REPORTS

OF THE

EXCHEQUER COURT

OF

CANADA

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JUDGES

OF THE

Exchequer Court of Canada

During the period of these Reports:

THE HONOURABLE SIR WALTER G. P. CASSELS

Appointed 2nd. March, 1908

THE HONOURABLE LOUIS ARTHUR AUDETTE

Appointed 4th. April, 1912

LOCAL JUDGES IN ADMIRALTY OF THE EXCHEQUER COURT OF CANADA

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

ATTORNEY-GENERAL FOR THE DOMINION OF CANADA

The Honourable Charles Joseph Doherty, K.C.

SOLICITOR-GENERAL FOR THE DOMINION OF CANADA

The Honourable Hugh Guthrie, K.C.

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IN THE MATTER OF THE PETITION OF RIGHT OF

PIERRE EUGENE FUGERE, and LOUIS JOSEPH FUGERE .....SUPPLIANTS,

AND

HIS MAJESTY THE KING.....RESPONDENT.

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Feb. 10.

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In an expropriation by the Crown of lands held under a Crown grant subject to a reservation in favour of the Crown of the right to retake the lands if required for public purposes:

Held, that the owners were entitled to have their rights duly adjusted without fixing the actual value of the rights remaining in the Crown under the grant.

(2) That want of registration did not affect the validity of the conditions or reservations.

(3) That the rights reserved affected lands within the category of "banks, sea-shore, lands reclaimed from the sea, ports and harbours", and forming part of the Crown domain were imprescriptible.

(4) That the rights were not extinguished by a sheriff's sale of the land.

(5) Where expropriation has been abandoned, but no legal rights are invaded and no damage suffered, compensation cannot be allowed.

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(6) An advantage to the property by the construction of a railway crossing is to be taken into consideration in estimating the amount of compensation.

(7) That the Crown having made no offer by its statement of defence was liable for the costs.

PETITION OF RIGHT to recover compensation in an expropriation by the Crown.

Tried before the Honourable Mr. Justice Audette, at Quebec, November 21, 22, 1916; February 10, 1917.

E. Baillargeon, K.C., and *F. O. Drouin, K.C.*, for suppliants; *Alleyn Taschereau, K.C.*, for respondent.

AUDETTE, J. (June 2, 1917) delivered judgment.

The suppliants, by their Petition of Right, seek to recover the sum of $50,000 as representing the value of a certain piece or parcel of a beach lot, expropriated by the Crown, for the purposes of the National Transcontinental Railway, at Levis, P.Q., covering also all damages resulting from such expropriation, including damages arising from the detention of the whole property during a few months, together with all damages resulting from the erection of a pier in front of the property, as the whole is hereinafter more clearly set forth.

On the 9th January, 1913, the Crown expropriated the whole lot, No. 314, at Windsor Indian Cove, Levis, P.Q. This property is a beach lot, lying between high and low water marks of the Saint Lawrence, and according to the original Crown grant, contains an area of 149,000 feet more or less, —and according to the suppliant's title from their immediate *auteurs*, contains an area of 162,482 feet, more or less without warranty as to measurements.

Having expropriated the whole lot in January, 1913, the Crown, on the 13th May, 1913, abandoned the expropriation of the same and returned the lot to its owners, the whole in pursuance of sec. 23 of *The Expropriation Act.*

Then on the 31st December, 1914, the Crown, by depositing plans and descriptions in the Registry Office, for the County of Levis, expropriated 17,000 square feet of the said beach lot No. 314—as shewn coloured red on the plan filed herein as Exhibit "B".

The Crown having erected a pier or "Fender Crib" opposite the northern boundary of the lot 314, but outside of the boundary of the said lot and below low water mark, the suppliants claim damages for such erection, contending that it interferes with the access to their property.

Therefore, the suppliants' claim may be stated as follows, to wit:

1st. For the damages resulting from the expropriation of the whole of lot 314 which remained vested in the Crown between the 9th January, 1913, and the 13th May, 1913, when it was abandoned and returned to them.

2nd. For the value of the 17,000 square feet expropriated on the 31st December, 1914, and for damages resulting from such taking.

3rd. For the damages resulting from the erection of the said "Fender Crib" below low water mark.

The Crown by the statement of defence, traverses all the *claims* set up by the suppliants, denies any liability and makes no offer of any amount of money in compensation for the said expropriations, relying

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upon the Crown grant, under which this lot left the hands of the Crown, whereby this beach lot No. 314 was granted to the suppliants' predecessors in title (*auteur*), on the 23rd July, 1859, subject to a number of provisos and conditions, amongst which the following is to be found, namely:

"Provided further, and we do also hereby ex-
"pressly reserve unto us, our heirs and succes-
"sors, full power and authority, upon giving
"twelve months' previous notice to our said
"grantee, his heirs or assigns, to resume for the
"purpose of public improvement, the possession
"of the said lot or piece of ground hereby grant-
"ed, *or any part thereof,* upon payment or tender
"of payment to him or them of a reasonable sum
"as indemnity for the ameliorations and improve-
"ments which may or shall have been made on
"the said lot or piece of ground, or on such part
"thereof as may be so required for public im-
"provements, and upon re-imbursement to our
"said grantee, his heirs or assigns, of such sum
"as shall have been by him or them paid to our
"Commissioner of Crown Lands for such lot or
"piece of ground or such part thereof so required
"for public improvements; and in default of the
"acceptance by our said grantee, his heirs or as-
"signs of such sum so as aforesaid tendered, the
"amount of indemnity, whether before or after
"the resumption of possession by us, our heirs
"or successors, shall be ascertained by two ex-
"perts." . . . .

No improvements or ameliorations have been made upon this property as contemplated in the said Letters Patent.

Therefore the Crown concludes that since a portion of this lot is required for the purposes of the National Transcontinental Railway, *for the purpose of public improvement,* no indemnity is due the suppliants under their title for the land so taken.

However, at the opening of the trial, counsel at Bar, on behalf of the Crown, offered the suppliants the sum of $4,250 for the 17,000 square feet expropriated, this amount to cover all damages resulting from the said expropriations, and the damages, if any, for the time the whole property remained vested in the Crown, under the first expropriation, &c.

This offer, the suppliants, through their counsel, then declined to accept.

The expropriation is in the nature of a second invasion, the Grand Trunk having already, for a long period, intersected the property by its line of railway.

The question of damages resulting from the neighbourhood of a railway with respect to this lot is to-day only one of degree, as compared with the time when the expropriations herein were made. There was a railway adjoining the property before the expropriation, and there is one more to-day, and the owner over which one railway has obtained a right of way is entitled to other and different damages from a second railway expropriating land alongside the first, the property having already adjusted itself to the first invasion. (1).

EVIDENCE.

On behalf of the suppliants the following witnesses were heard in respect of value and damages.

(1) *Re Billings & C. N. Ont. Ry. Co.*, 15 D.L.R. 918; 16 Can. Ry. Cas. 375; 29 O.L.R. 608 and 31 O.L.R. 335, (reversed in 32 D.L.R. 351).

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E. Lamontagne values the land taken at 15 to 20 cents a square foot, stating it should not be too much for one who needs it; but to give the property any value wharves must be erected. His attention being called to the proviso of redemption in the Crown grant, he says that with such a provision the property is worth less. He would not purchase. It is a great risk for a purchaser.

George Peters values the piece taken at 20 cents a foot and adds that the remaining portion would retain the same value as before, if there was a good crossing. He would not have bought with the proviso, unless it had been for two or three years.

Eugene Trudel values the piece taken at 20 cents a foot; with a crossing the damages to the balance would be greatly reduced.

Charles J. Laberge also places a value of 20c. a square foot.

On behalf of the Crown, *Robert H. Fraser,* the right of way agent of the Department of Railways and Canals, values the Fugere property at 5c. a foot. He bought the two adjoining lots at 5c. a foot for the land, and $3 a yard for the wharf, adding 10 per cent. to that price and interest. He was offered a property at Hadlow, ½ mile higher, at 2½ cents a foot. He did not take it because it was not opposite the Quebec Landing of the "Leonard."

E. Giroux was offered the Bennett property at Hadlow at 2½ cents a foot, and values the Fugere property at 10 cents a foot, and he reckons the damages at 10 to 15 cents on the 17,000 feet. He further adds that the "Fender Crib" is an advantage and not a source of damage.

UNDERTAKING.

A good deal of evidence was adduced in respect of a crossing over the Grand Trunk Railway, and over the Transcontinental, from the King's highway to the suppliants' property. Some of the witnesses even testified on the assumption that such a crossing was impossible. Surveyors were sent to the *locus in quo*, with the result that the following undertaking was made and filed on behalf of the Crown. This undertaking reads as follows, to wit:

"I, the undersigned counsel for the Attorney-"General of Canada, in pursuance of sec. 30, Ex-"propriation Act of Canada, hereby undertake to "build, give or cause to be built and maintain a "crossing for heavy and small vehicles over the "railway constructed on the piece of property taken "from lot No. 314 of the Cadastre of the City of "Levis, Province of Quebec, the property of the "petitioners and expropriated from the petitioners.

"The undersigned counsel, Alleyn Taschereau, "further undertakes to build, cause to be built and "maintain said crossing over the branch of the "Transcontinental Railway, constructed on the "south part of said lot No. 314, and over the "main line of the Grand Trunk Railway Com-"pany to the public road as shown on a plan "attached to the present document, and in accord-"ance with the regulations of the Railway Act."

This crossing, as explained by witness Dick, is of a length of 170 feet, with the following grades: From the King's highway fence to the centre of the Grand Trunk, for 16 feet, there is a grade of one foot in 8.07; then it is level for 8 feet. Thence it falls one foot in 50 for a distance of 13 feet. Then

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it is level for another 8 feet, and thence falls one foot in ten for a distance of 125 feet. All of this appears on plan Exhibit "D."

Such a crossing is a great boon to the property, since it assures a good crossing over the two railways, and gives a perfectly good access to the balance of the suppliants' property. Not only does it reduce the damages, but it is an advantage to the suppliants in respect of the balance of the property.

It is true that the only question put to the witnesses who were asked to testify in respect of the value of this property, that their attention was only called to the proviso of redemption by the Crown, as mentioned in the grant; but on looking over this Crown grant, it will be seen there are a number of other conditions and reservations therein mentioned which would certainly go to again reduce the market value of that property, looked at with such a title. Indeed, on looking over the grant, it will be seen, among other things, that it is made subject to the express conditions of—1st, building, and erecting and maintaining wharves upon this beach lot, within three years. 2nd, in default of erecting such wharves, an additional yearly rent would become due. 3rd, in default of maintaining wharves in certain cases,—exception being made when the property is used for storing logs,—the land reverts to the Crown and the grant becomes void. 4th, the grant is further subject to any right any previous grantee of the land in rear of said beach lot may have. 5th, it is also subject to the delivery of the necessary ground for a 36 foot width road on the whole length of the beach lot. 6th, subject further-

more to the rights, privileges and easements or servitudes of a railway company more particularly provided by 13-14 Vict., &c., &c.

All of these conditions and reservations are in addition to the proviso respecting redemption, and there is no evidence as to whether the original grantee, or his successor in title, ever paid this additional rent or whether or not such additional annual rent ever became due and what use was made of the property.

This property was sold by the Sheriff on the 14th February, 1891, to the Fabrique de St. David de l'Auberivière, for the sum of $195, under the usual legal title in such case made and provided by the Code of Procedure.

On the 10th August, 1912, the said Fabrique sold to the suppliants the same property for the sum of $25,000, of which $7,500 were at that date paid,—the balance, bearing interest at 5 per cent., is made payable on demand upon three months' notice.

Therefore the suppliants in August, 1912, bought the whole of the property at a figure of about 15 cents and a fraction of a cent, or between 15 and 16 cents a foot. The suppliants are manufacturers of men's clothing, and it is testified they had so bought to sell to a lumbering company for which they were promoters. And one of the suppliants heard as a witness testified they never used the property—it yields them nothing, and never did yield them any revenue. The company was formed and it bought a property at Cap à la Madeleine.

The suppliants did not have the property long in their hands before, as we have seen, they were troubled by expropriation. However, there is not

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on the record any clear and direct evidence that their scheme, as promoters, did actually suffer therefrom, and there is no such contention in the suppliants' written argument. Whether or not the suppliants, when they bought, at a figure between 15 and 16 cents a foot, contemplated, as promoters, to ever sell that property to their company at a profit, is not in evidence; but what is quite certain they purchased at a higher figure than property was held in the neighbourhood, as established by the respondent's evidence—and, after all, there is no more cogent evidence than the evidence of sale of property immediately adjoining the property in question and of the same nature.

The suppliants' evidence, as a whole, would not justify any more than 15 cents a foot. Even some of the suppliants' witnesses who, after fixing a value of 15 to 18 cents upon the property, when their attention was being called to the proviso of redemption in the Crown grant, said they would not purchase with such a title.

At the date of the expropriation, the property, with the conditions and reservations enumerated in the Crown grant would hardly be worth 15 cents a foot, the price paid by the suppliants in 1912. Could it be explained from the fact the Fabrique sold to the suppliants with covenants? It may, however, be a fair price for the small piece taken in 1914, as the sale of a small piece always commands a somewhat higher price than where the sale is made for a large one or for the whole property.

The Crown did not choose to exercise this right of redemption under the grant, but proceeded under the provisions of *The Expropriation Act,* therefore

the value of the property is to be determined with reference to the nature of the suppliants' title. *Samson v. The Queen* (1); *Corrie v. MacDermott* (2); *Stebbing v. Metropolitan Board of Works* (3); *Penny v. Penny* (4). It is also a right which is still alive and which the Crown could exercise with respect to the balance of the property.

For the reasons mentioned in the case of *Raymond v. The King* (5), the suppliants are found entiled, under their petition of right, to have their right duly adjusted herein, without fixing the actual value of the rights remaining in the Crown under the grant.

QUESTION OF LAW.

Now it is contended on behalf of the suppliants that the provisos containing the conditions and reservations in the Crown grant are of no effect for the want of registration, in the Registry Office, of their Crown grant. This appears to be a mere forensic assertion in face of and contrary to a clear text of law, as enacted in Art. 2084 of the C. C. I cannot read such meaning in this statutory enactment. This Art. 2084 must be read in its plain grammatical sense, without restriction or addition. And, as is so well said by Mr. Mignault, in Vol. 9, p. 195, Droit Civil Canadien:

"C'est l'ancienneté de ces titres qui les a fait "exempter de la formalité de l'enregistrement. "D'ailleurs, personne ne songerait à les contester."

(1) 2 Can. Ex. 30.
(2) [1914] A.C. 1056.
(3) L. R. 6 Q. B. 37.
(4) L. R. 5 Eq. 227 at 236.
(5) 16 Can. Ex. 1 at 5, 29 D.L.R. 574.

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And Langelier, Cour de Droit Civil, Vol. 6, at p. 324, says: "Les titres originaires de concession "d'un immeuble sont exemptés d'enregistrement, "parce que tous ceux qui acquièrent des droits réels "sont au droit du concessionnaire primitif, et qu'ils "n'ont point d'interêt à invoquer le défaut d'enreg- "istrement."

See also *Corp'n. of Quebec v. Ferland* (1).

If the original title need not be registered, how can it be contended that the charges, or conditions and reservations in favour of the Crown, be subject to such registration? The title is but a unity and the right of redemption and other conditions and reservations form part of the title, which is in its very essence an original title from the Crown, and which is indivisible in that respect. There is no more necessity under the law as enacted, to register in one case than in the other. And, indeed, are not most of these grants made under some reservation or another? Under the law as it stands, the maxim *caveat emptor* obviously applies and the prospective purchaser is, under Art. 2084, put upon his inquiry to ascertain what the original Crown grant contains. He has constructive notice under Art. 2084, and he should search his title. If he does not do so, he has but himself to blame.

Moreover, the Crown, under the grant, retained real rights upon the lot No. 314, and these rights still form part of the public domain, and are clearly set out in the grant and are imprescriptible. The Crown could grant an absolute title, but it chose in this case not to do so,—it retained certain rights in the property.

(1) (1888) 14 Que. L.R. 271; 11 L.N. 364.

These rights so reserved to the Crown under the grant are imprescriptible, since they form part of the public domain; and they do form part of the public domain, since the land in question comes within the ambit of Art. 400 C.C.—"*Banks, sea-shore, lands reclaimed from the sea, ports and harbours,*" and are as such considered as being dependencies of the Crown domain,—and as such, under Arts. 2212 and 2213, they are imprescriptible,—the property being in a public harbour, and a part of the shore or bank of a navigable river—*Nullum tempus occurit regi.* Moreover, the reservation, condition or provision in the grant are rights in the Crown which form part of the public domain and as such are not subject to prescription. *Lachapelle v. Nault* (1), and statutes of limitations are not binding without apt language therefor in the case of the King.

How could prescription run? The grantee and his successor in title were always rightly and legally in possession under the terms and tenure of the grant, and there was never any adverse possession. *Coppin v. Fernyhough* (2).

It is further contended that the sheriff's sale in 1891, to the Fabrique, the suppliants' direct *auteurs,* has discharged the property from all real rights, under the provisions of Art. 781 of C.C.P., and that therefore the reservation mentioned in the provisos of the grant have been discharged. With this contention I cannot agree. This Art. 781 must be read in the light of Art. 2084 C.C., and, moreover, the sheriff's sale, as usual, only transferred and conveyed to the purchaser the rights to the

(1) 6 R. d. J. 3. (2) Brown Ch. Cases, 291, 29 E.R. 159; *Watson's Compendium,* Vol. 1, p. 150.

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property which the judgment debtor might have exercised. Therefore the sheriff's sale only conveyed such rights which originally were mentioned in the grant when the property left the hands of the Crown, under the conditions and reservations therein mentioned. Nothing but what left the hands of the Crown under the grant was or could be sold by the sheriff.

Pigeau, 2nd Ed., Vol. 2, at p. 145, says:

"L'adjudication definitive ne transmet a l'adju-"dicataire d'autres droits à la proprieté que ceux "qu'avait le saisi; si donc il n'etait pas propriétaire "ou s'il ne l'était qu'en partie, ou sa propriété etait "conditionnelle, rèsoluble ou grevée d'usufruit, "l'adjudicataire ne serait propriétaire ou ne le se-"rait que comme l'était le saisi."

Coming now to the fixing of the compensation. There is a claim made for the time the whole lot 314 remained vested in the Crown, that is, between the 9th January, 1913, and the 13th May, 1913, when the Crown abandoned and returned the same to the suppliants. The Crown derived no benefit from the expropriation and did not interfere with the possession of the lot. This property never yielded any revenue to the suppliants, and there is no evidence of any damage suffered by them during the interval in question. Such a claim does not lie in tort, and does not arise out of the violation of a legal right or a contract. There was no invasion of any legal right. For the reasons given in the case of *The King v. Frontenac Gas Co.* (1) no compensation or damages under the present circumstances can be allowed.

(1) 15 Can. Ex. 438 at 442, et seq.; affirmed 51 Can. S. C. R. 594, 24 D.L.R. 424.

The evidence upon the question which may result from the "Fender Crib," although meagre, is controverted. Some witnesses say it is a source of damage, and others say it is an advantage. The Crown has dredged to the east of the crib, which is obviously an advantage to the suppliants' property. Counsel for the Crown, in his argument was willing to allow $500 for the same. No doubt the Crown could not derogate from its grant and erect a pier or wharf in the immediate front of the suppliants' property without due compensation. *North Shore Ry. Co. v. Pion* (1), and *Lyon v. Fishmongers' Company* (2).

It is not the value of the full fee, the whole interest in these 17,000 feet which has been expropriated by the Crown, that has to be ascertained; it is the value of the interest in this land which was vested in the suppliants at the date of the expropriation. There is a separate and distinct interest in the land which is not vested in the suppliants as controlled by their title with the conditions and reservations in question. What is the value of that interest held by the Crown it is herein unnecessary to ascertain; but, what has to be determined is the value of this land under the suppliants' title, at the date of the expropriation, and the court, acting as a jury, must decide.

In order to arrive at the value of the land taken, all the circumstances above mentioned, which it is unnecessary to repeat here, must be taken into consideration. And, in view of the fact mentioned several times, by the witnesses for the suppliants, that their valuation was on the assumption it was im-

(1) 14 App. Cas. 612. (2) 1 App. Cas. 662.

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possible to establish a proper crossing, it must be found that a very good crossing has been given the suppliants, not only over the Transcontinental, but also over the Grand Trunk, and that the Crown is for all time to maintain the same. That is a very great advantage to the property as a whole, which under the provisions of sec. 50 of *The Exchequer Court Act,* should be taken into consideration. This piece of land was expropriated in January, 1914, and the evidence shows there was no difference in the value of that property in 1913 as compared to 1914.

The taking of this strip of 17,000 feet, alongside the Grand Trunk Railway right of way, is no detriment to the balance of the property, under the circumstances. Before the expropriation the tide came up to the Grand Trunk Railway embankment, and since the expropriation of these 17,000 feet, which were formerly submerged at high tide, the Crown has erected an embankment for the railway and given the crossing. If the balance of this property is to be used for warehouse, industrial or other purposes, the fact of having access to an additional railway is another advantage to the property.

If 16 cents a foot were allowed for the part taken it would amount to.....$2,720.00
and if the amount of 500.00
suggested by counsel is allowed in respect of the Fender Crib, that would give a total of $3,220.00

Leaving a large margin still between that amount and the offer by the Crown of $4,250, which was made before the undertaking for the crossing was filed.

The suppliants are in any event entitled to their costs, the Crown having made no offer by the statement in defence. They would also be entitled to costs even if they did not accept the sum of $4,250, at the opening of the trial, because at that time the Crown had not offered the undertaking to build and maintain the crossing, which crossing of itself is of very great value to the suppliants' property. I am, however, of opinion to fix the compensation at the sum of $4,250 the unaccepted offer made by the Crown, but in order to make the compensation more liberal under all the special circumstances of the case, I will allow the ten per cent. for the compulsory taking, making in all the sum of $4,675.

Therefore, there will be judgment as follows, to wit:

1. The lands expropriated herein, namely, the 17,000 square feet taken from the beach lot No. 314, are declared vested in the Crown from the 31st December, 1914.

2. The compensation for the said land so taken is hereby fixed at the sum of $4,675 with interest thereon from the 31st December, 1914, to the date hereof.

3. The suppliants are entitled to be paid the said sum of $4,675 with interest as above mentioned, upon giving to the Crown a good and satisfactory title free from all hypothecs, charges or incumbrances whatsoever.

4. The suppliants are further entitled to the performance and execution of the obligations on behalf of the Crown, set forth in the above mentioned undertaking.

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5. The suppliants are further entitled to their full costs.

Judgment for suppliants.

Solicitors for suppliants: *Drouin, Sevigny & Drouin.*

Solicitor for respondent: *Alleyn Taschereau.*

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

PLAINTIFF;

AND

ELIZA TORRENS AND ROBERT T. BAIRD,

DEFENDANTS.

1917
Nov. 20.

Expropriation—Compensation—Building lots—Loss of Access—Costs.

In an expropriation of building lots by the Crown in the city of Fredericton, N.B., for railway purposes, the owner was held not entitled to special damages for the depreciation in value to the remainder of the land as factory sites because of their being cut off from the proposed extension of a public street. As factory sites the losses, if any, were offset by the advantages.

(2) Notwithstanding the recovery of more than the amount tendered, a party having failed to establish his main claim cannot be allowed full costs of the action.

INFORMATION for the vesting of land and compensation in an expropriation by the Crown.

Tried before the Honourable Sir Walter Cassels at Fredericton, N. B., October 1, 2, 1917.

Hanson, K.C., for plaintiff; *A. J. Gregory*, K.C., for defendant.

CASSELS, J. (November 20, 1917) delivered judgment.

An information exhibited by His Majesty upon the Information of the Attorney-General of

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Reasons for Judgment.

Canada, to have it declared that certain lands the property of the defendant, Eliza Torrens, required for the line of the Intercolonial Railway, are vested in the Crown, and to have the compensation money payable in respect of the lands expropriated ascertained.

Fredericton is a city containing a population of between seven and eight thousand people. While beautifully situate, it is a city which, according to the evidence, has not advanced in growth for a number of years past. There are a few large manufactories located there.

It is quite clear from the evidence that the building of factories at Fredericton is not active. The factories are few and far between, and real estate does not command large values.

Somewhere about 20 years ago, probably a longer period, Mrs. Torrens had a plan prepared by Mr. Beckwith, a civil engineer, who died several years ago. This plan is marked Exhibit "A" in the suit. The plan was never registered. It is in point of fact inaccurate, as I will point out later; but a glance at this plan will indicate the contentions on the part of Mrs. Torrens.

York Street is a street that runs up from King Street on the south passing the lands of Mrs. Torrens, and leads to the Station of the Canadian Pacific Railway in Fredericton. Aberdeen Street was opened in the year 1898. It was opened on the northwesterly side of York Street, extending to York Street, but not extended beyond York Street.

On the plan to which I have referred, Mrs. Torrens divided her property into 3 lots fronting on York Street. Each of these lots contained a front-

age of 53 feet, and extended southerly about 150 feet. She also laid out 5 other lots, Numbers 4, 5, and 6; also 7 and 8. These two latter lots are not shown on Beckwith's plan. In addition to the 8 lots which she owned according to the plan, there was reserved 50 feet on York Street for the extension of Aberdeen Street. In point of fact she had not the 50 feet to reserve. From Mr. McKnight's evidence, the engineer, she had only 35.2 feet.

The railway has expropriated a portion of this so-called reserve for the extension of Aberdeen Street, but have not taken all the land belonging to Mrs. Torrens so reserved. They have expropriated 14,533 square feet, which have a frontage of 33 feet on York Street and running back southerly a distance of 410 feet.

No portion of the lots Numbers 1 to 8 inclusive has been taken by the railway. There is still a strip of land a portion of the so-called reserve between the southern boundary of lot 3 and the lands expropriated by the railway. The measurements in regard to this strip differ. On York Street there are several feet, but as the expropriated piece goes south-easterly it narrows down and is not so wide at the rear of lot 3, as at the front on York Street. I will refer to this more in detail later on.

At present I am endeavouring to explain the situation in order to understand the claim made by the defendant. I may mention that Mrs. Torrens never intended to dedicate the portion reserved by her for the proposed extension of Aberdeen Street. She apparently contemplated that the city would extend Aberdeen Street from York Street south-easterly as far as Regent Street; and her idea was

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that the city would have to expropriate this reserve and pay her compensation for the land so taken for the extension of Aberdeen Street. The city has never done so and Aberdeen Street has never been extended beyond York Street.

The defendant, as set out in her answer, states that the land so taken, referring to that portion of the proposed extension of Aberdeen Street (to which I have referred) formed part of a larger tract of land fronting 209 feet, more or less, on York Street, and preserving the width throughout. The said larger tract of land, owned by the said Eliza Torrens, had been sub-divided prior to the taking of the said land for railway purposes, into 8 building lots, and in the said sub-division provision was made for a portion of the land required for the extension of Aberdeen Street. She alleges that 3 of the said building lots, Numbers 1, 2 and 3, front on York Street, each with a width on York Street of 53 feet, and a depth of 150 feet, and the remaining land fronting on York Street 50 feet, and running back preserving the same width for a distance of 405 feet, was set apart or laid out as a portion of the land required for the extension of Aberdeen Street, the same being in prolongation south-easterly of said Aberdeen Street, and it was the intention of the City of Fredericton to extend the said Aberdeen Street taking in the said strip of land in prolongation of said Aberdeen Street. Five of the said building lots, namely, Numbers 4, 5, 6, 7 and 8, front on the said proposed extension or prolongation south-easterly of Aberdeen Street.

She proceeds to allege that the said lot 3 is bounded south-westerly by the said proposed prolongation

or extension of Aberdeen Street as laid out a distance of 150 feet.

The defendant then states that upon the taking and using of the said land for railway purposes, it became impossible to extend the said Aberdeen Street as was intended, and the said lots 4, 5, 6, 7 and 8 are forever cut off from access to any public street, and have become useless for building lots.

She claims the sum of $6,160. Of this amount she claims for the value of the land actually taken $1,500. She sets up a claim of $500 for the depreciation in value of lot No. 3; $300 for depreciation in value of lot No. 2; $300 for depreciation in value of lot No. 1; and $3,000 for the depreciation in value of lots 4, 5, 6, 7 and 8.

I have had the opportunity of viewing the premises in question with the counsel for the various parties, and I am of opinion that the claim made for the value of the land taken is excessive. I am also of the opinion that any claim for depreciation of the various lots 3, 2 and 1, 4, 5, 6, 7 and 8, has not been sustained by the evidence in the case.

I think there can be no question but that the future of these lots, 4, 5, 6, 7 and 8, can only be for factory purposes, if in point of fact they can be sold to any person desiring to erect factories upon this particular property. Moreover, as I will point out more in detail, Mrs. Torrens must have held the same view, as these rear lots, 4, 5, 6, 7 and 8, had been leased by her for a period of years, ending in the year 1928, for use as coal and wood yards, to be held and used in conjunction with the land held by Mr. Baird fronting on York Street. I will have to deal with the evidence more in detail, but I desire

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to point out that the lease of lot 3, and the leases of the rear lots 4, 5, 6, 7 and 8, all expire about the same time, namely, 1928; and that Mrs. Torrens is now receiving a cash payment for that portion of the so-called reserve for Aberdeen Street expropriated. The balance of the so-called reserve, the property of Mrs. Torrens, has since the expropriation been leased to Mr. Baird for a period of 14 years from the 22nd November, 1914. Mr. Baird has obtained access to these rear lots by means of a lane from York Street. The various leases are renewable on terms set out in these instruments. These rear lots, from 4 to 8 inclusive, as I have stated, can only be of use for factory purposes,—and the construction of the Intercolonial Railway on the land in question has enabled the lessee of these rear lots, 4 to 8 inclusive, to obtain trackage accommodation, a matter of considerable value to the lots; and if there were any damage occasioned by the expropriation of this so-called reserve to the lots, it is more than compensated by the additional value given by reason of the railway facilities.

The evidence of Mr. Mitchell, the Mayor of Fredericton, impressed me as having the greatest weight in regard to the value of the lots taken. He places the area of the land taken at 14,533 square feet. Of this land taken he puts a value on the part fronting on York Street, and running back a distance of 150 feet, of ten cents a square foot. The square feet of this particular piece are 5,700. For the balance in the rear, amounting to 8,753 square feet, he places a value of 5 cents a square foot, amounting to $437.50, or in all $1,007.50. And in my opinion if she receives this amount, together with ten per cent. for

compulsory taking and interest to the date of judgment, she will be well compensated.

Mr. J. Fraser Winslow is the main witness called on behalf of Mrs. Torrens, and there are certain pieces of his evidence which are important. He gives an account of his experience in handling real estate in Fredericton. He is asked the following question:

"Q. Now, from your experience of the selling "values, and what you find purchasers are willing "to pay or that you can command for land in that "vicinity, etc., what would you value the land that "is actually taken per foot?"

He states:

"A. To sell that land to a third party and not "use it for a street, you could not put a price on "it exactly, because it has such an effect on the "other part of the property.

"As I understand Mrs. Torrens' situation, it "is this: The city, or she thought the city at all "events, was compelled to come to her to open "up that street, and she was in a position where "she could make them pay a reasonable price for "the street and at the same time get the benefits "of the opening of the street. For the purposes "of selling it for a street, I would think if she "got seven and one-half cents per foot she would "be well paid for it."

He is asked:

"Q. Suppose Aberdeen Street was extended "through the Torrens property, how far would "it go?"

"A. To Regent Street; about two blocks, or "1,200 feet, from York to Regent Street.

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This distance from York to Regent Street, according to Mr. Winslow, is about 1,200 or 1,300 feet, of which Mrs. Torrens owns 500 feet. I think this is slightly inaccurate.

Then he is asked:

"Q. It would not pay the city to open up the "street just as far as Mrs. Torrens' property?

"A. Not at all.

"Q. To make her lots become in any way valu- "able, it would require the city to extend Aber- "deen Street right through to Regent Street?

"A. Yes, Sir."

I asked him this question:

"Q. As far as she is concerned, it might pay "her to dedicate it as a street, to utilize her other "lots?

"A. There would be no object in opening that "unless they were going to open up the rest of "the land."

It is quite apparent from Mr. Winslow's view that Mrs. Torrens would gain nothing by simply dedicating that portion of the proposed extension of Aberdeen Street for her own lots, in order to enhance the value of these lots from 4 to 8 inclusive, and I agree with his view. Because, as I have stated, in addition to her getting compensation for that portion of the reserve, and these rear lots being only capable of being used for factory or other purposes, she can always give the requisite amount of land off lot 3 taken in connection with what is left of the proposed reserve for Aberdeen Street.

He is asked:

"Q. What is to prevent you taking a piece off "the rear of these lots?

"A. That is under lease; we cannot do that. We "will have to take a portion off lot 3, to get in to "the rear."

He is asked:

"Q. You say they will have to do that; you are "not professing that there is any legal right on "Mrs. Torrens' part to do that?

"A. No. She owns the freehold, and she would "have to get the consent of the leaseholders.

"Q. What is the occupation, so far as you "know of the rear portion of Mrs. Torrens' prop- "erty, the portion which is sub-divided into lots "4, 5, 6, 7 and 8?

"A. A wood-yard and coal sheds.

"Q. Occupied by whom?

"A. By Mr. Robert T. Baird."

He is asked:

"Q. I ask you this question: what in your "opinion within the space of a few years would "these lots 4, 5, 6, 7 and 8 be saleable at or about "$800 each? A. I think so."

In cross-examination he is asked this question:

"Q. All your calculations are based on the hy- "pothesis that a street goes through there, are "they not? A. Yes.

"Q. As a matter of fact, you know there never "was any such street there, except on that paper?

"A. There never was."

When Mr. Winslow places a value of $800 on these lots, it is really valuing them at ten cents per square foot,—and the valuation is based on track-age or a street.

He is asked:

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"Q. But you do know as a matter of fact that "he (Mr. Baird) has now a private siding from "the I. C. R.? A. Yes.

"Q. And that is an advantage to the prop- "erty, supposing he did not have it before, is it "not?

"A. Yes, it is an advantage.

"Q. A very decided advantage? A. It would be "absolutely useless to him without it."

"*Mr. Gregory*—Useless to Mr. Baird?

"A. Useless to Mr. Baird.

"*Mr. Gregory*—That is what gives it its pres- "ent value.

"*Mr. Hanson*—Having access to a siding on "this railway? A. Yes.

"Q. That gives it its present value? A. Yes.

"Q. So that your value of 10 cents per square "foot for the rear of those lots is based on the "idea of having railway communication?

"A. Altogether. Without the railway the lots "would be worth nothing, they might as well be "in the Sahara Desert. But now they are worth "something."

The leases in question are produced. One is dated April 25th, 1907; another, May 9th, 1910; and they run, as I have pointed out, for a long period. Mr. Baird by sub-lease assented to by Mrs. Torrens is the lessee, and I have called attention to the fact that these leases if not renewed will expire in 1928, and at that time if the leases are not renewed Mrs. Torrens can deal with the property in any manner in which she thinks best.

Mr. Mitchell's evidence explains the position of matters. He is asked in regard to the value of the railway trackage: He states:

"I think it is increased in value even if there "is no access from York Street, for warehouse "purposes."

He goes on to point out:

"These lots (referring to the lots from 4 to 8) "were leased by Mr. Baird from the Torrens' "estate, also lot 3 on York Street. He controlled "the lots on the rear and on York Street at the "time the expropriation was made, and he still "occupies the back lots and is provided access to "them."

Mr. Hooper points out that the lots in question are dedicated for factory purposes. He states that for residential purposes it will be of very small value. He is asked:

"Q. Wouldn't the proper way of dealing with "this land be, to start with some eight feet on "what is the proposed street still left below that "lot which was sold?

"A. Yes.

"Q. Wouldn't the best way of utilizing that "property be, to take the fourteen feet, utilizing "what is left of the proposed roadway, and run it "into the property at the rear?

"A. Yes.

"Q. By utilizing that wouldn't that make the "property in the rear more valuable?

"A. I think so.

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"Q. You would get what you would lose, in "making the lane offset by the additional track-"age?

"A. Yes.

And as I have pointed out, in addition to that, she gets the immediate cash sale for that portion of her land reserved for the proposed extension of Aberdeen Street expropriated.

I think she is fully compensated if she receives the amount of $1,007.50 with ten per cent. added and interest to the date of judgment.

I do not think the tender a proper tender. If Mr. Baird has any interest there should have been a separate tender. It is stated by counsel that he makes no claim.

Before any amount is paid to Mrs. Torrens a consent should be filed on behalf of Mr. Baird.

In dealing with the question of costs, it is to be observed that a very considerable portion, if not the greater part of the evidence, is based on the claim put forward in regard to Aberdeen Street, and the injury or loss to Mrs. Torrens by reason of the depreciation of these various lots from 1 to 8, and on the best consideration I can give to the case, and for the reasons stated, I have come to a conclusion adverse to the claim of Mrs. Torrens.

In view of this I think Mrs. Torrens ought not to be allowed the full costs of the action, although she recovers something more than the amount of the compensation tendered. She certainly would not be entitled to the costs of the trial so far as they were enhanced by the abortive attempt to establish damages arising from the fact that the expropria-

tion prevents any extension of Aberdeen Street. If the costs were taxed there would have to be a set-off between the items relating to the issues upon which each party succeeded. I think that the sum of $50 will fairly represent the difference that Mrs. Torrens would be entitled to if such a set-off were made.

There will be judgment in favour of Mrs. Torrens for $1,007.50 with the usual 10 per cent. added thereto, together with interest at the rate of 5 per cent. per annum from the date of the expropriation. She will also have costs fixed at the sum of $50. There will be no costs to the plaintiff.

Judgment accordingly.

Solicitors for plaintiff: *Slipp & Hanson.*

Solicitors for defendant: *Gregory & Winslow.*

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HIS MAJESTY THE KING, UPON THE INFORMATION OF THE ATTORNEY-GENERAL OF CANADA.

PLAINTIFF,

AND

HENRY MONTGOMERY-CAMPBELL and HERBERT MONTGOMERY-CAMPBELL, and THE NORTHFIELD COAL COMPANY, LIMITED,

DEFENDANTS.

Expropriation—Compensation—Coal handling site—Lease—Access.

In an expropriation of land leased as a coal-handling site the owners were awarded compensation for the value of the land taken and for the injurious affection to the remainder, with means of access thereto, together with a 10% allowance for the compulsory taking, without regard to the special use of the land, and the lessees were allowed for the loss they have been put to from the interference with their business and the necessary removal of their weigh-scales to another site.

INFORMATION for the vesting of land and compensation in an expropriation by the Crown.

Tried before the Honourable Mr. Justice Cassels, at Fredericton, N. B., October, 3, 4, 1917.

Hanson and *J. B. M. Baxter, for plaintiff; A. J. Gregory* and *J. J. F. Winslow,* for defendants, Montgomery-Campbell; *M. G. Teed,* K.C., and *Jas. Friel,* for Northfield Coal Co.

CASSELS, J. (December 12, 1917) delivered judgment.

The evidence in this case was taken at the same time as the evidence in the case of *The King v. Henry Montgomery-Campbell* and *Herbert Montgomery-Campbell.* The information was exhibited to have it declared that certain lands expropriated are vested in the Crown, and to have the compensation ascertained.

The defendants, Henry Montgomery-Campbell and Herbert Montgomery-Campbell, are the owners in fee of the lands in question. They leased the property to their co-defendants. The date of the lease is July 18th, 1913, and it is a lease for a period of 21 years. A right of purchase is given by the Montgomery-Campbells to their co-defendants The Northfield Coal Company, Limited, to purchase the properties in question at any time within ten years from July 1st, 1913, for the price of $1,000. This right has not been exercised, although it is stated that the coal company contemplated purchasing.

The land prior to the expropriation contained 12,523 square feet. The railway have expropriated the whole of the lands fronting on Aberdeen Street. According to Mr. Winslow, 7,225 square feet have been expropriated. According, however, to Mr. Ross Thompson, who is a civil engineer, there is left in the property after the expropriation some 7,200 feet.

The plan known as the Colter plan, which is marked Exhibit "E," in the case, shows the situation of the property as it existed before and after the expropriation. It is admitted that the coal shed of the coal company is partly erected on lands belonging to the Canadian Pacific Railway. It has

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been erected since the year 1913, and apparently with the consent of the railway.

The Crown offers by the information the sum of $1,278 together with interest from October 2nd, 1914, the date of the filing of the plan, up to the date of tender, namely, June 14th, 1916.

At the trial it was agreed between counsel that the sum of $1,000, the price at which the option of purchase was fixed, should be accepted as the market value of the land, without regard to the erections thereon, or to any special value it might have to the lessees for the purposes of their particular business.

The Montgomery-Campbells, by their defence, claim the sum of $2,970. They claim for the value of the land taken under the lease $650; for severance $150; in all $800. They also made a claim for Aberdeen Street which was not entertained at the trial, the parties being left to any independent proceedings that they might be advised to take as against the city in any action to which the city would be a party.

The contention is put forward that when the Crown expropriated part of Aberdeen Street, it ceased to be any longer a street, that there was a reverter to the grantors, namely, to the Campbells. On the present record the defendants, the Montgomery-Campbells, claim that by reason of the expropriation the lands, the value of which have been agreed upon as being $1,000, have been depreciated by the sum of $800 leaving what is left as of a value of $200 only.

The lessees, The Northfield Coal Company, Limited, claim by their defence the sum of $6,345, made up as follows:

A. Value of leasehold interest in land actually taken	$1,000.00
B. Injurious affection to the residue of the leasehold lands not actually taken	1,000.00
C. Value of coal shed	765.00
D. Value of scale-house	100.00
E. Value of scale installed	235.00
F. Loss of business site	1,000.00
G. Damages for loss of business	2,000.00
H. Removal expenses, etc., and interest	245.00
	$6,345.00

By the information it is stated in paragraph 6, "that His Majesty the King is willing to provide "and construct and hereby offers to provide and con- "struct a good and sufficient crossing for horses, "teams and vehicles over the said lands so taken as "aforesaid, for the use of the defendants or such of "them as may be found entitled, his, it, or their "heirs, successors and assigns,"

The information was filed on September 9th, 1916, and for the first time the offer of this crossing was given to the defendants. Without a crossing the defendants would not have access to their premises.

At the trial of the cause, it having been pointed out that one crossing would not be sufficient as coal carts entering the premises do not have room to turn, the Crown made an offer of two crossings at any point to be designated by the defendants, the effect of which would be to enable coal carts to enter by one crossing and depart by the other. I suggested that the undertaking should be in writing and signed, and filed as required by the statute. A written undertaking has been placed on file.

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The Canadian Pacific Railway siding is used in connection with the coal shed as well as with the Everett property situate alongside.

In reference to this plan Exhibit "E" there is some confusion in regard to the lettering, but there is no difficulty when the distances are looked at. For instance, from the iron pipe to the letter marked "D," as it appears on the plan, the distance is 155 feet; the distance on the railway is 123 feet; and the distance on the other side from the iron pipe is 109 feet.

As shown by the plan in connection with the coal shed, the defendants had a "scales house" for the purpose of weighing their coal, this being raised about 3 feet, the idea being to prevent flooding and also freezing during the winter. Having this scales house and scales elevated require approaches on both sides, which are practically of about 28 feet on the inner side, and 24.8 feet on the street side. The railway, as appears on the plan, have cut off the greater part of the scales house, rendering it useless.

The contention was raised by the counsel for the Crown that the company did not require a weigh-scales at their premises, there being a provision in the city's by-laws requiring all coal to be weighed on the city's scales prior to delivery. I do not think the contention well founded. The defendants were entitled to carry on their business in a manner which they considered best in their own interest, and I think according to the evidence of Mr. Baird that they were right in having their own scale-house.

It is quite clear that a scale-house can be erected elsewhere on the premises as left after expropria-

tion. It is not necessary to have it higher than one foot, which would require short approaches. This scale-house can be constructed of cement, and the scale removed as well as the building which protects it. It is a mere matter of expense. It will probably cost, according to Mr. Mitchell, the sum of $300. The rail of the railway is only 12 inches above the surface of the lot. This is shown by Mr. Mitchell, the mayor, who measured it the night previous to the giving of his evidence, and would not be a serious grade for teams.

The coal shed is in precisely the same position now as it was prior to the expropriation. The only interference with the property is the cutting off the portion of the land fronting on Aberdeen Street, and the destruction of the scales-house.

There was considerable evidence given at the trial in regard to the difficulty of loading and unloading from the Canadian Pacific Railway siding, but whatever difficulty existed after the date of the expropriation also existed prior thereto. There has been no change in the facilities for carrying on the particular business there, other than the frontage on Aberdeen Street taken and the destruction of the scales-house, to which I have referred.

I think it was the duty of those acting for the Crown to have made the offer of the crossings at the time the land was taken, and it may be that technically the Northfield Coal Company, Limited, would not have the right to cross the lands so expropriated. I think, however, had the lessees really contemplated the continuance of the business they would have approached the Crown officers, and no doubt would have acquired the necessary crossing.

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They neither did that nor did they investigate to find out whether other suitable premises could be obtained. I think the evidence shows that there would be no difficulty in obtaining such premises together with trackage. Any new site may not be as favourably situate for the purposes of their business as the present one. To my mind there are certain facts that have to be kept in mind. In the first place, as I have mentioned, the City of Fredericton is a small place, the whole population being under 8,000. The coal supply is from the Minto mines, and is usually sold direct, according to the statement of the witness to which I will refer to, the Intercolonial Railway being the largest purchaser.

It is quite apparent from the evidence which I will quote of the officers of the coal company that they had not intended to enter upon an extended business in the City of Fredericton. The business done during the portions of the years 1913 and 1914 is comparatively small, and a certain portion of it was not loaded into the shed.

I can quite understand that if the defendants intended or contemplated a large and extensive business the taking away of this portion of their land might diminish it to such an extent as to prevent them from so extending their business to a great extent. Had, however, such been their intention, the moment they made up their mind to stop carrying on business at the site in question they would have looked out for another site.

Mr. James Barnes is president of the Northfield Coal Company, Limited. He is asked:

"Q. How long has the Northfield Coal Com-
"pany been operating?

"A. We commenced operations I think in 1907.

"Q. Where is your mine?—A. Minto, Kent
"County.

"Q. You have been doing business in Freder-
"icton?

"A. Yes.

"Q. For how long?—A. I think we purchased
"this property in connection with the Minto prop-
"erty in 1913."

He then refers to the lease with the option of purchase.

"Q. Before that had you been doing business
"in Fredericton selling coal?"

"A. Not to a very great extent.

He states that the business in Fredericton was managed from the office in Minto through an agent. He then proceeds to state:

"That when the railway put down a trial line,
"we pulled up stakes, when we saw what was go-
"ing to happen, after building up the properties.
"Then we waited developments, and did very lit-
"tle. The next thing was, the government expro-
"priated. We were advised not to interfere with
"it at all then."

He says:

"Q. Do you remember when it was that you
"found that it (referring to the railway) was laid
"out through your land?

"A. I could not give the exact date.

"Q. But when you did find out, you stopped do-
"ing business?

"A. We dropped right out.

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He is asked:

"Q. Have you yourself set any damages, have "you any figure in your mind as to how much you "are damaged?

"A. No. I cannot say offhand now. The sec- "retary-treasurer might be able to do so."

In answer to a question he states:

"We were holding that as part of our mining "property in Minto. We used this as a safety "valve. We got rid of any demurrage. If a man "did not call for his coal for a day we shipped it "on here."

He also states that they never used the coal shed to its full capacity. "I think we could put 8 or 10 cars in it."

I do not think this is correct. A car holds an average of 35 tons. Lately they have been loading them up to as much as 40 tons, probably on account of shortage of cars; but, I think it clear that it would never have paid them to fill the coal shed right up to its full capacity. The expense would be too great, Mr. Baird points that out. Barnes is asked:

"Q. You were not doing a very active coal busi- "ness in the summer of 1914?

"A. Where?

"Q. Right there, at that coal shed?—A. We did "not do very much.

"Q. Did you do anything during the whole sum- "mer, from the time the warm weather came in?

"A. We kept this here, to take the surplus.

"Q. So you had no surplus during the summer "of 1914?

"A. We did not send it there."

And he goes on to point out that after the war was declared the Minto mines cannot supply the demand. "There has been a good demand."

"Q. Did you ever try to provide another loca-
"tion, did you ever seek another location?—A.
"No, I did not."

James M. Kennedy was the secretary-treasurer of the Northfield Coal Company. He says:

"The mines are at Minto, in Kent County."

"Q. And carry on operations there?—A. Yes.

"Q. Soft coal, bituminous coal?—A. Yes."

He is asked by his counsel:

"Q. Tell me, what induced you to open this
"plant in Fredericton?—A. We had two reasons.
"One was, the irregularity of the I. C. R. orders.
"Some weeks there would be 120 or 150 tons, and
"the next week 200. Then it would drop to 150,
"while our labour was pretty nearly the same,
"especially during the winter season, and we
"thought by having a shed over here that when
"we got stuck with a car of coal on our hands
"which we could not put in to the I.C.R. we could
"slip it over here and retail it. The next was that
"we could obtain better prices than the I.C.R. was
"paying at the time."

He refers to the cost of the buildings, but places a much higher figure upon them than what they cost.

Mr. Moses Mitchell, who constructed them, states their cost.

Mr. Kennedy of the company states:

"Q. When did you commence?—A. The first car
"came here in November, 1913, or part of a car.

"Q. That autumn or that year?—A. That year,
"1913.

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"Q. You continued during that winter, did you?

"A. We continued during that winter, and up "to the following June. In that time we sold "over 800 tons, between 800 and 900 tons I think."

He is asked:

"Q. How much coal did you ship in that period?

"A. We shipped 893.78 tons.

"Q. That was sold and disposed of, practically "all of it?—A. All here.

"Q. On these premises?—A. Through this "agency."

"Q. But on these premises?—A. I said through "this agency we had established here."

"Q. Was it through these premises?—A. Yes, "through these premises, sure, as far as is known "to me. It was sent to Mr. Baird's order, our "agent."

Now Mr. Baird points out that a certain portion of the coal never went through the premises at all. The profits of the company were 66 cents, apparently, per ton over and above what they were getting in Minto.

He is asked:

"Q. You never tried to get another site?

"A. We never tried to get another site; the "one we had pleased us."

Taking the evidence of the other witnesses I am of opinion that with the two crossings, and with the scale-house rebuilt on a different site on their premises, the Northfield Coal Company, if they wish to, can carry on all the business that can be done in Fredericton; and it has to be borne in mind that

there are other coal agencies furnishing coal to the people in Fredericton.

Mr. Baird, who was their agent, shows the situation of the property. He is asked:

"Q. Assuming that you had two crossings con-"veniently located across the railway, is there "any trouble to utilize that property as a coal "shed?

"A. It could be used, I think, in a small busi-"ness, but its usefulness for a big business is "done.

"Q. Was there ever any big business done "there?

"A. No. There was a great chance for a big "business."

He also goes on to point out there were other sites to be obtained, although in his opinion the one in question was the best.

He also points out what I have previously referred to, that the only difference in carrying on the business as formerly would be the crossing of the railway and the elimination of the scales.

He refers to the area left as about 5,200 square feet, differing from the measurement of Mr. Ross Thompson referred to.

I asked Mr. Baird the following question:

"Q. Coal in Fredericton would be dealt with the "same as anywhere else. Suppose I order 10 or "20 tons of coal; the coal would come on the rail-"way, it would go to the carts, be taken to the "weigh scales and then to my house?

"A. Half of it might be sold that way. The "shed is there for transient orders coming in, and

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"for the people who want coal during the winter. "If I had kept it in the business alone, I would "have unloaded a lot into the carts."

"*Mr. Friel*—Off the track?—A. Yes.

"HIS LORDSHIP—If you got an order, you would "put the coal right into the cart and send it to the "house?

"A. There are good facilities for that yet, "there."

He states further in reference to the site that "It "was an ideal site before. Of course it is a pretty "good site yet."

Mr. Mitchell refers to the cost of the buildings and shows, for instance, that the cost of the coal shed which the defendants value at $765 in their defence, practically was about less than half. His idea of the cost of moving the buildings and the scales would be in the neighborhood of $1,000. In regard to the value of what is left, he says, that if the measurement given by Mr. Ross Thompson at 6,700 square feet is correct, what is left would be worth $500—if there are 5,225 feet left, at $400 placing the value at 8 cents.

I am of opinion that if the defendants are allowed $500 for the value of the land taken, and the injurious affection to the balance, without regard to the special use, they will be amply recompensed for what has been taken.

As I have stated, it was agreed that the value of the land without reference to the present use, or without regard to the buildings is $1,000.

A question arises in regard to the disposition of this $500. It seems to me that the defendants could agree among themselves. The Coal Company are under a covenant to pay the rent, which is $60 a year. If they continue to be tenants they would be entitled to the interest on this $500 during the currency of the lease. If they subsequently become purchasers, they would have to pay the $1,000 under the terms of their agreement, but they would receive the $500 part of the value of the land which has been turned into money. If the parties cannot come to an agreement, perhaps a statement of the views of the counsel could be forwarded to the registrar.

I think that as far as Henry Montgomery-Campbell and Herbert Montgomery-Campbell are concerned, they are entitled to a judgment for $500, to which I would add ten per cent. for compulsory taking, making in all $550, to be dealt with as I have suggested, and they should get their costs of the action.

The undertaking as to the two crossings should also be inserted in the formal judgment.

In regard to The Northfield Coal Company, I think if they are allowed $1,000 for all the loss they have been put to, and for the interference with their business, and their having to place their scales upon a different site, they will be amply compensated,—and I give judgment for The Northfield Coal Company, Limited, for the sum of $1,000, and interest to the date of the judgment. I think this will cover every reasonable claim, including any sum

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for compulsory taking if they are entitled to it. They are also entitled to their costs of the action.

Judgment accordingly.

Solicitor for plaintiff: *R. B. Hanson.*

Solicitors for defendants, Montgomery-Campbell: *Gregory & Winslow.*

Solicitors for Northfield Coal Co.: *M. & J. Teed.*

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

PLAINTIFF,

AND

THE HALIFAX ELECTRIC TRAMWAY COMPANY, LIMITED, a body corporate, and THE EASTERN TRUST COMPANY, a body corporate, Trustee,

DEFENDANTS.

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Feb. 6.

Expropriation—Gas and electric plant—Valuation—Agreement.

The Crown having expropriated land used as a site for a gas and electric plant, an agreement was entered into which provided for a complete reinstatement of the owners on a new site.

Held, that in ascertaining the value of the lands agreed to be conveyed to the owners by the Crown, the value to be ascertained under the terms of the agreement was not the value to the grantors, but the value to the owners; that the owners were entitled to compensation only according to the terms of the agreement, with interest on the unpaid amount from the time of surrendering possession of the lands expropriated; but they could not claim for the additional value of the old site as compared with the new site, in regard to the increased cost of erections and operations, nor for the speculative value of the land.

INFORMATION for the vesting of land and compensation in an expropriation by the Crown.

Tried before the Honourable Mr. Justice Cassels, at Halifax, N.S., September 11, 12, 13, 14, 1917.

T. S. Rogers, K.C., and *T. F. Tobin, K.C.,* for plaintiff.

H. A. Lovett, K.C., and *L. A. Lovett,* K.C., for defendant.

CASSELS, J. (February 6, 1918) delivered judgment.

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An information exhibited on behalf of His Majesty the King by the Attorney-General of Canada to have it declared that certain lands referred to in the information are vested in His Majesty, and to have the compensation therefor ascertained.

The properties in question comprise a parcel of land in the City of Halifax upon which were erected the gas plant and electric light plant, and also a portion of the Halifax Tramway Company's plant. The Tramway organization operates the gas plant and supplies gas to the City of Halifax; they also operate the electric tramway and the electric light company, and furnish electric light to the people of Halifax.

At the trial counsel for the plaintiff and defendants kindly offered to furnish a statement showing the dimensions in square feet of the property expropriated, also of the property owned by the defendants and utilized for the purposes of their new plant—also the property purchased by the Crown on the west side of Water Street to be conveyed to the defendants, and also of the land part of which was known as the Government wharf property and conveyed to the defendants.

Owing to the terrible disaster which occurred in Halifax there was delay in furnishing this memorandum which was received by the Registrar on February 4th, 1918. I will append a copy of this statement to these reasons. *Infra,* p. 73.

I may add that my reasons for judgment were prepared long prior to the Halifax catastrophe and I have not been influenced in any way by what occurred since.

The Crown by the information tendered to the defendants the sum of $364,923. The details of this

tender are set out in the 7th paragraph of the information.

The defendants by their statement of defence claim the sum of $901,812.84.

The particulars of their claim are set out in the defence. In the particulars, Sec. "K." sets out:

"The property expropriated has for some "seventy-five years been utilized as the site of the "gas works, and from its character, size and loca- "tion has special adaptation to the conduct of the "defendants' undertaking of supplying gas to the "citizens of Halifax. By reason of the long user, "above mentioned, the defendants are not subject "to injunction or damage suits by adjoining pro- "prietors on account of the emission of fumes or "noxious gases incident to the carrying on of the "undertaking, but under the laws of the Province "of Nova Scotia, as interpreted by its Supreme "Court, the defendants are liable to be enjoined "at the suit of neighbouring proprietors, if they "conduct these operations on a new site."

This claim need not be considered, as on the argument of the case, Mr. H. A. Lovett stated that they had come to an arrangement in regard to this claim, and it was unnecessary for the court to consider it.

The defendants set out the following:

"So far as the defendants are aware at the "present time it will be impossible for the defend- "ants to secure another site in a location suffi- "ciently near the centre of the city to enable the "undertaking to be successfully carried on as a "business enterprise, except on payment of very "large sums to neighbouring proprietors for the

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"conveyance of their properties, or for prospec-
"tive damage to their properties."

"The defendants are willing to co-operate with
"the Crown in the selection of a new site, but
"claim that they are entitled to be indemnified by
"the Crown against loss and damage to their busi-
"ness by reason of the plant being located on such
"new site."

The expropriation plan was registered on February 13th, 1913. The representatives of the Crown and of the defendant company acted together in a friendly manner in endeavouring to procure new premises for the defendants in lieu of the premises expropriated by the Crown, and eventually the new site upon which the present plant is erected was procured.

In order to reinstate the defendants it was eventually agreed between the representatives of the Crown on the one part, and the representatives of the company on the other part, that the company should utilize the property owned by them not expropriated, and that the Crown with the object of reinstating the defendants upon lands sufficient for the operation of their business should convey to the company a certain piece of land the property of the Crown forming part of what is known as the old lumber yard in the City of Halifax, and should also procure a further piece of land on the west side of Water Street, these two parcels of land being contiguous to the lands of the company not expropriated, the three parcels containing the square feet shewn in the memorandum annexed.

The information was filed on March 29th, 1915, and the statement in defence on July 14th, 1915.

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On August 14th, 1917, and shortly previous to the trial, an agreement was arrived at, as follows:

"1. It is agreed between the parties that all "items of compensation at issue in this action are "settled as follows, subject only to determination "by the Court of the matters provided for in "paragraphs 3 and 4 hereof, and that His Maj- "esty the King shall pay to the defendant, The "Halifax Electric Tramway Company, Limited, "the following sums, viz.:

"(a) As the value of all the buildings upon the lands described in paragraph 3, sub-sections 4, 5, 6, 7, 8, 9, 10, 11a, 11b of the information the sum of	$ 17,500.00
"(b) As the value of the car barn, storage shed and buildings upon the lands described in paragraph 3, sub-section 12 of the information the sum of	20,000.00
"(c) As the value of the gas plant, consisting of coal and coke handling plant, retort benches, carburreted water gas set, scrubber, condenser, gas blowers, annular condenser, exhausters, tar extractor, washer, scrubber, purifiers, oil tanks, stationmeters, pipes and valves in yard, steam and feed pipe, etc., described in paragraph 4, sub-section "A" of the information, the sum of.....	152,460.00
"(d) For the cost of removal of auxiliary machinery, the sum of.....	500.00

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"(e) As the value of the gas plant buildings, consisting of meter repair shop, wagon shed and storeroom, blacksmith shop, oxide shed, boat house, coal store, drip and valve houses attached to large and small holders, retort house, purifying house, exhaust and scrubber house, condenser house, meter house, oxide building, chimney and fences, described in paragraph 4, sub-section "B" of the information, the sum of	82,145.00
"(f) For expropriation of tracks, Pleasant Street to Point Pleasant Park, the track extending south from Morris Street to car barn or storage shed, including tracks in shed and yard, described in paragraph 4, sub-section "C" of the information, the sum of.....	23,695.00
"(g) As compensation for increased cost of operation of new tracks, the sum of.....	7,750.00
"(h) For cost of increased track and overhead construction, the sum of	13,835.00
"(i) For cost of connecting new gas plant with gas main, not included in tender.....	6,867.25
"(j) For cost of additional expenses to Tram Company in carting coal pending completion of new premises, not included in tender.....	1,500.00

"(k) For gas plant machinery not included in tender, consisting of that part of the boat house equipment, blacksmith shop and testing laboratory not removed by defendant and expense in removing part taken away.....	2,500.00
"(l) The value of the wharf structure on the lands and lands covered with water, described in paragraph 3, sub-sections 1 and 2b of the information	5,000.00
Total.....	$335,752.25

"2. The defendant, The Halifax Electric Tramway Company, Limited, admits having received from His Majesty the King the sum of $250,000 on account of compensation payable herein, as follows, viz.:—

On the 21st December, A.D. 1915, the sum of	$100,000.00
On the 15th March, A.D. 1916, the sum of	50,000.00
On the 31st May, A.D. 1916, the sum of	50,000.00
On the 28th November, A.D. 1916, the sum of	50,000.00
Total.....	$250,000.00

"3. The following matters referred to in the in- "formation are to be tried and the amount of "compensation to be paid by the Crown de- "termined by the Exchequer Court, subject

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"to the rights of appeal by either party, viz.:

"(a) The value of all the lands and lands covered with water of the defendant (exclusive of buildings and fixtures and of the wharf structure) expropriated by the plaintiff under the provisions of the Expropriation Act, Ch. 143, R.S.C., 1906.

"(b) The compensation indemnity and relief, if any is allowed by the Court, to which the defendant may be entitled under paragraph 2, sub-paragraph "K" of the defence herein."

"4. (1) The parties also agree that the value to "the defendant of the lands on the west side "of Lower Water Street and south side of "Fawson Street, in the City of Halifax, "described in a certain undertaking given "by His Majesty to the defendant, The "Halifax Electric Tramway Company, Lim-"ited, on the 22nd day of December, A.D. "1916, whereby His Majesty undertook with-"in a reasonable time after the questions at "issue herein are finally determined to con-"vey or cause to be conveyed the said lands "to the said defendant, The Halifax Electric "Tramway Company, Limited, shall be de-"termined and disposed of in this action, "and that the amount for which His Majesty "is to receive credit by reason of providing "and conveying said lands to the defendant, "The Halifax Electric Tramway Company, "Limited, is to be finally settled and deter-"mined herein subject to the rights of appeal

"by either party. Proceedings to be amend-
"ed accordingly.

"(2) Nothing herein contained shall prejudice "any claim which the defendant, The Halifax "Electric Tramway Company, may have for "compensation for the value and cost of de- "molition of the two car barns on the east "side of Water Street, property of defendant, "to enable the said defendant to use land of- "fered by Government for its gas plant, "which claim for compensation, if any, is also "to be adjudged in this action."

Sub-sec. "B" of paragraph 3 of the agreement need not be considered, as it refers to the defence, as previously indicated, withdrawn from my consideration. I think the agreement in question shows an extremely liberal offer on the part of the Crown. It is practically recouping the defendants the full value of the plant, and also compensating them; and paying them other sums, such, for instance, as compensation for increased cost of operation of the new tracks, the cost of increased track and overhead construction, etc.

The effect of this agreement is that all matters in controversy between the parties have been agreed upon, with the exception of clause 3 of the agreement, namely, the value of all the lands and lands covered with water of the defendants exclusively of buildings and fixtures.

And secondly, what is covered by clause 4 of the agreement, that is the value to the defendants of the lands procured by the Crown and agreed to be conveyed to the defendants, to which I have referred.

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It will be noticed that there is a difference in regard to the basis for ascertaining the value of the lands which have been expropriated, and the basis upon which the lands procured by the Crown and conveyed to the defendants. In the former case the value of the lands expropriated is to be ascertained, and it has been pressed with force by counsel for the defendant that that value is the value to the defendants to be ascertained according to the principles settled by such cases as *Corrie v. MacDermott* (1); *Cedars Rapids v. Lacoste* (2); *Pastoral Finance v. The Minister* (3); *Lake Erie v. Schooley* (4); and I may refer to a very important case not reported in the regular reports, but to be found reported in full in *Hudson* on Compensation (5); *Metropolitan & District Railway Co. v. Burrow.*

Later on when I discuss the value of the lands expropriated I will deal with this contention of the defendants.

In ascertaining the value of the lands agreed to be conveyed to the defendants by the Crown the value to be ascertained is not the value to the grantors, but it is the value to the company. For instance, a portion of these lands was at the time the Crown procured them covered with buildings. These buildings were of no value to the defendants. They necessarily had to be torn down, and the only offset the Crown is entitled to would be an offset for the value to these defendants for the purposes of their new works. I will have to give my views later on when dealing with the value of these lands.

(1) (1914) 83 L.J.P.C. 370 at 372.
(2) [1914] A.C. 569; 16 D.L.R. 168.
(3) 84 L.J.P.C. 26 at 28.
(4) 53 Can. S.C.R. 416; 30 D.L.R. 289.
(5) (1905) Ed.

The Crown, it will be noticed by the agreement which I have recited in full, has at various times advanced sums of money to the defendants, amounting in all to the sum of $250,000.

The defendant taking advantage of the large sums of money agreed to be paid by the Crown, set to work to rebuild their plant, and with a much larger and more efficient plant upon the new site, the Crown in the meantime allowing them to remain in occupation of their old premises so as not to have their business interfered with.

In the report of the president and directors of the Halifax Electric Tramway Company, Limited, for the year ending December 31st, 1915, the directors report as follows:

"Considerable sums have been expended during "the year on capital account in order that the "company would be in a position to meet the "growing demand upon its services. The princi- "pal items of expenditure under this heading are "new cars, and electrical equipments for the "same, extensions of electric lighting system, gas "mains, and additions to repair shop building. "Work has been started on the construction of "the new gas plant to replace the old plant which "has been expropriated by the Dominion Govern- "ment. *Upon the completion of this work the "company will have the most modern and econ- "omical plant obtainable.*"

An analysis of the schedules showing the increased earnings from the years 1904 to 1915, shows a steady increase in the volume of their business. The report for the year 1916 might also be referred to as showing an increase in the business for the year

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1916 over that of 1915, and no disruption of their business caused by the movement to the new premises.

The first question that I am called upon to determine is the market value of the lands expropriated by the Crown. I will deal subsequently with the claim put forward on behalf of the defendants' counsel for the added value, namely, the special value to the defendants over and above the market value by reason of the lands expropriated having a greater value to the defendants than the lands upon which they have been reinstated.

The only evidence called on behalf of the defendants was the evidence of Henry Roper. He is called not as an expert in land values. At the opening of his evidence, Mr. Lovett states as follows:

"I am examining Mr. Roper, my Lord, as to the "estimates on the buildings. Perhaps his qualifications will be admitted?" Counsel for the Crown stated "Certainly."

If it were necessary to qualify Mr. Roper as an expert on land values, no evidence of his qualification as such has been given.

During the progress of his evidence, having testified to the value of the buildings, he is asked as follows:

"Q. Assuming that those buildings were on that "property (referring to the property expropriat- "ed) with no machinery in them, and with no bus- "iness carried on there, with no equipment in "them, what would you say would be the fair "market value in 1913 of that property?

"A. As a water site property?

"Q. Yes. A. Including the wharf?

"Q. The whole of the land, land covered with "water, wharves, and buildings empty?

"A. Including the wharves?

"Q. Yes. A. 75 cents a foot.

"Q. Including the buildings as well, without "any equipment in them? A. I would say the "land was worth about 75 cents per foot, and "those buildings $60,000."

I called Mr. Lovett's attention in the following way:

"HIS LORDSHIP—Supposing before it comes to "a conclusion that the market value is the only "thing that is open in regard to your lands, I "don't think you gave any evidence in regard to "that.

"*Mr. Lovett*—Our evidence is in, as far as we "intend to give any evidence in that respect."

Dealing with the market value of the lands expropriated apart from the special claim put forward on the part of the defendants I am of opinion that the values placed upon it by Mr. Clark and his associates is the full value, and also a very liberal value.

Mr. Clark places a value on a portion of the lands of 50 cents per square foot for the land, and 30 cents per square foot for that portion covered with water.

Mr. Lovett apparently was himself impressed with the liberality of his valuation, as when I mentioned it, the following will be found reported in the evidence:

(His Lordship is referring to Clark.)

"HIS LORDSHIP—His whole evidence is given as "to the value of the land. The 50 and the 30 are "for the land without the buildings.

"*Mr. Lovett*: *A good market price,* my Lord."

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"HIS LORDSHIP—That is what the Crown of-
"fered?

"*Mr. Lovett*: Yes, my Lord."

The property referred to in the evidence is immediately adjoining the property that was in question before the court in the case of *The King v. Wilson* (1). These values were allowed in that particular case, and on appeal to the Supreme Court of Canada this case was affirmed.

I think Mr. Clark and his associates have, as I have stated, made a liberal offer. The perusal of his evidence would indicate that he and his associates valued the land as if there was a business being carried on upon it. As to the value of the other lands expropriated, I accept Mr. Clark's valuation, and will deal later with any special claim.

If the sum allowed by Mr. Clark and his associates, namely, $73,271, as shewn by the attached memorandum, is allowed, I think that would compensate the defendants amply for the value of the lands expropriated based upon market value.

The next question arises as to the value to the defendants of the lands agreed to be conveyed to the defendants. The agreement in question reads: "that

> "the value to the defendants * * * shall
> "be determined and disposed of in this action,
> "and that the amount for which His Majesty
> "is to receive credit by reason of providing and
> "conveying said lands to the defendants is to
> "be finally settled and determined herein, etc."

I will deal first with the lands on the west side of Water Street. These lands embrace an area of 39,180 square feet, and upon them were erected buildings.

(1) 15 Can. Ex. 283, 22 D.L.R. 585.

Mr. Clark in his evidence states that he paid for these lands the sum of $65,750 for the whole block. He stated, however, that the Government were held up and that the fair market value for these particular lands would be $45,000. That includes all the property on the west side of Water Street. He is asked by Mr. Rogers, counsel for the Crown:

"Q. Making due allowance for the value of the "buildings, in accordance with your opinion and "judgment, what would the value of the land be?

"A. I valued the buildings at about $25,000.

"Q. What would the square foot-value of the "land be without the buildings?

"A. About 50 cents, roughly speaking.

"HIS LORDSHIP—About $20,000?

"A. About $20,000 for 39,180 feet of land.

"*Mr. Rogers*—On the basis of $45,000?

"A. On the basis of $45,000."

This land was being acquired by the defendants for the purpose of reinstatment; and as I have pointed out they are to be charged with the value of the land to them. It is manifest that the buildings were of no use and would have to be demolished.

I think, therefore, that under the terms of the agreement set out, which is a reinstatement agreement, the Crown should at the outside receive credit for the value of the land at the sum of $20,000, less, however, certain deductions that will have to be made on account of placing the land in shape for the purposes of the defendants' business. There is not much contest in regard to these items:

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Net cost of demolishing old buildings, excavating to street level and filling in cellars .. ..$	8,268.03
The retaining wall on Morris Street, which would appear to be essential.....	637.58
Cost of completion, cutting off slope and grading portion of street level.....	2,500.00
Demolishing remaining building	75.00
Estimated cost of retaining wall on west boundary corner-lot and protecting adjoining building	2,206.00
	$13,686.61

I do not think the estimated cost of retaining wall along the west boundary of the property should be allowed. This wall is not built and most likely never will be built.

The above items amount to $13,686.61. I think on the evidence it is shown that this expenditure is required in order to place the defendants in the same position in regard to the lands as they were before the expropriation.

It would leave to the Crown an offset in respect to this property of only the sum of $6,313.39, a very small amount compared to the $65,000 paid for this particular piece of land.

The area of the land agreed to be conveyed by the Crown and forming part of the old Lumber Yard is as stated, 37,900 square feet—land 20,100 square feet and land covered by water 17,800 square feet. This land is valued by Mr. Clark at the sum of $15,390, viz., 50 cents a square foot for land and 30 cents per square foot for land covered by water. From this amount there should be deducted:

1. Cost of removal of cable huts ..... $	100.00
2. Expense caused by retention of cables and cable huts while work was going on	500.00
Expense caused by removal of storehouse and contents after original location was fixed by Government Engineer	200.00
3. Excavation grading to level of street and filling in lower portion to water front level	2,362.48
4. Construction of concrete retaining wall across centre of car barn and on property between car barn and gas works to separate high and low levels.....	3,328.00
5. Piling work for car barn.....	2,037.75
6. Constructing coffer-dam	1,160.00
Excavating to rock foundation and building reinforced concrete foundation wall..	2,064.00
7. Concrete piers built for car barn column supports	1,060.00
8. Cost of excess amount of concrete used in car barn wall foundation due to physical defects of site; details drawing 134C	1,536.00
	$14,348.23

Mr. Rogers, counsel for the Crown, stated that with reference to the items in Exhibit 16, on page 7 of the evidence, numbered 1 to 8, aggregating $14,348.23, as to expenditures with reference to the Lumber Yard property, the Crown is satisfied that

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the estimates made in respect thereof are not excessive.

This would leave an offset of $14,348.23 which, deducted from the value of the lands, would leave the sum of $1,041.77. Deducting these two items of $6,313.39 and $1,041.77, in all $7,355.16, from the value of the lands expropriated $73,271, there would be due the defendants the sum of $65,915.84 for the lands.

I come now to deal with the claims put forward by counsel for the defendants. Apparently they are not satisfied with the liberal treatment accorded to them by the representatives of the Crown—having got so much they desire to get more. They allege that the lands expropriated are better adapted for the erection of their new plant and that a saving of over $100,000 would be gained had they erected their plant on their property expropriated instead of on the new site.

A further ground is put forward on the part of the defendants that the cost of operation of the business of the company on the new site as compared with what the cost would be had the new plant been erected on the old premises would amount to $7,900 a year, and they ask that this amount should be capitalized and a further sum in the neighbourhood of $160,000 be added to their claim. This method of arriving at the sums is dangerously in line with the method condemned in the case of the *Pastoral Finance v. The Minister* (1); and the *Lake Erie & Northern Railway Co. v. Schooley* (2).

Both of these claims, namely, the claim for the alleged additional value of the old site as compared

(1) 84 L.J.P.C. 26 at 28. (2) 53 Can. S.C.R. 416, 30 D.L.R. 289.

with the new site, in regard to the increased cost of the erections and also the increased cost of operation, is to my mind of a very imaginative character.

I refer to some of the evidence in the case. Mr. Malison is the Managing Director of the Tram Company and gives evidence. It would appear that the business was stopped on the old site in April, 1917. His evidence in chief shows what took place between himself and Mr. Gutelius. The defendants were to get from the Crown lands sufficiently wide to serve the purposes of the Company.

The following portion of his evidence explains the situation and capacity of the plant, etc., on the new premises as compared with the old premises. It must also be borne in mind that the Crown has paid the full value of the old plant, which has been in steady use a long number of years, and that by the assistance of the Crown they have what is an up-to-date plant. Necessarily a considerable sum of money would have to be advanced by the company for the purpose of obtaining a much better result from the new plant on the present site than of a plant similar to that situate on the old property.

Mr. Malison states, as follows:

"*Mr. Rogers*—Q. You spoke of the capacity of "your plant at the time of the expropriation, Feb- "ruary 13th, 1913, as being 3,300 kilowats of ma- "chinery; what is the capacity to-day, on the same "basis?—A. About 6,000.

"Q. Nearly double?—A. Yes.

"Q. You spoke of having 2,100 horse-power in "your boilers, in steam power?—A. 2,100 horse- "power, rated capacity.

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"Q. What is that to-day?—A. In round figures, "that is about 5,000 horse-power, the rated capa- "city."

"Q. You spoke then of the peak load being 3,400 "kilowatts—A. Yes.

"Q. What would that be to-day?—A. Last De- "cember or last January, which is the test of the "peak load always, we had approximately 6,000 "horse-power.

"Q. So that the capacity of your electric plant at "any rate has nearly doubled, speaking generally?— "A. Yes, I consider it more than double.

"Q. You have done that by the installation of "new boilers?—A. By the installation of new boil- "ers and new machinery.

"Q. New generators?—A. New generators.

"Q. And new machinery?—A. Yes.

"Q. These new boilers and new machinery were "installed on the old property you had before?— "A. Yes.

"HIS LORDSHIP—Q. On the expropriated prop- "erty?—A. No, my Lord, on the other property.

"*Mr. Rogers*: Q. At the time of the expropriation "what was your gas producing capacity at the old "plant?—A. About 200,000 feet capacity per day; if "everything was all right.

"Q. That was your maximum capacity; 200,000 "cubic feet per day would be your maximum capa- "city?—A. Yes.

"Q. On your old plant?—A. At our old plant.

"Q. What is the maximum capacity of your new "plant to-day, 400,000?—A. Well, it is more than "that; it is over 600,000.

"Q. That is in gas capacity alone?—A. Yes.

"HIS LORDSHIP: Q. On your new premises?—A. "On our present premises, my Lord.

"*Mr. Rogers*: Q. You have been operating your "new premises since January of this year?—A. I "think it was April.

"Q. I have not the figures of your sales of gas. "What would your average sales of gas be in the "current year?—A. We are selling now about "220,000 cubic feet of gas per day, on the average.

"Q. What would your average sales of gas be "in 1913, per day?—A. Subject to verification, I "would say 120,000 to 125,000 cubic feet per day, on "the average.

"Q. Throughout the year 1913 or 1912?—A. Yes.

"Q. You can correct these figures afterwards, "if you find you have made a mistake in any of "them.—A. I might say, in addition, if I may, that "the average for the current year, when we take "into consideration this coming winter, will be much "greater than the figures I have given to you.

"Q. You have given us 220,000?—A. That is, "up to date.

"Q. Perhaps you have already estimated, that "is your Company in Montreal, what you think your "output of gas will be for next year?—A. For "1918?

"HIS LORDSHIP: Q.—You distinguish between the "cold days and the warm days?—A. Yes, my Lord. "Our consumption is greatest in December, of "course.

"*Mr. Rogers*: Q. For 1918 would you say 300,-"000?—A. Much more than that. My estimate for "this year will be 300,000 per day, and my estimate

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"for next year will be at least twenty-five per cent. "greater than that.

"HIS LORDSHIP: Q. Does that take into account "from January to January? A.—Yes, for the cur- "rent year.

"Q. The full winter and the full summer?—A. "Yes.

"*Mr. Rogers*: Q. You are looking for a steady "increase?—A. I am looking for better than a "steady increase in gas because we are only really "beginning to develop the gas business as a business "proposition now, now that our construction is com- "pleted.

"Q. What is the size of the present gas holder?— "A. It has a capacity of 300,000 cubic feet.

"Q. The old ones had a capacity of how much?— "A. The two old ones had a capacity, I think, of "190,000 cubic feet.

"Q. The two of them together?—A. The two "together.

"Q. They were much smaller holders?—A. "They were.

"Q. Of a different type?—A. Yes, a different "type.

"Q. A type not now made?—A. Not on this side "of the water.

"Q. Obsolete?—A. Not obsolete, but they have "developed a holder of cheaper construction, that "serves the purpose.

"Q. Better?—A. I would not say better, but as "good.

"Q. And of greater individual capacity?—A. "That would not necessarily be so.

"Q. It is obvious that it is so, in this case?—A. "It is quite so, in this case.

"Q. The present gas holder does not occupy as "much square-foot space as the two old ones did?— "A. I could not say as to that actually.

"Q. Guess at it?—A. There is some little differ- "ence, I think.

"HIS LORDSHIP: Q. Almost the same shape as "the two old ones?—A. Almost the same.

"Q. Is the type of these any different?—A. This "present holder, the new one, is much higher than "the other ones.

"Q. Can you make it higher still?—A. Yes, sir, "we can put another lift on it.

"Q. So that you can get any quantity more by "elevating it, up to a safe limit, without taking any "more land?—A. Yes, without taking any more land.

"*Mr. Rogers*: Q. As has been stated, on the west "side of Water Street there is available land there, "on the land obtained from the Government, for "another gas holder of equal capacity?—A. Yes.

"Q. What other products do you get in connec- "tion with the gas business, or did you get before "the expropriation; of course you got coke.—A. "Coke and tar. We did not save our ammonia.

"Q. At the time of the expropriation you were "not saving your ammonia?—A. No.

"Q. You are doing so, now?—A. Yes.

"Q. And on these premises which you got from "the Government?—A. Yes.

"Q. Does that require an extra building?—A. "It requires an underground tank.

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"Q. What else are you saving; what other pro-"ducts are you saving?—A. We are not saving any "other products.

"Q. Have you anything in mind?—A. Why, we "expect to refine the tar and the ammoniacal liquor.

"Q. Of course your sales of coke, or the pro-"ducts of coke, tar, and ammonia, including the re-"fining of the ammonia, will increase rateably with "the gas product itself? A.—With the increased "output of gas we will make more of these products.

"Q. Proportionately?—A. Yes.

"Q. Previous to the expropriation you had three "car barns?—A. Four.

"Q. Three of them on what we call the power "plant property?—A. Yes.

"Q. The fourth on the rear portion of the gas "property?—A. Yes.

"Q. You now have how many car barns?—A. Two.

"Q. The capacity of those two is equivalent to "the capacity of the former four?—A. Yes.

"Q. More, is it not?—A. A little more.

"Q. What percentage more?—A. Not ten per cent.

"Q. The construction of the new car barn is of the "latest and most modern, I believe? A.—Yes, it is "a very good design.

"Q. The foundations are much heavier and of a "much more permanent character than any one of "the four former car barns?—A. Very much more.

"Q. Built with a view to permanency?—A. Yes.

"Q. The idea on the part of the Company being "that that additional capital expenditure in that "way would pay in the long run? A.—To some ex-

"tent that would be right; but the permanency, or "rather the excess permanency in that building as "compared with the others was necessitated by rea- "son of the difficulty, first, in obtaining a good "foundation, and secondly, by reason of the fact "that we have to support the rear end, or the water "side of the end of that car barn on stilts, in other "words, because we are so much above the level of "the ground.

"Q. I understand that.—A. That necessitated a "very much more permanent type of building, foun- "dation, and under-supports than would otherwise "have been the case.

"Q. But at the same time, in all your re-construc- "tion work, I understand you to say that you had "in view the matter of lasting and permanent quali- "ties?—A. Quite true.

"Q. That is true, all through?—A. True, all "through," which he explains is the present situation.

A considerable amount of evidence was given in regard to the probable future of Halifax. One prominent witness seemed to figure on a growth to a population of 150,000. It has been a city for a great number of years with the present population of under 50,000, and I think it would strain the credulity of a Judge to figure on any basis of this character. If such an event did occur, there is no trouble in building another gas holder, the site for which was marked out on the plan of the property west of Water Street, and there will be no difficulty in doubling the capacity of each of these gas holders—and there will be ample for the supply for a community even far in excess of what these imaginative

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gentlemen look forward to. So with regard to car barns. There is ample room for any addition,—and if the population of Halifax ever did increase to a very large extent, it will be proper practice, as admitted by Mr. Malison on his re-examination, towards the end of the evidence, to place car barns in different portions of the city, a practice in vogue in all other cities.

In the case of *Corrie v. MacDermott* (1), which I have referred to, the defendants desired to construe the words "the value of the land to them" as if they read the unrestricted value—and their Lordships held that was the incorrect way of viewing the case, and that they were only entitled to the value of their interest in the lands, and there is language in that case which would indicate that an agreement should be construed by reference to the law governing ordinary cases of expropriation. I think the case before me is of an entirely different character. It seems to me to allow any such claim as put forward on the part of the defendants would be doing violence to the whole intention of the parties. I think they have entered into an agreement which provided for a complete reinstatement of the defendants, and having regard to all the circumstances of the case this is the view that I entertain.

There will be judgment for the defendants for the sum of $401,668.09, from which will be deducted the sums referred to in the agreement advanced by the Crown. The defendants have had occupation of their former premises, and have been carrying on, as I have stated, their business as usual until April of 1917. They should be allowed interest on the bal-

(1) (1914) 83 L.J.P.C. 370 at 372.

ance of $151,668.09 from that time until judgment. The defendants are entitled to their costs of the action.

*Judgment for defendants.**

Solicitor for plaintiff: *T. F. Tobin.*

Solicitors for defendant: *Lovett & Roper.*

* Reporter's Note: The following is a copy of the agreement referred to on p. 48:

"It is agreed between the parties that the following information be supplied to the Court in response to the request in writing of the Registrar of the Court dated December 21st, 1917, and that for the purposes of this action the said information shall be considered by the Court as if it had been given by way of sworn testimony at the trial of the action.

1. The exact area in square feet of the lands of the defendant Company expropriated by the Crown is as follows:

(a) Land and land covered by water of defendant Company expropriated by the Crown, the title to which is admitted by the Crown:—

(1) Land ..... 189,480 square feet
Area of fill in post confederation grant 3,200 square feet
Area of Gas Lane ..... 2,794 square feet
(2) Land covered by water ..... 19,000 square feet

Total..... 214,474 square feet

(b) Land covered by water included in the grant by the Provincial Government in 1876, the title to which is not admitted by the Crown—53,300 square feet.

2. The exact area of the lands of defendant Company now utilized by it for its new plant and which area is not expropriated by the Crown is equal to 39,500 square feet plus the ground taken up by the location of the elevated conveyor across the yard from the unloading wharf of the Dominion Coal Co. to the Coal Storage buildings of the Gas Plant.

3. The exact area of the lands procured by the Crown and to be conveyed to the defendant Company on the property, situate on the west side of Water Street, is 39,180 square feet.

4. The exact area agreed to be conveyed to defendant Company off the lumber yard property is 37,900 square feet, made up of land—20,100 square feet, and land covered by water, 17,800 square feet.

5. The exact sums agreed by Mr. Clark and his associates to be paid for the lands expropriated from defendant company are as follows:—

For portion marked on plan Exhibit "B" as area in fill 109,800 square feet at the rate of 50c. per square foot..$ 54,900

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For portion marked on plan Exhibit "B" as "Area 2,600 square feet," at the rate of 50c per square foot.....	1,300
For portion marked on plan Exhibit "B" as "Area covered by water in grant prior to Confederation, 19,000 square feet," at the rate of 30c per square foot.....	5,700
For 4,440 square feet of the land marked on plan Exhibit "B" as "Area of land (car barn and field) 42,500 square feet," said 4,440 square feet being the part thereof on which the car barn was erected, at the rate of 25c per square foot	1,110
For the balance of the land marked on plan Exhibit "B" as "Area of land (car barn and field), 42,500 square feet," after deducting said 4,440 square feet last above mentioned, leaving 38,060 square feet, at the rate of 10c per square foot	3,806
For the portion marked on plan Exhibit "B" as "Area of land in house lots, 34,580 square feet," at the rate of 10c per square foot	3,458
For the portion marked on plan Exhibit "B" as "Area of fill on grant of 1876, 3,200 square feet," at the rate of 50c. per square foot	1,600
For portion of Gas Lane omitted, 2,794 square feet, at the rate of 50c. per square foot	1,397
Total.....	$73,271

6. Mr. Clark and his associates did not value the lands forming part of the lumber yard to be conveyed to the defendant company. Mr. Clark gave some evidence at the trial as to what he considered the value.

Dated at Halifax, N.S., this 22nd day of January, A.D. 1918.

(Sgd.) *T. F. Tobin,* Solicitor of Attorney-General of Canada.

L. A. Lovett, of Counsel for Defendant, The Halifax Electric Tramway Co., Limited.

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

1917
Nov. 5.

PLAINTIFF,

v.

VASSIE & COMPANY, LIMITED; JOSEPH ALLISON; PRUDENTIAL TRUST COMPANY, LIMITED; THE PETRIE MANUFACTURING COMPANY, LIMITED (4 cases).

DEFENDANTS.

Expropriation—Compensation—Warehouse property—Value.

The Crown had expropriated a number of lots in the business section of the city of St. John, N.B., specially adapted for warehouse purposes.

Held, that the same value per square foot does not attach to small lots as to a larger lot, and that apart from the market value of the land the owners were entitled to an allowance for the compulsory taking, together with interest from the date of expropriation.

INFORMATION for the vesting of land and compensation in an expropriation by the Crown.

Tried before the Honourable Mr. Justice Cassels, at St. John, N. B., September 24, 25, 1917.

Daniel Mullin, K.C., for plaintiff.

F. R. Taylor, K.C., and *C. F. Sanford*, for defendants.

CASSELS, J. (November 5, 1917) delivered judgment.

These four cases were tried together before me at St. John, it being agreed that the evidence ad-

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duced should be treated as if adduced in each separate case, with the right to any of the parties to adduce any further evidence that would be applicable to the particular case.

The informations were exhibited to have it declared that certain lands in the City of St. John fronting on Prince William Street, and running through to what is called St. John or Water Street, are vested in His Majesty the King, and to have the compensation for these lands ascertained. The lands are expropriated for public works, namely, the erection of an elevator in the City of St. John.

I will have to deal separately with each case, but before doing so may mention some facts which are common to all of the four cases.

Exhibit No. 1 in the case of *The King v. Vassie* shows the different properties in question. Lot No. 1 is the property of Vassie & Co. The Allison lot on the same plan is lot No. 6, which is marked on the plan "The Salvation Army." The Prudential Co. lots are lots 3 and 5 on the plan—and Petrie lot is marked 8 on plan. All of these properties are unquestionably excellent warehouse sites, if there are warehouses to be erected on them.

Th evidence of all the witnesses agrees that Prince William Street is one of the best streets in the City of St. John. On the east side of this street is erected the post-office and a large number of other public buildings, banks, etc. On the west side of the street and fronting on the street, all of these lots, from 1 to 8 inclusive, is vacant property (with the exception of one or two sheds) having no buildings on them.

St. John Street or Water Street is considerably below the level of Prince William Street, and is not far from the water of the harbour of St. John. It is proved that having this difference in level between Prince William Street and Water Street is of considerable advantage for the purposes of wholesale warehouses. All the properties in question have railway trackage, a matter of considerable importance for a warehouse property.

Prince William Street and Water Street are so situate that any person carrying on business on the sites in question would save considerably in the way of cartage from the proximity of these particular sites to the Custom House, and also to the waterfront, and to the railways. The saving of haul being considerable both by reason of the distance saved and the hills which are avoided.

I think it may be taken for granted, having regard to the evidence, such as that given by Senator Thorne, a very experienced and capable witness, and also to evidence given by other witnesses, that it would be difficult if not impossible to obtain in St. John in any other situation property equally adapted for the purpose of the erection of a wholesale warehouse and carrying on the business thereon. Other properties might be obtained, but the most available sites are covered by buildings, unsuitable as a rule for warehouse purposes,—and to acquire such sites would necessarily involve considerable expenditure by reason of these buildings having to be torn down as useless for the purposes of a warehouse business. On the other hand, the values of properties in the City of St. John have been and are extremely low compared to values in any other

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city in the western part of Canada, such as Quebec, Montreal, Toronto, Winnipeg, etc. These properties have for a great number of years been lying idle and unoccupied, and with the exception of the McClary Manufacturing Company, no warehouse has been erected.

Before dealing with the individual cases I may mention that in my opinion the same value per square foot does not attach to small lots as to a larger lot. Deal, for instance, with the Vassie & Co.'s lot. There is a frontage on Prince William Street of 150 feet, also a frontage on St. John or Water Street of 150 feet, with a depth of a little over 91 feet.

The Prudential Trust Co.'s property, lot No. 5, has a frontage of only 25 feet on Prince William Street, and 25 feet on St. John or Water Street. The Prudential Trust Co.'s lot, No. 3, has a frontage of 50 feet on Prince William Street and on Water Street; the Allison lot has a frontage of 50 feet on both streets—and the Petrie lot 104 feet frontage on Prince William Street and on Water Street, with a depth of practically 93 feet.

For certain classes of business the smaller lots may be all right, but for a large warehouse business as the Vassie & Company contemplate it would be essential to have the larger lot.

I mention these facts because the Crown in making their various tenders have tendered in each case at the rate of $1.50 per square foot, treating all the lots as of the same proportionate value whether the lot in question contained a larger or a smaller frontage.

Dealing first with the case of *The King v. Vassie & Company, Limited*:

This property, as I have stated, is lot No. 1 on the plan. It has a frontage of 150 feet on Prince William Street, and also the same frontage on St. John or Water Street. The depth is about 91 feet from Prince William to St. John Street. The area of the property in question is 13,737 square feet. The expropriation plan was registered on the 7th October, 1916. The Crown tendered on the 8th March, 1917, $20,605.50 and interest at five per cent. from the date of the filing of the expropriation plan to the date of the tender, less, however, interest on $15,000 from the 1st August, 1917. On this date the Crown advanced on account the sum of $15,000, which amount with interest from the 1st August, 1917, has to be deducted from the amount allowed. The Crown also tendered an additional sum of $200 with interest to the date of the tender as compensation for certain sheds or buildings erected on the land.

The amount tendered by the Crown is practically at the rate of $1.50 per square foot. No amount was allowed for the compulsory taking.

The defendants by their defence set up that they had carried on for years an extensive wholesale dry-goods business, and that the defendant purchased the said lands for the special purpose of building thereon a building with offices, warehouse and sample rooms, in which to carry on its said business, and that the situation of the said lands is especially adapted for the purposes of the defendant's business.

They further allege that they incurred considerable expense in having plans prepared for such of-

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fices, sample rooms and warehouse by an architect in the City of Boston; also that it would be less expensive for the defendant to carry on its business on the said lands than at the place where the said business is now carried on.

They claim the sum of $27,474 for the lands, and $500 for the sheds.

The first witness called for the defence was the Honourable Walter Edward Foster. He is the Vice-President and General Manager of Vassie & Company, and I may say that Mr. Foster's evidence was given in a very fair manner, in respect to the claim put forward. During the progress of his examination I asked Mr. Taylor the following question:

"Q. You claim peculiar damages. Is there any "issue between you and the Crown as to the value "of the land as land?

"*Mr. Taylor*: I think so, my Lord.

"HIS LORDSHIP: The defence seems to set up spe-"cial damages.

"*Mr. Taylor*: We think there are special dam-"ages. We think the land is worth at least the "amount we claim, as land, apart from the special "damages.

"HIS LORDSHIP: You are only claiming the value "of the land apparently; you do not set up anything "special.

"*Mr. Taylor*: We do not set up any special dam-"ages outside the value of the land."

Then Mr. Taylor further states:

"We are simply claiming what we asked the Gov-"ernment for the land. We told the Government "we would take that amount."

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I allowed Mr. Taylor to amend setting up the claim of the additional value to the defendants by reason of the adaptability of the premises for their particular purposes, and a defence was filed claiming in addition to the sums claimed by their defence the sum of $5,000. I thought that the defendants should have the right to put forward any claims which they considered they were legally entitled to put forward, and counsel for the Crown did not oppose such application.

The defendant company purchased the land in January, 1913, for the sum of $15,000. This purchase was from the City of St. John, who owned the land. I gather from the evidence that the city was willing to make their bargain with Mr. Foster for the sale of this particular property to them at this price of $15,000. Probably the city would be influenced by the desirability of having a warehouse erected upon this vacant property, and while the price was $15,000 in order to protect themselves, it being difficult to ascertain the real value, it was arranged that the property should be put up for sale at auction with this upset price of $15,000—and after due advertisement the sale took place, and there being no other bidders, it was knocked down to the defendants at this sum of $15,000.

I hardly think that this particular sale should be taken as the real test of its value. It is quite apparent from the evidence that other bidders were deterred from bidding by reason of the fact that they knew that the defendant company wanted the property. The evidence for instance of Mr. Bruce, a very satisfactory witness, shows these facts.

Mr. Foster, in his evidence, points out the parti-

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cular value of this property for the purposes of their business. There is no doubt that the defendant company intended to erect a large warehouse building on this particular piece of property. Plans were prepared for the erection of the buildings by an architect in Boston. These plans are filed as an exhibit in the case. Delays took place, as explained by Mr. Foster, when the breaking out of the war on the 4th August, 1914, changed the whole aspect of affairs. The defendants prudently abandoned for the time the idea of erecting new buildings, not knowing what effect the war might have upon their business; and, I rather gather from what Mr. Foster states, that they probably have not reconsidered the question of building, and in the meantime on the date mentioned the expropriation plan was filed.

Mr. Foster states that, in his opinion, the property has not risen in the market since 1913. I asked him this question:

"Q. You bought these lands in 1913? A. Yes.

"Q. Has that property risen in the market since "1913? A. No, sir, I would not say so."

Further on I asked him this question:

"Q. The real question is, as between 1913 and "1916, has the property risen in value? A. I would "not say that it has."

—And he goes on to point out that the market value could not be obtained.

I think from the evidence of Mr. Thorne and Mr. Bruce and other witnesses, that there was a considerable improvement in the value of property between the date of the purchase in January, 1913, and the fall of 1916, when the expropriation plan was filed. There had been considerable improvement in

the City of St. John generally. The harbour was being improved, and other additional works were in contemplation.

I gather that what Mr. Foster meant was that on account of the war there would be great difficulty in selling the property,—not that property generally had not increased in value between the two dates. This I also think must be the view of those representing the Crown, because the tender in question is a very large advance upon the purchase price.

The difficulty is to get evidence of what the market value is. It appears from the Crown's evidence that some of these other lots between Block 1 and Block 8 had been acquired at the price of $1.50 per square foot. As I have said, if intervening lots were worth $1.50 a square foot, the value of lot 1 for the reasons I have stated is of greater value.

Mr. Foster stated that he was willing to hand it over to the Crown for what he paid with interest, pointing out, however, that five or six per cent. interest would not of course compensate him for the locking up of the capital.

It is difficult to arrive at an exact valuation of property of this nature, having regard to the fact of the effect of the war on realizing from real estate.

The amount offered by the Crown does not include anything for compulsory taking.

After the best consideration I can give to the case, I think if to the sum of $20,805.50 there is added the sum of $4,194.50 to cover any allowances for compulsory taking, and any other claims, such as for the plans and special adaptability of the site, a fair result will be arrived at—and I allow this amount with interest thereon from the date of the

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expropriation up to the 1st August, 1917, at which date the $15,000 was paid on account and must be credited, and interest on the balance would run to the date of the judgment. The defendants are entitled to their costs of the action.

The King v. Allison.

It is needless to repeat what I have already stated in a general way. This property is No. 6, with a frontage of 50 feet on Prince William Street, and also 50 feet on St. John or Water Street. It has a depth practically of 92 feet between these two streets.

On this property there will have to be a certain amount of excavation. The date of the expropriation is the same, the 7th October, 1916. The area of the property is 4,617 square feet. The Crown tenders $7,225.50, made up as follows: The sum of $1.50 per square foot for the land, and an additional sum of $300 as compensation for an easement and right of way and sewerage over an alleyway, making the total amount tendered $7,225.50.

I think if there were added to this amount ten per cent. for compulsory taking, namely, $722.55, the defendant will be amply compensated.

I therefore give judgment for the amount of $7,948.05. The defendant is entitled to interest on this amount from the date of expropriation to the date of judgment. The defendant is also entitled to the costs of the action.

The King v. Prudential Trust Company.

In this case two properties are expropriated, namely, lot No. 3 and also lot No. 5. In respect to

lot No. 3 there is an annual charge of $8 per annum payable to the City of St. John. This sum is payable in perpetuity.

I pointed out that I thought the city should be a party to the action, as their rights were expropriated as well as the rights of the Prudential Trust Co. The statement was made that an agreement had been come to whereby the city had released any rights they had in it for the sum of $300. This, however, apparently had not been assented to by all the parties. Mr. Baxter, K.C., who is solicitor for the city, appeared in court, and agreed that the city should be added as a party defendant, and that he would file a short defence. Subsequently an agreement was arrived at in court that the sum of $200 should be deducted from the sum to be allowed to the Prudential Trust Co., and the judgment in the case will have to direct that this $200 should be deducted from the allowance and be paid over to the city in full of their rights in regard to this charge of $8 per annum,—and in drawing the judgment, care must be had to the fact that the rights of the city are also expropriated.

There is also apparently a mortgage upon the property, and the mortgagee is not before the court. It is stated by counsel that there will be no difficulty in arriving at the amount payable. This mortgage should also be provided for in the formal judgment.

Lot No. 3 contains a frontage of 50 feet on Prince William Street and a similar frontage on St. John Street, with a depth practically of over 91 feet.

Lot No. 5 contains a frontage on Prince William Street, with the same frontage on St. John Street.

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The tender of the Crown for lot No. 3, was $6,898.50 and for lot No. 5, $3,457.65.

I think that if to the amount tendered by the Crown there is added 10 per cent. for the compulsory taking, the defendants will be fully compensated.

I would therefore allow the sum of $6,898.50 for the lot No. 3, less the sum of $200, the amount payable to the City of St. John, leaving the sum of $6,698.50, to which I would add 10 per cent., making $7,368.35.

In regard to lot No. 5, to the sum tendered of $3,457.65 should be added 10 per cent., namely, $345.76, making in all the sum of $3,803.41.

On these respective amounts interest should be added from the date of the expropriation, namely, the 7th October, 1916, to the date of judgment.

The defendants are also entitled to the costs of the action. There will be no costs to or against the City of St. John.

The King v. The Petrie Manufacturing Co., Limited.

This property is lot No. 8 on the plan. It contains a frontage on Prince William Street of about 104 feet, also the same frontage on St. John Street, with a depth of about 93 feet.

The Crown tendered the sum of $14,526.30, together with an additional sum of $200 for the sheds situate on the property. The defendants claim the sum of $20,336.82 for the lands, and $800 for the sheds.

In this case I would add to the amount tendered the sum of $1,000. I think the size of the lot makes it of more relative value than the smaller lots. I

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would also add 10 per cent. on the total amount for the compulsory taking. This will make in all the sum of $17,298.93, to which must be added interest from the date of the expropriation, namely, the 7th October, 1916, to judgment. The defendants will also be entitled to their costs of the action.

As I undertook at the trial to do, I have gone very carefully over all the evidence in these various cases, and after the best consideration I can give to the cases and with the knowledge I have of the properties in question, I have arrived at the conclusions stated above.

Judgment accordingly.

Solicitor for plaintiff: *Daniel Mullin.*

Solicitors for defendants: *Barnhill, Ewing & Sanford.*

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Nov. 12.

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

PLAINTIFF,

AND

THOMAS NAGLE,

DEFENDANT.

Expropriation—Compensation—Gravel lands—Value.

In an expropriation of gravel lands by the Crown, the basis of compensation is the true or fair market value of the property as a whole; the value to the owner, not the value to the Crown expropriating it is to be considered. The amount awarded may be allowed to go to a mortgagee.

INFORMATION exhibited by His Majesty The King on the information of the Attorney-General of Canada, plaintiff, and one Thomas Nagle, defendant, for the vesting of land expropriated by the Crown.

Tried before the Honourable Mr. Justice Cassels, at St. John, N. B., September 26, 27, 1917.

Hanson, for plaintiff.

H. O. McInerney, for defendant.

CASSELS, J. (November 12, 1917) delivered judgment.

The information asks that certain lands expropriated by the Crown should be declared vested in

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His Majesty The King, and that the compensation for the lands should be ascertained and settled.

The lands in question comprise 59,680 acres. The expropriation plan was registered on the 8th May, 1916. On the 21st April, 1917, the Crown tendered the sum of $1,492 in full compensation for the lands taken and for all damages.

The defendant by his defence claims the sum of $30,000.

When the case came on for trial it appeared that the defendant Nagle was a mortgagee of the lands in question. One Joseph Bennett Hachey was in reality the owner of the lands subject to the said mortgage. By agreement Hachey was added as a defendant to the action, and Mr. McInerney appeared for him as solicitor and counsel, and subsequently a defence was filed for Hachey.

From the evidence of Mr. O'Dwyer it would appear that of the 60 acres expropriated by the Crown, about 32 acres were composed of gravel.

The Crown expropriated the lands in question for the purpose of obtaining gravel for use upon the Intercolonial Railway. At the time of the expropriation the pit had not been opened. It was after the expropriation that the railway opened the pit and took the gravel therefrom.

It appears that the general manager of the railway permitted Hachey to take certain carloads of gravel; and, according to Mr. Hachey, the amount of gravel that he took has to be paid for by him to the railway, and it is not a matter in question before me.

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There is no doubt that the gravel from the lands expropriated is gravel of a fine quality. This is conceded by all parties.

It would also appear that there was considerable gravel upon the balance of the 105 acres not expropriated by the railway, and a claim is put forward upon the part of the defence for injury by the severance of the lands, the defendants claiming that they have no means of working the gravel pit on the land not taken.

The lands in question, comprising 105 acres in lot No. 26, Block No. 36, South Gloucester Junction, were purchased by Hachey at public auction, and the Crown grant to him is dated the 12th February, 1914. The price paid by him for the 105 acres was the sum of $525, or at the rate of five dollars per acre.

The evidence given at the trial is of an unsatisfactory nature. A great mass of it is as to the quantity of gravel contained in the lands expropriated, the various witnesses differing considerably as to quantities. I had grave doubts at the trial as to the admissibility of this class of evidence. As I understand the law, what I have to ascertain is the true or fair market value of the property as a whole. I thought it better to allow the evidence, as it might have some bearing on the intrinsic value if supplemented by evidence of the market value.

In the case of *The King v. Kendall* (1) the learned Judge states "that the property in question must "be assessed at its market value in respect of the "best uses to which it can be put by the owner, "taking into consideration any prospective capa-

(1) 14 Can. Ex. 71 at 81, 8 D.L.R. 900 at 906.

"bilities and any inherent value it may have. One "must discard the idea of arriving at its value by "measuring every yard of sand and gravel on the "bar." The learned Judge cites a decision of the Supreme Court of Massachusetts, namely, the case of *Manning v. Lowell* (1), and also some other cases, and rightly distinguishes the case of *Burton v. The Queen* (2), as this latter case was not an expropriation of lands, but merely the taking of a certain quantity of gravel. The case of *The King v. Kendall* (3) was taken by way of appeal to the Supreme Court of Canada, and the judgment was sustained. The decision in the Supreme Court has not been reported, but I have had the benefit of a perusal of the judgments. The reasons for judgment of Mr. Justice Idington, it seems to me, deals with the question in the way it was dealt with by the learned Judge in the court below. The statement is as follows:

"A mass of evidence was given relative to the "cubic contents of sand and gravel to be found "within the area in question and the market value "of such material. This sort of evidence might well "have some bearing upon the intrinsic value of the "property in question, but unless supplemented by "evidence of the true or fair market value of the "property as a whole must be held of little value "for the reasons given by the learned trial judge. "Of direct evidence of the latter kind little appears "in the case, and I cannot say that the amount ad- "judged is obviously erroneous."

These remarks are very apposite to the case before me.

(1) 173 Mass. 100.
(2) 1 Can. Ex. 87.
(3) 14 Can. Ex. 71, 8 D.L.R. 900.

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A second proposition of law is one of considerable importance in the present case. It is too well settled to need comment, that in dealing with the value of the lands in question, it is the value to the owner that has to be considered and not the value to the Crown expropriating it.

The language in the reasons of the judges in the case of *Sidney v. North Eastern Railway* (1), has strong application to the facts of the present case. Curiously enough, in the *Sidney* case the decision in *Cedars Rapids Power Co. v. Lacoste* (2) was not referred to, although apparently decided before the decision in the *Sidney* case.

The result of the evidence in the present case is that, outside of the Intercolonial Railway, there is no market for the gravel from the pit in question except to a very trifling extent.

Albert E. Trites, a witness examined by the plaintiff, is probably the one best qualified as a witness. He gave his evidence in a satisfactory manner. He is a railway contractor to a large extent, and has been such for over 40 years. He is asked:

"Q. As such have you had considerable experi-
"ence with gravel and gravel pits?—A. Yes.

"Q. You know gravel pretty well as a result of
"that long experience?—A. I think so."

He then goes on to explain how he was called upon in the Crown Lands office in Fredericton, to report on certain lots. He then proceeds to give evidence in regard to the gravel pit in question, that is lot No. 26. He states, what is uncontradicted, that the gravel is all of a good quality. As I have mentioned before, the pit was opened by the rail-

(1) [1914] 3 K.B. 629. (2) [1914] A.C. 569, 16 D.L.R. 168.

way, after the expropriation. He places a value of $300 per acre upon the portion of the land expropriated which contains gravel. On his cross-examination he points out that in placing this valuation upon the pit, he is placing a value on it to the railway and not to the owner. I quote some portions of his evidence:

"Q. Upon what did you base your value of $250 "per acre of ballast ground down there, on 27, "and $300 on 26; how did you arrive at that "figure, how did you make that up?

"A. My idea was that if anybody wanted it, it "would be worth that much money.

"Q. To the person taking it?—A. To the person "taking it.

"If the railway wants it you thought it would "be worth that much to the railway?

"A. That was my idea.

* * * *

"Q. In other words, your value of $300 an acre "is based on what you think it is worth to the "railway?

"A. That is my idea.

"Q. If the railway was not a purchaser, Mr. "Trites, if there was no Intercolonial Railway to "sell it to—eliminate that for the time being— "what would you say would be the market value "of that gravel land altogether, leaving out of "consideration the railway?—A. I could not say. "The demand would be very light for large quan- "tities.

"Q. The demand would be almost negligible, "would it not, as far as you are aware; can you

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"suggest any market for that ballast outside of "the railway?

"A. Nothing further than what is used for pri- "vate use and the roads.

"Q. That would be very small, would it not?

"A. It would not amount to any big quantities, "for the time being.

"Q. I agree with that, that the railway is the "market for this ballast?

"A. The railway is the big market.

"Q. And practically the sole market?

"A. Largely the sole market.

"Q. And it appears to have been the only mar- "ket up to this year from what we have heard to- "day?—A. Yes.

"Q. You know of no market outside of what has "been said to-day?—A. No.

"Q. You would not say there was a market to "haul that gravel to Moncton?

"A. The distance would be against it.

"Q. They get gravel a good deal nearer?

"A. They get it nearer.

"Q. This is about 120 miles from Moncton?

"A. I think so. It is a long haul.

"Q. So that your figure of $300 and $250 per "acre respectively was based on a value to the "railway?

"A. Certainly.

* * * *

"Q. So you based it on Hachey's value to the "Intercolonial Railway?—A. Certainly.

And further on he says:

"Q. You knew no other market in 1916 for this "property except the Intercolonial Railway?

"A. No extended market.

"HIS LORDSHIP: No practical market?

"A. No practical market.

"*Mr. Hanson*: No commercial market?

"A. No commercial market on a large scale."

He says further:

"I think the demand for the gravel, outside of "the railway, would be for small quantities."

Had there been other railways competitors with the Intercolonial Railway the case might be different, but it is beyond question there was no other competitor. I think it is also evident there was no market for the gravel at Moncton. The expense of the haul would be too great to make it a commercial venture, and as the evidence shows there are other quarries within a short distance from Moncton containing all the gravel that could be required. For instance, the Anagance pit, etc. Mr. O'Dwyer in his evidence gives details of the various pits.

Now we have, as I have stated, the fact that the whole 105 acres were purchased by Hachey in the fall of 1913 for the sum of five dollars an acre, viz., for $525. At the time of the expropriation the lands were in the state in which they were at the time of the purchase. There had been no attempt to develop them.

A letter was produced purporting to be signed by one White and Robertson, containing an alleged offer of $200 an acre. I do not think that this offer was intended as a genuine offer. Hachey himself does not seem to treat the matter as if it was *bona fide*. He is asked the question:

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"Q. Was that a *bona fide* offer?—A. It came in-
"directly to me. It did not come to me person-
"ally."

* * * *

"Q. As a matter of fact, did you regard this as
"a serious offer?—A. No, I don't know as I did."

I think that if the defendant intended to seriously rely upon such an offer they should have called these two gentlemen. I have but little doubt that when Hachey purchased the lot in question he contemplated that he would be able to sell it to the railway, and had that in view when purchasing.

On the best consideration I can give to the case and having regard to the law that governs, as I understand it, the offer of the Crown of $1,492 is more than ample to compensate Mr. Hachey for the loss of the 60 acres and any damage on the severance.

I think the tender of the Crown is ample, and that the amount tendered, together with interest up to the date of the tender from the time of expropriation, is sufficient to cover all claims the defendant can reasonably have, including any allowance for compulsory taking, and I think the Crown are entitled to their costs of the action, to be paid by the defendants.

The amount allowed should go to the mortgagee.

Judgment accordingly.

Solicitors for plaintiff: *Slipp & Hanson.*

Solicitor for defendant: *H. O. McInerney.*

IN THE MATTER OF THE PETITION OF RIGHT OF

1917
Aug. 30.

EDWARD MAXWELL,

SUPPLIANT,

AND

HIS MAJESTY THE KING,

RESPONDENT.

Harbours—B. N. A. Act—Provincial grant—Expropriation—Wharf—Compensation.

Bedford Basin, being a public harbour at the time of Confederation and the property of the Province of Nova Scotia, passed to the Dominion by virtue of the provisions of the *British North America Act*. A subsequent provincial grant of a water-lot thereon is therefore void and confers no title. *Fisheries Case* [1898], A.C. 700; *Attorney-General v. Ritchie* (*English Bay* case), 52 Can. S.C.R. 78, 26 D.L.R. 51, followed; *The King v. Bradburn*, 14 Can. Ex. 419, referred to.

2. Upon the facts established in evidence, there was no dispute that the suppliant was entitled to compensation for the expropriation of the wharf and for the deprivation of the right of way to and from the wharf over the railway tracks. *Held*, that under the circumstances of the case, the suppliant was entitled to compensation for such expropriation and for the deprivation of the right of way; but the loss of business not attributable to the taking of the wharf, or the loss of profits in connection with a business in anticipation but not actually embarked on, were not elements of compensation.

PETITION OF RIGHT claiming compensation in an expropriation by the Crown.

Tried before the Honourable Mr. Justice Cassels, at Halifax, N. S., September 21, 22, 30, 1916.

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Lovett, K.C., and *Barnhill,* for suppliant.
T. S. Rogers, K.C., for respondent.

CASSELS, J. (August 30, 1917) delivered judgment.

This is a petition of right filed on behalf of Edward Maxwell claiming compensation for lands expropriated by the Crown for the construction of works at Halifax in connection with the Intercolonial Railway. The suppliant claims $150,000. His claim is of a three-fold character.

First, for land expropriated bounded by high water mark on Bedford Basin.

Second, for a water lot granted to him by the Crown represented by the Province of Nova Scotia dated 1st April, 1873.

Third, for damages to his property to the west of the railway used by him for manufacturing purposes and which, he alleges, is destroyed for such purposes by reason of his access to the water being cut off.

A further claim is put forward, namely, that even if his title to the water lot is void, he had title to the wharf and a right-of-way over the railway to reach the wharf.

By the defence the Crown admits the title of the suppliant to the land east of the railway bounded by the high water of Bedford Basin. As to the water lot, the contention of the Crown is that Bedford Basin was at the date of the *Confederation Act,* 29th March, 1867, a public harbour and became the property of the Dominion, and that the grant of the water lot by the Province of Nova Scotia after Confederation is void.

The Crown offers the sum of $915.75 as full compensation.

While denying the title of the suppliant to the water lot, included in this tender of $915.75 is the value of the wharf as estimated by the Crown valuators.

It becomes necessary to consider the question whether what is termed Bedford Basin was or was not at the date of Confederation a public harbour. If the answer is in the affirmative, then this public harbour became the property of the Dominion by virtue of the provisions of the *British North America Act* and the grant of the water lot by the Province of Nova Scotia passed no title, and the suppliant would not be entitled to any compensation for the land comprised in this water lot except as to the wharf, title to which may have been acquired otherwise than by this grant. This question I will deal with later.

What constitutes a public harbour in contemplation of the *Confederation Act* is a question of difficulty. I had occasion to consider the question in the case of *The King v. Bradburn* (1). On appeal to the Supreme Court of Canada this case was affirmed. I do not think the judgment of the Supreme Court is reported. It was necessary to pass upon this point as it affected the question of compensation.

In a later case of *Attorney-General of Canada v. Ritchie Contracting and Supply Co* (2), the question has been elaborately discussed by the learned judges of the Supreme Court. This case is inscribed for hearing before the Board of the Privy Council, and possibly some more light may be thrown on the sub-

(1) 14 Can. Ex. 419 at p. 429.
(2) 52 Can. S.C.R. 78; 26 D.L.R. 51.

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ject. The decision of the Supreme Court, I think, makes two points clear. First, to be a public harbour under the provisions of the *Confederation Act* it must have been a public harbour at the time of the enactment, and second, that a potential harbour, not a harbour at the date of the *Confederation Act,* but subsequently becoming a public harbour, is not covered by the statute.

In the case of *Attorney-General of Canada v. Ritchie Contracting and Supply Co.* (supra) the courts were dealing with English Bay outside of Vancouver Harbour. There is no similarity between English Bay and Bedford Basin. At the time of the passing of the *Confederation Act,* according to the views of the Judges who gave reasons in that case, English Bay was in no sense a public harbour. It was nearly unknown and practically could at the outside be merely termed a haven or harbour of refuge. It had already been decided by the Supreme Court in *The King v. Bradburn* (supra) that a mere haven could not be considered a public harbour within the meaning of the statute.

The able argument of Mr. Newcombe, that potential harbours subsequently became public harbours and passed to the Dominion, was not given effect to. To anyone who personally knows Halifax and Bedford Basin, and I imagine most of those who may read these reasons are in that class,—if not the charts will explain—it is apparent that in no sense of the word could Bedford Basin be termed a haven or harbour of refuge. It is a completely land-locked bay—the only entrance thereto being through what is termed "The Narrows," a continuation of "Halifax Harbour." If Halifax Harbour were held not to include The Narrows or Bedford Basin, it would

seem rather an anomaly to have a harbour of refuge or haven into which vessels could take refuge from their anchorage in Halifax Harbour.

It is admitted by counsel for the Crown and for the suppliant, both of whom have devoted a great deal of time to investigation, that "no records are "in existence either before or after Confederation "shewing the geographical limits of the harbour as "such by statute or any other way, shape or form."

The distance from "The Narrows" to Bedford at the head of the Basin is said to be four miles. In considering the question I think too much stress must not be laid on the words used as denoting the name of the harbour. For instance, on a map to which I will refer the words "Halifax Harbour" are written and the words "North-West Arm," but there is no contention that the North-West Arm is not part of Halifax Harbour. Also in respect of Dartmouth. Why should Dartmouth not have its harbour termed Dartmouth Harbour? As stated, there is no delimitation of the boundaries of Halifax Harbour, but it is beyond question that Halifax Harbour includes Dartmouth Harbour. I mention these facts, as I think too much stress may be laid on the fact that in the maps the terms "Bedford Basin" or "Bedford Bay" are used. None the less, it may be the harbour of Halifax.

It is conceded by counsel for the suppliant that "this is a basin in which from the time it was first "settled the warships and other ships went in and "anchored, and to that extent I am perfectly satis-"fied," says counsel. There can be no question as to this. For over a century the warships of Great Britain used Bedford Basin as the inner harbour of

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Halifax. Navy Island, situate in the basin, was the property of the British Admiralty. The Duke of Kent's house was situated on the basin. The Admiral's flagship was usually anchored in the basin at Birch Cove. At the head of the basin was Sackville Fort, erected and garrisoned and armed by the British. At Bedford as far back and further than living memory was a wharf, grist mill and other industries, and vessels plied in and out. Along the west shore of the basin were numerous wharves, to which vessels would take cargoes, such as hemlock, etc. Boats would go for pleasure parties, and so on.

If each of these different factors were looked upon separately, possibly it would not amount to strong evidence of Bedford Basin being considered a public harbour within the definition of the Fisheries case, but they must be taken collectively and consideration be given to the fact that fifty years have elapsed.

Considering the importance of Halifax Harbour to the Imperial authorities, I think the DesBarres report throws a strong light on the question. A printed copy of this document was discovered by the officers of the Archives Department of Canada as a result of careful enquiry. By the consent of counsel for both parties it has been marked Exhibit "V" in this case. It is entitled:

> "Nautical Remarks and Observations on the Coasts and Harbours of Nova Scotia; Surveyed pursuant to Orders from the Right Honourable the Lords Commissioners of the Admiralty, for the use of the Royal Navy of Great Britain, by J. F. W. DesBarres, Esq., 1778."

He describes Halifax Harbour, otherwise called Chebucto. He gives directions how to approach the

harbour from the east. He described Bedford Basin "at the head of Halifax Harbour" and "Sackville River" *at the head of Bedford Basin in the Harbour of Halifax.*

This report differs from a mere statement of someone who may have described it as suitable for a harbour. *It is official.*

If the views of Robinson and Rispin—two visitors from England in 1774—are of any importance, they will be found in Exhibit "T," in which it is stated that Fort Sackville is distant from Halifax about 12 (sic) miles, situate upon a navigable river that empties itself into Halifax Bay. This document, as well as the following extracts from "A brief de-"scription of Nova Scotia, etc., by Anthony Lock-"wood, Professor of Hydrography, Assistant Sur-"veyor-General of the Province of Nova Scotia and "Cape Breton—London, 1818," were furnished by the Archives Department. He describes the Harbour of Halifax as about sixteen miles in length, "terminating in a beautiful sheet of water called Bedford Basin, within which are ten square miles of safe anchorage."

In his "*directions for the harbour*" he states:

"From Georges Island to the confluence of Sack-"ville River with Bedford Basin a distance of seven "miles, there is not a single obstruction."

The sailing directions published by James Imray & Son, 1855, treats Bedford Basin as part of Halifax Harbour.

Thomas C. Haliburton (Sam Slick), in his history of Nova Scotia, 1829, treats Bedford Basin as part of Halifax Harbour.

It has to be kept in mind that in dealing with this question of whether Bedford Basin was a public

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harbour at the time of Confederation the Court has no records of an official kind delimiting the boundaries of the harbour and must arrive at the result from the best evidence obtainable.

I have no hesitation in coming to the conclusion, bearing in view the reasons in the *Fisheries* case (1) and the *English Bay* case (2) that at the time of Confederation, Bedford Basin was a public harbour, the property of the Province of Nova Scotia and passed to the Dominion by the provisions of the *British North America Act.*

I think the grant of the Crown, as representing the Province of Nova Scotia, of the water lot was void and gave no title.

The next question to be determined is the right to the wharf.

It is not an important question so far as the actual value of this wharf is concerned, as the Crown has offered what I consider the full value. Mr. Clarke in his evidence shews that $800 and ten per centum added was allowed for the wharf. Mr. Clarke and his associates, however, did not take into account any damages that the suppliant might suffer in respect to his property and business, which property has not been expropriated, and having regard to this branch of the suppliant's claim, it becomes important to consider his legal right to the wharf and the approach thereto across the railway tracks.

The evidence and documents show that as far back as 1819 the property had been in use as a tannery. The wharf in question, although possibly not as long a wharf as at the time of the expropriation, was then in existence and a road went down to

(1) [1898] A.C. 700. (2) 52 Can. S.C.R. 78; 26 D.L.R. 51.

the wharf. The wharf was used for the unloading of hemlock logs, the bark from which was used for tanning.

Apparently from time to time the wharf would be partially destroyed and repaired. In 1850, according to the witness Geiser, who worked on the railway, the Nova Scotia Railway, now the Intercolonial Railway, was constructed. Counsel place the date as of 1854, probably the date of completion of the railway. It is not material. Access to the wharf would have been cut off by the railway.

Mr. Rogers argues and the defence sets up that at this time any damage by reason of severance was compensated for by the railway. I do not think this contention well founded. While perhaps not legally compellable, the railway did in fact give a crossing over their tracks so as to provide access to the wharf. This crossing was planked between the rails during the summer months, the planks being removed during the winter, the wharf not being then used. The crossing was guarded by a gate. According to Geiser, the tannery ceased to be operated twenty-five or thirty years from 1916, about 1891 or 1886. According to Geiser, a siding was put in for the use of the tannery. The plan Exhibit 4, tracing of Nova Scotia Railway, 29th April, 1854, shews Henry Stetson's land and apparently the wharf and road across the railway tracks. Exhibit No. 8, a grant from the Crown of the water lot, 19th August, 1881, shows the wharf and apparently the crossing over the railway. Exhibit No. 10, a plan from the Department of Crown Lands, 28th September, 1906, also shows the wharf. According to the evidence of the witness Renner, an addition of

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twenty to twenty-five feet in length was added to the wharf about thirty years ago. The evidence is very indefinite, probably necessarily so from the lapse of time. It might be material if the question of sixty years' title arises, but immaterial practically in this case, as the Crown has tendered compensation for the whole wharf.

Exhibit No. 10 referred to is a plan from the Department of Crown Lands, Halifax, 28th September, 1906. This plan shews the property as used for the crushing of rock and as it was when Maxwell purchased. I will have to refer to it later. The title, as admitted, is a continuous title from 1819. While at times the wharf was not used when the property was idle, it was held and owned (if there was title) by the legal owners of what was called the tannery property. There was no actual interference with navigation, nor was any objection to the wharf being erected on the foreshore and beyond low water mark ever made by the Crown, and the very object of the present proceeding is to expropriate for the purpose of filling up the place where the wharf was.

Tweedie v. The King (1) and *Booth v. Ratté* (2), the citation from which in the reasons of Sir Louis Davies, at page 205 of the *Tweedie* case, may be referred to. Also *Hamilton v. The King* (3). *Attorney-General of Southern Nigeria v. Holt & Co.* (4), may be referred to, in which case an irrevocable license from the Crown was presumed.

After the best consideration I can give to the case I am of the opinion that in considering the question of the compensation payable to the suppliant, he

(1) 52 Can. S.C.R. 197, 27 D.L.R. 53.
(2) 15 App. Cas. 188.
(3) 54 Can. S.C.R. 331, 35 D.L.R. 226.
(4) [1915] A.C. 599.

should be considered as the owner of the wharf, with the right-of-way over the railway for access to and from his premises west of the railway and from and to the wharf. I do not agree with Mr. Lovett's contention that the wharf and right-of-way could be leased or sold to McCormack for the use of his company.

The right-of-way across the railway is, I think, limited to the owners of what was known as the tannery property.

The question of the amount of compensation is difficult to arrive at. The suppliant has put forward a ridiculous claim by his petition, in which he claims $150,000. I am informed that this claim was subsequently modified, to what extent I do not know. As far as his business of selling crushed stone is concerned, he is not damnified at all. Exhibit No. 10, the map of 28th September, 1906, shows the two quarries—stone crushers, etc., and a loading platform. The suppliant admits that the crushed stone was all marketed by rail and teams and the taking of the wharf in no way affects this business. He has since the expropriation rented the property to one Henninger at a rental of $1,000 a year for two years with a right of renewal.

In regard to his claim for anticipated loss of profits by reason of his being prevented from prosecuting a business of making cement and chimney moulds, the method adopted by the suppliant in presenting this claim is in my opinion entirely erroneous. He had not embarked in this business. He endeavours to show that by a certain expenditure of money a business could be built up which would yield him an annual return of so many thousands

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of dollars per annum, and from this hypothetical conjecture of profits to be realized from the operation of this conjectural business he deduces this absurd value of $150,000. This method of arriving at the value is expressly negatived in the judgment of the Lords of the Privy Council in *Pastoral Finance Association v. The Minister* (1), and by the judgment of the Supreme Court in *Lake Erie & Northern Railway Co. v. Schooley* (2).

On the evidence before me it is very difficult to arrive at any satisfactory result. The claim put forward is one not in my opinion meritorious. The Crown valuators allowed nothing for this claim, not taking into account any damage the suppliant might be entitled to by reason of the depreciation of the value to the suppliant of the property as a whole. Some damage has no doubt resulted.

I think if in addition to the sum allowed two thousand dollars is added, the suppliant will be fairly compensated.

Judgment will issue for $2,915.75 and interest from the date of the expropriation. As both parties have succeeded on different issues and considering the claim put forward, no costs should be awarded to either party.

Judgment accordingly.

Solicitor for suppliant: *J. S. Roper.*

Solicitors for respondent: *Henry, Rogers, Harris & Stewart.*

(1) [1914] A.C. 1083.
(2) 53 Can. S.C.R. 416, 30 D.L.R. 289.

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

PLAINTIFF,

AND

ROBERT PATERSON RITHET AND THE ATTORNEY-GENERAL OF THE PROVINCE OF BRITISH COLUMBIA,

DEFENDANTS.

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Jan. 22.

Constitutional law—Companies—Bona vacantia—Rights of Province and Dominion—B. N. A. Act.

The right of *bona vacantia*, as regards the assets of a defunct English corporation, formerly carrying on business in British Columbia, is vested in the Dominion and does not pass to the province as "revenues" or "royalties" under secs. 102 and 109 of the *British North America Act*.

INFORMATION for the recovery of assets of a defunct corporation.

Case argued at Ottawa, March 28, 1917, before the Honourable Mr. Justice Cassels.

E. L. Newcombe, K.C., and *C. P. Plaxton*, for plaintiff.

J. A. Ritchie, for defendant.

CASSELS, J. (January 22, 1918) delivered judgment.

An information exhibited by His Majesty the King, on the information of the Attorney-General of

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Canada, against Robert Paterson Rithet and the Attorney-General of the Province of British Columbia. The facts are not in dispute.

It appears that a company called the Colonial Trust Corporation, Limited, was incorporated in England in the year 1871, empowered to carry on business in the Province of British Columbia. The company went into liquidation, and by an order of the English court, one Charles Fitch Kemp became the sole liquidator of the said corporation.

By an order of the English court, Charles Fitch Kemp, who was then the sole liquidator of the corporation, was authorized to appoint the defendant Rithet as his attorney, and a power of attorney dated December 24th, 1879, was executed in his favour by the Colonial Trust Corporation, Limited, and Charles Fitch Kemp, the sole liquidator, empowering Rithet to get in and take possession of all the property, assets and effects of the corporation in the Province of British Columbia.

It appears that the defendant Rithet acting in pursuance of his powers from time to time recovered and dealt with the assets of the corporation and accounted for the proceeds realized therefrom to the said Kemp as liquidator of the corporation.

The Colonial Trust Corporation was finally dissolved on October 7th, 1904.

The statutes relating to the dissolution of companies are: 43 Vict., Cap. 19 (1880), and 53-54 Vict., Cap. 62 (1890). These statutes are to be found in *Lindley's Law of Companies* (1).

The exhibits filed show compliance with the provisions of the statutes.

(1) 6th ed., Vol. 2, at pp. 1360 and 1370.

It appears that Kemp, the sole liquidator, died; and on January 4th, 1911, the company having been dissolved, and Kemp being dead, Rithet held in his hands the proceeds of assets realized by him, amounting to the sum of $7,215.04. The information alleges that these moneys are still in the hands of Rithet.

By his defence, Rithet brings into court the sum of $7,131.44, claiming to have paid a certain small amount for legal expenses and advice; and Rithet, by his defence, asked to be paid the costs incurred by him.

The claim of the plaintiff is thus stated in the information:

"4 The Attorney-General of Canada, on behalf "of His Majesty the King, claims that from the "time of the final dissolution of the said corpora- "tion, the said moneys in the hands of the defend- "ant Rithet became and were *bona vacantia,* and "under and by virtue of the provisions of the "*British North America Act,* vested in His Maj- "esty in the right of the Dominion of Canada, or "to which His Majesty in the right aforesaid was "and is entitled, and that the said moneys are "held by the defendant Rithet as money had and "received by him to the use of His Majesty in the "right of the Dominion aforesaid."

The defendant, the Attorney-General of the Province of British Columbia, sets out in his defence, as follows:

"2. As to the allegations set out in paragraph "4 of said information the defendant, while ad- "mitting that the moneys in the hands of the de- "fendant Robert Paterson Rithet became and

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"were *bona vacantia,* as therein alleged, denies "that the same vested in His Majesty in right of "the Dominion of Canada, or are moneys to which "His Majesty in such right was or is entitled, or "that said moneys are held by the defendant "Rithet as money had and received by him to the "use of His Majesty in said right, or are moneys "held by the said defendant in trust for His "Majesty in said right, as therein alleged."

"3. The defendant, the Attorney-General of the "Province of British Columbia, admits the alle- "gations set out in paragraph 5 of said informa- "tion and says, as the fact is, that upon the final "dissolution of the Colonial Trust Corporation, "Limited, the said moneys in the hands of the "defendant Rithet became *bona vacantia,* and as "such vested in the Crown in right of the "Province of British Columbia, and the defend- "ant asks that upon the trial of this action it may "be so adjudged and declared."

The case was argued before me, the facts being admitted. Formal proofs of the incorporation of the company, the appointment of a liquidator, the winding-up of the company, the dissolution of the company, and the formal compliance with the various statutes in force relating to the company were adduced.

The case was very ably argued by counsel on both sides. Subsequently to the hearing, able arguments in writing were handed in for my consideration covering every point that counsel could possibly raise in regard to the question.

At the hearing it was again conceded by counsel for both parties that the moneys in question should

be treated as *bona vacantia,* and I am relieved from any necessity of considering the question whether or not there is any doubt as to this proposition. I assume in dealing with the case that the moneys in question are *bona vacantia,* the only question arising being whether these moneys belong to the Crown as represented by the Dominion, or whether the moneys belong to the Crown, as represented by the Province of British Columbia.

The question practically resolves itself into the proper construction to be placed upon the *British North America Act,* and mainly turns upon the construction to be placed upon sections 102 and 109. I think there is no doubt but that British Columbia is under the provisions of this statute. In what is called the *Precious Metals* case (1) Lord Watson refers to the admission of British Columbia into and forming part of the Dominion of Canada.

In the brief furnished me by the counsel for the plaintiff there is an account of the constitutional history of the colony of British Columbia, which as it is of interest I insert in full.

"1821.—By an Imperial Act of this year the Hud-"son's Bay Company was given a monopoly of "trade in the territory east and west of the Rocky "Mountains not included in the charter granted in "1670 to Prince Rupert and his associates. Under "this Act civil and criminal matters came under the "jurisdiction of the courts of judicature of Upper "and Lower Canada (2).

(1) *Attorney-General of British Columbia v. Attorney-General of Canada,* 14 *App. Cas.* 295 at 299.
(2) Short & Doughty's Canada and its Provinces, Vol. 21, pp. 62. 68.

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"1838.—The license of the Hudson's Bay Com-"pany was extended this year for a further period "of 20 years (1).

"1849.—By an Imperial Act of this year Van-"couver Island was constituted a colony. Richard "Blanshard was appointed Governor with the usual "power to appoint a Council to aid him in his ad-"ministration. This Act repealed the previous Act "extending the jurisdiction of the courts of justice in "the provinces of Upper and Lower Canada in civil "and criminal matters, and also a subsequent Act "regulating the fur trade and establishing crim-"inal and civil jurisdiction within certain parts of "North America, so far as these Acts related to the "Island of Vancouver; and made it lawful for His "Majesty to provide in that colony for the adminis-"tration of justice, for the constitution of courts, "and appointment of judges. Governor Blanshard "found the affairs of the Island so inconsiderable "that he declined to give effect to his instructions "to establish a representative government. He "tendered his resignation in 1850, but before the "acceptance of the same reached him, he, in August, "1851, nominated a Legislative Assembly to assist "him in administering the affairs of the colony (2).

"1856.—By a proclamation issued this year by "Governor Douglas (who succeeded Governor Blan-"shard), in pursurance of his instructions, the Gov-"ernment of the Island was changed, provision be-"ing made for administering the affairs of the "Island by a Governor by and with the advice of an "elective Legislative Council.

(1) Short & Doughty's Canada and its Provinces, Vol. 21, pp. 79, 80.
(2) Short & Doughty's Canada and its Provinces, Vol. 21, p. 89.

"1858.—The license of the Hudson's Bay Com-
"pany over the mainland was revoked, and by Im-
"perial Act, 21 and 22 Vict., c. 99, it was organized
"as a Crown colony (1).

"Her Majesty by Order-in-Council appointed Sir
"James Douglas, who was Governor of the Colony
"of Vancouver Island, also Governor of the Colony
"of British Columbia. By his commission he was
"authorized to make laws, institutions and ordi-
"nances for the peace, order and good government
"of British Columbia by proclamation issued under
"the public seal of the colony. Her Majesty was
"authorized to empower, by Order-in-Council, the
"Governor to institute a Legislature consisting of
"a Governor and Council, or a Council and Assem-
"bly, to be composed of such and so many persons,
"to be appointed or elected in such manner and for
"such periods and subject to such regulations as to
"Her Majesty might seem expedient. Power was
"given to annex Vancouver Island on receiving an
"address from the two Houses of the Island Legis-
"lature. By a proclamation issued by the Governor
"on the 19th of November, 1858, the English civil
"and criminal law as it existed at that date was de-
"clared to be in force in the colony.

"1863.—By an Order-in-Council this year a
"change was made in the constitution of the colony
"of British Columbia, it being provided that the
"legislative authority of the colony should be vested
"in the Governor with the advice and consent of the
"Legislative Council (2).

(1) Short & Doughty's Canada and its Provinces, Vol. 21, pp. 126, 127.
(2) Short and Doughty's Canada and its Provinces, Vol. 21, p. 164 et seq.

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"1866.—By a proclamation of the Governor dated "17th November, 1866, an Imperial Act, 29 and 30 "Vict., c. 67, providing for the union of the Colony "of Vancouver Island and the Colony of British "Columbia, was declared to be in force, the two "colonies being united under the single title of Bri- "tish Columbia. On the union taking effect, the form "of government existing in Vancouver Island as a "separate colony ceased, and the power and author- "ity of the executive government and of the legis- "lature existing in British Columbia extended to "and over Vancouver Island.

"1867.—The effect of the proclamation declaring "the English civil and criminal law as it existed on "19th November, 1858, to be in force in British Co- "lumbia was modified by an ordinance of March "6th, 1867, which enacted that the English law as it "existed on November 19th, 1858, should apply, 'so "far as the same are not from local circumstances "inapplicable.' See R.S. B.C. 1871, No. 70.

"1870.—By Article 14 of the proposed terms of "union of the Colony of British Columbia with the "Dominion of Canada, dated July 7th, 1870, it was "declared that the constitution of the executive au- "thority of the Legislature of British Columbia "should, subject to the provisions of the *British "North America Act,* continue until altered; but "this article stated an intention of the Governor of "British Columbia to amend the existing constitu- "tion so that the majority of the members of the "Legislative Council should be elective. By an Or- "der-in-Council passed on August 9th, 1870, it was "provided that the Legislative Council should "thereafter consist of nine elective and six appoint-

"ed members. The election of these nine popular "members took place in November, 1870, and the "first meeting of this quasi-representative body was "held on January 5th, 1871.

"1871.—By an Act entitled the *Civil List Act*, "1871, enacted by the Governor of British Colum- "bia with the advice and consent of the Legislative "Council on March 27th, 1871, after reciting that "it is desirable that a permanent Civil List should "be established by law, provision was made for "an annual appropriation of $78,346.25 out of the "general *revenue* of the colony to Her Majesty, her "heirs and successors, for the purpose of defraying "the expenses of various public services enumerat- "ed in the schedule to the Act. It was provided, "however, that the Act should not come into opera- "tion until it had received Her Majesty's assent "and such assent had been proclaimed in the colony. "This Act was repealed by an Act of the Provincial "Legislative Assembly in 1872.

"1871.—By an Act passed on 14th February of "this year a Legislative Assembly of twenty-five "members, thirteen elected by the mainland and "twelve by the Island constituencies, was substi- "tuted for the Legislative Council. The operation "of the Act was suspended until Her Majesty should "assent thereto and fix a date for its coming into "force. By a proclamation of June 26th, 1871, Gov- "ernor Musgrave declared that the Act should come "into operation on July 19th, 1871, the day prior to "the entry of British Columbia into the Dominion.

"For the purpose of the *Colonial Laws Validity* "*Act*, 1865, 28 and 29 Vict., c. 63, which regulates "the powers of colonial representative legislatures,

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"the term 'representative legislature' signifies any "colonial legislature which shall comprise a legis- "lative body of which one-half are elected by the in- "habitants of the colony (sec. 1).

In the *Mercer* case (1) the late Sir William Rit- "chie, C.J., elaborately explained the laws as af- "fecting escheats in the Province of New Bruns- "wick.

By the statute reuniting the Provinces of Upper and Lower Canada, sec. 50 provided:

> "And be it enacted, that upon the union of the "Provinces of Upper and Lower Canada all du- "ties and *revenues* over which the respective leg- "islatures of the said provinces before and at the "time of the passing of this Act had and have "power of appropriation, shall form one consoli- "dated revenue fund, to be appropriated for the "public service of the Province of Canada."

The words of this statute are similar to the language used in sec. 102 of the *British North America Act,* the language being:

> "All . . . revenues over which the respective "legislatures of Canada, Nova Scotia and New "Brunswick, before and at the union had and "have the power of appropriation."

This statute, 3 and 4 Vict., cap 35 (Imp.) was amended by 10 and 11 Vict., cap 71 (Imp.). It is a statute to authorize Her Majesty to assent to a certain Bill of the Legislative Council and Assembly of the Province of Canada for granting a civil list to Her Majesty and to repeal certain parts of an

(1) (1881) 5 Can. S.C.R. 538.

Act for reuniting the provinces of Upper and Lower Canada.

It became necessary in this case that an Imperial statute should be enacted, as the statute passed by the Canadian Parliament differed from the previous statute as to the apportionment of the civil list. Sections 50 to 57, inclusive, had to be repealed before the Canadian Parliament could enact the statute in question. By this statute, which was sanctioned by the Imperial Parliament, it was provided in part:

"And be it enacted that during the time for "which the said several sums mentioned in the "said schedules are severally payable, the same "shall be accepted and taken by Her Majesty, by "way of Civil List, instead of all territorial and "*other revenues* now at the disposal of the Crown "arising in this province."

The Imperial statute, 15 & 16 Vict., cap. 39, referred to in the arguments in the various reasons for judgment in the *Mercer* case, is styled "An Act "to remove *Doubts as to the Lands and Casual Rev-* "*enues* of the Crown in the Colonies and Foreign "Possessions of Her Majesty," and recites certain previous Statutes, namely, 1st William the Fourth, cap. 25, and 1 Victoria—and it enacts as follows:

"1. The provisions of the said recited Acts in "relation to the Hereditary *Casual Revenues* of "the Crown shall not extend or be deemed to have "extended to the moneys arising *from the sale or* "*other disposition of the lands of the Crown* in "any of Her Majesty's Colonies or Foreign Pos- "sessions, nor in anywise invalidate or affect any "sale or other disposition already made or here- "after to be made of such lands, or any appro-

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"priation of the moneys arising from any such "sale or other disposition which might have been "lawfully made if such Acts or either of them "had not been passed."

This section applies to lands or moneys arising from lands. The section of the statute which is important in this case reads as follows:

"Nothing in the said recited Acts contained "shall extend or be deemed to have extended to "prevent any appropriation which, if the said "Acts had not been passed, might have been law- "fully made, by or with the assent of the Crown, "*of any Casual Revenues* arising within the Col- "onies or Foreign Possessions of the Crown (other "than Droits of the Crown and Droits of Admir- "alty) for or towards any public purposes within "the Colonies or Possessions in which the same "respectively may have arisen: *Provided always, "that the surplus not applied to such public pur- "poses of such Hereditary Casual Revenues shall "be carried to and form part of the said Consoli- "dated Fund."*

In the elaborate judgment of Mr. Justice Gwynne, in the *Mercer* case (1) there is a history of the earlier statutes, and of the effect of this statute, 15 & 16 Vict. It is needless for me to repeat what has been so fully gone into in the reasons of the learned Judge.

Counsel for the plaintiff and also counsel for the defendant claim that the Province of British Columbia prior to that colony entering into the union, had the power of appropriation over the moneys in question. In view of the provisions of sec. 2 of the *Imp. Act,* 15 and 16 Vict., c. 39, I am of the opinion that

(1) 5 Can. S.C.R. 538.

the view entertained by counsel is correct. I have set out *in extenso* this section. It would seem to me that this section sanctions the appropriation. The proviso as to the surplus would be useless if it were not so.

In dealing with the provisions of sec. 102, in the *Mercer* case (1) the Lord Chancellor (the Earl of Selborne) refers to sec. 102:

> "All duties and revenues, etc., before and at "the union, had and have the power of appropria- "tion," as follows:
>
> "The words of exception in sec. 102 refer to "revenues of two kinds:
>
> "(1) Such portions of the pre-existing 'duties "and revenues' as were by the Act 'reserved to "the respective legislatures of the provinces'; "and, (2) such duties and revenues as might be "raised by them, in accordance with the special "powers conferred on them by the Act."

And he goes on to state:

> "It is with the former only of these two kinds "of revenues that their Lordships are now con- "cerned; the latter being the produce of that "power of 'direct taxation within the provinces, "in order to the raising of a revenue for provin- "cial purposes,' which is conferred upon Pro- "vincial Legislatures by sec. 92 of the Act."

The *Mercer* case was one relating to escheats for lands. It has been fully considered in the judgment of the Supreme Court in the case of *Trusts and Guarantee Co. v. The King* (2) on appeal from the judgment rendered by me (3).

(1) 8 App. Cas. 767 at 775.
(2) 54 Can. S.C.R. 107, 32 D.L.R. 469.
(3) 15 Can. Ex. 403, 26 D.L.R. 129.

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In the *Mercer* case the court carefully guarded itself from dealing with anything more than lands or the proceeds of lands. But, it is important to bear in mind that the Lord Chancellor construed sec. 102—and at page 774 uses these words:

"If there had been nothing in the Act leading "to a contrary conclusion, their Lordships might "have found it difficult to hold that the word "revenues in this section did not include *terri-"torial as well as other revenues,* or that a title in "the Dominion to the revenues arising from pub-"lic lands did not carry with it a right of disposal "and appropriation over the lands themselves. "Unless, therefore, the casual revenue, arising "from lands escheated to the Crown after the "Union, *is excepted and reserved to the Provin-"cial Legislatures,* within the meaning of this sec-"tion, it would seem to follow that *it belongs to "the Consolidated Revenue Fund of the Dominion.* "If it is so excepted and reserved, it falls within "sec. 126 of the Act, which provides that 'such "portions of the duties and revenues, over which "the respective Legislatures of Canada, Nova "Scotia, and New Brunswick had before the "Union power of appropriation, as are by this "Act reserved to the respective governments or "legislatures of the provinces' * * *"

In *St. Catherine's Milling & Lumber Co. v. The Queen* (1), Lord Watson states, as follows:

"The only other clause in the Act by which a "share of what previously constituted provincial "revenues and assets is directly assigned to the "Dominion is sec. 102. It enacts that all 'duties "and revenues' over which the respective legis-

(1) 14 App. Cas. 46 at 56.

"latures of the United Provinces had and have "power of appropriation, 'except such portions "thereof as are by this Act reserved to the re- "spective legislatures of the provinces, or are "raised by them in accordance with the special "powers conferred upon them by this Act,' shall "form one consolidated fund, to be appropriated "for the public service of Canada. The extent to "which duties and revenues arising within the "limits of Ontario, and over which the legislature "of the old Province of Canada possessed the "power of appropriation before the passing of "the Act, have been transferred to the Dominion "by this clause, can only be ascertained by refer- "ence to the two exceptions which it makes in "favour of the new provincial legislatures."

At page 57 Lord Watson states, as follows:

"The enactments of sec. 109 are, in the opinion "of their Lordships, sufficient to give to each "province, subject to the administration and con- "trol of its own Legislature, the entire beneficial "interest of the Crown *in all lands within* its boun- "daries, which at the time of the Union were vest- "ed in the Crown, with the exception of such "lands as the Dominion acquired right to under "sec. 108, or might assume for the purposes speci- "fied in sec. 117. Its legal effect is to exclude from "the 'duties and revenues' appropriated to the "Dominion, all the ordinary *territorial revenues* "of the Crown arising within the provinces. That "construction of the statute was accepted by this "Board in deciding *Attorney-General of Ontario* "*v. Mercer* (1).

(1) 8 App. Cas. 767.

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It is obvious from a consideration of the *British North America Act* that certain revenues which, but for the statute, would have belonged to the provinces, were transferred to the Dominion. The Dominion by the statute granted to the provinces large sums of money for the purposes of their civil lists. Having regard to the provisions of sec. 102, which refers to certain revenues over which the provinces at the date of the Union had and have power of appropriation passing to the Dominion except such portions as are reserved to the provinces under sec. 109, it is apparent that all royalties of every kind were not intended to belong to the provinces under the wording of sec. 109. The royalties in that section must have a limited meaning.

I think the meaning of sec. 109 was to pass to the provinces royalties arising from lands, mines, minerals, and royalties limited to escheats, or something arising out of lands, as referred to in sec. 1 of the Statute 15 & 16 Vict. I do not think it ever was in contemplation that under that term royalties, all royalties of every kind, including *bona vacantia,* were left to the provinces under the provisions of this statute.

Mr. Ritchie, in his able argument, referred to the precious metals, which he says belonged to the Province of British Columbia. But on reference to the *Precious Metals* case (1) it is stated:

"The title to the public lands of British Columbia has all along been, and still is, vested in the "Crown; but the right to administer and to dispose of these lands to settlers, together with all "*royal* and *territorial* revenues arising therefrom,

(1) 14 App. Cas. 295 at 301.

"had been transferred to the province, before its "admission into the Federal Union."

After the best consideration I can give to the case I am of the opinion that the claim put forward by the Attorney-General of the Province of British Columbia, to have the moneys in question paid over for the use and for the benefit of the Crown as represented by the province, fails.

In regard to costs, it is conceded by counsel for all parties that the defendant Rithet acted in an honourable and upright manner, and that he should receive the costs of the action. There will be an order allowing Rithet his costs. It is stated that these costs are small, as Rithet did not appear at the trial of the action. I would suggest that counsel agree to an amount and avoid the necessity for a taxation. Failing agreement, the costs will have to be taxed before the Registrar in the ordinary way.

I think under the circumstances of the case there should be no costs for or against either the plaintiff or the other defendant, the Attorney-General of the Province of British Columbia.

Judgment for plaintiff.

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

Solicitors for defendant Rithet: *Bodwell & Lawson.*

Solicitor for Attorney-General B. C.: *J. A. Ritchie.*

1918
March 14.

ROBERT LOWE,

SUPPLIANT,

AND

HIS MAJESTY THE KING,

RESPONDENT.

Yukon—Intoxicating liquors—License—Customs—Illegal tax—Recovery.

Under the provisions of the statutes relating to Yukon Territory the Dominion Government has the power to exact a fee for the granting of a permit for the importation or bringing in of intoxicating liquors in the territory; such exaction is a mere charge for the granting of the permit and not in the nature of customs duties or tax within the provisoins of the *Customs Act* (R.S.C. 1906, c. 48, s. 130).

(2) Where such a charge has been illegally imposed but paid voluntarily it cannot be recovered back.

PETITION OF RIGHT to recover taxes alleged to have been illegally exacted.

Tried before the Honourable Mr. Justice Cassels, at Ottawa, January 24, 1918.

W. D. Hogg, K.C., for suppliant.
C. P. Plaxton and *F. P. Varcoe*, for respondent.

CASSELS, J. (March 14, 1918) delivered judgment.

This was a Petition of Right filed on behalf of Robert Lowe, of Whitehorse, in the Yukon Territory. The petition was filed in the Exchequer Court

on the 1st day of April, 1915. It is stated that the petition was deposited with the Secretary of State on February 12th, 1915.

The Petition of Right alleges as follows:

"2. That for a number of years past your sup-"pliant imported into the said Territory, under "permit duly obtained, large quantities of spirit-"uous or malt liquors, wine, ale, porter, beer and "lager beer, upon which spirituous or malt liquors "he was obliged to pay in addition to the Customs "and Inland Revenue tax already paid thereon, a "tax of two dollars per gallon on all the said "spirituous or malt liquors so imported by him "into the said Territory as aforesaid, and upon "the said wine, ale, porter, beer and lager beer "he was obliged to pay a tax of fifty cents a gallon "on such liquors so imported.

"3. That during the years between July, 1900, "and the present time your petitioner has been "obliged to pay, and has in fact paid on account "of the said tax upon the spirituous and malt li-"quors, wine, ale, porter, beer and lager beer so "imported into the said Territory as aforesaid to "the officers of the Dominion Government and "those employed under the said officers in the col-"lection of revenue for the said Yukon Territory, "the sum of eighty-seven thousand three hundred "and forty-seven dollars.

"4 That the imposition of the said tax of two "dollars per gallon on spirituous and malt liquors "and the tax of fifty cents per gallon on wine, ale, "porter, beer and lager beer so imported into the "said Territory as aforesaid by your suppliant "was and is based upon certain orders in council

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"passed by your Majesty's government of Can-
"ada from time to time between the 26th day of
"July, 1900, and the 12th day of August, 1911,
"which Orders-in-Council purport to be founded
"upon the provisions and powers contained in the
"*Yukon Territory Act,* now consolidated in Re-
"vised Statutes of Canada, as Chapter 63, and the
"money so collected has been and is assigned un-
"der the provisions of the said orders in council
"to form part of the revenue of the said Yukon
"Territory.

"5. The suppliant alleges and the fact is that
"the said orders in council are *ultra vires* the
"government of Canada, the said government not
"having been authorized or empowered by the
"said *Yukon Territory Act* to impose the said tax
"on spirituous or malt liquors, ale, porter, beer
"or lager beer imported or brought into the said
"Territory; and the suppliant submits that the
"sum above mentioned has been exacted from
"him without warrant or legal authority by the
"officers of your Majesty's government of Can-
"ada, and has been received by your Majesty's
"said government as money paid to your Majesty
"for the use and benefit of your suppliant, and
"should be repaid to your suppliant with in-
"terest."

The petitioner claims that it may be adjudged that he is entitled to payment of the sum of $87,347, being the amount of the tax illegally exacted.

To this petition His Majesty the King, represented by the Attorney-General for the Dominion of Canada, filed a defence. The second paragraph of his defence reads, as follows:

"If the suppliant did make such payments as "in the third paragraph of the petition of right "alleged, which the Attorney-General does not "admit, such payments were made voluntarily by "him, and the Crown is under no liability to repay "them."

In paragraph 2a the respondent alleges, as follows:

"The alleged debt, cause of action or claim "pleaded herein did not accrue within six years "before this action, and was and is barred by the "statute of limitations. *Exchequer Court Act,* "R.S.C. 1906, ch. 140, sec. 33. *North-West Terri-"tories Act,* R.S.C. 1906, ch. 62, sec. 12. *Yukon "Act,* R.S.C. 1906, ch. 63, sec. 19. *Yukon Consoli-"dated Ordinances,* 1914, ch. 55, sec. 1. 21 James "I, ch. 16, sec. 3."

On the argument of the case respondent asked permission to supplement his defence by pleading the limitation which is provided by sec. 130, ch. 48, Revised Statutes of Canada, 1906. This section reads as follows:

"Although any duty of customs has been over-"paid, or although, after any duty of customs has "been charged and paid, it appears or is judicially "established that the same was charged under an "erroneous construction of the law, no such over-"charge shall be returned after the expiration of "three years from the date of such payment, un-"less application for payment has been previ-"ously made."

The respondent was granted leave to file this supplemental defence, and although in the view I take

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of the case it is not necessary to determine this point, if a higher court should take a different view, the question will arise whether or not this sec. 130 is applicable to the facts of the case, and would protect the respondent from any repayment for a longer period than three years. No application for repayment had been previously made.

In connection with sec. 130, in the interpretation the Act respecting the customs, sec. 2, sub-sec. 2, contains the following: "All the expressions and "provisions of this Act or any law relating to cus- "toms, etc." If it were to appear, as Mr. Hogg argued, that the charges imposed and collected are in the nature of customs duties, my view is that this sec. 130 would be applicable.

Before dealing with the case it would be well to state that in the year 1902, by the statute 2 Ed. VII., cap. 34, the *Yukon Territory Act* was amended, and for the first time, as far as I can ascertain, sub-sec. 2, of sec. 8, was enacted. It reads as follows:

> "2. Every ordinance made under the authority "of this section shall remain in force until the day "immediately succeeding the day of prorogation "of the then next session of parliament, and no "longer unless during such session of parliament "such ordinance is approved by resolution of both "Houses of Parliament."

The subsequent provision is in regard to publication in the Gazette.

On the argument Mr. Hogg, K.C., who appeared for the suppliant, and Mr. Newcombe, K.C., who appeared for the Crown, agreed that this provision of sub.-sec. 2, of sec. 8 cap 34. 2 Ed. VII., had been

complied with, and also that all the provisions relating to the advertisement had been complied with.

The *Yukon Territory Act* (intituled "An Act to provide for the Government of the Yukon Territory"), (1) reads as follows:

"113. No intoxicating liquor or intoxicants shall "be manufactured, compounded, or made in the "Territory; and no intoxicating liquor or intoxi- "cants shall be imported or brought into the Ter- "ritory from any province or territory in Canada "or elsewhere, except by permission of the Gov- "ernor-in-Council."

Sec. 114 reads as follows:

"114. All intoxicating liquors or intoxicants im- "ported or brought from any place out of Can- "ada, into the Territory, shall be subject to the "customs and excise laws of Canada."

I suggested to counsel that it might be well to supplement the admission of facts, which had been agreed upon by a statement showing whether the liquors referred to were imported or brought into the Territory from any province or territory in Canada, or whether they were imported or brought from any place out of Canada, and the parties have agreed to supplement the admissions which are on file by stating that the liquor above referred to was brought into the Territory from other parts of Canada.

The parties have agreed upon a statement of facts, the first three paragraphs of which reads as follows:

"1. That under permits duly issued in pur- "suance of the provisions of the orders-in-council

(1) R.S.C. 1906, c. 63.

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"hereinafter mentioned, the suppliant, trading "under the name of Robert Lowe and Company, "at Whitehorse, in the Yukon Territory, during "the years between June 24, 1901, and April 1, "1915, imported and brought into the said Terri- "tory spirituous and malt liquors, ale, porter, beer "and lager beer.

"2. That during the period aforesaid the sup- "pliant paid to officers of the respondent in the "said Territory, in respect of the liquors so im- "ported, the following sums of money:

"1901-2	$16,436.00
"1902-3	4,986.00
"1903-4	7,785.50
"1904-5	6,386.50
"1905-6	9,947.00
"1906-7	6,414.00
"1907-8	5,650.00
"1908-9	5,800.00
"1909-10	3,742.00
"1910-11	5,125.00
"1911-12	5,902.00
"1912-13	3,318.00
"1913-14	3,501.00
"1914-15	1,796.00
	$86,789.00

"3. That the said permits were issued and the "said payments were made in pursuance and sub- "ject to the provisions of the following Orders-in- "Council:

"Order in Council dated Feb. 25, 1901, P.C... 256
"Order in Council dated March 5, 1901, P.C. 257
"Order in Council dated March 18, 1901, P.C. 579

"Order in Council dated June 22, 1904, P.C. 1159
"Order in Council dated Sept. 17, 1908, P.C. 2055
"Order in Council dated Dec. 9, 1909, P.C. 2475
"Order in Council dated August 12, 1911, P.C. 1794

The various orders-in-council under which the fees were exacted are filed as part of the proceedings in the present action.

I have considered the various statutes relating to the Yukon Territory. Cap. 6 of 61 Vic. (13th June, 1898), which constitutes the Yukon a judicial district. Cap. 11, 62 & 63 Vic. (11th August, 1899, repealed the previous sec. 8, and provided as follows:

"Provided always that the Governor-in-Council "or the Commissioner-in-Council may make regu- "lations in respect to shop, tavern and other li- "censes, and may impose fees for the issue of the "same."

By cap. 41, 1 Ed. VII. (23rd May 1901) it was provided that the Yukon should no longer form part of the North-West Territories.

Colour is afforded to the argument advanced by Mr. Hogg that the fees which were exacted for the granting of the permit were in reality a tax by the language used in one or two of the ordinances which are filed. For instance, the ordinance which is dated September 17th, 1908, is headed "Ordinance respecting the imposition of a tax upon ale, porter, "beer, or lager beer, imported into the Yukon Ter- "ritory." It purports to amend a previous ordinance of June 22nd, 1904, by providing that on and after the first day of November, 1908, a tax of 50 cents a gallon be imposed. A subsequent ordinance, passed on December 9th, 1909, is an ordinance to

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rescind an ordinance respecting the imposition of a tax.

Various permits were from time to time obtained by the suppliant permitting him to take into the Territory intoxicating liquor or intoxicants. The ordinances would indicate that as a term for obtaining these permits the applicant was asked to pay certain fees which apparently were graduated or based upon the quantity of intoxicating liquors which he sought permission to take into the Territory.

For a time my impression was that these exactions were in the nature of customs dues and in the nature of a tax, but on reflection I have come to the conclusion that they were mere charges made by the Dominion government for the granting of the permit.

It was conceded before me by Mr. Hogg, counsel for the suppliant, and who presented his case with great ability and considerable research, that the Dominion government had the right to impose license fees as a term for the granting of the permits. His contention, however, is that the amounts charged were so excessive as to show that they were really charged as customs dues or as a tax. If it be once conceded that the Governor in Council had the right to impose a fee for the granting of the permit, I do not think it would be open to the suppliant to question the amount. He paid what was asked, raised no objection, did not pay under protest, but acquiesced in the charges, and no doubt when he came to retail the liquor, the consumer paid what had been advanced for the permit.

I think that a fee could be legally exacted for the granting of the permit. It is not the case of a man

having the right to take liquor into the Territory, and then being charged with this so-called tax. He had the right to accept or refuse the permit.

The case of *Chappelle v. The King* (1), is of a different character. In that case the plaintiff had the legal right to mine for ores. Subsequent to the granting of this right the Crown attempted by regulations to alter his contract by requiring him to pay certain royalties. It was held that this was illegal so far as the first license was concerned. Subsequently the Privy Council adopted the judgment of Sir Louis Davies, to the effect that the subsequent licenses were practically new grants, and were subject to the regulations then in force.

The case was somewhat similar to the case of *Booth v. The King* (2), a case referring to the renewal of a license to cut timber.

In the present case before me, as I have pointed out, there was in no sense any change or attempted change of any contract entered into between the Crown and the suppliant. He voluntarily acquiesced in the charge made by the permit, and even if it were to be held illegal as a tax, I do not think he could recover.

In an elaborate judgment of the Court of Appeal in Ontario in the case of *Cushen v. City of Hamilton* (3), it was held that fees having been paid with full knowledge of the facts, under a claim of right, could not be recovered back.

Another case of taxes paid was that of *O'Grady v. Toronto* (4).

(1) 7 Can. Ex. 414; 32 Can. S.C.R. 586; [1904] A.C. 127.
(2) 51 Can. S.C.R. 20, 21 D.L.R. 558.
(3) 4 O.L.R. 265.
(4) 37 O.L.R. 139, 31 D.L.R. 632.

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I would in addition to the cases I have mentioned add the case of the *Grand Trunk Railway v. Quebec* (1),—and would refer to the language of Mr. Justice Strong at page 79. It is *obiter*, but nevertheless the opinion of a very eminent judge.

I have also been furnished with an elaborate list of authorities to show that under the general words authorizing the Governor in Council to enact laws for the peace, order and good government, etc., that as a matter of police regulation there was the power on the part of the Governor in Council to charge these fees. I do not think it necessary to rely upon this point, but I may add that any power to enact a law in the nature of a police regulation would fall rather to the Yukon government than to the Governor in Council of the Dominion.

Claims of this character become serious if after such length of time these moneys have to be paid back.

The case of *Schlesinger* (2) may be referred to as showing the views of the American courts.

I think the petition should be dismissed with costs.

Petition dismissed.

Solicitors for suppliant: *Hogg & Hogg.*

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

(1) 30 Can. S.C.R. 78.
(2) 1 Court of Claims, p. 16.

IN THE MATTER OF THE PETITION OF RIGHT OF

FRANCOIS FRADETTE,

SUPPLIANT,

AND

HIS MAJESTY THE KING,

RESPONDENT.

1918
March 11.

Limitation of actions—Negligence—Action against Dominion Crown—Interruption of prescription.

By virtue of sec. 38 of the *Exchequer Court Act* (R.S.C. 1906, c. 140) the provincial laws relating to prescription and limitation of actions apply to an action for personal injuries against the Crown in right of the Dominion.

Mere "negotiation" does not operate as an interruption of the prescription.

PETITION OF RIGHT to recover damages for personal injuries.

Tried before the Honourable Mr. Justice Audette, at Quebec, February 16, 1918.

W. Amyot, for suppliant.

E. Belleau, K.C., for respondent.

AUDETTE, J. (March 11, 1918) delivered judgment.

The suppliant, who is an employee of the Department of Marine, brought his petition of right to re-

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cover damages in the sum of $2000, as arising out of an accident of which he was the victim while working, at Quebec, as boiler-maker on board the Steamer *"Princess,"* a steamer owned by the Dominion Government. He claims that in course of this work a piece of steel flew from his tool, lodged in his left eye, and as a result he absolutely lost the use of the eye.

The accident happened on the 30th January, 1914. The petition of right is dated as of the 12th October, 1916, and the fiat was granted on the 7th November, 1916.

Sec. 33 of *The Exchequer Court Act* enacts that, "The laws relating to prescription and the limita- "tion of actions in force in any province between "subject and subject shall, subject to the provisions "of any Act of the Parliament of Canada, apply to "any proceeding against the Crown in respect of "any cause of action arising in such province."

Moreover, under Art. 2211 of the Civil Code of the Province of Quebec, the Crown may avail itself of prescription, and the manner in which the subject may interrupt such prescription is by means of a petition of right,—apart from the cases in which the law gives another remedy.

Under Art. 2262 of the Civil Code the right of action for bodily injuries is prescribed by one year, and Art. 2267 thereof enacts that in such case the debt is absolutely extinguished, and that no action can be maintained after the delay for prescription has expired.

Counsel for the suppliant contends, however, that the correspondence produced of record amounts

to negotiations which would interrupt prescription. In that contention I am unable to acquiesce.

The term "negotiation," as defined in Black's Law Dictionary, is "the deliberation, discussion or "conference upon the terms of a proposed agree-"ment; the act of setting or arranging the terms "and conditions of a bargain, sale, or other business "transaction."

A demand of payment has been made and the Crown, when informed of the nature of the claim, declines to acknowledge any liability. The claimant cannot bind the other side by a mere demand for payment. It is, at most, a unilateral demand, without mutuality of purpose to negotiate, and it is in its very nature insufficient to interrupt prescription.

It is unnecessary to say any more upon this question; the matter is to my mind too clear. I therefore find that the injury complained of in this case having been received more than a year before the lodging of the petition of right with the Secretary of State, the right of action is absolutely prescribed and extinguished under the provisions of Articles 2262 and 2267 C. C. See also *The Queen v. Martin* (1)

In the view I take of the case it becomes unnecessary to consider both the question of "negligence" and the question of "public work," and while the accident is most unfortunate, it is, however, to some extent comforting, under the circumstances, to know the suppliant has been continued in his work and

(1) 20 Can. S.C.R. 240.

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that he has even received an increase in his wages.

The action is dismissed and the suppliant is declared not entitled to the relief sought by his petition of right.

Action dismissed.

Solicitors for suppliant: *Drouin & Amyot.*

Solicitors for respondent: *Belleau, Baillargeon & Belleau.*

GILBERT BROTHERS ENGINEERING COMPANY, LIMITED,

SUPPLIANTS,

AND

HIS MAJESTY THE KING,

RESPONDENT.

1917
April 26.

Public work—Contract for construction—Progress estimate—Allowance to contractor not made therein—Claim in writing—Engineer's certificate—Right of engineer subsequently appointed to review—Condition precedent—Right of contractor to recover.

By the provisions of a contract for the construction of a public work every allowance to which the contractor was fairly entitled should not be paid the full amount due him under the contract until if the contractor had any claims which were not so included it was necessary for him to make such claims in writing to the engineer within a specified time.

Held, that the failure to comply with these provisions disentitled the contractor to recover the amount of such claims.

2. It was further provided by the contract that the contractor should not be paid the full amount due him under the contract until he had obtained the certificate of the engineer "for the time being", having control of the work, that the same had been completed to his satisfaction. B. was the engineer "for the time being" when the work was completed. He drew up a document which was intended to be a final certificate. In this certificate a certain claim was neither expressly allowed nor disallowed, but it was left for the determination of the Exchequer Court under a clause in the contract which provided that all matters of difference between the parties arising out of the contract, the decision whereof was not especially given to the engineer, should be referred to the Exchequer Court of Canada.

Held, that as it appeared that B. had intended to give a final certificate, an engineer subsequently appointed had no power to re-open the matter.

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GILBERT BROTHERS ENGINEERING CO. v. THE KING.

Reasons for Judgment.

PETITION OF RIGHT to recover for work performed under a building contract.

Tried before the Honourable Mr. Justice Cassels, at Ottawa, June 20, 21, 22, 1916; March 12, 1917.

R. A. Pringle, K.C., and *L. Coté,* for suppliants.
Howard and *E. E. Fairweather,* for respondent.

CASSELS, J. (April 26, 1917) delivered judgment.

A petition of right filed on behalf of the petitioners, The Gilbert Brothers Engineering Company, Limited, claiming the sum of $115,000 and interest. The claim is made for work alleged to have been performed by the petitioners, under the terms of a contract bearing date September 15th, 1897.

It is admitted that the contract is correctly set out in the petition of right with the correction made at the trial of clause 12 of the contract as there set out.

The contract provided for the payment of the sum of $425 per day of 12 hours, during which the said plant is in actual operation, etc., but nothing turns upon that portion of the contract.

Clause 12 proceeded: "And further, if it should "be determined upon by Her Majesty's Minister of "Railways and Canals to improve the said channel "by deepening and widening the same below the "original or contract grade, then Her said Majesty "will pay the said contractors for such work of "drilling, blasting and dredging as may be ordered "by the said Minister in the deepening and widen-"ing the said channel below said grade, the sum of "$8.40 per cubic yard *for rock necessarily excavat-*

"*ed*, the said sum of $8.40 per cubic yard to cover all "cost of removal and deposit of excavated material, "drilled, blasted, dredged below and outside of the "prism described in the specification annexed to the "original contract of William Davis and Sons, of "the 5th day of August, 1879."

The contention of the petitioners is that work to the extent of over one hundred and thirty thousand odd dollars was performed, for which work they have not been paid. Their contention is that Mr. Rheaume, the engineer in charge of the work, acting under the directions of the Chief Engineer of Railways and Canals, issued a certificate certifying that the Gilbert Brothers Engineering Company, Limited, were entitled to the sum of about $115,000.

By the prayer of the petition the Gilbert Brothers Engineering Company, Limited, submit that they are entitled to a final certificate for the sum of $115,000, or thereabouts, and to interest thereon since the completion of the work.

The 20th and 21st paragraphs of the petition of right read as follows:

"20. The said L. N. Rheaume, acting under direc- "tions of the Chief Engineer of Railways and Can- "als, did revise his figures, as shown in the state- "ment of final quantities and claims, and issued a "certificate showing that the Gilbert Brothers En- "gineering Co., Ltd., were entitled to a sum of "about $115,000.

"21. That the certificate is in the hands of the De- "partment of Railways and Canals and is the final "certificate as required by the contract."

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Reasons for Judgment.

In these clauses the petitioners claim that the final certificate under the terms of the provisions of the contract had been signed. If no such certificate had been given, the petitioners' action would fail, as there is no case made on the face of the petition entitling them, as asked by the prayer, to a final certificate.

Since the trial and the argument of the case I have gone carefully over the evidence and the various authorities cited by counsel. A late case of *Hampton v. Glamorgan* (1) may be referred to as showing how little assistance is afforded from the citations of numerous decisions determined on different contracts. Regretfully I have come to the conclusion that the defence raised by Mr. Howard on behalf of the Crown is a valid defence.

Certain provisions of the contract are important. Clause 1 provides that the word "Engineer" shall mean the "Chief Engineer," for the time being having general control over the work.

Clause 12 reads as follows:

"12. And Her Majesty, in consideration of the "premises and of the supplying by the contractors "of all the necessary plant for the purpose of sur- "veying the bottom of the channel through the "Galops Rapids, in the River St. Lawrence, and of "removing alleged obstructions therefrom which "may be discovered above the original or contract "grade, as above recited, covenants with the con- "tractors that they will be paid for said work the "sum of four hundred and twenty-five dollars per

(1) [1917] A.C. 13 at p. 18.

"day of twelve hours, during which the said plant "is in actual operation, time to commence when the "plant is in position as designated by the engineer "in charge. The length of time that the plant is to "be so employed to be determined by the Depart- "ment of Railways and Canals, it being distinctly "understood that this agreement of survey may at "any time be determined by a three days' notice. "And further, if it should be determined upon by "Her Majesty's Minister of Railways and Canals "to improve the said channel by deepening and "widening the same below the original or contract "grade, then Her said Majesty will pay the said "contractors for such work of drilling, blasting and "dredging as may be ordered by the said Minister "in the deepening and widening the said channel "below said grade, the sum of $8.40 per cubic yard "for rock necessarily excavated, the said sum of "$8.40 per cubic yard to cover all cost of removal "and deposit of excavated material, drilled, blasted, "dredged below and outside of the prism in the "specification annexed to the original contract of "William Davis and Sons of the 5th day of August, "1879."

Clause 15 is as follows:

"15. That in the event of its being determined by "the said Minister of Railways and Canals to im- "prove the said channel by deepening and widening "the same, then, and in that event only will this "clause Number 15, and clauses Numbers 16, 17 and "18 apply and form part of this contract. Cash "payments equal to about ninety per cent. of the "value of the work done, approximatively made up "from returns of progress measurements and com-

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GILBERT BROTHERS ENGINEERING CO. v. THE KING.

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"puted at the prices agreed upon, or determined "under the provisions of this contract, will be made "to the contractor monthly, on the written certifi- "cate of the engineer stating that the work, for or "on account of which the certificate is granted, has "been performed, and stating the value of such work "computed as above mentioned, and the said cer- "tificate shall be a condition precedent to the right "of the contractor to be paid the ninety per cent., "or any part thereof; the remaining ten per cent. "shall be retained till the final completion of the "whole work to the satisfaction of the engineer for "the time being, having control over the work, and "within two months after such completion the re- "maining ten per cent. will be paid. And it is here- "by declared that the written certificate of the said "engineer certifying to the final completion of the "said works to his satisfaction shall be a condition "precedent to the right of the contractor to receive "or to be paid the said remaining ten per cent., or "any part thereof."

Clauses 16, 17 and 18 are as follows:

"16. It is intended that every allowance to which "the contractors are fairly entitled will be em- "braced in the engineer's monthly certificates; but "should the contractors at any time have claims of "any description which they consider are not in- "cluded in the progress certificates, it will be neces- "sary for them to make such claims in writing to "the engineer within thirty days after the date of "the despatch to the contractors of each certificate "in which they allege such claims to have been "omitted.

"17. The contractors in presenting claims of the

"kind referred to in the last clause must accompany "them with satisfactory evidence of their accuracy, "and the reason why they think they should be al- "lowed. Unless such claims are thus made during "the progress of the work, within thirty days, as in "the preceding clause, the contractors shall be for- "ever shut out and shall have no claim on Her Maj- "esty in respect thereof.

"18. The progress measurements and progress "certificates shall not in any respect be taken as "binding upon the engineer, or as final measure- "ments, or as fixing final amount; they are to be "subject to the revision of the engineer in making "up his final certificate, and they shall not in any "respect be taken as an acceptance of the work or "release of the contractors from responsibility in "respect thereof, but they shall at the conclusion of "the works deliver over the same in good order, ac- "cording to the true intent and meaning of this con- "tract."

Clause 23 of the contract, on which a good deal of stress is laid by Mr. Pringle, is as follows:

"23. It is hereby agreed that all matters of dif- "ference arising between the parties hereto upon "any matter connected with or arising out of this "contract, the decision whereof is not hereby espe- "cially given to the engineer, shall be referred to "the Exchequer Court of Canada."

It is conceded by Mr. Pringle, counsel for the petitioners, that the petitioners received progress estimates from time to time, and that all the money certified as due by the progress estimates has been paid.

It is also conceded that the drawback of ten per cent. referred to in the contract has also been paid.

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Mr. Pringle stated further that the drawback had been paid prior to the 43rd estimate.

On the opening of the case the following discussion took place:

THE COURT—Does the $115,000 represent the drawback or what?

Mr. Pringle—I think not.

THE COURT—You got your progress estimates from time to time?

Mr. Pringle—Yes, all signed properly in accordance with the contract.

THE COURT—Has the money been paid on the progress certificates?

Mr. Pringle—Yes.

THE COURT—Then those are not in question?

Mr. Pringle—No.

THE COURT—Then what is before me in the form of the claim of $115,000—is it the ten per cent. drawback, plus a rectification of the progress estimates?

Mr. Pringle—I would not like to say that the ten per cent. drawback was included. I think that was paid to them.

It is important to bear in mind that the drawback has been paid, as the 15th clause of the contract provides:

"And it is hereby declared that the written certi-
"ficate of the said engineer, certifying to the final
"completion of the said works to his satisfaction,
"shall be a condition precedent to the right of the
"contractor to receive or to be paid the said remain-
"ing ten per cent., or any part thereof."

The certificate there required is as to the drawback of ten per cent. not now in question.

Mr. T. S. Rubridge was the Superintending Engineer of the works until he died in the year 1904.

Mr. L. N. Rheaume, a witness in the case, and upon whose evidence the petitioners rely, was appointed Superintending Engineer on the 25th June, 1904. Mr. Killaly was the local engineer in charge from 1898.

Mr. M. J. Butler was the Chief Engineer from 1905 until 1910, when he retired from the service, and Mr. W. A. Bowden was appointed Chief Engineer.

It is conceded by counsel for both parties that Mr. Butler was the Chief Engineer for the time being, having control over the work during his appointment, and Mr. Bowden after the retirement of Mr. Butler. Counsel for the petitioner undertook to file copies of the orders-in-council making these appointments. They have not been filed. If it becomes of importance they may be put in. There is no dispute on the part of counsel as to these facts.

The Crown by their defence rely on the provisions of clauses 16 and 17 of the contract, and as I have stated, I have come to the conclusion that the defence is well founded in law.

The work under the contract was completed in September of 1906. It is alleged by the petitioner that the claims in question were not placed in the progress estimates and it is conceded that no objection or claim was made by the contractors, as required by the provisions of these clauses 16 and 17. It is alleged that an agreement was entered into between the petitioner and the engineers in charge.

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The 12th paragraph of the petition of right reads as follows:

"12. That estimates were given from time to time "as the work progressed, but there was a thorough "and distinct understanding between the Gilbert "Bros. Engineering Co., Ltd., and the engineers in "charge that the question of excavation below grade "done by the Gilbert Bros. Engineering Co., Ltd., "was absolutely necessary in order to obtain grade, "and should remain in abeyance until such time as "there was a final sweeping of the channel and the "quantities could be ascertained, and in the esti- "mates given by the engineer in charge, at different "times, there was a clear reservation in regard to "the work done below grade. For instance, in esti- "mate No. 43 the engineer puts in 'Allowance on "rock necessarily excavated below grade pending "a final adjustment of this item.' Again, in esti- "mate No. 42 there are several allowances for neces- "sary excavation above grade which had not pre- "viously been measured, and there is an allowance "on rock necessarily excavated below grade, pend- "ing final adjustment. So that the estimates of the "engineer in charge bear out the contention of the "Gilbert Bros. Engineering Co., Ltd., that the ne- "cessary excavation below grade for the purpose of "completing the work, was to be considered and dis- "posed of in the final estimate after the sweeping "was done."

If any such agreement was entered into it was with Mr. Killaly, and he had no authority to vary the terms of the contract. The claims in question should, if allowable, have appeared in the progress estimates, and the course provided by clauses

16 and 17 adopted, if not so included. Mr. Killaly in his evidence states as follows, referring to work now claimed for:

"Q. Now were those quantities obtained at that "time in such a shape that they could have been "included in the progress estimates?—A. So far as "the soundings off the dredge were concerned, they "might have been included in the estimate. They "might have been included in the estimates.

"Q. What estimates?—A. In the monthly pro- "gress estimates.

"Q. We have been informed that they were not so "included?—A. No material below grade was re- "turned in progress estimates during the course of "the work, except in one estimate that has been re- "ferred to."

This estimate referred to is what they call Estimate No. 43.

Mr. Rheaume in his evidence states as follows:

"Q. Was there any way of arriving at the actual "quantity of excavation below grade until the chan- "nel was swept?—A. There was approximately, for "all practical purposes to establish the principle of "it. But the figures probably would not be correct, "but you would get a fair approximation.

"Q. Was it done, as a matter of fact, until the "channel was swept?—A. Not to my knowledge; it "might have been done."

He stated further:

"Portions of the work thus far completed, al- "though not swept, could have been approximately

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"estimated under this to show the quantity below "grade.

"By *Mr. Pringle*:

"Q. Was it?—A. It was not done in my time; it "might have been done before.

"Q. Was it done in your time?—A. Not in my "time."

Mr. Bowden states, "I would consider that sub- "stantially the whole of the amount should have "been included in the progress estimate.

"THE COURT—Subject to re-adjustment for the "final certificate?

"The Witness—Subject to re-adjustment for the "final."

Mr. M. J. Butler, as I have stated, was the Chief Engineer for the time being, having the control of the work at the time the contract was completed. The effect of Mr. Butler's evidence is that he finally dealt with the matter, and intended to give a final certificate. It is quite clear from his evidence that he neither intended to allow or disallow the claim in question. His view apparently was that under the clause of the contract to which I have referred, the claim in question should be left to the court. This was the view he entertained and he acted upon it and gave what he intended to be a final certificate.

Referring it to the court did not get rid of the legal difficulties raised by clauses 16 and 17 of the contract.

My view is that after what took place before Mr. Butler, the subsequent Chief Engineer, Mr. Bowden, had not the right to reopen the matter.

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I think the principle laid down in *Murray v. The Queen* (1) is applicable to this case. The facts in the *Murray* case are not similar to the facts in this case, as in the *Murray* case the amount in question had been paid. If in point of fact Mr. Butler dealt with the case I do not think that the subsequent engineer had the right to reopen the matter.

In the case of *Murray v. The Queen,* supra (2), the learned Judge points out objections might have been raised to the right of the petitioner. He states: "These and other minor objections presented themselves to us as conclusive reasons, if urged and "relied on, why the contractors could not as a matter of technical law (*though not of natural justice*) maintain their action."

In the case before me, the Crown relies upon the objections.

Even if the dealing with the matter by Mr. Butler was not final, I do not think the subsequent reopening by Mr. Rheaume and Mr. Bowden could deprive the Crown of the defence which they have raised. Both of these gentlemen seem to be of opinion that the claim of the petitioner to the extent of $115,000 is a meritorious claim.

I have to deal with the case as it comes before the Court from the legal point of view. It is for the advisers of the Crown to say whether or not under the circumstances of the case such a claim should be paid. There may be reasons as suggested by Mr. Howard why the claim is not a meritorious one. It is not for me to pass upon this point.

(1) 26 Can. S.C.R. 203.
(2) At p. 212.

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In the case of *Gilbert Blasting & Dredging Co. v. The King* (1), the learned judge, the late Mr. Justice Burbidge states as follows:

"By the twenty-sixth and twenty-seventh para-
"graphs of the contracts the contractors agreed
"that they should have no claim on Her Majesty for
"anything not included in the progress estimates,
"unless the claim was made and supported by sat-
"isfactory evidence, and repeated every month.
"Nothing of the kind was done with respect to the
"present claim. Sometimes one feels that there
"may be some hardship in the Crown invoking these
"provisions against a contractor's claim. But per-
"haps one ought not to have that feeling where the
"contractor during the progress of the work lies
"back and does not give any intimation that he
"thinks himself entitled in any way to that for
"which afterwards he puts forward a claim. At all
"events it is for the Crown to say when these pro-
"visions shall be invoked against a claim, and when
"they may be waived. In the present case the
"Crown relies upon them, and they constitute, I
"think, a bar to the whole claim." This case was affirmed by the Supreme Court of Canada (2).

I have therefore come to the conclusion, as I have stated, that the petitioners fail in their action, which must be dismissed with costs.

Action dismissed.

Solicitors for suppliants: *Pringle, Thompson, Burgess & Coté.*

Solicitors for respondent: *McLennan, Howard & Aylmer.*

(1) 7 Can. Ex. 221 at 236.
(2) 33 Can. S.C.R. 21.

ON APPEAL FROM THE TORONTO ADMIRALTY DISTRICT.

1917
Dec. 1.

FRED JOHNSON,

(PLAINTIFF) APPELLANT,

AND

ADAM BROWN MACKAY,

RESPONDENT,

V.

THE STEAMSHIP "CHARLES S. NEFF"

(No. 1.)

Shipping—Admiralty law—Appeal—Jurisdiction—Leave of Court.

The Exchequer Court, sitting in appeal, cannot entertain an appeal from an interlocutory decree without leave having previously been obtained from either the local Judge in Admiralty or from the Judge of the Exchequer Court, as required by sec. 20 of the *Admiralty Act* (R.S.C. 1906, c. 141).

APPEAL from the Toronto Admiralty District.

The appeal came on for hearing before the Honourable Mr. Justice Audette at Ottawa, December 1st, 1917.

J. A. H. Cameron, K.C., for Johnson.
Langs, for MacKay.
M. J. O'Reilly and *Scott,* for the Ship.

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Reasons for Judgment.

At the conclusion of the argument the following judgment was delivered.

AUDETTE, J. (December 1, 1917)

I do not see that there will be anything gained by my taking this case under advisement. The matter is so clearly before me, and the question that I will have now to decide is succinctly boiled down to one as to whether or not under sec. 20 of the Admiralty Act (1), this court, sitting in appeal from a local Judge in Admiralty, can be seized of an appeal from an interlocutory decree without leave having previously been obtained from either the local Judge in Admiralty or from the Judge of this Court.

This is a statutory enactment whereby I am bound, and failing to have such leave this court is not seized with the proper jurisdiction to entertain the appeal.

Moreover, under the jurisprudence of this court, the expression jurisprudence taken as used in the Province of Quebec, I have to follow the decision of my colleague, who has already passed upon a similar subject in the case of *251 Bars of Silver v. Canadian Salvage Association* (2), wherein he decides that when a mode of appeal is prescribed by statute, the same must be followed in its entirety, citing in support of such decision *Brown on Jurisdiction,* wherein it is stated: "The mode of appeal must fol- "low the statute, and when the statute requires that "the appeal shall be taken in a specified manner, it "must be followed as to time, manner, and the ful- "filing of all the statutory directions." See also *Supervisors v. Kennicott* (3).

(1) R.S.C. 1906, c. 141. (2) 15 Can. Ex. 367.
(3) 94 U.S. 498.

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Reasons for Judgment.

Following this decision and finding myself bound by the statute, I dismiss the appeal with costs.

Appeal dismissed.

Solicitor for plaintiff: *J. A. H. Cameron.*

Solicitors for MacKay: *Langs & Binkley.*

Solicitor for Ship "Charles S. Neff": *M. J. O'Reilly.*

1917
Dec. 11.

FRED JOHNSON AND ADAM BROWN MACKAY,

PLAINTIFFS,

v.

THE STEAMSHIP "CHARLES S. NEFF"
AND
The Crew of the STEAMSHIP "SARNOR" and the Underwriters of the Ship as added parties,

DEFENDANTS.

(No. 2.)

Admiralty Courts—Transfer of cause—Comity.

On the ground of comity, the Exchequer Court will not entertain an application for the transfer of a cause from one admiralty district to another without the application having first been made before the local Judge.

APPLICATION for the transfer of a cause from the Toronto to the Quebec Admiralty District.

The motion came on before the Honourable Mr. Justice Audette, at Ottawa, December 11, 1917.

J. A. H. Cameron, K.C., for plaintiff Johnson.

Langs, for MacKay.

M. J. O'Reilly, for the Ship.

AUDETTE, J. (December 11, 1917) delivered judgment.

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Reasons for Judgment.

I am asked to make an order to transfer a case from the Toronto to the Quebec Admiralty District, without an application for this purpose having first been made before the Local Judge.

Were I to entertain the application, it seems to me, it would be a "tyrannous exercise of concurrent jurisdiction," to quote an expressive judicial phrase; because there is a competent Court duly seized of the cause where the matter ought to be first dealt with.

It would be a great discourtesy to the Judges of the Quebec and Toronto Admiralty Districts, and it would also be ignoring the principles of comity, for me to entertain the proposed application, and I wish especially to put myself on record as absolutely declining to deal with this matter on the merits,—and that it is strictly and exclusively upon the ground of comity that I dismiss the application and with costs.

Application dismissed.

Solicitor for plaintiff Fred Johnson: *J. A. H. Cameron.*

Solicitors for plaintiff, Adam Brown MacKay: *Langs & Binkley.*

Solicitor for Ship "Charles S. Neff" and Underwriters: *M. J. O'Reilly.*

1915
April 27.

QUEBEC ADMIRALTY DISTRICT.

CANADIAN PACIFIC RAILWAY COMPANY,

PLAINTIFF,

v.

THE STEAMSHIP "STORSTAD,"

DEFENDANT.

Shipping—Collision—Fog—Rule of road—Liability.

A collision occurred between the plaintiff's ship, an outward-bound vessel, and the defendant ship, an inwardbound vessel, while passing each other in converging courses on open water of the St. Lawrence river during a fog,

Held, that the rules governing the open sea applied, and that the former having complied with art. 23 of the Rules of the Road was blameless in manœuvering herself out of the danger of a collision; that the collision was brought about by the negligence of the officers of the defendant ship in altering her course in the fog and failing to slacken her speed, in violation of arts. 16, 21 and 29 of the Rules.

ACTION for damages resulting from a collision.

Tried before the Honourable Mr. Justice Dunlop, Local Judge of the Quebec Admiralty District, Captain Francis Nash, Assessor, on February 15, 16, 18, 19, 22, 23, 25, 26, and March 1, 2, 3, 4 5, 1915.

A. Geoffrion, K.C., for plaintiff.

J. W. Griffin, and *W. P. Sedgwick,* of New York Bar, for defendant.

DUNLOP, Loc. J. (April 27, 1915) delivered judgment.

The plaintiff, as the owner of the Steamship "Empress of Ireland," claims the sum of three million dollars against the Ship "Storstad" for the loss of the Steamship "Empress of Ireland," and the amounts paid or that may hereafter be paid for loss of life, or personal injury to members of the crew or others, whether under the *Workmen's Compensation Act* or otherwise, and for other and all losses and damages occasioned by the collision which took place in the St. Lawrence River, near Father Point, on May 29th, 1914, and for costs.

Whereas the plaintiff, by its statement of claim, alleges as follows:

(1) That between 1.45 and 2 o'clock A.M., on the 29th May, 1914, the Steamship "Empress of Ireland," 8028 net registered tonnage, of which the plaintiff is the owner, whilst on a voyage from Quebec to Liverpool, with passengers and general cargo, was between 6 and 7 miles to the northward and eastward of Father Point, which is on the south shore of the River St. Lawrence; (2) there was fog and no wind and the tide was about half flood, although there remained a current down stream running at the rate of about one and a half knots; (3) the "Empress of Ireland" had dropped her pilot near the Father Point gas buoy, and had then got under way, taking a course of N.470 deg. E. magnetic, until she had the Cock Point gas buoy abeam, when the course was changed to N. 73. deg. E. magnetic; (4) that the lights of another ship, which turned out to be the "Storstad," were first seen several miles off before the fog shut in and bearing at first about 4 points on the starboard bow of the "Empress of Ireland," but when the latter altered her

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course, off Cock Point buoy, the "Storstad's" lights bore about a point or a point and a half on the starboard bow of the "Empress of Ireland" and the vessels would have passed each other starboard to starboard, at a safe distance, if the "Storstad" had not subsequently altered her course in the fog; (5) there had been intermittent fog earlier in the night, but the weather was clear when the "Empress of Ireland" left Father Point, and it was somewhat later, a little after altering the course off Cock Point buoy, that fog coming from the south shore was seen to be dimming the "Storstad's" lights; the "Empress of Ireland" was duly exhibiting the regulation lights for a steamship under way; (6) that seeing said fog, the engines of the "Empress of Ireland" were reversed full speed and her whistles blown three short blasts, which signal was a few minutes later repeated. When the "Empress" was stopped in the water her engines were stopped and two long blasts were twice sounded on her whistle. When the lights of the "Storstad" were seen coming out of the fog, the Master of the "Empress" hailed the "Storstad" to go astern and in the hope of avoiding or minimizing the effect of a collision, the engines of the "Empress" were ordered full speed ahead and her helm hard-a-port; (7) nevertheless, the "Storstad" came on at a considerable speed and the "Storstad's" stem struck the starboard side of the "Empress of Ireland" about amidships, causing her to sink soon after; (9) that the helm of the "Storstad" was improperly ported; (10) that the "Storstad" failed to keep her course and pass the "Empress of Ireland" starboard to starboard; (11) that the "Storstad" was navigated at an immoderate rate of

speed; (12) that those in charge of the "Storstad" failed to reduce her speed and sound her fog signal before she ran into the fog; (13) that the engines of the "Storstad" were not in due time slowed, stopped or reversed; (14) that no competent officers were on duty on the "Storstad"; (15) that those in charge of the "Storstad" neglected to comply with articles 16, 27 and 29 of the International Rules in force in Canadian waters. *And plaintiff claims*—

(1) A declaration that it is entitled to the damage proceeded for; (2) the condemnation of the defendant and its bail in such damage and costs; (3) to have an account taken of such damage with the assistance of merchants; (4) such other and further relief as the nature of the case may require.

The defendant, by its statement of defence and counter-claim, alleges in substance the following: (1) That except as hereinafter admitted, the several statements contained in the plaintiff's statement of claim are denied; (2) the defendant is owner of the Norwegian Steamship "Storstad," of 6028 gross tonnage; (3) that at about 2 A.M., on the 29th May, 1914, the "Storstad," while on a voyage from Sydney, Cape Breton, to Montreal, with a cargo of coal, came into collision with the "Empress of Ireland" at a point about 7 miles to the northward and eastward of Father Point, in the River St. Lawrence; (4) the "Storstad," proceeding up the river, passed Metis Point at about 12.35 A.M. There was no wind; the tide was flood, but in spite of the tide, there was a current setting down the river at the speed of between one and two knots; the "Storstad" left Metis Point about 3 miles off and proceeded on a course of west one-quarter south magnetic, for a distance,

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measured by patent log, of 6 miles, and then on a course of west of one-half south magnetic for a distance, measured by patent log, of 5 miles; and thence on a course of west by south magnetic, which course she held until the collision; (5) that at about the time when the "Storstad" changed her course to west by south, those in charge of her sighted the masthead lights of a steamer, which proved to be the "Empress of Ireland"; the lights were several miles away and were on the port bow of the "Storstad." As the vessels proceeded, those on board the "Storstad" saw the green light of the "Empress" still on the "Storstad's" port bow. Shortly afterwards the "Empress" changed her course, so that, in addition to her masthead lights, her red light was visible to those on the "Storstad" and her green light was shut out. The vessels were then 2 miles away and the "Empress" was a point or more on the "Storstad's" port bow; (6) that shortly after a bank of fog, which had been moving out from the southern shore of the river, dimmed and finally shut out the lights of the "Empress." The "Storstad's" engines were at once slowed, and, about 2 minutes later, when the fog bank enveloped the "Storstad" also, her engines were stopped; (7) that 4 or 5 minutes after the "Storstad's" engines had been stopped, her wheel was ported in order to prevent the current swinging her head to port and in the direction of the "Empress" and in order thus to insure ample space for clearance. The "Storstad" did not swing under the port wheel, since her steerage way was lost, or nearly so. The engines of the "Storstad" were then ordered slow ahead, because it was desirable to preserve steerage way, and immediately

thereafter the green light and masthead lights of the "Empress" were seen on the "Storstad's port bow, moving across her bow. The "Storstad's" engines were at once put full speed astern and kept so until the collision. The stem and the bluff of the starboard bow of the "Storstad" struck the starboard side of the "Empress" about amidship, the vessels, at the moment of the contact, forming an angle of about 3½ points. The "Empress" continued to go ahead across the bow of the "Storstad," which was swung around in the direction of the "Empress's" movement. As soon as the vessels touched, the "Storstad's" engines were ordered ahead, for the purpose of keeping her stem in the wound, but the headway of the "Empress" caused the vessels to separate. At the time the vessels came together, the "Storstad" was still heading west by south. (8) That as soon as the fog set in, fog whistles of one long blast were blown by the "Empress," and were answered by the "Storstad." Shortly thereafter, 2 signals of 3 whistles each were heard from the "Empress;" all the "Empress's" whistles sounded on the "Storstad's" port bow. The "Storstad," so long as she retained headway, continued to blow fog signals, but when it was found that she had lost steerage way, a signal of 2 long blasts was sounded on her whistle. When, after the lights of the "Empress" were seen through the fog, the "Storstad" went full speed astern, a signal of 3 blasts was blown on her whistle. (9) The defendant charges against plaintiff, its agents and servants, the following faults: (a) In keeping a bad look-out; (b) in that she was in charge of incompetent officers; (c) in attempting to cross the bow of

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the "Storstad" although the vessels, when the fog shut in, were clear to pass port to port; (d) in failing to hold her course and to pass the "Storstad" port to port; (e) in changing her heading and course to port in the fog; (f) in that, having headed across the bow of the "Storstad," she put her engines full speed astern, reduced her speed, and thereby caused collision; (g) in that she attempted to pass the "Storstad" too close; (h) in that she failed to comply with articles 15, 16, 18, 19 and 22 of the International Rules of the Road at Sea, which were then and there in force; (i) in that she blew a signal of 3 whistles when the vessels were enveloped in fog, contrary to article 28 of the said rules; (j) in that she failed to indicate her position and manœuvres by blowing proper or sufficient whistles; (10) that no blame and resulting damage is attributable to the steamship "Storstad" or to any of those on board of her; *And by way of counter-claim defendant says*: That the collision has caused great damage to the defendant and to the steamship "Storstad," and claims:

(1) A declaration that the defendant is entitled to the damage asked under its counter-claim; (2) the condemnation of the plaintiff in the damage caused to the "Storstad" and to defendant, and in the costs of this action; (3) to have an account taken of such damage with the assistance of merchants; (4) such further and other relief as the nature of the case may require.

The plaintiff, in answer to the foregoing defence, prays *acta* of the allegations contained in the 3rd, 7th and 8th paragraphs of the said defence; as to paragraph 9, it takes exception to the allegations as

to "other faults that may develop at the hearing" and "others in future respect which will be pointed out at the trial," the same being illegal, otherwise denies said paragraph; that plaintiff denies all the other allegations of the defence, except in so far as the same are in accordance with the statement of claim and this answer. And as to the so-called counter-claim, plaintiff alleges: That the same is illegal and incompetent to the defendant; and without waiver of said allegations, it denies the same in any event.

The pretensions of the parties are set forth in the pleadings, a summary of which is given in the present judgment.

The plaintiff moved to strike from paragraph (9) of the defence, the words "(k) and in other and further respects which will be pointed out at the trial" . . . as being illegal. This motion was granted by judgment of this Court of date the 15th December, 1914.

After the issues had been joined on the 12th February, 1915, the plaintiff moved to amend its preliminary act and statement of claim by adding the words "in the middle of the river but at the place of the collision and all along the shores the current ran up stream" to paragraph 6 of the plaintiff's preliminary act and paragraph 2 of the statement of claim, on such conditions, as to costs, as the Court may deem appropriate.

I thought it better to hold this motion over until the trial, and I am of opinion that same can be granted, and it is granted, costs of same to be paid by plaintiff, as appears by judgment on said motion, of even date.

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Reasons for Judgment.

I grant this motion more especially because evidence in support of it has been adduced before this Court, without any objection being made thereto.

Evidence in this cause is very voluminous because, by consent of parties, it is agreed that all the evidence taken and exhibits filed before the Commission of Enquiry into the casualty of the "Empress of Ireland," held at Quebec on the 14th June, 1914, and following days, would be read and used as evidence to all intents and purposes as if taken in this case, the whole as appears by consent of the parties of date the 23rd June, 1914, and filed the 12th August, 1914.

Under said consent, the right was reserved to each party to recall any witness examined in said enquiry and to put in further evidence, if desired, and that said agreement was made effective in all respects, in and for any class of action, counter-claim, or any action or proceedings against the "Empress of Ireland."

A very large amount of additional evidence was taken before this Court, in Montreal, and the record is, consequently, very voluminous.

The question as to who, if anyone, is to blame for the collision in this case depends largely on which of the two stories put forward by the respective owners of the respective vessels, is to be accepted.

The evidence on material points is absolutely contradictory.

The main difference between the two vessels' stories is to be found in the description of the way in which the two vessels were approaching each other at the time when the "Empress of Ireland"

changed her course after having obtained an offing from Father Point. Father Point is the place where the "Empress of Ireland," the outwardbound ship, had dropped her pilot; it is also the place where the inwardbound ship, the "Storstad," was to pick up her pilot. It is situated on the south side of the river.

The witnesses from the "Storstad" say they were approaching so as to pass red to red, while those from the "Empress of Ireland" say they were approaching so as to pass green to green.

I feel that I am safe in making the assertion that the "Storstad" never saw the red light of the "Empress" at any time, which can be proved by converging courses. But it is within the bounds of possibility that the "Empress" might have seen the green light of the "Storstad" at some time, and the Assessor quite agrees with me in this finding.

I am going to prove later that the "Empress" was stopped in a position which is indisputable, and the present position of the wreck will verify it, whereas the "Storstad," having nothing to verify her position by, might have been somewhat to the south, in which case the "Empress" might have seen the "Storstad's" green light at some time. The fact that the "Storstad" ported her helm and ran into the "Empress" on the starboard side shows that the "Storstad" must have been somewhat to the south. So, of the two stories of green to green of the "Empress," and red to red of the "Storstad," the "Empress" has the best of the argument, as hers is a possibility, but the "Storstad's" is an impossibility. Now, having shown that there is a possibility of the "Empress" having seen the green

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light of the "Storstad" at some time, it immediately places her in the enviable position of being a passing ship instead of a crossing ship. The stories are absolutely contradictory and we have to determine which is the more probable.

The whole trend of the evidence taken at Quebec was evidently made with the purpose of establishing which of the two vessels had changed her course in the fog, and this was the main question the commission had to decide.

The defendant, in opening its case, charged the plaintiff with three faults: (1) that the alteration of the "Empress's" course at Cock Point buoy was, according to it, a wrong thing to do; (2) that the speed of the "Empress" was maintained until the collision took place, and (3) the "Empress of Ireland" is charged with not having a proper lookout.

As to the alteration of the course at Cock Point buoy, the defendant pretends that by so doing, a risk of collision was produced.

A manœuvre is wrong if it creates a risk of collision. The test, therefore, is whether this manœuvre created a risk of collision. A further test is again if it did create a risk of collision, did it contribute to the disaster in question? If a given manœuvre creates a risk of collision, it would be a breach of the rule, and if it creates a risk of collision which contributed to the collision or caused it, then it would be a fault. As is well known, there is a difference between the English law and our law that used to exist and which has been very recently abolished. All the English jurisprudence is under the old law. In England, formerly, a breach of the rules was pre-

sumed to have contributed to the collision or caused it, unless the contrary was proved. Whilst, in our law, the plaintiff has to prove the breach of the rule, and also that it caused or contributed to the collision.

In this particular case, either the ships were, for some minutes to the knowledge of each other, green to green, or they were, for some minutes before the collision, to the knowledge of each other, red to red, after the Cock Point buoy alteration.

There is no suggestion that the ships were head-on or nearly head-on. The ships were passing ships, each one seeing the other. Even if the ships were either red to red, or green to green, to the knowledge of each other, for some minutes before the fog, the courses were safe: there was no risk of collision at that moment.

The anterior manœuvre had not created a risk of collision and the material and vital question is, as was stated in Quebec by everybody before the commission, which ship destroyed the safe position? The ship which altered its course was at fault.

If the ships entered the fog red to red, the courses were absolutely safe. If red to red is safe, then green to green is equally safe.

I cannot see that there should be any difference in the "Empress's" favour in that risk. What is true of red to red must be true of green to green, so on defendant's statement, there is nothing in the suggestion that the initial manœuvre created a risk of collision, or otherwise created a dangerous position, or that the initial manœuvre, in any way, caused or contributed to the collision, since the ships

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were each on passing courses and each knew that they were on passing courses before the fog set in.

As to the second alleged fault, that the speed of the "Empress of Ireland" was maintained until the collision took place, I will take this into consideration when I treat of the responsibility for the accident.

As to the third alleged fault, that the "Empress of Ireland" had no proper look-out, this has certainly not been established, as the witness Carroll was in the crow's-nest look-out and faithfully fulfilled his duty and remained there to the last moment.

It has also been charged that the "Empress of Ireland" changed her course, not by reason of any wilful alteration of her wheel, but in consequence of some uncontrollable movement which was accounted for on the assumption that the telemotor steering gear was out of order and on the theory that having regard to the fulness of the stern of the "Empress," the area of the rudder was insufficient.

It may be remarked that this was not pleaded by the defendant and, in my opinion, the evidence shows clearly that the steering gear was in good order, and there is not a shadow of evidence to show that there was anything wrong with it at the time of the collision, or that it, in any way, contributed to the said accident.

In addition to the evidence taken before the commission at Quebec, which will hereafter be referred to by the number of the questions applicable to the different matters at issue in this cause, the Liverpool Pilot, who was examined for the first time before this Court, testified that he had been pilot in

charge of the "Empress of Ireland" while she was proceeding to sea ever since the ship was launched, sometime in the year 1906, and he spoke in the highest terms of her steering gear. I do not think this question requires a more detailed explanation.

Much comment has been made on the fact that Captain Kendall says, just before the ship sank, he looked at the compass and found her head S.E. The present position of the wreck is with her head N.E.

When we take into consideration the fact that there was no light for him to see the compass by, and take into consideration that he was steering eastward, it would be easy for him to confound S.E. with N.E. There is also another explanation. Nothing will cause deviation of the compass more than a heavy jar. The "Empress" had jar enough to send her to the bottom. Then the angle of the ship was 45° or more, and no ship has her compass adjusted for such a serious heeling error, so that this compass which he looked at might be altogether useless, and the S.E. that Captain Kendall imagined he saw might be several points out.

The evidence being so contradictory, the witnesses from the "Storstad" saying that they were approaching so as to pass red to red, while those of the "Empress of Ireland" say they were approaching so as to pass green to green, the stories are irreconcilable, and we have to determine which is the more probable.

In order to place the responsibility for the disaster, the first point I will dispose of is the position of the "Empress" at the time of the collision, say at 1.55 A.M. I think I am entitled to state positively that it was 1200 to 1500 feet to the eastward or past

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the place where the wreck now lies and that is marked on the defendant's chart or diagram No. 3, produced by Mr. Griffin, one of the defendant's counsels, in illustration of his argument from the position of the churches, namely:

It lies N.62½°.W., 7 1-6 miles from Ste. Flavie church.

It lies N.11°E., 4 2-5 miles from St. Luce church.

It lies N.45° E., 6¾ miles from Father Point Lighthouse.

The position of the wreck has been checked by me, with the assistance of the assessor, and it agrees with the above bearings.

I know the position of the wreck and I know by many witnesses that there was a current of one mile an hour running westerly, and it is well known that the "Empress" sank 15 minutes after the collision. She drifted back with the current 15 minutes after she was struck. This places her position exactly at the time of the collision 1200 to 1500 feet to the eastward or past the wreck, provided she was lying dead in the water, as she claims to be at the time of the impact.

We have the evidence of Captain Kendall, (Q. 20), Captain Murray (Q. 4079), Brennan (Q. 138), Murphy (Q. 2177 to 2194), that she could be stopped dead in the water from 2 to 3 minutes, and cases have been cited where it has been done, such as off Point Lynas, off the Welsh Coast, in 2 minutes and 15 seconds (Q. 4199).

On the present occasion, we have the evidence of Captain Kendall (page 26), Brennan, that on seeing the "Storstad's" light being shut out by the

fog, they reversed their engines for 3 minutes, blowing, while doing so, 2 whistles of 3 short blasts, to let the "Storstad" know that she was reversing, Then, according to the evidence, she blew 2 whistles of 2 long blasts, indicating that she was stopped in the water, which is verified by Jones, the First Officer (Q. 1764), Captain Kendall (Q. 218), John Murphy (Q. 2194), Brennan (Q. 2149), Liddell (Q. 2540), and Miss Townsend (Q. 7205). Tufteness and Saxe heard the three short blasts twice (Q.Q. 1092, 1094), which is important and material evidence, as Tufteness admits he heard the "Empress's" 3 short blasts about one or two minutes apart. Therefore, he admits she was reversing for that time, sufficient to bring her to a standstill.

Saxe (Q. 4650) also admits the same, though the "Storstad" denies at all times hearing the "Empress's" 2 whistles of 2 long blasts saying she was stopped.

After carefully considering all the evidence, I have come to the conclusion that the "Empress" was stopped. I think it has been established that the "Empress's" position, at the time of the collision, was 1200 to 1500 feet eastward from the wreck, notwithstanding the contradictory evidence that has been produced. The fact remains that she was dead in the water 15 minutes before she sank, and she had to be from 1200 to 1500 feet past the position where the wreck now lies, notwithstanding all arguments to the contrary.

Having established the position of the "Empress" dead in the water at the time of the collision, I will review the action of the vessels which led to the collision.

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I will first speak of the courses of the two ships, which I consider as most important. The evidence is emphatic that the "Empress" was steering a final course of N.73° E. and never varied this course. I am forced to accept it, and the Assessor concurs, and the same applies to the "Storstad's" course of W. by S.

Now, it is shown by the chart or diagram prepared at my request by the Assessor, verified by me, and signed by me and the Assessor for identification and hereto annexed,[1] that these two courses were converging and that two ships approaching each other, in opposite directions, on these courses would meet or cross each other at a given point. This crossing point must be the position of the "Empress" after she was stopped in the water at the time of the collision.

It having been proved that the "Empress" was stopped in the water, and that her position was from 1200 to 1500 feet to the eastward of the wreck, by looking at the chart, it will be seen that during the whole time the "Empress" was following her N.73° E. course. She had the "Storstad" on her starboard bow and disposes finally of the contentions of the "Storstad" that she saw the "Empress's" red light. At a distance of a mile and a half or two miles apart, where both parties agree they last saw each other before the collision, and when their lights were commencing to be dimmed by the fog, the "Empress" would be showing the "Storstad" her green light, and the "Storstad" would be showing the "Empress" her red light, unless the "Storstad" was to the southward, as I think she was, then she would be showing her green light. This

[1] At p. 183 *post*.

can be verified by looking at the chart. I think it is quite probable that at this time the coloured lights of both ships were obscured by fog, but if they saw any coloured lights at this time, they would have to be as stated by me.

Now, I will take up the question of the action of the two ships when they both arrived at the position of one mile and a half to two miles apart, after which they were obscured by the fog until the time of the collision, which is proved to be about 8 minutes. They enter this area of one mile and a half to two miles going full speed, say 16 miles per hour for the "Empress" and 11 miles per hour for the "Storstad." Therefore they were approaching each other at the rate of 27 miles an hour. At this rate of speed, they would have either collided or passed clear in 3 or 4 minutes.

Considering the close proximity of the vessels at this time, any change of course might have been imprudent, particularly as they were running into a fog bank, and this explains the fact that at this point, say at 1.47 A.M., the "Empress" ordered her engines full speed astern, and notified the "Storstad" by the appropriate whistle of 3 short blasts that she had done so.

Instead of following the example of the "Empress" and reversing her engines, the "Storstad" merely slowed her engines and continued her speed; about 8 minutes after the "Empress" started to reverse her engines, the collision occurred, say at 1.55 A.M.

Any difference of opinion as to the time here seems to be absolutely of no importance, as we have the evidence of the "Empress" that she was re-

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versing for 3 minutes and the evidence of the "Storstad" that she knew the "Empress" was reversing, having heard her signal of 3 short blasts.

Now, what happens in this interval of 8 minutes before the collision occurred?

The "Empress" goes about a quarter of a mile, or practically 3 ship lengths, under reversed engines before she is brought to a standstill. The evidence shows that this took 3 minutes. During these 3 minutes the "Storstad" is going on with no effort to check her speed other than slowing her engines, and must be going at a speed of say 8 knots, which is a compromise between full speed, 11 knots, and slow speed, 5 knots. She would cover the distance of nearly half a mile.

This leaves the ships about three-quarters of a mile apart, and 5 minutes yet to go before the collision occurred. The "Empress" is dead in the water and the "Storstad" is continuing on her course. At some part of this period, she claims she came to a dead stop, then ported her helm, only affecting her heading a quarter or half a point, and ordered slow speed ahead again.

I will make some observations as to the probable speed of the "Storstad" at the time of the collision.

At a mile and a half apart, the "Storstad" was going 11 knots an hour with the current. She then slowed her engines. At the time of the order to slow down, she was still going 11 knots. It would take some time to come back from her 11 knot speed to slow speed, which is about 5 knots an hour. Therefore, when the next order to slow the engines was given 2 minutes later, by the evidence, it was reason-

able to suppose that she was going at 8 knots per hour. As it would take her some time to come to a standstill from a speed of 8 knots an hour without reversing her engines, and taking into consideration how close she was to the "Empress" after these first orders were given, I cannot see how she can have lost her way, particularly as she again started slow speed ahead before the collision, and after her order to stop.

Her next order was full speed astern and that was only 30 seconds before the collision.

She therefore seems to have maintained her speed all through the short period before the collision, and it is my opinion that at the time of the impact she was going at not less than 6 knots an hour, and probably more.

The depth she penetrated into the "Empress's" side, which the evidence gives all the way from 10 to 18 feet, and the condition of her own bows after colliding, would go to substantiate this speed.

I would mention that the "Storstad" is built longitudinally, or Isherwood system, and consequently very strong, and the damage to her bows was very extensive.

In my opinion, three facts have been established.

The position of the "Empress" when she was stopped in the water, 15 minutes before she sank—

The fact that the "Empress" was stopped in the water—and

The fact that at the time of the impact, the "Storstad" was travelling at least at a rate of 6 knots an hour, or probably more.

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In arriving at my finding as to the responsibility for the collision, other considerations come in, which I will enumerate later, but I would like to mention that I consider the evidence on both sides, other than that above referred to, immaterial and of little value.

For instance, the defendants, on their chart and in the calculations of course and distance, &c. . . . . have gone on the assumption that the current was against them at the rate of a mile and a half per hour, while it was in their favour one mile per hour, so that on their own contentions, with their own chart, they would be in a position past the wreck before they ever started the manœuvres that occurred just previous to the collision.

They base their contention that the "Empress" could not cover the distance to the wreck and remain dead in the water for some time before the collision, on the theory that when the "Empress" started from a point one miles N.43° W. from Father Point buoy, she had stopped to let her pilot off, but it appears that her engines had never been stopped, but were only slowed down, as is the usual practice, as I am advised by the Assessor, and, therefore, she did not lose any time in the warming-up process of her engines, which would have happened had they been stopped, but was able to increase her speed rapidly.

The coloured lights were as I have represented them. If you will follow out the courses of the ships to the time of impact, on the chart hereto annexed and above referred to, you will see that the lights would appear as I have stated.

I am confirmed in my opinion that these vessels approached each other on their converging courses more rapidly than they realized, and as the "Empress" had the "Storstad" on her starboard bow, she adhered to the green light story, and as at the same time the "Storstad" had the "Empress" on her port bow, she adhered to the red light story, in order to evade responsibility for the collision.

Art. 23 of the Rules of the Road says:

"Every steam vessel which is directed by these "rules to keep out of the way of another vessel, "shall, on approaching her, if necessary, slacken "her speed, or stop or reverse."

The "Empress" obeyed this rule.

ART. 16.—"A steam vessel hearing, apparently "forward of her beam, the fog signal of a vessel "the position of which is not ascertained, shall, so "far as the circumstances of the case admit, stop "her engines, and then navigate with caution, until "danger of collision is over."

ART. 21.—"When, in consequence of thick wea- "ther, or other causes, such vessel finds herself so "close that collision cannot be avoided by the action "of the giving-way vessel alone, she also shall take "such action as will best aid to avert the collision."

ART. 29.—"Nothing in these rules shall exoner- "ate any vessel . . . of the neglect of any pre- "caution which may be required by the ordinary "practice of seamen, or by the special circumstances "of the case."

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Attention might be called to the way the "Empress of Ireland" was navigated. She had 3 first-class officers on the bridge, namely: Captain Kendall, Mr. Jones, first officer, and Mr. Moore, third officer.

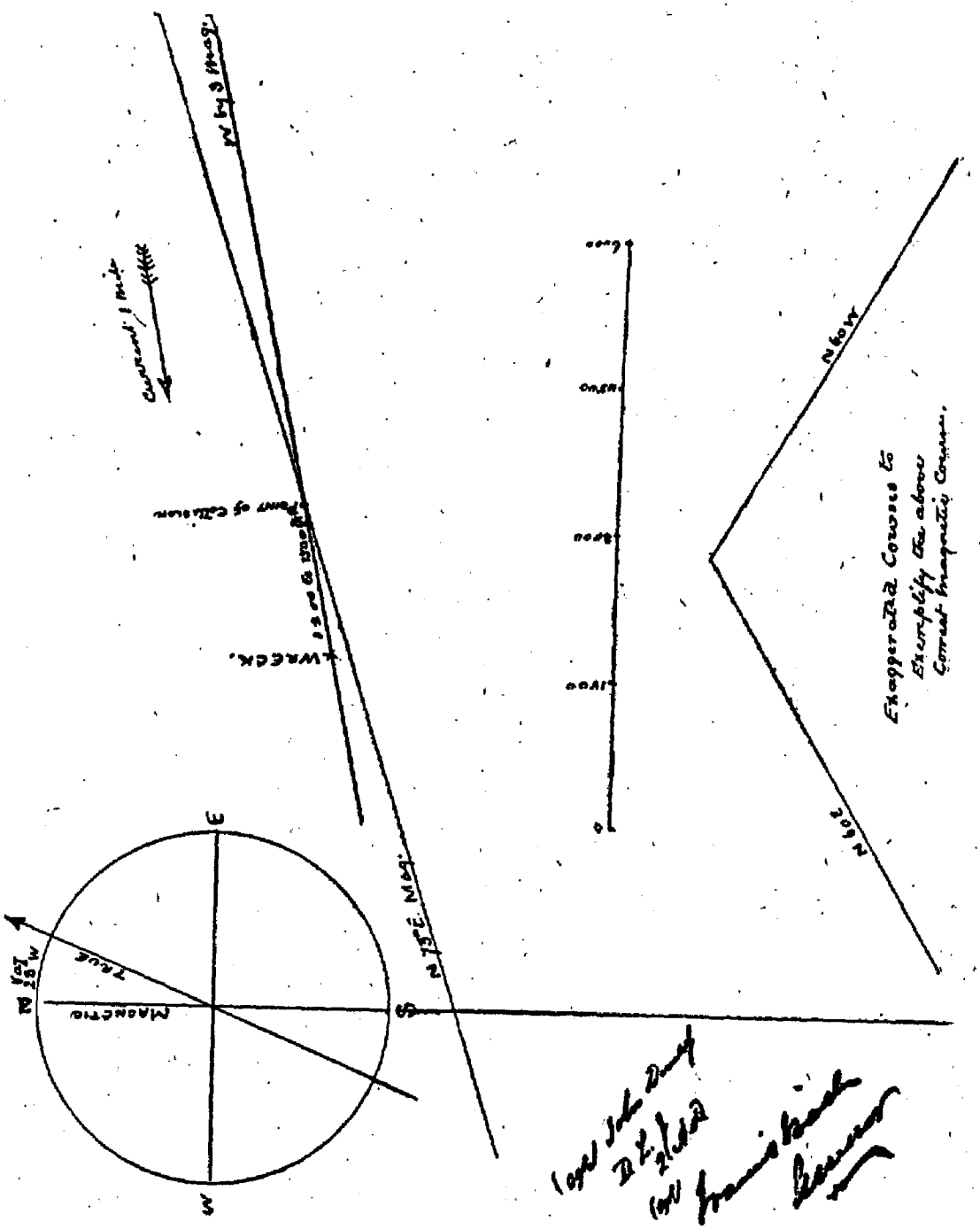
On the "Storstad," Mr. Tufteness, first officer, was in charge, perhaps assisted by Mr. Saxe, third officer, though the latter claims he had nothing to do with the navigation of the ship.

In my opinion, Mr. Tufteness, in not stopping the "Storstad," when he heard the first 3 blasts from the "Empress," made a great error of judgment, and to my mind, had Captain Andersen, the Master of the "Storstad," been called earlier and had been on deck, he would immediately have stopped his ship and avoided the whole calamity.

I cannot emphasize this neglect too strongly.

I regret very much to have to find Mr. Tufteness at fault in violating Articles 16, 21 and 29 of the Rules of the Road above quoted. Through his neglect or inexperience, in my opinion, the cause of the accident was the speed of the "Storstad," and the porting and hard-aporting of her helm, and the "Storstad" is entirely to blame for the said accident, because Mr. Tufteness had the opportunity to take the speed off his ship, the same as the "Empress" did, and if he had not ported her helm, I believe he would have gone clear and the collision would not have occurred.

I regret very much to have to impute blame to anyone in connection with this lamentable disaster and I would not have done so, and would not do so, if I had felt that any reasonable alternative was left to me.


Exaggerated Courses to
Exemplify the above
Correct Magnetic Courses.
N 60 W
N 10 E
N 75 E Mag.
Point of Collision
WRECK.
Magnetic
True
N 18 W
E
S
W

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There is nothing to show that the disaster was in any way attributable to the St. Lawrence route, and, being open water, all sea rules apply.

In conclusion, I am of the opinion that Mr. Tufteness, the first officer of the "Storstad," was wrong and negligent in altering the course of the "Storstad" in the fog, as he undoubtedly did, and that he was also wrong and negligent in keeping the navigation of the vessel in his own hands and in failing to call the Captain when he saw the fog coming on.

I am further of opinion that no fault or blame is attached or attributable to the "Empress of Ireland," and, consequently, I am of opinion that plaintiff's action must be maintained, with costs, and the counter-claim of the defendant rejected, and the defendant is condemned by the present judgment to pay to the plaintiff the sum to be found due to said plaintiff, and in costs, and doth further order that an account should be taken and doth refer same to the Deputy-registrar, assisted by merchants, to report the amount due the plaintiff in respect of its claim, and that all accounts and vouchers, with the proof in support thereof, shall be filed within 6 months from the date of the present judgment.

Judgment for plaintiff.

Solicitors for plaintiff: *Meredith, Macpherson, Hague, Holden, Shaughnessy & Heward.*

Solicitors for defendant: *Duclos & Bond.*

BRITISH COLUMBIA ADMIRALTY DISTRICT.

1913
Feb. 28.

PALLEN, *ET AL.*,

v.

THE SHIP "IROQUOIS."

Collision—Fog—Duty as to speed—Liability—Costs.

The provisions of art. 16, requiring each vessel in case of fog or thick weather to "stop her engines and then navigate with caution", must be strictly adhered to in order to avert a collision. Mere sounding of the fog signal is not sufficient. Where both vessels are at fault "the damages shall be borne equally by the two vessels", pursuant to sec. 918 of the *Canada Shipping Act* (R.S.C. 1906, c. 113). The old rule that each delinquent vessel shall bear her own costs is still in force.

ACTION for damages resulting from a collision.

Tried before the Honourable Mr. Justice Martin, Local Judge of the British Columbia Admiralty District, at Vancouver, October 30 and November 1, 1912.

J. A. Russell and *Moffat*, for plaintiff.
A. D. Taylor, K.C., for defendant.

MARTIN, Loc. J. (February 28, 1913) delivered judgment.

On October 22nd, 1911, about 4.30 P.M., off the sandheads, Fraser River, the Steamship "Iroquois" (a high-powered passenger vessel, Henry C. Carter, Master), heading for Vancouver Narrows, on a N.W. by N. ½ N., collided with the Steam Tug "No-name" (registered tonnage 116, length 86 feet, John Barberie, Master), with loaded scow in tow, 60 x 26 feet, bound for Fulford Harbour, *via* Active Pass,

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on a course S.E. by S. ¾ S. The day was calm, with little if any wind; tide flooding probably under one knot an hour. The "Noname" had clear weather till 3.45, when she ran into a thick fog, in which objects were not visible beyond half a cable, but proceeded on her course without abating her speed, which was about the best she could make, viz.: 6 knots through the water. I am satisfied that she regularly gave the proper signals, nor do I find any reason for thinking that the "Iroquois" failed to do the same; the fact that some of the witnesses gave apparently truthful, yet conflicting, evidence regarding the signals heard in fog can readily be explained by a perusal of the Report of Trinity House Fog-Signal Committee, 1901, reprinted in Smith's Leading Cases on the Collision Regulations (1907) 296. The "Iroquois" was, with the slight assistance of the tide, maintaining a speed of probably a little over 14 knots through the water, which her officers call her "fog speed," as she runs very regularly on that speed and makes distances more accurately on it between fixed points than on her best speed, which, at 143 revolutions, is about 15½ knots. When the vessels actually came in sight of one another they were not more than 250 or 300 feet apart. It was only immediately before sighting the "Noname" that the engineer of the "Iroquois" had been given the signal for half speed, which signal, he says, was followed up without any interval by one for "full speed astern," which was responded to, but it was too late to avoid the collision, though the force of the impact was greatly diminished.

It is proved by the evidence of the master and mate of the "Noname" that though they heard a

vessel approaching them almost, if not quite, right ahead through the fog for 5 or 6 minutes before they sighted her, they took no other precautions than to continue to sound the fog signal. Article 16 provides that:

"Every vessel shall, in a fog, mist, falling "snow, or heavy rainstorms, go at a moderate "speed, having careful regard to the existing cir- "cumstances and conditions.

"A steam vessel hearing, apparently forward "of her beam, the fog signal of a vessel the posi- "tion of which is not ascertained, shall, so far as "the circumstances of the case admit, stop her "engines, and then navigate with caution until "danger of collision is over."

No valid reason was given for the failure of the "Noname" to "stop her engines and then navigate with caution"; the suggestion of her master that he did not do so because the barge astern would sheer and become more difficult to handle, is inadmissible in the circumstances, because there was nothing in wind, tide or weather conditions to prevent him from at least reducing his speed to what would be the lowest possible speed consistent with safety of tug and tow in the circumstances, even if it were not practicable to let the way run entirely off the tow and come to a standstill. To escape liability it must be shown that the movement was not more than was necessary, but no attempt was made to establish this. Compare *The Lord Bangor*,[1] *The Challenge and Duc d'Aumale*.[2] The truth is, according to his own testimony, that he mistook the fog whistle of the "Iroquois" for that of a small boat, and took

[1] [1896] P. 28.
[2] [1905] P. 198.

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dangerous chances, which contributed to the collision. Indeed, the man at the wheel, Williams, testified that they had heard the "Iroquois" for 20 minutes on their port bow, and she had whistled at least 4 times from that point. On the other hand, I am unable to accept the excuse offered on behalf of the "Iroquois" for running at such a speed, which cannot be called moderate in the circumstances. While it may be true that she runs more regularly at a certain speed, that may make it safer for herself in determining her position as aforesaid, but at the same time it, if high, makes her more dangerous to other vessels, which is the fact the regulations require her to guard against. She might, on the one hand, run more regularly at 12 knots than at full speed, or, on the other hand, at full speed than 12 knots, at which full speed she would be safer for herself but still more dangerous to others than she was in this instance.

I am unable to say that, after the vessels came in sight of one another, either of them could reasonably be said to have failed to do anything which would have avoided the collision. They are equally at fault in having brought it about by contravening Article 16, which the Privy Council stated in *China Navigation Co. v. Lords Commissioners S.S. Chinkiang*,[1] "is a most important article and one which "ought to be most carefully adhered to in order to "avert the danger in thick weather." . . . It was notorious that it was a matter of the very greatest difficulty to make out "the direction and distance of "a whistle heard in a fog, and that it was almost im- "possible to rely with certainty on being able to

[1] [1908] A. C. 251.

"determine the precise bearing and distance of a "fog signal when it was heard." According to the following extract from the judgment of the Admiralty Court in the late case of *The Sargasso*,[1] not only the "Iroquois," but the "Noname" was also guilty of excessive speed:—

"With regard to the *Mary Ada Short*, her speed "spoken to by her master was three knots; that is "probably a smaller speed than she had a good deal, "and in this regard, apart from the angle of the "blow, I have come to the conclusion, from the "nature of the wound, that the speed at which this "vessel was going was a good deal more than he "says. If vessels could only see each other at a "distance of 100 yards and if they had to be under "way at all, they ought to proceed as slowly as they "possibly can. It is impossible to say what the "speed ought to be in figures in every case, but it "is obvious, if a vessel is proceeding at a speed "which would not allow her to pull up in something "like her own length, in the circumstances of this "particular afternoon, and if a vessel could proceed "and have steerage way at a smaller speed than she "was going, she ought to have gone at that speed, "and in so far as that speed was exceeded it was "excessive."

The situation, finally, herein was like that described in a case in this Court: *Wineman v. The Hiawatha*,[2] wherein it was said:—

"The rate was so immoderate and the fog so "thick that it prevented either vessel, in the brief "space of time which elapsed after sighting the

[1] (1912) P. 192 at 199.
[2] (1902) 7 Can. Ex. 446 at 468.

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PALLEN, ET AL., v. THE SHIP "IROQUOIS."

"other, from taking any effective steps to avoid "the other."

Pursuant to sec. 918 of the *Canada Shipping Act*[1] I direct that "the damages shall be borne equally by "the two vessels . . . one-half by each," which means in this case that the "Iroquois" must pay one-half of the damage to the "Noname" because no evidence was given of any damage to the "Iroquois," and there will be the usual reference to the Registrar, assisted by merchants, if necessary, to assess them. I note that the *Maritime Conventions Act,* 1911 (Imp.) 1 and 2 Geo. V., c. 57, s. 9, does not apply to Canada, so no question of establishing the degree of blame can arise in this Court, but it has been decided that even where that statute can be given effect to the old rule that each delinquent vessel bears her own costs is still in force. The *Bravo.*[2] And compare the *Rosalia,*[3] the first decision under said Act.

Judgment accordingly.

[1] R.S.C. 1906, c. 113.
[2] (1912) 29 T.L.R. 122, 12 Asp. M.C. 311.
[3] [1912] P. 109.

QUEBEC ADMIRALTY DISTRICT.

1914
May 9.

CROWN STEAMSHIP COMPANY,

Plaintiff;

v.

THE STEAMSHIP "LADY OF GASPÉ"

Defendant.

EDWARD BOUCHARD, et al,

Plaintiffs;

v.

THE STEAMSHIP "CROWN OF CORDOVA"

Defendant.

Collision—Overtaking vessel—Fog signals—Negligence—Faute commune—Damages.

A steamer descending the St. Lawrence River in foggy weather had come to anchor for safety. Previous to anchoring the ship was being overtaken by another ship descending the river. Both ships had failed to give the proper fog signals, and as a result the steamer at anchor was run down by the other.

Held, as the ships were both at fault the damages should be divided.

2. Status of report of the Commission of Wrecks before the Court commented on.

ACTION for collision in the St. Lawrence River.

Tried at Quebec before the Honourable SIR A. B. Routhier, Local Judge of the Quebec Admiralty District, April 15th and 16th, 1914.

C. A. Pentland, K.C., *C. A. Duclos,* K.C., and *C. Thompson,* for the "Crown of Cordova."

L. A. Taschereau, K.C., and *A. R. Holden,* K.C., for the "Lady of Gaspé."

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SIR A. B. ROUTHIER, Loc. J. (May 9, 1914) delivered judgment.

Les faits principaux dans ces causes sont bien établis, malgré les contradictions des détails dans les témoignages. Les voici en résumé:

Le 28 juillet dernier, le steamer "Lady of Gaspé" descendait le fleuve St-Laurent de Montréal à Québec, et il était suivi par le steamer "Crown of Cordova", à une distance approximative de 1½ mille à 2½ milles. Pendant toute la journée ils suivirent tous deux la même course, à la même distance l'un de l'autre. Il était environ dix heures et quelques minutes du soir lorsque le "Lady of Gaspé" passa à Trois-Rivières, et le "Crown of Cordova" passa au même endroit quelques minutes plus tard.

Avant d'arriver au Cap de la Madelaine, les officiers du "Lady of Gaspé" furent d'avis que le brouillard était trop épais pour naviguer sans danger, et décidèrent de jeter l'ancre. Ils ralentirent leur course, se rapprochèrent de la Côte Nord, arrêtèrent la machine, et jetèrent l'ancre. Ils mirent les lumières obligées, et sonnèrent la cloche comme signal pour indiquer qu'ils étaient à l'ancre.

A bord du "Cordova", on vit bien aussi qu'il y avait du brouillard, mais on ne le trouva pas assez épais pour arrêter. Les officiers voyaient très bien les lumières du "Lady of Gaspé", disent-ils, et cependant ils se jetèrent sur lui, quand il n'avait pas encore complètement tourné sur son ancre, et le frappèrent sur son flanc gauche.

Les deux steamers ont souffert de la collision, et la question est de savoir lequel des deux est en faute.

La commission des naufrages a jugé que le "Lady

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of Gaspé" était en faute, et elle n'a rien trouvé à blâmer dans le "Crown of Cordova".

On sait qu'en loi ce jugement ne lie pas la cour d'Amirauté. C'est tout de même une opinion dont elle peut tenir compte; mais il faut remarquer que plusieurs témoins nouveaux ont été entendus devant cette cour, qui ne l'ont pas été devant la Commission. A part cette preuve additionnelle, toute la preuve faite devant la Commission a été produite devant cette cour, du consentement des parties.

Il s'agit maintenant pour nous de faire l'application des règles de la navigation aux faits prouvés, et à toutes les circonstances de la cause, afin de décider s'il y a eu des fautes commises et par qui.

Il est incontestable d'abord que la cause matérielle, physique, de la collision a été le brouillard ou la brume. C'est le grand ennemi de la navigation.

Pour les défendre contre cet ennemi et empêcher les collisions, le législateur a tracé aux navigateurs différentes règles qu'ils doivent observer.

Quelques précédents cités par les avocats du "Lady of Gaspé" (*The Blue Bell*,[1] *The Otter*[2]) ont considéré comme "un devoir" de jeter l'ancre si c'est possible, quand le vaisseau est entouré d'un brouillard épais. Evidemment, cela dépend des circonstances, et je ne crois pas qu'on doit en faire une "règle absolue", surtout en face de la règle 16, qui dit: "Every vessel shall, in a fog, mist, falling snow, or heavy rain storms, go at moderate speed, having careful regard to the existing circumstances and conditions". Comme on le voit, la règle ne dit pas qu'il faut jeter l'ancre, mais ralentir la vitesse.

[1] 7 Asp. Mar. Cas. 601, [1895] P. 242.
[2] (1874) L.R. 4 Ad. & Ex. 203.

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Dans les précédents cités, les circonstances étaient telles que la plus élémentaire prudence faisait un devoir aux navires blâmés de jeter l'ancre.

Mais si ce n'est pas toujours "un devoir" de jeter l'ancre dans des cas de ce genre, c'est certainement un "droit" pour un navire qui est pris dans le brouillard, si les officiers qui le commandent le jugent nécessaire à sa sécurité.

Ainsi, dans cette cause, on a certainement tort de la part du "Cordova" de blâmer le "Lady of Gaspé" d'avoir jeté l'ancre en soutenant que le "brouillard" était si léger que l'on voyait encore très bien toutes les lumières nécessaires pour se diriger. C'était aux officiers du "Lady of Gaspé" de juger de l'épaisseur de brouillard à l'endroit et au moment où ils ont jeté l'ancre.

Le brouillard pouvait être moins épais à l'endroit où était alors le "Cordova", à deux milles plus haut. Plusieurs officiers du "Cordova" ont prétendu que le brouillard était si léger qu'ils voyaient très bien. Mais s'ils voyaient très bien, pourquoi se sont-ils jetés sur le "Lady of Gaspé"? Leur faute est d'autant plus grande qu'ils voyaient plus clair. Mais la preuve faite par les voyageurs à bord du "Lady of Gaspé", et par les habitants du rivage du Cap de la Madelaine, ne laisse aucun doute sur l'épaisseur du brouillard, et justifie ce steamer d'avoir jeté l'ancre. Si le "Cordova" avait eu la même prudence, la collision n'aurait pas eu lieu. Mais avant de jeter l'ancre, et à raison des circonstances, le "Lady of Gaspé" n'avait-il pas des précautions à prendre, et certaines règles à observer, pour faire savoir au "Cordova" qu'il arrêtait, et l'endroit où il se trouvait? Car il ne faut pas oublier

que les deux "steamers" se suivaient depuis le matin à une distance assez courte pour rester en vue l'un de l'autre. Quand donc le "Lady of Gaspé", enveloppé d'un brouillard épais, a arrêté sa machine en vue de jeter l'ancre, il savait que le "Cordova" venait derrière lui et que le brouillard l'empêcherait de le voir.

Comment devait-il lui signaler sa présence?

Les lumières (Anchor Lights) ne suffisaient pas, à cause du brouillard? La cloche, serait un avertisseur, une fois à l'ancre; mais cette cloche serait-elle entendue d'assez loin pour permettre au "Cordova" de l'éviter?

Les officiers du "Lady of Gaspé" auraient dû penser à cela, et se rappeler la règle 15 qui ordonne des coups de sifflets dans le brouillard. "Sound signals for fog."

Dès que le brouillard est devenu assez dense pour qu'il y eut risque de collision, la règle 15, paragraphe (a) faisait un devoir au "Lady of Gaspé" de siffler longuement à deux minutes d'intervalle; et quand il eut donné l'ordre d'arrêter il aurait dû pousser encore deux longs coups de sifflets avec une second d'intervalle, suivant le paragraphe (b) de la même règle.

A la distance où il se trouvait alors, le "Cordova" aurait certainement entendu ces coups de sifflet.

En aurait-il compris la signification? Il est probable que non, parce que Lachance qui avait charge de ce "steamer" ne connait pas la règle.

Le capitaine (Cliff, un des assesseurs nautiques), l'a pressé (Lachance) de questions à ce sujet, mais il n'a pu lui faire comprendre ni l'obligation ni la signification de ces coups de sifflet. Et c'est une des

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circonstances les plus curieuses de cette cause: Ni le "Cordova" ni le "Lady of Gaspé", je veux dire, ni Lachance, ni Vézina, ni Bélanger no connaissent cette règle 15 concernant les coups de sifflet dans le brouillard. Mais l'ignorance de l'un n'excuse pas l'ignorance de l'autre. Et le fait que Lachance n'aurait peut-être pas compris ne peut disculper Vézina d'avoir violé la règle importante des coups de sifflet dans la brume.

Au surplus, en entrant dans la brume le "Cordova" était tenu d'observer la même règle, et il l'a violée parce que Lachance l'ignorait, comme Vézina et Bélanger.

Tous trois ignoraient le seul signal effectif en temps de brume qu'ils devaient mutuellement se donner d'après les règles de la navigation, et qui aurait dû empêcher la collision.

Il faut reconnaitre que le "Lady of Gaspé" entré le premier dans le brouillard, devait être le premier à siffler. C'est donc lui qui a commis la première faute, la faute initiale.

Après lui, le "Cordova" est aussi entré dans le brouillard, et il a commis la même faute, suivie de plusieurs autres.

Lachance et les autres officiers, savaient que le "Lady of Gaspé" était devant eux à une courte distance. Non seulement ils le savaient, mais ils voyaient sa lumière de l'arrière "stern light". Bientôt même ils s'apercurent qu'ils le ratrappaient "they were overtaking her." Dès lors, ils devaient, suivant la règle 24, se tenir en dehors de l'endroit qu'occupait le "Gaspé", "keep out of the way of the overtaken vessel".

Rule 24: Notwithstanding anything contained in these rules, every vessel overtaking any other, *shall keep out of the way* of the overtaken vessel.

Bien loin de faire cela, ils gouvernent sur lui, sur son "stern light". Et quand ils approchent davantage, au lieu de *stopper* et de renverser suivant la règle 23,

Rule 23: . . . shall slacken her speed, or stop or reverse.

Rule 25: . . . shall keep the starboard side.

Ils commandent: "hard astarboard" to the helm and "full speed ahead", se dirigeant ainsi vers le nord du chenal, où le "Lady of Gaspé" était à l'ancre. En suivant cette direction, vers la gauche du chenal, le "Cordova" violait aussi la règle 25, qui lui commandait de suivre cette partie du chenal qui était à sa droite.

Après cela, il ne restait plus au "Cordova" de faute à commettre, et il frappait violemment le "Lady of Gaspé" dans son flanc gauche, lui causant de grands dommages.

Il y a dans les règles de la navigation une recommandation générale donnée à tous les vaisseaux, et dont les pilotes ne tiennent pas assez compte: c'est d'avoir égard *aux circonstances de chaque cas.* Les régles ne doivent pas être appliquées d'une façon absolue. Il faut savoir y déroger *quand les circonstances l'exigent,* et recourir aux mesures de prudence et de précaution requises pour éviter les collisions. Le Législateur le déclare expressément dans plusieurs de ces règles. Voyez, par example, les règles 16-27 et 29:

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Rule 16: Every vessel shall in fog . . . *have careful regard to the existing circumstances* and *conditions.*

Rule 27: . ... *Due regard shall be had . . . to any special circumstances* which may render departure from the rules necessary to avoid danger.

Rule 29: . . . No vessel shall *neglect proper precautions* which may be *required . . . by the special circumstances of the case.*

Eh bien, dans la présente cause, *il y avait des circonstances* dont les deux navires devaient tenir compte. Ils avaient navigué toute une journée dans le voisinage l'un de l'autre et tant qu'ils ne se perdaient pas de vue il était facile d'éviter toute collision.

Mais quand ils se perdirent de vue à cause de la nuit et du brouillard, ils auraient dû se rappeler qu'il leur restait un moyen de communiquer ensemble. C'était le sifflet. Le sifflet est la parole donnée aux steamers pour se faire connaitre mutuellement leurs courses, leurs intentions, et l'endroit où ils se trouvent.

Voyez, par example, la règle 28. C'est un véritable langage. Cette règle 28 n'avait guère d'application dans ce cas-ci. Mais il y avait la règle 15 (a) et (b) qui s'appliquait du moment qu'ils entraient dans le brouillard. Dès qu'ils ne se voyaient plus ils devaient se parler par le sifflet.

Dans le cas qui nous occupe, le "Cordova" est resté absolument muet. Le "Lady of Gaspé" a sonné de la cloche, mais ce langage n'était pas assez fort pour être entendu de loin, à temps pour éviter la collision.

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Nous sommes donc d'avis que la collision a été occasionnée par la faute des deux navires, et la loi ne nous laisse aucune discrétion à exercer en ce cas dans la division des dommages. La perte doit être également partagée entre les deux navires, et chacune des parties devra payer ses frais.

*Judgment accordingly.**

The following is the decree as settled by the Registrar under the above reasons for judgment.

"The Judge having heard the plaintiffs and the defendants by their counsel in the two joint and consolidated causes, No. 296 *The Crown Steamship Company, Limited,* plaintiff, against the *S.S. Lady of Gaspé,* defendant, and No. 297, *Edouard Bouchard et al,* plaintiffs, *vs.* the *S.S. Crown of Cordova,* defendant, and having been assisted by Captain Charles Koenig, his assessor, pronounced the parties in these two causes, plaintiffs and defendants respectively, to have been in fault as to the collision of the two steamships above mentioned in the River St. Lawrence, a short distance below Three Rivers, near Cape Madelaine, on the 28th day of July last (1913), and adjudged that the damages arising out of the said collision to the said steamship the "Crown of Cordova," as well as to the said steamship the "Lady of Gaspé," shall be borne equally by the two parties in those cases, one-half by each, as provided by law;

"And the Judge condemned the steamship "Lady of Gaspé" and her owners, and the bail given on their behalf to pay to the Crown Steamship Com-

* An appeal to the Supreme Court was asserted by both parties, but has been abandoned.

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pany, Limited, one-half of the damages suffered by the steamship "Crown of Cordova," and condemned also the said steamship "Crown of Cordova" and her owners, the Crown Steamship Company, Limited, and their bail, to pay to the steamship the "Lady of Gaspé" and her owners. Edouard Bouchard et al, one-half the damages suffered by the said steamship "Lady of Gaspé," and arising out of the said collision;

"And the said Judge ordered that an account should be taken, and referred the same to the Registrar, assisted by merchants, to report the amount due for both claims, and that all accounts and vouchers, with the proofs in support thereof, should be filed within 4 months.

"And the Judge further decreed that the parties respectively should pay their own costs in the two cases."

Solicitors for plaintiffs: *Pentland, Stuart, Gravel & Thompson.*

Solicitors for "Lady of Gaspé": *Taschereau, Roy, Cannon, Parent & Fitzpatrick.*

BRITISH COLUMBIA ADMIRALTY DISTRICT.

1914
June 12.

PICHON

v.

THE SHIP "ALLIANCE NO. 2."

Shipping—Lien for necessaries—Fishing schooner—"Fishing-stores".

Held, that "fishing-stores" or tackle, such as hooks, gaffs, nippers, and knives, used by a schooner employed in the business of halibut fishing are to be considered as necessaries.

CLAIM on an alleged lien for necessaries supplied to a fishing vessel.

Heard at Victoria, B. C., before the Honourable Mr. Justice Martin, Local Judge of British Columbia Admiralty District, June 9, 1914.

Patton, for plaintiff.

T. C. Elliott, for the ship.

MARTIN, Loc. J. (June 12, 1914) delivered judgment.

This is a claim for fishing tackle such as hooks, gaffs, nippers and knives used by the fishing Schooner "Alliance No. 2" in her business as a halibut fishing boat, which, it is alleged, come within the term "necessaries," lately considered by me in the case of the *Victoria Machinery Depot Co. v. The "Canada"*[1] wherein the leading authorities are collected. After a further consideration of them and others, cited chiefly in *Roscoe's Admiralty Practice*

[1] (1913) 18 B.C.R. 515, 14 D.L.R. 318, 15 Can. Ex. 142.

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PICHON v. THE "ALLIANCE No. 2."

Reasons for Judgment.

(3rd ed.) 266, I have reached the conclusion that these fishing-stores, as they are properly called, are just as much necessaries as are sailing-stores, to a vessel engaged in that occupation. In the case of the whaler *Dundee*[1] the fishing-stores she had on board, *viz.*, "boats, fishing tackle, such as harpoons, "lines and rockets, casks and various other imple-"ments," independently of her sailing-stores, were held to be "appurtenances" within the meaning of the 53 Geo. III., cap. 159, and there is no distinction, for the purposes of the present case, between necessaries and appurtenances, because unless she was provided with them she could not sail for the fishing-grounds. The subject is considered by Lord Stowell at pp. 126-7 with his customary lucidity, and he summarizes it in saying that—

> "A ship may have a particular employment "assigned to her, which may give a specialty to "the apparatus that is necessary for that employ-"ment. A ship built for the reception of galley "slaves must have such a peculiar apparatus. "Whether a whaler is originally built with any "peculiarity of construction for that service, is "more than I know; but this is clear, that unless "she has various appurtenances not wanted in "other ships, as well as a crew peculiarly trained, "she had better stay at home, than resort to the "Arctic regions, where alone her function can be "exercised."

I hold, therefore, that these fishing-stores are necessaries to this fishing vessel, and judgment will be entered for the amount already agreed upon.

Judgment accordingly.

[1] (1823-7) 1 Hag. Ad. 109, 2 Hag. Ad. 137.

BRITISH COLUMBIA ADMIRALTY DISTRICT.

1914

June 19.

In re THE SHIP "AURORA."

Shipping—Liens for equipment — Necessaries — Seaman's wages— Priority.

A lien for "building, equipping or repairing" a ship under sec. 4 of the *Admiralty Court Act*, 1861, or one for necessaries, cannot take priority over a lien for seaman's wages. *Munsen v. The Comrade*, (1902), 7 Can. Ex. 330, commented on.

MOTION for payment out of court of a sum recovered on a statutory lien for equipping a ship.

Argued at Vancouver, B. C., before the Honourable Mr. Justice Martin, Local Judge of the British Columbia District, May 2, 1914.

E. A. Lucas, in support of motion.

Sears, contra.

MARTIN, Loc. J. (June 19, 1914) delivered judgment.

This is a motion for the payment out of Court to Momsen et al., who had recovered a judgment on August 19th, 1913, for their statutory lien for equipping the "Aurora" with an engine—for $925 and costs.[1] On November 12th, in the same year, Nosler recovered judgment for his wages as a seaman on the "Aurora".[2] The ship was sold by the marshal in *Momsen's* action, and so far, $700, part of the proceeds, have been paid into Court. It is contended on behalf

[1] See *Momsen v. The Aurora* (1913) 18 B.C.R. 353, 13 D.L.R. 429.
[2] See (1913) 18 B.C.R. 449, 15 Can. Ex. 31, 17 D.L.R. 13.

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RE THE "AURORA."

Reasons for Judgment.

of Momsen, *et al.* that because they had a decree of this court in their favour for the sale of the ship they are entitled to priority over Nosler's claim, who did not begin his action till after the decree had been pronounced. The ship after being arrested by Momsen gave bail and was released, and later re-arrested after Nosler's claim had attached, and there are other facts and circumstances on which Nosler relies which it is unnecessary to mention because, even taking the case to be wholly as Momsen *et al.* contend for, they are not entitled to the order asked for because there is no authority in support of the submission that a statutory lien for "building, equipping or repairing" a ship under sec. 4 of the *Admiralty Court Act,* 1861, or for necessaries[1] can take priority over a lien for seamen's wages, in regard to which the authorities are thus summarized in *Williams & Bruce's Admiralty Practice*:[2]

> "It takes precedence of claims for bottomry "or necessaries supplied to foreign or British "ships and of payments for towage and for light "and dock dues charged against the ship, but it "ranks below maritime liens for damage done by "collision, and for salvage rendered subsequently "to the time when the wages were earned. Be- "tween the holder of a bottomry bond and a "claimant for wages earned on the same voyage "on which the bond was given, no distinction is "to be drawn between the portion of such wages "earned before and wages earned after the giving "of the bond. . . . . "

[1] *Victoria Machinery Depot Co. v. The Canada and the Triumph* (1913), 18 B.C.R. 511, 514, 15 Can. Ex. 136, 17 D.L.R. 27. Cf *Roscoe's* Adm. Prac. (1903) 64 (f).

[2] (1902) 205-6.

Reference may also be made to *The William F. Safford*,[1] *The St. Lawrence*,[2] *The Andalina*[3] (a case very similar to this), *The Africano*,[4] *Roscoe's Ad. Prac.*,[5] *The Neptune*,[6] wherein Lord Stowell says "a "seaman (has) a right to cling to the plast plank of "his ship in satisfaction of his wages or part of "them"; *The Cella*[7] on the effect of the arrest, and *Munsen v. The Comrade*[8] (a decision of this court in its New Brunswick District) shows that claimants will be protected according to their priority if they make application before the money has actually been paid out. I note, however, in this last case, on the point of priority between claimants *in pari conditione* and the decree that should be made in such circumstances in the absence of la hes, the decision is not in accord with that of the President of the Admiralty Court in *The Africanc* [9] which was not cited to the Court, and points out he change in the practice since the decree in the *Sar ıcen case* was issued.[10]

The order, therefore, to be made herein is that Nosler is entitled to be paid his wages in full and the balance will be applied in reduction of Momsen's judgment. With respect to the order that ought to be made as to costs, I refer to *Williams & Bruce Admiralty Practice*[11] and *Roscoe's Admiralty Practice*,[12]

[1] (1860) 2 L.T.N.S. 301.
[2] (1880) 5 P.D. 250.
[3] (1886) 12 P.D. 1.
[4] [1894] P. 141.
[5] (1903) 76-7.
[6] (1824) 1 Hag. Adm. 227 at 237-8-9.
[7] (1888) 13 P.D. 82.
[8] (1902) 7 Can. Ex. 330.
[9] [1894] P. 141.
[10] See (1845) 4 Notes of Cases 498, 6 Moo. P. C. 56, Williams & Bruce *supra* 289 (z).
[11] At p. 469-70.
[12] 319 and the cases there cited.

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RE THE "AURORA."

Reasons for Judgment.

and if the parties do not agree upon the order to be made in the unusual facts, *i.e.*, the release and re-arrest of this case, I am prepared to hear further argument thereupon, if it is desired, though counsel for *Momsen, et al.* made no submission on this point, nor did either counsel submit any authority.

Judgment accordingly.

Sears, for Nosler's claim.

E. A. Lucas, for Momsen's claim.

BRITISH COLUMBIA ADMIRALTY DISTRICT.

1915
July 17.

COWAN

v.

THE SHIP "ST. ALICE."

Seamen—Wages—Jurisdictional amount.

The jurisdiction of the Exchequer or Admiralty Court under the *Canada Shipping Act* (R.S.C. 1906, c. 113, s. 191), over claims for seamen's wages, depends upon the amount of recovery, not the amount sued on. Where the amount of recovery is less, although the amount sued on is more than $200, the Court is without jurisdiction. Several such claims may be consolidated into one action in order to confer jurisdiction.

ACTION for seamen's wages.

Tried before the Honourable Mr. Justice Martin, Local Judge of the British Columbia Admiralty District, at Vancouver, B. C., May 11, 1915.

H. B. Robinson, for plaintiff.

R. M. Macdonald, for defendant.

MARTIN, Loc. J. (July 17, 1915) delivered judgment.

An important question, of interest to all seamen, is raised by this action, which was brought to recover the sum of $225 for wages, by an action *in rem,* against the defendant ship, registered at Vancouver, B. C., with the result that after hearing several witnesses judgment was entered for $88 only, the question of costs being reserved for further argument. It is submitted by the defendant that the effect of

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Reasons for Judgment.

sec. 191 of the *Canada Shipping Act*,[1] is that when it was found at the trial that the plaintiff can only recover a sum less than $200 the court should thereupon dismiss the action with costs, leaving the plaintiff to pursue his remedy in the proper forum, where it should originally have been brought, because this court can only entertain and adjudicate upon claims in excess of the specified amount, which amount should be determined, not by a fictitious sum wrongly sued for, but by that which is and was really due for the wages earned at the time suit was begun.

Said section provides:

"No suit or proceedings for the recovery of "wages under the sum of two hundred dollars "shall be instituted by or on behalf of any sea- "man or apprentice belonging to any ship regis- "tered in any of the provinces in the Exchequer "Court on its Admiralty side, or in any Superior "Court in any of the provinces, unless—"

"(here follow certain immaterial exceptions.)

And sec. 192 is:

"If any suit for the recovery of a seaman's "wages is instituted against any such ship, or "the master or owner thereof, in the Exchequer "Court on its Admiralty side, or in any Su- "perior Court in any of the provinces, and it "appears to the court, in the course of such suit, "that the plaintiff might have had as effectual "a remedy for the recovery of his wages by com- "plaint to a judge, magistrate or two jus- "tices of the peace under this Part, the judge "shall certify to that effect, and thereupon no "costs shall be awarded to the plaintiff."

[1] R.S.C. 1906, c. 113.

For the plaintiff it is urged that where, as here, a plaintiff *bonâ fide* believes he is entitled to recover a sum above the statutory amount he is entitled to invoke the aid of the court to determine that matter and there is no lack of jurisdiction.

I have found it necessary to examine at length a very large number of authorities bearing directly and indirectly on the point, including *The Ann*,[1] *The Margaretha Stevenson*,[2] *The Robb*,[3] *The Royal*,[4] *The Monark*,[5] *Brown v. Vaughan*,[6] *Phillips v. Highland Ry. Co. The Ferret*,[7] *Beattie v. Johansen*,[8] *The W. B. Hall*,[9] *The Jessie Stewart*,[10] *The Bessie Markham*,[11] *The W. J. Aikens*,[12] *Gagnon v. The Savoy*,[13] *Beaton v. The Christine*,[14] *Abbott on Shipping*,[15] *MacLachlan on Merchant Shipping*,[16] *Williams & Bruce Admiralty Practice*,[17] *Roscoe's Admiralty Practice*,[18] *The Blakeney*,[19] and *The Harriet*.[20] Fortunately the last named case, decided by Dr. Lushington, exactly covers the question and decides it in favour of the present defendants. That was a case where a mate sued for wages as being over the prescribed amount (£50) under the

1 (1871) Young 104.
2 (1873) 2 Stuart 192, Stockton 83-4.
3 (1880) 17 C.L.J. 66.
4 (1883) Cook (Quebec) 326.
5 *Ib.* 345.
6 (1882) 22 N.B. 258.
7 (1883) 8 App. Cas. 329.
8 (1887) 28 N.B. 26.
9 (1888) 8 C.L.T. 169.
10 (1892) 3 Can. Ex. 132.
11 cited by Stockton, p. 85.
12 (1893) 4 Can. Ex. 7, Stockton 690.
13 (1904) 9 Can. Ex. 238.
14 (1907) 11 Can. Ex. 167.
15 (1901) 14th Ed. 1129.
16 (1911) 5th Ed. 116 (Note) 264.
17 (1902) 3rd Ed. 210, 214, 216.
18 (1903) 3rd Ed. 263.
19 (1859) Swab. 428.
20 (1861) Lush. 285.

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corresponding sec. 189 of the *Merchant Shipping Act* of 1854 (which is essentially to the same effect as our sec. 191, except that the prescribed amount is greater), but at the conclusion of the hearing the amount due him was found to be below £50, whereupon the Court said, p. 291, in language which was cited with approval in the *Margaretha Stevenson* case, supra:

> "I regret that this decision not only deprives "the plaintiff of wages which he has justly "earned as purser, but must also bar him from "recovering in this court the wages he has earn- "ed as mate. His claim, reduced to a claim for "mate's wages only, does not amount to the "minimum of £50 which the statute requires for "a proceeding for seamen's wages in a Superior "Court, except in certain contingencies, which "are not applicable to this case. It is true that "the words are 'No suit or proceeding for the "recovery of wages under the sum of £50 shall "be instituted,' and that here a claim, and a *bonâ* "*fide* claim, has been made for a sum exceeding "£50, but I must interpret the statute to require "a recovery of £50. I dismiss the case, but I do "not give costs."

The learned judge added:

> "I am happy to say that an Act is now pass- "ing through the legislature, which will remedy "the defect in the jurisdiction of the Court, "which in the present case has operated with "such hardship on the plaintiff."

This paragraph refers to the *Admiralty Act*, 1861, assented to May 17th of that year (the judgment be-

ing delivered on March 21st), as to which I shall speak later. The result of that decision as applied to this case is that the same prohibition and restriction extend to cases where the amount sued for, as well as recovered, is less than the prescribed amount, the only difference being that in the former case the lack of jurisdiction appears on the face of the proceedings and in the latter case it is determined by the result of the trial, and will only be determined there at and not by means of a preliminary investigation; *The Nymph*.[1] One curious result of the unusual wording of the section is that where a sum in excess of the statutory amount is claimed it is impossible to object to the jurisdiction till after the case has been decided on the merits, to the extent at least of determining the question as to whether or not the plaintiff can recover up to the said amount.

But the further question remains as to whether or not this court is prevented by sec. 191 from entertaining the action. In other words, is its jurisdiction to entertain claims for any amount still unfettered? On that point there is a regrettable conflict of authority in this court (referred to in *Beaton v. The Christine*[2]), one of the learned judges thereof, in the Toronto District, having held, after consideration of the said *Admiralty Act* of 1861 and other statutes, in *The W. J. Aikens, supra,* that the court has jurisdiction, and another learned judge, in the Quebec District, declining, in *Gagnon v. The Savoy, supra,* to follow that decision, thus leaving the matter in a very unsatisfactory state. In these unfortunate circumstances what is my duty as a judge of the same court, though in another district? I find

[1] (1856) Swab 86.
[2] (1907) 11 Can. Ex. 167, 171.

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a safe guide in the judgment of Mr. Justice Channell, who was placed in a similar position in *North v. Walthamstow Urban Council*,[1] and took this view of it:—

> "Of course, where two cases are inconsistent, "the judge who is considering them is entitled, "if his opinion inclines to one or the other, to "follow the one that he prefers; but where he "has no very clear opinion upon the point, I "think it is his duty to consider which of the two "is the higher authority and therefore the one "which ought to be followed, and that, in my "view, depends upon whether the second case "is a decision given with knowledge of the ex- "istence of the first, and with a deliberate dis- "regard of it, or not. If it is, then the second "case is the one of greater authority. But if, "on the other hand, as sometimes happens, the "second case is a decision given in ignorance of "the first, then the first is the greater authority, "and the second must be treated as having been "given inadvertently."

Compare also *Knowles v. Bolton Corporation*.[2] Now, after a very careful consideration of all the authorities on the point (many of which are cited *supra*) I confess the result is that I have "no very clear opinion upon" it, though if I may be allowed so say so with every respect, in neither of the conflicting judgments did the court, apparently, have the benefit of an adequate argument, nor were many authorities cited that would have been of assistance. But I can go no further than to say that if I had been in the position of the learned judge who decided the

[1] (1898) 67 L.J.Q.B. 972 at 974.
[2] (1900) 2 Q.B. 253 at 258-9.

latter case, I should have felt it my duty to adhere to the salutary rule "*stare decisis,*" but since he has felt it his duty to assume the responsibility of going to the unusual length of departing from it, I do not think I would be justified in the circumstances in making confusion worse confounded by delivering another judgment, differing, possibly, in part at least, from both my learned brothers, so, in the public interest, I formally adopt the latter decision as the greater authority, and leave it to the court above, or Parliament, to take steps, if any, that may be necessary to change the law. I would not, however, have it understood that I think any change is necessary or desirable, because the reason for placing this restriction upon what are sometimes the oppressive and vexatious proceedings *in rem* of small claimants is set out in the case of *The Monark, supra,* and by the Supreme Court of New Brunswick *in banco* in *Beattie v. Johansen, supra,*[1] wherein the "complete and adequate scheme of relief" under the Act and its special appropriate remedies are considered, particularly in the judgment of Mr. Justice King, p. 31, who furthermore points out that sec. 57 (now 192), relating to the judge giving his certificate for costs, applies to the excepted cases under sec. 56 (now 191), but there is no need for me to express my opinion on sec. 192, as the case is disposed of by 191.

The result is that the action should be dismissed, but in the circumstances, owing to the conflict of authority, without costs, following in that respect *The Harriet,* and the *Margaretha Stevenson, supra.*

[1] p. 30.

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I note by way of precaution that it has been settled that the separate claims of seamen for wages may be combined in one action so as to confer jurisdiction: *The Ann, supra; The Ferret, supra; Beaton v. The Christine, supra,* followed by *Burke v. The Vipond*[1].

Action dismissed.

[1] (1913) 14 Can. Ex. 326, 14 D.L.R. 396.

BRITISH COLUMBIA ADMIRALTY DISTRICT.

1915
Sept. 17.

BECK

v.

THE SHIP "KOBE."

Seamen—Wages—Master of ship—Jurisdictional amount.

Under the *Canada Shipping Act* (R.S.C. 1906, c. 113, s. 194) the master of a ship is put upon the same basis as a seaman as regards the jurisdictional amount for the enforcement of claims for wages.

MOTION to set aside warrant of arrest of ship for want of jurisdiction.

Heard by the Honourable Mr. Justice Martin, Local Judge of British Columbia Admiralty District, at Victoria, B. C., September 8, 1915.

C. M. Woodworth, for motion.

W. F. Hansford, contra.

MARTIN, Loc. J. (September 17, 1915) delivered judgment.

This is a motion by the defendant to set aside the writ and warrant of arrest for lack of jurisdiction. The defendant ship, of Canadian registry, is under arrest to satisfy a claim of the master for wages amounting to $190, an amount which on the face of the proceedings is too small to give this court jurisdiction under sec. 191 of the *Canada Shipping Act,*[1] in the case of "any seaman or apprentice," according to the recent decision of this court in *Cowan*

[1] R.S.C. 1906, c. 113.

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v. The St. Alice.[1] But it is submitted that a master is not within the scope or prohibition of that section, and reliance is placed upon the following definition of "seaman" in interpretation sec. 126 of Part III. of the said Act, dealing with "seamen," in the group of sections from 126 to 325 inclusive:

> "'Seaman' includes every person employed "or engaged in any capacity on board any ship, "except masters, pilots and apprentices duly "indentured and registered."

This is essentially the same as the definition in the *Imperial Merchant Shipping Act* of 1854, sec. 2.

It is also pointed out that sec. 215 of the same, cap. 113, relating to expenses for injuries, draws a distinction between "the master or any seaman or apprentice." And in sec. 10 of the *Admiralty Court Act,* 1861, a like distinction is drawn between the claims of seamen and masters for wages and disbursements, the High Court of Admiralty being given jurisdiction over both, which this court possesses. The history of various Imperial enactments on the point is considered in, *e.g., The Sara*[2] (particularly Lord Macnaghten's judgment) *Morgan v. Castlegate Steamship Co.,*[3] and *The Arina,*[4] wherein it is said by Brett, J., that the master "*ex hypothesi* is not a seaman."

It is urged that while the "same rights, liens and and remedies" as a seaman are given a master under sec. 194, "for the recovery of his wages, and for the recovery of disbursements properly made

[1] (1915) Ante. p. 207, 21 B.C.R. 540.
[2] (1889) 14 App. Cas. 209.
[3] [1893] A.C. 38 at 46-8, 51.
[4] (1887) 12 P.D. 118 at 127.

by him," yet these are in addition to and not in derogation of his other pre-existing rights. But it is submitted for the defendant that even though a master would in general be excepted from said sec. 191, yet because of sec. 194 he can be in no better position than a seaman or apprentice when he resorts to the "Mode of Recovering Wages," as the significant heading runs to this particular group of secs. 187-195. Sec. 194 is as follows:

> "Every master of a ship registered in any "of the provinces shall, so far as the case per- "mits, have the same rights, liens and remedies "for the recovery of his wages, and for the re- "covery of disbursements properly made by him "on account of the ship and for liabilities prop- "erly incurred by him on account of the ship, "which, by this Part or by any law or custom, "any seaman, not being a master, has for the "recovery of his wages."

And *cf.* the similar sec. 167 (2) of the *Imperial Merchant Shipping Act,* 1894, c. 66, which is in substance the same as sec. 1 of the *Imperial Merchant Shipping Act,* 1889 (52 & 53 Vic., c. 46), under which a lien for disbursements was first given the master: *Morgan v. Castlegate S.S. Co., supra.*[1] After a careful consideration of the various statutes and authorities cited, *e.g., Abbott on Merchant Ships;*[2] *Temperley on Merchant Shipping;*[3] *Maclachlan on Merchant Shipping;*[4] *Halsbury's Laws of England;*[5] *Maude and Pollock on Merchant Shipping,*[6] and *Wil-*

[1] p. 51.
[2] (1901) 14th ed. 185, 296, 1130.
[3] 2nd ed. 89.
[4] (1911) 5th ed. 218-9, 237 (n), 258.
[5] Vol. 26, p. 53.
[6] (1881) 4th ed. 122, 240.

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liams & Bruce's Admiralty Practice,[1] I can only bring myself to hold that it is the clear intention of the legislature in the enactment of this little group of nine sections dealing with one subject matter and which ought to be read together, to put the master upon the same basis as a seaman in respect of recovery and remedy as well as of substantive rights. There is nothing in the circumstances which renders it improper to apply the statutory restriction to the facts before me, as "the case permits" it, to quote the words of the statute, which expression has been considered in two of the English cases I have cited. The matter is, in short, given valuable rights, but they must be asserted in the same way as others are required to assert them who possess the same rights, or some of them. The reason which actuated parliament to place by sec. 191 such a restriction upon these actions for wages, and which I have alluded to in *Cowan v. The St. Alice, supra,* applies with even greater force to the claim of a master than to that of a seaman or apprentice.

It follows that this court has no jurisdiction to entertain this action and therefore it must be dismissed, and the warrant for arrest set aside. I see no good reason why the usual order for costs should not be made in favour of the successful party.

Motion granted.

[1] (1902) 3rd ed. 208-10, 216.

1914

Oct. 29.

BRITISH COLUMBIA ADMIRALTY DISTRICT.

FARRELL,

PLAINTIFF,

v.

THE STEAMSHIP "WHITE."

Seaman's wages—Ship's articles—"Lay" and "bonus".

Plaintiff sued for a balance of wages as pilot on a whaling steamer at the rate of "$50 per month and lay", as entered on the ship's articles. The articles provided also for the payment of a bonus to the members of the crew at the termination of the whaling season, stipulating, however, that should any of the persons who had signed such articles leave the employment of the owners of the ship, or be discharged for cause, before the determination of the whaling season, such persons should forfeit all claims to a bonus. There was no such provision applied to the "lay", the amount of which earned in addition to wages at any period during the whaling season being liquidated and set out in a table of lays embodied in the articles. The plaintiff did not remain in the said employment for the period mentioned, but voluntarily signed off the ship's articles in a port at which the ship touched before the expiry of the season.

Held, upon a proper construction of the ship's articles, that while the plaintiff had forfeited any right to a "bonus" by leaving the ship before the end of the whaling season, he had not thereby prejudiced his right to credit on his wages for the amount of his lay.

ACTION for seaman's wages and for an amount due for "lay."

Tried before the Honourable Mr. Justice Martin, Local Judge of the British Columbia Admiralty District, at Victoria, October 14, 1916.

J. Percival Walls, for plaintiff.

E. V. Bodwell, K.C., for defendant.

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FARRELL v. THE "WHITE."

Reasons for Judgment.

MARTIN, Loc. J. (October 29, 1914) delivered judgment.

I reserved the question raised by this action for further consideration because of its wide application to seamen employed in various kinds of fisheries on this coast wherein it is customary to give what are called "lays." The plaintiff sued for a balance alleged to be due him for wages as pilot on the whaling Steamer "White" at the rate of $50 per month "and lay," so entered on the articles. The "lay" is set out in a printed table in the articles apportioning to the officers and crew various amounts for various kinds of whales; that which the plaintiff is entitled to being $25 for each right whale; $10 for each sperm whale; $4 for each sulphur bottom whale; $2 for each fin back whale and $1 for each hump back. Preceding this table the articles contain this printed clause:

> "Wages to be paid monthly, and bonus to be "paid at the final termination of the whaling "season 1914. Should any of the persons signed "on the articles leave the employment of the "Canadian North Pacific Fisheries, Ltd., or be "discharged for insubordination before the "final termination of the whaling season 1914, "he shall forfeit all claims to a bonus."

At the end of the table of "lays" is this written notice: "Fireman and cook to receive $5 per month "bonus at end of season." In the list of the crew, given later in the articles, out of the nineteen seamen who signed on in various capacities, 11 were to receive so much wages in cash per month "and lay," 7 were to receive so much wages "and bonus,"

and the master was entered as under a "special agreement."

I decided at the trial that, on the facts, the plaintiff voluntarily signed off at the whaling station at Naden Harbour, Graham Island, on the 14th July last, and that he was not entitled to his expenses of coming to the ship's home port at Victoria. But a further dispute arises from the fact that at the time he was paid off and signed off he did so on the understanding with the manager of the station that he was to be paid his lay money on his arrival in Victoria and he received a statement from the manager, dated 13th July, showing that he was entitled to the sum of $60 for whales of various kinds captured during his service. This statement is addressed to the company (Canadian North Pacific Fisheries, Ltd.) at Victoria, and begins: "As shewn by our "pay-rolls bonus and lay have been earned by W. "Farrell, pilot S.S. "White", for periods ending "(particulars here). Total $60." At the foot is this clause:—

> NOTICE.—Stations will issue pay-rolls for amount of bonus earned as shown on the statement. Pay-roll draft must be attached to the statement and sent to head office by mail. This account will be checked by the head office and draft issued to employee at Victoria. This statement and draft must be sent direct to Victoria office and not given to *employee.*

This statement given to the plaintiff was probably a duplicate of that which would be sent to the Company's head office at Victoria. On his arrival at Victoria the plaintiff presented this statement at said head office, where he was informed that the mat-

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ter would be referred to the master of the "White" for report, but the amount was not then paid to the plaintiff, nor later, though he made at least one more demand for it, and therefore a refusal to pay must be inferred, and the right to recover is now contested.

The difficulty arises from the use of the words "bonus" and "lay", and reliance for the plaintiff is placed upon the fact that a distinction is recognized and drawn both in the articles and statement between then, and that while the articles provide for the "forfeiture of claims to a bonus" in case of discharge for insubordination or leaving the employment "before the final determination of the whaling season," yet no such consequences attach to a lay.

In *Abbott's Law Dictionary* a "lay" is thus, in general, defined, the definition being founded on the case of *Coffin v. Jenkins*:[1]

> "A share of the profits of a fishing or whaling voyage, which is, by the usages of those employments, commonly allotted to each officer and seaman, as his compensation, and in lieu of fixed wages. This custom does not create any partnership in the profits of the voyage. The lay is regarded in admiralty, as in the nature of wages for seamen in the common merchant service, and is governed, as respects forfeiture, by the same rules."

Lays were the custom in the British whale fishery from early times, and were, in that fishery, stipulated in the articles to be paid out of the produce of the voyage to be divided in certain proportions. It

[1] U.S. Cir. Ct. 3 Story, 108.

is stated in *Wilkinson v. Frasier*,[1] that the proportion of a common sailor was a one-hundredth and ninetieth part. In that case it was decided by Lord Alvanley that—

> "the share was in the nature of wages, unliqui-
> "dated at the time, but capable of being reduced
> "to a certainty on the sale of the oil, which had
> "taken place, and that he should not therefore
> "consider them (seamen) as partners, but as en-
> "titled to wages to the extent of their proportion
> "in the produce of the voyage."

In *Perrott v. Bryant*[2] a similar method of remuneration is described as "really only a mode of cal-
"culating the amount of the wages due to the
"dredgers from the owners of the boats."

In the case of such a lay as is now before the court there was no occasion to wait till the end, or the produce of the voyage to determine the share due thereunder because it was liquidated at the time and set out in the table of lays, and therefore immediately upon the whales being brought into the station every man on the articles was entitled to credit on his wages for the amount of his lay. The test may be seen in this, that if after the whales had been brought to the station it had been destroyed by fire so that the whales could not be utilized, nevertheless the crew had earned their lay, *i.e.* their additional wages, and ascertained the amount thereof, though it would be otherwise if, *e.g.*, the lay were payable out of the proceeds of the oil, etc., from the catch.

[1] (1803) 4 Esp. 182.
[2] (1836) 2 Y. & C. 61.

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A "bonus", however, is of a fundamentally different nature. It is thus defined in the *New English Dictionary*:—

"A boon or gift over and above what is normally due as remuneration to the receiver, and which is therefore something wholly to the good.

(a) Money or its equivalent, given as a premium, or as an extra or irregular remuneration, in consideration of offices performed, or to encourage their performance; sometimes merely a euphemism for *douceur*, bribe.

(c) A gratuity paid to workmen, masters of vessels, etc., over and above their stated salary."

The first of the above clauses was adopted in *Re Eddystone Marine Ins. Co.*[1] and it was held that the word "bonus" on share certificates was utterly inappropriate to their having been issued in satisfaction of a debt or other liability and therefore the holder of them was fixed on a list of contributories as liable for the full value thereof.

It follows from the foregoing, I think, that the forfeiture clause should under the articles and form of the lay thereby provided for, be restricted to what it in terms includes, *viz*: a bonus, and not be extended to cover something of so different a nature as a lay, and consequently the plaintiff is entitled to judgment for the amount of his lay. It is desirable to note, since a lay had been held to be in the nature of wages, that it was on that ground that the several plaintiffs in the consolidated actions of *Miller et al v. The Orion* failed to recover their lays when their

[1] (1894) W.N. 30.

actions for wages were dismissed in the trial immediately before the present case was called on, because the plaintiffs had been discharged for insubordination.

Judgment for plaintiff.

1916
Feb. 24.

NOVA SCOTIA ADMIRALTY DISTRICT.

(IN PRIZE.)

Re THE SHIP "HOCKING."

Prize Courts—Transfer of cause.

By virtue of the provisions of the *Imperial Prize Courts Act*, 1915, c. 57, a Canadian Prize Court will order, at the instance of the Crown, the transfer of a prize case to an English Prize Court for the purpose of the more convenient conduct of the proceedings.

MOTION on behalf of the Crown for the transfer of prize proceedings to an English Prize Court.

The S.S. "Hocking" was brought into the Port of Halifax, N. S., as a Prize by His Majesty's Ship "Calgarian," and proceedings were taken in this court at Halifax by Edmund L. Newcombe, K.C., the Procurator-General, on behalf of the Crown, to have her condemned as good and lawful prize.

Later a motion was made on behalf of the Crown to have all proceedings in this action transferred to the High Court of Justice, Probate, Divorce and Admiralty (Admiralty) In Prize, in London, G. B.

This motion came on for argument before the Honourable Mr. Justice Drysdale, Local Judge for the Nova Scotia Admiralty District, on January 23, 1916.

W. A. Henry, K.C., for the Crown, read an affidavit made by himself which referred to 3 exhibits, the latter being copies of the correspondence between the Honourable Bonar Law, the Colonial Sec-

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retary to our Governor-General, copies of which follow. He also read an affidavit of Sir William Graham Greene, Secretary to the Admiralty in London, a copy of which follows. The grounds of the application are fully set out in said correspondence and affidavit.

H. McInnes, K.C., in reply, read affidavit of Richard G. Wagner, of New York, U.S.A., a copy of which is attached hereto.

I, *Sir William Graham Greene,* Secretary to the Admiralty, make oath and say as follows:

1. It is the desire of His Majesty's Government that the proceedings against the S.S. "Hocking" should be transferred to the English Prize Court under the *Prize Courts Act,* 1915, (5 & 6 George 5, Ch. 57).

2. Amongst other reasons for such transfer I may mention the following:

(1) His Majesty's Government decided to seize and take proceedings against the "Hocking" under the Declaration of London Order-in-Council dated the 20th day of October, 1915, on the ground that though flying a neutral flag the ship had an enemy character and was liable to condemnation in accordance with the rules and principles formerly observed in the British Prize Courts. The "Hocking" was accordingly seized on the instructions of His Majesty's Government. She was brought into Halifax because that was the nearest convenient port to which to take her.

(2) No case has yet been decided under the said Order-in-Council. It is of the utmost pub-

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lic and international importance that the rules and principles formerly observed in British Prize Courts, which are to be applied in the case of the "Hocking," should be laid down by the English Prize Court. The English Prize Court has access to records which explain or illustrate the rules and principles formerly observed in such court, but the Prize Court in Halifax would not have this assistance.

(3) All, or most of the evidence in support of the claim for condemnation of the "Hocking" is in London.

(4) The proceedings would be more conveniently conducted on behalf of the Crown in the Prize Court in England owing to the information and materials being in the possession of the Officers of the Crown in London and to the complicated and difficult nature of the investigation which the case involves.

(5) The case will be ready for trial in the Prize Court in England and can be decided sooner than if the case is tried in Halifax.

(6) The Claim of the alleged owners to release of the steamship to them would be heard in the English Prize Court on affidavit evidence and they would not be prejudiced in any way in relation to the preparation of such evidence or the presentation of their case or otherwise by the findings being remitted to the Prize Court in England.

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Sworn at the Admiralty, London, S.W., by the said Sir William Graham Greene, the 11th day of January, 1916. Before me, Arthur L., a Commissioner of Oaths.

(Sgd.) W. Graham Greene.

From Mr. Bonar Law to the Governor-General.
(Telegram. Code.)

London, October 26th, 1915.

Official news, 26th October. Following Order-in-Council published second supplement "London Gazette," 22nd October. *Begins.*

At the court at Buckingham Palace, the 20th day of October, 1915. Present, the King's Most Excellent Majesty in Council. Whereas, by the Declaration of London Order-in-Council No. 2, 1914, His Majesty was pleased to declare that during the present hostilities the provisions of the said Declaration of London should, subject to certain exceptions and modifications therein specified, be adopted and put in force by His Majesty's Government, and whereas by Article 57 of the said Declaration it is provided that the neutral or enemy character of a vessel is determined by the flag which she is entitled to fly, and whereas it is no longer expedient to adopt the said article now, therefore His Majesty, by and with the advice of his Privy Council, is pleased to order, and it is hereby ordered, that from and after this date Article 57 of the Declaration of London shall cease to be adopted and put in force. In lieu of the said article British Prize Courts shall apply the rules and principles formerly observed in such

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courts. This order may be cited as the Declaration of London Order-in-Council, 1915.

And the Lords Commissioners of His Majesty's Treasury, the Lords Commissioners of the Admiralty and each of His Majesty's principal Secretaries of State, the President of the Probate, Divorce and Admiralty Division of the High Court of Justice, all other Judges of His Majesty's Prize Courts and all Governors, Officers and authorities whom it may concern, are to give the necessary directions herein as to them may respectively appertain. *Ends.*

(Signed) Bonar Law.

From Colonial Secretary to the Governor-General.

London, February 16th, 1916.

With reference to your telegram 5th February, "Hocking." No further affidavit necessary on behalf of the Crown. Court should be pressed with argument that case of "Genesee," in which same company are claimants, has been transferred to United Kingdom and will shortly be heard, so that company will have to submit continuation "Hocking" proceedings Halifax would cause duplication, trouble and expense all parties; moreover, purchase of ship by company and all previous transfers mentioned Wagner's affidavit took place in Europe. Court prefers evidence by affidavit, so no commission New York necessary. Entries in company's books can be proved by certified copies. Application by Crown under *Prize Court Act,* 1915, should not be determined on similar grounds to those of application

change venue in civil proceedings. If court refuses transfer, leave to appeal should be asked for. Despatch follows.

(Signed) Bonar Law.

From Colonial Secretary to the Governor-General.

London, February 17th, 1916.

With reference to my telegram 16th February, "Hocking" counsel advises as follows: It is true that defendant may apply to change venue in civil action on grounds that owing to local feeling it will not have fair trial, or owing to expense of bringing witnesses where oral evidence necessary. These grounds do not apply to prize case. Moreover, in civil case Crown has by virtue of prerogative right to select venue. It follows that Crown has the right to transfer under *Prize Court Act,* 1915, if it can thus conduct proceedings more conveniently. Moreover, prize is Imperial matter, and on Imperial grounds may be held responsible to neutral governments for result of proceedings. Imperial authorities therefore have the right to select court before which they can put their case to the best advantage.

(Signed) Bonar Law.

I, Richard G. Wagner, of Whitehall Building, 17 Battery Place, New York City, make oath and say as follows:

I. I am President and the organizer of the American Transatlantic Company, the owners of the above named Steamship "Hocking."

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RE THE "HOCKING."

Statement.

I am fifty-three years of age, and I am a native-born American citizen. In my earlier years I was a contractor in a large way, but latterly I am engaged in the manufacture of beet sugar.

2. In February of this year I went to Denmark; my object was to buy in Europe beet sugar. While there I met Albert Jensen, coal merchant, of Copenhagen, who is a Danish subject, and whom I had previously known in a business way. In conversation with Jensen in reference to business matters he made an attractive statement to show that profits would be realized in purchasing and operating ships, as freights were likely to be very, very high. As a business speculation I decided to interest myself in the ship-owning business, and on my return to the United States I caused a company to be organized, under the laws of the State of Delaware, known by the name of the American Transatlantic Company. This company was organized the 22nd March, 1915, and among the ships that it purchased was the "Hocking," a British ship, built at West Hartlepool in the year 1895. She was registered at first in Great Britain, under the name of the "Parklands," and I believe the following to be a correct statement of her owners.

3. A Dutch firm by the name of W. Ryus & Zonan, Rotterdam, then purchased her, and she was registered as the "Ameland." The firm of W. Ryus and Zonan sold her on the 4th day of March, 1915, to the Aktieselskabet Dampskabet Gronland. The American Transatlantic Company purchased her at Copenhagen, and the bill of sale bears date the 9th day of June, 1915.

4. Some difficulties were experienced in securing the American registry, but finally she was registered under the American flag on the 27th day of October, 1915.

5. The shareholders of the said American Transatlantic Company are all American citizens.

6. The capital of the American Transatlantic Company has all been subscribed by citizens of the United States. I myself am a large shareholder and the money I have put in this company was all my own, and I am not trustee for any funds belonging to other people, and I believe that no other person other than American citizens has any interest, directly or indirectly, in the capital stock of the company, and that no subject of any power at war with Great Britain, has any interest, directly or indirectly, in the said ship, or in the stock of the company that is her owner.

7. The said ship when seized was under Charter Party to proceed to Norfolk, Virginia, and there to load coal for the Argentine Republic.

8. The books of the said American Transatlantic Company and the records pertaining to the ownership of the "Hocking" are at the office of the American Transatlantic Company, New York City, and all material documents relating to the ownership of the "Hocking," and all material witnesses, so far as the defendants are concerned, are in said New York City, which is only two days by rail from the City of Halifax. A commission could be issued from the Prize Court at Halifax, and evidence all taken and returned to the said court in one week.

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RE THE "HOCKING."

Statement.

9. My solicitor practises in Halifax, and my counsel in New York and Washington, and I would say that the balance of convenience in favour of trying the cause at Halifax, instead of London, preponderates in favour of Halifax. The evidence that is in London can only be documents, and these can be transmitted to Halifax in due course of mail, and I am willing to instruct my counsel to proceed with the trial of the action at once, and will undertake that no technical objection as to admissibility of evidence be raised at the trial; however, reserving all rights and not consenting or admitting that any Prize Court has jurisdiction of these vessels, and always contending that the seizure and all proceedings thereunder were and are without cause or justification and in violation of established international law.

10. I am disclosing my case fully on the records, and it will be unfair to me to have this case tried in London, where evidence cannot be quickly obtained to substantiate my case and meet the case of my opponents, and the delays must therefore of necessity be very great.

11. It is a great loss to the company, of which I am a large shareholder, to have the "Hocking" requisitioned, as freights are excessively high, and now is the time I want to build up the business of my company, and I am therefore desirous of such action as will secure the immediate release of this vessel.

(Signed) Richard G. Wagner.

1916

RE THE "HOCKING."

Reasons for Judgment.

DRYSDALE, Loc. J. (February 24, 1916) delivered judgment.

A summons was taken out on December 3rd, 1915, for an order that the proceedings herein be transmitted to the High Court of Justice, Probate and Admiralty Division, the Prize Court in England. The motion was made by counsel for the Crown and is based on the *Imperial Act*, cap. 57 of the Acts of 1915.

That Act specially provided for an order remitting proceedings in Prize when it is made to appear that the proceedings can be more conveniently conducted in any other Prize Court. When the motion first came on for hearing the argument stood over pending conferences between counsel, representing all parties, with a view to some agreement between the parties as to the disposition of the motion. The parties having failed to agree, the argument was continued before me, and concluded yesterday, and I have now to determine whether a case has been made within the terms of the Act, cap. 57, that justifies an order to transmit the proceedings to the English Prize Court as contemplated by that Act.

The Ship "Hocking" was brought into this jurisdiction as a Prize and proceedings to condemn her taken by the Crown in this court. In the ordinary course these proceedings should proceed to their legitimate conclusion and such proceedings would be as of course unless this motion is well formed under sec. 1 of the Act, cap. 57. The question is, has it been established on the material before me that the proceedings can be more conveniently conducted in another Prize Court? The motion as launched was not based upon any material, other than a desire

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RE THE "HOCKING."

Reasons for Judgment.

on the part of Crown officers to have the case remitted, and if at that stage the motion had been concluded, the Crown officers had not, I think, made a case within the Act. It is not the mere desire of one side or the other as to where the case should be disposed of that is covered or intended to be covered by the Act, but the convenient conduct of the proceedings that is, I take it, the convenience of all the parties should be the test.

I heard a good deal on the argument about the great importance of the proceedings, as well as of the Crown's prerogative rights, matters that I think have no bearing on the motion, at least matters not touched upon by the Act in question, and for very obvious reasons not intended to be touched upon, matters that I pay no attention to in endeavouring to come to a decision on this motion. As I have already intimated, I should be guided by ascertaining the proper solution on the question of convenience, that is, the convenience of all the parties.

The owners of the defendant ship reside in New York and they naturally insist that a disposition of the cause here would be much more convenient to them than a disposition in London. *Primâ facie,* this is so, but on the argument it appeared that another ship of the same owners was lately taken into a Prize Court on this side of the Atlantic and that proceedings in respect to such ship have been remitted to the Prize Court in London. It also was made to appear that the material for the defence of said owners' position in that case is in all respects practically the same as the material they require for defence in this case, and under such circumstances it occurs to me that it will be a convenience for the defence to have the proceedings in this case

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Reasons for Judgment.

proceed in the London Court when such owners are there defending the case already so remitted. This point is the determining factor with me. If proceedings here are not remitted, the defence must at practically the same time, or on or about the same time, make their defence both in London and here, and to obviate this I have determined to remit the proceedings as provided for in the Act mentioned to the Admiralty Division as Prize in London, England.

Motion granted.

1915
Jan. 20.

NOVA SCOTIA ADMIRALTY DISTRICT.

(IN PRIZE.)

In re CARGO *ex.* THE SHIP "SANDEFJORD."

Prize—Cargo—Pleadings.

Where parties appear and make claim to a cargo seized as a prize, the claimants are to commence their action by a petition or statement of claim, in the form of pleadings, to which the Crown pleads by what is technically called under the rules an answer.

MOTION for the filing of pleadings in an action for the condemnation of a cargo as a prize.

Alfred Whitman, K.C., solicitor for the Guarantee Trust Company, of New York, William T. Baird and Frederick Karl Fritsch, claiming to be the owners of 36 cases of rubber marked "(B) Copenhagen" and of 85 cases of rubber marked " B. Copenhagen," which were laden on board the ship "Sandefjord" at the time she was taken and seized as a prize off the coast of New York, of the United States of America, by His Majesty's ship "Suffolk," Bentick J. D. Yelverton, commander, and brought into the port of Halifax, Nova Scotia, and which is sought to be condemned in this action as good and lawful prize, after entering an appearance for said owners, took out a chamber summons requiring that Edmund L. Newcombe, K.C., the proper officer of the Crown, appointed in that behalf to attend before the Local Judge in Admiralty, at the County Court House in Halifax, N. S., on the 15th day of January, A.D. 1915, at 3 o'clock in the afternoon, to show cause why the above named Edmund

L. Newcombe, K.C., the proper officer of the Crown, should not deliver pleadings in the action by filing a petition or statement of claim setting forth the facts on which the said officer bases his claim herein in the Registry of this Honourable Court, and serve a copy of said petition or statement of claim on the other parties in this action, and that an order do pass accordingly.

On the return of this chamber summons on January 15th, 1915, *A. Whitman,* K.C., for the petitioner, asked that such order be granted by the judge.

A party instituting a cause or making a claim shall, if ordered by the judge, file a petition in the Registry, etc. *Tiverton's Prize Law,* pp. 79 and 80. Order 7, rule 1 to 5.

A party instituting a cause or making a claim includes the "proper officer of the Crown" and the party's solicitor. Order I., see "Party."

Thus under Order I. interpretation makes the word "party" used in Order 7, rule 1, apply to the "proper officer of the Crown." See also the interpretation of the word "claimant" and "solicitor" and "party."

Mr. Newcombe is a party instituting a cause as he issues a writ. Order 2, rules 1 and 2.

If the contention of the other side is correct, the party for whom I am acting cannot rest satisfied by simply resisting the claim for condemnation. By his contention they must set up a claim for damages or otherwise before they can present a petition. Suppose my clients did not wish to put in any claim for damages at all, they would practically be out of court.

1915

RE THE "SANDEFJORD."

Reasons for Judgment.

The true construction of the rules is that the claim or petition must be put in by the "proper officer of the Crown."

W. A. Henry, K.C., for the "proper officer of the Crown," contra.

In this case we have issued a writ of summons against the cargo for condemnation as lawful "prize" on behalf of the "proper officer of the Crown."

The owners of the cargo, the claimants, and not the Crown, are the proper parties to put in the claim and petition. See Order 7 and Order 13. See also *Tiverton,* page 55, "(c) Forms of Claim." See also *Tiverton,* page 53, "II. Procedure."

All the rules contemplate that the claimants shall put in their claim and petition, otherwise they have no status in the action and will not be before the court.

DRYSDALE, Loc. J. (January 20, 1915) delivered judgment.

The writ issued herein on December 31st, 1914, for the condemnation as prize of gum or rubber and hog casings. Appearance was entered by Mr. Whitman as solicitor for the Guarantee Trust Company, *et al.,* as owners of that portion of the cargo marked "Gum," under date of 7th January, 1915; appearance also being entered by Mr. Fulton on the same day as solicitor for Sulzberger & Co., owners of the hog casings. The writ herein was issued at the instance of E. L. Newcombe, the proper officer of the Crown. On the 12th of January Mr. Whitman took out a summons calling upon Mr. Newcombe to show

cause why he should not deliver pleadings in the action by filing a petition or statement of claim setting forth the facts on which the Crown bases its claim herein for condemnation.

Mr. Henry, acting for Mr. Newcombe, does not object to pleadings in the action, but contends that the claimants are the parties to commence the pleadings by filing a petition and that the place of the Crown is to answer such petition. A claim has not yet been filed by the parties appearing, but I am informed by counsel that counsel for Mr. Fulton, the solicitor appearing for owners of the casings, desires to join in this application for pleadings, and that claims on behalf of the respective owners of cargo will be filed under the rules forthwith. I will direct pleadings in the action as a matter of course and this is not objected to, but parties desire my ruling as to the proper party to begin such pleading. An examination of the rules of 1914 and the prescribed forms issued therewith convinces me that Mr. Henry's point is well taken. By Order 3 a party appearing may make a claim in respect to all or any of the cargo and forms therein are provided. I am informed claims are to be filed. By Order 7 a party instituting a cause or making a claim shall, if ordered, file a petition, and forms are provided. I think it is the plain intention of the rules that where a party appears and makes a claim, if pleadings are directed, the claimant should begin by filing his petition, to which the Crown answers and on the petition and answer the cause goes down to trial in the absence of any further order.

The party instituting the cause may be ordered to file a petition, and in a proper case this could be

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RE THE "SANDEFJORD."

Reasons for Judgment.

done; but when parties appear and make a claim, I think the rules contemplate a petition or statement of claim of such parties in the form of pleadings, to which the Crown pleads by what is technically called under the rules an answer. This will be my direction in this case, and after the claim or claims be duly made herein, an order will pass for pleadings.

Judgment accordingly.

NOVA SCOTIA ADMIRALTY DISTRICT.

1916
Jan. 7.

(IN PRIZE.)

In re THE STEAMSHIP "HAMBORN" (No. 1).

Prize—Appraisement—Ship—Coal.

In appraising a ship brought in as a prize the coal in the bunkers is not to be appraised as part of the ship; it should be inventoried separately. Where the appraisers have acted in good faith the Court will not interfere with their judgment.

MOTION to set aside appraisement of ship taken as prize.

This ship was seized by H.M.S. "Melbourne" whilst on a voyage from New York to a port in the Island of Cuba. The said steamer was seized as lawful prize and brought into the port of Halifax on or about November 2nd, 1915, where she was taken possession of by the marshal, and an action began against her in this court as lawful prize at the suit of the Crown at the instance of *Edmund L. Newcombe,* K.C., the Procurator-General.

An appearance was entered by *A. G. Morrison,* K.C., for the owners of the defendant ship, the Maatschappij, Stoomtoot, Hamborn Company, a body corporate, incorporated under Dutch law on October 23rd, 1913, with its head office at Rotterdam, Holland, a corporation of a neutral State.

By an order of the court a commission of appraisement was issued to Samuel M. Brookfield and Neil Hall, of Halifax, to appraise the ship and her cargo. These appraisers reported that they valued the

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RE THE "HAMBORN." (No. 1.)

Argument of Counsel.

Steamer "Hamborn," 1229 tons register, including her outfit, special parts and what is on board, which they considered additional to her outfit as per inventory attached (the latter included the 182 tons of bunker coal claimed to be owned by the Munson Company, of New York) at £28,700.

A. G. Morrison, K.C., for the owners of the Steamship "Hamborn," took out a chamber summons to set aside this appraisement and to have the steamer re-appraised.

This motion came up for argument before the Local Judge in Admiralty on January 6th, 1916.

W. A. Henry appeared for the Crown and *A. G. Morrison,* K.C., and *H. McInnes,* K.C., for the Steamer "Hamborn" and her cargo. *Morrison,* K.C., read affidavits of Willem Van Eyken, the master of the steamer, and exhibits referred to therein and an affidavit of his own with exhibits referred to in it. These affidavits showed that the Steamship "Hamborn" was built in Antwerp, 1229 tons gross, 742 tons net. The owners valued her at £50,000. A mercantile publication in England called "Fairplay" was quoted which gave a number of record sales of steamers in England, some of which were about the same age and tonnage as the "Hamborn," but they sold for a much larger sum than the appraisement of this steamer. Amongst the sales mentioned were the Norwegian Steamer "Hilda Lee" (ex Cyquers), 1185 tons gross, 713 tons net, built by Wood Lhinney Co., Newcastle, 1906—sold November 11th, 1915, for £35,750.

The Danish Steamer "Active," 1291 tons gross, 763 tons net, built and engined in Copenhagen in 1900—sold November 11th, 1915, for £38,500.

The Dutch steel Steamship "Ottoland" (ex Maassted), 1574 tons gross, 978 tons net, built by N. W. Schiepswerf, at Alclassertlam in 1901—sold on October 14th, 1915, for £41,250.

The Norwegian steel Steamship "Asturia," 1185 tons gross, 741 tons net, built and engined by the Mylande, Vaerkstad, Christiana in 1905—sold on December 2nd, 1915, for about £37,000.

The steel Steamship "Winnfield" (ex "Louis Botha"), 3433 tons gross, 2205 tons net, built by W. Gray & Co., West Hartlepool, in 1901, was absent December 2nd, 1915, for £56,500 for February delivery. This vessel was sold in 1907 for £22,300, in May, 1915, for about £38,000, and in June, 1915, for about £41,000.

He also submitted that the price for prompt steamers was steadily going upward and that the number for sale was steadily decreasing owing to the large number requisitioned by the Government and sunk by mines, etc.

The earning capacity was greatly increased by the excessive rates now being offered for the carrying of freight to all ports.

He also contended that it being admitted that the bunker coal, owned by the Munson Steamship Lines, of New York, having been included in the valuation of the steamer and her cargo, and not being appraised separately, made the whole appraisement bad.

W. A. Henry, K.C., in reply, read affidavits of the appraisers.

These showed that they not only consulted "Fairplay," a shipping journal, but also the "Shipbuild-

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ing and Shipping Record," also published in England, the latest available issues of the latter available when they made the appraisement being those of November 11th and 18th, 1915. From these they extracted essential particulars for the purpose of intelligent comparison, and prepared a table of sales, tonnage and prices realized. From this table they figured out the selling prices of the several steamships which they found reported in the said issue of November 11th, 1915, per dead weight ton. The highest price so ascertained was about £13 per dead weight ton for a steamship, the "Cadmus," built in 1911. They then ascertained the dead weight tonnage of the "Hamborn" to be 1975 tons. Dividing that figure into £28,700, the appraised value of the "Hamborn," it worked out at over £14 per dead weight ton.

The reported sale price of the "Hilda Lee" they regarded as a special price due to special considerations. For greater certainty they obtained the opinion of C. W. Kellock & Co., of London, England, as to the value of the Steamship "Hamborn," which was £27,000, providing she was in good sea-going condition and fully equipped.

The appraisers placed the value of the "Hamborn" at £28,500 and the value of the coal and other stores on board the steamship at £200.

Mr. Henry also submitted the fact that the bunker coal being appraised with the steamer did not vitiate the appraisement, but that the court could order the appraisement to be amended by the appraisers and the correction made.

Judgment was reserved. On January 7th, 1916, the Honourable Mr. Justice Drysdale, Local Judge of the Nova Scotia Admiralty District, delivered the following judgment:

DRYSDALE, L. J., now (January 7, 1916) delivered judgment.

By an order made herein on December 1st, 1915, a Commission was directed for the appraisement of the above named ship, a Commission duly issued and a return made by the Marshal and appraisers in and by which it appears the law ship "Hamborn" was appraised at £28,700, including her outfit as per inventory attached to said return. It appears that coal in the bunkers of the steamer mentioned in said inventory was put on board by the Munson Steamship Line, who are making a claim therefor, and that the value of the coal is included in the valuation of £28,700 returned as the value of the ship.

Counsel for the Munson Steamship Line desire that the value of the coal be appraised separately from the value of the ship, and on December 30th a summons was taken out herein by the Munson Line's solicitor calling upon the proper officer of the Crown and the solicitor for said ship to shew cause why an order should not be granted herein that the appraisement made should not be set aside and an order granted that the 182 tons of coal in the bunkers of the "Hamborn" be appraised separately and apart from the steamer.

The putting in the coal in the inventory of the ship's filings and including the same in the ship's valuation seems to have arisen by mistake and now all the parties desire that the appraisement be sent back to have a separate valuation and appraisement

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Reasons for Judgment.

made of the coal mentioned. This will be granted and is a matter easily adjusted.

A more serious attack is, however, made on the appraisement by Mr. Morrison, solicitor for the said ship, and on December 31st, 1915, such solicitor took out a summons calling upon all parties to shew cause why an order should not be granted to set aside the appraisement made herein under order of 1st December, and all the proceedings had thereunder on the ground that the appraisement was too low in amount, that the appraisers had acted on a wrong principle in making the appraisement and in arriving at the ship's value and that the return to the Commission disclosed a valuation of the "Hamborn" very much less than her real value. In support of this application were read the following affidavits:

1. Affidavit of William Van Eyken sworn December 21st.
2. Affidavit of William Van Eyken sworn December 31st.
3. Affidavit of A. G. Morrison sworn December 21st.
4. Affidavit of A. G. Morrison sworn December 31st.
5. Affidavit of A. G. Morrison sworn January 6th, 1916.
6. Affidavit of William Van Eyken sworn January 6th, 1916.

Cause was shewn on this summons, Mr. Henry, K.C., heard on behalf of the Crown, who submitted the affidavits of Captain Neil Hall and Samuel M. Brookfield, sworn respectively on the 5th and 6th of January.

The argument submitted by counsel in support of this motion seemed to me to disclose and to disclose

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only an attack on the judgment of the appraisers selected by the Marshal in arriving at the valuation returned, and such an attack cannot prevail in a motion against the appraisement. The appraisers selected were men of high standing, thoroughly capable for the work they undertook and I have little doubt respecting the accuracy of the return. They seem to have acted upon the proper principle and in my opinion no case is made to authorize or enable me to interfere. An order will go directing appraisement of the coal and ship separately, but the motion attacking the appraisement under the summons taken out by Mr. Morrison will be dismissed with costs.

Motion dismissed.

1916
Feb. 21.

NOVA SCOTIA ADMIRALTY DISTRICT.

(IN PRIZE.)

In re THE STEAMSHIP HAMBORN (NO. 2.)

Prize—Ship and appurtenances—Coal.

Bunker coal does not pass as part of a ship brought in as a prize.

CLAIM for coal, or value thereof, on board of ship taken as prize.

The Ship "Hamborn" was seized by His Majesty's Ship "Melbourne" whilst on a voyage from New York to a port in the Island of Cuba and brought as lawful prize into the Port of Halifax, where proceedings were instituted against her for condemnation as lawful prize on November 2, 1915, by the Crown at the instance of *Edmund L. Newcombe,* K.C., Procurator-General.

An appearance was entered for the said ship by *A. G. Morrison,* K.C.

An appearance was also entered by *W. H. Fulton,* K.C., for the Munson Steamship Lines of New York, who claimed to be owners of 225½ tons of bunker coal which was on the said steamer when she was so seized and brought to Halifax.

The claim of the Crown as to the "Hamborn" being a lawful prize was not tried here, but it was intended that the trial thereof should take place later on in the High Court of Justice, Probate, Divorce and Admiralty Division (Admiralty) In Prize in London, G. B., and the papers transmitted there.

The Munson Steamship Lines'claim was as follows:

"The claim of the Munson Steamship Lines, of New York, who are the time charterers of the Steamship "Hamborn," now in prize, and who are an incorporated company, whose head office is in the State of New York, and subject to the jurisdiction of the Government of the United States, is for the return of 225½ tons of bunker coal, or the value thereof, at $4.90 per ton.

The said Munson Steamship Lines are and were the true and lawful owners of the said bunker coal, at the time the "Hamborn" was captured by H.M.S. "Melbourne," on Wednesday, October 27th, 1915, and ordered to proceed to Halifax, where the Steamship "Hamborn" was ordered to be held as a prize. Under a time charter with the owners of the "Hamborn," she was to take a general cargo of freight to Caibarien, in the Island of Cuba, and under the terms of the charter, the said Munson Steamship Lines were to furnish the bunker coal.

The trial took place before the Local Judge in Admiralty at Halifax, N. S., on January 7th, 1916. *H. McInnes,* K.C., appeared for the claimants, the Munson Steamship Lines, and *W. A. Henry,* K.C., for the Crown. The evidence for the claimants showed that the Munson Steamship Lines were the owners of the coal and that they had supplied the number of tons claimed. The appraisement at Halifax fixed its value at $4.90 per ton.

McInnes, K.C., asked for judgment for the amount claimed.

Henry, K.C., contended that the Crown was not liable unless it had been finally determined that the

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RE THE "HAMBORN." (No. 2.)

Reasons for Judgment.

defendant ship was not liable to be condemned in prize.

This could not be ascertained until the main trial of the action took place and the claimants' trial herein for the coal was premature.

Judgment was reserved, and on February 21st, 1916, the Honourable Mr. Justice Drysdale, Local Judge of the Nova Scotia Admiralty District, delivered the following judgment:

DRYSDALE, L. J., now (February 21, 1916) delivered judgment.

This ship was seized by H. M. S. "Melbourne" whilst on a voyage from New York to a port in the Island of Cuba. The said steamer was seized as lawful prize, brought into the Port of Halifax and on November 2nd, 1915, taken charge of by the marshal of this court, and this action to condemn the said ship as lawful prize is now pending. At the time of the seizure there was on board the said Steamer "Hamborn" 225½ tons of bunker coal, the property of the Munson Steamship Lines, the charterers of the "Hamborn." A claim has been asserted in this court by the said Munson Steamship Lines as against the Crown to recover the value of such coal and a claim herein duly filed under date of 29th November, 1915. A hearing was had before me as to this claim without pleadings, and I am asked to decide the question whether or not under the circumstances the Crown is liable for the coal in the bunkers on board at the time of the seizure. I note that at the time the vessel was seized by the "Melbourne" the coal on board amounted to 225½ tons, but as the "Hamborn" was directed to Halifax and came here under her own steam, more or less coal was used in steaming here, so that at the time of the

appraisement we found the actual coal on board reduced to 182 tons. I think that if there is liability here on the part of the Crown it must be for the coal on board at the time of seizure, viz., 225½ tons. The Crown officers do not admit liability in this respect. They do not question the amount claimed as a reasonable charge or price for the coal and simply submit the question of liability. As the action respecting condemnation of the "Hamborn" has not yet come on for hearing, and I am asked by the parties interested to dispose of this claim for coal at this stage, I think I can only do so on the assumption that the Ship "Hamborn" was lawful prize at the time of seizure. Assuming this to be so, the question presents itself, does the coal pass as part of the ship? It is common ground that the "Hamborn" was under time charter to the Munson Line at the time of the seizure and it is not disputed that by the terms of the charter the charterers were to supply the bunker coal used by the "Hamborn" and that the coal in question was placed on board the "Hamborn" by the Munson Line for the intended voyage to Cuba. If the ship at the time of the seizure on said voyage was lawful prize, can it be said under these circumstances the coal on board passes with the ship simply because the ship is lawful prize?

Counsel for the Crown relied upon the disallowance of a claim for coal made in connection with the condemnation of the cargo of the Steamship "*Roumanian,*"[1] which, he submitted, had some bearing. An examination of the facts in that case, however, satisfied me it is no authority here and has no application under the circumstances of this case. The

[1] 31 T.L.R. 111 at 114.

1916

RE THE "HAMBORN." (No. 2.)

Reasons for Judgment.

right of the Crown to the bunker coal here must depend on what properly passes as the ship. I am assuming the ship was properly taken. It is true, I think, that a transfer of a ship passes not only the ship but the ship and its appurtenances. It would, I think, include spare machinery, duplicate anchors, anything in fact which a prudent owner had on board for the purposes of the ship and without which it would not be prudent to go to sea. But here the Munson Line that put on the coal is not the owner and not even temporary owner, but simply time charterer, and I do not think it can be reasonably said that even a transfer by the "Hamborn" owners of the ship would pass the charterers' coal. What passes by a simple transfer of the ship is discussed and considered in the case of *Coltman v. Chamberlain.*[1] In that case Charles, J., had occasion to consider what passed under a mortgage of a ship simply by a conveyance of the ship, and his opinion is concurred in by Vaughan Williams, J. I take that decision to be an authoritative declaration on the subject and instructive in considering the question submitted here.

With this ship, the "Hamborn," the Crown took the coal and cannot, I think, retain it without paying its value simply because the ship was lawful prize. The coal under the circumstances here cannot, I think, be said ever to have become a part of the ship, and I feel obliged to hold that the Crown must pay for the coal at the price claimed, that is to say, for the amount on board at the time of the seizure.

Judgment for claimant.

[1] 25 Q.B.D. 328.

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Jan. 10.

DOMINION CHAIN COMPANY,

PLAINTIFF,

v.

McKINNON CHAIN COMPANY,

DEFENDANT.

Patents—Place of manufacture—Assembling of parts—Disclaimer—New invention.

A patented article made in the United States in detail, in the sizes required in accordance with specific orders, the parts merely being joined together in Canada, is not manufactured or constructed in Canada within the meaning of the *Patent Act*, R.S.C., 1906, c. 69, s. 38.

2. Under the *Patent Act* a disclaimer by the patentee must be considered as part of the original specification. The patent itself, not the form of the patented article manufactured under the patent, must be considered.

3. *Held*, that the plaintiff's patent for grip treads for pneumatic tires had been anticipated and disclosed no new invention.

ACTION by plaintiff claiming to be the assignee of a patent No. 90,650, bearing date December 20, 1904, and granted to one Harry De Lyne Weed, and to Joseph Sumner Pickell, the assignee of one-half interest by assignment from Weed.

Tried before the Honourable Mr. Justice Cassels, at Ottawa, December 4, 1917.

R. S. Smart, for plaintiff.

W. D. Hogg, K.C., and *J. G. Gibson*, for defendant.

CASSELS, J. (January 10, 1918) delivered judgment.

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The plaintiff claims as assignee of the patentees to have it declared that the defendant has infringed the said letters patent by the manufacture, use and sale of the grip treads for pneumatic tires covered by the said letters patent.

The defendant denies the infringement and sets up their 3 main defences:—(1) That the plaintiffs, and those through whom they claim, have failed to comply with the provisions of the *Patent Act,* in that they did not manufacture the invention in Canada according to the requirements of the law. (2) That in violation of the provisions of the *Patent Act,* the plaintiff, and those through whom it claims, imported from the United States the article covered by the patent, and by reason thereof the patent became void. (3) That Weed was not the inventor of the invention claimed by him in his patent, and that, by reason thereof, the patent is void.

There was a further defence that the fees required to be paid for the subsequent term of the patent had not been paid, and that by reason thereof the patent lapsed. This defence was not pressed by Mr. Hogg.

It appears that the fees were not paid, and thereby the patent would have terminated. By subsequent legislation, what is called the *War Measures Act,* the commissioner was empowered to accept the fees, notwithstanding the non-payment, and the effect of such acceptance was to place the patentee in the same position as if he had complied with the provisions of the statute.

The patent relates to treads for pneumatic tires. The patentee describes his invention as follows:

"The object of my present invention is to provide "a flexible and collapsible grip or tread composed

"entirely of chains linked together and applied to "the sides and periphery of the tire, and held in "place solely by the inflation of the tire, and which "is reversible so that either side may be applied to "the periphery of the tire, thus affording double "wearing surfaces."

He places two opposite parallel chains, called side chains, which are flexible. Attached to these flexible chains are a series of cross chains which are attached to the lateral or side chains by hooks. When the tire is inflated, these side chains are held in position. Apparently the patentee had the idea that these side chains to which the cross chains are attached would form a continuous chain, and he describes the method of placing the grip tread over the rubber tire. This is by the deflation of the tire, and when deflated the side chains are placed in position and the tire is then inflated again. This method would not be of much practical use, and in the manufactured tread, instead of the side chains being in one continuous piece, they interlock when placed in position, which obviates the necessity of deflating and inflating the tire.

According to all the witnesses who gave evidence before me, there is considerable benefit from what is styled the creeping motion of this grip tread over the tire. This creeping motion is provided for in the Parsons patent, to which I will have to refer subsequently. But, curiously enough, the patentee Weed seems to have endeavoured to prevent the creeping. In his specification he puts it in this way:

"These grips or auxiliary treads are adapted to "be applied to the traction or driving wheels of au- "tomobiles, and one of the important objects is to "enable anyone, skilled or unskilled, to easily and

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"quickly apply the auxiliary tread when needed by "partially deflating the tire and then placing the "grip thereon, and finally, reinflating the tire to "cause the transverse chains to partially imbed "themselves in the periphery of said tire, whereby "the auxiliary tread or gripping device surface is "firmly held in operative position against circum-"ferential slipping of the tire."

Further on in the specification he states:

"The chains—4—are of slightly less length than "the arc measured on a cross section of the tire be-"tween the chains—3—when the tire is inflated, and "it therefore follows that when the tire is inflated, "the chains—4—are imbedded in the periphery of "the tire."

He further states that:

"owing to the fact that the cross chains are imbedded into the tire they are also prevented from slipping relative to the tire."

And further on he refers to the fact that the cross chains are held in their position by being partially imbedded in the tire when inflated.

All the witnesses describe, as I have stated, the benefit to be derived from the so-called creeping of the tread—and according to Professor Carpenter, notwithstanding Weed's contention, there would be creeping in his device. It seems to me that this probably results from the manner in which the manufacturer constructed the treads. If they were constructed as the patentee described, and were thoroughly imbedded in the tire, it is difficult to see how the creeping action could take place. However, this does not become a question of much importance.

I am of opinion, the defence of want of manufacture, and also of importation, has been proved by

the defendant, and that the patent has long since become void under the provisions of the *Patent Act*.

In *Fisher & Smart on Patents*[1] will be found the history of these provisions.

By c. 24 of 55 & 56 Vict., 1892, it is provided:

"(*a*) That such patent, and all the rights and "privileges thereby granted, shall cease and deter- "mine, and that the patent shall be null and void at "the end of 2 years from the date thereof, unless the "patentee or his legal representatives or his assig- "nee, within that period or any authorized extension "thereof, commence, and after such commencement, "continuously carry on in Canada the construction "or manufacture of the invention patented, in such "a manner that any person desiring to use it may "obtain it, or cause it to be made for him at a rea- "sonable price, at some manufactory or establish- "ment for making or constructing it in Canada;

"(*b*) That if, after the expiration of 12 months "from the granting of a patent or any authorized "extension of such period, the patentee or paten- "tees, or any of them, or his or their representa- "tives, or his or their assignee, for the whole or a "part of his or their interest in the patent, imports, "or causes to be imported into Canada, the invention "for which the patent is granted, such patent shall "be void as to the interest of the person or persons "importing or causing to be imported."

As I will point out later, to my mind it would be almost farcical to hold under the facts established in this case that there was any manufacture in Canada, prior at all events to the year 1913.

[1] (1914) pp. 131-141.

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William Thomas Morris, a witness called for the plaintiff, states that he was one of the original directors of the Dominion Chain Company when it was first formed in Canada, and has been active in the development of the manufacturing department. That was in 1913. He goes on to point out that the Dominion Chain Company has a factory in Canada where it makes these grips. It is located at Niagara Falls, and has been located there ever since 1913. He describes the method of manufacture of the patented grip. He is asked, as follows:

"Q. Can you illustrate the method of making the "chain grip. Just describe it?

"A. These side members are for a given size of "tire.

"HIS LORDSHIP—What are those side members?

"A. These side members are for a 34 by 4 inch "tire."

At the trial before me there was a table upon which the so-called manufacture was explained. And the witness Morris is asked:

"Q. What is done with the side members—explain "it?—A. The side members are stretched on this "table—they are of a given size for this 34 x 4 inch "tire.

"Q. How many sizes of those do you carry?—A. "Some 80 odd—that is, 80 odd combinations of side "chains."

There are about six different sizes, according to this witness, of cross chains. The cross chain is inserted in the side chain by a hook.

I asked the witness whether what he showed me on the table would be described in the first claim of the patent subsequently disclaimed, and he states—

"HIS LORDSHIP—What you have just been show-"ing me, that would be described in the first claim, "would it not? A grip for elastic tires comprising "side chains flexible in all directions whereby they "may be reversed side for side, interlocking mem-"bers on the ends of said chain and cross chains "having their ends secured to the side chains and "their inner and outer faces similar, whereby either "face may be placed against the tire. Does not that "what you show correspond to that?

"A. It is a description of these that I have just "got through showing you.

"HIS LORDSHIP—Is there any difference?

"*Mr. Smart*—No, it does not specify. The cross "chains are not at right angles, as claim 10 does "for instance."

He proceeds to describe what he claims was manufacturing in Canada as follows (to his own counsel):

"Q. When did the Weed Company begin opera-"tions in Canada and where?—A. In 1906, at "Bridgeburg.

"Q. How long did the Weed Company continue its "operations in Canada at Bridgeburg?—A. In 1906 "and 1907.

"Q. And where and when did it next carry on its "operations?—A. In 1908, in Sarnia.

"Q. How long did you continue operations in Sar-"nia, and after that when and where did you con-"tinue operations?—A. In the spring of 1908 and "1909, 1910, 1911 and 1912, at the United Commun-"ity Company's plant at Niagara Falls, Canada."

He is asked this question:

"Q. Where did the Weed Chain Company get the "chains it used from 1906 to 1907 in the manufac-"ture of chain grips in Canada?—A. We imported

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"it from the United States, the side chains with the "cross chain hooks attached."

He states:

"We had an arrangement with the United Com- "munity Company as manufacturing agent to man- "ufacture the grips for the Canadian market, "during the years 1909, 1910, 1911 and 1912. Their "method of manufacturing was the same that we "followed in 1906, 7 and 8, and continued to-day "in our chain manufacturing department of the Do- "minion Chain Company at Niagara Falls."

He is asked:

"Q. In what shape did the material come into "your manufacturing establishment in the United "States?—A. The connecting hooks were attached "to the side chains and the cross chain hooks were "attached to the cross chains."

On cross-examination, referring to the chains exhibited on the table, he is asked the following questions:

"Q. I am asking you, what is here on the table— "these side chains are complete?—A. They are com- "plete as they stand.

"Q. The side chains you say there are complete "as they stand, these on the table?—A. Yes.

"Q. And the cross chains those that are attached, "and those that are on the table there loose, they "are also complete; they are cut to the proper length "with the hooks attached?—A. Manufactured to "the proper lengths in the manufacturing depart- "ment.

"Q. I do not care where they are manufactured, "what we have on the table as cross chains are com- "plete with the hooks upon them?—A. Yes.

"Q. Now we understand one another; then we "have here two side chains complete with the hooks "upon them?—A. Yes.

"Q. We have a number of cross chains complete "with the hooks upon them?—A. Yes.

"Q. Is there any other part or member required to make the completed grip chain?—A. No."

Further on he is asked:

"Q. They were to be put upon tires, they were not "to be put upon gate posts?—A. As a completed "chain tire grip.

"Q. Nor were they brought in, in 1907, for no "other purpose?—A. For chain tire grips.

"Q. And these parts, as we have them here on the "table, were brought in and you put them together, "and completed them, for what purpose?—A. Com- "pleted them for the purpose of the Weed Chain "Tire Grip."

Further on he states, as follows:

"Q. You yourself, with one assistant from New "York and two or three boys, did the work?—A. "Yes.

"HIS LORDSHIP—Were these things sent in from "the United States made to order in lengths and so "on?

"A. The side chains with the connecting hooks at- "tached and the cross chains with the hooks at- "tached.

"HIS LORDSHIP—Were they all made in the United "States to order for particular sizes?

"A. The specification, as I have explained that "question, the specification was received from our "agent, and the goods were ordered from the chain

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"manufacturer, following the same procedure as "we had done in New York."

It would appear that the agent in Montreal would apply for certain numbers of the grip treads for the particular sizes of the automobiles to be furnished. This specification was forwarded to the United States, and the side chains and the cross chains fully completed would be sent to Bridgeburg, hooked together and sent on to their Montreal agent.

This witness further states:

"HIS LORDSHIP—You sent the specifications of "the tire you wanted and they sent you the side "chains and the cross chains to suit that specifica- "tion?—A. Yes; the specification would go if we "wanted 1200 pieces over all.

"HIS LORDSHIP—There might be one thing in "bringing in a marketable commodity from the "United States, say 200 or 300 feet of side chains, "and another thing if you sent a specification for a "particular length of chain to suit a particular "wheel, and then get it in in that shape,—is that the "way you got it?

"A. I will try to make myself clear. The specifi- "cation coming to us, for example, from Montreal "would read his requirement for the year or six "months, that would be probably 50 setts of 34 x 4- "inch or 50 setts of 33½-inch. I would purchase "chain to make 50 pairs of 34 by 4. I would pur- "chase from the manufacturer 200 pieces of this "chain required to make 50 pairs to a given length, "then so many hundred pieces of cross chains, "which would be supplied to me with a cross hook "attached and with the connecting hook attached.

"HIS LORDSHIP—Ready to be put on?

"Yes. I would then take my schedule sheet, and "decide, for example, that a 96-foot length would "make so many pairs of 34 by 4 grips."

Further on he describes that the side chains with the connecting hook attached were packed in separate barrels, and the cross chains with the cross hooks attached were packed in separate barrels.

Further on he states:

"Q. But the portions of the chain you brought in "in 1907, as you have already said, were made and "ready to be completed for an automobile wheel "and to be sent forward to your purchaser on com- "mission in Montreal for that purpose?—A. On "consignment.

* * * *

"HIS LORDSHIP—In regard to these cross or trans- "verse chains, they would have to be made to order "of certain dimensions?

"A. Yes.

"Q. There is a hook on each end. They would be "made to order of certain dimensions?—A. Yes.

"Q. And made to order in order to hook into the "side chains?—A. Yes.

"Q. Where was that work done?—A. By a chain "manufacturer in the United States at that time.

"HIS LORDSHIP—They would buy a length of that "brass wire and cut it into the necessary lengths?

"A. At this particular time in the United States "the company that actually manufactured this side "chain manufactured, I believe, as near as I know, "the hook; but they did buy these cross chains, and "furnished us at first the completed part, the com- "pleted grip in itself first, and then afterwards "furnished us with this cross hook secured with the

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"cross chain separate, with the cross chain hook at-
"tached, and the side chain with the side chain hook
"attached."

In regard to this alleged manufacture at Bridgeburg, the evidence of Frank T. Patterson describes the so-called manufacture. The place of manufacture seems to have been a small harness and barber shop, that the plaintiffs would rent for perhaps two weeks in the year; and in this place, having received from the United States the complete tread, they would attach the cross chain to the side chain. The only work apparently performed in Canada towards the so-called manufacture is nipping down the point of the hook after it is inserted in the cross chain, so as to prevent it being detached from the side chain. This is done with a tool which was exhibited in court.

Now, it is to be noticed that, curiously enough, the patentee never contemplated the point of the hook being bent into the cross chain. If the patentee's specifications were to be carried out, once his tread was on the tire and imbedded in the tire, it could not become detached. And in his specification the patentee states as follows:

"I also contemplate detaching the cross chains
"from one or both of the parallel chains by making
"an open link or hook connection, as seen on the
"left hand side of Fig. 3, in which case the ends of
"the parallel chains might be permanently con-
"nected."

It seems to me that it would be farcical to treat as a manufacture in Canada what has been done by the plaintiffs or their predecessors. It is, in no sense of the word, a purchase on the American market of

material, a common subject of merchandise, and then bringing these things over and manufacturing them in Canada to the sizes required.

In the case in point, a *specific order* for the completed treads, comprising the side chains and the cross chains, was sent to the United States. They were manufactured to order in the United States for the sizes required, and they arrived in Canada completed treads for the tires of these particular sizes. All that had to be done was hooking the cross chains into the side chains. If this can be called manufacture, I fail to see what possible benefit there can be in the statute which aims at preventing importation and requires manufacture in Canada.

In the case of the *American Dunlop Tire Co. v. Anderson Tire Co.*,[1] Burbidge, J., apparently against his own judgment, went as far as it was possible to strain the law. He evidently thought that he should follow the decisions of the late Dr. Tache, and laid a good deal of stress upon the fact that, after these decisions, the law had been re-enacted. The facts in the *Dunlop* case are not similar to the facts in the case before me; but since the judgment in the Supreme Court in the case of *Power v. Griffin*[2] these decisions of Dr. Tache can hardly be followed. At p. 47 of the report, Armour, J., quotes Dr. Tache's decision, and adds these words:

"Thus holding contrary to the express words of the condition that it was not necessary that the patentee should, within the period mentioned, commence, and after commencement, continuously carry on, in Canada, the construction or manufacture of the invention patented, and holding, without any

[1] 5 Can. Ex. 82.
[2] 33 Can. S.C.R. 39.

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words in the condition to warrant it, that the conditions would be sufficiently satisfied by the patentee granting to any person desiring to use the invention patented a license to use it upon applying to him for it and upon payment of a fair royalty. This decision cannot be supported, nor can it be held to be supported by the decisions in the Court of Appeal for Ontario, and in this court, in *Smith v. Goldie,*[1] for what was said by Patterson, J., in the former court, and by Henry, J., in this court, was plainly *obiter,* for each of them held that the decision of Dr. Tache was final and not subject to appeal."

Then there are a number of decisions cited in vol. 2 of the Exchequer Court reports. I take it, however, that since the case of *Power v. Griffin,* the law is that a statute must be construed as it reads.

Reliance was placed by the plaintiffs on the case of *Grinnell v. The Queen.*[2] This case was one under the Customs Act. It was tried before Gwynne, J., who, apparently, treated the case as if it were being tried under the provisions of the *Patent Act,* which has been quoted. He uses this language:

"It is a preposterous fallacy to say that a patented invention, every minutest particle of which was manufactured and constructed in the United States, was manufactured or constructed in Canada. I confess that I am wholly unable to understand how any business man of plain common sense could conscientiously entertain the idea that it was."

I could not express my own views in more forcible language than that used by Gwynne, J. This case was reversed by the Supreme Court, but on the

[1] 9 Can. S.C.R. 46.
[2] 16 Can. S.C.R. 119 at 123.

ground that the question was not one in regard to the manufacturing clause of the *Patent Act*, but under the provisions of the *Customs Act*.

Ritchie, C. J., at p. 127, states as follows:

"It seems to me that the question in this case is "not whether the bringing in the parts composing "the sprinklers in an unfinished state, and complet- "ing them so as to be in a state to be used as auto- "matic sprinklers with a view of satisfying the pro- "visions of the patent law, as contemplated by the "claimant, is a *bonâ fide* compliance with the condi- "tions of the claimant's letters patent."

And then he proceeds to point out the difference.

Mr. Justice Strong uses this language, at p. 145: "The case of a watch or a carriage completed "abroad, then taken to pieces and imported in sep- "arate parts, is wholly different, and the same may "be said of the case where the several parts, with- "out being actually put together previous to im- "portation so as to form one whole, are yet so iden- "tified with the one specific whole which is to be "formed out of them that they are appropriated to "one particular instrument or machine, and to no "other; in such circumstances it may well be said "that there is an importation of a particular ma- "chine in parts, but in the present case there was "nothing resembling this."

I think that the patent is null and void for the reasons that I have stated.

I might rest my decision on these points, but, as at the trial, the whole question was tried as to the validity of the patent outside of the question of non-manufacture and importation, and as counsel

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showed a great deal of research and care, I think it due to them that I should express my views on the validity of the patent, having regard to the prior state of the art.

The patentee, on November 2, 1917, filed in the Patent Office, a disclaimer, whereby he disclaimed claims numbers 1, 2, 3, 5, 6, 8, 11, 13, and 14, forming part of the specification for the said patent.

Under the *Patent Act* it is provided that where a disclaimer is made, such disclaimer shall thereafter be taken and considered as part of the original specification. The result of the disclaimer is that the patentee limits his invention to a strict construction patent, namely, of the side chains and with the cross chains at right angles. This is all that is left to him, and this is all that is claimed by the counsel for the plaintiffs.

I agree with Hains, one of the expert witnesses for the defendant, that, in the face of the Parsons patent, which was referred to in evidence, namely, United States patent No. 732,299, dated March 24, 1903, the plaintiff's patent limited, in the way in which I have stated, is absolutely anticipated by the patent of Parsons.

It has to be borne in mind that in dealing with these patent cases, the judge has to consider the case from the patent itself, and not from the particular form of the patented article manufactured under the patent. For instance, in the exhibit produced before me evidencing the Parsons tread, it was a zig-zag tread, with the cross chains at an angle of about 50 degrees. That, however, is only one method of manufacture, described in the patent itself.

Now, a careful consideration of the Parsons patent would show that it was not limited to any particular angle. It is obvious that the more cross chains you choose to apply, the less will be the angle. And the sixth claim of this patent is:

"Anti-slipping or protective means for the peri-
"pheries of wheels, pulleys or the like, comprising
"two rings or *annuli* at opposite sides of the wheel,
"and an anti-slipping medium consisting of a chain
"or chains secured to the rings and extending across
"and around the periphery of the wheel."

Now there is no possible doubt that if Parsons were to manufacture his tread with the cross chain instead of being at right angles at any angle of 15 degrees he would be within the rights of his patent. If Professor Carpenter's evidence is accepted, and there is no difference between a diagonal cross chain with an angle of 15 degrees and a cross chain at right angles, what would be Weed's defence in an action of infringement by Parsons? Would it be possible for him to set up that he was not an infringer because he chose to place his cross chains at right angles? I think not. It seems to me impossible to hold that any such variation from the Parsons invention, as placing the cross chains at right angles, is invention.

Taken with the disclaimer, counsel for the plaintiff admitted that there is nothing left but this feature.

I think there is no invention whatever on the part of Weed in merely taking what was completely disclosed in the art and endeavouring to sustain a patent for a construction patent by this slight variation. I do not think myself that Parsons was limited

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to a diagonal cross-bar, but if he were he would be within his rights to have it anywhere even at a less angle than 15 degrees; and to say there was any invention in placing it at right angles and thereby entitling the patentee to a patent, is almost an absurdity, and I cannot see under the facts of this case there can be any intervention.

Judgment will go declaring the patent void, and the defendants are entitled to their costs of the action.

Judgment for defendant.

NORTHERN SHIRT COMPANY,

PLAINTIFF,

1917
Dec. 20.

v.

CHESTER E. CLARK,

DEFENDANT.

Patents—New invention.

The application of a well-known contrivance to an analagous purpose, without novelty in the mode of application, is not invention and is not good ground for a patent.

ACTION to set aside patent of invention.

T. J. Murray and *E. K. Williams,* for plaintiff.

Russel S. Smart, for defendant.

AUDETTE, J. (December 20, 1917) delivered judgment.

This is an action to impeach or annul patent of invention, No. 166,462, for "an alleged new and useful improvement in methods of producing overalls" granted to the defendant, who, by his statement in defence, avers the letters patent in question is valid and in full force and effect. Further, the patentee by way of counter-claim, alleges the plaintiff has infringed the said letters patent, and concludes by asking that his patent be declared good and valid, with the usual conclusions for damages, of an account of profits and for an injunction to restrain the plaintiff from making, using or selling the invention claimed by the letters patent.

The defendant's petition for the grant of the letters patent is dated June 5, 1915, and appears to

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have been received at the patent office on July 10, 1915.

The letters patent bears date December 7, 1915, and on February 20, 1917, the defendant filed, in the patent office, at Ottawa, a disclaimer alleging that "through mistake, accident, or inadvertence, with-"out any wilful intent to defraud or mislead the "public, he has, in the specification, claimed that he "was the inventor of a material, or substantial part "of the invention patented, of which he was not the "inventor, and to which he had no legal right."

Therefore disclaiming that part of the invention patented as claimed in claims 1, 2, 3, 4, 5, 6, and 7 of the specifications to the said letters patent.

The letters patent as they stand to-day are exclusive of the first 7 claims, and therefore are in respect of the following claims:

(8) The method of constructing the side opening in overalls between the front and back legs which consists in slitting the front leg and then applying a band on the edges of the slit.

(9) The method of constructing the side opening in overalls between the front and back legs, which consists in slitting the front leg in advance of the seam connecting the front and rear legs and then applying a protective band on the edges of the slit.

(10) The method of constructing the side opening in overalls between the front and back legs, which consists in slitting the front leg in advance of the seam connecting the legs, applying inner and outer bands on the edges of the slit and finally sewing, in a single operation, the bands together and to the trouser legs by parallel rows of stitches.

(11) The method of constructing the side opening in overalls between the front and back legs, which consists in vertically slitting the front leg at the top in advance of the seam connecting the trouser legs, opening up the slit to bring the edges thereof in a straight line, then applying a protecting band on the edges of the opened up slit and finally sewing the band to the edges of the slit.

(12) The method of constructing the side opening in overalls between the front and back legs, which consists in vertically slitting the front leg at the top in advance of the seam connecting the trouser legs, opening up the slit to bring the edges thereof in a straight line, applying an inner and an outer band on the opened up edges of the slit and finally sewing, in a single operation and with parallel rows of stitches, the edges of the bands together and to the edges of the slit.

(13) As a new article of manufacture, an overall having a side seam passing from top to bottom of the trouser leg and a side slit in advance of the seam.

(14) As a new article of manufacture, an overall having a side slit in advance of the side seam connecting the front and back legs.

(15) As a new article of manufacture, an overall having the front and back legs connected by a side seam passing from top to bottom of the legs and provided, further, in the front legs and at the top with side slits.

(16) As a new article of manufacture, an overall having the front and back legs connected by a side seam passing from top to bottom of the legs and provided, further, at the top, with side slits located in advance of the leg seam and having the edges of the slit suitably bound with a protecting band.

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The patentee testified that in the spring of 1914 he was called over to the office of the T. Eaton Co., Ltd., and shewn an overall, manufactured by a competitor in the trade, which carried a *continuous* side facing in the opening put on by a single needle machine, and was asked to duplicate the garment. He refused to duplicate this garment (a sample of which is marked as Ex. No. 8) at the same price he was then selling his own overalls—he believed some extra charge should be made as he thought it involved extra cost over and above what he was manufacturing and selling his overalls at the time. From that time on, he says, "I tried to scheme out some way "of overcoming the difficulty in cost of producing "a garment with a continuous side facing on the "side seam." At that period he was not using the continuous side facing but a two-piece side facing tacked at the bottom of the vent, but not continuous clear across the bottom of the opening.

He had not so far tried the operation of sewing the facing on the vent with a double needle machine, because, he says, he thought it was impossible owing to the thickness of the cloth at the bottom of the opening, so he conceived the idea of moving the seam back one inch and leaving the opening in the same position as before—and that is what is all through called a slit in advance of the seam, involving making—after the garment has been sewn from the bottom to the waist band—an opening or slit in the same place where the former opening and seam were —thus taking away the extra surplus thicknesses of cloth from the bottom of the opening.

In September, 1914, he started manufacturing this alleged new garment as described in the patent. He filed in the patent office his petition for a patent

on July 10, 1915, and obtained his letters patent on December 7, 1915.

On the other hand, some time in January, 1915, witness McKelvie was approached by witness Foster, who was anxious to push his trade, and who endeavoured to convince McKelvie to purchase some double needle machines. At the time the plaintiff was using a narrow gauge two needle machine in the manufacture of shirts, in sewing the facing on the slit of the cuff. Witness Foster represented to witness McKelvie that a saving would be accomplished by using a two-needle machine of the proper gauge, in thereby making the operation at one time instead of twice on the back band (that part disclaimed by the patentee) and on the continuous side facing, with a proper folder. On witness Foster representing that, with a double needle machine, the continuous band on the slit could be thus sewn in one operation,—witness McKelvie interjected, he thought the thickness of the material at the bottom of the vent would not go through the folder. However, witness Foster, who was familiar with the making of shirts, asked him to go down to the shirt department of their factory to demonstrate on a double needle machine which was in use in the factory for shirts. In thus experimenting on this machine they encountered difficulty in crossing over a seam on that machine. The folders were too close together (p. 89),—they being made that way for finer material, such as shirt material. He then took off two screws which held the folders, and inserted a piece of cardboard between them, thus separating the folder a little more, and then ran the overall material through. He had thus relieved the folder which then allowed the material to pass, which it did

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not do before,—and regarding the facing, it was then suggested putting it off the seam, not directly upon the seam, but to one side or another, the same as a placket on a shirt—that is, having a seam and making a continuous facing. The witness further adds, it was because he was familiar with the manufacture of shirts he suggested it could be put forward or back of the seam, as *in shirt sleeves.*

Somewhere about in June, 1915, witness McKelvie went over to Minneapolis and bought two of those double needle machines and received them at Winnipeg some time in the following July, when he at once applied himself to the manufacture of overalls therewith. He first manufactured a two-seam overall, as ex. "P," with a continuous side piece put on the seam with a double needle machine.

Not being satisfied with the first attempt on account of the thickness of the material, his second attempt was to run the seam up to the band, make an opening in front of the seam, and in doing so really took the idea, as he says, from the shirts we were manufacturing.

Then in the third attempt, he ran the seam right up to the band and made a slit at the back of the seam,—when, however, he finally decided to place the slit in front of the seam. And in doing so, again he says, that idea of putting the slit other than on the seam, he obtained from the knowledge of what he had done on shirts following up witness Foster's suggestion.

Then the plaintiff began manufacturing, but without taking any patent, and in the fall of 1915, in September or October, the plaintiff received a notice similar to ex. "S," advising them as follows:

"September 2nd, 1915.

"The Northern Shirt Co.

"It has come to our notice through reliable chan-"nels that some of the manufacturers in Canada are "contemplating manufacturing an overall similar to "one we have marketed.

"We take it that it is not their intention or desire "to infringe our rights, and that you are possibly "not aware that we have protected our improved "garments by patent application.

"We accordingly desire to advise you that it is "our intention to protect ourselves in every way "possible in this matter, and we trust that this ad-"vice may guide any manufacturer who contem-"plates copying our improved garment."

A copy of this letter was sent to Western King Mfg. Co., Leadley Mfg. Co., Monarch Overall Co., Western Shirt & Overall Co., Canadian Shirt & Overall Co.

Following this notice the present action was instituted asking for the cancellation of the defendant's patent as above set forth.

Under the *Canadian Patent Act,* s. 7, a patent may be granted to any person who has invented any *new* and useful art, machine, *manufacture* or composition of matter; or any new and useful improvement therein, which was not *known* or *used* by *any other person before his invention thereof* and which has *not been in public use* or sale with the consent or allowance of the inventor thereof, for more than one year previously to the application for the patent.

Therefore in so far as relating to the present case the subject matter of the letters patent must be a manufacture that must be new, useful and involving ingenuity of invention. There must be a new art.

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"The primary test of invention, and the question as "to whether there has been invention is one of fact "in each case."

And as was said in the *British Vacuum* case,[1] different minds may arrive at different conclusions on the point as to whether or not there has been invention. In the present case, however, we must enquire whether the alleged combination imply invention and whether the result therefrom has not been anticipated. Commercial success as contended in this case is not a test of invention, although it may be of usefulness. Can it be said that the patentee practically brought on a new result, even if his overall is compared with ex. 8, the one shewn him by Eaton & Co.? A more than doubtful matter.

Counsel for the defendant contends that the combination covered by the patent is composed of the three following elements: 1. Continuous seam running from top to bottom of garment. 2. Slit in advance of the seam. 3. Continuous facing put around slit.

All and each of these three devices, I may say, were old, and the question is whether this combination involved ingenuity of invention, and actually produced something that was new and involved invention.

When the patentee was examined the following evidence was adduced:

When making some explanation he was asked:

"Q. HIS LORDSHIP—You did not really change the "pattern of the overall (No. 8) as it was turned out, "but you did change what I may call the internal "distribution of the seams?—A. Yes.

[1] 39 R.P.C. 209.

"Q. HIS LORDSHIP—As it was before, excepting "the seams were in a different position?—A. As it "was before, excepting the seams were in a differ- "ent position."

Therefore it is clear we had in the trade, before the patent was ever thought of, a two-seam overall, like ex. No. 8, which carried a *continuous side facing* in the opening, but put on with a single needle machine. True, it was not sewn with a two-needle machine, but what of that. There was no slit in advance of the seam, but after all the practical result, with whatever difference or change there existed, resided only, as patentee himself states, in the internal distribution of the seams. Is it conceivable that one can claim ingenuity of invention for so changing the seam in a garment? Can there be invention after all if these devices claimed in the combination were old and that both functions and result had *all been used* in other garments?

And what is the paramount feature of the overall, in common with ex. No. 8—what is its most beneficial feature, if not the continuous side facing which is not claimed by the patent and yet relied upon by counsel. The defendant put in the witness box a commercial traveller named Jamieson, who was selling the defendant's overalls covered by his patent,—and at p. 110 he is asked:

"Q. Just tell me your experience in the sale of "that overall?—A. Well, my experience was in sell- "ing the overall that the *talking point* of the over- "all, the thing that helped to sell it, was the *con- "tinuous* side facing on the overall. It was the talk- "ing point—perhaps it did not have anything to do "with the wearing of it—but it helped to sell the

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"overall. That has been my experience since I "started to sell the overall."

Then at p. 111, after detailing his success in so selling the overall, he again says, that this very overall had to do with this success: "Because the "continuous side facing on the overall was certainly "a talking point for me . . . I sold the goods on "the strength of the continuous side facing."

All of this evidence on behalf of the defendant again sets out that the conspicuous feature of the overall was the *continuous* side facing which he was not formerly manufacturing, but which he had seen in ex. 8, shewn him by the Eaton Co., and which had been in existence and manufactured for years before the patent. The internal distribution of the seams had nothing to do with the selling and disposing of the goods; but it was the continuous side facing which is not part of any of the subsisting claims of the patent and which the defendant himself, when heard as a witness, declared he did not invent the continuous side facing, and, obviously enough, since it was in evidence long before he obtained his patent.

That would therefore establish that what is claimed as constituting invention—such as the slit in advance of the seam—was not of any importance or benefit in the garment as a whole when placed on the market for sale, and again as a whole did not practically produce a new result as distinguished from ex. No. 8, since that in shewing the merit of their product for the purposes of sale it was, as it had been established by the patentee's evidence, relied upon on the continuous side facing and not on the slit in advance of the seam, and if the merchants bought on the strength of the continuous side facing

alone, how could one expect that the common labourer buying an overall would look to the slit in advance of the seam? And after all comparing exs. 8 and E, both two-seam garments, with in one case the slit on the seam and with the other the slit in advance of the seam—do they not both effect the same purpose? The continuous side piece whether put on the slit with a single needle machine or with a double needle machine, effects the same purpose or the same function. That is, it reinforces the opening, the great and advantageous feature, *the talking point* for the sale of the garment. Both fulfilled the function as in the *Pencil* case. And a large sale of the product of a patented process is not in itself a proof of utility: *Hatmaker v. Nathan.*[1] And the patentee really claims his patent is for a combination in manufacture and the process of turning out the manufactured article.

However, it would appear the patentee claims, as another feature of his patent in his method of constructing an overall,—in fact as its principal object, "the saving of time and labour." In his specification he says:

"The present invention is wholly directed towards "a method of construction of overalls which has as "its principal object the saving of time and labour "which allows the overalls to be produced at less "cost than has heretofore been possible. In carry- "ing out my invention I make three distinct changes "in the construction of the ordinary overall: (1) one "being in connection with the side facing; (2) an- "other being in connection with the attachment of "the apron; (3) and the other in connection with "the attachment of the back band. Heretofore in

[1] 34 R.P.C. 323.

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"sewing these parts, several operations have been "required which rendered the construction expens- "ive. With my method of construction, the cost of "assembling is cheapened."

Taking into consideration that all that which is claimed by Numbers 2nd and 3rd above recited, and all that is contained in claims 1 to 7, have been disclaimed, does not all that is claimed "in respect of what heretofore in sewing these parts, several operations have been required which rendered the construction expensive. With my method of construction the cost of assembling is cheapened"—as well as other claims made in the specification, in respect of, when using the double needle machine, only *one* operation being required when a second operation was formerly required and others—does it not equally apply as well to what has been disclaimed as to what is still claimed in the remaining claims? If so, then all of what has been disclaimed has necessarily been given to the public and could not again or still be claimed in the remaining claims Nos. 8 to 16: *Copeland-Chatterson Co. v. Paquette.*[1] The disclaimer under the statute become part of the original specification. (*Patent Act*, s. 25 (2)).

The patent is "for an alleged new and useful improvement in the methods of producing overalls." Subsequent to the granting of the patent the patentee has disclaimed claims Nos. 1 to 7 inclusively. The patentee now claims the product of his patent for the overall as the result of combining all the claims which are left. No one of the claims still remaining valid in the patent would by itself be sufficient to produce the complete overall, which is manifestly what the patentee is aiming at. The in-

[1] 10 Can. Ex. 410, 38 Can. S.C.R. 451.

vention is the result of obtaining a complete overall by the process described in the patent. The case is something like *Hunter v. Carrick.*[1]

The patent is an indivisible grant and if some of the claims are incomplete, defective or bad, subject to the provisions of sec. 29 of the *Patent Act,* the patent cannot be sustained. *Cropper v. Smith,*[2] *Hunter v. Carrick, supra.*

The method of producing overalls, as claimed by the patent, cannot be exclusively found within the four corners of any of the remaining claims of the patent. For instance, claims 9 and 10, standing by themselves, are absolutely invalid, they require other elements to be added to the construction in order to make an effective claim.

And this is not a case where the judicial discretion of the court should be used to discriminate as contemplated by s. 29.

The fact of being enabled with a double needle machine to do in one operation what a one needle machine had to do in two, is no innovation. The advantage resulting in using the double needle machine and which consists in saving labour and increases production is not new, it having been in use for over 35 years. And that very advantage which is claimed in respect of the remaining claim was also claimed in respect of the disclaimed claims—and, indeed, if any one could claim such advantage or benefit in its abstract operation, would it not be the inventor of the machine, instead of the one who is making use of the machine?

Moreover, it is established by witness Jacob's testimony that some years ago his company was

[1] 10 A.R. (Ont.) 449, 452, 11 Can. S.C.R. 300.

[2] 26 Ch. D. 700.

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manufacturing (ex. "A.") a one-seam overall with continuous side facing or band (a lining and an upper) sewn in one operation with a two needle machine, fed on the folders—and no claim, in the patent, is necessarily or specifically made for a two-seam overall, but it is for an overall generally.

It may also be casually mentioned that plaintiff's counsel, at the trial, pleaded insufficiency of the specification, contending that as the patentee testified it was impossible to produce the garment without possessing the art of cutting; that it was necessary to take an inch off one side and put it on the other; that it was necessary to move the seam back to get the slit in the vent where it was wanted; therefore, in other words, that that second process was not disclosed in the specification. That it was something which the patentee kept to himself, and that without which the patented garment could not be manufactured. That as the moving an inch back did not appear in the specification, an ordinary workman taking the specification, could not on the patentee's own showing, produce the garment that he claims he produced. In other words, the contention is, no sufficient directions are given to obtain the described result.

Coming now to the claim in respect of the slit in advance of the seam it is clear on the evidence before the court, it had been in use in garments such as shirts long prior to the patent in question in this case, and would have undoubtedly suggested itself to any housewife, or to any person of ordinary skill and knowledge of the subject, when encountering bulky thicknesses of cloth.

Referring to the evidence of David Hepton, heard on commission, it will be seen that he was a fore-

man cutter at Seibert & Co., in 1910 or 1911, and that witness, besides explaining the operation in respect of the continuous side facing, is very illuminating also on the question of the slit in advance of the seam, as he established clearly that while it was not in use in an overall, that it had been in full use with shirts.

The following parts of his testimony are very enlightening, viz.:—

"Q. If you were going to cut the garment (ex. "E"), could you use the patterns that have been "used for garment (ex. "D")?—A. Yes. Q. Would "you have to make any change in the patterns to "produce "E"?—A. No. Only with the slit. The "balance of the pattern would not be altered. Q. "Just tell us what you would do with the slit, what "change would be needed?—A. There is no change "whatever. The pocket is merely moved forward, "that is, the pocket at the corner of the opening. "The seam in ex. "E" is run right up to the band. "Q. How would that affect the position of the pocket?—A. It would mean the advancing of the "pocket in front of the seam. Q. Why was it advanced?—A. *It is the same as used in shirt "sleeves.*"

After stating the two needle machine could not be used in sewing the continuous side facing on the seam on account of the thickness of the cloth at the bottom of the opening, he is further asked:

"Q. As a practical cutter, taking the garment, "ex. "D", could you alter the position of the slit "so that it would open off of and in advance of the "seam without making any change in your pattern, "except to move your pocket an inch or two neces-

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"sary to bring it away from the seam?—A. Yes. "you can do that.

"Q. Now, Mr. Hepton, as a practical cutter, if "you came to apply the continuous side piece on the "seam with a two-needle machine and found, as you "have stated that you would have too large a bulk "of cloth, what would you do?—A. I would have to "do just as in ex. "E". I could not advance it back "on account of the seam being in the way of putting "the hand in the pocket. Q. Now, you did a few "moments ago, if I understand you correctly, refer "to the opening in the sleeve of a shirt. *Does the "opening in the sleeve of a shirt bear any similarity "to the overall which we are now discussing?*—A. "Nearly all shirts have the continuous band opening "on the sleeve. Q. Just explain how you cut the "sleeve of a shirt that has the continous band on the "seam?—A. As a rule it is moved similar to ex. "E." The opening in the sleeve is moved from "the seam to wherever you care to put it, so as to "bring the opening on a line with the little finger. "Just as on ex. "F"."

"Q. What is the objection to the piece coming "where the opening is?—A. It is *on account of the "two-needle operation* on this continuous band on "the opening. Q. Why could not the two-needle "operation be used on the continuous side piece on "the opening if the piece inserted came in at the "same place?—A. *Because the material is too bulky.* "The continous side piece is fed through folders "and a seam would interfere with the flow of the "material through the folder."

From this, perhaps over-lengthy, extract, it appears clearly that there was nothing new, when the patentee applied for his patent in the operation of

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a slit in advance of the seam in sewing a continuous band on the vent or any kind of opening in a garment. That the same process or operation had long been in use in the manufacture of such garments as shirts, and that what the patentee, a person as familiar with the manufacturing of shirts as with overalls, has done was only to adopt without invention the old contrivance of a similar nature in the manufacture of overalls. The adaptation of an old function or contrivance to a new purpose is not invention —there is no subject matter when no ingenuity of invention has been exercised. *Terrell,* p. 38.

The same contrivance has also been in use for a number of years in the sewing of a placket on the front part of a shirt; and it is contended by witnesses it was also used in a petticoat, and this slit in advance of the seam also appears in some of the American patents filed of record and more especially in ex. "V4."

The case of *Abell v. McPherson,*[1] abundantly confirms my views concerning the present patent. The head note in that case reads as follows:

"The plaintiff had obtained a patent for an im-
"proved gearing for driving the cylinder of thresh-
"ing machines; and the gearing was a considerable
"improvement; but, it appearing that the same
"gearing had been previously used for other ma-
"chines, though no one had before applied it to a
"threshing machine—it was held (affirming the de-
"cree of the Court below) that the novelty was not
"sufficient under the statute to sustain a patent."

And using the very words of Mowat, V.-C., in the conclusion of his judgment, it must be said that the use of the slit, etc., in an overall, similar to that one

[1] 17 Gr. 23, 18 Gr. 437.

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on a shirt "is thus an old and well-known contriv- "ance, applied to an analagous purpose (on an over- "all instead of a shirt) and the settled rule is that "such an application cannot be patented."

Again, in the case of *Harwood v. G.N.R. Co.*[1] it was held that:

"A slight difference in the mode of application is "not sufficient, nor will it be sufficient to take a well- "known mechanical contrivance and apply it to a "subject to which it has not been hitherto applied."

The transfer of a known thing from one use to another, or to an analagous use, is not a good ground for a patent. See also *Bush v. Fox*,[2] and *Brook v. Aston*.[3]

The saving of labour and expense, and the production of a new and useful result cannot alone support a patent; there must be some "invention" was held in *Waterous v. Bishop*.[4]

And in the present case the conflicting evidence on the question of cost of manufacture could not be satisfactorily used in support of the patent. It would under the evidence be practically impossible to ascertain which mode of manufacturing cost more. The placing of known contrivances to a use that is new, but analagous to the uses to which they had been previously put, without overcoming any fresh difficulty, is no invention. *Re Mertens' Patent*;[5] *Layland v. Boldy & Sons*.[6]

"There is no patentable invention where the pecu- "liar structure necessarily resulted from the fact

[1] 11 H.L. Cas. 654, 11 E.R. 1488.
[2] 9 Ex. 651.
[3] 8 El. & Bl. 478, 120 E.R. 178.
[4] 20 U.C.C.P. 29.
[5] 31 R.P.C. 373.
[6] 30 R.P.C. 548.

"that the patentee wanted to combine certain old "elements and a person skilled in the art would "naturally group the elements in the way the pat- "entee adopted": *Eagle Lock Co. v. Corbin Cabinet Lock Co.*[1]

"And there is no invention in applying to the "making of undershirts a peculiar stitch and "method of putting together already well known in "the making of cardigan jackets": *Dalby v. Lynes.*[2]

See also *Wisner v. Coulthard;*[3] *Carter v. Hamilton;*[4] *Nicholas on Patents,* p. 23; *Saxby v. Gloucester;*[5] *Riekmann v. Thierry;*[6] *Penn v. Biddy;*[7] and *Kemp v. Chown.*[8]

And in *Blake v. San Francisco,*[9] Wood, J., delivering the opinion of the Court, says:

"It is settled, says Gray, J., that the application of "an old process, or machine, to a similar or *analag- "ous subject,* with no change in the manner of ap- "plication, and no result substantially distinct in its "nature, will not sustain a patent, even if the new "form of result has not been before contemplated."

I have had the advantage in the course of the trial, at the request and in company of counsel for both parties, of visiting the plaintiff's factory, and seeing and viewing the one needle machines, and two needle sewing machine and folders in question, and to witness the process of manufacturing the principal parts of overalls in question in this case.

[1] 64 F.R. 789.
[2] 64 F.R. 376.
[3] 22 Can. S.C.R. 178.
[4] 23 Can. S.C.R. 172.
[5] 7 Q.B.D. 305.
[6] 14 R.P.C. 105, 114 and 116.
[7] L.R. 2 Ch. App. 127.
[8] 7 Can. Ex. 306.
[9] 113 U.S.R. 682.

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Does not, in the result, the problem of this patent resume itself in manufacturing two-seam overalls with a continous band, or side facing, sewn, with a double needle machine, on a slit in advance of the seam?

Two-seam overalls are old. The continuous band or side facing in an overall—one-seam and two-seam overalls is not new, nor is it claimed by this patent. The sewing of the continuous band with a two needle machine is an operation which might properly be the subject of a claim by the inventor of the sewing machine, but not, as far as I can see, by the one using the machine. Then there remains the slit in advance of the seam; but the slit in advance of the seam has been anticipated in shirts and other garments—*though no one, so far as the evidence discloses, had applied it to an overall*—and following the case of *Abell v. McPherson, supra,* I am of the opinion that the novelty of using it on an overall did not evolve invention or ingenuity of invention and is not sufficient under the statute to sustain the patent. What the defendant did was to apply a well-known contrivance to an analagous purpose—to an overall instead of to a shirt. Why then should, at this stage of the art, the public be deprived, by monopoly founded on unmeritorious grounds, of a device or contrivance well known in the past, and for which none ever dreamt of asking a patent, and which, again repeating myself, any housewife or person of ordinary skill and knowledge of the subject would have readily solved.

The patent is made up of a group of well-known old devices and contrivances, the result of which had long been anticipated on analagous garments, and discloses no invention. No new result is obtained

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from the patent, save perhaps the display of a function in an overall which was in existence in other garments before and was thus anticipated.

The mere carrying forward or the extended application of the original thought—the slit in advance of the seam—from a shirt to an overall, doing substantially the same thing in the same manner by substantially the same means even with better results, is not such invention as will sustain a patent. The patent does not possess any element of invention. It does not involve, in any sense, a creative work of inventive faculty, which the patent laws are intended to encourage and reward. *Hinks v. Safety Lighting Co.*;[1] *Smith v. Nichols.*[2]

The patent, read with the disclaimer, disentangled and freed from the redundancy and repetitions of the specifications and claims, appears to me to be invalid for want of subject-matter, exercise of inventive faculties or ingenuity of invention; therefor the action is maintained with costs, the patent is declared void and of no effect and the counterclaim is dismissed with costs.

Judgment for plaintiff.

[1] 4 Ch. D. 607.
[2] 21 Wall. 118.

1917
June 26.

IN THE MATTER OF THE PETITION OF RIGHT OF

THE GULF PULP & PAPER COMPANY, A BODY CORPORATE,

SUPPLIANTS,

AND

HIS MAJESTY THE KING .....RESPONDENT.

Contract—Hire of horses—Military officer—Liability of Crown.

A contract for the hire of horses entered into by an officer of the Crown's military forces acting under the authority of the commanding officer is binding upon the Crown.

PETITION OF RIGHT to recover for the loss of horses hired by a military officer.

Tried before the Honourable Mr. Justice Audette, at Quebec, June 21, 1917.

A Fitzpatrick, K.C., for suppliant.
G. F. Gibsone, K.C., for respondent.

AUDETTE, J. (June 26, 1917) delivered judgment.

The suppliants, by their petition of right, seek to recover the sum of $850 for the hire of a team of horses, damages, and for the loss of the horses.

In the month of August, 1914, after the declaration of war by Germany, Sergeant-Major Moisan, of the 7th Field Ambulance, came to the suppliants' office and hired a heavy team of horses, which was delivered at the Drill Hall to said Sergeant-Major at 8 o'clock, on the evening of August 21st, 1914, by witness Paquet, who received from the Sergeant-Major the receipt for the same, Exhibit No. 1.

After taking delivery of the team, witness Paquet helped the Sergeant-Major to at once hitch the horses on an ambulance waggon to go down to Beaumont, to the Martiniere Battery, where Captain Delage, who was in charge, was stationed. The Captain saw the horses several times, and he says they were the best horses they had.

Without entering into full details, it will perhaps be sufficient to say that when the rent for the hiring of these horses was sought, they could not be found and they seem to have disappeared.

The name and description of these horses, as well as the name of their owners, are not on an official list, which was long after prepared, as best it could be done, because Major Lagueux said, although he repeatedly asked for information with respect to the horses from Major Wright, who had been in command of a section of the 7th Division at Levis before him, he never could get an answer.

Some horses, to the knowledge of Major Lagueux, were omitted from this official list. This list is more or less reliable.

However, I must find that this team of horses was actually delivered, on behalf of the suppliants, to Sergeant-Major Moisan, who on that same evening had them hitched to a military ambulance waggon. The horses were actually delivered and accepted, as attested by the receipt. Sergeant-Major Moisan went to the front either in August or September, 1914, and is now in France.

The evidence further disclosed that the Commanding Officer, in presence of Captain Delage, authorized Sergeant-Major Moisan to procure the necessary horses for the use of the 7th Ambulance Division.

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War at that time had been declared. Sergeant-Major Moisan was in active service, acting under the authority of his Commanding Officer. It is therefore obvious that it must be taken he had then the proper authority to hire these horses, and, moreover, that the Crown, through him, took delivery of the same.

If, as is contended, these horses were afterward converted to the use of someone else, the suppliants herein have nothing to do with it. After delivery it was not the suppliants' duty to see that the horses were not stolen. They were delivered to the Crown.

If the Crown did not get much benefit out of the horses, it is not the suppliants' fault. *The Queen v. Henderson.*[1] The horses had been hired in the regular manner, no other provision having been made for procuring them. They have been delivered and used by the Crown, and therefore the Crown must be taken to have ratified what in this respect its officers and agents had done. *Henderson v. The Queen.*[2]

The Crown has paid no rent to the suppliants and the horses have apparently been lost—they are therefore entitled to recover for the breach of the contract under the decision of the case of the *Windsor & Annapolis Ry. Co. v. The Queen.*[3]

I am not satisfied with the evidence respecting damages, but I think the suppliant should get the value of these two horses, which I hereby fix at the sum of $450. In lieu of their rent and damages, there will be interest upon this sum from August 21st, 1914, the date of the delivery of the team to the

[1] 28 Can. S.C.R. 433.
[2] 6 Can. Ex. 48.
[3] 11 App. Cas. 607.

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Crown. *Johnson v. The Queen;*[1] *Henderson v. The Queen;*[2] *Wood v. The Queen;*[3] and *Hall v. The Queen.*[4]

Therefore, judgment will be entered declaring that the suppliants are entitled to recover from the respondent the sum of $450, with interest thereon at 5 per cent. per annum, from August 21st, 1914, and costs.

Judgment for suppliant.

Solicitors for suppliant: *Fitzpatrick, Dupré & Gagnon.*

Solicitors for respondent: *Gibsone & Dobell.*

1 8 Can. Ex. 360.
2 6 Can. Ex. 39; 28 Can. S.C.R. 425.
3 7 Can. S.C.R. 634, 639.
4 3 Can. Ex. 373.

1915
May 19.

IN THE MATTER OF THE PETITION OF RIGHT OF

GEDEON BEAULIEU.....SUPPLIANT,

AND

HIS MAJESTY THE KING.....RESPONDENT.

Contract—Extra work—Certificate of engineer.

There can be no recovery for extra work performed in connection with a contract entered into with the Crown, in the absence of an authorization and certificate of the chief engineer required by the stipulations of the contract. The Court, under sec. 48 of the *Exchequer Court Act*, is bound to adjudicate upon the claim in accordance with the stipulations.

PETITION OF RIGHT to recover for extra work.

Tried before the Honourable Mr. Justice Audette, at Quebec, April 14, May 10, 1915.

P. J. Jolicoeur, for suppliant.
V. de Billy, for respondent.

AUDETTE, J. (May 19, 1915) delivered judgment.

The suppliant brought his petition of right to recover the sum of $3,718.50 for alleged extra works executed in connection with his contract between himself and the Crown, bearing date December 11th, 1895, and filed of record as Exhibit No. 2,—including also in that amount the sum of $30 as a balance still due under the said contract and a further sum of $500 he would have realized in profit had the engineer allowed him to build the wall in question herein 2 feet higher, namely, of 9 feet instead of 7 feet, as called for by the contract and specifications.

This contract is for the lump sum of $4,480. The contractor acknowledges having received the full amount of the contract price, less $30, which, however, his counsel at trial abandoned, but which becomes of no effect, as will be hereafter shown.

From the evidence at trial the suppliant would appear to have been paid, in satisfaction of the said contract, in four several cheques to his order from the Department of Finance, the sum of $4,450.

The final certificate of the chief engineer certifies that the suppliant is entitled to recover in full satisfaction of the works executed under his contract, together with authorized extras, the full sum of $4,966. This sum is made up as follows:

The sum of	$4,480.00
amount of the contract, with the sum of	276.00
for two culverts, duly authorized by the chief engineer, together with the further sum of	210.00
for three hundred yards of extra filling, making in all the sum of	$4,966.00

The total amount of the sum covered by the chief engineer's certificate has been paid in the following manner, viz.	$4,450.00
direct to the suppliant in the manner above mentioned, together with sum of	516.00
for labour performed in connection with the said contract, pursuant to clause 22 thereof, after giving due notice, which is admitted by the suppliant in his evidence: making in all the sum of	$4,966.00

Under the several clauses of the contract entered into the suppliant at bar, as a condition precedent

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to his recovery, must have a certificate from the chief engineer, and for any extra work authority from the same officer estimating further the value of such work. The final certificate is only for the said sum of $4,966, and in the absence of the certificate for any further amount, the suppliant must fail. Cases of this kind have come before this Court for adjudication so very often that it is thought unnecessary to cite here a long chain of decisions establishing the principle involved in the present case, which principle indeed has been dealt with and considered both by the Supreme Court of Canada and by the Judicial Committee of His Majesty's Privy Council.

Furthermore, under sec. 48 of the Exchequer Court Act, it is enacted that, "in adjudicating upon "any claim arising out of any contract in writing "the Court shall decide in accordance with the stipu- "lations in such contract and shall not allow com- "pensation to any claimant on the ground that he "expended a larger sum of money in the perform- "ance of his contract than the amount stipulated for "therein."

The suppliant is not entitled to any portion of the relief sought by his petition of right herein.

Action dismissed.

Solicitor for suppliant: *P. J. Jolicoeur.*

Solicitors for respondent: *Bernier, Bernier & de Billy.*

IN THE MATTER OF THE PETITION OF RIGHT OF

1917
Nov. 22.

ZEPHIRIN GAGNON,

SUPPLIANT,

AND

HIS MAJESTY THE KING,

RESPONDENT.

Railways—Negligence—Employees' Relief Fund—Validity of contract—Estoppel.

The agreement of an employee of the Intercolonial Railway, as a condition to his employment, to become a member of the temporary employees' relief and insurance association, and under its constitution and by-laws to accept its benefits in lieu of all claims for personal injury, is perfectly valid and may be set up as a complete bar to his action against the Crown for injuries sustained in the course of employment; by accepting the benefits he will be estopped from setting up any claim inconsistent with the rules and regulations.

PETITION OF RIGHT to recover damages for personal injuries to an employee of the Intercolonial Railway.

Tried before the Honourable Mr. Justice Audette, at Quebec, November 5 and 6, 1917.

Armand Lavergne, for suppliant.

P. J. Jolicoeur, for respondent.

AUDETTE, J. (November 22, 1917) delivered judgment.

The suppliant, by his petition of right, seeks to recover damages in the sum of $10,521 for bodily injuries sustained by him and which he alleges re-

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sulted from defective machinery, and the incompetence of the foremen and employees of the Intercolonial Railway, a public work of Canada.

On December 17, 1916, some short time after one o'clock in the afternoon, the suppliant was engaged, with other labourers, in the railway yard of the I.C.R. at Chaudiere, P. Q., in the work of lifting a turn-table with the aid of a derrick,—his work consisting in placing blocks underneath the table as it was being raised. While engaged in this work the hooks, attached to the table, worked from the derrick, suddenly slipped from under the table; the latter fell, pinning the suppliant's right arm between the blocks and the table. For the purposes of this case, it is found unnecessary to go any more into the details of the accident and the causes which occasioned it. The sole question involved in this case can be stated without reciting the details of fact which have given rise to the litigation. It will be sufficient to state that as a result of the accident herein the suppliant's right arm was amputated three inches below the elbow joint, about 8 to 10 inches of the arm being removed.

To this claim for damages the Crown, *inter alia*, sets up the plea that the suppliant being a member of the I.C.R. Employees' Relief and Insurance Association, it was relieved by the rules and regulations of that association and by the suppliant's agreement on becoming a member thereof, of all liability for the claim now made.

At the time the suppliant entered the employ of the I.C.R. he was given (Exhibit C 2) a booklet intituled "Intercolonial and Prince Edward Island "Railways Employees' Relief and Insurance Asso-

"ciation.—Rules for the guidance of members of the "*Temporary* Employees' Accident Fund."

Having been given this book, containing the rules of this insurance association, for the *temporary* employees of the I.C.R., he signed a document or agreement in the form of Exhibit B, whereby he acknowledged having received the booklet in question and consented himself to be bound by it, as a condition to his employment, and to abide by the rules and regulations of the association.

Furthermore, the suppliant, at different dates subsequent to the accident, and in compliance with the rules and regulations of the insurance association, was paid and received a certain weekly sick allowance during a period of 26 weeks, for which he duly gave receipts, as appears by Exhibit F.

The receipts for these "sick allowances" contain the following words: "As full of all claims against "said association on account of injury to arm. . . . "in accordance with constitution, rules and regula- "tions." These last words cannot be read otherwise than as being a full confirmation of that part of the original contract of service, Exhibit B.

The rules and regulations of the association contain the following provisions:

"The object of the Temporary Employees' Acci- "dent Fund shall be to provide relief to its members "while they are suffering from bodily injury, and "in case of death by accident, to provide a sum of "money for the benefit of the family or relatives of "deceased members; all payments being made sub- "ject to the constitution, rules and regulations of "the Intercolonial and Prince Edward Island Rail- "ways Employees' Relief and Insurance Associa- "tion from time to time in force."

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"Rule 3. In consideration of the contribution of "the Railway Department to the Association, the "constitution, rules and regulations, and future "amendments thereto, shall be subject to the ap- "proval of the Chief Superintendent and the Rail- "way Department shall be relieved of all claims for "compensation for injury or death of any member."

Having said so much, it becomes unnecessary to express any opinion as to whether or not the suppliant's claim could have been sustained on the ground of negligence. The agreement (Exhibit B) entered into by the suppliant, whereby he became a member of the insurance society and consented to be bound by its rules, was a part of a contract of service which it was competent for him to enter into. And this contract is an answer and a bar to this action, for the restrictive rules are such as an insurance society might reasonably make for the protection of their funds, and the contract as a whole was to a large extent for the benefit of the suppliant and binding upon him. *Clement v. London South-Western Ry. Co.*[1]

Such contract of service is perfectly valid and is not against public policy, *Griffiths v. Earl of Dudley,*[2] and in the absence of any legislation to the contrary,—as with respect to the Quebec Workmen's Compensation Act,[3] any arrangement made before or after the accident would seem perfectly valid. *Sachet, Legislation sur les Accidents du Travail,* Vol. 2, pp. 209 et seq.

The present case is in no way affected by the decision in the case *Saindon v. The King,*[4] and *Miller*

[1] L.R. 2, Q.B.D. 482.
[2] L.R. 9 Q.B.D. 357.
[3] 9 Edw. VII., c. 66, s. 19; Art. 7339, R.S. Q. 1909.
[4] 15 Can. Ex. 305.

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v. Grand Trunk.[1] because in those two cases the question at issue was with respect to a *permanent* employee where the moneys and compensation due him, under the rules and regulations of the insurance company, were not taken from the funds toward which the Government or the Crown were contributing. It is otherwise in the case of a *temporary* employee, and I regret to come to the conclusion, following the decision in *Conrod v. The King,*[2] that the suppliant's claim is absolutely barred by the condition of his engagement with the I. C. Ry.

Furthermore, the suppliant having accepted the weekly sick allowance and given the receipt therefor in the manner above mentioned, he "is estopped "from setting up any claim inconsistent with those "rules and regulations, and, therefore, precluded "from maintaining this action." Per Sir Charles Fitzpatrick.—*Conrod v. The King, supra.*[3]

Therefore the suppliant is not entitled to the relief sought by his petition of right.

Action dismissed.

Solicitor for suppliant: *Armand Lavergne.*

Solicitor for respondent: *P. J. Jolicoeur.*

[1] [1906] A.C. 187.
[2] 49 Can. S.C.R. 577.
[3] p. 581-582.

1917
Jan. 24.

IN THE MATTER OF THE PETITION OF THE HONOURABLE JOSEPH DOHERTY, HIS MAJESTY'S ATTORNEY-GENERAL OF CANADA,

AND

IN THE MATTER OF THE PURCHASE BY HIS MAJESTY OF THE QUEBEC & SAGUENAY RAILWAY; THE QUEBEC, MONTMORENCY & CHARLEVOIX RAILWAY, AND THE LOTBINIERE AND MEGANTIC RAILWAY.

Railways—Acquisition by Government—6 and 7 Geo. V., ch. 22—"Subsidies"—"Actual cost"—Interest and charges on bonds.

The Court was required to fix the value of certain railways to be acquired by the Crown under the provisions of 6 and 7 Geo. V., ch. 22. By sec. 2 of such statute it was provided that the consideration to be paid for each of the said railways should be the value as determined by the Exchequer Court of Canada, "said value to be the actual cost of the said railways, less subsidies and less depreciation, but not to exceed four million, three hundred and forty-nine thousand dollars, exclusive of outstanding bonded indebtedness, which is to be assumed by the Government, but not to exceed in all two million, five hundred thousand dollars."

Held, that the word "subsidies" in the above section did not relate only to those granted by the Dominion Government, but extended to any subsidies granted by the Provincial Government to the railways in question.

2. The Court, in finding the "actual cost", ought not to proceed as if the matter were an accounting between the directors of the railways and the shareholders. The duty of the Court was to ascertain the value of the railways as between vendor and purchaser, and that value must be taken to be the actual cost of the railways, less subsidies and less depreciation.

3. Interest on bonds issued by the company and moneys paid on the flotation of bonds during the period of construction of the railways could not be included in "actual cost" as the term was used in the statute.

ACTION to determine the value of railways acquired by the Crown.

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Tried before the Honourable Mr. Justice Cassels, at Ottawa, December 11, 14, 15, 20, 27, 28, 1916.

A. Bernier, K.C., *F. E. Meredith,* K.C., and *E. E. Fairweather,* for Crown.

P. F. Casgrain, and *Louis Coté,* for railways.

CASSELS, J. (January 24, 1917) delivered judgment.

Since the conclusion of the hearing of these cases I have carefully perused the evidence and exhibits produced before me, and have also considered the questions to be determined. I think as the questions to be determined depend to such an extent upon the construction to be placed upon the statute as to the method by which the amounts payable are to be ascertained, and as the differences are so large between the method of valuation claimed by the railway companies and the views I entertain, it may be better before any further evidence is taken, that an appeal, if such is proposed (assuming the right of appeal exists), should be taken to the Supreme Court, in order that I may be set right, if I have taken an erroneous view.

I may say that I have given the matter a great deal of thought, and I must express my thanks to the counsel for all parties for the great assistance they have afforded me.

The statute pursuant to which the matters came before the Exchequer Court of Canada is ch. 22, 6-7 Geo. V., assented to on May 18th, 1916. This statute provides that the Governor-in-Council may authorize and empower the Minister of Railways and Canals to acquire, upon such terms and conditions as the Governor-in-Council may approve, the rail-

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ways described in the schedule hereto, together with such equipment, appurtenances and properties used in connection with such railways, as the Governor-in-Council may deem necessary for the operation thereof.

There are three railways mentioned in the schedule:

(a) The line of railway commonly known as the Quebec, Montmorency & Charlevoix Railway, extending from St. Paul Street, in the City of Quebec, to St. Joachim, a distance of about forty-three and one-fifth miles;

(b) The Quebec & Saguenay Railway, extending from its junction with the Quebec, Montmorency & Charlevoix Railway at St. Jacobim, in the County of Montmorency, to Nairn Falls, in the County of Charlevoix, a distance of about sixty-two and eight-tenths miles; and

(c) The Lotbinière & Megantic Railway, extending from Lyster, in the County of Megantic, to St. Jean Deschaillons, in the County of Lotbinière, a distance of about thirty miles.

The second section provides as follows:

"2. The consideration to be paid for each of the "said railways and for any equipment, appurten- "ances and properties that may be acquired as "aforesaid shall be the value thereof as determined "by the Exchequer Court of Canada; said value to "be the *actual* cost of said railways, less subsidies "and less depreciation, but not to exceed four mil- "lion, three hundred and forty-nine thousand dol- "lars, exclusive of outstanding bonded indebtedness "which is to be assumed by the Government, but not

"to exceed in all two million, five hundred thousand "dollars."

It is agreed by counsel for the railways and for the Crown, that the maximum consideration of $4,394,000 and $2,500,000 is the maximum price to be paid for the three railways. Pursuant to the statute, an agreement was entered into between the Crown and the Saguenay Company, the Quebec Railway, Light and Power Company, the Lotbinière & Megantic Railway Company, and the Quebec Railway, Light, Heat and Power Company. The different railways are referred to throughout the agreement: 1, as "The Saguenay Company"; 2, "The Quebec Railway Company"; 3, "The Megantic Company"; and 4, "The Quebec Power Company."

The railway referred to as (a) in the schedule to the statute, and commonly known as the Quebec, Montmorency & Charlevoix Railway, is what is referred to as "The Quebec Railway Company," in the agreement in question. The name was changed by statute.

The agreement requires a separate valuation for each of these three lines of railway. By the agreement the Crown assumes bonds of $2,500,000 secured by a trust mortgage. These bonds and the trust mortgage securing the same in addition to being a charge on the Quebec Railway Company, are also a charge on other railways and properties not taken over by the Crown. By the terms of the agreement this bonded charge of $2,500,000, while it is assumed by the Crown, forms part of the purchase money payable by the Crown under the statute. If the value placed by the court on the Quebec Railway Company, known as the Quebec, Montmorency &

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Charlevoix Railway, exceeds the $2,500,000 only the excess over the $2,500,000 and the value so found is to be paid by the Crown, the $2,500,000 being treated practically as a payment on account. If, on the other hand, the value placed upon the Quebec, Montmorency & Charlevoix Railway is less than the $2,500,000, then the difference between the value as ascertained and the $2,500,000 is to be deducted from any sums that may be found due in respect of the other two railways.

The agreement refers to it in the following language:

"It is understood and agreed by and between "all the parties hereto jointly and severally that "in case the Exchequer Court of Canada fixes the "value of the line of railway and other property "set out in schedule 'C' hereto at a sum less than "$2,500,000, the difference between the sum so "fixed and the sum of $2,500,000 shall be deducted "from the aggregate amount of the purchase "price to be paid for the lines of railway and other "properties set out in schedules 'B' and 'D' "hereto.

"The intention of this agreement being that in "no event shall His Majesty be liable to pay for "the said three lines of railway and other proper- "ties a greater amount than the value thereof as "fixed by the Exchequer Court, less the sum of "$2,500,000, the amount of the bonds to be assum- "ed by His Majesty as aforesaid."

There are other provisions in the agreement in question which it is unnecessary for me to refer to at the present time. There are provisions protecting and guarding the Crown against any charges or incumbrances on the properties or any defect in

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regard to the titles to the right of way, etc.,—the intention of the agreement clearly being that His Majesty shall receive an absolute and clear title to all the properties in question.

On the opening of the case, I suggested that the duties of the Exchequer Court did not extend to an ascertainment of whether the various railways had good titles to the properties being transferred. These questions of title are questions provided for by the agreement, and it is a matter for the Crown attorneys and counsel to be satisfied upon. The view was assented to by the counsel for the railway companies, and for the Crown. The Court assumes that the railways are deeding the various properties with good title thereto, and the valuation is based on that supposition.

The method of procedure was one of considerable moment. I came to the conclusion that the only practical way of arriving at a result would be to adopt the method adopted in the arbitration in which I acted as counsel for the Canadian Pacific Railway Company, in regard to what was known as the Onderdonk sections of the railway in British Columbia. The same course of procedure used to be adopted in the administration of estates in Ontario. The counsel, both for the railways and for the Crown, acquiesced in my view as to the course of procedure to be adopted. I therefore directed the railway companies to file and furnish to the Crown, accounts showing in detail what they claimed to be the amount to which they were entitled under the agreement in question. I also directed that upon counsel for the Crown being furnished with these accounts they should investigate them, and such items as they were prepared

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to admit, should be admitted, and such items as they were not prepared to admit, would then become the subject of inquiry, and evidence could be adduced in respect thereof. I also directed that the Crown counsel should furnish to the counsel for the railways a statement of the amount which the Crown claimed should be set off for depreciation in respect of each of the three railways. Pursuant to these directions the railway companies by their counsel filed and served a complete and detailed account of their claim.

Competent experts were employed by the Crown to make a minute examination of the three lines of railway, and to furnish in detail what they considered the proper amount to be deducted for depreciation. A large amount of time was occupied by these gentlemen in making this inquiry. Subsequently the railway companies, by their counsel, accepted as correct the amounts as found by the experts of the Crown. The amounts of the depreciation to be offset against the value of the railways has therefore been settled. The figures I will deal with later.

Another question of considerable importance is in regard to the offset referred to in the statute as subsidies. Before me it was conceded by counsel for the Crown that the only subsidies in contemplation at the time of the statute were subsidies granted by the Dominion Government. This view is, in my judgment, untenable. I have to follow the statute. The statute says "less subsidies." There is nothing in the statute which would limit the meaning of the word "subsidies" to subsidies granted by the Dominion Government only. The word "subsidy" as

defined in Webster's International Dictionary, page 2070, is as follows:

"A grant of funds or property from a govern-"ment as of the state or municipal corporation to a "private person or company to assist in the estab-"lishment or support of an enterprise deemed ad-"vantageous to the public,—a subvention."

The manifest object of the statute is that any grants furnishd by the public towards the construction of the railways should be deducted. If in point of fact the statute and the agreement based upon the statute does not carry out what the parties intended, the only course in my judgment, open to the parties is to have the statute amended. I must take the statute as I find it, and, according to my view, subsidies include not merely Dominion but Provincial as well. This construction is of importance as the Quebec subsidies amount to something in the neighbourhood of $440,000, which, according to the view I entertain, must be deducted from the value as ascertained. *Inglis v. Buttery.*[1] In the *Dominion Iron & Steel Co. v. Dominion Coal Co.*,[2] Judge Longley rejected evidence tendered as to the communings preceding the agreement, and this view was upheld in the Appellate Court in Nova Scotia, and also in the Privy Council.[3] And in a late case, the *City of Toronto v. Consumers' Gas Co.*,[4] decided by the Privy Council, Lord Shaw, in delivering the judgment of the board, used the following language at p. 622:

"It is now expedient to see what are the powers "relied upon by the appellants as entitling them to

[1] L.R. 3 App. Cas. 552.
[2] 43 N.S.R. 77.
[3] [1909] A.C. 306.
[4] 30 D.L.R. 590, [1916] 2 A.C. 618.

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"charge upon the Gas Company the cost necessarily "incurred by them of lowering the pipes of that "company. One ground is thus stated by the learned "trial judge, whose opinion is that the corporation "'has the paramount duty of providing for the "health of the citizens, with reference to the con- "struction of sewers on their streets, and that the "defendants have only the right to use the streets "for their own benefit, subject to the paramount "authority.' Certain decisions of courts in the United States reports in support of this doctrine of paramount right are quoted.

"Their Lordships are of opinion that there is no "such doctrine of paramount right in the abstract, "and that, unless legislative authority, affirming it, "to the effect of displacing the rights acquired under "statute as above described by the respondents, ap- "pears from the language of the statute-book, such "displacement or withdrawal of rights is not sanc- "tioned by law. *In this, as in similar cases, the "rights of all parties stand to be measured by the "Acts of the Legislature dealing therewith; it is not "permissible to have any preferential interpreta- "tion or adjustment of rights flowing from statute; "all parties are upon an equal footing in regard to "such interpretation and adjustment; the question "simply is—what do the Acts provide?*"

I come now to the consideration of the accounts as filed by the railways. I will deal first with that relating to the Montmorency Division. The heading is as follows:

"Statement showing amounts expended yearly on "capital account, Montmorency Division, from the "date of the organization, viz., July, 1899, to the "30th June, 1916."

The first item is dated July 1st, 1898—"Road and "Equipment, Real Estate and Buildings, etc. Mont- "morency Division, $2,038,149.40."

This starting point is assumed by the railways to have been the cost of construction up to that date. At the date in question, namely, July 1st, 1898, according to Colonel Wurtele, the road had been constructed as far as St. Anne's. The mileage of this road was about 21 miles, and it may be that they were running a mile or two beyond. Even if it were granted, that 22 miles instead of 21 miles of the railway had been constructed at that date, the cost would be in the neighbourhood of $92,500 a mile. Colonel Wurtele puts it about $100,000. It seems a high figure. It is stated by counsel for the railway company that a certain portion of the right-of-way beyond St. Anne's had been procured. This may or may not be so. The proof before me is lacking on this point. Here there is a distinct difference between the views put forward by the counsel for the railway company and the counsel for the Crown. The counsel for the railway company contend that what the Court has to do, is to find the cost as if it were an accounting between the directors of the railway and its shareholders; and that this amount being shown by the books of the company as the amount expended at that date, should therefore be accepted as the cost. Numerous witnesses were called, gentlemen of good standing—accountants from Montreal—who gave evidence as to the custom in regard to the charging up of interest, etc., to capital account.

When I deal with the case of the Saguenay Railway, the absurdity of this contention put forward on the part of the railway company will be apparent.

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The directors of a company might have to pay fifty per cent. commission for obtaining a loan of a million dollars. It would undoubtedly be quite right as between themselves and their shareholders to charge this fifty per cent. in their accounts. So also they might delay construction for a period of say 20 years, in the meanwhile paying interest on this bonded indebtedness. As between the directors and their shareholders, as a matter of book-keeping, it may be quite reasonable to charge up every item of expenditure. But the case before me is of a different character. I am not dealing with the accounts as between the shareholders and their directors. What I have to ascertain is the value as between the vendor and the purchaser, and that value must be the *actual* cost of the railways, less subsidies and less depreciation.

The railway company contend that owing to the fact of the books kept by Mr. Beemer being destroyed, there is no other proof available. There is no suggestion that there was any intention of destroying these books with the view of preventing enquiry. Colonel Wurtele's evidence is to the effect that he was the executor of Mr. Beemer, that it turned out that Mr. Beemer's estate was insolvent. He advised the heirs and next of kin to relinquish all claim to the estate. The books were retained by him for several years, and as he considered them of no value and they were occupying space required, he destroyed them. This may render it more difficult to arrive at the value. I suggested at the trial that it did not seem to me so impossible as counsel seemed to think. Two or three times I pointed out to them that it would be easy to have competent valuators go over this line of railway from Quebec to Ste.

Anne, and to value in detail the present railway. Of course it would not be by any means conclusive. The present values would probably be considerably higher than when the road was originally constructed. Under the agreement with the Crown, made pursuant to the statute, a good title has to be made to the right-of-way, and I would imagine that the title deeds conveying this right-of-way would show the price paid.

By the trust deed which was executed on June 11th, 1898, entered into after the passing of the statute, ch. 59, 58-59 Vic., dealing with the application of the proceeds of the stock and the bonds, it is provided that out of the proceeds of the bonds, the trustees shall pay off and redeem the present interim bonds, the whole as set forth in Schedule "A" to the deed; and also to pay the floating debt detailed in Schedule "B."

Now it is admitted that these two items of $500,000 referred to in Schedule "A," and also the item of $794,869.58 floating liabilities, comprise part of this item of $2,038,149.40. Crown counsel in their statement were of opinion that these two items of $500,000 and $794,869.58 should be taken as the cost up to that date, namely, July 1st, 1898. I do not agree with that contention. I fail to see how it can be assumed without further proof that the proceeds of these interim bonds, namely, $500,000, went into the construction of the railway. They may or may not. That is a question of proof. The bonds were held by the various parties, shown on page 15, as Schedule "A." They were held as collateral security by the various parties. What the nature of the debts due to these various parties is I would have thought susceptible of proof—at all events, before

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such an item can be allowed, further inquiry will be necessary, and so with regard to the liabilities. Unquestionably a considerable portion of them never went into the railway. Colonel Wurtele states as follows:

"Q. A lot of these items on their face do not ap-"pear to be items that went into the construction "of the road, how is that?—A. They may have "gone into the operation of the road, we were "operating the railway."

It would be impossible to accept Colonel Wurtele's evidence as proving the fact that these two particular items went into the construction of the railway. Other evidence would be required before I would be willing to accept those two sums of $500,000 and $794,689.58 as having been expended in the construction of this 21 miles of railway.

I have to determine the value of the railways, the actual cost of them,—and construing the statute, as I think it must be construed, I would be unable, upon the evidence at present before me, to come to the conclusion that this item of two million odd dollars should be taken as being the actual cost of the railway to that date.

I do not think, as I have stated before, that I am concerned with the manner in which, as between the directors and their shareholders, the company kept their books. What I have to ascertain, as well as I can, is the meaning of the words "*actual* cost and value" is.

I pointed out during the progress of the trial the course which I thought might be followed. My remarks will be found at page 102, and the following pages, of the transcript of the evidence.

I may call the attention of counsel to the fact, that in the trust deed, Schedule "D," at page 19, there is the estimate of cost of constructing certain extensions. The total is 11 miles, and the total estimate is $149,947, which would be under $14,000 a mile,—and while of course the main railway, previously built, may not have been built at that low figure, the contrast between the two figures, namely, $92,500 a mile and the $14,000 a mile, is striking.

There seems to be little controversy as to the expenditure after July 1st, 1898. At present it is unnecessary for me to deal with the expenditure between that time and November, 1916. It can be taken up later on.

After careful examination the Crown is willing to concede the main part of this expenditure. There are one or two items objected to, not of very much moment, and I think the evidence adduced has satisfied Crown counsel that these items should be allowed. However, it will be a matter for later consideration.

LOTBINIERE & MEGANTIC RAILWAY.

Dealing with the Megantic Railway, the amount involved in this railway is comparatively speaking not very large, but I think that further proof of a similar nature to that suggested in regard to the Montmorency Railway should be forthcoming. The only evidence given is that of Mr. Robbins, the manager of the railway, and it is a mere surmise. He may or may not be correct when he states that it would probably cost about $11,000 a mile. I think, however, some evidence by outside witnesses qualified to speak should be forthcoming.

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Mr. Matthews, the manager of the railway, was called as a witness. He states that the construction of the Quebec & Saguenay Railway was started in April or May, 1911. Previous to that he believes exploration surveys had been made. He points out that the main construction on this road stopped some time about September, 1912, but certain small constructions were continued for quite a while. He also states that as a matter of fact, on what is known as the branch spur line, from Murray Bay Wharf to Nairn Falls, very considerable work was done in 1915. That branch is 7.6 miles in length, he thinks. He goes on further and explains that this spur line was constructed for the purpose of handling pulp from a pulp-mill situate at **Nairn's Falls.** Referring to the main construction, he states as follows:

"Q. You say that it was financial trouble that "stopped you?—A. Financial trouble which stopped "us."

"Q. How long has it been stopped—ever since?— "A. Yes.

"Q. Since 1912?—A. September or October, "1912."

No further work was done, with the exception of repairing cribwork on the spur line, but on the main part of the line, from St. Joachim to Murray Bay, nothing has been done since October, 1912, and the work had to be stopped on account of the lack of money.

It is well to bear this fact in mind when we come to consider the claim made by and on behalf of the Saguenay Railway. There appears to have been two flotations of bonds, and to float these bonds a

discount had to be allowed of $833,600. There were fees paid, according to the statement in connection with the listing of the bond issue amounting to $63,465.09. Counsel on behalf of the Crown objected to these items.

It would also appear that in making up their claim of $5,543,260.89, there is an item charged of interest on the bond issue of $1,012,950. This item is also objected to by counsel for the Crown. I think the objection taken by Crown counsel is well founded. I am of opinion that this item of $1,012,950 interest, payable right up to 1917, is not a charge that can be allowed under the terms of the statute. The work of construction, as I have pointed out, with the exception of that small spur line, so to speak, from Murray Bay to Nairn Falls, stopped in October, 1912, and has never been gone on with, so far as the company is concerned. While, as I have stated before, as between the directors and shareholders it may be right to put in all items of cost, I do not think that as between the vendor and the purchaser, having regard to the wording of the statute, they are proper sums to be allowed. The statute, as I have pointed out, is precise and, to my mind, unambiguous.

The consideration to be paid is the value of the railways, the said value to be the *actual* cost of the said railways, less subsidies and less depreciation.

I cannot bring my mind to the concluson that it was ever in contemplation that the actual cost should be what is represented on the books of the company as the outlay as between the directors and shareholders of the company. Some meaning must be given to the word "actual." The word "actual," according to Black's Law Dictionary, at page 28,

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means "Real; substantial; existing presently in act; "having a valid objective existence as opposed to "that which is merely theoretical or possible."

"Actual cost" excludes interest on money borrowed. *Re Old Colony Railroad Company.*[1]

"Actual cost" means real cost as distinguished amongst other things from "estimated cost". *Lanesborough v. County Commissioners,*[2] or from market price which may include matters which do not enter into the real cost. *Alfonso v. United States;*[3] *United States v. 26 Cases of Rubber Boots.*[4]

"The word 'cost' is of limited significance, much narrower than 'damages'." *Massachusetts Central R.R. v. Boston & Clinton R.R.*[5]

In *Re Lexington & West Cambridge R.R. v. Fitzburg R.R.*[6] the term "actual cost" of running trains was held not to include interest on cars and to mean money actually paid out.

Story, J., in construing a revenue Act in *United States v. Sixteen Packages of Goods*[7] says:

"It is apparent that the terms 'actual cost,' 'real "cost' and 'prime cost,' used in these sections are "phrases of equivalent import, and mean the true "and real price paid for the goods upon a genuine "*bona fide* 'purchase'."

In *Re Mayor and Aldermen of Newton,*[8] the Supreme Court of Massachusetts construed the term "total actual cost of the operations" used by certain railroad commissioners in a report made under

[1] 185 Mass. 160.
[2] 6 Met. 329.
[3] 2 Story, C.C. 421.
[4] 1 Cliff, 580.
[5] 121 Mass. 124.
[6] 9 Gray 226.
[7] 2 Mason, Rep. 48 at 53.
[8] (1897) 172 Mass. 5.

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statute in that behalf. The railroad corporation claimed to be allowed the cost of a new station, new rails outside the area in question and other matters, representing an investment return upon the moneys expended. The Court said: "In construing "the statute, regard is to be had to the nature of "the subject matter, the various interests, public "and private, which are to be affected."

The Court further said:

"If the railroad corporaton is entitled to an in- "vestment return upon the portion of its road out- "side the commissioners' lines that was used in "transporting the material, we do not see why it is "not entitled to a like return upon that portion "which was within the commissioners' lines, and "also upon the capital invested in locomotives, cars, "etc. But we think that by the words 'actual cost' "it was intended to exclude anything in the nature "of a profit, or return upon the investment. . . . . "The object of the provision was . . . to exclude "in the accounting between them any profit, and "everything except what fairly might be reckoned "as a part of the real cost of the alterations; and "it appears like a contradiction of terms to speak "of an advance upon the actual cost as constituting "a part of that cost. . . . Though in a sense "the return on capital which one would have re- "ceived for work done may be said to be a part of "the cost, we do not think that in ordinary usage "the term of 'real cost,' or 'actual cost,' includes "a return upon the capital invested. "After allow- "ing all the actual expenses of doing the work, that "seems to us more in the nature of profit than of "cost."

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In the case of *Richards v. Bussell,*[1] the Supreme Court of Washington Territory, in construing a statute which used the words, "the actual cost of "filling in, etc.", limited the term "actual cost" as follows: "The word 'cost' as used in this section "manifestly means cost to the contractor aside from "any profit to him."

Reference again may be had to the above case *Re Old Colony Railroad*[2]: "Unless 'actual cost' and "'expense' are to be taken as equivalent in mean- "ing to the expression, full compensation for any "and all expenses in whatever form they may be "sustained, which is a construction that in view of "the language used and the general purpose of the "Act for the abolition of grade crossings cannot be "adopted, it must be held that these words have the "limited definition given to them by the statute, and "cannot be extended to include the claim of the "petitioners."

In the case of *Lynch v. Union Trust,*[3] the Court said in construing a statute:

"When Congress employed the expressions 'act- "'ual value' and 'clear value' it very evidently in- "tended to convey the idea of definite or certain "value—something in no sense speculative."

The case of *National Telephone Co. v. Postmaster-General*[4] came before the Railway and Canals Commission in England,—Lawrence, J., Mr. Gathorne-Hardy and Sir James Woodhouse constituting the tribunal which heard the case. There Lawrence, J., Mr. Gathorne-Hardy concurring, decided that the value of the plant of the National Telephone Co.

[1] 127 Pac. 198.
[2] 185 Mass. 160 at 165.
[3] 164 Fed. R. 161 at 167.
[4] 29 T.L.R. 190.

taken over by the Postmaster-General was to be arrived at by taking the cost of construction, less depreciation, and that every expense which was necessary to construct the plant was an element to be considered, including in such expense (*inter alia*) reasonable cost of obtaining subscriptions, agreements which were in force at the date of the transfer, and also the cost of raising capital necessary to construct the plant. Sir James Woodhouse wrote a vigorous dissenting opinion in which he reached the same conclusion as the American courts in the cases I have collated above. He says at p. 196: "Those "expenses, forming the actual cost of construction, "having been ascertained, represented the value. "That value had then to be expressed and paid in "the current coin of the realm. How, or where, that "current coin was obtained, or what was paid for "obtaining it, had nothing in the world to do with "the value of the thing which was the subject mat-"ter of the payment. If it were otherwise, the cost "of construction, and equally, the value of the thing "constructed, would differ according to the finan-"cial standing of the person who constructed. . . . "It was, in fact, making the value of the thing con-"structed vary with and be dependent on the finan-"cial ability or credit of the constructor. . . . "Again, the cost of raising capital was not the cost "in the sense that the vendor was saving any-"thing to the buyer, because the buyer had to raise "his capital when he came to pay for what he ac-"quired. He would develop this a little. The com-"pany in this case said they incurred so much in "raising the money to pay for what they construct-"ed, and therefore the value must include that cost. "Let him assume that another company, instead of

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"the Postmaster-General, was the purchaser of the "undertaking, and that the purchase-price at cost "included, say £500,000, as the amount paid by the "vendor company for raising its capital to pay for "the structure. The value of the thing constructed "stood in the books of the purchasing company "therefore with this £500,000 as part of it, for which "there was, in fact, no actual asset corresponding "to the item. Now the purchasing company must "also raise its capital to pay the vendor company "this price, and the cost of raising this money must, "in turn, equally become to it an element in the "value of the thing bought. Thus in the case of the "second company, precisely the same asset would "stand in its books enhanced in value by the amount "it spent on raising its capital, and they had only "to imagine a series of similar sales to perceive "what an enormous value this same original asset "would ultimately attain.

"This point, again, could not be stated in better "or more convincing language than that used by the "learned Judge in answering Mr. Gill's contention, "at page 244, when he said: 'The buyer has to raise "'his capital also.' According to that, you see, if "the cost of raising the capital is an element of "value in a plant, the second time the plant changes "hands there have been two costs of raising capital, "and so it would go on every time it changes hands. "The plant would be increasing in value by reason "of the cost of raising the capital necessary to pur-"chase it. That, in his opinion was the sound view, "and the only logical conclusion from the premises "underlying the company's contention. He had "heard no argument and could find none which dis-"placed it. It was the view taken by the only ex-

"perienced men of business who gave evidence about "it, *viz.*, by Sir William Peat, the eminent account- "ant, and Sir George Gibb, who, they all knew as a "railway lawyer and manager, had had a very large "professional experience in valuations. He did not "see his way to regard this item as one which they "could rightly include in the value to be ascertained. "If, however, he was wrong in his opinion, he had "no objection to the amount of £247,189 which his "colleagues allowed for it."

An appeal was taken from the decision of the Railway and Canal Commission in this case to the Court of Appeal, but it was settled between the parties before the appeal was called for hearing, and so we have not the advantage of a judgment of that court upon the question raised by the tribunal below.

In *Kirby & Stewart v. The King*,[1] a case tried before me, I refused to allow the contractor interest which he had paid to the bank for moneys required for the purpose of the construction of the work. That case was appealed to the Supreme Court of Canada, and my ruling sustained. There is a difference between that case and the present in this respect; the claim there made was by the contractor, and he had been allowed the usual contractor's profits. The words of the reference, by the Order-in-Council in that case, were that he was to be allowed the "actual and reasonable cost".

To my mind, to allow these charges for obtaining money and the interest for a period of years might make the matter almost farcical. The railway might have laid dormant for a period of another 20 years, meanwhile the interest on the bonds would have to

[1] Unreported.

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be paid, amounting to 2 or 3 more million dollars, all of which, assuming the company paid the interest, would be charged up in their books to the shareholders,—and if the argument put forward is correct in that case the Crown when paying what is defined by the statute to be the *actual* cost of the railways, would be paying some 3 million dollars odd for interest for which no value is given in return.

The views of the various accountants seem to vary. Some of them apparently were rather shocked at the length to which their evidence would lead, and came to the conclusion that the interest could only be a proper charge during a reasonable period of construction.

It will be easy when the case is concluded to arrive at the amount which in my judgment ought to be allowed. There will have to be deducted the allowance for depreciation, which has been settled. There will also have to be deducted the amounts received from the Dominion and Provincial subsidies. These sums are not in dispute. There will also have to be deducted these items that I have just been referring to in connection with the Saguenay Railway, and any amounts that should be deducted from the Montmorency & Charlevoix Railway, and the Megantic Railway on a proper valuation being proved.

Judgment accordingly.

THE KING UPON THE INFORMATION OF THE ATTORNEY-GENERAL OF CANADA,

Plaintiff;

AND

THE VANCOUVER LUMBER COMPANY,

Defendant.

1914
May 30.

Public lands—Deadman's Island—Lease—Authority of Minister.

Deadman's Island, in the harbour of Vancouver, is the property of the Crown in the right of the Dominion of Canada. An Order in Council authorizing the Minister of Militia and Defence to lease that island for a term of years does not carry with it the authority to vary its terms by providing for a right of perpetual renewal. In the absence of an Order-in-Council authorizing such variation, the action of the Minister in doing so is null and of no effect.

ACTION to set aside a lease of Deadman's Island.

Tried before the Honourable Mr. Justice Cassels, at Ottawa, May 27, 1914.

The facts are stated in the reasons for judgment.

E. L. Newcombe, K.C., and *H. Cowan,* K.C., for plaintiff.

I. F. Hellmuth, K.C., and *R. S. Lennie,* for defendant.

CASSELS, J., (May 30, 1914) delivered judgment.

Deadman's Island, in the Harbour of Vancouver, is the property of the Crown, represented by the Dominion of Canada. At the time of the passage of the *Confederation Act,* it was owned by the Crown represented by the Imperial Government. Subsequent to Confederation it was transferred to the Dominion of Canada.

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The facts relating to the title to this island are fully set out in the reports of the case of *Attorney-General of British Columbia v. Ludgate & Attorney-General of the Dominion of Canada.* The reasons for judgment in that case are to be found reported in 8 B.C.R. p. 242 (at trial), 11 B.C.R. 258 (Court of Appeal, and [1906] A.C. 552 (Privy Council).

An Order-in-Council was passed by Her Majesty's Privy Council of the Dominion of Canada, and was subsequently approved of by His Excellency the Governor-General of Canada. The Order-in-Council is as follows:

"P.C. 276.

"Certified copy of a Report of the Committee of "the Privy Council approved by His Excellency "the Governor-General on the 16th February, "1899.

"On a memorandum, dated 10th February, "1899, from the Minister of Militia and De- "fence, recommending that authority be given "him to lease Deadman's Island, situated in "Coal Harbour, Burrard Inlet, British Col- "umbia, to the Vancouver Lumber Company, of "Vancouver City, British Columbia, for a term "of twenty-five years, at an annual rental of "five hundred dollars.

"The Committee submit the same for Your Ex- "cellency's approval.

"(Sgd.) Rodolphe Boudreau,

"Clerk of the Privy Council."

(Seal).

Pursuant to this Order-in-Council, on February 14th, 1899, a lease of this island, a copy of which is set out in the information and admitted by the defendant, was executed by the then Minister of Mi-

litia and Defence, Sir Frederick Borden, purporting to lease to the defendant company the island in question for a term of 25 years. It is open to question whether this lease is effective and whether it does not contain provisions in excess of the powers conferred by the Order-in-Council.

The plaintiff in the action before me does not raise any question attacking the validity of this lease. On April 14th, 1900, the then Minister of Militia and Defence, Sir Frederick Borden, purported to vary the terms of the lease of February 14th, 1899, in very important particulars. Among other changes one amendment would provide for a right of perpetual renewal to the lessee instead of a lease for 25 years, as authorized.

This information is filed to have it declared that the variation of the terms of the lease was unauthorized and that the document in question signed by Sir Frederick Borden is null and of no effect.

I am of the opinion that the contention of the Crown is well founded. It has been proved before me that no Order-in-Council was passed authorizing such a variation as that made by the subsequent document dated April 14th, 1900. I expressed my view at the trial that the evidence of Mr. Macdonell taken on commission was almost wholly inadmissible and irrelevant, and that part of it reciting the statements of Sir Frederick Borden that an Order-in-Council had been passed authorizing the execution of this document was wholly inadmissible to prove such fact. Sir Frederick Borden was not called as a witness.

The plea of *res judicata* which I allowed the defendant to set up by amended defence in order not to deprive it of any defence if a higher Court were

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to take a different view from that entertained by me, in my opinion hardly merits any consideration. It lacks every essential element of a valid defence of *res judicata.*

I think the plaintiff is entitled to judgment declaring that the document of April 14th, 1900, varying the terms of the lease of February 14th, 1899, is void and of no effect, and if the plaintiff so desires it should be delivered up and cancelled.

The defendant must pay the costs of the plaintiff in this action.

*Judgment for plaintiff.**

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

Solicitors for defendant: *Pringle, Thompson, Burgess & Coté.*

* Affirmed on appeal to Supreme Court of Canada, December 4th, 1914.

IN THE MATTER OF THE PETITION OF RIGHT OF

PIERRE EDOUARD EMILE BELANGER,

SUPPLIANT,

AND

HIS MAJESTY THE KING,

RESPONDENT.

1917
June 28.

Public lands—Beach—Harbour of Quebec—Validity of grant—Expropriation—Compensation—Value.

The right to alienate part of the public domain by the King of France has always been recognized even subsequent to the Edict of Moulins. A title to certain beach lots, in Quebec, founded on a grant from Louis XIV., is perfectly good and valid, and cannot be attacked by the Crown. Furthermore, such lands do not form part of the Harbour of Quebec.

2. In estimating compensation for the expropriation of land by the Crown, the value of the property for expropriation purposes cannot be taken as a basis; the value of the property to the owner, not to the party expropriating it, is to be considered.

PETITION OF RIGHT to recover compensation for the expropriation of land by the Crown.

Tried before the Honourable Mr. Justice Audette, at Quebec, September 13, 16, 1916; March 26, 27, 28, 1917.

G. G. Stuart, K.C., *A. Marchand,* K.C., and *Alleyn Taschereau,* K.C., for suppliant.

A. Bernier, K.C., and *V. de Billy,* for respondent.

AUDETTE, J. (June 28, 1917) delivered judgment.

The suppliant, by his petition of right, seeks to recover the sum of $800,085.65, as compensation for

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the value of certain lands expropriated from him by the Crown, on January 13th, 1913, for the purposes of a public work of Canada, namely, for the construction, maintenance and repair of the Harbour of Quebec, and the improvement of navigation in the River St. Charles, at Quebec.

The lands taken are composed of two different lots, to wit: Of part of lot 513, containing an area of 295,652 square feet, and the whole of lot 560, containing an area of 1,863,599 square feet, making a total of 2,159,251 square feet, for which the suppliant claims $800,085.65,—namely, 50c. a square foot for lot 513 and 35c. a square foot for lot 560.

The Crown denies the suppliant's title and makes no offer in money by its statement in defence; but declares that, if the suppliant proves title, a reasonable sum, ascertained under the provisions of the *Expropriation Act,* should be paid him for the value of such land and damages. The respondent further contends, *inter alia,* that the original title from the Crown never transferred the property in question to the predecessor in title of the suppliant and that the lands in question form still part of the public domain. Furthermore, the Crown avers by the statement of defence that these beach lots form part of the Quebec Harbour, and that as such they are vested in His Majesty in the right of the Dominion of Canada.

Upon reading in the statement of defence, an allegation contending that the lands in question formed part of the Crown lands of the Province of Quebec, I made an order directing that a copy of the pleadings herein be served upon the Attorney-General of the Province of Quebec, to allow him to intervene in the present case, if he saw fit. The pleadings

were served, and the Attorney-General of the Province of Quebec did not intervene or ask to be added a party to the present proceedings.

The original titles of concession of the lands in question go back to one of the first French regimes of our Colony.

The first title consists in letters-patent issued on March 10th, 1626, by Henri de Levy, Duc de Vantadour, Lieutenant-General de Sa Majeste le Roi de France au Gouvernement de Languedoc, Vice-Roy de la Nouvelle France, whereby the following piece of land, called Seigneurie de Notre Dame des Anges, was granted to the Jesuits, viz: "La quantite de "quatre lieues de terre tirant vers les montagnes "de l'ouest ou environ, scitues partye sur la riviere "St-Charles, partye sur le grand fleuve St-Laurent, "d'une part bornees de la riviere nomme Ste-Marie, "qui se decharge dans le susdid grand fleuve de St-"Laurent, et de l'autre part, en montant la riviere "St-Charles, du second ruisseau qui est au-dessus "de la petite riviere dite communement Lairet, les-"quels ruisseaux et la dite petite riviere Lairet, se "perdent dans la dite riviere St-Charles: item nous "leur avons donne et donnons comme une pointe de "terre avec tous les bois et *prairies* et *toutes autres* "*choses* contenues dans la dite pointe scittuee, vis-"a-vis de la dite riviere Lairet, de l'autre cote de la "riviere St-Charles, montant vers les Peres Recol-"lets d'un coste et de l'autre coute descendant dans "le grand fleuve."

Subsequently thereto, by an Edict of the King of France, all concessions made were revoked, with the object of transferring all such titles in La Compagnie de la Nouvelle-France. On January 15th, 1637, however, la Compagnie de la Nouvelle-France

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granted to the Jesuits the lands above described, confirming thereby the first grant of the Duc of Vantadour, including *"les bois, prés, lacs, etc."*

In compliance with an *Ordonnance* of January 12th, 1652, with respect to "la confection d'un pa-"pier terrier contenant le denombrement des terres "mouvantes, tant en fief qu'en roture," Monsieur de Lauzon, conseiller ordinaire du Roy en ses conseils d'Etat et prive, Gouverneur et Lieutenant-General pour sa Majeste en la Nouvelle-France, etendue du fleuve St.-Laurent, did on January 17th, 1652, again grant and confirm the previous grants of the lands in question, "mesme les prez la mer couvre et decouvre a chaque maree."

Then under a Royal Édit et Ordonnance, being an Arret du Conseil d'etat du Roi, bearing date at St. Germain en-Laye, May 12th, 1678, the King of France, Louis XIV., granted total *amortissement* of the lands referred to in the above grants, with the object of removing any doubt as to the title granted the Jesuits by the Duc de Vantadour, la Compagnie de la Nouvelle-France and le Sieur de Lauzon. This deed of *amortissement,* which was registered at Quebec, on the last day of October, 1679, also mentions in the descriptions of the lands, "les pres que la mer couvre et de couvre a chaque maree."

Now, it is contended by the respondent that all of these grants did not divest the Crown of its ownership in these foreshores and beds of navigable rivers which form part of the public domain, and which cannot be alienated. And counsel at bar for the respondent rests his contention upon l'Ordonnance de Moulin, of February, 1566, by Charles IX., which is to be found in the Recueil d'edits at Ordonnances Royaux, by Neron et Girard, at p. 1999,

whereby it is forbidden to alienate the public domain, except under the circumstances therein mentioned, and the present case does not come within such exception.

There can be doubt that this doctrine has been the basis and foundation of the old public law in France. It was supported by the authors, and maintained by the courts down to the time of the Revolution, when the law governing the public domain was subjected to material modification. However, the old doctrine was followed by the Code Napoleon, Art. 538, which afterward found its way in our Art. 400, C.C. P.Q. This law, however, was necessarily subject to flexible modifications under the unlimited powers of the King.

Then it must be said that a number of Édits et Ordonnances passed subsequent to the Ordonnance de Moulins, were cited by Mr. Smith, of counsel for the suppliant, whereby parts of the public domain were allowed to be sold and alienated, and in some of these the grant goes so far as to say that it thereby derogates to that effect, as much as need be, from all the laws, *ordonnances et coutumes* to the contrary.

And this right to alienate part of the public domain by the King of France has always been recognized by the courts of France, even subsequent to the Édit de Moulins.[1]

Authorities have also been cited by the suppliant to the effect that this right has been recognized in France since the Revolution.[2]

[1] Merlin. Questions de droit. Vol. 7 Vo. Rivage de la mer. Edits et Ordonnances, Vol. 3, p. 122. Pieces et documents relatifs a la Tenure Seigneuriale, Vol. II., pp. 126, 128, 567.

[2] Sirey (Perodique) 1841, I, p. 260. Dalloz, Vo. Domaine Public, 29, 30. Dalloz, Vo. Organization Maritime, 751.

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And after the cession many laws were passed in Canada recognizing the validity of the grants made before 1760.[1]

After the Revolution, the authors assert, that all these concessions became null under the provision of a law of l'Assemblee Nationale Constituante of 1789, which abolished all these grants. These grants were then abolishd by a new law because they were considered good legal grants, until such new law would decide to the contrary. But all French legislation of 1789, in fact all legislation since 1760, when Canada passed under the British flag, have no effect in Canada, not any more than the Code Napoleon has.

It is, indeed, a somewhat strange proposition for the Crown to take in denying the power of the King of France at the time the grant was made. No one, says Mr. Migneault,[2] would dream of contesting the original title of concessions and it is the ancientness of these titles which dispensed them from registration.

However, to properly appreciate the grants in question, and more especially the last one, which covers them all, and is under the signature and seal of the great King Louis XIV., one must go back to that heroic period. It was the period of great and lofty politics, and when justice resided in the acts of the Prince, and where there was no other justice than the Prince's justice. The King at that time was all power. He could one day legislate by such Edit and Ordonnance as he saw fit, and the following day he could, at his pleasure, derogate therefrom by another Edit and Ordonnance. He was the

[1] 47 Geo. III, ch. 12; 4 Geo. IV, ch. 17.
[2] Droit Civil Canadien, Vol. 9, p. 195.

source and foundation of power; and, indeed, well he knew he was possessed of this absolute power, when the famous words, said to have fallen from his lips, were pronounced by him, *"L'Etat, c'est moi."* He did then mark, as if with the engraver's tool, upon the table of the laws of France, the very character of his power. The monarchy existing in France in the 17th century was a royal monarchy and not a seignorial monarchy and the monarchs wielded sovereign power, independent of les etats de la nation.[1]

Even if the will of the King of France, either by special grant or by general edicts, did clash with the edicts of his predecessors on the throne, there was no way to reproach him from a legal standpoint, whilst he might perhaps be criticized from a political view. The King was the sovereign master of the kingdom in an absolute and unlimited monarchy. Parliament during his reign even became nothing but a court of justice losing its right of *remonstrance.*

The Seignorial Court Created under 18 Vic., ch. 3, whose great weight and authority, to which an almost authoritative sanction has been given by statute, commanding also the highest respect by reason of the composition of the tribunal, have passed upon the very point in question, recognizing the validity of the seignorial titles from the King of France. Answering the 27th question submitted to them, that court answered it as follows, to wit:

"3. Quant aux droits des Seigneurs sur les greves "des fleuves et rivieres navigables; dans ceux de "ces fleuves et rivieres qui etaient sujets au flux et "reflux de la mer, ces droits, sur l'espace couvert et "decouvert par les marees, resultaient d'un octroi "expres dans leurs titres; et, sans un tel octroi,

[1] Furgole 10.

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"s'etendaient jusqu'a la ligne de haute maree seule-
"ment.

"4. Les seigneurs avaient le droit de percevoir
"des profits des lods et ventes sur les mutations des
"greves situees entre haute et basse maree sur le
"fleuve St-Laurent, ou dans les autres rivieres
"navigables, lors qu'ayant droit a ces greves par
"leurs titres, ainsi qu'il a ete dit, ils les avaient
"concedees, et ce, dans les memes cas, ou ces profits
"seraient accrus sur d'autres ventes. (See Seig-
"norial Court Decisions, p. 69a)."

Then the Act of Commutation granted to the suppliant or his predecessors in title, together with the receipts for the rents and seignorial dues, or of their commuted capital, have recognized his right of ownership and made his title incommutable. See 3 Geo. IV., ch. 110 (Imp.), secs. 31 & 32 Vic., ch. 42; and Revised Statutes P. Q. 1909, 7277, 7278, 7282.

These lands which had been granted to the Jesuits and which still belonged to the Jesuits in 1800 were then confiscated by the British Crown.

Then in 1838 the administration of the Jesuits Estates was confided to Commissioner Stewart, but this commissioner had nothing to do with the lands which had already left the hands of the Jesuits.

Moreover, the Jesuits' Estates, under Art. 1587, of the Revised Statutes, P.Q., 1909, have been declared to be in the control of the Department of Lands and Forests. Therefore, the original title has been recognized, and all grants, deeds and titles given by the department, or those acting under it, must be considered good and valid.

See also Journals of the Legislative Assembly, 1824-25, Appendix "Y".

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Commissioner Stewart has granted and sold some of the land from the Jesuits' Estate to the Hotel-Dieu, who in turn sold to the suppliant or his predecessor in title.

I hereby find, following the decision of the Seignorial Court, and for the reasons above mentioned, that the original grant from Louis XIV., as well as the other three primordial grants, constitute a good title with full force and effect. And I further find that all titles, deeds or grants made by Commissioner Stewart, who was invested with full power, are also good and effective titles, and more especially after the Crown has taken the rents and revenues derived from such grants, waiving thereby the formality of the deed. *Peterson v. The Queen.*[1]

Then with the object of removing all doubts, the Statute of 6 Geo. V., ch. 17, passed in 1916, with retroactive effect, has positively declared that the Crown has the right and power to alienate the beds and banks of navigable rivers and lakes, the bed of the sea, the sea-shore and land reclaimed from the sea, comprised within the said territory and forming part of the public domain. See also *Commrs. Havre Quebec v. Turgeon and Attorney-General, P.Q.*, decided June 24th, 1910—Unreported. This Act removes all doubt, if any could exist, and makes it clear that all previous grants, whatever may have been the system of government, are good and have full force and effect.

Only a few words need be said with respect to the contention that these lands formed part of the Harbour of Quebec, and thus became vested in His Majesty, as representing the Dominion of Canada. By sec. 2 of 22 Vict., ch. 32, an Act to provide for the

[1] 2 Can. Ex. 67.

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improvement and management of the Harbour of Quebec, the lands forming part of the Jesuits' Estates are excluded from the harbour. By the same Act, the right of all the riparian proprietors are further duly saved and recognized. See also 62-63 Vict. ch. 34, sec. 6, sub-sec. A to sub-sec. 2 thereof, whereby acquired rights are saved and acknowledged. Therefore the lands in question do not form part of the Harbour of Quebec.

Having disposed of the two great objections raised against the suppliant's title, it becomes unnecessary to enter here into the long catena of title-deeds under which the suppliant claims. It will be sufficient to find the suppliant has proven his title, and is entitled to recover the value of the land expropriated from him.

COMPENSATION.

Coming now to the question of compensation, a summary review of the evidence on the question of value becomes of interest.

On behalf of the suppliant the following witnesses were heard upon the question of value: C. E. Taschereau, Edmond Giroux, Joseph Collier, Malcolm J. Mooney and Eugene Lamontagne.

C. E. Taschereau. This witness prefaces his valuation by citing a number of sales, at Limoilou, at figures ranging from 64 cents to $2.27, but of small building lots varying in size from 40 and 30 feet by 60 feet. He also cites a number of other sales, mostly on *terra firma,* but with the exception of lot 514, these sales are more or less apposite. He relies, however, on the sale of lot 514, at 23 cents, to the Government in June, 1914. He further cites sales

on the Quebec side of the River St. Charles, and after stating that the lands in question may be used for wharves, warehouses, etc., he values, on January 13th, 1913, lot 513 at 35 cents and lot 560 at 30 cents a square foot, making a total sum of $662,557.90. Lot 560 is a vacant lot, without wharf, upon which there was no commercial activity. Filling would be necessary on lot 513 before it could be used for building purposes. He considers that the public work now being constructed has enhanced the value of this property ever since the works have been decided.

Edmond Giroux, between 1911 and 1912, held for 6 months an option on lot 514, at 22½ cents, for the Canadian Northern. However, the option was not exercised, and he says he would have recommended to renew it at 24 cents and at even 30 cents.

He values lots 513 and 560 in January, 1913, at 25 to 30 cents a square foot. He contends that of lot 513 about one-third or one-half is land and the balance foreshore; and that of lot 560, one-third is land and two-thirds are covered by ordinary tides—but that in the usual monthly high tides the whole of lot 560 is covered by water.

He places a value on the shore of Honore Lortie at one to one and a half cents, the price paid by Dussault & Turgeon.

Joseph Collier states that with the development of the St. Charles River these lots 513 and 560 will acquire a great value. He considers the front part, the water front, of more value than the rear part of the lot, and values lot 513, for 300 feet in depth from the water front, at 60 cents and the back at 25 cents. Lot 560—the front part for 300 feet at 45 cents and the back or balance at 20 cents. That

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would represent $597,600.00 for the two lots. He took into consideration that the river would be dug, and that the depth of the river would be increased.

Malcolm J. Mooney contends that the land in question would be useful for the development of wharves, shipping, pulp and iron industry, and values lot 513 at 40 cents a foot, and lot 560 at 30 cents.

Eugene Lamontagne states that this property could be used for industrial purposes, lumber business, mill and railway yard, and values lots 513 and 560 at 30 and 35 cents a square foot.

The suppliant has also produced a number of deeds of sales of building lots by the Quebec Land Company, and witness Lefebvre was also heard in respect of the several options obtained in connection with lot No. 514, which was finally bought by the Government at 23 cents. It is true the Government did purchase this lot 514, in June, 1914, at 23 cents a foot; but under such circumstances that that will take that transaction out of the ordinary course of business, and prevent one using it as a criterion. Indeed, as will appear partly by the evidence of witness Lefebvre and by the case now pending on appeal to the Supreme Court of Canada from this court, it having become known that 514 was required by the Crown, speculators got hold of it,—option after option, linking into one another, and even under fictitious names, were executed, with the object of inflating the price of this lot 514. The Crown, through its officers under the circumstances, did not wish to allow the property to pass into other hands, went over to the owners, bought the property in face of this skein of options, and undertook to indemnify the owners in case they would be troubled

by the parties to whom they had consented these options—as it will appear from the deed filed of record as Exhibit No. 78. Visionary wealth at the expense of the Crown was in that transaction seen, but not realized; but the Crown's hand was then forced and the property had to be bought at these high figures.

The suppliant, as will appear by his testimony and Exhibit "N," has paid the sum of $18,165.32 for these two lots 513 and 560,—with still the sum of $4,200 unpaid, as representing the capital of the rent due the Community of the Hotel-Dieu. He has received in revenues from these two lots since the 18th January, 1901, the sum of $1,224.25, of which $924.50 was from lot 560, but with $200 still outstanding, and $299.75 from lot 513. The revenues from lot 560 were pasturage and from lot 513 from the rent of a small building, with no new erection or improvement, and the taxes amounted to more than the revenues.

On behalf of the Crown, the following witnesses were heard on the question of value: J. Arthur LaRue, Joseph G. Couture, H. Octave Roy, and Joseph A. Dumontier.

J. Arthur LaRue says that to his knowledge lot 560 was never made any use of for 20 to 25 years; that it is not advantageous and has not much value. He says lot 513 is of more value because it is smaller and of easier access. At the time of the expropriation, these properties had not much value, but for the purpose of public utility he values lot 513 at 16 cents a square foot, and lot 560 at 10 cents a square foot. Of lot 560 about one-fifth is land, which he values at 30 cents a square foot, and the balance, which is beach property, he values at 5 cents a foot. Of lot 513, one-third is solid ground, which he values

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at 35 cents, and the balance he values at 6 cents. He cites the Nesbitt sale on the 14th October, 1912, bei· parts of lots 515, 546, and 594, with stone and brick buildings erected thereon, at 20 cents a foot, including buildings. In September, 1912, Lortie sold to Park St. Charles lot 586, fronting on Beauport road, at 8½ cents. He mentioned a number of other sales, but the most apposite is the Nesbitt property.

Lot 560 is entirely submerged in high tides.

Joseph G. Couture values lot 513 at 9 to 10 cents and lot 560 at 10 cents. For a very long time these lands were idle and unoccupied. He says lot 513 is not worth anything for building purposes. Property divided into building lots has gone up, but not industrial properties.

J. H. Octave Roy values 513 at 15 cents and 560 at 10 cents. He sold the Nesbitt property, composed of between 150,000 to 160,000 feet, with stone building of two or three storeys, large building—comprising a large brick chimney for factory—and one other brick building, near the Beauport road, for $30,000.

Joseph A. Dumontier values 513 at 15 to 18 cents and 560 at 10 to 15 cents,—citing the sale of Dussault & Turgeon, of 29th February, 1909, for lots 583 and 582, comprising a beach lot of 67 arpents—Exhibit "L."

From the evidence of witness Decary, the Superintendent Engineer of the Public Works Department for Quebec, it appears there are tides at Quebec of 25 to 26 feet, and that a tide 18 feet will entirely submerge the two lots in question. The locks or dams are being built on 560.

The lands in question were acquired by the suppliant for the sum of $18,165.32, and were practi-

cally yielding no revenue, save the renting of one house on lot 513, and pasture on lot 560. These lots lie in the estuary of the River St. Charles, and are nothing but a stretch of muddy soil upon which, in the case of 560, some marine grass grows, upon which cattle may feed; but the land is entirely covered by water at high tide, and the lot has been practically idle and no use has been made of it for years and years. Wharves may be built upon the same, as wharves may be built in fields, but it has no access to deep water, except to the height of the water brought in by the tide. Lot No. 513 is impracticable for building purposes. It is a beach lot. Retaining walls and fillings would have to be resorted to. Some of the witnesses contend that lot 560 might be used as a railway yard. Is it, indeed, conceivable that a railway could afford to spend thousands and thousands of dollars in building wharves for a railway yard, when other property is available inland? Some of the witnesses were candid enough to say they thought the property had very little value, but it might have value for public purposes and assessed it on that basis. In other words, that the property was of very little value to the owner, but might be of some good value to a party expropriating for public purposes or for a scheme like the present works. However, it is now settled law that in assessing compensation for property taken under compulsory powers, it is not proper to consider as part of the market value to the owner such value as the land taken may have to the party expropriating when viewed as an integral part of the proposed work or undertaking. But the proper basis for compensation is the amount for which such land could have been sold, had the pres-

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ent scheme carried on by the Crown not been in evidence, but with the possibility that the Crown or some company or person might obtain those powers and carry on their scheme. And, in the present instance who, outside of the Crown, should undertake such colossal works? *Cedars Rapids Co. v. Lacoste;*[1] *Sydney v. North-Eastern Ry. Co.*[2]

The scheme must be eliminated, notwithstanding works had been started, subject, however, to what has just been said. *Fraser v. City of Fraserville.*[3]

When Parliament gives compulsory powers and provides that compensation shall be made to the person from whom property is taken, for the loss he sustains, it is intended that he shall be compensated to the extent of his loss; and his loss shall be tested by what was the value of the property to him, not by what will be its value to the person acquiring it. *Stebbing v. Metropolitan Board of Works.*[4]

The question is not what the party who takes the land will gain by taking it, but what the person from whom it is taken will lose by having it taken from him. *Sydney v. North-Eastern Ry.*[5]

The policy of the *Expropriation Act* is to enable the court to compensate the owner; but not to penalize or oppress the expropriating party. The Court must guard against fostering speculation in expropriation matters, and must not encourage the making of extravagant claims, and more especially must guard against being carried away by the subtle arguments of real estate speculators or expert witnesses and thus render the execution of public works

[1] 16 D.L.R. 168, [1914] A.C. 569.
[2] [1914] 3 K.B. 629, 641.
[3] 34 D.L.R. 211, [1917] A.C. 187.
[4] L.R. 6 Q.B. 42.
[5] [1914] 3 K.B. 629.

impossible or prohibitive. While the owner must be amply compensated in that he is no poorer after the expropriation, it is no reason to charge the public exchequer with exorbitant compensation built upon imaginary or speculative basis.

These remarks, I must confess, are provoked by the extravagant amount of the claim of the suppliant, namely, the sum of $800,085.65, for a property which has cost him, a few years before, the sum of $18,165.37, as above set forth,—and more especially when the property has been idle for years and years, and the public work in question herein is but the only thing which will give it any value. But since the suppliant's property is required for the erection and building of this public work, he cannot derive any additional value to his property on its account, because if the property is not taken, the public work will not be built.

I need not here repeat the observations made in the case of *Raymond v. The King*,[1] and in the case of *The King v. Hearn*,[2] in respect of the law which should govern in assessing compensation, but they equally apply in this case.

The transaction that presents the most similarity to the present property is that of lot 583, which changed hands at a very low figure only a few years ago, as shown by the evidence. And when assessing the compensation of such a large area of land, as in the present case, it must be borne in mind that a lesser price should be paid than where a small piece of land is expropriated. What similarity, indeed, could there be between the sale of this present property compared to the sale of building lots of 60 by

[1] 16 Can. Ex. 1, 29 D.L.R. 574.
[2] 16 Can. Ex. 146 ,(Reversed in 55 Can. S.C.R. 562).

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30 feet, upon which some of the witnesses have based their valuation?

Under all the circumstances of the case I will bracket the two lots together and will allow an average price of ten (10c.) cents a square foot for the same, making the total sum of $215,925.40; and in fixing such compensation, although remaining within the evidence adduced, I feel I am perhaps allowing too high an amount for a property composed of waste flats and beach entirely covered with water at high tides, which a few years ago cost in round figures $18,000 and which had been for years practically unproductive and has been a charge upon the owner, the taxes being larger than the revenues, and but for the public work in question would have very likely remained idle for years to come. While the owner cannot share in the benefits derived from the development of this public work, such development has given rise to a market bringing forth a purchaser. And this compensation also appears to me too large when I consider the low figures at which the 67 arpents of beach and flats on lot 583 were sold only a few years before the expropriation.

In the days when the lumber trade was flourishing at Quebec, the property would have been of some advantage, but since the disappearance of this industry there was no market for it. And had not the question of this public work been mooted, no such price could be paid, because there would have been no market at all for this class of property.

To this sum of $215,925.10 will be added the usual 10 per cent. for compulsory taking, the land having obviously been taken against the will of the owner, making in all the sum of $237,517.61.

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Therefore, there will be judgment, as follows, to wit:

1st. The lands expropriated herein are declared vested in the Crown as of January 13th, 1913.

2nd. The compensation for the land so taken and for all damages whatsoever, if any, resulting from the expropriation, is hereby fixed at the sum of $237,517.61, with interest thereon from January 13th, 1913, to the date hereof.

3rd. The suppliant is entitled to recover the said sum of $237,517.61, with interest as above mentioned, upon giving to the Crown a good and satisfactory title free from all hypothecs, mortgages, ground rents and all incumbrances whatsover. Failing the suppliant to discharge the ground rents, the capital of the same may be discharged by the Crown out of the compensation moneys and the balance thereof paid over to the suppliant.

4th. The suppliant is also entitled to the costs of the action.

Judgment accordingly.

Solicitors for suppliant: *Pentland, Stuart, Gravel & Thomson.*

Solicitors for respondent: *Bernier, Bernier & de Billy.*

1915
March 15.

IN THE MATTER OF THE PETITION OF RIGHT OF

UBALD COURTEAU,

SUPPLIANT,

AND

HIS MAJESTY THE KING,

RESPONDENT.

Negligence—Prescription—Public work—Vessel—Shore.

The prescription for filing a petition of right is interrupted by the deposit of the petition with the Secretary of State.

An injury to an employee of the Crown while taking a Crown vessel on launch-ways owned and operated by a company on lands leased from the Crown, is not an injury happening "on a public work" within the meaning of sec. 20 of the *Exchequer Court Act*, and is therefore not actionable against the Crown; the mere fact of a chain breaking is not *prima facie* negligence of the Crown.

PETITION OF RIGHT to recover damages for personal injuries.

Tried before the Honourable Mr. Justice Audette, at Three Rivers, Quebec, January 29, 1915.

Bruno Marchand, for suppliant.

Alfred Désy, for respondent.

AUDETTE, J. (March 15, 1915) delivered judgment.

The suppliant brought his petition of right to recover a yearly rent of $312, or in the alternative, the lump sum of $3,000, for alleged damages arising out of bodily injury suffered by him while in the employ of the Dominion Government, on the shores of the St. Maurice River, in the Province of Quebec.

The accident happened on November 27th, 1912, and the petition of right was filed in this court on February 12th, 1914,—that is, more than one year after the accident, a delay within which the right of action would be prescribed and extinguished under the laws of the Province of Quebec. However, it appears from the documentary evidence that the petition of right was, under the provision of sec. 4 of the *Petition of Right Act*,[1] left with the Secretary of State on the 10th November, 1913 (See Exhibit No. 1). Following the numerous decisions upon this question in this Court, it is found that such deposit with the Secretary of State interrupted prescription within the meaning of Art. 2224 C.C. P.Q.

During the month of November, 1912, the Government District Engineer at Three Rivers instructed P. Hamel, the Captain of the Government Steamboat "The Montmorency," to take his vessel ashore, in winter quarters, upon the launch-ways of the St. Maurice Lumber Company. These launch-ways belong to the St. Maurice Lumber Company and have been erected by them upon lands leased from the Government. Permission was obtained from the company to haul the vessel upon the launch-ways upon the condition that it should be done at the cost of the Government and upon its (the latter) making all the necessary repairs for that purpose.

A cross-beam was placed at the head of the launch-ways and a pulley was fastened to this beam by means of a three-quarter inch chain. This chain snapped in the course of the work of hauling the vessel, and striking the suppliant on the arm, caused a fracture of the same. It would appear, under the evidence, that the size of the chain was sufficient and

[1] R.S.C. 1906, ch. 142.

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was of the usual strength for that class of work, and the resident engineer stated that all chains bought by the Government were tested chains. There is no satisfactory evidence of defect or weakness in the chain or to establish what caused it to break; nor is there anything to indicate that the officers or servants of the Crown had been negligent either in not providing a better or different chain or that they had any knowledge of any condition from which they could have known that it was otherwise than safe and fit for the purposes for which it was used. Indeed, the mere fact of a chain breaking is not *primâ facie* evidence of negligence. *Hanson v. Lancashire and Yorkshire R. Co.*,[1] and that same view is shared by Mr. Ruegg in the 8th Ed. of his work on the *Employers' Liability and Workmen's Compensation Act. Haywood v. Hamilton Bridge Works Co.*[2]

There is no satisfactory evidence, apart from the mere breaking, that the chain was or appeared to be or was known to be weak or otherwise defective or insufficient or unfit for the purposes for which it was used,—there is not that additional evidence of defect in condition or of any negligence by the Crown's officer or servant which would so far support the suppliant's contention of actionable negligence under the Act. There must have been a latent or hidden defect in the chain, which the accident itself, by exposing the inside of the metal, failed to disclose and which would still continue to baffle the scientist.

At the time of the accident the Crown's officer offered the suppliant to be taken to a hospital to be

[1] (1872) 20 W.R. 297.
[2] 7 O.W.N. 231.

cared for by medical men. He refused and went to a bonesetter, with the result that the arm was not properly attended to. The doctor called and heard as a witness by the suppliant stated that the reduction of the wrist had been placed in a false position, and that if the limb had been properly treated it would not have been left in the position in which it was. Indeed, if one voluntarily submits himself to unprofessional medical treatment, proper skilled treatment being available, and the results of the injury are aggravated by such unskilled or improper treatment, he is in any case only entitled to such damages as would, with proper treatment, have resulted from the injury, but not to damages resulting from the improper treatment to which he subjected himself. *Vinet v. The King.*[1]

Now, to succeed in an action for tort against the Crown, the suppliant must bring the facts of his case within the provision of sec. 20 of the *Exchequer Court Act,* and that is, there must first be a public work; secondly, an officer or servant of the Crown whose duty it was to do a given thing; and thirdly, that officer or servant must have been guilty of a breach of such duty which would amount to a negligence from which the accident resulted.

In the present case the first requirement is wanting. That is, the St. Maurice Lumber Company's launch-ways, upon which the Government vessel was being hauled, is not a public work, within the meaning of any Act of the Parliament of Canada, or of any known decision of the Courts. See case of *City of Quebec v. The Queen.*[2]

[1] 9 Can. Ex. 352.
[2] 3 Can. Ex. 164, and 24 Can. S.C.R. 420.

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There will be judgment that the suppliant is not entitled to the relief sought by his petition of right.

Action dismissed.

Solicitor for suppliant: *Bruno Marchand.*

Solicitors for respondent: *Désy & Langlois.*

IN THE MATTER OF THE PETITION OF RIGHT OF

1917
March 17.

ALEXANDER DUNNETT,

SUPPLIANT,

AND

HIS MAJESTY THE KING,

RESPONDENT.

Negligence—Public work—Railways—Collision—Stalled automobile.

The collision of a train with an automobile stalled on a level crossing of the Intercolonial Railway, occasioned by the delay of the engine driver to apply his brakes the moment he became aware of the presence of the motor upon the track, is an accident "on a public work" and caused by the "negligence of an officer or servant of the Crown while acting within the scope of his duties or employment upon, in or about the construction, maintenance or operation of the Intercolonial Railway", within the meaning of sec. 20 of the *Exchequer Court Act.*

PETITION OF RIGHT to recover damages for the destruction of suppliant's automobile by a train of the Intercolonial Railway.

Tried before the Honourable Mr. Justice Audette, at Quebec, February 5, 1917.

C. D. White, K.C., and *A. Galipeault,* K.C., for suppliant.

Alleyn Taschereau, K.C., for respondent.

AUDETTE, J. (March 17, 1917) delivered judgment.

The suppliant, by his petition of right, seeks to recover the sum of $1,590 as representing alleged damages to his automobile and effects in an accident

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on a level crossing of the Intercolonial Railway, near Old Lake Road Station, in the Province of Quebec.

The accident happened under the following circumstances. The suppliant and his friend, W. J. Bigelow, between 8 and 9 o'clock in the morning of September 30th, 1915, were returning by automobile to their home in St. Johnsbury, Vermont, from a fishing excursion to the Scott Fish and Game Club. They left Riviere du Loup that morning for Levis, and having found they had gone too far east, they retraced their way by a cross-road to get on the main road at another point, and came to the crossing in question some little distance from Old Lake Road Station, on the Intercolonial Railway, a few miles only from Riviere du Loup. The highway intersecting the railway crossing at the *locus in quo* runs diagonally, but the way across the rails is directly at right angles.

On approaching the crossing they were travelling upon an ordinary country road, with grass on the sides, and the road was slightly lower than the railway track; but they could see both ways for quite a distance. They looked up and down the railway and there was no sign of any approaching train. When they came close to the rails they saw a hand-car on the other side of the track, about eight feet from the rail, and it occupied about three-quarters of the travelled part of the road. On coming still closer a man stood up on their left hand side, threw up his hands, signalling to stop. He "occupied the "broad portion of the road between the hand-car "and the margin of the road." The suppliant applied his emergency brake, with the result that he suddenly stopped and stalled his car squarely on the

track, the front wheels of the car just reaching the south rail, the car itself covering more than the track, the hind wheels being north of the north rail.

Seeing there was space, on the grass, to pass by the hand-car to the left, the suppliant's companion got off the car to crank. He had never cranked a car before this trip, and it is always more difficult to crank a car after it has been stalled. He tried three or four times, and, failing to succeed, the suppliant sprang out of the car to do it,—they did not feel too secure in this position on the centre of the track,—and as the suppliant stepped to the ground a train whistled. The suppliant says he thinks it was then at the whistling post, about a quarter of a mile away. All then started to push the car, but as there was no one in front to steer, the motor sheered and the left wheel of the car, which was near the edge, left the planking and became stopped by the rail. Then it became difficult to move the car—the train was coming and they got away near the fence.

When the train was about half way between the whistling post and the crossing, witness Bigelow stepped out about ten feet from the fence and signalled the engineer of the train to stop. So also did witness Giles.

The whistling post in question is 1,386 feet from the crossing. Between the Old Lake Road Station and the crossing in question there is a slight curve, and witness Bigelow says he saw the train pass that station, then for a short time lost sight of it, and before it came to the whistling post it was again in sight. By reference to plan Exhibit "B," filed by the Crown, it will be seen that from the crossing one can see to about 1,600 feet in the direction from

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which the train was coming,—the line of vision being unobstructed, as specifically shown upon the plan, and sworn to by the suppliant after actual measurement.

The train was coming at a good speed when it struck the car and practically destroyed it, and some of the baggage in it was also damaged.

This was a passenger-train of eight cars, engine and tender, and when it stopped, after the accident, the rear coach was right across the highway.

Now, this is clearly an action sounding in tort and such an action, apart from the statute, will not lie against the Crown. Therefore, the suppliant to succeed must bring his case within the ambit of sections "c" or "f" of sec. 20 of the *Exchequer Court Act.*

The accident happened on a public work, the Intercolonial Railway being by statute declared to be a public work of Canada. The only point to be decided is, whether or not the injury to the suppliant's property was caused by the negligence of an officer or servant of the Crown while acting within the scope of his duties or employment upon, in or about the construction, maintenance or operation of the Intercolonial Railway.

It must be found, as established by the evidence, that the automobile at the time of the accident was in good working order, and that had it not been for the signal to stop, the suppliant would not have stopped his car right across a railway track, and that the machine did not stop of itself, as attested by the suppliant and his companion.

Warren, an employee of the Crown, who was around at the time of the accident and who might have thrown some light upon the facts, was not heard as a witness. Giles swears he did not give

the signal in question, but his memory is not very reliable, especially when he states, of the suppliant and his companion, that one was sitting in the front seat and the other at the back of the automobile. On this point he was contradicted by two witnesses. Then when he says that one person was still sitting inside the automobile, at the back, when they were pushing it, he is contradicted by three witnesses. Taking into consideration these salient facts, and the general nervous and peculiar demeanour of the old man Giles when giving his testimony, I have no hesitation in accepting in preference to his evidence that of both the suppliant and his companion.

Now Giles was a servant of the Crown acting within the scope of his duties and employment, and had it not been for him, the highway would not have been partly obstructed by the hand-car, and the suppliant's motor would not have been signalled to stop. But while Giles' negligence made the accident possible, was there any other negligence which determined the accident? Was the engineer in charge of the train guilty of any negligence?

Witness Bigelow says when the train was halfway between the whistling post and the crossing he stood about ten feet from the fence and signalled the engineer to stop the train. Witness Giles also swore that when the suppliant and his companion had got out of the motor, he made a sign to the engineer to stop when he was standing on the southwest side and that he so signalled the train from a place where the engineer could have seen him.

Tardif, the engine-driver, swears he did not see anyone making signals to stop. However, the motor was in the centre of the track and his line of vision was unobstructed for 1,600 feet. The whistling

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post was 1,386 feet from the crossing. He saw the whistling post, since he says he whistled when he passed it. Had he exercised reasonable care and diligence, since he could see the stalled motor 1,600 feet before getting to it, had he looked ahead as he should have done, he would have seen the motor in full view, the line of vision being unobstructed for that distance, and could have avoided the accident. He blew his whistle at the whistling post. Therefore his attention was thereby attracted to the fact that the crossing was quite close—he had knowledge of the conditions obtaining, and it was his duty to look for the crossing, as he had no excuse or justification taking an unnecessary and improper chance where even human life could have been in jeopardy and peril. He knew of the crossing. Two persons signalled to him to stop, and he swears he did not see them. Did he or did he not see them? If he did not see them it is because he was not looking ahead, as he should have done. However, I would feel very much inclined to apprehend and believe that he took an improper chance, and did not see fit to apply his brakes the moment he became aware of the presence of the motor upon the track, and that delaying in doing so he only applied his emergency brakes when it was too late. *Canadian Pacific Railway v. Hinrich;*[1] *Long v. Toronto Railway;*[2] *City of Calgary v. Harnovis.*[3]

He stated he stopped his train in one length and a half, and that he applied his emergency brakes about half-way between the whistling post and the crossing, perhaps a little closer to the crossing. Had

[1] 48 Can. S.C.R. 557, 15 D.L.R. 472.
[2] 50 Can. S.C.R. 224, 250, 20 D.L.R. 369.
[3] 48 Can. S.C.R. 494, 15 D.L.R. 411.

this statement been accurate it would seem he should have stopped his train before getting to the crossing, since it was giving him a margin of about 690 feet. He further stated in his testimony that his train was going 3 miles an hour when he struck the motor, a statement which on its face is obviously wrong. A speed of 3 miles an hour is the ordinary step of a man. Had the train been going only 3 miles an hour when it struck the motor, it would have shoved it away and not sent it up in the air, smashing everything. In making that statement was he actuated by the consideration of sec. 34 of the *Government Railway Act,* with respect to the six-mile limit of speed at certain places? However, such a statement goes to the reliability of the evidence. The stoker on board the very same engine swore the train was going at 15 to 20 miles an hour at the time of the accident, and the suppliant puts it at from 40 to 50 miles. All of this goes to shake the strict accuracy of the engine-driver's evidence, and would go much to militate in favour of the hypothetical assumption, as above stated, that he really did take chances and neglected to apply his brakes when he did see the motor for the first time and applied his emergency brakes only when it was too late. And how could it be otherwise, when it is established beyond peradventure both by the plan and the testimony of the suppliant, after actual measurement, that the line of vision was unobstructed for over 1,600 feet, that he whistled at the whistling post, which indeed notified him, so to speak, of the crossing in question. Had he looked ahead, as a reasonable man should have done, as his duty called upon him to do, exercising due and reasonable care and diligence, he would have seen the stalled automobile, around

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which men were engaged pushing it, in time to stop his train well before reaching the crossing. The engine-driver neglected to apply his brakes until he was too near the place of the accident for him to do so in time. He only attempted to stop when in the agony of the accident, as is said in collisions at sea, and should have done so before, as he should have seen the stalled car and the men around it, before only about 300 to 400 feet from the crossing,—had he attended to his duty by looking ahead and exercised due care and diligence. *Connell v. The Queen;*[1] *Harris v. The King.*[2]

The duty of the engine-driver, a breach of which would constitute ultimate negligence, arose when the danger was or should have been apparent. He should have looked ahead, and if he did not he became guilty of want of care and diligence, which amounted to the negligence causing the accident. And as said by Mr. Justice Anglin in *Brenner v. Toronto R. Co.*,[3] a judgment most favorably commented upon by Lord Sumner in *B. C. Electric R. Co. v, Loach*[4]: "If, notwithstanding the difficulties of the "situation, efforts to avoid injury duly made would "have been successful but for some self-created in-"capacity, which rendered such efforts inefficacious, "the negligence that produced such a state of dis-"ability, is not merely part of the inducing causes,—"a remote cause or a cause merely *sine qua non*,—it "is in very truth the efficient, the proximate, the de-"cisive cause . . . of the mischief."

The ultimate negligence which was the cause of the accident in this case would therefore arise either

[1] 5 Can. Ex. 74.
[2] 9 Can. Ex. 206.
[3] 13 O.L.R. 423.
[4] [1916] 1 A.C. 719 at 726, 23 D.L.R. 4 at 9.

in the engine-driver's incapacitating himself to stop his train in time by his want of looking ahead as he should have done, or in his want of care and diligence in delaying to apply his emergency brake in time to avoid the accident.

Coming to the question of quantum, one must not overlook that the damaged automobile was a second-hand car bought by the barter of an old second-hand car and some cash.

It was a second-hand six-cylinder Mitchell car, model of 1913, which had been operated for 14,000 miles in July, 1913, when it was purchased by the suppliant for the barter of an old second-hand 4-cylinder model, same make of 1911, and $750.

He had to disburse some money, as shown in the evidence, to pick up the pieces of the machine after the accident and ship them to the United States by freight, because his machine was bonded for duty. He sold the scrap in the United States for $65. He also suffered some damages to a rifle, telescope and a few other things of minor value.

Under all the circumstances of the case I am of opinion that judgment should be entered for the suppliant, who is declared entitled to recover from the respondent the sum of $750 and costs.

Judgment for suppliant.

Solicitors for suppliant: *Cate, Wells & White.*

Solicitor for respondent: *Charles Smith.*

1918
March 25.

IN THE MATTER OF THE PETITION OF RIGHT OF

DAME EUGENIE THIBAULT,

SUPPLIANT,

AND

HIS MAJESTY THE KING,

RESPONDENT.

Negligence—Railways—Injury to brakeman—Accident.

The death of a brakeman riding on a box car while in the discharge of his duties on the Intercolonial Railway, occasioned by the overturning of the car when it suddenly jumped the track, the roadbed and the car being in perfect condition and the train travelling at a moderate speed, must be regarded as an accident due to an unforeseen event and is not attributable to the "negligence of any officer or servant of the Crown . . . in or about the construction, maintenance or operation of the Intercolonial Railway", within the meaning of sec. 20 of the *Exchequer Court Act.*

PETITION OF RIGHT to recover damages for the death of a brakeman while in the discharge of his duties on the Intercolonial Railway.

Tried before the Honourable Mr. Justice Audette, at Fraserville, Que., January 15, 16, 1918.

E. Lapointe, K.C., and *A. Stein,* for suppliant.

Léo Bérubé, for respondent.

AUDETTE, J. (March 25, 1918) delivered judgment.

The suppliant, by her petition of right, seeks to recover the sum of $22,000 as damages arising out

of her husband's death, resulting from an accident while engaged in the discharge of his duties as brakeman on the Intercolonial Railway, a public work of Canada.

On August 25th, 1916, Horace Levesque was working, as brakeman, on a train travelling on the spur or branch line, between Tobin Junction and The Trois Pistoles Pulp & Lumber Co.'s mills, a part of the Intercolonial Railway. They took up 17 empty cars from Tobin Station to the mill, and they had 15 loaded cars to take from the mill to Tobin. Arrived at the mill, they first took 8 loaded cars down to Tobin Station, and on that first trip passed the place of the accident, at a speed of 10 or 11 miles an hour. They returned to the mills and took down to Tobin the remaining 7 loaded cars, and on their way down the conductor was on the top of the last box car with Levesque, who was sitting on the walking board at the end of the last car, when suddenly that car jumped and left the track, uncoupled and rolled down an embankment, about 40 feet below the track. Levesque was then severely injured and died on the 3rd September following, as a result of the accident which happened at between 5.30 to 5.45 p.m., on the 26th August.

While this train travelled at 10 or 11 miles on the previous trip with 8 cars, at the place of the accident, she only travelled at between 6 or 7 miles with 7 cars, at the time of the accident. The track, at the *locus in quo*, winds around a hill, and the train at the time of the accident was travelling through a parabolic curve, that is, after leaving a 16 degree curve, ran into an 8 degree curve, both bends curving in the same direction.

Without entering into unnecessary details it can

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be stated that in the result the suppliant's evidence established beyond doubt that the road bed at the place of the accident was in especially good condition. The track lay in a rock cut, with rock foundation,—the ties were new, having been placed there the preceding summer or autumn, and were clamped or braced with iron at every other tie,—the roadbed had been attended to during the summer, and, as put by witness Rioux, the place where the accident took place was as good as on the main track. The rails were in perfect order. Then, after an endeavour had been made to prove that steel framed cars were hard to curve, it was established, beyond peradventure, by the suppliant's evidence, that the boxcar which jumped the track was a Delaware & Hudson car, and that such cars were very good and perfect. And, moreover, the evidence establishes that this very car was examined after the accident and it was found to be "first class," the wheels and the track "perfect." It further appears from the evidence that certain steel frame cars built at New Glasgow in March, 1917, the year following the accident, have proved defective and had been repaired; but that the Delaware & Hudson cars were perfect, and further, that steel frame cars, used for coal had been in use on the Intercolonial Railway for over 10 years and had given entire satisfaction.

With respect to the rate of speed, the witnesses say, at the time of the accident, the train was travelling at 6 to 7, or 6 to 8 miles, and on the previous trip, over the same ground, on the same day, at a speed of 10 to 11 miles,—and finally they concur in saying that the speed was not excessive and was not the cause of the accident.

The suppliant to succeed in the present instance

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must bring the facts of her case within the ambit of sub-secs. (c) and (f) of sec. 20 of the *Exchequer Court Act,* as amended by 9-10 Ed. VII. ch. 19. (The Act. 7-8 Geo. V. ch. 23 (1917), not being in force at the time of the accident.) In other words, the claim must arise "out of the death * * * of Levesque "caused by the negligence of any officer or servant "of the Crown while acting within the scope of his "duties or employment upon, in or about the con- "struction, maintenance, or operation of the Inter- "colonial Railway or the Prince Edward Island "Railway."

The suppliant's evidence has amply convinced me that the road bed was in perfect condition, the ties were new and clamped at every other tie, the rate of speed was moderate and far from excessive, and that the box-car which jumped the track was in perfect order. Some of the witnesses have suggested the accident might have been the result of a bolt falling on the track, and which could have caused the accident, but this is only conjecture and surmise. It might also have been the result of a latent defect somewhere and not capable of detection by any ordinary means of examination open to the railway officials.

The *onus* of establishing negligence is upon the suppliant and she has failed to do so. The accident remains unexplained. The case is not within the statute and the action fails. *Colpitts v. The Queen*;[1] *Dubé v. The Queen.*[2]

What happened was fortuitous and unexpected. *Thompson v. Ashington Coal Co.*[3] The event was unforeseen and unintended, or was "an unlooked-

[1] 6 Can. Ex. 254.
[2] 3 Can. Ex. 147.
[3] 84 L.T.R. 412; 3 B.W.C. Cas. (O.S.) 21.

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"for mishap or an untoward event which was not "expected or designed." *Fenton v. Thorley Co.*;[1] *Higgins v. Campbell.*[2] It was a personal injury by accident. In *Briscoe v. Metropolitan St. Ry. Co.*[3] an accident is defined as "such an unavoidable cas- "ualty as occurs without anybody being to blame "for it; that is, without anybody being guilty of "negligence in doing or permitting to be done, or "in omitting to do, the particular things that caused "such casualty."

The accident in this case was an unforeseen event which was not the result of any negligence or misconduct of an officer or servant of the Crown, and while the court cannot grant any relief in such a case as the present, it is to some extent comforting to realize the widow and children are receiving insurance moneys to the amount of $3,000 and that they have a home free of the mortgage of $600 paid out of such insurance moneys.

The suppliant is not entitled to the relief sought by her petition of right and there will be judgment in favour of the Crown.

Action dismissed.

Solicitors for suppliant: *Lapointe, Stein & Levesque.*

Solicitor for respondent: *Léo Bérubé.*

1 [1903] A.C. 443; 89 L.T.R. 314; 52 W.R. 31.
2 [1904] 1 K.B. 328.
3 120 Southwestern Rep. 1162 at 1165.

IN THE MATTER OF THE PETITION OF RIGHT OF

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March 25.

JEAN BAPTISTE POISSON,

SUPPLIANT,

AND

HIS MAJESTY THE KING,

RESPONDENT.

Negligence—Expropriation—Riparian rights—Flooding—Dam—Public work.

Where there has been no expropriation by the Crown of any easement to flood the land of a riparian owner, the injury or damage suffered by the latter from flooding, as a result of the construction of a dam by the Crown, is not actionable under the provisions of the *Expropriation Act*, nor is it actionable under secs. 19 or 20 of the *Exchequer Court Act*. The land being situate over 50 miles from the dam cannot be regarded as "on a public work" and no evidence being adduced that the injury resulted from the negligence of an officer or servant of the Crown acting within the scope of his duties or employment.

PETITION OF RIGHT to recover damages for flooding suppliant's land.

Tried before the Honourable Mr. Justice Audette, at Three Rivers, March 5, 6, 1918.

M. L. Duplessis, for suppliant.

Auguste Désilets, for respondent.

AUDETTE, J. (March 25, 1918) delivered judgment.

The suppliant, by his petition of right, seeks to recover the sum of $4,999 for the flooding of his land and injury to his mill and loss of business.

In 1909, the Government of Canada started works at the foot of Lake Temiscamingue, which were com-

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pleted in April, 1912. These works consisted in building two dams,—one on the Quebec side and one on the Ontario side, of the lake, with the object of making a reservoir of the lake in order to control the debit of the waters and regulate thereby the water power at the Chaudiere Falls, Ottawa. The dam, it must be well borne in mind, was not built with the object and did not have the effect of raising the level of the lake to any new height; but only and especially to retain such waters, for a longer period, on a high known level in the past.

The effect of such dam, in the result, was not to raise the waters to any new high level, but to maintain a high level for a much longer period. The damage or injury suffered by the riparian owners would therefore be one of degree as compared with the past. That is, if the waters in the past attained a given maximum height, it only maintained that state of things for hours, and perhaps two or three days, while at present a high level, without being the maximum of the past, is maintained for months.

Under deed of March 6th, 1908, Jean Baptiste Poisson, the suppliant, and Joseph Poisson, both merchants of Gentilly, carrying on business under the name and firm of "Poisson & Poisson," acquired the land in question herein with the second-hand saw mill thereon erected, and its appurtenances, including also, with covenant, a timber license, etc.

Subsequently thereto on November 9th, 1909, Joseph Poisson, after the dissolution of the above mentioned partnership, as mentioned in the deed, assigned and transferred to the suppliant all his rights in the property in question. Nothing is said in that deed of the transfer of the timber limits, in respect of which there is not a tittle of evidence and which

was not brought to my attention at the trial—a matter which may have no direct effect in the present case, but which might have had in the adjustment of accounts at the time of the dissolution of partnership.

Joseph Poisson was not heard as a witness. Jean Baptiste Poisson, the suppliant, states the mill was bought with the object of establishing Joseph Poisson's sons, who worked the mill for some time. The suppliant says the sons were to pay for the mill out of the revenues derived from the operation of the same; but they had so many repairs to attend to that they never paid him anything, and Joseph Poisson asked the suppliant to purchase the mill, thereby relieving Joseph Poisson of any liability in respect of the same, which he did, as appears from the deed of November 9th, 1909.

A book of account was filed at trial to show the revenues of the mill, when operated by the two Poisson boys; but that book has proved unreliable, and the least said about it perhaps the better. In it is found one of the elements of exaggeration which is found in almost all expropriation cases, and cases of compensation. And, in the present case, that element may be coupled with the further exaggeration in respect of the capacity of the mill as stated by the suppliant,—the topography of the land adjoining Simard Street, the line of flooding shown on plan Exhibit No. 4, and finally the allegation in paragraphs 9 and 10 and following, of the petition of right, where it is alleged that since March, 1913, the mill, its accessories and the lands are of no more use and have lost four-fifths of the value,—yet the mill was rented to Parent and operated by him in 1915. In respect of this plan No. 4 it may be said

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at once, so as to avoid misconception, that it is unreliable, as the different lines of flooding were not ascertained *de visu* or in any satisfactory manner. From observation on the premises, witness Cross says lines "E," "F" should be at "X," "Z." Were even these lines of flooding accurate, the witness Barrette could not establish whether the lines on his plan Exhibit No. 4 would be in respect of the period before or after the construction of the dam.

Having said so much as a prelude, let us consider the construction of the building of the mill. Apart from the machinery, its construction was of the cheapest. The building, except on the land side, rested on posts, and some of the witnesses even said they were not braced. A mill on such foundation did not assert permanency of construction. It should have been on a proper foundation. These posts standing without protection were greatly affected by the frost, and as a result the building was continually out of plumb, hence calling for so many repairs, as claimed by Joseph Poisson's sons, and as said by some of the witnesses, it could hardly be called a permanent building. Frost had more to do with undermining the solidity of the mill than any erosion mentioned in the evidence. Witness Verhelst said it was difficult to maintain a mill upon such foundation. It had the appearance of being affected by frost,—it was sloping upon one side or another, involving considerable repairs every spring. The posts under the mill were upset or taken away by the beating of the logs. The suppliant has suffered injury to this property from the operation and maintenance of the dam. While he might assert a reasonable claim he could not expect the Crown to step in at this juncture and help him out of an unsuccessful

undertaking,—the unremunerative operation of this mill, which like so many others in that locality had to be closed down.

The waters of Lake Temiscamingue have not been raised by the dam. The dam has maintained a level reached by the lake before, but maintained this high level for a longer period than formerly. A level of 588 could be maintained all the time by using the stop logs.

The present space, at the dam, through which the water runs out of the lake, is larger than before the erection of the dam. The dam is never completely closed, and there is a 45 foot opening down to the bottom, which is kept open all the time.

Dealing with the question of the level of the waters of the lake, taking the sea as datum, 585 was a very ordinary high level obtaining on the lake before the construction of the dam. Here follows the ascertained levels prevailing from 1906 to 1914, inclusively, viz.:

1906	1st July	583
1907	June	587
1908	June	589
	That is 47 consecutive days above	585
1909	End of May—highest during 5 days.	592
	And above 585 for 45 days from 15th May to the end of June.	
1910	On 10th May, highest	585
	Duration at that elevation,—20 days. Did not go any higher that year.	
1911	On 5th May, highest, for one day	590
	Above 585 for 35 days from beginning of May to beginning of June.	
1912	Last days of May, for 5 or 6 days	587

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Above 585 for 35 days, from middle of May to end of June.

Dam completed in April, 1912, and put in operation from that time.

1913 .....Highest on 1st May..... 589

Duration above 585 for 95 days, from the end of April to the end of July, and, moreover, for 40 additional days in the Autumn, November and December.

1914 .....Highest from 12th to 15th June.. 586

The dam broke on the 14th June, and the repairs were completed in January, 1915.

Most of the damages claimed to have been suffered by the suppliant have been done by the logs, held within the boom in front of the mill, beating against the land and the unprotected posts of the mill. The flimsy construction of the mill was also in no small degree the cause of some of the injury. Good size posts run into the ground and properly braced would perhaps have stood the knocking of the logs. The frost had also a deal to do with the keeping of the building plumb.

The engineer heard on behalf of the Crown has suggested, in his testimony, a very rational remedy for stopping any further damage, a remedy which is most practical and has the advantage of economy.

There can be no doubt that the mill was exposed to similar damages before the dam, but in a lesser degree, during a shorter period; but a deal of havoc might have been done to the property if a strong wind, combined with waves, had been beating in the direction of the property.

Small cribwork at the southern and western sides of the mill would stop all damages. The loose rock

bank of the size and dimensions mentioned by Mr. Coutlee would also have the same effect. It would stop erosion, the waves would break upon the stone and the turbulation of the water would not reach the ground or soil.

The amount offered by the Crown would obviously, under the testimony of witnesses Coutlee and Cross, cover the necessary expenditure for such work. Would it cover the damage to the land, for the deprivation for a long period of a certain area of land which, but for the dam, the suppliant would have had the possession and enjoyment and also for the damage to the two piers?

Witness Parent rented the mill in 1915 for one year and operated it. He says it was in a bad state when he took it. The shingle machine was outside, between the two buildings, unfit to be used. The mill was off level, not plumb. He added from 10 to 12 posts under the mill and braced them. The roof was leaking over the planers, etc.

The prospect of such small saw-mills at Ville Marie is not very bright,—a number of them, according to the evidence, have already gone under.

The suppliant has made a claim for loss of business in 1913 and 1914, but has not supported it by any satisfactory evidence. Indeed, both from his books and the evidence of record in respect of the general operations of small mills in the neighbourhood at the time, coupled with what we know of the operation of this mill by the suppliant himself for a short period, it would appear that the mill was closed down to avoid further financial complications. However, there is not a tittle of evidence on record upon which a compensation for such element of dam-

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ages could be substantiated or reckoned upon and the *onus* of such evidence was upon the suppliant.

The Crown, by its plea, has not set up any legal objection to the claim; but, if I have no jurisdiction to hear the claim, and if it is not well founded in law, I cannot but dismiss it. The Crown, by its plea, admits the suppliant has suffered damages, and rightly so.

As between subject and subject there can be no doubt that a right of action would exist in a case like the present one, but the law is different as between the subject and the Crown.

The Crown, in the present case, has not expropriated (the *Expropriation Act,* R.S.C., 1906, ch. 143, sec. 2, sub-sec. f, sec. 3), the easement to flood the suppliant's land, therefore the court has no jurisdiction to entertain the claim under the *Expropriation Act.*

This case is in its very essence in tort, and apart from special statutory authority, no such action will lie against the Crown. The case does not come under sec. 19 of the *Exchequer Court Act.* Can it be said that it comes within the ambit of sec. 20 of that Act?

If the suppliant seeks to rest his case under subsec. (b) of sec. 20,—to which the attention of counsel at Bar was called by me at the trial,—I must answer that contention by the decision of the Supreme Court of Canada in *Piggott v. The King,*[1] where His Lordship the Chief Justice says: "Paragraphs (a) "and (b) of sec. 20 are dealing with questions of "compensation, not of damages."

"Compensation is the indemnity which the statute "provides to the owner of lands which are com-

[1] 32 D.L.R. 461, 53 Can. S.C.R. 626.

"pulsorily taken in, or injuriously affected by, "the exercise of statutory powers."

Therefore, it obviously follows that the present case does not come under sub-secs. (a) and (b) of sec. 20.

Does the case come under sub-sec. (c) of sec. 20, repeatedly passed upon by this Court and the Supreme Court of Canada, before its amendment in 1917, by 7-8 Geo. V., ch. 23?

To bring this case within the provisions of sub-sec. (c) of sec. 20, before the last mentioned amendment, the injury to property must be: 1st. On a public work. 2ndly. There must be some negligence of an officer or servant of the Crown while acting within the scope of his duties or employment; and 3rdly. The injury must be the result of such negligence.

The suppliant's property is situate a good deal over 50 miles from the dam, which undoubtedly, under sec. 108 of the *B. N. A. Act* and the third schedule thereof, is the property of Canada.

Under the circumstances and under the decisions in *MacDonald v. The King;*[1] *Hamburg American Packet Co. v. The King;*[2] *Paul v. The King;*[3] *Olmstead v. The King*[4] *and Piggott v. The King* (*ubi supra*), it is impossible to find that the suppliant's lands, so situate at over 50 miles from the dam, are on the *public work.*

Were even this question of *on a public work* answered in favour of the suppliant, there would still be wanting, missing from the case, the evidence that

[1] 10 Can. Ex. 394.
[2] 7 Can. Ex. 150, 175; 33 Can. S.C.R. 252.
[3] 38 Can. S.C.R. 126.
[4] 30 D.L.R. 345, 53 Can. S.C.R. 450.

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an officer or servant of the Crown, while acting within the scope of his duties and employment, had been guilty of such negligence that would have caused the damages complained of. There is not a tittle of evidence in this respect in this case.

In the result it must be found, following the decisions in *Chamberlin v. The King;*[1] *Paul v. The King (ubi supra); The Hamburg American Packet Co. v. The King (ubi supra); MacDonald v. The King (ubi supra);* and especially *Olmstead v. The King (ubi supra)*, that the injury complained of did not happen on a public work, and moreover, that it did not result from the negligence of any officer or servant of the Crown, while acting within the scope of his duties or employment. The action will not lie.

There will be judgment dismissing the petition of right and declaring that the suppliant is not entitled to the relief sought by the same.

Action dismissed.

Solicitors for suppliant: *Duplessis, Langlois & Durand.*

Solicitors for respondent: *Désilets, Désilets & Ladouceur.*

[1] 42 Can. S.C.R. 350.

IN THE MATTER OF THE PETITION OF RIGHT OF

1916
Nov. 10.

ERNEST THEBERGE,

SUPPLIANT,

AND

HIS MAJESTY THE KING,

RESPONDENT.

Negligence—Public work—Railways—Contractor—Sand deposits—Expropriation.

Damages suffered by a landowner from sand deposits in the course of construction of a Crown railway are only recoverable as against the contractors. The injury not having resulted from any expropriation of land is not actionable against the Crown under the *Expropriation Act*, and having happened 10 acres away from the railway was not "on a public work" within the meaning of sec. 20 of the *Exchequer Court Act*, and therefore not actionable against the Crown under the latter statute.

PETITION OF RIGHT to recover damages for an injury to land.

Tried before the Honourable Mr. Justice Audette, at Quebec, November 10, 1916.

E. Belleau, K.C., for suppliant.

E. Gelly, for respondent.

AUDETTE, J. (November 10, 1916) delivered judgment.

The suppliant brought his petition of right to recover the sum of $300 for alleged damages suffered to his farm from sand, earth and coal which, through the Crown's employees, were dumped into a creek passing in a culvert under the right of way of the

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National Transcontinental Railway, and which were carried on to part of his farm under cultivation about ten acres from the railway.

The damages in question are claimed to have been suffered during the years 1911-12, 1912-13, and 1914-15.

The National Transcontinental Railway was in the course of construction, and in the hands of the contractors up to the date at which the Crown began to operate the same on November 23rd, 1914.

The question to be decided, under the circumstances of the case, is whether these damages were caused by the contractors or by the Crown.

It is conceded at bar by the suppliant's counsel that the damages suffered during the construction of the railway are only recoverable as against the contractors, following the decision in the case of *Marcotte v. Davies.*[1]

It is established by the evidence that some of the sand so carried upon the suppliant's property came, for a certain portion, as ascertained from indications upon the premises, from a large sandhill upon the suppliant's property. The toe of that hill abuts on the creek and the steep slopes thereof are practically denuded of vegetation.

The piece of land in question was, before the construction of the railway, flooded in the spring and in freshets.

The farm in question was purchased by the suppliant in 1910 for the sum of $600 and comprises one and one-half arpents in front by 28 arpents in depth, and the suppliant contends that upon that farm only one and one-half by four and a half arpents were under cultivation, the balance being rocky

[1] 41 Que. S.C. 444.

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and wooded. The damages claimed are in respect of the part under cultivation.

Mostly all the evidence adduced on behalf of the suppliant establishes damages suffered before the operation of the railway by the Crown in November, 1914, and for which the Crown is obviously not liable. The only evidence extant upon which the existence of damages subsequent to November, 1914, would be the evidence of the suppliant himself given in a general way, without specifying anything, when he says that "the same thing occurred in 1915"; and he adds at the end of his evidence that in 1915 "he did not touch his land,"—meaning, I assume, he did not remove any sand that might have been carried thereon.

Witness Zephirin Laflamme, a section-man, also testified that in 1915 some sand slid from this embankment near the culvert in question; but that he did not then go upon the suppliant's land, at the point marked "A" on the plan, to ascertain if any damages were suffered. However, he adds, this sand-slide was not of enough importance to necessitate any repairs.

On behalf of the Crown witness Lefebvre says, that in October, 1915, he was sent to ascertain if the suppliant were suffering any damages from the operation of the railway. He then paid a visit to the *locus in quo*, and starting from the culvert he noticed near the same an erosion of about 10 yards; but cannot say when it took place. He travelled from the culvert to the next place marked "A" on the plan and ascertained there was grass growing nearly everywhere at that place, excepting, however, at certain spots where it appeared to him some earth had been taken away, but he did not know under what

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circumstances and on what occasion. There was then, according to him, no damages.

In view of the fact that the overwhelming weight of the evidence adduced by the suppliant was directed to damages suffered before November 23rd, 1914, when the Crown took possession, I find that there is not enough evidence on the record upon which I could find that there was any damage suffered from causes originating since November, 1914, and that if any appreciable damages were suffered since then it cannot be distinguished from the result of those suffered before that date.

Having thus primarily disposed of the facts of the case there remains the question of law standing in the way of the suppliant and which did not attract or invite the argument of counsel at bar.

This case is in its very essence an action in tort and such an action does not lie against the Crown, excepting under special statutory authority.

The case does not involve any expropriation of land and the injurious affection flowing therefrom, and does not come under the *Expropriation Act*. The suppliant, to succeed, must bring his case within the ambit of either sub-sec. (c) or sub-sec. (f) of sec. 20 of the *Exchequer Court Act*.

Under sub-sec. (c) the injury to property must be: first, on a public work; secondly, occasioned by an officer or servant of the Crown acting within the scope of his duties and employment; and thirdly, the injury must result from such negligence.

Following the decisions in *Chamberlin v. The King;*[1] *Paul v. The King;*[2] *Olmstead v. The King;*[3]

[1] 42 Can. S.C.R. 350.
[2] 38 Can. S.C.R. 126.
[3] 30 D.L.R. 345, 53 Can. S.C.R. 450.

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and *Piggott v. The King*,[1] I must arrive at the conclusion that as the damages suffered were so suffered ten acres (as stated by witnesses) away from the public work, the National Transcontinental Railway, he cannot recover. The injury to property was not "on the public work." Absurd as this conclusion might appear, the jurisprudence has now been clearly established and settled upon that point.

There is some oral evidence by one witness that that part of the railway in question herein was operated by the I. C. R., but more than verbal evidence by one witness would be required to arrive at the conclusion that that part of the Transcontinental is now operated and forms part of the Intercolonial Railway. And were it operated as part of the Intercolonial Railway it would be still doubtful as to whether or not 10 acres from the public work would bring the case within the provisions of sub-sec. (f) of sec. 20 of the *Exchequer Court Act*, and within the words "upon, in or about" of said section.

Under the circumstances the suppliant is not entitled to any portion of the relief sought by the petition of right herein.

Action dismissed.

Solicitors for suppliant: *Belleau, Baillargeon & Belleau.*

Solicitors for respondent: *Gelly & Dion.*

[1] 32 D.L.R. 461, 53 Can. S.C.R. 626.

1917
July 7.

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

PLAINTIFF,

AND

THE QUEBEC GAS COMPANY, A BODY CORPORATE,

AND

THE CITY OF QUEBEC,

DEFENDANTS,

AND

THE ROYAL TRUST COMPANY, A BODY CORPORATE,

AND

THE QUEBEC RAILWAY, LIGHT, HEAT & POWER COMPANY, A BODY CORPORATE,

ADDED DEFENDANTS.

Expropriation—Conversion of rights — Compensation — Companies—Action—Parties—Market value—Special adaptability—Railways.

By virtue of sec. 8 of the *Exchequer Court Act*, the deposit of the plan and description of the land expropriated has the effect of vesting the property in the Crown, and from such time, under sec. 28 of the Act, the compensation money stands in lieu of the land, and any claim to the land is converted into a claim for the compensation money.

2. A corporation holding the shares of a subsidiary company has no *locus standi* to prosecute a claim for compensation on behalf of the latter; the action of the subsidiary company must be brought in its own corporate name.

3. The special adaptability of land for railway purposes is but an element of the market value of the land. In assessing compensation for the taking of such land regard must be had of its value to the owner, not the value to the taker. The doctrine of reimbursement does not apply to the taking of lands not used as a going manufacturing concern. The best test of the market value is what other properties in the neighbourhood have brought when acquired for similar purposes.

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INFORMATION for the vesting of land and compensation therefor in an expropriation by the Crown.

Tried before the Honourable Mr. Justice Audette, at Quebec, May 11, 12, 14, 15, 16, 18, 1917.

G. F. Gibsone, K.C., *Arthur Holden,* K.C., and *J. P. Gravel,* for Crown.

E. A. D. Morgan, K.C., for Quebec Gas. Co.

A. Taschereau, K.C., for Royal Trust Co.

L. G. Belley, for Quebec Ry., L., H. & Power Co.

AUDETTE, J. (July 7, 1917) delivered judgment.

This is an information exhibited by the Attorney-General of Canada, whereby certain lands, belonging to the defendants, were taken and expropriated for the purposes of the National Transcontinental Railway, by depositing on April 24th, 1913, and on February 24th, 1915, plans and descriptions of the same with the Registrar of Deeds at the City of Quebec.

These lands are situate in St. Peter's Ward, in the City of Quebec, and since the expropriation form part of the new C. P. R. Union Station, at the Palais.

The Crown by the information offers $144,400 and interest. The Quebec Gas Company by its statement in defence claims the sum of $822,704, and the Quebec Railway, Light, Heat and Power Company claims the sum of $860,176.90, inclusive of 10 per cent. for coercion.

It is admitted by all parties that the total area of land taken is of 62,558 1-3 square feet—that is:

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	Square ft.
Lot 1937 contains	16,098 1-3
And the whole Lot 1937 A, contains.....	46,460
Making a total of.....	62,558 1-3

It is further admitted by all parties that the value of the buildings upon the lands in question, at the time of the expropriation, was of $32,000, therefore the evidence in respect of valuation will be limited to the land only,—the value of the buildings having thus been ascertained by consent.

Mr. Morgan, K.C., counsel at bar for the Quebec Gas Company, at the opening of the trial, filed the following declaration of admission, which reads as follows, to wit:

"The defendant, the Quebec Gas Company, by "way of amendment to the statement of defence "put in by them, declare that they now admit that "the filing of the plan and the taking of the lands "described in the information was actually made "and done on behalf of His Majesty the King, "and by reason thereof said lands are now, and "have been since the filing of the said plan, vested "in His Majesty the King."

This declaration or admission speaks for itself, and removes one of the traversed allegations of the information.

It was also admitted, in the course of the trial, that the indications on plan 3-a, made with arrows by Mr. Trembly, are correctly marked in accordance with the deeds, including the yellow portion; which is an exchange between the Harbour Commissioners and the Transcontinental. The deeds indicated on the plan were executed after the plans for expropriation for such land had been deposited.

In order to follow the trend and the development of the different phases of this case, it is thought advisable to mention here that on January 21st, 1915, Mr. Morgan, K.C., moved the court for an order directing that the question of title or ownership of the property in question be disposed of before going into the question of compensation, alleging in his motion paper that his clients claimed the sole ownership of the land in question. The application was then enlarged *sine die.*

Then on February 9th, 1917, Mr. Morgan, K.C., alleging his application of January 21st, 1915, just referred to, and also a resolution of the City of Quebec (at that time the only other defendant), by its Council, at a meeting of June 29th, 1916, setting out that the city had no interest in the properties herein, prayed for an order, in view of the said resolution, declaring that the Quebec Gas Company was the sole and only defendant in this case, and that it be declared that the other defendant (the City of Quebec) is no longer a defendant. * * *

Mr. Chapleau, K.C., of counsel for the City of Quebec, then showed cause and declared he withdrew from the case.

Under these circumstances an order was made *donnant acte* of such disclaimer or withdrawal from the case by the City of Quebec, with, however, no further pronouncement for the time being. Subsequently thereto, two other parties were added defendants to this suit, namely, The Royal Trust Company, which company did not file any written plea, but by its counsel, Alexandre Taschereau, K.C., at the opening of the trial, declared *s'en rapporter a justice,* that is, submitted itself to the judgment of the court, and The Quebec Railway, Light, Heat and

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Power Company, which filed of record a set of pleadings.

In the result there is now on the record a claim by the Quebec Gas Company for the land taken herein, and there is also a claim by the Quebec Railway, Light, Heat and Power Company (hereinafter called the Power Company) in respect of the land itself, and also in respect of the Montmorency and Charlevoix Railway.

Before entering into the consideration of the compensation to be paid under the present expropriation, it becomes necessary *in limine* to establish the actual rights of both the Quebec Gas Company and the Power Company, respectively.

THE QUEBEC POWER COMPANY.

The manager of the Quebec Power Company, heard as a witness, testified that he was the manager of that company, which might be called the holding company, or the merger, as it is popularly called; that he was also manager of all the subsidiary branches or companies under the merger, that is to say: the Quebec Gas Company, the Frontenac Gas Company, the Quebec Jacques Cartier Electric Company, the Quebec Railway, Light and Power Company, the Quebec County Railway, the Canadian Electric Light Company, the Lotbiniere & Megantic Railway Company, and the Quebec and Saguenay Railway. He did not mention or include among these subsidiaries the company known as the Quebec, Montmorency & Charlevoix Railway, but it was always taken for granted at trial that it was one of the companies of which the Power Company held the stock.

The merger deed so much spoken about and relied upon at trial has not been filed of record in this case, although asked for by the tribunal. We are told by the manager that the merger took place in the early part of 1910, but it might be inferred from the trust deed to the Montreal Trust Company, bearing date December 15th, 1909, that it must have been in existence in 1909. That fact, however, has no bearing upon the case.

Now, it is important to bear in mind, that on April 24th, 1913, the date of the expropriation, both the City of Quebec and the Quebec Gas Company appeared, on the Registry, to be the only parties having any real registered rights upon this property.

As the partial result of an agreement entered into on September 11th, 1916 (long after the expropriation) between the City of Quebec and the Quebec Power Company, it was among other things covenanted and agreed as follows, to wit:

"Et en considération de tout ce que dessus, la "dite cité (City of Quebec) cede et abandonne a "la dite Compagnie (the Quebec Railway, Light, "Heat & Power Company) toutes les prétentions "et tous les droits de propriété que la dite cité "peut avoir sur le terrain précédemment occupé "par la 'Quebec Gas Works' et connu sous le "numéro (1937 A) dix neuf cent trente sept A du "cadastre officiel pour le Quartier St. Pierre de la "Cité de Québec."

Under the provisions of sec. 8 of the *Expropriation Act*, by the deposit of the plan and description of this property on April 24th, 1913, such property became vested in the Crown; and under sec. 22 of the same Act, a like provision is made, and it is fur-

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ther thereby enacted that from such time the compensation money shall stand in the stead of the land, and that any claim thereto is converted into a claim to such compensation money. *The Queen v. McCurdy;*[1] *Partridge v. Great Western Railway Co.;*[2] *Dixon v. Baltimore & Potomac R. Co.;*[3] *Lamontagne v. The King;*[4] *Dawson v. G. N. & C. Railway;*[5] *Mercer v. Liverpool, St. Helen's & South Lancashire Ry. Co.;*[6] and *Halsbury.*[7]

On September 11th, 1916, the lands in question had, since April 24th, 1913, the date of the expropriation, become under the statute, the property of the Crown, and all mutations of this property subsequent to the expropriation are null and void on their face,—the only effect such mutations may have is between the parties to the deed itself, which at its best can be construed as a transfer to any right "to the said compensation money" which the City of Quebec may have had, and I hereby so find.

Then follows in this chain of title the deed of May 12th, 1917,—a deed passed a long time after the expropriation and even pending the instruction of the trial,—between the Quebec Gas Company and the Quebec Railway, Light, Heat & Power Company, Limited,—to confirm the statement therein mentioned, to the effect that the Power Company had, before January 1st, 1912, "already acquired and "taken possession of a certain part or parcel of the

[1] 2 Can. Ex. 311.
[2] 8 U. C. C. P. 97.
[3] 1 Mackey 78.
[4] 16 Can. Ex. 208.
[5] [1905] 1 K. B. 260, 273.
[6] [1904] A. C. 461.
[7] Vol. 6, p. 33.

"land in question with the approval and consent of "the Quebec Gas Company, and enjoyed the same "as its own and absolute property, and has always "been considered, even by the Quebec Gas Co., as "sole and absolute owner of the same. Further- "more, that no deed or instrument in writing was "executed at the time between the said parties to "state and establish the same, and that it is expe- "dient to then execute the deed."

All of what has just been said in respect of the deed of September 11th, 1916, may equally be said with respect to this deed of May 12th, 1917, and that in the result it is a transfer by the Quebec Gas Company to the Power Company of its rights to "the compensation money" herein, coming also within the ambit of sec. 22 of the *Expropriation Act*.

However, the contention of the Power Company goes beyond that. While it claims to have been the owner of the land in question before the expropriation, as the holding company, I should say they hold and own the shares of the Quebec Gas Company, and they ask that the compensation to be paid should be ascertained as if the property did belong to them, and as the Power Company is also the holding or parent company of the Montmorency & Charlevoix Railway, also holding and owning the shares of the latter, they conclude similarly.

The Power Company is the owner of the shares of the Quebec Gas Company, and of the Montmorency & Charlevoix Railway Company; the Power Company represents and is effectively nothing but the shareholders of these two companies.

Dealing first with that part of the claim made by the Power Company, as owner of the lands in question and described in this deed of May 12th, 1917,

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executed during the trial, I must confess I cannot accept, under the circumstances, the statement made in that deed, to the effect that the Quebec Gas Company had, as far back as January, 1912 (a carefully selected date, which would take the transaction prior to the expropriation), sold their property to the Power Company, in view of the fact that the latter is only the holding or parent company. Moreover, the inherent rights of the City of Quebec in this property had not passed to the Power Company until September 11th, 1916, also a long time after the expropriation. It is obvious and conclusive that this statement is but the result of a misconception of the respective rights between a holding or parent company and a subsidiary company, and the seemly result of an afterthought which originated only at the trial. Therefore, it must be again found, taking into consideration all these surrounding circumstances, and the allegations in its pleadings, that this deed can but amount to an agreement between the Power Company and the Gas Company, whereby the Power Company are made entitled to receive the compensation money for the lands expropriated. In other words, it is a transfer by the Quebec Gas Company of its rights, not to the land, but to the compensation money, as the transfer is made after the expropriation,—the whole pursuant to the provisions of sec. 22 of the *Expropriation Act.*

However, the Power Company makes a claim which, if it were allowed, would let in a very important element under the head of injurious affection to the Montmorency & Charlevoix Ry. Co., one of its subsidiary companies—the whole as more particularly set out in paragraph 13 of the Power Com-

pany's statement in defence, which reads as follows, to wit:

"13. L'expropriation en cette cause et la prise "de possession de sa Majesté a occasionné à la dé- "fenderesse des dommages considérables dans l'ex- "ploitation de son chemin de fer Montmorency et "Charlevoix, en le privant des immeubles expro- "priés, dont elle avait absolument besoin pour son "terminal a Quebec."

This is a claim made by the Power Company for damages alleged to be suffered by the Montmorency & Charlevoix Railway, a subsidiary company, for which the Power Company is holding the shares.

What is therefore the position of the Power Company in its relation to the Montmorency & Charlevoix Railway Company? The relation is nothing more than that of a shareholder in a corporate body is to a company. The Power Company holds the shares of that company, and is in the same position as a shareholder of the Montmorency & Charlevoix Railway Company, and as such can no more than an ordinary shareholder take an action for that company or defend an action against it. Any action on behalf of the Montmorency & Charlevoix Railway Company must be taken in its corporate name and not by one or all of its shareholders individually. Therefore, that part of the claim set up by the Power Company for any damages which might result to the Montmorency & Charlevoix Railway Company, not having been taken by that company in its corporate name, must obviously be dismissed.

Although the Montmorency & Charlevoix Railway Company is not a party to this suit and cannot be bound by this judgment, yet, as the voluminous evidence adduced in respect of the rights of that com-

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pany does not disclose any proprietary rights in the land in question, it was thought advisable under the peculiar circumstances of the case, to offer a few observations in this respect for the sake of argument only, which really become exclusively academic, since the Montmorency & Charlevoix Railway Company did not set up a claim in its corporate name. For instance, what is the position of that company? If the property expropriated herein did form part of the terminal of the Montmorency & Charlevoix Railway Company, it has already passed to the Crown under the provisions of 6-7 Geo. V., ch. 22, the Order-in-Council of August 4th, 1916, and the agreement of July 25th, 1916, made under the provisions of the said Act. This is too obvious. A summary perusal of the schedule to the Act and to the deed in question, and Schedule "C" thereof, will establish that point beyond controversy. Both the Quebec & Saguenay Railway, and the Quebec, Montmorency & Charlevoix Railway passed to the Crown under these instruments, "inclusive of its terminals in the City of Quebec."

If, on the other hand, as the case is, notwithstanding contention to the contrary, the property in question did not and does not form part of the Terminal,—and even if part of it was used for the company's *stone business*, with or without the assent, consent or tolerance of the Quebec Gas Company, or those controlling that company,—it does not make the land part of the Terminal.[1] It only shows, as will be hereafter referred to, that this property was a discarded gas property, where gas had not been manufactured for several years (since 1910), and that the property was not a gas proposi-

[1] See Cripps on Compensation, 5th ed., p. 148.

tion or a going concern as such; but a property practically idle and which on the market would sooner or later be taken by some of the railway companies that had already property in the neighbourhood.

It may also be said casually that these damages, in the nature of injurious affection to the Montmorency & Charlevoix Railway, and the Quebec & Saguenay Railway, are grossly exaggerated by some of the witnesses, when it is actually established that only a very small portion of the land expropriated of the Quebec Gas Co., property was used for this stone business, and that the property is entirely separate and distinct from the railway company—a street lying between both properties. Moreover, it is difficult to conceive that the alleged congestion at the Quebec Terminal did actually exist, in view of the fact which glaringly struck me on the visit to the premises during the trial at the request and in the company of counsel for all parties, that the company has almost right alongside of its station, as shown on the plan, its workshops. If there were actual congestion in the yard, at the Terminal, would not a company conducted as it is on a sound business basis, have transferred these shops to their Limoulou yard to give them more space at the Terminus? But it is unnecessary to elaborate upon this point, since I have found, for the reasons above mentioned, that the Power Company has no *locus standi* when claiming damage to the Terminal of the Quebec, Montmorency & Charlevoix Railway. There can be no compensation for injurious affection, if no legal right is interfered with.[1]

[1] Cripps on Compensation, 5th ed. 140.

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Proceeding now to the examination of the evidence and the ascertainment of the compensation to be paid for the land so taken, it will be seen that quite a few engineers were examined on behalf of the defendants, and their evidence tends to show that the Quebec Gas Company's land could be added with advantage to the railway companies' property already owning land in the neighbourhood. Two of these engineers are of opinion that the Quebec Gas Company's property would be more valuable to the Canadian Pacific Railway Company, or the National Transcontinental, than to the Quebec Railway, because it is adjoining the C. P. R., and that for the Quebec Railway to use it effectively and economically it would be necessary to acquire some city property and some property from the Quebec Harbour Commissioners.

In view of what has already been said it becomes unnecessary to go into this class of evidence, more than repeating here what I have already said, and that is that this property decidedly falls within the class of property which sooner or later would be taken by some of the railway companies that have already property in this neighbourhood.

On behalf of the defendants the following witnesses were heard upon *the question of value*: Henry G. Matthews, George W. Parent, Fitzjames E. Browne, George Beausoleil and Lucien Bernier.

Henry G. Matthews, the general manager, testified that if an offer of $50 per square foot had been made on behalf of the holding company he would have advised not to accept it. But if $75 a square foot had been offered he would have advised to accept it,—that amount representing over $4,000,000,—which

would have "allowed us to sell the railway for scrap and the Montmorency Railway go out of business."

Yes, this property of 62,558 1-3 feet at $75 a square foot would represent $4,681,875. Such a valuation calls for no comment, as it is of no help to a tribunal desirous to do justice in a conscientious manner.

George W. Parent, a resident of Montreal, who, however, in 1906, 1907 and 1908, made some subdivisions in Quebec, arrives at an average price of $14 a foot for the land in question. To establish this value he reasons in the following manner. He considers that the Canadian Pacific Railway and the Quebec Railway are both cramped for space, and that therefore the situation is different from that of an expropriation visited upon a private individual who could move his establishment to another place. He takes it that the only available block to replace the property expropriated is between Place d'Orleans and St. Paul Street, containing about the same area; and he concludes that the only price he could place upon the land taken would be what it would cost to replace it,—the price asked on the Ramsay-Henderson block,—that is $8 to $20—or, as he says, an average of about $14. He further adds that from a real estate standpoint, the block between Place d'Orleans and St. Paul Street is perhaps worth more, but the advantage of the Quebec Gas Company being near the water is a set-off.

Fitzjames E. Browne, a well-known real estate broker, of Montreal, prefaces his statement as to his valuation by stating he bases such valuation on common sense and on *what has been paid for extension of railroads in Montreal,* and concludes by saying the only way to arrive at the value of the property in question is what will have to be paid for adjoin-

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ing property to replace it. The sum of $20 a foot is asked for the corner of Henderson Street, and other owners ask $14. He fixes the value of the property expropriated at the average price of $15 a square foot. And on cross-examination he further states the prices asked on Henderson-Ramsay Street are of and in 1917, and he did not know what they asked in 1913, the year of the expropriation.

George Beausoleil, who has had experience as valuator both in Montreal and New York, states he visited the Quebec Gas property recently and seeing the advantage that the Quebec Railway has to be in a position to replace in the proximity the land expropriated, and that for so doing the company would have to pay $15,—the claimants would be entitled to recover $15,—*C'est une valeur de remplacement.* It is a reinstatement value, he says. He further adds, that out of two properties available to replace the land expropriated there is also what is known as the Clint and Young property, for which the same price would have to be paid as for the Henderson-Ramsay block.

Lucien Bernier, a resident of Montreal, who had known Quebec for 54 years, and resided near the Quebec Gas property for 20 years, says he is a real estate broker, with, however, a more extensive and special experience in respect of farms (*des terres*). He says the property in question is indispensable for the C. P. R., or the Transcontinental. The sum of $14 or $15 a square foot is asked on Henderson and Ramsay Streets, therefore he would value the land taken at $15, because it is a railway property.

This witness, it follows, seems to arrive at his valuation, both upon the reinstatement basis and upon seeking the value to the taker and not to the

owner. Both elements are erroneous in the present case.

On behalf of the Crown the following witnesses were heard on the question of value: Joseph G. Couture, Edmond Giroux, Joseph Samson, Gustave Proteau and Eugene Lamontagne.

Joseph G. Couture, Notary, of Quebec, with quite an experience to his credit in land transactions, says the property expropriated could be used for garage, warehouse, industrial and railway purposes. He bases his valuation upon prices paid for property at Quebec, in the neighbourhood of the land taken, and cites, among others, the following sales. In St. Peter's Ward, City of Quebec—as will be more readily understood by reference to Plan, Exhibit 3A—he relies upon:

Exhibit 4—Sale of the Dombrowski property, including wharves and buildings. Lots Nos. 2009 and 2010, sold in 1914 at $1.23 a square foot.

Exhibit 5—Same lot 2009 sold in 1915 to Harris Abattoir at $1.00 a foot.

Exhibit 6—Racy property, lot 2008, sold in 1910 at $1.95½ a square foot.

Exhibit 7—Sale of Amyot to Delisle, in 1909, of lots 1993, 1994, with extensive buildings, at $2.65 a square foot.

Exhibit 8—Sale of Piddington to Gorrie, in 1911, lot 2005, beach lot, at 65c a square foot.

Exhibit 9—Sale of Ritchie to Drouin, in 1911, lots 2008-2, and 2008A, at $1.00 a square foot.

Exhibit 10—Dupuis to Archer, in 1912, lot No. 2004, at $1.06.

Exhibit 11—Lamontagne to Mackenzie, Mann & Co., on June 5th, 1909, lot 2001, at $1.60. This is a sale repeatedly mentioned and often referred to as

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the Archer property, or the sale from Archer to the Canadian Northern. This transaction is somewhat apposite to the purchase in question herein, in that it was bought by a railway at the extreme north-eastern end of its yard, to enlarge it. The property was partly covered with wharves, with access on the one side to the Louise Basin, and on the other to St. Andrew Street.

Exhibit 12—Sale of Quebec Seminary to Lake St. John Railway, in 1903, of lot 2006, a beach lot, at 40 cents.

Exhibit 13—Sale between Renaud and Lemoine, in 1906, of lot 2011b, with buildings, at $1.45.

Exhibit 14—Sale by Renaud to the Canadian Northern Railway Co., in 1907, of lots 2011e and 2012a, no buildings, at $1.90 a square foot.

Coming now to St. Roch Ward.

Exhibit 15—Sale of Moraud to the Quebec Progressive Realty Co., in 1912, of lot 886, adjoining the C.P.R. yard, at $1.42, i.e., $60,192, with buildings of a value of at least $15,000.

Exhibit 16—Sale, Cie. Carrier to Moraud, in 1911, of same property for $60,000.

Exhibit 17—Sale, Archer to Leclerc, in 1909, of lot 886, at about $1.06 a square foot.

Exhibit 18—Sale, Walcot to McKay, in 1913, of lot No. 733a, at $1.83 per square foot, with buildings.

Exhibit 19—Sale of Delisle to the Quebec & Lake St. John Railway Co., in 1906, of lot 557-I., etc., at Limoulou, at 4½c a square foot. The witness also relied upon some other sales, and at this stage of the case counsel for the Crown put in the following exhibits:

Exhibit 21—Judgment *re The King v. Peters*,[1] July

[1] 32 D.L.R. 692, 15 Can. Ex. 462.

24th, 1914, respecting lots 576a and 577, at $2.08.

Exhibit 22—Dorchester Electric Co. to Transcontinental, lot 578, at $2.08 per square foot.

Exhibit 23—Stadacona Land Co. to Transcontinental, part of lot 579, at $1.87 per square foot.

Exhibit 24—Stadacona Land Co. to Transcontinental, part of lot 579, at $1.87 per square foot.

Exhibit 25—Sale of Martel to Drouin, lot 719, in 1911, of 62,380 square feet at $60,000.

Exhibit 26—Sale of Dunn to Drouin, in 1906, lot 720, of 16,800 feet for $18,000.

Then witness Couture concludes in fixing upon the land taken a value of $2.25 a square foot.

Edmond Giroux, basing his valuation upon sales in the neighbourhood, values the land taken, with the buildings thereon erected (which have been by consent admitted at the value of $32,000) at $2.60 a square foot. However, he values the land at $2.00 and the buildings at $42,600.50—which would bring the balance of the land slightly below $2.00 a foot.

In the course of a valuation made by this witness of the value of the C.P.R. lands in that neighbourhood, with the view of establishing a value of that property for a Union Station, he placed a value of $3 a foot on St. Paul Street, for a depth of 125 to 150 feet, at 50c a foot, from the Harbour Commissioners' line to the south of the projected street on plan 3a, and the space between at $1.50 a square foot.

He says he could have bought Madame Fortin's property on the 15th of February, 1913, between Henderson and Ramsay Streets, lot 1946, at $5.13 a square foot, including buildings, leaving the land at $3.37. Lot 1948 was sold, with buildings, at between $6 and $7 a square foot.

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Jos. Samson assumed, in arriving at his valuation, that the Quebec Railway Co. were the owners of the property taken, and that the Gas Company was not a going concern, and basing his valuation upon the figures paid on sales in the neighbourhood, valued the property taken at $2.50 a foot. In this valuation he allowed 50c a foot for damages, taking into consideration the Electric Company needed it.

Gustave Proteau bases his valuation upon sales in the neighbourhood, taking also into consideration the fact that the gas property is detached from the yard of the Quebec Railway. He values the land taken at between $2.25 and $2.50 a square foot.

Eugene Lamontagne, taking into consideration the prices paid for sales in the neighbourhood, values the land taken at $2.25 to $2.50. He knows the property for a long while, and says that before he last visited the property, with witness Couture, he thought it was worth from $2.50 to $3; but, when he went there, he came to the conclusion it was only worth $2.50.

This concludes the evidence upon the question of value.

In view of the conclusion arrived at on the question of law above referred to, it is unnecessary to go into any other part of the evidence.

Now, this property must be valued and assessed, as at the date of the expropriation, at its *market value* in respect of the best uses to which it can be put, taking into consideration any prospective capabilities, potentialities or value it may obtain within a reasonably near future.

Market value is defined in the case of *The King v. Macpherson*[1] as: "The value that a vendor not

[1] 15 Can. Ex. 215 at 216.

"compelled to sell, not selling under pressure, but "desirous of selling, is to get from a purchaser not "bound to buy, but willing to buy."

Most of the engineering evidence, if I may call it so, adduced on behalf of the claimants, is to show the Quebec Gas property is an advantageous piece of land for a railway operating as the Montmorency & Charlevoix and the Saguenay companies, and that from being surrounded by several railways, this property has acquired special adaptability for railway purposes. It was obviously the ultimate fate of the property to be acquired for railway purposes. It is perhaps of more value to the C. P. R., whose yard and station are immediately adjoining it, than it would be to the Quebec Railway (or the Montmorency & Charlevoix Ry., etc.), from which it is separated by a street, and which would have had to acquire that triangular piece of property to the north belonging to the Quebec Harbour Commission to be in a position to work and use this property in a business-like and economic manner, and that would tend to make it rather expensive for them. And the Montmorency & Charlevoix Railway and the Quebec & Saguenay Railway have almost already passed to the Crown under the statute above mentioned.

There may, indeed, be here competition in the prospective purchasers of this property by railway companies owning property in this neighbourhood; but in no sense should the compensation to be awarded be more than the price that legitimate competition by purchasers would reasonably force it up to. And when it is claimed that the property has a high value on account of its special adaptability for railway purposes, it is not claimed that such special purposes are limited to the C. P. R., or the Transconti-

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nental; but that the situation of the land in the neighbourhood of railways will bring these railway companies as prospective competitive purchasers, and in such a case it becomes an element in the general value.

However, when the owner of such property is given more than the price or the value of his property to him for his own purposes and all that anyone else would offer him, except the taker, what else can he ask, if not part of the value of that land to the taker,—and in no case should the value be the value to the buyer, but the value to the seller. *Fraser v. City of Fraserville,*[1] and the *Sidney* case.[2]

In the present case the land expropriated was of very little value to the Quebec Gas Co., the company having for a number of years discontinued manufacturing gas there—it was a discarded gas proposition, and the property would be of much more value for railway purposes. Therefore, the Crown has offered more than the land is worth to the owners for their own purposes, assuming the full title is in the Gas Company. Moreover, the owners are offered the market value of this land in which its special adaptability for railway purposes is an element. This special adaptability does not, however, reside in its conformation or topography, as in the *Lucas* case, but from being in the neighbourhood of several railways. In the amount offered by the Crown is merged both the intrinsic value and the market value of the land, including the special adaptability for railway purposes due to prospective competitive purchasers; as special adaptability is nothing more than an element of the market value, and forms part

[1] [1917] A.C. 187, 34 D.L.R. 211.
[2] [1914] 3 K. B. 629.

of the same. Indeed, this element of potentiality, or prospective capability, call it what you may, is after all nothing but an element in the market value itself. *Sidney v. North E. Railway;*[1] *Cedar Rapids* case.[2]

In the *Sidney* case will be found a very instructive discussion on the question of special adaptability, in which Rowlatt, J., says:

"Now, if and so long as there are several compe-
"titors including the actual taker, who may be re-
"garded as possibly in the market for purposes such
"as those of the scheme, the possibility of their of-
"fering for the land is an element of value in no
"respect differing from that afforded by the possi-
"bility of offers for it for other purposes. As such it
"is admissible as truly market value to the owner
"and not merely value to the taker. But when the
"price is reached at which all other competition must
"be taken to fail to what can any further value be
"attributed? The point has been reached when the
"owner is offered more than the land is worth to
"him for his own purposes and all that anyone else
"would offer him except one person, the promoter,
"who is now, though he was not before, freed from
"competition. Apart from compulsory powers the
"owner need not sell to that one and that one would
"need to make higher and yet higher offers. In
"respect of what would he make them? There can
"be only one answer—in respect of the value to him
"for his scheme. And he is only driven to make
"such offers because of the unwillingness of the
"owner to sell without obtaining for himself a share

[1] [1914] 3 K. B. 629.
[2] 16 D.L.R. 168, [1914] A.C. 569, 576.

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"in that value. Nothing representing this can be "allowed."

The evidence adduced on behalf of the defendants, eliminating the testimony of the manager, whose valuation would amount to $4,681,875, is by residents of Montreal, and partly based upon mutations of property in Montreal, which is obviously another proposition than the value of property in the City of Quebec. Moreover, their evidence is arrived at entirely upon the reinstatement basis, which does not apply in a case of this kind. This doctrine of reinstatement is thus defined by *Cripps, on Compensation,* 5th ed., p. 118:

> "There are some cases in which the income de-
> "rived, or probably to be derived, from land would
> "not constitute a fair basis in assessing the value
> "to the owner, and then the principle of rein-
> "statement should be applied. This principle is
> "that the owner cannot be placed in as favorable
> "a position as he was in before the exercise of
> "compulsory powers, unless such a sum is as-
> "sessed as will enable him to replace the premises
> "or lands taken by premises, or lands which
> "would be to him of the same value. It is not
> "possible to give an exhaustive catalogue of all
> "cases to which the principle of reinstatement is
> "applicable. But we may instance churches,
> "schools, hospitals, houses of an exceptional
> "character, and business premises in which the
> "business can only be carried on under special
> "conditions or by means of special licenses. In a
> "case heard at Edinburgh it was sought to extend
> "the principle of reinstatement to a case in which
> "a portion of a public garden had been taken, but

"such a contention was rightly set aside by the "arbitrator (Lord Shand)."

See also *Browne & Allan, Law of Compensation.*[1]

The doctrine of reinstatement does not apply to a case of this kind. The property was not a going concern manufacturing gas.

Then this basic element of the reinstatement valuation bears also on its face an apparent fallacy, since it rests upon the assumption the market price of these properties rests upon what the owners on Henderson or Ramsay Streets we are told said, in 1917, they would ask for their property, which is entirely built upon. True, the buildings are of no value to the taker, the party expropriating; but they represent to the owner a substantial value which forms part of the market value of such property, and it would be another reason to differentiate the price of these as compared to the Gas Company's property. And it may well be assumed that if these proprietors on Henderson and Ramsay Streets were so approached they knew the actual position of affairs in that neighbourhood in 1917 when seen by these witnesses or other persons; but they are not entitled to share in the value of the land to the taker. Then, if not to rebut, to mitigate this inflation in the price of properties in the block, we have the testimony of Giroux, who says that in February, 1915, he could have bought lot 1946, in the Henderson and Ramsay block, at $5.13 a square foot, including buildings, and which without the buildings would bring the land down to $3.37, and that lot 1948 was sold at $6 or $7 with buildings.

The evidence of the claimants is therefore adduced entirely upon a wrong basis, a wrong princi-

[1] 2nd ed., pp. 103, 656.

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ple, leaving the court without any help therefrom.

The Crown's evidence appears to be based upon the value of properties in the neighbourhood, and while with perhaps one exception where the buildings were of great value, the prices paid were all below the amount of their valuation of the present property, although the block taken is large as compared to some of these sales and that a smaller piece usually commands a larger price than a large block proportionately.

The claimants' and the Crown's evidence with respect to value is very far apart. It runs from $75 and $14 to $2 a foot. How can these valuations be best reconciled, without, however, overlooking the claimants' evidence is on a wrong basis and of no help to the court? What can help out of this conflict and difficulty, if not sales made in the neighbourhood. What can be better evidence of the market value of the present parcel of land, if not the actual and numerous sales made by neighbouring owners, and some of them under similar circumstances. These sales are a determining element to be guided by,—and what can be more cogent evidence than the sales of almost adjoining properties? *Dodge v. The King;*[1] *Fitzpatrick v. Town of New Liskeard.*[2]

Indeed, while the claimants in a case of this kind are entitled, not only to the bare value of their property, but to a liberal compensation, it does not follow that because this property is expropriated by the Crown, and that the compensation is to be paid out of the public exchequer, that the Crown in matters of expropriation is to be penalized, and it is not because the owners claim a very extravagant amount

[1] 88 Can. S. C. R. 149.
[2] 13 O. W. R. 806.

that they should be paid a larger amount than the market value of that property.

Now, I have had the advantage of viewing the premises in question, in the company of the counsel for the respective parties at bar, and after weighing the opinion of the valuators, and giving effect to such part of the evidence as appears credible and trustworthy, and taking into consideration the numerous sales of properties in the neighbourhood and the surrounding conditions, I have come to the conclusion to allow, not the bare value of the land, but the most liberal and generous price possible under the circumstances, namely, the sum of $3 a foot, this amount to include all damages whatsoever, if any, resulting from the expropriation, as well as the usual 10 per cent. for compulsory taking; and in arriving at that figure, due consideration has been given to the enhanced value flowing from the element of special adaptability which went to establish the market value of that land at such a high price.

The area expropriated of 62,558 1-3 square feet, at $3 a foot, will represent the sum of..$187,675.00
To which shall be added the sum of..... 32,000.00
as representing the value of the buildings, as above set forth.....

Making the sum of.....$219,675.00

Undoubtedly the property was taken against the will of the owners, and in consideration of this compulsory taking, ten per cent. has been included in the liberal amount allowed for the land taken. I advisedly say for land taken, because the value of the buildings having been arrived at by consent, and the parties are praying for judgment therefor, and were ten per cent. added to the value of the buildings the

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owners would be given that which they do not ask—it would be allowing *ultra petita*. Therefore ten per cent. has been allowed on the amount of the compensation for the land only.

The Power Company is the transferee to the compensation money, as above set forth, of such rights the City of Quebec had in this property at the time of the expropriation, under the deed above referred to. Mr. Morgan, K.C., counsel at bar for the Gas Company, states he is quite willing that the compensation money herein should be paid either to the Quebec Gas Company or to the Power Company, Therefore, it becomes unnecessary to investigate and ascertain the compensation in respect of the respective rights of these two companies and segregate the same. The moneys will, therefore, be made payable to the defendants, the Quebec Gas Company and the Power Company, upon giving good title to the Crown, the Trust Companies releasing their pledge or lien upon the property, if they have any.

Therefore, there will be judgment as follows:

To wit:

1st. The lands expropriated herein are declared vested in the Crown as of April 24th, 1913.

2nd. The compensation for the land taken, for the buildings thereon erected, and for all damages whatsoever, if any, resulting from the expropriation, is hereby fixed at the sum of $219,675, with interest thereon at the rate of five per centum per annum from April 24th, 1913, to the date hereof.

3rd. The defendants, the Quebec Gas Company, and the Quebec Railway, Light, Heat and Power Company, are entitled to be paid the said sum of $219,675, with interest as above mentioned, upon giving to the Crown a good and satisfactory title,

free from all hypothecs and incumbrances whatsoever, including a release from the Royal Trust Company and the Montreal Trust Company, respectively.

4th. The Quebec Gas Company is further entitled to its full costs as against the plaintiff on the issue traversing the information. The City of Quebec, and the Quebec Light, Heat and Power Company, are, as against the plaintiff, entitled to such costs necessarily and legitimately incurred in respect of such rights the defendant, the City of Quebec, had in the lands herein. The Crown will recover, as against the Quebec Light, Heat and Power Company, the general costs on the contention raised by the latter, the said costs to be set off, *pro tanto,* as against the other costs the Power Company is recovering.

The Royal Trust Company is also entitled, as against the plaintiff, to its costs on the appearance of counsel at trial, under the circumstances above set forth. There shall be no costs to either party on the issue as between the Quebec Gas Company and the Quebec Railway, Light, Heat and Power Company.

*Judgment accordingly.**

Solicitors for plaintiff: *Pentland, Stuart, Gravel & Thomson.*

Solicitor for Quebec Gas Co.: *E. A. D. Morgan.*

Solicitors for City of Quebec: *Chapleau & Morin.*

Solicitors for Royal Trust Co.: *Taschereau, Roy, Cannon & Co.*

Solicitor for Quebec Railway, Light, Heat & Power Co.: *L. G. Belley.*

* Affirmed on appeal to Supreme Court of Canada, May 7, 1918.

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May 27.

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

PLAINTIFF,

AND

LA COMPAGNIE DES CARRIERES DE BEAUPORT, LIMITEE, A BODY CORPORATE, OF THE PROVINCE OF QUEBEC,

DEFENDANT,

AND

ALFRED ROBITAILLE,

ADDED DEFENDANT.

Expropriation—Compensation—Market value—Right to street—Title —Reversion.

For purposes of compensation lands must be assessed as of the date of the expropriation, at their market value, in respect of the best uses to which they can practically and economically be put, taking into consideration any prospective capabilities. The best criterion of the market price is the price at which property in the neighbourhood changes hands in the ordinary course of business.

2. Mere interference with a public right to travel upon a street, the person claiming compensation therefor not having the fee or any predial rights therein, is not an element of compensation.

3. A reversionary right in favour of a vendor of the land materially affects the value of the land itself as compared with land the title to which is free of any encumbrances.

INFORMATION for the vesting of land and compensation therefor in an expropriation by the Crown.

Tried before the Honourable Mr. Justice Audette, at Quebec, May 10, 14, June 22, 1915.

J. E. Chapleau, and *A. Rivard,* K.C., for plaintiff.

E. A. D. Morgan, for defendants.

AUDETTE, J. (May 27, 1915) delivered judgment.

This is an information exhibited by the Attorney-General of Canada, whereby it appears, *inter alia,* that certain lands belonging to the defendants, respectively, described in the information as Block A, Block B, and Block C, were taken and expropriated under the authority of 3 Ed. VII., ch. 71, for the purposes of the National Transcontinental Railway, by depositing a plan and description of the said lands, on April 15th, 1913, with the Registrar of Deeds, in the City of Quebec, within the Registration Division in which the same are situated.

No tender was made before the institution of the action. The Crown offered $5,634.13 by the information and the defendants by their amended plea claim $39,981.45. The question of title is contested and the *onus probandi* is placed upon the defendants, who claim title to the said lands.

The following is a brief summary of the evidence adduced at trial on behalf of both parties.

On behalf of the defendants, the following witnesses were heard, viz.: Alfred Robitaille, Henry G. Matthews, Camille J. Lockwell, Charles W. Bell, Malcolm J. Mooney and George Beausoleil.

Alfred Robitaille, the president of the defendant company, and who is the predecessor in title of the defendant company for part of the lands expropriated, testified that in 1881 he erected upon part of the premises in question a vinegar factory, which was destroyed by fire a few years ago. The actual date of the fire is not in evidence. The land in question is somewhat higher and raised as compared to the south, which was looked upon as swampy and marshy, and he contends that Block C is drained by the ditches of the C. P. R. track to the north.

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He values Block A at 60 cents a square foot, as suitable for a shoe factory,—Block B, on Dumesnil Street, at 60 cents a foot, and the back part thereof at 30 cents a foot; Block C he values at $1 a foot,—as an industrial site, adjoining the C.P.R., where there is presently a railway platform.

He further claims the additional sum of 25 cents a foot upon the whole area of the land expropriated, for, as he puts it, having closed the streets to which he had a right—because he claims he had a right of way over and upon all the streets of St. Malo and that if the Crown take possession of his land, it has thereby the right to close the street—adding that the expropriated lands carried with them the right to the streets.

Henry G. Matthews, general manager of the Quebec Light, Heat & Power Co., values Blocks B and C, as manufacturing sites, at 75 cents to $1 a square foot, and Block A at half of the value placed on Blocks B and C. He says that at the end of 1911, or beginning of 1912, he was looking for a site for a tobacco factory and that he started from the C. P. R. Station to about half to three-quarters of a mile east of these premises and that he could not get land for less than $1.90 a square foot. He, however, bought at St. Malo about 3-8 of a mile southeast of this property, without any possibility of access to the railway siding in question for a car barn and paid 30 cents a foot.

Camille J. Lockwell, who is in the real estate business for five years, values Block A at 60 cents to 75 cents a foot, for private residences—for commercial and residential purposes—residences and shops. Block B he values at 60 cents to 75 cents a foot on

Dumesnil Street and at the back at 40 cents to 50 cents. Block C he values at 75 cents to $1 a foot, as an industrial site, because it has not much value for residential purposes. He places that value upon C, considering the high level of ground, the access to the railway and the railway platform. He, however, says that since 1913 he knows of no factory being established in Quebec,—adding that a number of his clients are ready to give away sites for industrial purposes. He owns Jacques Cartier Park, where lots are sold at 50 cents a foot, payable in 10 years without interest.

Charles Bell values Block C at $1, the same as his own property on St. Valier Street; Block B at 75 cents a foot for the whole block—or would ask $1 for the front on Dumont St. and 75 cents a foot for the back, and Block A he values at 75 cents a foot.

He sold in the fall of 1914 on St. Valier Street—at the place shown on the general plan filed of record—a lot of 30 x 70 feet, at $1, equal to $2,100. However, the witness did not care to disclose the name of the purchaser, who happened to be one of his relatives. The deed, he says, has not as yet been passed, but the money passed.

Malcolm J. Mooney, who is in the real estate business since 1911, values Block C at $1 a foot, thinking it would be worth that for manufacturing purposes, —it would be suited for a railway station. He values Block A at 65 cents to 66 cents as suitable for small factory; Block B, on Dumesnil Street, he values at 65 cents to 66 cents and the back at 30 cents to 33 cents. The lots at Vandyke,—situate to the northeast of the property in question, are selling at $500 to $700 a lot of 30 x 80,—10 per cent. cash and the balance at so much a month for 8 years, and some,

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the shortest, for a period of 5 years. He says he would not care to put a price on the land in question as building lots; they would be very cheap, about 25 cents a foot,—it would be difficult to handle them as building lots.

George Beausoleil was assessor for the City of Montreal for 5 years and for the last 2 years is a member of the firm of Beausoleil Limited, real estate brokers, in Montreal.

He values Block C at $1 a foot, taking into consideration the advantage of the high level of the land, the platform and the ditches of the C. P. R. draining the land. And he bases his valuation upon the value of industrial sites at Montreal,—adding that in the City of Montreal these lands would be worth more, but he compares them with land similarly situated in the Banlieue. The Block C is well adapted for industrial purposes, but a larger depth would be desirable. He values Block A at 50 cents to 60 cents a foot. It would be suitable as industrial site, for a shoe factory, but it would have to be 5 storeys high. Not large enough for a biscuit factory. He values Block B at 50 cents a foot, as a reasonable valuation.

He compares the value of the premises in question to the Turcot Village, Coté St. Paul, Montreal, where there is a large block of land; part of it is marshy and part raised. The former part is selling at 30 cents and the latter at $1. However, he added, no sale took place at $1; it is 90 cents which is asked. They have waterworks and Turcot Village forms part of Montreal since two or three years ago.

Speaking of Block C, on cross-examination, he says it is difficult to establish the value of this property, it depends upon the use one wants to make of

it. It is adjoining the C. P. R. and that is why I gave it a higher value. He looks upon values in the Banlieue of Montreal as the same as Quebec. He admits he does not know the value of property in Quebec and its surroundings and has no personal knowledge of any sales at Quebec in 1912, 1913 and 1914,—nor does he know anything during these years respecting the starting or closing down of factories in Quebec.

This closes the defendant's evidence.

On behalf of the Crown the following witnesses were heard, viz.: Joseph J. Couture, Eugene Lamontagne and Joseph Savard.

Joseph J. Couture, a notary public with a large experience to his credit and who is familiar with the sales of property in the neighbourhood, values Block A at 15 cents a foot; Block B at 15 cents on Dumesnil Street and 12 cents on the south, and Block C he values at 15 cents.

He compares the value of the lands in question to those on Park St. Valier, situated quite close, to the northwest of the C. P. R. track and which are also bounded on the east by Lesage Street, and says that in Park St. Valier lots of 2,040 feet are selling at $600—that is, at $1 weekly, without interest. He cites lots 1 and 2, corner Deslaurier and Lesage Streets, where two lots of 3,960 feet were sold on June 16th, 1913 for $1,400, at $1 weekly, without interest. This sale is made at $700 a lot, of which $355.03 represent the interest and the capital is represented by the sum of $344.97—showing the sale at 17¼ to 17½ cents a square foot, and he considers these two lots better situated than the lands expropriated, because they are on Lesage Street, to the north of the C. P. R. track, carrying with it the ad-

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vantage to go to St. Valier Street—the principal commercial street in St. Roch—without crossing the railway track. They also have the waterworks and sewers. Lots of 2,040 feet, at other places on St. Valier Park, are also sold at $400, $350 and $300. In a $600 lot the interest is represented at $322.24, under weekly payments. The land expropriated is subdivided into building lots and he has valued them as such,—and Block C is too small to be used for a factory; it is disadvantageous for that purpose and he does not believe it could be sold as such. From 1910 to April, 1913, there has been no demand for factory sites; the last factory establishment was the steel works, between Deslaurier Street and the C. P. R. From Exhibit 4 it will be seen that, on April 9th, 1912, Perodeau sold to the Transcontinental Railway a large piece of land, to the south, immediately adjoining the land expropriated and of which they formerly formed part, at $1,000 an acre, or about 3½ cents a square foot. The whole of the lands taken could not be used for industrial purposes, on account of the streets which separate the several blocks from one another.

Eugene Lamontagne, real estate at Quebec, is the owner of two parks: Park St. Valier and Domaine Lairet. He is interested in four real estate companies, of which he is manager: one owns lands at Charlesbourg, outside the city limits; another on Ste. Foye Road, called "Park Quebec," another called Park St. Malo and the fourth one at Regina, Sask. He sold, in the name of Delaney (Exhibit 5) to the Transcontinental, on April 18th, 1913, at 12½ cents a square foot, a piece of land about 2,000 feet west of the present premises and immediately to the east of the Bell Road. He began selling in the St.

Valier Park in 1908 and has almost sold every lot. Out of 140 lots, he has between 20 and 25 left. In 1913 he was selling lots on Lesage Street at $600 and $700, on weekly payments of $1 without interest, which would represent between 28 to 30 cents a square foot.

He values Blocks C and B, for building purposes, excepting the corners, at 15 cents a foot and the corners at 18 cents; and the piece behind, in B, he values at 10 to 12 cents a square foot. He values Block A at 15 cents and the corners at 18 cents. Even if there were a demand for factory sites, he is not ready to say the land in question would be worth more than his valuation, not even sure it would fetch as good a price. There is the Pion factory, closed since 4 or 5 years ago, containing 21,000 feet, with a 3 storey brick building, on Prince Edward Street, close to the river, the railway, and closer to the city, which could be purchased at $2 a foot,—and that price would not quite cover the building, so that the land would, at that figure, go for nothing. No purchaser has as yet been found. St. Malo Park is to the east of the Bell Road, and the reason why we sold these lots and the Delaney lot and the lots on the St. Valier Park is because people had confidence in the building of the Transcontinental shops.

Joseph Savard, assessor for the City of Quebec for the last 23 years, values Block C at 18 cents a square foot, Block B at 12 cents, and Block A at 15 cents,—stating that these prices are what is called the market prices, the price at which they can be purchased. The defendants' lands are worth 50 per cent. less than the Bell lots above referred to. If the whole of the Bell property were sold at $1 a foot, it would fetch the abnormal price of $3,525,000; taking the whole property it would be worth 2 and

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3 cents a foot. He considers that the St. Valier Park lots, on Lesage Street, are worth more than the defendant's lands. He says that Block C is too far from the centre of the city for manufacturing purposes. The Gas Works, immediately adjoining to the east, are injurious to the value of the defendants' property, and residents of that neighbourhood have already complained to him of such objection.

This closes the evidence.

Now, the lands in question must be assessed as of the date of the expropriation, at their market value, in respect of the best uses to which they can practically and economically be put, taking into consideration any prospective capabilities they may obtain in a reasonably near future. From the perusal of the evidence, it clearly appears that the witnesses of the defendants and those of the Crown are very far apart respecting their opinion as to the market value of the lands in question. Should Block C be assessed on the basis of industrial property? Witness Matthews thinks it should, because he said in 1911 or 1912 he looked for a site for a tobacco factory from the C. P. R. Station to ¾ of a mile of the property in question, and yet we have in evidence that at that tme, within that very area, the Pion property was on the market for sale. Another witness for the defendants, Lockswell, says that he knows of no factory being established in Quebec since 1913, and that a number of his clients were ready to give away for nothing sites for industrial purposes — deriving truly from such gifts value to their adjoining lands,—but all of this would go to show that the market for industrial properties was not very active and that tendency to give land under such circumstances would not go towards enhancing prices for that class of property. The wit-

ness Bell's sale upon his own property, to one of his relatives whose name he did not care to disclose, with no deed executed, but money passed, seems to be shrouded with such mystery that it cannot be used as a true test. Then witness Mooney places a high price upon the property as fit for manufacturing purposes, thinking also Block C could be sold as a railway station and that if sold under its subdivision as buildings lots it would be sold for very little, say 25 cents a foot. And finally we have witness Beausoleil who admits very frankly he does not know the value of property in Quebec and its surroundings, and that he has no personal knowledge of any sale at Quebec in 1912, 1913, or 1914. He establishes his valuation by comparing the value of the property in question to the value or prices paid in Montreal out in the Banlieue, outside of the city limits and more especially with Turcot Village, which is selling somewhat lower than his valuation of the defendants' property, and which he finally tells us is within the city limits. To use the language of Mr. Justice Idington, in the case of *Dodge v. The King*,[1] "If "opinions, regardless of knowledge, or means of "knowledge and plainly without knowledge, of a wit-"ness must be accepted as fact," then this high valuation of the defendants' witness must prevail.

How can this material conflict between the plaintiff's and the defendants' evidence be better reconciled, if not by accepting and using the prices at which properties in that neighbourhood are being sold and were being sold at the date of the expropriation? The best criterion, indeed, of the market price of these lands is the price at which property in that neighbourhood changes hands,—that is what goes to establish the true market price. The evi-

[1] 38 Can. S.C.R. 149 at 158.

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dence of witnesses Couture and Lamontagne is entirely based upon sales in the immediate neighbourhood, and their evidence must therefore be accepted in preference to opinion evidence standing by itself, resting on opinion give in the abstract, so to speak. What really establishes the market price of real property is on the one hand the offer and on the other the demand. No such demand as would enhance the value of property has been proved. Indeed, on the whole, the contrary has been established. The large area known as San Bruit, the land immediately adjoining on the south of the property in question, was sold for the Transcontinental in August, 1912, at $1,000 an arpent, which would represent about 3 24-100 cents a square foot.

After carefully considering the evidence, and after having the advantage of visiting the premises in question, accompanied by counsel for both parties, I have come to the conclusion that the prices paid for property in that neighbourhood should be used as a basis of the present assessment. That this property is worth about the same as, if not less, than the St. Valier Park property, but somewhat more than the Delaney property, near Bell Road. Therefore, a fair, reasonable and liberal compensation for these lands would be as follows, viz.:

Block A,—At 18 cents a foot.....$1,113.66

Block B,—The front part, on Dumesnil Street, 16,125 feet at 18 cents $2,902.50

And the balance of the Block, to the south, 13,975 feet, at 15 cents 2,096.25

$4,998.75

Block C,—At 20 cents a foot, valuing it a little higher, taking into consideration that the siding and the platform might make its purchase more attractive for certain purposes	2,132.80
	$8,245.21
To which should be added 10 per cent. for compulsory taking—the evidence showing indeed in this case that the defendants were unwilling to part with their property	824.52
	$9,069.73

Better lots, indeed, than on A, B and C are being sold at St. Valier Park, on Lesage Street, at 17½ cents. And why should Block C have that high value claimed by some of the defendants' witnesses, when some of them even say that if it is sold as building lots, it will go very cheap, and then the land is too narrow at the western end to be economically and practically used with advantage for a factory. Even if there were a demand for industrial purposes and that C could be sold as such, one of the witnesses says he is not sure that it would fetch, on that basis, as good a price as that he valued it at for building and commercial purposes, that is, for dwellings and shops.

The defendants further claim the additional sum of 25 cents a square foot, upon the whole area of the land expropriated, because the Crown closed the streets to which they had a right, claiming further they had a right of way over and upon all the streets of St. Malo, and that if the Crown takes possession

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of their land, it has thereby the right to close the streets, adding that the expropriated lands carried with them the right to the streets.

This is a somewhat extraordinary proposition. The defendants' lands were formerly part of that large subdivided area known in Quebec as Sans Bruit,—a subdivision made a great many years ago. When the owners of Sans Bruit subdivided this property they allotted a part for streets and a part for lots. In arriving at the price for such lots they must have included in the same the value of the streets opposite the lots,—because they were getting no ear-mark value or consideration for them from the purchasers of these lots. What the owners of Sans Bruit did, indeed, was to dedicate these streets to the public, and when the defendants, or their *auteurs,* acquired their property, such dedication to the public had been made for already a number of years. If anyone could, consistently with the circumstances, have any claim upon such streets it would be the defendants' vendors; but neither the vendors nor the purchasers of these lands have any right therein. In *Myrand v. Légaré,*[1] Sir A. A. Dorion, C.J., says: "Une propriété privée peut devenir "propriété publique, lorsqu'elle est déclarée telle "par une autorité compétente ou encore par la dédi- "cation que le propriétaire en fait pour l'usage du "public. Un chemin ou une route peuvent être "établis par un procès-verbal ou autre acte émanant "des autorités municipales, (autrefois des officiers "de voiries) conformément aux dispositions de la loi, "ou ils peuvent l'être par tout acte du propriétaire "indiquant clairement son intention de le céder au "public. Ainsi lorsqu' un propriétaire ouvre sur

[1] 6 Q.L.R. 120 et seq.

"sa propriété une rue ou une place publique et qu'-
"il y concéde des terrains en les désignant comme
"attenant à telle rue ou place publique, sans aucune
"réserve de son droit de propriété, il n'y a aucun
"doute, que par l'usage que le public en fait, cette
"rue ou place publique ne devienne propriété pub-
"lique, a l'usage non seulement de ceux qui y ont ac-
"quis des terrains riverains, mais a l'égard de tous
"ceux qui peuvent avoir a y passer, c'est-a-dire, a
"l'egard du public en général. Cet effet ne résulte
"pas de la convention faite avec les acquéreurs des
"terrains cédés, car alors il n'y aurait qu'eux et
"leurs ayant-cause qui pourraient exiger l'accom-
"plissement des conventions portées dans leurs
"contrats, ni de la prescription qui acquiert toujours
"une possession pendant une période détérminee
"par la loi, pour qu'elle puisse conférer un droit
"quelconque; ce qui imprime ce caractére de rue
"ou de place publique au terrain indiqué comme tel
"par le propriétaire, c'est la dédication ou l'aban-
"don qu'il en a fait au public par une déclaration
"expresse et qui recoit son exécution par l'ouver-
"ture de telle rue ou place à l'usage du public.

Page 123:

"Il n'est pas meme necessaire que cette dedication
"soit faite par ecrit; il suffit que les circonstances
"soient telles, qu'elles indiquent clairement que
" 'intention du proprietaire a ete de faire un aban-
"don de son terrain au public, pour qu'il ne puisse
"plus s'opposer a ce que le public s'en serve con-
"formement a sa destination.

"Les auteurs reconnaissent du reste que le public
"peut, comme un particulier, acquierir par la pre-
"scription la propriete d'un chemin. En effet si

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"un particulier acquiert, pa trente ans de posses-"sion exclusive, la propriete, d'un terrain qui ap-"partient a autrui, on ne voit pas pourquoi la pos-"session non interrompue du public, pendant trente "ans, ne lui ferait pas egalement acquerir la pro-"priete d'un chemin, d'une rue ou d'une place pub-lique."

See also *Guy v. City of Montreal*,[1] *Bourget v. The Queen*,[2] and *Jones v. Township of Tuckersmith*.[3]

At the date of the expropriation these streets were by dedication vested in the public, the defendants having neither fee nor predial rights of any kind therein, but merely enjoying in common with others of the public, the privilege of travelling upon the same and nothing more. Therefore, the right alleged to be interfered with must be found to be a right common to the public generally and for which an individual, affected by such interference, even in a greater degree than that sustained by other subjects of the Crown, is not entitled to any compensation. *Archibald v. The Queen*;[4] *The King v. MacArthur*.[5]

As already intimated, the Crown does not admit the defendants' title to the lands in question, and the defendants, by their counsel, contend they own the same, thereby taking upon themselves the burden of proof in that respect.

It having been found, in the course of the trial, that Alfred Robitaille, the auteur of the defendant company, still retained the ownership of some por-

[1] 25 L. C. J. 132.
[2] 2 Can. Ex. 1.
[3] 23 D.L.R. 569, 8 O.W.N. 344.
[4] 3 Can. Ex. 251; 23 Can. S. C. R. 147.
[5] 34 Can. S. C. R. 570.

tions of the lands expropriated, he was, by order of this court, made a party to this action and appeared represented by counsel. Having been made a party to this suit he filed of record, under the joint signature of his counsel and his own, a declaration reciting among other things that such of the lands expropriated, which at the date of the expropriation, appeared to belong to him really belong to the defendant company, and that the compensation money belongs to the said company, thereby further assigning to them all his right or claim thereto. That cured part of the title to a certain number of lots, leaving without any title lot 54, being a lane on Block B, including also No. 751.

Then there is also some doubt as to lots 55a, 55b, and 55c, there being no title to such lots under that description; but there is title to parts of lot 55, of which 55a, 55b and 55c are parts. Under Exhibit J, in 1881, "part of lot 55" was sold to Alfred Robitaille and Edouard Robitaille, who in turn, in 1882 (Exhibit G), sold the same with covenant to Patrick Lynott. And Patrick Lynott, in 1888 (Exhibit J), assigned and transferred a number of lots and both in items 1 and 4 of the said deed "parts of 55" come into the hands of the defendants. I think it may reasonably be inferred that under this description of parts of 55, these lots 55a, 55b and 55c passed to the defendants.

There is further upon lot No. 55 a mortgage by L. N. Carrier in favour of James Machider, the amount of a judgment for $402.01, with interest and costs, as mentioned in the registrar's certificate, together with a further hypothec on one undivided twentieth of lot 54, the lot for which no title has been shown.

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Then there is this further matter which has not been mentioned at the trial and which became known to this court only upon reading the chain of title and it is this. Under both Exhibits E and F, Alfred Robitaille, in 1898, purchased the lots therein mentioned, but did not pay the capital or purchase price of $450 and $300 respectively; but this capital remained in the hands of the vendors, subject to an annual rent until the payment of the capital of the rent. It is not in evidence whether or not the capital has been paid. If it is not paid, such capital should be paid out of the compensation money hereby fixed.

Furthermore, the sale to Alfred Robitaille and Edouard Robitaille, in 1881 (Exhibit I), is made subject, *inter alia,* to their erecting and operating upon the premises, within 6 months from the date of sale, a vinegar factory. And it is further equally covenanted thereby that in case the building ceased to be employed as a shop or factory, as well also in case they would be destroyed either through old age or otherwise, that the said lands would revert *de plein droit* to the vendors. When did the fire destroying the building take place, and had the failing to be rebuilt in the 6 months first assigned the effect to revert the property to the vendors?

These are all matters that were not mentioned or raised at the trial and upon which the court would think advisable to hear counsel before finally pronouncing upon the same. Indeed, the question of reversion of the property under certain circumstances should have been made known to the witnesses before they placed any value upon this property; because the nature of such a title goes to the value of the land itself and tends to decrease its

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value as compared with land held under a fee free from any flaw or *alea* of any kind.

On March 15th, 1915, the sum of $4,500 was paid by the plaintiff to the defendant company on account of the compensation money herein.

Therefore, there will be judgment as follows:

1st. The lands expropriated herein are declared vested in the Crown from the date of the expropriation.

2nd. The compensation for the lands expropriated and for all damages resulting from such expropriation is hereby fixed at the sum of $9,069.73, with interest thereon from April 15th, 1913.

3rd. The defendants, upon their joint signatures, are entitled to be paid, such part of the established compensation as will remain as a balance, after deducting therefrom the said sum of $4,500, plus the value represented by lot 54, including No. 751, for which no title has been shown, unless, however, the defendants succeed in proving title, as hereinafter mentioned, the whole upon giving to the Crown a good legal and sufficient title, free from all encumbrances whatsoever, and more especially upon releasing and freeing, 1st, the mortgage on lot 55; 2nd, the mortgages or hypothec of *bailleur de fonds* under Exhibits E and F; 3rd, upon satisfying the Crown respecting the clauses of their title creating reversion under the circumstances therein mentioned; and 4th, upon releasing the mortgage on lot 54, in case only the defendants establish title thereto.

And failing the defendants to be able to give such title free from all encumbrances to the satisfaction of the Crown, and failing the parties to be able to

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adjust among themselves this question of title, leave is hereby reserved to either party, upon giving 10 days' notice to the other, to again bring the matter before this court for further adjudication upon the question of title, with leave to hear any further evidence that may throw light upon the matter and to be heard upon the whole question of title, but of title alone, the question of the assessment of the compensation money having been already finally settled so far as this court is concerned.

5th, the defendants will be entitled to their costs.

Judgment accordingly.

Solicitors for plaintiff: *Chapleau & Morin.*

Solicitors for defendants: *Morgan & Lavery.*

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

AND

GEORGE DUNCAN AND ELIZABETH DUNCAN, DEFENDANTS.

1914
June 15.

Expropriation—Water lots—Compensation—Riparian rights—Access.

A riparian owner on the foreshore of a tidal and navigable water has the right to the water for domestic purposes, also the right of access and exit to and from his property, which are elements of value in estimating compensation for the expropriation of lots by the Crown.

INFORMATION for the vesting of land and compensation therefor in an expropriation by the Crown.

Tried before the Honourable Mr. Justice Audette, at Campbellton, N. B., June 10, 11, 1914.

J. B. M. Baxter, K.C., and *G. Gilbert,* K.C., for plaintiff.

H. A. Powell, K.C., and *W. A. Trueman,* for defendants.

AUDETTE, J. (June 15, 1914) delivered judgment.

This is an information exhibited by the Attorney-General of Canada, whereby it appears, *inter alia*, that, under the provisions of the *Expropriation Act*, certain pieces of land, belonging to the said defendants, were expropriated for the purposes of providing additional yard room, buildings and tracks for the Intercolonial Railway, at Campbellton, in the Province of New Brunswick.

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Three plans and descriptions were respectively filed of record, in the Office of the Registrar of Deeds for the County of Restigouche, New Brunswick, namely: The plan and description respecting Parcel 1, in the said information mentioned, and dealing with the piece of land under lease, were so deposited of record on September 8th, 1910. The plan and description respecting parcels Numbers 2 and 3, in the said information mentioned, and dealing with the piece of land abutting on the river, together with the lane of 14 feet, were so deposited on August 31st, 1910. Finally, the plan and description, respecting parcel 4, in the said information mentioned, and dealing with half of Sugar-Loaf Street, were so deposited on May 19th, 1911.

The Crown tendered by the information the sum of $6,100.

The defendants aver by their plea that the amount tendered is wholly insufficient and inadequate, and claim the sum of $30,000.

Here follows a brief statement of the evidence adduced at the trial.

On behalf of the defendants the following witnesses were heard, viz.: William F. Yorston, Geoffrey Stead, Arthur W. Wilbur, Stenning H. Lingley and Alexander McLennan.

William F. Yorston, married, 14 years ago, the defendants' daughter, and ever since his marriage has resided with the defendants and has had the management of their business. The defendant Geo. Duncan is 76 years of age—has been confined to his home by illness for nearly a year. The fire which swept part of Campbellton took place on July 11th, 1910. In 1886 this piece of land of 410 feet, abutting on the river, had been divided in 8 building lots. Be-

fore the fire Alexander McLennan offered $1,000 for the eastern lot of 50 feet wide down to the road at the bluff on the river side, he being the proprietor of the adjoining eastern lot, and George Duncan refused the offer. During the summer before the fire, Mr. Malcolm asked what price the defendant Duncan would take for all the land, on the river side, from Sugar-Loaf Street to the point marked "Z" on plan filed herein as Exhibit No. 4; and Yorston, after consulting Duncan, told Malcolm he would give him an option for the same for the sum of $25,000. When Yorston told this to Malcolm, the latter said it was all right,—but nothing came out of it,—it did not mature, and Malcolm never made any offer.

Geoffrey Stead is a civil engineer and speaks with respect to the project of a wharf, and the cost thereof.

Arthur W. Wilbur is the civil engineer who made the survey of the Restigouche River, taking depths opposite the property in question with respect to the scheme of a wharf. There being shallow water opposite this property, it would be expensive to dredge for a wharf at that place.

Stenning H. Lingley, Town Treasurer of Campbellton, speaks respecting the population of the different wards and the taxation of property.

Alexander McLennan, manufacturer, has his foundry on a piece of property leased from Duncan, immediately to the east of Parcels Nos. 2 and 3 hereof. He offered to Yorston, who was Duncan's agent, the sum of $1,000 for 50 feet to the top of the bank, adjoining his property, and he told Yorston he was even willing to buy or lease the whole of the 410 feet to Sugar Street on that basis, including the

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access to the shore. He looks upon the shore privileges as valuable, and he has already landed goods and machinery at the foot of Sugar Street. There is a road outside of the fence, at the bluff, near the shore. He thinks the land in question is worth to him the price he offered, but does not know what it is worth to anybody else.

On behalf of the Crown the following witnesses were heard, to wit: Henry C. Reid, John Harquail, Fred. M. Anderson, William F. Napier and Charles C. Duberger.

Henry C. Reid, manufacturer, values parcel No. 2 at $400 a lot, dividing it into 8 fifty-foot lots, equal to 400 feet,—allowing for a road which would give a depth of 70 to 80 feet to the lots. Making for the eight lots the sum of .....$ 3,200.00

To which he would add for damages and compulsory taking, the further sum of.. 800.00

.....

making the total sum of $4,000.00

In making his valuation of the leasehold lots at $2,100 he included the value of the lane, giving access thereto, and allowed a certain amount for the compulsory taking.

He did not allow anything for the eastern half of Sugar Street,—which is equal to 30 feet in width,—because he says it gave value to the eight lots in giving access thereto. He further adds he considered the water privileges.

He valued the 471 by 150 feet belonging to Jane C. Duncan, and situated to the west of the present property, and also abutting on Sugar Street, at $600 a lot.

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John Harquail, in valuing at $2,100 the leasehold lots, included therein the 14-foot lane and allowed a certain amount for compulsory taking.

He allowed $3,200 for the 8 lots at the rate of $400 a lot, inclusive of the value of Sugar Street, and taking the shore privileges into consideration.

Fred. M. Anderson, in valuing at $2,100 the leasehold property, included therein the 14-foot lane and allowed a certain amount for compulsory taking.

He also allowed $400 a lot for the 8 lots, making the sum of $3,200, and allowed the further sum of $800 for damages and compulsory taking, inclusive of the Sugar Street land.

The Jane C. Duncan property was valued at $800 a lot. However, that figure was afterwards in the course of the evidence corrected and ascertained at $600 a lot.

William F. Napier speaks as to the advisability and necessity of wharves at Campbellton. He says that there are presently enough wharves, but is not prepared to speak as to the future.

Charles C. Duberger, a surveyor, has taken levels. From the top of the railway embankment to the high water level there is a difference of 32.15 feet. The railway embankment is 9 feet high.

This concludes the evidence.

It is admitted by both parties that the sum of $2,100 for the leasehold lots, inclusive of a certain amount allowed for compulsory taking, is fair and just compensation for the same.

The Crown filed at trial an undertaking whereby it gave the defendants a road or right-of-way, 14 feet wide, beginning at the eastern boundary line of George Duncan's lands, now under lease to one Alexander McLennan, thence easterly following

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the northern boundary line of the Intercolonial Railway lands to the eastern boundary of George Duncan's land, and a continuation of said road easterly to the present junction with the road leading from Water Street to Duncan's Point; also a road or right-of-way over the Intercolonial Railway lands from the western end of Water Street to the lands of the said George Duncan, as indicated on the plan, filed as exhibit No. 4 herein, and marked thereon by letters A, B, C, D, and E, said road to be constructed and maintained by the Crown.

This is, indeed, a very valuable undertaking and of very great advantage to the defendants who, without it, were left without access to or exit from the balance of their property lying to the east of the lands expropriated herein.

While the foreshores on the Restigouche River, which is a tidal and navigable river, are at the place in question up to high water mark in the right of the Provincial Government, subject to the paramount right of regulating navigation in the Federal Parliament, there exist certain rights in the riparian owners, which are, under the *Lyons* case, distinguishable and in excess of those held by the public at large. The riparian owner has the right to the water for domestic purposes, which, however, in salt water do not amount to much. He has also the right of access and exit to and from his property, etc. These rights are of some value, of, indeed, appreciable value.

The Crown's valuators, it may be said, proceeded upon a wrong principle of law and fact in not allowing anything for the 30 feet in width on Sugar Street,—on the assumption that this road could only be used in connection with the 8 lots in question.

That road was of itself of value to the owner, who had his dwelling house to the southwest of the railway track. That road was available and of value to him to get to the river and draw upon this road anything landed on the shore at the foot of Sugar Street. A certain amount should be allowed for that road, and the defendants are fully entitled to it.

Then if the lots of Jane C. Duncan, which are, it is true, deeper than the lots on the George Duncan property, have been assessed and paid for at the rate of $600, why would George Duncan's lots be assessed only at $400. Jane Duncan's lots abut at one end on Sugar Street—just as George Duncan's lots do. The former lots had all the disadvantage of being near a railway track, because the railway was passing there before this expropriation. It is true some advantage might be derived from such neighbourhood, but approaching them as building lots such neighbourhood would be detrimental.

Pursuing the comparison of the lots of Jane C. Duncan with those of George Duncan, the latter have certainly a great, material and valuable advantage over the former, in that they have the water front, with all the commercial advantages derivable therefrom.

In view of all the circumstances above related, it is thought that if the basis of valuation of $600 for each of the 8 lots were allowed, a fair and just compensation would be arrived at. In this sum of $600 a lot will be included a certain amount for the land forming part of Sugar Street, which the Crown's valuators have neglected to take into account and the 10 feet over and above the 8 fifty-foot lots.

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Consideration is also given to the great advantage resulting from the Crown's undertaking given at trial.

Taking the 8 fifty-foot lots at $600 ..... $ 4,800
and the sum of 800
allowed by the Crown's witnesses for damages, etc.,
and the further sum of 2,100
for the leasehold lots, we arrive at the total sum of $7,700
for which judgment will be entered.

Therefore, there will be judgment as follows, to wit:

1st. The lands expropriated herein are declared vested in the Crown from the date of the expropriation.

2nd. The compensation for the lands so taken and for all damages resulting from the said expropriation is fixed at the sum of $7,700, with interest.

3rd. The defendants, upon giving to the Crown a good and sufficient title free from all incumbrances upon the said property, are entitled to be paid the sum of $7,700, with interest upon the sum of $2,100 from September 8th, 1910, to the date hereof, and upon the sum of $5,600 from August 31st, 1910.

4th. The defendants are entitled to the costs of the action after taxation thereof.

Judgment accordingly.

Solicitor for plaintiff: *George Gilbert.*

Solicitors for defendants: *Powell & Harrison.*

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

PLAINTIFF,

AND

THE GOVERNOR AND COMPANY OF ADVENTURERS OF ENGLAND, TRADING INTO HUDSON'S BAY,

DEFENDANTS.

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Feb. 10.

Expropriation—Water lots—Basis of valuation—Municipal assessment—Advantages—Wharf.

The basis or starting-point for the valuation of water lots, expropriated by the Crown for the purpose of wharf improvements, may be had from a municipal assessment of the property, taking into consideration the higher assessable value of the land owing to its location, and the advantage afforded to the owners as a result of the improvements.

INFORMATION for the vesting of land and compensation therefor in an expropriation by the Crown.

Tried before the Honourable Mr. Justice Audette, at Winnipeg, January 26, 27, 28, 1916.

H. E. Kennedy and *E. Bailey Fisher,* for plaintiff.

S. J. Rothwell, K.C., and *H. A. Bergman,* for defendant.

AUDETTE, J. (February 10, 1916) delivered judgment.

This is an information exhibited by the Attorney-General of Canada, whereby it appears, *inter alia,* that certain lands, belonging to the defendants, were

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taken, under the provisions of the *Expropriation Act,* by His Majesty the King, for the purpose of a public work, namely, for an approach to a proposed wharf on the Pas River, by depositing on October 6th, 1914, a plan and description of such lands, in the office of the Registrar of Titles for the Land Registry District of Neepawa, in the Province of Manitoba, in which Land Registration District the same are situate.

The total area of the land taken—inclusive of the two pieces of land respectively described in paragraph 2 of the information—contains by admeasurement (0.13) thirteen one-hundredths of an acre.

The Crown, by the information, offers the sum of $1,000 in full compensation for the lands so taken and for all damages resulting from the expropriation.

The defendants at bar, by their plea, as amended at the trial, claim the sum of $5,500 for the lands taken and for all damages consequent thereto.

The defendants' title is admitted.

By expropriating the piece of land of (0.02) two hundredths of an acre—described in sub-paragraph (b) of paragraph 2 of the information, the access, by Larose Avenue, to the defendants' property has been absolutely taken away, and the expropriation made in that manner would, indeed, have resulted in very serious damages to the defendants' property. However, counsel for the Crown, acting under the provisions of sec. 30 of the *Expropriation Act,* filed at trial an undertaking dedicating to the public for the purposes of a public road or highway for ever this piece of land of (0.02) two hundredths of an acre. As a result of such undertaking the parcel of land marked "A", on plan "C", will now

be used by the public and the defendants as a continuation of Larose Avenue, leaving thus free, open and untrammelled, the access to the defendant's property by that avenue.

This undertaking removes entirely from the consideration of this case the question of damages, leaving for adjudication only the question of the value of the lands taken.

On behalf of the defendants the following witnesses were heard:

Auguste de Tremaudan, eliminating the question of damages, and the rights of wharfage, valuing the lands taken at $5,000.

Neil T. McMillan values Plot "B" at $1,925, and Plot "A" at $760—in all the sum of $2,685, eliminating the two elements above mentioned.

Under similar aspect, *C. S. Tyrrell,* values Plot "B" at $1,900 and Plot "A" at $760—making in all $2,660.

George M. Brown values the two plots at $2,500—although upon being asked by the Crown to place a value upon the land, his valuation for the same, as appears by Exhibit No. 6, is only $1,000. This witness's mentality and judgment are obviously affected by the interest of the party who calls upon him for the expression of his opinion, a circumstance which will necessarily go to make his valuation of very little use and reliability. Eliminating wharfage rights and damages, witness *Harry C. Beatty* values the two pieces of land at $7,000. There was some further evidence on behalf of the defendants with respect to the general facts of the case.

On behalf of the Crown the following witnesses were heard:

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C. H. Anderson and *David E. Brown,* who placed a value upon the two plots at the total sum of $1,000.

Henry Elliott, the secretary of the Town of Pas, states that the defendants' property, containing 3.30 acres, was assessed in 1914, at the sum of $30,000. In 1915, exclusive of buildings, the land was also assessed at $30,000. The original valuation of the assessors for that year (1915) had been $40,000, but was reduced by an order of the court to $30,000.

Two of the defendants' witnesses, de Tremaudan and Beatty, hold substantial interests in real estate at The Pas for speculative purposes, and I venture to say that their valuation is based more on speculative value than upon the real market value. G. M. Brown's testimony, for the reasons given above, must be eliminated. Then we remain with the disinterested evidence of both McMillan and Tyrrell at $2,685 and $2,660 respectively, based upon the market value of the property, as against the evidence of the Crown at $1,000.

To reconcile this conflicting evidence recourse should be had to the municipal assessment to be used only as a basis or starting-point. Although such assessments are under the statute directed to be made at the actual value of the property (R.S.M., ch. 117, sec. 29), it must be taken to be so done in a conservative manner. Under the municipal basis for the 3.30 acres at $30,000, the (0.13) thirteen one-hundredths of an acre would represent a valuation of about $1,181.81. Using this as a starting-point, one must consider that a small piece of land, carved out, as it is in the present case, in an irregular shape, with the base of the triangle abutting on the river, the apex of the triangle where the property is worthless, cut in that shape, would call for a larger

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price than the regular piece of land. Hence, the proper valuation of a parcel of land taken in that shape would be assessed at a higher figure than where the whole of the property or a large part thereof is taken, and also at a higher figure than the municipal assessment made, as said before, in a conservative manner.

The defendants own the land abutting on the river, but they are not proprietors of the part covered by the water and have no right to build wharves or make any erection in the river, without leave from the Crown. *Gillespie v. The King.*[1]

This prospective public work, this wharf which the Crown is now putting up, will be of great advantage to the defendants.

Taking all these circumstances into consideration, I hereby assess the value of the land at the sum of $1,700, to which should be added 10% for the compulsory taking of the same against the wish of the owner, making in all the sum of $1,870.

Therefore, there will be judgment as follows:

1st. The lands expropriated herein are declared vested in the Crown since the 6th day of October, 1914.

2nd. The compensation for the land taken, and for all damages resulting from the said expropriation, is hereby assessed at the sum of $1,870, with interest thereon at the rate of five per centum per annum, from October 6th, 1914, to the date hereof.

3rd. The defendants are entitled to be paid the said sum of $1,870, with interest as above mentioned, upon giving to the Crown a good and sufficient

[1] 12 Can. Ex. 406.

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title, free from all mortgages and incumbrances whatsoever.

4th. The defendants are further entitled to the rights and privileges mentioned in the undertaking filed at trial herein.

5th. The defendants are further entitled to their costs.

Judgment accordingly.

Solicitor for plaintiff: *E. B. Fisher.*

Solicitors for defendants: *Rothwell, Johnson, Bergman & McGhee.*

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

PLAINTIFF,

AND

HALBERTRAM HECTOR BRADBURN AND JOHN TAYLOR WEBB,

DEFENDANTS.

1916
Feb. 2.

Expropriation—Compensation—Water lots—Valuation—Advantages—Set-off.

In estimating the amount of compensation upon the expropriation of water lots by the Crown for harbour improvement purposes, regard will be had to the local market value of the land, its state of improvement respecting water frontage, and the advantage and benefit accrued to the owners as a result of the undertakings, the latter of which, under sec. 50 of the *Exchequer Court Act*, must be considered by way of set-off.

INFORMATION for the vesting of land and compensation therefor in an expropriation by the Crown.

Tried before the Honourable Mr. Justice Audette, at Fort William, Ont., February 1, 2, 1916.

F. R. Morris, for plaintiff.
H. W. White, K.C., for defendants.

AUDETTE, J. (February 2, 1916) delivered judgment.

This is an information exhibited by the Attorney-General of Canada, whereby it appears, *inter alia*, that certain lands, belonging to the defendants, were, under the provisions of the *Expropriation Act*, taken and expropriated for the purposes of a public work of Canada, namely, the improvements and enlargement of the harbour of Fort William, in the

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Province of Ontario, by depositing, on September 16th, 1913, plans and descriptions of the lands so expropriated in the office of the Local Master of Titles in and for the District of Thunder Bay, Ontario, in which district the lands are situate.

Two pieces or parcels of land were so expropriated. One being part of Lot 7, Concession E, Island No. 1, of the City of Fort William, and containing by admeasurement one and twelve one-hundredths (1.12) acres.

The second piece or parcel of land so expropriated is Lot No. 6, Concession E, Island No. 1, of the said City of Fort William, and containing by admeasurement two and thirty-four one-hundredths (2.34) acres.

The Crown, by the information, offers the sum of $3,360 in respect of Lot No. 7, and the sum of $7,020 with respect to Lot No. 6, making in all the sum of $10,380.

Together with the said sum of $10,380, the Crown further undertakes and consents that the defendants and their successors in title be at liberty to construct, maintain and use, upon the space of 25 feet lying between the line of expropriation and the harbour line, owned by the plaintiff, such wharves, docks or piers as they may desire.

The Crown further undertakes to dredge to the harbour line, and in the event of docks or other structures being so built to the harbour line, to dredge forthwith clear of such docks or other structures as to enable vessels to approach to and along the same. The whole as more specially described and set forth in paragraphs 5 and 6 of the said information.

The defendants at bar contend that the amounts offered by the Crown, in the manner above set forth, are not sufficient, and claim the sum of $65,000.

The defendants' title is admitted.

The several questions of law respecting the road allowance, the right of the riparian owners on a navigable river, have already been passed upon, in the case between the same parties, namely, in the case of *The King v. Bradburn*,[1] and do not come up for decision in the present issues. The only question to be now decided is one of the *quantum* of the compensation to be paid with respect to the lands taken and the damages, if any, resulting from the expropriation.

Dealing first with Lot No. 6, it may be said, that taking into consideration the condition of the real estate market at Fort William at the date of the expropriation,—the unimproved condition of the lot respecting water frontage and without any water front on account of the road allowance, and further the material advantage derived from the two undertakings above mentioned, I have come to the conclusion that the offer, at the rate of $3,000 an acre, for the said Lot 6, is over and above the actual market value of the same,—and specially so indeed if full effect is given to sec. 50 of the *Exchequer Court Act*, whereby the advantage and benefit accrued to the owners of the property from the undertakings must be taken into account, and consideration given to it by way of set-off. Therefore, the amount of $7,020 offered by the Crown for the 2.34 acres expropriated with respect to Lot No. 6, is declared sufficient and adequate in respect of the land taken

[1] 14 Can. Ex. 419.

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and for all damages resulting from the expropriation of the same.

Coming to Lot. No. 7, for which the Crown has also offered a compensation at the similar rate of $3,000, inclusive of all damages, I must say that if Lot. No. 6 is worth $3,000 an acre, Lot No. 7 must necessarily be worth more, as it had already been improved by the dockage and frontage improvements given by previous expropriations, and furthermore, it has been damaged by the manner in which the 1.12 acres have been carved out of the same, although the increased frontage given by the present expropriation must not be lost sight of. The plaintiff has taken a piece of land of irregular shape, at the expense of the frontage on the Kaministiquia River.

Therefore, taking into consideration the irregular shape of the piece taken on No. 7, the advanced value derived by the defendants from the improved piece fronting on the McKellar River, with the above mentioned undertakings and the state of the market at the date of the expropriation, I have come to the conclusion that this piece should be assessed on a basis of $5,000—thus allowing a compensation that is ample and liberal under the circumstances. The sum of $5,600 will be allowed for the 1.12 acres expropriated and taken from Lot No. 7.

Therefore, there will be judgment as follows, to wit:

1st. The lands expropriated herein are declared vested in the Crown from the date of the expropriation, namely, the 16th day of September, 1913.

2nd. The compensation for the lands expropriated herein is hereby fixed at the total sum of $12,620, with interest thereon at the rate of 5% from the 16th

September, 1913, to the date hereof. The whole in full satisfaction for the land taken and all damages whatsoever, resulting from the said expropriation.

3rd. The defendants are entitled to be paid, by the said plaintiff, the said sum of $12,620, with interest thereon, as above mentioned—upon giving to the Crown a good and sufficient title, free from all mortgages and encumbrances whatsoever.

4th. The defendants are also entitled to the rights, powers and privileges conferred upon them and their successors in title by the two undertakings mentioned in the information herein.

5th. The defendants are further entitled to the costs of the action.

Judgment accordingly.

Solicitors for plaintiff: *Morris & Babe.*

Solicitors for defendants: *Whitla, Bury & McCormick.*

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April 22.

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

PLAINTIFF,

AND

ARTHUR PICARD, HONORINE MORAUD, WIFE OF EDMUND R. ALLEYN, AND THE SAID EDMUND R. ALLEYN, TO AUTHORIZE HIS SAID WIFE AND DAME PHILLA LEE,

DEFENDANTS.

Expropriation—Basis of compensation—Value of land—Speculative purchase—10% allowance.

In assessing compensation for property taken under compulsory powers, it is not proper to treat the value to the owner of the land and rights, as a proportional part, the value of the realized undertaking proposed to be carried out. The proper basis of compensation is the amount for which the property could have been sold had the proposed undertaking by the Crown not been in existence, with the possibility that the Crown or some other person might obtain those powers. The price the property brought from purchasers speculating upon the expropriation affords no proper mode for arriving at its market value, and having been acquired for such speculative purposes the usual 10% allowance for the compulsory taking will be refused.

INFORMATION for the vesting of land and compensation therefor in an expropriation by the Crown.

Tried before the Honourable Mr. Justice Audette, at Quebec, December 20, 21, 1915.

Geo. F. Gibsone, K.C., and *A. C. Dobell*, for plaintiff.

Louis S. St. Laurent, K.C., and *A. Baillargeon*, for defendant Picard.

Lucian Moraud, for other defendants.

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Reasons for Judgment.

AUDETTE, J. (April 22, 1916) delivered judgment.

This is an information exhibited by the Attorney-General of Canada, whereby it appears, *inter alia*, that certain lands belonging to the defendant Picard, were taken and expropriated, under the authority of 3 Ed. VII., ch. 71, for the purposes of the National Transcontinental Railway, a public work of Canada, by depositing a plan and description of the same, on November 8th, 1913, with the Registrar of Deeds of the Registration Division of Quebec.

The Crown, by the information, offers the sum of $4,589.55 for the land so expropriated, and for all damages resulting from the said expropriation, and defendant Picard, by his plea, claims the sum of $28,200.

The hypothecary-creditors, Moraud, Alleyn and Lee, appeared by attorney and filed of record a declaration whereby they admit having been served with the information and declare to leave the matter in the hands of the Court.

The total area of the land expropriated is 5,367 feet.

This property is situate on Champlain Street, in the City of Quebec, and extends at the back to low water mark, as conceded by the Crown's counsel. The Crown has expropriated from this property the right-of-way for the National Transcontinental Railway, taking all the land, belonging to the defendant, on the river side from the north line of the said right-of-way,—thus leaving the defendant with a certain piece of land on the northern side of the said right-of-way to Champlain Street, and upon the piece of land so left to the defendant, there is a dwelling house with a small yard at the back.

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Reasons for Judgment.

Under a previous expropriation of the whole property herein,—including the dwelling house and the land up to Champlain Street, of January 20th, 1911, as appears by a copy of the information filed herein as (Exhibit A),—the Crown had offered the sum of $16,411.48. By reference to that record, it appears the defendant Christie (Mrs. Howe) had accepted that amount by her plea of November 4th, 1911. However, that plea has been subsequently amended by substituting a new one filed on November 29th, 1911, whereby the amount of $16,411.48 offered by the said information is refused and a claim for the sum of $36,324.50 made in respect of the same. That case was finally discontinued on March 20th, 1912.

However, on December 13th, 1911, while the whole property was thus expropriated and before the Crown abandoned the said expropriation, under the provisions of sec. 23 of the *Expropriation Act,* and before the discontinuance of the first case in respect thereto, the defendant in the first case, Elizabeth Christie (Mrs. Howe), sold her property and assigned all her rights to and interest in the compensation moneys to J. T. Donohue. The latter, heard as a witness, testified he paid as consideration for the said sale or assignment, the sum of $16,411.48 to Reverend Father Wood, acting on behalf of the St. Bridget Asylum, to whom the said Mrs. Howe had assigned her rights, in the manner mentioned in the evidence. And it is well to add that Reverend Father Wood, heard as a witness, recognizes having so received the said moneys. A conveyance of this kind, while the property was expropriated, did not pass the fee at that time, but the assignment to the compensation moneys was good and valid.

Subsequently thereto the said Donohue appears to have sold to the present defendant Picard, the whole of the said property for the sum of $18,000, as appears by the deed filed herein as (Exhibit B). The defendant Picard frankly admits in his evidence that when he bought, it was not with the intention of occupying the property, but that it was absolutely a speculation, with the idea of making more later on. Witness Donohue also admits he bought to speculate, and it must be conceded there is nothing wrong in speculating; but the market price of property and its speculative price may be very different.

Be all this as it may, I cannot refrain mentioning that while my opinion is that all the facts disclosed by the evidence are true,—that all the witnesses heard in respect of this transaction, told the truth, I am inclined to believe I have not the whole truth. In other words, I feel satisfied I have not the whole history of this transaction. I have had some hesitation as to whether or not I should not re-open the case to hear further evidence,—but after mature deliberation, I have come to the conclusion that perhaps with additional evidence, I would not then be in a better position than I am now to do justice between the parties, and I have abandoned the idea.

It is, indeed, in a case of this kind, quite difficult to arrive at a satisfactory amount as representing the market value of the land in question herein, in view of the fact that at the date of the expropriation there was practically no market for all these water front properties, in the neighbourhood,—notwithstanding these transactions by witnesses Donohue and Picard made with the object of speculating upon the expropriation.

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The only revenue derived from the property was from the dwelling houses which at the date of purchase by the defendant Picard had seven different tenants, honourable and respectable tenants, but of the labouring class, as a property in that locality would obviously call for and command, and calling for small rents. Notwithstanding the large claim made for the damages resulting from the expropriation, from the fact that the railway passes at the back of the property,—the defendant Picard tells us that the revenue derived from the house has not varied in 1912, 1913, 1914 and 1915.

There is a small wharf on the property, running practically to low water mark, but there is not a tittle of evidence showing that there was ever any revenue derived from the same, or whether or not, it was not only used as a yard, together with all rights attached to a riparian owner under similar circumstances.

The property at the date of the expropriation was used as a residential proposition, and the house was occupied by tenants, and that was the only apparent revenue it did yield as such. There is, however, some evidence and much argument as to the future potentialities of this property, as forming part of the harbour of Quebec, in course of development. But in that respect, it is now clearly settled that in assessing compensation for property taken under compulsory powers, that it is not proper to treat the value to the owners of the land and rights, as a proportional part of the value of the realized undertaking proposed to be carried out; and the proper basis for compensation is the amount for which such land and rights could have been sold had the present scheme carried on by the Crown not been

in existence,—but with the possibility that the Crown or some company or person might obtain those or such powers. The *Cedar Rapids* Case.[1] And is there any competition in a case of this kind? Would these works be done by anybody else but the Crown?

In approaching these considerations, it is well to bear in mind that I am not using the transactions made by Donohue and Picard as a proper mode of arriving at the market value of this property; because they were obviously made with the open purpose of speculating upon the expropriation, to the detriment of the public interest. The matter becomes self-evident, when it is considered that the defendant is now claiming by his plea the sum of $28,200, and that he openly and frankly admits in his evidence that he bought for the purpose of speculation, a purpose which is not in itself wrong, but a speculative price, boosted up upon imaginary schemes or reasons, does not always establish the market value of a property.

Then it is said the Crown, by the original information under case No. 2152, offered the sum of $16,411.48 for the whole property and has thus to a certain extent established the market price of the property.

Accepting that view, the whole question of compensation would then resume itself into finding what is the value of what remains of this property after the expropriation of 1913,—since we have the value agreed upon before the expropriation. Considering, therefore, that the whole of the dwelling house, with a small yard, remains intact, and that the only revenue derived from this property at the date of

[1] [1914] A.C. 569, 16 D.L.R. 168.

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the expropriation, was from the dwelling, it will obviously appear that the sum of $28,200 claimed by the defendant is not only excessive, but is extravagant.

There can be no objection to the taking of the view to a certain extent and to consider that the valuations made by witnesses Giroux and Tanguay in 1911 was right and acceptable to the defendant. If these valuators are declared fair and just and properly enlightened in 1911 in fixing the value of this property,—why cannot their judgment be also accepted at the date of the 1913 valuation? Their competency would appear to be equally good in 1913 as it was in 1911. Is such competency divisible? If the valuation of 1911 is accepted, why not accept that of 1913, which is by them fixed at $7,207.31? That would have been the end of the present controversy.

On the other hand, is the optimistic valuation of $3 or $3.52 a foot to be accepted, bringing the value of this property up to over $40,000. Undoubtedly, in taking this view, the witnesses must have been looking through a magnifying glass at Quebec, that will some day be, but at too far a distance, with too remote capabilities to be presently taken into consideration, and be coupled with the true market value of this property in 1913. And, indeed, why would the Crown be now charged with the enhanced value that the present work it is now carrying on in the harbour of Quebec would some day, in an uncertain distant future, give to these properties in the harbour.

And as is so well said, by Rowlatt, J., in *Sidney v. North Eastern Railway Co.*[1]: "Now, if and so

[1] [1914] 3 K.B. 629 at 637.

"long as there are several competitors, including "the actual taker, who may be regarded as possibly "in the market for purposes such as those of the "scheme, the possibility of their offering for the "land is an element of value in no respect differing "from that afforded by the possibility of offers for "it for other purposes. As such it is admissible as "truly market value to the owner and not merely "value to the taker. But when the price is reached "at which all other competition must be taken to "fail, to what can any further value be attributed? "*The point has been reached when the owner is "offered more than the land* is worth to him for his "own purposes, and all that any one else would offer "him except one person, the promoter who is now, "though he was not before, freed from competi- "tion. Apart from compulsory powers, the owner "need not sell to that one, and that one would need "to make higher and yet higher offers. In respect "of what would he make them? There can be only "one answer, in respect to the value to him for his "scheme. And he is only driven to make such offers "because of the unwillingness of the owner to sell "without obtaining for himself a share in that "value. Nothing representing this can be allowed."

See also the observation of Lord Dunedin in the *Cedar Rapids Case*.[1]

In the result the only question involved in this case is that of the quantum of the compensation under the circumstances. I have had the advantage, accompanied by counsel for the respective parties, to visit and view the premises in question, and giving due consideration to the evidence and to all the circumstances of the case, I have come to the conclusion

[1] 16 D.L.R. 168, [1914] A.C. 569 at 576.

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Reasons for Judgment.

to fix as a fair and liberal compensation the sum of $9,132.20—this amount to cover the value of the land taken, the wharf, the damages to the balance of the property remaining in the hands of the defendant, together with all riparian rights attached to such a property.

This property having been ostensibly bought for speculative purposes when it was tied up under expropriation proceedings, and upon the expectation of a further and ultimate expropriation, the usual 10% allowed in some cases for the compulsory taking will be refused. While the 10% allowance may be in certain cases allowed when one is forced out of his own premises or some such condition, the present case does not offer any of the elements operating in favour of such allowance. *The King v. MacPherson*,[1] *Cripps on Compensation*,[2] *Browne and Allan on Compensation*.[3]

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

1st. The lands expropriated herein are declared vested in the Crown from November 8th, 1913.

2nd. The compensation for the lands so expropriated and for all damages whatsoever arising out of or resulting from the said expropriation is hereby fixed at the sum of $9,132.20, with interest thereon from November 8th, 1913, to the date hereof.

3rd. The defendant Picard is entitled to receive from and be paid by the plaintiff, the said sum of $9,132.20, with interest as above mentioned, upon giving to the Crown a good and sufficient title, free from all hypothecs, mortgages, charges and encum-

[1] 15 Can. Ex. 215, 232, 20 D.L.R. 988.
[2] 5th Ed. 111.
[3] 2nd Ed. 97.

brances whatsoever, the whole in full satisfaction for the land taken and for all damages whatsoever resulting from the said expropriation.

4th. The defendant Picard is also entitled to the costs of the action.

*Judgment accordingly.**

Solicitors for plaintiff: *Gibsone & Dobell.*

Solicitors for defendant Picard: *Galipeault, St. Laurent, Metayer & Boisvert.*

Solicitors for other defendants: *Moraud & Savard.*

* Affirmed on appeal to Supreme Court of Canada, March 26, 1917.

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Nov. 6.

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

PLAINTIFF,

AND

THOMAS BERRY, JOHN BERRY AND MARGARET BERRY, ELIZABETH MIRIAM BERRY, ADAM AIKENS, AND WINCESLAS LA RUE, REPRESENTATIVE OF THE HEIRS AND NEXT OF KIN OF EDWARD J. HALL AND C. H. LLOYD,

DEFENDANTS.

Expropriation—Compensation—Title—Community property—Will—Agreement of sale—Mortgage—Prescription.

In an expropriation of land by the Crown for training camp purposes, held that land acquired by a testator during his married life being community property could only be disposed of by him to the extent of his interest therein, and those claiming under the will were entitled to compensation therefor to no greater extent; that the testator's wife having died intestate, half of the community went to her children, who were entitled to compensation accordingly. A purchaser of such land, who has resold them to the Crown, is only entitled to compensation according to the terms of the agreement of sale, but not to damages for the compulsory taking; nor will compensation be allowed for mortgages or hypothecs which have become prescribed. The amount of recovery being greater than the amount offered, interest was allowed from the date of expropriation.

INFORMATION for the vesting of land and compensation therefor in an expropriation by the Crown.

Tried before the Honourable Mr. Justice Audette, at Quebec, October 6, 1917.

W. Amyot, for plaintiff.

Arthur Fitzpatrick, K.C., for defendants.

AUDETTE, J. (November 6, 1917) delivered judgment.

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Reasons for Judgment.

This is an information exhibited by the Attorney-General of Canada, whereby it appears, *inter alia*, that certain lands belonging to the defendants were taken and expropriated, under the provisions of the *Expropriation Act*,[1] for the purposes of a public work of Canada, namely, the "Valcartier Training Camp", by depositing plans and descriptions of such lands, on September 15th, 1913, and on August 31st, 1914, in the office of the Registrar of Deeds for the County or Registration Division of Quebec.

The lands so expropriated are composed of the western half of lot No. 67, of lot No. 65, lot No. 64 and lot No. 35, with farm buildings erected on lot No. 67.

The Crown, by the information, offers the sum of $2,600.

The defendants, who severed in their defence, claim the sum of $10,000 for the immovables so expropriated, while some of them claim, in addition thereto, the further sum of $1,500 for damages resulting from the expropriation.

Dealing first with the question of title, it appears that one Thomas Berry, the father of the defendants Berry, was in his lifetime the owner in his name of lots 67, 65 and 35. He married without marriage contract, and during his married life lot No. 64 was acquired and fell in the community.

It is further in evidence that, at the time Thomas Berry, the father, made his will, his wife was *non compos mentis*, and that she died demented, being unable to testate, and the family notary further testified that it is not to his knowledge she ever made a will.

[1] R.S.C. (1906) ch. 143.

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On September 4th, 1904, Thomas Berry, the father, by his will, bequeathed and devised to his son, James Berry, all his movable and immovable properties, and constituted him his universal legatee.

On November 21st, 1909, the said James Berry, by his will of that date, bequeathed and devised to his brother, Thomas Berry, all his movable and immovable properties and constituted him his universal legatee. The said James Berry has since departed this life.

On May 6th, 1913, the said Thomas Berry (the son) sold (Ex. "C") to his brother-in-law, Adam Aikens, the lands described in the deed of sale as the two half-lots 65 and 67, lot No. 64 and lot No. 35, for the sum of $1,700, to be paid by instalments, in the manner mentioned in the said deed of sale.

From the above mentioned chain of title it will therefore appear that Thomas Berry, the father, could only fully dispose of lots 65, 67 and 35, together with the half only of lot 64. The other half of 64 having fallen into the community and becoming the property of his wife. When he bequeathed and devised his properties to his son James he could only dispose of half of lot 64, and in like manner James, by his will, in favour of his brother Thomas, could dispose of no more under the title acquired from his brother's will.

The mother having died intestate, the half of lot 64 became the property of her children, Thomas, John, Margaret and Elizabeth Miriam,—each being the owner of one-eighth of lot No. 64.

However, under the deed of sale of May 6th, 1913, it must be found that Thomas Berry, the son, conveyed to Adam Aikens, all the rights he had in the lands in question, making, therefore, Adam Aikens

the owner of lots 65, 67 and 35, as well as one-half of 64, together with the eighth which came to Thomas Berry, the son, from his mother.

Then John, Margaret and Elizabeth Miriam Berry were each the owner of one-eighth of lot 64 at the date of the expropriation, and are entitled to the compensation therefor, while Adam Aikens is entitled to compensation for the balance.

Now, on September 10th, 1913, assuming the full ownership of the four lots, Adam Aikens entered into an agreement with the plaintiff's representative (Ex. No. 3) whereby he sold this property for $2,600, when $50 were paid him on account and in part payment of the price of such sale. This agreement was entered into between Aikens and Captain Arthur E. McBain, who was duly authorized by his brother, Colonel W. McBain, the latter being in full charge on behalf of the Crown of the expropriation for the Valcartier Camp. The sale had to be completed by January 15th, 1914, and as it was not, the agreement lapsed and the $50 were forfeited in favour of Adam Aikens.

Then on September 17th, 1914, Aikens having gone to Colonel William McBain, they both entered into the agreement of that date, whereby Aikens agreed to sell his farm for $3,050, he receiving the sum of $100 on account, "the balance of $2,950 to "be paid over as soon as deeds are executed," and the purchaser was to have immediate possession.

The original of the latter agreement, having been used before the Public Account Committee of the House of Commons, could not be found, but both parties thereto spoke to the agreement when a copy was produced. Aikens admitted entering into the agreement, signing the same and receiving $100 on

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account, but he said he understood he was to be paid the balance at once; and Colonel William McBain states the balance was to be paid upon Aikens giving good title—the latter construction of the agreement being the only reasonable one. Now it appears clearly from what has already been said with respect to the question of title that Aikens could not give good title for all the lots, and the notary charged with the preparation of the deed, as appears from the evidence, so reported to Colonel William McBain.

I, therefore, find that the compensation to which defendant Aikens is entitled for the property in question is, on the basis of the sum of $3,050 as agreed upon by him. But from that sum should be deducted the sum of $100 already paid to him on account, and which he never returned, but retained, together with the further sum of $458.62, representing the value of the 3/8 of lot No. 64 reckoned under the basis of $3,050 for the whole farm.

That is to say $3,050.00
From which should be deducted.... $100.00
and the further sum of..... 458.62
——— 558.62

leaving the sum of $2,491.38

While I find that defendant Aikens is bound by his agreement, it is obvious that the other defendants are at large and are not affected by that sale, beyond conveying implicitly that if Aikens accepted that amount for the farm, he being the one most interested, it would give a very good idea of the value of the same.

However, the defendants have adduced evidence in respect of the value of the farm as a whole, and

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as to lot 64 in particular. That evidence has practically remained uncontroverted, the Crown, relying on the agreement (Ex. No. 4), did not adduce any evidence on the question of value.

I will, therefore, assess the value of each eighth of lot 64, under the basis of $20 an acre, as established by the evidence adduced, making the sum of $675 as representing the three-eighths coming to the defendants John, Margaret, and Elizabeth Miriam Berry—the defendant Thomas Berry (the son) having disposed of his eighth of lot 64 by the deed to Aikens of May 6th, 1913. In the result John Berry will receive ..... $ 225.00
Margaret " " " 225.00
Elizabeth Miriam " " 225.00

$675.00

As the defendants recover more than the amount offered by the information, they will be entitled to interest from the date of the expropriation.

Dealing with the question of damages, I find that the defendants Aikens, Elizabeth Miriam Berry, and Thomas Berry make a claim for $1,500 as set out in their plea. I have already found that Thomas Berry had not, at the time of the expropriation, any interest in the lands in question, he having conveyed all such interest therein to defendant Aikens in May, 1913. We must, therefore, ascertain what damages Aikens and his wife can have suffered.

This property was expropriated in September, 1913, but Aikens and his wife remained in possession of the lands at the sufferance of the Crown. They were still in possession in September, 1914, when Aikens entered into the agreement of the 17th of that month—and it would appear from the evi-

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dence that he and his wife did not abandon the possession until some time in January, 1915, although by the agreement of September 17th, 1914, he was to give immediate possession. If Aikens and his wife suffered damage, the evidence does not disclose any tangible loss. It is true Aikens and his family had to leave and vacate the house, some time in the autumn of 1914, during artillery practice, and that it had to be done perhaps at very trying times; but they were in possession by sufferance—and what is referable to the grace and bounty of the Crown cannot be construed as an acknowledgment of a right of action for damages, if any were suffered. Especially is this true when damages, including those to crop and for stolen goods, appear to have already been paid by the Crown to the defendant Aikens. I fail to see how, under the evidence, I could with any degree of exactness name any amount. But in view of the fact that I cannot allow Aikens any amount for compulsory taking when I have accepted as a basis of compensation the amount he was willing to sell for in September, 1914, I will, by way of damages—although he remained in occupation up to January, 1915—allow interest from the date of the expropriation to this day, this interest to cover the damages to his mill and all trouble or damage not already compensated, resulting from the expropriation. This accrued interest will amount to slightly over $500.

The two mortagages or hypothecs, mentioned in paragraphs 6, 7 and 8 of the information, in favour of Hall & Lloyd, are declared prescribed, and the heirs at law or next of kin of the said parties are not therefore entitled to recover in respect of the same.

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Coming to the question of costs, I find that the defendants, who were represented by the same solicitors and counsel, severed their defence into two sets of pleadings. Each part of the plea with respect to the claim made for the lands taken is absolutely identical; but one set of pleading claims, in addition thereto, the damages above referred to. Under the circumstances of the case I feel unable to allow full costs on each issue, but I will treat the two defences as one and will allow the defendants costs against the Crown, which I will fix at the sum of $275—the amount to cover all witness fees, disbursements, etc.

Therefore, there will be judgment as follows, to wit:

1st. The lands expropriated herein are declared vested in the Crown as of September 15th, 1913.

2nd. The compensation for the lands taken and for all damages resulting from the expropriation is hereby fixed at the total sum of $3,266.38. The said compensation being composed of the aggregate sums of $2,591.38 and $675.00 as above mentioned, with interest from the date of the expropriation.

3rd. The defendant, Adam Aikens, is entitled to be paid the said sum of $3,050.00
after deducting therefrom the sum
of $100.00
already paid on account; and the
further sum of 458.62
——— 558.62

leaving the net sum of $2,491.38
with interest thereon from September 15th, 1913. The said defendants, John Berry, Margaret Berry, and Elizabeth Miriam Berry, are also entitled to be paid the total sum of $675 in the proportion of $225

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each, with interest thereon as above mentioned. All of the said defendants being thus entitled to be paid the sums above mentioned in full satisfaction for the lands so taken and for all damages whatsoever resulting from the said expropriation, and upon giving to the Crown a good and satisfactory title free from all mortgages, hypothecs and encumbrances whatsoever upon the said property, including the release or discharge of the *bailleur de fonds* claim mentioned in the deed of May 6th, 1913 (Ex. "C").

4th. The mortgage creditors, Hall and Lloyd, or their heirs and assigns or next of kin, as mentioned in the information herein, are not entitled to recover in respect of the mortgages or hypothecs therein mentioned.

5th. The defendants who appeared at trial and filed written pleadings are entitled to their costs in the manner above set forth, which said costs are hereby fixed and allowed at the total sum of $275.

Judgment accordingly.

Solicitors for plaintiff. *Drouin & Amyot.*

Solicitors for defendant: *Fitzpatrick, Dupré & Gagnon.*

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

PLAINTIFF,

AND

PATRICK KING,

DEFENDANT.

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March 20.

Expropriation—Compensation—Farm — Timber land — Valuation — Damages—Offset—Use and occupation.

The basis of compensation for the expropriation of farm or timber lands by the Crown for training camp purposes is the market value of the property as a whole, at the date of expropriation, as shown by the prices other farms had brought in the neighbourhood when acquired for similar purposes; the benefits derived by the owner from the use and occupation of the land after the expropriation to go as an offset against his claim for damages.

INFORMATION for the vesting of land and compensation therefor in an expropriation by the Crown.

Tried before the Honourable Mr. Justice Audette, at Quebec, March 6, 7, 1916.

G. G. Stuart, K.C., for plaintiff.

L. S. St. Laurent, K.C., for defendant.

AUDETTE, J. (March 20, 1916) delivered judgment.

This is an information exhibited by the Attorney-General of Canada, whereby it appears, *inter alia*, that certain lands and real property, described in the amended information and belonging to the defendant, were taken and expropriated by the Crown under the provisions of the *Expropriation Act*, for the purposes of "The Valcartier Training Camp," a public work of Canada, by depositing on Septem-

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ber 15th, 1913, a plan and description of the same, in the office of the Registrar of Deeds for the County or the Registration Division where the same are situated.

While the property was expropriated in September, 1913, the defendant was allowed to remain in possession after that date for a long period of time, as will be hereafter mentioned.

The defendant's title is admitted.

It is also admitted and agreed upon by both parties, that Lot No. 20, the farm lot, contains 89½ arpents, out of which 20,000 square feet must be deducted, as having been sold to third parties before the expropriation; and that Lot No. 22, the bush lot, contains 146 2-5 arpents.

The Crown, by the information, offers the sum of $2,600 for Lot No. 20, and the sum of $1,300 for Lot No. 22. The defendant claims $5,000 for Lot No. 22 and $5,000 for Lot No. 20,—although expressing his willingness to accept $4,900 for the same, as intimated on previous occasions,—together with the sum of $140 for alleged damages suffered in disposing of his stock,—making in all the sum of $10,140.

While the expropriation took place on September 15th, 1913, the defendant was allowed to remain in possession of his property for quite a while after that date. He and his family had the use of the residence and buildings on Lot No. 20 up to May, 1915, and resided there until that time. The Crown took possession of Lot 20 some time about August 9th, 1914. The defendant had his crop of 1913, and the use of his farm up to August 9th, 1914. On the 15th September, 1914, he was paid the sum of $425 "in full settlement for all claims and damages of

"any and every nature whatsoever on Lot 20," as appears by the receipt for this sum of $425, filed as Exhibit No. 3.

On behalf of the defence, witness *Giroux,* assuming Lot No. 20 contained 94 arpents, valued it at $25 an arpent $2,350.00
The dwelling house 967.60
Extension kitchen 67.20
The barn 1,077.12
3 lean-tos 75.00
Dairy 25.00

$4,561.92
And he added thereto 338.08

to make up the amount of $4,900.00

for which he had obtained an option from the defendant. And he adds, "that was the value in August, 1914." He says to arrive at the intrinsic value of a property it has to be valued in details. He further testifies that the value of the farm (Lot No. 20), without any question of expropriation, is the sum of $3,000 to $3,500.

Witness *Vallee* values only Lot 22, which is a bush lot, with about 8 arpents under cultivation, at $5,325. To arrive at this figure, he proceeds by first estimating the quantity of commercial timber, pulp and cordwood upon the lot. He reckons there are 90 arpents with 882 cords of standing pulpwood, upon which he could realize $2.50 a cord. Twenty pieces of commercial timber at $2 a piece. One hundred and twenty standing cords of fuel at 75 cents profit upon each. Then he says, there are 38 arpents of swamp upon the lot, and an old barn which he valued

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at $50, and 8 arpents of good land under cultivation, which he valued at $100 an arpent. He values the swamp at $5 an arpent, and the balance which is not cleared at $20 an arpent, adding that by working out the lot he would make $3,000 and retain the land. On cross-examination he stated he does not know of any farm at Valcartier which was ever sold at $100 an arpent. He bought the right to cut on 8 or 10 lots, some of 80 others of 100 arpents, for $500 each. In 1903 he bought a wood lot for $400.

Witness *Jules Croteau,* a civil engineer, who did not show much qualification to value a bush lot, proceeded upon the same basis as the previous witness to arrive at the value of that Lot 22 at $5,332, as the intrinsic value. He states that he valued the lot upon the consideration that by working it he could realize the profits he mentioned. He further says a purchaser could advantageously purchase at $3,500 to $4,000. He estimates also the number of flooded acres upon this lot.

Witness *Murphy* examined Lot. No. 22 in March, 1916, and estimates there are 1,000 cords of pulpwood standing on it, and 120 cords of cordwood,—and values the pulpwood at $2.75 a cord, and the cordwood at $1 standing; but this witness did not put any valuation upon Lot No. 22 as a whole. He valued Lot 20, under the quantity survey method, as follows:

4 acres of swamp at $5	$ 20.00
12 acres of bush land at $15	180.00
And upon which are 3 cords of pulpwood per acre, at $2	72.00
1 cord of wood per acre	12.00
53 acres of land at $30	1,590.00
4 acres of land at $75	300.00

8 acres of land at $75	600.00
2 acres of land at $75	150.00
6 acres of land at $100	600.00
Building	1,190.00
Making the total of	$4,714.00

The buildings he valued as follows:

Dwelling-house	$500.00
Dairy	10.00
Pig pens	20.00
Machine and other sheds	60.00
Barn and stable	600.00
	$1,190.00

The valuation of $4,714 was made in November, 1915, in company with witness Maher.

Witness *Maher* valued Lot 20 at $4,714 and agrees with the details given by the previous witness. He values the bush lot, Lot No. 22, at $5,765, and states there are almost 8 acres of cleared land upon it, and about 38 acres of swamp. He estimates there are about 882 cords of wood upon the lot, 20 large commercial trees, etc., and says he does not know—or does not remember—of any sale of wood lots, at Valcartier, previous to 1913, or of any farm selling at $75 or $100 an arpent, but that he bases his valuation on what he thinks he could get out of this lot, which he visited once in September, 1915. He further adds that this lot *en bloc* is worth to a farmer from $3,500 to $4,000.

Patrick King, the defendant, says he has under cultivation about 75 arpents on Lot No. 20, and 8 or 10 on Lot No. 22. He sowed oats in 1914, but was

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settled with by the Crown for all damages in respect thereto. On Lot No. 22, upon which he reckons there are between 38 to 40 arpents of swamp, he estimates there are 1,000 cords of pulpwood. Carrying on the practice his father had before him, he was cutting some wood every year on Lot No. 22. In 1914-1915 he cut six cords of pulpwood, the cordwood for the use of his home, 75 saw logs and about 7 pine logs. He has been working at the Power House since April 1st, 1914. He further claims the damages mentioned in the defence.

On behalf of the Crown, Colonel McBain values Lot No. 22 in 1913 at not over $1,200 and says there are about 60 arpents of swamp on that lot; and if the wooded part was cleared there would remain but sandy land. He further values Lot No. 20, as of September, 1913, at the sum of $2,600 which, he said, is the outside figure, and adds, if that farm had been advertised in 1913, for one month, it could not sell for anything over that amount. This witness purchased 31 farms, at Valcartier, as appears by Exhibit No. 4, at an average price of $16.57 to $17 per arpent.

Witness *John Jack* values Lot No. 22, as of September, 1913, at the sum of $1,700, which, he says, is an extraordinarily big price. He examined and went over the bush lot for one day and a half, and estimates there are between 60 to 70 arpents of swamp, and from 8 to 10 arpents of good land on it. On Exhibit "C" he indicated what he thought was swamp, as distinguished from the balance of the lot. He says a man can walk with difficulty over the swamp, but that he would lose a horse if he took it there. He had a stick, at the time of his inspection of the lot, which he ran down for a couple of feet.

Leslie H. Coombes, accompanied the previous witness when visiting Lot No. 22, and says they went over it 3 times, and he made a sketch of the swamp, which is now produced as Exhibit No. 5, estimating there are 62 arpents of swamp on this lot.

Captain Arthur McBain says Lot No. 20, with buildings, in September, 1913, could not be sold for $2,000. He further says he purchased cordwood delivered at the Camp for $2.65 and $2.75 a cord.

Now, the defendant's farm of about 89 arpents, in round figures, after making the above mentioned deduction, would appear to be one of the fairly good farms at Valcartier, such as they are, that is, of sandy soil. The dwelling-house is old, but the barn and stable were built only about 6 years ago, and are in very good condition. About 75 acres are under cultivation, with about 12 acres of bush land and 4 acres of swamp.

Most of the evidence offered on behalf of the defendant in respect of Lot No. 20 has been on a wrong basis. Indeed, the witnesses proceeded by segregating the acreage of the farm and placing a certain value upon different sections,—running the price of some acreage as high as $75 and $100 an acre,—a price unknown to the witnesses as having ever been paid at Valcartier. Then, after valuing the land at $25 an arpent, witness Giroux testified to the intrinsic value of each building, as of August, 1914, nearly a year after the expropriation, when, he says, prices were all spoiled. *Tout etait alors gâte.* These valuations are more with respect to the intrinsic value than of the market value of the property. Although it is true, however, that after arriving at these very high figures, some of the defendant's witnesses added that, to the farmer it was

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worth a lesser sum arrived at on a market value basis, and witness Giroux, without any question of expropriation, said the farm would be worth $3,000 to $3,500; but that was in 1914 when the Camp had inflated the values. Others spoke in that stress, but the valuation is either made as of 1914 or 1915.

With respect to Lot No. 22, the bush lot, the evidence of the defence is again arrived at on a wrong basis,—upon a wrong principle. As was said in the *Woodlock*[1] and the *McLaughlin*[2] cases, it is useless to juggle with figures and to estimate the quantity of sticks of wood upon the lot, estimate the number of cords of pulpwood, cordwood, the value of 19 or 20 sticks of commercial timber, and having done so, estimate the profits which can be realized out of that lot with the object of arriving at the market value according to such profits and to the additional value of the soil. In other words, it would mean that a lumber merchant buying timber limits under these conditions would have to pay his vendor an amount representing the value of the land together with all the foreseen profits he could realize out of the timber upon the limit. In the result leaving to the purchaser all the labour and giving the vendor all the prospective profits to be taken out of the limits. Stating the proposition is solving it, because no sane business man would purchase, or could afford to purchase, under such circumstances.

What is sought in the present case is the market value of this farm as a whole, as it stood at the date of the expropriation,—the compensation to be ascertained, not upon the bare market value, but on a liberal basis. We have as a determining element

[1] 15 Can. Ex. 429, 32 D.L.R. 664.
[2] 15 Can. Ex. 417, 26 D.L.R. 373.

to be guided by, a large number of sales of farms in the neighbourhood acquired under private agreements and sales for camp purposes at prices which by comparison go to make the defendant's claim excessive. The prices paid by Colonel McBain (as shown by Ex. No. 4), as of the date of the expropriation, are $16.57 to $17 per acre, and they afford the best test and the safest starting point for the present enquiry into the market value of the present farm. *Dodge v. The King*,[1] *Fitzpatrick v. Town of New Liskeard*.[2]

For the farm and the buildings thereon erected I will allow $30 an arpent, which is indeed a high price for farms in that locality, making for the 89 acres in round figures (20,000 square feet having to be deducted from the acreage, as above set forth), the sum of $2,670.00

To which should be added the sum of..... 600.00
in round figures, in view of the barn and stable only recently built, and the fact that lots had been sold on the waterfront and others could be sold, and further to cover the cost of moving and all expenses incidental there to—

Making the total sum of..... $3,270.00

an amount coming within the range of the valuation of witness Giroux, heard on behalf of the defendant.

The valuation of the wood lot should also be arrived at as a whole and with the consideration of the sales above mentioned. *The King v. Kendall*,[3] con-

[1] 38 Can. S.C.R. 149.
[2] 13 O.W.R. 806.
[3] 14 Can. Ex. 71, 8 D.L.R. 900.

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firmed on appeal to Supreme Court. *The King v. New Brunswick Ry. Co.*[1] A deal of evidence has been adduced in respect of the value of this bush lot, and while it would seem that a bush lot of 146 arpents, with between 38 to 70 arpents of swamp and 8 to 10 acres of good land at Valcartier in September, 1913, must be of a good value to the owner, it cannot be worth anything like the amount claimed. I will allow for the same the sum of $1,700,—which is characterized by the Crown's witness himself, who made that valuation, as a very extraordinarily high price.

The claim for damages, as mentioned in the plea, small as it is, seems to be the result of an afterthought, as would appear by the reference to Exhibit No. 3,—which is the receipt given in September, 1914, for the sum of $425 in full settlement for all claims and damages of any and every nature whatsoever. The defendant remained in occupation of the farm up to August 9th, 1914, and resided on the farm, with the use of all the buildings, up to May, 1915. He further cut pulpwood, cordwood and commercial timber upon this property after the date of the expropriation. If all he has thus received from the benevolence of the Crown is not a waiver to such a claim for damages, and if he is not asked to account therefor, it can obviously be set up to offset any such claim for damages.

The compensation will be assessed as follows, viz.:—

For Lot 20, the farm.....	$3,270.00
For Lot 22, the wood lot.....	1,700.00
	$4,970.00

[1] 14 Can. Ex. 491.

To which should be added 10 per cent. for compulsory taking...	497.00
	$5,467.00

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

1st. The lands expropriated herein are declared vested in the Crown as of September 15th, 1913.

2nd. The compensation for the land and real property so expropriated, with all damages arising out of or resulting from the expropriation, are hereby fixed at the sum of $5,467, with interest thereon at the rate of five per centum per annum from August 9th, 1914 (when the Crown took possession of the farm) to the date hereof.

3rd. The defendant is entitled to recover and be paid from the plaintiff the said sum of $5,467, with interest as above mentioned, upon giving to the Crown a good and sufficient title free from all incumbrances whatsoever, the whole in full satisfaction for the land taken and all damages resulting from the said expropriation.

4th. The defendant is also entitled to the costs of the action.

*Judgment accordingly.**

Solicitor for plaintiff: *Ernest Taschereau.*

Solicitors for defendant: *Galipeault, St. Laurent & Co.*

* Affirmed on appeal to Supreme Court of Canada, December 11, 1916.

1916
March 20.

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

PLAINTIFF,

AND

HUGH BOWLES,

DEFENDANT.

Expropriation—Compensation—Farm—Timber land—Valuation.

The basis of compensation for the expropriation of farm or timber lands by the Crown for training camp purposes is the market value of the property as a whole at the time of expropriation, as shown by the prices other farms had brought when acquired for similar purposes.

INFORMATION for the vesting of land and compensation therefor in an expropriation by the Crown.

Tried before the Honourable Mr. Justice Audette, at Quebec, March 6, 9, 1916.

G. G. Stuart, K.C., and *E. Gelly,* for plaintiff.

L. Cannon, K.C., for defendant.

AUDETTE, J. (March 20, 1916) delivered judgment.

This is an information exhibited by the Attorney-General of Canada, whereby it appears, *inter alia,* that certain lands, belonging to the defendant were taken and expropriated by the Crown, under the provisions of the *Expropriation Act,* for the purposes of "The Valcartier Training Camp," a public work of Canada, by depositing on September 15th, 1913, a plan and description of such lands in the office of the Registrar of Deeds for the County or Registration Division of Quebec.

While this property was expropriated in September, 1913, the defendant was allowed to remain in full possession up to September 15th, 1914, when he was required to give up possession, under short notice. He had his full crop in 1913, but suffered some damage to the 1914 crop. He lived a couple of months off the farm in 1914, but came back and remained in possession of the buildings, but not of the farm, until November 1st, 1915, when he definitely left his house and went to reside somewhere else.

The defendant's title is admitted.

The lands so expropriated are in severality described in the information and are composed of three lots: Lot No. 28, of 137 arpents, 53 perches and 174 feet, and Lot 69a, of 32.097 arpents; these two lots form what is hereafter called the farm. There is also taken Lot 36, of 85 arpents, which is a bush lot. The total area of the lands taken is admitted by both parties at 255 arpents.

The Crown by the information offers the sum of $2,150, and the defendant, by his plea, claims the sum of $13,695.00.

On September 9th, 1913, a few days before the expropriation, the defendant gave an option upon his property at the sum of $2,150,—upon which option the Crown, through Captain McBain, paid the sum of $50. But the option was thereafter allowed to lapse.

An official from the Department of Militia and Defence was sent by the Deputy Minister to endeavour to effect a settlement with the defendant, and some time around the month of July, 1915, he offered the defendant the sum of $8,000 in full settlement. Nothing came of it.

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Shortly before this official came to the defendant, one Mynot, in the employ of the Government at Valcartier, but subsequently dismissed for cause, as appears in the evidence, prepared Exhibit N, and asked the defendant to sign it. The defendant, in his evidence, says that while he was quite willing to settle for $11,756, the amount mentioned in that document, he refused to sign it, because he had some doubt it was wrong and that Mynot wanted to catch him.

Be all that as it may, nothing came out of this option and these offers.

On behalf of the defendant, witness Hayes valued the three lots at $9,600, adding that $8,000 would be a fair price. Witness Vallee values Lots 29 and 69a at $8,424; witness Corrigan values the three lots at $8,800.

On behalf of the Crown, witness Captain A. McBain values the whole property at $2,150, as of September, 1913, and witness Colonel William McBain places a valuation of $2,200 to $2,400 upon the whole farm and the wood lot. This witness also filed as Exhibit No. 3, a list of 31 properties bought by him, for the Camp, in the actual neighbourhood of the property, at an average price per arpent of $16.57 to $17.

One cannot lose sight of these sales, as there certainly could not be a better illustration of the market value of these farms at the time of the expropriation than the prices actually paid to such a number of proprietors, not pressed to sell, but selling at a price arrived at of their own free will. These prices afford the best test and the safest starting point in the present enquiry into the market value of the

present property. *Dodge v. The King*,[1] *Fitzpatrick v. Town of New Liskeard*,[2] and *Falconer v. The Queen*.[3]

The character of the evidence adduced by the defence is worth a passing notice. Indeed, this evidence is adduced upon a wrong basis, upon a wrong principle. To arrive at the valuation, the witnesses segregated the acreage and allowed so much for such area and so much for another area and then valued the buildings, in 1915, on the basis of what it would cost to build them. A farm or property of this kind is valued as a whole. The valuation of the wood lot is also upon a wrong principle, as mentioned in the case of *The King v. Patrick King*.[4] See also *The King v. Kendall*,[5] confirmed on appeal to the Supreme Court of Canada; *The King v. New Brunswick Ry. Co.*[6]

The defendant suffered some damages occasioned by the expropriation; but the statement prepared by him fixing these damages at $668.56, is out of proportion and is grossly extravagant. Some of these items are shocking and preposterous and are better left without comment. However, while the amount claimed is extravagant and not justifiable, the defendant is entitled to some damages. He was allowed to remain upon the property after the expropriation and he certainly derived some material benefit therefrom, and for that reason it is now quite difficult to determine, out of his claim for damages, what is referable to the benevolence of the Crown, by thus allowing him to remain in possession, and

[1] 38 Can. S.C.R. 149.
[2] 13 O.W.R. 806.
[3] 2 Can. Ex. 82.
[4] Ante, p. 471.
[5] 14 Can. Ex. 71, 8 D.L.R. 900.
[6] 14 Can. Ex. 491.

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what may well constitute a legal right to compensation.

The option given by the defendant for the sum of $2,150 and which was allowed to lapse, was perhaps given at the time for the purpose of effecting an immediate settlement without litigation, and it cannot now be claimed as binding. Yet while declining to limit the compensation to that amount, it must be relied upon to a certain extent, as a sufficient ground for not adopting the extravagant estimates made by the defendant's witnesses and by his plea.

Taking all the circumstances of this case into consideration, and without overlooking that a just and fair amount should be allowed for damages, I have come to the conclusion to fix the amount of the compensation herein at the liberal and high amount of $5,000, inclusive of the 10 per cent. allowance for the compulsory taking, thus allowing the defendant more than double the amount of the option given by him in September, 1913.

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

1st. The lands expropriated herein are declared vested in the Crown from September 15th, 1913.

2nd. The compensation for the land taken and for all damages resulting from the expropriation is hereby fixed at the sum of $5,000, with interest thereon from September 15th, 1914, to the date hereof.

3rd. The defendant is entitled to recover from and be paid by the plaintiff, the said sum of $5,000, with interest as above mentioned, upon giving to the Crown a good and sufficient title free from all mort-

gages and encumbrances whatsoever upon the said property.

4th. The defendant is also entitled to the costs of the action.

*Judgment accordingly.**

Solicitors for plaintiff: *Gelly & Dion.*

Solicitors for defendant: *Taschereau, Roy, Cannon & Co.*

* Affirmed on appeal to Supreme Court of Canada, December 11, 1916.

1917
May 26.

HIS MAJESTY THE KING,

PLAINTIFF,

AND

THE QUEBEC NORTH SHORE TURNPIKE ROAD TRUSTEES,

DEFENDANTS.

AND

GEORGE H. BURROUGHS, CURATOR OF THE ESTATE OF SAID QUEBEC NORTH SHORE TURNPIKE ROAD TRUSTEES,

ADDED DEFENDANT.

Appeal—Extension of time—Delay—"Justice of the case".

An extension of time to appeal to the Supreme Court of Canada, under sec. 82 of the *Exchequer Court Act*, will not be granted after a delay of 14 months, particularly when "the justice of the case" does not warrant the granting of such an extension.

APPLICATION for extension of time to appeal.

Heard by the Honourable Mr. Justice Audette, at Ottawa, May 22, 1917.

A. Taschereau, K.C., for plaintiff.

G. G. Stuart, K.C., for defendant.

AUDETTE, J. (May 26, 1917) delivered judgment.

This is an application, on behalf of the Crown, made this 22nd May, 1917, under the provisions of sec. 82 of the *Exchequer Court Act*, for an extension of the time to appeal, to the Supreme Court of Canada, from a judgment pronounced herein by this Court on March 27th, 1916.

The present application is made about 14 months after the pronouncement of the judgment from which an appeal is desired. True, an application to the same effect was made some time in November last—that is about 9 months after judgment—but as the notice of the application was not served upon the proper parties, the application could not be entertained, and an order of taking nothing by the application was duly made.

The application is now renewed 5 months from the November application and 14 months from the delivery of judgment, and it is needless to say a strong case of special circumstances must be made at this date to induce the court to grant such a demand. In support of the application is read an affidavit setting forth pressure of public business in the Department of Justice. Is that an allegation to be taken to mean that pressure of public business was maintained to such a high degree during this long period as to actually prevent the giving of half an hour or an hour to the consideration of the report made by the counsel, who had charge of the case at trial, at Quebec? However, the Crown was duly notified before delivery of judgment of the date on which judgment would be rendered. Right after the delivery of the judgment the Crown obtained from the Registry a copy of the reasons for judgment and remained silent for months. The judgment has been settled and is filed of record.

Extension of time, after the lapse of 30 days, but within reasonable delay, is sometimes allowed under special circumstances; but in such cases the balance of justice or injustice to the litigants must be the determining consideration.

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I do not wish to charge the officers of the Crown with laches, for which the Crown is not liable; but, is it not natural to infer from the long silence either acquiescence in the judgment or waiver—if waiver could exist on behalf of the Crown, to its right of appeal. There was here want of diligence and the defendant is entitled at this period to the fruits of his judgment.

As a matter of actual fact, the remedy sought in the present action by the Crown can no more at the present date be given or asserted. And even if the argument against relief, which otherwise would be just, were founded merely upon delay, the validity of that defence must be tried upon principles substantially equitable.

The present case, on the merits, is an action by the Crown to recover $1,006.05 (an amount which was materially reduced at the trial) alleged to have been illegally collected by the defendant from the Crown's officers, as toll fees.

At the time of the institution of the action, the defendant was and had been insolvent for a number of years, having even defaulted some of its bonds for a period of over 35 years, and others for 3 years, as appears in the preamble of 6 Geo. V., ch. 2 (Prov.).

The defendant company, under the provisions of 6 Geo. V., ch. 2, was dissolved for all legal purposes from the 13th May, 1916, the date of the publication of the Proclamation in the Official Gazette, as provided by sec. 2 of the said Act, and a liquidator appointed under the provisions of sec. 4 thereof.

What does the equity of the case suggest under the circumstances? Would it be just and equitable to place, at this stage, an appeal upon the shoulders

of the curator after a silence of 14 months, on behalf of the Crown, and after the absolute insolvency of the defendant has been established even by an Act of the Legislature? Would not an appeal, or the continuation of litigation for such a small amount defeat the purposes of justice in delaying the adjustment of this small insolvent estate and prolong unduly the final winding up of such an insolvent company which practically has no assets? What interest can the Crown have in prosecuting this appeal? Were the judgment pronounced by this Court reversed and judgment given in favour of the Crown for the amount asked for, how could the Crown recover or realize? There are now no assets upon which the Crown could levy, and were there any assets the bondholders would take in preference and to the exclusion of all others.

As I have already said, granting this extension after such a long delay of 14 months would encourage fruitless litigation to discuss but academic questions without any substantial remedy against an absolutely insolvent defendant, who after such a long delay, and especially under the circumstances, has reason to expect not to be further troubled in respect of the matters raised and adjudged upon so many months ago. Taking into consideration the special position of the defendant, the reasons alleged in support of the application are not such as would justify the exercise of judicial discretion in favour of the same. Against the reasons set forth in support of the application, there are special circumstances which militate very strongly and equitably against them.

Although reluctant to shut out a party from the privilege of appealing, the "justice of the case"

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herein is against the granting of such an extension under the circumstances after such a long lapse of time.

Moreover, granting, at this stage and period, this application would consecrate the principle of no finality in the administration of justice and would be against the very spirit of the law, as enacted by sec. 82 of the *Exchequer Court Act,* whereby Parliament has enacted that 30 days would be a reasonable delay within which a suitor had to decide as to whether or not he would lodge an appeal, and the legislator could not reasonably anticipate that the discretion given the Judge in respect of an extension could ever be exercised 14 months after the pronouncing of judgment, unless serious and material injustice would follow, which is not the case in the present application.

The application is dismissed with costs.

Application dismissed.

Solicitor for plaintiff: *Alleyn Taschereau.*

Solicitors for defendants: *Pentland, Stuart & Co.*

QUEBEC ADMIRALTY DISTRICT.

1917
April 4.

W. C. SMITH, ET AL.,

PLAINTIFFS,

AGAINST

DONALD C. MACKENZIE, ET AL.,

DEFENDANTS.

Collision—Fog—Rule of road—Speed—Look-out.

Where in a fog or thick weather a steamer proceeds at an excessive speed, without a sufficient look-out, and fails to keep out of the way of a schooner keeping properly within her course, she is in violation of arts. 16 and 20 of the Rules of the Road and liable for a collision with the latter vessel.

ACTION to recover damages resulting from a collision.

Tried before the Honourable Mr. Justice Maclennan, Deputy Local Judge of the Quebec Admiralty District, March 6, 1917.

Hector McInnes, K.C., for plaintiffs.

A. R. Holden, K.C., for defendants.

MACLENNAN, Dep. L. J. (April 4, 1917) delivered judgment.

This is an action *in personam* by the owners and crew of the fishing schooner "Lucille M. Schnare" against the master, first officer and look-out of the steamship "Wartenfels" for damages from a collision between these vessels, on 18th June, 1916, resulting in the loss of the schooner and one member of the crew.

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The schooner was bound from St. Lawrence, Newfoundland, on a fishing trip to the Grand Banks, having on board a crew of 19, stores, bait and fishing tackle and the personal effects of the crew, and was proceeding on a course S.E. by E.½E. magnetic, when at 7.50 p.m., during daylight, she was struck by the steamship "Wartenfels" on the port side ranging aft between the foremast and mainmast. The wind was a light westerly breeze on the schooner's starboard quarter with fog of varying density. The schooner had all her sails up except topsails and was proceeding at a speed of about 3 to 4 knots per hour and had a mechanical fog horn at the bow which was sounded in accordance with the regulations. The master of the schooner had been on deck all day attending to the navigation, and with him was a man who was steering and two men keeping look-out forward, one of the latter operating the fog horn, when they heard a steamer's whistle 4 or 5 points on the port bow. The master heard about 4 blasts of the whistle and by watching he saw the compass bearing did not appreciably change, and on the last blast the steamship "Wartenfels" came into sight through the fog at a distance of 200 or 300 yards off the port bow, according to the evidence of the master and the look-out Beck, who was operating the fog horn. The other look-out, Arthur Schnare, also saw the steamer at a distance which he estimates at 800 or 900 feet. Another member of the crew, Stedman Corkum, was in his berth below, heard two blasts from the steamer, came up and saw the steamer at a distance of twice its own length, which would be about 800 feet. The schooner kept her course and speed, as her master relied upon the steamer keeping out of the way. The

schooner's length was 124 feet, drawing about 13 feet aft and 6 or 7 feet forward, and had on board about 30 tons ballast besides stores and provisions. The stem of the steamer struck the port side of the schooner between the main hatch and mainmast and the schooner went down in 15 minutes.

The "Wartenfels" was a German captured steel ship owned by the Crown and in the service of the Admiralty, 396 feet over all, with a gross tonnage of 4,511 tons, quadruple engines, single screw, drawing 14 feet forward and 18 feet aft, had 3 officers, 5 engineers and a crew of 79 which had been shipped in Bombay. She was on a voyage from London, and, at the time of the collision, was on a course S. 70 W. and about 5 or 6 miles south of Cape Race. The full speed of the steamer was 11 knots, and from 4 p.m., to the time of the collision at 7.50 p.m., had proceeded at varying speed owing to the fog conditions. The navigation was attended to by the master, the first officer and the quartermaster, who was steering on the bridge, and by one look-out forward on the forecastle head. The master left the bridge to go to his room 6 minutes before the collision when she was going at half-speed, and when about to leave his room to return to the bridge he heard the fog horn of the schooner about 30 seconds before the collision. The first officer, who was on the bridge, heard the schooner's fog horn, saw the schooner at the same moment, and says that he at once gave the order "Hard aport", and ordered the engines "full speed astern", and that the orders hard aport and full speed astern and the collision were simultaneous. The look-out did not hear the schooner's fog horn until the collision. The second officer, who was off duty, went from the fore part

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of the bridge deck into the bathroom, where he heard the schooner's fog horn, and in the space of a minute the collision occurred. The quartermaster was at the wheel steering; he says the fog was thick and he did not hear the fog horn. He was examined through an interpreter, and the following extracts from his evidence are relevant:

"Q. Did he get any orders from the first officer "when the schooner was seen?—A. Hard aport.

"Q. What time did the collision take place after "he got that order 'Hard aport'?—A. About a min- "ute of two, as soon as the first officer gave the "order 'Hard aport' he did it, and the vessels col- "lided.

"Q. Could he see the schooner?—A. No, sir, it was "too thick."

And further on he testified as follows:

"Q. Did he change his course just before the col- "lision?—A. S. 70 W. about 7 o'clock.

"Q. Did he change his helm just before the col- "lision?—A. No, sir.

"Q. Did he get an order to port his helm just be- "fore the collision?—A. He was going on the same "course.

"Q. Did not get any order to port the helm?—A. "The first officer gave him 'Hard aport', and after "two minutes they touched the schooner.

"Q. What order did he get?—A. The first officer "gave him 'Hard aport' and the ship touched the "other vessel.

"Q. What was the two minutes you were talking "about?—A. He did not say it, sir, as soon as he

"got the order 'Hard aport', he thinks it was two "minutes before the collision.

"Q. After he got the order 'Hard aport' he thinks "it was two minutes until the collision?—A. Yes, "sir.

"Q. Did he see the schooner?—A. No, sir.

"Q. Any time at all?—A. See nothing, sir."

The gunner of the steamer was on watch right aft, and he swears he heard a long blast from the schooner's fog horn when they struck. At the time of the collision the weather was fine and the sea smooth. The master of the schooner thought the steamer was going about 7 miles an hour from the foam that appeared on her bow. Corkum also saw the white foam, and the look-out, Arthur Schnare, says she had considerable foam on her bow rolled up.

The evidence on behalf of the steamer shows that she was proceeding at varying speed during the 3 or 4 hours preceding the collision, and I consider that a reasonable appreciation of all the evidence on this point shows that the steamer had a speed at the time of the collision of 6 knots an hour. There had been fog of varying density for some hours; some of the witnesses say that the fog was dense at the time of the collision. By article 16 of the Rules of the Road the steamer was obliged to go at a moderate speed, having regard to the existing circumstances and conditions. The meaning of this rule has been very frequently considered by the courts, and I think it is absolutely settled by the Court of Appeal and by the House of Lords, that you ought not to go so fast in a fog that you cannot pull up within the distance that you can see, and if you are going in a fog at such speed that you cannot pull

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up in time if anything require you to pull up you are going too fast. A steamer should be able to stop within the limit of observation and, as a general rule, speed such that another vessel cannot be avoided after being seen is excessive; *The Campania,*[1] *The Oceanic,*[2] *The Counsellor,*[3] *The Umbria.*[4]

Whatever number of knots per hour the steamer was making it was unable, after its first officer saw the schooner, to pull up and avoid the collision.

I, therefore, find that the steamer was going too fast, and not at the moderate speed required in a fog by article 16 of the Rules of the Road.

By articles 20 and 21 of the Rules of the Road the schooner had the right-of-way and was bound to keep her course and speed, and the steamer was obliged to keep out of her way. The evidence shows that the schooner did keep her course and speed, no alteration whatever having been made from the time that the fog signal of the steamer was first heard until the collision. The steamer was seen, according to the evidence of those on board the schooner, at a distance of 200 to 300 yards, and Captain Schnare says a minute or a minute and a half before the collision. If the look-out on the steamer had been sufficient and vigilant the schooner would have been seen at the very time the steamer came in view of those on board the schooner. The first officer was the only person on the steamer, according to the evidence, who saw the schooner before the collision, and when he saw her he says he gave the order "Hard aport". The quartermaster swore that one or two minutes elapsed between that order and the

[1] [1901] P. 289.
[2] 9 Asp. M. C. 378.
[3] [1913] P. 70.
[4] 166 U.S. 404.

collision. At the trial I had the advice and assistance of Captain Archibald Reid as nautical assessor, and he advised me that if the helm of the steamer had been put hard aport one minute before the collision or when she was 200 yards away, her bow would have gone to starboard and would easily have cleared the schooner. No explanation has been given why the order of the first officer "Hard aport", one or two minutes before the collision, was not carried out, as if it had been promptly and properly executed the steamer would have gone astern of the schooner. The steamer was bound to keep out of the way of the schooner and the burden rests upon her to show a sufficient reason for not doing so.

I, therefore, find that article 20 of the Rules was violated.

The plaintiffs have submitted that the steamer's look-out was incompetent and insufficient. The look-out was Fakir Hoosein, a Lascar, who gave his evidence through an interpreter; he was forward on the forecastle head and, according to his evidence, heard the horn and saw the schooner for the first time at the moment of the collision. The master of the steamer had left the bridge for 6 minutes; just as he was returning the collision took place. During this interval the only man on the bridge was the first officer, who walked across it constantly, and from time to time pulled the whistle cord and looked at the compass. The position of look-out is one requiring great fidelity, attention and care and should not be entrusted to an incompetent person. The greatest vigilance is required in fog or thick weather and one look-out which may be sufficient on a clear day is not sufficient in thick weather or in a place where other vessels may be met. The collision

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occurred on the route of ships coming in and going out past Cape Race, and during the course of the afternoon the fog signal of several ships was heard both on the steamer and schooner. In addition it was a place where fishing vessels were liable to be met. I asked my assessor if, having regard to the fog conditions, one look-out on the forecastle was sufficient, and he advised me it was not, that there should also have been a look-out in the crow's nest, and in the absence of the master from the bridge he should have left someone there with the first officer, and that it is usual in a fog to have, in addition to the other look-outs, someone on each end of the bridge to look and listen. I am satisfied that the look-out on the bow could have seen the schooner and heard its fog horn before the collision if he had been competent and attentive to his duty.

Dr. Lushington, in *The George*,[1] said: "What is a "proper look-out? Two things are necessary to "constitute it: first, that, according to the state of "the weather, the wind and the darkness at the "time, there be a sufficient number of persons sta- "tioned for the purpose. Secondly, assuming that "there is a sufficient number so stationed, that those "persons know and perform their duty; for it does "not follow, that, because persons are appointed to "a duty, they, therefore, discharge it. Upon the "present occasion, the question as to whether a good "look-out was actually kept will turn upon the ques- "tion, whether the 'Nora Creina' ought to have been "visible at a longer distance or not. If you are of "opinion that the night was not so dark as to pre- "vent persons seeing the 'Nora Creina' in good time "to prevent the accident, then there was not a good

[1] 9 Jurist 671.

"look-out. If, on the other hand, you shall be of "opinion that it was so dark that it was impossible, "by any ordinary care and caution, to have discov- "ered this vessel, so as to prevent the accident, then "no one will be to blame."

In the case of *The Germania,*[1] the Privy Council held that there ought to be two look-outs at the bow-sprit, and the Master of the Rolls, delivering the judgment for the Judicial Committee, said: "Their "lordships are informed by the naval assessors who "assist them that it is the usual practice in King's "ships to have never less than two look-outs at the "bow-sprit, and their lordships are not satisfied with "the sufficiency of the reason alleged for having only "one of these look-outs in the present case. The evi- "dence of the chief officer is to this effect. The first "report was from the look-out man, who reported "ship right ahead, the officer of the watch saw "something ahead, and ported the helm directly. "He says that the time was about a minute from the "time when he first saw her to the time when the col- "lision took place."

Marsden's Collisions at Sea[2]: "The look-out must "be vigilant and sufficient according to the exig- "encies of the case. The denser the fog and the "worse the weather the greater the cause for vigil- "ance. A ship cannot be heard to say that a look- "out was of no use because the weather was so thick "that another ship could not be seen until actually "in collision." In "The Mellona," Dr. Lushington said: "It is no excuse to urge that from the in- "tensity of the darkness no vigilance, however great, "could have enabled 'The Mellona' to have descried

[1] 21 L.T. 44.
[2] 6th Ed., p. 472.

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"'The George' in time to avoid collision. In proportion to the greatness of the necessity, the greater ought to have been the care and vigilance employed.

"In ordinary cases one or more hands should be specially stationed on the look-out by day as well as at night. They should not be engaged upon any other duty, and they should be stationed in the bows, or in that part of the ship from which other vessels can best be seen."

The great importance of a look-out is also referred to in the case of *The Batavier*.[1] In the *Cape Breton and Richelieu & Ontario Navigation Co.*[2], the offending ship was held liable for failure to maintain a proper look-out, and the decision of the Supreme Court in that case was subsequently confirmed in the Privy Council.[3] A vessel without a sufficient look-out has the burden cast upon her of proving that such fact did not contribute to the collision; *Magdalen Islands Steamship Co. v. The Ship Diana*.[4] In *The Curran*[5] the court found there had been a defective look-out on the part of one of the vessels because those on board failed to hear fog signals sounded by the other vessel.

I am, therefore, compelled to find that the evidence and circumstances of the case show that there was a failure to keep proper look-out on the steamer which directly contributed to the collision.

I have asked my assessor to advise me, if after the steamer came into sight there were any circumstances which required the schooner, under article

[1] 9 Moore's P. C. 286, 301, 14 E.R. 305.
[2] 36 Can. S.C.R. 564.
[3] 76 L.J.P.C. 14, [1907] A.C. 112.
[4] 11 Can. Ex. 40, 57.
[5] [1910] P. 184.

27 of the Rules of the Road, to depart from the rule requiring her to keep her course and speed, and he has advised me there were none and that it was imperative on the schooner to keep her course and speed, and that if she had changed her course she would have broken the rule. In my opinion, his advice on these points was proper and correct. A slight change in the helm of the steamer would have taken her out of the way and avoided the collision. The master of the schooner had a right to expect that the steamer would perform the necessary manœuvre, and he swears that "he thought the bow would sheer". I think he was justified in coming to that conclusion.

In the case of a collision between "The Turret Age", which held its course, and the "Lloyd S. Porter", which should have given way, the Privy Council observed:[1] "The 'Turret Age' is encountered by a "vessel which, if it is performing the manœuvres "that it ought to perform, will keep clear of them. "They proceed, and their Lordships think that they "had a right to proceed, upon the fair belief that the "vessel which they saw was going to perform the "proper manœuvres for the purpose of avoiding any "difficulty or danger."

A case in which the facts were very similar to these in the present action was *The Nacoochee*,[2] before the Supreme Court of the United States in 1900. In that case there was a moderate breeze and a thick fog, and a fishing schooner was under all plain sail making about 4 knots, when the steamer "Nacoochee" was suddenly sighted on the port side at a distance of 400 to 500 feet. The schooner kept its

[1] [1907] A.C. 498.
[2] 137 U.S. 330.

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course and the steamer, which was making 6 to 7 knots, struck her on the port quarter. The Court held that the schooner was not sailing too fast, that she was not in fault for keeping her course, and that the steamer was solely responsible for the collision.

I find that the master, first officer and look-out of the "Wartenfels" are to blame and that the collision was occasioned by their failure to observe articles 16, 20 and 29 of the Rules of the Road.

There is no blame imputable to the master or the crew of the schooner.

The plaintiffs are entitled to judgment against the defendants, with costs, and there will be a reference to the Registrar to assess the damages.

Judgment for plaintiffs.

Solicitor for plaintiffs: *Hector McInnis, K.C.*

Solicitors for defendants: *Meredith, Holden, Hague, Shaughnessy & Heward.*

APPEAL FROM THE QUEBEC ADMIRALTY DISTRICT.

1915
Sept. 7.

THE S.S. TUG "ETHEL Q." CAPTAIN EMILE SEQUIN,

APPELLANT (*Defendant*);

AND

ADELARD BEAUDETTE, CAPTAIN AND OWNER OF THE SAILING BARGE "A. YERGEAU,"

RESPONDENT (*Plaintiff*).

Admiralty—Appeal—What reviewable—Collision—Damages.

The Exchequer Court, sitting in appeal in admiralty matters, will not interfere with the judgment of the lower Court as regards pure questions of fact or the quantum of damages, unless it appears clearly erroneous.

Held, that upon the evidence the judgment of the Court below was correct in finding a tug, having a dead tow, responsible for a collision with a barge properly moored.

APPEAL from the Quebec Admiralty District in a collision case.

Heard by the Honourable Mr. Justice Audette, at Montreal, Que., May 31, 1915.

A. R. Angers, K.C. and *A. E. de Lorimier,* K.C., for appellant.

T. Rinfret, K.C., and *A. R. W. Plimsoll,* for respondent.

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

This is an appeal from the Deputy Local Judge of the Quebec Admiralty District, sitting at Montreal, in a case of damages arising out of a collision which

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occurred in the Lachine Canal, between the barge "A. Yergeau", which was moored at a berth assigned to her, by the proper officer in that behalf, on the north side of the Lachine Canal for the purposes of unloading, and the dead tow of the tug "Ethel Q", as set forth in the reasons for judgment of the learned judge.

Sitting as a single judge in an Admiralty Appeal from the judgment of a trial judge, while I might feel obliged to differ with great respect in matters of law and practice, yet as regards pure questions of fact or the quantum of damages, I would not be disposed to interfere with the judgment below, unless I came to the conclusion that it was clearly erroneous. *The Queen v. Armour*,[1] *Montreal Gas Co. v. St. Laurent*,[2] *Weller v. McDonald-McMillan Co.*,[3] *McGreevy v. The Queen*,[4] *Arpin v. The Queen*.[5]

The Supreme Court of Canada also held that when a disputed fact involving nautical questions, as the one raised in this case, with respect to what action should have been taken immediately before the collision, is raised by an appeal, that the decree of the Court below should not be reversed merely upon a balance of testimony. *The Picton*.[6] Indeed, it may be said that the hearing upon the appeal is a rehearing, and there is no presumption that the judgment in the court below is right; but it cannot be overlooked that the learned judge of the first instance has had an opportunity of hearing and seeing the witnesses and testing their credit by their

[1] 31 Can. S.C.R. 499.
[2] 26 Can. S.C.R. 176.
[3] 43 Can. S.C.R. 85.
[4] 14 Can. S.C.R. 735.
[5] 14 Can. S.C.R. 736, *Coutlée's Digest*, S.C., Vol. 1, p. 93 *et seq.*
[6] 4 Can. S.C.R. 648.

demeanour under examination. *Riekmann v. Thierry.*[1]

I have carefully read the whole of the evidence, given it serious consideration, and in the result, without again reviewing all the facts leading to the collision, but taking them all in consideration, I must without hesitation arrive at the conclusion that the tug is responsible for the collision. There was no false or wrong manœuvre on behalf of the plaintiff, his barge being moored at the pier, or at the bank of the canal, at the proper place. The tug was towing a scow that had no rudder, and no mode whatsoever of propelling or of moving by itself.

The point upon which most of the argument, on behalf of both parties, is addressed is as to the quantum of the damages allowed. Both sides apply to vary the same; the plaintiff, by his cross-appeal, asks that the amount of damages be increased, and the defendant claims that it should be reduced. On this question the evidence is very conflicting. On behalf of the defendant it is claimed that repairs were made which were not necessary or not flowing from or occasioned by the collision in question. And in support of that contention witnesses are brought to establish that fact upon what they have seen of the barge at the time of the accident, when the barge was still loaded, and when it was absolutely impossible to ascertain with any accuracy the extent of the damages. And there is this other evidence on behalf of the defendant by their employees who examined the barge after she had been repaired. While it may be said this class of evidence may in some degree help in arriving at a just conclusion, after the con-

[1] 14 R.P.C. 105.

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sideration of the evidence on behalf of both parties, it is not of itself conclusive.

On behalf of the plaintiff we have the evidence of the parties who made the repairs, the cost of all the materials bought for such purpose and which are claimed to have gone into the barge; but it is challenged that more repairs were made than were necessary and that the barge is now better than it was on July 26th, 1914, before the accident.

However, as one of the witnesses so wisely said, it is impossible, in a case of this kind, after the collision to properly ascertain the amount of the damages, what should be repaired, taken out or replaced, until, and only until, you begin to undo the damaged part of the vessel.

There appears to have, perhaps, been placed upon the damaged barge more repairs than were absolutely necessary, with some slight additions to the state in which she stood before the accident. But the plaintiff himself seems to have taken that into consideration, because while, by his statement of claim, he seeks to recover $2,586.93, by his general account filed as Exhibit No. 7, he only claims the sum of $2,151.67.

Obviously the learned judge has also taken that into consideration when by his judgment he only allows the sum of $1,500. And it must not be lost sight of the further fact that out of this $1,500, the sum of $315 appears to have been allowed for demurrage and towage, leaving the sum of $1,185 for the repairs.

Bilodeau, a witness heard on behalf of the defendants, claims that repairs to the extent of $904 were unnecessary. Taking these figures and deducting $904 from the amount of $2,151.67 claimed, there

remains the sum of $1,247. And witness Leamy, who states at the beginning of his evidence that the damages amount to $200, further on states, at page 15, that if the plaintiff claims $1,800 he should judge there might be $900 or $1,000 too much on that, leaving, then, the cost of repairs at $850. In face of the repairs actually made and their cost ascertained, no reliance should be placed upon a mere random statement of this kind.

Under the evidence considered in its *ensemble*, weighing its conflict in the best manner available, I am of opinion that the learned trial judge has come to the proper conclusion, and I hereby affirm the judgment of the Court below and dismiss the appeal with costs.

The plaintiff's motion by way of cross-appeal is dismissed without costs to either party—the same having occasioned no additional costs in the consideration of this appeal.

Appeal dismissed.

Solicitors for appellant: *Perron, Taschereau & Co.*

Solicitors for respondent: *Angers, de Lorimier & Co.*

1915
Jan. 12.

THE ATTORNEY-GENERAL OF CANADA, ON THE RELATION OF THOMAS HOUSE,

PLAINTIFF;

AND

HARVEY LEE MASSINGHILL AND BENJAMIN GRAHAM MASSINGHILL,

DEFENDANTS.

Public lands—Homestead—Abandonment—Misrepresentation—Subsequent patent—Estoppel.

The cancellation of a homestead entry by the Crown, brought about by the false statements of the entrant in his declaration of abandonment, will estop him from attacking a patent to the land subsequently issued by the Crown in good faith.

ACTION for the cancellation of a patent to land.

Tried before the Honourable Mr. Justice Audette, at Regina, Sask., December 3, 1914.

H. Y. MacDonald, K.C., for plaintiff.

W. B. Willoughby, K.C., and *Arthur Burnett,* for defendants.

AUDETTE, J. (January 12, 1915) delivered judgment.

This is an information exhibited by the Attorney-General of Canada, at the request of the relator, Thomas House, to have declared null and void a certain patent issued on November 24th, 1913, granting to the defendants the lands and premises in the said information described.

On or about April 11th, 1911, the relator, Thomas House, made entry as a homestead settler for the

southwest quarter of Section 16, Township 23, Range 29, West of the Third Meridian, in the Province of Saskatchewan; and at the same time he also pre-empted the southeast quarter of the said section.

Stripped of unnecessary details of fact, it is sufficient to say that in the fall of 1912 it became known that the Canadian Pacific Railway Company had decided to establish a divisional point for their railway in the neighbourhood of the relator's land, and that a new line of railway was being opened, both facts giving an enhanced value to the lands in question. The lands also adjoin the town site.

The relator, wishing to benefit by this enhanced value, formed the idea of selling his land before the time assigned under his homestead right had entitled him to a patent. He found it was too long a time to wait, and he thought if he could get title to his lands he could sell immediately. Someone secured for him a Cypress Hill Forest Reserve Scrip held by George Armstrong.

Both Armstrong and House, on May 15th, 1913, went to the Dominion Land Office at Maple Creek with the object of placing that scrip upon the relator's property. House there informed Stockdale, the land agent, that he wanted to abandon his property in favour of Armstrong, who held the scrip, and the agent answered that a homesteader or pre-emptor could only abandon in favour of the relations mentioned in the regulations. He further said he could not allow the scrip in question to be placed upon the land without being first instructed by Ottawa in respect to the same. Then House said he wanted to abandon anyway, and the agent said he warned him he would have to take his chances, because under such abandonment, the lands would

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have to be posted before being disposed of. The agent, however, undertook to notify them both when the land would be so posted and Armstrong gave him $2 for the purpose of telegraphing him when it would be so posted. These $2 were afterwards refunded. There is some conflicting evidence as to another $20 given to Stockdale on that occasion, but it has no bearing upon the case.

After House had decided to abandon, the agent began filling the forms of "Declaration of Abandonment", both for the homestead and pre-emption rights respectively, and the same are filed herein at Exhibits 1 and 2. When it came to the part calling for the reasons of the abandonment, the agent asked House and Armstrong what reasons would be assigned for such abandonment, and Armstrong suggested, "Sandy and not adapted for farming purposes", and that was duly entered in the declaration with House's assent.

Armstrong has sold for $6,400 the scrip in question to one Shannon, who had arranged matters for House, and the latter declared he had given a note to Shannon for whatever he paid to Armstrong. It is contended by one of the defendants also that House told him he had already received something like $1,800 and would ultimately receive $6,000 and 50 head of cattle if he succeeded in his abandonment.

Now, House in his testimony at trial, declares that the land he was abandoning was good farm land, and if sandy it is very little, and that he allowed the agent to put in these words because it was necessary, adding he knew it was not right to put that in. He further said he knew when he signed the declaration

it was as if he were swearing, taking his oath, to the truth of the document.

House, then, in making the "Declarations of Abandonment", knew he was twice swearing to a falsehood, to something that was untrue, when he declared that the land was "sandy and not adapted for farming purposes". He also affirmed, by another clause of the "Declarations", that he had not received, directly or indirectly, nor had been promised, nor did he expect to receive any consideration of any kind for allowing such entry to be cancelled, and in that respect, besides the evidence alleging the payment of $1,800 and more to come, the whole trend of the evidence does not bear that out. He further states in his declaration he intends to immediately re-enter for other land, if he got permission; but when the lands are offered him he does not do so, because it was never his intention of doing so notwithstanding such statement in his declaration of abandonment.

Upon receiving the "Declarations of Abandonment", the Department of the Interior, at Ottawa, taking for granted the veracity of House's allegations, kindly acquiesced in his demand and granted him the cancellation of his entry. No fault, indeed, can be found with what the Crown did,—it only acted on what House said and this with the object of helping him. And while cancelling the entry they offered him some other land upon which to enter, the time placed on the original homestead to count, and afterwards sending him a cheque for $200, which had been collected from the defendants and as representing the improvements made by House upon his abandoned land.

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Stockdale, the agent, broke faith with House and Armstrong and did not notify them when the lands were posted up for 10 days; but he was not obliged to do so under any of the Regulations relating to Dominion lands, and it was not part of his duty to do so. And while omitting to so notify them he was not derelict in his official duties yet he was certainly so in the moral obligation arising under his promise to them. Moreover, a copy of the letter of June 9th, 1912, (Exhibit B), appears on its face to have been received at the Dominion Land Office, Maple Creek, on June 13th, 1913, stating that the pre-emption entry would be cancelled. Yet by Exhibit No. 4, it appears that Stockdale was writing on June 17th, 1913, to George M. Armstrong, saying that up to the present time he had not received any word from Ottawa in regard to the lands in question. Peter Armstrong also stated that on the last Tuesday of June, 1913,—(which would be on the 24th) he was at Maple Creek when he stopped Stockdale on the street at about 8.30 or 8.45 a.m. and asked him if he had received news from Ottawa about the lands in which his brother was interested, and that Stockdale answered, "No, that it took time". However, Stockdale says in his evidence that he did meet Armstrong at about that date, but told him he had better come to his office, that he did not know the land had been posted. All of this goes to establish that Stockdale's conduct in all these transactions, while strictly keeping within the law, is certainly not upright and frank, and is anything but commendable.

The cancellation of the entry appears to have been made on June 14th, 1913,—the lands were posted up on the 19th of the same month,—and at the expiration of the 10 days, *i.e.*, on June 30th, the land

was taken up by the defendants, who subsequently obtained a patent and which the relator now seeks to have cancelled and declared null and void.

If House's entry was cancelled, and his abandonment acquiesced in, he has certainly but himself to blame. He might have sent the scrip to Ottawa and asked to have it placed upon his land, and in doing so he would have acted honestly, disclosing all he was doing, all he wanted. The agent, Stockdale, was not there to give him legal advice,—no fault can be found in all he told him before sending the "Declarations of Abandonment".

The relator in abandoning took chances, and the defendants becoming aware that the lands would be put up were more diligent and did what in law they were entitled to do. If any mischief or damage result from the abandonment of the lands, after their being posted up for 10 days, who is to blame if not the relator? The original cause of this mischief, the *causa causans,* is obviously the false statements House made in his declarations which secured him the abandonment, and he is therefore estopped from benefiting by his wrongful act.

Whoever seeks equity must come into Court with clean hands. House knew of the impropriety of making the false statements contained in the "Declarations of Abandonment"; he knew it was wrong, and admitted it in his evidence. He knew that by making false statements he was transgressing the rules of fair dealing, the common rules of right and wrong, and he is now estopped from setting up anything which is the result of such dealing. No man can take advantage of his own wrong, *Nullus commodum capre potest de injuria sua propria.* The author of wrong, who thereby contributed in placing a person in a position quite honest and legal

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shall not be allowed to take advantage of his own illegal act or avail himself of his wrong, as in the present case, in saying he did not intend to abandon without re-entry after the 10 days, and that he should have been given the right-of-way over the defendants. House deliberately chose to abandon unconditionally, taking all the chances of which he was made well aware before making the declarations,—he cannot to-day be given preference over the public when his lands were posted,—much more so indeed when the abandonment was granted upon false statement duly sworn to in a declaration that has the same legal effect as an oath.

"If a man, by his words or conduct, wilfully en-
"deavours to cause another to believe in a certain
"state of things which the first knows to be false,
"and if the second believes in such state of things
"and acts upon his belief, he who knowingly made
"the false statement is estopped from averring
"afterwards that such a state of things did not
"exist at the time." *Broom's Legal Maxims.*[1]

House succeeded in cancelling his entry upon a misrepresentation of existing facts, and as a result of his action a patent was given in good faith by the Crown after the posting up of the lands in the regular and usual manner, therefore, under the circumstances, it is found that a Crown patent cannot thus be trifled with, impeached and cancelled under such circumstances, and the action is dismissed with costs.

Action dismissed.

Solicitors for plaintiff: *MacCraken, Henderson, Greene & Herridge.*

Solicitor for defendants: *Arthur Burnett.*

[1] 8th Ed. p.p. 240, 241.

IN THE MATTER OF THE REFERENCE RESPECTING THE EXPEDIENCY OF THE REMOVAL OF THE INDIANS FROM THE RESERVE AT THE CITY OF SYDNEY, CAPE BRETON, IN THE PROVINCE OF NOVA SCOTIA.

1916
March 15.

Indians—Removal to new Reserve—Compensation.

The Exchequer Court, pursuant to the provisions of sec, 49a of the *Indian Act,* will recommend the removal of Indians from their Reserve to a new site, if in the interest of the public and the welfare of the Indians such removal seems expedient. Under sec. 2 (4) of the Act, they are to be compensated for the special loss or damage in respect of their buildings or improvements upon the Reserve from which they are removed.

REFERENCE to the Exchequer Court of Canada under the authority of an Order-in-council passed on April 24th, 1915, pursuant to the provisions of sec. 49a of the *Indian Act,* as amended by 1 & 2 Geo. V., ch. 14, sec. 2, for enquiry and report as to whether it was expedient, having regard to the interest of the public and of the band of Indians then resident on the Sydney (N.S.) Indian Reserve to another place outside the limits of the city of Sydney.

The proceedings under the reference were heard before the Honourable Mr. Justice Audette on the 20th, 21st, 23rd and 24th days of September, 1915.

J. A. Gillies, K.C., appeared on behalf of the party interested in the removal of the Indians.

G. A. R. Rowlings was appointed by the Judge to represent the Indians on the hearing of the Reference.

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RE INDIAN RESERVE, SYDNEY, CAPE BRETON.

Reasons for Judgment.

AUDETTE, J. (March 15, 1916) made his report to the Governor-General-in-Council as follows:

To His Royal Highness, the Governor-in-Council:

The question as to whether or not it is expedient —having regard to the interest of the public and of the Indians, that the latter should be removed from the Reserve at Sydney, and for further action under the provisions of the Act—having been referred to the Exchequer Court of Canada for inquiry and report, under both the provisions of the Order-in-Council of April 30th, 1915, and of 1-2 George V., ch. 14,—the undersigned has the honour to report as follows:—

The notice, provided by sub-sec. 2 of sec. 2 of the Act, fixing the time and place for the taking of evidence and the hearing of the investigation respecting the above matter, having been published in the *Canada Gazette* and in a local newspaper at Sydney, I assigned counsel to represent and act for the Indians, who might be opposed to the proposed removal, they having previously declared their unwillingness to surrender.

The hearing of the matter was proceeded with at Sydney, on the 20th, 21st, 22nd, 23rd and 24th days of September, 1915, and upon hearing read the pleadings, and upon hearing the evidence adduced both on behalf of the party seeking such removal, and on behalf of the Indians,—and upon hearing J. A. Gillies, K.C., of counsel on behalf of the party seeking the removal, and George A. R. Rowlings, on behalf of the Indians, the undersigned humbly submits the following finding:

The Reserve in question, which is numbered 28 in the Official Schedule of Indian Reserves, is located

on the eastern shore of Sydney Harbour, and was acquired by the Dominion Government on April 28th, 1882, under a grant from the Province of Nova Scotia, for the use of the Micmac Tribe.

It had been surveyed under direction of the Federal Government in 1877, and at that time contained 2 acres, 2 roods and 37 perches,—the area mentioned in the Provincial grant above mentioned.

When the Cape Breton Railway was built in 1887 or 1888, sixty-six hundredths of an acre of the Reserve was expropriated for the purposes of that public work, severing the land in two parcels, leaving the Reserve, already of irregular shape, with the contents of 2 acres and 12 perches, and a small piece of land on the water side of the track. This small piece of the Reserve, severed by the railway from its main part, is of no value and cannot be utilized for settlement purposes,—and in the result leaves the Reserve, for practical purposes, still smaller than its apparent and real size.

Joe Christmas, the present Chief, or Captain, of the band on the Reserve, has lived on the Reserve back and forth since 1875. In 1887 two more Indian families arrived upon the Reserve. In 1899 there were 85 Indians on the Reserve, and on February 15th, 1915, as appears by Exhibit "C", there were 23 houses and 115 Indians. At present there are between 120 and 122 Indians and 27 houses, without counting the school house and the brick building with sanitary closets.

The present Reserve is really an adjunct of the Eskasoni Reserve, composed of 2,800 acres, and which is about 24 to 25 miles from Sydney. The Grand Chief of the Micmacs resides at Eskasoni, and there is only a sub-chief, or Captain, at the

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Sydney Reserve. There are in the vicinity of 155 Indians at Eskasoni, who do some agricultural work. When these Eskasoni Indians come to Sydney to sell their handicrafts and products, they reside on the Sydney Reserve. There is also the Cariboo Marsh Reserve, of about 5,385 acres. The land on that Reserve is so poor that no Indians reside upon it, but as there is considerable timber upon it they use it to cut their supply for fuel and for making ties, which they sell to the Steel & Coal Company. There are also Indians residing at North Sydney and Little Bras d'Or who, like the others when they come to Sydney, put up at the Indian Reserve.

Now, this Reserve abuts on King's Road, which is one of the principal arteries of the city, a highway very much travelled and used by the public, and upon which a large number of fine residences are built. No one cares to live in the immediate vicinity of the Indians. The overwhelming weight of the evidence is to the effect that the Reserve retards and is a clog in the development of that part of the city. On this branch of the case I may say I would have come to a final decision with more satisfaction, had I heard the present Mayor of the city, some representatives from the Board of Trade, and some prominent public-spirited citizens.

It is worth passing notice to mention that the two medical doctors who respectively held the position of Indian Agent for this Reserve since 1899, favour the removal of the Indians, provided larger and better quarters are given them. Dr. McIntyre says, he thought the Reserve congested with 20 houses and 100 Indians, and there are now 27 houses and 122 Indians. The removal would make the property in that neighbourhood more valuable for assessment

purposes,—and it is no doubt an anomaly to have the Indian Reserve in almost the centre of the city, or on one of its principal thoroughfares.

The racial inequalities of the Indians as compared with the white man, check to a great extent any move towards social development, a state of affairs which under the system now obtaining can only grow worse every day as the number of Indians is increasing.

I do, therefore, without hesitation, come to the conclusion, on this branch of the case, that the removal of the Indians from the Reserve is obviously in the interest of the public.

Coming to the second branch of the case, as to whether it is in the interest of the Indians, to be removed to a larger place, I may say that during the trial or investigation, I had occasion, accompanied by counsel on both sides, to view and examine the Reserve in question. It was on that day quite clean and in good sanitary condition; but it is established that this condition did not always obtain.

The majority of the Indians is opposed to the removal. They find their present Reserve well located, close to the place where they earn their livelihood, and it suits their methods of life. They want to stay where they are, and do not wish to accept any place offered to them. However, if a better, larger and more suitable place is found it will be acceptable to some of them. This state of things carries us thus far and no further. But the Reserve is getting too small, too congested and too limited, to accommodate its increasing population, besides the fact that the sanitary conditions are unsatisfactory and can only grow worse with an increase in population on the settlement.

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RE INDIAN RESERVE, SYDNEY, CAPE BRETON.

Reasons for Judgment.

The brick sanitary closet on the Reserve has been closed as a result of misuse, and the several draught-houses, now in use to replace it, have proved to be very objectionable to the neighbourhood. Although provided with a number of such draught-houses, the Indians have not been always considerate and mindful of their neighbours in respect of cleanliness. They are also charged with disturbance, but that part of the evidence is meagre and not very reliable, and in that respect they may not be any worse than white men of certain classes. And while it can be said in one sense they may be undesirable neighbours in that locality, they could be considered as reasonably well-behaved Indians. They are healthy Indians and the Reserve is free from tuberculosis.

These Indians have abandoned the nomadic life of their ancestors, and are now employed as labourers all over the city at different works, while the women do some charring and washing.

This Reserve has become too small for the present requirements. There are too many buildings upon it, and the band of Indians has become too numerous to be located under the present conditions for sanitation on such a small area. An undesirable and objectionable congestion is the necessary result. Moreover, the band is growing, the young men are marrying and desire to settle there. And while the Reserve is too small for the Indians actually in occupation, we must not overlook that all the Indians of Cape Breton who come to Sydney, reside on the Reserve during the time of their visit. And looking to the future, made wise by looking on the past of this Reserve, it appears that the desirability of a larger Reserve, a matter of expediency now, will become imperative in the near future.

The Indians, in their own interest, should be removed to a larger place, where they would be given a small plot of land to cultivate. But this removal, while it should be to a place outside of the city, to avoid a further removal in the future, must be consistent with and considerate of the interest of the Indians. They should remain as close as possible to the city, although outside its limits, to allow them to pursue the same manner of earning their livelihood by doing work in the city, where, indeed, they have become quite a factor in the labour market. They must also be kept close to their Church, because it is insisted upon, in the evidence, that their priest has a very salutary influence over them, and when the Indian loses the influence of his church, he goes on the down grade. These Indians are labourers of all classes; bricklayers, masons, plasterers, carpenters, pick and shovel men, and some of them work on the Cape Breton Electric Tramway. They are much employed during the winter, for the removal of snow from the tramway. They also make pick handles, tubs and baskets.

The evidence establishes in the result that the removal would be in the interest of the Indians, provided they are given a better and larger Reserve in some place convenient to their church and their work. And in doing so, to place them in the neighbourhood of the Coke Ovens district must be avoided—that locality is undesirable in many respects—and occasion for intemperance is sure to arise there.

Both the unsatisfactory condition of the present Reserve with respect to sanitation, and the advantage to be derived by the Indians from larger grounds, make it expedient to recommend their removal to a better and larger place, consistent with

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the relatively close proximity to their work and church.

What the Indian, on the one hand, may lose from the convenience of close neighbourhood to his place of labour, in the future perhaps made costly by the expense of a ferry or car-fare,—which with that class must be reckoned,—will be offset by the advantage of a larger territory for his Reserve, where he can have his little plot of ground under cultivation giving him a vegetable garden, helping materially in support of his family.

The removal of this band of Indians from the Reserve will open to improvement at once that part of the city of Sydney, while the Indian, in the result, will not suffer anything serious, save perhaps a disadvantage in the degree of convenience in going to and from his work, and his morals can be looked after just as well upon the new Reserve. He will be able to attend his church just the same, and he will, moreover, be perhaps further away from the temptation in the way of intemperance and kept busy and interested in his Reserve by attending to his vegetable garden. Having each a small plot of land would also be an incentive to keep it in proper condition.

Having found the removal of the Indians from this Reserve expedient and advisable, it becomes my duty now, under the provisions of sub-sec. 4 of sec. 2 of the Act, "to ascertain the amounts of compensation, "if any, which should be paid respectively to in- "dividual Indians of the band for the special loss or "damages which they will sustain in respect of the "buildings or improvements to which they are en- "titled upon the lands of the Reserve."

On that branch of the case, Exhibit "E", testified to by 3 witnesses, establishes the value of each building upon the Reserve, with the name of the proprietor opposite the figures. This valuation, however, has been arrived at on a basis of re-instatement value. That is, it does not show the actual market value of the buildings, taking into consideration the depreciation for wear and tear. That document shows what it would cost to build these, however, anew to-day.

While the Indian, the ward of the nation, should be treated as well as possible, it is quite conceivable that a great part of the old buildings could be used in the erection of the buildings on the new Reserve. The total value of the buildings, owned by the Indians on the Reserve, is placed by these three witnesses at $8,850, subject to what has just been said. This is exclusive of the value of the brick sanitary closet and the school-house.

Passing now to the question of the selection of the site for a new Reserve, it may be said that a deal of evidence has been adduced in that respect. Indeed, the selection of a site is a question not free from difficulty, and upon which a deal of evidence has been adduced. A large plan of the city, Exhibit "D", has been filed, and upon it has been shown as prospective or available sites, the places marked respectively "A", "B", "C", "D", "E", "F", "G", and "H". On that plan is also shown the site of the present Reserve.

Besides these sites so indicated on the plan, there is also across the harbour at Westmount, almost opposite the present Reserve, a place recommended by some of the witnesses. It is entirely outside of the limits of the city, and quite accessible to the city

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for the most part of the year. However, in the autumn and in the spring the ice makes the crossing quite impossible at times for a period varying from one week to three weeks and perhaps more. Were it not for that last difficulty the place would be ideal. The Murphy farm of 50 acres is there available—and there is also a large quantity of land in that neighbourhood which could easily be secured at a reasonable price. The soil is very good, the site beautiful and abutting on the harbour. If the Indians were established at Westmount on really a good farm, would it not be possible for them to keep a few horses, and when the ice on the river prevents them from coming across, they could drive to town, a distance of only 5 or 6 miles. They would be there away from the liquor shops and the undesirable foreigners settled at the Coke Ovens, where they often get liquor—always a source of trouble to them.

Of all the other sites above mentioned and referred to by the letters "A" to "H", I would only recommend in the alternative, either "A" or "E".

The "A" site lies outside of the eastern part of the city between the Grand Lake Road and the Sydney and Glace Bay Railway Company's line; and "E", which is also outside the eastern part of the city, at the top of the Cow Bay Road.

Jos. Christmas, one of the Indians, although objecting to the removal, says if they must be removed, he would prefer the Westmount site to any other. Ben Christmas, another Indian, speaking for himself, says "E", at the top of the Cow Bay Road, would meet with his approval if they are given a little assistance in building and larger grounds. The soil there, however, seems to be of doubtful character for farming purposes.

Under all the circumstances, I would humbly recommend, as prospective alternative sites, "A" at the top of the Grand Lake Road, or "E" at the top of the Cow Bay Road, or Westmount. The prospective sites within the limits of the city should be discarded, because the same question of removal would arise again at some future date.

The price at which these prospective properties could be acquired, has been estimated by some of the witnesses.

It may be said that while the present site can only be sold at public auction, Mr. J. A. Gillies, K.C., has offered to purchase it at $5,000. If the sale is made this amount may be used as an upset price. Agent Parker valued the land at $4,800,—witnesses Ross and Midgley at $5,000,—Rev. Father Cameron at $150 an acre,—and Rev. Father McDonald, in his letter of January 8th, 1914, at $12,000. The valuation of $5,000 would appear to be about fair and right.

Therefore, the undersigned has the honour to report he finds it is expedient, having regard to the interest of the public and of the Indians located on the small Sydney Reserve, that the said Indians should be removed from such Reserve.

Furthermore, it is found that the compensation above set forth should be paid respectively to the individual Indians of the band for the special loss or damages sustained by them in respect of their buildings or improvements upon the Reserve, or an adjustment be made for their claims in respect thereto, and a suitable new Reserve be obtained for them before they be removed from or disturbed in the possession of the present Reserve.

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The undersigned would further recommend that the Indians should on their removal be treated with great consideration and kindness, and that such removal should be made quietly without undue haste, trouble or inconvenience, to the Indians. The site to be first selected and the compensation for their buildings or improvements adjusted on the basis above mentioned.

IN WITNESS WHEREOF I have set my hand this 15th day of March, A.D., 1916.

(Sgd.) L. A. AUDETTE,
J. E. C.

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CONTRACT

Public work—Contract for construction—Progress estimate—Allowance to contractor not made therein—Claim in writing—Engineer's certificate—Right of engineer subsequently appointed to review—Condition precedent—Right of contractor to recover. By the provisions of a contract for the construction of a public work every allowance to which the contractor was fairly entitled should not be paid the full amount due him under the contract until if the contractor had any claims which were not so included it was necessary for him to make such claims in writing to the engineer within a specified time. *Held*, that the failure to comply with these provisions disentitled the contractor to recover the amount of such claims. 2. It was further provided by the contract that the contractor should not be paid the full amount due him under the contract until he had obtained the certificate of the engineer "for the time being", having control of the work, that the same had been completed to his satisfaction. B. was the engineer "for the time being" when the work was completed. He drew up a document which was intended to be a final certificate. In this certificate a certain claim was neither expressly allowed nor disallowed, but it was left for the determination of the Exchequer Court under a clause in the contract which provided that all matters of difference between the parties arising out of the contract, the decision whereof was not especially given to the engineer, should be referred to the Exchequer Court of Canada. *Held*, that as it appeared that B. had intended to give a final certificate, an engineer subsequently appointed had no power to re-open the matter. GILBERT BROTHERS ENGINEERING CO. *v.* THE KING.....141

2. *Hire of horses—Military Officer—Liability of Crown.* A contract for the hire of horses entered into by an officer of the Crown's military forces acting under the authority of the commanding officer is binding upon the Crown. GULF PULP & PAPER CO. *v.* THE KING.....294

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EXPROPRIATION

Compensation—Water-lots—Crown grant—Reservations—Abandonment of proceedings—Advantages—Crossing—Costs. In an expropriation by the Crown of lands held under a Crown grant subject to a reservation in favour of the Crown of the right to retake the lands if required for public purposes: *Held*, that the owners were entitled to have their rights duly adjusted without fixing the actual value of the rights remaining in the Crown under the grant. (2) That wan of registration did not affect the validity of the conditions or reservations. (3) That the rights reserved affected lands within the category of "banks, sea-shore, lands reclaimed from the sea, ports and harbours", and forming part of the Crown domain were imprescriptible. (4) That the rights were not extinguished by a sheriff's sale of the land. (5) Where expropriation has been abandoned, but no legal rights are invaded and no damage suffered, compensation cannot be allowed. (6) An advantage to the property by the construction of a railway crossing is to be taken into consideration in estimating the amount of compensation. (7) That the Crown having made no offer by its statement of defence was liable for the costs. FUGERE *v.* THE KING..... 1

2. *Compensation—Building lots—Loss of Access—Costs.* In an expropriation of bulding lots by the Crown in the city of Fredericton, N.B., for railway purposes, the owner was held not entitled to special damages for the depreciation in value to the remainder of the land as factory sites because of their being cut off from the proposed extension of a public street. As factory sites the losses, if any, were offset by the advantages. (2) Notwithstanding the recovery of more than the amount tendered, a party having failed to establish his main claim cannot be allowed full costs of the action. THE KING *v.* TORRENS AND BAIRD.....19

3. *Compensation—Coal handling site—Lease—Access.* In an expropriation of land leased as a coal-handling site the owners were awarded compensation for the value of the land taken and for the injurious affection to the remainder, with means of access thereto, together with a 10% allowance for the compulsory taking, without regard to the special use of the land, and the lessees were allowed for the loss they have been put to from the interference with their business and the necessary removal of their weigh-scales to another site. THE KING *v.* MONTGOMERY-CAMPBELL.....32

4. *Gas and electrical plant—Valuation—Agreement.* The Crown having expropriated land used as a site for a gas and electric plant, an agreement was entered into which provided for a complete reinstatement of the owners on a new site. *Held*, that in ascertaining the value of the lands to be conveyed to the owners by the Crown, the value to be ascertained under the terms of the agreement was not the value to the grantors, but the value to the owners; that the owners were entitled to compensation only according to the terms of the agreement, with interest on the unpaid amount from the time of surrendering possession of the lands expropriated; but they

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