REPORTS

— OF THE —

EXCHEQUER COURT

— OF —

CANADA.

CHARLES MORSE, K.C.

EDITOR.

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CASES

DETERMINED BY THE

EXCHEQUER COURT OF CANADA

ON APPEAL FROM THE QUEBEC ADMIRALTY DISTRICT. 1913 Sept. 17.

BETWEEN:

THE SYDNEY, CAPE BRETON and MONTREAL STEAMSHIP COMPANY.....(PLAINTIFF) APPELLANT;

AND

THE HARBOUR COMMISSIONERS OF MONTREAL.....(DEFENDANTS) RESPONDENT.

Construction of Statutes—Shipping—Injury to Ship—Action against Harbour Commissioners—Prescription—56-57 Vict. (U.K.) c. 61—Applicability to Admiralty actions in Exchequer Court of Canada.

Held, (reversing the judgment of the Deputy Local Judge) that the *Public Authorities Protection Act*, 1893 (56-57 Vict. U.K. c. 61) does not apply to Admiralty proceedings in the Exchequer Court of Canada; and that the six month's prescription mentioned in sec. 1 thereof cannot be set up in bar of an action against a board of Harbour Commissioners charging negligence which resulted in injury to a ship.

APPEAL from the following judgment of the Honourable Mr. Justice Dunlop, Deputy Local Judge of the Quebec Admiralty District, pronounced on the 2nd June, 1913:—

DUNLOP, D. Lo. J.:—There is no question but that the action was taken more than six months after the

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accident occurred, and the question to be decided is not without difficulty.

The parties, by their counsel, have sent me elaborate factums.

The plaintiff contends, first, that the question of prescription must be decided by the *lex fori*, and that the only prescription applicable is the prescription of two years enacted by article 2261 of the Civil Code of this Province; while, on the other hand, the defendants contend that the Imperial statute, *Public Authorities Protection Act*, 56-57 Vict. cap. 61, applies and that plaintiff's action is barred, also that the six month's prescription mentioned in said Act applies, and that plaintiffs' action was barred and prescribed when it was instituted.

In order to elucidate this question, it will be necessary to refer to the different statutues applicable to the present case. *The Admiralty Act* (54-55 Vict.) (Dom.) cap. 29, sections 3 and 4 is in the following terms:

Section 3 reads in part as follows : "shall, within " Canada, have and exercise all the jurisdiction, " powers and authority conferred by the said Act and " by this Act."

Section 4 reads in part: "shall, as well in such parts " of Canada as have heretofore been beyond the reach " of the process of any Vice-Admiralty Court, as else- " where 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.*"

Section 2, paragraph 2, of the *Colonial Courts of Admiralty Act, 1890*, reads: "The jurisdiction of a

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" Colonial Court of Admiralty shall, subject to the pro-
" visions 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."

It is evident that the rights and remedies referred to in section 4 of the *Admiralty Act*, 1891, as being enforceable in any Colonial Court of Admiralty under the *Colonial Courts of Admiralty Act*, 1890, acording to the terms of this latter Act, can only be enforced in like manner and to as full an extent as the High Court in England.

I am of opinion that any statute which, in England, affects the manner or the extent of the exercise of Admiralty jurisdiction in the High Court must affect the manner and the extent of the exercise of such jurisdiction in any Colonial Court of Admiralty.

The Imperial Statute 56 and 57, Vict. cap. 61, entitled the *Public Authorities Protection Act*, 1893 is such an enactment. This statute, in part, provides as follows:—

"Where after the commencement of this Act any
" action, prosecution or other proceeding is commenced
" in the United Kingdom against any person for any
" act done in pursuance, or execution, or intended
" execution of any Act of Parliament, or of any public
" duty or authority, or in respect of any alleged neglect
" or default in the execution of any such act, duty or
" authority, the following provisions shall have effect:
" (*a*) The action, prosecution or proceeding shall not

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" lie or be instituted unless it is commenced within six " months next after the act, neglect or default com- " plained of, or, in case of a continuance of injury or " damage, within six months next after the ceasing " thereof."

This statute affects the manner and extent of the exercise of Admiralty jurisdiction in England as well as the rights and remedies of persons before the Admiralty Courts. This is evident both from the statute itself and its schedule and from jurisprudence.

For instance, the Act repealed section 27 of the *Harbours Act*, 1814, and section 93 of the *Passengers Act*, 1855, (now forming part of *The Merchants Shipping Act*) and section 24 of the *Dockyard Ports Regulation Act*, 1865.

Defendants have cited in their factum several decisions applicable to the present case, namely, *The Ydun* (1), *Williams* v. *Mersey Docks* (2), *The Johannesburg*(3).

The fact that section 1 of the *Public Authorities Protection Act* refers to a prosecution or other proceedings commenced in the United Kingdom does not prevent the application of that Act to the jurisdiction of Colonial Courts of Admiralty. The fact that it affects the Admiralty jurisdiction in England is sufficient to make it applicable to the jurisdiction of a Colonial Court of Admiralty.

The principle to be followed is contained in subparagraph (a) of the proviso to section 2 of *The Colonial Courts of Admiralty Act*, 1890, which declares:

" 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

(1) (1899) Prob. 236. (2) (1905) 1 K.B. 804.
(3) (1907) Prob. 65.

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" if the name of that possession were therein sub-
" stituted for England and Wales."

At the date of the passing of this Act (1890) the *Public Authorities Protection Act* had not been enacted; but it is quite evident that in applying the terms of paragraph 2 of section 2 of *The Colonial Courts of Admiralty Act*, 1890, determining the jurisdiction of the Colonial Court to be exercised in like manner and to as full an extent as the High Court in England, the name of the British Possession is to be read for the term "United Kingdom" in the same manner as for the words "England and Wales", on the principle that, in any event, the greater includes the less.

The present question, in my judgment, seems to be absolutely disposed of by Rule 228 of this Court which reads as follows:—

"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."

This case is not provided for by our Rules. Therefore, under Rule 228, reference must be made to the practice in force in England, and that practice is governed by the *Public Authorities Protection Act*, which the judges in the *Ydun* case declared to be an enactment affecting the procedure and practice of the Courts. Inasmuch as they applied it in an Admiralty proceeding, it clearly follows that it is to be applied in this Court, under this Rule.

The case referred to will be found reported in the Law Reports,(1) where it was held by the Court of Appeal (A. L. Smith, Vaughan-Williams and Romer, L.JJ., affirming the decision of the president, that the defendants were acting in pursuance of their public duties so

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that sec. 1 of the *Public Authorities Protection Act*, 1893, applied, and as that statute, dealing with procedure only, was retrospective, the action was barred after the expiration of six months from the default complained of.

It has not been established, in my opinion, that article 2261 of the Civil Code ever applied to a case like the present, even prior to the passing of the *Public Authorities Protection Act*, 1893, and if it ever did apply, the effect of the passing of that statute would alter the law and enact a prescription of six months.

Diligence must be used in proceedings.

I do not find that in England, prior to the passing of that Act, there was any limitation of time under which an action, such as the present, should be brought. The authors say: "should be brought in a reasonable time, " taking into consideration the facts and circumstances " of the case."(1)

In the case of *Williams* v. *Mersey Docks and Harbour Board*, above referred to (2) it was held that the action could not be maintained, inasmuch as the right of action of the deceased, if alive, would have been barred by the *Public Authorities Protection Act*, 1893 section 1 (a), that is, by six months, by the prescription under the *Fatal Accidents Acts*, 1846 referred to in the report of said case. The prescription would have been much longer.

No precedents applicable to the present case have been cited by the parties, and I do not think that the question has before been raised in Canada.

After a most careful consideration of the present case and of the factums filed by the parties, I have come to the conclusion that plaintiff's action is barred and prescribed, more than six months having elapsed

(1) See Maclachlan on Shipping, 5th ed. 72, 785, and 1044; Marsden on Collisions, 6 ed. p. 74.

(2) (1905) 1 K. B. 804.

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between the date of the accident and the institution of the present action.

I am therefore of opinion that the demurrer filed by the defendants must be maintained, and that plaintiff's action be dismissed, with costs, and judgment is given accordingly.

From this judgment an appeal was taken by the plaintiff to the Exchequer Court of Canada.

September 9th, 1913.

The appeal was now heard before the Honourable Mr. Justice Cassels.

A. R. Holden, K.C., for the appellant, submitted that the *Public Authorities Protection Act* (U.K.) 1893, is not in force in Canada *ex proprio vigore*, and Rule 228 of the general rules and orders regulating the practice and procedure in Admiralty cases in the Exchequer Court cannot be held to invoke its provisions. The subject-matter of the Imperial Act is a right and does not fall within the domain of "practice." (See Bouvier's Law Dictionary, *verbo* "Practice"; Stroud's Judicial Dictionary, *verbo* "Practice"; *Encyclopaedia of The Laws of England*;(1) *Re Osler*;(2) *Attorney-General* v. *Sillem*; (3) Beal's *Cardinal Rules of Legal Interpretation*(4).

Sir A. R. Angers, K.C., and *Arnold Wainwright*, K.C., for the respondent, contended that under section 2 of *The Colonial Courts of Admiralty Act*, 1890, the jurisdiction of the Exchequer Court of Canada was the same as that of the High Court in England. That the *Public Authorities Protection Act*, 1893, (U.K.) applied to Admiralty proceedings in the High Court is apparent from the language of that statute itself, and is estab-

(1) Vol. 10 p. 284.
(2) 7 Ont. P.R. 80.
(3) 10 H.L. c. 704.
(4) 2nd Ed. p. 392.

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lished by cases decided in England. (*The Ydun*;(1) *Williams* v. *Mersey Docks*;(2) *The Johannesburg*(3).

The point is absolutely disposed of by the provisions of Rule 228 of the Admiralty practice in the Exchequer Court of Canada:—"In all cases not "provided for by these Rules, the practice for the "time being in force in respect to Admiralty pro- "ceedings in the High Court of Justice in England "shall be followed." This case is not provided for by the Canadian rules, and the English practice comprehends the provisions of the *Public Authorities Protection Act*, 1893.

There is no question that the subject-matter of that statute is procedure; and "practice" and "procedure" are interchangeable terms in the law. See *Webster's International Dictionary, verbo* "Practice."

CASSELS, J. now (September 17th, 1913) delivered judgment.

This is an appeal from the judgment of Mr. Justice Dunlop, Deputy Local Judge, allowing the demurrer of the defendants and dismissing the action with costs.

Since the hearing of the appeal I have carefully considered the arguments of the counsel, both oral and written, the statutes relating to the case, and the reasons for judgment of the learned Judge below.

As the learned Judge states, the question to be decided is not without difficulty.

Having the greatest respect for the opinion of the learned Judge I am reluctantly unable to bring my mind to the same conclusion that he has arrived at.

The Colonial Courts of Admiralty Act, 1890, (53-54 V. (U.K.), cap. 27), is intituled "An Act to amend the

(1) (1899) Prob. 236. (2) (1905) 1 K.B. 804.
(3) (1907) Prob. 65.

" Law respecting the exercise of Admiralty Jurisdiction " in Her Majesty's Dominions and elsewhere out of " the United Kingdom."

Section 2, sub-sec. 1 of this statute reads as follows:—

"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.

Section 2, sub-sec. 2 is as follows:

" 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."

The statute provided (section 7) for making of rules of Court "for regulating the procedure and practice (including fees and costs) in a Court in a British

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possession *in the exercise of the jurisdiction* conferred by this Act." Subsequent to the passage of this Act Admiralty rules were drafted and after being approved of by Her Majesty in Council came into force on 10th June, 1893.

The Dominion statute, cap. 29, 54–55 Vict. was assented to 31st July, 1891.

It is conceded by the learned Judge in his reasons that at the time of the passing of *The Colonial Courts of Admiralty Act, 1890*, and until the first of January, 1894, there was no limitation of time within which an action such as the present should be brought. It is in each case a question of diligence.

The plaintiffs on the other hand invoke the limitation in the Civil Code of Quebec.

This is a question to be determined at the trial. if the Code governs, the action is commenced in time. It is a question of diligence. Then the facts will appear at the trial.

I do not give any decision on this question.

The learned Judge's decision rests upon the ground that an Imperial Statute, cap. 61, 56–57 Vict., is applicable to Admiralty proceedings in Canada, and bars the action after a lapse of six months.

This statute is intituled "An Act to generalize and " amend certain Statutory provisions for the protection " of Persons acting in execution of statutory and other " public Duties."

At the time of the enactment it would have been easy to have made it applicable to Canada, had Parliament so intended.

Instead of so enacting it is limited to actions, prosecutions and proceedings commenced *in the United Kingdom*; and it enacts that the action shall not lie or be instituted unless it is commenced within six months.

It is not correct to state that sec. 27 of the *Imperial Harbours, Act* 1814, is repealed.

Section 2 of cap. 61 states: "There shall be "repealed *as to the United Kingdom*, etc."

This sub-section 2 clearly indicates, if it were not otherwise clear, that the enactment was only intended to apply to the United Kingdom.

Therefore unless there is other ground for making it applicable to Admiralty proceedings in Canada it clearly does not apply.

Proviso (a) to sub-section 3 of section 2 of the *Colonial Courts of Admiralty*, 1890, is invoked as drawing in the provision of the *Public Authorities Protection Act*, 1893.

This proviso (a) is as follows:

"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."

It is unnecessary to consider the question whether this section applies to future legislation or merely to legislation existing at the time of the coming into force of the *Colonial Courts of Admiralty Act*, 1890.

The words "United Kingdom" in the *Public Authorities Protection Act*, 1893, are not the same as "England and Wales", referred to in proviso (a); and I cannot bring my mind to the conclusion that a statute can be construed on the theory that the greater includes the less.

I am of the opinion that the *Public Authorities Protection Act*, 1893, is not in force here by virtue of this proviso (a).

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It is said further that under Rule 228 of the Admiralty Rules this statute (the *Public Authorities Protection Act*, 1913, is in force.

Rule 228 reads as follows:

" 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."

The *Colonial Courts of Admiralty Act*, 1890, by section 7, provided, as I have pointed out, for the making of Rules regulating the procedure and practice in the exercise of the *jurisdiction conferred.*

It will be noticed that Rule 228 only refers to the "practice."

In the *Ydun* case (1) it was hardly in contest that the provisions of the *Public Authorities Protection Act* were applicable as a defence to an action commenced in the United Kingdom. The question involved was whether it was retroactive, and the Court there held it was, being a matter of procedure.

If under the word "practice" in Rule 228 this statute can be brought in, a plaintiff who had a good cause of action on the 1st of June, 1893, and entitled under the jurisdiction conferred to invoke the aid of the Court say on the 2nd January, 1894, would have found his claim absolutely taken away.

I cannot bring my mind to the conclusion that any such effect can be given to Rule 228.

In the House of Lords in *Attorney-General* v. *Sillem* (2) Lord Westbury remarks:

" A power to regulate the practice of a Court does " not involve or imply any power to alter the extent " or nature of its jurisdiction."..... " Here the word 'practice' is used in the common and ordinary

(1) (1899) P. 236.

(2) 10 H.L. at pp. 720, 723, 724.

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" sense, as denoting the rules that make or guide " the "cursus curiae" and regulate the proceedings " in a cause within the walls or limits of the Court " itself."..... " The right to bring an action is " very distinct from the regulations that apply to " the action when brought, and which constitute " the practice of the Court in which it is instituted."

On the whole case after the best consideration I can give to it, I am of opinion that the demurrer fails.

The appeal is allowed with costs including the costs in the Court below.

Judgment accordingly. (1)

Solicitors for appellant: *Meredith, MacPherson, Hague, Holden & Shaugnessy.*

Solicitor for respondent: *A. R. Angers.*

(1) This judgment was unanimously affirmed on appeal to the Supreme Court of Canada.

IN THE MATTER OF THE PETITION OF RIGHT OF THE

NORTH ATLANTIC TRADING COMPANY.....SUPPLIANT;

1912
June. 20.

AND

HIS MAJESTY THE KING..RESPONDENT

Private International Law—Foreign Syndicate or Partnership—Action in Exchequer Court—Right to sue—Practice.

Under the general rules and orders regulating the practice and procedure in cases in the Exchequer Court of Canada, a foreign partnership has no right to proceed as such in the Court, but must sue or petition in the names of the individual partners.

MOTION on behalf of the Attorney-General of Canada to dismiss a petition of right.

The grounds upon which the motion was made are stated in the reasons for judgment.

June 13th, 1912.

G. F. Shepley, K.C., for the motion.

E. Lafleur, K.C., contra.

CASSELS, J. now (June 20th, 1912) delivered judgment.

This was an application made to me to have the petition dismissed. The grounds taken are twofold. The first ground is that the petition should be dismissed or removed from the files, as no fiat was granted to the suppliant. The second ground, that the suppliant being a syndicate domiciled in Amsterdam, and not carrying on business in Canada or any of the British Colonies, is not competent to sue in the name of the North Atlantic Trading Company, but that the individual members of the Company should be suppliants.

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Reasons for Judgment.

On the 28th November, 1904, the contract which is set out in the petition, was entered into between "His Majesty The King, represented by the Minister of the Interior of Canada, of the first part, and the North Atlantic Trading Company of Amsterdam, Holland, a body corporate and politic, hereinafter called the Company, of the second part." It would appear now from the pleadings, that the North Atlantic Trading Company, the suppliant in this particular case, is not a body corporate but merely a partnership or syndicate. The contention on the part of the Crown is, that when the fiat was granted entitling the suppliant to fyle a petition, the Minister of Justice took for granted that the suppliant was as stated in the agreement a body corporate and politic; and the contention is that had it been known that it was not a corporate body, the fiat would not have been granted. I can readily understand how anybody to whom the petition is shown, setting out in full the agreement which refers to the North Atlantic Trading Company, as being a body corporate and politic, would infer that the suppliant when asking for a fiat was asking as an incorporated body.

On the application before me, Mr. Shepley acting for the Crown, disclaimed any charge of any improper misrepresentations, and it is not suggested that any misrepresentation was made when the fiat was asked for. Nevertheless, if, in point of fact, the fiat was intended to be granted to an incorporated body, there must be, it appears to me, some means of getting rid of the fiat. I have looked carefully for authority but can find none. Assume a fiat obtained by fraudulent representations, there must be some means of getting redress and having the petition treated as if no fiat had been granted; and I think that probably the method

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adopted by the Crown of a motion is the proper form of procedure. I think, however, in a matter of such importance, the question should be tried, if it becomes material, on oral evidence.

I do not think the statement of Sir Allen Aylesworth, referred to in the affidavit of Mr. Newcombe, is proper evidence. It is a memorandum or rather an argument made at the close of the proceedings. I think if it is to be used, it should be by affidavit or by oral evidence; and I do not think that the memorandum itself can be looked upon as evidence. If the suppliant desires to proceed further with its petition, I would direct an issue to be tried before me as to whether or not the fiat should be treated as in force; on this issue the facts will come out.

On the argument before me it was stated by Mr. Lafleur that it might be taken as granted that if the names of the syndicate forming the suppliant company had to be given, they would abandon the proceeding; as they must decline to give names. Assuming the petition to remain on the files of the Court, the respondent at any time might examine the proper officials of the suppliant company for discovery and I do not see how the suppliants could protect themselves from disclosing the names of the members of the syndicate. I do not think the Crown is prevented from taking this course, if so advised, notwithstanding the alleged agreement referred to by Mr. Smart in his affidavit. I merely mention this, as if the stand taken by Mr. Lafleur is well founded, it can only be a matter of time when the suppliants would be bound to furnish the information, and if they refused, their petition would be dismissed.

The other ground, namely, that the suppliants are incapacitated from suing, I think should be brought

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up in a different way. It does not appear to me to be proper to take this ground by notice of motion. Under the old practice it would be by demurrer. It should be, it seems to me, that on the pleadings something in the nature of a demurrer should be filed and the question of law decided; this, however, is practically a matter of form, and as the matter has been argued before me I will give my views. I think the point is well taken. The Rules of the Exchequer Court provide that the practice and procedure in suits, actions and matters in the High Court of Justice should be in force where no rules of the Exchequer Court are in force applicable to the case. Under the rules and orders in force in England, a foreign partnership not having a place of business in England, must sue in the names of the individual partners. But for the special rules and orders of court, a partnership could not bring an action in the firm name; the action would have to be brought in the name of the individual members of the firm. There is no relaxation of this rule where the partnership is a foreign partnership having no place of business within the United Kingdom; and I think the Crown's objection, as I have stated, is well founded. If the parties are willing to accept this ruling in the form in which it has come before me, that will be my judgment; otherwise I think the proper procedure would be to have a plea entered on the record and the question decided as a matter of law. I mention this, as there may be no appeal from my decision, if the case is treated as a decision on an application of the nature of that made before me. The parties can speak to the matter before me in Chambers, if so advised (1).

(1) EDITOR'S NOTE.—On the 19th December, 1912, this leave was exercised by the parties, and after argument the petition was dismissed with costs.

1913
Dec. 12.

KOPS BROTHERS of the Borough of Manhattan, in the City of New York, County of New York and State of New York, one of the United States of America.....PETITIONERS.

AND

THE DOMINION CORSET COMPANY.....RESPONDENT.

AND

In the Matter of the specific Trade-Mark "Self-Reducing" used by the petitioners in Connection with the sale of Corsets, Corset Waists and Corset Covers.

Trade-mark—Word "Self-reducing" as applied to corsets—Descriptive name.

Held, upon the facts, that, the word "self-reducing" as applied to the manufacture and sale of women's corsets is descriptive and does not constitute a good trade-mark.

THIS was a petition for the registration of a trade-mark, a previous application to the Minister of Agriculture to register the same having been refused.

The facts relied on by the petitioners for registration were set out in the petition as follows:—

1. That your petitioners are a firm composed of Daniel Kops and Max Kops, both residing in the said Borough of Manhattan and doing business at Fourth Avenue and Twelfth Street in the said Borough.

2. Your petitioners carry on an extensive business in the manufacture and sale of Corsets, Corset Waists and Corset Covers.

3. The business of the said firm was founded in the year 1894, and the said firm used the said Trade-Mark

as applied to the sale of Corsets, Corset Waists and Corset Covers continuously since that time, and have used the said Trade-Mark as applied to such goods in Canada continuously since the year 1900.

4. Throughout the whole of the aforesaid period the distinctive name and trade-mark "self-reducing," under which such goods have been and are being sold, was adopted and used by the petitioners for the purpose of distinguishing such goods from goods of a similar kind manufactured and sold by other persons.

5. The said distinctive name and trade-mark has been and is habitually and continuously used in connection with the said goods by placing the same on the goods themselves and also on the receptacles containing the goods, and also by displaying the same in your petitioners' catalogues, price lists, advertisements, and, in fact, in every way in which it would be likely to attract the notice of purchasers of such goods.

6. Your petitioners have spent hundreds of thousand of dollars in advertising their said goods and bringing their said goods to the attention of the public under their said trade-mark " self-reducing."

7. Throughout the whole of the period aforesaid the said distinctive name and trade-mark "self-reducing" has been and the same is universally recognized by the trade and public as indicating exclusively that the goods of the aforesaid description to which the same is applied, or in respect of which it is used, are goods manufactured or supplied by your petitioners, and no one has ever disputed your petitioners' right to the exclusive use of the said distinctive name and trade-mark "self-reducing" as applied to the goods in respect of which your petitioners are seeking to register the same.

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Statement of Facts.

8. The words "self-reducing" are not descriptive of the said goods and anyone desiring to describe similar goods for the purpose for which they are sold and used would not describe them as " self-reducing."

9. As far as your petitioners are aware no goods of the aforesaid description of other makers have ever been called or described by the said name and trade-mark, the use of which has been exclusively confined to the goods of the aforesaid description manufactured and supplied by your petitioners as aforesaid except lately when The Robert Simpson Company, of Toronto, have applied the said words to an imitation of your petitioners' goods, and your petitioners immediately notified the said Robert Simpson Company to discontinue such practice.

10. Your petitioners are desirous that, for the protection of their own business and also of the trade and public purchasing their goods, their said trade-mark should be registered in their name and protected under the provisions of the Trade Mark and Design Act.

11. That on the fifteenth day of September, 1911, your petitioners duly filed an application for the registration of the said Specific Trade-Mark "self-reducing" in the Department of Agriculture, Trade-Mark and Copyright Branch, at Ottawa, to be used in connection with the sale of Corsets, Corset Waists and Corset Covers which your petitioners make and deal in their trade.

12. That registration of the said Specific Trade-Mark was duly refused on the 18th day of June, 1912, in the form as presented.

The petition came on for hearing before the Honourable Mr. Justice Cassels on the twelfth day of December, 1913.

J. F. Edgar for the petitioners;

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Reasons for Judgment.

H. P. Hill for the respondents;

R. V. Sinclair, K.C., for the Minister of Agriculture.

CASSELS, J., now (December 12th, 1913) delivered judgment.

There is no doubt, as far as my judgment goes, that the decision of the Commissioner is correct, and that this trade-mark ought not to be registered.

This does not take away in any shape or form from the petitioner, the right to bring an action if anybody else is passing off his goods. That action remains open to him.

The question before me is one purely and simply of whether he is entitled to register the trade-mark "Self-Reducing."

In nearly all the exhibits put in, this particular corset is noted as the "Nemo" corset. The word "self-reducing" underneath is simply used to describe the character of the corsets. That appears on the covers of the boxes, produced as exhibits herein.

The law is laid down in the *Standard Ideal Co.* v. *Standard Mfg. Co.*, (1) and in *Registrar of Trade-Marks* v. *W. & G. Du Cros, Ltd.*, (2)

In the *Standard* case it was held, looking at Canadian legislation as it is now embodied in the *Trade-Mark and Design Act*, R.S.C., ch. 71, section 11, that the necessary ingredients of a trade-mark have to appear in order to entitle the party to registration.

Now the word "self-reducing" is absolutely nothing but descriptive of the kind of corset which is being sold by these petitioners. It is admitted beyond question that "reducing" corsets have been on the market for years, and that the reducing took place by the same mechanical means in these other corsets as in the

(1) (1911) A.C. 78. (2) (1913) A.C. 624.

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corsets sold by the petitioners. Every one was entitled in selling these corsets to their customers, to describe them as "reducing" corsets and also to point out that they were "self-reducing" corsets in the sense that the wearer of the corset could, by pulling a band a little tighter, contract the corset so as to reduce her figure down to the fashionable shape and fashionable size.

Taking the word "self" and putting it before the word "reducing" cannot, to my mind, confer any right whatever to a trade-mark. I do not see how it is possible to ask any Court to declare that such a trade-mark is valid.

I think the decision of the Minister is right, and that this petition must be dismissed with costs.

Judgment accordingly.

Solicitor for petitioners: *J. F. Edgar.*

Solicitors for objecting party: *Christie, Greene & Hill.*

BRITISH COLUMBIA ADMIRALTY DISTRICT.

(IN CHAMBERS.)

MOMSEN.....PLAINTIFF; 1913 Sept. 26.

AGAINST

THE SHIP *AURORA*.

Admiralty law Practice—Re-arrest of ship after judgment—Bail—Judgment—Costs—Secs. 15 and 22 Admiralty Courts Act, 1861—Rule 39.

A warrant may be issued for the re-arrest of a ship, released on bail, to answer the amount of the claim and costs for which judgment has been recovered and remains unsatisfied.

APPLICATION for an order under rule 39 for a warrant to issue for the re-arrest of the defendant ship. She had been arrested and released under a bail bond, and later judgment was recovered against her with costs, but had not been paid though execution had issued against the owner and sureties, and been returned *nulla bona*.

The application was heard by the Honourable Mr. Justice Martin, Local Judge, of the British Columbia Admiralty District, in Chambers at Victoria, September 26th, 1913.

E. A. Lucas for the motion. On the facts proved I submit the plaintiffs are entitled to the order—see secs. 15 and 22 *Admiralty Courts Act*, 1861; *Williams & Bruce Ad. Prac.*, (1) The ship is still within the jurisdiction available to all process of the Court.

MARTIN, L. J:—There does not seem to be any valid reason why the order should not be granted. In *The Freedom* (2) the ship was re-arrested to answer the costs, though the damages had been paid to the full

(1) Pp. 480, 511-2. (2) (1871) L.R. 3 Ad. & E., 495.

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extent of the bail bond. Here nothing has been paid on either head, so I see no obstacle in the way. She can at least be arrested for costs, and there is nothing in *The Freedom* case to show that she should not be arrested to answer the judgment in the present circumstances; the reasoning, indeed, in that decision is all in favour of such a course, though because no one has appeared to present an argument in support of a contrary view I shall be prepared to listen to one should occasion arise.

Order accordingly.

BRITISH COLUMBIA ADMIRALTY DISTRICT.

(IN CHAMBERS.)

1914
April 21.

MOMSEN, PLAINTIFF.

AGAINST

THE SHIP *AURORA* (No. 2)

Shipping—Admiralty Practice—Marshal—Costs of executing warrant to arrest—Travelling expenses.

Upon a proper construction of Part V of the Table of Fees in Admiralty Proceedings no greater sum than ten cents per mile can, in any circumstances, be allowed for executing a warrant to arrest.

APPLICATION in Chambers at Vancouver, before the Honourable Mr. Justice Martin, Local Judge of the British Columbia Admiralty District, to review the Registrar's taxation of the Marshal's Bill of Costs in respect of an item of $440 for hire of a tug for eleven days for proceeding from Vancouver to Sea Otter Cove, at the northern end of Vancouver Island, to arrest the ship *Aurora*, and thence towing her to Vancouver under arrest. The Registrar allowed the sum of $50 only, from Vancouver to Sea Otter Cove and returning, being at the rate of 10c. per mile, following the note to Part 5 of the Table of Fees in the Admiralty Rules of the Exchequer Court of Canada, as follows:—

"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."

Tuesday, the 21st April, 1914.

1914

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Reasons for Judgment.

E. A. Lucas for the plaintiff: This was a "payment necessary for the safe custody of the ship" and should be allowed under the proviso in that behalf in the third item of Part 5 of the Table of Fees. The note at the end of the said part as to 10 cents a mile refers to the Marshal's travelling expenses only and while it is conceded that he could have travelled by mail steamer via Victoria to Winter Harbour and hired a launch there to Sea Otter Cove, about twenty miles further on, yet to keep the ship in safe custody it was necessary to lay alongside her and tow her to Vancouver.

J. E. Sears for Nosler; a claimant on the funds in Court. It was not necessary to employ a tug from Vancouver. The Marshal's officer could have taken the regular steamer and hired a local launch, and it must be presumed that the *Aurora's* crew with the Marshal's officer aboard would have brought her to Vancouver in pursuance to the Marshal's orders.

J. M. Price for the bondsmen of the ship: The note to Part 5 of the Table of Fees expressly mentions travelling and boat hire and this is the only provision for such disbursements; parties providing the Marshal with more expensive means of travelling must bear the cost over and above 10 cents per mile.

MARTIN, L. J.:—The learned Registrar's ruling is the only one possible under the Table of Fees, and it is hereby confirmed. No greater sum than 10 cents per mile can in any circumstances be allowed in executing a warrant to arrest.

Motion dismissed.

BRITISH COLUMBIA ADMIRALTY DISTRICT.

MOMSEN

PLAINTIFF;

1913
August 19.

AGAINST

THE SHIP *AURORA*, (No. 3).

Shipping—Ship under arrest in prior action in rem—Subsequent action for equipping the ship—Section 4 of The Admiralty Court Act (U. K.) 1861—Jurisdiction.

Held, that the clear intention of section 4 of *The Admiralty Court Act (U.K.) 1861* is that as soon as a creditor finds that a "ship or the proceeds thereof are under arrest of the Court" in pursuance of its valid process issued in that behalf, then he may bring his action, and the Court acquires immediate and irrevocable jurisdiction over any claim for building, equipping or repairing the ship. The burden is not cast upon the creditor who proceeds against a ship under arrest in a prior action to show that such action must eventually succeed.

THIS was an action for the equipping of defendant ship with a standard engine.

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

Trial commenced before Mr. Justice Martin, Local Judge, at Vancouver, B.C., on 22nd May, 1913, and was continued at Victoria, B.C., on 28th June and 4th July, 1913.

J. M. Price for ship: No jurisdiction to entertain action. Jurisdiction limited by section 4 of the *Admiralty Courts Act*, 1861. Arrest must be legal. Section 165 of *Merchants Shipping Act*, 1894, applies.

E. A. Lucas for plaintiffs: Not now open to defence to take objection to want of jurisdiction. Should have appeared under protest. Halsbury's Laws of England (1). *Hall v. Seward* (2) The *Vivar* (3).

At time of our action ship was under arrest.

(1) Vol. 1, p. 87. (2) 3 Ex. CR. 268. (3) L.R. 2 P.D. 20.

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Reasons for Judgment.

Nothing to show that Oliver action not within section 191, of the *Canada Shipping Act.*

Mr. Price: Want of jurisdiction can be raised in defence : it is a matter of substantive jurisdiction, not procedure, and may be taken notice of by Court at any time.

MARTIN, Lo. J., now (August 19, 1913) delivered judgment.

This is an action for the equipping of the *Aurora* with a 20 h.p. "Frisco" standard engine, for the price of $1,625. At the end of the trial judgment was given in favour of the plaintiffs on the facts, reserving for further consideration the point of law raised as to the jurisdiction of this Court to entertain the action; which point is based on section 4 of the *Admiralty Courts Act* 1861 (24 Vic. c. 10) as follows:—

> 4. "The High Court of Admiralty shall have jurisdiction over any claim for the building, equipping, or repairing of any ship, if at the time of the institution of the cause the ship or the proceeds thereof are under arrest of the Court."

It is admitted that at the time this cause was instituted the *Aurora* was under arrest of this Court in an action by one Oliver for seaman's wages, yet because Oliver's claim was for less than fifty pounds it is submitted that his action should never have been brought, and therefore the ship cannot be deemed to have been legally under arrest at the time this present action was begun, since section 165 of the *Merchant's Shipping Act* of 1894 provides that:

> "A proceeding for the recovery of wages not exceeding fifty pounds shall not be instituted by or on behalf of any seaman or apprentice to the sea's service in any superior court of record in her Majesty's dominions, nor as an admiralty proceeding

in any court having admiralty jurisdiction in those dominions, except—

(i) where the owner of the ship is adjudged bankrupt; or

(ii) where the ship is under arrest or is sold by the authority of any such court as aforesaid; or

(iii) where a court of summary jurisdiction acting under the authority of this Act, refers the claim to any such court; or

(iv) where neither the owner nor the master of the ship is or resides within twenty miles of the place where the seaman or apprentice is discharged or put ashore."

In answer to this contention it is first submitted (apart from other objections as to waiver, and the application of the said *Merchants Shipping Act*) that once the fact of the arrest by this Court is established that of itself confers jurisdiction; and, furthermore as Oliver's action is coming on for trial it is open to him to prove any one of the four exceptions to section 165 which would entitle him to maintain his action even though his claim is under £50. In my opinion, after a careful consideration of the matter, this submission should prevail. I think the clear intention of the statute, section 4, is that as soon as a creditor finds that a "ship or the proceeds thereof are under arrest of the court" in pursuance of its valid process issued to the marshal in that behalf, then he may without further ado bring his action for, and the Court acquires immediate and irrevocable jurisdiction, over any claim for building, equipping, or repairing the ship. The burden is not cast upon the litigant to show to this Court now that the original action under which the ship was arrested must eventually succed. It would indeed be an anomalous position to place this Court

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Reasons for Judgment.

in to require it now to attempt to decide in this action the prophetic question of fact as to whether or not Oliver will be able, when his action comes to be tried, to adduce evidence that will bring him, say, within the fourth exception of section 165, and therefore be entitled to maintain his action, as another seaman was able to do before me in the case of *Cable v. The Socotra* (1). In short it is the present fact of the arrest and not the future result of the action that determines the question of jurisdiction.

It follows therefore that the question of law is also decided in favour of the plaintiffs and judgment will be entered for the full amount of their claim with costs.

Judgment accordingly.

(1) (1907) 11 Ex. C.R. 301.

BRITISH COLUMBIA ADMIRALTY DISTRICT.

NOSLER *v.* THE SHIP *AURORA*.

1913
Nov. 19.

Shipping—Admiralty Law—Practice—Action in rem—Wages—Judgment in default of appearance—Waiver of proceedings.

In an action *in rem* for seaman's wages wherein no appearance has been entered, and the ship is in the marshal's hands for sale in another cause, all preliminary proceedings may be waived and judgment entered forthwith.

MOTION before the Honourable Mr. Justice Martin, Local Judge of the British Columbia Admiralty District, at Vancouver on November 12th, 1913, in an action *in rem* for seaman's wages for judgment in default of appearance.

The plaintiff filed his affidavit verifying the cause of action and showing that no appearance had been entered though two weeks had elapsed since the filing of the warrant, and also that the ship was now in the Marshal's hands for sale in another action in this court. He further deposed "that " before I commenced this action I was advised by " the owner of the *Aurora* to come up town and " see if I could not get my wages out of the ship." The plaintiff's solicitor filed an affidavit stating that " I am informed by (A.B.) solicitor for the owner of " the ship *Aurora* that it is not intended to dispute " the plaintiff's claim."

J. E. Sears, on behalf of the plaintiff, cited Rule 115; Howell's Adm. Prac.(1); *The Julina* (2), and asked for an order for immediate judgment.

(1) Pp. 54, 55.

(2) (1876) 35 L.T.N.S. 410.

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THE SHIP AURORA.

Reasons for Judgment.

MARTIN, Lo. J.:—In the special circumstances of this case wherein the debt is practically admitted and the ship now in process of sale by the Marshal, I see no reason why an order should not be made waiving all preliminary proceedings and directing judgment to be entered forthwith. This case is stronger, if anything, than the *Julina*(1).

Order accordingly.

(1) (1876) 35 L.T.N.S. 410.

BETWEEN:

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

PLAINTIFF;

1913
Nov. 18.

AND

FRANK ROSS, AND THE QUEBEC HARBOUR COMMISSIONERS.

DEFENDANTS;

Expropriation—Immovable property—Sheriff's Deed—Error—Conveyance of larger estate than that possessed by judgment-debtor—Failure of Title thereunder—Prescription—Art. 2251 C.C.P.Q.—Costs.

Under the Code of Procedure of the Province of Quebec, a deed from the sheriff of immovable property after seizure and sale only conveys the rights and title of the judgment-debtor at the time of the adjudication; and if, through clerical error or otherwise, the deed purports to convey a parcel of land not in the possession of the judgment-debtor at such time, the title to that parcel does not pass by the deed.

2. In such a case the prescription of ten years mentioned in Art. 2251 C.C.P.Q. cannot be invoked. *Meloche* v. *Simpson*, 29 S.C.R. at p. 375 referred to.

3. Where the party succeeding on the issue as to title under the Sheriff's deed had previously stood by without attacking the deed, such party was not allowed the costs of that issue in the expropriation proceedings.

THIS was an information exhibited by the Attorney-General of Canada for the expropriation of certain lands in the Province of Quebec for the purposes of the National Transcontinental Railway.

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

October 27th and 28th, 1913.

The case was heard before the Honourable Mr. Justice Audette at Quebec.

E. Belleau, K.C., and *E. J. Flynn*, K.C., for the plaintiff.

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THE KING v. ROSS.

Reasons for Judgment.

G. G. Stuart, K.C., for the defendant Frank Ross.

A. C. Dobell for the defendant The Quebec Harbour Commissioners.

AUDETTE, J. now (November 18th, 1913) delivered judgment.

This is an information exhibited by the Attorney-General of Canada, whereby it appears, *inter alia*, that certain lands were taken and expropriated, under the authority of 3 Ed. VII, ch. 71, for the purposes of the National Transcontinental Railway, by depositing plans and descriptions on the 12th September, 1912, and 14th February, 1913, with the Registrar of Deeds for the City of Quebec, in the Province of Quebec.

The actual quantity of land taken was *in limine* the subject of controversy, but became finally adjusted, both parties admitting the figures given by the Surveyor Addie as correct and governing in the present case. The figures are as follows:

The total area of the four lots, down to the Harbour Commissioners' line, contains 2,392,932 square feet, which is equal to 54 934-1000 acres.

The total area between low water mark and the Harbour Commissioners' line is..... 461,601
and the area of the six water lots being..... 49,643

there remains a total of..... 411,958

claimed by the Harbour Commissioners as belonging to them and not to the defendant Ross herein. If the Harbour Commissioners' claim is well founded it will leave a total area expropriated from the defendant Ross of 1,980,974 square feet.

The plaintiff tenders, by the information, the sum of $79,700.00 and the defendant Ross claims the sum of $250.00.

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Reasons for Judgment.

As is usual in actions of expropriation the evidence adduced by both parties is of a very conflicting nature.

In view, however, of the documentary evidence of record it has become unneccessary to review at any length the evidence of valuation. Sufficient is it to say that the valuation of the witnesses on both sides varied from five to twelve cents a square foot,—with some valuations as low as two cents for the contested part lying between low water line and the Quebec Harbour Commissioners' line.

The conflict in the valuation is somewhat great, considering the large area in question, and would be somewhat difficult to reconcile but for the correspondence exchanged between the defendant Ross and the Dorchester Electric Company, which is filed as exhibits 5-a and 5-b and "G". Indeed by Exhibits 5-a and 5-b, the Dorchester Electric Company, of its own accord, offered for the property in question the sum of $130,000 payable in the manner therein set forth. And it may be noticed that the area then in contemplation was 2,300,000 square feet, or 92,932 less than the total area in question herein. It is, however, true that the figures of 2,300,000 are followed by the usual words "more or less," but the margin is large.

By Exhibit "G" the defendant expresses in clear terms and language his willingness to accept that amount. The transaction did not go through for reasons unnecessary to recite here, but it is the best expression of opinion as to the value of the property in question in March, 1911. It is an ordinary every day transaction whereby two parties, one the owner and the other a prospective purchaser, come to an agreement, *de gré à gré*, one to buy and the other to sell at a figure agreed upon.

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THE KING v. ROSS.

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The Court will accept this figure, the sum of $130,000 as the real market price of the property in March, 1911, to which will be added ten per cent. as representing (a) the increased value of the property between March, 1911, and the date of the expropriation—and further (b) a certain amount usually allowed for the compulsory taking against the wish of the owner,—

To wit, the sum of.....$ 130,000
to which ten per cent. is added..... 13,000

Making the total sum of.....$ 143,000

equal to about six cents per foot for the total area.

However, this sum of $143,000 will be subject to the deduction hereafter mentioned.

Now, some controversy has arisen as to the contents and the ownership of part lot 232, one of the four lots mentioned in the information herein.

The defendant Ross claims under a Sheriff's deed of sale of the 8th August, 1895, whereby, among others, lot 232, under its Cadastre number, without any description by metes and bounds, is sold and assigned to him. It may be well to mention here further that the Sheriff's deed recites Article 780 of the C.C.P. whereby "*the adjudication is always without any warranty as to the contents of the immovable.*"

The cadastral description, as shown in Exhibit "D," gives the southern boundary of lot 232 down to the Quebec Harbour Commissioners' line.

In Exhibit "Z-1," the conveyance of the property in question by Gilmour et. al. to John Roche, on the 15th October, 1868, the boundary is described down to low-water mark only. And further by Exhibit "Z-4" a deed of sale, of the 2nd August, 1880, between the said Roche and J. G. Ross (the *auteur* of the present defendant) the boundary of the said lot is also given down *to low-water mark.*

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The last deed of the 2nd August, 1880, is relied upon and recited in the declaration in the case *Ross* v. *Geggie*, wherein the said property was sold and wherein the said title has been given by the Sheriff under its cadastral number only.

The Cadastre which became in force in 1872 was not therefore in force at the time of the deed of 1868 wherein it is described by metes and bounds. Then the Cadastre does not constitute a title, but is merely a description; and it may be said and it is in evidence, that it is very often erroneous in its descriptions.

Be that as it may, the question now to be decided is whether by the Sheriff's sale that part, between low water and the Harbour Commissioners' line, not occupied by the six water lots—over which there is no dispute—did pass, and whether, notwithstanding the title to the same held by the Quebec Harbour Commissioners, the ownership of the said space passed to the defendant herein under the Sheriff's sale.

The total area affected by this controversy is 411,-958 square feet.

This area, under 22 Vict. ch. 22, secs. 1, 2 and 3, assented to the 24th July, 1858, (1) became vested in the Quebec Harbour Commissioners, in trust for the purposes of the Act, with the right to dispose of the same.

Now it is contended on behalf of the defendant, not withstanding the above facts, that the Sheriff's sale carried title to him.

Under Article 699, C.P.C. the seizure of immovables can only be made against the judgment-debtor, and he must be, or reputed to be, in possession of the same *animo domini*. Under Art. 779, the purchaser takes the immovable in the condition in which it is at

(1) See p. 27 of Supplement to Revised Statutes of 1886.

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the time of the adjudication; and under Art. 780, the adjudication is always without warranty as to the contents of the immovable. The conditions of sale have not been put in evidence.

A very important fact must be borne in mind and it is that it was the plaintiff in the case of *Ross* v. *Geggie*—the case in which the Sheriff's deed was given—who became the purchaser of the immovable in question. There is no question of a third party being the purchaser and where the latter might have to be put on his enquiry. Ross bought the very property described in the deed referred to in his declaration. He is not taken by surprise, he knows that the boundary, according to that deed, runs down to low-water mark and not to the line of the Quebec Harbour Commissioners, as contended for by him, because, and because only, the Sheriff's title mentions only the Cadastral number, and that the cadastral line runs down to the Quebec Harbour Commissioners.

It is obvious that, even to the knowledge of Ross, the seizure of these 411,958 square feet was made *super non domino et non possedente* and that therefore there was no transfer of property. The Sheriff's seizure and sale were made contrary to the provisions of Art. 699, C.P.C., above referred to. The adjudication only transferred the rights possessed by the person upon whom the immovable was seized.

Furthermore, the prescription of ten years cannot be invoked. (1)

If the Sheriff, through clerical error or otherwise, in making his judicial title included in such title a piece of land which he did not sell or sell *super non domino et non possedente*, the title to such parcel of land did not pass.

(1) *Meloche* v. *Simpson*, 29 S.C.R. 375.

For the purposes of this case, it will be found that the said 411,958 square feet did not pass under the Sheriff's title and that they belong, under the statute, to the Quebec Harbour Commissioners. (1)

The value of these 411,958 square feet must therefore be deducted from the said sum of $143,000. What is the value of this piece of land? It is obvious that even if the defendant is not the owner thereof he has in respect of the same all the rights appertaining both to the public and to a riparian owner, as defined in *Lyons* v. *The Warden, &c., of the Fishmongers.* (2)

This piece of land has been, by some witnesses, valued at two cents. That value will be accepted.

Therefore from the sum of.....	$ 143,000.00
there will be deducted the sum of.....	8,239.16
as representing the price of these 411,958 square feet, at two cents, leaving a balance of.....	$ 134,760.84

The question of interest cannot under the evidence be settled on a satisfactory basis, as it does not show what part was actually taken on the 12th September, 1912, and the 14th February, 1913, respectively, and where each piece of land lay. However, during the whole of the trial the expropriation was always mentioned as of September, 1912, and the Court will fix the date from which such interest will run from the 12th September, 1912—unless, under leave hereby given, within twenty days from the date hereof, an application is made upon affidavits showing that some other date should be fixed.

Coming now to the plea of the Quebec Harbour Commissioners, little will be said about it in view of

(1) Dufresne v. Dixon, 16 S.C.R. 596; 32 L.C.J. 80; Meloche v. Simson, 29 S.C.R 375; Canada Investment & Agency Co. v. McGregor, Q.R. 1 Q.B. 197, 21 S.C.R. 499; and Caron v. Houle, Q.B. 2 S.C. 186.

(2) L.R., 1 A.C. 662.

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the declaration of Mr. Dobell, of counsel for the said Quebec Harbour Commissioners, to the effect that the Crown and the Commissioners are practically one and the same party in the present instance, and that if they are—and they have been—declared the owners of the 411,958 square feet in question, it will be adjusted between themselves.

Dealing with the question of costs upon this issue the first consideration that suggests itself is, why did the Commissioners allow the sheriff's title to stand, in opposition to their own title for so many years? The title could have been ratified under proper procedure before the provincial courts. If this conflict has arisen today it is partly the Commissioners' fault as they could easily have been more diligent, having already filed an opposition *afin de charge*, the case was not unknown to them, and therefore this apparent flaw could have been removed from their title. There will be no costs to any one of the parties upon this issue.

There will be judgment, as follows:

(a) The lands expropriated herein are declared to be vested in the Crown from the date of the expropriation.

(b) The compensation to be paid herein for the lands so taken and for all damages whatsoever resulting from the said expropriation is fixed at the sum of $134,760.84 with interest thereon at the rate of five per centum per annum from the 12th day of September, A.D. 1912, to the date hereof. The Quebec Harbour Commissioners are entitled to recover out of the said compensation money the capital of the rent, with interest, for the six water lots, and the said defendant Ross is entitled to be paid and receive, from His Majesty the King, the balance of the said compensa-

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tion so fixed with interest as above mentioned, upon giving to the Crown a good and sufficient title to the lands so expropriated.

(c) The defendant Ross is further entitled to his costs of action. And there will be no costs to any of the parties on the defence raised by the Quebec Harbour Commissioners.

Judgment accordingly.

Solicitor for the plaintiff: *E. Belleau.*

Solicitors for defendant Frank Ross: *Pentland Stewart; Thompson & Gravel.*

Solicitor for defendant The Quebec Harbour Commissioners: *A. C. Dobell.*

1914
March 15.

IN THE MATTER OF THE PETITION OF RIGHT OF ALEXIS BRILLANT, farmer, of the Parish of St. Bruno, as well personally as in his quality of Tutor to his minor son, Alcide Brillant..... SUPPLIANT;

AND

HIS MAJESTY THE KING..... RESPONDENT.

Negligence—Government Railway—Crossing—Omission by railway employees to comply with requirements of section 37 of The Government Railways Act—Faute Commune.

B., the suppliant, in the afternoon of a clear winter day, was driving a horse attached to a double sleigh along a road crossed by the Intercolonial railway. He was followed by his son, aged eleven, who was driving a horse attached to a small single sleigh. The view of the track on the northeastern side until arriving within 25 feet of it was obstructed by wood-piles. After passing the wood-piles B. looked to the southwest to see if any train was coming down, but did not look in the opposite direction i.e., from which a train was coming. When he was in the act of crossing the track he heard the alarm signal of a train coming upon him from the northeast at about thirty to forty feet away; then, but not before, the engine-driver sounded an alarm signal. B. by urging his horse was just able to clear the train, but the boy was unable to stop his horse and sleigh with the result that the train struck them, killing the horse, smashing the sleigh and severely injuring the suppliant's son. The train hands had omitted to sound the whistle and ring the bell on the approach to the crossing as provided by section 37 of *The Government Railways Act.*

Held, that the Proximate or determining cause of the accident was the negligent omission of the railway employees to comply with the provisions of the said section; but inasmuch as the conduct of B. in not looking both ways before entering upon the track while not contributing to the proximate or determining cause of the accident, yet amounted to negligence, it was a case justifying the application of the doctrine of *faute commune* under the law of Quebec.

2. That upon the facts the suppliant was entitled to recover against the Crown under section 20 of *The Exchequer Court Act*, such damages as might be fixed comformably to the above mentioned doctrine having regard to the nature and extent of the negligence of the respective parties.

3. The doctrine of *faute commune* does not obtain under the law of Quebec where the claimant contributes to the proximate or determining cause of the accident.

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PETITION OF RIGHT for damages for injury to the person and loss of property alleged to have been caused by the negligence of servants of the Crown on a public work of Canada.

The facts appear in the reasons for judgment.

The case was heard at Fraserville on the 2nd and 3rd of February, 1914.

W. A. Potvin and *J. Langlois* for the suppliant.

L. Berubé for the respondent.

AUDETTE, J., now (March 25, 1914) delivered judgment.

The suppliant brought his petition of right, in the above dual capacity, to recover the sum of $1,346.90 as damages resulting from an accident on the Intercolonial railway.

On the 13th February, 1912, between half past three and four o'clock in the afternoon, the suppliant and his son, left the Chapleau shop, marked A on the diagram filed as Exhibit "A" herein, and travelled southerly along Central Road on their way home to St. Bruno, which is about six miles south of the crossing of the railway. It was a fine day and there was nothing abnormal in the state of the atmosphere. The father was driving in a double sleigh, with two bags of oats in it; and the son, in his eleventh year at the time, was following close behind sitting on a barrel of pork in a sleigh with side-sticks (une traine à batons). On their way to the crossing, opposite the *chemin de commodité* shewn on plan Exhibit No. 2,—there is a line of vision eastward, but it is not established how far and at what given place a train travelling west could be seen, and the evidence on this point is unsatisfactory and unreliable.

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For about 264 feet north of the crossing there are piles of deals and pulpwood on the Government land which obstruct the view eastward and northeasterly. On their way to the crossing the suppliant and his son say they looked to the northeast; but they could neither see any train or hear any noise indicating the approach of a train, either from the bell or the whistle or otherwise. On arriving at the end of the pulpwood piled on the western side of the Government property, at about 25 feet from the crossing, opposite the western end of the station, the suppliant says he looked towards the southwest to see if any train was coming down, and when he arrived at the track, a train came upon him from the east at about 30 to 40 feet, and the engineer then blew two blasts or the alarm signal. The suppliant touched his horse with his rein and cleared the track; but unfortunately his boy and rig were struck by the train and thrown upon the ground. The boy said he tried to stop his horse, but he could not. The animal at the time of the accident sprang up and followed the rig ahead. The accident resulted in the killing of the boy's horse, smashing of the harness and sleigh, and the boy was picked up unconscious all covered with blood.

He was taken to Dr. Deschêne's house, and it was found he had a compound fracture of the left arm,—the bones were protruding through the flesh and skin, his skull broken in at the eyebrow, ecchymosis at the hip where an abscess afterwards formed. Dr. Caron attended him to the end of March following. He examined him again some time in August or September and found a fistula on the arm brought on from pieces of bones acting as extraneous bodies. The boy was further examined by Dr. Caron at the time of the trial, and the doctor found two fistulas on the arm and

two other saturated sores; and he offers as his opinion and belief that the boy will probably be cured, but that it will take time, and that he will not have the same capacity in the broken arm as he would otherwise have.

It is found that the crossing in question, which is a level crossing, is on the outskirts of the village of St. Paschal, is one which on the day of the accident was made dangerous by the piles of deals and pulpwood on the Government land. The buildings and the wood piles made it impossible, under the weight of the evidence, for any one travelling on Central Road, as the suppliant did, to get a view of the track until arrived at about 25 feet from the same. The crossing although properly fenced (1) had become a dangerous one, under the circumstances. Section 37 of *The Government Railway Act* (R.S.C. ch. 36) reads as follows:

"37. The bell shall be rung or the whistle sounded " at the distance of at least eighty rods from every " place where the railway crosses any highway, and " shall be kept ringing or be sounded, at short intervals, " until the engine has crossed such highway."

From the perusal of the above section it will be seen that any one travelling on this Central Road has the right to expect, from an approaching train, the ringing of the bell and the sounding of the whistle. This should be expected at every place where the railway crosses any highway, and much more so where the crossing has been made more dangerous by the obstruction of the view in piling wood at the approach to the crossing.

Was the bell rung and the whistle sounded at 80 rods, or 1,320 feet from the crossing, and was the bell kept ringing, or the whistle sounding, at short intervals,

(1) Parent v. The King, 13 Ex. C.R. 104.

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until the engine crossed the Central Road, at the time of the accident? The question must, under the evidence, be answered in the negative. (1)

Eight witnesses,—Brillant, Senior, Langelier, Labrie, Leclerc, Lagacé, the baggageman at St. Paschal, Duval, Brillant, fils, and Lavoie the stationmaster at St. Paschal, testify they did not hear the train either whistling or ringing the bell. Duval is more specific and was in a position to be more observant also. He was driving down the Central Road, sitting on his load of wood and saw the train coming from quite a distance. He stopped his rig at about 50 feet south of the track (the southern approaches were not obstructed) to let the train pass and followed it up with his eyes, and testifies positively that the train did not whistle until it gave those alarm blasts at 30 to 40 feet from the place of the accident.

Against this overwhelming evidence we have the testimony of Engineer Rouleau, who had one month's experience as engineer, and who says he blew his whistle at four places on reaching St. Paschal. One of these places is indicated by him at a whistle post which never existed. This same witness says Brillant was at about 50 feet from the crossing when the train was at two hundred feet from the same when he blew the alarm blasts. If that was the case, travelling at eighteen to twenty miles an hour, the engine would have been at the crossing before the rigs. The stoker, Dumas, says the train blew and rang and he says so because it was their duty to do so. However, the brakesman, Levesque, who was on the engine at the time, says he does not remember that the bell rang when they passed St. Paschal—the stoker was taking a rest, he was sitting on his bench, He adds that the

(1) Connell v. the Queen, 5 Ex. C.R. 74.

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alarm signal was given at about one *arpent* from the crossing.

It is unnecessary to review the evidence any further. The only question remaining to be answered is, what was the determining, the approximate cause of the accident. The answer to this must necessarily be that it was the want of blowing the whistle and ringing the bell as required by section 37 above cited. Indeed, as was said, in the case of the *Grand Trunk* v. *McAlpine* (1): "Where a statutory duty is imposed upon a railway company, in the nature of a duty to take precautions for the safety of a person lawfully crossing its line, they will be responsible in damages to such a person who is injured by their negligent omission to discharge, or secure the discharge of, that duty properly; but the injury must be caused by the negligence of the company or its servants."

Had the engine whistled and the bell rang, the suppliant would have heard it and would not have ventured upon the track at all before the passing of the train. That is the natural inference. *Res ipsa loquitur*.

Now, did the suppliant approach the crossing with ordinary care and diligence on his own part? The warning the suppliant had a right to expect from the train was only such as ought to be apprehended by a person possessed of ordinary faculties in a reasonably sound, active, and alert condition, and the time given to avoid the danger should be such as would be reasonably sufficient (2).

The suppliant had been listening and looking to the northeast all along while travelling from quite a

(1) (1913) A.C. at p. 846.

(2) *Grand Trunk Ry. Co.* v. *McAlpine* (1913) A.C. 838; *Griffith* v. *Grand Trunk Ry. Co.* 45 S.C.R. 380; *Pedlar* v. *Canadian Northern Ry. Co.* 20 Man. L.R. 265; *Vallee* v. *Grand Trunk Ry. Co.* 1 O.L.R. 224; *Sims* v. *Grand Trunk Ry. Co.*, 10 O.L.R. 330.

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distance north of the track, but of course had not been able to see the track quite a distance north of the same. There was a space of 25 feet from the end of the wood-pile and the track. He was sitting on his bob-sleigh,—the length of his horse and rig would allow very little space for him to see before he got to the track; and, having looked to the northeast as above mentioned, when he got to the track he looked to the southwest, when the alarm signal brought his attention to the train coming upon him. However, he did not look both ways on approaching the track as he should have done (1).

True, as stated in the *McAlpine Case* (p. 845) "there is no rule of law in England as that if a person "about to cross a line or lines of railway looks both "ways on the approaching track, he need not look "again just before crossing it. Neither is it true "that according to the law of England a plaintiff "who is guilty of negligence cannot recover damages. "On the contrary a plaintiff whose negligence has "directly contributed to the accident, that is, that "his action formed a material part of the cause of it, "can recover, provided it is shown that the defendant "could by the exercise of ordinary care and caution "on his part have avoided the consequence of the "plaintiff's negligence."

The question of contributory negligence is a question of fact to be decided in each case on the evidence in the special case. The doctrine of *faute commune*, as it obtains in the Province of Quebec is somewhat different. Indeed, when there is *faute commune*, and where the suppliant did not contribute in the determining and proximate the cause of the accident, the amount of the damages are fixed having regard to the nature and

(1) *Beckett* v. *Grand Trunk Ry. Co.* 1 Cam. S.C. Cas 228; *Royle* v. *C.N.R.* 3 Can. Ry. C. 4.

extent of the negligence of both parties respectively (1).

Under the circumstances of the present case, this court cannot dispel from its mind that the suppliant Alexis Brillant should have been more careful and diligent in approaching and taking the track. Indeed, he knew that the *locus in quo* had become quite dangerous by the obstruction of the eastern view by the wood-piles, and notwithstanding that fact, he ventured upon the track looking but one way and with his back turned the other way. Should it not be expected from a person of ordinary care and prudence to look both ways before venturing upon the track? The greater the danger, the greater should be the care and prudence. By taking the track in the manner mentioned he contributed to some extent to the accident and made himself guilty of such negligence as would justify the application of the doctrine of *faute commune*, and thereby reduce the quantum of damages (2).

In the result it must be found that if the railway employees had complied with the statutory duties, as embodied in said section 37, the accident would not have happened; that the present case comes within the provisions of section 20 of *The Exchequer Court Act*, and that the injury complained of occurred on a public work and resulted from the negligence of the officers or servants of the Crown while acting within the scope of their duties or employment.

Therefore there will be judgment in favour of the suppliant for the sum of eight hundred dollars, apportioned in the following manner, namely, three hundred dollars for Alexis Brillant, the father, and five hundred dollars, free and clear of all charges for Alcide Brillant, the son. The whole with costs.

Judgment accordingly.

Solicitors for the suppliant: *Potvin & Langlois.*

Solicitor for the respondant: *L. Berubé.*

(1) *Nichols Chemical Co.* v. *Lefebvre*, 42 S.C.R. 404.
(2) *Beckett*, v. *Grand Trunk Ry Co.* Cam. S.C. Cas, 228.

1914
March 12.

IN THE MATTER of the Petition of Right of

J. GODFROY BROCHU,

SUPPLIANT;

AND

HIS MAJESTY THE KING,

RESPONDENT.

Negligence—Government Railway—Injury to the person—Trespasser—Liability.

B., in going towards a station of the Intercolonial Railway, instead of using a safe public way or road thereto, entered, contrary to the provisions of section 78 of *The Government Railways Act*, upon the track of the railway drawing behind him a small sled containing two valises. It was dusk at the time, but there was light enough for him to see, as he did, a train approaching him. This train consisted of a locomotive and tender with a snow plough attached. B. instead of getting out of the way as soon as he saw the train, attempted to pick up one of the valises that had fallen from the sled, an act which rendered it too late for him to escape being struck by the train. Upon the trial of his petition of right for damages it appeared that the suppliant had at the time an unreduced fracture of the right leg which impeded his movements. On the other hand, the fact that the place where the accident happened being a "thicky peopled district" within the meaning of section 34 of the said Act, was not established beyond question; nor was it shown conclusively that the track there was not properly fenced. The engine-driver had complied with all statutory requirements as to whistle and bell and his train was running at a rate of about twelve to fifteen miles an hour. He did not see B. on the track until he was some fifteen feet from him, and the emergency brakes were at once applied

Held, that inasmuch as B. was a trespasser on the track, the only duty cast upon the engine-driver was to abstain from wilfully injuring B. while so trespassing, and further that inasmuch as the engine-driver had applied the emergency brakes as soon as he saw B. on the track he had done all he could to avoid the accident, and there was no negligence attributable to him.

PETITION OF RIGHT for damages for personal injuries alleged to have been sustained on the Intercolonial Railway in the Province of Quebec.

The facts are stated in the reasons for judgment.

March 5 and 6, 1914.

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Reasons for Judgment

The case was heard before the Honourable Mr. Justice Audette at Quebec.

M. O'Bready, E. Baillargeon and D. Panneton, for the suppliant, contended that as the suppliant was injured upon the track of the railway owing to the negligence of an engine-driver, the Crown was liable. The suppliant was using the right of way and track with the implied sanction of the railway authorities; it was a customary way of approaching the station. The Crown ought not to invite people to use the tracks and then injure them by carelessness. There would have been no accident if the engine-driver had used reasonable care.

L. Moraud, for the respondent, relied on the facts to show that the suppliant was simply a trespasser. There was no duty towards the suppliant on the part of the railway employees except not to wilfully injure him. The engine-driver did all that he was required to do under the statute and regulations, and he did not see the suppliant until too late to avoid an accident.

AUDETTE, J., now (March 12, 1914) delivered judgment.

The suppliant brought his petition of right to recover the sum of $24,482.50 for alleged damages sustained by him, while walking on or along the track of the railway at Chaudière Curve, P.Q., when he was struck by a locomotive and snow plough of the Intercolonial railway travelling reversely. The railroad at the place of the accident, is operated under a joint traffic agreement between the Grand Trunk Railway and the Intercolonial Railway; the said agreement having been duly ratified by the Act, 62 and 63 Vict. Ch. 5. (1).

(1) Grand Trunk Ry. v. Huard, and Grand Trunk Ry. v. Goudie, 36 S.C.R. 655; and also the King v. Lefrancois, II Ex. C.R. 252, 40 S.C.R. 431).

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The accident happened on the 22nd day of January, 1912, and the petition of right was filed in this Court on the 10th day of February, 1913. On the face of the pleadings the action would therefore appear to be prescribed under the provisions of Art. 2262 of the Civil Code for the Province of Quebec. However, it is established by the evidence that the petition of right was, in compliance with sec. 4 of *The Petition of Right Act* (R.S.C. 1906, ch. 142) duly left with the Secretary of State of Canada, on the 30th day of December, 1912, and following the decision of *Conrod* v. *The King*, (1) and *Vinet* v. *The King*, (2), it is found that the leaving of the petition of right with the Secretary of State did interrupt prescription within the meaning of Art. 2224, C.C.P.Q.—and that the case may now be approached upon its merits.

The facts giving rise to the case are as follows:—On the 22nd January, 1912, the weather being fine, between half-past five and six o'clock in the evening, the suppliant started from his house for the railway station with two valises on a small sleigh which he was drawing himself. He travelled from the point marked "A", on diagram Exhibit "A" herein, which is his residence, came to point "B", thence to "C", where he took to the track, and finally to point "H", where he was struck by a locomotive and snow-plough. He was on his way to the station and says he took the road that accommodated him, the one he liked. It will be seen that the road to the station provided by the railway is the one marked by the letters D, E and F. on the said diagram, Exhibit "A". Had he wished to go to the station by the regular road he would would have had to travel from A to B, when he would have crossed the tracks, and then to the gate or

(1) 14 Ex. C.R. 472. (2) Audette's Practice, 2nd Ed. 183.

entrance to the station road, at point D, and travelling to E and F, arriving at the back of the station. A great deal of evidence is adduced pro and con as to the maintenance of this road to the station. Some say it is not shovelled, that the traffic of the horses and sleighs alone keeps it open and in maintenance. However, it is established that the mail is daily carried through that road, that it is the only one through which all the sleighs go for freight every day. The suppliant testifies he cannot say in what state the road was on the day of the accident, because he never thought of it; but that it could not be blocked because all those who have freight travel through it. However, one of the witnesses says he travelled four times a day through that road in 1912, and that it was in good condition, but that in a big storm, like every other road submitted to winter climatic changes, some snow gathered at a certain spot, but not enough to impede traffic.

For the purposes of this case, it is found that the regular road to the station was on the day of the accident, especially in the afternoon after a full day's traffic, in a fair state of maintenance and could have been used by the suppliant if he had cared to.

It may be further stated to acquaint one with all the facts of the case that in winter most of the pedestrians going to the station, make use of the track, as the suppliant did; and as during the summer, on St. John Street at the point B on Exhibit "A", cattle-guards are placed between the northern and southern fences of the crossing, most of the foot travellers or pedestrians arrived at point B, cross over the tracks, take the station road at point D, thence walk down to the southern rail of the siding and walk along the same to the station. The object of the foot travellers seems

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to have been a distinct manifestation of their inability to resist the temptation of using a short cut.

Now, on the day of the accident, the suppliant was walking either on the main track or between the two tracks, between the points marked C and H on the said diagram. He testifies he cannot say whether he was on the main line or between the two tracks; however, he says further on in his evidence that "he did not have time to place himself aside, the train was coming upon him". At the time of the accident there were cars on the siding from H to the west. As he was then walking upon the railway bed, one of the two valises, the smaller one, slipped out of his sleigh (en m'en allant, en passant sur la ligne) while on his way, in passing upon the line. He saw the train coming before bending down to pick up his valise,—the train appeared to him to be just far enough to give time to get out. It was not then "dark, dark", as he says, and the locomotive was large enough to be seen by him at a distance.

The suppliant, however, had not time to pick up the valise which had fallen. He moved to the side (me suis mis de coté), but he was not quick enough to avoid being struck. He was first struck on the elbow which had the effect of turning him round, then he fell to the ground and was struck by the plough, the injury resulting in his two legs being broken.

At the time of the accident the suppliant had an old unreduced fracture of the right leg, which made that limb defective, resulting in a certain impediment in his movements, all of which went to increase his risk and danger in the circumstances. This of course called for the exercise of a greater degree of care than would be required of a man sound of limb who might attempt to do what the suppliant was rash enough to do in this case.

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The suppliant was struck by an Intercolonial railway train composed of a locomotive, tender, and a snow plough, the wings of the plough being closed at the time of the accident. The train was backing from east to west, with the regulation light on the back of the tender. The bell was ringing. At the eastern crossings marked M and N on the diagram, the engine whistled. Then a long whistle was given for the station semaphore. Afterwards the engine blew two long and two short blasts, which is a signal for a public highway crossing; then about 600 feet east of the western crossing (St. John St.) the engineer blew an extra alarm on account of his home being right opposite the station. Up to a short distance east of the station, the train was travelling between 12 and 15 miles an hour, more or less. When he arrived at the station he reduced his speed to 6 to 8 miles to pass the station, having closed his engine at the eastern semaphore. He had no business to stop at the station, and having gone about a car length west of the station, he reopened steam to continue west, which measure, he said, had he not taken, his engine would have stopped. He started again going at a rate of 12 to 15 miles an hour. The engineer was sitting in the window of his engine facing west, when about half way between the station and the crossing (St. John St.) he saw, about 15 feet ahead, a dark object, something falling from the main track to the south side, when he at once applied his emergency brakes.

Sections 34 and 35 of *The Government Railways Act* read as follows:—

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

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"35. Whenever any train of cars is moving re-
"versely in any city, town, or village, the locomotive
"being in the rear, a person shall be stationed on the
"last car in the train, who shall warn persons stand-
"ing on or crossing the track of the railway, of the
"approach of such train."

The *locus in quo* is not a city, town or village as provided by section 34, but only a rural municipality, and it is very questionable under the evidence whether the place in question is what might be called "a thickly peopled district". And there is no evidence to show conclusively that the road on each side of the track was not properly fenced. True, there is evidence that there was no fence to the left of the entrance D, on the southern side of the siding; but the siding is within railway property, and access to the cars at that place is possibly given to vehicles for the purposes of loading and unloading. The railway property would therefore appear from the evidence to have been properly fenced.

Be that as it may, the suppliant being a trespasser was on the track at his own risk and the railway company was undoubtedly under no other duty than that of not wilfully injuring him. The engineer applied the emergency brakes as soon as he became aware of any danger, thus fulfilling his duty, as expounded in the case of *Canadian Pacific Ry.* v. *Hinrich.* (1)

If section 35 is invoked by the suppliant, the obvious answer is that the accident did not occur at the crossing, and if the train started going at about 12 to 15 miles an hour, one car length after leaving the station, and that the engineer saw the suppliant about 15 feet ahead of where he was struck and that he then applied his brakes, he must have passed at a very low speed at the crossing.

(1) 48 S.C.R. 557.

Then section 78 of *The Government Railways Act* which was moreover posted up in the railway station at Chaudière, reads as follows:

"78. Every person not connected with the Department or employed by the Minister, who walks "along the track of the railway, except where the "same is laid across or along a highway, shall for "every such offence, incur a penalty not exceeding "twenty dollars."

From the perusal of this section it will obviously appear that the suppliant, at the time of the accident was a trespasser. Can he recover under the circumstances of this case? What is the Common Law, and the Roman Law upon the subject?

Bramwell, B., in delivering the judgment of the Court in *Degg* v. *Midland Ry. Co.*, (1) pithily expresses the rule of the common law in the following words: "It seems to us there can "be no action except in "respect of a duty infringed, and that no man by "*his wrongful act* can impose a duty."

And the same learned judge says in *Holmes v. North Eastern Ry. Co.* (2):

"If the plaintiff had gone where he did by the mere "license of the defendants, he would have gone there "subject to all the risks attending his going."

To place the suppliant even in the position of a mere licensee would be giving him a better position than he is entitled to under the evidence.

The rule of Roman Law was to the same effect. In the Institutes 4, 3, 5, there is the following explanation of liability for bodily injury under the Lex Aquilia: "If a pruner, by breaking down a branch from a "tree kills your slave as he passes, then if this is done "near a public road or one used by the neighbours,

(1) (1857) 1 H. & N. at page 782. (2) (1869) L.R. 4 Exch. *at p.* 257.

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"and he did not first shout out so that an accident "might be avoided (ut casus evitari possit), he is "chargeable with negligence. But if he did first "shout out and the slave did not care to take heed, "the pruner is free from blame (extra culpam est). "And so, too, if he happened to be cutting at a place "quite off the road or in the middle of a field, *although* "*he did not first shout out, because there no outsider* "had any right to go." (Quia in eo loco nulli extra-"neo jus fuerat versandi.) (1).

The following excerpt is taken from *Sington's Law of Negligence,* pp: 216, 217:—

"A trespasser who is an adult, cannot, as a general "rule, recover damages. If, however, the defendant "has done an inhuman or an unlawful act, such as "setting a spring gun, then, although the trespasser "be by his own act the immediate cause of the injury "he sustains, he can maintain an action. The view of "the law seems to be that no duty is owed to a tres-"passer; but there is a duty owed to all the world not "to do something unlawful, or inhumanly cruel. "When, however, it is said that no duty is owed to a "trespasser, this only means that there is no such "duty towards him to prevent consequential injury "happening, as would be owed to one who is not a "trespasser. It does not mean that you have no duties "to him at all, merely because he is a trespasser; and "therefore if you go out of your way to inflict injury "upon him deliberately you would be liable."

"In the cases where a plaintiff has succeeded not-"withstanding that he was a trespasser, circum-"stances were present which made the trespass im-"material."

(1) *Hunter's Roman Law*, 4th Ed. 246; *de Couder*, 2. p. 322.

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Reasons for Judgment.

The suppliant has been a resident at Chaudière since 1904. He knew the locality well; he knew that when travelling on the railway track where cars were continuously passing up and down, he was taking a great risk, and that he should have been more careful. (1)

He saw the engine coming,—had he at once moved out of its way, there would have been no accident. He kept fumbling at his satchel which had slipped from his sleigh, losing thereby precious time,—and then his invalided leg must to some extent have impeded him and made his movements much slower.

The proximate and the determining cause of the accident was the conduct of the suppliant in walking on or along the track in direct violation of section 78 of *The Government Railways Act.* In a case of that kind, when the claimant is responsible for the determining cause of the accident, the doctrine of *faute commune*, as known in the Province of Quebec, does not apply.

Where the suppliant, as in the present case, is a trespasser, the duty of the railway rests merely upon grounds of general humanity and respect for the rights of others, and the engine-driver far from being wantonly or carelessly an aggressor towards Brochu, did all in his power to save him, but without avail. (1) The general rule is that a man trespasses at his own risk. (2)

In the result it must be found that the railway is relieved *quoad* the suppliant, who was injured while trespassing on the track, of all the above mentioned statutory duties. Brochu travelled along the track at his own risk. The only duty cast upon the railway

(1) Beven on Negligence 3rd Ed. 430, 925.

(2) *Grand Trunk* v. *Barnett*, (1911) A.C. 370; *Grand Trunk* v. *Anderson*, 28 S.C.R. 541.

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Reasons for Judgment.

was to abstain from wilfully injuring him while he so trespassed.

The Court is therefore of opinion that judgment should be entered for the respondent, and that the suppliant is not entitled to any portion of the relief sought by his petition of right.

Judgment accordingly.

Solicitor for suppliant: *O'Bready* and *Panneton.*

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

HIS MAJESTY THE KING, on the Information of the Attorney-General of Canada,.....Plaintiff;

1913
March 19.

AND

ROBERT BICKERTON,.....Defendant.

Expropriation—Previous Sale of Lots in neighbourhood by defendant—Market value—Test.

In assessing compensation for lands taken for a public work, sales made by the defendant to the Crown of other lands for the purposes of the public work in the neighbourhood of those taken may be relied on as establishing the market value of the lots expropriated.

THIS was an information exhibited by the Attorney-General of Canada seeking a declaration that certain lands required for the use of the Transcontinental Railway had become vested in the Crown by virtue of the expropriation in that behalf, and that a certain amount tendered by the Crown be adjudged sufficient compensation to the defendant.

The facts are stated in the reasons for judgment.

The case was heard at Winnipeg on October 17th and 18th, 1912, before the Honourable Mr. Justice Audette.

A. J. Andrews, K.C., and *A. Sullivan*, for the plaintiff.

G. W. Jameson, for the defandant.

AUDETTE, J. now (March 19th, 1913) delivered judgment.

This is an amended information exhibited by the Attorney-General of Canada, whereby it appears the Commissioners of the Transcontinental Railway have entered upon, taken possession of and expropriated certain lands described in paragraphs 2 and 2½ of the

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Reasons for Judgment.

said information, for the use of His Majesty The King in the construction and maintenance of the National Transcontinental Railway.

A plan and description of the said land mentioned in paragraph 2 of the said amended information were deposited of record, on the 6th day of September, A.D. 1911, in the Land Titles Office, in the City of Winnipeg, for the Winnipeg Division of the Province of Manitoba.

Then it having transpired in the course of the trial that lots 25 to 29 would be so materially damaged by the present expropriation, the information was by consent amended whereby it appears that the Crown has now taken possession of the said lots 25 to 29 in Block I, and that the compensation to be arrived at in the present instance should also cover the value of these last lots, in addition to the value of the land described in paragraph 2.

For the compensation of the said lands mentioned in paragraph 2 of the said information, the Crown tendered by the information the sum of $4,752, made up as follows, to wit:—

For parcel No. 1	$	2,200
For parcel No. 2		1,100
For parcel No. 3		1,452
		$4,752

The defendant by his plea avers that the Crown's tender is not sufficient or just compensation for the said lands, and claims for Parcel No. 1, $2,500, and for damages to lots 1, 2 and 3 adjoining, $1,500 ..... $4,000

For Parcel No. 2, $1,250, and for damages to lots 25 to 29 now expropriated by the amended information, $2,000 3,250

For Parcel No. 3, $3,040, and damages to

lots 2 and 3 and balance of lot 4 adjoining $9,500.....	12,540
The defendant further claims damages to lots 1 to 4 both inclusive in Block 1, which lots are shown upon a plan of sub-division of part of lots 74 and 75 of the Parish of St. Boniface, registered in the Winnipeg Land Titles Office as No. 1160.....	2,000
Further damages to lots 27 to 35, both inclusive, in Block 2.....	1,800
	$23,590

However, in the total sum of $23,590 is not included the value of the lots 25 to 29 in parcel 2, but only the $2,000 damages on the assumption of no expropriation of the same. This is also true of the Crown's tender, and it must be borne in mind that in its tender of $4,752, the value of the lots 25 to 29 is not included, but only such damages to the same as were then estimated.

The parties admitted that the Crown took possession of the land in question on the 15th September, 1910.

The Crown, by its counsel, also filed at the trial an undertaking, under the provisions of section 30 of *The Expropriation Act*, to acquire and dedicate to the public as a street lots 26 and 27, and 14 and 15, as the same are shown on a plan of lot 75, St. Boniface, registered as Number 1160.

The lands expropriated in the present case, including what has been added by amendment, are composed of three parcels divided as follows, to wit:—

Parcel No. 1—Lots 4 and 5 in Block 2, as shown on plan Exhibit Number 2.

Parcel No. 2—Lot 30 in Block 1, together with lots 25, 26, 27, 28 and 29 in said Block.

Parcel No. 3 Jog Portion of lot 4 in Block 4.

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[His Lordship here reviews the evidence.]

The lands in question herein must be assessed as of the date of the expropriation, at its market-value in respect of the best uses to which it can practically and economically be put, taking in consideration any prospective capabilities or value it may obtain in a reasonably near future.

The property was bought, as a block of land of ten acres, in 1905, for the sum of $12,500, and was divided in building lots in January 1906. There was a slump in the real estate market from 1906 to 1907, with a slight increase from 1907 to 1908, and Mr. Bickerton says there was not a big increase between 1908 to 1910.

During the months of May or June, 1906, the defendant sold:

Lots 31 to 35 in Block 1, at $12 a foot;
Lots 5 to 17 do do do
Lots 6 to 17 in Block 2, do do

and two years later, in 1908, he also sold lots 1 to 8 in Block 3 at $12 a foot.

Then in 1910, about June, he sold lots 9 to 14 in Block 3 for $20 a foot,—equal to $500 a lot. And in May, 1910, he sold lots 18, 19 and 20 in Block 2 for $35 a foot for the right of way of the Transcontinental Railway. In the last sale, although the evidence does not disclose it openly, it must be inferred that $35 a foot would include all damages resulting from such expropriation. The amount now tendered by the plaintiff with respect to parcels 1 and 2, is at the rate of $44 a foot, including damages.

With respect to Parcels 1 and 2, the proprietors' evidence shows that with respect to Parcel 1, McPhail values it at $40 to $60 a foot with damages of $500 a lot for lots 30 to 36, and with respect to Parcel 2, $50 a foot. Then witness Long values Parcel No. 1 at $50 a

foot as trackage, and considers lots 1, 2, 3, 29 and 30 damaged by $500 a lot,—and Parcel 2, $50 a lot. Witness Bickerton values Parcel 1 at $50 a foot, and lots 1, 2 and 3 damaged by $500 each, and 29 to 35 by $1,800 altogether—and Parcel 2, at $50.

The witnesses for the Crown value Parcels 1 and 2 at $15 a foot,—with damages to Parcel 1 estimated by Sheppard, respecting lots 1, 2 and 3 at 35 per cent or equal to $450 for the three lots, and by witness Pope at $125 for each lot, and witness Black at $450.

It will appear at first sight that the conflict between the witnesses is very material. What can help out of the difficulty if not sales made in the neighbourhood? We have the sales made by Bickerton himself in 1906 at $12 a foot; in June, 1910, at $20; and in May, 1910, at $35 a foot for the right of way of the Transcontinental, which as previously said must in this last case include all damages resulting from the expropriation. These sales to the Railway are in Block 2. What could be better evidence of the market price, if not sales actually made under similar circumstances. We have also the admission by counsel that a number of lots were sold in 1911 in Block 1 for $17 a foot. The Crown has offered $44 a foot including damages, an advance of $9 a foot on the sales made in May, about four months before, by the defendant himself.

The Court therefore looks upon the tender as fair and liberal and will not interfere with it.

The same ratio of $44 a foot will be accepted for Parcel No. 2, which is now composed of lots 30, 29, 28, 27, 26 and 25,—namely six lots of 25 feet frontage, equal to $6,600 including all damages.

Coming now to Parcel No. 3, witnesses McPhail and Long value it at $75. McPhail says there is no damage to lots 2, 3 and 4 in Block 4, but Long says

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Reasons for Judgment.

there is a damage of 20 to 30 per cent. to balance of lot 4. Bickerton values it at $100 a foot, with damages to the balance of lot 4 at $50 a foot for 80 feet, and considers lots 2 and 3 damaged by $25 a foot. On behalf of the Crown, Sheppard values it at $35 to $40, or $750 including all damages. Pope values it at $20 a foot including damages, and Black at $18 a foot for 35 feet, or $550, including all damages. The Crown, by the information, tendered nearly $48 a foot including damages.

The proprietor's witnesses have valued the other pieces of land at $50, placing them in the trackage class (notwithstanding they were actually divided in building lots and were being then sold as such). Let us accept that value for Parcel No. 3, including all damages that may accrue to the balance of lot 4 and to lots 1, 2 and 3,—although all the Crown's witnesses say there is no damage, and that opinion is shared by witness McPhail on behalf of the defendant. If, indeed, there is any damage to the adjoining lots it can hardly be appreciable, specially in view of the fact that if it is trackage property, the fact of running a railway upon it could not obviously hurt it much—even if not in the manner the most acceptable to the owner.

The Court is of opinion to allow $50 a foot, including all damages for the piece taken in Parcel No. 3, namely, 30.4 feet, making a total sum of $1,520.

Therefore the following sums will be allowed as follows, to wit:

Parcel No. 1	$2,200
Parcel No. 2	6,600
Parcel No. 3	1,520
Making in all the sum of	$ 10,320

to which shall be added 10 per cent. for compulsory taking, and to cover every element of damage which might have been overlooked.....	1,032
	$11,352

There will be judgment as follows, to wit:

1. The lands and real property expropriated herein, including lots 25 to 29, in Parcel No. 2, are vested in the Crown as of the date of the expropriation.

2. The defendant, upon giving a good and sufficient title and a release of all incumbrances, if any, upon the said property, is entitled to be paid the said sum of $11,352 with interest thereon at the rate of five per centum per annum from the date of the taking possession, namely, the 15th day of September, 1910, to the date hereof—the whole in full satisfaction for the lands taken and for all damages whatsoever resulting from the said expropriation.

3. The defendant is further entitled, under the provisions of the undertaking filed at trial by counsel for the Crown, to have the Crown acquire and dedicate to the public as a street lots 26 and 27 and 14 and 15, as the same are shown on a plan of lot 75, St. Boniface, registered as Number 1160.

4. The defendant will be entitled to the costs of the action after taxation thereof.

Judgment accordingly.

Solicitors for the plaintiff: *MacDonald, Sullivan & Tarr.*

Solicitors for the defendant: *Thomas & Jameson.*

1912
Nov. 27.

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

AND

LE COLLEGE DE SAINT BONIFACE,
DEFENDANT.

Expropriation—Practice—Information—Right to amend at Trial reducing the amount of Tender.

It is open to the Court in an expropriation case to permit an information to be amended at the trial for the purpose of reducing the amount tendered as compensation.

THIS was an information exhibited by the Attorney-General of Canada seeking a declaration that the lands and premises mentioned therein were vested in the Crown, for the purposes of the National Transcontinental Railway, and that the sum of $120,000 be adjudged to be fair and reasonable compensation to the defendant.

The facts are stated in the reasons for judgment.

The case was heard at Winnipeg before the Honourable Mr. Justice Audette, on the 15th, 16th and 17th October, 1912.

A. J. Andrews, K.C., and *A. Sullivan for the Crown.*

G. A. Elliott K.C., and *L. McMeans* K.C., *for the defendant.*

AUDETTE, J. now (November 27th, 1912) delivered judgment.

This is an information exhibited by the Attorney-General of Canada, whereby it appears, *inter alia*, that the Commissioners of the Transcontinental Railway acting under the authority of 3 Ed., VII. ch. 71, have

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THE KING v. LE COLLEGE DE SAINT BONIFACE.

Reasons for Judgment.

entered upon and taken possession of certain of the defendants' lands and real property described in the information herein, for the use, construction and maintenance of the National Transcontinental Railway.

A plan and description of the said lands were, on the 15th day of June, A.D. 1911, deposited of record in the Land Titles Office, in the City of Winnipeg, for the Winnipeg Division of the Province of Manitoba. However, it is admitted by both parties that the Crown took possession of these lands on the 15th day of September, A.D. 1910.

It is admitted that the title of the lands in question herein is in the defendants.

It is admitted by both parties that a farm building, belonging to the defendants, was removed off the right of way, and taken away, the cost of the same amounting to $5,000.00, which, in the final adjustment should be added to the compensation money fixed by the present judgment.

It is admitted that with respect to the lot first described in the information, and which is closer to Winnipeg, that the defendants own property only on one side, and that is on the North side. And it is admitted that with respect to the lot secondly described in the information, that the defendants own land on each side of the piece taken for the right of way.

Mr. Andrews, of counsel for the Crown, moved to amend the information by deducting from the acreage taken, in the lot first described in the information, an area of nine-tenths of an acre, as having already been expropriated for what is called on plan Exhibit "D", filed of record herein, an old right of way, afterwards abandoned—what might be called a false start. Counsel for the Crown further alleging that the defendants had already been paid for the same.

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THE KING v. LE COLLEGE DE SAINT BONIFACE.

Reasons for Judgment.

Mr. McMeans, of counsel for the defendants, then asked that the application should stand until he was given an opportunity to consult with his clients, as he was ignorant of these facts.

This plan, Exhibit "D," would at first sight confirm that statement made by the plaintiff, but the plan does not make any proof, and has no character of authenticity, as it bears no signature or certificate under the hand of the proper officer.

The application then stood for the time being.

However, the testimony of the witness Louis Verhoeven would bear out the allegations of plaintiff's counsel, and it would be idle to delay the delivering of this judgment any longer to get any further information. The plaintiff's motion to amend, as above mentioned will be allowed.

Mr. Andrews, of counsel for the Crown, further moved to amend the information by changing the amount tendered, that is by striking out the following figures "$134,607" in the second line of paragraph five, and in the first line of the second paragraph of the prayer of the information and substituting therefor the following figures "120,000." The learned counsel had first asked to substitute for the tender of $134,607 the sum of $90,000., but it having been found that the Crown had already paid on account on one occasion $90,000 and on a second occasion $30,000,—in all $120,000—asked to substitute for the original amount the last mentioned sum.

Mr. McMeans showed cause *contra*, and the application was granted,—the tender by the information now standing at $120,000.00.

At the request of counsel for both parties and accompanied by them, the president of this Court has had the advantage of viewing the premises in question

herein, of walking over part of it, of seeing the embankment, observing the lay of the land and the general topography of the surroundings.

The total area expropriated, as appears by the information, after amendment, is (40.21-100) forty acres and twenty-one hundredths of an acre, more or less, for which the tender now stands at $120,000,—instead of the tender of $134,607.00 mentioned in the information at the opening of the trial for the (41.11-100) forty one acres and eleven hundredths of an acre.

The defendants by their plea aver, *inter alia*, that, for the reasons therein set forth, the sum of $134,607 is not a sufficient and just compensation for the land taken and the damages resulting from the expropriation, and that they are entitled to recover the sum of $250,000 with interest and costs. They also refused the substituted tender of $120,000.00.

[Here His Lordship reviewed the evidence for both parties.]

It will be realized, from the perusal of the evidence as is usual in expropriation cases, that the testimony is most conflicting. It is a hectic valuation with intermittent fluctuations that has to be considered with care and premonition. Is it not, indeed, strange that people of the same place, with the same opportunity and, in most cases, engaged in the same avocation, with kindred aspirations and identical views of what constitutes right and justice, should differ so widely, and materially in their conception of the value of land and the damages resulting from the expropriation?

For the defendants we have witness Verhoeven who values the land in Lots "A" and "B" inclusive of the damage to Lot "A," at $242,500,—and exclusive of the damage to 50 feet on each side of Lot "B", which are damaged by 20% of their value. Henderson

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values the two lots and damages at $381,320, Peers at $357,012, Pace at $298,000, and Pickering at $595,312. On behalf of the Crown, Sheppard values the two lots at $78,750, Black at $88,750, Bain at $43,750, and Batley values Lot "A" at $15,000. All of the defendants' witnesses allow a large, a very large, sum for damages; and for the Crown no damage is allowed,—some say there is no damage, and others that the damage, if any, is offset by the advantage derived from the construction of the Transcontinental Railway.

One set of witnesses goes perhaps to one extreme, and the other to the other extreme. Taking all the circumstances into consideration, the value of the land in St. Boniface, and the continuous and steady growth of the place, and the increase in value of property, as obviously demonstrated by the evidence, only one conclusion is acceptable, and that is some of the Crown's witnesses put upon the property a too conservative valuation,—while perhaps some of the defendants' witnesses are carried away by the brilliant prospects of the growth and development of St. Boniface. Then the municipal valuation in the present case appears to be below the market price, as is usually the case. This Court is also of opinion that some of the defendants' land, held in unity with the property expropriated, has obviously been damaged by the construction of the high embankment, and some also damaged by the severance. Both elements of damage are serious and substantial. While the witnesses for the defendants magnify in a large degree the damages resulting from the expropriation, the Crown's witnesses do not give it enough consideration. A proper conclusion could be arrived at by the reconciliation of both classes. There can be no doubt that the 289 acres adjoining Lot "B", are not all equally damaged,—the

land close to the railway has been damaged as building lots, but that damage decreases and comes to nothing as we get away from the railway—while the railway enhances the value for commercial purposes, of the land near the right of way. A fair amount should be allowed for the land taken, and a fair amount should be allowed for the damages,—and there are damages, but not to the amount mentioned by the defendants' witnesses.

The property in question must be assessed on its market value, with the best uses to which it can be applied, taking into consideration its prospective capabilities. The defendants are entitled to a fair and liberal compensation,—allowance being made for the compulsory taking and for all damages.

The area taken, after deducting the nine-tenths of an acre already settled for as part of the old right of way—is now only (40.21) forty acres and twenty-one one hundredths of an acre. The change in area is so small as compared with the total quantity taken, that the Court treats it as *de minimis*.

This Court is of opinion that if the defendants are paid the amount of the original tender,—namely the sum of $134,607 for the land described in the amended information, together with $5,000 agreed upon respecting the farm building removed from the property in question, they will be fairly and liberally compensated. This will allow a very large average price per acre inclusive of damages,—and when taking a large area, as in the present case, a smaller price is usually arrived at. The defendants will also be entitled under the circumstances,—the tender now standing being $120,000 —to both interest and costs.

The sum of $90,000 has already been paid the defendants, on the 21st March, A.D. 1911, and the

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Reasons for Judgment.

further sum of $30,000 on the 11th September, 1911,—namely, the total sum of $120,000 on account of the compensation to which they ultimately are declared entitled to.

There will be judgment, as follows:—

1st. The lands and real property described in the amended information are vested in the Crown from the 15th September, A.D. 1910.

2nd. The defendants upon giving a good and sufficient title, and a release of all incumbrances, if any, upon the said property, are entitled to be paid the sum of ($139,607.00) one hundred and thirty nine thousand six hundred and seven dollars, the whole in full satisfaction for the land taken and for all damages resulting from the expropriation, including the removal of the farm building,—from which amount will be deducted the sum of ($120,000.00) One hundred and twenty thousand dollars, already paid to them as above mentioned, leaving an unpaid balance of ($19,607.00) Nineteen thousand six hundred and seven dollars, the whole with interest on the sum of $139,607 from the 15th day of September, A.D. 1910, to the 21st day of March, A.D. 1911,—and with interest on the sum of $49,607 from the 21st day of March, A.D. 1911, to the 11th day of September, A.D. 1911, and on the sum of $19,607 from the 11th day of September, A.D. 1911, to the date of judgment.

3rd. The defendants are also entitled to the costs of of the action.

Judgment accordingly.

Solicitors for the plaintiff: *Rothwell, Johnson & Bergman.*

Solicitor for the defendant: *L. McMeans.*

IN THE MATTER of the Petition of Right of

CECILE SAMSON, AND OTHERS..SUPPLIANTS.

1913
Nov. 4.

AND

HIS MAJESTY THE KING....RESPONDENT.

Railways—Negligence—Accident to workman in repairing cars—Failure of workman to observe rules—Faute commune.

Under certain rules prescribed by the Department of Railways and Canals for the observance of employees on the Intercolonial Railway at the time of the accident in question, a blue flag was required to be placed at the end of a car, engine or train during the day when workmen were engaged under or about the same. Special instructions were also given from time to time by the foreman of car-repairers that this rule should be strictly adhered to, and each car-repairer was supplied with two of such flags. L., on the day of the accident, had his flags in his tool-box but neglected to use either of them as a signal that he was working under a certain car on the siding. There was evidence that he asked another employee to watch the trains while he was working and to notify him of any train or locomotive approaching. While L. was so engaged, certain cars while being moved by means of a flying-shunt under the orders of the yard-master came into contact with the car under which L. was working with the result that he was fatally injured.

At the trial it was admitted by counsel for the suppliants that L. had been negligent in not putting up his flag but it was charged that there was *faute commune* because the yard-master had ordered the cars to be moved by means of a flying-shunt. The evidence showed that while flying-shunts were not prohibited under the rules, the yard-master would not have let the cars go on to the siding where the car stood under which L. was working, had he seen a blue flag on that car.

Held, that the proximate cause of the accident was the negligence of L. in failing to put up a blue flag, and it was not a case in which the doctrine of *faute commune* should be applied.

PETITION OF RIGHT for damages arising out of a fatal accident to an employee of the Crown on the Intercolonial Railway in the Province of Quebec.

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

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SAMSON
v.
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Reasons for Judgment.

The case was heard before the Honourable Mr. Justice Audette at Quebec on 27th October, 1913.

E. Belleau, K.C., for the suppliants;

G. G. Suart, K.C., for the defendant.

AUDETTE, J., (now November 4th, 1913) delivered judgment.

The petition of right herein is brought to recover the sum of $10,000 for alleged damages resulting from the death of Benjamin Lemieux, the husband of the late Cecile Samson and father of the three children above mentioned as suppliants by revivor.

The action comes under sub-sec. (c) of Section 20 of *The Exchequer Court Act.*

On the 30th October, 1906, between ten and eleven o'clock in the morning, both Benjamin Lemieux, the deceased, and Octave Lavoie, received instructions from their foreman to go and repair a car on Siding No. 5, shown in diagram, Exhibit "J". The repairs consisted in fixing or placing a packing bolt, at about the centre of the car. Lavoie said he calculated the work might take from five to six minutes; but Lafresnaie, another witness, says sometimes it takes quite a while when the bolt to be extracted is crooked.

This witness Lafresnaie, who is also a car-repairer, received instructions at the same time to go and repair the knuckle-block of a car on another siding. When the latter's work was through, he came to siding No. 5 and joined Lemieux and Lavoie. On arriving there Lafresnaie asked Lemieux if he had placed his flag below.

Under Rule 81 of Exhibit "L" (intituled "Time Table and Special Rules for the Use of Employees Only",—effective at time of accident) a blue flag must be placed at the end of a car, engine or train, when workmen are at work under or about the same. Special

instructions were also given from time to time by the foreman, as appears from the evidence, that this rule must be strictly adhered to, and each car-repairer was supplied with two such blue flags. Lemieux had them in his tool-box at the time of the accident, but had neglected to put them up. These flags are between 14 to 18 inches long attached to a three foot stick, and one should have been placed at the end of the last eastern car on the siding. The car under which the deceased was working, was the last to the west and there were ten to twelve cars, perhaps more, to the east towards the switch marked "D", on Exhibit "J".

It was customary to attend to the large repairs on a special siding, for instance where they had to take the wheels off a car and to use a jack; but small repairs were attended to where the car was,—on the siding.

Lavoie says he cannot swear he went inside the car before Lafresnaie arrived or not; but he seems to incline that way, and says Lafresnaie was asked to watch for them. It may be well to say here that such watching, if entrusted to him by Lemieux or Lavoie, was not such work as would come within the scope of Lafresnaie's duties and employment, and that the manner provided by the regulations to avoid any accident was by means of the blue flag.

It is therefore established under the evidence, that Lemieux, to his own knowledge and even after his attention had been called to it by Lafresnaie, was working under the car without having, before beginning his work, put up his flags, as required both by the regulations and his instructions from his foreman.

The yard-master was having trains made up and he had ordered the pilot,—the engine used for shunting in the yard,—to get some loaded cars from Breakey's yard to the East, and take them on the siding No. 5 for

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Reasons for Judgment.

the purpose of having them weighed. He had given instructions to the engineer of the pilot and the brakesmen, to give those cars a flag shunt or flying shunt, and that he would be at the switch "D" when they came there. The engineer did as he was instructed to do, and on arriving at the switch he remained and ran on the main line, while his cars ran into siding Number 5, with the brakesmen on the cars. These cars ran into the cars east of the one under which the deceased was working and started the same, which passed over his legs in his endeavour to come from underneath, when Lafresnaie called out that the cars were coming.

It is in evidence that while *flag-shunting* or *flying-shunts* are not actually forbidden, they are discouraged, especially for the protection of the rolling stock,—and for no other reasons. And the yard-master tells us that he has been 32 years in the employ of the railway, and that he has always done such shunting, adding that up to the time of the accident he had never seen any circular or order to the above mentioned effect,—except that it was said, among the men, that it was discouraged for the protection of the rolling-stock. The yard-master further says, and this Court adopts his view, that had the engineer run on the siding with his cars, it would have been at the rear instead of the front as it was on this occasion, and that the accident would likely have happened just the same,—if the blue flags had been negligently omitted to have been put up. Had the blue flags been up, he says, he would never have let the cars run thus on the siding; there was nothing to indicate to him that anyone was working under any of the cars.

It is admitted by Counsel, on behalf of the suppliants that the deceased was negligent in not putting up his

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flag; but he claims that there was *faute commune*, contributory negligence, by reason of the flying shunt.

What was the determining, the proximate cause of the accident? Obviously it was the want of the blue flag being put up at the last eastern car.

There can only be *faute commune* where the negligence on behalf of the victim is not the proximate cause determining the accident. In the present case, the accident happened because he neglected to put up the blue flag.

The suppliants are barred from recovering. *Quod quis ex culpa sua damnum sentit, non intelligitur damnum sentire.* The deceased alone has been derelict in the performance of his duties,—he alone should suffer,—or those claiming under him. He was the victim of his own negligence. Employees working under cars are expected to act as reasonable and sentient beings, and if they choose blindly and recklessly to run unto danger, they must take the consequences.

It is so common to see how persons engaged in work attended with danger, will familiarize themselves with such danger and ignore the most elementary rules of prudence. There is no doubt the deceased thought, as Lavoie said, that the work would take just a few minutes, and he took the risk resulting in his death.

Under the circumstances it becomes unnecessary to decide the questions of law raised by counsel, the action fails on the facts.

There will be judgment that the suppliants are not entitled to any portion of the relief sought by the petition of right herein.

Judgment accordingly.

Solicitors for the suppliants: *Belleau, Belleau and Belleau.*

Solicitors for the respondent: *Pentland, Stuart, Gravel and Thomson.*

1912
May 29.

HIS MAJESTY THE KING, on the Information of the Attorney General of Canada.....PLAINTIFF;

AND

ANDREW LOGGIE, ROBERT LOGGIE and FRANCIS P. LOGGIE.....DEFENDANTS.

Expropriation—Disused Shipyard—Method of assessing compensation.

Where an old ship-yard, not used as such at the time of expropriation, has been taken for the purposes of a public work, compensation should not be assessed on the basis of separating the various factors or component parts of the ship-yard and estimating their several values, but the yard must be regarded as a whole and its market value as such assessed as of the time of the expropriation.

EDITOR'S NOTE: See *The King* v. *Kendall*, 14 Ex. C.R. 71 and *The King* v. *New Brunswick Ry. Co.* 14 Ex. C.R. 491.

THIS was an information exhibited by the Attorney-General of Canada asking that a certain sum tendered by the Crown as compensation for the expropriation of lands at Chatham, N.B., for the purposes of the Intercolonial Railway be declared sufficient, and that the lands were vested in the Crown.

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

The case was heard before the Honourable Mr. Justice Audette at Chatham, N.B., May 17th, 18th and 20th, 1912.

R. A. Lawlor, K.C., for the plaintiff.

W. B. Wallace, K.C., and *R. Murray*, K.C., for the defendants.

AUDETTE, J. now (May 29th, 1912) delivered judgment.

This is an information exhibited by the Attorney-General of Canada, whereby it appears, *inter alia*, that

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the Government of Canada has expropriated from the defendants certain lands and real property for the purposes of the new diversion of the Intercolonial Railway from Nelson to Chatham, in the county of Northumberland, N.B.

The area taken is 94.681 square feet, and a plan and description of the same were deposited in the office of the registrar of deeds for the said county, on the 21st day of September, A.D. 1910.

The defendants' title is admitted.

The Crown tenders the sum of $18,150.00 for the said land and real property and for all damages resulting from the said expropriation.

The defendants aver by their plea that the amount tendered is not a sufficient and just compensation, and claim the sum of $125,000.00.

As will be seen by looking at the expropriation plan, filed as Exhibit No. 1-a, wherein the 94.681 square feet expropriated are shewn within the red line—the front part, facing on the Miramichi River, is of 295 feet, extending to the South in irregular shape. There are upon the part expropriated, nine wooden buildings respectively marked on the said plan from 1 to 9. The line of expropriation passes almost in the centre of building No. 8, which has been partly removed and rebuilt and extended at the western end. Building No. 9 has been entirely removed.

The properties taken are situated on the water front in the town of Chatham, and are the remains of a property which was equipped and used for ship building on the Miramichi River, in the days gone by when the trade was all done in wooden bottoms. The trade has now, as is well known and established by the evidence, been superseded by iron ships, the steamers. The last ship which was built in this ship yard was launched

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in 1870 or 1868, and at that time the wharf at the front, only extended to the western end of the building No. 6, —the part starting therefrom and upon which is now building No. 7, having been built since 1870. The dwelling house, No. 2, was built since 1870. No ocean going steamers ever came or can come to this wharf. The timber to the west, according to witness Bernard, was only used for the purposes of the shipyard, for ship building.

The evidence with respect to the value of each of these wooden buildings was adduced by defendants' witnesses John McDonald and Patrick Troy, and they both arrived at a total valuation of $13,983.39. The first witness says the buildings are perfectly sound above the sills, but that the latter are considerably depreciated, and that twenty five per cent. of that value would put them in a first-class state of repair. The other witness, Patrick Troy, who gives the same valuation, says he valued what it would cost to put them up and deducted twenty-five per cent for deterioration. For building No. 3, he adopted and took entirely McDonald's figures, and he gives us in what state of repairs the buildings were. He further said they used a quotient or ratio from 7 to 8 cents per cubic foot, to arrive at their value, and adds he does not know the value of property at Chatham.

The value to be ascertained here with respect to these buildings is not what it would cost to erect them anew, as above stated; but, what is their market value in the condition in which they were at the date of the expropriation? Most of these buildings, with one or two exceptions, are very old. The fish store was only built after 1870, but all the others, with the further exception of Numbers 1 and 2, were built before that date.

Now a good test of the valuation of these buildings would be the following,—Mr. Robert Loggie says, in his evidence, he put up building No. 1, four or five years ago, at a cost of about $400 to $500. What is the valuation put upon that building by witnesses McDonald and Troy ? They place a value of $819.84 upon this building. Their valuation is obviously unreliable. Their valuation for all the buildings is $13,983.39, and that of the Crown's witnesses ranges from $8,535.00 to $8,800.00.

How much reliance can there be placed on the extreme valuation of the defendants' witnesses. The inference is obvious,—they are astray and proceeded upon a wrong principle. And one would only have to cast a cursory eye at the buildings to make this statement without any hesitation, and as the Court has had the advantage of viewing the premises, in company with counsel for both sides, it obviously and necessarily comes to that conclusion. The photographs filed as exhibits would also convey the same idea.

Coming now to the valuation of the property on behalf of the defendants, we find two classes of valuation. One valuing the property as a whole, and another assuming certain facts and valuing it in the abstract, if that expression can be used.

[His Lordship here reviewed the evidence of certain witnesses on both sides.]

The valuation by the witnesses of the Crown is on a basis of four, five and ten cents a superficial foot. If part of it is wharf property and valued at such, this ratio is too low. No doubt some of it is wharf. While on the one hand the Crown's valuation is rather low, that of some of the defendants' witnesses is extravagant.

This property was purchased in 1897 by the defendants for the sum of $6,125.00, and the deed of

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purchase covered much more land then than that taken by the expropriation,—it extended,—as will be seen on plan Exhibit Number 1-a, from the southern and western red lines to the points marked between E and F. And this portion not expropriated embodied valuable buildings such as the Babineau hotel, which is a stone building three stories high, and also the Wyse property. Robert Loggie says they considered the price low and they bought it with the idea of using it for the purposes of their business. It is perhaps well to mention here the bulk of defendants' business is carried on at Loggieville, and that further the defendants have another wharf at Chatham, which they use in connection with their business.

Now is there any justification for arriving at a valuation on the basis disclosed by some of the witnesses, that is on the assumption, such as witness Murdoch and others did, that the whole of that expropriated piece is all wharf, made of the best material possible, of large pine timbers as could not be got in the present days, and that it was mostly filled with stone? This must be answered in the negative. Benjamin Flood, a resident of Chatham, 65 years old, who has known the place ever since he was a boy,—has worked in the shipyard, because it was formerly a shipyard—testified that large ships were formerly built at the back and west of the new portion of the wharf. He says there was never any wharf at the back of building No. 7 to the south; and further that there was no wharf on the westerly end of the property. To the south, he says, before the erection of the new westerly part of the wharf, there was no wharf behind; but there were tiers of timber in the shipyard upon which ships were placed. Then the moulding-house was not built on a wharf, but it was erected on a timber foun-

dation. All of this was before 1870. The trade has now changed—and, as I have already said, the wooden ships have been superseded by steamers. He testified that he never saw an ocean going steamer lying at the defendants' wharf.

Then speaking as to the condition of the wharf, he says the front of it is all rotten, and liable to cave in at any time. Top spruce has been put on at some date to repair it,—he considers the land ties rotten, the iron bolts are exposed and some of the face is worn out. The facing, although dilapidated, is helping to hold up the wharf, which is pretty badly rotten between high and low tides, but not below.

This state of things described by the witness is also corroborated by the photographs filed of record as Exhibits 3 to 7; and the Court would say, that after viewing the property as above mentioned, it has absolutely gathered the same impression. It is the remains of a property fitted at one time as a shipyard; and when some of the witnesses assume that it was all wharf property, because of the test pits bored at the back showing timber which were nothing but stringers or tiers of timber upon which the ships were built,—they are valuating the property upon a wrong basis,—they are in error and their abstract calculation cannot be a guidance in arriving at a sound conclusion. Most of the witnesses, it may even be said, have fallen into this fallacious assumption. The most satisfactory valuation is perhaps that given by a business man, Mr. Snowball, a resident of Chatham, alive to the needs of the commercial community, having known this property for a long time and knowing the purposes to which it could be put. He also valued it as a whole on the basis of its market value. It may perhaps be well to recite here a portion of his testimony, viz.:—

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"THE COURT—Supposing the whole of that property "as it stood before the expropriation, that part that you "have before you on the plan, with the buildings, the "land, the wharves—if that were put on the market "in Chatham, what would that property fetch?

"A.—I would not be able to answer that for the "reason that I don't know who would want a wharf.

"THE COURT.—Then the market for such a property "is limited?

"A.—Yes. What a party might pay under forced "circumstances I don't know.

"THE COURT.—You don't know that there is any "market just now for such a property?

"A.—I dont know that there is a market at the "present time for such a property.

"THE COURT.—Suppose that the property was adver- "tised for sale, what do you think it would be worth— "including its location?

"A.—If you take the demand for the property, it "would be doubtful just what it would bring in a way. "What it would be worth to a man who was going to "do a similar kind of business to Loggie?

"THE COURT.—If you wanted to sell your house "to-morrow, you will have to take the market value "for it.?

"A.—If I was forced to sell it.

"Q.—You want to sell it. You are not using it. "You want to get rid of it. What is the best price "you can get for it?

"A.—Valuing that property in the same way as I "valued my own, in connection with a going concern?

"THE COURT.—That is not the question. If it were "put on the market, what would be the market value "of it. You say the market is very limited?

"A.—Yes.

" Q.—Supposing you wanted to get rid of it, what do " you think it would fetch on the market with a limited " number of purchasers. You can always find a price " I suppose?

" A.—I don't know. If that property was forced on " the market to-morrow, and sold by any person, who " who would feel disposed to buy it, except they were—

" THE COURT.—What would it fetch at a bargain?

" A.—If it were sold that way, I don't think it would fetch over $15,000 or $20,000.

" THE COURT.—Take it now the other way—what " in your estimation would a property of that kind be " worth as it stands, if there was a market for it?

" A.—That property should be worth in connection " with a business, $35,000—that wharf property with " a frontage of 295 feet—should be worth $35,000. " It is a good deal bigger wharf than my own, but it is " not in as good state of repairs * * * * * *.

It will also be well to make an excerpt from one of the witnesses of the other class to show what was in their mind when they made up their valuation. The following is taken from the evidence of the witness Burpee, when questioned by the Court, viz.:

" THE COURT.—How old are you, Mr. Burpee?

" A.—Sixty eight.

" Q.—You have got a good idea of property in New " Brunswick—you are a business man, and have been " engaged in the timber business, and have been " building right and left ?

" Yes.

" Q.—Does not this appear to you, this piece of " work, as one that would have been built at some " time past, when the necessity of trade would have " been different from that of the present time?

" A.—Yes.

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" Q.—Some ship-building yard or something of that " kind?

" A.—Yes.

" Q.—We want to know what a property of this " kind, having come into the hands of owners of the " present day—what is its marketable value if it were " put on the market today, what would it fetch?

" A.—I could not tell you that at all.

" Q.—Your ability as an expert is in the abstract, " unless after your examination of the several timbers " that lie there, you are able to say what it would cost " to build up a similar class of work?

" A.—Yes. I made up just what I could put a " wharf there for.

" Q.—Leaving aside your business ability as a " contractor, and using your common sense and " general knowledge, do you think that a property of " that kind today would fetch a price that would be " made up on that basis. As a matter of fact using " your own common sense, do you think that a pur- " chaser today would give such a price for this property " as it stands, by arriving at it in the way you arrived " at it?

" No; I don't think it would fetch that to put it on " the market.

" Q.—Have you any idea, from your knowledge of " the value of Chatham property particularly its " wharf front property—have you any idea what it " would fetch, its commercial value?

" A.—No. I have not the least idea." * * *

There is no direct and substantial evidence of how many feet of wharfage there are on the property. Some parts have been measured and the balance has been assumed. How deep did the crib work go, and how was it filled,—we have only casual observations from what can only be termed cursory inspections.

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We have in this case evidence adduced on behalf of the defendants for finding from $141,801.39, graduating down to the sum of $60,000, under Mr. Loggie's evidence; and from $15,000 to $35,000 in the light of Mr. Snowball's evidence—and finally to $18,150 under the Crown's evidence. Rather a large range to travel through. However, the Court has no difficulty or hesitation in face of the evidence, and from the advantage it had in viewing the property, to discard these abstract valuations, and to adopt as a guidance something more tangible in the class of evidence adduced by Mr. Snowball.

The Court has come to the conclusion that this property must be assessed on its market value with the best uses to which it can be put by its owners,—that is, an old discarded ship-yard, slightly repaired at times, with all of its prospective capabilities at the date of the expropriation. It is contended by some of the witnesses that the railway is of some advantage to the property, and there is no doubt also that the balance of the property owned by the defendants, formerly held in unity with the part expropriated has been depreciated in value by the expropriation and by being deprived of its water front. Under all the circumstances of the case, the Court has come to the conclusion that the sum of twenty-five thousand dollars, to which should be added the usual ten per cent. for compulsory taking, is a just and fair compensation for the lands taken, real property, buildings and all, together with all damages present and future resulting from the said expropriation.

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

1st. The lands and real property taken herein are declared vested in His Majesty The King from the date of the expropriation.

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2nd. The compensation for such land, real property and damages is fixed at the sum of.....$25.000.00

To which 10% should be added for compulsory taking..... 2.500.00

Making the total sum of.....$27.500.00

And the said defendants are entitled to be paid the said sum of $27,500 with interest thereon at the rate of five per cent. per annum from the 21st day of September A.D. 1910, upon giving to the Crown a good and sufficient title and a full release for all claims for dower in the said land and real property by Alexandra Loggie, wife of Robert Loggie, and Ruby Loggie, wife of Francis P. Loggie.

3rd. The costs of the action will be in favour of the defendants and are hereby fixed at the sum of four hundred dollars.

Judgment accordingly.

Solicitor for the plaintiff: *T. W. Butler.*

Solicitor for the defendants: *R. Murray.*

IN THE MATTER OF

JOSEPH BURM, CLAIMANT;

and

HIS MAJESTY THE KING, RESPONDENT.

1914
March 28.

Revenue—Customs—Smuggling—Goods belonging to another seized along with smuggler's property—Release.

Upon an appeal from the decision of the Minister of Customs under section 179 of *The Customs Act* confirming the seizure of certain jewellery smuggled by the claimant through the Customs at the port of Montreal, it was shewn that four of the articles seized were part of the personal belongings of the claimant's wife, having been given to her by her father as a wedding present and entrusted to the husband for safe-keeping merely. On the other hand it was shewn that certain articles not dutiable personally owned by the claimant had been mixed with similar articles owned by him which should have been declared for duty.

Held, that in view of the provisions of sec. 180 of *The Customs Act* requiring the Court to decide "according to the right of the matter", and inasmuch as the claimant had not declared the dutiable articles, all the jewelry owned by him and smuggled into Canada was liable to forfeiture; but that such of the smuggled articles as clearly belonged to the claimant's wife and were not duitable should be released from seizure and restored to her.

Reg. v. *Six Barrels of Ham*, 3 N.B. R. 387 considered and distinguished.

The Dominion Bag Co v. *The Queen*, 4 Ex. C.R. 311, referred to.

THIS was a reference by the Minister of Customs, under section 179 of *The Customs Act* (R.S. 1906, c. 48) of a claim for the release of certain goods seized for an alleged infraction of *The Customs Act.*

The facts are stated in the reasons for judgment.

The case was heard by the Honourable Mr. Justice Audette at Montreal on the 12th day of February, 1914.

L. C. Meunier, for the claimant, contended that there was no intention on the part of the claimant to evade the law. He was under the impression that personal belongings such as rings were not dutiable.

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Argument of Counsel.

To shew how far his mind was from the offence of smuggling we must regard the fact that the claimant consulted an officer on board the ship he came by to ascertain his views on the matter. Claimant took his advice. This is clear evidence of an innocent mind. If Burm had wanted to dispose of the jewels he could have done so when he was in Canada before. The Court is required to decide "according to the right of the matter," and the demands of justice would not be regarded if the Court ordered the forfeiture of articles that were not dutiable simply because they were mixed with articles upon which certain duties were payable. As to the jewels belonging to the claimant's wife they clearly must be released. She merely entrusted them for safe-keeping to her husband, and was in no way guilty of the offence of smuggling.

He cited *Mignault's Droit Civ. Can.* (1); *Audette's Prac. Exchequer Court* (2); 12 *Cyclopedia of Law and Procedure, verbo "Customs Duties"* (3); 24 *American and English Encyclopedia of Law, verbo "Revenue Laws"* (4); *R.S.C. 1906, c. 48, sec. 23.*

H. J. Trihey, for the respondent, contended that the evidence shewed a clear intent on the part of the claimant to defraud the revenue by evading the payment of duty. It was established that he attempted to sell the articles in question, or some of them, in Montreal, after he had clandestinely introduced them into Canada. The evidence also rebuts the contention put forward by the claimant that the articles had been worn for some time by him; the expert evidence offered on behalf of the Crown is against that being found by the court. Then there was no proof that claimant was an immigrant when he brought the

(1) p. 110.
(2) 2nd ed. p. 347.
(3) p. 1186.
(4) p. 888.

goods in question into Canada, nor that they were really personal effects. In these circumstances the seizure must be maintained.

AUDETTE, J., now (March 28th, 1914) delivered judgment.

This matter comes before this Court on a reference by the Minister of Customs, under section 179 of *The Customs Act* (R.S.C. 1906, c. 48), the claimant having declined to accept the Minister's decision maintaining a seizure made, at the port of Montreal, of twenty-six articles of jewellery "for having been offered for sale " without report or entry at Customs or payment of " the duties lawfully payable thereon."

The claimant, who is an ebonist by trade, first came to Canada in June, 1908, and settled in Winnipeg with his family. During December, 1911, he left Canada for Antwerp, where he wanted to have his wife undergo a surgical operation. While in Belgium he tried to start a furniture factory, but found he had not enough money. He then came back to Canada and arrived in Montreal some time around the 12th September, 1912. Being in need of money he offered for sale, at three different places, jewels he brought with him from Belgium. Judging his social standing both from his own walk in life and his associations, as set forth in the evidence, one is somewhat astonished at the quantity of jewellery he possesses. However, that may be explained both from the fact that his father-in-law was, besides being a saloon-keeper, a diamond cutter; and further that in Belgium, where banks are in the hands of private individuals and do not command the same security as in Canada, it is customary to invest one's money in jewels, and sell them whenever one wants to realize. This will be again hereafter referred to.

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Bringing this quantity of jewellery across with him, the claimant seemed anxious to avoid the law and smuggle the goods, if possible; and he therefore sought legal advice from, among others, one of the nautical officers on board of the steamer in which he was coming across, and, as may well be expected, the result did prove fatal to him. There are many cases in fiction as well as in real life where the danger of consulting a "sea-lawyer" is exemplified—so it was with the claimant, who following that officer's advice with the obvious object to avoid the law, says he distributed his jewels among several members of his family. His conscience further allowed him to swear to the ownership of such goods according to this distribution, as appears by his affidavit of the 12th October, 1912, and Exhibit "6" attached thereto, both forming part of the Customs file.

His evidence is also unsatisfactory, unreliable and conflicting. A few instances may he here related. In his affidavit he states he possessed this jewellery on his first arrival in Canada. Then in his evidence before this Court he states he bought some jewellery in Belgium on his return there (p. 20) His wife states some of the jewels were bought in Belgium and in France before their return to Canada, and further that the last time they went to Belgium her husband has (une occasion) the chance of a bargain and bought diamonds (pierres) which he had made up in these horse-shoe pins.

It is unnecessary to review the evidence any longer, it will suffice to give the result. It is, however, well to state at this stage that the claimant is not a British subject, and that he did not get naturalized before he left Winnipeg in December, 1911, where he had been since June, 1908. He was still a Belgian when he came

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to Canada in 1912. Therefore, in view of that fact and of the further fact that quite a quantity of jewellery was bought by him in Belgium on his return thereto, which latter fact brings him within the principle of the case of *The Queen* v. *Six Barrels of Hams*, hereafter referred to, it is obvious that Item 705 of Schedule A of 6-7 Ed. VII cannot apply. Since any of the goods owned by the claimant himself were smuggled by him through the Customs, all of them should be declared forfeited.

In the result it appears quite clear that the six diamond pins were bought in Belgium on his last journey and were brought therefrom by him with the settled idea of selling them, and that they were smuggled through the Customs. The same may also be said with respect to a very large proportion of the jewellery seized with, however, some exception. The six horse-shoe shaped diamond pins were not bought for his own use—a certain variety would have been resorted to if it had been the case. These, then, were offered for sale to the public. However, it appears to this tribunal that some of the jewellery did belong to his wife, but from the loose and conflicting manner in which the evidence is presented, it is impossible to ascertain with any degree of certainty which of the said jewels belong to her and which do not. There is, however, enough evidence to find that the brooch or pendant, a marquise-ring with baroque pearls, and the ear-rings which go with this set, did belong to his wife, coming to her from her father as a wedding present, and the Court so finds for the purposes of this case.

Great stress has been laid in adducing the evidence to show that some of the jewels were not new and had been worn. That is not of great importance,—they might very well be new and be worn temporarily, with

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still the ultimate object on behalf of the owner of selling them. And it must be borne in mind that they were really merchandise investments, as above explained, and this being so, made them subject to duty.

Being satisfied on the question of fact, can the case of *The Queen* v. *Six Barrels of Hams* (1) be overlooked? Indeed this case as above mentioned goes as far as deciding that where a seizure of goods is made, and that among such goods there are some which are not subject to duty, the seizure is good for the whole. However, that case may be distinguished from the present one in that here all the jewellery did not belong to the one and the same individual, permitting thereby this Court to actually "decide according to the right of the matter" as provided by section 180 of *The Customs Act*. These words "decide according to the right of the matter" were commented upon in the case of *The Dominion Bag Co.* v. *The Queen* (2) where it was questioned as to whether or not they were really intended in any way or case to free the Court from following the strict letter of the law and to give it a discretion to depart therefrom if the enforcement, in a particular case, of the letter of the law, would, in the opinion of the Court, work an injustice.

Under the evidence as adduced before the Minister of Customs, no other decision than the one arrived at could have been given, and his finding was most justifiable under the circumstances. However, under the further evidence adduced at the trial read with the evidence before the Minister, and for the reasons above mentioned, this Court has come to the conclusion to somewhat vary that decision.

(1) 3 N.B.R. 387.

(2) 4 Ex. C. R. 311.

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There will be judgment maintaining the seizure of the goods herein, with the exception of the above mentioned pieces of jewellery belonging to the claimant's wife, viz.:—the brooch or pendant, a marquise-ring with baroque pearls and the ear-rings which go with the set, of which said last articles of jewellery release, or *mainlevée*, is hereby ordered with directions to deliver the same to the claimant's wife upon her giving a receipt for them.

The Crown will have the costs of the action after taxation thereof.

Judgment accordingly.

Solicitor for the claimant: *L. C. Meunier.*

Solicitor for the defendant: *H. J. Trihey.*

NOVA SCOTIA ADMIRALTY DISTRICT.

1913
Oct. 6.

WILLIAM NORMAN RHEINHARDT
And Others.....PLAINTIFFS.

AND

THE STEAMSHIP *CAPE BRETON*.

Shipping—Collision—Fishing Vessel—Loss of prospective catch of Fish—Measure of Damages.

In a case of collision between a steamship and a fishing schooner owing to the fault of the former, by which the fishing vessel is so much injured as to prevent her continuing on her trip to the grounds, the fair measure of damages is the estimated value of a prospective catch of fish by the injured vessel had she been permitted to prosecute her trip.

THIS was a claim against the defendant steamship *Cape Breton* for the sun of $10,000, arising out of a collision with the plaintiff's schooner *Guide* in Halifax Harbour, in the Province of Nova Scotia, on the 7th day of July, 1911.

The trial took place before the Honourable Mr. Justice Drysdale, Local Judge of the Nova Scotia Admiralty District, on the third day of April, A.D., 1913.

J. A. McLean, K.C., and *W. A. Henry*, K.C., for the plaintiff.

H. Mellish, K.C., and *W. C. McDonald*, for the defendant ship.

On October 6, 1913, the Local Judge pronounced in favour of the plaintiff and condemned the defendant ship in the amount to be found due to the plaintiff, and ordered that an account be taken, and referred the same to the Registrar (assisted by two merchants) to report the amount due.

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Argument of Counsel.

The evidence taken before the Registrar showed that the plaintiff's schooner *Guide* at the time of the collision, was on her way to the Grand Banks off Newfoundland on a fishing trip, and that by reason of the collision she was compelled to return to Halifax and be repaired and these repairs could not be completed before the fishing season was over.

In addition to the injury to the *Guide*, she also lost part of her permanent outfit and nearly all of her supplies. After the collision, the plaintiffs chartered another vessel, the *Speculator*; a few tons larger than the *Guide*, put the same crew in her and sent her on the same fishing trip, she arriving at the Banks about two weeks later than the *Guide* should have arrived there.

The *Speculator* on this trip, caught about 700 quintals of fish. By the evidence, the prospective catch of the *Guide* would have been 980 quintals.

H. Mellish, K.C., for the defendant ship.

The defendants are entitled to be credited with the net amount earned by the *Speculator*, as she was chartered by the plaintiffs, took the place of the *Guide* and finished out the latter's trip. They are also liable for the repairs of the *Guide*, the charter money paid for the *Speculator* and any other expense.

A ship gets her freight in damage and interest in the repairs and disbursements. They also get the profits of the voyage and interest on the outlay.(1)

The plaintiffs are only entitled to interest at the rate of five per cent per annum as that is the legal rate in Canada.

The rate of interest allowed in the Admiralty Registry in England is four per cent.(2)

There was no special agreement here to pay a larger rate of interest.

(1) Roscoe on Collisions, p. 113; *The Gleaner* 3 Asp. M.C. 582 *The Argentino*, L.R. 13 P.D. 191. (2) Roscoe on Collisions, p. 3

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Argument of Counsel.

R. E. Harris, K.C., for the plaintiffs.

In this case the defendant ship has been found to be wholly to blame for the collision and the rule as to damages is such cases is, *restitutio in integrum*. The *Speculator* was an independent venture of the plaintiffs, financed with their own funds and had no reference whatever to the trip of the *Guide*. Had the *Speculator* trip proved a failure, could the defendant vessel have been compelled to share the loss with the plaintiffs? If, not, then the defendants are not entitled to participate in the profits. The *Guide* was so badly damaged that she could not make her usual fishing trip and the plaintiffs are entitled to be allowed the full amount of the estimated profits thereof, without any deduction whatever (1).

The plaintiffs are entitled to interest at 7 % from the time the repairs to the *Guide* were completed, say two months after the collision up to the date of judgment, as they have sworn that the money was worth 7% to them, had the defendant paid it then. (2)

The Registrar reported fixing the damages due the plaintiffs by the defendant's ship at $8,404.70. He held that the defendants were entitled to be credited with the net profits of the fishing trip of the *Speculator* and that 5% interest should be charged.

Of the above sum of $8,404.70, the sum of $2,606.19 was allowed for the vessel's loss of voyage.

The plaintiffs move before the judge to vary the report of the Registrar and two merchants in allowing only $2,606.19 for the vessel's loss of voyage, claiming that the Registrar erred in deducting from the amount allowed to the plaintiffs for the loss of the fishing voyage of the plaintiff's vessel the net profits of a fishing

(1) The *Mediana*, (1900) A.C. at p. 121, explaining the "*City of Pekin*"; The *Risoluto*, 8 Prob. D. 109; The *Greta Holme*, 8 Asp. M.C. 317; The *Kate* (1899) Prob. 165.

(2) The *Gertrude*, 12 P.D. 204. The *Kong Magnus*, (1891) P.D. 223.

voyage of the schooner *Speculator* and asked that the said amount be increased.

The motion was argued before the Honourable Mr. Justice Drysdale, Local Judge of the Nova Scotia Admiralty District, on December 23, 1913.

W. A. Henry, K.C., for the plaintiffs;

H. Mellish, K.C., for the defendant vessel.

DRYSDALE, LO. J.—The damages here were referred to the Registrar and two merchants and assessed at $8,404.70.

This is a motion to vary the report made thereon and to increase the amount allowed the owners of the *Guide* by some $522. This motion is based first on an allegation that the people employing the ship for the substitute trip were not in fact the same people as the owners of the *Guide*, but I find in referring to the Registrar that the owners were the same in both cases.

The Registrar, in arriving at the damages, adopted the seemingly well settled rule in Admiralty in allowing in such a case as we have here the loss occasioned the owners of the *Guide* based on a prospective trip and catch, as if no injury had happened the *Guide*. This I think, is correct, and I am quite unable to detect any error in the calculations made upon the examination of the proof submitted.

I am of opinion the plaintiffs have recovered, according to the report and proofs upon which the same is based, full compensation for any damages sustained.

It was also argued that it was error to take into account the substituted trip, but the rule in this connection is too well settled to admit of controversy at this date.

I dismiss the motion to vary with costs, and confirm the report.

Judgment accordingly.

Solicitor for plaintiffs: *J. A. McLean.*

Solicitor for ship: *W. H. Fulton.*

NOVA SCOTIA ADMIRALTY DISTRICT.

1913
July 4.

CHARLES BRISTER & SON, LIMITED, PLAINTIFF;

AGAINST

THE STEAMSHIP *URANIUM*.

Shipping—Salvage—Extravagant claim—No tender or money paid into Court—Costs.

Where plaintiff named an extravagant sum for salvage services in his statement of claim, but the services were meritoriously rendered and the defendant did not tender or pay into Court any moneys to cover the demand, the Court declined to deprive plaintiff of costs although awarding a sum quite disproportionate to the amount claimed.

ACTION for salvage, and work done and materials supplied.

The plaintiff's action was begun for the sum of $30,000.00 for salvage services rendered by them to the Steamship *Uranium* her owners, underwriters, cargo and freight on the 16th and 17th days of January, A.D., 1913, at or near Chebucto Head in the County of Halifax, Nova Scotia, and for costs.

The case was tried at Halifax, N.S., on July 3rd, 1913, before the Honourable Mr. Justice Drysdale, Local Judge of the Nova Scotia Admiralty District.

J. Terrell, for plaintiff;

H. Mellish, K.C., for the defendants.

At the opening of the case it was agreed between the parties that the plaintiff should be permitted, and an order was made allowing it to amend the claim against the defendants in this action by adding an additional claim of $2,187.50 for work and labor done and performed and materials furnished and supplied

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by the plaintiff to the defendant at its request, $100.00 of which amount was for the hire of a large anchor.

Counsel for the defence admitted the plaintiff's claim for $2,187.50 but asked that the claim for $30,000.00 for salvage services should be dismissed with costs and the defendant should have the costs of defending the action as there clearly was no claim for salvage when the action was commenced.

It is admitted that the only claim for salvage is in respect to the anchor, and as the defendants hired this anchor for a definite period for a certain sum and anything in the nature of salvage was when the defendants had it under said contract of hire, it is clear that salvage cannot be charged or allowed.

Plaintiff contended that the evidence showed that this anchor materially assisted in pulling or floating the defendant ship off the rocks and salvage should be allowed therefor. The amount claimed by plaintiff for such salvage was not large considering the value of the steamer and her cargo.

The danger of the plaintiff's vessel, the *Bridgewater* in getting near the defendant ship to affix the latter's chain to the plaintiff anchor and paying it out, must also be taken into consideration. The plaintiff contract was merely for the hire of the anchor only.

DRYSDALE, Lo. J. now (July 4, 1913) delivered judgment.

The plaintiff's claim to the extent of $2,087.50 is not contested. The real contest herein is in respect to the use of an anchor supplied the defendant ship by the plaintiff. There was a contract to the effect that plaintiff should supply and make fast defendant's port cable and anchor, then carry the same out astern and

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drop it. This was to be done for an agreed sum of $100.00. The plaintiff contends that the contract was not performed inasmuch as the Captain of the defendant's ship would not permit plaintiff to make fast to his (plaintiff's) own anchor chain but required plaintiff to shackle the anchor direct to defendants' port cable, that this was something different from the contract and ought to be the basis of a salvage award. If this view of the plaintiff's case were taken there could be no recovery in respect to the anchor because a perusal of the whole evidence satisfies me that the anchor was in no sense a factor in the salving of the defendant's ship. I do not think, however, that the situation can properly be viewed in the light of the contention above referred to. I think the facts very clearly establish a contract to supply and make fast an anchor for a stated remuneration of $100.00, that in pursuance of this contract the plaintiff supplied and made fast the anchor that in so doing the method of fastening was assented to by plaintiff and his work in this respect can only be properly referable to his contract for which he was to receive $100.00, and this sum he ought to recover.

I am asked to deprive plaintiff of costs because of the exorbitant claim herein, but considering all the circumstances I am not inclined to do this. It is quite true that a foolish sum is named in the endorsement but plaintiff's outside of the anchor question have an undisputed right to $2,087.50, and I do not think the exorbitant sum endorsed in the claim has caused defendant's any serious harm. Defendant could have tendered or paid into court moneys to cover the demand. As this was not done I am not inclined to deprive plaintiffs of costs. There will be judgment for $2,187.50 with costs.

Judgment accordingly.

NOVA SCOTIA ADMIRALTY DISTRICT.

CHARLES BRISTER.....PLAINTIFF; 1913 Nov. 25.

AGAINST

THE STEAMSHIP *BJORGVIU*, HER CARGO AND FREIGHT.

Shipping—Salvage—Efficient service—Reasonable Award.

A steamship of the approximate value of $45,000, carrying a cargo of deals of the value of $25,000 in respect of which the freight when earned would have amounted to $13,375, went aground on a shoal on the coast of Prince Edward Island, and lay in an exposed and dangerous position. The plaintiff sent his salvage steamers to the grounded ship, pumped water from her hold, and set a gang of men to jettison part of the cargo, which was boomed and towed ashore where it was afterwards sold. It was agreed between the agent of the underwriters and the plaintiff that if the plaintiff failed to get the defendant steamship off the shoal the plaintiff would get $1,500 for loss of gear, but no arrangement was made in the event of success. The plaintiff succeeded in getting the steamship afloat some three days after she grounded. The steamship then proceeded under her own steam to Halifax, but one of the plaintiff's steamers stood by her until she was docked.

Held, that under all the circumstances and considering the respective values of the ship and cargo, the plaintiff was entitled to a salvage award of $8,000.

THIS was an action for salvage services.

The plaintiff as the owner of the steamship *Bridgewater* and ship *Harry* claimed the sum of $30,000 for salvage services rendered by the plaintiff and by the said steamship and ship, their masters, and crews to the SS. *Bjorgviu*, her cargo and freight, between the 6th and 11th days of October, 1913, at and from Indian Rocks off the coast of Prince Edward Island and to and at Halifax Harbour.

The evidence was taken before the Registrar of the Nova Scotia Admiralty District on November 19th,

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Statement of Facts.

A.D. 1913, and the case was argued before the Honourable Mr. Justice Drysdale, Local Judge of the Nova Scotia Admiralty District at Halifax, N.S., on November 22, 1913.

W. A. Henry, K.C., for the plaintiff.

Hector McInnes, K.C., for the defendant ship.

The evidence showed that the steamship *Bjorgviu* left Pugwash, N.S., on the 4th day of October, 1913, with a cargo consisting of 1,104 standard of deals for Dublin, Ireland, the freight on which was 55 shillings 6 pence per standard. The steamship's tonnage was 785 net and her value about $45,000. The value of her cargo was about $25,000 and her freight when earned would be about $13,375. On the morning of the 5th of October the defendant steamship went aground on an exposed shoal at or near Indian Rocks on the south coast of Prince Edward Island and about one mile and a half from the mainland, there being a channel between where she lay and the shore. She was headed S. S. E. on an exposed shoal, with the shoal outside of her and the channel inside.

The plaintiff is the owner of the steamer *Bridgewater* which is specially fitted with pumps, etc., for salvage purposes, and also of the schooner *Harry* which is used as an auxiliary. On October 6th the plaintiff received word that the defendant ship was ashore and he at once communicated with the captain of the *Bridgewater*, which was then at Louisburg, N.S., engaged in salving the gear of the steamer *Evelyn* and the schooner *Winnie Hazel* there. The *Bridgewater* arrived at the scene of the wreck on the morning of October 7, and her captain went on board the *Bjorgviu*, found from 5 to 7 feet of water in her, nearly up to the shafting. The captain of the defendant ship asked to have a pump placed as soon as possible in the engine

room as the water was gaining. The *Bridgewater* was brought near, coming by the inner channel, and about 4 o'clock in the afternoon a six-inch centrifugal pump was put on board and set working, being connected at first from the *Bridgewater*, and kept working about all night, and the following day it was connected with the donkey engine of the *Bjorgviu*. This pump reduced the water some. The plaintiff's diver was sent down to examine the ship's bottom and the bottom on which she lay. He reported very little damage to the ship and that she lay on a hard rocky shelving bottom. The *Bridgewater* was brought up under the bow of the *Bjorgviu* and both the port and starboard anchors were run out to a distance of about 100 fathoms each on both sides, so as to prevent the latter ship from getting further on the ledge if it breezed up.

On the afternoon of October 8th the plaintiff and the underwriters' agent arrived on the tug *Arcadia* via Pictou. A three-inch duplex pump was put on board to draw off the water which the larger pump would not take. A gang of men, including the two ships' crews and also men from the shore, were employed to jettison part of the cargo, in order to lighten the ship. They put a boom around it at the side of the ship, made it into a raft, fastened it with ropes and it was towed to Wood's Harbour, about half a mile distant, by the tug *Arcadia* which was employed by the plaintiff for that purpose. This part of the cargo was afterwards sold by the underwriters' agent. It was agreed between the agent of the underwriters and the plaintiff that if the plaintiff failed to get the defendant steamer off that the plaintiff should get $1,500 for loss of gear, but no arrangement was made in the event of success. On October 6, the plaintiff at Halifax received word from the captain of the *Bridgewater* (which was then at the

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Argument of Counsel.

wreck) to bring the auxiliary *Harry* (which was in Halifax) with pumps and gear. The *Harry* was got ready, with pumps, etc., and boilers, the latter brought for the occasion, and started and got as far as Sheet Harbour, N.S., when she received orders to return to Halifax as she was not required.

At noon on October 9th, the plaintiff placed on board the *Bjorgviu* three large sheave purchase blocks with a four-inch rope through them, one end of this rope being fastened to the ship's windlass and the other end made fast to the anchor that was taken off the starboard bow and run aft. A towing 10-inch hawser was also put from the defendant ship to the *Bridgewater*. The windlass and *Bridgewater* were then started and continued until four o'clock in the afternoon when the ship came off. Another examination was made of her bottom by the plaintiff's diver and the following morning the two steamers started for Halifax arriving there at one o'clock the following day (October 11th). The *Bridgewater* stayed by her until she docked on October 13th or 14th, the diver making another examination.

H. McInnes, K.C. for defendant ship:—This is not a case for a large salvage award. The defendant ship was not in great danger except if a storm came up. The weather was fine. She could have obtained other assistance.

The fact that the plaintiff was to be paid if he did not succeed in getting her off must be taken into consideration in fixing the amount of salvage (1).

If the award is to be on a percentage on the valuation basis, the freight which amounted to $13,375 was not earned and could not be taken into account(2).

(1) *Kennedy on Civil Salvage, p. 163; "The Lepanto," (1892) Prob. 122 at p. 130.*

(2) *Kennedy on Civil Salvage, p. 218.*

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The salving steamer was never in a dangerous position when performing these services, and the plaintiff should be paid a reasonable allowance for himself, his men and his ship and salvage gear. They were employed at the work less than a week.

W. A. Henry, K.C., for plaintiff:—There should be a substantial amount allowed the plaintiff for his services. The value of the property salved was $83,375, which includes the freight. The ship was in a dangerous place and if a storm came up she was bound to be a total loss, as she was exposed on four sides. We put the ship in a position to earn the freight after she had been repaired and she will then earn it. We salved the part of the cargo which has been jettisoned. We acted promptly and succeeded in the shortest possible time as we had all the appliances necessary for the work and did it most expeditiously. Time was of great value here not only on account of storms, but also to prevent the water reaching the engine and machinery, for had it done so the machinery would have been a total loss. The *Bridgewater* with her equipment was worth $20,000, and this was in danger when manoeuvring near the defendant ship in taking off the anchors.

The plaintiff keeps a complete salvage outfit for such purposes only, and the cases requiring it are so few that he should be encouraged by a good award.

DRYSDALE, Lo. J., now (November 25, 1913) delivered judgment.

The question here is one of salvage and I think the only thing involved is a question of amount. It is undoubtedly salvage—the services were undoubtedly salvage services; but in considering the amount I think the fact that some allowance was guaranteed in

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the event of failure ought to be taken into consideration. Nevertheless the services were valuable and the ship and cargo saved, in their damaged condition, were worth about $70,000 with a right to continue the voyage and earn upwards of $13,000 freight. Part of this freight may be and, I think, should be, considered as already earned. At least the owners were put in the position to continue the voyage and earn the freight after it had been fairly entered upon.

The ship was ashore near Bell Point on the southern coast of Prince Edward Island. When the services were rendered she was laying on a ledge of rock about a mile and a half from the shore and at least a long distance from any safe harbour. She was I think in an exposed position and, to my mind, no real question arises on the point of the ship and cargo being in grave danger.

The plaintiff keeps a salvage outfit in the way of tugs, and at the time his services were requested was in active work on the coast of Cape Breton. He promptly responded with the tug *Bridgewater* with the necessary salvage gear. Chiefly through promptly furnishing powerful pumps the defendant ship was put in a position to be saved. By the jettison of cargo and other necessary steps the defendant ship was lightened and taken off the shoal, and was enabled to arrive at the port of Halifax, the *Bridgewater* in company standing by.

Looking at the whole circumstances and considering the respective values I think it is a case for a substantial award, and, in my opinion, the plaintiff is entitled to have the salvage services in this case assessed at the sum of $8,000. I have gone over the cases cited with some care, and I think by analogous English cases this sum is a reasonable one under all the circumstances. I fix and assess the amount herein at $8,000 and costs.

Judgment accordingly.

TORONTO ADMIRALTY DISTRICT.

BETWEEN:

ONTARIO GRAVEL FREIGHTING COMPANY, LIMITED. ..... PLAINTIFF;

1914
March 2.

AND

THE SHIPS *A. L. SMITH* and *CHINOOK*

DEFENDANTS.

Shipping—Collision—Rules of the Road—Foreign Waters—Jurisdiction—Waiver.

1. Obedience to the rules of the road is not exacted as strictly in the case of a tug and tow as where a single vessel is concerned.

2. Where proceedings have been taken in a Canadian court in respect of a collision in foreign waters between two foreign ships, and a bond has been given and the *res* released, the question of jurisdiction cannot be raised by the defendant.

Semble:—A person or ship damaged in collision will not be restrained from proceeding in the domestic forum because the foreign vessel proceeded against has instituted an action in a foreign court to which the person or ship damaged is not a party.

ACTION in *rem* for damages for collision.

The case was tried at Windsor before the Honourable Mr. Justice Hodgins, Deputy Judge of the Toronto Admiralty District, on the 22nd day of December, 1913.

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

J. H. Rodd, for plaintiff.

A. St. George Ellis for defendant.

HODGINS, D.Lo.J., now (March 2, 1914) delivered judgment.

The plaintiff's loaded scow *Hustler*, while being towed down stream by the tug *Moiles*, was struck and

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sunk by the tug *Smith*, heading up stream, towing the scow *Chinook* light. The collision occurred in the St. Clair River just below Russell Island, at a point a little beyond Gd. Pointe Dock in American waters at about one a.m. on a bright moonlight night—the 28th day of November, 1913.

Both tugs were hugging the American shore, and the *Moiles* had the right of way descending the stream. Ray, the mate of the *Smith*, says that he saw the *Moiles* hugging the American shore and admits that the rule of the road is that the vessel coming down should keep or direct its course to starboard in the St. Clair River; that if he had wanted her to take another course he should have given some other signal and that he did not do so; that the *Moiles* was in her usual course, and at the time of the collision she was as near to the American shore as she could safely go. This last admission accords with the statement of Hunter, the mate of the *Moiles*.

Ray accounts for the collision by stating that when he sighted the *Moiles* he saw her starboard-light and thought she was on the range course for large vessels, that his ship was inside that course and so he intended to pass starboard to starboard instead of, as usual, port to port. He says the *Moiles* changed her course during a time when, owing to smoke, he had lost sight of her and that when it cleared he saw her red light on a course at an angle of forty-five degrees, to that of the *Smith*, and right across her course. He says that the smoke was caused by his own fireman putting in fire, and that a following wind blowing at thirty-five miles (or twenty-five to thirty miles, according to Hunter) had carried the smoke forward, right down on his bow and obstructed his view. The weather reports put the velocity of the wind at sixteen to eighteen or twenty

miles. As to signals, he says he did not give any and did not hear the first signal given by the *Moiles* notifying him that she was directing her course to starboard. This signal was given, according to Hunter, mate of the *Moiles* and others, about half a mile away, and Ray admits seeing her on that course when sighted. Ray says the danger signal was given only five seconds before the collision, but admits this is a guess and it may have been fifteen seconds, in which time both vessels would go two hundred and eighty feet. Hunter deposes that it was given five hundred or six hundred feet away, and three or four minutes before the collision, when he noticed the *Smith* sheer, and that after the earlier single blast he had given way a little towards the American shore, but not much, as he had not much room. The sheer of the *Smith* was denied.

It is clear that the *Smith* was heading so as to pass inside the *Moiles*. Ray says he gave no passing signal, because the *Moiles* was so far to starboard; but I cannot accept this statement, as he admits that he knew the *Moiles* which he often met, was close to the American shore, and would have to edge in further towards the American shore, after passing Light Ten, because there is a bay just below that light and that she had always done so, and he had no reason to expect she would not do it that night. He says he gave no danger signal, although the rules require three blasts when the view is obstructed (1). Allen, master of the *Smith*, on cross-examination admits that an upgoing vessel should keep out of the way, and that that should have been done in this case, and if blinded by smoke he would have given a signal.

The *Moiles* when she realized that a collision was

(1) Canadian Rules, Art. 15 (a); American Rules No. XIII.

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imminent, turned in towards shore and cleared the *Smith*. The *Chinook* came up on the starboard of the *Smith*, which struck the *Hustler* on the port bow. The *Smith* put her helm to port and went to starboard, and was also hit by the *Chinook* before she struck the *Hustler*.

The collision ought to have been avoided if the *Moiles* had had longer warning of the sheer of the *Smith*, so Heddrick, Captain of the *Moiles*, deposes, provided the *Smith* had been in control; but both he and his mate think that the *Smith's* steering was affected by the *Chinook*, which had machinery for using crane and anchor in its forward end, and that being light, this affected her own steering, which Hunter says was not good.

The mate of the *Moiles* admits that she did not slow down or stop until his crossing signal was understood and answered; and this is relied on as a breach of the regulations contributing to the collision.

There are two answers to this. There was nothing to indicate that the *Smith* was not observing and would not observe the rule of the road, and the *Moiles* was justified in keeping on. *The Lebanon* v. *The Ceto*, (1) *China Navigation Co.* v. *Asiatic Petroleum Co.*(2) The other answer made is that the danger from the loaded scow going down stream made this impossible, and that if the *Moiles* had stopped the *Smith* would have struck her, or the *Hustler* fouled her screw with the tow-line, as the down current was one and a half miles and the speed of the *Moiles* four and a half miles. To stop would mean collision or disabling or beaching the tug, as there was no visible channel bank and the *Moiles* was in as far as was safe at night. I accept this explanation as reasonable; the rules not being applied

(1) 14 A.C. at p. 686.

(2) 11 Asp. M.C. 310.

as strictly in the case of a tug and tow as where a single vessel is concerned. (1).

I also think that the difficulties in the situation proved distinguish this case from that of the *Owen Wallis*, (2). There was plenty of water to allow the *Smith* to have gone to the eastward and avoided all trouble. Under the Canadian Rules Art. 18, it is provided that when two steam vessels are meeting end on, or nearly end on, so as to involve risk of collision, each shall alter her course to starboard, so that each may pass on the port side of the other. Rule V of the American rules is substantially the same. Hunter says when he sighted the *Smith* he saw all her lights and hence his course was properly altered to starboard, although only slightly, owing to the danger he apprehended in getting too close in. He gave the signal required by Art. 28 (a) (American Rules 1); and the fact that it was not heard does not put the vessel giving it in the wrong. If not heard, it was the duty of the *Moiles* or *Smith* to have sounded five short blasts (Art. 28, American Rules 2). Ray, on the other hand, says he saw the green lights of the *Moiles* and, under Art. 19, (American Rule X,) it was his duty to have kept out of her way, and the *Moiles* was right in keeping her course (Arts. 21, 25 a and b. American Rules V or X). The *Moiles* gave the five short blasts when no answer was given to the first signal, and so conformed to the rules.

On the evidence I find that the fault lay with the *Smith* and that she alone was to blame for the collision.

The defendants argue that as the *Smith* had taken proceedings in the District Court of the United States for the Eastern District of Michigan in Admiralty to limit her liability, that this court has no jurisdiction

(1) The *Lord Bangor*, 8 Asp. M.C. 217. *Canadian Pacific Ry. Co.* v. *Bermuda*, 13 Ex. C.R. 389.
(2) L.R. 4 A. & E. 175.

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to proceed with this action. It is also put in the statement of defence on the ground that the defendant ships are both American ships and that the collision occurred in American waters, hence the proper forum is the United States Court.

It appears by the exemplification put in that those proceedings were begun in the United States Court on the 4th December, 1912, and that up to the 10th October, 1913, no judgment had been rendered. The proceedings were advertised in the Detroit newspapers, but no notice was given to the plaintiffs and their president denies any notice, and says he saw only a "squib" in the papers. This is not to be wondered at, as the order directing publication, authorizes service on the owners of the barge *Hunter* through the post office at Detroit, Michigan. The proceedings appear to be directed to limiting liability, and admit of proof being made by all claimants against the ship.

The *Smith* and *Chinook* were arrested on the 12th May, 1913, at the dock at Walkerville, in the Province of Ontario, this action having been begun on the 14th April, 1913, and a bond was given under which they were released on July 11th 1913. The question of jurisdiction, therefore, dealt with in *St. Clair* v. *Whitney* (1) does not arise here. I do not think the objection is open to the defendants. They have chosen to give a bond and to obtain an order releasing the *res* upon submitting to the jurisdiction of the Court, and securing to the plaintiffs payment of whatever amount is adjudged against them in this action.

The bond given is as follows:—

"Know all men by these presents that the United "States Fidelity & Guaranty Company hereby sub-

(1) 10 Ex. C.R. 1; 38 S.C.R. 303.

" mits itself to the jurisdiction of the said Court and " consents that if E. Jacques & Sons, owners of the " vessels, *A. L. Smith* and *Chinook*, seized by the " Sheriff of the County of Essex in this action, and for " whom bail is to be given, shall not pay what may be " adjudged against them or said vessels or either of " said vessels in the above named action with costs, " execution may issue against us, the said United " States Fidelity & Guaranty Company, its goods and " chattels, for a sum not exceeding twelve thousand " Dollars ($12,000.00)."

The ships are therefore free, and the plaintiffs cannot follow them into the American court and claim against them. They are limited to their bond, with which they are well content.

I have found no case, and none was cited to me, where the person or ship damaged was restrained from proceeding in the domestic forum because the foreign vessel had instituted proceedings in a foreign court to which the person or ship damaged was not a party.

The rule invoked rests upon convenience and fair dealing, and the plaintiff must be in some way responsible for or a party to the foreign proceedings before it is applied. No claim is made to limit liability under the *Merchants Shipping Act*.

I give judgment for the plaintiffs, with costs, and with a reference to the Deputy-Registrar of this Court at Windsor to assess the damages.

Judgment accordingly.

(1) The *Mannheim* (1897) P. 13; the *Reinbeck*, (1889) 6 Asp. M.C. 366; 60 L.T. 209; the *Christiansborg* (1885) 10 P.D. 141.

1914
April 2.

TORONTO ADMIRALTY DISTRICT.

C. H. STARKE DREDGE & DOCK COMPANY.....PLAINTIFFS;

AGAINST

THE SHIP *WILLIAM S. MACK*

Shipping—Collision—Rules of the Road—Failure to observe—Negligence.

In case of a collision between vessels, when damage has accrued, the responsibility lies upon the ship guilty of negligent navigation in failing to observe the rules which should have governed her course and speed.

THIS was an action for damages for collision, and was tried at Windsor, on March 23rd and 24th, 1914, before the Honourable Mr. Justice Hodgins, Deputy Local Judge of the Toronto Admiralty District, when judgment was reserved, counsel to put in written argument.

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

F. A. Hough, for plaintiff.

J. H. Rood, for defendant.

HODGINS, D. Lo. J., now (April 2nd, 1914) delivered judgment.

The west half of the Ballard Reef Channel, which stretches north-westerly from the north end of the Limekiln Channel, in the River Detroit, was closed to navigation from 23rd of August, 1913, until some time after the accident in question here.

This left the east half, three hundred feet in width and twenty feet deep, open; and the black gas buoy No. 71 was shifted to the eastward at the southern end

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of the channel so as to prevent vessels using the west half, which the plaintiff company was at work deepening. This end was also marked by a light ship, and there is a distinct bend in leaving the Limekiln Channel for the other, which latter channel is only used for upbound craft.

There was in use, belonging to the plaintiffs, a tug, drill, dredge and scow, and on the 11th of September, 1913, the drill was at work and stationary, the dredge lying to the south of it, and the tug *Milwaukee* was tied up at Texas Dock beyond and across the east half of the channel, on which dock is Duff and Gatfield's reporting station mentioned in the evidence.

The work was in charge of engineers employed by the United States Government; and one of them, Wright, states that there were three spar buoys marking the dividing line between the east and west halves of the channel, extending over one mile north of the lightship, the most southerly being 1200 feet north of the lightship, showing a white light at night.

A steamer, the *Byers* upbound, grounded on the *débris* caused by the operations just on the dividing line between the east and the west halves, 500 feet north of this spar buoy, or 1700 feet north of the light-ship. This occurred on the night of the 11th of September, 1913. The *Byers*, owing to the force of the current, began to swing, pivoting upon the *débris*, the point of contact being just abaft her smoke-stack. This allowed the forward two-thirds of her length to swing to the westward. The drill found herself in danger and got up her anchors, or spuds, cut her kedge, and signalled the tug *Milwaukee* to come to her assistance. Both the swing of the *Byers* and the current drove the drill down stream, and the two vessels were practically in contact until the *Byers* stuck in the position shown

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on exhibit 2. The tug had come across, took the drill in tow and headed up stream to pull her around the stern of the *Byers*, which was sixty feet over into the east half of the channel. The defendant ship, the *Mack*, just then hove in sight, coming up out of the Limekiln Channel, 1700 feet to the south.

The action arises out of a collision between the *Mack* and the drill which occurred shortly after, and the contest centres round the exact courses held by the tug and drill and the *Mack*, and their actions during the intervening time.

The night was clear and there was moonlight. Captain McCauley of the tug, O'Neill foreman of the drill, and Captain Ferguson of the *Mack* all seem to have sighted each other about the same time, i.e., when the *Mack* was south of the lightship at the south end of the Ballard Reef Channel. In this agrees the United States Government Inspector, Colton. The tug went south before turning to get hold of the drill and this probably accounts for Captain Ferguson saying he saw both green and red lights as he looked north. In consequence the question as to whether the spar buoy was lighted on that night is unimportant, though the Captain of the *Byers* gives it as a reason why he was so close to the west side of the east half of the channel.

The natural thing for the tug to do is what its captain says he did, i.e., to go upstream, past the stern of the *Byers* so as to get the drill back to where she was. The captain of the *Mack* admits that when on the last reach of the Limekiln Channel he thought there was trouble and checked to slow, i.e., three miles an hour. He then heard four whistles, which he says he did not understand. This was either the signal blown by the drill and dredge or from the tug before she

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started with the drill in tow. He, however, blew a danger signal when he had got 500 or 600 feet above the turn because, as he says, he saw the tug starting out into the channel. He knew the west half was closed, and, therefore, that he had to navigate in a 300 foot channel. He also admits that the *Mack* handles well, and he and his mate say they could hold her against the current for an indefinite time, which, as explained in the evidence, means that the *Mack* could have been held at the point he had then reached, practically motionless, by keeping the engines going against the current. He then heard four blasts from the tug, says he did not understand them, but he stopped and went full speed astern. As the accident happened 1700 feet above the entrance to the Ballard Reef Channel it is hard to reconcile his testimony with the facts. The *Mack*, he says, would stop in that current when going full speed astern in her length, 380 feet, so that, adding that to the 500 or 600 feet would still leave the *Mack* about 700 feet south of the point of collision. Evidently from the fact that after her first four whistles, the *Mack*, gave a passing signal, he must have proceeded, before stopping, much farther north; and indeed Captain Ferguson admits that he was 50 feet out from the Texas Dock and 200 feet south of it when he struck the drill, and on cross-examination says he stopped his engines a second time when he thought he would strike the dock. He claims that he had the right of way as he had the tug on his port bow and that his passing signal was not answered. The captain and mate of the tug say it was. At one time Captain Ferguson states that he was 200 feet south of the dock and practically standing still when the tug was drifting down on him at right angles and crossing the channel.

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I am satisfied that the tug when engaged in this difficult manoeuvre, with a heavy drill in tow, would not, in the face of an upbound vessel, attempt to cross the river exposed to the current and, therefore, necessarily drift down upon the *Mack*. I accept the account given by those on board of her that having pulled the drill round they endeavored to hold her and the tug steady till the *Mack* passed. They succeeded in doing so, except that the drill swung to and fro in the current. If the drill was not swinging she would have been hit in the stern. The tug, after the passing signal, blew a danger signal as the *Mack* was not far enough to the east, to which the *Mack* responded, and the tug then blew again. All of the plaintiff's witnesses say that the *Mack* showed no appearance of stopping or checking, during the time they saw her coming up. The account given by those on the *Mack* as to their position and that of the tug and drill at the time of the collision seems to be somewhat incredible. The captain says the *Mack* was 50 feet out from the dock and that the tug had not crossed his bow at all. His mate puts the *Mack* 20 feet or less away from the dock. Kelly, in charge of the signal station on the dock, gives the east side of the channel as 50 to 75 feet out from the dock which would leave the *Mack* out of and to the east of the channel.

The *Mack* struck the drill 19 feet aft of her forward end. The tow line between the tug and the drill was about 50 feet long, so that the tug must have been close to the Canadian shore or the deck if she were towing straight across. If the *Mack* was fifty feet out from the dock the drill must have been at least as close and I cannot see how she could have got in that position in view of the fact that she was being towed, unless the tug had gone across the bow of the *Mack* and turned

north close to the dock, but Captain Ferguson is clear that the tug did not cross his bow.

It is possible that the endeavors of the tug to pull the drill around may have thrown both further east in the channel than is admitted. But this only accentuates the necessity for extreme caution on the part of the *Mack*. The evidence of the engineer of the *Mack* is that he checked speed at 6.45 p.m. and at 7.01 p.m. went full speed astern for about one and a half minutes, and then full speed ahead at 7.05 p.m. This gives seven minutes under check, in which the *Mack* would have travelled, at three miles an hour, which is the speed her captain gives, about 1700 feet. This indicates that the *Mack* was not checked in reasonable time before the collision. Assuming in her favour that she had checked while still in the Limekiln Channel, and had gone full speed astern when 500 or 600 feet north of the lightship, and that the *Mack* was 200 feet south of the dock when the collision took place, and then went full speed ahead for half a minute to give her a kick to the west and then reverse again, it is difficult to see how she could have traversed the intervening distance if the engineer's time is correct.

Upon the whole, and after carefully considering the evidence, much of which I have not cited, and the written arguments put in after the trial, I come to the conclusion that the *Mack* was wholly to blame, was negligent in navigation and failed to observe the rules which should have governed her course and speed under the circumstances.

Judgment will go condemning the *Mack* in the damages fixed by the Deputy Registrar at Windsor, to whom the assessment of damages is referred, with costs.

Judgment accordingly.

TORONTO ADMIRALTY DISTRICT.

1914
May 12.

THE PENINSULAR TUG & TOWING COMPANY, LIMITED.....PLAINTIFFS.

AGAINST

THE SCHOONER *STEPHIE*.

Shipping—Salvage—Relative Liability of Ship and Cargo—Specific Agreement

Where no specific agreement is made for a sum certain, the rule in a salvage action is that the interests in the ship and cargo are only severally liable, each for its proportionate share of the salvage remuneration. The *Mary Pleasants* (1857) Swab. 224; The *Pyrennee* (1863) Br. & L. 189; The *Raisby* (1885) 10 P.D. 114, referred to.

ACTION *in rem* for salvage services.

The case was tried at Sarnia before the Honourable Mr. Justice Hodgins, Deputy Local Judge of the Toronto Admiralty District, on the 4th day of May, A.D., 1914.

The facts appear in the reasons for judgment.

R. V. LeSueur, for the plaintiffs.

F. F. Pardee, K.C., for the ship.

HODGINS, D. Lo. J., now (May 12, 1914) delivered judgment.

It is admitted that the services were actually rendered, and that the amount charged therefor, $1,080.63, is reasonable. The sole question is whether the ship is liable for the whole amount or only for her proportion, having regard to the fact that the salvage preserved the cargo and enabled the ship to earn the freight.

This depends upon whether there was an agreement for a specific sum or whether the ship merely accepted the services of the salving vessel.

No evidence was given that any sum had been agreed upon. The bargain, whatever it was, was made not by the master or owner, but by Lomer, acting for the insurers of the cargo, and no details of it were vouchsafed at the trial. The ship therefore cannot be made liable as upon any express contract by its owner or master. The *Cumbrian* (1); the *Prinz Heinrich*. (2)

The rule where no specific agreement is made for a sum certain is that the interests in the ship and cargo are only severally liable, each for its proportionate share of the salvage remuneration. See the *Mary Pleasants* (3) (1857) The *Pyrennee* (4) The *Raisby* (5).

The values given for the ship and cargo at the trial were $2000 and $12,000 respectively and the freight earned and paid is agreed by the parties to be $661.93. Upon that basis the plaintiffs will be entitled to judgment for proportion of their claim based on a valuation of the vessel and freight at $2,661.93, as against the value of the cargo at $12,000; in other words, to judgment for $240.00.

As the importance of the exact values of vessel and cargo were probably not, in this view, present to the minds of counsel, either party may apply to me on affidavit to vary them before the 18th of May.

The plaintiffs should have their costs of action and will be entitled to a like proportionate part of them from the cargo on the adjustment under the general average bond.

Judgment accordingly.

(1) (1887) 6 Asp. M.L.C. 151.
(2) (1888) 13 P.D. 31.
(3) (1857) Swab. 224.
(4) (1863) Br. & L. 189.
(5) (1885) 10 P.D. 114.

1914
March 24.

TORONTO ADMIRALTY DISTRICT.

THOMAS LANNON,.....PLAINTIFF.

AGAINST

THE SHIP *LLOYD S. PORTER.*

Shipping—Negligence—Loss of Goods in transit—The Water Carriage of Goods Act, 1910—Application—Right of Action.

The Water Carriage of Goods Act, 1910 (Dom.) does not apply in Admiralty cases, except when the vessel sails from a Canadian port.

Quære: Has a party who has not at the time of the happening of the event upon which action is based, paid for the goods lost or taken delivery of them, the right to maintain an action in respect of their loss ?

THIS was an action brought to recover the value of a cargo of coal laden in a barge attached to the defendant ship, and which cargo it is alleged was lost through the negligent navigation of the defendant ship.

The case was tried at Toronto before the Honourable Mr. Justice Hodgins, Deputy Local Judge of the Toronto Admiralty District, on the 16th and 19th days of February, A.D. 1914.

The facts are fully set out in the reasons for judgment

W. M. German, K.C., for plaintiff.

McGregor Young, K.C., for defendant.

HODGINS, D. Lo. J., now (March 24th, 1914) delivered judgment.

The *Porter*, a steam barge of 488 gross tons and 379 registered tons, left Erie, Pa., for Port Colborne with the dumb barge *Marengo*, laden with plaintiff's coal, in tow on the 11th day of October, 1912.

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The *Marengo* went ashore that evening just off Morgan's Point, about six miles west of Port Colborne, and it and the cargo were lost. The present action is by the owners of the cargo to recover its value; $2427.85, and the charge is negligent navigation of the *Porter* causing the stranding of the tow.

The log of the *Porter* reads as follows:

" Left Erie at 12.20 p.m. with *Marengo* in tow wind " south light and thick at 10 p.m. eased *Porter* down " and at 10.30 *Porter* struck bottom very easy and " *Marengo* brought up backed *Porter* off got alongside " *Marengo* whistled and brought tug out of Port " Colborne *Porter* and tug tried to pull her off but " could not dropped *Porter* out into deep water and " stopped there until 3 a.m. wind freshed up from the " south and *Porter* had to go into Port Colborne left " Port Colborne 4 a.m. wind south-west blowing a " gale."

The above is just as it is written. There is no attempt at punctuation or division into sentences.

The vessels crossed Lake Erie. At 8 p.m. the speed of the *Porter* was checked and at 10 p.m. was slowed "right down" so that she was then going at about two miles per hour. Savage, the sailing master, says it got very thick at 9 p.m. having gradually got denser from about 3 p.m., the wind drawing from the north east. Dove and Misener, who say it was clear in the afternoon, are corroborated by McGrath and my conclusion is that Savage is mistaken as to the fog or mist having set in as early as 3 o'clock. He is, however, corroborated as to fog at 9 p.m. by Dove, in charge of the tow, and by McGrath the tug captain, who was then lying in Port Colborne. At 10.30 the *Porter* touched the bottom and the *Marengo* astern went on ground thought to be a rocky shoal.

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The place where they struck was on the south-west of Morgan's Point, about three miles westerly in a straight line from and at right angles to the course shown on the chart and about six miles from Port Colborne.

Palmattier, who held a captain's certificate, for some reason, was not in command of the *Porter* but Savage who held only a mate's certificate, was in charge. The former is said to have been engaged in taking soundings after the *Porter* was slowed down at 10 p.m. and thereafter till she touched. Savage had the usual chart, a copy of which is filed as an exhibit.

The situation, then, at 9 p.m. appears to be that it was foggy or thick; that the *Porter* was checked and that no doubt Savage knew or ought to have known from his log, if he used one, or from the speed at which he had been going and the time, his general situation. The distance from Erie is only sixty-three miles.

From 9 p.m. until a little after 10 p.m. he heard the Port Colborne fog horn continuously and at 10 p.m. he slowed the *Porter* right down, going on then slowly and sounding and getting 4 to 6 fathoms. At 10.30 p.m. she and the tow grounded. Dove, who was in charge of the *Marengo,* and whose marine protest was filed as an exhibit, gave evidence, and says that he heard the *Porter* blow to check at 10 p.m., and proceeded under check, grounding at about 11 p.m. He says he heard the Port Colborne fog-horn for more than an hour before they grounded, the last half hour very distinctly and that the sound from the fog-horn appeared to be on his starboard bow. In this, while agreeing in the main with the evidence of Savage, there is an important difference. The latter says that from a little after 10 p.m. (later he put it more definitely at 15 minutes before they struck) till just after they

grounded he could not hear the fog horn. McGrath, captain of the Port Colborne tug, says that at intervals the fog-horn would not blow but generally did so every five or ten minutes. Stinson, master of the *McKinstry*, says the Port Colborne fog-horn is not to be relied on absolutely.

For an hour, until 10 p.m., Savage had the aid of the fog-horn in determining his position. He then went dead slow and must have done so either because, knowing his general position, he thought he could with caution make Port Colborne safely, or because, not knowing it, he was afraid to go faster. The *Porter* grounded at 10.30 p.m. and must at the specified rate have travelled a mile in the half hour. The depth of five fathoms is found one-eighth of a mile out from Morgan's Point according to Mann, so that for the greater part of the half-hour the *Porter* was in safe water. When the grounding took place there was less than two fathoms at the bow of the *Porter*—she drew twelve feet—and just over two fathoms at the bow of the *Marengo*. In the result it turned out that the course being followed before and after 10 p.m. led the vessels to a point five or six miles to the west of their intended destination. The question to be decided is not so much how the navigation had brought the *Porter* so far west but rather whether, under the circumstances in which Savage thought he was, he was guilty of negligence in moving at all after he lost touch with the fog-horn.

As to how he came to be where he was at 10 p.m. there is no definite evidence. Experts differ and in this case there is singular difference on the point of the true course to be steered.

The compass course from Erie to Port Colborne shown on the chart is N.E. $\frac{3}{8}$ N. The course steered

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by Savage, which he said had always led him to safety, was N.E. ¼ N. Johnson, one of the plaintiff's witnesses, gave this as the proper course allowing for variation. That of Cavanagh is N.E. $\frac{5}{8}$, E., he making allowance for his own compass, and of Johnson N.E. ¼ E.

Savage thinks there was something wrong with the compass, and two captains speak of a strong local attraction which may have resulted in a variation sufficient to account for the deflection, if the steering on the stated course was carefully maintained.

But the fact is that, whatever course was actually followed, the fog-horn had been heard for an hour, 9 to 10 p.m. or 10.15 and according to Dove, on the starboard bow. It then ceased, so Savage said, for half an hour although he says he heard it fifteen minutes before they grounded. Here seems to me to be the crucial point. It is known now that Savage was several miles to the west of where he ought to have been. There was safe water to within $\frac{1}{8}$ of a mile, i.e., 220 yards, from shore, and he had slowed down to dead after hearing the fog-horn continuously for an hour. I think it must be taken that during nearly thirty minutes before the vessels grounded no fog signal had been heard. That is the time given by Savage, although he puts the last blast as fifteen minutes before the *Porter* touched. If he got off his course by accident, and there is nothing in the evidence warranting me in finding differently, then he must be judged by the situation as he viewed it and not as it really was. His position, as he understood it at 10 p.m., was off Port Colborne with soundings of from four to six fathoms and with whatever the fog-horn had told him as to his position by its blasts continuously from 9 p.m. Should he have stopped dead till he picked it up

again? His not doing so is clearly responsible for the accident. A doubt is suggested by the proved irregularity of the blasts and by his statement that it sounded fifteen minutes before he struck. But if for one hour, shortly before he touched the ground, it had been heard, it seems to me that his calculation of his position was faulty. When the *Porter* grounded she was six miles from Port Colborne, going at say, four miles an hour, from 9 to 10 p.m. She was, while making that distance, in truth keeping at least as far away as when she began on a course almost parallel to the true chart course. If Savage assumed that he was on his proper course, I cannot help thinking that he should have in that hour realized that the sound was not coming any closer, as it would have been had he been heading straight for the harbour. Besides this, if he thought he was close in, and then lost touch with the fog-horn, that should have indicated to him the necessity for extreme caution in view of his assumed position close to the port. Mann, one of the defendant's witnesses, says that the compass course does not bring a vessel right into Port Colborne harbour, and that the course must be changed to get in.

There is another consideration. Having lost the fog-horn after hearing it for an hour, it might well have suggested, as the fact was, that he might be out of his course, and that the absence of the sound was due to the fact that he was not actually where he thought he was. The expert evidence, so far as it is useful, aids in this conclusion.

Anderson and Stinson, defendant's witnesses, say he should have known by fog-horn his position; while Johnson and Cavanagh for the plaintiff think he should have stopped, under the prevailing conditions the latter qualifying this by saying that he

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would have been justified in proceeding if he got his bearing from the fog-horn.

I do not give any weight to the evidence of Palmattier and Corby. If true, it betrays a singular disregard of their duty to their employers and to Savage. Nor am I able to understand why they maintained a resolute silence with Savage on the matter during all the rest of the season, while sailing together. Besides, if credited, their evidence throws the *Porter* one mile and a half further off her course, to the westward, at the speed shown during the time they mention.

I am unable to find that the *Porter* after the stranding was guilty of any negligence or want of seamanship in leaving the tow when she did, or that she could have given the latter any effective assistance. I am satisfied that to remain in face of the rising wind and sea, attached to a stranded barge by a line and endeavoring to get a strain upon it, was a task impossible to perform usefully, and was likely to end in disaster to the *Porter*.

Counsel for the defendant raised several objections to the plaintiff's recovery. The right of the plaintiff, who had not at the time of the accident paid for the goods nor taken delivery of them, to maintain the action is disputed and *Graham* v. *Laird* (1) was cited. It appears that the plaintiff took delivery of part (he sold the salvage) although the bulk was lost in transit, and that he has since paid for the whole. It may be that is such a case he has a right of action as owner. (2)

(1) 20 O.L.R. 11.

(2) *Irving* v. *Hagerman* (1863) 22 U. C.Q.B. 545. *The W. H. No. 1* and *The Knight Errant* (1910) Prob. 199, (1911) A.C. 30. *The Millwall* (1905) Prob. 155. *Sewell* v. *British Columbia Towing Co.* (1884) 9 S.C.R. at p. 547. *The Winkfield* (1902) Prob. 42. *Parratt* v. *The Ship Notre Dame D'Arvor* 13 Ex. C.R.456. But as it may be doubtful, see *The Charlotte* (1908) Prob. 206.

I give leave to the plaintiff to add the vendors of the coal as party plaintiffs.

The *Water-Carriage of Goods Act* (1910) cap. 61 (Dom.) does not apply except in cases where the vessel leaves from a Canadian port. Assuming that there is a statute of the United States in corresponding terms, as was stated at the bar, it would be equally inapplicable, and if otherwise relevant there is nothing before me to indicate that the parties had agreed that they were to be governed by it or had made it part of their contract, as in *The Rodney* (1), *Rowson* v. *The Atlantic Transport Co.* (2). The statute would, I think, be construed, in the circumstances here existing, as was the enactment relied on in *Morewood* v. *Pollok* (3).

The judgment will declare the plaintiff entitled to a maritime lien upon the authority of the following cases, and the decisions referred to therein. *The Tasmania* (4); *The Mersey Docks and Harbour Board* v. *Turner* (5); *The Utopia* (6); *The Ripon City* (7); *The Devonshire and The St. Winifred* (8).

On the vendors of the coal being added there will be judgment for the plaintiffs, for $2,427.85 with costs of action. If the vendors decline to be added the question of the right of the present plaintiff to succeed may be reargued.

Judgment accordingly.

(1) (1900) Prob. 112.
(2) (1903) 2 K.B. 666.
(3) (1853) 22 L.J.Q.B. 250.
(4) (1888) 13 P.D. 110.
(5) (1893) A.C. 468.
(6) (1893) A.C. 492.
(7) (1897) Prob. 226.
(8) (1912) Prob. 68.

BRITISH COLUMBIA ADMIRALTY DISTRICT.

1912
June 19.

LETSON.....PLAINTIFF;

AGAINST

THE SHIP *TULADI*.

Shipping—Action for necessaries—Admiralty Practice—Affidavit to lead Warrant—Rule 39—Discretion of Registrar—Review.

Where the Registrar has exercised his discretion under Rule 39 to dispense with some of the prescribed particulars in an affidavit to lead warrant for the arrest of the ship in an action *in rem* for necessaries, the Court will not review such discretion.

MOTION in an action *in rem* for necessaries to discharge warrant for arrest of ship.

The ground upon which the application was made was that the affidavit to lead warrant did not contain all the particulars required by Rules 35, 36 and 37 of the Admiralty Practice, and that, therefore, the Deputy District Registrar at Vancouver had no authority to issue the warrant.

W. J. Taylor, K.C., for the motion.

A. D. Macfarlane, contra.

MARTIN, L. J., now (June 19th, 1912) delivered judgment.

These rules bear a close similarity to the corresponding English rules, Order V., Rules 16 and 17, but there is this important distinction, *viz.*: that while in England the power to dispense with "all the required particulars" is reserved for "the Court or a judge", in this Court the Registrar has the like power, rule 39 providing that:

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" 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."

The affidavit here does not state the national character of the ship, or that the aid of the Court is required. The first omission is of importance, the latter is almost a matter of inference; in other respects I think the affidavit is sufficient. Were it not for Rule 39, I should have thought that as a whole there had not been a substantial compliance with the rules, but I see no escape from the fact that the Registrar has, for reasons which must be assumed to be valid, and which are not required to be disclosed on the record, "thought fit" to dispense with some of the prescribed particulars, and in such circumstances I cannot perceive in what respect I am entitled to review the exercise of that discretion any more than I should be under the English rule. I may say that I have searched carefully for any decisions which would throw light on the subject, as it is of much practical importance, but have been unable to find one.

The motion must be dismissed, with costs, payable to the plaintiff in any event.

Order accordingly.

BRITISH COLUMBIA ADMIRALTY DISTRICT.

1913
Sept. 24.

THE VICTORIA MACHINERY DEPOT COMPANY, LTD., ... PLAINTIFF;

AGAINST

THE STEAMSHIPS *CANADA* AND *TRIUMPH*.

Shipping—Admiralty Practice—Rules 35, 36, 37 and 39—Affidavit to lead Warrant—Supplementary Affidavits—"An owner domiciled in Canada"—Mortgagees—Necessaries—Statutory Lien— Promissory Notes—Dishonour—Right to sue for original debt.

Where an affidavit to lead warrant does not disclose that the Court is seized of jurisdiction, leave may be given to the plaintiff to file supplementary affidavits shewing that there was jurisdiction to issue the warrants and that the case is one in which the discretion of the Registrar under Rule 39 could be properly exercised.

2. A company whose head office is in England, although registered and licensed to carry on business in British Columbia, is not "an owner domiciled within Canada" within the meaning of Rule 37.

3. Where necessaries have been supplied in British Columbia to a ship which is away from its home port and has no owner domiciled in the province, a statutory lien for the same arises upon the arrest of the ship, and the lien may be enforced either upon the trial or upon a subsequent motion.

4. Where promissory notes have been accepted for part of the claim for necessaries and have been dishonoured the ship may be sued for the original debt.

TWO motions were heard by the Honourable Mr. Justice Martin, Local Judge of the British Columbia Admiralty District, at Chambers in Victoria on September 3rd, 1913, in an action *in rem* for necessaries, on behalf of the receiver and manager of the British Columbia Fisheries, Limited, (owner of the steamships *Canada* and *Triumph*) and of the trustees of a debenture mortgage covering said ships, to vacate certain warrants for arrest of the ships.

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The grounds upon which the motions were based appear in the reasons for judgment.

W. J. Taylor, K.C., in support of the motions.

E. V. Bodwell, K.C., and *W. C. Moresly, contra.*

Reasons for Judgment.

MARTIN, L. J., now (September 24th, 1913) delivered judgment.

These are two separate motions on similar material, heard together for convenience, on behalf of the receiver and manager (appointed on 13th August, 1913, by the High Court of Justice in England) of the British Columbia Fisheries, Limited, (owners of the steamships *Canada* and *Triumph*) and of the trustees of a debenture mortgage covering said ships, to vacate the warrants issued against the said ships now under arrest of the Marshal on the grounds that the affidavits to lead to warrant do not comply with Rules 35 and 36, it not being stated therein (a) what the "nature of the claim" is but only that:—

"2. The plaintiff has at the request of the de-
" fendants or their agents done work and rendered
" services to the *Canada*, a British vessel belonging
" to the port of Grimsby, England, to the amount of
" $3,217.37.

and (b), if it can be assumed that the action is for necessaries, the domicile of the owner within Canada is not deposed to; and (c), if it can be asumed that the action is for building, equipping or repairing, the fact that the ship is under the arrest of the Court, is not deposed to. My recent decision in *Letson* v. *Tuladi* (1) on the power of the Registrar under Rule 39 to dispense with certain "prescribed particulars" in the affidavit, was relied upon by the plaintiff in answer to these objections, but it was submitted by the defendants in

(1) (1912) *Ante*, p. 134.

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reply that though the registrar may so dispense, yet my decision does not go to the length of holding that such dispensation would confer upon this Court a jurisdiction which it did not in fact possess. This submission is, I think, correct, and according to the facts disclosed in the affidavits filed before the Registrar, and in support of this motion, this court would not have jurisdiction to issue the warrant for arrest. But an application was made by the plaintiff on the return of the motion to file supplemental affidavits to prove such facts as would show that in reality there was jurisdiction and that the case was one in which the discretion of the Registrar could be and was properly exercised, and I allowed the affidavits to be read for that purpose, and they did establish jurisdiction showing that the claim, or at least a large portion of it, was for necessaries (as defined by, e.g. *Webster* v. *Seekamp* (1); *The Two Ellens* (2); and *The Riga* (3), approved in *Foon Tai* v. *Buchheister* (4), and that "no owner or part owner of the ship [was] domiciled within Canada at the time of the institution of the action", because the owning company having its head office in London, England, has its domicile there within the meaning of the authorities which will be found conveniently collected in *Pearlman* v. *Great West Life Insurance Co.* (5), where the question was recently considered. I have not overlooked the fact that this company is licensed and registered to carry on business within this province under sec. 152 of the *Companies Act*, R.S.B.C., cap. 39, and that it has "the same powers and privileges in this " Province as if incorporated under the provisions of " this Act", but that language does not change or alter

(1) (1821) 4 B. & Ald., 352.
(2) (1871) L. R. 3 Ad. & E., 345; L. R. 4 P. C., 161.
(3) (1872) L. R. 3 Ad. & Ec., 516.
(4) (1908) A. C., 458 at p. 466.
(5) (1912) 17 B. C. R., 417.

its constitution or domicile, and it is not one of the "privileges" enjoyed by British Columbia companies that they should have two head offices, one of which could, *e.g.*, be used as a means to pursue its debtors, and the other to evade its creditors. The distinction between the "head office of the company" (*i.e.* its "home") and the "head office of the company in the Province" is preserved in the form of the license and of certificate given in secs. 154 and 160, sub-secs. (b) and (c).

But it is further contended in support of the motion that since at the time of the arrest the ships were in the possession of the said receiver, under the said debenture mortgage, duly registered in the Port of Grimsby, England, the registered port of the defendant ships, therefore as the lien for necessaries is not a maritime one, and the possessory lien has been lost, there is no other lien that can be enforced in the circumstances, and the arrest is of no avail.

While it is true that the plaintiff herein has no maritime or possessory lien, yet since he has supplied necessaries here to a ship, which I assume for the purposes of the argument, (1) though not a foreign one, is yet away from its home port and has no owner domiciled in British Columbia (which under sec. 2a of the *Colonial Courts of Admiralty Act*, 1890, must be substituted for "England and Wales" in the *Admiralty Court Act*, 1861, sec. 5) he has acquired a statutory lien for such necessaries when the ship was arrested under the warrant of this Court. The fact that it may turn out that such lien may be postponed to a prior charge or charges by way of lien or mortgage or to the claim of a bona fide purchaser of the ship for value does not prevent its enforcement so far as may be

(1) See *The Ocean Queen*, (1842) 1 W. Rob., 457.

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lawful upon the facts to be hereafter established, either upon the trial or upon a subsequent motion furnishing "the necessary materials for a judgment", as has been done in many cases, *e.g.*, *The Scio* (1). See also the following authorities which justify my view: *Abbott on Shipping* (2); *McLachlan on Shipping* (3); *Williams & Bruce* (4); *The Troubadour* (5); *The Pacific* (6); *The Aneroid* (7); *The Rio Tinto* (8); *Foon Tai* v. *Buchheister*, *supra*, and lastly and chiefly *The Cella* (9), applying the decisions in *The Two Ellens*, (10), *The Pieve Superiore* (11) and the *Heinrich Bjorn* (12). Thus in *The Cella:*—

> " They shew that though there may be no mari-
> " time lien, yet the moment that the arrest takes
> " place, the ship is held by the Court as a security
> " for whatever may be adjudged by it to be due to
> " the claimant." (p. 87).

And p. 88:—

> "It appears to me that so long as 1842 Dr. Lush-
> " ington in *The Volant* explained the principle upon
> " which the Court proceeds, when he said that "an
> " arrest offers the greatest security for obtaining
> " substantial justice, in furnishing a security for
> " prompt and immediate payment." The arrest
> " enables the Court to keep the property as security
> " to answer the judgment, and unaffected by chance
> " events which may happen between the arrest and
> " the judgment. That is Dr. Lushington's decision,
> " and I think is a right one."

With respect to the objection taken that promisory notes had been accepted for the amount of the claim the answer is, first, that the affidavits show that the notes

(1) (1867) L. R. 1 Ad. & E., 353.
(2) (1901) ed. pp. 49, 183, 1023.
(3) (1911) ed. pp. 115–20.
(4) *Admiralty Practice* (1902) ed. p. 198.
(5) L. R. 1 Ad. & Ec., 302.
(6) (1864) Br. & L., 243.
(7) (1877) 2 P. D., 189.
(8) (1884) 9 A. C., 356, 362–3.
(9) (1888) 13 P. D., 82.
(10) (1871) L. R. 3 Ad. & Ec., 345, 4 P. C., 161.
(11) (1874) L. R. 5 P. C., 482.
(12) (1886) 11 A. C., 270.

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are only for a part thereof, the sum of $2,224.98 not being covered thereby; and, second, since the notes have been dishonoured, the ship may be sued for the original debt.—*The N.R. Gosfabrick* (1).

The result is that the motions will be dismissed, with costs to the plaintiff in any event.

Orders accordingly.

(1) (1858) Swab., 344.

BRITISH COLUMBIA ADMIRALTY DISTRICT.

1913
Oct. 28

THE VICTORIA MACHINERY DEPOT COMPANY LIMITED,.....PLAINTIFF; (No. 2)

AGAINST

THE STEAMSHIPS *CANADA* AND *TRIUMPH*.

Shipping—The Admiralty Courts Act, 1861 (U.K.) sec. 5—Construction—Repairs to fishing vessel—"Necessaries".

Alterations in the structure and equipment of a vessel in order to change her from one style of fishing craft into another are "necessaries" within the meaning of section 5 of *The Admiralty Court Act*, 1861, (24 Vict. (U.K.) c. 10). *Williams* v. *The Flora* (1897) 6 Ex. C. R., 137, and *The Riga*, (1872) L. R. 3 Ad. & Ec. 516, followed.

THIS was an action *in rem* against a ship for necessaries.

The facts are stated in the reasons for judgment.

October 28, 1913.

The case was heard before the Honourable Mr. Justice Martin, Local Judge for the British Columbia Admiralty District, at Victoria.

E. V. Bodwell, K.C., and *E. B. Ross*, for plaintiff.

A. McLean, K.C., and *M. B. Jackson*, for defendants.

MARTIN, L. J., now (October 28th, 1913) delivered judgment.

At the hearing judgment was given against *The Triumph* for $906.25 for what could only, according to the evidence, be regarded as necessaries, but the claim for necessaries against *The Canada* was reserved for future consideration so far as it relates to the work done and materials furnished in the spring of 1913; no

objection can be taken to that part of the claim which relates to charges for repairing and making her seaworthy in October, 1912, after her arrival in Victoria *via* Cape Horn.

She was brought here to engage in fishing as a trawler but it was decided after some experience in that work to change the method of fishing and fit her out to fish with boats—dories. This necessitated certain alterations and additions to bunks for increased accommodation for her crew, and otherwise, and it is objected that this work being to some considerable extent at least of a structural nature, cannot properly be classed as necessaries. In the judgment I delivered on the interlocutory motion herein on the 24th of September last I cited the principal authorities on this question, and I now refer to them adding thereto the case in this Court of *Williams* v. *The Flora* (1) and noting with approval the statement in Roscoe's Admiralty Practice (1903) p. 265, that the term necessaries, "though primarily meaning indispensable repairs.....has now it is clear a wider signification, and " has been and is being gradually amplified by modern " requirements."

The position of the ship at bar is that her owners having engaged her in a particular service (fishing) in a particular way found it desirable to continue her in the same service in another way, and to do so it became necessary to make certain alterations in her structure and equipment. Now the general rule is that which was established in *The Riga* (2) as follows, p. 522:—

"I am of opinion that whatever is fit and proper " for the service on which a vessel is engaged, what- " ever the owner of that vessel, as a prudent man, " would have ordered if present at the time, comes

(1) (1897) 6 Ex. C. R., 137. (2) (1872) 1 Asp. 246; L. R. 3 A. & E., 516.

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"within the meaning of the term 'necessaries', as "applied to those repairs done or things provided "for the ship by order of the master, for which the "owners are liable."

I am unable to see why this rule does not apply to what was done here. Surely if a ship carrying a cargo of grain came to this port and got a return charter to carry long sticks of timber which necessitated the cutting of new ports to get them into her hold, such alterations, structural though they would strictly be, could only be said to be necessaries. And here it was necessary, for the effective business of fishing, to turn this trawler into a dory fisher, just as it was to turn the grain ship into a lumber carrier. In the case of *The Flora* above cited, a passenger steamer, her owners were without means to fit her out or operate her, so they entered into a contract with a railway company which agreed to advance the money to fit her out to carry freight and passengers for the season of 1897, and the sum of "$2,000 was expended in painting, repairing, furnishing and outfitting the steamer," and it was held, on the authority of *The Riga*, that what was done came within the definition of "necessaries." There is no substantial distinction between that case and this, and I see no obstacle to prevent judgment being entered in favour of the plaintiff against *The Canada* for the full amount of the claim, $3,217.37, all of which I hold to be necessaries in the circumstances.

Judgment accordingly.

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

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Nov. 21.

AND

JOSEPH LARENCE, JULIAN LARENCE, ESTHER MARION, SARA MARION, GENEVIEVE GENTHON, MARGUERITE LARENCE, HILAIRE TARDIF, JOSEPH GOBEIL, LOUIS WITT, MARIE J.A.M. DE LA GICLAIS, AND GENEVIEVE GENTHON, EXECUTRIX OF THE LAST WILL AND TESTAMENT OF ELIE GENTHON, DECEASED, DEFENDANTS.

Dominion Lands—Lands within territory of present province of Manitoba granted to person who died before province became part of Dominion—Heirs and assignees—Effect of 60-61 Vict. chap. 29—Cancellation.

Under the provisions of the *Dominion Lands Act*, 60-61 Vict. c. 29 where a patent to lands had been issued to a person who died before the date of the patent the same was not void but the title to the land designated therein became "vested in the heirs, assigns, or other legal representatives of such deceased person according to the laws of the province in which the land is situate as if the patent had issued to the deceased person during life."

By letters-patent dated 30th April 1906, the Crown purported to grant to one Charles Larence the lands in question, now part of the City of St. Boniface, Man. Charles Larence had died in the year 1870, without having made any will and leaving children all of whom died intestate and unmarried save a son, Jean Baptiste Larence, and two daughters, Genevieve Genthon and Marguerite Larence, two of the defendants herein. Jean Baptiste Larence died in or about the year 1866 leaving children all of whom died intestate and unmarried, save two sons, the defendants Joseph Larence and Julien Larence and two daughters Esther Marion and Sara Marion, defendants herein. The other defendants claimed under those especially mentioned above.

Held, that as the lands in question were not situate in any "province" at the date of the death of Charles Larence (to whom the grant purported to be made) the *Dominion Lands Act* did not apply so as to enable the defendants or any of them to make title under him either by assignment or by descent under the English law of primogeniture as it obtained in the territory in which the lands were situated in virtue of the provisions of the charter of the Hudson Bay Company granted in the year 1670.

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2. That upon the facts the Crown was entitled to an order for the cancellation of the patent in question.

3. In the absence of statutory authority therefor no part of the public domain can be disposed of by the Crown.

Larence v. *Larence*, 21 Man. R. 145, considered and followed.

THIS was an information exhibited by the Attorney-General for Canada, asking for the cancellation of a patent for lands.

The facts are stated in the reasons for judgment.

October 15th, 1912.

The case was heard at Winnipeg before the Honourable Mr. Justice Audette.

H. P. Blackwood and *A. Bernier* for the plaintiff;

A. C. Campbell and *N. F. Hagel*, K.C. for the defendants.

AUDETTE, J., now (November 21st, 1912) delivered judgment.

This is an information exhibited by the Attorney-General of Canada, whereby it appears, *inter alia*, that:—

2. On the 30th day of April, 1906, His late Majesty King Edward the Seventh, by Letters-Patent purporting to be issued under an Act passed in 60-61 Victoria, chaptered 29 (a certified copy thereof for greater particularity and certainty, will be referred to at the trial hereof) granted, conveyed and assured in the name of or unto one, Charles Larence, his heirs, and assigns forever, all that parcel or tract of land situate, lying and being in the St. Boniface Common, in the Parish of St. Boniface, in the Province of Manitoba, in the Dominion of Canada, and being composed of lots numbered seventeen and twenty-five of said St. Boniface Common, which is a subdivision of lot numbered eighty-two in the said Parish and as shown

on a map or plan of survey of said St. Boniface Common approved and confirmed, at Ottawa, on the 5th day of September, A.D. 1900, by Edward Deville, Surveyor-General of Dominion Lands and of record in the Department of the Interior under number 8542.

3. The said Charles Larence, above referred to, died in the month of February, 1870, without having made any last will and testament and leaving children, all of whom died intestate and unmarried, save and excepting a son, Jean Baptiste Larence, and two daughters, Genevieve Genthon and Marguerite Larence, two of the Defendants herein.

4. The said son, Jean Baptiste Larence, died in or about the year 1866, leaving children, all of whom died intestate and unmarried, save and except two sons, the Defendants, Joseph Larence and Julien Larence (the said Joseph being the oldest son of said Jean Baptiste Larence), and two daughters, Defendants herein, Esther Marion and Sara Marion.

5. The said Tardif claims to have received from the said Elie Genthon, deceased, what purports to be an instrument by way of bargain and sale, dated on or about the 13th day of February, 1902, granting to said Tardif Lot Seventeen (17) aforesaid, or some interest therein, and the said Tardif claims an interest in said Lot Seventeen (17) or in a portion thereof under said instrument.

6. The said Tardif registered the said Instrument purporting to be by way of bargain and sale, in the Registry Office at Winnipeg, on or about the 15th day of February, 1902.

7. The said defendant Gobeil claims to have received from the said Tardif what purports to be an instrument by way of bargain and sale, dated on or about the 30th June, 1906, granting to said Gobeil

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a portion of said Lot Seventeen (17) or some interest therein, and said Gobeil claims or did claim an interest in said Lot Seventeen (17) or a portion thereof under said instrument.

8. The said Gobeil registered the said instrument, purporting to be by way of bargain and sale, in the Registry Office at Winnipeg, on or about the 10th day of July, 1906.

9. By indenture dated the third day of April, 1905, the said defendant Tardif agreed to sell to the Defendant Louis Witt, and said Witt agreed to purchase from said Tardif, all that part of said Lot Seventeen (17) aforesaid, more particularly described as follows:

Commencing at the intersection of the South boundary of said Lot Seventeen (17) with the East boundary of St. Mary's Road, thence Easterly along the South boundary of said Lot Seventeen (17), a distance of One Hundred and Sixty (160) feet, thence Northerly at right angles with the said last mentioned course forty-nine and one-half ($49\frac{1}{2}$) feet, thence Westerly parallel with the South boundary of said Lot Seventeen (17) aforesaid, to the East boundary of St. Mary's Road, thence Southerly along the East Boundary of St. Mary's Road to the point of commencement.

10. The said Defendant Witt claims to have ever since been and to be now in possession of said parcel of land in the preceding paragraph described.

11. The Defendant de la Giclais claims to have received from his co-Defendants, Joseph Larence and Julien Larence, what purports to be an instrument by way of bargain and sale dated on or about the 18th day of July, 1911, granting to said de la Giclais all the said Joseph and Julien Larence's interest in said Lot Seventeen (17) and said de la Giclais regis-

tered said instrument purporting to be by way of bargain and sale in the Registry Office at Winnipeg.

12. The Defendant de la Giclais claims to have received from his co-Defendants, Joseph Larence, Julien Larence, Esther Marion, and Sara Marion, what purports to be instruments by way of Quit-Claim Deed, granting, releasing and quitting claim all their interests, or some of their interests in said Lots Seventeen (17) and Twenty-five (25), and said de la Giclais registered said instrument purporting to be by way of Quit Claim in the Registry Office at Winnipeg.

13. The said Defendant de la Giclais claims an interest in said Lots Seventeen (17) and Twenty-five (25) or a portion thereof.

14. In or about the year 1856, Charles Larence aforesaid, claimed to be entitled to Hudson Bay Lots Six Hundred and Eighty-seven (687) and Six Hundred and Eighty-eight (688), in the Parish of St. Boniface, and claimed to have conveyed the same to the late Archbishop Taché, and by a contemporaneous Agreement claims to have retained to himself (the said Charles Larence) the right of sharing in the subdivision of St. Boniface Common, as if he were still the owner of said Lots aforesaid.

15. The said Lots Seventeen (17) and Twenty-five (25) being portions of the St. Boniface Common aforesaid, as subdivided, are the said Lots allotted in respect of any such right (if any) claimed as aforesaid.

16. The said Letters-Patent aforesaid were issued through fraud, improvidence and error, and in ignorance of the rights of others and upon information by which the Crown has been deceived, and by mistake.

"17. The said Charles Larence had no right or interest in said above described parcels of land and no right or title to receive a grant by way of Letters-Patent from the Crown therefor.

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18. The said Letters-Patent contain misrecitals and the grantee under said Letters-Patent cannot be ascertained."

"The said Letters-Patent were not issued pursuant to, or by virtue of, the provisions of any Act of the Parliament of Canada.

"20. His Majesty, the King, is not aware of any other facts material to the consideration and determination of the said questions involved in the matter aforesaid.

The Attorney-General on behalf of His Majesty, claims as follows:—

1. An order and judgment setting aside and cancelling said Letters-Patent, and adjudging said Letters-Patent to be void.
2. A declaration as to whether any person other than the Crown has any legal right or interest in such lands and premises, and if so, who is entitled to such lands and premises:
3. Such further and other relief as to this Honourable Court may seem meet.

From the several affidavits of service of the said information filed of record herein, it appears that the defendants Esther Marion, Sara Marion, Genevieve Genthon, as well in her own personal capacity as Executrix of the last will and testament of her deceased husband Elie Genthon, Marguerite Larence, Joseph Gobeil, Louis Witt were personally served with an office copy of the said information.

At the opening of the trial, Mr. Blackwood, of counsel for plaintiff, moved for judgment by default against these last mentioned defendants, who although being duly served made default in pleading and in appearing at trial. This motion will be hereafter disposed of.

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The defendants Joseph Larence, Julien Larence and Marie J.A.M. de la Giclais filed one joint plea whereby they say that Charles Larence, referred to in the 2nd paragraph of the information, was entitled as of right to an interest in the Saint Boniface Common in respect to Hudson's Bay Co's Lots 687 and 688, in the Parish of St. Boniface, and that Joseph Larence is heir-at-law of the said Charles Larence and as such succeeded to the rights of the said Charles Larence in the Saint Boniface Common, and that the same have become vested in the said de la Giclais by virtue of the instruments referred to in paragraphs 11 and 12 of the information. Each of these defendants claim that de la Giclais is entitled to receive letters-patent to the lands allotted in respect of the right aforesaid on the sub-division of the said Common And these defendants further claim that it may be declared that Marie J.A.M. de la Giclais is entitled as of right to letters-patent conveying to him from the Crown Lots 17 and 25, being portions of the Saint Boniface Common, as shown on a map or plan of survey of the said Common, approved and confirmed at Ottawa, on the 5th day of September, A.D., 1900, by Edward Deville, Surveyor General of Dominion Lands and of Record in the Department of Interior under No. 8542.

The plaintiff joins issue with the defendants Joseph Larence, Jnlien Larence, and Marie J.A.M. de la Giclais and objects that paragraphs three and four of their statement in defence are bad in law and practice; as to paragraph three, on the ground, among others, that it raises no answer or defence to the information; as to paragraph four, on the ground, among others, that these defendants have no right in law and under the practice to make claim or pray the declaration therein

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set forth, because the above defendants have not been granted a fiat for any such claim and that they cannot raise or ask for such relief as prayed.

The defendant Hilaire Tardif severs in his defence, files a separate plea and appears at trial by counsel. He admits the letters-patent in question were issued through improvidence and submits his rights to a grant from the Crown to that portion of the land referred to in paragraph 5 of the information to the judgment of the Court and the grace of the Crown, claiming that he has been, as the fact is, in the actual, physical and exclusive possession of the said land for upwards of 10 years, and that he purchased the same in good faith and entered into possession thereof while no dispute existed as to it, and improved the same to the extent of many thousands of dollars by erecting buildings thereon and otherwise, at all times fully believing that the title was properly vested in the person from whom he purchased, and he submits that he is entitled to the exercise of the grace of the Crown in his behalf, and to a grant of letters-patent to him of that portion of the land in question described in paragraph 5 of the information.

An action having been taken in the Court of King's Bench, in the Province of Manitoba, between Larence and Larence, to recover possession of the said lots 17 and 25, and judgment having been given upon the same by His Lordship the Chief Justice, all parties appearing at trial herein cited and relied upon that judgment in respect of the facts or the history of the case. Mr. Campbell, however, of counsel for the defendants Joseph Larence, Julien Larence and Marie J.A.M. de la Giclais, admitted that the facts stated in that judgment were true,—with the addition, however, that he held title not only under the grace of the

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Crown, but as of right. Counsel for the Crown also admitted that Charles Larence made no will and that the property under the law as then in force, passed to the eldest son.* * * *

Having quoted at length the judgment of Mathers, C. J. in *Larence* v. *Larence*, 21 Man. R. 145, His Lordship proceeded as follows:—

This Court, adopting, without any hesitation the conclusion of His Lordship's view, has come to the conclusion—taking it also for granted as being conceded by all parties—that the letters-patent in question in this case should be set aside, cancelled and declared null and void.

Coming now to the second branch of the case whereby a declaration is asked as to whether any person other than the Crown has any legal right or interest in such lands and premises, and if so, who is entitled to such lands and premises, this court hereby declares that the defendants mentioned at the opening as having made default in pleading and from appearing at trial, have no legal rights or interest in the lands in question and are not entitled to the same.

Dealing with the issue as between the plaintiff and the defendant Joseph Tardif, it may be said that the latter's counsel admitted that the letters-patent should be cancelled, that Tardif had no legal right, and was entirely at the mercy and grace of the Crown; but that he should have a grant from the Crown of the land purchased in good faith. Tardif being subsequently heard as a witness testified that it is now going on to nine years since he had come from Crookstown to St. Boniface, and that he expended $4,500 upon the property in question. He has three houses erected upon the land,—he lives in one and has sold another for $1,500, but has not been paid for the same.

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The Crown, by counsel, admits that Tardif bought in good faith as having bought from a person whom he believed had title—that he was in possession since some time in 1904, and resided on the property ever since, and that he erected thereon three houses, stables and woodsheds.

Notwithstanding this expenditure by Tardif and his good faith, this Court must come to the necessary conclusion that this defendant has no legal rights or interest in the land in question.

Dealing next with the issue as between the plaintiff and the three defendants Joseph Larence, Julien Larence and Marie J.A.M. de la Giclais, it may be said that the laws in force in Manitoba, in February, 1870, at the date of Charles Larence's death, were the laws of England as they were at the time of the granting of the Hudson Bay Charter, on the 2nd May, 1670 (22 Charles II). Whatever rights Charles Larence had, at the time of his death, in lot 82,—and lots 17 and 25 are parts thereof,—passed and descended, under the laws of the inheritance by primogeniture then in force, to his eldest son Jean Baptiste, and at the death of the latter to his (Charles) grand-son of Joseph Larence, under whom these three last defendants claim title. Without going into the full details of the contention that, under the Order in Council of 1877 (Exhibit No. 8) and the case of the Attorney-General of Canada vs. Fonseca (1) these three defendants have a right to some commutation in the shape of lands, sufficient it is to say that this Court has come to the conclusion, accepting also as *res judicata*, under the case of *Larence* vs. *Larence* (2) that the defendants de la Giclais et al., have failed to establish satisfactory title outside of the Letters Patent, and that

(1) 17 S. C. R., 612. (2) 21 Man. Rep. 145.

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their rights, if any, are not legal rights, but may be undefined rights only that might appeal and commend themselves to the bounty of the Crown.

Moreover, the view of His Lordship, the Chief Justice, must be adopted and accepted with respect to the construction of the statute under which the Letters-Patent issued, (60-61 Vict. Ch. 29) and it must be held that, as the lands in question were not in any province at the date of Charles Larence's death in February, 1870—Manitoba having become part of the Dominion of Canada only on the 15th day of July, A.D., 1870—this Dominion statute does not apply or avail to validate a patent issued under it in the name of this deceased person who did not then reside in the Dominion of Canada, and such patent without the support of some statute is a nullity. And as Larence was unable to establish a title to the land independently of the patent, he must fail. His Lordship, the Chief Justice, went further and decided that although satisfied that there must have been some error or oversight in drafting the statute, that the Court could not correct the error or supply the omission, because that would be legislating and not interpreting the law. This conclusion must also be accepted by this court.

It will result from the above that Tardif and the three defendants who defended together, have no legal rights or interest in the land in question. This Court, was, however, requested at the close of the trial, to make a declaration that if these parties could not in strict law recover, they were in equity and in justice morally entitled to the exercise of the mercy and bounty of the Crown in their favour. However true that may be, this Court fails to see of what avail this could be to these parties, and it takes it that is a matter that

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should be more properly dealt with by the law officers of the Crown, bearing in mind the occupation and expenditure by Tardif and the rights claimed by the defendant de la Giclais.

These two defendants are left with a claim which might commend itself to the benevolence of the Crown, but it is not enforcible in a court of law.

There will be judgment by default, as prayed, against the several defendants who did not plead or appear at trial.

Judgment will be further entered as follows:1st. Ordering that the letters-patent mentioned in the information are set aside, and cancelled and void.

2nd. That no person, other than the Crown, has any legal right or interest in the lands and premises mentioned in the said letters-patent.

3rd. That there be no costs to plaintiff or defendants.

Judgment accordingly.

Solicitors for plaintiff: *Bernier, Blackwood & Bernier.*

Solicitor for defendants other than H. Tardif: *A. C. Campbell.*

Solicitor for defendant H. Tardif: *N. F. Hagel.*

JAMES GIBB, of London, England, and FRANK ROSS, of the City of Quebec,

SUPPLIANTS; 1914 Nov. 7.

AND

HIS MAJESTY THE KING, ... RESPONDENT.

Expropriation—Abandonment of Public Work—The Expropriation Act sec. 23, sub-sec. 4—The Exchequer Court Act, secs. 19 and 20—Interpretation—Damages.

Upon a fair construction of the language of *The Expropriation Act*, sec. 23, sub-sec. 4, the jurisdiction of the Court is not limited to claims arising out of a partial abandonment of the property but extends to claims for total abandonment as well.

2. Upon expropriation proceedings being taken it is the intendment of the above enactment, so that actions be not multiplied, that the damages are to be assessed once for all in such proceedings; but where the Crown, before judgment, returns the property to the owner, and discontinues the action, so that the damages are prevented from being assessed at all therein, then the owner of the property has a remedy by petition of right under the jurisdiction clauses (secs. 19 and 20) of *The Exchequer Court Act.*

3. The damage or loss in respect of which the Court will assess compensation must arise out of some physical interference with property or with some right incidental thereto, different in kind from that which all the properties in the neighbourhood are subject to, and must be of such a nature as would be actionable but for the statute authorizing the work. Hence, where the surrounding properties had been temporarily enhanced in value by reason of a projected Government work subsequently abandoned, the owner of property, no part of which had been taken, has no claim to compensation because of the abandonment by the Government of the proposed scheme. On the other hand where property has been taken and returned all damages arising out of any interference with the owner's rights in respect of leasing the lands during the period the expropriation was effective is a proper subject of compensation. *The Queen* v. *Murray*, 5 Ex. C. R. 69; *Cedar Rapids Power Co.* v. *Lacoste* (1914) A.C. 569, referred to.

4. For the purposes of a projected public work the Crown expropriated a market place and demolished the buildings thereon in the vicinity of suppliants' property. The Crown had also expropriated the suppliants' property which it subsequently returned to the suppliants.

Held, that suppliants had no right to damages for any depreciation in the value of their property arising from the destruction of the market, as any loss arising to the suppliants was suffered by them in common with the other property owners in the neighbourhood.

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PETITION of Right for compensation arising out of an expropriation of certain lands by the Crown, which were subsequently returned to the owners. The facts are stated in the reasons for judgment.

September 25th, 1914.

The case now came on for hearing before the Honorable Mr. Justice Audette at Quebec.

G. G. Stuart, K.C. for the suppliants contended that the offer by the Crown under the *Expropriation Act* to pay the defendants $61,747.75 for the lands taken in the expropriation proceedings became a contract when accepted by the defendants. This was done by the defendants in their statement of defence. So that while the Crown may possibly have the right in such a case to discontinue the expropriation proceedings, it could not by such discontinuance impair the right of the suppliants to recover the debt so established. The Crown having returned the property to us must pay us the difference between the value of the property as fixed between the Crown and the suppliants by the contract to which I have referred, and the value of the property as it exists today, which has depreciated very considerably. The value of the property for the purposes of this case must be taken to be the value at the time of the expropriation. He cites *Cedar Rapids Power Company* v. *Lacoste* (1). The Court has jurisdiction to hear this petition of right under sections 19 and 20 of *The Exchequer Court Act*. Petition of right is the proper process by which money due under a statutory contract is recoverable from the Crown. He cites *Feather* v. *the Queen* (2) *Clode* on *Petition of Right* (3); *North Shore Ry. Co.* v. *Pion* (4);

(1) (1914) A. C. 569.
(2) 6 B. & S. 257.
(3) p. 90.
(4) 14 A. C. 612.

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Windsor and Annapolis Ry. Co. v. *The Queen* (1); *Windsor and Annapolis Ry. Co.* v. *Western Counties Ry. Co.* (2); *Halsbury's Laws of England* (3);

The suppliants are entitled to be reimbursed also for their loss in not being able to lease the property.

E. Belleau, K.C., for the respondent, contended that the court only had jurisdiction under sub-section 4 of section 23 of the *Expropriation Act* when part of the lands had been returned to the owner, not when the whole has been returned. That being so the claim here amounts to a substantive claim for damages and is not recoverable upon petition of right under the 19th and 20th sections of the *Exchequer Court Act*, because what the Crown has done here is authorized by the *Expropriation Act*, and for something done under the authority of a statute no claim will arise unless a remedy is given by that or some other statute.

Again, if the claim is to be treated as one in contract arising under the *Expropriation Act*, then it is a contract with a resolutory condition expressed in the statute and the condition having been acted on, by the Crown; in returning the lands, no claim for damages, will lie. On the other hand if the action is one sounding in tort (*délit* or *quasi-délit*) under the statute, then there is no remedy. There would have been no remedy, but for the statute in respect of the expropriation; there is none for damages for an abandoned undertaking. (He Cites *Cedar Rapids Mfg. Co.* v. *Lacoste* (4); *Beven on Negligence* (5); *Robertson's Civil Proceedings against the Crown* (6); *Cripps on Compensation* (7)

(1) 11 A. C. 616.
(2) 10 S. C. R. pp. 354-390.
(3) Vol. 10, p. 26.
(4) (1914) A. C. 571.
(5) 2nd Ed. p. 106.
(6) p. 331.
(7) 5th. ed pp. 298 et seq.

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AUDETTE, J. now (November 7th, 1914) delivered judgment.

On the 2nd October, 1911, the Attorney-General of Canada, under the provisions of sec. 26 of the *Expropriation Act*, exhibited in this Court an information showing that the Crown had expropriated, under the authority of 3 Ed. VII ch. 71, for the purpose of the National Transcontinental Railway, a certain parcel of land belonging to the suppliants herein, which land is now the subject of the present litigation. The property was so expropriated by depositing a plan and description of the same, with the Registrar of Deeds of the City of Quebec, on the 24th January, 1911.

The Crown by such information offered the sum of $61,747.75 as a sufficient and just compensation for the lands so taken, and the defendants (the suppliants in the present case) by their plea filed in that case (under No. 2179) on the 25th October, 1911, among other things, accepted the amount so offered by the said information.

Subsequently thereto, namely on the 20th March, 1912, the Crown filed in this Court (in case No. 2179) a notice to the defendant that the Attorney-General was wholly discontinuing that action. Such notice appears to have been served on the 19th March, 1912.

Section 23 of the *Expropriation Act* (R.S.C. 1906 ch. 143) reads as follows:

"23. Whenever, from time to time, or at any time "before the compensation money has been actually "paid, any parcel of land taken for a public work, "or any portion of any such parcel, is found to be "unnecessary for the purposes of such public work, "or if it is found that a more limited estate or interest "therein only is required, the minister may, by

"writing under his hand, declare that the land or "such portion thereof is not required and is aban- "doned by the Crown, or that it is intended to retain "only such limited estate or interest as is mentioned "in such writing.

"2. Upon such writing being registered in the "office of the registrar of deeds for the county or "registration division in which the land is situate, "such land declared to be abandoned shall revest in "the person from whom it was taken or in those en- "titled to claim under him.

"3. In the event of a limited estate or interest "therein being retained by the Crown, the land shall "so revest subject to the estate or interest so re- "tained.

"4. The fact of such abandonment or revesting "shall be taken into account, in connection with all "the other circumstances of the case, in estimating "or assessing the amount to be paid to any person "claiming compensation for the land taken."

The Crown acting under the authority and power conferred by this section, and before any of the compensation money had been actually paid, abandoned the whole of suppliants' property which had been expropriated as appeared by the information hereinbefore mentioned, and the Minister of Railways and Canals, by writing under his hand, gave notice to the suppliants (the defendants in the previous case) of such abandonment on the 27th July, 1912,—(this date has been supplied by counsel for the suppliants)—such notice in writing was registered in the Registry Office for the Registration Division of Quebec, on the 30th December, 1912, as the whole appears by Exhibit No. 10.

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The property in question is composed of two square pieces of land built upon. Upon one of them is a brick building 5 stories in height, having a frontage on Champlain Market of sixty-one feet and nine inches, extending back to the second one on Sous le Fort Street, which is a stone building of three and a half stories in height, with a frontage of 29 feet. The lower portion of the property facing the market was occupied by small shops and the upper stories by boarding houses for the farmers and people coming back and forward to the city in connection with the market: and the Sous le Fort property was occupied by two boarding houses, and was frequented by the crews of the boats to a large extent.

Now, it is contended, as will be seen by reference to the pleadings, that this property at the time of the expropriation, on the 24th January, 1911, was worth $61,747.75, and when it was returned to the owner it was only worth $30,000.—and the present claim is for $31,747.75, representing such alleged difference in value, together with the sum of $500. for legal expenses, making the total amount of the claim, $32,247.75.

It may, however, be here stated at once that at the close of the suppliant's evidence, the claim for $500. was abandoned by suppliants' counsel.

The question which at the outset presents itself in the consideration of the present controversy, is one of jurisdiction. Has this court jurisdiction, either under *The Expropriation Act*, or under the *Exchequer Court Act*, to hear and determine the present case? Subsection 4 of sec. 23 of *The Expropriation Act*, reads as follows:

"4. The fact of such abandonment or revesting "shall be taken into account, in connection with all

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"the other circumstances of the case, in estimating "or assessing the amount to be paid to any person "claiming compensation for the land taken."

At the time of the trial my mind, supported by the contention of the Crown's counsel, was inclined to the view that the intendment of sub-sec. 4, because of the wording "in estimating or assessing the amount to be paid to any person claiming compensation for the land taken" was that the court was given jurisdiction only in the case of partial abandonment, and where compensation was to be assessed for the part taken. However, upon a careful reconsideration of the question I have reached the conclusion that the Court is given jurisdiction under sub-section 4 as well in cases of total as in those of partial abandonment.

Sub-section 4 would further seem to provide that where an information for expropriation has been filed the damages once and for all should be ascertained in the case. Such remedy is, however, denied in the present case, because the Crown being plaintiff and *dominus litis*, in that case, of its own accord discontinued the action under the provisions of Rule 109. A settlement of all damages resulting from such abandonment in the first action would have saved a second action, and multiplicity of actions should always be discouraged. But where the Crown, before judgment is had in the expropriation proceedings, discontinues the action and so prevents damages being assessed at all by the court, (as was the case here), then clearly the provisions of *The Expropriation Act* do not apply, and the owner of the property returned to his possession by the Crown has a remedy by petition of right under the provisions of *The Exchequer Court Act*.

Is this a case where statutory proceedings having been previously taken between the parties the doctrine

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that damages arising from the authorized interference with property must be taken to have been assessed once and for all in such previous proceedings? (See *Great Laxey Mining Co.* v. *Clague* (1) In the expropriation proceedings between the parties here there was a discontinuance filed by the Crown before the case had proceeded to judgment. Consequently there was no judgment which would constitute a foundation for the plea of *res judicata* to the petition of right herein; and the suppliants would be left without any remedy if the court declined to entertain the petition on that ground. The court has found that the suppliants have sustained damage by the act of the Crown in temporarily taking the lands in question out of the possession of the suppliants, and *ubi jus, ibi remedium.* That remedy is supplied by the provisions of The *Exchequer Court Act* above quoted.

Where the Crown has discontinued its expropriation action, the subject cannot be without remedy. The wording of sub-sec. 4 of sec. 23 is only in the affirmative; there is no negative clause in that section whereby, in the case where the Crown discontinues its action and does not ask for an adjudication in the expropriation case upon such damages, the owner would be denied remedy. Where the jurisdiction is not denied in a negative form, and where the Court has jurisdiction under other statute, it should assume jurisdiction. Indeed," It is a maxim in the common "law, says Coke that a statute made in the affirmative "without any negative expressed or implied does not "take away the common law (2)."

This is cited only with the view of showing the mode of approaching an affirmative not followed by a negative. Then "Every Act must receive such

(1) (1878) 4 A. C. 115;.

(2) Hardcastle, on Statutory Law, 2nd Ed 1911.

"fair, large and liberal construction as will best "ensure the attainment of the object of the Act, "and of such provision or enactment according "to its true intent, meaning and spirit." (1)

If the jurisdiction of the Court were doubtful under the provisions of sec. 23 of *The Expropriation Act*, it is abundantly clear that jurisdiction to try the present case arises under the *Exchequer Court Act*.

Under sec. 19 of the *Exchequer Court Act*, this Court is given exclusive original jurisdiction "in all cases which the lands of the subject *are* in the possession of the Crown". It must be admitted that the lands are no longer in the possession of the Crown—but approaching the interpretation of the word *are* with again the help of sec. 15 of the *Interpretation Act* above referred to, it must not be taken in the narrowest sense of which the expression admits, but should receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act. Furthermore, sec. 10 of the *Interpretation Act* says: "The law shall be considered "as always speaking, and wherever any matter or "thing is expressed in *the present tense*, the same shall be applied to the circumstances as they arise, so that "effect may be given to each Act and every part "thereof, according to its spirit, true intent and meaning."

Again, viewing the word *are* in the light of this section 10, although in the present tense, it must be applied to all circumtances as they arise, and cover the cases where lands are or have been in the hands of the Crown and thereafter abandoned.

Going through the same manner of reasoning it must also be found that this court has also jurisdiction

(1) The Interpretation Act, Sec. 15.

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to hear and determine the present case under the provisions of subsecs. (a) and (b) of section 20 of the *Exchequer Court Act* which reads as follows:

"20. 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."

The question of jurisdiction being all along distinguised from that of right of action.

RIGHT OF ACTION.

The Court having assumed jurisdiction it will now be necessary to decide as to whether or not the suppliants are entitled to recover for the alleged shrinkage in the value of the property between the date of the expropriation and the date of the abandonment.

The suppliants, as narrated in paragraphs 10 and 11 of their petition of right, rest their claim upon the allegations that their property "was situate on a "street bounding the Champlain Market, a large and "much frequented market place in the City of Quebec, "and it was anticipated at that time that the said "market, if removed, would be replaced by the prin-"cipal station of the National Transcontinental Rail-"way, and in fact the Crown was under contract with "the City of Quebec, to which the said market place "belonged, to replace the said market by the principal "station of the said Transcontinental Railway in the "City of Quebec . . . . . When the said property was "abandoned to the suppliants, the Champlain Market "had been removed and destroyed by and on behalf of

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"the Crown, and the proposal to erect the principal "or any railway station for the said railway had been "abandoned, and by reason of the foregoing facts, "the lot of land when returned by the Crown had "depreciated in value to the extent of $31,747.75.

Is there any right of action for such depreciation under the circumstances?

The trite maxim and rule of law for deciding whether or not the Crown can be held liable in such a case is clearly laid down in such text-books as Cripps, on *Compensation* (1), Hardcastle, *Statute Law*, (2) Browne & Allan, *Law of Compensation*, (3) See also the leading case upon this subject of *The Queen* v. *Barry*, (4), and the numerous cases therein cited.

The damage or loss must be such that, but for the statutory authority, it would have been actionable.

In the result the damages claimed in this case are for the injurious affection of the suppliants' property as resulting from the expropriation by the Crown of the Champlain Market or acquiring the same, and the tearing down of the Butcher's Hall, and failing to build there a terminal station. No physical interference with the suppliants' property is ever alleged.

They say when our property was first taken it was as part of a large scheme or project,—(and their property was required only as part of that large scheme):—but the Crown having changed its mind returned us our property and in the meantime it has decreased in value, because the Crown will not erect such principal station, and because it took and destroyed the Champlain Market. These facts may be all true, but will a right of action arise therefrom? That property has gone up in value at the time of the expropriation inside of six months, because of the prospective buil-

(1) 5th ed. p. 138.
(2) Ed. 1911 p. 305.
(3) 2 Ed. 116.
(4) 2 Ex. C. R. 333.

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ding of the principal or terminal station on the market place, as stated by Mr. Colston, one of the suppliants' witnesses. Then it is alleged its value fell through according to the suppliants' witnesses because of the abandonment of building such principal station and of the expropriation of the market.

There is no right of action that would give the suppliants relief under these circumstances. The Crown was and is at liberty to expropriate the Champlain Market, and not to erect that principal or terminal station, without giving a right of action to the suppliants, or to any of the proprietors in the neighbourhood. Whether or not the suppliants' property has or has not been expropriated, no right of action arises from such facts. The suppliants' neighbours, whose properties were never expropriated, while they benefited by what provoked the boom, and lost by the depreciation, if any, that followed such boom, have no right of action. If the Crown had not been authorized by statute to expropriate the market place, the suppliants or their neighbours would not have had a right of action against a purchaser of that market who would have destroyed it and used it in the manner as to him seemed best.

To enable the suppliants to succeed there must also be a physical interference with the property, or with some right incidental thereto, which would differ in kind from that to which others of his Majesty's subjects are exposed, or where what was done would give a right of action, but for the statute. It is not enough that such interference is greater in degree only than that which is suffered in common with the public. *Robinson* v. *The Queen*, (1).

(1) Ex. C. R. 439; 25 S. C. R. 692.

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The expropriation of the Champlain Market and the abandonment of the building of a terminal station thereon may be an interference that may affect the value of the suppliants' property; but such interference being suffered in common with the public in the neighbourhood cannot be the subject of an action, although it may happen that such injury sustained by the suppliants may be greater in degree than that sustained by other subjects of the Crown. *Archibald* v. *The Queen*, (1).

The increase or decrease in the value of the suppliants land, if any, was shared by all the other neighbouring proprietors whose lands were not taken and who cannot claim; therefore, if all these events had taken place and the suppliants lands had not been taken and abandoned,—exposed to the alleged fluctuation in the value of the lands in that neighbourhood, of which theirs would have been a part thereof, they would have had no right of action. The suppliants' land suffered no special damage distinguishable from that which has been suffered by the land owners in the immediate neighbourhood. *The King* v. *McArthur* (2), and cases therein cited.

The Crown could expropriate the market place without taking the suppliants' land and without becoming liable in damages to the suppliants. The Crown could make plans for a large station on the market place which would enhance the value of the suppliants property as well as the property in the neighbourhood,—abandon the erection of such a station, and could not again be held liable in damages by reason of such change. There would be no right of action in the suppliants with or without the statute allowing the Crown to expropriate.

(1) Ex. C. R. 251 and 23 S. C.R. 147. (2) 34 S. C. R. 577.

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The damages claimed are not damages resulting directly from the expropriation, of which the suppliants property formed part, but they are damages they allege which resulted from the fact that the Crown has expropriated the Champlain Market, thereby taking away some traffic from the locality. They further claim that the damages resulted also from the fact that the Crown did not carry out the plan of erecting on the Champlain Market a large terminal station. The damages on both counts are too indirect and too remote to form a legal element of compensation and for the reasons above mentioned are not recoverable.

There is no doubt that the considerable advance in the prices of the properties in the neighbourhood of the Champlain Market,—within the six months mentioned by Mr. Colston, a witness heard on behalf of the suppliants, —was in view of the fair prospective capabilities of these properties from their situation near a large terminal station. This sum of $61,747.75 offered by the Crown and accepted by suppliants, was obviously the particular and temporary value that attached to the property, in the estimation of the valuators at the time that it was thought Champlain Market would be the terminal station of the Transcontinental at Quebec. And it is equally obvious that if the project of that terminal station gave the suppliants' land that increased value, the Crown that gave it this is not to pay for it, in the case where it abandons the public work that had given such speculative temporary value.

In the case of *The Queen* vs. *Murray* (1), the temporary enhancement in the value of lands by reason of their being adjacent to the site of a projected rail-

(1) 5 Ex. C. R. 69.

way terminus which had been abandoned was not taken into consideration by the court in assessing compensation for the expropriation of such land. The enhanced value the suppliants' property had in 1911 was by reason of the projected terminal station, but which was subsequently abandoned to a certain degree. If the Crown's project gave it that enhanced value and if the Crown's abandonment of such project takes away that enhanced value, it should not be made to pay for the same if it does not exist at the time of the abandonment.

There is, of course, the further fact that the suppliants' property was required for such terminal station.

Part of the fallacy of the present case is, perhaps, as it was said in the *Cedar Rapids Case* (1) that the owners are seeking to recover a proportional part of the potential enhanced value that might have been derived or realized from the erection of this terminal station as it existed in their minds at one time. To use the expression of the man on-the-street, the "boom" took place when the erection of such terminal station was contemplated and the crash followed when it was abandoned. The suppliants are now claiming the difference, because they contend they might have sold their property at the top of the boom. But that could not be done, because their property was required for the larger scheme. If their property had not been expropriated it would have been because the larger scheme would not have been carried out, and its value would not have gone up to the sum of $61,747.75. If it had not been expropriated it would have been because the smaller scheme, as enunciated in the evidence, was to be carried out and the property would

(1) (1914) A. C. 577.

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not have gone up to these figures at that time,—although some of the witnesses contended that the works which will be actually carried out in that locality will eventually give this property much further enhanced value in the future.

Equity cuts both ways. If the value of the suppliants' property has decreased in value between the time of the expropriation in 1911 and the time of the abandonment in 1912, and that the contention of the suppliants is that the Crown should pay that difference, should, then, on the other hand, in a case where the value of the property has enhanced between the time of the expropriation and that of the abandonment, this difference be paid by the owners? That would seem the test of the rule laid down by the suppliants.

The suppliants further contend from the transaction which took place between the Crown and the suppliants a contract has arisen and has been entered into. They say the Crown took the property, offered $61,747.75, and the suppliants accepted that amount, and that completed the contract. To properly approach the question, one must first consider that the Crown took the property under powers vested in it under an Act of Parliament, and under an Act of Parliament it also had the power to abandon such property at any time "before the compensation money has been actually paid". Therefore, if there existed a contract, it must be a contract with a defeasible clause (*clause resolutoire*) as enacted in sec. 23 of the *Expropriation Act* giving the Crown the right to abandon. These transactions do not amount to a contract for which specific performance could be asked even between subject and subject.

EVIDENCE.

As a prelude to the examination of a part of the evidence in this case, it must be said that as is usual in

expropriation cases, the evidence, is very conflicting and divided, so to speak, on party lines. It may be said that the opinion of a witness may be honestly obtained, and it may be quite different from the opinion of another witness also honestly obtained; but the duty of the court is to take all the surrounding circumstances into consideration to properly weigh the same. It is with this preliminary remark that it is deemed desirable to approach this question of an alleged proposed sale of this property at the time of the expropriation. Three witnesses spoke upon this subject. The first one was witness Ramsey, who had been the suppliants' agent for the last 27 years for the purpose of collecting rents, having general charge of this property, with a number of other houses. At page 15 of the evidence, he says that between January, 1911, and July, 1912, several enquiries were made from men who wished to invest in the property either as speculation or otherwise, and who were willing to *consider* the purchase at $70,000.—adding, we could not deal with the property as it had passed to the Government. From this evidence, this has clearly happened after the expropriation.

Witness Collier says (p. 22) he was one, with another person, who called on Ramsey to try and purchase the property from him before the Government had expropriated, or at about that time; but he knew it was to be expropriated and he was disposed to offer $60,000.

Witness Hearn, who gave his evidence in a manly and honest manner carrying conviction, testified he was indeed one of those who, more or less, were associated with Collier and who thought of buying the property, having this amount of $60,000 in mind, but he adds frankly, "I don't know that I would have given that for it."

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On this evidence it is impossible to find, as contended by the suppliants, that an offer for either $60,000 or $70,000. was ever made the suppliants for the property before the expropriation.

On the question on the respective value of the property at the date of the expropriation and the date of the abandonment, it may be said that out of five witnesses altogether heard on behalf of the Crown, three of them may be considered interested as compared to perfect strangers. One is the suppliants' agent—two are exactly in the same position as the present suppliants with respect to property taken and subsequently abandoned. The fourth was one of the three Crown valuators who placed a value of $61,747.75 upon the suppliants' property at the date of the expropriation, but who considered such value reduced by half when abandoned. The fifth witness gave perfectly untrammelled evidence, and said that if the suppliants' property acquired that high value in 1911, in common with the property in the neighbourhood, it was on account of the prospective building of the station on the market place.

On behalf of the Crown two, out of the three valuators who had placed a value of $61,747.75 upon the suppliants' property at the time of the expropriation, testified the property was worth the same at the time of the abandonment. The judgment of these three valuators was accepted by the suppliants in 1911, why should not the judgment of the majority of these valuators be now accepted? However, the opinion of these two valuators is shared by all the other witnesses heard on behalf of the Crown.

TENANCY.

The Crown, by allowing the suppliants to retain possession of the lands and buildings all through the

period which elapsed between the date of the expropriation and the date of the abandonment, which was perfected on the 30th December, 1912, has saved the adjustment of the compensation coming to the tenants, if the leases had been cancelled or interfered with. The leases were thus allowed to run and the tenants were not interfered with in the occupation of the premises during the life of the leases.

And while for the multiplicity of reasons hereinbefore mentioned, the suppliants cannot succeed in respect of the alleged shrinkage in the value of their property, they should recover all damages occasioned by the expropriation, through the losses in the rents collectable from the leases of their property. It is true the suppliants by their petition of right are not specifically claiming any damages in respect of the tenancy; but sub-paragraph 2 of paragraph 12, which constitutes the prayer of the petition, reads as follows: "Such further and other relief as to this Honourable Court shall seem meet". The damages resulting from the tenancy are consequential damages resulting and flowing from the expropriation which is the subject of the present action. These damages are such as are contemplated by sub-sec. 4 of sec. 23 of the *Expropriation Act*, in the following words "*in connection with all the circumstances of the case.*" The Crown cannot with immunity interfere with the tenancy, as is even conceded by its counsel at trial.

What are the facts? At the date of the expropriation the suppliants had this property rented under nine separate leases, for a total yearly rental amounting to $2,147.00; all these leases, but one, expired during the time the land was vested in the Crown. There was one tenancy of $380 yearly, vacant when the property was returned to the owners. When the

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leases expired during the time the land was vested in the Crown, the tenants would not renew because the owners had no control over the property, and could not rent for any fixed or definite periods, and the prospective tenants would not enter into leases under such circumstances. In some cases leases were renewed at a lower rental and two stores had to be rented for storage instead of for business purposes. When the Crown abandoned the property, the owners were receiving an annual rental of $834.00 as compared with $2,147.00 at the time of the expropriation, and at the time of the trial they were getting $1,642.00.

The sum of three thousand dollars will be allowed for the interference in the tenancy as representing the damages arising therefrom, both during the period the lands were vested in the Crown and for such other period following the same as might have been affected by such interference, and this will carry with it the general costs of the action. It may be contended that the suppliants failed on the main issue and should not have costs; but it must be taken into consideration that this is an action wherein the Crown, exercising its arbitrary right of eminent domain, has compulsorily taken the suppliants' property, and that the latter, after all, are recovering a substantial amount of damages arising from such expropriation and abandonment, and it should be without any loss or costs to them.

There will, therefore, be judgment declaring that the suppliants are entitled to recover the sum of three thousand dollars and costs.

Judgment accordingly.

Solicitors for the suppliants: *Pentland, Stuart, Gravel & Thompson.*

Solicitors for the respondent: *E. Belleau.*

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Sept. 10.

THE KING, ON THE INFORMATION OF THE TORNEY-GENERAL FOR THE DOMINION OF CANADA.....PLAINTIFF;

AND

LEMUEL J. TWEEDIE.....DEFENDANT..

Navigable River—Grant of part of Bed—Jus Publicum—Adverse Possession and Prescription distinguished—New Brunswick Statute Law considered—Right to maintain boom for logs—Disclaimer of Right of Province in Navigable River—Validity.

The right to use a navigable river as a public highway is enjoyed by all the subjects of the Crown, and cannot be defeated by a claim of adverse possession. In respect of this right the Crown stands in the position of trustee for the public; and any grant from the Crown must be taken to be subject to this right. *Mayor of Colchester* v. *Brooke*, 7 Q. B. 339 and *Attorney-General of British Columbia* v. *Attorney-General of Canada* (1914) A. C. 168 relied upon.

2. The distinction in English law between prescription and adverse possession is that prescription relates to an incorporeal hereditamnet, while adverse possession is in respect of a thing corporeal, and arises out of the physical possession of land which gives the fee.

3. The right to stretch a boom for logs, and to boom logs, in the waters of a river is quite distinct from a right to the bed of the river. The former amounts to a profit *à prendre in alieno solo*, and may arise by prescription.

4. So far as the Province of New Brunswick is concerned it was not until the year 1903 that a statute was passed (Consol. Stats. N.B. 1903, c. 156) enabling the subject to prescribe an easement as against the Crown.

5. *Quaere*: Whether, in the absence of statutory authority therefor, the Executive Council of the Province of New Brunswick can pass a valid order disclaiming any interest which the province may have in lands covered by water and forming part of the bed of a navigable river within the province?

THIS was an information filed by the Attorney-General of Canada for the assessment of compensation due to the owner of certain land taken for the Intercolonial railway under *The Expropriation Act.*

The facts are stated in the reasons for judgment.

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The case was heard before the Honourable Mr. Justice Audette at St. John, N.B.

J. B. M. Baxter, K.C., (with him *A. A. Davidson*, K.C., for the plaintiff) contended that on the facts the defendant had no title to the water-lot in dispute, as he never had undisputed possession of the bed of the river for the requisite period of sixty years, even if as a matter of law title to a portion of the bed of a navigable river could be so acquired. Secondly, the defendant could not claim a prescriptive right to stretch his booms across the surface of navigable water because it was not until the year 1903 that the legislature of the Province of New Brunswick saw fit to pass an Act enabling the subject to prescribe an easement as against the Crown.

M. G. Teed, K.C., for the defendant contended that the facts established title to the land below high-water mark in the defendant by adverse possession. Continuous use of the surface of the river at a given point for sixty years would be tantamount to use of the bed as well, as the bed at such point could not have been contemporaneously used by any one else. Adverse possession will give a good title against the Crown in the bed of navigable waters. He cited *Moore on the Foreshore* (1).

AUDETTE, J., now (September 10th, 1914) delivered judgment.

This is an information exhibited by the Attorney-General of Canada, whereby it appears, *inter alia*, that the Crown, in the right of the Dominion of Canada, has taken and expropriated, under the provisions of *The Expropriation Act* (R.S. 1906, ch. 143) certain land and real property belonging to the said defendant for the purposes of a public work of Canada, to wit,

(1) p. 655.

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the Intercolonial Railway, as a right-of-way for the proposed track of the Chatham diversion of the said railway in the town and Parish of Chatham, N.B.

There are in this case two pieces or parcels of land expropriated which form the subject of contention, and which must be dealt with separately and which will hereafter be respectively called the *upland lot* and the *water-lot*.

By the original information filed in this court on the 19th February, 1914, it appears that the upland lot alone had been expropriated on the 21st September, 1910, by depositing of record, a plan and description of the same (Exhibits 1 and 2) in the office of the Registrar of Deeds for the County of Northumberland, in the Province of New Brunswick.

The Crown by its original information tendered the sum of $2,150 for the upland so taken and for all damages resulting from the said expropriation.

The defendant, by his plea to the said information, claimed that, at the time of such taking and expropriation, he was the owner and in possession of certain other lands which adjoined to the eastward of the said lands described in the second paragraph of the information, and which lands (hereinabove called the water-lot) were taken and expropriated for the purposes aforesaid, and taken and used for the right-of-way, and was and is the owner and in possession of other lands on either side of the said right-of-way, which were and are injuriously affected by such expropriation, and by the further extension of the said railway from the said land in an easterly direction from the said land, so described in the second paragraph of the information.

The defendant therefore claimed for all such lands and damages the sum of $25,000.

It having appeared to this Court, in the course of the trial, that if the defendant claimed the lands east of

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those described in the information, upon which the railway was actually constructed, it would be more satisfactory and less expensive to try the whole matter once for all and suggested the amendment of the information by inserting the lands actually taken by the Crown, giving at the same time leave to amend accordingly.

Under such leave, granted in these circumstances, it was unnecessary to provide beyond the granting of it,—that is without giving the defendant leave to answer such amended information, because the reason for the amendment allowed was raised and prompted by the allegations of the defendant's plea already recited above.

Subsequently thereto the information was amended in pursuance of such suggestion and leave, and an amended information was filed in the month of May last, (1914) whereby it appears that a further plan and description were deposited in the said Registry, on the 29th day of May, 1914, whereby the water-lot above referred to, was expropriated as set forth and described in the said amended information. The Attorney-General further adds in the said amended information that he does not admit any claim in the said defendant to lands and premises therein described and is not willing to pay him any sum in respect thereof; but claims that if the defendant is entitled to any interest in such lands, the compensation offered in paragraph 4 of the original information, namely the sum of $2,150, is sufficient to cover the same in addition to the interest of the said defendant referred to in the said paragraph 4.

At the opening of the trial the Crown admitted the title of the defendant to the upland lot, but denied his title to the water-lot.

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The upland lot left the hands of the Crown under a grant of the 4th of May, 1798, and is filed herein as Exhibit "A."

The defendant claims the ownership of this water-lot by virtue of this grant, and further that the acts of possession in evidence would show it was intended to extend beyond ordinary high-water mark. That is to say, that the acts, claims and user of the defendant and his predecessors in title in respect thereto are cogent evidence to read with the grant to show that the title extended beyond ordinary high-water mark.

It must be found that under the plain language of the grant itself the defendant cannot derive any title to the water-lot. Indeed, under this grant whereby several lots are given, in severalty, to the parties therein mentioned it appears that lot 37 is given to Thomas Loban, the predecessor in title of the said defendant, but is bounded "by the northerly bank or shore of the Miramichi River." With such unequivocal language and the description it appears to the court beyond controversy and ambiguity that the grant did not contemplate parting with the foreshore.—If even the ordinary rules of law to construe a doubtful grant were to be applied, such contention as that propounded by the defendant could not either be maintained. True, in ordinary cases between subject and subject, the principle is that a grant shall be construed, if the *meaning is doubtful*, most strongly against the grantor, who is presumed to use the most cautious words for his own advantage and security. But in the case of the King, whose grants chiefly flow from the royal bounty and grace, the rule is otherwise; and Crown grants have at all times been construed most favourably for the King, where a fair doubt exists as to the real meaning of the instrument, as well in the instance of

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grants from His Majesty, as in the case of transfers to him. (1).

This Crown grant, Exhibit "A," clearly conveyed the upland, and the upland alone, the bed of the river remaining in the Crown, in the right of the Province, the Crown holding it for the benefit of its subjects, for the purpose of navigation and fishery.

Now remains the question,—how, if ever, did the water-lot come out of the hands of the Crown? It must be found it never left the hands of the Crown.

The defendant contends that if it did not come to him by virtue of the grant, that he owns it by possession and prescription as against the Crown.

True, at the opening of his case, the defendant filed a number of titles, leases, as would originate from Loban; but of what avail can such titles or deeds be if the vendor, lessor or grantor is not possessed of the ownership. These titles, however, may tend to show an open and apparent manifestation of the contention of proprietorship, which might be of some help in establishing, in an ordinary case, proof by possession or otherwise. But by themselves, they are of no avail under the conditions above related.

Let us now approach the question of possession and prescription, under the laws of the Province of New Brunswick. (R.S.C. ch. 140, sec. 33).

The distinction in English law between prescription and adverse possession is that prescription is for an incorporeal hereditament, while adverse possession is in respect of a thing corporeal, such as the physical possession of land which gives the fee.

It is somewhat difficult to take actual possession of the *solum*, the bed of the river. It would not be sufficient to use the surface of the water, but it would

(1) Chitty's Prerog. 391-2,

of necessity involve the actual seizing or possession of the soil of the bed of the river.

The right of stretching a boom and booming logs in the waters of a river is quite distinct from a right to the bed of the river. Standing by itself the former would be a profit *à prendre in alieno solo*, an incorporeal hereditament subject to prescription.

The Miramichi River is a tidal and navigable river opposite the upland in question and where the ownership of the water-lot is claimed.

Dealing first with the question of possession, it must be said that in tidal waters (whether on the foreshore or in estuaries or tidal rivers) the exclusive character of the title is qualified by another and paramount title which prima facie is in the public. (1). The subjects of the Crown are entitled as of right to navigate in tidal waters. The legal character of this right is not easy to define. It is properly a right enjoyed so far as the high seas are concerned by common practice from time immemorial, and it was probably in very early times extended by the subject without challenge to the foreshore and tidal waters which were continuous with the ocean, if, indeed, it did not in fact first take rise in them. The right into which the practice has chrystalized resembles in some respects the right to navigate the seas, or the right to use a navigable river as a highway, and its origin is not more obscure than that of these rights of navigation. Finding the subjects exercising this right as from immemorial antiquity, the Crown as *parens patriae* no doubt regarded itself bound to protect the subject in exercising it, and the origin and extent of the right as legally cognizable are probably attributable to that protection, a protection which gradually came to be

(1) Atty-Gen. B.C. v. Atty-Gen. Can., (1914.) A.C. 168.

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recognized as establishing a legal right enforceable in the courts. (1).

It would, therefore, appear that the Crown, as trustee for the public, is the guardian of such right held by the public to use navigable and tidal rivers as a public highway and it thus rests with the Crown to protect its subjects against any right which might arise by adverse possession, in violation of such *jus publicum*. The defendant's grant is subject to the *jus publicum* or public right of the King and people, to the easement of passing and repassing both over the water and the land. (2).

Under sec. 33 of *The Exchequer Court Act*, the laws relating to prescription and the limitation of actions in force in any province apply to proceedings in respect of any cause of action arising in such province.

Under the laws of the Province of New Brunswick, Consolidated S. 1903, ch. 139, sec. 1, "No claim *for lands or rent* shall be made, or action brought by His Majesty, after *a continuous adverse possession* of sixty years." (6 Wm. IV, ch. LXXIV N.B.)

The defendant having failed to prove, as a question of fact, actual continuous possession for sixty years, it becomes unnecessary to decide whether or not a subject can acquire ownership in a foreshore on tidal and navigable water by such possession, assuming that the word "land" in the statute would be wide enough to embody the meaning of foreshore. On the question of possession the defendant fails.

Even if the boom in question had been stretched for the period required by the statute, it could not be construed as a possession of the *solum*, as an actual seizin or possession of the soil of the bed of the river.

(1) *Ibid.* at p. 169.

(2) Mayor of Colchester v. Brooke, 7 Q.B. 339.

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Coming now to the question of prescription as distinguished from that of possession, it may be said that assuming the defendant could prescribe, as against the Crown, an easement over these waters, giving him the right to so stretch that boom and use it for collecting logs, he would in such a case, fall under ch. 156, of the Consolidated Statutes of N.B., which for the first time enacted such law only in 1903. Before 1903, there existed no laws in New Brunswick whereby a subject could prescribe an easement as against the Crown. Therefore, from 1903, there did not elapse such delay as would under that statute acquire the right to so prescribe.

Having found on the question of fact, as disclosed by the evidence, that the defendant cannot succeed in his contentions of ownership or easement with respect to the water lot, it becomes unnecessary to decide whether or not a subject can acquire by possession or prescription the foreshore on tidal and navigable waters,—a moot question upon which decisions are found both ways.

The Crown at the trial, under the provisions of sec. 30 of *The Expropriation Act*, (R.S. 1906, ch. 143) filed an undertaking whereby it granted to the defendant a right-of-way across the line of the Intercolonial Railway at the Russell Wharf, and further undertook to efficiently maintain the same. Under the evidence, the privileges and material advantages derived from such undertaking, coupled with the offer of $2,150 made by the information, constitutes, in the opinion of the court, a just and liberal compensation for the upland expropriated herein and for all damages resulting therefrom, including such rights held by the defendant, a riparian owner, as are distinguishable from those held by the public at large as mentioned in the case of

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Lyons v. *The Fishmongers*, (1)—covering all rights whatsoever the defendant may have in respect of both the upland and the water lots.

And taking in consideration the advantages derived from the undertaking are material and substantial, because without them, the defendant would have been deprived of access by land to the northern part of his property, the defendant will be entitled to the costs of this action.

With respect to the water lot, the defendant has failed to establish any title to the same either under his grant for the upland or by adverse possession or prescription. This water lot before the expropriation was vested in the Crown as represented by the Province of New Brunswick, subject to such rights by the Dominion as are resting on sections 91 and 92 of the B. N. A. Act.

Having said so much, it becomes unnecessary to decide whether the small block to which the boom in question had at times been attached, is or is not a *nuisance*, because of it being an apparent obstruction in navigable waters impeding or likely to impede navigation,—the evidence being silent as to whether leave to so erect this block had been obtained (2).

The defendant has filed as Exhibit "L" an order of the Executive Council of the province of New Brunswick, dated the 16th July, 1910, whereby it appears, in the recital part thereof, that the Agent of the Minister of Justice of Canada applied for a disclaimer of damages on account of taking for use of the Intercolonial Railway, certain lands covered with water situate below highwater mark on the Miramichi River,

(1) L.R. 1 App. Cas. 662.

(2) Ratté v. Booth, 11 Ont. R. 491; 14 A. R. 419; 15 App. Cas. 188; Eagles v. Merritt, 7 N.B.R. 550; Blundell, v. Catterall, 5 B. & Ald. 268; by Holroyd, J.; Brinckman v. Matley, L. R. 2 C. D. p. 313; Mayor of Colchester v. Brooke 7 Q. B. 339; Gann v. Free Fishers of Whitstable, 11 H. L. Cas. 192; Ross v. Belyea, N. B. R. 1 Han. 109.

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at a point in question in this case. Then the order in council concludes with a disclaimer in favour of the Crown in the right of the Dominion, in the following words:—

> The Attorney-General "is therefore of opinion "that whatever rights the Province may have "formerly had in the said lands covered by water, "that said rights have become extinguished and that "it would be inadvisable to set up any claim to the "same. He therefore recommends that upon His "Honour, the Lieutenant Governor, approving of "this minute that the Minister of Justice be informed "that the said Province of New Brunswick lays no "claim to the said lands covered by water and "situate below high-water mark and that the "Department of Railways must deal with the parties "claiming said lands covered by water."

This order in council was passed on the 16th July, 1910, and recommends that the Attorney-General of Canada be informed that the Province of New Brunswick lays no claim to the said water-lot and that the Department of Railways must deal with the parties claiming the same.

As already stated the defendant has failed to make title to the water-lot as between himself and the Crown in the present action. It becomes unnecessary to decide here whether or not such a disclaimer of public domain can be of any legal effect without any statutory authority or without competent legislation. No such legislation has been cited and this court is not aware of any.

However, the rights to this water-lot as between the Crown represented by the Province, and the Crown represented by the Dominion, cannot in the present case be considered, because the Province of New

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Brunswick is not a party to this action, and all rights in respect thereto are hereby reserved. Maybe, however, that for all purposes this order in council adjusts the rights of the two Crowns, in their respective capacity.—Indeed, it would appear that if the Crown, in the right of the Province renounced its rights in favour of the Dominion for the public work in question, that it is the citizens of the Province who get the benefits derivable from such public work.

It may be added that the Dominion of Canada is possessed of statutory powers to expropriate Crown lands belonging to the Government of a Province, under sec. 14 of *The Expropriation Act*, and under the decision of the Judicial Committee of His Majesty's Privy Council in the case of the *Attorney-General of B.C.* v. *The Canadian Pacific Railway Co.* (1).

There will be judgment in favour of the defendant for the sum of $2,150 together with a declaration that he is entitled to the crossing mentioned in the said undertaking. The whole with costs.

Judgment accordingly.

Solicitor for the plaintiff: *A. A. Davidson.*

Solicitors for the defendant: *M. & J. Teed.*

(1) 1906, A. C. 204.

IN THE MATTER OF THE PETITION OF RIGHT OF

SARAH ELIZABETH LEAMY AND CHARLES LEAMY.....SUPPLIANTS;

AND

HIS MAJESTY THE KING.....RESPONDENT.

1915
Jan. 5.

Navigable river—Title to Bed—Crown Grant—Construction.

The bed of all navigable rivers is by law vested *primâ facie* in the Crown. But this ownership of the Crown is for the benefit of the subject, and cannot be used in any way so as to derogate from or interfere with such rights as belong by law to the subjects of the Crown. Hence, in a grant of part of the public domain from the Crown to a subject the bed of a navigable river will not pass unless an intention to convey the same is expressed in clear and unambiguous terms in the grant.

2. In the Province of Quebec all grants of the public domain made prior to the Union Act of 1840 are to be read as subject to the limitations, restrictions and reservations conserving the rights of the public as to navigation, and otherwise, contained in the instructions to Lord Dorchester as Governor of Lower Canada. Since the passage of the Union Act of 1840 grants of the public domain, in that province, have been made under the authority of the provincial legislature and subject to such statutory restrictions as have been from time to time imposed.

3. Under the decisions of the Seigneurial Court, constituted under the Seigneurial Act, 1854, together with the provisions of Art. 538 C. N. and of Art. 400 C. C. P. Q., navigable rivers are considered as being dependencies of the Crown domain and as such inalienable and imprescriptable. Hence all grants purporting to create rights in the bed of such rivers must be construed as subject to the exercise of the jus publicum at all times.

PETITION OF RIGHT seeking a declaration of title in certain lands covered by water being part of the bed of the Gatineau river in the Province of Quebec.

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

November 20th, 1914.

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

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Argument of Counsel.

H. Aylen, K.C., for the suppliants, relied on *Malcaren* v. *Attorney-General of Quebec* (1); and *Attorney-General of Quebec* v. *Scott*, (2). As to this case he contended that the question of navigability was not pertinent because the suppliant, while claiming that they were the owners of the bed of the river, did not dispute that their ownership was not subject to the public right of navigation over the *locus in quo*. But the Crown was doing more than merely exercising the right of navigation here; it was trespassing by its booms and other works upon the property of the suppliants. It is, therefore, liable in damages. He cited *McPheters* v. *Moose River Log Driving Co.* (3); *Perry* v. *Wilson* (4).

F. H. Chrysler, K.C., for the respondent, contended that the *Maclaren* case supported the contention of the Crown here. The suppliants were not in possession of the bed of the river, and never were. On the other hand these booms and piers have been there since 1864. (Cites Arts, 2211, 2213 and 2242 C.C.P.Q.)

AUDETTE, J., now (January 5th, 1915) delivered judgment.

The suppliants brought their petition of right to have it declared, *inter alia*, that they are vested as proprietors with all of those portions of the bed of the Gatineau River, within the boundary lines of lots 2 and 3 in the 5th Range of the Township of Hull, Province of Quebec,—within the ambit of the Crown Grant of the 3rd January, 1806,—whereby the Township of Hull is created and a number of lots thereof are given in severalty to the parties in the said grant mentioned, and more especially to Philemon Wright, senior, their original *auteur*, under whom they claim.

(1) (1914) A. C. 258.
(2) 34 S. C. R. 615.
(3) 5 Atl. Rep. 270.
(4) 7 Mass. 393.

The suppliants further seek to have it declared that they are proprietors and owners of the sand and sand-bars on that portion of the river, and furthermore they ask that the respondent be ordered to remove the piers, works, booms and logs in the said river, and that a sum of $500 per year be paid them for the use of the bed of the river in the past since the respondent so took possession of part of that portion of the river by the erection of piers or otherwise, and that *possession* of the bed of the river be given them.

For the purposes of this case, it is, at the outset, found that the suppliants herein, by the divers mesne assignments and the evidence of record, have all the right, title and interest in the lots in question as those possessed by their original *auteur* Philemon Wright, senior, under the Crown grant in question.

It is further found that the Gatineau river, a river of considerable size, at the point in question, is navigable and *flottable en trains ou radeaux*, as practically conceded at trial by suppliants' counsel. Indeed, the river Gatineau, from its mouth, on the northern bank of the Ottawa river, is *navigable* and so *flottable* for a distance of about four miles, up to Ironsides, the head of navigation. Within these four miles there is a draw-bridge across the river, at about $\frac{1}{4}$ to $\frac{1}{2}$ a mile from the mouth of the river. The bed of the river claimed herein is about $\frac{1}{4}$ of a mile higher up from the draw-bridge and extends to almost the C.P.R. bridge, as more particularly shown on plan Exhibit No. 5. Moreover, from Ironsides down to the mouth of the river Gatineau, the vessels navigating the same have access to the Ottawa river which is also navigable and thereby allows of such vessels to travel, for trade and commerce, from Ironsides to Montreal and Quebec, etc. For a number of years a lumbering firm, carrying

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on a large business there was shipping lumber in barges 75 by 100 feet long and 18 feet beam, carrying from 300,000 to 350,000 feet of lumber, b.m., which were towed down to Montreal and Quebec. Rafts, (*trains et radeaux*) of 24 feet wide by 72 feet long and 36 inches deep were also, during a number of years, taken from Ironsides to the mouth of the river Gatineau. All of this goes to show that the river, at the place in question, is obviously navigable.

The Crown grant of the land in question to Philemon Wright is made out of *special grace, certain knowledge* and *mere motion*, and in free and common soccage

> " upon the terms and conditions, and subject to the
> " provisions, limitations, restrictions and reser-
> " vations prescribed by the statute in such case
> " made and provided, and by our Royal Instructions
> " in this behalf":

and the grant is absolutely silent as to any right on navigable rivers.

How should such a Crown grant be construed and interpreted? The trite maxim and rule of law for our guidance in such a construction is well and clearly defined and laid down in Chitty's *Prerogatives of the Crown* (1) in the following words:

> " In ordinary cases between subject and subject,
> " the principle is, that the grant shall be construed,
> " if the meaning be doubtful, most strongly against
> " the grantor, who is presumed to use the most
> " cautious words for his own advantage and security,
> " —But in the case of the King, whose grants
> " chiefly flow from his royal bounty and grace, the
> " rule is otherwise; and Crown grants have at all
> " times been *construed most favourably for the King*,
> " where a fair doubt exists as to the real meaning of

(1) p. 391-2,

"the instrument x x x x x. Because general "words in the King's grant never extend to a grant "of things which belong to the King by virtue of "his prerogative, for such ought to be expressly "mentioned. In other words, if under a general "name a grant comprehends things of a royal and "of a base nature, the base only shall pass."

Approaching the construction of the grant in question in this case with the help of the rule above laid down, it must be found that in the absence of a special grant, especially expressed and clearly formulated, of the bed of the Gatineau river, a navigable river at the point in question, which therefore belongs to the King by virtue of his prerogative, and which is held by him in trust as part of the public domain constituting the *jus publicum*, the land only passed and not the bed of the river.

Then the limitations, restrictions and reservations under which the grant was made as provided "by the statute and our Royal instructions," are to be found in the Royal instructions to Lord Dorchester as Governor of Lower Canada and in a Proclamation published in the Quebec Gazette on the 16th February, 1792. Both of these documents are to be found in the Public Archives and more especially in the publication of 1914, by Messrs. Doughty & McArthur, containing the "Documents relating to the Constitutional History of Canada from 1791 to 1818," at the respective pages 13 and 61 *et seq.* The same instructions are to be found also to Lord Dorchester as Governor of Upper Canada at page 40 of the same volume, but we are here concerned with Lower Canada only. At page 21, under sections 31, 32 and 33, will be found the instructions to the Governor as to the method of

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granting these lands, and the following excerpt will show how such lands are granted, viz.:—

"It is our will and pleasure that the lands to be "granted by you as aforesaid, shall be laid out in "Townships, and that each inland Township shall, "as nearly as circumstances shall admit, consist of "ten square miles; *and such as shall be situated upon* "*a navigable River* or *Water* shall have a *front* of nine "miles and be *twelve miles in depth*, and shall be "subdivided in such manner as may be found most "advisable for the accommodation of the Settlers, "and for making the several *Reservations* for *Public* "*Uses*, etc.

And in Section 33, the following is also to be found, viz.:—

"as likewise that the breadth of each tract of land "to be hereafter granted be one-third of the length of "such tract, and *that the length of such tract do not* "extend along the Banks of any River, *but into the* "*main land*, that thereby the said Grantees may "have each a convenient share of what accommoda-"tion the said River *may afford for navigation or* "*otherwise.*"

From these instructions it will therefore appear that the lands so granted, *as nearly as circumstances shall admit*, should have their breadth on the front of navigable rivers, and the length extending in the mainland; but in no case to embody the bed of the river. And under section 32, due regard is given in making these grants subject to the several Reservations for *Public Uses*; which, in other words, would protect the paramount title in the bed of the river which *primâ facie* is in the Crown for the public. The bed of all navigable rivers is by law vested *primâ facie* in the Crown. But the ownership by the Crown is for the

benefit of the subject and cannot be used in any way so as to derogate from or interfere with such rights which belong by law to the subjects of the Crown. Hence in a grant of part of the public domain from the Crown to a subject, the bed of a navigable river will not pass unless an intention to convey the same is expressed in clear and unambiguous terms in the grant.

This right to use a navigable river as a highway, is part of the *jus publicum*.

"Finding its subjects exercising this right as from "immemorial antiquity the Crown as *parens patriae* "no doubt regarded itself bound to protect the "subject in exercising it, and the origin and extent "of the right as legally cognizable are probably "attributable to that protection, a protection which "gradually came to be recognized as establishing a "legal right enforceable in the Courts." (1)

It would, therefore, appear that the Crown, as trustee for the public, is the guardian of such right held by the public to use navigable rivers as a public highway, and it thus rests with the Crown to protect its subjects against encroachments in violation of such *jus publicum*. The public, all of His Majesty's liege subjects, have a right to use navigable waters which form part of the public domain and which are *inalienables and imprescriptibles*. The suppliants' grant is subject to this *jus publicum* and to the paramount title in the bed of the river which *prima facie* is in the Crown for the public. Truly, it would be a singular irony of law if this right of the Crown, held in trust for the public, could thus be taken away by such a Crown Grant, which is absolutely silent in respect thereto.

(1) Per Haldane, L.C., in the case of the Atty-Gen. B.C., v. Atty-Gen. for Canada (1914) A.C. p. 169. See also Coulson & Forbes, The Law of Waters, 3rd Ed. pp. 28, 29, 36.

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Coming now to the *Maclaren* case (1), a case relied upon by both parties, it must be said that the judgment of the eminent Judge in that case will be of great assistance here in arriving at a proper conclusion—the law affecting the present controversy having been so clearly discussed in the course of his pronouncement. In the *Maclaren* case neither party set up title in the public as in the present case. The scope of the decision of the Privy Council in that case is clearly defined at page 274, in the following words:—

> " So far as the river Gatineau is concerned, the " decision of this case will do no more than decide " whether or not the language of certain existing " grants was sufficient to pass particular portions of " the bed, or whether, after such grants were made, " they still remained in the *hands of the Crown* so that " it had power to grant them by a later grant."

And their Lordships having found that the Gatineau River, at the point in question in that case, was only *flottable a buches perdues* and that the claimant was owner of the land on each bank, that ownership went *ad medium filum aquae.*

In the present case it having been found that the Gatineau River opposite the lands in question, is both navigable and flottable *en trains ou radeaux* and that the bed of the river claimed is on such a navigable river, the logical corollary of the holding in the *Maclaren* case is, therefore, necessarily that the bed of the river in the *locus in quo,* did not pass with the grant of the land on each side, without any specific grant of the same.

It must, however, be said that the *Maclaren* case did not decide the question of law involved in the present

(2) (1914) A. C. 264.

case. It is true, at p. 276, the following statement is to be found, viz.:

"There is no trace in Canadian law of any exception to the rule that the bed of a stream presumably belongs to the riparian owner *except in the cases where that bed is in its nature public property*, and therefore such *presumption of ownership cannot exist.* A perusal of the seignorial decisions and the judgments of those who took part in them makes it clear that the exclusion of the beds of navigable and floatable rivers from the grants to seigniors was not by *reason of express words* in the grants nor of any special rule of law formulated ad hoc, but was a consequence flowing from the jurisprudence then existing derived from French sources under which the beds of such rivers were held to form part of the *domaine public* and thus to be incapable of becoming private property. But it followed that they were inalienable and this was fully recognized. They are always spoken of as *inalienables et imprescriptibles.* So much of that jurisprudence as remains is to be found in Art. 400 of the Civil Code, and on the construction to be given to that section must depend the status of the beds of these rivers from the point of view of property."

Their Lordships, however, under the circumstances of the *Maclaren* case, as presented to them, felt that the question of law, as to whether or not *the beds* of navigable and floatable rivers are public property incapable of being alienated, was of such importance (p. 277) that it should only be decided in some case in which the parties would be respectively interested in the one and the other of the two rival interpretations so that an opportunity would be given for full argument thereon.

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Long prior to the compilation (*Ibid.* p. 279) of the *Code Napoleon*, it was abundantly clear under the law then extant that the beds of navigable and floatable rivers belonged to the *domaine public*. Accordingly when the Code Napoleon was published this very law found its way into it and is expressed in Art. 538 thereof in language identical with that which is now to be found in Art. 400 of the Civil Code, P.Q., which reads as follows:—

> " 400. Roads and public ways maintained by the " State, navigable and floatable rivers and streams " and their banks, the sea-shore, lands reclaimed " from the sea, ports, harbours and roadsteads and " generally all those portions of territory which do " not constitute private property, are considered as " being dependencies of the Crown domain."

Now this legal doctrine, consecrated by both codes, obtained in Canada before and since the Cession. It obtained at the time of the Cession and since, and the British subjects who purchased lands in the Colony had to conform themselves to the local rules then followed with respect to property in Canada. (1)

The civil laws in existence at the time of the Cession were taken to remain and be in force, as long as they were not changed by a declaration of the Sovereign power, whose silence in such cases was interpreted as a tacit confirmation of such existing laws. (Idem p. 295). And indeed it was only by the Union Act of 1840, sec. 54 (3-4 Vict., Ch. 35, Sec. 54, Imp.) that the control of the sale of, and the administration of lands in Canada were completely abandoned to us by the Imperial Government.

Under the Roman Law navigable waters were not susceptible of individual appropriation, as they were

(1) Documents Constitutionels 1759-1791. French version, p. 151, and Vol. A, Seignorial Questions, p. 61 A.

considered as belonging to all men. (Instit. I, liv. 11, tit. 1; L. 5, ff De Divis. Rer. Inst. 2 cod. tit.)

"L'usage des grandes rivières est essentiellement "public, et les intérêts généraux de la société le "réclament libre et sans entraves. Le pouvoir "social devait donc les prendre sous sa garde pour "maintenir dans leur intégrité les facultés communes "à tous. Ce ne sont pas des droits de propriété "qui lui ont été attribués sur ces choses, car on a "précisément voulu les soustraire à l'exercise de "tous droits qui pourraient nuire au service public. "Mises hors du commerce, elles ne peuvent plus "recevoir l'empreinte de la propriété, et c'est "comme conservateur des intérêts généraux, comme "administrateur des choses dont l'usage est commun "à tous, que le souverain en a reçu le dépôt et la "surintendance.

"Tels étaient aussi les principes du droit romain "sur cette matière. x x x x x x x Les "rivières publiques sont spécialement rangées parmi "les dépendances du domaine public. (1)

"Les rivières navigables ou flottables ont tou-"jours fait partie du domaine public. (2).

Proudhon (3) also lays down the well known principle that navigable rivers are *inalienables et imprescriptibles*, as all other things destined to and for the public usage, and that they are therefore dependencies of the Crown domain within the meaning of Art. 400 C.C. And a grant of navigable waters unless authorized by an Act of Parliament, would be void and convey no right or title. (4).

(1) *Daviel*, Des Cours d'Eau, Vol. I, p. 27 et seq.

(2) *Garnier*, Régime des Eaux, Vol. I, p. 44.

(3) Domaine Public, Vol. 3, No. 680 et seq.

(4) See also Delsol, Civil Code, Vol. I, pp. 431, 435.

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Dalloz (1) states that rivers *navigables* or *flottables a trains ou a radeaux* are considered dependencies of the Crown domain. And the very instructive judgment in *Tanguay* vs. *The Canadian Electric Light Company* (2) upon almost a similar point, relies practically on the same principle of law. A long catena of decisions in that direction, as well as text-books, could be here cited in support of this doctrine, but in view of the decision in the *McLaren* case, the *Tanguay* case, and the decisions of he Seiginorial Court, it becomes unnecessary to mention them here, excepting, however, the decisions of the Seiginorial Court in view of their great weight and authority, to which an almost authoritative sanction has been given by statute, and which, apart from statute, naturally command the highest respect by reason of the composition of the tribunal which pronounced them. (2).

> "Before the passing of 'The Seigniorial Act of "1854', Seigniors had no other rights over navigable "rivers and streams, than those specially conveyed "to them by their grants *provided these rights were "not inconsistent with the public use of the water of "those rivers and streams which is inalienable and "imprescriptible.*" (3).

In order to acquire ownership in navigable rivers it is necessary to have an *express* conveyance from the Crown, and it is further necessary, to give validity to such rights, that they should not be contrary to the public usage of these rivers in regard to *navigation and commerce*, which usage is *inalienable and imprescriptible.* (4).

While certain rights may be specifically acquired in navigable waters, no *de plano jure* rights would pass

(1) (1823) I, 371.

(2) 40 S.C.R. 1. See *Maclaren* case, 1914, A. C. 2 81, and sub-sec. 9 of the Act of 1854.

(3) Seigniorial Questions, Vol. A, pp. 68, 130 A, 131 A. and 132 A.

(4) *Idem* Vol. A, p. 374 A.

with a conveyance of land which are contrary to the general law in force. Without a special grant of such navigable rivers, no such right or title as that claimed by the suppliants passed in respect of the navigable part of the Gatineau river, which by reason of its navigability becomes part of the Crown domain and is *inalienable and imprescriptible.* Even in certain cases a specific grant over navigable waters might be void. (1).

Great stress is laid by suppliants' counsel upon the case of *The Attorney-General of Quebec* vs. *Scott* (2). What was decided in that case, under the very land patent in question in this case, is that Brewery Creek passed with the land mentioned in the patent. But it was there overwhelmingly established that Brewery Creek was neither navigable, nor *flottable a trains ou radeaux.* The judgment in that case states that no one, before the appellant, has ever seriously contended that such a small stream as Brewery Creek, across which a child could throw a stone and which could be crossed on foot and was even dry in certain places during part of the summer was, as a matter of fact, a navigable or floatable river. Therefore, all is said in that judgment must be taken to apply to this creek, and not to apply to a case of a navigable river; and were there any doubt as to the meaning of any general observation on the law found in the judgment, it would stand corrected or rather made clear by the statement at the end of the second paragraph of page 615 of the Report where it is stated: "For if it is floatable, its banks are part of the public domain—Art. 400, C.C." In other words, if it is a navigable and floatable river,

(1) Oliva v. Boissonnault, Stu. K. B. 524; Reg. vs. Patton, 11 R. Jud. Rev. 394; Tanguay vs. Canadian Electric Light Company, 40 S. C. R. 17; and Coulson & Forbes, The Law of Waters, 3rd Ed. pp. 98, 99, 100, 491 and 494.

(2) 34 S. C. R. 614.

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it comes within the ambit of the legal doctrine to be found in Art. 400, C.C. This case of *The Attorney-General of Quebec vs. Scott*, only decided what was decided in the *McLaren* case and that is on a river neither navigable nor floatable *a trains ou radeaux*, the owner of the land on each bank extends his ownership *ad medium filum aquae*.

It might seem unnecessary to have considered in the present case the broad question as to whether or not navigable rivers can be alienated; because alone from the above rule of interpretation referred to, found in Chitty's *Prerogatives* the absence of a specific grant of the river, and the Instructions to Lord Dorchester with respect to the restrictions and reservations under which Crown grants for land were then issued, the question seems absolutely concluded that such navigable rivers could not pass, under the present circumstances, with the grant as worded.

There will be judgment in favour of the respondent, with costs, and the suppliants are adjudged not entitled to the relief sought by their petition of right.

Judgment accordingly.

Solicitors for suppliants: *Aylen & Duclos.*

Solicitors for respondent: *Chrysler & Bethune.*

IN THE MATTER OF THE PETITION OF RIGHT OF PATRICK WRIGHT.....SUPPLIANT; 1914 Nov. 14.

AND

HIS MAJESTY THE KING.....RESPONDENT.

Principal and Agent—Parol Contract—Right to recover—Mandate—Art. 1702 C.C.P.Q.—Art. 1233 C.C.P.Q.—Evidence.

The suppliant who was not a registered broker, was telephoned to by the Collector of Customs at Montreal and asked to procure for the Crown an option on certain property which was required for the site of a Customs building in the City of Montreal. Acting upon such instructions the suppliant took the necessary steps to obtain the option which, after some delay occasioned by the owners, he succeeded in securing.

The Commissioner of Customs was then instructed to proceed to Montreal and arrange to secure the purchase of the property for which the suppliant had obtained the option. The suppliant and the Commissioner met at the Custom House in Montreal and the latter authorized the suppliant to effect the purchase and asked him about his commission. The suppliant replied that 2½% was the customary commission, adding that he was not a regular broker and that he would leave that part of the matter with the Commissioner to deal with as he deserved. The suppliant then obtained a deed of the property from the owners to the Crown.

Held, that the mandate was not gratuitous under Art. 1702 C.C.P.Q., and that the suppliant was entitled to recover a commission on the purchase of the property in question.

2. That as the evidence established that 2½% was the usual commission paid under such circumstances the suppliant was fully entitled to his claim which was at the rate of 1½%.

3. An admission by the Crown in its defence to a petition of right (seeking the recovery of money due upon an alleged parol contract) that suppliant was employed to act for the Crown in respect of the subject-matter of such contract although disputing the amount claimed, will constitute a "commencement of proof in writing" so as to let in oral evidence under Art. 1233 C.C.P.Q.

PETITION OF RIGHT for the recovery of money alleged to be due as a commission on the purchase of property.

The facts are stated in the reasons for judgment.

October 15th, 1914.

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The ca was heard at Ottawa, before the Honourable Mr. Justice Audette.

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

F. J. Curran, for the respondent.

AUDETTE, J., now (November 7th, 1914) delivered judgment.

The suppliant brought his petition of right to recover the sum of $6,000. as representing his remuneration, in the nature of a commission of one and one half per cent. on the purchase of a piece of land made by him at the request of and for the Crown.

In the autumn of 1907, the suppliant was telephoned to and asked to come to the Custom House, at Montreal, where he met the Collector of Customs, Mr. White, who asked him to procure for the Crown, if possible, an option for the property in question which was required for Customs purposes. The suppliant then took the necessary steps and began negotiating for the option, which after some delay occasioned by the owners, he succeeded in securing. Then the Commissioner of Customs, Mr. McDougall, after having discussed the matter with the Minister of Public Works and the Minister of Finance, was instructed by the Minister of Public Works, to proceed to Montreal and arrange to secure the purchase of the property for which the suppliant had obtained the option. He was further instructed by the Minister of Public Works before closing the transaction to secure the report of Mr. J. C. Simpson, a real estate agent, at Montreal, that the property was worth the amount mentioned in the option, and that was complied with.

Then the suppliant and the Commissioner of Customs met at the Custom House and the latter autho-

rized Mr. Wright to purchase, and asked him about his commission, and the suppliant replied that 2½% was the customary commission, adding that he was not a regular broker, and that he would leave that part with the Commissioner to deal with as it deserved. Mr. McDougall says, "At that time we were anxious to secure the property and I did not say any more." However, such an interview would obviously let in a contract for remuneration, as it was at that time within the contemplation of both parties. The suppliant pursuing his negotiations with the owners, at the request of the Commissioner of Customs, had the option altered and made for $402,000, instead of a cash transaction at $400,000, the additional $2,000. representing the interest on the balance, a payment of only $10,000. being made by the Government on the passing of the deed — a matter fully explained in the evidence.

As a result of these transactions the suppliant, after a period of over six years, is seeking by his petition of right to recover the sum of six thousand dollars, as a remuneration for such services.

It has been established both by the suppliant's and the respondent's evidence, that the customary remuneration payable to a real estate broker under the present circumstances, would be 2½% and the suppliant is now claiming 1½%.

The business was well handled and Mr. White said he sought the services of the suppliant because he knew him as having had a large experience in real estate and that it was a better policy to deal through him, than through a real estate agent; because he feared if it became known the property would go up. In that view the Collector is corroborated by witness G. Hyde, a large real estate dealer of Montreal, who said the suppliant did better than a real estate broker.

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The Crown at the trial moved to amend its statement in defence by setting up at bar the plea of prescription,—a plea which was afterwards abandoned, as will be seen by the renunciation in writing filed of record, whereby "any prescription which may have been "acquired by the King against the claim of the sup- "pliant in this cause, was renounced." That disposes of that plea.

The Crown further pleaded that there being a claim above $50. it could not be proved by oral evidence without a (commencement de preuve par écrit) commencement of proof in writing; (1) and further that mandates were gratuitous and that therefore the suppliant could not succeed (2).

The first objection would at first sight appear to be well taken, as this claim is not, within the meaning of Art. 1233 and the numerous decisions thereunder (3) a transaction concerning commercial matters, possessing the two elements which go to constitute a commercial matter, that is either a trade transaction or coming within the habitual profession of the party. What constitutes a commencement of proof in writing is an act in writing emanating from the party against whom the action is taken or from some one representing him and which gives to the alleged fact a character of likelihood and verisimilitude.

Now we have in this case on this point the pleadings of the Crown admitting paragraph 3 of the petition of right, which narrates the transaction. By this plea it is also admitted the suppliant secured the option and that no specific remuneration was ever agreed upon,—letting in, however, that some undefined remuneration should be paid, as it is added by

(1) Art. 1233, C.C.Q.
(2) Art. 1702, C.C.P.
(3) Girard vs. Trudel, 21 L.C.J. 295; Trudeau vs. Rochon, R.J.Q. 8 C.S.387; Baillie vs. Nolton, R.J.Q. 12 S.C. 534.

par. 14 that the amount claimed by the suppliant for such services is excessive and greatly exaggerated. Reference may also be had upon this point to the Crown's Exhibits "B" and "C". Upon the pleadings, following the decisions upon such matters, (1) it was found at trial that such allegations in the plea constituted a "commencement of proof in writing", and the evidence was allowed.

Dealing with the Crown's second count which is based upon Art. 1702, which reads as follows: "1702. Mandate is gratuitous unless there is an agreement "or *an established usage to the contrary.*" It must be found that the custom has been abundantly established by all the witnesses heard in this case indiscriminately, whether on behalf of the suppliant or on behalf of the Crown, that in such a transaction a commission of $2\frac{1}{2}\%$ is usually paid. There was protracted discussion to establish that such commission is usually paid by the vendor, but admittedly recognized that in the result it was the purchaser who paid it.

In the present instance the suppliant has taken the necessary steps and gone to the necessary trouble incidental to negotiations for such a transaction at the request of the proper officer of the Crown, duly vested with the proper authority, and who does not deny it, has accordingly a right to a reasonable compensation for such steps and trouble. (2)

There may not have been in this case an express covenant to pay a fixed commission, but from the interview between Mr. McDougall and the suppliant it must be found there was a clear understanding in the mind of both parties that a commission would be paid, and from what took place between the parties on such interview an intention and undertaking on the part

(1) St. Pierre v. Jolicœur, 3 R.L., N.S. 155.

(2) Normandeau v. Desjardins, R.J.Q. 5 S.C. 354.

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of the Crown to pay the suppliant for his services was clearly implied. The only question which really remains open is the question of *quantum*; but Mr. McDougall has admitted in his evidence that the amount claimed was right and fair,—expressing his view further upon the commendable manner in which the transaction was handled. On behalf of the Crown, even Mr. Hunter said that after hearing the evidence he thought that $2,500. would be a liberal compensation.

In ordinary business transactions where the parties have not settled the salary of the mandatary, the salary depends upon the usage of the place where the transaction took place or upon the equitable determination of the Judge. (1)

On this question of *quantum* the evidence clearly establishes that $2\frac{1}{2}\%$ is usually paid under such circumstances. The suppliant claims $1\frac{1}{2}$, and the Commissioner of Customs, who is vested with all authority in respect to this purchase, looks upon that claim as fair and reasonable, and the Court agrees with this view. There are some other unimportant questions raised, which in the view the court takes of the matter it becomes unnecessary to discuss.

There will be judgment declaring that the suppliant is entitled to recover the sum of six thousand dollars and costs.

Judgment accordingly.

Solicitors for the suppliant: *Hogg & Hogg.*

Solicitor for the respondent: *F. J. Curran.*

(1) 2 Delamare et Poitevin, v. 280; Trolong, n. 631.

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

PLAINTIFF;

AND

GEORGE DOUGLAS TAYLOR, JESSIE WHITE, HELEN G. SPITTAL, ALEXANDER B. TAYLOR, NORMAN TAYLOR, MARGARET HODGES, ALLAN H. TAYLOR, and ANDREW M. TAYLOR,

DEFENDANTS.

1914
May 9.

Expropriation of Lands—Will—Gift to son subject to privilege of limited use of property by brothers and sisters—Interpretation—Compensation under The Expropriation Act.

The Crown expropriated certain property given by will to G. D. T. by his father in the following words:—"I give devise, and bequeath unto my son G. D. T., my farm property in the township of M., known as Blackhall, for his own use, subject to the right of the rest of my family to use the sam for the summer as heretofore, as I know he will allow them to do."

Held, that the duty imposed under the will upon G. D. T. to allow the other members of the testator's family to use the property attached only while the property in specie was in G. D. T.'s possession, and did not become changed into a claim to the compensation money under *The Expropriation Act* upon the lands being taken by the Crown.

Dougherty v. *Carson*, 7 Gr. 31 referred to.

THIS was an information exhibited by the Attorney-General of Canada for the expropriation of certain lands for the purposes of a rifle range.

The facts are stated in the reasons for judgment.

May 8th and 9th, 1914.

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

A. H. Armstrong for the plaintiff.

A. E. Fripp, K.C., for defendant G. D. Taylor.

J. E. O'Mara for the other defendants.

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Reasons for Judgment.

AUDETTE, J., now (May 9th, 1914) delivered judgment.

I do not think any benefit can be derived in my reserving this case for further consideration. The facts are presently most vividly impressed upon my mind.

The defendant, George D. Taylor, appears to have acted herein in a perfectly free and untrammelled manner. He is a man with as good intelligence as the average man of his education, having had the advantage, indeed, of a full elementary course at the public schools of this city. He is a man of common sense with good intelligence, quite able to transact and look after his own business.

There is nothing in the evidence to show that when he gave the option in question he was unduly influenced, or that he was unable to act satisfactorily for himself—and that further more in getting $8,000.00, the amount of the option, he is not paid the full value of his property.

The option is the best intimation of what he thought his property was worth at the time, and the Court cannot overlook that aspect of the case under the circumstances. Much more so, indeed, when even part of the claimant's evidence bears that out.

The defendant was perfectly satisfied with the $8,000.00 until about one year after when he heard a higher rate per acre had been paid others, but he is overlooking the fact that such higher rate was paid for much better land than his.

Dr. Scott paid $100. an acre for a piece of Wilson's farm,—but one must not overlook that where land is sold in small quantity, a higher price is always obtainable.

Mr. Rudcliffe testified it would cost $2,500. to renew the buildings on the property. That is not the test.

It is what are those buildings worth at the date of the expropriation, taking the wear and tear and depreciation, into consideration.

Lebel paid $50. for one acre in this neighbourhood for very desirable location, and as for his qualification as valuator he admits he has no experience in real estate.

Ritchie, the real estate agent from Aylmer, says he thinks the 40 acres could be divided into building lots—he could not speak as to the 98 acres.

Wilson, the neighbour, sold his 38 acres at $100. an acre,—but he values Taylor's 40 acres at $200.00 an acre. There is no justification for that discrimination under the evidence,—as the weight of the evidence shows Wilson's land to be better and of higher value.

Then we have the witness Smith who parted with his land, immediately adjoining Taylor's lands, at $53., and values Taylor's now at $80. That witness did not convince me by his manner of reasoning.

The evidence on behalf of the Crown establishes clearly that Richardson acted in a perfectly irreproachable manner in his relations with Taylor when obtaining the option in question. His dealings appear to have been straight and above board,—no fault to find with him. His valuation is also quite rational.

Bower Henry values about 3 acres of the 36 at $75. and the balance at $20. to $30. and the 98 acres at $20. to $25.

Argue values 10 to 12 of the 36 acres at not more than $75. and the balance at $40. an acre with not much prospect to sell for building lots. The 98 acres would be to pasture only young cattle. If these lands were alongside a good farm they could be used in connection therewith and would be worth $20. to $25. an acre.

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The access to the Taylor property militates against its desirability for building purposes.

Watts values 3 acres of the 40 acres lot at $60. and the balance at $20.—buildings at $2,100. The 98 acres unfit for residences—he values at $15. an acre; good for pasture for young cattle—40 acres have no value for building purposes because of transportation.

McCreary values the 36 acres and says 3 to 4 of them are tillable and are worth $75. an acre and the balance at $20. Buildings at $2,000. The 98 acres he values not to exceed $20. an acre.

Farrow says it is not advisable to put the 36 acres on the market, no such value in near future. Ninety-eight acres no value for subdivision, and he values the buildings at $2,000. to $2,500.

In the amount of the option Taylor received a very liberal compensation. The prospective capabilities and potentiality of the beach to be turned into building lots for summer residences are too remote to affect the actual market value,—such prospective value is not within a reasonable near future.

The defendants, outside of George D. Taylor, claim under the codicil to a will from the common *auteur* to them all. The part of the codicil upon which they rely and base their claim, reads as follows: "I give, devise and bequeath unto my son George Douglas Taylor, my farm property in the Township of March, known as "Blackhall" for his own use, subject to the right of the rest of my family to use the same for the summer as heretofore, as I know he will allow them to do."

Dealing with the claim of the other defendants as arising under the codicil, I find, following the decision

in the case of *Dougherty* v. *Carson*, (1) their claim cannot be charged to the detriment of the fee. The defendant George Taylor does not here try and get rid of his property to free himself from the obligation towards his brothers and sisters. He is forced to sell and that power to alienate is not denied him under the will. The obligation to receive his brothers and sisters existed so long as George remained in occupation and was the owner, but no longer.

Indeed this comparatively light burden of allowing his brothers and sisters to come during the summer upon the farm would press much more heavily upon George if a certain sum is to be set aside as a monied value of the right of occupation, and it is highly improbable that the testator intended to impose upon George the greater burden which is one that would probably consume a material part of the value of the lands.

Provision of this nature, unless the language of the will imperatively demands it, should not be held to require the burden cast upon the beneficiary to be made any greater than it actually is. To hold that such a provision, as the one in question in this case could be converted into a large capital fixed upon expectation of life of the brothers and sisters,—would be to impose a burden much greater than the testator contemplated should be borne.

There will be judgment as follows:

1st. The lands mentioned and described in the information are declared vested in the Crown from the date of the expropriation.

2. The compensation for such land is fixed at the amount of the option given by George D. Taylor, namely the sum of $8,000. which the said Taylor is

(1) 7 Gr. 31.

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entitled to be paid upon giving to the Crown a good and satisfactory title.

3. The said George D. Taylor is the only defendant entitled to any portion of the said compensation money —none of the other defendants having any right to the said money, their claim being hereby dismissed without costs to either of the parties.

The Crown will have costs on the issue of compensation as against defendant George D. Taylor, and the said costs are hereby fixed at the sum of $150.

Judgment accordingly.

Solicitor for the plaintiff: *A. H. Armstrong.*

Solicitors for defendant G. D. Taylor: *Fripp & McGee.*

Solicitors for other defendants: *O'Mara & Graham.*

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

PLAINTIFF;

AND

WILLIAM MOLSON MACPHERSON, PERCIVAL FREDERICK JOSEPH RIDOUT, ROBERT LEO DEFRIES, and FREDERIC M. HOLLAND,

DEFENDANTS.

1914
April 27

Expropriation—Market value of land taken—Question as to adding 10% to value considered as a matter of right—Crown's liability to pay bonus due under mortgage on lands expropriated.

On the 14th April, 1913, the Crown, represented by the Minister of Publit Works, registered a plan and description under *The Expropriation Act* for the acquisition of certain property in the City of Toronto for Posc Office purposes. Five days prior to such registration the defendant H. on behalf of certain other defendants, entered into an agreement for the purchase of the property in question for the sum of $100,000. The court found that at the date of the agreement to purchase neither H. nor the defendants for whom he bought were aware of the intended expropriation by the Crown, although the property had not been previously in demand in the real estate market.

Held, that the price paid for the property by the defendant H. should be taken at its actual market value for the purpose of compensation.

2. That the defendants were not entitled as a matter of right to have ten per cent. added to the market value of the property.

3. Where there is a mortgage upon property in which the mortgagor stipulates for a bonus to be paid him in case the principal is sought to be paid before the mortgage falls due, the Crown expropriating before that event must assume the payment of such bonus in addition to paying the value of the property taken.

THIS was a case arising upon the expropriation of certain lands by the Crown for Post Office purposes in the City of Toronto.

The facts are fully stated in the reasons for judgment.

January 26th, 27th and 28th, 1914.

The case was heard at Toronto before the Honourable Mr. Justice Cassels.

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E. E. A. DuVernet, K.C., and *W. G. Thurston*, K.C., for the plaintiff; *A. W. Anglin*, K.C., *F. J. Dunbar* and *R. L. Defries* for the defendants.

CASSELS, J., now (April 27th, 1914) delivered judgment.

For the purpose of acquiring land upon which to erect the new post office for the City of Toronto certain properties adjacent to the existing post office had been expropriated by the Dominion Government. On the 26th January, 1914, and during the following days, three out of the six cases were tried before me in Toronto. The other cases were not ready for trial, but came up before me in Toronto on March the 18th, 19th, 20th and 23rd. These cases present no features beyond the ordinary case of property expropriated for public purposes. There is nothing peculiar to any of them such as for instance the expropriation of the terminal yards of a railway, as to which different principles for allowing compensation may apply.

Before proceeding to deal with the cases in detail, it may be well to set out what I conceive to be the law which governs as to the allowance of compensation. It has to be borne in mind that where lands are required for a public work, no matter how unwilling the owner may be, nevertheless he has to yield in the public interest.

What the land-owner is entitled to receive is the market value of the lands expropriated, together with compensation for loss, such as good-will, etc., as is occasioned to him by reason of having to move from the premises occupied.

Market value has been defined as follows:

" The value that a vendor not compelled to sell, " not selling under pressure, but desirous of selling,

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"is to get from a purchaser not bound to buy, but "willing to buy."

In *Dodge* v. *The King* (1) the following is said in the judgment of the Court:

"The market price of lands taken ought to be the "*primâ facie* basis of valuation in awarding com- "pensation for land expropriated. The compen- "sation, for land used for a special purpose by the "owner, must usually have added to the usual "market price of such land a reasonable allowance "measured by possibly the value of such use, and "at all events the value thereof to the using owner, "and the damage done to his business carried on "therein, or thereon, by reason of his being turned "out of possession."

I think a careful analysis of the authorities as a whole will show that the above is an accurate and concise statement of the law that should govern.

In *Brown* v. *The King*, (2), I had occasion to collect the various statutes relating to the assessment of compensation by the Exchequer Court. In a very admirable judgment, if I may be permitted to say so, in *Paradis* v. *The Queen*, (3) the late Sir Elzear Taschereau collected and commented upon most of the cases determined up to date.

In *The Queen* v. *Barry*, (4), there is also a valuable review of the authorities.

There is also a valuable collection of the authorities in the case of the *National Trust Company* v. *The Canadian Pacific Railway* (5).

Arnold on Damages (6) states:

"That where lands are taken the owner should be compensated for loss of business and good-will.

(1) 38 S. C. R.155.
(2) 12 Ex. C. R. 472.
(3) 1 Ex. C. R. 191.
(4) 2 Ex. C. R. 33.
(5) 29 O.L.R. 462.
(6) Ed. 1913, at p. 229.

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The compensation must cover all losses directly sustained."

Cripps on Compensation, (1) says that the question is, what will the owner lose? At page 106 he states: "The loss to the owner includes not only the actual value of such lands, but all damages directly consequent. Compensation in practice is allowed for the profits of trade. They are bound to compensate him for all the loss by reason of the expulsion. At page 117, he states the owner is entitled to have the price of his land fixed in reference to the probable use which will give him the best return."

In the late case of the *Cedar Rapids Co.* v. *Lacoste* (2), it is stated, that the value to the owner consists in all advantages which the land possesses at present or future, but it is the present value alone of such advantages that falls to be determined.

In the *Cedar Rapids* case the judgment of Mr. Justice Moulton in the *Lucas* Case, (3), was commented upon with approval. Mr. Justice Moulton puts it as follows:

> "The owner receives for the lands he gives up
> "their equivalent, i.e., that which they were worth
> "to him in money."

At page 30, he states:

> "The owner is only to receive compensation based
> "upon the market value of his lands as they stood
> "before the scheme was authorized by which they
> "are put to the public uses. Subject to that he is
> "entitled to be paid the full price for his lands, and
> "any and every element of value which they possess
> "must be taken into consideration in so far as they
> "increase the value to him."

(1) 5th ed. p. 102.

(2) 30 T. L. R. 294.

(3) 1909 1 K. B. 29.

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The question of law governing these particular cases is not difficult. The difficulty is the application of the facts in regard to what should be found as the true market value.

I may say that since the trials I have gone very carefully through the evidence and have minutely analysed the same. If I have erred in my appreciation of the evidence it is not from lack of desire to arrive at the correct conclusion. In trials of this nature the evidence of the various experts produced on behalf of the owner of the land on one side, and on behalf of the Crown on the other, varies so much that it is often difficult to arrive at the correct result.

Before dealing with each case separately, I may say that in reference to all the properties, the language of the late Chief Justice Hagarty quoted by Sir Glenholme Falconbridge, C.J., K.B., in the case of *The Queen* v. *Fowlds* (1) is very pertinent to the cases before me. The learned Chief Justice stated that "the demand has been most languid if not *wholly non-existent.*"

In the present case the expropriation plan was filed on the 14th April, 1913. The property is situate on the north side of Adelaide Street. It is immediately adjoining the present post office on the west. The point of commencement is 86 feet 3½ inches east from the east side of Victoria Street. It has a frontage of 40 feet 11 inches on the north side of Adelaide Street running to the present post office. It then runs north a depth of 87 feet 10 inches, then west 41 feet 5½ inches, and south to the point of commencement 87 feet 8½ inches,—this may be only 87 and one-half feet.) There seems to be some doubt under the evidence. It is of no materiality. Upon the property

(1) 4 Ex. C. R. 1.

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in question are buildings valued as at cost price, not having regard to the market value, by G. W. Gouinlock at $39,633; and by H. B. Gordon another architect, produced on behalf of the Crown, at $29,464.

These valuations of the buildings are arrived at by the architects by estimating what it would cost to erect buildings of the character of those in question at the present time, and allowing for depreciation, wear and tear, etc. Several of the witnesses placed no value whatever upon the buildings, their ideas being that the value of the land is so great that to make it productive the building would have to be demolished and a new building of modern style erected in its place. I will have to deal with this later on.

The property in question was owned prior to the sale to Holland, by the trustees of the late Sir David Macpherson. They represented a wealthy estate and were under no obligation or necessity to sell. They had apparently been holding the property for some years at the sum of $100,000; the trustees apparently agreeing that when this price was reached the property would be sold.

On the 9th April, 1913, five days prior to the registration of the plan, the defendant Holland entered into an agreement with the trustees of the estate for the purchase of the property, the purchase price being agreed upon, as follows, namely: $25,000 on the 1st June, 1913; $5,000 on the 1st December, 1913; $5,000 on the 1st days of June and December in the years 1914, 1915, 1916 and 1917; and the balance of $30,000 on the 1st day of June, 1918. Interest five and one-half per cent, payable half-yearly.

It would appear from the evidence that negotiations were in progress between Holland and the trustees for a few days previous to the 9th April. Two of the

trustees were in Europe, and it necessitated numerous cablegrams passing to and fro between the agent in Canada and these trustees, the chief point of controversy being the rate of interest to be allowed on the mortgage.

It appears that Holland himself had no interest in the purchase, but in reality it was bought for Mrs. Holland, his wife, and Mr. McPhillips, to whom he apparently gave deeds acknowledging the trust.

By consent Mrs. Holland and Mr. McPhillips were added as defendants to this action, and are bound by the proceedings.

Apparently Mr. McPhillips and Mrs. Holland each raised the sum of one thousand dollars, and that two thousand dollars was advanced to the trustees as an earnest of good faith.

Prior to the payment of the $25,000 due on the 1st June, 1913, the Dominion Government came to the relief of the purchasers and advanced the sum of $25,000 on account of the moneys to be paid in order to meet the payments due on the 1st June, and thereupon the $1,000 was repaid to Mrs. Holland and the other $1,000 to Mr. McPhillips. I emphasize these facts as they may have an important bearing later on when dealing with the question of the ten per cent. alleged bonus for compulsory expropriation. The two purchasers were out of pocket each one thousand dollars for a period of less than two months.

The extraordinary avidity with which this property and other properties expropriated were sought to be acquired at or about the time when it was definitely understood that the new post office was to be erected on the present site, is shown by a perusal of the evidence of Hill, who offered to purchase this particular property for the sum of $120,000 on behalf of two clients, Mr.

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Miller and Mr. Orpen, examined as witnesses before me.

Mr. Miller seems to have got word before the plan was registered that the new post office was to be erected on the present site, and thereupon he lost no time in endeavouring to obtain an offer for the property. He telephoned Mr. Orpen, pointing out to him, to use his own graphic language, that there was an opportunity of milking the Government, and asking him to share with him a part of the cost and derive the benefit of part of the milk. This laudable desire was frustrated by an announcement in the morning paper before the deal was carried through, that the Government had expropriated the properties.

I have to find on the evidence that at the time Holland purchased, neither he nor Mr. McPhillips were aware that the Government intended to locate the new building on the present site. I was a good deal pressed by Mr. DuVernet to conclude that their purchase was entered into with knowledge of the proposed intention of the Government, and that the real object in entering into the agreement was with a view to obtain what they believed they would have been entitled to, namely ten per cent for the compulsory expropriation. In the face of the sworn testimony of both Mr. Holland and Mr. McPhillips to the contrary, I think it would hardly be just to disbelieve the statements of these gentlemen, and to find contrary to their sworn testimony that they had this knowledge.

Mr. Holland, it appears, is the manager of a company called the Dominion Permanent Loan Co. In 1910, the Dominion Permanent Loan Co. contemplated moving from their offices on King street, and were looking out for a new site. It appears from Mr.

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Holland's statement that after investigating numerous properties, he strongly recommended to his directors that they should purchase the Imperial Chambers. According to his statement, at this time the directors rejected the suggestion, preferring to remain on King Street as being more suitable for their business. This occurred in 1910. Mr. Holland states, towards the fore part of 1913, he felt quite sure his company would be compelled to move to the Imperial Chambers and he again urged the directors to purchase the property. They again declined—and his statement is, that believing that sooner or later they would be forced to move to the Imperial Chambers, he and Mr. McPhillips concluded to purchase the property for themselves, and subsequently when his company required it to sell to them at an advance. It is difficult to see why after the peremptory refusal on two occasions of the directors to move from King Street, that they should have entertained the idea that they would subsequently relent. Moreover, apparently he had no personal interest in the property in question, the property being owned, as I have stated by Mrs. Holland and by Mr. McPhillips, and they being under no obligation as far as the evidence before me discloses to sell to the company.

Mr. Defries, one of the trustees, states in his evidence as follows:

"Q. Then you had some negotiations with Mr. "Long of the Crédit Foncier I think you said?

"A. Yes.

"Q. And when you got this offer (referring to "the Holland offer) you gave him the option of "making a bid on it?

"A. We had been discussing it with him and "told him that before we actually accepted it we

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"would let him know so his company might have a "chance of buying.

"Q. You kept faith with the company and gave "them a chance before accepting the other?

"A. Yes. They had been tenants for a number "of years."

Mr. Long declined to purchase.

Before analysing the evidence in detail, I would refer to a statement made by Mr. Frederick James Smith, one of the main witnesses for the defendants. After giving evidence based upon certain sales and ground rents fixed for other properties in the neighborhood, he is asked this question:

"Q. But do you not know of any sales which "would justify a larger price than $100,000 at that "time?

"A. No, and that is how it is a hard matter to go "to work and arrive at a value, and it is only by "working it out and by analysis that you are able "to arrive at a value."

I fully share Mr. Smith's difficulty.

One Armstrong was called, and he gives evidence as to a property on the south west corner of Toronto and Adelaide Street. This property contained a frontage on Adelaide Street of 64 feet, with a depth on Toronto Street of 83 feet. It was conveyed to Mr. Fasken by deed bearing date the 30th August, 1913. The purchase price was $210,000. I do not think there is evidence in either this case or in that of the Dovercourt Land Company's case as to how this purchase came about. The fact is that it was shown in a later case that Mr. Fasken was the President of the Excelsior Life Insurance Company. The building owned by them was expropriated at the same time as the other properties for the purpose of obtaining land for the erection

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of the new post office, and this particular lot was required in order that the Excelsior Life Co. might erect a building thereon for their business. It also appeared that the property to the south, which is known I think as the Union Loan Building, was in reality purchased by Mr. Fasken and not by Mr. Gooderham. It was purchased for the purpose of using part of the building as a temporary office during the construction of their proposed building on the corner of Adelaide and Toronto Street. The question of particular titles to these two properties has no bearing on this particular case, but it is well that the facts should be accurately stated. The real importance of the purchase is the fact that the property on the south-west corner of Toronto and Adelaide Street with the dimensions mentioned, was sold on the 30th August, 1913, for the sum of $210,000. In the first place this sale and purchase was made after it was publicly known that a new post office was to be erected on the lands at present occupied by the old post office, together with the additional lands expropriated for the purposes of the new building

It is said that the Minister of Public Works represented in Toronto that the new post office is to be a very handsome building, and one that would cost a very large amount of money. The fact of this knowledge unquestionably had a tendency to raise the values of adjacent property. Moreover, this lot on the south-west corner of Torontoa nd Adelaide streets, had advantages not possessed by the Imperial Chambers. It had 64 feet on Adelaide street with corresponding light, and 83 feet on Toronto street, well lighted, and in my judgment very much better situate for office purposes than the Imperial Chambers.

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Mr. Seitz is President of the United Typewriter Company. He refers to a property situate on the east side of Victoria Street 99 feet and 1 inch north of Queen Street and running northerly 40 feet. It is a vacant property. This was sold on the 5th August, 1913, for $1,800 per foot frontage. It had the advantage of being vacant property. It is too far away from the premises in question to afford much value as a comparison. He refers to another property on the south side of Adelaide street 117 feet and 7 inches, east of Yonge street. It is leasehold property with a frontage on Adelaide street of 35 feet, running easterly on Adelaide street from this point 117 feet, 7 inches, east of Yonge street. It has a depth of 96 feet and three-quarter inches to a lane. On it is a five storey building. This leasehold was sold on the 15th July, 1913, for the sum of $100,000. The lease had from 14 to 15 years to run. The ground rent was $825 per annum. The buildings were to be paid for. This property was purchased for a hotel site, and the evidence shows that the license for the hotel had been transferred. It was a valuable site having regard to the purposes to which the purchaser intended to put it. It was near Yonge street, a matter of very considerable moment for that class of business. It is needless to say that the Imperial Chambers in question could not be put to any such purposes.

Another property also leasehold is referred to by Malcolm S. Mercer in his evidence. It is a property containing 93 feet and 11 inches on the west side of Victoria street, and 110 feet 10 inches on the south side of Richmond street. A lease was granted for 21 years from the 1st April, 1913; and the ground rent was $18,000 per annum—$9,000 of the first year's rent being remitted. At the same time, or about the same

time, the property to the south, namely, 29 feet and 9¾ inches, on the west side of Victoria street, with a depth of 107 feet 11 inches was leased by some parties, so as to form one property with the property on Victoria and Richmond streets. The leasehold was at a ground rent of $3,600 a year from the 1st April, 1913, with the right of renewal for three different periods. Immediately opposite the property in question and on the southeast side of Victoria and Richmond streets is situate Shea's Theatre. These two properties were leased by Myles with the view of the erection of an opposition theatre, and were extremely well situate for the purposes to which he intended to put them. They were close to Yonge street with the attendant street car service.

Heppler, who was called as a witness said that the land was wanted for a theatre.

The evidence of Lang with regard to the assessment to my mind is of no value whatever. It would appear that the property in question, the Imperial Bank Chambers, was assessed in 1913, at the sum of $56,000. The evidence of this witness was tendered with the view, not of showing that the assessment of $56,000 was the correct assessment, but with the object of showing the increased assessments from time to time of city properties, and to thereby argue for the advances of property values. It only shows to my mind the assessors were gradually waking up to a sense of their duty, and apparently had not risen to the full notions of what they were called upon to do in the year 1913.

Albert J. Walker, was secretary of the Home Life Company who have a property on the northwest corner of Adelaide and Victoria Street, upon which is erected a large building formerly known as the Freehold Building. This building covers not only the land

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owned in fee by the company, but in addition to that there is a piece of leasehold property comprising 55 feet and 10 inches on Adelaide Street, running west from Victoria Street with a depth of 48½ feet on Victoria Street, the whole depth of this lot on Victoria Street including a piece under leasehold from Griffiths of 48½ feet is 125 feet on Victoria Street. The Griffiths lease ran 21 years from the 1st May, 1910, the rental being the sum of $3,500 a year. Accepting a four per cent basis as a ground rent, it would be at the rate of four per cent. on about $1,800 a foot. At a subsequent period, namely December, 1913, a transaction took place between the Sun Life and the Home Life, and these buildings and lands were thrown in at the sum of $425,000 as part of the business that was conveyed by the Home Life to the Sun Life. The rents from this building make but a very poor showing.

Mr. Small was examined as a witness on the part of the defendants. He values the land per foot frontage at $3,500 a foot. He includes in this valuation the buildings, which according to his view are of no value whatever, having regard to the high price of land. He considers as others do that they had a temporary value in enabling the purchaser to carry the property by having the taxes paid and a small amount of interest, until such time as the purchaser would be prepared to build. The evidence in the case with which I am dealing, and in that of the Dovercourt Land Company, is to be used in either case; and later on I will have to comment on the evidence of Mr. Small in regard to his method of valuation. Mr. Small has sold nothing in the immediate neighborhood of these lands. He is giving his evidence based upon properties heretofore referred to, most of them renewals of leases. His idea is that on the property in question to make it of any

value a building should be erected, which he places at ten storeys in height, and would cost the purchaser the sum of $150,000. He figures out that if such a building were erected, the property would be occupied and it would yield a return which would give a ground rent equal to $3,500 a foot frontage. In fact his figures would show a sum in excess of this. Unquestionably when you come down to properties on King street, Toronto, with figures running from $7,000 to $12,000 a foot, frontage, a purchaser paying these enormous prices would necessarily look forward to the erection of suitable buildings so as to get a proper return. I think Mr. Poucher deals with it in his evidence, which I will have to comment upon later on, in what strikes me as a sensible way.

It is curious that for all these past years these properties, such as the Imperial Chambers and the other properties I have to deal with, have been lying dormant, nobody coming forward and being willing to pick up what appears to be a plum and to realize these large figures by the erection of suitable buildings. Capitalists who are prepared to give large prices for land, and at the same time to go to the further expenditure of $150,000 in the erection of buildings, are few and far between; and they have not been known in this particular locality until the trial of the actions before me, and then we have merely theoretical evidence as to what might or might not happen. It might have turned out that the offices in these large buildings would have remained untenanted. All sorts of contingencies would have to be taken into account. According to Mr. Small there are no modern buildings in that locality.

Mr. Frederick James Smith also places the value of the lands at $3,500 a foot, including the buildings

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which he values as worthless, except for carrying purposes, and he would place the whole value of the property at $143,500. He seems to form his conclusions as an inference based upon the transactions which I have referred to. He places property on Yonge street near the Bank of Montreal as of value $1,000 a foot frontage. He speaks of the property in the southeast corner of Lombard and Victoria streets, which in the spring of 1913 sold for $115,000. That property had a frontage of 45 feet and 11 inches and averaged $2,500 a foot including the buildings.

Horton Walker also places the value at $3,500 a foot.

Frederick Sparling, who is the secretary of the National Life Company, refers to the southeast corner of Adelaide and Toronto streets. This property had a frontage on Toronto street of 59 feet and 5 inches, with a depth of 79 feet on Adelaide street. In the fall of 1911, according to his testimony, $250,000 was refused for this property. Upon this property is erected a very substantial building.

This, I think, comprises an analysis of all the evidence adduced on the part of the land owners.

On the part of the Crown, certain evidence was adduced, amongst others being Dalton M. Gilpin. He is a broker in the city of Toronto. On the 26th of March, 1913, he was authorized to sell the Equity Chambers, being the northeast corner of Victoria and Adelaide streets one of the properties expropriated, at the sum or price of $250,000. This offer fell through. It is only fair to say that the offer was for cash.

John Firstbrook refers to property on Lombard street. I dont think that this has very much bearing owing to the difference between Lombard street and Adelaide streets. Lombard street is a street for

factories and possibly warehouses, but it is not a street for offices.

Hammill refers to a purchase on the northeast corner of Victoria and Lombard streets for the sum of $125,000. There were some old buildings on it. This property has been previously referred to. The property on the southeast corner of Victoria and Adelaide streets being 58 feet and three inches on Adelaide street, by 130 feet on Victoria street, with a lane 14 feet wide east and west, was sold according to Mr. Irving in 1911, for $60,000, subject to a lease until 1923, at a rental of $1,747. I dont think this a guide having regard to the nature of the lease.

Mr. Hudson who has had great experience as Manager of the Canada Permanent Loan and Mortgage Company states, that $2,000 a foot frontage for the Imperial Chambers would be a handsome price, and he would place the buildings at from $18,000 to $20,000.

Mr. Poucher also a man of very great experience and the manager for all the real estate business of the National Trust Company puts it at the outside at about $2,000 a foot, and he would throw in the buildings between $18,000 and $20,000.

Both Mr. Hudson and Mr. Poucher are of the opinion that office buildings do not pay. There is a great deal of force in Mr. Poucher's view, that for a loan company or a company of that class, or even for a bank who require a permanent situation, as well as accommodation for their own business, offices above in their building are of value as reducing the charges under which the institution lies.

Upon the whole case, in view of the class of evidence adduced before me, I am inclined to think that the conclusion arrived at by the Court of Appeal in Ontario in the case of *re Fitzpatrick* v. *Town of New Liskeard*,

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is as far as I know a proper solution of the matter. This case is reported in the Ontario Weekly Reporter, Vol. 13, p. 806. The judgment of the Court of Appeal was given by Garrow, J. In that case the price at which Fitzpatrick purchased, namely for the sum of $2,700 was accepted as the safest starting point in the enquiry into values. So in this particular case having regard to all the circumstances and the difficulty of arriving at an exact valuation, I should be inclined to take the price at which the trustees sold and at which Holland bought as the correct starting point, namely, $100,000.

Mr. Williams stated that in advising the Crown as to the amount to be paid, he had added on the usual ten per cent, for compulsory taking. I think that it would have been proper to have started with the $100,000 which was the sum unquestionably paid—and if ten per cent. were to be added it would have made the sum that should have been offered $110,000.

It is claimed that Holland is entitled to a ten per cent. advance by reason of the compulsory taking. I am not aware of any law which entitles the owner to add ten per cent. to the market value. It has been usual in most cases to make an allowance of some kind in order to recoup the purchaser for certain contingent items which cannot be taken into account.

Arnold, in his book on *Damages* (1), points out that there is no justification for this ten per cent. allowance.

Cripps on *Compensation*, (2) states, the customary ten per cent. can only be justified as part of the valuation and not as an addition thereto.

Browne and Allen on *Compensation* says (3):—

(1) Ed. 193 at p. 229. (2) 5th ed. p. 111.
(3) 2nd ed. at p. 97.

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"It should be noticed also that there is no pro-
"vision either in this or in any other section of this
"Act to the effect that anything is to be added in
"respect to compulsory purchase. In practice a
"percentage is regularly [*sic*] added to the market
"price, and this is usually right, for the sum to be as
"contained is not the market price but the value of
"the land to the owner."

I may say that having regard to the decisions in our courts, there seems to be no doubt that the principles enunciated in the cases decided under the *Lands Clauses Compensation Acts* have been adopted by our Courts. I fail to see, however, that any hard and fast rule as to a fixed allowance should be adhered to.

In this particular case I would add to the $100,000 the sum of $5,000. This will enable the purchasers to pay the commission which apparently they feel bound to pay to Buckland, amounting to $2,500.

I think, considering the facts of this case that the purchasers were only out of pocket $2,000 for about a month and a half, they will be amply recompensed by such allowance.

I give judgment for one hundred and five thousand dollars, and such interest as they may be entitled to, and the costs of the litigation.

The interest can be computed and if there is any trouble the question can be spoken to me in Chambers.

I may say that in this case, and in the other cases before me, no proper tender was made before action. It might be well for the solicitors to refer to section 46 of the *Exchequer Court Act*, which shows the manner in which a tender can be made.

[Upon the settlement of the minutes of judgment before the Registrar, the defendants sought to have it declared that the Crown should pay a bonus of interest

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to the mortgagees in addition to paying compensation for lands taken. On the minutes being spoken to before Mr. Justice Cassels in Chambers, he decided the question as follows (June 17, 1914)]:—

Upon the settlement of the minutes of judgment in this case, a question has arisen, not presented at the trial, where it should have been raised. It is as follows: By the agreement entered into by the trustees of the late Sir David Lewis Macpherson and Mr. Holland, one of the defendants, there was a provision which enables the mortgagor to pay off the principal money secured by the mortgage at any time on payment of three month's interest by way of bonus. The Crown, through its agent, has paid in full the principal money due on the mortgage. The mortgagees claim that they are entitled to receive the bonus of three month's interest under the terms of their mortgage. I think they are entitled to this bonus. The question, however, arises as between the Crown who expropriated the lands and who paid off the mortgage and the mortgagor. The mortgagor claims that the Crown, having expropriated the lands including the mortgagees' interests and having paid the mortgagees, that the Crown should pay the bonus and that it should not be thrown as a burden on the mortgagor. I think that the contention of the mortgagor is correct. In the *Lands Clauses Consolidation Act* (1845) which is to be found in Browne & Allen's *Law of Compensation*, (1) there is ample provision for securing the rights of the mortgagees. The promoter is obliged to secure the mortgagee against loss. Our statute does not contain any similar provision. Section 22 of *The Expropriation Act* provides that:—

(1) 2nd Ed., p. 242.

"The compensation money agreed upon or "adjudged for any land or property acquired or "taken for or injuriously affected by the con- "struction of any public work shall stand in the- "stead of such land or property; and any claim to "or encumbrance upon such land or property shall, "as respects His Majesty, be converted into a claim "to such compensation money or to a proportionate "amount thereof, and shall be void as respects "any land or property so acquired or taken, which "shall, by the fact of the taking possession thereof, "or the filing of the plan and description, as the "case maybe, become and be absolutely vested in His "Majesty."

Section 29 of the same Act provides:—

"Such proceedings shall, so far as the parties "thereto are concerned, bar all claims to the com- "pensation money or any part thereof, including "any claim in respect of dower, or of dower not "yet open, as well as in respect of all mortgages, "hypothecs or encumbrances upon the land and "property; and the Court shall make such order "for the distribution, payment or investment of the "compensation money and for the securing of the "rights of all persons interested, as to right and "justice, and according to the provisions of this "Act, and to law appertain."

It seems to me that if the Crown chooses to expropriate and get rid of the mortgage, the amount which is thrown as a burden on the mortgagor by reason of the expropriation should be added to the compensation allowed. It will be noticed that Sec. 22 of *The Expropriation Act* hereinbefore quoted only bars the right as between the Crown and the mortgagee. It leaves the relative rights as between mortgagor and

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the mortgagee as they were at the time of the expropriation. It could not be intended to take away the legal rights of the mortgagees. On the other hand, it would be unjust that the Crown availing itself of the privilege of paying off the mortgage should compel the mortgagor to suffer.

I think, therefore, that the bonus which has to be paid to the mortgagees should, if necessary, be added to the compensation money allowed the mortgagors. There should be no trouble in the parties arriving at an adjustment, if not, the matter can be spoken to before me in Chambers.

I think there should be no costs to any of the parties on this application. It should have been raised at the trial.

Judgment accordingly.

Solicitor for the plaintiff: *E. E. A. DuVernet.*

Solicitors for defendants, McPherson, Ridout and Defries: *Allan Cassels & Defries.*

Solicitors for the defendants, Holland and McPhillips: *Blake, Lash, Anglin & Cassels.*

IN THE MATTER OF THE PETITION OF RIGHT OF

THE QUEBEC, MONTREAL and SOUTHERN RAILWAY COMPANY, a body politic and corporate having its head office at the City of Montreal, in the said Province,

SUPPLIANTS;

1914
Nov. 19.

AND

HIS MAJESTY THE KING.....RESPONDENT.

Railway—Insolvency—4-5 Edw. VII, c. 158—Sale under Order of Exchequer Court—Effect of—7-8 Edw. VII, c. 63—Subsidy—Discretion of Governor in Council as to paying same—Order in Council and contract to pay subsidy based on mistake of fact—Invalidity.

The South Shore Railway, along with the Quebec Southern Railway, was sold under order of the Exchequer Court of Canada on the 8th November 1905. The suppliants, having acquired all the rights of the vendee under the sale, became incorporated by Act of Parliament in 1906 for the purpose of holding, maintaining and operating the said railways under the name of the Quebec, Montreal and Southern Railway Company. In 1899, by 62-63 Vict., c. 7, sec. 2, sub-sec. 27, the Governor in Council was authorized to grant a subsidy to the South Shore Railway Company from S. J. to L., "a distance not exceeding 82 miles." The South Shore Railway Company previous to January 1902, constructed some 18½ miles of the projected railway, and was paid a subsidy for 12 miles, but the subsidy for the balance so constructed, namely, 6½ miles, was never paid to any one, presumably because the statutory requirements were not fulfilled. In 1903, by 3 Edw. VII, c. 57, sec. 2, sub-sec. 12, the subsidy of 1899 was renewed, not in favour of the South Shore Railway Company in particular, but by way of a general grant towards the construction of a line of railway from Y. to L. (including the 6½ miles in question), a distance not exceeding 70 miles, "in lieu of the subsidy granted by item 27 of sec. 2 of ch. 7 of 1899". The South Shore Railway did not avail itself of this subsidy, and it lapsed. In 1908, by 7-8 Edw. VII, c. 63, sec. 1, sub-sec. 14, the subsidy last mentioned was renewed, the Act providing that "the Governor in Council may grant a subsidy" but it was provided that the railway subsidized was to be completed before 1st August, 1910. The suppliants built the railway so subsidized. Upon a petition of right filed by the suppliants to recover subsidy in respect of the said 6½ miles not constructed by them but by the South Shore Railway Company.

Held, that the language of 7-8 Edw. VII, c. 63, sec. 1 sub-sec. 14, must be read as permissive and not mandatory, and that a petition of right to recover

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the subsidy would not lie where the same has not been paid by the Governor in Council. *Canadian Pacific Railway Co.* v. *The King*, 38 S. C. R. 137, followed.

2. A contract entered into between the Crown and the suppliants for the payment of the subsidy in question, founded on an order in council passed on the assumption that the suppliants had constructed the 6½ miles in question (which the suppliants had not in fact done) cannot be enforced; and if moneys had been paid under such contract they could have been recovered back by the Crown under Arts. 1047 and 1048, C.C.P.Q.

3. The Crown is not bound by an order in council passed inadvertently and on mistake of fact. *De Galindez* v. *The King*, Q. R. 15 K. B. 320; 39 S. C. R. 682 followed.

4. The South Shore Railway Company not being in a position to enforce payment of the subsidy in dispute, the suppliants as assignees of the said company could not recover the same.

5. In disposing of public moneys under statutory authority, the Crown must adhere strictly to the terms of the statute, and neither by order in council nor by contract can the terms of the statute be enlarged or altered. *Hereford Ry. Co.* v. *The King*, 24 S. C. R. 1, followed.

PETITION OF RIGHT to recover a sum alleged to be due to the suppliants as a railway subsidy. The facts are stated in the reasons for judgment.

October 7th, 1914.

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

Honourable *F. L. Beique*, K.C., for the suppliants:—

As to the broad question of discretion in the Governor in Council to pay the subsidy, authority is given by Parliament to the Executive to do a given thing according to its discretion. Up to this point nothing is binding upon the Crown. But later on a contract is entered into between the suppliants and the respondent with respect to the payment of the subsidy—and under this contract the Crown is bound to pay the subsidy therein mentioned. Such contract was entered into under the statute. Referring to *The Hereford Railway Co.* v. *The King*, (1) much stress is laid upon the dissenting judgment of Sedgewick, J. but that case is distinguishable from the present case. In the

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

former there was no contract to pay the subsidy, and in the present one there is such a contract.

Coming to the second point, it may be that the subsidies under the statutes of 1899 and 1903 have both lapsed; but under the conveyance of the Quebec Southern Railway to the *auteurs* of the suppliant, all subsidies had been sold to them, and they have this day a right to claim the same, that right being in the same position as if exercised by the Quebec Southern Ry. Co. itself.

Dealing with the third question, it may be said that the position of the Crown is untenable. In virtue of the deed of sale by the Exchequer Court of Canada to the Quebec Southern Ry. Co., under which the suppliants have acquired a title free from all hypothecs and privileges, having the same effect as a sheriff's sale under 4 & 5 Ed. 7, Cap. 158, the suppliants are liable for no debt incurred by the old Quebec Southern Railway Co.

The old Quebec Southern Railway Co. was indebted to the Crown for a certain amount, and the Crown filed a claim for the same before the Exchequer Court of Canada, and it was duly collocated according to its rank and privileges. It has no recourse whatsoever for any part of the claim against the suppliants in this case.

F. J. Laverty, K.C. for the respondent, contended that the suppliants' claim for the subsidy wholly failed because they had not constructed the six miles for which this subsidy was claimed. That was a condition precedent to earn the subsidy. The order in council which authorized the payment of the subsidy was issued in error of fact, and that being so the Crown is in no way bound by it. *Leprohon* v. *City of Montreal*, (1); Art. 1047 C.C.P.Q. The rule that

(1) 17 R. L. 559.

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no one may enrich himself at the expense of another applies in favour of the Crown as wholly as in the case of a subject. If therefore the Government would have a right to recover back the amount now demanded by suppliants if it had been paid, clearly it has the right in the present proceedings to refuse payment of the subsidy.

The suppliants argue now, although their claim under the petition of right is not so shaped, that they are entitled to the subsidy because it was given to them by the Crown to encourage them to take up the construction of the railway and to facilitate their financial arrangements. But how can it be contended that the subsidy was intended to encourage the suppliants to build a railway when it had been built many years before?

The suppliants further contend that the Crown is estopped by the orders in council accepting the work and recommending payment. That proposition overlooks the fundamental rule that the Crown is not bound by the error, fraud, laches or negligence of its officers. He cited *Bank of Montreal v. The King*, (1); *Jones* v. *The Queen*, (2); *Black v. The Queen*, (3); *Brooms' Legal Maxims*, (4).

On the next point, which is of course the important point here, the Supreme Court in *Hereford Railway Co.* v. *The King*, (5) lays down the principle without qualification that where money is granted by the Legislature and its application is prescribed in the statute in such a way as to confer a discretion on the Crown no trust is imposed enforcible by petition of right. He cites *De Galindez* v. *The King*, (6).

(1) 38 S. C. R. 258.
(2) 7 S. C. R. 570.
(3) 29 S. C. R. 693.
(4) 8th Ed. p. 40.
(5) 24 S. C. R. 1.
(6) Q. R. 15 K. B., 320; 39 S.C.R. 682.

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In the next place the suppliants set up the terms of the statute and deed under which these railways were sold, claiming that inasmuch as the sale was stated to have the effect of a Sheriff's deed this necessarily cleared the property of all debts, charges, and incumbrances thereon. I submit that the Sheriff's deed simply cleared the charges and incumbrances on the real estate in the nature of taxes, mortgages and privileges. It does not release the debtor from any of its personal debts, so that the suppliants cannot contend that the effect of the Sheriff's sale was to wipe out the indebtedness of the Quebec Southern and South Shore Railway in such a way as to prevent the Crown from recovering its debt against them in the way it has undertaken to do.

AUDETTE, J., now (November 19th, 1914,) delivered judgment.

On the 8th November, 1905, The Quebec Southern Railway and the South Shore Railway were sold, by the Exchequer Court of Canada, under the provisions of 4-5 Ed. VII ch. 158, to the Honourable F. L. Beique, K.C., who, on the 11th June, 1906, assigned his bid and rights under this sale, to one William S. Opdyke and one Charles A. Walker, who, in turn, on the 12st August, 1906, sold, transferred and assigned all their right to the suppliants herein to whom the deed of conveyance of the said railways was granted, and who were incorporated in 1906, by 6 Ed. VII ch. 150 for the purposes of holding, maintaining and operating the said railways so acquired.

In 1899, by 62-63 Vic. ch. 7, sec. 2, sub. sec. 27, the Governor in Council was authorized to grant a subsidy to: "*The South Shore Railway Company* from

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Sorel Junction along the South shore to Lotbiniere, Quebec, a distance not exceeding 82 miles."

The South Shore Railway Company constructed of this projected railway 18 and a fraction of a mile ($18\frac{1}{4}$ or $18\frac{1}{2}$) from Sorel Junction to St. Francis River, and was paid a subsidy for twelve miles, extending from Sorel Junction to Yamaska River,—and the subsidy for the balance of the 18 miles, i. e., the $6\frac{1}{2}$ from Yamaska River to St. Francis River, as shown on Exhibit No. 6, has never been paid to any one. These $6\frac{1}{2}$ miles were built by the South Shore Railway Co., but the subsidy earned therefor was not paid to them; and, it must be presumed, because it did not amount to a section of 10 miles, as provided by sec. 7 of 62-63 Vic. ch. 7. It is admitted that one of the conditions of this subsidy was that the railway subsidized was to be completed before the 1st September, 1903, and that otherwise all right to subsidy lapsed and was forfeited whether as to instalment already earned or otherwise. These $6\frac{1}{2}$ miles form the subject-matter of this controversy.

In the year 1903, by 3 Ed. VII, ch. 57, sec. 2, sub. sec. 12, the subsidy of 1899 was renewed, not to the South Shore or to any other company in particular, but towards the construction of "a line of railway "from Yamaska to Lotbiniere, a distance not exceeding "70 miles,—in lieu of the subsidy granted by item "27 of sec. 2 of ch. 7. of 1899."

It will be noted that this subsidy is for 70 miles instead of 82, and is for a distance from Yamaska instead of from Sorel Junction,—because the 12 miles for which the South Shore Railway Company had been paid, were taken into account. Of this subsidy the South Shore Railway Company did not avail itself and it lapsed.

In the year 1908, by 7-8 Ed. VII ch. 63, sec. 1, sub-sec. 14, the subsidy of 1903 was again renewed for the 70 miles, but not to any company in particular. Sub. sec. 14 reads as follows: "For a line of railway "from Yamaska to a point in the County of Lotbi- "niere, in lieu of the subsidy granted by Chapter 57 "of 1903, sec. 2, item 12, not exceeding 70 miles. One of the conditions of the subsidy was that the railway subsidized was to be complete before the 1st August, 1910.

It is further admitted by both parties that previous to the 30th April, 1909, the suppliants had built the railway in question from Yamaska to Lotbiniere, excepting, however, the above mentioned 6½ miles which were built by the South Shore Railway Company previous to the 1st January, 1902.

As already mentioned, the Quebec Southern Railway and the South Shore Railway, were sold, by the Exchequer Court, as insolvent railways, and the proceeds of such sale were distributed among the creditors of the said railways, as appears by Exhibit No. 6, to the Referee's Report.

The Intercolonial Railway, the property of the Crown, had a claim against these insolvent railways, which was filed in this court. This claim is fully set forth, under No. 20, at p. 15 of the Referee's Report of the 25th May, 1908. (Part of Exhibit No. 6). The Intercolonial Railway was duly collocated in the distribution of the purchase price and the Registrar of the Exchequer Court transmitted to them, at different dates, the respective sums of $1,507.60—$3,939.50—and on the 3rd January, 1913, advised them of a further collocation for $7,187.70 which would be transmitted to them upon receipt, making the total collocations the sum of $12,634.70.

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However, on the 7th January, 1913, the last mentioned dividend of $7,187.70 was refused by the Intercolonial Railway, and is now on deposit in the Bank of Montreal at Ottawa. Explaining the circumstances under which these monies were refused, the Comptroller and Treasurer of the Intercolonial Railway wrote the following letter, to wit:

"Moncton, N.B., 7th January, 1913,
File No. 66207

Charles Morse, Esq., K.C., D.C.L.,
Registrar, Exchequer Court,
Ottawa,
Ont.

Dear Sir:

I have to acknowledge receipt of your communication of the 3rd inst. *re* Quebec Southern Railway enclosing form of receipt for collocation, and stating that upon this receipt being duly signed and returned to you, a cheque for $7,187.60 will be sent me.

In March 1908, I received through your Court, the sum of $1,507.60, and in November, 1910, a further sum of $3,939.50, but in January, 1912, the balance of our account against the Quebec Southern Railway, namely $21,808.64 was paid to us through the Department of Finance, being a deduction from the subsidy that was payable to that Railway, and consequently, we have no charges against this Railway on our books.

Yours truly,
(Sgd.) S. L. Shannon,
Comptroller & Treas."

It will be noted that the dividends for $1,507.60 and $3,939.50 were retained by the Crown, up to the present day.

On the 30th April, 1909, the Accountant of the Department of Railways and Canals, wrote the

following letter to the General Manager of the suppliant company, to wit:

"Ottawa, April 39th, 1909

File No. 887.

SIR:

I enclose you herewith a cheque of the Finance Department, No. 18872, for $43,414.55, drawn in favor of the Quebec Montreal & Southern Railway Co., being for a part of Progress Estimate on ordinary subsidy of $3,200. for 70 miles of railway, from Yamaska to a point in the County of Lotbiniere, and from Mount Johnson to St. Gregoire, 1½ miles.

70 miles at $3,200. per mile.....	$224,000.00
32% of $224,000.00.....	71,680.00
Less witheld on account of claims I.C.R. $26,765.45	
Less witheld on account of Labour. 1,500.00	28,265.45
	$43,414.55

Be pleased to acknowledge receipt of this cheque,

I am, Sir,

Your obedient servant,

(Sgd.) W. C. LITTLE,
Accountant."

D. I. Roberts, Esq.,
Gen. Mgr. Q.M. & S. Ry. Co.
Montreal."

The suppliants bought the railways in question, under the provisions of 4-5 Ed. VII. Ch. 158, the sale to have the same effect as a Sheriff's sale of immovables under the laws of the Province of Quebec, giving the purchaser a clear title, free from all charges, hypothecs, privileges and incumbrances whatsoever.

There is no contractual relation between the suppliants and the Crown with respect to the Interco-

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lonial Railway's claim, and the Crown cannot maintain the position taken by the letter of the 30th April, 1909, above recited. However, behind that position there is the question as to whether or not the present proceedings are not in substance an action against the Crown to recover a subsidy, and whether such a right of action exists against the Crown under the circumstances.

The pleadings on the record deal only with the situation created by the letter of the 30th April, 1909, above recited, but the Court, at trial, raised the substantial question, and there is no reason why the case could not be approached on its true merits. The question as to whether departure from such pleadings could be allowed was discussed by the learned counsel, and as suggested in the course of the argument by the Crown's counsel, if an action is taken for a debt and that the defendant, pleading the statute of limitations, discovers a receipt for such debt, he will obviously be allowed at all stages of his case to plead payment.

There cannot be any doubt that the present petition of right amounts to an action for the recovery of the subsidies above mentioned.

If the suppliants claim these subsidies as assignees under the purchase and conveyance, they cannot have more right to these subsidies than the South Shore Railway Co. itself had. The subsidies of 1899 have lapsed and the South Shore Railway Co. did not avail itself of the subsidy of 1903; therefore, neither the suppliants nor the South Shore Railway have now any right to this subsidy. The 1899 and 1903 subsidies have both lapsed. The simple transfer of a right cannot aggravate the debtor's position. The suppliants cannot succeed as assignees of the South

Shore Railway Co. whose right to such subsidies has entirely abated and disappeared.

Furthermore, it is admitted by both parties that the $6\frac{1}{2}$ miles from Yamaska River to St. Francis River, were built by the South Shore Railway Co. and not by the suppliants, notwithstanding they are making claim therefor.

Now the suppliants contend that the subsidies retained by the Crown and for which they claim payment have been authorized by statute, by an order in council, based upon the report of the Chief Engineer of the Railways and Canals, and upon an agreement entered into between the Crown and the suppliants, and these facts are true.

There can be no doubt that the language of the statute "*the Governor in Council may grant a subsidy towards the construction.*" (Sec. 1, ch. 63 of 7-8 Ed.VII) is not mandatory, but simply permissive and facultative,—it makes no direct grant to the suppliants. The Act is discretionary in so far as granting the subsidies are concerned. The Supreme Court of Canada, passing upon a similar Act, the very one above referred to, i. e., 3 Ed. VII, ch. 57, which is practically in the same language as the one just cited, held that the provisions of the Act 3 Ed. VII ch. 57, authorizing the granting of subsidies in aid of the construction of railways was not mandatory, but discretionary in so far as the grant of the subsidies by the Governor in Council is concerned. *Canadian Pacific Ry. Co.* v. *The King.* (1)

It is true that before the passing of the order in council the Chief Engineer made his report, in compliance with sec. 10 of the Act of 1908, but his report is not made upon his personal inspection but that of

(1) 38 S.C.R. 137.

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the engineer E. Johnson, filed herein as Exhibit No. 9. And this report states that on the 20th January, 1902, he had reported a section of the road, then the South Shore Railway, from Yamaska to the St. Francis River, $6\frac{1}{4}$ miles, as completed, and that no subsidy was paid, the completed section being less than ten miles in length. And he adds at the end of this report, which is dated 31st January, 1908, that the estimate he is making includes so much of the old work, done by the South Shore Railway Co. as will remain and form part of the completed railway. The Chief Engineer is not so explicit and clear in his own report which is reproduced in the Minister's recommendation to Council, and the order in council of the 6th April, 1909, practically embodies the recommendation.

However, before the passing of this order in council the suppliants had entered into a contract with the Crown to "*make, build, construct, and complete*" the line of railway mentioned in Item No. 14 of the Act of 1908,—and the Crown upon the performance and observance by the suppliants, to the satisfaction of the Governor in Council of the clauses of the agreement, in *accordance* with and subject to the provisions of sections 1, 2 and 4 of the Subsidy Act, undertook to pay the suppliant *so much* of the subsidies as the Governor in Council, *having regard to the cost of the work,* shall consider the suppliants to be entitled to, *in pursuance of the said Act.*

By this agreement the suppliants undertook to *make, build* and *construct* the line of railway in question, and they did not make build and construct the $6\frac{1}{2}$ miles in question, as admitted—and the Crown by that agreement undertook to pay the subsidy upon the performance by the suppliants of the covenant to

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make, build and construct the line of railway in accordance with the statute. The suppliants never complied with that agreement in regard to the $6\frac{1}{2}$ miles in question, which had been constructed, and therefore it was a physical impossibility for the suppliants to do so. The subsidy is payable to the party constructing the railway,—the contract itself makes against the suppliants contention. The subsidy is neither due to nor exigible in favour of the suppliants in any event. Paying the same would be acting contrary to the statute, and no contract or order in council going beyond the statute can grant any right enforcible by petition of right against the Crown. The primary and paramount meaning of the controlling words of the statute is that a subsidy may be granted towards the construction of a railway. The suppliants did not construct the $6\frac{1}{2}$ miles, and are not therefore entitled to the subsidy for the same. Granting the subsidy would be giving the suppliants something for which they are giving no consideration, the Crown does not owe anything to the suppliants with respect to the $6\frac{1}{2}$ miles in question. There exists no debt due to the suppliants in respect of these $6\frac{1}{2}$ miles,—there is no consideration given by them for such claim,—and had the Crown paid the same through error of law or of fact, it would have recovered the same back under the provisions of Arts. 1047 and 1048 C.C.P.Q.

The order in council cannot go beyond the statute which says that the subsidy *may be paid towards the construction*, and if the order in council directs payment to the suppliants for a part of the railway which they did not construct, it goes beyond the statute and is *pro tanto ultra vires*. The discretion to pay is limited to the object and purpose designated by the

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statute, and it is only within the statute that such discretion can be exercised, i.e. towards the construction of the railway. (1)

Therefore, using the words of the Chief Justice *in re Hereford Railway Company* v. *The Queen* (2) neither on the ground of contract nor on that of statutory obligation are the suppliants entitled to succeed. It was further held in that case that when money is granted by the Legislature and its application is prescribed in such a way as to confer a discretion upon the Crown, no trust is imposed enforcible against the Crown by petition of right. The statute granting the subsidy did not create a liability on the part of the Crown to pay the same. Where there is a discretionary power, there is no legal remedy.

The Crown is not bound by the laches of its officers. The orders in council in question were passed under misapprehension and error of facts, and it must be held, following the case of *De Galindez* v. *The King*, (3) that the Crown is not bound thereby (4).

The error and misapprehension of facts having been discovered by the officers of the Crown before payment made, the Crown moved by the sound consideration of public interest stayed its hand and the payment was stopped. It would even seem, as above stated, if such payment had been made under the circumstances, a right of action would exist for the recovery of the same.

The authority to grant a subsidy under the statute, is not mandatory but purely discretionary, and essentially a matter of bounty and grace on behalf of the Crown, creating no liability to pay the same enfor-

(1) See Qu'Appelle, etc., Ry. Co. v. The King, 7 Ex. C. R. 118.

(2) 24 S.C.R. 1.

(3) Q.R. 15, K.B. 320; 39 S.C.R. 682.

(4) See also Bank of Montreal v. The King, 38 S.C.R. 258, and Black v. The Queen, 29 S.C.R. 693.

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cible by petition of right. Moreover, under the facts of the case the suppliants are not entitled to the relief sought herein.

There will be judgment in favour of the respondent.

Judgment accordingly.

Solicitors for suppliants: *Beique & Beique.*

Solicitors for respondent: *Blair, Laverty & Hale.*

1914
April 15.

HIS MAJESTY THE KING, ON THE INFORMATION OF THE ATTORNEY-GENERAL FOR THE DOMINION OF CANADA.....PLAINTIFF;

AND

PAUL A. PAULSON AND THE INTERNATIONAL COAL AND COKE COMPANY, LIMITED..... DEFENDANT

Coal Mining Areas—Dominion Lands—Lease by Crown—Conditions—Breach—Forfeiture—Re-entry—Declaration of Right—Jurisdiction.

One of the provisions of a lease of coal mining rights in certain Dominion Lands contained the following stipulations:

"That the lessee shall commence active operations upon the said lands "within one year from the date of the commencement of the said term "and shall work a mine or mines thereon within two years from that "date and shall thereafter continuously and effectually work any "mine or mines opened by him unless prevented from so doing by "circumstances beyond his control or excused from so doing by the "Minister."

Held, that, read in the light of R. S. 1906, c. 50, sec. 47 and certain regulations made thereunder on 11th June, 1902, the power of the Minister to excuse the lessee did not extend to those active operations required to be done by the lessee within one year from the commencement of the term demised, but was limited to the obligations on the part of the lessee to work a mine or mines within two years and afterwards, as expressed in the provision of the lease in question.

2. Where the lessee under a lease such as that above mentioned has been guilty of a breach of conditions operating a forfeiture and is not in occupation of the demised area, the fact of the Crown leasing the same to another is a sufficient re-entry for the purpose of determining the prior lease.

3. While it is competent to the Court to make a merely declaratory order in any cause or matter, it is proper for it to decline to entertain proceedings wherein the party instituting the same attempts to forestall proceedings against him by the defendant, and merely seeks to obtain a declaration that the defendant would have no good cause of action against him in subsequent proceedings between the parties. *Dyson* v. *Attorney-General* (1911) 1 K. B. at p. 410 relied on.

THIS was an information exhibited by the Attorney-General of Canada to obtain a declaration that a

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certain lease of coal-mining areas in Dominion lands had been properly cancelled by the Crown; or if this was not so, then in the alternative for a declaration that a subsequent lease was issued improvidently, and should be cancelled.

The facts are stated in the reasons for judgment.

December 9th and 10th, 1913, and January 21, 1914.

The case was heard before the Honourable Mr. Justice Cassels, at Ottawa.

R. G. Code, K.C., for the plaintiff.

E. D. Armour, K.C., and *J. Travers Lewis*, K.C., for the defendant Paulson.

E. Lafleur, K.C., and *A. Falconer*, K.C., for the defendant The International Coal and Coke Company. Ltd.

CASSELS, J., now (April 15th, 1914) delivered judgment.

This is an information exhibited on the part of His Majesty setting forth that on or about the 8th August, 1904, the plaintiff represented by the Honourable the Minister of the Interior duly demised and leased to the defendant Paulson, by indenture in writing, all mines, seams, and beds of coal, in or under the following parcel or tract of land, that is to say,—the east half of section twenty-nine (29), township seven (7), range four (4), west of the fifth principal meridian. The information then sets out clauses 12 and 17 of the lease. Clause 12 reads as follows:

> " That the lessee shall commence active operations
> " upon the said lands within one year from the date
> " of the commencement of the said term and shall
> " work a mine or mines thereon within two years
> " from that date and shall thereafter continuously

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"and effectually work any mine or mines opened by "him unless prevented from so doing by circum- "stances beyond his control or excused from so doing "by the Minister."

The information then proceeds to state that on the application of the defendant Paulson, extensions of time under clause 12 were granted until on or about the 11th March, 1909. The said defendant Paulson applied for a further extension of time to July 15th, 1910, under the provisions of clause 12, within which to begin operations under the said lease.

The information proceeds to allege that the Minister by memorandum dated the 1st September, 1909, advised Paulson that he, Paulson, having failed to comply with the provisions of clause 12, the Department had been obliged to cancel the said lease.

The information further alleges that in view of representations made it had been decided to re-instate the lease in favour of the said Paulson. That subsequently the plaintiff being advised that the said lease had become and was in fact forfeited and void, granted a lease of the said premises to the defendant, the International Coal and Coke Company, Limited, bearing date the 28th April, 1910.

The information proceeds to allege that the defendant Paulson refused to recognize the validity of the said cancellation, and the prayer for relief is a declaration that the lease to Paulson was cancelled and forfeited prior to the granting of the lease to the defendant the International Coal and Coke Company, Limited, and that no obligation was created binding upon the plaintiff by the letter of renewal of the 28th January, 1910. In the alternative the plaintiff asks if the said lease to Paulson was not properly cancelled the subsequent lease to the Coal Company should be

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cancelled as having been issued improvidently. No relief is asked against Paulson for recovery of possession, but merely for the declaration above mentioned.

It is alleged in the information that prior to the issue of the lease to the defendant, the International Coal and Coke Company, Limited, to wit, on the 25th April, 1910, the defendant, the International Coal and Coke Company, Limited, by letter agreed, among other things, to indemnify the plaintiff for any expenses, loss and damage which might result from the refusal of the plaintiff to revive the lease issued to the said defendant Paulson. And by letter of the plaintiff to the defendant the International Coal and Coke Company, Limited, on the same date the plaintiff agreed to issue the lease referred to in the preceding paragraph to the defendant, the International Coal and Coke Company, Limited, subject to the undertaking and agreement to indemnify as in the said letters contained.

The defendants the International Coal and Coke Company, Limited, by their defence admit that the defendant now pleading agreed by letter of date the 25th April, 1910, to indemnify the said plaintiff as in the said letter set forth. The defendant Paulson raised various defences, amongst others, that the Minister having waived the condition that required the commencement of active operations within one year could not take advantage of any subsequent delays, also a waiver of the forfeiture by acceptance of rent and want of notice, and various other defences. The defendants the Coal and Coke Company supported the case presented on behalf of the Crown.

At the opening of the trial of the case, I suggested to the parties that this was not a case for a declaratory judgment, that the lease to Paulson had been cancelled

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and a new lease granted to the Coal and Coke Company After the argument(1), I found the reported case of *Dyson* v. *Attorney-General*, decided by the Court of Appeal in England. The following judgment of the Master of the Rolls is important. Referring to the power to make declaratory judgments, he states:

"The jurisdiction is, however, now enlarged, for "by Order xxv, r. 5, 'no action or proceeding shall "be open to objection on the ground that a merely "declaratory judgment, or order, is sought thereby, "and the court may make binding declarations "of right whether any consequential relief is or "could be claimed or not.' I can see no reason why "this section should not apply to an action in which "the Attorney-General, as representing the Crown, "is a party. The Court is not bound to make a "mere declaratory judgment, and in the exercise "of its discretion will have regard to all the circum-"stances of the case. I can, however, conceive "many casses in which a declaratory judgment may "be highly convenient, and I am disposed to think, "if all other objections are removed, this is a case "to which r. 5 might with advantage be applied. "*But I desire to guard myself against the supposition* "*that I hold that a person who expects to be made* "*defendant, and who prefers to be plaintiff, can, as* "*a matter of right, attain his object by commencing an* "*action to obtain a declaration that his opponent has* "*no good cause of action against him.* The Court "may well say '*Wait until you are attacked and then* "*raise your defence,' and may dismiss the action with* "*costs.* This may be the result in the present case. "That, however, is not a matter to be dealt with on

(1) (1911) 1 K. B. 410.

"an interlocutory application. It is pre-eminently "a matter for the trial."

What the plaintiff is seeking here is just what the Master of the Rolls guards against, namely, against the supposition that he was holding that a person who expected to be made defendant, and who preferred to be plaintiff could as a matter of right attain his object by commencing an action to obtain a declaration that his opponent has no good cause of action against him. To this he suggests the Court may well say, "Wait until you are attacked and then raise your defence." That language is very opposite to the facts of this case, more particularly to the second branch of the plaintiff's information namely, to have it declared in the event of Paulson's lease not being avoided that the lease to the Coal Company should be declared void as improvident, etc. It is obvious that having regard to the undertaking of indemnity, that no claim could be made by the International Coal and Coke Company, Limited, by reason of the lease not being valid. No application was made on behalf of any of the defendants to have this question first determined, and the case proceeded to trial, the facts being practically confined to the written documents and the correspondence between the parties.

At the trial of the action all parties seemed to take for granted that under the provisions of Clause 12, herein set out, the Minister had authority to excuse the lessee from commencing active operations upon the said lands within one year from the date of the said term, and work a mine or mines thereon within two years from that date. When I came to consider the case for the purpose of judgment, I formed a strong view that such was not the meaning of the clause, but not desiring to give judgment on the point which the

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parties had not argued—I caused the counsel for the various parties to be notified that I would like to have this question argued and subsequently counsel appeared before me and argued the case.

My view is that the plain grammatical meaning of Clause 12, confines the latter part, namely, "unless prevented from so doing by circumstances beyond his control or excused from so doing by the Minister," to what the lessee has to do after two years from the commencement of the term; but the Minister could not excuse the lessee from commencing within a year or from working the mine or mines thereon within two years from that date.

The Revised Statutes of Canada, 1886, Chapter 54, provides that the school lands shall be administered by the Minister under direction of the Governor in Council. Section 47 provides that lands containing coal or other minerals whether in surveyed or unsurveyed territory, shall not be subject to the provisions of this Act respecting sale or homestead entry, but shall be disposed of in such manner and on such terms and conditions as are from time to time fixed by Governor in Council by regulations made in that behalf.

By order in council of the 11th June, 1902, in virtue of the provisions of section 47 of the *Dominion Lands Act*, the issue of leases of school lands in Manitoba and the Northwest Territories for coal mining purposes, was authorized for the development of coal mines underlying such school lands, subject to the following terms and conditions:

1. Leases of school lands for coal mining purposes, shall be for a period not exceeding ten years, etc.

3. The lessee shall in addition to the ground rent pay a royalty of ten cents per ton on all coal taken out of the mine, etc.

6. Failure to commence active operations within one year and to work the mine within two years after the commencement of the terms of the lease, or to pay the ground rent or royalty as before provided, shall subject the lessee to the forfeiture of the lease and to resumption of the land by the Crown.

These regulations will be found in the Dominion Statutes of 1903, 3 Ed. VII, XXIX.

Section 47 of the *Dominion Lands Act* was repealed by chapter 15, of 55 and 56 Vict. Section 5. There is no material difference with the exception that the lease may be granted for twenty years instead of five years.

My own view of the grammatical meaning of this Clause 12 would confine the power of the Minister to excuse to a period after the expiration of the two years. Then this construction is greatly fortified by the fact that the Governor in Council by their regulations provided that the mines must be opened and worked within two years. It was strongly contended by Mr. Lewis before me that Section 24, which provides that the school lands shall be administered by the Minister, gave power to the Minister as part of his administration to grant a lease on terms different from the provisions and regulations passed by the Governor in Council. I cannot adopt that view. However, an analagous case is that of the *Quebec Skating Club* v. *The Queen*.(1) Mr. Justice Burbidge in dealing with one aspect of the case before him states as follows:—

> "We come now to the contention that there was "a contract to allow the suppliants to go into "possession 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

(1) 3 Ex. C. R. at pp. 398 et seq.

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"that there never was 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 R.S.C., c. 22, 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 "(R.S.C. c. 55, s. 4, ss. 4 and s. 5, ss. 21). 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 was strenuously pressed before me both by Mr Armour and Mr. Lewis, that no forfeiture arises without first re-establishing their title by information of intrusion or some other proceeding. And the contention is that the rent had been received prior to the forfeiture which estopped the Crown from taking advantage of this forfeiture. An instructive case on this point, is the case of *Emerson* v. *Maddison*, (1). A

(1) 34 S. C. R. 533; (1906) A. C. 569.

reference to the judgment of the Privy Council at page 575 would show that the Crown is to be considered always in possession. The facts of that case were different in that the Crown had granted the lands to another person who had entered into occupation. In the case before me, the lease is of mining rights, and Paulson was not in occupation of what was leased to him at the time of the lease to the Coke and Coal Company.

In *Robertson's Civil Proceedings against the Crown*, (1), it is stated " Nor does the information of intrusion suppose the King out of possession, etc." But however this may be, the fact of the granting of the lease to another is sufficient re-entry. This is laid down in the case of *Baylis* v. *LeGros*, (2) and is cited in the *Dumpor's case* (3), often referred to by counsel. I therefore think that this contention is of no effect. I have referred to all the cases cited by Mr. Armour, and an analysis of all of them show that the receipt of rent prior to the forfeiture waives the forfeiture. The leading case of *Davenport* v. *The Queen*, (4) is the one most pressed upon me. To my mind there is no analogy between that case and the present. It is only necessary to consider the facts of the case to recognize this. In that case there was a deliberate concurrence of all the members of the Government in accepting the rent. The full rent for the full term of the lease was accepted. That being so the Court held that the Crown could not avail themselves of the forfeiture.

The contention put forward is that on the 8th July, 1909, a marked cheque for $96.00 payable to the order of the Deputy of the Minister of the Department of the Interior, in payment of the rental for the year ending

(1) Ed. 1908 at p. 183.
(2) 4 C. B. N. S., 539.
(3) 1 Sm. L. C. 44.
(4) L. R. 3 A. C., p. 115.

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the 15th July, 1910, for coal mining purposes of the east half of section 29, was sent to the Department. A letter was written on the 14th July, 1909, signed by Mr. Keyes, Exhibit No. 40, in which he states that he begs

> " to acknowledge the receipt of your letter of the " 9th instant, enclosing your cheque for $96.00 in " payment of the rental for the year ending the 15th " July, 1910, for coal mining purposes of the East " half Section 29, Township 7, Range 4, West 5th " Meridian, which is leased to Mr. Paul A. Paulson, " for coal mining, and to say that the amount in " question is accepted conditionally, pending a " decision in regard to the extension of time asked " for by Mr. Paulson, which cannot be settled until " the Minister's return."

On the 13th September, 1909, a letter was written to Mr. Paulson addressed to him at his place of residence mentioned in the lease; and a similar letter was also written to Messrs Lewis & Smellie of the same date, by which they were notified that the lease to Pauson had been cancelled. Messrs. Lewis & Smellie were transacting the whole business in connection with this lease and acting for and on behalf of Paulson; and it is conceded that they received this letter. I also think that the subsequent correspondence indicates that Paulson duly received the notice. It seems to me impossible to contend under the provisions of the statute and of the order in council, to which I have referred, that such a receipt of rent would be treated as waiver. If the Minister himself had no power to waive, *a fortiori* a subordinate was equally without power. I think that the lease having been cancelled there was no power on the part of the Minister to revive the lease, and that the contention, if it is

essential to the determination of the case, put forward in the information on the part of the Crown is well founded.

Moreover, I think a careful perusal of the correspondence coupled with the declaration of Paulson shows that there never was a bona fide intention on the part of Paulson of mining the lands in question unless he could obtain the consent from the defendants the International Coal and Coke Company, Limited. In one letter it is stated that he has a controlling interest in that company; but at the trial it was stated by counsel that that statement is not corrrect. The Coke Company and Mr. Paulson are at daggers drawn, and absolutely refuse and decline to confer upon Paulson any right to utilize their property for the transmission of the coal.

In order to mine the property leased to Paulson it would according to his contentions be necessary to go down about 2,000 feet, a matter that would make it absolutely impracticable commercially to mine on the location in question. It is to my mind absolutely clear that what the defendant Paulson was seeking to do, was to hold his lease without complying with the terms of it, with the view to compelling the Coke Company to buy him out. The earlier representations in the correspondence show that the excuse put forward for obtaining further extension of time was the fact that the property in question could not be mined until the coal company who had mining rights on either side of Paulson's concessions reached his location, and was always upon the representation that it would be impossible for him to commence operations until the Coke Company approached his location that the delays were obtained.

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I think the Crown is entitled to a declaration that Paulson's lease was properly cancelled for the reasons I have stated. Had the proper course been pursued and the Crown waited until a petition of right for damages, if a fiat were granted, had been brought, Paulson's damage would have been nothing or merely technical. I think under the circumstances of the case each party should bear their own costs.

Judgment acordingly.

Solicitors for the plaintiff: *Code & Burritt.*

Solicitors for the defendant Paulson: *Lewis & Smellie.*

Solicitors for the defendant The International Coal and Coke Company, Ltd.: *Fleet, Falconer & Company.*

IN THE MATTER OF the Petition of JONKOPINGS OCH VULCANS TANDSTICKSFABRIKSAKTIEBOLAG of Westra Storgatan, Jonkoping, Sweden, Manufacturers.

AND IN THE MATTER of the Specific Trade Marks "VULCAN SUPERIOR," "VULCAN UNIVERSAL" and "VULCAN GLOBE PARAFFIN" used by the Petitioners in connection with the sale of matches which the Petitioners make and sell in their trade.

AND IN THE MATTER of the General Trade-Mark "VULCAN" registered by the firm of N. Quintal & Fils and assigned to the Firm of Bergeron, Whissell & Cie, of the City of Montreal, in the Province of Quebec.

1914
May 12.

Trade-Mark—Effect of Registration—Assignment in gross—Ownership in Claimant—Differences between English and Canadian Trade-Mark Statutes considered—Registration of General Trade-Mark "Vulcan" in, No. 21, Fol. 4846 Canadian Register varied.

1. Registration under the Canadian Trade-Marks Act confers no title in the mark registered; it is merely a pre-requisite to the right to bring an action.
2. A trade-mark cannot be assigned in gross. Dictum of Proudfoot, V.C., in *Smith* v. *Fair*, 14 O. R. 736, disapproved. *Gegg* v. *Bassett*, 3 O. L. R. 263 adopted.
3. The applicant for registration of a trade-mark in Canada must be the proprietor of the mark. *Partlo* v. *Todd*, 17 S. C. R. 196, and *Standard Ideal Co.* v. *Standard Sanitary Mfg. Co.* 27 T. L. R. 63, referred to.

Difference between English and Canadian statutes relating to trade-marks discussed.

The general trade-mark consisting of the word "Vulcan," registered in Canadian Trade-Mark Register No. 21, Fol. 4846, limited by excluding therefrom the use of the word "Vulcan" as applied to matches.

PETITION to have certain trade-marks registered. The facts upon which the application was based are stated in the reasons for judgment.

January 13th, 1914.

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In re VULCAN TRADE-MARK.

Reasons for Judgment.

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

J. F. Edgar for petitioners

J. A. Ritchie for objecting parties;

R. V. Sinclair, K.C., for Minister of Agriculture:

CASSELS, J. now (May 12th, 1914) delivered judgment.

The present petitioners, styled in English the Vulcan Match Manufacturing Company, presented a petition to have it declared that they are entitled to have placed on the Register of Trade-Marks, three specific trade-marks set out in the petition. The prominent feature of the alleged trade-marks is the word "Vulcan" as applied to matches. The application was made on the 21st November, 1910, and rejected by the Minister. The ground of rejection, as stated, is that by an application dated on the 23rd January, 1894, one Joseph E. Quintal on behalf of the firm of N. Quintal et Fils, applied for and registered as a general trade-mark the word "Vulcan". The certificate of the Registrar of Trade-Marks, which bears date the 24th January, 1894, certified that "this trade-mark "(general) which consists of the word "Vulcan", as "per the annexed application, has been registered in "the Trade-Mark Register as Number 21, Folio 4846, in accordance with the *Trade-Mark and Design* "*Act*, by N. Quintal et Fils of the City of Montreal, "province of Quebec."

It is important to refer to the application which is as follows

"I, Joseph E. Quintal, of the City of Montreal, in "the district of Montreal, and province of Quebec, 'one and on behalf of the firm of N. Quintal et Fils, "carrying on business in the said City as wholesale

"importers of wines, liquors cigars, groceries, etc. "do hereby furnish a duplicate copy of a general "trade-mark in accordance with sections 4 and 9 of "the *Trade-Mark and Design Act*, which I verily "believe to be the property of the said firm, on account "of its having been the first to make use of the same. "The said general trade-mark consists of the word "Vulcan" which can be printed in any form of type "on labels, wrappers or packages, or be stamped, "branded, or stencilled in any way on goods manufac- "tured and sold by the said firm."

It appears from the evidence that it is usual for those engaged in the wholesale grocery business to sell as part of their stock in trade matches. It is important, however, to bear in mind that no reference to matches is made in the application—and later on I will point out that, as far as the evidence shows, no matches labelled with the word "Vulcan" were in reality sold by the respondents with the label "Vulcan" until about the time of the trouble between the respondents Bergeron, Whissell & Cie., the assignees of N. Quintal et Fils, and the petitioners.

It would appear that about the 16th December, 1910, the petitioners asked the firm of Bergeron, Whissell & Cie., for a consent for the registration by the petitioners of their specific trade-marks.

The petitioners pray:—"(a) That the entry in the Register of Trade-Marks, of the said general trade-mark "Vulcan" by N. Quintal et Fils, be expunged, or (b) That the said entry be varied by limiting the said general trade-mark "Vulcan" to a specific trade-mark applicable to the manufacture and sale of a class or classes of merchandise of a particular description other than matches."

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Reasons for Judgment.

Evidence was taken on Commission in Sweden on behalf of the petitioners. At the trial before me, on behalf of the respondents, Mr. Ritchie objected to a portion of the evidence taken on Commission, as being hearsay evidence. I admitted the evidence subject to the objection. No other objection was made to the reception of this evidence.

It is clear from the evidence, that these petitioners The Vulcan Match Manufacturing Company, have been carrying on a most extensive business in matches, at all events as far back as the year 1870. Their business has been a continuous one. Their trade-mark, a prominent part of which is the word "Vulcan" was registered in England as far back as the year 1880, and in the United States as far back as the year 1883. A list of the places, and the dates of registration, are annexed to the evidence taken under the commission

As early as 1882 shipments of matches by the petitioners having the trade-mark "Vulcan" on the boxes were sent to Canada. There were further shipments in June of 1885. Subsequent shipments were made in August, 1895, in September of 1895, in October, 1895, in November, 1895, and in February, 1896.

The contention put forward on the part of the respondents is that the petitioners abandoned their right to the trade-marks by reasons of the length of time which elapsed between the various shipments; but it is to be borne in mind that no intention to abandon can reasonably be inferred in this case as the petitioners were continuously engaged in the manufacture and the sale of these matches practically the world over. Sales, according to the evidence, have amounted in value to about one million pounds sterling, and

according to the evidence of Palmgren at the time of giving his evidence the sale of goods was at the rate of over one hundred thousands pounds sterling per annum.

In the case of *Mouson & Co.* v. *Boehm*, (1) the judgment of Chitty J. is very pertinent—the facts in this case being much stronger against any idea of abandonment than in that case.

At the trial before me, Mr. Dandurand, a member of the firm of Bergeron, Whissell & Co. gave evidence. He sets out a great number of articles in which the firm have dealt in and to which the trade mark "Vulcan" was applied. He is asked in regard to matches, and he states:

"Q. And for some years you have used the word "Vulcan in connection with matches, as I understand? "A. Yes.

"Q. For the last three or four years? A. Yes."

This testimony was given on the 13th January, 1914. The last three of four years, if taken back would mean to the years 1910 or 1911, later on in cross-examination the question is put to him:

"Q. The first time you recollect the word "Vulcan" "being applied to matches was since 1907? A. Yes.

"Q. There is no doubt about that? A. No doubt." "They were selling matches apparently continuously.

"Q. Then you remember getting labels made since 1907? A. Yes by our own firm.

"Q. For your own firm? A. Yes.

"Q. These labels, such as the ones you produced "here, they were made since 1907? A. Yes.

"Q. And those were the first Vulcan labels that you "recollect seeing for matches? A. Yes.

"Q. You never saw any Vulcan labels for matches "before that? A. Never.

(1) 26 Ch. D. 398.

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Reasons for Judgment.

"Q. Never? A. No.

"Q. And you had those made since 1907. When "would it be—1911? A. About three years ago.

"Q. About 1911? A. Three or four years ago."

The importance of this evidence in my opinion is its bearing on the question of alleged abandonment. I have called attention to the fact that in the application for registration of the trade-mark in 1894, matches are not stated as part of the business; and as the word "Vulcan" was applied to matches by the respondents only within three or four years, it is not reasonable to impute to the applicants any intentional assent to the rights of the respondents to use this word as a trade-mark as against the rights of the petitioners.

It always has to be borne in mind that the registration under the statute confers no title. It is merely a pre-requisite to the right to bring an action.

I am of opinion that these petitioners are entitled to have their three trade-marks registered, and I so adjudge.

The question that remains to be determined, namely, how the registered trade-mark of the respondents is to be dealt with is one of difficulty. The trade-mark of the respondents, as I have mentioned, is a general trade-mark.

In the case of *Re Auto Sales Gum and Chocolate Company*, (1) I considered the question of the jurisdiction of this court to vary or rectify a trade-mark. In a later case of *Re Gebr Noelle's* Application, (2) I have given my views as to the difference between a general trade-mark and a specific trade-mark.

On the trial before me Mr. Edgar read a portion of the depositions of Mr. Joseph Dandurand on his examination for discovery. Mr. Dandurand stated:

(1) 14 Ex. C. R. 302. (2) 14 Ex. C. R. 499.

"Q. You have consented to the registration of "Vulcan" as a trade mark by others, have you not? "A. Yes Sir.

"Q. On payment of a consideration? A. Yes, on "a certain consideration."

The attention of the respondents had not been called to the effect a sale to others of the right to use the trade-mark might have on the validity of the trade-mark. See *The Bowden Wire Co.* v. *The Bowden Brake Co.* (1)

Nice questions would arise as to whether the law as applied in England, apply under our Canadian statute to a general trade-mark. I thought it fair to the respondents that they should have liberty to file an affidavit setting out dates of any assignments and consideration received for such assignment. It now appears that any sales made by the respondent firm of the right to use the word "Vulcan" were in regard to articles of manufacture not covered by their trade-mark,—according to the views I have expressed in the case referred to of Gebr Noelle's application. I have received a communication from the counsel of the petitioners to the effect that they do not desire to have the trade-mark of the respondents expunged except so far as applicable to matches. I would be very loth to declare that the trade-mark of the respondent should be expunged from the register in toto. The consent of the petitioners assists in relieving me from having to so decide.

The Canadian statute differs materially from the English Act.

In *Smith* v. *Fair*—a decision of the late Vice-Chancellor Proudfoot, (2) there is a dictum which would rather indicate that the Vice-Chancellor's view was

(1) 30 R. P. C. 581. (2) 14 O. R. 736.

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that there must have been evidence of prior user in Canada. He also apparently is taken to have held that under our statute a trade-mark might be assigned in gross. This is merely a dictum and it was held the other way in the case of *Gegg* v. *Bassett*, (1) by Lount, J. I have no hesitation in adopting the view of Mr. Justice Lount. It is thoroughly in accord with the opinions of the English judges. It is quite true that the Canadian statute permits an assignment of a trade-mark, but it would be contrary to all rule applicable to trade-marks if a mark could be assigned to somebody who would use it upon goods neither manufactured nor sold by the owner of the trade-mark. It would have the effect of leading to misrepresentation. I may say in passing that the Berliner case, referred to in *Smith* v. *Fair*, is a case of passing-off. If the judgment on appeal cited by Proudfoot, V.C., is looked at it will appear that it was not decided on the ground of infringement of trade-mark.

In *Spilling* v. *Ryall*, (2) the late Mr. Justice Burbidge guards himself against expressing any opinion as to what might be the result were the goods of the owner of the prior trade-mark in the United States placed upon the Canadian market.

The late Mr. Low, Deputy Minister of Agriculture, as far back as 1888, in two cases, namely, *Bush Manufacturing Co.* v. *Hanson*, (3) and *Groff* v. *The Snow Drift Baking Powder Co.* (4) expressed his views on the question. His opinion apparently being that the applicant must be the proprietor of the trade-mark the world over in order to entitle him to ownership of the trade-mark.

In tracing the Canadian statutest here does not appear to be any substantial difference between the

(1) 3 O. L. R. 263.
(2) 8 Ex. C. R. 195.
(3) 2 Ex. C. R. 557.
(4) 2 Ex. C. R. 568.

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Trade-Marks Act at present in force and the earlier Acts. The present statute provides that the Minister may from time to time, subject to the approval of the Governor-in-Council, make rules and regulations and adopt forms for the purposes of this Act respecting trade-marks and industrial designs, and such rules, regulations and forms circulated in print for the use of the public shall be deemed to be correct for the purpose of this Act.

The earlier statute of 1872 practically is the same. The form approved pursuant to the terms of the statute is that, "I hereby request you to register in the name of.....a general trade-mark, which I verily believe is mine on account of having been the first to make use of the same, etc. I hereby declare that the said general trade-mark was not in use to my knowledge by any other person than myself at the time of my adoption thereof.

I do not find in any of the forms given under any of the preceding statutes any limitations confining such use to Canada. I mention this because in one case a reference was made to the fact that the Commissioner had accepted the application which on its face stated that there was no knowledge of user in Canada.

Under Section 11 of *The Trade-Marks Act*, it is provided that the Minister may refuse to register any trade-mark, if he is not satisfied that the applicant is undoubtedly entitled to the exclusive use of such trade-mark.

The applicant for registration of the trade-mark must be the proprietor. The case of *Partlo* v. *Todd*, (1) deals with the question in an exhaustive manner. Reference may also be made to the case of the *Stan-*

(1) 17 S. C. R. 196.

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dard Ideal Co. v. *The Standard Sanitary Manufacturing Co.* (1) where the Judicial Committee of the Privy Council dealt with the same question.

I have pointed out that the Engl'sh statute differs from the Canadian statute. Prior to the statute in England of 1875, the courts there adopted what is usually styled the "three trade-marks" rule. This seems to have been based upon an order of the Comptroller, or the other official who had charge of the matter.

In two cases, *Re Walkden Aerated Waters Application,* (2) and *Re Hyde & Co.'s Trade-Mark* (3) the late Master of the Rolls, Jessel, has explained the reason of this rule. (4)

Under the English Act an applicant can apply for a trade-mark for the particular articles under each class. There are a long series of decisions in the English reports in which applications were made for registration of trade-marks, which would embrace all the articles mentioned in the particular class,—and where the applicant for the registration although obtaining the registration failed to use the trade-mark in respect to one or other of the particular articles. The courts in England have in such cases rectified the register by expunging from the trade-mark register the particular article not so used. For instance, in *Re Hart's Trade Mark* (5) "Condensed Milk" was covered by the registration but not used. The register was amended by striking out "Condensed Milk" from the register.

In *Hargreaves* v. *Freeman,* (6) *Anglo-Swift Condensed Milk Co.* v. *Pearks,* (7) and *Edwards* v. *Dennis,* (8)

(1) 27 T. L. R. 63.
(2) 54 L. J. Ch. 394.
(3) 54 L. J. Ch. 395.
(4) Sebastian, 5th ed. at page 71, also deals with the question.
(5) 19 R. P. C. 569.
(6) 3 Ch. D. 39.
(7) 20 R. P. C. 509.
(8) 30 Ch. D. 454.

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and in numerous other cases, a limitation has been imposed upon the trade-mark excluding from its scope articles which might have been covered.

On the whole, having regard to the facts of the case, I will direct that the general trade-mark be limited by excluding therefrom the use of the word "Vulcan" as applied to matches. The respondents will not be injured to any great extent, as the correspondence shows they were willing to sell the right to the present petitioners for a comparatively small sum.

I think the respondents are liable to pay the costs of the petitioners, and I so order. I give no costs for or against the Minister of Agriculture.

Judgment accordingly.

Solicitor for Petitioner: *J. F. Edgar.*

Solicitors for objecting parties: *St. Germain, Guerin & Raymond.*

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Dec. 19.

MICKELSON SHAPIRO COMPANY AND HENRY DOERR.....PLAINTIFFS;

AND

MICKELSON DRUG AND CHEMICAL COMPANY LIMITED AND ANTON MICKELSON.....DEFENDANTS.

Trade-mark—Application for—Drawing—Infringement—Limited jurisdiction of the Exchequer Court of Canada—Passing-off—Remedy.

In applying for a trade-mark under the Canadian statute the applicant must describe in writing what he claims as his mark. A drawing must also be filed. But the claim in the written application cannot be extended by reason of something appearing in the drawing which has not been claimed.

2. The Exchequer Court of Canada has jurisdiction to restrain any infringement of a trade-mark but has no jurisdiction to entertain an action seeking damages for passing off goods of the defendant as those manufactured and sold by the plaintiff.

3. Trade-mark for gopher poison, registered in Canadian Trade-mark Register No. 79, folio 19,498, ordered to be expunged.

THIS was an action begun by statement of claim seeking an injunction against the defendants to restrain them from infringing the plaintiffs' trade-mark, and an order to expunge the registration of the defendants' trade-mark.

The facts are stated in the reasons for judgment.

November 16, 1914.

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

W. L. Scott and *A. J. Fraser* for the plaintiffs.

F. H. Chrysler, K.C., and *G. St. J. van Hallen* for defendants.

CASSELS, J., now (December 19, 1914) delivered judgment.

The statement of claim was filed by the plaintiff company, a corporation incorporated under the laws of the state of Minnesota, against the defendants, a corporation incorporated under the laws of Manitoba with its head office in the city of Winnipeg, and one Anton Mickelson.

By their statement of claim the plaintiffs claim an injunction against the defendants restraining them from infringing their trade-mark, which I will subsequently refer to. They also seek an order that the registration of the trade-mark by the defendant company be expunged.

The case came on for trial before me at Ottawa on the 16th day of November last, when certain evidence was adduced, and counsel for the plaintiffs and defendants undertook to furnish authorities in support of their respective contentions.

I have lately been furnished with a full memorandum of authorities, both on the part of the plaintiffs and on the part of the defendants, and have considered the authorities together with many others, but I regret that I am unable to come to a different conclusion from that which I expressed at the trial, namely, that as a matter of trade-mark law the defendants' trade-mark does not infringe that sued upon by the plaintiffs. I would have been glad, under the circumstances of this case, to have been able to come to a different conclusion.

The Exchequer Court has no jurisdiction in passing-off cases. The Court has jurisdiction to restrain any infringement of a trade-mark. If there is no infringement of the trade-mark, no matter what the wrong may be, the remedy must be sought in some other tribunal.

The *Trade-Mark and Design Act* (Chap. 63, R.S. 1906) provides by section 20,—

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"That no person shall institute any proceeding to "prevent the infringement of any trade-mark unless "such trade-mark is registered in pursuance of the "Act."

By the 13th section the proprietor of a trade-mark may on forwarding to the Minister a drawing and description in duplicate of such trade-mark, etc., be entitled to have his trade-mark registered and thereafter to have the exclusive right to use the trade-mark to designate the articles manufactured or sold by him.

The trade-mark upon which the plaintiffs sue and which duly became by assignment the property of the plaintiffs, was applied for in accordance with the provisions of the statute, and a certificate of registration was granted on the 25th day of May, 1909.

The application for the trade-mark is in part as follows:—

The applicant "hereby requests you to register "in the name of the Mickelson Chemical Company "a specific trade-mark, to be used in connection "with the sale of a poison for gophers and prairie "dogs, which the said Mickelson Chemical Company "verily believes to be its property on account of it "having been the first to make use of the same." "The said Mickelson Chemical Company hereby "declares that the said specific trade-mark was not in "use to its knowledge, or to the knowledge of any of "its officers, by any other person than by the said "corporation."

"The said specific trade-mark consists of an oval "cut in which appears four gophers in the grass, one "of which has its front paws resting on the head of "a cylindrical can."

The description which I have just referred to is very clear and unmistakable, and if this trade-mark is as

specified there is no room to question the fact that the defendants do not infringe the trade-mark of the plaintiffs as a matter of trade-mark law.

The defendants' trade-mark was registered on the 16th March, 1914. The application of Anton Mickelson defines his trade-mark as follows:—

"The said Specific Trade-Mark consists of the "words "Kill-Em-Quick" hyphenated as above "written accompanied by the fac-simile signature "of the owner preferrably written across the words ""Kill-Em-Quick"; the letters may be in red as "shown in the drawings, etc."

The application for the plaintiffs' registration in addition to the statement of what the said specific trade-mark consists of, has the following:—

"A drawing of the said specific trade-mark is "hereunto annexed."

When the drawing is referred to, there appears to be written on the cylindrical can in small letters the words "Mickleson's Kill-Em-Quick Gopher Poison." If these words form part of the plaintiffs' trade-mark I would grant them relief, but I do not see how it can be held that they form part of the trade-mark in question. The statute is specific in requiring a description. The description is specific in its terms, and does not claim these words as part of the trade-mark. According to patent law it is clearly settled that in regard to a patent it is the specification which governs, and the drawings are merely for the purpose of illustration. (1).

In an application for a trade-mark the drawing might disclose more than the applicant desires to claim as a trade-mark, but in my judgment where the application is described as in the trade-mark upon which the plaintiff relies, it cannot be extended by reason of

(1) See Hogg v. Emmerson, 6 How. p. 337.

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something appearing on the drawing which has not been claimed.

Mr Scott strongly argues that the words "Mickleson's Kill-Em-Quick" have acquired in favour of the plaintiffs a secondary meaning, by the continuous length of sales. This, however, does not touch the point in question. I am not called upon in this case to decide that the plaintiffs are entitled to a registration of the trade-mark by reason of its having acquired a secondary meaning. It is time enough to consider that question if it ever arises. All that at present I am dealing with is to ascertain as far as I am able what is the trade-mark that they have registered.

The case of *De Kuyper* vs. *Van Dulken*, (1) is very much in favour of the defendants' contention. That case appears to me to be stronger in favour of the label in question forming part of the plaintiffs' trade-mark in that particular case. It was shown in the drawings, and something necessarily had to be used in order to affix the trade-mark to the bottle. Nevertheless the majority of the Supreme Court in the judgment delivered by Mr. Justice King, held that the drawing in question formed no part of the trade-mark in question in that case. Stress was laid upon the fact that the statute required a description and a drawing. It is quite true that as appears in the judgment of Mr. Justice King he apparently was of the opinion that if a label was claimed it should have been specifically claimed by a separate application, and that to a certain extent differentiates the case from the one before me. If I am right in my view as to what the plaintiffs obtained by their registration, then I think the numerous cases cited by Mr. Scott have no application. In all the cases, other than the passing-off cases, the

(1) 4 Ex. C. R. 71, and 24 S. C. R. 114.

plaintiff was entitled to the trade-mark claimed. The question was whether the defendant infringed.

In *Kerly on Trade-Marks*, for instance, at page 277 Mr. Kerly cites certain of the cases; and on page 278 he sums them up in this way :—

"The cases cited are cases where the name applied "to the opponent's or plaintiff's goods was taken "from the device used as a trade-mark."

"Take for instance, for illustration, a trade-mark "consisting of the full-length figure of a milkmaid "carrying two pails, one on her head and one in her "right hand, with the words *milkmaid brand* above "it, was registered for condensed milk, etc., and the "goods upon which it was used were known as the "*milkmaid or dairymaid* brand."

The goods obtained that name in the market by reason of the trade-mark.

Subsequently a trade-mark "consisting of a half-length figure of a woman carrying a pail under her right arm, with the words *dairymaid* at the side of the figure, was registered for butterine, etc."

And the Court granted an order "confining the second registration to goods other than those included in the first, and to restrain the use of the second mark upon any of the goods for which the first was registered."

In the case cited by Mr. Scott, *In re La Société Anonyme des Verreries de L'Etoile* (1), the plaintiff's trade-mark was the figure of a star, and his glass came to be known as star glass, although those words did not appear on the trade-mark. The defendant was restrained from using the words "Red Star Brand" for glass on the ground that it was an infringement of the plaintiff's mark.

(1) (1894) 1 Ch. 61; (1894) 2 Ch. 26.

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It is obvious that the figure of a star with the continous user was infringed by a trade-mark which sought to register in words what was practically shown by the figure.

I therefore dismiss such portion of the plaintiffs' case as relates to their claim for an infringement of the trade-mark. I think that the plaintiffs are entitled to have the trade-mark registered, and claimed by the defendants, expunged from the register. In the first place I do not think that it is the subject-matter of a trade-mark at all. The evidence is clear that the words "Kill-Em-Quick" had been used for years before plaintiffs' application, for the same class of goods by numerous other persons. The putting of a man's name over them would not constitute a valid trade-mark; but furthermore, in the face of the assignments to the plaintiffs, it was a fraud on the part of Mickleson to apply for registration of his trade-mark.

As I pointed out, the trade-mark upon which the plaintiffs sue was registered on the 25th May, 1909. It came direct to them through Mickleson. As far back as May, 1909, the words "Mickleson's Kill-Em-Quick" was shown upon the can referred to in the plaintiff's trade-mark. I have to hold that that did not form part of the plaintiff's trade-mark, but nevertheless it can be utilized in getting rid of the trade-mark registered by the defendants. I order that this trade-mark be expunged from the register.

Under the circumstances of the case each party succeeding and failing in part, there will be no costs to either party of the action or of the application to expunge.

Judgment accordingly.

Solicitors for the plaintiffs: *Moren, Anderson & Guy.*

Solicitors for the defendant, Anton Mickleson: *G St. J. van-Hallen.*

Solicitors for the defendant Mickleson Drug & Chemical Company: *Campbell, Pitblado, Haig, Montague & Drummond-Hay.*

1914
Dec. 7.

THE KING ON THE INFORMATION OF THE ATTORNEY GENERAL FOR THE DOMINION OF CANADA, —PLAINTIFF,

AND

MARGARET YOUNG WILSON, ALEXANDER WILSON AND SAMUEL WILSON, EXECUTRIX AND EXECUTORS OF THE ESTATE OF ALEXANDER WILSON, DECEASED, ET AL. DEFENDANTS.

Expropriation—Water-lot—Public Harbour—Compensation—Market Value—Approval of Erections by Crown—Expectation of Approval as Element of market value.—"Reinstatement."

In assessing compensation for lands compulsorily taken under expropriation proceedings any "special adaptability" which the property may have for some use or purpose is to be treated as an element of market value. *The King* v. *McPherson*, 15 Ex. C. R., 215 followed. *Sidney* v. *North Eastern Railway Co.* (1914) 3 K.B.D. 629 referred to.

2. In such cases the Court should apply itself to a consideration of the value as if the scheme in respect of which the compulsory powers are exercised had no existence. *Cunard* v. *The King*, 43 S. C. R. 99; *Lucas* v. *Chesterfield Gas & Water Board* (1909) 1 K. B. D. 16; *Cedar Rapids Mfg. Co.* v. *Lacoste* (1914) A. C. 569, referred to.

3. The owner of a water-lot in a public harbour under a patent from the Crown granted before Confederation cannot place erections thereon without the approval of the Governor in Council as required by Cap. 115, part 1 of R. S. 1906.

Held, that the market value of the water-lot is the proper basis for assessment of compensation, but while that value may be enhanced by the hope or expectation of obtaining authority to erect structures on the lot where there is no evidence of market value to guide it the Court will not assess compensation on a hope or expectation which cannot be regarded as a right of property in the defendant. *Lynch* v. *City of Glasgow* (1903) 5 C. of Sess. Cas. 1174; *May* v. *Boston*, 158 Mass. 21; *Corrie* v. *McDermott* (1914) A. C. 1056 referred to.

4. The doctrine of "reinstatement" in compensation cases considered.

THIS was a case arising out of the expropriation of certain lands for the Ocean Terminal Scheme of the Intercolonial Railway at Halifax, N.S.

The facts are stated in the reasons for judgment.

October 8th and 22nd, 1914.

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Reasons for Judgment.

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

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

H. Mellish, K.C., for the defendants.

CASSELS, J., now (December 7th, 1914) delivered judgment.

This is one of several cases tried before me at Halifax, between the 8th and 22nd October last. There were a series of expropriations on behalf of the Dominion Government in connection with large works undertaken with the object of providing the City of Halifax with large terminal accommodation. Millions of dollars are being spent in connection with these works, the object being to have terminal accommodation in connection with the Intercolonial Railway. For these terminals consisting of a breakwater, and several wharves with warehouses, slips, etc., it became necessary to expropriate a large area of land. Various disconnected properties were expropriated on the part of the Crown. The information embraces all of the properties of Wilson's expropriated. They consist of what is known as the wharf premises, this being the main property. The other properties, of which there are several set out in the information, are house property.

On page five of the information the Crown sets out in the paragraphs from "a" to "g" the various sums offered for these properties.

The total amount tendered by the Crown is the sum of $83,250. The amount claimed by the defendants in paragraph 5 of the statement of defence, shows a total claim of $410,500.

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THE KING v. WILSON.

Reasons for Judgment.

The plan of expropriation was filed on the 13th February, 1913, On the 2nd October, 1913, the Crown advanced to the defendants the sum of $30,000. on account.

It may be well to notice what is more fully brought out in the case of *The King* v. *Boutilier*, (unreported) that on the 30th October, 1912, a public announcement of the proposed scheme was made in Halifax by the Minister of Railways acting for the Premier, and the details of the scheme appeared in the daily papers of the following day. Previously to the announcement, at the request of the Government, a committee of leading merchants of Halifax had been convened by the President of the Board of Trade to consider the proposed plan of the Government. The scheme was approved of, and as I have mentioned the announcement was made on the 30th October, 1912. I mention this fact as there are references in the examination and argument of Mr. Mellish, K.C., counsel for the defendants, referring to this public announcement; and a good deal of stress is laid by counsel upon the enhancement of properties by reason of this announcement—and the claim is put forward that between this date, the 30th October, 1912, and the filing of the plan, the property in question had risen in value.

Before proceeding to deal with the case, it may be as well for the purposes of this and other cases, to consider the legal questions governing the decisions in this and the other cases.

In the case of *The King* v. *McPherson* (1), I have stated my view in regard to the law governing these cases, as to the fixing of compensation. In addition to the *Cedar Rapids* case (2), there is a valuable exposition

(1) 15 Ex. C. R. 215. (2) (1914) A. C. 569.

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Reasons for Judgment.

of the law in the case of *Sydney* v. *North Eastern Railway Co.*, (1). Strangely enough, this case was argued and decided after the decision in the *Cedar Rapids* case, but no reference is made to it. It deals in a very clear way with the question of special adaptability. Mr. Justice Sherman in that case expresses a view entirely in harmony with what I have frequently stated in reported judgments, namely, that special adaptability is nothing more than an element of market value.

A farm in the neighbourhood of a large city and almost certain within a short time to come into the market for building purposes in the city, has special adaptability for building property, and the value given to it in the market would have regard to that.

Another point which I think may be accepted as clearly settled is, in estimating the compensation to be awarded for property taken under compulsory powers, you are to apply yourself to a consideration of the value as if the scheme under which the compulsory powers are exercised had no existence. This is laid down in *Cunard* v. *The King*, (2) by Mr. Justice Duff; and also by Mr. Justice Moulton in the *Lucas* case, (3). It was subsequently approved of and affirmed by the Privy Council in the *Cedar Rapids* case. (4).

In the case of *The King* v. *Bradburn*, (5) I have dealt with the question of what forms a navigable river, and I do not wish to repeat what I have there stated. I have also considered the effect of the provisions of Chap. 115 of the Revised Statutes, 1906, dealing withthe right to place obstructions upon navigable waters.

(1) (1914) 3 K. B. D. 629.
(2) 43 S.C.R.99.
(3) (1909) 1 K.B. 16.
(4) (1914) A.C. 569.
(5) 14 Ex. C.R. 432.

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The water lots in question in these actions form part of the Harbour of Halifax. This is conceded. Under the provisions of Section 7, Chapter 115, of the Revised Statutes of Canada, 1906, approval of the Governor in Council must be obtained before the owner of these water lots can place any erections upon them. The owners by grants prior to Confederation, have obtained patents which have granted to them the fee in the bed of these water lots, extending out a considerable distance from low water mark. While the grantees own the bed of these water lots, they are not entitled to place erections thereon without the approval required by the statute. The value of these water lots has to be ascertained by reference to the market value, if in point of fact there was an element of market value arising by reason of the ownership of the bed. I don't think it is incumbent upon me to enter into the elements which create the market value. It is sufficient that the market value existed; and that market value may have been derived in part from the idea in the public mind that the grantee had certain rights; but assuming that there is no proof of market value, then there arises the question whether the hope, so called, of obtaining the approval above mentioned, should be taken into account as an element in arriving at the market value at the time of the expropriation. The question hardly arises in the particular cases before me, as the valuators for the Crown have in point of fact given compensation as if that right existed. It is an important question, and one that frequently arises, and which, according to the argument of the counsel for the Crown, has arisen in this case, and I propose to deal with it.

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In *Cunard* v. *The King* (1), it seems to have been assumed that this hope or expectation formed an element in the fixing of the compensation. It was not material in that case to decide this question, because in any aspect of the *Cunard* case the amount offered as compensation was more than adequate.

An important consideration has always to be borne in mind, it is this. In *Lucas* v. *Chesterfield Gas and Water Board* (2) and other cases of a similar kind, there was a complete title vested in the owners of the lands expropriated. All that was wanted was a market. But the market being there, the owner required no further addition to the title of the property of which he was being divested by the compulsory proceedings. In the case in question it is different, because to make the property fully available, there must be an approval; and the title to erect on the water lot would not be complete until such assent had been procured. At the time of the expropriation such assent was wanting, and therefore the owners of these water lots could not convey to any purchaser a right to erect structures. The proceedings are under the *Expropriation Act.*

In the case of *The King* v. *Brown* (3) I have set out the clauses of the *Expropriation Act,* and also of the *Exchequer Court Act,* bearing on the question of the expropriation. Section 47 of the *Exchequer Court Act,* Chapter 140, Revised Statutes of Canada, 1906, has to be considered. It reads as follows:

"47. The Court, in determining the amount to be "paid to any claimant for any land or property taken "for the purpose of any public work, or for injury "done to any land or property, shall estimate or "assess the value or amount thereof, at the time when

(1) 43 S. C. R. 99.
(2) (1909) 1 K. B. 16.
(3) 12 Ex. C.R. pp. 463, 471.

"the land or property was taken, or the injury com- "plained of was occasioned."

In *The King* v. *Bradburn*, already referred to, (1) I state:

"It may be a question whether a hope of this kind "(that is the assent required) is an element that "should be taken into account. The decisions in this "court and the Supreme Court follow the line of deci- "sions under the English Lands Clauses Act, except "where varied by local statute."

I have there given reference to several cases bearing on this question. It is a matter for the consideration of the statutes. In addition to the cases I have cited, I would refer to the case of *Lynch* v. *City of Glasgow* (2) in the Court of Sessions in Scotland, decided in 1903. It is a decision based upon *The Land Clauses (Scotland) Act*, 1845, which as far as I can see, is practically the same as the English *Land Clauses Acts* and of our *Expropriation Act* as construed by the various decisions in this court. The question there arising was whether the hope of obtaining a renewal of a lease was an interest that should be taken into account. The Lord President in giving judgment at page 1180 uses the following language:

"I think that the Lord Ordinary is correct in saying "that there is no reported case since the Act of 1845 "was passed, in which the chance of a tenant, or his "successor, obtaining a renewal of his lease after its "natural expiry, has been taken into account in assess- "ing compensation, although the case must have "occured very frequently, and if this be so, the present "case involves a new departure of great importance "and of far reaching consequences. It appears to me "that such a claim could only prevail if it was estab-

(1) 14 Ex. C. R. 437. (2) (1903) 5 C. of Sess. Cas. 1174.

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"lished that the chance or hope of obtaining a renewal "of a lease after its expiry, is an 'interest in the lands', "in the sense of the statutes, and I am unable to find "any warrant either in the statutes or in the decisions "for adopting this view. A lease during its currency "has some of the attributes of a real right or interest "in lands, but the chance of its being renewed by the "personal volition of the lessor, does not seem to me "to be in any reasonable sense an interest in land, "for the purposes of such a question as the present."

And Lord M'Laren puts it:

"And I am satisfied that there in no judicial author- "ity in support of the present claim—no authority for "holding that it is an element in awarding compen- "sation to a tenant that he may possibly have his "lease renewed."

He proceeds at page 1182: "In the present case, "I agree that the language of the section is broad "enough to cover a claim of expectancy, but then it "must be an expectation founded on legal right."

Then he proceeds: "Now, in the present case the "contingency which the arbiter proposes to value is "the chance that, at the termination of the lease, two "persons who are free to renew their relation and are "equally free to decline to renew it, might agree to "enter into a new relation for the same or a different "term of years. That is not a contingency founded "on any right, for it is admitted that there is no obli- "gation to renew the lease, and therefore I am of "opinion that the chance of renewal is not an element "which can be taken into account in valuing the "tenant's interest in terms of the statute."

And all the learned Judges in that case agreed.

In the case before me, as I pointed out, there is no obligation on the part of the Crown to approve of

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the construction of works. At the time of the expropriation no such right had been obtained; and if the authorities I have quoted are correctly decided, it would seem to me that this hope of obtaining such approval could not be an element within the meaning or our statute.

In the case of *The King* v. *Gillespie*, (1) which was affirmed by the Supreme Court (unreported) the owner had a piece of land bordering on a harbour. It was a natural site for a wharf. The Crown expropriated the land, and erected a wharf for their own purposes. It was strongly argued that the possibility of the owner obtaining the right to erect a wharf should be taken into account as an element in assessing the compensation. I declined to entertain that view, and my judgment was upheld by the decision of the Supreme Court.

In the *Gillespie* case there is a distinction that the owner of the land was not the owner of the water lot, if that makes any difference.

There is a case reported in the Supreme Court of California. (*The Central Pacific Railroad Co. of C lifornia* v. *Pearson.* (2). That was a case very similiar to the *Gillespie* case, in which the owner of land had riparian rights and a suitable site for wharf purposes. In that case it was claimed that compensation should be allowed on the basis that a wharf franchise might be given to the owner of the land. The Court deals with it at page 262, as follows:

"The testimony in relation to the value of wharf "privileges on the shore of the Sacramento River, 'where the tide ebbs and flows, given for the purpose "of enhancing the value of some of the land sought "to be appropriated, was also improperly received,

(1) 12 Ex. C.R. 406.

(2) 35 Cal. 247.

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"for the obvious reason that the party claiming the "compensation had no wharf franchise. The mere "fact that the party might at some future time obtain "from the State a grant of a wharf franchise if allowed "to remain the owner of the land, is altogether too "remote and speculative to be taken into considera- "tion. The question for the Commissioners to "ascertain and settle was the present value of the "land in its then condition, and not what it would be "worth if something more should be annexed to it at "some future time."

I would also refer to the case of *Corrie* v. *MacDermott* reported in November, 1914, (1)—an appeal to the Privy Council from the judgment of the High Court of Australia.

This case of *Corrie* v. *MacDermott* throws considerable light upon the question. At page 1065, Lord Dunedin, who gave the judgment of the court, states:

"And further the law of compensation being as they "have stated it, namely, the value to him as he holds" etc. There is a review of the authorities in the judgment of the court below, and also in the Privy Council judgment. I think this judgment bears out what I have endeavoured to express as my view of the law. There are two cases in the Supreme Court of Massachusetts (*Benton* v. *Brookline* (2) and *May* v. *Boston* (3) where a similar view is expressed.

During the progress of the case it would appear that those who valued the land, allowed for certain house properties expropriated on the basis of replacement. In other words, they ascertained what it would cost to build a house as it stood—they made a certain allowance for depreciation and then allowed

(1) (1914) A.C. 1056.
(2) 151 Mass. 250.
(3) 158 Mass. 21.

the owner the balance. This course was adopted in most of the cases, the result being that the owners were very liberally treated in most cases. In one or two of them I do not think sufficient was allowed. But in the greater number, more than sufficient as the difference between the market value which should govern, and the replacement, so styled by the witnesses, is considerable,—the market value being considerably below the replacement value. I apprehend that what is meant by the replacement value, is in reality the doctrine of reinstatement, which in my judgment has no application to cases where private houses, such as these in question, have been expropriated.

In *Brown* and *Allan* (2nd ed.) in the appendix, p. 656, there is reported the case of the *Corporation of Edinburgh* v. *The North British Railway Co.*—a judgment of Lord Shand, relating to an alleged claim for reinstatement for a portion of the Princess Street Gardens. This case is referred to in the case of *Corrie* v. *MacDermott.* (*Supra*).

In most of the textbooks, notably *Cripps on Compensation,* (5th ed.) and *Brown and Allan,* the case of the *School Board of London* v. *The South Eastern Railway Co.,* (1) is referred to. This is a judgment of the Court of Appeal reversing the judgment of the Divisional Court. That case turned entirely upon the provisions of a special Act. The terms of the statute were that they were to assess the cost and expenses which the School Board might prove to have been properly and necessarily incurred in acquiring another site equally suitable. In reversing the judgment of the court below, the Master of the Rolls states:

"The section of the private Act was substituted "for the provisions of The Land Clauses Act which "gave compensation *for the land taken.*"

(1) 3 T.L.R. 710.

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I know of no provisions which authorizes the application of the reinstatement doctrine to the ordinary cases of expropriation of lands as in this particular case consisting merely of isolated dwellings and the lands upon which they were situate.

At the threshold of the case, Mr. Mellish, K.C. with his usual ability, set forth his contention. He states it in this way. "In determining the values, "there is one point I may as well refer to at once, "and that is as to the basis upon which values in all "of these cases are to be assessed. Before Halifax "became in fact an Atlantic port for Canada, as we "were always hoping it would be, values were very low; "and when the policy of the government was announced "to extend the terminal facilities to Halifax, property "advanced, and advanced greatly in Halifax and "acquired a speculative value, and an actual value, "as far as prices are concerned—and I would contend "that the damages will be assessed on the basis of the "value of these properties when they were expro- "priated, that is when the expropriation plans were "filed,which was on the 13th February, 1913."

Mr. Mellish further states: "If the damages are not "assessed on that basis, the result is that everybody "else in town will have the benefit of the enhanced "value except the poor people whose land has been "taken."

He further adds: "That this claim involves taking "the water front all the way from Fairview along the "Arm for a long distance—it does not take the water "front but it goes through the lots lying along the "water front through the residential premises all "around there, and then comes the part near the "entrance to the Park, and strikes the water front and

"Halifax Harbour, and takes up practically all the "residential property on the Halifax side of the water "front, that is all the eastern side of Pleasant Street "from the Yacht Club right up to South Street and "beyond South Street taking all the residential por- "tion, and of course that scheme in itself has enhanced "the values."

This contention put forward by Mr. Mellish on behalf of his clients in an important one, and it seems to me is not well founded in law. I do not think the owners whose lands have been expropriated are entitled to any increase in value arising from the scheme. I have given the references to the law in the previous part of these reasons. Coming down to particular cases, I will deal first with that is called the business place, namely, the wharf property with the buildings situate thereon.

The business of Wilson is that of dealing in fish. According to his evidence, the largest part of his business is dealing in fresh fish. It is a business that has been in existence since the year 1878. The property consists of a certain quantity of land, and a certain amount of water filled in, upon which is situate the wharf with the various erections thereon. The land had a frontage of 216 feet, with a depth running out into the water of 300 feet. The grant of these water lots was prior to Confederation. The area of land, including that portion filled in, is 38,490 square feet. The area of land covered with water and not filled in is 26,310 square feet, as given by Mr. Clarke.

After the announcement of the proposed scheme of the Government, a Board was established, the members of which were Melvin S. Clarke, A. W. Stetson Rogers and J. C. Harris. The Chairman of the

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Board was Colonel Weston, the Manager of the Eastern Trust Company, a gentleman of very large experience in connection with real estate in Halifax. The method of procedure adopted by this Board was that these three valuators would make separate and independent valuations of the different properties, and would then meet and agree upon a sum to be offered. To the sum agreed upon in this particular case of Wilson, would be added ten per cent. for compulsory surrender, and the amount agreed upon was the amount tendered. For the wharf property and the buildings erected thereon the sum of $60,000. was tendered. The defendants claim the sum of $360,000.

In referring to the evidence, it is usually referred to as if the entrance to the harbour, namely, out towards the Atlantic Ocean, were south from the lands in question, and the lands further up the harbour north. It would be probably more correct to state South East and North West, but it is immaterial. I merely mention the fact in order to make plain what is continuously referred to in the evidence.

The Wilson case is put forward in the evidence to say the least of it in a very loose manner. Without any qualifications Wilson purports to place upon the water lot and the wharf property a value of $1,000 a foot frontage, making in all the sum of $216,000 irrespective of buildings. He bases his claim upon certain facts which he states gives the property a very great value for the purposes of his business. He is asked the following question:

"Q. You say it is the best location for your business "on the harbour front? A. Yes.

"Q. Why? A. It is close to the harbour mouth. "It is nearest to the source of supply, and has a pure

"supply of sea water that you cannot get anywhere "else in the harbour front; and besides that it has "all the facilities for handling the fish business."

These reasons are purely imaginary. It is unquestionably near to the source of supply; but the distance between this property and the property in the centre of the town is not more than a quarter of a mile. With a motor boat, travelling at the rate of eight miles an hour, it would only be $1\frac{7}{8}$ minutes distance away. His own witness Colwell from St. John, explains what is manifest, that it is an advantage to be near sea water, as the water used in the washing of fish should be pure, but he does not seem to think that ten minutes extra distance would be material.

Stillman, a witness called from Boston, places great stress upon having good water. All of this is correct, but in the case of Wilson, it is proved beyond any question that at the location we are now dealing with the water is not pure. This point can hardly be controverted in the face of the evidence of Johnson, the Assistant City Engineer, who shows that there is a sewer entering into the harbour 135 feet south from Wilson's premises, and a large sewer entering into the same harbour 700 feet further east; and this coupled with the evidence of Mr. Arthur C. Brown, with the exhibit that he produced, demonstrate to a certainty that one of the chief claims put forward, namely, the pure supply of sea water, does not exist. So that the two main grounds upon which Mr. Wilson relies, namely, the first point of call, and the pure water, are purely mythical. He is asked whether it was his intention to go out of business, and he replied as follows:

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"Q. You intend to continue your business if you "can? A. Yes, if I can get suitable premises.

"Q. You can get other premises? A. Yes, but not "nearly so suitable.

"Q. You can get them outside of the question of "pure water? A. Yes, It is a question of price largely."

When testifying in reference to his competency to speak, to give evidence as to values, referring to one of the houses, he is asked:

"Q. What would it cost to build the house? A. I "am not much of a builder. I have not had much "experience of that kind, but I have been advised by "competent men."

His estimate of $1,000 a foot frontage as the value of the water lot is purely guess work. There is not a tittle of evidence in support of such a claim.

In cross-examination he is asked:

"Q. You say its location, referring to the property "in question, is the best for two reasons; one is the "purity of the water, and the other because it is the "first point of call. These are the two main reasons "why you put a very special value on the property? "A. Yes."

He also shows that there are other fish merchants up the harbour. He shows that in addition to the Halifax property there are two other outside stations, one at Canso, and one at Hubbards. He is asked whether he has any arrangements with the fishermen to sell their output to him at these particular points, and he states:

"Yes, that they land their fish there and get paid "there."

Canso is about 120 miles, and Hubbards, about 35 miles from Halifax.

In support of the attempted valuation of $1,000 a foot frontage, one Adam B. Crosby is called. His evidence to my mind is absurd, if you take it without the explanation which he offered subsequently.

He is asked as follows:

"Q. I am assuming you have a good knowledge of "prices; what would you say would be a fair price? "A. I would say the price of that property in the "south end, because it seemed to me much better in "the south, it is developed; the properties there were "exceedingly better than they were north; in fact "the difference in the price of the properties on the "north and south was $500 a foot—the south pro- "perty being $1,500 a foot front, and the north $1,000 "a foot front.

"Q. I want your valuations of this particular pro- "perty? A. I would consider the property worth any- "where from $1,000 to $1,500 a foot, depending "upon the person who wanted it, and what they "wanted it for, and how badly they wanted it. If "they wanted that location they would have to pay "for it."

To place a value of $1,500 a foot upon the property in question, and the properties surrounding it towards the Atlantic, is contrary to all the evidence and to all the facts of the case.

He proceeds to qualify his statement in this way:

"Q. What would you say as to the advantages of "the location. A. For Mr. Wilson's business, I would "say there was no place in the City of Halifax that "could possibly give Mr. Wilson the advantages he "had in that place. No place in the port of Halifax, "I mean since the Government has taken over the "place south of him."

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He seems to ignore the fact that not only have the Government taken the property south of Wilson's but they have also taken Wilson's property. I could understand if the Government had left Wilson his property, and begun the expropriation at the south border line of Wilson's property, and spent these enormous sums of money and made these expensive improvements, it might have given a higher value to Wilson's property, but unfortunately Wilson's property has been expropriated and it does not get the benefit, which Mr. Crosby would give to it.

Mr. Mellish, in cross-examination of Mr. Clark, puts it in this way:

"Q. Before this announcement in 1912, the southern "water front of the City of Halifax, that is the pro- "perty that was taken for some years did not have any "very large value? A. No.

"Q. That is correct, is it not, the shipping was done "further away? A. Yes. It was undeveloped.

"Q. And now with the exception of Wilson's there "was no extensive business enterprise of any sort "south of the Gas Works on that water front? A. "That is right."

The Gas Works property is to the north of Wilson's, further up the harbour.

This forms all the evidence on the part of the claimants, and it utterly fails to substantiate any such claim as has been put forward. The evidence of the Crown witnesses establish beyond question, to my mind, that the allowances made were intended to be full and ample. Mr. Clark in his evidence went minutely into the valuations of wharf properties in the City of Halifax. He pointed out that the water lot in question contains reefs, the removal of which

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for wharf purposes for any large sized vessel would require an expenditure almost prohibitive. They have allowed for the land at fifty cents a square foot, and for the land covered with water thirty cents a square foot. They seem to have made this allowance to Wilson by reason of the fact that he was occupying the premises in question, and that to him carrying on his business it was worth this amount. The witness Rogers points out that the allowance of thirty cents a square foot, was made on account of the business being carried on. If there had been no business carried on ten cents a square foot would have been an ample allowance. Colonel Weston points out that all of these properties to the south were undeveloped properties. Harris points out that the additional allowance for the water front property was made on account of the business being carried on.

Mr. Clarke in his evidence admits that he allowed too little for the cold storage plant. His allowance was $2,500. It should be $4,000, an addition of $1,500. In addition to the sum allowed for the value of the premises to Wilson for the purposes of his business, I would add the sum of $5,000. There is no doubt there must be a certain dislocation of his business difficult of estimation. I would therefore add to the value of the wharf property the additional sum of $1,500 and $5,000 together with ten per cent., making the sum of $7,150, which added to the sum of $60,000 tendered would make the total for this property the sum of $67,150 and this amount I allow. I would refer to the case of *Pastoral Finance Ass. Ltd.* v. *The Minister*, decided by the Privy Council.(1)

There was considerable evidence in regard to the Levi Hart property about a third of a mile nearer the

(1) (1914) A.C. 1083.

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centre of the town, which has a depth of 700 feet. A valuable stone warehouse, which had cost originally a very large sum of money, was erected thereon. Wilson states that he had negotiations with Levi Hart for this property, and could purchase it for the sum of $60,000. It is much more valuable property than the one in question.

There was a great deal of other evidence given in detail by Mr. Clarke, of properties that could be purchased.

I am left in considerable doubt as to any loss of profits which Wilson may have suffered by reason of the expropriation. He has been for a considerable time landing his fish for the fresh market delivery at a wharf leased to him, apparently without any loss. A well established business of this nature would have a regular trade, and it is hardly likely that any of those bringing fish to the harbour of Halifax would pass over Wilson by reason of having to travel a quarter of a mile further in a motor boat. As to his curing the finnan haddies and obtaining pure sea water, the probabilities are that this part of his business would be carried on at the outlying places referred to, Canso and Hubbards. He would there get what seems to be a requisite for properly salted and cured fish, namely pure salt water.

Dealing with the various houses, the subject-matter of the expropriation, I have had the opportunity of visiting all of these houses. I may say that the photographs put in before me while showing the dimensions of the houses, cast a very happy gloss over their appearance, to the ordinary observer. The properties lying North East of Pleasant Street and between Pleasant Street and the water, are to

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say the least a very poor class of residence, and in a very poor part of the town. That part of Pleasant Street in question in the various cases before me, would hardly be characterized as a good residential part of the City of Halifax. Mr. Clarke gives in detail his reason for the valuations of these different properties. There is no evidence to the contrary. The only house of any possible value is the one owned by Wilson. As I mentioned before, these gentlemen have approached the subject with the desire to reimburse the various land owners for any possible loss that they have suffered. Had they approached it from a legal standpoint of market value, and allowed upon that basis, the amount allowed to Wilson would not have been nearly as much. The Crown does not object to their method, but giving these replacement values instead of the market values, has put the owners in a much better position than what according to my view of the law they are entitled to. On the whole I think the amount offered for these household properties is ample, and I so adjudge.

The result is that $7,150 will be added to the sum of $83,250 tendered making in all the sum of $90,400. The defendants are entitled to interest on the sum of $67,150 to the date of judgment, as the sum tendered was insufficient for this property. No interest is allowed on the amounts tendered for the other properties, as I am of opinion the amounts tendered were ample. In adjusting the accounts, regard must be had to the amount advanced, also the rentals agreed to be paid for the occupation of the premises of Wilson after the expropriation. No doubt counsel can agree on these details.

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I think no costs should be allowed to either party.

Judgment accordingly.

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

Solicitors for defendants: *McInnes, Mellish, Fulton and Kenney.*

IN THE MATTER OF THE PETITION OF RIGHT OF

ALPHEE SAINDON,

SUPPLIANT;

1914
Sept. 10.

AND

HIS MAJESTY THE KING,

RESPONDENT.

Negligence—Railways—Accident—Prescription—Construction—Stipulation Relieving the Crown of liability—Insurance—Assessment of damages.

1. The lodging of a petition of right with the Secretary of State in compliance with the provisions of sec. 4 of the *Petition of Right Act* (R.S. 1906, ch. 142) will interrupt prescription within the meaning of Art. 2224 C.C.P.Q.

2. The suppliant, having been injured on a government railway, was paid sick allowances by an insurance association for nearly twenty-six weeks, and when the sick and accident pay-rolls were presented to him for signature, and when he signed them, there was in small print at the head of the column to which he affixed his signature as a receipt for such moneys, the following: "In consideration of the receipt by us of the sums set opposite our respective names, we do hereby release and discharge the Intercolonial Railway etc., from all claims for damages, indemnity or other forms of compensation on account of said disablement."

Held, that as no notice was given to the suppliant of such condition, and as his attention was never called to it, and that he signed the receipt without being aware of the same, it could not now be set up as a bar to his recovering.

3. Under a by-law (113) of such association, by the payment of $10,000 annually by the Railway Department to the association, it was provided that the Railway Department "shall be relieved of all claims for compensation for injuring or death of any member." But in the case of death or total disablement the Crown did not, under the rules of the association, contribute to the amount paid in respect thereof, such fund being made up by special assessment among the members.

Held, that as the Crown did not contribute to the indemnity in the case of death or total disablement, it could not avail itself of the immunity provided by the by-law in question.

4. In assessing damages the moneys paid to the suppliant under the sick allowance insurance should be taken into consideration, but the moneys paid under the provident fund should not be so considered in view of sec. 20 of 6-7 Ed. VII, ch. 22.

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5. In general in considering the question as to whether insurance money should be taken in account in assessing compensation in cases of accident, a distinction must be made between the case where a party himself is suing for injury either to his person or his property, and the case under Lord Campbell's Act and Art. 1056 C.C.P.Q. where the action is for the pecuniary loss caused by the death to the survivors. In the former case he has two distinct causes of action, one on contract with the insurance company and the other in tort against the wrongdoer. In the latter case it is the pecuniary loss caused by the death which forms the basis of the action and the measure of damages, and in this case alone the insurance money is to be taken into consideration.

PETITION OF RIGHT for the recovery of damages against the Crown, arising out of an accident to an employee of the Intercolonial Railway, on a public work, through the negligence of officers of the Crown. The facts of the case are stated in the reasons for judgment.

June 20th and 22nd, 1914.

The case was now heard before the Honourable Mr. Justice Audette, at Fraserville, P.Q.

E. Lapointe, K.C., and *A. Stein*, K.C., appeared for the suppliant, and *E. H. Cimon* for the respondent.

AUDETTE, J., now (September 10th, 1914) delivered judgment.

The suppliant brought his petition of right to recover the sum of $15,000.00 for alleged damages arising out of the bodily injuries suffered by him, which he claims resulted from the negligence of the employees of the Intercolonial Railway, a public work of Canada.

The suppliant suffered very serious bodily injuries, resulting in total and permanent disablement, by the accident, the details whereof are related in the case of *Hudon* vs. *The King*, (1), and by consent of the parties the evidence in the latter case was made common to the present case, so far as applicable.

The accident happened on the 14th January, 1913, and the Petition of Right was filed in this court on

(1) Reported infra, p. 320.

the 14th of May, 1914—that is more than one year after the accident, a delay within which the right of action would be prescribed and extinguished under the laws of the Province of Quebec. However, it appears from the evidence that the Petition of Right was, under the provisions of sec. 4, of *The Petition of Right Act* (R.S. 1906, ch. 142) left with the Secretary of State, on the 2nd January, 1914 (see Exhibit No. 1). Following the numerous decisions in this Court upon this question, it is found that such deposit with the Secretary of State interrupted prescription within the meaning of Art. 2224, C.C.P.Q. This question has frequently been the subject of consideration in this court.

As a prelude to the discussion of the pleas at bar in this case, it may be said that for the reasons mentioned in the Hudon case, above referred to, the suppliant is entitled to recover, provided his right of action is not barred by any of the said pleas. The accident in question resulted from the negligence of an officer or servant of the Crown, while acting within the scope of his duties or employment on the Intercolonial Railway. It may be added that the suppliant is found not to have been guilty of any contributory negligence. In compliance with the duties assigned to him, between Cap St. Ignace and L'Islet stations, he was, as he should have been under the circumstances, discharging his duties as stoker, kept busy attending to his fire which had gone down while waiting at Cap St. Ignace for the passage of the trains which had the right of way over his.

From the date of the accident he was paid, by the Association, a sick allowance during a period close on to twenty-six weeks, as provided by Rule 49 of the said Association. And on the 1st of July following he

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was transferred to the Permanent Fund, ceasing from that day to belong to the Association and from receiving anything from it. From the date of his severance from this Association he thenceforth received $20 a month under the provisions of 6–7 Ed. VII, ch. 22, the Intercolonial and Prince Edward Island Railway Employee's Provident Fund Act.

While receiving his sick allowance from the Association, Saindon signed a receipt, on the sick and accident pay-rolls when the same were presented to him, and at the head of the column in which he so affixed his signature there is the following insidious clause, printed in small type reading as follows:—"In consid-"eration of the receipt by us of the sums set opposite "our respective names we do hereby release and forever "discharge the Intercolonial Railway, etc., from all "claims for damages, indemnity or other form of "compensation on account of said disablement." The pay-rolls are filed as exhibits C to H.

It is contended by the Crown that this receipt is a complete discharge and that the Crown is therefore relieved from any liability.

The evidence discloses that here again, as in the Hudon case, the suppliant's attention was never called to this clause when he signed the pay-rolls. He was not aware of it—did not read it—and whenever he so signed he says he was told "*Tiens, signez ici, et je signais*"—He adds, he never understood he was signing ("*une formule comme ca*")—a form like that, and he signed to get his cheque.

For the reasons already mentioned, upon an almost similar matter, in the case of *Hudon v. The King*, above referred to, it must be found that this printed form above the suppliant's signature is no bar to his recovery and that the receipt was obtained under such

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circumstances of unfairness as would entitle him to recover. This clause with the release and discharge, was not in the mind of or contemplated by the suppliant when so signing. Ignorant of the terms of the release, the mind of the suppliant was never exercised with the question of whether he would or would not abandon any right or claim he might have against the Crown. It is the duty of the Court to guard claimants from improvident waivers of right made through ignorance. The rules of equity as administered in England, and the foundation principles of the civil law discountenance all such one-sided bargains.

The most that might be said is that the release and discharge so given are only for such time as is covered by the pay-roll, as it is weekly renewed in the same form and with the same release or discharge. When the release had been once signed, it was unnecessary to have it repeated—if it were not only by necessary inference for the period and the amount mentioned in the pay-roll. The amounts so paid should, however, be taken into consideration if he is to recover for the future.

It may be said here, as was said in the Hudon case, that it is of the essence of a contract that the written covenant should embody the agreement contemplated by the parties to the contract, and that any contract which, through error or otherwise embodies what is not so contemplated, is voidable and should be rescinded. The receipt, with its conditions, was given in error and under Art. 992, C.C.P.Q. it is null and void.

Saindon did not agree when he signed that receipt to release and discharge the Crown from any liability on account of his disablement. Unaware of the existence of that condition, he cannot have assented

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to it, and "his mind did not go with it," to use the language of Erle C.J. in the case of *Rideal v. Great Western Ry.* Co. (1), quoted by Mr. Justice Duff in the case of *British Columbia Electric Ry. v. Turner,* (2). The suppliant never agreed to such a condition as embodied in the receipt which was so signed through the abuse of the opportunity that the situation afforded some of the officers who had anything to do with it. He was unaware of it and his mind was never brought to assenting to such a settlement as evidenced by exhibits C to H, and his signature to this document was evidently brought about in such circumstances of unfairness as will entitle him to impeach and rescind the same. It is not the true agreement between the parties. Notice of this condition should have been brought to Saindon's attention. *Robinson v. Grand Trunk Ry.* (3) and cases therein cited.

The further and more substantial defence set up is that the suppliant, as a condition precedent to his employment on the Intercolonial Railway (see Ex. "A") became a member of the Intercolonial Railway Employees' Relief and Insurance Association. It is provided by By-law No. 113 of this Association that in consideration of the annual contribution of $10,000 from the Railway Department to the Association, the Railway Department, "shall be relieved of all claims "for compensation for injuring or death of any member," and the Crown therefore claims that the suppliant is barred from recovery.

Is this by-law, under the circumstances, a bar to the present action?

Is there any privity of contract between the suppliant and the Railway Department? The term

(1) 1 F. & F. 706.
(2) 49 S.C.R. 492.
(3) 47 S.C.R. 622.

"Railway Department" in the by-law, taking the part for the whole, must mean the Crown.

Is the agreement (Ex. "A") entered into by the suppliant whereby he binds himself to abide by the rules and regulations of the Association, a good and valid agreement? This agreement between the suppliant and the Association is one whereby the suppliant agrees with the Association to be bound by its by-laws, the effect of one of the said by-laws is to contract the Crown out of any liability. This is a contract between the suppliant and the Association to which the Crown is not a party. This Association is not incorporated. The suppliant as a member of this Association did not personally enter into such an agreement with the Crown—and if there is such a contract it is the Association which made such a contract with the Crown, before the suppliant joined the Association.

If the agreement to abide by the Rules and Regulations is a contract between the suppliant and the Association, there is no privity of contract in so far as the Crown is concerned, and it is in that respect *res inter alios acta*. This contract being between the suppliant and the Association whereby it is agreed between them to contract the Crown out of such liability, becomes illegal because it is in contravention of sec 4, Ed. VII, ch. 31, which forbids any such contract. It is tainted with illegality and clashes with the statute. What cannot be done directly cannot be done indirectly, and prohibitive laws import nullity. It is true that under sec. 16 of *The Interpretation Act* the Crown is not bound by a statute unless it is therein expressly stated that the Crown is so bound thereby—but the contract of Saindon is with the Association—the Crown is not a party to the same. If the Parliament of Canada in the interests of public

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morality and fair dealing has enacted 4 Ed. VII, ch. 31, whereby it declares it illegal for any company to contract itself out of any liability, is it conceivable that the Crown in right of the Dominion would entrench itself behind such a plea when it is already illegal under the laws of the Province of Quebec? And moreover, it may be said that it is not a facultative contract, but unilateral and involuntary on behalf of Saindon, forced upon him under the menace of being dismissed from office or denied work if he refused to sign his application. (Exhibit "A".)

Then under the laws of the Province of Quebec (Art. 13, C.C.P.Q.) an agreement whereby one contracts for the immunity from the consequences of negligence is contrary to public order. One cannot contravene the laws of public order. It would be stipulating in advance against any responsibility resulting *ex delicto*. (See Art. 13, C.C.P.Q.) Can this, however, apply to the employees of the party thus contracting itself out of such responsibility. The French jurisprudence seems to answer that question in the negative. Sirey, 1874, 2, 285, cited in Menus-Moreau. See also Sourdat, "*Responsabilité*" I, (1); *Brasell* v. *Grand Trunk Railway Co.* (2). See also the case of the *Exchange Bank* v. *The Queen* (3), with respect to the legal interpretation to be placed upon the privileges of the Crown in the Province of Quebec, and how far the Crown is bound by the Codes of that Province.

There is no evidence of record establishing the Crown ever entered into such a contract as that recited in Rule 113. Mr. Paver, the Secretary of the Association since its early formation in 1890, says that the employees of the railway being desirous of forming a relief department, called different meetings among

(1) p. 679, No. 662, Series 11, p. 40. (2) R.J.Q., 11; C.S. p. 150.
(3) 29 L.C.J. 117; 8 L.C.J. 194; L.R. 11 A. C. 157.

themselves, made the rules and regulations in question, inclusive of rule 113, and after adopting them, they were submitted to the railway authorities who approved of them. Being asked if there existed an order-in-council or a written approval of these Rules and Regulations, he said the only written approval he ever saw was in a previous case, when Mr. Pottinger, who was then the General Superintendent, wrote to one of the lawyers who was managing the case, that they had been approved by the railway. He adds he never saw anything else except that letter. Can it be said that this could amount to a contract as between the Crown and the Association? A binding contract with the Crown must be made with some person having due authority to act on behalf of the Crown. This has not been established.

No vote appears to have been made by Parliament for any payment under Rule 113, and were it made it would not establish any contract or liability. (*Tucker* v. *The King*) (1).

No proof has been adduced showing any such contract by the Crown whereby it contracted under the terms of Rule 113.

Under the evidence the Association could not, by action, enforce the payment by the Crown of the $10,000 mentioned in Rule 113. There is no apparent contract upon which such an action could lie.

Furthermore the suppliant, as is shown by the evidence, after having been paid this sick allowance during a certain number of weeks, was transferred to the Permanent Fund—and this fund and the Association are two separate entities. This transfer was made, as provided by sec. 12, ch. 22, of 6–7 Ed. VII, and therefore "upon the approval of the Minister,

(1) 7 Ex. C.R. 362.

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"but subject to the Act" and to the rules and regulations of the Board (and the Board means the Board created under the Act). This transfer being made subject to the Act, necessarily falls under Sec. 20 thereof which reads as follows:

"20. Nothing in this Act and no action taken, "thing done or payment made by virtue hereof, "shall relieve His Majesty from liability in the "event of damage arising from the negligence, "omission or default of any officer, employee or "servant of the Minister."

Therefore, the inference is irresistible that the Crown intended to remove anything standing in the way of the suppliant from recovering under this statute of 6-7 Ed. VII, ch. 22. The transfer, under the authority of the Minister of the suppliant from the Association to the Statutory Permanent Fund is not consistent with an adherence on the part of the Crown to the condition in Rule 113 whereby the Railway Department would be relieved of all claim for compensation. *Peterson* v. *The Queen* (1). The moment the suppliant came under the Provident Fund he became subject to the statute regulating this fund, and anything in the rules of the Association clashing with this statutory enactment must disappear and the statute prevail.

The Association takes its existence under no statute, no letters patent, and might be considered as a mere partnership.

Under Rule 113, the annual contributions by the Railway Department is made in general terms to the Association. Rule 3 discloses the object of the Association which is two-fold. One is to provide relief to its members while suffering through illness or bodily

(1) 2 Ex. C.R. 67.

injury, and the other, in case of death to provide a sum of money for the benefit of the family or relations of the deceased member. The by-laws, distinguished from the rules dealing with the internal administration of the Association, may be said to be accordingly divided in these two different objects. Rules 49 to 85, deal with the sick allowance, and Rule 86 and following, deal with the insurance in case of death or total disablement of a member. There are three different funds, and the accounts for the same are kept entirely separate. (117.)

Under rules 94 and 95, upon the death or total *disablement* of a member in the insurance section, the surviving members are to be assessed as many rates of the class in which they are insured as will, in the aggregate, produce as nearly as possible the amount for which the deceased member was insured, the balance over being carried forward to the credit of the next ensuing levy. It is a scheme for mutual life insurance.

Assuming therefore all the by-laws to be valid, it must be found that, under the very rules of the Association the Crown does not contribute to the death and total disablement fund which is made up upon special assessment among the members, under rule 94, and therefore the insurance money does not proceed from the Crown, even in part. Moreover, the payment thus made for total disablement is independent and bears no relation to the tort or negligence governing the right of action herein. And in case of death, where the payment proceeds from the same fund as for total disablement, such payment would have to be made if the insured died of natural death.

The evidence does not disclose—and if it did it would amount to the same—whether the Crown

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recognizes any division by the Association of its contribution and that it so makes its contribution to the Association in general terms to be used as the Association pleases. But in accordance with the scheme contained in the rules of the Association, it appears clearly that the Crown does not contribute to the death and total disablement fund and the rules must be regarded as they stand. *Miller* v. *Grand Trunk Ry.* (1).

Therefore the contribution by the Crown does not stand as a bar to recovering in case of total disablement. It does not contribute to the insurance fund wherefrom payments for total disablement are taken. *The King* v. *Armstrong* (2); *The King* v. *Desrosiers* (3).

It is further enacted by sec. 60 of *The Government Railway Act* (R.S. 1906, ch. 36) that "His Majesty "shall not be relieved from any liability by any "notice, condition or declaration, in the event of any "damage arising from any negligence, omission of any "officer or servant of the Crown." In the case of *The Grand Trunk Ry. Co.* v. *Vogel* (4), it was decided by a majority of the Court that a provision to that effect prevented a railway company from contracting itself out of any liability for negligence; but in the case of *Robertson* v. *Grand Trunk Railway* (5) it was held that while the Company could not, under such a provision, contract itself out of any liability it could, by contract, limit that liability. How far such decision applies to this case, it is unnecessary to decide.

Quantum.

The suppliant, at the time of the accident, was caught under the engine and was getting badly burnt

(1) (1906) A.C. 194.
(2) 40 S.C.R. 229.
(3) 41 S.C.R. 71.
(4) 11 S.C.R. 612.
(5) 24 S.C.R. 611.

from the escaping steam and boiling water. His foot was badly crushed, yet holding to the leg by some flesh. From the knee to the ankle his leg was all burnt and the flesh had left the bone and, as he says, it was time to do something and get away. He pulled his leg out, leaving his foot in the ruins. From that time on he has been failing, little hope for his recovery being entertained. His leg was twice amputated, and the surgeon declares, as it is however obvious, that he remains permanently disabled, unfit for his usual work. The sums of $75 and $50 were charged for these two painful operations, an amount of $125, which seems quite reasonable under the circumstances.

It is admitted by both parties that the suppliant was earning, at the time of his death, the sum of $900 a year. It appears from exhibit No. 2, that Saindon at the time of the accident was in his 28th year, and—the evidence establishes he was enjoying good health and a strong constitution. He is married and is the father of two children.

The fact of Saindon obtaining in his lifetime indemnity or satisfaction for the damage resulting from the negligence of the officers of the Crown, under the provisions of *The Exchequer Court Act*, will thereafter be a bar to any action his heirs or assigns might hereafter take. *Miller* v. *Grand Trunk Ry.* (1).

In assessing the damages in a case of this kind the moneys paid the suppliant under the sick allowance insurance must be taken into consideration and applied in satisfaction *pro tanto* for the time such allowance was so paid.

Should the amount paid monthly to the suppliant under the Provident Fund be taken into consideration

(1) (1906) A.C. 191-194.

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in assessing the damages? The question must be answered in the negative.

In considering that doctrine a distinction must first be made between the case where a party himself is suing for injury either to his person or his property, and the case under Lord Campbell's Act and Art. 1056, C.C.P.Q., where the action is for pecuniary loss caused by the death to the survivors. In the latter case it is the pecuniary loss caused by the death "which is at once the basis of the action and the "measure of damages," and therefore the receipt of insurance money is a circumstance to be taken into consideration in estimating the pecuniary loss to the survivors." *Mayne on Damages.* (1).

In the former case, that is where the injured person himself sues, the law is different. He has in this case two distinct causes of action: one on contract with the insurance company in consideration of contributions and payments to the fund. For that contract he has paid money and given consideration and is entitled to enforce it even if he lets the wrongdoers go. The other cause of action he has is in tort against the wrongdoer for damages which he may enforce even if he lets the insurance money go. There is no reason why both cannot be enforced. *Millard* v. *Toronto Ry. Co.* (2) and the numerous cases therein cited. In the case where the injured person sues, the ground of the action is the wrong done to the individual—"The fact that he has "guarded by anticipation against such an event "neither diminishes the wrong itself nor the liability "of the wrongdoer to pay for it." *Mayne on Damages* (3); *Misner* v. *Toronto and York Radial R.W. Co.* (4).

Now, are the cases above cited to be distinguished from the present one because the fund from which the

(1) 8th ed. 495.
(2) 6 Ont. W.N. 519.
(3) 6th ed. (1899) p. 538.
(4) 11 O.W.R. 1064-1068.

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moneys which are monthly paid to the suppliant is one made by contributions from both the Government and the employees or the insured? The cases referred to by Mr. Justice Osler in *Misner* v. *Toronto & York Radial R. W. Co.* (*ubi supra*) are analogous to the present one, in that the fund was made up by joint contribution from the company and the injured.

There is in the present case an additional reason why the benevolent contribution to the Provident Fund made by the Crown under the Act (6–7 Ed. VII, ch. 22, sec. 4) should not be taken into consideration, and that is because sec. 20 of the same Act reads as follows:

> "Nothing in this Act and no action taken, thing "done or payment made by virtue hereof, shall "relieve His Majesty from liability in the event of "damages arising from the negligence, omission or "default of any officer, employee or servant of the "Minister."

Taking all of the circumstances of the case in consideration there will be judgment in favour of the suppliant for the sum of two thousand dollars together with $125 in payment of the surgical operations still owing by him, and costs.

Judgment accordingly.

Solicitors for the suppliant: *Lapointe & Stein.*

Solicitor for the respondent: *E. H. Cimon.*

1914
Sept. 10.

IN THE MATTER OF THE PETITION OF RIGHT OF

DAME JUSTINE HUDON,

SUPPLIANT;

AND

HIS MAJESTY THE KING,

RESPONDENT.

Negligence—Government Railway—Contract between employee and I.C.R. and P.E.I. Employees Relief and Insurance Association, to release Crown of any liability—Receipt given in error.—Defence.

Suppliant's husband was killed in an accident on the Intercolonial Railway. Suppliant gave a receipt for the insurance money payable on his death to the Intercolonial and Prince Edward Island Railway Employees' Relief and Insurance Association and in full satisfaction and discharge of all her claims against the said Association, and against His Majesty The King, arising out of the death of her husband. Her attention was not called to this discharge embodied in the receipt, and the letter transmitting the form of receipt for signature did not mention it. Moreover it was in the English language, which she did not understand, and could not read when signing it.

Held that suppliant could not be taken to have assented to such condition; and it could not be set up as a bar to her recovery.

2. *Held*, applying *Miller* v. *The Grand Trunk Railway Co.* (1906 A.C. 187) that suppliant's right of action in this case under Art. 1056 C.C.P.Q. was a personal one and independent from that of her husband; and that any immunity from damages, or condition that might have been available as a defence to an action by her husband because of his being a member of an Insurance and Provident Society, was no bar to the suppliant's action after his death.

PETITION OF RIGHT for the recovery of damages against the Crown, arising out of the death of an employee of the Intercolonial Railway, on a public work, through the negligence of certain employees of the Crown.

The facts are set out in the reasons for judgment.

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June 17th, 1914.

The case was now heard before the Honourable Mr. Justice Audette at Fraserville, P. Q.

Jules Langlais and A. W. Potvin for the suppliant; *E. H. Cimon* for the respondent.

AUDETTE, J. now (September 10th, 1914) delivered judgment.

The suppliant brought her petition of right, both in her own name and as tutrix to her minor children, to recover the sum of $15,000. as alleged damages arising out of the death of her husband, Joseph Hudon, which, it is claimed, resulted from the negligence of the employees of the Intercolonial Railway, a public work of Canada.

The action is brought under the provisions of subsection (f) of Sec. 20 of *The Exchequer Court Act* (R.S. 1906, ch. 140, as amended by 9–10 Ed. VII, ch. 19).

The accident happened on the 14th January, 1913, and the petition of right was filed in this Court on the 14th April, 1914—that is more than one year after the accident, a delay within which the right of action would be prescribed and extinguished under the laws of the Province of Quebec. However, it appears by the evidence ,that the Petition of Right was, under the provisions of sec. 4 of *The Petition of Right Act* (R.S. 1906, Ch. 142) left with the Secretary of State, on the 3rd December, 1913. Following the numerous decisions of this court upon this question, it is found that such deposit with the Secretary of State interrupted prescription within the meaning of Art. 2224, C.C.P.Q. This question has frequently been the subject of consideration in this court.

Briefly stated, freed from numerous details, the accident happened under the following circumstances.

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On the 14th January, 1913, the deceased Hudon was engine-driver on the freight train No. 110, which was travelling east from Quebec to L'Islet. On arriving at L'Islet, shortly after one o'clock at night, the train was placed on the western siding, as shown on plan, exhibit No. 10. Green lights were placed at the rear of the van, and after the person in charge of the station had acquainted the conductor with different orders at hand, the latter instructed brakeman Riou to coal the engine, after the English mail train had passed. After the passage of that train, Riou placed the western semaphore at danger, and brakeman Jean uncoupled Hudon's engine which then travelled from the point "A" (see Plan Ex. No. 10) to "B." Riou opened the switch "B," leaving it open, with the red light of the switch at danger; and Jean opened the switch at "C," and the engine was then backed upon the main-line, and switch "C" was closed. The engine was then brought to the point marked "X" on the main-line, opposite the northern loading station, upon which were two cars loaded with coal wherefrom it was their intention to coal.

No sooner was the tender opposite the coal car and before even a single shovel of coal had been taken, Hudon's tender and engine were struck by the engine of the incoming train called the *Levis Special*, travelling from west to east. This Levis special is what is termed an irregular train—it is not on the time tables and travels, as all specials, upon order. In the impact of the collision, which then took place, Hudon was killed and Saindon, the fireman, of the Levis special seriously injured. An action has also been brought by Saindon, and reference will be made therein to the facts of the present case in disposing of his claim.

Now this Levis Special had met the English mail train, at Cap St. Ignace, the previous station, and LeBel, the engine driver of that train, says that, in compliance with the Rules and Regulations, at Cap St. Ignace, he concealed the head light of his engine, with a piece of sheet-iron in the usual manner, to let the English mail pass. Having started from Cap St. Ignace, for the next station, L'Islet—on his way thereto he realized he had forgotten to uncover his headlight, but did not remedy this defect and proceeded on to L'Islet without any headlight, and arrived without any warning whatever upon Hudon's engine in the manner and with the result above mentioned.

LeBel contends he sounded his whistle before coming in, but does not remember whether he rang the bell. He is the only one who says he did sound the whistle and although it is not of great importance in the view this court takes of the case, it must be found he is under misapprehension, because the five men—the two brakemen, Labbie, and the stoker—would have heard it, and no one but LeBel says so. Is it because it is customary for him to do so, that he testifies in this manner?

The night was fine and the track between Cap St. Ignace and L'Islet is perfectly straight and a powerful electric head-light can be seen from one station to the other, although the head-light on the Levis Special engine was only an oil lamp light, but a powerful one.

It is quite clear and obvious that had the head-light on this Levis Special engine been uncovered and lighted that the accident would have been averted, and that it would have been seen by some of the men engaged around the Hudon engine. The proximate and the determining cause of the accident is the want of any head-light on the Levis Special engine. Even if LeBel

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had failed to sound his whistle, his head-light would have been sufficient to warn Hudon and given him time to get out of the way.

A great deal of evidence has been adduced with respect to the western semaphore which was passed by this Levis Special on coming in to L'Islet. However, this cannot change the above finding on the question of fact.

The accident happened on the 14th, which was a Tuesday, and on the 11th, the previous Saturday, this semaphore had been reported defective, as not working and standing at danger. It was not reported repaired until the 18th—an unaccountable delay—but it has no bearing upon this case. It would, however, appear that the station master at L'Islet had neglected to report the repairs to the semaphore immediately after it had been so repaired.

From the evidence and especially from the testimony of both Marquis and Fortin, the acting station-master, it must be found that the semaphore had been repaired before the accident and that it was working all right on the night of the accident, as testified to by Fortin, who says he had worked it several times in the course of that evening, and Marquis who had ascertained, notwithstanding the evidence of LeBel to the contrary, that this semaphore was lighted and showing light at the time of the accident as he walked back to it at that time for that very purpose.

Even supposing the semaphore out of order, Rule 26 says that the absence of a signal at a point where one is usually displayed is to be taken as denoting danger. And Rule 75 is to the same effect.

This Levis Special, as already mentioned, was an irregular train (see rules 2 and 9) and under Rule 18 such trains must always be run upon the

assumption that another train *may be delayed and out of place.* Such train must approach all stations very carefully. Mr. Brassard, the chief train despatcher, a gentleman of 35 years' experience in the railway business, testifies that even if the semaphore had been repaired and no notice thereof given, LeBel, the engineer of the Levis Special, was bound to take great care in coming into L'Islet. He should have slackened his train, come in under control —adding, control means that he should be in a position to stop his train almost at once (de suite). And when the semaphore is at danger, as it was on the night in question, that a train cannot come in without sending a man to the station to give or receive a signal. Without order, neither of the two trains had a right of way over the other. The engine-driver of the Levis Special was guilty of gross and unpardonable negligence in coming in without any head-light. The least he could have done, knowing his head-light was concealed, would have been to get out of his engine at the western semaphore and uncover the head-light. Coming in under such circumstances he should have come in under perfect control, feeling his way, so to speak. The greater the danger, the greater the prudence is exacted and expected.

Now, it has been further contended there was contributory negligence on behalf of Hudon in that, among other things, —1st —That he had no red light at the back of his tender; 2nd—That he should not have gone on the main line to coal, but to the coaling platform; and 3rd—That he should not have travelled through the cut-out on to the main line, but should have gone to the end of the southern siding to the coaling platform.

Respecting the first count, it must be found that there is no evidence excepting that of LeBel establishing

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that there was no light at the rear of the tender; but other evidence to presume there was, because it is proved there was a red light at the back of the tender when they left Chaudiere. LeBel also asserted there was no red light at point "B," but such light was there.

Answering the second count, the evidence establishes that the moment he was protected by the semaphore at danger, he had no reason to expect anyone coming in as LeBel did.

And with respect to the third objection, it is established by Fortin, that the Marquis train was ahead of Hudon's train on the same siding, and that it left only after the accident. The necessary inference being that the cut out, which was the shorter way of the two to go to the coaling platform, was also at that time the only way available.

There was no contributory negligence.

The next question to be considered is whether the receipt given by Mrs. Hudon, the suppliant, for the insurance money paid to her is a bar to her recovery. This receipt is filed as exhibit "T," and reads as follows:

"$1,000.

"Received from the Intercolonial and Prince Edward "Island Railways Employee's Relief and Insurance "Association, the sum of one thousand xx/100 dollars, "which I hereby accept in full satisfaction and dis- "charge of all my claims against the said Association, "and against His Majesty The King, His officers or "servants, arising out of the death of my husband, "the late Joseph Hudon.

"Dated at Riv. du Loup, this 12th of August, 1913.

"Signed, Sealed and delivered Justine Hudon (L.S.)
"in the presence of widow of the late
" P. V. Begin, Joseph Hudon.
" Harvey W. Sharpe.

The receipt is given for $1,000, but the cheque actually paid Madame Hudon was only $945, the amount of $55 being deducted therefrom in payment of the accounts attached to exhibit "T." In the unreported case of *Blair v. The Association de Secours et d'Assurance, Intercolonial Railway*, Cimon J., on the 10th November, 1909, decided, among other things that the plaintiff, the widow of an employee of the I.C.R. killed in an accident on the said railway, was entitled to be paid her insurance money without having, as a condition precedent, to sign a receipt therefor relieving the Crown from any liability on account of the accident.

Under what circumstances was this receipt obtained and signed? On the 7th August, 1913, Mr. Paver, the Secretary of the Employees' Relief and Insurance Association, transmitted to P. V. Begin, the district Secretary of the Association at Riviere du Loup, a copy of a letter he addressed to Mrs. Hudon together with the form of receipt in question asking him to return the voucher to him after Mrs. Hudon has executed it, or signed it in the presence of either himself or some other railway official.

It will be noticed that Mr. Paver's letter to Mrs. Hudon does not call her attention to the condition he has placed in the receipt. He merely tells her that her husband was insured in class A for $1,000 and calls her attention to the deductions made from that amount. And he says, if you will sign the voucher, Mr. Begin will return it to me, and upon receipt of the same the cheque will be forwarded to your address by registered

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letter. Not a word said of the condition whereby the Crown is released of any liability which might arise from the death of her husband.

After Begin received this unsigned voucher, he went over to witness Wilson, who is the brother-in-law of Mrs. Hudon, and gave it to him, and asking him, without further explanation to have it signed by Mrs. Hudon on the line indicated by Begin. Wilson took exhibit T, the form of receipt, to Mrs. Hudon, and he told her to sign that document at the place indicated by Begin and that by doing so she was signing the receipt for her insurance money (qu'elle signait le reçu pour ses assurances). Wilson did not read the document to Mrs. Hudon, who, moreover, testified she did not understand a single word of English and that in all her life she had been to school but during nine months. Wilson says when Mrs. Hudon signed this receipt he was alone with her and her two young children.

Begin being handed back by Wilson this signed receipt transmitted it to Paver who in turn transmitted the cheque of $945 to Mrs. Hudon, who endorsed it and got it cashed.

Harvey W. Sharpe, whose signature appears as that of a witness attesting Mrs. Hudon's signature, being heard as a witness, says he was not present when Mrs. Hudon signed the receipt and that he placed his signature below that of Begin's as a matter of form.

Now both Begin and Sharpe were not present when Mrs. Hudon signed this document, and their conduct in this transaction, to say the least, is most reprehensible conveying deception by thus falsifying the receipt.

From the above it appears quite clearly that Mrs. Hudon did not agree when she signed that receipt "to "discharge the Crown from any liability arising out of "the death of her husband"—not knowing of the

clause she cannot have assented to it and "her mind "did not go with it" to use the language of Erle, C.J., in the case of *Rideal* v. *G.W. R.y Co.* (1). She never did agree to such a condition as embodied in the receipt which was so signed through the conscientious or unconscientious abuse of the opportunity which the situation afforded the several officers who had anything to do with it. Her mind was never brought to assenting to such a settlement as evidenced by exhibit "T," and her signature to this document was evidently brought about in such circumstances of unfairness as will entitle her to impeach and rescind this receipt as not embodying the true agreement between the parties. *B.C. Electric Ry. Co.* v. *Turner* (2).

It is of the essence of a contract that the written covenant shall embody the agreement contemplated by both contracting parties, and that any contract which through error or fraud, embodies what is not so contemplated is voidable and should be rescinded. It was clearly incumbent upon the officials to bring notice of this condition to Mrs. Hudon's attention. *Robinson* v. *Grand Trunk Ry* (3); *Bate v. Canadian Pacific Railway* (4).

The receipt was given in error, and under Art. 992, C.C.P.Q. it is null and void.

It is perhaps unnecessary to add, applying the decision of *Miller* v. *Grand Trunk Ry Co.* (5), that suppliant's right of action in the present case arises under Art. 1056 C.C.P.Q., giving her an independent and personal right not derived from her deceased husband, and that any condition which might be set up against him because he was a member of an insurance and provident society, a by-law of which afforded a defence to this action as against him, is no bar as

(1) 1 F. & F. 706.
(2) 49 S.C.R. 492, 493.
(3) 47 S.C.R. 622.
(4) 18 S.C.R. 697.
(5) (1906) A.C. 194.

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against her. See also *Desrosiers vs. The King* (1); *Armstrong vs. The King* (2).

Quantum.

It appears from Exhibit No. 4 that Hudon, at the time of his death was thirty years and six months old and it is admitted by both parties that he was then earning an average yearly salary of about $1,000.

In assessing damages in a case of this kind it is impossible to arrive at any amount with mathematical accuracy—but one should strive to give the suppliant such damages as will compensate her and her children for the pecuniary loss sustained by the death of the husband and father; to make good to them the pecuniary benefits that they might reasonably have expected from the continuation of his life and which by his death they have lost. In arriving at such amount one must take into account the age of the deceased, his state of health, his expectation of life, his employment, the wages he was earning and his prospects. On the other hand, consideration must be given to the fact that the deceased in such a case as the present one must out of his earnings have supported himself as well as his wife and children, and that there were contingencies other than death, such as illness or the being out of employment, to which in common with other men he was exposed.

There will be judgment in favour of the suppliant for the sum of $4,500, out of which $2,500 will go to the widow personally and $1,000 to each of her two children, Gerard and Joseph. Costs will follow the event.

Judgment accordingly.

Solicitors for the suppliant: *Langlais and Potvin.*

Solicitors for the respondent: *E. H. Cimon.*

(1) 41 S.C.R. 71.

(2) 40 S.C.R. 229.

IN THE MATTER OF THE PETITION OF RIGHT OF

CYRILLE TURGEON

SUPPLIANT;

1914
Nov. 7.

AND

HIS MAJESTY THE KING,

RESPONDENT.

Negligence—Government Railway—Brakesman attempting to board moving train—Rules of 1889—"Person"—Acceptance of Risk—Faute Commune—Liability.

The suppliant while employed as a brakesman on a government railway attempted to board a way-freight train while in motion. In doing so he slipped and fell, a wheel of the last truck of the van passing over one of his legs injuring it to such an extent that it had to be amputated. By rule 48 of the railway regulations of the 7th December, 1889, it was provided that "no person shall be allowed to get into or upon or quit any car after the train has been put in motion, or until it stops. Any person doing so, or attempting to do so, has no recourse upon the Railway Department for any accident which may take place in consequence of such conduct."

Held, that suppliant was a "person" within the meaning of the above rule and was subject to its provisions.

2. That the suppliant accepted the risk incidental to his attempt to board a moving train.

3. That as the proximate cause of the accident was the suppliant's act in attempting to board a moving train, he had contributed to the determining cause of his injury and the doctrine of *faute commune* could not be applied even if the railway authorities had been guilty of negligence in allowing the platform of the car by which the suppliant attempted to board the train to be defective—a fact not found by the Court.

PETITION OF RIGHT for damages resulting from alleged negligence on the part of certain servants of the Crown on the Intercolonial Railway in the Province of Quebec.

The facts are fully set out in the reasons for judgment.

September 23rd, 1914.

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The case was tried at Quebec before the Honourable Mr. Justice Audette.

J. A. Lane, K.C., for the suppliant.

P. J. Jolicœur for the respondent.

AUDETTE, J. now (November 7th, 1914) delivered judgment.

The suppliant brought his petition of right seeking to recover the sum of $20,000. for alleged damages arising out of bodily injuries received by him while employed as a brakeman on the Intercolonial Railway, which injuries, he claims, resulted from the negligence of the employees of the said railway, a public work of Canada.

The accident occurred on the 4th November, 1912, and the petition of right was filed in this Court on the 18th June, 1914, that is more than one year after the accident, a delay within which the right of action would be prescribed and extinguished under the laws of the Province of Quebec. However, the petition, under the provisions of sec. 4 of *The Petition of Right Act*, was left with the Secretary of State on the 18th day of September, 1913, and following the numerous decisions given in this Court upon this question, it is found that such deposit with the Secretary of State has interrupted prescription within the meaning of Art. 2224 C.C.P.Q.

The suppliant was one of three brakesmen on the way-freight No. 50, which, on the morning of the 4th November, 1914, left Chaudiere for Riviere du Loup, arriving at Cap St. Ignace at 11.55 a.m., and leaving the same station at five minutes after twelve noon.

This way-freight is composed of freight cars and a passenger car at the rear, which has been called the van

all through the evidence. This van is divided into two compartments, one for passengers and one for baggage.

As will be seen by reference to exhibit No. 3, there was no side hand rails on that van on the day of the accident —they are, however, indicated in red on the said exhibit. By reference also to exhibit "A" —a photograph of the van in question taken sometime after the accident showing the hand side rail added to it thereafter —the construction of the step will be seen. It appears from the evidence that the last step, the one nearer to the ground, had to the right a rod of iron which ran from the body of the car to the middle of the last step, leaving about four inches of the eight inch step, without any right angle construction.

When the suppliant, in company with the other train hands, had finished loading the last car, which, according to him, was the second from the locomotive and according to others, the third —he, with brakeman N. Belanger, took down the gang-way, closed the door of the car, and says he walked towards the rear of the train for about ten feet.

The conductor says that when the gang-way had been taken away, he went to the station—went in the ladies' waiting room, and asked the agent if there were any orders and the latter told him there was nothing, that they could go. He then came out of the station, walked about 30 feet from the men towards the van. When he was about opposite the fifth car he gave the signal to start, and got on board the van by the steps at the rear end of the same. As the station was on the left of the train—and the engineer's place in the engine is on the right and that of the fireman on the left—the latter saw the signal given by the conductor and he transmitted it to the engine driver who was in the cab with him.

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The suppliant says that when this signal was given, his associates, the conductor and brakeman Belanger, started to get on board and he followed them, eight or nine feet behind. Belanger boarded the van by the front platform at the very same time the conductor was boarding it at the rear platform. The suppliant was the last one behind, the last one to get on board; but they all got on board after the train had started and while the train was in motion. Turgeon got on by the front of the van, and on getting on he seized the vertical iron rail on the front of the platform, his foot slipped on the step, he fell and the last truck of the van passed over his leg which was afterwards amputated three inches below the knee. His left arm was also forced and strained resulting in a partial paralysis caused by the lesion of the root of the nerves which are distributed at the arm. This arm is permanently affected in the ratio of a decrease of 75% of its normal power, according to the medical men heard as witnesses.

Having related the salient facts leading to the accident, the next question which presents itself is: What was the proximate, the determining cause of the accident?

The answer is, indeed very apparent and obvious. The cause of the accident was boarding the train in motion.

The suppliant contends, 1st—That the employees always board the train after it has been put in motion, 2nd—That the train at the time in question started at double the usual rate of speed, 3rd—That there were no side hand rails on the van in question at the time of the accident, and 4th—That the steps were defective, in that there was nothing to protect the foot on the side of half the last step.

Can the boarding of trains in motion be justified from the fact that the employees have fallen into the habit of doing so? This must be answered in the negative. If such a practice exists, it is clearly explainable from the fact that the employees with time familiarize themselves with danger and omit to take the most ordinary precautionary measures to protect themselves; notwithstanding that all through the Rules and Regulations hereinafter referred to, they are repeatedly warned they must always take the safe side and not run unnecessary risk.

On his examination in chief, Turgeon says that there was a space of two minutes between the time when they had finished unloading and the starting of the train. On cross-examination he, however, adds that, in those two minutes, he closed the car and took off the gangway with his associate. But Belanger on the other hand, who was the person who took off the gangway with Turgeon, says that Turgeon closed the door, they both took off the gangway and adds, "*Ca "été court après avoir tiré le gangway. Deux minutes "se sont écoulées après avoir tiré le gangway.*"

There must have been some delay between the time the gangway was taken off and the time the train left. That is further corroborated by the conductor's evidence, when he says that, when the gangway had been taken off, he went in to the station, in the ladies' waiting room, enquired from the agent if there were any orders, received an answer from the latter that there was nothing and that they could go. When he came out of the station he walked about thirty feet from the men, and when opposite the fifth car gave the signal to start. When the men took off the gangway, they all knew that was the last piece of work they had to do at that station, and instead of walking towards the back of the train, they waited for the

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signal to start again and got on board when the train was moving.

The getting on board the train while in motion was of Turgeon's own choosing, thus voluntarily and rashly exposing himself to injury, and in so acting he also took the consequences of such risk. Had he walked to the van the moment his work was over he could have boarded the train before it left, or at least before it had acquired the speed it had when he actually boarded it. If he perceived the train was going too fast to get on board, he was not bound to attempt it; he could have signalled to stop the train, as the conductor said he himself did on a former occasion, and the conductor further adds he would not have found fault for once stopping his train on such an occasion to allow Turgeon to get on board.

Did the train start with unusual speed? On this point the evidence is conflicting. While the Conductor Belanger, the porter and the suppliant, say it did, both the fireman and the engine-driver say they started at the usual speed. The latter adding they had on that occasion an old (*ancien*) passenger-engine, commanding 20 to 25% of decrease in power. Such engines, he says, are placed on such way-freight trains when they are ruined, and the one he had that day was ruined and ripe to be sent for repairs. It was contended on the one hand the train started at seven or eight miles an hour, while on the other hand that it started at the usual speed of three or four miles. However, when the train was stopped after the accident, it had covered between 200 to 300 feet. The train cannot have actually started at seven or eight miles, while it must no doubt have increased its speed as it went along; but there is no speed assigned to the engine-driver at which he should start his train.

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Fault is further found because there were no hand side rails on the van at the time of the accident. But it is clearly and admittedly conceded that a hand side rail would be of no avail or use for one boarding a train by the front platform. However, it is said had there been hand side rails Turgeon could have boarded the rear of the car with the help of that rail, and he thus would have cleared the rear truck of the car. The boarding of the train by the rear platform would have delayed only the more his boarding the train, and in no case was it justifiable or excusable, under the circumstances, to board the train in motion. This latter argument would also apply to the step, notwithstanding that it is impossible to find that such a step is defective. It was under all the circumstances safe and more particularly so for boarding a train which is not moving. And while, under the evidence, it is impossible to find whether Turgeon's foot slipped lengthwise or crosswise, the probability is that he merely slipped crosswise from the side of the step and not from the end.

Turgeon knew the van in question—knew how it was equipped—even knew it was dangerous to board a train in motion, and his only excuse for so boarding it was that they always did it (which is no excuse). He knew the danger and risk. There was nothing to constrain him to get on board in the manner he did—he did it of his own accord.

The suppliant, contrary to the Rules and Regulations, a copy of which was given him when he entered the Government employment, boarded a moving train. *Grand Trunk Ry.* v. *Birkett*, (1); *Cook* v. *Grand Trunk Railway Co.* (2).

(1) 35 S.C.R. 296.

(2) 31 Ont. L.R. 183.

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Under section 49 of *The Government Railway's Act*, the Governor in Council is authorized to make regulations, *inter alia*, (c) "to be observed by conductors, "engine drivers and other officers and servants." Among the Rules and Regulations so made and published in the *Canada Gazette* on the 7th December, 1889, is found Rule 48, reading as follows:

> "No person shall be allowed to get into or upon "or quit any car after the train has been put in "motion, or until it stops. Any person doing so, or "attempting to do so, has no recourse upon the "Railway Department for any accident which may "take place in consequence of such conduct."

This rule is under the heading of "Passenger and "Station Regulations," and it was questioned at the trial as to whether or not it applied to the employees of the railway. It will be noticed that the regulations made under that heading are not only with regard to "passengers," but also with regard to "station," and apply to a number of persons who are not passengers. Whenever a rule under that heading deals only with passengers it says so; but whenever the rule deals with more than passengers, the more general word of "person" is used. It would therefore seem that the word "person" in rule 48 is broad enough to cover all persons, and that it lays down the rule for all persons at a station, passengers and employees of the railway. As the proximate cause of the accident is the boarding by him of a train in motion, he thus contributed to the cause which determined the accident, and the doctrine of *faute commune* does not apply when the person injured contributed to the determining cause of the accident. If the accident occurred Turgeon has but himself to blame, and *Quod quis ex culpa sua damnum sentit, non intelligitur damnum sentire.*

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The unfortunate position in which the suppliant is now placed appeals greatly to one's sympathy, and while the Court cannot grant any relief in such a case, it is to a certain extent comforting to know he is getting, under the Provident Fund Act (6–7 Ed. VII, ch. 22) an allowance of $20 per month during his lifetime.

There will be judgment in favour of the Crown, the suppliant being denied any relief under his Petition of Right.

*Judgment accordingly.**

Solicitor for the suppliant: *J. A. Lane.*

Solicitor for the respondent: *P. J. Jolicœur.*

*EDITOR'S NOTE:—Affirmed on Appeal to Supreme Court of Canada.

1915
Jan. 13.

HORACE G. JOHNSON, AND HENRY S. COOPER AND PENMAN'S, LIMITED,

PLAINTIFFS;

AND

THE OXFORD KNITTING COMPANY, LIMITED,

DEFENDANT.

Patent for Invention—Proper method of Construction—Specification and Claim—Canadian Patent No. 130,413 for closed crotch underwear—Infringement.

Held, that a patent for invention should be construed in the same way as any other written instrument. According to the true canons of construction the claim of the patent should not be read without reference to the specification. The whole document must be looked at to see what the claim is. *Canadian Car Heating Co.* v. *Came*, (1903) A.C. 509 followed. *Edison-Bell Phonograph Corporation (Ltd.)* v. *Smith*, (1894) 10 T.L.R. 522, specially referred to.

Canadian Patent No. 130,413 held not to be infringed by a garment using two flaps to obtain a permanently closed crotch.

STATEMENT OF CLAIM for damages for an alleged infringement of a patent for invention, and for an injunction to restrain further infringements.

The patent is described and the alleged acts of infringement stated in the reasons for judgment.

September 28th, 29th and 30th, 1914.

The case was heard at Toronto before the Honourable Mr. Justice Cassels.

A. W. Anglin, K.C., for the plaintiffs.

W. C. Languedoc, K.C., for the defendants.

CASSELS, J. now (January 13th, 1915) delivered judgment.

The statment of claim in this case was filed by Horace G. Johnson, and Henry S. Cooper andPenmans,

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Limited, as plaintiffs, against the Oxford Knitting Company, Limited, defendant. The claim is based upon Letters Patent, No. 130413, bearing date the 17th January, 1911, granting to Johnson and Cooper certain rights for an invention consisting of a certain new and useful improvement in garments.

The plaintiffs allege that the defendants have infringed their patent, and ask for an injunction restraining them from further infringing, with the usual claim for damages and costs.

The case came on for trial before me at Toronto on the 28th, 29th and 30th September last. I have been unable to dispose of the case earlier on account of pressure of work. The very able and astute argument of the counsel for the plaintiffs shook the views that I had formed at the trial, and I deemed it necessary before coming to a conclusion, to very carefully consider the evidence adduced at the trial and the various exhibits.

I may say that after the best consideration I can give to the case I am of opinion that the argument of Mr. Anglin that the plaintiff's patent should be construed broadly, as a *quasi*-pioneer patent, is not well founded. I will give some of my reasons for this view subsequently.

At the trial the plaintiffs' counsel relied upon the 4th claim of the patent, and I have not thought it necessary, as no argument was adduced before me on behalf of the defendants, to consider the effect of the first three claims of the patent as affecting its validity.

The fourth claim of the patent does not contain the words, as the previous three claims do at the end of the claim, "substantially as described." I do not think this affects the case one way or the other.

Before dealing with the merits I may cite one or two cases as to the manner in which a patent should

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be construed. An important case, is *Edison-Bell Phonograph Corporation* v. *Smith* (1). I do not find a report of this case in the regular reports. In this particular case the contention was raised that the claim was too broad, as the claim itself had not the words "substantially as herein described," and had to be construed in a broad way. I quote the language of the Master of the Rolls:

"The first question was, what was the proper mode "of construing a patent? The rules of construction "were the same as would be applied in the case of "any other written instrument. It was not in "accordance with the true canons of construction "to read the claim alone without the specification. "The whole document must be looked at to see "what the claim was. In *Arnold* v. *Bradbury* (2) it "was contended that the claim, when read alone, "was too large as including something which could "not be patented, and that therefore the patent was "bad. Lord Hatherley, however, said that the "specification must be read first to see what the "inventor had described as the thing to be patented. "He said:—'I do not think that the proper way of "dealing with this question is to look first at the "claims, and then see what the full description of "the invention is; but rather first to read the des-"cription of the invention, in order that your mind "may be prepared for what it is the inventor is "about to claim.' Therefore, in order to construe "the instrument, the description of the invention "must be looked at to see whether the claim went "further than the specification. That rule had been "followed in subsequent cases. That was the true "rule, and it was the same as was applicable to any

(1) (1894) 10 T.L.R. 522.

(2) L.R. 6 Ch. App. 706.

"other instrument. In the present case there was "an elaborate and detailed specification of what the "inventor wished to patent. It was an invention "of certain improvements in phonograph machines. "He described those improvements minutely. It "was not suggested that the descriptions in the "specification were too large. The objects and the "means of carrying out those objects were described. "Then the claims were headed with a statement that "the inventor, 'having now particularly described "and ascertained the nature of this invention "and in what manner the same is to be performed,' "claimed, etc. Claim No. 1 was the one chiefly "contested. It was said that it was too wide. But "in the specification the inventor had pointed out "the exact manner in which he would carry out the "object stated, and any one reading the claim "reasonably would come to the conclusion that all "he meant to claim was what he had previously "described and shown. Therefore the claim was "not too large, and the patent was not bad upon "that ground."

In the case of *Badische Anilin Und Soda Fabrik* v. *Levinstein* (1), Lord Herschell is reported as stating that Lord Justice Fry had complained of the course pursued at the trial in not calling witnesses to prove what the invention is. He states—"I cannot think "that this complaint was well founded. The question "what the real invention is must be answered from a "critical examination of the specification."

Another case that might be referred to is the case of *Consolidated Car Heating Company* v. *Came* (2)—the judgment of the Privy Council in which Lord Davey pronounced the judgment of the Board. In that case

(1) 12 A.C. p. 717.

(2) (1903) A.C. 509.

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the claim had to be construed in the light of the specification.

Any number of cases might be cited for the same proposition. Before referring to the specifications of the patent in question, it may be well to state that union suits, so-called, were old at the date of the alleged invention of the patentees. These union suits, so-called, were otherwise styled combination under-garments and were formed in one piece. The effort was to obtain a union under-garment with a permanently closed crotch, with a slit or opening at the back of sufficient depth to permit the wearer to perform the operations graphically described by the patentee.

Numerous prior patents have been fyled, and evidence adduced before me to show the gradual advance and improvement in the art. The fourth claim sued upon reads as follows:

> "A permanently closed crotch under-garment "having a posterior opening extending below the "crotch and a sewed in flap constituting a closure "for said opening, said flap having one of its lateral "margins permanently sewed to the garment from "a point above the seat to a point in one leg below "the crotch, the other lateral margin being free from "a point above the seat to a point in the opposite "leg below the crotch."

I agree with Mr. Anglin that the crotch referred to is the crotch in the garment and not the crotch of the human body.

It is admitted that a permanently closed crotch under-garment is old. It is shown by the art that the extension of a flap extending below the crotch to the leg is also old. This is made clear by what is called the Austrian patent to Caroline Tichy of the 25th January, 1907. This patent shows the covering with

two flaps instead of a *single* flap. The exhibit produced of the Holmes Knitting Company, namely, Exhibit "D," referred to by Lacher, shows a permanently closed crotch, but with *two* flaps.

In arriving at the question of the construction of a patent of this character, and whether it is to be construed as a pioneer patent or merely a patent for a specific mode or method of construction, a considerable amount of stress has to be laid upon the nature of the article for which the invention is sought; and I think the case cited before me by Mr. Languedoc, of *Dalby* v. *Lyons* (1) is very apposite.

According to the evidence of the patentee, Johnson, he seems to have discovered what would have been obvious to anybody, that a longer slit or opening would have answered all his objections to the previous union garments. His difficulty apparently, which lasted for a considerable period, was to devise some kind of flap which would act as a cover for this extended slit. The idea apparently flashed upon him one Friday night of how to devise such a covering. He may or may not have known of this Austrian patent, which indicates by the drawing and specification the extension down the leg. I should judge that what he was aiming after was to break away from the prior art and obtain something which would enable him to get a construction patent, and that idea has been carried out in the description in the patent.

Bearing in mind the previous state of the art, and of the character or nature of the article in question, I turn to his specification. He says:

"This invention relates to that class of underwear "known as union suits, and has for its chief object "to provide an improved construction of such gar-

(1) 64 Fed. Rep. 376.

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"ment permitting the use of a permanently closed "crotch and *dispensing with the use of double flaps* or "a single, wide drop-fall or flap, with their numerous "fastenings, heretofore used to cover the posterior "opening, while at the same time presenting a "posterior opening of ample dimensions for its "required purpose *covered by a single flap* capable "of being secured by a single button or other fasten- "ing. In *other* words, my present invention is "designed to supply a garment combining in its "construction the two most essential requisites for "comfort and convenience in garments of this "character, namely, a permanently closed crotch, "and a posterior opening of ample dimensions and "convenient location that will not gap to expose the "person and *closed by a single flap* requiring but a "single button or equivalent fastening."

He then proceeds to describe his invention, and towards the end of the specification he states:

"From the above it will be seen that my invention "provides a garment having a *permanently closed* "*crotch* and a posterior opening extending from a "point near the waist-line to a point below the "crotch in one leg only. By carrying this opening "obliquely from a point substantially in the waist "line down to a point on the inner side of the leg "below the crotch, I provide a construction affording "an opening of ample dimensions and not requiring "twisting or lateral displacement of the intermediate "portion of the garment when in service. *This* "*opening is covered and fully protected by the single* "*stitched-in flap L*, requiring to be buttoned at but "a single point to effect a perfect closure."

His claim sued upon as Number 4, is as I have stated, "a permanently closed crotch undergarment

"having a posterior opening extending below the crotch "*and a sewed in flap* constituting a closure for said "opening, said flap having one of its lateral margins "permanently sewed to the garment from a point "above the seat to a point in one leg below the crotch, "the other lateral margin being free from a point above "the seat to a point in the opposite leg below the "crotch."

The defendants do not use the single flap; their garment has the two flaps—and as far as I can see does not differ from that of the Holmes Knitting Company. Lacher in his evidence shows that there are *two* flaps in the Holmes' garment; that there are *two* flaps in the defendants' garment; also *two* flaps in what is called the fit-to-fit garment.

McLoughlin shows the same thing, and so does Meyer—and I think a consideration of the garments themselves indicates that these witnesses are correct in the views which they have expressed.

It was contended before me that the patentee was in reality entitled to two flaps. I do not think this contention is correct. I do not think that patent would have been granted to him had it been as large as contended for by counsel.

After the best consideration I can give to the case, and bearing in mind the specification which I have quoted, and the construction which I am forced to place upon the patent, having regard to the prior art and evidence, I am of opinion that the plaintiffs have failed to prove infringement on the part of the defendants. Having come to this conclusion, and following the precedent set before me in the case of the *Consolidated Car Heating Co.* v. *Came,* (1) it is unnecessary for me to enter into the question of the validity of the

(1) (1903) A.C. 509.

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plaintiffs' patent. I may say, however, that were I called upon to pass upon this point, I would find grave difficulty owing to the manner in which the case has been presented for my consideration. With the exception of what is called the Austrian patent to Tichy, I have had no assistance by evidence of experts or an examination of the patents by counsel.

I would refer to one case in the Supreme Court of the United States which is worthy of perusal, namely, *Bischoff* v. *Wethered* (1). The language of Lord Westbury referred to in that case, can be seen in Frost on Patents, 4th ed. at pages 108, 144 and 148.

Betts v. *Menzies*, (2) may be referred to on the same point.

Another case may be looked at, lately decided by the House of Lords, *Pugh* v. *Riley Cycle Company, Limited* (3). It has not much bearing upon the case before me, but is very important as showing how publication may be made by a prior specification. A drawing even without a specification may amount to publication if it could be understood by any machinist, and would be prior publication. See Terrel on Patents, 5th ed. p. 80; (4) and also *The Electric Construction Company* v. *The Imperial Tramways Co.* (5).

There is not much to be gained by an elaborate citation of authorities in these patent cases. Authorities go into the thousands, but I think the principles which govern are well understood.

As I have said my opinion is, for the reasons I have stated, that the defendants in this particular case do not infringe. I decline to pass one way or the other

(1) 9 Wall. p. 812.
(2) 10 H. of L. Cases, p. 117.
(3) 31 R.P.C. 266.
(4) 5th ed. p. 80.
(5) 17 R.P.C. p. 550.

on the validity of the patent. The action is dismissed with costs.

Judgment accordingly.

Solicitors for plaintiffs: *Blake, Lash, Anglin & Cassels.*

Solicitors for defendants: *Greenshields, Greenshields & Languedoc.*

BETWEEN

1915
April 12.

HIS MAJESTY THE KING,

PLAINTIFF;

AND

THE CANADIAN PACIFIC LUMBER COMPANY, LIMITED, AND CAMPBELL H. D. ROBERTSON, OFFICIAL LIQUIDATOR OF THE SAID COMPANY,

DEFENDANTS.

Expropriation—Value of water-lot—Right to make erections—Abandonment—The Expropriation Act, sec. 23—Measure of Damages.

Where a water-lot, with no erection thereon, is expropriated for the purpose of a public work its value must be assessed as at the date of the expropriation, without considering such enhanced value as would be given to the water-lot if the approval of the Crown to make erections were obtained. On the other hand such assessment must be made in view of such riparian rights as are actually enjoyed by the owner at the time of the taking. *Lyon* v. *Fishmongers Co.* (L.R. 1 A.C. 662) referred to.

2. Where property used in connection with a saw-mill, is taken by the Crown and subsequently abandoned under sec. 23 of *The Expropriation Act*, the owner is entitled to damages measured by what the property would have been worth to him if used in such connection during the time it was vested in the Crown and the owner was out of possession.

THIS was a case arising out of the expropriation of certain real property at Vancouver, B.C., by the Dominion Government for the purposes of harbour improvements.

The facts are stated in the reasons for judgment.

February 22nd, 23rd, 24th, 25th, 26th, and March 1st, 2nd and 3rd, 1915.

The case was heard at Vancouver before the Honourable Mr. Justice Audette.

W. B. A. Ritchie, K.C., and *R. Maitland* for the plaintiff;

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Douglas Armour, K.C., *J. L. G. Abbott*, and *E. Herne* for the defendants.

AUDETTE, J. now (April 12th, 1915) delivered judgment.

This is an information exhibited by the Attorney-General of Canada, whereby it appears, *inter alia*, that certain land and a water-lot, belonging to the defendant Company, were taken and expropriated, under the provisions of *The Expropriation Act*, for the purposes of a public work of Canada, namely the construction of wharves, piers, docks and works for improving and developing the Harbour of Vancouver, Burrard Inlet, B.C., by depositing, on the 27th February, 1913, a plan and description of such land and water lot, in the office of the Registrar of Deeds for the County or Registration Division of Vancouver, B.C.

This case first came on for trial before the Honourable Mr. Justice Cassels, in November, 1913, upon the original information filed on the 6th September, 1913, when the Crown was expropriating both a strip of land 44 feet wide together with the water lot extending in front of the same. Mr. Justice Cassels, in his reasons for judgment, filed in the case of *The King* v. *Investment Corporation of Canada, Limited*, speaking of the present case said that the evidence had been made common to the three cases therein mentioned "and "that he had been notified that the Crown would "likely give an undertaking or possibly abandon the "proceedings relating to the strip of 44 feet, together "with this water lot in front of the same. Adding "that in this case uncontradicted evidence was adduced "to show that if the 44 feet were expropriated by the "Crown, the whole of the property held in connection

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"with the strip would practically be destroyed for mill "purposes—as this was practically the only land "available for the piling of lumber—lately, notice of "abandonment has been registered pursuant to the "statute, abandoning the 44 ft. strip so far as it is "composed of land, and about the southerly half of "the water lot extending in front of the 44 ft. strip. "The practical result of this abandonment is to render "the trial abortive."

On the 17th February, 1914, the Minister of the Public Works Department, acting under the authority and power conferred upon him by sec. 23 of *The Expropriation Act,* abandoned 450 ft. by 44 ft. in width of lot 14 in question herein. That is abandoning the whole of the land from Stewart St. for 290 ft. on the west side and 310 on the east side, by 44 ft. in width, up to the original high-water mark—together with 160 ft. on the west side and 140 ft. on the east, by 44 ft. in width, of the water lot—leaving 30,140 sq. feet, the balance of the water lot retained by the Crown as shewn on plan exhibit No. 21.

The defendant company's claim is: 1. For the value of this piece of the water lot first mentioned. 2. Alleged loss of profits caused by the closing of the mill during the period of 8½ months, from 15th July, 1913, to 31st March, 1914, at $53,516.71 per annum equal to $37,907.66. 3. Standing charges borne by the Vancouver mill during the above mentioned period being a direct loss in addition to the above loss of profits, viz.:

Insurance	$ 6,942.50
Taxes	2,875.17
Depreciation on buildings and plant (on $203,918.98 for 8½ months at 5% per annum)	7,222.13

Watchman's wages.....	$ 785.00	
Head office expenses estimated 8½ at $5,000 per annum...	3,541.67	
		$ 21,367.27

4. Loss sustained in the realisation of lumber piled on lot expropriated due to the enforced sale, estimated at $3 per M. ft. (For inventory of lumber piled on lot expropriated):

1,721,282 ft. at $3 per M. ft...	$ 5,163.84	
Cost of pile bottoms.....	850.13	
		$ 6,013.97

In view of the abortive trial during November 1913, resulting from the above-mentioned abandonment, at the opening of the present trial, during February 1915, I ordered out of the present case all the evidence already adduced in the three cases, both documentary and *viva voce*, and which had been made common to the present case; subject however to the leave by either party of applying to the Court to put in any part of such evidence. No such application was made and we therefore now face the present issues upon the evidence adduced solely at the trial during February 1915.

The defendant company, which is the result of a merger or amalgamation of several companies, own large saw-mills in British Columbia and had been in operation for twenty-three months at the date of the expropriation. It is perhaps idle to go into the numerous details of their amalgamation, sufficient will it be to mention that after the consummation of the amalgamation they decided to borrow £400,000—of which £350,000 were underwritten in England at 93 and brokerage, netting in round figures $1,413,000, 25 years bonds at 6%, payable half-yearly. The balance

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of £50,000 are held by the bank in Canada as security on loans.

The proceeds of the bonds were used to purchase the other companies. The sum of $1,000,000 was for the payment of the liabilities of each company—putting them in the amalgamation free from other incumbrances. The balance was placed over to the different other companies and they started business with $15,000 to $20,000.

In 1913 the company borrowed from the directors over $100,000 to meet the liabilities on the bonds, and in 1914 the two February and August payments were defaulted.

On the 18th November, 1914, under an order of the Supreme Court of British Columbia, C. N. D. Robertson, a party hereto, was appointed liquidator. He is also the receiver who is presently operating the Vancouver mill in question, which is the only mill of the Company which is presently operated.

I have had the advantage at the time of the trial of viewing the premises in question accompanied by counsel as well for the plaintiff as for the defendant. The mill, which is a large one, was then in full operation.

Value of water lot.

This water lot was sold to one John Hendry on the 16th May, 1905, under a Crown Grant from the Dominion Government for the sum of $500 subject to the following clause: "Provided that nothing in these "presents shall be held to absolve the grantee, his "heirs and assigns, or any of them, from fulfilling in "that respect the requirements of the Act, chapter "ninety-two of the *Revised Statutes of Canada* (1886); "and it is an express condition of this grant that no " 'work' within the meaning of the said Act shall be "undertaken or constructed on the said lands by the

"grantee, his heirs or assigns or any of them or shall be "suffered or allowed by them or any of them, to be "constructed thereon until as regards such works the "provision of the said Act shall have been fully com- "plied with. (See also 49 Vic. ch. 35; R.S.C. (1906) ch. 115; and 9-10 Ed. VII, ch. 44.)

The whole lot 14—land and water lot—was subsequently sold to Mr. Meredith on the 17th September, 1907, for $22,000 and on the following day he sold it to The Anglo-American Lumber Company for $25,000. And then it was sold to the defendant company on the 17th August, 1911, for $150,000—but it cannot be overlooked that the last sale was made at the time of the amalgamation of the several companies, as already mentioned, and one only knows too well what it means when promoters are handling properties under such circumstances. It should also be qualified by the fact that the asset of each company was not put in at the full value of their appraisal.

In tidal waters (whether on the foreshore or in estuaries or tidal rivers) the exclusive character of the title is qualified by another and paramount title which *prima facie* is in the public (1). The subjects of the Crown are entitled as of right to navigate on tidal waters. The legal character of this right is not easy to define. It is properly a right enjoyed so far as high seas are concerned by common practice from time immemorial, and it was probably in very early times extended by the subject without challenge to the foreshore and tidal waters which were continuous with the ocean, if, indeed it did not in fact take rise in them. The right into which the practice has chrystalized resembles in some respects the right to navigate the

(1) Atty Gen. B.C. v. Atty Gen. Can. (1914) A.C. 168.

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seas, or the right to use a navigable river as a highway, and its origin is not more obscure than that of these rights of navigation. Finding the subjects exercising this right as from immemorial antiquity, the Crown, as *parens patriæ*, no doubt regarded itself bound to protect the subject in exercising it, and the origin and extent of the right as legally cognizable are probably attributable to that protection, a protection which gradually came to be recognized as establishing a legal right enforceable in the Courts. (1).

It would, therefore, appear that the Crown, as trustee for the public is the guardian of such right held by the public to use navigable and tidal rivers as a public highway and it thus rests with the Crown to protect its subjects against any right which might arise by adverse possession, in violation of such *jus publicum*. The defendant's grant is subject to the *jus publicum*, or public right of the King and people, to the right of passing and repassing both over the water and the *solum* of the river. (2)

While the grantee of this water lot, owns the bed of this water lot, he is not entitled to place erections or stretch booms thereon without the approval required by the statute, and its value must be ascertained by reference to that approval, which is not obtainable as of right.

Following the decisions in the cases cited below (3) it must be held that the right to that approval provided by the statute is too remote and speculative to form a legal element for compensation. And, indeed, it is too obvious that the Crown requiring these lands for the

(1) (1914) A. C. at p. 169.

(2) *Mayor of Colchester* v. *Brooke*, 7 Q.B. 339; Ency. Laws of England, vol. 12, p. 566; and The King v. Tweedie, 15 Ex.C.R. 183.

(3) *The King* v. *Wilson*, 15 Ex. C. R. 288; *Cunard* v. *The King*, 43 S.C. R. 99; *The King* v. *Brown*, 14 Ex. C. R. pp. 463; 471; *The King* v. *Bradburn*, 14 Ex. C.R. 432–437; *Lynch* v. *City of Glasgow* (1903) 5 C. of Sess. Cas. 1174; *The King* v. *Gillespie*, 12 Ex. C.R. 406; and the *Central Pacific Railroad Company of California* v. *Pearson*, 35 Cal. 237.

purposes of a public work would not grant such leave and the property must therefore be assessed without that right.

Several witnesses have expressed their opinion upon the value of this water lot, with and without the right to erect wharves and stretch booms. Some have valued it as real estate land—but that valuation is not applicable in the present case. Witness Bateman, a witness heard by the defendant, said that without the right to erect wharf and stretch boom, the lot is not worth much. Witness Heap was negotiating for the purchase of some additional water lot and was offering 10 cents a square foot. He declined to purchase at 25 cents—the price fixed in 1914 by the Vancouver Harbour Commission, saying it was too high a price.

This water lot must be assessed at its market value, at the date of the expropriation, without the right to erect wharves and stretch booms, but with such rights as are defined in *Lyon* v. *Fishmongers* (1), that is to say with such right as are enjoyed by a riparian owner, *ex jure naturæ*, which are quite distinct from those held in common with the rest of the public. Besides the use of the water for domestic purposes—which in a case of salt water is however obviously less valuable, the riparian owner has over and above the rights enjoyed by the public, the right of access to and from the river.

Taking as a basis for the market value of this water lot the price now asked by the Harbour Commission I hereby fix the value of the same at $7,535.00—to which should be added 10% for compulsory taking, making in all the sum of $8,288.50.

Claim resulting from Abandonment.

The defendants claim that, as a result of the expropriation of their piling ground on lot 14, and which was

(1) L.R. 1 A.C. 622.

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subsequently abandoned and returned to them, they were compelled to close down their mill and thereby suffered very heavy damages.

The expropriation of the piling ground, which was made at the same time as the water lot, took place on the 27th February, 1913. On the 20th June, 1913 (Exhibit C.) the defendants were asked by the Crown, for the possession of lot 14 not later than two months from that date. On the 29th July, 1913 (Exhibit D) the defendants are requested to vacate without contest the lands in question. At a meeting of the defendant company on the 4th July, 1913, it is decided to close down the mill and stop operations on the 7th July, 1913, and they do so and remain closed until the 1st April, 1914. On the 17th July, 1913, Mr. Meredith, the Managing Director, writes to the Minister of Public Works asking that either the whole of the Hastings Shingle Co. be expropriated leaving the defendant's property intact or that the whole of the defendant's property be taken leaving the other intact, because if the expropriation is pursued as projected these two companies will have to shut down and alleging further that the notice to vacate the lot expropriated within 60 days from the 20th June, 1913, had compelled them to close down their mill—as it would be impossible to clear off this lot and keep the mill in operation.

In November, 1913, the defendant company had still about 500,000 feet of lumber on lot 14 and the balance was only removed at the end of December, 1913.

Mr. Meredith tells us that this mill is usually closed down every year for taking stock and overhauling for a couple of weeks or a month and the Secretary-Treasurer mentions about the same period.

There is an unaccountable error of fact which has slipped in and has been worked upon almost all through the trial, and that is the statement made by Mr. Meredith, that after the Crown had taken the water lot 14, the company remained with 275 feet by 400 feet of water lot for booming purposes opposite their property. That statement is not borne out by the title which only shows 95 feet frontage. A material difference indeed as between 95 and 275 feet. A great many questions put to witnesses have been answered on this basis and assumption of 275 by 400—instead of 95 by 765 on one side and 690 feet on the other side. The difference in the statement is so large that it becomes impossible to reconcile it.

Now the state of the market in the lumber business in 1913, at Vancouver, had not been very good. Witness Hardy tells us that business began to slack off in the latter part of 1913, and witness Meredith states that business has not been very good. Witness Lewis says that the condition of the lumber business in 1913 was not good and there was a drop in the fall of 1913. Three or four large mills went down and were placed in the hands of Receivers. Witness Alexander who belongs to the Association of Lumber Mills Co., which issue prices that are from time to time varied by discount sheets, says that trade held fairly well up to July 1913, and after that it began to decline. Things then went to pieces and we could not recommend any prices and did not issue any. The trade picked up again in the spring of 1914; but when the war started it went to pieces again. Witness Chew says that by the end of June 1913, prices began to drop. There was no stable or fix price after that and we made the best we could. Then Witness Heap, who is in the same business as the Defendants, speaks in the same stress, and says

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it had got to a price where nobody could live and we had to close down.

The fixed charges the defendant company had to face in 1913 were as follows, as shewn by the evidence of witnesses Meredith and Hardy, viz.:

Interest on Bonds	$ 103,000
Sinking Fund	35,000
Licenses, taxes, etc	25,000
Insurance	11,000
Interest on loan from Bank in 1913, $275,000 at 6%	16,500
	$ 190,500

Then Witness Crehan, a chartered accountant, contended, from the figures and explanations given in his evidence that the Company was running its business at a loss in June, 1913—just before they decided to close down.

It is perhaps well to mention that the defendant company was also using the water-front, opposite their mill, for stretching logs, on sufferance by the Crown—because under the statute as above set forth, they had no such right to interfere with navigation without leave from the Crown. In the early days when trade was being built up at Vancouver, no objection was ever made by the Crown—but that did not give them any legal right to such use. The silence of the Crown is only referable to its grace and bounty and does not constitute an acknowledgement of such a right. And this tolerance resulting from the benevolence of the Crown may be very reasonably expected to be put an end to since the passing of the statute creating a Commission for the Harbour of Vancouver.

If the defendant's business is affected by the curtailment of booming space by the Crown exercising

its right, what of the whole business of the company if the Crown were exercising its right with respect to all the water lots?

Now, in the result, it would appear from the evidence that the lumber business and the company's business was in a very undesirable financial state at the time they closed down. That their going into liquidation and in the hands of a Receiver were, under the circumstances, its ultimate fate and a matter of time.

It would, therefore, appear to me that the closing in July was perhaps the combined result of the state of the trade and of the expropriation and would let in for a part certain compensation. The defendants did not wish to be expropriated, they protested and made suggestions to avoid it. The Crown finally returned the piling ground in face of the large claim for damages and the Company re-opens its mill in 1914, when, as witness Gibbons says the market was a little better and we closed down because it was bad. They had at the time of re-opening a very large contract with the firm constructing the Government piers in question.

In their claim as set forth in Exhibit No. 16 and in their statement of defence, the defendants claim loss of profits during 8½ months—from 15th July, 1913, to 31st March, 1914. By their particulars it would appear that they operated that mill for about ten months in the year; that they vacated the piling ground on 30th December, 1913; that they claim by such particulars 6½ months from about 3 months after the closing down of the mill; but qualified by the statement that they operated during about ten months, that would reduce it to 4½ months.

While the defendants should be confined to the particulars delivered (1), they, perhaps should not be

(1) *Chitty's Archbold*, pp. 387, 388.

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held to it, under the circumstances, in absolute strictness; but it should be taken into account as a help in arriving at a conclusion respecting the period in question.

If we are to reckon the number of months from about three after the closing of the mills, we should start to reckon up from the 7th or 15th October, and down to the 17th February, 1914, and that would give us about 4 months and a few days. Then if something should be deducted because of the usual closing up for stock-taking and over-hauling around Christmas that would still go to reduce the number of months. However, one cannot expect that they could re-open on the very day they were served with the abandonment—a reasonable time should be given them for re-organization.

Therefore about 4½ months should be allowed but to make it more liberal, I will allow five months.

By Exhibit M the defendants claim that for the 23 months therein mentioned their Vancouver Mills earned per 12 months $53,516.71, giving about $4,459.72 per month. However, in face of the lumber business which had gone to pieces at that time, it is not reasonable to expect that the mill would have maintained its earning power at that figure, especially when we have in evidence that prices were no longer fixed or stable and that mill after mill was running into liquidation and in the hands of Receivers. I will therefore take one-third off the sum of $4,459.72 and fix the monthly profits which might have been earned at the sum of $2,973.14—making in all for five months the sum of $14,865. To this amount should be added the standing charges borne by the Company while it was earning the above-mentioned figures. The amount representing these standing charges, which according

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to plaintiff's witness, the chartered accountant, should also be classified as damages—because they were taken care of by the defendant company while they earned the above mentioned profits. The claim for 8½ months is made up at $21,367.27, therefor for 5 months they are hereby fixed at the sum of $12,568.98.

There is the further claim of $6,013.97 alleged loss sustained on the lumber piled on lot 15 due to enforced sale, estimated at $3.00 per M. ft. I find that the defendant company has failed to establish that claim. Indeed the lumber in question which was partly sold in the Middle West, was under the evidence sold at about the prevailing prices at the time and at the prices fixed by their contract of the 16th September, 1913, for the following year 1914. (Exhibit 27.) I find this claim is not meritorious and it is disallowed.

Now is the defendant company entitled to recover the above-mentioned damages. It may be said that loss of profit *per se* is not recoverable, because it is a personal claim; (*The King* v. *Richard*) (1), but it may well be that sub-sec. 4 of sec. 23 of *The Expropriation Act* contemplates a class of cases not governed by the general principles of expropriation, but standing by themselves under that particular enactment. Its language is as follows:—"The fact of "such abandonment or revesting shall be taken into "account in connection with *all the circumstances of* "*the case*, in estimating or assessing the amount to be "paid to any person claiming compensation for the "land taken." If we have to take into account all the circumstances of the case, the damages resulting from such abandonment and revesting would seem to be part of the consideration in estimating and assessing the compensation for the land taken and would let in such class of damages.

(1) 14 Ex. C.R. 372

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However, the defendants are clearly entitled to receive compensation based upon the value of the piling ground to them whatever that might be during the time it remained vested in the Crown. This piling ground has a special value to them in connection with the running of their mill. The suitability of the piling ground, for the purpose of the mill business affected the value of the land to them and the prospective profits which it was shewn would attend the use of that land in their business furnish material for estimating what was the real value of the land to them. The prospective profits are only entitled to be taken into consideration in so far as they might fairly be said to increase the value of the land to them. Probably the most practical form in which the matter can be put is that they were entitled to that which a prudent man in their position would have been willing to give for the land sooner than fail to retain it. Now in this present paragraph I have mostly paraphrased the able judgment of Lord Justice Moulton upon this subject, in the case of *Pastoral Finance Association Ltd.* v. *The Minister* (1). In this latter case it will be noticed that the profits that might be realized from the land in question and which went to give it a special value to the owner were also unearned profits; but really represented the potential capability of the piece of land to the owner as in the present case. (2).

Therefore the value of this piling ground to the defendant company—between the time of the expropriation and the abandonment—must be measured by the value it had to them in connection with the running of their mill, which had a revenue producing power as established by the evidence and they are entitled to receive as well the value of the water lot as the value

(1) Pastoral Finance Ass. Ltd. v. The Minister, (1914) A.C. 1085.

(2) See also Paradis vs. The Queen, 1 Ex. C.R. 191.

of the piling ground to them for the time it remained vested in the Crown.

Now witnesses Bateman, McClay, Vassar and Albernethy have testified that the Government works will appreciate and increase in value the defendant's property as a whole. And great stress has been made upon the new facilities for shipping, as resulting from this public work. Under sec. 50 of The Exchequer Court Act such advantage should be taken into account and consideration by way of set-off. While I agree with their evidence I will not earmark any figure by way of set-off, but I will leave this advantage as part of the compensation to make it more liberal and fair, under the circumstances of the case.

The Crown having abstained from tendering any amount by the pleadings as amended, costs will go in favour of the defendants.

There will be judgment as follows, viz.:

1. The lands expropriated herein and described in the amended Information are declared vested in the Crown from the 27th day of February, 1913.

2. The compensation is hereby fixed as follows, viz.: At the sum of $8,288.50 for the water lot—together with the further sum of $14,865.00 and $12,568.98, as above mentioned making the total sum of $35,722.48, —with interest on the sum of $8,288.50 from the 27th February, 1913, to the 14th May, 1913, when the Crown paid the defendant $58,500.00. The whole in satisfaction for the land taken and for all damages resulting from the expropriation and the abandonment, upon giving to the Crown a good and sufficient title free from all encumbrances whatsoever.

3. The defendants are entitled to all costs herein inclusive of all costs incidental to the two trials.

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Reasons for Judgment.

4. The Crown having paid the defendant company the sum of $58,500.00 on the 14th May, 1913, on account of the present expropriation, the said sum of $35,722.48 with interest as above mentioned and costs, will be deducted from the said sum of $58,500.00; and I do order and adjudge that the plaintiff recover from the defendants the difference between the said sum of $35,722.48, interest and costs and the said sum of $58,500.00.

Judgment accordingly.

Solicitors for the plaintiff: *Maitland, Hunter & Maitland.*

Solicitors for the defendants: *Davis, Marshall, Macneill & Pugh.*

IN RE

1915
Jan 26.

251 BARS OF SILVER AND THE SEA INSURANCE CO. *ET AL.*

(DEFENDANTS) APPELLANTS;

AND

THE CANADIAN SALVAGE ASSOCIATION,

(PLAINTIFF) RESPONDENTS.

Admiralty Law—Practice—Appeal from Interlocutory Order—The Admiralty Act, 1891, c. 141, s. 14.

Held, where a mode of appeal is prescribed by statute such procedure must be followed in its entirety. *Supervisors* v. *Kennicott*, 94 U.S. 498, referred to.

2. Where the appellant on an appeal from the order of a Local Judge in Admiralty to the Exchequer Court failed to obtain the permission of such local judge, or the Judge of the Exchequer Court, for such appeal being taken, the appeal was dismissed for not having complied with the requirements of the statute.

APPEAL from an interlocutory order of the Local Judge for the Quebec Admiralty District, refusing to accept certain bonds tendered by defendants as bail in a salvage action.

January 23rd, 1915.

The appeal was heard before The Honourable MR. JUSTICE CASSELS at Ottawa.

George F. Gibsone, K.C. for the appellants;

C. A. Pentland, K.C., for the respondents.

CASSELS, J. now (January 26th, 1915) delivered judgment.

Since the argument of the case I have carefully considered the points argued on behalf of Mr. Gibsone.

1915

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BARS OF SILVER v. THE CANADIAN SALVAGE ASSOCIATION.

Reasons for Judgment.

As I have come to the conclusion that the appeal does not lie, it is not necessary to deal with the facts.

It was conceded both by Mr. Gibsone, who argued the appeal, and Mr. Pentland, who was for the respondents, that if I was of opinion that the objection taken by Mr. Pentland was well founded, there would be no object in my dealing with the other matters argued before me.

I do not see how it is possible to get away from the provisions of the statute as embodied in Sec. 14 of *The Admiralty Act*, 1891.

It is conceded by Mr. Gibsone that the order appealed from is an interlocutory order. That being so no appeal lies except with the permission of the Local Judge or of the Judge of the Exchequer Court from any interlocutory decree or order. No such permission has been granted or asked for.

Mr. Gibsone argued that under the orders of the Court regulating the procedure in Admiralty cases, no leave is necessary, and that these orders virtually overrule the statute. I cannot acceed to such a statement. The orders are made pursuant to the statute. If they purported to order something contrary to the express terms of the statute, they would be simply void; but there is nothing inconsistent between the statute and the orders. The orders refer to appeals properly brought. The right of appeal is purely statutory, and the provisions of the statute must be followed. If it were necessary to quote authority on the point, it is admirably summarised in *Brown on Jurisdiction* (1):

"The mode of appeal must follow the statute, and "when the statute requires that the appeal shall be "taken in a specified manner, it must be followed as to

(1) 2nd ed. (1901) sec. 21 at p. 111.

"time, manner and the fulfilling of all the statutory "directions." And see the case of *Supervisors* v. *Kinnekutt*, (1) and other cases cited by the author.

I think, therefore, that the appeal must be dismissed with costs.

Appeal dismissed.

1915

251 BARS OF SILVER v. THE CANADIAN SALVAGE ASSOCIATION.

Reasons for Judgment

(1) 94 U.S. p. 148.

IN RE

1915
Feb. 18.

251 BARS OF SILVER *ET AL.*,

(DEFENDANTS) APPELLANTS;

AND

THE CANADIAN SALVAGE ASSOCIATION,

(PLAINTIFFS) RESPONDENTS.

No. 2.

Admiralty Law—Shipping—Salvage—Release and Bail—Competency of incorporated company to contract as Surety—Practice.

Held, that in a salvage case arising in the Quebec Admiralty District an incorporated company duly authorized by law to carry on the business of suretyship may be accepted as bail for the purpose of releasing the property salved.

THIS was a motion by way of appeal from an interlocutory order of the Local Judge of the Quebec Admiralty District refusing the bond of an incorporated company, authorized to carry on the business of suretyship in Canada, offered as bail for the release of 251 bars of silver bullion salved from the wreck of the *Empress of Ireland*.

February 18th, 1915.

The appeal was argued before the Honourable Mr. Justice Cassels at Ottawa.

George F. Gibsone, K.C., in support of appeal.

A. C. M. Thomson, contra.

1915

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BARS OF SILVER v. THE CANADIAN SALVAGE ASSOCIATION.

Reasons for Judgment.

CASSELS, J:—There is no rule or practice forbidding a surety company duly authorized by law to carry on business in Canada being accepted as bail in a proceeding in the Quebec Admiralty District. Rules 45–52 respecting bail do not attempt to exclude such companies, and while the forms of the bond and affidavits of justification are made to apply to individual sureties, it must not be overlooked that the interpretation clauses to the rules declare that "person" shall include a body corporate.

There will be an order declaring the sureties offered by appellants not to be incompetent by reason of their being incorporated companies; and that the proceedings for release and bail be remitted to the Registrar of the Quebec Admiralty District to be continued before him in due course as to the sufficiency of the security.

Appeal allowed.

IN THE MATTER OF THE PETITION OF RIGHT OF

1915
Feb. 22.

WILLIAM MONTGOMERY,

SUPPLIANT;

AND

HIS MAJESTY THE KING,

RESPONDENT.

Practice—Discovery—Rule 135—"Any departmental or other officer of the Crown" —Master of Government Dredge.

Upon an application being made in Chambers for an order to examine the master of a Government dredge for the purposes of discovery, in a proceeding by petition of right for damages arising out of an accident to an oiler employed on such dredge.

Held, that the master of the dredge was not an "officer" within the meaning of the rule in question.

SUMMONS for an order for the examination on discovery of the captain of a government dredge on board of which the suppliant had met with an accident.

February 19th, 1915.

Alexander Smith in support of summons; *E. J. Daly*, contra.

CASSELS, J. now (February 22nd, 1915) delivered judgment.

This was an application on behalf of the suppliant for an order for the examination for the purposes of discovery of one Gavin, who was captain of the government dredge *Industry* at the time that the suppliant was employed as an oiler on board of such dredge, and

1915

MONTGOMERY v. THE KING.

Reasons for Judgment.

at the time of the accident set out in the Petition of Right.

I am of opinion that the application fails. The Rule of Court (Rule 135) which permits examination of "any departmental or other officer of the Crown" cannot be extended so as to comprise the captain of the vessel in question. See *Larose* v. *The Queen* (1) The words there interpreted were "any officer or servant of the Crown" as appearing in sec. 20 of *The Exchequer Court Act.*

A collection of authorities in the United States may be referred to in the second series of *Judicial and Statutory Definitions of Words and Phrases* Vol. 3 at page 703 under the word "Officer". See also *Bouvier's Law Dictionary.* (2)

The costs of this application will be costs in the cause, in any event, payable by the suppliant to the Crown.

Summons dismissed.

(1) 31 S.C.R. 209

(2) By Rawle, 1914, 2404.

IN THE MATTER OF THE PETITION OF RIGHT OF

1915
April 21.

WILLIAM MONTGOMERY,

SUPPLIANT;

AND

HIS MAJESTY THE KING,

RESPONDENT.

No. 2.

Exchequer Court Act, R.S. 1906, c. 140, sec. 20(a)—"Public Work"—Dredge belonging to Dominion Government.

Held, following the views expressed by the judges of the Supreme Court in the case of *Paul* v. *The King*, (38 S.C.R. 126), that a dredge belonging to the Dominion Government is not a "public work" within the meaning of sec. 20(c) of the *Exchequer Court Act*.

PETITION OF RIGHT for the recovery of damages arising out of an alleged act of negligence by a servant of the Crown.

The facts are stated in the reasons for judgment.

March 3rd, 1915.

The case was tried in Toronto before the Honourable Mr. Justice Cassels.

J. Birnie, K.C., for suppliant;

A. E. H. Creswick, K.C., for respondent.

CASSELS, J. now (21st April, 1915) delivered judgment.

This case was tried before me in Toronto on the 3rd March, last.

1915

MONTGOMERY v. THE KING.

Reasons for Judgment.

The petition was filed on behalf of the suppliant claiming that in the month of January or February, 1913, the suppliant was duly hired by the captain of the Dredge *Industry*, belonging to the Dominion Government, to oil the engines and keep them in running order.

He alleges that on or about the 15th August, 1913, the suppliant sustained an injury whilst cutting a swing wire cable on the dredge, under orders from the captain, which the suppliant was bound to obey.

He also alleges that the cable had to be brought from the top part of the deck down into the drum in the engine room, and when the said cable was all set in place it was found twelve feet had to be cut off.

He further alleges that the usual method of cutting was to heat the cable, and that the captain was asked "should not the cable be heated," whereupon the captain informed him not to mind heating the cable but to go on and cut it as quickly as possible with a cold chisel.

He then proceeded as alleged, and whilst cutting the cable, a chip came off and hit him in the right eye completely destroying the sight thereof.

The ground of negligence alleged in the petition was that the suppliant should not have been ordered to cut the cable, having no previous experience or knowledge of the matter; that the cable should have been heated before any one attempted to cut it; and that the instructions furnished for the cutting of the cable were not proper or suitable for the purpose. These are the grounds of liability alleged in the petition of right. Subsequently the counsel for the suppliant gave notice, that he would apply for leave to amend his petition at the trial by setting up the following:—

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MONTGOMERY v. THE KING.

Reasons for Judgment.

"That the said cable was not properly seized before the suppliant proceeded to cut it and by the orders of the said Captain a strain was improperly and dangerously put upon the cable while it was being cut, by seizing one end fast to the winch-engine and starting up the engine, and that the place where the suppliant was ordered to cut the said cable was an improper and unsuitable place, with not sufficient light and room."

At the opening of the case I pointed out to counsel for the suppliant that I was afraid that under the authorities as they stand there was no remedy in that the accident in question did not occur on a public work.

As the witnesses were present and no objection being raised by the counsel for the Crown, I allowed the evidence to be given so that in the event of the counsel for the suppliant being able to satisfy the Supreme Court that their judgment in the *Paul*(1) case was erroneous, it would not be necessary to have a new trial in the event of the findings in his favour on the merits.

At the trial I formed an opinion that on the facts of the case the suppliant was not entitled to succeed. The unfortunate man has suffered a severe injury resulting in the loss of the sight of one of his eyes. I fail to see that he has sustained the charge put forward by him of negligence. Dealing with his alleged cause of complaint, I am of opinion that he fails in the allegation that before cutting the cable it should have been heated. It is clear from the evidence that the heating of the cable destroys to a certain extent the temper of the cable and has an injurious effect upon its strength. According to the suppliant there were

(1) 38 S.C.R. 126.

three occasions on which cables were cut during his employment on the dredge; in only one of the three was the cable heated. In two of the three cases the cable was cut cold—and I think the evidence of the defendant's witnesses shows that there is no negligence whatever in directing the cable to be cut cold. The allegation in the petition of right that the instruments furnished for the cutting of the cable were not proper and suitable for the purpose completely fails on the evidence.

When we come down to the amendment, while the contention is properly before the court, it is not unimportant to note that the ground taken, namely, that the cable was not properly seized, was an afterthought, and I do not think there is anything in this contention. The cable in question in this particular case was about 1½ inches in diameter. The cable is composed of some six strands, each strand is composed of about twenty-five wires. The plan of seizing, or binding, is with the view of preventing the wires from unravelling and so losing a portion of the iron rope. In the case before the Court, what was being cut off was a piece about 12 feet in length, which the drum around which the cable was being wound could not carry. It is admitted on all sides that this piece of 12 feet in length was valueless, and therefore while they seized or bound that part of the cable which was to be utilized so as to avoid the wires unravelling there was no object in seizing the end of that portion which was being cast away as useless.

It is alleged that the effect of seizing on both sides would have the effect of preventing splinters from flying. I do not agree with this contention. Dowers, a witness for the suppliant, puts it in this way:—

"Q. Would seizing on both sides of the cut have "anything to do with that, or would it prevent it or

1915

MONTGOMERY v. THE KING.

Reasons for Judgment.

"not (Referring to the liability of splinters to fly)?—A. The seizing I don't think would have any cause to "stop the splinters from flying."

"Q. You don't think the seizing on both sides would "have anything to do with preventing the splinters "from flying?—A. No.

"Q. Then with regard to this accident, according to "your evidence the seizing of the cable did not have "any effect one way or the other?—A. No.

Later on in cross-examination he explains the effect of the heating on the wire.

Bunting, another witness for the suppliant, deposes as follows:—

"Q. What effect does the seizing have?—A. It keeps "the wire from unlaying.

"Q. What effect would it have on a thread if it is not "seized, supposing you cut each thread?—A. It would "be the same thing.

"Q. It is apt to fly if it is not seized and I suppose it "would be more apt to throw splinters?—A. Not any "more, but it would be just as apt to throw splinters."

Another ground of complaint is that before the wire was cut, it was strained by a pressure of about two tons weight, and it is alleged that this made the operation more dangerous. It certainly would facilitate the cutting of the wire. The danger apprehended is that where such a strain is placed upon the wire, when it is cut through, the end of the wire is apt to spring back and cause injury to a person who may be hit by the wire. This may be so but there is no complaint of any such thing happening in this case. No injury was caused by the springing back of the wire.

On the whole I fail to see how the suppliant has brought himself within the terms of the statute proving negligence on the part of an officer of the Crown.

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MONTGOMERY v. THE KING.

Reasons for Judgment.

While I deal with the merits, I may as well point out that as at present advised I do not see how this case can be distinguished from *Paul* v. *The King* (1). The main opinion of the court was delivered by Sir Louis Davies, J. and he points out (2) that "to hold the "Crown liable in this case of collision for injuries to "the suppliant's steamer arising out of the collision we "would be obliged to construe the words of the section "so as to embrace injuries caused by the negligence "of the Crown's officials not as limited by the statute " 'on any public work,' but in the carrying on of any "operations for the improvement of the navigation of "public harbours or rivers. In other words, we would "be obliged to hold that all operations for the dredging "of these harbours or rivers or the improvement of "navigation, and all analogous operations carried on "by the Government were either in themselves public "works, which needs, I think, only to be stated to "refute the argument, or to hold that the instruments "by or through which the operations were carried on "were such public works. If we were to uphold the "latter contention I would find great difficulty in "acceding to the distinction drawn by Burbridge J. "between the dredge which dug up the mud while so "engaged and the tug which carried it to the dumping "ground while so engaged. Both dredge and tug are "alike engaged in one operation, one in excavating the "material and the other in carrying it away."

According to Mr. Justice Idington, the interpretation given to the words "public works" in the *Public Works Act* cannot be applied.

It is quite true, as stated by Mr. Birnie, that in one of the cases referred to in the *Paul* case, i.e. *Chambers v. Whitehaven Harbour Commissioners*, (3) A. L. Smith,

(1) 38 S.C.R. 126.

(2) See p. 131.

(3) (1899) 2 Q.B. p. 132.

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MONTGOMERY v. THE KING.

Reasons for Judgment.

L.J. does state that the man was not killed on the dredge; if he had been I am inclined to think that he would have been within the Act, but I do not decide it. He was killed while employed on the hopper which was in a similar position to the cart in the cases cited.

The *Paul* case was very similar to the *Chambers* case. In the case before me there is a difference in that the accident happened on the dredge. However, it is quite clear from the *Paul* case that the Supreme Court intended to hold that a dredge utilized for the deepening of a harbour was not a public work within the meaning of sec. 20 of the *Exchequer Court Act.*

A further difficulty would confront the suppliant by the case of *Ryder* v *The King,* (1) if the Supreme Court holds it to be still good law. I reserve to myself the right to consider in any future case that may arise the question whether or not the law as laid down in the *Ryder* case has not by subsequent decisions of the Supreme Court been over ruled. In the case before me, the defence of common employment would be a good defence. The suppliant would be forced to rely upon the *Workmen's Compensation Act* in force at the time of the right of action accruing. According to the decision in the *Ryder* case, the suppliant would have no cause of action under the *Workmen's Compensation Act,* because that Act did not apply to the Crown.(1)

On the whole, I regret the suppliant is not entitled to the redress as his injury has been a serious one. No other course is open to me than to dismiss the petition with costs.

Judgment accordingly.

Solicitor for suppliant: *J. Birnie.*

Solicitor for respondent: *A. E. H. Creswicke.*

(1) 36 S.C. 462.

(1) EDITOR NOTE.—See *Gauthier v. The King, infra* for a further discussion of this point.

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

PLAINTIFF;

AND

ESTATE OF JOHN MANUEL,

DEFENDANT.

1915
March 29

Expropriation—Basis of Compensation—Gentleman's Residence—"Market value" and "Intrinsic value" distinguished—"Quantity Survey Method" considered in relation to establishing market value.

Held, that the owner of property expropriated is entitled to have the compensation assessed at its market value in respect of the best uses to which it can be put, e.g. where a property has its chief value as a gentleman's residence commanding a good view and with a fairly desirable location that is the value upon which compensation should be assessed.

2. Compensation for property taken under the authority of *The Expropriation Act*, R.S. 1906, c. 143, is to be assessed upon the market value of the property and not upon its intrinsic value.

3. Distinction between the terms market value and intrinsic value stated.

4. The so-called "quantity survey method" considered in relation to ascertaining the true market value of property expropriated.

THIS was a case arising out of an information exhibited by the Attorney-General of Canada seeking to have the compensation assessed in respect of certain lands in the City of Ottawa expropriated for the purposes of the Government of Canada.

The facts are set out in the reasons for judgment.

March 10th, 11th, 12th and 13th, 1915.

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

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

G. F. Henderson, K.C., for the defendant.

1915

THE KING v. MANUEL.

Reasons for Judgment.

AUDETTE, J. now (March 29th, 1915) delivered judgment.

This case arose on an Information exhibited by the Attorney-General of Canada, whereby it appears, *inter alia*, that certain lands and buildings belonging to the defendant were taken and expropriated, under the provisions and authority of section 3 of *The Expropriation Act*, for the purposes of a public work of Canada, namely, the erection of Departmental Buildings for the use of His Majesty's Government, at Ottawa, by depositing a plan and description of such lands, on the 9th day of March, 1912, in the office of the Registrar of Deeds for the registration division of the City of Ottawa, in the County of Carleton and Province of Ontario.

The lands and real property so expropriated are severally described in paragraph 2 of the Information and are composed of four singular parcels or tracts of land respectively described in sub-paragraph 1, 2, 3 and 4 of said paragraph 2.

At the opening of the trial counsel for both parties declared that the compensation for the lands and real property described in said sub-paragraph 1 and 4 had been adjusted and settled for the respective sums of $33,000 and $44,000—or a total of $77,000.

The only questions now remaining before the Court is the ascertainment of the compensation for the lands and real property described in the said sub-paragraphs 2 and 3, for which the Crown, after the above intimation of the settlement of the lands in sub-paragraph 1 and 4, now offers the sum of $100,000.

The defendant, by his counsel, also declared at the opening of the trial, in view of the above adjustment and settlement, that he now claims for the said lands

and real property described in said sub-paragraph 2 and 3, the sum of $155,000.

The question of title is admitted.

It is also admitted that the area taken on the South side of the street is of 37,456 square feet and the area on the north, also called the River side, is of 21,000 square feet.

On behalf of the defendant the following witnesses were heard: viz.: Victor V. Rogers, Theodore St. Germain, W. J. Seymour, Harry W. Staunton, and Werner Noffke.

Now this property must be assessed, as of the date of the expropriation, at its market value in respect of the best uses to which it can be put, viz.:—as a gentleman's residence commanding a good view and located in a fairly desirable portion of the City of Ottawa.

On behalf of the defendant we have the evidence of two real estate business men, who speak in respect of the value of the land and two other witness who speak respecting the appraisal of the buildings.

It will be noticed that the valuation of the land by these two real estate agents of considerable experience, contrary to the custom in Ontario, is made upon the square foot instead of upon the foot frontage basis, and their opinion is not asked as to the value of the buildings or the property as a whole, although this method of valuation comes within the scope of their daily occupation. We have been deprived of their opinion upon the value of the property as a whole and it naturally comes to one's mind to question whether this double departure from their usual course has not had the effect of inflating the assessment. Taking the figures of witness Rogers—at $1.80 a square foot for the South, it would give us in round figures $325 a foot frontage; and the North at 80 cents a square foot

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Reasons for Judgment.

would give about $120 a foot frontage—showing figures which cannot be accepted.

On the question of value of the buildings and erections upon the property we are facing a somewhat new and unusual method of arriving at the value of the same. Two witnesses are heard on this subject. One of them takes measurements and reports upon the same and upon the depreciation and the other places a value before depreciation and a value after making an allowance for such depreciation. From their first evidence and appraisal it appears that the value of the buildings, before the allowance for depreciation, was in 1912 the sum of $78,488.31, and after allowing the depreciation the sum of $64,045.20.

Now this appraisal of the value of the buildings made under what is called "the quantity survey method", while it undoubtedly discloses the intrinsic value of the property does not necessarily establish its market value. The compensation under the statute is not to be assessed upon the basis of the intrinsic value, but upon the basis of the market value of the property.

The intrinsic value is the value which does not depend upon any exterior or surrounding circumstances. It is the value embodied in the thing itself. It is the value attaching to objects or things independently of any connection with anything else. For instance, had we to fix a proper compensation for a discarded ship-yard, formerly used in the building of wooden ships—we would be facing launch-ways, logs and piers of perhaps great intrinsic value; but if the property were thrown upon the market it would have indeed very little commercial or market value. The same might be said with respect to the numerous wharves and piers on the shores of the St. Lawrence, which were formerly used in connection with the timber

trade, when square timber was shipped in wooden bottoms—and that have since become useless and valueless, notwithstanding the fact that they have retained and have their intrinsic value which can be arrived at on this basis of quantity survey method, but which would be no criterion of their market value. Therefore the intrinsic value of the property is not what is sought here—and it would be proceeding upon a wrong principle to take the "quantity survey method" as a basis to ascertain the compensation as it would give the result of the intrinsic value and not of the market value.

The compensation in the present case should be arrived at upon the basis of the market value of the property, taking into consideration all the circumstances above mentioned, viz.: the location, the advantageous view and its uses as a gentleman's residence.

Although the market for a property of this class, is somewhat limited, as is disclosed by the evidence, it has nevertheless a commercial value.

The "quantity survey method" evidence submitted by the defendant—quite proper in valuations for the merger of companies—must be held not to be the proper method to follow in expropriation matters. This intricate valuation, made by the combination of two separate individuals, takes us away from the real market value of the property, as above set forth, which is obviously the proper basis of valuation in assessing compensation for lands expropriated, as decided by the Supreme Court of Canada, in *Dodge* v. *The King*, (1) and under numerous other authorities. The effect of such a finding in the present case throws the overwhelming weight of the evidence in favour of the Crown. And indeed the evidence adduced by the Crown is given by a very credible

(1) 38 S.C.R. 155

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Reasons for Judgment.

class of witnesses who have approached the assessment on the proper basis of market value; and among these witnesses we have Mayor Porter, whose high character and good standing in the community, backed as they are by a very large experience of twenty-five years in this line of business, makes his evidence worthy of weighty consideration.

How is the value of property ascertained and established on the market if not from the prices paid in the mutation of property in the neighbourhood? The McLean property, referred to in the testimony of several witnesses, compared vary fairly with the property in question and $200 a foot frontage was allowed. Then one of the defendant's properties, the Bowling Green, immediately adjoining the present lands to the west was assessed and settled for on a basis of $150 foot frontage. It is true the land is lower and does not command as good a view as the plateau upon which the dwelling house is erected; but the garden which is part of the property to be assessed herein, being lot No. 40 is still on the slope and yet the ratio of $222.50 is extended to cover that part as well as the eastern lots 41 and 42. The valuation on behalf of the Crown for the property as a whole ranges in round figures from $75,000 to $91,000. It would seem that the assessment of the compensation should not be made on the basis of separating and segregating the various factors or component parts of the buildings and the land—although all these elements must be taken into consideration—but the property must be regarded as a whole and its market value as such assessed as of the date of the expropriation. *The King* v. *Kendall*, (1) affirmed on appeal to the Supreme Court of Canada; *The King* v. *N.B. Ry. Co.* (2); and *The King* v. *Loggie*, (3). It may be

(1) 14 Ex.C.R. 71. (2) 14 Ex.C.R. 491. (3) 15 Ex.C.R. 386.

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Reasons for Judgment.

said here that the doctrine of re-instatement which was mentioned in the course of the trial does not obtain in a case like the present one. (1).

I have had the advantage of viewing the premises in question, accompanied by counsel for both parties, and looking at the River lot, and realizing the topography of the same which presents a cliff of very abrupt and precipitous decline, I cannot see it has the value of $65.00 a foot frontage or $11,000 altogether —the value put upon it by the Crown's witnesses— unless by way of placing upon it a very large additional value it may acquire to the joint owner on the North side opposite, to assure the view and give him an access to the river. It has a very restricted level space which can hardly be called a plateau.

Viewing the property as a whole and taking all the legal elements of compensation into consideration, as above set forth, this property, with its age, the amount of money that would be required to modernize it, would seem to be worth in the neighbourhood of $80,000, thus leaving still the very large margin of $20,000 to reach the sum of $100,000 tendered by the Crown; a margin which would go to cover the usual amount for compulsory taking, for moving and other incidentals of that nature, leaving available a further sum which would go to make the compensation especially liberal and generous. It must therefore be found that the amount of $100,000 offered by the Crown at the opening of the trial, is just and sufficient under the circumstances.

The property, ever since the date of the expropriation, has remained in the possession of the defendant and there will therefore be no interest allowed on the compensation money.

(1) *Wilson* v. *The King*, 15 Ex.C.R.

1915

THE KING. v. MANUEL.

Reasons for Judgment.

There will be judgment as follows, viz.:

1. The lands expropriated herein and described in the information in sub-paragraph 2 and 3 of paragraph 2 thereof are declared vested in the Crown since the date of the expropriation.

2. The compensation for the lands and real property so expropriated and for all damages resulting therefrom are hereby fixed at the sum of $100,000 which the defendant is entitled to recover upon giving to the Crown a good and sufficient title free from all incumbrances whatsoever.

Judgment accordingly.

Solicitors for the plaintiff: *Hogg & Hogg.*

Solicitors for the defendant: *MacCracken, Henderson, Greene & Herridge.*

BRITISH COLUMBIA ADMIRALTY DISTRICT.

GRAND TRUNK PACIFIC COAST S.S. CO., LTD, PLAINTIFF;

1914 March 25.

AGAINST

THE GASOLENE LAUNCH *B.B.*, DEFENDANTS.

Admiralty Law—Shipping—Salvage or towage—Appreciable risk in service rendered—Excessive claim—Costs.

The *B.B.*, a gasolene launch of some 60 feet in length, became disabled, owing to lack of gasolene, when approaching in the day time the entrance of the First Narrows in Burrard Inlet. There was a fresh breeze and a somewhat rough sea prevailing at the time, but these conditions were not sufficient to make the position of the launch perilous, although the passengers on board (numbering some 15 or 16) were calling for help. The master of the *Prince George*, a passenger steamship, of 3379 gross tonnage and 320 feet in length, belonging to plaintiff company, heard the calls for help and went to the launch's assistance, taking her in tow and bringing her safely to port. The *Prince George* was not delayed more than half an hour by rendering this service, but there was an element of appreciable risk incurred by her master, in that his ship was carried by the tide close to the shore during her manœuvres in taking the launch in tow.

Held, that the service was a salvage service and not one of towage merely, and that an award of $500 should be made.

2. Inasmuch as the plaintiff's claim was excessive, bail having to be furnished by the defendant in the sum of $2,000, the costs of furnishing the same were given to the defendant, although in other respects the costs were ordered to follow the event. *Vermont S.S. Company v. The Abbey Palmer* (1904) 8 Ex. C. R. 463 referred to.

ACTION to recover the sum of $2,000 for alleged salvage services.

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

March 2nd and 3rd, 1914.

The case was heard before the Honourable Mr. Justice Martin, Local Judge of the British Columbia Admiralty District at Vancouver.

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GRAND TRUNK PACIFIC COAST S.S. CO. v. THE GASOLENE LAUNCH B.B.

A. Alexander, for plaintiff; *J. E. Bird*, for the defendant ship.

MARTIN, L. J., now (March 25th, 1914), delivered judgment.

Reasons for Judgment.

This is an action brought by the owners of the S.S. *Prince George* to recover $2,000 for alleged salvage services rendered to the gasolene launch *B.B.* about 6.15 p.m. on the 29th of November last, off Prospect Bluff when approaching the entrance to the First Narrows in Burrard Inlet. The *Prince George* is a twin screw, high powered passenger vessel of 3,379 tons gross, 320 feet long with a speed of about $18\frac{1}{2}$ knots, and valued at half a million dollars. The *B.B.* is a small launch, 60 feet in length, valued at $3,000, carrying passengers and freight between Vancouver and Howe Sound, and at the time in question, it is admitted in the defence, that she had 15 or 16 passengers on board, and a crew of two, the master and the engineer. She had become disabled because the gasolene was exhausted and was drifting about in the track of vessels approaching the Narrows, about two miles west of Prospect Bluff. I note here that the one boat on the *B.B.* could only hold ten persons. The night was dark but clear; the wind from the west, was, I find, a fresh breeze, strong enough to raise a fairly rough sea against the strong ebb tide, though not sufficiently so to make it dangerous to the *B.B.*, but the situation was doubtless alarming to the passengers whose calls for help attracted the attention of the master of the *Prince George*, who was on the bridge and went to their assistance, and finally (after breaking one line in towing her for about a mile) made fast with another and towed her into Vancouver harbour. This service delayed the *Prince George* not more than half an hour,

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Reasons for Judgment.

and the question is whether it is to be considered as a salvage or a towage service. The defence submits that there was no element of danger in it and that it should be deemed to be merely a towage service, to satisfy which, the sum of $100 is brought into court. A good deal of evidence was given as to the state and direction of the tide at the point where the launch was picked up, and the evidence is conflicting in this respect and as to the varying positions of both vessels. I am, however, of the opinion that, whatever may be said about danger to the launch, no valid reason has been shown why credence should not be given to the Master and First Officer of the *Prince George* as to the different positions that she was forced into, and then there is no escape from the fact that there was an element of appreciable risk to her in the position close to the land where she was carried by the tide during her manœuvres, which I am satisfied, were expeditiously and skilfully carried out. The case must therefore be dealt with on a salvage basis, and I award the sum of $500 as an adequate compensation.

Objection was taken to the fact that the *B.B.* was arrested to answer an extravagant claim of $2,000, two thirds of her value, and the case of *Vermont S.S. v. The Abbey Palmer* (1), was cited in support of an application to reduce the costs for that reason, as bail had to be furnished for $2,000. I am of opinion that the claim, in all the circumstances, upon which each case must depend, was so excessive as to be within the rule there laid down as to oppression, and therefore it is ordered that the costs of furnishing bail be costs to the defendant: in other respects they will follow the event.

Judgment accordingly.

(1) (1904), 8 Ex. C. R., 462.

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March 30.

BRITISH COLUMBIA ADMIRALTY DISTRICT.

HIS MAJESTY THE KING,

PLAINTIFF;

AGAINST

THE SCHOONER *VALIANT*,

DEFENDANT.

Illegal fishing—Three-mile limit—Presence of fishing vessel within prohibited zone without reference to stress of weather or other unavoidable cause.—R.S.C. 1906 cap. 47, sec. 10-3-4 Geo. V. (Dom.) cap. 14, sec. 1—Fisheries and Boundaries Convention, 1818—Convention of Commerce and Navigation, 1815.

Where a foreign fishing vessel has committed a breach of clause (b) of section 10 of the *Customs and Fisheries Protection Act* (R.S. 1906, cap. 47) by entering the three-mile limit for some purpose not permitted she is liable to seizure and forfeiture notwithstanding that she was actually seized outside of the three-mile limit.

2. That the Fisheries and Boundaries Convention of 1818, between Great Britain and the United States does not apply to the coast of British Columbia so far as fisheries are concerned.

3. That under Article 1 of the Convention of Commerce and Navigation, 1815, between Great Britain and the United States, no liberty or right is given to foreign vessels to carry on fisheries, but simply "to come with their cargoes to all such places, ports and rivers in the territories aforesaid, to which other foreigners are permitted to come, but subject always to the laws and statutes of the two countries respectively." Section 186 of *The Customs Act* (R.S. 1906 c. 47.) would, therefore, apply, which makes it unlawful for a vessel, to enter any place other than a port of entry unless from stress of weather or other unavoidable cause; as there was no cause justifying the entry of the vessel into the "place" or natural harbour on Cox Island, it was liable to seizure.

THIS was an action for the forfeiture of a foreign fishing vessel—the gasolene schooner *Valiant*, belonging to the port of Seattle, U.S.A.—seized off West Haycock Island, B.C., by a Fisheries Protection Officer because of an alleged infraction of the *Customs and Fisheries Protection Act*.

The facts are fully stated in the reasons for judgment.

December 18th, 19th, and 30th, 1913.

The case was heard at Victoria before the Honourable Mr. Justice Martin, Local Judge of the British Columbia Admiralty District.

W. B. A. Ritchie, K.C., for the plaintiff; *A. H. MacNeill, K.C.*, for the ship.

MARTIN, L. J., now (March 30th, 1914) delivered judgment.

In this action is sought the forfeiture of the gasolene schooner, *Valiant*, a foreign fishing vessel of Seattle, U.S.A., gross tonnage 18 tons; length 40 feet; breadth 12 feet 6 in.; depth 4 feet 9 in., engaged in the halibut fishery, and seized on the 11th of May last off West Haycock Island, about 16 miles from Cape Scott, V.I., by Captain Holmes Newcombe, Canadian Fisheries Protection Officer, then on board the *S.S. William Joliffe*, employed in that service, under command of Captain Thomas Thomson, because of an alleged infraction of sec. 10 of the *Customs and Fisheries Protection Act*, cap. 47, R.S.C., as amended by sec. 1 of cap. 14 of 3-4 Geo. V., 1913. The *Valiant* was seized outside the three mile limit about five miles off shore after a "hot pursuit" which began, I am satisfied, when she was first sighted within said limit, and suspected of poaching.

I first consider the reference in sub-secs. (a) and (b) of said section 10 to a fishing vessel being "permitted by any treaty or convention" to fish or prepare to fish within Canadian territorial waters, or being prohibited from entering such waters for a purpose not permitted thereby. The contention of the Crown counsel on this point was that the Convention of

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1818 between Great Britain and the United States respecting fisheries, boundaries, etc., applied to the coast of British Columbia as regards fisheries. Article 2 thereof contains this proviso:

> "Provided, however, that the American Fishermen shall be admitted to enter such bays or harbours for the purpose of shelter and of repairing damages therein, of purchasing wood, and of obtaining water, and for no other purpose whatever. But they shall be under such restrictions as may be necessary to prevent their taking, drying or curing fish therein, or in any other manner whatever abusing the privileges hereby reserved to them."

And it is urged that since upon the evidence it clearly appears that the *Valiant* did not enter British waters for any of these special purposes but merely spent the night before the seizure in a bay on the uninhabited Cox Island, in Canadian territory, because it was more pleasant and convenient to do so than to remain outside in rough but not dangerous waters, therefore the Convention affords no justification for her presence in said waters. It is further submitted, alternatively, that if the Convention does not apply to these waters, the *Valiant* had no right at all to be where she was, thereby using Canadian bays and natural harbours as bases or points of vantage from which she could conveniently and expeditiously carry on fishing operations on the contiguous halibut banks either within or without the three-mile limit.

For the defence it is submitted that said Convention does not apply to said waters, and that the *Valiant* was entitled to be where she was under the 1st Article of the Convention of Commerce and Navigation of 1815 between Great Britain and the United States

(conveniently given with notes in Malloy's *Treaties and Conventions* (1) as follows:—

"There shall be between the territories of the United States of America, and all the territories of His Britannic Majesty in *Europe*, a reciprocal liberty of commerce. The inhabitants of the two countries, respectively, shall have liberty freely and securely to come with their ships and cargoes to all such places, ports and rivers, in the territories aforesaid, to which other foreigners are permitted to come, to enter into the same, and to remain and reside in any parts of the said territories, respectively; also to hire and occupy houses and warehouses for the purpose of their commerce; and, generally, the merchants and traders of each nation respectively shall enjoy the most complete protection and security for their commerce, but subject always to the laws and statutes of the two countries, respectively."

I entertain no doubt that the Convention of 1818 (see Malloy's *Treaties*, (2) does not apply to these Pacific waters, so far as fisheries are concerned, because it purports only to enter into an agreement to give the inhabitants of the United States "forever in common with the subjects of His Britannic Majesty" "the liberty to take fish of every kind" on certain specified coasts of Newfoundland and Labrador and also to dry and cure fish thereon with certain limitations. And Article 2 then goes on to provide that

"The United States hereby renounces forever any liberty heretofore enjoyed or claimed by the inhabitants thereof to take dry or cure fish on or within three marine miles of any of the coasts, bays, creeks, or harbours of His Britannic Majesty's dominions in America not included within the above mentioned

(1) Vol. 1. p. 631.

(2) Vol. 1, p. 624, Wash. 1910.

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limits: Provided however" (then follows the proviso quoted *supra.*)

Now on this coast there never was any such "liberty heretofore enjoyed or claimed" to take fish etc., within three miles of the British Coasts etc., so the proviso has no application thereto. And furthermore it is apparent by Art. iii relating to territorial and navigation claims on the Northwest coast of America "westward of the Stony (Rocky) Mountains" that such matters were excluded from the Convention and that it had no reference to disputes between them or "to the claims of any other Power or State "to any part of the said country" which was then almost wholly *terra incognita.*

Then as to the claim under the Convention of 1815. The Article already cited shows that no liberty or right whatever is given to foreign vessels to carry on fisheries, but simply, as to vessels, "to come with "their ships and cargoes to all such places, ports and "rivers in the territories aforesaid to which other "foreigners are permitted to come..... "but subject always to the laws and statutes of the "two countries respectively." Now one of the laws of Canada is sec. 186 of the Customs Act. R.S.C., cap. 48, which declares that:—

> "If any vessel enters any place other than a port of entry, unless from stress of weather or other unavoidable cause, any dutiable goods on board thereof, except those of an innocent owner, shall be seized and forfeited, and the vessel may also be seized and the master or person in charge thereof shall incur a penalty of eight hundred dollars, if the vessel is worth eight hundred dollars or more, or a penalty not exceeding four hundred dollars, if the value of the vessel is less than eight hundred

dollars, and the vessel may be detained until such penalty is paid.

2. Unless payment is made within thirty days, such vessel may, after the expiration of such delay, be sold to pay such penalty and any expenses incurred in making the seizure and in the safe-keeping and sale of such vessel."

Here there was no "stress of weather or other unavoidable cause" justifying the entry into this wild place i.e. natural harbour on Cox Island, not a port of entry, which the *Valiant* was making use of for fishing purposes, and the vessel was consequently liable to seizure and sale in default of payment of fine, and her dutiable goods to forfeiture, i.e. stores and supplies gear and bait which had been purchased in the State of Washington and which were not those of an innocent owner because her master, John Courage, was half owner subject to a bill of sale. In so making use of Cox Island she was not entering a Canadian port for any one of those "innocent and naturally beneficial purposes" which were detailed by Mr. Phelps in 1886 in the *David J. Adams Case,* which may in appropriate circumstances be well regarded with a lenient eye.

It follows therefore that the *Valiant* has, by said entry of "such waters for a purpose not permitted" committed a breach of said s.s. (b) and is liable to seizure and forfeiture as therein provided. The objection was taken that as she was seized outside the three-mile limit, she is not liable to seizure under the decision of this court in *The King v. the North* (2). which it was argued does not extend to an infraction of sub. sec. (b). A perusal of the case however shows that there is no such distinction and that the same

(1) See Moore's Int. Law Dig. (1909) p. 818, etc., and p. 847.

(2) (1905) 11 Ex.C.R. 141, affirmed by the Supreme Court of Canada (1906) 37 S.C.R., 385.

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right of seizure exists in regard to that sub-section as to sub-section (a) which deals with fishing only. This is clear from the judgment of Mr. Justice Davies, with which Mr. Justice MacLennan, concurred at p. 394, as follows:—

> "I think the Admiralty Court when exercising its jurisdiction is bound to take notice of the law of nations, and that by that law when a vessel within foreign territory commits an infraction of its laws either for the protection of its fisheries or its revenues or coasts she may be immediately pursued into the open seas, beyond the territorial limits, and there taken."

And Mr. Justice Idington says at p. 403:—

> "The fundamental right existed to so legislate that a foreign vessel might become forfeited for non-observance of a municipal regulation, and be seized beyond the three mile zone. This right has been repeatedly asserted by legislation relative to breaches of shipping laws, neutrality laws, and customs, or revenue laws as well as the case of fisheries."

But while I should feel justified in condemning the *Valiant* on this charge alone (and in so doing I should derive much support from the case of *The Frederick Gerring, Jr. v. The Queen* (1). I prefer also to consider the other charge of unlawful fishing, because of the misapprehension that may have existed in regard to liberties or rights under Conventions, but I trust that hereafter the owners of foreign fishing vessels will be careful to ascertain what their rights and duties are before venturing into these Canadian waters. I make this observation and give this warning because in the course of the many years experience I have had in trying cases of this description in this

(1) (1896) 5 Ex. C.R. 164; 27 S.C.R. 271, wherein the Convention of 1818 and domestic legislation of Canada on the point are considered.

Court, I take judicial cognizance of the fact that immense damage has been done to Canadian fisheries on this coast by foreign vessels using these waters and bays and natural harbours as shifting and temporary headquarters from which they have for years made repeated sudden and secret raids upon adjacent Canadian fishing banks. These acts are a gross "abuse" (to use the word employed in the Convention of 1818) of international hospitality, and the presence of such vessels in such localities without good and sufficient cause is calculated to raise a just suspicion of their motives and conduct. I again draw attention to this apt language of the Chief Justice of the United States (Marshall) uttered in the case of *The Exchange*(1) cited by me in the *North Case*, (*supra*) as follows:—

> "When merchant vessels enter (foreign ports) for the purposes of trade, it would be obviously inconvenient and dangerous to society, and would subject the laws to continual infraction and the government to degradation, if such..... merchants did not owe temporary and local allegiance and were not amenable to the jurisdiction of the country."

But leaving this aspect of the matter, and turning to consider the facts of the present seizure, it is sufficient in the view I take of the matter to say, in addition to the facts already stated, that the question as to whether or not the *Valiant* was fishing within the three-mile limit primarily depends upon the contention of the Crown that the halibut which were discovered in her hold that day packed in ice were caught that morning. She was first observed at 11.35 a.m. and was pursued and finally overhauled at 12.20, when Captain Newcombe, accompanied by Chief Officer

(1) (1812) 12 Cranch, 116, at p. 144.

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Moore went on board her. The master of the *Valiant*, John Courage, says, in brief, that said fish (about two thousand five hundred pounds in all) had all been caught the evening before between 6 and 9.15 o'clock at a point outside the three-mile limit, and that he had gone to a bay or natural harbour in Cox Island near by, to spend the night, which bay he reached about midnight. Next morning about six o'clock, the day being fine and clear, he left to return to the same halibut bank, passing the N.W. corner of Lanz Island on the way, and then setting a course about N.W. by W. $\frac{1}{2}$ W., (which he had taken bearings for the night before, so as to reach said bank); and after proceeding on that course about an hour, at a speed of about 5 knots, the engine broke down and he had to lie-to for repairs which took all on board (except the cook) about three hours to make, and the vessel during that time drifted about carried by the tide, which was setting in an easterly direction between Lanz and West Haycock Islands, till a quarter past eleven when the vessel started again, on a N.W. course and ran on it for about fifteen minutes when the master took soundings; then ran on again for ten minutes and sounded again; then ran on for eight minutes more and sounded again; and he had, he says, just satisfied himself that he had reached the fishing bank when the *William Joliffe* was observed coming up just as the dories were being set out. Up to this time the master affirms that no fishing had been done or attempted, and if his story is true he is not guilty of this charge because he was at the time of over-hauling and preparing to fish well outside the three-mile limit. It will consequently be seen that if the contention of the Crown is correct that the fish were caught that morning his story cannot be true,

and the fish must have been caught within the three mile limit. It is not asserted by the Crown that the vessel fished outside the limit but that being, or having been, engaged in fishing within the limit, she stood out to sea to escape from the approaching Government ship which, being much larger, was visible to her a long way off. This fact of the time of the catching of the fish must then be determined and is of the first consequence. I have deliberated longer than usual over the facts of this case because the seizure of a vessel is an unusually serious matter, and because of the forcible manner in which Mr. MacNeill has presented his client's case, and the result is that I find I can reach only one conclusion which is that the fish were caught that morning within said limit. The evidence of Captain Newcombe of the state of the three halibut which he took out of the ice in the hold is that "They were all alive, everyone I handed up; they were good lively fish, all flapping on deck," and this is confirmed by Moore who says they "were alive—quite lively" and "wriggled on the deck" close by the feet of the master of the *Valiant*. To meet this testimony there is the denial of the master, and of his cousin Mark Courage and Peter Sunds, that there had been any fish caught that day, and evidence was also given by various witnesses as to the length of time halibut will live or show signs of life out of water on ice, or otherwise, under varying conditions. No evidence however, was adduced that could reasonably explain the degree of vitality exhibited by these fish on the theory that they had been caught the previous night before 9.15 and since kept on ice, and the testimony of Captain Newcombe, who is the most experienced and reliable of all the witnesses on the subject, is opposed to it. Moreover, this view is further supported by the fact that certain of

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the dories and skates of gear "had every appearance of being just hauled out of the water." And lastly, I am more inclined to reject the story of Captain Courage because I regret to say the answers he gave to Captain Newcombe were unquestionably untrue both as regards his statement that there was nothing but bait and ice in the hold and that he had not been inside three-mile limit that day; and also, later, after he had admitted that he had been inside, that he had gone inside only for the purpose of getting his position. In view of these deliberate misstatements no court could give credence to his evidence, as against that of witnesses of unimpeached veracity, and since the facts on vital points are irreconcilably in conflict I have no other course open to me than to find them against the defendant. It would now be unprofitable to go into other features of the case, and express my opinions thereon, so I shall content myself with saying, generally, that they have not escaped my attention.

The result is that judgment will be entered against the *Valiant*, and she is, together with her tackle, rigging, apparel, furniture, stores and cargo, hereby forfeited to the Crown.

Judgment accordingly.

THE KING, ON THE INFORMATION OF THE ATTORNEY-GENERAL OF CANADA, 1916 Jan. 16.

PLAINTIFF;

AND

THE TRUSTS AND GUARANTEE COMPANY, LIMITED.

DEFENDANT.

Provincial Rights—Title to Land—Dominion lands—Intestacy—Failure of heirs and next of kin—Escheat—Bona Vacantia.

R., a resident of and domiciled in the province of Alberta, was at the time of his death the registered owner of a certain parcel of land in said Province under a patent issued to him by the Department of the Interior of Canada on the 25th July, 1911. He died on November 18th, 1912, leaving no heirs or next of kin. Letters of administration to his property, both real and personal, were granted to the defendant as public administrator under the law of the Province, and a certificate of title to the land in question was granted to defendant under the *Land Titles Act* of Alberta. The land was thereafter sold by the defendant and the provincial government claimed the proceeds of the sale, except in so far as they were amenable to debts and administration expenses as belonging to it under the provisions of the Alberta statute, 5 Geo. V, c. 5, sec. 1. Upon an information being exhibited by the Attorney-General of Canada to have it determined that such proceeds belonged to the Crown in right of Canada.

Held, 1. That the right of escheat to the lands in question (or if the principle of escheat did not apply and the lands were to be treated as *bona vacantia*, then the right to them as such bellonged to the Crown in right of the Dominion as *jura regalia*.

2. That in so far as rights of the Dominion Crown to escheated lands or *bona vacantia* in the Province are concerned the provisions of the Alberta Statute 5 Geo. V, c. 5, sec. 1, purporting to vest the property of intestates dying without next of kin or other persons entitled thereto in the Crown in right of the Province, are to be regarded as *ultra vires*.

Attorney-General of Ontario v. *Mercer*, (1883) 8 App. Cas. 767; *Church* v. *Blake*, 2 Q.L.R. 236; *The King* v. *Burrard Power Co.* 12 Ex. C. R. 295; *Dyke* v. *Walford*, 5 Moo. P. C. 434, referred to.

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Reasons for Judgment.

THIS was an information exhibited by the Attorney-General of Canada seeking a declaration of escheat to the Crown in right of the Dominion of Canada of certain lands situate within the province of Alberta.

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

October 30th, 1915.

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

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

Frank Ford, K.C., for the defendants.

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

The information in this case was exhibited on behalf of His Majesty by the Attorney-General of the Dominion of Canada. The case was argued before me on an admission of the facts. Mr. Hogg, K.C., appeared for the plaintiff; Mr. Ford, K.C., of the Alberta Bar, for the defendant. The statement of facts agreed upon is as follows:

"1. Prior to his death Yard Rafstadt was a resident "of and domiciled in the Province of Alberta.

"2. During his lifetime and at the time of his death "the said Yard Rafstadt was the registered owner of "the southeast quarter of Lot Thirty, Township "Forty-four, Range Seventeen, west of the Fourth "Meridian in the Province of Alberta, he having "obtained a certificate of title therefor under the "Land Titles Act of Alberta, the patent for the said "lands having been issued to the said Yard Rafstadt

"by the Department of Interior of Canada on the "25th day of July, 1911.

"3. The said Yard Rafstadt died on or about the "18th day of November, 1912, leaving no heirs or next "of kin.

"4. A grant of letters of administration to the property of the said Yard Rafstadt was made by the proper Court in that behalf in the Province of Alberta "to the defendant as public administrator under the "Statutes in force in the said Province and the said "property was taken possession of and administered "by the defendant as such public administrator under "the laws of Alberta, the defendant having obtained "a certificate of title to the said lands in its name under "the said Land Titles Act of Alberta.

"5. The said grant of letters of administration has "never been revoked.

"6. The property of the said Yard Rafstadt "consisted of the said land above described and a "small amount of personal property which latter is not "in question in this action.

"7. The said land above described was sold and "disposed of by the defendant company as public "administrator as aforesaid, and the sum of fourteen "hundred and five dollars was realized therefor. "The defendant as public administrator paid the "debts of the deceased and also the costs and charges "incurred in the administration of the estate and there "remains a balance of five hundred and sixty-three "dollars and twenty-five cents in the hands of the "defendant company as such public administrator.

"8. In view of the fact that the said land has been "sold and it is not the desire of either party to disturb "the title of the purchasers, the parties to the action "are content to treat in the alternative the said

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"balance of proceeds remaining in the hands of the "defendant as public administrator to the extent that "it represents the land, as the subject matter of the "action, and that the judgment to be delivered in the "suit may dispose of and award the said balance to "one or the other of the parties in the action."

At the opening of the case, I made the suggestion that the Attorney-General of the Province of Alberta should be notified, as a question might arise as to the validity of a Statute of the Province of Alberta. Mr. Ford stated that he had authority to represent the Attorney-General of Alberta, and appeared for him as well as for the defendant.

Although the amount in question is small, the point raised is one of very considerable importance. The contention of the Crown, represented by the Attorney-General for the Dominion, is that Yard Rafstadt, having died inestate without heirs, the lands in question escheated to the Crown in right of the Dominion of Canada, and thereupon became and is now under the provisions of the Dominion Statute 4-5 Ed. VII, cap., 3, sec. 21, the property of His Majesty the King in such right.

The defendant on the other hand denies the contention of the plaintiff, and alleges that the said Yard Rafstadt was at the time of his death a resident of and domiciled in the Province of Alberta; and was during his lifetime and at the time of his death, which occurred on the 18th November, 1912, the owner of the lands in question.

The defendant admits that the said Yard Rafstadt died intestate leaving no heirs or next of kin, but says that a grant of administration to the property referred to in the statement of claim was made by the proper court in that behalf to the defendant, as public admin-

istrator under the statutes in force in the Province of Alberta, and that the said property was taken possession of and administered by the defendant as such public administrator under the law of Alberta. The defendant further alleges and contends that if the land in question did escheat, it escheated to His Majesty in the right of the Province of Alberta. In the alternative the defendant alleges that the property referred to in the statement of claim immediately on the death of the said Yard Rafstadt vested in His Majesty in his right of the Province of Alberta, under Chapter 5 of the Statutes of Alberta, 1915, being an Act respecting the property of intestates dying without next of kin.

The lands which now comprise the Province of Alberta were formerly the property of the Hudson's Bay Company. The Royal Charter incorporating the Hudson's Bay Company was signed on the 2nd day of May in the 20th year of the reign of Charles II. It will be found in full in the work published by Mr. Archer Martin (now Mr. Justice Martin) in 1898, intituled "The Hudson's Bay Company's Land Tenures."(1) It was a very extensive grant by the Crown and contains the following: "To have, hold, possess "and enjoy the said Territory, Limits, and Places, "and all and singular other the premises hereby "granted as aforesaid, with their, and every of their "Rights, Members, Jurisdictions, *Prerogatives*, * * * "*Royalties* and Appurtenances whatsoever, to them "the said Governor and Company, and their Succes- "sors forever, to be holden of us, Our Heirs, and "Successors, as of Our Manor of East Greenwich in "our County of Kent, in free and common Soccage, "and not in Capite or by Knight's service."

(1) At p. 163.

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Section 146 of *The British North America Act*, 1867, provided for the admission of other Colonies than those originally constituting the Union. After expressly providing for the admission of Newfoundland, Prince Edward Island, and British Columbia, it is further provided:

"And on addresses from the Houses of the Parliament "of Canada to admit Rupert's Land and the North "Western Territory or either or them into the Union "*on such terms and conditions* in each case as are in the "addresses expressed, and as the Queen thinks fit to "approve subject to the provisions of this Act."

By the *Rupert's Land Act*, 1868 (31-32 Vic., U.K. Cap. 105) to be found in the R.S.C., 1906, vol. 4, 3125, the Hudson's Bay Company were authorized to surrender all or any of the lands, territories, rights, etc., granted or purported to be granted, by the Letters Patent to the Governor and Company of Adventurers of England, trading into Hudson's Bay, and known as the Hudson's Bay Company, unto Her Majesty Queen Victoria, and Her Majesty was authorized to accept the surrender upon the conditions to be set forth in an Order in Council. It was further enacted that Her Majesty by an order in council on addresses from the Houses of Parliament of Canada might declare that the lands so surrendered should be admitted into and become part of the Dominion of Canada, and that thereupon it should be lawful for the Parliament of Canada to make all such laws as might be necessary for the peace, order and good government of Her Majesty's subjects and others therein.

The lands of the Hudson's Bay Company were duly surrendered to Her Majesty the Queen on the 19th day of November, 1869, and Her Majesty by an

instrument under her sign manual and signet bearing date at Windsor the 22nd day of June, 1870, duly accepted the surrender of the said lands.

The Queen's order in council (R.S.C. 1906, 4 vol., p. 3142) was passed on the 23rd day of June, 1870, under which the lands of the Hudson's Bay Company so surrendered as aforesaid and accepted by Her Majesty were admitted into and became part of the Dominion of Canada, with full power and authority to the Dominion Parliament to legislate for the future welfare and good government of the territory in which said lands were situated.

Subsequently by section 2 of *The British North America Act*, 1871, (34–35 Victoria, Cap. 28) intituled *An Act respecting the establishment of Provinces in the Dominion of Canada*, it was provided as follows:—

"The Parliament of Canada may from time to time "establish new provinces in any territories forming for "the time being part of the Dominion of Canada but "not included in any province thereof, and may at the "time of such establishment make provision for the "constitution and administration of any such province "and for the passing of laws for the peace, order and "good government of such province and for its rep- "resentation in the said parliament."

By sec. 3 of 51 Vict., c. 20, as amended by 57–58 Vict., c. 28, sec. 3, the Dominion Parliament enacted as follows:—

"Land in the territories shall go to the personal "representatives of the deceased owner thereof, in the "same manner as personal estate now goes" and be dealt with and distributed as personal estate—and

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when the statute establishing the Province of Alberta was enacted this statute still remained in force.*

It becomes necessary to consider carefully the provisions of *The Alberta Act*, 4–5 Ed. VII, cap. 3. It created the Province of Alberta. No public lands were given or granted to the Province—they still remained the property of the Dominion; and in consequence thereof Section 20 was enacted which provides as follows:

"Inasmuch as the said province will not have the "public land as a source of revenue, there shall be "paid by Canada to the province by half-yearly "payments in advance, an annual sum based upon the "population of the province as from time to time "ascertained by the quinquennial cen us thereof, as "follows:

"The population of the said province being assumed to be at present two hundred and fifty thousand the "sum payable until such population reaches four "hundred thousand, shall be three hundred and "seventy thousand dollars;

"Thereafter until such population reaches eight "hundred thousand, the sum payable shall be five "hundred and sixty-two thousand five hundred dollars;

"Thereafter, until such population reaches one "million two hundred thousand, the sum payable shall "be seven hundred and fifty thousand dollars;

"And thereafter the sum payable shall be one "million, one hundred and twenty-five thousand "dollars.

"As an additional allowance in lieu of public lands, "there shall be paid by Canada to the province annually

*EDITOR'S NOTE:—See also 63–64 Vict. c. 21. The enactment is now in Sec. 5 of R.S.C., 1906, c. 110. But so far as the Provinces of Saskatchewan and Alberta are concerned the Dominion Parliament by 4-5 Edw. VII, c. 18, authorized the Governor in Council to repeal the above enactment. Orders or this purpose were passed on 23rd July, 1906, while both the Acts constituting the provinces mentioned came into force on the 1st September, 1905.

"by half-yearly payments in advance, for five years "from the time this Act comes into force, to provide "for the construction of necessary public buildings, "the sum of ninety-three thousand, seven hundred and "fifty dollars."

Section 21 of *The Alberta Act*, provided as follows:

"All Crown lands, mines and minerals and *royalties* "incident thereto, and the interest of the Crown in "the waters within the province under the North West "Irrigation Act, 1898, *shall continue* to be vested in "the Crown and administered by the Government of "Canada for the purposes of Canada, subject to the "provisions of any Act of the Parliament of Canada "with respect to road allowances and roads or trails "in force immediately before the coming into force of "this Act, which shall apply to the said province with "the substitution therein of the said province for the "North West Territories."

This section would not vest in the Crown, represented by the Government in question, the royalties incident to the Crown lands unless such royalties (including the rights to lands escheated or to *bona vacantia*) were vested in the Crown as represented by the Government of the Dominion.

It is a clause relating to the administration of the particular lands and royalties, etc., and would not have the effect of vesting such property in the Crown represented by the Dominion unless such rights were otherwise so vested. It is a provision enacted on the assumption that *The Alberta Act* did not divest the Crown, as represented by the Dominion, of any royalties or *jura regalia* theretofore the property of the Dominion. It may be contended, however, that as far as Alberta is concerned the province accepted its incorporation as such with this stipulation in favour

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of the Dominion; and that it cannot now be heard to contend to the contrary.

Section 1 of cap. 5, 5th Geo. V of the Legislature of Alberta, assented to on the 17th April, 1915, is as follows:

"When any person dies inestate owning any real or "personal property and without leaving any next-of- "kin or other person entitled thereto by the law of "Alberta, such property shall immediately on his "death vest in His Majesty in his right of Alberta, and "the Attorney-General may cause possession thereof "to be taken in the name of His Majesty in his said "right; or if possession is withheld may cause an "action to be brought in the Supreme Court of Alberta "for the recovery thereof.

"(2) The proceedings in the action may be in all "respects similar to those in other actions in the said "Court."

If in point of fact the right to lands escheated, or to *bona vacantia* (which at the time of the passing of *The Alberta Act* were part of the revenues and properties of the Dominion) did not pass as property of the province, then I think it obvious that such legislation as affecting the property of the Crown, represented by the Dominion of Canada, would be *ultra vires* of the legislature of the Province as purporting to vest in His Majesty in his right of Alberta property or revenues of the Crown as represented by the Dominion.(1)

After the best consideration I can give to the case I am of opinion that 51 Vict., c. 20, sec. 3, as amended by 57–58 Vict., c. 28, sec. 3 (Dom.) above recited at length, does not, as contended for by Mr. Ford, take away this right of escheat, whether belonging to the

(1) See remarks of Patterson J. in his reasons for judgment in *Attorney-General* v. *Mercer*, 3 Cart. Cas. 90. Also *The King* v. *Burrard Power Co.*, 12 Ex. 295; 43 S.C.R. 27; (1911) A.C. 87.

Crown as represented by the Dominion, or by the Province, as if the lands were not real estate but personal estate possessed by the owner at the time of his death intestate and without next of kin.

Furthermore if the argument be well founded, the proceeds of the lands in question would be *bona vacantia* and consequently *jura regalia*, and would belong to the Crown represented by the Dominion or the Province as the case may be, as in the case of escheat.

In vol. 3 of "Cartwright's Cases on the *B.N.A. Act*" p. 1, will be found reported in full the decisions of the Privy Council, the Supreme Court of Canada, the Court of Appeal of Ontario and of Proudfoot V.C. in the *Mercer* case; also the reasons for judgment in the Court of the Province of Queen's Bench, Quebec, in *Attorney-General of Quebec* v. *Attorney-General of the Dominion* (*Church* v. *Blake*).

These judgments and the arguments of counsel deal at great length with the history of the law relating to escheats. In many of the reasons for judgment, the question raised in the *Mercer* case is treated as depending upon the true construction of *The B.N.A. Act.*

In his reasons for judgment, Lord Chancellor Selborne is quoted as stating that in "its primary and "natural sense, 'royalties' is merely the English "translation or equivalent of 'regalitates,' 'jura "regalia', 'jura regia,' etc.; and he adds:

"The subject was discussed with much fullness of "learning in *Dyke v. Walford*(1) where a Crown grant "of *jura regalia* belonging to the County Palatine of "Lancaster, was held to pass the right to *bona vacantia.* "That it is a *jus* said Mr. Ellis in his able argument, "is indisputable; it must also be *regale*; for the

(1) 5 Moore P.C. 434.

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"Crown holds it generally through England by Royal "prerogative, and it goes to the successor of the Crown, "not to the heir or personal representative of the "Sovereign. It stands on the *same footing as the right "to escheats, etc., etc.* With this statement of the law, "their lordships agree and they consider it to have "been in substance affirmed by the judgment of Her "Majesty in Counsel in that case."

The first point to consider is to whom the rights of escheat or *bona vacantia* belonged prior to the creation of the Province of Alberta. They must have belonged (I am employing the word as used in *The B.N.A. Act*) to the Crown of Great Britain and Ireland or to the Crown represented by the Dominion. I think, having regard to the judgment in the *Mercer* case (*supra*) that they belonged to the Crown represented by the Dominion.

I have previously referred to the grant to the Hudson's Bay Co. If at and previous to the creation of the Province of Alberta, the rights belonged to the Crown represented by the Dominion, how did such rights pass to the Crown represented by the Province of Alberta? I have set out in a previous part of these reasons, the Statute creating Alberta as a Province. No lands were conveyed to it. The lands remained the property of the Crown represented by the Dominion and to be administered for the benefit of the Dominion. Alberta obtained a money subsidy.

In the *Mercer* case (*supra*) where it was decided that the right of escheat belonged to the Crown represented by the Province of Ontario, the question turned upon the construction of a section of *The British North America Act*, 1867.

Section 109 of that Statute provides that:

"All Lands, Mines, Minerals, and Royalties belonging "to the several Provinces of Canada, Nova Scotia, "and New Brunswick at the Union, and all sums then "due or payable for such Lands, Mines, Minerals, or "Royalties, shall belong to the several Provinces of "Ontario, Quebec, Nova Scotia, and New Brunswick "in which the same are situate or arise, subject to "any Trusts existing in respect thereof, and to any "interest other than that of the Province in the same."

Lord Chancellor Selborne referring to sec. 102 of the Act is reported as stating:(1)

"If there had been nothing in the Act leading to a "contrary conclusion, their Lordships might have "found it difficult to hold that the word 'revenues' in "this section did not include territorial as well as other "revenues; or that a title in the Dominion to the "revenues arising from public lands did not carry with "it a right of disposal and appropriation over the "lands themselves. Unless, therefore, the casual "revenue arising from lands escheated to the Crown "after the Union '*is excepted and reserved*' to the "Provincial Legislature within the meaning of this "section, it would seem to follow that it belongs to "the Consolidated revenue fund of the Dominion."

The "royalties" referred to in section 109 according to this judgment covered escheats as "jura regalia' and therefore belonged to the Province of Ontario.

In the present case, I am of opinion that the right to the escheat in the lands in question, to the *bona vacantia*, never passed to the Province of Alberta, but belong to the Crown represented by the Dominion as *jura regalia*. The patent to the lands in question was a grant from the Dominion.

There will be judgment declaring that the plaintiff

(1) 3 Cart. Cas. p. 9.

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is entitled to be paid the surplus in the hands of the defendant, the amount thereof being agreed upon.

This being the first case in which the question has arisen, the parties having agreed upon the facts, I think each party should bear its own costs.

Judgment accordingly.

Solicitors for plaintiff: *Hogg & Hogg.*

Solicitor for defendants: *Frank Ford.*

BETWEEN:

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

PLAINTIFF;

AND

HUGH McLAUGHLIN, OF THE PARISH OF ST. GABRIEL DE VALCARTIER, IN THE COUNTY OF QUEBEC, AND THE RECTOR AND CHURCH WARDENS OF ST. PETERS CHURCH, MORTGAGEES,

DEFENDANTS.

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Expropriation—Compensation—Offer made before information filed—Amount of offer not based upon proper valuation—Market value—Market value established by sales—Costs.

Where an offer of compensation is made to the owner by the Crown prior to legal proceedings being taken to ascertain the value of the lands expropriated, such offer, if it is too liberal when tested by the evidence before the Court, is not shown to have been based on any proper valuation, and is moreover made with a view to a settlement of the claim without litigation, will not be regarded as evidence of the true market value of the land.

2. Even when the amount recovered is so much less than that claimed as to make the latter appear extravagant if negotiations for a settlement prior to action brought involve an offer by the Crown far in excess of the sum offered by the information, the defendant ought not to be deprived of his costs.

McLeod v. The King, 2 Ex. C.R. 106 considered and distinguished. *The King v. Woodlock*, 15 Ex. C.R. 429 referred to.

3. The prices paid for properties purchased in the immediate neighbourhood of land expropriated afford the best test and the safest starting point for an inquiry into the true market value of the lands taken.

THIS was an information exhibited by the Attorney-General for the Dominion of Canada for the

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expropriation of certain lands for the purposes of the Valcartier Training Camp.

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

The case was heard at Quebec before the Honourable Mr. Justice Audette on the 27th and 29th days of November, 1915.

G. G. Stuart, K.C., and *E. Taschereau* for the plaintiff.

F. Murphy, K.C., and *A. Laurie* for the defendant.

AUDETTE, J., now (December 9, 1915) delivered judgment.

This is an information exhibited by the Attorney-General of Canada, whereby it appears, *inter alia*, that, in pursuance of section 3 of *The Expropriation Act*,(1) certain lands and real property, in the said information described, belonging to the said defendant, have been taken and expropriated for the purposes of the Valcartier Training Camp, a public work of Canada, by depositing of record, on the 15th September, 1913, a plan and description thereof, in the office of the Registrar of Deeds for the Registration Division of the County.

The defendants' title is admitted.

The lands so expropriated are in severality described in the Information and are composed of two farm lots respectively known as lots 21 and 25, of the Cadastre of the Parish of St. Gabriel de Valcartier, containing an area of 275 acres—and two bush lots, respectively known as lots 62 and 63 of the said Parish, and containing an area of 180 acres.

(1) R.S.C. (1906) c. 143.

The Crown by the information, offers the sum of $5,500. for the farm lots, and $900. for the bush lots, making in all the sum of $6,400. The defendant by his plea, claims the sum of $29,377.30 as therein particularly set forth.

While the expropriation took place on the 15th September, 1913, the defendant was allowed to remain in possession of his property for quite a long while after that date. He with his family left his house only on the 22nd November, 1915, and had his crops for the years 1913 and 1914, but not the crop of 1915. It is conceded by the Crown that interest may run on the compensation moneys from the 1st of May, 1915.

On behalf of the defence, Hugh McLaughlin, the owner, testified he had as good a farm as any in the neighbourhood and valued it at $25,000—that amount to cover everything—the farm lots, the bush lots and all the buildings. He contends that in 1913, he made $3,000 out of his farm, without making any allowance for labour, food, etc., but he has failed to satisfactorily establish that estimate prepared, as he says, with the joint help of his children.

Ernest Vallée, who has no knowledge or experience respecting the value of farms at Valcartier, bases his valuation upon the knowledge he has of farm lands at Beauport and elsewhere, and begins by placing a value upon the buildings at the sum of $2,857. This is upon the reinstatement basis, or what it would cost to put up new buildings like those upon the property in question, and he values the whole farm at $19,481. with the bush lots at $2,000. However, in this valuation at $19,481. as appears by Exhibit "B", his valuation of the wood lots is put down at $4,320 proceeding upon a wrong basis as hereafter mentioned. This valuation also includes the scow and a bridge.

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Thomas Murphy values the whole farm, bush lots, exclusive of buildings, excepting three old ones, at $17,334- including a few other items, as appears by Exhibit "C," and says that "the McLaughlin bush lots have been cut over quite a bit"—some parts long ago and some other parts quite recently. He purchased a 90-acre farm and bush lot—22 acres not cultivated—with pretty fair barn and stable, but house in poor condition, for $2,600. He bases his valuation upon his own farm, seven miles from McLaughlin's place.

Arnold Maher, values the whole property, exclusive of buildings, at $17,104. as appears by Exhibit "D," which includes a few items other than the property itself. He is not aware of any sale in Valcartier, but he calculated his valuation upon a gross return from the farm of $3,000. to $4,000.

Alexander H. V. McKee while placing a value of $2,700. to $3,000. upon the buildings, values the farm and bush lots exclusive of the buildings at $17,104; but in that valuation, as appears by Exhibit "E," are included several items outside of the value of the property. He further testifies that if he were to buy a farm, he would value it as a whole and not as he was asked, to severally value so many acres at so much and so on—and he adds he never heard of a farm being sold in that way. He does not know of any sales in the neighbourhood.

This closes the owner's evidence. And before passing to the Crown's evidence, I wish to say that farmers when valuing, buying or selling a farm are in the habit of treating it as a whole, not separating the buildings from the land and placing a specific value upon acreage in severality, as has been done by the defendant's witnesses, and recognized as erroneous by some of his

witnesses themselves. An inflation of the true value of the land, *per se*, may very naturally result from this method of valuation, which is a departure from the usual course.

On behalf of the Crown witness, *Col. William McBain*, valuing the defendant's farm, exclusive of bush lots, says it would not be possible to get for it $100. over $3,500. Coming to the bush lots he says that all the large timber has been taken away, and that as an adjunct to the farm, he would value them at $600. He produces as Exhibit No. 3, a list of 31 properties purchased for the Valcartier Camp, which he says he acquired at the average price of $16.57 per arpent, and is taken over several of these sales by counsel by way of comparison with McLaughlin's farm.

John Hornby values the bush lots at $900. to $1,000. All the good stuff has been taken away. It would not fetch that price at a sale, but that is the value to a farmer for his own use.

Fred. Lepere valued the wood lots at $900. to $1,000. adding that it would not be worth that to a (marchand de bois) wood dealer or lumberman; but it may have that value to a farmer living close by. He himself sold a 50-arpent wood-lot, at Stoneham, for $140.

Captain A. E. McBain, speaking of the character and quality of the defendant's farm, says it is an average farm in the locality. He compares it with the McBain farm, of 270 acres, which was sold in 1911 for $2,700 saying it is as good as the defendant's, with good buildings, good house, and several small buildings, located right in the village with a brook running through it. Comparing again the defendant's farm with the Thomas Billing property of 270 acres, which was sold in 1913 for $3,150. including buildings, stock and agricultural implements, he says the latter property is

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worth more than the defendant's property. He places no specific value upon the defendant's property.

Thomas Billing is heard and corroborates the previous witness's statement with respect to the sale of his farm and gives full details.

The general character of the defendant's property must be taken to be an average farm in Valcartier with good buildings, about 200 acres cleared of which 30 to 50 were yearly put under crop, but in 1913 with only 30 to 35 under crops. The property is assessed at $950. The soil is light and sandy, and while the 30 acres on the river front are good, other parts are only fair, with about 35 to 40 acres *marshy* and *swampy*—these are the defendant's own words. A large portion is covered with moss. Some witnesses state that it is not possible to get a crop on lot 25. Lot 21 would be about an average farm in Valcartier, while lot 25 would be below the average. On the latter lot there is also a dip about 150 to 200 feet, at a slope of about 15 degrees, and the dip is all sand.

Witness McBain purchased for the camp 31 farms, at Valcartier, as appears by Exhibit No. 3, at an average of $16.57 per arpent.

The defendant, after the expropriation of 1913, when property in that neighbourhood must be taken to have gone up, in October, 1914, purchased a 75-acre farm adjoining the camp for $3,000. with buildings thereon erected. And it was rightly or wrongly pointed out and hinted that it had been so bought because engineers had been seen staking out land in that neighbourhood for military purposes, but which, however, were taken to be in anticipation of further expropriation in that direction. The defendant sold to his neighbour in 1912 lots number 17 and 18, a 320-acre property, with a barn on it, for $400. The purchaser sold it afterwards

to Giguere for $1,200. The Fogarty farm, 459 acres, was sold for $9,000.

In December, 1913, or January, 1914, the defendant also bought a wood-lot, 3 arpents by 30, about three lots outside of the camp for $80.

Notwithstanding the large estimate made by the defendant of his income from the farm, he was yearly buying hay.

There is in this case a special feature with respect to a certain offer for settlement, made by the Assistant Deputy Minister of the Department of Militia and Defence, under the following circumstances. On the 20th July, 1915 (see Exhibit "A") the Deputy Minister of the Department, wrote to the defendant, advising him he was sending his assistant "to visit him with a "view to ascertaining whether it will not be possible "to come to some mutual agreement as to the price to "be paid for his property, etc."

On the 29th July, that official, accompanied by his secretary and one Mynot, whose honesty of purposes has been questioned in the course of the trial, offered the defendant for his lands and all damages, the sum of $17,850. which offer, however,he declined *as not being enough.* The offer was afterwards withdrawn as shown by Exhibit No. 2. The official did not visit the farm and stated he was not a valuator; but had only been sent to try and arrive at a settlement out of court. It is to be regretted that this official, through illness and absence, has not been heard as a witness.

The offer was obviously made by way of a compromise to avoid litigation, and a much larger amount than the value of the property was thus offered to arrive at such a settlement—*pour acheter sa paix,* as is said in French. While an offer of this kind is often a starting point—a basis to arrive at a proper valuation

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of a property—I, however, feel quite unable to use it in this case in any manner whatsoever, because the amount is too much out of proportion with the true value of the farm, considering the evidence before the court.

Indeed, while the defendant in a case of this kind is entitled, not only to the bare value of his property, but to a liberal compensation, it does not follow that because his property is expropriated by the Crown and that the compensation is to be paid out of the public Exchequer, that the Crown in matters of expropriation is to be penalized, and it is not because the owner claims a very extravagant amount that he should be paid a larger amount than the market value of his property assessed on a liberal basis.

What is then sought in the present case is the market value of this farm as a whole, as it stood at the date of the expropriation—the compensation, as already said, to be assessed not at the bare market value, but on a liberal basis. We have as a determining element to be guided by, a number of sales in the neighbourhood between private individuals, besides the large number of farms acquired by private agreements and sales for camp purposes at prices which by comparison, go to make the defendant's claim very extravagant. The prices paid under these circumstances afford the best test and the safest starting point for the present inquiry into the market value of the present farm.(1)

For the farm and the buildings thereon erected I will allow $30. an acre, which is indeed a high price for farms in that locality, making for the 275 acres, the sum of..... $ 8,250.00

(1) Dodge v. The King, 38 S.C.R., 149; Fitzpatrick v. The Town of New Liskeard, 13 Ont. W.R. 806.

And considering that the buildings were perhaps a little better than the average farm buildings, I will add to that the sum of.....$ 250.00

Making in all for the farm and buildings..$ 8,500.00

Coming to the valuation of the wood-lots, it must be stated that much of the evidence in this respect, in fact all of the defendant's evidence, as will more particularly appear by Exhibits "B," "C," "D," and "E," has been adduced upon a wrong basis, upon a wrong principle. As was said in the Woodlock case, it is useless to juggle with figures, and to measure every stick of wood upon a lot, estimate the number of cords of wood upon the same, and upon that basis estimate the profits that can be realized out of that lot to fix its value according to such profits. In other words, it would mean that a lumber merchant buying timber limits would have to pay his vendor of limits, as the value thereof, the value of the land together with all the foreseen profits he could realize out of the timber upon the limits. In the result leaving to the purchaser all the labour and giving to the vendor all the prospective profits to be taken out of the limits. Stating the proposition is solving it; because it is against common sense and no man with a slight gift of business acumen would or could become a purchaser under such circumstances.

The defendant is entitled to the value of his wood-lots as a whole.[1] A deal of evidence has been adduced in respect to the value of these bush lots, and while I am of opinion that such lots are not worth more than $200 to $500, I have evidence on behalf of the Crown

(1) The King v. Kendall, 14 Ex. C.R. 71, confirmed on appeal to the Supreme Court of Canada. The King v. The New Brunswick Railway Co,. (14 Ex. C.R. 491.)

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which induces me to allow the sum of $950. Then the defendant has been cutting extensively upon these lots, even since the expropriation, during the winters of 1914 and 1915, and at present they must be well nigh exhausted.

As already said any damages the defendant suffered with respect to his crop has been settled out of Court, but he has been put to some expenses and serious trouble in moving and finding a new home; some of his pulpwood has been taken and used by the Militia; he will lose in the sale of his scow, and for such damages and other incidentals to the expropriation, I will allow the sum of $350.

Coming to the question of costs, I feel and realize that the case at bar is one where the amount offered is not unreasonable and the amount recovered somewhat in excess of the offer made by the Information; but where the amount claimed is so very extravagant that the (téméraire plaideur) reckless suitor should be punished and deprived of his costs under the decision of the case of *McLeod v. The King*.[1] However in view of the very large amount offered for settlement by the above-mentioned official, an incident which must have been a great factor in prompting and encouraging the defendant in magnifying his claim, I will allow costs.

In recapitulation, the assessment of the compensation will be, as follows, to wit:—

For the farm and buildings thereon erected	$ 8,500.00
For the wood lots	950.00
For expenses incurred in moving, looking for a home, and all other damages incidental or arising out of the expropriation, etc	350.00

(1) 2 Ex. C.R. 106.

To this amount should be added 10 per cent. for the compulsory taking—the defendant neither needing nor wishing to sell.....$ 980.00

$ 10,780.00

From this amount should be deducted the sum of..... 100.00
which the defendant offered to credit on the compensation he would be declared entitled to receive, if he were allowed to remove and take away the old barn upon his farm, which was at trial accepted by the Crown's counsel.

Leaving the net sum of.....$ 10,680.00
with interest and costs, which under the proper appreciation of all the circumstances of the case is thought to represent a very liberal, fair and just compensation to the defendant.

There will be judgment as follows:—

1. The lands and real property expropriated herein are declared vested in the Crown, as of the 15th day of September, 1913.

2. The compensation for the land and real property so expropriated, with all damages arising out of or resulting from the expropriation, are hereby fixed at the sum of $10,680. with interest thereon at the rate of five per cent .from the 1st of March, 1915,to the date hereof.

3. The defendant, McLaughlin, is entitled to recover from, and be paid by, the plaintiff the said sum of $10,680. with interest as above mentioned, upon giving to the Crown a good and sufficient title, free from all hypothecs, mortgages, charges, rents and

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Reasons for Judgment.

incumbrances whatsoever; the whole in full satisfaction for the lands taken, and all damages resulting from the said expropriation, and he is further declared entitled to the old barn above mentioned.

4. The defendant is also entitled to the costs of the action.

Judgment accordingly.

Solicitors for the plaintiff: *Pentland, Stuart, Gravel and Thompson.*

Solicitor for defendant McLaughlin: *F. Murphy.*

Solicitor for defendant mortgagees: *F. Murphy.*

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

PLAINTIFF;

AND

MICHAEL WOODLOCK, OF ST. GABRIEL, COUNTY OF QUEBEC,

DEFENDANT.

1915
Nov. 18.

Expropriation—Agricultural land—Wood-lot—Water supply for cattle—Basis of valuation.

Compensation for the expropriation of a wood-lot is to be arrived at by seeking the market value of the same as a whole and as it stood at the date of the expropriation; not by calculating the profits which might be realized out of the sale of the timber upon the land.

2. In assessing compensation in the case of agricultural land, the fact that there is a small lake on the property, suitable for watering cattle and other general purposes, will be aken into consideration as an additional element of value in respect of its use for agriculture.

THIS was an information exhibited by the Attorney-General for the Dominion of Canada to have the value of certain lands, expropriated for the purposes of the "Valcartier Training Camp", determined by the Court.

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

The case was heard at Quebec before the Honourable Mr. Justice Audette on the 10th, 11th, 12th and 13th days of November, 1915.

G. G. Stuart, K.C., for plaintiff;

L. A. Cannon, K.C., for defendant.

1915

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Reasons for Judgment.

AUDETTE, J. now (November 18th, 1915) delivered judgment.

This is an information exhibited by the Attorney-General of Canada, whereby it appears, *inter alia*, that certain lands belonging to the defendant were taken and expropriated, under the provisions of *The Expropriation Act* (R.S.C. 1906, c. 143) for the purposes of a public work of Canada, namely, "The Valcartier Training Camp," by depositing a plan and description of such lands, on the 15th September, 1913, and 31st August, 1914, in the office of the Registrar of Deeds for the County or Registration division of Quebec.

The defendant remained in possession of his property up to the 16th September, 1914.

The lands so expropriated are severally described in paragraph 2 of the information and are composed of a farm with buildings thereon erected and a wood-lot.

The title is admitted.

The Crown, by the information, offers for the farm, containing an area of 126 acres, with the buildings thereon erected, the sum of $2,575., and for the wood-lot, containing an area of about 85 acres, the sum of $425., making in all for the two lots the sum of $3,000.

The defendant by his amended plea claims the sum of $15,250.40.

On behalf of the defendant, witness Gilfoy valued the farm, exclusive of buildings at the sum of $4,920., and the wood-lot at $1,800., the lake at $1,500., and thought that the land upon the farm was worth $30. an acre. Robert Hayes and John Corrigan value the farm at $5,226. without buildings, adding that the land varied in quality for different area, together with $1,000. for the lake and $1,845. for the wood-lot. Morris King places a value of $5,950. upon the farm,

exclusive of buildings, but inclusive of the lake which he values at $1,500., and $2,900. for the wood-lot. And James McCartney values the farm, exclusive of buildings, at the sum of $5,226., and the wood-lot at $1,800. There is also on behalf of the defendant evidence in respect of the lake and the buildings on the farm, together with the evidence of the defendant himself with respect to his loss and damage.

I may be permitted here to make a casual observation with respect to the defendant's evidence. It is this. Farmers when valuing a farm are in the habit of treating it as a whole, not separating the buildings from the land. An inflation of the true value of the land, *per se*, may very naturally result from this unusual method of valuation, which is a departure from the usual course.

On behalf of the Crown, witness Powell values the farm and wood-lot at $3,000. This witness, who admits he has no experience in real estate, bases his valuation upon a list shewn to him and purporting to contain the prices at which certain properties in the neighbourhood had been sold but of which he had no knowledge. Witness John Jack, values the farm as a whole at $3,000. to $3,500., and the wood-lot at $900, and the buildings upon the land at $150. But taking the special circumstances of this case in consideration he would allow the sum of $5,030. for the land and all damages. Witness Perry in the result, came to the same conclusion, and placed a value for the land and all damages at the sum of $5,030. Col. William McBain values the farm in September, 1913, at the sum of $2,800, but in view of the unusual and special circumstances of this case would put a value of $4,500. for the farm, the wood-lot and all damages.

The lands in question became vested in the Crown on the 15th September, 1913, and the defendant was

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allowed to remain in possession until the 15th September, 1914. At four o'clock on the 14th September, 1914, he received notification that he had till six o'clock on the 15th to move out of his property, as artillery firing would take place on Wednesday, September 16th from 9 a.m. to 5 p.m. and that it was important he should move out, so as not to be within the fire zone. He moved out within the 26 hours. The notice, which is filed, as Exhibit "F", also states:—"We only require possession for a few weeks and if "you wish to return to the holding, arrangement can "be made to give you possession through the winter."

The defendant continued to retain possession of his property after September, 1913, put in his crops and in September, 1914, had only gathered part of his oats, vegetables and potatoes. On receipt of the last notice, he cut his cattle loose, and vacated that property within the 26 hours left him. He claims having suffered thereby losses and damages with respect to his furniture, oats, vegetables in the ground, fowls and turkeys, that his cows, pigs and sheep went back and lost in weight when he came to sell, and the rent he is now paying for the house he occupies. He further claims for extra labour occasioned from the fact that his present residence is away from the farm, and in respect to his agricultural implements, which he says he cannot sell, they being second hand and the neighbouring farmers who might be purchasers being in the same plight as he is himself.

While the defendant is clearly entitled to damages in respect of his crops, his moving, etc., there is obviously a great deal of what he claims which does not constitute the legal elements of compensation—and no accurate or reliable accounts of his business have been produced.

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However, for all damages suffered by him in respect of his crops, moving, etc., I will allow the sum of $1,000. (1)

With respect to the value of his farm, very conflicting evidence has been adduced. However, upon taking in consideration the unusual and special circumstances of the case, the Crown's witnesses increased their valuation in such a manner that it makes it possible to reconcile the evidence as a whole, notwithstanding the numerous purchases made by the Crown of some of the neighbouring properties for sums very much lower.

The defendant's farm is an average farm in Valcartier with also average buildings. The soil is very sandy, and while some parts of the farm are fair, other parts are poor and covered with moss.

The defendant is rather advanced in age—he has lived on the farm all his life and his father lived there before him. Where, indeed, the property has thus been occupied by the owner as his home, and he has no need nor wish to sell, the compensation should be assessed on a liberal basis.

For the farm and the buildings thereon erected I will allow $30 an acre, which is a high price for farms in that locality, making for the 126 acres, the sum of $3,780.

Coming to the valuation of the lake, one must guard against being carried away by "fish stories" and bear in mind that the trout did not spawn in the Woodlock lake. But it must be admitted that such a lake, small as it is, with part of the Griffin lake, is of a most appreciable value on a farm, for watering cattle and other general purposes. Just as much as a small water-course or a well is very valuable on a farm. To the $30 an acre already allowed, I will add $4 an acre as representing the additional value given to the farm by these two lakes, amounting to the sum of $504.

(1) *The King v. Thompson*, 11 Ex. C.R. 162.

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Reasons for Judgment.

Coming to the valuation of the wood-lot, it must be stated *in limine* that much of the evidence adduced in this respect—all of the defendant's evidence—has been upon a wrong basis, upon a wrong principle. It is indeed useless to juggle with figures and measure every stick of wood upon the lot, estimate the number of cords of wood upon the same, and upon that basis estimate the profits that can be realized out of the lot, to fix the value of the same according to such profits. In other words, it would mean that a lumber merchant buying timber limits would have to pay to the owner of the limits as the value thereof, the value of land together with all the foreseen profits he could realize out of the timber upon the limits. In the result leaving to the purchaser all the labour and giving all his prospective profits to the owner of the limits. Stating the proposition is solving it, because it is against common sense and no man with a slight gift of business acumen would or could become a purchaser under such circumstances.

What is sought in the present case is the market value of such a wood-lot, as a whole, as it stood at the date of expropriation.(1) A deal of evidence has been adduced in that respect, and while I think a lot of that kind is not worth more than $200. to $500., I have evidence on behalf of the Crown, which induced me to allow the sum of $900. together with the sum of $150. for the buildings thereon erected.

In recapitulation, the assessment of the compensation is as follows:

(1) The King *v.* Kendall, 14 Ex. C.R. 71 (confirmed on appeal to the Supreme Court of Canada); The King *v.* The New Brunswick Railway Co., 14 Ex. C.R. 491.

For the farm, and the buildings thereon erected, an average price of $30, an acre for 126 acres	$	3,780.00
The lakes, an additional value of $4 an acre upon the whole farm, i.e.		504.00
The damages to the crops, etc., and in moving, etc		1,000.00
For the wood-lot		900.00
The buildings on the wood-lot		150.00
	$	6,334.00
To this amount should be added 10% for compulsory taking—the defendant neither needing nor wishing to sell		633.40
Making in all the sum of	$	6,967.40

with interest thereon from the date at which the Crown took possession, namely, the 16th September, 1914.

Under the proper appreciation of all the circumstances of the case, it is thought that $6,967.40 is an amount representing a very liberal, fair and just compensation to the defendant.

It would be wrong to be carried away with the impression that the defendant has not been properly treated by the authorities. Indeed, there would go to mitigate against his extravagant claim and the alleged feeling of annoyance for want of considerate treatment the obvious fact that the defendant has been allowed to remain in possession of his property until some time in August, 1914, although his property had been expropriated in September, 1913, and that he was still in possession on the 15th September, 1914. He was at that time quite aware, he admits, that the camp was in operation and that he expected to move any day. He was again reminded at the end of August, 1914, as

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appears by Exhibits 3 and 4, that his property had been expropriated and that it was required for the camp. The advisement to remove on short notice he received in September was by no means a first notice, nor was it given in a harsh or inconsiderate manner. Quite to the contrary it is intimated to him that his property is required for a few weeks for artillery practice, and that if he wished to return to his holding arrangement can be made to give him possession through the winter.

Then properties have been acquired in the neighbourhood for camp purposes at prices which by comparison go to make the defendant's claim obviously extravagant. Moreover, it must not be overlooked that we are now living in a time of war and that the duty cast upon the State to train its soldiers within as short a time as possible is a duty which is clearly paramount to all other interests.

There will be judgment as follows, to wit:

1. The lands and real property expropriated herein are declared vested in the Crown, as of the 15th September, 1913.

2. The compensation for the lands and real property so expropriated, with all damages arising, or resulting from the said expropriation are hereby fixed at the sum of $6,967.40, with interest thereon at the rate of five per cent. per annum from the 16th September, 1914, to the date hereof.

3. The defendant is entitled to recover and be paid by the plaintiff the said sum of $6,967.40 with interest as above mentioned, upon giving to the Crown a good and sufficient title, free from all incumbrances whatsoever, the whole in full satisfaction for the lands taken and all damages resulting from the said expropriation.

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Reasons for Judgment.

4. The defendant is also entitled to the costs of the action.

Judgment accordingly.

Solicitors for plaintiff: *Pentland, Stuart, Gravel & Thompson.*

Solicitors for defendant: *Taschereau, Roy, Cannon, Parent & Fitzpatrick.*

1915
Jan. 27.

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

PLAINTIFF;

AND

THE FRONTENAC GAS COMPANY, A BODY POLITIC AND CORPORATE HAVING ITS PRINCIPAL PLACE OF BUSINESS IN THE CITY OF JERSEY IN THE UNITED STATES OF AMERICA, AND HAVING A BRANCH OFFICE IN QUEBEC,

DEFENDANT.

Expropriation—Abandonment—The Expropriation Act, sec. 23—Damages—Costs.

Under sec. 23 of *The Expropriation Act* the Crown, through its proper Minister in that behalf, may abandon in whole or in part any land previously taken for the purpose of a public work. Where the owner is allowed to retain possession and such abandonment is made in full, no loss having been sustained by the owner between the time of the taking and of the abandonment, compensation even in the nature of nominal damages will not be allowed because the taking was authorized by statute.

2. The Court, however, may declare the owner entitled to the costs of and incidental to making his defence to the information and order such costs to be taxed as between solicitor and client including all legitimate and reasonble charges and disbursements under the circumstances.

3. In such a case there should be no allowance of interest to the owner either upon the amount offered as compensation by the information or upon the amount of compensation claimed by the owner.

THIS case arose out of an expropriation of land for the purposes of the National Transcontinental Railway, such land being subsequently abandoned to the owner.

The facts are stated in the reasons for judgment.

The case was heard at Quebec before the Honourable Mr. Justice Audette on the 21st and 22nd days of

September, 1914, and on the 18th, 21st and 22nd days of January, 1915.

G. G. Stuart, K.C., for the plaintiff;

T. Chase Casgrain, K.C., and *E. A. D. Morgan* for the defendant.

AUDETTE, J. now (January 27th, 1915) delivered judgment.

This is an information exhibited by the Attorney-General of Canada whereby it appears, *inter alia*, that a certain piece or parcel of land belonging to the defendant was duly expropriated on the 23rd day of April, 1913, for the purposes of the National Transcontinental Railway.

The area taken contains 32,137 square feet, and adjoins the new workshops of the Transcontinental Railway, at St. Malo, Quebec. The Court, accompanied by counsel for both the plaintiff and the defendant, viewed the premises in question and ascertained that the lands expropriated were vacant and rough, and not built upon, but duly fenced in with the rest of the property. The buildings and workshops of the defendant company are on the front of the property, while the lands so expropriated are at the back and unused, with the exception of a spur line connected with the Canadian Pacific Railway.

The case was proceeded with at Quebec on the 21st and 22nd days of September, 1914, when the defendant company adduced part of its evidence, without closing its case which, on the 22nd September, 1914, was adjourned to a day to be named upon the application of either party to the suit.

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Reasons for Judgment

The matter came on again ,at Quebec, on the 18th 21st and 22nd days of January, 1915, by way of a motion, on behalf of the plaintiff, for leave to withdraw or discontinue the present action, the Crown in the meantime, namely on the twenty-third day of October, A.D. 1914, by a writing under the hand of the Minister, pursuant to the provisions of sec. 23 of *The Expropriation Act*, having abandoned the lands so expropriated, no money having as yet been paid—such abandonment having been registered on the 29th October, 1914.

When the motion was first made on the 18th January, 1915, the Court gave directions, under the provisions of sub-sec. 4 of sec. 23 of *The Expropriation Act*, that if the defendant company had any claim to make in connection with such abandonment, it should be so made as to enable the Court to hear and dispose of such claims at the same time as upon the pronouncement on the motion for leave to discontinue.

On the 21st January, 1915, the defendant company filed a supplementary statement in defence on the abandonment, whereby *inter alia* it claimed that by the evidence already adduced on its behalf—(the Crown so far having adduced no evidence)—it appeared that the 32,137 feet expropriated were of the value of $1.00 a foot, making a capital of $32,137, upon which interest at the rate of five per cent per annum should be allowed them for the time the land remained vested in the Crown.

The plaintiff joined issue on such supplementary plea by denying all the allegations of the same.

Now, the possession of the lands in question was never interfered with beyond the fact that the engineers and servants of the Crown entered upon the same, surveyed and staked the land so expropriated, the

defendant company remained in possession of the lands all the time from the date of the expropriation to the date of the abandonment, and used them as they liked. There is a spur line running from the Canadian Pacific Railway into these premises—and the centre of this spur being the dividing line between the properties of the defendant company and that of the Quebec Jacques-Cartier Electric Company and which was used by both companies.

The defendants apparently did not suffer any damage from such expropriation and abandonment and claim none beyond the interest on the capital that in their estimation would represent the value of the land.

Were there any damages to be assessed, the method suggested by the defendant is obviously unsound, because it rests on an unreliable basis. Indeed the Crown tendered $3,856.44 for the land expropriated and for all damages resulting from the expropriation, and the defendant company claimed $82,137. for the same, out of which $32,137. represents in their estimation, the land, and the balance is for damages. The defendants alone have adduced some evidence—their case is not closed, and the Crown has not as yet adduced a tittle of evidence on the question of value. A tribunal, desiring to do justice, should not, indeed, under any circumstances, venture to rest a judgment on such uncertain and incomplete evidence.

Now, as has already been said, the defendants have not been deprived of the possession of their land—they had a free and untrammelled use of it, as well as of the spur running into the property, in the manner already set forth.

Therefore the only actual trouble and expense the defendants have been put to is in respect to the proceedings in the present case, and in that respect

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Reasons for Judgment.

they should indeed not only recover full costs, but, by way of damages, if it may be so-called, they should recover not party and party costs, but costs as between solicitor and client which will allow them to be recouped of all legitimate and reasonable charges and disbursements.(1)

The claim made by the defendants in respect of their property for the time that it was out of their control and vested in the Crown, does not lie in tort—it does not arise out of the violation of a legal right or a contract. The Expropriation Act gave the Crown the right and power to expropriate as it did and to abandon as it did.(2) It is a trite maxim that the defendant or proprietor, in an expropriation case and in a case of this kind, should be placed in the same position as he was before the expropriation, or the same position as that in which he would have been but for the expropriation and abandonment. The defendants having retained possession of their land and suffered no damages, they are therefore after the abandonment in the same position in which they were before the expropriation, but for the costs and expenses of these proceedings for which they should be recouped.(3)

No special damage and no damages of any kind have been proved, although full opportunity has been given the defendants to do so. And while I would feel inclined to allow nominal damages in a case of this kind, I find that nominal damages can only be allowed in a case of a breach of duty, and in tort. No nominal damages can be allowed as the result of an act authorized by statute or from an act made legal by statute.(4) If the act complained of, as in the case at

(1) Winkelman *vs.* City of Chicago, 72 N.E. Rep. 1068.
(2) Gibb *et al vs.* The King, 15 Ex. C.R.
(3) Bergman *v* St. Paul *etc.*, *Rd. Co.* 21. Minn. R. 533.
(4) Hals. Laws of England, vol. 10, p. 365.

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Reasons for Judgment.

bar, is neither wrongful nor injurious, there is no liability.(1) No legal right has been violated in this case, and no actionable injury is complained of. And rights are legal when recognized and protected by statute and by law. The expropriation and the abandonment were both legal and authorized by statute, and by its abandonment the Crown has not been guilty of any invasion of any legal right of the subject. In doing what it did the Crown only exercised its legal rights defined and protected by statute in the interest of the community at large.(2)

Therefore, all that can be allowed in the case at bar is the recovery of all costs incurred in connection with the proceedings in the present case, and in order that full compensation may be made, such costs are ordered to be taxed as between solicitor and client, covering all legitimate and reasonable charges and disbursements under the circumstances.

There will be judgment as prayed, entitling the plaintiff to discontinue the action with costs in favour of the defendants, the said costs to be taxed as between solicitor and client.

*Judgment accordingly.**

Solicitors for the plaintiff: *Moraud & Savard.*

Solicitor for the defendant: *E. A. D. Morgan.*

(1) Winkelman v City of Chicago, 72 Northeastern Rep. 1067.
(2) Sutherland on Damages, 3rd Ed., Vol. 1, p. 25.

*EDITORS' NOTE: Affirmed on appeal to the Supreme Court of Canada, 51 S. C. R. 594.

IN THE MATTER OF THE PETITION OF RIGHT OF

1915
Oct. 30.

CHARLES WILLIAM GAUTHIER, SUPPLIANT;

AND

HIS MAJESTY THE KING, RESPONDENT.

Constitutional Law—Effect of new provincial legislation on pre-existing rights of the Crown represented by Dominion Government—Specific performance of contract entered into by Crown—Dominion Interpretation Act, (R.S. 1906 c. 1) sec. 10.

Where the Crown, represented by the Dominion Government, prior to the enactment of the *Ontario Arbitration Act* (R.S.O. 1914, c. 65)had the right to revoke any agreement for submission to arbitration to which it may have been a party,

Held, that such right was not taken away by the provisions of the Act mentioned.

2. The Court will not decree against the Crown specific performance of its contract entered into with its subjects.

3. Observations upon the effect of sec. 10 of *The Interpretation Act* (R.S.C. 1906 c. 1) in applying the law of the province, as it exists at the time of action brought in cases of tort. *The King v. Desrosiers*, 41 S.C.R. 75., referred to.

PETITION OF RIGHT for certain relief claimed by the suppliant as arising out of an agreement entered into with the Dominion Government.

The facts are stated in the reasons for judgment.

The case was heard at Ottawa on the 17th September, 1915 before the Honourable Mr. Justice Cassels.

McGregor Young, K.C., for suppliant;

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

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Reasons for Judgment.

CASSELS, J. now (October 30, 1915) delivered judgment.

This was a petition of right filed on behalf of the suppliant claiming certain relief against the Crown for alleged breach of an agreement said to have been entered into between the suppliant and the Crown.

The allegations of the suppliant are "that on or "about the 15th February, 1909, the suppliant was "granted by the Crown, in the right of the Province "of Ontario a license of occupation to enter upon, "possess, occupy, use and enjoy during the term of "twenty-one years certain parcels of land covered by "water in the Detroit River in the Province of Ontario, "said parcels of land being the land already in "occupation of the suppliant."

"That during the years 1909 and 1910 negotiations "were carried on between the Crown in right of the "Dominion of Canada and the suppliant for the "purchase by the Crown from the suppliant of certain "of said fishing gear and improvements and of the "rights of the suppliant under said license of "occupation."

"The suppliant alleges that pursuant to said "negotiations an agreement was arrived at between "the Crown and the suppliant as set forth in Order in "Council dated August 1, 1910, and a letter from the "said Deputy Minister to the suppliant dated the "4th August, 1910, whereby it was agreed that such "purchase be made at a price to be fixed by arbitration "such arbitration to be final and the award to be "accepted by both parties,—the purchase to cover so "much of the said fishing gear and improvements as "should be requested by the Department of Marine "and Fisheries for the Dominion of Canada, and other-

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Reasons for Judgment.

"wise as in the said Order in Council and letter set "forth."

"The suppliant further alleges that on the 11th "August, 1910, pursuant to the said Order in Council "and letter, the Crown, represented by the Minister "of Marine and Fisheries, for the Dominion of Canada, "and the suppliant entered into a written agreement, "whereby it was agreed that the price to be paid by "the Crown to the suppliant as aforesaid be referred "to the arbitration of Francis Henry Cunningham, "Superintendent of Fish Culture of Ottawa, nominated "by the Crown, and one Alfred Miers, nominated by "the suppliant, together with a third arbitrator to be "appointed by the two arbitrators already nominated, "and otherwise as in the said agreement set forth."

The petition proceeds that on or about the 11th August, 1910, pursuant to the said agreement the said Cunningham and Miers did duly and validly by writing under their hands, appoint one Albert F. Healy as such third arbitrator.

The petition further alleges that "on or about "September 23rd 1910, the said arbitrators, by a "majority of them, namely, the said Miers and the "said Healy, did duly make and publish their award "in writing whereby they awarded to the suppliant "the sum of $2,401.90 for fishing gear and buildings "taken over by the said Department of Marine and "Fisheries, and the annual sum of $9,990.00 for the "relinquishment of all rights under the said license of "occupation such annual payments to commence "with and cover the year 1910, and to continue "the term of said license of occupation, the whole "as in the said award set forth."

The allegation is that prior to the making of the said award, the Minister of Marine and Fisheries gave

to the said arbitrators a notice stating that by writing under his hand, dated the 28th September, 1910, he had revoked, annulled and made void their authority as arbitrators, and that he thereby discharged and prohibited them from further proceeding in the matters of the said arbitration.

The petitioner contends that the said notice and the said revocation were invalid and ineffectual, and he claims the benefit of the provisions of the Arbitration Act of the Province of Ontario.

The suppliant prays:

"(a) That the Crown be condemned to pay him the amount of the said award.

" (b) In the alternative that the Crown be condemned to pay him damages, to be assessed, for the breach by the Crown of its agreement to refer as herein set forth.

" (c) In the alternative for a declaration that the Crown is bound to carry out its agreements to purchase and to refer as herein set forth.

" (d) In the alternative that the Crown be condemned to pay him damages, for the breach by the Crown of its agreement to purchase as herein set forth together with the damages occasioned by the interruption of his fishery business."

The Attorney-General of Canada, on behalf of His Majesty, filed a defence in which he alleges that the award referred to was made and signed by the two arbitrators, Miers and Healy, after the agreement of submission had been duly revoked and cancelled by the Minister of Marine and Fisheries, by reason whereof the said award was and is now of no effect, and the Crown denies the right of the petitioner to any relief.

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Reasons for Judgment.

The Order in Council of the 1st August, 1910, states that the attached Memorandum fully "explains the "details connected with the fisheries surrounding "Fighting Island as they have arisen since the sale of "the Island by the Government in 1858."

This memorandum which is stated to be annexed to the Order in Council and forms part thereof, is a memorandum purporting to be signed by F. H. Cunningham, Superintendent of Fish Culture, and is dated the 17th March, 1910. This memorandum and the evidence of Mr. Gauthier give a detailed statement of the rights of the suppliant and the facts connected with his fishery which led up to the agreement referred to in the petition.

It would appear that the island called Fighting Island, situate on the Canadian side of the Detroit River, between Sandwich and Amherstburg, was sold by the Government (Indian Department) in 1858 for the sum of $6,000. This island is situate about 8 miles South of Windsor and 4 or 5 miles from Amherstburg.

Down to the year 1890 the purchaser of this Island enjoyed the right of fishing off the Island when it was discovered that the sale of the Island did not include the right of fishing, but that these privileges were still reserved to the Crown.

The question of the title has been dealt with by the Courts in the case of *Bartlet* v. *Delaney* tried before Mr. Justice Latchford, subsequently heard before the Court of Appeal in Ontario, and finally before the Supreme Court of Canada (1).

Apparently the right of fishing for whitefish is of considerable value. It is stated in this memorandum, that previous to 1890 there was no "close season for

(1) EDITOR'S NOTE.—See a report of the case at trial in 11 D.L. R. 584; Rev. 29 O.L.R. 426.

" whitefish in the Detroit River, and licenses were " issued to such as desired to fish and amongst them is " Mr. C. W. Gauthier, who fished several stations in " the river, amongst them the five stations on Fighting " Island."

It also alleges that considerable money was expended by the Gauthier family in preparing these stations.

The memorandum further states—" It might be " explained here that whitefish fishing in the Detroit " River is only productive during the close season " (November) as it is at this time that the fish are in " the river, passing up to Lake St. Clair for spawning " purposes.

" That in 1892 a close season for whitefish was put " in force in Lake Erie and the Detroit River, and of " course no licenses were issued to fish in the River " during this period, which rendered Mr. Gauthier's " fishing stations useless to him as a fishing commodity."

The Memorandum states " that in that year, 1892, " the Department took possession of these fishing " stations and not withstanding innumerable protests " from Gauthier, continued to fish for the purpose of " procuring eggs for the Sandwich Hatchery up to 1903, " in which year Mr. Gauthier took possession of the " most important stations, claiming that the fishing " was being conducted in American waters."

It appears that Mr. Gauthier's contention was upheld and that in 1903 the November close seasons was abolished and licenses have been issued by the Provincial Government of Ontario to fish these stations.

The memorandum proceeds " that it has not been " possible to make any satisfactory arrangements with " Mr. Gauthier to procure eggs for the Sandwich " Hatchery and the Department has, at additional

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" expenditure, been securing its eggs from the different " points, offering the best facilities for so doing. This " process has been expensive and the procuring of the " eggs has been largely dependent upon weather " conditions."

In February, 1909, the Provincial Government issued to Mr. C. W. Gauthier a license of occupation for a period of twenty-one years for certain parcels of land covered with water in front of the western shore of Fighting Island for the sum of $50.00 per annum.

The memorandum proceeds that " whilst this " license of occupation conveys no fishing rights the " very fact of his controlling the land covered with " water creates an exclusive fishing privilege as of " course no one could trespass on this area.

" This area includes the only five stations in the " Detroit River that can be relied upon for the purpose " of filling the Sandwich and Sarnia hatcheries with " eggs each year.

" The International Fisheries Regulations will, when " they become law, prohibit all fishing in the Detroit " River, except for fish breeding purposes, and will " thus render the area referred to valueless to Mr. " Gauthier, from the standpoint of commercial fishing " but as the lease given by the Ontario Government " will still be in force this Department will still be " debarred from using these stands."

The Memorandum proceeds, " that owing to the " great value to the Fisheries of Canada resulting from " the Department's Fish Breeding operations, it is of " the utmost importance to successful operations that " these fishing stands should be absolutely under the " control of this Department, especially as they are " situated within a short distance of the Sandwich " Hatchery.

"In correspondence with the Ontario Government "this Department has practically asked them to cancel "this lease and Mr. Cochrane, Minister of Lands, "Forests and Mines, states 'with all respect I do not "think we can interfere in the matter further than the "way I have indicated, that is to say, when you have "acquired Mr. Gauthier's fishery rights, such as they "are, we should give you a License of Occupation on "the same terms we gave it to him, that is at an annual "rental of $50.00.'"

The memorandum proceeds, "every possible means "has been taken with Mr. Gauthier with a view of "getting him to name a lump sum or an annual "payment and transfer this lease to this Department "but without success as he refuses to move in the "matter except under arbitration.

"The Honourable L. P. Brodeur has practically "agreed to purchase Mr. Gauthier's fishing gear used "in operating these stands and was inclined towards "a favourable consideration of settling the matter by "arbitration but he reached no final decision.

"It was agreed however that, should arbitration be "finally decided upon, Mr. Alfred Miers of Walker-"ville should represent Mr. Gauthier, the undersigned "(F. H. Cunningham) to represent this Department, "and these two arbitrators to have authority to decide "upon a third person. Whilst I anticipate con-"siderable difficulty in arriving at what would be "considered a fair amount from a Departmental "standpoint still, knowing the value that these stands "would be to the Department in its endeavours to "build up the fisheries of Canadian waters I recommend "favourable consideration to arbitration as being the "only means of settling this difficulty of thirty years "standing."

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The disputes between the Department of Marine and Fisheries on the one hand, and Mr. Gauthier, the Suppliant, on the other, extending for over a period of some ten years prior to the order in council relied upon, are detailed in this memorandum and are referred to at considerable length in the evidence of Mr. Gauthier.

There is no claim put forward in respect of any supposed grievances on the part of the suppliant detailed but it is important to have them in mind as showing the reason why during a period of years the suppliant did not utilize all the stations owned by him for the purpose of catching whitefish; and it is also important when dealing with the question as to whether he has ever been out of occupation of his fishing rights.

This memorandum also indicates the reasons why the Department of Marine and Fisheries were anxious to procure by purchase from Mr. Gauthier any right which he had under his license of occupation from the Crown represented by the Province of Ontario.

I think the Crown, represented by the Dominion Government, bound itself to purchase and acquire Mr. Gauthier's rights. The only question that was left open was with respect to the amount to be paid therefor. The parties failing to agree upon a specific sum it was mutually agreed that the sum which was to be paid should be arrived at by arbitration in the manner designated.

I cannot adopt the contention put forward by Mr. Hogg on the part of the Crown that the arbitration was entered upon with the object of ascertaining what amount Mr. Gauthier's rights would be valued at, and that it was open to the Crown after the award if they desired, to desist from further negotiations. In other words, it is contended by the Crown that they were

merely negotiating and with the view of enabling them to say whether they would enter into an agreement or not—this arbitration was to take place, and that then the Crown would decide whether they would continue the negotiations and enter into an agreement or recede from the negotiations. I think it obvious that the intention was that there was to be a complete agreement of bargain and sale, the purchase money to be arrived at in the manner indicated.

The order in council which is dated the 1st August, 1910, states that " On a memorandum dated 6th July, " 1910, from the Minister of Marine and Fisheries " submitting that it is in the interests of the Fish " Cultural Service as conducted by the Department of " Marine and Fisheries to obtain absolute control of " certain fishing stations located off the shore of " Fighting Island in the Detroit River, Province of " Ontario;

" That these stations are now in the possession " of Mr. C. W. Gauthier, of Windsor, Ontario, by virtue " of a License of Occupation issued by the Provincial " Government of Ontario for twenty-one years, dating " from February, 1909, which leases to him certain " parcels of land covered by water in front of the " western shore of Fighting Island for the sum of " Fifty dollars per annum;

" That the attached memorandum (this is the memorandum signed by F. H. Cunningham previously referred to and which I have quoted at considerable length) fully explains the details connected with the " the fisheries surrounding Fighting Island as they " have arisen since the sale of the Island by the " Government in 1858;

" The Minister recommends, in view of the value of " the stations to the Department of Marine and

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"Fisheries that the annual amount of money to be "paid to Mr. C. W. Gauthier for the relinquishment "of all rights and privileges conveyed by the lease of "occupation be settled by Arbitration and that the "additional sum to be paid to him for such of his "fishing gear as is required by the Department of "Marine and Fisheries be also covered by Arbitration.

"The Minister further recommends,—as Mr. "Alfred Miers, of Walkerville, Ontario, has been "nominated by Mr. C.W.Gauthier to act as Arbitrator "for Mr. Gauthier,—that Mr. F. H. Cunningham, "the Superintendent of Fish Culture, be arbitrator "for the Department of Marine and Fisheries, and that "these arbitrators be authorized to appoint a third "party;"

Then follows a provision as to the costs, and "the "Minister further recommends that the finding of the "arbitration shall be final and shall be accepted by "all parties interested."

This document is followed up by the agreement bearing date the 11th August, 1910, between His Majesty the King, represented by the Honourable Louis Brodeur, Minister of Marine and Fisheries, and Mr. C. W. Gauthier.

It recites the facts and it agrees to refer the matter to arbitration, and contains further provisions, and amongst others, "that the parties shall, on their "respective parts, in all things obey, abide by, perform "and keep the award so to be made and published as "aforesaid."

This is signed by Mr. A. Johnson, the Deputy Minister of Marine and Fisheries.

Up to this point it seems to me there is a binding agreement and a contract between the Crown on the one part, and Mr. Gauthier on the other, by which the

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Crown agreed to purchase and Mr. Gauthier agreed to sell the property in question.

Prior to the making of the award notice was served on behalf of the Crown revoking, annulling and making void Mr. Cunningham's authority to act as an arbitrator, and a formal document was served notifying the arbitrators that they were discharged from making any award.

The contention is put forward on behalf of Mr. Gauthier that this notification was given without authority of an Order in Council. If this be a valid objection it has been remedied by the subsequent Order in Council which adopts and confirms the action of the Minister in revoking the authority.

It is conceded that at common law the revocation referred to would be operative and effectual to cancel the rights of the arbitrators to proceed, and the award would be null and void unless the Legislation in Ontario takes away the right of the Crown to withdraw.

It is contended, however, by Mr. Young, that the Crown represented by the Dominion is bound by the Arbitration Act, enacted by the Legislature of the Province of Ontario. This statute is Cap. 65, of the Revised Statutes of Ontario, 1914.

The statute has been carried into the Revised Statutes from earlier statutes, and is to a great extent similar to the statute in force in England. It first became part of the Statute Law of Ontario so far as it purports to bind the Crown in 1897, 60 V. cap. 16, 346. The Act specifically provides that the Act shall apply to an arbitration to which His Majesty is a party. And it is provided that a submission, unless a contrary intention is expressed therein, shall be irrevocable except by leave of the Court and shall have the same effect as if it had been made an order of the Court.

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In the Interpretation Act of the Ontario Statutes is the following:—

"His Majesty," "Her Majesty," "The King" "The Queen," or "The Crown," shall mean the sovereign of the United Kingdom of Great Britain and "Ireland and of the British Dominions beyond the seas for the time being."

The Exchequer Court Act was enacted in 1887, 50-51 V. The provisions of the Arbitration Act as I have stated purporting to bind the Crown first became part of the Statute Law of Ontario in 1897. If the view suggested that in dealing with rights of action arising in any province regard must be had to the laws of the Province as they were in force at the time of the passing of the Act of 50-51 V. 1887, is the correct view, then that part of the Arbitration Act of Ontario purporting to make a submission executed by the Crown irrevocable would not apply even if the Crown represented by the Dominion were otherwise bound by such legislation. Regard, however, must be had to Sec. 10 of the *Interpretation Act*, R.S.C., 1906.

"The law shall be considered as always speaking "and whenever any matter or thing is expressed in the "present tense the same shall be applied to the cir- "cumstances as they arise so that effect may be given "to each act and every part thereof according to its "spirit true intent and meaning."

I do not think the view put forward can be upheld. If such a construction were placed on the Exchequer Court Act innumerable absurdities might arise as the Statute laws of the various provinces are from time to time repealed or varied.

The question raised that the Crown represented by the Dominion is bound by the provisions of the

Arbitration Act is an important one. In *Fry on Specific Performance* (1) will be found a note of various authorities which, dealing between subject and subject, decide that where the price is to be settled by arbitration and no award has been made the Court cannot decree specific performance. *Wilks* v. *Davis*, (2) and *South Wales Railway Company* v. *Wythes*, (3) decide that there is no case where the Court has ordered specific performance to proceed to Arbitration. *Darbey* v. *Whitaker*, (4) is a case where one party had appointed an arbitrator and had subsequently forbidden him to act. *Jureidini* v. *National British & Irish Millers Insurance Company*, (5) is a case where the ascertainment of the amount of loss by arbitration was a condition precedent of the right to sue as in *Scott* v. *Avery* (6). The contract having been repudiated in toto the House of Lords entertained the action without the amount being ascertained by Arbitration. In the present case the amount has been ascertained by the award of a majority of the Arbitrators and the suppliant claims a declaration that the amount found due should be paid.

For reasons which I shall give I am of opinion that the Crown represented by the Dominion is not affected or bound by the provisions of the Arbitration Act enacted by the Legislature of Ontario.

Before doing so I will consider another point of considerable importance. The question raised is that whether the Crown is named in the Arbitration Act or not is immaterial, as wherever a subject is liable if in the action he were a defendant, the Crown represented by the Dominion is liable. I think the law is as stated

(1) 5th Ed. (1910) p. 777.
(2) 3 Mer. 509.
(3) 5 De G. M.G. 880.
(4) 4 Drew. 134; *Vickers v. Vickers*, L. R. 4 Eq. 534.
(5) (1915) A. C. 499.
(6) 5 H. L. C. 811.

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by the Chief Justice of Canada in *The King* v. *Desrosiers*, (1).

"Since the judgment in *Armstrong* v. *The King* (2) "it must be considered as settled law that the "Exchequer Court Act" not only creates a remedy, "but imposes a liability upon the Crown *in such a case* "*as the present*, and that such liability is to be deter- "mined by the laws of the Province where the cause "of action arose."

In the *City of Quebec* v. *The Queen* (3) the view of the late Chief Justice, Sir Henry Strong, is stated as being that the laws of the various provinces govern, and that a plaintiff suing for relief to which he becomes entitled under the provisions of the Exchequer Court, becomes entitled to the same relief as would be granted between subject and subject.

Regard must be had to the fact in question in the case of *Desrosiers* v. *The Queen*. The Chief Justice carefully guards himself by using the words "in such a case as the present." Prior to the Stat. 50-51 V. c. 16 (*The Exchequer Court Act*) an action would not lie against the Crown for tort by a servant. *The Exchequer Court Act* by section 16, section 20 of the present Act, sub-sec. c., expressly provides the remedy and when expressing his view of the law the Chief Justice had reference to this provision, so also Sir Henry Strong.

I have no doubt that in a case such as the *Desrosiers* case, or the *Armstrong* case, where the facts bring the case within the provisions of sub-sec. c. of sec. 20, the Crown would be liable if a subject were liable were defendant instead of the Crown. This I think is obviously the effect of the decision in the *Desrosiers* case. If the remedy were to be only in cases in which the Crown represented by the Dominion was made

(1) 41 S. C. R. 71.
(2) 40 S. C. R. 229.
(3) 24 S. C. R. 420.

liable by legislation of the province it would be useless legislation as the local legislature could not enact laws making the Crown represented by the Dominion liable. The liability imposed upon the Crown is as stated by the Chief Justice by the Exchequer Court Act section 20, sub-sec. c.

In the case before me the right of action of the suppliant is founded on contract not in tort. It is regulated by section 19 of *The Exchequer Court Act.* Prior to the enactment of the Ontario Legislature (the Arbitration Act referred to) the Crown represented by the Dominion had the right to revoke the submission to Arbitration. I am of opinion the Local Legislature cannot legislate so as to take away this right. In *Burrard Power Co.* v. *The King* (1) the question was determined where the province attempted to enact Laws interfering with rights of property of the Crown represented by the Dominion. Chitty's *Prerogatives of the Crown* (2) states: "But Acts of Parliament "which would divest or abridge the King of his "prerogatives, his interests or his remedies, in the "slightest degree, do not in general extend to, or bind "the King unless there be express words to that effect." (3).

The case relied on by Mr. Young of *Exchange Bank* v. *The Crown* (4) does not effect the question. This case was decided under the French law prior to Confederation. The Quebec Civil Code was enacted in 1866 continued as law by the Confederation Act.

A further point to be considered is that I could not decree specific performance against the Crown. There would be no means of enforcing any such judgment.

(1) (1911) A. C. 87.
(2) p. 283.
(3) See per Burbidge, J., in *Powell* v. *The King*, 9 Ex. R. 374. Also per Chancellor of Ontario in *Weiser* v. *Heintzman*, 15 Pr. R. 407.
(4) L. R. 11 A. C. 157.

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In the case before me not merely has the Crown, the defendants in this petition, cancelled the powers of their arbitrator and terminated the proceedings, but by subsequent letter of the 13th October, 1910, forwarded to the suppliant, they have repudiated the agreement in toto, and declined to further proceed with the purchase.

The letter states that " Moreover, I am to say that " upon further inquiry it appears very doubtful " whether you are entitled to any rights or privileges " in respect of the fisheries at Fighting Island or under " your License of Occupation which it would be in the " public interest for the Government to acquire, and " the Minister has therefore decided not to proceed " further with the negotiations for purchase. You " may consider therefore that the Government is not " contemplating the purchase of your interest in the " premises, whatever it may be."

The Crown declines to carry out their contract. This being so the only remedy which the suppliant can obtain is damages for the breach of the contract.

I think if the suppliant can prove damages he is entitled to recover them and be paid the amount by the Crown. It was suggested on the trial that the parties would agree upon a referee who could assess the claim for damages, and if a reference becomes necessary perhaps the parties will agree. It appears from the evidence that the suppliant has never been out of occupation or enjoyment of his fishing privileges. Mr. Gauthier in his evidence puts it in this way:

" There were no fishery operations going on at that " particular time in August; they were not being " occupied. (Referring to the fishery sites.) The " season does not begin until the 1st of November, or " a week before that, in the fall; so that at that time " they were not in actual possession of anybody.

"Q. When did they (referring to the Crown) go "into possession?

"A. They did not as a matter of fact go into "possession.

"Q. There was no loss occasioned by the taking "away of the fisheries between the Order in Council "and the revocation of the arbitration?

"A. No, and the loss really did not begin until the "beginning of the fall season, about a week prior to the "1st of November, etc.

It would therefore appear, that so far as any injury is occasioned to the petitioner by reason of being out of possession of his fishery, there is no loss.

The submission to arbitration, made provision in regard to the costs of the arbitration proceedings. This was all based upon the supposition that the agreement would be carried out. It seems to me that it would be fair if the parties could come together, that the suppliant should be reimbursed by the Crown any loss that he has been put to by reason of these arbitration proceedings. This, however, is a matter for consideration by the parties themselves.

Judgment will issue declaring that there is a valid contract, and that the Crown is liable in damages for breach thereof, and a reference to a party to be named if the parties fail to agree.

I think the suppliant is entitled to costs up to judgment; but subsequent costs and further directions will be reserved until after the report as to damages.

Judgment accordingly.

Solicitors for suppliant: *Young & McEvoy.*

Solicitors for respondent: *Hogg & Hogg.*

BETWEEN:

1915
Sept. 7.

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

PLAINTIFF;

AND

ALBERT HYACINTHE PETERS, ET AL.,

DEFENDANTS;

Expropriation—Re-instatement—Method of ascertaining value—Access destroyed —Market price.

1. The re-instatement doctrine in expropriation cases ought not to be applied to the case of a mill which has been closed down for ten or eleven years before the expropriation.
2. Where a strip of land along the front of a property abutting upon a public street already encumbered with a railway track was expropriated together with the street itself, access to that part of the property being thus destroyed, it was held that a fair and liberal compensation should be assessed not only for the land taken but for all damages resulting from the injurious affection of the remaining land.
3. Every subject holds his property subject to the right of eminent domain reposed in the State, and the compensation which is guaranteed to the owner, whose property is so taken for public uses, is its fair market value at the date of the expropriation.
4. Certain land taken for a public work was the site of a discarded industrial enterprise with no hope of revival at the time of the taking. The unused building and plant connected with the enterprise gave no added value, but on the other hand the land had potential capabilities in a general way for commercial purposes by reason of its propinquity to rail and water-side.

Held, that damages ought not to be assessed on the basis of the former use of the property being restored, but in view of the general adaptability of the property for commercial purposes.

THIS was an information exhibited by the Attorney-General of the Dominion of Canada, for the expropriation of certain lands for the purposes of the

National Transcontinental Railway in the Province of Quebec.

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

The case came on for hearing before the Honourable Mr. Justice Audette, at Quebec, P.Q., on the 18th, 19th, 21st and 22nd of June, 1915.

E. Belleau, K.C., and *A. R. Holden*, K.C., for the plaintiff.

F. W. Hibbard, K.C., and *G. F. Gibson*, K.C., for the defendants.

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

This is an information exhibited by the Attorney-General of Canada, whereby it appears, among other things, that a certain piece or tract of land, belonging to the defendants, was taken and expropriated, under the authority and provisions of 3 Ed. VII, Chap. 71, for the purposes of the National Transcontinental Railway, by depositing, on the 11th December, 1913, a plan and description of the said land, with the Registrar of Deeds, in the City of Quebec.

The defendants' title is not contested.

The Crown, by the information, offered the sum of $44,911.00 and the defendants claim the sum of $119,780.00

By this expropriation the Crown has taken a strip of land fronting on Prince Edward Street, 259 feet and five inches by 60 feet in depth, containing an area of 15,570 feet—the same being portions of lots 576A, and 577, of the official cadastre of St. Roch's Ward of the City of Quebec. This strip of land forms part of an old saw-mill property extending from Prince Edward

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Street to the St. Charles River, including the water lot therein, on the above mentioned width of 259 feet and 5 inches, bounded on the northeast by Grant Street, and by the Drolet foundry to the west.

Upon the whole property, which is composed of 111,800 feet, are erected a planing mill, saw-mill, engine room, boiler house, office and lean-to along part of the fence which, in the course of the evidence, is also called sheds. This saw-mill was built between the years 1861 and 1863—and the office, which was long ago used as a residence, was erected about the middle of the last century. The line of expropriation takes the larger part of the planing-mill and about 4½ feet of the front of the office.

Accompanied by counsel for both parties, I have had the advantage of viewing the premises and of going through the buildings in question.

Mr. S. Peters, the father, who built the mill, died in 1895, leaving Mrs. Peters, his wife, the usufructuary legatee of the estate who continued to carry on the business, through her son Albert, as manager and agent, up to 1904, when the business failed, and since that date the property never yielded any revenue. The mill has practically been closed from 1904 to the date of the expropriation, with the obvious result, like all other properties unused, that it is now in a very bad state. It was with a sad and painful impression I came out of the premises, having witnessed the ruins of what had been a large business undertaking. The floors of the mill buildings are literally all gone—rotten and unfit to be used with any degree of safety. Excepting the engine, the machinery is all rusted—large scales of rust falling off upon touching it.

There is upon this point very conflicting evidence indeed, and had I not had the advantage of viewing

the premises, I would decidedly have experienced great difficulty in reconciling such evidence—arriving at a proper appreciation of the state of the buildings upon the property. We have evidence on record estimating these buildings and machinery at inconceivably high figures, down to that evidence which says that the machinery is obsolete and only fit for scrap.

All of this is said with the view of stating that the value of this property as a whole is not of itself to be approached as a saw-mill only, because *per se* and as such it has no market value that would appeal to a purchaser. The property has a great value because of its situation for industrial purposes, of many kinds, but no more for a saw-mill than any other industries. It has the railway on one side and can be served by spurs, and it is bounded by the River St Charles. The defendants are owners of the water lots, upon which are still seen the remains of old wharves, also in a state of ruin. This property has an especial value by its potential prospective capabilties; but not on account of the buildings thereon erected. And that class of evidence establishing the value of the land taken, and the damages resulting from the expropriation at the sum of $164 952.36, as shown by Exhibit "P'—involving the taking down of all the buildings and erecting them for the purposes of a saw-mill further back on the property, cannot be adopted as a scheme that any man with a capital to be invested would follow. That valuation is made, as witness Lamonde states, upon the value of a mill to be operated; but we must face the facts as they are. What we are seeking is the value of the property as it stood, on the date of the expropriation, after the business had failed and the mill been closed down for ten or eleven years.

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And that witness adds: In 1913, the market value (la valeur marchande) of the Peters property was stopped and cannot say what it was worth at that time. The land, of itself, on account of the situation is valuable; but the buildings standing upon it in their dilapidated state do not add much, if any, value to it, as some of the witnesses so truly said.

A deal of evidence has been adduced, reckoning the damages at very high figures on the replacement basis, or under what is known as the re-instatement doctrine. But such basis or doctrine does not obtain in the case of an industry which had been closed down for ten or eleven years. It was not a going concern at the date of the expropriation.

As appears by Exhibits "A," "B," and "C," there has been some orrespondence, or options given, in respect of this property. Mr. Lockwell, by Exhibit "A," offered $2.00 a foot for the whole property, land and buildings and this offer was refused. By Exhibit 'B," it will appear that the estate, through Mrs. A. Peters, on the 18th April, 1912, offered the whole property, land and buildings, at $2.50 a foot, and the same appears also by the option given to Mr. Dobell. It will be noticed that the owners themselves appear to have been acting upon the v ew above enunciated, and that is the market va'ue of this property is to be approached as a whole and not as a saw-mill—or in other words, the land not distinguished from the buildings, and all erections thereon. They were willing to part with the whole property, lands and buildings at $2.50 a foot and they could not find a purchaser at hat price—$2.00 a foot was the only offer.

Undoubtedly, when a strip of land is taken upon the front of a property, as in the present case, and where

the street upon which it is abutting is taken away, destroying access to that street, bad as it was with railway tracks upon it, it is a different proposition. And in a case of that kind, a fair and liberal price should be paid the owners for the land taken, for the buildings affected by the expropriation and for all damages resulting from such taking.

Every subject holds his property subject to the paramount right of "eminent domain" enjoyed by the State; but the compensation which is guaranteed to the owner, whose property is so taken for public purposes, is its fair market value at the date of the expropriation. *Dodge* v. *The King*. (1). And the best method of ascertaining such value is to test it by the sales of property in the neighbourhood.

Prices from $1.00 to $3.50 per square foot have been placed upon the land expropriated. The officers of the Transcontinental Railway seem, however, to have established the market price of the land, taken under similar circumstances, by what they have paid in the neighbourhood. They seem to have paid $2.08 a foot to the Stadacona Co., and to the Dorchester Electric Co., $2.05 a foot, exclusive of buildings.

I therefore think that the 15,570 feet expropriated should be valued or assessed at $2.08 per foot ..... $ 32,385.60

Coming to the planing-mill, it must be said that after taking about 33 feet of it, the remaining part is worth nothing, and the full market value thereof must be paid. It is valued as high as $20,050, and for reconstruction at $30,000, by some of the witnesses, and by others at $3,000, and

(1) 38 S.C.R. 149.

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$8,700, respectively. Witness Ratté say it could be built for $8,700 and he would build it for that. And other witnesses say this building could be put up at eleven cents per cubic foot. Therefore, the value placed upon it, as it stood, at the date of the expropriation, by witness Giroux a $9,792 seems about right, although in my estimation, on the liberal side. And I adopt that valuation, exclusive of the machinery, as fair and just and place it in round figures at..... 9,800.00

For the removal of the machinery from the planing-mill and placing it in its present state somewhere upon the property, or in a planing-mill erected upon the property. 2,250.00 But its ultimate fate is to be sold for what it is worth, and that is very little.

Coming now to the building used for the office, while different valuations have been placed upon it, one cannot value it without some hesitation. It is in a very bad state of dilapidation, as will be partially seen by reference to Exhibit No. 4, a photograph of the front and one gable of the building. Mr. Gignace placed a value upon the same of $5,000, but he qualifies it by adding for the proprietor—and his valuation like that of witness Lamonde, is with respect to a mill to be operated.

The market value of that building is very small. With 4½ feet taken from the front and the legal space for light taken over and above those 4½ feet, one

must arrive at the conclusion that the building must be taken down. I assess the value of the same at the sum of.... 3,000.00

For the sheds or lean-to, the boundary fence of the property forming the back part thereof, a value has been placed upon the same of $1,500 when new. Like the rest of the property, they show great age and are in a very poor state of repairs. I allow for the same, in the state in which they stood at the date of the expropriation..... 600.00

The defendants have been deprived of the use of Prince Edward Street—and their property, which formerly was fronting upon that street is now fronting upon the right of way of the railway, leaving them without any exit or issue direct from the front of their property upon Prince Edward Street. Then there would be the legal space for light, if the defendants cared to build on the southern part of the property. It is true the former use of that street by the defendants, was not one without serious inconvenience. Indeed, all the trains coming out and going to the C.P.R. station were passing upon that street, upon which the railway tracks were laid. From the northeast side of their property, adjoining Grant Street, there is another source of damage, and that is, to cross Prince Edward Street from north to south and return they will have to pass over five or six double tracks instead of one track as formerly, and there will be gates on each side of the

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right of way to control the traffic, resulting obviously to the detriment of the defendants when using the same. However, a new road 75 feet wide will be opened from Grant Street to Ramsay Street, with the object of relieving the traffic. This road starts about opposite the yard-gate of the Defendants' property on Grant Street. This last street will go to mitigate and set off to a large extent the damages above referred to, but not altogether, and a certain amount should be allowed to cover generally this damage to the property. For the amount of the damages resulting from the taking away of Prince Edward Street, and the additional obstacles placed in the operation of Grant Street which are not quite set off by the new proposed road, I will allow 2% on the value of the balance of the property. That is, deducting 15,570 feet from the total area of 111,800 and calculated at $2.08 per foot—in round figures..... 4,000.00

Making in all.....$ 52,035.60

To this amount should be added 10% to cover the compulsory taking of this piece or parcel of land in the manner mentioned, against the will or desire of the owners—cover ng also all other in cidental legal elements of compensation which may have been omitted..... 5,203.56

$ 57,239.16

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The wood-yard or piling ground, on the south side of Prince Edward Street forms no part of the present claim by the defendants, as their counsel clearly stated during the argument, that they did not claim any injury to the piling ground at all.

Therefore, there will be judgment, as follows:

1. The land and property expropriated are declared vested in the Crown from the date of the expropriation.

2. The compensation is hereby assessed at the sum of $57,239.16, with interest thereon from the 11th December, 1913, to the date hereof. The estate of Peters, the defendants herein, are entitled to be paid by the plaintiff, the said compensation moneys, with interest as above mentioned, upon their giving to the Crown a good and sufficient title free from all mortgages, hypothecs, encumbrances whatsoever—with leave reserved to all parties to apply to this court in case any difficulty arises with respect to the distribution of the said moneys.

3. The defendants are also entitled to the costs of the action.

Judgment accordingly.

Solicitors for plaintiff: *Belleau, Baillargeon & Belleau*

Solicitors for defendants: *Gibsone & Dobell.*

1916
Jan. 10.

HIS MAJESTY THE KING, ON THE INFORMATION OF HIS MAJESTY'S ATTORNEY-GENERAL FOR THE DOMINION OF CANADA,

PLAINTIFF;

AND

MARIE CAROLINE ROY, DAVID FALARDEAU, THE ROYAL TRUST COMPANY AND FRANK CARREL, LIMITED,

DEFENDANTS.

Expropriation—Plan and description—Book of Reference—Metes and Bounds—Special adaptability—Market value—Second expropriation.

1. Depositing in the Registry Office of a plan and a copy of the "Book of Reference," is not a compliance with the provisions of section 8 of *The Expropriation Act*—it is a plan and description by metes and bounds that is so required.

2. Special adaptability for railway purposes is nothing more than an element in the general market value of the property.

3. The owner of property over which one railway has already obtained a right of way is entitled to other and different damages for a second railway expropriating lands alongside the first, the property having already adjusted itself to the first expropriation.

THIS was an information exhibited by the Attorney-General for the Dominion of Canada seeking to have compensation assessed for certain lands taken for the National Transcontinental Railway Company.

The facts are fully stated in the reasons for judgment.

November 3rd, 4th and 5th, 1915.

The case was heard before the Honourable Mr. Justice Audette at Quebec.

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G. G. Stuart, K.C., for plaintiff;

T. Vien, *L. St. Laurent* and *A. Lachance* for defendants.

AUDETTE, J., now (January 10th, 1916) delivered judgment.

This is an information exhibited by the Attorney-General of Canada whereby it appears, *inter alia*, that certain lands belonging to the defendant were taken and expropriated, under the authority of 3 Ed. VII, c. 71, for the purpose of the National Transcontinental Railway, a public work of Canada, by depositing plans and descriptions on the 7th April, 1906, and on the 2nd March, 1914, with the Registrar of Deeds for the County of Quebec, P.Q.

The actual quantity of land taken forms *in limine* the subject of controversy. By section 8 of *The Expropriation Act*, the land taken must be laid off by metes and bounds and a plan and description thereof deposited in the Registry, in a case where no settlement is arrived at. On the 7th April, 1906, a plan and a copy of the Book of Reference were deposited in the Registry Office, without any such description as required by the statute. The deposit of a plan with a copy of the Book of Reference, is not a compliance with *The Expropriation Act* which requires the lands to be described by metes and bounds. This question has already been the subject of judicial pronouncement, and even legislation was resorted to when such error had been fallen into in the case of the building of the Intercolonial Railway, as will more particularly appear by reference to sections 81 and 82 of *The Government Railway Act*, R.S.C. 1906, c. 36.

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From the plan alone, as deposited on the 7th April, 1906, it appears that the area taken from the defendant is 8.55 acres.

Under the provisions of section 9 of *The Expropriation Act*, a corrected plan and description may be deposited with like effect, in case of any misstatement or erroneous description in such plan or description.

Acting under the authority of section 9 the plaintiff, through the proper officer, deposited in the said Registry on the 2nd March, 1914, a new or corrected plan and description by metes and bounds of the land expropriated, setting forth the area at 7.14 acres—as against the original plan showing 8.55.

The reason of the conflict in respect of the measurement is explained in the following manner, and was admitted by counsel for the defendant at the argument. By the defendant's title to her property, the farm is of two arpents in width, whilst by the cadastre it is two arpents and six perches. The cadastre does not constitute a title, but it is merely a description, and I regret to say it is very often erroneous in its descriptions.

The property was measured by two surveyors. One, Mr. Tremblay, called by the plaintiff, the very person who made the measurements for the corrected plan and description deposited on the 2nd March, 1914, is an officer who has proved himself to be most reliable and accurate all through these expropriations at Quebec. For the defendants one surveyor was examined, taking as his datum a very uncertain and unsatisfactory point and for the purpose of finding the quantity claimed had to take land from the neighbours. At the time he was upon the ground for the purpose of settling these boundaries, some of the neighbours were repre-

sented; but the Crown was neither notified nor represented although the owner at that date. To find 7.64 acres the surveyor had to encroach on the neighbours' property and their consent to that effect was not at the date of the trial signified to the defendant. And what would their consent amount to, in any case; the lands on each side of the defendant's property have been expropriated and vested in the Crown ever since the deposit of the plan and description. The neighbours have no title to that portion of this farm expropriated—that title or interest is converted into a claim to the compensation money.

Under all of these circumstances, I find that the area actually expropriated from the defendant, is the area set forth in the information and in the corrected plan and description deposited on the 2nd March, 1914, namely 7.14 acres.

By the information the Crown offers for the land so taken and for all damages resulting from the expropriation the sum of $2,677.50 or $375. per acre. The defendants by their plea aver that the offer by the Crown is insufficient and claim at the rate of $1. per foot the sum of $372,438.—a most unreasonable and extravagant claim unsupported by the evidence. The defendants further claim an overhead crossing across the railway track to communicate with a piece of property valued by uncontroverted evidence at $433.—a most ambitious and preposterous claim.

The property in question is situate on the south side of the St. Louis Road, six or seven miles from Quebec, with frontage on the highway and running down to the St. Lawrence, in the immediate neighbourhood of the Quebec Bridge in course of construction. On the highway, about 400 feet deep on its width, is a plateau upon which grass or hay grows. Running south from

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these 400 feet, there is a dip of between 40 to 75 feet, at the foot of which lies the piece of land expropriated. The piece taken was partly swampy and partly covered with a second growth of trees. With the exception of a small fifty-foot strip which could be cultivated, the balance being unfit for agricultural purposes, the soil was composed of boulders and hard pan. After taking possession of this piece of land, a ditch from 4 to 5 feet in depth was dug to drain it, as it was impossible to use it in the state in which it was, says engineer Montreuil.

The southern part of the property still remaining to the defendants on the southern side of what was the Quebec Bridge Railway running to Champlain Market, is waste land, open bush, upon rocky and swampy soil. There are no buildings upon this property—the owners never resided upon it. It was never operated as a farm, but was used for pasture—the upper part adjoining the highway was rented for pasture.

From 1902 to 1907 the whole lot No. 352 composed of 32 acres was under the municipal assessment, valued at $660.

On behalf of the defendants, witness A. Turgeon values the land taken at 20 to 25 cents a square foot, as an industrial site, but more especially to be used as a railway yard, as it is impossible for residential purposes.

Rupert McAuley, who admits not knowing the value of these properties in 1906, as he did not know Quebec before 1912, values the land taken at 20 cents a square foot, as being suitable for industrial purposes.

Joseph B. Poirier and Malcolm J. Mooney, valued the land, for railway and industrial purposes, at 20 to 25 cents a square foot. And Frank Carrel places a

value of 25 cents a square foot upon the expropriated land.

On behalf of the Crown, witness J. J. Couture, taking in consideration the nature of the land and the locality, values the lands taken at $150 to $200 an acre, including all damages. He adds that in 1906 the work shops were much spoken of, but that we could not have found at that date any individual willing to give as much as $150. an acre for that land which had its value for pasture only. He further says that on account of the sales of the surrounding lands it might have a higher value. In his assessment he does not take the speculative but only the market value into consideration. If he were considering the speculative value, he would allow $300. an acre—the price paid for the neighbouring properties.

Edmond Giroux, starting with the idea that the defendant should be satisfied with similar prices paid to her neighbours, values the land in question at $200 an acre, together with $25. for damages, making in all $225. per acre, for land and damages. This witness further describes the southern part of the property, as a rocky hill, covered with underbrush and swampy. The area of this southern part is 628,062 feet, equal to 14.45 acres, which he values at $25. to $30. an acre.

Jean Baptiste Godreau says the land expropriated has no value for agricultural purposes, but taking in consideration it is occupied by a railway, he values it at $150. an acre. His farm, four miles further out from the bridge was taken for an experimental farm, and he received $50. an acre for 90 acres, and $100. an acre for a grove.

Désiré Brosseau values the land taken at $150. for the same reasons given by the previous witness.

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Eugène Lamontagne places a value of $250 an acre upon the land taken in 1906, foreseeing the passage of a railway. The part taken valued for industrial purposes would not be worth any more.

As is customary in expropriation matters we are facing a great conflict in the opinion evidence respecting the value of the land taken. The sum of $1. a foot is claimed by the pleadings, but no witness testified to such a value. The highest valuation testified to is 25 cents a square foot, and the lowest valuation is $150. an acre. A difference between $150. and $10,890. an acre. Or a variation for the 7.14 acres taken between $1,071. and $77,683.20.

How can these valuations be reconciled? What can help out of this material difficulty, if not sales made in the neighbourhood? What can be better evidence of the market value of the present parcel of land so expropriated, if not the actual and numerous sales made by the adjoining owners under similar circumstances.

As already said in the *King* v. *Falardeau*(1) tihs property must be assessed as at the date of the expropriation, at its market value in respect of the best uses to which it can be put, taking into consideration any prospective capabilities, special adaptability, or value it may obtain within a reasonably near future. The market value of the lands taken ought, however, to be the *prima facie* basis of valuation in awarding compensation.(2)

In 1904, the defendant sold to the Quebec Bridge Company, 1.02 acres of this lot 352, for $300. including all damages and the severance of his property. On the 23rd July, 1891, the defendant acquired four-fifths of the whole property—she being already the owner of one-fifth, for the sum of $380.

(1) 14 Ex. C. R. 275. (2) The King v. Dodge, 38 S.C.R., 155.

The following sales were made to the Transcontinental Railway in 1906, 1907 and 1908, of properties in the immediate neighbourhood, with about the same configuration, topography and kind of soil, viz.:

In October, 1906, 0.71 acres of lot 351 for $325, including damages and severance, = $457. per acre.

In October, 1906, 1.98 acres of lot 349 for $497. including damages and severance, = $251. per acre.

In October, 1906, 1.73 acres of lot 347, for $430.50, including all damages and severance, = $249. per acre.

In April, 1907, 2.76 acres of lot 350 for $700., including damages and severance, $254. per acre.

In February, 1907, 10.18 acres of lot 358 for $1,527., including damages and severance, = $150. an acre.

In November, 1907, 20 acres of lot 359, for $3,500, including damages and severance, = $175. per acre.

In May, 1908, 61.15 acres of lots 354, 355, 356, and 357 for $22,848.18., = $350 per acre.

In May, 1908, 66.70 acres of lot 357 for $23,345., = $350 per acre.

In August, 1908, 17.17 acres of lot 353 for $3,500., including all damages and severance, = $204 per acre.

In December, 1908, 2.70 acres of lot 358 for $405, including damages, = $150 an acre.

The several deeds of these sales are filed herein as exhibits and from plan., exhibits No. 4 and "C," will appear the respective location of these lots in juxtaposition to the present property.

The prices paid under these circumstances afford the best test and the safest starting point for the present inquiry into the market value of the present property.[1]

The question of "special adaptability" has been argued at considerable length with the object of establishing competition of buyers from the alleged

(1) Dodge v The King, 38 S.C.R., 149; Fitzpatrick v. Town of New Liskeard, 13 Ont. W.R., 806.

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railway companies, which, under the statutes creating the Quebec Bridge Co., now merged in the Crown, would likely establish terminals at the northern side of the bridge. Without reviewing here the statutes referred to and the facts as to whether or not the principal railway companies in question have or have not already railway yards in the neighbourhood, it must be admitted that the compensation which should be awarded is in no sense more than the price that the legitimate competition of purchasers would reasonably force it up to.[1] When it is claimed that the property has a high value on account of its special adaptability for railway purposes, it is not claimed that such special purposes are limited to the Transcontinental, the party expropriating; but that the situation of the land in the neighbourhood of the Quebec Bridge will bring in other railway companies as prospective competitive purchasers. In such case it becomes an element in the general value. As such it is admissible as to the true market value to the owners and not merely value to the taker, as said in the case just cited.

In the present case the land expropriated was of very little value to the owner. It was a piece of swampy and rocky land, mostly covered with second growth and practically yeilding no revenue. Therefore, even by the offer made by the Crown the owner is offered more than the land is worth to him for his own purposes, and he is offered the market value of the land enhanced by the special adaptabilty from the neighbourhood to the bridge, the erection of which, it is estimated would bring competing railway companies who would require land for their own purposes. In the amount offered by the Crown is merged both the intrinsic value, and the market value, of the land

(1) Sidney v. North E. Railway (1914) 3 K.B., 641.

enhanced, by this special adaptability for railway purposes due to prospective competitive purchasers, as special adaptability is nothing more than an element of market value.(1)

In the case of *Sydney v. North Eastern Railway*,(2) a very instructive discussion on this question of special adaptability will be found. In that case at page 637, Rowlatt, J., says:—

"Now, if and so long as there are several competi-
"tors including the actual taker who may be regarded
"as possibly in the market for purposes such as those
"of the scheme, the possibility of their offering for
"the land is an element of value in no respect differing
"from that afforded by the possibility of offers for it
"for other purposes. As such it is admissible as truly
"market value to the owner and not merely value to
"the taker. But when the price is reached at which all
"other competition must be taken to fail to what can
"any further value be attributed? The point has been
"reached when the owner is offered more than the land
"is worth to him for his own purposes and all that any
"one else would offer him except one person, the pro-
"moter, who is now, though he was not before, freed
"from competition. Apart from compulsory powers
"the owner need not sell to that one and that one
"would need to make higher and yet higher offers.
"In respect of what would he make them? There can
"be only one answer—in respect to the value to him
"for his scheme. And he is only driven to make such
"offers because of the unwillingness of the owner to
"sell without obtaining for himself a share in that
"value. Nothing representing this can be allowed."

(1) Idem., p. 640. (2) (1914) 3 K.B., 637.

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And in the *Cedar Rapids Case*,(1) Lord Dunedin lays down the following rule for guidance upon the subject-matter of special adaptabilities in the following language:

"For the present purpose it may be sufficient to "state two brief propositions: (1) The value to be "paid for is the value to the owner as it existed at the "date of the taking not the value to the taker.

"(2) The value to the owner consists in all advan- "tages which the land possesses, present or future, but "it is the present value alone of such advantages that "falls to be determined.

"Where, therefore, the element of value over and "above the bare value of the ground itself (commonly "spoken of as the agricultural value) consists in "adaptability for a certain undertaking (though "adaptability as pointed out by Fletcher Moulton, "L. J. in the case cited, is really rather an unfortunate "expression) the value is not a proportional part of "the assumed value of the whole undertaking, but is "merely the price, enhanced above the bare value of "the ground which possible intended undertakers "would give. That price must be tested by the "imaginary market which would have ruled had the "land been exposed for sale before any undertakers "had secured the powers, or acquired the other "subjects which made the undertaking as a whole a "realized possibility."

Some stress has been placed by the defendant upon the fact that buildings or shops, and a travelling crane have been put upon the land taken, with spurs running to them. But all of this has been made clear by the evidence. These buildings and shops, and the spur lines, including the crane, were only of a temporary

(1) (1914) A.C., 576.

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nature, put up by the contractors for the second bridge. The contractors for what is called the first bridge did not use it. In 1906 the piers of the first bridge were finished, and part of the ironwork put up. The bridge fell in August, 1907. These spurs and buildings will disappear and there will then be no obstruction in the new road given the defendant.

Now I have had the advantage of viewing the premises in question, in the company of counsel for the respective parties, and after weighing the opinions of experts, or rather valuators, as against the actual several sales, of the large quantity of land on both sides of the defendant's property, who, in her isolation is holding up for an extravagant and unreasonable price, and applying the principles in the two last cases cited, I have come to the conclusion that to allow, not the bare value of the land, but the most liberal and generous price possible under the circumstances, namely the sum of $500. an acre, including, as in the sales above cited, all damages resulting from the expropriation—a fair and liberal compensation will have been paid the defendant, including all enhanced value flowing from the element of special adaptability which went to establish the market value of the land at such high valuation.

There is the further question of the crossing over the Quebec Bridge Railway Co., which is now vested in the Crown, and the damages to the balance of the property to the south. The Crown has undertaken by the Information to give the defendant the crossing therein mentioned that will be part of the compensation awarded herein. However, some question has arisen as to whether or not the crossing as described and tendered, takes the defendant entirely across the said right of way—and if it does not whether the defendant

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being no more in possession or owner of the land on each side of the said right of way of the Quebec Bridge Co., now merged in the Crown, would be able to obtain a complete crossing from the Railway Commission.

However, the value of the land to the south has been established in this case, by uncontroverted evidence at $25. to $30. an acre. The area to the south is of 628,062 feet, or 14.45 acres. Giving the defendant the benefit of both the highest price and the larger area fixed in round figures at 15 acres, the total value of the land to the south would be $450. This amount will be allowed as representing the damages to the southern part of the property and as arising from the want of a perfect crossing—including also all damages resulting from the road, given to reach the southern part of the property, which subjects the owner to delay and involves a longer distance to travel.

The question of railway damages which might arise from the present expropriation, such as widening the existing severance, has not been much pressed, except in so far as the new road is concerned. Indeed, in the present case this element only comes up as a question of degree as compared with the time before the expropriation. There was before the present expropriation a railway already crossing this property, severing it in two. The owners of property over which, one railway has already obtained a right of way is, indeed, entitled to other and different damages from a second railway expropriating lands alongside the first, the property having already adjusted itself to the first invasion.[1]

In recapitulation, the assessment of the compensation will be as follows:—

(1) Re Billings and C. N. Ont. Ry. Co., 15 D.L.R., 918; 16 Can. Ry. Cas., 375, and 29 Ont. L.R. 608.

For the land taken, i.e., 7.14 acres at $500. inclusive of all general damages as above mentioned	$ 3,570.00	
Specific damages to the southern part of the property as well as those arising from the Crossing and the new road	450.00	
	$ 4,020.00	
To this amount will be added 10 per cent for the compulsory tak ng	402.00	
	$ 4,422.00	

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

1st. The lands expropriated herein are declared vested in the Crown since the 7th April, 1906, when possession of the same was taken.

2nd. The compensation for the land and real property so expropriated and for all damages resulting from the expropriation are hereby fixed at the sum of $4,422. with the interest thereon from the 7th April, 1906, to the date hereof.

3rd. The defendant is further declared entitled to the road and railway crossing described and referred to in paragraphs 4 and 8 of the information herein.

4th. The defendant Roy is entitled to recover from and be paid by the plaintiff the said sum of $4,422. with interest as above mentioned, and is further declared entitled to the road and crossing also hereinbefore referred to, upon giving to the Crown a good and sufficient title, free from all hypothecs, mortgages, charges and incumbrances whatsoever, the whole in full satisfaction for the land taken and all damages resulting from the said expropriation.

Failing the said defendant to give a release of the hypothecs mentioned in this case, the moneys will be

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paid over to the hypothecary creditors in satisfaction of the said hypothecs and interest, and the defendant will then be entitled to be paid the balance, if any, of the said compensation moneys after satisfying the said hypothecs.

5th. The costs will follow the event.

Judgment accordingly.

Solicitors for plaintiff: *Pentland, Stuart, Gravel & Thompson.*

Solicitors for defendants: *Francoeur, Vien & Theriault.*

IN THE MATTER OF THE PETITION OF RIGHT OF

HODGSON, SUMNER & CO., LIMITED

SUPPLIANTS;

1915
May 6.

AND

HIS MAJESTY THE KING,

RESPONDENT.

Customs—Goods stolen or lost while in bond in Customs Warehouse—Liability of Crown.

Held, following *Corse* vs. *The Queen* (3 Ex. C.R. 13) that the Crown is not liable for the loss of any goods while the same were in the custody of the Officers of Customs.

THIS was a claim against the Crown by petition of right for the recovery of $260.89, the value of certain goods which were alleged to have been lost or stolen while in the custody of the Customs authorities.

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

May 1st, 1914.

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

A. Geoffrion, K.C., for the suppliants.

L. T. Marechal, K.C., for the respondent.

Mr. *Geoffrion* contended that the action would be one based either on a quasi-contract or on a contract. The Crown took possession of the goods for the pur-

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Argument of Counsel.

pose of examining them, and has not returned them. The reason why it may not be a contract is this, a contract supposes freedom, mutual consent. The Crown should either return the goods to the suppliants or pay for them. If it is a quasi-contract, it corresponds to what a bailment is in English law. Now coming to the question of whether or not there is a bailment here, the *Corse* case was similar to this one, and it was there held not to be a bailment. That is my difficulty. You must look at the law of the Province where the transaction took place. What would be a bailment in one Province, might not be one in another. Whether the Crown can ever be a bailee or not is immaterial. The only way in which I can distinguish that particular case from the present one, is that it was established there that the Crown was dispossessed—*the goods had been stolen.* In the case before the court, the Crown has not proved that the goods are not still in its possession—they simply say we cannot find them. The Crown took possession of the goods, and it has not been established that they are no longer in its possession. If it is a quasi-contract it is to be governed by the law of contract and not by the rules with respect to tort; and if the Crown is bound by a contract, it is equally bound by a quasi-contract.

Mr. *Marechal* contended on behalf of the Crown that the case now before the Court was absolutely similar to the *Corse* case. The suppliants were aware of the system of examination which was followed in the Custom House at Montreal, and that custom has existed for the past fifty years. In the case of *Fry* v. *Quebec Harbour Commsisioners* (1)—which was confirmed by the Court of Appeal (2), it was held that "a

(1) Q.R. 9 S.C, 14.

(2) 5 Q.B.R. (Que.) p. 340.

"warehouseman is not liable for a loss resulting from a "cause the danger and risk of which was made known "to the owner of the goods at the time they were "warehoused." In this case there is no quasi-contract —it is purely and simply a contract and; you cannot enlarge the interpretation of the section of the Act, and base the claim upon a quasi-contract.

AUDETTE, J. now (May 6th, 1915) delivered judgment.

The suppliants brought their petition of right to recover the sum of $260.89, being the value to them of certain goods purchased in and imported from Germany, and which would appear to have been stolen or lost at the Custom House in Montreal. The above value includes the duty paid.

The goods in question, which were fancy goods bought for the Christmas trade, belonged out and out to the suppliants, having been bought by them in Germany. The goods were packed in a large case, four feet by three feet and three feet in height. This case, one of several, was taken from the steamer to the third flat of the Examining Warehouse, where the goods were examined and appraised, as appears by Exhibit No. 2, and sent down to the basement of the building for delivery.

Such delivery is usually made—at any rate it was at the date in question—under the practice prevailing at the Custom House of the Port of Montreal, upon this examination ticket, Exhibit No. 2, being handed to the checking Customs clerk, who takes receipt for the goods upon this ticket, which is finally retained by him.

Upon obtaining this examination ticket, the suppliants deputed their own carter to go and take delivery

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of the case in question. Upon enquiry, and after searches being made, it was found that the case was missing, and a correspondence was started between the said suppliants and the Collector of Customs at Montreal in respect of the same. On the 10th March, 1911, the Collector of Customs, addressed to the suppliants a letter reading as follows:—

"Referring to your letter of the 4th inst. respecting one case ex S.S. *Montezuma* short-delivered to you from the Examining Warehouse on entry No. 54578A, I beg to inform you that this package was duly received in the Examining Warehouse, examined by Appraiser and returned to the ground floor where all trace of it, I regret to say, has been lost. A very thorough search has been made without avail. I return you the examination ticket and can only trust that sooner or later trace of the package may be found.

"Yours truly

"R. S. WHITE,
"Collector of Customs."

This established beyond controversy the failure on behalf of the Customs authorities to deliver the goods after due demand had been made therefor.

The goods have ever since been missing and the suppliants are suing to recover the value thereof.

For the loss of goods under such circumstances is the Crown liable ? That is the question to be determined in the present action.

The same question has been under consideration before this Court in the case of *Corse* v. *The Queen* (1) where the question has been answered in the negative, denying the subject any redress. There is no reason

(1) 3 Ex. C.R. p. 13.

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for reaching any other conclusion, the present case not being distinguishable from the *Corse* case.

The suppliants not being entitled to the relief sought by their petition of right, there will be judgment for respondent with costs.

Judgment accordingly.

Solisitors for suppliants : *Geoffriom, Geoffrion and Cusson.*

Solicitor for respondent : *L. T. Marechal.*

IN THE MATTER OF THE PETITION OF RIGHT OF

1915
Nov. 24.

NAZAIRE DEMERS.....SUPPLIANT ;

AND

HIS MAJESTY THE KING.....RESPONDENT.

Government railway—Expropriation—Gravel-pit—Compensation—Basis of value.

Where land was taken for the purpose of a gravel-pit for a government railway, the price paid on the sale of the land some three years after the expropriation of the right of way when the land had been enhanced in value by the operation of the railway, was held to be the best test and starting-point for ascertaining the market value of the land.

THIS was a petition of right seeking compensation of certain lands taken for the purposes of a gravel-pit by the National Transcontinental Railway in the Province of Quebec.

The case was tried at Quebec on the 6th and 8th days of November, 1915.

Ernest Roy, K.C., for suppliant.

P. J. Jolicoeur for the Crown.

AUDETTE, J. now (November 24th, 1915) delivered judgment.

The suppliant brought his petition of right to recover compensation for certain lands, being portions of lots 467, 468 and 469 of the official cadastre of the Parish of Notre-Dame du Mont Carmel, in the County of Kamouraska,—together with a portion of lot No. 4, Range "A", in the Township of Painchaud, which

have been expropriated by the Crown, for the purposes of the National Transcontinental Railway, by depositing, on the 27th January, 1914, a plan and description of the said lands in the registry office for the County of Kamouraska, in the Province of Quebec. Possession of these lands had, however, been taken on the 1st July, 1913.

The total area of land taken, by this expropriation of 1913-14, is thirteen and sixty-five hundredths acres (13·65) as appears by the plan and the amended description deposited in the Registry Office.

Previous to this expropriation, the Transcontinental Railway on the 12th July, 1909, expropriated and purchased from T. St. Onge, the suppliant's *auteur* in the present case, (6·97) six and ninety-seven hundredth acres out of lots 468 and 469 for the sum of $450.00, for the lands and all damages, including severance,—and on the 10th August, 1909, (3·2) three and two hundredths acres out of lot 467, from Thomas Plourde, also the suppliant's *auteur*, for $150.00, this amount covering the land and damages including the severance of his property in two pieces. On the 24th March, 1909, The Transcontinental Railway also purchased from Achille Desjardins et. al. again the suppliant's *auteurs*, (3·17) three and seventeen hundredths acres out of No. 4, Painchaud Township, for $150.00, this price covering the land and damages, including severance.

After the Transcontinental Railway had so acquired from the suppliant's *auteurs* the necessary land for the right of way, and when the construction of the railway was in full operation, the suppliant purchased, namely in September and October, 1912, the whole of the balance of lots 468 and 469, containing about 192 acres for the sum of $1,500. or about $7.81 an acre;

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the balance of lot 467, containing about 100 acres for the sum of $600., or $6.00 an acre, and parts of No. 4, Range "A", in the township of Painchaud, containing about 100 acres for the sum of $1,400.00. or $14.00 an acre. These lands were purchased from the same owners who sold in 1909 to the Trans-continental Railway for the right of way.

Now this expropriation of 1913-1914, made eight or nine months after the suppliant had acquired these lots, was so made for the purpose of taking the gravel upon these (13·65) thirteen and sixty-five hundredth acres, and the suppliant claims as the value of the same the sum of $30,000.00.

The Crown traverses this claim by its plea and offers $35.00 an acre, or the sum of $472.15 with interest from the date of the expropriation.

The suppliant who is a wood-dealer, contends, by his evidence, that at the time of his purchase, the right of way was laid out and work had been done upon the same, but the railway was still under construction;—that he purchased these lots from farmers who held them as wood lands (terres-à-bois). They were not cultivated and he is wont to impress upon the Court he purchased for the wood and for the gravel-pit upon them,—indeed, he states that when he paid $1,500, for lots 468 and 469, he did so on account of the gravel pit, and that without the latter he would have only given $1,000, and for lot 4, instead of giving $1,400, he would have only given $1,000. However, in this respect, he is not supported or borne out by witness J. B. Plourde, who obtained for Demers the option for the purchase of these lands. Indeed, Plourde says that wood lots, in a general way, in that neighborhood are worth from $10.00 to $15.00,—from $15.00 to $20.00 an acre, when part of it is

burnt, as in the present case, and that lots that are not burnt sell as high as $60.00 an acre. Therefore the suppliant, at the price he paid really purchased at a very low price, and there would be no reason to infer from his statement that he paid more because of the gravel-pit,—although such consideration does not really affect the case as it stands. And there were other places where the railway could take gravel, and part of the gravel on the suppliant's property was not of very good quality and could not be used for concrete. The Transcontinental Railway by this last expropriation took from the suppliant two parcels of land, or two gravel-pits, upon the lots so purchased in 1912, and the question now is what was the value of these gravel-pits at the date of the expropriation in January, 1914, or rather on the 1st July, 1913, when the railway took possession of the same, as provided, by section 22 of *The Expropriation Act.*

It was held in *Vezina v. The Queen,* (1) that where land is taken by a railway company for the purposes of using the gravel thereon as ballast, that the owner is only entitled to compensation for the land so taken as farm land, (or wood land as the case may be), when there is no market for the gravel.

But we are beyond that stage. The first expropriation for the right of way was in 1909, and this expropriation of 1913 is about four years after, when the railway is still under construction. The suppliant is entitled to the market value of the land at the date of the taking possession, (*Sec. 22 Ch. 143 R.S.C. 1906*).

This property changed hands in September and October 1912, as between a vendor willing to sell, but not obliged to sell, and a purchaser not bound to buy, but willing to buy, and about four years

(1) 17 S.C.R. 1.

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after the expropriation for the right of way. It had then the potential enhanced value the completion of the construction of the railway could give it. The expropriation took place about nine months afterwards (1st July, 1913) and before the railway had been completed and was in operation. There certainly could not be a better illustration of the market value of these lands in the autumn of 1912 than the price paid by the suppliant himself, not pressed to buy and not buying at a forced sale. The price he paid for the lands in 1912,—four years after the first expropriation for the right of way and when the railway was still under construction, affords the best test and the safest starting point for the present inquiry into values (1).

Has the market value of these lands changed much between the autumn of 1912, when purchased by the suppliant and the time of the second expropriation, 1st July 1913. There is nothing in the evidence to show it had changed,—the railway was still under construction and witness Beaulieu contends that the price for these lands was the same in 1912, 1913 and 1914.

Whatever potentialities those lands had in 1913, at the date of the last taking, they also had them in the autumn of 1912—the conditions being about the same. The railway was under construction, with perhaps the fact that in 1913, it was closer to its completion and of being operated.

The suppliant makes up his claim of $30,000. for these few acres in the Parish of Notre-Dame de Mont Carmel, on a basis of five cents a yard for gravel *in situ*. However, inasmuch as this property had a market value, had a price, as a whole in

(1) Dodge *v.* The King, 38 S.C.R. 149; Fitzpatrick *v.* The Town of New Liskeard, 13 Ont. W.R. 806.

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1912, and taking into consideration whatever potentialities it had at that time, it should also have a market value as a whole, per acre, at the date of the taking in July 1913, without going into abstract calculations with respect to the quantity of material *in situ*, at so much per yard. To pursue such a course would lead to fanciful and absurd valuation. Then why should an amount arrived at by measuring every yard in the pit, be paid at one time. Assuming it could be sold, it would take many years to dispose of it with heavy expenditure for getting it out, plant, outlay of capital, etc. and with profits coming in gradually and being in very small amounts at a time,—if, however, the industry and honesty of the management could ever justify it, a contingency to be reckoned with (1).

This property must be valued as a whole by the acre, at the date of the expropriation.

Taking into consideration all that has been said, that lots, with no parts burnt, are selling at $60.00 an acre; and that the 13·65 acres which are not burnt are taken at two different places, that is in small pieces and not a purchase of a big block or the whole property; that these pieces or parcels of land are adjoining the railway, and therefore more valuable than land away from it,—and further, notwithstanding that the village is almost seven miles away, considering one part of the land taken is reasonably close to a station—the sum of $100.00 an acre, under the circumstances would be a very liberal compensation. To this sum will be added 10 per cent for the compulsory taking, making in all $1,501.50.

Therefore there will be judgment as follows, to wit:

(1) The King *v.* Kendall, 14 Ex. C.R. 71,—confirmed on appeal to the Supreme Court of Canada; The King *v.* The New Brunswick Ry. Co. 14 Ex. C.R. p. 491.

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1st The lands expropriated herein and described in the respondent's plea are declared vested in the Crown since the 1st July, 1913.

2nd The compensation for the land so taken and for all damages resulting from the said expropriation is hereby fixed at the sum of $1,501.50 with interest therein from the 1st July, 1913 to the date hereof.

3rd The suppliant is entitled to recover the said sum of $1,501.50 with interest as above mentioned, upon his giving to the Crown a good and sufficient title, free from all hypothecs, mortgages, charges and all incumbrances whatsoever upon the said land and property.

4th The suppliant is entitled to the costs of the action.

Judgment accordingly.

Solicitors for the suppliant: *Turgeon, Roy, Langlois & Morin.*

Solicitor for respondent: *P. J. Jolicoeur.*

IN THE MATTER OF THE PETITION OF RIGHT OF

THE LAURENTIDE PAPER CO., LIMITED, 1915 May 8.

SUPPLIANT;

AND

HIS MAJESTY THE KING,

RESPONDENT.

Public work—Injury alleged to arise from construction of Railway Bridge—Driving of logs—Damages where work authorized by Statute—Servitude—Title.

Where any right of property is injuriously affected by a railway company in the exercise of powers conferred upon it by Act of Parliament, the company is not liable in damages for such injury unless Parliament has made provision therefor.

2. The suppliants alleged that their business of driving logs on the La Croche river was interfered with by the piers of a bridge constructed across the river by the National Transcontinental Railway, and they asked to be reimbursed a sum which they claimed they had been obliged to pay to break a jamb of logs caused by the alleged faulty construction of the piers as regards using the river for driving logs.

The court having found that the railway had statutory authority for the construction of the bridge,

Held, that the suppliants were not entitled to compensation.

3. While, under the provisions of sec. 7298 of R.S.P.Q., 1909, any person, firm or company has the privilege of floating and driving timber down rivers, such privilege is not a predial servitude, as it is shared in common with the rest of the public, and is not derived from any title or fee in the land. *Price Bros. & Co.* v. *Tanguay*, 42 S.C.R. 133 referred to.

PETITION of Right for damages alleged to have been caused by the construction of a public work. The facts are stated in the reasons for judgment.

April 6th, 1915.

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The case came on for argument on questions of law arising on pleadings and directed to be heard and disposed of before trial.

G. H. Montgomery, K.C., and *P. N. Martel*, K.C., for the suppliants.

E. L. Newcombe, K.C., for the respondent.

AUDETTE, J. now (May 8th, 1915) delivered judgment.

This matter comes before the court, under the provision of Rule 126, pursuant to an order directing the hearing and disposal before trial of the points of law raised by the pleadings herein.

The suppliants allege in their pleading they hold timber limits in the Township of Langelier, and that during the winter of 1912–13, in the course of the operation of the said limits, while driving a certain quantity of logs, on river "La Croche," the bridge erected by the National Transcontinental Railway, across the said river, interfered with the drive, created a jamb and that they expended $1,411.16 to break the jamb and that they now seek the recovery of that sum from the Crown. They further allege that the piers of the bridge, which cross the river diagonally, constitute an obstruction which is a constant menace to the driving of logs in the river.

The river "La Croche" is a watercourse only *flottable à buches perdues* and the Transcontinental Railway, or the Crown, is the owner of the adjoining land on each bank, upon which the bridge is erected and that ownership extends on each side *ad medium filum aquæ—MacLaren* case.(1)

(1) (1914) A. C., 274.

In the Province of Quebec the privilege of floating and driving timber down rivers is given to any person, firm or company under the provisions of sec. 7298 of the R.S.P.Q. 1909; but that privilege enjoyed by the suppliants, in common with others of the public, is not a predial servitude, because they have no title or fee in the land.(1)

By the Dominion Statute 3 Ed. VII, ch. 71, and the several acts amending the same, the construction and operation of the National Transcontinental Railway were duly authorized.

In the construction of the terms of the Constitution of Canada the courts have encountered many doubtful questions, but the subject matter now before us has been clearly defined in a long catena of cases.

There may be a constitutional domain, as in the present case, in which Provincial and Dominion legislation overlap, in which case neither legislation will be *ultra vires* if the field is clear. But if the field be not clear and in such domain the two legislatures meet, the Dominion legislation is paramount and must prevail.(2) Moreover under the authority of the case of the *Attorney-General of Ontario v. Attorney General of the Dominion*(3) and in the due exercise of the enumerated powers conferred by sec. 91 of the B.N.A. Act, the Parliament of Canada may incidentally legislate upon matters which are *primâ facie* committed exclusively to the provincial legislatures by sec. 92 thereof.

Under the decision of the case of *C. P. Railway Co. v. Corporation of Notre Dame de Bonsecours*,(4) it must be held that under the B.N.A. Act, the legislative control of the Transcontinental is vested in the

(1) *Price v. Tanguay*, 42 S.C.R., 133. A.C. *65*.
(2) *The Grand Trunk Railway Co.a. Attorney General of Canada* (1907)
(3) (1899) A.C. 367.
(4) (1896) A.C. 359.

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Parliament of the Dominion to the exclusion of any provincial legislation. This being conceded, it would appear that neither the Provincial Legislature nor the suppliants have any right or power to regulate the structure of the bridge forming part of the authorized works of the Transcontinental Railway. And it might be said, *en passant*, that the fact of the piers being diagonally situate is indeed preferable of itself than if placed at right angles with the current and stream.

In the case of *Toronto Corporation v. Bell Telephone Co. of Canada*,(1) which related to a telephone company whose operations were not limited to one province, and which depended on the same principle, full effect was given to Dominion legislation as against Provincial legislation, when the respective powers overlapped. And in the case of the *Attorney-General for British Columbia v. The Canadian Pacific Railway*,(2) the Judicial Committee held that the power given to the defendant company to appropriate the foreshore for the purposes of that railway, of necessity included the right to obstruct any rights of passage previously existing across the foreshore. If, indeed, such a principle obtains with respect to navigable and tidal waters, *a fortiori*, will it obtain in the case of a water course floatable only (à buches perdues) for loose logs. The federal Crown by means of expropriation has acquired proprietary rights both in the bed of the river and in the riparian land where the bridge is constructed, and in the exercise of such rights that Crown is not answerable except in cases provided by Dominion statute.(3)

(1) (1905) A.C. 52.
(2) (1906) A.C. 212.
(3) See *Burrard Power Co. v. The King*, (1911) A.C. 87; "*S.S. Scotia*" (1903) A.C. 504; The Interpretation Act, R.S.C. 1906, c. 1, sec. 16, also R.S.Q. 1909, c. 1, sec. 14 & C.C.P.Q. Art. 9.

The Parliament of Canada has for instance the power to legislate upon the subject matter of railways, banks and bankruptcy, and such power extends to civil rights arising from or relating to the class of subject matter coming within its jurisdiction.(1)Indeed, in the case of *Bourgoin v. Montreal, Ottawa & Railway Co.*(2) it was held in effect that the provinces were incompetent to legislate as to civil rights relating to a railway subject to the jurisdiction of the Dominion when inconsistent with its legislation.(3) Common Law rights of riparian owners as well as civil rights existing under provincial statutes, can, in certain cases, be taken away by legislation.(4) Primarily the rights in the river "La Croche" is in the riparian owner. If a provincial statute gives to the public special rights with respect to the driving of loose logs (buches perdues) in that watercourse, those rights must be held to be subject to any statute passed by the Parliament of Canada which holds the paramount right to legislate in respect of the Transcontinental Railway.

Railway companies authorized and empowered by federal statutes to construct and operate a railway, are as a necessary incident thereto, also authorized to construct bridges across watercourses, and they are not liable if, in the proper exercise of their power of doing so, without negligence, they create a nuisance.(5)

No right could accrue in favour of the suppliants herein under *The Expropriation Act*, as they are

(1) *Cushing v. Dupuy*, L.R. 5 A.C. 409; *Tennant v. Union Bank* (1894) A.C. 31.

(2) 49 L.J. P.C. 68.

(3) See also *G. T. Ry. v. Attorney-General of Canada*, (1907) A.C. 65.

(4) *Cook v. Corporation City of Vancouver* (1914) A.C. 1077.

(5) *Bennett v. Grand Trunk Railway Co.* (1901) 2 Ont. L.R. 425. See also *The London, Brighton & South Coast Railway Co. v. Truman et. al.* (1885) 11 A.C. 45.

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without any predial rights and no part of their lands is taken or alleged to be injuriously affected.(1)

At p. 723, Vol. 23 of Halsbury's *Laws of England*, the following principle is enunciated, viz.:

"1494.—Where a person suffers injury through the "injurious affection of his land or otherwise, by the "exercise by a railway company of the powers conferred "on it by Act of Parliament, no compensation is pay- "able by the company in respect of such injury unless 'Parliament has given the injured person the right to "such compensation."

"A railway company which is given power by statute "to do an act which would otherwise amount to an "interference with the rights of the public is not liable "to indictment for a public nuisance nor does an action "lie against a railway company for doing an act which "is authorized by statute, but which would be a "nuisance if not so authorized."

And Sir Frederick Pollock, in the 9th Ed. of his treatise on the law of Torts, p. 132 et seq. says: "Parliament has constantly thought fit to direct and "authorize the doing of things which but for that "direction and authorization might be actionable "wrongs. . . . In other words no action will lie "for doing that which the legislature has authorized, "if it be done without negligence, although it does "occasion damage to any one. . . . The remedy "of the party who suffers the loss is confined to recov- "ering such compensation, if any, as the legislature "has thought fit to give him.

"An Act of Parliament may authorize a nuisance, "and if it does so, then the nuisance which it author-

(1) *Hammersmith v. Brand*, (1868) L.R. 4 H.L. 171. See also *Cracknell v. Mayor of Thetford*, L.R. 4 C.P. 629; *Leighton v. B.C. Electric Railway Co.*, 6 W.W.R. 1472; *Robinson v. The King*, 4 Ex. C.R. 439 and 25 S.C.R. 692; *Archibald v. The Queen*, 3 Ex. C.R. 251 and 23 S.C.R. 147; *The King v. McArthur*, 34 S.C.R. 577.

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"izes may be lawfully committed. But the authority "given by the Act may be an authority which falls "short of authorizing a nuisance. It may be an authority "to do certain works provided that they can be done "without causing a nuisance, and whether the authority "falls within the category is again a question of "construction. Again the authority given by Parlia- "ment may be to carry out the works without a "nuisance if they can be so carried out, but in the "last resort to authorize a nuisance if it is necessary "for the construction of the works." P. 137.

Therefore it must be found that the Parliament of Canada has the full and paramount power to authorize the construction and operation of the National Transcontinental railway, and that such power must prevail over any Provincial legislation which might clash with any rights, powers and authority that the franchise carried with it. And paraphrasing the language of their Lordships of the Judicial Committee of His Majesty's Privy Council, in the case of *The Attorney-General of British Columbia v. The Canadian Pacific Railway Co.*,(1) it must be found that the power given to the railway to appropriate the riparian lands of the watercourse in question and the bed of the said watercourse in the manner above set forth, for the purposes of their railway, of necessity includes the right to obstruct or interfere with any right of passage previously existing across or upon the watercourse—it also includes the right to interfere with the flow of water and to impede with immunity, the passage and floating of loose logs (buches perdues) in the said river or watercourse.

Having arrived at this conclusion, it must be found that the suppliants have no right of action and that

(1) (1906) A.C. 212.

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no action will lie in the present case as against the Crown, in respect of the allegation mentioned in the pleadings herein, and that as a necessary sequence the action must be dismissed.

I have been asked to further decide whether or not the present action should have been brought or would lie as against the Commissioners of the Transcontinental Railway, but to do this would be to answer an abstract question, the impolicy of which has been commented on by the Courts from the earliest times. "I cannot properly give advice to anybody," says Bayley, J.(1) "It is very often supposed Judges can "give advice; and I therefore take this opportunity "of saying that a Judge cannot do it."

And Lord Mansfield, in *The King v. Inhabitants of the West Riding of Yorkshire*(2) also said: "if we give "an opinion, we can't give a judgment. You cannot "come here for an opinion to us."

It is not thought proper for this court to decide a point of law with the only object to forestall proceedings against persons who are not even parties to the present proceedings.(3)

There will be judgment maintaining the points of law raised by the Crown's defence and declaring that the suppliants are not entitled to the relief sought by their Petition of Right, and with costs in favour of the Crown.

Judgment accordingly.

Solicitor for suppliants: *P. N. Martel.*

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

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(1) *Trial of Dewhurst* (1820) 1 St. Tr. N.S. 607.

(2) (1773) Lofft. 238.

(3) Dyson v. Attorney-General, 1911, 1 K.B. 410.

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"*Reinstatement.*" In assessing compensation for lands compulsorily taken under expropriation proceedings any "special adaptability" which the property may have for some use or purpose is to be treated as an element of market value. THE KING *v.* MCPHERSON, 15 Ex. C.R. 215 followed. SIDNEY *v.* NORTH EASTERN RAILWAY CO. (1914) 3 K.B.D. 629 referred to. 2. In such cases the Court should apply itself to a consideration of the value as if the scheme in respect of which the compulsory powers are exercised had no existence. CUNARD *v.* THE KING, 43 S.C.R. 99; LUCAS *v.* CHESTERFIELD GAS & WATER BOARD (1909) 1 K. B.D. 16; CEDAR RAPIDS MFG. CO. *v.* LACOSTE (1914) A.C. 569, referred to. 3. The owner of a water-lot in a public harbour under a patent from the Crown granted before Confederation cannot place erections thereon without the approval of the Governor in Council as required by Cap. 115, part 1, of R.S. 1906. *Held*, that the market value of the water-lot is the proper basis for assessment of compensation, but while the value may be enhanced by the hope or expectation of obtaining authority to erect structures on the lot where there is no evidence of market value to guide it the Court will not assess compensation on a hope or expectation which cannot be regarded as a right of property in the defendant. LYNCH *v.* CITY OF GLASGOW (1903) 5 C. of Sess. Cas. 1174; MAY *v.* BOSTON, 158 Mass. 21; CORRIE *v.* MCDERMOTT (1914) A.C. 1056 referred to. 4. The doctrine of "reinstatement" in compensation cases considered. THE KING *v.* WILSON *et al* — 283

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9.——*Basis of Compensation—Gentleman's Residence—"Market value" and "Intrinsic value" distinguished—"Quantity Survey Method"—considered in relation to establishing market value. Held* that the owner of property expropriated is entitled to have the compensation assessed as its market value in respect of the best uses to which it can be put, e.g. where a property has its chief value as a gentleman's residence commanding a good view and with a fairly desirable location that is the value upon which compensation should be assessed. 2. Compensation for property taken

under the authority of *The Expropriation Act*, R.S. 1906, c. 143, is to be assessed upon the market value of the property and not upon its intrinsic value. 3. Distinction between the terms market value and intrinsic value stated. 4. The so-called "quantity survey method" considered in relation to ascertaining the true market value of property expropriated. THE KING *v.* ESTATE OF JOHN MANUEL — — — — — 381

10.——*Compensation—Offer made before information filed—Amount of offer not based upon proper valuation—Market value established by sales—Costs.* Where an offer of compensation is made to the owner by the Crown prior to legal proceedings being taken to ascertain the value of the lands expropriated, such offer, if it is too liberal when tested by the evidence before the Court, is not shown to have been based on any proper valuation, and is moreover made with a view to a settlement of the claim without litigation, the Court will not regard it as evidence of the true market value of the land. 2. Even when the amount recovered is so much less than that claimed as to make the latter appear extravagant if negotiations for a settlement prior to action brought involve an offer by the Crown far in excess of the sum offered by the information, the defendant ought not to be deprived of his costs. MCLEOD *v.* THE KING, 2 Ex. C.R. 106 considered and distinguished. THE KING *v.* WOODLOCK, 15 Ex. C.R. 417 referred to. 3. The prices paid for properties purchased in the immediate neighbourhood of land expropriated afford the best test and the safest starting point for an inquiry into the true market value of the lands taken. THE KING *v.* MCLAUGHLIN *et al* 417

11.——*Agricultural land—Wood-lot—Water supply for cattle—Basis of valuation.* Compensation for the expropriation of a wood-lot is to be arrived at by seeking the market value of the same as a whole and as it stood at the date of the expropriation; not by calculating the profits which might be realized out of the sale of the timber upon the land. 2. In assessing compensation in the case of agricultural land, the fact that there is a small lake on the property suitable for watering cattle and other general purposes will be taken into consideration as an additional element of value in respect of its use for agriculture. THE KING *v.* WOODLOCK — — — — 429

12.——*Abandonment—The Expropriation Act, sec.* 23—*Damages—Costs.* Under sec. 23 of *The Expropriation Act* the Crown, through its proper Minister, in that behalf may abandon in whole or in part any land previously taken for the purpose of a public work. Where the owner is allowed to retain possession and such abandonment is made in full and no loss having been sustained by the owner between the time of the taking and of the abandonment, compensation even in the nature of nominal damages will not be allowed because the taking was authorized by statute. The Court, however, may declare the owner entitled to the costs of and incidental to making his defence to the information and order

using a safe public way or road thereto, entered, contrary to the provisions of section 78 of *The Government Railways Act*, upon the track of the railway drawing behind him a small sled containing two valises. It was dusk at the time, but there was light enough for him to see, as he did, a train approaching him. This train consisted of a locomotive and tender with a snow plough attached. B. instead of getting out of the way as soon as he saw the train, attempted to pick up one of the valises that had fallen from the sled, an act which rendered it too late for him to escape being struck by the train. Upon the trial of his petition of right for damages it appeared that the suppliant had at the time an unreduced fracture of the right leg which impeded his movements. On the other hand, the fact that the place where the accident happened being a "thickly peopled district" within the meaning of section 34 of the said Act, was not established beyond question; nor was it shown conclusively that the track there was not properly fenced. The engine-driver had complied with all statutory requirements as to whistle and bell and his train was running at a rate of about twelve to fifteen miles an hour. He did not see B. on the track until he was some fifteen feet from him, and the emergency brakes were at once applied. *Held*, that inasmuch as B. was a trespasser on the track, the only duty cast upon the engine-driver was to abstain from wilfully injuring B. while so trespassing, and further that inasmuch as the engine-driver had applied the emergency brakes as soon as he saw B. on the track he had done all he could to avoid the accident, and there was no negligence attributable to him. Brochu *v.* The King 50

3.——*Railways—Accident to workman in repairing cars—Failure of workman to observe rules—Faute commune.* Under certain rules prescribed by the Department of Railways and Canals for the observance of employees on the Intercolonial Railway at the time of the accident in question, a blue flag was required to be placed at the end of a car, engine or train during the day when workmen were engaged under or about the same. Special instructions were also given from time to time by the foreman of car-repairers that this rule should be strictly adhered to, and each car-repairer was supplied with two of such flags L., on the day of the accident, had his flags in his tool-box but neglected to use either of them as a signal that he was working under a certain car on the siding. There was evidence that he asked another employee to watch the trains while he was working and to notify him of any train or locomotive approaching. While L. was so engaged, certain cars while being moved by means of a flying-shunt under the orders of the yard-master came into contact with the car under which L. was working with the result that he was fatally injured. At the trial it was admitted by counsel for the suppliants that L. had been negligent in not putting up his flag but it was charged that there was *faute commune* because the yard-master had ordered the cars to be moved by means of a flying-shunt. The evidence showed that while flying-shunts were not prohibited under the rules, the yard-master would not have let the cars go on to the siding where the car stood under which L. was working, had he seen a blue flag on that car. *Held*, that the proximate cause of the accident was the negligence of L. in failing to put up a blue flag, and it was not a case in which the doctrine *faute commune* should be applied. Samson *et al v.* The King — 75

4.——*Railways—Accident — Prescription — Construction—Stipulation relieving the Crown of liability—Insurance—Assessment of damages.* The lodging of a petition of right with the Secretary of State in compliance with the provisions of sec. 4 of the *Petition of Right Act* (R.S. 1906, ch. 142) will interrupt prescription within the meaning of Art. 2224, C.C.P.Q. 2. The suppliant, having been injured on a government railway, was paid sick allowances by an insurance association for nearly twenty-six weeks, and when the sick and accident pay-rolls were presented to him for signature, and when he signed them, there was in small print at the head of the column to which he affixed his signature, as a receipt for such moneys, the following: "In consideration of the receipt by us of the sums set opposite our respective names, we do hereby release and discharge the Intercolonal Railway, etc., from all claims for damages indemnity or other forms of compensation on account of said disablement." *Held*, that as no notice was given to the suppliant of such condition and as his attention was never called to it, and that he signed the receipt without being aware of the same, it could not now be set up as a bar to his recovering. 3. Under a by-law (113) of such association, by the payment of $10,000 annually by the Railway Department to the association, it was provided that the Railway Department "shall be relieved of all claims for compensation for injury or death of any member." But in the case of death or total disablement the Crown did not, under the rules of the association, contribute to the amount paid in respect thereof, such fund being made up by special assessment among the members. *Held*, that as the Crown did not contribute to the indemnity in the case of death or total disablement, it could not avail itself of the immunity provided by the by-law in question. 4. In assessing damages the moneys paid to the suppliant under the sick allowance insurance should be taken into consideration, but the moneys paid under the provident fund should not be so considered in view of sec. 5. In general in considering the question as to whether insurance money should be taken in account in assessing compensation in cases of accident, a distinction must be made between the case where a party himself is suing for injury either to his person or his property, and the case under Lord Campbell's Act and Art. 1056 C.C.P.Q. where the action is for the pecuniary loss caused by the death to the survivors. In the former case he has two distinct causes of action, one on contract with the insurance company and the other in tort against the wrong-doer. In the latter case it is the pecuniary loss caused by the death which forms the basis of the action and the measure of damages, and in this case alone the insurance money is to be taken into consideration. Saindon *v.* The King — 305

In the Exchequer Court of Canada.

GENERAL RULES AND ORDERS.

In pursuance of section 87 of the Exchequer Court Act (R.S. 1906, c. 140) it is hereby ordered that the following Rules shall be in force in the Exchequer Court of Canada in respect of the matters therein mentioned:—

336. The Court or a Judge shall have power at any stage of the proceedings in any cause or matter now pending or hereafter instituted to direct the trial of any particular issue or issues therein upon oral evidence prior to the trial of other issues in question in such cause or matter and to make all necessary orders and directions for the purposes of the trial of any issue or issues as may be so directed.

337. In any cause or matter now pending, or hereafter instituted, where the defendants are numerous, and where the rights of the defendants or of any class or classes of defendants in any particular substantially depend upon the same facts and where by reason of difficulty in effecting personal service upon the defendants, or for any other reason, it appears that in the due administration of justice such order should be made, the Court or a Judge shall have power upon the application of the plaintiff *ex parte*, (or upon such notice to any of the parties to the cause or matter as may have been directed) to order or direct that one or more of such defendants, or such other defendant or defendants as may be added as representing a class, shall defend the action so far as the questions of fact or law are directed to be tried on behalf or for the benefit of all defendants having similar interests, and that service of the Information or other proceeding upon such defendants so named shall be good and sufficient service thereof upon the other defendants, whether for the purpose of the cause or matter generally or for the purposes of the trial of such questions of fact or law, as may be directed:

Provided always that the rights of the defendants in any cause or matter in which such order may be made shall not be taken

to be affected thereby so far as any other questions of law or fact in such cause or matter are concerned.

338. Judgment on the trial of any question ordered or directed in the manner provided by the next preceding rule, shall, if directed in such order, be binding on all the defendants in any cause or matter and their heirs and representatives, and in the event of death of any of the defendants before judgment being had on such trial no abatement of the action shall thereupon arise and it shall not be necessary to revive the cause or matter as against the heirs or personal representatives of such defendants.

Dated at Ottawa, 15th February, A.D., 1915.

W. G. P. CASSELS,
J. E. C.

IN THE EXCHEQUER COURT OF CANADA

In Prize.

General Rules and Orders.

IN pursuance of the authority contained in the Prize Court Rules, 1914, it is hereby ordered that the following rules and orders be and the same are in force for the purpose of regulating the practice and procedure in the Exchequer Court of Canada in Prize matters.

Order XLVII.

Hours within which service of documents may be made.—Service by Sheriff in certain cases.—Seal.

Rule 1. Except as otherwise provided by the Prize Court Rules, 1914, the service of all notices, pleadings, summonses, orders and other documents, proceedings and written communications mentioned in Order XXXV, r. 6, thereof, shall be effected between the hour of 10 in the *forenoon* and the hour of 5 in the *afternoon*, except leave be given by a Judge or the Registrar of the Court to effect service outside of such hours. Without such leave obtained service after the hour of 5 p.m. shall be deemed to be made on the following day.

Rule 2. The duties of the Marshal under the said rules shall, in any case where they fall to be executed in a district for which there is no Marshal, be executed and carried out by the Sheriff of the County or District within which the duties are to be performed and every such Sheriff is hereby appointed to carry out the duties of the Marshal under the said rules.

Rule 3. In proceedings in Prize matters, in the principal Registry of the Exchequer Court of Canada at Ottawa, or in any Admiralty District Registry of the said Court in Canada, the seals respectively used in the said Registries may be used in matters of Prize.

Dated at Ottawa this 23rd day of September, A.D. 1914.

W. G. P. CASSELS,
President.