REPORTS

— OF THE —

EXCHEQUER COURT

— OF —

CANADA.

CHARLES MORSE, LL.B., BARRISTER-AT-LAW,

REPORTER.

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1893.

JUDGE

OF THE

EXCHEQUER COURT OF CANADA.

THE HONOURABLE GEO. W. BURBIDGE,

Appointed on the 1st day of October, 1887.

LOCAL JUDGES IN ADMIRALTY OF THE EXCHEQUER COURT OF CANADA.

The Honourable	GEORGE IRVINE, Q. C.	- - -	Quebec District.
do	JAMES MCDONALD, C.J.S.C.	- - N. S.	do
do	WILLIAM HENRY TUCK, J.S.C.	- N. B.	do
do	WILLIAM W. SULLIVAN, C.J.S.C.	P. E. I.	do
do	SIR MATTHEW BAILLIE BEGBIE, C.J.S.C.		B. C. Dist.
His Honour Judge	MCDOUGALL	- -	Toronto District.

ATTORNEY-GENERAL OF THE DOMINION OF CANADA:

THE RIGHT HONOURABLE SIR JOHN S. D. THOMPSON, K.C.M.G.; P.C.; Q.C.

SOLICITOR-GENERAL OF THE DOMINION OF CANADA.

THE HONOURABLE JOHN JOSEPH CURRAN, Q. C.

ERRATA.

Errors in cases cited are corrected in the Table of Cases Cited.

Page 26, foot-note 2nd line, read *1891* for *18 1.*

" 109, 19th line, for *condition* read *conditions.*

" 66, line 17, for *$150* read *$550.*

" 63, foot-note, for *W. Robb.* read *W. Rob.*

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DETERMINED IN THE

EXCHEQUER COURT OF CANADA.

JACOB P. CLARKE AND JOHN R. BARBER..... } SUPPLIANTS; 1892 Mar. 16.

AND

HER MAJESTY THE QUEEN.....RESPONDENT.

Practice—Extension of time for leave to appeal after period prescribed by statute has expired—The Exchequer Court Act (1887) sec. 51; 53 Vic. c. 35, s. 1—Grounds upon which extension will be granted.

Where sufficient grounds are disclosed, the time for leave to appeal from a judgment of the Exchequer Court of Canada prescribed by section 51 of *The Exchequer Court Act* (as amended by 53 Vic. c. 35, s. 1) may be extended after such prescribed time has expired. [The application in this case was made within three days after the expiry of the thirty days within which an appeal could have been taken.]

2. The fact that a solicitor who has received instructions to appeal has fallen ill before carrying out such instructions, affords a sufficient ground upon which an extension may be allowed after the time for leave to appeal prescribed by the statute has expired.

3. Pressure of public business preventing a consultation between the Attorney-General for Canada and his solicitor within the prescribed time for leave to appeal is sufficient reason for an extension being granted although the application therefor may not be made until after the expiry of such prescribed time.

MOTION for extension of time for leave to appeal (1).

The judgment from which the defendant desired to appeal to the Supreme Court of Canada was pronounced

(1) 50-51 Vic. c. 16, s. 51, as amended by 53 Vic. c. 35, s. 1 :—

Any party to any action, suit, cause, matter or other judicial proceeding, in which the actual amount in controversy exceeds five hundred dollars, who is dissatisfied with any final judgment

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herein on the 16th day of December, 1891. The ordinary time in which the defendant had leave to appeal under the statute expired on the 16th January, 1892. The reasons why the ordinary time was allowed to expire before an extension was asked by the defendant, and the grounds upon which the present motion is made, appear from the following affidavits:

(1.) "I, James Morris Balderson, of the City of "Ottawa, in the County of Carleton, Barrister, make "oath and say:—

"1. I am a member of the firm of O'Connor, Hogg & "Balderson, solicitors herein for Her Majesty's Attor- "ney-General for the Dominion of Canada.

"2. The judgment of the Exchequer Court in this "case was delivered on the sixteenth day of Decem- "ber, 1891.

"3. Owing to the Christmas Vacation immediately "succeeding the date of delivery of said judgment and "owing to the subsequent absence from Ottawa of "Her Majesty's said Attorney-General of Canada the "said solicitors herein for the Attorney-General of "Canada have been unable to consult with him to

given therein by the Exchequer Court, in virtue of any jurisdiction now or hereafter, in any manner, vested in such court, and who is desirous of appealing against such judgment, may, within thirty days from the day on which such judgment has been given, or within such further time as the judge of such court allows, deposit with the registrar of the Supreme Court the sum of fifty dollars by way of security for costs; and thereupon the registrar shall set the appeal down for hearing before the Supreme Court on the first day of the next session; and the party appealing shall thereupon, within ten days after the deposit, give to the parties affected by the appeal, or their respective attorneys or solicitors, by whom such parties were represented before the judge of the Exchequer Court, notice in writing that the case has been so set down to be heard in appeal as aforesaid; and in such notice the said party so appealing may, if he so desires, limit the subject of the appeal to any special defined question or questions; and the said appeal shall thereupon be heard and determined by the Supreme Court.

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" ascertain if it is his intention to appeal to the " Supreme Court of Canada from the said judgment " herein of the Exchequer Court, and consequently the " said solicitors herein for the Attorney-General for " Canada desire to have the time for the appealing to " the Supreme Court extended for one month from the " date hereof to allow them an opportunity to consult " with the said Attorney-General for Canada on his " return to Ottawa and ascertain if he desires to " appeal....."

(2.) " I, William Drummond Hogg, of the City of " Ottawa, in the County of Carleton, Barrister-at-Law, " make oath and say :—

" 1. That I have had and still have the conduct of " the defence in this case on behalf of the Attorney-" General of Canada.

" 2. That the judgment herein confirming the report " of the referees was pronounced by the court on the " 16th day of December, 1891.

" 3. That within the thirty days allowed by the " Supreme and Exchequer Courts Act within which " an appeal to the Supreme Court of Canada may be " taken I was instructed to give notice of appeal in " this case to the said Supreme Court.

" 4. That on or about the 8th day of January I was " taken ill with a severe attack of the grip and for " upwards of ten days I was confined to my house " unable to attend to any of the business of my office, " and for some part of the time, not allowed by my " medical adviser to consult with reference to any " legal matters which were at that time pending in " my office.

" 5. That I was not allowed to return to my business " until the 18th day of January last past, and, as a " consequence of my illness and the confinement to " my house, the time within which notice of appeal

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" should have been given in this case had elapsed " and I immediately instructed a motion to be made " to have the time extended.

" 6. That at the time I gave such instructions I was " not attending to active duties in my office, and " my partner, James Morris Balderson, made the affi- " davit upon which the motion herein was based; and " I am desirous of adding, to the grounds set out in " his affidavit in support of the motion, the facts above " set out in this affidavit....."

March 18th, 1892.

Hogg, Q. C., in support of motion :—

The application is made under the 51st section of the Act 50–51 Vic. c. 16, which gives the party desirous of appealing leave to do so within thirty days from the day on which the decision has been given or within such further time as the judge or the court may allow. Under this section your Lordship has full discretion to grant such an order under the circumstances of this case. The circumstances of this case are such as will commend themselves to your Lordship's mind. The application for extension of time was made three days after the thirty days mentioned in the section had elapsed. I propose to submit that this case does not come within the rules at all. It arises under the statute. The rules of court do not seem to deal specifically with the extension of time. There is nothing in the rules that is applicable to this case.

It appears to me that the effect of the whole practice of the courts is to allow an extension where a proper case is made out. As it does not come within the rules of court in any way, it must be treated in the same way as cases of similar character in other courts.

It will, no doubt, be contended that the application not having been made within the thirty days, your

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Lordship's discretion is at an end. But on this point I wish to refer to the case of *Banner* v. *Johnson* (1) which was a case arising under the *Companies' Act*; but the powers which your Lordship has under this Act are greater in respect to exercising discretion than the provisions of the *Companies' Act*. At page 170 the Lord Chancellor (Hatherly) says:—

> An argument was adduced in favour of that view from an ordinary rule of our courts, namely, that where an application is made for an extension of time, the application must be made before the period of time has elapsed. That, no doubt, is so in cases of putting in answers, and such like. But there is this to be said with reference to that, that in Chancery the court has all its own orders and rules under its own control; and, although, as a rule, it would say that the application ought to be made before the actual time has run out; yet case after case has occurred where, on payment of the costs, which the parties are always made to pay on such occasions, the court, having its orders under its own control, has extended the time and allowed the matter to be entered into.

The result of this case was that an order for an extension of time was granted some ten months after the time had expired. And, notwithstanding the lapse of time, the order made by the Court of Appeal was confirmed by the House of Lords upon the words of the statute. In *Wheeler* v. *Gibbs* (2) we have a fully stronger case in support of my contention. In that case the appeal had been dismissed for want of prosecution, on the ground that a certain notice had not been given within a certain time. Subsequent to the judgment dismissing the appeal, an application was made to the court below to extend the time for giving the notice. The court below so extended the time. The appeal had been reinscribed, and upon motion to quash, the question came up whether the time should have been extended in this way, and it was held that the judge of the court below in extend-

(1) L. R. 5 H. L. 157. (2) 3 Can. S. C. R. 374.

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ing the time had acted properly within the words of the statute. (See the judgment of the Chief Justice at page 395.) I submit that the words used by the learned Chief Justice are most applicable to the words of our statute.

I submit, under section 51 of *The Exchequer Court Act*, your Lordship has full right to exercise your discretion although the prescribed time has expired within which the appeal had to be taken out and the notice given. You have a perfect right under this section to allow the extension of time where the application is made after the thirty days.

There are a large number of cases in the reports dealing with the question of discretion in matters of this kind, the result of them being that you find fifty per cent of them one way and fifty per cent the other. But the rule deducible from them would seem to be that an application for an extension after the prescribed time has expired will be granted, unless by the lapse of time the position or rights of the parties have been changed, and unless some reason why the time should not be extended be shown by the adverse party. The question is fully discussed in the case *re Manchester Economic Building Society* (1). That decision is based upon a rule of court. There is another case, that of *re Ambrose Lake Tin and Copper Company* (2). In this case the time was extended, and it is perhaps a case as nearly like the present case as one can be. No length of time elapsed after the last day of the time prescribed for giving notice of appeal and when the application was made.

Now there is a case in our reports, *The Glengarry Election Case* (3). I submit that *The Glengarry Elec-*

(1) 24 Ch. D. p. 488. (2) 8 Ch. D. 643.
(3) 14 Can. S. C. R. 453.

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tion Case does not affect the rule as laid down in *Banner* v. *Johnson* (1).

Now as to the facts set out in the affidavits. While there would seem to be some contradiction between the affidavits made in support of the motion for the extension, I can explain it by saying, with regard to Mr. Balderson's affidavit, that where he states that the solicitors for the Crown had been unable before the expiration of the thirty days to consult with the Attorney-General to ascertain if it was his intention to appeal, he is under a misapprehension. As a matter of fact I had instructions to appeal before that date. Your Lordship will observe that I have stated that I was instructed to give notice of appeal within the thirty days. I had abundance of time after the 8th of January to do that. In my letter of the 18th of December, I had written to the Deputy Minister and asked him as to whether an appeal would be taken. This shows very plainly that the question of taking an appeal was under discussion, and it was in consequence of this report of mine that that letter was written by the Deputy Minister. I submit that here we have a case where if ever there were one in which the time should be extended after the prescribed period had expired, it should be done here. If ever there could be a case where, the exercise of your discretion should be applied to it, that case is this. The 16th of January was Saturday, and the 17th was Sunday, and on Tuesday the 19th the application was made. There is nothing to show that the respondents have suffered by reason of the delay of two days. In the case of *Banner* v. *Johnson* (1) the time was extended although ten months had elapsed from the expiry of the prescribed time before the application was allowed. It cannot be shown that the suppliants have been prejudiced by the delay,

(1) L. R. 5 H. L. 157.

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and at least it should have been set out in their affidavits. (He cites *re New Callao* (1) which is followed in *re Manchester Economic Building Society* (2), and *re Blyth and Young*) (3).

Argument of Counsel.

McCarthy, Q.C., *contra:*

The various questions which my learned friend has discussed at considerable length I do not propose to occupy time in answering; but I do not wish to be considered as conceding them. The case of *Banner* v. *Johnson* (4), I am inclined to think, is decisive of the practice in such matters. I am inclined to regard that case as decisive as to what extent discretion may be exercised in a case such as the present. I don't think that *The Glengarry Election Case* (5) should be considered to affect it in any way. But I do not propose to labour that point; and while not conceding it I leave it for your Lordship to decide.

The next question that arises is, what is the ground put forward here for the exercise of your Lordship's discretion? It is certainly not sufficient to take out a summons without grounds being given for it, or an affidavit showing that the Crown has been placed in some position which gives an equity against the suppliants. The legislature has fixed the period of thirty days in an ordinary case in which an appeal should be taken, and where that period has expired something more must be shown than the Crown has undertaken to do here in order to obtain an extension of that time. Now with regard to the affidavits upon which this motion is based, they are not consistent. The first affidavit on which the summons was issued states that an extension of time was required for the purpose of enabling the solicitors to obtain instructions to appeal

(1) 22 Ch. D. 484.
(2) 24 Ch. D. 488.
(3) 13 Ch. D. 416.
(4) L.R. 5 H.L. 157.
(5) 14 Can. S. C. R. 453.

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from the Attorney-General. The date of this affidavit was the 19th January, 1892. (Reads the affidavit of J. M. Balderson) (1). Apparently up to that time no instructions to appeal had been given.

[*Hogg*, Q.C.—If my learned friend will allow me I can explain the matter in three words: The explanation is simply this, the consultations and instructions which I had were had with and obtained from the Deputy Minister. The instructions I got were obtained from the Deputy Minister, but we wanted to see the Attorney-General of Canada who was at that time absent.]

Now, if the case were that the solicitor was instructed to appeal and fell ill before he had carried out his instructions it would be quite a different matter. That, I fancy, would be a case falling within the equity mentioned in the authorities. I prefer to rely on the statement made by Mr. Balderson as to how the matter stood. Mr. Balderson's affidavit is to the effect that it was owing to the Christmas Vacation intervening and the absence of the Attorney-General previously to the application being made, that they wished further time to consult with him as to the expediency of taking the appeal. Now it seems as a matter of fact that the Attorney-General was absent but a few days during that vacation. And at all events it is not shown that he was pressed with business to such an extent that an opportunity was lacking to promptly consult with him. If he had been really pressed with business and it was so stated, I think that would be a good ground for the extension. All the cases referred to in the *Annual Practice* of 1892 go to show that there must be an equity subsisting in favour of the party applying for an extension. In *Holmstead & Langdon's*

(1) *See* p. 2.

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Ontario Judicature Acts (1), the authorities are collected, and they show that there must be an equity of some sort (2).

Now what is the equity on which they rely in this case? I admit that the sickness of the solicitor, if it had been more particularly stated, might have justified an extension. For instance, if it had been so that he had sole charge of the business and the business had to stand still during the sickness. Here nothing of the sort was shown, and there is no equity of any kind to put forward to entitle the Crown to the relief sought. To grant an extension under such circumstances would be contrary to justice. In this case they have consented to the judgment and the reference to a master. And they have allowed the suppliants to go to all this great expense before they ask for the right to appeal. At this late date they ask your Lordship to exercise your discretion to enable them to raise all the questions in the case by an appeal to the Supreme Court and, ultimately, to the Privy Council. Taking the case as it stands it would seem to be the better way and a way more consonant with our ideas of justice to leave the parties as they are. There is no particular equity that they have shown while it is clearly their duty to do so.

Then your Lordship has to consider even if there be an equity shown if it is not overborne by the equities of the other side (2).

It seems to me that the facts that have been mentioned show that this is a case in which justice requires that the extension should not be allowed (4).

BURBIDGE, J.—I think I should make the order.

(1) P. 81.

(2) Cites *re New Callao* 22 Ch. D. 484, and *Cusack* v. *London & N.W. Ry. Co.*, 1 Q.B. 347 (1891).

(3) Cites *Manchester Economic Building Society*, 24 Ch. D. 497 and *Curtis* v. *Sheffield* 21 Ch. D. 1.

(4) Cites *Platt* v. *The Grand Trunk Railway Company*, 12 Pr. (Ont.) 380.

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Reasons for Judgment.

With reference to an appeal on the questions decided in the *McLean Case* (1) and in view of which the judgment by consent was given in this case, and the reference made as in the *Boyd Case* (2), the suppliants would, it appears to me, have some reason to complain; for the delay has been long and they have been allowed to go to great expense in proving the damages. But the only ground for appeal given, although there may be others not disclosed upon which the Crown may rely, is that which arises on my own judgment in respect of the evidence that the referees declined to admit. As to that, I do not think a delay of two or three days ought to prevent me from extending the time. The Crown on the 19th January asked me for an order which I would have granted on the 16th January if a motion had been made therefor, and I think I ought not now to refuse it.

Taking the facts established by Mr. Hogg's affidavit it is conceded that grounds for the order asked for are disclosed. Then, as to Mr. Balderson's affidavit,—it simply amounts to a statement by one of the solicitors for the Crown that they needed further time to consult the Attorney-General; and that, also, in view of the large amount of public business Her Majesty's Attorney-General for Canada is called upon to transact, appears to me, under the circumstances of this case, to afford a sufficient reason for making the order to extend the time within which the appeal may be taken. The only question is as to the terms.

[*McCarthy*, Q.C.—Your Lordship will make the order then on terms ?]

I think there should be conditions to secure you the fruits of your judgment, and one of the conditions should be that you have interest upon the judgment.

(1) *The Queen* v. *McLean* 8 Can. S. C. R. 210.

(2) *Boyd* v. *The Queen* 1 Ex. C.R. 186.

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Reasons for Judgment.

Of course, I have no right to give interest after judgment, that is a matter for the Minister of Finance.

[*Hogg*, Q.C.—Then by this condition you really vary your judgment ?]

Not at all ; I merely give you leave to appeal on condition that an undertaking be filed to the effect that if the judgment of this court is ultimately sustained the Crown will pay interest on it at the rate of four per cent.

I extend the time for leave to appeal seven days from this date, and upon the terms of the Crown paying the costs of this application (except the enlargements at the request of the suppliants) and on condition of the Crown undertaking to pay interest at the rate of four per cent from the date of the judgment of the Exchequer Court, upon any judgment ultimately recovered.

Order extending time for leave to appeal granted.

Solicitors for suppliants: *Macdonald, Merritt & Shepley.*

Solicitors for respondent: *O'Connor, Hogg & Balderson.*

DAME SARAH DICKENSON CORSE AND EUSÈBE TONGAS..... } PLAINTIFFS; 1892 Mar. 21.

AND

HER MAJESTY THE QUEEN.....DEFENDANT.

Goods stolen while in bond in Customs Warehouse—Claim for value thereof against Crown—Crown not a bailee—Personal remedy against officer through whose act or negligence the loss happens.

The plaintiffs sought to recover from the Crown the sum of $465.74, and interest, for the duty paid value of a quantity of glaziers' diamonds alleged to have been stolen from a box, in which they had been shipped at London, while such box was at the examining warehouse at the port of Montreal.

On the 21st February, 1890, it appeared that the box mentioned was in bond at a warehouse for packages used by the Grand Trunk Railway Company, at Point St. Charles, and on that day the plaintiffs made an entry of the goods at the Custom-house, and paid the duty thereon ($107.10). On Monday, the 24th, the Customs officer in charge of the warehouse at Point St. Charles delivered the box to the foreman of the Custom-house carters, who in turn delivered it to one of his carters, who took it, with other parcels, and delivered it to a checker at the Customs examining warehouse. The box was then put on a lift and sent up to the third floor of the building where it remained one or two days. It was then brought down to the second floor and examined, when it was found that the diamonds had been stolen—the theft having been committed by removing the bottom of the box. Although the evidence tending to show that the theft was committed while the box was at the Customs examining warehouse at Montreal was not conclusive, the court drew that inference for the purposes of the case.

Held—That, admitting the diamonds were stolen while in the examining warehouse, the Crown is not liable therefor.

2. In such a case the Crown is not a bailee. The temporary control and custody of goods imported into Canada, which the law gives to the officers of the Customs to the end that such goods may be examined and appraised, is given for the purpose of the better securing the collection of the public revenue. Without such a power the State would be exposed to frauds against which it

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would be impossible to protect itself. For the loss of any goods while so in the custody of the Customs officers the law affords no remedy, except such as the injured person may have against the officers through whose personal act or negligence the loss happens.

Statement of Facts.

THIS was a claim against the Crown for the recovery of the duty paid value of a quantity of glaziers' diamonds which were alleged to have been stolen while in the custody of the Customs authorities at the port of Montreal (1).

The matter came before the court on a reference by the Minister of Customs under *The Customs Act* (R. S. C. c. 32, sections 182 and 183, as amended by 51 Vic. c. 14, s. 34).

The facts of the case appear in the reasons for judgment.

December 9th, 1891.

Hogg, Q. C., for the defendant: I submit that the facts do not show that the diamonds were stolen while in the possession of the Crown. The goods were entered in the usual way and the duty paid as usual. The Crown, therefore, is neither liable in respect of indemnifying the importer for the value of the goods nor in respect of refunding the duty. Admitting, for the sake of argument, that the goods were stolen while in the possession of the Customs authorities, the Crown would not be liable. An action in trover or conversion would lie in such a case against the person through whose act or fault the loss arose, but not

(1) By sec. 15 of *The Exchequer Court Act* (50-51 Vic. c. 16) it is enacted as follows:—The Exchequer Court shall have exclusive original jurisdiction in all cases in which demand is made or relief sought in respect of any matter which might, in England, be the subject of a suit or action against the Crown, and for greater certainty, but not so as to restrict the generality of the foregoing terms, it shall have exclusive original jurisdiction in all cases in which the land, goods or money of the subject are in the possession of the Crown, or in which the claim arises out of a contract entered into by or on behalf of the Crown.

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against the Crown. (Cites *Cotton* v. *Lane* (1); *Whitfield* v. *Le Despencer* (2); *Rowning* v. *Goodchild*) (3). In such a case as this the Customs department is assimilated to the Post Office. If the Postmaster-General cannot be held responsible for the loss or theft of a letter containing money (*Whitfield* v. *LeDespencer*, *ut supra*), the Minister of Customs, representing the Crown in this case, cannot be held liable here. Both the Customs and the Post Office departments collect revenues of the Crown, and the two are in an analogous position. (Cites *Lord Canterbury* v. *The Queen* (4); *The Queen* v. *MacFarlane*) (5). Sec. 15 of *The Exchequer Court Act* (6) does not alter the law in anyway from that existing in England to-day, and the cases there show that the Crown is not responsible for the torts of its servants. (Cites *Clode on Petition of Right*) (7).

Curran, Q.C., for the plaintiffs: There is no doubt that the Crown is liable in such a case as this,—not only to return the duty paid but also to make good the value of the goods stolen while in its possession. There is no analogy between the Customs and the Post Office departments with respect to the reason for non-liability of the Crown for the safe-keeping of goods, because in the case of the Post Office a man is not obliged to use it, he may send his letters by a servant, while in the other case he is bound to put his goods in the custody of the Customs authorities by law. He has no option.

BURBIDGE, J., now (March 21st, 1892) delivered judgment.

(1) 1 Ld. Raym. 647.
(2) 2 Cowp. 754.
(3) 2 Wm. Black. 906.
(4) 12 L. J. Ch. 281.
(5) 7 Can. S. C. R. 216.
(6) 50-51 Vic. c. 16.
(7) Pages 88 and 89.

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Reasons for Judgment.

The plaintiffs seek to recover from the Crown the sum of $465.74 and interest, for the value, including the duty paid, of a quantity of glaziers' diamonds alleged to have been stolen at the examining warehouse in the port of Montreal from the box in which they had been shipped at London.

On Friday, the 21st day of February, 1890, the box mentioned was, it appears, in bond at a warehouse for packages at Point St. Charles, Montreal, used by the Grand Trunk Railway Company. On that day the plaintiffs made an entry of the goods at the Custom-house, and paid the duty thereon ($107.10). On Monday, the 24th, Owen Smith, the Customs officer in charge of the warehouse at Point St. Charles, delivered the box to Daniel O'Neil, the foreman of the Custom-house carters, who in his turn delivered it to John Mooney, one of the carters, who took it with other parcels and delivered it to Owen Ahern, a checker at the Customs examining warehouse. The box was then put on a lift and sent up to the third floor of the building where it remained one or two days. It was then brought down to the second floor and examined, when it was found that the diamonds had been stolen.

The bottom of the box, by removing which the theft had been effected, had not been skilfully replaced, and one of the nails used to fasten it on had come out at the side of the box. This nail was not, it appears, noticed by any of the persons who saw or handled the box until after it had been opened and the loss discovered.

O'Neil, Mooney and Ahearn think that they would have noticed the nail if it had been exposed when the box passed through their hands. Smith was not at all sure that he would have done so, because he handles many boxes and it was the carter's business to object if the box was not in good order, though if he had

noticed the nail the fact would, he thinks, have struck him. On the other hand, Labelle who opened the box in the examining warehouse, and those who were with him, do not appear to have observed that anything was wrong with it until after the box had been opened and found to be empty.

On this state of facts I am asked by the plaintiffs to find that the theft was committed while the box was at the examining warehouse, and although the evidence is not to my mind conclusive one way or the other, I shall accede to the plaintiff's contention and for the purposes of the case draw that inference from the facts proved.

For the loss of the goods under these circumstances the plaintiffs argue that the defendant is liable. With that view I cannot agree.

Even if it were possible under the authorities to hold that the Crown was, in the ordinary acceptation of the word, a bailee of the goods in question, and bound in keeping them to that degree of diligence which the law exacts, for example, of such special or quasi-bailees as captors or revenue officers, the plaintiffs would, I think, fail (1). There is no evidence of want of diligence in keeping the goods, or, if it is to be inferred that they were stolen by a servant of the Crown, of negligence in selecting or retaining the dishonest servant. But the question is not to be determined by the law of bailments. The officer of the Crown who has the custody of goods sent to a Customs warehouse for examination may be, and no doubt is, in a sense, a bailee of such goods, but the Crown is not (2). For any wrong committed by an officer of the Crown the injured person

(1) Story on Bailments, ss. 38, 39, 444-450, 613-618; *Finucane* v. *Small*, 1 Esp. N.P.C. 315.

(2) *Moore* v. *State of Maryland*, 47 Md. 467; 28 Am. R. 483.

(3) *Whitfield* v. *LeDespencer*, 2 Cowp. 765; *Rowning* v. *Goodchild*, 2 Wm. Bl. 906; Story on Agency s. 319.

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has his remedy against such officer (3), but the Crown is not liable therefor except in cases in which the legislature has expressly, or by necessary implication, imposed the liability, and given the remedy (4).

Moreover, the officer answers for his own acts and omissions only and not for those of his subordinates (5).

In answer to the suggestion that the Postmaster-General is a carrier of letters and liable for the loss of bank-notes stolen therefrom by a sorter in the Post Office, Lord Mansfield, in giving judgment in *Whitfield* v. *LeDespencer* (6), says that:

> The Post Office is a branch of revenue, and a branch of police, created by Act of Parliament. As a branch of revenue, there are great receipts; but there is likewise a great surplus of benefit and advantage to the public, arising from the fund. As a branch of police, it puts the whole correspondence of the Kingdom (for the exceptions are very trifling) under Government, and entrusts the management and direction of it to the Crown, and officers appointed by the Crown. There is no analogy, therefore, between the case of the Postmaster and a common carrier. .....As to an action on the case lying against the party really offending, there can be no doubt of it; for whoever does an act by which another person receives an injury is liable in an action for the injury sustained. If the man who receives a penny to carry the letters to the Post Office, loses any of them, he is answerable; so is the sorter in the business of his department. So is the Postmaster for any fault of his own.....But he is like all other public officers, such as the Lords Commissioners of the Treasury, the Commissioners of the Customs and Excise, the Auditors of the Exchequer, &c., who were never thought liable for any negligence or misconduct of the inferior officers in their several departments.

(4) See authorities cited in the *The City of Quebec* v. *The Queen*, 2 Ex. C.R. 257, and in *Burroughs* v. *The Queen*, 2 Ex. C.R. 298. For United States authorities, see *The United States* v. *Kirkpatrick*, 9 Wheaton 720; *Nichols* v. *The United States*, 7 Wallace 122; *Gibbons v. The United States*, 8 Wallace 269; *Schmalz* v. *The United States*, 4 C. of C.R. 142; *Moore* v. *The State of Maryland*, 47 Md. 467; 28 Am. R. 483; and *Langford* v. *The United States*, 101 U. S. R. 341.

(5) Story on Agency, s. 319; *Cotton* v. *Lane*, 1 Ld. Rayd. 646; *Whitfield* v. *LeDespencer*, 2 Cowp. 754; *Dunlop* v. *Munroe*, 7 Cranch 242; *Wiggins* v. *Hathaway*, 6 Barb. 632; *Brissac* v. *Lawrence*, 2 Blatch. 121, 124.

(6) 2 Cowp. 764-65-66.

The principle of the immunity of the State from liability for wrongs committed by its officers is well illustrated in the opinions of the Supreme Court of the United States in a number of cases to which reference has already been made.

Mr. Justice Story, in delivering the opinion of the court in the case of *The United States* v. *Kirkpatrick* (1), says that:

> The general principle, is that laches is not imputable to the Government; and this maxim is founded, not in the notion of extraordinary prerogative but upon a great public policy. The Government can transact its business only through its agents, and its fiscal operations are so various, and its agencies so numerous and scattered, that the utmost vigilance would not save the public from the most serious losses if the doctrine of laches can be applied to its transactions.

This case was approved and followed in *Dox* v. *The Postmaster-General* (2). In *Nichols* v. *The United States* Mr. Justice Davis, who delivered the opinion of the court, states the rule and the reason therefor, as follows (3):—

> The immunity of the United States from suit is one of the main elements to be considered in determining the merits of this controversy. Every Government has an inherent right to protect itself against suits, and if, in the liberality of legislation, they are permitted, it is only on such terms and conditions as are prescribed by statute. The principle is fundamental, applies to every sovereign power, and but for the protection which it affords the Government would be unable to perform the various duties for which it was created. It would be impossible for it to collect revenue for its support, without infinite embarrassments and delays, if it was subject to civil process the same as a private person.

In the opinion of the court delivered by Mr. Justice Miller in *The United States* v. *Gibbons* (4), we find the following:—

> No Government has ever held itself liable to individuals for the misfeasance, laches or unauthorized exercise of power by its officers and

(1) 9 Wheaton 735.
(2) 1 Peters, 318.
(3) 7 Wall. 126.
(4) 8 Wall. 274-75.

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agents. In the language of Judge Story [Story on Agency, s. 319] "it does not undertake to guarantee to any person the fidelity of any of the officers or agents whom it employs, since that would involve it in all its operations in endless embarrassments, and difficulties and losses, which would be subversive of the public interests."

The general principle which we have already stated as applicable to all Governments forbids, on a policy imposed by necessity, that they should hold themselves liable for unauthorized wrongs inflicted by their officers on the citizen, though occurring while engaged in the discharge of official duties.

The same judge, delivering the opinion of the court in a later case, in which a question as to the jurisdiction of the Court of Claims was involved (1), said :—

While Congress might be willing to subject the Government to the judicial enforcement of valid contracts, which could only be valid as against the United States when made by some officer of the Government acting under lawful authority, with power vested in him to make such contracts, or to do acts which imply them, the very essence of a tort is that it is an unlawful act, done in violation of the legal rights of some one. For such acts, however high the position of the officer or agent of the Government who did or commanded them, Congress did not intend to subject the Government to the results of a suit in that court. This policy is founded in wisdom, and is clearly expressed in the Act defining the jurisdiction of the court, and it would ill-become us to fritter away the distinction between actions *ex delicto* and actions *ex contractu* which is well understood in our system of jurisprudence, and thereby subject the Government to payment of damages for all the wrongs committed by its officers or agents, under a mistaken zeal, or actuated by less worthy motives.

It is, therefore, always to be borne in mind that for the wrong of the public officer there is no remedy against the State unless the legislature thereof has created the liability and given an appropriate remedy. Of such instances of "liberality of legislation" (to use a term found in the opinion of Mr. Justice Davis that has been cited) the statutes of Canada and other British colonies afford a considerable number of instances (2); and in 17 Dalloz Rép. Jur. (3) will

(1) *Langford* v. *The United States*, 101 U.S.R. 345.

(2) *The City of Quebec* v. *The Queen*, 2 Ex. C. R. 252.

(3) C. 10, s. 1, Art. 5, p. 704.

be found a case where the owner of property stolen from a box in the custody of the Customs officers recovered from the Administration the value thereof under the provisions of the French Customs law of 1791. But there is no suggestion that there is in the case under consideration any statute to aid the plaintiffs. Mr. Curran, for them, pointed out that the case differed from the storage of goods in a bonded warehouse, in which case the importer may exercise his option to leave the goods in the warehouse or not, but that in such a case as the present he has no option but must submit to having his goods taken to the examining warehouse to be examined by the officers of the Customs. That is, no doubt, true, and it might be an element to take into consideration if the case depended upon the law applicable to bailees. But we have seen that in such a case the Crown is not a bailee. The temporary control and custody of goods imported into Canada, which the law gives to the officers of the Customs to the end that such goods may be examined and appraised, is given for the purpose of the better securing the collection of the public revenues. Without such a power the State would be exposed to frauds against which it would be impossible to protect itself. For the loss of any goods while so in the custody of the Customs officers the law affords no remedy, except such as the injured person may have against the officer through whose personal negligence or act the loss happens.

There is another aspect of the case to which it is necessary briefly to refer. If the finding of the court had been, as the counsel for the Crown contended it might have been, that the diamonds were stolen before the 21st February, 1890, it is evident that there was at the time nothing in respect of which any duties were payable and the plaintiffs would, I think, have been

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entitled to a return of the duties paid by them. The plaintiffs' case supported, perhaps, as we have seen by the weight of evidence was, however, that the theft was committed while the goods were in the examining warehouse. In that view of the facts of the case, and it is the view in which it is to be disposed of, the duties were rightly paid. There will be judgment for the defendant, and the costs will as usual follow the event.

Judgment for defendant with costs.

Solicitors for plaintiffs : *Curran & Grenier.*

Solicitors for defendant : *O'Connor, Hogg & Balderson.*

VICE-ADMIRALTY COURT OF BRITISH COLUMBIA.* 1891

Feb. 19.

THE COSTA RICA.

Salvage—Ordinary service performed at request of master of stranded ship—Jurisdiction of Vice-Admiralty Court to award compensation for same.

A ship was stranded on a rocky shore with a point of rock protruding through her hull. H. was employed to blast it away and so free the ship.

Held, that this was not a salvage service.

2. That the Vice-Admiralty Court had jurisdiction to award reasonable remuneration in respect to the same.

The Watt (2 W. Rob. 70) referred to.

THIS was a claim of $5,000 for salvage.

The following are the facts of the case :—The *Costa Rica*, a large vessel, insured for $60,000, had been run ashore inside Beechy Head just beyond Royal Roads, in a partially sheltered position about ten or eleven miles from Victoria, B. C. A pointed rock, always covered at high water and always exposed at low water, had penetrated her hull some two or three feet, about twenty feet from her stem, and held her nailed to the reef. She was not otherwise injured, nor in any immediate danger unless the wind had shifted, when her position would have been critical. The captain engaged Hagarty, the plaintiff, to go on board and blast away the rock which held her. Hagarty, misunderstanding the dimensions of the rock, took ten men, (enough for three gangs of blasters,) with iron drills, dynamite, &c. The operation required, evidently, considerable judgment and experience for regulating the direction of the drills, the amount of explosive, &c. The whole work was successfully per-

*This case was decided before 54-55 Vic. c. 29 (*The Admiralty Act*, 1891) came into operation.

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formed and the plaintiff and his party returned to Victoria within thirty-six hours from the first summons to Hagarty, the *Costa Rica* being forthwith hauled off by a tug and towed into the dry-dock in Esquimalt harbour. The ship would certainly have gone to pieces sooner or later if she had not been freed from this rock; but the Dominion hull inspector in his evidence thought that she could have been got off by milder means, *viz.*, by employing camels. The defendants paid $109 into court, calculated at $3 for a day's work for each of the ten men, $24 for material, and $50 for Hagarty himself. The plaintiff alleged that he had allowed each man 50 cents per hour for the whole thirty-six hours he himself had been engaged, and that the material used was worth $25.

19th February, 1891.

Wilson for plaintiff;

Pooley, Q.C., for the *Costa Rica*.

Sir MATTHEW B. BEGBIE (C.J.) J.V.A.—This may be, perhaps, termed a salvage service in this sense—that the removal of the rock was a *sine quâ non* for the safety of the ship; though this is denied by the witness Colliser, who considers that a simpler and less dangerous plan would have been to raise the ship from off the rock that held her transfixed. But this does not make the blasting a salvage service so as to earn a salvage reward. It was equally necessary, after the rock was blasted away, to tow her off the shore, to navigate her to a place of safety, to receive her into the dry-dock, and repair her there. The labourers of Mr. Hagarty would have failed of success—*i.e.*, the ship would have sunk notwithstanding his labours—if the dockers had refused to work. Are all these salvage services? But none of them have sued. And if these were salvage services,

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Reasons for Judgment.

all the men were salvors and the salvage remuneration is divisible among them all ; but they have all been paid ordinary wages, with something extra for working overtime and on a Sunday. There was no enterprise of peculiar risk ; the men were at their ordinary work, only instead of blasting the foundation for the new hotel, they were blasting this point of rock in the hold of the *Costa Rica*. The work was well and energetically performed and with good success, and they deserve a reward, as in *The Watt* (1), and *The Favourite* (2), and *The Chetah* (3). I shall allow $240, including $109 paid into court, for services and materials. I think the plaintiff was quite right in taking down an abundant force of men, more, as it happened, than could be utilized. But time was all important,—a single tide might have lost the ship.

As to costs: the only justification for coming into this court, rather than the County Court, is that it is a case of salvage. As in my opinion the plaintiff has made an extremely exaggerated demand, and in fact fails to prove salvage at all, I might dismiss the action with costs. But on the other hand I clearly have jurisdiction (as in *The Watt*, *The Chetah*, and other cases) to award reasonable remuneration, and the $109 paid into court by the defendant I think too little. Both parties fail in some particulars, and I shall leave each to pay his own costs.

Judgment accordingly.

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(1) 2 W. Rob. 70. (2) 2 W. Rob. 255.
(3) L. R. 2 P. C. App. 205.

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May 18.

VICE-ADMIRALTY COURT OF BRITISH COLUMBIA.*

THE CITY OF PUEBLA.

Collision—Navigation of dangerous channel—Rules to be observed when two vessels in same channel.

Two steamers of considerable length and draught, the one entering, the other leaving the port of N., signalled to each other that they both proposed to take the same channel, which, though short, was narrow and tortuous. The one steamer being fully committed to the channel, it was, under art. 18 of R. S. C. c. 79, the duty of the other steamer to remain completely outside until the first had passed completely through.

2. Where a collision appears possible, but as yet easily avoidable, neither vessel has a right to adopt manœuvres which place the other vessel in a position of unnecessary embarrassment or difficulty. The wrong-doer is solely responsible for damages from a consequent collision.

THIS was a case of collision.

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

May 6th, 7th, 8th, 15th and 18th, 1891.

The case was tried before Sir Matthew B. Begbie, C. J., Judge of the Vice-Admiralty Court for British Columbia,—Capt. Turner, R. N, and Lieut. Musgrave, R. N., sitting as Nautical Assessors.

Bodwell and *Irving* for the *Eton*;

Davie, Q.C., and *Helmcken* for the *City of Puebla*.

Sir MATTHEW B. BEGBIE (C.J.), J.V.A., now (May 18th, 1891) delivered judgment.

About 9 a.m., on the 22nd of January last, on a fine, calm morning, the *Eton*, about 310 feet long, and with 4,000 tons of coal on board, left the wharf at Nanaimo

*This case was decided before 54-55 Vic. c. 29 (*The Admiralty Act*, 18. 1) came into operation.

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to proceed to sea by the north channel. This is a narrow and rather tortuous channel about 900 or 1,000 feet long, between Middle Bank on the south and Satellite Reef and Three Fathom Patch to the north. It lies nearly E.N.E. and W.S.W., the west end, next the wharf, being environed by shoals, the east end being quite open and free from any danger. The *Eton* left on a port helm, moving about from about N. W. towards north and east, until near the Black Buoy, No. 7, when she headed N.E., looking almost, but not quite, clear down the north channel. At this point she seems to have been for the first time aware of the approach of the *City of Puebla* coming in from the Gulf of Georgia to coal at Nanaimo. This vessel is 340 feet long, and was almost fully loaded, having about 3,000 tons of cargo on board. On observing her approach, the *Eton* gave one whistle, which the *Puebla* answered also with a single blast. Both vessels thereby intimated their intention of passing each other, port side to port side (1). This gave the *Eton* distinct notice that the *Puebla* was intending to take the north channel—the only other access to Nanaimo wharf being by the south channel, in taking which the vessels would have passed starboard to starboard, and the *Puebla* must have seen that the *Eton* was already committed to the north channel. Indeed, the *Puebla* seems, according to the *vivâ voce* evidence, to have seen the *Eton* while still lying at the wharf, at a distance of two and a half to three miles, and to have been aware of her subsequent movements. The *Puebla's* preliminary act, however, alleges that the *Eton* was first sighted about seven or eight lengths (about four cables) away.

At this distance from each other, at all events, both vessels were fully aware that they were about to meet "end-on," so that there was a risk of collision. Both ves-

(1) *The Dominion Navigation Act*, R.S.C. c. 79, s. 2, art. 19.

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sels were, therefore, bound to take all the steps required by "skilful and careful navigation" to avoid collision. There are three stages in a collision: 1st. When it appears possible, there being merely a chance of a collision occurring; 2nd, when a collision is imminent; 3rd, when it is inevitable. In the last two stages, certainly in the last stage, skilful and careful navigation requires, at least permits, each commander to look after the safety of his own vessel exclusively. In the first stage, skilful and careful navigation requires each commander to take such steps as are requisite for the safety and convenience of both vessels. Neither vessel has a right to thrust the other vessel upon a shoal, or to necessitate the other to have recourse to difficult or embarrassing manœuvres in order to avoid a catastrophe (1).

The gentlemen whose assistance we are fortunate enough to have been able to secure in this case are of the opinion, in which I fully coincide, that skilful and careful navigators would not dream of taking two vessels, of the length and draught of these two steamers, to pass each other in the north channel; but that one of the two ought to have waited for the other. They are further of opinion that careful and skilful navigation on board the *Eton* required her not to wait off the Black Buoy, No. 7, where she sighted, and (according to the preliminary act) was sighted by the *Puebla*, but to go on through the north channel, to which she was then fully committed. Further, that a skilful person on the *Puebla* must have known the difficulties of the *Eton's* position—and especially the captain of the *Puebla*, who had been often through that channel.

He deservedly praised his own vessel, saying how powerful, and how handy she was; and yet in the

(1) See s. 1 and arts. 18, 23 and 24 of s. 2 of *The Dominion Navigation Act*, R.S.C., c. 79.

north channel he had, as often as not, found it necessary to reverse his course and his screw, and found that her great draught diminished the power of her rudder. Unless, therefore, he assumed the *Eton* to be much more manageable than his own ship, which a sailor is not apt to do, he must have known that she might be obliged to have recourse to the same dilatory measures. It follows, necessarily, that, in their opinion, skilful and careful navigation (which is required by the statute) required the *Puebla* to stop, not her engines merely, but her way, and to remain stationary (1) off or near Gallows Point, until the *Eton* had at least got entirely through the north channel. The rule laid down by the Conservators of the Thames (2) is the rule of common sense for all narrow channels—"Where two vessels, moving in opposite directions, sight each other across a point, the vessel going against the tide shall remain stationary until the other shall have passed clear," which, in that case, is decided to mean "clear of the stationary vessel." And this is the course dictated by ordinary care in navigation, even when it is not, as in the Thames, a written law.

The *Puebla's* measures are somewhat variously stated. In the preliminary act, in answer to the inquiry, as to the measures which were taken, and when, to avoid collision, the defendant simply said: "Backed full speed;" without saying "when," or "where." In the opinion of my assessors, with whom I am happy to say I agree throughout, this backing was only adopted after a collision had become imminent, and indeed, unavoidable, looking to the speed of the *Puebla*, although, no doubt, by this time much reduced, and to the proximity of the two ships. According to the *vivâ voce* evidence for the defendants, the *Puebla*, at first, acted with perfect prudence. While still outside

(1) R.S.C. c. 79, s. 2, art. 18. (2) The *Libra*, L. R. P. D. 139.

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the harbour, she slowed her engines, and, before entering, had stopped them altogether—but she came in, swinging past the entrance buoys (which are about two cables only from the east end of the north channel—the scene of the collision) at the rate of six or seven knots. This is the estimate in the defendants' own preliminary act, and the estimate also of the four or five quite independent witnesses who happened on this calm, bright morning, from five or six points on shore, to be watching the whole drama. Capt. Debney also, in the witness box, estimated his speed, on entering the harbour, at six knots. The defendants attempted, by the *vivâ voce* evidence of some of the crew, to cut down this speed to four knots, or even less—but, even if they could be permitted to vary the statement in their pleadings, the great preponderance of the evidence is that the speed was six or seven knots. Having ported her helm, so as to head "square" for the north channel, as one witness expressed himself, and having by her whistle clearly intimated that she intended to take that channel, from which she was but four hundred yards distant, or thereabouts, she does not appear, by the unanimous testimony of all the independent witnesses, to have checked her speed, or deflected her course, or taken any measures at all, with a view either to prevent or mitigate the collision, or otherwise. She was simply allowed to run on by her own impetus, as if the north channel had been quite clear, until within about 300 feet of the *Eton*, which was slowly but surely advancing towards her. Then she reversed her screw, but the collision was then inevitable, and the steps taken by the *Puebla*, according to the statements made by her captain immediately afterwards, were not directed to the avoidance of a collision, which by this time, no human force or skill could prevent, but simply to the

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protection of his own vessel. Instead of going to starboard, which would infallibly have thrown his port bow on the stem of the *Eton*, he turned to his port hand, and ran his stem into the starboard side of the *Eton*, nearly amidships.

In the defendants' preliminary act, and also by evidence at the hearing, the defendants alleged the *Eton* to be in fault in not keeping a course to her starboard side, as indicated by the single whistle. And both Captain Debney and his pilot, Ettershanks (on the bridge but not in charge, not being a Nanaimo pilot), declared that while the ships were in collision, Captain Debney shouted to Captain Newcomb: "Why did you not go to starboard?" and that the latter answered: "She won't answer her helm." There must be some mistake here, for, if there is one thing quite clearly proved and admitted on all hands, it is that the *Eton* was moving, and never ceased moving, to starboard, the whole time after leaving the wharf up to the moment before the collision. All the plaintiff's crew, all the independent witnesses, even Capt. Debney himself, and Ettershanks, his pilot, agree in this: That the *Eton* was turning to starboard the whole time up to the time when the *Puebla* reversed her screw, in order to give the blow instead of receiving it. Under these circumstances, it seems quite incredible that either the exact question, or the exact answer, should be as the defendants' witnesses now allege.

Both parties must have meant, and understood each other as saying: "Why don't you go to starboard faster?" and answering "She won't answer any better;" which as Captain Debney himself points out; might be due either to the very slow speed of the *Eton* at the time, one and a half knots to two knots, or the shoalness of the water. He excuses the *Puebla*, an exceedingly handy vessel, for not going to starboard,

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by observing that she was going less than six knots. But that Captain Debney, who saw the *Eton* going all the time to starboard, however slowly, should ask simply why she did not go to starboard, or that Captain Newcomb, who was trying all he could to send her to starboard, and was sending her to starboard, as he saw and as everybody saw, should reply that he could not make her go to starboard, is, of course, quite incredible, except on the supposition that they had both, in the excitement of the collision, failed to perceive the meaning of their words.

It was suggested, but there was no evidence on the point, that the undue hurry of the *Puebla* was due to her anxiety to "beat the record." This anxiety has, undoubtedly, lost many a ship.

It seems clear, however, that if the *Puebla* had stood still for a single minute, or, at most, a minute and a half by the clock, off Gallows Point, there can scarcely be a doubt but that the *Eton* would have passed completely through the channel and got round well to the southward, and the *Puebla* would have made better time to the wharf. However this may be, I am advised, and I find, that the collision was wholly due to the imprudent navigation of the *Puebla*; that the *Eton* neither did anything careless or unskilful that contributed to the collision, nor omitted to do anything which could have prevented or mitigated the collision; and I give judgment accordingly, condemning the *City of Puebla*, and her bail in damages and the costs of this action. There will be the usual reference to inquire as to damages, and all proper directions.

Judgment accordingly.

ADMIRALTY DISTRICT OF NOVA SCOTIA.

1891

Nov. 5.

THE SHIP "*QUEBEC.*"

Salvage of ship and cargo—Principal and agent—Power of attorney given by crew to agent of owners of salving vessel for purpose of adjustment of salvage claim—Construction of.

A crew of a fishing schooner had performed certain salvage services in respect of a derelict ship and gave the following power of attorney respecting the claim for such services to the agent of the owner of the schooner: "We, the undersigned, being all the crew of the "schooner *Iolanthe* at the time said schooner rendered salvage "services to the barque *Quebec*, do hereby irrevocably constitute "and appoint Joseph O. Proctor our true and lawful attorney "with power of substitution for us, and in our name and behalf "as crew of the said schooner, to bring suit or otherwise settle "and adjust any claim which we may have for salvage services "rendered to the bark *Quebec* recently towed into the port of "Halifax, Nova Scotia, by said schooner *Iolanthe*; hereby grant-"ing unto our said attorney full power and authority to act "in and concerning the premises as fully and effectually as we "might do if personally present, and also power at his discre-"tion to constitute and appoint, from time to time, as occasion "may require, one or more agents under him or to substitute "an attorney for us in his place, and the authority of all such "agents or attorneys at pleasure to revoke."

Held, that this instrument did not authorize the agent to receive the salvage payable to the crew or to release their lien upon the ship in respect of which the salvage services were performed.

2. That payment of a sum agreed upon between the owners of such ship and the agent and the latter's receipt therefor, did not bar salvors from maintaining an action for their services.

ACTION for salvage.

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

October 14th, 15th, 16th, 17th, 19th, 23rd and 24th and November 2nd, 1891.

The evidence was taken before the Registrar.

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THE SHIP QUEBEC.

Morrison and *Smith* for salvors ;

Ritchie for owners of ship *Quebec*.

Reasons for Judgment.

McDONALD (C.J.) L.J., now (November 5th, 1891) delivered judgment.

This is an action for salvage by the plaintiffs, the crew of the schooner *Iolanthe* of Gloucester in the United States of America, against the British ship *Quebec*, her cargo and freight. The *Quebec* was abandoned at sea on the LaHave Banks, off the coast of Nova Scotia, on the 8th September last, and on the same day was boarded by the salvors or some of them. On boarding the vessel they found the vessel making water rapidly through two auger holes which had been bored in her side. These they plugged, and stopped the leak. They then started to tow the ship to Halifax, where they arrived with her on the 12th September. It is admitted that the vessel was derelict, and that ship and cargo were saved by the exertions of the plaintiffs. The schooner *Iolanthe* was owned by one Joseph O. Proctor, junior, of Gloucester, who by deed dated 14th September, 1891, authorized and empowered his father, Joseph O. Proctor, senior, as his attorney " to bring suit or otherwise settle and adjust any claim which I may have for salvage services rendered to the barque *Quebec* recently brought into the port of Halifax, Nova Scotia, by my said schooner *Iolanthe*," and on the 16th of the same month the master and crew of the schooner executed a power of attorney to the same Joseph O. Proctor " for us and in our name and behalf as crew of the said schooner, to bring suit, or otherwise settle and adjust any claim which we may have for salvage services rendered to the barque *Quebec* recently towed into the port of Halifax, Nova Scotia, by said schooner *Iolanthe*, hereby granting unto our said attorney full power and authority in and concerning the premises as fully and

effectually as we might do if personally present." Acting under this power of attorney, Joseph O. Proctor, agreed with the owner of the *Quebec* to accept the sum of $1,680 in full of salvage for the ship, and that amount was paid to him by the agents of the owner on the 19th September. The salvage on the cargo was reserved for negotiation with the owners of cargo. The only evidence as to the arrangement for salvage on cargo is that given in the testimony of George S. Campbell, of the firm of Corbett & Co., agents for the owners of the cargo. He says:—

> I had several conversations with Joseph O. Proctor, senior. He brought me the powers of attorney to him at the first interview I had with him, on the authority of these papers I treated with him as to salvage of the cargo. We made a settlement on 22nd September in the forenoon, we were to pay the parties represented by Proctor $1,300 in full. This settlement was based on the supposition that the cargo was in perfect order. Proctor offered to take $1,300. We accepted subject to approval of our principals. Before that approval was obtained the power of attorney to Proctor was cancelled. The notice of cancellation to us was after the arrangement with Proctor.

A release from Proctor, senior, was put in evidence dated the 19th September which acknowledges receipt of $650 in settlement of the claim of the owner of the schooner on the salvage of the cargo, and $46.43 for the claim of the master of the schooner on the same fund, which I assume was paid to him by Corbett & Co. The plaintiffs did not receive their money and became dissatisfied with the conduct of Proctor, and, on the 22nd September, they revoked and cancelled their power to him, of which due notice was given to Proctor, the owner of the ship and his agents and to the agents for the owners of the cargo. Negotiations for a settlement of the plaintiffs' claims were continued, but without success, and on the 8th October the ship was arrested under process from this court, and appearance was en-

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tered for the owners of the ship and cargo on the 9th October, and on the 22nd October the owners of cargo paid $603.57 into court. The defendants contended that the payment to Proctor and his release and receipt for the money received by him is an answer to the plaintiffs' claim, while the plaintiffs contend: 1st.—That their signatures to the power of attorney were fraudulently obtained, that they did not know the nature of the paper they were signing and that it was not read over or explained to them—and 2ndly. That assuming the paper to be duly executed, it only authorized Proctor to settle and adjust the amount to be paid by the defendants, but did not authorize him to receive or them to pay to him the money payable to the plaintiffs, nor did it authorize him to adjust and settle the proportion of the salvage to be paid respectively to the owner of the schooner and the plaintiffs, and that the payment to him did not release their lien on the ship and cargo. As to the first point, I am of opinion that the men signing the power of attorney understood what they were doing and clearly comprehended the fact that they were, by executing the instrument, delegating power to Proctor to act for them to the extent of the power expressed by the words of the instrument. They were all, with two exceptions, able to read and write, and they admitted that the paper was read over to them, and I am satisfied from the evidence of Creed and the master of the schooner that the men intended to authorize Proctor to arrange with the owners of the ship and cargo the gross amount of salvage to be paid. But whether they authorized or intended to authorize him to settle and adjust their proportion of the salvage as between the owner of the schooner and themselves and release their lien, is a different and more difficult question. That question must be settled by a reasonable construction of the written instrument, as there

is certainly, no evidence outside of the written paper to lead the court to any such conclusion. Let us first discuss the right of Proctor to release the lien of the plaintiffs on the cargo. It will be remembered that the authority of Proctor to act for plaintiffs was cancelled on the 22nd September, and Campbell swears that the conditional agreement to accept and pay $1.300 for the cargo was made between himself and Proctor on the same day, but before he had notice of cancellation. Campbell does not say when the $650 was paid, whether before or after the notice of cancellation, and it is a somewhat significant fact that the release or discharge purporting to be made to the owners of the cargo is dated on the 19th September, three days before the day on which Campbell swears the agreement to accept $1,300 was made. This curious discrepancy was not explained, and in connection with the exceedingly improper conduct of Proctor towards these men, for and to whom he was bound to act with the utmost good faith, necessarily leaves an unfavourable impression upon the mind. Apart, however, from these circumstances it is clear from the evidence of Mr. Campbell that, up to the time Proctor's authority was cancelled and notice of such cancellation given to Campbell, no agreement was made in relation to the cargo binding on either Corbett & Co. or Proctor. The amount agreed to was subject to the approval of the owners of the cargo; that approval was not given, if at all, till after the plaintiffs had resumed the right to control their own interests, and in my opinion they have not lost their lien upon the cargo and have a right to enforce it in this action. The payment of the salvage on the ship was made on the 19th and before notice to the owner or his agents that Proctor's authority was revoked. The only question, therefore, in that case is whether Proctor had

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authority under the instrument in question to release the lien which the law conferred upon these men. It is quite clear from the evidence that the plaintiffs did not intend to abandon their lien on the ship till they got their money as they kept possession of the vessel till she was arrested under the process of this court. The witness McKay says:—

> On Saturday night the 12th September the barque got to anchor about 9 o'clock. I went on board of her, I think, on Tuesday after and we took turns keeping a watch on board of her to the time she was arrested.

The authority conferred by the instrument was "to bring suit or otherwise settle and adjust any claim which we may have for salvage services, &c." After the most careful consideration I can give the question, I have come to the conclusion that this power of attorney did not authorize the owner of the ship to pay, or Proctor to receive, the salvage payable to these men, and for which the law gives them a lien on the ship and tackle till paid, and that the payment to Proctor and his release or receipt cannot prevent these plaintiffs asserting their rights in this action. As to the amount of salvage to be allowed on the ship I think the plaintiffs must be bound by the agreement of their agent—the amount agreed upon $1,680 is certainly not excessive. Under the circumstances in proof I think the distribution ought to be one-third to the schooner and two-thirds to the crew. The latter lost their fishing voyage entirely through the misconduct of the agent of the owner of the *Iolanthe*, and were obliged to remain in Halifax without means to prosecute their claim; while the schooner with the loss of a few days' time was able to refit and resume her trip with another crew. The salvage, therefore, to be allowed to the plaintiffs will be as follows:

The amount agreed upon as payable by ship $1,680,
⅓ to the schooner *Iolanthe* and ⅔ to the crew.
60 per cent on cargo as valued..... 2,100

$3,780

⅔ per cent to the crew..... $2,520

To be divided among 14, or $180 each man.

The defendants will pay the costs.

*Judgment accordingly.**

Solicitor for salvors: *C. Hudson Smith.*

Solicitor for owners: *W. B. A. Ritchie.*

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*REPORTER'S NOTE.—On appeal to the Supreme Court of Canada by the owners of the ship *Quebec*, this judgment was confirmed.

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Mar. 2.

ADMIRALTY DISTRICT OF PRINCE EDWARD ISLAND.

The HEATHER BELLE.

The FASTNET.

Collision—Arts. 13 *and* 18 *of Imperial Regulations for Preventing Collisions at Sea—Interpretation of—Quantum of damages—R.S.C. c.* 79 *s.* 12.

Two steamers were approaching each other near a public harbour in a dense fog, those in charge having mutually learned their approximate whereabouts by an interchange of blast signals. Notwithstanding such proximity, and the fact that the courses they were steering were such as would have brought them across each other's bows, one of them maintained a speed of from three to four miles an hour, and was running with a tide, at flood force, of one and a-half knots per hour; the other was steaming at a speed of about three knots an hour, and no effort was made to alter her course. A collision occurred.

Held, that both vessels had infringed the provisions of arts. 13 and 18 of the *Imperial Regulations for Preventing Collisions at Sea*, an were, therefore, mutually to blame for the collision.

2. The word "moderate" in art. 13 is a relative term, and its construction must depend upon the circumstances of the particular case. The object of this article is not merely that vessels shoul go at a speed which will lessen the violence of a collision, bu also that they should go at a speed which will give as much tim as possible for avoiding a collision when another ship suddenly comes into view at a short distance. It is a general principle that speed such that another vessel cannot be avoided after she is seen is unlawful.

The Zadok (L.R. 9 P. D. 114) referred to.

3. The owner of a ship wrongfully injured in a collision is entitled to have her fully and completely repaired, and if a ship is totally lost the owner is entitled to recover her market value at the time of the collision.

4. Where both ships are at fault, the law apportions the loss by obliging each wrong-doer to pay one-half the loss of the other.

[The provisions of sec. 12 of R.S.C. c. 79, limiting the liability of the party at fault in a collision to a sum of $38.92 for each ton of gross tonnage, was applied to this case.]

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THESE were two actions for damages by collision. They were consolidated by order of the court upon consent of parties.

The facts are fully recited in the reasons for judgment.

The case was heard before the Honourable William W. Sullivan, C. J., Local Judge for the Admiralty District of Prince Edward Island, on January 6th, 7th, 8th, 9th, 11th, 14th, 15th, 22nd and 23rd, 1892.

McLeod for owners of *Heather Belle* ;

Peters, Q.C. (A.-G., P.E.I.) for owners of *Fastnet*.

SULLIVAN, (C.J.), L.J., now (March 2nd, 1892) delivered judgment.

This was an action brought by the owners of the steamship *Heather Belle* to recover damages, and there was a cross cause on behalf of the owners of the steamship *Fastnet*. The cases were consolidated by order of the court, tried as one action, and heard upon the same evidence. The litigation arose from a collision between the two steamers which took place on the 12th of November last in Hillsborough Bay, a short distance outside the Block House at the mouth of Charlottetown Harbour, and resulted in the total loss of the *Heather Belle*. The *Heather Belle* was making a return trip from Orwell to Charlottetown, and the *Fastnet* was proceeding from Charlottetown, on her way to Halifax. According to the statement of the captain of the *Heather Belle*, the collision took place about 6.40 o'clock in the evening, and according to the account of the captain of the *Fastnet* it happened at about 6.47 in the evening. There was a dense fog prevailing at the time. The statement of the captain of the *Heather Belle* is, that he left the Brush Wharf, Orwell, at 4.50 o'clock in the evening, having on board fifteen or sixteen passengers and some cargo. It had been foggy, but had cleared. He made the Bell

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Buoy, leaving it on the port side. The atmosphere was then thick. He commenced blowing the whistle, long blasts (fog signal), and steered for the Black Buoy, sounding with a lead for five or six minutes before he reached it, having previously slowed the speed of the steamer. He reached the Black Buoy, having it on his port side, about thirty or forty yards distant. He then steered for the harbour, N. ½ E., and proceeded on that course for a minute or two when he heard a whistle ahead which he took to be the *Fastnet's* whistle. He thought she was a little on his port bow. He spoke to the mate who was at the wheel, and said: "That is the *Fastnet's* whistle. She is a little on our port bow. Port your helm and give him plenty of room, and blow one short blast." His order was obeyed, and the steamer went to starboard. He kept his helm ported, and his ship came to N. E. by N., steadied and proceeded on that course. The short blast was given about the time the helm was ported. It was between two and three seconds long. It took about two minutes to get the ship around to the new course. When he started on the N.E. by N. course both vessels were blowing short blasts. The short blasts were blown by him to let the *Fastnet* know he was directing his course to starboard, and he understood the *Fastnet* was doing the same. When he heard the first blast from the *Fastnet* he thought she was somewhere near the Block House. He continued on that course, after he had steadied on it, for about six minutes going at the rate of three or four miles an hour, having the tide with him. In the six minutes mentioned he would have run about three-quarters of a mile from the Black Buoy. He was then beyond the middle of the channel on the east side. The *Fastnet* could not then be seen, but her whistles indicated that she was approaching nearer to the *Heather Belle*. The first

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things he saw were the masthead light and the starboard light of the *Fastnet*. He then gave orders to stop. He said to the mate: "Hard-a-port; stop her; go astern." He could see by the wheels that she did go astern. He says in his evidence that when he first saw the lights of the *Fastnet* the course of his vessel was north-east by north, and the *Fastnet* was about north of him and about four points on his port bow heading south-east. Before the collision, he gave an order to go to port, which was obeyed, and the *Heather Belle* altered her course a little to the eastward. The collision took place a few seconds after he first saw the *Fastnet's* lights. The *Fastnet* came out of the fog like a flash. He hailed her to go astern but received no reply. The port side of the *Heather Belle's* stem was struck by the "luff" of the *Fastnet's* bow and the breakage was carried to starboard, both vessels pointing to the eastward. The evidence of the captain of the *Heather Belle* is that at the time of the collision the engine of his vessel was reversed and he thinks the *Heather Belle* was about at a stand-still, and that the *Fastnet* was going pretty rapidly. A large hole was made in the *Heather Belle* through which the water was quickly entering. She was made fast to the starboard side of the *Fastnet* by lines, and they proceeded at full speed for Charlottetown Harbour. The *Heather Belle* was towed inside the harbour about 300 yards from the Block House, when the *Fastnet* separated from her, and she ultimately sunk. In his preliminary act the captain of the *Heather Belle* charges that:

The Fastnet improperly neglected to keep clear of the *Heather Belle* and improperly attempted to pass ahead of her and improperly neglected to port her helm on hearing the steam-whistle of the *Heather Belle* before the collision, and improperly starboarded her helm. The *Fastnet* improperly neglected to ease her engines, and improperly neglected to stop and reverse her engines in due time. Those on board the *Fastnet* while the *Heather Belle* was fastened to her with lines and

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while the two steamships were steaming towards the mouth of the harbour after the collision, improperly cut the lines and let the *Heather Belle* go, and thus permitted her to sink and be lost.

Reasons for Judgment.

The statement of the captain of the *Fastnet* is that he started from the wharf at Charlottetown at six o'clock in the evening having been delayed on account of the fog, taking a S. ½ W. course for the Block House, which he passed at a distance of about one hundred and twenty-five or one hundred and fifty yards. He then steered S. ½ E., which he alleged would take him a course about thirty-five yards east of the Black Buoy. At 6.30 o'clock he was at the Block House and he then started on at full speed. At 6.40 he slowed down, and reduced to three or three and one-half knots through the water with the tide against him. He commenced to blow about seven or eight minutes after leaving the Block House. After two or three blasts, he heard the *Heather Belle's* horn ahead on his starboard bow. The blasts from both ships were long ones. The steamers appeared to be approaching nearer to one another, the *Heather Belle* still on the *Fastnet's* starboard bow. About from five to seven minutes after hearing the *Heather Belle's* first whistle, the collision took place. The first thing he saw was the *Heather Belle's* white light on her starboard bow, about thirty or forty yards off. He could not see the ship. He was then going three to three and one-half knots through the water. In a few seconds the *Heather Belle* came out of the fog, and, within six or ten feet of the *Fastnet's* bow, her paddles stopped. The *Heather Belle's* stem struck the *Fastnet's* bow five or six feet from the stem. Just before the *Heather Belle* struck, he saw her red light. The *Fastnet* had some speed on at the time of the collision, but when she struck he stopped her engines. The *Heather Belle* was then made fast to the *Fastnet*. They turned round to starboard and took a

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course north for Charlottetown Harbour which they entered. The *Heather Belle* was filling with water rapidly. Her guard rested upon that of the *Fastnet*. The *Fastnet* listed over and the *Heather Belle* went off with a jerk. He gave no order to cut the lines and he endeavoured to retake the *Heather Belle*, but could not do so, and his own ship afterwards went aground on the west side of the harbour.

The captain of the *Fastnet* alleges in his preliminary act that:

> The steamer *Heather Belle* was going at too great a speed having regard to the thick fog and to the fact that she was going with the tide, and that the *Heather Belle* did not reverse her engines before the collision as she should have done, but improperly ported her helm. In addition to this, the *Heather Belle* did not, by giving the proper number of blasts of her whistle, indicate to the *Fastnet* what course she was steering or what direction she was going in, and the *Heather Belle* was on the wrong side of the channel. She should have come in on the eastern side, but she came in on the western side.

On these allegations and the evidence adduced, in support of them, the question arises, which, if either, of the ships is to blame or are they both in fault?

Before referring to the rules and principles that, in my opinion, are decisive of this case, I shall briefly dispose of one fault attributed to the *Fastnet*, namely, that of severing herself from the *Heather Belle* and thereby allowing the latter to be lost. Up to the time the vessels separated, no fault could be found with the conduct of those on board the *Fastnet* so far as regards their endeavours to save the *Heather Belle*, and although it is true that when the latter listed over and her guard slipped off the *Fastnet* one of the lines was cut possibly under the apprehension that she might take the *Fastnet* over with her, yet no order to cut the lines or separate the vessels was given by the captain or by any officer on board the *Fastnet*; and their previous action in bringing the *Heather Belle* inside the har-

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bour, as well as their subsequent endeavour to recover her, show a desire on their part to save her. The evidence does not enable me to find that the officers of the *Fastnet* were to blame in this respect.

Article 21 of the *Regulations for preventing Collisions at Sea* requires that:

> In narrow channels every steamship shall, when it is safe and practicable, keep to that side of the fairway or mid-channel which lies on the starboard side of such ship.

The entrance to Charlottetown Harbour, where these vessels were, I regard as a narrow channel requiring the observance of this rule, and under it, situated as these vessels were, it was the duty of the *Heather Belle* to enter on the eastern side, and of the *Fastnet* to depart on the western side. According to the evidence of the captain of the *Heather Belle*, after passing the Bell Buoy he took a course for the Black Buoy on the west side, and passed within thirty or forty yards of it. On this point I put this question to the gentleman who most intelligently aided in this case as nautical assessor, whether, under the circumstances, it was proper as a matter of good seamanship for the captain of the *Heather Belle* to make the Black Buoy and to pass so close to it. He advises that it was proper. That, in starting from the Belle Buoy, the captain of the *Heather Belle* was right in steering for the Black Buoy. That as there is no buoy to mark the eastern side of the channel, on that account the *Heather Belle* was not to blame for making the Black Buoy for the purpose of verifying her position. That such is the custom of ships making Charlottetown Harbour; but, that having so verified her position, it was the duty of the *Heather Belle* at once to shape a course so as to reach her proper side of the channel, and especially so on account of the fog then prevailing. Instead, however, of steering a course for the eastern side of the channel,

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the *Heather Belle* was shaped N. ½ E. for the harbour, and the captain says he proceeded on that course for a minute or two—but, according to the witness Robert McLaren, for three or four minutes—till he heard the whistle of the *Fastnet* when he steered N.E. by N. This latter course, the nautical assessor advises, was proper, but it should have been taken sooner and from the Black Buoy. In thus acting, if his conduct could possibly contribute to the collision, the captain of the *Heather Belle* would violate art. 21, and it appears to me that the minutes delayed on the N. ½ E. course might, if employed in moving on the N.E. by N. course, have placed him clear of the *Fastnet*.

The captain of the *Heather Belle* states, that having heard a whistle ahead, a little on his port bow, which he took to be the *Fastnet's* whistle, he directed the mate, who was at the wheel, to port his helm, give him plenty of sea room, and blow one short blast; and that his orders were obeyed and the ship took a course N.E. by N.; that he continued on that course for about six minutes after he got the vessel steadied, running at the rate of three or four miles an hour, having the tide with him, and, that in the interval from seven to ten short blasts were blown by each vessel. As regards the character of the blasts there is a direct conflict between the witnesses of the *Heather Belle* and those of the *Fastnet*, the former swearing that they were short blasts and the latter that they were long ones. The captain of the *Heather Belle* says that the blast from his ship when he altered his course from N. ½ E. to N. E. by N. was given to indicate to the *Fastnet* that the *Heather Belle* was directing her course to starboard, that they were continued by him with that object, and that he understood by what he designates short blasts from the *Fastnet* that she also was going to starboard.

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Article 12 of the regulations requires that "in fog, mist or falling snow whether by day or night" a steamship under way shall make with her steam whistle or other steam sound or signal, at intervals of not more than two minutes, a prolonged blast; and article 19 provides that, in making any course authorized or required by the regulations a steamship under way may indicate that course to any other ship, which she has in sight, by certain signals on her whistle. In these signals one short blast means, "I am directing my course to starboard." But the regulation as to the signals, in my opinion, only applies when the vessel to which the signal is given is in sight of the ship giving the signal, and as the *Heather Belle* and the *Fastnet* were not in sight of one another when the signals were given, those signals were inapplicable to the circumstances, which both captains ought to know; and the captain of the *Fastnet* was not required to govern himself by them. Moreover, the captain of the *Fastnet* says the blasts were all long ones, and that he regarded and treated them as such. As long blasts were the proper ones for the circumstances, the captain of the *Fastnet* was not misled by the blasts given, because whether they were long or short, they indicated to him what the fog signal intends, namely, that another ship was in his vicinity, and they served him as a compliance with article 12. It is charged that the *Heather Belle* infringed article 13, which requires that:

> Every ship, whether a sailing ship or a steamship, shall in a fog, mist, or falling snow, go at a moderate speed.

The word "moderate" is regarded in this connection as a relative term, and, in law, what it should be in each case depends on the circumstances of the particular case. A general principle is, that speed such

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that another vessel cannot be seen in time to avoid her is unlawful (1).

Speed which is justifiable in an unfrequented part of the ocean is unlawful in a crowded roadstead, or in a highway (2). Besides, speed which was "moderate" when no vessel was known to be near may be illegal after the whistle or horn of another is heard to be approaching (2).

The object of article 13 is not merely that vessels should go at a speed which will lessen the violence of a collision, but also that they should go at a speed which will give as much time as possible for avoiding a collision when another ship suddenly comes into view at a short distance. This is the dictum of Sir James Hannen in the *Zadok* (3).

On the sea ten miles off Ushant four knots an hour have been held too fast (2), and off Cromer, with a whistle sounding ahead, three knots have been held too fast (4).

In the *Frankland* and the *Kestrel* (5), *The Kirby Hall* (6) and *The Dordogne* (2) it was held that where the fog was so dense that a steamship heard the whistle and hailing from another without being able to see, her duty was to stop at once and hail the other vessel. In a fog so dense that it is not possible for a ship to see another in time to avoid it—as undoubtedly was the case in this instance—she is not justified in being under way at all, except from necessity. In *The Lancashire* (7) and *The Otter* (8) it was held that neither article 13 nor 18 justified a ship in being under way in such circumstances.

(1) *The City of Brooklyn* L. R. 1 P. D. 276; *The Zadok* L. R. 9 P. D. 114.
(2) *The Dordogne* L.R. 10 P.D. 6.
(3) L. R. 9 P. D. 114, 115.
(4) *The Ebor* L. R. 11 P. D. 25.
(5) L. R. 4 P. C. 529.
(6) L. R. 8 P. D. 71.
(7) L. R. 4 Ad. & Ec. 198.
(8) *Ibid.* 203.

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In the latest edition of Mr. Marsden's excellent work on collisions at sea, published in 1891, at page 405, he writes:

A vessel going at too great a rate of speed on a dark night, or in thick weather, cannot be heard to say that a collision was the result of inevitable accident. Under such circumstances it is her duty to go at such a rate of speed as will enable her, after discovering another vessel, to avoid her by stopping and reversing her engines. If her speed is higher than this, she will, almost certainly, be held in fault for any collision that may occur, although she does her best to avoid it when the other ship is seen.

The evidence satisfies me that from the moment the *Heather Belle* sighted the *Fastnet* nothing that either ship could do would have avoided the collision. Under the circumtances I hold that the *Heather Belle* was not going at a "moderate" speed, and that she infringed article 13 of the regulations.

In this connection it becomes necessary for me to consider whether the *Heather Belle* did not also break article 18 of the regulations, which reads as follows:

Every steamship when approaching another ship, so as to involve risk of collision shall slacken her speed, or stop and reverse if necessary.

The requirement of this article is that a vessel when approaching another with risk of collision shall, whatever her speed may be, slacken it if possible, and at the same time, or afterwards if necessary stop, and reverse (1). In *The Ceto* (2) Lord Bramwell held that the word "necessary" does not mean that the situation is such that, without stopping and reversing, a collision would take place; but that it means rather "prudent and expedient."

In *The Dordogne* (3) a steamship in a fog so dense that a vessel could not be seen her own distance off, hearing, as in this case, the whistle of another continually approaching her was held in fault for not reversing until the other vessel was seen.

(1) *The Beryl* L. R. 9 P. D. 137-145.
(2) 14 App. Cas. 689.
(3) L. R. 10 P. D. 6.

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In *The Ceto* the exigency of the rule is defined by Lord Watson (1) thus:

In broad day-light, or in the night time, so long as ships' lights are discernible at a moderate distance, I do not think that it is within the meaning of the rule "necessary" for two approaching steamers to stop and reverse until it becomes apparent to the eye that if they continue to approach they will in all likelihood either shave close or collide. When the approaching vessels are enveloped in a fog, and cannot see each other, the rule must, in my opinion, apply with greater stringency.

When two steamships invisible to each other, by reason of a thick fog, find themselves gradually drawing nearer until they are within a few ships' lengths, they are in my opinion within the second direction of Rule 18, and each of them ought at once to stop and reverse unless the fog signals of the other vessel have distinctly and unequivocally indicated that she is steered on a relatively safe course, and will pass clear without involving risk of collision.

In the same case Lord Herschell (2) said:

The necessity must not be such as to become manifest only when all the facts are ascertained, but must be such as would be apparent to a seaman of ordinary skill and prudence with the knowledge which he possesses at the time.

The *Khedive* (3) and *The Frankland* and *The Kestrel* (4) are like authorities.

In *The Love Bird* (5), a steamship in a thick fog going three knots heard a blast of a fog-horn nearly ahead. She was held in fault for not having stopped or reversed her engines until the other vessel was seen about a length off.

In the *John McIntyre* (6), Brett, M.R., said:—

It may be laid down as a general rule of conduct that it is necessary to stop and reverse, not indeed every time that a steamer hears a whistle or fog-horn in a dense fog, but when in such a fog it is heard on either bow [as in this case] and approaching [as in this case] and is in the vicinity, [as in this case also] because there must then be a risk of collision.

(1) 14 App. Cas. 686.
(2) *Ibid.* p. 694.
(3) L. R. 5 App. Cas. 876.
(4) L. R. 4 P. C. 529.
(5) L. R. 6 P. D. 80.
(6) L. R. 9 P. D. 136.

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Lord Herschell in *The Ceto* (1) used similar language:

I think that when a steamship is approaching another vessel in a dense fog she ought to stop, unless there be such indications as to convey to a seaman of reasonable skill that the two vessels are so approaching that they will pass well clear of one another.

In *The Ebor* (2) Lord Esher, M.R., said :—

Supposing the whistle is ahead or on either bow, then the question is whether the officer has a right to wait till he hears a second whistle. It seems to me that if it is ahead he ought not to wait at all. If it is on either bow, and apparently at a considerable distance, he may possibly, though I doubt it, wait till he hears the second whistle. If the second whistle is nearer, the position is clear : he should stop and keep his vessel in hand, so that he can do anything in a moment.

He further said :—

He was going at the time at a speed of three to three and a half knots over the ground, he was in fact going with the engines easy which was, under these circumstances, a moderate speed, before the whistle was heard. But it was not moderate afterwards, for moderate speed then was to go as slowly as he could, only keeping his vessel well under command. [And he adds that] The speed should be as slow as it can be. If it is not, article 13 is broken, and if a vessel has broken that rule, the consequence is that if a steamship, she has also broken article 18. It is possible to break article 18 without breaking article 13, because the latter only applies to a fog, but by breaking article 13, article 18 is also broken.

According to the preliminary act filed on behalf of the *Heather Belle* when the other vessel was first seen at a distance of twenty or thirty yards off, and about two points on the *Heather Belle's* port bow notwithstanding that the previous exchange of from seven to ten whistles from each ship gave the captain of the *Heather Belle* ample notice, he still proceeded at a speed of three or four miles an hour with a tide at flood force of about one and one-half knots per hour.

Under these circumstances with the facts as proved and the law as it has been laid down by the eminent authorities I have quoted, and others to the same effect,

(1) 14 App. Cas. 695. (2) L. R. 11 P. D. 27-28.

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I am forced to the conclusion that the *Heather Belle* violated article 18 as well as article 13.

Now as regards the *Fastnet*:

The master's preliminary act says that on passing about one hundred and fifty yards from the Block House shore he shaped a course S. ½ E. and from his evidence, in which he says the sounds of the whistles of the *Heather Belle* were on his starboard bow, confirmed as that is by the evidence of those on board the *Heather Belle* that the sounds from the *Fastnet* were on the *Heather Belle's* port bow, I am inclined to believe that the *Fastnet* actually traversed a S. ½ E. course, and that at the precise moment of the collision that ship was, if anything, rather on the east side of mid-channel in violation of article 21. The course the *Fastnet* took, steering north to re-enter the harbour, is also in confirmation of this view.

The evidence shows that the ships were pursuing courses which would lead to their crossing one another's path, and thus article 16 was brought into operation It says:

> If two ships under steam are crossing so as to involve risk of collision the ship which has the other on her starboard side shall keep out of the way of the other.

This, it seems to me, casts upon the *Fastnet* the duty of keeping out of the way of the *Heather Belle*, which she might have done effectually by going a little to starboard on her own side of the channel. This was on her part a breach of article 16. But it may be open to question, that if the *Fastnet* was bound to observe article 16, then the *Heather Belle* became bound to observe article 22, which is that:

> Where by the above rules one of the two ships is to keep out of the way, the other shall keep her course.

In my view that rule was not violated by anything

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proved against the *Heather Belle*; as it appears that she did keep her course from the time she steered for the eastern side of the channel until she had ported her helm at a period when she was in the very "agony of collision," at which time she was justified in adopting any manœuvre considered likely to save her.

But apart from this, I consider the *Fastnet* equally at fault with the *Heather Belle*. According to the captain's preliminary act, when the light of the *Heather Belle* was first seen, his vessel was making about three knots an hour through the water; she was then, he says, about forty yards from the *Heather Belle* whose bearing was from $1\frac{1}{2}$ to $2\frac{1}{2}$ points on his starboard bow. So that although he knew that the *Heather Belle* was on his starboard bow and that the vessels were rapidly approaching one another he adopted no manœuvre to get out of the way or to avoid a collision but kept on his S. $\frac{1}{2}$ E. course at a speed of three knots an hour in the midst of a dense fog. In my opinion he violated article 13 by going at an immoderate speed and article 18 by not slackening his speed or stopping and reversing at an earlier period. The authorities I have cited and the references I have made regarding the breach of articles 13 and 18 by the *Heather Belle*, apply with equal force to the *Fastnet*, and I need not again allude to them. I have, therefore, no hesitation in finding that both vessels were active agents in contributing to the collision and in declaring them both to be in fault, and pronounce accordingly,

The remaining consideration regards the damage. There was a good deal of conflicting testimony as to which vessel struck the other. The evidence leads me to the belief that when the impact between them took place, the stem of the *Heather Belle* and the bow of the *Fastnet* came in contact very nearly at right angles, that the *Fastnet* had more force and was going at a

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greater speed than the *Heather Belle* and carried the breakage off to starboard. I conclude that the dent described as about five or six feet from the stem of the *Fastnet* and the projection opposite to it on the port side were caused by the collision, but that the other dent described as about fifteen feet from the stem of the *Fastnet* was not caused by the collision.

The general rule as to damages was thus stated by Dr. Lushington in *The Clarence* (1):

> The party who has sustained damage by collision is entitled to be put, as far as practicable, in the same condition as if the injury had not been suffered.

The owner of a ship wrongfully injured in a collision is entitled to have her fully and completely repaired; and if a ship is totally lost the owner is entitled to recover her market value at the time of the collision.

Where both ships are in fault, the law apportions the loss by obliging each wrong-doer to pay half the loss of the other.

The *Heather Belle* having been lost I have to ascertain her market value at the time of the collision. In most cases I should be disposed to adopt the practice of referring the assessment of damages to the registrar of the court assisted by merchants, but in the circumstances of this case, I see no advantage in that course, while its adoption would be attended with expense to the parties and would cause delay.

Messrs. Welsh, Owen and Hughes, three witnesses for the plaintiffs, valued the *Heather Belle* at $16,000 at the time of the collision. Mr. Owen swore that he had been endeavouring to procure another steamer like her and found he could not purchase one for an amount so low as that sum. The evidence is that the vessel although eight years old was nearly as good as when

(1) 3 W. Rob. 285.

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built, that she was examined and carefully repaired every year, and was only in use about one-half of each year.

By section 12 of chapter 79 of the Revised Statutes of Canada, to which I have been referred to limit the liability of the owners of the *Fastnet* (without objection by the counsel for the owners of the *Heather Belle*) it is enacted that "the owners of any steamship in case of a collision occurring like the present one,' without their actual fault or privity, "shall not be answerable in damages to an aggregate amount exceeding $38.92 for each ton of the gross tonnage." This would amount on the *Fastnet*, whose gross tonnage is 338 tons, to $13,154.96, at which sum, under the evidence, I value the *Heather Belle* and estimate the damages on account of her loss.

In regard to the damage done to the *Fastnet*, after a careful consideration of the evidence and all the circumstances, I estimate it at $2,800.

Each party to contribute a moiety of the amount decreed against the other, and to bear their own costs for counsel, solicitors and witnesses, the cost of reporting the evidence and all other fees and expenses to be borne equally by the parties, and I pronounce and decree accordingly.

Judgment accordingly.

Solicitor for owners *Heather Belle: L. H. Davies.*

Solicitor for owners *Fastnet: A. Peters.*

TORONTO ADMIRALTY DISTRICT.

1892

Feb. 15.

THE GLENIFFER.

Maritime law—Salvage—Maritime lien—Possessory lien—Priority—Towage—Nature of services—Express agreement for reward—Successful result—Amount of salvage award—Costs.

A stranded vessel abandoned by the owners to the underwriters, and sold by them was saved, and was brought by the purchasers to a shipwright for repairs:

Held, that the towage of the vessel from the place where stranded to the dry dock was a salvage service.

2. Claim for use of anchor, chains, &c., used in saving vessel:

Held, a salvage service.

3. Claim for personal services not performed on vessel:

Held, not a salvage service.

4. Claim for services of tug in unsuccessful attempt to remove vessel.

Held, not a salvage service. Salvage is a reward for benefits actually conferred.

5. *Held*, maritime liens take priority of possessory liens to the extent of the value of the *res* at the time of delivery to the shipwright.

6. *Held*, following the usual rule, that not more than a moiety of the value of the *res* at the time when saved should be awarded to salvors, there being no exceptional feature except the small value of the *res*.

Costs of salvors awarded out of other moiety. Costs of arrest and sale and of bringing fund into court paid in priority to claims out of fund, in proportion to the value of the *res* at the time of delivery to the Dry Dock Company, and balance of the proceeds of sale which was not sufficient to pay claim of possessory lienholder.

THIS was an issue between Frank Jackman, Patrick McSherry, A. B. Morrison, and Joseph Jackson and the Toronto Dry Dock and Ship-Building Company (Limited), in which said Jackman, *et al.*, set up that they respectively had valid and subsisting claims for salvage services performed on the ship, *The Gleniffer*, and that their claims were entitled to rank on the proceeds of the sale of the said ship in priority to the claim of the company under a possessory lien for repairs and dockage charges.

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THE GLENIFFER.

Statement of Facts.

The facts appear in the judgment.

February 15th, 1892.

The issue was tried on affidavit.

Mulvey for the salvors:—

The questions to be decided are whether the services performed give maritime liens, and whether the maritime liens should rank on the proceeds of the ship in priority to the possessory lien of the shipwright.

The services performed by Jackman and Morrison give a maritime lien. (Cites *The Catherine* (1); *The London Merchant* (2); *The Princess Alice* (3); *The Reward* (4).)

The services of Morrison give a maritime lien notwithstanding the fact that they were performed under an express agreement. (Cites *The Catherine* (5); *The True Blue* (6); *The Mulgrave* (7).)

Jackson is entitled to a maritime lien for services rendered; although no immediate benefit accrued from his services, he was a party to the general successful result. (Cites *The Atlas* (8); *The Camellia* (9); *The E. U.* (10); *The Santipore* (11).)

When a ship is arrested by the marshal she is in the possession of the court, and the possessory lien is divested. (Cites *The Harmonie* (12); *Ladbroke* v. *Crickett* (13).)

Possession is not required to support a maritime lien. The lien travels with the *res* into the possession of whomsoever it may come. It is inchoate from the moment the claim attaches, and when carried into

(1) 12 Jur. 682.
(2) 3 Hagg. 394.
(3) 3 W. Rob. 138.
(4) 1 W. Rob. 174.
(5) 6 No. of Ca. Supp. 43.
(6) 2 W. Rob. 176.
(7) 2 Hagg. 77.
(8) Lush. 523.
(9) 9 P. D. 27.
(10) 1 Spks. 66.
(11) 1 Spks. 231.
(12) 1 W. Rob. 178.
(13) 2 T. R. 649.

effect by legal process relates to the period when it first attached. (Cites *The Bold Buccleugh*) (1).

A maritime lien is prior to a possessory lien. (Cites *The Gustaf* (2); *The Immacolata Concezione* (3); *The Acacia* (4).)

The work done by the shipwright was done on personal security. There is no maritime lien for such services. (Cites *The Heinrich Björn*) (5).

A. C. Galt, for the Toronto Dry Dock Company, after setting out the condition of the vessel when brought to the Dry Dock Company and the work which was subsequently done on her:—

When an agreement is entered into for the performance of service salvage remuneration will be refused. (Cites *Abbott on Shipping*) (6).

Salvage is a compensation allowed for services performed in rescuing a ship, and must involve skill, enterprise, and risk. (Cites *Sweet's Law Dictionary*). There was no risk or enterprise in this case, the vessel being an abandoned hulk.

A salvor is a person who performs useful services as a volunteer. When these alleged salvors entered into an agreement to perform the services, they were under a legal duty.

The services of Jackman were merely towage services, which give no maritime lien. (Cites *The Heinrich Björn*) (7).

Jackson's services gave no maritime lien. No benefit was obtained therefrom.

A maritime lien travels with the *res*, but is subsequent to any lien through which the value of the *res* is increased. (Cites *The Bold Buccleugh*) (1).

(1) 7 Moore P.C. 267.
(2) Lush. 506.
(3) 9 P.D. 37.
(4) 4 Asp. M.L. C. 254 (*n*).
(5) 11 App. Cas. 270.
(6) 12 ed. 547, 548, 569.
(7) 11 App. Cas. 270.

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It is the general rule of maritime law that not more than a moiety of the *res* will be awarded to salvors. (*Jones on Salvage* (1), *International Wrecking Co.* v. *Lobb*) (2).

Mulvey in reply: The full value of the *res* was awarded in the following cases: *The William Hamilton* (3), *The Castletown* (4), *The Rutland* (5).

The amount of the salvage award is in the discretion of the court. (Cites *The Acquila*) (6).

McDOUGALL, L.J.—This is a motion before me, in the several suits brought against the above ship, to determine the priorities of the various claims. Four actions have been instituted for salvage, and one by the Toronto Dry Dock Co. for repairs. In two of the salvage cases the plaintiffs claim under an express agreement as to amount; in the other two salvage cases, the plaintiffs demand a *quantum meruit* by virtue of their alleged salvage services under the maritime lien thereby created. The ship was arrested in the salvage actions while in the possession of the plaintiffs, in action No. 10, the Toronto Dry Dock Company, who claim they are entitled to a possessory lien for the amount of their account for repairs and dock charges. The owners do not appear to the actions in this court. The Dry Dock Company, before any one had commenced an action in the Admiralty Court, had taken proceedings in the High Court of Justice, *in personam*, against the alleged owners, and have secured a judgment by default against two of the defendants in the action, named Baker, for the amount of their claim. The other defendant, Patrick McSherry, disputes their right to recover against him, on the ground that he was not an

(1) P. 88.
(2) 11 O. R. 408.
(3) 3 Hagg. 168.
(4) 5 Irish Jur. 379.
(5) 3 Irish Jur. 283.
(6) 1 C. Rob. 37.

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owner of the vessel at the time she came into the hands of the Dry Dock Company for repairs. McSherry is plaintiff in action No. 6 in this court, claiming a considerable sum for alleged salvage services. All the alleged salvage services were performed before the ship came in possession of the Dry Dock Company.

A brief history of the ship will be of value as showing the relative position of the parties. The *Gleniffer* was stranded on the shore of Lake Ontario, near Toronto, several years ago. She became a total wreck, and was abandoned by her then owners to the underwriters. These latter sold the wreck to McSherry; McSherry stripped her of her sails, rigging, chains, anchors, and practically all movable articles, leaving the hull partially under water, where she lay for a year or two. In the autumn of 1891 McSherry sold the hull and outfit removed by him to the present owners, two brothers named Baker, for the price or sum of $400, retaining, however, possession of the outfit until the purchase money was paid. The Bakers proceeded at once to recover the hull, employing the plaintiffs in actions No. 6, 7 and 8 to aid them in their endeavours to get the vessel afloat. Their efforts were ultimately successful, and the vessel was taken by the salvors, under the direction of the owners, the Bakers, to the yard of the Dry Dock Company, where the vessel had been docked immediately on her arrival, and she was kept afloat only by the constant working of a steam-pump.

The salvage claim may be described briefly as follows:

Action No. 5—Frank Jackman, plaintiff: 67 hours' work of steam tug, at $6 per hour	$402.00
Towing scows	5.00
	$407.00
Action No. 6—Patrick McSherry, plaintiff: For use of boat, tow lines, anchors and chains, and 21 days' personal services	$267.00

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Action No. 7—A. B. Morrison, plaintiff: For use of steam-pump, per express contract, at $20 per diem, for twenty-three days	$460.00
Half cost of fuel, also per express contract	24.00
Ten days' use and work of steam scow and crew (not covered by any agreement as to price), at $20	200.00
	$684.00
Less cash paid on account	167.00
Leaving a balance due of	$517.00
Action No. 8—Joseph Jackson, plaintiff: Trying to pull *Gleniffer* off ground, 2½ hours with steamer *Eurydice*, under express agreement, $50 for the first hour, and $10 for each additional hour	$65.00

These efforts were unsuccessful.

The value of the hull when delivered to the Dry Dock Company was about $300; after the repairs made to her by the Dry Dock Company the vessel was sold by the marshal, without any outfit or sails, for $850.

In the first place, it must be determined whether all or any of the foregoing claims are properly salvage claims or not.

McSherry's claim, in action No. 6, is for the use of the boat tackle, anchors, chains, tow-lines, tackle lines, &c., and twenty-one days' personal service, of which only three days were spent on the wreck, the remaining eighteen days being occupied in going about town, it is said, procuring and forwarding supplies. I think the services rendered were salvage services, except the eighteen days' personal services in town, which I disallow as salvage.

The claims of the plaintiff in No. 5, Frank Jackman, and of the plaintiff in No. 7, A. B. Morrison, are also clearly for salvage services. It is argued that the claim of the plaintiff Morrison, for the use of the steam pump, being under express agreement, cannot rank as a maritime lien for salvage; the express agreement either ousts the court of jurisdiction, or, if it is found to be an express agreement, it ceases to be a lien,

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which is a right or privilege seldom arising, it is contended, except in the absence of an express agreement, I cannot concur in this view. The agreement does not alter the nature of the service as a salvage service, and the court will give effect to its provisions in awarding remuneration according to its terms. An agreement fixing an amount to be paid for the services, whether in writing or verbal, is legally conclusive on both parties as to the amount of the reward (1). Such an agreement must, however, be free from fraud or any taint of dishonesty or corruption, and made with a competent knowledge of all the facts (2). The proof of the alleged agreement rests with the party who sets it up, and satisfactory evidence must be given of its existence (3).

Jackson's claim for attempting to pull the boat off, which effort was entirely unsuccessful, I do not consider a salvage service. There is no agreement shown that he was to be paid in any event. Salvage is a reward for benefits actually conferred, not for services attempted, and resulting in nothing. The exertions must in some way contribute to the successful result (4). Here there is no evidence or allegation that the service resulted in the slightest benefit whatever.

The claims made for services which I hold to be salvage, with the amounts claimed, will be as follows :—

Patrick McSherry		$213
A. B. Morrison, contract	$484	
Less cash paid	167	
Leaving a balance of	$317	
Services not under contract	200	
Total		517
Jackman's claim		407
Total		$1,137

(1) *The Fire Fly*, Swa. 240 ; *The True Blue*, 2 W. Robb. 177.

(2) *The Betsy*, 2 W. Robb. 170 ; *The Kingalock*, 1 Spk. 263.

(3) *The Graces*, 2 W. Robb 297 ; *The Salacia*, 2 Hagg. 265.

(4) *The Edward Hawkins*, Lush. 515.

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The value of the vessel when saved, in the hands of the salvors, and at the date of delivery to the plaintiffs, the Dry Dock Company, was $300. This amount is the fund to be distributed unless the salvors are entitled to claim up to the added value resulting from the work done by the Dry Dock Company. Singularly enough, I can find no express decision on the point. In the cases of *The Gustaf* (1), and *Immacolata Concezione* (2), the question was not raised, it may be because the maritime liens which were in priority in these cases were small in amount, compared with the amount realized from the sale of the *res*; probably in each case below the actual value of the *res* at the time it came into the hands of the shipwright. In the case of *The Gustaf*, the vessel sold for £810, and the liens preferred to the claim of the shipwright came only to £390. In the case of *The Immacolata Concezione*, the proceeds of the sale paid into court were £2,328; wages were paid to the amount of about £500. Though that amount was not then settled, priority was given to such wages as had been earned up to the date of the ship's coming into the possession of the shipwright.

The principle laid down in the case of *The Gustaf*, and followed in the case of *The Immacolata Concezione*, was that the shipwright takes the vessel into his possession *cum onere*; *i.e.*, with the existing obligations, then completed and done; and it would appear to me that the equitable and just meaning of taking the vessel *cum onere* would only extend to the value of the *res* at the time of its coming into the shipwright's hands. If the *res* at that time was of less value than the aggregated amount of the maritime liens attaching to the vessel, then the holders of such liens must abate their claims to the extent that their security failed them. I do not mean to say that it is always a simple

(1) Lush. 506. (2) 9 P.D. 37.

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thing to determine the value of the *res* at the time of its entering the shipwright's yard; but it can be very closely approximated. Especially should this rule be applied to claims for salvage. In the case of such claims the court rarely allots for salvage more than a moiety of the property saved. Surely a vessel worth $1,000 when saved, and worth $5,000 after the shipwright has got through his work on her, though his, the shipwright's, individual claim may exceed, and usually would exceed, the selling value of the patched-up vessel, could not fairly be valued at $5,000 for the purpose of estimating the amount to be awarded for salvage. If this rule were to prevail the salvors need only postpone suing for their claims till the shipwright has expended a large sum on the vessel, and then make a large claim for salvage, and for an award therefor far in excess of the actual value of the property so saved. I think the value of the *res* must be taken at the time she is salved and handed over by the salvors, and it is in reference to this value that the amount to be allotted for salvage is to be computed.

In this case I find the value of the *Gleniffer*, when handed over to the Dry Dock Company, to have been $300, and I fix the amount of salvage at the sum of $150, being a moiety of the value of the property saved. I do not think there were any special circumstances of danger or risk involved in the services rendered in this case which would warrant my making an award exceeding what appears to be the usual limit in cases of salvage. The only exceptional feature in the present case is the small value of the property saved; but that, standing by itself, I do not consider as sufficiently exceptional or extraordinary to take the case out of the usual rule.

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I also allow the salvors their costs, but these (including their share of the costs of arrest and sale) are not to exceed the sum of $150, so far as the funds in court are concerned. The $150 for costs and the $150 allowed for salvage exhaust the full value of the *res* in the hands of the salvors at the time they delivered it over to the Dry Dock Company for repairs.

The owners in this case not appearing, the salvors are awarded the full value of the property saved, because I assume that the sum which will be taxed for costs will equal, if not exceed the sum of $150, the other moiety of the value of the *res* saved. This view protects to a just extent the possessory lien of the Dry Dock Company. They will have to pay their proportion of the costs of arrest and sale; these will be in the same proportion to the salvor's share of these costs as $150 bear to $300. After the payment of these costs and the money awarded to the salvors, the Dry Dock Company will be entitled to the balance of their fund in court to be applied on their claim and costs.

Judgment accordingly.

ADMIRALTY DISTRICT OF BRITISH COLUMBIA.

1891
Dec. 14.

The ZAMBESI (JOHNSON.)

The FANNY DUTARD (UPTON.)

Collision—Damages—Salvage.

1. In a collision between a steamer and a sailing vessel in a fog, the steamer was going half-speed. Had she been going dead slow she might have been stopped in time to prevent the collision.

Held, that the steamer was partly in fault, although the collision was no doubt due to the want of a fog-horn on the sailing vessel.

2. The sailing vessel immediately becoming water logged and helpless, and in a position where, though safe for the moment, she might very shortly have been in great danger, it was a salvage service, towage not merely, to rescue her.

3. Where two vessels in collision are both in fault, salvage services performed by one towards the other are to be divided.

THESE were two actions arising out of a collision in the Straits of Fuca, about twenty-five or thirty miles from Victoria.

The *Zambesi* was the regular Japan steamer, of the Upton line, on her voyage to Victoria, well found and equipped and navigated in every respect. The *Fanny Dutard* was a three-masted schooner, laden with lumber, outward bound, beating out of the straits against the tide, with a light variable wind from the westward, steering by the wind. The night was foggy, occasionally very dense, with intervals of lighter fog, but always foggy. The schooner had no mechanical fog-horn at all as required by R.S.C., c. 79, s. 2, art. 12, only a horn sounded by the mouth. It was not produced at the trial and was alleged to have been lost at the time of the collision. The *Zambesi*, inward bound, with the tide, had been at half speed in an interval of lighter fog and was just reducing her speed on entering a

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dense fog bank, when she heard a fog-horn faintly and perceived the bow of the *Fanny Dutard* at four hundred or five hundred feet distance right ahead and, before she could stop her way, struck her, stem on, nearly amidships, totally incapacitating her from further navigation, though being laden with lumber she was in no danger of sinking. The *Zambesi* took her in tow into the port of Victoria, for which she was herself bound. In performing this service she carried away two of her own hawsers, worth when new $175 and $150 respectively. The towage service was in the opinion of the assessors skilfully performed. The half speed of the *Zambesi* was about five miles per hour. She had been travelling for some time in the denser fog dead slow, at about two knots. The first action was brought by the owners of the *Fanny Dutard* for damages consequent on the collision. The second action was brought by the *Zambesi* for salvage.

December 12th, 14th, 1891.

The case was heard before Sir MATTHEW B. BEGBIE, C. J., Local Judge in Admiralty for the district of British Columbia, Capt. Sinclair, R. N., and Lieut. Melville, R. N., sitting with him as nautical assessors.

Pooley, Q.C., and *Helmcken*, for the *Fanny Dutard*, cited *The Franconia* (1).

Bodwell for the *Zambesi*, cited *The Franconia* (2); *The Margaret* (3); *The William Tell* (4); Marsden on Collisions (5).

Sir MATTHEW B. BEGBIE, (C. J.) L. J.—It seems clear, and we are all convinced, that the disregard by the steamer of the statutory rule as to a fog-horn

(1) L.R. 2 P.D. 12.
(2) *Ibid.*
(3) L.R. 6 P.D. 76.
(4) 13 L.T., N.S. Adm. 414.
(4) Pp. 30, 31, 36.

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THE ZAMBESI.
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was the real cause—the *causa causans*—of the disaster; but in all cases of collision the immediate cause is to be regarded,—*causa proxima, non causa causans, spectanda est*,—and the immediate cause was the inability of the *Zambesi* to stop her way in time. Was that a fault in her? When a steamer and a sailing vessel are in danger of collision, the statute throws on the steamer alone the duty of getting out of the way. If she does not do so, *primâ facie* she is a wrong-doer and has neglected her duty. If it be said on her behalf that she could not stop in time, that only states in other words that she was going too fast to permit her to perform this duty. It is true, every vessel—steamer or not—has a right to keep herself safe; she cannot be safe unless under command; she cannot be under command unless she has steerage way; and therefore it is certain that even the statute permits, and, indeed, compels, a steamer to make some progress through the water. The rate of progress, therefore, alone is in question. Now, as the assessors point out, the *Zambesi* had for three-quarters of an hour on that very night deemed it quite safe, as far as her own navigation was concerned, to go dead slow. And if she had been going at that rate when the loom of the *Dutard* was first seen, I should have pronounced her free from blame. But she was at that time going half speed. This was an unnecessary rate for her own safety, and she must, unfortunately, stand to the consequences of having exceeded it.

Without any doubt the *causa causans* of the calamity was the almost criminal negligence of the schooner in regard to her signal outfit. There was very imperfect evidence as to the quality of her lights, and we are by no means satisfied that these were sufficient. But the lights were comparatively unimportant on this occasion;

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the most important instrument of safety on that foggy night was undoubtedly a fog-horn,—and this was clearly quite inadequate. The assessors are well acquainted with the instrument, and inform me that with even a small horn it is quite usual to convey orders, by signal, at distances of a mile or even a mile and a half. We have no doubt but that if the *Dutard* had been furnished with such an instrument, the *Zambesi*, carefully navigated as she was, could easily have avoided her even at half speed. But the *causa proxima* of the collision was, we think, the unnecessary —we do not say improper—speed of the *Zambesi*. That speed might have been proper enough among vessels duly equipped; but it was not recollected on board the *Zambesi* that she might encounter some vessel that was not duly equipped, perhaps helpless, through no fault of her own. In fact the *Zambesi* was on the point of reducing her speed on entering the denser wreath of fog which, unfortunately for her, concealed the schooner. Both vessels being to blame there must be the usual reference to assess the damage, which will be divided. Then as to salvage. There was no immediate danger to life or ship, nor any difficulty or risk in the service performed, and not above three hours delay. But, though the *Dutard* was in no imminent danger, she was utterly unmanageable and might, within an hour, have been in most imminent danger. It was, therefore, highly important that she should be placed at once in a place of safety. I award one-tenth of the value of the schooner and cargo, not exceeding $2,000, one-half to be borne by each vessel, and there will be a reference as to that, unless the parties agree. The chief responsibility and merit of the salvage belongs to the *Zambesi* herself, and to the captain. I therefore award $\frac{5}{8}$ to the ship, $\frac{1}{4}$ to the captain, $\frac{1}{8}$

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to be divided among the crew, in proportion to their wages.

As to costs. If I have jurisdiction, in a case where both vessels are in fault, I feel disposed to give the costs of the *Zambesi* in both actions against the *Dutard* if that can be shown to have been ever done.

[*Pooley*, Q.C.—Where both are to blame costs are divided.]

That is, of course, the general rule, and if I have no discretion that will be the direction in the first action for damages by the collision. In the second action costs to the *Zambesi* to be paid by the *Dutard*. But it will be better to reserve the whole question of costs, which may be mentioned again.

December 23rd, 1891.

The salvage action, *Upton* v. *Fanny Dutard*, came on again to be mentioned.

February 3rd, 1892.

Pooley, Q.C., wished to have the whole decision as to salvage reargued and reconsidered. No judgment has as yet been drawn up or signed, and the court has power to reconsider the result with a view to an appeal. [The *Monarch* (1); *Griffin* v. *Hamilton* (2).] Where both vessels are in fault, no salvage will be awarded to either, for she must necessarily be a wrong-doer and cannot be permitted to make a profit out of her own wrong. [*Glengaber* (3); *Cargo ex Capella* (4); *Griffin* v. *Hamilton* (5); The *Glamorganshire* (6); and the *Fanny Carvill* (7).] Where the neglect of statutory rules does not lead to the collision, it may be disregarded.

(1) 1 Wm. Rob. 21.
(2) 7 Ir. Rep. Eq. 141.
(3) 41 L. J. Adm. 84.
(4) 1 L.R. Adm. and Eccl. 356.
(5) 7 Ir. Rep. Eq. 141.
(6) 13 App. Cas. 455.
(7) 13 App. Cases 455, foot note.

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Bodwell contended that the power of reconsidering a judgment only extended to amending or explaining it, but not to a complete reversal.

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Sir MATTHEW B. BEGBIE, (C.J.) L.J.—I think Mr. Bodwell's contention right. The power of altering a decree after verbal utterance and before being drawn up, is undoubted. But I think this power ought not to be deemed to extend so as in fact and in substance to reverse the whole decision. Upon this application in the salvage action, both considerations arise. I shall avail myself of this opportunity of correcting a clear oversight as to the cargo. And I shall give an additional direction to the taxing-master as to the plaintiff's costs in the salvage action, viz., that the plaintiff is to get them, so far as they are distinguishable from, and additional to, his costs in the collision action. Neither of these matters received any attention on the argument at the hearing. But as to reversing my decision, which allowed salvage to the *Zambesi*, that being a matter which I had fully considered and discussed with the assessors, I much doubt whether that is within my power; that can probably be done only by a court of appeal. However, I still think the decision reasonable and not contrary to any decided case; rather carrying out the principles of the cases cited.

There does not appear to be any reported decision on the circumstances of this case, viz., a claim for salvage services rendered by one vessel to the other in collision, where both are declared to be in fault. In the *Cargo ex Capella* (1) the court expressly points out that the cargo was entirely innocent, and then lays down the principle, on which Mr. Pooley

(1) 1 L. R. Adm. & Eccl. 356.

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strongly relies, that no man can make a profit out of his own wrongful act. That principle clearly applied in the case of the *Glengaber* (2): the collision had been occasioned by the vessel claiming for salvage, the other vessel not being, apparently, in fault. It strikes me that the principle must be applicable to both parties. The question was fully discussed before myself and the assessors; of course I am wholly responsible for the decision, but we did discuss it, and were fully agreed that this was a salvage service. The *Fanny Dutard* was drifting with the tide (which runs five or six miles an hour), quite helpless and quite unable to indicate her position either to a tug or to a passing ship,—in danger herself and a danger to navigation. Even if a tug had been summoned by the *Zambesi* on her arrival at Victoria, she would not have gone out on such an errand on the ordinary terms of towage; nor could she, probably, have discovered the disabled ship. It is none the less salvage, because a steamer to perform the service happened to be on the spot. If the service had been performed by a stranger, the remuneration, whatever it was, would have been part of the damages arising out of the collision, just as much as the repairs of the schooner, and so would have been divided between the two ships equally. If indeed the *Zambesi* had been solely to blame, the expense of a tug would have fallen on her exclusively, and she would, by performing the service merely, have exonerated herself from paying the stranger tug; she would therefore have been entitled to nothing at all. On the other hand, if the *Dutard* alone had been in fault, she would have had to pay the whole expense of the tug. Why should she, being the chief, and in our opinion, the real wrong-doer, take advantage of her own wrong, and get this salvage service *gratis?* The

(1) 41 L. J. Adm. 84

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proper amount for salvage ought therefore, like the other expenses caused by the collision, to be divided equally. The assessors thought $2,000 would have been a proper sum if performed by a stranger. I thought that rather high. It was a very valuable service, no doubt, to the schooner—her existence, and the lives of her crew, probably, depended on it; but it was easily performed and involved no danger to life or limb or ship, of the salvors. I therefore awarded one-tenth of the value of the schooner as salved, not however to go beyond $2,000; the amount to be equally divided; one-half payable by the *Dutard*, distributed as I have directed.

Judgment accordingly.

ARTHUR H. MURPHY.....SUPPLIANT; 1892

AND Sept. 1.

HER MAJESTY THE QUEEN.....RESPONDENT.

Sale of Ordnance Lands in Quebec—Cancellation—23 *Vic.* (*P. C.*) *c.* 2, *s.* 20.

In the year 1876 the suppliant purchased a number of lots at an auction sale of Ordnance land in the city of Quebec. He paid certain instalments and interest thereon amounting in all to a sum of $2,447.92. Being unable to complete the payments for which he was liable, he applied to the Crown, in 1885, to appropriate the money paid by him to the purchase of three particular lots,—Nos. 19, 38 and 39. This the Crown consented to do, and upon an adjustment of the account there was found to be a sum of $73.92 due to the suppliant, which, by mutual arrangement, was appropriated to the purchase of another lot (No. 100), leaving a balance then due to the Crown of $126.08. When, however, the suppliant came to pay this balance and get his patents for the four lots, he was informed that lot 19 would probably be required for certain military purposes. He then tendered the balance due to the proper officer of the Crown in that behalf, but it was declined. Patents for lots 38, 39 and 100 were subsequently issued to suppliant, and nothing further was done until 1886, when the Crown resumed possession of lot 19, which was followed up by an attempted cancellation of the sale of the lot under 23 Vic. (P.C.) c. 2 on the ground that as the balance due on the purchase had not been paid the terms and conditions of the sale had not been complied with.

Held, that the sale was not duly cancelled, that the suppliant had forfeited none of his rights under the sale, and was entitled to damages equal to the value of the lot at the time the Crown resumed possession thereof.

Quære:—Has the Deputy Minister of the Interior the right to exercise the powers of cancellation vested in the Commissioner of Crown Lands by the 20th section of the Act of the Province of Canada, 23 Vic. c. 2 ?

PETITION of right for damages arising from an alleged expropriation of land.

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Reasons for Judgment.

The facts of the case are recited in the judgment.

June 28th, 1892.

Code and *Stafford* for suppliant;

Hogg, Q.C., for respondent.

BURBIDGE, J. now (September 1st, 1892) delivered judgment.

The suppliant, by his petition, claims $6,000 damages for the expropriation of lot No. 19 on the Grande Allée, in Montcalm Ward, in the city of Quebec. At the trial no evidence of expropriation proceedings was tendered, and I allowed the suppliant to amend the petition by setting up a claim for breach of an agreement by the Crown to sell to him the said lot.

It appears that in the year 1876, at an auction sale in Quebec of certain Ordnance lands, the suppliant purchased a number of lots of which he was put in possession and on which he paid certain instalments and interest thereon, amounting in all to the sum of $2,447.92. Being unable to complete the payment for which he was liable, he applied to the Crown, in 1885, to appropriate the money paid by him to the purchase of three lots designated by the numbers 19, 38 and 39, agreeing, at the same time, to bear a proportion of the expenses of the sale. This application was granted, and, upon an adjustment of the account, there was found to be a sum of $73.92 due to the suppliant. As the Crown declined to return this balance, he was allowed to select a lot, number 100, the value of which was $200, upon agreeing to pay the difference of $126.08. When, however, he came to pay the balance and get the patents for the four lots, he was made aware that it was probable that lot 19 would be required for military purposes in connection with the Drill Shed at Quebec. At this time he had with him

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the balance of $126.08 and offered to pay it to the proper officer, but, pending a decision as to whether or not the lot would be required for military purposes, the Crown officer declined to accept the money, and the matter, apparently by mutual consent, remained in abeyance. The patents for lots Nos. 38, 39 and 100 were duly issued. In 1886 the Crown resumed possession of lot 19, and on the 21st July, 1887, without any notice or intimation to the suppliant, the sale of the lot was attempted to be cancelled under the authority of the 20th section of the Act of the Legislature of the Province of Canada, 23 Vic. chapter 2, on the ground that, as this sum of $126.08 had not been paid, the terms and conditions of sale had not been complied with.

The principle question in this case is as to whether or not this cancellation was effective for the purposes for which it was intended. Apart altogether from any question of the right of the Acting Deputy Minister of the Interior, in July, 1887, to exercise, in respect of the sale of the lot in question, the powers conferred by the statute mentioned upon the Commissioner of Crown Lands, the facts are that the sum of $126.08 was not due in respect of lot 19, but was due either on lot 100, which is probably the correct view to take of the evidence, or in respect of the four lots; that the suppliant prior to the attempted cancellation had offered to pay the amount, and was ready at any time to do so; and that the true reason for the proposed cancellation was not the non-payment of the sum mentioned, but the fact that the lot was required for the public use. Under these circumstances I have no doubt that the sale was not duly cancelled, that the suppliant forfeited none of his rights, and that he is entitled to damages equal to the value of the lot in 1886,—which I assess at the sum of

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$1,365. From this amount there should be deducted the sum of $126.08, which it was agreed should be set off against the value of the lot.

There will be judgment in favour of the suppliant for the sum of $1,238.92 and costs.

Judgment accordingly.

Solicitors for suppliant: *McIntyre, Code & Orde.*

Solicitors for respondent: *O'Connor, Hogg & Balderson.*

JOHN A. BROWN AND HIRAM BELKNAP ..... } SUPPLIANTS; 1892 Sep. 1.

AND

HER MAJESTY THE QUEEN ..... RESPONDENT.

Construction of a Government fish-way in a private mill-dam—Damage to mill owner—Public work—50-51 Vic. c. 16, s. 16 (c).

The suppliants complained that the Crown, by its servants, so negligently and unskilfully constructed a fish-way in a mill-dam used to secure a head of water for running certain mills owned by them, that such mills and premises were injuriously affected and greatly depreciated in value.

Held,—That the fish-way was not a public work within the meaning of 50-51 Vic. c. 16, s. 16 (*c*), and that the Crown was not liable.

PETITION of right for damages arising from the construction of a Government fish-way in a private mill-dam.

The facts of the case appear in the judgment.

May 31st, 1892.

Ritchie, (W.B.A.) for respondent: There was no cause of action in 1885, and suppliants cannot recover under the law as it stands to-day. The fish-way is not a public work within the meaning of 50-51 Vic. c. 16, s. 16 (*c*). The Dominion Government, it is true, bears a proportion of the expenditure on the fish-way, but that does not make it a public work. Public works are such things as are defined by statute, and must be works owned and operated by the Government. These elements are not present in the case of this fish-way.

Ritchie, (J.J.) for suppliants: The fish-way has all the elements of a public work. The very constitution of the Department of Marine and Fisheries gives it authority and control over fish-ways. The legislative authority for their construction is founded on their

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being for the benefit of the public and for the public use. There is clear jurisdiction in the court to entertain this action. There is only a dictum of the Supreme Court of Canada that *The Exchequer Court Act* is not retroactive in giving a remedy in cases like this. [*Martin* v. *The Queen* (1).] There was a liability enforceable under 33 Vic. c. 23, before the Board of Official Arbitrators.

BURBIDGE, J. now (September 1st, 1892) delivered judgment.

The suppliants complain that the Crown, by its servants, so negligently and unskilfully constructed a fish-way in a mill-dam used to secure a head of water for running certain mills owned by them, that such mills and premises were injuriously affected and greatly depreciated in value.

Immediately upon the case being opened it was objected that the court had no jurisdiction,—on the ground, among others, that neither the dam nor the fish-way was a public work of Canada (50-51 Vic. c. 16, s. 16 (*c*); and I thought that the objection should prevail. As there were, however, a number of witnesses in attendance from long distances the parties agreed that the question should be reserved and the hearing of the case continued.

For the negligence of its officer in the construction, or in directing the construction, of a fish-way in the dam, it was admitted that the Crown was not liable unless such liability was founded on a statute; and that the suppliants could not succeed unless the fish-way in question was held to be a public work within the meaning of 50-51 Vic. c. 16, s. 16 (*c*). On that point I adhere to the view that I expressed at the trial. The case is, I think, very clear. The fish-way

(1) 20 Can. S. C. R. 240.

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was not a public work within the meaning of the statute. Whatever right of action the suppliants might have had against the persons of whose negligence they complain, they have none against the Crown, because there is no Act of Parliament creating any liability to answer for such negligence.

A number of other objections were raised and discussed; but as the one I have mentioned disposes of the case it is unnecessary to refer to them.

Judgment for the respondent with costs.

Solicitor for suppliants: *J. A. Chisholm.*

Solicitor for respondent: *H. E. Gillis.*

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Sep. 1.

JACQUES COUETTE, ALFRED GOULET AND HENRY BROWN } SUPPLIANTS;

AND

HER MAJESTY THE QUEEN.....RESPONDENT.

Maritime law—Salvage—Government vessel—Special contract.

A steam-ship belonging to the Dominion Government went ashore on the Island of Anticosti, and suppliants rendered assistance with their wrecking steamer in getting her afloat. The service rendered consisted in carrying out one of the stranded steam-ship's anchors, and in taking a hawser and pulling on it until she came off. For carrying out the anchor it was admitted that the suppliants had bargained for compensation at the rate of fifty dollars an hour, but whether the bargain included the other part of the service rendered or not, was in dispute. The service was continuous,—no circumstances of sudden risk or danger having arisen to render one part of the work more difficult or dangerous than the other.

Held, that the rate of compensation admittedly agreed upon in respect of carrying out the anchor must, under the circumstances, be taken as affording a fair measure of compensation for the entire service.

2. A petition of right will not lie for salvage services rendered to a steam-ship belonging to the Dominion Government.

PETITION OF RIGHT for salvage services alleged to have been rendered to a Government ship.

The facts of the case are recited in the judgment.

April 11th and 12th, 1892.

Pentland, Q.C. (with whom was *Stuart*, Q.C.) for the suppliants, cites *Jones on Salvage* (1); *Pritchard's Admiralty Digest* (2); *Stewart* v. *Brewis* (3); *The Isabella* (4); *The Bomarsund* (5); *Kay on Shipping* (6); *Parsons on Shipping* (7); *The Monkwearmouth* (8); *The Reward*

(1) pp. 1, 23.
(2) Vol. 2, chap. 8, p. 1854.
(3) 1 Dor. 319.
(4) 3 Hagg. 428.
(5) 1 Lush. 77.
(6) Vol. 2, p. 1017.
(7) Vol. II. p. 309.
(8) 9 Jur. 72.

(1); *Atwater* v. *The Importers & Traders Co.* (2); *The Favourite* (3).

Cook, Q.C. (with whom was *Angers*, Q.C.) for the Crown, cites *The Undaunted* (4); *Maude & Pollock on Shipping* (5); *Pritchard's Admiralty Digest* (6); *The Victory* (7); *The America* (8).

Pentland, Q.C. in reply, cited *The Carmona* (9); *The Palmerine* (10); *Jones on Salvage* (11); *Hudon Cotton Co.* v. *Canada Shipping Co.* (12); *The Sovereign* (13); *The Princess Royal* (14); *The Fortitude* (15).

BURBIDGE, J. now (September 1st, 1892) delivered judgment.

The suppliants Couette and Goulet are owners of the *Annie McGee*, and the suppliant Brown of the *Florence*. Both are steam wrecking-vessels. For themselves and for the crews of the vessels the suppliants, by their petition, claim from the Crown the sum of five thousand dollars for salvage services rendered to the Government steam-ship *Alert*.

To this claim the Crown answers that :—

(1.) A petition of right will not lie for salvage services; and—

(2.) That the suppliants agreed to perform the services rendered for a sum of fifty dollars per hour, amounting in all to three hundred and fifty dollars, which amount the Crown tendered to the suppliants before the petition was filed in the Court, and which it is still ready to bring in.

(1) 1 Wm. Rob. 174.
(2) 31 L. C. J. 52.
(3) 2 Wm. Rob. 255.
(4) 1 Lush. 90.
(5) 4th. ed., p. 638.
(6) Pp. 2094, 2095 & Nos. 1289 & 1300.
(7) Cook Adm. Rep. 335.
(8) Stu. Adm. Rep. 2nd ser. 214.
(9) Cook Adm. Rep. 350.
(10) Ib. 358.
(11) P. 81.
(12) 13 Can. S.C.R. 417.
(13) 1 Lush. 85.
(14) 9 Jur. 434.
(15) 2 Wm. Rob. 224.

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The first objection taken must, I think, be maintained. In England the practice has been where salvage services of a meritorious character have been rendered to naval stores carried as cargo in a merchant vessel against which a salvage suit has been instituted, for the Admiralty Proctor to enter an appearance for the Lords of the Admiralty in respect of the cargo and submit to an award of salvage, (1) and it is thought that a similar course would probably be taken in the case of valuable salvage services having been rendered to a Queen's ship and the assistance of the Court being desired for the purpose of assessing the amount which the Crown would be willing to pay to the salvors.

But in such a case neither the ship nor the cargo is liable to arrest, and it cannot be doubted, I think, that no action could be taken against the Crown itself in respect of the salvage service (2).

A petition of right will lie in the High Court of Admiralty where the subject matter of the petition arises out of the exercise of any belligerent right on behalf of the Crown, or would be cognizable in a prize court if the same were a matter in dispute between private persons. But that is an exception created by statute (3). Whether or not the Exchequer Court in the exercise of its Admiralty jurisdiction might in an action against the commander of a Government vessel, the Crown appearing and submitting to the assess-

(1) Williams & Bruce, Admiralty Practice, 1886, p. 250 (K), citing *The Marquis of Huntley*, 3 Hagg., 246; *The Lulan*, Adm. Div. Feby. 8, 1883.

(2) *The Comus* cited in *The Prins Frederik*, 2 Dods. 464; *The Lord Hobart*, 2 Dods. 100; *The Athol*, 1 Wm. Rob. 374; *The Volcano*, 3 No. of Cas. 210; *Lipson* v. *Harrison*, 22 L. T. 83; *Wadsworth* v. *The Queen of Spain*, 17 Q.B. 171, 196; *The Constitution*, L.R. 4 P.D. 39; *The Parlement Belge*, L.R. 5 P.D. 197; *The Schooner Exchange*, 7 Cranch 116; *The Thomas A. Scott*, 10 L.T.N.S. 726; *Briggs* v. *Light Boat Upper Cedar Point*, 11 Allen 157.

(3) 27 & 28 Vic. c. 25 s. 52.

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ment, award compensation to salvors for services rendered to such vessel, need not now be considered. It is clear, I think, that in the present proceeding it has no such jurisdiction.

That brings us to the second ground of defence which is to be decided with reference to the contract that was made between the parties or is to be inferred from what passed between them.

On the 12th October, 1891, about six o'clock in the morning, the steam-ship *Alert*, then engaged in supplying the lighthouses in the Gulf of St. Lawrence with provisions, ran aground near Heath Point, at the eastern end of the Island of Anticosti. There was on board the steam-ship some supplies for the suppliants, who, as partners and with the vessels mentioned, were employed a few miles distant in saving the cargo of the wrecked ship *Circe*. Couette, when starting with the *Annie McGee* to go to the *Alert* for the supplies, noticed that something was wrong with the steam-ship, and having called Brown's attention to the fact, the latter accompanied him, leaving his men to continue their work with the *Florence*. Couette anchored the *Annie McGee* near to the *Alert*, and went on board for his provisions. At the time Koenig, the captain of the *Alert*, was about to get out his port anchor and on Couette's offer to assist he engaged him to carry it out with the *Annie McGee*, agreeing to pay for the service the sum of fifty dollars per hour. After the anchor had been carried out, Couette with the *Annie McGee* took a hawser which was made fast to the port-bow of the *Alert*, and assisted in towing the latter off. Whether he did this at Koenig's request or on his own offer, and whether it was part of the service for which he had agreed to accept fifty dollars per hour, is in dispute. The whole time he was engaged in respect of the two services was

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seven hours. The *Florence* rendered no actual assistance. But when Couette took the hawser, he, of his own motion, signalled the *Florence* which came near to and stood by his vessel, ready to aid if necessary.

Reasons for Judgment.

With reference to the difference between the parties as to what was covered by the express agreement made, Koenig and his chief officer, Morin, say that it covered the entire service; Couette and Brown that it was limited to carrying out the anchor. In the view I take of the case it makes little difference in the result whether credence is given to the former or the latter. The service was continuous. The hawser was taken as soon as the anchor had been dropped. With the exception of putting a strain on the anchor and ascertaining that it, and not the steam-ship, moved, there was no change in the position of affairs. There was no new or sudden danger to render improbable the exercise of the care that the captain of the *Alert* had shown in having the value of the services settled before he accepted them.

Brown says that, at the time the hawser was being taken on board the *Annie McGee*, he said to Couette: "This is a different arrangement, we had better go and have an arrangement for it," and that the latter answered that they would settle that afterwards. Whatever Couette may have had in his mind, he certainly gave Koenig no intimation that he considered his bargain at an end, and that he was then entering upon an entirely different work for which he would expect a more liberal remuneration. But, as I have said, the difference is not important. If the arrangement made was limited to carrying out the anchor, then there is to be inferred, I think, from the acts of the parties, an undertaking on the part of the suppliants to continue their assistance at the rate previously agreed upon and even if it were open to me to determine the value of

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such services rendered, I should not, in this proceeding and apart from considerations to which effect are given in actions for salvage, assess such value at a higher amount than that which the Crown offers to pay. The evidence as a whole shows that the one service was not more difficult or dangerous than the other. For carrying out the anchor the suppliants by their offer and agreement to accept fifty dollars per hour established a measure of compensation that might with great propriety be applied to the later service.

There will be judgment for the suppliants Couette, Goulet and Brown for three hundred and fifty dollars. The Crown under the circumstances is entitled to costs.

Judgment for suppliants; costs to respondent.

Solicitors for suppliants: *Caron, Pentland & Stuart.*

Solicitors for respondent: *O'Connor, Hogg & Balderson.*

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Sept. 1.

JOHN DEKUYPER & SON.....PLAINTIFFS;

AND

VAN DULKEN, WIELAND & COMPANY..... } DEFENDANTS.

Trade-Mark—Rectification of register—Relief for infringement—Jurisdiction of Exchequer Court, 54-55 *Vic. c.* 35 *and* 54-55 *Vic. c.* 26.

The court has jurisdiction to rectify the register of trade-mark in respect of entries made therein without sufficient cause either before or subsequent to the 10th day of July, 1891, the date on which the Act 54-55 Vic. c. 35 came into force.

Quære? Has the Court jurisdiction to give relief for the infringement of a trade-mark where the cause of action arose out of acts done prior to the passage of 54-55 Vic. c. 26?

DEMURRER to a statement of claim whereby relief was sought for the purpose of cancelling the registration of a trade-mark.

The questions arising upon the demurrer are stated in the judgment.

June 21st, 1892.

Ferguson, Q.C. (with whom was *Duhamel*) in support of the demurrer: The Court has no jurisdiction to rectify any entry made prior to the 10th July, 1891, and the registration of the defendants' trade-mark was made in 1884. Whatever jurisdiction the court has in this matter has to be derived from the *Trade-Mark and Design Act* of 1891 (54-55 Vic. c. 35) and not under *The Exchequer Court Amendment Act*, 1891. The former Act is not retrospective in its operation. Up to 1891 this court had no power to compel the Minister of Agriculture to rectify the registration of any trade-mark duly made. With reference to the relief sought for the alleged infringement, I submit that the fact that the person aggrieved always had a convenient remedy in the

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provincial courts is one of the very strong reasons to urge against any retroactive effect being given to the new Act. The defendants have acquired a vested right under the old law to have the case tried by jury, and it ought not to be interfered with unless such interference is clearly and expressly authorized by the legislature. (Cites *Wilberforce on Statutes* (1); *Maxwell on Statutes* (2); *re Suche* (3); *Kimbray* v. *Draper* (4); *Endlich on Statutes* (5); *Hardcastle on Statutes* (6); *Ings* v. *Bank of P. E. Island* (7); *Fisher's Digest* (8); *Coats* v. *Kelly* (9).

Again, the plaintiffs have not alleged anything to show that the registration of the defendants' trade-mark was made without sufficient cause, and they have, consequently, not put themselves within the benefit of the remedy provided for by section 1 (12) of 54-55 Vic. c. 35.

Christie, Q.C. *contra.*

The plaintiffs have a remedy in this court, either under 54-55 Vic. c. 35, or under 54-55 Vic. c. 26. The defendants have acquired no property by their registration of the trade-mark. It was laid down in the case of *Partlo* v. *Todd* (10), that the fact of ownership is a condition precedent to the right to register under *The Trade-Mark and Design Act*, and that if the party registering is not the owner he obtains no advantage by such registry and it may be cancelled. It is the very fact of lack of proprietorship on the part of the defendants that makes their registration a registration without sufficient cause within the meaning of the statute. We have a clear right

(1) Pp. 161, 244.
(2) Pp. 257, 357.
(3) 1 Ch. Div. 50.
(4) L.R. 3 Q.B. 160.
(5) P. 367.
(6) P. 195.
(7) 11 Can. S.C.R. 265.
(8) Vol. 6. col. 2022.
(9) 15 Ont. App. 81.
(10) 14 Ont. App. 444; 17 Can. S. C.R. 196.

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under the statutes and authorities to an injunction restraining defendants from the use of the trade-mark, and also to damages for the infringement. Cites *Bondier* v. *Depatie* (1); *Sebastien on Trade-Marks* (2); *Smith* v. *Fair* (3); *The Henrich Bjorne* (4).

Ferguson, Q.C., in reply: Plaintiffs do not allege that they are the owners of our trade-mark. In their pleadings they set out two trade-marks that are not the same. Clearly there cannot be an order pass to cancel our registration in view of this fact, and if there has been an infringement of the plaintiffs' trade-mark, the cause of action in respect thereof arose prior to the passing of the statutes under discussion.

BURBIDGE, J. now (September 1st, 1892) delivered judgment.

The determination of the questions raised by the demurrer to the statement of claim in this case depends upon the construction to be given to certain provisions of two Acts of the Parliament of Canada, passed in the year 1891, to which I shall presently refer.

By the second clause of the 11th section of *The Trade-Mark and Design Act* (5) it was in substance provided that errors in registering trade-marks and oversights in respect to conflicting trade-marks might be corrected by the Minister of Agriculture, who for such purpose was to cause all persons interested in the matter to be notified to appear before him, in person or by attorney, with their witnesses. By the 21st section of the Act he had authority to correct clerical errors in the drawing up or copying of any instrument made under the preceding sections of the Act, and there can, I think, be no doubt that the power of rectification given by

(1) 3 Dor. 233.
(2) Chap. vi.
(3) 14 Ont. 729.
(4) 11 App. Cas. 270.
(5) R. S. C. c. 63 s. 11 (2).

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the 11th section was intended to be and was a substantial power. By virtue of it he might have determined the right to the exclusive use of a trade-mark in any case where, through some error or oversight, two persons had obtained registration of the same trade-mark, and I see no reason why, at the instance of a person interested, he might not have entertained an application to expunge from the registry an entry that ought not to have been made, and which, but for some error or oversight would not have been made therein.

By the Act of 53 Victoria, chapter 14, the jurisdiction theretofore vested in the Minister of Agriculture to determine, in certain cases, the right to the exclusive use of a trade-mark was transferred to this court; and by the 3rd section of the Act it was provided that errors in registering trade-marks, and oversights in respect to conflicting registration of trade-marks, might be corrected in this court upon proceedings instituted therein in the manner provided in the first section of the Act. It happened, however, that the manner of proceeding in the court, so far as the Act dealt with procedure, was defined in the second and not in the first section thereof. That was one difficulty. Then the only jurisdiction clearly conferred upon the court was the authority to determine, in a proper case, the question of the right to the exclusive use of a trade-mark, and in the case of *The Queen* v. *Van Dulken* (1), which was in reality a proceeding between the parties to this action, I held that the court had, as the law then stood, no jurisdiction to determine questions as to whether or not a trade-mark ought not to be registered or continued on the registry because it was calculated to deceive the public, or for such other reasons as were mentioned in the 12th section of the Act (2).

(1) 2 Ex. C. R. 304.

(2) R. S. C. c. 63 s. 12.

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The Act 53rd Victoria, chapter 14, was repealed by 54-55 Victoria, chapter 35, and other provisions substituted therefor.

By the latter Act it was provided :—

Reasons for Judgment.

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

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

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

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

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

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

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

It will be observed that to give the court jurisdiction in such a case there must be an application to register a trade-mark, the Minister must refuse to register, and he must refer the matter to the court. But the statute does not stop there. By a subsequent provision (1), in terms substantially identical with those used in the 90th section of the English Act (2) to define the jurisdiction of the High Court of Justice, the Exchequer Court is given power, on the information of the Attorney-General or at the suit of any person aggrieved by any omission without sufficient cause to make any entry in the register of trade-marks, or by an entry made therein without sufficient cause, to make such order for making, expunging or varying the entry as it thinks fit. By another Act passed in the same session (3) the court was amongst other things given

(1) 54-55 Vic. c. 35 s. 1 (12). (2) 46-47 Vic. c. 57 s. 90 (1).
(3) 54-55 Vic. c. 26 s. 4.

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jurisdiction as well between subject and subject, as otherwise, in all cases of conflicting applications for the registration of any trade-mark, or in which it is sought to have any entry in any register of trade-marks made, expunged, varied or rectified, and in all other cases in which a remedy is sought respecting the infringement of any trade-mark. The Act 54-55 Victoria, chapter 35, came into force on the 10th July, 1891, and 54-55 Victoria, chapter 26, on the 30th of September of the same year.

The objections raised by the demurrer are that the court has no jurisdiction :—

1. To rectify any entry made in the registry of trade-marks prior to the 10th July, 1891, or—

2. To give any other relief where the infringement complained of happened before the 30th of September of that year.

First, in respect to the rectification of the registry of trade-marks there is no question that the jurisdiction conferred should in its exercise be limited to entries made after the statute came into force, unless it is clear, as I think it is, that Parliament intended the statute to apply to entries then already made. There is nothing in its language to show a contrary intention The court may make, it is enacted, an order respecting an entry made in the register of trade-marks, without sufficient cause (1), and it is to have jurisdiction in all cases in which it is sought to have any entry therein made, expunged, varied or rectified (2). This power of rectification was not in 1891 a new one. It had been exercisable by the Minister of Agriculture since 1868 (3), and the object of Paliament was to transfer that power to the court, and perhaps to define it somewhat more explicitly, and to remove the doubts

(1) 54-55 Vic. c. 35 s. 1 (12.) (2) 54-55 Vic. c. 26 s. 4.
(3) 31 Vic. c. 55 s. 6.

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that had arisen as to the meaning of the Act of 1890. To apply the jurisdiction in question to cases where entries had been made before the 10th of July is not to interfere with any vested right, for the Act did not in this respect do more than substitute one tribunal for another, and no one could be said, I think, to have had any vested right to have his controversy determined in a proceeding before the Minister of Agriculture. On the other hand to limit the jurisdiction to entries made in the register subsequently to July 10th, would be to take away and destroy the remedy that any person aggrieved by an earlier entry would otherwise have had for the protection of his rights. I am, therefore, of opinion that the jurisdiction of the court in respect of the rectification of the register of trade-marks may be exercised in respect of any entry made therein without sufficient cause, as well where such entry was made before the coming into force of the amending Act of 1891, as where it was made afterwards.

The second objection is not so much to the jurisdiction of the court as to the character and extent of the relief that may be given to the plaintiffs, in case they are found to be entitled to relief. It is alleged in substance that the infringement complained of was continued during the year 1891, and consequently at a date subsequent to the passing of the Acts of that year to which reference has been made. At present, therefore, it is not necessary to express any opinion as to the court's jurisdiction where in the case of an infringement of a trade-mark the cause of action arises out of acts done prior to September, 1891; though there is not wanting, it may be added, precedents for the exercise of jurisdiction in an analogous case (1).

(1) *The Alexander Larsen*, 1 *Wm. Rob.* 288; *The Ironsides*, 1 *Lush*, 458.

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There will be judgment for the plaintiffs on the demurrer to the statement of claim, and with costs, upon payment of which the defendants may amend and plead.

Judgment accordingly.

Reasons for Judgment.

Solicitors for plaintiffs: *Christie, Christie & Greene.*

Solicitors for defendants: *Duhamel & Merrill.*

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Sept. 1.

CHARLES LAVOIE.. .... SUPPLIANT;

AND

HER MAJESTY THE QUEEN ..... RESPONDENT.

Liability of the Crown as common carrier—Negligence—Remedy—Regulations for carriage of freight—Notice by publication in Canada Gazette—The Government Railways Act, 1881—*The Exchequer Court Act* (50-51 *Vic. c.* 16 *s.* 16)—*Construction—Duty of conductor of train carrying live stock in box cars.*

1. Apart from statute the Crown is not liable for the loss or injury to goods or animals carried by a Government railway, occasioned by the negligence of the persons in charge of the train by which such goods or animals are shipped.

By virtue of the several Acts of the Parliament of Canada relating to Government railways and other public works the Crown is in such a case liable, and, under the Act 50-51 Vic. c. 16 a petition of right will lie for the recovery of damages resulting from such loss or injury.

The Queen v. *McLeod* (8 Can. S. C. R. 1) and *The Queen* v. *McFarlane* (7 Can. S. C. R. 216) distinguished.

2. The publication in the *Canada Gazette*, in accordance with the provisions of the statute under which they are made, of regulations for the carriage of freight on a Government railway is a notice thereof to all persons having occasion to ship goods or animals by such railway.

3. Under and by virtue of R. S. C. c. 38, certain regulations were made by the Governor-in-Council whereby it was provided that all live stock carried over the Intercolonial Railway were to be loaded and discharged by the owner or his agent, and that he assumed all risk of loss or injury in the loading, unloading and transportation of the same. The regulations were, by section 44, to be read as part of the Act, and by section 50 it was enacted that the Crown should not be relieved from liability by any notice, condition or declaration where damage arose from the negligence, omission or default of any of its officers, employees or servants.

Held, that the regulations did not relieve the Crown from liability where such negligence was shown.

4. The owner of a horse shipped in a box car, the doors of which can only be fastened from the outside, and who is inside the car with the horse, has a right to expect that the conductor of the train will see that the door of the car is closed and properly fastened before the train is started.

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Statement of Facts.

PETITION OF RIGHT for damages arising from injuries sustained by a horse while being carried on a Government railway.

The facts of the case are stated in the judgment.

October 21st and 22nd, 1891.

Belcourt, for the suppliant:

The law of the province of Quebec must govern this case. (Cites C. C. L. C. Arts. 1672 to 1683.) The obligation of a carrier under the articles I have cited is not that of an insurer, but is the same as that of an inn-keeper. The Crown in this case is simply a common carrier. That is the position contemplated by *The Government Railways Act*, 1881. The liability arises under this Act, and the remedy therefor is provided by 50-51 Vic. c. 16 s. 16. (Cites *The Attorney-General of the Straits Settlement* v. *Wemyss* (1); *Farnell* v. *Bowman* (2); *Sharp*, C. C. L. C. (3).

The Crown cannot escape liability by shielding itself behind the regulations. By section 44 (R. S. C. c 38) the regulations are to be read as part of the Act, and by section 50 the Crown is expressly denied the right to so shield itself where there has been negligence on the part of its servants causing damage and loss to a subject of the Crown. This claim can be maintained either under section 15 of chap. 16, 50-51 Vic., or under section 16 thereof. There is an action arising either *ex contractu* or *ex delicto*.

It was a *primâ facie* case of negligence to allow the horse to be shipped for carriage in a box car, when

(1) 13 App. Cas. 192. (2) 12 App. Cas. 648.
(3) Pp. 51, 59.

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Argument of Counsel.

there were special cars used for that purpose fitted with the necessary and proper appliances for safe carriage, which the box car lacked. The conductor of the train was cognizant of the way the horse was tied in the car, and yet took no precautions to prevent an accident. It was gross negligence on his part to omit to see that the door was fastened. A cleat should have been nailed on the side of the car to prevent the door from sliding open. (Cites *The Grand Trunk Railway Company* v. *Vogel* (1); *The Canadian Pacific Railway Co.* v. *Bates* (2).)

Choquette followed on the same side, reviewing the evidence and citing Art. 1053 C. C. L. C.

Hogg, Q.C., for the respondent:

The suppliant has proved a contract for the carriage of the horse, and his claim is founded in damages for a breach thereof. The Crown is not liable in such a case, because it is not a common carrier and cannot be assimilated to one. (Cites *The Queen* v. *McLeod*) (3). *The Exchequer Court Act* (4) does not affect the law as laid down in that leading case. The law in this regard is the same to-day as it was when that case was decided.

There is no positive enactment in *The Government Railways Act*, 1881, that the Crown shall be liable in respect of damages to property carried on its railways arising from the negligence of its servants. (Cites *McCawley* v. *The Furness Railway Co* (5); *Carr* v. *The Lancashire & Yorkshire Railway Co.* (6); *McManus* v. *The Lancashire Railway Co.* (7).)

The suppliant assumed the risk cast upon him by the regulations when he put his horse into the box

(1) 11 Can. S. C. R. 612.
(2) 18 Can. S. C. R. 697.
(3) 8 Can. S. C. R. 1, 26.
(4) 50-51 Vic. c. 16.
(5) L.R. 8 Q.B. 57.
(6) 7 Ex. c. 707.
(7) 4 H. & N. 327.

car. He must take the consequences of his own negligence, if there was any.

Angers, Q. C., follows, citing Art. 1676 C. C. L. C.

Belcourt, in reply, cites *Hettihewage Siman Appu* v. *The Queen's Advocate* (1).

April 27th, 1892.

Upon the direction of the court further evidence was this day adduced by the suppliant to show whether or not a grain car is a proper car to use for the carriage of horses, and if so whether the necessary precautions were taken to prevent accident,—whether both the door and the grain door should have been closed. A model of the car in which the suppliant's horse was carried was also produced, showing the door and grain door and their fastenings.

BURBIDGE, J. now (September 1st, 1892) delivered judgment.

The suppliant, by his petition of right, seeks to recover damages for injuries that he says a horse, shipped by him on the 3rd July, 1890, at St. Thomas, on the Intercolonial Railway, for Bic, on the same line, sustained in consequence of the negligence of the persons in charge of the train. The first question to be determined is as to whether in such a case the petition will lie, and that depends upon considerations, which, in respect of injuries to the person received under like circumstances, have been the subject of some debate and difference of opinion. It is conceded, of course, that apart from statute the Crown is not in such a case liable. The question depends, and the difference of opinion arises, upon the construction to be put upon the Acts of the Parliament of Canada re-

(1) 9 App. Cas. 571.

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Reasons for Judgment.

lating to railways and other public works, and the inferences to be drawn therefrom and from the regulations made thereunder (1).

In *The Queen* v. *McLeod* the majority of the court (2), following *The Queen* v. *McFarlane* (3), held that the Crown, in respect of Government railways, is not a common carrier, and that a petition of right would not lie against it at the suit of a passenger who was injured in an accident on a Government railway occasioned by the negligence of the Crown's servants in maintaining and operating such railway. The minority in that case (4) were of opinion that the Government, when working railways for gain and hire, is subject to the same responsibility as a common carrier of goods and passengers; and that there is a contract with the passenger to carry him with ordinary care and skill, for the breach of which a petition will lie. In *Martin* v. *The Queen* (5), referring to the views that I had expressed in the *City of Quebec* v. *The Queen* (6) and in *Brady* v. *The Queen* (7), I held that the Crown is liable in damages for an injury to the person received on a public work, resulting from the negligence of which its officer or servant is guilty while acting within the scope of his duties or employment; and that under the statutes then in force the

(1) See *The British North America Act*, 1867, s. 145; 31 Vic. c. 12; 31 Vic. c. 13; 31 Vic. c. 68 ss. 2 and 4; 33 Vic. c. 23; 34 Vic. c. 43 s. 5; 37 Vic. c. 15; 39 Vic. c. 16; 41 Vic. c. 8; 42 Vic. c. 7; 42 Vic. c. 8; 42 Vic. c. 9 ss. 2 and 4; 44 Vic. c. 25; R.S.C. cc. 38 and 40; and 50-51 Vic. c. 16. See also Regulations for the conveyance of freight on the Intercolonial Railway, &c., Orders-in-Council 1874, p. 325, Acts of 1875 pp. LXXXVII-CI; Orders-in-Council, 1889, p. 976; and the general rules and regulations respecting the working of Government Railways, Orders-in-Council, 1874, p. 345; Acts of 1889, pp. CVI-CXI; Orders-in-Council, 1889, p. 945.

(2) Ritchie, C.J. and Strong and Gwynne, JJ. in 8 Can. S. C. R. 1.

(3) 7 Can. S. C. R. 216.

(4) Fournier and Henry, JJ. in 8 Can. S. C. R. 1.

(5) 2 Ex. C. R. 328.

(6) 2 Ex. C. R. 252.

(7) 2 Ex. C. R. 273.

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injured person had a remedy by petition of right. In that case the appeal was allowed (1) on grounds of defence not raised in the Court below; but Mr. Justice Patterson, in an opinion that adds much to the discussion, deals fully with the more important question raised but not decided by the appeal. He holds that since the passing of *The Government Railways Act*, 1881, (2) a person injured on the Intercolonial Railway through the negligence of the Crown's servants might have sustained his petition. He thinks that Act made some important changes, or, at all events, removed some questions that previously existed with respect to the liability of the Crown for the acts or defaults of the persons employed in the actual working of the road. It is to be observed, however, that the Act is a consolidation of parts of a number of Acts that were then applicable to the Intercolonial Railway, and which were exhaustively discussed in *The Queen* v. *McLeod* (3), in which it will be seen Mr. Justice Fournier expresses the opinion that the Act of 1881 was to be regarded as a legislative interpretation of *The Consolidated Railways Act*, 1879, on the subject of the Crown's responsibility in the working of Government railways (4). There appears, therefore, to be some difficulty in maintaining that the Crown's liability for the torts in question was created by the Act of 1881. It is, however, it seems to me, unnecessary to go so far as that, or even to appear to be in conflict with the law as affirmed in *The Queen* v. *McLeod* (5). That case and *McFarlane's Case* (6) established beyond controversy that as the law then stood no petition would lie for a wrong committed by an officer of the Crown. The subject was not, however, in such a

(1) 20 Can. S. C. R. 240.
(2) 44 Vic. c. 25.
(3) 31 Vic. c. 12 and the amendments thereof; 31 Vic. c. 13, and 42 Vic. c. 9.
(4) 8 Can. S. C. R. 58.
(5) 8 Can. S. C. R. 1.
(6) 7 Can. S. C. R. 216.

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case without a remedy. As Mr. Lash pointed out in his argument for the Crown in *The Queen* v. *McFarlane* (1), there might in certain cases have been a reference to the Official Arbitrators with, as we shall see, an appeal to the Exchequer Court and then, as in other cases, to the Supreme Court.

In the 14th section of the Intercolonial Railway Act (2) we find a reference to this tribunal, to whom, in certain cases of dispute, were to be referred for award claims for lands taken or damaged by the construction of the railway, and for whose appointment provision had been made by *The Public Works Act* (3). The latter Act also provided for a reference to such Arbitrators of any claims for property taken, for alleged direct or consequential damage to property arising from the construction or connected with the execution of any public works, or for the breach of any contract for the construction of a public work, and for the manner in which such claims should be heard and determined (4). By 33 Victoria, chapter 23, intituled, *An Act to extend the powers of the Official Arbitrators to certain cases therein mentioned*, such Arbitrators were given jurisdiction, among other things, to hear and award upon any claim arising out of any death or injury to the person or property on any railway, canal or public work, under the control and management of the Government of Canada, that the Head of the Department concerned should, under the instructions of the Governor-in-Council and within three months from the passing of the Act, or within six months after the occurrence of the accident, or the doing or not doing of the act upon which the claim was founded, refer to arbitration. By the 3rd section of 41 Victoria, chapter 8, the Minister of Public Works

(1) 7 Can. S. C. R. 216.
(2) 31 Vic. c. 13.
(3) 31 Vic. c. 12.
(4) 31 Vic. c. 12 ss. 31 and 48.

was given power to refer to the Official Arbitrators, for report only, claims against the Government of Canada such as those to which reference has been made; but the jurisdiction of the Arbitrators to hear and determine any case referred to them under either of the Acts, 31 Vic. c. 12 or 33 Vic. c. 23, was in no way limited or qualified.

In 1879 the Exchequer Court which had been established in 1875 (1) was given appellate jurisdiction in all cases of arbitration arising under 31 Vic. c. 12 and the Acts in amendment thereof, when the claim exceeded five hundred dollars (2). It was, also, provided that in any such case the submission might be made a rule of court, and that the court should have power to set aside the award and remit the matters referred, or any of them, to the Arbitrators for reconsideration and redetermination; or that it might, upon the evidence taken before the Arbitrators, or upon the same or any further evidence that it might order to be adduced, make such final order and determination of the matters referred as it should deem just and right between the parties, and that such final order and determination should be enforced by the court, and the same should be taken and dealt with as a final award under the authority of *The Public Works Act* (3.) It was further provided that the court should have and might exercise all the powers contained in the Supreme and the Exchequer Court Acts which, according to the nature of the case, were applicable, and that an appeal should lie from the Exchequer Court to the Supreme Court from all judgments, orders, rules and decisions in like cases, and upon the same terms and conditions as was provided in the Supreme and Exchequer Courts Acts.

The subject of the Arbitrators' jurisdiction was also

(1) 38 Vic. c. 11 s. 1. (2) 42 Vic. c. 8 s. 2.
(3) 42 Vic. c. 8 ss. 4 & 6.

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dealt with in sections 27 to 48 of *The Government Railways Act*, 1881, where the claims that might be referred, and the procedure to be adopted on a reference and on an appeal to the Exchequer Court and thence to the Supreme Court were defined in language substantially the same as that used in *The Public Works Act* and amendments. There is one difference, which, though in my view it does not affect the argument, should not be overlooked. The power vested in the Minister of referring to the Official Arbitrators any claim arising out of any death or any injury to person or property on any Government Railway (1) is the power of reference for report only, defined in 41 Vic. c. 8 s. 3, and not the power of reference for hearing and award given in certain cases by 33 Vic. c. 23. The latter Act, however, remained in full force and applicable to Government railways as public works, and notwithstanding the omission it would appear that the Minister of Railways and Canals might, in accordance with its provisions, have referred such a claim to the Arbitrators for hearing and determination. That view is supported by reference to the corresponding provisions of *The Revised Statutes*, chapter 40, *An Act respecting the Official Arbitrators*, in which it will be found that, while in the 11th section the power of reference for report only, which was first given by 41 Vic. c. 8, was retained, the Minister might under the 6th section have referred to the Arbitrators for their decision, amongst other claims, any claim arising out of the death, or any injury to the person or property, on any public work, as was provided by 33 Vic. c. 23.

The Official Arbitrators' Act was repealed by *The Exchequer Court Act* (2), which, in reference to matters formerly within the jurisdiction of such Arbitrators, contains the following provisions:—

(1) 44 Vic. c. 25 s. 27 (3). (2) 50-51 Vic c. 16.

16. The Exchequer Court shall also have exclusive original jurisdiction to hear and determine the following matters :

(*a.*) Every claim against the Crown for property taken for any public purpose ;

(*b.*) Every claim against the Crown for damage to property, injuriously affected by the construction of any public work ;

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

58. * * * and whenever in any Act of the Parliament of Canada, or in any Order of the Governor-in-Council, or in any document, it is provided or declared that any matter may be referred to the Official Arbitrators acting under the "*Act respecting the Official Arbitrators,*" or that any powers shall be vested in, or duty shall be performed by, such Arbitrators, such matters shall be referred to the Exchequer Court, and such powers shall be vested in, and such duties performed, by it ; and whenever the expression "Official Arbitrators" or "Official Arbitrator" occurs in any such Act, order or document, it shall be construed as meaning the Exchequer Court.

59. All matters pending before such Official Arbitrators when this Act comes into force shall be transferred to the Exchequer Court, and may therein be continued to a final decision in like manner as if the same had in the first instance been referred to the court under the provisions of this Act.

I have not cited section 15 of the Act in which the original jurisdiction of the court in all cases in which the claim arises out of a contract entered into by or on behalf of the Crown is continued, though it will of course be noticed that the Official Arbitrators exercised a like jurisdiction (1), and that the rules given in sections 33 and 34 of the Act for adjudicating upon claims arising out of contracts are taken from the Official Arbitrators Act (2).

Now, as I said in *The City of Quebec* v. *The Queen* (3), I do not doubt that the words used in clause (*c*) of the 16th section of *The Exchequer Court Act* (4) recognize

(1) R. S. C. c. 40 s. 6.
(2) R. S. C. c. 40 s. 17
(3) 2 Ex. C. R. 269.
(4) 50-51 Vic. c. 16.

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the Crown's liability for certain torts committed by its officers and servants for which a remedy had theretofore been provided by a proceeding on a reference to the Official Arbitrators, and for the redress of which it was, for the first time, by that Act provided that proceedings might be instituted in this court.

The object of the Act was to make better provision for the trial of claims against the Crown, not to create new liabilities, for the origin of which we must look to the Acts under which the Government railways and the public works were constructed, maintained or operated. By the 145th section of *The British North America Act*, 1867, after reciting that inasmuch as the provinces of Canada, Nova Scotia and New Brunswick had joined in a declaration that the construction of the Intercolonial Railway was essential to the consolidation of the Union of British North America, and to the assent thereto of Nova Scotia and New Brunswick, and had, consequently, agreed that provision should be made for its immediate construction by the Government of Canada, it was provided that in order to give effect to that agreement it should be the duty of the Government and Parliament of Canada to provide for the commencement within six months after the Union of a railway connecting the river St. Lawrence with the City of Halifax, in Nova Scotia, and for the construction thereof without intermission, and the completion thereof with all practical speed. In performance of the duty so imposed, the Parliament of Canada in 1867 passed *An Act respecting the Construction of the Intercolonial Railway* (1) by which it was, among other things, provided that the railway should be a public work of Canada (2), that its construction and management, until completed, should be under the charge of four commissioners to be appointed by

(1) 31 Vic. c. 13. (2) Sec. 2.

the Governor (1), and that whenever the railway or any portion thereof should be completed, the Governor-in-Council might make suitable arrangements for the working of the same, for a period not longer than the end of the session of Parliament next after the making of the same. The commissioners were succeeded in such management and charge by the Minister of Public Works (2), and the latter by the Minister of Railways and Canals (3). By the 12th section of the Intercolonial Railway Act (4) it was provided that the commissioners should have all such powers (not inconsistent with the Act) as might be conferred upon railway companies by any Act which might be passed for the consolidation and regulation of the general clauses relating to railways. In the same session, but following year, an Act with this object was passed (5). By the 1st and 4th sections thereof it was provided that the Act should apply to the Intercolonial Railway and to all railways in course of construction by the Government of Canada and the property of Canada, so far as the same was not inconsistent with any special Act respecting any such railway. Among the provisions for the working of the railway thus made applicable were the following: That the train should be started and run at regular hours to be fixed by public notice, and should furnish sufficient accommodation for the transportation of all such passengers and goods as were within a reasonable time previous thereto offered for transportation at the place of starting, and at the junction of other railways and at usual stopping places established for receiving and discharging way-passengers and goods from the trains; that such passengers and goods should be taken, transported and discharged

(1) Sec. 3.
(2) 37 Vic. c. 15.
(3) 42 Vic. c. 7.
(4) 31 Vic. c. 13 s. 12.
(5) *The Railway Act*, 1868, (31 Vic. c. 68.)

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at, from and to such places on the due payment of the toll, freight or fare legally authorized therefor; that the party aggrieved by any neglect or refusal in the premises should have an action therefor against the company; that the bell should be rung or the whistle sounded at the distance of at least eighty rods from any place where the railway crossed any highway, and that in case of neglect the company should be liable for all damage sustained by any person by reason thereof; and that a passenger injured while standing on the platform of a car, or on any baggage, wood or freight car, in violation of the printed regulations posted up at the time in a conspicuous place inside of the passenger cars then in the train, should have no claim for injury, provided room inside of such passenger cars sufficient for the accommodation of the passengers was furnished at the time (1). It was also provided that every company conveying passengers should provide and cause to be used in and upon its trains such known apparatus and arrangements as would best afford good and sufficient means of immediate communication between the conductors and engine-drivers, of applying the brakes, of disconnecting the locomotive and carriages and of securing the seats or chairs in the carriages (2). By the 11th section of the Act it was provided that until fences and cattle-guards were duly made, as therein prescribed, the company should be liable for all damages done by its trains or engines to cattle, horses or other animals on the railway; and by the 21st that all suits for any damage or injury sustained by reason of the railway should be instituted within six months next after the time the damage was sustained. At this time there was no proceeding by which the right of a

(1) 31 Vic. c. 68, s. 20. (2) (3) (6) (10) and (13). (2) 31 Vic. c. 68 s. 59.

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person sustaining injury to his person or property on a Government railway could be inquired into and maintained, but that remedy, as we have seen, was supplied in 1870 by 33 Victoria, chapter 23, which gave jurisdiction in such a case to the Official Arbitrators. It is all the more important, therefore, to notice that when in 1871, subsection 4 of section 20 of *The Railway Act*, 1868, giving a cause of action to any one aggrieved by neglect of the company to carry passengers or goods according of the terms of that Act, was amended by adding that the company should not be relieved from any such action by any notice, condition or declaration if the damage arose from any negligence or omission of the company or of its servants, it was expressly enacted that the provisions of the amending Act should apply to those railways to which *The Railway Act*, 1868, was by its terms declared to be applicable (1).

Turning then to the condition and rules of carriage prescribed for the conveyance of freight on the Intercolonial Railway, it will be observed that they consist, in the main, of limitations of a general liability assumed to exist. The authority for the rules made in 1871 is to be found in *The Public Works Act* (2), which was applicable to the railway as a public work (3). By such rules it was, among other things, provided that the railway would not be accountable for any articles unless the same were signed for as received by a duly authorized agent (4); that it would not be responsible for the loss of, or damage to, money, jewellery, gold and silver plate, writings, marbles, china, and a number of other articles (5); nor for certain delays, nor that goods should be forwarded by a particular train (6); nor for

(1) 34 Vic. c. 43.
(2) 31 Vic. c. 12.
(3) Orders-in-Council 1874, p. 325.
(4) Sec. 1.
(5) Sec. 2.
(6) Sec. 3.

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packages insufficiently or improperly marked, nor for leakage arising from bad casks (1); nor for goods put into empties (2); nor for any risk of storage, loss or damage, however, caused in the loading or unloading of goods conveyed at a special or mileage rate (3); nor for dangerous articles (4); nor for articles landed at a way-station or platform to which they were directed, and where there were no buildings and no resident agent (5); nor for fresh fish, fruit, meat, poultry, oysters and other perishable articles (6).

With reference to goods intended to be forwarded by some other conveyance to their final destination, it was provided that the responsibility of the Intercolonial Railway should cease as soon as such goods were delivered to such other conveyance (7); and with respect to live stock that they should be loaded and discharged by the owner or his agent and should be under his sole care, and in all respects at his risk then and during transit (8). By the 14th section of the rules it was provided that no claim whatever for loss or damage would be allowed unless notice in writing was given to the station agent before the goods were removed.

In 1873, by virtue of *The Public Works Act*, general rules and regulations were made respecting the Intercolonial Railway and other Government railways in the provinces of Nova Scotia and New Brunswick. These rules dealt principally with the duties of station-masters, conductors, engine-drivers and other officers and employees of the railway. But in clauses 45 to 63 will be found a number of regulations respecting passengers; by the 60th of which it was provided that the

(1) Sec. 4.
(2) Sec. 5.
(3) Sec. 6.
(4) Sec. 8.
(5) Sec. 9.
(6) Sec. 10.
(7) Sec. 11.
(8) Sec. 25.

railway would not be responsible for any baggage or articles not properly given in charge to an officer authorized to receive the same, or in excess of the value of fifty dollars.

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The provisions of *The Railway Act*, 1868, and the amendments of 1871, to which I have referred, were reproduced in *The Consolidated Railways Act*, 1879 (1), and with some modifications and additions were re-enacted in the *The Government Railways Act*, 1881 (2), and in the *Revised Statutes* (3). To one difference only shall I refer.

By the fourth clause of section 25 of the Act of 1879, following 31 Vic. c. 68 s. 20 (4) as amended by 34 Vic. c. 43 s. 5, it was provided, as we have seen, that the party aggrieved by any neglect or refusal in the premises thereinbefore mentioned should have an action against the company from which it should not be relieved by any notice, condition or declaration if the damage arose from any negligence or omission of the company or its servants. By the 74th, the corresponding section of *The Government Railways Act*, 1881, it was enacted that the Department of Railways, that is the Crown, should not be relieved from liability by any notice, condition or declaration in case of any damage arising from any negligence, omission or default of any officer, employee or servant of the department, nor should the officer in the like case be relieved. In the Act of 1881 the declaration that the person aggrieved should have an action was omitted, but the enactment against limiting any liability arising from a servant's negligence was made general, and not restricted as in the Act of 1879 to the premises therein defined.

The conditions and rules for the conveyance of freight

(1) 42 Vic. c. 9 s. 25 (2), (3), (4), (10), (13); s. 72, s. 16 (2) and s. 27.

(2) 44 Vic. c. 25 ss. 65, 72, 73, 74, 79, 81, 56, 108.

(3) C. 38, ss. 17, 24, 31, 32, 36, 38, 50.

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on the Intercolonial Railway, and the general regulations respecting the Government railways, to which I have referred, have been twice re-enacted since 1871 and 1873, respectively (1); but it will not be necessary to follow in detail the reproduction of the clauses to which allusion has been made.

Now, it seems to me that a fair consideration of the Acts to which I have referred, and the regulations respecting the Government railways, must lead to the conclusion that for the negligence of its servants employed upon the Government railways and acting within the scope of their duty, Parliament intended and the Crown undertook that in proper cases it should answer. As respects other public works the matter is in a somewhat different position. They were outside the range of the railway Acts and the case is not, perhaps, as clear,—the Act 33 Vic. c. 23 affording the chief support for the view that the liability as well as the remedy existed.

In *The City of Quebec* v. *The Queen* (2) several cases decided by the Judicial Committee of the Privy Council were cited in which, on statutes not clearer, to say the least, than those involved in this case, Colonial Governments were held liable for wrongs committed by their servants. *The Queen* v. *Williams* (3); *Hettihewage Siman Appu* v. *The Queen's Advocate* (4); *Farnell* v. *Bowman* (5); *The Attorney-General of the Straits Settlement* v. *Wemyss* (6).

Then in reference to the remedy it appears clear that a petition of right will now lie. The limitation contained in the 21st section of *The Petition of Right Act* (7) has been repealed, and it has been provided

(1) Acts of 1875 p. lxxxvii.; Acts of 1877, p. cii., and Orders-in-Council, 1889, pp. 945-976.
(2) 2 Ex. C. R. 263, 266.
(3) 9 App. Cas. 418.
(4) 9 App. Cas. 571.
(5) 12 App. Cas. 643.
(6) 13 App. Cas. 192.
(7) R. S. C. c. 136.

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that any claim against the Crown may be prosecuted by petition of right or may be referred to the court by the head of the department in connection with the administration of which the claim arises (1).

It will be convenient before referring to the facts of the case to notice more particularly the limitation of the Crown's liability for loss or injury to live stock carried on the Intercolonial Railway, contained in the 27th clause of the regulations made by His Excellency the Governor-General-in-Council on the 26th of October, 1889, in virtue of the powers vested in him by *The Government Railways Act*, 1881 (2).

By this clause, which is one of the general conditions of carriage applicable to live stock and other freight, it is provided that all live stock conveyed over the railway are to be loaded and discharged by the owner, or his agent, and he undertakes all risk of loss, injury, damage and other contingencies in loading, unloading, transportation, conveyance and otherwise, no matter how caused. The condition is expressed in the same terms as were used in the 24th paragraph of the conditions and rules of carriage prescribed in respect of the Intercolonial Railway by an order-in-council of the 12th December, 1 74 (3), and is similar to the 25th clause of the conditions made in respect of the same railway on 18th of April, 1871, (4), to which reference has already been made.

To the statement of defence setting up this condition the suppliant replies in substance that the regulations were not in force at the time of the accident, and that he had no notice thereof. Of the regulation being in force there can, of course, be no question, and with respect to notice it appears to me that publication in

(1) 50-51 Vic. c. 16. ss. 23 & 57.
(2) R. S. C. c. 38. Supplement 1889, p. 981.
(3) Acts of 1875, p. XCI.
(4) Orders-in-Council, 1874, p. 328.

7, 1889, p. 22 ; Orders-in-Council, to the *Canada Gazette*, December

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the *Canada Gazette*, in accordance with the terms of the statute under which it was made (1), constitutes notice to every one having occasion to forward live stock by the Intercolonial Railway.

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The more important question is as to whether or not this condition of carriage relieves the Crown from liability for the negligence of the persons who are in charge of trains by which live stock are conveyed. No doubt its terms are sufficiently large to relieve from such liability. But the regulations are to be taken and read as part of the Act (2), and by the 50th section thereof it is provided that Her Majesty shall not be relieved from liability by any notice, condition or declaration in the event of any damage arising from the negligence, omission or default of any officer, employee or servant of the Minister.

The suppliant's horse was put in an empty box car, forming part of a freight-train, by the suppliant and two or three other persons who were acting for him, and was tied to an iron rod or upright near the door on the south side of the truck. As to whether or not the door was at the time closed or open a few inches, the witnesses are not agreed. The conductor of the train testified that he closed and fastened it at St. Pierre, a station six miles west of St. Thomas, and that he examined it at the latter place and found it fastened. Lagacé, a brakesman on the train, examined this box car at St. Pierre and found both doors bolted. Brock, the engine-driver, saw the conductor close the car. Lemieux, another train hand, said that at St. Thomas the door was closed, but whether fastened or not he could not say. Lavoie, the suppliant, states that when the horse was put into the car, this door was open fifteen or eighteen inches, and Guimont, from whom he bought the horse, and who was with him in the car,

(1) R. S. C. c. 38 s. 52. (2) R. S. C. c. 38 s. 44.

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says that the door was open one and a half or two inches, while Mercier who led the horse into the car, and Guay who tied him, think that the door was closed. Whatever the fact as to that may be, it is clear from what happened that the door if closed was not properly and securely fastened, and when the train was put in motion it opened and the horse starting at the same time got his leg through the opening and was injured.

All the witnesses who speak of the matter are agreed that there was nothing in the box car to which the horse could be tied except the iron rod near the door, and Lavoie, Guimont and Mercier say that the rod was pointed out to them by the conductor. The latter and the train hands on the contrary say that the conductor offered to attach to the car a bar or cleat to which the horse might be tied, but that the owner and those acting for him declined the offer and chose to tie the horse to the iron rod. The difference is not, I think, material, for the evidence shows, and there can be no question, that with the door closed securely, as it ought to have been, there was nothing out of the way in tying the horse to this rod. It was also suggested that if the horse had been tied shorter, he would have escaped injury. But there is no evidence that he was not properly tied assuming as the person who tied him had a right to assume that the door was closed. It was not the manner of tying the horse, but the open door that occasioned the accident.

The box car in question was built for carrying grain, and was provided with two sliding doors kept in position by iron rods or uprights, to one of which, as we have seen, the horse was tied. For the suppliant it was contended that the conductor should have seen that the grain or sliding door on the south side of the car was closed. But it appears that in using box cars

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for carrying horses and other large animals, as it is customary and proper to do, these grain doors are not in practice closed, because of the danger of the horse or animal getting its legs between the two doors and injuring itself.

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With reference to the incident that Lavoie and Guimont remained in the car with the horse, and that, in their view of the facts, the car door near which the horse was tied was open, it is, I think, important to keep in mind that this door was one that could not be fastened except from the outside, and that the accident happened as the train was first put in motion. Up to that time Lavoie had, I think, a right to expect that the persons in charge of the train would do their duty and see the car door properly closed and fastened. If the accident had happened later and it had appeared that the suppliant had left the horse standing near the open door, and had made no effort to close it, or to have it closed, or to remove the horse from the dangerous position in which it stood, it might be that he would be held to have been guilty of contributory negligence. On the other hand, if the door was closed and not fastened, as probably the fact was, there was nothing to direct his attention to the danger, and he was in no way responsible for the accident that happened, which, it appears to me, resulted from the conductor's failure to secure the door of the car.

With reference to the damages, it appears that the horse at the time of the accident was worth three hundred dollars, that besides some personal expenses the suppliant incurred a liability of about one hundred and twenty-five dollars in the treatment of its injuries and in its care, and that now its value is not considerable. But it also appears that the treatment was not skilful, and it does not necessarily follow that the vici-

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ousness the horse has since displayed was the result of the accident.

Before the petition was brought the Crown offered to pay the suppliant one hundred and fifty dollars, but that offer was not renewed in the statement of defence which denied all liability. Under all the circumstances of the case, I am of opinion that there should be judgment for the suppliant for two hundred and fifty dollars and costs.

Judgment accordingly.

Solicitor for suppliant: *P. A. Choquette.*

Solicitors for respondent: *O'Connor, Hogg & Balderson.*

1892
Sept. 1.

HORMISDAS MARTIAL.....SUPPLIANT;

AND

HER MAJESTY THE QUEEN.....RESPONDENT.

Tort—Injury to the person on a public work—Remedy—Prescription, interruption of—C.C.L.C. Art. 2227—50-51 *Vic. c.* 16.

The suppliant, who was employed as a mason upon the Chambly Canal, a public work, was injured through the negligence of a fellow-servant. Subsequent to the accident the Crown retained the suppliant in its employ as a watchman on the canal, and indemnified him for expenses incurred for medical attendance.

Held, that what was done was referable to the grace and bounty of the Crown and did not constitute such an acknowledgment of a right of action as would, under Art. 2227 C.C.L.C., interrupt prescription.

Quære: Does Art. 2227 C.C.L.C. apply to claims for wrongs as well as to actions for debt?

Semble: That the Crown's liability for the negligence of its servants rests upon statutes passed prior to *The Exchequer Court Act*, (50-51 Vic. c. 16) and that the latter substituted a remedy by petition of right or by a reference to the court for one formerly existing by a submission of the claim to the Official Arbitrators, with an appeal to the Exchequer Court and thence to the Supreme Court of Canada.

PETITION OF RIGHT for damages arising out of an accident caused by the negligence of a fellow-servant of the suppliant on a public work.

The petition of right reads as follows:—

"L'humble pétition de Hormisdas Martial, maçon et briquetier de la ville de Saint-Jean, dans la province de Québec, expose respectueusement:—

"1. Que le ou vers le vingt-quatre avril mil huit cent quatre-vingt-six, dans la dite ville de Saint-Jean, il était employé à réparer les écluses du canal St.-Jean, en qualité de maçon, dans l'intérêt du Gouvernement du Canada et de Sa Majesté sous la direction et le contrôle

des employés, agents et officiers du dit Gouvernement et de Sa Majesté qui, agissant dans l'exercice de leurs fonctions, l'avaient engagé pour faire le dit ouvrage."

" 2. Que pendant l'année 1890, et depuis, le dit canal était la propriété de Votre Majesté et était et est encore conduit et administré comme travail public de la Puissance du Canada, dont elle est propriétaire, et ce, sous le contrôle et la direction du ministre des chemins de fer et canaux."

" 3. Que là et alors, et lorsqu'il travaillait ainsi à l'emploi et au service de Sa Majesté la Reine, il fut violemment frappé et terrassé par une des pièces du cabestan dont on se servait tout près de l'endroit où il travaillait pour lever l'une des portes ou vannes de l'écluse du dit canal, lequel cabestan ou *derrick* se brisa à cause du mauvais état où il était."

" 4. Que le dit accident arriva par la faute et la négligence des agents et employés de Sa Majesté qui, agissant dans l'exercice de leurs fonctions, faisaient usage du dit cabestan et de ceux qui étaient chargés par le dit Gouvernement et Sa Majesté de surveiller et de diriger les dits ouvrages, parce que, en particulier, le dit cabestan était en mauvais ordre et que les supports et les différentes pièces qui le composaient étaient trop faibles pour supporter un si grand poids, et sans proportion avec la pression à laquelle ils étaient soumis."

" 5. Que rien ne fut fait pour prévenir le dit accident et pour avertir votre requérant du danger qui le menaçait, et que les agents et représentants de Sa Majesté chargés de surveiller les dits travaux étaient absents ou éloignés de l'accident."

" 6. Que votre requérant a été incapable de travailler depuis cette époque et qu'il est resté invalide, ruiné complètement de santé et que, d'après l'opinion des médecins qui l'ont soigné, la maladie ou les maladies

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dont il souffre depuis cet accident devront abréger sa vie considérablement."

"7. Qu'il est marié, père de famille et qu'avant le dit accident il était fort et plein de santé et qu'il était jeune, dans toute la force de l'âge."

"8. Qu'à venir au mois de juillet dernier les agents ou représentants du Gouvernement et de Sa Majesté lui ont donné les moyens de vivre et qu'ils ont voulu le forcer de travailler quoiqu'il en soit incapable."

"9. Qu'il a essayé de travailler et que les efforts qu'il a faits ont aggravé son mal et ses souffrances ; qu'avant le dit accident, votre requérant gagnait de deux piastres et demie à trois piastres par jour et même plus."

"10. Qu'en vertu de ce que dessus, votre requérant est bien fondé à réclamer de Sa Majesté une indemnité ou compensation qui lui permette de vivre et de faire vivre sa famille et qui soit une compensation pour sa femme et ses enfants dans le cas où le mal dont il souffre mettrait bientôt fin à sa vie, laquelle indemnité doit être d'au moins quinze mille piastres pour assurer son existence et celle de sa famille."

"11. Que le Gouvernement du Canada ayant discontinué de lui payer une pension alimentaire dans le mois de juillet dernier, et son mal, au lieu de diminuer, ayant augmenté, il ne reste plus à votre requérant que d'avoir recours à la pétition de droit pour obtenir justice."

"12. Pourquoi votre requérant prie humblement qu'il lui soit permis de procéder par pétition de droit pour obtenir la dite indemnité et que Sa Majesté soit condamnée à lui payer la dite somme de quinze mille piastres, avec dépens distraits aux soussignés."

To this petition the following defence was pleaded :—

"1. All admissions made herein are made for the purposes of this suit only."

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"2. Her Majesty's Attorney-General admits that the suppliant was employed by Her Majesty as a mason in the month of April, 1890, on certain repairs and work then being carried on, on the St. John Canal, a public work of the Dominion of Canada, and that while so engaged the suppliant was injured by the breaking of a derrick which was being used in connection with the said work, as alleged in the 3rd paragraph of the said petition of right."

"3. Her Majesty's said Attorney-General denies that the injury to the suppliant was caused through the fault or negligence of the agents or officers of Her Majesty who had the charge and control of the said work, for and on behalf of Her Majesty, while acting within the scope of their duty or employment, as alleged in the 4th paragraph of the said petition, and Her Majesty's Attorney-General further denies that her said officers and agents were negligent in the discharge of their duty in connection with the said work."

"4. Her Majesty's Attorney-General denies that the said derrick or capstan, which was being used in connection with the said work, was defective in construction or in a bad state of repair, as set forth in the 3rd paragraph of the suppliant's petition of right, and puts the suppliant to the strict proof of the allegations."

"5. Her Majesty's Attorney-General charges, and the fact is, that the accident and injury to the suppliant was due to and happened by reason of the negligence and carelessness of the suppliant in remaining in a position so close to the said derrick at a time when the same was being used in lifting a heavy weight, and Her Majesty's Attorney-General says that if the suppliant had exercised ordinary caution and care the injury to himself would not have occurred when the said derrick was accidentally broken as aforesaid."

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"6. Her Majesty's said Attorney-General further says, as a defence to the said petition of right, that the suppliant was engaged as a workman upon the said canal repairs, and that he was well aware, at the time he was so engaged and during the course of his employment, of the character and condition of the said derrick, and that it was being frequently used by other workmen on the said work; and it is submitted that the suppliant in accepting employment on the said work accepted all the risks incident to or connected with such employment, and that the breaking of the derrick in the manner described in the petition of right was one of the risks incident to the said employment, and that the suppliant is not entitled to recover from Her Majesty as his employer any damages for the injury which it is alleged he suffered by reason of the accident aforesaid."

"7. Her Majesty's Attorney-General further says that none of the officers or agents of Her Majesty who had control of the said work made any misrepresentation to the suppliant as to the strength or condition of the said derrick, nor was the suppliant induced by any statements of the said officers or agents to be less careful on the work than an ordinary workman would be in the same position."

"8. Her Majesty's Attorney-General further says that one of the causes of action in the petition is based upon the defective construction of the said derrick, and because the supports and different pieces composing it were too weak to bear the weight they were subjected to; but Her Majesty's Attorney-General says that no action will lie against Her Majesty on such grounds, and the same benefit is claimed from this objection as if a formal demurrer were filed to the said petition of right."

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"9. Her Majesty's Attorney-General for a further defence to the said petition of right, says that one of the claims and causes of action set out in the said petition is based upon the negligence and carelessness of Her Majesty's officers and agents who had charge and control of the said work, but it is alleged that Her Majesty cannot be rendered liable to an action, nor is the suppliant entitled to recover damages against Her Majesty, for or in respect of the said causes of action."

"10. Her Majesty's Attorney-General further says, that any help or assistance which has been given to the suppliant since he met with the said accident was so given of the grace and bounty of the Crown, and not because of any liability on the part of Her Majesty to render such assistance, and it is submitted that the rendering of such assistance to the suppliant has not created any liability on the part of Her Majesty to pay the suppliant anything in respect of the injuries received by him as aforesaid."

"11. Her Majesty's Attorney-General submits that under no circumstances is Her Majesty, as representing the Dominion of Canada, answerable or responsible to the suppliant for or in respect of the claim for damages in the said petition of right mentioned, and he denies that the suppliant is entitled to the relief prayed for in the said petition of right."

Issue was joined.

May 4th, 1892.

David, for suppliant:

There is no prescription arising upon the facts of this case. The negotiations for settlement only ceased in August, 1891, and it was then the right of action accrued. The prescription is one of two years, it being

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Argument of Counsel.

a *quasi-delit*, under Art. 2261 C.C.L.C. (Cites *Caron* v. *Abbott* (1); *Sharp*, C.C.L.C. (2).)

There is no doubt about the liability of the Crown in such a case. (Cites *Martin* v. *The Queen* (3); *Cooley on Torts* (4); *Sourdat, Traité de la Responsabilité* (5).)

Sharp, for the respondent: The alleged negotiations for settlement were made when the prescription was entirely acquired and suppliant cannot under such circumstances claim interruption of the prescription. At the time these negotiations took place the suppliant was barred from recovering and his right of action cannot be revived. (Cites Arts. 2261, 2262, 2267, C.C.L.C.; *Ursulines* v. *Gingras* (6).)

Hogg, Q.C., following:

The case of *Martin* v. *The Queen* is no authority for the proposition that the Crown is liable in such a case as this. (Cites *The Queen* v. *McLeod* (7).) A case like this should have been brought before the lapse of six months from the date of the accident. (Cites R.S.C. c. 40 s. 8.)

BURBIDGE, J. now (September 1st, 1892) delivered judgment.

The suppliant by his petition claims fifteen thousand dollars for damages for personal injuries sustained by him on the 24th of April, 1886, while working upon the Chambly Canal, a public work of Canada, situate in the province of Quebec.

It was alleged, and, for the purpose of disposing of the question of law arising at this stage of the case, it may be taken as admitted, that the accident which was the occasion of the injury happened in consequence of the

(1) M.L.R. 3 S.C. 375.
(2) Art. 2261, n. 20.
(3) 2 Ex. C.R. 328.
(4) P. 549.
(5) p. 452 (par. 1299).
(6) 13 Q.L.R. 300.
(7) 8 Can. S.C.R. 1.

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negligence of the persons in charge for Her Majesty of the public work in question. At the time of the accident the suppliant, who was employed upon the canal as a mason, was receiving wages at the rate of two dollars a day. Afterwards he was taken on the canal staff as a watchman and given light work to do, such as lighting lamps, for which he was paid twenty-five dollars a month. The Government, as will be seen, also paid certain expenses that the suppliant incurred for medical attendance.

On the 9th April, 1890, the following order-in-council was passed with respect to his employment on the canal :

On a memorandum, dated 29th March, 1890, from the Minister of Railways and Canals representing that, as appears from a report made by the superintending engineer of the Chambly Canal on the 26th of August, 1886, in the previous April one of the workmen, Hormisdas Martial, a mason, engaged in rebuilding a lock wall, was injured by the fall of a derrick used in fitting in a lock-gate ; that the injured man, who had been receiving wages at the rate of $2.00 a day before the accident, was incapacitated for the work of a mason and was taken on the canal staff as a watchman at the rate of $25.00 a month, the accounts of the medical attendant being paid, amounting, up to January, 1887, to $187.25.

That a further account of $37.50 has now been presented and it is suggested by the superintending engineer that it should be paid ; but that for the future Mr. Martial should pay the medical expenses himself, his salary being increased to $38.00 a month, and the matter being so finally settled.

The Minister recommends that authority be given for the settlement proposed.

The Committee advise that the requisite authority be granted as recommended.

The suppliant, who at the time was demanding a pension of $400.00 per annum on account of the injuries sustained, refused at first and for more than a year to accept the settlement proposed ; and in July, 1890, quitted work.

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Subsequently he changed his mind and signed an acceptance in the following terms:—

Je, Hormisdas Martial, consens à accepter la somme de trente-huit piastres par mois a la condition posée par le Gouvernement que je le décharge pour l'avenir de toute responsabilité dans le paiement de mes frais de médecin.

La présente déclaration n'aura d'effet qu'en autant que le Gouvernement me paiera mes arrérages de salaire depuis le quatre juillet dernier à venir aujourd'hui au taux de trente-huit piastres par mois et je déclare ne pouvoir signer.

Montréal 1er juin, 1891.

L. O. David, Jos. Martial. } Témoins. (Signé.) HORMISDAS sa X marque. MARTIAL.

He was returned as a watchman on the Chambly Canal staff pay-list of June, 1891, for arrears of wages to the amount of $452.32 and for $38.00 for that month. The $38.00 were paid to him but no part of the arrears. In the meantime the Auditor-General had learned that the suppliant was not doing any work, and when the next pay-list was presented he struck the suppliant's name out of the list, and since then he has not been paid anything.

He now brings his petition to recover damages for the injuries received in 1886, and he relies upon the fact of his employment, the payment of the charges incurred for medical attendance, the order-in-council of 9th April, 1890, and the payment of wages in July, 1891, as constituting an interruption of prescription.

At the time of the action the only remedy the suppliant had against the Crown was by a proceeding before the Official Arbitrators on a reference of his claim under the provisions of 33 Victoria, chapter 23, by the second section of which it was provided that no claim should be submitted to arbitration, or entertained under the Act, unless it were made within six months after the occurrence of the accident, or the doing or not doing of the act upon which the claim was

founded. This limitation was in substance continued by the *Revised Statutes* c. 40 s. 8 until 1st October, 1887, when the Act was repealed by *The Exchequer Court Act* (1), by the eighteenth section of which it was provided that the laws relating to prescription and the limitation of actions in force in any province between subject and subject should, 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. By Article 2262 of the Civil Code of Quebec it is provided, with an exception that it is not necessary to note here, that actions for bodily injuries are prescribed by one year. It has been thought, however, that for injuries such as those of which the suppliant complains the prescription is two years under Article 2261 (2); but the law may, I think, be taken to be settled the other way (3). The question is not, however, material for in any case the suppliant must fail unless in some way the Crown has lost the benefit of the prescription. That, the suppliant contends, may happen by virtue of Article 2227 of the Code, which is as follows:

> Prescription is interrupted civilly by renouncing the benefit of a period elapsed, and by any acknowledgment which the possessor or the debtor makes of the right of the person against whom the prescription runs.

And he relied upon *Walker* v. *Sweet* (4) the headnote of which is:

> That the short prescription referred to in Articles 2250, 2260, 2261 and 2262 of the Civil Code are liable to be renounced and interrupted in the manner prescribed in Article 2227.

(1) 50-51 Vic. c. 16.

(2) *Caron* v. *Abbott*, M. L. R. 3 S. C. 375; *Morrisson* v. *Mullins*, 16 R. L. 114: *Morrisette* v. *Catudal*, 16 R. L. 486; Taschereau, J. in *Robinson* v. *The Canadian Pacific Railway Company*, M. L. R. 5 S. C. 225.

(3) *The Canadian Pacific Railway Company* v. *Robinson*, 19 Can. S. C.R. 292; M. L. R. 5 S. C. 233, 243.; [1892] A. C. 481.

(4) 21 L. C. J. 29.

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But that case, which was an action on a bill of exchange, cannot, I think, be taken as conclusive authority for any larger proposition than that a short prescription of a debt may be interrupted by an acknowledgment which the debtor makes of the right of the person against whom the prescription runs. The principle, or at least the principle of the English law, is that in actions of assumpsit the acknowledgment of the debt is evidence of a fresh promise to pay, but that rule has never been applied to actions for wrongs (1).

In *Angell on the Limitation of Actions* the author, referring to the words of the statute of James that all actions on the case, &c., shall be commenced and sued within six years next after the cause of such actions or suits, and not after, says that—

* * * where the gist of the action is an injury committed, if the right of action is once barred, it is impossible to revive it by any admission however unequivocal and positive, and it may be considered as an unvarying rule in the case of torts that no acknowledgment will reserve it from the express language of the statute (2).

The use of the word "debtor" in Article 2227 would appear I should have thought to point to a like distinction in the French law But from the decision of the Court of Review in *Marcheterre* v. *The Ontario and Quebec Railway Company* (3), in which it was held that the defendant company in paying the plaintiff some money, and, in part, the charges for medical attendance had renounced the benefit of the prescription to which the court below had given effect (4), I conclude it must be taken that the distinction does not exist in the French law. I also observe that in *The Canadian Pacific Railway Company* v. *Robinson* (5), Mr. Justice Taschereau, in discussing

(1) *Hurst* v. *Parker*, I. B. & Ald. 92 ; *Boydell* v. *Drummond*, 2 Camp. 160 ; *Whitehead* v. *Howard*, 2 Bro. & B. 372.

(2) Sec. 209.

(3) 17 R.L. 409.

(4) M.L.R. 4. S.C. 397.

(5) 19 Can. S.C.R. 333.

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the contention made in that case that the appellant company had by its conduct acknowledged its liability for the accident and thereby interrupted the prescription invoked, does not suggest that there is any difference in respect of the interruption of the prescription of a right of action for a debt, and a right of action for a bodily injury. It should, however, be added that he was discussing a contention which as the case presented itself was not open to the respondent, and that he was of opinion that the relief given by the company to the plaintiff was given gratuitously and without acknowledging any obligation whatever.

But however that may be, I entertain no doubt that in this case the acts of the Crown's Ministers and officers in employing the suppliant and paying him wages without exacting an equivalent in work, and in paying the charges for medical attendance incurred by him, cannot be taken as an acknowledgment of a legal liability for the consequences of the accident. The order-in-council of the 9th of April, 1890, without doubt recognizes the existence of some sort of a claim to be indemnified for the medical expenses incurred, which it was proposed to satisfy by an increase of the rate of wages paid to the suppliant. It was contended that no effect can be given to the order-in-council, because to his acceptance of the offer thereby made the suppliant attached a condition to which the Crown has never acceded. Without discussing that, or the other question as to whether or not the arrangement if completed did not discharge the Crown from this action, leaving the suppliant no remedy unless he has one for breach of agreement which he says was made with him, and confining myself to the effect of the order as an admission of an existing liability enforceable in law, it appears to me that no greater

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weight is to be given to it than to the fact of the previous employment and payment of medical expenses. The Government acts by orders-in-council, and the one in question constituted the requisite authority for continuing the suppliant's employment at a higher rate of wages instead of paying the accounts rendered by his doctor. But there is no stronger inference in the one case than in the other, that what was done was so done in recognition of a legal obligation and not by the favour of the Crown.

What then is the fair inference to be drawn from the facts?

A servant of the Crown dependent upon his labour to support himself and his family is injured upon a public work. Is it unnatural to expect that, apart from any question of liability, the Crown would of its grace render some assistance and so long as possible continue the servant's employment? Without its consent, or that of its Minister, no proceeding could in this case have been taken against it, and there was no occasion, as there might have been for an individual or a company exercising a like benevolence, to carefully guard against any implication of an admission of liability. All that was done is referable, it appears to me, to an exercise of the grace and bounty of the Crown, and ought not to be construed as an acknowledgment of a right of action. It would, I think, looking only to the interests of the employed be unfortunate to lay down a rule that would, in like cases, make an act of humanity or bounty unsafe, unless attended by a formal denial of liability.

The view I take of the inference to be drawn from the acts relied upon as constituting an interruption of prescription makes it unnecessary for me to discuss at length the other question of law raised. On the general question of the Crown's liability for the negligence of

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its servants, I have given my opinion in *The City of Quebec* v. *The Queen* (1) and in *Lavoie* v. *The Queen* (2). The other question as to whether or not a petition of right in such a case will lie when the cause of action accrued before the 1st of October, 1887, depends upon the view taken of *The Exchequer Court Act* (3).

If, as I think the fact is, the Crown's liability for the negligence of its servants employed on its public works and acting within the scope of their duties rests upon statutes passed before *The Exchequer Court Act* (3), and that the latter substituted a remedy by a petition of right, or by reference to the court, for one formerly existing by a submission of the claim to the Official Arbitrators with an appeal to the Exchequer Court and to the Supreme Court, it cannot be doubted that in a proper case a petition would lie. If on the other hand it were held that in such a case there was no liability before the passing of *The Exchequer Court Act* (3), and that the latter Act not only provided a remedy but gave the right of action, then of course the remedy given must be limited to causes of action arising subsequent to the date on which it became law.

Judgment for respondent, with costs.

Solicitors for suppliant: *David & Demers.*

Solicitors for respondent: *O'Connor, Hogg & Balderson.*

(1) 2 Ex. C. R. 252. (2) 3 Ex. C. R. 96.
(3) 50-51 Vic. c. 16.

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Sept. 8.

TORONTO ADMIRALTY DISTRICT.

THE JESSIE STEWART.

Maritime law—Action to recover seaman's wages—Motion to dismiss—Bill of sale—Registration—The Merchant Shipping Act, 1854 *s.* 55—*Jurisdiction of Exchequer Court—The Inland Waters Seamen's Act (R. S.C. c.* 75 *s.* 34)—*Insolvent owner.*

In the year 1887, A. sold a vessel to M. and S. under an agreement stipulating, among other things, that the vessel was to remain in the name and under the control of A. until the purchase-money was fully paid, and that, in the event of the terms of the contract not being performed by the vendees, A. was entitled to take possession and the vendees would thereupon lose all claim or title they might have to the ship or to moneys paid by them in respect of the contract. This agreement was not registered. For some time the vendees performed the terms of the agreement, but having failed to do so after a certain period A. resumed possession of the vessel. Upon an action *in rem* for wages due to a seaman employed by the vendees and which were earned during their possession of the vessel,—

Held, that the amount of the claim being below $200, the Exchequer Court had no jurisdiction under sec. 34 of *The Inland Waters Seamen's Act.*

2. That the property in the vessel had not passed to the vendees under the agreement, and that whatever rights the seaman had *in personam* must be enforced against the persons who employed him and not against the vendor.

3. That the agreement was not a bill of sale within the meaning of *The Merchant Shipping Act*, 1854, s. 55.

4. That if summary proceedings had been taken as provided by *The Inland Waters Seamen's Act*, a direction might have been made to provide for the realization of the seaman's claim against the vessel, and she might have been tied up by the court on his showing that the vendees who employed him were then the supposed owners of the vessel and when action was brought were insolvent within the meaning of section 34 of the said Act.

MOTION to dismiss an action brought on a claim for seaman's wages.

The facts upon which the motion was based appear upon the argument.

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Argument of Counsel.

The motion was argued before His Honour Judge McDougall, local judge for the Toronto Admiralty District.

Mulvey, for the intervener, in support of the motion:

This is a motion to dismiss an action brought in the Admiralty Court for seaman's wages claiming the sum of $83.60.

The ground on which I ask the action to be dismissed is section 34 of *The Inland Waters Seamen's Act* (1). The facts of the case are these: In the year 1887, Joseph Adamson, the defendant in this action, sold his vessel the *Jessie Stewart* to John Marks and Frederick Stoner, the latter a brother of the plaintiff. The terms on which she was sold were that Stoner and Marks were to pay Adamson $850 for the vessel and were to work the vessel in the building-stone trade. In 1887 this contract was entered into, and for some two or three years they continued to live up to the terms of the agreement, that is, to deliver to Adamson all the stone they carried, and he credited them for the amount, and, also advanced them money at different times to do repairs, &c., to the vessel—they being in difficulties. These advances were made time and again. Early in the last season they ceased to deliver any stone whatever to Adamson and did not deliver any from about a year ago last July until a couple of days before the vessel was arrested in this action. The cause of that being done was that Adamson had written several times asking them to comply with the terms of the contract, otherwise he would have to take the vessel from them. When they were coming in from one trip he brought them to his wharf and there they agreed to give up the vessel and deliver her over to

(1) R.S.C. c. 75.

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Adamson. Then the plaintiff, a brother of one of the parties who contracted with Adamson, brought this action for the recovery of his wages.

Now, the point to be considered is whether Stoner and Marks were the owners of this vessel at the time she was arrested. I say Stoner and Marks had delivered her over to Adamson, as the cross-examination of the defendant on his affidavit shows, and that they had delivered up all rights in the vessel under the contract at that time. And I further say whether that is so or not that nevertheless Adamson must be still considered to be her owner. Adamson is the registered owner, and the register never was transferred; he held it all the time. (Here he refers to sections 30 and 34 of *The Inland Waters Seamen's Act*) (1).

(1) R.S.C. c. 75, s. 30. Any seaman or apprentice belonging to any ship subject to the provisions of this Act, or any person duly authorized on his behalf, may sue in a summary manner before any judge of the Superior Court for Lower Canada, judge of the sessions of the peace, judge of a county court, stipendiary magistrate, police magistrate, or any two justices of the peace acting in or near the place at which the service has terminated, or at which the seaman or apprentice has been discharged, or at which any master or owner or other person upon whom the claim is made is or resides, for any amount of wages due to such seaman or apprentice not exceeding two hundred dollars over and above the costs of any proceeding for the recovery thereof, as soon as the same becomes payable; and such judge, magistrate or justices may, upon complaint on oath made to him or them by such seaman or apprentice, or on his behalf, summon such master or owner, or other person to appear before him or them to answer such complaint.

Ibid. s. 34. 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 seaman or apprentice belonging to any ship subject to the provisions of this Act, in any court of Vice Admiralty, or in the Maritime Court of Ontario, or in any Superior Court, unless the owner of the ship is insolvent within the meaning of any Act respecting insolvency, for the time being in force in Canada, or unless the ship is under arrest or is sold by the authority of any such court as aforesaid, or unless any judge, magistrate or justices, acting under the authority of this Act, refer the case to be adjudged by such court, or unless neither the owner nor the master is or resides within twenty miles of the place where the seaman or apprentice is discharged or put ashore.

I say, moreover, Stoner and Marks cannot be considered the owners of the vessel, because *The Merchant Shipping Act*, 1854, expressly states how ownership in vessels is transferred and states that the transfer must be by bill of sale, and that bills of sale must be registered. The clauses in the Act relating to that are 19, 43 and 50. They say that ownership can only be transferred by bill of sale ; and that bills of sale must be registered. I contend, therefore, that Adamson is still the registered owner of this vessel.

Then there is a distinction drawn between charterers and owners of vessels. As to that, I will refer your Honour to the case of *Meiklereid* v. *West* (**1**).

The authorities are numerous which point to the distinction between those cases where the effect of the charter is to retain the ownership in the owner and the ownership is vested in the charterer temporarily only.

In this case the contract expressly reserves the control of the vessel to Adamson. He is the registered owner, and they could only use the vessel as he directed. Under the terms of the contract, if they used it in any way whatsoever, they must come to him for a written consent. They could not take it out of Lake Ontario. They could not trade in Lake Ontario except with his express consent; and I say, under authority of section 81 of *The Merchant Shipping Act*, 1854, which impliedly says the owner means the registered owner, the owner is he who has control of the vessel; and a charterer cannot be held to be the owner except he has absolute control of it.

[His Honour : In the case cited he did not bind the registered owner of the ship.]

No. He did not bind the registered owner. He only bound the charterer, the person to whom the allotment note was addressed and who accepted it.

(1) 1 Q.B.D. 428.

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I say that this word "owner" in *The Inland Waters Seamen's Act* can only apply to Adamson and Adamson resides in Toronto, and it has not been shown he is insolvent. Supposing it can be shown that Stoner, the man who entered into the contract with Adamson, is insolvent and cannot pay this claim, I say that is not sufficient ground to bring an action within the meaning of the Act. I say he must have made an assignment for the benefit of his creditors; he must have taken advantage of an insolvent Act.

[His Honour: I take it to mean a person who is in fact insolvent. I do not think it means that you have to produce evidence of his having made an assignment before you can hold he is insolvent, though it is notorious he cannot pay ten cents on the dollar.]

Section 189 of *The Merchant Shipping Act*, 1854, reads "adjudged bankrupt or declared insolvent." The only Act we have is the Act touching assignments for the benefit of creditors.

[His Honour: I should read our statute to mean a person in insolvent circumstances, that is, who is in effect insolvent, although perhaps not legally adjudged to be such.]

With regard to the effect of such a clause, I would refer you to the case of *The Harriet*, decided by Dr. Lushington (1).

I may state the object of this section is quite plain and clear. A mode of procedure is given to seamen to recover their wages without arresting the ship because that always puts an owner to a great deal of expense, and he can recover no costs as a rule against the seamen and the vessel is likely to be tied up at any time of the year when incalculable damage may be sustained. We say Stoner and Marks are liable, but we are not liable in any way at all, and that the plaintiff must proceed

(1) Lush. 285.

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against them in the way set out in the statute, and if he cannot recover against them, and if the magistrate before whom the matter is brought decides the amount can be recovered from the vessel, we will pay the amount rather than have any proceedings taken against the vessel; but we say that the present plaintiff must do that before he can take proceedings in the Admiralty Court.

Smyth, for the plaintiff, *contra*:

The plaintiff brought this action against the vessel because he knew the owners Stoner and Marks were insolvent. Mr. Marks as a fact left the vessel some time last fall—a year ago—and transferred whatever interest he had to Capt. Stoner and the plaintiff, knowing that Stoner was unable to pay, brought this action against the vessel, and he brought it against the vessel before it had been delivered over to Adamson, because, as he stated to me at the time, "I have the key of some part of the vessel in my pocket"; and the fact is the vessel was still in the possession of Capt. Frederick Stoner, who was then negotiating with Adamson as to what terms he would deliver up the vessel and sell to Adamson. As Capt. Stoner states in an affidavit on this motion, he had come to the conclusion that there was not much money in his keeping the vessel and it was a question upon what terms he would deliver the vessel to Adamson. Adamson promised to pay the wages that were due the plaintiff, to pay another account due for repairing sails, or something of that sort, and give Capt. Stoner a small money consideration, if he would give him over the vessel and her load of sand which Stoner states was worth some $32.

A vessel is personal property, and is so declared by *Maclachlan on Shipping* (1). He says that ships, according to the law of England, are personal property and

(1) P. 1.

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the common law relating to personal property is in general applicable to them. Therefore a sale and delivery, in so far as passing the property is concerned, is sufficient, and that is all that is required. In regard to the registration of vessels, chapter 72 of the *Revised Statutes of Canada* simply requires a vessel to be registered in some port, but there is no provision whatever that in order to pass title, to pass property, in that vessel a bill of sale must be executed and that that bill of sale must be registered. There is no law in regard to the registration of bills of sale of vessels as in regard to chattel mortgages or bills of sale to protect creditors. There is a section (1) stating that mortgages executed on ships would take priority according to the date of their registration, but there is no section whatever in the whole Act that lays down that a bill of sale must be executed and registered. This action was brought under section 34 of *The Inland Waters Seamen's Act* for the reasons I have mentioned, that the owners were insolvent, and, therefore, it would be useless to bring an action under section 30, which provides for a summary proceeding before a police magistrate or a judge, as that would necessarily lead to a dismissal of the action, or a direction, at least, to bring the action under the section under which it has been brought. I claim, therefore, the property in this vessel passed to Stoner and Marks, and that at the time this action was brought Capt. Stoner was the owner. The document under which the vessel was delivered to Stoner and Marks recites the fact that it was sold, and recites the price and the terms upon which it was to be paid for. That is very clear. Then in addition to that there are certain conditions giving Adamson certain rights, the rights of a mortgagee and nothing more. This document further provides the vessel is to be paid for in

(1) R. S. C. c. 72, sec. 35.

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full on or before the 1st day of October, 1892, unless a further extension of time is given by Adamson to Stoner and Marks. Under this agreement I submit it is clear on the authorities that the property in the vessel passed. Mr. Adamson simply, by this agreement, provides a means, such as a mortgagee would provide, whereby he may take the vessel if there is any default in the payment. The authorities are numerous as to the passing of property. I have grouped together a number of English authorities, and will refer to them hereafter.

It will be observed that Adamson does not say that until such an amount of consideration is paid that the vessel will be his property or that he will remain the owner of it or anything of that sort; he sells the vessel out and out, though no bill of sale is executed and though the vessel remains registered in his own name.

[His Honour: According to that there would not be any protection to him at all; he would not cease to be the owner.]

He would not cease to be the owner in this respect, —he would have this security, that Stoner and Marks could not sell the vessel to any person else and pass title because of the legal title.

[His Honour: But you claim the title passed?]

I claim the property passed. I claim so far as the abstract of registration is concerned that it could not be made perfect without a conveyance from Adamson; and Adamson just held the vessel in that way because he could say "You cannot sell to any person else."

[His Honour: If he could sell to Stoner as you describe, what was to prevent Stoner selling to some person else in the same way?]

He could, if any person else cared to take the risk.

[His Honour: There would be no risk if the property passed, as you say. There would be no risk if the legal

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title to the property passed. I do not understand how the property can pass and the legal title not pass, because "property," as I understand it, is legal title to goods, the right to their possession together with the right to their disposition.]

It gave Adamson a right to exercise an ownership over it or a lien on the property, but the property itself passed to these parties. I submit no other construction can be given to that agreement; it only reserves the control. The intention of the parties must be looked to in a case of this kind. It is clear it was the intention that the boat should be the property of Stoner and Marks.

The authorities say in a case of this kind, more particularly where there is a document, that if there is any doubt about the matter it is a question for the jury to say what was the intention of the parties as to the sale, whether it was the intention that the property should pass or not. Of course it is the province of the court to say whether the document is a mortgage or a deed. As to the property passing, I can refer your Honour to a case of the *Yorkshire Railway Wagon Company* v. *Maclure* (1), where a railway company borrowed £30,000 from the plaintiffs and sold them their rolling-stock. The company then made a contract for the hire of the stock, paying a rent that would represent the £30,000, and interest, in five years. An action was brought against the sureties, and a question, as to whether the property passed, arose and it was held to be a sale out and out and the evidence there plainly showed that was merely a surety for the repayment of that £30,000. I would also refer to the case of *The North Central Wagon Company* v. *The Manchester, &c., Railway Company* (2), which decides in the same way on a similar state of facts.

(1) 21 Ch. D. 309. (2) 35 Ch. D. 191.

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[His Honour: There was a bill of sale in those cases?]

Yes; and the question was whether it was a sale out and out or whether it was a hiring.

[His Honour: They complied with all the requirements of the law?]

No. The bills of sale were not registered.

[His Honour: They must have been, because they could not sell their wagons and have them in their possession, and use them, or at least there would be no change of title unless there was a bill of sale duly registered.]

I would also refer to the case of *Beckett* v. *Tower* (1), which says it is the real question to determine what the intention of the parties was. There are several Canadian cases on the same ground, and touching on the same point. I say here that there was a complete sale and transfer of the property and that this document, if anything, gave Adamson nothing more or less than the privilege of a mortgagee. The evidence also shows that Stoner and Marks were to pay Adamson $850. This vessel was sold in May, 1887, and in the year 1887 Stoner and Marks received credit from Adamson for $548.71, and in 1888 credit for $665.30, making altogether $1,214; and I claim that with a proper adjustment of the credits the vessel was paid for in the year 1888.

[His Honour: Were there not advances made?]

Yes. But they were advances he made on account of repairs, &c.

[His Honour: But the agreement says they were only to be credited for the final balance on the purchase-money? You cannot take one side of the account and say the payments are so much.]

$352.52 is what Adamson charges for interest on the purchase-money.

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

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If your Honour should ultimately hold that Stoner and Marks were not the owners, I would refer to the section which says no costs should be awarded to the plaintiff. As to the question of costs, it does not state that the action shall be dismissed with costs, but it seems to state the fact clearly that the plaintiff is not entitled to his costs, therefore it seems to be in the discretion of the court to say whether, from the circumstances of the case, the plaintiff's action should be dismissed with costs. I submit in this particular case, where the vessel has been in the hands of what were supposed to be the owners by every person for the last three or four years, no costs should be given against the plaintiff.

[His Honour : There is always one very simple way of finding out who owns the ship, and that is by examining her register. She is bound to carry her certificate on board. If you cannot get access to that, then the custom-house is the place.

There is a good deal of force in the plaintiff's contention that the present owner of the vessel sold her to another party and gave a bill of sale, and the other party did not choose to register. The question would become a question of fact, as to which was the owner. I do not think registration is done to pass the title ; but it may prevent the owner from conveying to somebody else. If you can argue that this agreement amounts to a bill of sale which could have been registered at Montreal ; or even, if it were defective in part but yet amounted to a bill of sale, there is some force in your contention ; but how do you account for the clause providing that Adamson retains the control, and merely intrusts the possession to these parties ? That seems to be against your contention. I think if that expression had not been used you might well argue this was a bill of sale of the vessel. You cannot say "entire

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control of the said vessel" shall not mean "any control of the vessel." If the expression had been ambiguous, you might introduce evidence to show what was the intention of the parties.

You are arguing that, granting there is no jurisdiction against the vessel, yet Adamson is liable. On what principle would Adamson be liable if I should hold Marks and Stoner are not the owners of the boat?]

He agreed with this plaintiff, and with the owner of the boat, Capt. Stoner, that if he would deliver over the boat, he (Adamson) would pay the plaintiff the amount of his wages, and the plaintiff was present when that agreement was made, and there is, therefore, privity on his part to it.

Mulvey: Adamson denies that in his examination.

[His Honour: You could not make out any privity of contract with the seaman who was merely standing by and happened to hear the conversation between Mr. Adamson and Capt. Stoner.]

Mulvey, in reply:—With regard to the fact of ownership, section 55 of *The Merchant Shipping Act*, 1854, says that every transfer and every disposition of a vessel or any share in it must be in the form of a bill of sale; it must be in the form given in that act; the custom-house authorities would not have taken that agreement; it is not in the form required by the act at all. The registered owner can make a bill of sale and give a clear title under section 73; and section 55 says every transfer or disposition must be by bill of sale in the form given. I think the question of ownership is settled by Frederick Stoner's own affidavit. I contend, and I think there is not much to be said to the contrary, that the circumstances which give rise to these exceptions in section 34 of *The Inland Waters Seamen's Act* (1) must exist at the time the action is brought,

(1) R. S. C. c. 75.

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that is to say the owner must be away, the master must be more than twenty miles from the port, or he must be insolvent at the time the action is brought, so that it must be the owner of the vessel at the time the action is brought, not the owner of a month ago or a month hence, but at the time the action is brought. Frederick Stoner says he gave up possession on the 27th August, while this action commenced on the 26th August.

[His Honour: Assuming that Mr. Adamson, the real owner of the vessel or the legal owner of the vessel, had been sailing the vessel this season himself and claims had arisen in respect of wages, and this fall he sold the vessel to you and gave you a transfer of it would that cut out any claims by those seamen whose wages had been earned and which were liens against the hull at the time you got the transfer ?]

He cannot do it because they have a maritime lien on the vessel and it attaches to the vessel.

[His Honour: Then, if Mr. Stoner was the owner at the time this debt was contracted, anything he did towards divesting himself of the title would not discharge the maritime lien once created ; that brings us back to the question, was Stoner at any time the owner of the vessel or was he at the time this debt was incurred ?]

Yes. But I submit that the plaintiff must proceed under sec. 30 (1) when the claim is under $200, and if the claim cannot be recovered from the owner who employed the seaman, it is a clear case for a judge to refer to this court for the enforcement of his maritime lien. Proceedings can only be taken before a magistrate on the contract, not to enforce a lien ; it must be taken against the person who employed the seamen, not against the owner if the ownership is

(1) R. S. C. c. 75.

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changed. If the wages cannot be recovered from the person who made the contract to pay them, it is a proper case then to be referred to this court to enforce the maritime lien. And then we say, rather than have the lien enforced against the vessel, we will pay it. But we want him to proceed against Stoner; he should have first proceeded against him. You have no right to bring this action until you have exhausted your remedies against the other man who is liable for the wages.

[His Honour: What about the vessel?]

The vessel is liable, but you must exhaust your other remedies first against the employer before you enforce your lien.

MACDOUGALL, L.J.—I am of the opinion that there is no jurisdiction to try this case here. I am not so clear if it were tried in the other court that a direction could not be made to proceed for the realization of the claim against the vessel, I mean if it had been commenced in the other court. I have very little doubt but what the vessel would have been ultimately tied up, the court saying, it is quite clear you cannot succeed against this man, but you are entitled to proceed against the vessel because you cannot make your claim against Stoner.

I cannot get over feeling that had the plaintiff commenced his action regularly, he would have reached this court ultimately; but I will fix the costs at $25, including disbursements. It is a small claim, and I feel some sympathy with the plaintiff, looking at all the circumstances.

My judgment is, the action will be dismissed so far as the vessel is concerned, with costs fixed at $25, including disbursements. Of course I cannot make any order as to payment of the wages because Adamson is

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not before me, but I will express the opinion that there is a maritime lien on this boat for the amount of the wages because the men supposed to be the former owners of the vessel are worthless, and the difference between costs and wages will doubtless yet have to be paid by the intervener to the plaintiff.

Judgment accordingly.

TANCRÈDE DUBÉ.....SUPPLIANT; 1892

AND Nov. 11.

HER MAJESTY THE QUEEN.....RESPONDENT.

Petition of Right—Injuries sustained in an accident on a Government Railway—Burden of proof—Latent defect in axle of car—Undue speed in passing sharp curve.

On the trial of a petition claiming damages for personal injuries sustained in an accident upon a Government railway, alleged to have resulted from the negligence of the persons in charge of the train, the burden of proof is upon the suppliant. He must show affirmatively that there was negligence. The fact of the accident is not sufficient to establish a *primâ facie* case of negligence.

The immediate cause of the accident was the breaking of an axle that was defective. It was shown, however, that great care had been used in its selection and that the defect was latent and not capable of detection by any ordinary means of examination open to the railway officials. The train had immediately before the accident passed a curve which, at its greatest degree of curvature, was one of 6° 52'. It was alleged that the persons in charge of the train were guilty of negligence in passing this curve and a switch near it at too great a rate of speed. On that point the evidence was contradictory, and, having regard to the rule as to the burden of proof stated above, it was—

Held, that a case of negligence was not made out.

PETITION OF RIGHT for the recovery of damages arising out of an accident on a Government railway.

By his petition the suppliant alleged, *inter alia*, as follows:—

"L'humble pétition de Tancrède Dubé, marchand, de la paroisse des Trois-Pistoles, dans le comté de Témiscouata, district de Kamouraska, représente humblement:

"1. Que le dix-huit décembre dernier (1890), le requérant s'est embarqué à la station des Trois-Pistoles sur le convoi express du chemin de fer Intercolonial

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qui est un ouvrage public et la propriété du Gouvernement de la Puissance du Canada et exploité par celui-ci ; "

" 2. Qu'il s'est ainsi embarqué sur le convoi du dit chemin de fer après avoir pris son billet de passage et avoir payé le coût de son transport des Trois-Pistoles à Lévis ; "

" 3. Que le convoi *express* qui était la propriété et en la possession de Notre Souveraine Dame la Reine, représentée par le Gouvernement de la Puissance du Canada, était sous la direction et le contrôle des employés de notre dite Dame Souveraine la Reine représentée comme susdit, et que, par la faute, la négligence et imprévoyance des dits employés de notre dite Dame Souveraine la Reine agissant dans la sphère de leurs devoirs et à cause de la mauvaise construction du dit chemin de fer Intercolonial possédé et administré par le Gouvernement de cette Puissance, le dit convoi *express* dérailla près de la station de St-Joseph de Lévis dans le comté de Lévis, dans le district de Québec, et le dit Tancrède Dubé fut grièvement blessé ; "

" 4. Que par suite des blessures reçues lors du dit accident, le dit requérant a fait de grandes dépenses pour soins de médecins et par l'absence de son bureau d'affaires, et qu'il a souffert des peines morales et physiques considérables ; "

" 5. Que le dommage subi lors du dit accident s'élève à la somme de deux mille piastres ($2,000.00) ; "

" 6. Que le dommage ainsi subi et les blessures infligées sont le résultat de la faute, de la négligence et imprévoyance des employés du dit chemin de fer Intercolonial, agissant dans la sphère de leurs devoirs, propriété de notre Souveraine Dame la Reine ; lesquels employés sont sous le contrôle immédiat du Gouvernement de cette Puissance ; "

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"A ces causes votre pétitionnaire prie humblement qu'une pétition de droit soit accordée afin qu'il puisse faire valoir suivant la loi sa réclamation contre notre Souveraine Dame la Reine, et que la dite somme de deux mille piastres demandée en compensation des dommages réels qu'il a éprouvés lui soit accordée avec dépens distraits."

The Crown pleaded the following defence:—

"1. Her Majesty's Attorney-General is not aware of the truth of the facts set out in the first paragraph of the suppliant's petition of right, and he therefore denies the same and puts the suppliant to the strict proof thereof."

"2. Her Majesty's Attorney-General for a defence to the second and third paragraphs of the said petition of right says, that the derailment of the express train on the 18th day of December, 1890, near the station of St. Joseph de Lévis, by which it is alleged the suppliant met with serious injury, was not caused by the default, negligence or improvidence of the employees of Her Majesty on the said Intercolonial Railway, while acting within the scope of their duty, nor by the bad and defective construction of the said railway at the place of the accident, as alleged in the said two paragraphs; but the derailment of the said express train was the result of inevitable accident and was a fortuitous event beyond the control of Her Majesty's employees and in respect to which Her Majesty cannot be rendered liable."

"3. Her Majesty's Attorney-General denies that the employees of Her Majesty who had the management of the said express train on the said 18th day of December, 1890, were negligent or improvident in the discharge of their duties, and further denies that the said railway was defective in its construction at the place where the said derailment of the said express train is alleged to have occurred."

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"4. Her Majesty's Attorney-General for a further defence says, that the said petition of right does not disclose any claim which the suppliant can enforce by petition of right, nor does the said petition disclose any cause of action for which Her Majesty can be rendered liable inasmuch as the claim and cause of action therein alleged and set out are founded upon the negligence and misconduct of the servants and employees of Her Majesty upon the said Intercolonial Railway; and it is submitted that the control and management of the said Intercolonial Railway being vested by statute in the Minister of Railways and Canals, Her Majesty cannot be made liable upon petition of right because of any negligence or misconduct in the management thereof, and that even assuming the said railway to be under the management and control of Her Majesty, no negligence can be imputed to her, and Her Majesty is not answerable by petition of right for the negligence or misconduct of her servants, and no action will lie against Her Majesty for damages in consequence of such negligence or misconduct on the part of her servants; and Her Majesty's Attorney-General claims the same benefit from this objection as if he had formally demurred to the said petition of right."

"5. Her Majesty's Attorney-General for a further defence says, that the said petition of right alleges a cause of action based upon the bad and defective construction of the said Intercolonial Railway, which is a charge of tort against Her Majesty; but it is submitted that no action will lie against Her Majesty for damages, founded upon the bad and defective construction of the said railway, and Her Majesty's Attorney-General takes the same benefit from this objection as if he had formally demurred to the said petition of right."

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"6. Her Majesty's Attorney-General for a further defence says that the suppliant has not suffered pecuniary loss or damage by reason of the said accident to the extent of $2,000 as alleged in the said petition of right."

Quebec, November 4th, 1892.

Flynn, Q.C., *Choquette* and *Carroll* for the suppliant;

Osler, Q.C., *Hogg*, Q.C. and *Angers*, Q.C. for the respondent.

On the opening of the case, Mr. Choquette stated that in his view of the case it would be sufficient for him to prove that the suppliant was a passenger on the train on the day of the accident, that the accident happened and that the suppliant was injured, and that then the Crown would have to answer the *primâ facie* case of negligence so made out.

[BURBIDGE, J.—I do not think that is sufficient in a petition against the Crown in an accident on a Government railway. You will, I think, have to go further and show in the terms of the statute that the accident was occasioned by the negligence of some officer or servant of the Crown while acting within the scope of his duties or employment.]

November 4th, 5th, 7th, 8th, 9th and 11th, 1892.

Evidence was taken on behalf of both parties and the following facts, amongst others, were established:

The accident took place on the 18th December, 1890, shortly after the express train of the Intercolonial Railway, upon which the suppliant was a passenger, had passed the station at St. Joseph de Lévis. The train was derailed and the suppliant was injured. Near the spot where the accident occurred is a curve in the rails, which, at its maximum curvature, attains a degree of 6° 52'. There was evidence adduced by the suppliant to show that the train was being run at too

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great a rate of speed to be consistent with safety in passing this curve and a switch immediately beyond it; this evidence was, however, met by testimony on behalf of the Crown, equally as strong in its character, negativing the fact that undue speed was the cause of the derailment. The weight of the evidence went to show that a defective axle was the cause of the accident. The defect in the axle was, however, a latent one, and was not discoverable by the ordinary means taken by the railway authorities to test the efficiency of this portion of their equipment. It was, moreover, shown that great care had been taken in the selection of this particular axle. The Crown also established the fact that the curve in question had not so great a degree of curvature as to make it a menace to the safety of trains.

At the conclusion of the evidence, counsel on behalf of both parties addressed the court.

Choquette: I submit that the suppliant has made out his case. There can be no doubt that, under the law as it exists to-day, the Crown is a common carrier in respect of Government railways. That being the case, I maintain that where an accident occurs in the operation of trains a *primâ facie* case of negligence is at once established and the *onns* is on the carrier to rebut the same. (Cites Art. 1672 C.C.L.C.; *The Government Railways Act*, 1881; *Lavoie* v. *The Queen* (1); *The Grand Trunk Railway* v. *Vogel* (2); *The Canadian Pacific Railway Co.* v. *Bate*) (3).

Flynn, Q.C.: The case has to be decided under section 16 (*c.*) of *The Exchequer Court Act*. I admit that there is no specific evidence of negligence, but there is a chain of evidence which leads up to that result. The evidence shows that the train was going at forty miles

(1) 3 Ex. C.R. 96. (2) 11 Can. S.C.R. 612.
(3) 18 Can. S.C.R. 697.

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an hour. That is a fair inference to draw from the whole evidence, and there is no doubt that such a rate of speed was inconsistent with the safety of the train at the point where the accident occurred.

Osler, Q.C.: A case has not been made out even if it had been a matter between subject and subject. The view of the law taken by my learned friend who opened the case is not the view of the courts of the province of Quebec. The case of *The Canadian Pacific Railway* v. *Chalifour* (1) shows that Art. 1672 C.C.L.C. does not apply to the carriage of passengers, but the carrier's liability in such a case must be determined under Art. 1053 C.C.L.C. The burden of proof is certainly upon the suppliant under section 16 (*c.*) of *The Exchequer Court Act*, and he must prove that the engine-driver was guilty of negligence, or that there was negligence in construction, or both combined. On the contrary, the evidence here shows that the engine-driver was a cautious man. It could hardly be assumed that he would be so careless of his own life as to endanger it on that day. (Cites *Daniel* v. *Metropolitan Railway Co.*) (2).

Choquette, in reply, maintained that the whole current of authority showed that the suppliant was entitled to judgment.

BURBIDGE, J.—The duty of the court after a most careful trial, in which counsel for the suppliant and for the Crown have with great ability and fairness presented the evidence and summed up the case, is simply to find upon the question of fact.

If I thought, in a matter where the responsibility is so great, that I could come to a better conclusion by

(1) M.L.R. 3 Q.B. 324. (2) L.R. 3 C.P. 216.

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taking more time to consider it, I should certainly do so; but on a trial lasting several days I have had every opportunity to consider the evidence as it has been given and to come to a conclusion.

I think there is a great difficulty in finding upon a question of fact in a case such as this, because the evidence is very conflicting. A considerable number of respectable witnesses say that the speed was unusual. Of course, as it has been said, no one doubts their truthfulness; no one doubts, I think, that these witnesses speak of what they saw and experienced. But they all look back to the events of that day through the accident; and we also have it proved that from St. Charles to Harlaka the rate of speed was great, but not more than forty miles an hour; and it may be that the impressions which they received do not attach to the rate of speed between Harlaka and St. Joseph, although, no doubt, they were under the impression that the train was running quite as fast at that place.

In regard to the train hands, there is a general concurrence—not a suspicious concurrence. Of these, the engine-driver and conductor, are perhaps the most interested witnesses. The others are not brought into the accident in any way, and there is nothing to discredit them except that they are in the employment of the Crown; and taking their evidence it shows that the rate of speed was from twenty to twenty-five miles per hour.

In regard to the passengers, I may say that I attach very considerable weight to Mr. Hudon's evidence. He was a passenger and seems to have been in a position to determine whether the train was going at an undue rate of speed better than any person who has spoken at this trial. I do not know him, but anybody who saw him and heard him give his evidence in the box must conclude that he stated what he thought to

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be true; and he stated that immediately before the accident he passed from near the rear end of the first-class car to the postal car and noticed nothing unusual about the speed of the train. His opportunities for observing the speed were therefore better, I think, than those of any other person who spoke on that point.

Then, with regard to the witnesses who saw the train pass, while they speak of the train going very fast, and some, of its going faster than usual, I think, on the whole their evidence rather supports than conflicts with the view of the train men and Mr. Hudon that there was nothing unusual in the speed of the train on that day.

I think on the question of speed I cannot hold that the suppliant's case is made out. There is too much evidence the other way; and, undoubtedly, if it is an even matter, as Mr. Osler stated, I have no right to fix upon the officers of the Crown any negligence in the management of the train on that day.

I think it is unnecessary to discuss at length the other points of the case, as the case turns upon that.

There is considerable evidence as to the curve which the train had passed immediately before the accident. At the point of greatest curvature, this curve was one of 6° 52′. That was considerable, but not, it appears, extraordinary. One witness, Mr. Macquet, a most intelligent witness, thinks it is dangerous; but against his evidence we have that of a number of practical engineers who have been engaged in constructing and operating railways, and who say that it is not a menace to the safety of trains. I would attach this much importance to it, however, that if the rate of speed had been excessive, I should have thought it necessary to have entered judgment the other way; but, holding the view which I do, that the probable cause of the

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accident was the breaking of the axle, and that having regard to the weight of evidence it has not been proved that the rate of speed was unusual or extraordinary or greater than twenty or twenty-five miles an hour, I think judgment must be entered for the respondent.

Judgment accordingly.

Solicitor for the suppliant: *P. A. Choquette.*

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

THE CANADIAN COAL AND COLONIZATION COMPANY (LIMITED)... } CLAIMANTS; 1892 Oct. 31.

AND

HER MAJESTY THE QUEEN.....RESPONDENT.

Sale of Dominion Lands—Reservation of mines and minerals—The Dominion Lands Act (43 Vic. c. 26)—Rights of purchaser.

Where the Crown, having authority to sell, agrees to sell and convey public lands, and the contract is not controlled by some law affecting such lands and there is no stipulation to the contrary express or implied, the purchaser is entitled to a grant conveying such mines and minerals as pass without express words.

THIS was a reference to the court by the Department of the Interior of a claim respecting certain Dominion Lands. The reference was made under 50-51 Vic. c. 16 s. 23.

The facts of the case are stated in the judgment.

May 4th, 1892.

Hogg, Q.C. for the Crown:

The agreement, as well in its terms as in the negotiations and correspondence leading up to it and in the dealings of the parties subsequent to its execution, shows conclusively that so far as the Government were concerned they were dealing with farm lands. This is an element of great importance in view of the effect of the legislation and the order in council. The whole object and intention of Sir John Lister Kaye when he applied for this agreement was to start farms in that locality. And not only that, but all the conditions in the agreement had reference to farming and stocking and carrying grain and cattle upon the railway. On the 27th of March, 1887, Sir John Lister Kaye telegraphs: "Will the Government include coal in sale

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" of lands to me. Most important. Sixty thousand " pounds conditionally subscribed "; and the Government replied: " Will sell coal lands on usual terms, " ten dollars cash with deduction, however, on cash " price to you,—being a deduction in all of two dol- " lars and fifty cents per acre." So that if there was anything really required to show what the intention of the parties was both before and after this agreement was entered into, they have revealed it most plainly in these two telegrams.

Taking the whole conduct of the parties from the beginning to the end, although the agreement contains the words "fee simple," it must be held to have reference merely to the use of the land for farming or agricultural purposes. The proper and fair inference to be drawn from the mutual dealings is that when the Government was entering into the contract they were doing so with that view. It should not be assumed that the Government were entering into a contract which they had no power to make under the Act 42 Vic. c. 31.

He cites *Jones* v. *The Queen* (1).

Gormully, Q.C. for the claimants:—I thought that the words "fee simple" were of such a very ancient and settled meaning that any man who was entitled to get lands in fee simple was never satisfied to get merely the surface rights to the ground. (Cites *Cruise's Digest* (2).) These telegrams between the parties are quite independent of the contract, and the agreement itself is the best evidence of its own meaning. I submit that the words "fee simple" must include all mines and minerals, except gold and silver.

The Crown is the holder of these lands. The fee simple in these lands is in Her Majesty just as much

(1) 7 Can. S. C. R. 570. (2) Vol. 1 p. 55.

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as I am the owner of the fee in my own lands. Now the Crown makes a bargain which cannot be carried out, and am I not entitled to damages for the breach of contract? The claimants come into court having performed all the conditions necessary on their part to entitle them to relief, and ask a proper remedy in damages. Again, the orders in council which were supposed to have been made in 1883, have never been sufficiently published in *The Canada Gazette*, and are therefore, under the statute, not binding on the claimants or any body else.

Abbott, Q.C. followed on same side.

BURBIDGE, J. now (October 31st, 1892) delivered judgment.

The claimants purchased from the Crown certain Dominion Lands, of which the east half of section 12, township 12, range 5 and section 36, township 13, range 7, west of the 4th meridian, formed part. In the letters-patent issued to them of the half-section and the section mentioned was inserted a reservation of all mines and minerals. The claimants allege that they are entitled to letters-patent without any such reservation, and their claim in that behalf has been referred to the court for determination.

The lands described form part of 50,000 acres which, on the 11th February, 1887, the Crown agreed to sell and convey in fee simple to Sir John Lister Kaye for the price and upon the conditions set out in an agreement of that date, and which, under the authority of an order in council made on the 3rd of January, 1889, the Crown, for the price of $1.50 per acre, sold to the claimants as assignees of Kaye.

There is in the agreement and order in council nothing to support the reservation complained of, and

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limiting the question to what appears therein, I have no doubt that the claimants' contention must prevail.

I am unable, however, to go to the full extent of their argument and to hold that the question referred to is concluded by the use of the expression "fee simple" in the agreement. These words indicate that the estate is to be one of inheritance without any condition or limitation that would abridge or defeat the fee. But one may have an estate in fee simple in lands in which the right to take the minerals therein is in another, or is reserved. If, however, the Crown having authority to sell agrees to sell and convey public lands, and the contract is not controlled by some law affecting such lands, and there is no stipulation to the contrary, express or implied, the purchaser is, it seems to me, entitled to a grant conveying such mines and minerals as pass without express words.

But if by the law authorizing the sale thereof, such lands may not be sold without a reservation of the mines and minerals therein, then, I think the purchaser has no good ground of complaint if such reservation is inserted in the grant thereof, although by the terms of the agreement of sale the lands were to be conveyed in fee simple.

In the first place it is said for the Crown in support of the reservation that the sale was made subject to certain orders in council relating to coal lands passed, respectively, on the 26th of December, 1882, the 2nd of March, 1883, the 13th of May, 1884, and the 13th of April, 1886. By the first two of such orders certain lands, including those for which the letters-patent are in question, were declared to be coal districts, and were withdrawn from ordinary sale and settlement. By the third an upset price for coal lands was prescribed, and by the fourth coal districts were opened

to settlement reserving, however, the coal rights therein. There was also an order in council of October 30th, 1887, upon which the Crown does not now rely, though it is set out in the statement in defence. This order authorized the insertion in letters-patent of all lands west of the 3rd meridian of a reservation of all mines and minerals, except in the case of lands which had theretofore been sold and disposed of for valuable consideration.

These orders in council were made under the authority of a clause in *The Dominion Lands Act* (1) by which it was provided that lands containing coal or other minerals should not be subject to the provisions of the Act respecting sale or homestead, but should be disposed of in such manner and on such terms and conditions as might from time to time be fixed by the Governor in Council by regulations to be made in that behalf—which regulations should not go into operation until after they should have been published for four successive weeks in *The Canada Gazette*. It turns out, however, that none of the orders-in-council referred to were published in accordance with the statute. Two were published for three weeks only, and the others were never published. So it happened, I think, that, at the time of the sale to the claimants, the lands in question had not been withdrawn from the operation of the provisions of the Act respecting sale (2), and there was nothing to prevent the Crown selling them without any reservation of the mines or minerals therein.

In the second place, for the Crown, it is contended that the reservation was properly inserted in the letters-patent for the reason that when the agreement of February 11th, 1887, was entered into the Crown and

(1) 43 Vic. c. 26 s. 6; 46 Vic. c. 17 ss. 42 & 81 (2); R. S. C. c. 54 ss. 47 & 91.

(2) 46 Vic. c. 17 s. 24.

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Kaye had in contemplation the sale of agricultural lands to be used for agricultural purposes only, and that, it appears to me, is a fair inference to draw from the following incident:—On the 27th of March, 1887, Kaye sent a message by cable to the Minister of the Interior asking if the Government would include the coal in the sale of the lands, to which the Minister two days later replied that the Government would, with certain reductions mentioned, sell coal lands on the usual terms of ten dollars per acre. Probably Kaye had seen the orders in council respecting coal lands and believed that he was purchasing subject to their provisions. But that does not, it seems to me, dispose of the question in issue between the parties. The orders not having been published cannot be regarded as valid regulations of which all purchasers of Dominion Lands were bound to take notice; and there is nothing to show that the claimants were aware of their existence. Neither had they knowledge of what passed between Kaye and the Minister of the Interior in respect to the purchase of the coal in the lands. When as assignees of Kaye they were accepted by the Government as the purchasers of such lands there was no intimation to them that the sale was made subject to any reservation. There was nothing in the agreement to put them on their guard. On the contrary by its terms they had, I think, a right to conclude that they would acquire all mines and minerals in the lands, excepting gold and silver (1). Then too, it appears to me, that the sale to the claimants of the 50,000 acres at $1.50 per acre, authorized by the order in council of January 3rd, 1889, even if it did not constitute, had in a great measure the character of, a new transaction to which the only parties were the Crown and the claim-

(1) 46 Vic. c. 17 s. 43 ; R. S. C. c. 54 s. 48.

ants, and which could in no way be effected by any view Sir John Lister Kaye may have entertained of the rights he was acquiring under the agreement of February 11th, 1887.

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*Judgment for claimants, with costs.**

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

Solicitors for respondent: *O'Connor, Hogg & Balderson.*

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*REPORTER'S NOTE.—Upon a motion heard on 23rd January, 1893, on behalf of the respondent, to make absolute a rule *nisi* for a new trial or to vary the judgment, the learned Judge said the rule would be dismissed without costs. He was, however, glad of the opportunity afforded him to correct the statement in his reasons for judgment that the order in council of the 26th of December, 1882, was not published in *The Canada Gazette* in accordance with the statute,—the fact being that it was so published three times in English and twice in French, and in this way for four successive weeks; but that there was no evidence that it had been laid before Parliament, as was also required by the statute, and in any case he did not think the question as to whether or not that particular order was in force was in anyway material to the issues raised by the reference in the case.

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THE CORPORATION OF THE CITY OF QUEBEC..... } SUPPLIANTS;

AND

HER MAJESTY THE QUEEN.....RESPONDENT.

Injury to property on a Public Work—Negligence of Crown's officer or servant—50-51 *Vic. c.* 16. *s.* 16 (*c.*)—33 *Vic. c.* 23—*Liability—Remedy.*

The Crown is liable for an injury to property on a public work occasioned by the negligence of its officer or servant acting within the scope of his duty. That liability is recognized in *The Exchequer Court Act*, s. 16 (c), but had its origin in the earlier statute 33 Vic. c. 23.

2. Prior to 1887, when *The Exchequer Court Act* was passed, a petition of right would not lie for damages or loss resulting from such an injury, the subject's remedy being limited to a submission of his claim to the Official Arbitrators, with, in certain cases after 1879, an appeal to the Exchequer Court and thence to the Supreme Court of Canada.

3. It is not the duty of an officer of the Crown to repair or add to a public work at his own expense, nor unless the Crown has placed at his disposal money or credit with instructions to execute the same. He must exercise reasonable care to know of the condition in which the public work under his charge is, and he must report any defect or danger that he discovers. It does not follow from the fact that a public officer does not discover a defect in, or a danger that threatens, a public work under his charge, that he is negligent. To make the Crown liable in such a case it must be shown that he knew of the defect or danger and failed to report it, or that he was negligent in being and remaining in ignorance thereof.

The Sanitary Commissioners of Gibraltar v. *Orfila*, 15 App. Cas. 400 referred to.

The injury complained of by the suppliants was caused by the falling of a part of the rock or cliff below the King's Bastion at the citadel in Quebec, in the year 1889. The falling of the rock was caused or hastened by the discharge, into a crevice of the rock, of water from a defective drain, constructed and allowed to become choked up while the citadel and works of defence were under the control of the Imperial authorities, and before they became the property of the Government of Canada. The existence of this drain

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and of the defect was not known to any officer of the latter Government, and was not discovered until after the accident, when a careful enquiry was made. In the year 1880 an examination of the premises had been made by careful and capable men, one of whom was the city engineer of Quebec, without their discovering its existence or suspecting that there was any discharge of water from it. The surface indications, moreover, were not such as to suggest the existence of a defective drain. The water that came out lost itself in the earth within a distance of four or five feet, and might reasonably have been supposed to be a natural discharge from the cleavages or cracks in the cliff itself.

Held, that there was no negligence on the part of any officer of the Crown in being and remaining ignorant of the existence of this drain and of the defect in it.

Quære, whether the place where the accident happened was part of the public work?

Semble, the Crown may be liable although the injury complained of does not actually occur on, *i.e.* within the limits of, a public work.

MOTION for nonsuit upon the ground that suppliants had failed to make out a *primâ facie* case within the allegations contained in their petition of right (1).

By their petition of right the suppliants alleged as follows:—

1. "That for a number of years past, Your Majesty has been and still is proprietor in possession of the lots of land known by the Nos. 2263, 2304, 2305, 2306, 2307, 2308, 2312, 2313, 2314, 2315, 2316, 2320, 2321, 2322, 2323 and 2327 on the official cadastre for Champlain ward of the said city of Quebec."

2. "That the said lots form a high, steep and rocky cliff extending from the place commonly called "Dufferin Terrace," southward to opposite the citadel, with a short slope at the foot thereof, along a street called Champlain street."

3. "That the said Champlain street has been opened there and used by the public for over a century."

"3*a*. The lots of land herein above mentioned and

(1) NOTE.—This case came before the court at a previous date by way of demurrer. For the report thereof see 2 Ex. C. R. 253.

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described by the cadastral numbers form part of the citadel of Quebec, are used, and have, for a long time previous to the facts herein alleged, been used by Her Majesty as a work of defence and fortifications, and are and were a public work of Canada."

"3*b*. As such works of defence and public works and fortifications, the said lots were and, for a long time previous to the facts herein alleged, have been under the special care and superintendence of certain of Her Majesty's officers, servants and employees, whose duty it was to keep the said lots in a good state of repair, and who were charged with doing all the necessary work and acts to maintain the said lots in such a manner as to render them useful as works of defence without rendering them dangerous to surrounding private property."

"3*c*. In the exercise of their duties and acting within the scope of their authority, Her Majesty's said officers, servants and employees have, within ten years previous to the facts herein alleged, continuously and without interruption, negligently and carelessly done divers other works and acts, and have done carelessly and negligently other works and acts by which the solidity of the cliff or rock was greatly impaired from time to time, and by reason of which finally a portion of the said cliff or rock, as hereinafter alleged, gave way and fell into the said Champlain street."

"3*d*. While so acting in the exercise of their duties and within the scope of their authority, Her Majesty's said officers, servants and employees, who were, as aforesaid, bound to maintain the said cliff, rock, fortifications and public work in a good state of repair and usefulness to the country as a work of defence, and at the same time in a state of safety for the surrounding private property, while they were, as aforesaid, doing acts which greatly, from day to day, impaired the

solidity of the said rock or cliff, negligently omitted to do any acts or take any precautions to guard against slides or the falling of the said rock or cliff or portions thereof unto the surrounding property."

"3*e*. The falling of the said large portions of rock, as hereinafter mentioned, is completely due to the acts, faults, commissions and omissions of Her Majesty's said officers, servants and employees, in the exercise and fulfilment of their duties as such."

4. "That during the last ten years, your Majesty's officers, servants and employees, in the exercise and fulfilment of their duties as such, have negligently and carelessly done and caused to be done, and have done and caused to be done negligently and carelessly to the said cliff certain works which have had the effect of breaking the flank side thereof."

5. "That your Majesty's officers, servants and employees, in the exercise and fulfilment of their duties as such, negligently and carelessly continued the daily firing of guns over the said cliff after it was apparent that such firing contributed to the splitting of the rocky surface of the said cliff."

6. "That during the last ten years, your Majesty's officers, servants and employees have negligently failed to do to the said property the proper and convenient and necessary works to prevent it from becoming dangerous, and also to prevent accidents from the sliding of pieces of rock."

"7. That owing to carelessness, want of precautions and gross negligence of your Majesty's officers, servants and employees in the exercise and fulfilment of their duties as such in doing works which ought not to have been done and in not doing what was necessary to be done to prevent the said property from becoming dangerous, it is now averred that on or about the nineteenth day of the month of September, one thousand

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eight hundred and eighty-nine, a very large portion of rock fell from the flank-side of the said rock or cliff, and breaking into pieces formed an enormous heap which totally blockaded the said Champlain street on a considerable length and rendered almost impossible the communication between the southerly and the northerly portions of the said street."

"8. That the said Champlain street is the only street running between the said cliff and the river St. Lawrence, and that at the place where the accident occurred the space between the said street and the river St. Lawrence is so narrow that there is no interval left between the said street and the wharves on the beach of the said river St. Lawrence."

"9. That since the nineteenth day of September last the said Champlain street has remained obstructed by the said heap of stones and rock."

"10. That the said city of Quebec has in the said street under the said heap of stones its water and drainage pipes, and that in the case of breakage of the said pipes, or of necessity to replace or repair the same, the presence of the said heap of stones would occasion to the city of Quebec expenses amounting to a considerable sum of money."

"11. That to protect the said part of the street and its surroundings against the return of similar accidents in the future, it would be preferable to leave where it is the said heap of stones, and to make round Champlain street to the east of the said heap of stones, and to remove the said water and drainage pipes into the new line of the street."

"12. That immediately after the accident your Majesty's officers, servants and employees were made aware of the state of things aforesaid, and were requested by the said city of Quebec to afford means to meet the emergency."

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"13. That your Majesty's officers, servants, and employees, in the exercise and fulfilment of their duties as such, have neglected and refused to make the works urgently necessitated by the said accident; the said city of Quebec has been obliged to make for the said works certain expenditures for the payment and reimbursement of which it has a right of action against your Majesty."

"14. That to clear near and around the said heap of stones what was necessary to clear at once, in order to prevent other damage, and to make a temporary road, the said city of Quebec has expended a sum of six thousand and five hundred dollars."

"15. That your Majesty's officers, servants and employees have been summoned to remove from the said Champlain street the stones and other stuff fallen from your property, and to put the said street in its former state, but your Majesty's officers, servants and employees have unjustly refused to do so."

"16. That should the said heap of stones be left upon the street, and the said Champlain street run eastward thereof, that would cost about as follows, to wit: To remove and replace the said water and drainage pipes as aforesaid, a sum of five thousand dollars; for the cost of land or right of way for the new part of the said Champlain street, twenty thousand dollars; to make the said street, including the cost of a retaining wall on the river side, eight thousand dollars."

"17. That the said city of Quebec has a right of action against Your Majesty to enforce the removal from the said Champlain street of the said stones, earth and other stuff fallen as aforesaid from the said property of your Majesty upon the said street, and to have it declared by the said court, that, in default of clearing the said Champlain street at the said place and of putting again the said street in the same state and condition as it

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was before the said accident, it shall be the right of the said city of Quebec to cause to be made, at the costs and expenses of your Majesty, the necessary works for that purpose, unless your Majesty should prefer to pay to the said city of Quebec the sum of thirty-three thousand dollars to enable the said city to purchase the land required for the opening of a new portion of Champlain street, and replace therein the said water and drainage pipes, and all other necessary works appertaining thereto."

"18. Your suppliants, therefore, humbly pray that, for the reasons and considerations aforesaid, it may be ordered by this honourable court that the said city of Quebec is entitled to receive and to be paid and reimbursed by your Majesty the sum of six thousand and five hundred dollars expended as aforesaid, and that your Majesty shall, within such time to be specified by the said order, remove and cause to be removed from the said Champlain street, in the said city of Quebec, all stones, earth or other materials or things which have, on or about the nineteenth day of September last (1889), fallen upon the said street from the property of your Majesty as aforesaid, and to put the said street in the same state and condition as it was before the accident aforesaid, and that in default of so doing by your Majesty, it shall be the right of the said city of Quebec to remove all the said obstructions at the costs and expenses of your Majesty; and should your Majesty declare at once your desire to leave all the said obstructions in the said street so as to run the said street eastward of the same, that your Majesty be adjudged to pay to the said city of Quebec the said sum of thirty-three thousand dollars for the causes and reasons aforesaid, the whole with costs."

To the petition the following defence, in substance, was pleaded by the respondent:—

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"2. Her Majesty's Attorney-General admits the truth of the allegations contained in the 2nd and 3rd paragraphs of the amended petition of right."

"3. Her Majesty's Attorney-General denies the truth of all the other paragraphs of the said amended petition of right."

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"4. Her Majesty's Attorney-General denies that the lots of land in the first paragraph of the amended petition are or ever were a public work of Canada, as alleged in paragraph 3*a* of the petition, and further denies that there is or ever was any duty incumbent upon Her Majesty or upon her officers, employees or servants to do any work upon or in respect to the said lots of land for the purpose of keeping them in repair, or for any other purpose, as is alleged and set out in paragraph 3*b* of the amended petition."

"5. In answer to paragraphs 3*c*, 3*d*, 4, 6 and 7 of the amended petition, Her Majesty's Attorney-General says, that any work which may have been done by Her Majesty's officers, employees or servants upon or in respect to the said lots of land was so done and performed with the view to support and strengthen the rock on the said cliff, and did not in any way tend or contribute to loosen the rock or facilitate its fall."

"6. Her Majesty's Attorney-General, in answer to the allegations contained in the fifth paragraph of the amended petition, says that the daily firing of guns from the citadel at Quebec over the said cliff was and is a lawful and proper act on the part of Her Majesty's officers, servants and employees, and that they, in the discharge of their duty, duly and properly fired the said guns without any negligence or carelessness on their part, and Her Majesty's Attorney-General, while denying that the said firing of guns in any way contributed to the splitting of the rocky surface of the cliff as alleged, says that even if the said firing had such effect,

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Her Majesty cannot be rendered liable for the injury to the the suppliants which, it is alleged, happened by reason of the falling of rock from the said cliff."

"7. Her Majesty's Attorney-General for a further defence to the said petition of right says that the slide of rock from the said cliff was a fortuitous event and was the result of the natural position, wear and deterioration of the said rock, and was not the result or effect of any act of commission or omission on the part of Her Majesty's officers, employees or servants in connection with the said lands."

"8. Her Majesty's Attorney-General further says that the suppliants though well aware of the decay and deterioration of the said rock, contrary to their duty in that respect, neglected to take the proper precautions to protect their street and property against any slides or falling of the said rock, in consequence whereof and by reason of their negligence and carelessness, portions of the rock on the said cliff were allowed and permitted to fall and come upon the said Champlain street in the petition mentioned which is the claim and cause of complaint of the suppliants herein."

"9. For a further defence to the said petition of right Her Majesty's Attorney-General says that the injury alleged to have been suffered by the suppliants, and the claim and cause of action set out in the said petition is the blocking up of a portion of Champlain street in the city of Quebec with a large quantity of rock which, it is alleged, fell or slid from the cliff adjacent to the said street, through the negligent acts of the officers, employees and servants of Her Majesty in the performance of their duty or through the negligent omission to perform works and acts which it was their duty to perform; but Her Majesty's Attorney-General alleges that if any action will lie against Her Majesty for damages resulting from the negligence of Her

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officers, servants or employees while acting within the scope of their employment, which is not admitted but denied, it will only lie where the injury to property has happened on a public work, and Her Majesty's Attorney-General says that as the injury complained of by the suppliants in their petition of right happened on the said Champlain street in the city of Quebec, which is not a public work of Canada, no action will lie against Her Majesty therefor, and the same benefit from this objection is claimed by the said Attorney-General as if he he had formally demurred to the said petition of right."

The case was tried at Quebec, on November 2nd, 3rd and 4th, 1892.

Casgrain, Q.C. (A.-G. P.Q.), *Pelletier*, Q.C. and *Flynn*, Q.C. for the suppliants;

Cook, Q.C., *Pentland*, Q.C. and *Hogg*, Q.C. for the respondent.

At the conclusion of the suppliants' evidence, *Hogg*, Q.C. for the respondent moved for a nonsuit:—

It has not been shown that the part of the cliff from which the rock and débris fell is a public work, or part of a public work, and, therefore, the suppliants have not made out a *primâ facie* case. Nor has it been shown that there was any negligence on the part of any of the employees of the Crown. There was no indication on the surface of the existence of a choked drain, alleged to have been the cause of the accident. (Cites *The Sanitary Commissioners of Gibraltar* v. *Orfila*) (1). There is no officer, so far as the evidence shows, who is charged with the duty of superintending this work, and the case is, therefore, without the scope of the provisions of section 16 (c) of 50-51 Vic. c. 16. There is no officer employed by the Crown whose duty it

(1) 15 App. Cas. 400.

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was to discover such defects as might have existed in this drain. Mr. Baillairgé was employed by the Crown for the special purpose of making a report upon the state of the premises (and it will be admitted that no better man could have been engaged for the purpose) and he made a most skilful examination, and his report exonerates the Crown from all imputation of negligence.

Now, as to the position of the suppliants in respect to claiming a remedy under the statute 50-51 Vic. c. 16. The accident happened, it is true, since the passage of the statute, but its cause must be traced to a date prior to the Act, and there is no retroactive effect to be given to such Act. (Cites *The Queen* v. *Martin*) (1).

Cook, Q.C. following:

No case has been made out that would show liability even between subject and subject. No authority can be cited either from the French or English law to show that the owner of a cliff or hill of rock is bound to prop it up to keep it from falling.

Again, it is not a public work where the slide occurred. Looking at the French version of the provisions of section 16 (c) of 50-51 Vic. c. 16, the construction in favour of the Crown is still stronger than in the English version: it must be *sur un ouvrage public.*

There was no employee acting within the scope of his duties or employment, and guilty of negligence therein; there was no special officer whose duty it was to oversee, and who had charge of, these premises. The principle involved in this case is discussed in *Mersey Docks Trustees* v. *Gibbs* (2).

Again, the drain was not visible, nor was its condition at all apparent to the Crown's officers or servants. A charge of negligence cannot be successfully based upon such a state of affairs

(1) 20 Can. S. C. R. p. 240. (2) L.R. 1 H.L. 93.

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Pelletier, Q.C. for the suppliants: It is satisfactorily proved that the *locus in quo* is a public work. It has also been established that the Crown had been notified of the dangerous character of the premises before the occurrence of the slide. It is true that the filling of the crack in the cliff was done in a proper way, but no body ever went down one of the man-holes to see if they were in good or bad order. (Cites *The Queen* v. *Williams*) (1). The witness Baillairgé made his report as an engineer acting at the request of the Crown, not as the city engineer. It is quite possible he never went near the King's Bastion. Had he been there and seen the grating he would have undoubtedly been led to discover the drain and its defective condition. It was his duty to inquire where all the water coming from the trenches was going. It was also his duty to examine the rock outside the citadel. The Crown, however, did not put into effect the suggestions he did make. It would be a natural inference to draw from the fact that the outlet of the drain was not working that the body of the drain had become defective.

Flynn, Q.C. following:

There are two kinds of negligence, one of *omittendo* and the other of *committendo*. If the accident was the result of a *cas fortuit*, then it was a matter of *omittendo*, the ommission to do something that should have been done. This defect in the drain has had the effect of changing the whole nature of things on the property. It is no justification for the Crown to say it was not aware of the defect. (Cites Art. 553 C.C.L.C.) Servitudes are apparent or not apparent. This drain is a servitude not apparent. The law puts on the shoulders of the Crown the responsibility of the accident. (Cites *Sirey: Recueil des lois et arrêts*, 1856) (2). Between adjoining owners, the one holding the land on the

(1) 9 App. Cas. 418. (2) Pp. 470, 471, 472.

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higher level would be responsible for injury arising to his neighbour from something done or happening on his land. It is established by the evidence that a certain branch of the Militia Department has charge of the public military works and fortifications. The statute (1) entrusts the Minister of Militia with the care and management of such premises. It is not necessary that a special officer, under the Minister, be shown to have had charge of this drain. The Government bought this property in 1877 and took it subject to all its appurtenances. There was a drain upon it which was defective, and they are responsible for the damages thereby caused. (Cites *Jones on Negligence of Municipal Corporations*) (2).

The maxim that the "King can do no wrong" has practically no bearing upon this class of cases now. We have no longer a prerogative Government.

It is in the interests of justice that the case be proceeded with.

Hogg, Q. C. in reply: There is no obligation upon the Government to keep an officer constantly employed in superintending this drain. The suppliants have failed to make out a *primâ facie* case upon the evidence produced.

BURBIDGE, J.—I am of opinion that the case has not been made out and that the motion must prevail.

The petition is brought to recover damages for injuries to the suppliants' property caused by a landslide from a portion of the cliff or rock on which the citadel here is constructed.

Now, I think there can be no doubt that the citadel itself is a public work. That depends, of course, upon the construction of a number of statutes. You will

(1) R.S.C. c. 41, secs. 4 & 6. (2) P. 292.

find the definition in *The Public Works Act*, 1867, *The Official Arbitrators' Act*, and in *The Expropriation Act* in *The Revised Statutes*, and also in *The Expropriation Act* of 1889; and there may be other Acts in which it is declared that works of defence and fortification are public works.

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But whether or not the portion of the property where the accident occurred is part of a public work in this sense may be open to some question. I shall, however, assume for the purposes of this case that it is a public work; that the place where the injury occurred is part of the works of defence, and therefore a public work.

As counsel have stated, I have held in the demurrer in this case that for an injury to property on a public work, resulting from the negligence of its officer or servant while acting within the scope of his duty, the Crown is liable. Undoubtedly that liability is recognized in *The Exchequer Court Act*, in section 16, clause (c); but it is not my view, and I do not agree with Mr. Cook, that the liability was created by that statute. Clearly, it was recognized; but it appears to me that it rests upon the earlier statute of 1870, the statute 33 Vic. c. 23, which relates to the Official Arbitrators, and which, for the first time, allowed the submission to them of a claim against the Crown for death or injury happening on any public work.

Mr. Cook is quite right in saying that the word "negligence" first occurs in the statute of 1887; but in my view the words there used limit rather than enlarge the liability of the Crown, if it be not true that they do not do anything more than define a limitation implied in the Act of 1870.

I also agree with Mr. Cook that prior to the passing of *The Exchequer Court Act* there was in such a case no remedy against the Crown by petition of right.

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That is settled by *McLeod's Case* (1) and *McFarlane's Case* (2); but, at the same time, the subject injured had a remedy by a submission of his claim to the Official Arbitrators. It is said that that was a proceeding which the Crown allowed to go on or not as it saw fit, but the same may be said of a reference to this court; and if you will examine the statutes, you will see with respect to this class of cases—and now I am distinguishing them from the case in which the reference was for report only—the cases were submitted for hearing and determination. To hear and determine is all that any court can do. There is also this additional fact, that from 1879 to 1887 there was an appeal from the Official Arbitrators to the Exchequer Court, and from the Exchequer Court to the Supreme Court; and both courts were seized of the case as completely as they could be seized of any other case. And I do not know how proceedings of that kind can be said to differ in any way from proceedings in this court by reference of the claim against the Crown.

For these reasons I do not accept Mr. Cook's view, that the liability of the Crown, in a case such as this, rests upon *The Exchequer Court Act;* and, therefore, I need not follow him through the conclusions which he drew from that proposition.

With reference to the contention that there can be no liability where the injury does not happen on a public work, I have only to repeat what I said during the argument, that the construction seems to me somewhat narrow. It would, I think, exclude cases which come within the meaning of the statute. Take, for instance, the case which was mentioned of the blasting of a rock on a public work, where it happened that through the negligence of an officer some one was injured beyond the actual limit of the public work.

(1) 8 Can. S. C. R. 1. (2) 7 Can. S. C. R. 216.

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Could it be fairly contended that the injured person could not maintain his claim because he was not at the time on the public work?

But without being understood to express a considered opinion upon that question, which, I have no doubt, will be argued fully in the court of appeal, I will dispose of it for the present in the suppliants' favour.

That brings us to the question of negligence; and so far as misfeasance is concerned, I do not think there has been any case made out. The only witness who pretended to say that the works executed for the protection of the cliff were improperly done was Michael Costello. I believe he said that he did his work well, but he thought what was done contributed to the accident rather than prevented it. I do not attach much importance to Costello's opinion, in view of the other evidence that we have of witnesses who were undoubtedly capable of speaking upon the matter; and I am satisfied on that ground that the measures which were taken were neither imprudently undertaken nor negligently carried out. I was not on this point pressed very much by Mr. Pelletier or Mr. Flynn to find that there was any actual misfeasance, and, speaking for myself, I do not think there was any. I think the works undertaken, so far as they went, were works which were proper in themselves and were carried out with reasonable care. As to that, there is another thing to be borne in mind, and that is, that the works which were constructed did not, under the evidence as presented, contribute in any way to the accident.

The accident, so far as the evidence goes, was occasioned or at least hastened by the discharge of the water from the drain which has been so much spoken of.

Now, this drain was built very many years ago, while the property was in charge of the War Depart-

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ment and when the Crown was represented by the Imperial authorities. For anything they did then, the Crown in the right of Canada cannot be held liable. I have no right, sitting in this court, to take into consideration any act done by any officer of the Imperial Government with reference to the work in question. I think, also, the evidence shows that the choking up occurred during the time the War Department was in occupation and before the property came into the possession of the Crown as represented by the Government of Canada, which, in respect of a large portion of the property, occurred in 1877, by virtue of the statute 40 Vic. c. 8, and, in regard to the rest of the property, by the deed from the Honourable John Hearn in 1880.

With reference to the question of non-feasance, I agree with the view which Mr. Hogg and Mr. Cook put forward, that no officer of the Crown is under any duty to repair or to add to a public work at his own expense, nor unless the Crown has placed at his disposal money or credit with instructions to execute the repairs or the addition.

In that sense there is no evidence here of any officer who was charged with any such duty, and being so charged, neglected to perform his duty. The truth of the matter is, with regard to the drain, that no one knew of its existence until after this accident had occurred and minute inquiry was made into its causes. And it seems to me that the suppliants must fail, unless there was some officer or servant of the Crown whose duty it was to know of the existence of this drain, of its choking up, and to report the fact to the Government, and who was negligent in being and remaining in ignorance of the drain and of the defect.

Now, so far as the Minister of Militia was concerned, Mr. Flynn pressed the argument strongly that he had a duty under the statute in respect of works of defence

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and fortifications generally, and consequently in respect to this drain; but it would be unreasonable to expect that the Minister of Militia should himself come upon the ground, in the administration of the affairs of his Department, and cause the drain to be dug up and examined. He would only do this through his officers. Therefore, I do not see any reason to charge him with ignorance of a defect which was never reported to him by any officer who was under him. There is some evidence that the commandant of the citadel had general charge of the property; but I shall refer to that matter later. Apart from this evidence of the general charge of the commandant, there is no evidence, I think, of any person who had any duty in this respect, unless it was Mr. Baillairgé, or Captain Imlah; and they had no duty, except in respect of the examination and report which they were asked to make in 1880.

Assuming that Mr. Baillairgé and Captain Imlah were officers or the servants of the Government in respect of their employment to make their examinations and reports, it is quite clear that they failed to discover the existence of this drain and the defect that was in it. But there is no question raised in this case of the capacity of either of these gentlemen or of their carefulness. I think there is nothing to suggest that any better men could have been sent to do the work. In addition to his employment, Mr. Baillairgé had the interest of a citizen of Quebec and of the city engineer of Quebec; and I cannot conceive that any person could have been sent who would have been more likely to exercise reasonable and proper care, or who was more capable of exercising reasonable and proper care, than Mr. Baillairgé. It is quite clear, I think, that there were at the time no indications on the ground which would lead him to suspect that there was a defective

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drain discharging its waters into the inner crevice and accelerating the accident which unfortunately happened in 1889.

Now, I think the same can be said with regard to Captain Imlah, although we have not so much evidence with regard to his employment and to his duty to make a minute search and inquiry; but I think there is nothing to suggest that either of these gentlemen were careless in making the respective examinations to which I have referred.

I take it, that although there is some evidence of the discharge of water at the place where the drain was broken, discovered subsequently to the happening of the accident, that previous thereto and before special attention had been directed to it, the discharge was not sufficient to suggest to any one that there was a broken drain there. It was said by one of the witnesses that all the water that came out of it lost itself in the earth in four or five feet; and situated, as it was, any one might have believed that the water was a natural discharge from the cleavages or cracks in the rock of the cliff.

For that reason, I think there were no such indications as would make it the duty of either Mr. Baillairgé or Captain Imlah—assuming that they were officers charged with this duty—to make a further investigation and examination of this drain and to open it up and see what its condition was. It does not follow from the mere fact that they did not discover the defect that they were negligent. That is settled by the case of *The Sanitary Commissioners of Gibraltar* v. *Orfila* (1), and in the view which I take of the evidence, I am satisfied that neither of these gentlemen were negligent of their duty in that respect.

(1) 15 App. Cas. 400.

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Then, as to Colonel Montizambert. Take it that as commandant, having general charge of the fortifications and works of defence here in Quebec, he had a duty to know of and report upon any danger that might arise to threaten the stability of the rock at the place where the accident happened, there is no evidence that he neglected or failed in his duty. I think that in order to fix him with such negligence as the Government would have to answer for, it must be shown that he knew of, and failed to report the defect in the drain, or that he was guilty of negligence in not being aware of its existence.

In regard to the first, it has not been suggested that he knew of the defect; and in reference to his ignorance of its existence, I do not think one could expect or exact from him a greater degree of responsibility or care than would be exacted of Mr. Baillairgé or Captain Imlah on the occasions on which it was their duty to make an examination of the premises.

I am led, therefore, to find in this case that Colonel Montizambert has not been guilty of any negligence, which, under the statute, would make the Crown liable.

Now, entertaining these views of what seems to me to be the merits of the case, I have not thought it worth while to allow the case to proceed. I am satisfied that all the questions of law—and there are important questions of law involved in the case other than those I have discussed—will on the appeal which, I assume, will be taken, be fairly raised and presented for determination.

Motion allowed, costs to follow the event.

Solicitors for the suppliants: *Baillairgé & Pelletier.*

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

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Jan. 9.

HENRY BULMER, THE YOUNGER.....CLAIMANT;

AND

HER MAJESTY THE QUEEN.....RESPONDENT.

Crown domain—Disputed Territory—License to cut timber—Implied warranty of title—Breach of contract—Damages.

By the 50th section of *The Dominion Lands Act*, 1883, it is provided that leases of timber berths shall be for a term of one year, and that the lessee shall not be held to have any claim whatsoever to a renewal of his lease unless such renewal is provided for in the order in council authorizing it, or embodied in the conditions of sale or tender. The orders in council in question in this case authorized the issue of leases subject to the terms of the regulations of March 8th, 1883, by which it was provided that under certain conditions (existing in this case) the Minister of the Interior might renew such licenses. From the orders in council and character of the several transactions it appeared to be the intention of the parties that the licenses should be renewable.

Held, that such renewals were provided for within the meaning of the statute.

2. When the Crown agrees to issue a lease or license to cut timber on public lands it agrees to grant a valid lease or license, and a contract for title to such lands is to be implied from such agreement.

3. Not only the word "demise" but the word "let," or any equivalent words which constitute a lease, create, it appears, an implied covenant for quiet enjoyment. *Hart* v. *Windsor* (12 M. & W. 85); *Mostyn* v. *The West Mostyn Coal and Iron Company* (1 C.P.D. 152).

Quære, if this rule is applicable to a Crown lease? *The Queen* v. *Robertson* (6 S.C.R. 52) referred to.

4. To the general rule as to the measure of damages for the breach of a contract there is an exception as well established as the rule itself, namely that upon a contract for the sale and purchase of real estate, if the vendor without fraud is incapable of making a good title, the intending purchaser is not entitled to recover compensation in damages for the loss of his bargain. *Bain* v. *Fothergill* (L. R. 7 H. L. 158); *Flureau* v. *Thornhill* (2 Wm. Bl. 1078), referred to. This exceptional rule is confined to cases of contract for the sale of lands, or an interest therein, and does not apply where the conveyance has been executed and the purchaser has

entered under covenants express or implied for good title or for quiet enjoyment. *Williams* v. *Burrell* (1 C. B. 402); *Lock* v. *Furze* (L. R. 1 C. P. 441), referred to.

5. The authorities are not agreed, but it is probable that this exceptional rule as to the measure of damages for the breach of a contract of sale of real estate does not apply where the vendor is able to make a good title and refuses or wilfully neglects to do so. *Engel* v. *Fitch* (L. R. 3 Q. B. 314); *Robertson* v. *Dumaresq* (2 Moo. P. C. N.S. 84,95), referred to.

6. An agreement to issue and to renew from year to year at the will of the lessee or licensee a lease or license to take exclusive possession of a tract of land and to cut the merchantable timber thereon is an agreement in respect to an interest in land, and not merely a sale of goods.

7. The claimant applied to the Government of Canada for licenses to cut timber on certain timber berths situated in the territory lately in dispute between that Government and the Government of Ontario. The application was granted on the condition that the applicant would pay certain ground-rents and bonuses, and make surveys and build a mill. The claimant knew of the dispute which was at the time open and public. He paid the rents and bonuses, made the surveys, and enlarged a mill he had previously built, which was accepted as equivalent to building a new one. The dispute was determined adversely to the Government of Canada, and consequently they could not carry out their promises.

Held, that the claimant was entitled to recover from the Government the moneys paid to them for ground-rents and bonuses but not the losses incurred in making the surveys, enlarging the mill, and other preparations for carrying on his business.

THIS was a claim for damages for the breach of several agreements,—1st. to issue and renew licenses to cut timber on certain berths situated within territory the title to which was, at the dates of such agreements, in dispute between the province of Ontario and the Dominion of Canada; 2ndly. to give good title to the trees or timber standing thereon; and 3rdly. to hold the claimant in quiet enjoyment of the said berths.

The case came before the court upon a reference by the Minister of the Interior under the provisions of 50-51 Vic. c. 16, s. 23.

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The facts appearing upon the evidence are stated in the judgment.

The case was tried at Ottawa on the 27th and 28th April and the 6th and 7th of May, 1892.

Argument of Counsel.

McCarthy, Q.C. for the claimant:

Before we come to deal with questions of law it may be well to state, shortly, the material facts which ought to be considered. We would have got out 8,000,000 feet in 1884-85, and we would have had the right to cut up to the end of 1885 under our license. Then we make our claim, so far as that goes, in this way: We say, during the first season of 1884-85 we were prohibited from cutting 5,000,000 feet, and in the cutting of what we did we were unable to make any profit, because, having got supplies in there for a much larger quantity, we were merely able to save ourselves from actual loss on such supplies, and, therefore, as we were not able to realize any profit we claim that we are entitled to get a profit on the whole 8,000,000 feet, which, if we had remained undisturbed, we would have cut during that season. So that upon this basis our claim is for 16,000,000 feet. Taking the evidence as a whole, I do not think that there is any question about this,—that the timber upon the berths would average 1,000,000 feet per square mile. The claimant stated that the reports made to him showed that there were 200,000,000 feet on the berths and I suppose that would be a fair maximum for us to claim; but I do not think that there is any evidence here which would reduce the quantity to less than 200,000,000 feet. Then, the facts, which I may shortly state, show this result: There was a mill put up, a portion of which was built before we got the limits and a portion was erected after we got the limits, costing, in the aggregate, $37,737. We procured and supplied boats which were required for working the limits at a cost of $10,125, a wharf at the mill costing

$325, and houses were built at a cost of $2,401. We spent in repairs to the mill $5,000. Then there were improvements on streams which cost $2,200.

Now, then, what are the rights of the licensees? (Here counsel quoted at length from the statute (1), and the regulations of the Governor-General in Council (2), governing the issuing of licenses and the rights of licensees.)

The license purports, on its face, to be granted by the Minister of the Interior under authority vested in him by the Act to which I have referred. It is granted in consideration of the sum of $286, paid as ground-rent. And two other cases include, in addition to that, a bonus. It gives the licensee full right, power and authority to cut all timber on the tract or tracts of land described in the license. So far it is a license to cut, a license not revocable because it is based on a valuable consideration. It, however, goes on to say, "and to take and keep exclusive possession of the said lands." Here it becomes a lease, for it proceeds, "except as hereinafter mentioned for and during the period of one year from the 31st day of December, 1884, to the 31st day of December, 1885, and no longer." Then, it says that the lease or license shall vest in the licensee, subject to the conditions hereinafter mentioned, all rights of property whatsoever in all trees, timber, lumber, and other products of timber, cut within the "berths" during the continuance thereof, whether such trees, timber and lumber or product be cut by authority of the licensee or by any other person with or without his consent; and shall entitle the licensee to seize in replevin, revendication, or otherwise, as his property, such timber where the same is found in the possession of any unauthorized person. So far we have got a document plain enough in its terms. First, it gives a license to cut;

(1) 46 Vic. c. 17 s.s. 50 to 55. (2) See post p. 207

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secondly, it vests in the licensee the tracts of timber land mentioned in the license, and then it declares that such timber as may be cut on that license during its continuance, by the licensee or any other person, shall be vested in him. Then it gives the condition under which the license shall be granted. It stipulates, first, that the licensee shall not have the right thereunder to cut timber of a less diameter than ten inches, except such as may be actually necessary for the construction of roads, &c., to facilitate the taking out of merchantable timber. The second condition provides that the lease or license shall not be allowed to interfere with the settlement of any lands within the berths which may be desirable for settlement; that the unnecessary destruction of growing timber shall be prevented, and after further conditions it winds up by saying, "the licensee shall erect in connection with this berth and have in operation within two years from the 1st of December, 1884, a saw-mill of a capacity to cut in twenty-four hours a thousand feet, board measure, for every two and one-half square miles of the area licensed."

Now, what are the rights of the licensee? Clearly during the term of the license there can be no question as to what his rights are. He is the lessee, during the period mentioned in the lease, of all the land mentioned therein, evidently for the purpose of enabling him to enjoy the license, which was the main object of the grant, and that is made more pointed and definite by the 54th section of the Act to which I referred (1), where, notwithstanding the license, permission is given to the Government to deal with the coal and other minerals found upon the territory, and to permit the entry of those to whom the Government may have disposed of the coal or other minerals, but who must pay for any

(1) 46 Vic. c. 17.

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timber they may use in making roads or in working the mines. It is quite clear, also, that the timber when cut vests in the licensee. What his rights are up to that period, I think your lordship has decided in the *St. Catharines Milling and Lumber Company's case* (1). At this moment, I am unable to distinguish the difference between the right which the licensee would have during the continuance of the license, and the rights arising under the permit granted in the case I have mentioned. The distinction, if there be one, is this: In this case there is the exclusive right and license to cut within the territory mentioned, while in the case of the permit there is merely the right to cut, but not an exclusive right, and the Crown might grant a dozen permits to cut timber on the same territory, and prior holders of permits could not object. On the principle upon which the *St. Catharines Milling and Lumber Company's case* (1) was decided there can be no question at all that for the period for which we had our license, and for the quantity that we might have reasonably cut during that time, we have the right to say that the Crown sold to the claimant, for valuable consideration, the right to cut any timber they pleased upon those limits during the currency of the license. Then we say, the Crown having no title thereto but having implied that it had title, must make good any damage arising by reason of its breach of contract on the part of the Crown. And we say more than that. We say we are entitled to get as damages the profits we would have obtained by the exercise of our rights, if undisturbed. It is plain, according to this instrument and according to the regulations approved by order in council, that it was never contemplated that while we were compelled to erect a mill of the capacity mentioned and to have that mill in operation, the

(1) 2 Ex. C. R. 202.

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license would be terminated at the end of any one year or any given period ; and therefore, we say that the license having been terminated by reason of the fact that the Crown had no title to grant it, we are entitled to get the value of the property and the expenditure made in fulfilment of our part of the contract, less, of course, such values during the period we were allowed to occupy it. Upon that part of the case, subject to what is to be said on the other side, I am unable to distinguish the principle upon which we claim to recover these damages from the rule enunciated by your lordship, therefore I assume that rule will be followed by your lordship in the disposal of this case. We make, however, a much larger claim than that. We claim that this contract on the part of the Crown was to be renewed in perpetuity—that is, the license,—until the timber, the 200,000,000 feet upon the limits, had been cut by us ; and we say that the proper construction to place upon this instrument is that we are entitled not merely to recover the loss sustained by not being allowed to cut the 16 million feet, but the loss we sustained by not being permitted to cut the 200,000,000 feet.

Now, what is the rule for the interpretation of instruments of this sort? I am, no doubt, limited to the instruments that are in writing. The instruments that are in writing are the application for a license, the order in council upon which the survey has to be made, the regulations referred to in the order in council, and thereby embodied in the order in council for this particular contract, and the part performance of that contract by the license which has been issued. Now, I think the true rule is well stated in the language of the Court of Queen's Bench in England, in the case of *Ford* v. *Beech* (1) referred to in *Leake on*

(1) 11 Q.B. p. 66.

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Contracts (1). There is another rule of construction, and that is that the language used by one party, if ambiguous, is to be taken most strongly against the party using it. I apply that to the regulations and to the order in council, but more especially to the regulations. It is claimed that at the utmost the licenses could not run longer than a year; but let us see to what absurd conclusions we shall arrive if the duration of the licenses is to be cut down to a period of a year. They compel us, for instance, to put up a mill. What would be the use of putting up a mill if we were to be bound down to a license of one year. I say it is absolutely plain that the licenses were to be continued. The very fact that they compel us to put up a mill and keep it in operation clearly implies that we were to have a renewal of the licenses. The claimant was required to keep the mill in operation and be prepared to cut, for "at least six months each year of his holding, at least ten thousand feet of lumber daily." Then, we have the express agreement here, that when the licensee has fully complied with all the above conditions, and where no portion of the timber berth is required for settlement or other public purposes, of which the Minister of the Interior is to be the judge, the license may be renewed for another year subject to such revision of the annual rental and royalty to be paid therefor as may be fixed by the Governor in Council. What interpretation is to be given to that word "may?" The Crown did not require to issue regulations and pass an order in council saying that it "may" renew a license. Is there a word in the statute which says to the Crown that the license may be renewed? All that it says is that the license shall not exist for more than one year, and may be renewed according to the terms on which it is granted; but

(1) P. 224.

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where is there any necessity for putting in the regulations a statement that the Minister of the Interior "may" grant a renewal of the license. My contention is that that word "may" must be read as "shall." In no other way can effect be given to the statute. Let me put the rival contentions. On our side we say, so long as we comply with the conditions of the order in council, that we shall be entitled to a license. It is true that the ground-rent and royalties may be increased; we take our chances of that. We say that such is its meaning. On the other hand, we are told that is not its meaning; we are told that the meaning is: You are to put up a mill for two years, to keep the mill running during the holding, and yet you are not to be the holder under this agreement; hat this document only holds good for one year; that the word "may" is permissive, not compulsory, nor obligatory.

Your lordship will have to determine which is the true intention to be gathered from the documents and from the Acts. There is no question at all about it; as a matter of fact, we all know what the true intention is. We know it is based on practice which has existed in both the provinces of Ontario and Quebec for I do not know how many years; and we know that the claimant never went up there and erected a mill and commenced to make these improvements in the belief that he would not get a renewal. We all know about that, but I am free to admit that notwithstanding that fact I would have to satisfy the court that in these documents there is an agreement for renewal. If that word in the regulations read "shall" instead of "may" there would be no question about it. Can it fairly be read as permissive? Let us test it. Put it in any form of contract you please, and see if it will have that meaning. Suppose in an agreement between "A" and

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"B," "A" says in consideration of "B" paying a certain sum of money or performing a certain service, "A" may vest in him a piece of land. "B" pays the money, performs the service, and can it be expected that "A" can turn around and say: "All that I have agreed to is that I might let you have the land?" Now, what has been done here? The Government has required the claimant to make a survey of that limit, costing hundreds of dollars; he has been made to erect a mill costing fifty or sixty thousand dollars; he has been required to enter into a contract to keep the mill in operation during six months of each year and to perform other conditions,—and then the Crown says: "We may or may not grant you a renewal of the license." When we look at the rules to which I have referred, the only reasonable reading of the instrument is that the word must be taken as imperative not permissive. (Cites *Lee* v. *Lee*) (1). The Crown's power to make a contract such as I contend it did is expressed in clause 50 of the Act. (2)

The meaning of the contract is, I think, fairly enough illustrated, as well as the rights which grow from it, by a mining case, and as far as I can see these timber-cases are more like mining cases than anything we have. It is a lease with a right to take timber, and there might be a mining lease with a license to mine, and when you get authority of that kind, you approach pretty nearly to this particular line of contract. (Cites *Carr* v. *Benson* (3); *Hart* v. *Windsor* (4); *Mostyn* v. *The West Mostyn Coal &c. Co.* (5); *Dart on Vendors, etc.*). (6)

There remains but one question, it seems to me, open now for consideration, namely, is there any rule why

(1) 4 Ch. D. p. 175.
(2) 46 Vic. c. 17.
(3) L. R. 3 Ch. 524.
(4) 12 M. & W. 68.
(5) 1 C. P. D. 145.
(6) Vol. 2, p. 893.

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we should not get the full measure of our damages? That is settled, I think, by the case of *Locke* v. *Furze* (1). That is a case in point, and for the reasons which were laid down in that case I submit we are entitled to recover for the whole quantity of timber that was upon the limits,—admitting, of course, that in such a case we would not be entitled to recover for our mill, for the improvements or for expenses of survey, and so forth.

Ferguson, Q.C., following, contended that the claimant was entitled to damages on the basis of what he had expended in consequence of the agreement entered into with the Crown and on the faith of the Crown having the right to give him power to cut upon the limits in question.

Robinson, Q.C., for the respondent: It is difficult to see how this case and that of the *St. Catharines Milling and Lumber Company* (2) are to be assimilated. When the latter case was under discussion, the points in question here were raised in argument before your lordship, but there was practically no decision on them, and the real ground upon which your lordship had disposed of the case was that, assuming it to be a sale of goods, and there were no circumstances to the contrary, there would be an implied warranty of title. Your lordship did not there decide whether it was a sale of goods or of land.

[BURBIDGE, J.—I think I came to the conclusion that it was a sale of goods.]

The whole machinery provided by the Act points to dealing with land and not with goods. *The Dominion Lands Act* never contemplated the Crown dealing with goods. It suggests itself to my mind that as no employee of the Department of the Interior could purchase

(1) L. R. 1 C. P. 441. (2) 2 Ex. C. R. 202.

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any Dominion Lands, that dealing with goods and chattels by the Government was not the intention of the Act. In regard to the case of *Marshall* v. *Green* (1) your lordship, in *The St. Catharines Milling and Lumber Company's case* (2), discussed the point at length and said you did not dissent from it. (Cites *Lavery* v. *Pursell*) (3). In *Marshall* v. *Green* (1) the fact was that the trees were to be removed as soon as possible. That is not the case under a permit or license. In *The St. Catharines Milling and Lumber Company's case* (2) the question arose under a permit, and it is necessary, in order to arrive at a proper understanding of the Government's position, to look at the terms of the permit, then the terms of the license, then the terms of the order-in-council, and see whether this was a disposition of an interest in land. Permits are granted under the authority of the Minister of the Interior by virtue of a general power which he derives under the statute for the regulation of Crown Lands and the disposition of timber.

The conditions in a license are quite different from those in a permit. The permits provide for nothing except what they may grant, and that the holder would be instructed by the Minister as to the quantity to be cut. The reservation of "ground-rent" in a license is employing a term especially applicable to land, and means something issuing out of land. It is well to call attention here to the fact that these regulations which are authorized are not regulations as to renewal, but relate to ground-rents, royalties and other dues. Now, there are three ways in which timber licenses may be granted. In the first place they may be put up at auction; in the next place they may be granted by order-in-council to a single tenderer — where there are no conflicting tenders; and, thirdly

(1) 1 C. P. D. 35.

(2) 2 Ex. C. R. 202.

(3) 39 Ch. D. 508.

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where there are conflicting tenders they may be granted to the highest tenderer. In this case four licenses were granted on individual applications without conflicting tenders; two others were granted upon application; none were obtained by auction, and, therefore, there were no conditions of sale. The inference I draw is that "conditions of sale" apply to those sold by auction. I should not suppose they could apply where there are single tenderers (1). These are the three methods provided by the statute.

Now we come to one of the most important sections, section 50, which I pass for a moment, because that bears on the subsequent question of the right of renewal, and not on the question I am now discussing as to whether this is an interest in land or in goods. (Counsel here refers at length to the sections of the statute quoted by the other side.)

How can there be a renewal on any other notion than that of an interest in land; how can you say that under section 51 of the statute you merely get an interest in goods? All the statutory provisions are designed to give a licensee control over the land, as distinguished merely from the timber that is to be cut. Now, if we turn to the license itself, I may ask what rights does it pretend to give *per se*? The license is even stronger in its terms as distinguishing between an interest in land and an interest in goods. I call your lordship's attention to this fact, that in the statute they speak of leases, while in the licenses they speak of leases or licenses. The license is endorsed "license," and throughout the instrument itself it is said to be a lease or license, and the person getting it is not a lessee but a licensee. Now does a permit give exclusive possession of the land? Does not the permit in other words, but in the barest possible

(1) 46 Vic. c. 17 s. 49.

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manner, say: You may cut a certain amount of timber within the time specified? The statute, moreover, gives a distinct interest in land under a license, and exclusive right of possession to a piece of land. The license says:

"This lease or license shall vest in the licensee, sub-"ject to the conditions hereinafter mentioned, all right "of property whatsoever in all trees, timber, lumber "and other product of timber cut within the berth dur-"ing the continuance thereof, whether such trees, tim-"ber and lumber or products be cut by authority of the "license or by any other person with or without his "consent, and shall entitle the licensee to seize in "replevin, revendication or otherwise as his property "such timber where the same is found in the possession "of any unauthorized person, and also to bring any "action or suit, at law or in equity, against any party "unlawfully in possession of any such timber, or of "any land so leased."

The words of the statute are: "Any party unlawfully in possession of any such timber," while the license says: "Any party unlawfully in possession of any such timber, or of any land so leased." There, I should say, is a clear proof of the transfer of an interest in land.

It is impossible, taking the statute and license together, and assuming that the permit confers only an interest in goods, or is only practically a sale of goods, to conceive that the license which vests in the strongest possible terms a distinct interest in land is a sale of goods and contains by implication a warranty of title. If so, this case is not governed by the *St. Catharines Milling and Lumber Company's case* (1). I do not desire to waste time in discussing the case of *Marshall* v. *Green* (2), because I have no doubt your

(1) 2 Ex. C. R. 202. (2) 1 C. P. D. 35.

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lordship has given every consideration to that case, but my contention is that this is entirely a different case from the *St. Catharines case*. It is to be remarked that just in proportion as my learned friend claims that this is a perpetually renewable lease, which they claim it is, just in proportion does it not become a mere sale of goods? Their contention is that they were given the exclusive right only to strip off the timber. If it took them twenty years to get rid of all the timber on these limits, for assuming that there were two hundred million feet on the limits and that the claimant's estimate of ten million feet annually was the capacity of the mill, it would require twenty years for the mill to get rid of all the timber on the limits, the result of their argument is that they are vested with an exclusive interest in this land for twenty years; and then they say that they are merely purchasers of goods and chattels. That surely shows there is no possibility of founding an argument in this case upon a similarity to the *St. Catharines Milling and Lumber Company's case* (1). If this is for the possession of an interest in land, one thing is certain, that there is no covenant for title. The defect of my learned friend's argument is that one contention destroys the other. If there is an implied covenant for the renewal of the license to the claimant, then it is a sale of goods. If it is a lease of land, as such, under the law of real property, there is no implied warranty. Both positions cannot be sustained; the two arguments are wholly inconsistent. (Cites *Clarke* v. *The Queen*) (2). The question of quiet enjoyment and the question of implied covenant of title is one of comparatively minor importance, for this reason, that if it be a covenant for quiet enjoyment it can only extend during the term of the lease. It seems to have no bearing whatever on the

(1) 2 Ex. C. R. 202. (2) 1 Ex. C.R. 182.

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question of renewal. According to *Woodfall on Landlord and Tenant* (1), a covenant for quiet enjoyment seems to turn on the word "demise," which is not used anywhere in the license.

As to the question of damages, my learned friend seems to think that they can recover the whole value of the mill. That is altogether out of the question. All that they can get from that would be the expenditure that they have been put to by reason of the license. (Cites Strong, J. in *The Queen* v. *Robertson*) (2). The license there conferred the right to take fish on a certain stream for a certain period but contained no covenants.

Dealing with the main question, the right of renewal, it is very important to point out that that right of renewal is expressly prohibited by the statute, except in a certain way, and I do not think sufficient attention is always paid to the binding effect of statutes. There seems to be a general impression that the Crown can do as it pleases, and if the Crown makes a bargain it ought to be subject to a petition of right, whether the statute authorizes it or not. (Cites *Churchward* v. *The Queen*) (3).

The statute prohibits the recognition by any court of any claim for renewal unless such renewal is provided for in the order-in-council authorizing it, or embodied in the conditions of the sale or tender under which it was obtained. There is not in the order-in-council any express provision for right of renewal. If there is any at all it is only raised by implication from the introduction into the order-in-council of the regulations to which it refers. I should have thought that it was a desperate argument to contend there is a right of renewal in the words of the

(1) 14th ed., pp. 695-696. (2) 6 Can. S. C. R. 126.
(3) L. R. 1 Q. B. 210.

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regulations, because what do the regulations say: "The license may be renewed for another year subject to such revision of the annual rent and royalty to be paid therefor as may be fixed by the Governor in Council." How are you going to support a claim, if the Governor in Council does not interfere to fix the rent?

There is no object in providing with the greatest possible care what obligations the Crown shall enter into if you are entitled to go to a court of justice and say they amount to nothing. We know very well the Crown never intended to abide by any such covenants and warranties as are sought to be raised here. It is impossible upon the mere obligation which is imposed upon them to build a mill to found an obligation on the part of the Government to allow them to keep the limits until they had manufactured all the timber on such limits. In considering the measure of damages, your lordship has to bear in mind that the Government never contemplated any such legal obligation. You have these two provisions which, without going into detail, must put an end to any absolute application of the ordinary measure of damages. To my mind, one of the strongest arguments, as showing the whole tenor of the conduct of the Government, is that they never intended to bind themselves up in any legal obligation that would subject them to damages; they said you shall have it for a year and no longer. Cites *Simpson* v. *Grant* (1); *Contois* v. *Bonfield* (2); *Attorney-General* v. *Contois* (3); *McQueen* v. *The Queen* (4); *McIntyre* v. *Belcher* (5); *Addison on Contracts* (6); *Johnston v. Shortreed* (7); *Webber v. Lee* (8).

(1) 5 Grant 272.
(2) 25 U. C. C. P. 39.
(3) 25 Grant 346.
(4) 16 Can. S. C. R. 66.
(5) 14 C. B. N. S. 654.
(6) 9th ed., p. 417.
(7) 12 Ont. 643.
(8) 9 Q. B. D. 315.

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Hogg, Q.C. followed, and argued that if the Crown was liable at all it was only liable to indemnify the claimant for such expenditure as was made in performing the conditions of the license.

McCarthy, Q.C., in reply, cited *Carr* v. *Benson* (1).

BURBIDGE, J. now (January 9th, 1893) delivered judgment.

The case comes before the court upon the reference of a claim made against the Crown, by the claimant, for two hundred thousand dollars, with respect to certain timber limits or berths situated in what was formerly known as the Disputed Territory. Prior to the several applications made by or on behalf of the claimant for licenses to cut timber on certain lands in such territory, to which reference will be made, he had established himself in the lumber business at Rat Portage, in that territory, and had built a mill there for the manufacture of logs which he was cutting under permits issued by authority of the Minister of the Interior. This case has to do with ten applications for such licenses, on which orders-in-council were passed authorizing their issue, in only two out of which was the claimant the applicant. But it is admitted that he is entitled to the benefit of the concessions granted by all such orders-in-council, and no question is raised as to the validity of the several assignments of such concessions. The case is to be dealt with as if the claimant had in each case been the applicant, and all the orders-in-council had been passed in his favour. Neither is any question raised as to his right to hold more than one berth, and the departure in that respect from the regulations of the 8th of March, 1883, to which it will be necessary to refer more than once, is

(1) L. R. 3 Ch. 524.

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to be taken to have had the sanction of His Excellency the Governor-General in Council. It is also admitted that the claimant fulfilled all conditions entitling him to the issue of the licenses and that the lands described in the several orders-in-council were not required for settlement. For convenience of reference I append a brief abstract (1) of the several orders-in-council showing the date of each, the name of the applicant, the number of square miles in each berth, the cases in which yearly licenses were issued and the dates thereof.

The claimant's action, to state it briefly, is for damages: 1st. for the alleged breach of the several agreements, created by the applications and orders-in-council mentioned, to issue or renew the licenses to cut timber on the berths in question; 2ndly. for the alleged breach of the several warranties and agreements for good title to the trees and timber said to be implied from the transactions; and 3rdly. for the alleged breach of covenants for quiet enjoyment to be implied from the language used in the licenses that were issued.

It is not necessary to state all the facts relating to these several transactions. In a general way they are of like character. But taking for example the application of F. T. Bulmer, it will be seen that the order-in-council of 1st November, 1883, after reciting his application for a yearly license to cut timber on a berth of fifty square miles described in the order, gave authority for the issue of such license on the terms and under the conditions provided by the regulations approved by the order-in-council of the 8th of March, 1883, subject to any previous grant or reserve and upon the survey of the berth being made within one year under instructions.

(1) *See* following page.

Date of the Order-in-Council.	Name of the Applicant.	Number of Square Miles surveyed or applied for.	Cases in which Leases or Licenses issued for the year, from 31st Dec., 1883, to 31st Dec., 1884, and dates of issue.	Cases in which Leases or Licenses issued for the year, from 31st Dec., 1884, to 31st Dec., 1885, and dates of issue.	Remarks.
November 1, 1883.	F. T. Bulmer	$36\frac{22}{100}$	July, 28, 1884	June, 22, 1885	Licensee notified by letter dated 14th November, 1883.
do 29, 1883.	H. H. Bailey	$52\frac{55}{100}$	November, 22, 1884.	April, 28, 1885	The date of the order-in-council is that given in the statement of claim and admitted. The order-in-council put in is dated 11th Aug., 1883, and the fact of its having been passed was communicated by letter of 10th Sept., 1883. Apparently this order was not acted on.
December 1, 1883.	H. Bulmer	$57\frac{24}{100}$		June, 23, 1885	
do 21, 1883.	George F. Hartt	$64\frac{1}{100}$		March, 30, 1885	
February 5, 1884.	H. Bulmer	$51\frac{10}{100}$	September, 4, 1884.	June, 20, 1885	In this case and the next there were several applicants from whom tenders were invited. The offer of Bulmer of a bonus of $500 in the one case, and that of Williamson of $13 per square mile in the other, were the only tenders received, and were accepted.
do 5, 1884.	A. C. Williamson	$49\frac{80}{100}$		June, 22, 1885	
October 9, 1884.	A. J. Parsons	50			
do 9, 1884.	A. J. Lefaivre	50			
do 9, 1884.	Joseph McCoy	50			
do 9, 1884.	F. T. Bulmer	$4\frac{50}{100}$			
		$465\frac{32}{100}$			

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The sale of timber upon public lands was at the time regulated by the Act of the Parliament of Canada, 46th Victoria, chapter 17. By the 47th section of that Act it was provided that the Governor in Council might from time to time declare districts of territory to be timber districts, and by the 48th section that the Minister of the Interior might set apart any tract in any timber district, and cause the same to be divided into berths not exceeding in area fifty square miles each, and that leases of the right to cut timber on such berths might be granted under such regulations as might be made by the Governor in Council respecting the ground-rents, royalties or other dues to be paid in connection therewith. By the 49th section it was provided that leases of the right to cut timber on timber berths might, by order of the Governor in Council, be offered at public auction, or that tenders might be invited from one or more applicants or the public, or that authority might be given for the issue of the lease to a sole applicant. In the two cases first mentioned the lease was to go to the person offering the highest cash bonus, and in the latter a bonus might be fixed in the order-in-council. By the 50th section it was enacted that leases of timber berths should be for a term not exceeding one year, and the lessee of the timber berth should not be held to have any claim whatever to a renewal of his lease unless such renewal was provided for in the order-in-council authorizing the lease, or was embodied in the conditions of the sale or tender, as the case might be, under which it was obtained. The rights of the lessee and the terms and conditions of the lease were dealt with in the 51st and 52nd sections. (1). The regulations of the 8th of March, 1883,

(1). 51. The lease shall describe the lands upon which the timber may be cut, and shall, during its continuance, vest in the lessee all rights of property whatsoever in all trees, timber, wood or other

referred to in the order-in-council of 1st November, 1883, and the other orders in question were made in pursuance of, and to give effect to, the provisions of *The Dominion Lands Act*, 1879, on the subject of granting yearly licenses to cut timber on Dominion Lands. (1). That

products of wood, cut within the limits of the leasehold, whether such trees, timber and wood or products be cut by his authority or by any person without his consent; and such lease shall entitle the lessee to seize in replevin, revendication, or otherwise, as his property, such timber where the same is found in the possession of any unauthorized person, and also to bring any action or suit at law or in equity against any party unlawfully in possession of any such timber, and to prosecute all persons cutting timber in trespass upon his lease to conviction and punishment, and to recover damages, if any, and all proceedings pending at the expiration of any such lease may be continued and completed as if the lease had not expired.

52. The lease shall contain, in addition to such other provisions as may be in the order-in-council granting it, or in the conditions of sale or tender under which it was obtained, provisions binding the lessee,—

1. To erect in connection with the berth leased, and to have in operation within a time prescribed in the lease, a saw-mill or mills of capacity to cut in twenty-four hours a thousand feet, board measure, for every two and a half-square miles of the area leased; or to establish such other manufactory of wood goods as may be accepted by the Minister of the Interior as equivalent thereto;

2. To pay in advance, in addition to the bonus, an annual ground-rent of five dollars per square mile, and further, to pay in cash, at each time of his making the return prescribed in sub-clause four of this clause, a royalty of five per cent. on his sales of the products of the berth, as shown by such return;

3. To keep correct books of account of his business, and to submit the same for the inspection of any authorized agent of the Minister of the Interior, whenever required;

4. To make monthly, or at such other interval of time as they may be required of him, by regulations under this Act, or by the Minister of the Interior, returns sworn to by him or by his agent or employee, cognizant of the facts, declaring the quantities taken from the berth, and those sold, of all timber or products of wood, in whatever form the same may be sold or otherwise disposed of by him, during such month or other period, and the amount received by him therefor;

5. To prevent any unnecessary waste of timber in the process of cutting it, and to prevent, when it can be avoided, the destruction of growing trees which have not yet attained a size fitting them to be used for merchantable timber;

6. To exercise strict and constant supervision to prevent the origin and spread of fire.

(1) 42 Vic. c. 31 s. 52 (10).

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Act differed in several respects from the Act of 1883. For instance, by the Act of 1879 it was provided that the right of cutting timber on timber lands should be put up at a bonus per square mile, and should be sold to the highest bidder by competition either by tender or at public auction, (1) that the purchaser should receive a lease granting, subject to certain conditions, the right to cut timber on such limits or land for twenty-one years, (2) and that if the lessee faithfully carried out the prescribed conditions, he should have the refusal of the same limits if not required for settlement for a further term not exceeding twenty-one years, on payment of the same amount of bonus per square mile as was paid originally, and on such lessee agreeing to such conditions and to pay such other rates as might be determined on for a second term. (3).

The provisions of the Act on the subject of granting yearly licenses will be found in the proviso to the 10th sub-clause of the 52nd clause of the Act, whereby it was enacted that the Governor in Council might, on the recommendation of the Minister of the Interior, in special cases where the same was deemed expedient, grant licenses in either surveyed or unsurveyed territory to cut timber for one year, and renewable from year to year in the discretion of the Minister of the Interior, at such ground-rent as the Minister might deem fair and reasonable.

It was to give effect to this provision, apparently, that the regulations of March 8th, 1883, (4), were made.

(1) S. 51.
(2) S. 52.
(3) S. 52, (9).
(4) REGULATIONS governing the granting of yearly licenses to cut timber on Dominion Lands, under the provisions of section 52 of *The Dominion Lands Act*, 1879.

1st. The area of the timber berth to be covered by yearly license shall not exceed fifty square miles, and not more than one berth shall be given to an individual or firm. Any departure from this rule, which special circumstances may render expedient, shall be made only with the sanction of the Governor in Council.

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And if the transactions on which the claimant relies had occurred while the Act of 1879 was in force, the question of his right to a renewal of the licenses issued to him, to which I shall have occasion to refer, would not have presented any serious difficulty.

Coming now to the form and terms of the licenses issued in F. T. Bulmer's case, which has been selected as an illustration, we find that the license for 1885 was issued under the authority of the Act of 1883, while that for the year 1884, through inadvertence, no doubt, purported to be authorized by the repealed Act of 1879. Both licenses were issued in the name of the

2nd. Licenses shall be granted under the following conditions :— (*a.*) The licensee shall pay a ground-rent of five dollars ($5) per square mile. (*b.*) Within a month after the date of the order-in-council granting a timber berth, the party in whose favour it was passed shall pay the rent for the year, in advance, the said rent to bear interest at the rate of six per cent. per annum from that date until the same is paid. (*c.*) The licensee shall pay a royalty of five per cent. on the amount of the sales of all products of the berth. (*d.*) When applications for licenses conflict, berths shall be laid off, and described as the Minister of the Interior may direct, and tenders will be invited for the same. Parties tendering will be required to state the sum or bonus per square mile, which they will pay in addition to the ground-rent and royalty ; and the limit will be awarded to the party offering the highest bonus. (*e.*) The licensee shall have in operation, within a year from a date to be fixed in the license, and keep in operation for at least six months of each year of his holding, a saw-mill capable of cutting daily at least ten thousand feet, board measure, of lumber.

3rd. When a licensee has fully complied with all the above conditions, and where no portion of the timber berth is required for settlement or other public purpose of which the Minister of the Interior is to be the judge, the license may be renewed for another year subject to such revision of the annual rental and royalty to be paid therefor as may be fixed by the Governor in Council.

4th. In unsurveyed territory the party to whom a license shall be promised shall, before the issue of said license and before the said party shall cut any timber, cause to be made at his own expense, under the instructions of the Surveyor-General, a survey of his timber berth by a duly qualified Dominion Lands Surveyor, and the plan and field-notes of such survey shall be deposited on record in the Department of the Interior.

In surveyed territory berths shall consist of Township sections, their legal subdivisions, or fractions thereof.

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Minister of the Interior, for the time being, and under the hand and seal of his deputy; and in other respects they are the same. The instrument is denominated a license to cut timber on Dominion Lands, and the person to whom it is issued is called a licensee. It contains, however, in one of its clauses, a lease of the land on which the timber was to be cut, and in that clause and the one following is described as a lease or license. For convenience I shall in general refer to it as a license.

This license, I refer now to that of 1884, sets out that in consideration of the sum of $181.10 groundrent paid to the Minister for the use of Her Majesty, and in consideration of the royalty thereinafter mentioned, the Minister gives the licensee, his executors and administrators full right, power and license, subject to certain conditions and restrictions, to cut timber on a tract of land therein described and, except as therein mentioned, to take and keep exclusive possession of the said land for and during the period of one year from the 31st day of December, 1883, to the 31st day of December 1884, and no longer. In respect of the exclusive possession of the land given by the lease or license it follows the 7th sub-clause of the 52nd clause of the Act of 1879, and not the 51st section, the corresponding one, of the Act of 1883. The same is true also of the next paragraph of the license, which in addition to giving the licensee the right to seize any timber cut in trespass on the lands therein described, and to bring his action against any person unlawfully in possession of such timber, a provision common to both Acts, gives him in the terms of the Act of 1879 the further right to bring an action against any person unlawfully in possession of such lands, and to prosecute trespassers thereon.

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Then follow the conditions to which the lease or license is subject, to none of which is it necessary to refer more particularly, except perhaps to add that it was provided that the saw-mill to be erected in connection with the berth was to be in operation within two years from the 1st of November, 1884, that the licensee should take from every tree he cut down all the timber fit for use and manufacture the same into sawn lumber or other saleable product, that he should, in addition to the ground-rent, pay a royalty of five per cent. on his monthly accounts of sales, and that the license could not be assigned or transferred without the consent of the Minister.

We have seen that the lands on which the timber was to be cut were situate in the territory formerly in dispute between the province of Ontario and the Dominion of Canada. In 1874 an agreement was come to between the Governments of the Dominion and of the Province whereby, pending the determination of the true boundary, a conventional boundary was adopted, it being provided that patents for lands to the South and East thereof should be issued by the latter, and that the Government of Canada should administer the public lands to the West and North thereof. The lands mentioned in the orders-in-council in question in this case were West of such conventional boundary. In 1879 the province of Ontario withdrew from this provisional arrangement, on the ground that the boundaries had been definitely settled by an award that had been made in the year previous. The Government of Canada refused to accept the award as binding and continued to administer the public lands to the West and North of the conventional boundary that had been agreed upon in 1874. In December, 1883, the boundaries of the province of Manitoba having in the meantime been extended

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easterly to the western boundary of Ontario, the Governments of the two Provinces agreed in submitting a case for the decision of the Judicial Committee of the Privy Council (1). The decision of the Committee was in favour of Ontario. The report was made on the 23rd of July, 1884, and approved by Her Majesty on the 11th of August following. The Government of Canada did not, however, accept this decision as conclusive against its right to deal with the lands within the territory that had been in dispute. Reliance was placed upon what was known as the Indian title and the questions raised in reference thereto were not definitely determined until December, 1888.

On the 6th of October, 1884, the Lieutenant-Governor of Ontario issued a proclamation forbidding all persons to cut timber on Crown Lands within the territory mentioned, and on the 10th of November following the claimant was, by authority of the Commissioner of Crown Lands, served with a notice in writing forbidding him to cut any kind of timber on such lands. At this time the claimant had in the woods a portion of his supplies for the ensuing winter, and he was permitted by the Ontario authorities to use up such supplies in getting out logs. But with that exception he had not, subsequent to such notice and dispossession, any use or benefit of the timber berths mentioned in the orders-in-council and licenses to which reference has been made, or of the large expense he had incurred for surveys, for ground-rents and bonuses, for river improvements, for the enlargement of his saw-mill to comply with the conditions of his contracts, and for other matters incidental to a business such as that which he had proposed to carry on.

Now it is important to ascertain if possible what the obligations of the Crown were, that resulted from the

(1) 47 Vic. (Ont) c. 2 ; 47 Vic. (Man.) c. 2.

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passing of the several orders-in-council to which reference has been made, and the performance by the claimant of the terms and conditions therein mentioned. Was the Crown in the first place bound by its contracts to issue the licenses thereby authorized? Of that I think there can be no doubt. But was the Crown also bound, at the request of the licensee and so long as he complied with the conditions imposed and the land was not required for settlement or other public purpose, to renew the licenses from year to year subject only to a revision of the annual ground-rent and royalty to be paid therefor? So far as the licenses are concerned, they are in express terms limited to one year and no longer, and though they contained covenants and clauses that indicate that they formed part of a larger contract than is expressed upon the face of each, they may, I think, for the purposes of the immediate enquiry be put to one side.

We have seen that by the 50th section of *The Dominion Lands Act*, 1883, it was provided that leases of timber berths should be for a term of one year, and that the lessee should not be held to have any claim whatever to a renewal of his lease unless such renewal was provided for in the order-in-council authorizing it, or embodied in the condition of lease or tender. Was such renewal provided for in the orders-in-council in question? The applications were for yearly licenses not for licenses for a year, and authority was given to grant such licenses, that is yearly licenses. In the two cases in which tenders were called for the tenders are in evidence but not the letters to which they refer; and it does not appear what the conditions were that the tenderers undertook to comply with. The tender in each case was, however, for a timber berth or limit, not for the privilege of cutting timber thereon for the year following, or for any one year. Then the condi-

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tions in respect to the erection and operation of a saw-mill indicate that the agreements were to continue for more than one year. By the regulations of the 8th of March, 1883, on the terms of which the licenses were to issue, such mill was, after the date limited for its construction, to be operated for at least six months of each year of the holding. The 3rd paragraph of such regulations provided that, under circumstances which existed in this case, the license might be renewed for another year subject to such revision of the annual rental and royalty as might be fixed by the Governor in Council. It was objected that the word "may," used in the regulations, left the Minister an option to renew or not; and that, no doubt, was its effect in respect of any transaction that occurred under the Act of 1879. But all the Act of 1883 requires is that the renewal be provided for in the order in council; and where it otherwise appears therefrom, as I think it does in this case, that it was the intention that the license should be renewable, such provision is, it appears to me, made when the Minister is given the necessary authority to grant the renewal. Looking at the terms of the orders-in-council, and of the regulations, and having regard to the character of the transactions in question, it seems to me to be reasonably clear that the renewal of the several licenses was provided for and formed part of the contracts entered into. If that is the case, then without doubt the refusal, in 1886, in the six cases to renew the licenses, and in the other four to issue them, constituted a breach of such contracts and the claimant is entitled to judgment.

As incident to the question of damages, and before discussing the rules by which they are in this case to be ascertained, it is necessary to enquire as to whether or not the Crown, in issuing licenses in the years 1884 and 1885 to that extent discharged its obligations. Did

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the Crown, in agreeing to grant leases or licenses to cut timber on the lands mentioned, impliedly promise that it had a good title to such lands, and agree that it would grant valid leases or licenses?

Unless there is some good reason for distinguishing the Crown's contracts in such a case from a subject's, the question must, I think, be answered in the affirmative. In *Stranks* v. *St. John*, (1) the defendant agreed by an instrument, not under seal, to let to the plaintiff certain lands for a term of seven years, though at the time he had no title to let them. This agreement, though void as a lease under 8 & 9 Vic. c. 106, was held to be valid as an agreement to grant a lease; and that raised the question as to whether such an agreement was merely an agreement to sign a piece of parchment, or whether it bound the lessee to grant a really valid lease, and it was held that it must in such a case be implied that the lease should be a valid lease. Mr. Justice Willes (2) discusses a number of cases supporting that view, and with reference to the opinion expressed by Lawrence, J., in *Gwillim* v. *Stone*, decided in 1811 (3), that the rule of *caveat emptor* applied to purchasers of land, says, that he cannot think that the case was "correctly reported, for it was already "settled law that on the sale of land a covenant "for a good title was implied": and he concludes his reasons for judgment with the general proposition that "a person who agrees to let land agrees to "grant a valid lease, as a person who agrees to sell "land agrees to execute a valid conveyance of it." (4) It is of course an elementary principle that, while in ordinary cases between subject and subject, a grant shall, if the meaning is doubtful, be construed most strongly against the grantor, the King's

(1) L. R. 2 C. P. 376.
(2) L. R. 2 C. P. 379.
(3) 3 Taunt. 433.
(4) L. R. 2 C. P. 380.

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grant shall be construed most favourably for him. But no strained or extravagant construction is to be made in his favour, and if the grant is made for valuable consideration it is to be construed strictly for the grantee. (1) And while, no doubt, great care should be taken (greater, let it be admitted, than in construing agreements made between subject and subject) not to imply any obligation not fairly deducible from the terms and nature of the contracts in question in this case, I can see no good reason for coming to any other conclusion than that when the Crown agreed to issue leases or licenses to cut timber on the lands mentioned, it agreed to grant valid leases or licenses thereof, and that a contract for title to such lands is to be implied from the agreement.

Now, as to damages the general rule is that a person who makes a contract with another and breaks it is bound to pay to such other person, and the latter is entitled to recover from him, such damages as may fairly be considered to have been the natural result of the breach of the contract, or such as may reasonably be supposed to have been contemplated by both parties at the time when they entered into the contract, as the probable result of the breach of it. (2) To this rule, however, there is an exception as well established as the rule itself, that upon a contract for the sale and purchase of real estate, if the vendor without fraud is incapable of making a good title, the proposing purchaser is not entitled to recover compensation in damages for the loss of his bargain. (3)

(1) Chitty Prerog. 391 2-3-4.

(2) *Robinson* v. *Harman* 1 Ex. 850 ; *Hadley* v. *Baxendale* 9 Ex. 341.

(3) *Bain* v. *Fothergill* L. R. 7 H. L. 158, approving *Flureau* v. *Thornhill* (1776) 2 Wm. Bl. 1078 and the cases in which the latter was followed, and overruling *Hopkins* v. *Grazebrook* 6 B. & C. 31. See also *The Rock Portland Cement Co* v. *Wilson* 52 L. J. N. S. Ch. 214 ; *Gas Light and Coke Co.* v. *Towse* L. R. 35 Chan. Div. 519 ; *Rowe* v. *The School Board for London* L. R. 36 Chan. Div. 619.

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In *Bain* v. *Fothergill*, (1) in which the whole question is exhaustively discussed and the law settled, Lord Chelmsford expressed the opinion that the rule laid down in *Flureau* v. *Thornhill* (2) as to the limits within which damages may be recovered upon the breach of a contract for the sale of real estate, must be taken to be without exception; that no damages beyond the expenses incurred can be recovered, except in an action of deceit. If that be the true view of the matter the Crown would never be liable for any damages which a purchaser from it sustained for loss of profits or of his bargain, for in no case would a petition lie against the Crown for deceit, in an action where it is necessary to prove actual fraud. It is difficult, perhaps, to reconcile Lord Chelmsford's statement of the law with the decision in *Robertson* v. *Dumaresq* (3) in which he delivered the judgment of the Judicial Committee of the Privy Council. That case came before the Supreme Court of New South Wales upon a proceeding in the nature of an action brought by the respondent, under the local Act 20 Vic. No. 15, against the Government of the Colony. In this proceeding, which was in substitution for the remedy by petition of right, the appellant, the Secretary for Lands and Public Works, was the nominal defendant representing the Government. The respondent in this action claimed damages for the breach of a promise made, in 1826, by the Governor of the Colony to give him an allotment of Crown lands if he would retire from service in the Royal Staff Corps, in which he was a captain, and would settle in the Colony. In 1831 the land promised him was worth £100 an acre, and in 1858, when the action came in for trial, £8,000 per acre. Under a direction that

(1) L. R. 7 H. L. 158. (2) 2 Wm. Bl. 1078.
(3) 2 Moo: P. C. N. S. 84-95.

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the damages would be the value of the lands at the time of the trial, the jury found for the respondent for £5,000, and the verdict was sustained in the Supreme Court of the Colony and in the Privy Council. On the question of damages their Lordships were of opinion that if the respondent had received his allotment as he ought to have done, he would have had it with the benefit of the increased value which it might have acquired while in his possession. Of this the other party had deprived him by the breach of his promise, and whether he had obtained the benefit himself, or had hindered the respondent from enjoying it, it seemed to be equally just and reasonable that he should pay the full value of the property to the person from whom he had wrongfully withheld it. This case was, however, treated as differing materially from ordinary actions, both in the considerations applicable to the claim, and to the extent that evidence might be adduced in support of it. That is one distinction between it and the case of *Bain* v. *Fothergill* (1) which was decided ten years later. There is, I think, another distinction. *In Dart on Vendors and Purchasers* (2) it is pointed out that the decision in *Bain* v. *Fothergill* (1) applies merely to cases where the vendor is *bonâ fide* unable to give a title, and that it does not conflict with the only point decided in *Engel* v *Fitch*, (3) that a purchaser is entitled to substantial damages from a vendor who, to save himself trouble or moderate expense, or from mere caprice, absolutely refuses or, which is the same thing, wilfully neglects to perform to the best of his ability his part of the contract.

The exceptional rule laid down in *Bain* v. *Fothergill* (4) is also confined to cases of contract for the sale of

(1) L. R. 7 H. L. 158.
(2) Ed. 1888 p. 1082.
(3) L. R. 3 Q. B. 314.
(4) L. R. 7 H. L. 168.

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lands, or an interest therein, and does not apply where the conveyance has been executed and the purchaser has entered into possession under covenants express or implied for good title or for quiet enjoyment. (1) In the *Windsor and Annapolis Railway Company* v. *The Queen* (2) Lord Watson, delivering the judgment of their Lordships the Judicial Committee of the Privy Council, said that they were of opinion that, on the 1st of August, 1877, when the suppliant company was ousted by the act of the Crown, there arose to it a claim of damages for loss of possession during the whole remainder of the term specified in the agreement of 1871, for breach of which the petition was brought. This case is an illustration of one, perhaps of both, of the exceptions to the exceptional rule to which I have referred.

The claimant in this case contends, however, that the subject-matter of his agreements with the Crown was a sale of goods and not of an interest in land, and he relies upon *Marshall* v. *Green* (3) which I followed in *The Saint Catharines Milling and Lumber Company's case* (4). In the latter case, in which certain permits to cut timber were in question, I thought it was clear that the timber was not to pass until severed, and that it was not contemplated that the purchasers were to derive any benefit from its further growth in the soil. They acquired, it was clear, no interest in the land from which it was to be cut (5). Here, however, the facts are very different. The licensee is given, subject to certain exceptions that are not material, the exclusive possession of the lands and the right to bring an action against any person unlawfully in possession thereof and to prosecute all trespassers thereon, and a

(1) *Williams* v. *Burrell* 1 C. B. 402; *Lock* v. *Furze* L. R. 1 C. P. 441; 19 C. B. N. S. 96.

(2) 11 App. Cas. 616.

(3) 1 C. P. D. 35.

(4) 2 Ex. C. R. 229.

(5) *Sinnott* v. *Scoble* 11 Can. S. C. R. 581.

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ground-rent is reserved. Then, if the licenses were renewable from year to year, possibly for twenty years or more, at the request of the licensee, subject only to a revision of the ground-rent and royalty, and that is a necessary part of the claimant's case, how can it be said that the agreements entered into were for the sale of goods and not of an interest in land? But if it were otherwise, it is not clear that the measure of damages would not be the same. Growing trees are very different from ordinary chattels. Every one knows that the vendor's title to them depends upon his title to the lands on which they are growing, and if that fails he cannot convey any interest in such trees. And it may well be that in an action on a contract to sell growing trees, whether they are to be at once removed or not, the measure of damages should, where the breach resulted from the failure of the vendor's title through no fault of his own, be the same as in a contract to sell real estate. I am of opinion that the claimant is not entitled to damages for the loss of his bargain.

Coming now to the expenses that he incurred and for which he seeks in this action to be indemnified, it will be seen that they cover ground-rent and bonuses paid to the Crown, the cost of explorations and surveys, of the enlargement of his saw-mill, and of the construction in connection with the mill, of houses, outbuildings and a wharf, the price of steamboats purchased for use in the business, and moneys expended on river improvements, for repairs to the mill, outbuildings and boats, for insurance and taxes, and for taking care of the property during the years 1886, 1887 and 1888.

With reference to the ground-rent and bonuses paid to the respondent, there can, it seems to me, be no doubt of the claimant's right to succeed. It is not suggested that the money was paid for the Crown's in-

terest, whatever that might happen to be, or that the claimant got what he bargained for. Assuming that both parties contracted in view of the contingency that happened, that the Government's title might fail, as to which I shall have more to say presently, there would still be no ground upon which the Crown could justly or lawfully retain the money that the claimant has paid to them. There might, I suppose, be some question as to whether or not he has had any return for this outlay. In the summer of 1884, he manufactured some lumber which he thinks was cut on one of the limits, but his evidence is not very clear or satisfactory on the point, and I am not sure that he is not mistaken, and that the logs he referred to were not cut under one or other of the permits he had previously held. The earliest of the licenses was issued on the 28th of July, 1884, and the logs sawn in the summer of that year could not well have been cut under its authority, and all that were cut after the 10th of November were cut by permission of the Ontario Government and not under any of the licenses referred to. But any way the amount, if any, involved is too unimportant to justify any further enquiry. The amount paid for ground-rent and bonuses, and for interest thereon, was $5,070.18, for which sum, the plea of the statute of limitations having been withdrawn by the Crown, the claimant is, I think, entitled to judgment.

The other items of the claim stand in a different position and are subject to other considerations to which it will be necessary briefly to refer.

Asked if in 1883, he knew that the territory in respect of which his applications were made was in dispute between the Governments of Ontario and of the Dominion, the claimant answered that he did not. Asked if he had any knowledge of the general question that was being agitated at the time about the boundary

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between Ontario and Manitoba, he said that he knew there was some question, but that, personally, he did not know anything at all about the dispute. I understand the witness to mean that he knew there was a question or dispute, but that he was ignorant of the particulars or merits of it. That may be a somewhat free paraphrase of his evidence, but if he meant more, I should have the greatest difficulty in giving credit to his testimony. It is alleged in the statement in defence that the dispute was a matter of public notoriety. No evidence was tendered in proof of the allegation, but it is supported by recitals and references in Acts of the Parliament of Canada, and of the Legislature of the province of Ontario, of which I must take judicial notice (1). There is also some authority for the view that I should notice judicially such other facts in respect to the dispute as form part of the public history of the Dominion (2), and it is well known that the dispute was in 1883 no new matter. It had occurred within a few years after Rupert's Land was surrendered to the Government of Canada. It had been the subject of negotiation between that Government a d the Government of the province of Ontario, and of an arbitration that had failed because the former refused to be bound by the award. It had been referred to by the Lieutenant-Governor on several occasions in the speeches with which he opened the Legislature of the province, and it had been the subject of at least one Parliamentary enquiry. Now, the witness, who is an intelligent man of affairs, was contemplating carrying on in the territory in dispute a business, for the conduct of which a concession of timber limits cover-

(1) 38 Vic. (Ont.) c. 6 ; 42 Vic. (Ont.) c. 2 ; 43 Vic. (Dom.) c. 36 ; 44 Vic. (Dom.) c. 15 ; 45 Vic. (Dom.) c. 31.

(2) Taylor on Evidence, s. 16, citing *Bank of Augusta* v. *Earle*, 13 Pet. 590 ; and s. 18, citing *Taylor* v. *Barclay*, 2 Sim. 221.

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ing more than four hundred and fifty square miles was not thought excessive. Would not these great interests make him alive to every thing that was being said or done in respect of such territory? And when he admits that he knew there was some question about the boundary between Ontario and Manitoba, is it possible to come to any other conclusion than that he knew that in that dispute was involved the title of the Government of Canada to the lands in question? The concessions were of great value. As to that, there can be no question. Portions of the limits were subsequently sold at auction by the Government of Ontario for bonuses exceeding one thousand dollars per square mile. These were no doubt selected portions, but the evidence of the value of the limits is all one way. The estimate that two hundred million feet of lumber could have been taken from them is probably within, rather than over, the mark. The reason of the Government authorizing the issue of licenses to the claimant for so large a tract of timber lands is no doubt to be found in their desire to aid in establishing mills that would supply Manitoba and the country to the West with lumber. The claimant was no doubt attracted by the great prospective value of the concessions he was hoping to acquire. The transaction involved some risk, and now that the chances have gone against him and his speculation has failed I do not see what good ground of complaint he has, or why the losses he incurred should be shifted from his shoulders to the shoulders of the public. With the knowledge that he had of the dispute he should, if he had wished to throw upon the Government the risk of the outlay he proposed to make, have stipulated for express covenants for title. On the transactions as they stood he would not, it appears, have been entitled to demand

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such covenants (1), but it was open to him to raise the question at any stage of the negotiations and to ascertain if the Crown was willing to warrant its title and to take the risk of loss incident to such warranty.

In the case of *The Gas Light and Coke Company* v *Towse* (2), Mr. Justice Kay, expressing the opinion that the authorities were against the claim for damages made in that case, said :

> If a man enters knowingly into a contract concerning real estate—and for this purpose a contract for a lease is, in my opinion, a contract for real estate—if he enters into it knowing exactly what the title of his vendor is, and that the carrying out of the contract eventually is subject to a possible difficulty, how can he turn round and say, "although I entered into that contract with you knowing of that diffi- "culty, still I hold you liable for damages ?"

The plaintiff's predecessors had in that case, between the date of an agreement for a lease for thirty years with a covenant for renewal for a further term of thirty years and the date of such lease, expended some £2,000 in the erection of a large purifying house mentioned in the lease. The lease was made under a power and when the time for renewal came the rent reserved was not the best rent that could be obtained, and it was held that the plaintiffs were not entitled to specific performance. (3) With reference to the claim for damages the learned judge said :—

> Holding, as I do, that both parties must be taken to have known that this was an infirmity incidental to the nature of the real estate which they were contracting about, and to the title of the lessor and covenantor to deal with that real estate, it seems to me that I am only acting in conformity with that which I understand to be the doctrine as laid down in *Flureau* v. *Thornhill* (4), *Bain* v. *Fothergill* (5), and other cases, in saying that, where the trustee says, " I am

(1) Sugden on Vendors and Purchasers, p. 575.

(2) 35 Ch. D. 543. See also *Ogilvie* v. *Foljambe*, 3 Meriv. 53 ; *Carroll* v. *Keayes*, Ir. R. 8 Eq. 97 ; *Farebrother* v. *Gibson*, 1 DeG. & J. 602 ; *James* v. *Lichfield*, L. R. 9 Eq. 51 ; and *Caballero* v. *Henty*, L. R. 9 Ch. Ap. 447.

(3) 35 Chan. Div., 543.

(4) 2 Wm. Bl. 1078.

(5) L. R. 7 H. L. 158.

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perfectly willing, if I have power, to carry out this contract, and I only fail to do so because of the nature of the subject-matter, it being real estate, and of the infirmity of my title and of my power to carry out the contract," that is a case in which the trustee is not liable for any damages.

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That, I think, aptly illustrates the position of the parties in this case. It may be that neither the Government of Canada nor the claimant anticipated when they entered into their contracts that the title of the former would fail; but there was always that contingency, and of that the claimant must be taken to have been aware, and consequently not entitled to be indemnified by the Crown for the losses he has made.

That makes it unnecessary to discuss the items of such losses in detail. But some of them are obviously so remote, or so far from being within the contemplation of the parties, that they could not be recovered in any view of the case. That remark does not, however, apply to the expenditure for surveys or for the enlargement of the mill. Whatever loss occurred on so much of the outlay under these two heads as was made subsequently to the middle of November, 1883, when the passing of the order-in-council of the first of that month was communicated to the claimant, or probably to the 10th of September of that year, when he had notice of the order of August 11th, would no doubt be recoverable if the view that I have taken of the expenses as a whole is not correct.

There is another question which has to do with the license issued to F. T. Bulmer on July 28th, 1884, and that issued to the claimant on the 4th of September of the same year. The decision of the Privy Council in the Boundary Case was given five days before the first of these licenses issued, but at that time it was not, of course, known what action the Government of Ontario would take. There is evidence that the claimant went into possession under such licenses, and his possession

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was affected by the notice served on him on the 10th of November, 1884. That, however, is not true of the other license issued on the 22nd of November, or of any of the six licenses issued in the year 1885, under none of which was he ever in actual possession. The latter, I infer, were neither issued nor accepted with a view to the cutting of timber on the lands therein described, pending the determination of the question of the Indian title, but for the purpose of keeping alive the claimant's rights to the limits in the event of the controversy being ultimately decided in favour of the Dominion. For that reason I limit to the two leases or licenses first mentioned the contention that from their terms a covenant for quiet enjoyment is to be implied. That contention Mr. McCarthy supported by reference to *Hart* v. *Winsor* (1) and *Mostyn* v. *The West Mostyn Coal and Iron Company* (2). In the former case, which is cited as an authority in the latter, Parke, B. said:

> Considering this case without reference to the modern authorities, which are said to be at variance, it is clear that from the word "demise" in a lease under seal, the law implies a covenant, in a lease not under seal, a contract for title to the estate merely, that is for quiet enjoyment against the lessor and all that come in under him by title, and against others claiming by title paramount during the term; and the word "let" or any equivalent words (3) which constitute a lease have no doubt the same effect but not more (4).

The words used in the licenses in this case are that in consideration of a ground-rent paid and a royalty to be paid, the Minister gives to the licensee full right, power and license to cut timber on a described tract of land, and to take and keep exclusive possession of such land for one year. That undoubtedly created a lease for one year (5) and if the law is as stated in *Hart* v. *Winsor* (6) a covenant for quiet enjoyment should be

(1) 12 M. & W. 85.
(2) L. R. 1 C. P. D. 152.
(3) Shepp. Touch. 272.
(4) Shepp. Touch. 165.
(5) Shepp. Touch. 272.
(6) 12 M. & W. 85.

implied, unless a Crown lease is to be distinguished. In *The Queen* v. *Robertson* (1) a lease of fishing for nine years made between Her Majesty, acting by the Minister of Marine and Fisheries, and the respondent came under consideration. The words used in that lease were:

> Her Majesty hereby leases for the purpose of fly-fishing for salmon unto the said Christian A. Robertson hereto present and accepting for himself, his heirs, executors, administrators and assigns for and during the period hereinafter mentioned and under the conditions hereinbelow stipulated a certain fishing station situated on the South-west Miramichi river in the Province of New Brunswick and described as follows, that is to say: the fluvial or angling division of the South-west Miramichi river from Price's Bend to its source.'

Referring to this lease or license Mr. Justice (now Chief Justice) Strong said:

> The fishery license granted to the respondent contains no covenant for title or warranty on the part of the Crown, and, therefore, upon no principle of law which has been suggested, or that I can discover, could the Crown be made liable to indemnify the respondent in the case of eviction (2).

But assume, for the purpose of argument, that Mr. McCarthy is right and that a covenant for quiet enjoyment is to be implied from the license issued in this case, I fail to see in what way the claimant stands in any better position as to damages for the breach of such covenant than with respect to the expenses incurred for the surveys and the enlargement of the mill. If, however, he were held to be entitled to the value of the unexpired term, what greater use could he have made of it than by the permission of the Government of Ontario he was enabled to do? Had he paid anything for that permission the case might have been different, but there is no evidence that he did, and there is nothing in the case to lead me to suppose that between the 10th of November, 1884, and the 31st day of December following he could have got out more logs

(1) 6 Can. S.C.R. 56. (2) 6 Can. S.C.R. 126.

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than he did. His intention in the autumn of 1884 to send in more men and supplies and to get out some eight million feet of lumber had reference to the operations of the season of 1884-1885, the greater part of which, subsequent to November 10th, would have been carried on under the licenses for the year 1885, under which, as we have seen, he never went into, or intended to go into, possession. Therefore, on this branch of the case I do not see that he could, under the most favourable view of the law that it is possible to take, be entitled to more than nominal damages.

The case as a whole, stated briefly, comes to this: the claimant, who was carrying on a lumber business at Rat Portage, in the Disputed Territory, applied to the Government of Canada for licenses to cut timber on certain public lands in that territory, then in their possession but in dispute between them and the Government of Ontario. The application was granted on the condition that the claimant would survey the limits and build a saw-mill. Nothing was said as to the dispute. That this happened was not more the fault of one party than the other. The dispute was a matter of public or common knowledge, and the Government had no reason to suppose that the claimant was ignorant of it. As a matter of fact, he did know of it, though there may be some question as to how much he knew. In any event, his ignorance would have been without excuse. Under these circumstances, he made his surveys and enlarged his mill, the enlargement being accepted as a performance of the conditions to build; but the Government, because their title to the lands failed, were unable to carry out their promises. That made a hard case for the claimant, no doubt; but, except for the irrelevant consideration that they were better able to bear the loss than he was, it would be equally hard that it should be borne by the

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Government. The equity of the case is, I think, that the loss should fall on the party who made it. If the Government had been able to carry out its agreement and had failed or refused to do so, or if their inability had resulted from any act or fault of their own, the case would have been very different, and, notwithstanding what was said in *Bain* v. *Fothergill* (1), there would not be wanting authority to support a judgment for substantial damages. (2).

There will be judgment for the claimant for $5,070.18 and costs. In a case such as this, a subject would be liable for interest on that amount, and I should be glad to add it if I could, but that I fear is not possible, unless the Crown consents.

Judgment accordingly.

Solicitor for the claimant: *A. Ferguson.*

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

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(1) L. R. 7 H. L. 158.

(2) *Engel* v. *Fitch*, L. R. 3 Q. B. 314; *Robertson* v. *Dumaresq*, 2 Moo. P. C. N. S. 66.

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Jan. 9. JONAS BERGMAN.....PLAINTIFF.

AGAINST

THE SHIP *AURORA*.

Maritime law—Master's lien—Inland waters—R.S.C. cc. 74 and 75—The Colonial Courts of Admiralty Act, 1890—*The Admiralty Act*, 1891—*Construction.*

The master of a vessel registered at the Port of Winnipeg and trading upon Lake Winnipeg had, in the years 1888, 1889 and 1890, no lien upon the vessel for wages earned by him as such master.

2. Even if such a lien were held to exist, there was in the years mentioned no court in the Province of Manitoba in which it could have been enforced; and it could not now be enforced under *The Colonial Courts of Admiralty Act*, 1890, (53-54 Vic. (U. K.) c. 27) or *The Admiralty Act*, 1891, (54-55 Vic. (D.C.) c. 29) because to give those statutes a retroactive effect in such a case as this would be an interference with the rights of the parties.

ACTION to enforce a maritime lien for wages earned by the master of a ship plying on certain inland waters of Canada.

The case was heard at Winnipeg on the 14th and 16th September, 1892.

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

Wade, (with whom was *Wheeler*) for the plaintiff cited: *The Merchant Shipping Act*, 1854 (1); *The Eagle* (2); *Jackson* v. *The Magnolia* (3); *Nelson* v. *Leland* (4); *Reg.* v. *Sharp* (5); *Rajah of Cochin* (6); *The Tug Royal* (7); *The Tug Maytham* (8); *The Colonial Courts of Admiralty Act*, (U. K.) 1890; *The Admiralty Act*, 1891,

(1) Secs. 61, 109, 191, 547.
(2) 8 Wall. 15.
(3) 20 How. 296.
(4) 22 How. 48.
(5) 5 Pr. R. (Ont.) 135.
(6) Swab. 473.
(7) 19 C. L. J. 165.
(8) 18 C. L. J. 287.

(1); 48 Vic. (Man.) c. 15 (2); *The B. N. A. Act* (3); *In re Australian Direct Steam Navigation Company* (4); *The Ironsides* (5); *Reg.* v. *Birwistle* (6); *Endlich on Statutes* (7); *The Alexander Larsen* (8); and 51 Vic. c. 33.

Darby, for the creditors of the insolvent owners, cited *Williams & Bruce's Adm. Prac.* (9); *The Freedom* (10); *The Nellie Schneider* (11).

Mather, for the liquidators, cites *The Feronia* (12); *The Kate Moffat* (13); *Reg.* v. *Taylor* (14); *Scott* v. *Carveth* (15); *The Aura* (16); *Tarring's Law of the Colonies* (17); *re Lake Winnipeg Transportation Co.* (Ltd.) (18); *The Sara* (19); *The Rio Tinto* (20); R.S.C. c. 129, s. 66.

Wade, in reply, cites *re Lake Winnipeg Transportation Co.* (Ltd.) (21); *The Lord Bishop of Natal.* (22); *Brown's Admiralty Practice* (23); *Pritchard's Ad. Dig.* (24); *The Bilbao* (25); *The Louisa* (26); *The W. B. Hall* (27).

BURBIDGE, J. now (January 9th, 1893) delivered judgment.

The plaintiff is seeking to enforce a master's lien for wages which he thinks he has against the steamship *Aurora*, registered at the Port of Winnipeg. The

(1) Sec. 6.
(2) Secs. 6 & 92.
(3) Sec. 146.
(4) L.R. 20 Eq. 325.
(5) 31 L.J. Pr. M. & Ad. 129.
(6) 58 L. J. Mag. C. 158.
(7) P. 286.
(8) 1 Wm. Rob. 295.
(9) P. 304.
(10) 4 L.R. Ad. & Ecc. 495.
(11) L.R. 3 P. D. 155.
(12) 17 L. T. N. S. 621.
(13) 15 C. L. J. 284.
(14) 1 Can. S.C.R. 65.
(15) 20 U.C. Q.B. 430.
(16) Young's A.D. 54.
(17) P. 81.
(18) 2 W.L.T. 155.
(19) 14 App. Cas. 209.
(20) 9 App. Cas. 356.
(21) 3 W.L.T. 108.
(22) 3 Moo. P. C., N.S. 115.
(23) P. 80.
(24) P. 521.
(25) 3 L. T. N. S. 338.
(26) 9 Jur. N.S. 676.
(27) 8 C. L. T. 169.

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Aurora was owned by the Lake Winnipeg Transportation, Lumber and Trading Company, and was, in the years 1888, 1889 and 1890, engaged in carrying passengers and freight between the Town of Selkirk on the Red River in the Province of Manitoba and Bad Throat River on Lake Winnipeg in the said Province, and has also carried freight and passengers to Old Norway House in the District of Keewatin and to the Hudson's Bay Company's post at Grand Rapids in the District of Saskatchewan, in the North West Territories, and has not been employed otherwise or elsewhere. The plaintiff was, during the period of navigation of Lake Winnipeg in the years 1888, 1889 and 1890, employed as master of the *Aurora*, and there is due to him for wages earned, as such master, the sum of five hundred and six dollars and interest. The steamer is subject to a mortgage for six thousand dollars, and the company is being wound up under an order made on the 2nd February, 1891, pursuant to the provisions of *The Winding Up Act* (1) and amendments. There is a large number of unsecured creditors of the company, and the assets are not sufficient to pay them in full. The plaintiff sought in the winding-up proceedings to set up a lien against the ship for his wages, and the learned Chief Justice of the Court of Queen's Bench for the Province of Manitoba, although by no means satisfied that such a lien existed, gave him leave to proceed in this court against the steamer. On the 30th day of April, 1892, he sued out of this court a writ of summons against "the owners and all others interested in the ship or vessel *Aurora* of the Port of Winnipeg, in the Province of Manitoba." The company appeared and they and the plaintiff have filed a statement of facts upon which, and some evidence taken at the hearing, the case has been argued by counsel for the

(1) R.S.C. c. 129.

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plaintiff, for the liquidators of the company and, by direction of the Chief Justice, for the creditors of the company. The mortgagees were not represented, and no warrant has been issued against the steamship, which at the time of the hearing was lying at the Town of Selkirk, on the Red River in the said Province.

The principal question to be determined is as to whether or not the master of a vessel, registered at the Port of Winnipeg, and trading upon Lake Winnipeg, had, in the years 1888, 1889 and 1890, any lien upon the vessel for wages earned by him as such master. It is well settled that apart from statute the master of a British ship has no lien thereon for wages earned on board of the ship. The lien was first given by the Act of the Parliament of the United Kingdom 7-8 Victoria, chapter 112, by the 16th section of which it was provided that all rights, liens, privileges and remedies (save such remedies as were against the master himself) which by that Act or by any law statute custom, or usage, belonged to any seaman or mariner, not being a master-mariner, in respect of the recovery of his wages, should, in the case of the bankruptcy or insolvency of the owner of the ship, also belong and be extended to masters of ships or master-mariners in respect of the recovery of wages due to them from the owner of any ship belonging to any of her Majesty's subjects. The Act 7-8 Victoria, chapter 112, was repealed by 17-18 Vic. c. 120. By the 191st section of *The Merchant Shipping Act*, 1854 (1), passed in the same session as the repealing Act referred to, it was in general terms provided that every master of a ship should, so far as the case permitted, have the same rights, liens and remedies for the recovery of his wages, which by that Act or by any law or custom any sea-

(1) 17-18 Vic. c. 104.

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man, not being a master, had for the recovery of his wages. *The Merchant Shipping Act*, 1854, is divided into several parts, for which different rules of application are prescribed. For instance *Part II*, relating to the ownership, measurement and registry of British ships, applies to the whole of Her Majesty's dominions, while *Part V*, relating to pilotage, applies to the United Kingdom only.

By the 109th section of the Act it is among other things provided that the third part of the Act, in which section 191 occurs, shall, with certain exceptions that are not material, apply 1st. to all sea-going ships registered in the United Kingdom, and 2ndly. to all ships registered in any British possessions and employed in trading or going between any place in the United Kingdom and any place or places not situate in the Possession in which such ships are registered and to the owners, masters and crews of such ships respectively wherever the same may be. It is also provided by the same section that so much of the third part of the Act as relates to wages and remedies for the recovery thereof shall apply to all ships registered in any of Her Majesty's dominions abroad when such ships are out of the jurisdiction of their respective Governments. By *The Admiralty Act*, 1861 (1) the High Court of Admiralty, and by *The Vice-Admiralty Courts Act*, 1863, (2) repealed by 53-54 Vic. c. 27, the courts of Vice-Admiralty were given jurisdiction for claims for a master's wages and for his disbursements on account of the ship. But while these statutes gave jurisdiction they did not create or give maritime liens (3). The law as to a master's lien for

(1) 24 Vic. c. 10 s. 10.

(2) 26 Vic. c. 24 s. 10 (2.)

(3) *The Rio Tinto* (L. R. 9 App. Cas. 356). *The Heinrich Björn* L. R. 10 P. D. 44 and on appeal 11 App. Cas. 270. The *Sara* L. R. 14 App. Cas. 209. See also as to disbursements 52 & 53 Vic. (U.K.) c. 46 s. 1.

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wages is, in Canada, supplemented by the 59th section of *The Seamen's Act* (1) by which it is provided that every master of a ship registered in any of the Provinces of Quebec, Nova Scotia, New Brunswick, Prince Edward Island and British Columbia shall, so far as the case permits, have the same rights, liens and remedies for the recovery of his wages which by that Act or by any law or custom any seaman, not being a master, has for the recovery of his wages. There is no such provision in *The Inland Waters Seamen's Act* (2) by which the shipping of seamen in the inland waters of Canada and the remedies for wages are regulated.

Now, for the plaintiff it was contended that the 91st section of *The Merchant Shipping Act*, 1854, was in force in the Province of Manitoba. It was said that it was so in force by virtue of its own provisions, or failing that, by reason of the Act of the Parliament of Canada, 51 Victoria, chapter 33, by which it is enacted that the laws of England relating to matters within the jurisdiction of the Parliament of Canada, as the same existed on the 15th day of July, 1870, were from the said day and are in force in the Province of Manitoba in so far as the same are applicable to the said province and have not been affected by any Act of the Parliament of the United Kingdom or of Canada. It was also contended that the 191st section of the Act should be read without the limitations to be found in the 109th section, to which reference has been made. And it is obvious that unless the plaintiff can make good both contentions his case fails. For admitting that the provisions of the Act relating to the rights to wages and remedies for the recovery of the same were, in the years 1888, 1889 and 1890, in force in Manitoba, it is clear that the plaintiff's case is not within the statute if the application of the 191st section is to be limited

(1) R. S. C. c. 74. (2) R. S. C. c. 75.

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by the 109th section. The *Aurora* was registered at Winnipeg and was never out of the jurisdiction of its Government. Mr. Wade's contention that the 191st section of the Act is to be given a wider and more general construction than one would at first suppose from reading it with the 109th section is supported by the opinion of Dr. Lushington in the cases of *The Milford* (1), and *The Jonathan Goodhue* (2), that the section extended to the masters of foreign ships and gave them a remedy against ship and freight for their wages. Speaking, in the case of *The Milford* (1), of the contention that the 109th section of the Act restrained the application of section 191 to certain classes of vessels therein named, he said:

> The language there used, however, is affirmative, stating the cases to which the third part of the Act shall extend; there are no negative words which tend to show that the court should not apply section 191 to foreign masters and seamen. As there are no such words is it consistent with justice that the court should hold its hand in all these matters, and say that as to foreign masters it will impose a restriction not found in the statute?

Now I cannot but think that Dr. Lushington made too little of the 109th section of the Act. The master's lien for wages was the creation of the statute. Affirmative words were necessary to create it. Negative words were not necessary to limit its application. It is for the legislature to say in what cases it should exist, and I should have thought that it was consistent with justice for a court enforcing such a lien to hold its hand when it had gone as far as the legislature had seen fit to go. I am speaking now only of the maritime lien, not of the jurisdiction of the courts of Admiralty over claims for master's wages, which is a different matter and exists as we have seen by virtue of other statutes. So far as *The Merchant Shipping Act*, 1854, is concerned I do not find in its provisions any

(1) Swab. 367. (2) Swab. 526.

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warrant for the proposition that the master of a ship registered in the Province of Manitoba and trading on Lake Winnipeg had a lien for his wages earned on such ship.

Assuming, however, that section 191 should be construed without reference to the 109th section of the Act, and that in 1870 the master of any ship had by the law of England a lien on the ship for his wages, was that law introduced into the Province of Manitoba by the Act 51 Victoria, chapter 33? As to that it is lear that the subject of a master's lien for wages is within the legislative authority of the Parliament of Canada, and it must, I think, be conceded that such a law would be applicable to the general circumstances and conditions of the people of that province and to the navigation of Lake Winnipeg and the Red River. In respect to that aspect of the case I have no hesitation in agreeing with Mr. Wade, whose argument is supported by the case of *The Genesee Chief* (1), and other authorities to which he referred. The question is, it seems to me, concluded in this court by the Act of Parliament conferring upon it Admiralty jurisdiction throughout all navigable waters of Canada, whether tidal or non-tidal, or naturally navigable or artificially made so (54-55 Vic. c. 29 s. 4). There were, however, in 1888, two difficulties in the way of applying such a law to Manitoba. In the first place the Parliament of Canada had within a few years dealt with the subject of the shipping of seamen on the inland waters of the Dominion, their engagement and remedies for wages, and had given no lien to the master for his wages, although such a lien existed in respect to vessels registered in the provinces adjacent to the sea (2). And I should hesitate to hold that by the general language of the Act of 1888, 51

(1) 12 How. 443. . . . . (2) R.S.C. cc. 74-75.

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Vic. c. 33, Parliament had intended to make a change in the law of the Province of Manitoba relating to a master's remedies for his wages, which a few years before when dealing with the subject, it had refrained from making.

In the second place, there was at the time no court capable of exercising Admiralty jurisdiction in the Province, and of enforcing a maritime lien against the ship. In that sense the law of the master's lien for wages was not at the time applicable to the Province. To borrow an illustration from the criminal law, there was no reason why incest or adultery should not, in Canada, have been punishable as offences against the law of England applicable thereto except that there were in Canada no courts in which the offender could be punished, the ecclesiastical law of England not being in force in the colonies. (In *re The Lord Bishop of Natal*) (1).

As there were in the colonies no courts to enforce the law against the offences mentioned, the law was held not to be applicable to the colonies, so, I take it, that as in 1888 there was in Manitoba no court having Admiralty jurisdiction, the law of England respecting maritime liens was not applicable to that Province and was not introduced by the Act 51st Vic. chapter 33. For these reasons I am of opinion that the plaintiff had no lien upon the *Aurora* for the wages earned by him as master of that vessel.

I do not understand the plaintiff to desire the judgment of the court against the owners for the amount admitted to be due to him. There is no question as to that, and he has proved his claim in the winding-proceedings.

The object of this suit was to determine the question of his lien against the ship. And the view I have

(1) 3 Moo. P. C. N. S. 115.

taken of that subject makes it unnecessary to discuss the question of the Admiralty jurisdiction of the court, or the limits within which it might be exercised, in respect to a cause of action arising in the Province of Manitoba before the first of July or the second of October, 1891, when *The Colonial Courts of Admiralty Act*, 1890, and *The Admiralty Act*, 1891, respectively, came into force. I may add, however, that in giving a retrospective effect to statutes relating to procedure, which constitute an exception to the general rule that statutes are to be construed prospectively, care must be taken not to interfere with substantial rights; and it is, I think, tolerably certain that to enforce a lien, not enforceable at the time the cause of action arose, would, in such a case as this, be an interference with the rights of parties.

I am also relieved of the necessity of considering whether or not the facts that the *Aurora* is in the possession of the liquidator of the company, and that the mortgagees are not before the court, would have stood in the way of enforcing the master's lien if it had been found to exist. Under all the circumstances of the case I am not inclined to give costs to either party, but that matter, and the question of the plaintiff's right to a judgment against the owners of the vessel for the amount due to him, may, if either party desires it, be reserved.

Judgment accordingly.

Solicitors for plaintiff: *Wade & Wheeler.*

Solicitor for owners: *G. H. West.*

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Feb. 8.

ALEXANDER LUCAS ....SUPPLIANT ;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

Election for the House of Commons—The North-West Territories' Representation Act (R.S.C. c. 7)—Returning officer—Claims for services of subordinate officers—Liability.

A person duly appointed and acting during an election as returning officer under the provisions of *The North-West Territories' Representation Act (R. S. C. c. 7)* cannot recover from the Crown for the services of the several enumerators, deputy returning officers or other persons employed in connection with such election.

PETITION OF RIGHT for the recovery of moneys alleged to be due by the Crown to a returning officer for services and disbursements in connection with an election in the North-West Territories of Canada.

The facts of the case are stated in the judgment.

The case was tried at Calgary, N. W. T., on the 22nd and 23rd of September, 1892.

Lougheed, Q.C. and *McCarter* for suppliant ;

Costigan, Q.C. for respondent.

BURBIDGE, J. now (February 8th, 1893) delivered judgment.

The suppliant, who was the returning officer at the election of a member to serve in the House of Commons of Canada, for the Electoral District of Alberta, held on the 6th of March, 1891, brings his petition to recover from the Crown a balance of $7,195.76 which, he says, is due to him for his services and disbursements in performing his duty as such returning-officer. His claim as rendered amounted to $12,106.56, of which he was allowed by the Auditor-General and paid the sum of $4,910.80. The defence is that he has been paid

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all that he is entitled to. By the 5th paragraph of the statement in defence it was alleged that the amount paid had been determined by an order of His Excellency the Governor-General in Council made under *The North-West Territories' Representation Act* (1) and that the suppliant could not recover anything beyond such amount. But that ground of defence was abandoned at the trial.

The claim consists for the most part of charges for the services of enumerators, deputy returning officers and other persons employed in connection with the election. There are besides some accounts for the hire of horses and for the cost of printing and advertising. For such charges the suppliant, as he was acting for the Crown, is not, it is clear, personally liable (2), except where he has expressly made himself so (3); and that happened but once in this case and then for a small sum only. Neither has he paid the several amounts claimed, although in one or two cases he has made advances in excess of what has been allowed. The objection that arises on this state of facts is one, that in this case, the Government does not wish to take advantage of. When, at the trial, attention was called to it, counsel for the Crown at once agreed that the case should be disposed of as if the suppliant had paid to the several persons interested the amounts which they should be found entitled to. On consideration, however, I have come to the conclusion that it would not be proper to adopt that course however convenient it might be for

(1) R. S. C. c. 7 s. 66.

(2) *Macbeath* v. *Haldimand*, 1 T. R. 172; *Unwin* v. *Wolseley*, 1 T. R. 674; *Myrtle* v. *Beaver*, 1 East. 135; *Hodgson* v. *Dexter*, 1 Cranch, 345; *Gidley* v. *Lord Palmerston*, 3 Br. & B. 275; *Autey* v. *Hutchison*, 17 L. J. N. S. C. P. 304; *Parks* v. *Ross*, 18 Curtis 652; *Twycross* v. *Dreyfus*, L. R. 5, Ch. D. 605; *Summer* v. *Chandler*, 2 P. & B. 175; *Palmer* v. *Hutchison*, 6 App. Cas. 619; *McKay* v. *Moore*, 4 Rus. & G. 326.

(3) *Cunningham* v. *Collier*, 4 Doug. 233; *Gilbert* v. *Porter*, 2 Kerr 390.

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this particular case. There are a good many persons directly interested in the result. Some of them were, it is true, before the court as witnesses and were examined and cross-examined upon their claims; but they are not parties to the action and could not, I think, be made parties thereto. None of them has either a *fiat* or a reference, and their claims are not before the court. Obviously, therefore, I have no right or authority to determine the several amounts to which they are entitled.

With respect to the suppliant's personal services and expenses as returning officer I shall allow him three hundred dollars in addition to what he has been paid, and I think he should have his costs.

I shall place the notes of evidence at the disposal of the Auditor-General if he cares to have them, and as an officer of his department was present at the trial, it is probable that a fair and satisfactory adjustment of the several accounts will be made without further litigation. But, if not, the suppliant may move to increase the judgment in his favour by the amount of the account for which he became personally liable, and of any advances properly made by him.

Judgment for suppliant with costs; leave reserved as above.

Solicitors for suppliant: *Lougheed, McCarthy & McCaul.*

Solicitors for respondent: *O'Connor, Hogg & Balderson.*

ADMIRALTY DISTRICT OF BRITISH COLUMBIA. 1893

Jan. 5.

HER MAJESTY THE QUEEN. .....PLAINTIFF;

AGAINST

THE SHIP *OSCAR AND HATTIE.*

Illicit hunting of seals in Behring's Sea—54-55 Vic. (U.K.) c. 19, sec. 1, sub-sec. 5—Interpretation—Presence of fully-equipped sealer in forbidden waters—Lawful intention—Burden of proof.

By sub-section 5 of section 1 of the Imperial Act, 54-55 Vic. c. 19 (*The Seal Fishery [Behring's Sea] Act*, 1891) it is enacted that "if a "British ship is found within Behring's Sea having on board "thereof fishing or shooting implements or seal skins or bodies "of seals, it shall lie on the owner or master of such ship to prove "that the ship was not used or employed in contravention of this "Act."

Held, that the words "used or employed" are not to be confined to the particular use and employment of the ship on the occasion of her seizure but extend to the whole voyage which she is then prosecuting; and if the ship is found in the condition described in the said sub-section she is liable to forfeiture unless the presumption therein raised can be rebutted by the owner or master.

ACTION *in rem* for the condemnation of a ship for a contravention of *The Seal Fishery (Behring's Sea) Act*, 1891.

The facts of the case are stated in the judgment.

December 29th, 1892.

The case was heard before Sir Matthew B. Begbie, C. J., Local Judge in Admiralty for the district of British Columbia.

Pooley, Q.C. for plaintiff;

Eberts, Q.C. for the ship.

Sir MATTHEW B. BEGBIE, (C.J.) L.J. now (January 5th, 1893) delivered judgment.

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In this case the court is asked to condemn the *Oscar and Hattie* for a contravention of the *Seal Fishery (Behring's Sea) Act*, 1891, chapter 19, section 1, sub-sections 2 and 5. (1).

The schooner *Oscar and Hattie* left Victoria on a sealing voyage, on the 28th January last, and took a new departure from Yakima, in Oregon, on the 18th February. She was seized on Wednesday, the 31st August last (the schooner's, i. e. Victoria time,—disregarding the 180 degree long. limit) in Gotzleb harbour, on the north side of Atu Island, and so, within the prohibited waters; having on board a full equipment of arms and crew and two hundred and seventy-six seal skins, and admittedly in all respects within the express terms of sub-section 5. The sole defence is that the schooner was in that harbour, and in fact in Behring's Sea at all, solely for the purpose of procuring water, for want of which she was quite unable to prosecute her return voyage to Victoria. The defence admits that the schooner had on the 17th June, 1892, been duly warned not to enter Behring's Sea to fish there, and served with a copy of the Act. The Captain being examined on a commission declared that the schooner had entered the prohibited limits the day before the seizure, but only in search of water. That all the seal skins on board had been secured outside those limits, viz.: a little to the southward of

(1) Sub-section (2). While an Order-in-Council under this Act is in force—

(*a*) A person belonging to a British ship shall not kill, or take, or hunt, or attempt to kill or take, any seal within Behring's Sea during the period limited by the Order; and

(*b*) A British ship shall not, nor shall any of the equipment or crew thereof, be used or employed in such killing, taking, hunting or attempt.

Sub-sec. (5) If a British ship is found within Behring's Sea having on board thereof fishing or shooting implements or seal skins or bodies of seals, it shall lie on the owner or master of such ship to prove that the ship was not used or employed in contravention of this Act.

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Copper Island, nearly two hundred miles from Atu, and about one hundred miles (roughly speaking) from the dividing line claimed by the United States, and which bounds the forbidden waters on the west as the chain of the Aleutian Islands bounds them on the south. That, finding seals scarce and the weather bad, and being besides short of water, he being then about forty or fifty miles off the south-east end of Copper Island, determined to abandon further hunting and return to Victoria; but in order to procure water, he bore away for Gotzleb harbour, in Atu Island, which he had known before of, and where he moored on Tuesday evening 30th August at 6.30 o'clock. The next morning he commenced watering his vessel and took fifteen hundred gallons on board that day, when at 5 p. m. he was seized by an officer from the United States ship *Mohican*.

In support of these allegations there were produced Captain Turtle's deposition, the log of the *Oscar and Hattie*, and the evidence of Joseph Brown, a hunter. The evidence of this last witness was almost perfectly immaterial. He probably knew nothing—he certainly said nothing—as to the localities visited by the schooner in the course of the summer. Probably none of the crew, except the master and the mate, could speak with any knowledge of the matter, but only what they had heard from these two; and the mate was not examined.

There seemed to be during the argument some misconception on both sides as to the nature of the charge and the facts which would exonerate the schooner. The prosecution seemed to treat the presence, within the forbidden limits, of a British ship fully equipped for sealing as a substantive offence. That is not so. A perfectly innocent man may be found standing over a

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newly slain corpse with a bloody knife in his hand. That would arouse vehement suspicion, but is not a crime in itself. Again, the defence seemed to suppose that if they showed that the schooner was not actually hunting when seized, but, on the contrary, had a very good and innocent reason for being there at that time, she was bound to be returned to the owners. That assumes, in favour of the ship, the narrower meaning of the words of the Act. For the question then immediately arises, do the words 'used or employed in contravention of the Act' refer to the use or employment on that particular occasion; or do they not rather mean employment generally on the voyage. I think they must have the latter and wider meaning. For otherwise, the master of any ship seized in Behring's Sea, especially if near the land (unless seized in active pursuit of seals), could easily contrive an excuse —none perhaps more easily contrived or established than a scarcity of water—to show that he had, at the time of capture, a lawful intention, or even that he was there through necessity. And in the case of a seizure of a ship actually engaged in hunting, it seems quite improbable that the legislature should enact that merely an inference, liable to rebuttal, is to be drawn from her being seized red-handed. I think the section means that a ship seized with arms, etc., was to be deemed to have offended against the Act, and forfeitable, unless the contrary were shown. The particular purpose on which the ship was actually engaged when seized may have been, and probably would be, occasioned by, or be necessary for, the prosecution of the general purposes of the voyage; of which indeed, it thus becomes a part; and though colourless and indifferent in itself, becomes illegal, just as much as lowering a boat, if performed as a part of the illegal use or employment of the ship. In a word, if

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the schooner was short of water on August 31st., it would be necessary for her to take a fresh supply, whatever she had been doing or was about to do, whether engaged in sealing or on her return to Victoria; and the taking of such supply throws no light whatever upon her plans or purposes or employment. The question, therefore recurs: What is the evidence offered in rebuttal? At the end of the argument I reserved my decision, intimating at the same time that the conduct of the schooner had at the very least been so suspicious as fully to warrant the seizure on the part of the naval officers of both services. I wished also to examine the log and the courses it records for the whole voyage, about which really nothing had been said in argument. And the log produced certainly throws a strong light on the truth of the case. In Captain Turtle's evidence the only statement in exoneration is in ambiguous terms—'I never lowered a boat in Behring's Sea,' is his expression, which he again repeats, and a third time adopts when repeated to him by his counsel, excepting, of course, the boats in Gotzleb harbour on the 31st August. He uses no other expression of denial. I do not wish to attribute to him any desire to deceive the court or his owners, but many of his statements—nearly all of them—are so flatly contradicted by the statements in the log, by Commander Johnson, and even by his own evidence, that all his words are to be carefully weighed; and it is impossible to carry them further than the dry meaning they express. It is evident that he does not, in express terms, contradict the charge that he was in Behring's Sea attempting to hunt seals, and that the schooner was employed for that purpose. All he says is that he himself never lowered a boat there. To understand the accuracy of Captain Turtle's memory, and the credit his statements deserve, we must compare them

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with the log, with his own statements, and with the other evidence in the case. Now, his own statement, made on oath, is that he made up his mind to get water on Friday, the 26th August, when forty or fifty miles south of Copper Island, immediately before bearing away for Atu Island; that he could not make the south side of Atu Island on account of the wind, and that his want of water was the only reason why he was found within Behring's Sea at all. Every one of these statements is contradicted by the entries in the log. On the 26th the log makes no mention of scarcity of water, but states that at noon that day they sighted Copper Island twenty miles off, ran for six hours north-west, which must have taken them pretty well up the coast of Copper Island; and then, *i.e.*, 6 p.m., on August 26, commenced a south-easterly course, on the average, for about sixty hours. Then the log for the first time mentions a shortness not of water only but of fuel also, and that Captain Turtle resolved to find a supply of both (*i.e.*, water and drift wood) "here." This was at noon on the 29th, up to which time their course seems to have been well enough directed for Victoria. The distance run each day, as well as the rate per hour, is entirely omitted from the log; but it seems reasonable that on the 29th August they should be well to the southward and eastward, not of Atu Island merely, but of Aguttou, an island fifteen or twenty miles south of Atu; an appreciable distance on the return to Victoria. Then, according to the log, the master, making for water and fuel, turns his course completely round, viz., westward, in consequence of which manœuvre about 10 p.m. Aguttou Island is stated in the log to be abeam; and they double the west end of Atu Island the following morning, the 30th. So completely does the log contradict the master's statement that he could not make the south side of Atu Island for the wind,

whereas he had just come from the south side. Of course, it may be that there is no convenient watering place either on Aguttou or the south side of Atu; but that is not what the master says was his reason for making Gotzleb harbour. The master's evidence is also contradicted as to the state of the weather in Gotzleb harbour. The log alleges the wind to be strong northerly; cloudy and rainy; the master describes the way as an open roadstead facing due north, but that he was protected against the heavy swell—"rough, stormy, with a heavy sea,"—by a westerly bluff, which could hardly protect him from the north. The log says nothing of this. Commander Johnson's evidence contradicts it; and the state of the weather on this lee-shore did not prevent the schooner taking on board fifteen hundred gallons of water in two or three hours when he once commenced operations. Captain Turtle's evidence (in itself not very probable) says that Commander Johnson, immediately after the capture, admitted that the schooner had only come into Behring's Sea for water. How could the Commander make such a statement? Of what value is it, if made? How could he know where the schooner had been, or what she had been about? And the whole alleged admission is completely contradicted by the Commander himself. Nor does Captain Turtle fail to contradict himself, apparently. He says: 'Gotzleb is the harbour I know;' and again: 'I did not want to go into Tschitschogoff harbour but Gotzleb.' But later on he has forgotten this preference, and says he went into Gotzleb as the only one he could make with safety. By his evidence also on the same page, Captain Turtle appears never to have been in Behring's Sea in his life, except on this unfortunate occasion. How did he know these two harbours so well as to distinguish between their characters? He says he had no

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chart except the general chart of Behring's Sea, on a scale, I suppose, of some forty miles to the inch; and his deposition leads one to suppose that he had no other sources of information; and he had never been on a sealing voyage before. How then did he know? This seems to have struck even himself a little, for when asked why he went into that particular harbour, he says on the same page, after giving a very bad account of the weather: 'It was the only harbour I could make out that I thought it safe to go into.' And this witness is very cautious about his statements, for he for a long time declines to commit himself to the statement that the Aleutian Islands are the southern boundary of Behring's Sea, though he was warned by the United States steamship *Adams*, and furnished with copies of the proclamation, Act of Parliament and order-in-council, — documents which very plainly describe the proscribed boundaries. Clearly none of these statements by Capt. Turtle can be relied on for rebutting the statutory inference which I am commanded to draw from the equipment of the schooner.

Then I was referred to the log, and certainly the entries there show, if they can be relied on, that the *Oscar and Hattie* did not, during the month of August, enter on the forbidden limits, except with an innocent purpose. But upon the log, as produced, there are many remarks to be made. In the first place I apprehend that in these proceedings the statements in the log, like the entries in a merchant's ledger or day-book, may be evidence against the owners but not for them. In the next place on examining the hand-writing, the whole appears to have been written by Peters, the mate, as it professes to be (certainly, I think, by a German); and the last entry states their arrival at Ounalaska on the 5th September. The original log-book ought surely to have been taken into the posses-

sion of the captors when the schooner herself was seized, and carefully retained by them. Then the entries would have been beyond suspicion, and would, perhaps, have contained much information which is now wanting.

I do not quite understand how the log-book has been treated since August 31st. At page 5, the master says it was seized by Ensign Harrison on August 31st.; but it must have been returned immediately, for Peters, the mate continues to make entries up to the arrival, on September 5, at Ounalaska. The master's statement is either untrue or disingenuous in not stating this clearly: if he and Peters had contemplated the construction of a fictitious log, they had most ample opportunity. And the production of a log-book of this character, under the circumstances, merely adds to the suspicious nature of the whole case for the defence. But the curious thing about this log-book is that, although it is called on the title page "Log of the schooner *Oscar and Hattie* on a voyage from Victoria to the North Pacific," a title which is repeated at the head of each page up to the 26th or 27th August, and although we are told that the schooner first left Victoria on the 28th January, and received her present master and sailed from Yakima on the 18th February, the log produced commences on the 30th July at some point off Copper Island. There are six months unaccounted for, and this is the only log-book referred to or mentioned in argument. Under the circumstances it seems very doubtful whether Captain Turtle's statement in his deposition or the mate's in the log as to the transactions in August is the less entitled to credit. But even if one of them be exactly true, I do not see how it proves more than this, that during one month out of the seven, from the 20th January to the 30th August, the schooner did not contravene the Act.

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Neither the log nor Captain Turtle speak of the other six months. There is therefore no rebutting evidence at all except Captain Turtle's wide declaration that except on the 30th August, he never 'lowered a boat' in Behring's Sea. This does not even amount to a point-blank denial that the ship was employed in hunting in contravention of the Act. And for the reasons above given, the case being otherwise full of suspicion—no log-book for June or July, no tender of Peters for examination, no explanation of the direct contradiction between the log and the master's statements in examination—I do not think this sufficient to rebut the statutory presumption, though if these proceedings had been against individuals, a jury might have hesitated *in favorem libertatis* to find them guilty of a misdemeanour. I, therefore, declare for the condemnation of the schooner, tackle and cargo under the Act. Any application respecting the fund in court or other fruits of the capture may be made to me in Chambers. I suppose the successful captors do not apply for the costs. If they do I must award them against the owners.

If I am wrong in my construction of the inference to be drawn under sub-section 5 of section 1 of the Act (1), there is now a cheap and ready appeal court at Ottawa; it is no longer necessary to have recourse to the costly and tardy appeal to the Privy Council.

Judgment accordingly.

Solicitor for plaintiff: *Chas. E. Pooley.*

Solicitor for the ship: *D. M. Eberts.*

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(1) The Seal Fishery (Behring's Sea) Act, 1891.

ISAAC ARCHIBALD.....SUPPLIANT; 1893
AND Jan. 23.
HER MAJESTY THE QUEEN.....RESPONDENT.

*Construction of public work—Interference with public rights—Damage to individual enjoyment thereof—Liability—*50-51 *Vic. c.* 16 *sec.* 16 (c) *—Construction of.*

Where the Crown, by the construction of a public work, has interfered with a right common to the public, a private owner of real property whose lands, or any right or interest therein, have not been injured by such interference, is not entitled to compensation in the Exchequer Court, although it may happen that the injury sustained by him is greater in degree than that sustained by other subjects of the Crown.

2. The injurious affection of property by the construction of a public work will not sustain a claim against the Crown based upon clause (c) of the 16th section of *The Exchequer Court Act* (50-51 Vic. c. 16) which gives the Court jurisdiction in regard to claims arising out of any death or injury to the person or to property on any public work, resulting from the negligence of any officer or servant of the Crown while acting within the scope of his duties or employment.

PETITION OF RIGHT to recover compensation for the injurious affection of property arising from the construction of a public work.

June 9th, 1891.

Pursuant to an order of this date, the facts in issue, having been agreed upon by counsel, were submitted to the court in the form of a special case under the provisions of rule 111 of the Exchequer Court rules. The arguments were also reduced to writing and filed in pursuance of an agreement between counsel.

The following are the facts stated in the special case:—

1. The suppliant is now and has been for the past eight years or more the owner of an estate for years in

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a certain saw-mill site and premises and the buildings thereon erected, situate on Barrachois Brook, District of Boisdale, in the County of Cape Breton, in the Province of Nova Scotia, about one mile above Barrachois Pond, and being part of a lot of land granted to one Donald McNeil, said property being known as the Archibald mill property.

2. That the suppliant purchased said mill site and erected saw-mills thereon largely by reason of the excellent facilities afforded by the Barrachois Pond for rafting and floating suppliant's timber and lumber to convenient places for shipping to market and the lumber to convenient temporary piling-grounds.

3. That in or about the month of October, in the year 1889, the Government of Canada, represented by the Minister of Railways and Canals, his engineers, superintendents, agents, workmen and servants, caused to be erected, in connection with the construction of the Cape Breton Railway, a public work authorized by statute of the Parliament of Canada, a bridge across the said Barrachois Pond about a mile and a-half below the suppliant's said saw-mill and premises, and the said bridge so erected impedes and obstructs the floating of rafts of timber or lumber on said Barrachois Pond and impairs the usefulness of the said Barrachois Pond for the purposes of rafting and floating timber and lumber on said Barrachois Pond. The said Barrachois Pond is an arm of the Bras D'or Lake, which said Bras D'or Lake is a navigable water, but said Barrachois Pond is shut off from the said Bras D'or Lake by a beach and the only connection between the said Barrachois Pond and the said Bras D'or Lake is by a small channel two and a-half feet deep and not of sufficient size for the passage of vessels. The area of said Barrachois Pond is about one-third of a square mile. The tide ebbs and flows in said Barrachois Pond and the water is

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sufficiently deep for small vessels. The said bridge is constructed across the upper portion of said Barrachois Pond at a place seven hundred feet wide and the position of said Barrachois Pond and said mill and bridge and the surroundings is correctly shown on the plan filed herewith marked "A," and the distances as represented on said plan are correct.

4. The suppliant does not own the land situate between the said saw-mill and said Barrachois Pond or any part thereof or the land covered by said Barrachois Pond or any part thereof.

5. The suppliant formerly conveyed his lumber from his said saw-mill on said plan marked "Isaac Archibald's saw-mill" to a shipping place by hauling same from said mill to the head of said Barrachois Pond, marked on said plan "old piling-ground," a distance of one mile and by rafting from said "old piling-ground" to a point on said plan marked "Sandy Beach," a distance of about one and a-quarter miles, and in consequence of the construction of said bridge the suppliant now conveys his lumber from his said mill to a shipping place by hauling from said mill to a point on said plan marked "new piling-ground," a distance of two and one-half miles, or to North Sydney or Grand Narrows, distant, respectively, eighteen miles and twenty miles. And in consequence of the construction of said bridge the suppliant has been hindered and obstructed in rafting his lumber to a shipping place as he formerly did and he has suffered loss and damage, and it is admitted by the Crown that if the suppliant has a right to raft his lumber down said Barrachois Pond that by the construction of said bridge the suppliant's said saw-mill and premises have been injured and decreased in value.

The question for the opinion of the court is whether the Crown is liable for said injury and decrease in

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value of suppliant's said-saw mill and premises and for the said loss and damage.

Code, for the suppliant, contended that the authorities are conclusive on the question as to Barrachois Pond being a public navigable water, and thus, a public highway. (He here cited *Angell on Watercourses* (1); *Coulson & Forbes on Waters*) (2). The suppliant as one of the public had a right of way for his logs and lumber, even if the said pond could not be termed a navigable water, inasmuch as it was capable in its natural state and with its ordinary volume of water of transporting the same. Then, having the undoubted right to use the said pond for such a purpose, he has suffered damage in being obliged to haul his lumber a much greater distance than before the bridge was built, and by reason of the consequent diminution in value of his saw-mill and premises. This is a damage peculiar to himself and such as is contemplated in *Crandall* v. *Mooney* (3); *Iveson* v. *Moore* (4); *Winterbottom* v. *Lord Derby*, (5); and *Hart* v. *Bassett* (6).

The respondent on the facts admitted has been guilty of a breach of duty under the provisions of *The Government Railways Act* (7). Having obstructed the stream, the Crown, under this statute, was under an obligation to restore its former state of usefulness. The bridge could have been so constructed as to obviate the injury to the pond in the manner mentioned. That being so, a case of negligence is established against the servants of the Crown employed in the construction of this bridge, and the liability attaches to the Crown under sub-section (*c*) of section 16 of 50-

(1) 7th ed. p. 691, 697, 702.
(2) P. 58.
(3) 23 L. R. C. P. 212.
(4) 1 Ld. Raym. 486.
(5) L. R. 2 Ex. 316.
(6) Sir T. Jones' Rep. 156.
(7) R.S.C. c. 38 sec. 5 sub.-sec. (h) and sec. 7.

51 Vic. ch 16. (He here cited *The City of Quebec* v. *The Queen* (1); and *Brady* v. *The Queen*) (2).

There has been in this case a physical interference with a public right which the suppliant was entitled to make use of in connection with his property, and which right gave such property an additional market value. (He here cited *The Metropolitan Board of Works* v. *McCarthy*) (3).

Ritchie, for the respondent, argued that no right to float property on rivers except in the way of navigation is given by the law of England, but on the American continent the usefulness of streams for conveying logs has led to legislation giving such rights. This is the case in several of the American States, and also in the Province of Ontario. In Nova Scotia also the subject has been dealt with by the legislature. Section 8 of c. 69 of the *Revised Statutes of Nova Scotia* (4), deals with the subject as follows: "The Municipal Council shall when necessary make regulations respecting the bringing down of logs, timber and lumber on rivers, and the seasons of the year at which the same shall be brought down, and the removal of obstructions thereto." Section 9 of the same statute enacts that "persons may bring logs, timber and lumber down rivers in reference to which such regulations have been made, provided they shall in all respects conform to the regulations and do as little damage as possible to the owners of the soil adjoining." It is submitted that this statute impliedly enacts that rivers cannot be used for the floating of logs and lumber unless regulations have been made by the municipal council, and it does not appear that any such regulations have been made in regard to the Barrachois Pond.

(1) 2 Ex. C.R. 252.
(2) 2 Ex. C.R. 273.
(3) L. R. 7 H.L. 243.
(4) 5th. series.

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The injury to the suppliant is only in respect of a public right and as one of the public. The right is not so connected with his property as to render the Crown liable for injurious affection. (Here he cited *Archibald* v. *The Queen* (1); *Ricket* v. *The Metropolitan Ry. Co.* (2); *The Queen* v. *The Metropolitan Board of Works*) (3).

There is no remedy in such a case as this provided for by sec. 5 (h) of *The Government Railways Act*. The argument for the suppliant on this point goes to show that building the bridge was an unlawful act, and if this is so the Crown would not be liable on a petition of right in this court brought under sec. 16 (c) of 50-51 Vic. c. 16.

It is clear that the injury complained of is not an injury to "property" in respect of which the authorities say compensation should be made, nor does the injury arise from the negligence of any officer or servant of the Crown while acting within the scope of his duty or employment on a public work.

BURBIDGE, J. now (January 23rd, 1893) delivered judgment.

The petition of right in this case is brought to recover compensation for the injurious affection, by the construction of the Cape Breton Railway, of the suppliant's property consisting of a saw-mill site and premises and buildings thereon erected, situate at Barrachois Brook, in the District of Boisdale, and County of Cape Breton.

The case came on for hearing at Sydney, in June, 1891, and it appearing to me at the time that the petition could not be maintained the hearing was deferred until the questions of law were settled upon a

(1) 2 Ex.C.R. 374. (2) L.R. 2 H.L. 175.
(3) L.R. 4 Q. B. 358.

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case to be stated. That case has since been filed, and the matter now comes before the court thereon and upon written arguments submitted by counsel for the suppliant and for the Crown.

Reasons for Judgment.

On the question of injurious affection I see no reason to change the opinion I expressed at the hearing. Assuming that Barrachois Pond was navigable and that the suppliant had a right to use the same for rafting and floating his timber or lumber thereon, the right was common to the public, and the interference therewith of which he complains, though it may have differed in degree did not differ in kind from that to which others of Her Majesty's subjects were exposed. There was no injury to the suppliant's land as such, nor to any right or interest therein. I had occasion to discuss this question in *The Queen* v. *Barry, et al* (1) and to refer to the cases at some length, and to the principles deducible therefrom, and I am satisfied that under the facts of this case the suppliant's claim for compensation for the injurious affection of his property cannot be sustained.

I am also of opinion that he cannot succeed on the other ground now put forward for the first time, that his case falls within clause (c) of the 16th section of *The Exchequer Court Act* (2), which gives the court jurisdiction in respect of claims against the Crown arising out of any injury to property on a public work resulting from the negligence of an officer or servant of the Crown acting within the scope of his duties or employment.

Judgment for the respondent with costs.

Solicitor for suppliant: *G. H. Murray.*

Solicitor for respondent: *J. A. Chisholm.*

(1) 2 Ex. C.R. 354.

(2) 50-51 Vic. c. 16.

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Oct. 6.

TORONTO ADMIRALTY DISTRICT.

JAMES REIDE AND MATTHEW HAYES,

PLAINTIFFS;

AGAINST

THE SHIP *QUEEN OF THE ISLES*.

AND

J. A. CAMPBELL (INTERVENING).....DEFENDANT.

Maritime law—Lien of master for disbursements and wages—Lien for liability assumed by master—The Merchant Shipping Act, 1854 *s.* 191—52-53 *Vic.* (*U.K.*) *c.* 46 *s.* 1.

The master of a ship sought to enforce a claim *in rem* for wages as well as for disbursements and liabilities assumed in respect of necessaries supplied the ship, for which he had made a joint-note with the owner for $250 under an agreement that the note should be paid out of the earnings of the ship. This agreement was made without the consent or knowledge of the mortgagee.

Held, that the master had a maritime lien for his wages as well as for disbursements actually and necessarily made and liability incurred in connection with the proper working and management of the ship, and that the limit of such liability would be to the value of the vessel and freight.

2. That the master did not exceed his authority in borrowing money on the note for the purposes of the ship, it appearing that the sum so borrowed had been duly and properly expended for the ship.

MOTION to confirm a report of the local registrar. The facts of the case are as follows: James Reide, the first named plaintiff, was the master of the vessel the *Queen of The Isles*. The action is brought for a balance of his wages of $295, and for disbursements. The registrar in his report found that the balance of the disbursements for the year 1891 was $16.37, that being the amount which the master had actually disbursed above the receipts of the vessel for that year. The balance of the wages for this season

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he fixes at $295, and the balance of the disbursements above actual receipts for this year, $7.67; and he also reports "that the plaintiff Reide became joint-maker of "a note for two hundred and fifty dollars with in- "terest thereon at ten per cent with one H. S. Scad- "ding, the owner of the said ship; one hun- "dred and twenty-five dollars of the proceeds of the "said note being applied as part payment of wages "due to the plaintiff for the season of 1891, and the "remaining one hundred and twenty-five dollars being "disbursed by the said plaintiff as master of the said "ship."

The owner of the vessel and the master made this note for $250 to raise money for the purposes of the vessel. The proceeds of the $250 were applied, first, $125 towards the wages of the master for the season of 1891, and the balance of it is debited in the cash accounts of receipts for this year. It was shown clearly in the evidence that the proceeds of the $250 note were actually used for the purposes of the vessel.

October 6th, 1892.

Mulvey, for plaintiffs, moves to confirm the report, and for payment out of court: Our claim is based on section 1 of 52-53 Vic. (U.K.) c. 46, amending the 191st section of *The Merchant Shipping Act*, 1854. We say if we have to pay the disbursements we should get the money from the boat; and that we are liable for it, I think, is clearly shown by the evidence, and for that reason we say that we should get it from the proceeds of the vessel. *The Merchant Shipping Act*, 1854, and its amendments, apply to this court, the main statute being in effect re-enacted by the Act establishing this court (1). Under the 191st section of *The Merchant Shipping Act*, 1854, the master has the same

(1) *The Maritime Court Act*, R.S.C. c. 137.

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Argument of Counsel.

liens, rights and remedies to recover his wages as a seaman has, and I say that a master has also a maritime lien on the boat to recover his disbursements under the amending Act.

I would also refer your Honour to the case of the *Sara* (1). This case was reversed in the House of Lords; and that is the reason why the amending Act was passed, and therefore this case is good authority.

The case of the *Sara* (1) was originally decided in 1887, and the case on appeal in 1889, while the statute was passed on the 26th August, 1889. I submit, therefore, that the judgment of the House of Lords in the *Sarah* is authority now on the subject. It was held in the House of Lords that the master had a maritime lien, although he had not paid a liability he had undertaken on behalf of the ship at the time he brought his action, but was liable to pay it if he was sued.

The circumstances were all very much the same as those here.

In the present case there is a joint-note made by the master and owner. The owner has since absconded and the master is liable for the amount, and, therefore, I submit it should be paid as soon as the note itself is deposited in the registry.

I also submit that it nowhere appears in evidence or from the records in this case that Mr. Dennison's client is a mortgagee.

Dennison, for intervening mortgagee: I submit that such an agreement as that set up by the plaintiffs could not be made between the captain and the owner to the prejudice of the mortgagee. The claim of the captain is in respect of $125 wages and a certain amount of disbursements. At the time of the receiving of this money it was cash in the captain's hands; it was not the case

(1) 12 Pr. Div. 158.

of a note having been given, but cash in his hands and he treated it as having been paid the $125.

I submit further, that in a case like this, once a lien is gone it can hardly be revived, and I maintain the lien for wages is lost, when the captain is paid. And further, the note is for $250 and interest at ten per cent., and I submit that no agreement between the owner and the master can raise a liability like that to the prejudice of the other parties.

No necessity is shown for the making of a bottomry-bond or anything of that nature; and I submit, in the absence of any such necessity, this can hardly be taken to be a bottomry-bond. This agreement, I submit, could not be dealt with as a lien upon the boat at all, or at any rate a lien at such a high rate as ten per cent interest.

I also submit, from the stand-point of the mortgagee, that the captain and owner have no right to enter into such a contract, unless necessity is shown, where the interest is to be charged at a higher rate than six per cent, because other creditors would then be practically at the mercy of the owner.

McDOUGALL, L.J.—If you allow the owner to remain in possession the captain is not bound to consider the mortgagee at all, so long as he acts in good faith. He might do anything that would bind the owner in the same manner and to the same extent as if there were no mortgage against the vessel at all. The fact of the mortgage being there does not alter his relation one way or the other. If he could bind the owner, supposing there were no mortgage on the boat, such an act would be equally binding on the owner if she were mortgaged so long as the vessel was in the custody and under the control of the owner.

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My judgment, therefore, is that the master has a maritime lien for his wages and also has a maritime lien, to rank with wages, for disbursements actually and necessarily made and the liability incurred in connection with the proper working and management of the ship, and that the limit of the liability would be restricted only to the value of the vessel and freight.

I also hold that the master did not exceed his authority in borrowing money on the note for the purposes of the ship, it appearing that the sum so borrowed had been duly and properly expended for the ship.

I, therefore, confirm the report of the registrar and decree that the amount found by the said report be paid to the plaintiff Reide on the delivery up of the note referred to, and on filing, in the registry, receipts for the different disbursements shown. Interest to be calculated at ten per cent to the maturity of the note, and six per cent afterwards until the amount is paid.

Judgment accordingly.

TORONTO ADMIRALTY DISTRICT.

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Feb. 2.

JOHN CHARLTON AND THOMAS CHARLTON..... } PLAINTIFFS;

AGAINST

THE *COLORADO* AND THE *BYRON TRERICE*.

Maritime law—Collision—Damages—Admission in pleading—Evidence—Obligation to begin—Cost of survey—Notice—Demurrage.

During the early hours of the morning of August 12th, 1891, a collision occurred between the plaintiffs' vessel lying moored to a dock in Windsor, Ont., and a barge in tow of a tug. The defendants in their pleadings admitted the collision, but claimed that the plaintiffs' vessel was in fault, since there was no light on board and no stern-line out, in consequence of which latter neglect she swung out into the stream as the tug and its tow were passing at a reasonable distance away from her, and that the collision was occasioned thereby.

1. Upon the question as to whom should begin,—

Held, that the defendants having admitted that their vessels were moving and the plaintiffs' vessel was at rest, and that a collision had occurred, they must begin on the question of liability for the accident, with a right to reply on the question of the amount of damage, if it were necessary to go into that question.

Held, also, that it was necessary for the defendants to establish such negligence against the plaintiffs as would contribute to the accident, and that as it was about daylight at the time of its occurrence and the plaintiffs' vessel was admittedly seen by the tug when more than one hundred feet distant, the tow being at that time three hundred feet behind the tug, and further, since the evidence showed that the plaintiffs' vessel was properly and securely moored to the dock, the absence of light did not constitute such negligence on the part of the plaintiffs as contributed to the accident. They were, therefore, entitled to recover for the damage arising from the negligent navigation of the tug and her tow, to the amount of the actual cost of the repairs and also the cost of towage to the ship-yard.

2. A survey of the damage done to their vessel was made at the plaintiffs' instance. Notice of intention to have a survey made was only given to one of the defendants, and that by mailing a letter

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to his address on the day before the survey was made. Notice of the result of the survey was given to the defendants.

Held, that the cost of the survey was not chargeable to the defendants, because reasonable notice was not given to enable them to be present or to be represented thereat.

Held, also, that demurrage should not be allowed, inasmuch as the vessel was lying idle at the time of the collision, and that as soon as the plaintiffs obtained a commission for her the vessel went to work, although repairs were not then completed,—no loss of earnings occurring by reason of the accident.

ACTION for damages arising out of a collision.

The collision occurred in the early morning of the 12th August, 1891, between the plaintiffs' vessel, the *Starling*, while moored to a dock at Windsor, Ont., and the barge *Colorado*, in tow of the tug *Byron Trerice*. The defendants admitted in their pleadings that a collision did occur with the plaintiffs' vessel, the *Starling*, which was moored to the dock, at day-break on a clear morning in August; but claimed that the plaintiffs' vessel was in fault because there was no light on board of the latter, and they also alleged that there was no stern-line out, in consequence of which last mentioned neglect her stern swung out into the stream as the tug and tow were passing at a reasonable distance away from the *Starling*, and that the collision was occasioned by such swinging out of the *Starling* into the stream.

February 2nd, 1893.

The case was tried before His Honour Judge McDougall, local judge for the Toronto Admiralty District.

Cox, for the plaintiffs, asked that the defendants be directed to begin, because, having regard to their admissions in the pleadings, the *onus* of proof was on them. They must either prove that the collision was the result of unavoidable accident, or was occasioned by the fault of the plaintiffs' vessel. (He cited M.C.O. Rules, sec. 139, and the following cases: *The Annot*

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Lyle (1); the *Indus* (2); and the *Merchant Prince* (3). In all these cases it is laid down very clearly and distinctly that the moment the plaintiff shows that his vessel is at anchor, or is moored and is visible, and that the defendant's vessel is moving, the *onus* is upon the defendant to prove either an unavoidable accident, or exculpate himself by some such defence as that he was employing a compulsory pilot. (He cites *Marsden on Collisions* (4); *Myer's Federal Decisions* (5); *The Hornet* (6). The plaintiffs' vessel was properly moored; she was seen, as admitted, and the accident occurred solely from the negligent and careless manner in which the tug and its tow were handled on that morning. The tug made very little, if any, effort to prevent the accident, simply leaving the line slack and letting the tow get out of the difficulty the best way it could.

Fraser, for the defendants, in reply submits that the cases cited by Mr. Cox do not decide the question of fact, but the question of law; the question is whether the defendants were guilty of negligence? He submits that the *onus* is on the person claiming damages, and asserting that the other party was guilty of negligence, to show that the defendants were in fault, and submits that until the plaintiffs establish the defendants were in fault that they must fail.

McDOUGALL, L.J.—The defendants having admitted that their vessels were moving and plaintiffs' vessel was at rest, and that a collision occurred, the defendants must begin on the question of liability for the accident, with the right to reply on the question of damage if it should become necessary to go into that question.

(1) 11 Pr. Div. 114.
(2) 12 Pr. Div. 46.
(3) L. R. [1892] Pr. 9.
(4) P. 227.
(5) Vol. 23 p. 995.
(6) L.R. [1892] Pr. 361.

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Reasons for Judgment.

Evidence was then taken upon the question of damages, and after counsel had addressed the court final judgment was pronounced.

McDOUGALL, L.J.—I propose to make the allowance $378.81. I throw out the charge of $10 for survey, on the principle that I think the owners of the colliding vessel should have had an opportunity to join in the survey had they so desired; and I do not think they were given a reasonable opportunity of so doing. I allow interest on the sum of $378.81 from the 1st November, 1891, to the 1st February, 1893, a year and a-quarter, $30. I allow for the yawl boat $30; on reflection I am of the opinion that the defendants are not bound to give the plaintiffs a brand-new yawl; they are bound to give the outside value for all that was destroyed. I allow for towing, $7. I throw out the claim for the amount paid the wharfinger for damage to the dock, on the ground that the plaintiffs were not legally bound to pay it; that it was a matter between Hurley, the owner of the dock, and the defendants in this suit, and should have been left between them to have the liability determined.

Then comes the question as to whether there should be any demurrage allowed. I am very reluctant to allow any in this case, because it appears the vessel lost no time, she having gone away in a partially repaired state and undertaken work the moment a commission was secured; and because she was not on any regular service, but was simply lying at her dock with the intention of doing any work that presented itself; and that when something did present itself during the time she was laid up for these repairs, and before she was fully repaired, she was able to undertake the work. It might have cost a few dollars more expense to go out with the repairs only partially fin-

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ished (no doubt this is included in the shipwright's bill) to patch her up till she returned. Therefore, I have disallowed the claim for demurrage. I hold, as to the question of lights on the moored vessel, that as it was about daylight at the time and the vessel was admittedly seen by the tug over one hundred feet away, and that the tow was three hundred feet behind the tug; and, further, as the *Starling* was properly and securely moored to the dock, the absence of lights did not constitute such negligence on the part of the plaintiffs as contributed to the accident, and that, therefore, they are entitled to recover for the damages arising from negligent navigation on the part of the tug and her tow.

I give judgment for the plaintiffs for the sum of $445.81, with their full costs of the action and with interest on the amount from judgment until paid.

Judgment accordingly.

Solicitors for plaintiffs: *Cox & Yale.*

Solicitor for defendants: *J. S. Fraser.*

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Feb. 26.

THE NEW BRUNSWICK ADMIRALTY DISTRICT.

STEPHEN S. HALL AND CHARLES H. FAIRWEATHER..... } PLAINTIFFS;

AGAINST

THE SHIP "*SEAWARD.*"

Maritime law—Action of account between co-owners—The Colonial Courts of Admiralty Act, 1890—*The Admiralty Act*, 1891—*Jurisdiction—Practice.*

The Exchequer Court has jurisdiction to hear and determine actions of account between co-owners of a ship.

Semble,—That in an action by the managing owner of a ship against his co-owner, the indorsement on the writ need not show that there was any dispute as to the amount involved.

MOTION to set aside a writ of summons on the ground that the court had no jurisdiction to deal with the cause of action relied on therein.

The plaintiffs, as part-owners of the ship *Seaward*, sued the defendants, as part-owners thereof, for the recovery of $728.74 for moneys paid and disbursements made by the plaintiffs, as managing and part-owners of said ship, for said defendants.

The defendants appeared under protest, objecting to the jurisdiction of the court and asking to have the writ set aside on the grounds (1st) that co-owners could not come to the court for an account, or for the recovery of any amount thereunder in cases where the plaintiffs kept the accounts themselves; and (2ndly) because it did not appear from the indorsement of the writ that there was any dispute as to the amount.

February 26th, 1892.

The motion was argued before Mr. Justice Tuck, Local Judge for the Admiralty District of New Brunswick.

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McLean, in support of motion, contended:

1st. The statement of claim as endorsed on the summons is for a debt due from the defendants to the plaintiffs. This is not such a matter as the court has jurisdiction over under section 10 of subsection 9 of *The Vice-Admiralty Courts Act*, 1863.

2ndly. The said statement of claim does not set out that there is a dispute between the owners of the ship *Seaward* touching the ownership, possession, employment or earnings of such ship.

3rdly. The claim for an account to be taken cannot be entertained by the court. The plaintiffs claim $728.74 for moneys paid and disbursements made by plaintiffs as managing and part-owners of said ship, which amount they allege is now due and payable. It is not alleged that said debt is disputed nor is there any reason given why plaintiffs' own accounts should be taken, nor is it alleged that defendants dispute said accounts. In other words, the managing owners cannot ask to have their own accounts taken without giving a sufficient reason therefor.

4thly. A suit cannot be commenced in this court to take accounts. The account can only be taken as ancillary to other matters over which the court has jurisdiction.

Stockton, Q.C., *contra*, pointed out that *The Vice-Admiralty Courts Act*, 1863, had been repealed by *The Colonial Courts of Admiralty Act*, 1890, (53-54 Vic. c. 27). This latter act has been given effect to in Canada by the statute 54-55 Vic. c. 29; so that the laws relating to the jurisdiction of the High Court of Admiralty in England—including the Imperial statute 24 V. c. 10—are now in force in Canada. By section 8 of 24 Vic. c. 10, the High Court has jurisdiction to decide all questions arising between co-owners, or any of them, touching the ownership, employment or earn-

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ings of any ship registered in England and Wales, and to settle all accounts in relation thereto between the parties.

As the claim sued for in this suit is one arising out of the employment of the ship *Seaward*, registered in Canada, and is outstanding and unsettled, the court clearly has jurisdiction to adjudicate in the case. The jurisdiction of the Colonial Courts of Admiralty, by 53-54 Vic. c. 27, sec. 2, subsec. 2, may be exercised in like manner, and to as full an extent, within Canada, as the High Court of England, with a few exceptions not material to this case. There is nothing in the objection that the court cannot entertain a suit for the purpose of taking an account,—the court will order accounts to be taken either as a step in the cause or in a suit having the taking of accounts for the sole object. (He cites the *Idas* (1); *Roscoe Ad. Pract.* (2); the *Lady of the Lake* (3); the *Meggie* (4).

TUCK, L. J.—I think the court has jurisdiction and that the action has been properly brought. I, therefore, dismiss this application, and order the defendants to appear absolutely. The costs of this application will be costs in the cause.

Motion dismissed.

Solicitors for plaintiffs: *Stratton & Hazen;*

Solicitor for the ship: *H. H. McLean.*

(1) Br. & Lush. 65.
(2) (2nd Ed.) 50.
(3) L. R. 3 Ad. & Eccl. 32.
(4) L. R. 1 Ad. & Eccl. 77.

THE QUEEN ON THE INFORMATION OF THE ATTORNEY-GENERAL FOR THE DOMINION OF CANADA..... } PLAINTIFF; 1893 Mar. 13.

AND

ARTHUR STANHOPE FARWELL.....DEFENDANT.

Information of intrusion—Appropriate relief to be prayed for therein—Order to reconvey—Practice—Subsequent action between same parties—Res judicata.

Where, in a former action by information of intrusion to recover possession of land, the title to such land was directly in issue and determined, the judgment therein was held to be conclusive of the issue of title sought to be raised by the defendant in a subsequent action between the same parties.

2. An order directing the defendant to reconvey the land is not an appropriate part of the remedy to be given upon an information of intrusion.

Semble: That letters-patent for public lands situated within the railway belt in British Columbia should issue under the Great Seal of Canada and not under the Great Seal of British Columbia.

INFORMATION at the suit of Her Majesty's Attorney-General for the Dominion of Canada to obtain an order of the court directing the defendant to execute a conveyance to Her Majesty, in right of the Dominion, of certain lands in the railway belt in British Columbia.

The facts of the case are stated in the judgment.

The case was tried at Victoria, B. C., on the 30th of September and 1st of October, 1892.

Bodwell, (with whom was *Hunter*) for the defendant:

This action might have been brought with more propriety against the Government of British Columbia by the Government of the Dominion. The defendant is not an aggressor in any way. He is not asserting any right to the prejudice of the Dominion Government. He has simply obtained from the Registrar-

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General the registration of his title and the certificate of that registry, and there the matter stands.

Now the plaintiff is already in possession of a judgment decisive of the only issues that can properly be raised here, and what more can your lordship give Her? On this branch of the case I will refer your lordship to the dictum of a very celebrated judge of the Supreme Court of the United States, Mr. Justice Grier, as laying down the principle that ought to govern your lordship in this case. (Cites *Orton* v. *Smith*) (1). This action is not for the purpose of obtaining a title but for the purpose of quieting the title.

The plaintiff, who has a writ of possession whereof execution has been had, will, it seems to me, have to rest content with that. What power has the court now to pronounce on that judgment? The action which was first brought was to compel possession of lands and, upon the judgment rendered, the writ of possession has been issued and returned by the sheriff. What more has this court to do with the judgment? With regard to the second paragraph of the prayer of the information, "to order the removal of clouds, liens, etc., from the title," this difficulty meets my learned friend. This court under the statute, has directly no power over provincial officers. It is true that by section 17 of the Act 50-51 Vic. c. 16 a very wide measure of concurrent jurisdiction with the provincial courts is given to the Exchequer Court, but that concession will not help my learned friends because an application has been made, similar in character to the prayer of this petition, to the Supreme Court of British Columbia, and it has been refused. Whatever the grounds for such refusal are, surely the Exchequer Court ought to leave the Crown to pursue its remedy to the utmost in the forum where it began proceedings.

(1) 18 How. 265.

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Again, this is a case where an order is asked to be made against an officer who is in no way represented in the suit. He has no counsel here, and is not directly or indirectly affected by the proceedings. What order could your lordship make against him? He has merely registered the deed back from Prevost to Farwell. Now so long as that deed remained uncancelled and unimpeached, he could not be compelled by mandamus to cancel the registration. It is not for him to say that it should be delivered up to be cancelled. Upon production of the deed to Farwell, there is *primâ facie* title in Farwell, and he was only obeying the positive directions of the law in registering it. This court was organized to try actions of a peculiar character, actions in which the Crown, in right of the Dominion, is interested. Then when the parties come before the court it is necessary, first, to show that the relief asked for, pertains to the Crown, and secondly, that it pertains to the Crown in the right of the Dominion. Now in the first paragraph of the information it is averred that Her Majesty, in right of the Dominion of Canada, is now Lady Paramount and the absolute owner of the land in question, and in the prayer an order is asked for the removal of all conveyances from the title. I say that it appears to go to the very nature of this action, that these two propositions should be established. Now the right of possession does not mean the right of possession of the fee simple. Where is the residence of the ultimate fee in the railway lands in British Columbia? We have that answered in the opinion of our very highest court, in the judgment of the Privy Council pronounced in the *Precious Metals Case*. (Cites opinion of Lord Watson in *Attorney-General of British Columbia* v. *Attorney-General of Canada*) (1).

(1) 14 App. Cas. 301.

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I think it is clear from this, that the Privy Council has, in effect, decided that the paper title must still proceed as it always proceeded from the Provincial Government. If the Dominion were the owner in fee Lord Watson would be wrong in saying that the land, after sale, would revert to the same position as ordinary land granted by the Provincial Government, because then there would be the right of escheat to the owner of the fee. It seems to me that it is not altogether clear that the question of title was under discussion in the Supreme Court of Canada. It seems to me that the judgment of the Chief Justice is not altogether inconsistent with Lord Watson's views. (See *The Queen* v. *Farwell*) (1). The opinion of the Privy Council just amounts to this, that the Dominion has the right to appropriate the revenues of these lands, but that the ultimate fee is in the Crown in the right of the province. The province, therefore, is the proper authority to take such steps as would pertain to the cancellation of the grant. What status has the Attorney-General of Canada to bring an action in this court, to interfere with an estate which Her Majesty, in right of Canada, does not hold and could not grant? Of course, the opinion of the Privy Council does not go so far as to say that the right of possession and the right to the title must be in the same person; but, merely, that the right to receive the revenues of these lands and the right to control them is in the Dominion, while the ultimate fee is in the Crown in the right of the province. I submit that in the opinion of the Privy Council there are two Crowns in respect of these railway lands, and if that view is correct the Attorney-General of Canada cannot bring an action to repeal these letters-patent and this court has no jurisdiction to entertain this action. (Cites *Wells on Res Adjudicata.*) (2).

(1) 14 Can. S. C. R. 392. (2) P. 2, sec. 1.

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It is said that the Crown is not bound by estoppel, but Mr. Justice Gwynne, in the *Fonseca Case* (1), thinks the Crown is bound by estoppel. So much for the use of the word "estoppel" generally. Now there is a very important distinction with reference to estoppels by judgment, *i.e.* between cases where the parties to the action are the same and the cause of action the same, and where the parties are the same and the cause of action different. In the case of *Castrique* v. *Imrie* (2), it was in effect held, that where the parties are the same and the cause of action the same, everything that was decided in the action is binding between the parties; but that where the parties are the same but the cause of action different, only those matters are *res judicata* that were necessary to the judgment of the court. In *Brandlyn* v. *Ord* (3) it was decided that where the defendants pleaded a former suit and alleged that the court implied there was no title when they dismissed the bill, it was not sufficient, they should have shown it was *res judicata*, an absolute determination in the court that the plaintiff had no title. (Cites *Cromwell* v. *The County of Sac.* (4); *Philadelphia* v. *Ridge Avenue Ry. Co.* (5); *Russell* v. *Place* (6); *Packet Company* v. *Sickles* (7); *Barrs* v. *Jackson* (8); *Bigelow on Estoppel* (9); *Bell* v. *Merrifield* (10); *Read* v. *Brown* (11); *King* v. *Chase* (12), and *Carver* v. *Jackson*) (13).

Again, I submit, it was not absolutely necessary to decide the question of title in the former suit, it was only necessary to decide the question of possession. If your lordship will look at the two informations you

(1) 17 Can. S. C. R. 612.
(2) 4 E. & I App. 434.
(3) 1 Atk. 571.
(4) 94 U. S. 352.
(5) 24 Am. St. Rep. at 515.
(6) 94 U. S. 608.
(7) 5 Wall 592.
(8) 1 Y. & Col. 596.
(9) P. 98.
(10) 109 N.Y. 202.
(11) 22 Q. B. D. 131.
(12) 41 Am. Decisions 678.
(13) 4 Pet. 87.

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will see that the first was essentially and actually an action for obtaining the possession of the land. There was no allegation in the first information that Her Majesty was Lady Paramount and absolute owner of the lands, it was simply an allegation that such lands "were and still ought to be" in her possession. And the judgment in the former suit was for the removal of the defendant from possession of the lands, and nothing more. The very form of the action brought goes to show that the question of possession was the only one decided. (He reads from *Sweet's Law Dictionary* on "Information of Intrusion") (1). It is not necessary to establish the question of title in such actions, it is sufficient against an intruder to show possession. It is thus laid down in *Reg.* v. *Stanley* (2):

"An information of intrusion is in fact an action of "trespass at the suit of the Crown, not brought to gain "possession or establish title, except incidentally. The "judgment is not in the nature of a seizin or possession, but only that the defendant be convicted and "committed for the fine; and it includes judgment for "any damages that may have been given for the trespass, and includes also an *amoveas manus*—that is, "upon the judgment for the intrusion, an injunction "issues for the possession against the defendants and "all claiming under them."

The fact that the remedy was not taken—that the repeal of the letters-patent was not asked for in the former action,—must be taken to mean that the Crown assented to be estopped from raising it again. It appears upon the pleadings that the question of possession was the basis of the judgment. The Crown claimed possession only. You must look at the pleadings to determine what matters were necessary for the judgment of the court. (Cites *Elphin-*

(1) P. 429.

(2) 9 U. C. Q. B. 86.

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stone on Deeds (1). What I say is, that however necessary it may have been to consider the question as to Farwell's position, what the Crown asked the court to decide, and what the court did decide, was the question of possession only,—"that these lands ought to be in the hands or possession of the Crown in the right of Canada." That is the essence of the judgment, and if the Supreme Court of Canada went beyond that, they were pronouncing on what was not the cause of action upon which the pleadings proceeded. In looking at the defence in the former action you must read it with reference to the claim that was made. The issue was, who was entitled to possession? and the court held that Farwell was not entitled to possession by reason of the Crown grant.

[BURBIDGE, J.—The real question at issue then was the question of title.]

I submit, with all deference to your lordship, that it was simply an issue of possession. Such a judgment would not only satisfy the pleadings in the action but would be quite consistent with the opinion of the Privy Council. To say that the Crown grant gave Farwell no right to the possession of land whereof the right of possession was in the Dominion, is a very different thing from saying that the Crown grant gave him no title. That would not be correct. I submit that the record is the only thing that can be looked to, to determine what is *res judicata*. You cannot go behind the record to find what the judgment was. (Cites *Abbott's Law Dictionary, verbo*, Judgment; *Freeman on Judgments* (2); *Am. Ency. Law* (3); *Hunter* v. *Stewart* (4).

(1) P. 572.
(2) P. 1, *et seq.*
(3) Vol. 12 pp. 59-60.
(4) 4 Deg. F. & J. 179.

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It is perfectly clear that in the former action the plaintiff could have obtained all the relief which the Crown was entitled to, and is estopped from maintaining the present action; and if your lordship decides that the relief could have been given before, the plaintiff is out of court in the present action. In *Nelson* v. *Couch* (1), it was held that "to constitute a good plea of *res judicata* it must be shown that the former suit was one in which the plaintiff might have recovered precisely that which he seeks to recover in the second." (He cites also *Hatch* v. *Coddington* (2); *Henderson* v. *Henderson* (3); *Everest and Strode on Estoppel*) (4). Where a cause of action is not shown in the pleadings it is a pretty strong argument to show that it was not litigated or decided.

Again, we contend that the former judgment in this case if it did decide that the fee simple was in the Crown in right of the Dominion, is not in accordance with the decision of the Privy Council in the *Precious Metals Case* (5). If that judgment does not go the length we contend it does, then it is nugatory and useless. We cannot imagine that the Privy Council would go through the solemn farce of delivering an opinion if that very opinion would make no difference in the administration of affairs. The Privy Council has decided that the ultimate fee is in the province, and the decision in the *Farwell Case* in the Supreme Court is founded on a principle of law which is overruled by the highest court in the land. Therefore, I submit that this court will not lend its aid to enforce a judgment that is erroneous. (Cites *Commercial Bank* v. *Graham* (6); *Hamilton* v. *Houghton*) (7). In the latter case it was sought to obtain an order to carry into effect

(1) 15 C.B.N.S. 99.
(2) 32 Minn. 92.
(3) 3 Hare 113.
(4) P. 60.
(5) 14 App. Cas. 295.
(6) 4 Grant 429.
(7) 2 Bligh 169.

a decree made some forty years before and which was acquiesced in by one of the parties during his whole life time. The court refused its aid to perpetuate an erroneous decree. This case is cited by Chancellor Blake in the *Commercial Bank Case (ubi sup.)* The decree was only wrong in respect of calculation of interest; how much more then should a court refuse its aid to perpetuate a judgment wholly wrong on a question of law ? (Cites from *Lawrence Manufacturing Co.* v. *Janesville Mills*) (2).

Richards, Q. C., *Pooley*, Q.C., and *Helmcken* for the plaintiff.

Richards, Q. C.: As to the first contention of my learned friend, that this action should have been brought with more propriety against the Government of British Columbia, he has cited no authorities in support of that proposition, and indeed if that Government had any interest in the property, it passed out of them on the issuing of the patent to Farwell.

Now, as to his second contention, with reference to the question of jurisdiction, I presume that the Supreme Court of British Columbia could have entertained this action, and I presume that the Exchequer Court was constituted for purposes of this kind, besides others. (Cites clauses 15, 16 and 17 of 50-51 Vic. c. 16.) I submit that under section 17 of the Act the Exchequer Court has concurrent original jurisdiction with the Supreme Courts in the provinces. Now I have this to say, that we would be perfectly satisfied if your lordship were to direct the defendant here to reconvey the property to the Crown. If that were done —if your lordship sees your way clear to doing that— it would be satisfactory to us.

Then, thirdly, with reference to my learned friend's contention that we ought to have exhausted all our

(1) 138 U. S. 561.

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remedy in the first action, I suppose there is no doubt, from the dates of these documents, that they were registered at that time, but possibly the Crown was not aware of it. But, however that may be, I deny the doctrine urged by my learned friend, that acts of the Crown's officers are binding on the Crown. My learned friend has no authority for this proposition. I cannot imagine how it can be held that because an officer of the Crown did not ask more than he did, in the first action, although the Crown was entitled to ask it, that the Crown would be afterwards estopped from asking the further remedy. The Crown is not bound by estoppel. And, I think, it is a very proper doctrine, because the Crown's business is conducted by her officers, and the Sovereign has no personal interest in a case like this.

The action of intrusion is not in the nature of an action of trespass, and the question of title does come up in an action of intrusion. Why, your lordship, the defendant pleaded his title, and that was all that was tried after he set out his patent. My learned friend can find no authority for the position that he has taken, that we cannot go further and ask now for a cancellation of the registration of the deed to Farwell, or even ask the court to direct that the defendant make a reconveyance of the property to the Crown. Just see the position we are in if we cannot get the remedy we ask for. The Crown, in right of the Dominion, is the owner of these lands and yet the Crown cannot utilize them because it is impossible to give a good title by reason of there being certain documents on record in the provincial registry, and the Dominion's vendees are unable to record the letters-patent made by the Crown in right of the Dominion. There is no use of selling these lands when the title cannot be made good. Nobody wishes to buy land when

he cannot get his deed recorded. I contend, in view of this fact, that it is absurd to say the Crown cannot go further than it did in the former action and get the blemish of Farwell's deed removed from the title. I know of no authority to show that because one did not ask for some remedy that they were entitled to, in an action which took place some years ago, the remedy cannot be asked for at a later date. No authority is cited for this proposition.

Fourthly, with regard to my learned friend's contention, that the court here has no power over the Registrar-General of Titles to compel him to do what we ask, we saw no use in making him a party.

[BURBIDGE, J.—Why did you not register the judgment you obtained in the Supreme Court of Canada?]

We have no means of doing that. The deed from Farwell to Prevost, and back from Prevost to Farwell, gives a good title.

Fifthly, as to the question of estoppel, there should be no doubt about it. It was more than a question of possession in the first action. It was a question of title and nothing more or less. Mr. Farwell pleaded his patent as he had a perfect right to do. He pleaded his title in the first action and the court decided against him. The court decided that he had no title, and is that matter to be litigated over again?

The Crown has a prerogative right to compel a defendant to show his title, and the defendant could not in an action rely merely on his possession of the land. (Cites *Friend* v. *The Duke of Richmond* (1) and *Chitty on Prerogatives*) (2). The judgment would not bind a stranger, but it would be an estoppel against the defendant and every one claiming under him. (Cites *Outram* v. *Morewood*) (3).

(1) Hardres' Ex. R. 460. (2) P. 332.
(3) 3 East 345.

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The *Precious Metals Case* (1) only goes so far as to decide which Government—the Provincial or the Dominion—owns the precious metals in the railway lands. Now, my learned friend goes so far as to say that the Dominion does not own the fee. I do not see anything in the cases to support that view. He argued that the effect of the decision in the *Precious Metals Case* is that the Crown has no fee in the lands in the right of the Dominion. He says they can control the lands and take the revenues of the land, and still they cannot grant the patent for the land. Now I maintain the Dominion has the fee simple.

With reference to the Registry Act, I think ours was based upon the report of a Royal Commission upon the registration of titles appointed by the British House of Commons in 1854. (Reads from a speech of the Attorney-General in 57 L. T. 190.)

There is a case of *Doe Spafford* v. *Breakenridge* (2), in which it was held that the prior registration of a deed from a person having no good title had no effect upon a prior deed not registered and that the common law prevailed. There is also another case of *Dynes* v. *Bales* (3) in point, and I refer to the case of *Harkin* v. *Rabidon* (4) to show that this court may direct the defendant to execute a conveyance to the Crown. I also refer to *Robinson and Joseph's Digest* at column 3408, where all the authorities are collected together, and also to *Smith and Joseph's Digest*, column 1891.

In the case of *Keefer* v. *McKay* (5), it was held that a party has a right to have removed from the registry books a cloud on his title. The court will order it to be removed. In one of the cases I have cited—*Harkin* v. *Rabidon* (3),—the court ordered a conveyance from the defendant to the plaintiff.

(1) 14 App. Cas. 295.
(2) 1 U. C. C. P. 492.
(3) 25 Grant 593.
(4) 7 Grant 243.
(5) 10 Pr. R. 345.

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Pooley, Q. C. followed on the same side, and cited *Alison's Case* (1).

Bodwell replied.

Reasons for Judgment.

BURBIDGE, J. now (March 13th, 1893) delivered judgment.

The information in this case was exhibited on the 16th of March, 1892, to obtain an order of the court directing the defendant to execute a deed of conveyance to Her Majesty the Queen, in the right of Canada, of the unsold portions of a certain parcel of land known as lot number six in group one, of the district of Kootenay, in the province of British Columbia, and in that way to remove the cloud upon Her Majesty's title created by the registration in the records of absolute fees in the office of the Registrar-General of Titles for the province of British Columbia of the following instruments affecting such lot, that is to say: 1st, a grant to the defendant under the Great Seal of British Columbia, dated the 13th of January, 1885; 2ndly, a conveyance in fee, dated the 16th of January, 1885, from the defendant to James Charles Prevost; and 3rdly, a conveyance in fee dated the 28th of February, 1885, from the said Prevost to the defendant.

The lands in question are situated at Revelstoke on the Columbia River at or near the place where it is crossed by the Canadian Pacific Railway, to which fact is due in a large measure the value of such lands and the importance of the controversy between the parties.

To an information of intrusion exhibited in this court on the 29th day of October, 1885, against the defendant praying judgment for possession of the said lands, the defendant in his statement of defence alleged that on and prior to the 13th day of January, 1885, the

(1) 9 Ch. App. 6.

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said lands were in the hands and possession of Her Majesty, and on the said day Her Majesty by patent duly issued under the Great Seal of the province of British Columbia granted the said lands unto, and to the use of, the defendant and his heirs for ever, wherefore the defendant entered upon and took possession of the said lands, and has since enjoyed possession, use and occupation of the same, which was the intrusion and trespass complained of. To the defence so set up the Attorney-General replied that the lands and premises in the information and statement of defence mentioned were on the 13th of January, 1885, in the hands and possession of Her Majesty in the right of Her Dominion of Canada and not in the right of Her province of British Columbia, and that a grant of the said lands under the Great Seal of the province of British Columbia conveyed no interest therein to the defendant. Issue having been joined upon the replication, the matter came on for trial in the Exchequer Court where there was judgment for the defendant. On appeal to the Supreme Court of Canada the judgment of the Exchequer Court was, on the 14th December, 1887, reversed, and it was ordered and adjudged that the defendant should be removed from the possession of the said lands and premises. A writ of possession was issued on the 24th of November, 1891, addressed to the sheriff of the county of Kootenay, who, on the 6th of January, 1892, put the agent for Dominion lands at Revelstoke in possession for the Crown.

By the 63rd section of the *Land Registry Act* of British Columbia (1) it is in substance provided that the owner in fee of any land, the title to which shall have been registered for the space of seven years, may, upon an affidavit that all deeds and papers relating

(1) Consol. Acts B.C., Vol. 1, c. 67.

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to the title have been produced to the Registrar-General, apply for a certificate of indefeasible title. Attempting to avail himself of this provision of the *Land Registry Act* the defendant, on the 17th of March, 1892, applied to the Registrar-General of Titles for a certificate of indefeasible title to the lands in question. In the list of instruments annexed to his affidavit are mentioned the grant under the Great Seal of British Columbia, the deed to Prevost, and that from Prevost to the defendant, to which reference has already been made, "also a sub-division map of part of the lot," and then follows a note "that in an action *The Attorney-General of Canada* v. *Arthur Stanhope Farwell* the Supreme Court of Canada has issued a writ of possession to the said lot." On the same day (the 17th of March) the Registrar-General caused to be published in *The British Columbia Gazette* a notice that a certificate of indefeasible title to the unsold portions of the said lot would, on the 24th of June, 1892, be issued to the defendant unless in the meantime a valid objection thereto were made to the Registrar-General in writing by some person claiming an estate or interest in said property or some part thereof. On the 9th of June following, the solicitors, at Victoria, for the Attorney-General of Canada, filed objections to the issue of the certificate on the ground, among others, that the land in question was the property of the Crown in the right of the Dominion, that the Supreme Court had ordered the defendant to be removed from the possession thereof, and that the present information was pending. On the 17th of June the Registrar-General gave the solicitors notice that, in his opinion, the objections were not valid objections within the meaning of the Act, and that unless a valid objection were made he would proceed to issue the certificate. Thereupon Mr. Helmcken, for

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the Attorney-General of Canada, obtained from Mr. Justice Crease an order *nisi* directing the Registrar-General to show cause why he should not omit to issue the certificate, and on the return of the order it was, with the consent of the learned judge, agreed that the hearing thereof should be enlarged until the final determination of this action, the Registrar-General undertaking in the meantime not to issue the certificate.

The jurisdiction of this court to entertain the information and to give the relief prayed for depends upon clause (d) of the 17th section of *The Exchequer Court Act* (1) by which it is provided that the court shall have and possess concurrent original jurisdiction in Canada in all actions and suits of a civil nature at common law or equity in which the Crown is plaintiff or petitioner; that is, as I understand it, concurrent original jurisdiction in such matters with the provincial courts of law and equity. It is not disputed that the Supreme Court of British Columbia would have jurisdiction to entertain this information and to give relief such as that prayed for. In fact the objection to the jurisdiction of the court is directed principally to the point that in this case the plaintiff seeks, in substance, to compel the Registrar-General of Titles for British Columbia to make certain entries in his books of registry. But it will be seen that the Registrar-General has not been made a party, and that no order is asked against him, and I am relieved from the necessity of considering the force of the objection by the fact that counsel for the Attorney-General on the hearing limited the relief asked for to an order against the defendant Farwell only.

The defendant also contends that the question of title between the Crown in the right of the Dominion

(1) 50-51 Vic. c. 16.

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and the defendant is not, so far as this action is concerned, concluded by the decision in the previous case between the same parties. There was, I think, no difference or dispute as to the rule or principle of law deducible from the authorities cited and which should be applied to the determination of this contention. But it was said that in the former action the right of possession and not the title to the land was in issue, and that, consequently, the action was conclusive only of the right of possession at the time. It is, however, unnecessary to do more than to advert to the facts I have already stated to see that such a view cannot be maintained. To the information of intrusion the defendant did not plead not guilty or *non intrusit*, but he admitted his intrusion and justified by claiming title under a patent issued under the Great Seal of the province of British Columbia. To the defence so set up the Attorney-General replied that the lands in the information and statement of defence mentioned were, on the day on which the letters-patent under the Great Seal of British Columbia were issued, in the hands and possession of Her Majesty in the right of the Dominion of Canada, and not in the right of the province of British Columbia; and that the issue of such letters-patent under the Great Seal of the province of British Columbia conveyed no interest in such lands to the defendant. On that replication issue was taken, and upon such issue, on appeal to the Supreme Court of Canada, there was judgment for the Crown which established two propositions: 1st, that the defendant had no title to the lands in question; 2ndly, that the Crown in right of the Dominion had title to the lands in question. The first proposition, under the circumstances of the case, could not be decided without deciding the second. It seems perfectly clear therefore, and I have no doubt that the allegation in

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the first paragraph of the information in this case that Her Majesty, in the right of the Dominion of Canada, is Lady Paramount and absolute owner of the land in question, is, between the parties hereto, concluded by the decision pronounced on the information in the former action to which I have referred.

But it is said that the judgment of the Judicial Committee of the Privy Council, in the case of *The Attorney-General of British Columbia* v. *The Attorney-General of Canada* (1), shows that the decision of the Supreme Court of Canada in the case of *The Queen* v. *Farwell* (2) was erroneous; and it is contended that this court should not in this action enforce or give further relief in regard to such erroneous decision. It is argued that the result of the views expressed by their lordships in the former case is that the lands in the railway belt in British Columbia are still vested in the Crown in the right of the province, subject only to the right of the Government of Canada to administer such lands and to take the revenues therefrom; but that all grants thereof must issue under the Great Seal of the province of British Columbia. That, it is said, is a fair inference from the following expression of their lordships' opinion (3):—

> 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 dispose of these lands to settlers, together with all royal and territorial revenues arising therefrom, had been transferred to the province before its admission into the federal union. Leaving the precious metals out of view for the present, it seems clear that the only "conveyance" contemplated was the transfer to the Dominion of the provincial right to manage and settle the lands, and to appropriate their revenues. It was neither intended that the lands should be taken out of the province nor that the Dominion Government should occupy the position of a freeholder within the province. The object of the Dominion Government was to recoup the cost of constructing the railway by selling the land to

(1) 14 App. Cas. 295. (2) 14 Can. S. C. R. 392.
(3) 14 App. Cas. 301.

settlers. Whenever land is so disposed of, the interest of the Dominion comes to an end. The land then ceases to be public land, and reverts to the same position as if it had been settled by the provincial Government in the ordinary course of its administration.

I do not, however, think that the language of their lordships taken as a whole bears out the construction sought to be placed upon it. The case decides, 1st, that the public lands in British Columbia are in the Crown ; 2ndly, that prior to the Union the right to administer and dispose of these lands to settlers, and all royal and territorial revenues arising therefrom, had been transferred to the province ; 3rdly, that by the transactions in question in that case the province had transferred to the Dominion the provincial right to manage and settle the lands and to appropriate their revenues ; and 4thly, that the right to administer the precious metals in such lands and to take the revenues therefrom remain in the province. But in each case, in the right to manage, settle, sell and take the revenues arising from such lands or precious metals that may exist therein, is involved the power and authority to make conveyances of and give title to the land or right sold. The language which their lordships use in regard to the rights of the province and of the Dominion is substantially the same in both cases. With reference to the right of the province they say that (1) :—

> the right to administer and to dispose of these lands to settlers, together with all royal and territorial revenues arising therefrom, had been transferred to the province before its admission into the federal union ;

and of the right acquired by the Dominion they say :

> leaving the precious metals out of view for the present, it seems clear that the only "conveyance" contemplated was a transfer to the Dominion of the provincial right to manage and settle the lands, and to appropriate their revenues.

(1) 14 App. Cas. 301.

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There is no greater reason for inferring from the language used that their lordships were of opinion that if the Dominion Government sold a piece of land in the railway belt it would be obliged to procure the issue of the patent by the Lieutenant-Governor at Victoria, than to infer that if the provincial Government sold any public land in the province, or any interest therein, the letters-patent should come from London. It is unnecessary to dwell upon the very great inconvenience of such a course of procedure as that last suggested, contrary as it would be to the well established practice in all the provinces; but to compel the Dominion Government in administering the lands in the railway belt to secure the issue, under the Great Seal of the Province of British Columbia, of the grant for every lot of such land that might be sold would be almost equally inconvenient, and would involve great confusion, difficulty and delay. That, of course, would be no answer if their lordships had really said that such was the result of the compact made between the two Governments; but in my view they have not said so, nor do I think that such a meaning is fairly deducible from the language used by them. There can, I think, be no doubt that letters-patent for any lands in the railway belt sold by the Dominion Government may be issued under the Great Seal of Canada in accordance with the statutes passed by its Parliament in the exercise of a clear and undoubted authority to make laws in respect of the public property of the Dominion (1).

There is only one other objection to the granting of the relief prayed for which it is necessary to consider, and that is that such relief might have been obtained in the former action between the same parties, and that, for

(1) *The British North America Act*, 1867, sec. 91 clause 1; R. S. C. c. 56.

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this reason, the Crown is not now entitled to succeed It is true that when the information in the former case was exhibited the grant under the Great Seal of British Columbia to the defendant, the deed from defendant to Prevost and the deed back from Prevost to defendant, which have been mentioned, had been registered with the Registrar-General of Titles for British Columbia; but it is clear, I think, that an order directing the defendant to reconvey to the Crown would not have been an appropriate part of the relief which might have been given on an information of intrusion. In *Chitty on Prerogatives* (1) it is laid down (and to the same effect is *Manning's Exchequer Court Practice*) (2) that

> judgment for the King in an information for intrusion is that the defendant be amoved from the possession, and for damages in case damages be found for any particular trespasses committed by the defendant, as cutting trees, &c., and after judgment in an information for intrusion, execution shall be sometimes by injunction, or it may be by *amoveas manum*, and thereupon every party to the information, or claiming under him, shall be removed from the possession.

By the practice of this court (Rule 169) a judgment for the recovery of, or the delivery of possession of, land may be enforced by writ of possession.

That, then, was the relief to which the Crown was, on the information of intrusion, entitled, although having regard to the issues raised and decided the case involved more than a question of possession. It should, I think, have been accepted by the defendant as conclusive against his title, and there is no justification for the attempt he has made since the information was filed to further cloud the Crown's title by procuring and registering a certificate of indefeasible title.

There will be an order that the defendant execute to Her Majesty the Queen, in the right of Canada, a surrender or conveyance of the unsold portions of lot

(1) Pp. 334, 335. (2) P. 200.

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No. 6 in group 1, of the District of Kootenay, in the Province of British Columbia, containing 1,175 acres, more or less; and I shall, under the circumstances, reserve to the Crown the right to apply for an order restraining the defendant from further prosecuting his proceedings before the Registrar-General of Titles and to make all amendments that may be necessary for the purpose of obtaining such additional relief.

Judgment for plaintiff, with costs.

Solicitors for plaintiff: *O'Connor, Hogg & Balderson.*

Solicitors for defendant: *Bodwell & Irving.*

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

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Mar. 13.

AND

LUDGER O. DEMERS AND NUMA DEMERS..... DEFENDANTS.

Federal and provincial rights—Title to lands in railway belt in British Columbia—Unsurveyed lands held under pre-emption record at time grant of railway lands came into operation—British Columbia Land Acts of 1875 *and* 1879—*Terms of Union, section* 11—*Construction.*

Held:—Lands that were held under pre-emption right, or Crown grant, at the time the statutory conveyance of the railway belt by the Province of British Columbia to the Dominion of Canada took effect, are exempt from the operation of such statutory conveyance, and upon such pre-emption right being abandoned or cancelled all lands held thereunder become the property of the Crown in the right of the province and not in the right of the Dominion.

2. Unsurveyed lands recorded under the British Columbia Land Acts of 1875 and 1879 are lands held under "pre-emption right" within the meaning of the 11th section of the Terms of Union between the Province of British Columbia and the Dominion of Canada. [See Statutes of Canada, 1872, p. XCVII.]

INFORMATION of intrusion by the Attorney-General for the Dominion of Canada to recover possession of a lot of land within the railway belt in the Province of British Columbia.

The facts of the case are stated in the judgment.

The case was tried at Victoria, B.C., on the 1st and 3rd of October, 1892.

Richards, Q.C. (with whom was *Helmcken*) for the plaintiff: It will, doubtless, be contended, on behalf of the defence, that the lands in question in this case were held under pre-emption right at the time of the setting out of the railway lands under the grant to the

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Dominion by the province. They were first held under what purported to be a pre-emption record by Messrs. Dunbar, Wilson and Pillmore, but the lands were unsurveyed by them, and under the British Columbia Land Acts of 1875 and 1879, in unsurveyed land no one could acquire pre-emption rights. Unsurveyed lands were recorded merely, and only surveyed land could be regularly pre-empted. Therefore, they were not exempted from the operation of the statutory grant, nor were they lands held under pre-emption right within the meaning of the Terms of Union. Again, even if Dunbar, Wilson and Pillmore had acquired pre-emption rights they abandoned them, as appears by the record; and upon such abandonment, and in view of the fact that it was the obvious intention of the two Governments that the railway reservation should apply to all lands within the railway belt, the escheat would enure to the benefit of the Crown in right of the Dominion. The lands having so passed to the Dominion, there could be no new pre-emption of them by the defendants. (He cited secs. 10, 11 and 12 of the British Columbia *Land Act*, 1875.)

Davie, Q. C. (A.-G. B. C.) for the defendants: The issues in this case are substantially the same as in the first case of *The Queen* v. *Farwell* (1), and we are now in a position to discuss the question which arose in that case in the new light which is thrown upon it by the judgment of their lordships of the Privy Council in the *Precious Metals Case* (2).

The result of that decision seems very plainly to amount to this, that while the object of the provincial Government in conveying the lands in the railway belt to the Dominion was to indemnify the latter for building the railway, there never was any intention

(1) 14 Can. S.C.R. 392.

(2) *The Attorney-General of British Columbia* v. *The Attorney-General of Canada*. 14 App. Cas. 295.

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of making it a freeholder in the province. The Dominion has the right to take the revenues of the lands merely. It might be said that the province holds these lands in trust for the Dominion to recoup the latter for the outlay in building the railway. (He here refers to the judgment of Chancellor Boyd in *The Queen* v. *The St. Catharines Milling and Lumber Company*) (1). The decision of the Supreme Court of Canadain *The Queen* v. *Farwell* (2) is virtually overruled by the Privy Council in the *Precious Metals Case*, and this court ought not to follow the former. (He here cites *Mercer* v. *The Attorney-General of Ontario.*) (3)

It is very clear on the facts of this case that the plaintiff is out of court. The lands in question were held under a pre-emption record at the time the statutory grant to the Dominion came into operation, and it is our contention that, under the provisions of the eleventh section of the Terms of Union, they were expressly exempted from the lands affected thereby. There can be no difficulty about the construction of this section as applied to the case before the court.

Smith, following on the same side, contended that insomuch as the lands were held under a pre-emption record, dated the 10th September, 1883, by Dunbar, Wilson and Pillmore at the time of the statutory grant by the province to the Dominion, the only time when they could by any possibility have become affected by the reservation for railway purposes would be within the very few minutes it would take for the first pre-emptors to formally abandon their claim in the provincial land office and for the new papers to be made out on behalf of the defendants. This would probably not take over ten minutes' time, and both the abandonment and the new pre-emption were made on the same

(1) 10 Ont. 234. (2) 14 Can. S.C.R. 392.
(3) 8 App. Cas. 767.

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day. If the final location of the railway lands was made before the 29th August, 1885, then the lands in question were held under pre-emption record at the time; if it was made on that day then in order to bind these lands it must have been made during the very brief interval that elapsed between the formal abandonment of the first pre-emption and the issuing of the new pre-emption papers to the defendants, and I am of the opinion that such is not the case.*

As to the question whether the first pre-emption record was a regular one, under the 11th section of the Terms of Union, we rely on the practice of the provincial lands office as explained by the evidence of the Deputy-Commissioner of Lands.

Under the Provincial Lands Acts of 1875 and 1879, even where a pre-emptor had died without obtaining a certificate of improvements, the province did not enforce an escheat but allowed the heirs to get a Crown grant after performing certain requirements. Clearly, then, the pre-emption of Dunbar, Wilson and Pillmore was within the exception contained in the Terms of Union.

A class of cases similar to this has received very careful consideration in courts in the United States. (He here cites *Sioux City Land Company* v. *Griffey* (1) *Kansas Pacific Railway Company* v. *Dunmeyer*.) (2).

Richards, Q.C. replied.

BURBIDGE, J. now (March 13th, 1893) delivered judgment.

The information of intrusion is exhibited in this case to recover possession of lot number 237, in group

*REPORTER'S NOTE.—The learned judge at the trial reserved leave to the plaintiff to prove by affidavit the date of the final location of the railway through the district where the lands in question are situated. Such date was so ascertained to be the 16th January, 1885.

(1) 143 U.S. Rep. 32. (2) 113 U. S. Rep. 629.

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one, in the Osoyoos Division of Yale District, in the Province of British Columbia, situate within the railway belt and containing six hundred and forty acres, more or less. The defendants plead title, and justify their intrusion under letters-patent issued to them on the 31st day of July, 1889, under the Great Seal of the province. To this defence the Attorney-General of Canada replies that on the day on which such letters-patent were issued the lands mentioned were in the hands and possession of Her Majesty, in the right of the Dominion of Canada, and not in the right of the Province of British Columbia; and that the grant thereof under the Great Seal of the province conveyed no interest therein to the defendants. The issue is in terms the same as that which was decided in *The Queen* v. *Farwell* (1), but the facts and questions to be determined are different.

By the Terms of Union between the Province of British Columbia and the Dominion of Canada, the Government of the Dominion undertook to secure the construction of a railway to connect the seaboard of British Columbia with the railway system of Canada, and the Government of British Columbia agreed to convey to the Dominion Government in trust, to be appropriated in such manner as the Dominion Government might deem advisable in furtherance of the construction of the said railway, a similar extent of public lands along the line of railway throughout its entire length in British Columbia (not to exceed, however, twenty miles on each side of said line), as might be appropriated for the same purpose by the Dominion Government from the public lands of the North-west Territories and Province of Manitoba; provided that the quantity of land which might be held under pre-emption right, or by Crown grant, within the limits of the tract of land in

(1) 14 Can. S.C.R. 392.

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British Columbia to be so conveyed to the Dominion Government should be made good to the Dominion from contiguous public lands (1).

The history of the controversies and negotiations that grew out of this agreement makes a long story. But for the determination of the issue raised in this case, it will not be necessary to go back of the year 1883. On the 10th of September of that year three settlers, named Dunbar, Wilson and Pillmore, obtained, under the British Columbia *Land Act*, 1875, and the *Land Amendment Act*, 1879, what purported to be a certificate of pre-emption record to the lands in question, which are situated some eighty miles east of Kamloops and within the twenty-mile belt south of the Canadian Pacific Railway, but which, at the time this certificate was issued, were unoccupied, unsurveyed and unreserved public lands of the province. On the 5th of November, 1883, the Government of British Columbia were informed, on behalf of the Government of Canada, of the adoption of a line of railway crossing the Rocky Mountains by the Bow River Pass, and the Selkirk Range through Roger's Pass, by the Beaver Creek and Illicillewaet River Valleys, and through Eagle Creek Pass to Kamloops, and were requested to place a belt of land twenty miles wide on each side of the line along the route so indicated under reservation, as the land to be granted to the Dominion by British Columbia, instead of the land along the line from Kamloops to the Yellow Head Pass, conveyed with other lands by the British Columbia Act, 43 Vic. c. 11. The reservation was made on the 29th of November, 1883, by public notice published in *The British Columbia Gazette* of that date. In the notice, reference was made to an Act of the province, 46 Vic. c. 14, passed on the 12th of May of that year, to ratify, so

(1) Statutes of Can. 1872 p. xcvii.

far as British Columbia was concerned, an agreement which at the time was thought to have been made between the two Governments. The last-mentioned Act was, however, repealed on the 19th of December following, by the Act 47 Vic. c. 14, which confirmed on the part of the province the agreement finally concluded between the Governments of the Dominion and of the province, for the purpose of settling all disputes and differences then existing between them. By this agreement, which was ratified by the Parliament of Canada on the 19th of April, 1884 (1), it was, among other things, in substance agreed that the grant of public lands in aid of the Canadian Pacific Railway should be made of lands on each side of the railway, wherever finally settled; that three and one-half millions of acres of land in the Peace River District of British Columbia should be conveyed to the Government of Canada, and that the agreement should be taken by the Dominion Government in satisfaction of all claims for additional lands under the Terms of Union, that is, in satisfaction of the right of the Dominion, under the Terms of Union, to have made good to it, from public lands contiguous to the railway belt, the quantity of land that might, at the date of the conveyance, be held under pre-emption right or by Crown grant. By the second section of the Act 47 Vic. c. 14, by which, as we have seen, the agreement of 1883 was confirmed by the Legislative Assembly of the province, it was, in amendment of the first section of the Act No. 11 of 1880, provided that from and after the passing of the first-mentioned Act, there should be and there was granted to the Dominion Government for the purpose of constructing and to aid in the construction of the portion of the Canadian Pacific Railway on the mainland of British Columbia, in trust

(1) 47 Vic. c. 6.

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to be appropriated as the Dominion Government might deem advisable, the public lands along the line of railway wherever it might be located, to a width of twenty miles on each side of the said line, as provided in the order in council, section 11, admitting the Province of British Columbia into Confederation. The location of such line of railway between Sicamous Narrows to a point west of Shuswap Lake, a distance of fifty miles south of which and within twenty miles thereof, are situate the lands in question, was approved by an order of His Excellency the Governor-General in Council on the sixteenth day of January, 1885. On the 29th of August, 1885, the certificate of pre-emption record issued to Dunbar and his associates was cancelled, and on the same day a like certificate for the same lands was issued to the defendants, to whom, the provisions of the Land Acts of the province having been complied with, letters-patent for such lands were issued on the 31st day of July, 1889, under the Great Seal of British Columbia.

The question that arises on this state of facts is: Did the statutory grant or conveyance from the province to the Dominion attach to such lands? The defendants say that it did not. They contend that as the lands were at the time held under pre-emption right, they were not affected either by the reservation of 29th November, 1883, or by the Act of the 19th of December following (1). To this contention the Crown makes two answers. In the first place, it is objected that Dunbar and his associates did not hold the lands under pre-emption right within the meaning of the Terms of Union, and in the second place, that when their rights under the certificate were abandoned, the grant to the Dominion attached to the lands mentioned therein.

(1) 47 Vic. (B.C.) c. 14.

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In support of the first objection, it is said that by the provisions of the British Columbia *Land Act*, 1875, under which the certificate was issued, surveyed lands might have been pre-empted, but not unsurveyed lands; that an intending settler "recorded" unsurveyed lands and "pre-empted" surveyed lands, and that as the lands in question were unsurveyed lands, the Dunbar certificate was improperly denominated a certificate of pre-emption record. In 1871, when the Queen's order was passed giving effect to the Terms of Union between British Columbia and Canada, the *Land Ordinance*, 1870 (1), was in force in the province; by the third section of which it was provided that a right of pre-emption might be acquired in unsurveyed lands. In 1874, the laws of the province relating to Crown lands were amended and consolidated by the *Land Act*, 1874 (2), by which provision was made for "recording" unsurveyed lands and "pre-empting" surveyed lands. The same apparent distinction was preserved in the *Land Act*, 1875. By the fourth section of the *Land Amendment Act*, 1879 (3), it was provided that every person who thereafter "recorded" or "pre-empted," as a "settler" or "homestead settler," surveyed or unsurveyed land, should pay one dollar per acre for the same. The procedure by which the "settler" or "homestead settler" secured his homestead did not differ greatly in the two cases, and the "settler" who recorded a tract of unsurveyed land and performed the prescribed conditions, did in substance obtain the right to pre-empt the land recorded. So little difference was there between "recording" and "pre-empting" land, under the system of laws in force in the province, that when we come to the *Land Act*, 1884 (4), we find that the person who desires to

(1) R. S. B. C. No. 144.
(2) 37 Vic. No. 2.
(3) 42 Vic. c. 21.
(4) 47 Vic. c. 16.

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"pre-empt" either surveyed or unsurveyed land, "records" such land.

The expression "pre-emption right," used in the Terms of Union, had reference no doubt to the right to pre-empt lands for which provision was made by the third section of the *Land Ordinance*, 1870, to which reference has been made.

The right which Dunbar and his fellow settlers obtained in the lands described in their certificate was a right of that character, and it matters little, it seems to me, whether the certificate was called a certificate or record of unsurveyed land, as it is contended that it should have been, or a certificate of pre-emption record, as it purported to be. In either case the lands were, I think, within the description of lands held under pre-emption right, and which by the Terms of the Union were excepted out of the grant from the province to the Dominion.

If that be the true view to take of the matter, it is clear that when the certificate was cancelled the lands described therein became the property of the province, and not of the Dominion. If at the time of the statutory conveyance the lands were held under pre-emption right, they were not affected by the conveyance, and when that right was abandoned they became public lands of the province, which its Government was free to deal with as they saw fit. That would follow from the fact that there was never any transfer of such lands to the Dominion. But there is another consideration which appears to me to be conclusive of the question. The province has made good to the Dominion any loss the latter may have sustained by the exception from the grant of these lands and others in the railway belt which at the time were held under like title or by Crown grant. In lieu thereof it has conveyed to the Dominion, and the latter has agreed to accept in satis-

faction of its claim, three and one-half million acres of land in the Peace River District. The contention that, notwithstanding such conveyance and agreement, the Dominion is entitled to the lands in the railway belt which at the date of the conveyance were held under pre-emption right or Crown grant and which have since reverted to the Crown, is clearly untenable.

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Judgment for defendants, with costs.

Solicitors for plaintiff: *O'Connor, Hogg & Balderson.*

Solicitor for defendants: *A. G. Smith.*

1893
Mar. 20.

CHARLES MAGEE, ADMINISTRATOR OF THE ESTATE AND EFFECTS OF THE LATE NICHOLAS SPARKS, THE YOUNGER, MARY SPARKS, NICHOLAS CHARLES SPARKS, AND SARAH SPARKS, INFANTS UNDER THE AGE OF TWENTY-ONE YEARS, RESPECTIVELY, BY THEIR GUARDIAN, THE SAID CHARLES MAGEE, ESTHER SLATER, MARY WRIGHT, AND ALONZO WRIGHT, } SUPPLIANTS;

AND

HER MAJESTY THE QUEEN ..... RESPONDENT.

Rideau Canal—7 Vic. (Prov. Can.) c. 11—9 Vic. (Prov. Can.) c. 42—*Conditional gift—Expropriation—Acquiescence—Forfeiture for breach of condition subsequent—Remedy against the Crown for unauthorized use of land—Abandonment by Crown—Reverter—Solicitor and client—Privileged communication—Evidence.*

The Act 9 Vic. c. 42, was passed with the object of removing doubts as to the application of section 29 of the Act 7 Vic. c. 11 to certain lands set out and expropriated from one *S.* at Bytown. By the first section of the first mentioned Act it was enacted that the proviso contained in the 29th section of *The Ordnance Vesting Act* should be construed to apply to all the lands at Bytown set out and taken from *S.* under the provisions of *The Rideau Canal Act*, except,—

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

(2.) A tract of two hundred feet in breadth on each side of the said canal,—the portion of the said land so excepted having been freely granted by the said Nicholas Sparks to the late Colonel By of the Royal Engineers for the purposes of the canal—and excepting also,

(3.) A tract of sixty feet round the said Basin and Bywash * * * * which was then freely granted by the said Nicholas Sparks to the Principal Officers of Ordnance for the purposes of the said canal, provided that no buildings should be erected thereon.

The site of the canal and the two hundred feet which were included within the limits of the land so set out and ascertained had been given by an instrument, dated 17th November, 1826, under the hand of *S.* and *B.*, who was acting for the Crown, by which it was agreed that such portion of the land so freely given as might not be required for His Majesty's service, should be restored to *S.* when the canal was completed. The canal was completed in 1832. Subsequent to the passing of the Act 9 Vic. c. 42 all the lands of *S.* so set out and ascertained were given up to him, except the portions above described, and deeds in the terms of the Act were exchanged between *S.* and the Principal Officers of Ordnance in regard to the land so given up and so retained, respectively.

Held:—That apart from the question of acquiescence and delay on the part of *S.* and those claiming under him, the Act 9 Vic. c. 42 and the deeds of surrender so exchanged were conclusive between the parties so far as the area and boundaries of the lands to be retained and restored respectively are concerned.

2. That the lands so retained are held by the Crown for the purposes of the canal, and that as to the tract of sixty feet around the Basin and Bywash there is attached a condition that no buildings are to be erected thereon.

3. That the proviso, "that no buildings shall be erected on the said tract of sixty feet," does not create a condition subsequent, a breach of which would work a forfeiture and let in the heirs, nor would the use by the Crown of a portion of the lands in question for purposes other than the "purposes of the canal" work such a forfeiture.

4. The court has no power to restrain the Crown from making any unauthorized use of the land or to compel the Crown to remove any buildings erected thereon contrary to the terms of the grant.

Semble:—That the Crown cannot alien the land held for the purposes of the canal or any portion thereof, and if it should do so the suppliants would have their action against the grantee. If the Crown should abandon the land or any portion of it, the land or such part of it would revert to the suppliants and they might enter and possess it.

Held, also, that where a solicitor or counsel of one of the parties to a suit has put his name as a witness to a deed between the parties he ceases, in respect of the execution of the instrument, to be clothed with the character of a solicitor or counsel and is bound to disclose all that passed at the time relating to such execution.

Robson v. *Kemp* 5 Esp. 52, and *Crawcour* v. *Salter* L.R. 18 Chan. 34 followed.

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PETITION of right to obtain a declaration of title to certain lands in the possession of the Crown.

The facts of the case are stated in the judgment.

Argument of Counsel.

The case was tried at Ottawa on the 15th, 16th, 18th and 19th days of November, 1892.

McCarthy, Q.C. (with whom was *Christie*, Q.C.) for suppliants: Undoubtedly the letter of gift from Sparks to the Crown was a grant of the lands for the purposes of the canal, and for that only, and those purposes being fulfilled so much of the land as was not required therefor was to be restored to the grantor. The conditions of this gift are crystallized in the Act of Parliament 9 Vic. c. 42. Here then we have satisfactory evidence of the basis upon which the Crown holds the lands in question. Now, then, what are the legal elements entering into the ownership of a canal? I think the authorities establish beyond a doubt that the proprietor of a canal is merely the owner of a "highway by water." His title is simply that of an easement in the land covered by the canal. (He cites *Mulliner* v. *The Midland Railway Company* (1); *Angell on Highways* (2); *Lewis on Eminent Domain* (3); *Nelson* v. *Fleming*) (4). There is a wide distinction between the owner of a canal and a railway company which enjoys the franchises and exercises the business of a common carrier. The owner of a highway has nothing to do with the business that passes over the road, nor has the Crown as owner of this canal anything to do with the business done in connection with it. For the Crown to attempt to erect warehouses and other buildings on the banks of the canal is assuming rights of property in excess of our grant.

(1) 11 Ch. D. 611.
(2) Sec. 310.
(3) Sec. 597.
(4) 56 Ind. 310.

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Now, then, I submit that it is for the court to say how much of the land is required for the purposes of the canal. It is a matter subsisting in contract, and it is for the court, not for a party to the contract, to declare what are the rights of the parties thereunder. The two hundred feet portion, mentioned in the letter of gift and in the statute 9 Vic. c. 42, are subject to the condition that it be used for the purposes of the canal, and it is in evidence that beyond fifty feet from the canal this land is not so required. We are, therefore, entitled to a declaration from the court as to the exact quantity of the tract of land that is required for the purposes of the canal.

Again, in so far as the Crown has permitted the lands to be used for the purpose of erecting commercial buildings thereon, and for other purposes foreign to those for which the lands were unmistakably granted, there has been an abandonment of so much of the lands under the grant, and such lands should revert to the suppliants. We are entitled to a declaration from the court to that effect.

Then, upon two grounds we are entitled to succeed in this case. First, I say we are entitled to the surplusage of the land which the evidence shows the Crown does not require for the purposes of the canal; and, secondly, we are entitled to so much of the remaining lands as have been abandoned. (He cites *Proprietors of Locks and Canals* v. *The Nashua and Lowell Railroad Company* (1); *Inhabitants of Worcester* v. *The Western Railroad Corporation* (2); *The Illinois Central Railroad Company* v. *Wathen* (3); *Browne and Theobald on Railways* (4); *Morawetz on Private Corporations* (5); *McQueen* v. *The Queen* (6); *Tylee* v. *The Queen* (7);

(1) 104 Mass. 9.
(2) 4 Metc. 564.
(3) 17 Ill. App. 582.
(4) P. 231.
(5) Sec. 419.
(6) 16 Can. S.C.R. 1.
(7) 7 Can. S.C.R. 651.

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Jessup v. *The Grand Trunk Railway Company* (1); *Great Western Railway Company* v. *May*) (2).

Robinson, Q.C. (with whom was *Hogg*, Q.C.) for the Crown:

The suppliants' claim is barred by acquiescence. It is perfectly plain that the stipulation in the so-called letter of gift was contemplated to be enforced by the grantee as soon as the canal was completed. The canal was completed in 1832, and from that time the statute begins to run against Sparks and his heirs. So much, then, for the argument that the Crown derives title under the letter of gift. We contend, however, that Colonel By had no authority to bind the Crown by any agreement with Sparks, and, moreover, the Crown can only acquire title by deed or matter of record, and its title must be referable to a conveyance that will hold in law. The Crown's title was acquired by virtue of the expropriation proceedings taken under *The Rideau Canal Act* (3), and Sparks never made a claim for compensation under that Act. (He cites *Duke of Leeds* v. *Earl of Amherst*) (4).

Then, referring again to the letter of gift to ascertain the purposes for which the property was acquired, we find the land was to be taken for "His Majesty's service." That, I submit, means military service in connection with the canal at all times and in view of all possible military contingencies, such as requiring the lands for the purposes of fortification, storing supplies, &c.,—purposes which would require every portion of the lands in dispute to be controlled by the Crown.

Then, as to my learned friend's contention, that it is for the court to declare how much of the lands are required for the purposes of the canal,—I submit that the right to determine that fact rests with the military

(1) 7 Ont. App. 128.
(2) L.R. 7 H.L. 283.
(3) 8 Geo. IV. c. 1.
(4) 2 Phil. 123.

authorities. Looking at the letter of gift as a good contract, is it not the plain intention of the parties that the quantity of land required was to be decided by the grantee? To illustrate the case in the light of the law of contract, A. gives B. so much land for a specific purpose, and B. agrees to give back so much as he does not use for such purpose; now when the object of the grant is completed is the time for B. to require of A. a statement or declaration as to how much land he needs to hold for the original purposes of the grant. It being a matter of contract, the statute of limitations runs against B. from the time I have mentioned.

My learned friend also contends that by the passing of 9 Vic. c. 42, a new title was created and that the Crown cannot refer its title to the expropriation under *The Rideau Canal Act* (1). Our answer to that is that we are so entitled to the land. I do not understand how that statute makes a new start as regards the title at all. It was under 7 Victoria, c. 11, *The Ordnance Vesting Act*, that the Ordnance land vested in the Crown as represented by the Principal Officers of Ordnance. The new statute only provided for the restoring to Mr. Sparks of the lands not wanted for the canal. The new statute was to settle the doubts arising under the proviso in the former Act. It is simply a declaration in 9 Victoria that section 29 of the former Act would apply to Sparks. This does not in any way affect the previous title acquired by the Crown to the 104 acres. It is expressly stated that the Crown had previously acquired title to the Bywash, to the canal and to the 200 feet and the 104 acres. I think a fair construction of the preamble in 9 Victoria is that it was passed for the relief of Mr. Sparks purely and simply.

(1) 8 Geo. IV. c. 1.

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Any recital of facts in the preamble of the statute 9 Vic. c. 42 would not override a legal title which was acquired under a former statute. It would require a provision in the operative part of the statute to do that.

If your lordship decides that the lands were taken under the statute 8 Geo. IV. c. 1, then that will settle any question as to there being a reverter.

As to the question of abandonment, I maintain that a temporary user of the land is not an abandonment of it for the original purposes for which it was given. So long as the Crown keeps the land in its own hands it is quite within its rights and cannot be said to be permanently using it or allowing it to be used for other purposes than the purposes of the canal. The Crown has not parted with the fee of any portion of the lands. Lots are held either by tenants at will or by squatters, or by lessees under terms. (He cites *Smith on Real and Personal Property*) (1). When the fee simple is once vested any condition for devesting it should be construed with the utmost strictness. There is nothing in the evidence to show we are abusing the rights we have obtained, and even if we are, that is ground perhaps for restricting our improper use of it, but not for recovering the land back. Where land is given for certain purposes, I do not know of any law which says that the abuse of that right is ground for reverter. I do not see upon what authority my learned friend bases his claim to the rents we got from these lands. And it must be remembered that we have granted none of this land. My learned friend has said that the canal is but a highway, and he has also said that a grant for a canal is only an easement. To that I answer that the land was taken under the statute. If your lordship finds that way,—that the lands were

(1) Sec. 177.

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ascertained and taken under the statute,—our rights to them are absolute and incontestable. Before there was a *Rideau Canal Act*, Mr. Sparks put it in writing that he would give the Crown this land. It needed the passage of the Act to pass a good title to the Crown. The facts are that Mr. Sparks first signed a memorandum agreeing to give the land, the statute was passed enabling the Crown to acquire it, and then the lands were set out. There was no dedication by Sparks to perfect the gift under his license, and can anybody pretend to say that the Crown could acquire any rights under that license until they acted upon it?

Now take the Bywash. That portion of the land has been built upon years and years ago.

[*McCarthy*, Q.C.—We claim the Bywash from the abandonment of it.]

Then let us look into the facts. We have merely taken advantage of the main drain of the city for canal purposes. Suppose that main drain gave out and it was decided by the city authorities to change its course. It might then become necessary for us to use the Bywash again and I say that the Bywash, so so far as it stands now as an element in this action, has only been the subject of a temporary disuse. I venture to say there is no authority that can be advanced by the suppliants that the lands can be taken away from us under such circumstances.

I have found no authority to show (I am speaking of Ontario) where land is taken by a railway company that it is not taken as a rule in fee simple. I never heard that people could claim the land back again from them. [He here refers to *The People* v. *White*) (1). There is a great difference between American law and English law on this subject as to the question of constitutionality. I think that it must be held that in

(1) 11 Barb. S. C. 26.

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order to support the suppliants' contention the lands are held in trust, otherwise the statute would run against the suppliants. There is no express trust in this case, and I refer your lordship to *Cunningham* vs. *Foot* (1); *Lewin on Trusts* (2); *Wright* v. *Wilkin* (3); *Lewis on Eminent Domain* (4); *Bright* v. *Legerton* (5); *Hodgson* v. *Bibby* (6); *Browne* v. *Cross* (7); *Payne* v. *Evens* (8); *Kennedy* v. *City of Toronto* (9); *Jones* v. *Higgins* (10); *Lewin on Trusts* (11); *Mills* v. *Fox* (12); *Jessup* v. *Grand Trunk Ry. Co.* (13).

McCarthy, Q.C. in reply:

Your lordship is asked to find that there was no dedication by Mr. Sparks of the land to the Crown, but in answer to that I have to say that there is not a syllable alleged by the Crown that this was not a voluntary gift. I say it is incumbent upon the Crown to either reject it out and out or to accept it out and out; and I say, further, that unless they communicated to Mr. Sparks their determination not to accept it, the presumption is that they did accept it and act upon it. It is not for them now, in the absence of a disavowal or refusal of it, to come here and say that they took the land under the statute and not under the gift. They should have communicated their rejection of the gift to Mr. Sparks. They never let Mr. Sparks know that they did not take the land as a gift, but sixty years afterwards they come in here and attempt to say that they took it under the statute. I do not think that the document of 1826 can be construed as raising a reverter in the legal sense of the word. I do not so read that

(1) 3 App. Cas. 974.
(2) P. 140.
(3) 2 B. & S. 232.
(4) Secs. 922, 873, 874, 716.
(5) 29 Beav. 60.
(6) 32 Beav. 221.
(7) 14 Beav. 105.
(8) 18 L. R. Eq. 356.
(9) 12 Ont. 211.
(10) L. R. 2 Eq. 538.
(11) 9th ed. p. 900, 994.
(12) 37 Ch. Div. 153.
(13) 7 Ont. App. 128.

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document. That document created a trust. (He cites *Lewin on Trusts* (1), and also *Croome* v. *Croome*) (2). It may be that it is an implied trust in this instrument, but the case of *Cunningham* v. *Foot* (3) seems to show that it would be an express trust. (He cites *Lewin on Trusts* (4); *Kennedy* v. *City of Toronto* (5); *Trent Valley Canal Case* (6); *McQueen* v. *The Queen* (7). Now then when you get the Crown in the position of a trustee, I wish to know what is to prevent the suppliants at any time from coming in and asking that the trust should be declared. I deny the proposition of my learned friend that Mr. Sparks should have insisted on his rights under the agreement of 1826 upon the completion of the canal, for against an express trust the statute never runs. (He cites *Lewin on Trusts*) (8). The statute might run if we had to come into court and prove that there was a trust, but where the document shows a trust on the face of it the statute does not run against us. (He cites *McDonald* vs. *McDonald*) (9). If we were entitled in 1830 to the benefit of such a trust, we can get the benefit of it to-day. They cannot say that there was no trust on the face of the document. The trust appears plainly from the statute 9 Victoria c. 42; and that statute reaffirms the terms of the gift and, for the first time, puts our rights on a definite footing. It was not until 1846 that our rights were publicly defined, and it would be monstrous now to hold that we could not take advantage of them because we had not done so at the time of the completion of the canal. Why should I not be able to call my trustee to account at any time? (He cites

(1) Pp. 150 and 151 and cases cited there.
(2) 59 L. T. N. S., 582.
(3) 3 App. Cas 974.
(4) Pp. 116, 136, 137.
(5) 12 Ont. 211.
(6) 11 Ont. 698.
(7) 16 Can. S.C.R. 40.
(8) P. 113.
(9) 21 Can. S. C. R. 201.

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Lewin on Trusts (1); *Rennie* vs. *Young*) (2). Then with regard to the fact that the Crown can say it is only using this land for temporary purposes now, but that it requires the land for purposes in connection with the canal in the future, and will hold it for such purposes, I think my learned friend can cite no authority in support of that argument. It seems to me, to ask your lordship to decide that way would be to broaden the rule altogether beyond its proper limits. The statute should run only from the time when we have been given a remedy in the Exchequer Court. Until there was some tribunal having jurisdiction in this matter, whereby we may have obtained the remedy we seek for here, we should not be held to be barred by the statute. My learned friend would contend that although we had no court which afforded us a medium whereby we might obtain our rights, that we are bound by acquiescence. Now acquiescence here means forbearance to sue, and how could we sue when we had no court to resort to for that purpose. (He cites *Vane* v. *Vane* (3); *McQueen* v. *The Queen* (4) and *Rustomjee* v. *The Queen*) (5).

Then the statute only runs in cases of actual occupation, so it is held in the case of *McDonald* v. *McDonald* (6) I have before referred to. With respect to the lots, the possession of the Crown is not the kind of possession in favour of which the statute runs. It is required to be an actual occupation, no theoretical possession is sufficient. It cannot be possession referable to anybody else.

Now my learned friend contends that it is not for the court to determine as to how much of this land is required for the purposes of the canal; but looking

(1) P. 995.
(2) 2 De.G. & J. 136.
(3) 8 Ch. App. p. 383.
(4) 16 Can. S.C.R. 40.
(5) 1 Q. B. Div. 487.
(6) 21 Can. S. C. R. 201.

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at this transaction as a matter of contract, I do not think it can be said that Sparks gave to the grantee the exclusive right to say how much of the land is required for the work. In that case the *cestui que trust* would have no voice or determination in the matter at all.

With reference to the fact as to whether putting up buildings will work a forfeiture I refer to the case of *Vankoughnet* vs. *Denison* (1).

I submit that we are entitled to a declaration as to the Bywash, that part of the property has been abandoned by the Crown. But my learned friend says there could be no abandonment of this property except by conveying the fee. On this point I will refer to *Lewis on Eminent Domain* (2). (He also cites *The People* v. *The Albany and Vermont Railroad Co.*) (3). There can be no doubt about the abandonment of a portion of the Bywash. Then as to the question as to whether the Crown has been using this property consistently with our grant, I would refer to the recent case of *Canada Southern Ry. Co.* v. *Niagara Falls* (4), and also the cases cited in *Lewis on Eminent Domain* (5), and *Grand Junction Canal Co.* v. *Petty* (6). I think it is eminently fair and reasonable that the court should determine what is required for the purposes of this canal, and that the excess should be declared as not necessary for that purpose.

BURBIDGE, J. now (March 20th, 1893) delivered judgment.

The suppliants bring their petition to obtain a declaration of their rights in certain lands in the city of Ottawa adjacent to the Rideau Canal and Basin, the

(1) 11 Ont. App. 699.
(2) P. 598.
(3) 24 N. Y. 261.
(4) 22 Ont. 41.
(5) P. 584.
(6) 21 Q. B. Div. 273.

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title to which was acquired by the Crown under the following circumstances. In 1826 the lands mentioned formed part of Lot C in Concession C, of the Township of Nepean, of which lot Mr. Nicholas Sparks, through whom the suppliants claim, was at the time the owner in fee simple. On the 17th of November of that year, by an instrument under his hand, and that of Lieutenant-Colonel By, commanding the Royal Engineers on the Rideau Canal, Mr. Sparks authorized Colonel By to take such part of the said lots *gratis* as might be required for the purpose of constructing the canal, but not to exceed two hundred feet in breadth on each side thereof; and it was agreed between them that such parts of the land as might not be required for His Majesty's service should be restored when the canal was completed.

At that date there was no legislative authority for the construction of the contemplated canal, or for the expropriation of the lands required therefor. That authority was given in February of the following year by *The Rideau Canal Act* (1), by which, after reciting that His Majesty had been most graciously pleased to direct measures to be immediately taken, under the superintendence of the proper Military Department, for constructing a canal, uniting the waters of Lake Ontario with the River Ottawa, and affording a convenient navigation for the transport of naval and military stores, and which when completed would tend most essentially to the security of the Province by facilitating measures for its defence, and would also greatly promote its agricultural and commercial interests, it was in substance enacted that the officer employed by His Majesty to superintend the said work, might enter upon any lands, and survey and take levels of the same, and set out and ascertain such parts thereof

(1) 8 Geo. IV. c. 1.

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as he should think necessary and proper for making the canal and other works and conveniences connected therewith and requisite and convenient for the purposes of the said navigation. By the second section of the Act it was provided that after any lands should be set out and ascertained to be necessary for making and completing the canal, and other purposes and conveniences mentioned, such officer might agree with the owners or persons interested in such lands, for the absolute surrender to His Majesty of so much thereof as should be required, or for the damages which they might reasonably claim in consequence of the canal and other works being cut and constructed in and upon their respective lands. By the third section it was enacted that such parts and portions of land as might be so ascertained and set out by the officer employed by His Majesty, as necessary to be occupied for the purposes of the canal, should be forever thereafter vested in His Majesty, His heirs and successors. Then followed provisions for determining the compensation to be paid for land taken for, and for damages occasioned by, the construction of the canal (1); and it was provided (2) that in estimating the claim of any individual to compensation for property taken or for damages done under the authority of the Act, the arbitrators or jury assessing such damages should take into their consideration the benefits likely to accrue to such individual from the construction of the canal by its enhancing the value of his property, or producing other advantages, but that it should not be competent to any arbitrators or jury to direct any claimant to pay a sum in consideration of such advantages over and above the amount at which his damages should be estimated.

Acting under the authority of this statute Colonel By, the officer employed by His Majesty to superintend

(1) Ss. 4–9. (2) S. 9.

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the work, ascertained and set out, as being necessary for the purposes of the canal, a portion of Lot C, in Concession C before referred to, containing about one hundred acres, the area being sometimes given as 104 acres, and at others 98 acres. In the portion so ascertained and set out was included the site of the canal where it passed through the lot, and the two hundred feet on each side of the site, which had been previously acquired under the license of the 17th of November, 1826. In the setting out of this land Mr. Sparks never acquiesced. On the contrary he always protested that, with the exception of what he had freely given, no part of his land was necessary for the purposes of the canal, and he never took any steps to determine the compensation to which he was entitled. It was suggested at the time, as it is now suggested, that he was deterred by the provision of *The Rideau Canal Act*, to which reference has been made, and under which the arbitrators or jury would have been bound to take into account the benefits accruing to him, in the enhanced value of his other lands, arising from the construction of the canal. But without attempting to determine how far that consideration may have affected or controlled his course of action, a question that in view of the subsequent disposition of the controversy is unimportant, it is clear that he persistently pressed upon the authorities the simple demand that they should restore to him the land of which he alleged they had wrongfully deprived him.

The Rideau Canal was, it appears, completed and opened for traffic throughout its entire length some time in the month of May, 1832. In 1843 the canal and the lands acquired for the purposes thereof were vested in the Principal Officers of Her Majesty's Ordnance in Great Britain, and their successors in office,

in trust for Her Majesty (1). In 1856 it and "its adjuncts" were transferred to the Crown for "the benefit, use and purposes" of the Province (2), and in 1867 the canal and the lands connected therewith became part of the public property of Canada (3).

When, in 1843, the Ordnance Vesting Bill was before the legislature, a special committee was sitting on Mr. Sparks's petition to have the lands restored to him, and, to meet the objections of those who supported his claims, a provision was added to the Bill, which is to be found in the proviso to the 29th section of the Act (4), that all lands taken from private owners at Bytown, under the authority of *The Rideau Canal Act*, for the uses of the canal, which had not been used for that purpose, should be restored to the party or parties from whom the same were taken. About seventy-seven acres of the land taken from Sparks were within the effect and operation of this proviso, but the Officers of the Ordnance, contrary to good faith it was charged, and so far as I can see justly charged, refused to give up possession. They did not say, for it could not be said, that such lands were then required for the purposes for which they had been taken; but it was suggested that some day they might be, and on that plea they sought to retain the hold they had on the land.

The refusal of the officers in charge of the canal to give effect to the provisions of *The Ordnance Vesting Act* was followed by the exercise by Sparks of acts of ownership over the lands then in question, which, in December, 1844, the Principal Officers of Her Majesty's Ordnance took steps to restrain. In 1845 the controversy was again before the legislature, and a Bill was

(1) 7 Vic. c. 11 s. 1 and schedule.
(2) 19 Vic. c. 45 s. 6 and second schedule.
(3) *The British North America Act*, 1867 s. 108 and third schedule (1).
(4) 7 Vic. c. 11 s. 29.

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passed to explain and amend *The Ordnance Vesting Act* so far as regarded the proviso to the 29th section, and to set at rest the doubts that had arisen as to its application. The Bill was reserved for the signification of Her Majesty's pleasure thereon, and did not receive the Royal assent.

In August, 1845, Sparks, who was defending the suit that the Principal Officers had brought against him in the previous December, in his turn filed a bill against them, and so matters stood until June, 1846, when the Act 9th Vic. c. 42 was passed, with the object of removing the doubts to which I have alluded, and of fairly and amicably settling all matters in difference between the Principal Officers and Mr. Sparks. To the provisions of this Act it will be necessary to refer at some length. By the first section it was enacted that the proviso contained in the 29th section of *The Ordnance Vesting Act* should be construed to apply to all the lands at Bytown set out and taken from Nicholas Sparks, under the provisions of *The Rideau Canal Act*, except :

(1) So much thereof as is actually occupied as the site of the Rideau Canal, as originally excavated at the Sappers' Bridge, and of the Basin and Bywash, as they stood at the passing of the Ordnance Vesting Act, and excepting also,

(2) A tract of two hundred feet in breadth on each side of the said canal, the portion of the said land so excepted having been freely granted by the said Nicholas Sparks to the late Colonel By, of the Royal Engineers, for the purposes of the canal ; and excepting also

(3) A tract of sixty feet round the said Basin and Bywash (wherever the present Ordnance boundary stones stand beyond that distance from the said Basin and Bywash, but where they stand within that distance, then they shall bound the tract so excepted) which is freely granted by the said Nicholas Sparks to the said Principal Officers for the purposes of the said canal, provided no buildings be erected thereon.

It was further enacted that all the land to which the proviso was applicable should, if retained by the Prin-

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cipal Officers of Her Majesty's Ordnance, be paid for in the manner provided by the Act, and that any parts thereof which should not be so retained and paid for, should be and the same were thereby declared to be absolutely revested in the said Nicholas Sparks, or the parties respectively to whom he had conveyed the same, to his and their proper use for ever.

By the second section it was provided that the Principal Officers should, within one month after the passing of the Act, obtain a certificate from the Officer Commanding Her Majesty's forces in the Province, setting forth what part or parts of the land, to which the proviso was applicable, it was necessary to retain for the service of the Ordnance Department for military or canal purposes; and that such part or parts should be retained by, and remain vested in, the Principal Officers in trust for Her Majesty; and that the remainder, if any, should be immediately thereafter absolutely revested in the said Nicholas Sparks or the party or parties claiming under him, to his and their own proper use for ever. By the fourth, fifth and sixth sections of the Act, provision was made for determining by arbitration the amount of compensation to be made for any land retained; and by the seventh, in some distrust, apparently, of the methods of the Officers of the Ordnance, and to leave them no chance to longer delay complying with the will of the legislature, it was provided that if the sum awarded should not be paid within three months after the award was made, or if the Principal Officers should fail to obtain the certificate of the Officer Commanding Her Majesty's forces within the time limited for that purpose; or if they should negligently fail to comply with any of the other requirements of the Act, or if, through the non-attendance or wilful neglect of the arbitrator acting for them, the other arbitrators should be prevented from pro-

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ceeding, and such wilful default or neglect should continue for three months, the land to which the proviso, that has been referred to, was applicable, should be absolutely revested in the said Nicholas Sparks and those claiming under him, without any proceeding being requisite for that purpose.

The certificate of the commanding officer, a copy of which I find with the papers filed in this case, and to which, though it was not, I think, tendered in evidence, I may perhaps, without impropriety, refer on a matter respecting which there is no dispute, was obtained within the time limited by the statute, and there were described in such certificate all the lands to which the proviso was applicable, excepting about twelve acres.

For the lands so proposed to be retained by the Principal Officers, the arbitrators awarded Mr. Sparks the sum of twenty-five thousand pounds, and the Master-General and Board of Ordnance, thinking the amount of the award excessive, declined to complete the purchase. Their decision was communicated to Mr. Sparks by a letter from the officers of the Ordnance at Montreal, dated the 21st of May, 1847, wherein, in order that no difficulty might thereafter arise between him and the Department in respect to this property, it was proposed to reinvest him by a deed of surrender with all the land taken from him for the canal, except the portions he had freely granted and which were vested in the Principal Officers by the statute 9th Vic. c. 42; and that he should give a deed to the Principal Officers conveying to them, in the terms of the statute, the portions so excepted, being the ground actually occupied as the site of the Rideau Canal as originally excavated at the Sappers' bridge, and of the Basin and Bywash as they stood at the passing of *The Ordnance Vesting Act*, and also a tract of two hundred feet in

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breadth on each side of the said canal, with a tract of sixty feet round the Basin and Bywash. At the time Mr. Scott was the Solicitor, at Bytown, of the Ordnance Department, and the letter to Mr. Sparks concluded with the statement that Mr. Scott would present these deeds to him for his approval and signature, and that, as the latter had been desired to draft them in communication with the former's solicitor, it was not doubted that the arrangement referred to would meet with his concurrence. From a letter of the 26th of May from Mr. Scott to the Respective Officers of Her Majesty's Ordnance at Bytown, it appears that he had a personal interview with Mr. Sparks and his counsel, Mr. R. Harvey, relative to the restoration of the land taken from Mr. Sparks for the uses of the Rideau Canal, and that they would be prepared to have the land surveyed and the portions to be given up marked off, on the 29th of that month, and that up to that time Mr. Sparks would not execute any conveyance as required by the Respective Officers at headquarters in their letter dated the 21st.

An official plan produced from the office of the Rideau Canal (Exhibit H^1) dated and signed on the 9th of July, 1847, shows that the proposed survey, of which Mr. Scott wrote on the 26th of May, was completed in June of that year, and that the boundaries between the lands retained for the purposes of the canal by the Principal Officers, and those that were to be given up to Mr. Sparks were definitely determined and indicated on the ground by stone posts or monuments then set up. Of the deeds that it was proposed to give and take, a most diligent and exhaustive search has failed to secure a trace. They were not registered, but the fact has not perhaps the importance that was sought to be attached to it by the suppliants' counsel. So far as Mr. Sparks was concerned there was nothing in the Regis-

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try in respect of the transactions, of which I have been speaking, to cloud the title he had acquired in 1821; and for the rest he may well have been satisfied with the provisions of the statute 9th Victoria, chapter 42; while on the other hand it was provided, by the 27th section of *The Ordnance Vesting Act* (1), that no enrolment of any deed conveying any lands or real property or any estate or interest therein to the Principal Officers should be necessary to vest the same in them in trust for Her Majesty, but at their option they might cause any such deed to be enrolled in the office of the Provincial Registrar. Both parties could, I think, afford to be, and probably were, indifferent as to the registration of any deeds that may have passed between them. To prove the execution and exchange of the deeds proposed in the letter of the officers of Ordnance at Montreal of the 21st of May, the Crown called Mr. Harvey who is mentioned in Mr. Scott's letter of the 26th, and who acted as solicitor and counsel for Mr. Sparks. Putting aside for the present the question of the admissibility of a part of his evidence to which objection was taken, he testified, in substance, that he acted professionally for Mr. Sparks from 1841 to 1852 and was cognizant of the litigation and difficulties that took place between Sparks and the Principal Officers with regard to the Rideau Canal; that he prepared the petitions to the Governor and Legislature; that he was instrumental in getting the proviso put into *The Ordnance Vesting Act*; that he was counsel for Sparks before the arbitrators and conducted his case; that the deeds mentioned in the letter of May 21st, from the Ordnance Department at Montreal, were prepared by Mr. Scott, and were handed to him (Harvey) for examination, and that after examining them he took them to Sparks, that the latter might execute

(1) 7 Vict. c. 11.

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the deed in favour of the Principal Officers, the other having been executed before it was delivered to him (Harvey) by Scott; that Sparks refused to receive the one or to execute the other until the contents of the land were ascertained by actual survey; that the survey was made and other deeds prepared by Mr. Scott; that he (Harvey) took to Sparks the deed from the latter to the Principal Officers and it was executed by Sparks and his wife, he (Harvey) and one Caldwell Waugh being the witnesses to the execution thereof; that he then took the deed to Scott and delivered it to him, whereupon the latter delivered to him (Harvey) the deed from the Principal Officers to Sparks which he handed over to the latter. With reference to the contents of the deed from Sparks to the Principal Officers, Harvey's memory is that there was no reference therein to the statute 9th Victoria c. 42, and no condition that the lands were to be held for the purposes of the canal; that the deed was an absolute conveyance to the Principal Officers of the site of the Canal, Basin and Bywash, of the two hundred feet on each side of the canal, and of the sixty feet round the Basin and Bywash. This is at once the most important part of his evidence, and that which, if it is admissible, should be received with the greatest caution.

Of the testimony of this witness, I desire to say that from the manner in which it was given, and the fact that, speaking generally, it was corroborated by the documentary evidence, I attach to it all proper weight and credit. But the transaction happened nearly half a century ago, and it would be surprising that there should not be some infirmity of memory. The letters of May, 1847, which are in evidence, show, I think, that there was. For instance, I do not think it at all probable, that the deed from the Principal Officers to Sparks was, as he says it was, executed when Mr.

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Scott first handed it to him. As to that he has, perhaps, confounded the first with the second deed. Then too it is probable that he is wrong when he says the deed was executed at Bytown and not at Montreal. But I attach more importance to the circumstance that what he recollects and states of the contents of the deed is not consistent with the facts of which there is no doubt. First, I think we are safe in concluding, from all we have learned of him, that Mr. Sparks was not the man to make any concession that was not demanded of him, or to which the Principal Officers were not entitled. What did they ask of him? That he would give them a deed in the terms of the statute. What would a deed in the terms of the statute give them? A surrender for the purposes of the canal of the lands which they were to retain, with a condition that no buildings were to be erected on the sixty feet round the Basin and By-wash. It is evident that for some reason Mr. Sparks attached considerable importance to this proviso, and it is not likely that having, in 1846, taken the trouble to have it inserted in an Act of the Legislature, he would in 1847 destroy its effect by executing a deed containing no such condition. Then the letter of instructions from the officers of Ordnance to Mr. Scott for the preparation of the deeds is expressed in terms similar to those used in the letter to Sparks, and I see no reason to doubt that the deeds were prepared in accordance with the instructions given. For these reasons, while I conclude that the deeds Mr. Harvey speaks of were duly executed and delivered, I am unable to rely upon his recollection of what the deed from Sparks to the Principal Officers contained. As to that I think the safe and proper course is not to depart from the Act 9th Victoria, chapter 42, and the facts established by, and the fair inferences to be drawn from, the letters of May, 1847.

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In that view of the case it was, of course, a matter of no great importance whether the deeds, that it was proposed to exchange, were ever executed and delivered or not. But there is nothing apart from Mr. Harvey's evidence to suggest that any departure from the statute was proposed. Everything that we know with certainty is to the contrary, and it is clear that the exchange of the deeds of surrender was suggested as a matter of greater caution, and for no other reason. The Act by which their differences were settled expressly defined the rights of the parties and their respective interests in the lands to be retained by the Principal Officers, and those to be given up, leaving to be determined the question of the amount of compensation and the respective boundaries and limits of such lands; and the latter as we have seen, were in June, 1847, duly ascertained, set out and marked upon the ground.

To return for a moment to the objection to Mr. Harvey's evidence, that his knowledge of the facts of which he spoke were acquired in his capacity as solicitor and counsel to Mr. Sparks, it is settled law that when he put his name as a witness to the deed from the latter to the Principal Officers he ceased, in respect of the execution of the instrument, to be clothed with the character of an attorney, and bound himself to disclose all that passed at the time relating to such execution (1). Then as to the objection to the contents of the deed, there is, it seems to me, great weight in the answer that was made, that the witness's knowledge was not obtained from Mr. Sparks but from Mr. Scott; and that the terms and provisions of the deed submitted to the former on behalf of the Principal Officers, and accepted by him, could not in any fair sense be considered to be a privileged communication between him

(1) Robson v. Kemp, 5 Esp. 52; Crawcour. v. Salter, L. R. 18 Chan. 36.

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and his attorney (1). It is unnecessary, however, to further discuss that question, as, in the view I have taken of the contents of the deed, it is not material.

Now I think that the facts that I have recited establish two things. First, that the contention of the suppliants that they are entitled to have an inquiry as to what parts of the lands in question are not now required for Her Majesty's service within the meaning of the writing of November 17th, 1826, which Nicholas Sparks and Colonel By signed, and a declaration that such parts should be restored to them, cannot be maintained.

From the time the canal was completed to the day the statute 9th Victoria c. 42 was passed, Mr. Sparks never put forward any claim to any part of the land that he had freely given for the purposes of the canal. The fair inference from all that we know he said or did, is that in his opinion the two hundred feet on each side of the canal were necessary for such purposes. And apart altogether from any question of acquiescence or delay on his part, or on the part of those who claim under him, the Act by which he and the Principal Officers of Her Majesty's Ordnance determined their controversy (2), and the deeds of surrender they exchanged, were, it seems to me, conclusive between them so far as the area and boundaries of the lands to be retained and restored, respectively, were concerned.

In the second place it is, I think, equally clear that the Crown holds for the purposes of the canal the lands so retained, and that to "the sixty feet round the Basin and Bywash" is attached the condition that no buildings shall be erected thereon. This question is, it seems to me, equally concluded by the Act 9th Victoria chapter 42, which declares in plain terms that

(1) Lyell v. Kennedy, L.R. 23 Ch. D. 405; 9 App. cas. 81.

(2) 9th Victoria c. 42.

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such lands were freely granted for the purposes of the canal. Such a declaration may not be disregarded. If authority is required for that proposition it is to be found in the judgment of the Judicial Committee of the Privy Council in the late case of *The Labrador Company* v. *The Queen* (4), in which their lordships say, that even if it could be proved that the legislature was deceived in an absolute statement of facts in a statute, it would not be competent for a court of law to disregard its enactments. If a mistake is made, the legislature alone can correct it. The courts of law cannot sit in judgment on the legislature but must obey and give effect to its determination.

With reference to the proviso that no buildings should be erected, I cannot agree with the suppliants' contention that it extended as well to the two hundred feet on each side of the canal. I entertain no doubt that the Act will not bear that construction, and that the proviso is limited to "the tract of sixty feet round the Basin and Bywash."

That brings us to a consideration of the question of the relief that the suppliants may obtain in this court for any breach of the condition not to erect buildings, or for the non-user of any portion of the land granted, or for its misuse. This branch of the case demands, I think, more consideration than was given to it at the hearing, the attention of all parties having then been principally directed to the discussion and determination of the title by which the Crown holds the lands in dispute, and I propose to reserve it for further argument, and if necessary to take further evidence as to the use to which in particular cases such lands have been put. But to refer briefly to the questions involved, it is not contended, and I do not think it could with success be contended, that the proviso that no buildings should

(4) 67 L. T. N. S. 734; [1893] A. C. 104.

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be erected on the tract of sixty feet round the Basin and Bywash, created a condition subsequent, a breach of which would work a forfeiture and let in the heirs, or that the use by the Crown of a portion of the lands in question for purposes other than the "purposes of the canal" would work such a forfeiture. Under like circumstances, and in a proper case between subject and subject a court of competent jurisdiction would no doubt restrain the defendant from making any unauthorized use of the land, and would compel him to remove any buildings that had been erected thereon contrary to the terms attached to the grant. But this court has no such power or authority where the Crown is the defendant. It may, I think, declare what the rights of the parties are, but at present I do not well see how it could go beyond that. The Crown cannot alien the land or any portion of it, and if it should do so the grantor's heir would probably have their action against the grantee. If the Crown should abandon the land or any portion of it, the land or such portion would revert to the heirs and they might enter and possess it. The Crown ought not, it seems to me, to use the land or any portion of it, contrary to the terms of the gift; but if it does, it is clear that it cannot be restrained by order of the court, and I do not at present see what remedy the suppliants would have except to appeal to the Crown or to Parliament to do them justice and to render to them the profits derived from any use of the land foreign to the purposes for which their ancestor had freely granted it. If it were conceded that the grant from Sparks and the Act 9 Vict. c. 42 created a contract or agreement on the part of the Crown not to use the lands granted for other than the canal purposes, and not to build on the sixty feet mentioned; and that for the breach of such agreement the suppliants are entitled to damages, the answer would be that no

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damages have been proved. In such a case the damages would not, I am inclined to think, depend upon and be measured by the profits the Crown has made by the unauthorized use of the land granted, but by the loss which the suppliants have suffered, though I wish to add that the case of *The Proprietors of Locks and Canals on the Merrimack River* v. *The Nashua and Lowell Railroad Company* (1) would appear to support a contrary opinion.

It seems, that some years ago, an arrangement was made with the city authorities, and a drain constructed by which the water from the waste-weir at the Bywash was carried into the city sewers, and since then a portion of the land at the Bywash has not been used for the purposes of the canal. This portion is now useful, so Mr. Wise, the Government engineer in charge of the canal, says, for building purposes only. But the Crown still retains possession, and it is doubtful if the court can give any relief; though if Mr. Wise expresses the views of the Government, as well as his own, it would seem to be fair and just that this portion of the tract of land at the Bywash, excepting so much thereof as is occupied by Mosgrove Street, should be given up to the suppliants.

There will be a declaration that the Crown holds the lands in question for the purposes of the canal, and that no buildings should be erected on the tract of sixty feet round the Basin and Bywash.

The other questions, including the question of costs, will be reserved.

Judgment accordingly.

Solicitors for suppliants: *Christie, Christie and Greene.*

Solicitors for respondent: *O'Connor, Hogg and Balderson.*

(1) 104 Mass. 1.

ADMIRALTY DISTRICT OF BRITISH COLUMBIA.

1893
Jan. 24.

THE CANADIAN PACIFIC NAVIGATION COMPANY. ..... } PLAINTIFFS;

AGAINST

THE SHIP C. F. SARGENT.

Maritime law—Salvage—Essentials of—Difference between towage and salvage service—Professional and volunteer services—Rate of compensation.

Salvage means rescue from threatened loss or injury. No danger, no salvage. If the ship be in danger, then the rescuers earn a salvage reward, which, on the grounds of public policy, is to be liberal, but yet varies according to the imminence of the danger to the ship on the one hand, and the skill and enterprise and danger of the salvors on the other hand.

2. A small packet steamer, while performing one of her regular trips between certain points in thick weather, discovered a large steamship lying at anchor in such a position as to be in imminent danger of becoming a total loss. The latter signalled the former and asked to be towed into port. This the packet steamer refused to do, wishing to prosecute her voyage, but agreed to tow the ship out of her dangerous position into the open sea, and there give her captain directions to enable him to reach his port of destination. This offer was accepted and acted upon. In conducting the ship to the open sea the packet steamer performed the services both of a pilot and tug, and showed skill and enterprise, and incurred appreciable risk, while so engaged.

Held, to be a salvage, and not a mere towage service.

Semble, while the court is disposed to confine the claims of professional pilots and tugs to the tariff scale for such professional services, a volunteer ought to be allowed a more liberal rate of compensation.

THIS was a claim for salvage services.

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

January 23rd and 24th, 1893.

The case was heard before Sir Matthew B. Begbie, C.J., Local Judge for the Admiralty District of British

Columbia,—Capt. May, R.N., C.B., and Lieut. Stileman, R.N., sitting as Nautical Assessors.

Bodwell, for the plaintiffs, cited *The Princess Alice* (1); *The Charlotte* (2); *Maclachlan on Shipping* (3); *The Ellora* (4); *The Reward* (5); *The Rialto* (6); *The Undaunted* (7); *The Silver Button* (8).

Eberts, Q.C. (with whom was *Taylor*), cited *The Strathnaver* (9); *Maclachlan on Shipping* (10); *The Reward, ubi supra*; *The Mulgrave* (11); *The True Blue* (12).

Bodwell replied.

Sir MATTHEW B. BEGBIE, C.J., L.J., now (January 24th, 1893) delivered judgment.

On the morning of the 4th November last, the steamer "Maude," Captain Roberts, with a full cargo and forty or fifty passengers, was on her regular trip from Victoria to Clayoquot, calling, among other places, at Mr. Sutton's settlement in Uculet. She passed Cape Beale about 5 a.m., but, owing to the fog, could not see the light. Owing to the same cause, she abandoned her usual course in clear weather, viz., through the intricate but smooth inner-water channels of Barclay Sound, and stood across to Cape Flattery. As soon as she heard Flattery whistle, she made for the western entrance of Barclay Sound. The first thing she made out was Black Rock, at a distance of one-half mile. On closing up to Black Rock she saw a ship lying at anchor inside, being the "C. F. Sargent," Captain Snow (now libelled), on a voyage from San Francisco to Port Angeles. The ship hoisted a signal, but before paying any attention to it, the "Maude," wishing to

(1) 3 W. Rob. 138.
(2) 3 W. Rob. 71.
(3) P. 631.
(4) Lush. 550.
(5) 1 W. Rob. 174.
(6) (1891) Prob. 175.
(7) Lush. 90.
(8) L. R. 2, E. & A. 70.
(9) 1 App. Cas. 58.
(10) P. 633.
(11) 2 Hagg. Adm. 77.
(12) 2 W. Rob. 176.

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ascertain her exact position, and not being quite sure of Black Rock or any of the rocks, (owing to the fog) endeavoured to make Round Island, where there is a beacon, easily identifiable. Finding her first signal unnoticed, the ship began tooting on her horn, but the "Maude" continued her course till, recognizing the beacon, she knew that she had rightly judged Black Rock, and returned to the ship. After informing the captain, in answer to his inquiries, that he was off the entrance of Barclay Sound, and refusing (on account of his freight and passengers) to tow him to a port, Captain Roberts undertook to tow him out of his position into the open sea, whence he could give him directions to proceed on his voyage. It was also, after various offers and refusals, agreed that the amount payable for these services was to be left to the respective owners. But, a very few minutes after this had been agreed to by both parties, Captain Snow wished to add a stipulation that in no case was the amount to exceed $500; and he says that Captain Roberts, from the deck of his steamer, gesticulated assent, and shouted "all right"; Captain Roberts insisting that his gesticulations meant dissent, and that he shouted back a refusal to add anything to what was already agreed upon. And this is confirmed by those on board the "Maude," who could, much better than Captain Snow, hear what it was that Captain Roberts really said. I am of opinion that the defendants fail to prove any assent to this further stipulation; and so the amount of remuneration was either by agreement left to the respective owners, who now cannot agree; or else, if the last stipulation were considered by Captain Snow to be a necessary term of the agreement, there was no concluded agreement at all.

In either case, the parties now failing to agree upon an amount, it falls upon the court to say what is a pro-

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per remuneration. And the first thing to be determined is, whether such remuneration is to be made as for a salvage service, or simple towage; the plaintiffs claiming as for the first; the defendants alleging that it was nothing but ordinary towage.

Salvage means rescue from threatened loss or injury. If the ship were in no danger, there could be no salvage. If she were in danger, then the rescuers earn a salvage reward, which, on the grounds of public policy, is to be liberal; but which varies very much according to the imminence of the danger to the ship on the one hand, and the skill and enterprise and danger of the rescuers on the other hand. But the question of the ship's danger is the first thing to be considered. On a service of towing, for instance, the tug may display both skill and enterprise, and expose herself to risk, but if the ship be towed merely for the sake of expedition, and not to take her out of danger, actual or impending, it is towage merely, and not salvage. And the court is to judge whether the danger really existed, and not the parties themselves.

Now, what was the position of the ship out of which the "Maude" undertook to tow her? Captain Snow tells us, that having left San Francisco; a few days before, in his ship of nearly 1,700 tons, with crew of twelve men before the mast, bound for Port Angeles, he found on the early morning of the 4th November, that he had completely lost his way—was in utter ignorance whereabouts he had got to. He had been wandering and drifting about with light airs and a fog, which prevented any observations for two or three days previously. He had never been in Barclay Sound before, though he had been to Victoria and Nanaimo; he had no chart except one quite out of date, on a small scale, and almost, if not quite, useless for the purposes of navigation within the intricate channels of Barclay

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Sound, into which, without knowing it, he had drifted; sailing first north and then south, without knowing where he was or whither he was going. At 6.30 a.m., he was running north-east with a light wind from south-east, when he saw land right ahead. He immediately wore, and proceeded on a south-west course for an hour and a half or two hours, the wind dying out, when, on the fog lifting a little, he saw enough to make him immediately drop both his anchors, running out seventy-five fathoms on the one and sixty fathoms chain on the other. What induced him to do this? He could not have the least notion of the bottom under him; it might have been rock, and sixty fathoms deep; in fact there are fifty or sixty fathoms marked not very far from the place where he was. What was that place?

According to the evidence of the plaintiffs, the ship was lying near a point about equi-distant from Black Rock on the south, and Starlight Reef on the west, having Heddington Reef and Great Bear Rock on the north; and westward of a line drawn from Black Rock to Great Bear. A ship coming down from the north-east with a light dying air from south-east, as Captain Snow describes, with the westerly current mentioned by some of the witnesses, might easily find herself just about that spot; and the fog rising a little would show an almost uninterrupted semi-circle of broken water, completely embaying the ship, except on the quarter by which both the wind, such as it was, and the current forbade her escape. I am advised that under these circumstances, in order to save the ship from the visible breakers, it was prudent seamanship to cast anchor without wasting any time in examining the ground; but that imminent danger is the only apparent ground for such a manœuvre. And if the ship had been in any of the four positions alleged by Captain Snow (to be presently mentioned), inasmuch as there would in

that case have been clear open water ahead of him, and none of the rocks above mentioned would even have been sighted, (about half a mile was probably about the sight limit in the fog that morning, at that distance from the shore, though one or two of the Sargent's crew speak of two or three miles), there is no conceivable reason why he should have cast his anchor at all, or why he did not continue on his S.W. course.

The four positions just mentioned arise thus, Captain Snow does not admit that the ship's position is accurately alleged by the plaintiffs. He says that in the course of conversation between himself and the captain of the "Maude," while his own ship was getting ready to weigh her anchors, he learned for the first time that he was off the western entrance to Barclay Sound, and obtained the names of the different rocks in the neighbourhood—his own chart of Barclay Sound being on too small a scale to contain half their names. From these rocks he took many cross bearings, the result being to place his ship, he says, from a mile to a mile and a half to the eastward of the position described by the plaintiffs. Of course, if the ship had been where her captain alleges, she would have been in little or no danger; and so there could have been no salvage service performed. The only wonder is, why, if so far from the rocks, she should have repeatedly demanded the plaintiffs' services, or why she should have cast anchor at all, or wanted a tug at all. She might have wanted to know where she was. But when the assessors plotted out the cross bearings, of which Captain Snow took no less than four, it appears that no two of the points of intersection coincide. There are, therefore, no less than four positions of the ship, as thus shown, some of them three-quarters of a mile apart. This extraordinary discrepancy in a part of the case which was very strongly relied on, and announced with an air of

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great particularity, throws great doubt over the accuracy of Captain Snow's recollections and observations in other respects. And these alleged and uncorroborated observations by a complete stranger, scarcely deserve to be considered or weighed against the direct evidence of the captain and engineer of the "Maude" and of Mr. Sutton, a settler on Uculet Inlet, who knew Barclay Sound well, having traversed it in steamers, in canoes and in a steam launch, and who happened to be a passenger on board the "Maude." Besides which, the fact admitted by both parties that the "Maude" began to tow S.E., and afterwards edged away to S. and S.W., is entirely consistent with the ship's position as alleged by the plaintiffs; but from the position stated by the defendants there was nothing to prevent her steering south at once. There is no doubt that the service of getting the ship out of her difficulties, and placing her in the open sea, with sufficient directions as to her future course, was well and sufficiently performed by the "Maude."

It was, indeed, argued for the defendants that the ship, even if in the position assigned by the plaintiffs, was in no danger, for that if a westerly wind should arise (and the wind actually came strong from the westward early next morning near Port Angeles) she could have easily sailed out. In the first place, it is to be observed that the argument completely misconceives the meaning of the word "danger." The argument seems to admit that every other wind would have been fatal. And a position which leaves only one chance of escaping destruction, and that chance depending entirely upon one particular change of wind is, in the view of this court, dangerous in the extreme. The force and direction of the wind experienced by the ship one hundred miles away, off Port Angeles, is not at all decisive —is scarcely a guide for guessing the nature or direction

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of the wind at the western entrance of Barclay Sound. Nothing is more common than to stand on Beacon Hill with a fairly strong west wind, and watch the smoke of a forest fire on the opposite side of the Strait, scarcely twenty miles away, rapidly carried towards the Pacific, exactly in a contrary direction to the wind on Vancouver Island, on the north side of the Strait. The evidence of witnesses who were in the neighbourhood that night, shows that the wind there was either S.E. or S.W. But this is very immaterial. I am not satisfied how the wind was that night at the point from whence the ship had been towed. What is more material is this, that with the most favourable wind I do not think she could have taken advantage of it. There is every ground for believing that Captain Snow used all possible expedition in raising his anchors on the 4th November, yet he was four hours getting them aboard, even with the assistance of the "Maude" towing the ship up to her anchors in order to get the last of them on board. How could the ship have raised them in time to sail out, even if the wind had changed to the west and freshened suddenly, as Captain Snow says it did? She might have slipped them, it is true; but she would have been in a sorry plight without an anchor, and the first vessel from whom she borrowed one might perhaps have claimed as for a salvage service. Nor would her troubles have been nearly over, nor would she have been nearly out of danger, even if she had got free from her immediate entanglement. The assessors are of opinion that with the fairest wind it would have required good seamanship, with a well found crew and a knowledge of her starting point, to have evaded the dangers, of which she knew absolutely nothing, which lay to the eastward and south-eastward. Assuming that her captain had the requisite seaman-

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ship, all the other requisites were absent. To describe such a position as quite safe, because she was not at the moment in instant danger of sinking or drifting, is to misuse language. She might, of course, have ultimately been wafted harmlessly and ignorantly out of that triangle, as she had been, in fact, wafted harmlessly and ignorantly into it. Perhaps the one event was not more unlikely than the other; and of course the second event might have happened as well as the first. But in the opinion of the assessors, in which I quite coincide, she was on the morning of the 4th November in imminent danger of becoming a total loss. And however Captain Snow may now make light of his position, as men are apt to do of a danger that is past, I am quite clear that he thought at the time he was in a most imminent danger, or he never would let go both his anchors; nor would he otherwise have repeatedly, by ensign and fog horn, called for assistance. And we all think that the "C. F. Sargent" was just in such a position as that a prudent owner or master would willingly have accepted the services of a tug and pilot (for it is to be remembered that the "Maude" rendered both services—the one might have been of little avail but for the other), knowing that he would have to requite such service with a salvor's reward.

The defendants urge that the ship might have lain there in perfect safety till she could summon a tug, and that Captain Snow could have taken a boat to Carmanah or Cape Beale, only twelve or thirteen miles distance, and telegraphed thence to Victoria. The suggestion seems absurd. The captain had not the least idea where he himself was, or where or in what direction either Cape Beale or Carmanah lay. For all he knew, they might have been fifty miles off. How could he have gone on so mad an errand? Then it

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was suggested that tugs were often in that vicinity. But the contrary is the notorious fact; tugs seeking employment go, it is true, beyond Cape Flattery, but they always expect their customers from the southward. Scarcely once in a year would a chance sailing ship wanting a tug be met coming from the north, and the very perilous position of the ship did not admit of delay. One of the defendants' own witnesses, who said he had once approached Barclay Sound, admitted that he had not been nearer than seven or eight miles off and thought that quite near enough Fortunately for Captain Snow, the same fog which had driven him out of his course, had compelled the "Maude" deliberately to alter hers, and, by the merest chance in the world, brought her right down on the ship, so close as to be seen. A quarter of a mile farther off, and neither of them probably would ever have known of the other's vicinity.

The service then being a salvage, we have to consider the amount of remuneration, there being no concluded agreement between the parties. The defendants have paid $500 into court; and they urge that as $50 per diem would be sufficient charter money for the "Maude," $500 are fully ample for a service which only detained her eight or nine hours. But the mere expense out of pocket of a salvor is never much considered in estimating the value of the service rendered. The most important services may be rendered without the expenditure of a shilling or the loss of a quarter of an hour's time by the salvor; e. g., by giving a course, or information of locality by word of mouth, or giving a lead by sailing ahead of one or more ships; all of which would be lost, in an intricate channel, but for the lead; that is a salvage service; and it was performed by the "Maude" in addition to the mere physical motive power which she lent to the

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ship to enable her to reach the line of safety. The "Maude" was not there seeking such service; she was crowded with freight and passengers, on her fortnightly trip to the West Coast. The court leans against the large claims sometimes made by professional tugs and pilots; they are generally confined to the tariff scale for their professional services. But the case is different with respect to pure volunteers who cannot be expected to work for mere tariff allowance. Nor is it at all clear on the evidence produced that the "Sargent" could have procured a tug from Victoria or Port Townsend, without aid from the "Maude." Without information from the "Maude," the captain could not have reached any telegraph station. He neither knew where he was, nor where the telegraph was. The "Maude" could have taken a letter engaging a tug from Victoria; but that tug could not have reached the ship without information derived from the "Maude." And if a regular tug charges $700 for going from Cape Flattery to Nanaimo and back, (which is what the defendants and their witnesses proved) and $650 from Port Angeles to Nanaimo and back to Cape Flattery, it may well be doubted whether such a tug would have gone from Victoria or Port Angeles to the Black Rock just opposite Cape Flattery and back for so small a sum as $500. I look upon the $500 paid into court as barely sufficient for a towage service. The "Maude" was of small size, 95 tons; the ship was 1,704 tons gross. The "Maude" consequently had to put on all her power against the current and wind in the heavy swell, so that though her engines were racing, yet she could not relieve them. Then the delay in the ship in getting her anchor up, also caused risk. If anything had given way in the "Maude's" engine she would have been in some risk, as she was not fitted to pass the night at sea if disabled, nor was she rigged so as to enable her to seek shelter

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under sail. Fortunately her engines stood the strain, and she did reach shelter; but she did not reach her destination until next day, losing a whole twenty-four hours; though the actual towage only lasted an hour and a half. The "Maude," therefore, showed both skill and enterprise, and incurred some appreciable risk, and the ship derived great benefit from her service and did not lose a rope yarn. I do not think that any insurance company would, in the absence of a tug, have underwritten a policy on her for less than 10 per cent premium; and there were the lives of all on board at stake. The ship being valued for the purposes of this action at $20,000, I do not think less than $2,000 would be sufficient acknowledgment of the advantage to the ship's owners from the local knowledge and steam power furnished by the "Maude." There will be judgment for that sum, with costs. If there is any difficulty about the disposal of the salvage money, application can be made to me in Chambers.

I am alone, of course, responsible for this judgment; but it is founded on the advice, upon nautical matters, of the two gentlemen I have been fortunate enough to have as assessors, with whom, I am happy to say, I have agreed throughout.

Judgment accordingly.

Solictors for plaintiffs: *Bodwell & Irving.*

Solicitors for ship: *Eberts & Taylor.*

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April 25.

QUEBEC ADMIRALTY DISTRICT.

HENRY B. CHRISTIAN AND GEORGE OWEN SMITH, TRADING UNDER THE STYLE AND FIRM OF J. O. SMITH & CO. ..... PLAINTIFFS;

AGAINST

THE BRIGANTINE "*ST. JOSEPH.*"

Maritime law—Bottomry bond, essentials of—Communication to owner of master's intention to hypothecate—Brokers' commissions.

The hypothecation of a ship is only justified when it is done to secure amounts due for necessary repairs to enable the ship to proceed with her voyage, or for necessaries or provisions required for the same purpose. Furthermore, in order to enable the creditor to benefit by the hypothecation, the following elements must be present in the transaction, (*a*) the repairs must be performed and the necessaries or provisions supplied on the express condition that the claim is to be secured by a bond; (*b*) there must be a total absence of personal credit on the part of the owner or master; (*c*) before pledging the ship, the master should, if it was at all possible to do so, have communicated with the owner, and (*d*) there must not be sufficient cash or credit available to the master to pay the amount of the indebtedness so incurred.

2. A master gave a bottomry bond on his ship for repairs executed some time previous to the voyage he was then prosecuting, and which were done entirely on his personal credit at the time and upon the distinct understanding that he would not be required to pay for them until his return from another voyage. It also appeared that the master had not communicated with the owners before entering into the bond, although means of communication were open to him; and it was, moreover, shown that the ship had enough credit at the place where the bond was made to pay the whole amount of the claim.

Held, That the bond was void.

3. A ship-broker's commissions cannot be the subject of a bottomry bond.

ACTION on a bottomry bond.

The facts of the case are stated in the judgment.

March 21st, 1893.

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The case was heard before the Honourable George Irvine, Local Judge in Admiralty for the District of Quebec.

Pentland, Q.C. for plaintiffs;

A. H. Cook for the ship.

IRVINE, L. J., now (April 25, 1893) delivered judgment.

This action was brought in the Exchequer Court of Canada on the 31st July, 1891, against the brigantine "St. Joseph," Auguste Langelier, master, then lying in the Port of Montreal, to enforce payment of a bottomry bond given by the master to the plaintiffs at Port Elizabeth, Algoa Bay, on the coast of Africa, on the 18th April, 1891, for £298. 3s. 10d. Mr. John Arthur Maguire appears as sole owner of the vessel proceeded against and pleads, in effect, the nullity of the bond for various reasons set forth in the plea.

It is important to consider the facts of this case so far as they have reference to the circumstances under which this bond was given and which involve the history of the movements of the ship during the two years preceding the date of the bond. The original owner of this vessel, as far as the record shows, was one Gamache, of Cap St. Ignace, P.Q., who sold her to a man named Marcotte, the latter, however, never registered his purchase at the Custom-house, and Marcotte having got into pecuniary difficulties in 1887, Gamache resumed his ownership and the possession of the vessel.

In 1889 Gamache sold the vessel to Maguire, the present owner. She was at this time in Algoa Bay in South Africa, and Langelier was the master. The ship had been occupied for some time in making coasting

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voyages on the East coast of South Africa, and the plaintiffs had been acting as agents or brokers for the master at Port Elizabeth.

Maguire appears not to have been satisfied with the master's management of the affairs of the ship, and ordered him to leave the coast of Africa and gave him directions to sell the ship under the instructions of Maguire's agents and to return himself to Canada; or in any case, in the event of not being able to arrange for a satisfactory sale of the ship, to bring her to America at once.

Langelier was not able to comply with these instructions as he had chartered the vessel for a voyage to Mauritius under rather favourable circumstances, and his contract had to be carried out. He accordingly sailed on this voyage and arrived at Mauritius in the beginning of October, 1890. On this voyage the foremast was carried away, and it became necessary on his arrival to have a new mast put in. This was done by the firm of Black, Smith & Co., and their charge for the work amounted to 2,300 rupees, equal to £184 sterling. The arrangement between the shipwrights and the master was that they were to be paid on the return of the master with his ship on the next voyage,—he then intending to obtain a new charter to Mauritius on his return to Algoa Bay. It appears that the ship did not return to Mauritius, but made one or two coasting voyages and finally obtained, in April, 1891, a charter to carry wool to Montreal. In the meantime Maguire, being apparently anxious to get his ship more under his own control and not to allow the master to be deterred from returning for want of funds, opened a credit with the firm of Blythe & Co., at Mauritius for £300—this was done through Blythe's London house and the credit had been notified before or about the time that the foremast was being put into the ship.

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The counsel for the plaintiffs at the hearing threw some doubt on the fact of Maguire having established this credit, but there is no evidence to contradict it. Maguire swears that while in London he made arrangements for this credit, and Langelier, although not very clear in his statement, seems to have had a conversation with Blythe on the subject, and states that if he had chosen to do so he would have had no difficulty in obtaining the amount necessary to pay the bill for the foremast. He expected, however, to have enough out of the freight for the next voyage to meet this amount without its being necessary to draw on the owner, which he seemed very reluctant to do. The ship not returning to Mauritius, Black, Smith & Co. became naturally anxious about the payment of their claim, and sent authority to the plaintiffs to collect it. Black, Smith & Co. had made no stipulation for a bottomry bond, but had simply given credit to the master who had promised to pay them on his return voyage and they had been satisfied with his promise.

The position of the case respecting the shipwrights' claim is explained in the plaintiffs' letter to them on the 7th March, 1891, and their letter to Maguire of the 30th March.

The following are copies of the letters referred to:—

PORT ELIZABETH, 7th March, '91.

MESSRS. BLACK, SMITH & Co.,
MAURITIUS.

DEAR SIRS,—We came duly in possession of yours 10th February, per "Dunrobin Castle." The captain of "St. Joseph" duly informed us on his arrival from Mauritius last time that he was indebted to you for a new mast and he confirms your account of 2,300 rupees. The "St. Joseph" would have returned to your island before this if we could have got a cargo the freight on which would have sufficed to pay your account, but he has not yet been able to do so and we have employed him on the coast here so as to pay expenses until he could get a cargo of guano which he may shortly succeed in, when he will go your way. Meantime we have at his credit about £70 the result of his last coasting trip which he has authorized us to hold against your account.

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The "St. Joseph" has now gone to East London and will return to this in a few days when we shall decide what to do further. Capt. Langelier has shown us letters from his owner naming that Blythe Bros. are his agents and hold his power to sell and failing a sale the vessel will proceed home, that is to Canada, and any indebtedness of the vessel will be met by Messrs. Blythe. Under all these circumstances we have not considered it advisable to adopt any extreme measures but to await the working out your account which we hope to see effected shortly. If we can get a cargo of guano for him to Mauritius this will at once clear your account.

Yours faithfully,
(Sgd.) J. O. SMITH & Co.

PORT ELIZABETH, 30th March, 1891.

Messrs. MAGUIRE & Co.,
Quebec.

DEAR SIRS,—We last addressed you on the 2nd February, since which Captain Langelier has shown us your letter to him, wishing him to proceed on his way homeward-, and we had hoped to give him another cargo of guano to Mauritius, which would have enabled him to pay his indebtedness there for a new mast. A cargo in grease wool offering for Montreal, Capt. Langelier determined to accept the offer of 9s. 6d. in full per bale, as per copy of charter-party enclosed, as she would have to proceed to West Indies in ballast. You will note that the charterers are to advance £100 on account of freight, this, with a balance we had in hand from her last voyage to East London, will suffice to pay the Mauritius account; but the master will have to draw on you for disbursements to enable him to make this voyage, which we shall advance and which we do on the faith of your having placed credit with Messrs. ———, Mauritius, to enable him to proceed home. The "St. Joseph" will be fully loaded this week, and we will estimate it to carry 750 bales.

Had this vessel been properly found and in good order when she came into our hands, and not needed the heavy outlay to keep her in sea-going trim, she would have done well here, as she has earned money and would be a useful and profitable vessel on the coast here, with occasional runs to Mauritius, if in the hands of some one who had the authority to control expenditure and positively direct her movements.

Yours faithfully,
(Sgd.,) J. O. SMITH & CO.

The plaintiffs then remitted the amount of the cost of the foremast to Mauritius, gave the master £75 in cash and paid some other small disbursements

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for the ship, which, with the amount of their commissions, make the sum mentioned in the bond.

The question to be decided in this case is whether, under the circumstances as above detailed, the master had any legal justification for giving the bond of hypothecation. It must be observed that I have only jurisdiction in this matter if a valid bottomry bond has been given. I have nothing to decide as to the question of whether or not there exists a just debt due to the plaintiffs by the owner of the vessel, nor is it my duty to give any opinion on that subject. The principles which govern this branch of maritime law are well known and have been defined by numerous decisions of the Admiralty courts in England and in this country. The hypothecation is only justified when created to secure amounts due for necessary repairs given to the ship to enable her to proceed on her voyage, or for necessaries or provisions required for the same purpose, and which must be furnished on the express condition that the amount is to be secured by the bond. There must be also a total absence of personal credit on the part of the owner and master, and before binding the ship in this way the master is bound, where it is at all possible to do so, to communicate with the owner. Applying these principles to this case, we have first the amount of 2,300 rupees as the cost of the foremast, for this expenditure no bond was asked by the shipwrights, but the work was distinctly done on the personal credit of the master, who was not to be required to pay for it until his return after another voyage. Moreover, it was not a necessary repair made to enable the vessel to proceed on her last contemplated voyage, indeed she had made at least one, if not two, voyages since such repairs were made.

I find that nothing can be more clear than that, so far as respects the amount due for the repairs in

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Mauritius, there was no legal case to justify bottomry; but as a bottomry bond may be bad for a part, and good for the remainder, it is necessary to inquire into and decide on the balance of the amount intended to be secured by the bond. I hold that the commissions, although possibly quite fairly due to the plaintiffs, could not be the subject of bottomry.

Moreover, there are two additional grounds of nullity which I consider conclusive. The master and owner had enough credit to pay the whole amount of the claim. The plaintiffs, on the 30th March writing to Maguire, stated that they were willing to advance the required amount on the faith of his having placed a credit in Mauritius to enable the master to return home.

I am further of the opinion that there is not sufficient excuse for not having communicated with the owner before entering into the bond. The plaintiffs say it was impossible. I consider that this is not established, the master had a code and the cost of telegraphing is only $2.40 per word.

I am, on the whole, of opinion that the bond is null, and I dismiss the action with costs.

Judgment accordingly.

Solicitors for plaintiffs: *Caron, Pentland & Stuart.*

Solicitors for the ship: *W. & A. H. Cook.*

CARTER & COMPANY (LTD.).....PLAINTIFFS; 1893

AND June 26.

SAMUEL DAVID HAMILTON AND JOHN PHILLIPS..... } DEFENDANTS.

Patent—"The Paragon Black-leaf Cheque Book"—Validity—Want of novelty—Infringement.

The plaintiffs obtained letters-patent on the 15th February, 1882, (registered in the Patent Office at Ottawa as No. 14182) for "The Paragon Black-leaf Cheque Book" which was described in the letters-patent to consist "in a black-leaf cheque book composed of double leaves, one-half of which is bound together while the other half folds in as fly leaves, both being perforated across so that they can readily be torn out; the combination of the black-leaf bound into the book next to the cover, and provided with the tape bound across its end, the said black-leaf having the transferring composition on one of its sides only." The objects of the invention, as stated in the specification, were to provide a check-book in which the black-leaf used for transferring writing from one page to another need not be handled and would not have a tendency to curl up after a number of leaves had been torn out. The first of such objects was to be obtained by the use of the tape which enabled "the black-leaf to be folded back or raised without soiling the fingers," and the second by binding the black-leaf in with the other leaves but next to the cover in which position there "would be less likelihood of the black-leaf becoming crumpled up than if it were placed in the centre and the leaves removed from the stub on either side."

The defendants had a patent for and manufactured a counter-check-book in which a margin was left on the carbon leaf by which it could be turned over without soiling the fingers. With the exception of the tape for turning the leaf it was established that the plaintiffs' patent had been anticipated, and it was also proved that prior to the issue of the plantiffs' patent, a patent had been granted in the United States for the process of manufacturing carbon for use in manifold writing with clean margins so that the paper could be handled without soiling the fingers.

Held, that if the plaintiffs' patent was construed to include the use of clean margins on carbon paper, as applied to countercheck-books,

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it failed for want of novelty; but that if the patent was limited, as it was thought it should be, to the means described therein for turning over such carbon leaves without soiling the fingers, that is, to the use of the tape, the defendants did not infringe the patent by using a clean margin for the like purpose.

Argument of Counsel.

ACTION for infringement of a patent for invention.

The facts of the case are stated in the judgment.

The case was heard at Toronto on the 5th April, 1893.

Cassels, Q.C. for the plaintiffs: The two points which present themselves for the consideration of the court in this case are, first, whether there has been an infringement by the defendants and, secondly, whether the patent has been successfully impeached.

It would be entirely wrong on the evidence before the court to conclude that the patent should be impeached after all the length of time that has elapsed since the granting of the patent (Cites *Walker on Patents*) (1). This patent was granted in the year 1882. We find from that year right down to the institution of the present action no attack has been made on the patent; nothing has been done towards having it repealed. The defendants cannot come in here now and attack it with success. Then, in regard to the patentability of the article in question, the law is exhaustively discussed in the case of *Harrison* v. *Anderston Foundry Co.* (2). There every element of the combination was as old as the hills. A great many of the elements had been already put in several combinations, but there was no combination of all these elements together forming one patent. Such a combination was there held to be a valid patent. The law is well settled that the combination may be valid although all the elements are old. (Cites *Cannington* v.

(1) Sec. 76.

(2) 1 App. Cas. 574.

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Argument of Counsel.

Nuttall (1); *Cantrell* v. *Wallick* (2).) The courts uphold patents although the invention is a simple one. (Cites *Gadd* v. *Mayor of Manchester* (3); *Frearson* v. *Loe* (4); *Terrell on Patents* (5); *Spencer* v. *Jack* (6); *Hinks & Son* v. *Safety Lighting Co.* (7); *Hayward* v. *Hamilton* (8); *Grip Publishing Co.* v. *Butterfield* (9); *Gould* v. *Rees* (10); *Eames* v. *Godfrey* (11); *Vance* v. *Campbell* (12); *National Cash Register* v. *American Cash Register* (13); *Seymour* v. *Osborne* (14); *Philadelphia & Trenton Ry. Co.* v. *Stimson* (15); *Plimpton* v. *Malcolmson* (16); *Hills* v. *Evans* (17); *Hill* v. *Thompson* (18); *Machine Co.* v. *Murphy* (19).)

Edgar followed on the same side and discussed the evidence.

Johnston, for the defendants;

It is not an invention to improve a known structure by substituting an equivalent for either of its parts. (Cites *Walker on Patents* (20).) The fact that one device performs the same function as another, though necessary, is not sufficient to make it an equivalent thereof. (Cites *Eames* v. *Godfrey* (21); *Conover* v. *Roach* (22); *Merriam* v. *Drake* (23).) The function must be performed in the same way, so that if one thing performs the same function as another, but does it in a different way, it is not an equivalent. (Cites *Burr* v. *Duryee* (24).) Patents

(1) L. R. 5, H. L. 205.
(2) 117 U. S. 689.
(3) 9 T. L. R. 42.
(4) 9 Ch. D. 48.
(5) P. 50.
(6) 11 L. T. N. S. 242.
(7) 4 Ch. D. 615.
(8) Griff. P. C. 115.
(9) 11 O. A. R. 145; 11 Can. S. C.R. 291.
(10) 15 Wall. 187.
(11) 1 Wall. 78.
(12) 1 Black 427.
(13) U. S. Patent Gazette Jan. 17, 1893.
(14) 11 Wall. 515.
(15) 14 Pet. 458.
(16) 3 Ch. D. 567.
(17) 31 L. J. Ch. 643.
(18) 1 Web. P. C. 242.
(19) 97 U. S. 135.
(20) 2 Ed. sec. 36 and cases cited.
(21) 1 Wall. 78.
(22) 4 Fisher 12.
(23) 5 Fisher 259.
(24) 1 Wall. 573.

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Argument of Counsel.

should be construed in the light of the description and specifications. (Cites *Clark* v. *Adie* (1); *Harrison* v. *Anderston Foundry Co.* (2); *New American File Co.* v. *Nicholson File Co.* (3).) Claims are narrowed by limitations in descriptions. (Cites *Crawford* v. *Heysinger* (4).)

Interpretation is not to be strained in favour of the patentee. (Cites *Simpson* v. *Holliday* (5); *Badische* v. *Levinstein* (6).) The mere fact that there is a similarity of appearance between an article made by the patent process and the alleged infringement is not sufficient. There must be reasonably satisfactory evidence that a similar article could not be produced in any other manner, that in fact it carried the footprint of the invention with it. (Cites, generally, *Palmer* v. *Wagstaff* (7); *Davenport* v *Richard* (8); *Curtis* v. *Platt* (9); *Rushton* v. *Crawley* (10); *Morley Machine Co.* v. *Lancaster* (11); *McCormick* v. *Talcott* (12); *Railway Co.* v. *Sayles* (13); *Walker on Patents* (14); *Terrell on Patents* (15); *Nordenfeldt* v. *Gardiner* (16); *Brown* v. *Davis* (17); *Murray* v. *Clayton* (18); *O'Riely* v. *Morse* (19); *Ewart M'fg. Co.* v. *Bridgeport Iron Co.* (20); *Pope M'fg. Co.* v. *Gormully, et al.* (21); *Saxby* v. *Clunes* (22); *Seed* v. *Higgins* (23); *Gill* v. *Wells* (24); *Snow* v. *Lake Shore and M .S. Ry. Co.* (25); *Walker on Patents* (26); *Roger* v. *Schultz Belting Co.* (27); *Robinson on Patents* (28); *Many* v. *Sizer* (29).)

(1) 2 App. Cas. 315.
(2) 1 App. Cas. 581.
(3) 31 Fed. Rep. 289.
(4) 123 U. S. 606.
(5) 13 W.R. 578.
(6) 12 App. Cas. 723.
(7) 9 Ex. 494.
(8) 3 L.T. N.S. 504.
(9) 3 Ch. D. 135.
(10) L.R. 10 Eq. 522.
(11) 129 U.S. 273.
(12) 20 How. 405.
(13) 97 U.S. 556.
(14) Sec. 360.
(15) P. 177.
(16) Cited at p. 5 of *Terrell on Patents*, 2nd ed.
(17) 116 U.S. 249.
(18) L.R. 7 Ch. 570.
(19) 15 How. 62.
(20) 31 Fed. Rep. 150.
(21) 34 Fed. Rep. 885.
(22) 43 L.J. Ex. 228.
(23) 8 H.L. C. 550.
(24) 22 Wall. 14.
(25) 121 U.S. 629.
(26) Sec. 349.
(27) 28 Fed. Rep. 850.
(28) Vol. 1, p. 388.
(29) 1 Fisher 27.

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BURBIDGE, J. now (June 26th, 1893) delivered judgment.

The plaintiffs complain that the defendants are infringing certain letters-patent issued to one John Robert Carter on the 15th day of February, 1882, and registered in the Patent Office at Ottawa as number 14182, under which and certain assignments thereof they claim the exclusive right of making, constructing and using and vending to others, to be used in Canada, certain new and useful improvements in copying books. The plaintiffs' book, the title of which is "The Paragon Black-leaf Check Book," is described in the letters-patent to consist in a black-leaf check-book composed of double leaves one half of which is bound together while the other half folds in as fly-leaves, both being perforated across so that they can readily be torn out, the combination of the black-leaf bound into the book next to the cover, and provided with the tape bound across its end, the said black-leaf having the transferring composition on one of its sides only. The objects of the invention, as stated in the specification, were to provide a check-book in which the black-leaf used for transferring writing from one page to another need not be handled and would not have a tendency to curl up after a number of leaves had been torn out. The first of such objects was to be obtained by the use of the tape which enabled "the black-leaf to be folded back or raised without soiling the fingers," and the second by binding the black-leaf in with the other leaves but next to the cover in which position there "would be less likelihood of the black-leaf becoming crumpled up than if it were placed in the centre and the leaves removed from the stub on either side." Referring to his knowledge of the state of the art at the time of his application for letters-patent, the inventor in the specification stated that he was

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aware that black-leaves were employed in other forms of books used in transferring writing from one page to another but they were either loose in the book and were therefore easily lost and were dirty to handle, or were placed in the centre of the book and the leaves numbered on either side of it,—which latter arrangement was faulty from the fact that the space left on each side of the black-leaf when the leaves were torn out caused the black-leaf to curl up and become unsatisfactory in its operation.

The validity of this patent came in question in the case of *Grip Printing and Publishing Company of Toronto* v. *Butterfield* (1), and it was upheld by the learned Chancellor of Ontario, and by the Supreme Court of Canada on appeal from the Court of Appeal of Ontario, which had reversed the Chancellor's decision. The countercheck-book of the manufacture of which the plaintiffs in that case complained, was made without any tape attached to the black-leaf and, with the exception of a few that were not sold, that is also true of "The Paragon black-leaf check books" manufactured by Carter and by the assignees of the letters-patent granted to him. It will be necessary to refer to this matter of the tape more at length; but for the present it will be sufficient to observe that in the result nothing turned upon it in the case to which I have referred It was there held on the evidence before the court that the plaintiffs were under the letters-patent in question entitled to the exclusive right to manufacture countercheck-books with the black or carbon leaf bound into the book next to the upper cover, and that the manufacture of a similar book with the black or carbon leaf bound in between the lower leaf and the lower cover, but which, in use was placed next to the upper or open cover as it was called, was an infringement of the plaintiffs' patent.

(1) 11 Ont. App. R. 145; 11 Can. S. C. R. 291.

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But in this case it is set up as a defence and it is, I think, satisfactorily established that countercheck-books with the black or carbon leaf bound into the book next to the upper cover had been made and used prior to the date of the plaintiffs' patent.

Harmon Butterfield, the defendant in the case referred to, in his evidence in this case said,—that about July, 1882, he saw two copies of such a book at the Copyright Office at Ottawa, and that he believed the book produced in court from the office of the Minister of Agriculture was one of them. In the countercheck-book produced, for which Charles Andrew Muma and Angus George Mackay appear to have obtained copyright in 1871, the black-leaf was loose. But it bore evidence of having been stitched in with the other leaves, though apparently one of the stitches had missed or only touched the black-leaf at the very edge. Butterfield says that in the book which he saw at the Copyright Office the black-leaf was bound in the book, the binding thread passing through the leaf the same as it did through any of the other leaves. Crawford Ross, a dry goods merchant of Ottawa, testified that in 1871 or 1872, when he was a clerk with McGee & Russell, then doing business at Ottawa, the Muma & Mackay countercheck-books were in use at McGee & Russell's place of business, and that the black-leaf in such books was bound in as part of the book, and next to the upper cover. Hiram S. Morison testified to the use in 1874 or 1876 of a similar book in W. A. Murray & Co.'s, of Toronto, and Charles Lanning to the use at O'Donnel & Company's, of Toronto, in the year 1878, of countercheck-books with the black-leaf stitched in at the top of the book. For the plaintiffs, James Gordon, who succeeded Muma in the business of manufacturing the Muma & Mackay countercheck-book, was called and testified that Gordon & Mackay never manufactured

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a book with the black-leaf bound in with the other leaves. It is to be observed, however, that Knox, who was the manager of Gordon & Mackay's business, was not called although he was in court. Neither was Muma or Mackay, and no reason was given for not calling them; I cannot but regard the negative evidence as incomplete and unsatisfactory, and insufficient to meet the case made by the affirmative evidence to which I have referred. There is not, I think, ground for a reasonable doubt, and on the evidence before the court I have none, that prior to Carter's invention, and the granting of the letters-patent in question, countercheck-books, similar to those manufactured by the plaintiffs and with the black or carbon leaf bound into the book next to the upper cover, had been manufactured and used in Canada.

Now, putting aside any question as to the effect upon the patent as a whole of the want of novelty in one of the improvements claimed, it is obvious that the patent is to be sustained, if sustained at all, as an improvement in the manufacture of countercheck-books, the leading feature of which is the tape attached to the black or carbon leaf for the purpose of enabling the person using the book to turn the leaf over or back without soiling the fingers. The plaintiffs say that the patent is a good patent for a new combination of old elements. I shall not stop to discuss that question which at present does not appear to be material. I am not, however, at all convinced that the countercheck-book protected by the patent is a combination in the proper sense of the term. But assuming that it is, we come back to where we were before, that the only novelty the combination possesses is the tape attached to the carbon leaf. In using the books which the plaintiffs have manufactured, and which are not provided with any tape, the fly-leaf may be used for turn-

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ing over the carbon leaf, though it would appear that such a use of the fly-leaf is not in practice general. It was suggested that the fly-leaf would perform this function only when the book was bound at the top, but it is clear, I think, that the fly-leaf may be used in the same way, and for a like purpose, though not so conveniently, where the book is bound at the side, as was the case with the Muma & Mackay book produced. In the defendants' countercheck-books a margin or black space is left on the carbon leaf, or on the cover to which the carbon is applied by means of which the carbon leaf or cover may in like manner be turned over without soiling the fingers. This margin the plaintiffs say is the equivalent of the tape mentioned in their patent, and they complain that as the books used by the defendants are in other respects substantially the same as the book for which they hold the prior patent, the use of such book constitutes an infringement of the patent.

No question is raised by the pleadings that the invention for which Carter's patent was granted was not the proper subject of a patent, and the case is to be disposed of on the assumption that some invention or ingenuity was necessary to the conception that if one attached a tape or a tag to the carbon leaf in a countercheck-book he could turn the leaf over without touching it. Neither is any question raised as to the utility of the tape, though the evidence on that point is, to say the least, conflicting. The utility of the improvements covered by the patent, and the use of the tape is one of them, is conceded, and the defence is limited to the want of novelty in the invention. Now apart from the means employed to attain that end there was, I fancy, in 1882 nothing new in handling or turning over the carbon leaves in countercheck-books without soiling the fingers. Whether the fingers were

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soiled or not depended probably upon the care and means taken by the person using the book to avoid such soiling. It was said by one of the witnesses that in the Toronto shops the clerks who use "The Paragon check-book" manufactured by the plaintiffs turn over the black-leaf by taking it between the thumb and fingers. That may not be the best way, and it may have its disadvantages; but as there is no carbon on the upper side of the leaf, the leaf may, I suppose, in that way, if one is careful, be turned over or back without leaving any dirt on the fingers.

Then there are the fly-leaves which Mr. Ridout, who is a patent solicitor and who was put upon the stand by the plaintiffs, says perform the same function as the tape, and constitute an equivalent therefor. If he is right that the fly-leaves are an equivalent for the tape, then it would follow, I suppose, that the tape would equally be the equivalent of the fly-leaves and that the use of the tape as well as the manner of binding in the black-leaf with the other leaves of the book had been anticipated by the Muma & Mackay countercheck-book and that there was no novelty in either of the improvements for which the patent was granted.

Further it appears from the evidence of Mr. Caron, one of the examiners of patents in the office of the Minister of Agriculture at Ottawa, that as early as 1872 a patent had been granted in the United States for the process of manufacturing carbon for use in manifold writing, with clean margins so that the paper could be handled without soiling the fingers.

Apart altogether from any question of anticipation, it must, it seems to me, at all times have been open to any one who had occasion to use carbon paper, to have the paper prepared with a clean margin by which it could be handled without touching the carbon. There may be different ways in which to secure the clean

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margin and in the adoption of the means to attain that result there would be room for the exercise of the inventive faculty, but it would not, it seems to me, be possible for one to monopolize the use of such margins on carbon paper even within the limited field of countercheck-books. In the same way it might require some skill or invention to devise a practicable method of attaching a tape to such carbon paper or leaves, and such method might possibly be the subject of a patent, although it appeared obvious to every one that the end arrived at could be attained by the use of a tape. But that question is not at present in issue.

The result, I think, is that if the plaintiffs' patent is construed to include the use of clean margins on carbon paper used in countercheck-books, it fails for want of novelty; but that in case the patent is limited, as I think it should be, to the means described therein for turning over such carbon leaves without soiling the fingers, that is to the use of the tape, the defendants do not infringe the patent by using a clean margin for a like purpose. In either case the plaintiffs' action fails.

Judgment for defendants, with costs.

Solicitors for the plaintiffs: *Edgar & Malone.*

Solicitors for the defendants: *Heighington & Johnston.*

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April 28.

BRITISH COLUMBIA ADMIRALTY DISTRICT.

THE ESQUIMALT AND NANAIMO RAILWAY COMPANY..... } PLAINTIFFS ;

AGAINST

THE SHIP "*CUTCH*."

Maritime law—Collision—Responsibility for, where uninjured ship declines to assist helpless one—The Navigation Act, R. S. C. c. 79, secs. 2 and 10.

Under the provisions of section 10 of the Navigation Act (R.S.C. c. 79) where a collision occurs, the ship neglecting to assist is to be deemed to blame for the collision in the absence of a reasonable excuse.

Two steamships, the *C.* and the *J.*, were leaving port together in broad daylight, and a collision occurred between them. The *J.* received such injury as to be rendered helpless. The *C.* did not assist, or offer to assist, the disabled ship, but proceeded on her voyage. The excuse put forward by the master of the *C.* was that the *J.* did not whistle for assistance, although the evidence showed that he must have been aware of the serious character of the damage sustained by her. He further attempted to justify his failure to assist by the fact that other ships were not far off; but it was shown that these ships were at anchor and idle.

Held, that the circumstances disclosed no reasonable excuse for failure to assist on the part of the *C.* and that the consequences of the collision were due to her default.

Held, also, that the *C.* was in fault under Art. 16 of sec. 2 of the Navigation Act for not keeping out of the way of the *J.*, the latter being on the starboard side of the *C.* while they were crossing.

ACTION for damages by collision.

The plaintiffs' vessel *Joan* and the steamer *Cutch*, both moored at the same wharf, (Gordon's wharf, Nanaimo) were advertised to leave at the same hour, 7 a.m. Both cast off their lines within a few seconds of each other. Both were endeavouring to leave the harbour by the South channel, but a short distance before entering it, they came into collision under the

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circumstances mentioned in the judgment. The *Joan* having suffered considerable injury brought this action for damages.

April 26th and 27th, 1893.

The case was tried before Sir Matthew B. Begbie, C.J., Local Judge in Admiralty for the District of British Columbia,—Lieut. Masters, R.N., and Lieut. Nugent, R.N., sitting with him as Assessors.

Pooley, Q.C. for the plaintiffs.

E. V. Bodwell (with him *P. Æ. Irving*) for the defendants.

Sir MATTHEW B. BEGBIE, C.J., L.J.A., now (April 28th, 1893) delivered judgment.

This case has been somewhat embarrassed by the different views taken of the facts by the witnesses for the plaintiffs and defendants; a difference not altogether unprecedented in the case of maritime collisions, and naturally accounted for by the well-known, although unaccountable, sympathy that every man feels for the vessel in which he happens to be; by the suddenness and unforeseen nature, in general, of all collisions; and by the erroneous views too often taken by the masters of vessels of their own rights and of the rights of others.

The evidence, which has occupied the court nearly eleven hours on two days, refers wholly and entirely to events which, in fact, from first to last, were commenced and concluded in eight minutes of time on the morning of November 19th, 1892, just before sunrise.

A great deal of contradictory evidence was given upon a preliminary, and, I think, an immaterial point, viz., which of the two colliding vessels was the first to leave the wharf; the master and mate and some passengers on board the *Cutch* alleging (what she also

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insists upon in her Preliminary Act) that the *Cutch* was clear of the wharf at which both vessels had peacefully lain all night, *i.e.*, had all her lines thrown off before the *Joan*. Upon this point, however, I am quite clear that they are all in error. Verbally perhaps, and for a moment, two of the *Cutch's* lines were the first removed from the mooring pile; she had come into the wharf on the 18th, later than the *Joan*, and her head and spring-lines were thrown over the *Joan's*, so that it was necessary to remove them in order to let the *Joan's* lines go, and that is what the wharfinger says he did; but he immediately, and as soon as ever he had lifted the *Joan's* lines, replaced the *Cutch's* lines on the pile; and he says he cleared the *Joan* first, and that he saw her completely detached from the wharf, although quite alongside of it, before he cast off the last line of the *Cutch*, and while the *Cutch* was still swinging to her stern line.

Both vessels were lying at Gordon's wharf, and purposed leaving by the South channel, the entrance to which is distant about 1,100 feet E.N.E. from the wharf. The *Joan* was a twin-screw moored with her head nearly S.E. The *Cutch* was a single screw, lying nearly S.W. across the *Joan's* bow, having come in at a later hour on the previous day. It was therefore necessary for the *Cutch*, in order to get her head round, that she should hang on to her stern line and that the *Joan* should have got out of her way. It was not necessary for the *Joan* to hang on to her stern line: she was a twin-screw, and had a much smaller angle to move through.

Other quite independent witnesses (Mr. Thompson and Mr. Jensen) also saw from the shore that the *Joan* was free while the *Cutch* was still fast. Now, in weighing these contradictory statements, we must consider that the wharfinger's business was to free these

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lines; that none of the defendants' witnesses handled or could have handled the *Cutch's* ropes, or could probably have seen exactly what the wharfinger did with them, or could see the *Joan's* lines; that all the defendants' witnesses were either crew or passengers on board the *Cutch*, and so, liable to the mysterious sympathy already alluded to; and that the wharfinger's statement is supported not only by the *Joan's* crew, but by independent witnesses and by the high probabilities of the case. I am quite sure that the *Joan* was the first to get clear of the wharf. And the chief conclusion I drew from all this evidence of the defendants was, that they placed great reliance upon the point which vessel cast off first (which I consider quite immaterial as regards the actual collision), imagining that it gave them priority of right of entry into the South channel (by which both vessels purposed to leave the harbour), whereas that priority would depend entirely upon the subsequent manœuvres of the two vessels; and I think this erroneous notion of right probably influenced the subsequent conduct of the *Cutch* and the views of her master. And the positiveness with which the *Cutch's* witnesses swore to these things, which could not have been within their own knowledge, and as to which they were clearly in error (although there is no suggestion against their firm belief that they were right), very much impairs the force of their statements upon other points which they believe they saw.

The defendants' case is that she got clear of Gordon's wharf before the *Joan*, and so obtained a *primâ facie* right of priority of leaving the harbour by such channel as she might select; that she was the first to get into the open harbour, and was making at a moderate speed for the South channel, as the leading ship, with the *Joan* on her starboard quarter, when the latter exerting her full power overtook the *Cutch*, and, making for the

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wrong side (viz., the port side) of the South channel, for which they were both bound, threw herself at full speed on the *Cutch's* bow, which was actually reversing her screw to mitigate the force of the collision which the extraordinary conduct of the *Joan* had rendered inevitable. The *Cutch* being thus entirely innocent, and the *Joan* guilty of various infractions of the Articles of the Navigation Act, as an overtaking ship she ought to have kept out of the *Cutch's* way (Art. 20),—there being risk of collision, the *Joan* ought to have slackened her speed (Art. 18),—moreover, the *Joan*, intending to leave by the South channel, ought to have left by the South or starboard side, and was guilty of gross misconduct in endeavouring to get to the North side (Art. 21).

To all this there are several answers. In the first place, it is clearly made out in the opinion of myself and assessors that the *Cutch* was not, and the *Joan* was, the first to leave the wharf. As already intimated, the mere fact of casting loose did not confer on either vessel the unqualified right of being the first to take the channel. But whatever expectations the *Cutch* founded on her supposed priority were founded on a complete misconception of the facts; and this double error, both of the facts and of the rights founded on those facts, probably influenced the subsequent conduct and belief of the master. In the next place, from a very careful measurement of distances and bearings as given by the defendants themselves, quite irrespective of the plaintiffs' witnesses, or of the natural probability of the case, the assessors have come to the conclusion that it is quite impossible that the *Joan*, which was always on the starboard hand of the *Cutch*, could ever have been abaft her beam; and therefore that the *Cutch's* second contention that she was the leading vessel at the start for the South channel, is equally devoid of founda-

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tion. It is true, some of the passenger witnesses of the *Cutch*, and one or two others on board, were of opinion that the *Joan* was at the commencement of their course abaft the *Cutch's* beam; which would make the *Joan* a following or overtaking ship within Art. 20. But the times and distances and bearings given by the master and other skilled witnesses on the *Cutch* (the defendants' own witnesses) quite contradict this: though it would, of course, be possible that in turning and twisting in the neighbourhood of the *Babcock* (1) she might momentarily have her quarter towards the *Joan*. That would have been an accident merely: but we are of opinion that it never did so happen; and that in fact during all her manœuvres in the harbour, she had the *Cutch* forward of her beam. And then when we look at the plaintiffs' witnesses, they produce three who are quite independent of either ship: Mr. Thompson, Mr. Jensen and the mate of the *Quadra*, who all agree as to the relative position of the vessels, viz.: That the *Joan* was, from the time when the *Cutch* first began to move her head towards the South channel, always nearer than the *Cutch* to that channel. And the probabilities of the case are so great in the same direction that it would require the greatest unanimity of testimony to make one believe that the *Cutch* could ever have been the leading ship. She had on leaving the wharf eight points, an entire right angle, to make good more than the *Joan*, before she could head for the channel. On backing out it would manifestly be her natural manœuvre to turn her stern through the North towards the West as well as she could, and that the curve so described would probably carry her to the North much further than the point assigned by her master, and,

(1) NOTE.—This was a ship that happened to be lying at anchor in the harbour a short distance from Gordon's wharf.

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indeed, according to the time and rate of speed given by him, very nearly to the position assigned by the plaintiffs in the chart submitted by them, leaving the *Joan* several points forward of the *Cutch's* beam; but even from the point indicated by the defendants on the chart submitted by them—not, as I have said, borne out by the times and rates of speed sworn to by their own master—and supposing (what is incredible, and contrary to the evidence) that the *Joan* remained stationary all that time, off the north end of Gordon's wharf, she still would be forward of the *Cutch's* beam, and therefore entitled to have her way given to her under Art. 16, and not bound to give way to the *Cutch* under Art. 20, as contended by the defendants. But it can be mathematically proved that the theory of the *Cutch* as to the conditions of the actual collision is entirely baseless. It would be mathematically impossible that the *Joan*, throwing herself at the rate of ten knots per hour across the bow of the *Cutch*, a nearly stationary ship, as the defendants' witnesses would appear to suggest, could cause the injuries described and not disputed, viz., a deep cleft nearly perpendicular to her beam. If the injuries were occasioned as the defendants contend, the rent would extend in a direction from the stem of the *Joan* towards her stern, and would be mainly external, without much penetration.

But if two vessels of nearly equal size and speed, of equal momentum, collide at an angle of about 45°, the injury will extend inwards into the vessel that receives the shock, in a direction nearly perpendicular to her beam. This will be apparent on drawing the necessary diagram so as to show the resultant thrust: the impetus of the recipient vessel being exactly represented by an equivalent thrust in the direction opposite to her motion. That is to say, the injury inflicted and shown to have been suffered by the *Joan*, is exactly

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explained by the plaintiffs' account of the position and speed of the vessels, though their witnesses did not seem to understand that; and is quite irreconcilable with the circumstances suggested by the defendants.

Neither is there any force in the defendants' contention that the *Joan* ought to have entered the South channel close on the starboard hand, and to the Southward of the mooring buoys, (Art. 21,) and that it was improper navigation for her to attempt to pass to the North of the buoys. If the *Cutch* were, as the defendants contend, the leading vessel, surely it was equally her duty to make for the Southward of the buoys; but she was herself making for the North side. In fact, I am advised that, on the evidence and the statement of the practice, it is a reasonable and proper course of careful navigation, having regard to the risk of lines from the buoys to the wharfs, and other matters, to pass to the north of these buoys, especially when another vessel is lying between the mooring buoys. Neither vessel was in fault in this respect. I believe the *Cutch* did, in fact, go to the starboard side of the channel, South of the buoys, after the collision.

The *Cutch*, therefore, we consider to be in fault, under Art. 16, which throws upon her the duty of keeping out of the way of the *Joan*. Even if the *Joan* had been utterly mismanaged, had been steering a wrong course—it was the duty of the *Cutch* to keep out of her way; to take all possible precautions to prevent a collision. Now, what precautions did she take? None whatever; except stopping and reversing her engine two or three seconds before the impact; when such a stoppage could produce no sensible effect; and, in fact, two independent witnesses who were watching the proceedings decidedly declined to believe that the *Cutch* ever stopped her engines at all. Yet the *Joan* was in sight, and the possibility of a collision evident if the

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Cutch had any sort of a lookout (and if she had none, she is again in fault) from the first moment that she began her forward progress, especially if, as some of her witnesses say, that was only about 300 feet off. It is possible, of course, that the master of the *Cutch* had no eyes for anything but his rival the *City of Nanaimo*, just disappearing with a few minutes start. If so, that again makes him in default. A master cannot claim to be blameless if, being on deck, he fails to see a vessel of the size of his own right ahead and only her own length off in clear daylight.

But there is another section which imposes on a colliding ship a duty the neglect of which is decisive. Seamen generally eagerly accept it as a privilege, requiring no Act of Parliament to command them, to assist fellow seamen in distress. This was entirely neglected on the present occasion. Section 20 says in the absence of a reasonable excuse, the ship neglecting to assist is to be deemed to blame for the collision. Now, what is the reasonable excuse put forward? That the *Joan* did not whistle. But there was no evidence that she could whistle. The force of the blow was so great, and on such a part of the ship as to burst the steam gear and drive all the engineers from below, the steam escaping in clouds. The master of the *Cutch* says he saw nothing of this, which seems almost incredible, but, if true, it shows that he was not in a state of attention properly to conduct the navigation of any ship; and the accuracy of all his disculpatory observations may be questioned if he did not observe this. His other excuse is that there were other ships not far off; but they were at anchor, and otiose; he was on the spot, with all his crew in hand. Life might have been at stake. If the *Joan* had drifted ashore she might have been a total loss, at all events much more extensively injured. As it was, she was only brought up

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on the edge of the flat, and made fast to the black buoy on the south side of the channel, having drifted helplessly in the high wind across the tail of the middle bank, while the *Cutch* went straight on in full chase of her rival, the *City of Nanaimo*. I am bound by this section to say that it alone fixes the consequences of the collision as being due to the default of the *Cutch*.

But then, was the *Cutch* alone in default? Upon this point Mr. Bodwell urged Art. 18, which says that every steamer approaching another so as to involve risk of collision shall slacken speed, or stop and reverse if necessary. Now, as to this, it is to be observed that the whole of these rules are intended to prevent collisions, if possible; and that it is the most mischievous pedantry to insist on a literal compliance with a rule when such compliance would increase the probability of a collision. Now, the position of the *Joan* was this: She was making, probably as fast as she could, though she had perhaps not acquired full headway, for what we think was a proper way of entering the South channel. She saw the *Cutch* coming down on her port bow, probably not quite so fast as herself, but yet fast. She would say: "The *Cutch* has, under Art. 16, to keep out of my way; she will probably slacken speed, perhaps pass under my stern, though she seems, like myself, to prefer to make for the North side of the mooring buoys. If I slacken speed, under S. 218, I shall very likely run into her. If she keeps on as at present and I slacken, I shall certainly run into her, and then I shall be liable for damages; I should be in default under Art. 22. Much my best plan is to keep my course according to that Article; if the *Cutch* slows down I shall get abundantly clear." And I am advised that such reasoning is founded on good and careful seamanship.

I therefore declare the ship *Cutch* to be alone in default, and that the *Joan* was not in any default, and

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there will be the consequent condemnation in damages and costs. I refer it to the Registrar and Merchants to ascertain the amount of damage.

I cannot conclude without some observations as to the very serious consequences of allowing several steamers to leave the wharfs, especially in narrow waters, at the same hour. In time of war, when two belligerents are in a neutral harbour, they are never permitted to leave together; nor, I believe, until a period of 24 hours has elapsed after the sailing of the first. In the present case the *Cutch* and the *City of Nanaimo* are not in one sense belligerents. They do not fire red-hot bullets or shells at each other, but they run the manifest risk of inflicting on each other, or on innocent neutrals, as the present case shows, quite as important damage and loss, both of property and life. Two steamers colliding in the Gulf and bursting their steam-chests may settle their differences quite as substantially by going to the bottom with all their cargo and passengers as they could possibly manage it with the most improved projectiles or explosives. And although it was in evidence that these vessels never race—that is forbidden by the Pilot rules—yet it was ingenuously confessed that they never meet without seeing which of them can go the fastest. This the Harbour Master can hardly prevent. But a fine of $200 upon any master who leaves this confined wharfage until some small interval—eight minutes is, according to the present case, far more than is necessary—say five minutes after the other, or even $10 on the wharfinger who throws off a line earlier, might be effective.

Judgment accordingly.

WILLIAM HAWKINS HALL.....PLAINTIFF; 1893

AND Oct. 2.

HER MAJESTY THE QUEEN.....DEFENDANT.

Parol contract between Crown and subject—42 Vic. c 7, s. 11—R. S. C. c. 37, s. 23—Effect of such provisions where contract executed—Quantum meruit.

The provisions of section 11 of 42 Vic. c. 7 and of the 23rd section of R. S. C. c. 37, do not apply to the case of an executed contract; and where the Crown has received the benefit of work and labour done for it, or of goods or materials supplied to it or of services rendered to it by the subject at the instance and request of its officer acting within the scope of his duties, the law implies a promise on the part of the Crown to pay the fair value of the same.

ACTION for the recovery of damages arising out of an implied contract.

The plaintiff was the owner of a saw-mill at Buckhorn, in the County of Peterborough, Ontario, driven by water-power derived from a dam belonging to the Crown. In the years 1886 and 1887 plaintiff held the position, under the Dominion Government, of Slide-master at Buckhorn, and it was his duty to regulate the flow of water over the said dam in accordance with the instructions of the Government Engineer in charge of certain works then being carried on for the improvement of navigation on the Trent River. In order to facilitate the construction of the said works it was desired to stop the flow of water at Buckhorn, and this could only be accomplished effectually at the time by closing down the plaintiff's mill which was then in full operation. In September, 1886, the Government Engineer ordered the plaintiff to close down his mill whenever the contractor should

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require him to do so. In pursuance of those instructions, and by the direction of the contractor, the plaintiff on several occasions closed down his mill, and thereby suffered considerable loss in prosecuting his milling business. There was no express promise on the part of the Chief Engineer, or the officers acting under him to indemnify the plaintiff for such loss (1); but the Minister of Railways and Canals acquiesced in what had been done, and caused the plaintiff's claim to be investigated by a competent person on his behalf, who recommended that a certain sum be paid to the plaintiff in full satisfaction of his claim. It also appeared that the Minister thereafter took, or proposed to take, a vote of Parliament to compensate the plaintiff in respect thereof.

The case proceeded to trial at Peterborough on the 6th June, 1893, and was continued at Ottawa on the 27th June, 1893, and then concluded.

Hogg, Q.C. for the defendant: I rely upon the provisions of the 23rd section of chapter 37 of the *Revised Statutes of Canada*, which require a contract to be signed by the Minister of Railways and Canals, or by some one lawfully authorized on his behalf, before it shall be binding upon the Crown, as a sufficient defence in law to this action. (Cites *Wood* v. *The Queen* (2), and *Jones* v. *The Queen*) (3).

Poussette, Q.C. for the plaintiff: I submit that the section of the statute relied on by my learned friend

(1) By sec. 23 of R. S. C. c. 37, it is enacted as follows:—No deed, contract, document, or writing relating to any matter under the control or direction of the Minister shall be binding upon Her Majesty, unless it is signed by the Minister, or unless it is signed by the deputy of the Minister, and countersigned by the Secretary of the Department, or unless it is signed by some person specially authorized by the Minister, in writing, for that purpose: Provided always, that such authority from the Minister, to any person professing to act for him, shall not be called in question except by the Minister, or by some person acting for him or for Her Majesty.

(2) 7 Can. S. C. R. 634.

(3) *Ibid.* 570.

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applies to executory contracts only. It is quite a different matter where something is done or forborne at the request of the Crown which it accepts and gets the benefit of. In such a case, and that is our case, the law raises an implied contract on the part of the Crown, in the same way as it would on the part of the subject, to pay for the same on a *quantum meruit.*

BURBIDGE, J. now (October 2nd, 1893) delivered judgment.

There is no doubt upon the evidence in this case that the plaintiff shut down his mill at the instance and request of the Government Engineers in charge of the public work mentioned in the pleadings. It is objected, however, that the direction to shut down the mill was not in writing, and signed in accordance with the Statute, and that therefore the Crown is not bound thereby. In support of this position I am referred to the Act 42 Vic. c. 7 s. 11 and the 23rd section of the *Revised Statutes of Canada* c. 37, which are enactments of a like character,—the latter of which is as follows:

No deed, contract, document or writing relating to any matter under the control or direction of the Minister shall be binding upon Her Majesty, unless it is signed by the Minister, or unless it is signed by the deputy of the Minister, and countersigned by the Secretary of the Department, or unless it is signed by some person specially authorized by the Minister, in writing, for that purpose: Provided always, that such authority from the Minister, to any person professing to act for him, shall not be called in question except by the Minister or by some person acting for him or for Her Majesty.

A like question was considered in the case of *Wood* v. *The Queen* (1), arising upon the 7th section of *The Public Works Act of Canada*, 1867, by which it was provided that no deeds, contracts, documents or writings should be deemed to be binding upon the Department or should be held to be acts of the Minister,

(1) 7 Can S. C. R. at p. 645.

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unless signed and sealed by him or his deputy, and countersigned by the Secretary.

In that case Sir William B. Richards, C.J. expressed his view of the matter in the following terms:—

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I do not think, however, that the 7th section would prevent the suppliant recovering for the actual value of the work done by him and accepted by the Department. I see no reason why the law may not imply a contract to pay for work done in good faith, and which the Department has received the benefit of. Suppose, instead of work done, the contract had been to furnish a quantity of timber, the lumber had been supplied and worked up by the workmen of the Department in finishing one of the public buildings; suppose for some reason the Department repudiated the verbal contract and refused to be bound by it, could it be said that the property of the suppliant could be retained and used for the purposes of the Department, and he not be paid for it because the statute said the contract on which it was furnished was not deemed binding on the Department? I should say not. The contract which is binding is that which arises from the nature of the transaction; having received the benefit of the contractor's property he ought to be paid for it under the new contract which the law implies. For the same reason, for the value of all services actually rendered by the suppliant before he was notified not to do any further work he ought to be paid. If only the seventh section were considered, I should, as at present advised, say the suppliant is entitled to recover what the services rendered by him were worth under the implied contract. It may be, that on further consideration my views as to the suppliant's right on this point would be less favourable.

It may be conceded that this opinion was given with some reservation, and that the decision of the question discussed was not necessary to the determination of the case, but still the views to which the learned Chief Justice gave expression are entitled to the greatest consideration, and must, I think, commend themselves to one's sense of what is fair and just. I cannot for myself think that it was the intention of Parliament that the provisions to which I have referred should be invoked to defeat the just demand of the subject for work or labour done for the Crown, or for goods or materials supplied to it and of which it has

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received the benefit. In such and like cases the law implies, I think, as well against the Crown as against the subject, a promise to pay the fair value of the work done, the materials supplied, or the service rendered.

There might of course be cases in which some question would arise as to the authority of the officer at whose instance the service was rendered, or as to whether or not he acted within the scope of his duties. But there is no such question in the present case. The direction to close down the mill was given by the Chief Engineer of Canals and continued by the officers immediately under him. Afterwards the Minister of the Department acquiesced in what had been done and, it appears, took or proposed to take, a vote of Parliament to compensate the plaintiff.

The amount is not in dispute. There will be judgment for the plaintiff for $975, and the costs will follow the result.

Judgment accordingly.

Solicitors for plaintiff: *O'Connor & Hogg.*

Solicitor for defendant: *A. P. Poussette.*

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Mar. 16.

ADMIRALTY DISTRICT OF NOVA SCOTIA.

L. VANVERT, *et al.*.....PLAINTIFFS;

VS.

M. M. DE ARROTEGUI.....DEFENDANTS.

The SANTANDERINO.

Collision—Arts. 18 *and* 21 *of the Navigation Act, R. S. C. c.* 79, *sec.* 2—*Undue rate of speed for steamer in public roadstead—Negligence in taking precautions to avert collision, responsibility for collision where such occurs.*

The steamship *S.* was proceeding up the harbour of Sydney, C.B., at a rate of speed of about 8 or 9 miles an hour. When entering a channel of the harbour, which was about a mile in width, her steam steering-gear became disabled and she collided with the *J.*, a sailing vessel lying at anchor in the roadstead, damaging the latter seriously. It was shown that the master of the *S.* had not acted as promptly as he might have done in taking steps to avoid the collision when it appeared likely to happen.

Held, that even if the breaking of the stearing-gear—the proximate cause of the collision—was an inevitable accident, the rate of speed at which the *S.* was being propelled while passing a vessel at anchor in a roadstead such as this was excessive, and that, in view of this and the further fact that the master of the *S.* was not prompt in taking measures to avert a collision when he became aware of the accident to his steering-gear, the *S.* was in fault and liable under Article 18 of sec. 2 of R. S. C. c. 79.

Held, also, that the provisions of Article 21 of sec. 2 of R. S. C. c. 79, should be applied to roadsteads of this character, and that inasmuch as the *S.* did not keep to that side of the fair-way or mid-channel which lay on her starboard side, she was also at fault under this article, and responsible for the collision which occurred.

THIS was an action for damages arising out of a collision.

The facts of the case are stated in the judgment.

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The case was heard before the Honourable James McDonald, C.J., Local Judge for the Admiralty District of Nova Scotia, on the 17th November, 1892.

W. B. A. Ritchie for the plaintiffs;

A. Drysdale for the defendants.

McDONALD, (C.J.) L.J. now (March 16th, 1893) delivered judgment.

The barque *Juno* was at anchor in the roadstead of Sydney harbour, when at 11.30 A.M. on 3rd July, 1892, she was run into and seriously injured by the Spanish steamship *Santanderino* then entering Sydney harbour. The *Juno* was anchored near the middle of the channel, about 9 cables W. by N. from Gillivary Point, and a little more than 9 cables S. by E. from Capel Point,—the navigable channel being about one mile in breadth, and the position of the *Juno* about 3¾ miles from Flat Point, where the *Santanderino* stopped at 10.45 A.M. and took on board a pilot on the way into the harbour. The weather was fine and clear, the wind blowing a fresh breeze from the S. W., and the tide about half-flood. The *Juno* was sighted by the master of the *Santanderino* when the pilot was taken on board, and the attention of the latter was called to her position by the master of the steamer, with a caution to be careful of the barque. The steamer continued her course up the harbour, after taking her pilot, at a speed of about 8 or 9 knots an hour, and when on the port side of the *Juno*, distant about 200 yards, she suddenly turned as if under a port helm, and struck the *Juno* on her port side just abaft the forerigging.

It is not disputed that the *Juno* was not in any way to blame for the disaster. The burden of proof to relieve herself from responsibility is therefore thrown upon the *Santanderino* (1).

(1) The *Schwan* P. D. (1892,) 419-427.

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The defendants meet the case of the plaintiffs with the contention that the collision was the result of inevitable accident; and that accident they say arose from the fact that while the steamship was pursuing her course up the harbour of Sydney and at a safe distance from the *Juno*, the steering-gear of the steamship suddenly broke down, that all control over the course of the ship was lost, and although everything in the power of the master and crew was done to prevent it, the *Santanderino* collided with the *Juno* as stated. There is no other defence asserted, and we are now to enquire whether the plea of inevitable accident has been established by the defendants. In the *Virgil* (1), the court said :—

> In my apprehension an inevitable accident in point of law is this, viz., that which the party charged with the offence could not possibly prevent by the exercise of ordinary care, caution and maritime skill. If a vessel charged with having occasioned a collision should be sailing at the rate of eight or nine miles an hour when she ought to have proceeded only at the speed of three or four, it will be no valid excuse for the master to aver that he could not prevent the accident at the moment it occurred if he could have used measures of precaution that would have rendered the accident less probable.

This definition is cited and affirmed in the *Marpesia* (2), and the court adds :—

> Here we have to satisfy ourselves that something was done or omitted to be done, which a person exercising ordinary care, caution and maritime skill in the circumstances either would not have done or would not have left undone, as the case may be.

In the case of the *Merchant Prince* (3), Fry, L.J. thus states the same doctrine :—

> The burden rests on the defendant to show inevitable accident. To sustain that the defendants must do one or other of two things. They must either show what was the cause of the accident and show that the result of that cause was inevitable, or they must show all the possible causes, one or other of which produced the effect, and must further

(1) 2 Wm. Rob. at 205. (2) L. R. 4. P. C. 220.
(3) P. D. (1892), 189.

show with regard to every one of these possible causes that the result could not have been avoided. Unless they do one or other of these two things, it does not appear to me that they have shown inevitable accident. (1)

The defendants here allege that the cause of the accident was the breaking of a pin forming part of the machinery or steering-gear which rendered the people on board the steamer helpless to control the course of the ship, and that when and after this misadventure occurred, everything possible was done to avoid the collision or mitigate its effects. The plaintiffs reply that the accident to the steering apparatus was not the only fault of the steamer tending to produce the result complained of.

It is alleged 1st. That the speed of the steamer in a narrow roadstead where other vessels were at anchor was too great, so great as to put it out of the power of the master to avoid danger in the event that has happened, or any other similar misadventure, and that the excessive speed negatived the exercise of "ordinary care, caution or maritime skill" under the circumstances. 2ndly. That in passing the *Juno* the steamer approached dangerously near to a vessel at anchor, without necessity for doing so and at too great speed. 3rdly. That the defendants' vessel violated Article 21 of the regulations for preventing collisions at sea, by not keeping, in sailing up the channel, to the side of the mid-channel which lay on her starboard side. That Article is as follows:—

> In narrow channels every steamship shall, when it is safe and practicable, keep to that side of the fair-way or mid-channel which lies on the starboard side of such ship.

A large mass of evidence was read at the trial on the part of the defendants, in affirmance of their contention that the break-down in the steering machinery

(1) See also *The Schwan*, supra.

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was an accident over which the master and officers of the ship had no control, and to which they did not contribute by any negligence on their part. In this contention I think they have on the whole succeeded, —that is, they have established the fact that the steering-gear was made under a patent recognized by shipowners and engineers as well constructed and serviceable machinery, that it was used in the *Santanderino* for a considerable time with satisfactory results and without accident; that before the ship's departure from Liverpool for St. John, the machinery was carefully inspected and repaired by competent persons; that on the arrival at St. John, and before leaving that port for Sydney, the steering-gear was carefully inspected by the engineers of the ship and found in good order; that it was used in steering the ship on the voyage from Liverpool to St. John, and from St. John to Sydney, and worked with entire satisfaction until it suddenly broke down while entering Sydney harbour as described. The cause of the collapse in the steering-gear has also been proved to be owing to the fracture of a small iron or steel pin connecting two parts of the machinery, and I am not able to say that the fracture of this iron pin, and consequent collapse of the steering power was owing to the absence of ordinary care, caution or maritime skill on the part of the master and officers of the *Santanderino*. As the evidence shows, the *Santanderino*, when loosed from the control of her rudder, was on the port side of the *Juno*, and about 200 yards distant, and going at the rate of 8 to 9 knots an hour, she sheered suddenly toward the *Juno*, and at the rate she was then steaming would reach and strike her in less than two minutes' time. It was therefore the imperative duty of the master of the *Santanderino* to take the most prompt and immediate measures to meet the obvious danger of collision. Did he perform

this duty? This is Capt. Lurzenage's account of what then took place:

We went on all right until we were about two lengths of the ship from the barque; the officer said to me that there was something wrong with the wheel. At the moment when the officer informed me that there was something the matter with the wheel, the rudder, I immediately went myself to the wheel to see if it was possible to manage the wheel, and seeing that the wheel was obstructed, I immediately gave orders to the second and third officers to go down and see what was the matter, and to advise and inform the engineer at the same time, that I myself went to the telegraph to start the engine and to give orders to anchor.

Q. And was that done? A. Yes.

Q. Immediately? A. Yes, immediately. After letting go the anchor and ordering the engines back, in about a minute we had the collision.

And on cross-examination he was asked:

Q. You went to the wheel and tried it, and what did you do then? A. I told the two officers at once to go and see what it was, and to communicate with the first engineer, while I myself went to the telegraph in order to stop the engines, to anchor and reverse.

The officers whom the master instructed to ascertain the cause of the difficulty give much the same account of the circumstances as he does himself. The pilot of the ship, John S. Laffin, an intelligent man, gave the following evidence:

All at once the man at the wheel said something in Spanish to the master. I did not understand what was said. The master immediately sprung to the telegraph and signalled to stop the ship, before that order could be complied with he telegraphed to reverse and full speed astern. I could see the telegraph on the bridge, one side of the telegraph was marked in Spanish and one in English. Immediately after the steersman spoke to the captain the ship began to change her course towards the *Juno*. The steamer, when she struck, had changed her course 6 or 7 points. The captain then gave orders to let go the port anchor. The speed at the moment of collision was about four knots. The speed had been reduced by letting go the anchor and reversing the engines. The captain telegraphed before he went to the wheel. The captain went to the wheel and I went with him, we tried the wheel. He went to the wheel after telegraphing to the engine-room to stop and go full speed astern.

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This evidence is important, because it is quite clear that it was the master's duty, instantly, to stop and reverse, and do what else he could to avoid the collision. The pilot's evidence does certainly more than corroborate that of the master. According to the evidence of the latter, and of his officers, most valuable time was lost by the master and his officers in the endeavour to ascertain the cause of the accident instead of taking instant measures to obviate its effects, while according to the pilot's evidence the master acted most promptly and in the right direction. It may be that the fact of the master and his officers speaking through an interpreter may have occasioned the discrepancy. However that may be, it is clear that if the captain's evidence be adopted as the true statement of the occurrence, he was guilty of want of promptitude, foresight and seamanship, as well as a violation of rule 18, which under such circumstances required him to stop and reverse at once,—while if we accept the pilot's version, the master acted with commendable promptness and coolness in the emergency. The burden of proof in this as in other points connected with this accident lies upon the defendants, and I am not prepared to say on the faith of the pilot's statement, against that of the master and his officers, that they have met that requirement, and I am advised by the competent assessor who sat with me at the hearing, that in his opinion, "the master did not act with "promptness immediately the third officer informed "him that there was something wrong with the steer-"ing-wheel, and the helmsman could not move it," and that "if he had reversed the engines instantly and "rung the alarm bell, in all probability the collision "would not have happened, and even if the vessel had "been struck by the steamer the blow would have "been so slight that no serious damage would have

"occurred to the *Juno*." In considering this point of the case, the rate of speed of the steamer must not be lost sight of; she was entering a comparatively narrow channel, where other vessels besides the *Juno* were using the waters, and I concur in the opinion of the assessor, that, under the circumstances, the speed of 8 or 9 knots, nearly the full speed of the ship, was too great. Had the speed been reduced to the more careful and reasonable rate of 4 knots, it cannot be doubted that after the steering-gear broke down, the collision could have been prevented or its consequences very much minimized. It only remains to consider the objection under rule 21. The roadstead in which the *Juno* was anchored is the channel entrance to Sydney harbour, and is about a mile wide. We need not discuss whether the accident could or might not have happened if the *Santanderino* had obeyed the rule, and entered and continued her way through the channel on the side lying on her starboard side, because disobedience of the rule brings disaster to the ship in fault, whatever might have been the result of her observance of the rule,—she has collided with the ship guilty of no fault, and if she has violated the rule she must be declared in the wrong. In the *Tirzah* (1) Sir R. Phillimore said:

> Now this section has undergone much discussion, both in this court and before the judicial committee of the Privy Council, and the result of the cases is to establish the law to be that in any case where an infringement of the regulations could by any possibility have caused or contributed to the collision, the ship infringing the regulations is brought under the section to which I have referred.

My only difficulty has been whether the rule applies to a channel such as this. There is no doubt the rule was originally intended to facilitate the navigation of rivers and narrow tidal estuaries,—the history of the

(1) 4 P. D. at 37. See also 6 P.D. 80; the *Magnet*, L.R. 4 A. & E. 417.

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rule will be found in *Marsden's Law of Collisions at Sea*. But I have arrived at the conclusion that the rule is applicable to such a channel as that in which the *Juno* was anchored, as it would be, I think, to the narrow channel between George's Island in the harbour of Halifax and the city wharfs. On this ground, therefore, as well, I think the *Santanderino* to blame.

I find the *Santanderino* solely to blame for the collision with the *Juno*, and decree accordingly. There will be the usual reference to the Registrar and Merchants as to damages.

Solicitors for plaintiffs: *Borden, Ritchie, Parker & Chisholm.*

Solicitor for defendants: *Blowers Archibald.*

THE QUEBEC SKATING CLUB.....SUPPLIANTS; 1893

AND Nov. 6.

HER MAJESTY THE QUEEN.....RESPONDENT.

Contract, breach of—Undertaking by Government to promote legislation—Damages—Ordnance lands—Power of Minister of Interior to lease.

A Minister or Officer of the Crown cannot bind the Crown without the authority of law.

(2). An Order of His Excellency the Governor General in Council pledging the Government to promote legislation does not constitute a contract for the breach of which the Crown would be liable in damages.

(3). The Minister of the Interior cannot lease or authorize the use of Ordnance lands without the authority of the Governor in Council.

(R.S.C., c. 22, sec. 4; R.S.C., c. 55, secs. 4 and 5 discussed.)

Wood v. *The Queen*, 7 Can. S.C.R., 631; *The Queen* v. *St. John Water Commissioners*, 19 Can. S.C.R., 125; and *Hall* v. *The Queen*, 3 Ex. C.R. 373 referred to.

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

The facts of the case are stated in the judgment.

June 27, 1893.

The case was heard before Mr. Justice Burbidge.

Stuart, Q.C., for the suppliants: Our case rests upon a breach of contract.

A Minister of the Crown authorized by law to administer a department has as much power to deal with matters appertaining to such administration as an ordinary agent has to deal with the business of his principal under a power of attorney.

In the words of Richards, C.J., in *Wood* v. *The Queen* (1):

(1) 7 Can. S.C.R., 644.

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A department of State, presided over by a Minister of the Crown, responsible to Parliament for the conduct of the business of his department, may, I have no doubt, as the agent of, or representing, the Crown in all matters under the charge of that department, make agreements and enter into contracts which would bind the Crown, unless there is some legislative enactment or, perhaps, Orders in Council, controlling and limiting such power.

Argument of Counsel.

This is authority sufficient for the purposes of our case to show that a Minister of the Crown may bind the Crown by ordinary contracts made in the administration of the affairs of his department (1). There was a contract for the granting of these lands to the suppliants in this case made by the Minister of Interior, who was charged with the administration of the same. By their Order in Council the Government authorized the suppliants to enter into possession of the lands in question until such time as Parliament could be asked to perfect the transfer of the property by passing a bill for that purpose. That permission having been given, it could not properly be revoked by a Minister of the Crown until Parliament had been asked to legislate for the purpose mentioned. It was so revoked by the Minister of the Interior, and for this breach of contract the Crown is responsible. (He cites *Peterson* v. *The Queen* (2); *The Queen* v. *St. John Water Commissioners* (3); 54-55 Vict. c. 14; *Churchward* v. *The Queen* (4); *Thomas* v. *The Queen* (5); C.C.L.C., Art. 1703; 27 *Laurent*, no. 149.; *Pothier*, *Mandat* 148.

Secondly.—The Crown bound itself by Order in Council to promote the necessary legislation at the next session of Parliament, and failed to do so. I know of no case which says the Crown would be liable under such circumstances, but I submit that where there was a clear breach of this promise, and no reasonable excuse

(1) He refers to sec. 4, R.S.C. c. 22; R.S.C., c. 41; R.S.C. c. 55.
(2) 2 Ex. C.R., 74.
(3) 19 Can. S.C.R., 125.
(4) L.R. 1 Q.B., 173.
(5) L.R. 10 Q.B., 31.

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Argument of Counsel.

offered therefor, in view of the first principles of the law of contract the Crown ought to be held responsible for the results which flowed from the happening of such breach. (He cites *Holland* v. *Ross*) (1).

Hogg, Q.C. for the respondent.—There is no evidence here of any act on the part of the Government of the Dominion, as a whole, that would create a contract. The only act of the Government as such is the Order in Council of 13th October, 1888; and I submit that what we find there is purely a voluntary promise to invite Parliament to legislate for a certain purpose. There is no consideration transforming it into a legal obligation on the part of the Government. It is a mere declaration of intention; and for failure to carry out which no action will lie.

Secondly.—The Government did carry out their intention to invite Parliament to pass the necessary legislation at the next session. A bill was prepared and introduced, and what became of it afterwards is beyond the scope of our enquiry here. What they voluntarily promised to do they carried out. Parliament was invited to legislate.

Thirdly.—There was no contract entered into by a Minister of the Crown to make a grant of these lands. There was nothing officially done by the Minister of the Interior, within whose administration the matter properly fell, to amount to an act in the law. Mere informal conversations, such as occurred in this case between one or two members of the suppliant club and one or two Ministers of State, could never be construed into a formal or departmental transaction. It was distinctly intimated to suppliants that nothing final could be done without the sanction of Parliament.

Fourthly.—What has been cited by counsel for the suppliants from the case of *Wood* v. *The Queen* (2) is a

(1) 19 Can. S.C.R. 566. (2) 7 Can. S.C.R. p. 644.

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Argument of Counsel.

mere dictum of Richards, C.J. The point before the court there, was the validity of an executed parol contract for materials provided and which the Crown accepted and got the benefit of, a state of facts not at all applicable to this case. He cites *Goodwin* v. *City of Ottawa* (1); R.S.C. c. 55, subsec. 4; *Smith* v. *The Queen* (2).

Stuart, Q.C. replied.

BURBIDGE J. now (November 6th, 1893) delivered judgment.

The suppliants, in 1877, purchased from the Government of Canada, for two thousand dollars, certain Ordnance land situated at the city of Quebec, on which they put up a skating-rink. In 1888 they were proposing to themselves to remove this rink to another site, and in August of that year the Local Goverment of Quebec, in view of the contemplated removal, offered them fifteen thousand dollars for the land on which it then stood, on condition that the rink should be removed and the land levelled and cleared during that year. They also offered to pay to the suppliants a further sum of five thousand dollars in case the latter should rebuild the rink that year or the next year, on the south side of the Grande Allée at a place and according to plans approved by the former, and should bind themselves to give *gratis* the use of the building for certain industrial and other exhibitions. The suppliants then applied to the Government of Canada for a free grant of other Ordnance lands, at Quebec, that were so situated as to enable them to comply with the conditions for which the Local Government had stipulated. The terms of the offer made by that Government were communicated to the Minister of the Interior, and it was represented to him, that from a military point of view the buildings which the Club

(1) 28 U.C, C.P. 561. (2) 10 Can. S.C.R. 1.

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then occupied were too near to the fortification walls. The Minister was, under the circumstances, willing to recommend the grant; but the *Act respecting Ordnance and Admiralty Lands* (1) presented a difficulty. By the third section of that Act it is provided that such lands shall be divided by the Governor in Council into two classes, to be denominated respectively, Class one, and Class two; and that lands in either class may from time to time be placed or replaced in the other class by the Governor in Council. Lands in Class one are by the fourth section of the Act to be retained by the Government of Canada for the defence of Canada, and when not occupied by any military force may be leased or otherwise used as the Governor in Council thinks best for the advantage of Canada. There appears to be no authority for selling them while they remain in Class one. By the fifth section lands in Class two may be sold leased or otherwise used as the Governor in Council from time to time thinks meet, but any sale of any such lands other than a sale to the Government of a Province must be made at public auction. A part of the lands for which the suppliants applied was in Class one and the remainder in Class two. To meet the difficulty, it was proposed that an Act of Parliament should be procured. That proposition was made during a discussion of the matter that took place about the 11th of October, 1888, between Mr. White, the President, Mr. Chinic, one of the Directors, and Mr. Campbell, the Secretary of the Club, on the one side, and Sir John Thompson and Sir Adolphe Caron on the other. Mr. Campbell, the only witness examined, testified that when it was proposed to invite Parliament to pass an Act authorizing the grant, he remarked to Sir John Thompson that the session of Parliament would probably not take place until the

(1) R. S. C. c. 55.

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end of January or the beginning of February, whereas the Local Government required that the building should be removed before the first of January; and that Sir John Thompson replied that the difficulty could be got over, so that they could proceed, by passing an Order in Council in the meantime and that then they could pass the Bill. But perhaps it will be better to let the witness tell his story in his own way:—

Then the President, he continues, said:

What position will we be in, Sir John, if Parliament does not pass the Bill.

Sir John replied to this, that if Parliament would not pass the Bill it was tantamount to saying that they did not possess the confidence of the country. We looked upon this as a Ministerial question and made a contract and proceeded to do the work.

Q. Will you state whether the three Ministers were present at this conversation? A. At the first conversation there were Sir Adolphe Caron and Mr. Dewdney, and at the second there were Sir Adolphe Caron and Sir John Thompson.

Q. Were all the circumstances fully explained to the Ministers at the several interwiews that you had? A. The whole circumstances were talked over with Sir Adolphe Caron and were gone over again with Mr. Dewdney and again with Sir John Thompson.

Q. Was it made clear to them that the Club had to have possession of the land immediately? A. We explained the offer that was made to us by the Local Government and we said to them that it was necessary to have immediate possession to enable us to accept that offer.

Q. Did you state to the Ministers at the time, that the Club would not accept the Local Government's offer unless they were sure of a grant of this land and the immediate possession of it? A. We did.

Q. Did you immediately after that interview proceed to make the contract of the 12th November, 1888, (Exhibit No. 2) or did you wait until the Order in Council passed? A. We waited until we got a certified copy of the Order in Council and then we went to the Local Government and the Corporation of the City of Quebec and explained to the latter the offer of the Local Government. We entered into a notarial contract with the Local Government and also with the city.

And again on cross-examination:—

Q. As I understand from conversations with the Minister of Militia and the Minister of the Interior and the Minister of Justice, as you

have said they were, they told you that on receipt of the Order in Council, you could then proceed with your work? A. That was at the interview we had here at Ottawa. It was the object of passing the Order in Council to give us the right to do so at once.

Q. Did you explain to the Ministers that you required the lands at once? A. After we had explained the Minister said, as I said before, we "will pass a Bill." I said: "That will not help us to accept the offer of the Government. We have to do the work at once." Then the Minister of Justice said: "We will pass an Order in Council and you can proceed on that in the interval, until the Bill passes."

Q. Was it distinctly understood between all parties that it was necessary for you to have the land before the Bill passed? A. Certainly.

* * * * * *

Q. You say it was understood, who was it that understood that you were to go into possession at once? A. We understood that when the Minister of Justice told us "we will pass the Order in Council and upon that you can go and take possession."

Q. Did he say you might go and take possession? A. He said you can proceed at once.

Q. Did he say that you could go and take possession at once? A. I am not prepared to swear that, but he said, "you can proceed at once with your work."

Q. That was in about the beginning of October? A. Yes, a day or two after the 9th, the date of the telegram."

On the 30th of October, 1888, an order of His Excellency the Governor General in Council was passed approving of a recommendation made by the Minister of the Interior that Parliament should be invited at its then next session to authorize a free grant to the suppliants of the lands applied for, upon the condition that the building to be erected thereon by them should be suitable and available for the purpose of public exhibitions. The approval of the recommendation was given on the further condition that neither the suppliants nor their assignee should at any time erect buildings or other constructions on the site from which the suppliants proposed to remove their rink.

On the 31st of October, Mr. Benoit, Sir Adolphe Caron's Secretary, telegraphed to Mr. Campbell, the

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Secretary of the Club, that the Order in Council had been passed, and on the 10th of November, Sir Adolphe Caron, himself, appears to have sent a copy of the order to Mr. Campbell. On the 14th of November, Mr. Douglas, the assistant Secretary of the Department of the Interior, by direction of the Minister of that Department, enclosed to the Secretary of the Quebec Skating Club, for his information, a copy of this Order in Council. Mr. Douglas, in his letter, refers to the order, inadvertently no doubt, as granting portions of certain lots in the city of Quebec to the Club. But as a copy of the Order in Council was forwarded at the same time, the suppliants were not, and for that matter do not claim, to have been misled by the terms in which it was described in the covering letter.

On the 12th of November, the suppliants concluded their arrangement with the Government of Quebec, and surrendered to Her Majesty, as represented by that Government, the lands upon which the rink stood and on the 6th of December following, they entered into a contract for the construction of a new rink on the lands for which they had applied to the Government of Canada. Part of the new material was placed on the ground that year, but by arrangement with the Local Government the tearing down of the old building was deferred until the latter end of March, 1889. In that month it was represented to the Minister of the Interior that the suppliants were proceeding with the excavations on the new site and he notified them by telegraph to stop work as Parliament had not passed the necessary legislation. His telegrams were confirmed by a letter of the 10th of April following, and the suppliants then notified their contractor to stop work.

On the 20th of April, the Parliament of Canada being then in session, the Minister of the Interior introduced

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a Bill to authorize the conveyance of the lands in question to the suppliants, and it was read a first time and ordered to be read a second time on the following Monday, the 22nd of April. This order was reached on the 27th and was then discharged, and the Bill withdrawn. On the 29th the Minister telegraphed to the suppliants that a resolution was to be introduced that day respecting the skating-rink, upon which a Bill would follow; and a resolution was put on the order paper but was never moved. Nothing was done with reference to the matter during the session of Parliament held in the year 1890.

On the 21st of January, 1891, the Minister of the Interior withdrew his letter of the 10th of April, 1889, adding, however, that under all the circumstances the responsibility of proceeding with the work must rest upon the suppliants. On the 28th of August, 1891, an Act of Parliament was passed that authorized a free grant of the lands mentioned to be made to the suppliants, and in accordance with its provisions, letters-patent were issued to them on the 2nd of November, of that year, and were accepted by them. In September of the year following they filed their petition.

Mr. *Stuart*, for the suppliants, concedes of course that they cannot recover except for a breach of contract. But he contends that the facts that I have stated disclose a good contract or agreement 1st, to ask Parliament in the session of 1889 to pass the Act mentioned, and 2ndly to allow the suppliants to go into possession and to keep possession of the land for which they had applied until Parliament had either authorized, or refused to authorize, a free grant thereof. In each case the consideration was, he argues, to be found in the suppliants' undertaking to remove the old rink from the site on which it stood and to build on the new site

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a rink that could be used for industrial and other exhibitions.

Now in the first place it seems to me that the Order in Council of the 30th of October, 1888, does not constitute or disclose a contract on the part of the Governor in Council that can be enforced in a court of law. For any failure to keep the promise then made the Ministers of the Crown may be responsible to Parliament, but the Crown is not bound to answer in any of its courts. The order was passed no doubt to pledge the Government to a definite and defined course of action in respect of the matter whereof it treats; but it was never intended that for a failure to keep the promise given the Crown should be liable for damages. That is clear, I think, from the position of the parties, from the character of the suppliants' application, and from what transpired in respect thereto. The suppliants were asking the Crown for a free grant of certain public lands, that it was not in its power to make without the authority of Parliament. The Ministers of the Crown being willing to recommend the grant suggested that an Act of Parliament should be obtained. The suppliants, however, wished to commence work on such lands at once, and to meet that difficulty it was proposed that an Order in Council should be passed, which would stand as an earnest of the Government's intentions and commit them to promote the necessary legislation. The contingency that such a course left unprovided for was not lost sight of, for the President of the Club asked what position they would be in if Parliament should not pass the Bill, and the Minister replied that if Parliament should refuse to pass the Bill, that would be tantamount to saying that the Government did not possess the confidence of the country. "We looked upon that," says Mr. Campbell, "as a Ministerial question and made a contract," that

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is for removing the old and building a new rink, "and proceeded to do the work." The suppliants, it is clear, considered the promise made to them as one that involved the good faith of Ministers and nothing more. There was at the time no thought or question on the part of any one that the Government intended to enter into, or was entering into, a contract for the breach of which the Crown would be liable in damages.

More than that, if it had then been proposed that they should make with the suppliants such a contract as that which the suppliants now seek to set up, it would at once have been obvious that the Governor in Council had no such power or authority. As no Minister or officer of the Crown can make a contract binding on it without due authority of law, so the Crown itself cannot without like authority dispose of public lands or public moneys. In the present case it could not make the free grant applied for because the authority of Parliament was wanting, and for a like reason it could not have entered into a contract to make such a grant. If that is so, on what principle could the Governor in Council incur an obligation, to be answered for in damages if broken, to invite Parliament to give the necessary authority therefor. Were that possible it might happen that before Parliament had an opportunity of passing upon the matter the Crown would be bound to satisfy the suppliants' demand with public land or money, and in that indirect way the settled and well understood rules of law governing the disposition of such lands and money come to be evaded.

Then there would be, it is evident, great difficulty and inconvenience in determining such an issue as that raised in this case. If the Government's authority to make the contract were beyond debate a court

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ought not, I suppose, to be too greatly deterred by any such consideration. But where the question is doubtful the inconveniences incident to the trial of such an issue may very properly be looked at. Suppose for the moment that the Government could make the contract which it is alleged that they made, what must they do and how far must they go to discharge their obligation, and by what rules or test should a court determine the question? The suppliants in a letter to the Minister of the Interior of the 7th of May, 1889, informed him that they did not consider that the bringing in and laying before Parliament a Bill at the end of the session, and then withdrawing it without any real cause, as the leading men of the opposition, as they were informed by one of them, the Mayor of Quebec, were not going to oppose it, was a compliance with the Order in Council of the 30th of October, 1888. But how is the court going to determine whether there was "real cause," or a good one, for withdrawing the Bill. Is it to ascertain by evidence whether or not the opposition would oppose it, and when that is done what about those who sit on the other side of the House? Are they not to be taken into account? Are they to have no voice in the matter? And who is to speak for them and to say whether they, or any of them, were in favour or opposed to the measure? Is the court to poll the House, or must it hold that nothing but a vote would discharge the Government's obligation in the matter? If Ministers thought the opinion of the House was against the Bill would it be for them a case of defeat or damages? That would indeed be something new, and such and like considerations need only be suggested to show how untenable is the position for which the suppliants contend.

We come now to the contention that there was a contract to allow the suppliants to go into possession

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of the land for which they had applied, and to keep the possession until Parliament had given or refused authority for the proposed grant. And here again I may say that it seems clear to me that there was never any intention on the part of any one to enter into such a contract. There is nothing of all that in the Order in Council of the 30th of October, and no Minister could, without authority of law bind the Crown by such an agreement. Had any Minister any such authority? By the fourth section of the Act respecting the Department of the Interior (1), it is provided that the Minister of the Interior shall have the control and management of all Crown lands which are the property of Canada, including those known as Ordnance and Admiralty lands. But that is a general provision, which is obviously limited to a control and management in accordance with the law relating to such lands. By the Act respecting Ordnance and Admiralty lands, to which I have already referred, such lands may, in certain cases, be leased or otherwise used as the Governor in Council thinks best for the advantage of Canada (2). But the Minister of the Interior is not by the Act entrusted with the power of deciding whether they may be so leased or used or not. In practice he would, no doubt have a large, perhaps a controlling influence in determining such a question; but the decision, to have any legal force, must be made by the Governor in Council.

It is contended, however, that as the consideration for the promise alleged to have been made to the suppliants was executed at least in part, their petition will lie, and it is argued that the contention is supported by two cases to which I shall refer presently. Now, no doubt the belief that it would be in the public interest

(1) R. S. C. c. 22.

(2) R. S. C. c. 55, s. 4, ss. 4 and s. 5, ss. 21.

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to have the old rink removed from the site it then occupied adjacent to the walls of the fortifications of the city, and that no other building should be there erected without the consent of the Governor in Council, afforded a reason or motive for the Government pledging themselves to promote an Act for a free grant of a new site; but I do not think that the conditions on which the Order in Council was passed as an earnest of the Government's intention can properly be regarded as a consideration that would support a legal obligation. Not to quarrel with that, however, I do not see how the suppliants can succeed if there was no due authority for the promise on which they rely. In *Wood* v. *The Queen* (1), Chief Justice Sir William Richards gave it as his view that the provisions of the 7th section of the Public Works Act (2), then in force, did not apply where work was done for, or materials supplied to, a department of the Government and accepted by such department, and that in such a case the law would imply a contract on the part of the Crown to pay the fair value of such work or materials. I had occasion in *Hall* v. *The Queen* (3) to follow the opinion of the learned Chief Justice, though it was expressed with some reserve and in a case which was decided on other grounds. In doing so, however, I thought it proper to add that there might be cases in which some question would arise as to the authority of the officer at whose instance the service was rendered. If the Minister of a department, or the officer acting under him, has no authority to bind the Crown in respect of such work or materials, I do not see how a petition of right can lie for the value thereof, and that view is not, it seems to me, opposed to, but, on the contrary, supported by the case of *The Queen* v.

(1) 7 Can. S. C. R. 646. (2) 31 Vict. c. 12.
(3) 3 Ex. C. R. 373.

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The Saint John Water Commissioners (6), upon which the suppliants rely. The facts of that case were that the respondents' system of water works had in the year 1884 been injuriously affected by the execution by the Crown of certain works and improvements in the yards and tracks of the Intercolonial Railway, at or near the station of the railway at the City of Saint John. By a verbal arrangement between the Chief Engineer of the railway and the respondents' engineer, it was agreed that such works as were necessary to restore the respondents' property to its former safe and serviceable condition should be executed under the direction of their engineer, but at the expense of the Crown. The works that were carried out went in some particulars beyond this, but they were executed upon and adjacent to the railway property, where they were at all times open to the inspection of the officers and engineers of the railway, and the necessary excavations for laying the water pipes that the respondents' engineer was putting down were made by workmen employed and paid by the Minister of Railways and Canals. The question of the Chief Engineer's power to bind the Crown by the arrangement that he made was not raised in this court; but on appeal to the Supreme Court his authority was called in question, and Mr. Justice, now Chief Justice Sir Henry Strong, and Mr. Justice Gwynne thought the appeal should be allowed because he had no such power. But a majority of the court, consisting of the Chief Justice, and Mr. Justice Taschereau, and Mr. Justice Patterson were of opinion to dismiss the appeal. The case cannot, however, be taken as deciding that the Chief Engineer could bind the Crown without due authority, but that in the case in question he had such authority. By the fifth section of *The Government Railways Act*, 1881, then in force,

(6) 19 S. C. R., 130.

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the Minister of Railways and Canals was empowered by himself, his engineers, superintendents, agents, workmen, and servants, to do the acts and execute the works by which the respondents' property was injured, and to agree with any person as to the amount of compensation to be paid for any damages thereby occasioned, and the money for carrying on such works had been voted by Parliament (1). But if the Minister had the power to agree with the respondents as to the amount of compensation to be made to them, what was there to prevent him from doing so by or through the Chief Engineer or some other officer of the railway? Would that not be the natural and usual course to pursue, and if not, how is the public service with its great interests and wide scope of operations to be carried on? When then we find the Chief Engineer, the officer under the Minister charged with the execution of the public work, exercising, without question, the powers necessary for its completion, and the settlement of the claims arising therefrom, is it not fair, in the absence of evidence to the contrary, to infer that he is acting by the Minister's authority and direction? In the case of *Hall* v. *The Queen* (2), the claimant, to enable certain improvements connected with the Trent Valley Canal to be proceeded with, closed down his mill at the request of the Chief Engineer of Canals, and the officers under him. There was evidence that what was done in reference thereto was, in that case, expressly ratified by the Minister of Railways and Canals, who had power to take possession of the mill and to agree with the claimant as to the amount of compensation (3), and I thought that under the circumstances a promise should be implied on the part of the Crown to indem-

(1) See the Appropriation Act, 1883, pp. 10 and 24, and that of 1884, pp. 16 and 31.

(2) 3 Ex. C. R. 373.

(3) 31 Vict., c. 12, s. 24; R.S. C., c. 39, s. 3, and 52 Vict., c. 13, ss. 3 and 15.

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nify the claimant for the actual loss he had thereby incurred. The Minister might himself have made such a contract, and I could see no good reason why it might not be implied from what his officer with his approval did.

In coming to the conclusion to dismiss the petition, I have not considered the defence set up that it was thought necessary to secure the consent of the War Office before proceeding with the Bill. In the view I have taken of the case, that has not been necessary. Neither have I laid any stress on the incident that in the deed of surrender from the suppliants to the Queen, as represented by the Goverment of Quebec, executed on the 12th of November, 1888, there is no condition or stipulation that no buildings or other constructions should, without the consent of the Governor in Council, be erected on the lands surrendered. That was one of the conditions mentioned in the order in council of the 30th of October, 1888, and had the Government of Canada, because the suppliants had failed to have such a provision inserted in the deed by which they parted with the property on which the old rink stood, refused to promote the passing of the Act to which they had pledged themselves, I do not well see what ground of complaint the suppliants would have had. But that has not been insisted upon. The condition is not repeated in the order in council of the 2nd of November, 1891, and is not to be found in the letters-patent of the same date, and I do not understand the Crown to raise any such question as an answer to the claim put forward by the suppliants.

Judgment for respondent, with costs.

Solicitors for suppliants: *Pentland & Stuart.*

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

GENERAL RULES AND ORDERS

REGULATING THE

PRACTICE AND PROCEDURE

IN

ADMIRALTY CASES

IN THE

EXCHEQUER COURT OF CANADA,

WITH FORMS AND TABLES OF FEES.

Made in pursuance of the provisions of "The Colonial Courts of Admiralty Act, 1890," and of "The Admiralty Act, 1891," (Canada) and approved by Order of His Excellency the Governor-General in Council of the 10th day of December, 1892, and by Order of Her Majesty in Council of the 15th day of March, 1893, and brought into force by publication in The Canada Gazette on the 10th day of June, 1893.

OTTAWA
PRINTED BY S. E. DAWSON, PRINTER TO THE QUEEN'S MOST EXCELLENT MAJESTY
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GENERAL ORDER.

—:o:—

In pursuance of the 55th section of *The Exchequer Court Act* (50–51 Victoria c. 16 and 52 Victoria c. 38) it is ordered that the following rules shall be in force in respect to any proceeding that may be had or taken in the Exchequer Court of Canada to impeach any Patent issued under *The Patent Act* and the amendments thereto :—

1. In any proceeding for the impeachment of any Patent under the 34th section of *The Patent Act*, as amended by the Act 53 Victoria c. 13, intituled *An Act to amend the Patent Act*, the practice and procedure which in like proceedings were in force in Her Majesty's High Court of Justice in England immediately prior to the passing of the Act of the Parliament of the United Kingdom of Great Britain and Ireland, 46 and 47 Victoria c. 57, intituled *An Act to amend and consolidate the Law relating to Patents for Invention, Registration of Designs and Trade-Marks*, shall be followed as near as may be.

2. In any such proceeding the party seeking to impeach the Patent may, in addition to any ground or cause for impeachment that might be relied on under the 34th section of the said Act, set up and rely upon any ground or cause mentioned in the 37th section of *The Patent Act*, as amended by the Act 55–56 Victoria c. 24, intituled *An Act to further amend The Patent Act.*

3. If in any case it is sought to impeach a Patent for one or more of the grounds or causes mentioned in section 37 of *The Patent Act*, as amended by 55-56 Victoria c. 24, intituled *An Act to further amend The Patent Act*, and for no other cause, a sealed and certified copy of

the Patent and of the petition, affidavit, specification and drawings thereunto relating may be filed in the office of the Registrar of the Court, and proceedings to have the same declared null and void may thereupon be taken by Information in the name of the Attorney-General of Canada, or by a statement of claim at the suit of any person interested, in accordance with the ordinary practice of the court.

Dated at Ottawa, this 5th day of December, A.D. 1892.

(Signed) GEO. W. BURBIDGE.
J. E. C.

53-54 VICTORIA.

CHAPTER 27.

An Act to amend the Law respecting the exercise of Admiralty Jurisdiction in Her Majesty's Dominions and elsewhere out of the United Kingdom.

[25*th July*, 1890.]

BE it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

Short title.

1. This Act may be cited as the Colonial Courts of Admiralty Act, 1890.

Colonial Courts of Admiralty.

2.—(1.) Every court of law in a British possession, which is for the time being declared in pursuance of this Act to be a court of Admiralty, or which, if no such declaration is in force in the possession, has therein original unlimited civil jurisdiction, shall be a court of Admiralty, with the jurisdiction in this Act mentioned, and may, for the purpose of that jurisdiction, exercise all the powers which it possesses for the purpose of its other civil jurisdiction; and such court, in reference to the jurisdiction conferred by this Act, is in this Act referred to as a Colonial Court of Admiralty. Where in a British possession the Governor is the sole judicial authority, the expression "court of law" for the purposes of this section includes such Governor.

(2.) The jurisdiction of a Colonial Court of Admiralty shall, subject to the provisions of this Act, be over the like places, persons, matters and things, as the Admiralty jurisdiction of the High Court in England, whether existing by virtue of any statute or otherwise, and the Colonial Court

of Admiralty may exercise such jurisdiction in like manner and to as full an extent as the High Court in England, and shall have the same regard as that Court to international law and the comity of nations.

(3.) Subject to the provisions of this Act any enactment referring to a Vice-Admiralty Court, which is contained in an Act of the Imperial Parliament or in a Colonial law, shall apply to a Colonial Court of Admiralty, and be read as if the expression "Colonial Court of Admiralty" were therein substituted for "Vice-Admiralty Court" or for other expressions respectively referring to such Vice-Admiralty Courts or the judge thereof; and the Colonial Court of Admiralty shall have jurisdiction accordingly.

Provided as follows:—

(*a.*) Any enactment in an Act of the Imperial Parliament referring to the Admiralty jurisdiction of the High Court in England, when applied to a Colonial Court of Admiralty in a British possession, shall be read as if the name of that possession were therein substituted for England and Wales; and—

27 & 28 Vict. c. 25. 36 & 37 Vict. c. 88.

(*b.*) A Colonial Court of Admiralty shall have, under the Naval Prize Act, 1864, and under the Slave Trade Act, 1873, and any enactment relating to prize or the slave trade, the jurisdiction thereby conferred on a Vice-Admiralty Court and not the jurisdiction thereby conferred exclusively on the High Court of Admiralty or the High Court of Justice; but, unless for the time being duly authorized, shall not, by virtue of this Act, exercise any jurisdiction under the Naval Prize Act, 1864, or otherwise in relation to prize; and—

(*c.*) A Colonial Court of Admiralty shall not have jurisdiction under this Act to try or punish a person for an offence which according to the law of England is punishable on indictment; and—

(*d.*) A Colonial Court of Admiralty shall not have any greater jurisdiction in relation to the laws and regulations relating to Her Majesty's Navy at sea, or under any Act providing for the discipline of Her Majesty's Navy, than may be, from time to time, conferred on such Court by Order in Council.

(4.) Where a Court in a British possession exercises in respect of matters arising outside the body of a county or other like part of a British possession any jurisdiction exercisable under this Act, that jurisdiction shall be deemed to be exercised under this Act and not otherwise.

Power of Colonial legislature as to Admiralty jurisdiction.

3. The legislature of a British possession may, by any Colonial law,—

(*a.*) declare any court of unlimited civil jurisdiction, whether original or appellate, in that possession to be a Colonial Court of Admiralty, and provide for the exercise by such court of its jurisdiction under this Act, and limit territorially or otherwise, the extent of such jurisdiction; and—

(*b.*) confer upon any inferior or subordinate court in that possession such partial or limited Admiralty jurisdiction under such regulations and with such appeal (if any) as may seem fit:

Provided that any such Colonial law shall not confer any jurisdiction which is not by this Act conferred upon a Colonial Court of Admiralty.

Reservation of Colonial law for Her Majesty's assent.

4. Every Colonial law which is made in pursuance of this Act, or affects the jurisdiction of or practice or procedure in any court of such possession in respect of the jurisdiction conferred by this Act, or alters any such Colonial law as above in this section mentioned, which has been previously passed, shall, unless previously approved by Her Majesty through a Secretary of State, either be reserved for the signification of Her Majesty's pleasure thereon, or contain a suspending clause providing that such law shall not come into operation until Her Majesty's pleasure thereon has been publicly signified in the British possession in which it has been passed.

Local Admiralty appeal.

5. Subject to rules of court under this Act, judgments of a court in a British possession given or made in the exercise of the jurisdiction conferred on it by this Act, shall be subject to the like local appeal, if any, as judgments of the court in the exercise of its ordinary civil jurisdiction, and the court having cognizance of such appeal shall, for the purpose thereof, possess all the jurisdiction by this Act conferred upon a Colonial Court of Admiralty.

Admiralty appeal to the Queen in Council.

6.—(1). The appeal from a judgment of any court in a British possession in the exercise of the jurisdiction conferred by this Act, either where there is as of right no local appeal or after a decision on local appeal, lies to Her Majesty the Queen in Council.

(2.) Save as may be otherwise specially allowed in a particular case by Her Majesty the Queen in Council, an appeal under this section shall not be allowed—

(*a.*) from any judgment not having the effect of a definitive judgment unless the court appealed from has given leave for such appeal, nor—

(*b.*) from any judgment unless the petition of appeal has been lodged within the time prescribed by rules, or if no time is prescribed within six months from the date of the judgment appealed against, or if leave to appeal has been given then from the date of such leave.

(3.) For the purpose of appeals under this Act, Her Majesty the Queen in Council and the Judicial Committee of the Privy Council shall, subject to rules under this section, have all such powers for making and enforcing judgments, whether interlocutory or final, for punishing contempts, for requiring the payment of money into court, or for any other purpose, as may be necessary, or as were possessed by the High Court of Delegates before the passing of the Act transferring the powers of such court to Her Majesty in Council, or as are for the time being possessed by the High Court in England or by the court appealed from in relation to the like matters as those forming the subject of appeals under this Act.

(4.) Al Orders of the Queen in Council or the Judicial Committee of the Privy Council for the purposes aforesaid or otherwise in relation to appeals under this Act shall have full effect throughout Her Majesty's dominions, and in all places where Her Majesty has jurisdiction.

(5.) This section shall be in addition to and not in derogation of the authority of Her Majesty in Council or the Judicial Committee of the Privy Council arising otherwise than under this Act, and all enactments relating to appeals to Her Majesty in Council or to the powers of Her Majesty in Council or the Judicial Committee of the Privy Council in relation to those appeals, whether for making rules and orders or otherwise, shall extend, save as otherwise directed by Her Majesty in Council, to appeals to Her Majesty in Council under this Act.

Rules of court.

7.—(1.) Rules of court for regulating the procedure and practice (including fees and costs) in a court in a British possession in the exercise of the jurisdiction conferred by this Act, whether original or appellate, may be made by the same authority and in the same manner as rules touching the practice, procedure, fees and costs in the said court in the exercise of its ordinary civil jurisdiction respectively are made:

Provided that the rules under this section shall not, save as provided by this Act, extend to matters relating to the slave trade, and shall not (save as provided by this section) come into operation until they have been approved by Her Majesty in Council, but on coming into operation shall have full effect as if enacted in this Act; and any enactment inconsistent therewith shall, so far as it is so inconsistent, be repealed.

(2.) It shall be lawful for Her Majesty in Council, in approving rules made under this section, to declare that the rules so made with respect to any matters which appear to Her Majesty to be matters of detail or of local concern may be revoked, varied or added to, without the approval required by this section.

(3.) Such rules may provide for the exercise of any jurisdiction conferred by this Act by the full court, or by any judge or judges thereof, and subject to any rules, where the ordinary civil jurisdiction of the court can, in any case, be exercised by a single judge, any jurisdiction conferred by this Act may in the like case be exercised by a single judge.

Droits of Admiralty and of the Crown.

8.—(1.) Subject to the provisions of this section nothing in this Act shall alter the application of any droits of Admiralty or droits of or forfeitures to the Crown in a British possession; and such droits and forfeitures, when condemned by a court of a British possession in the exercise of the jurisdiction conferred by this Act, shall, save as is otherwise provided by any other Act, be notified, accounted for and dealt with in such manner as the Treasury from time to time direct, and the officers of every Colonial Court of Admiralty and of every other court in a British possession exercising Admiralty jurisdiction shall obey such directions in respect of the said droits and forfeitures as may be from time to time given by the Treasury.

(2.) It shall be lawful for Her Majesty the Queen in Council by Order to direct that, subject to any conditions, exceptions, reservations and regulations contained in the Order, the said droits and forfeitures condemned by a court in a British possession shall form part of the revenues of that possession either for ever or for such limited term or subject to such revocation as may be specified in the Order.

(3.) If and so long as any of such droits and forfeitures by virtue of this or any other Act form part of the revenues of the said possession the same shall, subject to the provisions of any law for the time being applicable thereto, be notified,

accounted for and dealt with in manner directed by the Government of the possession, and the Treasury shall not have any power in relation thereto.

Power to establish Vice-Admiralty Courts.

9.—(1.) It shall be lawful for Her Majesty, by commission under the Great Seal to empower the Admiralty to establish in a British possession any Vice-Admiralty Court or Courts.

(2.) Upon the establishment of a Vice-Admiralty Court in a British possession, the Admiralty, by writing under their hands and the seal of the office of Admiralty, in such form as the Admiralty may direct, may appoint a judge, registrar, marshal and other officers of the court, and may cancel any such appointment; and in addition to any other jurisdiction of such court, may (subject to the limits imposed by this Act or the said commission from Her Majesty) vest in such court the whole or any part of the jurisdiction by or by virtue of this Act conferred upon any courts of that British possession; and may vary or revoke such vesting, and while such vesting is in force the power of such last-mentioned courts to exercise the jurisdiction so vested shall be suspended.

Provided that—

(*a.*) nothing in this section shall authorize a Vice-Admiralty Court so established in India or in any British possession having a representative legislature, to exercise any jurisdiction except for some purpose relating to prize, to Her Majesty's Navy, to the slave trade, to the matters dealt with by the Foreign Enlistment Act, 1870, or the Pacific Islanders Protection Acts, 1872 and 1875, or to matters in which questions arise relating to treaties or conventions with foreign countries, or to international law; and—

33 & 34 Vict. c. 90.
35 & 36 Vict. c. 19.
38 & 39 Vict. c. 51.

(*b.*) in the event of a vacancy in the office of judge, registrar, marshal or other officer of any Vice-Admiralty Court in a British possession, the Governor of that possession may appoint a fit person to fill the vacancy until an appointment to the office is made by the Admiralty.

(3.) The provisions of this Act with respect to appeals to Her Majesty in Council from courts in British possessions in the exercise of the jurisdiction conferred by this Act, shall apply to appeals from Vice-Admiralty Courts, but the rules and orders made in relation to appeals from Vice-Admiralty Courts may differ from the rules made in relation to appeals from the said courts in British possessions.

(4.) If Her Majesty at any time by commission under the Great Seal so directs, the Admiralty shall, by writing under their hands and the seal of the office of Admiralty, abolish a Vice-Admiralty Court established in any British possession under this section, and upon such abolition the jurisdiction of any Colonial Court of Admiralty in that possession which was previously suspended shall be revived.

Power to appoint a vice-admiral.

10. Nothing in this Act shall affect any power of appointing a vice-admiral in and for any British possession or any place therein, and whenever there is not a formally appointed vice-admiral in a British possession or any place therein, the Governor of the possession shall be *ex-officio* vice-admiral thereof.

Exception of Channel Islands and other possessions.

11.—(1.) The provisions of this Act with respect to Colonial Courts of Admiralty shall not apply to the Channel Islands.

(2.) It shall be lawful for the Queen in Council by Order to declare, with respect to any British possession which has not a representative legislature, that the jurisdiction conferred by this Act on Colonial Courts of Admiralty shall not be vested in any court of such possession, or shall be vested only to the partial or limited extent specified in the Order.

Application of Act to courts under Foreign Jurisdiction Acts.

12. It shall be lawful for Her Majesty the Queen in Council by Order to direct that this Act shall, subject to the conditions, exceptions and qualifications (if any) contained in the Order, apply to any Court established by Her Majesty for the exercise of jurisdiction in any place out of Her Majesty's dominions which is named in the Order as if that Court were a Colonial Court of Admiralty, and to provide for carrying into effect such application.

Rules for procedure in slave trade matters.

13.—(1.) It shall be lawful for Her Majesty the Queen in Council by Order to make rules as to the practice and procedure (including fees and costs) to be observed in and the returns to be made from Colonial Courts of Admiralty and Vice-Admiralty Courts in the exercise of their jurisdiction in matters relating to the slave trade, and in and from East African Courts as defined by the Slave Trade (East African Courts) Acts, 1873 and 1879.

36 & 37 Vict. c. 59.
42 & 43 Vict. c. 38.

(2.) Except when inconsistent with such Order in Council, the rules of court for the time being in force in a Colonial Court of Admiralty or Vice-Admiralty Court shall, so

far as applicable, extend to proceedings in such court in matters relating to the slave trade.

(3.) The provisions of this Act with respect to appeals to Her Majesty in Council, from courts in British possessions in the exercise of the jurisdiction conferred by this Act, shall apply, with the necessary modifications, to appeals from judgments of any East African court made or purporting to be made in exercise of the jurisdiction under the Slave Trade (East African Courts) Acts, 1873 and 1879.

Orders in Council.

14. It shall be lawful for Her Majesty in Council from time to time to make Orders for the purposes authorized by this Act, and to revoke and vary such Orders, and every such Order while in operation shall have effect as if it were part of this Act.

Interpretation.

15. In the construction of this Act, unless the context otherwise requires,—

The expression "representative legislature" means, in relation to a British possession, a legislature comprising a legislative body of which at least one-half are elected by inhabitants of the British possession.

The expression "unlimited civil jurisdiction" means civil jurisdiction unlimited as to the value of the subject-matter at issue, or as to the amount that may be claimed or recovered.

The expression "judgment" includes a decree, order, and sentence.

The expression "appeal" means any appeal, rehearing, or review; and the expression "local appeal" means an appeal to any court inferior to Her Majesty in Council.

The expression "Colonial law" means any Act, ordinance, or other law having the force of legislative enactment in a British possession and made by any authority, other than the Imperial Parliament or Her Majesty in Council, competent to make laws for such possession.

Commencement of Act

16.—(1.) This Act shall, save as otherwise in this Act provided, come into force in every British possession on the first day of July, one thousand eight hundred and ninety-one.

Provided that—

(*a.*) This Act shall not come into force in any of the British possessions named in the First Schedule to this Act until Her Majesty so directs by Order in Council and until the day named in that behalf in such Order; and—

(*b.*) If before any day above mentioned rules of court for the Colonial Court of Admiralty in any British possession have been approved by Her Majesty in Council, this Act may be proclaimed in that possession by the Governor thereof, and on such proclamation shall come into force on the day named in the proclamation.

(2.) The day upon which this Act comes into force in any British possession shall, as regards that British possession, be deemed to be the commencement of this Act.

(3.) If, on the commencement of this Act in any British possession, rules of court have not been approved by Her Majesty in pursuance of this Act, the rules in force at such commencement under the Vice-Admiralty Courts Act, 1863, and in India the rules in force at such commencement regulating the respective Vice-Admiralty Courts or Courts of Admiralty in India, including any rules made with reference to proceedings instituted on behalf of Her Majesty's ships, shall, so far as applicable, have effect in the Colonial Court or Courts of Admiralty of such possession, and in any Vice-Admiralty Court established under this Act in that possession, as rules of court under this Act, and may be revoked and varied accordingly; and all fees payable under such rules may be taken in such manner as the Colonial Court may direct, so however that the amount of each such fee shall, so nearly as practicable, be paid to the same officer or person who but for the passing of this Act would have been entitled to receive the same in respect of like business. So far as any such rules are inapplicable or do not extend, the rules of court for the exercise by a court of its ordinary civil jurisdiction shall have effect as rules for the exercise by the same court of the jurisdiction conferred by this Act. 26 & 27 Vict. c. 24.

(4.) At any time after the passing of this Act any Colonial law may be passed, and any Vice-Admiralty Court may be established and jurisdiction vested in such Court, but any such law, establishment, or vesting shall not come into effect until the commencement of this Act.

17. On the commencement of this Act in any British possession, but subject to the provisions of this Act, every Vice-Admiralty Court in that possession shall be abolished; subject as follows:— Abolition of Vice-Admiralty Courts.

(1.) All judgments of such Vice-Admiralty Court shall be executed and may be appealed from in like manner as if this Act had not passed, and all appeals from any Vice-Admiralty Court pending at the commencement

of this Act shall be heard and determined, and the judgment thereon executed as nearly as may be in like manner as if this Act had not passed:

(2.) All proceedings pending in the Vice-Admiralty Court in any British possession at the commencement of this Act shall, notwithstanding the repeal of any enactment by this Act, be continued in a Colonial Court of Admiralty of the possession in manner directed by rules of court, and, so far as no such rule extends, in like manner, as nearly as may be, as if they had been originally begun in such court:

(3.) Where any person holding an office, whether that of judge, registrar or marshal, or any other office in any such Vice-Admiralty Court in a British possession, suffers any pecuniary loss in consequence of the abolition of such court, the Government of the British possession, on complaint of such person, shall provide that such person shall receive reasonable compensation (by way of an increase of salary or a capital sum, or otherwise) in respect of his loss, subject nevertheless to the performance, if required by the said Government, of the like duties as before such abolition:

(4.) All books, papers, documents, office furniture and other things at the commencement of this Act belonging, or appertaining to any Vice-Admiralty Court, shall be delivered over to the proper officer of the Colonial Court of Admiralty or be otherwise dealt with in such manner as, subject to any directions from Her Majesty, the Governor may direct:

(5.) Where, at the commencement of this Act in a British possession, any person holds a commission to act as advocate in any Vice-Admiralty Court abolished by this Act, either for Her Majesty or for the Admiralty, such commission shall be of the same avail in every court of the same British possession exercising jurisdiction under this Act, as if such court were the court mentioned or referred to in such commission.

Repeal.

18. The Acts specified in the Second Schedule to this Act shall, to the extent mentioned in the third column of that schedule, be repealed as respects any British possession as from the commencement of this Act in that possession, and as respects any courts out of Her Majesty's dominions as from the date of any Order applying this Act:

Provided that—

(*a.*) Any appeal against a judgment made before the commencement of this Act may be brought and any such appeal and any proceedings or appeals pending at the commencement of this Act may be carried on and completed and carried into effect as if such repeal had not been enacted; and—

(*b.*) All enactments and rules at the passing of this Act in force touching the practice, procedure, fees, costs and returns in matters relating to the slave trade in Vice-Admiralty Courts and in East African Courts shall have effect as rules made in pursuance of this Act, and shall apply to Colonial Courts of Admiralty, and may be altered and revoked accordingly.

SCHEDULES.

Section 16.

FIRST SCHEDULE.

BRITISH POSSESSIONS IN WHICH OPERATION OF ACT IS DELAYED.

New South Wales, | Victoria.
St. Helena. | British Honduras.

SECOND SCHEDULE.

Section 18.

ENACTMENTS REPEALED.

Session and Chapter.	Title of Act.	Extent of Repeal.
56 Geo. 3 c. 82.....	An Act to render valid the judicial Acts of Surrogates of Vice-Admiralty Courts abroad, during vacancies in office of Judges of such courts.	The whole Act.
2 & 3 Will. 4 c. 51...	An Act to regulate the practice and the fees in the Vice-Admiralty Courts abroad, and to obviate doubts as to their jurisdiction.	The whole Act.
3 & 4 Will. 4 c. 41...	An Act for the better administration of justice in His Majesty's Privy Council.	Section two.
6 & 7 Vict. c. 38.....	An Act to make further regulations for facilitating the hearing appeals and other matters by the Judicial Committee of the Privy Council.	In section two, the words "or "from any Admiralty or "Vice-Admiralty Court," and the words "or the "Lords Commissioners of "Appeals in prize causes "or their surrogates." In section three, the words "and the High Court of "Admiralty of England," and the words "and from "any Admiralty or Vice-"Admiralty Court." In section five, from the first "the High Court of Admiralty" to the end of the section. In section seven, the words "and from Admiralty or "Vice-Admiralty Courts." Sections nine and ten, so far as relates to maritime causes. In section twelve, the words "or maritime." In section fifteen, the words "and Admiralty and Vice-"Admiralty."
7 & 8 Vict. c. 69.....	An Act for amending an Act passed in the fourth year of the reign of His late Majesty, intituled: "An Act for the "better administration of jus-"tice in His Majesty's Privy "Council," and to extend its jurisdiction and powers.	In section twelve, the words "and from Admiralty and "Vice-Admiralty Courts," and so much of the rest of the section as relates to maritime causes.

SECOND SCHEDULE—(*Continued.*)

ENACTMENTS REPEALED.

Session and Chapter.	Title of Act.	Extent of Repeal.
26 Vict. c. 24.....	The Vice-Admiralty Courts Act, 1863.	The whole Act.
30 & 31 Vict. c. 45...	The Vice-Admiralty Courts Act Amendment Act, 1867.	The whole Act.
36 & 37 Vict. c. 59...	The Slave Trade (East African Courts) Act, 1873.	Sections four and five.
36 & 37 Vict. c. 88...	The Slave Trade Act, 1873.	Section twenty as far as relates to the taxation of any costs, charges and expenses which can be taxed in pursuance of this Act. In section twenty-three, the words "under the Vice-Admiralty Courts Act, 1863."
38 & 39 Vict. c. 51...	The Pacific Islanders Protection Act, 1875.	So much of section six as authorizes Her Majesty to confer Admiralty jurisdiction on any court.

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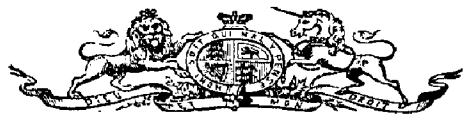

54-55 VICTORIA.

CHAPTER 29.

An Act to provide for the exercise of Admiralty Jurisdiction within Canada, in accordance with "The Colonial Courts of Admiralty Act, 1890."

[*Assented to* 31*st July*, 1891.]

Preamble.

WHEREAS by the third section of the Act of the Parliament of the United Kingdom, passed in the session held in the fifty-third and fifty-fourth years of Her Majesty's reign, chapter twenty-seven, intituled "*An Act to amend the Law respecting the exercise of Admiralty Jurisdiction in Her Majesty's Dominions and elsewhere out of the United Kingdom*," it is amongst other things provided that the Legislature of a British Possession may, by any colonial law, declare any court of unlimited civil jurisdiction, whether original or appellate, in that Possession, to be a Colonial Court of Admiralty, and provide for the exercise by such court of its jurisdiction under the said Act; and whereas the authority given is exercisable by the Parliament of Canada by virtue of the powers vested in it by "*The British North America Act*, 1867," and "*The Interpretation Act*, 1889," of the United Kingdom; and whereas the expression "unlimited civil jurisdiction," as defined by the Act first herein referred to, which may be cited as "*The Colonial Courts of Admiralty Act*, 1890," means civil jurisdiction unlimited as to the value of the subject-matter at issue, or as to the amount that may be claimed or recovered; and whereas by the second section of the said "*Colonial Courts of Admiralty Act*, 1890," it is amongst other things enacted that every court of law in a British Possession, which is, for the time being, declared in pursuance of the said Act to be a Court of Admiralty, or which, if no such declaration is in

53-54 V. (Imp) c. 27.

30-31 V. (Imp) c. 63.

52-53 V. (Imp) c. 63.

force in the Possession, has therein original unlimited civil jurisdiction, shall be a Court of Admiralty, with the jurisdiction in the said Act mentioned; and whereas the Exchequer Court of Canada is a court of law which, within Canada, has original unlimited civil jurisdiction as defined by the said Act, and it is desirable, in pursuance of the said Act, to declare the said court to be a Court of Admiralty: Therefore Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:—

Short title.

1. This Act may be cited as "*The Admiralty Act*, 1891."

Interpretation.

2. In this Act the expression "the Exchequer Court," or "the court," means the Exchequer Court of Canada.

Exchequer Court constituted a Court of Admiralty.

3. In pursuance of the powers given by "*The Colonial Courts of Admiralty Act*, 1890," aforesaid, or otherwise in any manner vested in the Parliament of Canada, it is enacted and declared that the Exchequer Court of Canada is and shall be, within Canada, a Colonial Court of Admiralty, and as a Court of Admiralty shall, within Canada, have and exercise all the jurisdiction, powers and authority conferred by the said Act and by this Act.

Jurisdiction.

4. Such jurisdiction, powers and authority shall be exercisable and exercised by the Exchequer Court throughout Canada, and the waters thereof, whether tidal or non-tidal, or naturally navigable or artificially made so, and all persons shall, as well in such parts of Canada as have heretofore been beyond the reach of the process of any Vice-Admiralty Court, as elsewhere therein, have all rights and remedies in all matters, (including cases of contract and tort and proceedings *in rem* and *in personam*), arising out of or connected with navigation, shipping, trade or commerce, which may be had or enforced in any Colonial Court of Admiralty under "*The Colonial Courts of Admiralty Act*, 1890."

Admiralty districts and registries.

5. The Governor in Council may, from time to time, constitute any part of Canada an Admiralty district for the purposes of this Act, and fix the limits thereof, and provide for the establishment of some place therein of a registry of the Exchequer Court on its Admiralty side.

2. The Governor in Council may also, from time to time, change the limits of any Admiralty district, create new districts, and assign to any district a name and place of registry.

Local judges in Admiralty.

6. The Governor in Council may, from time to time, appoint any judge of a Superior or County Court, or any barrister of not less than seven years standing, to be a local judge in Admiralty of the Exchequer Court in and for any Admiralty district; and every such local judge of Admiralty shall hold office during good behaviour, but shall be removable by the Governor General on address of the Senate and House of Commons; and such judge shall be designated a local judge in Admiralty of the Exchequer Court.

Oath of office.

7. Every such local judge in Admiralty shall, previously to his entering on the duties of his office, take, before the judge of the Exchequer Court or a judge of any Superior Court, an oath in the form following, that is to say:—

"I, do solemnly and sincerely swear that I will duly and faithfully, and to the best of my skill and knowledge, execute the powers and trusts reposed in me as local judge in Admiralty in and for the Admiralty district of (*as the case may be*). So help me God."

Officers of court.

8. The Governor in Council may, from time to time, appoint for any district a registrar, a marshal and such other officers and clerks as are necessary.

Powers of local judges.

9. Every local judge in Admiralty shall, within the Admiralty district for which he is appointed, have and exercise the jurisdiction, and the powers and authority relating thereto, of the judge of the Exchequer Court in respect of the admiralty jurisdiction of such court.

Deputy judges.

10. A local judge in Admiralty may, from time to time, with the approval of the Governor in Council, appoint a deputy judge; and such deputy judge shall have and exercise all such jurisdiction, powers and authority as are possessed by the local judge:

Tenure of office.

2. The appointment of a deputy judge shall not be determined by the occurrence of a vacancy in the office of the judge:

3. A local judge in Admiralty may, with the approval of the Governor in Council, at any time revoke the appointment of a deputy judge.

Surrogate judges.

11. The Governor in Council may, from time to time, appoint, for any district or portion of a district, a surrogate judge or judges; and such surrogate judge shall have such

jurisdiction, powers and authority, and be paid such fees, as are, from time to time, prescribed by general rules or orders :

Tenure of office.

2. A surrogate judge shall hold office during pleasure; and his appointment shall not be determined by the occurrence of a vacancy in the office of the local judge of his district.

Oaths.

12. Every deputy and surrogate judge shall, previously to entering on the duties of office, take, before the judge of the Exchequer Court, or the judge of any Superior Court, an oath similar in form to that to be taken by a local judge.

Where suits may be instituted.

13. Any suit may be instituted in any district registry when—

(*a.*) The ship or property, the subject of the suit, is at the time of the institution of the suit within the district of such registry ;

(*b.*) The owner or owners of the ship or property, or the owner or owners of the larger number of shares in the ship, or the managing owner or the ship's husband reside at the time of the institution of the suit within the district of such registry ;

(*c*) The port of registry of the ship is within the district of such registry ; or—

(*d.*) The parties so agree by a memorandum signed by them or by their attorneys or agents :

Proviso.

Provided always, that when a suit has been instituted in any registry, no further suit shall be instituted in respect of the same matter in any other registry of the court, without leave of the judge of the court, and subject to such terms, as to costs and otherwise, as he directs.

Appeal.

14. An appeal may be made to the Exchequer Court from any final judgment, decree or order of any local judge in Admiralty, and, with the permission of such local judge or of the judge of the Exchequer Court, from any interlocutory decree or order therein, on security for costs being first given, and subject to such other provisions as are prescribed by general rules or orders :

2. An appeal may, however, be made direct to the Supreme Court of Canada from any final judgment, decree or order of a local judge, subject to the provisions of "*The Exchequer Court Act*" regarding appeals.

15. Any party to a suit or to an appeal may, at any stage of such suit or appeal, by leave of the court, and subject to such terms as to costs or otherwise as the court directs, remove any suit instituted or appeal pending in any registry to any other registry. Removal of suit.

16. A scale of costs and charges in Admiralty causes in the district registries of the court, and fees to be taken in such registries, shall be prescribed by general rules or orders. Fees, &c.

17. Until otherwise provided by the Governor in Council, the following Provinces shall each constitute an Admiralty district, for the purposes of this Act, and a registry of the Exchequer Court on its Admiralty side shall be established and maintained within such districts at the places following, that is to say:— Provisional districts and registries.

(*a.*) The Province of Quebec shall constitute the district of Quebec, with a registry at the city of Quebec;

(*b.*) The Province of Nova Scotia shall constitute the district of Nova Scotia, with a registry at the city of Halifax;

(*c.*) The Province of New Brunswick shall constitute the district of New Brunswick, with a registry at the city of St. John;

(*d.*) The Province of Prince Edward Island shall constitute the district of Prince Edward Island, with a registry at the city of Charlottetown; and—

(*e.*) The Province of British Columbia shall constitute the district of British Columbia, with a registry at the city of Victoria.

18. Until otherwise provided by the Governor in Council, there shall be a registry of the Exchequer Court on its Admiralty side at the city of Toronto, and the Governor in Council may, from time to time, fix the limits of such registry, which shall be known as "The Toronto Admiralty District." Toronto district.

19. Every person who, at the coming into force of "*The Colonial Courts of Admiralty Act*, 1890," holds in Canada the office of judge of a Vice-Admiralty Court, shall, until his death, resignation or removal from such office or from the office by virtue of which he is such judge of a Vice-Admiralty Court, or until an arrangement is made with him under the seventeenth section of the Act last mentioned, have and exercise, within the Admiralty district correspond- As to judges of Vice-Admiralty courts.

ing to the limits of his former jurisdiction as such judge of a Court of Vice-Admiralty, all the jurisdiction, powers and authority of a local judge in Admiralty.

As to judge of Maritime Court of Ontario.

20. The judge of the Maritime Court of Ontario shall, in like manner and for a like time, have and exercise within the Toronto Admiralty district all the jurisdiction, powers and authority of a local judge in Admiralty.

As to Officers of Vice-Admiralty courts.

21. Every person who, at the coming into force of "*The Colonial Courts of Admiralty Act*, 1890," is a registrar, marshal or other officer of a Vice-Admiralty Court in Canada, shall, during the pleasure of the Governor in Council, and within the Admiralty district corresponding to the limits of the jurisdiction of such Vice-Admiralty Court, have and exercise the like office in the Exchequer Court in respect of its Admiralty jurisdiction, and shall, subject to any general rule or order, have the like powers and authority, and perform the like duties, as he might have had or performed, as such registrar, marshal or other officer of a Vice-Admiralty Court.

As to registrar and marshal of Maritime Court of Ontario.

22. The registrar and marshal of the Maritime Court of Ontario shall, during the pleasure of the Governor in Council, be the registrar and marshal, respectively, of the Toronto Admiralty district.

Maritime Court of Ontario abolished.

23. On the coming into force of this Act, the Maritime Court of Ontario shall be abolished, but subject to the following provisions :—

(1.) All judgments of such court shall be executed and may be appealed from in like manner as if this Act had not been passed, and all appeals from such court pending at the commencement of this Act shall be heard and determined and the judgment thereon executed as nearly as may be in like manner as if this Act had not been passed :

(2.) All proceedings pending in such court at the commencement of this Act shall be continued in the district registry corresponding to that in which they were instituted or are now pending :

(3.) The procedure and practice (including fees and costs) now in force in such court shall, until otherwise provided by general rule or order, be followed, as nearly as may be, in any proceeding now pending in such court or hereafter instituted in the registry of any Admiralty district in the Province of Ontario :

(4.) The provisions of the fifth and sixth sub-sections of the fourteenth section of "*The Maritime Court Act*" shall apply to any proceeding instituted in the registry of any Admiralty district in the Province of Ontario.

Construction.

24. Nothing in sections five to twenty-two of this Act, both inclusive, shall limit, lessen or impair the jurisdiction of the judge of the Exchequer Court in respect of the Admiralty jurisdiction of the court, or otherwise.

Rules of court.

25. Any rules or orders of court made by the Exchequer Court of Canada for regulating the procedure and practice therein, (including fees and costs), in the exercise of the jurisdiction conferred by "*The Colonial Courts of Admiralty Act*, 1890," and this Act, which requires the approval of Her Majesty in Council, shall be submitted to the Governor in Council for his approval, and, if approved by him, shall be transmitted to Her Majesty in Council for Her approval.

Commencement of Act.

26. This Act shall not come into force until Her Majesty's pleasure thereon has been signified by proclamation in the *Canada Gazette*.

OTTAWA: Printed by S. E. DAWSON, Law Printer to the Queen's Most Excellent Majesty.

CERTIFIED Copy of a Report of a Committee of the Honourable the Privy Council, approved by His Excellency the Governor-General in Council, on the 10th December, 1892.

On a report dated 6th December, 1892, from the Minister of Justice submitting for Your Excellency's consideration certain general rules and orders, made by the judge of the Exchequer Court of Canada on the 5th December instant, for regulating the practice and procedure in that court in Admiralty cases. These rules and orders, under the provisions of section 25 of *The Admiralty Act*, 1891, require the approval of Your Excellency in Council, and under the provisions of section 7 of *The Colonial Courts of Admiralty Act*, 1890, they will not come into operation until they have been approved also by Her Majesty in Council.

The Minister is of opinion that they are such as should receive approval of Your Excellency in Council, and he recommends accordingly.

The Minister further recommends that a copy of them be transmitted to the Right Honourable Her Majesty's Principal Secretary of State for the Colonies with a request that he will cause them to be submitted to Her Majesty in Council for approval.

The Minister further suggests that in the Despatch transmitting these rules and orders, attention be called, with a view to such action thereunder as to Her Majesty in Council may seem proper, to the provisions of subsection 2 of section 7 of *The Colonial Courts of Admiralty Act* under which Her Majesty in Council may, in approving rules made under the section, declare that rules with respect to any matters which appear to Her Majesty to be matters of detail or of local concern may be revoked, varied or added to, without the approval required by the section.

The Committee advise that Your Excellency be moved to take action in the sense of the recommendation of the Minister of Justice.

All of which is respectfully submitted for Your Excellency's approval.

JOHN J. McGEE.

Clerk of the Privy Council.

To the Honourable
The Minister of Justice.

DOWNING STREET, 6th April, 1893.

MY LORD,—I have the honour to transmit to you, with reference to your despatch, No. 331, of the 14th of December, an Order of Her Majesty in Council approving the rules of Court regulating the practice and procedure in Admiralty cases in the Exchequer Court of Canada.

I have, &c.,

(Sd.) R. H. MEADE,
For the S. of S.

The Officer Administering
The Government of Canada.

Date.	Description of Document.
15th March.....	Order of Her Majesty in Council. (4 spare copies).

AT THE COURT AT WINDSOR,

The 15th day of March, 1893

PRESENT:

THE QUEEN'S MOST EXCELLENT MAJESTY.

LORD PRESIDENT,
LORD CHAMBERLAIN,
MR. BRYCE.

WHEREAS *there was this day read at the Board a Memorial from the Right Honourable the Lords Commissioners of the Admiralty, dated the 24th day of February*, 1893, *in the words following, viz.:—*

"WHEREAS by an Act passed in the fifty-fourth year of Your Majesty's reign, entitled, '*The Colonial Courts of Admiralty Act*, 1890,' it was, amongst other things, provided that Rules of Court for regulating the procedure and practice

(including fees and costs) in a court in a British possession in the exercise of the jurisdiction conferred by this Act, whether original or appellate, may be made by the same Authority and in the same manner as rules touching the practice, procedure, fees, and costs in the said court in the exercise of its ordinary civil jurisdiction respectively, are made, but that such rules of court shall not come into operation until they have been approved by Your Majesty in Council, but on coming into operation shall have full effect as if enacted in the said Act.

"And whereas it appears to Us and to Your Majesty's Secretary of State for the Colonies to be expedient that the Rules of Court hereto annexed, having been duly prepared by the proper Authority as required by the said Act, should be established and be in force in the Exchequer Court of Canada in its Admiralty jurisdiction.

"And whereas the provisions of subsection 2 of section 7 of the aforesaid Act empower Your Majesty in Council in approving rules made under this section to declare that the rules so made with respect to any matters which appear to Your Majesty to be matters of detail or of local concern may be revoked, varied, or added to, without the approval required by this section.

"And whereas it appears to Us that rules 158 to 176 relating to appeals from the judgment or order of a local Judge in Admiralty to the Exchequer Court; Rule 224, as to cases in which half fees only should be allowed; and the Tables of Fees appended to the Rules should be considered to come within the scope of the subsection in question, and be declared to be subject to revocation, variation, or addition, without the approval of Your Majesty in Council.

"Now, therefore, We beg leave humbly to recommend that Your Majesty will be graciously pleased by Your Order in Council to direct that the Rules of Court hereto annexed shall be the Rules of Court for the said Exchequer Court of Canada in its Admiralty jurisdiction, and shall be established and be in force in the said court, and to declare that Rules 158 to 176 (both inclusive), Rule 224, and the Tables of Fees appended to the Rules, may be revoked, varied or added to without the approval of Your Majesty in Council."

Her Majesty, having taken the said Memorial into consideration, was pleased, by and with the advice of Her Privy Council to approve of what is therein proposed, and to direct that the Rules of Court hereto annexed shall be

the Rules of Court for the said Exchequer Court of Canada in its Admiralty jurisdiction and shall be established and be in force in the said court, and to declare that Rules 158 to 176 (both inclusive), Rule 224, and the Tables of fees appended to the Rules, may be revoked, varied, or added to without the approval of Her Majesty in Council. And the Right Honourable the Lords Commissioners of the Admiralty are to give the necessary direction herein accordingly.

C. L. PEEL.

GENERAL RULES AND ORDERS

REGULATING THE

PRACTICE AND PROCEDURE IN

ADMIRALTY CASES IN THE EXCHEQUER COURT OF CANADA.

In pursuance of the provisions of "*The Colonial Courts of Admiralty Act*, 1890" and of "*The Admiralty Act*, 1891," (Canada), it is ordered that the following rules of court for regulating the practice and procedure (including fees and costs) of the Exchequer Court of Canada in the exercise of its jurisdiction, powers and authority as a Court of Admiralty shall be in force in the said Court.

1. In the construction of these rules, and of the forms and tables of fees annexed thereto, the following terms shall (if not inconsistent with the context or subject-matter) have the respective meanings hereinafter assigned to them ; that is to say :—

(*a.*) Words importing the singular number include the plural number, and words importing the plural number include the singular number ;

(*b.*) Words importing the masculine gender include females ;

(*c.*) "District shall mean an Admiralty district constituted by or by virtue of *The Admiralty Act*, 1891 ; and in respect of proceedings in the registry of the court at Ottawa shall include the whole of Canada ;

(*d.*) "Court" or "Exchequer Court" shall mean the Exchequer Court of Canada ;

(*e.*) "Registry" shall mean the registry of the court, or any district registry thereof;

(*f.*) "Judge" shall mean the judge of the court, or a local judge in admiralty of the court, or any person lawfully authorized to act as judge thereof;

(*g.*) "Registrar" shall mean the registrar of the court, or any deputy, assistant or district registrar thereof ;

(*h.*) "Marshal" shall mean the marshal of the court, or any deputy, assistant or district marshal thereof, or any sheriff or coroner authorized to perform the duties and functions of a sheriff in connection with the court;

(*i.*) "Action" shall mean any action, cause, suit, or other proceeding instituted in the court;

(*j.*) "Counsel" shall mean any advocate, barrister-at-law, or other person entitled to practise in the court;

(*k.*) "Solicitor" shall mean any proctor, solicitor or attorney entitled to practise in the court;

(*l.*) "Plaintiff" shall include the plaintiff's solicitor, if he sues by a solicitor;

(*m.*) "Defendant" shall include the defendant's solicitor, if he appears by a solicitor;

(*n.*) "Party" shall include the party's solicitor, if he sues or appears by a solicitor;

(*o.*) "Person" or "party" shall include a body corporate or politic;

(*p.*) "Ship" shall include every description of vessel used in navigation not propelled by oars only;

(*q.*) "Month" shall mean calendar month.

ACTIONS.

2. Actions shall be of two kinds, actions *in rem* and actions *in personam*.

3. Actions for condemnation of any ship, boat, cargo, proceeds, slaves, or effects, or for recovery of any pecuniary forfeiture or penalty, shall be instituted in the name of the Crown.

4. All actions shall be entitled in the court, and shall be numbered in the order in which they are instituted, and the number given to any action shall be the distinguishing number of the action, and shall be written or printed on all documents in the action as part of the title thereof. Forms of the title of the court and of the title of an action will be found in the Appendix hereto, Nos. 1, 2, 3 and 4.

WRIT OF SUMMONS.

5. Every action shall be commenced by a writ of summons which, before being issued, shall be indorsed with a

statement of the nature of the claim, and of the relief or remedy required, and of the amount claimed, if any. Forms of writ of summons and of the indorsements thereon will be found in the Appendix hereto, Nos. 5, 6, 7, 9 and 10.

6. In an action for seaman's or master's wages, or for master's wages and disbursements, or for necessaries, or for bottomry, or in any mortgage action, or in any action in which the Plaintiff desires an account, the indorsement on the writ of summons may include a claim to have an account taken.

7. The writ of summons shall be indorsed with the name and address of the Plaintiff, and with an address to be called an address for service, not more than three miles from the registry, at which it shall be sufficient to leave all documents required to be served upon him.

8. The writ of summons shall be prepared and indorsed by the Plaintiff, and shall be issued under the seal of the court, and a copy of the writ and of all the indorsements thereon, signed by the Plaintiff, shall be left in the registry at the time of sealing the writ.

9. The judge may allow the Plaintiff to amend the writ of summons and the indorsements thereon in such manner and on such terms as to the judge shall seem fit.

Service of Writ of Summons.

10. In an action *in rem*, the writ of summons shall be served—

(*a.*) upon ship, or upon cargo, freight, or other property, if the cargo or other property is on board a ship, by attaching the writ for a short time to the main-mast or the single mast, or to some other conspicuous part of the ship, and by leaving a copy of the writ attached thereto;

(*b.*) upon cargo, freight, or other property, if the cargo or other property is not on board a ship, by attaching the writ for a short time to such cargo or property, and by leaving a copy of the writ attached thereto;

(*c.*) upon freight in the hands of any person, by showing the writ to him and by leaving with him a copy thereof;

(*d.*) upon proceeds in court, by showing the writ to the registrar and by leaving with him a copy thereof.

11. If access cannot be obtained to the property on which it is to be served, the writ may be served by showing it to any person appearing to be in charge of such property, and by leaving with him a copy of the writ.

12. In an action *in personam*, the writ of summons shall be served by showing it to the Defendant, and by leaving with him a copy of the writ.

13. A writ of summons against a firm may be served upon any member of the firm, or upon any person appearing at the time of service to have the management of the business of the firm.

14. A writ of summons against a corporation may be served upon the mayor, or other head officer, or upon the town clerk, clerk, treasurer or secretary of the corporation and a writ of summons against a public company may be served upon the secretary of the company, or may be left at the office of the company.

15. A writ of summons against a corporation or a public company may be served in any other mode provided by law for service of any other writ or legal process upon such corporation or company.

16. If the person to be served is under disability, or if for any cause personal service cannot, or cannot promptly, be effected, or if in any action, whether *in rem* or *in personam*, there is any doubt or difficulty as to the person to be served, or as to the mode of service, the judge may order upon whom, or in what manner service is to be made, or may order notice to be given in lieu of service.

17. The writ of summons, whether *in rem* or *in personam*, may be served by the Plaintiff or his agent within *twelve months* from the date thereof, and shall, after service, be filed with an affidavit of such service.

18. The affidavit shall state the date and mode of service and shall be signed by the person who served the writ. A form of affidavit of service will be found in the Appendix hereto, No. 11.

19. No service of a writ or warrant shall be required when the Defendant by his solicitor undertakes in writing to accept service thereof and enter an appearance thereto, or to put in bail, or to pay money into court in lieu of bail; and any solicitor not entering an appearance or putting in bail or paying money into court in lieu of bail in pursuance of his written undertaking so to do, shall be liable to attachment.

SERVICE OUT OF JURISDICTION.

20. Service out of the jurisdiction of a writ of summons, or notice of a writ of summons, may be allowed by the judge whenever:—

(*a.*) Any relief is sought against any person domiciled or ordinarily resident within the territorial jurisdiction of the court;

(*b.*) The action is founded on any breach or alleged breach within the territorial jurisdiction of the court of any contract wherever made, which according to the terms thereof ought to be performed within such jurisdiction;

(*c.*) Any injunction is sought as to anything to be done within the territorial jurisdiction of the court;

(*d.*) Any person out of the jurisdiction is a necessary or proper party to an action properly brought against some other person duly served within such territorial jurisdiction.

21. Every application for leave to serve a writ of summons, or notice of a writ of summons, on a Defendant out of the jurisdiction shall be supported by affidavit, or other evidence, stating that in the belief of the deponent the Plaintiff has a good cause of action, and showing in what place or country such Defendant is or probably may be found, and whether such Defendant is a British subject or not, and the grounds upon which the application is made; and no such leave shall be granted unless it shall be made sufficiently to appear to the judge that the case is a proper one for service out of the jurisdiction.

22. Any order giving leave to effect such service, or give such notice, shall limit a time after such service or notice within which such Defendant is to enter an appearance, such time to depend on the place or country, where or within which, the writ is to be served or the notice given.

23. When the Defendant is neither a British subject nor in British dominions, notice of the writ, and not the writ itself, is to be served upon him. A form of notice will be found in the Appendix hereto No. 8.

24. Notice in lieu of service shall be given in the manner in which writs of summons are served.

APPEARANCE.

25. A party appearing to a writ of summons shall file an appearance at the place directed in the writ.

26. A party not appearing within the time limited by the writ may, by consent of the other parties or by permission of the judge, appear at any time on such terms as the judge shall order.

27. If the party appearing has a set-off or counter-claim against the Plaintiff, he may indorse on his appearance a statement of the nature thereof, and of the relief or remedy required, and of the amount, if any, of the set-off or counter-claim. But if in the opinion of the judge such set-off or counter-claim cannot be conveniently disposed of in the action, the judge may order it to be struck out.

28. The appearance shall be signed by the party appearing, and shall state his name and address, and an address, to be called an address for service, not more than three miles from the registry, at which it shall be sufficient to leave all documents required to be served upon him. Forms of Appearance and of Indorsement of set-off or counter-claim will be found in the Appendix hereto, Nos. 12 and 13.

PARTIES.

29. Any number of persons having interests of the same nature arising out of the same matter may be joined in the same action whether as Plaintiffs or as Defendants.

30. The judge may order any person who is interested in the action, though not named in the writ of summons, to come in either as Plaintiff or as Defendant.

31. For the purposes of the last preceding rule an underwriter or insurer shall be deemed to be a person interested in the action.

32. The judge may order upon what terms any person shall come in, and what notices and documents, if any, shall be given to and served upon him, and may give such further directions in the matter as to him shall seem fit.

CONSOLIDATION OF ACTIONS.

33. Two or more actions in which the questions at issue are substantially the same, or for matters which might properly be combined in one action, may be consoli-

dated by order of the judge upon such terms as to him shall seem fit.

34. The judge, if he thinks fit, may order several actions to be tried at the same time, and on the same evidence, or the evidence in one action to be used as evidence in another, or may order one of several actions to be tried as a test action, and the other actions to be stayed to abide the result.

WARRANTS.

35. In an action *in rem* a warrant for the arrest of property may be issued by the registrar at the time of, or at any time after, the issue of the writ of summons, on an affidavit being filed, as prescribed by the following rules. A form of affidavit to lead warrant will be found in the Appendix hereto, No. 14.

36. The affidavit shall state the nature of the claim, and that the aid of the court is required.

37. The affidavit shall also state—

(*a.*) In an action for wages, or possession, the national character of the ship, and if the ship is foreign, that notice of the action has been served upon a consular officer of the State to which the ship belongs, if there is one resident in the district within which the ship is at the time of the institution of the suit; and a copy of the notice shall be annexed to the affidavit;

(*b.*) In an action for necessaries, the national character of the ship, and that, to the best of the deponent's belief, no owner or part owner of the ship was domiciled within Canada at the time when the necessaries were supplied;

(*c.*) In an action for building, equipping, or repairing any ship, the national character of the ship and that at the time of the institution of the action, the ship, or the proceeds thereof, are under the arrest of the court;

(*d.*) In an action between co-owners relating to the ownership, possession, employment, or earnings of any ship registered in such district, the port at which the ship is registered and the number of shares in the ship owned by the party proceeding.

38. In an action for bottomry, the bottomry bond in original, and, if it is in a foreign language, a translation thereof, shall be produced for the inspection and perusal of the registrar, and a copy of the bond, or of the translation thereof, certified to be correct, shall be annexed to the affidavit.

39. The registrar, if he thinks fit, may issue a warrant, although the affidavit does not contain all the prescribed particulars, and, in an action for bottomry, although the bond has not been produced; or he may refuse to issue a warrant without the order of the judge.

40. The warrant shall be prepared in the registry, and shall be signed by the registrar, and issued under the seal of the court. A form of warrant will be found in the Appendix hereto, No. 15.

41. The warrant shall be served by the marshal, or his officer, in the manner prescribed by these rules for the service of a writ of summons in an action *in rem*, and thereupon the property shall be deemed to be arrested.

42. The warrant may be served on Sunday, Good Friday, or Christmas Day, or any public holiday, as well as on any other day.

43. The warrant shall be filed by the marshal within *one week* after service thereof has been completed, with a certificate of service indorsed thereon.

44. The certificate shall state by whom the warrant has been served, and the date and mode of service, and shall be signed by the marshal. A form of certificate of service will be found in the Appendix hereto, No. 16.

BAIL.

45. Whenever bail is required by these rules, it shall be given by filing one or more bailbonds, each of which shall be signed by two sureties, unless the judge shall, on special cause shown, order that one surety shall suffice.

46. Every bailbond shall be signed before the registrar, or by his direction before a clerk in the registry, or before a commissioner having authority to take acknowledgments or recognizances of bail in the court, or before a commissioner appointed by the court, to take bail. Forms of bailbond and commission to take bail will be found in the Appendix hereto, Nos. 17 and 18.

47. The sureties shall justify by affidavit and may attend to sign a bond either separately or together. A form of affidavit of justification will be found in the Appendix hereto, No. 19.

48. The commission to take bail and the affidavits of justification shall, with the bailbond, when executed, be returned to the registry by the commissioner.

49. No commissioner shall be entitled to take bail in any action in which he, or any person in partnership with him, is acting as solicitor or agent.

50. Before filing a bailbond, notice of bail shall be served upon the adverse party, and a certificate of such service shall be indorsed on the bond by the party filing it. A form of Notice of Bail will be found in the Appendix hereto, No. 20.

51. If the adverse party is not satisfied with the sufficiency of any surety, he may file a notice of objection to such surety. A form of Notice of Objection to Bail, will be found in the Appendix hereto, No. 21.

52. Upon such objection being filed with the registrar an appointment may be obtained for its consideration before him. Twenty-four hours' notice of such appointment shall be given to the Plaintiff unless the judge for special reasons allows a shorter notice to be given; and, on the return of the appointment, the registrar may hear the parties and any evidence they may adduce regarding the sufficiency of the sureties; and he may direct such sureties to submit themselves to cross-examination on their affidavits of justification; and he may allow or disallow the bond. He may adjourn the appointment from time to time if he thinks necessary, and shall himself make such inquiries respecting the sureties as he thinks fit.

Releases.

53. A release for property arrested by warrant may be issued by order of the judge.

54. A release may also be issued by the registrar, unless there is a caveat outstanding against the release of the property,—

(*a.*) On payment into court of the amount claimed, or of the appraised value of the property arrested, or, where cargo is arrested for freight only, of the amount of the freight verified by affidavit;

(*b.*) On one or more bailbonds being filed for the amount claimed, or for the appraised value of the property arrested, and on the allowance of the same if objected to; or if not objected to on proof that *twenty-four hours'* notice of the names and addresses of the sureties has been previously served on the party at whose instance the property has been arrested;

(*c.*) On the application of the party at whose instance the property has been arrested;

(*d.*) On a consent in writing being filed signed by the party at whose instance the property has been arrested;

(*e.*) On discontinuance or dismissal of the action in which the property has been arrested.

55. Where property has been arrested for salvage, the release shall not be issued under the foregoing rule, except on discontinuance or dismissal of the action, until the value of the property arrested has been agreed upon between the parties or determined by the judge.

56. The registrar may refuse to issue a release without the order of the judge.

57. The release shall be prepared in the registry, and shall be signed by the registrar, and issued under the seal of the court. A form of release will be found in the Appendix hereto, No. 22.

58. The release shall be served on the marshal, either personally, or by leaving it at his office, by the party by whom it is taken out.

59. On service of the release and on payment to the marshal of all fees due to, and charges incurred by, him in respect of the arrest and custody of the property, the property shall be at once released from arrest.

Preliminary Acts.

60. In an action for damage by collision, each party shall, within *one week* from an appearance being entered, file a Preliminary Act, sealed up, signed by the party, and containing a statement of the following particulars:—

(1.) The names of the ships which came into collision, and the names of their masters;

(2.) The time of the collision;

(3.) The place of the collision;

(4.) The direction and force of the wind;
(5.) The state of the weather;
(6.) The state and force of the tide, or, if the collision occurred in non-tidal waters, of the current;
(7.) The course and speed of the ship when the other was first seen;
(8.) The lights, if any, carried by her;
(9.) The distance and bearing of the other ship when first seen;
(10.) The lights, if any, of the other ship which were first seen;
(11.) The lights, if any, of the other ship, other than those first seen, which came into view before the collision;
(12.) The measures which were taken, and when, to avoid the collision;
(13.) The parts of each ship which first came into collision;
(14.) What fault or default, if any, is attributed to the other ship.

Pleadings.

61. Every action shall be heard without pleadings, unless the judge shall otherwise order.

62. If an order is made for pleadings, the Plaintiff shall, within *one week* from the date of the order, file his statement of claim, and, within *one week* from the filing of the statement of claim, the Defendant shall file his statement of defence, and within *one week* from the filing of the statement of defence the Plaintiff shall file his reply, if any; and there shall be no pleading beyond the reply, except by permission of the judge.

63. The Defendant may, in his statement of defence, plead any set-off or counter-claim. But if, in the opinion of the judge, such set-off or counter-claim cannot be conveniently disposed of in the action, the judge may order it to be struck out.

64. Every pleading shall be divided into short paragraphs, numbered consecutively, which shall state concisely the facts on which the party relies; and shall be signed by the party filing it. Forms of pleadings will be found in the Appendix hereto, No. 23.

65. It shall not be necessary to set out in any pleading the words of any document referred to therein, except so far as the precise words of the document are material.

66. Either party may apply to the judge to decide forthwith any question of fact or of law raised by any pleading, and the judge shall thereupon make such order as to him shall seem fit.

67. Any pleading may at any time be amended, either by consent of the parties, or by order of the judge.

Interrogatories.

68. At any time before the action is set down for hearing any party, desirous of obtaining the answers of the adverse party on any matters material to the issue, may apply to the judge for leave to administer interrogatories to the adverse party to be answered on oath, and the judge may direct within what time and in what way they shall be answered, whether by affidavit or by oral examination.

69. The judge may order any interrogatory that he considers objectionable to be amended or struck out; and if the party interrogated omits to answer or answers insufficiently, the judge may order him to answer, or to answer further, and either by affidavit or by oral examination. Forms of interrogatories and of answers will be found in the Appendix hereto, Nos. 24 and 25.

Discovery and Inspection.

70. The judge may order any party to an action to make discovery, on oath, of all documents which are in his possession or power relating to any matter in question therein.

71. The affidavit of discovery shall specify which, if any, of the documents therein mentioned the party objects to produce. A form of affidavit of discovery will be found in the Appendix hereto, No. 26.

72. Any party to an action may file a notice to any other party to produce, for inspection or transcription, any document in his possession or power relating to any matter in question in the action. A form of notice to produce will be found in the Appendix hereto, No. 27.

73. If the party served with notice to produce omits or refuses to do so within the time specified in the notice, the adverse party may apply to the judge for an order to produce.

Admission of Documents and Facts.

74. Any party may file a notice to any other party to admit any document or fact (saving all just exceptions), and a party not admitting it after such notice shall be liable for the costs of proving the document or fact, whatever the result of the action may be, unless the taxing officer is of opinion that there was sufficient reason for not admitting it. Forms of notice to admit will be found in the Appendix hereto, Nos. 28 and 29.

75. No costs of proving any document shall be allowed, unless notice to admit shall have been previously given, or the taxing officer shall be of opinion that the omission to give such notice was reasonable and proper.

Special Case.

76. Parties may agree to state the questions at issue for the opinion of the judge in the form of a special case.

77. If it appears to the judge that there is in any action a question of law which it would be convenient to have decided in the first instance, he may direct that it shall be raised in a special case or in such other manner as he may deem expedient.

78. Every special case shall be divided into paragraphs, numbered consecutively, and shall state concisely such facts and documents as may be necessary to enable the judge to decide the question at issue.

79. Every special case shall be signed by parties, and may be filed by any party.

Motions.

80. A party desiring to obtain an order from the judge shall file a notice of motion with the affidavits, if any, on which he intends to rely.

81. The notice of motion shall state the nature of the order desired, the day on which the motion is to be made, and whether in court or in chambers. A form of notice of motion will be found in the Appendix hereto, No. 30.

82. Except by consent of the adverse party, or by order of the judge, the notice of motion shall be filed *twenty-four hours* at least before the time at which the motion is made.

83. When the motion comes on for hearing, the judge, after hearing the parties, or, in the absence of any of them, on proof that the notice of motion has been duly served, may make such order as to him shall seem fit.

84. The judge may, on due cause shown, vary or rescind any order previously made.

TENDERS.

85. A party desiring to make a tender in satisfaction of the whole or any part of the adverse party's claim, shall pay into court the amount tendered by him, and shall file a notice of the terms on which the tender is made. But the payment of money into court shall not be deemed an admission of the cause of action in respect of which it is paid.

86. Within *a week* from the filing of the notice the adverse party shall file a notice, stating whether he accepts or rejects the tender, and if he shall not do so, he shall be held to have rejected it. Forms of notice of tender and of notice accepting or rejecting it will be found in the Appendix hereto, Nos. 31 and 32.

87. Pending the acceptance or rejection of a tender, the proceedings shall be suspended.

EVIDENCE.

88. Evidence shall be given either by affidavit or by oral examination, or partly in one mode, and partly in another.

89. Evidence on a motion shall in general be given by affidavit, and at the hearing by the oral examination of witnesses; but the mode or modes in which evidence shall be given, either on any motion or at the hearing, may be determined either by consent of the parties, or by order of the judge.

90. The judge may order any person who has made an affidavit in an action to attend for cross-examination thereon before the judge, or the registrar, or a commissioner specially appointed.

91. Witnesses examined orally before the judge, the registrar, or a commissioner, shall be examined, cross-examined, and re-examined in such order as the judge, registrar or commissioner may direct; and questions may be put to any witness by the judge, registrar, or commissioner as the case may be.

92. If any witness is examined by interpretation, such interpretation shall be made by a sworn interpreter of the court, or by a person previously sworn according to the form in the Appendix hereto, No. 33.

Oaths.

93. The judge may appoint any person to administer oaths in Admiralty proceedings generally, or in any particular proceedings. Forms of Appointments to administer oaths will be found in the Appendix hereto, No. 34.

94. If any person tendered for the purpose of giving evidence objects to take an oath, or is objected to as incompetent to take an oath, or is by reason of any defect of religious knowledge or belief incapable of comprehending the nature of an oath, the judge or person authorized to administer the oath shall, if satisfied that the taking of an oath would have no binding effect on his conscience, permit him, in lieu of an oath, to make a declaration. Forms of oath, and of declaration in lieu of oath will be found in the Appendix hereto, Nos. 35 and 36.

Affidavits.

95. Every affidavit shall be divided into short paragraphs numbered consecutively, and shall be in the first person.

96. The name, address, and description of every person making an affidavit shall be inserted therein.

97. The names of all the persons making an affidavit, and the dates when, and the places where it is sworn, shall be inserted in the jurat.

98. When an affidavit is made by any person who is blind, or who from his signature or otherwise appears to be illiterate, the person before whom the affidavit is sworn shall certify that the affidavit was read over to the deponent, and that the deponent appeared to understand the same, and made his mark or wrote his signature thereto in the presence of the person before whom the affidavit was sworn.

99. When an affidavit is made in English by a person who does not speak the English language, or in French by a person who does not speak the French language, the affidavit shall be taken down and read over to the deponent

by interpretation either of a sworn interpreter of the court, or of a person previously sworn faithfully to interpret the affidavit. A form of jurat will be found in the Appendix hereto, No. 37.

100. Affidavits may, by permission of the judge, be used as evidence in an action, saving all just exceptions,—

(1.) If sworn to, in the United Kingdom of Great Britain and Ireland, or in any British Possession, before any person authorized to administer oaths in the said United Kingdom or in such Possession respectively;

(2.) If sworn to in any place not being a part of Her Majesty's dominions, before a British minister, consul, vice-consul, or notary public, or before a judge or magistrate, the signature of such judge or magistrate being authenticated by the official seal of the court to which he is attached.

101. The reception of any affidavit as evidence may be objected to, if the affidavit has been sworn before the solicitor for the party on whose behalf it is offered, or before a partner or clerk of such solicitor.

Examination of Witnesses before Trial.

102. The judge may order that any witness, who cannot conveniently attend at the trial of the action, shall be examined previously thereto, before either the judge, or the registrar, who shall have power to adjourn the examination from time to time, and from place to place, if he shall think necessary. A form of order for examination of witnesses will be found in the Appendix hereto, No. 38.

103. If the witness cannot be conveniently examined before the judge or the registrar, or is beyond the limits of the district, the judge may order that he shall be examined before a commissioner specially appointed for the purpose.

104. The commissioner shall have power to swear any witnesses produced before him for examination, and to adjourn, if necessary, the examination from time to time, and from place to place. A form of commission to examine witnesses will be found in the Appendix hereto, No. 39.

105. The parties, their counsel and solicitors, may attend the examination, but, if counsel attend, the fees of only one counsel on each side shall be allowed on taxation, except by order of the judge.

106. The evidence of every witness shall be taken down in writing, and shall be certified as correct or approved of by the judge, or registrar, or by the commissioner, as the case may be.

107. The certified evidence shall be lodged in the registry, or, if taken by commission, shall forthwith be transmitted by the commissioner to the registry, together with his commission. A form of return to commission to examine witnesses will be found in the Appendix hereto, No. 40.

108. As soon as the certified evidence has been received in the registry, it may be taken up and filed by either party, and may be used as evidence in the action, saving all just exceptions.

Shorthand Writers.

109. The judge may order the evidence of the witnesses whether examined before the judge, or the registrar, or a commissioner, to be taken down by a shorthand writer, who shall have been previously sworn faithfully to report the evidence, and a transcript of the shorthand writer's notes, certified by him to be correct and approved by the judge, registrar, or commissioner, as the case may be, shall be lodged in or transmitted to the registry as the certified evidence of such witnesses. The shorthand writer shall, in addition to such transcript thereof, supply to the registrar three copies of such transcript, one of which shall be handed to the judge and the others given to the Plaintiff and Defendant respectively. A form of oath to be administered to the shorthand writer will be found in the Appendix hereto, No. 41.

Printing.

110. The judge may order that the whole of the pleadings and written proofs, or any part thereof, shall be printed before the trial; and the printing shall be in such manner and form as the judge shall order.

111. Preliminary Acts, if printed, shall be printed in parallel columns.

Assessors.

112. The judge, on the application of any party, or without any such application if he considers that the nature of the case requires it, may appoint one or more assessors to

advise the court upon any matters requiring nautical or other professional knowledge.

113. The fees of the assessors shall be paid in the first instance by the Plaintiff, unless the judge shall otherwise order.

SETTING DOWN FOR TRIAL.

114. An action shall be set down for trial by filing a notice of trial. A form of notice of trial will be found in the Appendix hereto, No. 42.

115. If there has not been any appearance, the Plaintiff may set down the action for trial, on obtaining from the judge leave to proceed *ex parte*,—

(*a.*) In an action *in personam*, or an action against proceeds in court, after the expiration of *two weeks* from the service of the writ of summons ;

(*b.*) In an action *in rem* (not being an action against proceeds in court), after the expiration of *two weeks* from the filing of the warrant.

116. If there has been an appearance, either party may set down the action for trial,—

(*a.*) After the expiration of *one week* from the entry of the appearance, unless an order has been made for pleadings, or an application for such an order is pending ;

(*b.*) If pleadings have been ordered, when the last pleading has been filed, or when the time allowed to the adverse party for filing any pleading has expired without such pleading having been filed.

In collision cases the Preliminary Acts may be opened as soon as the action has been set down for trial.

117. Where the writ of summons has been indorsed with a claim to have an account taken, or the liability has been admitted or determined, and the question is simply as to the amount due, the judge may, on the application of either party, fix a time within which the accounts and vouchers, and the proofs in support thereof, shall be filed, and at the expiration of that time either party may have the matter set down for trial.

TRIAL.

118. After the action has been set down for trial, any party may apply to the judge, on notice to any other party

appearing, for an order fixing the time and place of trial; or he may upon giving the opposite party ten days' notice, set the action down for trial at any sitting of the court duly appointed to be held by the judge.

119. At the trial of a contested action the Plaintiff shall in general begin. But if the burden of proof lies on the Defendant, the judge may direct the Defendant to begin.

120. If there are several Plaintiffs or several Defendants, the judge may direct which Plaintiff or which Defendant shall begin.

121. The party beginning shall first address the court, and then produce his witnesses, if any. The other party or parties shall then address the court, and produce their witnesses, if any, in such order as the judge may direct, and shall have a right to sum up their evidence. In all cases the party beginning shall have the right to reply, but shall not produce further evidence, except by permission of the judge.

122. Only one counsel shall in general be heard on each side; but the judge, if he considers that the nature of the case requires it, may allow two counsel to be heard on each side.

123. If the action is uncontested, the judge may, if he thinks fit, give judgment on the evidence adduced by the Plaintiff.

References.

124. The judge may, if he thinks fit, refer the assessment of damages and the taking of any account to the registrar either alone, or assisted by one or more merchants as assessors.

125. The rules as to evidence, and as to the trial, shall apply *mutatis mutandis* to a reference to the registrar, and the registrar may adjourn the proceedings from time to time, and from place to place, if he shall think necessary.

126. Counsel may attend the hearing of any reference, but the costs so incurred shall not be allowed on taxation unless the registrar shall certify that the attendance of counsel was necessary.

127. When a reference has been heard, the registrar shall draw up a report in writing of the result, showing the amount, if any, found due, and to whom, together with any

further particulars that may be necessary. A form of the report will be found in the Appendix hereto, No. 43.

128. When the report is ready, notice shall be sent to the parties, and either party may thereupon take up and file the report.

129. Within *two weeks* from the filing of the registrar's report, either party may file a notice of motion to vary the report, specifying the items objected to.

130. At the hearing of the motion the judge may make such order thereon as to him shall seem fit, or may remit the matter to the registrar for further inquiry or report.

131. If no notice of motion to vary the report is filed within *two weeks* from filing the registrar's report, the report shall stand confirmed.

Costs.

132. In general costs shall follow the result; but the judge may in any case make such order as to the costs as to him shall seem fit.

133. The judge may direct payment of a lump sum in lieu of taxed costs.

134. If any Plaintiff (other than a seaman suing for his wages or for the loss of his clothes and effects in a collision), or any Defendant making a counter-claim, is not resident in the district in which the action is instituted, the judge may, on the application of the adverse party, order him to give bail for costs.

135. A party claiming an excessive amount, either by way of claim, or of set-off or counter-claim, may be condemned in all costs and damages thereby occasioned.

136. If a tender is rejected, but is afterwards accepted, or is held by the judge to be sufficient, the party rejecting the tender shall, unless the judge shall otherwise order, be condemned in the costs incurred after tender made.

137. A party, who has not admitted any fact which in the opinion of the judge he ought to have admitted, may be condemned in all costs occasioned by the non-admission.

138. Any party pleading at unnecessary length or taking any unnecessary proceeding in an action may be condemned in all costs thereby occasioned.

Taxation of Costs.

139. A party desiring to have a bill of costs taxed shall file the bill, and shall procure an appointment from the registrar for the taxation thereof, and shall serve the opposite party with notice of the time at which such taxation will take place.

140. At the time appointed, if either party is present, the taxation shall be proceeded with.

141. Within *one week* from the completion of the taxation application may be made, by either party, to the judge to review the taxation.

142. Costs may be taxed either by the judge or by the registrar, and as well between solicitor and client, as between party and party.

143. If in a taxation between solicitor and client more than *one-sixth* of the bill is struck off, the solicitor shall pay all the costs attending the taxation.

144. The fees to be taken by any district registrar shall, if either party desires it, be taxed by the judge.

Appraisement and Sale, &c.

145. The judge may, either before or after final judgment, order any property under the arrest of the court to be appraised, or to be sold with or without appraisement, and either by public auction or by private contract, and may direct what notice by advertisement or otherwise shall be given or may dispense with the same.

146. If the property is deteriorating in value, the judge may order it to be sold forthwith.

147. If the property to be sold is of small value, the judge may, if he thinks fit, order it to be sold without a commission of sale being issued.

148. The judge may, either before or after final judgment, order any property under arrest of the court to be removed, or any cargo under arrest on board ship to be discharged.

149. The appraisement, sale, and removal of property, the discharge of cargo, and the demolition and sale of a vessel condemned under any Slave Trade Act, shall be effected

under the authority of a commission addressed to the marshal. Forms of commissions of appraisement, sale, appraisement and sale, removal, discharge of cargo and demolition and sale will be found in the Appendix hereto, Nos. 44 to 49.

150. The commission shall, as soon as possible after its execution, be filed by the marshal, with a return setting forth the manner in which it has been executed.

151. As soon as possible after the execution of a commission of sale, the marshal shall pay into court the gross proceeds of the sale, and shall with the commission file his accounts and vouchers in support thereof.

152. The registrar shall tax the marshal's account, and shall report the amount at which he considers it should be allowed; and any party who is interested in the proceeds may be heard before the registrar on the taxation.

153. Application may be made to the judge on motion to review the registrar's taxation.

154. The judge may, if he thinks fit, order any property under the arrest of the court to be inspected. A form of order for inspection will be found in the Appendix hereto, No. 50.

Discontinuance.

155. The Plaintiff may, at any time, discontinue his action by filing a notice to that effect, and the Defendant shall thereupon be entitled to have judgment entered for his costs of action on filing a notice to enter the same. The discontinuance of an action by the Plaintiff shall not prejudice any action consolidated therewith or any counter-claim previously set up by the Defendant. Forms of notice of discontinuance and of notice to enter judgment for costs will be found in the Appendix hereto, Nos. 51 and 52.

Consents.

156. Any consent in writing signed by the parties may, by permission of the registrar, be filed, and shall thereupon become an order of court.

Certificate of State of Action.

157. Upon the application of any person the registrar shall, upon payment of the usual fee, certify as shortly

as he conveniently can, the several proceedings had in his office in any action or matter, and the dates thereof.

Appeal from the Judgment or Order of a Local Judge in Admiralty to the Exchequer Court.

158. Any person who desires to appeal to the Exchequer Court, from any judgment or order of a Local Judge in Admiralty of the said court, shall give security in the sum of two hundred dollars if such judgment or order is final, or if interlocutory, in the sum of one hundred dollars, to the satisfaction of such local judge, or of the judge of the Exchequer Court, that he will effectually prosecute his appeal and pay such costs as may be awarded against him by the Exchequer Court. If the appeal is by or on behalf of the Crown, no security shall be necessary.

159. All appeals to the Exchequer Court from any judgment or order of any Local Judge in Admiralty of the court shall be by way of rehearing, and shall be brought by notice of motion in a summary way, and no petition, case or other formal proceeding other than such notice of motion shall be necessary. The appellant may by the notice of motion appeal from the whole or any part of any judgment or order, and the notice of motion shall state whether the whole or part only of such judgment or order is complained of, and in the latter case shall specify such part. A form of notice of motion on appeal will be found in the Appendix hereto, No. 53.

160. The notice of appeal shall be served upon all parties directly affected by the appeal, and it shall not be necessary to serve parties not so affected; but the Exchequer Court may direct notice of the appeal to be served on all or any parties to the action or other proceeding, or upon any person not a party, and in the meantime may postpone or adjourn the hearing of the appeal upon such terms as may be just, and may give such judgment and make such order as might have been given or made if the persons served with such notice had been originally parties. Any notice of appeal may be amended at any time as the Exchequer Court may think fit.

161. Notice of appeal from any judgment, whether final or interlocutory, or from a final order, shall be a *twenty days'* notice, and notice of appeal from any interlocutory order shall be a *ten days'* notice.

162. The Exchequer Court shall in any appeal have all its powers and duties as to amendment and otherwise, together with full discretionary power to receive further evidence upon questions of fact,—such evidence to be either by oral examination in court, by affidavit, or by deposition taken before an examiner or commissioner. Such further evidence may be given without special leave upon interlocutory applications, or in any case as to matters which have occurred after the date of the decision from which the appeal is brought. Upon appeals from a judgment after the trial or hearing of any cause or matter upon their merits, such further evidence (save as to matters subsequent as aforesaid) shall be admitted on special grounds only, and not without special leave of the court. The court shall have power to draw inferences of fact and to give any judgment and make any order which ought to have been given or made, and to make such further or other order as the case may require. The powers aforesaid may be exercised by the said court, notwithstanding that the notice of appeal may be that part only of the decision may be reversed or varied, and such power may also be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have appealed from or complained of the decision. The court shall have power to make such order as to the whole or any part of the costs of the appeal as may be just.

163. If, upon the hearing of any appeal, it shall appear to the Exchequer Court, that a new trial ought to be had, it shall be lawful for the said court, if it shall think fit, to order that the verdict and judgment shall be set aside, and that a new trial shall be had.

164. It shall not, under any circumstances, be necessary for a respondent to give notice of motion by way of cross-appeal, but if a respondent intends, upon the hearing of the appeal, to contend that the decision of the local judge in Admiralty should be varied, he shall within the time specified in the next rule, or such time as may be prescribed by special order, give notice of such intention to any parties who may be effected by such contention. The omission to give such notice shall not in any way interfere with the power of the court on the hearing of the appeal to treat the whole case as open, but may, in the discretion of the court, be ground for an adjournment of the appeal, or for a special order as to costs.

165. Subject to any special order which may be made, notice by a respondent under the last preceding rule shall, in the case of any appeal from a final judgment, be a *fourteen days'* notice, and, in the case of an appeal from an interlocutory order, a *seven days'* notice.

166. The party appealing from a judgment or order shall produce to the registrar of the Exchequer Court the judgment or order or an office copy thereof, and shall leave with him a copy of the notice of appeal to be filed, and such officer shall thereupon set down the appeal by entering the same in the proper list of appeals, and it shall come on to be heard according to its order in such list unless the Judge of the Exchequer Court shall otherwise direct, but so as not to come into the paper for hearing before the day named in the notice of appeal.

167. Where an *ex parte* application has been refused by the Local Judge in Admiralty, an application for a similar purpose may be made to the Exchequer Court *ex parte* within *ten days* from the date of such refusal, or within such enlarged time as the Judge of the Exchequer Court may allow.

168. When any question of fact is involved in an appeal, the evidence taken before the Local Judge in Admiralty bearing on such question shall, subject to any special order, be brought before the Exchequer Court as follows:—

(*a.*) As to any evidence taken by affidavit, by the production of printed copies of such of the affidavits as have been printed, and office copies of such of them as have not been printed;

(*b.*) As to any evidence given orally, by the production of a copy of the judge's notes, or such other materials as the court may deem expedient.

169. Where evidence has not been printed in the proceedings before the Local Judge in Admiralty, the Local Judge in Admiralty, or the Judge of the Exchequer Court, may order the whole or any part thereof to be printed for the purpose of the appeal. Any party printing evidence for the purpose of an appeal without such order shall bear the costs thereof, unless the Judge of the Exchequer Court shall otherwise order.

170. If, upon the hearing of an appeal, a question arise as to the ruling or direction of the Local Judge, the Exche-

quer Court shall have regard to verified notes or other evidence, and to such other materials as the court may deem expedient.

171. Upon any appeal to the Exchequer Court no interlocutory order or rule from which there has been no appeal shall operate so as to bar or prejudice the Exchequer Court from giving such decision upon the appeal as may be just.

172. No appeal to the Exchequer Court from any interlocutory order, or from any order, whether final or interlocutory, in any matter not being an action, shall, except by special leave of the Exchequer Court, be brought after the expiration of *thirty days*, and no other appeal shall, except by such leave, be brought after the expiration of *sixty days*. The said respective periods shall be calculated, in the case of an appeal from an order in Chambers, from the time when such order was pronounced, or when the appellant first had notice thereof, and in all other cases, from the time at which the judgment or order is signed, entered, or otherwise perfected, or, in the case of the refusal of an application, from the date of such refusal.

173. An appeal shall not operate as a stay of execution or of proceedings under the decision appealed from, except so far as the Local Judge in Admiralty, or the Exchequer Court may order; and no intermediate act or proceeding shall be invalidated, except so far as the Judge of the Exchequer Court may direct.

174. Wherever under Rules 158 to 176 an application may be made either to the Local Judge in Admiralty or to the Exchequer Court, or the Judge thereof, it shall be made in the first instance to the Local Judge in Admiralty.

175. Every application in respect to any appeal to the Exchequer Court or the judge thereof shall be by motion.

176. On appeal from a Local Judge in Admiralty, interest for such time as execution has been delayed by the appeal shall be allowed unless the Local Judge otherwise orders, and the taxing officer may compute such interest without any order for that purpose.

Payments into Court.

177. All moneys to be paid into court shall be paid, upon receivable orders to be obtained in the registry, to the ac-

count of the registrar at some bank in the Dominion of Canada to be approved by the judge, or, with the sanction of the Treasury Board, into the Treasury of the Dominion. A form of receivable order will be found in the Appendix hereto, No. 54.

178. A bank or Treasury receipt for the amount shall be filed, and thereupon the payment into court shall be deemed to be complete.

Payments out of Court.

179. No money shall be paid out of court except upon an order signed by the judge. On signing a receipt to be prepared in the registry, the party to whom the money is payable under the order will receive a cheque for the amount signed by the registrar, upon the bank in which the money has been lodged, or an order upon the Treasurer in such form as the Treasury Board shall direct. A form of order for payment out of court will be found in the Appendix hereto, No. 55.

Caveats.

180. Any person desiring to prevent the arrest of any property may file a notice, undertaking, within *three days* after being required to do so, to give bail to any action or counter-claim that may have been, or may be, brought against the property, and thereupon the registrar shall enter a caveat in the caveat warrant book hereinafter mentioned. Forms of notice and of caveat warrant will be found in the Appendix hereto, Nos. 56 and 57.

181. Any person desiring to prevent the release of any property under arrest, shall file a notice, and thereupon the registrar shall enter a caveat in the caveat release book hereinafter mentioned. Forms of notice and of caveat release will be found in the Appendix hereto, Nos. 58 and 59.

182. Any person desiring to prevent the payment of money out of court shall file a notice, and thereupon the registrar shall enter a caveat in the caveat payment book hereinafter mentioned. Forms of notice and of caveat payment will be found in the Appendix hereto, Nos. 60 and 61.

183. If the person entering a caveat is not a party to the action, the notice shall state his name and address, and an address within three miles of the registry at which it shall be sufficient to leave all documents required to be served upon him.

184. The entry of a caveat warrant shall not prevent the issue of a warrant, but a party at whose instance a warrant shall be issued for the arrest of any property in respect of which there is a caveat warrant outstanding, shall be condemned in all costs and damages occasioned thereby, unless he shall show to the satisfaction of the judge good and sufficient reason to the contrary.

185. The party at whose instance a caveat release or caveat payment is entered, shall be condemned in all costs and damages occasioned thereby, unless he shall show to the satisfaction of the judge good and sufficient reason to the contrary.

186. A caveat shall not remain in force for more than *six months* from the date of entering the same.

187. A caveat may at any time be withdrawn by the person at whose instance it has been entered, on his filing a notice withdrawing it. A form of notice of withdrawal will be found in the Appendix hereto, No. 62.

188. The judge may overrule any caveat.

Subpœnas.

189. Any party desiring to compel the attendance of a witness shall serve him with a subpœna, which shall be prepared by the party and issued under the seal of the court. Forms of subpœnas will be found in the Appendix hereto, Nos. 63 and 64.

190. A subpœna may contain the names of any number of witnesses, or may be issued with the names of the witnesses in blank.

191. Service of the subpœna must be personal, and may be made by the party or his agent, and shall be proved by affidavit.

Orders for Payment.

192. On application by a party to whom any sum has been found due, the judge may order payment to be made out of any money in court applicable for the purpose.

If there is no such money in court, or if it is insufficient, the judge may order that the party liable shall pay the sum found due, or the balance thereof, as the case may be, within such time as to the judge shall seem fit. The party

to whom the sum is due may then obtain from the registry and serve upon the party liable an order for payment under seal of the court. A form of order for payment will be found in the Appendix hereto, No. 65.

ATTACHMENTS.

193. If any person disobeys an order of the court, or commits a contempt of court, the judge may order him to be attached. A form of attachment will be found in the Appendix hereto, No. 66.

194. The person attached shall, without delay be brought before the judge, and if he persists in his disobedience or contempt, the judge may order him to be committed. Forms of order for committal and of committal will be found in the Appendix hereto, Nos. 67 and 68.

The order for committal shall be executed by the marshal.

EXECUTION.

195. Any decree or order of the court, made in the exercise of its Admiralty jurisdiction, may be enforced in the same manner as a decree or order made in the exercise of the ordinary civil jurisdiction of the court may be enforced.

SEALS.

196. The seals to be used in the registry and district registries shall be such as the Judge of the Exchequer Court may from time to time direct.

INSTRUMENTS, &C.

197. Every warrant, release, commission, attachment, and other instrument to be executed by any officer of, or commissioner acting under the authority of, the court, shall be prepared in the registry and signed by the registrar, and shall be issued under the seal of the court.

198. Every document issued under the seal of the court shall bear date on the day of sealing and shall be deemed to be issued at the time of the sealing thereof.

199. Every document requiring to be served shall be served within *twelve months* from the date thereof, otherwise the service shall not be valid.

200. Every instrument to be executed by the marshal shall be left with the marshal by the party at whose instance it is issued, with written instructions for the execution thereof.

NOTICES FROM THE REGISTRY.

201. Any notice from the registry may be either left at, or sent by post by registered letter, to the address for service of the party to whom notice is to be given; and the day next after the day on which the notice is so posted shall be considered as the day of service thereof, and the posting thereof as aforesaid shall be a sufficient service.

FILING.

202. Documents shall be filed by leaving the same in the registry, with a minute stating the nature of the document and the date of filing it. A form of minute on filing any document will be found in the Appendix hereto, No. 69.

203. Any number of documents in the same action may be filed with one and the same minute.

TIME.

204. If the time for doing any act or taking any proceeding in an action expires on a Sunday, or on any other day on which the registry is closed, and by reason thereof such act or proceeding cannot be done or taken on that day, it may be done or taken on the next day on which the registry is open.

205. Where, by these rules or by any order made under them, any act or proceeding is ordered or allowed to be done within or after the expiration of a time limited from or after any date or event, such time, if not limited by hours, shall not include the day of such date or of the happening of such event, but shall commence on the next following day.

206. The judge may, on the application of either party, enlarge or abridge the time prescribed by these rules or forms or by any order made under them for doing any act or taking any proceeding, upon such terms as to him shall seem fit, and any such enlargement may be ordered although the application for the same is not made until after the expiration of the time prescribed.

Sittings of the Court.

207. The judge shall appoint proper and convenient times for sittings in court and in chambers, and may adjourn the proceedings from time to time and from place to place as to him shall seem fit.

Registry and Registrar.

208. The registry shall be open to suitors during fixed hours to be appointed by the judge.

209. The registrar shall obey all the lawful directions of the judge. He shall in person, or by a deputy approved of by the judge, attend all sittings whether in court or in chambers, and shall take minutes of all the proceedings. He shall have the custody of all records of the court. He shall not act as counsel or solicitor in the court.

Marshal.

210. The marshal shall execute by himself or his officer all instruments issued from the court which are addressed to him, and shall make returns thereof.

211. Whenever, by reason of distance or other sufficient cause, the marshal cannot conveniently execute any instrument in person, he shall employ some competent person as his officer to execute the same.

Holidays.

212. The registry and the marshal's office shall be closed on Sundays, Good Friday, Easter Monday, Easter Tuesday, and Christmas Day, and on such days as are appointed by law or by proclamation to be kept as holidays or fast days.

Records of the Court.

213. There shall be kept in the registry a book, to be called the minute book, in which the registrar shall enter in order of date, under the head of each action, and on a page numbered with the number of the action, a record of the commencement of the action, of all appearances entered, all documents issued or filed, all acts done, and all orders and decrees of the court, whether made by the judge, or by the registrar, or by consent of the parties in the action. Forms of minute of order of court, of minute on examination of witnesses, of minute of decree, and of minutes in an

action for damage by collision, will be found in the Appendix hereto, Nos. 70 to 73.

214. There shall be kept in the registry a caveat warrant book, a caveat release book, and a caveat payment book, in which all such caveats, respectively, and the withdrawal thereof, shall be entered by the registrar.

215. Any solicitor may inspect the minute and caveat books.

216. The parties to an action may, while the action is pending, and for *one year* after its termination, inspect, free of charge, all the records in the action.

217. Except as provided by the two last preceding rules, no person shall be entitled to inspect the records in a pending action without the permission of the registrar.

218. In an action which is terminated, any person may, on payment of a search fee, inspect the records in the action.

Copies.

219. Any person entitled to inspect any document in an action shall, on payment of the proper charges for the same, be entitled to an office copy thereof under seal of the court.

Forms.

220. The forms in the Appendix to these rules shall be followed with such variations as the circumstances may require, and any party using any other forms shall be liable for any costs occasioned thereby.

Fees.

221. Subject to the following rules, the fees set forth in the tables of fees in the Appendix hereto shall be allowed on taxation.

222. In any proceeding instituted in the registry at Ottawa the fees to be taken by the registrar shall be paid in stamps, and the proceeds of the sale of such stamps shall be paid into the Consolidated Revenue Fund of Canada.

223. Where the fee is per folio, the folio shall be counted at the rate of 100 words, and every numeral, whether contained in columns or otherwise written, shall be counted and charged for as a word.

224. Where the sum in dispute does not exceed $200, or the value of the *res* does not exceed $400, one-half only of

the fees (other than disbursements) set forth in the Table hereto annexed shall be charged and allowed.

225. Where costs are awarded to a Plaintiff, the expression "sum in dispute" shall mean the sum recovered by him in addition to the sum, if any, counter-claimed from him by the Defendant; and where costs are awarded to a Defendant, it shall mean the sum claimed from him in addition to the sum, if any, recovered by him.

226. The judge may, in any action, order that half fees only shall be allowed.

227. If the same practitioner acts as both counsel and solicitor in an action, he shall not for any proceeding be allowed to receive fees in both capacities, nor to receive a fee as counsel where the act of a solicitor only is necessary.

Cases not Provided for.

228. In all cases not provided for by these Rules the practice for the time being in force in respect to Admiralty proceedings in the High Court of Justice in England shall be followed.

Commencement of Rules.

229. These Rules shall come into force on the day on which notice of the approval thereof by His Excellency the Governor-General in Council, and by Her Majesty in Council shall be published in the *Canada Gazette*, and shall apply to all actions then pending in the Exchequer Court of Canada on its Admiralty side, as well as to actions commenced on and after such day.

Repealing Clause.

230. From and after the day on which the notice of the approval of these Rules by His Excellency the Governor-General in Council and by Her Majesty in Council, is published in the *Canada Gazette*, the following rules and regulations, together with all forms thereto annexed, and the table of fees now in force in the Exchequer Court in Admiralty proceedings, shall, in respect to any such proceeding in such court be repealed:—

(*a.*) The rules and tables of fees for the Vice-Admiralty Courts established by an Order of Her Majesty in Council of the 23rd day of August, 1883; and

(*b.*) The rules and regulations and the table of fees previously in force in the Maritime Court of Ontario, and made by the judge of such court on the 31st day of January, 1889, and approved by His Excellency the Governor-General in Council on the 14th day of February, 1889, and all rules of the said Maritime Court of Ontario.

Dated, at Ottawa, this 5th day of December, A. D. 1892.

GEO. W. BURBIDGE,
J. E. C.

APPENDIX.

I. FORMS.

No. 1.

Rule 4.

TITLE OF COURT.

IN THE EXCHEQUER COURT OF CANADA.

IN ADMIRALTY.

or (*if instituted in a District Registry*)

IN THE EXCHEQUER COURT OF CANADA.

THE QUEBEC (*or as the case may be*) ADMIRALTY DISTRICT.

No. 2.

Rule 4.

TITLE OF ACTION IN REM

[*Title of court.*]

No.____[*here insert the number of the action*].

A.B., Plaintiff,

against

(*a.*) The Ship_____.

or (*b.*) The Ship_____and freight.

or (*c.*) The Ship_____her cargo and freight.

or (if the action is against cargo only),

(*d.*) The cargo *ex* the Ship [*state name of ship on board of which the cargo now is or lately was laden*].

or (if the action is against the proceeds realized by the sale of the ship or cargo),

(*e.*) The proceeds of the Ship_____

or (*f.*) The proceeds of the cargo *ex* the Ship._____

or as the case may be.

Action for [*state nature of action, whether for damage by collision, wages, bottomry, &c., as the case may be.*]

No. 3.

TITLE OF ACTION IN PERSONAM. Rule 4.

[*Title of court*]

No.____[*here insert the number of the action.*]

A B., Plaintiff

against

The Owners of the Ship_____, [*or as the case may be*].

Action for [*state nature of action as in preceding form.*]

No. 4.

TITLE OF ACTION IN THE NAME OF THE CROWN. Rule 4.

[*Title of court.*]

No.____[*insert number of action*].

Our Sovereign Lady the Queen.

[*add, where necessary,* in Her Office of Admiralty].

against

(*a.*) The Ship_____, [*or as the case may be*],

or,

(*b.*) A.B., &c. [*the person or persons proceeded against*].

Action for [*state nature of action*].

No. 5.

Rule 5. WRIT OF SUMMONS IN REM.

(L.S.) [*Title of court and action.*]

VICTORIA, by the grace of God, of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith, Empress of India.

To the owners and all others interested in the Ship_____ [her cargo and freight, *&c., or as the case may be.*]

WE command you that, within *one week* after the service of this writ, exclusive of the day of such service, you do cause an appearance to be entered for you in Our Exchequer Court of Canada in the above-named action; and take notice that in default of your so doing the said action may proceed, and judgment may be given, in your absence.

Given at Ottawa (*or as the case may be*) in Our said court, under the seal thereof, this_____ day of_____ 18____

Memorandum to be subscribed on the Writ.

This writ may be served within *twelve months* from the date thereof, exclusive of the day of such date, but not afterwards.

The Defendant (*or* Defendants) may appear hereto by entering an appearance (*or* appearances) either personally or by solicitor at the registry of the said court situate at Ottawa (*or as the case may be*).

No. 6.

Rule 5. WRIT OF SUMMONS IN PERSONAM.

[*Title of court and action.*]

(L.S.)

VICTORIA, by the grace of God, &c.

To *C.D.*, of_____, and *E.F.*, of_____

We command you that, within *one week* after the service of this writ, exclusive of the day of such service, you do

cause an appearance to be entered for you in our Exchequer Court of Canada, in the above-named action; and take notice that in default of your so doing the said action may proceed, and judgment may be given, in your absence.

Given at Ottawa (*or as the case may be*) in Our said court, under the seal thereof, this_____day of_____18___

Memorandum to be subscribed on the Writ.

This writ may be served within *twelve months* from the date thereof, exclusive of the day of such date, but not afterwards.

The Defendant (*or* Defendants) may appear hereto by entering an appearance (*or* appearances) either personally or by solicitor at the registry of the said court situate at Ottawa (*or as the case may be*).

No. 7.

WRIT OF SUMMONS IN PERSONAM FOR SERVICE OUT OF JURISDICTION. Rules 5-20-23.

(L.S.) [*Title of court and action.*]

VICTORIA, by the grace of God, &c.

To *C. D.*, of_____, *E. F.*, of_____.

We command you that within (*here insert the number of days directed by the Judge ordering the service or notice*) after the service of this writ (*or notice of this writ, as the case may be,*) on you, inclusive of the day of such service, you do cause an appearance to be entered for you in Our Exchequer Court of Canada, in the above named action, and take notice that in default of your so doing the Plaintiff may proceed therein, and judgment may be given in your absence. Given at Ottawa (*or as the case may be*) in Our said court, under the seal thereof, this_____day of_____18___

Memorandum to be subscribed on Writ as in Form No. 6.

Indorsement to be made on the Writ before the issue thereof:—

N.B.—This writ is to be used where the Defendant or all the Defendants, or one or more Defendant or Defendants,

is or are out of the jurisdiction. When the Defendant to be served is not a British subject, and is not in British dominions, notice of the writ and not the writ itself, is to be served upon him.

No. 8.

Rules 23-24 NOTICE IN LIEU OF WRIT FOR SERVICE OUT OF JURISDICTION.

[*Title of court and action.*]

To *C. D.*, of_____.

Take notice that *A. B.*, of_____, has commenced an action against you *C. D.* in the Exchequer Court of Canada at Ottawa, (or in the_____Admiralty District, *as the case may be*,) by writ of that court, dated the_____ day of_____, A.D. 18___; which writ is indorsed as follows: (*Copy in full the indorsements*), and you are required within_____days after the receipt of this notice, inclusive of the day of such receipt, to defend the said action, by causing an appearance to be entered for you in the said court to the said action, and in default of your so doing the said A. B. may proceed therein, and judgment may be given in your absence.

You may appear to the said writ by entering an appearance personally or by your solicitor at the office of the registrar of the said court at Ottawa) *or* at_____ in the_____Admiralty District, *as the case may be*).

(Signed,) *A. B.*, of_____&c.,

Or *X. Y.*, of_____

Solicitor for *A. B.*

No. 9.

Rule 5. INDORSEMENTS TO BE MADE ON THE WRIT BEFORE ISSUE THEREOF.

(1.) The Plaintiff claims [*insert description of claim as given in Form No.* 10].

(2.) This writ was issued by the Plaintiff in person, who resides at [*state Plaintiff's place of residence, with name of street and number of house, if any*].

or,

This writ was issued by *C. D.*, of [*state place of business*] solicitor for the Plaintiff.

(3.) All documents required to be served upon the said Plaintiff in the action may be left for him at [*insert address for service within three miles of the registry*].

or,

Where the action is in the name of the Crown:—

(1.) *A. B.*, &c., claims [*insert description of claim as given in Form No.* 10].

(2.) This writ was issued by *A. B.* [*state name and address of person prosecuting in the name of the Crown, or his solicitor, as the case may be*].

(3.) All documents required to be served upon the Crown in this action may be left at [*insert address for service within three miles of the registry*].

No. 10.

INDORSEMENTS OF CLAIM. Rule 5.

(1.) *Damage by collision:*

The Plaintiffs as owners of the Ship "Mary" [her cargo and freight, *&c., or as the case may be*] claim the sum of $____ against the Ship "Jane" for damage occasioned by a collision which took place [*state where*] on the_____day of _____, and for costs.

(2.) *Salvage:*

The Plaintiffs, as the owners, master, and crew of the Ship "Mary," claim the sum of $____for salvage services rendered by them to the Ship "Jane" [her cargo and freight *&c., or as the case may be*] on the_____day of_____ 18——, in or near [*state where the services were rendered*], and for costs.

(3.) *Pilotage:*

The Plaintiff claims the sum of $_____for pilotage of the Ship "Jane" on the_____day of_____18____ from [*state where pilotage commenced*] to [*state where pilotage ended*], and for costs.

Rule 6.

(4.) *Towage:*

The Plaintiffs, as owners of the Ship "Mary," claim the sum of $_____for towage services rendered by the said Ship to the Ship "Jane" [her cargo and freight, *&c., or as the case may be*], on the_____day of_____18____, at or near [*state where the services were rendered*], and for costs.

(5.) *Master's wages and disbursements:*

The Plaintiff claims the sum of $_____, for his wages and disbursements as master of the Ship "Mary," and to have an account taken thereof, and for costs.

(6.) *Seamen's wages:*

The Plaintiffs, as seamen on board the Ship "Mary" claim the sum of $_____, for wages due to them, as follows, and for costs:

to *A.B.*, the mate, $____, for two months wages from the_____day of_____.

to *C.D.*, able seaman $_____&c., &c.;

[and the Plaintiffs claim to have an account taken thereof.]

(7.) *Necessaries, repairs, &c.:*

The Plaintiffs claim the sum of $_____, for necessaries supplied (*or* repairs done, &c., *as the case may be*) to the Ship "Mary" at the port of_____on the_____ day of_____, and for costs [and the Plaintiffs claim to have an account taken thereof].

(8.) *Possession:*

(*a.*) The Plaintiff, as sole owner of the Ship "Mary," of the port of_____, claims possession of the said ship.

(*b.*) The Plaintiff, as owner of 48-64th shares of the Ship "Mary," of the port of_____, claims possession of the said Ship against *C.D.*, owner of 16–64th shares of the same Ship.

(9.) *Mortgage:*

The Plaintiff, under a mortgage dated the_____ day of_____, claims against the Ship "Mary," [*or* the proceeds of the Ship "Mary," *or as the case may be*], the sum of $_____, as the amount due to him for principal and interest, and for costs.

(10.) *Claims between Co-Owners:*

(*a.*) The Plaintiff, as part owner of the Ship "Mary," claims against *C.D.*, part owner of the same Ship, the sum of $_____, as part of the earnings of the said Ship due to the Plaintiff, and for costs; and to have an account taken thereof.

(*b.*) The Plaintiff, as owner of 24–64th shares of the Ship "Mary," being dissatisfied with the management of the said Ship by his co-owners, claims that his co-owners shall give bail in the sum of $_____, the value of his said shares, for the safe return of the Ship to the Dominion of Canada [*or to the District, as the case may be*].

(11.) *Bottomry:*

The Plaintiff, as assignee of a bottomry bond, dated the _____day of_____, and granted by *C.D.*, as master of the Ship "Mary" of_____, to *A.B.* at the port of_____, claims the sum of $_____against the Ship "Mary" [her cargo and freight, *&c., or as the case may be*] as the amount due to him under the said bond, and for costs.

(12.) *Derelict:*

A.B., claims to have the Derelict Ship "Mary" [*or* cargo, *&c., or as the case may be*,] condemned as forfeited to Her Majesty in Her Office of Admiralty.

(13.) *Piracy:*

A.B., Commander of H.M.S. "Torch," claims to have the Chinese junk "Tecumseh" and her cargo condemned as forfeited to Her Majesty as having been captured from pirates.

(14.) *Slave Trade:*

A.B., Commander of H.M.S. "London" claims to have the vessel, name unknown [together with her cargo and 12 slaves] seized by him on the_____day of_____18____, condemned as forfeited to Her Majesty, on the ground that the said vessel was at the time of her seizure engaged in or fitted out for the Slave Trade, in violation of existing treaties between Great Britain and Zanzibar (*or* of the Act 5 Geo. IV. c 113, *or as the case may be*).

or

C.D., the owner of the_____vessel_____[and cargo, *or as the case may be*] captured by H. M. S. "London" on the _____day of_____18_____, claims to have the said vessel [and cargo, *or as the case may be*] restored to him [together with costs and damages for the seizure thereof].

(15.) *Under Pacific Islanders Protection Acts:*

A.B., as Commander of H.M.S. "Lynx," claims to have the British Ship "Mary" and her cargo condemned as forfeited to Her Majesty, for violation of the Pacific Islanders Protection Acts, 1872 and 1875.

(16.) *Under Foreign Enlistment Act:*

A.B. claims to have the British Ship "Mary," together with the arms and munitions of war on board thereof, condemned as forfeited to Her Majesty for violation of the Foreign Enlistment Act, 1870.

(17.) *Under Customs Acts:*

A.B. claims to have the Ship "Mary" [*or as the case may be*] condemned as forfeited to Her Majesty for violation of [*state Act under which forfeiture is claimed*].

(18.) *Recovery of pecuniary forfeiture or penalty:*

A.B. claims judgment against the Defendant for penalties for violation of [*state Act under which penalties are claimed*].

No. 11.

Rule 18. AFFIDAVIT OF SERVICE OF A WRIT OF SUMMONS.

[*Title of court and action.*]

County of———— }

I, *A.B.*, of———in the County of———— [*calling or occupation*] make oath and say:

1. That I did on the day of 18 serve the writ of summons herein by [*here state the mode in which the service was effected, whether on the owner, or on the ship, cargo or freight, &c, as the case may be*] on———the ———day of———18—

(Signed)

A. B.

SWORN before me, &c.

A Commissioner, &c.

No. 12. Rule 28.

APPEARANCE.

(1.) *By Defendant in person.*

[*Title of court and action.*]

Take notice that I appear in this action.
Dated this_____day of_____18____
(Signed) *C.D.*, Defendant.

My address is_____
My address for service is_____

(2.) *By Solicitor for Defendant.*

[*Title of Court and Action*]

Take notice that I appear for *C.D.* of [*insert address of C.D.*] in this action.
Dated this_____day of_____18____
(Signed) *X.Y.*,
Solicitor for *C.D.*
My place of business is_____
My address for service is_____

No. 13.

INDORSEMENT OF SET-OFF OR COUNTER-CLAIM. Rule 28.

The Defendant [*or, if he be one of several Defendants*, the Defendant *C.D.*] owner of the ship "Mary" [*or as the case may be*] claims from the Plaintiff [*or* claims to set-off against the Plaintiff's claim] the sum of_____for [*state the nature of the set-off or counter-claim and the relief or remedy required as in Form No.* 10, *mutatis mutandis*] and for costs.

No. 14.

Rule 35. AFFIDAVIT TO LEAD WARRANT.

[*Title of court and action.*]

I, *A.B.* [*state name and address*] make oath and say that I have a claim against the Ship "Mary" for [*state nature of claim*].

And I further make oath and say that the said claim has not been satisfied, and that the aid of this court is required o enforce it.

On the_____day of_____18___, the said *A.B.* was duly sworn to the truth of this affidavit at_____ } (Signed) *A.B.*

Before me,
E.F., &c.

or

Where the Action is in the name of the Crown,

I, *A.B.*, &c. [*state name and address of person suing in the name of the Crown*] make oath and say that I claim to have the Ship "Mary" and her cargo [*or* the vessel, name unknown, *or* the cargo *ex* the Ship "Mary," *&c., or as the case may be*] condemned to Her Majesty ;—

(*a.*) as having been fitted out for or engaged in the Slave Trade in violation of [*state Act or Treaty alleged to have been violated*] ;

or (*b.*) as having been captured from pirates ;

or (*c.*) as having been found derelict ;

or (*d.*) for violation of [*state Act alleged to have been violated, or as the case may be*].

I further make oath and say that the aid of this court is required to enforce the said claim.

On the_____day of_____18___, the said *A.B.* was duly sworn to the truth of this affidavit at_____ } (Signed) *A.B.*

Before me,
E.F., &c.

No. 15.

WARRANT. Rule 40.

(L.S.) [*Title of court and action.*]

VICTORIA, &c.

To the Marshal of the Admiralty District of_____ [or Sheriff of the County of_____*or as the case may be*]. We hereby command you to arrest the ship_____ her cargo and freight, &c., *or as the case may be*], and to keep the same under safe arrest, until you shall receive further orders from Us.

Given at_____in our said court, under the seal thereof, this_____day of_____18___.

Warrant
Taken out by_____

(Signed) *E. F.*,
Registrar (*or District Registrar, as the case may be*).

No. 16.

CERTIFICATE OF SERVICE TO BE INDORSED ON THE WARRANT AFTER SERVICE THEREOF. Rule 44.

This warrant was served by [*state by whom and in what mode service was effected*] on_____the_____ day of_____18___

(Signed) *G. H.*,
Marshal of the Admiralty District of_____[or, *Sheriff of the County of*_____, *or as the case may be*].

No. 17.

BAILBOND. Rule 46.

[*Title of court and action.*]

Know all men by these presents that we [*insert names, addresses, and descriptions of the sureties in full*] hereby jointly and severally submit ourselves to the jurisdiction of the said court, and consent that if the said [*insert name of party*

for whom bail is to be given, and state whether Plaintiff or Defendant,] shall not pay what may be adjudged against him in the above named action, with costs [*or*, for costs, *if bail is to be given only for costs*], execution may issue against us, our heirs, executors, and administrators, goods and chattels, for a sum not exceeding [*state sum in letters*] dollars.

This Bailbond was signed by the said_____ and_____ the sureties, the_____day of _____18___, in the registry of the Exchequer Court of Canada [*or as the case may be*]. } *Signatures of sureties.*

Before me,

E. F.,

Registrar, *or* District Registrar, [*or* clerk in the registry, *or* Commissioner to take bail, *or as the case may be*].

No. 18.

Rule 46. COMMISSION TO TAKE BAIL.

[*Title of court and action.*]

[L.S.]

VICTORIA, &c.

To [*state name and description of Commissioner*], Greeting.

Whereas in the above-named action bail is required to be taken on behalf of [*state name of party for whom bail is to be given, and whether Plaintiff or Defendant*] in the sum of [*state sum in letters*] dollars, to answer judgment in the said action.

We, therefore, hereby authorize you to take such bail on behalf of the said_____from two sufficient sureties, upon the bailbond hereto annexed, and to swear the said sureties to the truth of the annexed affidavits as to their sufficiency, in the form indorsed hereon.

And we command you, that upon the said bond and affidavits being duly executed and signed by the said sureties, you do transmit the same, attested by you, to the registry of our said court.

Given at_____in our said Court, under the seal thereof, this_____day of_____18____.

(Signed) *E. F.*,
Registrar *or* District Registrar.

Commission to take bail.
Taken out by_____

Form of Oath to be administered to each surety.

You swear that the contents of the affidavit, to which you have subscribed your name, are true.

So help you GOD.

No. 19.

AFFIDAVIT OF JUSTIFICATION. Rule 47.

[*Title of court and action.*]

I [*state name, address, and description of surety*], one of the proposed sureties for [*state name, address, and description of person for whom bail is to be given*] make oath and say that I am worth more than the sum of [*state in letters the sum in which bail is to be given*] dollars, after the payment of all my debts.

On the_____day of_____
18__, the said_____
was duly sworn to the truth of this
affidavit at_____ } *Signature of surety.*
Before me,
E. F., Registrar.
or District Registrar *or* Commissioner,
or as the case may be.]

No. 20.

Rule 50. NOTICE OF BAIL.

[*Title of court and action.*]

Take notice that I tender the under-mentioned persons as bail on behalf of [*state name, address, and description of party for whom bail is to be given, and whether Plaintiff or Defendant*] in the sum of [*state sum in letters and figures*] to answer judgment in this action [*or* judgment and costs, *or* costs *only, or as the case may be*].

Names, addresses, and descriptions of

SURETIES.	REFEREES.
(1)_____	_____
(2)_____	_____

Dated this_____day of_____18____.

(Signed) *X. Y.*

No. 21.

Rule 51. NOTICE OF OBJECTION TO BAIL.

[*Title of court and action.*]

Take notice that I object to the bail proposed to be given by [*state name, address, and description of surety or sureties objected to*] in the above-named action.

Dated the_____day of_____18____

(Signed) *A.B.*

No. 22.

Rule 57. RELEASE.

(L.S.) [*Title of court and action.*]

VICTORIA, &c.

To the Marshal of the Admiralty District of_____ (*or* the Sheriff of the County of_____, *or as the case may be.*) Greeting:

Whereas by our warrant issued in the above-named action on the_____day of_____18__, we did command you to arrest [*state name and nature of property arrested*] and to keep the same under safe arrest until you should receive further orders from us. We do hereby command you to release the said [*state name and nature of property to be released*] from the said arrest upon payment being made to you of all fees due to and charges incurred by you in respect of the arrest and custody thereof.

Given at_____, in Our said court, under the seal thereof,_____day of_____18__.

Release
Taken out by_____

(Signed) *E.F.*,
Registrar [*or* District Registrar].

No. 23.

PLEADINGS. Rule 64.

(1.) *In an Action for damage by collision:*

a. (*The "Atlantic."*)

STATEMENT OF CLAIM.

[*Title of court and action.*]

Writ issued_____18__.

1. Shortly before 7 p.m. on the 31st January, 1878, the brig "Anthes," of 234 tons register, of which the Plaintiff, George De Garis, was then owner, whilst on a voyage from Cardiff to Granville, in France, laden with coals, and manned with a crew of nine hands, all told, was about fifteen miles S.E. ½ E. from the Lizard Light.

2. The wind at that time was about E.N.E., a moderate breeze, the weather was fine, but slightly hazy, and the tide was about slack water, and of little force. The "Anthes" was sailing under all plain sail, close hauled on the port tack, heading about S.E. and proceeding through the water at the rate of about five knots per hour. Her proper regulation side sailing lights were duly placed and exhibited and burning brightly, and a good look-out was being kept on board of her.

3. At that time those on board the "Anthes" observed the red light of a sailing vessel, which proved to

be the "Atlantic," at the distance of about from one mile and a half to two miles from the "Anthes," and bearing about one point on her port bow. The "Anthes" was kept close hauled by the wind on the port tack. The "Atlantic" exhibited her green light and shut in her red light, and drew a little on to the starboard bow of the "Anthes," and she was then seen to be approaching and causing immediate danger of collision. The helm of the "Anthes" was thereupon put hard down, but the "Atlantic," although loudly hailed from the "Anthes," ran against and with her stem and starboard bow struck the starboard quarter of the "Anthes" abaft the main rigging, and did her so much damage that the "Anthes," soon afterwards sank, and was with her cargo wholly lost, and four of her hands were drowned.

4. There was no proper look-out kept on board the "Atlantic."

5. Those on board the "Atlantic" improperly neglected to take in due time proper measures for avoiding a collision with the "Anthes."

6. The helm of the "Atlantic" was ported at an improper time.

7. The said collision, and the damages and losses consequent thereon, were occasioned by the negligent and improper navigation of those on board the "Atlantic"

The Plaintiff claims—

1. A declaration that he is entitled to the damage proceeded for.
2. The condemnation of the Defendants [and their bail] in such damage and in costs.
3. To have an account taken of such damage with the assistance of merchants.
4. Such further or other relief as the nature of the case may require.

Dated the_____day of_____18____.

(Signed) *A.B.*, Plaintiff.

DEFENCE AND COUNTER-CLAIM.

[*Title of court and action.*]

1. The Defendants are the owners of the Swedish barque "Atlantic," of 988 tons register, carrying a crew of nineteen

hands all told, and at the time of the circumstances hereinafter stated bound on a voyage to Cardiff.

2. A little before 6.30 p.m., of the 31st January, 1878, the "Atlantic" was about fifteen miles S.E. by S. of the Lizard. The wind was E.N.E. The weather was hazy. The "Atlantic," under foresail, fore and main topsails, main topgallant sail, and jib, was heading about W.S.W., making from five to six knots an hour with her regulation lights duly exhibited and burning, and a good look-out being kept on board her.

3. In these circumstances the red lights of two vessels were observed pretty close together, about half mile off, and from two to three points on the starboard bow. The helm of the "Atlantic" was put to port in order to pass on the port sides of these vessels. One, however, of the vessels, which was the "Anthes," altered her course, and exhibited her green light, and caused danger of collision. The helm of the "Atlantic" was then ordered to be steadied, but before this order could be completed was put a hard-a-port. The "Anthes" with her starboard side by the main rigging struck the stem of the "Atlantic" and shortly afterwards sank, her master and four of her crew being saved by the "Atlantic."

4. Save as herein-before admitted, the several statements in the statement of claim are denied.

5. The "Anthes" was not kept on her course as required by law.

6. The helm of the "Anthes" was improperly starboarded.

7. The collision was caused by one or both of the things stated in the fifth and sixth paragraphs hereof, or otherwise by the negligence of the Plaintiffs, or of those on board the "Anthes."

8. The collision was not caused or contributed to by the Defendants, or by any of those on board the "Atlantic."

And by way of Counter-claim, the Defendants say—

They have suffered great damage by reason of the collision.

And they claim as follows:—

1. Judgment against the Plaintiff [and his bail] for the damage occasioned to the Defendants by the collision, and for the costs of this action.
2. To have an account taken of such damage with the assistance of merchants.

3. Such further and other relief as the nature of the case may require.

Dated the_____day of_____18____.

(Signed) *C. D. &c.*, Defendants.

REPLY.

[*Title of court and action.*]

The Plaintiff denies the several statements contained in the statement of defence and counter-claim, [*or* admits the several statements contained in paragraphs____and____of the statement of defence and counter-claim, but denies the other statements contained therein.]

Dated the_____day of_____18____.

(Signed) *A. B.*, Plaintiff.

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b. (*The "Julia David"*)

STATEMENT OF CLAIM.

[*Title of court and action.*]

Writ issued_____18____.

1. At about 2 a.m. on the 4th day of September, 1876, the steamship "Sarpedon," of 1,556 tons register, and 225 horse power, of which the Plaintiffs were owners, whilst on a voyage from Shanghai, and other ports to London, with a cargo of tea and other goods, was about eighty miles south-west of Ushant.

2. The wind at such time was about south-west, the weather was a little hazy and occasionally slightly thick, and the "Sarpedon" was under steam and sail, steering north-east, and proceeding at the rate of about ten knots per hour. Her proper regulation masthead and side lights were duly exhibited and burning brightly, and a good look-out was being kept.

3. At such time the masthead and red lights of a steam vessel, which proved to be the above-named vessel "Julia David," were seen at the distance of about two miles from and ahead of the "Sarpedon," but a little on her port bow. The helm of the "Sarpedon" was ported and hard

a-ported, but the "Julia David" opened her green light to the "Sarpedon," and although the engines of the "Sarpedon" were immediately stopped, and her steam whistle was blown, the "Julia David" with her stem struck the "Sarpedon" on her port side, abreast of her red light, and did her so much damage that her master and crew were compelled to abandon her, and she was lost with her cargo. The "Julia David" went away without rendering assistance to those on board the "Sarpedon," and without answering signals which were made by them for assistance.

4. Those on board the "Julia David" neglected to keep a proper look-out.

5. Those on board the "Julia David" neglected to duly port the helm of the "Julia David."

6. The helm of the "Julia David" was improperly starboarded.

7. The "Julia David" did not duly observe and comply with the provisions of Article 16 of the "Regulations for Preventing Collisions at Sea."

8. The said collision was occasioned by the improper and negligent navigation of the "Julia David."

The Plaintiffs claim—

1. A declaration that they are entitled to the damage proceeded for, and the condemnation of the said steamship "Julia David," and the Defendants, therein, and in costs.
2. To have an account taken of such damage with the assistance of merchants.
3. Such further and other relief as the nature of the case may require.

Dated the_____ day of_____ 18___.

(*Signed*) *A.B. &c.*, Plaintiffs.

DEFENCE AND COUNTER-CLAIM.

[*Title of court and action.*]

1. The Defendants are the owners of the Belgian screw steamship "Julia David," of about 1,274 tons register, and worked by engines of 140 horse power nominal, with a crew of 30 hands, which left Havre on the 2nd of September, 1876, with a general cargo, bound to Alicante and other ports in the Mediterranean.

2. About 2.45 a.m. of the 4th September, 1876, the "Julia David," in the course of her said voyage, was in the Bay of Biscay. The weather was thick with a drizzling rain, and banks of fog and a stiff breeze blowing from S.S.W., with a good deal of sea. The "Julia Daivid," under steam alone, was steering S.S.W. ½ W. by bridge steering compass, or S.W. ½ W. magnetic, and was making about five knots an hour. Her regulation lights were duly exhibited and burning brightly, and a good look-out was being kept on board her.

3. In the circumstances aforesaid those on board the David" was kept on her course. But after a short time the "Sarpedon" opened her red light and caused danger of collision. The helm of the "Julia David" was thereupon put hard a-port, and her engines stopped and almost immediately reversed full speed, but, nevertheless, the "Sarpedon" came into collision with the "Julia David," striking with the port side her stem and port bow, and doing her considerable damage.

4. The vessels separated immediately. The engines of the "Julia David" were then stopped, and her pumps sounded. She was making much water, and it was found necessary to turn her head away from the wind and sea. As soon as it could be done without great danger, she was steamed in the direction in which those on board her believed the "Sarpedon" to be, but when day broke and no traces of the "Sarpedon" could be discovered, the search was given up, and the "Julia David," being in a very disabled state, made her way to a port of refuge.

5. Save as hereinbefore appears, the several statements contained in the statement of claim are denied.

6. A good look-out was not kept on board the "Sarpedon."

7. The helm of the "Sarpedon" was improperly ported.

8. Those on board the "Sarpedon" improperly neglected or omitted to keep her on her course.

9. Those on board the "Sarpedon" did not observe the provisions of Article 16 of the "Regulations for Preventing Collisions at Sea."

10. The collision was occasioned by some or all of the matters and things alleged in the 6th, 7th, 8th, and 9th paragraphs hereof, or otherwise by the default of the "Sarpedon," or those on board her.

11. No blame in respect of the collision is attributable to the "Julia David" or to any of those on board her.

And by way of counter-claim the Defendants say that the collision caused great damage to the "Julia David."

And they claim—

(1.) The condemnation of the Plaintiffs [and their bail] in the damage caused to the "Julia David" and in the costs of this action.

(2.) To have an account taken of such damage with the assistance of merchants.

(3.) Such further and other relief as the nature of the case may require.

Dated the_____day of_____18____.

(Signed) *C. D., &c.*, Defendants.

REPLY.

[*Title of court and action.*]

The Plaintiffs deny the several statements contained in the statement of defence and counter-claim [*or, as the case may be*].

Dated the_____day of_____18____.

(Signed) *A. B., &c.*, Plaintiffs.

(2.) *In an Action for Salvage:*

a. (*The "Crosby."*)

STATEMENT OF CLAIM.

[*Title of court and action.*]

Writ issued_____18____.

1. The "Asia" is an iron screw steamship of 902 tons net register tonnage, fitted with engines of 120 horse-power nominal, is of the value of $_____, and was at the time of

the services hereinafter stated manned with a crew of twenty-three hands under the command of George Hook Bawn, her master.

2. At about 9 a.m. on the 29th of April, 1877, while the "Asia"—which was in ballast proceeding on a voyage to Nikolaev to load a cargo of grain—was between Odessa and Ochakov, those on board her saw a steam-ship ashore on a bank situated about ten miles to the westward of Ochakov. The "Asia" immediately steamed in the direction of the distressed vessel which made signals for assistance.

3. On nearing the distressed vessel, which proved to be the "Crosby," one of the "Asia's" boats was sent to the "Crosby," in charge of the second mate of the "Asia," and subsequently the master of the "Crosby" boarded the "Asia," and at the request of the master of the "Crosby" the master of the "Asia" agreed to endeavour to tow the "Crosby" afloat.

4. The "Crosby" at this time was fast aground, and was lying with her head about N.N.W.

5. The master of the "Asia" having ascertained from the master of the "Crosby" the direction in which the "Crosby" had got upon the bank, the "Asia" steamed up on the starboard side of the "Crosby" and was lashed to her.

6. The "Asia" then set on ahead and attempted to tow the "Crosby" afloat, and so continued towing without effect until the hawser which belonged to the "Asia" broke.

7. The masters of the two vessels being then both agreed in opinion that it would be necessary to lighten the "Crosby" before she could be got afloat, it was arranged that the cargo from the "Crosby" should be taken on board the "Asia."

8. The "Asia" was again secured alongside the "Crosby" and the hatches being taken off cargo was then discharged from the "Crosby" into the "Asia," and this operation was continued until about 6 p.m., by which time about 100 tons of such cargo had been so discharged.

9. When this had been done both vessels used their steam, and the "Asia" tried again to get the "Crosby" off, but without success. The "Asia" then towed with a hawser ahead of the "Crosby," and succeeded in getting her afloat, upon

which the "Crosby" steamed to an anchorage and then brought up.

10. The "Asia" steamed after the "Crosby" and again hauled alongside of her and commenced putting the transhipped cargo again on board the "Crosby," and continued doing so until about 6 a.m. of the 30th of April, by which time the operation was completed, and the "Crosby" and her cargo being in safety the "Asia" proceeded on her voyage.

11. By the services of the Plaintiffs the "Crosby" and her cargo were rescued from a very dangerous and critical position, as in the event of bad weather coming on whilst she lay aground she would have been in very great danger of being lost with her cargo.

12. The "Asia" encountered some risk in being lashed alongside the "Crosby," and she ran risk of also getting aground and of losing her charter, the blockade of the port of Nikolaev being at the time imminent.

13. The value of the hawser of the "Asia" broken as herein stated was $.....

14. The "Crosby" is an iron screw steam-ship of 1,118 tons net (1,498 gross) register tonnage. As salved, the "Crosby" and her cargo and freight have been agreed for the purposes of this action at the value of $.....

The Plaintiffs claim—

1. Such an amount of salvage, regard being had to the said agreement, as the court may think fit to award.
2. The condemnation of the Defendants [and their bail] in the salvage and in costs.
3. Such further and other relief as the case may require.

Dated the_____day of_____18___

(Signed) *A.B., &c.*, Plaintiffs.

DEFENCE.

[*Title of court and action.*]

1. The Defendants admit that the statement of facts contained in the statement of claim is substantially correct, except that the reshipment of the cargo on board the "Crosby" was completed by 4 a.m. on the 30th April.

2. The Defendants submit to the judgment of the court to award such a moderate amount of salvage to the Plaintiffs under the circumstances aforesaid as to the said court shall seem meet.

(Signed) *C.D., &c.*, Defendants.

REPLY.

[*Title of court and action.*]

The Plaintiffs deny the statement contained in the 1st paragraph of the statement of defence that the shipment of the cargo was completed by 4 a.m. on the 30th April.

Dated the_____day of _____18____

(Signed) *A.B., &c.* Plaintiffs.

---

b. ("*The Newcastle.*")

STATEMENT OF CLAIM.

[*Title of court and action.*]

Writ issued_____18____.

1. The "Emu" is a steam tug belonging to the Whitby Steam Boat Company, of six tons register, with engines of 40 horse-power, nominal, and was at the time of the circumstances hereinafter stated manned by a crew of five hands.

2. Just before midnight on the 22nd of July, 1876, when the "Emu" was lying in Whitby harbour, her master was informed that a screw steamship was ashore on Kettleness Point. He at once got up steam, but was not able, owing to the tide, to leave the harbour till about 1.45 a.m. of the 23rd.

3. About 2 a.m. the "Emu" reached the screw steam-ship, which was the "Newcastle," which was fast upon the rocks,

with a kedge and warp out. The wind was about N., blowing fresh; the sea was smooth, but rising; the tide was flood.

4. The master of the "Emu" offered his services, which were at first declined by the master of the "Newcastle"; shortly afterwards the kedge warp broke and the "Newcastle" swung square upon the land and more upon the rocks. The master of the "Newcastle" then asked the master of the "Emu" to tow him off, and after some conversation it was agreed that the remuneration should be settled on shore.

5. About 3 a.m. those on board the "Emu" got a rope from the "Newcastle" on board, and began to tow. After come towing this rope broke. The tow-line of the "Newcastle" was then got on board the "Emu," and the "Emu" kept towing and twisting the "Newcastle," but was unable to get her off till about 5 a.m., when it was near high water. The master of the "Emu" then saw that it was necessary to try a click or jerk in order to get the "Newcastle" off, and accordingly, at the risk of straining his vessel, he gave a strong click in a northerly direction, and got the "Newcastle" off.

6. The master of the "Emu" then asked if the "Newcastle" was making water, and was told a little only, but as he saw that the hands were at the pumps he kept the "Emu" by the "Newcastle" until she was abreast of Whitby. He then inquired again if any assistance was wanted, and being told that the "Newcastle" was all right, and should proceed on her voyage, he steamed the "Emu" back into Whitby harbour about 7 a.m.

7. About 8 a.m. a gale from N.E. which continued all that day and the next, came on to blow with a high sea. If the "Newcastle" had not been got off before the gale came on she would have gone to pieces on the rocks.

8. By the services aforesaid the "Newcastle" and her cargo and the lives of those on board her were saved from total loss.

9. The "Newcastle" is a screw steamship of 211 tons register, and was bound from Newcastle to Hull with a general cargo and 19 passengers. The value of the "Newcastle" her cargo and freight, including passage money, are as follows: —

The "Newcastle," $_____, her cargo, $____; freight and passage money, $_____; in all, $____.

Plaintiffs claim—

(1.) The condemnation of the Defendants [and their bail] in such an amount of salvage remuneration as to the court may seem just, and in the costs of this action.

(2.) Such further and other relief as the nature of the case may require.

Dated _____day of_____ ___18

(Signed) *A.B., &c.*, Plaintiffs.

DEFENCE.

[*Title of court and action.*]

1. At about 6.45 p.m. on the 22nd of July, 1876, the iron screw steam-ship "Newcastle," of 211 tons register, propelled by engines of 45 horse-power, and manned by 12 hands, her master included, whilst proceeding on a voyage from Newcastle to Hull with cargo and passengers, ran aground off Kettleness Point, on the coast of Yorkshire.

2. The tide at this time was the first quarter ebb, the weather was calm, and the sea was smooth, and the "Newcastle," after grounding as aforesaid, sat upright and lay quite still, heading about E.S.E. Efforts were then made to get the "Newcastle" again afloat by working her engines, but it was found that this could not be done in the then state of the tide.

3. At about 10 p.m. of the said day a kedge, with a warp attached to it, was carried out from the "Newcastle" by one of her own boats and dropped to seaward, and such warp was afterwards hove taut and secured on board the "Newcastle" with the view of its being hove upon when the flood tide made. Several cobles came to the "Newcastle" from Runswick, and the men in them offered their assistance, but their services, not being required, were declined.

4 At about 2 a.m. of the following morning the steam tug "Emu," whose owners, master, and crew are the Plaintiffs in this action, came to the "Newcastle" and offered assistance, which was also declined.

5. The flood tide was then making, and by about 2.45 a.m. the "Newcastle" had floated forward, and attempts

were made to get the stern of the "Newcastle" also afloat, and the warp attached to the aforesaid kedge was attempted to be hove in, but the said warp having parted, the master of the "Newcastle" endeavoured ineffectually to make an agreement with the master of "Emu" to assist in getting the "Newcastle" afloat, and at about 3 a.m. a rope was given to the "Emu" from the port bow of the "Newcastle," and directions were given to the "Emu" to keep the head of the "Newcastle" to the eastward in the same way as it had been kept by the aforesaid kedge anchor and warp. The "Emu" then set ahead and almost immediately the said rope was broken. A coir hawser was thereupon given to the "Emu," and those on board her were directed not to put any strain on it, but to keep the "Emu" paddling ahead sufficiently to steady the head of the "Newcastle," and to keep her head to the eastward. This the "Emu" did and continued to do until about 4.40 a.m., when the "Newcastle," by means of her own engines, was moved off from the ground, and the "Emu" was brought broad on the port bow of the "Newcastle," and the "Emu" had to stop towing and to shift the rope from her port bollard, where it was fast to her towing hook; but the "Newcastle" continuing to go ahead, the said rope had to be let go on board the "Emu," and it was then hauled in on board the "Newcastle." The "Newcastle" under her own steam, then commenced proceeding south, the wind at the time being N.N.W. and light, and the weather fine. It was afterwards ascertained that the "Newcastle" was making a little water in her afterhold, and her hand pumps were then worked, and they kept the "Newcastle" free.

6. The "Emu" proceeded back with the "Newcastle" as far as Whitby, and the "Newcastle" then continued on her voyage and arrived in the Humber at about 2.45 p.m, of the same day.

7. During the time aforesaid the master, crew, and passengers of the "Newcastle" remained on board the "Newcastle," and no danger was incurred in their so doing.

8. Save as herein appears the Defendants deny the truth of the several statements contained in the statement of claim.

9. The Defendants have paid into Court and tendered to the Plaintiffs for their services the sum of $____, and have offered to pay their costs, and the Defendants submit that such tender is sufficient.

Dated the_____day of_____18____.

(Signed) *C.D. &c.*, Defendants.

(3.) *In an action for distribution of salvage:*

STATEMENT OF CLAIM.

[*Title of court and action.*]

Writ issued_____18 ___.

1. *Describe briefly the salvage services, stating the part taken in them by the Plaintiffs, and the capacity in which they were serving.*

2. The sum of $____ has been paid by the owners of the ship, &c [*state name of ship or other property salved*] to the Defendants, as owners of the ship [*state name of salving ship*], and has been accepted by them in satisfaction of their claim for salvage, but the said Defendants have not paid and refuse to pay any part of that sum to the Plaintiffs for their share in the said salvage services.

The Plaintiffs claim —

1. An equitable share of the said sum of $____, to be apportioned among them as the court shall think fit and the costs of this action.
2. Such other relief as the nature of the case may require.

Dated the_____day of_____18 .

(Signed) *A.B., &c.*, Plaintiffs.

(4.) *In an Action for master's wages and disbursements:*

a. ("*The Princess.*")

STATEMENT OF CLAIM.

[*Title of court and action.*]

Writ issued_____18____.

1. The Plaintiff, on the 10th day of February, 1877, was appointed by the owner of the British barque "Princess,"

proceeded against in this action, master of the said barque, and it was agreed between the Plaintiff and the said owner that the wages of the Plaintiff as master should be $_____ per month.

2. The Plaintiff acted as master of the said barque from the said 10th day of February until the 25th day of October,

1877, and there is now due to him for his wages as master during that time the sum of $_____

3. The Plaintiff as master of the said barque expended various sums of money for necessary disbursements on account of the said barque; and there is now due to him in respect of the same a balance of $_____

The Plaintiff claims—

1. A decree pronouncing the said sums, amounting in the whole to $_____, to be due to him for wages and disbursements, and directing the said vessel to be sold and the amount due to him to be paid to him out of the proceeds.
2. Such further and other relief as the nature of the case may require.

Dated the_____day of_____18___ .

(Signed) *A.B.*, Plaintiff.

---

b. ("*The Northumbria.*")

STATEMENT OF CLAIM.

[*Title of court and action.*]

Writ issued_____18___

1. In or about the month of July, 1873, the Plaintiff was engaged by the owners of the British ship "Northumbria" to serve on board her as her master, at wages after the rate of $_____per month, and he entered into the service of the said ship as her master accordingly, and thenceforward served on board her in that capacity and at that rate of wages until he was discharged as hereinafter stated.

2. When the Plaintiff so entered into the service of the said ship she was lying at the port of North Shields in the county of Northumberland, and she thence sailed to Point de Galle, and thence to divers other ports abroad, and returned home to Cardiff, where she arrived on the 1st day of October, 1875.

3. The "Northumbria," after having received divers repairs at Cardiff, left that port on the 5th day of November, 1875, under the command of the Plaintiff on a voyage,

which is thus described in the ship's articles signed by the Plaintiff and her crew before commencing the same; viz.: "A voyage from Cardiff to Bahia or Pernambuco, and "any ports or places in the Brazils, or North or South "America, United States of America, Indian, Pacific, or "Atlantic Oceans, China or Eastern Seas, Cape Colonies, "West Indies, or Continent of Europe, including the "Mediterranean Sea or Seas adjacent, to and fro if re-"quired for any period not exceeding three years, but "finally to a port of discharge in the United Kingdom or "Continent of Europe."

4. The "Northumbria," after so leaving Cardiff, met with bad weather and suffered damage, and was compelled to put back to Falmouth for repairs before again proceeding on her voyage.

5. The Plaintiff was ready and willing to continue in the service of the "Northumbria," and to perform his duty as her master on and during the said voyage, but the Defendants, the owners of the "Northumbria," wrongfully and without reasonable cause discharged the Plaintiff on the 23rd day of November from his employment as master, and appointed another person as master of the "Northumbria" on the said voyage in the place of the Plaintiff, and thereby heavy damage and loss have been sustained by the Plaintiff.

6. The Plaintiff, whilst he acted as master of the "Northumbria," earned his wages at the rate aforesaid; and he also, as such master, made divers disbursements on account of the "Northumbria"; and there was due and owing to the Plaintiff in respect of such his wages and disbursements, at the time of his discharge, a balance of $_____, which sum the Defendants without sufficient cause have neglected and refused to pay to the Plaintiff.

The Plaintiff claims—

1. Payment of the sum of $_____, the balance due to the Plaintiff for his wages and disbursements, with interest thereon.
2. Ten days double pay, according to the provisions of section 187 of "The Merchant Shipping Act, 1854."
3. Damages in respect of his wrongful discharge by the Defendants.

4. The condemnation of the Defendants [and their bail] in the amounts claimed by or found due to the Plaintiff.

5. To have an account taken [with the assistance of merchants] of the amount due to the Plaintiff in respect of his said wages and disbursements, and for damages in respect of such wrongful discharge.

6. Such further and other relief as the nature of the case may require.

Dated the_____day of_____18____.

(Signed) *A.B.*, Plaintiff.

DEFENCE.

[*Title of court and action.*]

1. The Defendants admit the statements made in the 1st, 2nd, 3rd and 4th paragraphs of the Plaintiff's statement of claim.

2. Whilst the "Northumbria" was upon her voyage in the said 3rd paragraph mentioned, and before and until she put into Falmouth, as in the said 4th paragraph mentioned, the Plaintiff was frequently under the influence of drink.

3. During the night of the 10th November, 1875, and the morning of the 11th November, 1875, whilst a violent gale was blowing and the ship was in danger, the Plaintiff was wholly drunk and was incapable of attending to his duty as master of the said ship; and in consequence of the condition of the Plaintiff much damage was done to the said ship, and the said ship was almost put ashore.

4. The damage in the 4th paragraph of the statement of claim mentioned was wholly or in part occasioned by the drunken condition of the Plaintiff during the said voyage from Cardiff to Falmouth.

5. The Defendants having received information of the above facts on the arrival of the said ship at Falmouth, and having made due inquiries concerning the same, had reasonable and probable cause to and did discharge the Plaintiff from their employment as master of the said ship on the 23rd November, 1875.

6. The Plaintiff, on the 12th day of November, 1875, whilst the said ship was at Falmouth, wrongfully and improperly tore out and destroyed certain entries which had been made by the mate of the said ship in her log-book relating to said sea voyage from Cardiff to Falmouth; and the Plaintiff substituted in the said log-book entries made by himself with intent to conceal the true facts of said voyage from the Defendants.

7. The Defendants bring into court the sum of $____ in respect of the Plaintiff's claim for wages and disbursements, and say that the said sum is enough to satisfy the Plaintiff's said claim in that behalf. The Defendants offered to pay the plaintiff's costs to this time in respect of those two causes of action.

Dated the_____ day of_____ 18____.

(Signed) *C.D., E.F., &c.*, Defendants.

REPLY.

[*Title of court and action.*]

The Plaintiff denies the several statements contained in the statement of defence [*or as the case may be*].

Dated the_____ day of_____ 18____.

(Signed) *A.B.*, Plaintiff.

(5.) *In an Action for Seamen's wages:*

STATEMENT OF CLAIM:

[*Title of Court and Action.*]

Writ issued _____ 18__.

1. The Plaintiff, *A.B.*, was engaged as mate of the British brig "Bristol," at the rate of $_____ per month, and in pursuance of that engagement served as mate on board the said brig from the _____ day of_____ 18___, to the_____ day of_____ 18___, and during that time as mate of the said brig earned wages amounting to $_____. After giving credit for the

sum received by him on account, as shown in the schedule hereto, there remains due to him for his wages a balance of $\$$_____.

2. The Plaintiffs *C. D.*, *E. F.* and *G. H.* were engaged as able seamen on board the said brig, and having in pursuance of that engagement served as able seamen on board the said brig during the periods specified in the schedule hereto, earned thereby as wages the sums set forth in the same schedule, and after giving credit for the sums received by them respectively, on account of the said wages, there remain due to them the following sums, namely:—

To *C.D.* the sum of $\$$_____.
To *E.F.* " $\$$_____.
To *G.H.* " $\$$_____.

3. The Plaintiffs *I K.* and *L. M.* were engaged as ordinary seamen on board the said brig, and having served on board the same in pursuance of the said engagement during the periods specified in the schedule hereto, earned thereby the sums set forth in the same schedule, and after giving credit for the sums received by them respectively, on account of the said wages, there remain due to them the following sums, namely:—

To *I.K.* the sum of $\$$_____.
To *L.M.* " $\$$_____.

SCHEDULE referred to above.

Wages due to *A.B.*, mate, from the_____18___, to the_____18___,_____months and_____days at $\$$_____per month.

		$\$$____:___:___
Less received on account	–	$\$$____:___:___
Balance due	–	$\$$____:___:___

Wages due to *C.D.*, able seaman, from the_____ 18___, to the_____18___,____months and____ days, at $\$$_____per month.

		$\$$____:___:___
Less received on account	–	$\$$____:___:___
Balance due	–	$\$$____:___:___

[*So on with the wages due to the other Plaintiffs*].

The Plaintiffs claim—

1. The several sums so due to them respectively with the costs of this action.
2. Such double pay as they may be entitled to under sec. 187, of "*The Merchant Sihpping Act*, 1854."
3. Such other relief as the nature of the case may require.

Dated the_____day of _____18___.

(Signed) *A.B., &c.*, Plaintiffs.

(6.) *In an Action for bottomry :*

STATEMENT OF CLAIM.

[*Title of court and action.*]

Writ issued_____18___.

1. In the month of July, 1876, the Italian barque "Roma Capitale" was lying in the port of Rangoon in the Pegu Division of British Burmah, and Pietro Ozilia, her master, being in want of funds, was compelled to borrow on bottomry of the said barque and her freight from the Cassa Marittima di Genova the sum of $_____for the necessary and indispensable repairs, charges, and supplies of the said vessel in the said port of Rangoon, and to enable her to prosecute her voyage from Rangoon to Akyab and thence to_____.

2. Accordingly, by a bond of bottomry dated the 11th day of the said month of July and duly executed by him, the said Pietro Ozilia, in consideration of the sum of $_____ lent by the said Cassa Marittima di Genova upon the said adventure upon the said barque and freight at the maritime premium of 23 per cent, bound himself and the said barque and the freight to become payable in respect of the said voyage to pay to the said Cassa Marittima di Genova, their successors or assigns, the sum of $_____ (which included the principal charges and the maritime interest due thereon), within 30 days after the said barque should arrive at her port of discharge; and the said bond provided that the said Cassa Marittima di Genova should take upon themselves the maritime risk of the said voyage.

3. The "Roma Capitale" has since successfully prosecuted her said intended voyage for which the aforesaid bond was granted, and arrived at _____ as her port of discharge on or about the 30th day of March, 1877.

4. Before the issue of the writ in this action the said bond became due and payable, and was duly endorsed by the said Cassa Marittima di Genova to the Plaintiffs who thereby became and are the legal holders thereof, and the said sum of $_____ is now due and owing thereon to the Plaintiffs.

The Plaintiffs claim—

1. A declaration for the force and validity of the said bond.
2. The condemnation of the said barque "Roma Capitale" and her freight in the sum of $_____ with interest thereon at per cent per annum from the time when the said bond became payable, and in costs.
3. A sale of the said barque and the application of the proceeds of her sale and of her freight in payment to the Plaintiffs of the said amount and interest and costs.
4. Such further and other relief as the case may require.

Dated the_____day of_____18___.

(Signed) *A. B., &c.*, Plaintiffs.

(7.) *In an Action for mortgage :*

STATEMENT OF CLAIM.

[*Title of court and action.*]

Writ issued_____18_____.

1. The above-named brigantine or vessel "Juniper" is a British ship belonging to the port of_____, of the registered tonnage of 109 tons or thereabouts, and at the time of the mortgage hereinafter mentioned, Thomas Brock, of _____was the registered owner of the said brigantine.

2. On the 4th day of July, 1876, $\frac{32}{64}$th parts or shares of the said brigantine were mortgaged by the said Thomas Brock to the Plaintiff, to secure the payment by the said Thomas Brock to the Plaintiff of the sum of $_____, together with interest thereon at the rate of — per cent per annum on or before the 1st day of July, 1877.

3. The said mortgage of the "Juniper" was made by an instrument dated the 4th day of July, 1876, in the form prescribed by the 66th section of "*The Merchant Shipping Act*, 1854," and was duly registered in accordance with the provisions of the said Act.

4. No part of the said principal sum or interest has been paid, and there still remains due and owing to the Plaintiff on the said mortgage security the principal sum of $_____, together with a large sum of money for interest and expenses, and the Plaintiff, although he has applied to the said Thomas Brock for payment thereof, cannot obtain payment without the assistance of this Court.

The Plaintiff claims—

1. Judgment for the said principal sum of $_____, together with interest and expenses.
2. To have an account taken of the amount due to the Plaintiff.
3. Payment out of the proceeds of the said brigantine now remaining in court, of the amount found due to the Plaintiff, together with costs [*or* to have the said brigantine sold, *&c., as the case may be.*]
4. Such further and other relief as the nature of the case may require.

Dated the____ ___day of _____18___.

(Signed) *A. B.*, Plaintiff.

(8.) *In an Action between co-owners (for account):*

STATEMENT OF CLAIM.

[*Title of court and action.*]

Writ issued_____18___.

1. The "Horlock" is a sailing ship of about 40 tons register, trading between_____and_____.

2. By a bill of sale duly registered on the 11th day of June, 1867, the Defendant, John Horlock, who was then sole owner of the above named ship "Horlock," transferred to Thomas Worraker, of_____, $\frac{32}{64}$th parts or shares of the ships for the sum of $\$$_____.

3. By a subsequent bill of sale duly registered on the 16th December, 1876, the said Thomas Worraker transferred his said $\frac{32}{64}$th shares of the ship to George Wright, the Plaintiff, for the sum of $\$$_____.

4. The Defendant, John Horlock, has had the entire management and the command of the said ship from the 11th day of June, 1867, down to the present time.

5. The Defendant has from time to time up to and including the 24th September, 1874, rendered accounts of the earnings of the ship to the aforementioned Thomas Worraker, but since the said 24th of September, 1874, the Defendant has rendered no accounts of the earnings of the ship.

6. Since the 16th December, 1876, the ship has continued to trade between_____and_____, and the Plaintiff has made several applications to the Defendant, John Horlock, for an account of the earnings of the ship, but such applications have proved ineffectual.

7. The Plaintiff is dissatisfied with the management of the ship, and consequently desires that she may be sold.

The Plaintiff claims—

1. That the court may direct the sale of the said ship "Horlock."
2. To have an account taken of the earnings of the said ship, and that the Defendant may be condemned in the amount which shall be found due to the Plaintiff in respect thereof, and in the costs of this action.
3. Such further or other relief as the nature of the case may require.

Dated the_____day of_____18___.

(Signed) *A. B.*, Plaintiff.

DEFENCE.

[*Title of court and action.*]

1. The defendant denies the statements contained in paragraph 2 of the statement of claim.

2. The Defendant further says that he never at any time signed any bill of sale transferring any shares whatever of the said ship "Horlock" to the said Thomas Worraker, and further says that if any such bill was registered as alleged on the 11th June in the said 2nd paragraph (which the Defendant denies) the same was made and registered fraudulently and without the knowledge, consent, or authority of the Defendant.

3. The Defendant does not admit the statements contained in the 3rd paragraph of the statement of claim, and says that if the said Thomas Worraker transferred any shares of the said ship to the Plaintiff as alleged (which the Defendant does not admit), he did so wrongfully and unlawfully, and that he had not possession of or any right to or in respect of said shares.

4. The Defendant denies the statements contained in paragraph 5 of the statement of claim, and says that he never rendered any such accounts as alleged therein.

5. The Defendant does not admit the statements contained in paragraph 6 of the statement of claim.

Dated the_____day of_____18 .

(Signed) *C.D.*, Defendant.

REPLY.

[*Title of court and action.*]

The Plaintiff denies the several statements in the statement of defence.

Dated the_____day of_____18___.

(Signed) *A.B.*, Plaintiff.

(9.) *In an Action for Possession.*

STATEMENT OF CLAIM.

[*Title of court and action.*]

Writ issued _____ 18____

1. The Plaintiffs are registered owners of $\frac{44}{64}$ shares in the British ship "Native Pearl," and such shares are held by them respectively as follows:—

Morgan Parsall Griffiths is owner of $\frac{16}{64}$ shares, Edmund Nicholls of $\frac{8}{64}$ shares, William Meagher of $\frac{4}{64}$ shares, Isaac Butler of $\frac{8}{64}$ shares, and William Herbert of $\frac{8}{64}$ shares.

2. The only owner of the said ship other than the Plaintiffs is John Nicholas Richardson, who is the registered owner of the remaining $\frac{20}{64}$ shares of the said ship, and has hitherto acted as managing owner and ship's husband of the said ship, and has possession of and control over the said ship and her certificate of registry.

3. The Defendant, the said John Nicholas Richardson, has not managed the said ship to the satisfaction of the Plaintiffs, and has by his management of her occasioned great loss to the Plaintiffs; and the Plaintiffs in consequence thereof before the commencement of this action gave notice to the Defendant to cease acting as managing owner and ship's husband of the said ship, and revoked his authority in that behalf, and demanded from the Defendant the possession and control of the said ship and of her certificate of registry, but the Defendant has refused and still refuses to give possession of the said ship and certificate to the Plaintiffs, and the Plaintiffs cannot obtain possession of them without the assistance of this court.

4. The Defendant has neglected and refused to render proper accounts relating to the management and earnings of the said ship, and such accounts are still outstanding, and unsettled between the Plaintiffs and the Defendant.

The Plaintiffs claim—

1. Judgment giving possession to the Plaintiffs of the said ship and of her certificate of registry.
2. To have an account taken, with the assistance of merchants, of the earnings of the ship.
3. A sale of the Defendant's shares in the said ship.

4. Payment out of the proceeds of such sale of the balance (if any) found due to the Plaintiffs and of the costs of this action.
5. Such further and other relief as the nature of the case may require.

Dated the_____day of_____18___.

(Signed) *A.B.*, &c., Plaintiffs.

(10.) *In an Action for Necessaries :*

STATEMENT OF CLAIM.

[*Title of court and action.*]

Writ issued_____18___.

1. The Plaintiffs at the time of the occurrences hereinafter mentioned carried on business at the port of_____as bonded store and provision merchants and ship chandlers.

2. The " Sfactoria" is a Greek ship, and in the months of June, July, August and September, 1874, was lying in the said port of_____under the command of one George Lazzaro, a foreigner, her master and owner, and in the said month of September she proceeded on her voyage to_____

3. The Plaintiffs, at the request and by the direction of the said master, supplied during the said months of June, July, August and September, 1874, stores and other necessaries for the necessary use of the said ship upon the said then intended voyage to the value of $_____, for which sum an acceptance was given by the said George Lazzaro to the Plaintiffs; but on the 4th day of February, 1875, the said acceptance, which then became due, was dishonoured, and the said sum of $_____with interest thereon from the said 4th day of February, 1875, still remains due and unpaid to the Plaintiffs.

4. In the month of August aforesaid the Plaintiffs, at the request of the said master, advanced to him the sum of $_____for the necessary disbursements of the said ship at the said port of_____, and otherwise on account of the said ship; and also at his request paid the sum of $_____, which was due for goods supplied for the necessary use of the said ship on the said voyage; and of the

sums so advanced and paid there still remains due and unpaid to the Plaintiffs the sum of $_____with interest thereon from the 5th day of January, 1875, on which last mentioned day a promissory note given by the said George Lazzaro to the said Plaintiffs for the said sum of $_____ was returned to them dishonoured.

5. The Plaintiffs also at the said master's request, between the 1st of September, 1874, and the commencement of this action paid various sums amounting to $_____for the insurance of their said debt.

6. The said goods were supplied and the said sums advanced and paid by the Plaintiffs upon the credit of the said ship, and not merely on the personal credit of the said master.

The Plaintiffs claim—

1. Judgment for the said sums of $_____ and $_____ together with interest thereon.
2. That the Defendant [and his bail] be condemned therein, and in costs.

or

2. A sale of the said ship, and payment of the said sums and interest out of the proceeds of such sale, together with costs.
3. Such further and other relief as the case may require.

Dated the_____day of_____18___.

(Signed) *A. B., &c.*, Plaintiffs.

(11.) *In an Action for condemnation of a ship or cargo, &c.:*

STATEMENT OF CLAIM.

[*Title of court and action.*]

Writ issued_____18___

State briefly the circumstances of the seizure, or, if an Affidavit of the circumstances has been filed, refer to the Affidavit.

A.B. [*state name of person suing in the name of the Crown*] claims—

The condemnation of the said ship_____[and her cargo, and of the said slaves, *or as the case may be*], on the ground that the said ship, &c., was at the time of the seizure thereof fitted out for or engaged in the Slave Trade [*or* as having been captured from pirates, *or* for violation of the Act_____ S.____ *or as the case may be*].

Dated the_____day of_____18____.

(Signed) *A.B.*

(12.) *In an Action for Restitution of a Ship or Cargo:*

STATEMENT OF CLAIM.

[*Title of court and action.*]

Writ issued_____18____.

State briefly the circumstances of the seizure.

C.D. [*State name of person claiming restitution*] claims—

The restitution of the said vessel_____[and her cargo, *or as the case may be*] together with costs and damages for the seizure thereof [*or as the case may be*]

Dated the_____day of_____18____.

(Signed) *C. D. &c.*, Plaintiffs.

(13.) *In a Piracy case, where the captors intend to apply for Bounty, add—*

A. B. further prays the Court to declare—

(1.) That the persons attacked or engaged were pirates.

(2.) That the total number of pirates so engaged or attacked was_____of whom_____were captured.

(3.) That the vessel [*or* vessels and boats] engaged was [*or* were]_____[and_____].

Dated the_____day of_____18____.

(Signed) *A. B.*

(14.) *In an Action for recovery of any pecuniary forfeiture or penalty :*

STATEMENT OF CLAIM.

[*Title of court and action.*]

Writ issued_____18___.

State briefly the circumstances, and the Act and section of Act, under which the penalty is claimed.

I, *A. B.*, claim to have the Defendant condemned in a penalty of $_____, and in the costs of this action.

Dated the_____day of_____18___.

(Signed) *A. B.*

No. 24.

INTERROGATORIES. Rule 69.

[*Title of court and action.*]

Interrogatories on behalf of the Plaintiff *A. B.* [*or* Defendant *C. D.*] for the examination of the Defendants *C. D.* and *E. F.* [*or* Plaintiff *A. B.*, *or as the case may be*].

1. Did not, &c.
2. Have not, &c.

The Defendant *C. D.* is required to answer the interrogatories numbered_____.

The Defendant *E. F.* is required to answer the interrogatories numbered_____.

Dated the_____day of_____18___.

(Signed) *A.B.* [*or C.D., as the case may be.*]

No. 25.

Rule 69. ANSWERS TO INTERROGATORIES.

[*Title of court and action.*]

The answers of the Defendant *C.D.* [*or* Plaintiff *A.B.*, *&c.*] to the interrogatories filed for his examination by the Plaintiff *A. B.* [*or* Defendant *C. D.*, *&c.*]

In answer to the said interrogatories I, the above-named *C.D.* [*or A. B.*, *&c.*], make oath and say as follows:—

1. _____.
2. _____.

&c. &c. &c.

On the_____day of_____ 18__, the said *C.D.* [*or A.B.*, *&c.*,] was duly sworn to the truth of this affidavit at_____. Before me, *E. F.*, *&c.* } (Signed) *C.D.* [*or A.B.*]

No. 26.

Rule 71. AFFIDAVIT OF DISCOVERY.

[*Title of court and action.*]

I, the Defendant *C. D.* [*or* Plaintiff *A. B.*, *&c.*], make oath and say as follows:

1. I have in my possession or power the documents relating to the matters in question in this action, set forth in the first and second parts of the first schedule hereto.

2. I object to produce the documents set forth in the second part of the said first schedule on the ground that [*state grounds of objection, and verify the facts as far as may be*].

3. I have had, but have not now, in my possession or power the documents relating to the matters in question in this action as set forth in the second schedule hereto.

4. The last mentioned documents were last in my possession or power on [*state when*].

5. [*Here state what has become of the last mentioned documents, and in whose possession they now are.*]

6. According to the best of my knowledge, information, and belief, I have not now and never had in my possession, custody, or power, or in the possession, custody or power of my solicitor or agent, or of any other person or persons on my behalf, any deed, account, book of account, voucher, receipt, letter, memorandum, paper or writing, or any copy of or extract from any such document, or any other document whatsoever, relating to the matters in question in this action, or any of them, or wherein any entry has been made relative to such matters, or any of them, other than and except the documents set forth in the said first and second schedules hereto.

SCHEDULE No. 1.

Part 1.

[*Here set out documents.*]

Part 2.

[*Set out documents.*]

SCHEDULE No. II.

[*Set out documents.*]

On the_____day of_____ 18__ said *C.D.* [*or A.B. &c.*] was duly sworn to the truth of this affidavit at_____ Before me, *E.F., &c.* } (Signed) *C.D.* [*or A.B.*]

No. 27. Rule 72.

NOTICE TO PRODUCE.

[*Title of court and action.*]

Take notice that the Plaintiff *A.B.* [*or* Defendant *C.D.*] requires you to produce for his inspection, on or before the _____day of_____, the following documents.

Here describe the documents required to be produced.]

Dated_____day of_____18____.

(Signed) *A.B.*, Plaintiff,
[*or C.D.*, Defendant.]

To *C.D.*, Defendant,
[*or as the case may be.*]

No. 28.

Rule 74.

NOTICE TO ADMIT DOCUMENTS.

[*Title of court and action.*]

Take notice that the Plaintiff, *A.B.* [*or* Defendant *C.D.*] in this action proposes to adduce in evidence the several documents hereunder specified, and that the same may be inspected by the Defendant [*or* Plaintiff], his solicitor or agent, at_____on_____, between the hours of_____and_____; and the Defendant [*or* Plaintiff] is hereby required, within *forty-eight hours* from the last mentioned hour, to admit that such of the said documents as are specified as originals were respectively written, signed or executed, as they purport respectively to have been; that such as are specified as copies are true copies; and that such documents as are stated to have been served, sent, or delivered, were so served, sent or delivered respectively; saving all just exceptions to the admissibility of all such documents as evidence in this action.

Description of Documents.	Dates.	Time and mode of service or delivery, &c.
[*Here briefly describe documents.*] (1.) *Originals.* (2.) *Copies.*	[*Here state the date of each document.*]	[*Here state whether the original or a duplicate was sent by post, or served or delivered, and when and by whom.*]

Dated the_____day of_____18___.

(Signed) *A. B.*, Plaintiff [*or C.D.*, Defendant.]

To *C. D.*, Defendant,
[*or as the case may be.*]

No. 29.

NOTICE TO ADMIT FACTS. Rule 74.

[*Title of court and action.*]

Take notice that the Plaintiff *A. B.* [*or* Defendant *C. D.*] demands admission of the under mentioned facts, saving all just exceptions.

1. } [*Here state briefly the facts of which admission is*
2. } *demanded.*]

Dated the_____day of_____18___.

(Signed) *A. B.*, Plaintiff [*or C. D.*, Defendant.]

To *C. D.*, Defendant,
[*or as the case may be*].

No. 30.

NOTICE OF MOTION. Rule 81.

[*Title of court and action.*]

Take notice that on [*state day of week*] the_____day of_____, the Plaintiff [*or* Defendant] will [by counsel, *or* by his solicitor, *if the motion is to be made by counsel or solicitor*] move the judge in court [*or* in chambers, *as the case may be*] to order that [*state nature of order to be moved for. In a notice of motion to vary a report of the registrar, the items objected to must be specified*].

Dated the_____ day of_____18___.

(Signed) *A. B.*, Plaintiff [*or C. D.*, Defendant.]

Rule 86.

No. 31.

NOTICE OF TENDER.

[*Title of court and action.*]

Take notice that I have paid into court, and tender in satisfaction of the Plaintiff's claim [*or, as the case may be*] *if the tender is for costs also, add* including costs,] the sum of [*state sum tendered both in letters and figures, and on what terms, if any, the tender is made*].

Dated the_____day of_____18___.

(Signed) *C. D.*, Defendant

Rule 86.

No. 32.

NOTICE ACCEPTING OR REJECTING TENDER.

[*Title of court and action.*]

Take notice that I accept [*or* reject] the tender made by the Defendant in this action.

Dated the_____day of_____18___.

(Signed *A. B.*, Plaintiff

Rule 92.

No. 33.

INTERPRETER'S OATH.

You swear that you are well acquainted with the English and_____languages [*or as the case may be*] and that you will faithfully interpret between the Court and the witnesses.

So help you GOD

No. 34. Rule 93.

APPOINTMENT TO ADMINISTER OATHS.

(1.) *In Admiralty Proceedings generally:*

(L.S.)

[*Title of court.*]

To [*State name and address of Commissioner*].

I hereby appoint you to be a Commissioner to administer oaths in all Admiralty proceedings in this Court.

(Signed) *A.B.*,
Judge, or *Local Judge in Admiralty.*

(2.) *In any particular Proceeding.*

(L.S.)

[*Title of court and action.*]

To [*State name and address of Appointee*].

I hereby authorize you to administer an oath [*or* oaths *as the case may be*] to [*state name of person or persons to whom, and proceeding in which the oath is to be administered, or as the case may be*].

(Signed) *A.B.*,
Judge, or *Local Judge in Admiralty.*

No. 35. Rule 94.

FORM OF OATH TO BE ADMINISTERED TO A WITNESS.

You swear that the evidence given by you shall be the truth, the whole truth, and nothing but the truth.

So help you GOD.

FORM OF DECLARATION IN LIEU OF OATH.

I solemnly promise and declare that the evidence given by me shall be the truth, the whole truth, and nothing but the truth.

Rule 94.

No. 36.

FORM OF OATH TO BE ADMINISTERED TO A DEPONENT.

You swear that this is your name and handwriting, and that the contents of this affidavit are true.

So help you GOD.

FORM OF DECLARATION IN LIEU OF OATH TO BE MADE BY A DEPONENT.

I solemnly declare that this is my name and handwriting, and that the contents of this deposition are true.

No. 37.

Rule 99.

FORM OF JURAT

[*Where Deponent is sworn by Interpretation.*]

On the_____day of_____ 18 , the said *A.B.* was duly sworn to the truth of this affidavit by the interpretation of *C.D.*, who was previously sworn, that he was well acquainted with the English and_____languages, [*or as the case may be*] and that he would faithfully interpret the said affidavit, at_____.

Before me,

E.F., &c.

(Signed) *A.B.*

No. 38. Rule 102.

ORDER FOR EXAMINATION OF WITNESSES.

[*Title of court and action.*]

On the_____day of_____18____.

Before_____Judge, &c.

It is ordered that [*state the names of the witnesses so far as it can be done*], witnesses for the Plaintiff [*or* Defendant], shall be examined before the judge [*or* registrar], at [*state place of examination*], on [*state day of week*], the_____ day of_____instant [*or as the case may be*], at_____ o'clock in the_____noon.

(Signed) *E.F.*,
Registrar, *or* District Registrar

No. 39.

COMMISSION TO EXAMINE WITNESSES. Rule 104.

(L.S.) [*Title of court and action.*]

VICTORIA, &c.

To [*state name and address of commissioner.*] Greeting:

Whereas the Judge of our Exchequer Court of Canada, [*or the Local Judge in Admiralty of the Exchequer Court for the Admiralty District of*_____] has decreed that a commission shall be issued for the examination of witnesses in the above named action. We, therefore, hereby authorize you, upon the_____day of_____18____, at _____, in the presence of the parties, their counsel, and solicitors, or, in the absence of any of them, to swear the witnesses who shall be produced before you for examination in the said action, and cause them to be examined, and their evidence to be reduced into writing. We further authorize you to adjourn, if necessary, the said examination from time to time, and from place to place, as you may find expedient. And we command you, upon the examination

being completed, to transmit the evidence duly certified, together with this commission, to the registry of our said court at_____.

Given at_____in our said court, under the seal thereof, this_____day of_____18___.

(Signed) *E.F.*,
Registrar, *or* District Registrar.

Commission to examine witnesses.
Taken out by

Rule 107.

No. 40.

RETURN TO COMMISSION TO EXAMINE WITNESSES.

[*Title of court and action.*]

I, *A. B.*, the commissioner named in the commission hereto annexed, bearing date the_____day of_____ 18___, hereby certify as follows:—

(1.) On the_____day of_____18___I opened the said commission at_____, and in the presence of [*state who were present, whether both parties, their counsel, or solicitors, or as the case may be*], administered an oath to and caused to be examined the under named witnesses who were produced before me on behalf of the [*state whether Plaintiff or Defendant*] to give evidence in the above named action, viz.:—

[*Here state names of witnesses.*]

(2.) On the_____day of_____18___I proceeded with the examinations at the same place [*or, at some other place, as the case may be,*] and in the presence of [*state who were present, as above,*] administered an oath to and caused to be examined the under-named witnesses who were pro-

duced before me on behalf of [*state whether Plaintiff or Defendant*] to give evidence in the said action, viz.:

[*State names of witnesses.*]

(3.) Annexed hereto is the evidence of all the said witnesses certified by me to be correct.

Dated the_____day of_____18____.

(Signed) *G. H.*,
Commissioner.

No. 41.

SHORTHAND WRITER'S OATH. Rule 109.

You swear that you will faithfully report the evidence of the witnesses to be produced in this action.

So help you GOD.

No. 42.

NOTICE OF TRIAL. Rule 114.

[*Title of court and action.*]

Take notice that I set down this action for trial.

Dated the_____day of_____18____.

(Signed) *A.B.*, Plaintiff,
[*or C.D.*, Defendant.]

Rule 127.

No. 43.

REGISTRAR'S REPORT.

(L.S.) [*Title of court and action.*]

To the Honourable the Judge of the Exchequer Court of Canada [*or* To the Honourable the Local Judge in Admiralty of the Exchequer Court for the Admiralty District of_____.

Whereas by your decree of the_____ 18____, you were pleased to pronounce in favour of the Plaintiff [*or* Defendant], and to condemn the Defendant [*or* Plaintiff] and the ship_____[*or as the case may be*] in the amount to be found due to the Plaintiff [*or* Defendant] [and in costs], and you were further pleased to order that an account should be taken, and to refer the same to the registrar [assisted by merchants] to report the amount due:

Now, I do report that I have [with the assistance of *here state names and description of assessors, if any,*] carefully examined the accounts and vouchers and the proofs brought in by the Plaintiff [*or* Defendant] in support of his claim [*or* counter-claim], and having on the_____day of _____heard the evidence of [*state names*] who were examined as witnesses on behalf of the Plaintiff and of [*state names*] who were examined as witnesses on behalf of the Defendant, [and having heard the solicitors (*or* counsel) on both sides, *or as the case may be*], I find that there is due to the Plaintiff [*or* Defendant] the sum of $_____ [*state sum in letters and figures*] together with interest thereon as stated in the schedule hereto annexed. I am also of opinion that the Plaintiff [*or* Defendant] is entitled to the costs of this reference [*or as the case may be*].

Dated_____18____

(Signed) *E.F.*,

Registrar [*or* District Registrar.]

SCHEDULE annexed to the foregoing report.

		Claimed.		Allowed.	
		$	Cts.	$	Cts.
No. 1					
2	[*Here state as briefly as possible the several items of the claim with the amount claimed and allowed on each item in the columns for figures opposite the item.*]				
3					
4					
5					
&c.					
Total – – –					

With interest thereon from the_____day of_____ 18____, at the rate of_____per cent. per annum until paid.

(Signed) *E.F.*,
Registrar [*or District Registrar.*]

No. 44.

COMMISSION OF APPRAISEMENT. Rule 149.

[L.S.] [*Title of court and action.*]

VICTORIA, &C.

To the Marshal of our Admiralty District of_____, [*or* the Sheriff of the County of_____, *or as the case may be,*] Greeting:

Whereas the judge of our said court [*or* the Local Judge

in Admiralty of our said court for the Admiralty District of_____] has ordered that [*state whether ship or cargo and state name of ship and, if part only of cargo, state what part*] shall be appraised.

We, therefore, hereby command you to reduce into writing an inventory of the said [ship *or cargo, &c., as the case may be*], and having chosen one or more experienced person or persons, to swear him or them to appraise the same according to the true value thereof, and upon a certificate of such value having been reduced into writing, and signed by yourself and by the appraiser or appraisers, to file the same in the registry of our said court, together with this commission.

Given at_____, in our said court, under the seal thereof, this_____day of_____18 .

(Signed) *E.F.*,
Registrar [*or* District Registrar.]

Commission of Appraisement.

Taken out by_____

No. 45.

Rule 149. COMMISSION OF SALE.

[*Title of court and action.*]

(L.S.)

VICTORIA, &C.

To the Marshal of our Admiralty District of_____,

[*or* the Sheriff, *&c., as in Form No.* 44.] Greeting:

Whereas the judge of our said court [*or* the Local Judge, &c., *as in Form No.* 44] has ordered that [*state whether ship or cargo and state name of ship, and if part only of cargo, what part*] shall be sold. We, therefore, hereby command you to reduce into writing an inventory of the said [ship *or* cargo, &c., *as the case may be*], and to cause the said [ship *or* cargo, &c.] to be sold by public auction for the highest price that can be obtained for the same.

And we further command you, as soon as the sale has been completed, to pay the proceeds arising therefrom into

our said court, and to file an account sale signed by you, together with this commission.

Given at_____, in our said court, under the seal thereof, this_____day of_____18___.

(Signed) *E.F.*,
Registrar [*or* District Registrar.]

Commission of sale.

Take out by_____

No. 46.

COMMISSION OF APPRAISEMENT AND SALE. Rule 149.

(L.S.)

[*Title of court and action.*]

VICTORIA, &c.

To the Marshal of our Admiralty District of_____
[*or* the Sheriff, *&c., as in Form No.* 44.] Greeting:

Whereas the judge of our said court [*or* the Local Judge, *&c., as in Form No.* 44] has ordered that [*state whether ship or cargo, and state name of ship, and if part only of cargo, what part*] shall be sold. We, therefore, hereby command you to reduce into writing an inventory of the said [ship *or* cargo, *&c., as the case may be*], and having chosen one or more experienced person or persons to swear him or them to appraise the same according to the true value thereof, and when a certificate of such value has been reduced into writing and signed by yourself and by the appraiser or appraisers, to cause the said [ship *or* cargo, &c., *as the case may be*] to be sold by public auction for the highest price, not under the appraised value thereof, that can be obtained for the same.

And we further command you, as soon as the sale has been completed, to pay the proceeds arising therefrom into our said court, and to file the said certificate of appraisement and an account sale signed by you, together with this commission.

Given at_____, in our said court, under the seal thereof, this_____day of_____18___.

(Signed) *E. F.*,
Registrar [*or* District Registrar].

Commission of appraisement and sale.

Taken out by_____

No. 47.

Rule 149. COMMISSION OF REMOVAL.

(L.S.) [*Title of action.*]

VICTORIA, &c.

To the Marshal of our Admiralty District of_____,
[*or* the Sheriff, *&c.*, as in Form No. 44.] Greeting:

Whereas the judge of our said court [*or* the Local Judge, &c., *as in Form No.* 44] has ordered that the [*state name and description of ship*] shall be removed from_____to_____on a policy of insurance in the sum of $_____being deposited in the registry of our said court; and whereas a policy of insurance for the said sum has been so deposited. We, therefore, hereby command you to cause the said ship to be removed accordingly. And we further command you, as soon as the removal has been completed, to file a certificate thereof, signed by you, in the said registry, together with this commission.

Given at_____, in our said court, under the seal thereof, this_____day of_____18___

(Signed) *E.F.*,
Registrar [*or* District Registrar].

Commission of removal.

Taken out by_____

No. 48.

Rule 149. COMMISSION FOR DISCHARGE OF CARGO

(L.S.) [*Title of court and action.*]

VICTORIA, &c.

To the Marshal of our Admiralty District of_____
[*or* the Sheriff, *&c.*, *as in Form No.* 44.] Greeting:

Whereas the judge of our said court [*or* the Local Judge, &c., *as in Form No.* 44] has ordered that the cargo

of the ship_____shall be discharged. We, therefore, hereby command you to discharge the said cargo from on board the said ship, and to put the same into some fit and proper place of deposit. And we further command you, as soon as the discharge of the said cargo has been completed, to file your certificate thereof in the registry of our said court, together with this commission.

Given at_____in our said court, under the seal thereof, this_____day of_____18___.

(Signed) *E. F.*,
Registrar [*or* District Registrar].

Commission for discharge of cargo.

Taken out by_____

No. 49.

COMMISSION FOR DEMOLITION AND SALE. Rule 149.

(In a Slave Trade case.)

(L.S.) [*Title of court and action.*]

VICTORIA, &C.

To the Marshal of our Admiralty District of_____, [*or* the Sheriff, *&c., as in Form No.* 44.] Greeting:

We hereby command you, in pursuance of a decree of the judge of our said court [*or* the Local Judge, &c., *as in Form No.* 44] to that effect, to cause the tonnage of the vessel_____to be ascertained by Rule No. 1 of the 21st section of *The Merchant Shipping Act*, 1854, [*or by such rule as shall, for the time being be in force for the admeasurement of British vessels*], and further to cause the said vessel to be broken up, and the materials thereof to be publicly sold in separate parts (together with her cargo, *if any*) for the highest price that can be obtained for the same.

And we further command you, as soon as the sale has been completed, to pay the proceeds arising therefrom into our said court, and to file an account sale signed by you, and

a certificate signed by you of the admeasurement and tonnage of the vessel, together with this commission.

Given at _____, in the said court, under the seal thereof, this _____ day of _____ 18 .

(Signed) *E.F.*,
Registrar [*or* District Registrar.]

Commission for demolition and sale.
Taken out by _____.

No. 50.

Rule 154.

ORDER FOR INSPECTION.

[*Title of court and action.*]

On the _____ day of _____ 18___.

Before _____ Judge, &c.

The judge, on the application of [*state whether Plaintiff or Defendant*] ordered that the ship _____ should be inspected by [*state whether by the marshal or by the assessors of the court, or as the case may be,*] and that a report in writing of the inspection should be lodged by him [*or* them in the registry.

(Signed) *E.F.*,
Registrar [*or* District Registrar.]

Rule 155.

No. 51.

NOTICE OF DISCONTINUANCE.

[*Title of court and action.*]

Take notice that this action is discontinued.

Dated the _____ day of _____ 18___.

(Signed) *A.B.*, Plaintiff.

No. 52.

NOTICE TO ENTER JUDGMENT FOR COSTS. Rule 155.

[*Title of court and action.*]

Take notice that I apply to have judgment entered for my costs in this action.

Dated the _____ day of _____ 18___.

(Signed) *C.D.*, Defendant.

No. 53.

NOTICE OF MOTION ON APPEAL. Rule 159.

In the Exchequer Court of Canada.

In Admiralty.

Between *A.B.*, Plaintiff;
and
C.D., Defendant.

Take notice that this Honourable Court will be moved on _____ the _____ day of _____ 18___, or so soon thereafter as counsel can be heard, on behalf of the above named Plaintiff *A.B.* [*or Defendant C.D.*], that the judgment [*or order*] of the Local Judge in Admiralty for the Admiralty District of _____ made herein and dated the _____ day of _____ 18___, [*or if only part of the judgment or order is appealed from say* that so much of the judgment (*or order*) of the Local Judge in Admiralty for the Admiralty District of _____ made herein and dated the _____ day of _____ 18___, as adjudges (*or directs or orders as the case may be*) that _____ [*here set out the part or parts of the judgment or order which are appealed from*] may be reversed [*or rescinded*] and that—[*here set out the relief or remedy, if any, sought*] and that the costs of this appeal, and before the Local Judge in Admiralty, may be paid by the _____ to the _____.

Dated, &c.

Yours, &c.,
X.Y.,
Solicitor, &c., *or*, Agent, &c.

(To the above named Defendant), (or Plaintiff), and to _____, his solicitor or agent.

No. 54.

Rule 177.

RECEIVABLE ORDER.

Registry of the Exchequer Court of Canada
[*or*, for the Admiralty District of_____]

No.____. _____

_____18____.

[*Title of court and action.*]

Sir,—

I have to request that you will receive from [*state name of person paying in the money*] the sum of_____dollars on account in the above named action, and place the same to the credit of the account of the Registrar of the Exchequer Court of Canada [*or*, for the Admiralty District of _____].

(Signed) *E.F.*,
Registrar, [*or* District Registrar].

To the Manager of [*state name or style of bank to which the payment is to be made,*] *or*,
To the Deputy of the Minister of Finance and Receiver-General of Canada.

No. 55.

Rule 179.

ORDER FOR PAYMENT OUT OF COURT.

[*Title of court and action.*]

I,_____, Judge of the Exchequer Court of Canada [*or, as the case may be*], hereby order payment of the sum of [*state sum in letters and figures*], being the amount *state whether found due for damages or costs, or tendered in the action or, as the case may be*] to be made to [*state name and address of party or solicitor to whom the money is to be paid*] out of the [proceeds of sale of ship, *&c., or as the case may be*] now remaining in court.

Dated the_____day of_____18____.

Witness,
E.F.,
Registrar,
[*or District Registrar*].

(Signed) *J.K.*,
Judge,
[*or as the case may be.*]

No. 56.

NOTICE FOR CAVEAT WARRANT. Rule 180.

[*Title of court, or title of court and action.*]

Take notice that I, *A.B.*, of_____apply for a caveat against the issue of any warrant for the arrest of [*state name and nature of property*], and I undertake, within *three days* after being required to do so, to give bail to any action or counter-claim that may have been or may be brought against the same in this court in a sum not exceeding [*state sum in letters*] dollars, or to pay such sum into court.

My address for service is_____.

Dated the_____day of_____18____

(Signed) *A.B.*

No. 57.

CAVEAT WARRANT. Rule 180.

[*Title of court, or title of court and action.*]

[*State Name of Ship, &c.*]

Caveat entered this_____day of_____18____ against the issue of any warrant for the arrest of [*state name and nature of property*] without notice being first given to [*state name and address of person to whom, and address at which, notice is to be given*], who has undertaken to give bail to any action or counter-claim that may have been or may be brought in the said court against the said [*state name and nature of property*].

On withdrawal of caveat add:—

Caveat withdrawn the_____day of_____18____.

No. 58.

NOTICE FOR CAVEAT RELEASE. Rule 181.

[*Title of court and action.*]

Take notice that I, *A.B.*, Plaintiff [*or* Defendant] in the above named action, apply for a caveat against the release of [*state name and nature of property.*]

[*If the person applying for the caveat is not a party to the action, he must also state his address and an address for service within three miles of the registry.*]

Dated the_____day of_____18____.

(Signed) *A.B.*

No. 59.

Rule 181.

CAVEAT RELEASE.

[*Title of court and action.*]

Caveat entered this_____day of____ _____18____, against the issue of any release of [*state name and nature or property*] by [*state name and address of person entering caveat, and his address for service*].

On withdrawal of caveat, add:—

Caveat withdrawn this_____day of_____18____.

No. 60.

NOTICE FOR CAVEAT PAYMENT.

Rule 182.

[*Title of court and action.*]

Take notice that I, *A. B.*, Plaintiff [*or* Defendant] in the above named action, apply for a caveat against the payment of any money [*if for costs, add* for costs, *or as the case may be*] out of the proceeds of the sale of [*state whether ship or cargo, and name of ship, &c.*] now remaining in court, without notice being first given to me.

[*If the person applying for the caveat is not a party to the action, he must also state his address, and an address for service within three miles of the registry.*]

Dated the_____day of_____18____.

(Signed) *A. B.*

No. 61.

CAVEAT PAYMENT. Rule 182.

[*Title of court and action.*]

Caveat entered this_____day of_____18___, against the payment of any money [*if for costs, add* for costs, *or as the case may be*] out of the proceeds of the sale of [*state whether ship or cargo, and if ship, state name of ship, &c.*] now remaining in court, without notice being first given to [*state name and address of person to whom, and address at which, notice is to be given*].

On withdrawal of the caveat, add:—

Caveat withdrawn this_____day of_____18___

No. 62.

NOTICE FOR WITHDRAWAL OF CAVEAT. Rule 187.

[*Title of court and action.*]

Take notice that I withdraw the caveat [*state whether caveat warrant, release, or payment*] entered by me in this action [*or as the case may be*].

Dated the_____day of_____18___.

(Signed) *A. B.*

No. 63.

SUBPŒNA. Rule 189.

(L.S.) [*Title of court and action.*]

VICTORIA, &c.

To_____. Greeting.

We command you_____that, all other things set aside, you appear in person before the judge [*or*

the registrar, *or G.H.*, a commissioner appointed by an order of our said court] at_____on_____ the_____day of_____18___, at_____o'clock in the_____noon of the same day, and so from day to day as may be required, and give evidence in the above named action.

And herein fail not at your peril.

Given at_____, in our said court, under the seal thereof, this_____day of_____18___.

Subpœna.

Taken out by_____

Rule 189.

No. 64.

SUBPŒNA DUCES TECUM.

The same as the preceding form, adding before the words "And herein fail not at your peril," *the words* "and that "you bring with you for production before the said judge "[*or* registrar *or* commissioner, *as the case may be*] the fol- "lowing documents, viz.,

[*Here state the documents required to be produced.*]

No. 65.

Rule 192.

ORDER FOR PAYMENT.

[L.S.] [*Title of court and action.*]

On the_____day of_____18___.

Before_____

Judge, &c., [*or* Local Judge of the Admiralty District of_____].

It is ordered that *A.B.* [Plaintiff *or* Defendant, *&c.*,] do pay to C.D. [Defendant *or* Plaintiff, &c.,] within _____*days* from the date hereof the sum of $_____[*state sum in letters and figures*] being the amount]*or* balance of the amount] found due from the said

A.B. to the said *C.D.* for [*state whether for damages, salvage, or costs, or as the case may be*] in the above-named action.

(Signed) *E.F.*,
Registrar [*or* District Registrar.]

No. 66.

ATTACHMENT. Rule 193.

[L.S.] [*Title of court and action.*]

VICTORIA, &c.

To the Marshal of our Admiralty District of_____,
[*or* the Sheriff, *&c., as in Form No.* 44.] Greeting:

Whereas the Judge of our said Court [*or* the Local Judge in Admiralty, &c., *as in Form No.* 44] has ordered [*state name and description of person to be attached*] to be attached for [*state briefly the ground of attachment.*]

We, therefore, hereby command you to attach the said _____, and to bring him before our said judge.

Given at_____, in our said court, under the seal thereof, this_____day of_____ 18____.

(Signed) *E.F.*,
Registrar [*or* District Registrar.]

Attachment.

Taken out by_____

No. 67.

ORDER FOR COMMITTAL.

(L.S.) [*Title of court and action.*] Rule 194.

On the_____day of_____18____.

Before_____
Judge, &c.
[*or* Local Judge in Admiralty for the Admiralty District of_____

Whereas *A.B.* [*state name and description of person to be committed*] has committed a contempt of court in that [*state*

in what the contempt consists] and, having been this day brought before the judge on attachment, persists in his said contempt, it is now ordered, that he be committed to prison for the term of_____from the date hereof, or until he shall clear himself from his said contempt.

(Signed) *E.F.*,
Registrar, [*or* District Registrar.]

No. 68.

Rule 194. COMMITTAL.

[*Title of court.*]

To_____

Receive into your custody the body [*or* bodies] of_____ herewith sent to you, for the cause hereinunder written; that is to say,

For [*state briefly the ground of attachment*].

Dated the_____day of_____18____.

(Signed) *J.K.*,
Judge, &c.
[*or* Local Judge in Admiralty for the Admiralty District of_____.]

Witness,
E.F.,
Registrar,
[*or* District Registrar.]

No. 69.

Rule 202, MINUTE ON FILING ANY DOCUMENT.

[*Title of court and action.*]

I, *A.B*, [*state whether Plaintiff or Defendant*], file the following documents, viz.:

[*Here describe the documents filed.*]

Dated the_____day of_____18____.

(Signed) *A.B.*

No. 70.

MINUTE OF ORDER OF COURT. Rule 213.

[*Title of court and action.*]

On the_____day of_____18___.

Before_____

Judge, &c.

[*or* Local Judge in Admiralty for the Admiralty District of_____]

The judge, on the application of [*state whether Plaintiff or Defendant*] ordered [*state purport of order*].

No. 71.

MINUTE ON EXAMINATION OF WITNESSES. Rule 213.

[*Title of court and action.*]

On the_____day of_____18___.

Before_____,

Judge, &c.

[*or* Local Judge, *&c., as the case may be*].

A.B. [*state whether Plaintiff or Defendant*] produced as witnesses

[*Here state names of witnesses in full.*]

who, having been sworn [*or as the case may be*], were examined orally [*if by interpretation, add* by interpretation of_____].

No. 72.

MINUTE OF DECREE. Rule 213.

[*Title of court and action.*]

On the_____day of_____18___.

Before_____,

Judge, &c.

or Local Judge, *&c., as the case may be.*

(1.) *Decree for an ascertained sum:*

The judge having heard [*state whether Plaintiff and Defendant, or their counsel or solicitors, or as the case may be,*]

and having been assisted by [*state names and descriptions of assessors, if any,*] pronounced the sum of [*state sum in letters and figures*] to be due to the Plaintiff [*or* Defendant], in respect of his claim [*or* counter-claim], together with costs [*if the decree is for costs*]. And he condemned—

(a) *in an Action in rem where Bail has not been given;* the ship_____ [*or* cargo *ex* the ship_____, or proceeds of the ship_____, *or* of the cargo *ex* the ship_____ *or as the case may be*] in the said sum [and in costs].

(b.) *in an Action in personam, or in rem where Bail has been given:*

the Defendant [*or* Plaintiff] and his bail [*if bail has been given*] in the said sum [and in costs].

(2.) *Decree for a sum not ascertained:*

The judge having heard, &c., [*as above*] pronounced in favour of the Plaintiff's claim [*or* Defendant's counter-claim] and condemned the ship_____[or cargo, &c., *or* the Defendant *or* Plaintiff] and his bail [*if bail has been given*] in the amount to be found due to the Plaintiff [*or* Defendant] [and in costs]. And he ordered that an account should be taken, and

(a.) *If the amount is to be assessed by the judge,* that all accounts and vouchers, with the proofs in support thereof, should be filed within_____ *days* [*or as the case may be*].

(b.) *If the Judge refers the assessment to the registrar,* referred the same to the registrar [assisted by merchants], to report the amount due, and ordered that all accounts, &c., [*as above*].

(3.) *Decree on dismissal of action:*

The judge having heard, &c., [*as above*] dismissed the action [*if with costs, add*] and condemned the Plaintiff and his bail [*if bail has been given*] in costs.

(4.) *Decree for condemnation of a derelict, subject to salvage:*

The judge, having heard, &c., [*as above*] pronounced the sum of [*state sum in letters and figures*] to be due to *A.B., &c.*, for salvage, together with costs, and subject thereto condemned the said ship_____, [*or* cargo *or* proceeds of ship *or* of cargo, &c., *as the case may be*] as a droit and perquisite of Her Majesty in her office of Admiralty.

(5.) *Decree in action for possession:*

The judge having heard, &c., decreed that possession of the ship_____should be given to the Plaintiff, and condemned the Defendant [and his bail] in costs.

(6.) *Decree of condemnation in a slave trade action:*

The judge having heard, *&c.* [*as above*], pronounced that the vessel, name unknown [*or as the case may be*], seized by H.M.S. "Torch" on the_____day of_____18___, had been at the time of her seizure engaged in or fitted out for the slave trade in contravention of the Treaties existing between Great Britain and_____[*or* in violation of the Acts 5 Geo. IV. c. 113, and 36 & 37 Vict. c. 88, *or as the case may be*], and he condemned the said vessel [together with the slaves, goods, and effects on board thereof] as forfeited to Her Majesty [*or* condemned the said vessel and slaves as forfeited, &c., but ordered that the cargo should be restored to the claimant, *or, as the case may be*].

The judge further ordered that the said slaves [*or* the slaves then surviving], consisting of_____men,_____women, and_____boys and_____girls, should be delivered over to [*state to whom, or how the slaves are to be disposed of*].

If the vessel has been brought into port, add:—

The judge further ordered that the tonnage of the vessel should be ascertained by the rule in force for the admeasurement of British vessels, and that the vessel should be broken up, and that the materials thereof should

be publicly sold in separate parts, together with her cargo *if any*] ;

or

If the vessel has been abandoned or destroyed by the seizors prior to the adjudication, and the court is satisfied that the abandonment or destruction was justifiable, add :—

The judge further declared that, after full consideration by the court of the circumstances of the case, the seizors had satisfied the court that the abandonment [*or* destruction] of the vessel was inevitable or otherwise under the circumstances proper and justifiable.

(7.) *Decree of restitution in a slave trade action :*

The judge having heard, &c., pronounced that it had not been proved that the vessel_____was engaged in or fitted out for the slave trade, and ordered that the said vessel should be restored to the claimant, together with the goods and effects on board thereof ;

add, as the case may be,

but without costs or damages,

or

on payment by the said claimant of the costs incurred by the seizors in this action ;

or

and awarded to the said claimant costs and damages in respect of the detention of the said vessel, and [referred the same to the registrar (assisted by merchants) to report the amount thereof, and] directed that all accounts and vouchers with the proofs in support thereof, if any, should be filed within_____*days.*

(8.) *Decree in case of capture from pirates :*

The judge having heard, &c., pronounced that the said junk "Tecumseh" [and her cargo] had been at the time of the

capture thereof by H.M.S. "Torch" the property of pirates, and condemned the same as a droit and perquisite of Her Majesty in Her office of Admiralty;

or

pronounced that the said junk "Tecumseh" [and her cargo] had prior to her re-capture by H.M.S. "Torch," &c., been captured by pirates from the claimant [*state name and description of former owner*], and he decreed that the same should be restored to the said claimant as the lawful owner thereof, on payment to the re-captors of *one-eighth* part of the true value thereof in lieu of salvage. The judge also directed that the said junk [and her cargo] should be appraised;

If the junk, &c., has been captured after an engagement with the pirates, and if there is a claim for bounty, add:—

The judge further declared that the persons attacked or engaged by H.M.S. "Torch," &c., on the occasion of the capture of the said junk were pirates, that the total number of pirates so attacked or engaged was about _____, that _____ of that number were captured, and that the only vessel engaged was H.M.S. "Torch" [*or, as the case may be*].

(9.) *Decree of condemnation under Pacific Islanders Protection Acts:*

The judge, having heard, &c., pronounced that the ship _____ had been at the time of her seizure [*or* during the voyage on which she was met] employed [*or* fitted out for employment] in violation of the Pacific Islanders Protection Acts, 1872 and 1875, and he condemned the said ship _____ [and her cargo, and all goods and effects found on board, *or as the case may be*,] as forfeited to Her Majesty.

The judge further ordered that the said ship _____ [and her cargo, and the said goods and effects] should be sold by public auction, and that the proceeds should be paid into court.

(10.) *Decree of condemnation under Foreign Enlistment Act:*

The judge, having heard, &c., pronounced that the ship _____had been [built, equipped, commissioned, despatched, *or* used, *as the case may be*] in violation of the Foreign Enlistment Act, 1870, and he condemned the said ship_____and her equipment [and the arms and munitions of war on board thereof, *or as the case may be*] as forfeited to Her Majesty.

(11.) *Decree of condemnation under Customs or Revenue Acts:*

The judge having heard, &c., condemned the ship _____[*or* cargo *or* proceeds, &c., *as the case may be*] as forfeited to Her Majesty for violation to the Act [*state what Act*].

(12.) *Decree for pecuniary forfeiture or penalty under Customs Act or other Act:*

The judge having heard, &c., pronounced the said goods to have been landed [*or other illegal act to have been done*] in violation of the Act [*state what Act*] and condemned the Defendant *C.D.* [the owner of the said goods, *or as the case may be*] in the penalty of_____imposed by the said Act [and in costs].

No. 73.

MINUTES IN AN ACTION FOR DAMAGE BY COLLISION. Rule 213.

A. B., &c.

No.____ against

The Ship "Mary."

18___.		
Jan.	3	A writ of summons [and a warrant] was [*or* were] issued to X.Y. on behalf of A.B., &c., the owners of the ship "Jane" against the ship "Mary" [and freight, *or as the case may be*] in an action for damage by collision. Amount claimed $1,000.
"	5	Y. Z. filed notice of appearance on behalf of C. D., &c., the owners of the ship "Mary."
"	6	X. Y. filed writ of summons.
"	"	The marshal filed warrant.
"	7	Y. Z. filed bailbond to answer judgment as against the Defendants [*or as the case may be*] in the sum of $1,000, with affidavit of service of notice of bail.
"	"	A release of the ship "Mary" was issued to Y. Z.
"	8	X. Y. filed Preliminary Act [and notice of motion for pleadings].
"	"	Y. Z. filed Preliminary Act.
"	10	The judge having heard solicitors on both sides [*or as the case may be*], ordered pleadings to be filed.
"	11	X.Y. filed statement of claim.
"	14	Y.Z. filed defence [and counter-claim.]
"	15	X.Y. filed reply.
"	16	The judge having heard solicitors on both sides [*or as the case may be*] ordered both Plaintiffs and Defendants to file affidavits of discovery, and to produce, if required, for mutual inspection, the documents therein set forth within *three days*.
"	18	X.Y. filed affidavit of discovery.
"	19	Y.Z. filed affidavit of discovery.
"	22	X.Y. filed notice of trial.

Jan. 26	X.Y. produced as witnesses [*state names of witnesses*], who, having been sworn, were examined orally in court, the said [*state names*] having been sworn and examined by interpretation of [*state name of interpreter*] interpreter of the_____language. Present [*state names of assessors present, if any*] assessors.
	Y.Z. produced as witnesses, &c. [*as above*].
18____.	The judge having heard [*state whether Plaintiffs and Defendants, or their counsel or solicitors, as the case may be*], and having been assisted by [*state names and descriptions of assessors, if any*], pronounced in favour of the Plaintiffs [*or* Defendants] and condemned the Defendants [*or* Plaintiffs] and their bail [*if bail has been given*] in the amount to be found due to the Plaintiffs [*or* Defendants] [and in costs]. And he ordered that an account should be taken, and referred the same to the registrar [assisted by merchants] to report the amount due, and ordered that all accounts and vouchers, with the proofs in support thereof, should be filed within_____*days* [*or as the case may be*].
Feb. 5	X.Y. filed claim, with accounts and vouchers in support thereof [numbered 1 to____], and affidavits of [*state names of deponents, if any.*]
" 8	Y.Z. filed accounts and vouchers [numbered 1 to _____] in answer to claim.
" 9	X.Y. filed notice for hearing of reference.
" 15	X.Y. [*or* Y.Z.] filed registrar's report, &c.

Here insert address for service of documents required to be served on the Plaintiffs.

Here insert address for service of documents required to be served on the Defendants.

Note.—The above minutes are given as such as might ordinarily be required in an action *in rem* for damage by collision, where pleadings have been ordered. In some actions many of these minutes would be superfluous. In others additional minutes would be required.

II. TABLES OF FEES TO BE TAKEN BY THE REGISTRARS, MARSHALS AND PRACTITIONERS, &C., IN ADMIRALTY PROCEEDINGS IN THE EXCHEQUER COURT OF CANADA

I.—BY THE REGISTRAR.

1. *For sealing or preparing Instruments, &c.*

	$ cts.
For sealing any writ of summons or other document required to be sealed	50
For preparing any warrant, release, commission, attachment, or other instrument, required to be sealed, or for attending the execution of any bail-bond	2 00
For preparing a receivable order or a receipt for money to be paid out of court	1 00
For preparing and sending any notice, or issuing any appointment	50
For preparing any other document for every folio	30

Note.—The fees for preparing shall include drawing and fair-copying or engrossing.

2. *For Filing.*

On filing any instrument or other document	20

3. *For Evidence, &c.*

For attending at examination of any witness, per hour	1 00
For administering any oath or declaration	20
For taking down and certifying the evidence of any witness examined before him, when the same is not taken down by a shorthand writer, for every folio	20

4. *For the Trial, &c.*

On setting down action for trial	1 00
For attendance at the trial of an action, to be paid by the party whose case is proceeding, per hour	1 00
Swearing each witness	20

On a final decree in an uncontested action	2 00
On a final decree in a contested action	4 00
For attendance before the judge when any order is made or act done, other than pronouncing a final decree	1 00

Note.—The above fees shall include the entry of the decree or order in the minute book.

5. *For References.*

For hearing any reference, according to the case, per day	From	$ 5 00
	To	15 00
For preparing the report of a reference		5 00

6. *For Taxations.*

For taxing a bill of costs:—

If the bill does not exceed *ten* folios	2 00
For every folio beyond *ten*	20

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7. *For Office Copies, Searches, &c.*

For a copy of any document, for every folio (in addition to the fee for sealing)	$ 10
For search	20
For a general search	50

Note.—No search-fee is to be charged to a party to the action, while the action is pending, or for one year after its termination, or to any seaman.

II.—By the Assessors.

For each nautical or other assessor, whether at the examination of witnesses or at the trial of an action, or upon any assessment of damages, or taking of an account, according to the case, in the discretion of the judge, per day	From	$ 5 00
	To	$25 00

Note.—The above fees shall be paid to the registrar, for the assessors, and *in the first instance* by the party preferring the claim.

III.—By a Commissioner to examine Witnesses.

For administering any oath or declaration	$	20
For taking down and certifying the evidence of any witness examined before him, when the same is not taken down by a shorthand writer, for every folio		20

IV.—By a Commissioner to take Bail.

For attending the execution of any bailbond	$	2 00
For taking any affidavit of justification		50

V.—By the Marshal or Sheriff.

For the service of a writ of summons or subpœna, if served by the marshal or a sheriff	$	1 00
For executing any warrant or attachment		4 00
For keeping possession of any ship, goods, or ship and goods (exclusive of any payments necessary for the safe custody thereof), for each day		50

Note.—No fee shall be allowed to the marshal for the custody and possession of property under arrest, if it consists of money in a bank, or of goods stored in a bonded warehouse, or if it is in the custody of a Custom-House officer or other authorized person.

On release of any ship, goods, or person from arrest		2 00
For attending the unlivery of cargo, for each day		8 00
For executing any commission of appraisement, sale, or appraisement and sale, exclusive of the fees, if any, paid to the appraiser and auctioneer		4 00
For executing any other commission or instrument		4 00
On the gross proceeds of any ship, or goods, &c., sold by order of the court:—		
If not exceeding $400		4 00
For every additional $400, or part thereof		2 00

Note.—If the marshal, being duly qualified, acts as auctioneer, he shall be allowed a double fee on the gross proceeds.

For attendance at the trial of an action to be paid by the party whose case is proceeding, per hour	$	1 00
Calling each witness		20

Note.—If the marshal or his officer is required to go any distance in execution of his duties, a reasonable sum may be allowed for travelling, boat-hire, or other necessary expenses in addition to the preceding fees, but not to exceed 10 cents per mile travelled.

VI.—Fees to be Taken by Appraisers.

Each, per appraisement	From	$ 2 50
	To	$10 00

(This fee may be increased to a sum not exceeding $30.00 in the discretion of the judge.)

VII.—By the Solicitor.

Retaining fee		$ 2 00
For preparing a writ of summons (to include attendances in the registry for sealing the same)		2 50
For bespeaking and extracting any warrant or other instrument prepared in the registry (to include attendances)		1 00
For serving a writ of summons or a subpœna		1 00
For taking instructions for a statement of claim or defence		4 00
For drawing a statement of claim or defence		4 00
For taking instructions for any further pleading		1 00
For drawing any further pleading		2 00
For drawing any other document, for every folio		20
For fair-copying or engrossing any document, for every folio		10
For taking instructions for any affidavit (unless made by the solicitor or his clerk) or for interrogatories or answers, according to the nature or importance thereof	From	1 00
	To	4 00
For taking instructions for brief	From	1 00
	To	4 00
For attending counsel in conference or consultation		2 00
For attending to fee counsel		2 00
For attendance on any motion before the judge :—		
If with counsel		2 00
If without counsel		4 00
For attending the examination of witnesses before the trial, for each day :—		
If with counsel		4 00
If without counsel		8 00
For attendance at the trial for each day	From	4 00
	To	12 00
For attendance at the delivery of judgment, if reserved		2 00

For attendance at the hearing of a reference to the registrar for each day:		
If with counsel	From	$ 4 00
	To	8 00
If without counsel	From	4 00
	To	20 00
For any other necessary attendance before the judge, or in the registry, or on the marshal, or on the adverse party or solicitor, in the course of the action		1 00

Note.—Where more than one document can conveniently be filed, or one document can be filed and another bespoken, at the same time, the fee for one attendance only shall be allowed.

For any necessary letter to the adverse party	50
For serving any notice	20
For extracting and collating any office copy obtained from the registry, for every folio ....$	10
For correcting the press, for every folio	5
For attending the taxation of any bill of costs, not exceeding *ten* folios	2 00
For every folio beyond *ten*	10

VIII.—By Counsel

Retaining fee....$		5 00
For settling any pleading, interrogatories, or answers, &c	From	5 00
	To	20 00
For any necessary consultation in the course of the action	From	$ 5 00
	To	10 00
For any motion	From	5 00
	To	15 00
For the examination of witnesses before the trial, for each day	From	10 00
	To	20 00
For the trial of an uncontested action		10 00
For the trial of a contested action, for the first day	From	15 00
	To	50 00
For each day after the first	From	10 00
	To	25 00
For attending judgment if reserved	From	5 00
	To	10 00
For the hearing of a reference to the registrar, for each day	From	10 00
	To	25 00

Note.—Where the same practitioner acts as both counsel and solicitor, he may, for any proceeding in which a counsel's fee might be allowed, charge such fee in lieu of a solicitor's fee.

IX.—By Shorthand Writers.

For taking down and transcribing the evidence, certifying the transcript and transmitting the same to the registrar and supplying three copies thereof to the registrar, per folio.....$	20
If for any reason the evidence is not required to be transcribed, for each hour occupied by the examination	1 50

Such fees shall in the first instance be paid to the registrar for the shorthand writer by the party calling the witness.

If any such fee is not paid by the party liable therefor it may be paid by any other party to the proceeding and allowed as a necessary disbursement in the cause, or the Judge may make such order in respect of such evidence and the disposal of the action or proceeding as to him seems just.

Note—If evidence is taken down by a shorthand writer no fee for taking down and certifying to such evidence shall be allowed to the Registrar or Commissioner.

X.—By Witnesses.

To witness residing not more than three miles from the place to which summoned, per day.....$	1 00
To witnesses residing over three miles from such place.....	1 25
Barristers and attorneys and solicitors, physicians and surgeons, when called upon to give evidence in consequence of any professional service rendered by them, or to give opinions, per day.....	5 00
Engineers and surveyors, when called upon to give evidence of any professional service rendered by them, or to give evidence depending upon their skill or judgment, per day.....$	5 00

If the witnesses attend in one cause only, they will be entitled to the full allowance.

If they attend in more than one cause they will be entitled to a proportionate part in each cause only.

The travelling expenses of witnesses over ten miles, shall be allowed according to the sums reasonably and actually paid, but in no case shall exceed ten cents per mile travelled.

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APPENDIX.

I.—FORMS.

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salvage service. (2.) Claim for use of anchor, chains, etc., used in saving vessel; *Held*, a salvage service. (3.) Claim for personal services not performed on vessel. *Held*, not a salvage service. (4.) Claim for services of tug in an unsuccessful attempt to remove vessel. *Held*, not a salvage service. Salvage is a reward for benefits actually conferred. (5.) *Held*, following the usual rule, that not more than a moiety of the value of the *res* at the time when saved should be awarded to salvors, there being no exceptional feature except the small value of the *res*. Costs of salvors awarded out of other moiety. Costs of arrest and sale and of bringing fund into court paid in priority to claims out of fund, in proportion to the value of the *res* at the time of delivery to the Dry Dock Company, and balance of the proceeds of sale which was not sufficient to pay claim of possessory lien-holder. THE GLENIFFER — 57

4——*Collision—Salvage services performed by one vessel to the other where both at fault.*] Where two vessels in collision are both at fault and one vessel renders salvage services to the other when the value of such services are determined it should be divided and the salved vessel only be required to pay one-half of the amount. THE ZAMBESI AND THE FANNY DUTARD — — — 67

5——*Maritime law—Salvage—Government vessel—Special contract.*] A steamship belonging to the Dominion Government went ashore on the Island of Anticosti, and suppliants rendered assistance with their wrecking steamer in getting her afloat. The service rendered consisted in carrying out one of the stranded steamship's anchors, and in taking a hawser and pulling on it until she came off. For carrying out the anchor it was admitted that the suppliants had bargained for compensation at the rate of fifty dollars an hour, but whether the bargain included the other part of the service rendered or not, was in dispute. The service was continuous,—no circumstances of sudden risk or danger having arisen to render one part of the work more difficult or dangerous than the other. *Held*, that the rate of compensation admittedly agreed upon in respect of carrying out the anchor must, under the circumstances, be taken as affording a fair measure of compensation for the entire service. (2.) A petition of right will not lie for salvage services rendered to a steamship belonging to the Dominion Government. COUETTE *v.* THE QUEEN — — 82

6——*Maritime law—Salvage—Essentials of—Difference between towage and salvage service—Professional and volunteer services—Rate of compensation.*] Salvage means rescue from threatened loss or injury. No danger, no salvage. If the ship be in danger, then the rescuers earn a salvage reward, which, on the grounds of public policy, is to be liberal, but yet varies according to the imminence of the danger to the ship on the one hand, and the skill and enterprise and danger of the salvors on the other hand. (2.) A small packet steamer, while performing one of her regular trips between certain points in thick weather, discovered a large steamship lying at anchor in such a position as to be in imminent danger of becoming a total loss.

The latter signalled the former and asked to be towed into port. This the packet steamer refused to do, wishing to prosecute her voyage, but agreed to tow the ship out of her dangerous position to the open sea, and there give her captain directions to enable him to reach his port of destination. This offer was accepted and acted upon. In conducting the ship to the open sea the packet steamer performed the services both of a pilot and tug, and showed skill and enterprise, and incurred appreciable risk, while so engaged. *Held*, to be a salvage, and not a mere towage service. *Semble*, while the court is disposed to confine the claims of professional pilots and tugs to the tariff scale for such professional services, a volunteer ought to be allowed a more liberal rate of compensation. THE CANADIAN PACIFIC NAVIGATION COMPANY *v.* THE SHIP C. F. SARGENT — — — 332

SEAL HUNTING—*Illicit hunting of seals in Behring's Sea* –54-55 *Vic.* (*U.K.*) *c.* 19, *sec.* 1, *subsec.* 5—*Interpretation—Presence of fully-equipped sealer in forbidden waters — Lawful intention — Burden of proof.*] By subsection 5 of section 1 of the Imperial Act, 54-55 Vic. c. 19 (*The Seal Fishery* [*Behring's Sea*] *Act.* 1891) it is enacted that "if a British ship is found within Behring's "Sea having on board thereof fishing or shooting "implements or seal skins or bodies of seals, it "shall lie on the owner or master of such ship "to prove that the ship was not used or employed "in contravention of this Act." *Held*, that the words "used or employed" are not to be confined to the particular use and employment of the ship on the occasion of her seizure but extend to the whole voyage which she is then prosecuting; and if the ship is found in the condition described in the said subsection she is liable to forfeiture unless the presumption therein raised can be rebutted by owner or master. THE QUEEN *v.* THE SHIP OSCAR & HATTIE — — — 241

SEAMEN'S WAGES — *Action to recover — Motion to dismiss under sec.* 34 *of The Inland Waters Seamen's Act, R.S.C. c.* 75—*Bill of Sale of Ship—Registration thereof—The Merchant Shipping Act*, 1854 *s.* 55.] In the year 1887, A. sold a vessel to M. and S. under an agreement stipulating, among other things, that the vessel was to remain in the name and under the control of A. until the purchase-money was fully paid, and that, in the event of the terms of the contract not being performed by the vendees, A. was entitled to take possession and the vendees would thereupon lose all claim or title they might have to the ship or to moneys paid by them in respect of the contract. This agreement was not registered. For some time the vendees performed the terms of the agreement, but having failed to do so after a certain period A. resumed possession of the vessel. Upon an action *in rem* for wages due to a seaman employed by the vendees and which were earned during their possession of the vessel,—*Held*, that the amount of the claim being below $200, the Exchequer Court had no jurisdiction under sec. 34 of *The Inland Waters Seamen's Act.*] (2.) That the property in the vessel had not passed to the vendees under the agreement, and that whatever rights the seaman had *in personam* must be en-

officer through whose act or negligence the loss happens.] The plaintiffs sought to recover from the Crown the sum of $465.74, and interest for the duty paid value of a quantity of glaziers' diamonds alleged to have been stolen from a box, in which they had been shipped at London, while such box was at the examining warehouse at the port of Montreal. On the 21st February, 1890, it appeared that the box mentioned was in bond at a warehouse for packages used by the Grand Trunk Railway Company, at Point St. Charles, and on that day the plaintiffs made an entry of the goods at the Custom-house, and paid the duty thereon ($107.10). On Monday, the 24th, the Customs officer in charge of the warehouse at Point St. Charles delivered the box to the foreman of the Custom-house carters, who in turn delivered it to one of his carters, who took it, with other parcels, and delivered it to a checker at the Customs examining warehouse. The box was then put on a lift and sent up to the third floor of the building where it remained one or two days. It was then brought down to the second floor and examined, when it was found that the diamonds had been stolen—the theft having been committed by removing the bottom of the box. Although the evidence tending to show that the theft was committed while the box was at the Customs examining warehouse at Montreal was not conclusive, the court drew that inference for the purposes of the case. *Held*, that, admitting the diamonds were stolen while in the examining warehouse, the Crown is not liable therefor. (2.) In such a case the Crown is not a bailee. The temporary control and custody of goods imported into Canada, which the law gives to the officers of the Customs to the end that such goods may be examined and appraised, is given for the purpose of the better securing the collection of the public revenue. Without such a power the State would be exposed to frauds against which it would be impossible to protect itself. For the loss of any goods while so in the custody of the Customs officers the law affords no remedy, except such as the injured person may have against the officers through whose personal act or negligence the loss happens. CORSE *v.* THE QUEEN — — 13

2——*Torts—Injury to the person on a public work—Remedy—Prescription, interruption of—C.C. L. C. Art.* 2227—50-51 *Vic. c.* 16.] The suppliant, who was employed as a mason upon the Chambly Canal, a public work, was injured through the negligence of a fellow servant. Subsequent to the accident the Crown retained the suppliant in its employ as a watchman on the canal, and indemnified him for expenses incurred for medical attendance. *Held*, that what was done was referable to the grace and bounty of the Crown and did not constitute such an acknowledgment of a right of action as would, under Art. 2227 C.C. L. C., interrupt prescription. *Quære*: Does Art. 2227 C.C.L.C. apply to claims for wrongs as well as to actions for debt? *Semble*: That the Crown's liability for the negligence of its servants rests upon statutes passed prior to *The Exchequer Court Act*, (50-51 Vic. c. 16) and that the latter substituted a remedy by petition of right or by a

reference to the court for one formerly existing by a submission of the claim to the Official Arbitrators, with an appeal to the Exchequer Court and thence to the Supreme Court of Canada. MARTIAL *v.* THE QUEEN — — — 118

3——*Petition of Right—Injuries sustained in an accident on a Government Railway—Burden of proof—Latent defect in axle of car—Undue speed in passing sharp curve.*] On the trial of a petition claiming damages for personal injuries sustained in an accident upon a Government railway, alleged to have resulted from the negligence of the persons in charge of the train, the burden of proof is upon the suppliant. He must show affirmatively that there was negligence. The fact of the accident is not sufficient to establish a *primâ facie* case of negligence. The immediate cause of the accident was the breaking of an axle that was defective. It was shown, however, that great care had been used in its selection and that the defect was latent and not capable of detection by any ordinary means of examination open to the railway officials. The train had immediately before the accident passed a curve which, at its greatest degree of curvature, was one of 6° 52'. It was alleged that the persons in charge of the train were guilty of negligence in passing this curve and a switch near it at too great a rate of speed. On that point the evidence was contradictory, and, having regard to the rule as to the burden of proof stated above, it was *Held*, that a case of negligence was not made out. DUBÉ *v.* THE QUEEN — — — — 147

4——*Injury to property on a Public Work—Negligence of Crown's officer or servant*—50-51 *Vic. c.* 16 *s.* 16 (*c.*)—33 *Vic. c.* 23—*Liability—Remedy.*] The Crown is liable for an injury to property on a public work occasioned by the negligence of its officer or servant acting within the scope of his duty. That liability is recognized in *The Exchequer Court Act*, s. 16 (c), but had its origin in the earlier statute 33 Vic. c. 23. (2.) Prior to 1887, when *The Exchequer Court Act* was passed, a petition of right would not lie for damages or loss resulting from such an injury, the subject's remedy being limited to a submission of his claim to the Official Arbitrators, with, in certain cases after 1879, an appeal to the Exchequer Court and thence to the Supreme Court of Canada. (3.) It is not the duty of an officer of the Crown to repair or add to a public work at his own expense, nor unless the Crown has placed at his disposal money or credit with instructions to execute the same. He must exercise reasonable care to know of the condition in which the public work under his charge is, and he must report any defect or danger that he discovers. It does not follow from the fact that a public officer does not discover a defect in, or a danger that threatens, a public work under his charge, that he is negligent. To make the Crown liable in such a case it must be shown that he knew of the defect or danger and failed to report it, or that he was negligent in being and remaining in ignorance thereof. *The Sanitary Commissioners of Gibraltar* v. *Orfila*, 15 App. Cas. 400 referred to. The injury complained of by the suppliants was caused by the falling of a part of