claimed by the contractor, and his decision shall have the force of an award and be final and conclusive to both parties. But the contractor is the originator and designer of the aforesaid works, he shall have the right to decide all matters pertaining to design or form of construction of the work and be responsible to the owner for the correctness of the same."

Clauses 8 and 9 of the contract are as follows:—

"8. The Contractor shall execute and deliver to the Owner a bond to secure the Owner in the faithful performance of this contract by said Contractor, in the penal sum of thirty thousand dollars ($30,000.00) with a surety company as surety thereon, by use of the bond hereto attached, the surety to be such as may be approved by the Treasurer of the Owner."

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"9. The Owner shall pay and the Contractor shall accept, the sum of three hundred and sixty thousand dollars ($360,000.00) in full payment for the materials and labour herein agreed to be furnished by the Contractor for the construction and completion of the works hereinbefore described, and for the full and complete performance by the Contractor of all the covenants herein contained and specifications herein referred to; payment thereof to be made in the manner and within the time set forth in the attached specifications under the head of Estimates and Payments, except as the same may be modified by the foregoing provisions of this indenture."

The work was proceeded with and sums on account amounting to over $280,000 paid prior to 23rd October, 1906.

A second contract was entered into between the same parties bearing date 26th November, 1906, for the erection of a storage house, as stated in the contract "adjoining their present elevator and connected thereto at Harlem."

In the specifications under "General Description" is the following:—

"The work shall consist of a tile storage house, resting on a reinforced concrete foundation and connected to present working elevator, with three concrete tunnels to basement and three enclosed steel bridges at cupola."

The final payment for the Harlem Elevator was made on the 21st January, 1907. The application for the second patent was on the 6th April, 1908.

Certain correspondence was produced from which it was contended that there was no acceptance of the Harlem Elevator until August, 1907. This correspondence relates to the storage elevator, the subject-matter of the second contract of 26th November, 1906.

The Peavey plan for the elevator at Duluth is dated 6th March, 1906, and in the evidence quoted it is stated

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that this plan shewed the whole invention. I think the Harlem elevator was constructed and in use prior to the 26th November, 1906. It was paid for in full more than a year prior to the application for a patent in Canada for the main invention.

It is said guarantee bonds are executed. One such bond is attached to the contract. It is merely to guarantee the performance of the work. If a further bond was given it is not produced, and in my opinion does not affect the case.

I think it cannot be held that the inventor was experimenting with the view to perfecting his invention. The fact that he took a contract for the erection of the Peavey structure would demonstrate this. Moreover, I think it was on sale within the meaning of the statute. If an inventor attended a fair and produced a model of his invention soliciting orders for its construction, would it not be on sale. In this case, in lieu of a model complete plans were exhibited and contracts entered into for its erection. He could not manufacture a grain storage elevator and have it on view.

In a very recent case, *Dittgen* v. *Racine Paper Goods Co.* (1) the Circuit Court of the Eastern District of Wisconsin had occasion to construe the provisions of section 4886 of the Revised Statutes of the United States (2).

I think the plaintiffs' action fails. There will be the usual declaration, declaring the patents invalid; the plaintiffs to pay defendants' costs.

Judgment accordingly

Solicitors for plaintiffs: *Blake, Lash, Anglin & Cassels.*

Solicitors for defendants: *Davidson & Wainwright.*

(1) Fed. R. 394.

(2) See U.S. Comp. St., 1901, p. 3382.

BETWEEN

1910
January 22.

EMIL ANDREW WALLBERG.....PLAINTIFF;

AND

HIS MAJESTY THE KING.....DEFENDANT.

Public work—Work done without contract in writing—Instructions of Government Engineer—Quantum Meruit.

By an order of reference, on consent of parties, to ascertain "the value of certain works executed by the plaintiff" under the direction of the Chief Engineer of the Intercolonial Railway (there being no written contract therefor) it was directed that "the amount to be ascertained shall be the fair value or price thereof allowed on a *quantum meruit.*" The referee having dealt with the case as if the market value of the works had to be ascertained under the order of reference, and having found that the works could have been executed for the sum much less than their actual cost as executed had a different plan of construction been adopted by the Chief Engineer, reported that judgment should be entered for the plaintiff for a much smaller sum than the alleged actual cost of the works as executed.

Held, that the referee should have found in favour of the plaintiff for the actual value of the works as executed under the direction of the Chief Engineer.

THIS was an appeal from the report of the Registrar of the Court, acting as Referee.

The facts of the case will be found in the report of the Referee and in the reasons for judgment.

The report of the Referee was as follows:—

This claim comes before this court on a reference by the Minister of Railways and Canals, under the provisions of Section 38 of *The Exchequer Court Act* (R.S.C. 1906 ch. 140.)

The plaintiff, by the pleadings, claims the total sum of $105,940.15 for the concrete sewer, branch sewers and water system, with interest thereon from the 26th January, 1909, and costs. He alleges, *inter alia*, that in the year 1906 :—

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"2. His Majesty the King, represented by the Minister of Railways and Canals of Canada, undertook the erection of a car and locomotive repair plant at Moncton, in the province of New Brunswick, and entered into contracts dated respectively September 18th, 1906, October 29th, 1906, January 18th, 1907, and October 22nd, 1907, with the said Emil Andrew Wallberg, for the execution of the whole of the said work at bulk sum prices, aggregating $682,975, and with provision for payment for a part of the said work in addition at prices set out in schedules contained in the said contracts, the total value of the said work being in the neighbourhood of $1,000,000.

"3. Each of the said contracts contained a provision that the Chief Engineer of the Department of Railways and Canals, or other officer for the time being appointed to inspect, supervise or control the work on behalf of His Majesty, should be at liberty at any time before the completion and acceptance of the work to order any extra work to be done, and to make any changes which he might deem expedient in the dimensions, character, nature, location or position of the works, or any part or parts thereof, or in any other thing connected with the works.

"4. Before the completion of the said works, it became necessary to construct a sewerage system, a water system and other work in connection with the same, and W. B. Mackenzie, the Chief Engineer of the Intercolonial Railway, being the officer for the time being, appointed to inspect, supervise and control the work on behalf of His Majesty, ordered the said Emil Andrew Wallberg to construct the said sewerage and water system as extra work.

"5. The said Emil Andrew Wallberg constructed the said sewerage system, the said water system, and the

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said other work to the satisfaction of the said W. B. Mackenzie and the Minister of Railways and Canals of Canada, and the said works have been accepted and taken over by the Minister of Railways and Canals of Canada. The said sewerage system was completed January 9th, 1908. The said water system was completed October 3rd, 1908. The said other work was completed September 11th, 1908.

"6. The said Emil Andrew Wallberg claims to be entitled to be paid for the said sewerage system, water system and other work as extra work under the said contracts or one of them, or in the alternative to be paid for the same as work and labour done, and materials supplied by him at the request of the Minister of Railways and Canals of Canada.

"7. The said Emil Andrew Wallberg has demanded the amount due him and payment has been refused."

The Crown by its defence states that:

"His Majesty did not in the year 1906, or at any time, represented by the Minister of Railways and Canals, or otherwise, enter into any written or other contract with the claimant for the execution of the work for which the claimant is seeking payment, nor for any part of the same.

"2. His Majesty did not authorize W. B. Mackenzie, the Chief Engineer of the Intercolonial Railway, to contract for such work or for any part of the same.

"3. The said Chief Engineer of the Intercolonial Railway did not order the claimant to construct the sewerage and water system as extra work under the contracts or any or either of them mentioned in the second paragraph of the claimant's statement of claim.

"4. The said sewerage and water system were not extra work under any of the said contracts.

"5. The Minister of Railways has accepted and taken over the said works on behalf of His Majesty and is willing to pay the fair value of the same, but not the amount claimed, which is considered excessive.

" 6. His Majesty did not agree, nor is His Majesty liable to pay the interest sought to be recovered."

From the scope of the reference to the undersigned, it will obviously appear that it is unnecessary to decide as to whether or not, under the decisions of the cases of *Henderson* v. *The Queen* (1) ; *Wood* v. *The Queen* (2); and *Hall* v. *The Queen* (3), there existed a valid contract as between the plaintiff and the Crown for the construction of the works in question herein, or whether, under the circumstances, an implied contract could be asserted against the Crown. This is no more in question. We have gone far beyond the question of contract. The only question now to be determined, the Crown having accepted and taken over the works, is the fair and reasonable value, the market value, so to speak, of said works. The Crown having accepted and taken over the works, stands in the position of a person who employs another to do work for him without any agreement as to his compensation, and in such a case the law implies a promise from the employer to the workman that he will pay him for his services as much as he may deserve or merit—*quantum meruit.*

The Chief Engineer, on behalf of the Crown, in charge of the present works and of the works covered by the four contracts, Mr. Wm. B. Mackenzie, had nothing to do with the preparation of the plans and estimates for the four contracts above referred to for the erection of the shops and other buildings. These contracts, however, provided for drainage inside, but

(1) 6 Ex. C. R. 39 ; 28 S. C. R. 425. (2) 7 S. C. R 634.
(3) 3 Ex. C. R. 377.

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not outside, of the buildings to the edge of the buildings, but not for carrying the drainage away.

The site of the shops and other buildings covered by the four contracts was low ground, the ground being higher on three sides, the land swampy, holding a good deal of water near the surface, and it became manifest to the Chief Engineer at the very threshold, in 1906, that a drainage system was of paramount necessity to drain the area upon which these buildings were being erected. Mr. Mackenzie very reasonably contends that immediate drainage was absolutely necessary in order to save the buildings from destruction by frost during the incoming winter. Being familiar with the time it generally takes to ask for tenders, he says he did not think there was any time to call for tenders. It was a case of emergency.

Under such circumstances, having a contractor upon the premises, he turned to him and instructed him "to go ahead and build as quickly as he could the works in question herein and that he would see that he was paid the actual cost plus 15 per cent." Then further on, he is asked:—

"Q. Did you have any other reason for giving it to Mr. Wallberg?

A. Nothing but the desire to get it done in time to prevent the destruction of the buildings.

Q. Why could he do it more quickly, in your opinion?

A. Because he had the facilities for getting men quickly and rapidly, and he had some plant on hand, and it was close to his work, and some of it was, part of it was right in the middle of his work, so that it would have been a very difficult matter for an outside contractor to come in there with any amount of plant and carry those things on without coming into conflict, the

one with the other, and delaying the whole work, either one work or the other, or perhaps both. I have had experience with different contractors on the same work, and I know what I am talking about."

Then we have Mr. Wallberg's own version as to the circumstances under which these works were started and done. See page 32 of the evidence, which reads as follows:—

"Q. How did you come to do that work?

A. At that time the foundations for several buildings were built; the trenches were open for those, and also were open for further work on foundations, and there was no way of carrying off the rain water, the surface water off the building site. These trenches naturally filled up with water, and remained full, and in spite of any pumping that could be done they filled up again, because these buildings were in the lowest spot of a large area sloping down towards the site in which the buildings were built, and of course the reason the drains were built in that part was because they were in the lowest part, so that they could, when completed, take the surface water and carry it away; the foundations standing in water, it was very detrimental to them and in a dangerous condition for their permanent safety, because this water would soak into the soil and soften it, and naturally, when the load came on the foundations would sink unevenly and crack.

Q. With whom did you make the arrangement, or who made the arrangement with you?

[THE REGISTRAR. Under what circumstances did you do the work?]

MR. FISHER. Q. Under what circumstances did you commence the work?

A. I received plans and verbal instructions from Mr. Mackenzie, the Chief Engineer of the I.C.R.

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[THE REGISTRAR. Q. To do what?]

A. To proceed as quickly as possible to build these sewers and carry on the work as rapidly as I could carry it on, so as to relieve a large amount of water on the ground."

It is perhaps well to mention here, so as not to be misled by the plans mentioned by the witnesses that it appears from the evidence, outside of plan "G," which was in the possession of the Assistant Engineer, Mr. Torrens, during the construction of these works, most of the other plans, especially the cross-section plans, were prepared after the construction of the works, only in 1908.

Now it will appear from what has just been stated that Mr. Wallberg, the contractor, would reasonably be under the impression that he would recover the actual cost of these works, plus 15 per cent profit. It is indeed a very unfortunate thing that he should have thus been placed in such a position, standing between his duty and his interest. Without casting any insinuation, it will obviously appear that he had no interest to perform or execute the work with any economy. The higher the actual cost would be, the larger his profit, and he would in any case be refunded the actual cost. As in the consideration of all matters we have first to look where the interest lies, this element is an important one to bear in mind in approaching the serious question of a fair and reasonable cost.

A great deal of evidence has been adduced and time taken up on behalf of the plaintiff in proving, or attempting to prove, the actual cost of these works to the contractor.

It may perhaps be contended that the actual and honest cost of these works to the contractor, performed with usual skill and economy, might amount to the

quantum meruit we are now seeking. I fear, however, that the actual cost as attempted to be proved would not represent the value of the works.

There was practically no labour time kept by the Government, and with respect to the time kept by the contractor, it is a question whether we have the best evidence in face of the fact that the foreman's slips and the time books of the teamsters' time have been destroyed. There was neither no separate set of books kept by the contractor with respect to these works, notwithstanding the fact that the plaintiff at the time had under way, at the same place, besides the works in question in this case, the four contracts above mentioned, together with a sub-contract from the Rhodes, Currie & Co., for the erection of the planing mill, all of them involving a great deal of work and money which might have a tendency to create confusion in the distribution of the work.

The works were not carried on properly, and there was mismanagement somewhere, says Mr. Willis Chipman, an engineer of uncommonly wide experience respecting work of excavation, and sewers and water systems generally. And in that broad and sweeping assertion he is corrobated by the plaintiff's own witness C. D. Godfrey, a man of great experience and value, commanding quite a salary for one in his walk of life. Mr. Leblanc says he would not have done the work in that way, and gives his reasons. The following are a few excerpts from Mr. Godfrey's evidence.

"Q. How much of the main sewer was done when you took hold?

A. How much had been done?

Q. Yes?

A. Well, they had done that much that if I had been taking the contract, I would have taken it for less money than when I commenced.

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Q. Try that again?

A. If you want to understand it more thoroughly, all the work they had done I considered a detriment at that time.

[THE REGISTRAR. In what way?]

A. In this way, that as the stuff where they had scooped it out in holes had filled in with soft stuff off the banks, and slid right in there, there was no chance for the water to get away from that hardpan or get through it; it was in sort of basins.

MR. FRIEL. You mean by using the teams?

A. It had not kept it level.

[THE REGISTRAR. Q. By leaving a knoll?]

A. Yes, where they would go up and over and down; that run in and was filled up with stuff, and you could not shovel it or do anything with it.

Q. You would not have done it in that way?

A. No, sir, I would not; I would have kept it so that it would have drained. . . . . "

Then, to continue :—

"Q. And they had been using their horses there ?

A. They had been using them before I came.

Q. And this condition of pockets existed all the way along the line?

A. Yes, I could not tell you to the depth.

Q. When you took charge you had to contend with those pockets?

A. Yes, and drain it out and put it in shape.

Q. That is what you mean by saying that you would sooner start now if you were tendering?

A. Yes, with the exception of the clearing.

Q. The grubbing?

A. Yes.

[THE REGISTRAR. Q. How would you have taken the stuff out with a team? Would you have got in sideways?]

A. I would have kept it more level.

Q. All through?

A. I would not have worked the whole sewer; I would have worked it out from the lower end, and would have kept it so that it would have drained. . . . . "

And again,

["THE REGISTRAR. Q. Look at this sketch. Here is your excavation for the sewer. You said it was stripped from the top between two to four feet, and at the lower end there was this platform in the neighbourhood of 50 to 100 feet. Then you went on excavating in the same manner as the others were excavating?]

A. Yes.

Q. And you said that through the system prevailing before, you found there were holes in which the water had accumulated and the soft stuff had run in a liquid state, and you found fault with the knolls?

A. Yes.

Q. Show us where the knolls were?

A. We will say———

Q. There were knolls at different intervals?

A. Yes.

Q. Say how many feet apart, in a general way?

A. Probably 100 feet or 200 or 250.

Q. Where would the knolls be with respect to this?

A. There was scarcely anything taken out where the horses came out. . . . .

Q. What we are more concerned with, we want to know where the knolls stood. Did they stand right in the middle of the excavation to allow the horses to climb up to the side?

A. Well, it was a gradual rise from the lower side.

Q. In the centre of the excavation?

A. Oh, no.

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Q. Where?

A. It would lower all the way from this to the other side, to the other side where they went out. . . . ."

And again, at page 607:—

"Q. All the way across?

A. Not the whole way. There is a passage-way for water, but too narrow to carry that stuff that had blocked up and formed a basin there of mud.

Q. Where?

A. In these places.

Q. Between the knolls?

A. Between the ridges where the teams would come out.

Q. You mean knolls?

A. Yes. I suppose that the passage that had been left there to convey the water was too narrow and was blocked; it was soft and sticky; I could not tell you how it had been dug. . . . ."

MR. FISHER. How did you find it when you came in June? Was the ditch empty or full, or how?

A. I found it all water and mud."

At another place, witness Godfrey further states he would *not let the water go down the ditch.* And Mr. Peter Archibald a well known civil engineer of great experience heard on behalf of the plaintiff, tells us also: "The surface drainage was not kept out of the trench, "and the water came in, and you could not expect any- "thing else but slurry when you left the surface water "in."

Mr. Mackenzie tells us, that "the first thing "that had to be done in doing that work was to "get the water off from the vicinity of the buildings." And that seems to explain a great deal. It was of great moment to get the water away from that area and of great benefit to the buildings; and it was a great relief

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and advantage to the contractor to get rid of this water and to place him in a position to proceed with his contract work on dry territory.

Adverse comments have been made respecting Mr. Mackenzie, because of his universal approval of the cost of the works. I may say that I have, all through the case, taken him to live up to his good reputation of honesty, and his conduct may be readily explained when one bears in mind with him that he has ordered these works to be done, pledging his word that he would see the contractor paid in the manner above mentioned. By his conduct he only shews he is living up to his word. That is all there is in it.

Without going into the minute details of the manner in which these works were executed, it will be sufficient to say that, besides what has already been said by two of the plaintiff's witnesses, trouble resulted from the fact that the sewer was open on its whole length from the creek to the railway track at the same time, and that the surface water was not taken care of in a satisfactory manner. The trenches were of course opened too wide, and after this opening of the sewer in 1906 it was next to impossible when they resumed work the following year, early in June, 1907, to start shoring. Quite a few witnesses speak as to the mode of excavating for a sewer with horses and scrapers, and say notwithstanding their long experience, they never knew or heard of that being done before. This view is especially impressed by Messrs. Leblanc, Chipman and Ker, most honest and knowing witnesses, whose evidence also will bear out the statement that there was nothing about the feature of these works which made them exceptional and took them from the ordinary run of excavation works of that class. The time engaged upon the work was also uncommonly long. Mr. Leblanc built at Moncton a

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sewer 2,400 feet long and 17 feet deep at places, in three months. Shoring should have been done by the plaintiff from the start, and not tried when the banks were in a state not to allow it.

Of course, we have also in this case, that class of evidence given in the usual supercilious manner, which invariably gives that blind, servile and cunning approval to all doings of a certain party,—even where his *modus operandi* is glaringly defective and at fault. That class of evidence can be had in every case; it is always available. However, the least said about it the better.

Under the evidence adduced I hereby find that the so-called actual cost the plaintiff has endeavoured to prove does not represent the fair and reasonable cost of these works executed in a proper manner.

The plaintiff's experience with works of this kind is very limited. It cannot be compared with that of men like Mr. Chipman, a gentleman of uncommon experience and ability who for a number of years has been engaged in that class of work, I might say all over Canada;—like Mr. Ker, the present Ottawa City Engineer, who has a very large experience in such works; like also the practical experience of Mr. Leblanc who gave his evidence in such an honest manner, but who, it must be admitted could not be taken from the actual practical work upon the ground to the reading of plans and explaining of the same. The latter work was too much for him, but it does not militate against that part of his evidence based on actual results.

We will now endeavour to arrive at a fair and reasonable price for the works in question, and deal *seriatim* with, 1st, the concrete sewer; 2nd, the branch sewers; and 3rd, the water system.

MAIN SEWER.

The question of the quantity of excavation and the price per cubic yard for the same, is the one which must be met with and ascertained at the very threshold.

The price charged by the plaintiff under Exhibit No. 5 is $1.13 for excavation, and 33/43 cents for back filling, making the total price for excavation and backfilling $1.46 43-100 exclusive of profit. Upon this point we have had all manner of testimony.

The most reliable evidence upon the subject, one backed by experience and knowledge in excavation for sewers of this kind, is certainly that of Messrs. Lablanc, Chipman and Ker. By referring to that evidence, it will be seen that Leblanc's experience is very large. Besides his numerous works and undertakings, he built between nine and ten miles of main sewer at Moncton, and he places the price of excavation at 75 cents a cubic yard, including back-filling and profit,—adding, further, that he never has had such a high price himself for it.

John Edington, the City Engineer at Moncton, says that on the sewer now under construction at Moncton the excavation runs from 50 to 55 cents for a depth of about ten feet, and under the contract Wallberg, the present plaintiff, had with the City of Moncton in 1908, for an average depth of nine feet, his estimate was in the vicinity of 60 cents, including backfilling and profit. And a fact which is well worth noting is that Leblanc had tendered for the same work and did not get it because Wallberg, with all his experience of the works in question in this case, was tendering lower than Leblanc. Why should the excavation be so much different at such a small distance?

Willis Chipman, Civil Engineer, who has had so much experience in matters of this kind, would call $1, including backfilling and profit, a fair price for

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material of this class. Mr. Ker shares that opinion. To this price of $1 both those gentlemen have added 10 per cent. for contingencies, making the price as high as $1.10.

To make the price of excavation, inclusive of back-filling and profit, not only fair and reasonable, but liberal, I will fix it for the purposes herein at $1.20 per cubic yard.

Now, this brings us to the quantity of excavation for this sewer. It is obvious that the quantities charged in Exhibit No. 5 are excessive; but that is due to the manner in which the works were proceeded with.

It is proven, and I think admitted, that the average depth of the main sewer is 15 feet. As to the reasonable width both at the top and bottom, the evidence is very conflicting; but the evidence of men like Messrs. Leblanc, Edington, Chipman and Ker must be adopted and followed in a case of his kind. Mr. Chipman who is in the habit of laying concrete on earth, would allow four and one half feet at the bottom and nine feet at the top. Mr. Ker, who follows this modern method, which he calls the standard way of doing it, also has the same width. Mr. Leblanc, on cross-examination makes it 8 feet at the bottom and 9 feet at the top.

In order not to be harsh with the plaintiff, but to treat him as liberally as possible under the circumstances, consistent however with the idea that the works would have been done more economically under proper management, the excavation will be arrived at and ascertained in the most favourable manner for the plaintiff, taking it to be of a length of 2,880 feet, including the 80 feet at the cedar box,—the width to be 8 feet at the bottom and 9 feet at the top,—or an average of 8½ feet in width, with an average depth of 15 feet. This will give us a total excavation of 13,600 cubic

yards, which at $1.20 per cubic yard will amount to the total sum of $16,320.

It might be asked why the prices for excavation which are to be found in the schedules of the four contracts were not taken into account. Three prices are found in those contracts. Two are the same under two contracts, and in the other two contracts are different. This would give us three different prices, and for a depth not at all similar to the one in question.

Dealing now with the question of the price of concrete, it may be said that upon this point again the evidence is very conflicting, and it is thought that a price of $15.00 a cubic yard, inclusive of profit, would be fair and reasonable and liberal.

In the schedules attached to the four contracts, the price of concrete runs from $8.50 to $22. Again the witnesses are at variance as to the quantity, and the plaintiff's figures at 1,040 cubic yards will be accepted. Therefore 1,040 cubic yards of concrete at $15 a cubic yard will give us the total sum of.....$15,600 00

To which should be added eight manholes of
4½ cubic yards each..... 540 00

The labour and bolts in building the outlet,
the Crown having supplied the timber... 78 00

Steel reinforcing, as per claim..... 36 00

Supporting tracks, as per claim..... 33 00

Cast iron gates, setting, as per claim..... 41 00

Making a total of.....$32,648 00

There is a further claim made with respect to the main sewer, and that is the excavation of 1,222 cubic yards, which have been measured by the Assistant Engineer Mr. Torrens. It would appear that the plaintiff was ordered to build the sewer at another place on another site than the one in question, and that it had afterwards to be abandoned, the work having

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been started on land which was not owned by the Crown.

For the excavation on this false start, which was composed of only surface excavation so to speak in comparison with the depth of the sewer, the usual high price is claimed.

Under the order of reference recited above, the undersigned has no jurisdiction to entertain such a claim. The question as to whether this work could be construed to come within the works in connection with the case and could be considered in ascertaining the *quantum meruit* the plaintiff should be entitled to recover for the main sewer, is one not free from difficulty, and one which I fear could not be decided in the plaintiff's favour. It is a question which might be left to the mercy and bounty of the Crown. For this work, however, the plaintiff could very properly be paid at the price for excavation mentioned in two of the contracts, it being about similar work and of small depth. A rate of 58 cents per cubic yard would seem reasonable, making thus the total sum of $708.76.

It is taken that the amount is fairly ascertained, if the Crown sees fit to pay it.

BRANCH SEWERS.

The great bulk of the evidence has been adduced more with respect to the Main Sewer than the Branch Sewers and the Water System. When one comes to analyze the evidence with respect to the Branch Sewers, it is found to be rather meagre.

The price asked by the plaintiff is $1.19 for excavation, inclusive of backfilling, but without profit. The prices paid under the contracts for excavating at about the same place, but not quite as deep, runs from 39 cents to 78 cents per cubic yard. The price allowed by Messrs. Chipman and Ker is 80 cents,

plus 10 per cent. It is found that $1 per cubic yard for excavation and backfilling, inclusive of profit, would be liberal, fair and reasonable.

The quantity of excavation claimed is 7,647 cubic yards. The quantity allowed by Messrs. Chipman and Ker is 7,000 cubic yards, with the usual 10 per cent.

The quantity claimed, viz. 7,647 cubic yards, will be allowed at $1 per cubic yard, making the sum of ..... $ 7,647 00

The balance of the items as claimed, will be allowed, (with the exception of item No. 14, which is included in the sum allowed for excavation) viz:..... $ 775 56
3,529 07
29 52
23 63

Making a total sum of $12,004 78

WATER SYSTEM.

"The Water System" says Mr. Wallberg, in giving his evidence, "comprises in a general way a main "pipe leading from the water system and connecting "to the water system of the City of Moncton on "St. George Street, and running for a long distance "up along the railway track to the site of the works, "and then running into the power house, where it "connects with the big power pump of the shops, and "from that another pipe system leads out and extends "all around the outside of the whole grounds covered "by the works, all around the outside of the whole "plot.

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["THE REGISTRAR. What inch would you have to the power house.]

"A. Twelve inch.

"Q. And to the other?

"A. Round the outside of the works is ten inches, "and then from that main extending round the works "there are pipes leading inwards to hydrants in among "the buildings, where required for fire protection.

["THE REGISTRAR. For fire protection?]

"A. Yes, as well as water supply. These hy- "drants were put in for fire protection. Traps were "taken off these hydrants for water service."

The cast iron pipes and the lead were supplied by the Crown. The works consisted in the excavation and in laying the pipes, and all other work incidental thereto.

Mr. Wallberg tells us, that a small part of the works was done in winter time with the view of lessening the cost, assuming that in swampy land it could be done cheaper in a frozen state than in summer. This was also Mr. Mackenzie's view, who says, that it is easier to work in frozen than in boggy or wet ground. One would have thought, however, that very seldom in this country excavation work could be done to advantage in winter time.

Mr. Ker, states that it is practically all the same class of work in water systems. The depth in this climate very seldom varies in water-works trenches. The nature of the excavation alone may vary.

Here again the teams of horses and scrapers were put upon the work, a *modus operandi* unknown to all practical engineers. Here again this manner of proceeding had the effect of increasing enormously the quantity of excavation, without any justification.

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The claim made by the plaintiff in respect of this Water System is $18,488.93. His price for excavation and backfilling is $1.80, without profit. With the 15 per cent. claimed it would bring it up to $2.07 a cubic yard, where for similar work done in the City of Moncton is paid 50 to 60 cents a cubic yard, with an average depth of nine feet. It must be conceded that the nature of the soil was more difficult on account of the water; but all this again is because the contractor neglected to take care of the water and to shore. The price charged by the contractor for pipe laying and jointing is 10¼ cents per lineal foot.

The price for excavation and laying the 12 inch pipe at a depth of from 6 to 6½ feet at Moncton, would, according to the City Engineer, Edington, run from 40 to 60 cents per lineal foot.

The quantities found by Messrs. Chipman and Ker from the plans supplied, will be accepted, but a different and higher price will be allowed for the excavation on account of the difficulties mentioned by the Chief Engineer, Mr. Mackenzie.

One must bear in mind that for excavation at about the same place for the foundation of the buildings a price ranging from 39 cents to 78 cents was allowed under the schedules for any extra work; but this may not be the correct manner of finding a reasonable price, because, as Mr. Ker puts it, contractors sometimes jockey with their prices, charging one very low and the other very high; charging low for such portions of the work of which they expect little to do, and high for the work they expect the most of. These prices are, however, an element to bear in mind.

Mr. Ker, for an excavation of this kind, would allow 75 cents a cubic yard, inclusive of the laying. A price of $1, considering the small depth, should

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be a very high and liberal price, and it will be allowed. We shall then take first the 12inch pipe, and the estimated quantities by Mr. Ker:—

Excavation, 12-inch main, 3 ft. wide by 7 ft. deep, length 2080 ft. at $1 per cub. yd.	$1,617	78
Laying, at 12 cents per lineal foot	249	60
Excavation, 10-inch main, 3 ft. wide by 7 ft. deep, length 4520 ft. at $1 per cub. yd.	3,515	56
Laying, at 10 cents per lineal ft.	452	00
Excavation, 6-inch main, 2½ ft. wide by 6½ ft. deep, length 1,500 ft. at $1 per cub. yd.	902	78
Laying, at 8 cents per lineal foot	120	00
Excavation, 4-inch main, 2½ ft. wide by 6½ ft. deep, length 600 ft. at $1 per cub. yd.	361	12
Laying, at 8 cents per lineal foot	48	00
Setting hydrants, 11 at $5 each	55	00
Setting gate valves and boxes, 27 at $5 each	135	00
Making valve boxes, as per claim	37	12
Supporting tracks, as per claim	147	42
Concrete valve boxes, at end of 12-inch pipe, 8 cub. yds. at $15 per cub. yd.	120	00
Gasolene, as per claim	13	96
Making a total of	$ $7,775	34
To cover any possible deficiency in the reckoning of the quantity of excavation of the Water System, 10 per cent will be added	777	53
	$ 8,552	87

RECAPITULATION

Main Sewer	$32,648.00
Branch Sewers	12,004.78
Water System	8,552.87
	$53,205.65
To this may be added the sum of	708.76

as representing the work done on the false start, and ascertained as above mentioned.

Making a total of $53,914.41

This sum represents the fair and reasonable value of these works, nay, it is not only a fair and reasonable value, but is a very liberal price to any ordinary contractor, and Mr. Wallberg tells us, at page 158, that he did say to Mr. Mackenzie he would be the proper person to execute these works, because he was on the ground performing contracts with respect to the same, and that he could do it cheaper.

Interest is asked upon the amount the plaintiff would ultimately recover, from the 26th January, 1909, which would, I take it, be the date the Government received this claim for $105,940.15, which is dated the 25th January, 1909, and is attached to the reference by the Minister. The Crown has made no tender, no amount was ever offered.

Can such interest be allowed? Much as I would like to find the law enabling me to do so, as I think the plaintiff is in equity entitled to the interest on his money, if not from the completion of the works, at least from the date of the reference to the court. I fear the law will not allow it.

Interest is payable by the Crown under contract and by statute. There is no statute in force outside of the Province of Quebec which would authorize the Court in a case such as this to allow interest.

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The Crown can do no wrong and is not liable in tort, except under special statute, and therefore awarding interest in the nature of damages cannot be allowed.

In the case of the *Algoma Central Railway Co.* v. *The Queen* (1), decided by the Exchequer Court of Canada, the Crown having been condemned to repay the sum of $3,500 it had collected for customs duties, the question arose as to whether this amount should be so repaid with interest. As there was no statute authorizing the Court in a case such as this to allow interest, it was refused. The learned Judge in discussing this question of interest (2), said:—

"Perhaps in passing one might point out that in that respect the statute law of Canada is not less liberal than that of other countries. In England there is no statute allowing interest to be recovered in such a case; and in the United States it is expressly enacted that no interest shall be allowed on any claim up to the time of the rendition of the judgment by the Court of Claims, unless upon a contract expressly stipulating for the payment of interest. (Acts of the 3rd of March, 1863, R.S.U.S., s. 109; *Tillou* v. *The United States* (3).

"It is certain also that there was in this case no contract on the part of the Crown to pay interest. That being so, it only remains to ask the question whether or not damages in the nature of interest may be allowed for the wrongful exaction of the duties, or for the wrongful detention of the money. But that obviously cannot be done without making the Crown liable for a wrong done to the suppliant. And the Crown can in law do no wrong, and for the wrongs of its servants it is not answerable, unless expressly made liable by statute.

(1) 7 Ex. C. R. 239. (2) 7 Ex. C. R. at p. 269.
(3) 1 C. Clms. 232.

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"Then with regard to the wrongful detention of money, the case of *The London, Chatham and Dover Railway Co.* v. *The Southeastern Railway Co.* (*1893*, L.R. App. Cas. 429) is an authority that even as between subject and subject interest cannot at common law be given by way of damages for the detention of a debt, the law upon the subject, unsatisfactory as it was said to be, having been too long settled to be departed from.

"There are, of course, statutes such as the Acts of the Parliament of the United Kingdom, 3 and 4 Wm. IV, c. 42, ss. 28 and 29, which make interest or damages in the nature of interest recoverable in cases where it was not recoverable at common law. The provisions of that Act either by express reenactment here, or by reason of its application as part of the law of England, are in force in most of the provinces of Canada. (7 Wm. 4 (U.C.) c. 3, ss. 20, 21; C. S. U. C. c. 43, ss. 1, 3; R.S.O. (1877) c. 50, ss. 266, 268; R.S.O. (1897) c. 51, ss. 113, 115; R.S.N.S. 1st S. c. 82, ss. 4 and 5; R.S.N.S. 4th S. c. 94, ss. 231 and 232; 12 Vict. c. 39 (N.B.) ss. 27 & 28; C.S. (N.B.) c. 37, ss. 118 and and119; 28 Vict. (P.E.I.) c. 6, ss. 4 and 5.

"The Act in force in the Province of Ontario goes further than the English Act and provides that interest shall be payable in all cases in which it was payable by law, or in which it has been usual for a jury to allow interest. (See the following cases: *Michie* v. *Reynolds* (1), and *McCullough* v. *Newlove* (2). But the rights and prerogatives of the Crown are not affected by these statutes, it not being provided therein that the Crown shall be bound thereby.

(1) 24 U. C. Q. B. 303. (2) 27 Ont. R. 267.

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"If the action were against the Crown's officer, he would be bound, and his liability to damages in the nature of interest would depend upon the law in force in the province in which the cause of action arose; but it is not so with respect to the Crown.

It has been held by the Supreme Court of Massachusetts that where taxes, assessed without authority are recovered back, interest may also be recovered; (*The Boston & Sandwich Glass Co.* v. *The City of Boston* (1); but the Crown stands in this respect in a wholly different position from a civic or municipal corporation.

"Then there is a class of cases in which where administration on behalf of the Crown to the estate of a person dying intestate without leaving any known next of kin is taken out, and the proceeds are paid into the treasury; if thereafter the next of kin obtains a decree in his favour interest is allowed on such proceeds (2).

"But in these cases the action was brought against the Crown's nominee or representative, not against the Crown itself, by petition of right. They stand upon a footing of their own and cannot be considered as authorities for the proposition that the Crown is liable for damages in the nature of interest." (See also Audette's Exchequer Court Practice, 2nd Ed. pp. 87, 88, 89 and following).

If the action had originated in the Province of Quebec and were to be decided according to the law of that Province, it would be different, as Taschereau, J. says, at page 434, 28 S.C.R., in the case of *The Queen* v. *Henderson*:—"The law of the Province of Quebec

(1) 4 Metc. 181.

(2) *Turner* v. *Maule*, 18 L. J. Ch. N. S. 454; *Edgar* v. *Reynolds*, L. J. 27 L. J. Ch. N. S. 562; *Attorney-General and Reynolds* v. *Kohler*, 9 H. L. C. 655; *Baur* v. *Mitford*, 3 L. T. N. S. 575; *Partington* v. *The Attorney-General*, L. R. 4 E. and I. App. 101.

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"rules the case, and according to that law, such inter- "est must be allowed upon a claims of this nature. "This is not a case upon a written contract, so that "Section 33 of The Exchequer Court does not apply". (1) This might at first sight appear as an anomaly, but the same thing occurs with respect to the doctrine of common employment which is no part of the law of the Province of Quebec, while it is in force in all the other provinces.

THEREFORE, the undersigned has the honour to submit and report that the plaintiff is entitled to recover from His Majesty the King the sum of fifty three thousand two hundred and five dollars and sixty five cents ($53,205.65) in full satisfaction for the works in question herein, with the costs of the action and of the reference, after taxation thereof.

The question of the payment of this sum of $708.76, as representing the value of the excavation in connection with the false start, is one which is left to be adjusted between the parties herein, the undersigned having no jurisdiction to pass upon the same.

The plaintiff appealed from this report.

December, 20, 1909.

The appeal from the report of the Referee now came on for argument.

W. Nesbitt, K.C., and *H. Fisher* for the plaintiff; and *J. Friel*, for the defendant.

Mr. Nesbitt: Our principal contention is that the Referee has erred in applying the principle of *quantum meruit* to the case. We say that we are entitled to be paid what our services and materials are worth as the work was executed by us. In the absence of fraud, and the evidence wholly negatives that,

(1) See also upon this point Audette's Exchequer Court Act Practice, 2nd ed., pp. 99 and 92.

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we are entitled to what we reasonably expended in carrying out the instructions of the Chief Engineer. It is not a question of whether the work was done on the most economical plan that might have been devised; we have nothing to do with that. It was for the Engineer to lay out the plan, and for us to obey his instructions. The evidence establishes that that is what we did to the letter. If the Crown finds fault with their engineer, that is not a matter for us. It is a very simple question in issue between the parties; it is merely to ascertain what the contractor is entitled to on a *quantum meruit*. Not only was the work laid out by the Chief Engineer, but the execution of it was under the superintendence of the officials of the Crown. The work was done under the particular supervision of Mr. Torrens, who took his orders from the Chief Engineer.

The Referee misconstrues the scope of the reference under the consent order, and undertakes to find what the work could be done for under a different and supposedly more economical plan. We submit that that is not the method that he should have adopted under the order of reference; but it was his duty to find the fair value of the work and materials as they were performed and used in carrying out the instructions of the Chief Engineer. It is no part of the referee's duty to sit in judgment on the manner in which the Chief Engineer has conducted himself with reference to the works in question. There is no charge of fraud or collusion between the Chief Engineer and the contractor, and all considerations as to extravagance or unsuitable plans have nothing to do with the issue raised between the parties here. (*Bush* v. *Whitehaven* (1),

(1) Hudson on Building Building Contracts, vol. 2, p. 121 ; 52 J. P. 392.

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The Referee has refused to allow the contractor for the work done on the "false start." This false start was made on the instructions of the Engineer, and as the contractor honestly performed the work he is entitled to be paid for it.

We also claim that we are entitled to fifteen per cent. profit as promised by the Chief Engineer. Fifteen per cent. profit is a regular thing in contracts performed in the West and in Ontario for force work. It is perfectly proper to allow such a percentage in this case. In addition to this the contractor has to find the money to carry on the work, and bank interest has to be included in the fifteen per cent.

With regard to the character of the cement put into this work, the evidence shows that it was a richer cement than was generally used in buildings. It is submitted that the court, under the order of reference, has no discretion to review the decision or judgment of the Chief Engineer; that is not in question here. We are prepared to accept the Chief Engineer's figures, and we submit that upon the evidence they are fair to the Crown in every way.

Mr. Fisher, following for the plaintiff, contended that the contractor should get the fair value of the work done. Engineers taken on the ground as experts after the work was done, and the nature of the difficulties of excavation covered up, could not be expected to give the fair value of the work actually executed. We have nothing to do with the hypotheses of experts; the order of reference requires the court to allow us the fair value of the work *as executed*.

Mr. Friel, for the defendant, argued that the Chief Engineer had no authority from the Department of Railways and Canals to give the contract in question to Wallberg. Further than that, he did not at the

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outset, as was his duty, prepare plans showing the character of the work that the contractor was required to do. True, plans are in evidence; but it is submitted on behalf of the Crown, as the evidence is, that they were prepared after the event. Then again we have not the original time sheets in evidence. The evidence offered by the plaintiff is to the effect that the foreman's time-sheets were destroyed.

[*Mr. Nesbitt.* The best evidence as to the time is before the court. We have the original time-sheets.]

The evidence shows that the work was begun at the worst time of the year for meeting difficulties. They began it late in the fall. The whole evidence bears upon its face the suggestion of extravagance and want of care. Then again there were no progress estimates, and the Department was kept wholly in the dark as to the character of the work that was being done.

We contend that the Referee was absolutely right in his application of the principle of *quantum meruit* to this case. It was his duty to find what the work could be reasonably done for, and this he has reported. To place any other interpretation upon the order of reference would do violence to the intention of the Crown in referring the case to the court.

Mr. Nesbitt replied citing *Murray and Cleveland* v. *The Queen* (1).

CASSELS, J. now (January 22, 1910) delivered judgment.

This is an appeal from the report of the Referee dated the 30th October, 1909.

The appeal was argued before me on the 20th December, 1909.

(1) 5 Ex. C. R. 19; 26 S. C. R. 203.

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The action was instituted by the plaintiff Wallberg claiming payment for certain works performed by him in connection with the property of the Intercolonial Railway at Moncton.

Wallberg had contracts for the erection of certain buildings for the Intercolonial Railway at Moncton. The cost of these erections was in the neighbourhood of of $1,000,000.

The facts connected with these contracts are detailed in the very carefully prepared report of the Referee.

It appears that in the preparation of the plans for the buildings in question no provision had been made for drainage or water connection. The contracts are in writing.

Mr. W. B. McKenzie, who has been the Chief Engineer of the Intercolonial Railway since 1897, was entrusted by the Government with the supervision of these works. Mr. McKenzie has been in employ of the Government since 1872.

Throughout the whole of the prolonged enquiry no suggestion has been made that Mr. McKenzie was not thoroughly competent to perform the duties imposed upon him, nor is there the slightest slur cast upon his integrity or good faith.

With the view to procuring the buildings being erected by the contractor Wallberg, and to obtain the necessary water supply and drainage, Mr. McKenzie directed Wallberg to proceed with the works in question. They comprise what are called:—

1. The main sewer;
2. Branch sewers;
3. Water system.

He undertook with Wallberg that the Government would pay him the actual cost of the works and an additional sum of 15 per cent. contractor's profit. No

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written contract was entered into. The works in question were commenced in 1906 and completed about 1908. Wallberg was not paid for the works and applied to the Government after their completion for payment.

The Government, represented by the Minister of Railways, acting with fairness agreed to pay him; but being dissatisfied with the amount claimed directed a reference to the Exchequer Court to ascertain the amount properly due. Thereupon a statement of claim was filed by Wallberg setting out his claim. The defendant filed a defence. The fifth paragraph of the defence is as follows:—

"5. The Minister of Railways has accepted and taken over the said works on behalf of His Majesty and is willing to pay the fair value of the same, but not the amount claimed, which is considered excessive."

The defendant denied that the claim in question could be claimed as extras under the contracts referred to.

Counsel for the plaintiff and also for the defendant both agreed that the case was one for a reference under the provisions of the *Exchequer Court Act* and the Rules of Court, and thereupon an order was made as follows:—

"2. This Court doth order that it be referred to the Registrar of this Court for enquiry and report and to ascertain the value of the works executed by the Plaintiff referred to in the Statement of Claim, and in respect of which this action is brought.

3. And this Court doth further order that the amount to be ascetained shall be the fair value or price thereof allowed on a *quantum meruit*."

The trial was proceeded with before the Registrar and an enormous amount of evidence adduced, followed

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up by the report in question by which the plaintiff was allowed the sum of $53,205.65, without interest.

The Referee has expended a great deal of time on consideration of the case and the preparation of his report.

The case on appeal was presented to me by Mr. Nesbitt, K.C., in an aspect, as I was informed by counsel on the appeal, not presented before the Referee.

Since the argument I have perused and considered the mass of evidence and documents, and in my opinion the Referee has not adopted a correct method of dealing with the case.

The Referee has dealt with the case as if the market value of the work had to be ascertained, and adopting the views of Messrs. LeBlanc, Chipman and Ker, has concluded that the works could have been executed at a much less cost than the actual cost, had a different plan of construction been adopted than the plan adopted by Mr. McKenzie. Even on this view of the case, for reasons I will give later on, I would not be prepared to accept the conclusions of Messrs. LeBlanc, Chipman and Ker as against the views of Messrs. Holgate, St. George and Archibald. All these gentlemen, Messrs. LeBlanc, Chipman and Ker, Holgate, St. George and Archibald are men of eminence in their profession. They are expert witnesses no doubt intending honestly to put forth their different views, and I see no reason for any reflection being made against any of them. Some of them, notably Mr. St. George, had personal knowledge of the locality in question, and was much better qualified to give evidence by reason of his intimate knowledge of the character of the locality and soil than the others accustomed to deal with sewerage works in other localities.

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In the first place, to consider the question of how the case should be approached: The statement of claim sets out the cost of the works including the cost of excavation for what is called the " false start."

It has to be borne in mind, as stated, that McKenzie was the trusted employee of the Government. Wallberg is a trusted contractor under the Government. No imputation of bad faith is made against him. He was under the strict orders of Mr. McKenzie who directed the method of carrying on the work. How can any question of self-interest as against duty arise? It is proved conclusively that all sums claimed for wages have been paid. The vouchers are produced from which this fact is clear. Every precaution seems to have been taken to have the correct time of the men ascertained. The vouchers were satisfactory to those in charge representing the Government. The men received their pay as shown by the time-sheets. Is it to be assumed that for the paltry sum of 15 per cent. on the wages Wallberg would pay the men sums in excess of the amount to which they were entitled ? I think such a presumption should not be entertained. Now, we have the works proceeded with directed by Mr. McKenzie. The width of the ditch is marked. His evidence is clear that in his opinion it was not too wide. Torrens acting under McKenzie was superintending the work. Rhindress also, in charge of the cement, was seeing that the contractor did his work properly. All are agreed that the work as completed is well done. It is true that the plans shewing details were prepared after the work was completed, no doubt with the view to a record being kept. These plans shew the works as completed. Nevertheless the work was done under the direction and as ordered by the Chief Engineer. This being the case the consent judgment was pronounced.

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The form of judgment is incorrect if it is open to be construed as a reference to the Registrar as an arbitrator, or *persona designata*, without appeal (1).

What really took place was an agreement that the case was one proper for a reference, the terms of reference being agreed upon, and then I made the order. It was intended the reference should be the ordinary one with right of appeal as usual. No question against the right to appeal has been raised before me.

Bearing in mind that the claim as presented by the statement of claim is for the works as executed under the directions of McKenzie, the judgment directs an inquiry "to ascertain the value of the works executed "by the plaintiff referred to in the Statement of Claim "and in respect of which this action is brought," and proceeds to direct "that the amount to be ascertained "shall be the fair value or price thereof allowed on a "*quantum meruit*".

There being no written contract making McKenzie the sole judge the Crown is not bound by his report as to the amount due. But the Crown does admit his authority in ordering the works. To my mind it would be manifestly unfair to the contractor in the face of what has taken place, and in the face of this judgment, to act on the evidence of other engineers who endeavour to show that McKenzie might have adopted a different plan which would have cost less. It seems to me the case must be viewed from the standpoint of the works being executed on the plans of Mr. McKenzie and, accepting his plans, then a *quantum meruit*.

If during the execution of these works extra expense was incurred through the negligence of the contractor, this amount of course would not be allowed, but what is fair and reasonable in carrying out the particular

(1) See *Fraser* v. *Fraser* (1904) 1 K. B. 56.

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works should be allowed. If McKenzie is incompetent, and might have adopted a better and cheaper method, why should the contractor suffer? I do not think the evidence shows that he was incompetent. I think a careful analysis of the evidence proves that he knew what he was about.

It is said the market value should be the test. I do not so view it. *Quantum meruit* is thus defined in the books:—

"When a person employs another to do work for him, without any agreement as to his compensation, the law implies a promise from the employer to the workman that he will pay him for his services as much as he may deserve or merit" (Bouvier's Law Dictionary, p. 801).

"The value is the 'reasonable' value." (1).

"*Quantum meruit* is the reasonable amount to be paid for services rendered for work done, when the price therefor is not fixed by contract." (2).

Now, suppose I instruct a contractor to build me a house of ordinary size, say rentable at about $400 per annum. A brick wall of the thickness of 1½ bricks would be sufficient for all practicable purposes. There is no written contract. I have a whim that I would like a wall about three feet thick, and I tell the contractor to so build the house. The contractor follows my instructions and gets paid on a *quantum meruit*. The extra thickness of wall would have little or no effect on the market price, but is not the contractor to be paid for the work?

It appears from the evidence of Mr. McKenzie and of Mr. Torrens that peculiar difficulties were encountered in the performance of the work. McKenzie

(1) 12 Ency. of Laws of Eng., p. 1635, citing 3 Black Com. 161; 153. *Cutter* v. *Powell*, 6 T. R. 320; *Sumpter*

(2) Stroud's Judicial Dictionary, v. *Hedges*, (1898) 1 Q. B. D. 673.

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gave the directions as to the width of the cut. According to some of the evidence even this width was insufficient to allow the banks to stand. According to Holgate the slope should have been greater. The material is peculiar. It is a question of paying for a greater amount of excavation with a greater width, or a smaller amount for getting rid of the material falling in. I think the evidence shows that the width of the cutting was not too great. Greater reliance should be placed on the evidence of those who were present on the ground and saw the actual state of affairs, than on expert testimony given by witnesses testifying after the completion of the work. See *Gareau* v. *Montreal Street Ry. Co.* (1), where the head-note in part reads as follows:—

"HELD (Taschereau, J., dissenting): That notwithstanding the concurrent findings of the Courts below, as the witnesses were equally credible, the evidence of those who spoke from personal knowledge of the facts ought to have been preferred to that of persons giving opinions based merely upon scientific observations."

Moreover, Mr. St. George and Mr. Archibald have knowledge of the locality and the character of the soil and the difficulties to be encountered, and they were both in accord with the manner of doing the work adopted by Mr. McKenzie. If the soil is as described I do not think Mr. Leblanc's idea of a proper slope very feasible.

Both Mr. Chipman and Mr. Ker give in the main theoretical evidence. The Referee in his report referring to branch sewers, states:—"The quantities found by Messrs. Chipman and Ker from the plans supplied will be accepted, but a different and higher price will be allowed for the excavation on account of

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the difficulties mentioned by Chief Engineer Mr. McKenzie."

It would appear from this finding that in the opinion of the Referee, neither Mr. Chipman nor Mr. Ker was cognizant of the difficulties.

In dealing with the main sewer, the Referee refers to the excavation. He states it is obvious that the "quantities charged in Exhibit No. 5 are excessive but that is due to the manner in which the works were proceeded with."

He allows for a length of 2,880 feet, the width to be 8 feet at the bottom and 9 feet at the top, with an average depth of 15 feet. I have endeavoured to point out that in my opinion this was not the proper method of arriving at what the contractor is entitled to. It is also obvious that a sewer 15 feet in depth and 8 feet wide at the bottom and 9 feet at the top must require a greater slope. The evidence as to shoring in streets of a city has but little application.

Then as to wages, neither Mr. Chipman nor Mr. Ker seem to be cognizant of the peculiar difficulties surrounding this work and the difficulty of procuring labour.

I hesitate at overruling the Referee, who has great experience in cases of this nature, and has given very full consideration to the case, but after the fullest consideration of the evidence I have formed the opinion I have expressed.

I think the plaintiff is entitled to the amount expended for the work on the so-called false start. The sum found by the Referee is $708.76. I think it is covered by the Reference and no reason exists why the contractor should not be paid.

I think on the evidence as a whole the plaintiff should be paid the amount found as due by Mr.

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McKenzie, but not any amount for accidents to workmen, loss of horses, or wear and tear of machinery. He is entitled to the fifteen per cent. profit. I do not think he can recover interest.

If there is any difficulty in arriving at the amount on the basis of this judgment the matter can be referred back to the Referee to settle the amount.

Costs of this appeal to the plaintiff.

*Judgment accordingly.**

Solicitor for the plaintiff: *Harold Fisher.*

Solicitor for the defendant: *J. Friel.*

*REPORTER'S NOTE.—This judgment was reversed on appeal to the Supreme Court (3rd April, 1911), judgment being ordered to be entered for the plaintiff in the amount reported by the Referee.

IN THE MATTER OF THE PETITION OF RIGHT OF

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Nov. 19.

JOHN L. GARLAND, EDITH GARLAND, EMMA MARIA GARLAND, EXECUTORS AND TRUSTEES OF THE ESTATE OF JOHN MUTCHMOR GARLAND, AND NICHOLAS GARLAND..... } SUPPLIANTS;

AND

HIS MAJESTY THE KING..... RESPONDENT.

Rideau Canal lands—Agreement to convey—Action to enforce parol Agreement—Acquiescence by Crown's Servants—Specific Performance—Damages—Title to Canal Lands delimited prior to Confederation under C.S.C. 1859, Cap. 24.

The suppliants sought to obtain a declaration by the court that they were entitled to a grant from the Crown, represented by the Dominion of Canada, of a certain parcel of land being part of several parcels conveyed by *J. M.*, (of whom suppliants were the legal representatives) to the late Colonel By for the purposes of the Rideau Canal. There was no written agreement to sell and convey, but the suppliants based their right to the grant upon the acquiescence of certain officials of the Crown in the validity of their claim. The facts in evidence however, disclosed that the parties were negotiating with a mistaken view of their rights.

Held, that the suppliants had shewn no valid agreement on the part of the Crown to convey; and that if the suppliants were otherwise entitled to specific performance, or damages in lieu thereof, the mutual mistake of the parties as to their rights would afford a sufficient defence thereto.

Quære,—If the fact were that in 1862 the Ordnance Department prepared a plan delimiting and laying off certain land (including the parcel in controversy) as required for canal purposes to the extent of a chain in width on each side of the canal, whether, under the provisions of C.S.C., 1859, cap. 24, sec. 1, the lands in dispute had, upon such delimitation, not become vested in the Province of Canada, so as to pass at Confederation to the Province of Ontario instead of to the Dominion? *Commissioners Queen Victoria Niagara Falls Park* v. *Howard* (23 O.A.R. at pp. 360, 361) referred to.

THIS was a petition of right for the recovery of certain lands in the possession of the Crown.

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Argument of Counsel.

The facts are stated in the reasons for judgment.

November 3rd, 1910.

The case was now argued at Ottawa.

N. A. Belcourt, K.C., for the suppliants, argued that while there was no written contract by the Crown to grant the suppliants letters-patent, the evidence clearly shewed that the Crown officers assumed there was such a contract and acted upon that view in their dealings with Mutchmor. It is a case where, as between subject and subject, a decree for specific performance would undoubtedly be made. In 1868, when Mutchmor paid in his $30, he was entitled to get back all land which the Crown did not need for canal purposes. (Cites R.S., 1906, c. 58, secs. 2 and 3.)

There was an implied agreement entered into concurrently with our going into possession. This agreement was never questioned, and the Crown would be estopped from denying it after its officers acted upon it for so long a period. (Cites *Magee* v. *The Queen* (1); *Tylee* v. *The Queen* (2); *Qu'Appelle, &c. Ry. Company* v. *The King* (3); *McQueen* v. *The Queen* (4); *Henry* v. *The King* (5.)

F. H. Chrysler, K.C. The Crown purchased lands, including the parcel in question, from the suppliants' predecessor in title, and leased back to him what was not required for the canal. There was no agreement at all to reconvey the piece in dispute. No money passed in respect of this particular lot, and there is no ground for specific performance even between subject and subject.

[CASSELS, J. Is the statute of frauds open to you as a defence ?] Yes; we have set it up in the defence.

(1) 3 Ex. C. R. 304.
(2) 7 S. C. R. 651.
(3) 7 Ex. C. R. at p. 117.
(4) 16 S. C. R. 1.
(5) 9 Ex. C. R. 417.

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CASSELS, J., now (November 19th, 1910) delivered judgment.

This is a petition of right filed on the part of the representatives of one John Mutchmor, deceased, claiming a declaration that they are entitled to have a certain piece of land (described in the petition) granted to them by the Crown.

By consent, leave was granted to the suppliants to amend their petition by properly describing the land.

The land in question forms part of the lands granted by one John Mutchmor to Colonel By on behalf of His Majesty King George IV by deed bearing date the 15th June, 1830.

By the conveyance of the 15th June, 1830, in consideration of £5 of lawful money of Upper Canada, John Mutchmor conveyed several parcels of land comprising about 20 acres to Colonel By.

The lands, the subject-matter of the present action, are shown on the plan marked Suppliants' Exhibit No. 1. They are situated to the west of the Exhibition Building, and immediately adjoining on the east the allowance for road between Concessions B and C. They comprise four and one-half acres, more or less.

There is no dispute as to that portion of the four and one-half acres coloured green on the plan in question, being the northerly part of the triangular piece. The dispute is as to the portion of the four and one-half acres coloured pink.

The contention on the part of the Crown is that this piece coloured pink, having a depth of 200 feet from the canal, is required for canal purposes, and that the Crown never agreed to convey any portion of this piece.

The suppliants on the other hand contend that they are entitled to have conveyed to them all of the piece

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coloured pink, except such portion thereof as would be included in a depth of one chain from the canal. The suppliants base their case on an alleged agreement whereby the Crown agreed to convey to them all the lands conveyed by Mutchmor in 1830, except such portions as were required for canal purposes, and the contention is that a depth of 66 feet is all that is required, and that they are entitled to a conveyance of the balance.

In 1898 a grant was executed by the Crown conveying the portion of other parts of the 20 acres not required for canal purposes. These lands so conveyed comprise all the lands referred to in the correspondence, with the exception of the piece in question.

A reference to *Magee* v. *The Queen* (1) ; *Tylee* v. *The Queen* (2); *McQueen* v. *The Queen* (3), will show the statutes relating to the construction of the canal. It is not necessary to consider these authorities in dealing with the case before me.

The case as presented by the petition is as follows:—

"1. That on or about the 15th day of June, 1830, John Mutchmor, farmer, of the township of Nepean, in the County of Carleton and Province of Ontario, now deceased, who was then the owner in fee simple of all the lands hereinafter referred to, at the request of His late Majesty King George IV, and for the purpose of building part of the Rideau Canal, conveyed by deed before witnesses to His Majesty certain parts or portions of Lot 1 in Concession Letter '(C)', Rideau Front, in the said township of Nepean in said deed described more particularly for and in consideration of the sum of Twenty dollars.

"2. That concurrently with the conveyance in the last paragraph recited to wit: On or about the said

(1) 3 Ex. C. R. 304. (2) 7 S. C. R. 651.
(3) 16 S. C. R. 1.

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15th day of June, 1830, His late Majesty King George IV granted unto the said late John Mutchmor a lease of all the lands above described at a yearly rental of one dollar for the term of thirty years from the said date, with the right to a renewal thereof at the expiration of said thirty years at an increased rental of one fourth upon the purchase money, the said Mutchmor agreeing to pay all taxes, assessments and other charges on said lands; and in and by the said lease the said Mutchmor released His Majesty from all claims to damages by reason of the building of the said canal.

"3. That under and by virtue of the said lease His Majesty reserved to himself the right to cut and take from the said lands trees, stone and other material necessary for the construction of the said canal and also to take such parts of said lands as might be considered necessary for military works or for the completion of the Rideau Canal aforesaid, or for repairs or for additions after the completion of the same. The said Mutchmor to be entitled to have reconveyed to him such portions of said lands as should not be required for the purposes above named upon re-payment by said Mutchmor of the purchase money aforesaid, namely, the sum of Twenty dollars".

The words in paragraph 3: " The said Mutchmor to 'be entitled to have reconveyed to him such portions 'of said lands as should not be required for the pur-'poses above named upon repayment by said Mutch-'mor of the purchase money aforesaid, namely, the 'sum of Twenty dollars" are not to be found in the lease, and there is no foundation for any such alleged agreement so far as the evidence before me discloses.

Also it is material to consider the terms of the lease. The lease is for the term of thirty years from 15th June,

1830; the annual rent 5 shillingsp (5 per cent.) interest on the purchase money).

An option to renew the lease at the expiration of thirty years at an increased rental is given to the lessee.

It is admitted that Mutchmor, or his representatives, have always had possession of the lands leased, with the exception of the piece of land colored pink. Mutchmor, or his representatives were in possession of this piece down to the year 1903, when the Crown leased the portion colored pink, having a depth of 200 feet, to the Ottawa Improvement Commission for driveway purposes, subject to the proviso that at any time if the land were required for canal purposes the Improvement Commission would vacate the premises.

Another important fact is admitted, namely, that one Lascelles, a tenant of Mutchmor, was in occupation of the portion of colored pink at the time of the lease to the Improvement Commission, and was paid $100 by the Commissioners and given the right to remove his house.

To entitle the suppliants to relief, in whatever form a judgment might issue, they must prove a contract capable of enforcement. The suppliants in their petition state their case as follows:—

"5. That in the year 1868 the legal representatives of the said Mutchmor applied to Her late Majesty Queen Victoria for re-conveyance to them of those portions of the said lands which were not required for the purposes of the said canal, and Her late Majesty, represented by the then Under-Secretary of State for Canada, to wit: on the 18th day of December, 1868, notified the said applicants in writing that upon payment of the twenty dollars paid to said Mutchmor by His late Majesty King George IV on or about the said 15th day of June, 1830, and subject to certain condi-

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tions in said letter mentioned, a grant by way of Letters Patent would be issued to the legal representatives of the said late John Mutchmor.

"6. That subsequently, to wit: On the 16th February, 1869, the legal representatives of the said Mutchmor were notified by the then Under-Secretary of State that unless an immediate settlement were made with, and the said sum of Twenty dollars paid to, the proper authority in that behalf the lands in question would be included in the scheme which was then pending for the purpose of disposing of the said lands and other lands.

"7. That in pursuance of the said agreement and of their application for a reconveyance of the said lands and in conformity and in compliance with the said notices the legal representatives of the said Mutchmor, on the 25th day of June, 1869, paid to Her late Majesty, represented by the proper officer in that behalf, the said sum of Twenty dollars and on the 30th June, 1869, a receipt was made and given to the legal representatives of the said Mutchmor by the proper officer in that behalf, namely, W. F. Coffin, being the officer then having charge of this matter, for the sum of Twenty dollars, being the consideration in full for the reconveyance of the said lands, subject, however, to the condition that the legal representatives of the said Mutchmor would hold Her Majesty harmless from any and all damages arising from the flooding of the said lands or any other damage at any time.

"8. That the said John Mutchmor and his representatives have always been and are now entitled to have and receive from the Respondent a conveyance of the portions of the said lands not actually required for the purposes of the said Rideau Canal."

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The letter of 24th July, 1868, written by Mr. Scott to the Honourable H. L. Langevin, C.B., (Exhibit No. 13) is as follows:—

'OTTAWA, 24th July, 1868.

'The Hon. H. L. Langevin, C.B.

Sir,—On behalf of Mr. Mutchmor, I have the honour to request that the lease of certain property in Nepean, granted by Col. By and held in perpetuity, may be converted into a freehold. The rental being nominal, only $1.25 per year, it would be convenient to Mr. Mutchmor to hold an absolute deed subject if considered necessary, to such conditions as are contained in the lease. The property originally belonged to the Mutchmor family and forms a part of that taken for the Rideau Canal. The twenty acres mentioned in the lease, having been returned, Col. By considering it would not be required for canal purposes, and the experience of the last forty years fully confirms that view.

I have the honour to be,
Your Obdt. Servant,
(Sgd.) R. W. SCOTT."

On the 10th December, 1868, Mr. Parent, Under-Secretary of State, writes Mr. Scott as follows:— (Exhibit No. 14):—

"Dept. of Sect. of State,
Ottawa, 10th Dec. 1868.

"Sir,—I am directed to address you the present communication on the application preferred by you on behalf of Mr. Alex. Mutchmor of Ottawa in Nepean, dated 24th July last. Mr. Mutchmor applies by two letters dated 24th July, 1868, 1st, that the tenure of 3 pieces of land forming part of Lot Letter "I" Con. C, Nepean, be changed from leasehold to freehold. The

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said lease is renewable at the option of the said Mutchmor at the end of each and every thirty years. The first piece lies at the southwest angle of said lot Letter I, Con. C, and in the lease is stated to contain four and a half acres, more or less. There is no objection to his resuming so much of the land as lies outside to the north of the 200 feet required for canal purposes.

The second is a triangular piece as shewn on the plan stated to contain six and three quarter acres and lies between the Ordnance Boundary stones 30, 31, 32 on the said lot Letter I. There is no objection to the resumption by Mr. Mutchmor of the whole of this piece of land.

The third piece of land lies on the east and west banks of the Rideau Canal on the said lot Letter I between the Ordnance Boundary stones 14, 15, 33, 34, containing as stated eight and a half acres of land. There is no objection to the resumption of this piece of land, with the exception of one chain wide on each side of the canal required for canal purposes. On payment to the Department of the sum of $20 originally paid for the land, and provided always that the said Mutchmor holds the Department, harmless from the consequences of any flooding and from any damage from this or any other cause at any time hereafter.

2nd. Mr. Mutchmor requests to be allowed to buy two pieces of land shown on a plan produced by him, but more clearly described on a plan by Thistle, P.L.S. certified by Andrew Russell, Asst. Commr. of Crown Lands, Quebec, 16th January, 1862, and known thereon as sub-lots 31, 32, 33, contents one acre and one-fifth of an acre, and reserving always two hundred feet in front of the said lots for the use of the canal. Mr. Mutchmor might be allowed to buy the said

sub-lots at the rate of $150 per acre or for sub-lots 31, 32, 33 the sum of $225, and for said sub-lots 40, 41, 42 the sum of $180, or $405 for the whole. On payment therefor of $425, letters-patent might issue which would contain the proviso guaranteeing the Department against all damages or claim for damages.

I have the honour to be, Sir,
Your obedt. servant,
(Sgd.) E. PARENT,
Under-Secy.

To R. W. Scott, Esq."

Both in the letter of the 24th July and in the answer of 10th December, there seems to be a misapprehension as to the rights of the lessee. It seems to be assumed that the lessee is entitled to a renewal at the end of each and every thirty years.

This letter of 10th December expressly states, dealing with the land in dispute, that there is no objection to his resuming so much of this land as the outside to the north of the two hundred feet required for canal purposes.

A second letter, 18th December, 1868, from Parent to Scott (Exhibit 15) is as follows:—

"Department of Secretary of State,
Ottawa, 18th December, 1868.

Sir: I am directed to address you the present communication on the application preferred by you on behalf of Mr. Alex. Mutchmor of Ottawa in Nepean, dated 24th July last.

Mr. Mutchmor applies by two letters dated 24th July 1868, 1st, that the tenure of 3 pieces of land forming part of Lot Letter 'I' Concession 'C' Nepean be changed from leasehold to freehold. The

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said lease is renewable at the option of the said Mutchmor at the end of each and every thirty years. The first piece lies at the southwest angle of said lot Letter 'I,' Con. 'C,' and in the lease is stated to contain four and a half acres more or less. There is no objection to his resuming so much of this land as the outside to the north of the 200 feet required for canal purposes. The second is a triangular piece as shown on the plan stated to contain six and three quarter acres and lies between the Ordnance Boundary stones 30, 31, 32 on the said Lot Letter 'I.' There is no objection to the resumption by Mr. Mutchmor of the whole of this piece of land. The third piece of land lies on the east and west banks of the Rideau Canal on the said Lot Letter 'I' betweenthe Ordnance boundary stones 14, 15, 33, 34, containing as stated eight and a half acres of land. There is no objection to the resumption of this piece of land with the exception of one chain wide on each side of the canal required for canal purposes, on payment to the Department of the sum of $20 originally paid for the land and provided always that the said Mutchmor holds the Department harmless from the consequences of any flooding and from any damage from this or any other cause at any time hereafter.

I have the honour to be, Sir,
Your obedient servant,

(Sgd.) E. PARENT,
Under-Sec'y.

To R. W. Scott, Esq."

This letter is in effect the same as that of the 10th December.

On the 16th February, 1869, Mr. Parent wrote as follows (Exhibit No. 16):—

"Department of the Secretary of State,
Ordnance Lands,
Ottawa, 16th February, 1869.

Sir,—On the 10th December last past, a letter was addressed to R. W. Scott, Esq., M.P.P., acting on your behalf, and informing you through him of the price and terms of a proposed sale to you of parts of Lot I, Con. C, Nepean, and have to request an immediate settlement or the piece of land in question will be included in a scheme of sale now preparing.

I am, Sir,
Your obedient servant,
(Sgd.) E. PARENT,
Under-Secretary of State.

A. Mutchmor, Esq.,
Ottawa.'

The contract rests on these letters of the 24th July, 1868, and 10th and 18th December, 1868, and of the 16th February, 1869. In the 5th and 6th paragraphs of the petition it is so stated.

It is apparent that there was no intention to convey to Mutchmor or his representatives any portion of the land colored pink.

The 7th paragraph of the petition alleges that in pursuance of the said agreement, on the 25th June, twenty dollars was paid. The letter of the 25th June, 1869, Mutchmor to Col. Coffin (Exhibit No. 20) is as follows:—

"Ottawa, 25th June, 1869.

Col. Coffin,
Ordnance Department,

Sir,—Enclosed herewith, please find $20, said twenty dollars to cover the amount required for a conveyance

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of all the Ordnance land belonging to Lot Letter I in Con. C. Nepean, Rideau Front, held by lease for perpetuity, renewable every thirty years, deed to be without any reservations except to the Department of Public Works and of one chain on either side of the canal when actually required for canal purposes.

Deed to be made in favor of John Thornton Mutchmor and Thos. McMorran, executors to the estate of the late John Mutchmor.

Yours very truly,

(Sgd.) A. MUTCHMOR.

Also that Mr. Mutchmor holds the Department harmless from flooding or any other damage at any time.

A. M."

The contention of the suppliants apparently is that because by this letter he states "deed to be 'without any reservations except to the Department 'of Public Works and of one chain on either side of canal when actually required for canal pur-'poses" that therefore the Crown is bound to convey. The letter of the 10th December, 1868, expressly stated that in the opinion of the authorities two hundred feet was required at the place in question:

The letter of the 16th February, 1869, expressly demanded payment for the lands which the Crown was willing as stated in their letter of 10th December, 1868, to convey and this money was sent on the 25th June, 1869. To argue that Mutchmor's statement in his letter of 25th June, 1869, binds the Crown to a new contract seems to me an absurdity. Besides there would be no right to convey what was required for canal purposes.

That Mutchmor understood that the Crown never receded from the position taken as to the 200 feet is

apparent from his letter of 26th December, 1873 (Exhibit No. 22):—

"OTTAWA, 26th December, 1873.

Honourable A. McKenzie,
Premier and Minister of Public Works.

Dear Sir,—I have the honour to inform you, that while the Rideau canal was in course of construction, my grandfather, the late John Mutchmor, was the owner of Lot I, in Concession 'C, Rideau Front, Township of Nepean, and County of Carleton. The Government at that time anticipating a great future for the canal, forced us into selling them a much larger area of said lot than was ever required for canal purposes, the price being a mere nominal sum. They leased the land back to us in leases renewable every thirty years, for time immemorial, by us paying them the interest on the above nominal sum as the rent, which we have continued to do up to three or four years ago, when we made an application to purchase by paying the original amount received by the late John Mutchmor. The Ordnance Department acceded to our request at once, but reserved two hundred feet from the water's edge of the canal for canal purposes. To this we demurred, but offered to accept of a deed, with the exception of the two hundred feet, if we were allowed to lease as before the remainder not deeded to us, and if ever required for canal purposes, we were willing to relinquish our claim. We considered this a fair and reasonable proposal on our part, as the Department were bound to renew the lease originally made, and one chain was all the reserve made in it. The Department refused us and the matter remains in the same position to the present day. We still claim that in justice and equity, no more than the

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chain originally reserved, can be kept from us, and even that will never be required for canal purposes, as it is already nearly double the usual width where it runs through the above lot.

Hoping you will be pleased to include in our deed all contained in our original lease, and allow us the use or give us a lease of that until it may be needed for canal purposes.

I have the honour to be,
Sir,
Your obedient servant,
(Sgd.) ALEXANDER MUTCHMOR,
For Estate late John Mutchmor."

I do not think the subsequent views of officials of the Government as to the rights of the suppliants have any bearing on the question. The right rests purely on contract, and in my opinion no contract has been proved entitling the suppliants to relief.

I have not overlooked the point that the parties were negotiating with a mistaken view of their rights.

Mutchmor's contention that he was entitled to renewals in perpetuity seems to have been taken for granted by the officials of the Government.

If otherwise entitled to specific performance, or damages in lieu thereof, this mistake would afford a defence.

Both parties take for granted that the lands in question passed to the Dominion at the time of Confederation. I have not thought it necessary to decide this question, but if Mr. Belcourt's contention that in 1862 the Ordnance Department prepared a plan delimiting the lands required for canal purposes as a chain in width on each side of the canal is correct, a serious question arises whether under 18 Vict. cap. 91 and 19

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and 20 Vict. cap. 45, consolidated by cap. 24 of the Consolidated Statutes of Canada, 1859, the lands in dispute ever passed to the Crown as represented by the Dominion? See per Hagarty, C. J. in *Commissioners Queen Victoria Niagara Falls Park* v. *Howard* (1).

I think the petition should be dismissed with costs. The whole contention is in reference to the part colored pink. The Crown was always willing to convey the part coloured green.

Judgment accordingly.

Solicitors for suppliants: *Belcourt & Ritchie.*

Solicitors for respondent: *Chrysler, Bethune & Larmonth.*

(1) 23 O. A. R. at pp. 360, 361.

BETWEEN:

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Dec. 29.

THE KING, ON THE INFORMATION OF THE ATTORNEY-GENERAL FOR THE DOMINION OF CANADA ..... } PLAINTIFF;

AND

JOHN K. POWELL ..... DEFENDANT.

Dominion lands—Patent—Omission of reservation of railway rights—Improvidence—Cancellation—Certificate of title—Rectification of Register—Jurisdiction.

On the 13th November, 1906, the defendant applied for a homestead entry for certain Dominion lands in the Province of Alberta. On the 21st March, 1907, his application was filed, and a homestead receipt given him with the following notice or declaration stamped thereon: "Subject to the right of way and other purposes for Grand Trunk Pacific Railway Company, cited in clause 46 of agreement." In July, 1907, the defendant acquired the adjoining lands, and then applied to purchase the lands in question, abandoning his homestead application. On the 19th September, 1907, a patent for said lands was issued to the defendant, but through error and improvidence the Department of the Interior, in issuing the patent, neglected to reserve thereout a portion of the lands required by the Grand Trunk Pacific Railway Company for its right of way, although it was shewn that prior to the receipt by the Department of the defendant's application for the purchase of the said lands, the railway company (on the 21st December, 1906) had made an application for a free grant of so much of the said lands as might be required for their right of way, and the Crown agreed to grant such right of way pursuant to the provisions of clause 46 of the agreement set out in the schedule to "An Act respecting the construction of The National Transcontinental Railway" (3 Edw. VII c. 71). On the 23rd October, 1907, a certificate of title to the said lands was issued to the defendant by the provincial government, and at the time of action brought he was the registered owner of the lands under *The Lands Titles Act*, cap. 24 of the Statutes of Alberta, 1906.

Held, that at the time of the application of the Grand Trunk Pacific Railway Company for the lands in question, and the recognition of such application by the Dominion Government, the defendant had no right whatever in the lands except as subject to the right of the Grand Trunk Pacific Railway Company; and that the omission of a reservation of the said right was a matter of error and improvidence which avoided the said patent under section 94 of 7 and 8 Edw. VII, c. 20. *Williams* v. *Box* (44 S.C.R. I); *The Attorney-General* v. *Conto is* (25 Gr.

353); *Fonseca* v. *The Attorney-General of Canada* (17 S.C.R. 612 referred to

2. That the Exchequer Court had jurisdiction to decree the patent void under sec. 94 of 7 and 8 Edw. VII, c. 20 (Dom.) Subsec. (*r*) of sec. 2, chap. 24, of the Statutes of Alberta, 1906, considered. *The Queen* v. *Farwell* (3 Ex. C.R. 271 and 22 S.C.R. 553) relied on.

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Argument of Counsel.

THIS was an information by the Attorney-General for the Dominion of Canada seeking the cancellation of a patent for certain Dominion lands.

The facts are stated in the reasons for judgment.

December 16th, 1910.

The case was now heard at Ottawa.

F. H. Chrysler, K.C., for the plaintiff, contended that the facts set up a sufficient case for a declaration that the patent in question should be declared void by reason of error and improvidence. The court has undoubted jurisdiction to so declare under section 205 of *The Dominion Lands Act* (1).

The patent should have contained a reservation of the rights of the railway company, because those rights had become vested prior to any application on behalf of Powell to purchase the lands. The patent must be set aside, the certificate of title delivered up, and the register of title rectified. There is no question about the propriety of this court exercising the jurisdiction to grant a remedy in this case. *Attorney-General* v. *Contois* (2).

W. L. Scott, for the defendent, argued that there was a complete contract on behalf of the Dominion Government to issue a patent to the defendant before any rights of the Grand Trunk Pacific Railway Company had obtained. Whatever relation of a contractual nature subsisted between the Dominion Government and the railway company was entirely *res inter alios acta* so far as the defendant Powell was concerned.

(1) R. S. C., 1906, Cap. 55. (2) 27 Gr. 346.

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(*Leake on Contracts* (1); *Tamplin* v. *James* (2); *Hunter* v. *Carrick* (3); *Cyclopedia Laws of England* (4). Then again there was no notice to the defendent of any rights of the railway company. In the absence of notice the property passed to him clear of any equities, if anything of that nature enures to the benefit of the railway company. (*Boulton* v. *Jeffrey* (5); *Bank of Australia* v. *The Attorney-General* (6); *Attorney-General* v. *Fraser* (7); *Attorney.General* v. *Goldsbrough* (8).

This is not a case where the court even if it had jurisdiction can excerise the same to set aside a patent, because the defendant is an entirely innocent purchaser.

If the land is taken from the defendant, compensation should be generous and commensurate with the loss he would thereby sustain. The land is worth about $250, an acre, while the defendant only paid $3 an acre.

It is submitted on behalf of the defendant that this court has no jurisdiction in the matter in question to grant the relief sought. The moment the land is patented it passes out of the Crown in the right of the Dominion, and becomes provincial land. Thereafter the Dominion can exercise no rights over it either contractual or remedial. If *The Exchequer Court Act* can be said to provide jurisdiction by section 31 in such a case as this, then it is submitted that such provision is *ultra vires* of the Dominion Parliament. After the land takes upon itself the character of provincial land, under *The British North America Act*, section 92, it is only competent for the provincial

(1) 4th ed. pp. 206, 207.
(2) L. R. 15 Ch. D. 215, 217, 218.
(3) 28 Gr. 489; 10 A. R. 449; 11 S. C. R. 300
(4) Vol. 9, pp. 274, 275.
(5) 1 U. C. E. & A. 111.
(6) 37 S. C. R. 577.
(7) 15 N. S. W. Rep. 256.
(8) 15 Vic. Rep. 658,

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legislature to deal with it as falling within the classification of "property and civil rights". *Pockett* v. *Poole* (1); *Kennedy* v. *The City of Toronto* (2).

But even if there is jurisdiction in the court it should not be exercised because it would be fruitless as there is no machinery for carrying the judgment of the court into execution. If the court cannot grant complete relief, and such relief can be fully granted by a provincial court, this court in such a case would stay its hand. Under the provisions of the Alberta statute (1906, cap. 24 Sec. 2) the certificate of title is evidence that the defendant is owner of the land. Even if the patent were set aside this certificate would still belong to the defendant, and would be a cloud on the title. But if proceedings were taken in the provincial court it would have jurisdiction over the local Lands Titles office, and could give a complete remedy in the way of removing any cloud on the title. Under section 44 of the Alberta statute the certificate of title is a complete defence to anyone attacking the title. (*Attorney-General* v. *Goldsbrough* (3); *Hamilton* v. *Iredale* (4); *Jonas* v. *Jones* (5); *Steere* v. *The Minister of Lands* (6).

It is submitted that the Crown cannot get rid of the certificate of title; it would stand as a bar to the action both in the provincial and federal courts under section 44 of the Alberta statute. (See also sections 44, 50, 57, 76, 79, 82, 114, 115, 116, 128, and 130, and also *Williams* v. *Box* (7).

Mr. Chrysler, K.C. replied citing *Fonseca* v. *Attorney General* (8); *Farwell* v. *The Queen* (9); *Jellett* v.

(1) 11 Man. Rep. 508.
(2) 12 O. R. 211.
(3) 15 Vict. R. 658.
(4) 3 N. S. W. State Reports, 1903, pp. 535, 548.
(5) 2 N. Z. L. Rep. 2 S. C. 15.
(6) [1904] 6 W. A. L. R. pp. 178.
(7) 44 S. C. R. p. 1.
(8) 17 S. C. R. 612.
(9) 22 S. C. R. 553.

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Wilkie (1); and *Syndicat Lyonnais Du Klondyke* v. *McGrade* (2).

Reasons for Judgment.

CASSELS, J. now (December 29th, 1910) delivered judgment.

This is an information exhibited by His Majesty the King on the information of the Attorney-General for the Dominion of Canada, asking for a declaration that a certain patent bearing date the 19th September, 1907, granting to the defendant certain lands described as part of the north-east quarter of Section twelve, in Township Fifty-three, Range Five, West of the Fifth Meridian, in the province of Alberta, in the Dominion of Canada, and being composed of all that portion of the north-east quarter of Section twelve of the said Township, which is not covered by any of the waters of Wabamum Lake, as shown upon a map or plan of survey of the said Township, approved and confirmed at Ottawa on the 4th day of July, 1906, by Edouard Deville, Surveyor General of Dominion Lands, and of record in the Department of the Interior, containing by admeasurement Forty-six and Fifty-hundredths acres, more or less, was issued and granted improvidently and in error, and should be declared to be null and void and delivered up to be cancelled.

The following are the allegations in the information in support of the contention of the plaintiff:—

"2. That the said patent was issued to the Defendant in pursuance of an application made by the Defendant to the Department of the Interior to purchase the said lands.

"3. That prior to the receipt by the Department of the Interior of the application of the Defendant for the purchase of the said lands, and while the said lands were

(1) 26 S. C. R. 282. (2) 36 S. C. R. 251.

vested in His Majesty in right of the Dominion of Canada, the Grand Trunk Pacific Railway Company made an application for a free grant of so much of the said lands as might be required for the right of way of the said Company, and His Majesty agreed to grant such right of way to the said Company, pursuant to the provisions of Clause 46 of the Agreement set forth in the schedule forming part of Chapter 71 of the Statutes passed in the year 1903, intituled 'An Act respecting the construction of a National Transcontinental Railway.'

"4. That at the time the Defendant made application to purchase the said lands, the Defendant was well aware that the said Grand Trunk Pacific Railway Company had received a grant of so much of the said lands as might be required for its right of way.

"5. That through improvidence and in error, the Department of the Interior, in issuing the patent for the said lands the said Defendant, neglected to reserve thereout and therefrom the portion of the said lands required by the said Grand Trunk Pacific Railway Company for its right of way, and improvidently and in error issued the patent for the said lands to the Defendant."

The defendant denies the allegations of fact stated in the information, and in addition sets up that on the 23rd October, 1907, a certificate of title to the said lands was issued to him, and he is now the registered owner of the lands under and by virtue of *The Land Titles Act*, cap. 24 of the Statutes of Alberta of the year 1906, and he pleads this statute as a bar to any relief.

Clause 46 of the agreement ratified by cap. 71, 3 Edw. VII. (1903) provides that "the Government shall pro-
"cure to be granted to the company in so far as the same
"are vested in His Majesty in right of the Dominion of

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"Canada such lands as may be required for the right of "way of the Western Division', &c. 'The right of the "said company to obtain such lands without compen- "sation shall cease when the said division is constructed "and equipped as required by clause 29 hereof."

On the 21st December, 1906, an application was made for right of way over a portion of the lands in question, as appears by Exhibit 'A' of the ylaintiff:—

"The Grand Trunk Pacific Railway,
Land Department.
G. U. RYLEY, Commissioner.

MONTREAL, Que., Dec. 21, 1906.

The Secretary,
Department of the Interior,
Ottawa, Ont.

Sir,—I beg to apply, on behalf of the Grand Trunk Pacific Railway Company, for a right-of-way or for the other purposes mentioned in Clause 46 of the Agreement, embodied in the *National Transcontinental Act*, on Sections 12, 13, 14, 15, 16, 17, 18, 7, Township 53, Range 5, West 5th Meridian, and to ask you to advise me, at an early date, whether or not your Department is in a position to grant the application.

Yours truly,
(Sgd.) G. U. RYLEY,
Land Commissioner."

On the 14th January, 1907 a letter was written as follows (Plaintiff's Exhibit 'B'):—

"Department of the Interior, Canada,
OTTAWA, January 14, 1907.

Sir,—Replying to your letter of the 21st ultimo, respecting right of way in Township 53, Range 5, West Fifth Meridian, I am directed to say that the sections referred to stand as follows:—

N. ½ 7 patented C.P.R.
S. ½ 7 selected C.P.R.
All 12 Agent asked to report if clear.
All 13 patented C.P.R.
NE. ¼ 14 unpatented homestead Fred. R. Smith.
NW. ¼ 14 unpatented homestead Alb. N. Smith.
S. ½ 14 selected C.N.R.
All 15 patented C.P.R.
NE. ¼ 16 unpatented homestead A. Michaud.
NW. ¼ 16 unpatented homestead G. A. Leduc.
S. ½ 16 Agent asked to report if clear.
All 17 patented C.P.R.
NE. ¼ 18 unpatented homestead John Ek.
NW. ¼ 18 unpatented homestead Robert Smith.
SE. ¼ 18 unpatented homestead Sylvester Mahoney.
SW. ¼ 18 unpatented homestead Mastai Bertrand.

Your obedient servant,

(Sgd.) P. G. KEYES,

Secretary.

G. U. Ryley, Esq.,
Commissioner,
Grand Trunk Pacific Railway Company,
Montreal, P.Q."

Section 12 referred to includes the land in question.

On the same date (14th January, 1907) a letter was written by the Secretary of the Department of the Interior in Ottawa to the Agent of Dominion Lands, Edmonton, as follows (Plaintiff's Exhibit "D"):—

"Department of the Interior, Canada.

OTTAWA, January 14th 1907.

Sir,—I am directed to instruct you that if they are available, or should in the future become available, you are to reserve right of way for the Grand Trunk Pacific Railway in the following quarter sections:—

N.W. ¼	28–52–1 W. 5th M.
W. ½	30

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N.E. ¼	36
N.E. ¼ and S.W. ¼	25–52–2 W. 5th M.
All	26
All	30
S.E. ¼	33
W. ½ & S.E. ½	34
N.W. ¼	35
E. ½	36
S. ½	2–53–4 W. 5th M.
S. ½	7
All	8
All	10
E. ½ and N.W. ¼	12
S. ½	7–53–5 W. 5th M
All	12
All	14
All	16
All	18
All	12–53–6 W. 5th M.
All	13
All	14
All	15
All	16–53–6 W. 5th M.
All	17
All	19
All	20
All	24–53–7 W. 5th M.
All	25
All	26
All	27
All	28
All	30
All	25–53–8 W. 5th M.
All	26
All	27

All	28	
All	30	
All	25–53–9 W. 5th M.	
All	26	
All	27	
All	28	
All	30	

Please report if any of the above quarter sections are clear for this purpose now.

Your obedient servant,

(Sgd.) P. G. KEYES,
Secretary.

The Agent of Dominion Lands,
Edmonton,
Alberta."

On the 4th February, 1907, the agent at Edmonton wrote to the Secretary of the Department at Ottawa as follows:—

"*Re* H.O. letter of the 14th ult., I beg to say that the right of way of the Grand Trunk Pacific Railway has been reserved from the following land:—

Among other lands the N.E. ¼ 12."

On the 21st February, 1907 a letter was written as follows (Plaintiff's Exhibit 'C'):—

" Department of the Interior, Canada,

OTTAWA, February 21st, 1907,

Sir,—Referring to the Departmental letter of the 14th ultimo, respecting right of way in Township 53, Range 5, West fifth meridian, I am directed to say that right of way is being reserved for the Grand Trunk Pacific Railway Company in the N. ½ of Sec. 12 of the said township. The S. ½ of section 12 and

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the S. ½ of section 16, of the said township, are within Lake Wabamum.

Your obedient servant,

(Sgd.) LYNWOOD PEREIRA,
Assistant Secretary.

G. U. RYLEY, Esq.,
Land Commissioner,
Grand Trunk Pacific Railway Company,
Montreal, P.Q."

In the book kept in the Department at Ottawa a note had been made showing a reservation through the lands in question in favour of the Grand Trunk Pacific Railway Company. The exact date of its insertion is not clear, but it was there at the time of the application for a homestead right on the part of the defendant.

The defendant's position in relation to these lands is as follows:

On the 1st May, 1906 the following application had been made (Defendant's Exhibit No. 4):—

" Mr. GREENWAY. 1186940

P.O. Box 364, Edmonton, Alberta,
1 May,1906.

Hon. Frank Oliver,
Minister of the Interior.
Ottawa, Ont.

Dear Sir,—I would like to purchase a small piece of land having a frontage on Wabamum Lake. Will you therefore file my application for the piece in Township 53, Range 5, West of the 5th Meridian, lying between section 13 and the lake, and marked thus X on the attached diagram, and let me know the price per acre and terms of payment for same, and oblige.

JOHN K. POWELL.

50 acres, more or less.
The acreage is not marked on the Township map.
N. ½ 12–53–5–W. 5th."

On the 31st May, 1906 an answer was sent as follows:—(Exhibit 6 of Defendant):—

"Department of the Interior. File 1186940.

OTTAWA, 31st May, 1906.

Copy for the A.D.L. Edmonton.
Sent R.D.

Sir,—In reply to your letter of the 1st instant, addressed to the Minister, applying to purchase the fractional north ½ of Section 12, north of Wabamum Lake, in Township 53, Range 5, West 5th Meridian containing 59·9 acres, I am directed to say that if you own the adjoining quarter of section 13 and furnish the Department with satisfactory evidence to that effect, you will be permitted to purchase the land applied for at the current rate of $3. per acre, but otherwise the Department could not entertain your application.

A copy of this letter is being sent to the Agent of Dominion Lands, Edmonton, for his information.

Your obedient servant,

(Sgd.) P. G. KEYES,
Secretary.

JOHN K. POWELL, Esq.,
P.O. Box 364,
Edmonton, Alta."

On the 11th of June, 1906 the defendant wrote as follows (Defendant's Exhibit No. 7):—

"1215490.
Box 364 W.

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EDMONTON, Alberta, 11 June, 1906.
1186940 C.J.S., 25–6.

The Hon. Minister of the Interior,
Ottawa, Ont.

Dear Sir,—Noting your favour 1186940 of 30 ulto., I beg leave to say that for some reason lands west of range 2 (or 1) west of the 5th meridian, since passing from the Canadian Pacific Ry. to the Western Land Co. have been withdrawn from sale. The Section 13, Township 53, Range 5, referred to is included in the above. I would have no use for a quarter section out there anyway. All that I want is a small piece of lake front for a summer home,—something large enough for a vegetable garden and pasture for three or four cows and ponies would do—half of the 59·9 acres would answer. I would therefore be glad if you would permit me to select either "A" or "B" as shown on accompanying sketch. Hoping you may do so

I am,
Yours very respectfully
JOHN K. POWELL.

Reference, Merchants Bank, Edmonton.

Patent Branch, July 12, 1906. Received."

On the 25th October and the 9th November, 1906 the following letters were sent to the defendant:—

Defendant's Exhibit 8:—

"1186940.

Department of the Interior, Canada,
OTTAWA, October 25, 1906.

Dear Sir,—In accordance with the promise I made to you yesterday I submitted to the Minister your application to purchase either the whole or a part of the fractional north half of Section 12, Township 53, Range 5, west of the 5th Meridian, that is, the portion of that

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section which is dry land and which lies north of Wabamum Lake. He carefully considered the matter and decided the application could not be granted. You will be more formally advised by a letter from the Secretary of the Department in the course of a few days.

Yours faithfully,

(Sgd.) T. G. ROTHWELL,
Acting Deputy Minister.

JOHN K. POWELL, Esq.,
Edmonton, Alta."

Defendant's Exhibit No. 9:—

"File No. 1186940.

Department of the Interior,
OTTAWA, Nov. 9, 1906.

Sir,—Adverting to the Acting Deputy Minister's letter to you of the 25th ultimo, having reference to your application to purchase either the whole or apart, of the fractional N. ½ of Section 12, Township 53, Range 5, West Fifth Meridian, north of Wabamum Lake, I am directed to inform you that your contentions in this regard received the personal attention of the Minister of the Interior, but that he is unable to meet your wishes in the matter. I am to add that other applications for portions of the fractional parcel have also been refused.

Your obedient servant,

LYNWOODE PEREIRA,
Assistant Secretary.

John K. POWELL, Esq.,
Edmonton, Alberta."

This ended the application of the defendant to purchase the lands in question.

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Apparently, on the 13th November, 1906 the defendant made an application for a homestead entry, and the following correspondence passed:—

Defendant's Exhibit No. 16:—

"File No. 124805.

Department of Interior,
Dominion Lands and Crown Timber Office.

EDMONTON, Nov. 20, 1906.

Sir,—On the 13th inst. Mr. J. K. Powell called at this office to make homestead entry for the N.E. of 12-53-5 W. 5th. Mr. Powell was advised that the land could not be disposed of until instructions were received from Ottawa. Please refer to H.O. letter of the 22nd June last, file 1186940, and advise if homestead entry may be granted for this land.

Your obedient servant,

(Sgd.) A. E. HARRIS,
A. D. S.

The Secretary,
The Department of Interior,
Ottawa."

Defendant's Exhibit No. 17:—

"File No. 1186940.

Department of the Interior,
OTTAWA, February 22, 1907.

Sir,—Adverting to your letter of the 20th November last, File No. 124805, in which you state that Mr. J. K. Powell has made application for homestead entry for the N.E. quarter of Section 12, Township 53, Range 5, West Fifth Meridian, I am directed to inform you that if the owner of the S.E. quarter of Section 13, in the same Township, has not applied for the parcel in question, and if Mr. Powell is eligible to make a homestead entry his application may be granted, but it should be

noted that it will be necessary for him to fulfill all the requirements of the homestead law.

In this connection I am to state that Messrs. Johnson & Gunner, of Edmonton, made application some little time ago to purchase the land covered by Mr. Powell's application, and stated that they had purchased the said S.E. quarter of Section 13. They, however, failed to establish their ownership, and intimated that evidence of purchase from the Land Company was not obtainable, as the company had reserved their land for their own purposes.

I am to add that there is no other application for the said S.E. quarter of Section 13 before the Department, and that it would seem that the Land Company has withdrawn the parcel from the market.

Your obedient servant,

P. G. KEYES,
Secretary.

The Agent of Dominion Lands,
Edmonton, Alberta."

Defendant's Exhibit No. 14:—

"The Secretary,
Department of the Interior,
Ottawa, Ont.

Dear Sir,—I would be glad to know if my application to homestead the N.E. ¼ Section 12, Township 53, Range 5, West of the 5th Meridian will be granted.

I made the application in the Land Office here on Nov. 13 last, and I understand the matter was referred to you by the Land Agent about Nov. 20.

Yours respectfully,

(Sgd.) JOHN K. POWELL.

P.O. Box 364, Edmonton, Alberta.
February 27, 1907."

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Reasons for Judgment.

Defendant's Exhibit No. 15:—

"OTTAWA, March 26, 1907.

Copy for A.D.L. Edmonton, Ref. 124805.

Sir,—Replying to your letter of the 27th ultimo respecting your application to homestead the N.E. ¼ Section 12, Township 53, Range 5, West Fifth Meridian I am directed to say that on the 22nd ultimo the Agent of Dominion Lands at Edmonton was advised that if the owner of the S.E. ¼ of Section 13, in the above Township, had not applied for the N.E. ¼ Section 12, and if you were eligible to make homestead entry, your application might be granted, on the understanding, of course, that you would have to fulfil the homestead conditions.

Your obedient servant,

(Sgd.) P. G. KEYS,

Secretary.

John K. Powell, Esq.,
P.O. Box 364, Edmonton, Alberta."

On the 21st March, 1907 the application for a homestead entry was filed and apparently allowed, but it was expressly allowed "subject to right of way and other "purposes for Grand Trunk Pacific Railway cited in "clause 46 of agreement."

The defendant expressly admits in his evidence that on the homestead receipt handed him this notice in reference to the Grand Trunk Pacific Railway was stamped.

Subsequently, and towards the end of July, 1907, the defendant acquired the adjoining lands, and then applied to purchase the lands in question abandoning his homestead application, and subsequently the patent in question was issued.

According to my view of the case at the time of the application of the Grand Trunk Pacific Railway Co. and the recognition thereof by the Government, the

defendant had no right whatever in the lands in question—at all events except subject to the right of the Grand Trunk Pacific Railway.

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The issue of the patent without reserving the right of way for the Grand Trunk Pacific Railway was a mistake, and its issue was in error and through inadvertence.

Cap. 55, R.S.C. 1906, s. 205, is as follows:—

"205. Whenever patents, leases or other instruments respecting lands have issued through fraud, or in error or improvidence, any court having competent jurisdiction in cases respecting real property in the province where such lands are situate, may, upon action, bill or plaint respecting such lands, and upon hearing the parties interested, or upon default of the said parties after such notice of proceeding as the said court orders, decree or adjudge such patent, lease or other instrument to be void; and upon the registry of such decree or adjudication in the office of the Registrar-General of Canada, such patent, lease or other instrument shall be void. R.S. c. 54, s. 57."

Section 94 of 7–8 Edw. VII, cap. 20, "An Act to consolidate and amend the Acts respecting the Public Lands of the Dominion," which was assented to 20th July, 1908, is as follows:—

"94. Whenever letters-patent, leases or other instruments respecting lands have issued through fraud, or improvidence, or in error, any court having competent jurisdiction in cases respecting real property in the province where the lands are situate may, upon action, bill or plaint respecting the lands, and upon hearing the parties interested, or upon default of the said parties after such notice of proceeding as the said court orders, decree or adjudge the letters patent, lease or other instrument to be void; and upon the

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filing of the decree or adjudication in the Department of the Interior at Ottawa, the letters patent, lease or other instrument shall be void; and if the letters patent, lease or other instrument have been registered in the registry office or the land titles office for the diss trict in which tne land described in the letters patent, lease or other instrument is situate, and if such letters patent, lease or other instrument have been adjudged void at the suit of the Minister he shall cause a copy of the decree or adjudication, certified to be a copy as provided by section 96 of this Act, to be recorded forthwith in the said registry office or land titles office."

There is no difference between the two statutes except the latter part of section 94. In my opinion the latter Act governs. No vested rights are interfered with.

I have read the reasons for judgment in *Williams* v. *Box*, decided by the Supreme Court of Canada (1) and they confirm my view. In any event it is not of any material consequence. See *Attorney-General* v. *Contois* (2), where the late Chancellor Spragge sets out his views on the meaning of the statute.

Fonseca v. *Attorney-General of Canada* (3), per Gwynne, J., at pp. 649, 650; and per Patterson, J., at p. 655.

Under the facts in this case I am of the opinion that the grant in question was issued in error and improvidently.

Mr. Scott argued that there is no jurisdiction in the Exchequer Court, and that resort should be had to the courts of Alberta.

It may not be necessary to determine the question, but my view is that sub-section (*r*) of section 2 of

(1) 44 S. C. R. 1.

(2) 25 Gr. at p. 353.

(3) 17 S. C. R. 612.

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the statutes of Alberta, 1906, 6 Edw. VII, chap. 24, defining the expression "Court" as meaning "any court authorized to adjudicate in the Province in civil matters in which the title to real estate is in question" would include the Exchequer Court in this form of action, and so with the expression "Judge."

I am relieved from further consideration of this question by the decision in *The Queen* v. *Farwell* (1).

The New South Wales case, *Bank of Australasia* v. *Attorney-General of New South Wales* (2), does not seem to me to have any application. A reference to this case at pages 260 and 262 shows that the Court pointed out that it was not a proceeding by *scire facias* by which a grant could be called in, set aside or corrected.

In *Assets Co. Ltd.* v. *Mere Roihi* (3), it is expressly pointed out that the power of the Crown to set aside its own grant has not been considered.

In the case before me, the question is not complicated by any grant from the defendant. If the plaintiff desires the same form of judgment as in the *Farwell* case it can issue, and the defendant be ordered to reconvey. If any amendment of the information is desired it can be made.

1. The patent should be set aside and the requisite directions given for the rectification of the register.

2. If any difficulty arises as to the form of judgment it can be spoken to in chambers.

The defendant must pay the costs. He had full notice of the claim of the Crown prior to action, and notice of the railway company's right was also given on the homestead receipts.

(1) 3 Ex. C. R. 271; 22 S. C. R. 553.

(2) L. R. [1894] 15 A. C. N. S. W p. 256.

(3) (1905) A. C. at p. 203.

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The Crown will of course repay the purchase money. The costs can be set off *pro tanto* against this amount.

Judgment accordingly.

Solicitors for plaintiff: *Chrysler, Bethune & Larmonth.*

Solicitors for defendants: *Dawson, Hyndman & Hyndman.*

IN THE MATTER OF THE PETITION OF RIGHT OF

ALPHONSE POIRIER.... .... SUPPLIANT;

1911
Feb. 9

AND

HIS MAJESTY THE KING.....RESPONDENT.

Contract—Supply of hay for the use of Imperial Government in South African War—Hay not up to requirements of contract—Sale of rejected hay by Crown Officers—Conversion—Damages—Counterclaim—Excess of Stowage space—Evidence—Laches in asserting claim.

Suppliant had a contract with the Minister of Agriculture for the supply of hay for use by the Imperial authorities in the South African War. A certain quantity was rejected by the officers of the Department of Agriculture as not up to the requirements of the contract. Some of the rejected hay was returned to the suppliant, but a portion of it was stored subject to his order. The suppliant not having removed the hay, and the storage space occupied by it being required, the hay was sold by the officers of the department at a price less than its alleged value. The price realized by such sale was paid to the suppliant, but he claimed damages for the difference between such price and the alleged value of the hay, charging that his loss was sustained by reason of the tortious act of the Crown's employees, amounting to a conversion of the hay.

Held, that the claim was not one in respect of which the Crown was liable under the provisions of sec. 19 of *The Exchequer Court Act*. *Boulay* v. *The King* (43 S.C.R. 61) referred to; *Windsor & Annapolis Co.* v. *The Queen* (L.R. 11 A.C. 607) referred to and distinguished.

2. It was provided in the contract that the hay should be compressed to stow in not more than 70 cubic feet per ton, and that hay occupying more than that space might be accepted at the option of the Department, "but only at a reduction of $1.50 per ton from the contract price for every ten feet, or any part thereof, stowage space required per ton in excess of the standard specified." There was no provision for payment of excess of space used by any particular bale. In support of its counterclaim for an amount alleged to represent the aggregate deductions by reason of excess of space used, the Crown offered evidence which showed that not more than five bales out of twenty-two tons had been tested and found to exceed the standard. It was also shewn that the Crown had not sought to enforce any claim for deduction for a period of five years.

Held, that as the evidence supporting it was insufficient, the counterclaim ought to be dismissed.

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

The facts are stated in the reasons for judgment.

The case was heard at Montreal on the 1st, 2nd, and 3rd days of March 1910, and at Ottawa on the 13th day of January, 1911.

A. Lemieux, K.C. for the suppliant contended that the Crown was liable for the value of the hay under sec. 19 of *The Exchequer Court Act*, because the hay had gone into possession of the Crown; and there was also liability for the acceptance of goods supplied under contract. The fact of the officers or employees of the government selling the hay was tantamount to an act of dominion (*dominium*); it was exercising the the right of ownership, and was evidence of an acceptance of the hay on behalf of the Crown. The suppliant was thus prevented from taking back his goods, and the acceptance nullifies the antecedent rejection. If the purchaser has exercised acts of dominion over the goods, as by parting with the property in them, or has prevented the vendor being placed in the same situation, then, generally speaking, he will not be entitled to return or reject them.

Per *Bovill, C. J.* in *Heilbutt* v. *Hickson* (1). See also *Grimoldby* v. *Wells* (2); *Couston* v. *Chapman* (3); *Williston on Sales* (4).

If it is contended that this is a tortious breach of contract, then I submit that even in such a case the Crown is liable. *Windsor & Annapolis Ry. Co.* v. *The Queen* (5). It is settled law that a petition of right will lie for any breach of contract by the Crown. *Thomas* v. *The Queen* (6); *Feather* v. *The Queen* (7).

(1) L. R. 7 C. P. at pp. 438, *et seq.*
(2) L. R. 10 C. P. 391.
(3) L. R. 2 Sc. Ap. 250.
(4) P. 867.
(5) L. R. R. 11 A. C. 607.
(6) L. R. 10 Q. B. 31.
(7) 6 B. & S, 257.

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It is immaterial whether the breach is occasioned by acts or omissions of the Crown officials.

Upon the point of acceptance of the hay by the fact of resale, the suppliant relies on the further authorities of *Boulay* v. *The King* (1); *Benjamin on Sales* (2); *Perkins* v. *Bell* (3); *Parker* v. *Wallis* (4); *Parker* v. *Palmer* (5); *Campbell on Sales* (6).

The law of the Province of Quebec should govern. The liability of the Crown is in the nature of quasi-contract (Cities Art. 1043 C.C.P.Q.)

As to the question of the Crown's liability under sec. 19 of *The Exchequer Court Act*, Clode (7) affirms the liability of the Crown for property wrongfully taken and detained.

As to the counterclaim, it is a mere after-thought and should not be taken seriously. In any event there is no satisfactory evidence to support it.

R. C. Smith, K.C., for the respondent.

Counsel for the suppliant takes two positions which are diametrically opposed to each other and incompatible. He contends that the act of resale was at one and the same time an acceptance under the contract and a breach of the contract. If there was an acceptance it must stand as a fulfilment of the contractual obligation; it could not be a breach of it.

Let us look first at the object of the contract to see if there was a breach of the contract here by the Crown. In order that there should be a breach it must be perfectly manifest, or rather one of two things must be manifest, that the Crown has neglected to do something which it was bound to do under the contract, or that it has done something which under

(1) 12 Ex. C. R. 198.
(2) 5th ed. p. 752.
(3) [1893] 1 Q. B. 193.
(4) 5 E. & B. 21.
(5) 4 B. & Ald. 387.
(6) 2nd ed. pp. 341, 514.
(7) Petition of Right, p. 66.

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the contract it was bound not to do. Those are the only two possible breaches of the contract. The Crown might be guilty by its officials of one hundred and fifty wrongful acts in respect of this property; but in order to constitute a breach of contract there must be a breach of some provision of the contract. Now it is abundantly clear that this property had relation to the contract only up to a certain time. It had a relation to the contract when it was destined by the vendor, and, insofar as he could appropriate it to the contract, it had relation to the contract. But the provisions of the contract are absolutely explicit and clear, that the acceptance was left to the person representing the Crown, he could either accept or reject. So far as the vendee is concerned we are met with this position that the hay had some relation to the contract only so long as it was appropriated to the contract by the vendee. But what was the fact? When the hay comes to the ship's side it is rejected—properly rejected as not fulfilling the requirements of the contract. It won't make it any stronger to repeat it a hundred times, the proper rejection of the hay is admitted throughout the case. It is common ground. The suppliant in his petition of right accepts it as having been properly rejected. The moment that is admitted it is no longer contract hay. It is then in the same position as if it had been destined for the East Indies. It is not the hay under contract that has been rejected, and it has no possible relation to the contract at all. The Crown under the contract has no obligation resting on it at all with respect to that hay. There cannot be any breach of contract. Let us suppose for a moment that it had been thrown into the ocean. Supposing the officers of the Crown, Mr. McFarlane and Lieutenant

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Bell, instead of selling it said, that hay has no right to be on this wharf, and they shoved it into the water? Would it be argued there, or could it be argued, or could an argument be stated either that it was a breach of contract or that it was an acceptance? I submit not. It would have been purely a tort. If it were in the Province of Quebec it would have been a *delit*, which is equivalent to a tort. The character of that act, as to whether it was a tort, would be determined by the law of the place where that act took place.

As to the question whether the conversion of Poirier's property by the resale of it, could possibly constitute an acceptance, the whole of the petition of right negatives such an idea. But I would just say in that connection in all of these cases of acquiescence or acceptance, what is it all founded upon? It is founded upon consent only. In the case of acquiescence and in the case of acceptance by active conduct, it is simply an act from which consent may be reasonably inferred.

That is what they all resolve themselves into. Counsel for the suppliant argued that the *Windsor & Annapolis* case disturbed in some way *Tobin* v. *The Queen* (1), on which all of those cases were founded. The *Tobin* case was the leading case on the subject. It is the leading case to-day, and it simply decides that while the Crown is liable in contract it is not in tort. It distinguishes between contracts and torts, and the *Windsor & Annapolis* case (2) does not extend or modify the principle (See per Lord Watson in *Windsor & Annapolis* case.)

In the civil law there is a distinction between actions of pure tort and those based on wrongs arising out of

(1) 10 L. T. N. S. 762. (2) L. R. 11 A. C. p. 614.

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contract. In Sourdat's work on *Responsabilité* (1) there is a chapter devoted to *delit civil*—and there we find, you can have a tort arising out of a contract, or you can have an action purely tortious. That distinction is well marked in the civil law. But I do not recall that a straight action of tort can be brought against the Crown.

Supposing there was a contract to deliver certain goods and the contractor does not deliver them, but deals with them in an improper manner. You could sue him for breach of contract for failing to deliver or for tort in the manner he dealt with them. Those questions would not elucidate what is before your lordship at all—because here there is no tort in connection with the contract, unless an obligation rested upon the Crown under the contract to deal with that property after its rejection. If there were any resulting trust, or if the Crown was the bailee of the hay after rejection under the contract there might be some ground for an argument; but there was nothing of the sort. The Crown assumed no responsibility concerning it, and any manner the subordinate officials of the Crown dealt with it would not be binding on the Crown.

With regard to the counterclaim. In determining how much evidence ought to be required to give certitude to the particular facts, we have to look at the particular circumstances of the case; and if what was done was proved to be done in pursuance of a regularly established system—and it is proved that that system was faithfully adhered to, no better evidence can be made to establish the fact. In the case of *Vasey* v. *The Montreal Gas Co.*, (2) which was discussed before our courts, and in the Privy Council,

(1) Vol. 2, pp. 452-453.

(2) 4 Q. R. S. C. p. 388.

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a certain record was kept of the strength of ammoniacal liquor from day to day. There were three or four deliveries of ammoniacal liquor from day to day for three or four years. To say that anybody could speak from memory as to those particular deliveries would be absolutely impossible. The weight in the *Vasey* case was given to the fact that what was done was in pursuance of a regular system.

The facts here are that we have the positive evidence of the man who made the measurements. We have his recollection with regard to the shipment of the bales, and so on, which is very, very strong. We rely upon the evidence given to support the counter-claim.

CASSELS, J. now, (February 9th, 1911) delivered judgment.

This is a claim by Alphonse Poirier in respect of hay delivered at St. John, N. B., under contracts entered into by the Minister of Agriculture for Canada for and on behalf of the Imperial Government. The contracts are similar to those dealt with in the case of *Boulay* v. *The King* (1).

One material difference between the claim put forward in the *Boulay* case and the case in question is, that in the present case the petitioner admits that the hay, the subject-matter of the present action, was rightly rejected. His claims are of a twofold character. A part of his claim is for the payment of 33,680 pounds of hay which he alleges the Department received, and for which it is said the Crown is indebted to him in the sum of $235.76. The second part of his claim is in respect of 267,750 pounds of hay sold by employees of the Government. The petition claims

(1) 12 Ex. C. R. p. 198; 43 S. C. R. p. 61.

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that this sale was illegal, and asks for damages for the illegal conversion of his hay. His claim on this account amounts to the sum of $1,095.99.

After setting out in his petition the contracts, the petitioner alleges as follows:

(Par. 3) "Que, par une des conditions des dits "contrats, le dit Département ne devenait propriétaire "que du foin, expédié par votre requérant, qu'il n'avait "pas rejeté avant son chargement sur des bateaux à "vapeur, St-Jean, Nouveau-Brunswick, appert aux "dits contrats, lesquels, pour plus amples imforma- "tions, sont produits au soutien des présentes comme "Exhibits numéros 1, 2, 3, 4, 5 et 6;"

(Par. 6.) "Que sur la quantité de foin ainsi livré "par votre requérant durant les années de 1901 et de "1902, le dit Département a rejeté, en petites quan- "tités, pour chacune des dites deux années 144,878 "livres et 243,743 respectivement, en tout 388,621 "livres qui ont continué à être la propriété de votre "requérant, appert aux états fournis par le dit Dépar- "tement et qui seront produits au soutien des pré- "sentes comme Exhibits numéros 31, 15 et 14—et à "certaines lettres en date des 27 août 1902 et 10 dé- "cembre 1902 par lesquelles il est clairement admis "que 370,350 (au lieu de 388,621) livres de foin ont "été rejetées, en petits lots, par le dit Département "durant les années 1901 et 1902; appert également à "ces lettres qui seront produites comme Exhibits "numéros 11 et 21."

(Par. 7.) "Que votre requérant admet avoir reçu "du dit Département 102,000 livres du foin ainsi "rejeté durant les dites deux années;"

(Par. 8.) "Que la balance du foin ainsi rejeté, "savoir 286,621 livres valant $14.00 la tonne, le dit "Département, par ses officiers et préposés, se l'est

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"approprié, s'en est emparé et l'a vendu, parait-il, "pour la somme de $910.35 que votre requérant admet "avoir reçu sans préjudice toutefois à ses droits;"

(Par. 9.) "Que le dit Département, par ses officiers "et préposés, n'avait pas le droit en vertu d'aucune "convention, ou de la loi, de s'emparer et de vendre "le foin de votre requérant ainsi rejeté par lui, et il "n'y a jamais été autorisé par votre requérant;"

(Par. 11.) "Qu'en agissant ainsi le dit Départe- "ment, par ses officiers et préposés a manqué à ses "obligations et a par là fait perdre à votre requérant "la somme de $1,095.99, puisque de fait ce dernier "aurait vendu cette balance du foin, savoir $286,621 "à raison de $14. la tonne, soit $2,006.34 sur lesquelles "il (votre requérant) n'a reçu, comme susdit, que "$910.35, lui causant une perte sèche de $1,095.99.

(Par. 12.) "Que cette perte de $1,095.99 résulte "de l'inexécution des obligations du dit Département "ainsi que de la faute et de la négligence de ses officiers "et préposés, dont l'intimé est responsable."

The petitioner then sets out in the subsequent paragraphs his claims in respect of 345 bales of hay weighing 33,680 pounds, and demands the sum of $235.76 on this account. The Crown denies the right of the petitioner to receive this sum of money, and it sets out in the alternative, as follows:

"23. In the alternative he says that in the final "settlement of the accounts of the suppliant with "the Department of Agriculture, his account was on "the 12th of August, 1902, credited with 43,633 pounds "of hay which at $14 a ton, amounted to $303.43, "which was above the value of the said car load in "the petition of right alleged to have been sent as "aforesaid."

The case came on for trial in Montreal on the first day of March, 1910, there being an agreement between

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the counsel for the suppliant and the counsel for the Crown, that only the evidence in support of the suppliant's case should be then adduced, the further trial of the case to enable the Crown to put in their evidence to take place in Ottawa at some time to be agreed upon.

The case was concluded on the 13th day of January last at Ottawa. During the progress of the trial it became apparent that the contention of the Crown set out in the 23rd paragraph of the defence quoted was not well-founded. The explanation given in the earlier stages of the trial in regard to the 43,633 pounds of hay was, that prior to the 12th day of August, 1902 when the final account was rendered and final payment made, the plaintiff had made a claim in respect of the 333,680 pounds referred to in paragraph 13 of the petition. According to the evidence of Mr. Moore, the Department found that they had received the amount of 43,633 pounds of hay, which had not been paid for—whose hay this was they did not know—but as Mr. Poirier was making the claim they gave him the benefit of the credit. During the progress of the trial it was clearly proved that the hay in question, namely, the 43,633 pounds, was the hay of the suppliant and that the suppliant was entitled as of right to the payment therefor; and upon the true facts coming to light this claim for an offset of $305.43 was abandoned.

It was also clearly proved and admitted by a letter among the exhibits written on behalf of the Crown, that the contention of the petitioner in regard to the claim for 33,680 pounds was well founded. The mistake arose from the fact that the hay had been loaded upon a car of the Canadian Pacific Railway Company, No. 2542. This car in transit had been destroyed, and the hay was transhipped to car No. 19084, and was received

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by the Department at St. John. By the admission of the respondent the suppliant is entitled to receive from the Crown the value of this hay amounting to $235.76, and the claimed offset in respect of the 43,633 pounds is abandoned.

The further claim made on behalf of the suppliant is as follows: It is admitted by both parties that the total quantity of hay rejected by the officers at St. John amounted to 370,350 pounds of hay. Of this amount 102,600 pounds was delivered to the suppliant or his nominees. The claim made is in respect of the balance 267,750 pounds. Immense quantities of hay were being purchased for shipment to South Africa. The suppliant did not see fit until late in December of 1901 to send anyone to St. John or to write to anyone to take care of his rejected hay. His hay together with rejected hay belonging to other shippers was placed in the sheds on the wharf. Congestion took place and the officers of the railway required the hay to be removed. Thereupon sales were from time to time made of this blended hay. The average price received for the hay comprising a portion of the petitioner's rejected hay and the hay of other shippers, came to $6.80 per ton. This sum, amounting to $910.35, the suppliant was credited with and he admits having received it. His complaint, however, is that his hay was sold by the officials in St. John without any authority from him. The price of $6.80 was below the value of the hay; and he claims as damage, valuing his hay at $14. per ton, for the difference between $6.80 per ton and $14. which he claims his hay should have realized. It has to be borne in mind that while the suppliant received the $6.80 per ton in cash, he practically received the sum of $9.80 per ton. The freight on the hay from the point of shipment to St. John was $3 per ton; this

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amount was payable by Mr. Poirier in respect of the hay carried for him. The Department in addition to crediting him with cash for $6.80 released him from the freight of $3. Mr. Poirier in this way receiving payment in fact at the rate of $9.80 per ton. In the view I take of this branch of the case, I do not propose to enter into the question as to what amount Mr. Poirier should have received for his hay. It may eventually turn out that the $9.80 a ton was ample. In this particular case upon the facts stated, and as the case was presented both by the petition and during the conduct of the case, I do not think there is any liability no behalf of the Crown.

The act complained of both in the petition and during the progress of the trial by the suppliant was that it was a tortious act by employees in the service of the Crown. The claim put forward is one of wrongful conversion, and I do not see that the Crown can be held responsible for the torts of its employees. The case of the *Windsor & Annapolis Railway Company* v. *The Queen*, (1) cited by Mr. Lemieux, is a case of a different character. All that was there decided is that the Crown may be liable in damages for breach of a contract. In the case before me the hay was the property of the suppliant. There was no contractual relation whatever in regard to the hay. Clode on Petition of Right (2) deals with the question. He also refers to the American case of *Langford* v. *The United States*, (3). The question is also discussed in some of the reasons for judgment in the case of *Boulay* v. *The King*, (4).

I think, therefore, that in respect of the petition, the suppliant is entitled to be paid the sum of $235.76 hereinbefore mentioned; and that that portion of the peti-

(1) L. R. 11 A. C. 607.
(2) p. 136 *et seq.*
(3) 101 U. S. R. 341.
(4) 43 S. C. R. 61.

tion which claims damages for the wrongful conversion of the hay must be dismissed.

I proceed now to deal with the counterclaim filed on behalf of the Crown.

The Attorney-General on behalf of the Respondent in his counterclaim alleges as follows:

"1. By contracts respectively dated the 19th Sep-"tember, 1901, the 15th November, 1901, the 20th "December, 1901, and the 26th December, 1901, the "Commissioner of Agriculture agreed with the sup-"pliant for the purchase from the latter of certain quan-"tities of hay therein particularly mentioned and de-"scribed and upon the terms and conditions therein "contained."

"2. It was one of the terms and conditions mentioned "in the preceding paragraph that the hay was to be "compressed to stow in not more than 70 cubic feet per "ton, that hay occupying more than 70 cubic feet per "ton might be accepted at the option of the Depart-"ment, but only at a reduction of $1.50 per ton from "the contract price for every ten feet or any part "thereof stowage space required per ton, in excess of "the standard specified."

"3. All of the hay shipped by the suppliant between "the 4th November, 1901, and the 31st of January, "1902, exceeded the limit of stowage specified in the "said Clause 3."

"4. The suppliant is indebted to His Majesty the "King in the sum of $3,525.72, the amount of the reduc-'tions from the contract price provided by the contract 'and incurred in respect of the hay mentioned in the "preceding paragraph."

Clause 3 of the contract reads as follows:

"The hay to be compressed to stow in not more than "seventy (70) cubic feet per ton; hay occupying more

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"than seventy cubic feet per ton may be accepted at "the option of the Department, but only at a reduction "of $1.50 per ton from the contract price for every ten "feet, or any part thereof, stowage space required, per "ton, in excess of the standard herein specified."

While the language of the contract has to be construed as it is written, it is well to understand the object of this clause. Moore in his evidence puts it in this way:—"Clause 3 of the agreement referred to the compression of the hay, the compression of the hay was a very important point, because we chartered our steamers at so much per cubic foot for cargo space under deck."

[THE COURT:—Who paid that freight?]

A. We did.

Q. Are the Dominion Government out of anything?

A. We paid for stowage.

Q. Somebody lost. Did the British Government?

A. If we exceeded our limit of the amount offered them our Department would have to pay. We stated we could deliver 15,000 a month at Cape Town at a certain price, and to get that down there we had to get a certain amount of space in the ship. We had to compete with the United States and the Argentine and Australia for getting this business for Canada." Again he says:—

"We were anxious to get as much hay in the ships as possible. The more hay we got into a ship it reduced the freight."

Further on he states:—

"It cost us roughly $1.50 for every ten cubic feet in stowage; and that is the way we arrived at that figure in the contract. If a ton of hay occupied more than 70 cubic feet, which was a reasonable stowage limit with those steam presses,—if it occupied ten

feet more than that amount the shippers would receive $1.50 less. It is an important matter to the shipper. This hay was put through the steam compressors. It was hard compression and hard on the press. If a shipper could compress to 80 feet, and he could supply the hay under our contract calling for 70 cubic feet compression, and have it accepted, when it occupied 80 or 90 cubic feet per ton, it would be a decided advantage to him, because he could run his press without any danger of breakage and have no large bills for repairs, and have no loss of time on the part of his staff and in that way it would cost him less money."

This witness produced the stowage book. He states that the measurements were made by Lieutenant Bell who was the Inspector of Weights and Measures. A copy of the book is filed, marked respondent's exhibit "K."

On the 27th August, 1902, a final settlement was made,—marked "Suppliant's exhibit No. 17." It appears that at the date of this settlement Mr. Poirier, the suppliant, had been overpaid the sum of $393.54. The Department had received $910.35 the proceeds of the hay sold in St. John. The way in which the settlement was carried out was dividing $910.35 into two cheques—one for $393.54 and one for $516.81. The cheque for $393.54 was endorsed over by Mr. Poirier, and thus the amount of his over-payment was repaid. At the time of this balancing in August, 1902, no claim was made on the part of the Department for the alleged repayment of the $1.50 referred to in the counter-claim. Mr. Moore explained it as follows:—

"Q. THE COURT:—Have you looked at the settlements of Mr. Poirier?

A. Yes. There was no deduction made with Poirier.

[THE COURT:—Why was that?]

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A. They wanted to be as generous with the shippers as they could be. We remitted the freight also on the culled hay we sold—I don't know why."

From August, 1902, until about 1907 no claim was ever put forward on the part of the Government for repayment of the amount now claimed in the counter-claim, viz., $1.50 per ton. Had the claim been made in August of 1902, Poirier would no doubt have been in a better position to meet the case than five years later. There is not what can be called strictly a settlement of accounts in 1902; and if there had been the effect of the action taken by the suppliant Poirier would be to open up the settlement. And the counter-claim being filed on behalf of the Crown I would probably have been compelled to allow their claim had sufficient proof been adduced in support of it. Having regard to the circumstances detailed, I think it incumbent upon the Crown to give strict proof in support of their contention. In this I think they have failed. The contracts of September 19th, 1901, November 15th, 1901, December 20th, 1901, and December 26th, 1901, are all similar in language so far as clause 3 is concerned. In the contracts of the 22nd January, 1902, and the 22nd February, 1902, instead of clause 3 containing the words "more than seventy (70) cubic feet per ton," it is "more than seventy-five cubic feet per ton." In other respects they are the same. The Department have placed a construction upon this clause 3 which certainly presses hardly on the vendor. The obvious meaning of clause 3 is that $1.50 per ton should be deducted from the contract price for every ten feet "stowage space required per ton in excess of the standard herein specified." This no doubt was framed for the purpose of meeting the case put by Mr. Moore in his evidence quoted, namely, that for every loss of

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ten feet of cubic space, there was a monetary loss of $1.50. The Department, however, seem to take the view of the contract which would enable them to deduct $1.50 per ton for every ton compressed in such a way as to require more than seventy cubic feet per ton, even if the excess was merely one cubic foot. The result of their method of construing the contract would be that if a ton of hay was so compressed that it occupied 71 cubic feet instead of 70, Mr. Poirier would only receive $12.50 per ton, instead of his contract price of $14 per ton. The contract in clause 3 is open to doubt as to its true meaning by the interposition of the words "or any part thereof" after the words "for every ten feet." I should hesitate before accepting the construction placed upon it by the Department of Agriculture. I think, however, there is no proper proof of the non-compliance with this particular provision of the contract. The book produced by the Department is relied upon under the *Canada Evidence Act* as proof. These books are compiled from the slips prepared by Lieutenant Bell. Lieut. Bell was appointed for the purpose of seeing that the various contracts were lived up to. He states in his evidence that all the hay passed through his hands. He is asked:—

"Q. Did you immediately report the measurements of all the bales of hay that you measured there in St. John?

A. I did. That is to say, after each day's work the actual figures were returned to Ottawa on a slip which was provided for the purpose. The slip bore the number of each car, the number of the bales tested in the car, and the number of bales that were eventually shipped from the car.

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Q. The record in Ottawa was the record of your daily reports?

A. Yes, actually."

His evidence goes no further than the record produced from the book. I find nothing in the contract which permitted Lieutenant Bell to test a certain number of bales and to conclude that because this particular number of bales occupied proportionately more space than that provided by the contract, therefore it was to be assumed as against the suppliant Mr. Poirier, that the balance of the bales making up the ton of hay measured the same as those bales tested. The contract provides for an excess per ton. In my opinion if the Department had intended, or were entitled, to charge this sum of $1.50 per ton, they should have had a proper measurement, not jumping at it in the manner in which Lieutenant Bell performed his work.

Referring to the statement, exhibit "K" (a copy of the book), take for illustration Number 1—Car No. 18198; shipping date November 4th; net weight of hay accepted 43,629 pounds; number of bales tested, five; measurement per cubic feet, seventy three; reduction per ton $1.50; and reduction per carload $32.72. A bale of hay is said to contain 100 pounds, a ton of hay 2,000 pounds. The 43,629 pounds being the weight of the hay accepted, amounts to almost 22 tons. Lieutenant Bell tested out of these 22 tons five bales, or if it were averaged by the ton about 25 pounds of hay per ton. It would probably have turned out, or at all events it might have turned out, if he had made a proper examination, that while a considerable number of the bales might have been in excess of the 70 cubic feet, others might have been under, so that when the whole thing was computed, Mr. Poirier might

have been found to have complied with his contract. In my opinion this method of arriving at the amount due is not sufficient to prove the claim put forward.

The contract calls for a reduction of $1.50 per ton from the contract price. There is no provision for payment for excess of space occupied by any particular bale. If after the lapse of time and what has taken place, assuming the contention of the Department as to the meaning of clause 3 to be in their favour, I think they would have to prove the truth of their allegations by evidence stronger than that adduced before me. I think the Crown have failed to support their counterclaim, and the counterclaim should be dismissed.

That portion of the counterclaim referred to in paragraph 5, as follows:—"In the final settlement of the accounts of the suppliant with the Department of Agriculture, the account of the former was on the 12th August, 1902, credited with 43,633 pounds of hay at $14 a ton, amounting to $305.43, being in respect of a carload of hay referred to in paragraph 13 of the petition of right, and alleged to have been delivered by the suppliant, but which the Attorney-General claims was never received by the respondent," has been dealt with in the judgment on the main case, and was abandoned.

The result of the whole case is that the suppliant Poirier succeeds as to the sum of $235.76. He also succeeds in respect to the claim put forward by the Crown in respect to the 43,633 pounds of hay referred to in the 23rd clause of the defence. He fails in regard to the damages claimed for the wrongful conversion of his hay amounting to a sum over $1,000. The defence fails entirely as to their counterclaim. To adjust the different items that would be allowed for

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costs to and against the suppliant, and to or against the respondent, will be difficult. I think if the suppliant is allowed $250 for his costs it will be about the correct amount. Judgment will therefore be entered for the suppliant for the sum of two hundred and thirty five dollars and seventy-six cents, and for two hundred and fifty dollars costs. The counterclaim is dismissed, no further costs to or against the respondent.

Judgment accordingly.

Solicitors for suppliant: *Beauregard & Delage.*

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

IN THE MATTER of the Petition of Right

MATILDA SABOURIN.....SUPPLIANT; 1911 Jany. 10.

AND

HIS MAJESTY THE KING.....RESPONDENT.

Public work—Soulanges Canal—Accident to workmen—Negligence—Electric lighting system—Failure of workman to obey instructions—Faute commune.

The electric lighting system of the Soulanges Canal at the time of its installation, some ten years before the accident in question, embraced all the means then known to the art for safe-guarding the workmen in charge of it from accident. The facts shewed that while this system was not defective, in installations made at the present time more protection may be afforded workmen in lowering and returning lamps to position. The safety of the men engaged in this work on the canal was absolutely ensured by their observance of certain instructions communicated to them by the proper officer of the Crown in that behalf, viz., to wear rubber gloves furnished for the purpose by the Crown, and to use the crank provided for the purpose of raising and lowering the lamp to position. On the occasion of the accident in question M., the suppliant's husband, while discharging his duties as carbon-man, was killed by a current of electicity entering his body from the wire cable used for lowering and raising the lamp. The facts shewed that this cable had become electrified owing to certain weather conditions, and that M. had taken hold of it without rubber gloves in order to shake the carbon into place without lowering the lamp for such purpose, which he had been expressly forbidden to do.

Held, affirming the finding of the Referee, that the facts did not establish a case for the application of the doctrine of *faute commune;* and that as the accident was solely the result of M's own negligence, the petition must be dismissed.

PETITION OF RIGHT by the widow of a workman, employed on the Soulanges Canal, who was killed by an accident while engaged in the sphere of his employment.

The facts are stated in the report of the Referee.

By consent of parties, the case was referred to the Registrar, as Referee, for enquiry and report.

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Report of Referee.

September 18th, 1909.

The Referee now filed the following report:—

The reference was proceeded with at Montreal, before the undersigned on the 23rd and 24th days of April, 1909, in presence of S. Letourneau, Esq., of counsel for the suppliant and of Jean Charbonneau, Esq., of counsel for the respondent, and after hearing the evidence adduced and what was alleged by counsel aforesaid, the undersigned submits as follows:—

The preparation of this finding was delayed by the production of the evidence.

The suppliant brings her petition of right to recover the sum of $10,000 for alleged damages resulting from the death of her husband, Aurèle Mercier, who was killed while discharging his duties as carbon-man on the Soulanges Canal, a public work of Canada.

The action is based upon sub-section (c) of section 20 of the *Exchequer Court Act* (R. S. 1906, c. 140) which gives the subject relief against the Crown for every claim arising out of any death or injury to the person or to property on any public work, resulting from the negligence of any officer or servant of the Crown while acting within the scope of his duties or employment.

The accident happened in the following manner:— On the evening of the 12th July, 1907, Mercier was found dead, hanging by the hand still grasping the metal cord or cable used to take the lamp up and down the post. The coroner's investigation was passed upon the body, and the medical man declared, after hearing all the circumstances, that he had been killed by an electric shock.

The several duties assigned to Mercier and to all carbon-men are told to us by Damien Lalonde, the Chief Electrician on the Soulanges Canal, from whom the carbon-men received their orders and directions.

He was their superior officer. In daytime there is no current on the wire, and it is at that time the carbon-men pass and change the carbon on the lamps. In the evening and at night, when the current is on,—and it is put on at the power house and not by the carbon-men, when the sun is down,—it is the duty of the carbon-man to go the round of the section and see that the lamps are lighting. If they do not light they should be taken down in the manner told and shown them by the Chief Electrician, who tells us further that when Mercier first came upon the works, he showed him how to carbon a lamp and all the work that was expected of him. He further gave him a man with experience to go over his works for a few days, who showed him what to do.

Damien Lalonde further gave him a pair of rubber gloves to use when he was doing anything to the lamps at night, when the current was on. If a lamp does not light at night, the duty of the carbon-man is to take it down in the regular manner, as mentioned hereafter and to repair it if he can. If the lamp does not light for a second night, he takes it down to the power house to have it repaired. He is not supposed to open the lamp on the grounds, but only at the power-house.

Under the system at the Soulanges Canal, there was, with very few exceptions, a transformer for each lamp, and the lamp in question had its own transformer.

The lamp is suspended at the end of an arm running out from the post. It is so suspended by a metal cord running upon blocks, which runs down the post and through cross-bars holding the transformer and finally reaches a reel at about three feet from the ground at the time of the accident. This reel is worked with a detachable crank, having a wooden handle. The voltage on the main was 2,400, conducted to the transformer by two secondary wires. There is on the lamp proper,

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under normal conditions, a voltage of 110 to 112, and this voltage cannot kill.

However, it appears that through unknown reasons, which are at least assigned to thunder, the primary or main wire came in contact with the box of the transformer, burning the insulation and loading the box of the transformer with the current of 2,400, which is the current on the primary. The thunder would have burnt the wire inside and brought it in contact with the box. As a result the secondary wire came in contact with the primary or main, the wire coming in contact with the main came in contact with the box of the transformer which is of wrought iron. Now, as was already said, the transformer rests on two wooden cross-bars through which passes the metal cord to take the lamp up and down, and it is contended by all the experts and those who know of electricity that as it had rained all day and the weather was still very damp on the night of the accident, the electricity was, following this disturbance, communicated to this metal cord by water on those cross bars. Water is a conductor. The induction, on account of this rainy, wet and damp weather prevailing all the time, electrified this metal rope. The metal cord was then practically loaded from the primary or main wire with a current of 2,400, more or less.

On the very first day that Mercier reports for work, Damien Lalonde teaches him his work as above mentioned, and furthermore gives him a pair of rubber gloves and instructs him and gives him orders to use them every time he has any work to do with the lamps when the current is on (pp. 136, 282, 284, 305, 307). Mercier had had two pairs of gloves, and he would have been given more, so the Chief Electrician tells us, for the asking. There was no reason for him to be

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without gloves, and he had gloves. He was, by his superior officer, from whom he took instructions, ordered not to shake the lamp and warned that an accident might happen if he did not use his rubber gloves. He was told several times to use his rubber gloves ; and if a lamp does not light it is a sign something has gone out of order, and that alone is a good reason to use the gloves.

Furthermore, he had been forbidden on several occasions, strict orders being given him never to shake the lamps by catching hold of the metal cord, because among other reasons, it had the effect on some occasions to shake the globe off the lamp and make it fall to the ground and break it. It was said in evidence that sometimes by so shaking this metal cord, it would give a jerk to the lamp and work down the carbon to its place and start a lamp which would be temporarily out. But this mode of starting the lamps was forbidden, strict orders being given never to do it. Sauvé, the superintendent, and Damien Lalonde, the Chief Electrician, under whom were the carbon-men, gave these orders.

On the night of the accident, Mercier first transgresses the order given him in not putting on his rubber gloves to attend to the lamp, and, secondly, he further disobeys in attempting to shake the lamp by holding the metal cord in his hand, because it is the necessary surmise we must, under the evidence, come to, when he is so found hanging by the hand to this metal cord.

By way of shifting the liability the suppliant has endeavoured to prove that the lamp in question was often out of order. Would not that fact, if it were satisfactorily proved, be an additional reason why Mercier should obey his orders and instructions and put on his rubber gloves when he has to do with such a lamp?

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Damien Lalonde says, that it was Mercier's duty on the night of the accident to use his gloves in connection with the lamp out of order, and especially so in rainy weather.

Jean Baptiste Juillet says he sometimes saw Mercier at work at night with rubber and kid gloves on his hands.

Under the present circumstances and the facts as above related, there cannot be any other conclusion to come to than that Mercier met with the fatal accident through his own fault. The man who is the author of his own wrong merits nobody's sympathy; he does not come into Court with clean hands. *Thrussell* v. *Handyside* (1).

So far, having relation to sub-section (c) of section 20 of the *Exchequer Court Act*, we have a public work and an officer of the Crown in charge of the works, *i.e.*, Damien Lalonde, the Chief Electrician. Can it be said that the latter was in any manner negligent? The question must obviously be answered in the negative.

Two experts, electrical engineers, were heard as witnesses on behalf of the suppliant. They were Messrs. J. de G. Beaubien and Louis Herdt, men of good standing and capacity. The latter especially is a gentleman of experience and profound knowledge and professor at McGill University.

Both of them, in answer to the undersigned, clearly and unhesitatingly declared that the electrical system or installation in force at the Soulanges Canal is not defective. Mr. Beaubien tells us clearly that if Mercier had used his rubber gloves the accident would not have happened.

Mr. Herdt tells us that the installation, made ten years ago, was so made in the best possible conditions

(1) [1838] 20 Q. B. D. 359; 57 L. J. Q. B. 347.

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but that now precautions might be taken ,and he concludes by saying:—

"Le développement dans l'installation électrique dans les dix dernières années a été tellement sensible que je me rappelle avoir visité cette installation avec l'ingénieur en chef de la compagnie et avoir exprimé mon admiration de la manière que ç'avait été installé mais d'ici là qu'une protection aurait du être faite sur ce point en question. Or je voudrais comme ingénieur être absolument indemné de blâme contre quelqu'un qui a fait une installation il y a dix ans."

Mr. Herdt, however, when stating he could not say that the installation was not defective, added that it was not complete, inasmuch as it had not sufficient protection to raise and take down the lamps. It is always easy to be wise after the event, and to suggest some way or manner how an accident might have been avoided. And, obviously, the criticism of Mr. Herdt could not, by hook or crook, be construed to be a condemnation of the installation. The installation was, in his judgment, the best that could be made and erected at the time, and it must now be worked with precaution. Mr. Damien Lalonde has shown that precaution by giving strict orders from the beginning to use rubber gloves when handling the lamps. What more could be expected? *Quebec & Lake St. John Ry.* v. *Lemay* (1).

Under the English law the legal doctrine would in a case like the present one deprive the suppliant from recovering.

Under the Admiralty law, the rule governing in cases of contributory negligence is founded upon the principle which from ancient times has been applied in Admiralty courts, that damages occasioned by a

(1) Q. R. 14 K. B. 35.

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common fault shall be considered as a common loss. *Williams' & Bruce's Admiralty Practice* (1).

However, the present case is to be decided under the law of the Province of Quebec where, when the employer and the employee injured are both at fault, damages are divided. *Price* v. *Roy* (2). The damages must then be reduced in the ratio of the relative fault. But this is not a case of common fault or of contributory negligence. There is no fault or negligence proved on behalf of the servants or officers of the Crown. Mercier suffered death through his own negligence, from his disobedience to the orders and instructions of his superior officers. *Volenti non fit injuria.* If an employer could be held liable in such a case, he could not protect himself against the concerted action of his employees to mulct him in damages. *Beven on Negligence* (3). says:—

"If the necessary advices are given to insure the safety of the workmen so far as is, in the circumstances, reasonably practicable, the master's duty is discharged; and a workman who has had the requisite orders given to him to safeguard his working and who disregards them is not to be heard to say that the master is liable for an injury sustained by him because the foreman did not see the orders were not disobeyed, or where the danger is intensified by his own insensate folly".

Among the numerous cases cited by Bevan, we find the two Canadian cases of *Davidson* v. *Stewart* (4); and *The Royal Electric Co.* v. *Paquette* (5) on this very point. See also *Canada Foundry Co.* v. *Mitchell* (6); *Lepitre* v. *Citizens Light etc. Co.* (7); *Montreal Park and Island Ry. Co.* v. *McDougall*;(8) *Allen* v. *New Gas Co.* (9).

(1) 3rd ed. p. 95.
(2) 29 S. C. R. 494.
(3) [1908] ed. 3, vol. 1, p. 618.
(4) 34 Can. S. C. R. 215.
(5) 35 Can. S. C. R. 202.
(6) 35 Can. S. C. R. 452.
(7) 29 Can. S. C. R. 1.
(8) 36 Can. S. C. R. 1.
(9) 1 Ex. D. 251.

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The person who sustains damages through his own fault is supposed not to suffer any. *Quod quis ex sua culpa damnum sentit, non intelligitur damnum sentire.* He has, indeed, but himself to blame for the prejudice suffered, and no one but himself is responsible for the damage he has suffered through his own fault. *Larombiere Oblig.* (1); *Sourdat, Responsabilité* (2); *Laurent* (3); *Dalloz* (4); *Cie. Navigation de Richelieu et Ontario* v. *St. Jean* (5); *Grand Tronc* v. *Bourassa* (6); *Bergeron* v. *Tooke*(7); *Currie* v. *Couture* (8); *Coallier* v. *Dominion Oil Cloth Co.* (9); *The Globe Woollen Mills Co.* v. *Poitras* (10).

I regret to say that the late Mercier had but himself to blame for the accident, and under the circumstances the suppliant cannot recover.

Therefore, the undersigned has the honour to report and finds that the suppliant is not entitled to the relief sought by her petition of right herein.

The suppliant appealed from the report of the Referee.

December 15th, 1910.

The appeal from the report of the Referee was now argued.

J. A. Beaulieu, for the suppliant, contended that the facts showed a case of contributory negligence on the part of the suppliant's husband. In such a case the principle of *faute commune* must be applied and the damages divided but not necessarily equally. The accident was the combined fault of the Crown's officers and of the deceased. The electric lighting system of the canal was admittedly defective. The

(1) Vol. 5, p. 708.
(2) Vol. 2, pp. 9, 10.
(3) Vol. 20, pp. 494, 495.
(4) [1874] Part 1, p. 230.
(5) 28 L. C. J. 91.
(6) 19 L. N. 132.
(7) 27 Can. S. C. R. 567.
(8) 19 R. L. 443.
(9) M. L. R. 6 Q. B. D. 268.
(10) Q. R. 4 K. B. 116.

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cable by which the lamp in question was lowered and raised into position became electrified owing to the negligence of the Crown's officer in charge of the electric lighting system. Mercier, the plaintiff's husband, was admittedly negligent in not using rubber gloves, but the accident would not have happened if the cable had not been permitted to become charged with electricity owing to the defective state of the lamp and the transformer.

Canadian Pacific Railway Co. v. *Tapp* (1); *Jacquemin* v. *Montreal Street Railway* (2); *Fleury* v. *Quebec District Railway Co.* (3); *Caron* v. *La Cité de St. Henri* (4).

The electric light system was defective as a whole. It was incumbent upon the Crown to have adopted all the modern means of safeguarding the carbon-man from accident. The evidence shows that more precautions are taken now in protecting men in charge of the lights than was the case in this system installed some ten years ago. The Crown should have brought the system up to date. The evidence shows that if a porcelain tube had been provided through which the wire from the lamp would pass, the accident would have been averted. The cable was too close to the transformer, and the wire should have been grounded. Moreover, this particular lamp was in a defective condition to the knowledge of the Crown's officials, and that knowledge was not communicated to the suppliant's husband. Under these circumstances there is a clear case of negligence within the meaning of the *Exchequer Court Act*, sec. 20. The utmost care was upon the Crown to safeguard the workmen from accident where the work was necessarily dangerous as was the case here. (Cites *The Citizen's Light and*

(1) 18 Q. O. R. K. B. 552.
(2) Q. R. 11 S. C. 419.
(3) Q. R. 13 S. C. 268.
(4) Q. R. 9 S. C. 490.

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Argument of Counsel.

Power Co. v. *Lepitre* (1); *The Royal Electric Co.* v. *Hévé* (2); *City of Montreal* v. *Dame Mary Gosney* (3).

The Crown seeks to put the sole cause of the accident on the fact that the deceased did not wear gloves. But if the wire had not been charged with electricity the accident would not have happened. True the deceased took hold of the cable, but it is submitted that if he had used the crank instead of doing what he did he would have met with the same fate because the crank itself was charged with electricity. We admit there was fault on the part of the deceased, but it was partial and contributory only; and if everything had been normal in the system, gloves would not have been needed. This being so, the Crown was more at fault than the deceased. The deceased had no knowledge of the action of electricity. He should have been instructed by the Crown officials as to the dangerous nature of the work. It was not sufficient for the Crown to provide rubber gloves and to give instructions that they should be used; it was the duty of the Crown to see through its officials that the gloves were worn by its employees. (Cites *Chemical Co.* v. *Forster* (4).

The Crown officials knew that it was a common practice amongst the employees to neglect instructions with regard to wearing gloves. They should have seen that the instructions were carried out. (Cites *Fournier* v. *Lamoreux* (5); *Martell* v. *Ross* (6).

S. Letourneau contended that upon the facts the sole cause of the accident was first the breach by the suppliant's husband of the plain instructions that had been given to him not to attempt to regulate the carbon in the lamp by pulling the cable; and, secondly, by his

(1) 29 S. C. R. 1.
(2) 32 S. C. R. 462.
(3) Q. R. 13 K. B., 214.
(4) Q. R. 15 K. B. 411.
(5) Q. R. 21 S. C. 99.
(6) Q. R. 16 S. C. 118.

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not wearing rubber gloves as he was instructed to do. Under such circumstances the doctrine of *faute commune* could not be applied.

There is no negligence attributable to the Crown. The evidence shows that at the time of its installation the system of electric lighting on the canal was in every way perfect. The Crown, therefore, had done everything required of it with respect to the safety of its workmen. There was no contributory negligence on the part of the Crown, and Mercier the suppliant's husband was solely responsible for the accident which caused his death.

CASSELS, J., now (January 10th, 1911) delivered judgment.

This is an appeal from the report of the Registrar, acting as Referee herein, made on the 9th day of September, 1909, by which he found that the suppliant was not entitled to the relief sought by her petition of right.

I have read over the evidence taken before the Referee and have referred to the various authorities cited.

On the argument of the appeal Mr. *Beaulieu*, counsel for the suppliant, conceded that the deceased was in fault, but based his contention for partial relief on the doctrine of *faute commune*.

I think the Referee has arrived at a correct conclusion, both as to the facts and the law applicable thereto.

In addition to the authorities cited, *Tooke* v. *Bergeron* (1), and *George Matthews Co.* v. *Bouchard* (2), may be referred to.

(1) 27 S. C. R. 567.

(2) 28 S. C. R. 580.

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Walsh v. *Whitely* (1), and *Morgan* v. *Hutchins* (2) are instructive authorities relating to liability under the Workmen's Compensation Act.

It has to be borne in mind that the present case is an action against the Crown, and the relief can only be given under the provisions of the *Exchequer Court Act* if the suppliant makes out a proper case.

The appeal is dismissed with costs, and judgment may now be entered accordingly, if the parties waive making the motion for judgment provided by Rule No. 214.

Judgment accordingly.

Solicitors for the suppliant: *Pelletier & Letourneau.*

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

(1) 57 L. J. Q. B. 57, 586. (2) 59 L. J. Q. B. 197.

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Feby. 28.

BROWN, LOVE AND AYLMER,.....PLAINTIFFS;

AND

HIS MAJESTY THE KING.....DEFENDANT.

Public Work—Trent Canal—Contract—Claims thereunder—Sec. 38, R.S. 1906, c. 140—Meaning of word "Claim"—Waiver—Validity—Reference of questions of quantities and prices.

Held,—That the word "claim" as used in section 38 of *The Exchequer Court Act* (R.S. 1906, c. 140) must be construed to mean a cause of action.

2. Upon a construction of sec. 48 of The *Exchequer Court Act*, that a waiver by the Crown of stipulations in a contract respecting (a) the fixing of rates and prices by the Engineer; (b) The limitation of time for the performance of the contract; (c) The finality of the Engineer's decision of certain matters in controversy between the parties; (d) The obtaining of written directions and certificates of the Engineer as conditions precedent to recovery for extra work; and (e) The formal making and repetition of claims by the contractor, such stipulations constituting technical defences to claims by the contractor, might be validly made by a Minister of the Crown under the authority of an order-in council in that behalf. *Pigott* v. *The King* (10 Ex. C.R. 248; 38 S.C.R 501) considered.

3. Upon a reference to the court of a claim by the Minister of Railways and Canals under the provisions of Sec. 38 of the *Exchequer Court Act*, in connection with which the above waivers were made, the court held that, under the circumstances, it might be declared that the contractors were entitled to recover in respect of certain items of work, leaving the questions of quantities and prices therefor to be fixed by the Engineer to whom by consent of parties such questions were referred.

THIS was a reference of a claim to the court by the Minister of Railways and Canals.

The facts appear in the reasons for judgment.

February 21st, 22nd, 23rd and 24th, 1911.

The case was now heard at Ottawa.

R. J. McLaughlin, K. C., for the plaintiffs;

T. Stewart, for the defendant.

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Argument of Counsel

Mr. *McLaughlin:*—The plans of the Department were incorrect. The profile on the general plan showed that at a distance of one hundred feet from the margin of the river where Canal No. 1 entered, there was deep water. That was quite incorrect as it required two and one-half feet of excavation at that very point.

[THE COURT:—Is the contractor not bound to examine the ground before he makes his tender?]

I submit not, on the authority of *Pearson* v. *Mayor of Dublin* (1) The contract in that case provided that the corporation would not be liable for any mistake or inaccuracy or imperfection in the plans, or the truth of any statement contained in the specifications, when the contractor could examine the ground himself. It was found afterwards that the specifications were untrue and not fraudulent actually; but the engineers made statements in the specifications as to the nature of an ancient wall beneath the river that they had no good reason for making, and the House of Lords held generally in this way:—That it was impossible for people to take the responsibility of making reckless statements in a document that they knew was a matter of fact and when they knew that the Contractor would act upon it, and then protect themselves from all liability for the statements. By such clauses as that in the contract the Court held that it amounted to legal fraud—that is the making of statements without knowing them to be true or believing them to be true.

[THE COURT:—The contractors here knew they had to look at more than one plan. The large plan (No. 2) was not all; the contractors knew they had to consult others. If they had examined plan No. 19 they would have discovered that the line marked out on plan No. 2

(1) [1907] A. C. 351.

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was not what was contemplated. It would at least have put them upon enquiry, and they would have been able to get the necessary information.]

I fully appreciate the position. That the plans were notoriously incorrect is beyond question. The contractor examining a general plan would undoubtedly look at the detail plans—but he would look for the details of the matters shown on the general plan. Plan number 19 is not a detail of anything—it is simply a piece that ought to have been part of the general plan. There is nothing there to shew the width and line of excavation. The contractors were misled by the plans. In this way the case before the Court is very similar, if not altogether on all fours with the case I have cited. I also would refer to *Walton* v. *Moran* (1); *Wood* v. *City of Fort Wayne* (2); *Pigott & Ingles* v. *The King* (3).

[THE COURT:—Your argument, as far as it is affected by the *Piggott* case, is this: Had the parties kept to the original contract the plaintiffs would have been bound by the stipulations—but if they choose to open up the contract then it leaves it at large for a *quantum meruit.*]

Yes. It might throw some light on Burbridge, J's decision in that case. If we considered what the general law would be if there was a just contract to dig out a canal in so many words. As far as I have been able to find among the authorities, I am free to say that I do not think there is any uniformity among them. We have practically no authorities in this country but there are a great many American cases. There is *Collins* v. *United States* (4). Under the order of the engineer in charge in that case the contractors had to excavate below grade, and in excess of the amount contracted for. The

(1) *Hudson on Building Contracts*, 3rd ed. Vol. II, p. 400.
(2) 119 U. S. R. 312.
(3) 10 Ex. C. R. 248.
(4) 34 Ct. Clms. R. 294.

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claimants also demanded compensation for losses caused by delays. The plaintiff's claim was allowed. And that case agrees with the case of *Ford* v. *United States* (1). And it would also seem to agree with the decision of Burbidge, J. in the *Pigott* case (2).

The defences waived by the Minister of Railways and Canals in this case are justified under the decision in the *Pigott* case.

Mr. *Stewart* contended that if the contractors had carefully examined the plans they would have discovered the excess of excavation they are claiming for.

As to Claim I, I would draw the attention of the court to paragraph 9 of the contract. It reads:—

"9. It is hereby distinctly understood and agreed, "that the respective portions of the works set out or "referred to in the list or schedule of prices to be paid "for the different kinds of work, include not merely "the particular kind of work or materials mentioned "in the said list of schedule, but also all and every "kind of work, labour, tools and plant, materials, "articles and things whatsoever necessary for the full "execution and completing ready for use of the respec- "tive portions of the works to the satisfaction of the "Engineer. And in case of dispute as to what work, "labour, material, tools and plant are or are not so "included, the decision of the Engineer shall be final "and conclusive." The question under that section is, are they not bound by the schedule of prices?

The great body of the increased work here was of the more costly kind, and it seems beyond conscience to ask these men to add that on at the ordinary price. But in regard to the other feature of it, I submit with confidence to your lordship that the excavation shown on exhibit 19—profile No. 9—is part of the contract. Mr.

(1) 17 Cl. Clms., p. 60.

(2) 10 Ex. C. R. 248; 38 S. C. R. 501.

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Greenwood one of the engineers in charge of the work, had observed the defect in the general plan, Exhibit 2, and he drew the attention of the Superintending Engineer to this—and said they would show it on the profile plan of the river bed itself,—and it was shown on that and came down here, and was exhibited,—and you cannot separate them,—they are all part of the contract, and you cannot take that away any more than you could take Exhibit 2 away, I submit that taking it below lock I, there can be no doubt they indicated the excavations there. And perhaps I might go farther, and say that the extra allowance would not be allowed with reference to the entrance into the canal, because the specification itself provides for an extra width there.

My submission is that in all the other claims put forward by the plaintiffs the contract prices must prevail where the work is such as could be said to be of a class contemplated by the contract. In the *Pigott* case the contract prices were adhered to. The prices were not changed there by by the lowering of the grade.

CASSELS, J. now (February 28th, 1911) delivered judgment.

This is an action referred to the Exchequer Court by the Minister of Railways and Canals under section 38 of the *Exchequer Court Act*, which reads as follows:

"Any claim against the Crown may be prosecuted "by petition of right, or may be referred to the Court "by the head of the department in connection with "the administration of which the claim arises."

Section 38, sub-section 2 reads as follows:

"If any such claim is so referred no fiat shall be "given on any petition of right in respect thereof."

The reference is in the following form:

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"By virtue of the powers vested in me in that "behalf by section 38 of the *Exchequer Court Act*, "Chapter 140 of the Revised Statutes of Canada, "of 1906, I hereby refer to the Exchequer Court of "Canada for adjudication thereon the hereunto "annexed claim dated the 15th day of February, 1909, "of Messrs Brown, Love and Aylmer against the "above named respondent.

"Dated at Ottawa this seventh day of April, 1909.

(Sgd.) GEO. P. GRAHAM,
Minister of Railways and Canals.

The word 'claim' as used in the statute must be read in its technical sense.

"The word 'claim' has been considered a word of art; and long since was defined by Dyer, C.J., (*Stowell* v. *Lord Zouch* (1), to be "a challenge by a man, of the property or ownership of a thing which he has not in possession, but which is wrongfully detained from him." (*Kneedler* v. *Sternbergh* (2).

"In practice the word 'claim' and the phrase 'cause of action' relate to the same thing and have one meaning." (*Minick* v. *Trow* (3).

"A claim in a just juridical sense, is a demand of some matter as of right, made by one person upon another to do or to forbear to do some act or thing as a matter of duty." (*Prigg* v. *Commonwealth* (4).

After the reference pursuant to the orders of the Exchequer Court, an amended statement of claim was filed. As part of the amended statement of claim the following Order-in-Council is referred to:

(A Report of the Committee of the Privy Council, approved by His Excellency the Governor General on the 5th December, 1908.)

(1) Plow. 353.
(2) 10 How. Pr. 67, 72.
(3) 83 N.Y. 514, 516.
(4) 16 Pet. 541.

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"On a Memorandum, dated 1st December, 1908, from the Minister of Railways and Canals, representing that under date the 27th August, 1895, a contract was entered into with Messrs. Brown, Love and Aylmer for the construction of Section No. 1 of the Peterborough and Lakefield Division of the Trent Canal. The works embraced in this contract were duly completed."

"The Minister further represents that the contractors subsequently put forward certain claims for extras and otherwise, and these claims were, to some extent, the subject of investigation, on the 20th of July, 1906, but that no decisive conclusion was reached in the matter."

"The Minister submits a report, dated 24th April, 1908, from the Chief Engineer of the Department of Railways and Canals, upon the said claims."

"The Minister observes that it appears to him, therefore, that, apart from any question of strict legal obligation, the contractors have a meritorious claim, having done work of which the Government has received the benefit, under the direction of the Government officers, at very considerable cost to the contractors, and for which they have not been compensated."

"The Minister, in view of these circumstances, considered that it would be fair and reasonable to refer the said claim to the Exchequer Court of Canada for adjudication, subject to certain modifications of the contract, and upon the conditions hereinafter stated."

"The Minister further observes that he does not consider it expedient or desirable to submit to the Court the determination of quantities or prices as to

work of any class in respect of which the Court may find the contractors entitled to recover."

"The Minister accordingly recommends that he be authorized to waive, at his discretion, for the purposes of a reference of the said claim to the Exchequer Court of Canada, the following provisions of the contract, that is to say:—

1. Provisions prescribing limitations of time.

2. Provisions requiring the making and repetition of claims.

3. Provisions excluding implied contracts.

4. All provisions and conditions in respect of the fixing of prices by the Engineer, the requirement of directions in writing and certificates from him, and the finality of his decision contained in clauses 5, 8, 9 and 25 of the contract, and similar provisions, if any, in other clauses.

If and when the contractors agree that, upon the determination by the Court of the questions of liability affecting their said claims under the contract as so modified, the quantities and prices necessary to be ascertained in order to fix the amount of the liability, if any, found by the Court, shall be determined not by the Court but by the Chief Engineer of the Department of Railways and Canals, and that the judgment shall be entered for the amount so found by the said Chief Engineer.

"The committee submit the same for approval.

(Sgd.) RODOLPHE BOUDREAU,
Clerk of the Privy Council."

To this Statement of Claim the defendant pleaded as follows:—

"The defendant further says that on the fifth day of December in the year 1908, an Order-in-Council was passed respecting certain claims of the plaintiffs,

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a copy whereof is annexed to the said statement of claim, to which said Order-in-Council, for greater certainty, the defendant craves leave to refer, and except as the Honourable the Minister of Railways and Canals may have power to waive the clauses of the said contract and specification set forth in the said Order, and as the said Minister, may, at his discretion, hereafter waive the said Clauses, the Defendant hereby pleads and relies upon the Clauses of the said Contract and Specification, and particularly, upon those herein set forth or referred to."

The defence then proceeds to deal with each claim in detail, setting out the different clauses of the contract claimed to be a bar to the right of action of the plaintiffs.

Upon the case being opened I declined to try it until counsel for the Crown formally waived whatever provisions of the contract it was intended should be waived. I was and am still of the opinion that my jurisdiction was confined to the trial of the legal rights, and that it was no concern of mine to pass upon the meritorious claims unless the claimants were entitled in law to a judgment for the amount of such claims. Thereupon counsel for the Crown filed the following document:—

"In pursuance of and under the authority of a Report of the Committee of the Privy Council approved by His Excellency the Governor General on the fifth day of December, 1908, the Minister of Railways and Canals for the purpose of a reference of the claims referred to in the said Report to the Exchequer Court of Canada, waives certain provisions of the Contract referred to in the said Report as hereinafter set forth, namely:—

1. The waivers hereinafter contained are made for the purpose of this action only and shall apply only to those items or claims now on fyle in this action in this Court.

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2. Notwithstanding anything herein contained the Minister of Railways and Canals makes all waivers herein contained only so far as he has power to do so under the authority of the said Report and of the Statute Law or other Law applicable to or concerning the said Contract or the matters in question in this action.

3. The Minister waives that part of paragraph 143 of the Specification requiring that rates or prices should be fixed by an authorized officer as a condition precedent to the bringing of an action, and agrees that any rates or prices which might come under the said paragraph may be fixed under the provisoes of the said Report by the Chief Engineer of the Department of Railways and Canals.

4. The Minister waives the limitations of time provided for in paragraph 145 of the Specification and clauses 3 and 18 of the Contract, provided that the plaintiffs shall not under this waiver, be entitled to recover for any increased or additional work occasioned by their own delay or default.

5. The Minister waives that part of clause 4 of the contract which provides that the decision of the Engineer shall be final.

6. The Minister waives all provisions and conditions in respect of the fixing of prices by the Engineer, requirement of directions in writing and certificates from him and the finality of his decision contained in clauses 5, 8, 9, and 25 of the Contract.

7. The Minister waives the provisions in Clauses 26 and 27 of the Contract requiring the making and repetition of claims.

Ottawa, Feb. 21, 1911.

(Sgd.) GEO. P. GRAHAM,
Minister of Railways and Canals."

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Counsel also on behalf of the Crown agreed to these waivers.

I understand the effect of this waiver is that if the plaintiffs be entitled to succeed for all or some of the claims, any technical defences not going to the root of the legal right are withdrawn. The reason no doubt for the course taken is that the plaintiffs should not be deprived of their legal rights by mere technical defences not affecting the merits.

Section 48 of the *Exchequer Court Act* reads as follows:

"In adjudicating upon any claim arising out of any contract in writing the Court shall decide in accordance with the stipulations in such contract, and shall not allow,—

(*a*) compensation to any claimant on the ground that he expended a larger sum of money in the performance of his contract than the amount stipulated for therein; or,

(*b*) interest on any sum of money which it considers to be due to such claimant, in the absence of any contract in writing stipulating for payment of such interest or of a statute providing in such a case for the payment of interest by the Crown."

The effect of this clause was dealt with in the case of *Pigott & Inglis* v. *The King* (1). The learned Judge Burbidge after dealing with certain provisions states as follows:

"All of the provisions mentioned are in this case "waived by the order in council cited. Such matters "may, if the Crown sees fit, be set up as defences to any "action the contractors may bring on the contract, but "I do not see that the Crown is bound to set them up. "It is true of course that they are stipulations in the "contract, and the thirty-third section of *The Exchequer*

(1) 10 Ex. C. R. 263.

"*Court Act* provides that in adjudicating upon any "claim arising out of any contract in writing the court "shall decide in accordance with the stipulations in such "contract. But that general provision may perhaps be "treated as directory only and not as one that imposes "on the court the obligation of giving effect to a defence "disclosed by the contract which the Crown has not "pleaded." That at least has been the practice that "has hitherto prevailed in such cases both in this court "and in the Supreme Court of Canada. The section, "however, "goes further and provides that the court "shall not in adjudicating upon any such claim allow "compensation to any claimant on the ground that he "expended a larger sum of money in the performance of "his contract than the amount stipulated for therein; "nor shall it allow interest on any sum of money which "it considers to be due to such claimant in the absence "of any contract in writing stipulating for payment of "such interest, or of a statute providing in such a case "for the payment of interest by the Crown. These "negative enactments limiting, as they do, the power "and authority of the Court, must be construed not as "directory merely, but as imperative."

The learned Judge seems to divide the section and to treat the first part of section 48, namely, in ajudicating upon any claim arising out of any contract in writing, the court shall decide in accordance with the stipulations in such contract as separate from sub-sections "a" and "b". Entertaining that view he seems to be of the opinion that the earlier part of the section may be treated as directory only; but the latter part as being imperative. Unless bound by the decision of the Supreme Court I would find it difficult to hold that the word "shall" in the earlier part of the section is to be treated in any different

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manner from the word "shall" in the two sub-sections. It was not necessary so to hold in the case of *Pigott & Ingles* v. *The King* (supra).

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In the Supreme Court of Canada Mr. Justice Idington expressly deals with this question. Mr. Justice Duff concurred with Mr. Justice Idington. Mr. Justice Girouard, agreed with the reasons stated by His Lordship Mr. Justice Burbidge in the court below. Mr. Justice Davies said:—"For the reasons given by the learned Judge of the Exchequer Court, I am of opinion that this appeal should be dismissed with costs". Mr. Justice Maclennan concurred in the opinion of Davies J.

It was not necessary in the *Pigott* case to decide the point referred to by Mr. Justice Burbidge. The language of the Judge in the court below as quoted is "but that general provision may perhaps be treated as directory only."

The Supreme Court in the judgment quoted probably were merely affirming the result arrived at by Mr. Justice Burbidge, and probably did not intend to pass upon the construction of this particular section. I may be wrong in this view. It is not of much importance in considering the present case, because it is quite clear as to certain of the waivers contained in the document produced, that both the Exchequer Court and the Supreme Court have upheld the right to waive such stipulations as are important in this particular case. I have referred to the matter, as I do not wish to be bound hereafter, if the case ever arises, by a construction of section 48 of the *Exchequer Court Act* that would make the first part of the section, if construed as it was construed by Mr. Justice Burbidge, directory.

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As to some of the claims there is considerable room for different views. The views for and against the right of the claimants were presented by counsel ;— and during the trial and since the trial I have considered the various claims produced. The 1st, 3rd and 4th claims were tried together.

CLAIM NO 1.

The first claim is for sub-marine excavation in the river below Lock No. 1.

The profile plan upon which the contract was let indicated the submarine excavation to a less extent than the actual amount of submarine excavation made in the bed of the river below Lock No. 1. This was about 2,500 lineal feet in length. There is a slight difference of opinion as between the plaintiffs and the Crown as to whether it was 2,400 or 2,500 feet. The Claim Number 1 referred to me treats it as if the government engineer had allowed for the 2,500 feet. The plaintiffs base their claim upon the ground that by the profile plan a less quantity was indicated. In answer the Crown produced a plan Exhibit No. 19 which would indicate sub-marine work at the point in question of 2,500 feet or thereabouts. This plan, Mr. Aylmer the witness for the plaintiffs said he did not see; that had he seen the plan he would not have made the tender which he did. Upon the other hand, it was proved that this plan was exhibited with the other 18 similar plans which Mr. Aylmer admits having seen. I think it must be held Mr. Aylmer is bound by this particular plan. If he did not see it it was there to be seen, and it formed part of the contract plans. It may seem a hardship on the plaintiffs that excavation of this character should be paid for as earth excavation when in fact it was earth excavation under water; never-

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theless the contract is express on the point and no allowance other than for rock and earth excavation is to be allowed. It is obvious from the specifications that a certain quantity of excavation under water had to be performed. This excavation is provided for by the contract as being earth excavation. So far as this particular claim is concerned, I think the plaintiffs are not entitled to succeed.

CLAIM No. 3.

Claim No. 3 is for submarine excavation in the bed of the river below Lock No. 3, about 900 lineal feet in length. The plan exhibited and the only plan referring to the length of this submarine excavation showed a less quantity. It was the same way with Claim No. 4. The claim is for the cost of submarine excavation in the bed of the river below Lock No. 5 about 600 feet in length. The contract plan upon which the tender was based showed a less quantity. The specification provided that the canal shall be generally 50 feet wide on the bottom except at the entrances to the canals and to the approaches to the locks which shall be excavated to the lines as shown upon the plan exhibited. There was a material change from the dimensions of the work after the contract was entered into. The width instead of being limited to 50 feet was extended to the width of 100 feet. I am of the opinion that as to the extensions of the work, referred to in claims 3 and 4, and as to the extra width from 50 to 100 feet, except so far as the specifications required the extra width at the entrances to the canals and to the approaches to the locks, that they should be classified as extra work governed by clause 5 of the contract. This section of the contract reads as follows:—

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"5. The Engineer shall be at liberty at any time, "either before the commencement or during the con- "struction of the works or any portion thereof to "order any extra work to be done, and to make any "changes which he may deem expedient in the dimen- "sions, character, nature, location, or position of the "works, or any part or parts thereof, or in any other "thing connected with the works, whether, or not "such changes increase or diminish the work to be "done, or the cost of doing the same, and the Contract- "ors shall immediately comply with all written re- "quisitions of the Engineer in that behalf, but the "Contractors shall not make any change in or addition "to, or omission, or deviation from the works, and "shall not be entitled to any payment for any change, "addition, deviation, or any extra work, unless such "change, addition, omission, deviation, or extra work, "shall have been first directed in writing by the Eng- "ineer, and notified to the Contractors in writing, "nor unless the price to be paid for any addition or "extra work shall have been previously fixed by the "Engineer in writing, and the decision of the Engineer "as to whether any such change or deviation increases "or diminishes the cost of the work, and as to the am- "ount to be paid or deducted as the case may be in "respect thereof shall be final, and the obtaining of his "decision in writing as to such amount shall be a "condition precedent to the right of the contractors "to be paid therefor. If any such change or alter- "ation constitutes, in the opinion of the said Engineer, "a deduction from the works, his decision as to the "amount to be deducted on account thereof shall "be final and binding."

Section 25 of the contract reads that cash payments equal to about ninety per cent. of the value of the work

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done, approximately made up from returns of progress measurements and computed at the prices agreed upon, or determined under the provisions of this contract, will be made to the Contractor monthly.

Clause 143 of the specification reads as follows:—

"The plans now exhibited are only intended to "show the general mode of construction adopted; but "detail drawings which must be strictly carried out, "will be supplied for the guidance of the Contractor "as the work proceeds.

"If any alteration becomes necessary from any "cause, or if any work required for the entire construc- "tion and completion of the said Section No. 1, save "as hereinbefore expressly excepted, shall be found "to have been omitted from or not enumerated in "these specifications, the contractor must, when direct- "ed, carry them out in the same manner as if they "formed a part of the original design, and at rates or "prices fixed by an authorized officer for the additional "or reduced expenses that may be caused by such "alterations."

Now, it seems to me in reference to these items other than the extended length referred to in Claim 1, namely, the excavation in the bed of the river below Lock No. 1, were changes in the dimensions etc., by the clauses of the contract and specifications referred to, this extra work was to be performed at prices to be settled by the Engineer. It might or might not be that the Engineer would consider the schedule rates as being sufficient compensation. Be that as it may, it was left at large for him to determine what was the proper amount to be allowed. As the case stands before me if the plaintiffs are legally entitled to be paid for the extra cost occasioned by these changes then it is for the Engineer to whom the reference is directed

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to ascertain the quantities and the prices. It is solely a matter for him to say what ought to be allowed. It is open to him to allow higher prices than those referred to in the schedule of rates. The waiver leaves it open to have these amounts ascertained as if the prices were to be settled for this work under the provisions I have quoted. I do not wish to say anything that in any way will limit the right of the Chief Engineer to whom by consent the questions of quantities and prices are to be referred. I merely declare that in regard to these claims the matter is at large.

CLAIM No. 2.

Claim No. 2, submarine excavation at the upper entrance. This claim I think should also be left to the findings of the Chief Engineer. It is stated by counsel for the Crown that the change in the location and the pier in question effected no change whatever in the quantity of submarine excavation that would be required at the upper entrance to the canal at Lakefield. If this be so then the plaintiffs should not be entitled for any extra excavation. If on the other hand the contention of the plaintiffs is well founded, then I think they will be legally entitled to have the question determined on the reference by the Chief Engineer. It is for him to decide and to settle the quantities if the plaintiffs be entitled, and the prices.

CLAIM No. 5.

Claim No. 5 is for the cost of putting on a mortar coat on the face and coping of the concrete wall. I think the plaintiffs are entitled to have this matter dealt with under the reference. It is in no way provided for in the specifications that a mortar coat shall be placed on the face of the concrete walls. It is for the Engineer to whom the question is re-

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ferred to ascertain the quantities and the price to which plaintiffs would be entitled.

CLAIM NO. 7.

This claim is for rock excavation below grade and outside of the line as laid out by the Engineer for canals and lock pits.

CLAIM NO. 8.

Claim No. 8 is for earth excavation below the grade line of canal.

CLAIM NO. 15.

Claim No. 15 is for earth excavation outside of excavation lines of structures as laid out by the Engineer.

I think no case has been proved with respect to these last three claims.

CLAIM NO. 10.

This claim is for extra filling etc., required to complete the lifting of the Grand Trunk Railway track at Sawer's Creek. The provisions of the specifications referring to this particular work are sections 124 and 125, and are as follows:

"124. The grade of the Grand Trunk Railroad at "Sawer's Creek will have to be raised 4½ feet above "its present grade, which shall be done by the Con- "tractor. The bed of the railroad shall be carried "up with a grade of 1 in 100 or such other grade as "may be ordered by the Engineer. The slopes of "the embankment shall be of such an inclination "and the top of the embankment of such width as "shall be directed by the Engineer. The material "used in making this embankment shall be approved "of by the Engineer and be placed as he may direct.

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"125. The track shall be taken up, relaid and "ballasted and everything left in as good condition as "it was found when commencing the work of altera- "tion, and to the satisfaction of the Chief Engineer "of the G. T. Railway and the Engineer. The bal- "last shall be of a depth of 10 inches below the ties. "The cost of raising, taking up, relaying, ballasting, "and everything connected therewith, shall be in- "cluded in the schedule price for the ballast."

I am forced to the conclusion that the contention of Mr. Stewart upon the part of the Crown that the whole cost of this work is to be included in the schedule price for the ballast, must be given effect to. This seems to be the true meaning of these sections; and I think the plaintiffs are not entitled to any relief in respect to that particular claim.

CLAIM NO. 11.

This claim is for excavation of rock and earth in ditches at sides of roads, and embankment and from borrow pits for roads.

In the schedule of prices, Number 66 is as follows:

"Broken stone or gravel, for road beds, furnished or laid as described in specification per cubic yard, $1.00." It is admitted that this has been paid for. The clauses referring to the roads are sections 14 and 15 of the specification and are as follows:

"14. Where roads are ordered they shall be formed "24 feet wide, unless otherwise ordered by the Engineer, "between the side ditches, properly graded, rounded off "and trimmed. In the centre a layer of broken stone "12 feet wide and about 1 foot deep shall be placed, the "stone to be broken so as to pass through a ring 2 inches "in diameter, and the whole to be properly blinded with "gravel and rolled, compacted and finished in a satis- "factory manner.

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"15. Off-take drains, side-ditches, &c., shall be dug "wherever directed by the Engineer, and of such depth, "dimensions and side slopes as will be laid out. The "material arising from these will be paid for at the "ordinary price for 'earth excavation', which shall "include the cost of all trimming, sloping, grading, &c.

In the schedule of prices item 62 is as follows

"Grading and ditching of roads per 100 lineal feet $25."

It is contended by Mr. Stewart upon the part of the Crown that this covered side-ditches upon either side of the road as built. Section 15 very expressly provides that side-ditches shall be dug wherever directed by the Engineer, &c. The material arising from these will be paid for at the ordinary price for earth excavation. Section 14 provides that the road shall be formed, &c., between the side-ditches. I do not take Mr. Stewart's view as to the meaning of this contract. It is expressly provided that the excavation of these side-ditches shall be paid for. What is provided for by the schedule of prices, namely, the grading and ditching of roads, in my judgment, does not refer to the side-ditches. The side ditches are something other than the ditching of the roads. In forming the road embankment it is necessary to have certain drains or ditches across the road itself in order to properly drain the roadbed; and it seems to me that that is what was contemplated. That part of the claim which refers to embankment or borrow pits for roads, I think should not be allowed. There is no evidence whatever before me that it has not already been paid for. I think, however, the excavation for the side ditches is a proper claim, and should be considered by the Engineer to whom the question of quantities and prices are referred.

CLAIM No. 27

This claim is for the cost of putting in glance-booms and running logs past dams before permanent booms were constructed. I do not think this claim can be allowed. The contractors were bound to protect the works. The specification required that no rights should be interfered with; and the engineer ordered this protection. The contractors acquiesed in it; and I do not think they are entitled to any provisions of the contract, having regard to the specifications, as would entitle them to this claim.

CLAIM No. 41.

This claim is for extra unwatering of section over that contemplated in contract. I think this a proper matter of reference to the Chief Engineer. It will be for him to judge whether the plaintiffs were put to any extra cost having regard to the matters with which I have heretofore dealt.

CLAIM No. 50.

This is a claim for overhaul on earth from borrow pits, to make up filling in rear of north-west entrance pier at the upper entrance to Canal No. 1, Lakefield.

As I read the specifications there is no provision governing the subject matter of this claim. The excavations referred to are clearly in my judgment excavations required for the work contracted to be done, but do not refer to earth taken from borrow pits for the purpose of filling. I think this claim should be left to the Engineer; it is for him to say what ought or ought not to be allowed as respects both quantities and prices.

CLAIMS NOS. 16 AND 40.

These claims are for dry masonry retaining-walls at the sides of the river and raceway at Lakefield.

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I think these claims should be entertained by the Chief Engineer. They are works not contemplated by sections 16, 17 and 127 of the specifications. They are extras on the same principle which applies to the earlier claims that I have referred to and apply to these particular claims.

By the agreement of the parties the questions of quantities and prices are to be left to the determination of the Chief Engineer. I do not wish in any way to hamper his judgment in regard to these matters so far as quantities and prices are concerned. I have considered the cases cited by Mr. McLaughlin in support of his contentions with respect to the claim for the 2,500 feet at the entrance to LockNo. 1, namely to the submarine excavation in the bed of the river below Lock No. 1. I do not think the case of *Pearson* v. *The City of Dublin* (1), assists his contention. That case is referred to in the Irish Reports, 1907, Vol., 2—K.B.D. The case is reported in the different courts at pages 27, 82, and 537. It might be well to consider the language in the court below at page 43. The *Pearson* case was an action of deceit. The groundwork of the action was fraud. It was an action of tort. In the case before me no suggestion of tort or wrongdoing on the part of the officials of the Crown has been suggested, nor would there be any room for such contention. In any event an action of tort would not lie against the Crown for the wrongs of its officers. The bearing of the *Pearson* case so far as this case is concerned is against the contention of Mr. McLaughlin. The action of deceit could not lie unless the plaintiffs had been damnified. The facts in that case show that the damage claimed was, that he had been misled into entering into a contract

(1) [1907] A. C. 351.

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which was more onerous than he contemplated. It was conceded in that particular case that the contract had to be performed, and the damage claimed in the action of deceit was his loss occasioned by having entered into this contract which he was compelled to perform. I am dealing in the present case with a question of contract. If in the *Pearson* case notwithstanding what took place the plaintiffs were bound by their contract *a fortiori* they are bound in the present case. In the case of *Re Walton* reported in K.B.D. of 1905, and referred to in Hudson, 3rd Ed. Vol. 2, at p. 400, the contract was to lay the pipe to low water. This case is a case in favour of the plaintiffs upon the points upon which I have given judgment in their favour. It must be remembered that in the *Walton* case the contract was explicit and clear that the pipe was only to be laid to low water, having no reference in the schedule of prices to any work under water, and while the plaintiff was aware that work under water might be required, according to the findings of the learned Judge it should also be assumed that he took for granted that he would be properly remunerated. *Wood* v. *The City of Fort Wayne* (1), is also in favour of the plaintiffs' contentions on the questions which I decided in their favour.

I have given my reasons for coming to the conclusion that these matters were extra work and are governed by the clauses of the specifications which I have set out.

The question of costs will have to be dealt with after the report of the Chief Engineer, and can be spoken to before me, if the parties so desire. I think if the plaintiffs fail in obtaining any claim beyond that already allowed, that the action should be dis-

(1) 119 U. S. at p. 312.

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missed with costs. Upon the other hand if any substantial claim is proved I think it is a case, having regard to the fact that certain of the claims have been disallowed and that but for the waiver of the technical defences by the Crown the plaintiffs could not have succeeded, in which each party should bear its own costs. This matter, however, I have stated may be spoken to if the parties so desire.

Judgment accordingly.

Solicitor for plaintiffs: *R. J. McLaughlin.*

Solicitor for defendant: *T. Stewart.*

IN THE MATTER OF the Petition of Right of

ELIZABETH JOHNSON.....SUPPLIANT; 1911 [March 15.

AND

HIS MAJESTY THE KING.....RESPONDENT.

Public Work—Injury to the person—Fatal accident to workman—Negligence—Evidence—Statement of witness before the Coroner's Inquest—Inadmissibility.

On the trial of a petition of right for damages against the Crown, arising out of an accident on a public work, whereby the suppliant's husband was killed, the plaintiff sought to read and put in evidence the statement of a deceased witness who had been sworn and gave evidence before the coroner at the inquest into the death of the suppliant's husband some five years before the trial of the petition. At this inquest the Dominion Government was not represented by counsel, or otherwise, and had no opportunity of cross-examining the witness whose statement was so tendered.

Held, that in the absence of an opportunity on the part of the Dominion Government to cross-examine the witness before the coroner, his evidence was inadmissible.

Sills v. *Brown* (9 C. & P. 601) considered and not followed.

The evidence on the whole case showing that the accident was solely due to the negligence of the deceased in attempting to climb upon a swing-bridge while it was in motion, the petition was dismissed.

PETITION OF RIGHT for damages arising out of an accident to a workman on the Welland Canal.

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

March 7th, 1911.

The case now came on for hearing at Welland.

F. Morison, for the suppliant, applied for leave to read and put in evidence the statement of a witness, now deceased, who had given evidence before the coroner at the inquest into the death of the deceased. The Crown was not represented at the inquest. He relied

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Argument of Counsel.

on *Sills* v. *Brown* (1). He also cited Boys on Coroners (2); the *Canada Evidence Act*, section 10; section 20 of *The Exchequer Court Act*; *Filion* v. *The Queen* (3); *Ryder* v. *The King* (4); *Williams* v. *Birmingham Battery* (5); *Smith* v. *Baker* (6).

T. D. Cowper for the respondent contended that the evidence before the coroner tendered on behalf of the suppliant was inadmissible. The case of *Sills* v. *Brown* has been criticized by Taylor in his work on Evidence and other text writers of authority, and has not been followed by recent cases. He cites Taylor on Evidence (7); Phipson on Evidence (8); Russell on Crimes (9). In the case *Reg.* v. *Rigg* (10), Smith, J. refused to admit evidence before the coroner when the prisoner was not present. (Cites Roscoe's Nisi Prius Evidence (11). The facts in evidence disclose that the sole cause of the accident was the carelessness of the suppliant's husband in attempting to climb upon the swing-bridge while it was in motion, and the petition ought to be dismissed.

CASSELS, J. now, (March 15th, 1911) delivered judgment.

The petition of right is filed on behalf of the widow of Aaron Johnson, in his lifetime a carpenter on the Welland Canal. On the 30th April, 1906, the said Aaron Johnson while working at the Allanburg Bridge, met with an injury which resulted in his death on the 8th May, 1906.

On the 9th of May, 1906, J. W. Schooley, coroner for the County of Welland, summoned a jury with a view to enquiring as to the death of Aaron Johnson.

(1) 9 C. & P. 601.
(2) 4th ed., p. 290.
(3) 4 Ex. C. R., 134.
(4) 36 S. C. R., 473.
(5) [1899] 2 Q. B., 338.
(6) [1891] A. C. 325.
(7) 9th ed. vol. 1, p. 340.
(8) 3rd ed. pp. 400, 401.
(9) 7th ed. vol. 3, p. 2245.
(10) 4 F. & F. 1085.
(11) 18th ed., p. 201.

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At the trial before me at Welland, application was made on behalf of the suppliant for leave to read the evidence of one Edward Smith, who was sworn and gave evidence before the coroner. I reserved judgment in order to consider the question of the admissibility of this evidence. Counsel for the suppliant and respondent have since the trial filed with me written arguments in favor of and against the granting of the application. I am of opinion that the evidence is not admissible. It is alleged that Edward Smith died within a few days previous to the trial. This fact is not disputed. The proceedings at the trial were conducted by both counsel in a liberal manner, and it may possibly be that outside of the legal question strict proof has not been furnished on behalf of the suppliant to enable her to have the evidence received, if admissible. If hereafter it is desired to appeal from my judgment, and any objection is taken on this head, I give liberty to the suppliant to file affidavits, if so advised, in order to put her in a correct position. I hardly think, however, this will be necessary.

Counsel for the suppliant relies upon the case of *Sills* v. *Brown*, a case decided in 1840. It is reported in 9 C. & P., at page 601. In the report of the case it is stated that the witness had been examined before the coroner on the enquiry concerning the death of the plaintiff's son, and since his examination had gone abroad. It was proposed on the part of the defendant to read his deposition taken on oath before the coroner. This was objected to on the part of the plaintiff. Coleridge, J. was of opinion that under the circumstances the deposition ought to be admitted, and being properly proved it was read in evidence. This case has not been approved of. In *Regina* v. *Rigg*, (1), which was a case of manslaughter, it appearing

(1) 4 F. & F. 1085.

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that a witness was too ill to be examined on the trial of the prisoner, it was proposed by the prosecution to put in evidence the deposition of the witness taken before the coroner. Smith, J., refused to admit it on the ground that it was taken in the absence of the prisoner.

Reference may be made to Phipson on Evidence, (1); Taylor on Evidence, (2); Odgers on Evidence, (3); and Boys on Coroners, (4).

The Crown as represented by the Dominion had no opportunity of cross-examining this witness Smith.

I think the suppliant entirely fails in the proof of her case. It is quite clear from the evidence that the unfortunate man Aaron Johnson, the deceased, moved towards the bridge in a northerly direction, and was getting up while the bridge was in motion, his foot slipped and thereby the accident happened. If he had waited as he should have done until the bridge came to a stop, the accident would not have occurred. The witnesses John C. Johnson, William Scott and Frederic Edgar gave their evidence in a manner which satisfied me that they were speaking the truth. They are all respectable men so far as I could judge. The only evidence against their statements is that of one Edward Doherty. His statement is that instead of the accident occurring within three or four feet of the northerly side, that it occurred three or four feet towards the south side. Doherty at the time of the accident was between 14 and 15 years of age. The accident occurred five years previously to his giving his testimony. The witnesses on the part of the Crown had reason to locate the place of the accident, as on the deceased crying

(1) 4th ed., 1907, p. 449.
(2) 10th ed., 1906, vol. 1, pp. 371-72.
(3) Canadian ed. by Russell, p. 334.
(4) 4th ed. p. 291.

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out they went to his aid and helped him to the bank. Doherty's evidence is not very positive. He is asked asked by Mr. Morison, counsel for the suppliant, this question:—

"Q. Now you have heard the evidence of Mr. Johnson who says this man was injured about two or three feet from the north side of the abutment? What do you say as to that?

A. Well, it was on the south side I think."

Doherty is, I think, mistaken. The petition must be dismissed—and if the Crown asks for it, with costs.

Judgment accordingly.

Solicitors for suppliant: *Staunton, O'Heir & Morison.*

Solicitors for respondent: *Harcourt & Cowper.*

1911
April 12.

HIS MAJESTY THE KING.....PLAINTIFF;

AND

MOSES L. MORRIS.....DEFENDANT;

AND

MOSES L. MORRIS.....CLAIMANT;

AND

HIS MAJESTY THE KING..... DEFENDANT.

Customs Act—Reference by Minister of a Claim to the Court—Affidavit used before Minister in respect of which there was no opportunity of cross-examining the Deponent—Admissibility.

By sec. 183 of *The Customs Act* (51 Vict., c. 14) it is provided that upon a reference of any matter to the court by the Minister of Customs, the court shall hear and consider the same upon the papers and evidence referred, and upon any further evidence produced under the direction of the court. Among the documentary evidence referred in connection with a claim for a refund of duties paid, was an affidavit by a witness, since deceased, testifying to a fact adverse to the claimant, and in respect of which no opportunity was afforded the claimant to cross-examine the deponent.

Held, that while the statements of the deponent were not as effective as if he had been examined as a witness in court, and so subject to cross-examination, yet the affidavit was admissible as evidence under the statute.

THIS was a claim referred to the court by the Minister of Customs, under the provisions of sec. 183 of 51 Vict. c. 14.

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

March 28th, 1911.

S. Beaudin, K.C., for the claimant, contended that the affidavit of Wallace, the deceased carter, should not be admitted in evidence as he had not been cross-examined, and the proceedings before the Minister were not

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judicial. This was the first time that he had seen the affidavit in question. It ought not to be relied on as establishing delivery of the goods by the customs authorities.

J. Archambault, for the Crown, contended that the court was bound to receive all the evidence referred to the court by the Minister.

CASSELS, J. now (April 12th, 1911) delivered judgment.

This was a matter referred to the Exchequer Court by the Minister of Customs under the provisions of section 182 of chapter 14 of 51 Victoria. The Minister had found Morris guilty of a contravention of the customs laws, and held that the sum of $123.42, deposited as security, be forfeited to the Crown as a mitigated penalty, and dealt with accordingly.

It appears that an information had been filed on behalf of His Majesty, the fact that the reference had been made under the statute referred to being overlooked. On the opening of the case, counsel for the Crown moved to consolidate the two cases, and asked that the pleadings in the case of His Majesty against Morris be made the pleadings in the case referred by the Minister. No objection was made to this application, provided that no more costs should be allowed than if only the one case were being proceeded with. The motion was granted, and the matter was proceeded with before me in Montreal upon the papers and evidence before the Minister, and also on further additional evidence produced before me. At the trial I formed a strong opinion in favour of upholding the decision of the Minister. Since the trial I have gone carefully over the evidence and the various exhibits and still adhere to the same opinion.

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There are certain salient facts in connection with the case which strongly tend to the conclusion arrived at. It is unquestioned that two bales consigned to Morris arrived in Montreal on the steamer *Canada* of the Dominion Line. These bales were numbered M.773 and L.M.450. Apparently no invoice had been received for bale No. 450, but an invoice for bale No. 500 was in the possession of Morris. The agent of Morris, Greene, paid the freight of the Dominion Line for two bales; he also paid the customs dues for two bales. It is proved, I think, clearly, that bale No. 450 which had arrived by the *Canada* was delivered in lieu of bale No. 500. No doubt this was a mistake; but there is no question on the evidence that the two bales had arrived, one numbered 773 and the other numbered 450, and that both of these bales were consigned to Morris. Number 773 was detained for examination at the custom house, and was delivered to Morris on the 4th September; and the other bale 450 was delivered to Mullally's carter, one Wallace, on the 3rd September. In his evidence, referring to other bales delivered on the 3rd September, Morris is asked this question:

"Q. Where did they come from?

"A. I think they came from the Steamship Company's.

"Q. Do you know which Company?

"A. I could not say, because we passed entries for "sometimes two or three bales, or sometimes one bale, "or sometimes half a dozen bales in a day. Sometimes "we would get three or four bales from the same place. "Mr. Mullaly was our carter, and Mr. Mullaly's men "would bring them to the store."

Under section 183 of the statute, it is provided that the court shall hear and consider such matter upon the papers and evidence referred, and upon any further evidence, &c.

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Wallace, the carter who delivered the bale, is dead. His affidavit was before the Minister, and he swears to the delivery of bale No. 450 on the 3rd September. I quite agree that, there having been no opportunity of cross-examination, the statements in the affidavit are not as effective as if the witness had been examined in court and counsel for Morris given the opportunity to cross-examine him. Wallace is corroborated by Bushel, who gave his evidence clearly, and I do not think Bushel's evidence in any way is shaken by the cross-examination. There can be no doubt whatever, on the evidence, that these two bales Nos. 773 and 450, were intended for Morris, and I think 450 was received by Morris. As stated, 773 was delivered on the fourth September. The duty on the two bales had been paid in the latter part of August. The customs dues on the two bales were paid also in the latter part of August. There is no evidence of any application or request by Morris for a refund of the duty paid upon bale No. 450, which he states was not received. About two weeks afterwards the *Devona*, of the Donaldson Line, arrived in Montreal; and consigned to Mr. Morris on this vessel was a bale, number 5 or 500, which corresponded with the invoice given to Greene upon which bale No. 450 had been handed over. Mr. Greene then went to the custom-house with the invoice and showed that he had already paid duty on bale number 500 or number 5, and the result was that this bale 500 was handed over, the duty previously paid on No. 450 being credited as against this bale. This left bale 450 in the possession of Morris without the duty being paid. The letter of the 3rd October, 1906, asks for an invoice for bale 450. There is no suggestion that the goods in bale 450 had not been purchased by Morris, nor is there a suggestion in the letter that the goods in this bale 450 had not been received by Morris.

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Staton, the agent, in the letter which he wrote to Day & Fox makes no reference whatever to any contention that the bale in question had not been received. Their letter is as follows:

"Dear Sirs,—Kindly send this firm a duplicate invoice for goods invoiced August 13th. They claim not to have received this invoice, and there is some trouble with the cartage company. Kindly mark on the invoice 'duplicate'."

Subsequently Day & Fox were paid by Morris for the goods contained in bale 450.

The contention is raised that sometimes carters were in the habit of leaving bales at the wrong places, and it was suggested that Wallace, the carter, may have left the bale at some other place. It would not in my mind affect the case if it were so. The property passed through the custom-house, and was handed to Mullaly's carter, and as between the custom-house and Crown the duties were payable on this bale, the bale being the property of Morris, whether he received it or not.

I think there is but one conclusion to be arrived at on the facts, and that the application on behalf of Morris should be dismissed with costs.

Judgment accordingly.

Solicitors for claimant: *Beaudin, Loranger & Cie.*

Solicitor for the Crown: *J. Archambault.*

BRITISH COLUMBIA ADMIRALTY DISTRICT.

CANADIAN PACIFIC RAILWAY COMPANY..... } PLAINTIFFS; 1910 Feb. 14

AGAINST

THE TUG *BERMUDA*

Shipping—Collision—Tug and Scow—Narrow Channel—Departure from Rules—Justification.

Held, that while a channel, admittedly difficult of navigation under certain conditions, might properly be used by a ship, she is under an obligation to take all precautions to avoid collision with another ship.

2. Where prudent seamanship precludes a tug, in charge of a laden scow, from following certain of the regulations, she will be exonerated from blame in departing therefrom.

ACTION for damages caused by collision. The facts appear in the reasons for judgment.

The trial took place in Victoria, B.C. on the 8th and 9th December, 1909, before the Local Judge for the British Columbia Admiralty District ; Captain J. F. Parry, R.N. and Captain P. C. Musgrave sitting as Nautical Assessors.

E. P. Davis, K.C. and *J. E. McMullen* for plaintiff.

J. A. Russell and *H. B. Robinson* for Tug.

Judgment in favour of the *Bermuda* was handed down on 14th February, 1910.

MARTIN, L. J.

In this action the owners of the steamship *Charmer* seek to recover damages from the owners of the tug *Bermuda* because of a collision which occurred between the two vessels about 12 or 15 minutes after one o'clock in the afternoon of the 3rd December, 1908, in the First

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Narrows at the entrance to Vancouver Harbour. The day was clear and calm, with a flood tide of about two knots.

The *Bermuda* had a large barge, containing 510 tons of coal, secured to her port bow, projecting forward, and came up the channel towards Brockton Point on her proper course, viz: a little south of mid-channel, at a speed of about three knots, or with the tide, five knots over the ground The *Charmer* left her wharf in Vancouver Harbour two minutes after one by her time, and in entering the Narrows between Burnaby Shoal and Brockton Point, on a course N.W. by N. ½ N., so as to cross mid-channel and go out on the N. side of the Narrows, she admittedly got a little too near the kelp on Burnaby Shoal for safety, upon which, as her master says, he hauled off to port and "ran a little bit to get clear of it and then straightened up again...the same as before."....The *Bermuda* was first sighted about three cables distant and bearing about two points off the *Charmer's* port bow, the *Charmer's* speed being about nine knots, or seven over the ground. At this juncture sound signals were necessary according to Article 28, but a strange and embarrassing dispute here arose (doubtless owing to an intervening tug, the *Edith*) regarding the signals blown by the respective vessels, the *Charmer* contending that she blew one blast for the *Bermuda*, and the *Bermuda* answered with two blasts, a cross signal; but the weight of evidence supports the contrary contention of the *Bermuda* that she blew two blasts and the *Charmer* answered with one, which I find to be the fact. This unfortunate mistake of the *Charmer's* master about the signals is also important in showing not only that he was confused on the point but that he had the intention of directing the *Charmer's* course

contrary to that course which she actually signalled, and consequently it becomes very difficult to place reliance upon his evidence as regards her course after the signals, or upon the means he took to avoid the collision, or his opinion as to the relative positions and courses of the two vessels. In such circumstances it is hard to say what his exact intentions were, seeing that his mind was working on the very important erroneous assumption that he had blown two blasts, instead of one. His contention is that after the *Bermuda* blew her two blasts the *Charmer* put her helm hard-a-starboard and began to swing to port and continued so to swing till the time of the collision, and that if the *Bermuda* had continued on her port course, pursuant to signals, after the *Charmer* began to swing there would have been no collision, but that it was caused by the *Bermuda* again changing her course from port to starboard when about 60 or 70 yards distant from the *Charmer*. Both vessels towards the last reversed their engines, but too late to avoid the collision, the corner of the scow striking the *Charmer* on her starboard side about 40 or 50 feet from her stem. The reversal of the *Bermuda's* engine necessarily had the effect of bringing her back to her original course. Just before the moment of impact the *Bermuda* properly went ahead (to avoid swinging crosswise to the channel) on the chance of reducing the tangent and sliding past, in which she was nearly successful, but not quite. The *Charmer's* master admits that after he blew his whistle for the *Bermuda*, he shifted his helm a little to port so as to swing off to starboard, but contends that the *Charmer* did not have time to swing before the *Bermuda* blew. Here is clearly where serious difficulty first arose, because in the first place there is the error about the *Bermuda's* whistle, which

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was, I find, blown first, and in the second place the *Charmer's* master underrated and in his evidence unduly minimized the effect of porting his helm in the flood tide. I am advised by the Assessors that if the *Charmer* had continued under a port helm as indicated by her one blast (in reply to the *Bermuda's* two blasts) she would undoubtedly have run clear of any possibility of collision. When her helm was eventually put to starboard, having regard to the swinging of the ship under port helm augmented by the flood tide on her port bow, it was too late to turn within a sufficiently small circle to avoid the *Bermuda*.

I am further advised by the Assessors that seeing that the *Bermuda* was on her proper course (a little to the south of mid-channel) in a narrow channel, and having a very unhandy scow, much longer than herself, secured on her port side, and heavily laden with 510 tons of coal, and being on a correct course to clear Burnaby Shoal and proceed up harbour, she, in view of her unwieldy tow and the proximity of Burnaby Shoal, with a flood tide of two knots, was, in the circumstances, precluded, as a matter of prudent navigation, from either using the channel between Burnaby Shoal and Brockton Point, or altering her course to starboard. Therefore her action in blowing two blasts and then starboarding her helm was justified, and the above specified indecisive action of the *Charmer* after said signal was given justified the *Bermuda* in reversing her engines at the time she did.

I am further advised that while the channel between Burnaby Shoal and Brockton Point is a recognized and navigable channel for light draught vessels of moderate dimensions, and proper at that time for the *Charmer* to use (though not so now since the regulations of July 17th, 1909, passed subsequent to the

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collision) yet it is of such a nature that in using it to enter the Narrows, especially on a flood tide, as here, it is necessary to be prepared to take precautions to clear incoming vessels.

With respect to the signals it seems desirable to observe that the *Charmer* should have promply blown two blasts to indicate her change of course to port, because the failure to do so withheld information from the *Bermuda* of the *Charmer's* change of course which would have been more valuable than the master of the *Bermuda* appears to have appreciated, according to his evidence, it being not quite clear what he means to convey by the statement that he was not "confused by the omission."

I am entirely in accord with the advice of the Assessors, and the case appears to me to be eminently one to be decided by practical seamanship.

It is also to be noted that neither ship gave the prescribed signal for going astern, though neither ship alleges that it was affected by that oversight.

The omission of the plaintiff to call the quarter-master who was on duty in the *Charmer* at the time of the collision, whose evidence would have been of great value to this Court, is something which was not satisfactorily explained and is to be regretted.

With regard to the alleged custom of vessels in the Narrows, it is not necessary, in view of the foregoing, that I should consider that matter, because, apart from it, the *Charmer* in my opinion must in all the circumstances be held to be solely responsible for the collision.

There will be judgment for the *Bermuda* on the claim and counter-claim, with the usual reference to

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the Registrar, and merchants if necessary, to assess damages.

Solicitor for Plaintiffs: *J. E. McMullen.*

Solicitors for Tug: *Russell and Russell.*

REPORTER'S NOTE.—The learned Local Judge of the British Columbia Admiralty District held the *locus in quo* to be a narrow channel, under Article 25, in *Bryce* v. *Canadian Pacific Ry. Co.* (13 B. C. R. 96). His judgment was confirmed on appeal to the Judicial Committee of the Privy Council on the 30th July, 1909, the judgment of their Lordships proceeding as follows:—

Present at the hearing: Lord Macnaghten, Lord Collins, Lord Gorell, Sir Arthur Wilson.

Nautical Assessors: Admiral Sir Archibald L. Douglas, G.C.V.O., K.C.B.; Commander W. F. Caborne, C.B., R.N.R.

[Delivered by Lord Gorell.]

The appellants in this case are the Canadian Pacific Railway Company, the owners of the steamship *Princess Victoria*, which came into collision about or near the Parthia Shoal, off Brockton Point, near Vancouver, at about 2.20 p.m. on the 21st July, 1906 with the steamer *Chehalis*, and in consequence the latter vessel sank, and some of her passengers and crew were drowned. Six actions were afterwards brought in the Supreme Court of British Columbia against the appellants by certain passengers and members of the crew of the *Chehalis* or their personal representatives to recover damages for loss of life and personal injuries and loss of effects, on the alleged ground that the collision was caused by the negligent navigation of the *Princess Victoria*.

The appellants denied that the collision was caused or contributed to by any negligence in the navigation of the *Princess Victoria*.

The actions were consolidated and tried in February, 1907, before Mr. Justice Martin, the Local Judge in Admiralty for British Columbia, assisted by two nautical assessors, and on the 22nd May, 1907, the learned judge, after a very long trial, held, with the concurrence of the assessors, that the collision was caused solely by the negligent navigation of the *Chehalis*, and he dismissed all the actions with costs.

On appeal to the full Court of the Supreme Court of British Columbia, sitting without assessors, it was held by a majority of the judges that the *Princess Victoria* was to blame for the collision, and damages and costs were awarded to all the plaintiffs except the plaintiff Cyril James Eldridge House, the master of the *Chehalis*, whose appeal was dismissed.

The Chief Justice held that the *Princess Victoria* was solely to blame. Clement, J., held both ships to blame and Irving, J., held the *Chehalis* was solely to blame. House's appeal failed, because he was responsible for the navigation of the *Chehalis*, and the result of the judgments was that he could not recover, and he has not appealed against this decision.

The facts are simple, and it is difficult to understand why the trial should have lasted so long as it did.

The *Princess Victoria*, a twin-screw steamship of 1,943 tons gross register, left the wharf on the south side of Vancouver harbour bound

to Victoria, with passengers, mails, and baggage, and a crew of about 100 hands, at about 2.05 p.m. on the day of the collision. The weather was fine and clear. A strong tide about two hours' flood was setting to the eastward through the Narrows of Burrard Inlet. The *Princess Victoria* proceeded at a speed of about 14 knots through the water, between Burnaby Shoal and Brockton Point, and rounded the point under starboard helm so as to straighten down the Narrows.

The *Chehalis* was a small screw tug of about 54 tons register, with a crew of six hands, House being her master. She left the wharf at Vancouver about 1.20 p.m. with passengers, and, after crossing to North Vancouver and picking up some more passengers, left that place at about 2.05 p.m., bound to the westward through the Narrows for Blunden Harbour. House was in charge, and was at the wheel in a closed wheelhouse, steering, giving such orders as were required, attending to the whistle and keeping the look-out. There was no one else on the look-out. The *Chehalis* proceeded at about nine knots through the water down the inlet, being steered by the land and not by any compass course.

The appellants' case was that, after rounding the point, the *Princess Victoria* was steadied so as to pass to the northward of a steam launch and to the southward of the *Chehalis*, which was then proceeding on the starboard bow of the *Princess Victoria* some distance off on a course nearly parallel to that of the *Princess Victoria*; that two blasts were then sounded on the *Princess Victoria* to indicate that she was intending to pass to the southward of the *Chehalis*, but that the *Chehalis* suddenly came off to port towards the *Princess Victoria*, causing risk of collision; that thereupon both engines of the *Princess Victoria* were put full speed astern, and her helm hard-a-starboard, and that the *Chehalis* came rapidly to the southward, and, although she ported at the last moment she struck the starboard bow of the *Princess Victoria* and afterwards sank, and seven persons were drowned.

Broadly stated, the case on the other side was that the *Chehalis* was proceeding on her course out of the Narrows, and that, after she had passed Brockton Point, her master heard a whistle behind him, and on looking through a stern window in in his wheelhouse, saw the *Princess Victoria* coming down on him, that he saw she was coming right into him, and that he threw his helm hard-a-port and gave a short blast of the whistle, but that in a few seconds the *Princess Victoria* struck his vessel.

The main question in the case was purely one of facts *viz.*: whether the *Chehalis* starboarded or was improperly allowed to swing over to port across the course of the *Princess Victoria*, or whether the latter vessel came too close to the *Chehalis* and ran into her, or was allowed to be sheered into her by the tide.

The learned judge who tried the case and saw the witnesses accepted the account of the officers of the *Princess Victoria* as being substantially correct. He found that, beyond doubt, there was ample room for her to have passed between the launch and the *Chehalis*, and in the course of his judgment said,—

"I am satisfied that the officers in the pilot house of the *Princess* did keep a proper and continuous look-out and that at the time the two blasts were blown she, having just then freed herself from the anticipation of any danger from the launch close to her port bow, which had caused a momentary but immaterial deviation from her course, was steadied on a course W. by N. ½ N., within a quarter of a point, so as to just clear Prospect Point and take her straight down the Narrows, which course was, roughly, parallel to that of the *Chehalis*. Had these respective courses and speeds been maintained, there was at that time no reason to anticipate any danger of collision,

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though the courses would probably have ultimately converged. . . . But I find that while said blasts were being blown, or immediately thereafter, the *Chehalis* suddenly altered her course at least three to four points from west to southward, thus bringing herself across the bows of the *Princess*. . . . I have very little, if any, doubt that it was owing to the fact that Captain House, as he admits, only kept a look-out ahead, and I believe he was startled when he heard the signal and made a wrong movement of his wheel at a critical moment in the strong tide. There must have been something of the kind, for House did not take the position that he was thrown out of his course by an unforeseen eddy or current or otherwise."

The learned judge further held that the *Princess Victoria* had not committed a breach of any of the regulations for preventing collisions in Canadian waters, which are similar to those made under the Imperial Act, though the statutory section is different (*cf.* section 916 of Revised Statutes of Canada, 1906, chap. 113, and section 419 (4) of the Merchant Shipping Act, 1894). In particular upon the point which appears to have been much discussed, that is to say, whether the *Princess Victoria* had broken Article 25 of the regulations—the narrow channel rule—he stated that, having regard to the relative positions of the three vessels after the *Princess Victoria* had rounded the point, the mid-channel course which she took was the only proper one for her to take as a matter of good seamanship, as he was advised, consistent with her own safety, and it would have been unreasonable to expect her to have gone to the north of the *Chehalis*, already on the northerly course, and under her stern.

On the appeal to the Full Court the Chief Justice differed from the finding of fact by Martin, J., that the *Chehalis* altered her course across the bows of the *Princess Victoria*, and he considered that that vessel was to blame under Articles 22, 23, 24 and 25 of the regulations. Clement, J., held that he could not, having due regard to the principles which should guide an appellate tribunal in reviewing a judgment as to matters of fact, say that the learned judge was wrong in finding Captain House to blame, *i.e.*, guilty of contributory negligence; but he held that the *Princess Victoria* had broken Article 25, and that that was "the larger inducing cause of the catastrophe." Irving, J., supported the judgment on all grounds.

There are two different matters to consider in this case. The first is, what were the facts; and the second, upon the facts whether either or both of the vessels were to blame?

Their Lordships consider that the facts appear to have been very fully and carefully investigated by Martin, J., with the assistance of assessors, and that no adequate ground has been shewn for an appellate court to take a different view of the facts from that taken by the learned judge. He had the great advantage of seeing and hearing the witnesses, and unless it could be shewn that he had taken a mistaken or erroneous view of the facts, or acted under some misapprehension, or clearly came to an unreasonable decision about the facts, he should not, in accordance with well recognized principles, be overruled on matters of fact which depended mainly upon the credibility of the witnesses.

An examination of the evidence in this case shows that, not only was the the learned judge entitled to come to the conclusions of fact at which he arrived, but that the weight of the evidence is in favour of those conclusions, and that the real cause of this unfortunate collision was that there was no adequate look-out kept on board the *Chehalis*, and that her master was unaware of the presence

of the *Princess Victoria* until she was about to pass him, and improperly put his helm to starboard, or allowed his vessel, which had just entered the part of the Narrows where he began to feel the full effect of the tide, to fall off her course towards the *Princess Victoria*. Broadly speaking, there can hardly be the least doubt that, if House had seen and been aware of the presence of the *Princess Victoria* the collision would never have happened. It seems almost incomprehensible that he should not have noticed her even before she rounded, and as she was rounding the point, unless he never looked anywhere except straight ahead of his vessel.

The finding of the learned judge upon this point really makes an end of the case, but it is desirable to deal briefly with the other points made on this appeal.

'It was urged that the *Princess Victoria* broke Articles 22, 24, 25 and 28.

Article 22 is the crossing rule, and Article 24 is the overtaking rule. The 24th Article is that which was applicable, for the *Princess Victoria* was an overtaking ship, but the charge is disposed of by the finding that there was ample room for the *Princess Victoria* to pass the *Chehalis*, and that there would have been no collision but for the improper action of the *Chehalis* and her breach of Article 21, according to which she was bound to keep her course and speed.

Article 25 is the narrow channel rule, which provides that—

"in narrow channels every steam vessel shall, where it is safe and practicable, keep to that side of the fairway or mid-channel which lies on the starboard side of such vessel."

The collision took place somewhere about midway across the channel, which their Lordships consider has been correctly stated to be a narrow channel within the meaning of the Article. Then the configuration of the locality and the circumstances with regard to tide, etc., have to be considered. The learned trial judge held that the course taken by the *Princess Victoria* was justified by the circumstances, but the Chief Justice and Clement, J., appear to have considered that she should have gone outside the Burnaby Shoal or at any rate under the stern of the *Chehalis*.

The *Princess Victoria* appears to have followed the usual course in passing through the narrow channel between the Burnaby Shoal and Brockton Point, and to have rounded the point in a proper course to prevent herself from being swept out by the very strong tide which she would have had on her port broadside, if she had attempted to pass directly across to the north side of the channel leading outwards, and a similar effect would have been produced upon her if, having regard to the position of the vessel, she had proceeded to attempt to pass under the stern of the *Chehalis*.

Their Lordships are advised by the experienced assessors who have assisted them on this appeal that the *Princess Victoria* pursued a proper course having regard to the locality and tide, and was, in the circumstances, justified, as a matter of good seamanship, in taking the mid-channel course between the two other vessels, and therefore they do not agree with the views expressed on this point by the majority of the Full Court. They further do not consider that the course pursued by the *Princess Victoria* can be held to have caused or contributed to the collision, which was solely brought about by the improper action of the *Chehalis*.

With regard to Article 28, the point made under it against the *Princess Victoria* was that she did not sound her whistle when she began to round the point, and improperly failed to indicate by whistle signals the course she was taking. There does not

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seem to have been much, if any, argument on these points in the Courts below. It is to be noticed that when proceeding to round the point, the *Princess Victoria* was acting in the ordinary course of navigation, and that it has been but faintly suggested that she did anything wrong at a later time with regard to her whistle. A breach of the Article does not seem to their Lordships to be made out in the circumstances.

The conclusion at which their Lordships have arrived is that the decision of Martin, J., was right and should be affirmed. It would seem from the order of the Full Court that some dealings have taken place between the appellants and the plaintiffs William James Crawford and Ruby Crawford with regard to withdrawing the appeal of these plaintiffs to that Court, and any arrangement between the parties should remain unaffected by His Majesty's order.

Their Lordships will therefore humbly advise His Majesty to allow the appeal, to set aside the judgment of the Full Court dated the 18th of February, 1908, except so far as it relates to House, to restore the judgment of Martin, J., dated the 22nd of May, 1907, and to order that the present respondents do pay to the present appellants their costs of the appeals to the Full Court, but that His Majesty's order be without prejudice to any arrangement which may have been made between the appellants and the said William James Crawford and Ruby Crawford.

The respondents who have contested this appeal must pay the appellants' costs thereof.

QUEBEC ADMIRALTY DISTRICT.

CANADIAN ELECTRIC CO.....PLAINTIFF; 1910 Nov. 18.

AND

THE STEAMSHIP "*CROWN OF ARAGON.*"

Shipping—Collision—Electric Cable—Agreement between Plaintiff and Quebec Harbour Commissioners—Validity—Donation—Stipulation for the benefit of third parties—C. C. P. Q. Art. 1029—Infringement of Local Rule—Justification.

Held: That the Harbour of Quebec is the property of the State (i.e. the Dominion of Canada), and is controlled by the Quebec Harbour Commissioners in the interest of shipping; hence an agreement between the plaintiff company and the Commissioners, permitting the former to lay down an electric cable on the bed of the harbour must be held to be valid as having been made in the interest of navigation which the Commission is bound to protect and promote.

2. The said agreement operates as a donation to the plaintiff company, and in such a case the Commissioners could validly stipulate for the benefit of others (C.C.P.Q. Art. 1029).

3. That under the said agreement the defendant can only be held responsible for wilful or culpable fault, and, under the evidence, it did not appear that the defendant was guilty of such fault.

4. The defendant ship had collided with and damaged the plaintiff's cable While it appeared that the damage was occasioned by the defendant transgressing a local regulation of the Harbour of Quebec, it was done to avoid a collision with other vessels, and was held to be justifiable under the circumstances.

[Rule of Navigation No. 27, secs. 916, 917, R.S.C. 1906 c. 113, considered.]

ACTION in rem for damages against a ship for injury to a submarine cable.

The facts are fully stated in the reasons for judgment. The case was heard at Quebec on the 26th October, 1910.

L. P. Pelletier, K.C., for plaintiff.

C. Pentland, K.C., and *C. A. Duclos*, K.C., for ship.

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ROUTHIER, L. J., now (November 18th, 1910, delivered judgment.

Dans la cause Canadian Electric Co. vs. SS. "Crown of Aragon," il s'agit d'une action au montant de $10,000 de dommages causés au câble électrique de la Compagnie demanderesse, qui était posé au fond du fleuve, dans le Havre de Québec, et qui a été endommagé par le Steamer "Crown of Aragon", le 9 juillet dernier, vers huit heures du soir, par la faute et la négligence—dit la demanderesse—des officiers du Steamer "Crown of Aragon".

La défense expose les faits suivants:

1° Que le Steamer était attaché au *shed* ou hangar No. 19 du bassin Louise, le 9 juillet. Vers huit heures et dix (8.10) du soir, sous la conduite du pilote Perron, assisté d'un remorqueur, le steamer est sorti du bassin. Deux amarres le retenaient au quai, aux soins d'hommes expérimentés, pour faciliter la manœuvre;

2° Quand ces amarres ont été lâchées—je fais toujours le récit de la défense—du quai, elles ont été tirées à bord aussi promptement que possible, mais l'extrémité de l'une de ces amarres s'est enroulée dans l'hélice; il fallut arrêter la machine et, pour empêcher la marée montante de jeter le steamer sur un bateau amarré au quai Crawford, on jeta l'ancre qui s'accrocha dans le câble de la demanderesse et d'où on le dégagea le plus tôt possible;

3° Que tout cela s'est fait sous les ordres d'un pilote dans le cours ordinaire de la navigation, avec la prudence et l'habileté d'usage, et que l'accident est arrivé en conséquence par cas fortuit;

La défense allègue de plus une convention entre la demanderesse et les Commissaires du Havre, du 27 novembre 1901, par laquelle la demanderesse, la

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Canadian Electric Co., a renoncé à tout recours pour dommages à son câble, dans le cas d'accidents causés par des navires qui seraient sous les ordres de pilotes réguliers, et même sans pilotes dans certains cas expliqués par la convention.

La preuve faite consiste dans des admissions de faits, dans les témoignages et dans certains documents qui sont produits. L'admission de fait admet la propriété du câble de la demanderesse; elle admet qu'il était placé dans l'espace où il est défendu aux vaisseaux d'ancrer; elle admet que les traversiers circulent dans cet espace-là, et enfin, elle admet les règlements du port, qui sont produits dans la cause.

Monsieur L. P. Pelletier, avocat de la demanderesse, en même temps que président de la demanderesse, s'est fait entendre comme témoin et, dans son témoignage, il paraît faire une question de ce que le câble posé en 1901, très peu de temps après l'acte de convention sur lequel nous reviendrons, n'existe plus, et que le câble actuel, celui qui a été brisé, fût posé en 1907 sans convention spéciale; il paraît croire que cela peut avoir quelque effet sur l'issue de cette cause, mais il est évident que cela est absolument sans effet; car la convention stipule explicitement non pas de poser un câble, mais de poser des câbles quand la compagnie demanderesse en aura besoin et non pas seulement celui qui sera posé immédiatement après la convention. Il est évident que l'acte d'arrangement n'était pas pour un seul câble ni pour une seule année, mais pour le temps que la compagnie en aura besoin.

Les autres moyens invoqués par la demanderesse sont les suivants: Elle dit d'abord que la convention de 1901 est nulle, parce qu'elle est une stipulation pour autrui. En thèse générale en effet, on ne peut pas

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stipuler pour autrui. Mais on peut le faire dans bien des cas cependant, qui sont des exceptions à cette règle générale. Par exemple, qu'est-ce que la gestion d'affaires? La gestion d'affaires n'est rien autre chose qu'une stipulation pour autrui et elle est parfaitement légale. Dans la gestion d'affaires, vous agissez pour un tiers vis-à-vis de quelqu'un sans l'autorisation de ce tiers; la convention que vous faite est valide et elle produit ses effets. Elle vaut aussi, dans le cas de l'article 1029. Or, l'article 1029 de notre code civil se lit comme suit:

"On peut pareillement stipuler au profit d'un tiers "lorsque telle est la condition d'un contrat que l'on "fait pour soi-même ou d'une donation que l'on fait "à un autre . Celui qui fait cette stipulation ne peut "plus la révoquer si le tiers a signifié d'en profiter".

Voilà donc un cas bien spécial, déterminé par l'article 1029, dans lequel on peut stipuler valablement au profit d'un tiers. On peut imposer à la donation des conditions et des stipulations en faveur d'un tiers. C'est précisément le cas ici. La Commission du Havre a fait une vraie donation à la Compagnie demanderesse en lui donnant le droit de poser son câble sur le lit du fleuve. C'est un vrai don parce que la Compagnie demanderesse ne paie rien pour cela; et alors la Commission du Havre lui a imposé les conditions qui sont contenues dans la convention.

Ce premier moyen invoqué par la demanderesse n'est donc pas fondé. Il est évident que la convention, quoiqu'elle ait été faite en faveur de tiers, c'est-à-dire en faveur des navires qui sillonnent le port de Québec, était parfaitement valide en loi, parce qu'elle était une véritable donation consentie par les Commissaires du Havre à la Compagnie demanderesse.

En outre, la Commission du Havre représente l'Etat; elle administre le domaine public dans l'intérêt de la marine, et quand elle concède à une Compagnie privée des droits, des privilèges, des jouissances sur ou dans cette propriété publique dont elle a l'administration, elle peut y mettre les conditions, les réserves, les limitations qu'elle juge nécessaires dans l'intérêt public, ou dans l'intérêt d'une industrie ou d'un service d'utilité publique.

Ce n'est pas là stipuler pour autrui, si elle stipule pour les intérêts de la Marine, c'est stipuler pour les intérêts qui lui sont confiés. Elle agit alors comme mandataire de la marine marchande dont elle représente les intérêts.

En réalité d'ailleurs, dans ce cas-ci, elle ne fait que mettre des restrictions, des limitations aux droits, à la jouissance qu'elle concède gratuitement.

Cette convention est donc valide en droit; cela ne fait aucun doute, à mon avis.

La vraie question est de savoir quelle est l'étendue des effets de cette convention.

En ce qui concerne la Commission du Havre, la convention est parfaitement claire. La condition troisième l'exempte de toute responsabilité. Voici comment se lit cette clause troisième de la convention:

"That the Commissioners shall in no way be res-
"ponsible for any damage that may occur through the
"infraction of the By-Law by whomsoever, or through
"any other cause, and that all and every infraction
"of the said By-Law, brought under the notice of the
"Harbour Commissioners, shall be prosecuted by
"them, if the Commissioners shall think fit so to do,
"against any and every party or parties infringing
"the rules laid down by the said By-Law".

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Elle ne s'oblige pas même à poursuivre les infractions et elle n'est responsable en aucune manière.

Mais dans quel cas les navires seront-ils irresponsables, d'après la clause huitième Voici comment se lit cette clause, relativement aux navires:

"That vessels when in charge of pilots shall be "relieved by the said Company from all respon- "sibility whatever for accidents to their cables or "lines, and will only be held responsible when an "accident is caused by the wilful or culpable careless- "ness on the part of their officers when the said "vessels are not in charge of pilots".

Comme on le voit, il y a deux cas prévus par cette clause huitième; Quand ces navires seront en charge d'un pilote, c'est-à-dire sous la direction et la conduite d'un pilote, la restriction de la responsabilité dans ce premier cas paraît être absolue et générale. Mais on l'attaque en droit, en disant "qu'il n'est pas permis de stipuler qu'on ne sera pas responsable de sa faute". Il est incontestable en effet, qu'une telle stipulation ne peut pas être absolue et couvrir par exemple un délit.

Au deuxième cas, quand ces navires ne sont pas en charge d'un pilote, la convention dit: " When an acci- "dent is caused by the wilful or culpable carelessness "of the officers". Je viens de dire que quand ils sont en charge d'un pilote, d'après la convention, la restriction de la responsabilité est absolue et générale, mais que même dans ce cas elle ne couvrirait pas un délit.

Dans le deuxième cas, il faut encore, d'après la convention "the wilful or culpable carelessness of "the officers", pour que le navire soit responsable.

Cela veut dire évidemment que le fait préjudiciable ne suffit pas pour entraîner la responsabilité, mais

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qu'il faut une faute lourde pour qu'il y ait responsabilité. On sait qu'en droit civil, un fait préjudiciable suffit pour rendre responsable celui qui l'a commis, même sans intention criminelle, même sans avoir voulu faire mal; une seule négligence, une seule imprudence suffit pour le rendre responsable. Ceci, c'est le droit commun; mais, en vertu de cette convention-là, on voit qu'il faut plus qu'une simple imprudence, plus qu'une simple négligence, mais "the wilful and culpable "carelessness" c'est-à-dire une faute lourde et volontaire.

Quelle est la raison de cette stipulation dans cette convention? C'est évidemment l'intérêt public que la Commission du Havre a voulu protéger. Elle a voulu faire une faveur à la Compagnie demanderesse, en lui donnant gratuitement le droit de poser son câble sur le lit du Fleuve St-Laurent ; mais elle a voulu favoriser plus encore, la circulation des navires dans le port. C'est l'intérêt majeur dont elle est chargé, c'est l'intérêt primordial. Attirer les navires dans le port de Québec, leur assurer le plus de liberté, le plus de sécurité, le plus de privilèges possibles. Le port, c'est le domaine de la Marine et non pas le domaine des cables électriques. Par exception, on permet à la Compagnie demanderesse d'en poser; mais à la condition qu'elle ne sera pas une gêne pour les navires et que si les accidents de la navigation causent des dommages à ses câbles, elle n'aura de recours que contre les navires sans pilote et coupables de *faute volontaire,* ou encore contre les navires ayant pilote, mais coupables de *véritable délit.*

Pour que la Compagnie ait droit de se plaindre, il faudra donc deux conditions: Absence de pilote et négligence volontaitre et coupable. Ici, il y avait

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pilote et il n'y a pas eu, suivant nous, une faute volontaire et coupable.

Le pilote Perron a peut-être commis une erreur de jugement; il a peut-être commis un fait d'inexpérience, mais il n'a pas voulu faire mal. Il ne peut pas avoir voulu un accident à son propre navire. Quand il a jeté l'ancre, il voulait éviter une collision, et les circonstances et les témoins le prouvent. Il s'en allait se frapper sur les navires qui étaient amarrés au quai Crawford, s'il n'avait pas arrêté son vaisseau. Quand il a jeté l'ancre, il voulait donc éviter une collision avec d'autres vaisseaux, c'est-à-dire éviter un plus grand mal pour les autres et pour lui-même.

On dit: "Mais il a trangressé une règle ayant force de loi, une règle locale de la Commission du Havre, en jetant l'ancre dans l'espace prohibé par les règlements de la Commission du Havre, et la section 917 du statut dit qu'alors la faute volontaire est présumée". Voilà le grand argument de la Compagnie demanderesse. Elle dit: "Vous avez commis une trangression contre la règle locale qui défend de jeter l'ancre dans cet endroit-là; or, en transgressant cette règle, vous avez commis en loi, un véritable délit, et la faute volontaire est présumé, aux termes de la loi". On cite le statut à ce sujet, mais on n'a pas tout cité. Voici ce que dit le statut au sujet de ces règlements locaux: C'est à la section 916 et à la section 917 des statuts refondus, chapitre 113, reproduit dans les "Rules and Regulations of Navigation".

Section 916, qui est la règle 5:

"If, in any case of collision, it appears to the court "before which the case is tried, that such collision was "occasioned by the non-observance of any of such

"regulations Act, the vessel or raft by which such rules "have been violated shall be deemed to be in fault."

Et voici ce que le statut ajoute: "*Unless* it can be "shown to the satisfaction of the court that the cir- "cumstances of the case rendered a departure from "the said regulations necessary".

Si la règle de la navigation a été mise de côté pour éviter un plus grand mal, une collision, on avait droit de la mettre de côté.

La règle sixième qui est la section 917 du statut dit encore ceci: "If any damage to person or property "arises from the non-observance by any vessel or "raft of any of the said regulations Act (La règle "qui défend de jeter l'ancre dans un endroit ré- "servé) such damage shall be deemed to have been "occasioned by the wilful default of the person in "charge of such raft, or of the deck of such vessel at "the time, *unless* (toujours *unless*) the contrary is "proved, or it is *shown to the satisfaction of the court "that the circumstances of the case rendered a departure "from the said rules necessary, etc*".

Cette disposition n'est pas seulement relative aux règles locales passées par la Commission du Havre ou par les autres autorités locales, mais cette exception est relative à toutes les règles de la Navigation.

Ainsi, si l'on réfère à la règle 27 de la Navigation qui est une règle générale, voici ce qu'on y lit: "In obey- "ing and construing these rules, due regard shall be "had to all dangers of navigation and collision, and "to any special *circumstances which may render a depar- "ture from the above rules necessary in order to avoid "immediate danger*".

C'est la règle que l'on applique constamment dans les cas de collision. *Non-seulement c'est le droit* des navires de mettre de côté les règles dans certains cas,

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pour éviter une collision, par exemple, *mais c'est leur devoir*, et s'ils ne le font pas, ils peuvent en être tenus responsables.

Ainsi, par exemple, dans les cas de collision, il arrive quelquefois ceci: Voici deux navires qui se rencontrent, ils se voient venir de loin. Les deux doivent savoir ce qu'ils ont à faire; l'un observe la règle et l'autre ne le fait pas. En transgressant la règle, celui-ci va causer une collision dont il sera responsable. Mais si celui qui observe la règle voit clairement qu'en la mettant de côté il va éviter la collision, c'est son devoir de le faire.

C'est le cas ici: Le navire "Crown of Aragon" était exposé—tout le monde le dit—à s'en aller se jeter sur les vaisseaux qui se trouvaient au quai Crawford. Pour éviter cette collision très dommageable pour lui et pour les autres, il met de côté la règle qui lui défend de jeter l'ancre. *Il avait droit* de le faire et *c'était son devoir* de le faire pour éviter un plus grand mal.

Remarquons bien une chose d'ailleurs: La règle qui défend de jeter l'ancre à cet endroit-là veut dire qu'il ne faut pas mouiller à cet endroit-là. Or le "Crown of Aragon" n'avait pas du tout l'intention de mouiller à cet endroit-là; il jetait l'ancre pour éviter une collision. C'était par conséquent une *manœuvre nécessaire* pour éviter la collision. Or c'est le droit et même le devoir des navires de mettre les règles de côté quand c'est nécessaire pour éviter une collision.

Mais, dit la demanderesse, s'il est devenu nécessaire de jeter l'ancre pour éviter une collision, c'est parce que le pilote Perron a commis la faute de jeter une amarre en sortant du Bassin Louise et que cette amarre s'est enroulée dans l'hélice.

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Voyons comment cela est arrivé. Il est prouvé par un grand nombre de témoins, qu'on a fait comme de coutume; que pour sortir le "Crown of Aragon", on a suivi l'usage ordinaire. On a loué un remorqueur qui a tiré le vaisseau qui était dans le Bassin Louise, le devant du côté de la ville et le derrière vers l'embouchure du Bassin. Alors, pour le sortir, il fallait nécessairement le tirer par l'arrière, la chose se fait toujours ainsi. Un remorqueur a été loué pour tirer le vaisseau par derrière; l'hélice a été mise en mouvement avec l'ordre "Slow Astern", lentement en arrière. C'est l'ordre qu'il fallait donner et, par conséquent, jusque là, pas de faute. On a reproché au pilote d'avoir donné cet ordre-là; on a dit: "Pourquoi avoir fait marcher son hélice, il n'en avait pas besoin"? D'abord, c'est l'usage; on le fait toujours et on comprend parfaitement l'utilité de l'hélice. Le navire qui est remorqué n'a aucun mouvement propre quelconque; il est tiré alors comme une pièce de bois et, par conséquent, il n'est pas maître de tous ses mouvements. Tandis que, si son hélice marche lentement dans le même sens que le remorqueur, il est prêt à modifier son mouvement comme bon lui semble et il faut qu'il se tienne dans cette position-là pour être un navire bien dirigé, bien commandé.

On dit encore qu'en allant ainsi en arrière avec l'hélice en mouvement, on devait prévoir très certainement que l'amarre qui était attachée sur le quai et qu'on laissait tomber à l'eau allait s'enrouler dans l'hélice. Eh bien! je ne crois pas que ce fût inévitable; je ne crois pas que ce soit un danger certain que si l'on jette une amarre à l'eau, elle aille s'enrouler dans l'hélice et, je crois que la chose est expliquée très bien par le témoin Thompson et aussi par le témoin Dinan.

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Quand une amarre est jetée du quai et que le vaisseau est en marche, naturellement, l'amarre tombe au pied du quai et si le vaisseau n'est pas tout près, elle est entraînée par le mouvement du navire, et traîne le long du navire. Ici, au lieu de traîner le long, elle est allée s'enrouler dans l'hélice. On se demande pourquoi. Ces deux témoins dont je viens de parler l'expliquent comme ceci: "A ce moment-là, l'arrière du navire sortait du Bassin, la mer montait et en montant elle se précipite dans l'ouverture du Bassin, et là elle fait, à cette étage de la marée, un remous, un tourniquet, et l'amarre, tombant dans ce tourniquet, a roulé sur elle-même et s'est prise dans l'hélice. Sans ce remous-là, l'amarre aurait traîné le long du vaisseau et n'aurait pas été s'enrouler dans l'hélice."

On dira encore: "Le pilote aurait dû prévoir cela". Il y a tant de choses dans la navigation, qu'on ne peut pas prévoir; on se le dit après: "Si je n'avais pas fait tel mouvement, l'accident ne serait pas arrivé". Et c'est comme cela que, transquestionné par M. Pelletier, le pilote Perron a dit qu'il avait fait une erreur, erreur qu'il n'avait pas prévue, ni faite volontairement, puisqu'elle paralysait le mouvement de son navire.

Remarquons bien encore une chose: L'amarre, en s'enroulant autour de l'hélice, arrêtait le mouvement de l'hélice. Alors, si c'était une faute de mettre l'hélice en mouvement, l'amarre aurait plutôt rendu un service et réparé cette faute en arrêtant l'hélice.

Mais non! c'était un bon mouvement, c'était une bonne manœuvre de mettre l'hélice en mouvement et, selon l'usage ordinaire, on a jeté l'amarre pour la tirer à bord, mais elle s'est accrochée là par cas fortuit.

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On dit: "On n'aurait pas dû jeter l'amarre. On aurait dû attendre que le derrière du navire fût sorti du Bassin". Cela est bien facile à dire; mais les deux hommes qui portaient l'amarre ont dit: "Nous étions au bout du quai et nous ne pouvions pas arrêter le steamer avec l'amarre, ni nous jeter à l'eau; alors nous l'avons lancée à l'eau". Evidemment, le pilote n'a pas cru que son amarre allait s'accrocher dans l'hélice, c'est clair comme le jour. Il n'a pas prévu la chose, et supposons qu'il ait commis une erreur comme il paraît l'admettre, il n'a constaté son erreur qu'après coup, comme dans tous les cas d'accidents. Il a voulu faire pour le mieux et il n'a certainement pas commis *une faute grave et volontaire* parce que, enfin, commettre une faute volontaire, c'est commettre une faute dont on prévoit les conséquences.

Je crois, qu'en face de la convention, les navires ne peuvent être responsables que de fautes graves et volontaires. Sinon, il faudrait dire que la convention est absolument nulle, qu'elle n'a aucun effet quelconque. Or, c'est un principe de droit qu'il faut faire les conventions de bonne foi et les interpréter de bonne foi en leur donnant autant qu'il se peut l'effet que les parties contractantes ont eu en vue.

Qu'est-ce que les parties contractantes ont voulu? Elles ont voulu que les navires ne fussent pas responsables lorsqu'il n'y a pas eu faute volontaire et coupable.

En prétendant que la convention est absolument nulle, on ne se conforme pas à ce principe de droit qu'il faut faire des conventions de bonne foi et les interpréter aussi de bonne foi.

Si celle-ci n'avait aucun effet, elle aurait été une duperie, un véritable dol de la part de la demanderesse.

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On a fait une convention pour obtenir une faveur, on a obtenu cette faveur et quand elle est obtenue, on veut mettre la convention de côté.

Evidemment la Commission ne voulait pas mettre un nouvel embarras sur le lit du fleuve, et une nouvelle gêne pour les navires. La demanderesse a alors dit: "Mais nous n'y avons pas d'objections du tout; nous allons renoncer à tout dommage, à toute garantie. Si les navires nous font du tort, des dommages, nous allons renoncer à tous recours. Commission du Havre a dit: "Très bien, nous allons en faire un écrit redigé par un notaire". Cela a été fait. Et maintenant, voilà que la Compagnie dit: "La convention est nulle en loi". Ce serait injuste.

Les conventions doivent être respectées.

Il est prouvé d'ailleurs, que le steamer était bien commandé, bien équippé, qu'il avait le nombre voulu d'officiers et d'hommes, qu'il était sous la conduite d'un pilote branché dont les ordres étaient transmis par mégaphone. Le capitaine a déclaré qu'il était sorti plusieurs fois sans accident de la même manière; il dit: "I cannot say it was anybody's fault; it was an accident". L'ordre donné à l'ingénieur était "slow astern", et c'est ce qu'il devait être.

Par conséquent, je ne crois pas qu'il y ait eu une faute grave et volontaire commise par le pilote, s'il y a eu une faute quelconque.

C'est un pur accident, un cas fortuit, et je n'ai aucun doute que la convention doit avoir son application, et que la compagnie ne doit pas réclamer de dommage.

En conséquence, l'action est renvoyée avec dépens.

Judgment accordingly.

TORONTO ADMIRALTY DISTRICT.

THE REID WRECKING COMPANY, LIMITED..... PLAINTIFFS,

1911
June 9.

AND

THE SHIP "*JOHN B. KETCHAM 2ND.*"

Shipping—Salvage—Repairs and Necessaries—Lien—Dockage.

In a contract for salvage where the parties acquiesce in a change of the place of delivery, a deduction must be made if the distance is shortened by the change.

In order to succeed in an action for repairs, the authority to make the contract must be clear, and when repairs have been made on a foreign ship in a foreign port and by foreign contractors the law of the foreign State as to the existence of a lien therefor must govern.

THIS is an action brought by the plaintiffs, a foreign corporation, against the American steamer *John B. Ketcham, 2nd,* to recover an amount alleged to be due them for salvage services; and also an amount expended on the said steamer for repairs and dockage charges and for other services rendered by them in connection with the said steamer.

The defendants denied the contract and claimed that no lien existed in respect of the claims for dockage and repairs.

The trial of the case took place at Toronto on the 6th of May, A.D. 1911, when after argument judgment was reserved.

F. F. Pardee, K.C., for plaintiffs.

A. H. Clarke, K. C. and *A. R. Bartlet,* for defendants.

GARROW, L. J., now (June 9th, 1911) delivered judgment.

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I have come to the conclusion that it is a proper inference from the evidence that the owner ratified and adopted, if he did not personally authorize, the contract with the plaintiffs, under which the salvage services in question were rendered. I accept Mr. Jones' evidence as satisfactory; what he says is that the owner left the matter in his hands; Mr. Loud's contradiction, if it amounts to that, is at least hesitating and unsatisfactory.

The contract is in terms, in my opinion under the circumstances, a salvage contract, and the option to pay $12,000 instead of 50% of the salvage property was, I think, sufficiently exercised. The contract, however, not having been fully performed by a delivery at the destination agreed upon, there should be deducted a reasonable sum upon that account. What is a reasonable sum so to deduct seems to me to be at least what it cost the owner to forward the cargo to its destination, which he places at $1,842, and I therefore allow that sum out of the $12,000, or $10,158.00 as the proper amount of the plaintiff's claim for salvage.

The owner claimed against the underwriters as for a total loss $57,500. He accepted $35,000 and retained the ship, and gave a bond to indemnity them from the plaintifs' claim under the salvage contract. The services actually rendered required the use of an extensive plant and occupied several days, so that even in the absence of any agreement fixing the price the amount I have allowed would not in my opinion be excessive. The delivery at Port Huron instead of at Niagara Falls was acquiesced in by the owner, and also by Mr Jones. And the subsequent removal of the vessel to Sarnia where the arrest occurred was authorized by Mr. Jones and not objected to by the

owner so far as appears, and was made to place the damaged vessel in a place of safety.

I am unable to see on what grounds I can allow the balance of the plaintiff's claim, which is for dockage and repairs. Slight evidence, or even no evidence at all, may be sufficient to establish a claim to salvage where such services have actually been rendered, but it is quite otherwise with this part of the claim, for which the owner could only be made liable by his own act or by that of his authorized agent. There is no pretence that the owner himself gave any instructions or direct authority to any one to have these things done, and in my opinion Mr. Jones had no general authority from him, or by reason of his position as representing the underwriters, to bind the owner with respect to such matters. And in addition it is in my opinion very doubtful if a lien in respect of such matters exists in law. The ship is, I understand, foreign, the owner resides in the State of Michigan, in which State the docking and repairs were supplied, and by the laws of which the right of lien, if any, would be determined. There is no evidence before me that by the law of that State there would be such a lien under the circumstances, and indeed from what I can gather although I do not, in the absence of evidence, absolutely so determine, the result would be otherwise.

As to the law in England in the case of necessaries supplied to a foreign ship in a British port, see the *Henrich Bjorn* (1)

The plaintiffs should therefore in my opinion have judgment for the above mentioned sum of $10,158.00 and their costs, and for no more; this of course to be without prejudice to any right or remedy the plain-

(1) 11 A. C. 270.

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tiffs may otherwise have against anyone but the ship or the owner in respect to the matters which I disallow.

Nothing was said before me about the cargo or the freight, or as to contribution by them or either of them if claimed. If necessary these matters may be discussed on settling the judgment.

Judgment accordingly.

Solicitors for Plaintiffs: *Pardee, Burnham & Gurd.*

Solicitors for Defendants: *Clarke, Bartlet, & Bartlet.*

NOVA SCOTIA ADMIRALTY DISTRICT.

HEATER ..... PLAINTIFF.

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May 12

AGAINST

ANDERSON *et al.* Part Owners of the *SS. Abeona* ..... } DEFENDANTS.

Shipping—Jurisdiction—Contract made without reference or application to Court—Security for return of ship.

Where the majority owners of a ship, desiring to make use of the ship, without application to the Court, execute a bond under seal to the minority owners, conditioned for the safe return of the ship to a port mentioned, or, in default, payment of a fixed money penalty, such contract is not one which the Court has jurisdiction to enforce, differing in this respect from a bond executed under the same circumstances in the Court, which is not a contract between the parties but is a security given to the Court.

The *Bagnall*, (12 Jur. 1008) followed.

ACTION on a bond dated the 1st day of June, 1909, in the sum of $2500, being the value of plaintiff's share in said ship registered in Barbadoes, the condition being, among other things, that defendants would within six months from said 1st day of June, 1909, bring the said ship *Abeona* to the port of Lunenburg in good condition and repair or pay plaintiff said sum of $2500. Breach of the condition was alleged.

May 12, 1910.

The case came on for hearing.

S. A. Chesley, K. C., and *J. J. Richie, K. C.*, for defendants took the preliminary objection that the court had no jurisdiction as the bond in question was an ordinary common law bond. The effect of taking such a bond is to merge plaintiff's right of action in Admiralty in a common law debt under seal. There is no direct authority, but we rely on the case of *Goodwyn* v. *Goodwyn*. (1) When plaintiff accepted the bond under seal he abandoned his remedy in the Admiralty Court, which has no further jurisdiction in

(1) Yelv, 39

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the matter. The statute gives the court jurisdiction to decide all questions arising between the co-owners or any of them, touching the ownership, possession employment and earnings of any ship registered &c. We submit that there is no such question to be decided here as all these questions were settled between the owners themselves. The question now is simply as to the enforcement of the bond. A later authority is *East India Co.* v. *Lewis*; (1) ; also *Luke* v. *Aldern* (2). In that case the rule worked the reverse way, and it was held that a legacy which would otherwise have lapsed was merged in a sealed security and was a debt and enforceable. In Admiralty a special form of bond is to be used. (3). In this case the parties have contracted themselves out of the Admiralty Court. After the bond was taken the minority owners could not come into court and get bail or bring an action of restraint. [THE COURT. You say that the contract ousts the jurisdiction?] Yes. [THE COURT. I will hear the other side.]

T. S. Rogers, K. C., and *H. B. Stairs*, contra. The objection should have been raised before. *The Louisa*, (4). The appearance should have been marked "under protest." As regard to main point, we do not rely upon the Act of 1861, s. 8., but upon the inherent jurisdiction of the court in maritime matters. The counterclaim is in the nature of a cross action for necessaries and is not within section 8, which applies only to ships registered in Canada while this vessel is a British ship registered at Barbadoes, and we object to the jurisdiction of this court to deal with it. The *Lady Clermont*, (5). As to jurisdiction in the action on the bond see Williams & Bruce (6). *The Cawdor*, (7). We base our claim

(1) 3 C. & P. 358.
(2) 2 Vern. 31.
(3) Williams and Bruce, 296.
(4) 9 Jur. 676.
(5) 3Mar. Law Cas. 508.
(6) At p. 8.
(7) (1900) P. 47.

on the ancient jurisdiction of the Court in cases of possession and restraint. *Abbott on Shipping* (1). The worst that can be said of the security we took is that it is a contract, but it is a contract referring to the possession of a ship. It was taken to insure the bringing back of the ship to the port of Lunenburg where the owners were, and to bring her back into this jurisdiction so that the plaintiff might have his remedy against her. There is ample authority for the proposition that where the court has jurisdiction over the main subject-matter all subsequent matters are equally within the jurisdiction of the court.

Bidly v. *Egglesfield* (2); *The Catherine* (3). The latter case is as near this as we can get. In *Menetone* v. *Gibbons* (4), it was held that where the court has jurisdiction over the subject-matter no incidental matter will deprive it of its jurisdiction. The bond in this case is not in the form that a bail-bond would be in, but it is essentially a security to the plaintiff for the return of the ship to the jurisdiction, and the facts that it is under seal and that there are no sureties are not material.

Ritchie, K. C., in reply. The case of *The Catherine* was an action of salvage over which the court had jurisdiction, and all that was decided was that in that case the jurisdiction of the court was not ousted by the fact that there was an agreement made on land. That case is altogether different from the case at bar. The court has never had jurisdiction over a common law contract made between the parties under seal whether they were co-owners or not. Because the contract happens to be made about a ship it does not follow that this court has jurisdiction. In this case the dissenting owner, instead of going into Admiralty, made a common law contract. In the case of *The Catherine* the first question

(1) P. 119.
(2) 2 Lev. 25.
(3) 12 Jur. 682.
(4) 3 T. R. 267.

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to be decided was whether it was salvage or not, and you cannot get more out of it than this that the court was not ousted of its jurisdiction because the contract was made on land instead of on the deck of the ship. An element to be considered is that the bond cannot be enforced and the accounts cannot be gone into as between the parties.

[THE COURT:—If that is so it is a very one-sided transaction, and it should appear on the pleadings. I will do my best to prevent any money being taken out of court if there is any question of account. I will adjourn to any day agreed upon, and I will order pleadings in the meantime.]

May 10th 1910, (The matter having been adjourned to this date).

Richie, K. C., and *Chesley, K.C.*, renewed the objection taken on behalf of defendants and cited, in addition to the cases previously referred to, *The Bagnall* (1); and *The Ebrezia* (2); and Williams & Bruce (3). There is an American decision to the effect that a policy of marine insurance comes within the jurisdiction of the Admiralty Court, but it has been disregarded in England, and it is not fully approved in the United States. (4). There is no jurisdiction to take the accounts in this court.

Rogers, K. C., in reply. We admit that the counterclaim cannot be proceeded with as the vessel is registered in Barbadoes. Plaintiff should have accounted as master for what he took in that capacity and he did so. Mixed up with this is his liability as owner. We do not contend that we are not liable to pay for our share of the vessel, and we would not object to a deduction of what plaintiff owes on the purchase money. We are also willing to account for the commission of

(1) 12 Jur. 1008.
(2) 12 Jur. 143.
(3) 3rd Ed. 11.
(4) (1891) 1 Q. B. 293.

$100 received from the vendors. Under the Act of 1840, if money were paid in, the court would have jurisdiction to decide as to the ownership of funds in the registry and might found jurisdiction on that principale to decide the question of our liability.

[THE COURT. I might keep the money there, but I could not try the question of liability on a promissory note, for instance.] The court has jurisdiction to settle the question of title, and there is no dispute as to amount or liability. We admit liability for the share of the purchase money and also for the commission. The case of *The Bagnall*, cited by the other side, was decided on the ground that the whole proceeding was statutory. The statute was passed, among other things, to enable the salvors more readily to obtain salvage. It enabled the receiver of wrecks to hold the ship or to let it go on taking satisfactory security. No form of security was provided, and the point was that the ship had been in the custody of the receiver of wrecks, whose right to detain her was purely statutory. The bond was given to get her back into the custody of the receiver of wrecks, and it was held that by the bondsmen submitting themselves to the jurisdiction of the court they could not give jurisdiction over a matter which was simply statutory.

[THE COURT:—The action was in admiralty on the bond?] Yes. The bond was taken after the action by the receiver.

[THE COURT:—Had the ship been arrested?] I do not think so.

[THE COURT:—Then I do not see how it got before him]. In the case of *Ridly* v. *Egglesfield* (1) goods were purchased on land which had been taken piratically on the sea, and in an action in admiralty there was an

(1) 2 Lev. 25.

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attempt to get the Court of Kings Bench to interfere but that court refused to do so on the ground that the matter was one over which the Admiralty Court originally had jurisdiction.

Lambert v. *Aeretree* (1), is very like this except that the proceedings were taken in the first instance in admiralty. We had a right to security, and we have it in the form of a bond or contract in reference to an essentially maritime matter. No other court than a Court of Admiralty has jurisdiction as to disputes between the owners of a ship as to the use of the ship. The whole spirit of the thing is that it is a security for an interest in a ship which is only cognizable in admiralty.

[THE COURT:—It is an agreement that he will bring this share of the ship back, or that he will pay $2,500.]

DRYSDALE, D. L. J. now (May 29th, 1910) delivered judgment.

Objection is taken to the jurisdiction of this court to enforce payment of the bond sued on herein, and I am of the opinion that objection is well founded. The bond here is a contract made between the parties without any reference or application to this court, and differs in that respect from a bond executed in this court at the instance of minority owners from a majority intending to use the ship. In the latter case the bond or bail is not a contract between the parties but is security given to the court, and can of course be enforced here. In the present case I am asked to enforce a bond made between parties, no doubt upon good consideration ; and if this could be done as well might I be asked to enforce any other agreement made between parties respecting the use of the vessel. I can

(1) 1 Ld. Raym. 223.

find no authority for the exercise of any such jurisdiction in this court. On the contrary *The Bagnall* (1) is, I think, in point directly against the power now claimed by plaintiffs.

I must dismiss the action with costs.

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Judgment accordingly.

(1) 12 Jur. 1008

QUEBEC ADMIRALTY DISTRICT.

1908
May 22.

GEORGE B. TAYLOR, owner of the steamship *"HAVANA"*.....PLAINTIFF;

AGAINST

THE STEAMSHIP *"PRESCOTT."*

Shipping—Collision between two steamers in Canal—Negligence—Breaking of bell-spring in agony of collision—"Inevitable accident."

Held,—that if at a critical moment in the agony of collision, or immediately before it takes place, a vital or material part of the machinery, or of the steering-gear, or equipment, of a ship fails or breaks and cannot possibly be remedied, and the command of the movement of the ship by those in charge of her is lost and cannot be regained, and a collision then occurs without any antecedent negligence on the part of the disabled ship, and is unavoidable as far as she is concerned, the accident is inevitable; but, if, as in the present case, a bell-spring, a mere accessory of the equipment of the vessel, breaks, but the command of the vessel is not necessarily thereby lost by those in charge of her, and antecedent fault on her part is proved, this cannot be deemed to be an "inevitable accident".

ACTION *in rem* for damages arising out of a collision in the Lachine canal.

The facts are stated in the reasons for judgment.

October 28th and 29th and November 4th and 6th, 1907.

The case was now heard at Montreal.

A. R. Holden, for the plaintiff;

The Honourable A. R. Angers, K. C., for the ship.

DUNLOP, D. L. J. now (May 22nd, 1908) delivered judgment.

[Having stated the respective allegations of the parties as appearing upon the pleadings His Lordship proceeded as follows:—]

It is admitted that George B. Taylor is the owner of the steamer *Havana*, and that the *Prescott* is owned by the Richelieu and Ontario Navigation Company.

The facts under which the accident in question occurred, and by reason of which damages were caused, are clear, and they can be disposed of in a few words.

On the evening of the 2nd of July, 1907, the plaintiffs' ship, *Havana*, on her way from the City of Quebec to Erie in the State of Pennsylvania, came to the down-stream entrance of the Lachine Canal. The wind at that time was from the north or north-west, the weather was clear and fine, it being still daylight. It was the intention of the *Havana* to take the lower or south lock, lock number one. The *Havana* approached the entrance to that lock, ran alongside of the north-west wall of the south lock and put two of her crew ashore to manage the lines in locking the *Havana*, in conformity with the canal regulations. When the *Havana* was alongside of the north wing-wall, the authorities in charge of the lock notified her that she could not pass through the lock until the passenger steamer that was coming up astern had passed through; in other words, that the steamer *Prescott* should take precedence, and the *Prescott* thereupon pushed her way through, and became jammed between the *Havana* and the lock for a short time, and then hurried into the lock. She went through the south lock number one, struck the upper gates, broke them, and was carried swiftly back by the rush of water, and in doing so came into collision with the *Havana* and damaged her to such an extent that she had to be beached in order to save her.

The *Havana* after receiving the orders from the canal authorities that the *Prescott* was to have precedence, backed up towards the south side of the entrance to

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the lock, as far as was necessary to allow the *Prescott* to pass in ahead of her, and while she was lying on the south side of the entrance, her bow was slightly in front of a pinflat loaded with a deck-load of timber that was moored to the south wall, near the down-stream end.

After the *Prescott* had passed the *Havana*, the *Havana* worked her way slowly across the entrance to the lock in order to make fast to the north wing-wall, until the *Prescott* had been locked through. This she did, because it was evidently considered by those in charge of her that she was in the only place at the entrance of the lock free and clear and available for that purpose; but before this manoeuvre could be carried out the collision took place, and the *Havana* was seriously damaged.

The substantial defence of the defendant in this case is that the accident was inevitable owing to the breaking of the spring of the bell in the engine-room of the *Prescott*; and, subsidiarly, that if the *Havana* had been carefully and skilfully navigated by those in charge of her at the time the accident and collision could have been avoided

Before referring to the facts as proved, it might be well to consider the authorities bearing upon the question of inevitable accident

Marsden on Collisions, at p. 6 explains:—"Inevitable accident in Admiralty is commonly used to describe a collision which could not have been prevented by ordinary care; in other words, a collision which occurs without negligence in either ship."

A little further on he says: "It is evident that to sustain the plea of inevitable accident it is not enough to show merely that the collision was inevitable at the moment of or for some moments before its occurence."

Further on he says: "It is not enough for a ship to show that as soon as the necessity for taking measures to avoid collision was perceived, all that could be done was done. The question remains whether precautions could not have been taken earlier."

At page 24 he lays down the principle in these words:—

"If a ship is negligently allowed to be at sea in a defective or inefficient state as regard her hull or equipment, and a collision occurs which probably would not have occurred but for the defective condition, the collision will be held to have been caused by the negligence of her owners".

Kay in his well known work, "*On Ships-masters and Seamen,*" 2nd edition, at page 517, puts it in these words: "An accident is not inevitable merely because it could not be prevented at the very moment at which it occurred. Where it might have been prevented if proper and reasonable measures had been adopted in due time, it is not inevitable."

In the American and English Enc. of Law, Vol. 25, title Ships and Shipper, page 906, the principle is laid down in these words:—

"A collision is said to be inevitable accident when it could not have been prevented by the exercise of ordinary care, caution and nautical skill, but it is not sufficient that the collision could not have been prevented after realization of the dangerous position of the vessels, if they were negligently brought into that position."

Reference might also be made to two cases decided in Lower Canada, which I think have a direct bearing upon the question, and which were decided by two very eminent Judges in Admiralty, Judges Black and Stuart. I refer to the case of the *Cumberland*

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which is a judgment of Judge Black in 1836. (1) This was a case of two brigs at anchor The claim of inevitable accident was based upon the fact that a serious storm arose. That was the inevitable danger in that case. Mr. Justice Black at page 78 said:—

"If the collision be preceded by a fault, (the fault in that case as he found being wrongful anchoring). which is its principal or indirect cause of offending vessel cannot claim exemption from liability on the ground of the damage proceeding from inevitable accident the rule being *quando culpa praecessit casum tunc casus fortuitus non excusat.*"

The other Canadian case is the case of the *Agamemnon,* decided by Judge Stuart in 1876 (2). In this case of the *Agamemnon,* one vessel struck another as a result of its anchor chains giving way in some manner. At page 334 Judge Stuart said: "To support a plea of inevitable accident, the burden of proof rests upon the party pleading it, and in this instance it was for the respondent to shew before he could derive any benefit from it, first, that the damage was caused immediately by the irresistible force of the wind and waves; second, that it was not preceded by any fault, act, or omission on his part as the principal or indirect cause; and third that no effect to counteract the influence of the force was wanting. If the persons in charge of the *Agamemnon* failed, in any one of the above particulars, she is liable for the consequences of this collision."

In cases of collision the jurisprudence of the highest courts in England is of very great importance, and reference might be made to some of the leading cases.

The first I would refer to is the case of the *Marpesia,*

(1) 1 Stu. 75.

(2) 1 Q.L.R., 333.

decided by the Privy Council in 1872. (1) This is a case of two sailing vessels in a fog. Sir James W. Colville, at page 336, after citing and approving of a very old decision of Dr. Lushington, in the case of the *Virgil* which is found in 2 W. Rob. 205, says:—

"An inevitable accident in point of law is this: viz., that which the party charged with the offence could not possibly prevent by the exercise of ordinary care, caution and maritime skill. If a vessel charged with having occasioned a collision should be sailing at the rate of eight or nine miles an hour when she ought to have proceeded at the speed of three or four, it will be no valid excuse for the master to aver, that he could not prevent the accident at the moment it occurred, if he could use measures of precaution that would have rendered the accident less probable".

Sir James Colville goes on to say:—

"Here we have to satisfy ourselves that something was done or omitted to be done which a person exercising ordinary care and caution and maritime skill in the circumstances either would not have done, or would not have left undone as the case may be."

The next English case is the case of the *Merchant Prince*, decided by the Court of Appeal in England in 1892 (2).

This was a case between two steamships, one being at anchor, and a collision occurred from the steering gear of the other going wrong. The trial Judge found that the accident was inevitable, and the Court of Appeal reversed his judgment. The trial Judge said it was an inevitable accident. The Court of Appeal held it was not inevitable.

At page 253 of this report Lord Esher, the Master of the Rolls, says: "The only way a man can get rid

(1) 26 L.T., N.S. 333.

(2) 67 L.T., N.S. 251.

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of liability for the accident, the circumstances of which prove negligence against him is to shew that it occurred by an accident which was unavoidable by him, that is an accident the cause of which was such that he could not, by any act of his, avoid the result." A little further on, he continues:—

"The defendants have shewn a probable cause, and have shewn that if that was the cause there were means of which its result could without difficulty have been avoided."

The next case I would refer to is the case of the *Lochlibo* (1). This case was decided by the High Court of Admiralty in England in 1850. This is a case of two ships under sail, and the collision occurred on a dark hazy night. Dr. Lushington, at page 317 puts it in this way:—

"If either of the two vessels was to blame in any particular, whether from the default of the crew, or of the pilot, or from the joint misconduct of both, then of course the collision could not be the result of inevitable accident."

At page 318 of the same report, he says:—

"By 'inevitableaccident' I must be understood as meaning a collision which occurs when both parties have endeavoured by every means in their power, with due care and caution, and a proper display of nautical skill, to prevent the occurrence of the accident".

I shall now make a few references to the jurisprudence in the United States, and will refer to *Spencer on Marine Collisions*. At page 350, section 195, he says:—

"Where inevitable accident is shown, the loss must remain where it falls, on the principle that no one should be held to be in fault for the results produced

(1) 3 W. Rob. 310.

by causes over which human agency can exercise no control. Where it appears that either party or both are at fault, that everything was not done that could have been done, that the collision might have been prevented by the use of known and proper precautions, by the display of proper nautical skill and judgment, it no longer becomes inevitable accident, but one for which one or both vessels are responsible."

I would also refer to a case of the *Michigan*, (1) decided by the Circuit Court of Michigan on appeal from the District Court, in 1891.

This was a collision between two schooners at the entrance of St. Mary Falls' Canal. One, the *Delaware*, was moored waiting for a tug and she was struck by the *Michigan* entering the canal. The *Michigan* pleaded that the collision was inevitable because of the inevitable cause, which was a strong wind which apparently blew from twenty-five to thirty miles an hour. The Judge in appeal, Mr. Justice Jackson, says at page 506:—"The *Michigan* sent out but the one forward line. That line was too short, was sent out too late, and it failed to reach the dock".

Then at page 507, he goes on to say:—

"To call an injury resulting from such conduct and mismanagement an 'inevitable accident' is a misnomer. A collision is said to occur by inevitable accident when both parties have endeavoured by every means in their power with due care and caution and a proper display of nautical skill to prevent the occurrence of the accident."

Then there is the case of the *Olympia* which is also a judgment of the Circuit Court of Appeal (2) decided in 1894. This was a collision due to the breaking of

(1) 52 Fed. Rep. 501.

(2) 61 Fed. Rep. 120.

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the tiller rope on ship. At page 127 the Court of Appeal puts the question of proof in this way:—

"If a ship damages another ship in consequence of the giving away or inefficiency of her gear or equipment a *primâ facie* case of neglect arises."

On the general principle of inevitable accident, Mr. Justice Lurton speaking for the Circuit Court in Appeal at page 127 says:—

"It is not meant by the expression 'inevitable accident,' one which it was physically impossible from the nature of things for the defendant to have prevented. We only mean that it was an occurrence which could not be avoided by that degree of prudence, foresight, care and caution which the law requires of everyone under the circumstances of the particular case."

Before leaving what I think is a fair exposition of the jurisprudence on inevitable accident, reference might be made to the case of the *Europa*, decided by the Admiralty Court in England, (1). The *Europa* struck a barque in a fog. Dr. Lushington at page 628 says:—

"The import of the words 'inevitable accident' in my view is this, where a man is pursuing his lawful avocation in a lawful manner and something occurs which no ordinary skill or caution could prevent, and as the consequence of that occurrence an accident takes place....." And he goes on to say: "Was there a sufficient arrangement as to the engines? The safety of the *Europa* herself and of vessels which are likely to meet her mainly depends upon the expedition with which the orders are executed, and the means which are adopted to execute them with great expedition. As a landsman I may say that if it is necessary to stop a vessel, the arrangement should be best to effect it in the shortest time."

(1) 14 Jur. Part 1, at p. 627.

There is also the case of the *Warkworth*, decided by the English Court of Appeals in 1884 (1). The *Warkworth* had, as it turned out, a defect in her steam-steering gear, and in this connection Lord Justice Fry, at page 148, speaking for the Court of Appeal, said:—

"Skilful mariners, if the ship is not supplied with proper instruments necessary for her locomotion cannot efficiently and properly conduct her. So also all proper instruments are useless without skilful sailors. If either of these is wanting and a collision happens, then we have a case of improper navigation."

Lord Justice Bowen in the same case at page 148 said: "A person who uses his ship which is not in a condition to be so employed, does in reality improperly navigate her."

The last case I shall at present refer to is the *Turret Court*, a case decided by the Admiralty Court in England in 1900 (2). Sir F. H. Jeune, speaking for the court in that case, which was another accident from steam-steering gear, said, at page 118:—

"Where you have steam-gear, which is necessarily a delicate instrument liable to accidents of various kinds, and a vessel going up a narrow stream in a place of difficulty, then I venture to say, after very careful consideration with the Elder Brethren, that it is the duty of the captain of that vessel not to neglect the means of safety which he has at his command, in other words, to have his hand-steering gear available for use."

Reference might be made for the sake of illustration to Articles 1071 and 1072 of the Civil Code of Lower Canada. These two articles are the counterpart of each other, and mean precisely the same thing. One

(1) 9 P. D., 145.
(2) 69 L. J. Pr. 117.

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says when a person is liable to pay damages and the other when he is not liable to pay damages. The principle involved is necessarily the same. Article 1072 says he is not liable to pay damages when the inexecution of the obligation is caused by fortuitous event, or by irresistible force.

Sub-section 24 of Article 17 of the Civil Code defines a fortuitous event as one which is unforseen, and caused by superior force, which it was impossible to resist.

To constitute *force majeure* the obligation must become absolutely impossible, and not merely more onerous or more difficult, and the plea of *force majeure* must be accompanied by proof that the accident was neither preceded nor followed by any fault on the part of the defendant. See *Alexander vs. Hutchinson*, (1).

Reference might also be made to some of the authorities cited by the counsel for the defendants.

I shall first refer to the American and English Encyclopedia of Law, Vol. 25, pages 904 to 906—

"Inevitable accident, disablement : When a vessel is disabled without any negligence on her part, she is not liable for collision with another vessel when she took all the means in her power to avoid it."

"In case of inevitable accident, neither party is liable, and each bears its own loss if neither is guilty of antecedent negligence on its part. A collision is said to be inevitable accident when it could not have been prevented by the exercise of ordinary care and nautical skill."

I would also refer to the Federal Reporter, Volume 91, page 803.

"Collision, breakdown, accident without fault."

This is the case of the *Transfer Number 3*. The tug *Mould* overtook and passed *Transfer Number 3* with her

(1) M. L. R., 3 S. C. 283.

heavy tow coming down the East River. The *Mould*, after passing ahead of *Transfer Number 3* and when 500 feet in advance of her, broke her valve-stem, so that she became disabled. When, soon afterwards, the break was discovered, danger signals were given, and the *Mould* turned to go into the docks, but her way was gone, and collision ensued with *Transfer Number 3*. The *Mould* brought action. It was held that *TransferNumber 3* had no notice that the *Mould* was disabled until the boats were too near to avoid collision in the flood tide, and that the collision was an inevitable accident without fault, and the libel was dismissed. The *Mould* was uncontrollable. *Transfer Number 3* was in a course which she had a right to adopt, and could not alter in time to avoid the accident. The collision was held inevitable, the loss remaining where it fell."

"The *May Queen*, a barquetine, running into New Haven in a southeast gale, let go her anchor when about 150 yards off a ketch at anchor. There was a spring flood tide running, and the gale was right into the harbour. The port cable parted, and before the starboard anchor, which was let go, brought her up, the barquetine fouled the ketch."

It was held to be an inevitable accident due either to a latent defect in the cable or to stress of weather. No latent defect was visible in the broken link of the chain which was produced in court, and the chain was sufficient in point of size. The accident was held to be inevitable owing to stress of weather.

See also the case of the *Virgo* (1).

When a collision occurred in consequence of the breaking of the steering-gear, there being a latent defect in the metal, it was held to be inevitable accident when the same was properly cared for.

(1) 3 Asp. M.L.C. 295.

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See also the case of the *Java* (1).

In the case of the *Olympia* (2), the collision, having resulted from the breaking of the steamer's tiller rope, it was shewn in her behalf that the rope was of a charcoal iron wire of suitable size of the usual kind, and externally sound; and that it had been bought of a reputable outfitter and used less than two seasons, while the minimum life of such a rope is about three years, and that it had been inspected a few hours before the accident. Witnesses who saw the broken ends of the wires testified that there were no indications of defects. The steering-gear was worked by steam engines, capable of putting severe strain on the rope, but the evidence shewed that the wheel was not suddenly handled.

Held: That the collision was due to inevitable accident and not to the steamer's fault.

Defendant's counsel contends that the breaking of the spring of the hammer on the *Prescott* was caused by a defect, without antecedent negligence, and that the collision which followed was inevitable.

In order to assist me in arriving at a decision in this case, I had availed myself of the power which this court has to refer to some gentlemen conversant with nautical affairs. I have obtained the assistance of Captain James J. Riley, a mariner of experience, holding a certificate of competency as master from the British Board of Trade, number 82599, now engaged in important public service as Superintendent of Pilots and Examiner of Masters and Mates, and a Director of the Nautical College, upon whose judgment and opinion I shall find it my duty to rely and to whom I have submitted the following questions, and whose answers are appended thereto:—

(1) 14 Wall. 189.

(2) 61 Fed. Rep. 120.

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"Q. 1 Do you consider that under the facts of this case as proved, the steamer *Prescott* was properly manned, equipped and navigated, and that a proper lookout was kept, and that all possible precautions were taken by her master and crew to avoid collision with the *Havana*, which took place as has been proved at the time and placed in the pleadings in this cause mentioned? If not, state in what particulars, the manning, equipment, navigation and lookout of the *Prescott* were at fault, and what precautions should have been taken to avoid the collision in question, that were not taken?"

"A. In my opinion the *Prescott* was at fault in the following particulars: She was not properly equipped. There was no arrangement to repeat back signals from the engine room to the wheel-house. There was no proper officer in charge of the vessel. The master was at supper when the collision took place. The mate, whose duty it was to take the *Prescott* through the canal, was on the main deck, a place from which, after he had ordered the men to go on deck with the ropes, he could not take any part in the management of the vessel while she was going through the canal. Ouellette, the Rapids Pilot, was pilot of the vessel from Victoria Pier up to the time of the collision. In my opinion he navigated the vessel improperly. He was proceeding too fast when he entered the canal, and approached and entered lock number one too fast, without having any lines ashore. When about 50 feet inside of the lock, a line was got ashore, but the one man of the crew who jumped ashore did not put the line over the snubbing post until the vessel was about the middle of the lock and it could not be made fast on board the the vessel, as she was going too fast. There was no proper lookout."

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"I am further of the opinion that the collision could have been avoided if reasonable skill and care had been exercised by the officers and crew of the *Prescott* up to the time of the collision."

"Q. 2 Do you consider that under the facts of this case as proved, the steamer *Havana* was properly manned, equiped and navigated, and that a proper lookout was kept, and that all possible precautions were taken by her master and crew to avoid the collision which took place, as has been proved, with the *Prescott*, at the time and place in the pleadings in this cause mentioned. If not, state in what particulars the manning, equipment and navigation of the *Havana* were faulty, and what precautions should have been taken to avoid the collision in question that were not taken?"

"A. With respect to the *Havana* the evidence shews that she approached the lock in a proper manner. The mate was on the forecastle head, on the lookout, and two men were put ashore to handle the lines on the north wing-wall of the approach to the lower gates. She gave the right-of-way to the *Prescott* as ordered by the lockman. After she was released from the jam, caused by the *Prescott* forcing past her, she proceeded to retake her position alongside of the north wing-wall of the approach to the canal, which was the only thing she could do owing to local conditions and canal regulations.

"I am of opinion that the *Havana* was properly manned, equipped and navigated, and that everything that was possible was done by those in charge of her to avoid the collision, and to get out of the way of the *Prescott*, and that all reasonable skill and care were exercised by those in charge of the *Havana* at the time of the collision."

I concur in the foregoing opinion of the Assessor.

No arrangement existed to repeat back from the engine-room the signals given from the bridge as required by law.

The Canadian Shipping Act, chapter 113, R.S.C., 1906, section 621, enacts and requires as follows:—

"Every passenger steamboat shall be provided with wire tiller ropes or iron rods or chains correctly and properly laid with suitable rollers for the purpose of steering and navigating the vessel, and shall use wire bell-pulls for signalling the engineer from the pilot house where bell-pulls are used, together with tubes of proper size so arranged as to transmit the sound of the engine-bells to the pilot house, or other arrangement approved by the Inspector to repeat back the signal."

Ouellette, in his evidence, in answer to a question asking if any mechanism of any kind existed to repeat back orders given by the officers on the bridge to the engine room, answered, "There is none. Well, there is a speaking tube, but it was out of order."

The evidence of Hull Inspector Duclos, is unsatisfactory regarding the sound being repeated back to the bridge through the opening in the dome. In answer to a question asking what he understood as being required by law with reference to the communication or the repeating back of an order from the bridge to the engine, he said: "Whatever the Inspector deems necessary, or if he approves it." The law does not so read, but even from his own interpretation of it his evidence is unsatisfactory, for he seems to approve what he did not test because in answer to the question: "Did you ring the bells in making use of the handles on the bridge this spring in 1907?" he said, "No, I do not remember having done so. I cannot say that

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I rang them this spring. I heard them rung but I cannot say that I rung them myself." It is questionable whether the statement that he heard them rung is correct, because he says that he was alone at the time of completing his examination of this vessel at Sorel.

What the Inspector of Hulls approved of was no arrangement at all. He simply seems to have been of opinion that the signal could have been repeated through an aperture of the dome,—part of the structure of the vessel. The owners of the vessel were bound to see that the provisions of the law were carried out, and that there was some arrangement approved of by the Inspector to repeat back the signal. Here there was no arrangement. This, in my opinion was a violation of the law. Any lack in the enforcing of this very important provision of the law might, and would undoubtedly lead to disastrous results.

It might be noted as to the bells that the plural is used in the Act. It is admitted that the *Prescott* had only one gong or bell. (See evidence of Joseph Langlois, plumber and steamfitter, also the evidence of Chief Engineer Crepeau.) Langlois says that a second bell or gong was placed on the *Prescott* after the accident; and Crepeau says that the other vessels of the Richelieu & Ontario Navigation Company on which he had served had two bells or gongs. He also says that they had speaking tubes from the bridge to the engine room, and that they were in good order.

Now, in the present case it is admitted that the speaking tube on the *Prescott* was not in good order.

The master of the *Prescott*, Andrew Dunlop, was below taking his supper at the time of the accident. The mate, Edmond Robineau, was on the lower deck, where, after the men were sent by him to the promenade

deck to attend to the ropes, he could not be of any use in the management of the vessel. The second mate was not on board the *Prescott* at the time of the accident. Alfred Ouellette who assumed charge of the *Prescott* from Victoria Pier to Shed No. 2, and was on the bridge as navigating officer in charge at the time of the accident, seems to have been engaged as pilot for the rapids between Cornwall and Montreal, and his assertion that he was engaged as captain and pilot for the canals going up as far as the second shed of the Lachine Canal is not in agreement with his testimony, where he says, "Well, I don't belong to the boat, you know," nor is it substantiated by Captain Dunlop who swears that he (the captain) was the master of the *Prescott* in every sense of the word, and answers the question as to who decides whether the mate or the pilot shall take charge when the captain goes off watch by saying, "Well, if Ouellette wants to go ashore there, he can go," thus making it optional with Ouellette or at his convenience, whether to get off at the Victoria Pier or go with the vessel.

Again, the captain does not seem to have appointed any one in particular to take charge that evening, for when he is asked what he said to Ouellette when appointing him to the charge of the vessel, he answered: "Nothing, he simply comes up and takes charge."

Edmond Robineau says in answer to the question: "Did you ever handle the bells during that time?" (referring to the time of his services on the boat), answered, "Yes, sir, I handled the boat through the canal. That was my job." In answer to a question, "When you came on the ship as first mate a month before the accident, how did you know that it was your job to take the ship through the canal?" He stated, "Well, I was hired for that."

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The evidence of the master shews a lack of system in the navigation of the *Prescott* from Victoria Pier to Shed No. 2. He says that he sometimes took charge of her, and that sometimes the mate took her, and sometimes the pilot. It is in evidence that on the night in question no instructions were given regarding who should be the navigating officer when Captain Dunlop went below.

That the sound of the gong or bell in the engine room should be heard on the bridge, when attention was paid, seems to have been accidental or opportune, but not by arrangement, but when heard on the bridge it seems to have come through an aperture or opening in the dome, part of the structure of the vessel.

Ouellette does not seem to have paid attention to whatever sound may have come from the engine-room through the dome to the bridge.

At the critical moment Ouellette failed in judgment and skill in not earlier communicating by word of mouth to the engine-room. He admits that after pulling the starboard bell for the reverse order, that he knew something was wrong with the bells; yet he ran from bell to bell and wasted more time by giving two blasts on the steam-whistle which did not convey any meaning to the engineer, instead of which he could have sent Coutu immediately to notify the engineer to reverse, as easily as he could have asked Coutu if the walking-beam was moving.

It appears to me that the Chief Engineer Crepeau was negligent in not examining the gong when he heard the signal to go ahead at the time when he expected the signal to reverse. The bell that was used to signal to the engine-room was as much under his care as any part of the machinery.

In my opinion there was no lookout. The evidence of Coutu where he states that he was employed as lookout is unreliable, and is contradicted by himself in his examination before Commander Spain in the investigation held by him shortly after the collision took place, at which investigation Coutu swore that he was not acting as lookout.

The men who were placed on the promenade deck to handle the lines were without control or guidance, and it is in evidence that the ship was going too fast for the the men on the promenade deck to handle the line that it is said was thrown ashore.

The *Prescott* entered the canal improperly. She did not keep out of the way of the *Havana* which she was overtaking. Section 5 of the Regulations for the Dominion Canals reads as follows:

"It shall be the duty of all masters or persons in charge of any steamboat or other vessel on approaching any lock, to ascertain for themselves whether the lock is prepared to receive them, and to be careful to stop the speed of any such steamboat or other vessel with lines and not with the engine and wheel in sufficient time to avoid a collision with the lock or its gates."

We will not review the evidence as to the manner in which the *Prescott* entered the canal. The evidence of Ouellette on this subject is not as clear as that given by Chief Engineer Crepeau but generally agrees with it. Crèpeau states clearly that when the *Prescott* reached the entrance of the canal he got an order to stop, and then an order to go ahead, and after, making, he supposes, three or four revolutions, he got another order to stop and after that, but without saying how many revolutions he went on it, he got one bell. This one bell it is evident was the half of the reverse signal that the navigating officer intended to send to

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the engine-room when the spring broke. Thus, until the time that her stern was a few feet inside of the lock gates; that is to say, between the time of approaching the entrance of the canal and the breaking of the spring, he got two orders to stop and one to go ahead. The weight of the evidence is that her way was not stopped, but that she entered the lock at great speed, and without having a line or lines ashore (see Sections 5 and 26 of the Regulations for Dominion Canals). Section 5 has just been quoted. Section 26 reads as follows:—

"Every vessel, boat, or craft of two hundred tons and under navigating the canals shall be provided with at least two good or sufficient lines or hawsers, one at the bow, and one at the quarter, and every vessel, boat or craft of more than 200 tons shall be provided with four good and sufficient lines or hawsers, two leading astern, one leading ahead and one breast line, which when locking shall be made fast to the snubbing posts on the bank of the canal and lock, and each rope shall be attended by one of the boat's crew, to check the speed of the vessel while entering the lock, and to prevent it from striking against the gates or other parts of the lock, and to keep it from moving about in the lock, while the lock is being filled or emptied; and the master or owner of any vessel or boat who shall neglect to comply with this section shall be liable to a fine not exceeding fifty dollars and the vessel or boat shall not be permtitted to pass if in the opinion of the superintending engineer the lines are considered insufficient."

The first stop ordered on the *Prescott* is said to have been given when she was about twenty feet from the outer end of the north wing-wall, but her way seems to have carried her so that she jammed between the wing-wall and the steamer *Havana*. To free herself from

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this jam, there seems to have been a go-ahead order given when Ouellette says he let his boat go. She proceeded on this go-ahead order, it is stated, until about sixty feet from the lock-gates, when the second order to stop was given, but her great headway carried her inside the lock gates. Her speed could not have been a mile or "about half a mile," as stated by Ouelette in his evidence or "almost not moving" as stated by him, because at such rate of speed no difficulty would have been experienced in getting the lines ashore, or of stopping the vessel with lines. Nor would there have been any need for an order to reverse, as the vessel at half a mile an hour, would have taken a little over four minutes to go inside the lower gates, and in space of time, her way would have been lost when she got inside the gates of the lock. Ouellette says that the engines reversed when the boat was going nine miles an hour. Now, from the upper gates; and he says that when she struck the upper gates, her speed was about fifteen miles an hour, but on the same page of his evidence he reduced his estimate of her speed to about nine miles an hour. Now, from the time her bow was three feet inside the lower gates (when it is stated the spring broke) until it was forty feet from the upper gates, there was only a distance of about forty feet in excess of the ship's own length. In view of this fact it is not credible that with the engines working as described by Chief Engineer Crepeau, when on his own initiative he made her engines turn as slowly as possible, that she could have approached the lower gates slowly, as is stated. The facts and the evidence are overwhelming against the plea that the vessel was going slowly through the gates until the breaking of the spring caused the ship to forge ahead at undue speed.

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To sum up briefly, the way in which the steamer *Prescott* approached the lock was as follows: She approached the lock improperly, and in violation of the Regulations (Sections 5 and 26 of the Regulations for the Dominion Canals). She approached, and even entered the lock with her engine and wheel and without lines. Had the regulation lines been out, on her approach to the lock, they would at the speed as stated by the witnesses for the *Prescott* have held her, even when her way was increased by the breaking of the spring, if not altogether, at least sufficiently long for a navigator of good judgment to have communicated with the engine room verbally before harm could be done to the gates. The attempt to put even the one line out was made too late, and it was useless when got out.

Now, let us see what is said about the lines. Ouellette in answer to Mr. Holden's question: "Had the bow of the *Prescott* reached the lower gates of the lock when the man went off," says "Yes," and further, he says: "We were opposite the gates, perhaps we had passed a little," and it was at that moment that he tried to give two bells to reverse.

He says he intended to put two men off with the cables, but his intention was not carried out, and had the ship not been going at great speed it could have been carried out; because the ship, in passing through the lock gates, could not have been more than six inches from the side of the lock at any time. Ouellette states that the vessel's beam including the fenders, was 44 feet 6 inches, and the width of the lock 45 feet. Robineau says that after she entered the lock she was rubbing the walls, and Gibeau says: "I could even touch the wall," and on the same page he says that when they threw the line ashore the ship was just

passing the first gate. Robineau says that he supposes the vessel was in the lock about 50 or 60 feet before the man jumped ashore to handle the line; but his testimony is rather unreliable on this point on account of his being on the main deck, and without an opportunity of seeing or directing the movements of the men on the lines. Ouellette says the cable was given to the man a couple of seconds after he pulled the starboard bell that broke the spring, and that it was put on the post about the middle of the lock, but his testimony is vague, as he says "I know they placed it on the post, but I did not see them doing it." McLeod says that the vessel was half way between the lower and upper gates when they got the snubbing line out and that the boat had such headway that they could not handle the line—that they could not take the turns and hold it. McLean says they got a line out between the upper and lower gates, but she was going so fast that they could not stop her.

The statement of Ouellette's intention to put two men ashore is not quite in keeping with this evidence. He says: "The man specially appointed for that purpose jumped off on to the wharf, and he took the cables in his hands," and he says "Yes, when the man does not jump off on to the wharf I give him orders to go and put the cable around the post." The singular is used by Ouellette in these instances.

The men in charge of the lines on the night in question were without guidance or control. Ouellette says only one man jumped on the wharves to handle the lines, and that first mate Robineau was in charge of the men with the lines on that night.

I concur fully in and accept the advice given me by the Nautical Assessor as to the management of the ship *Havana* by those in charge of her, as set forth in

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his answer to the second question submitted by me to him.

The defendant contended at the argument that the *Havana* had no authorized officers and the certificates of the master and mate did not extend to local Canadian waters, where the collision occurred; and Sections 96 and 97 of the Canadian Shipping Act were cited. But these sections do not appear to have any bearing on the case, as the requirements referred to are for officers navigating Canadian registered vessels, and not United States vessels as in the present case. In any event, the nature of the certificates held by the officers of the *Havana* had nothing whatever to do with the collision, as I find, and concur in the opinion of the Nautical Assessor to the same effect, that the *Havana* was properly navigated on the occasion in question.

Again, the defendant invokes Section 19, sub-section (d) of the Regulations for the Dominion Canals which reads as follows:—

"(d). When several boats or vessels are lying by or waiting to enter any lock or canal, they shall lie in single tier, and at a distance of not less than 300 feet from such lock or entrance except where local conditions may otherwise require, and each boat or vessel, for the purpose of passing through shall advance in the order in which it may be lying in such tier, except, in the case of vessels of the first class, to which priority of passage is granted as above."

Defendant contends that the *Havana* violated the provisions of this sub-section, but I concur in the advice given me by the Assessor, and am of opinion that there was no violation of the section, because after the *Havana* was released from the jam caused by the *Prescott* forcing her way past her, she proceeded to

retake her position along the north wing-wall of the canal, which was the only thing she could do under the circumstances, as owing to the local conditions, there was not the length of wall to permit of her going further back than she did, and she was prohibited by law from anchoring at the entrance of the canal. But before the *Havana* could retake her position, the collision occurred, and she was so seriously damaged that she had to be beached, as above mentioned. Everything possible was done by those in charge of the *Havana* to get out of the way of the *Prescott*, and to avoid the collision that unfortunately occurred, but without avail.

I have cited at considerable length many of the most important decisions and authorities on the question of inevitable accident. The spirit of the jurisprudence seems to me to be this: That if at a critical moment in the agony of a collision, or immediately before it takes place, a vital or material part of the machinery or of the steering gear or equipment of a vessel fails or breaks and cannot possibly be remedied, and the command of the movements of the vessel by those in charge of her is lost and cannot possibly be regained, and a collision then occurs without any antecedent negligence on the part of the disabled ship, and is unavoidable as far as she is concerned, the accident is inevitable. But, if, as in the present case, a bell-spring breaks, a mere accessory of the equipment of the vessel, and the command of the vessel is not thereby necessarily lost by those in charge of her, and antecedent fault on her part is proved, this cannot be deemed to be an inevitable accident.

There was no need for the pilot, Ouellette, running about the deck as he did. A prompt verbal order given by him at once without leaving his post could have

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been immediately transmitted to the engineer and the accident could have been avoided, and was in no sense inevitable. This order might have been transmitted through the speaking tube, if it had been in order, which it was proved it was not. There was no reason why the pilot should have been *in extremis*, as admitted by one of the learned counsel for the defendant, if he had kept his place and acted promptly. Had he done so the collision, in my opinion, could have been avoided.

Having carefully considered all the authorities and the evidence of record and the advice given me by the Nautical Assessor, which I accept and in which I concur, I am of opinion that the collision in question could have been avoided if reasonable care and skill had been exercised by the master, officers and crew of the ship *Prescott*, and that the defendant the ship *Prescott* and her owners, the Richelieu and Ontario Navigation Company, are solely responsible for all damages caused by and resulting from the collision in question.

I consequently find and pronounce in favour of the plaintiff, as owner of the ship *Havana*, and maintain plaintiff's claim and action with costs; and do further order and adjudge that an account be taken, and I refer the same to the Deputy Registrar, assisted by merchants, to report the amount due; and order that all accounts and vouchers with the report in support thereof be filed within six months.

I am much indebted to the counsel for the numerous authorities cited and for their able arguments in this case, and to the Nautical Assessor for his valuable assisstance in this important case, wherein plaintiff claims $25,000 for damages in the collision in question,

this being the amount endorsed on the writ in this cause issued.

*Judgment accordingly**

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* Affirmed by judgment of Supreme Court of Canada (unreported) on December 15th, 1908; and by the Judicial Committee of the Privy Council, see (1910) A.C. 170.

IN THE MATTER OF THE PETITION OF RIGHT OF

1911
Nov. 13.

GEORGE A. DUCLOS. . . . . SUPPLIANT;

AND

THE KING. . . . . RESPONDENT.

Government Railway—Fire occasioned by cinders from engine—Damages—Government Railways Act as amended by 9-10 Edw. VII c., 24—Application.

The suppliant's property was destroyed by fire caused by cinders carried in smoke emitted by an engine on the Intercolonial Railway. There was no negligence proved against the employees of the Dominion Government in charge of the train, and it was established that the engine in question was of a most approved type, and was equipped with all modern and efficient appliances for the prevention of the escape of sparks.

Held, that the case fell within the provisions of sub-section 2 of sec. 61 of *The Government Railways Act* as amended by 9-10 Edw. VII c. 24; and that the damages must be limited to the sum of $5000 to be divided amongst the suppliant and others who had suffered loss by the fire.

PETITION OF RIGHT for damages from loss by fire alleged to have been occasioned by a locomotive on the Intercolonial Railway.

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

May 31st, 1911.

The case came on for trial at Quebec.

J. E. Perreault and *A. A. Magee* appeared for the suppliant.

The Honourable J. Bureau, K.C. (Solicitor-General) and *A. Leblanc* appeared for the respondent.

The argument was adjourned to take place at Ottawa.

November 7th, 1911.

The case now came on for argument.

A. A. Magee, for the suppliant;

E. L. Newcombe, K.C., for the respondent.

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CASSELS, J. now (November 13th, 1911) delivered judgment.

Prior to the argument of the case before me on the 7th November, instant, I had carefully perused the evidence taken at the trial. Since the argument I have re-perused the evidence with the view to appreciating the argument of counsel. I see no reason to change the view which I entertained after the close of the trial. To my mind there can be no reasonable doubt that the fire in question was occasioned by cinders from the smoke-stack of the engine drawing the special freight train. The fire occurred somewhere about 1.30 p.m., of the 21st of August, 1908. On the day in question and about the time of the fire there was a strong wind blowing from a direction westerly or north westerly towards the east or south east. The season had been a peculiarly dry one. The fire seems to have started in the third or fourth tiers of cordwood situate on the premises of the owner of the mill. It started on top of the piles in two or three places. These piles were from five to five an a half feet above the surface of the ground; and they were situate somewhere about fifty feet east of the highway which ran in front of the premises from north to south. There is no other possible explanation of the origin of the fire than that the cinders were carried n the smoke which on the evidence was carried directly in the direction of this cordwood, and alighted on top of the cordwood. There would no doubt be gathered a considerable quantity of loose wood or bark on top of the piles owing to the peculiar dryness of the season, and this material would become very inflammable.

I think the evidence of Madame Chandonnet in reference to two young men, who where said to have

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Reasons for Judgment.

been smoking cigarettes—while it may be accepted so far as the fact that the cigarettes were being smoked, could not by any possibility have the effect of inducing me to draw the conclusion that the fire originated from these cigarettes. In the first place the road down which the young men were walking, was in the neighbourhood of about 130 feet from the highway—certainly more than 60 feet from the piles of cordwood in question. Moreover, all the witnesses agree that there was a very strong wind blowing away from the wood piles. It is difficult to comprehend how by any possibility any fire could have been occasioned by these young men. I do not place much credit on the evidence of the witness Laliberté. I think the fire unquestionably took place after the engine had reached the point marked "U" on the plan. I think the suppliant is entitled to a judgment to the extent of five thousand dollars, to be apportioned among the parties who suffered the loss. This is provided for by the Act to amend subsection 2 of section 61 of the *Government Railways Act*, viz., 9 & 10 Edward 7th, chapter 24.

In *Moxley* vs. *The Canadian Atlantic Railway Company* (1) Mr. Justice Patterson is reported as stating: "We have been accustomed to take it to be a fact so well established as to be judicially recognized, that no spark arresting contrivance which can be used without interfering with the working of the engine, will altogether prevent the escape of sparks capable of setting fire to combustible matter"—citing numerous authorities in favour of the proposition. This case was affirmed by the Supreme Court (2). This proposition seems to be recognized by Parliament in enacting 9 and 10 Edward VII.

(1) 14 O.A.R., at p. 312. (2) 15 S.C.R., 145.

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Reasons for Judgment.

I think the crown has absolved itself from any question of negligence. The engine in question was of a most approved type, and had all modern and efficient appliances; and I fail to see in what respect any negligence has been proved or should be inferred as against the Crown.

The argument that the ashpan was out of order, is I think, not in accordance with the facts. Moreover, it would have been impossible that the fire should have been occasioned on top of the wood piles from live cinders dropped from the fire-box on to the right of way. There is no evidence whatever that any fire started on the right of way; and the supposition that shavings might have taken fire and have been blown on top of the wood piles is an ingenious theory of counsel but not based on any evidence or any probabilities that such a thing would happen. I think the claim of the suppliant must be limited to the sum of five thousand dollars. As counsel for the suppliant and the Crown agree that others are interested in this fund, there must, unless the matter is settled between themselves, be a reference to the Registrar to ascertain who are entitled to share in the five thousand dollars, and in what proportions.

I think the suppliant is entitled to his costs of the action. The order can be drawn so that upon the report of the referee, in the event of there being no appeal, the judgment will direct the payment of this amount without further order to those who may be entitled thereto.

Judgment accordingly

Solicitor for Suppliant : *Perrault & Perrault.*

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

BRITISH COLUMBIA ADMIRALTY DISTRICT.

1911

July 13.

PARRATT & CO.; HIND, ROLFE & CO.,

PLAINTIFFS;

AGAINST

THE SHIP *NOTRE DAME D'ARVOR.*

Shipping—Charter-party—Sale of cargo—Locus standi of charterers after sale—Dispute between charterers and purchasers of cargo—Delay occasioned by dispute in discharging cargo—Right of ship to demurrage.

The plaintiffs, R. R. & Co., were charterers of a ship, but before action brought by them for a breach of the charter-party resulting in damage to a cargo of cement, they had sold the same. By the terms of sale the cargo was sold as a "full cargo," the sale being subject to the condition "that the buyers are only bound to accept cement delivered in good merchantable condition." P. & Co., together with the plaintiffs R. R. & Co., were jointly in possession of bills of lading duly endorsed by the shippers and were also parties to a general average bond given by them to the owners of the ship wherein they were shown to be owners or shippers of the cargo.

Held, that under the facts set out, the charterers had a substantial interest in litigation arising out of the failure by the owners of the ship to properly carry the cargo.

2. When the ship arrived at her destination the consignees declined to pay freight except on the cement that was in good condition, and the ship was delayed in discharging the cargo. The master declined to continue to unload under his lien for freight pending a settlement of the dispute.

Held, that while the ship was entitled to be paid the freight when the cargo was in 'slings alongside,' the master had not acted unreasonably in declining to unload under his lien, and the ship was entitled to demurrage under the circumstances.

THIS was an action brought by Hind, Rolfe & Co., and Parratt & Co., of San Francisco against the ship *Notre Dame d'Arvor* for damage to cargo and for non-delivery or wrongful delivery of cargo at the port of discharge. The ship counterclaimed for demurrage and detention.

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PARRATT & CO. v. THE SHIP NOTRE DAME D'ARVOR.

Argument of Counsel

Hind, Rolfe & Co. chartered the *Notre Dame d'Arvor* at Antwerp to load cement to be delivered at Astoria, Wash. This was a joint project of Hind, Rolfe & Co., and Parratt & Co. Shortly after leaving port the *Notre Dame d'Arvor* had a collision with the English ship *Rathwaite;* part of her cargo was jettisoned and part sold at Falmouth, England. She put back to port and was repaired. In an action in the English Admiralty Court, arising out of the collision, it was decided that the *Notre Dame d'Arvor* was not to blame, the action against her was dismissed and she was allowed her counterclaim. On leaving again, she came into contact with the breakwater at Falmouth whereby some of her plates were opened up and further damage to cargo ensued. During the voyage a portion of the cargo was sold to Balfour, Guthrie & Co. and by them to R. V. Winch & Co. Balfour, Guthrie & Co. by their contract were only obliged to accept such portion of the cargo as might be in good condition. The ship's destination was diverted from Astoria to Victoria, where a portion of the cargo was discharged and she proceeded to Vancouver to unload the balance. After discharging a portion, some difficulty arose as to payment of freight, and the captain refused to wholly unload until the freight was paid. The consignees refusing to pay freight on the damaged portion of the cargo, the captain finished discharging at an independent warehouse to his own order.

The trial took place before Mr. Justice Martin, the Local Judge for the British Columbia Admiralty District, at Victoria, B. C., on the 21st and 22nd April, and was continued at Vancouver, B. C., on 1st and 2nd May, 1911.

E. V. Bodwell, K.C., and J. H. Lawson for plaintiffs; *J. A. Russell* and *H. M. Robinson* for ship.

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Argument of Counsel.

Mr. Bodwell, as to damages for demurrage cites:—*Hick* v. *Raymond* (1); *Carlton S. Co.* v. *Castle Mail Co.* (2); *Maclay* v. *Bakers* (3); *Smith* v. *Rosario* (4); *Wright* v. *New Zealand Co* (5);

As to damages for wrongful arrest:—*The Strathnaver* (6); *Xenos* v. *Aldersley* (7); *The Collingrove* (8); *Wilson* v. *The Queen* (9); *The W. D. Wallet* (10);

Mr. Russell cites : The *Stettin* (11).

MARTIN, L. J. now (July 13th, 1911,) delivered judgment.

With respect to the opening objection that the plaintiffs have no status to maintain this action, it is sufficient to say that this is an action for breach of a charter party wherein the plaintiffs Hind, Rolfe & Co., are charterers, and the fact that before action they, on January 16, 1910, sold the full cargo of cement to Balfour, Guthrie & Co., would not deprive them of their right to enforce the due performance of the charter party. Moreover I am of the opinion that Hind, Rolfe & Co., have still an interest in the cargo because the sale of it as a "full cargo" was subject to the condition that the "buyers are only bound to accept cement delivered in good merchantable condition." Such being the case the charterers have a very substantial interest in this litigation respecting the cargo since a dispute arose out of that provision. As regards the plaintiffs Parratt & Co., they jointly with Hind, Rolfe & Co., are in possession of the bills of lading duly endorsed by the shippers and are also parties to the general average bond of the 31st of August, 1910, given by them to the owners of the ship

(1) [1893] A. C., 22.
(2) [1898] A. C. at 491.
(3) 16 T. L. R., 401.
(4) [1894] 1 Q. B., 174.
(5) 4 Ex. D., 165.
(6) 1 A. C., 58.
(7) 12 Moore P. C., 352.
(8) 10 P. D., at 161.
(9) L. R. 1 P.C., at 410.
(10) [1893] P. D., 206.
(11) [1889] 14 P.D. 142.

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wherein they are shown to be owners or shippers of the cargo, Balfour, Guthrie & Co., being stated to be the consignees, therefore the owners of the ship cannot now be heard to say that Parratt & Co., have no interest in the subject-matter, and, consequently, no status in this court. But if it should be necessary to do so I should not hesitate, in the circumstances, to add Balfour, Guthrie & Co.. as party plaintiffs under the wide powers given me by rule 29.

I turn then to the main question in dispute, the determination of which has been far from easy and has occupied much time. It is not necessary to refer to what happened in Victoria, where 6,029 barrels of cement were discharged, other than to say that the actions of R. V. Winch & Co., Ltd. and of Balfour, Guthrie & Co., from whom Winch & Co., had bought the cargo, in regard to the bills of lading and general average bond were so unbusiness like and irregular that Captain Picard was fully justified in forming the opinion that he would have to be careful in dealing with them in future and stand upon his strict legal rights which he had waived in a very accommodating manner in Victoria, relying upon the letters of Balfour, Guthrie & Co., of the 1st and 6th of September and telegram of the 8th, which, in view of the evidence of Greer and Barnaby, must be given full effect to and cannot be explained away. The further unjustifiable refusal or neglect to give the captain receipts for the cargo as discharged and the taking away, even temporarily, of receipts that had been given, naturally had the effect of straining the situation, and rendering him the more subject to suspicion. I make this observation because this case turns very largely upon the estimate that is to be placed upon Captain Picard's credibility, capacity and integrity and I am glad to

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be able to say, after scrutinizing his conduct very carefully in the light of the evidence and exhibits—all of which I have re-read since the trial—that I have formed a favourable opinion of him and do not hesitate to place reliance upon his testimony. It is due to him to say this as his conduct was at one time severely criticized by the plaintiffs. Winch & Co., indeed, according to their letter of the 29th September, 1910, thought so highly of him that, as they say, "out of a true gratitude for the services rendered to them" they sent him what they euphemistically call "a small gratuity" in the shape of a cheque for $25.00 "acc-according to our usual custom." In the circumstance of the case, in view of the dispute between themselves and the ship, such a proceeding was peculiarly improper partaking of the nature of a bribe, and the captain correctly interpreted it as such and returned the cheque. I trust his good example will be followed by all other ships' officers who may be approached in a similar manner, and also that I shall hear no more in this court of such a pernicious custom.

No question was raised in Victoria about not paying the freight on damaged cement but some days after he had arrived in Vancouver alongside Winch's wharf on Monday, the 12th of September, 1910, and after he had discharged 5,000 barrels, Winch & Co., refused to pay freight except on barrels of cement that was in good condition and would only accept such barrels. This was clearly an improper stand to take because according to the charter party the captain was entitled to be paid his freight when it was "in slings alongside" and this unjustifiable contention is what led to all the difficulty and delay. This state of affairs continued from the 15th to the 20th of September, inclusive, during which time Winch & Co., and Balfour,

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Guthrie & Co., on behalf of Hind, Rolfe & Co., were negotiating to settle the dispute between them on this point, though the captain notified them by letters, on the 16th and 17th September, of the embarrassing position he was placed in by the stoppage of the discharge owing to their disputes.

It was contended that the captain should have got the cargo out of his ship as soon as possible and thereby save demurrage, and consequently that when the dispute and its consequences became apparent he should have unloaded under his lien. But this raises a question of what is reasonable under the circumstances, and to unload under a lien is a serious step to take. He would naturally be expecting that the groundless contention which was causing all the difficulty would be withdrawn at any moment, and the whole chain of unusual circumstances had placed him in such a position of embarrassment that I am unable to say he acted unreasonably.

With regard to subsequent occurrences I content myself with saying briefly that I am unable to hold, if I accept the captain's statements as correct, which I do, that he acted in other than a reasonable and proper manner, and I am satisfied that he is not answerable for any delay and that the ship is entitled to demurrage beginning on the 11th of October. The cargo I am satisfied was duly discharged according to the charter-party, averaging over 220 tons per weather working day, the charter party calling for only an "average rate of not less than 150 tons". The tackle was sufficient to discharge within the lay days if there had been no interference.

The matters in which the captain was in error were two, viz. (1) his original demand in Victoria of $500 too much freight, which he later admitted was

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an error on his part (unless his contention as to the weight of the barrels were correct); but this had no material consequences; and (2) his contention that the weight of the barrels should be taken at 400 lbs., though that weight was in conflict with the figures given in the bills of lading, and therefore, as the witness Thompson states, if he did not accept the weight in the bills of lading he should have weighed the whole cargo; the weights fixed by the custom-house could not be taken as a guide, nor in any event would his estimate based on the weighing of twenty barrels be satisfactory.

With respect to the alternative contention that in any event the ship is liable for the damaged cargo, it is sufficient to say that upon the evidence I think this is answered by the exceptions in the charter-party.

On the whole case, therefore, there should be judgment for the defendant ship upon the claim ,and upon the counterclaim which will be refered to the Registrar, assisted by merchants, if necessary, for assessment of damages, with the direction, however, that there being no gross negligence or bad faith herein no damages will be recovered for the arrest of the ship.

Judgment accordingly

Solicitors for Plaintiffs: *Bodwell & Lawson.*

Solicitors for ship: *Russell, Russell & Hannington.*

QUEBEC ADMIRALTY DISTRICT.

DAME ALMA DE ST. AUBIN.....PLAINTIFF

1910
October, 25.

AGAINST

THE STEAMSHIP *'CANADA.'*

GAUDIOSE MOREAU AND JOSEPH SAMSON, ROBERT McKAY AND F. X. DROLET.

CLAIMANTS;

J. ARISTIDE BENOIT (LIQUIDATOR) AND G. A. BINET (MORTGAGEE)

CONTESTING PARTIES.

Shipping—Sale of Res under mortgage—Liquidator—Claims for repairs for "last voyage"—Privilege—Article 2383. C. C. P. Q. —Meaning of "voyage" and "dernier équipeur."

Under the provisions of Art. 2383, C. C. P. Q. one who has furnished to a ship repairs and necessaries "for her last voyage" has a privilege for the same. The privilege is not given to one who has made the last repairs to the ship, but only to him who has repaired her for her "last voyage" This privilege only attaches during the prosecution of the "last voyage", and if after such repairs are made the ship has prosecuted other voyages, the privilege becomes lost.

2. To make a voyage is to depart from a terminus *a quo* and arrive at a terminus *ad quem*—e. g. when a ship leaves the port of Quebec with a cargo for Liverpool, G. B., as her port of destination, Quebec is the terminus *a quo*, and Liverpool the terminus *ad quem*. When the ship has taken another cargo at Liverpool and has returned to Quebec she has made another voyage.

THIS was an action by a mortgage for the recovery of a sum of $12,000 against the steamship *Canada.*

The ship was sold by public auction for $1,500 to G. A. Binet, first mortgagee, whose claim amounted to

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Statement of Facts.

$20,189. The owners of the ship, the Fraserville Navigation Company, made an abandonment of property shortly after the seizure of the ship in the action, and J. A. Benoit was appointed liquidator by a Judge of the Superior Court of the Province of Quebec. On the 3rd April following, the Local Judge of the Quebec Admiralty District ordered that all claims against the proceeds of sale of the ship be produced and filed, with vouchers, on or before 12th April; and on the 25th April the Judge granted a motion to refer all claims to the District Registrar for report.

RE MOREAU AND SAMSON'S CLAIMS.

Gaudiose Moreau, merchant and contractor, filed a claim for $346.58 for repairs made and supplies furnished to the ship from the 18th April to 11th May, 1910.

Joseph Samson also filed a claim for $202.00; this amount being made up of $192 for superintending repairs to the ship from the 12th December, 1909, to the 20th. June 1910, and $10 for annual survey of the boilers.

These two claims were allowed by the Registrar as privileged. Thereupon the liquidator of the Fraserville Navigation Company, appeared *es qualité* in the case and moved to have these two claims struck out from the Registrar's report, on the ground that they were not privileged.

ROUTHIER, L. J. now (October 25th., 1910) delivered judgment in respect of these claims.

Dans cette cause, le Canada, propriété de la Fraserville Navigation Co., a été vendu par la Cour, et MM. Samson et Moreau ont produit chacun une réclamation demandant à être colloqués par préférence sur le produit

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du navire. Ces deux réclamations sont contestées, quant à leur nature et leur rang dans le rapport, par M. Benoit, liquidateur de la compagnie, alléguant qu'elles ne sont que des créances purement chirographaires, ne comportant ni privilège, ni hypothèque.

Elles avaient été colloquées comme privilégiées par le Régistraire du District de Québec; et le liquidateur demande à la Cour que cette partie du rapport, relative à ces créances, soit modifiée.

C'est le liquidateur seul qui conteste ces privilèges. Ni les créanciers hypothécaires, ni les autres créanciers privilégiés postérieurs ne sont intervenus. Et les réclamants allèguent ce fait comme première exception à la contestation du liquidateur. Ils disent que le liquidateur n'a pas d'intérêt à intervenir.

Cette première question doit être examinée d'abord. Evidemment, le liquidateur n'a pas d'intérêt personnel; mais, comme liquidateur, il a reçu de la Cour qui l'a nommé un mandat qui lui impose le devoir de réduire en argent tous les biens de la société en liquidation, La Fraserville Navigation Co., et à partager ces argents entre tous les créanciers d'après le droit respectif de chacun, et dont il est fait juge en premier ressort. Il est nommé pour représenter les intérêts de tous les créanciers.

Dans cette cause, le liquidateur n'est pas devant la Cour Supérieure de Fraserville qui l'a nommé; il est devant la Cour d'Amirauté. C'est seulement parce que le navire a été vendu sous l'autorité de la Cour d'Amirauté qu'il n'a pas entre ses mains l'argent provenant de la vente. Mais le droit et le devoir de surveiller les intérêts de tous les créanciers qu'il représente n'en existe pas moins pour tout cela.

Le privilège réclamé existe-t-il?

En principe, on sait que ces privilèges sont de droit

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strict et rigoureux, et qu'ils sont soumis aux conditions que la loi impose à leur existence.

Le privilège réclamé par Moreau et Samson est celui de «*dernier équipeur.*» Ces mots: *dernier équipeur*, ne sont pas les termes dont se sert la loi. C'est le privilège mentionné à l'art. 2383 du Code Civil qui a rapport aux réparations et aux matériaux fournis «*pour son dernier voyage.*» Le privilège n'est pas accordé à celui qui a réparé le vaisseau le dernier, mais à celui qui l'a réparé pour son *dernier voyage*. Si, après ces réparations le vaisseau a fait plusieurs voyages, le privilège n'existe plus.

Qu'est-ce *qu'un voyage*? Qu'est-ce qu'un *dernier voyage*?

Pour faire un voyage il faut partir d'un terminus *a quo* et arriver au terminus *ad quem*. Quand un bateau part de Québec avec un chargement en destination pour Liverpool, Québec est le terme *a quo*, et Liverpool est le terme *ad quem*. A Liverpool il y a eu un voyage.

Quand il a pris un autre chargement à Liverpool et qu'il est revenu à Québec, il a fait un autre *voyage*.

Et si un bateau, réparé à Québec pendant l'hiver, a voyagé ensuite pendant l'été entre Québec et un autre port ou entre deux ports ailleurs qu'à Québec, il se trouve à avoir fait plusieurs voyages. Si à l'automne ce navire est saisi et vendu, celui qui l'aura réparé ne pourra pas être payé sur le prix de vente par privilège, pour les réparations qu'il aura pu faire pendant l'hiver précédent. En vain, dira-t-il qu'il est le dernier équipeur; on lui répondra: Vous auriez dû vous faire payer après le premier voyage du printemps. Vous auriez eu droit alors au privilège que vous réclamez maintenant à tort. Vous ne l'avez pas fait dans le temps. Il y a eu négligence de votre part. Votre privilège n'existe plus.

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Dans la cause actuelle, le cas est identique à celui que j'ai supposé. Le bateau en question «Le Canada» voyage entre Campbelltown et Gaspé. Il fait durant la saison 25 voyages à peu près. Les réclamants qui ont réparé et approvisionné le bateau durant l'hiver et qui l'ont inspecté au commencement de l'été ont attendu six mois pour se faire payer. Ils ont donc consenti à faire crédit. Leur créance est une créance personnelle, elle subsiste encore, mais elle est purement chirographaire, ni privilégiée, ni hypothécaire.

Pour ces raisons les deux contestations du liquidateur doivent être maintenues, et le rapport du Régistraire du District modifié en conséquence.

Le Juge Johnson, dans la cause de *Owens v. Union Bank.* (1) a jugé....."That the privilege under C. C. Art. 2383 upon vessels for furnishing the ship "on her last voyage", does not apply to supplies furnished during the whole season of navigation, though the vessel be one making short trips on inland waters."

Dans une cause de *Henn* et al. vs *Kennedy* et *Ross interv.*, (2) j'avais jugé que:

«Le créancier qui fait des avances pour l'équipement d'un navire parti de Québec en nov. 1886 et revenu à Québec au printemps de 1887, et qui, dans cet intervalle a fait *divers voyages dans différents pays du monde*, a perdu son privilège de dernier équipeur."

Relativement à Samson, il y a une réclamation pour avoir examiné la bouilloire du bateau. Il n'y a pas de date mentionnée sur la réclamation. C'est un devoir pour la Compagnie de faire examiner ses bouilloires, mais il n'y a pas de privilège donné à l'inspecteur. Les privilèges sont de droit strict. Ils ne peuvent exister que s'ils ont été spécialement créés par un texte

(1) 1 L. N. 87.

(2) 17 Q. L. R. 243.

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de loi. Il n'y a pas de texte de loi qui crée un privilège dans ce cas-ci.

Les deux motions pour modifier le rapport du Régistraire du District relativement à ces deux réclamations sont donc maintenues, avec dépens contre les réclamants.

RE McKAY AND DROLET'S CLAIMS.

Robert McKay, obtained judgment against the ship for $1,205.08 on the 4th May, 1911, upon a claim for labour and materials provided by the claimant in repairing the ship during the spring of 1910. This judgment was filed as a claim before the District Registrar, and was by him collocated as privileged.

F. X. Drolet filed a claim for a sum amounting to $4,524.03 for repairs done to the ship in the spring of 1910. This claim was also collocated as privileged in the report of the District Registrar.

The liquidator and the first mortgagee contested the collocation of these claims as privileged, and the Local Judge found that such claims were not privileged for the reasons stated in his judgment upon the claims of Moreau and Samson.

Judgment accordingly upon all the claims.

Solicitors for plaintiffs : *Bernier, Sevigny & Bernier.*

Solicitors for liquidator: *W. A. Stein.*

Solicitors for claimants: *Francœur & Vien.*

QUEBEC ADMIRALTY DISTRICT.

IN RE

DAME ALMA DE *ST. AUBIN*.....PLAINTIFF; 1910

Dec. 16.

AGAINST

THE STEAMSHIP *CANADA*;

GAUDIOSE MOREAU.....INTERVENING PARTY.

Shipping—Ship seized under warrant in a proceeding in rem—Subsequent bankruptcy of owner—Proceedings in liquidation in Provincial Court—Effect of such proceedings on jurisdiction of Exchequer Court.

Proceedings had been instituted against the defendant ship in the Exchequer Court in an action upon a mortgage for $12,000. A warrant was issued by the mortgagee, and the ship duly seized thereunder. Thereafter the Fraserville Navigation Company, owners of the ship, filed an appearance with endorsement of set-off for $356 on behalf of a certain creditor. Subsequently the creditor filed an intervention, which was admitted by the Judge as a plea to the action. The plaintiff filed an answer to this intervention and the case was set down for trial on that issue. The Fraserville Navigation Company having become insolvent, a liquidator was appointed under the *Winding-Up Act* subsequent to these proceedings in the Exchequer Court. The liquidator then applied to the Exchequer Court to be permitted to take an inventory of the ship, her tackle, apparel and furniture, as part of the company's assets, and that, should she be sold by the Exchequer Court, the proceeds of such sale be paid over to the liquidator for distribution.

Held:—That the ship having been seized under a warrant of the court upon an hypothecary action by the plaintiff, the subsequent bankruptcy of the Fraserville Navigation Company, owners of the said ship, did not have the effect of removing the cause and the vessel so seized out of the jurisdiction of the Exchequer Court.

2. That all the proceedings in liquidation in respect of the other property of the defendant company had to be taken before the Superior Court and not before the Exchequer Court.

3. That while the liquidator was at liberty to contest the action instituted in the Exchequer Court, that court could not entertain his motion to take proceedings therein for the purposes above set out.

MOTION by the liquidator of an insolvent company to have an inventory taken of a ship, then in the possession of the Exchequer Court, her tackle, apparel,

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and furniture as part of the company's assets, and that in case she should be sold by order of the Exchequer Court the proceeds of such sale be paid over to the liquidator for distribution.

Reasons for Judgment.

December 16, 1910.

A. Stein in support of motion.

A. Bernier (for the Plaintiff and *T. Vein* for the intervening parties), *contra.*

ROUTHIER, L. J:

La demanderesse parait être créancière hypothécaire du défendeur au montant de $12,000. Elle a pris son action le 8 octobre 1910, et a saisie le navire le 13 octobre, en vertu de son mortgage.

Le défendeur, et la Fraserville Navigation Co., propriétaire du *Canada*, ont fait défaut, et le 14 novembre, la dite propriétaire a été mise en liquidation devant la Cour Supérieure du District de Kamouraska, et J. A. Benoit a été nommé liquidateur.

Le 9 décembre le liquidateur Benoit a obtenu la permission de comparaître et de plaider en cette cause, mais il n'a pas plaidé à l'action.

Au lieu de plaider, il a fait une motion comme liquidateur, et il demande en invoquant le chap. 144 des Statuts Revisés du Canada :

1° Qu'il lui soit permis de faire un inventaire du Steamer, de ses agrès et meubles,

2° Qu'il soit autorisé à collecter les argents dus au Steamer;—

3° Qu'il soit autorisé à signifier un avis à tous les agents, capitaine et équipage d'avoir à lui payer tous les argents qu'ils peuvent avoir en mains;

4° Que la demanderesse soit condamnée à fournir au liquidateur un compte détaillé et complet des recettes du navire;

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5° Qu'il soit ordonné que toutes les procédures en cette cause soient signifiées au liquidateur;

6° Qu'advenant la vente du Steamer, le produit, déduction faite des créances privilégiées, soit mis à la disposition de la Cour Supérieure du district de Kamouraska;

Aucune de ces demandes ne peut être accordée par cette Cour.

Presque toutes se rapportent à la liquidation de la Fraserville Navigation Company. Or, cette liquidation est confiée par le Statut chap. 144, à la Cour Supérieure et non à la Cour d'Amirauté. Je n'ai pas jurisdiction pour effectuer et contrôler cette liquidation; mais en même temps je ne puis pas me dessaisir de cette cause-ci, et la renvoyer devant la Cour Supérieure. Il sera de mon devoir de prononcer sur la validité du *Mortgage* de la demanderesse, et d'ordonner la vente du navire et d'en partager le prix entre les créanciers et le liquidateur.

Si la Fraserville Navigation Co. possède d'autres biens meubles, immeubles et créances, la liquidation doit s'en faire devant la Cour Supérieure de Kamouraska.

En attendant, le liquidateur est saisi de tous les droits de la Fraserville Navigation Co., sans préjudice aux droits de la demanderesse saisissante sur le navire.

Quand au compte que le liquidateur réclame de la demanderesse au No. 4 de sa motion, il n'y a rien au dossier qui puisse justifier cette demande.

Plusieurs des autres choses demandées par la motion peuvent être faites par le liquidateur, en vertu de la loi, et sans ordre d'aucun tribunal, puisqu'il représente la propriétaire.

Pour toutes ces raisons la motion du liquidateur Benoit doit être rejetée, avec dépens.

Motion refused with costs.

TORONTO ADMIRALTY DISTRICT.

1911
April 6.

THE DUNBAR AND SULLIVAN DREDGING COMPANY.....PLAINTIFFS,

AGAINST

THE SHIPS "*AMAZONAS*" AND "*MONTEZUMA*" AND THE DAVIDSON STEAMSHIP COMPANY.

DEFENDANTS.

Shipping—Collision—Jurisdiction—Contributory Negligence.—Evidence.

1. To establish contributory negligence in the case of a collision, the evidence must be clear and definite.
2. A collision occurring in Canadian waters between foreign vessels places the owners of the damaged ship under the protection of Canadian law, and the court has jurisdiction to entertain an action for damages. The *Milwaukee*, (11 Ex.C.R. 179) followed.

THIS is an action brought by the plaintiffs against the Steamers *Amazonas* and *Montezuma* and the owners the Davidson Steamship Company, to recover damages for injuries to the *Brian Boru*, a dredge belonging to the plaintiffs, as the result of a collision which took place on the night of the 28th day of September, 1908.

The trial of the case took place at Windsor, before the Local Judge for the Toronto Admiralty District, on the 20th and 21st days of December, A.D. 1910. A written argument subsequently was put in on which judgment was reserved.

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

F. A. Hough, for the plaintiff;

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Argument of Counsel.

The witnesses all agree that the collision took place about 2 a.m. Sept. 29th, 1908, that the night was dark with a moderate strong westerly wind blowing.

The dredge was at anchor working on her contract with her attendant scow lashed alongside.

If the contract of making this channel was a legitimate and proper one, as it unquestionably was, the dredge and the scow, which was a necessary part of her equipment, were in a perfectly proper place, and the only place in which they could be in while engaged in the performance of that contract at that particular time.

The contract was being carried on under the instructions of the Government engineers, pursuant to clause 35 of the contract, and the contractors were not in any way obstructing navigation, being entirely outside of the navigable channel, as marked by the lights and buoys at that time. The dredge was stationary, being at anchor and at work on her contract at the point indicated above.

The *Amazonas* and *Montezuma* were bound down the river full speed, which they never slackened from the time they left the Rouge until they reached their destination. The *Amazonas* could tow the *Montezuma* seven miles an hour. Added to this there would be the force of the current over the Lime Kiln Crossing. Defendants' witnesses put the current at four or five miles an hour, although their preliminary act fixes it at seven miles an hour, which they cannot be heard to contradict.

However, the better judgment of those working at the crossing that night places the current at about five miles an hour, which would mean that the defendant ships passed the place of collision, where plaintiffs' dredge was anchored, at the rate of 12 miles an hour,

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Argument of Counsel.

or one mile every five minutes, 2,112 feet in two minutes, 1,056 feet in one minute.

The witnesses who were on the defendant ships swear positively that they passed down the westerly side of the Lime Kiln Crossing channel, the *Amazonas* within 50 feet of the buoys and lights marking the westerly limit of the channel, and the *Montezuma* "trailing off in the wind," but not more than 100 feet from this westerly row of lights. It is absolutely clear, however, that the defendant ships could not have been in this channel as marked by the lights and buoys, and that they could not have followed the course their navigators appear to think they followed, otherwise they would not have passed within at least 200 feet of the dredge, and there could have been no collision.

These witnesses, on the other hand, all agree that the *Amazonas* passed within about fifty feet of, and unquestionably the *Montezuma* collided with, the scow. It follows, therefore, that the defendant ships were quite out of the channel at the time of the collision and that those in charge of them did not know where they were. This is also made apparent by the evidence of Capt. Hayberger, master of the *Amazonas*, who says that he saw the row of lights marking the west side of the channel and kept within fifty feet of them all the way down; that he saw no lights to the east of him, except the north one, until he got down to Malden, the next light below the south lightship, when he got back into the channel again.

It appears therefore that the row of lights which the captain says he held up to within fifty feet of, were the row marking the east side of the channel, instead of the west side, and that as a matter of fact while passing through this most dangerous part of the whole river, he and his crew and the master and crew of his consort, lost their bearings altogether.

The general rule is that a vessel at anchor in a proper place observing the precautions required by law is not liable for the result of a collision with a moving vessel.(1)

And passing vessels should give the anchored vessel a sufficiently wide berth to pass by in safety, taking into consideration the effect of wind and current and other contingencies of navigation as may reasonably be anticipated. (2)

And it has been held that whether the anchored vessel is in an improper place or not the vessel in motion must avoid her if practicable and can only exculpate herself by showing that it was not in her power by adopting any practicable precaution to have prevented the collision. (3)

In an action founded on a collision between a vessel at anchor and one in motion the burden of proof is upon the latter to prove that the collision was not occasioned by any negligence on her part. See the *Annot Lyle*, (4) see also the *Indus*, (5).

In *Marsden on Collisions*, p. 30 et seq. it is laid down: "The general rule that a vessel under way is *primâ facie* in fault in a collision with a ship at anchor applies,

(1) A. & E. Enc. of Law, Vol. 25, page 940;
Commander-in-Chief 1 Wall. (U. S.) 43 affirming 4 Fed. Cas. No. 2216.
The Lady Franklin, 2 Lowell (U. S.) 220.
The John H. May, 52 Fed. Rep. 882.
The Buffalo (C.C.A.). 55 Fed. Rep. 1019.
The Steven Decatur, 108 Fed. Rep. 446.

(2) The John H. May, 52 Fed. Rep. 882.
The D. H. Miller, (C.C.A.) 76 Fed. Rep. 877.
Wilhelmsen v. Ludlow, 79 Fed. Rep. 979.
The Minnie, 100 Fed. Rep. 128.
The Langfond, 102 Fed. Rep. 699.
The Aller, 38 U.S. App. 549.

(3) The Clarita, 23 Wall. (U.S.) 14.
The D. S. Gregory, 6 Blatch. (U.S.) 528.
Green v. The Helen, 1 Fed. Rep. 916.
The Shaw, 6 Fed. Rep. 923.
The Mary Nettie Snudberg, 100 Fed. Rep. 887.

(4) 11 P.D. 114.

(5) 12 P. D. 46.

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Argument of Counsel.

although the latter is in an improper place, or has no riding light, provided that the former could with ordinary care have avoided her. It is the bounden duty of a vessel under way, whether the vessel at anchor be properly or improperly anchored, to avoid, if it be possible with safety to herself, any collision whatever."

In the *Batavier* (1) Dr. Lushington was of opinion that even if a ship is brought up in the fairway of a river, if the other could with ordinary care have avoided her, the latter should be held solely to blame.

Dredging vessels when at work and stationary, have the rights of vessels at anchor. (2).

The defendants seek to rebut the presumption of their liability in having collided with a ship at anchor, by setting out the fact of a prior collision of the *Montezuma* with the ship *Osler*, which took place a short distance above the North lightship, and which they allege caused the *Montezuma* to sheer into the dredge.

These plaintiffs, however, are in no way to blame for the collision between the *Montezuma* and the *Osler*, and even if the *Osler* could be proved to be at fault, it would be merely a question of a right of contribution against her on the part of the owners of the *Amazonas*.

The evidence, however, does not prove any negligence on the part of the *Osler*, but rather that even before defendants met the latter ship, they were not following the "starboard hand rule", and were on the wrong side of the channel. From the evidence of these same independent witnesses it further appears that this collision caused no perceptible sheer on the part of the *Montezuma*.

(1) 2 W. Rob. 407.
(2) American Dredging Co. v. The Bedowin 1 Fed. Cas. No. 299.
The D. H. Miller (C.C.A.) 76 Fed. Rep. 877.
The Virginia Ehrman, 97 U. S. 309

But however this may be, the *Osler* did not touch the *Amazonas*, did not therefore affect her steerage way, and could not be in any way responsible for her taking the wrong course through the Lime Kiln Crossing, which she evidently did, and her consort with her. Nor had they any other excuse for not following the proper channel, for according to the evidence of Colbourne nothing passed over the crossing either way for over half an hour afterwards, and they had an absolutely clear course.

From the facts also that the *Amazonas* passed within fifty feet of the dredge and that the *Montezuma*, notwithstanding the alleged sheer caused by her impact with the *Osler*, or the force of the wind, causing her to trail off as described by some witnesses, was able to follow her steamer within little more than 50 feet, it is apparent that had the *Amazonas* taken the proper course as marked by the lights and buoys, her consort, the *Montezuma*, would have been able to follow that course within little more than 50 feet leeway, notwithstanding her impact with the *Osler*, or the force of the wind.

The defendants further seek to establish contributory negligence on the part of the plaintiffs on the ground that the captain of the dredge when he saw the collision impending "should have dropped the dump scow astern of the dredge, and then raised his anchor spuds, and let the dredge, and scow swing with the current." This is the only fault or default attributed to the plaintiff ship by the defendants' preliminary act, by which they are bound.

It is clear from the evidence, however, that until they reach the bend in the channel at the North lightship, the usual and proper course of down-bound boats, from upwards of 2 miles above the bend, would take

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them head on to the point where the dredge was at work the night of the collision, and until they passed the lightship and failed to make the turn following the lights and buoys marking the channel, there would be nothing to indicate to those on the dredge that the down bound boat was not going to follow the proper course, and unless there was something unusual to prompt them to do so, there would of course be no reason for those on the dredge to have dropped the dump scow astern or raised their anchors, or taken any other steps with a view to avoiding a collision. And if the down bound boat took a long turn at the lightship, she could come comparatively close to the dredge within 200 or 300 feet, before a collision would appear to be imminent to the people on the dredge. At the rate of speed at which they were moving they would go 300 feet in less than $\frac{1}{2}$.0 seconds.

Defendants further contend that plaintiffs were at fault in not having a man aboard the dredge specially designated as lookout, though it does not appear, in view of the foregoing situation, how such a lookout could have observed anything to indicate that a collision was pending any sooner than did those on board, who as some of the witnesses put it, were all supposed to be on the lookout, and unless such lookout could have discovered the danger at least two minutes before the collision took place, or while the defendant ships were practically half a mile away, he could not have been of any assistance in avoiding it.

It is quite clear, therefore, from the situation existing here that had there been a dozen lookouts nothing unusual would have been apparent to them until the defendants' ships got within 500 feet at most, of the dredge, therefore the absence of a specially detailed lookout did not in any way contribute to this collision.

It has been held, however, that "a vessel anchored in a place where other vessels are not reasonably to be expected to anchor need not maintain an anchor watch."

See the *Erastus Corning* (1).

And when such a watch is necessary "it is sufficient to have someone of the crew on deck, though without any specific duties assigned him". *Seabrook* v. *Raft of Railroad Cross Ties* (2).

Defendants further set up that their ships blew alarm signals to warn those on the dredge of the impending danger, and that the latter should then have taken steps to avoid the collision.

If the statements of Capt. Hayberger and the witness Gaunia are to be believed, all these signals were blown before the collision between the *Montezuma* and the *Osler*, and because that collision appeared threatening. It was impossible then to tell what effect this collision would have, even if it did take place, and it is absurd to say therefore that these signals, if blown, were intended for a warning to those on the dredge, or that there was anything then present to indicate that a collision was imminent between the *Montezuma* and the dredge.

Plaintiffs submit, however, that the defendants' evidence as to these signals is not such as to enable the court to find that they were given at any particular time or place, or that they had any bearing whatever on the subsequent collision with the dredge, or that they were given at all.

It is clear, however, that there was no time to complete either of the manœuvres suggested by the defendants from the moment the collision could have been seen to be imminent, or from the time the alarm signals are said to have been given, which according to

(1) 25 Fed. Rep. 572. (2) 40 Fed. Rep. 596.

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Capt. Hayberger would be "close to a minute" before the crash.

In answer to this question in their preliminary act the defendants say the *Amazonas* was kept as close to the north light as she could be, and the *Montezuma* followed in tow as closely as she could. The captain of the *Montezuma* signalled to the dredge to drop their dump scow astern, and called out to raise the spuds or anchors of the dredge. Further comment is unnecessary on the manner in which these measures to avoid the collision were carried out, or on their effectiveness.

When the collision became imminent to those on the dredge, orders were given to raise the anchors and get clear. It may be that to have attempted to let the scow go would have been better judgment, and perhaps could have been accomplished more quickly. However, in the "agony of collision" the former course seemed best to the captain of the dredge, and he gave the orders accordingly.

It may be also that either of these manœuvres would have been unwise under the circumstances, for if there had been time to carry them out, they might have resulted in much greater damage, with perhaps loss of life as was the opinion expressed by Capt. Mains.

And in the *Norge* (1) it was held that "on the approach of another vessel a dredge at work should keep its position."

However this may be, the law is clearly laid down that an error of navigation or judgment committed "in extremis" is not to be deemed a fault in the vessel committing the error where the peril is produced solely by the mismanagement of those in charge of the other vessel, nor will it relieve the latter from liability, though it directly contributes to the collision (2).

(1) 55 Fed. Rep. 347.
(2) The Bywell Castle, 4 P. D. 219.
The Ship Cuba v. McMillan, 26 S. C. R. 651.
The Cape Breton v. the Richelieu & Ontario Navigation Co. 36 S. C. R. 564.

In their search for an excuse for having collided with a ship at anchor the defendents plead in paragraph 6 "that neither the *Brian Boru* nor the dump scow moored alongside had proper lights".

The evidence showed, however, that the dredge had her own electric plant, with which she and her attendant scow were brilliantly lighted. Defendants urge however, that there should have been a light on the scow itself, but the evidence of all those familiar with the workings of a dredge is that such is not customary, and is entirely unnecessary while the scow is alongside the dredge, as it is abundantly lighted from the latter's plant.

Capt. Johnson says that coming up on the *Osler* on the night of the collision, he saw the lights of the dredge a couple of miles off and saw the scow lying alongside her half a mile away.

Capt. Hayberger himself says he saw the dredge's lights from Ballard's Reef, practically two miles away; and he should have expected her to have an attendant scow alongside.

Notwithstanding this he brings his ship and her consort right down onto the dredge. Is it to be presumed that he would have altered his course one fraction of an inch in coming down this two mile stretch, if there had been a coal oil lantern on the corner of the scow? And after he had brought his ship sufficiently close to make such a lantern discernible in the glare of the electric lights, as Anderson, mate of the *Montezuma*, says "If the scow had been lit up with a dozen lights at each end, they couldn't have done more than they did to avoid striking it".

The jurisdiction of this court is determined by the *Colonial Courts of Admiralty Act, 1890; The Merchant*

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Shipping Act, 1894, as applied by the *Admiralty Act* R.S.C., chap. 141, secs. 3, 4 and 5.

This jurisdiction extends over so much of the boundary lakes and rivers as are within the Canadian side of the International boundary line. See *Regina* v. *Sharp* (1) ; *Rex* v. *Meikleham* (2).

The waters within which this cause of action arose, and within which the defendant ships are admitted to have been seized, are all in the County of Essex in the Province of Ontario.

Neither the United States nor any other foreign country can have any jurisdiction over them, and unless they are beyond the jurisdiction of every court,—a sort of neutral ground within which tort-feasors may do as they wish,—they must be within the jurisdiction of this court.

And the court has jurisdiction whether or not the vessels or the parties belong to a foreign nation or that the matters complained of occured in foreign waters, provided the property is within the jurisdiction and the jurisdiction of the persons is acquired (3).

Subject to the general limitations of Courts of Admiralty as to subject-matter, water and places, such courts have jurisdiction of libels *in rem* for injuries to and by vessels without regard to the citizenship of the parties, nationality of the vessels or place of injury.

In England and in Canada the Admiralty Courts by the Act of 1861 giving them jurisdiction of "any claim for damages done by any ship" have jurisdiction of actions *in rem* and *in personam* for injuries by vessels to persons and property wherever situated, the test of

(1) 5 O. P. R. 135.
(2) 11 O. L. R. 366.
(3) 1 A. & E. Enc. of Law (2nd ed.) page 652.
The Diana, Lush. 539.
The Griefswald, 1 Swab. 430.
The Courier, Lush. 541.
The Johann Friederich, 1 Wm. Rob. 36.

jurisdiction being the origin rather than the place of the injury. (1)

In the *Johann Friederich* (2) in which the court was held to have jurisdiction where a Danish ship was sunk by a Bremen ship, Dr. Lushington said:— "An alien friend is entitled to sue in our courts on the same footing as a British born subject, and if the foreigner in this case has been resident here and the cause of action has arisen *infra corpus comitatus*, no objection could have been taken.

All questions of collision are questions *communis juris*, but in the case of mariners' wages, whoever engages voluntarily to serve on board a foreign ship necessarily undertakes to be bound by the laws of the country to which such ship belongs, and the legality of his claim must be tried by such law. One of the most important distinctions therefore, respecting cases where both parties are foreigners, is whether the case be *communis juris* or not. If so, then parties must wait until the vessel that has done the injury has returned to its own country, this remedy might be altogether lost, for she might never return, and if she did, there is no part of the world to which they might not be sent for their redress".

Although it is clear, that the jurisdiction of this court extends over the waters within which this cause of action arose, and the waters within which the defendant ship are admitted to have been seized, the defendants urge that by reason of Article 7 of the Ashburton Treaty, the jurisdiction cannot be enforced by a seizure of the offending ships while they are passing through these waters, because this treaty declared these waters should be equally free and open to the ships, vessels and boats of both parties to it.

(1) 25 A. E. Enc. of Law. p. 1007; Mersey Docks etc., Board v. Turner (1893) A.C. 468.

(2) 1 Wm. Rob. 36.

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The natural and ordinary meaning of these words would appear to make them applicable to an attempt by one of the parties to close to navigation any portion of the waters covered by the treaty, as in the present controversy over the proposed Long Sault dam in the St. Lawrence river, rather than to oust the jurisdiction of either country over that portion of these waters within their respective sides of the boundary line, or the right to enforce that jurisdiction by due process of law.

There can be no question that this court would have power to exercise its jurisdiction by seizure of an offending ship if she came to anchor within these waters. Its exemption from seizure therefore (if it be exempt) must depend on its keeping moving. In other words as long as the offending ship "keeps moving", although in the waters included within the jurisdiction of this court, the order of the court cannot be enforced against it; and if an offending ship cannot be seized at the instance of these plaintiffs while passing through these waters, and within the jurisdiction of this court, it could not be seized at the instance of a British subject who had been damaged by her within in its own territory, and who could therefore be obliged to seek redress in a foreign Court, unless indeed the wrongdoer should be so obliging as to stop long enough to enable the warrant to be served. (See section 685 of the *Merchant Shipping Act* of 1894.

It is quite clear therefore that the Act contemplates that the process of the Court shall be effective over vessels moving as well as stationary, and this is the practice all over the world.

The only reported decision from which the contrary view might be taken is the old Scotch case of *Borjesson*

v. *Carlberg*, (1) where a Norwegian vessel which had started from the port of Greenock on an ocean voyage, was pursued by a tug manned by thirty armed men, and captured by force of arms. Here the seizure was set aside on the ground that the mode of arrest had been made "nimiously and oppressively". This decision did not go so far as to say that the process of the court could not be effective against a moving vessel, but held that the manner in which the warrant was enforced was improper, and as stated by the Lord Chancellor it was purely and simply a question of practice.

The plaintiffs, however, submit that the right to use these waters, which is all that the Treaty, on the face of it, appears to reserve to the parties to it, does not oust the jurisdiction of the courts of the respective countries over such part of the waters covered by the Treaty as may be within their respective boundary lines, nor does the fact that she keeps under way while passing through them exempt an offending ship from the consequences of her acts. On the contrary the very fact that she is a wrong-doer deprives her of the right of free passage, which the Treaty otherwise gives her. The present case, however, is distinguishable from the *D. C. Whitney* case (2) in that in the latter the cause of action arose in the harbour of Sandusky, Ohio, in the United States of America, while in the case at bar, the collision took place in the County of Essex within the jurisdiction of the court.

The plaintiffs submit, therefore, that this collision was caused by the failure of the defendant ships to obey the "starboard hand rule" in coming down this narrow channel, and by their getting out of the channel altogether at the point where the collision took place.

Further, that the defendants have not only failed to satisfy the onus thrown upon them to prove that they

(1) 3 App. Cas. 1316. (2) 38 S. C. R. 303.

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were not negligent, or that the plaintiffs were guilty of contributory negligence, but the plaintiffs have been able to go much further than were obliged to go in order to succeed, and have proved that the damages have been caused solely by the negligence of the defendants.

The cause of action arose in Canadian waters, and within the jurisdiction of this court. The defendant ships are admitted to have been seized in Canadian waters within this jurisdiction. (1)

Canada has never, by Treaty or otherwise, surrendered her sovereignty over these waters and as long as she retains that sovereignty, her Courts having jurisdiction in the premises, will administer justice therein by due process of law.

J. H. Rodd for defendants:

On the 29th day of November, 1909, a motion was made before the Local Judge in Admiralty at Osgoode Hall asking that the writ of summons issued herein and all subsequent proceedings be set aside on the ground of want of jurisdiction. The motion was refused but leave given in the order to renew the objection on the hearing.

At the trial of the action the objection was renewed and the material used upon the motion offered in evidence and the objection was reserved and the trial proceeded with.

The objection to the jurisdiction is two fold,—First, the material used upon the motion and put in at the trial shows that at the time the writ and warrant were issued, and the affidavits in support were made, the ships were not in Canadian waters. The only authority for the bringing of the proceedings against the ships as plainly appears by the evidence is sub-section (a) of section 13 of the Admiralty Act, and if the plaintiff

(1) See Dunbar & Sullivan Dredging Company v. Milwaukee, 11 Ex.C.R. 193.

is not within the requirements of that sub-section then the suit was not properly instituted. That subsection says that a suit may be instituted when "The ship or property, the subject of the suit is, *at the time of the institution of the suit* within the district of such Registry."

This as appears by the evidence was not the case. The suit was instituted in September and even the constructive seizure did not take place until about the middle of October.

This objection was raised and discussed in the case of the *D. C. Whitney* (1) and the objection was held to be a valid one. See especially at page 311 where it is said "I do not think it is possible to successfully argue that the right to initiate an action, make affidavits and issue a warrant, can exist before the foreign ships even come within our territorial jurisdiction."

Then the second objection to the jurisdiction is upon still broader grounds. It is admitted that the ships are of United States registry, that their owners are Americans and that the ships were seized while passing from one American port to another, but through Canadian waters. It is admitted that the plaintiffs are also citizens of the United States doing work for the Government of their own country, and the only excuse for bringing the suit in a Canadian Court is that the injury to the plaintiff's dredge was done in Canadian waters. Is that enough? It is submitted that it is not. The evidence shows that defendant ships have been engaged entirely in connection with shipping on the Great lakes and the rivers dividing Canada from the United States, which by the Ashburton Treaty were made common highways for ships of both countries, and are by the effect of that Treaty entitled to free and

(1) 38 S.C.R., 30.

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uninterrupted passage while passing through, as these ships were, when the seizure herein was made.

It is submitted that the matter is concluded by the case of the *D. C. Whitney*, above cited. The present case is in every respect the same as the one cited with this single exception, that the collision took place in Canadian waters. I refer particularly to page 309. It is true that at page 310 of the judgment the court referred to the fact that in that case the wrong doing, if any, took place in a foreign port; but the learned Judge premised his reference by the statement that he could not see "how there could be a *pretence* of jurisdiction" so that even if such a circumstance had existed it would have been simply a *pretence* of jurisdiction and no more. The whole tenor of the judgment in that case shows that the decision rests upon broader grounds.

I have not overlooked the judgment in the case of the *Milwaukee* (1) The judgment, however, went off on the point that there had been a voluntary submission to the jurisdiction, and the learned Judge in giving judgment refers at page 181 to the difference between the two cases. It is true that in the judgment there is an academic discussion of the questions raised in the *Whitney* case, and it is apparent that the learned Judge did not agree with the judgment of the Supreme Court, but it is submitted that the decision of the latter court must be and is binding upon us.

Then part 10 of the *Merchant Shipping Act*, which by Sec. 517 is made applicable to all of His Majesty's Dominions, may be referred to. It is therein provided when and for what offence a foreign ship may be seized when within the territorial jurisdiction, viz, when such ship has in any part of the world done injury to

(1) 11 E. C. R. 179.

a British ship. The maxim *expressio unius exclusio alterius* applies and under no other circumstances can a foreign ship be forcibly brought into a British port or be detained.

Then upon the facts it is submitted the plaintiffs cannot succeed. Let us first look at the position of the dredge and scow and assume that the plaintiffs' evidence upon this question is to be accepted. There is no doubt upon the evidence that they were within the 600 foot channel, having a depth of seventeen feet, which had existed and been in use for many years but one that was being deepened. Of the 600 feet at least 400 feet have been completed and Captain Maines at page 74 says "it was 450 easy" and Munn at page 103 says the same. The plaintiff Dunbar at page 20 says that the channel had been completed "with the exception of 50 feet of the east edge" though not thrown open to navigation. The dredge must have been a little distance from this outward. The dredge was 28 feet wide and the scow 25, so that according to the plaintiffs' evidence they were distant from the East side of the old channel over one hundred feet, and if the evidence of Captain Maines and Edward Munn is to be accepted (and they were called on behalf of the plaintiff) distant less than 50 feet from the marked channel.

Then as to the distance from the turn at the North light ship, the plaintiffs are bound by their Preliminary Act which says 500 yards south-east from North light ship, and the evidence fully warrants the conclusion that this is about correct, though some of the witnesses gave even a greater distance and of course some gave less.

Now all the witnesses for the defence testify that the defendant ships were following the usual and proper

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course and holding up against a strong wind with the tow tailing off a little. Captain Johnson of the steamer *Osler* naturally, to account for striking the tow and to save himself, says he was being crowded to the east side of the channel. The evidence of Captain Maines, however, at page 78, bears out the statement of the defendants' witness. He was watching the boats as they approached the light ship and says they were following the usual channel. He admits he was not watching all the time after that but as soon as the turn was made he saw the danger. There is no doubt that the *Osler* struck or rubbed the tow and threw her out of course. Captain Maines frankly admits that there was no fault in the tow, and the only fault alleged is that the steamer went too far over.

The captains and the crews of both the *Amazonas* and the *Montezuma* all swear positively that this is not the fact, and the only other two men who saw the boats coming down were Maines and Johnson, and they do not agree. Then could it be so that the steamer crowded over to the east side of the channel as she passed the dredge ? Her length is 287 feet, the tow 360 feet, and the line from 300 to 400 feet making a total length of nearly 1000 feet. If the plaintiffs' evidence were true the tow, tailing off as it was to a considerable extent, would have struck the dredge itself beyond a doubt as the scow was well up forward of the dredge. The circumstances bear out the evidence of the defence that the steamer was held well up to the west side of the channel, and that the tow, being thrown out of her course by the upbound steamer, was the cause of the accident without fault of the tow.

There is, however, grave fault on the part of those in charge of the dredge. She was in fact anchored in a place where under the circumstances of the night

she was an obstruction to navigation. The dredge and scow were there by virtue of a contract which provided in the strongest and most definite terms that this was not to be done, and necessarily so. Those in charge of the dredge were guilty of still graver faults. It was anchored beyond question in one of the most dangerous parts of the river, and whatever might be said as to the necessity of a watch or look out in the day time there should be one at night and beyond question such a night as this.

The evidence of the plaintiffs' witnesses show the necessity of looking out, though that part of their duty is badly performed.

But even as it is, and without the look-out, the accident could have been avoided if the men on the dredge had taken the proper precaution when they in fact did see the ships and saw that the tow was likely to strike. The simplest thing to have done was to have thrown off the lines of the scow, which undoubtedly could have been done in a moment or two, and the scow being well in advance of the dredge with its front pockets loaded would have immediately gotten in motion. But even if as stated by some of the plaintiffs' witnesses, the force of the wind might have held her stationery till the tow reached it, yet being free no injury would have been done to the dredge, but the scow would have simply been shoved ahead.

Instead of doing the thing they ought to have done the crew attempted to get the dredge in motion ; and the plaintiffs, by their workmen, are not only therefore guilty of contributory negligence but are entirely at fault. See the *Hemminger* v. Ship *Porter*. (1) ; the *Ogemaw* (2).

(1) 6 Ex. C. R. 154 & 208. (2) 32 Fed. Rep. 919.

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GARROW, L. J., now (April 6th, 1911) delivered judgment.

On September 29, 1908, the barge *Montezuma* in tow of the steamship *Amazonas* collided with the *Brian Boru*, a dredge belonging to the plaintiffs, anchored and at work in what is called the "Lime Kiln Crossing" in the Detroit river, thereby causing injury to the dredge and interrupting the dredging operations of the plaintiffs until the injuries were repaired. The collision occurred about 2 a. m. The night was dark with a moderate wind blowing from the west. The dredge was from the United States and was working under a contract with the United States Government at the time of the collision, that Government having undertaken the deepening and widening of the channel in question, so as to give a width at the point in question of 600 feet. Of this the westerly 400 feet had been completed and lights on each side placed for the use of navigation and was the proper channel in use for such purpose. A portion of the remaining 200 feet had also been completed, the work being continued along the face from the westerly side of the completed 400 feet, and the dredge at the time of the collision was situated about 150 feet to the east of the easterly side of such 400 feet channel. There was also a scow alongside, attached to the dredge, for use in the dredging operations. This scow was upon the west side of the dredge and it was with the scow that the *Montezuma* actually collided, although the impact also injured the dredge.

The collision, it is not disputed, occurred upon the Canadian side of the International boundary, and therefore in Canadian waters. The ships were both foreign, from the United States, where also the defendants, their owners, reside.

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The collision itself is not disputed, but the defendants say they are not liable because (1) the collision was not the result of negligence; (2) that there was contributory negligence in not maintaining a light and a lookout or watchman on the scow, and in not casting off from the dredge when they saw, or should have seen, that a collision was likely to occur; and (3) that this court is without jurisdiction, the parties and the ships all being foreign, although the collision occurred in Canadian waters.

I am against the defendants on all three of their contentions, which I will consider in their order.

As is, I think, not infrequent in collision cases, the evidence of the crews does not harmonize, those of the dredge accusing while those upon the ship excuse as best they can. The case, however, so far as the the facts are concerned, does not, in my opinion, turn upon any fine points in the evidence which, taken as a whole, really leaves no doubt that the navigation of the ships on the occasion in question was greatly at fault. The dredging operations had been going on for years and the captains of both ships knew that the dredge was working at or near where she actually was on the night in question. Her electric arc lights were lighted and were visible for more than a mile. In order to work, she had to be well lit up, and also to be anchored. The tow line between the ships was between 300 and 400 feet in length. This seems to be unnecessarily long, but I cannot on the evidence say that it was negligently so. They were proceeding down stream with a current of about four miles an hour in their favour, steam up, and a westerly wind blowing. About 1000 feet up stream or northerly from the dredge, the direction from which the ships were coming, there is a slight turn towards the south-

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west in the channel. Until that turn is reached, the course of vessels approaching down stream towards where the dredge would be, about on the dredge, and at the turn the proper course necessarily changes in order to keep within the 400 feet channel. And good navigation, concurring in this respect with what would seem reasonable even to a lay mind, requires that even in ordinary circumstances a ship proceeding down stream with another ship in tow, in approaching and on reaching this turn should keep close to the westerly bank. This is fully recognized even by the defendants' witnesses, the captains and seamen on board of the ships, for they all say that that is what they did. I do not, however, accept their statements. The first mate of the *Osler* (a steamship bound up stream, which the defendants passed at a little above the bend) an intelligent and wholly disinterested witness, said that the *Osler* was at the extreme easterly side of the 400 feet channel, and while in that position "the steamer *Amazonas* and tow was hugging us down close, they were close also to us, they were too close altogether", with the result that "the port quarter of the barge rubbed lightly the port quarter of the *Osler*, but not enough to hinder the steerage way of the *Osler* nor yet of the barge as far as I could tell"; and this is corroborated by the evidence of other witnesses. That, then, being shown to be the position just above the bend, the next position which in my opinion is clearly proved by the evidence is that the *Amazonas* passed the dredge and scow at a distance of about 50 feet to the west of the scow. Mr. Neff, Captain of the dredge, puts the distance at not over 50 feet and says the vessel was to the east of the easterly line of the 400 foot channel. Mr. Pennock, the engineer of the dredge, says "I saw the *Amazonas* coming close

to us, she was out of the channel, she was about 50 feet from the dredge, she was running us pretty close; she was off the channel altogether". Evidence to the same effect was also given by Alexander Anderson and John Breault, deck-hands on the dredge, and this class of evidence was scarcely disputed. The plaintiffs' witnesses were not even cross-examined as to it, and it was not specifically contradicted by any one called for the defence, although Charles Ahlstrom, the mate on the *Amazonas*, not in answer to questions asked by the learned counsel for the defence but by myself, after much hesitation and an evident attempt to avoid the answer, finally said "Well, it must have been a couple of hundred feet or so off, anyway. Q. A couple of hundred feet to the west (i.e. the ship)? A. Yes sir,—more or less, I cannot say". Under the circumstances I place no reliance on this evidence. Then we have the evidence of Mr. Anderson, the master of the *Montezuma*, who said that until they met the *Osler*, the *Montezuma* had been following quite regularly the line of the *Amazonas*. Upon passing the *Osler*, he says they were within 75 feet of the west bank of the channel, following the *Amazonas* in range. The wind about which so much, too much in my opinion, is said, appears not to have bothered them down to that moment. Then came the slight touch of the *Osler*, and it and the wind and the current are blamed for having sent the *Montezuma* so far out of her course as to strike the scow, which must have been at least 500 feet easterly from the westerly bank of the 400 foot channel, which all the defendants' witnesses say they were so closely hugging or attempting to hug. I do not believe them; I believe the plaintiffs' witnesses, that the leading ship, the *Amazonas*, was to the east of the 400 foot channel, and therefore

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entirely out of her proper course when abreast of the dredge. The dredge was a fixture. We know almost to a foot where it was, namely, its easterly side between 150 to 180 feet to the east of the easterly side of the completed 400 foot channel. The width of the dredge was 28 feet and of the scow 25 feet. Deducting those would still leave the extreme westerly side of the scow almost 100 feet to the east of the easterly bank of the 400 foot channel, or entirely out of the way of vessels who were not at that time, as every one knew, intended to pass beyond the limits of that channel as defined by the lights and buoys.

The dredge with its scow was therefore where it had a perfect right to be. It was anchored and at work. It was brilliantly illuminated, so much so that all its immediate surroundings, including the scow, were plainly visible at a considerable distance, and there was absolutely no excuse in the circumstances for the collision, which in my opinion was entirely due to the careless and negligent navigation of the leading ship, the *Amazonas*.

Nor was there in my opinion any reasonable evidence of contributory negligence on the part of the plaintiffs. The absence of a light on the scow as a contributing cause, considering the brilliancy of the lights on the dredge, borders on the absurd; so under the circumstances does the objection as to the absence from the dredge or scow of a person charged with the duty of watchman. There is more reason perhaps in the suggestion that the plaintiffs' servants might by casting off the lines of the scow have set her loose, and thus either prevented or at least mitigated the damages; but the evidence is in my opinion wholly insufficient to justify fixing the plaintiffs with any fault in that respect. A plaintiff, otherwise faultless,

is not to be put in fault simply because in a momentary crisis caused by another's carelessness, he does not make as much of the moment as a witness, in cold blood, after the event, thinks he might have done.

I have great doubts about the signalling which the plaintiffs' witnesses say took place. Mate Johnston on the *Osler* did not hear the danger signal (5 blasts) which they are sure were given when near the *Osler*, neither did Mr. Colbourne above, nor Captain Maines below, who were in positions to hear if it had been given. It is an unsual signal, and to a mariner, one likely, I think, both to be observed and remembered. At all events I accept the evidence of those who were on the dredge, that whether these signals were or were not given they were not heard upon the dredge. When Mr. Neff, the captain of the dredge, the first to see the *Amazonas* when abreast of the dredge, saw her, he looked back to see where the barge in tow was, and seeing its position it was then for the first time that he or any one on the dredge became really aware of danger.

He at once ordered the dipper, which was down, to be taken up, and the men to go to their posts to get up the anchors, but before the men could even get there the crash came; and little wonder, as a slight calculation will show, for assuming that the speed was 7 miles an hour, or about 600 feet per minute, they had only that time in which it took the *Montezuma* to traverse the length of her tow line, say 350 feet, or a little over half a minute to do it in. And even if the lines had been thrown off as the defendants suggest, I am not at all convinced that the scow would have floated down stream fast enough and far enough to have saved the dredge from the collision. The scow was partially loaded and was lying flat against the side of the dredge.

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The set of the current and of the wind were both unfavorable, and it was all a matter literally of moments. Upon the whole I think as I have said before, that the attempt to establish contributory negligence wholly fails.

The remaining question is as to the jurisdiction of this court. I had to consider this question on the defendants' preliminary motion to set aside proceedings, which I refused, but reserved leave to renew at the trial. No new facts however appeared upon the trial, and I therefore remain of the opinion I then expressed. The subject was considered and the same conclusion arrived at by my late learned and careful predecessor in the *Milwaukee*, (1) upon somewhat similar facts, which he quite properly, in my opinion, distinguished from the *D.C. Whitney* (2), so much relied on by the defendant, upon the ground that in the latter the collision occurred in United States waters. In this case the plaintiffs' property was injured while in Canadian territory, and therefore under the protection of Canadian law, by the negligence of the servants of the owners of the ships who are the defendants here. The cause of action arose and continued from the moment of the collision down to the commencement of the proceedings. See the *Bold Buccleugh* (3) . The arrest was therefore a mere step in the course of enforcing rights which in a way depended upon the arrest itself to confer jurisdiction, as was apparently the situation in the *Whitney* case.

Sec. 18, of *The Admiralty Act* (R. S. C., 1906, chap. 141) upon which the defendants rely, has relation to procedure, and not primarily at least, to jurisdiction.

The jurisdiction of the court is conferred by sections 2 and 3 of that Act, and by the Imperial Statute, *The*

(1) 11 Ex.C.R. 179. (2) 38 S.C.R. 303.
(3) 7 Moo. P. C. 267.

Colonial Courts of Admiralty Act, 1890. And by sub-sec. 2 of sec. 2 of the latter statute a Colonial Court of Admiralty, subject to the provisions of the Act, is given the same jurisdiction over "the like places, persons, masters and things" as the Admiralty jurisdiction of the High Court in England, whether existing by virtue of any statute or otherwise, and may exercise such jurisdiction in like manner and to as full an extent as the High Court in England. Sec. 3 provides that the legislature of a British possession may declare any court of unlimited civil jurisdiction to be a Colonial Court of Admiralty, and provides for the exercise by that court of its jurisdiction under the Imperial Act, and limits territorially or otherwise the extent of such jurisdiction.

Under these provisions the Canadian Parliament enacted the statute first before referred to (as originally passed), and conferred jurisdiction in Admiralty upon the Exchequer Court of Canada. By sec. 4, this jurisdiction is conferred in the broadest terms as that "which may be had or enforced in any colonial Court of Admiralty under the *Colonial Courts of Admiralty Act, 1890.*" Sec. 6 provides that the Governor General in Council may from time to time constitute any part of Canada an Admiralty District, and establish at some place within the Admiralty District a Registry of the Exchequer Court on its Admiralty side, and divide an Admiralty District into one or more Registry Divisions. Sec. 7 establishes the Province of Ontario as an Admiralty District, subject to alteration by the Governor General in Council. Sec. 8 provides for the appointment of Local Judges, and sec. 10 provides that the Local Judge shall, within the district for which he is appointed, have and exercise the jurisdiction and the powers and authority relating thereto of the Judge

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of the Exchequer Court. Then comes sec. 18 which under the title "Procedure" begins "Any suit may be instituted *in any Registry* when" &c., the whole very clearly intended not to limit the general jurisdiction of the court, but to supply a guide in the case of a possible conflict between two or more Registry districts. The confusion seems to arise from confounding Admiralty Districts with Registry Districts, the two not being by any means identical, or at least necessarily so.

Sec. 685 of *The Merchant Shipping Act,* 1894, (Imperial) which, by sec. 712, is made applicable to all Her Majesty's Dominions, enacts that when any district within which a court has jurisdiction either under that or any other Act or at common law, for any purpose whatsoever, is situate on the coast of any sea or abuts on or projects into any bay, channel, lake, river or other navigable water, the court shall have jurisdiction over any vessel being on or lying or passing off the coast or being in or near that bay, etc., and over all persons on board of such vessel. Our jurisdiction is, under the several statutes to which I have referred, the same as that of the High Court in England, and that that court would under similar circumstances have had jurisdiction, seems clear. See Marsden on Collisions. (1) It is indeed a stronger case than the *Johann Friedrich* (2) in which the collision occurred at sea, and yet the action was maintained. Nor in my opinion does the special provision made in *The Merchant Shipping Act* for injury by a foreign ship to British property, impair the general jurisdiction asserted in such cases as the one to which I have just referred, as counsel for the defendants contended.

The other grounds upon which the defendants

(1) 6th Ed. 198 et seq.

(2) 1 W. Rob. 35.

relied was, that by Clause 7 of the Ashburton Treaty, a right of free navigation over the waters in question was conferred. But it by no means follows that the further right was also conferred of exemption from the legal consequences of negligence or other wrongs committed by a United States vessel while in Canadian territory, or by a Canadian vessel in United States territory. That was not, so far as appears, in the mind of either of the high contracting parties, and certainly ought not to be lightly imputed to them.

There will, therefore, be judgment for the plaintiffs with costs, including the costs of the motion, and a reference as agreed at the trial, to take an account of the damages, including therein the damages caused by the loss of the use of the dredge while being with reasonable speed repaired.

Judgment accordingly.

Solicitor for Plaintiffs; *F. A. Hough.*

Solicitors for Defendants; *Rodd & Wigle.*

APPEAL FROM NOVA SCOTIA ADMIRALTY DISTRICT.

1911
Dec. 14.

CHARLES KANE,.....(PLAINTIFF) APPELLANT.

AGAINST

THE SHIP *"JOHN IRWIN"*.

Shipping—Necessaries supplied in home port—Credit to ship—Liability of master.

Where necessaries are supplied to a ship in a home port and the facts show that they were supplied on the credit of the ship, the liability therefor is that of the owners and not that of the master who has ordered the goods at the request of the owners.

APPEAL from the judgment of the Deputy Local Judge for the Nova Scotia Admiralty District in an action for necessaries supplied to the ship.

The grounds of the appeal are stated in the reasons for judgment of the Judge of the Exchequer Court.

August, 15th 1911.

The following reasons for judgment were delivered by the Deputy Local Judge.

DRYSDALE, D.L.J.

There are two questions here, first, can the captain of the ship recover wages or damages for wrongful dismissal, and secondly, can he recover as for liabilities incurred by himself to Crowell Bros., and Mitchell & Shaffner? The two last named firms supplied goods to the ship and charged them in the case of Mitchell & Shaffner to the ship and owners, and in the case of Crowell Bros. to the ship, *John Irwin*. The goods were supplied in the home port of the ship, the master having ordered the stuff after being directed by the

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manager of the owners to get the goods. The master was a new hand, he apparently enquired of the engineer where the owners were accustomed to deal and being given the name of the said merchants ordered the supplies. The manager of the company (the ship's owners) admits he told the captain to order the goods and charge them to the ship, and this is apparently what was done. Under these circumstances can it be said the master has incurred a personal liability for the goods that enables him to enforce a statutory lien. Therefore, I ask myself to whom was the credit given when I come to test this question. The goods were charged in one case to the ship and owners and in the other to the ship. A charge to the ship in a home port when there is no lien for supplies means a charge to the owners, it cannot, I think, be fairly said to mean anything else. The merchants were not examined and no evidence given to establish a liability on the part of the master personally.

It seems the firms mentioned drew directly on the company (the owners) for the amount. As to Crowell's bills the master states they were paid for by a note. Whose note or when it was given or any of the circumstances connected therewith are not stated. And I think under the case as presented I am left to determine the question of the captain's liability on the state of facts as shewn, viz: That the captain had authority to order the goods for the owners, that he did so, that they were charged to the owners by the merchants and not to the captain at the home port, and where the merchants had been accustomed to furnish supplies for the owners. Under these circumstances I see no personal liability incurred by the master, and I feel obliged to hold that he has failed to shew that these two bills are matters as to

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Argument of Counsel.

which he incurred a personal liability, and by reason of such a position can enforce a lien therefor.

On the other point in the case I am of opinion the master was improperly dismissed.

Taking his own story of the grounding of the vessel it may have been a matter so slight that he innocently and properly did not think it a matter worth mentioning to his owners. He seems to have so treated it and I cannot say he was wrong. Considering the fact that he got other employment in a week or so at fifteen dollars a week he has not suffered much. I think fifty dollars ($50) would amply compensate him, and so fix the damages at that sum.

The question of accounts on the crew's supplies I did not go into inasmuch as any small balance in the captain's hands in respect to the daily supplies would seem to about square the money shortage which on the whole evidence he may, I think, be entitled to.

The decree will condemn the bail in fifty dollars and costs.

November, 27th., 1911.

The arguments of counsel were, by consent of the court and agreement of parties, submitted in writing.

J. Terrell, for the appellant, cited the *Ripon City;*(1) *The Limerick* (2); *Maclaghlan on Shipping* (3); *Kay on Shipmasters and Seamen* (4); *The Marco Polo* (5); the *Chieftain* (6); *Williams & Bruce's Adm. Prac.* (7); *Rich* v. *Coe* (8); *Curtis* v. *Williamson* (9); *The Huntsman* (10); *The Justitia* (11); *Palace Shipping Co.* v. *Caine* (12).

(1) (1897) P. 226 at p. 231.
(2) L.R. 1 P.D. 292; 411.
(3) 5th ed. p. 150.
(4) 2nd ed. p. 47-116, 120, 218.
(5) 1 Asp. N.S. 54.
(6) B. & L. 212.
(7) 3rd. ed p. 196.
(8) Cowp. 639.
(9) 10 Q.B. 57.
(10) (1894) P. 214.
(11) 12 P.D. 145.
(12) (1907) A.C. 386.

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H. Mellish, K.C., for the respondent cited *Howell's Admiralty Practice* (1); *Macdonnell on Master and Servant* (2).

Mr. *Terrell*, in reply, cited *Halsbury's Laws of England* (3).

CASSELS, J. now (December 14th) delivered judgment.

I have carefully considered the evidence adduced before the learned Judge who tried this case, and have also considered the factums of the appellants and respondents. After the best consideration I can give to the case, I am of the opinion that the learned trial Judge could have come to no other conclusion so far as the claims of Mitchell & Shaffner and of Crowell Brothers are concerned. I have perused all of the authorities cited by the appellants in the factum. In this particular case the facts are so strong in favour of the view that the credit was given to the ship or the ship owners and not to the master, that if this were not so the plaintiff should have proved his case. It would have been quite easy to have produced the note which I am asked to assume was drawn by the master. In the case of *The Ripon City* the ship was in a foreign port, and it was proved as a fact that the bills had been drawn by the master. In the case under review it is shown that the note was drawn on the owners. The master was directed by the agent of the owners to procure the goods on the credit of the ship. The inference from the facts is that he did what he was told. It is quite true that there may be a liability both against the owners and the master, but this depends entirely upon the facts. Here, according to Mr. Law's evidence, the master was

(1) At p. 271.

(2) 2nd ed. pp. 140, 157.

(3) Vol. 1, p. 219.

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directed to purchase what he needed in the cheapest way, and to charge the ship in the usual way. This was the master's first venture in the ship. The goods in question were obtained prior to the ship sailing and for the purposes of repairs. The course of business down to the period when the master took charge was to have the goods purchased and charged to the vessel. The master having received these nstructions naturally went to the engineer to ascertain from him from whom they were in the habit of purchasing goods, no doubt following Mr. Law's instructions. The goods are furnished, the ship is charged in the usual way, and no claim has been put forward upon the part of these two parties who furnished the goods against the master. It would have been very easy for the plaintiff had the facts been otherwise and any liability existed as against him to have proved affirmatively this fact, but in the face of all that took place it seems to me that the onus was shifted to him. The proper inference is that he did what he was told and incurred no personal liability.

In regard to the claim for wages, all that the captain was entitled to was reasonable notice. The Judge in his discretion has allowed the sum of fifty dollars and costs. It is quite evident from the learned Judge's reasons for judgment that he was desirous as far as he properly could to assist the plaintiff. The appeal is dismissed with costs.

Appeal dismissed.

BETWEEN

THE IMPERIAL SUPPLY COMPANY, LIMITED, PLAINTIFFS;

1912
Feb. 14,

AND

GRAND TRUNK RAILWAY COMPANY OF CANADA DEFENDANTS.

Patent of invention—License to Manufacture same—Instrument not executed by Licensee—Validity—Estoppel.

B. and D. were employees of the Grand Trunk Railway Company. Under the instructions of R., superintendent of the motive power of the railway, they experimented on lubricators for use on the railway, and eventually succeeded in making a triple sight feed lubricator for which they obtained a patent in Canada. Following the usual custom of the railway company in such cases, R. sought to obtain a license from the inventors which would enable the company to use the invention not only on its own line but also on its allied lines. B. and D. refused to do more than license the use of the invention by the defendant company on their own line of railway. Subsequently, an instrument purporting to be a license to the company to use the said invention on their own line of railway only was prepared under the instructions of an officer of the railway subordinate to R., and was executed by B. and D. This instrument was not executed by the defendant company, and did not provide for the payment of any royalties for the use of the invention; the express consideration being the nominal sum of one dollar. It also contained a covenant on the part of the inventors that they would maintain the validity of any patents to be thereafter granted to them for such invention.

When this instrument was communicated to R., he wrote to the official who had obtained the same, objecting to the license being limited to the defendant company's line of railway and directing a new license to be drawn up extending the use of the invention to the Grand Trunk Pacific Railway as well as the Grand Trunk Railway. R's letter was communicated to B. and D. who knew that R. was the proper officer of the Company to make agreements of this nature. The instrument in question was in the possession of the defendant company at the time of action brought.

Held, upon the facts, that the instrument was not binding upon the defendant company as a license.

Semble, that in an action for infringement the company would not be estopped from asserting the invalidity of the title.

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Argument of Counsel.

THIS was an action arising out of an alleged breach of a license to use the invention covered by Canadian patents numbered 98330 and 129053, respectively. The facts are stated in the reasons for judgment.

January 11th, 1912.

The case came on for hearing at Montreal.

V. E. Mitchell, K.C., and *G. Stairs*, for the plaintiff, contended that there had been established by the evidence a relationship of licensor and licensee between the inventors and the Grand Trunk Railway Company; and in consequence of that relationship the defendant company could not set up the invalidity of the patents in suit. The following authorities were relied on:—

Halsbury's Laws of England (1); *Nicolas on Patents* (2); *Crossley* v. *Dixon* (3); *Clark* v. *Adie* (4); *Redges* v. *Mulliner* (5); *Frost on Patents* (6); *Ashworth* v. *Law* (7); *Useful Patents* v. *Rylands* (8); *Mills* v. *Carson* (9); *Africa Gold Co.* v. *Sheba Gold Co.* (10); *Bassett* v. *Graydon* (11); *Post Card Automatic Supply Co.* v. *Samuel* (12).

They also relied on Art. 1730 of the Civil Code.

E. Lafleur, K.C. and W. H. Biggar, K.C., for the defendant company, argued that inasmuch as the defendant company had not executed their license it was not binding on them nor could estoppel be raised upon it. The instrument contained no recitals and no covenants binding upon the defendant. Moreover, it was expressly repudiated by Mr. Robb, the only official of the company having authority to bind the

(1) Vol. 1, p. 201.
(2) p. 99.
(3) 10 H.L.C. 293.
(4) L.R. 2 A.C. 423.
(5) 10 R.P.C. 27.
(6) 3rd ed. Vol. 2, pp. 115. 148, 152.
(7) 7 R.P.C. 234
(8) 2 R.P.C. 261.
(9) 10 R.P.C. 17.
(10) 14 R.P.C. 663.
(11) 14 R.P.C. 711.
(12) 6 R.P.C. 560.

defendant. Such repudiation was expressly communicated to the inventors.

CASSELS, J. now (February 14th., 1912) delivered judgment.

In this case a statement of claim was filed on behalf of the Plaintiffs who claim to be assignees of two certain patents, one numbered 98330, bearing date the 3rd April, 1906, and the other numbered 129053, bearing date the 1st November, 1910.

The case came on for trial before me in Montreal on the 22nd May, 1911, when it was on application adjourned with leave to the defendants to amend their pleadings so as to raise other defences. In their statement of claim the plaintiffs allege that by an instrument in writing executed on the 2nd June, 1906, Thomas Akin Dalrymple and Robert Burnside, Jr., who were the patentees under the first patent, and who are alleged to be the inventors of the invention described in the second patent, licensed the Grand Trunk Railway Company for the consideration of one dollar, to use the inventions in question. As the document is short, I set it out verbatim:—

"KNOW ALL MEN BY THESE PRESENTS, that we, Thomas Akin Dalrymple, and Robert Burnside, both of the City of Montreal, Province of Quebec, Dominion of Canada, Machinists, for and in consideration of the premises and of the sum of one dollar ($1.00) to us paid by the Grand Trunk Railway Company of Canada (the receipt whereof is acknowledged) do hereby empower and license the said Grand Trunk Railway Company of Canada, their servants and agents and the servants or agents of any company whose line or lines of railway is or are known as part of the Grand Trunk Railway System, to manufacture at any of the shops or works of any of the said

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Companies, for the use by the said Companies, their servants or employees, and each of them, but not for sale, the articles and appliances; to wit:—a Triple Sight Feed Lubricator, letters patent for which have been applied for in the Dominion of Canada and the United States of America on the 12th and 13th days of December, 1905, respectively, together with any and all modifications and further improvements of which the said invention or improvement or any part thereof is susceptible. The said license and authority to continue to the full end of the terms for which the said patents in either Canada or United States, or any of them, covering the said invention or improvements, or patents for any and all modifications and further improvements thereof is or are shall be granted renewed or extended.

"And we, the said Thomas Akin Dalrymple and Robert Burnside, do hereby agree with the Grand Trunk Railway Company of Canada that the right to manufacture and use the said improvements, articles and appliances and modifications or improvements thereof herein granted shall not be subject to any royalty or payment whatever by the said Companies or any of them other than the said sum of One dollar ($1.00) hereby acknowledged.

"And we further covenant and agree with the said Company, that we will do all and every act and thing necessary to protect and preserve our interest in and right to the said inventions and the said letters patent when granted, and also in and to any patents hereafter granted for any modification or further improvement of said inventions, and will at all times fully protect the said Companies and each of them in the enjoyment of the privileges hereby granted to manufacture and use the said inventions or improvement, or

any modification and improvement thereof, and that any license or right to manufacture, use or sell the said invention or improvement or any modification or improvement thereof, or any of them which shall at any time be granted by us to any other person or corporation shall be made expressly subject to the rights hereby conferred upon the said Companies and each of them.

It is understood that the above agreement does not include the Grand Trunk Pacific Railway or the Central Vermont Railway.

WITNESS our hands and seals this Second day of June in the year of our Lord one thousand nine hundred and six.

Signed, sealed and delivered in presence of (Sgd.) Jno. A. Duffie.	(Sgd.) THOMAS AKIN DALRYMPLE (SEAL)
	(Sgd.) ROBERT BURNSIDE, JR. (SEAL)"

In this document the words are inserted, "It is "understood that the above agreement does not "include the Grand Trunk Pacific Railway or the "Central Vermont Railway".

The plaintiffs claim that under this agreement the defendants became licensees under the patentees. They also claim that the Grand Trunk Railway Company had been making lubricators for the Grand Trunk Pacific Railway Company. The latter fact is not disputed.

The Grand Trunk Railway Company set up several defences. They first set up that the document of the 2nd June referred to, was never in fact so accepted, regarded, treated or acted upon by the defendants as to constitute an agreement. They further assert that

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if the document in question is an agreement binding upon the Grand Trunk Railway Company, the doctrine of estoppel cannot be held as applicable to the case in hand. They furthermore set up that the patentees obtained the patents in trust for the railway company, and in the alternative they allege that there was no invention disclosed by the patents, and in any event that these patents are void having regard to the state of the art, and for other reasons.

On the first hearing I suggested to counsel that if the law of estoppel was not applicable to the case in hand, the Grand Trunk Railway Company would be in a better position if the document were held to be binding on them. If the document of the 2nd June, 1906, is as contended for by the Grand Trunk Railway Company, then the Grand Trunk Railway Company would become infringers of the patented inventions assuming the patents to be eventually upheld as valid patents. On the other hand, f the alleged agreement of the 2nd June, 1906, were held valid, but that there was no estoppel preventing the Grand Trunk Railway Company from disputing the validity of the patents so far as their sales to the Grand Trunk Pacific are concerned, then the Grand Trunk Railway Company would have the right to attack the validity of the patents in this action, and if they failed they would still have the right under the alleged license to continue manufacturing for their own uses. I suggested to counsel at the trial that it would be better to determine the two points—First, is the alleged document of the 2nd June, 1906, an existing and valid license binding upon the Grand Trunk Railway Company; and, Secondly, if it were held to be a valid and existing license, are the Grand Trunk Railway Company at liberty to endeavour to impeach the patents, or are

they estopped from denying the validity of the patents? If these two issues were held against the Grand Trunk Railway Company, then there would be nothing left but a reference as to the damages for the infringement of the patent—and in this latter event a prolonged litigation affecting the validity of the patents would be avoided. This course, subsequent to the trial, seemed to meet with the approval of the counsel; and an order was made that these issues should be first tried. It was also directed that the issue as to whether or not the patentees were trustees for the Grand Trunk Railway should also be tried. At the subsequent trial which took place on the 11th January, 1912, both counsel for the plaintiffs and for the defendants agreed that it would be better that this last issue should be held over to be tried, if the case came down to trial on the defences as to the validity of the patents.

I have considered carefully the question of estoppel, and have arrived at the conclusion that if the agreement of the 2nd June, 1906, be a valid and a binding agreement, the Grand Trunk Railway Company are estopped. In the view I take of the case, namely that the agreement is not a binding agreement on the Grand Trunk Railway Company, it may be unnecessary to deal with the question of estoppel. Later on, however, I will deal with this question; as if I am in error in the conclusion I have arrived at in regard to the agreement being one not binding on the Grand Trunk Railway Company, then the question of whether there is estoppel or not may become material. The case is a peculiar one, and I have been very much impressed by the able argument presented by Mr. Mitchell, K.C., in support of the plaintiffs' contention.

After the best consideration I can give to the case I have come to the conclusion that the agreement of

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the 2nd June, 1906, was never assented to or accepted by the defendants, the Grand Trunk Railway Company. It must be borne in mind that the patentees, Robert Burnside, Jr., and Thomas Akin Dalrymple, were employees of the Grand Trunk Railway Company. It was admitted that Mr. Robb was the superintendent of motive power employed by the Grand Trunk Railway Company. Mr. Maver was the master mechanic. I do not wish at the present stage of the proceedings to pass upon the question as to whether or not the invention was an invention by these two mechanics or whether the invention belonged to the Grand Trunk Railway Company. Two cases, one in the United States, and one in England, deal with the question when an invention becomes the property of the employer or when it becomes the property of the workman. (1) It is material, however, in considering the evidence as to whether the alleged document of the 2nd June, 1906, was accepted by the Grand Trunk Railway Company, to take into account the facts as to how the alleged inventions were arrived at. Mr. Robb states that the lubricators that the Grand Trunk Railway Company were using were not satisfactory; and he told his master mechanic, Mr. Maver, "to get up a lubricator ourselves in our own shop". "Q.—Which "would be more satisfactory? A—A lubricator which "would suit our requirements." He goes on to say "that "the lubricator we had was too small, and it "was weak, and it lacked a bulls-eye glass. I told "him to embody all these features, and have a lubri-"cator which would hold more oil, which would take "care of the larger engines, and which would have a

(1) See Worthington v. Moore, 64 L. T. N. S. 338 and Hapgood v. Hewitt, 119 U.S. 226.

"bulls-eye glass. I told him to embody all these "features from the old lubricators, and to make one "that would be our own lubricator. These were the "instructions I gave".

It appears that pursuant to these instructions the work in question was performed. It would appear also before or after the patents were granted, the account for the expenses of obtaining the patents, certainly the earlier patent, was sent to the Grand Trunk Railway Company. Mr. Robb refused to pay this on the ground that the patentees had declined to grant the license asked by the Grand Trunk Railway Company. It also appears that in cases where the Grand Trunk Railway permitted their workmen to experiment at their expense, that a form of license was always executed which permitted not merely the Grand Trunk Railway Company to use the inventions, but their allied lines—and the Grand Trunk Pacific Railway was an allied line of the Grand Trunk Railway Company.

In the first place both Robert Burnside, Jr., and T. A. Dalrymple, knew that Mr. Robb was the official representing the Grand Trunk Railway Company who had the authority to make agreements of this nature. Dalrymple in his evidence states as follows:—

"THE COURT:—As I understand from your evi- "dence, your previous communication between you "and Mr. Robb for this license was prior to this "document being signed of the 2nd of June? A—Yes.

"Q—Mr. Robb was insisting that the Grand Trunk "Pacific should be included in the license? A—Yes.

"Q—Did he ever recede from that position prior "to this document being signed? A—He never told "me if he did.

"Q—And you knew that Mr. Robb was the senior "man? A—Yes.

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"Q—And that the document in question was drawn "by a junior in his office. As far as you know "Mr. Robb had never changed his mind? A.—As "far as I know".

It would appear that the document in question was apparently drawn up under the instructions of Mr. Maver. The document itself is not signed by the Grand Trunk Railway Company. It was forwarded by Mr. Maver to Mr. Robb on the 4th June, 1906. Mr. Robb returned it at once to Mr. Maver in a letter of the 7th June, in which he states:—

"Referring to your letter of June 4th and attached agreement. As I explained to Messrs. Dalrymple and Burnside whi'e in my office, the right to manufacture and use this lubricator must apply to the Grand Trunk Pacific as well as the Grand Trunk..... I shall be glad if you will have the papers made out and signed in this way."

This letter was communicated by Mr. Maver to Mr. Dalrymple by a letter of the 12th June, 1906,—and it is admitted that a copy of Mr. Robb's letter was sent with the letter of the 12th of June. Dalrymple and Burnside, who had previously been negotiating with Mr. Robb were aware of his position in the railway—they were aware that he had charge of that portion of the railway relating to the patents for invention; and they were aware that Mr. Robb had never receded from the position which he took, as shewn by the evidence of Dalrymple quoted above. They knew that Mr. Robb required that a new agreement should be drawn. It would have been better had the document in question been returned. It seems to have been filed away like other papers in the pigeon holes of the Grand Trunk Railway Company. It was not registered. Both Burnside and Dalrymple

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knew that Mr. Robb who represented the Grand Trunk Railway Company, was the proper officer to accept it on behalf of the Grand Trunk Railway Company.

Ingenious arguments are based upon the examination of Mr. Robb for discovery, and certain admissions said to have been made by him. I have no doubt whatever that Mr. Robb was truthfully relating the facts, as he understood them, when examined in the witness box in Montreal. And this is corroborated by his letter, which I have quoted, to Mr. Maver of the 7th June. I do not think that I can find that the agreement was ever accepted by the Grand Trunk Railway Company. Nor do I think that Burnside and Dalrymple were in any way misled by the act of Mr. Maver. At all events Maver had no power to bind the Grand Trunk Railway Company. I must therefore find this issue in favour of the Grand Trunk Railway Company.

On the question of estoppel, as I have mentioned above, it may not be necessary for me to deal with this question; but as the parties argued the case at full length, and as it may be helpful to have my views in case a higher court were of opinion that I have come to a wrong conclusion on the question as to whether the document is binding or not, I will give my views. The clause in the so called agreement—"It is understood that the above agreement does not "include the Grand Trunk Pacific Railway or the "Central Vermont Railway" might as well have been omitted from the document. The license without these words, if it were in force, would have been sufficiently explicit. It is not a covenant on the part of the Grand Trunk Railway Co., nor as I have stated, have the Grand Trunk Railway Company signed the

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document. I have found no case where a form of license is identical with the one in question. The nearest case is the case of *The Magic Ruffle Company* v. *Elm City Co.* (1) In that case the license was to manufacture portions of four patents. There was a covenant and there were recitals. The court at page 156 concluded that the defendants might have been sued for breach of their contract. It also pointed out that the alternative remedy might have been adopted of treating them as infringers in an action for infringement brought. The facts are not the same.

I think, however, on principle that if this document were a binding agreement on the Grand Trunk Railway Co., that estoppel would extend so as to prevent the Grand Trunk Railway Co., when being sued as infringers for manufacturing the patented inventions and selling to the Grand Trunk Pacific, from setting up as against the claim of the patentees the invalidity of the patents. I think there is a good deal of force also in the contention of Mr. Mitchell, that the latter part of the document which states,—

"And we further covenant and agree with the said Company, that we will do all and every act and thing necessary to protect and preserve our interest in and right to the said inventions and the said letters patent when granted, and also in and to any patents hereafter granted for any modification or further improvement of said inventions, and will at all times fully protect the said companies and each of them in the enjoyment of the privileges hereby granted to manufacture and use the said inventions or improvements," etc.

(1) 13 Blatch. 151.

adds strength to the contention put forward on behalf of the plaintiffs.

There is in this case no estoppel by recital unless that part of the document which I have just referred to would amount to it. But estoppel may exist from the relative positions of the parties even without recital. On this point I would refer to Terrell on Patents, (1); Fulton on Patents, (2); Nicolas on Patents, (3); Frost on Patents, (4); and Thornton on Patents British and Foreign, 1910, p. 324.

In these text-books nearly all the later cases have been considered. I have examined a large number of them, but find no case in which a license is similar to the terms of the one in question. In most cases the licensee had agreed to pay royalties. In *Crossley* v. *Dixon*, (5); it is pointed out that a license may be verbal and the licensee estopped from disputing the validity of the patents, so long as he uses them. (6).

The question was raised by Mr. Lafleur at the trial that it would be open to the licensees to show the invalidity of the patents in order to show a failure of consideration. I think a consideration of the cases indicate that this could only be done where there was fraud in obtaining a license. There is no warranty of the validity of the patents. There is no contention of that nature under these pleadings. A case that might be looked at which discusses a considerable number of the cases, is *Vermilyea* v. *Caniff*, (7). It is a decision that the Chancellor of Ontario gave in 1886, and deals with the question of attacking the patents.

Before closing the judgment I think it advisable

(1) 5th ed. 1909, 205.
(2) 4th ed. 1910, pp. 280, 283.
(3) 1904, p. 99.
(4) 3rd ed. 1906, Vol. 2, pp. 115 and 158.
(5) 10 H. L. Cas. p. 293.
(6) *Clark* v. *Ady*, 2 App. Cas. p. 425.
(7) 12 Ont. R. 164.

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that I should give leave to the plaintiffs to amend their pleadings and also their proof in one respect. I do not find in their proof of title as made at the trial any copy of the assignment from Herbert H. Bradfield and Charles A. Myers of the earlier patent. In the agreement of the 5th of October, 1910, it is recited that "Whereas the said Herbert H. Bradfield and "Charles A. Myers by agreement in writing dated "April 6, 1910, did assign to the Imperial Supply Co., Limited," etc. This assignment of the 6th April, 1910 has not been put in. If the plaintiffs so desire they are at liberty to put in a certified copy from the Patent Office of this assignment.

I also do not find on the record any plea of estoppel. It seems to me that the plaintiffs should have such plea upon the record, if it is their intention to rely upon it. Such a plea may also be filed.

The Grand Trunk Railway Co., set up by counterclaim that the patent is void. There is no defence to this counterclaim. As I understand it, the counterclaim is equivalent to a substantive action. Had the defendants applied for judgment on the counterclaim for default, it may be that they would have been entitled to judgment. If the plaintiffs so desire in order to make the record complete they can file whatever defence they deem necessary to the counterclaim. I would refer the solicitors of the parties to Rule 41 of the Exchequer Court, which has the force of a statute.

The costs of this portion of the trial are reserved to be dealt with when the case comes on subsequently to be tried, or if there is no further trial then they can be spoken to before me in Chambers.

Solicitors for plaintiff: *Casgrain, Mitchell, McDougall & Creelman.*

Solicitor for defendant: *A. E. Beckett.*

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

PLAINTIFF;

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Feb. 14.

AND

THE MONCTON LAND COMPANY, LIMITED, AND NAPOLEON J. GOVANG AND PACIFIC D. BREAU

DEFENDANTS.

Expropriation of land—Compensation—"Prospective Capabilities"—Market Value.

In assessing compensation for lands taken for the purposes of a public work, *primâ facie* the market price governs, but the "prospective capabilities" of the property must be taken into account. Usually such capabilities form an element in fixing the market price.

Brown v. *The King* (12 Ex. C. R. 463) followed.

INFORMATION filed by the Attorney-General for Canada for the expropriation of certain lands in the City of Moncton for the purposes of the Intercolonial Railway.

October 24th, 25th, 26th and 27th, 1911.

The case came on for trial at St. John, N.B.

H. A. Powell, K.C. and *J. Friel* for the Crown; *W. Nesbitt, K.C., M. G. Teed, K.C.* and *G. L. Harris* for the defendant company.

C. W. Robinson for the defendant Breau.

Counsel for the defendants relied on *Lucas* v. *Chesterfield Gas and Water Board* (1); *Brown* v. *Mayor of Montreal* (2); *Davies* v. *James Bay Ry. Co.* (3); *Cowper Essex* v. *Local Board* (4); *Mayer on Compen-*

(1) (1909) 1 K.B. 16.
(2) L.R. 2 A.C. 168.
(3) 20 O.L.R. 534.
(4) L.R. 14 A.C. 153.

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sation (1); *Hudson on Compensation*(2); *Cripps on Compensation* (3); *Brown and Allen on Compensation* (4).

CASSELS, J. now (February 14th, 1912) delivered judgment.

This is an information filed on behalf of the Crown to have the value of certain lands expropriated for the use of the Intercolonial Railway ascertained.

The lands expropriated comprise 11½ acres situate in the City of Moncton.

The trial lasted four days, and a great deal of evidence was adduced. Since the trial I have carefully analyzed the evidence. I do not propose to quote therefrom, as to do so would necessitate repeating a considerable part of it.

It is agreed that the date at which the expropriation took place and for ascertaining the compensation is the 23rd October, 1909.

There is not room for much dispute as to the method of arriving at the compensation.

The company, whose lands are expropriated, are entitled to be fully compensated for the loss they have sustained by reason of the exercise of the right of eminent domain. I have had occasion to express my views in *Brown* v. *The King* (5); and other cases. *Dodge* v. *The King* (6); is a guide. "Prospective capabilities" have to be taken into account. *Primâ facie* the market price governs. Usually the prospective capabilities forman element in fixing the market price. In the present case the lands are situate in the city of Moncton. They were, before the expropriation, divided by plan into building lots, and I propose in dealing with

(1) 1903 ed. p. 140.
(2) Pp. 287, 308.
(3) 4th ed. p. 98.
(4) (1903) 2nd ed. p. 97.
(5) 12 Ex. C. R. 463.
(6) 38 S. C. R. 149.

the question of compensation to deal with them as such, although I do not think it of much consequence whether they were so laid out on a plan or not. The real point is what method of realizing would yield the best return. I know of a recent sale of land within three miles of a large city used as a farm which realized $3500 an acre. The purchaser acquired the lands to be retailed on the market for building lots. There is no magic in a plan. In the case before me the lands in question were treated as building lots by the government valuators. The area taken by the railway comprised 11½ acres. It was assumed at the time that this was equiva'ent to sixty-one and one-half lots.

It is hardly questioned that after the expropriation the best method of laying out the remaining lands north and south of the expropriated area is by laying out the two streets Essex and York running west to east as shewn on the plan. This method of utilizing the lands minimizes as far as possible the damage caused by the severance of the lands, and is, I think, in ease of the Crown.

There are said to be, as I have stated, sixty-one and a half lots expropriated. To the north there remain 289 lots; to the south 180 lots. Allowing for the cross streets Essex and York streets would each require 2.3 acres, or 4.6 acres for both.

Mr. Jones states, and it does not seem to be disputed, that allowing for streets of the width in question, each acre divides into $6\frac{7}{10}$ lots.

These 4·6 acres would yield 30·82 lots which have to be put into roadways. It was suggested at the trial by counsel that as Imperial Avenue which the Company intended to lay out would have been lost for building lots, therefore only one of the new streets should be allowed for, the other being in lieu of Impe-

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rial Avenue, and this seems to have been the view of all concerned. It no doubt would be correct on that understanding. On analyzing the evidence I find however that Mr. Taylor in arriving at the 61½ lots expropriated called the 11½ acres, has deducted the area comprised in the proposed Imperial Avenue, otherwise instead of there being 61½ lots there would be about 77 lots. I therefore propose to allow for the lots lost by the laying out of both York and Essex Streets one of the streets as mentioned having been deducted in reducing the 11½ acres to 61½ lots. The result is that the lands expropriated and the lands necessitated for streets amount to 61½ plus 30·82 lots, or about 92 lots.

The lands north of the expropriated land comprise 289 lots, from which must be deducted 15·41 lots taken for Essex Street, leaving 274·41 lots. The lands south of the expropriated land comprise 180 lots, and deducting 15·41 lots for York Street, leaves 165·41 lots.

It is difficult to arrive at an exact sum as the fair value of the damage. There is no doubt the damage to the property both north and south of the lands expropriated caused by the severance and the closing of the streets is considerable. The damage to those lots south of the expropriated land is not so great as to those on the north, nor is the damage to the lots either north or south equal to the damage to those nearer to the railway which necessarily suffer more than those more remote. The land company claims $100,000; the Crown offers $15,889.

The fact of the discovery of natural gas, and the works of the Transcontinental Railway, necessarily have to be considered. Moreover, it is apparent that some lots are more valuable than others.

I think I will be doing justice to all parties if I fix the value of the lots at $175 on the average.

Taking 92 lots expropriated at $175 would equal	$ 16,100
The injury to the lots north of the expropriated land, 274, averaging them, I would place at $20 a lot	5,480
The injury to those south (180 lots) averaging them, I would place at $15 a lot	2,700
	$ 24,280

If to this amount the sum of $3,000 be added for compulsory expropriation and cost of grading one of the two cross streets and incidentals the total would amount to $27,280, and this amount I allow to the company. Interest should be allowed on the $16,100 and the company are entitled to their costs of action.

I had written my opinion several weeks ago, but have delayed delivering it until the undertaking offered by the Crown was settled upon and filed. This undertaking was filed today and should be embodied in the formal judgment.

I think if the defendant Breau be allowed $150 for the land taken from him and the damage, he will be fully compensated, and I allow him his costs which I fix at $50.

Judgment accordingly.

Solicitor for the plaintiff: *J. Friel.*

Solicitors for the defendant Company: *M. G. Teed.*

Solicitor for defendant Breau: *C. W. Robinson.*

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