BETWEEN

1920
Dec. 16.

DOMINION IRON AND STEEL CO., LIMITED, AND THE DOMINION STEEL CORPORATION, LIMITED (ADDED BY ORDER OF COURT DATED 4th NOVEMBER, 1920).....PLAINTIFFS;

AND

HIS MAJESTY THE KING.....DEFENDANT.

War Measures Act—"Appropriation"—Meaning of under section 7—Section 6—Contract—Necessity for formal document—Effect of erroneous statement in Reference by Minister.

Held: Where a proposal to manufacture certain steel rails was accepted in writing by the party to whom it was sent, such acceptance stating that it would be followed by a formal contract, and where it appeared that the formal contract was intended solely to embody the agreement already arrived at, in such a case, looking to the intention of the parties, the contractual relations between them should be regarded as based upon the terms so agreed upon. *Lewis* v. *Brass*, 3 Q.B.D. 667 referred to.

2. That where during the whole time that an order given by the Crown to a company to manufacture rails for various railways, was being filled, the company carried on their own business in addition to turning out the rails ordered, and had full control thereof, the act of the Crown in giving such an order cannot be construed as an "appropriation" of the plant, within the meaning of section 7 of the War Measures Act, or otherwise, *United States* vs. *Russell*, 13 Wall. 623 referred to.

3. That section 7 of the said Act only applies to cases where the Crown appropriates property for its own use, and section 6 authorizes the issuing of an order by the Crown, directing a company to furnish goods, etc., to a third party, without the Crown incurring any liability therefor.

4. That where the Minister of Justice in referring the claim in question to the court erroneously stated that the same was referred under the powers conferred by section 7 of the War Measures Act, such statement could not vary the rights of the parties as established under an order-in-council.

1920

DOMINION IRON AND STEEL CO., LIMITED AND THE DOMINION STEEL CORPORATION, LIMITED v. THE KING.

Statement of Facts.

REFERENCE by the Minister of Justice of a claim of the plaintiff, to recover the price of rails furnished to various railways, to wit: the Canadian Pacific Ry., the Grand Trunk Ry., the Toronto, Hamilton and Buffalo Ry., etc., during the war, upon the order of the Crown for which it was liable.

Informations were also exhibited by the Crown, claiming from the railways for whom said rails had been ordered, the price thereof.

By consent of counsel for all parties, inasmuch as the said railways were interested in the result of this action, counsel for the said railways attended the trial and were permitted to cross-examine the witnesses and were heard in argument. No judgment was given against them, counsel for the Crown declaring they were not asking for judgment against the railways and that the question, as between the Crown and Railways, would be left over for future direction.

September 7th, 8th, October 25th, 26th, 27th and 29th; November 3rd, 4th, 6th and 8th, 1920.

The case was heard before THE PRESIDENT OF THE EXCHEQUER COURT at Ottawa.

Wallace Nesbitt, K.C., Hector McInnes, K.C., J. McG. Stewart and *E. F. Newcombe,* for plaintiff.

F. E. Meredith, K.C., and *A. Holden, K.* C., for the Crown.

W. N. Tilly, K.C., for the Canadian Pacific Railway and (*J. A. Soule* with him) for the Toronto, Hamilton, and Buffalo Railway.

C. P. Chisholm, K.C., for the Grand Trunk Railway.

The facts are stated in the reasons for judgment.

1920

DOMINION IRON AND STEEL CO., LIMITED AND THE DOMINION STEEL CORPORATION, LIMITED v. THE KING.

Reasons for Judgment.

THE PRESIDENT OF THE EXCHEQUER COURT now (December 16th, 1920) delivered judgment.

The trial of this case commenced at Ottawa on the 17th September, 1920. The only witness called on behalf of the plaintiffs was Charles Symonds Cameron. He is the Controller and the Secretary-Treasurer of the Dominion Iron and Steel Company, and also a Director of the company.

After proceeding for a considerable length of time with the cross-examination of Cameron, it appeared that a mass of papers required for the cross-examination were not in Ottawa, and it was subsequently arranged that the continuation of the cross-examination should be taken at Sydney. At the request of all the parties, the Registrar of the court went to Sydney, and several days were occupied in the continuance of his cross-examination, and then adjourned to Montreal, and then to Ottawa where the trial was continued before me on the 25th October, 1920, and Mr. Cameron's cross-examination was concluded. The trial was then continued and lasted nearly five days. The argument took place on a subsequent day, and lasted for nearly five days. A great mass of evidence and exhibits have cumbered the record. Had counsel for the defendant examined Mr. Cameron for discovery prior to the trial, a great deal of time would have been saved, and a mass of irrelevant evidence eliminated from the case. The examination of Cameron at Sydney was practically, to a great extent, an examination for discovery.

In justice to the counsel who conducted the case, it is apparent that Cameron was not over anxious to facilitate the getting at the facts. It looked to me as if he were rather enjoying the tilt of wits with the learned counsel who was cross-examining him.

1920

DOMINION IRON AND STEEL CO., LIMITED AND THE DOMINION STEEL CORPORATION, LIMITED v. THE KING.

Reasons for Judgment.

However. the case came to an end. Since the close of the argument, I have read over carefully all the evidence and arguments, and such of the exhibits as in my opinion required consideration.

On the 13th March, 1918, the company had a contract with the Imperial Munitions Board for the rolling of shell steel for munition purposes. The order in council reads, as follows:

"P.C. 629. Report of the Committee of the Privy Council, approved by His Excellency the Governor General on the 15th March, 1918.

"The Committee of the Privy Council have had before them a report, dated 13th March, 1918, from the Minister of Railways and Canals, representing that it is essential that rails for renewals be obtained immediately for the various railways in Canada, if the railways are to continue operation to their full capacity for war purposes during the next year.

"The Minister further represents that every source of supply outside of Canada has been investigated without success.

"Further, that the Imperial Munitions Board, realizing the absolute necessity of the railways obtaining rails, have agreed to release the Dominion Steel Corporation, Limited, from its contract with the Imperial Munitions Board from the 1st April, so as to permit of the rail plant running to fullest capacity until at least one hundred thousand tons (100,000) of rails have been rolled, as said rails are urgently needed for war conditions.

"Further, that the Minister of Railways and Canals took up with the Dominion Steel Corporation the question of rolling said rails and he has received the following letter:

"In accordance with your request of this date, I beg to submit the following proposal covering your requirements of steel rails:

"Material: Basic Open Hearth Steel Rails, of the Canadian Pacific Railway's Company's section weighing eighty-five pounds per lineal yard, first quality.

"Quantity: One hundred thousand (100,000) gross tons of 2,240 pounds.

"Specification. The rails covered by this proposal to be manufactured in accordance with the specification which governed the production of steel rails by the Dominion Iron and Steel Company for the Canadian Government Railways, during 1917.

"Lengths: The standard length of rail to be thirty-three (33) feet. The purchaser to accept not less than ten per cent (10%) of the contract tonnage in shorter lengths, down to and including twenty-four (24) feet, should the seller elect to supply the same.

"Inspection: Testing, inspection and acceptance of the rails to be carried out at Sydney, N.S.

"Shipment: The rolling of the rails covered by this proposal shall be undertaken to commence on or about April 1st, 1918, and shipments shall begin as soon as practicable thereafter, in carload lots. The rate of rolling to be the capacity of the Dominion Iron and Steel Company's rail mill. It is estimated that it will be possible to produce approximately 10,000 tons during the month of April, 1918.

"No. 2 rails: The purchaser shall accept not less than five per cent (5%) in second quality rails, in lengths down to and including twenty-four (24) feet, should the seller elect to supply the same.

1920

DOMINION IRON AND STEEL CO., LIMITED AND THE DOMINION STEEL CORPORATION, LIMITED v. THE KING.

Reasons for Judgment.

"Price: No. 1 quality, seventy dollars ($70.00). No. 2, sixty-eight dollars ($68.00). Both prices per gross ton of 2,240 pounds, free on board cars, Sydney, Nova Scotia.

"Terms: Net cash on thirty days from date of shipment.

"The above proposal is made subject to acceptance within a reasonable period, and will in the event of the same meeting with your approval be followed by a formal contract.

"And to which the following reply has been sent:

"Dear Sir:

"I am in receipt of your letter of the 12th instant, covering your offer for the rolling of 100,000 tons of steel rails, and in reply, beg to say that your offer to manufacture is quite acceptable, the price will be submitted to Council. You will hear from me in due course.

"Please make the necessary arrangements to proceed with the rolling as of April 1st.

"Yours faithfully,

"J. D. REID.

"Mark Workman, Esq.,
"President, Dominion Steel Corporation, Limited,
"Montreal, P.Q.

"Further, that since the Dominion Steel Corporation received reply to their letter they ask that before agreeing to commence the manufacture of said rails, the price quoted be assured to them.

"The Minister recommends that authority be granted under the War Measures Act, 1914, for an order to be issued to the Dominion Steel Corporation,

Limited, for the rolling by the Dominion Iron and Steel Company, of at least one hundred thousand tons of steel rails, rolling to commence on the 1st April, 1918, to specifications to be approved by the Minister of Railways and Canals and at a price to be determined on the recommendation of the said Minister, approved by your Excellency in Council, after an investigation of the Company's costs by experts appointed by the Minister of Railways and Canals.

"The Committee concur in the foregoing recommendation to submit the same for approval.

"RODOLPHE BOUDREAU,

"Clerk of the Privy Council."

It will be noticed that by this order in council it was provided that the price to be paid for the rails was to be approved by the Minister of Railways and Canals, and at a price to be determined on the recommendation of the said Minister, approved by His Excellency in Council, after an investigation of the Company's costs by experts appointed by the Minister of Railways and Canals.

Under the order of the 15th March, 1918, the company proceeded to roll the rails, and the 99,000 tons of steel rails number one, were delivered to the various railways, and in addition thereto some 17,000 tons of second class rails were also delivered, it having been agreed, first, that five per cent of second class rails should be accepted out of the 99,000 tons of rails, subsequently modified by an agreement that the five per cent of second class rails should be in addition to the 99,000 tons of first class rails,—and by a later arrangement, an additional number of tons of second class rails were also to be taken over.

1920

DOMINION IRON AND STEEL CO., LIMITED AND THE DOMINION STEEL CORPORATION, LIMITED v. THE KING.

Reasons for Judgment.

Instead of the Minister fixing the price, a subsequent order in council, dated on the 26th February, 1919, was passed, under which the Minister, apparently with the assent of some of the railways, made the reference to the Exchequer Court to fix the price.

The Dominion Iron and Steel Company presented their claim, and it is material to consider this claim. The Minister of Justice referred the claim as presented by a direction, which reads, as follows:

"Under the powers confered by section 7 of the War Measures Act, 1914, or otherwise existing in this behalf, I hereby refer to the Exchequer Court of Canada the annexed claim of the Dominion Iron and Steel Company, Limited, for compensation for appropriation by His Majesty 100,000 tons of steel rails.

"Dated at Ottawa this 30th day of October, 1919.

CHARLES J. DOHERTY,
Minister of Justice.

"To the Registrar of the Exchequer Court of Canada, Ottawa."

This reference states that under the powers conferred by section 7 of the War Measures Act, 1914, *or otherwise existing in that behalf*. No doubt seeing this reference to section 7 of the War Measures Act, counsel were astute enough to amend the nature of the claim and to attempt to obtain compensation under section 7 of the War Measures Act, Cap. 2, 5 Geo. V, assented to on the 22nd August, 1914.

The claim put forward at the trial by Mr. Nesbitt, K.C., senior counsel for the steel company, was shortly, as follows: He proved certain contracts with the Imperial Munitions Board under which shell steel was to be delivered at the contract price of about $80.00 per

ton, and his contention was that they should receive the same price per ton for the rails in order that the steel company might obtain compensation under section 7 for the loss of their contract with the Imperial Munitions Board.

I suggested that if the case had to be decided under section 7, it would be necessary for the Steel Company to prove the loss which they had sustained. It might appear that instead of the steel company suffering by reason of having as they claimed a loss from their contract, they might have been saved from loss. Had the cost of the shell steel contract been greater than the $80.00 a ton, there would be no ground even on the contention of the steel company for compensation under section 7, for the reason that it might have been beneficial to get rid of a losing contract.

Mr. Nesbitt, however, took a different view stating he had fully considered the question and was prepared to take his stand on his case.

Counsel for the Crown or the railways did not suggest that the action should be dismissed for lack of proof, and the case was proceeded with, and the question now is of no importance, as counsel for the Crown proved conclusively the case of the steel company, if it stood to be decided on the basis of compensation and the profit which they would have made from the shell contract had it been carried out.

After a full consideration of the case, I am of opinion that the steel company cannot avail themselves of the provisions of section 7 of the War Measures Act. The reference of the Minister of Justice in which he states: "Under the powers conferred by section 7 of the War Measures Act, 1914," is evidently a mistake,

1920

DOMINION IRON AND STEEL CO., LIMITED AND THE DOMINION STEEL CORPORATION, LIMITED v. THE KING.

Reasons for Judgment.

and cannot vary the rights of the parties as provided by the order in council of the 15th March, 1918. Under section 6, the Governor-in-Council shall have power to do and authorize such act and things, etc., and that the powers of the Governor-in-Council shall extend to all matters coming within the class of subjects hereinafter enumerated. Sub-section "f" includes appropriation.

In no sense can it be held under the facts of this case, that the premises of the steel company were appropriated by His Majesty.

Mr. Meredith referred me to an authority in the United States Supreme Court, which has an important bearing on the case before me. *United States* v. *Russell* (1). It was an appeal from the Court of Claims. In that case two steamers were requisitioned on the part of the United States for the services of the United States. On the 4th July, 1864, an Act had been passed, which reads "That the jurisdiction of the said court (Court of Claims) shall not extend to or include any claim against the United States growing out of the destruction or appropriation of property, etc."

It was contended under the circumstances of that case that the vessels in question had been appropriated by the United States. The Court of Claims held against this contention, finding that during the time each of the said steamers was in the service of the United States they were in command of the claimant, or of some person employed by him subject to his control. Further, that when the steamers were respectively taken into the service of the United States, the officers acting for the United States did not intend to "appropriate" these steamers to the

(1) 13 Wall. Rep. 623.

United States, nor even their services; but they did intend to compel the captains and crews with such steamers to perform the services needed. Part of the opinion of the court reads as follows:

"Three steamboats, owned by the appellee during the rebellion, were employed as transports in the public service for the respective periods mentioned in the record, without any agreement fixing the compensation to which the owner should be entitled. Certain payments for the services were made in each case by the government to the owner, but he claimed a larger sum, and the demand being refused he instituted the present suit. Prior to the orders hereinafter mentioned the steamboats were employed by the owner in carrying private freights, and the findings of the court below show that he quit that employment in each case and went into the public service in obedience to the military order of an assistant quarter master of the army. Reference to one of the orders will be sufficient, as the others are not substantially different. Take the second, for example, which reads as follows, as reported in the transcript: 'Imperative military necessity requires the services of your steamer for a brief period; your captain will report to this office at once in person, first stopping the receipt of freight, should the steamer be so doing.' Pursuant to that order or one of similar import in substance and effect, the respective steamboats were impressed into the public service and employed as transports for carrying government freight for the several periods of time set forth in the findings of the court. Throughout the whole time the steamboats were so employed in the military service they were in command of the owner as master, or of some one employed by him and under his pay and control, and the findings of the

1920

DOMINION IRON AND STEEL CO., LIMITED AND THE DOMINION STEEL CORPORATION, LIMITED v. THE KING.

Reasons for Judgment.

court show that he manned and victualled the steamboats and paid all the running expenses during the whole period they were so employed."

The facts in the present case before me are much weaker than the facts in the case before the Supreme Court, as during the whole time that the order in question was being filled, the steel company, as I will point out, were carrying on their own business in addition to the turning out of the rails as required by the order in question.

I have come to the conclusion after a good deal of consideration, and after hearing the forcible argument before me by Mr. Meredith and Mr. Tilley, and of Mr. Nesbitt and Mr. Stewart, that the relationship between the Crown and the Steel Company was one of contract and not a compulsory order under the provisions of the War Measures Act. Even if it were not one of contract it would make but little difference as in point of fact the Steel Company accepted the terms of payment as provided by the order of the 15th March, 1918, namely, that the price should be determined on the recommendation of the said Minister approved by His Exellency in Council, after an investigation of the Company's costs by experts appointed by the Minister.

Before discussing the question of contractual relationship between the Crown on one side and the steel company on the other, I think I should refer to what I think has a strong bearing on this feature of the case. Section 7 only applies to a case where the Crown appropriates property for its own use. It is admitted here that the bulk of the order in question of the 99,000 tons of steel rails, was not for the use of His Majesty, but only a comparatively small portion of the order. There is no dispute on this point.

The order in council of the 15th March stated "that rails for renewals be obtained immediately for the various railways in Canada,"—the greater portion of which rails were being ordered for the various railways, namely:—the Canadian Pacific, the Grand Trunk, etc.

Under section 6, had the Crown been acting under the powers thereby conferred, they could have directed the steel company to furnish the rails for these different railway companies. As I read the section there would be no liability on the part of the Crown. The liability would have been a direct liability as between the Steel Company and the various railways obtaining their share of the tonnage of the rails. The Crown did not purport to act under Section 6, but themselves became the contracting party, and became liable to the steel company, and have subsequently paid large sums to the steel company, amounting according to the claim of the steel company to some $5,500,000. I was informed on the argument that since the presentation of the claim a further sum has been paid. This would, to my mind, have a strong bearing on the question whether it was a compulsory mandate or not. There is no question that the steel company had an intimation that if they refused to comply with what the Minister requested, power would be invoked under the War Measures Act to compel the production and manufacture of these rails to be furnished to the railway companies.

The order in council of the 15th March, 1918, contains a provision that the Minister recommends that authority be granted under the War Measures Act, 1914, for an order, etc. It confers upon the Minister power, if the parties could not come together, to invoke the provisions of the War Measures Act.

1920

DOMINION IRON AND STEEL CO., LIMITED AND THE DOMINION STEEL CORPORATION, LIMITED v. THE KING.

Reasons for Judgment.

That the steel company did not consider it as a mandatory order is apparent from the correspondence had betweeen the parties.

In Exhibit No. 3, the letter of the 12th March, 1918, the proposition is put forward on the part of the steel company. I may refer to a portion of this letter, which has a bearing on another phase of this case, with which I will have to deal later, in which it states that the rate of rolling is to be the *capacity* of the Dominion Iron and Steel Company's rail mill. There is no distinction between that and the words "'fullest capacity."

The company asked that they should be paid for No. 1 rails, $70.00 per ton, and for No. 2's $68.00 per ton; and the letter further states that: "The above proposal is made subject to acceptance within a reasonable period, and will in the event of the same meeting with your approval be followed by a formal contract."

This letter is answered by a subsequent letter from the Minister of Railways in which he states: "I am in receipt of your letter of the 12th instant, covering your offer for the rolling of 100,000 tons of steel rails, and in reply, beg to say that your offer to manufacture is quite acceptable, the price will be submitted to Council."

This letter from the Minister is followed up by a letter from the steel company, in which it is urged that, "it is very desirable and essential that price be established before rolling arrangements commence. We would appreciate your early confirmation of price quoted my letter of twelfth."

There is further correspondence which was referred to at length in the argument of Mr. Tilley, and eventually the parties came together with the exception as to the specifications which were to govern under the

contract, and for a time the price to be paid. It was pointed out on behalf of the steel company that as these rails were to be supplied to the different railway companies, it would make the work more difficult if a common specification was not agreed upon. Thereupon, a meeting took place in Ottawa, on the 22nd March, 1918, and at this meeting Mr. Lavoie, the purchasing agent, details in his evidence, what took place. He says he met Mr. McNaughton, the representative of the steel company in Ottawa, on the 22nd March, 1918, and were present at the meeting, Mr. Bell, the Deputy Minister of the Department of Railways and Canals, the Chief Engineer Fairbairn, of the Canadian Pacific Railway, Chief Engineer Stewart, of the Canadian Northern Railway, Chief Engineer Blaiklock, of the Grand Trunk Railway, and Chief Engineer Brown, of the Canadian Government Rrilways, and at this meeting specifications applicable to the manufacture of these rails were arrived at without dissent. It was under the provisions of these specifications that the manufacture of the rails was proceeded with. The only other point left undetermined was the price. The steel company through its president was anxious to have the price fixed as quoted in his letter. To this the Minister would not agree, and the steel company went on with the order and rolled the rails which were subsequently delivered and accepted. The steel company had been furnished with a copy of the order in council of the 15th March, 1918, by which the manner of ascertaining the price was set out; and with full knowledge and without dissent, they proceeded to carry out the contract, evidently accepting that provision of the order in council which required the price to be fixed by the method stated in the order.

1920

DOMINION IRON AND STEEL CO., LIMITED AND THE DOMINION STEEL CORPORATION, LIMITED v. THE KING.

Reasons for Judgment.

The proposal of the Steel Company contained this statement: "The above proposal is made subject to acceptance within a reasonable period, and will in the event of the same meeting with your approval, be followed by a formal contract."

No formal contract was ever executed, and in my view that is of no consequence, as the documents showed a contract, and the contract has been performed (1).

Had a formal contract been drawn up and executed by the parties, it would have no doubt contained a provision as to the manner in which the price was to be ascertained. It is quite evident that the steel company, if the price could not be agreed on, had no objection to this method of providing for the ascertainment of the sum they should be paid.

An order in council was passed on the 6th December, 1918, providing for a contract with the steel company, for 125,000 gross tons of 85 pound rails. This was followed up by a written agreement which bears date the 1st April, 1919. It throws light on the willingness of the company to accept the method of fixing the price.

"8. His Majesty, in consideration of the premises agrees that, upon delivery of the said rails as aforesaid, and the production of a certificate from the said agent or inspector that the said rails as herein contracted for have been manufactured and delivered in accordance with this agreement, and certifying to his approval of and satisfaction with the same, the Company will be paid for and in respect of the said rails so delivered, such price or prices as may be fixed by the Minister of Railways and Canals of Canada upon and subject to the approval of the Governor in Council."

(1) *Lewis* v. *Brass*, 3 Q.B.D. 667.

It appears from the order in council of the 26th February, 1919, that the Minister was of opinion that $65.00 a ton was a fair and equitable price in his judgment to be paid to the steel company. Instead, however, of proceeding to make a final adjudication by himself and obtaining the approval of the Governor in Council and ending the matter, he makes this reference to the Exchequer Court.

Mr. Tilley argued with considerable force that this action of the Minister arriving at the sum of $65.00 was in fact an adjudication by the Minister, and that his finding became binding and conclusive with the result that the reference to the Exchequer Court was abortive. I do not agree with him. It is perfectly obvious there was no intention to adjudicate on the price. It was a mere recital of facts. The object of the order in council is to provide for a reference to the court, as a forum to adjudicate in place of the Minister. It was simply changing the forum, and nothing more. I would refer to the cases cited, of *Cameron* v. *Cuddy*, (1) and also *Yule* v *The Queen* (2)

It was also argued by Mr. Tilley that the effect of this order in council of the 26th February, 1919, was to fix the price for the subsequent order, for the 125,000 tons of rails ordered by the order in council of the 6th December, 1918. This order in council of the 6th December, 1918, might have been worded in clearer language, but it could hardly have been the intention to fix the price of the order of the 125,000 tons of rails. As I have pointed out, the contract for these rails was executed on the 1st April, 1919, and contained the provision which I have quoted, as to the manner in which the price was to be fixed, namely, upon the completion of the contract.

(1) (1914) A.C. 651, at page 666. (2) 6 Ex.C.R. 103, and 30 S.C.R. 24.

1920

DOMINION IRON AND STEEL CO., LIMITED AND THE DOMINION STEEL CORPORATION, LIMITED v. THE KING.

Reasons for Judgment.

I am of opinion that a contract is proved for the reasons stated; but, even if what has taken place is not in fact to be deemed a contract, it would not affect the case, as I think it quite clear that it never was contemplated or intended that compensation should be made to the steel company for any loss of profits by reason of the interference with the munition contract. The contract for the munitions was not cancelled or done away with. The time for the completion of this contract was only postponed, and placing oneself in the position of the parties in March, 1918, it is apparent that no claim was ever thought of being put forward in respect of any loss that might be sustained by reason of the company being asked to turn out steel rails in lieu of shell steel. If such a claim was contemplated it should have been put forward by the steel company at the time. There is no suggestion in any of the correspondence or documents that such a claim was ever in their mind. What is termed the contract with the Munitions Board for shell steel, are the orders which were given. There was no other, more formal contract. It is admitted the steel company, had the Munitions Board terminated the contract, would have lost nothing because the Munitions Board would have had to order rails or other material produced by the steel company at a price which would have given them the same profit as if they had complied with their steel contract.

During the course of the trial (page 371 of the evidence) the following conversation took place:

"His Lordship: Is there any contract produced which required the Imperial Munitions Board to accept that Quantity (Referring to the tonnage to be turned out for the Munitions Board)?

"Mr. Holden: Yes, they bought the steel.

"His Lordship: There has been so much evidence submitted that I do not profess to follow the details: has anything been produced showing a contract which required the Imperial Munitions Board to take so many tons, as that before me in evidence?

"Hon. Mr. Nesbitt: That information has been filed in the nature of an exhibit, and there is an order in council dated March 22nd, expropriating the work for rails which were to be supplied. Perhaps your lordship has forgotten that in the turmoil. It was understood by the Minister of Railways at the time of taking over these works that the rails would all be delivered some time towards the end of the summer. Then the idea was that we should continue after this to produce the 118,000 or the 100,000 of shell steel to the Imperial Munitions Board."

This, evidently, was the view of the counsel for the steel company, and is in my opinion the correct view. It is also obvious from the manner in which the claim was made upon the steel company, signed by Mr. MacInnes, solicitor for the steel company, that he was of the same opinion. In the second clause of his claim he refers to the fact that "the price was to be determined on the recommendation of the said Minister approved by His Excellency in Council after an investigation of the Company's costs by experts appointed by the Minister."

Mr. MacInnes proceeds to state that the company in obedience to the said order rolled and delivered to the Government of Canada the said 100,000 tons of steel rails, "but the Governor in Council has not determined the said price but has referred it to the Exchequer Court."

1920

DOMINION IRON AND STEEL CO., LIMITED AND THE DOMINION STEEL CORPORATION, LIMITED v. THE KING.

Reasons for Judgment.

I think it obvious that this claim which is set up for compensation for loss of profits, on the munitions contract, is an afterthought. In point of fact, as I will point out later, had the Steel Company run their mills to full capacity, instead of carrying on their other more profitable business, they would probably have completed the munitions contract.

I propose now to deal with the question of what sum should be allowed as the cost of the rails furnished by the steel company with a reasonable profit added thereto. The plaintiffs by the Exhibit No. "U.B." claim the cost per ton to be the sum of $61.01, less profit. The Crown and the railways accept this as the basis, taking issue with the plaintiffs as to certain items, notably the price charged for the coal. The plaintiffs in making up their statement of costs, place the price of the coal at $3.442. The Crown on the other hand, claim that the cost of this coal should be taken at the rate of $1.55 per ton. The difference makes a very considerable amount in the cost per ton. I think the contention of the Crown, as put forward by their counsel, should be given effect to, and that in arriving at the cost the sum of $1.55 per ton should be the amount allowed.

It appears from the evidence that both in the accounts of the Dominion Coal Company, Limited, and the Dominion Iron and Steel Company, Limited, the cost of coal has been carried in their books at the rate of $1.55 per ton. A contract has been entered into between the Dominion Iron and Steel Company, Limited, and the Dominion Coal Company, Limited, by which at the time this particular order was given, namely, in March of 1918, and down to the present time, the Dominion Coal Company had contracted to furnish the coal to the Steel Company at certain rates,

subject to revision. At the date of this particular order the price at which the coal was to be furnished was the sum of $1.55 per ton. There had been no further fixing of the price under the terms of the contract. What happened was that some time in September, 1918, the parent company, namely, the Dominion Steel Corporation, Limited, readjusted the price, and after certain fluctuations in the price so fixed, arrived at the sum of $3,443 per ton. This amount was not credited to the Dominion Coal Company, but is held in a sort of suspense account by the Dominion Steel Corporation, Limited.

The claim put forward on behalf of the present plaintiffs is that a merger had taken place whereby both the Dominion Coal Company, and the Dominion Iron and Steel Company, had been merged in what is referred to as the parent or holding company, namely, the Dominion Steel Corporation, Limited. There was in reality no merger, but each company, namely, the Dominion Coal Company, Limited, and the Dominion Iron and Steel Company, Limited, were kept alive as separate corporate bodies, the stock of each company being held by the holding company. The terms upon which the arrangement between the holding company and the Dominion Coal Company, and the Dominion Iron and Steel Company, are set out in two documents which have been filed as Exhibit No. "F." They are similar in terms except as to the separate companies, and I will refer to the one relating to the Dominion Iron and Steel Company, Limited. It recites the fact of the stock of the company being held by the holding company, and it then proceeds:

"And whereas the corporation (meaning the Dominion Steel Corporation, Limited, the holding company) is arranging to handle the products and revenues of

1920

DOMINION IRON AND STEEL CO., LIMITED AND THE DOMINION STEEL CORPORATION, LIMITED v. THE KING.

Reasons for Judgment.

the said Steel Company, and desires to handle the products of this company (The Dominion Iron and Steel Company, Limited) as well, so that the output of both companies may be jointly dealt with.

"Be it resolved, that all products of the company intended for sale and all rents and revenues of its property now or hereafter existing or arising be and are hereby assigned and transferred to the corporation to be handled by it jointly with the products and revenues of the said Steel Company, on the following terms, namely:

"1. The corporation is to provide the company with all moneys required for its current operating expenses and also for capital expenditures approved by the corporation, as and when required.

"2. The company shall issue promissory notes to the corporation from time to time to cover moneys used in operating expenses until the corporation has been recouped for the same out of the proceeds of the company's products and revenues.

"For the moneys required for expenditures chargeable to capital account securities of the company shall be issued and transferred to the corporation.

"3. The corporation shall from time to time pay over to the company the moneys necessary to pay its interest and other charges, now or hereafter existing as follows:—

"Interest and sinking fund on mortgage bonds.

"Depreciation as hereinafter specified.

"Interest on general indebtedness.

"Interest on income bonds.

"Dividends on preferred stock.

"4. The amount to be provided for depreciation shall be fixed from time to time but so that the amount provided for depreciation and sinking fund together shall not in any year be less than $480,000.

"5. Payments under clause 3 shall be made by the corporation as and when the respective payments therein mentioned fall due from time to time, but nothing herein contained shall make it obligatory on the corporation to pay any part thereof unless the surplus derived by it from the products and revenues of the company during the then current financial year are sufficient to meet the same. The corporation shall nevertheless be bound to pay over to the company whatever surplus has been so derived whenever the same is insufficient to meet the whole of the above payments.

"6. If the corporation shall at any time fail to pay any part of the moneys required to meet the said charges it shall forthwith prepare a separate account of all receipts and expenditures in connection with the products and revenues of the company so assigned to it, and submit the same with proper vouchers to the company's auditors so that the company may be able to submit proper statements to the holders of its securities, provided, however, that so long as the moneys above specified are provided in full the corporation shall not be bound to furnish the company with any accounts.

"7. Any part of the above charges which the corporation may leave unpaid in any year shall be added to and form part of the charges to be provided for and in the following year and shall bear interest only in case of any interest charges left unpaid and unprovided for.

"8. Nothing herein contained shall affect the right of the corporation to receive payment of the interest or dividend on any securities of the company held by it, as if the same were held by any other person."

1920

DOMINION IRON AND STEEL CO., LIMITED AND THE DOMINION STEEL CORPORATION, LIMITED v. THE KING.

Reasons for Judgment.

It is quite apparent in my judgment that the Dominion Iron and Steel Company, Limited, are entitled under the terms of this resolution to have the profits from their works treated separately from the profits derived from the Dominion Coal Company, Limited. Under the terms of this resolution, the contingency might arise that by charging the Steel Company with this increase in price of coal, injury might be done to the Steel Company.

For instance, take clause 5 of this resolution. I do not think the holding company had any right whatever to readjust the price of the coal. If they did readjust it, credit should have been given to the coal company for the increased price which the coal company was supposed to derive by the increase from $1.55 to the $3.442. This so-called readjustment did not take place until, as I have stated, some time in September, 1918. By this time, had the Dominion Iron and Steel Company carried out the bargain as it ought to have been carried out, the contract for the 99,000 tons of rails and also the extra quantity of seconds, would probably have been completed. It seems to me that this so-called readjustment was made with the view of increasing the cost so that the Dominion Iron and Steel Company might recover from the Crown a larger sum of money.

In the same way with the adjustment of the cost of iron ore. In the books of the companies, the cost of the ore has been treated as being five cents. On this claim this price has been raised to twenty cents.

I think the arguments of the counsel for the defendants are well founded, and that from the $61.01 shown on the Exhibit "U.B.," this additional charge should be eliminated.

1920

DOMINION IRON AND STEEL CO., LIMITED AND THE DOMINION STEEL CORPORATION, LIMITED v. THE KING.

Reasons for Judgment.

The claim put forward on the part of the Crown that credit should be given for the profits realized from the by-products should not be allowed. The Steel Company have given credit in their cost sheets for the sum of $100,000. The additional profits were earned by putting these by-products through a different process and manufacturing them into articles of commerce. Had there been a loss in the manufacture of these by-products it would be difficult to see how this loss should be added to the cost of turning out of the steel rails.

I asked counsel for the Crown to furnish me with authority in support of their contention, but they have not done so.

I would have thought it quite clear that no such claim can arise in this case, and that the Crown and the railways have received all that they are entitled to receive by this allowance of $100,000 odd.

A further claim was put forward upon the part of the Crown. If the rail mill had been operated to the fullest capacity the government would have had full deliveries by October, 15th, 1918, according to the claim of the Crown, and they argue that a deduction should be made by reason of the increased cost incurred owing to higher wages, etc. My opinion is adverse to the claim put forward under this head. It might have been a forcible claim if raised on behalf of the Munitions Board, had they complained of the failure of the Steel Company to comply with the contract for the turning out of the rails within a reasonable period. I will refer later to some portions of the evidence to show that this delay in reality to a great extent was occasioned by the fact that, instead of the company devoting their plant to its fullest capacity, two-

1920

DOMINION IRON AND STEEL CO., LIMITED AND THE DOMINION STEEL CORPORATION, LIMITED v. THE KING.

Reasons for Judgment.

fifths of the products were devoted to other business of a more profitable nature. The rails were eventually rolled and accepted by the Crown, in fulfillment of their contract.

Mr. Cameron in his evidence at page 383, describes the whole process of making the shell steel, and also of making the steel for rails. The process up to the manufacture of ingots is the same for both. When the ingots are put through the blooming mill for the making of the steel rails, about eighty per cent of the ingots would be used in the manufacture of the rails as against sixty per cent of the ingots used for the purpose of the manufacture of shells. Mr. Jones explains this in his evidence at page 335.

It is quite apparent from the evidence of Mr. Cameron that the making of wire rods and barbed wire was more profitable. For instance, at the opening of the trial, in answer to Mr. Nesbitt, page 15, Cameron describes the kind of material that they were asked to supply in addition to rails, for wire rods and barbed wire, and billets in a form suitable for the manufacture of rods. He is asked this question:

"Q. How would that business compare, if you had been allowed to carry on and run your own business, how would that have compared, in point of being profitable, with either shell steel or the rolling of rails?

"A. It would be more profitable. It would be a better price relatively for wire rods and barbed wire than almost any other form of steel.

"Q. So that, may I take if for granted that, apart from your contention as to the 99,000 tons, as to the difference of the 16,000 tons, that the court can be satisfied that but for this order in council and its interference with your business, you would have had a more profitable business even for the 99,000?

"A. Yes."

Towards the end of the trial I asked Mr. Cameron certain questions, which are to be found at page 655 (the fifth day). I asked him the following questions:

"Q. Were the products turned out from soft steel more lucrative to your company than the product you turned out from hard steel?

"A. I think that they possibly may have been.

"Q. Was it a matter of more importance to your company to get out the manufacture of the products of soft steel than to keep on with the contract for hard steel?

"A. It was a matter of importance to the company to keep on its organization and to keep its mills going.

"Q. You got your contract for the rails, that was fixed, and you wanted to keep your custom for the soft steel products; isn't that what it all boils down to, speaking man to man?

"A. That is true, sir."

McQuarrie, who was inspector (page 485) referring to the subsequent contract, states that they commenced the rolling in January of 1919. He also shows that in March the company rolled over 22,000 tons of rails—and the important part of his evidence to which I refer is the fact, according to the statement of this witness, that the plant was the same in 1919 as it was in 1918.

Carney, an important witness, states (page 637) that if they gave the rail mill the right of way, they could easily have turned out about 18,000 tons of rails per month. He also refers to the fact that eighty per cent of the ingots would be used for rails, as against sixty per cent for the shell steel.

1920

DOMINION IRON AND STEEL CO., LIMITED AND THE DOMINION STEEL CORPORATION, LIMITED v. THE KING.

Reasons for Judgment.

In regard to prices, it is important, as sworn to by Lavoie, that under the contract of August, 1917, the company turned out 12,000 tons of 85 pound rails at the price of $58.50 per ton; he also refers to the letter of Mr. McNaughton, the general sales agent of the Steel Company, in which they offered to turn out 40,000 gross tons for the price of $62.50, and afterwards for a reduced tonnage of 7,500 tons instead of 40,000, they agreed to take $60.00.

The claim as to the Newfoundland tax needs no consideration. The directors exercised wise judgment and their decision must be accepted.

I am afraid my reasons for judgment are too voluminous. The matter involved is so great I have thought it better to set out more in detail than perhaps is necessary.

Counsel devoted a great deal of time to the preparation and conduct of the case. I have felt it due to them to make an examination of the voluminous evidence and exhibits, fuller than otherwise I would have felt inclined to do.

After the best consideration I can give to the case, and having regard to all the circumstances existing owing to the war, I think the price arrived at by the Minister of $65.00 a ton for number one rails, will fully and amply recompense the Steel Company. For the second class rails, I would allow $63.00 a ton. The letter previously quoted from the Steel Company would indicate that in their view there should be this difference in price between the two classes of rails.

The application to amend the claim should be and is refused.

1920

DOMINION IRON AND STEEL CO., LIMITED AND THE DOMINION STEEL CORPORATION, LIMITED v. THE KING.

Reasons for Judgment.

Counsel will have no difficulty in arriving at what amount should be paid at the prices I have quoted. And the fact must not be lost sight, of, that since the claim was filed, further payments have been made by the government and received by the Steel Company.

In regard to interest, I have no power to allow interest as against the Crown. This seems to have been conceded by counsel who only claim interest as part of the compensation, if they were entitled to compensation under section 7 of the statute.

I am of opinion that under all the circumstances of the case, each party should bear their own costs.

Judgment accordingly.