REPORTS

OF THE

EXCHEQUER COURT

OF

CANADA

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JUDGES

OF THE

EXCHEQUER COURT OF CANADA

During the period of these Reports:

PRESIDENT:

THE HONOURABLE SIR WALTER G. P. CASSELS.
Appointed 2nd March, 1908.

PUISNE JUDGE:

THE HONOURABLE LOUIS ARTHUR AUDETTE.
Appointed 4th April, 1912.

LOCAL JUDGES IN ADMIRALTY OF THE EXCHEQUER COURT OF CANADA:

The Honourable SIR ADOLPHE ROUTHIER, Local Judge Quebec District.
(died 27th June, 1920.)

do	F. S. MACLENNAN, Deputy Local Judge	do	do
do	F. E. HODGINS, Local Judge	Toronto	do
do	ARTHUR DRYSDALE, Local Judge	N.S.	do
do	HUMPHREY MELLISH, Deputy Local Judge	do	do
do	Sir J. D. HAZEN, C.J., Local Judge	N.B.	do
do	W. S. STEWART, Local Judge	P.E.I.	do
do	ARCHER MARTIN, Local Judge	B.C.	do
	W. A. GALLIHER, Deputy Local Judge	B.C.	do
do	CHARLES D. MACAULAY, Local Judge	Yukon Territory	District.

ATTORNEY-GENERAL FOR THE DOMINION OF CANADA:

THE RIGHT HONOURABLE CHARLES JOSEPH DOHERTY, K.C., P.C.

SOLICITOR-GENERAL FOR THE DOMINION OF CANADA:

THE HONOURABLE HUGH GUTHRIE, K.C.

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ERRATA.

Page 36: *foot note,* "1919 A.C. 293" should read "1909 A.C. 293."

Pages 279 and 287: *footnote,* "Ontario Mining Co. *vs.* Province of Ontario (1910) A.C. 637" should read "The Ontario Mining Company and the Attorney-General for Canada *vs.* Seybold et al. and the Attorney-General for Ontario, 1903, A.C. 73." And the case of "The Dominion of Canada *vs.* Province of Ontario (1910) A.C. 637" should be added.

Page 117: *foot note,* "Manmatha North Mitler" should read "Manmatha Nath Mitter."

MEMORANDA.

During the period of these reports, namely, on the 27th June, 1920, the Honourable Mr. Justice Sir Adolphe Routhier, Local Judge in Admiralty, for the Quebec Admiralty District, departed this life.

Appeals have been taken to the Supreme Court in the following cases reported in this volume and are still pending:—

1. *Halifax Graving Dock Company* v. *The King*, p. 67.
2. *Bauer Chemical Company, Inc.*, v. *The Sanatogen Company of Canada*, p. 123.
3. *The King* v. *The Ontario and Minnesota Power Company*, p. 279.
4. *Locomotive Stoker Corporation* v. *Commissioner of Patents*, p. 191.
5. *Neitzke* v. *Secretary of State*; *Wiehmayer* v. *Secretary of State;* p. 219.
6. *Wolfe Company* v. *The King*, p. 306.
7. *Dominion Iron and Steel Co.* v. *The King*, p. 245.
8. *City Safe Deposit and Agency Co.* v. *Central Railway Company and C. N. Armstrong*, claimant, etc., p. 346.

In re *Jessie Mac, The* v. *The tug Sea Lion.* Judgment of Local Judge in Admiralty (19 Ex. C. R. 78) reversed by Exchequer Court (20 Ex. C.R. 137).

Fraser v. *Aztec.*—Appeal from judgment of Deputy Local Judge in Admiralty, (19 Ex. C.R. 454; 20 Ex. C.R. 39), confirmed by the Exchequer Court; (20 Ex. C.R. 450).

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CASES

DETERMINED BY THE

EXCHEQUER COURT OF CANADA

QUEBEC ADMIRALTY DISTRICT.

1920
May 21.

ULRIC TREMBLAY *et al*.....PLAINTIFFS;

VS.

HYMAN *et al*.....DEFENDANTS.

Shipping—Collision—"Inevitable Accident"—Burden of Proof—Act of God.

During the night between the 14th and 15th November, 1918, the plaintiff's steam barge the *A.T.* and defendant's schooner *B.S.M.* were moored on the lee side of Fox River wharf, on the Gaspe coast, lying stern to stern, the former near the shore, and latter between her and the outer end of the wharf. The schooner had been moored in the usual way, ordinary care and caution in this regard being observed. Towards evening, there being indications of bad weather ahead, the master borrowed a half-inch cable and two large manila hawsers, which were put out as "springs," making in all five hawsers, with the anchor leading forward and four lines leading aft. These additional moorings were more than sufficient under ordinary circumstances to have held her. She was a small vessel of only 99 tons, with an anchor weighing 1,200 lbs., and having a chain suitable for a 250 ton ship. The breaking strain of the larger lines (1 forward and 1 aft) was about 20 tons each, and the smaller 10 tons each. There was another hawser and a second anchor on board, and as the wind increased the master attempted to make fast the hawser to the wharf but was unable to do so, and it was impracticable to make effective use of the anchor, when the lines broke.

About 2 a.m. in the course of a severe storm, a tidal wave swept over the wharf and vessel, tore the latter from her moorings and she began to drift astern colliding with plaintiff's barge causing her some injury. When the forward moorings parted, she dragged her anchor, and it being impossible to put to sea, the master let go the anchor allowing the vessel to drift ashore, in the hope of saving the crew.

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Statement of Facts

Held, on the facts, that the master had taken all the precautions that a man of ordinary prudence and skill exercising reasonable foresight would have taken, and the owners cannot be held responsible for the damage resulting from the collision.

2. Where a vessel collides with another lying at anchor, the burden of proof is on defendant to show that it was due to inevitable accident.

3. To constitute inevitable accident, it is necessary that the occurrence take place in such a manner as not to have been capable of being prevented by ordinary caution, prudence and maritime skill. Utmost caution, or extraordinary skill need not be shown, but it is sufficient if such is reasonable and as is usual in similar cases.

4. In such a case as the present, not only must the defence prove that the breaking of the moorings was due to the irresistible force of the wind and waves, but also that all ordinary care, caution and maritime skill was exercised in mooring the vessel and in the handling thereof.

AN ACTION in personam by the owners of the steam barge *A. Tremblay* claiming the sum of $5,819.36 for damages occasioned by the defendant's schooner *Beatrice S. Mack* colliding with the *Tremblay* whilst moored at Fox River wharf, in the Province of Quebec.

The case was tried at Quebec on the 28th day of January, 1920, and the 16th, 25th and 31st days of March, 1920, before The Honourable Mr. Justice Maclennan.

Messrs. *F. E. Meredith, K.C.*, and *A. R. Holden, K.C.*, counsel for plaintiffs.

Mr. E. Languedoc, K.C., counsel for defendants.

The facts are stated in the reasons for judgment.

MACLENNAN, D. L. J. A., this (21st May, 1920) delivered judgment.

This is an action in personam by the owners of the steam barge *A. Tremblay* claiming the sum of $5,819.36 for damages occasioned by a collision with the Defendants' schooner *Beatrice S. Mack* at Fox River wharf, in the Province of Quebec, on 15th November, 1918, and for costs

The plaintiffs allege in their statement of claim substantially: that between one and two o'clock on the morning of 15th November, 1918, their steam barge *A. Tremblay*, whilst on a voyage from Quebec to Gaspe and way ports, was lying moored alongside Fox River wharf where she had been all the day previous, that the Defendants' sailing vessel *Beatrice S. Mack* was also moored to the wharf between the *A. Tremblay* and the outer end of the wharf, when suddenly, about 1.30 A.M. those on board the *A. Tremblay* heard the Master of the schooner call out that his moorings had been carried away, and shortly afterwards the schooner collided with the barge causing the latter great loss and damage; that those on board the schooner improperly neglected to take in due time proper measures for avoiding the collision which was entirely due to the defective and improper mooring and want of due care and skill on the part of the schooner's Master and crew, and plaintiffs' claim for a declaration that they are entitled to damages and costs and such further relief as the nature of the case may require.

The defendants by their statement of defence admit that they were the owners of the schooner *Beatrice S. Mack* which, on 14th November, 1918, was lying moored to the wharf at Fox River, her stern being towards the shore, and on the morning of that day plaintiffs' steam barge arrived at Fox River and moored at the same wharf close astern of the schooner with her bows towards the shore, the two vessels being stern to stern in close proximity to one another, and during the afternoon and evening of that day the wind and sea gradually arose until 9 P.M., when they reached the height of a heavy gale from the northeast, which further continued to increase in

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violence making it impossible for the schooner to leave her berth or put to sea; that every possible precaution was taken to make the schooner absolutely fast both by hawsers and ground tackle; that she was heavily anchored and attached to the wharf as securely as could possibly be done; in addition to her usual hawsers a wire cable and heavy manila hawsers were borrowed to secure her; that by two o'clock on the morning of 15th November the wind had reached hurricane force and the sea was running at such a height that it reached half way up the masts of the schooner and was continuously breaking over the wharf and the schooner, the storm being the worst within the memory of the inhabitants of the locality; that those on board the schooner used every possible effort which good seamanship and determination could devise or apply to see that the hawsers strained evenly and that the schooner kept her berth, but shortly after 2 A.M. the wharf moorings parted and the schooner started to drift towards the shore and in doing so her main boom came into contact with the stern of the *A. Tremblay*, injured the planking thereof and carried away part of the railing surrounding the superstructure; that at the time the schooner had received and was receiving very severe injuries and was pounding heavily against the wharf and bottom and it was then resolved that the only chance for the safety of those on board was to slip her anchor chain and let her go ashore, which was done; after the collision, the *A. Tremblay* was found to be aground at her bows at low tide but got off under her own steam and proceeded to sea and was navigated without repairs, subsequently went ashore at Ile Rouge, and later on was in collision at or near Quebec, and the only damages caused by the

contact between the schooner and the *A. Tremblay* is of little or no pecuniary consequence, and the damages resulting from the said contact or collision is due to *vis major* and the act of God and is in no respect or manner imputable to the defendants;

The plaintiffs by their reply deny the statement contained in the defence, except the admission that defendants were the owners of the schooner and that, early in the morning of 15th November, 1918, she parted her wharf moorings and started to drift towards the shore.

The schooner *Beatrice S. Mack*, 100 feet long, 24 feet wide, drawing 13 feet aft and 8 feet forward and having a crew of six all told and of 99 tons net register, arrived at Fox River wharf, in the Province of Quebec, on the morning of 13th November, 1918. As she approached the wharf a large anchor weighing about 1,200 pounds on a chain suitable for a 250 ton ship was put out and the schooner moored on the southwest side and near the outer end of the wharf running out about 900 feet from the shore. The anchor was leading forward with 45 or 50 fathoms of chain. The schooner was moored to the wharf by two manila lines leading forward and one aft. Cargo was discharged during that and the following day. On the following morning, 14th November, the plaintiffs' steam barge, 111 feet long, 28 feet wide, and having a registered tonnage of 147 tons, arrived and tied up to the same side of the wharf facing the shore and a short distance astern of the schooner. Between 4 and 5 P.M. on November 14th there were indications of bad weather ahead; the moorings of the plaintiffs' barge were doubled and the Master of the defendants' schooner borrowed a half inch wire cable and two large manila hawsers two and

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three quarters in diameter and having a circumference of seven and three quarter inches. These two large hawsers were put out as "springs," one being attached from the foremast forward to the wharf, the other from the aftmast and attached to the wharf leading astern. When these and other additional lines were put out the defendants' schooner had five lines and the anchor leading forward and four lines leading aft. These lines were considered by the Master of the Schooner, who had over twenty years' experience as a seaman, to be sufficient to securely hold the schooner in safety. The weather during the evening became very bad; there was another hawser on board one and a quarter inches in diameter and five inches in circumference which the Master tried to put out later, but was unable to do so owing to the sea coming over the wharf and the wind which was blowing hard from the northeast. As the night advanced the wind increased and the sea became more tempestuous until the storm reached its height near midnight. The wharf ran out to the northwest, the wind was from the northeast and the sea came against the wharf practically at right angles, went over it to a depth of eight or ten feet and then over the schooner, carrying away barrels on the wharf and anything that was loose on the schooner; some skylights on the schooner also were broken. During the night all possible attention was given to the lines on the schooner, slacking them when it was necessary, in order that they might all work together. About 2 A.M. on the morning of 15th November, when the wind was blowing, what several of the witnesses called *a gale*, a heavy sea, which some of the witnesses called *a tidal wave* and others *un raz de marée*, came over the wharf and schooner and the lines leading forward

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from the schooner to the wharf parted, the anchor dragged and the schooner began to drift astern, its main boom came into collision with the barge and began to beat violently against it. As the anchor was dragging and it was impossible to put to sea, the Master of the schooner thought it more prudent to let the anchor go and drift ashore in the hope of saving the lives of his crew. The schooner went ashore and became a total loss. The evidence shows that the storm was one of the worst which had occurred within the memory of the witnesses on the Gaspe coast. Several fishing boats and barges at Fox River and in the vicinity were driven ashore during the night.

In this case the plaintiffs' barge was moored to the wharf when the defendants' schooner broke loose from its moorings and collided with the barge. These facts are established by witnesses called on Plaintiffs' behalf and constituted a prima facie case against defendants, and the onus of proof was then shifted and the defendants were called upon to explain the cause of the collision and that it was due to inevitable accident. The defence of inevitable accident is well known in Maritime Law and the principles upon which it is applied are stated in the following cases:—

In the *Europa*, (1) Dr. Lushington said, page 629:—

"Inevitable accident is where one vessel, doing a lawful act, without any intention of harm, and using proper precaution to prevent danger, unfortunately happens to run into another vessel..... But it should be observed, that the caution which the law requires is not the utmost caution that can be used. The law is not so extravagant as to require that a man should possess that mind, and understanding, and

(1) 14 Jurist 627.

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firmness of purpose, as always to do what is right to the very letter. If it were so, it is obvious that the demands of the law would be seldom satisfied. It is sufficient that a reasonable precaution be taken, such as is usual and ordinary in similar cases—such as has been found, by long experience, in the ordinary course of things, to answer the end—the end being the safety of life and property."

In *The Thomas Powell* vs. *The Cuba*, (2) Dr. Lushington said:—

"To constitute an inevitable accident it was necessary that the occurrence should have taken place in such a manner as not to have been capable of being prevented by ordinary skill and ordinary diligence. We were not to expect extraordinary skill or extraordinary diligence, but that degree of skill and that degree of diligence which is generally to be found in persons who discharge their duty."

In *The Uhla*, (3) Dr. Lushington said:—

"Inevitable accident is that which a party charged with an offence could not possibly prevent by the exercise of ordinary care, caution and maritime skill. It is not enough to show that the accident could not be prevented by the party at the very moment it occurred, but the question is, what previous measures have been adopted to render the occurrence of it less probable.

The caution which the law requires is not the utmost that can be used, it is sufficient that it be reasonable, such as is usual in ordinary and similar cases, such as has been found by long experience in the ordinary course of things to answer the end, that end being the safety of life and property. I bring your attention

(2) 14 L. T. (N.S.) 603. (3) 19 L.T. (N.S.) 89–(See 90).

particularly to that, because we must not expect in vessels of this kind, that the master and crew should be possessed of such ordinary nautical skill that they would be quite certain to discover that which is the best to be done, and quite certain to do it; but we look at the general degree of intelligence, care, and caution which we find in people of the same description."

In the *Marpesia*, (4) Sir James Covile, in rendering the judgment of the Privy Council, said at page 219:—

"In the case of the *Bolina* (5) Dr. Lushington says:—With regard to inevitable accident, the onus lies on those who bring a complaint against a Vessel, and who seek to be indemnified,—on them is the onus of proving that the blame does attach upon the Vessel proceeded against; the onus of proving inevitable accident does not necessarily attach to that Vessel; it is only necessary when you show a prima facie case of negligence and want of due seamanship.

"Again in the case of *The Virgil*, (6) the same learned Judge gives the definition of inevitable accident:—"In my apprehension, an inevitable accident in point of law is this: viz., that which the party charged with the offence could not possibly prevent by the exercise of ordinary care, caution and maritime skill. If a Vessel charged with having occasioned a collision should be sailing at the rate of eight or nine miles an hour, when she ought to have proceeded only at the speed of three or four, it will be no valid excuse for the Master to aver that he could not prevent the accident at the moment it occurred, if he could have used measures of precaution that would have rendered the accident less probable."

(4) L.R. 4, P.C. 212. (5) 3 Note of Cases, p. 208, at p. 210.
(6) 2 Wm. Rob., p. 201, at p. 205.

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"Here we have to satisfy ourselves that something was done or omitted to be done, which a person exercising ordinary care, caution and maritime skill, in the circumstances, either would not have done or would not have left undone, as the case may be."

In *The William Lindsay* (7) Sir Montague E. Smith, in delivering the judgment of the Judicial Committee, said at page 343:—

"The master is bound to take all reasonable precautions to prevent his ship doing damage to others. It would be going too far to hold his owners to be responsible, because he may have omitted some possible precaution which the event suggests he might have resorted to. The true rule is that he must take all such precautions as a man of ordinary prudence and skill, exercising reasonable foresight, would use to avert danger in the circumstances in which he may happen to be placed."

In *The Merchant Prince* (8) in the Court of Appeal, Lord Esher, M.R., at page 187 said:—

"The great object of the judges in Admiralty cases has been to lay down a plain rule to govern the acts of sailors, and not to have niceties of argument about what they are to do; and the plain rule which they have laid down is this:—Unless you can get rid of it, it is negligence proved against you that you have run into a ship at anchor. The only way for a man to get rid of that which circumstances prove against him as negligence is to show that it occurred by an accident which was inevitable by him, that is an accident the cause of which was such that he could not by any act of his have avoided its results. He can only get

(7) L.R. 5, P.C. 338.
(8) 1892, P.D. 179.

rid of that proof against him by showing inevitable accident, that is by showing that the cause of the collision was a cause not produced by him, but a cause the result of which he could not avoid. Inevitable means unavoidable. Unavoidable means unavoidable by him."

Fry, L. J., p. 189, said:—

"The burden rests on the defendants to show inevitable accident. To sustain that the defendants must do one or other of two things. They must either show what was the cause of the accident, and show that the result of that cause was inevitable; or they must show all the possible causes, one or other of which produced the effect, and must further show with regard to every one of these possible causes that the result could not have been avoided. Unless they do one or other of these two things, it does not appear to me that they have shown inevitable accident."

"An inevitable accident is, according to the law laid down in the case of *The Marpesia*, Law Rep. 4, P.C. 212, that which cannot be avoided by the exercise of ordinary care and caution and maritime skill."

The *Merchant Prince* is now regarded as the leading English case on the defence of inevitable accident and has been followed in a number of cases in the Canadian Courts, some of which are referred to in Mayers Admiralty Law and Practice, pp. 146-147.

The immediate cause of the collision in this case was the irresistible force of the wind and waves, which caused the moorings of the schooner to break, and the question *which the Court has to decide is*:—Did the Master of the schooner, on the evening preceding, exercise ordinary care, caution and maritime skill when he tied up his schooner for the night with five

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lines and an anchor leading forward and four lines leading aft? Were these all the reasonable and ordinary precautions, in the circumstances of the case, which a Master in his position and for a vessel of the size of the defendants' schooner, should have taken to ensure her safety? As has been said by Dr. Lushington, the caution which the law requires is not the utmost caution which can be used, and we are not to expect extraordinary skill, but it is *sufficient if the caution and skill bs reasonable and such as is usual in ordinary and similar cases.* The schooner was a small vessel of 99 tons and we must not expect in vessels of that kind that the Master and crew should be possessed of such extraordinary nautical skill that they would be quite certain to discover and apply what was the very best thing to be done. The true rule as laid down by the Privy Council is, that the *Master must take* all such precautions as a man of ordinary prudence and skill exercising reasonable foresight would use to avert danger in the circumstances in which he may happen to be placed, and his owners are not to be held responsible for what cannot be avoided by the exercise of ordinary care, caution and maritime skill. Until late in the afternoon before the accident the schooner was moored by the anchor and two lines leading forward and one line leading aft. These lines were five inches in circumference and about one inch and a half in diameter. When the additional lines were put out there were five lines and the anchor leading forward and four lines leading aft. The large lines, one forward and one aft, had a circumference of seven and three-quarter inches. A reference to standard Engineering Works of authors of repute show that the breaking strain of the large lines was about twenty tons each,

and the small lines nine or ten tons each, which shows that there must have been a tremendous strain on the forward lines before they broke. The schooner was moored on the lee side of the wharf and the moorings only gave way when the tidal wave came over wharf and schooner to a depth of eight or ten feet. It is established that the storm was one of the worst on the Gáspé coast during the last twenty-five years. Other shipping at Fox River was driven ashore by the force of the storm. When the forward moorings of the schooner parted, it is proved that it was quite impossible for the schooner to have put to sea. The Master of the plaintiffs' barge had chosen the berth where he tied up immediately astern of the schooner and so close to the schooner that as soon as the schooner broke loose its boom came into contact with the barge. Plaintiffs' Counsel suggested that another small anchor on board the schooner should have been used. That anchor was ready for use and had a chain attached to it, but it was quite impracticable to make any effective use of it when the moorings parted. The plaintiffs also suggested that another cable which the schooner had on board should have been put out when the weather got dirty, but it is proved that in the course of the night, when the sea became boisterous and the wind high, it was impossible for any one to go on the wharf and attach any additional ropes or cables to the posts on the wharf.

This case has to be considered in the light of the situation on the evening before the accident, and I have to decide if the Master of the schooner omitted to do something which a person exercising ordinary care, caution and maritime skill in the circumstances would not have left undone. The violent storm with

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the tidal wave which came on some hours later could not have been foreseen. The additional moorings in the circumstances were more than sufficient under ordinary circumstances, they were in fact extraordinary precautions against the possibility of a bad night, but unfortunately proved insufficient and, in my opinion, it would be going too far to hold the owners responsible because the Master had not the extraordinary foresight to take some additional measures which would have withstood the force of the wind and sea in one of the worst storms ever known on the coast.

Evidence was adduced at the trial as to the extent of the damages to the plaintiffs' barge and the cost of the repairs, but I refrain from expressing any opinion in this phase of the case, as I have come to the conclusion that reasonable care, caution and maritime skill were exercised and did not and could not prevent the accident, and that the defence of inevitable accident has been fully established.

In these circumstances, the loss must rest where it has fallen, and there will be judgment dismissing the action with costs.

Judgment accordingly.

Solicitors for plaintiffs: *Pentland, Gravel & Thomson.*
Solicitors for defendants: *Greenshields, Greenshields, Languedoc & Parkins.*

May 11th 1920

No. 3474
No. 3493

IN THE MATTER OF AN APPLICATION OF THE POINTE AUX TREMBLES TERMINAL RAILWAY..... PLAINTIFF;

No. 3474 AND

THE CANADIAN NORTHERN QUEBEC RAILWAY CO., AND THE CANADIAN NATIONAL RAILWAYS..... DEFENDANTS.

AND

IN THE MATTER OF AN APPLICATION OF THE POINTE AUX TREMBLES TERMINAL RAILWAY..... PLAINTIFF;

No. 3493 AND

THE CANADIAN NORTHERN QUEBEC RAILWAY CO., AND THE CANADIAN NATIONAL RAILWAYS..... DEFENDANTS.

Railway Act, 9-10 *Geo. V, ch.* 68, *s.* 49—*Board of Railway Commissioners, Orders of—Exchequer Court—Sequestration—Service of Order—Rule* 70 *Exchequer Court Rules—Drastic Process.*

1. Where an order of the Board of Railway Commissioners has been made an order of this Court under section 49 of the Railway Act, the Judge of the Court has no power to modify, vary, review or supplement the same.

2. Before a writ of Sequestration can issue in proceedings in contempt for disobedience of an order of the Board of Railway Commissioners which has been made an order of this Court, it should appear that the disobedience of the same has been wilful and intentional.

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3. Where any such order authorizes one railway to operate its trains across the tracks of another, and where the train which is refused a crossing is not a train of the said company (in the present case it consisted of an engine and crew of the Harbour Commissioners of Montreal drawing cars of another company) such refusal cannot be said to be a refusal to comply with the above mentioned order so as to render them liable to contempt.

4. The Order for a Writ of Sequestration against a corporation will only be granted when the requirements of the practice have been strictly observed.

THIS is an application by the Pointe aux Trembles Terminal Railway Company for a writ of Sequestration against the defendants for an alleged contempt of court by them.

On the 3rd day of April, 1914, the plaintiff company obtained an order from the Board of Railway Commissioners for Canada authorizing them to construct its lines and tracks across the lines and tracks of the defendant companies at a certain point on a plan filed, subject to certain conditions as to control by defendant companies and as to costs of maintenance, etc.

On the 1st day of April, 1920, the plaintiff obtained a further order reading as follows: "IT IS ORDERED that the Pointe aux Trembles Terminal Railway Company and the Canadian National Railways be, and they are hereby authorized to operate their trains over the said crossing without their first being brought to a stop."

These orders were filed with the Registrar of the Exchequer Court of Canada under article 49 of the Railway Act and being entered of record thereby became an order of the court.

On the 7th May, application was made by the plaintiff company before this court asking for the issue of a writ of Sequestration against the defendant companies

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on the ground that they had refused to allow the plaintiff to cross its tracks and this in contempt of the orders of the Railway Commissioners, above referred to. This was enlarged to 11th May at request of defendants.

The matter then came up for hearing on the 11th May before the Honourable Mr. Justice Audette.

Mr. Arthur Holden, K.C., and *E. F. Newcombe* for plaintiff.

George F. Macdonnell, for the defendants.

The affidavits filed, in substance state—*inter alia*—that on the 17th day of April, 1920, an engine of the Harbour Commissioners in charge of an engineer and crew of the Harbour Commissioners and drawing three empty cars belonging to the Canadian Pacific Railway Company had proceeded from the Harbour Commissioners' tracks along the tracks of the Company plaintiff, as far as the crossing above referred to, where the man in charge of the diamond refused to set the derail so as to allow the train to proceed along plaintiff's track, and they were forced to return.

Arthur Holden, K.C., after reciting the orders above referred to, asked for the issue of the writ of Sequestration on the ground that the defendants had made themselves liable for contempt of court in refusing to obey said orders. He admitted that the train referred to in the affidavits and which was refused passage, consisted of an engine of the Harbour Commissioners manned by the employees of the Harbour Commissioners and three cars belonging to the Canadian Pacific Railway. That the plaintiff had no engines, and as far as he knew, no rolling stock of its own, but had an agreement with the Harbour Commissioners whereby they leased engines and crew from the Har-

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bour Commissioners to bring cars of the other railways over their tracks, to the Cement Company's works.

The plaintiff company was incorporated practically by the Cement Company for its benefit, to connect their works with the Harbour.

Mr. Macdonnell: The defendants have never wilfully refused to comply with the order of the Board of Railway Commissioners. The order at best only authorizes the plaintiff Railway Company to cross, and the cars and the train in question in this case were not the property of the plaintiff nor operated by it. Moreover, the order is not specific, but merely permissive, and there is nothing therein to show the plaintiff's right to use a leased train.

The facts are stated in the reasons for judgment.

AUDETTE J. this (11th May, 1920,) delivered judgment.

I find, after hearing Counsel and taking cognizance of the affidavits filed of record, it is unnecessary for me to ask for further evidence in order to arrive at a conclusion, as to how the matter should be disposed of. It will serve no purpose to delay my decision.

As appears by the notice filed of record, this is an application by the Pointe aux Trembles Terminal Ry. Co., for the issue of a writ of Sequestration against the Caandian Northern Quebec Railway Company, and (as mentioned in the notice of such application) in so far as may be necessary to that end, against also the Canadian National Railways, in as much as the said two last mentioned railway Companies are alleged to have refused, failed and neglected to obey the orders of the Board of Railway Commissioners for Canada Nos. 21592 and 29513 of the 3rd of April, 1914, and

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1st April, 1920, which have been made orders of this Court. The charge made against the said two railways, is that, on the 17th April, 1920, they refused to permit the Pointe aux Trembles Terminal Railway Company and its officers and servants to use its crossing over the Canadian Northern Quebec Railway and prevented them from doing so, in direct contempt and contravention of the said orders of the Railway Board.

The application is for the issue of a writ of Sequestration, a very drastic process that can issue only upon circumstances *strictissimi juris*, and when the disobedience of the judgment or order of the Court has been wilful and intentional.

In the case in question the service of these notices and orders upon the defendants has not been made in the manner required by the Rules of this Court. The first order of the Railway Commissioner (3rd April, 1914) has been made against the Canadian Northern Quebec Railway Company while the second order (1st April, 1920), has been made against the Canadian National Railways, pursuant to 9-10 Geo. 5, ch. 13.

Before any such writ can issue to enforce obedience, the order or judgment in question must be personally served upon the director or such other responsible officer of the company, as required by the rules of this Court Nos. 70 and 245 and as further set forth in The Annual Practice, 1920, p. 738. (*See McKeown* v. *Joint Stock Institute, Ltd.* (1).

There is before me no evidence of a wilful and intentional disobedience of these orders, the conflict, to the contrary, seems to result from some local friction that some common sense and business acumen could easily overcome.

(1) (1899) 1 Ch. 671.

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Sitting here and dispensing justice in this Court my powers are limited by the Statute, The Railway Act in respect of such orders which are made orders of this Court. I am not in the position of a judge sitting in proceeding in contempt where there has been disobedience to his orders made under full knowledge of all the circumstances of the case. I cannot go behind the orders of the Railway Commission, cannot modify, review, vary or supplement these orders. I am not seized of the facts or evidence which determined the making of the orders. It is obviously a question for the Railway Commission to *say how these orders are to be understood.* To say whether the Terminal Company can, under its charter and under the orders made by the Board, enter into contract with all the railways in the land, a contract to which the Canadian National Railways would not be a party—and allow them under the leave given to go over the railway crossing in question.

The best and only remedy the Terminal Railway can now have is from the Railway Board under the provisions of the Railway Act, section 33, subsection 3 of section 34 and subsection 5 of section 49. The Railway Board can make these orders clear and supplement them, if necessary, by enforcing them by a daily penalty or such other money penalty they see fit and if the defendant companies set these orders at defiance, a writ of Sequestration might then issue for the payment of such moneys. I feel sure that when the matter is brought again before the Railway Board that some acceptable remedy, acceptable to all parties concerned, will be arrived at. In the meantime I am unable to issue a writ of Sequestration which would have the effect of stopping service on the Government

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Railways, a public utility of great importance, whereby the public at large would be the sufferers. This trouble, resulting from a trifling local friction must be adjusted in another manner.

Moreover, the small train which is alleged to have been stopped appears to be a train belonging to and manned by the crew of a company other than the Pointe aux Trembles Railway Company.

Under these circumstances, my order will be to take nothing by this application, which stands dismissed with costs, which are hereby fixed at the sum of $50.

Judgment accordingly.

Solicitors for plaintiff: *Meredith, Holden, Hague, Shaughnessy & Heward.*

Solicitor for defendant: *Geo. F. Macdonnell.*

1920
June 15

IN THE MATTER OF THE PETITION OF RIGHT OF BESSIE M. ANDERSON..... SUPPLIANT;

AND

HIS MAJESTY THE KING..... RESPONDENT.

Railways—Breach of Statutory duty—Responsibility—Quantum of Damages—Res ipsa loquitur.

Held: that where there was no witness of the accident, but in going over the crossing one of the crew of the locomotive felt the pilot scraping over something, and going back, found an u ıbrella with ribs broken and near thereto, about four feet from the crossing, the body of the deceased on the track, one arm and one leg on the outside of the rails and the body between the rails, a few feet from the crossing, towards which he was seen going, just a moment before, with an umbrella; and having apparently been struck at the crossing and dragged; and, moreover, where the witnesses heard at trial took it for granted that he had been so killed by the said locomotive, the court, considering the probabilities and drawing necessary inference from the circumstances related in evidence, will find the deceased was killed at the crossing by the locomotive. (*Res ipsa loquitur*).

2. The crew of the locomotive, having failed to display either a headlight or two white lights on the rear of the engine, in breach of their statutory duties, and moreover having neglected to place a man on each side of the tender with a light, to warn people, which omissions were the proximate cause of the accident, the respondent will be held responsible for damages due to the death of a man so killed at a crossing.

3. That the life of a man of 78 years of age, who had retired 29 years before, but still attended to chores about the house, administered, his home and land, attended to the garden and made all carpenters' and plumbers' repairs in the house, was not without real value to his family; and as according to mortality tables, the victim had an expectation of life of from 5 to 7 years more, the Court declared suppliant entitled to recover the sum of $2,000.

PETITION OF RIGHT to recover the sum of $10,000 damages alleged to have been suffered by reason of the

premature death of her husband by being struck by a shunting engine of the Intercolonial Railway, and killed at a railway crossing.

Mr. J. Friel, K.C., counsel for suppliant.
Mr. R. Trites, counsel for the respondent.

The facts are stated in the reasons for judgment.

AUDETTE, J., now (this 15th June, 1920) delivered judgment.

The suppliant, by her Petition of Right, seeks, both for herself and on behalf of her two minor children, to recover the sum of $10,000 damages, alleged to arise out of the death of her husband, the result of an accident on the Intercolonial Railway.

At about 5.30 o'clock, p.m., on the night of the 31st October, 1918, Captain Anderson went over to the freight shed office, at Sackville, to see Mr. Harris, an old friend, a witness heard in the case, with the object of finding out what was the best time to go to Moncton to get in touch with one of the railway engineers, as related at trial by Mr. Harris. He remained at the latter's office for 15 to 20 minutes, and when leaving Mr. Harris accompanied him out in the alleyway, and afterwards saw him pick up, inside the building, an umbrella and a small parcel of 8 or 9 inches long by 5 inches in diameter.

This is the last ever heard of Captain Anderson until he is found dead on the crossing within comparatively a short time after leaving the freight shed building.

A few minutes after Captain Anderson's departure Mr. Harris was standing in the clerk's office, in the freight shed building, looking out of the window, and

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saw a locomotive passing from the direction of the station to the freight shed crossing,—the location of which is shown on plan, Exhibit No. 1, filed herein.

Now, from all accounts, this was a shunting engine doing work in the railway yard, at Sackville,—extending east and west of the station. It is in evidence that before the engine went over the crossing, fireman Carter had tried to light, with six matches, he says the headlight of the locomotive, and having failed to do so, the engineer had decided to back over the crossing in question to some place of shelter to light. It was a very stormy night, blowing and raining heavily. The wind was blowing quite hard. However, no attempts were made to light the side or tail lights, at the rear end, on both sides of the tender.

While the locomotive was thus moving reversely, brakeman Keswick was on the step at the western side of the far end of the tender, facing Lorne Street. He was holding on with one hand, and had a lamp in the other, which he moved for a while, and was unable to tell us with what hand he was holding; however, he says he did not signal all the time, because his hand could not stand it. And on this point, Engineer Ison says Keswick signalled within a few feet of the crossing, but not at the crossing.

Brakeman Hicks who was at the rear, on the pilot of the locomotive, with a lamp in his hand, when at the crossing or thereabout, felt the pilot scraping over something. He was then facing Lorne Street, and turning around saw something which, on jumping off and going back, he ascertained to be an umbrella, with two ribs sticking out, and close by it was the body of Captain Anderson lying, one leg and one arm on one side of the rail and the body between the two rails—

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at about four feet from the crossing, as if the engine had struck him at the crossing and had dragged him that distance. He then advised the crew of the locomotive of the accident.

Some of the witnesses testify the bell was ringing, and engineer Ison says he blew the whistle before starting, and being inside of 60 rods of the two crossings contends one whistle was sufficient. However, brakeman Hicks says he does not know that they whistled before the crossing.

The accident happened somewhere around ten minutes to six o'clock in the evening, on a very stormy night, the wind blowing very hard and with heavy rain. Under the evidence which is somewhat conflicting on the subject, it must be found it was also quite dark at the time of the accident, as testified to by witness Hicks.

There was no witness of the accident, but it was taken for granted by the witnesses who spoke upon the subject, that Captain Anderson had been killed at the crossing, by the locomotive.—*Res ipsa loquitur*.—Considering the balance of probabilities and drawing the necessary inference from the circumstances related in the evidence, the court must come to the conclusion that the deceased was so killed at the crossing by the locomotive in question.

Now, the locomotive, which was travelling at a low rate of speed, at the time of the accident, was travelling without her headlight and her two side lights or tail lights at the rear,—the tail lights being missing entirely, and with proof establishing that no attempt had even been made that night, to light them before going over the crossing.

The Rules and Regulations in force at the time of

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the accident, respecting trains on the Canadian Government railways, approved by the Governor-in-Council, were filed as Exhibit "A" herein.

At page 7 of the booklet containing these rules we find that the definition of a train covers the case of an engine without cars,—and under rule 9, that night signals are to be displayed from sunset to sunrise. That, under rule 17, a headlight must be displayed at the front of every train by night. And, under rule 18, that yard engines, (as in the present case), *must display the headlight to the front and rear by night;* and that when not provided with a headlight at the rear, two white lights must be displayed, and that yard engines will not display markers. And under conditions not requiring display of markers, *road engines* without cars will display a white light on the rear of the tender by night.

Then, under rule 102, whenever an engine is moving reversely in any city, town or village, *a man must take a position on the tender to warn persons* standing on or crossing the track of the railway of the approach of such train or engine.

These rules and regulations which are made under the provisions of section 49 of the Government Railway Act, have, under section 54 thereof, the same force and effect as if made by the statute itself, since it is there said that they shall be taken and read as part of the Act.

In starting to travel over the crossing without his headlight and tail lights, the engineer became guilty of a breach of rules 9, 17 and 18.

There can be no doubt that there is good reason to assume that if the strong headlight had been lighted, the glare of that light could have been seen by the

deceased; but it is obvious the accident would not have happened if the engine had had proper tail lights burning when they went over the crossing. Being a yard engine, the locomotive should have displayed a rear light by night when not provided with a headlight at the rear, two white lights should have been displayed, as required by rule 18.

There was no attempt made to light the tail lights,—the most important lights under the circumstances. These side lamps, with which the locomotive was provided, could, as testified to, have been taken out of their sockets, and very likely lighted in the cab of the locomotive or in the shelter of the locomotive.

One brakeman with a lamp was placed on the side step of the tender facing Lorne street. No one was on the corresponding side step, on the side next to the freight shed, upon which side Captain Anderson was travelling.

Under rule 106, in all cases of doubt, or uncertainty, the safe course must be taken and no risks run. Obviously, the crew of the locomotive assumed a great and unnecessary risk in travelling without lights. They should have placed the other brakeman on the other side of the tender with a lamp in hand. In that position, he would either have been seen by the deceased before taking the crossing, or the brakeman himself would have seen the Captain and warned him and thereby, in both hypothesis, the accident would have been avoided.

If the hearing of the deceased was not the very best, we are told his eyesight was good. And if the wind was blowing with such violence, and the rain falling so heavily on that occasion, is it unreasonable to assume that a person of ordinary hearing could

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very well not hear a locomotive travelling at the slow speed of 4 to 5 miles an hour? Had the lights been on, they would very likely have been seen.

Therefore, I find that the crew was under the circumstances, guilty of a breach of their statutory duties as above defined and set forth.

On the question of *quantum*, the evidence is conspicuously meagre. We have evidence showing that the Captain was 78 years old, that he retired 29 years ago. He had a nice home of about 3 acres with buildings, valued at about $2,500. He kept five cows and two horses, and had 48 acres of marsh land, and $500 of stock in a paper box company; but there is no evidence as to his yearly revenue or income. However, his services were not without real value. He attended to the chores, administered his home and lands, and he attended to his garden, and made all carpenter's, plumber's and painter's repairs to his home.

All of his estate has passed to his wife and children at his death. By the accelerated enjoyment of the estate by the suppliant and her children, it is a question whether this share in the expenses of the deceased is not made up by his work, management and services generally. It would, however, be improper for the purpose of ascertaining the pecuniary loss to treat the widow and the children as benefiting by the Captain's premature death.

Under some of the tables of mortality, the expectation of life, at the age of 78, is between 5 and 7 years.

Now in assessing damages in a case of this kind, while it is obviously impossible to arrive at any sum with mathematical accuracy, several elements must be taken into consideration and one must strive to com-

pensate for the loss, to make good the pecuniary benefit which might reasonably have been expected had the accident not taken place. In doing so one must necessarily take into account the age of the deceased at the time of the accident, his state of health, his expectation of life, his income, not overlooking on the other hand the several contingencies to which every person is subjected, such as being subject to illness, involving expense and care. All of these circumstances must be taken into account.

It is alleged by the statement in defence the Crown tendered $1,500 without admitting liability. However, the suppliant did not reply to that allegation, and under rule 114 that allegation is deemed denied and put in issue. No evidence was offered upon this point. This fact is mentioned because it is with great hesitation I have come to the conclusion that $1,500 was not a reasonable offer under the circumstances. However, taking all the circumstances into consideration, I hereby fix the compensation at the sum of two thousand dollars.

There will be judgment declaring that the suppliant and her children are entitled to recover from the respondent the sum of two thousand dollars—and with costs.

Judgment accordingly.

Solicitors for suppliant: *Messrs. Friel and Clark.*
Solicitors for respondent: *Messrs. Trites and Richards.*

1920
July 5

HIS MAJESTY THE KING.....PLAINTIFF;

AND

GEORGE W. BROWN AND JAMES W. BROWN, BOTH OF REGINA, IN THE PROVINCE OF SASKATCHEWAN..} DEFENDANTS.

AND

BY ORDER OF REVIVOR,

BETWEEN

HIS MAJESTY THE KING.....PLAINTIFF;

AND

THE SAID JAMES W. BROWN AND THE NATIONAL TRUST COMPANY, LIMITED, EXECUTORS OF THE LATE GEORGE W. BROWN, WHO DEPARTED THIS LIFE SINCE THE INSTITUTION OF THE PRESENT SUIT. } DEFENDANTS.

Expropriation—Leasehold—Damages due to abandonment—Mitigation of damages—Burden of Proof.

On the 14th of October, 1918, the Crown expropriated a certain leasehold term of 18 months for the purpose of temporary military barracks in Regina, and offered to pay $1,200 a month, plus taxes, insurance, light and heat for the same. Subsequently, on the 31st of October, 1919, it filed an abandonment of the leasehold in question in the Land Titles office.

Held: That the offer of the Crown, $1,200 per month for the time up to date of abandonment was sufficient; but in as much as by the abandonment the Crown practically took the position of one repudiating a contract, the lessors would also be entitled to damages resulting from the loss of rent from date of cancellation to end of term, either by reason of such repudiation of contract, or under the provisions of sub-sec. 4 of sec. 23 of the Exchequer Court Act.

2. That the burden of proof, in respect of the mitigation of the damages flowing from the abandonment by the Crown in expropriation proceedings, is upon the Crown.

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THE KING v. GEORGE W. BROWN AND JAMES W. BROWN AND THE KING v. JAMES W. BROWN AND THE NATIONAL TRUST COMPANY LTD. (EXECUTORS OF THE LATE GEORGE W. BROWN).

Reasons for Judgment.

INFORMATION by the Attorney General of Canada to have certain leasehold interest in land described expropriated and valued.

Mr. F. W. Turnbull, counsel for plaintiff.

Mr. G. H. Barr, K.C., and C. J. Johnston, counsel for defendants.

The facts are stated in the reasons for judgment.

AUDETTE, J., now (this 5th July, 1920) delivered judgment.

This is an Information exhibited by the Attorney General of Canada, whereby a certain leasehold interest in the lands hereinafter described and belonging to the defendants were taken and expropriated, by the Crown, for the purposes of a temporary military barracks, at Regina, province of Saskatchewan, by depositing a plan and description of such leasehold term in the Land Titles Office for the Assiniboia Land Registration District, in the province of Saskatchewan. This leasehold interest is described as follows: "A leasehold term of eighteen months, commencing on the *14th day of October, 1918,* of, in and to the following lands, namely:—Lots numbered five (5) to ten (10) inclusive, in block three hundred and seventy-two (372) in the city of Regina, in the province of Saskatchewan, according to a plan of record in the Land Titles Office for Assiniboia Land Registration District as Old No. 33, as *well as of all buildings situate thereon.*"

The Crown, by the Information, offers for said leasehold interest in the said land and buildings, the sum of $1,200 per month net, paying taxes, insurance, light and heat, and the defendants by their statement of defence claim the sum of $2,500 per month net to them, in addition to taxes, insurance, light and heat.

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Now, counsel at bar on behalf of the plaintiff, at the opening of the case, filed an undertaking to abandon, under the provisions of section 23 of the Expropriation Act, the expropriation of the leasehold in question in this case, and in compliance thereto, such an abandonment was filed in the Land and Titles Office for the Assiniboia Land Registration on the 31st October, 1919.

The controversy therefore becomes twofold. First, in respect to the fixing of the monthly rent payable by the Crown from the date of the expropriation to the 31st October, 1919, and secondly, the fixing of the compensation for the damages resulting from the abandonment under the provisions of sub-sec. 4 of sec. 23, of the Expropriation Act.

In respect of the rent that should be paid for the time that the Crown occupied the premises, a deal of evidence has been adduced on both sides, with the usual conflicting character as is met with in expropriation cases.

The evidence on behalf of the owners may be summarized in the following manner: Witness *Linton* values the property at $300,000, and the monthly rental at $2,800. Witness *McCarthy* values the property, in the fall of 1918, at $240,000 to $250,000, and contends he should get 8 per cent. net on that amount for rent. He is of opinion that the parties who built the Sherwood block were not justified in building it; it is too expensive a building for that locality, and it was a mistake. Witness *Lecky*, values the property at $350,000, and says the owners should get 8 per cent. net per month; but that there was no market for that price in October. 1918, and that in October, 1918, the property should command a rent of

$2,200 to $2,300 per month. Witness *Darke* values the property at $250,000 in October, 1918, and the rent at $1,700 per month—with respect to the abandonment, the plaintiff should pay half the rent since the cancellation of the lease, and take care of the carrying charges. Witness *Delai* fixes the rental at $2,810 monthly.

On behalf of the Crown, witness *McAra* places the value of the rent at $1,200 net, monthly, in the fall of 1918. Witness *Gibsone* considers that a fair rental in the fall of 1918 would be $1,000 to $1,200, and values the property at $225,000, which at 6 per cent. would give $1,350 net. Witness *Carmichael*, an architect in the employ of the plaintiff as Clerk of Works since June, 1919, and before that date assistant for a while, says that he was asked to report on the Sherwood Building in September, 1918. The Government was offering $1,200. Mr. Brown did come down and was asking $1,500. Mr. Mollard was at the head of the Department when defendant Brown was asking $1,500. He stated the Government would pay taxes from the 1st January to the 31st October, 1919.

The parties admitted that Mr. Mollard at one time in the course of the negotiations, recommended a rent of $1,475, but that was not accepted by the Department at Ottawa.

However, the most cogent evidence and the most helping evidence in the circumstances is the fact that this property was previously occupied by the Crown under a lease for a term of four months and eight days, ending on the 30th April, 1918, and this lease, although signed only by the owners of the Sherwood Stores, contained the following provision: "That the lessor will, on the request of the Minister, before the expira-

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tion of the term hereby created, grant to His Majesty a lease of the demised premises for the further term of .....years from the expiration of the said term at the same rent, and containing the like covenants, provisos and condition." The monthly rent payable under that lease was the sum of $1,346. The amount now offered by the Crown is the sum of $1,200 per month *net* to the lessors, the Crown paying taxes, insurance, light and heat. If it is considered, as established by the evidence, that the taxes for the year 1919 amount to the sum of $4,374.65, and the insurance without the sprinklers being kept in operation at $2,000, these two amounts added together alone represent the sum of $6,374.65, which added to the $14,400 represented by the monthly rent for 12 months at $1,200, that will give a yearly rent of $20,774.65, as compared with $16,152 for 12 months' rent at $1,346, under the lease above referred to.

It therefore results that the rent of $1,200 net per month offered by the Crown, is a most fair and reasonable one, under the circumstances. The owners of the Sherwood Building having already during the same year (1918), between the same parties, accepted a rent of $1,346, looking after the carrying charges, with the undertaking to continue the renting at the same price for an unlimited number of years, I therefore, without any hesitation think that the amount offered by the Crown of $1,200 per month *net* is most reasonable, yielding to the owners of the building placed at a value of $240,000, a *net* income of 6 per cent.

It appears from the evidence that the erection of the building in the locality in question was a financial mistake.

Moreover, as appears by the affidavit of W. G. Styles, the manager of the company, notwithstanding his numerous and earnest efforts to rent the building since the Crown has abandoned, he has been unable to secure a tenant, as shown by the affidavit filed herein on the 14th day of May, 1920.

Coming now to the question of compensation arising under the abandonment, the Crown practically takes the position of one repudiating a contract and therefore entitling the lessors to damages resulting from the loss of such rent from the date of cancellation, or under the provisions of sub-sec. 4 of sec. 23 of the Expropriation Act, which reads as follows:

"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."

Upon this branch of the case, the evidence is very meagre, if any on the record that could satisfy one to arrive at any just conclusion and none in that respect was adduced on behalf of the Crown.

Is not the lessor, under the circumstances, entitled to such damages as would have arisen from the non-performance of the contract at the appointed time, subject, however, to abatement in respect of any circumstances which may have had the effect of mitigating the loss?

The *onus probandi*, in respect of mitigation of the damages flowing from the abandonment, is upon the Crown and not upon the defendants. Moreover, under sub. sec. (c) of sec. 26, of the Expropriation Act, the plaintiff is bound by the Information to set forth:

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"(c). The sums of money which the Crown is ready to pay to such persons respectively, in respect of any such estate, interest, charge, lien or encumbrance," and the Crown has made no offer in connection with the abandonment.

With respect to the damages resulting from the abandonment, the Court at trial was unable to say whether the defendants would be able to rent their premises before the expiration of the life of the lease. It could not then comply with the provisions of sub-sec. 4 of sec. 23 of the Expropriation Act which says that: "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 compenation for the land taken" and give judgment fixing such compensation without proper evidence, without being seized with all the facts and "all the, circumstances of the case." By doing otherwise a most egregious piece of justice would be done.

If such damages could be mitigated by circumstances that would happen between the time of the trial and the expiration of the 18 months, they would be taken into consideration before fixing the damages and the Court would be justified in staying its hand.

The damages must be fixed once for all [1]. Furthermore, there is authority for the proposition that in fixing damages for loss of profits arising out of a breach of contract, events which happened between the date of the commission of the wrong and the time of the trial must be taken into account in estimating the loss for which one is entitled to compensation [2].

[1] Dominion Coal Co., Limited, *v.* Dominion Iron and Steel Company, Limited, (1919) A.C. 293.

[2] Finlay *v.* Howard, 58, S.C.R., 516.

Therefore, before proceeding to render judgment, I called the parties before me and asked them whether it would not be proper, under the circumstances, for the Crown to undertake to pay to the defendant the amount of the rent offered by the Information at $1,200 per month *net*, up to the 31st October, 1919, the date of the abandonment, and ask the Court to stay its hand until the expiration of the 18 months, when evidence by affidavit or *viva voce* might be adduced showing what has really taken place since the 31st October, 1919, the defendants, in the meantime, showing diligence in their endeavour to rent or use the premises in question.

This course having been accepted and an application having been made, I refrained from giving judgment at the time, allowing the matter to rest until the expiration of the lease, and proceeding now to render judgment upon all the questions involved herein:

I hereby fix the compensation for the rent, up to the 31st October, 1919, at the sum of $1,200 per month, the Crown paying the carrying charges of taxes and insurance.

With respect to the unexpired portion of the rent and the abandonment,—Counsel for the defendants having at bar declared his readiness to accept half of the rent,—the Crown paying the carrying charges,—stating that this course would be satisfactory, I shall therefore direct that judgment be entered accordingly, the defendant having in the meantime been paid and accepted the sum of $3,000 in full settlement of all repairs to the building during the time it was occupied by the Crown.

Therefore there will be judgment in favour of the defendants declaring them entitled to recover from the

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plaintiff the rental of $1,200 a month, together with all charges mentioned in the Information such as taxes, insurance and heat, between the 14th October, 1918, and the 31st October, 1919,—and from the 31st October, 1919, to the end of the lease the sum of $600 a month together with all cost of taxes and insurance. The defendants being entitled to their full costs, after taxation thereof.

Solicitor for plaintiff: *F. W. Turnbull.*

Solicitors for defendants: *Barr & Stewart.*

QUEBEC ADMIRALTY DISTRICT.

1920

July 6

Statement of Fact.

BETWEEN

WILLIAM FRASER,.....PLAINTIFF;

v.

S.S. *AZTEC*.....DEFENDANT.

Admiralty Law—Nautical Assessors—Expert Evidence—Practice.

The case was appealed to the Exchequer Court from the decision of the Deputy Local Judge in Admiralty. On the application of plaintiff to have further witnesses heard, defendant consenting, the judgment was set aside and the case was sent back before the Deputy Local Judge in Admiralty to allow plaintiff to put in such evidence as he desired and as might be legal.

On the re-hearing before a Judge, assisted by a Nautical Assessor' photographs were filed to show the action of the water in the lock, but no steamer was in the lock at the time and they do not show what would have been the result had the *Aztec* or a similar steamer been in the lock.

Held: That the evidence of experiments with water in the lock without any steamer being in it is of the nature of expert evidence, and as the Court had the assistance of a Nautical Assessor to advise upon any matters requiring nautical or other professional knowledge, such expert evidence is inadmissible. "The Universe" (1) referred to.

2. That the new evidence, so far as it is expert evidence, being inadmissible, and being advised by the Nautical Assessor that the mooring of the steamer was sufficient, there was nothing in the evidence to make the court change its former judgment (2).

(1) 10 Can. Ex. E.R. 305; (2) See 19 Can. Ex. C.R. 454.

THE CASE was tried in the first instance by the Honourable Mr. Justice Maclennan and was dismissed, the Judge finding that the accident was caused by the gross negligence of the lockmen and not of the *Aztec* and her crew.

This case has been appealed to the Exchequer Court.

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Statement of Facts

The plaintiff then appealed from the Deputy Local Judge to the Exchequer Court. At the opening of the appeal, application was made by plaintiff to be permitted to examine further witnesses. The Honourable Mr. Justice Audette presiding, considered that such evidence should be given before the Judge who had heard the case in the first instance and therefore ordered that the case be remitted before the Local Judge in Admiralty, and that the case be there reheard and the evidence which the parties desired to adduce and which might be legal be there taken and that judgment be rendered by the said judge upon such new evidence as well as upon the evidence already of record.

The new trial was held on the 22nd of June, 1920, at Montreal, before the Honourable Mr. Justice Maclennan, assisted by a Nautical Assessor.

Mr. R. A. Pringle, K.C. and *Mr. Aubrey H. Elder*, counsel for plaintiff;

Mr. A. R. Holden, K.C., counsel for defendant.

The facts in connection with the re-hearing are stated in the reasons for judgment.

Maclennan, D. L. J. A., now (this 6th July, 1920) delivered judgment.

This case was tried before me some time ago and, on 16th March, 1920, (1) I dismissed the action with costs, having come to the conclusion that the accident was caused by the gross negligence of the lockmen, and that the *Aztec* and her crew were not to blame.

On a motion by plaintiff by way of appeal from that judgment Mr. Justice Audette, of the Exchequer

(1) See 19 Can. Ex. C.R. 454.

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Court, on 26th May, 1920, ordered and adjudged that said judgment be set aside and the case be re-heard and thereafter determined by me upon the evidence already adduced and upon such further evidence as the parties might see fit to adduce, and that the costs of the first trial or hearing be reserved to be dealt with by me.

The new trial was held on 22nd of June, 1920, when I had the assistance of Captain Grey as Nautical Assessor. The plaintiff adduced some new evidence including a number of photographs of the lock where the accident occurred. Among the photographs several purport to show the water in the lock, some with one, others with two valves in the upper gates open and all valves in the lower gates open. No steamer was in the lock at the time these photographs were taken and they do not show what the result would have been had the steamer *Aztec* or a ship of similar size been in the lock. The evidence of experiments made with the water in the lock without any steamer being in it is the nature of expert evidence, and as the Court had the assistance of a Nautical Assessor to advise upon any matters requiring nautical or other professional knowledge, such expert evidence is inadmissible.[2]

Two witnesses examined at the first trial, Albert Durocher and Joseph H. McDonald, the two lockmen in charge of the lock at the time of the accident, were recalled by plaintiff and testified that after the *Aztec* entered the lock her bow was tied up to the north wall of the lock and her stern was to the south wall. The *Aztec* had a right hand propeller and I am advised by my assessor that its action as the steamer came to a

(2) The Universe, 10 Exchequer Court Reports, 305.

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standstill when it was tied up to the north wall would be to cause the stern of the steamer to lie against the north wall of the lock, and I am also advised that the effect of water coming through one or more of the valves in the upper gates and striking against the lower gates would cause a back eddy, and the effect of such eddy would be to keep the stern of the steamer against the north wall. Neither Durocher nor McDonald, at the first trial, said anything about the stern of the steamer being against the south wall of the lock. They were both examined at considerable length at the first trial and neither of them suggested the steamer was in the position in which they said she was when examined at the new trial. I was not impressed at the first trial with their credibility and I am not disposed to accept their evidence at the new trial on this point. At the first trial Heppel, a lockman, swore that the steamer when it went astern hit the north gate. Lebeau, a witness called on behalf of the defendant, said it hit the south leaf of the west gate. McDonald said she went into the centre of the upper gates, and Durocher could not say if the steamer canted into the middle of the lock or went straight astern. In my opinion it is immaterial whether the steamer, when thrown astern, struck the centre, the north leaf or the south leaf of the upper gates.

The new evidence, so far as it is expert evidence, is inadmissible and I am advised by my Assessor that the mooring of the steamer was sufficient. At the first trial I came to the conclusion that the non-observance of canal Rule 27 regarding the number of lines to be used in making the steamer fast in the lock did not contribute to the accident in any manner whatsoever, and there is nothing in the evidence adduced

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at the new trial to make me change my opinion on that question.

Having regard therefore to the evidence adduced at the first trial and the further evidence adduced by plaintiff at the new trial, I have come to the conclusion that plaintiff's action should be dismissed for the reasons given in support of the first judgment.

The costs of the first judgment were given against plaintiff and there is no reason why that order should not be followed. Plaintiff's action fails and there will be judgment dismissing it with costs of both trials against plaintiff.

Solicitors for plaintiff: *Messrs. Davidson, Wainwright, Alexander, Elder & Hackett.*

Solicitors for S.S. *Aztec: Messrs. Meredith, Holden, Hague, Shaughnessy & Howard.*

BETWEEN

1920
6th July.

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

AND

THE HALIFAX GRAVING DOCK COMPANY, LIMITED, A BODY CORPORATE, THE RIGHT HONOURABLE THOMAS BARON DENMAN AND SAMUEL MACKEW. DEFENDANTS.

War Measures Act—Expropriation Act—Effect of Order in Council amending same—Depreciation — Compensation — Statutory Discretion of Minister.

By Order in Council of 27th May, 1918, the Minister was authorized to offer defendants for their graving Dock, as it stood, the sum of $1,100,000.00 and upon offer being refused, he was authorized "pursuant to the powers conferred by the War Measures Act, 1914 and all other powers vested in your Excellency in Council," to take possession thereof and to expropriate the same, and have compensation fixed by the Court.

By another Order in Council, the Expropriation Act was, during the war, enlarged and amended under the provisions of the War Measures Act permitting the expropriation of personal property "as fully and effectually to all intents and purposes as if the same were specified as included in the definition of land under the said act." The lands herein were taken and expropriated by the Crown under the authority of the Expropriation Act for reasons arising out of the war, and pursuant to the powers conferred by the War Measures Act.

Held: That it is abundantly clear on the face of Order in Council enlarging and amending the Expropriation Act that the Governor in Council only intended to augment the powers of the Crown in respect of taking property for public purposes during the war, under the War Measures Act, and had no intention to abridge any of the powers of the Crown under the Expropriation Act.

2. Where, in an Order in Council authorizing the expropriation of property by the Crown, reference is made to the statute (War Measures Act) in pursuance of which the same purports to be made, and where the authority to act under said statute is questionable, but the same property could unquestionably be expropriated and taken under the general Expropriation Act, the court may treat the proceedings as taken under the latter act, notwithstanding the said reference in the Order in Council; especially, as in this case, the Minister had, in the exercise of his statutory discretion, decided to so expropriate and all the requirements of the latter act have been complied with.

Attorney General *vs.* De Keyser's Royal Hotel, Ltd., (1920) 36 T.L.R. 600 referred to.

3. The Minister, under the statute, is the judge of the necessity or propriety for the taking over of the property and the Court has no jurisdiction to sit on appeal from such decision.

4. That in assessing the compensation for property of a commercial or industrial company, due consideration must be given to the history of the company from its origin, such as how organized, its capital, how applied and financed, the business carried on, and actual profits, and in the present case (a dock) its age and state of repairs, and, while one must also examine the component parts of the Dock, the good will of the industry as a going concern, the compensation must be arrived at upon its commercial market value as a whole at the date of the expropriation, without being obliged, in arriving at such value, to go into abstract calculations with respect to each component part, but taking all of them as a whole after having weighed and considered each of them. The King. *v.* Kendall (1); The King *v.* The Carslake Hotel (2); and King *v.* Manuel (3) referred to.

INFORMATION exhibited by the Attorney General of Canada to have property expropriated by the Crown valued and compensation fixed.

Mr. W. N. Tilley, K.C., T. S. Rogers, K.C., and *W. L. Hall, K.C.*, Counsel for plaintiff.

Mr. McInnes, K.C., L. A. Lovett, K.C., and *J. S. Roper, K.C.*, Counsel for defendants.

This case was tried before the Honourable Mr. Justice Audette, at Halifax, on the 14th, 15th, 16th,

(1) 14 Can. Ex. C.R. 71; (1) 16 Can. Ex. C.R. 24;
(3) 15 Can. Ex. C.R. 381.

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Argument of Counsel.

17th, 18th, 19th, 20th, 22nd, 23rd and 24th days of June, 1920.

Mr. Lovett, K.C.—The Expropriation Act only authorizes the taking of land and real property. Under the War Measures Act an Order in Council was passed extending and enlarging the provisions of the said act to cover and include personal property as well; but this extension or enlargement was only effective for the period during the war.

The authority for expropriation is set out in the Information as follows:

(1) The *lands* herinafter described were taken, (*a*) Under the provisions and authority of Section 3 of the Expropriation Act, Cap. 143, R.S.C., 1906, by His Majesty; (*b*) For reasons declared to arise out of the present war; (*c*) Pursuant to powers conferred by War Measures Act, 1914, and other powers vested in His Majesty; (*d*) By depositing plan and description *under sections 8 and 9* of Expropriation Act of such lands in the Registry of Deeds.

It is further alleged that by the act of depositing plan and description the *said* lands became and are now vested in His Majesty. The lands described and claimed to be so vested are only 7.5 acres.

Under Order in Council, March 17th, 1917, it is provided that the Order in Council may contain a description specifying or describing with reasonable certainty by reference or otherwise all the property both real and *personal* intended to be taken and that a certified copy if deposited in the Registry will vest the lands in His Majesty or the description under the Expropriation Act can describe the property real and *personal* intended to be taken.

A certified copy of Order in Council P.C. 1291

has not been deposited. No description of property except land has been deposited in the Registry under Expropriation Act.

The Expropriation Act alone, or as extended by Order in Council, only authorizes the taking of property real or personal subject to all the provisions thereof, one of which provisions is that the taking can only be for a *public work*. There has been no description of any public work for which the property is taken. Consequently the Crown has not complied with the provisions of the Expropriation Act and is driven to seek refuge under the War Measures Act and the Order in Council P.C. 1291 as the authority pursuant to which the property is alleged to have been taken and to have been vested in His Majesty.

Order in Council P.C. 1291 must therefore be shewn to have been complied with by the Crown. (See Order in Council).

The Crown claims it became vested with the lands and property described in the information and descriptions filed on June 7, 18 and on June 21st, 1918. It produced as part of its case a tender of June 21-18 as follows:

"for the property of Deft. Company as described in amended plan and notice of expropriation filed June 21 1918, in Registry, under provisions of the Expropriation Act." The tender proceeds: "This offer is made in accordance with the provisions of an Order in Council of May 27th, 1918, and includes the said property as it now stands (June 21st, 1918) with repair shops and plant connected therewith and all work of reconstruction done up to the present (namely June 21, 1918)."

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Argument of Counsel.

The Crown was also permitted to reopen its case and produced a letter dated May 25th, 1919, from Mr. Carvell to defendant company stating he was authorized to expropriate Halifax Graving Dock and to offer $1,100,000.00. The Crown also put in a letter dated May 28th, 1918, from S. M. Brookfield, Chairman Defendant Company, to Mr. Carvell, declining the offer.

It is submitted that no offer has been made in compliance with the O. in C., P.C. 1921:—

(*a*) The tender was after deposit of expropriation plans and descriptions.

(*b*) Carvell's letter was before any authority was given, is manifestly incorrect in its statement as to his authority, and it is not an offer for the property as it stood at May 28, 1918, including all work of reconstruction done up to that date.

(*c*) No refusal by the Company of any offer has been proved. There was never any offer as prescribed by the Order in Council, made, and if there was such an offer the Chairman of the Company had no authority to refuse or accept. The undertaking of a Company cannot be disposed of without the resolution of its shareholders.

There has therefore been no vesting of any property of Defendant Company in His Majesty.

There is no allegation in the Information that the property attempted to be taken was, in the judgment of the Minister, necessary for the use, etc., of a public work. On the contrary the Information is based entirely on the taking of the property for reasons declared to arise out of the present war.

It may be argued that the deposit of the plan and description resulted in the land vesting in the Crown

as mentioned in Section -8 of the Expropriation Act. It is submitted that under the Expropriation Act it is a matter going to jurisdiction that,—

(*a*) the taking of the property shall be for a public work;

(*b*) the appropriation of the property is in the judgment of the Minister necessary for the use of a public work; and

(*c*) what is claimed to be the public work must be designated in clear terms. The Information, if the taking of the land is contended to be under the Expropropriation Act, must be set out and the evidence must prove these various facts before it can be held that the plan and description deposited vests any property in His Majesty.

In answer to any contention based on Section 11 of the Expropriation Act, it is submitted that the question of whether the plan and description have been deposited by the direction and authority of the Minister and the question as to whether the Minister exercised his judgment in deciding that the lands taken were necessary for the purpose of a particular public work, the Crown must prove these facts as a foundation for the jurisdiction exercised, and that the acts mentioned are only prima facie presumed to have the effect mentioned in Section 11 (See Sec. 21). If this were otherwise any surveyor could deposit a plan and description and the property would then vest in His Majesty, even though he had no authority and the Minister may never kave known anything about it. In such a case it could not be held that the lands vested in His Majesty when the plan and description were deposited, and it would be quite competent to

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Argument of Counsel.

prove the real facts and show there was no legal expropriation.

As to the validity of the alleged expropriation under the War Measures Act, it is submitted that same is not valid for the following reasons:

(1) Because the said Order in Council is void for uncertainty in that same does not indicate to whom authority is given to make the offer therein mentioned; nor does it indicate to whom authority is granted for the expropriation and direction and control of the property of the Defendant Company; nor for whom the property is to be expropriated; nor the purpose for which it is to be expropriated.

(2) Because there is no jurisdiction under the War Measures Act to make Orders in Council which would have any valid operation after the termination of the war.

Reference is made to the case of Price Bros. Limited, Supreme Court of Canada, and the references therein contained to the scope of the War Measures Act. The absolute expropriation of the Graving Dock was, we submit, not possible for the Governor-in-Council to order. This property could, of course, have been taken under the War Measures Act for the period of the war, and if the Order in Council is valid at all it is only valid to that extent.

It is quite true that the use of this property during the war might have been taken, that is the use for the government. But it could not, under this act, take for all time this property for another private concern for a period beyond the duration of the war. The War Measures Act reads "for the defence, security, etc., *and*" and not "*or*" and anything done under that act must be for all those things and for each one of them.

There are no valid proceedings before the Court and no valid expropriation, and the properties alleged to be expropriated are not now and never became vested in the Crown, not even the *lands*.

The balance of the argument deals with the valuation.

Mr. Tilley, K.C.

(*a*) The contestation of the validity of the proceedings was something never thought of by defendants, until November, 1918, and the company had by that time, even if there were irregularities, as distinct from things being absolutely void and without any foundation at all, waived its right to insist on compliance with the technical requirements and had accepted the situation, and had voluntarily turned over its property to the Government knowing that a company was to take the same under lease, and in fact dealt by preference itself with that company rather than with the government officers. In fact Mr. Brookfield was a willing vendor desiring to have his property taken and only asking that the compensation therefor be fixed by the Exchequer Court (numerous references are made to the correspondence in support of this view).

(*b*) The requisite of the Order in Council which required an offer of a million and quarter to be made before proceeding to actual expropriation, was complied with because the letter refusing the proposition was written on the 28th May, 1918, the day following the passing of the Order in Council, he being advised that the order in council was being passed. And the defendants having refused the offer made them under the Order in Council, the ground was clear for the Crown to go on with the expropriation proceedings.

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Reasons for Judgment.

(*c*) That under this Order in Council on the 17th March, 1917, Exhibit "B", the Expropriation Act is deemed to be amended so that land has a broader significance.

(*d*) The Crown can proceed under those circumstances either by the old procedure fixed by the Expropriation Act, or by registering or depositing the Order in Council itself.

The facts are stated in the reasons for judgment.

AUDETTE, J. now (this 6th of July, 1920) 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 company, were taken and expropriated by the Crown, under the provisions and authority of The Expropriation Act, (Ch. 143, R.S.C. 1906), for reasons declared to arise out of the *present* war, and pursuant to the powers conferred by *The War Measures Act*, 1914, and other powers vested in the Crown,—by depositing of record, under the provisions of sections 8 and 9 of *The Expropriation Act*, in the office of the Registrar of Deeds for the County or Registration Division of Halfiax, N.S., a plan and description of the said lands, on the 7th June, 1918, together with a corrected plan and description thereof, on the 21st June, 1918.

The defendants, the Right Honourable Thomas Baron Denman and Samuel Mackew, by their answer to the Information, declared that "at the time of the filing of the Information herein they were trustees of certain indentures of trust whereby the lands and property of The Halifax Graving Dock Company,

Limited, described in the Information, were vested in them by way of mortgage for the purpose of securing debentures by the said defendants, the Halifax Graving Dock Company, Limited.

"That the said The Halifax Graving Dock Company, Limited, on the 31st of December, 1918, paid, redeemed and retired the debentures issued under said mortgage, and that these Defendants have executed a release of the said mortgage, and since the said 31st of December, 1918, they have had no property, estate or interest in the lands sought to be expropriated herein."

This indenture of release or reconveyance is also filed of record as Exhibit No. 46.

These two defendants are thereby eliminated, and we have now to deal only with The Halifax Graving Dock Company, Limited, as the defendants in the case.

The area expropriated, as mentioned in the information, is 326,200 square feet; the area claimed by the defendant is 328,294 square feet, and the area according to the Crown's evidence would be 325,100 square feet.

The defendant's title to the land above mentioned is admitted, but its claim to the land covered by water is denied. It further appears that the City of Halifax has a certain right to carry sewers across the property, at the head of the dock.

These two questions of area and title will be herein after mentioned and disposed of.

The Crown, by the amended information, offers the sum of $1,100,000, and the defendant company by its amended statement in defence claim the sum of $5,000,000.

The Expropriation Act above referred to, was during the war enlarged and amended under and in virtue of

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the provisions of The War Measures Act, 1914, and legislative effect thereto given by an Order-in-Council filed as Exhibit "B," and which may be found in the Statutes of 1914, p. cviii, wherein, among other enactments, the following is to be found, viz.:

"II). For the purpose of the compulsory taking, during and for any reason arising out of, the present war, of any property real or personal belonging or appurtenant to, or acquired, had, used or possessed in connection with any arms or munition factory, machinery or plant, or other factory, mills, machinery or plant whatsoever which is being operated as a going concern, The Expropriation Act shall, subect to all the provisions thereof, extend and apply not only to the taking and acquisition of the land, if any intended to be taken, but also to all buildings, fixtures, machinery, plant, tools, materials, appliances, supplies, goods, chattels, contract rights, accrued or accruing, choses in action and personal property of any description whatsoever possessed, acquired, had, owned, used, appropriated, or intended for use or consumption for, or in connection with or for any of the purposes of any such factory, mills, machinery or plant as aforesaid, or the operations or business theretofore carried on or intended to be carried on in or about or in connection with the same, and as fully and effectually to all intents and purposes as if the same were specified as included in the definition of land under the said Act."

It is also provided by the Order in Council that there shall be no allowance for compulsory taking.

The expropriation proceedings are attacked by the defendants, who contend they are null and void for want of authority to expropriate, a contention with which I am unable to agree; and the defendants on

entering upon their case and adducing evidence, did so reserve all their rights in that respect to hereafter set up such contention in another court, if they see fit.

It is abundantly clear on the face of the Order in Council, Exhibit "B," that there was no intention on the part of the Governor-in-Council in passing the same to do anything but exercise their right under The War Measures Act, 1914, to augment the powers of the Crown in respect of taking property for public purposes during the war. Under this Order in Council personal property became subject to the right of expropriation as well as real property. To do the other thing, i.e., to abridge any of the powers of the Crown under The Expropriation Act, would not be to their purpose, even if it could be argued to be within the powers of the Governor in Council under the War Measures Act. So that there is no occasion here to consider any question either of ouster of jurisdiction under pre-existing legislation or the repeal by implication of any of the provisions of such legislation enabling the Crown to take property. See Maxwell on the interpretation of Statutes, 5th Ed. Cap. vii.

Coming to this particular case, it was the undoubted intention of the Dominion Government to take the absolute right and title to the whole of this Graving Dock, plant and premises, in other words to expropriate the same. That is explicit on the face of the Order in Council of the 27th May, 1918, and the Attorney-General of Canada has taken the usual steps under the Expropriation Act, to effectuate that intention, by filing an information for expropriation in this court.

Some doubt may exist under the War Measures Act, 1914, as to whether the Crown under its provisions

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could "expropriate" the property of the subject in the plenary sense that it can be done under the first mentioned Act, as was suggested at bar—but, I am free to say that it is not necessary here for me to attempt to resolve that doubt. It is apparent that expropriation can be made, and has been made, under competent legislation that was in existence long before the War Measures Act referred to.

I am therefore relieved from entering upon any doubtful domain of statutory construction in order to decide that the defendant's property has been taken by due process of law.

The remarks of Lord Moulton in the appeal to the House of Lords of the case of *The Attorney-General* v. *De Keyser's Royal Hotel, Limited*, (1) are instructive where complete and satisfactory statutory powers can be relied on to govern a case before the court as against another more uncertain and unsatisfactory authority to do the act giving rise to the litigation. Lord Moulton says: "In deciding the issues between the Crown and the suppliants, the first question to be settled might in the present case, to his mind, be treated as a question of fact, viz., Was possession in fact taken under the Royal Prerogative or under special statutory powers giving to the Crown the requisite authority? Regarded as a question of fact, that was a matter which did not admit of doubt. Possession was expressly taken under statutory powers. The letter of May 1st, 1916, from the representative of the Army Council to Mr. Whitney said:—I am instructed by the Army Council to take possession of the above property under the Defence of the Realm Regulations. It was in response to that demand

(1) [1920] 36 T.L.R 600, at p. 609.

that possession was given. It was not competent to the Crown, who took and retained such possession, to deny that their representative was acting under the powers given to it by these regulations, the validity of which rested entirely on statute.

"It was not a matter of slight importance whether the demand for possession purported to be made under the statutory powers of the Crown or the Royal Prerogative. Even the most fervent believer in the scope of the Royal Prerogative must admit that the powers of the Crown were extended by the Defence of the Realm Consolidation Act, 1914, and the Regulations made thereunder. It was for that purpose that the Act was passed and the Regulation made. But even if that were so there was a manifest advantage in proceeding under the statutory power. It rendered it impossible for the subject to contest the right of the Crown to take the premises by the exercise of the powers given by the statute.

* * * * *

All such questions were put at rest by the Legislature giving express statutory authority by the Regulations. There could thenceforward be no doubt that the Crown possessed the powers formulated by the Regulations, and this was the object of the legislation. But when the Crown elected to act under the authority of a statute, it, like any other person, must take the powers that it thus used *cum onere*. It could not take the powers without fulfilling the condition that the statute imposed on the use of such powers."

The expropriation was made, as set forth in the information, for reasons declared to arise out of the "present war and pursuant to the powers conferred by the War Measures Act, 1914." The expropriation was made on account of the war when unrestricted

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submarine warfare was being carried on with alarming results to the commerce of the Empire, and to cope with the aftermath of the war in so far as it concerned shipping.

In expropriating this property, devoted to a certain extent to public use and to a like extent affected with a public interest, the Crown was endeavouring to meet the emergency affecting the Empire at large and to foster the building of vessels and the facilities for repairing the same. Wide powers were given the Executive under the War Measures Act, and in exercising them the Crown resorted to the machinery provided by the Expropriation Act, as enlarged by the Order in Council of the 17th March, 1917, (Ex. "B," and deposited plans and specifications as provided by section 8 of the said Act.

The Minister, as provided by the said section 8, having deemed it advisable to expropriate, has exercised his statutory discretion and the Court has no jurisdiction to sit on appeal or in review of such decision. That it cannot go back of that decision is a legal truism. These questions are political in their nature and not judicial—Lewis on Eminent Domain, sec. 239. The courts cannot enquire into the motives which actuate the authorities or into the propriety of their decision. *Dunham* v. *Hyde Park* (1); *Gilbert* v. *New Haven* (2). See *Beckman* v. *Saratoga and Shenectady Rd. Co.* (3); *Jackson* v. *Winn's Heirs* (4); *Brimner* v. *Boston* (5); *Matton* v. *The Queen* (6); *Vautelet* v. *The King* (7); *Wijejashear* v. *Festing* (8). *Atty. Gen.* v. *de Keyser's Royal Hotel, Limited* (9).

(1) 75 Ill. Rep.; 371.
(2) 39 Conn. 467.
(3) 3 Paige (N.Y.) 45.
(4) 4 Littell, 322.
(5) 102 Mass., 19.
(6) 5 Ex. C.R. 401.
(7) Auddette's Practice, 115.
(8) [1919] A.C. 646.
(9) 36 T.L. R. 604.

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Moreover, is not the company estopped from setting up such a plea, having waived any objection to the expropriation, if any reasonable one might have been set up, by voluntarily advising the Crown through its President, in several letters, that it would turn over the property and assist in every way in handing over possession. Furthermore, accepting the expropriation, as a *fait accompli*, they asked and were granted delays in delivering possession until the 24th June, 1918, without at any time, reserving the right to attack the expropriation proceedings,—a decision arrived at afterwards. When the Government was wavering as to whether or not they would expropriate, on the 23rd January, 1918, the President of the company wrote that if the Government wished to purchase they would take the purchase money in Dominion securities. This is absolutely inconsistent with the allegation put forward on the trial that the property was taken against the will of the company. So far from taking the stand of an owner relieved of his property *in invitum*, Mr. Brookfield's attitude at this time was that of a willing vendor, in fact of a man eager to sell, and, as fully set forth in the Order in Council of the 15th January, 1918, the original proposal to expropriate came from the company. Mr. Brookfield was helping the Government as much as possible by making it easier in finding the moneys to pay for it. However, on the 28th May, 1918, when the Government had made extensive repairs at its own expense the company refused an offer of $1,100,000.

Now, the property in question, a Graving Dock, with all its component parts, viz., land, land under water, buildings, wharves, machinery and tools, chattels, the dock itself, etc., must be assessed at its

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commercial market value to the owner, in respect of the best uses to which it can be put as a going concern, with its good-will.

A mass of evidence has been adduced on behalf of the proprietors with respect to the value of each of the component parts, therefore the Crown has followed the same course by offering statements in answer. Estimates by several of the defendant's witnesses giving opinion evidence, have been prepared in connection with the cost of reconstruction of the dock; but such estimates are all much subject to serious criticism, too long indeed to analyze here in detail on account of the view I take of the case,—and, I must say, I do not feel warranted in accepting these estimates which appear on their face to be unduly unreasonably large and which are manifestly largely speculative. At the time of the expropriation, fully seventy per cent of the inside facing of the Dock had to be repaired and replaced at a cost estimated, by the parties actually engaged in such repairs, of $151,000. These estimates of reproduction did not allow a proper amount for depreciation, assuming that such repairs will make the dock as good as new,—an erroneous view taken by them confusing efficiency with value. Depreciation is the lessened utility value caused by physical deterioration or lack of adaptation to function under requirements. The replacement of parts, as they need replacement, will not keep the property as valuable as when new, unless the parts are all replaced at once, which is practically impossible. There is not only the physical depreciation to be taken into account, but also the "supersession," that is the functional depreciation which may result from the growth of the business which renders the structure

inadequate, or to the development of the art which renders it obsolete. Supersession is the discarding of a thing before it is worn out.

As I remarked at trial, if the life of a street car be 20 years, and that it has run for 11 years, it will still answer the purpose for which it was built for another 9 years, and it is still efficient in rendering such service; but its value is not the same as new, although its efficiency for 9 more years is still good. The same principle applys to the dock, which is 29 years old. And this is said in view of the contention of some witnesses who said that the Dock was as good as new for all working purposes.

This Dock was built partly with subsidies amounting to $600,000, coming in severally from the Dominion Government, the City of Halifax, and the Imperial Admiralty, the latter being entitled to place any vessel in the Dock, and when such vessel is above 6,000 tons, they are not to be charged for any extra tonnage beyond the 6,000 tons.

The capital of the company was $750,000, and the greater part of the stock issued was handed over to the contractor building the dock, as part payment of his contract price. There was never any dividend paid upon the stock, a matter which must not be overlooked when arriving at the value of its good-will. The stock was obviously not very attracitve to the public.

The Crown in paying for the value of the Dock, and its component parts, at the date of the expropriation, will pay for all the reinstatement and work done since the explosion both by itself and the company, and moreover will also pay full value for the property towards which it has already paid a subsidy of $200,000.

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Be that as it may, this is not said by way of weakening the claim of the owners, because they are justly entitled to it; but, only to show that no extravagant price should be allowed and that only a fair and just compensation is all the owners are entitled to.

The Dock is not a large one, and the company has ever and anon mooted the question of enlarging it with a view, as said by the President, *to take any vessel in the Canadian trade*, and has approached the Government for help to that effect.

In assessing the compensation for the Dock due consideration must be given to the history of the company from its origin, how it was organized, what was its capital, how it was applied and financed, the business it was carrying on, its actual profits, the returns to the shareholders, the age of the Dock and its state of repairs, and while one must also examine the component parts of the Dock, the good-will of the industry as a going concern, the compensation must be arrived at upon its commercial market value as a whole at the date of the expropriation, without being obliged, in arriving at such value, to go into abstract calculations with respect to each component part, but taking all of them as a whole after having weighed and considered each of them. See upon this view, *The King* v. *Kendall* (1), — confirmed on appeal to the Supreme Court of Canada, 29th Oct., 1912; *The King* v. *The Carslake Hotel Co.*, (2), — confirmed on appeal toSupreme Court of Canada, 13th June, 1916; *King* v. *Manuel* (3), — confirmed on appeal to Supreme Court of Canada, 29th December, 1915.

Now, the valuation of the property as a whole is the method that would be resorted to and adopted by a

(1) 14 Ex. C.R. 71-81. (2) 16 Ex. C.R. 24,33.
(3) 15 Ex. C.R. 387, 389.

business man desiring to buy or sell. He would not make an offer for each component part of the property,—and indeed, this is the method that the defendant company itself has adopted when there was any question of sale. On the 14th December, 1917, The Halifax Graving Dock Company sent to the Right Honourable Sir Robert Borden the following telegram: "Hon. Mr. Carvell and Hon. Mr. Reid have approached me with a view of Government taking over our Dry Dock plant and all connected with it as it now stands, price to be fixed by the Exchequer Court with a maximum clause that court will not exceed one and a quarter million dollars. On behalf of company, I agree to this proposition if Government accept."

Then at p. 19, Exhibit 58, one of the books of correspondence, is a letter of the company to Mr. Carvell, Minister of Public Works, dated the 15th June, 1918, where the following excerpt is found, viz:—"After the explosion, when the buildings were knocked down and the whole place devastated, I offered you the dock, never doubting but that the management would remain in my hands. Two weeks afterwards you declined to purchase. You then agreed to reinstate buildings and plant and I told you this would probably cost $400,000, so this adds at least a value of $250,000 to the property making $1,500,000, to which should be added an amount for goodwill and a going business."

It is well to note that when the company place a price upon this property, they do so as a whole, and do not resort to the speculative statement prepared by the witnesses giving opinion evidence, and moreover, it is well to note also that their offer does not suggest any state of mind indicating an unwillingness to sell, but rather to inflate the price to $5,000,000. That

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was an afterthought apparently. But the fixing of price, the fixing of compensation is a matter of judgment, and one cannot do more than indicate within perhaps fairly narrow limits the figure at which the value should be placed.

To allow the claim as estimated by the defendant's witnesses would be doing a most misconceived and egregious piece of justice to which I cannot adhere.

I have had the advantage, accompanied by counsel for both parties, of viewing the premises in question, and to see with my own eyes the unsightly state of the disintegrating cement of the facing of the interior of the dock patched with brick, involving repairs to an amount of about $151,000. However, the dock in its present state of repair, 29 years old, with all its apparent defects, has a real substantial value, and if its defects have been brought out by the plaintiff, it must not be forgotten that an extravagant and inflated price of $5,000,000 has been asked by the defendant in the pleadings.

I have therefore come to the conclusion after making all allowances, and weighing all proper legal elements of compensation, to allow, for the Dock property, as it stood at the date of the expropriation, with all the improvements made since the expropriation, both by the Crown and the defendants, covering all its component parts, and its good will as a going concern, the sum of..... $1,400,000.00

from which should be deducted the sum of..... 8,315.20

paid to the company, as shown by Exhibit "X." $ 1,391,684.80

To which should be added the sum of the amount the Crown collected for scrap as shown by Exhibit 56. 2,395.37

$ 1,394,080.17

To this amount should be added interest at the rate of five per cent per annum from the date of delivery and taking possession, namely on the 24th June, 1918, to the date hereof. I have endeavoured to avoid delaying the rendering of the judgment in view of the heavy interest accumulating upon such a large amount, which up to date would amount to a sum approximating $141,000.

Then, there will be judgment as follows:—

1st. The land and property, including all buildings, plant, machinery, tools, wharves, and chattels expropriated herein, are declared vested in the Crown from the date of the expropriation.

2nd. The compensation for the same is hereby fixed at the total sum of $1,400,000, which after making proper adjustment as above mentioned, is reduced to the sum of $1,394,080.17 with interest thereon at the rate of five per cent per annum from the 24th June, 1918, to the date hereof.

3rd. The defendant The Halifax Graving Dock Company, Limited, upon giving to the Crown a good and sufficient title in respect of the dry land, the buildings, the plant, the machinery, tools, wharves, and chattels, etc., free from all encumbrances, mortgages,—save the right of the City of Halifax in respect of its sewer,—and further upon giving a release of whatever title the said company has with respect to the land covered by water, irrespective of its area, are entitled to recover and be paid by the plaintiff the said sum of $1,394,080.17, with interest thereon as above mentioned, to the date hereof; the whole in full satisfaction for the land, property, and chattels taken as above mentioned, and for all damages resulting from the expropriation.

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4th. The defendant company is also entitled to recover and be paid by the plaintiff the costs of the action.

Solicitor for plaintiff: *W. L. Hall, K.C.*

Solicitor for defendants: *McInnis, Jenks, Lovett, and Kenny.*

1920
July 6th

IN THE MATTER OF THE PETITION OF RIGHT OF THE HALIFAX GRAVING DOCK COMPANY, LTD., (A BODY CORPORATE)..... } SUPPLIANTS;

AND

HIS MAJESTY THE KING..... RESPONDENT.

Petition of Right—War Measures Act—Contracts, essentials of—Effect of expropriation.

On the 15th January, 1918, an Order in Council was passed stating, *inter alia*, that owing to the importance of Halifax as a naval base, authority should be given under the War Measures Act, to proceed with the repairing and reconstruction of the suppliants' dock which had been seriously damaged by the explosion of a munition ship, on condition, 1st, that the company contribute the sum of $111,000.00 towards the cost thereof; 2nd, that the balance be defrayed from the war appropriation; 3rd, the final decision as to the exact nature and extent of repair, reconstruction, etc., be under the inspection, supervision, and control of the representative of the Minister of Public Works.

On the 20th of May another Order in Council was passed rescinding the above and suspending the work on the dock, the preamble thereof showing, *inter alia*, that arrangements with the company in regard to sub-letting contracts, did not prove satisfactory to the Minister and the work was taken over by the Department, and had proceeded to the extent that vessels were capable of being received and repaired. A further Order in Council was passed on the 27th May authorizing the expropriation of the said dock, in which the former Orders in Council were referred to, and it is stated, *inter alia*, that the progress made in reconstruction by the Company had not been satisfactory, and owing to the urgency of this work being completed, it was necessary that the Crown should expropriate.

The correspondence shows that the suppliants wished the Crown to accept the proceeds of the insurance as their contribution to the reconstruction, when collected and whatever was collected, whereas the Crown, adhering to the terms of Orders in Council, insisted on the amount being paid, regardless of whether policies were collected or not.

Held, On the facts, that the parties were never in accord as to the suppliants suggestion regarding the insurance moneys and that

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therefore there never existed any contract under which the suppliants could recover.

2. That when the Crown came to the help of suppliants in the present instance, it was under no legal obligation to do so, and what it has done is referable to its grace and bounty and does not constitute an acknowledgment of any right of action or does not amount to an act that might imply any contract upon which an action would lie.

PETITION OF RIGHT to recover the sum of $195,638.18 estimated cost of the works of reconstruction of suppliants' dock at Halifax at the date of expropriation of the same by the Crown.

Mr. L. A. Lovett, K.C., Mr. J. S. Roper, counsel for suppliants.

Mr. W. N. Tilley, K.C., for respondent.

The case was tried before the Honourable Mr. Justice Audette, at Halifax, on the 24th and 25th days of June, 1920.

Mr. Lovett, K.C.—As regards the insurance money two points are to be considered:—(a) whether under the Order in Council it was intended that the insurance money should be paid only on complete reinstatement, that is, whether the intention was that the work was to be done, that we were to pay $111,000 on account of that whole work, and that the government was to pay the balance—or whether by reason of only one half of the reinstatement having been made, it can be found that only one half of the insurance money should be contributed, that is one half of the $111,000. (b) whether it was the sum of $111,000 or whatever sum might be realized from the insurance.

As to the question of liability I understand that the contention is that because there was no agreement drawn up and signed and sealed as provided

This case has been appealed to the Supreme Court.

by section 31 of the Public Works Act that we cannot recover.

The Public Works Act has no application. This was done under the War Measures Act, and it supersedes all others, and any Order in Council could be made under the War Measures Act. As to there being no agreement, the Crown is precluded from raising this point by its own Order in Council of May 27, 1918. (See O. in C. and also O. in C. P.C. 56.)

The work has been done admittedly. It was done under an Order in Council passed under the War Measures Act, which is just as good as under the hand and seal of the Minister. The War Measures Act was passed to permit such things being done without being hampered by the necessity of statutes. It was a thing that was agreed upon and done to this extent. It is not a matter of gratuity, because there was a consideration expressed in the Order in Council itself. We relieve the government of the alleged liability.

Under Order in Council P.C. 56 passed on the 15th day of January 1918, the Crown undertook to reinstate suppliants to the extent stated in Order in Council. The work was begun and carried on, and when the Crown took possession and expropriated, certain amount had been expended, and the suppliants are entitled to recover this amount so spent, less a proportion of the money recovered from the insurance company.

The company does not claim for unexecuted reconstruction; but only for what was actually put on the property by it, under the Order in Council.

HIS LORDSHIP:—Would not the Crown by paying you the value of your property at the date of expropriation, be paying you for everything?

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MR. LOVETT:—That would not be giving us reinstatement at all.

At the date of expropriation, the Crown owed us a debt, for moneys advanced by us for the reinstatement. Let us assume that the Crown had placed the work in the hands of a contractor instead of our doing it ourselves, it would have been bound to pay the contractor; and the property would have remained ours, and on subsequent expropriating, the Crown would have had to pay us for the property as it then stood including the reinstatement.

Mr. Tilley, K.C.—The claimant now says, you agreed to reinstate this property, and you must pay for the reinstatement work done; and if you had paid for the reinstatement work, the buildings would have been paid for. But then, you chose to expropriate my property, you pay me again for the property expropriated. So that, his claim is, that the Crown must first pay all the cost of the reinstatement work actually done by the company, and then the property thus created becomes the company's property—and when the Crown expropriates the company's property, it pays on the basis of the value of the property treating that property as the company's property. We are paying the full value of the property, but now he says, the Crown must not only pay for the full value under the expropriation, but it must pay the cost in addition of doing that reinstatement work, and doing it the second time.

My submission is that no liability to a third party can be created merely by the terms of an Order in Council. An Order in Council may authorize agreements to be entered into or be made. They can authorize something to be done, but we must find it done.

Contractual relationship cannot be made by Order in Council.

Secondly, even if it could be, there must be some evidence outside of the Order in Council showing the agreement. That is, there must be something to show Mr. Brookfield's concurrence with the terms of the intended contract.

It takes two to make a contract, and far from there being any contract here, or any concurrence by Mr. Brookfield, the evidence shows that Mr. Brookfield never agreed to what the Crown agreed to, assuming there was a contractual bargain. (Reference is made to correspondence.)

On the question of insurance money they were never agreed down to the time of the Petition of Right. They were never *ad idem*. (Love *v.* Instone (1) referred to.

Mr. Brookfield *now* says, I will let the court say whether it is $111,000 or something different, but he cannot make his contracts in court. He must make his contracts outside of the court and then come in and show what the terms were.

In this case there never was a contract at all between these parties, because the moment the Order in Council was sent stating they were to contribute $111,000, Mr. Brookfield wrote back, I am to give over my insurance—I am to assign my insurance to the government.

He in effect says, I have your order in council, but it does not show the true arrangement with you. The moment he said that he disclaimed the agreement.

I submit he is left to the benevolence of the Crown. He has no agreement which has been agreed to by the Crown. It is not as if the Crown had taken his pro-

(1) [1917] 33 T.L.R. 475.

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perty and kept it. It is not a matter in which the Crown is taking or keeping anything.

As a result of this proceeding the Crown is remunerating him for it, but it is not in the position of taking his property and refusing to return it. It is an expenditure by him on his own property, and the Crown is compensating him for it in the expropriation proceedings, and there is no question of having deprived him of anything that he had under any contract that is partly executed.

Mr. Lovett, K.C.—As to the estoppel against the Crown, see Attorney-General *v.* Collom. (1).

The case cited by Mr. Tilley does not apply. In that case the contract had not been executed, in this case the work was done and in presence of the agent of the Crown. It is only a matter of interpretation of the Order in Council.

The facts are stated in the reasons for judgment.

AUDETTE, J., now (this 6th July, 1920) delivered judgment.

The Suppliants, by their Petition of Right, seek to recover the sum of $195,638.20, that is $217,850.40 less the $22,222.20 hereinafter mentioned, being the amount claimed as representing what they are entitled to, under the provisions of the Order in Council dated the 15th January, 1918, for the expenditure upon the works of repair and reconstruction of the dock and shops, etc., at Halifax.

As the result of a disastrous explosion which occurred at Halifax, on the 6th December, 1917, creating a great upheaval inflicting considerable damages upon the property in the city, the Dominion Government,

(1) 1916, 2 Q.B.D. 193 et p. 204.

of its grace and bounty, came to the rescue of the sufferers.

The suppliants' dry dock, with its usual repair shops and plant, were considerably damaged thereby and the Crown, wishing to extend a helping hand, dealt with them in the manner that will clearly appear from the following Orders in Council. The Order in Council of the 15th January, 1918, reads as follows:—

"The Committee of the Privy Council have had before them a report, dated 5th January, 1918, from the Minister of Public Works, submitting as follows:—

"That a Dry Dock, with necessary repair shops and plant, was constructed in the Harbour of Halifax, N.S., by the Halifax Graving Dock Company, Limited, of England, and completed in 1889, the dock in question being 570 feet long, 88 feet wide at entrance and 30 feet deep over sill at high water, spring tides. This dock was subsidized by the Dominion Government under Act 45, Victoria, Chapter 17, and also by the Imperial Government and the city of Halifax. The subsidies were each for $10,000 per annum for a period of twenty years. Payment of the Dominion Government subsidy was completed in the fiscal year ending 31st March, 1910, and it is assumed that full payment has also been made of the two other subsidies;

"That, in the recent disastrous explosion of a munition ship in the harbour of Halifax, the dock was badly damaged and the repair shops and plant connected therewith were practically destroyed;

"That the port of Halifax is a naval base and is very largely used by warships and warcraft of all kinds of His Majesty and of his allies. It is also used as a rendezvous for ships needing convoy. For

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these reasons it is urgently necessary for the purposes of the war that all facilities for the repairing of ships of war and other ships should be effectively available with the least possible delay. That the owners of the dock are not, at present, in a position, financially, to enable them to undertake the necessary repairs to same and the reconstruction of the shops and plant, as this work will cost considerably more under present winter conditions and the scarcity of labour than would ordinarily be the case;

"That the owners originally proposed that the Government expropriate the property and they offered to sell their interest in same for a sum not to exceed $1,250,000 to which would have to be added the full cost of rebuilding the dock, etc. The acceptance of this proposition would, moreover, necessitate the operation of the dock by the Government;

"That an alternative proposal has, however, been made by the owners in which they offer to proceed with the reconstruction of the dock and to furnish the sum of $111,000, which is the amount of the insurance, towards the cost, provided the Government supply the balance of the cost of reconstruction by way of a subsidy relieving the Government of any further liability, as well as responsibility for the operation and maintenance of the dock. It is understood that the work of repair and reconstruction shall not consist of anything beyond the replacement of the dock and shops, etc., in the same condition in which they existed at the time of the disaster. The final decision as to the exact nature and extent of such repair, reconstruction and equipment, of the dock and plant to rest entirely with the Minister of Public Works or his delegated representative on the work; the actual

work of reconstruction and purchase of material therefore to be under the inspection, supervision and control of the representative of the Department of Public Works.

"The Minister, in view of the foregoing and of the imperative necessity that docking and repairing facilities at Halifax be forthwith re-established and made available at once for ships awaiting repairs in that port, recommends that authority be given, under the War Measures Act, to proceed with the repairing, reconstruction and re-equipment of the dock and plant at that place under the following conditions:—.

"1. The Halifax Graving Dock Company, Limited, the owners of the dock damaged, do contribute towards the cost thereof the sum of $111,000;

"2. The balance of the outlay required to be defrayed by the Government from the War Appropriation;

"3. The final decision as to the exact nature and extent of the repair, reconstruction and re-equipment of the dock and plant as well as the actual work of reconstruction and purchase of material therefor, to be under the inspection, supervision and control of the representative of the Minister of Public Works."

The Order in Council of the 20th May, 1918, which rescinded the Order in Council of the 15th of January, 1918, reads as follows:—

"The Committee of the Privy Council have had before them a Report, dated 14th May, 1918, from the Minister of Public Works, submitting as follows:—

"That under the authority of an Order in Council, dated 15th January, 1918, the work of repair and reconstruction of the Halifax Graving Dock and Plant, which were badly wrecked in the disastrous explosion of a munition ship in the Halifax harbour

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last fall, was entrusted to the Halifax Graving Dock Company, Limited, on the following conditions:—

"1. The Halifax Graving Dock Company, Limited, the owners of the dock damaged, to contribute towards the cost thereof, the sum of $111,000 (which is the amount of insurance).

"2. The balance of the outlay required to be defrayed by the Government from the War Appropriation.

"3. The final decision as to the exact nature and extent of the repair, reconstruction and re-equipment of the dock and plant, as well as the actual work of reconstruction and purchase of material therefor, to be under the inspection, supervision and control of the representative of the Minister of Public Works."

"That the work was commenced in due course, but the arrangements made with the company in regard to sub-letting contracts having proved unsatisfactory to the Minister of Public Works, actual building operations were taken over by the Department direct and work has proceeded to an extent that vessels are capable of being received and repaired in the dock;

"That it is considered advisable, therefore, that further operations be suspended for the present, and the Minister, therefore, recommends that authority be given to rescind the Order in Council of January 15th, 1918, accordingly.

"The committee concur in the foregoing recommendation, and submit the same for approval."

The Order in Council of the 27th of May, 1918, which provides for the expropriation of the dock, reads as follows, viz.:—

"The committee of the Privy Council have had before them a report, dated 24th May, 1918, from the

Minister of Public Works, stating that in the disastrous explosion of a munition ship in the harbour of Halifax on the 6th of December last, the dry dock, with necessary repair shops and plant, which was constructed in the harbour of Halifax, Nova Scotia, by the Halifax Graving Dock Company, Limited, and completed in 1889, was badly damaged and the repair shops and plant connected therewith were practically destroyed.

"That in view of the great importance of the port of Halifax as a naval base and of the fact that it is very largely used by war ships and war craft of all kinds and by transports of His Majesty and His allies and also as a rendezvous for ships needing convoy, it was urgently necessary for the purposes of the war that all facilities for the repairing of ships of war and other ships should be effectively available with the least possible delay.

"In order to attain this object an agreement was entered into with the owners of the dock in which they agreed to proceed with the reconstruction of the dock and to furnish the sum of $111,000, which was the amount of the insurance, towards the cost, provided the Government would supply the balance of the cost of reconstruction by way of a subsidy, relieving the Government of any alleged liability, as well as responsibility for the operation and maintenance of the dock.

"That the progress made by the company in the reconstruction of the dock has not been satisfactory, and in view of the urgency of restoring the port of Halifax to its former status as a naval base and rendezvous during the war and of preparing it to meet the greatly increased needs of shipping after the war, it is necessary that the Government take immediate mea-

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sures to enter into possession of the said dock at once and to proceed with the reconstruction of the same.

"That from reliable information received it would seem that the sum of one million, one hundred thousand dollars is a fair estimate of the value of the dock as it stands at the present time, and the Minister recommends that authority be given to offer this sum to the Halifax Graving Dock Company, Limited, for the property as it stands at present, and that if this offer is refused authority be granted pursuant to the powers conferred by the War Measures Act, 1914, and all other powers vested in Your Excellency in Council, for reasons declared to arise out of the present war, of the business, property and rights of, or connected with the operations of the dry dock which was constructed in the harbour of Halifax by the Halifax Graving Dock, Limited, aforesaid, and that the question of compensation for the property, etc., as aforesaid, be submitted to the Exchequer Court for adjudication.

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

The Crown therefore expropriated the said dry dock, as will more fully appear from the case of No. 3239, *The King* v. *The Halifax Graving Dock Company, Limited,* in which I this day delivered judgment and wherein I have allowed the present suppliants compensation to cover the value of the dock, as it stood on the 24th June, 1918, inclusive of all works, buildings, erections, etc., executed by the Crown and the suppliants from the date of the explosion to the date of the expropriation.

Now the suppliants' contention, as set forth in paragraph 7 of the Petition of Right is founded on the following method of reasoning, to wit:

"The estimated cost of said reconstruction was $450,000. The amount still to be done when Order in Council P.C. 1291 was passed to put the said dock in the same condition as before the explosion would amount to about $250,000, or about five-ninths of the work. Your suppliant in accordance with said letter more fully set out in paragraph 3 of this petition, collected $50,000, the cash results of the insurance monies on the said dry dock. As the respondent rendered it impossible for your suppliant to do any more than four-ninths of the work of reconstruction under said Order in Council, said respondent is only entitled to four-ninths of the insurance monies, or $22,222.22."

They contend that the above Order in Council constituted a contract and that as the total work of repairs and reconstruction, estimated at $450,000.00, were not entirely done, but only four-ninths thereof, that the Crown is only entitled to four-ninths of their insurance monies of $111,000, namely $22,-222.22.

The question which *in limine* presents itself for decision, as I understand it, is whether or not it can be found that from the evidence a legal contract was ever entered into between the said parties for the reconstruction of the dock, or whether what was done by the Crown was not solely referable to its grace, bounty and benevolence shown to the suppliants by reason of their loss through the explosion at Halifax in 1917, and therefore cannot be treated as giving rise to a contract with all its attendant consequences in case of breach.

In respect of the English law of contract the Crown is at least in no worse position than the subject.

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Tested by this parallel, how will the situation between the Crown and the suppliants eventuate under the authorities? It is an elementary question, but certitude is sometimes only attained by going back to first principles.

What is necessary to constitute a contract? "In its legal sense, it is the union of two or more persons, in a common expression of will affecting their legal relations.

"An agreement implies the assent of two minds. This idea is often expressed by the phrase 'It takes two to make a bargain.' Or, to state it in other words, it must be understood between the parties that one party has made an offer and the other has accepted it. . . . .

"In construing an agreement 'the question is, what by a fair and reasonable construction of the words and *acts of the parties*, was the bargain between them, and not what was the secret interest and understanding of either of them.'" Benjamin, on Contract, pp. 7 and 8.

Among the essential elements to the validity and enforcement of a contract are: "1. A communication whereby the parties unite in a common *expression of will* as to their legal relation, in other words, offer and acceptance.

"2nd. A consideration.

"3rd. A writing, wherever it is required by the Statute of Frauds.

"4th. Capacity of the parties to make a contract.

5th. Reality of the consent expressed in offer and acceptance.—Idem, p. 9.

In the case of offer and acceptance, "the latter must be absolute and identical with the terms of the offer." Benjamin, p. 12; Anson, on Contracts, p. 61.

"The intention of the offeree to accept must be expressed without leaving room for doubt as to the fact of acceptance or as to the correspondence of the terms of the acceptance with those of the offer." Anson, on Contracts, p. 61.

"The acceptance of an offer may introduce terms not comprised in the offer, and in such cases no contract is made, for the offeree in effect refuses the offer, and makes a counter-offer of his own." Idem, p. 62.

The first Order in Council, of the 15th of January, 1918, clearly stated that:—

"1. The Halifax Graving Dock Company, Limited, the owners of the dock damaged, to contribute towards the cost thereof the sum of $111,000."

It did not attach to the clause any stipulation that this amount must first be recovered from the insurance companies, before it became payable.

Now the suppliants never complied with this requirement,—they never did, up to the present day, pay the sum of $111,000 or any part of it to the Crown or on its account. Upon this question a long and protracted correspondence was carried on, which establishes beyond controversy that the parties have always failed to come to final terms or arrangement upon the question. They were never *ad idem* upon this point.

From the correspondence filed of record as Exhibits 1 and 2, it clearly appears that both parties always agreed to disagree from the very date of the first Order in Council.

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However, the intention of the parties was clearly set out by the suppliants before the date of the first Order in Council. Indeed as far back as the 1st January, 1918, (p. 2 of No. 1) we find a telegram of the president of the company addressed to Mr. Carvell, stating as follows: "As the dock is of such paramount importance, will accept, on behalf of the company, your proposal that we hand you the insurance, one hundred and eleven thousand, and you do the rest."

On the 15th June, 1918, (p. 19, Ex. No. 2) the president, on behalf of the suppliants, was writing to the Minister of Public Works, saying: "The proceeds of our insurance was to be handed to you and no doubt this will be paid, but I cannot say when unless the Government does something to force them. However, we will endorse our policies over to you so you are perfectly secure."

On the 18th June, 1918, (p. 26, Exhibit No. 2) Mr. Carvell writing to the president, says: "I am sorry, however, that I cannot agree with your contention that we were to take the proceeds of the insurance policy. While I think you may have opposed that, yet it was *distinctly understood* that you were to collect the policies and pay us $111,000 as your contribution to reconstruction, *regardless of whether the policies were collected or not.* We therefore cannot have anything to do with the policies." And again, at page 35 of the same exhibit, we find another letter of Mr. Carvell to the president saying: "In reply to your letter of the 15th inst., I realize just as much as you do the necessity of having our matters closed up at the earliest possible moment, but I think I should say to you frankly that before anything can be paid on the re-instatement account, we must have a settlement

with you as to the insurance. You know the terms of the Order in Council and my views as to the agreement made between us. The moment you are ready *to pay the $111,000*, or to recognize it as your contribution, we are prepared to make a settlement of this whole transaction."

Then in Mr. Hunter's letter, recited at paragraph 3 of the Petition of Right, it is stated "you are to collect your own insurance policies, and hand over the cash results to the Government"—refusing the assignment of the policies. To which letter the president answers on the 2nd February, 1918, (p. 27, Exhibit No. 1), saying: "Both clauses in your letter are quite satisfactory." At pp. 65 and 66 of the same exhibit, on the 5th and 8th April, 1918, the president again asks Mr. Hunter what he is to do with the insurance, and Mr. Hunter answers: "Collect and hand over cash to the Government."

At pp. 97 (2nd May, 1918) and 110 (13th May, 1918) Mr. Hunter again refuses to pay out any moneys until the sum of $111,000 reaches the Government.

Then after the expropriation on the 23rd August, 1918, (p. 126 of the Exhibit) the president joins issue with Mr. Carvell on the insurance moneys and says, (as alleged in the pleadings), "I think you would not be entitled to the whole of the insurance, but only part of it, because you did not finish the re-instatement of the dock, but took it out of our hands. . . . If the full insurance were collected, viz., $111,000, the proportion payable to the Government would be as $400,000 is to $185,000."

This last proposition enunciated both in the letter and on the pleadings is not to be found either in the Order in Council or in the correspondence on behalf of

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the Crown. It is outside of the alleged proposed agreement—*de hors* the alleged contract.

From the above cited correspondence, and from numerous other letters, and from the obvious fact that the $111,000 were never paid by the suppliants,—it conclusively appears that the parties were never *ad idem*, after the passing of the Order in Council of the 15th January, 1918, with respect to this sum of $111,000,—which the suppliants were to pay but never did pay. On the other hand it appears clearly that the Crown always adhered to the Order in Council, never waivering and never ceasing to ask for the $111,000. Therefore, it must be found,—as the parties were never *ad idem*, that there could never have existed any legal contractual obligation under which the suppliants could recover in an action like the present one.

It is perhaps noteworthy that on the 17th January, 1918, (p. 14 of Exhibit No. 1) the secretary of the Department of Public Works wrote to the company, "an agreement is being prepared in the matter, and it will be submitted to you for signature." Now, what can be deduced from this statement, except the Crown was then willing to enter into a contract with the suppliant, could the parties come to terms? This they wholly failed to do—no such contract or agreement has ever been entered into or executed by the parties. See *Love & Stewart* v. *Instone Co.; Ltd.* [1] The Crown has borne the expense of the considerable work it has performed at the dock, and in addition thereto the Crown has paid for it over again as part of the compensation in the expropriation of the dock.

Assuming for the sake of argument that a contract

[1] 33 T. L. R. 475.

had been entered into, could the suppliants recover for any work of reconstruction done, or to be done, outside the period between the 20th May, 1918,—(when the Order in Council of the 15th January, 1918, was rescinded) and the 21st June, 1918, the date of the expropriation? Indeed, on the 21st June, 1918, would not such contract be put at an end by the expropriation? That was the doctrine laid down by this court in the case of *Samson* v. *The Queen*.[2] See also Nichols, On Eminent Domain, p. 700 *et seq.* And for all such work executed up to the time of the expropriation, they have received full compensation in the expropriation case No. 3239.

Under all the circumstances of the case, I have come to the conclusion that there existed no legal contract between the parties, and when the Crown came to the help of the suppliants in this great upheaval and calamity, it did so of its own benevolence, and what it has done is referable to its grace, bounty and benevolence, and does not constitute an acknowledgment of a right of action or does not amount to any act that might imply any contract upon which an action would lie.

Therefore, my judgment is, that the suppliants are not entitled to any portion of the relief sought by their Petition of Right.

Judgment accordingly.

Solicitor for suppliants: *J. S. Roper.*
Solicitor for respondent: *W. L. Hall.*

[2] 2 Can. Ex. C. R. 30.—*See* 94.

1920
August 10th

Statement of Facts.

BRITISH COLUMBIA ADMIRALTY DISTRICT.

HALEY ET AL, PLAINTIFFS.

vs.

SS. "*COMOX*," DEFENDANT.

Shipping—Action for necessaries—Jurisdiction—Effect of entry in register—Admissibility of evidence to contradict.—24 *Vict., ch.* 10, *s.* 5; 53-54 *Vict., ch.* 27; (Imp.) *R.S.C.* (1906) *ch.* 141.

The SS. *Comox* was registered at the Port of Vancouver, B.C., and was owned by the H. S. Company, having its head office at the same port. While she was at the port of New Westminster, B.C., plaintiff supplied her with necessaries such as material and labour to refit her, and not being paid, action was taken in Vancouver to recover price thereof. The said H. S. Company was practically one Captain Woodside who was domiciled in San Francisco, U.S.A., being the owner of 995 shares of a total of 1,000 shares, capital stock of said Company.

Held, That notwithstanding the SS. *Comox* was registered in Vancouver, her home port was really San Francisco where the true owner thereof was domiciled; that she was a foreign vessel and that the court had jurisdiction in the matter under section 5, ch. 10, 24 Vict., and 53-54 Vict., ch. 27, sec. 3 (Imp.)

2. That evidence may be admitted to contradict entry in the ship's register to show the true owner and home port of the vessel. The *Polzeath* (1), the *St. Tudno* (2), the *Proton* (3); and the *Hamborn* (4); referred to.

In this case the plaintiff sued for necessaries supplied in the shape of material and labour in refitting the defendants' ship at New Westminster in the Province of British Columbia. The Defendants objected to the jurisdiction of the Court and alleged that the ship belonged to the port of Vancouver, on the ground that she was owned by the Henrietta Ship Company having its head office at the Port of

(1) 1916, P.D. 241.
(2) 1916, P.D. 291.
(3) 1918, A.C. 578.
(4) 1918, P.D. 19.

Vancouver, but the evidence showed that of a thousand shares of stock which comprised the capital stock of the Henrietta Ship Company, nine hundred and ninety-five shares were owned by Captain Woodside who lived and was domiciled in San Francisco.

Captain Woodside's wife and son the other directors of the Company, lived and were domiciled at San Francisco, and it was argued by Counsel for the plaintiff, Mr. E. C. Mayers, that therefore the ship was really owned in San Francisco, and was a foreign ship and that, in consequence Section 5 of the Admiralty Courts Act of 1861 applied.

The following cases were cited in support of the contention that the court should look behind the Register of the ship to ascertain the true ownership:—

The *Polzeath* (1); the *St. Tudno* (2); the *Proton* (3); the *Hamborn* (4).

By the Admiralty Courts Act, 1861, being 24 Vict., Chap. X, sec. 5, the High Court of Admiralty shall have jurisdiction over any claim for necessaries supplied to any ship elsewhere than in the port to which the ship belongs, unless it is shown to the satisfaction of the court that at the time of the institution of the cause, any owner or part owner of the ship is domiciled in England or Wales . . . . .

By the Colonial Courts of Admiralty Act, 1890, 53-54 Vict., Chap. 27, the word "Canada" is substituted for "England and Wales."

The case was tried at Vancouver on the 19th, 20th and 21st days of July, 1920, before the Honourable Mr. Justice Martin.

(1) 1916, P.D. 241.
(2) 1916, P.D. 291.
(3) 1918, A.C. 578.
(4) 1918, P.D. 19.

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HALEY ET AL v. SS. *Comox.*

Reasons for Judgment.

E. C. Mayers, and *G. L. Fraser*, counsel for plaintiffs;

C. B. McNeill, K.C., counsel for defendant.

Archer Martin, L.J.A., now (this 9th of August, 1920) delivered judgment.

"This is an action claiming $19,258.29 for necessaries supplied in the shape of material and labour in refitting the defendant ship at New Westminster in this Province. An objection is taken to the jurisdiction founded on the submission that the ship belongs to the port of Vancouver and that she is owned by the Henrietta Ship Company, a Canadian Company with head office at that port, but I have no hesitation whatever in finding upon the evidence that whatever the documents may pretend to show, her home port is in San Francisco and her true owner is Alexander Woodside domiciled there.

Part of the work was done under a written contract dated the 12th February, 1920, for $13,100, and the balance under a later verbal one: the submission that the plaintiffs' right to recover was dependent upon the owner being able to obtain classification from the British Corporation or otherwise is not supported. I find as a whole that the work done under both contracts was a fair job of its class, and the prices charged were reasonable, which leaves only a few items that require particular notice.

The main one relates to the engine, etc., under this clause of the written contract:—

"All propelling machinery to be installed complete with auxiliaries and pumps, also cargo winches. The above items to be supplied by the owners ready to install. It is assumed that the present tail shaft and propeller will be used."

It is submitted that under this clause the plaintiffs were required to supply the engine bed and therefore a large number of items in their bill covering the considerable cost of that work, about $5,000, should be disallowed. In the Oxford Dictionary I find these definitions:—

Install (2) To place (an apparatus, a system of ventilation, lighting, heating, or the like) in position for service or use:

Installation (2) The action of setting up or fixing in position for service or use (machinery, apparatus, or the like); a mechanical apparatus set up or put in position for use; spec. used to include all the necessary plant, materials and work required to equip rooms or buildings with electric light.

The main idea of "installing" thus conveyed is to place or set up in position for use, and though in certain circumstances and some trades it may have a special or wider meaning, yet there is nothing in the circumstances of this case to so enlarge it. I am of the opinion that it was and must have been in the contemplation of the parties that the new engine was to be placed in position upon a bed sufficient for that purpose already in "place" in the ship. The statement of the witness Lockhart, marine engineer, on cross-examination, that it meant the plaintiffs were to get the engine, auxiliaries and pumps from the owner "ready to install" and then couple them up for sea in the ship's engine room seems the reasonable view to take of the situation, and it is, moreover, supported by the correspondence between the parties, even if the blue print, Ex. 38, is to be discarded in this connection, as is rightly, I think, submitted by defendant's counsel, it being merely an over-all dimension

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plan, as explained by the witness Akhurst. Therefore said items covering the cost of the engine bed will be allowed.

As to certain "hardwood" items, it is clear from the evidence that unless otherwise specified by name local shipwrights include Douglas fir under that category and that wood was in fact used, therefore the items are allowed.

With respect to the two wing tanks for oil, that question has occasioned me the most difficulty but after a careful consideration of the evidence and the circumstances I have reached the conclusion that the owner, Woodside, has so acted that he must be held to have accepted them after full knowledge of the result of the test, and their capacity, if the plaintiff Christian's evidence is to be believed, and I prefer it to Woodside's; the latter did not insist upon larger tanks being substituted, as the plaintiffs offered to do, because they would reduce the cargo space, and, consequently, earning power, and it is difficult to understand, if his objection were so serious as now put forward, why he nevertheless put to sea without any further alterations to them: as they are now with a capacity of 3,800 gallons, instead of the 5,000 as specified for, they still give a 19 day voyage range on the engine consumption of 200 gallons per day, which he doubtless agreed to regard as sufficient; furthermore, his representative, Wallace, agreed to test them though he knew their capacity was short and that they were not $\frac{1}{4}''$ plate and did not order them to be taken out after the test, though he had the power to do so, simply because it would have delayed the vessel in sailing. I am of the opinion, on the whole aspect of this item, that it is too late for the owner to successfully contest it.

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Reasons for Judgment.

There are five items, however, which the owner is entitled to have disallowed, viz., those charged for the time occupied in purchasing materials, under these headings in the monthly "Statement of Wages:"—

J. F. Haley, looking after extra materials, work		$ 125.00
Overhead	(April)	83.33
Do.	(May)	83·22
Do.	(June 1st half)	125.00
Do.	(June 2nd half)	125.00
		$ 541.55

The verbal contract was that the plaintiffs were to purchase the material and supply the labour and do the work on a percentage of 20 per cent of the cost, and it is submitted that the time occupied in purchasing is part of the overhead cost of labour and that as in this case the plaintiffs did not include their office expenses in "overhead" they are entitled to exclude non-productive work outside the office, that is, instead of including in "overhead" the office administrative expenses they excluded them and therefore should be allowed for them as time occupied in the "labour" of purchasing. But I am of opinion that, while it may be the plaintiffs made an error in excluding their general expenses from "overhead" and estimated too low as pointed out by witness Lockhart, yet nevertheless that was the contract they made and if they made a mistake in it they must bear the loss, so consequently the said five items will be disallowed. judgment will be entered in favour of the plaintiffs for all the other items.

With respect to the counter-claim: it has not been supported by evidence and must fail. While the

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Reasons for Judgment

telegram of the 26th May from the defendants to Woodside concerning the arrival of the engine, beginning "Expect engine, etc.," was an unfortunate one, yet an ordinarily prudent man would not treat such expectations of the arrival of an engine, especially in these days of delayed transportation, with much confidence; the engine, as a matter of fact, did not arrive in the plaintiff's yard until the 8th June, and after that time I am unable to find that there was any undue delay, bearing in mind the fact that under the verbal contract additional and collateral work was being continually ordered by the owner's agent, Wallace, even up to the 3rd July, two days before sailing. It is therefore impossible to hold that the owner really suffered any loss or damage on this head.

The whole result is that judgment should be entered for the plaintiffs as above indicated, and the costs will follow the event.

Judgment accordingly.

IN THE MATTER of the Petition of Right of
NAPOLEON LOISELLE.....SUPPLIANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

1920
Sept. 23rd.
Reasons for Judgment.

Railways—Responsibility—Damage to one using property without permission of company—Licensee—Negligence.

S had three carloads of potatoes near the freight-shed at Mont-Joli, which by agreement with railway company he was to keep heated.

To reach this car, S. could take a good travelled road or could take a short cut through the busy railway yard. The latter was used by the public, but without the permission of the railway company. S. on the 16th November, 1917, at 8.15 p.m. elected to take this short cut to his car. The night was dark and having missed his way, he fell into a viaduct and was injured.

Held, that the proximate and direct cause of the accident was want of prudence on the part of the suppliant in venturing on a dark night, through a busy railway yard to his car, instead of using a good travelled road, free from any such dangers, as he was confronted with in using the tracks.

2. Where a licensee, for his own benefit, is upon the premises of a railway, without objection from it, such railway company cannot be said to be under the legal duty to guard such licensee against the obvious risks and dangers attending his crossing or walking through a railway yard at night. He must under such circumstances, take care of himself in using the premises as he finds them at the time he made his contract for transportation, and is not entitled to be protected from obvious conditions upon the property in their ordinary state.

PETITION of Right to recover from the Crown damages alleged to have been suffered by reason of an accident in a railway yard of the Intercolonial Railway Company.

THE case was tried at Rivière du Loup on the 9th of July, 1920.

Adolphe Stein and *Dominique Lévesque*, counsel for suppliant.

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NAPOLEON LOISELLE v. THE KING

Reasons for Judgment.

Mr. Bérubé, counsel for respondent.

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

AUDETTE, J., now (this 23rd September, 1920) delivered judgment.

The suppliant, by his Petition of Right, seeks to recover $4,660.10, damages for personal injuries caused by the negligence of the Intercolonial Railway's servants.

The accident in question occurred on the 16th November, 1917, and the Petition of Right was filed in Court only on the 20th January, 1919. While on its face the claim would therefore appear to be prescribed, the evidence established the Petition of Right had been lodged with the Secretary of State, pursuant to sec. 4, of the Petition of Right Act, on the 14th November, 1918, and it must be found that such compliance with the statute interrupted prescription.

The suppliant, having purchased three cars of potatoes, entered into agreement with the Intercolonial Railway Company, as appears by the Bill of Lading and the way-bill, filed herein as Exhibit No. 13, to transport the same to destination upon his undertaking to place a wooden lining inside the car, heat the same, and supply the fuel therefor,—the question of frost being thereby at his own risk and peril.

The cars of potatoes in question were placed at Mont-Joli, near the freight shed, at the place indicated on the plan, Exhibit No. 2, as "chars de patates."

At 4 o'clock on the afternoon of the day of the accident, the suppliant had gone and heated his cars,

and, as he says, that fire could last only about four hours,—at 8.15 p.m., of the same day, the 16th November, he started to attend to his fire again.

He went to the station, at the office marked "B" on the plan, with the object of advising the employees he wished to leave that night, and to have his cars weighed, and he was informed the employees were in the yard.

It was then he started from point "B," on his errand to heat his cars, and followed the dotted line shown on the plan and marked "trajet parcouru par Loiselle." He states it was then difficult to cross opposite the station towards his cars, as there was shunting going on. The Mont-Joli yard is at a Divisional point of the Intercolonial Railway and it is also the terminus of the Gulf & Terminal Railway running down to Metis and Matane. There are two shunting engines in that yard to attend to the considerable shunting necessarily involved in such a locality.

Loiselle, after leaving point "B," followed the dotted line above mentioned, and being carried beyond his bearings, reached point "A" and fell at that point into the viaduct from a height of 12 feet, 7 inches, upon the grating of a drain and was injured. He now claims for the bodily injury resulting from such accident. Can he recover under such circumstances? Was the suppliant justified in crossing the railway yard to go to his cars, instead of taking the road leading to them? What were his rights?

In answering this question let us follow the modern tendency of the courts and view the facts of the case in the light of the first principles of the law of negligence rather than to seek to establish an analogy between the facts of this case and those obtained in

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decided cases. Negligence is want of care in the circumstances, and every case must be determined upon its own set of facts. An observation upon this point of Lord Finlay, in the case of *Craig* v. *Glasgow Corporation* (1), is quite instructive. His Lordship was then dealing with a case of injury to the person arising out of alleged negligence on the part of the driver of a tram-car. He says:—"The use of cases was for the proposition of law they contained, and it was of no use to compare the principal facts of one case with the principal facts of another for the purpose of endeavouring to ascertain the conclusion to be arrived at in the second case."

In determining the question of liability in all such cases as the one before the court, it is necessary to examine the conduct of both parties in the circumstances, and note the bearing that the acts of each had upon the resultant injury. Want of care must be posited as the cause of the injury. Then whose incuria was the proximate or active cause of the accident. Liability is established where it is shown that the party injured had some legal right to be on the locus of the accident and did not know of a peril to his safety that was known to the defendant, but in respect of which he took no care to warn the plaintiff.

Holmes J. in the case of *Commonwealth* v. *Pierce* (2) says: "So far as civil liability is concerned, at least, it is very clear that what we have called the external standard would be applied, and that, if a man's conduct is such as would be reckless in a man of ordinary prudence, it is reckless in him. Unless he can bring himself within some broadly defined exception to general rules, the law deliberately leaves his idiosyn-

(1) 1919, 35 T.L.R. 214 at p. 216. (2) 138 Mass. 165, at p. 176.

crasies out of account, and peremptorily assumes that he has as much capacity to judge and to foresee consequences as a man of ordinary prudence would have in the same situation. In the language of Tindal, C.J., "Instead, therefore, of saying that the liability for negligence should be coextensive with the judgment of each individual, which would be as variable as the length of the foot of each individual, we ought rather to adhere to the rule which requires in all cases a regard to caution such as a man of ordinary prudence would observe." *Vaughan* v. *Menlove* (1).

To succeed in the present instance, the suppliant must bring the circumstances of his case within the ambit of sec. 20 of the Exchequer Court Act. There must be, 1st, a public work; 2nd, there must be negligence of an employee or servant of the Crown while acting within the scope of his duties or employment, and 3rd, the accident must be the result of such negligence.

Coming back to the course pursued by the suppliant on the night of the accident, it must be noted that there is a road indicated on the plan at the back of the station, joining when travelling west, the King's highway which runs north under the viaduct in question. Then both to the northeast and southeast of the letter "N," on the plan, there are good travelled roads leading from the King's highway, to the freight shed and therefrom to the cars of potatoes in question.

Leaving the station, the suppliant could and should have gone to his cars in that way, or on leaving his hotel, which was to the west of letter "x" he just had to walk east almost straight down to the freight

(1) 3 Bing N.C. 468, 475; S.C. 4 Scott, 244.

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Reasons for Judgment.

shed. However, he says he was unfamiliar with Mont Joli, and did not know of the roads; but, that is no excuse for running through a busy railway yard or any dangerous locality in Mont Joli. He could easily have enquired and been told.

He had gone across the yard in the afternoon, without interference or objection from the railway company. The most favourable construction of the suppliant's complaint is that he was in the railway yard, or at the place in question, in pursuance of a usage by the public, which usage was permitted passively by the railway company. It does not go further than this. The suppliant was not passing over the tracks at a crossing or on a road which had been adopted or recognized by the railway company; but was simply making use of this "short cut" from one place to another, which is said to have been used by many persons for convenience. Such user of the tracks or "short cut" is unquestionably dangerous and regarded as an intrusion upon the legal rights of the railway who maintain their railway yard solely for the purpose of operating the railway. It is not easy to see how such a user of the railway yard by the public could be wholly prevented without force, which would be attended with difficulties that might not be overcome without the imposition of unnecessary burdens upon the railway company. Conceding, however, that the suppliant had the tacit and passive permission, resting upon usage, to walk through the railway yard and that in the circumstance he might be termed a licensee, his presence there was not especially invited and was of no advantage to the railway company.

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Reasons for Judgment.

Where a licensee, for his own benefit, is upon the premises of a railway, without objection from it, such railway company cannot be said to be under the legal duty to guard such licensee against the obvious risks and dangers attending his crossing or walking through a railway yard at night, to get to his cars at the freight shed, when his business can be looked to by following the safe roads made and provided by the company to reach the freight shed or the siding adjoining thereto. In other words, the licensee must under such circumstances take care of himself in using the premises as he finds them at the time he made his contract for transportation, and is not entitled to be protected from existing conditions upon the property in their ordinary state (1).

The suppliant might have the right to complain of a wilful act of the railway company in running him down or of traps and pitfalls, which would be an allurement to unexpected dangers. There is no natural or possible relation between the injury and the fact that there was no cattle fence at the viaduct or that the latter was not lighted, as requested by the municipality, for its traffic. That is *nihil ad rem.* Had he not crossed the railway yard, had he not lost his way,there would have been no accident. As the station-master at Mont-Joli testified, "we do not give permission to pass over the tracks, but we do not prevent any one from doing so." The suppliant had no right to be where he was at the time of the accident, and in no case, can this passive leave to go across without objection, referable to the obliging act of the Crown, be said to give rise to a legal right of action. A wrongful act cannot impose a duty. There

(1) *Sullivan* v. *Waters*, 14 Ir. C.L. 460, (1903) 58, L.R.A. 77. (*cited*)

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Reasons for Judgment.

is no act of negligence on behalf of any officer or servant of the Crown, which caused the injury. The proximate and direct cause of the accident is the obvious *incuria*, want of elementary prudence for the suppliant to venture on a dark night through a busy railway yard, and to wander and grope his way therein to his cars which were accessible through a good travelled road, free from any such dangers.

A man gifted with ordinary prudence would not, at night, have ventured through that yard. He should have reached his destination by the ordinary road, and not choose to go through the yard. *Volenti non fit injuria.* As between himself and the railway company, he has obviously shown greater *incuria* and the railway can only be liable for cases of negligence.

The accident being obviously the result of the suppliant's *incuria* and imprudence, he is adjudged not entitled to any portion of the relief sought by his Petition of Right.

Judgment accordingly.

Solicitor for suppliant: *Adolphe Stein.*

Solicitor for respondent: *Léo Bérubé.*

1920
Sept. 23rd
Reasons for Judgment.

IN THE MATTER of the Petition of Right of

DAVID BRAULT.....SUPPLIANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

Contract—Breach—Damages—Public Work.

On the 22nd August, 1911, S. entered into a contract "for supplying crushed stone required for macadamizing a portion of the road along the west side of Chambly Canal," to be completed on or before October 15th, 1911. Before the 18th of September, the engineer in charge had repeatedly notified S. that he was not delivering enough stone to allow the work to be performed in time. On that date, he called in another contractor to help complete the necessary deliveries, and, notwithstanding that the date for completion of contract was extended a month, and S. delivered all he could, the work was only just able to be completed that season. No quantities were stipulated in the contract and no exclusive right to supply stone was given to S. and all that S. delivered or offered to deliver was accepted.

Held, that, upon the facts, the Crown had committed no breach of the contract, and that S. had suffered no damage for which the Crown was liable.

2. Where a party has by his own act or default put it out of his power to fulfil his contract, the other party may at once treat this as a breach of contract without waiting for the time of performance or completion to arrive.

PETITION of Right to recover from the Crown damages alleged to have been suffered by suppliant by reason of a breach of contract by the Crown.

THE case was tried at Montreal on the 10th of September, 1920.

Mr. G. Fortin, counsel for suppliant.

Mr. O. Gagnon, counsel for respondent.

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DAVID BRAULT v. THE KING.

Reasons for Judgment.

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

AUDETTE J. now (this 23rd September, 1920) delivered judgment.

The suppliant, by his Petition of Right, seeks to recover the sum of $1,746.55 for damages arising out of a breach of contract with the Crown.

On the 22nd August, 1911, the suppliant entered into a contract with the Crown, "for supplying crushed stone required for macadamizing a portion of the road along the west side of the Chambly Canal,"—and complete such supply on or before the 15th October, 1911.

He had, at the time he tendered for such contract, a small plant, at his quarry, that was insufficient for the performance of this contract, and he was duly notified by Mr. Parizeau, the Government Engineer, of that fact after his visit to the quarry, at the request of the Ottawa headquarters. However, the suppliant promised to purchase additional plant.

He started to make delivery under his contract, on the 10th August, 1911, and on the 1st September, he had delivered 395 tons. From the 1st to the 18th September, he delivered 743 tons.

Euclide Brault, the suppliant's son and foreman, says that at the time they took the contract they had a middling size plant, and that when they perceived that it was not sufficient, ten days or so after starting work, they purchased a larger crusher.

Mr. Parizeau, the engineer in charge of the works for the respondent, testifies that the delivery of stone made by Brault in September varied between 45, 55, and 14 tons a day; and that the average delivery

between the 10th August and 1st September was only an average of 27 tons.

Mr. Parizeau swears that before the 18th September, he has time and again told the suppliant he was not delivering enough stone to allow him to perform the work on time. However, at that date, he says he had realized, he was certain, that Brault was not delivering stone in sufficient quantity, and at the rate the stone was being supplied the works could not be finished in time. Mr. Parizeau further states that he repeatedly informed his superior officer that if the stone was not forthcoming the works could not be executed on time.

Under these circumstances, on the 18th September, 1911, he called in a Mr. Lord to supply similar stone at the contract prices, and with Lord's help and concurrence and all Brault could and did deliver, prolonging and extending the time of completion of the contract to the 15th November, 1911, he was only just able to complete the works.

Brault, ever since the 10th August to the 15th November, 1911, was asked to deliver all he could, and all he has delivered or offered to deliver was duly accepted.

However, it was contended at bar that the Crown was guilty of a breach of contract inasmuch as by calling in Lord, the latter took away from Brault a number of carters to whom he would give wages of 25 cents over and above what Brault was giving up to that date, and by Lord using some of these carters Brault was deprived of their services and could not supply all the stone he would otherwise have been able to deliver.

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Reasons for Judgment.

From perusal of the contract, it will be seen that there is no quantity of stone mentioned,—that Brault is not given the exclusive supply of the stone, therefore how could he sue for a given quantity supplied by himself exclusively? By clause 5, the works have to be carried on and prosecuted to completion to the satisfaction of the engineer. Clause 16 provided what the engineer may do in case of delay, and there are other such permissive clauses in the contract; but does not the word "may," in such a document, amount to a mere intimation of what might be done and not an obligation to resort exclusively to that method? Had the word "shall" been used instead of "may," it would have tied the engineer to that method and that method only.

However, it is abundantly proven that the contractor has delivered all he could, and that the Crown readily accepted all he offered and delivered, and that but for the help of Lord, according to the testimony of Mr. Parizeau, the works could not have been entirely executed that season. How could it be found under the circumstances that the Crown is guilty of a breach of contract?

If there is a breach of contract, it is a breach by the suppliant and of which he is alone responsible.

Indeed, where a party has by his own act or default put it out of his power to fulfil his contract, the other party may at once treat this as a breach of contract without waiting for the time of performance or completion to arrive. The apprehension of the engineer that the work was unduly delayed was in this case well founded (1).

(1) *Stewart* v. *The King*, 7 Ex. C. R. 55; 32 S.C.R. 483.

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DAVID BRAULT v. THE ING.

Reasons for Judgment.

Contractors cannot have the whole matter of the contract in their hands in respect of public works involving public interest. The Crown cannot be at the mercy of the contractor, it must protect itself, and would do no violence to the contract, when realizing that the contractor was going behind in the execution of the works, to buy outside to protect itself.

Moreover, time was by clause 26 of the contract, deemed to be material and of the essence of the contract, and while the stone should have been all supplied by the 15th October, 1911, the Crown extended the period of the contract by a full month and accepted all the stone supplied by the contractor even during the long extension.

Out of the total quantity of 5,119 tons required for the work in question, the suppliant supplied 2,498 tons and Lord 2,621.

If as between the suppliant and the respondent either of them has been guilty of a breach of contract, it is not certainly the Crown, but the suppliant himself.

The suppliant was given every opportunity of delivering all the stone he could from the 10th August to the 15th November, 1911, and all he was able to deliver within that period, which includes several days before and after the date of the contract, was accepted and credited to him. If there were not enough carters available in the contractor's own parish for the discharge of the duties imposed upon him by his contract, he could and should have procured that help from outside. Brault, the son, further adds all we had of crushed stone, we delivered

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Reasons for Judgment.

to the Government,—and the suppliant says the Crown never prevented us from delivering stone.

Under the circumstances, I have come to the conclusion that the suppliant is not entitled to any portion of the relief sought by his Petition of Right.

NOTE—Exhibit "A,"—a statement of the quantity of stone actually supplied up to a certain date—not to the end of the contract,—was filed at trial, and was to be completed to the end of the contract. The trial took place on the 10th September,—the completion of that exhibit involved the work of at most half an hour,—but it has not as yet come to hand and I am not on that account delaying judgment, because, in the view I take of the case, it is immaterial.

Judgment accordingly.

Solicitor for suppliant: *Georges Fortin.*

Solicitors for respondent: *Rainville & Gagnon.*

BETWEEN

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

1920
Sept. 23.

AND

ELIZA MURRAY (WIDOW) AND AGATHA HATT, MARRIED WOMAN, WIFE OF EARL HATT, AND EARL HATT ..... DEFENDANTS.

Expropriation—Value of farm for subdivision purposes—Market value—Probabilities of sale in village lots.

Held. The value of a farm for subdivision must be tested by the law of supply and demand; and where it does not appear that even had the property been subdivided, and on the market at the date of expropriation, it could have been all sold in lots within a reasonable time; and, moreover, where there is a large amount of property in the neighbourhood available for subdivision and more suitable than the property expropriated, the court will value the property on the basis of farm land and not as village or town lots, notwithstanding that industrial enterprises in the vicinity had developed the locality.

INFORMATION exhibited by His Majesty's Attorney-General for Canada for the expropriation of property of the defendants for use as a Seaplane Station at Eastern Passage, Portmouth, Nova Scotia.

The case was tried at Halifax, on the 22nd, 23rd, and 24th days of July, 1920.

R. H. Murray, K.C., counsel for plaintiff;

R. T. MacIlreith, K.C. and *C. Tremaine*, counsel for defendants.

1920

THE KING. v. ELZA MURRAY

Reasons for Judgment.

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

AUDETTE J., this 23rd September, 1920, delivered judgment.

This is an information exhibited by the Attorney-General of Canada, whereby it appears, *inter alia*, that certain lands, belonging to the defendants, were taken and expropriated by the Crown, under the provisions of the Expropriation Act, for the use, construction and maintenance of a Seaplane Station at Eastern Passage, on the Dartmouth side of Halifax Harbour, N.S., by depositing, on the 19th August, 1918, and the 6th November, 1918, respectively, plans and descriptions of such lands, in the office of the Registrar of Deeds for the county of Halifax, N.S.

The area taken is (19·31) nineteen and thirty-one hundredths acres for which, it is admitted, the Crown tendered, on the 29th August, 1918, the sum of $13,660 for the lot first described in the information, and the sum of $2,700 for the second lot, on the 14th January, 1919. Both tenders were refused. The expropriation takes the best and most valuable part of the farm upon which the buildings were erected.

The defendants by their plea, claim that the sum of $16,360 is insufficient and ask a larger and further compensation and relief.

Accompanied by counsel for both parties, I have had the advantage of viewing the *locus in quo* which is situate at about four miles from Dartmouth.

At the date of the expropriation the property in question was used and worked exclusively for farming purposes,—it was a farm in the full acceptation of the term. True, there had been at that time some few applications for building lots to be carved therefrom,

and the owners, as part of their policy, had refused to sell finding it undesirable to interfere with the property as a whole; but, at that date, no building lots therefrom had been sold. Subsequently, as appears by the evidence, a few were sold.

As a farm, it was nothing but a very ordinary farm,—below the average of what may be termed good farms. The soil, upon the part fit for cultivation, is very ordinary, and a great part of the farm to the east is rocky and covered with bushes and trees.

The compensation is to be based upon the value to the owners of land at the date of the expropriation, taking into account all its prospective potentialities, but only the existing value of such advantages at the date of the expropriation (1).

The value of the farm for subdivision purposes must be tested by the law of supply and demand. It does not appear from the evidence that if the property had been subdivided and in the market at that date, that it could have been all sold in lots within a reasonable time. The oil works at Imperoyal have developed that locality, but there is any amount of property in that neighbourhood available for subdivision, that would be taken in preference to the lands in question.

There were options of $80,000 for the whole, and $50,000 for half of the farm, given upon this property,—one of them, however, was of a very uncertain character—but such options never matured, and are very much of a speculative character. Some extravagant amounts would be arrived at, if the testimony of some of the witnesses for the owners were given heed to; but they are based upon public talk, especially among promoters, in the locality, built upon the comparative prices which were obtained from subdivisions in other

(1) *Trudel* v. *The King*, 49 S.C.R. 501, and cases therein cited.

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THE KING. v. ELIZA MURRAY

Reasons for Judgment.

localities. That is not of much assistance when it is sought to find the market price of this property at the date of the expropriation, especially when the demand for lots there must be admitted to be very small.

As expressed by Anglin J. in the *Trudel* case (*ubi supra*), p. 514: "Of anything which a farseeing purchaser would take into account in estimating what he should pay for the property, * * * * the owners are entitled to the benefit in fixing the value of the land for purposes of expropriation."

And indeed, when we consider the amount tendered and offered by the Crown, we must come to the conclusion that such consideration and basis have been weighed and accepted before arriving at the sum of $16,360, because that amount is far beyond the value of the property as a farm.

Viewed as a farm, with the advantage of the potentiality of being turned into subdivisions within a fairly reasonable time, the buildings, with very few exceptions, can only have a demolition value and not the value established by some of the witnesses on the basis, as to what it would cost in our days to build them anew. The dwelling house appears to have been built over 60 years ago.

At the date of the expropriation, it could not fairly be expected that this property could be all sold within a reasonable time as building lots. Sales would be very slow, and spread over a very long period, if ever they were all sold. There was no market for such a large subdivision in such locality at the date of the expropriation.

The tender and offer made by the Crown, which appears to be very reasonable under the circum-

stances, is based, as appears from the evidence, upon the valuation of Crown witness Morrison,—but as this witness has, apparently, left out some items for which the owners should receive compensation, and upon which the witness when at trial placed additional value, I have come to the conclusion that if $2,000 be added to the tender, as representing compensation for severance, the water-lot, fence, second well, etc., etc., in fact covering all other legal element of compensation,—that a very fair and just award will be arrived at.

Eliza Murray, one of the defendants, is vested with only a life interest in the property, and it is admitted by both parties, that she was born on the 11th October, 1864,—she being of the age of 54 at the date of the expropriation,—her life-interest is assessed, according to the tables found in Cameron on Dower, at 55·89 per cent of the award, and Agatha Hatt at 44·11 per cent for the reversion.

Therefore, there will be judgment as follows: 1st, the lands expropriated herein, are declared vested in the Crown as of the date of the expropriation; 2nd, the compensation for the lands taken and for all damages resulting from the expropriation, is hereby fixed at the total sum of $18,360, with interest on the sum of $15,660 from the 19th August, 1918, to the date hereof, and on $2,700 from the 6th November, 1918, to the same date; 3rd, the defendants are entitled to recover from the plaintiff the said sum of $18,360 in the following proportion, viz.: Eliza Murray,—for her life-interest, 55·89%, equal to $10,261.40, and Agatha Hatt, the reversion representing 44·11% equal to $8,098.60—with interest as above mentioned—upon their giving to the Crown a good and sufficient

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THE KING. v. ELIZA MURRAY

Reasons for Judgment.

title free from all mortgages or incumbrances whatsoever upon the said expropriated property. 4th, the defendants are also entitled to the costs of the action.

Judgment accordingly.

Solicitor for plaintiff: *R. H. Murray.*

Solicitor for defendant: *C. Tremaine.*

BETWEEN

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

1920
Sept. 23.

AND

JAMES LACK, MATTHEW T. REID, INGLIS N. SPROTT, ROBERT S. McCURDY, ROY B. McCURDY AND SAMUEL C. CROCKETT, THE TRUSTEES OF MIDDLETON CHURCH, MIDDLE MUSQUOBOIT, COUNTY OF HALIFAX ... DEFENDANTS.

Expropriation—Cemetery property—Owner's title—Value to Owner—Not commercial property.

The property expropriated was part of a cemetery consisting of sand and gravel and was absolutely vested in trustees "for cemetery purposes in connection with the congregation and . . . . shall be used solely for such cemetery and for no other purpose whatsoever."

Held, that the defendants were entitled to fair compensation to the extent of their loss, which loss is to be tested by what was the value to them at the date of the expropriation. That in view of the restriction upon their use of the property as a cemetery, the property was out of the market for commercial purposes.

That consequently, its value could not be estimated on the basis of its sand and gravel deposits, but as a cemetery only.

INFORMATION exhibited by His Majesty's Attorney-General for the Dominion of Canada for the expropriation of a part of a cemetery property belonging to the defendants for the purposes of the Intercolonial Railway, a public work of Canada.

The case was tried at Halifax on the 21st day of July, 1920.

1920

THE KING v. LACK *et al.*

Reasons for Judgment.

The facts are stated in the reasons for judgment.

Mr. J. H. MacKinnon counsel for plaintiff.

L. A. Lovette, K.C. and *Jas. A. Sedgewick* counsel for defendant.

AUDETTE J. now (this 23rd September, 1920) delivered judgment.

This is an information exhibited by the Attorney-General of Canada, whereby it appears, *inter alia*, that certain lands, belonging to the defendants, were taken and expropriated by the Crown, under the provisions of The Expropriation Act, for the purposes of the Intercolonial Railway, a public work of Canada, by depositing, on the 21st September, 1917, a plan and description of such land, in the office of the registrar of deeds for the county of Halifax, province of Nova Scotia.

The area taken is 0·674 of an acre,—very nearly three-quarters of an acre,—for which the Crown offers the sum of four hundred dollars.

The defendants, by their plea, claim:—

(a) To be reinstated.

(b) In the alternative for the acquisition of new land, under drainage of same, removing the soil therefrom to the depth of six feet and replacing the same with similar gravel to that expropriated, $6,000.00.

(c) In the alternative, for 16,000 cubic yards of gravel removed at 25 cents per yard, $4,000.00.

(d) In the alternative for 88 burial lots, taken at $10.00 per lot, $880.00, and for direct and consequential damage to remaining part of cemetery and to cemetery as a whole, $1,000—$1,800.00.

This piece of land so expropriated formed part of a Presbyterian cemetery, of about three acres in size, at Middle Musquodoboit, N.S., purchased by the

1920

THE KING v. LACK et al.

Reasons for Judgment.

defendants, under statutory power hereinafter referred to, on the 8th April, 1908, for the sum of $150, as appears by the deed of sale filed herein as Exhibit "J."

When the officials of a railway take upon themselves the responsibility of interfering with a cemetery, for the sole purpose of getting gravel,—not even for their right of way,—should they not expect this callous step involves the payment of a very adequate compensation for this interference with the field of the dead, when gravel is available elsewhere?

The nature of the soil is gravel and sand, and it is considered as the best material for cemetery purposes.

The population of Middle Musquodoboit, under the last census, is 1,000,—and under witness Bishop's estimate it is composed of about one-third of Methodists, and two-thirds of Presbyterians, although that estimate is criticised by witness Guild, who contends that the population is composed of not even a quarter of the Methodist denomination. Both denominations have a separate cemetery. There are 110 families belonging to the Presbyterian denomination, and we have it stated in evidence that the farming districts in Nova Scotia have not increased in the last thirty or forty years.

The new Presbyterian cemetery was opened in 1912 or 1913,—and there is also the old cemetery which is still open and used by a part of the population,—and the lots in the new cemetery are being sold at $10 each.

The defendants were duly incorporated under the name of trustees of Middleton Presbyterian Church of Middle Musquodoboit, by an Act of the Nova Scotia Legislature, in 1896 (Ch. 116, 59 Vict.), and by an Act of the same Legislature, in 1908 (8 Ed.

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THE KING v. LACK *et al.*

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VII, ch. 198), the trustees were authorized and empowered to purchase the three acres in question herein for cemetery purposes. By section 2, thereof, these lands were "absolutely vested in the said trustees and their successors in office forever, in trust nevertheless for cemetery purposes in connection with the said congregation, and the said lands and every part thereof shall be used solely for such cemetery and for no other purpose whatsoever."

It appears from the evidence of John B. Archibald that 0·30 of an acre, of this new three-acre cemetery, was on the 1st April, 1915, sold by the trustees to the Crown for the sum of $100. This piece of land is said to have been so sold to give access to the Bruce property, and it is contended that it was taken from the flat below, where the land is wet and low and valueless for cemetery purposes, although, as appears by the several plans filed at trial, that part was also divided in burial lots.

The first sale decreased the area of the cemetery and the present expropriation has also had the further effect of decreasing its size; but, does it really remain so small as to be useless, as not answering the requirements of the community for a long time to come, when used conjointly with the old cemetery in existence for over 100 years, and of a much smaller size? I am unable to answer this question in the affirmative.

However, be that as it may, the defendants are entitled to a fair compensation to the extent of their loss, and that loss is to be tested by what was the value at the date of the expropriation of such piece or parcel of land to them, with the statutory title above mentioned.

The value of the land to the taker, the party expropriating, is no test or criterion for arriving at the compensation. The nature of the trustee's title takes the property out of the market for commercial purposes and it has no value as such.

The defendants own the property solely for cemetery purposes, and it could not be used for any other purpose.

The consideration of the value of the gravel and sand,—the nature of the soil, is no test, as is well established by a long catena of cases. It is, I repeat, the value to them for cemetery purposes that must be considered (1).

I am unable to find, as stated in the evidence, that 88 lots were taken by the present expropriation,—I cannot find that quantity on the plans filed.

It was conceded on the argument at bar that reinstatement was impossible under the circumstances.

The whole of the cemetery is subdivided on plans, but such subdivision is not all plotted on the ground. To collect $10 a lot upon the land expropriated, the trustees would have to expend a certain amount of money.

Taking all the circumstances of the case into consideration, I will allow for the land taken, which, after proper allowance being made for roads, clearing, grubbing, seeding, etc., would sell at $10 a lot,—a sale spread perhaps over a number of years,—the

(1) See *Stebbing* v. *Metropolitan Board of Works*, (1870) L.R. 6 Q.B. 37; *Manmatha North Miller* v. *Secretary of State for India*, (1897) L.R. 24 Indian App. P.C. 177; *Secretary of State for Foreign Affairs* v. *Charlesworth Pilling & Co.* (1901) A.C. 373; Browne & Allan—Law of Compensation, 97, 153; Cripps on Compensation, 102, 103; Hudson on Compensation, 301, 302, 1192; Nichols on Eminent Domain, 212.

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lump sum of $600.00 and for the expenditure in the correction and alteration of roads, occasioned by the expropriation, together with the unsightly appearance of the land on the expropriated side, the total sum of $150.00, making in all the sum of $750.00.

There will be judgment, as follows, to wit:

1st. The lands expropriated herein are hereby declared vested in the Crown from the date of the expropriation.

2nd. The compensation for the land so taken, and for all damages resulting from the said expropriation is hereby fixed at the sum of $750, with interest thereon from the 21st September, 1917, to the date hereof.

3rd. The defendants are entitled to recover from the plaintiff the said sum of $750 with interest as above mentioned, in full satisfaction for the land taken, and for all damages resulting from the expropriation, upon their giving to the Crown a good and sufficient title free from all mortgages or encumbrances whatsoever upon the said property.

4th. The defendants are also entitled to the costs of the action.

Judgment accordingly.

Solicitor for plaintiff: *R. H. Murray.*

Solicitor for defendant: *Jas. A. Sedgewick*

IN THE MATTER of the Petition of

CHRISTIE BROWN CO., LIMITED, OF THE CITY OF TORONTO, IN THE PROVINCE OF ONTARIO, CANADA, 1920 September 7.

AND

IN THE MATTER OF A SPECIFIC TRADE MARK TO BE USED IN CONNECTION WITH THE MANUFACTURE AND SALE OF BISCUITS, CAKE, PUDDINGS, AND INFANTS' FOOD.

Trade-Marks—Names—Registration thereof.

Petitioners had manufactured biscuits, cake, puddings and infants' foods for a great number of years, and had adopted and used the word or name "Christie" as a trade-mark on labels and in advertising to denote and distinguish their goods. The word "Christie" had been used alone, not associated with the word "biscuits" or other words and had acquired a distinctive meaning.

Held, On the facts stated (following the decision of the Supreme Court, in the case of *Horlick Malted Milk* (1), that the word "Christie" should be registered as a specific trade-mark to be used in connection with the manufacture and sale of biscuits, cake, puddings and infants' foods.

PETITION praying for an order directing that the trade-mark "Christie" may be registered as a specific trade-mark to be used in connection with the manufacture and sales of biscuits, etc.

(1) Judgment rendered 1st May, 1917. Not reported.

Reporter's note.—In the case of the *Welch Company Limited*, decided the same day by Audette J. this case is referred to and followed, and the word "Welch's" was ordered to be registered.

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In Re CHRISTIE TRADE-MARK

Statement.

Reasons for Judgment.

In the petition it is alleged that petitioners are the proprietors of a trade-mark consisting of the word "Christie" which has been used by them for many years in connection with the manufacture and sale of Biscuits, Cake, Puddings and Infants' Food, manufactured and sold by them and which distinguishes said goods from similar goods manufactured and sold by others, which said trade-mark is known throughout Canada as denoting and distinguishing the goods of your Petitioners.

That the Petitioners made application to the Minister of Agriculture of the Dominion of Canada, for the registration of the said trade-mark as above described as a specific trade-mark to be used in connection with the manufacture and sale of biscuits, cake, puddings and infants' food, in accordance with the provisions of the Trade-Mark and Design Act.

That the Minister of Agriculture by letter dated December 15th, 1914, refused to register the said trade-mark on the grounds that it is a surname and could be registered only in accordance with an order from the Exchequer Court of Canada.

That as a matter of fact the word "Christie" has through long continued use and extensive sale acquired a secondary and trade-mark meaning denoting and distinguishing goods manufactured and sold by the Petitioners.

From several affidavits filed it is established that the petitioners have been manufacturing biscuits, cake and infants' goods for a great number of years and that the trade-mark "Christie" has been used by them to denote the goods manufactured by them and has acquired a distinctive meaning; that the said

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In Re CHRISTIE TRADE-MARK

Statement.

Reasons for Judgment.

word "Christie" has been used alone, and not the name of the petitioners' company, as a specific trade-mark aforesaid; and that said word "Christie" was not associated with the word "biscuits" or other words; and that, for a great number of years, biscuits manufactured by the Petitioners have had the word "Christie" alone stamped thereon and said word has been used in advertising and on labels to denote and distinguish the goods of the petitioners.

The application first came before the President of Court, on the 2nd. March, 1920, but was then enlarged to permit petitioners to furnish further evidence.

The application again came up on the 7th of September, 1920, and order for registration of the trade-mark as prayed for, was granted on the same day.

Russell Smart, counsel for petitioners.

THE PRESIDENT OF THE COURT, now (this 7th September, 1920), delivered judgment.

This application stood over with the view of furnishing further evidence. The petitioner has now shewn that for a great number of years the word "Christie" alone has been used on the biscuits manufactured by the firm. I should doubt very much the validity of such a trade-mark as the word "Christie" alone. My granting the order to register does not conclude any validity of the trade-mark, should an action be brought on the trade-mark, for contesting its validity. It has the effect merely of casting the onus upon the parties sued. In any event I find myself bound by the judgment of the Supreme Court of the 1st of May, 1917, in the Petition of the Horlick Malted Milk Co. to have their trade-mark "Horlick's"

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In re CHRISTIE TRADE-MARK

Reasons for Judgment.

registered. The Supreme Court have thought that they were entitled to register such a trade-mark and directed by their formal judgment that the word "Horlick's " be registered. The case of "Christie" is very much stronger than that of Horlick and I am bound by the judgment of the Supreme Court. I order that the word "Christie" as applied to biscuits, cake, puddings and infants' foods be registered as prayed.

Ordered accordingly.

MEMORANDA

Appeal has been taken to the Supreme Court in the following cases reported in this part and are still pending:—

1. BAUER CHEMICAL COMPANY, INC., VS THE SANATOGEN COMPANY OF CANADA.
2. THE KING, VS THE ONTARIO & MINNESOTA POWER COMPANY.
3. LOCOMOTIVE STOKER CORPORATION VS COMMISSIONER OF PATENTS.
4. { NEITZKE VS SECRETARY OF STATE.
   { WIEHMAYER VS SECRETARY OF STATE.
5. WOLFE COMPANY VS THE KING.

BETWEEN

THE BAUER CHEMICAL COMPANY, INC. ..... PLAINTIFF;

1920
Nov. 6.

AND

SANATOGEN COMPANY OF CANADA, LIMITED, AND WILLIAM WELLSTED BARRY ..... DEFENDANTS.

Trade-Marks, Title thereto—Custodian of Alien Property—Friendly Nation—War Measures Act.

B. and Co. were a German firm, operating in Germany but had branches of their business, under different names, in England and the United States. The trade-marks in question were registered in their name both in England and in Canada.

When England declared war, in 1914, the trade-marks registered there were avoided, and the British branch of business sold by the Custodian of Alien Property, and while the conditions of sale did not provide for the sale of the goodwill, it was subsequently inserted in the deed of sale.

When the U.S. entered the war,—the American business of B. and Co. who were owners of the Canadian trade-marks, was taken over by the American Alien Property Custodian, and later the stock and all assets of this company including the Canadian trade-marks, were by him sold to American citizens, who, with other shareholders, now constitute the plaintiff company.

Held, that by the sale of the American Alien Property Custodian to the plaintiff of all the assets of the German company aforesaid, the Canadian trade-marks in question passed to them and became their property.

2. Although the title was obtained by the plaintiff during the war, it was derived from the Government of a friendly nation, allied with Canada in the war, which purged it of any taint of German ownership, and was not adversely affected by anything contained in the Canadian War Measures Act, 1914, or any of the Orders in Council made thereunder.

3. That there being no privity of contract between those who purchased from the English Custodian and the defendants and moreover, as defendants cannot invoke *jus tertii* they have failed to prove any title to the trade-marks in question.

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THE BAUER CHEMICAL COMPANY INC. v. SANATOGEN COMPANY OF CANADA, LIMITED, AND WILLIAM WELLSTED BARRY.

Reasons for Judgment.

ACTION by plaintiff to restrain the defendants by injunction from selling or offering for sale their preparations under the trade-marks "Sanatogen" and "Formamint."

The case was tried at Quebec on the 5th and 6th days of August, 1920, before the Honourable Mr. Justice Audette.

Russell Smart and *J. Lorne McDougall* for plaintiff.

Louis Côté and *J. E. C. Bumbray* for defendants.

The facts are stated in the reasons for judgment.

AUDETTE J. now (November 6, 1920) delivered judgment.

By this action the plaintiff company seeks to restrain the defendants from infringing certain trade-marks and labels and from selling or offering for sale, in Canada, Chemical Pharmaceutical preparations under the trade-marks "Sanatogen" and "Formamint" or having thereon certain labels described in the trade-mark of 1912 hereinafter referred to.

The defendants, by their statement in defence, deny that the plaintiff company has any ownership in the said trade-marks, and they themselves make claim to the same in the manner hereinafter set forth.

On the 6th April, 1904, Bauer & Co., a co-partnership of Berlin, Germany, registered in Canada, a general trade-mark consisting of the word "Sanatogen."

On the 1st March, 1905, Luthe & Buhtz, of Berlin, Germany, registered in Canada, a specific trade-mark consisting of the word "Formamint" and on the 27th October, 1905, assigned the same to the said Bauer & Company, of Berlin. Germany.

Then on the 25th January, 1912, the latter, styling itself "Bauer & Cie," manufacturers and chemists, of 231 Friedrichstrasse, Berlin, Germany, trading also as The Sanatogen Company (A. Wulfing & Co.) of 12 Chenies Street, London, England, *registered in Canada in the name Bauer & Cie.*, trading as above mentioned, the specific trade-mark "Formamint," with label and device of a triangle containing the initials "A.W. & Co." and the facsimile signature "A. Wulfing & Co."

On the same day, the 25th January, 1912, the same party likewise registered in Canada, *in the name of "Bauer & Cie."* trading as above mentioned, the specific trade-mark of "Sanatogen" with label bearing the signature "A. Wulfing & Co." and the device of a shield provided with rays bearing the initials "S. Co."

Then the war between Germany and Great Britain broke out on the 4th August, 1914.

The German firm of Bauer & Cie., or Bauer & Company, according to witness Hehmeyer, is composed of John A. von Wulfing and Ernest Moeller; Wulfing being the senior partner and "the one with more money."

Hehmeyer, on behalf of the German firm, opened in the United States a regular branch office of the business, and later on a manufacturing plant. The manufacturing plant for "Formamint" was opened in 1913 and the Sanatogen manufacturing plant was decided to be erected in 1914, shortly after the outbreak of the war.

In 1914, owing to war conditions, Hehmeyer, the German agent in America, says he was given a new power of attorney superseding any other power of attorney limited in its powers, the new one being

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THE BAUER CHEMICAL COMPANY INC. v. SANATOGEN COMPANY OF CANADA, LIMITED, AND WILLIAM WELLSTED BARRY.

Reasons for Judgment.

more comprehensive and broader, and it was understood whatever Hehmeyer would do and say would have the sanction of his principal, the German firm.

Hehmeyer registered, under a partnership name in the United States as agent for Bauer & Co., carrying on business under the name of Bauer Chemical Co.

Then in June, 1916, Hehmeyer received a wireless from Bauer & Co., telling him to incorporate and pass the interest of Bauer & Co., to an incorporated company so that they would be the owners of the stock as that was the ultimate outcome. The German citizens remaining the owners, as shareholders in this new company. The principal reasons assigned for this incorporation was the alleged improvement in export facilities, as at that time the British black-list threatened to hamper their exports to other countries. The English branch of the German company having on the 11th May, 1916, under the Trading with the Enemy Amendment Act, 1916, been taken over by the English controller.

The new company was incorporated on the 26th July, 1916, and then on the 31st July, 1916, Hehmeyer made to the company an offer in writing, purporting to be on behalf of Bauer & Co., to transfer to the company all their American rights in North and South America to the products of "Formamint" and "Sanatogen." Hehmeyer testifies he had no specific instructions from Bauer & Co. to transfer the Canadian rights, but took it upon himself to do it under his general power of attorney, (Exhibit No. 10), thinking it was the best thing to do under the circumstances, in the interests of Bauer & Co. His idea, it is clear, was to save as much as he could for his German principal, knowing moreover that the Custodian of Alien Enemy property in England had taken

over the English business of A. Wulfing & Company and was controlling it, and knew it when he incorporated his American company. (See Exhibit "A").

The United States entered into the war on the 6th April, 1917.

Then, in June, 1918, the American business of this German company, carrying on business under the name of the company incorporated in July, 1916, was, under the provisions of the Act of Congress known as The Trading with the Enemy Act, taken over by the American Alien Property Custodian, and an order for sale of the same was made on the 23rd day of January, 1919. (Exhibit "B").

As a result of such proceedings, both the stock of the Bauer Chemical Co., Inc., and all the assets of the company were sold, by the Alien Property Custodian to three American citizens, Henry Pfeiffer, G. A. Pfeiffer and Garfred D. Merner, who now constitute,—with changes in the list of shareholders,—the Bauer Chemical Co., Inc., under which name they carry on their purchased business, and who claim the Canadian trade-marks which were transferred by Hehmeyer, agent of Bauer & Co., of Berlin, in 1916, and which they claim formed part of what they bought from the American Alien Property Custodian.

The war between Germany and England was declared on the 4th August, 1914, and was brought to a termination on the 10th January, 1920, as will be seen by the proclamation published in the "Canada Gazette" on the 29th March, 1920.

Therefore, it appears that, in England, the Official controller seized the business of the branch established by the Berlin firm of Bauer & Cie, avoided their trade-marks, forfeited and sold their business. In the United States, after entering in the war, the

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American branch of this Berlin firm, incorporated into a company, was also forfeited and sold and the present plaintiffs,—American citizens and an American company,—became the owners of the trade-marks held in the company's assets at the time they were sold and which were purchased by them from the American controller. *Continental Tire Co.* v. *Daimler* (1).

In Canada, Parliament enacted the War Measures Act, 1914, and further enacted thereunder a number of Orders in Council, the most important among them being that of the 2nd May, 1916, respecting Trading with the Enemy, (3 Sup. Proclamations O.C., relating to European war, 1558), and that of the 14th day of April, 1920, "Canada Gazette," 1st May, 1920) respecting the Treaty of Peace at Versailles.

Under this Canadian legislation, or otherwise,—after much labour,—I have been unable to find any enactment depriving the plaintiffs of the ownership of the trade-marks in question. There is no text of law dealing with a matter of this kind.

The sale by the American Custodian has purged any taint of German ownership, and the present plaintiffs,—an American company,—are entitled to the trade-marks in question. The action is based upon a sale, or title derived from the Government of a friendly nation allied with Canada in the war and the Canadian legislation and Orders in Council respecting Trading with the Enemy do not affect such a transaction.

In the case of *Porter* v. *Freudenberg*, In *re* Merten's Patent (2), Lord Reading, said (at p. 869): "In ascertaining the rights of aliens the first point for consideration is whether they are alien friends or alien

(1) [1915] 1 K.B. 893. (2) [1915] 1 K.B. 857.

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THE BAUER CHEMICAL COMPANY INC. v. SANATOGEN COMPANY OF CANADA, LIMITED, AND WILLIAM WELLSTED BARRY.

Reasons for Judgment.

enemies. *Alien friends have long since been, and are at the present day, treated in reference to civil rights as if they were British subjects,* and are entitled to the enjoyment of all personal rights of a citizen including the right to sue in the King's Courts."

Coming to the consideration of the defendants' right to the trade-marks in question and in respect of which they are sued for infringement, it will be sufficient, without going into the details of the several transactions in that respect, to state again that Bauer & Co., of Berlin, had also a branch of their business in England. When the war broke out, their trade-marks were avoided and their business seized and sold by the English Official Custodian. And while the conditions of sale did not provide for the sale of the good will, it was inserted in the deed of sale and the defendants claim that the Canadian trade-marks passed with such good will.

Hehmeyer testified that all trade-marks in question were the property of the Berlin partnership. However, with respect to the defendants' claim to the ownership of the trade-marks, it will be sufficient to say, whether or not such sale by the English Custodian dealt with or included the Canadian trade-marks, that they have absolutely failed to prove any title or proprietary rights thereto. Moreover, they cannot invoke *jus tertii,* the rights which could be derived from the sale by the Custodian in England. There is no privity between the defendants and those who purchased from the English Custodian, in London, England. All the defendant Barry did was to take the law in his own hands, and to assume and convert to himself the said trade-marks and assign them to a company formed by him and which, according to his own evidence, was himself.

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THE BAUER CHEMICAL COMPANY INC. v. SANOTOGEN COMPANY OF CANADA, LIMITED, AND WILLIAM WELLSTED BARRY.

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The defendants' claim to the trade-marks in question has not been proven.

Plaintiffs' counsel at bar, taking sec. 84 of the Order in Council of the 14th April, 1920, (C.G., 1st May, 1920) into consideration, declared he would be satisfied to limit the recovery of damages resulting from the infringement to the period after the termination of the war, and effect is hereby given thereto.

Under the circumstances, there will be judgment in favour of the plaintiffs, and they are at liberty and entitled to issue the injunction prayed for, the damages or the account of profits to be ascertained only from the date of the termination of the war. The whole with costs in favour of the plaintiffs.

Judgment accordingly.

Solicitors for plaintiff: *Fetherstonaugh & Co.*

Solicitors for defendant: *Louis Côté.*

BETWEEN :

1920
Oct. 14.
Reasons for Judgment.

HIS MAJESTY THE KING..... PLAINTIFF;

AND

JAMES LOONAN, LLOYD JAMES LOONAN, AND THE STANDARD AGENCIES, LIMITED..... } DEFENDANTS.

Expropriation—Defendants' title—Severance—Use by 'sufferance—Compensation.

Held, that where, by a previous expropriation, L's property was severed by the right of way of the Canadian Pacific Railway crossing it, and where L's. use of a culvert under their tracks as a passage from one parcel of land to the other was only by sufferance and without legal right or title, the fact that the expropriation takes land on each side of the said right of way and thus closes the access to the culvert, is not a severance of the property for which L. would be entitled to compensation, and nothing will be allowed for same in fixing the compensation under expropriation proceedings.

INFORMATION exhibited by the Attorney-General of Canada to have property taken for purposes of a hospital at Calgary valued.

The case was tried before the Honourable Mr. Justice Audette, at Calgary, on the 28th day of September, 1920.

Clifford F. Jones, K.C., for the plaintiff.

I. W. McArdle and *W. A. Davidson*, for Loonan Bros., defendants.

The facts are stated in the reasons for judgment.

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THE KING v. JAMES LOONAN, LLOYD JAMES LOONAN AND THE STANDARD AGENCIES, LIMITED.

Reasons for Judgment.

AUDETTE J. now (October 14, 1920) delivered judgment.

THIS is an information exhibited by the Attorney-General of Canada, whereby it appears, *inter alia*, that certain lands, belonging to the defendants, were taken by the Crown, under the provisions of The Expropriation Act, for the purposes of a hospital, by depositing on the 29th April, 1919, a plan and description of such lands in the office of the registrar of the Southern Alberta Land Registration District, at Calgary, in the province of Alberta.

The title to the land is admitted to be in the defendants, James Loonan and Lloyd James Loonan, subject to a mortgage in favour of the other defendant, the Standard Agencies, Limited.

By the information, the Crown offers for the lands so taken, the sum of $10,175.50—an amount already tendered, and being at the rate of $50 an acre. The defendants, by their statement of defence, claim the sum of $30,357.00.

The lands expropriated are composed of two parcels, separated from one another by the right of way of the Canadian Pacific Railway. The piece to the north of the railway contains 142.03 acres, and the one to the south 61.48 acres, making in all 203.51 acres.

This property, slightly over 1,100 acres, was at the time of expropriation and years previous, used as a ranch, with the exception of the piece adjoining the Bow River which was rented to Chinamen for gardening purposes and also for raising oats. The 900 odd acres were, previous to the expropriation, used as a ranch and rented as such for $300 a year. The whole ranch, four years previous to the expropriation, had been offered at $35 an acre.

As will be seen on looking at the plan, the Canadian Pacific Railway crosses the property and severs the northern part from the comparatively small piece to the south. There existed a severance of the property by the railway before the expropriation. The expropriation does not take the whole of the parcel lying between the railway and the Bow River,—leaving to the west 30 acres of the parcel south of the railway. It was claimed, at bar, that the parcel south of the railway was not absolutely severed before the expropriation, because, as stated by some witnesses, there existed a viaduct under the railway track connecting the south and north of the railway, through which cattle could easily pass. However, it turned out that the so-called viaduct is nothing but a large culvert, to conduct the waters of the creek under the railway; but it could formerly be used by the cattle and was so used. This state of things has been changed since the Crown has expropriated the piece of land immediately adjoining the railway to the north.

However, while this culvert was so used, as a means of access between these two pieces of property, there was no evidence adduced to show that the defendants had any legal right to use that culvert as such a means of access,—the reasonable inference being that they had been using it by sufferance without title, and that the railway could at any time fence in each side of the right of way, thus cutting off access.

Three witnesses were heard by each party respectively, and here follows a brief summary of their testimony. On behalf of the owners, witness Parslow values the land taken, without improvement, at $70 an acre, and contends the balance of the farm, about 911 acres, are damaged by the expropriation to the

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THE KING v. JAMES LOONAN, LLOYD JAMES LOONAN AND THE STANDARD AGENCIES, LIMITED.

Reasons for Judgment.

extent of $10 an acre, and the 30 acres, on the south-west, to the extent of $10 and $15 an acre. Henry Jones values the buildings at $1,400, the breaking of 140 acres at $5 an acre, and the land at $50 an acre. The property as a whole he values at $30 an acre, and the damages to the 911 acres remaining at $7.50 an acre. He values the lands expropriated from the Canadian Pacific Railway, taken at the same time as those in this case and for the same purposes, at $45 an acre—an amount which was accepted by the Canadian Pacific Railway.

George H. Johnston values the land taken at $50 an acre, and contends the 30 acres, above referred to, are depreciated to their full value. The depreciation of the 911 acres he placed at $6.25 an acre, and values the buildings at $2,300.

On behalf of the Crown, witness Clarry values the land taken to the north of the railway at $35 an acre, and to the south $40 an acre, and the buildings at $1,500, and adds that the 30 acres are depreciated 50 per cent. He cannot say, if any, by how much the balance of the farm is depreciated by the expropriation. Witness Thompson values the land taken at $50 an acre, including the buildings which he knows for 29 years. He values the depreciation to the 30 acres at $10 an acre, and testifies there is no depreciation to the 911 acres. Albert C. Johnston values the land taken at $35 an acre, and would not allow anything for the breaking of the land, adding that the thirty acres are possibly depreciated by $10 an acre.

The Canadian Pacific Railway, for lands of a similar class, accepted $45 an acre, including all damages, and the Crown tendered in this case at the rate of $50 an acre, including the buildings and for all damages.

Taking all the circumstances into consideration, I have come to the conclusion to allow as follows:

For the land taken, 203.51 acres, at the rate of $50 an acre	$ 10,175.50
For the buildings	1,500.00
For damages to the 30 acres, to the south west, at the rate of $10 an acre	300 00
For the breaking of 100 acres to the south at $5	500 00
Coming to the question of damages to the 900 odd acres, north of the lands taken, I consider that if the whole property were worth $30 an acre, and if $50 an acre is allowed for the 203 acres taken, this excess price of $20 an acre over the $30 for this piece so carved out of the whole property, offsets whatever damages or depreciation which might result from the expropriation to the parcel to the north.	
Making in all the sum of	$ 12,475.50

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

1st. The lands expropriated are declared vested in the Crown as of the date of the expropriation.

2nd. The compensation for such lands and property including all damages whatsoever resulting from the expropriation, is hereby fixed at the sum of $12,475.50 with interest thereon from the 29th day of April, 1919, to the date hereof.

3rd. The defendants, James Loonan, and Lloyd James Loonan, upon giving to the Crown a good and sufficient title to the lands expropriated, free from the mortgage to the Standard Agencies, Limited,

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THE KING v. JAMES LOONAN, LLOYD JAMES LOONAN AND THE STANDARD AGENCIES, LIMITED.

Reasons for Judgment.

and free from all other mortgages or incumbrances whatsoever, are entitled to recover from the plaintiff the said sum of $12,475.50 with interest as above mentioned. Failing the said defendants, James Loonan and Lloyd James Loonan to discharge the mortgage in favour of the Standard Agencies, Limited, the latter will be entitled to such part of the compensation monies as will discharge the said mortgage, and if any monies remain over and above the same, they shall be paid to the other two defendants, but always in the manner above mentioned.

4th. The defendants, James Loonan and Lloyd James Loonan are also entitled to their costs.

Judgment accordingly.

Solicitor for plaintiff: *J. W. McArdle.*

Solicitors for defendants, Loonan Bros. : *Jones, Pescod & Hayden.*

1920
Nov. 6.

IN ADMIRALTY

ON APPEAL FROM THE BRITISH COLUMBIA ADMIRALTY DISTRICT.

BETWEEN

THE *JESSIE MAC* AND OTHERS.... PLAINTIFFS
(Appellants)

AND

THE *SEA LION* AND OTHERS.... DEFENDANTS.
(Respondents).

Admiralty Law—Foul berth—Inevitable accident—Common harbour of refuge—Negligence.

A number of tugs with their tow, including the tug *J.M.*, had sought shelter in Trail Bay off the B.C. coast, recognized as a proper harbour of refuge.

The *J.M.* being first in, was tied to the shore in a safe position; three other tugs with their tow subsequently came in and tied alongside of her. At 2 a.m. the next day the *Sea Lion* and tow also sought shelter in the same bay, and anchored some distance out, but not far enough to allow her tow to swing clear of these boats and the shore. At 3 p.m. on the day of the accident the *Sea Lion* and her tow swung towards the Island with the tide and wind, and the tail end of the boom caught on the shore. At 9.30 p.m. the *Sea Lion* realizing she was dragging anchor, attempted by pulling at right angles to get her tow off the land, using the stern of the boom as a fulcrum. In so doing the boom parted and swung towards the tugs tied at the shore fouling the boom of the 2nd from the shore, breaking the eastern and centre shore wires fastening the *J.M.*'S boom to the shore, shoving the rafts and tugs to the west, and landing the *J.M.* on a rock and foundering her.

Held, (reversing the judgment appealed from) that there being ample space from which to select a safe anchorage, the act of the captain of the *Sea Lion* in electing to anchor where he did and in not allowing sufficient space between the *Sea Lion* and her tow and the other vessels on the shore to permit of his tow having a good, clear, swing-berth, showed a want of ordinary maritime skill and ordinary prudence and care and constituted his anchorage a foul berth.

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2. That having taken a foul berth endangering other crafts, the *Sea Lion* was in fault and liable.
3. That a manoeuvre is *prima facie* wrong if it creates a risk of collision; but the best test is that when it creates such a risk and eventually actually contributes to the accident, it then becomes a fault.
4. That a vessel not under way but fastened to the shore and moored in a position of safety, and exhibiting proper lights, is entitled to assume she is as safe as moored at a wharf or pier.

AN appeal from the decision of the Honourable Mr. Justice Martin, L.J.A., of the British Columbia Admiralty District, which dismissed the action of plaintiffs (1).

Hume Robinson K.C. for appellants.

Wallace Nesbitt K.C. for respondents.

The appeal was heard before the Honourable Mr. Justice Audette, at Ottawa, on the 19th day of October, 1920.

The facts are stated in the reasons for judgment.

AUDETTE J. now (November 6, 1920) delivered judgment.

THIS is an appeal from the judgment of the local Judge of the British Columbia Admiralty District, pronounced on the 9th day of April, 1919, dismissing the plaintiffs' action.

To properly understand the facts of the case and the circumstances of the accident, which are clear and simple, it is well to keep before our eyes the plan of the *locus in quo*, filed as exhibit No. 2.

Owing to strong westerly winds producing heavy sea in the open, a number of tugs, about ten in number, towing raft of logs, sought shelter in Trail Bay, under the lee of Trail Island, off Sechelt, where it is custom-

(1) Reported 19 Can. Ex. C. R. 78.

ary and proper to go for refuge in westerly winds; but unsafe with easterly winds, with perhaps the exception of the inside shore position between the S.W. point of the Island and a well known rock,—a position taken by the *Jessie Mac* upon her arrival in the Bay.

At various times between the 30th March and the 1st of April, 1918, inclusive, these tugs and rafts came into this haven. The *Jessie Mac* (39 tons net) was the first to come in, at about 3 o'clock a.m., on the 30th of March, and made fast to the shore with two 5/8 inch wires at the east end and centre and with one ½ inch wire at the west. Subsequently, the *Chieftain*, the *Stormer* and the *Volcan*, tugs of approximately the same size, came in with rafts and moored alongside the *Jessie Mac's* boom or rafts, in the manner, approximately shewn on Exhibit No. 2, with, however, some slight variations which have no bearing upon the case.

The *Sea Lion*, 129 feet long, 22 beam, drawing 15 feet, gross tonnage 218, with 46 swifters, in three rafts or booms, arrived on Sunday, the 31st March, at 2 o'clock a.m., and cast anchor at the place shewn on exhibit 2, and with westerly wind prevailing, her tow swung to eastward. She remained there all Sunday and the best part of Monday, when at 3 o'clock, p.m. on that day, her tow changed position, the tide having started to flood and the westerly wind having died out and a light wind having sprung from the northeast (p. 153), her tow swung to the west, in a southerly direction, and the tail end of the raft swung on the island and remained there fast, until 9.30 p.m. of the same day, when the Captain said he felt his anchor was dragging (148). Then being asked: "Q. And what did you do as a result of that?" (result of dragging anchor). "A. Well, I had to—

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when I was dragging my anchor I seen that was going to drag me into a very cautious position and I raised my anchor and steamed ahead." . . . . .

"Q. Now, what position did you take up—looking at the chart—is your position practically shewn there? "A. After I had raised my anchor I headed more to the eastward so as to draw my tow—and I used the stern of the boom for a fulcrum." . . . . "Q. And you used the stern of the boom as a fulcrum?" "A. Yes, I headed towards the eastward, and used the stern of my boom as a fulcrum to swing the boom—the whole tow, more to the eastward, so that I could draw it straight off, *so that the stern would not strike the boats on the beach.* In doing that the boom parted."

It is well to note, by way of testing his judgment and seamanship, that his raft went aground at 3 o'clock in broad day light in the afternoon, and that it is only at 9.30 p.m. when it is dark and his anchor is dragging that he ever awakes to the necessity of doing something. The boom parted at the end of the 9th swifter, leaving 6 swifters at the island. The tail end of the nine swifters, with the help of the tide and the wind, swung towards the four tugs and rafts fastened to the shore, and struck the head of the *Chieftain's* rafts. The two wires tying the *Jessie Mac's* rafts at the east and centre broke and the four tugs and rafts swung to the west, the western wire still holding, the *Jessie Mac* being dragged unto the rock shewn to the north west, she sunk and suffered damages for which she is now suing in the present case.

Some witnesses contend that these big tugs usually anchor far enough to clear the rock and the vessels fastened to the island (pp. 116, 137). Capt. Jones testifies that the trail of the tow fouling the shore, would indicate the *Sea Lion* was anchored too close.

Now the learned trial judge found that, under such circumstances, the accident was inevitable.

What is an inevitable accident? Marsden, Collision at Sea, 7th Ed., p. 18, says: "In the *Europa* (1), Dr. Lushington states that inevitable accident is 'where one vessel doing a lawful act without any intention of harm, and using *proper precautions*, unfortunately happens to run into another vessel.' Again it has been said, 'to constitute inevitable accident, it is necessary that the occurrence should take place in such a manner as not to have been capable of being prevented by *ordinary skill* and *ordinary prudence*. We are not to expect extraordinary skill or extraordinary diligence, but *that degree of skill* and that degree of diligence which is generally to be found in persons who discharge their duty. The Privy Council adopting the language of Dr. Lushington, defined inevitable accident to be 'that which a party charged with an offence could not *possibly* prevent by exercise of ordinary care, caution, and maritime skill, and this must now be regarded as an authoritative definition.' "

In Lowndes, Collision at Sea, pp. 98 et seq, almost the same definition is to be found, but it adds: "In the subsequent case of the *Locklibo* (2) the same principle was laid down in almost the same words: 'By inevitable accident, I must be understood, as meaning, a collision which occurs when both parties have endeavoured by every means in their power, with *due care and caution, and a proper display of nautical skill*, to prevent the occurrence of the accident.' Again in the case of *W. U. Moses* the same learned Judge defined inevitable accident to be 'that accident, that

(1) [1850] 14 Jur. 627, at p. 629.

(2) 3 Wm. Rob. 310, at 318.

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calamity, which occurs, without there being any *practicable means* of preventing its taking place; it is that accident which takes place when everything has been done which ordinary skill, care and ability could do to prevent the accident'." See also Williams' and Bruce's Admiralty Practice, p. 94.

What is the first and elementary duty of a captain picking out a berth? Todd & Whall, Practical Seamanship, under the chapter, intituled "Coming to An anchor," says at page 81: "Supposing many vessels are lying about, look out and pick out a good, clear swing-berth" and further on he guards against *bringing up close to other* vessels and against being too near the ground to be pleasant.

Marsden, p. 461: "In coming to an anchor caution must be used not to injure or embarrass other ships. A vessel rounding up to, so as to bring her head upon tide, should, before altering her helm, look round and see that all is clear, and that her manoeuvre will not endanger other ships." *The Ceres* (1); *The Shannon* (2); *The Philotaxe* (3).

Then at p. 462: "After *coming to an anchor*, those on board must show proper skill and seamanship in keeping their vessel from driving and endangering other crafts."

Lowndes, p. 76: "A ship which anchors too near another ship, so as to give her what is called 'foul berth,' or which neglects to drop a second anchor when she ought to do so, and when in a gale drifts foul of the other vessel, will be held answerable in damages."

The Secret (4): "Inevitable accident is where the collision could not have been prevented by *proper care* and seamanship in the particular circumstances of the case.

(1) [1857], Swab. 250.
(2) [1842] 1 W. Rob. 463.
(3) [1878] 37 L.T. 540.
(4) 1 Asp. N.S. 318.

"A defendant, in order to support a defence of inevitable accident, is bound to show that everything ordinary and usual was done which could and ought to have been done to avoid a collision."

See also *The Saima* v. *Wilmore* (1); *The City of Seattle* (2).

A number of cases bearing upon the facts of the case in question are hereafter cited:—

In Marsden's Collisions at Sea, 7th ed. article 29, p. 459, we find: "If one ship properly lighted (if at night) is fast to the shore, or lying at established moorings, it can scarcely happen that the other would not be held in fault for the collision (3).

Then at p. 460: "A ship in bringing must not give another a foul berth. If one vessel anchors there, and another here, there should be that space left for swinging to the anchor that in ordinary circumstances the two vessels cannot come together. If that space is not left, I apprehend it is a foul berth" (4).

In an American case it was held that a ship at anchor is entitled to have room to swing, not only with the scope of cable which she has out at the time when the other ship takes up her berth, but with as long a scope as may be necessary to enable her to ride in safety (5).

(1) 4 Lloyd's L.L. Rep. 218 et seq.
(2) 9 Ex. C.R. 146, at 152 et seq.
(3) See *The Secret* (1872), 1 Asp. M. C. 318; and *Culbertson* v. *Shaw*, 18 How (59 U.S.) 584; *Portevant* v. *The Bella Donna*, Newb. Adm. 510; *The Bridgeport*, 7 Blatchf. 361; 14 Wall. (81 U.S.) 116; *The Granite State*, 3 Wall. 310; *The Helen Cooper* and *R.L. Mabey*, 7 Blatchf. 378.
(4) Per Dr. Lushington in *The Northampton* (1853), 1 Spinks, Ece & Adm. 152, 160.
(5) *The Queen of the East and the Calypso*, 4 Bened. 103.

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"If a ship gives another a foul berth she cannot require the latter to take extraordinary precautions to avoid a collision. (1) It has been held that in the Mersey a cable's length between the two ships is a clear berth (2). This, however, cannot be laid down as a general rule, for at this distance a laden vessel riding to the tide might, in swinging, come dangerously close to a light vessel riding athwart the tide. And not only must a vessel *not bring up so close to another* as not to *giver her room to swing*, but she must not bring up in such a place that she *endangers* the other ship. She should not bring up directly ahead, or in the stream of another ship, having regard to the current and also the prevailing winds. If she brings up directly in the hawse of another ship, or elsewhere in the neighbourhood of another ship there should be such a distance between them that if either of them drives or parts from her anchors, she may have the opportunity to keep clear (3). Where a ship in bad weather, took up a berth two cables' length to windward of another, in an anchorage where there was plenty of room, and then rode with only one anchor down and that not her best, she was held in fault for a collision with the ship to leeward, against which she was driven when her cable parted in a heavy squall (4).....

"If a vessel takes up a berth alongside another where she takes the ground and falls over and injures

(1) *The Vivid* (1872), 1 Asp. M.C. 601; *The Meanatchy* (1897) A. C. 351.

(2) *The Princeton* (1878), 3 P.D. 90.

(3) The *Cumberland* (Vice-Ad. Court, Lower Canada), Stuart's Rep. (1858), p. 75; *The Egyptian* (1862), 1 Moore. P.C.N.S. 373.

(4) *The Volcano* (1844), 2 W. Rob. 337; *The Maggie Armstrong* and *The Blue Bell* (1866), 14 L.T. 340.

the other, she will be held in fault (1). A vessel voluntarily taking up such a berth in a dock does so at her own risk (2). So where two colliers were beached near each other for the purpose of discharging cargo, it was held that it was the duty of the last comer to moor head and stern, and in such a way as not to foul the other when the wind shifted (3)."

"The omission to warn a ship astern of her intention to bring up has been held neglect of a precaution required by the special circumstances of the case" (4).

"A tug in charge of an unwieldy tow of car floats in New York harbour was overpowered by her tow in a heavy squall, and, having let go her anchor, which did not hold, she drove against a third ship. It was held that she was in fault for not having an anchor that would hold her (5) p. 463.....

"Vessels navigating in an unusual manner or by an improper course do so at their own risk. p. 472.....

"A tug took her tow so close to a ship at anchor that, upon her suddenly altering her course to clear the ship at anchor, the tow line parted, and the tow fouled the ship at anchor. The tug was held in fault for the collision (6) p. 476.

In Lowndes, Collision at Sea, pp. 57 et seq.: "The next subject for consideration is the case where one of the colliding ships is at-anchor. Here, supposing

(1) The *Indian* and the *Jessie* (1865), 12 L.T. 586; The *George* and the *Lidskjalf* (1857), Swab. 117; *The America*, 38 Fed. Rep. 256; The *Addie Schlaeger*, 37 Fed. Rep. 382; The *Behara*, 6 Fed. Rep. 400.

(2) *The Patrioto* and *The Rival* (1860) 2 L.T. 301.

(3) *The Vivid* (1872), 1 Asp. N.S. 601.

(4) *The Philotaxe* (1874), 3 Asp. M.C. 512; and see *The Queen Victoria* (1891), 7 Asp. M.C. 9; *The Helen Keller*, 50 Fed. Rep. 142.

(5) *The J. H. Rutter*, 35 Fed. Rep. 365.

(6) *The City of Philadelphia* v. *Cavagnin*, 62 Fed. Rep. 617.

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that a proper light has been exhibited by the ship at anchor, the presumption of law is that the vessel which runs into her is in fault and the burden of enculpating herself rests with the latter." Thus, in the case of the *Percival Forster*, Dr. Lushington said: "She had anchored in a place respecting which no fault could be found, that is, she had a right to be anchored where she was. The result of that is, that if any vessel in motion comes into collision with her while at anchor, the burden of proof lies on the vessel so coming into collision, to show either the collision was inevitable from circumstances, or that the vessel at anchor was to blame. The justice of this, which is a rule of law, is obvious, because a ship lying at anchor has very little means of avoiding a collision; to a certain extent she may possibly manœuvre, but to a small extent; whereas the vessel driving up with the tide, whether under steam or sail, has much greater means of doing whatever may be necessary.

"Even though the ship should have been anchored in an improper place, the same rule must hold good.... Supposing a carriage be standing still, and be on the wrong side of the road, it would be no justification for another carriage, which might be on the right side of the road, to run into that carriage, if the driver could avoid it without risk to himself."

See also Pritchard's Admiralty Digest, p. 288, et seq, Nos. 884, 885, 886, 887 and 888.

See also *Culbertson* v. *Shaw* (1): "where a boat is fastened to the shore, especially at a place set apart for such boats, lights are not required." "A vessel tied to the shore is helpless." "Ordinary care, under such circumstances, *will not excuse a steamer for a wrong done*," etc.

(1) 18 How. Rep. 584 et seq: at page 587.

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In Parsons, on Shipping and Admiralty, Vol. 1, p. 573 et seq: "If a ship at anchor and one in motion come into collision, the presumption is, that it is the fault of the ship in motion, unless the anchored vessel was where she should not have been. The rule of law is the same when a vessel aground or one lying at a wharf, is run into..... If a vessel is at anchor, another must not anchor so near as to cause damage to her..... If a vessel about to get under way is so near to a vessel at anchor that there is danger of a collision, she should notify such vessel of her intention to get under way."

And in *The City of Seattle* (1), Martin, J. said: "Her position there was tantamount to that set in the preliminary act, that is to say, in being fast to the shore; and she was not a ship 'at anchor' or 'under way' within the proper meaning of these terms as understood by seafaring men.....She was moored .....in a position of safety and entitled to assume that she was safe.....

"The fact that.....was in the position I have referred to and that she was run down, as aforesaid, establish a *prima facie* case of negligence against the defendant ship that the rule of law set out in the case of *The Merchant Prince* (2), is properly invoked against her. That is to say, the defence has failed to sustain the plea of inevitable accident, because to do so it was necessary to show *what was the cause of the accident*, and that, though *exercising ordinary care and caution and maritime skill*, the *result of that accident was inevitable.*

The *Jessie Mac* fastened to the shore, not under way, moored to a position of safety, exhibiting proper light, was entitled to assume that she was safe.

(1) 9 Ex. C.R. 146, at 150 et seq. (2) [1892] P.D. 179.

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See also *The Bridgeport* (1), as to light, and *The Northampton* (2); Lloyd's List Law Reports, Vol. 4, p. 283; *The Ship Wandrian* (3); *The Helen Cooper* (4); *The Volcano* (5); *The Granite Slate* (6); *Neptune the Second* (7).

Having set forth, perhaps at too great a length, a number of cases and extracts from text books on the question at issue, let us follow the modern tendency of the courts and view the facts of the case in the light of the first principles of law that must guide in the present case. *Craig* v. *Glasgow Corporation* (8) —.

I am of opinion that the captain of the *Sea Lion* in selecting his berth,—he being the first of the 6 large tugs to come in at anchor in the open on the northwest of the island,—failed to show ordinary maritime *skill,* ordinary *prudence,* and failed to exercise *care, caution,* and maritime skill. As laid down by Todd & Wall,—and it is of ordinary common sense prudence for a mariner,—the first duty incumbent upon a captain bringing his vessel to anchor is to pick out a *good, clear, swing-berth* and to guard against bringing her up *close to another vessel* or the shore.

The berth selected by the *Sea Lion,* when there was plenty of space available, placed her in the position that if the tide turned and flowed to the west and if the wind, when changing from west, did change to southeast, instead of northeast as it did, she would swing unto the tugs fastened at the shore. It is too obvious. Looking at exhibit No. 2, placing a rule on the bow of the *Sea Lion*—although it should be placed above her anchor which is still more to the west, the tug and tow

(1) 14 Wall. (81 U.S.) 116.
(2) [1853], Spinks 152-160.
(3) 11 Ex. C.R. 1.
(4) 7 Blatch. 378.
(5) 2 W. Rob. 337.
(6) 3 Wall. (70 U.S.) 310.
(7) 1 Dodson 467.
(8) [1919] 35 T.L.R. 214, 216.

would swing directly north, west and south upon the well known rock and the four tugs and tow fastened to the shore. That alone would denote bad seamanship, want of ordinary maritime skill, etc.

However, the wind happened to shift from west to northeast and with the tide, the *Sea Lion's* tow swung upon the island, grounded hard and fast, on an exposed beach. This wrong anchoring, foul anchoring, resulted in taking the raft to the shore, moreover followed, as said by her captain, by the dragging of her anchor as too much stress was placed upon it from the grounding of the raft and the tide,—a position circumspect of consequences of danger. He then steamed up harder, as he said (p. 150) and pulled his raft at right angle, to the east, with the object of freeing her from the shore. Pulling thus at right angle especially with the tail end of the raft grounded at the beach,—placed a much heavier strain on the raft, as admitted in the evidence (pp. 173, 206) with the result that it broke at the end of the 9th swifter—leaving six swifters to the shore, that raft being of fifteen swifters altogether. The tail end of these 9 swifters swung to the west and struck the eastern end of the *Chieftain's* boom,—the 2nd from the shore—breaking the eastern and centre shore wires fastening the *Jessie Mac's* boom to the shore, and shoving the rafts and tugs to the west and landing the *Jessie Mac* on the rock and foundering her.

The following question was put to one of the expert witnesses for the defence: "Q. So, according to you, you would just as soon have your boom ashore as in open waters?" "A. No. No." "Q. Then it must be worse to have it ashore?" "A. Well, you try to keep it off, if you can." (p. 192. See also 137).

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The answer is obvious, although some witnesses contend it could be done. Some witnesses testified, in an irresponsible manner, that it was a proper manoeuvre to intentionally anchor close enough to the shore to allow the boom to come in contact with the beach and ground thereon. It is hard to believe good experienced mariners,—outside of a law suit—would assert such a proposition. Why! All seafaring men, mariners, worthy of the name—as a rule seek as much as possible to navigate in open waters and keep away from land. It was further contended at Bar, that one of the reasons why the *Sea Lion* dropped anchor where she did, was because she knew the island protected the four tugs fastened to the shore, in that the end of the rafts would be stopped by the island. Overlooking that if the raft had swung north, west and south, that then it came directly in contact with the rock and the four tugs at the shore.

However, the irony of such an afterthought and specious argument would not commend itself to a competent mariner. That was the cause of the accident; anchoring where he did eventually led to and created the accident. A manoeuvre is *prima facie* wrong if it creates a risk of collision; but the best test is when it creates such a risk and eventually actually contributes to the accident, and in that case it then becomes a fault. It is a bad thing to have your boom hung on the shore (p. 137) Good and, competent seamen and skippers always seek good, deep and open waters to manoeuvre—they always endeavour to get away from the shore and where there is plenty of water.

It is contended at bar that the *Sea Lion* had a right to anchor where she did. No doubt that *per se* she had that right; but having taken a foul berth endanger-

ing other crafts, she is responsible for all that might result therefrom. She anchored too close to the shore, too close to other vessels, and she did so at her own risk and peril and she must bear the consequences of a contingency to which she exposed herself. She must extricate herself at her own risk and peril. *The Hope* (1); *The Cape Breton* (2); *The Lancashire* (3); *The Patrioto* and *The Rival* (4).

A significant fact which should be noted is that when finally the *Sea Lion* succeeded in freeing her raft from the shore, she did not go back to her old anchoring. She anchored, according to her own reckoning, about 1,000 feet further out.

The want of due diligence in picking up a clear swung berth and the wrong and initial manoeuvre of the *Sea Lion* in anchoring at such a place, endangering other ships, dragging her anchor, etc., thus departing from good and cautious seamanship, destroyed the safe position and by her error and want of ordinary maritime skill, prudence, care and caution she became and was the cause of the accident—ignoring the dictates of good seamanship. She failed to show that degree of skill and that degree of diligence which is generally to be found in persons who discharge the duty of master on board ships and which amount in other words, to what is termed good seamanship. The tugs fastened to the shore, in a like position to vessels moored at a wharf or pier, had the right to expect that incoming large vessels anchoring outside, would anchor far enough to avoid colliding with them. If the *Sea Lion* had anchored far enough away from

(1) 2 W. Rob. 8.
(2) 9 Ex. C.R. 67, 116; 36 S.C.R. 564, 579; (1907) A.C. 112.
(3) 2 Asp. N.S. 202.
(4) [1860] 2 L.T. 301.

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the shore, as far as she did after the accident, her boom would have swung free from the shore and there would have been no accident.

Under the circumstances I am unable to adopt the finding of inevitable accident. An accident that can be avoided by mere ordinary seamanship cannot, in any manner, be termed inevitable. The fallacy of such a conclusion lies in the premises of the syllogism; *The Volcano* (1); the *Sea Lion* having been guilty of wrong and faulty seamanship, in anchoring as she did, as above set forth. She was primarily at fault in choosing her anchoring without first ascertaining she had a clear berth that would not endanger other ships. *The Ceres, The Shannon, The Philotaxe* (ubi supra). After coming to an anchor, her master had to show proper skill and seamanship, in keeping his vessel from driving and endangering other crafts.

The appeal is allowed and with costs.

Judgment accordingly.

Solicitor for appellants: *Hume B. Robinson.*

Solicitors for Respondents: *D. G. Marshall.*

(1) 2 W. Rob. 337.

QUEBEC ADMIRALTY DISTRICT.

1920
Oct. 6.

LOUIS WOLFE *et al*.....PLAINTIFFS;

VS.

SS. *CLEARPOOL*.....DEFENDANT.

Exchequer Court, Admiralty jurisdiction of—Damages—Breach of Contract—53-54 *Vict., Ch.* 27 (*Imp.*); 54-55 *Vict., Ch.* 29 (*Dom.*); 1-2 *Geo. V, Ch.* 41.

Plaintiffs were stevedores and had entered into a contract with the owners of the ship defendant to load the vessel on its arrival at the port of Montreal.

The captain of the ship refused to allow them to load the vessel in accordance with their said contract, and thereupon the ship was arrested on a claim for damages arising out of breach of said contract.

Held, that as the Admiralty jurisdiction of the Court is derivable from the Colonial Courts of Admiralty Act, 1890 (53-54 Vict. ch. 27 Imp) and the Admiralty Act, 1891 (54-55 Vict., ch. 29, Dom.) such jurisdiction is no greater than the Admiralty jurisdiction of the High Court of England.

2. That upon the facts the Court had no jurisdiction to entertain the present action.

ACTION in rem by plaintiffs, stevedores, to recover $1,700, damages alleged to have arisen out of a breach of their contract to load the ship defendant.

The case came up before this court, on a motion to dismiss the action for want of jurisdiction, on the 15th September and again on the 6th of October, 1920, before the Honourable Mr. Justice Maclennan, at Montreal.

A. Chouinard for plaintiffs.

Lucien Beauregard, for defendant.

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LOUIS WOLFE *et al* v. SS. CLEARPOOL.

Reasons for Judgment.

The facts and questions of law raised are stated in the reasons for judgment.

MACLENNAN D.L.J.A. now (6th October, 1920) delivered judgment.

This is an action in rem on a claim by the plaintiffs for breach of a stevedore's contract between them and the owners of the SS. *Clearpool*, the plaintiffs alleging that the captain of this ship, on its arrival in the port of Montreal, on or about 13th July, 1920, refused to allow them to load the vessel in accordance with their contract, whereupon they arrested the ship on a claim for $1,700 damages arising out of the breach of said contract. The ship has been released upon a bond and the defendant now moves for the dismissal of the action and all proceedings had therein upon the ground that this Court has no jurisdiction in an action of this kind.

The Exchequer Court derives its admiralty jurisdiction from two statutes, the Colonial Courts of Admiralty Act, 1890 (53-54 Vict., c. 27, Imperial), and the Admiralty Act, 1891 (54-55 Vict., c. 29, Canada.) From these statutes it is clear that the jurisdiction of the Exchequer Court, as a Court of Admiralty, is no greater than the Admiralty jurisdiction of the High Court in England. The expression "Admiralty jurisdiction of the High Court" does not include any jurisdiction which could not have been exercised by the Admiralty Court before its incorporation into the High Court or may be conferred by statute giving new Admiralty jurisdiction; *Bow McLachlan & Co.* v. *Camosun* (*owners*) 1).

(1) 79 L.J.P.C. 17; [1909] A.C. 597.

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LOUIS WOLFE *et al* v. SS. CLEARPOOL.

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The Admiralty Court has never exercised a general jurisdiction over claims for damages. Its jurisdiction was originally confined within well defined limits which have been extended by the Admiralty Court Act, 1840 (3-4, Vict., c. 65, Imperial) and the Admiralty Court Act, 1861 (24 Vict., c. 10, Imperial). Under section 4 of the latter Act the Admiralty Court was given jurisdiction over any claim for the building, equiping 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, but no provision was made in the statute giving jurisdiction to the Court to enforce a claim for damages for breach of a building contract, whether there was an arrest or not, and the Privy Council held in the *Camosun case*, that the Court did not have jurisdiction in such a claim. By the Admiralty Court Act, 1840, the Admiralty Court was given jurisdiction to take cognizance of all claims and causes of action of any person in respect of any mortgage of any ship, whenever such ship was under arrest by process issued from the Court of Admiralty or the proceeds of any ship having been so arrested have been brought into and were in the registry of the Court, and by the Act of 1861 the Court was given jurisdiction over any claim in respect of any mortgage duly registered according to the provisions of the Merchant Shipping Act, whether the ship or the proceeds thereof were under arrest of said Court or not. The *Camosun case* was an action on a mortgage in favour of the builders registered under the provisions of the Merchant Shipping Act, and it was held in that case that the Admiralty Court had no jurisdiction to enforce a claim for damages by the owners for breach of the contract for building the

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Reasons for Judgment.

ship either as a counter claim or as a set off against the amount due under the mortgage whether the claim were against the ship or against the builders.

By the Merchant Shipping (Stevedores and Trimmers) Act, 1911, 1-2 George V, chap. 41, claims for work done in respect of stowing and discharging on board or from any ship, the owners of which do not reside in the United Kingdom may be enforced as claims for necessaries in all Courts having Admiralty jurisdiction. This statute contains no provision for the enforcing of a claim founded on a breach of a contract in respect of stowing or discharging.

The plaintiffs' claim is clearly one for breach of a contract in respect of stowing and the principles which were applied by the Privy Council in the *Camosun case* on a claim for breach of contract for the building of a ship are applicable, in my opinion, to a claim for breach of a stevedore's contract.

In *Cook* v. *the SS. Manauence* (1), Chief Justice McColl, in the British Columbia Admiralty District of this Court, in an action for an alleged breach of contract to carry plaintiff from Liverpool to St. Michaels and thence to the Yukon Gold Fields, where proceedings were taken against the ship and a warrant of arrest was obtained, held that even if the breach alleged were established the plaintiff was not entitled to a lien on the ship and the action was dismissed.

In the case of *The Montrosa* (2), an action in rem for breach of a charter party originally brought in the City of London Court under the provisions of the County Courts Admiralty Jurisdiction Amendment Act, 1869, and transferred to the High Court by the order of the latter, Sir Samuel Evans said:—

(1) 6 Can. Ex. C.R. 193. (2) 86 L.J. Adm. 33.

"The Court could not have entertained the action if it had been originally brought in this Court, because it has not been entrusted with powers like those conferred on County Courts by the County Courts Admiralty Jurisdiction Amendment Act, 1869. Why that is so I do not know. Those interested in shipping have urged the extension of the powers of this Court to enable it to decide causes arising out of agreements made in relation to the use or hire of a ship, and also in relation to the sale and purchase of ships. It seems to me to be fitting that this should be done; but that is a matter for the Legislature. But if the City of London Court had jurisdiction to entertain the action, this Court by transferring the action to itself obtained jurisdiction to hear and determine it, notwithstanding that it could not have been instituted here originally."

I have examined the cases cited at the hearing and many others, but I have been unable to discover any case in which it was held that the Admiralty Court has jurisdiction to enforce a claim for the alleged breach of a contract between a stevedore and the owner of the ship. The owner is not a party to this action and, in my opinion, this Court had no jurisdiction to hear a claim of this kind whether against the ship or against the owner and the matter should be left to be settled in a Court having jurisdiction to entertain the claim.

For these reasons the plaintiffs' action must be dismissed with costs.

Judgment accordingly.

Solicitors for plaintiffs: *Poplinger & Chouinard.*

Solicitors for defendant: *Atwater & Bond.*

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Oct. 23.

BETWEEN:

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

AND

LYNCH'S, LIMITED, A BODY CORPORATE, AND THOMAS COZZOLINO..... DEFENDANTS.

Expropriation—Special adaptibility—Compulsory taking.

The property expropriated consisted of two lots of land one on which was a large bakery, and the other a vacant lot. The bakery was built on a slope, allowing of a high basement on the river side adjoining a siding of the railway, over which carloads of flour required for the bakery could be and were brought to their very doors, thus saving them haulage of freight.

Held; The special suitability of the property for the business there carried on by the owner, and the savings and additional profits derived thereby, are elements in assessing the compensation to be paid by the crown for a property expropriated. And, where there is such special suitability in a property, as compared to other neighbouring properties not so well situated for their own purposes, such property is of a special and higher value to the owners than the surrounding properties, and the court will allow them an additional amount over and above what was allowed for other properties in the neighbourhood, it being the value to the owner which must be taken into consideration.

2. Where an owner remains on the property after expropriation, and makes repairs to the buildings, and puts up temporary structures, he must assume the responsibility of such a course and its consequences, and nothing will be allowed him therefor.

3. Where the owners, owing to special adaptibility of the property to the business expropriated would obviously care to retain it, 10% will be allowed for compulsory taking thereof; but nothing will be allowed for compulsory taking of a vacant lot which was unimproved and from which no revenue was derived.

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THE KING v. LYNCH'S LIMITED, A BODY CORPORATE AND THOMAS COZZOLINO.

Reasons for Judgment.

INFORMATION exhibited by the Attorney-General for Canada to have the compensation for certain properties expropriated by the Crown, in the city of Halifax fixed by the Court.

W. H. Covert and *E. R. MacNutt*, for plaintiff.

J. McG. Stewart for defendants.

The case was tried before the Honourable Mr. Justice Audette, at the city of Halifax, on the 27th of July, 1920.

The facts are stated in the reasons for judgment.

AUDETTE J. now (October 23, 1920) delivered judgment.

This is an information exhibited by the Attorney-General of Canada, whereby it appears, *inter alia*, that certain lands, belonging to the defendants, were taken by the Crown, under the provisions of the Expropriation Act, for the purposes of the Canadian Government Railways, by depositing, on the 29th December, 1917, a plan and description of such lands in the office of the registrar of deeds for the county of Halifax, in the province of Nova Scotia.

The lands in question are situate in the city of Halifax between Barrington street and the dry dock, and no part thereof is under water, notwithstanding allegations to the contrary in the Information.

The extent of the area taken is in controversy between the parties. After hearing the evidence, I will accept the area of lot No. 23, at 7,025 feet, being the actual area covered by the building that had been thereon erected. With respect to lot No. 19, I find, under the evidence, that the defendants, both by

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THE KING v. LYNCH'S LIMITED, A BODY CORPORATE AND THOMAS COZZOLINO.

Reasons for Judgment.

themselves and by their predecessors, in title, had been in possession of an area of 11,960 feet for a period of upward of 20 years, and I fix the area at that figure.

A number of properties have been taken by the Crown, by the same expropriation, both on Barrington street and in that vicinity. In no case was there an amount over and above fifty cents a foot allowed for a number of other properties, together with a certain allowance for the foundation and quite a number were purchased at 20 cents a foot. All the proprietors of such lands have been satisfied with the Crown's tender and the present defendants are the only owners with whom the plaintiff has been unable to settle.

The catastrophe of the explosion which inflicted upon Halifax such disaster and upheaval occurred on the 6th December, 1917, that is 23 days before the expropriation and the properties expropriated had all been thereby badly shaken and wrecked. Part of the foundation of the defendants' property as well as the oven were left in a damaged state and compensation for the same is sought herein besides the value of the land.

The defendants were using the building erected on lot No. 23 as a large bakery, turning out between 300,000 to 350,000 loaves of bread in the year. The property, it must be admitted, was especially well adapted for the defendants' trade and business in that it was built on a slope from Barrington St., towards the railway, allowing a high basement on the river side, adjoining a spur or siding abutting to the back of this property, from which they received in car loads the flour required for their bakery. They, however, did not use the railway siding for the distribution of their bread or for small freight coming to them.

It is a well settled principle in expropriation matters that the most cogent evidence in arriving at the compensation for the land taken is the price which has been paid for similar properties in the vicinity within reasonable time from the date of the expropriation. The highest price paid for similar numerous properties, similarly situated on Barrington street, with the advantage of the slope and the access to the railway on the rear, was 50 cents a foot. *Fitzpatrick* v. *Township of New Liskeard* (1); *Dodge* v. *The King* (2).

On behalf of the defendants, one witness valued lot 23 at $1 a foot, while the witness heard by the Crown placed a value of 50 cents. I am unable to accept this extravagant valuation of $1, while I think that 50 cents a foot is about the real market price for that lot. But the value we seek to ascertain in the present instance, is the value to the owners who must be compensated for their loss. Through its special suitability for the business the owners were carrying on thereon, whereby for the purposes of their business they could realize savings in hauling their freight and thereby making additional profits, as compared to other properties not so well situated for their own purposes, this property was of a special and higher value to them than the actual market value thereof. And, as said in the case of *Pastoral Finance Association, Limited*, v. *The Minister* (3), the value of the property to the owners in such circumstances, is the amount a prudent man in the position of the owners would have been willing to give rather than fail to obtain it.

(1) 13 Ont. W.R. 806. (2) 38 Can. S.C.R. 149.
(3) [1914] A.C. 1083.

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Reasons for Judgment.

The defendants, on the 6th November, 1913, bought the two lots in question herein, with the building on lot 23, as excavated at date of expropriation, for the sum of $10,000, and there is no evidence upon the record that property has since increased in value at Halifax or that any boom in real estate has affected the value of the property. For lot No. 23, inclusive of the land and the excavation, I will allow, as a special value to the defendants in consideration of the special adaptibility to their business, the sum of 65 cents a foot, something like 15 cents a foot over and above what has been allowed for the other properties in the neighbourhood.

For the salvage value of the foundation and oven, including both stone and brick walls, which have ostensibly been badly shaken and wrecked by the explosion I will allow:—

For the walls.....	$ 5,666.12
and for the oven.....	1,800.00

The defendant Lynch testified he had leave to temporarily repair these foundations and remain in occupation for some time; but no satisfactory evidence has been adduced upon this question. He procured from the city his permit to build on the 28th of December, 1917, and the expropriation took place on the following day. By remaining upon the property and thus making repairs to the wall and putting up a temporary structure, the defendants assumed the responsibility of such a course and its consequences, thus waiving in advance any right to complain. *The King* v. *Thompson* (1); *Chambers* v. *London, Chatham and Dover Railway Company* (2).

(1) 18 Can. Ex. C.R. 23, at p. 30. (2) [1863] 8 L.T. 235; 11 W.R. 479.

Coming to the consideration of lot No. 19, which is a vacant and unimproved lot at the back of lot 23 and from which the defendants derived no revenue, I find, under the evidence, that an allowance of 20 cents a foot—a price paid for similar and perhaps better located property—would be a fair and just compensation. *Likely* v. *The King* (1).

The Crown, when tendering at 50 cents a foot for lot 23, and at 20 cents a foot for lot 19, had added thereto an allowance of 10% for compulsory taking. While I readily understand that this 10% might properly be allowed for lot No. 23—which had a special value to the owners for their business and that they would obviously care to retain its ownership—the same cannot be said with respect to the vacant lot No. 19. I will allow the 10% for compulsorily taking for lot 23; but no such allowance will be made for lot 19. *The King* v. *Hunting* (2).

Under all the circumstances of the case I have come to the conclusion of allowing for lot 23, as follows:

7,025 at 65 cents a foot, that is for the land with the excavation being of a special value to the owner.	$ 4,566.25
The salvage value of the oven	1,800.00
The salvage value of the walls, both of stone and brick, as damaged by the explosion	5,666.12
	$ 12,032.37
To which should be added 10% for compulsory taking	1,203.23
	$ 13,235.60

(1) 32 Can. S.C.R. 47.

(2) 32 D.L.R. 331; 27 D.L.R. 250.

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THE KING v. LYNCH'S LIMITED, A BODY CORPORATE AND THOMAS COZZOLINO.

Reasons for Judgment.

For lot 19:

11,960 at 20 cents a foot.....	2,392.00
Making in all.....	$ 15,627.60

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

1°. The lands and property taken herein are declared vested in the Crown as of the date of the expropriation.

2°. The compensation for the land and property taken and in satisfaction of all claims and damages arising out of the expropriation, is hereby fixed at the total sum of $15,627.60 with interest thereon from the 29th December, 1917, to the date hereof.

3°. The defendants, Lynchs,' Limited, upon giving to the Crown a good and satisfactory title free from the mortgage in favour of Thomas Cozzolino and free from all other mortgage and incumbrances upon the property, are entitled to recover the said sum of $15,627.60 with interest as above mentioned. Failing Lynch's, Limited, to procure a release of the Cozzolino mortgage, the latter is to be paid his mortgage from the said compensation, and whatever amount, if any, remains over, will be paid to the said Lynchs', Limited, subject always to the condition above mentioned.

4°. The defendants, Lynchs,' Limited, are also entitled to their costs.

Judgment accordingly.

Solicitor for plaintiff: *W. H. Covert.*

Solicitor for defendants: *W. A. Henry.*

IN THE MATTER OF THE PETITION OF RIGHT OF ARTHUR BILLARD, . . . } SUPPLIANT;

1920
Sept. 23.
Reasons for Judgment.

AND

HIS MAJESTY THE KING . . . . . RESPONDENT.

Petition of Right; Public Work; Grain elevator; Negligence.

B. was familiar with all machinery connected with grain elevators and the loading and unloading of grain, and on the occasion in question had been sent to one of the shovels (leg No. 2) to instruct a novice how to work it. This man worked the first shovel full without difficulty, but on the second trial it stopped, when B. gave it a jerk which started it. He was then standing with his face towards the platform and on turning round to return to work the rope or bight of the rope coiled around his leg and drew him to the iron block crushing his leg badly. No accident had ever occurred in connection with this machinery which had been in full operation for a very long time.

The machinery was inspected every morning and this particular shovel or leg had been inspected five minutes before the accident, and found in every way satisfactory; and no complaint had ever been made by suppliant in this regard.

Held; On the facts, that the accident was due to suppliant placing himself in the position he was in at the time of the accident, and that he was a victim of his own negligence and carelessness.

PETITION of Right seeking to recover the sum of $10,000 damages for personal injuries alleged to be due to the negligence of the Intercolonial Railway's employees.

The case was tried before the Honourable Mr. Justice Audette at the city of Halifax, on the 24th day of July, 1920.

J. E. Griffith, for suppliant.

J. S. Roper, for respondent.

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ARTHUR BILLARD v. THE KING

Reasons for Judgment.

The facts are stated in the reasons for judgment.

AUDETTE J. now (23rd September, 1920), delivered judgment.

The suppliant, by his Petition of Right, seeks to recover the sum of $10,000 damages for personal injuries caused by the negligence of the Intercolonial Railway's employees.

He had worked for the Intercolonial Railway, at loading and unloading grain at the elevator, from January to the 15th April, 1918, when he had left off. However, having come back upon the works on the last day of April, at foreman During's request, he then resumed the same class of work.

On the next morning, the 1st day of May, 1918, having gone back to work, he relates he was told by foreman During to take a new man at leg No. 2 of the elevator, and show him how to work it. This man worked the first shovel full all right he says, but the next time it stopped—he pulled again but it did not go. Then the suppliant said, pull it that way, with a jerk, and that time it started. When the suppliant pulled the rope, he was standing with his face towards the platform—he then turned around to go back, to get away, when the rope or the bight of the rope coiled around his leg, as he turned around to go to his work, and took him to the iron block where he was badly crushed. He further adds, on cross-examination, he really did not know himself how he was caught.

As a result of the accident, he was taken to the hospital, and his leg, after a few days, was amputated.

The suppliant contends that leg No. 2 of the elevator did not work well, was defective, and that he had complained about it to During, and to the oiling man,

Hartland, who inspects the machinery every morning. Hartland had inspected No. 2 five minutes before the accident. Both During and Hartland swear the suppliant never did complain to them about leg No. 2.

No accident had ever occurred at leg No. 2, which had been in full operation for a very long time in the past. And this question of defective machinery, in view of the disinterested testimony of both During and Hartland, as against that of Billard and others, cannot be given entire credence, especially in consideration of the circumstances of the accident, whereby it appears conclusively that Billard, for an experienced man in handling such machinery, had no business and no justification in placing himself in the position he was at the time of the accident,—that is, between the shovel and the block or machine. There was no justification for him to stand by that rope, between the shovel and the block,—he was the victim of his own negligence and carelessness.

It is testified by the suppliant's son that it is dangerous to stand between the two blocks. Witness Hartland says that the amount of slack in the rope depends upon the man himself operating the machine, and if anyone chooses to place himself between the shovel and the machine, he is there at his own risk.

The case cannot in any manner be brought within the ambit of Section 20 of the Exchequer Court Act, which requires, as a condition precedent to recovery, that the accident should be the result of negligence of some officer of the Crown acting within the scope of his duties and employment.

Having so found upon the facts, it becomes unnecessary to discuss the question of common employment (1). Furthermore, it also becomes unnecessary to

(1) *Ryder* v. *The King*, 9 Ex. C.R. 330, and 36 S.C.R. 462.

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ARTHUR BILLARD v. THE KING

Reasons for Judgment.

pass upon the improper manner in which the insurance was obtained,—by both antidating the document and having the signature of Billard authenticated by someone who was not present when he signed—together with the third question as to whether his acceptance of the insurance money does not estop him from setting up any claim inconsistent with the regulations governing his insurance. The Chief Justice of Canada, in re *Conrod* v. *The King* (1), says: "The suppliant, having accepted $250, the amount of insurance on the life of the deceased payable by the Association under the rules and regulations, is estopped from setting up any claim inconsistent with those rules and regulations, and therefore, precluded him from maintaining his action."

Therefore, there will be judgment declaring that the suppliant is not entitled to any portion of the relief sought by his Petition of Right.

Solicitor for suppliant: *J. E. Griffith.*

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

(1) 49 S.C.R. 577, at 581.

IN THE MATTER of the Petition of Right of

JAMES WILLIAM FLEMING.....SUPPLIANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

1920
Sept. 23.
Reasons for Judgment.

Petition of Right—Public Work—Negligence.

F. was a porter in the Post Office, at Halifax. and as such it was his duty to attend to incoming mail bags, some of which were pushed through a chute in the hall, to the basement. There was a door to the chute, and when open, as in this instance, a chain was across the opening as a warning, which was visible from the hall. It was also his duty to look after the strings by which the bags were tied, and he had frequently seen these strings break in the past, and knew they were at times defective. On the occasion in question, F. took hold of a bag, containing 27 or 28 empty bags, by the small string above referred to, giving it a powerful pull towards the chute, the string broke and he was thrown heavily against the chain protecting the opening, which gave way at one end, and he fell to the basement, injuring himself. It was not proved that the chain attachments were in a dangerous condition, but on the contrary, it was established that even if the attachments had been in perfect order, they could not have prevented the accident.

Held; On the facts, that there was no negligence on the part of any officer or servant of the Crown, and that the accident was entirely the result of suppliant's careless and imprudent conduct.

PETITION of Right seeking to recover damages from the respondent, for injuries alleged to be the result of negligence of respondent's employees in the Post Office building at Halifax.

The case was tried at Halifax, on the 29th of July, 1920, before the Honourable Mr. Justice Audette.

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JAMES WILLIAM FLEMING v. THE KING

J. Terrell for suppliant.

R. H. Murray for respondent.

Reasons for Judgment.

The facts are stated in the reasons for judgment.

AUDETTE. J., non (23rd September, 1920) delivered judgment.

The suppliant, by his Petition of Right, seeks to recover damages for bodily injury caused by the negligence of the respondent's employees in the Post Office building, at Halifax, N.S.

The accident in question occurred on the 2nd April, 1919, when the suppliant, a porter in the Post Office, at Halifax, was attending to the incoming mail bags, which were being brought from the street,—as shown by a plan of the *locus in quo*, filed as Exhibit No. 3.

Keeping this plan before our eyes, it is sufficient to say that the mail-bags, after being taken inside the building, were deposited on the floor of the hall. The bags containing letters were taken upstairs, by the elevator, which is to the right coming in. Having seen to this, he then gave his attention to the other bags that went to the basement through the chute in the hall, which is shown, at the end of the hall by the chain across the frame of the door opening into it. He then took a bag, (containing 27 to 28 empty bags) by the (small rope) string and pee and gave it a strong pull to move it towards the chute into the basement, and when at about 2½ to 3 feet from the chute, the string broke and with all the momemtum acquired from such a strong swing of the body, he struck with his shoulder the chain placed across the door of the chute. The chain gave way on one side owing

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to the weight and impact of his body; and the suppliant fell into the basement, sustaining serious bodily injury.

The suppliant was a porter whose duty it was to look after these mail bags and *push* them, as he says, under the chain into the basement. But he did not push this one, he pulled it. Had he pulled the bag to the orifice, as a prudent man would have done, and then pushed it into the chute, the accident would not have happened. Was not his way an unskilful way of handling the bag? Was he not doing his work in an awkward manner? His own evidence gives rise and justification for such an idea, when he tells us that those who were working with him complained that he was handling the bags with too much strength. He is a powerful and strong man. In addition to all this, one cannot overlook the unfortunate accident he had formerly met with, namely on the 12th July, 1918, when pulling a mail bag he had backed into the shaft of the elevator and fell to the basement on his head, when the elevator had gone up, and he had not even taken the elementary precaution to look before moving backward. He was severely injured in the first accident—he fell on his head and had both arms broken, and as a result of this first accident, he could not use his right hand to its full advantage.

He was in charge of these mail bags and it was his duty, as one of the porters, to look after those strings—and the bag in question was a Canadian bag.

He had seen such strings break in the past on several occasions, and he knew as a rule, he adds, "that the strings were bad."

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JAMES WILLIAM FLEMING v. THE KING.

Reasons for Judgment.

Coming to the question of the chain, it must first be said that this chain was placed across that door leading to the chute. That door was kept open in summer time, and it was when the door was open that the chain did show from the hall. Now the suppliant contends that this chain was nailed on the left side and screwed on the right. However, he asserts that the elevator-man, at his request, had repaired the side with the screws which were getting loose, and that he had filled the holes with matches and rescrewed them to their place. That is absolutely denied by the elevator-man, who says he has nothing to do with such work, that he attends to the elevator, is not a porter, and further that he had nothing to do with the repairs in the building. Umlah, this elevator-man, swears with emphasis that it is untrue Flemming ever asked him to repair this chain, and that he never screwed it before.

From the testimony of Flemming, which is so strongly denied by Umlah, who is a disinterested witness, it is impossible to find positively that these screws in the chain were ever loose or had been so replaced and, indeed, from what is said of Flemming's strength, it would appear he would, on the occasion in question, have pulled off the chain, whether in good or bad condition, by his manner of tugging at the bags and throwing his shoulder on the chain with such strength.

While it may be said to be the master's duty to take reasonable care and to make reasonable effort to provide a safe place and safe machinery in which and with which the servant is to work, he does not guarantee that the place and machinery shall be absolutely safe. (1)

(1) *Scott* v. *London & St. Katherine Dock Co.* (1865), 3 H. & C. 596, 601, 140 R.R. 627, 631.

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Reasons for Judgment.

There was a door at the chute, and for greater prudence the government had a chain placed across, more as a warning not to go beyond, than with the idea of placing there a bulwark that would withstand the assaults and attacks of a strong man. The mere fact of a chain breaking off or unscrewing is not prima facie evidence of negligence (1).

Had the suppliant looked to the string, and it was subject to his official inspection, before tugging at it with such strength,—had he drawn the bag to the orifice of the chute, instead of endeavouring, in an awkward manner accentuated by limbs affected by his first accident, he would not have taken the chain across the door as a bulwark against which he could throw himself, but merely as a sign or notice of danger and acted accordingly. In other words, had he acted as an ordinary prudent and careful man the accident would have been avoided.

The case cannot in any manner be brought within the ambit of sec. 20 of the Exchequer Court Act, which requires, as a condition precedent to recovery, that the accident should be the result of the negligence of some officer of the Crown acting within the scope of his duties and employment.

Having so found upon the facts, it becomes unnecessary to consider the question of common employment (2).

(1) *Haywood* v. *Hamilton Bridge Works Co.*, 7 Ont. W.N. 231; *Hanson* v. *Lancashire & Yorkshire Ry. Co.*, (1872) 20 W.R. 297. *Courteau* v. *The King*, 17 Ex. C.R. 352.

(2) *Ryder* v. *The King*, 9 Ex. C.R. 330; 36 S.C.R. 462.

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JAMES WILLIAM FLEMING v. THE KING.

Reasons for Judgment.

I have, therefore, come to the conclusion that there is in this case no proof of negligence on behalf of an officer of the Crown, and that the accident was entirely the result of the suppliant's careless and imprudent conduct.

There will be judgment declaring that the suppliant is not entitled to any portion of the relief sought by his Petition of Right.

Solicitors for suppliant: *James Terrell.*

Solicitors for respondents: *Murray & McKinnon.*

1920
Oct. 23.

IN THE MATTER OF THE PETITION OF RIGHT OF WILLIAM J. YATES, OF THE TOWN OF NEW LISKEARD, IN THE DISTRICT OF TEMISKAMING, IN THE PROVINCE OF ONTARIO, MERCHANT..... SUPPLIANT;

AND

HIS MAJESTY THE KING..... RESPONDENT.

Exchequer Court—Jurisdiction—Injurious affection—Tort—Expropriation of Easement.

Y. by his petition alleged that respondent constructed a dam at the south end of Lake Temiskaming which was operated by the Department of Public Works for the Dominion of Canada and which raised the level of the water in the lake, flooding part of Y's. land, and injuriously affecting his property. No part of his property, which is some 80 miles from the dam, was taken, nor was any easement to flood expropriated. It is not alleged the flooding was the result of the negligence of any officer or servant of the Crown.

Held, That sub-sections (A) and (B) of section 20 of the Exchequer Court Act must be read together, as they deal with questions of compensation, and not damages, i.e., the indemnity recoverable by owners for lands compulsorily taken, or injuriously affected by expropriation.

The Crown, in this case, not having expropriated any part of suppliant's property or any easement to flood the same, the case did not come within the ambit of said section and the court had no jurisdiction to entertain the claim under the Expropriation Act or any other provision of law.

2. *That* the action being for the recovery of damages to land, sounded in tort, and apart from special statutory authority no such action will lie against the Crown.

THIS case came before this court under the provisions of rule 126 for argument on points of law raised in the pleadings.

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Reasons for Judgment.

The argument was heard before the Honourable Mr. Justice Audette at Ottawa on the 19th day of October, 1920.

C. J. R. Bethune, for suppliant.

W. D. Hogg K.C., for respondent.

The points of law involved and the facts necessary for the understanding of the matter are stated in the reasons for judgment.

AUDETTE J. now (October, 23, 1920) delivered judgment.

This matter comes now before this Court, under the provisions of Rule 126, for the disposal of the points of law raised by the fifth paragraph of the Statement in Defence, which reads as follows: "The petition of right does not disclose any cause of action within the jurisdiction of this Honourable Court which entitles the suppliant to the relief sought herein."

The suppliant, by his Petition of Right, claims to be the owner of certain parcels or tracts of land in the town of New Liskeard, which, it is alleged, as the result of the construction, by the respondent, of a dam at the southern end of Lake Temiskaming, have been overflowed and flooded.

The dam in question has been constructed in or about the month of August, 1912, and is operated by the Department of Public Works for the Dominion of Canada, and it is alleged that the effect of such construction has been to raise the level of the waters of Lake Temiskaming, thereby creating the damages complained of herein.

The action is for the recovery of damages to land and is therefore in its very essence one sounding in tort. Apart from breach of contract or from special statutory authority, no such action will lie against the Crown.

As between subject and subject there can be no doubt that a right of action would exist in a case like the present one, but the law is different as between the subject and the Crown.

The respondent, in the present case, has not expropriated (The Expropriation Act, R.S.C. 1906, ch. 143, sec. 2, sub-section f.-sec. 3) the easement to flood the suppliant's land and it therefore follows that the Court has no jurisdiction to entertain the claim under the Expropriation Act.

The case does not come within the ambit of sec. 19 of the Exchequer Court Act, which as defined in the Supreme Court of Canada in the case of *Gauthier* v. *The King*, (1) merely recognizes pre-existing liabilities, *in posse*, of the Crown and confers jurisdiction upon the Court only to regulate the remedy and the relief to be administered.

Can it be said that the case comes within the provisions of sec. 20 of the Exchequer Court Act?

The suppliant seeks to rest his case upon sub-sec. (b) of this section 20; but that contention has already been answered by the decision of the Supreme Court of Canada in *Piggott* v. *The King*, (2) when His Lordship the Chief Justice, says: "Paragraphs (a) and (b) of sec. 20 are dealing with questions of compensation, not of damages."

(1) 56 Can. S.C.R. 176, at pp. 182, 190.
(2) 53 Can. S.C.R. 626.

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"Compensation is the indemnity which the statute provides to the owner of lands which are compulsorily taken in, or injuriously affected by, the exercise of statutory powers."

And His Lordship, Mr. Justice Anglin, in the same case, at pp. 632 and 633, says: "As to clause (b) of section 20 of the Exchequer Court Act, invoked in this court by the suppliant, damage to property sustained in the course of construction of a public work, through negligence or otherwise, is not 'damage to property injuriously affected by the construction' of such public work."

Therefore the present claim does not come either under sub-secs. (a) or (b) of sec. 20.

Does the case come under sub-sec. (c) of sec. 20, repeatedly passed upon by this Court and the Supreme Court of Canada?

To bring this case under the provisions of sub-sec. (c) of sec. 20, the injury to the property must be the result of some negligence of an officer or servant of the Crown while acting within the scope of his duties and employment.

No such negligence is even alleged upon the pleading.

The law and jurisprudence upon the subject matter under consideration is now well settled and as said by His Lordship Sir Louis Davies, at p. 553, re *Chamberlin* v. *The King* (1): "With the policy of Parliament we have nothing to do. Our duty is simply to construe the language used, and if that construction does not fully carry out the intention of Parliament, and if a wider and broader jurisdiction is desired to be given, the Exchequer Court Act can easily be amended."

(1) 42 S.C.R. 350.

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In the result, following the numerous decisions upon this point of law given by the Supreme Court of Canada and my own view expressed in the case of *Poisson* v. *The King* (1); and *Hopwood* v. *The King* (2), it must be found the suppliant is not entitled to any portion of the relief sought by the Petition of Right herein.

Solicitor for suppliant: *C. J. R. Bethune.*

Solicitors for respondent: *Hogg & Hogg.*

(1) 17 Ex. C. R. 371. (2) 16 Ex. C.R. 419.

1920
Nov. 11.

QUEBEC ADMIRALTY DISTRICT.

CHARLES A. FINNIGAN.....PLAINTIFF;

VS.

SS. *NORTHWEST*.....DEFENDANT.

Shipping—Jurisdiction—Action on mortgage—Registration according to Merchant Shipping Act—Amendment—Costs.

Action in rem, to recover balance due on a Deed of Mortgage, executed at Buffalo and registered there according to the law and regulations of the state of New York. The ship was arrested and subsequently released on bail. After other proceedings had in the cause, defendant moved for an Order to set aside the writ of summons, etc., for want of jurisdiction. On the hearing F. moved to amend, which amendment was in substance an allegation that defendant undertook to have the ship placed under Canadian Register and to mortgage the ship, which he failed to do. The ship was not under arrest or seizure at the time of the institution of this action.

Held; On the facts, that in as much as the Admiralty Court possessed no original jurisdiction over mortgages of ships, and that by the Admiralty Court Act, 1840 (3-4 Vict. ch. 65, Imp.) the Court was only given jurisdiction in respect to mortgages, when the ship or proceeds thereof were under arrest by process from that court; and that later by Admiralty Court Act, 1861 (24 Vict., ch. 10, Imp.) the High Court of Admiralty was given jurisdiction over claims in respect of any mortgage duly registered according to the provisions of the Merchant Shipping Act, 1854, whether the ship or proceeds thereof were under arrest of the Court or not, the Court is without jurisdiction to entertain the present claim.

2. In as much as by his proposed amendment, the plaintiff endeavours to add a claim for damages for breach of contract to grant a mortgage, which claim could not be entertained by the court, the plaintiff will not be allowed such an amendment.

3. That where defendant could have made his motion at an earlier stage and thus saved the parties useless proceedings and expense, he will only be allowed the costs of action up to the time he could have so moved.

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Reasons for Judgment.

ACTION in rem against S.S. *Northwest* claiming by endorsement on the writ of summons the sum of $76,997.62, balance due on a deed of mortgage executed at Buffalo and registered there according to the laws and regulations of the state of New York.

The matter came before the Honourable Mr. Justice Maclennan, Deputy Local Judge in Admiralty, by way of motion to dismiss for want of jurisdiction, at Quebec, on the 25th day of September, 1920.

Thomas Vien K.C., for plaintiff.

Louis S. St. Laurent and A. C. M. Thomson, for defendant.

The facts are stated in the reasons for judgment.

MACLENNAN D. L. J. A. now (November 11, 1920) delivered judgment.

THIS is an action in rem against the S.S. *Northwest* and by the endorsement on the writ of summons the plaintiff claims the sum of $76,997.62 for the balance due on a certain deed of mortgage executed at Buffalo, on the 19th day of November, 1918, payable in American funds at Buffalo on the 1st of July, 1919, with interest at six per cent (6%) and for costs. The ship was arrested and released on bail, pleadings were filed and some other proceedings were had in the cause. The defendant now moves for an order to set aside the writ of summons, the service thereof and the warrant and the seizure thereon, the defendant's bail released and the action dismissed with costs on the ground of want of jurisdiction of this Court to hear and decide the present cause. On hearing

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of this motion the plaintiff moved for leave to amend the endorsement on the writ of summons by adding the following words:—

"the whole as completed and amended by a memorandum of terms of settlement of mortgage claim of Charles A. Finnegan against the steamer *Northwest* and John F. D'Arcy, dated November the 10th, 1919, by which the defendant Charles A. Barnard undertook to have the said steamer *Northwest* placed on the Canadian register, and a first mortgage on such vessel registered on the Canadian Register against the said steamer *Northwest*, to secure in favour of the plaintiff in this case the payment of the above mentioned mortgage."

and by adding certain paragraphs to statement of claim alleging at greater length the matters referred to in the proposed amendment of the endorsement of the writ.

The Admiralty Court possessed no original jurisdiction over mortgages of ships, but by the Admiralty Court Act, 1840 (3-4 Vict., chap. 65, Imp.) section 3,—the Court was given jurisdiction over claims or causes of action in respect of any mortgage of a ship whenever such ship or the proceeds thereof were under arrest by process issued from the Court of Admiralty, and by the Admiralty Court Act of 1861 (24 Vict., chap. 10, Imp.) section 11, the High Court of Admiralty shall have jurisdiction over any claim in respect of any mortgage duly registered according to the provisions of the Merchant Shipping Act, 1854, whether the ship or the proceeds thereof be under arrest of the said Court or not. The Merchant Shipping Act, 1854, is now replaced by the Act of 1894. The jurisdiction of the Exchequer Court as a Court of Admiralty in cases on mortgages is derived from the Imperial

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Statutes of 1840 and 1861 above referred to. The mortgage upon which the present action is brought was executed at Buffalo, in the State of New York, U.S.A., on 9th November, 1918, and was registered in the office of the Collector of Customs for the Port of Buffalo, N.Y., on 19th November, 1918, according to the law and regulations of the state of New York. The pleadings and mortgage on their face show that the mortgage upon which this action is based is not a mortgage registered according to provisions of the Merchant Shipping Act, but is a mortgage registered according to the law and regulations of the state of New York. The ship was not under arrest or seizure at the time of the institution of this action, and, unless the plaintiff is entitled to amend by alleging a new cause of action over which the Court has jurisdiction, the defendant's application for dismissal of the proceedings will have to be granted. The plaintiff's proposed amendment is in substance an allegation that Charles A. Barnard undertook to have the ship placed under Canadian register and to mortgage the ship in favour of the plaintiff and that he has failed so to do. Any claim which might be based on the failure of the owner to carry out an agreement to grant a new mortgage must necessarily be in the nature of damages for the non-execution of the agreement, or, in other words, for the breach of a contract by which the owner of the ship undertook to grant a mortgage after the ship had been registered in Canada. This ship was brought from Buffalo to Quebec where certain repairs were made and the ship was registered on the Canadian register under a new name, but a new mortgage has not been executed in favour of plaintiff. The question therefore arises as to the jurisdiction of the Court to deal with a claim for the

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breach of a contract to grant a mortgage. If the Court has no jurisdiction in such a claim, the plaintiff's motion to amend should not be granted. The Admiralty Court has never exercised a general jurisdiction over claims for damages and its jurisdiction was originally confined within well defined limits which have been extended by the Admiralty Court Acts of 1840 and 1861. Neither of these Statutes give jurisdiction on a claim for damages arising from breach of contract.

In the case of *Bow, McLachlan & Co.* v. *Camosun (owners)* (1), it was held in the Privy Council that the Admiralty Court had no jurisdiction in a claim for the breach of a contract to build a ship whether there was an arrest or not, although the Court, under section 4 of the Imperial Statute of 1861, had jurisdiction over any claim for the building of a ship if, at the time of the institution of the action, the ship or the proceeds thereof were under arrest of the Court. In my opinion, the same principles apply on a claim for damages for breach of a contract to grant a mortgage and, holding that opinion, I must come to the conclusion that the plaintiff is not entitled to amend the endorsement on the writ and the statement of claim.

At the hearing plaintiff submitted that defendant's motion to dismiss for want of jurisdiction came too late and should not be entertained. The defendant's objection is that under the statute there is absolute absence of jurisdiction which is quite a different thing from a mere technical objection which could be waived by appearance and other proceedings—in the action. In the case of *Stack* v. the barge *Leopold* (2),

(1) 79 L.J.P.C. 17, 1909, A.C. 597.
(2) 18 Can. Ex.C.R. 325.

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I held that an objection to the jurisdiction could be raised at the trial and, upon the authorities cited in that case, I am of opinion that this objection to defendant's motion is unfounded.

As I have come to the conclusion that the record shows that the action is based on a mortgage not registered under the Merchant Shipping Act, the Court is without jurisdiction. Defendant's motion to dismiss could have been made at an earlier stage which would have saved some useless proceedings and expense to the parties.

There will therefore be judgment dismissing the action, setting aside the arrest and releasing the bail, with costs of defendant's motion to dismiss and with the general costs in the action up to and including the release of the ship on bail; and the plaintiff's motion to amend the endorsement on the writ of summons and the statement of claim will be dismissed with costs.

Solicitor for plaintiff: *Thomas Vien K.C.*

Solicitor for defendant: *Lewis St. Laurent K.C.*

1920
Nov. 19.

IN THE MATTER OF GRAY DORT MOTORS, LIMITED,

AND

IN THE MATTER OF A SPECIFIC TRADE-MARK CONSISTING OF A ROUND CIRCLE IN THE CENTRE OF WHICH ARE THE WORDS "GRAY DORT", THE BORDER OF THE SAID TRADE-MARK BEARING THE WORDS "OWN A" AT THE TOP, AND WORDS "YOU WILL LIKE IT," AT THE BOTTOM.

Trade-Mark—Company's name—Secondary meaning—Advertisement.

Petitioners were incorporated in October, 1915. Since then they have done a large business in motor cars, and have used a trade-mark consisting of a round circle in the centre of which are the words "Gray Dort", the border of the said Trade-Mark bearing the words "Own a" at the top, and the words "You will like it," at the bottom.

Held; That, had the petitioners used as their trade-mark the words "Gray Dort" alone, their five years user would have entitled them to have had the same registered as a trade-mark, and, in view of that, the fact of their using additional words as above mentioned, in connection therewith, should not have the effect of vitiating their right to register, and that the trade-mark as described and used should be registered. H. G. Burford & Company's trade-mark "Burford" (1919) Ch. D. 28, referred to.

PETITION of the Gray Dort Motors, Limited, praying for an order of this Court directing the registration of the words "Gray Dort" in the middle of a circle on the border of which are the words "own a" at the top, and "You will like it," at the bottom, as a trade-mark to be used in the sale of their motors.

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In re GRAY DORT MOTORS LIMITED, TRADE-MARK.

Reasons for Judgment.

The petition was first heard by the Honourable Sir Walter Cassels at the city of Ottawa on the 14th day of May, 1920, and enlarged sine die to allow petitioners to submit authorities. The matter was again spoken to on the 11th November, 1920.

M. G. Powell, for petitioners.

No one appearing for the Minister of Trade and Commerce.

The facts are stated in the reasons for judgment.

THE PRESIDENT OF THE COURT, now (November 19, 1920) delivered judgment.

The petitioners, Gray Dort Motors, Limited, are a Canadian corporation having their head office in the city of Chatham. They were incorporated on the 25th October, 1915. They ask for registration of a specific trade-mark consisting of a "round circle" in the centre of which are the words "Gray Dort,"—the border of the said trade-mark bearing the words "Own a" at the top, and the words "You will like it" at the bottom.

The advertisement required before the application is made states that notice is given that a petition of "Gray Dort Motors, Limited," etc., that a certain trade-mark described in said petition consisting of a circle in the centre of which are the words "Gray Dort," the border of the said trade mark bearing the words "Own a" at the top, and the words "You will like it," at the bottom, be registered.

A large number of affidavits have been filed showing that a large business has been built up, and that this specific trade-mark, including the words above the circle, have been attached to every motor sold.

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In re GRAY DORT MOTORS LIMITED, TRADE-MARK.

Reasons for Judgment.

For a considerable time I had doubts whether a trade mark, such as I have described, contained the essentials of a trade mark, having regard to the fact of these words "Own a," and "You will like it," being included as part of the trade-mark.

The Privy Council, in the case of the *Standard Ideal Co.* v. *The Standard Manufacturing Co.*, (1) have practically stated that under the subsequent sections of the Trade-Mark Act, there must be the essentials of a trade-mark, and that our decisions followed the line of decisions in England.

In the case of *Perry Davis & Son* v. *Lancaster Harbord* (2), the application was made for the registration of the words "Pain Killer." It is true the cases differ to a certain extent, but on one point their Lordships agree that what was used as the trade-mark was not the words "Pain Killer" alone, but "Perry Davis' Vegetable Pain Killer." Lord Halsbury, for instance, at page 320 states as follows:

"Now, finding this difficulty in his way, the learned counsel contended that the word 'pain-killer' alone, dissociated from everything else, was what had been used. As a matter of fact I find against him on that, as each Court in turn has found against him. The evidence negatives it. It appears to me that which was registered as a trade-mark was used as a trade-mark together with the words 'Perry-Davis, and 'vegetable,' the one set of words forming, to my mind, just as much part of the trade-mark as the other."

Lord Herschell says at page 322:

"Now, how has the appellant in this case marked, identified or distinguished his goods? Not merely by putting upon them the words 'Pain Killer,' but by

(1) 1911, A.C. 78. (2) 15 A.C. 316.

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In re GRAY DORT MOTORS LIMITED, TRADE-MARK.

Reasons for Judgment.

putting on them the words 'Perry Davis' Vegetable Pain Killer.' It seems to me impossible to say that he has used the words 'Pain Killer' as his trade-mark."

And Lord Macnaghten's words are to the same effect (at page 322): "It seems to me also, upon the evidence, to be perfectly clear that the appellant did not use the words 'Pain Killer' separately and alone as his trade-mark."

In this particular case on the face of the petition and by the advertisement, the words "Gray Dort" have not been used alone, but always with the words "Own a" at the top, and underneath it "You will like it." The reason I mention it is that on the argument before me, Mr. Powell contended that if the applicant be not entitled to a trade mark as prayed, that at all events they should be entitled to register the words "Gray Dort."

There is no question about it, that on the trade-mark as shown by the petition, and in the affidavits, the words "Gray Dort" form the prominent feature of the trade-mark and one which would strike the eye. Had the applicants used as their trade-mark the words "Gray Dort" alone, I think on the evidence of five years user they would have been entitled to registration.

The decision in the Court of Appeal in the case of H. G. Burford's & Company's application, (1) might be referred to. That was an application for registration of the word "Burford." In that case the trade-mark had been used for only 3½ years, but notwithstanding that, the court of appeal overruled the decision of Sargant J., who had refused to allow the registration.

(1) (1919) 2 Ch. D. 28.

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In re GRAY DORT MOTORS LIMITED, TRADE-MARK.

Reasons for Judgment.

A considerable amount of stress is laid upon the fact that a large amount of capital is necessary to be expended in the construction of works to turn out automobiles, and in this respect it differs from articles of a small kind.

I have come to the conclusion that on the evidence before me the petitioners have brought themselves within the decision I have just quoted if the trade-mark was "Gray Dort" alone. After some doubt I have come to the conclusion that their trade-mark should not be vitiated by the use of the words above and below the scroll. For a considerable time I thought taking the whole trade-mark as claimed it was merely an advertisement.

I have come to the conclusion, not without doubt, that the fact that they have above the circle "Own a," and below "You will like it" should not have the effect of vitiating their right.

Also, as I have said on more than one occasion, the owner of a trade-mark cannot bring an action unless his trade-mark is registered. The registration does not make it a valid trade-mark if contested in the courts. It merely has the effect of shifting the onus.

I think that an order should go directing the registration of the trade-mark as applied for.

Judgment accordingly.

1920
Nov. 19.

ON APPEAL FROM THE DECISION OF THE COMMISSIONER OF PATENTS FOR CANADA.

No. 4004. IN THE MATTER OF AN APPLICATION OF THE LOCOMOTIVE STOKER CORPORATION FOR LETTERS PATENT OF INVENTION FOR NEW AND USEFUL IMPROVEMENTS IN LOCOMOTIVE STOKERS.

International Law—Canadian Patent Act, secs. 7 and 8; 10 Geo. V, ch. 30—Order in Council, 14th April, 1920—Treaty of Versailles—International Convention of 1883, —Convention of 1900 and of 1911.

Petitioners, citizens of the United States of America, a nation allied and associated with His Majesty in the war, filed on the 30th June, 1920, a petition for a patent in Canada. On the 1st August, 1914, when war was declared, the invention had not been in public use or on sale with consent of the inventor for more than one year previous to that date. The words "par un tiers" which are to be found in Article IV of the International Convention of 1883, were omitted from the said Article in the Convention of 1900. In the Washington Convention of 1911, ratified by Great Britain in 1913, the words "by a third person" were carried into the English translation, although in the French version, the words "par un tiers" are again omitted.

Held: That the French version must be regarded as the official embodiment of the treaty; and in that view, where any difference of construction arises between the French text and that of the English translation, the language of the former must prevail.

2. That section 83 of the Order in Council of the 14th April, 1920, passed under authority of 10 Geo. V, ch. 30, not only affects section 8 of the Patent Act by declaring in effect that, in computing the delay for filing application for a patent, referred to therein, the time between the 1st August, 1914, and the 11th July, 1920 should not be taken into account, but also section 7, by abrogating the provisions thereof for the same period. The words "rights of priority" in said section 83 of the Order in Council mean that the status of the applicant should not be lost by any act of omission or commission, if the right claimed had not expired on said 1st August, 1914, the said period being eliminated from the consideration of whether or not the year referred to in article 7 had elapsed.

Reporter's note.—The appeals in the cases of: *In re Eiseman Magnetic Corporation; In re Charles H. Norton and In re Hemphill Company,* were argued by Mr. Russel Smart, at the same time, and the same judgment rendered.

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In re APPEAL OF THE LOCOMOTIVE STOKER CORPORATION v. THE COMMISSIONER OF PATENTS.

Reasons for Judgment.

APPEAL from the following decision of the Commissioner of Patents for Canada: "The Office understands that section 83 of the Treaty of Peace (Germany), Order, April 14th, 1920, extends the time fixed by section 8 of the Patent Act until the 11th July, 1920, but does not abrogate the other requirements of the Patent Act, notably those of section 7."

November 10th, 1920.

The appeal was heard before the Honourable the President of the Court (Sir Walter Cassels) at Ottawa.

A. W. Anglin K.C., for the Locomotive Stoker Corporation.

R. V. Sinclair K.C., for the Commissioner of Patents.

The facts and questions of law involved are stated in the reasons for judgment.

The PRESIDENT OF THE COURT, now (November 19th, 1920) delivered judgment.

The questions involved in the four cases are identical. The questions of law in all four cases were argued together.

Section 7 of the Patent Act, provides that "Any person who has invented any new and useful art, machine, manufacture or composition of matter, or any new and useful improvement in any art, machine, manufacture or composition of matter, which was not known or used by any other person before his invention thereof, and which has not been in public use or on sale with the consent or allowance of the inventor thereof, for more than one year previously to his application for patent therefor in Canada, may, on a petition, etc."

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In re APPEAL OF THE LOCOMOTIVE STOKER CORPORATION *v.* THE COMMISSIONER OF PATENTS.

Reasons for Judgment.

I deal with the locomotive stoker case argued by Mr. Anglin. The Commissioner of Patents has refused to entertain the applications for patents, and the appeal is brought to this court under the provisions of the statute, 3-4 Geo V, Cap. 17, which reads as follows: "23*a*. Every applicant for a patent under the Patent Act who has failed to obtain a patent by reason of the objection of the Commissioner of Patents as in the said Act provided may, at any time within six months after notice thereof has been mailed, by registered letter, addressed to him or his agent, appeal from the decision of the said commissioner to the Exchequer Court. 2. The Exchequer Court shall have exclusive jurisdiction to hear and determine any such appeal."

By virtue of that statute appeals from the ruling of the Commissioner will have to be dealt with by the Exchequer Court, instead of by the Governor in Council. Under this statute these appeals were set down for hearing and came on to be argued on the 10th day of November, instant. Mr. Sinclair, K.C., argued the case on behalf of the Commissioner.

Shortly, the point in the case is as follows: The petition dated the 23rd day of June, 1920, was filed on the 30th June, 1920. It must be borne in mind that the applicants for patents in all four cases are citizens of the United States. On the 30th day of June, 1920, the application in the stoker case was, as I have mentioned, filed in the patent office. On the 1st August, 1914, when war was declared the invention was not in public use or on sale with the consent or allowance of the inventor for more than one year previous to the 1st August, 1914.

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In re APPEAL OF THE LOCOMOTIVE STOKER CORPORATION *v.* THE COMMISSIONER OF PATENTS.

Reasons for Judgment.

At the time of the filing of the application for the patent, namely, the 30th June, 1920, if the ruling of the patent office is correct, more than the year had elapsed.

The contention of the appellant is that under certain orders and treaties, which I will refer to, a period of time between the 1st of August, and the 11th day of July, 1920, has to be eliminated from the consideration of whether or not the year had elapsed before the application for the patent on the 30th June, 1920.

The Patent Office have ruled as follows: It is referred to in their letter of the 5th August, 1920, in which they state: "The Office understands that section 83 of the Treaty of Peace (Germany,) Order, April 14th, 1920, extends the time fixed by section 8 of the Patent Act until the 11th July, 1920, but does not abrogate the other requirements of the Patent Act, notably those of section 7."

If that view is the proper view to be taken of the meaning of the order, then the judgment of the Commissioner of Patents is correct. If, on the other hand, the view or the opinion of the Commissioner of Patents is erroneous, his judgment should be reversed and the matter should be left to the Commissioner to proceed with the applications in the usual way.

After listening to the carefully prepared arguments of counsel for the appellant and also for the Commissioner, I am of opinion that the Commissioner has erred in the view he takes limiting the meaning of the Order in Council merely to section 8. I think it should equally apply to section 7,—and if I am correct in the view I have formed, then the time between the first August and the 20th July, 1920, should be eliminated from the consideration of the case, and if

this view is correct, at the time of the application for the patent the year had not elapsed as provided for by section 7 of the Patent Act.

The statute of the Dominion, 10 Geo. V, cap., 30, was assented to on the 10th November, 1919. It provides: "I. (i) The Governor in Council may make such appointments, establish such offices, make such orders in council, and do such things as appear to him to be necessary for carrying out the said treaties and for giving effect to any of the provisions of the said treaties."

The order in council bears date the 14th April, 1920. It recites the fact that whereas at Versailles, on the 20th June, 1919, the Treaty of Peace, etc., between the allied and associate powers and Germany, was signed on behalf of His Majesty acting for Canada by plenipotentiaries. The important sections of this order in council are to be found in part IV—they are sections 81, 82, 83 and 84. The main section, and which is the one in question here, is section 83, which reads as follows:

"83. The rights of priority, provided by Article 4 of the International Convention of Paris for the Protection of Industrial Property, of March 20, 1883, revised at Washington in 1911, or by any other Convention or Statute, for the filing of registration of applications for patents or models of utility, and for the registration of trade marks, designs and models which had not expired on the first day of August, 1914, and those which have arisen during the war, or would have arisen but for the war, shall be extended in favour of all nationals of Germany, and of the powers allied or associated during the war with His Majesty, until the eleventh day of July, 1920."

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In re APPEAL OF THE LOCOMOTIVE STOKER CORPORATION *v.* THE COMMISSIONER OF PATENTS.

Reasons for Judgment.

The words "rights of priority" evidently mean that the status of the applicant should not be lost by any act of omission or commission, if the right had not expired on the 1st August, 1914.

The first international convention, as far as I can ascertain, for the protection of industrial property; was signed at Paris on the 20th March, 1883. A copy is to be found in the 4th edition of Frost, on Patents, Vol. 2, commencing at page 308. There was an additional convention which modified the industrial property convention of March 20th, 1883, signed at Brussels on December 14th, 1900. The original French text commences in Frost, at page 328, and the English translation at page 329.

It may be of importance, as pointed out by Mr. Anglin, that the words in this latter convention omit in the new article IV the words "par un tiers." If these words had not been omitted, an argument would be raised that this clause of the convention or treaty, if read as in the former convention of 1883, would limit this application to public use by a third party, and not by the applicant for the patent.

By Article IV of the International Convention signed at Washington on the 2nd June, 1911, and ratified by Great Britain on April 1st, 1913, the words "par un tiers" (by a third party) are carried into the English translation of this convention, although in the French copy of the convention the words "par un tiers" are omitted, translating the section in the French text as if similar to the previous text of the convention of 1883. I think the contention put forward by Mr. Anglin is correct that the reaty is the treaty as set out in the French version, and the translator has in the English translation of it inserted these words "by a third party" by mistake.

This may be of importance. The question of whether or not Canada was bound by this Convention of 1911, is one of interest but not material for the consideration of this case. It is a debatable question whether or not when His Majesty the King of Great Britain and Ireland and of the British Dominions entered into a treaty, Canada is not bound by the terms of the treaty. That is a question which has been very much debated both for and against the view that Canada is bound. It is not, however, of importance at present.

Section 83, which I have quoted, refers to the rights of priority provided by Article 4 of the International Convention of Paris of 1883, as revised in 1911. It is unquestioned that the United States were allied or associated during the war with His Majesty.

I fail to see why the Commissioner should have held that the effect of this section 83, or the order in council should be limited so as to apply to section 8 of the Patent Act, and not to section 7. I think the matter should be referred back to the Patent Office for consideration of the applications.

There should be no order for costs.

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Nov. 15.

IN THE MATTER OF THE PETITION OF RIGHT OF A. G. CREELMAN AND H. H. VERGE ..... SUPPLIANTS;

AND

HIS MAJESTY THE KING ..... RESPONDENT.

Petition of Right—Damages—Tort—Reasonable Delay—Contracts—Tender.

In July, 1916, the Crown called for tenders for the construction of a Drill Hall in Calgary, Alta., such tenders to be received not later than August the 8th. On the 4th of August, suppliants mailed their tender from Calgary, and on the 12th September, they were advised their tender had been accepted and that the contract would be sent shortly for execution. On the 15th they were advised that the contract etc., was being expressed, and on the 19th the letter was received by suppliants; but the plans, etc., did not arrive for several days, not later than the 29th, when it was signed. At the trial suppliants stated they had no objection to the delays in staking, and no proof was offered as to delay in giving possession. The action was taken for damages due to delays above mentioned.

Held: That as the acts of the Crown complained of could not be considered as amounting to a breach of contract; and as the present action was one sounding in tort for which no action lies against the Crown, apart from special statutory authority, suppliants' action could not be entertained.

Semble: That owing to the abnormal conditions prevailing during the war and the unavoidable delays in communication due to the parties being over 2,000 miles apart, the delays in accepting the tender, advising thereof and sending the contract for signature, were not unreasonable or oppressive.

PETITION of Right seeking to recover $35,453.58, amount of loss alleged to have been suffered by suppliants by reason of delays in connection with the contract with the Crown for the construction of a Drill Hall at Calgary.

The action was tried before the Honourable Mr. Justice Audette at Calgary, Alta., on the 27th day of September, 1920.

R. B. Bennett K.C., and *W. D. Gow*, for suppliants.

I. W. McArdle and *W. S. Davidson*, for respondent.

The facts are stated in the reasons for judgment, and the material averments in the petition may be summarized as follows:

Suppliants claim that the delays in accepting their tender, in forwarding the contract for execution, in the staking and giving possession of the land for the building were unreasonable, and by reason thereof they were thrown into the winter months, when the work of excavation could not be done, and these operations had to be suspended till the following spring, and they were unable to undertake the work of construction when and in the manner contemplated by them and respondents. That the cost of labour and material was speedily increasing at all times during the construction, and, that in consequence, they suffered damages, from such delays to the extent of $35,453.58.

AUDETTE J. now (November 15, 1920), delivered judgment.

The suppliants, by their Petition of Right, seek to recover the sum of $35,453.58, the amount of a loss they allege to have suffered as hereinafter set forth, in connection with their contract with the Crown, for the construction of a Drill Hall, at the city of Calgary, in the province of Alberta.

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Reasons for Judgment.

The Crown, during July, 1916, called for and invited tenders for the construction of this drill hall, under the conditions mentioned in the notice to that effect, as set forth in exhibit No. 1, and stating, among other things, that tenders for the same would be received at the office of the secretary of the Department of Public Works, at Ottawa, until 4 o'clock, p.m., on the 8th August, 1916.

After acquainting themselves with the plans and specifications, the suppliants, on the 4th August, mailed their tender in the form shewn in Exhibit No. 2, under the form supplied by the respondent.

On the 12th September, 1916, the suppliants were by telegram advised and notified that their tender had been accepted and the following letter, bearing same date, was sent, by the Department of Public Works, to the suppliants, viz.:—

"I beg to inform you of the acceptance of your tender, at $282,051.45, for the construction of a Drill Hall, at Calgary, Alta., $9.25 per cubic yard to be paid for any additional concrete, as per specification, including all extra excavation, filling and wood forms, etc.

"The contract in this connection is being prepared and will be forwarded shortly for execution.

"I have the honour to be, Gentlemen,

"Your obedient servant,

"(Sgd.) L. H. Coleman,

Asst. Secretary."

"Messrs. A. G. Creelman & Co.

"Calgary, Alta.

Then on the 15th September the Department addressed to Mr. Leo Dowler, their resident engineer, at Calgary, the following letter:—

"Sir:—I beg to transmit to you herewith, in duplicate, the draft of contract to be entered into between His Majesty and Messrs. Creelman & Verge, for the construction of a drill hall at Calgary, Alta., and to ask you to kindly have these documents, and plans, forwarded to you under separate cover, signed by the contractors in your presence as witness.

"You will please fill in the blank spaces left for the date of signature and for the first names of the contractors, and return me these documents, together with the plans, for completion by the Department, after which, one of the duplicates will be returned to the contractors.

"Your obedient servant,
"R. C. Desrochers,
Secretary."

"Leo Dowler, Esq.,
"Resident Architect, P.W.D.,
"Calgary, Alta."

As may be inferred from this letter the draft of the contract, the specification and plans were being transmitted to Calgary, under separate cover.

This letter (exhibit A) appears to have been received at Calgary, on the 19th September, but the draft of the contract and plans, etc., which were sent by express only came several days afterwards. The resident architect testified he could not swear on what date they arrived; but he made repeated enquiries for these documents at the Express office, and on the day they came into his possession, he immediately advised the suppliants who came and signed the contract on the 29th September.

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[HIS LORDSHIP here recited certain averments of the petition, the substance of which is stated *Ante.* p. 199.]

Can it be said, with justification, that the tender having reached Ottawa on the 8th August and the notice of acceptance having emanated on the 12th September,—that the delay between these two dates was unreasonable and oppressive?

I must answer in the negative. The parties in question were more than 2,000 miles apart. The Crown was not obliged to accept the tender,—it had only invited the contractors to submit figures for the erection of that building; and, on the other hand, at any time, between the date of the tender and the notice of acceptance the suppliants were at liberty to revoke their tender which must be construed as speaking from day to day, expressing willingness from day to day to perform that contract. If they found the delay in answering their tender was too long, they could at any time put an end to it; they could have withdrawn by revoking it.

Now, if the suppliants had found, at any time after the 8th August, that the Crown was taking too long in advising them whether their tender was accepted or rejected, it was always opened to them to revoke it. If they did not do it and if they received, on the 12th September, the notice of acceptance without protest, and if they entered into and signed the contract on the 29th September without protest, have they not acquiesced in what was done, are they not to-day estopped from setting up contentions so inconsistent with their conduct? And this would apply as well to the delay in accepting and in signing the contract.

Halsbury, The Laws of England, Vol. 7, pp. 346, 347:

[His Lordship here gives the citation.]

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Apart from these considerations, I find that the delay in question cannot be qualified as unreasonable and oppressive. Under normal conditions, taking into consideration that the parties were over 2,000 miles away from one another, that the Crown is necessarily a slow body to move, as a matter of this kind has first to be taken up by the officials, then by the minister who finally takes the matter before the Governor in Council. All these contingencies are well known to experienced contractors as the suppliants.

However, in this case we have more than normal conditions to consider. In 1916 the country was engaged in this gigantic mondial war, when all the resources of the country were taxed to their limits and when all the ministers of the Crown gave their chief and paramount attention to the inumerable questions involved in the prosecution of the war, I unhesitingly find that the delays complained of were decidedly not oppressive, but quite reasonable and what might be expected, under the circumstances.

The suppliants were, as just said, always at liberty to revoke their tender before its acceptance, and they therefore cannot construe a right of action against the Crown for such delay. The delays which elapsed between the notice of acceptance (12th September) and the signature of the contract (29th September) were not unreasonable as far as the Crown is concerned when consideration is given to the necessary delay involved in forwarding any document from Ottawa to Calgary,—and moreover, in the present instance, the delays in the transmission of this contract, specification and plans seem to have been caused by the express company.

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With respect to the complaint of delays in staking and giving possession of the land upon which the building was to be erected, it must be found that there is no evidence bearing upon the delay in giving possession of the land, but only in respect of the staking, which seems to have been attended to just as soon as it was mentioned by the contractor and witness G. E. Hughes, the suppliants' manager, speaking of this delay, said: "After the receipt of the plans, I would say it (the staking) was not done promptly, but I do not object to the time it took. It was staked on October 7th. It might have been staked sooner." Indeed, many things might have been done sooner; the suppliants also might have started the excavation sooner than the day they did—they might also have held their sub-contractors to their contracts, etc. However, all of these matters in the view I take of the case become unnecessary to pass upon.

This action is for the recovery of damages, under the above mentioned circumstances, and is therefore in its very essence one sounding in tort. Apart from breach of contract or from special statutory authority no such action will lie against the Crown.

The complaints made herein cannot be construed as amounting to a breach of contract for the reasons already mentioned.

By the third clause, on page 4 of the specification, which forms part of the contract and which had been in the suppliants' possession before making any tender,—it is provided, among other things, that "no charge shall be made by the contractors for any delay or hindrance from any cause during the progress of any portion of the work embraced in his contract."

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The clause 44 of the contract provided that: "The contractor shall not have, nor make any claim or demand, nor bring any action or suit or petition against His Majesty for any damage which he may sustain by reasons of any delay or delays, from whatever cause arising in the progress of the work."

Failing to establish that the delays complained of were oppressive, as contemplated in the case of *Bush* v. *Trustees of Port and Town of Whitehaven,* (1) cited at bar in the able argument presented on behalf of the suppliants,—no right of action will lie against the Crown under the circumstances. The present case is clearly distinguishable from the latter in that the works contemplated by the contract in that case were to be performed in the space of four months and that the delay in giving possession of the land extended for a period of three months and thirteen days and ran into the winter.

It is true the suppliants discharged in a creditable manner the works contracted for at the sum of $282-, 051.45, plus the charges for concrete, and that under the evidence adduced by both parties, the building, as erected, was worth, at the time of the trial, between $350,000 to $400,000. However, the contractors would appear to have been the victims of circumstances. In the autumn of 1916, the climatic conditions were worse than usual and the cold weather set in earlier; then the war was being carried on with all due energy with the result that the price of labour and materials kept soaring up. Had the weather been more favourable, had prices gone down instead of jumping up, the result would have been different. Did not the con-

(1) Hudson on Building Contracts, (4th Ed.) Vol. II, p. 122.

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tractors tender at too low a price under the circumstances, when prices were so unsteady? However, these are matters that cannot be judicially weighed, the contract is the law of the parties.

Under clause 3 of the contract the works had to be fully completed by the 12th September, 1918. They were completed on the 25th October, 1918, with extras to the small amount of $940, and the Crown made no complaint in that respect. Perhaps I should not close without mentioning, that there is endorsed, on the outside cover of the contract a memo, that the contract was authorized on the 9th September, 1916, by an Order in Council; however that may be, there has been no evidence on the record establishing that any such Order in Council was ever passed and if any were passed, the nature of the same.

The suppliants have established that they have performed their contract in good workmanship, to the satisfaction of the Crown; but they have failed to show a right of action, under the circumstances. They have been the victims of circumstances over which neither party had any control.

There will be judgment declaring that the suppliants are not entitled to any portion of the relief sought by their Petition of Right.

Judgment accordingly.

IN THE MATTER OF THE PETITION OF THE PACIFIC LIME COMPANY, LIMITED..... } PETITIONER.

1920
Nov. 25.

Argument of Counsel.

Trade-Mark—Geographical name—Secondary signification—Registration.

Held; That a geographical name is not ordinarily the subject of a trade-mark and is not *per se* registerable; but when by long user thereof the name has acquired a secondary signification in derogation of its primary geographical meaning and has become the trade designation of a manufactured article, such a name may be registered.

APPLICATION by petitioners herein to have the words "Blubber Bay Lime" registered as their trade-mark.

November 16th, 1920.

Application before the Honourable Mr. Justice Audette at Ottawa.

L. P. Sherwood, for petitioners.

No one appeared for Commissioner of Patents.

L. P. Sherwood: I would refer to section 5 and part of section 11 of the Trade-Mark and Design Act (ch. 71 R.S.C. 1906).

The Act contains no precise definition of a trade-mark, but it is to be remarked that section 5 states that names may be "considered and known as trade-marks." Section 11 (e) "the essentials necessary to constitute a trade-mark properly speaking," it is submitted, must mean the essentials of a Common Law trade-mark as modified by the Canadian Trade-Mark Act.

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In Re PACIFIC LIME CO. LIMITED TRADE-MARK.

Argument of Counsel.

The various English Acts have little or no bearing upon the Canadian Act. See *New York Herald Co.* v. *Ottawa Citizen Co.* (1).

In the United States a large proportion of trade-marks granted consist of surnames of manufacturers or producers, but geographical names have also been registered, as, for instance, "Winchester" for rifles, and "Yale" for locks.

The law in regard to names is understood to be that whilst they are not primarily the subject of a trade-mark, they may nevertheless by use in connection with the goods of a certain individual, acquire a secondary meaning as a trade-mark, and may be registerable under the Canadian Trade-Mark Act. See *Horlick's Malted Milk Company case*, decided in the Supreme Court, 1st May, 1917 (2); *Canada Foundry Company* v. *The Bucyrus Company* (3); See also English cases, *Wetherspoon* v. *Currie*, *The Glenfield Starch case* (4), and particularly the remark of Lord Westbury at p. 251. See also *Seixo* v. *Provezende* (5), and *In re National Starch Company's application* (6), for registration of word "Oswego."

I submit that the case of *Grand Hotel Company, of Caledonia Mineral Springs* v. *Wilson and others* (7), can be distinguished and does not adversely affect the present application (See particularly Lord Davey at p. 113).

In the present application, the evidence which is submitted, shows that the words "Blubber Bay Lime" have acquired a secondary meaning as distinguishing the product of the Pacific Lime Company, and as

(1) 41 S.C.R., 229 at p. 232.
(2) 35 D.L.R. 516.
(3) [1912] 47 S.C.R. 484.
(4) 5 H.of L.(E. & I. App.) 508.
(5) [1865[14 L.T. (N.S.) p. 314.
(6) [1908] 2 Ch. D. 698.
(7) [1904] A.C. 103.

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In Re PACIFIC LIME CO. LIMITED TRADE-MARK.

Reasons for Judgment.

such, in accordance with the authorities referred to, the words have become a trade-mark which is properly registerable. Furthermore, the words are not in use as a distinguishing feature or as a trade-mark by any other individual, firm or corporation in connection with the sale of lime.

It is submitted therefore, that the applicants are entitled to have registered in their name as a trade-mark the words "Blubber Bay Lime" for the reason that the evidence shows these words to have acquired a secondary meaning as a trade-mark distinguishing the product of the applicants, and that the evidence shows that the words are not in use by any other person.

The facts are stated in the reasons for judgment.

AUDETTE J. now (November 25, 1920) delivered judgment.

This is an application, by the petitioners, who carry on the business of manufacturers or producers of lime, to register as their trade-mark the words "Blubber Bay Lime."

Blubber Bay is a small place situate in the electoral district of Comox-Alberni, in the province of British Columbia.

Therefore, it appears that the word "Blubber Bay" is, in its ordinary signification, a geographical name, and, *per se*, is not subject to registration as a trade-mark. (*Columbia Mill Co.* v. *Alcorn* (1).

The Canadian Act does not contain a definition of trade-marks capable of registration. To find what trade-marks in Canada are subject to registration, one must read together sections 5 and 11 of the Act.

(1) 150 U.S. 460.

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In Re PACIFIC LIME CO. LIMITED TRADE-MARK.

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Section 5 provides what may be the subject of a trade-mark, but that section must also be read with the provisions of sec. 11 whereby, among other things, it is set out what the minister may refuse to register. Sub-section (c) of that section reads as follows:—

"(c) if the so-called trade-mark does not contain the essentials necessary to constitute a trade-mark, properly speaking."

And as said in the *Standard Ideal Co.* v. *Standard Sanitary Co.* (1): "the Act does not define or explain the essentials of a trade-mark, it does not provide for taking off the register an alleged trade-mark which does not contain the requisite essentials. In applying the Act the Courts in Canada appear to consider themselves bound or guided mainly by the English law of trade-marks and the decisions of the courts of the United Kingdom."

By sub-sections 4 and 5 of section 9 of the English Act of 1905, it is provided that a geographical name cannot be registered as a trade-mark, unless upon an order of the Board of Trade, or the Court.

The words "Blubber Bay Lime" standing by themselves may not, strictly speaking, have reference to the character or quality of the lime as derived from the strata of the stone or the formation of the soil; but will not the registration of these words preclude any other resident of Blubber Bay, who migth choose to manufacture lime, to use that name? Nothing could prevent him from manufacturing lime, if he so saw fit. Would not also that mark appear to be generic, in its very nature? Does it not convey the idea that Blubber Bay lime is the product of one individual residing at Blubber Bay, while it may also designate

(1) [1911] A. C. 78.

the product of many hundred manufacturers or residents of Blubber Bay, to whom the trade-mark sought to be registered would equally apply? Would not the mark, in such a case, cease to be distinctive and therefore become objectionable?

Wood, V. C., in the *Anatolia liquorice case* (*McAndrew* v. *Bassett* (1) said that: "the plaintiffs had established beyond all doubt the connection of their name with that mark, that was beyond dispute," and that "he could not treat the word as being otherwise than a designation mark, which the plaintiff had caused to be attached to that particular article of liquorice which they so manufactured, and which they had a right to consider, in that qualified sense, property."

See Sebastian, 5th Ed. at p. 87. (Abstract recited.)

Lord Westbury, C., in that case strongly confirmed the opinion of the Vice-Chancellor; and in the later case of *Wetherspoon* v. *Currie* (2), where the subject of the dispute was the word "Glenfield," applied to starch, he stated that the word had acquired a secondary signification or meaning in connection with a particular manufacture; in short, it had become the trade designation of the starch made by the appellants. It was wholly taken out of its ordinary meaning, and in connection with the starch had acquired that peculiar secondary signification to which he had referred. The word "Glenfield," therefore, as a denomination of starch, had become the property of the appellants. It was their right and title in connection with the starch.

(1) 33 L.J., Ch. 561; 4 DeG.J.& S. 380 (App.).

(2) 5 H. of L. (E. & I. App.) 508.

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In view of the liberal modifications in previous jurisprudence, together with the legislation, introduced by sub-sec. 5 of section 9 of the English Trade-Mark Act of 1905, and the decision above referred to,—would it not be attaching an excessive regard to the geographical aspect of this mark to refuse its registration?

The American law upon the present subject would appear to be the same.

See Paul, on *Trade-Marks*, pp. 101 to 104 inclusively, and pp. 434 et seq. (Abstracts from these pages were here given at length.)

At p. 103 he states that geographical names, designating districts of country are incapable of appropriation as trade-mark and concludes by saying (p. 104) that one must avoid, in selecting devices for trade-mark, "geographical names which are descriptive of the local origin of the goods, if other persons have the right to deal in goods of a similar origin."

The words "Blubber Bay Lime" may not suggest to ordinary observers a geographical origin and may, therefore, remain special and distinctive. *In re Magnolia Metal Company* (1). The user of these words for the period mentioned in connection with the lime manufactured or sold by the petitioners has given such words a secondary signification in derogation of their primary geographical meaning and has become the trade designation of the lime manufactured by them.

It would appear that if a word is strictly geographical according to its ordinary signification, that, where it is not calculated or likely to deceive, it may still be registered in a proper case by the leave of the court.

(1) [1897] 2, Ch. Div. 371.

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In re Appollinaris Brunnen (1); *In re The National Starch Co.* (2); and *In re California Fig Sirup Co.* (3); *The Stone Ale case* (*Montgomery* v. *Thompson* (4); *The Bucyrus Company* (5).

It appears from the allegations of par. 5 of the petition that the application for registration made to, and refused by, the Minister of Trade and Commerce, was for a *general* trade-mark. It is obvious that the petitioners are applying for the registration of this trade-mark for the use of the same in connection with the sale of a class merchandise of a particular description,—namely, lime. In such a case they are not entitled to a general, but only to a specific trade-mark.

Therefore, I have come to the conclusion, under the circumstances of the present case, but not without some hesitation,—after considering the *de facto* distinctiveness arising from fairly long and exclusive user in the past,—although the words are originally geographical,—to allow the registration of the same as a *specific trade-mark* to be used in connection with the sale or manufacture of lime or of that class of merchandise coming within that particular description.

The granting of an order for the registration of this trade-mark does not conclude the validity of the trade-mark, should an action be hereafter brought contesting it. It amounts to no more than a *prima facie* decision, open to being varied or set aside upon evidence produced by opponents. *In re Crosfield* (6); *In re Akt. Hjorth* (7). In *re* Christie (8) the present

(1) 24 R.P.C. 436.
(2) 25 R.P.C. 802. & [1908] 2, Ch. D. 698.
(3) 26 R.P.C. 846.
(4) 1891 A.C. 217.
(5) 14 Ex. C.R. 35, 47, S.C.R. 484.
(6) 26 R.P.C. 561, 837.
(7) 27 R.P.C. 461.
(8) 20 Ex. C.R. 119.

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decree does not declare that the mark ought to be registered because it is a good mark but merely allows and permits its registration under the circumstances of the case. Such order, it would seem, ought to be decreed when there is a sufficient *prima facie* case made out establishing a reasonably long user of the trade-mark. Sebastian, 5th Ed., p. 370.

Judgment accordingly.

IN THE MATTER OF THE PETITION OF RIGHT OF MARIUS DUFRESNE.. SUPPLIANT; 1920 Nov. 15.

AND

HIS MAJESTY THE KING..... RESPONDENT.

Petition of Right—Plans and Specifications—Quantum meruit—Interest—Architect's Tariff.

D. was engaged in 1913 as supervising architect to take charge of the preparation of drawings and specifications for a Post Office, at Maisonneuve, and was to be paid for such services at the rate of 5% on the actual cost of the building. The plans and drawings were started and from time to time modified at the request of the Crown, after consultation with the Post Office officials; but on account of the war, or some other reason, not disclosed on the facts, the Crown did not start or proceed with the work. D. by his petition (filed in October, 1919) asked to be paid for his services.

Held; That although D. was not entitled to claim to be be paid under articles 11 or 14 of the Architects' Tariff, his plans not being complete, nevertheless, as the plans and estimates had been ordered and accepted by the officers of the Crown, the Crown must be taken to have ratified what, in that respect, its officers had done; and D. was entitled to recover the value of his services under a quantum meruit.

PETITION of Right seeking to recover the sum of $7,161 for plans prepared at request of the Crown for Post Office building contemplated to be erected in the city of Maissonneuve.

November 9th, 1920.?

Tried before the Honourable Mr. Justice Audette at Montreal.

E. Lafleur K.C., and *J. A. Bovin* for suppliant.

F. J. Laverty K.C., for respondent.

The facts are stated in the reasons for judgment.

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MARIUS DUFRESNE v. THE KING

Reasons for Judgment.

AUDETTE J. this (November 15th, 1920) delivered judgment.

The suppliant, by his Petition of Right, seeks to recover the sum of $7,161 for plans prepared by him, at the request of the Crown, for a post office building contemplated to be erected in the City of Maisonneuve, in the District of Montreal.

It appears from the evidence spread upon the record that, as far back as the 27th October, 1913, the suppliant accepted the position of supervising architect to have charge of the preparation of drawings and specifications etc., for the post office in question and started to prepare such drawings and plans, which were from time to time modified at the request of the Crown, after consulting with the post office officials.

Were there any doubt as to the validity of the contract under the circumstances, a matter which however appears to be conclusive in favour of the suppliant, it must be found, under the authority of *Henderson* v. *The Queen* (1); *Wood* v. *The Queen* (2); *Hall* v. *The Queen* (3); *May* v. *The King* (4), that the plans having been prepared, having been accepted by the Crown, having been modified at the request of the Crown, and of which it received full benefit,—that if the suppliant is not entitled to recover under an executed contract, he is entitled to recover under a *quantum meruit* for services rendered and goods supplied of which the Crown received the benefit.

The letter of engagement, exhibit No. 1, fixes the remuneration for such services at the rate of 5% of the actual cost of the building—and that charge would appear to be in conformity with Article 8 of the Architect's Tariff for the Province of Quebec, filed as Exhibit No. 24.

(1) 6 Ex.C.R. 39; 28 S.C.R. 425.
(2) 7 S.C.R. 634.
(3)3 Ex. C.R. 373.
(4) 14 Ex. C.R. 341.

However, as time went by, from 1913, the Crown did not finally decide to start the works in question, and has not done so up to date,—either on account of the war, or for any other reason,—and the suppliant, by his Petition of Right filed in October, 1919, is now very reasonably asking to be paid for his services.

The question now remaining to be considered and decided is as to the question of the remuneration which should be paid under the circumstances. The plans and the estimates have been ordered and accepted by the officers of the Crown, and the Crown must be taken to have ratified what, in that respect, its officers have done. The plans, however, were not working plans, as is understood by builders and contractors. The chief architect of the Department of Public Works, on the 29th July, 1919 (Exhibit No. 34) offered $3,570, in full and final payment for the preparation of the plans.

I find that suppliant is not entitled to any claim under article 14 of the Tariff. I further find he is not entitled to the full 2½% under article 11. His plans were not complete,—among other things, there was no longitudinal plan,—a plan required under the evidence to call the plan complete. Under all the circumstances of the case, I think a fair and just compensation will be 2% on the estimate of $238,700—namely, the sum of $4,774.

Pursuant to the leave mentioned at trial, I hereby order that the suppliant's pleadings be amended so as to agree with the facts proved, whereby if the suppliant cannot strictly recover under a specific item of the Architects' Tariff, he may recover upon a *quantum meruit*. (Arts. 518, 520, C.C.P., P.Q.).

1920

MARIUS DUFRESNE v. THE KING

Reasons for Judgment.

The suppliant is further asking for interest. Under the decision of the case of *St. Louis* v. *The Queen* (1), ever since followed in this court, I also find he is further entitled to interest from the date the petition of right was lodged with the Secretary of State, as provided for by sec. 4 of the Petition of Right Act, a date which may hereafter, by leave, be established by affidavit, at the time of the settlement of the minutes of judgment.

Therefore, there will be judgment declaring that the suppliant is entitled to recover from and be paid by the respondent the said sum of $4,774 with interest thereon from the date of the lodging of the petition of right with the Secretary of State to the date hereof, and with costs.

Judgment accordingly.

Solicitors for applicant: Taillon, Bovin, Morin & Laramée.

Solicitors for respondent: Blair, Laverty & Hale.

(1) 25 S.C.R. 649.

1920
Nov. 25.

BETWEEN

No. 4018.

MARY PENISTON WIEHMAYER..PLAINTIFF;

AND

THE SECRETARY OF STATE OF CANADA AS CUSTODIAN UNDER THE TREATY OF PEACE (GERMANY) ORDER, 1920.....DEFENDANT.

AND

BETWEEN.

No. 4006

LUCY HAMILTON NEITZKE.....PLAINTIFF;

AND

THE SECRETARY OF STATE OF CANADA AS CUSTODIAN UNDER THE TREATY OF PEACE (GERMANY) ORDER, 1920.....DEFENDANT.

Enemy Property, Custodian of—Treaty of Versailles, 28th June, 1919—Articles 296-297—"Debts"—Jurisdiction—10 Geo. V, ch. 14.

W. and N. were British-born women, who at birth had no other nationality, and who acquired German nationality only by their marriage, the former in July, 1898, and the latter in July, 1910. Their property, rights and interests in Canada were vested in the defendant by virtue of the Treaty of Peace (Germany) Order, 1920. Under this Treaty and an Order in Council in that behalf passed, they applied to have it declared that their said property, rights and interests did not come within the provisions of Article 296 of Treaty of Peace, that they be relinquished, etc.

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MARY PENISTON WIEHMAYER AND LUCY HAMILTON NEITZKE v. THE SECRETARY OF STATE OF CANADA.

(Nos. 4018 and 4006).

Statement of Facts.

Held: That jurisdiction to entertain such an application, and to make the declaration asked for was conferred on the Exchequer Court by 10 Geo. V, chap. 14.

2. That money on deposit in banks or with a loan and saving company; bonds of commercial and industrial companies and shares of the capital stock thereof or of banks, or of mortgage corporations; money in the hands of trust companies for investment, and moneys invested under their guaranteed trust investment receipts; money loaned and secured by mortgages on real estate in Canada; money loaned to a company upon a receipt, subject to call on 3 months' notice; could not be classed as "debts" within the meaning of Article 296 of the Treaty of Peace signed at Versailles on the 28th June, 1919, between the Allied and Associated Powers and Germany, and may be relinquished to the plaintiff.

THESE were applications to have it declared that none of the property, rights and interests of the plaintiffs which were vested in the defendant, were within the provisions of Article 296 of the Treaty of Peace with Germany, and to have the custodian relinquish the same.

Mary Peniston Wiehmayer was British-born, and in 1898 married Theodore Wiehmayer, a German, and took up residence in Germany where she was residing on the 4th August, 1914. By the death of her father and mother in Canada in years 1912 and 1916 respectively, she inherited certain properties, interests and rights in Canada which were held by her on the said 4th August, 1914, and which, by an Order of the 20th May, 1919, became vested in the Minister of Finance and Receiver General as custodian of Enemy property, and were later vested in defendant under the Treaty of Peace (Germany) Order 1920, together with interest, etc., accrued since.

In January, 1913, there was held for said plaintiff by one Fielding, at Toronto, mortgages upon and agreements respecting real estate in Canada, and in the said month she instructed him to remit the interest to her from time to time and to pay over any principal

moneys paid thereon to the National Trust Company, to be held by it for investment. On 22nd August, 1914, the Trust Company ceased to reinvest any principal sums, but held them in cash. On the 4th August, 1914, they held mortgages amounting to $34,050 and on the 10th January, 1920, they held mortgages amounting to $16,900. and cash $14,220.

On the 6th May, 1915, said Fielding handed over the balance of mortgages to the Trust Company, to be dealt with by the Company as aforesaid and on the 10th January, 1920, they held investments amounting to $32,115.14 and $21,054.27 in cash. During the war the interest, and part of the capital was paid to one Louis S. McMurray, for said plaintiff who deposited the same, along with interest from other securities, to her credit in a saving's account in the Bank of Toronto, except such as was remitted to said plaintiff.

The money now in the hands of the custodian as regards said plaintiff amounts to the sum of $23,285.54 under the vesting order aforesaid. Besides the above, bonds of the Wm. Davies Company, Limited, shares of the Consumer Gas Company, Dominion Bank Stock and Dominion Telegraph Company Stock, with interest accrued were vested in the Minister of Finance and Receiver General, by said vesting order, and later were vested in the defendant herein. That besides these the said plaintiff was, on the 10th of January, 1920, the owner of the following property and interest, to wit:

Bonds of the Commercial Cable Company;

Bonds of the Canada Locomotive Company;

Shares of the MacKay Companies;

Shares of the Canadian Pacific Railway Company, all of which was vested in the defendant.

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MARY PENISTON WIEHMAYER AND LUCY HAMILTON NEITZKE v. THE SECRETARY OF STATE OF CANADA.

(Nos. 4018 and 4006).

Statement of Facts.

The plaintiff, Lucy Hamilton Neitzke was also by birth of British nationality. In 1910 she married Leo Neitzke, a German, and has ever since resided in Germany where she was on the 4th August, 1914. At that time she owned certain property, rights and interests in Canada which, by an order of the 20th May, 1919, were vested in the Minister of Finance and Receiver General as custodian of Enemy property and were later vested in the defendant under the Treaty of Peace (Germany) Order 1920.

The property, rights and interests involved in this case are given in the schedule to the case and are as follows:

First mortgage, 15 year sinking fund of the William Davies, Company, Limited, of the par value of $10,000, bearing interest at 6 per cent per annum, the principal to mature July 1st, 1926; $13,000 invested by National Trust Company, Limited, under its guaranteed trust investment receipts, dated the 16th of January, 1912 and the 2nd January, 1914; $30,000 invested by the Toronto General Trusts Corporation under its guaranteed investment receipt, dated the 9th of July, 1913; 100 shares of the capital stock of the Canada Permanent Mortgage Corporation of the par value of $10.00 each; $20,000 in the hands of the W. B. Hamilton Shoe Company, Limited, under the terms of a receipt dated the 1st day of January, 1913; $3,456.67 on deposit with the Central Canada Loan and Savings Company; 6 shares of the Fire Insurance Exchange Corporation Stock and Mutual, of the par value of $60.00 per share, upon which $30.00 per share is paid up.

November 20th, 1920.

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(Nos. 4018 and 4006).

Statement of Facts.

The special cases of the said Lucy Hamilton Neitzke and Mary Peniston Wiehmayer, were united for argument, being argued by the same counsel, before the PRESIDENT OF THE EXCHEQUER COURT, at Ottawa.

Both plaintiffs by their statements of claim ask for (*a*) a declaration that none of their property, rights and interests vested in the defendant, as aforesaid, are within the provisions of Article 296 of the Treaty of Peace with Germany.

(*b*) An order that the said property, rights and interests be returned by the defendant to them.

R. S. Robertson K.C. for plaintiff.

Christopher C. Robinson K.C. for defendant.

Robertson K.C. cited the following cases: *Bradford Old Bank* v. *Sutcliffe*; (1); *Coyne* v. *Broddie* (2); *re Tidd* (3); *Atkinson and Bradford Building Society* (4); In *re Brown Estate* (5); Hart, Banking, 2 Ed. pp. 199, 200 and 567.

Robinson K.C. cited: *Pott* v. *Clegg* (6).

The remainder of the facts and the points of law submitted are stated in the reasons for judgment.

THE PRESIDENT OF THE COURT now (November 25, 1920) delivered judgment.

(1) [1918] 2 K.B. 833.
(2) 15 Ont. App. Rep. 159.
(3) [1893] 3 Ch. Div. 154.
(4) 25 Q.B.D. 377.
(5) [1893] 2 Ch. Div. 300.
(6) 16 M. & W. 321.

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MARY PENISTON WIEHMAYER AND LUCY HAMILTON NEITZKE v. THE SECRETARY OF STATE OF CANADA.

(Nos. 4018 and 4006).

Reasons for Judgment.

The questions raised are of considerable interest. On the 15th November, 1920, an order in council was passed which reads as follows:

"Ottawa, 15th November, 1920.

"To His Excellency,

"The Governor General in Council:

"The undersigned has the honour to observe that under the provisions of the treaty of peace with Germany, and the treaty of peace (Germany) Order, 1920, Canada has the right to retain and liquidate the property, rights and interests of certain enemies in Canada, and such property, rights and interests are vested in the custodian, but power is reserved to relinquish any of such property, rights or interests, and it is desirable to exercise the power of relinquishment with respect to property of British-born women, who at birth had no other nationality, and who acquired German nationality only by marriage. Doubt, however, arises as to the liability of Canada to Germany with respect to certain classes of such property, and it is desirable to resolve such doubt so far as possible by the decision of the Exchequer Court of Canada.

"The undersigned therefore recommends that the property, rights and interests of British-born women who at birth had no other nationality, and who have acquired German nationality only by marriage, be relinquished, provided such relinquishment shall not include any property, rights or interests for or in respect of which Canada is or may be liable to Germany under the provisions of the treaty of peace; that any such woman may make an application under the treaty of peace (Germany) Order, 1920, to the Exchequer Court of Canada for a declaration as to what

property, rights or interests formerly owned by her may be relinquished hereunder having regard to the foregoing proviso, and that the order in council approved by Your Excellency on the 29th of July, 1920, P.C. 1760, be rescinded."

A statute was enacted by the parliament of Canada Cap. 14, 10 Geo. V, assented to the 10th November, 1919, which reads as follows:

"His Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:—

"1. Section twenty of the *Exchequer Court Act*, Revised Statutes of Canada, 1906, chapter one hundred and forty, is amended by adding thereto the following:—

"(i) Every claim, demand, set off, counter claim, dispute, or question with respect to any debt, property right or interest mentioned in section three or section four of Part X of the treaty of peace with Germany, or in any similar section or provision which may be included in the treaties of peace with Austria, Bulgaria or Turkey, or in any statute or order in council passed for the purpose of carrying into effect the said section three or section four or any such similar section or provision.

"(2) Nothing in paragraph (i) shall affect the jurisdiction of any other court to hear and determine any matter now pending before such court."

By the treaty of peace between the allied and associate powers and Germany, signed at Versailles, June 28th, 1919, it is provided by section 3, article 296, as follows:

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MARY PENISTON WIEHMAYER AND LUCY HAMILTON NEITZKE v. THE SECRETARY OF STATE OF CANADA.

(Nos. 4018 and 4006).

Reasons for Judgment.

"There shall be settled through the intervention of clearing offices to be established by each of the high contracting parties within three months of the notification referred to in paragraph (e) hereafter the following *classes* of pecuniary obligations:

"(1) Debts payable before the war and due by a national of one of the contracting powers, residing within its territory, to a national of an opposing power, residing within its territory;

"(2) Debts which became payable during the war to nationals of one contracting power residing within its territory and arose out of transactions or contracts with the nationals of an opposing power, resident within its territory, of which the total or partial execution was suspended on account of the declaration of war.

"(4) * * * * The proceeds of liquidation of enemy property, rights and interests mentioned in section IV and in the annex thereto will be accounted for through the clearing offices, in the currency and at the rate of exchange hereinafter provided in paragraph(d),and disposed of by them under the conditions provided by the said section and annex. The settlements provided for in this article shall be effected according to the following principles and in accordance with the annex to this section:

"(b) Each of the high contracting parties shall be respectively responsible for the payment of such debts due by its nationals, except in the cases where before the war the debtor was in a state of bankruptcy or failure, or had been given formal indication of insolvency or where the debt was due by a company whose business has been liquidated under emergency legis-

lation during the war. Nevertheless, debts due by the inhabitants of territory invaded or occupied by the enemy before the armistice will not be guaranteed by the states of which those territories form part;

"(c) The sums due to the nationals of one of the high contracting parties by the nationals of an opposing state will be debited to the clearing office of the country of the debtor, and paid to the creditor by the clearing office of the country of the creditor;

"(d) Debts shall be paid or credited in the currency of such one of the allied and associated powers, their colonies or protectorates, or the British Dominions or India, as may be concerned. If the debts are payable in some other currency they shall be paid or credited in the currency of the country concerned, whether an allied or associated power, colony, protectorate, British dominion or India, at the pre-war rate of exchange.

"For the purpose of this provision the pre-war rate of exchange shall be defined as the average cable transfer rate prevailing in the allied or associated country concerned during the month immediately preceding the outbreak of war between the said country concerned and Germany.

"If a contract provides for a fixed rate of exchange governing the conversion of the currency in which the debt is stated into the currency of the allied or associated country concerned, then the above provisions concerning the rate of exchange shall not apply."

The first question that arises is whether or not the classes of property mentioned in the stated cases, in both actions, are "debts" within the meaning of this article 296 which I have quoted.

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MARY PENISION WIEHMAYER AND LUCY HAMILION NEITZKE v. THE SECRETARY OF STATE OF CANADA.

(Nos. 4918 and 4006).

Reasons for Judgment.

The case was very fully and ably argued by counsel for both parties. It is conceded that all the various classes of property referred to in both of the actions are now vested in the custodian by order of the Supreme Court of Ontario.

After considering the various sections of the treaty and also the authorities cited by counsel, I am of the opinion that none of the property, rights or interest set out in the special case and the schedules thereto, can be classed as debts within the meaning of section 296. I think this is manifest from a consideration of the different sections of the treaty, 296 and 297. For instance, article 296 starts by stating that: "There shall be settled through the intervention of clearing offices to be established by each of the high contracting parties within three months of the notification referred to in paragraph (e) hereafter the following classes of pecuniary obligations:"

And then follows the clauses defining the debts. The debts are manifestly not all classes of pecuniary obligations. If we turn over to sub-section 4, there is the provision that the proceeds of liquidation of enemy property rights and interests mentioned in section 4, and in the annex thereto will be accounted for through the clearing offices, etc.

In the annex of section 296, it is provided that in this annex, the pecuniary obligations referred to in the first paragraph of Article 296 are described as "enemy debts;" the persons from whom the same are due as "enemy debtors."

Article 297 is of importance as bearing on the meaning of the word "debts." It provides in sub-section (b): "Subject to any contrary stipulations which may be provided for in the present treaty, the

allied and associated powers reserve the right to retain and liquidate all property, rights and interests belonging at the date of the coming into force of the present treaty to German nationals, or companies controlled by them, within their territories, colonies, possessions and protectorates, including territories ceded to them by the present treaty.

"The liquidation shall be carried out in accordance with the laws of the allied or associated state concerned, and the German owner shall not be able to dispose of such property, rights or interests nor to subject them to any charge without the consent of that state."

This would answer all the matters argued before me as to which I have any jurisdiction. I am asked, however, to give my opinion on another matter as to which any views that I express would merely be a matter of personal opinion.

By the order in council, which I have set out in full, the Crown is willing to relinquish their claims on all of these properties and assets which are now vested in the custodian, to the two ladies, the plaintiffs in the different actions; but, they would like to be advised as to whether in case of their so doing there might be any liability to Germany by reason of their so relinquishing. The German government is not represented before the court, and any personal views of my own would have no binding authority, and would be of no more value than the opinion of the Justice Department. There can be no doubt that if the Crown so chooses, they can relinquish for the benefit of these ladies the properties in question, and it is difficult to see how any liability is likely to arise by reason of their so doing.

The only question that might arise is one of very remote probability, and it is this: By sub-section 4 of article 296, it is provided that "the proceeds of liquidation of enemy property, rights and interests mentioned in section IV and in the annex thereto will be accounted for through the clearing offices."

Sub-section (b) of article 297, provides that "Subject to any contrary stipulations which may be provided for in the present treaty, the allied and associated powers reserve the right to retain and liquidate all property, etc.

Sub-section 4 of the annex to article 298, reads as follows: "All property, rights and interests of German nationals within the territory of any allied or associated power and the net proceeds of their sale, liquidation or other dealing therewith may be charged by that Allied or associated power in the first place with payment of amounts due in respect of claims by the nationals of that allied or associated power with regard to their property, rights and interests, including companies and associations in which they are interested, in German territory, or debts owing to them by German nationals, and with payment of claims growing out of acts committed by the German Government or by any German authorities since July 31, 1914, and before that allied or associated power entered into the war. The amount of such claims may be assessed by an arbitrator appointed by Mr. Gustave Ador, if he is willing, or if no such appointment is made by him, by an arbitrator appointed by the mixed arbitral tribunal provided for in section VI. They may be charged in the second place with payment of the amounts due in respect of claims by

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MARY PENISTON WIEHMAYER AND LUCY HAMILTON NEITZKE v. THE SECRETARY OF STATE OF CANADA.

(Nos. 4018 and 4006).

Reasons for Judgment.

the nationals of such allied or associated power with regard to their property, rights and interests in the territory of other enemy powers, in so far as those claims are otherwise unsatisfied."

A question might arise if the German government retained assets belonging to Canadian subjects and failed to pay them over, in which case a claim might be put forward on the part of the Canadian government to have these monies paid by Germany. Germany might retort, if you had not relinquished the assets in question you might have set them off against any claims that you have against us. This is a remote contingency, and I should think not worth while taking into account.

I have gone out of my way as I have said in expressing any opinion on this latter question, but as I have been asked by counsel I have done so.

These are not cases in which costs should be given to either party. I presume that the Crown would be entitled to recoup themselves for any costs and expenses out of the properties in question.

1920
Dec. 6.

QUEBEC ADMIRALTY DISTRICT.

LA CIE DES BOIS DU NORD....PLAINTIFF;

VS.

S.S. *ST. LOUIS*.....DEFENDANT.

Shipping—Jurisdiction—Building and Equipping—Maritime Lien—Admiralty Court Act, 1861.

Plaintiff claimed $1,562.99 for work done and materials furnished for the S.S. *St. Louis* while at Amos, P.Q. The vessel was arrested, and J. F. H., of Amos, aforesaid, who had an interest therein under an agreement to purchase, filed an appearance under reserve. The vessel was registered at the Port of Montreal, and at the date of institution of the action the registered owner was J. F. S., of Smiths Falls, Ont. The vessel was not under arrest of the court at the time of the institution of the cause.

Held: On the facts, that the court had no jurisdiction to entertain the claim made herein (1).

2. A claim for the supply of necessaries to a ship does not constitute a maritime lien thereon. (The Two Ellens, 4 P.C. 161 (at p. 166) referred to.

AN ACTION *in rem* claiming $1,562.99 for work done and necessary disbursements made for the vessel *St. Louis*.

An appearance was filed and certain proceedings had in the case.

December 2nd, 1920.

Defendant moved before the Honourable Mr. Justice Maclennan, D.L.J.A., at Quebec, to have the action dismissed for want of jurisdiction.

(1) Reporter's Note.—See sections 4 and 5 of the Admiralty Court Act, 1861, and The Barge Leopold, 18 Ex. C.R., 325; and *Haley* v. *Comox*, 20 Ex. C.R. 86.

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LA CIE DES BOIS DU NORD v. S.S. ST. LOUIS

Reasons for Judgment.

J. A. Gagne, K.C. for plaintiff.

A. C. M. Thomson and *Lucien Moraud*, for defendant.

The facts and questions of law raised are stated in the reasons for judgment.

MACLENNAN, D. L. J. A. this (December 6, 1920) delivered judgment.

This is an action in rem and by the endorsement on the writ of summons the plaintiff claims the sum of $1,562.99 for work done and necessary disbursements made for the vessel *St. Louis* at Amos, province of Quebec, during the period within April and August, 1920, inclusively, and for costs. On a warrant issued from the Court the vessel was arrested in due course. The writ is addressed to the owners and others interested in the vessel *St. Louis*. An appearance was filed on behalf of Julius Francis House, lumber merchant and agent residing in Amos, province of Quebec, owner of the vessel *St. Louis* and under reserve. Both parties have taken some incidental proceedings in the action. The defendant now moves the Court to order that the writ of summons, the warrant and the arrest be set aside and be annulled, the vessel released from seizure and the action dismissed with costs, for want of jurisdiction, on the ground that the registered owner or owners were domiciled in Canada before, at the time and since the work claimed to have been done and materials claimed to have been furnished were so done and furnished and, in any event, that the warrant and the arrest should be set aside on the ground that the allegations of the affidavit for the warrant are insufficient and irregular; the whole with costs.

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LA CIE DES BOIS DU NORD v. S.S. ST. LOUIS

Reasons for Judgment.

It was admitted by the parties that at the time of the institution of the action the vessel was not under arrest of the Court, and it would not therefore have jurisdiction over a claim for building, equipping or repairing under section 4 of the Admiralty Court Act, 1861. Section 5 of that Act gives jurisdiction to the Court over any claim for necessaries supplied to any ship elsewhere than in the port where the ship belongs, unless it is shown to the satisfaction of the Court that at the time of the institution of the cause any owner or part owner is domiciled in Canada. This vessel was registered at the Port of Montreal, on July 3rd, 1902, and at the date when the cause of action arose and the case was instituted the vessel was registered in the name of John F. Sherman, of Smiths Falls, province of Ontario, and since April, 1919, House has had an interest in the vessel under agreement to purchase her. It is settled law that a claim for the supply of necessaries does not give a maritime lien on a ship (*Johnson and others* v. *Black*), *The Two Ellens* (1),

The registered owner Sherman being domiciled in Canada at the time of the institution of the action, and House, who claims to be interested in the vessel under agreement to purchase, being also domiciled in Canada since many years, it is manifest that the Court is without jurisdiction over the claim upon which the action is based and that the action must therefore be dismissed.

The defendant, as a second ground for the setting aside of the warrant and arrest, alleges that the affidavit to lead warrant is insufficient and irregular inasmuch as it does not state, as is required by Rule of

(1) L.R., 4 P.C., 161, at page 166.

1920

LA CIE DES BOIS DU NORD v. S.S. ST. LOUIS

Reasons for Judgment.

Practice and Procedure, 37, the national character of the ship and to the best of respondent's belief no owner or part owner of the ship was domiciled in Canada at the time of the institution of the action. The plaintiff submits that the objection raised by defendant to the sufficiency of the affidavit is a mere technical objection which has been waived by the appearance and other proceedings in the action.

It is unnecessary for me to decide the question raised as to the sufficiency of the affidavit, as I have come to the conclusion that under the statute there is absolute absence of jurisdiction, *Stack et al.* vs. the barge *Leopold* (1). The defendant could have raised the question of jurisdiction immediately after appearance; this would have saved some expense for both parties. There will therefore be judgment setting aside the writ, warrant and arrest, and dismissing the action with costs up to and including the appearance and defendant's motion to dismiss for want of jurisdiction, and as to all other proceedings in the action, each party will pay his own costs.

Judgment accordingly.

(1) 18 Ex. C.R. 325.

1920
Dec. 7.

IN THE MATTER of the Petition of Right of

JOSEPH LECLERC.....SUPPLIANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

Common Carrier—Railways—Negligence—Section 20—Exchequer Court Act—Quantum.

On the 30th September, 1919, L. shipped a carload of potatoes from St. Charles, 200 miles from Montreal, by the I.C.R., consigned to one. Gustave Brossard, Viger Station, Montreal. When the railway agent was preparing the bill of lading, L. placed a slip of paper on his desk giving the weight of potatoes and number of the car, and, by error, the agent, entered the weight of potatoes on the bill of lading for the car number, which L. on receiving put into his pocket without looking at it. By reason of this error the car was not found in Montreal till the 15th or 16th of October, when L. was notified, but notice was not received by B. until the 20th, due to the wrong name being placed on the notice. In fact, the car never reached its real destination, as indicated in the bill of lading. B. then refused delivery, the price of potatoes having in the meantime gone down, and, without notice to L. the potatoes were sold, and after deducting demurrage the balance was tendered to L. in settlement. Both L. and B. had made repeated enquiries for the car.

Held: On the facts, that the car did not reach Montreal in reasonable time, that the railway employees were guilty of negligence in the performance of their duty, and that L. should recover the damages suffered by reason of the delay in transportation.

2. That the crown is entitled to the benefit of the provision in the bill of lading that "the amount of any loss or damage for which the carrier is liable shall be computed on the basis of the value of the goods at the place and time of shipment under the bill of lading," and the court assessed the damage on the basis of the value at the time and place of shipment.

3. That as the petitioner alleged that he suffered damages "par la faute, negligence et imprevoyance" of the employees of the railway, the case came within the operation of section 20 of the Exchequer Court Act, and the Crown was liable thereunder, and without reference to any liability as a common carrier.

Quaere: Can the Crown now be said to be a common carrier, notwithstanding the decisions in the cases of *McLeod* v. *the Queen* (1), *MacFarlane* v. *the Queen* (2), *Lavoie* v. *the Queen* (3).

(1) 8 S.C.R. 1.
(2) 7 S.C.R. 216.
(3) 3 Ex. C.R. 96.

1920

JOS. LECLERC v. THE KING

Reasons for Judgment.

PETITION OF RIGHT seeking to recover $971, damages suffered by reason of delay in transportation of potatoes from St. Charles de Bellechasse to Montreal.

November 17th and December 3rd, 1920.

Tried before the Honourable Mr. Justice Audette, at Quebec.

J. A. Gagne, K.C. for suppliant.

A. Sévigny K.C. for respondent.

The facts are stated in the reasons for judgment.

AUDETTE J. this (December 7, 1920) delivered judgment.

The suppliant, by his Petition of Right, seeks to recover the sum of $971 as representing the alleged loss suffered by him in forwarding, by the Canadian Government Railway, a car of potatoes from St. Charles de Bellechasse, P.Q., to Montreal under the following circumstances.

The suppliant having secured a car from the station master at St. Charles, loaded the same at the siding, with 674 bags of potatoes of 90 lbs. each,—each bag being weighed as it went on board. The loading being completed, on the 30th September, 1919, he went, accompanied by witness Lapointe, who had weighed the potatoes, to the station and asked the station master for a bill of lading—and at the same time placed on the agent's desk a slip of paper giving both the weight of the potatoes and the number of the car. The letter "N" on such slip stood before the figures representing the number of the car, and the letter "P" (for poids-weight) stood before the figures representing the weight.

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JOS. LECLERC v. THE KING

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The agent then prepared the bill of lading, and handed to Leclerc the document filed as Exhibit No. 1, whereby he acknowledged having received the potatoes from Leclerc, at St. Charles, on the 30th September, consigned to Gustave Brossard, with destination to Viger Station, Montreal, and placed upon the bill of lading, Exhibit No. 1, as the number of the car, the figures representing the weight of the potatoes. Hence the present action.

The documents, constituting the contract of carriage in the present case, were prepared by the agent, and when Leclerc was handed exhibit No. 1, he placed it in his pocket without looking at it.

Leclerc contends that having enquired from the agent when the potatoes would reach their destination, he was told that the car *should or* would be in Montreal somewhere around the 3rd of October, and he went to Montreal for that date with the object of taking delivery with his consignee.

However, the agent denies having told him when he thought the car would be in Montreal, and says that Leclerc told him the number of the car and gave him the wrong figures.

Upon this latter point, both Leclerc and Lapointe, the latter a disinterested witness, swear positively that the slip of paper was duly handed to the agent, and I accept their testimony in preference to that of the agent; because, when in the witness box, although showing honesty of design, he disclosed a very bad memory, especially in respect of what I might call the McCarthy enquiries and telegrams.

The car of potatoes left St. Charles on the following day, which was the 1st of October, 1919, and having reached Chaudiere Station, a comparatively short

distance from St. Charles, it remained there according to some evidence until the 6th October, on account of the difficulty resulting from the wrong number on the bill of lading.

In the meantime Leclerc had gone to Montreal and several times each day had been enquiring at the Place Viger Station, at the freight offices at Bonaventure Station, at the freight offices of the Intercolonial Railway, the Grand Trunk, and the Canadian Pacific Railway, but he could obtain no knowledge of the car in Montreal. He then telephoned from Montreal to the agent at St. Charles de Bellechasse for the right number of the car, and was again given by the telephone the weight number. Leclerc said he knew the right number and took it that the agent was giving the wrong number. He then on the 6th October sent a telegram (Exhibit "A") to the agent asking immediately for the number of the car, and on the 7th the agent sent the right number, and that telegram was received by Leclerc, at Montreal, on the morning of the 8th.

Leclerc then went again to the Place Viger station, to Bonaventure station, etc., but again was told they did not have the car. He and Brossard again and again went to the station and freight offices, and finally on the Saturday, being discouraged, he left for his home, at St. Charles, giving the address of the consignee at the freight office. Leclerc arrived at St. Charles on Saturday, the 11th, in the evening, and next day agent Rheaume and Leclerc met at church. The evidence as to how the conversation which then took place arose, is somewhat conflicting, but in the result, it amounts to the agent telling Leclerc he had better take delivery of his car and make a claim if he suffered damages; but Leclerc

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said, I need not bother about it, Brossard, the consignee is in Montreal, and they are going to pay me for that car. His patience by that time had graduated down to its minimum and perhaps not without some justification.

The suppliant says that on the Wednesday or Thursday following (the 15th or the 16th) he was advised by agent Rheaume, at St. Charles, that the car had been traced and that he could find it in Montreal.

Brossard, the consignee of the potatoes, confirms Leclerc as to all of these enquiries at the railway freight offices, but some difficulty appears to have arisen as to Brossard's address—a matter which will be hereafter referred to. Brossard, however, testifies he went to Viger Station every day up to the 20th October.

Then, on the 10th October, witness McCarthy, an employee of the Intercolonial Railway, at Montreal, and agent of the Canadian Northern Railway at Montreal wharf, received the bill of lading or way-bill, and testifies that at the time he received the way-bill he supposed the car was likely at Pointe St. Charles (Montreal) but he did not actually know. Witness McCarthy says he then endeavoured to locate Gaston (not Gustave Brossard) Brossard, the consignee, but seeing he could not succeed, he wired the station agent at St. Charles de Bellechasse (Exhibit "C") for Gaston Brossard's address. After several enquiries Gustave Brossard was found on the 20th, and according to McCarthy he then refused delivery of the potatoes, as endorsed upon the document—because, says Brossard, he did not want to sign before seeing the car, and because the price of potatoes had then gone down. The evidence is conflicting upon this point. The railway official endeavoured in part

to escape liability upon the ground that they could not locate the consignee, but it must not be overlooked that they were trying to find Gaston Brossard and not Gustave Brossard. A messenger had been sent to the place where the consignee was working, and upon enquiry was told they had no Gaston Brossard in their employ. Moreover, as the destination of the car was entered upon the bill of lading, would it not appear, as a primary duty of witness McCarthy, to notify the freight office at Viger station, of the arrival of the car. Had that been done, it is obvious that Brossard would have been notified before the 20th, as he kept enquiring daily at that station, the destination of his car.

Upon Brossard refusing delivery on the 20th October, the potatoes were sold without any notice to the consignor, and the sum of $517.52 realized by such sale, from which the freight, $114.20, and demurrage of $55.00 were deducted, leaving the sum of $348.32 which was tendered the suppliant in settlement, and he refused it, standing by his rights for the full value of the potatoes.

I must not overlook mentioning that we also had in the case the hyper-expert who testified as to what might have happened, and as to what might not have happened to the potatoes while in transit at that season. However, this speculative evidence has no bearing upon the gravamen of this action.

In the result I must find that the car in question never reached its destination, Viger station, Montreal. It is true witness McCarthy when pressed to locate the car at certain dates, tried to explain that the car might not have gone to Viger station on account of the Canadian Pacific Railway embargo, on account of congestion. From his evidence, however, it must be

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found that while that year there had existed intermittent embargoes, he did not know positively whether the embargo was in force at the very time in question. Moreover, if there was such an embargo, it should have been proved in the regular manner.

The wrong number was placed upon the document prepared by the St. Charles agent, and it was his duty to ascertain the right number before placing it on the bill of lading or way-bill, even if the document had been prepared by the consignor.

The evidence does not clearly disclose at what date the car actually reached Montreal. On the 10th October, witness McCarthy, who received the bill of lading, testified he thought the car was at Pointe St. Charles, but he was not sure,—as he might very well and very likely receive the way-bill or bill of lading even before the arrival of the car. The consignee was only notified on the 20th. On the 15th or 16th October, the consignor was notified at St. Charles de Bellechasse that the car had reached Montreal.

Did this car of potatoes reach Montreal within a reasonable time? What is a reasonable time depends upon the circumstances of each case. It was known to all concerned that the car in question was loaded with perishable goods, and therefore that all due urgency and efforts should have been made by the railway officials to forward the car to its destination with all due speed. Too much seems to have been taken for granted in allowing the car to remain at Chaudiere up to the 6th. It if took all of that time to transport potatoes over a distance of about 200 miles, railways would thus defeat their utility.

The wrong number was placed upon this bill of lading by the railway official, and he admits, in his evidence, it was his duty to corroborate and ascertain

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if the number was correct. The name of the consignee on the bill of lading is Gustave Brossard, and it was wrongly placed upon the notice to be served upon him. Gaston Brossard was the person sought, andnot Gustave Brossard. The car did not reach Montreal within a reasonable time under the circumstances, and in fact never reached its destination, Viger station, Montreal.

Upon the facts, if the case were one between subject and subject, the respondent would be liable in damages for a breach of the contract of carriage. But in view of the decisions in this court of *McLeod* v. *the Queen* (1), following *MacFarlane* v. *the Queen* (2), and *Lavoie* v. *the Queen* (3), holding that the Crown cannot be a common carrier, it would be necessary for me to consider whether those decisions have not become obsolete before I could find liability in respect of the contract of carriage. (See annotation to report of *Vipond* v. *Furness Withy Co.*)(4). However, I am relieved from any necessity of considering the case on the theory of carrier's liability by the fact that by his petition the suppliant alleges that he suffers damage occasioned "par la faute, negligence et imprevoyance" of the employees of the railway, and so brings the case within the operation of section 20 of the Exchequer Court Act.

It is mentioned in the evidence that the potatoes cost $1.25 a bag at St. Charles, and were sold at Montreal for $1.50. However, under the terms and conditions of the bill of lading, "the amount of any loss or damage for which the carrier is liable shall be computed on the basis of the value of the goods at the place and time of shipment under the bill of lading." *Getty* vs. *the C.P. Ry. Co.* (5).

(1) 8 S.C.R. 1.
(2) 7 S.C.R. 216.
(3) 3 Ex. C.R. 96.
(4) 35 D.L.R. 285
(5) 22 Can. R. C. 297.

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The suppliant loaded his car partly with some of his own potatoes and partly with potatoes he had bought at $1.00 a bag. I will accept that figure.

He also charged for his board at Montreal, but I fail to see the necessity of a consignor following his goods to their destination and therefore disallow such charge.

The suppliant is therefore entitled to recover the sum of $674, with interest (*St. Louis* vs. *the Queen* (1) and *Laine* vs. *the Queen* (2) thereon from the date at which the petition of right was left with the Secretary of State (a date which may hereafter be established by affidavit) to the date hereof, and with costs.

Solicitors for suppliant: *Galipeault, St. Laurent, Gagne, Metayer & Devlin.*

Solicitors for respondent: *Sévigny & Sirois.*

(1) 25 S.C.R. 649 at p. 665. (2) 5 Ex. C.R. 103.

BETWEEN

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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.

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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.

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.

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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.

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"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.

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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,

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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

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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 Excllency 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.

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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.

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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.

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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.

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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."

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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

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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."

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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.

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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-

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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.

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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.

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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.

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Dec. 20.

IN ADMIRALTY.

APPEAL FROM THE NOVA SCOTIA ADMIRALTY DISTRICT.

BETWEEN

PERLEY W. McBRIDE, (WILLIAM LOVETTE, A. D. CAMERON, W. D. McBRIDE, ELVIN GATES AND HARRY I. MATHERS, DOING BUSINESS UNDER THE FIRM NAME OF I. H. MATHERS SON, ADDED BY ORDER OF COURT)..... PLAINTIFFS;

AND

THE STEAMSHIP *AMERICAN*..... DEFENDANT (APPELLANT).

AND

JOHN S. DARRELL COMPANY; INTERVENORS..... RESPONDENT.

Shipping—Equitable jurisdiction of the Admiralty Court—Sale of vessel by sheriff—Vigilantibus et non dormientibus jura subveniunt.

M. obtained judgment for wages, etc., against the S.S. *American*, the owners having made default to appear. But D. & Co., the owners of the cargo, intervened. The vessel was duly seized and advertised for sale. On the application of the owners of the ship, the sale was adjourned for two days, and on the expiration of this delay the vessel was duly sold at auction by the sheriff on Saturday, the 18th September, 1920, and purchased by D. & Co., who made the necessary deposit. Money had been wired by the appellant to discharge plaintiff's claim, but arrived too late to stop the sale. D. & Co. tendered the balance of price on the following Monday, which was refused on account of an application to the Deputy Local Judge to set aside the sale, and to redeem the vessel. D. & Co., on purchasing the vessel, made arrangements for repairs thereto, and at the time the said application was originally made, they were negotiating for the sale thereof. The vessel is now on the high seas, and it did not appear whether she had been sold. The D.L.J. refused the application and from his decision the present appeal was taken. The claim is based on equity alone.

Held: (Affirming the judgment appealed from) that while the Admiralty Court exercises an unquestionable equitable jurisdiction, inasmuch as the appellant had failed to show a superior equity to those arising in favour of the purchasers, the order below should not be interfered with.

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PERLEY W. McBRIDE *et al* v. J. DARRELL.

Reasons for Judgment.

APPEAL from the decision of the Honourable Mr. Justice Mellish, D.L.J.A. for the Nova Scotia Admiralty District dismissing the application of the owners of the S.S. *American* to set aside the sale thereof made under authority of justice.

Geo. Henderson, K.C., for appellant.

R. V. Sinclair, K.C., for respondent, John S. Darrell Co.

December 9th, 1920.

Appeal heard before the Honourable Mr. Justice Audette, at Ottawa.

The facts and questions of law raised on this appeal are stated in the reasons for judgment.

AUDETTE, J. this December 20, 1920, delivered judgment.

This is an appeal from the judgment or order of the Deputy Local Judge in Admiralty for the Admiralty District of Nova Scotia, pronounced on the 25th September, 1920.

This is an action for wages and disbursements in which the plaintiffs obtained judgment for $1,871.83 and costs after the owners of the ship had made default to appear; but when John S. Darrell & Co., the owners of the cargo, had been allowed to intervene and contest the plaintiff's claim.

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PERLEY W. McBRIDE *et al* v. J. DARRELL.

Reasons for Judgment.

After judgment the vessel was seized and advertised for sale. On the application of the shipowners, the sale was adjourned for two days and on the expiration of the two days the vessel was sold at auction by the sheriff and purchased by Darrell & Co. on Saturday, the 18th September, 1920, through their Halifax agent, when the necessary deposit was paid and the balance tendered on the following Monday—and refused on account of the present application of the shipowners to set aside the sale, and allow them to pay the amount due the plaintiffs and redeem the vessel.

It appears that the necessary monies to discharge the claim of the plaintiffs in the action came too late to Halifax,—about the time of the sale,—but not on time to stop the sale.

There is spread upon the record the further fact that the purchasers of the vessel on the Monday following the sale had made arrangements with the Halifax Shipyard to have the *American* go in the dry dock on the following Monday for repairs. Moreover, it appears from an affidavit on record that negotiations had already been entered into for the sale of the vessel at the time the application was originally presented, and a long time has elapsed since the sale. Where is the vessel at present, was asked at the hearing of the appeal, and counsel for the intervenors answered she was travelling on the high seas. She may well have been sold for all is known of her. If that were so, it would hardly be practicable to attempt at this stage, to restore the parties to pre-sale conditions.

From my first impression gathered at the hearing of the case I thought, to do justice among the parties interested, that the application ought to be granted and the vessel restored to the original owners upon paying the plaintiffs' claim and all costs occasioned by

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their neglect, upon the ground that "much is to be said in favour of a principle which does justice to one party without doing injustice to the other;" however, so many conflicting interests have arisen since the time of the sale, which was made in a perfectly legal manner, that it becomes apparent that to extend an equity to the party in default would be to do an injustice to the other party whose rights were acquired in an unimpeachable way.

It is true the Admiralty Court, as said by Lord Stowell, exercises an equitable jurisdiction. The Court is not absolutely ministerial, and it is at liberty to hold its hand when it appears equitable to do so. See also *The Montreal Dry Dock and Ship Repairing Co.* vs. *Halifax Shipyards, Limited*(1).

However, *Vigilantibus et non dormientibus jura subveniunt;* the equitable arm of the Court is extended to the vigilant and not to the negligent. The sale was adjourned for two days to allow the shipowners to come in and cure their negligence and they failed to do so. The indulgence of the court has already been extended to them and they failed to take due advantage of it.

While the Admiralty Court exercises this unquestionable equitable jurisdiction, it must not be expected to peddle small equities. The case presents equities on behalf of both sides and they seem equally balanced. The burden was upon the appellant to show a superior equity which I fail to discover on the facts before me.

There were ample reasons for the learned local judge, after delaying the sale *for two days* at the request of the shipowners, to refuse their application and I am unable to find sufficient reasons to vary his pronouncement. And as said per Lord Loreburn, L.C., in *Brown* vs. *Dean* (2).

(1) 60 S.C.R. per Anglin J., p. 371. (2) [1910] A. C. 375.

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"When a ligitant has obtained a judgment in a Court of Justice, whether it be a county court or one of the High Courts, he is by law entitled not to be deprived of that judgment without very solid grounds." There is ample reason to support the judgment appealed from, which, under the circumstances gives substantial justice to all concerned.

There will be judgment dismissing the appeal.

Judgment accordingly.

BETWEEN

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Dec. 22.

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

AND

THE ONTARIO & MINNESOTA POWER COMPANY, LIMITED, DEFENDANTS.

Indian Lands, surrender of to Dominion—Powers thereof to accept—Indian Reserves—Transfer by Province to Dominion—Provincial Lands—B.N.A. Act 1867—5 *Geo. V, ch.* 12—*6 Ed. VII, ch.* 132 (*Ont.*)

Held: That upon a proper construction of the Nort West Angle Treaty (1873), the Dominion Government had full power under such treaty to accept the surrender on behalf of the Crown from the Indians, and as the result of such surrender the title to or beneficial interest in the lands so surrendered, within the Ontario boundaries, passed to the province under the provisions of section 109 of the B.N.A. Act, 1867, and that the entire beneficial interest therein was in the province until the conveyance of a part for Indian Reserves, by the province to the Dominion by the Act of the legislature of the province in 1915 (1).

2. That when the province assented to the "Reserves" being made and transferred them to the Dominion (5 Geo. V, ch. 12), the Dominion acquired them subject to the statutory rights, (2), and that the lands and privileges so granted were specifically eliminated from what was transferred to the Dominion, including among other things, the right granted to defendants to flood the land up to bench mark 497.

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(1) *St. Catharines' Milling and Lumber Co.* vs. *the Queen*, 14 A.C. 46; and *Attorney-General P.Q.* vs. *Attorney-General Dominion*, 37 T.L.R. 125; *Ontario Mining Co.* vs. *Province of Ontario* (1910) A.C. 637; *the King* vs. *Bonhomme*, 16 Ex. C.R. 437, confirmed on appeal to the Supreme Court of Canada.

(2) See 6 Ed. VII, ch. 132 (Ont.

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3. That, by reason of a reserve for roads, etc., along the shores of Rainy Lake and River being contained in the description of the Indian Reserves so surendered by the province to the Dominion as aforesaid, the land so reserved, did not form part of the Indian Reserves, and the beneficial interest therein remained in the province.

4. That, therefore, in view of all the facts, plaintiff could not recover for injury due to the flooding of any of said lands previous to the Act of 1915 aforesaid; but that, in 1916 (after the conveyance of the Indian Reserves to the Dominion) in view of the defendants having accumulated large quantities of water in the upper lakes and reservoirs, plaintiff could recover damages occasioned by the flooding of the land between bench mark 499 (in the state of nature) and bench mark 500.

INFORMATION exhibited by the Attorney General for the Dominion of Canada claiming damages for injuries to an Indian Reserve in the Rainy Lake District in the province of Ontario, by reason of flooding due to a dam constructed on the banks of the river and other works of the defendant.

October 5th, 6th and 7th, 1920.

Case was heard before the Honourable Mr. Justice Audette at Fort Frances.

November 12th, 1920, trial and argument continued at Ottawa.

Peter White, K.C., and B. *H. L. Symmes* for plaintiff.

W. N. Tilly, K.C., for defendant.

The facts are stated in the reasons for judgment.

AUDETTE J. now (December 22nd, 1920) delivered judgment.

This is an information exhibited by the Attorney General whereby the sum of $23,413.50 is claimed from the defendants as damages, for the flooding of lands alleged to belong to the plaintiff.

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I have had the advantage, accompanied by counsel for both parties, of viewing the premises in question the day preceding the trial.

By the North West Angle Treaty, No. 3, made and concluded on the 3rd October, 1873, between Her late Majesty Queen Victoria and the Saulteaux tribe of the Ojibbeway Indians, a certain tract of land,—containing about 55,000 square miles, covering in general terms, the area from the watershed of Lake Superior to the North West Angle of the Lake of the Woods, and from the boundary of the United States of America to the height of land from which the streams flow towards Hudson Bay—was duly ceded, released, surrendered and yielded up to the Government of the Dominion of Canada for Her Majesty The Queen, subject to certain conditions mentioned in the treaty, and among others to lay aside reserves for Indians, etc. See Exhibit No. 11.

By an act of the Parliament of Canada, 54-55 Vic., Ch. 5 (1891) and an act of the Legislature of Ontario, 54 Vic. ch. 3 (1891) the government of the Dominion of Canada and that of the province of Ontario were given authority to enter into an agreement for the settlement of these reserves, and certain questions respecting the lands so surrendered by this Treaty No. 3, with such modifications or additional stipulations to the draft recited in such statutes, as may be agreed upon by the two governments.

On the 16th April, 1894, the agreement above referred to was entered into by both governments, and it is therein, among other things, recited that whereas, out of the lands so surrendered by the Indians, reserves were to be selected and laid aside; and whereas the *true boundaries of Ontario had since* been ascertained and declared to include part of the territory

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surrendered; and whereas *before* the true boundaries had been declared as aforesaid, the Government of Canada *had selected and set aside* certain reserves for the Indians in intended pursuance of the treaty, although the Government of Ontario *was no party to the selection*, and *at that time had not concurred therein*—with the view of coming to a friendly and just understanding—the two governments had agreed between themselves as follows:

"1. With respect to the tracts to be from time to time taken up for settlement, mining, lumbering or other purposes and to the regulations required in that behalf, as in the said treaty mentioned, it is hereby conceded and declared that, as the Crown lands in the surrendered tract *have been decided to belong to the Province of Ontario* or to Her Majesty in right of the said province, the rights of hunting and fishing by the Indians throughout the tract surrendered, not including the reserves to be made thereunder, do not continue with reference to any tracts which have been, or from time to time may be, required or taken up for settlement, mining, lumbering, or other purposes by the Government of Ontario or persons duly authorized by the said government of Ontario; and that the concurrence of the province of Ontario is required in the selection of the said reserves.

"2. That to avoid dissatisfaction or discontent among the Indians, full enquiry will be made by the government of Ontario, as to the reserves before the passing of the said statutes laid out in the territory, with a view of acquiescing in the location and extent thereof unless some good reason presents itself for a different course.

"3. That in case the Government of Ontario after such enquiry is dissatisfied with the reserves or any of them already selected, or in case other reserves in the said territory are to be selected, a joint commission or joint commissions, shall be appointed by the Government of Canada and Ontario to settle and determine any question or all questions relating to such reserves or proposed reserves.

"4. That in case of all Indian reserves so to be confirmed or hereafter selected, the waters within the lands laid out or to be laid out as Indian reserves in the said territory, including the land covered with water lying between the projecting headlands of any lake or sheets of water, not wholly surrounded by an Indian reserve or reserves, shall be deemed to form part of such reserve including islands wholly within such headlands, and shall not be subject to the public common right of fishery by others than Indians of the band to which the reserve belongs.

"5. That this agreement is made without prejudice to the jurisdiction of the parliament of Canada, with respect to inland fisheries under the British North America Act, one thousand eight hundred and sixty-seven, in case the same shall be decided to apply to the said fisheries herein mentioned.

"6. That any future treaties with the Indians in respect of territory in Ontario to which they have not before the passing of the said statutes surrendered their claim aforesaid, shall be deemed to require the *concurrence of the government of Ontario.*"

Under the provisions of an order in council of the 8th July, 1874, Messrs. S. J. Dawson and Robert Pithers, had already been appointed to secure and select these reserves, and by a further order in council of

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the 27th February, 1875, the report upon the selection of such reserves was provisionally approved, after the maps accompanying the report of the commissioners had also been submitted *with a full description of the reserve.*

Now it has been established by Mr. Bray, the chief surveyor of the Indian Department at Ottawa, who has been in the employ of the Department for a long period of time, and who has knowledge of the matters concerning treaty No. 3,. and who was called as a witness on behalf of the plaintiff, that the reserves provided for by the treaty were duly selected by federal officers, and surveyed and accepted by all concerned. Mr. Bray filed as Exhibit No. 21 and as Exhibit "Q" (also marked "V") plans of the Indian reserve at Rainy Lake, together with the description of that reserve, which description forms part of the records of his department—the language (p. 33 of the evidence) used in setting apart the same and which is to be found, at page 1 of Exhibit "R-a" reads as follows:

"Treaty No. 3. Description of reserves to be set aside for certain bands of the Saulteaux tribe of the Ojibbeway Indians, under treaty No. 3.

"Rainy River. At the foot of Rainy Lake, to be laid off as nearly as may be, in the manner indicated on the plan, *two chains in depth along the shore of Rainy Lake* and bank of Rainy river, to be reserved for roads, right of way to lumbermen, booms, wharves and other public purposes.

"This Indian reserve not to be for any particular chief or band, but for the Saulteaux tribe, generally and for the purpose of maintaining thereon an Indian agency with the necessary grounds and buildings."

This description appears to have been in existence and accepted by the department ever since 1875, when it was provisionally approved by an order in council of the 27th February, 1875 (Exhibit R-A).

Reading this description together with the two plans filed by Mr. Bray, it will be found that they conjointly agree. That is to say, that the "two chains in depth along the shore of Rainy Lake and bank of Rainy river, to be reserved for roads, right of way to lumbermen, booms, wharves and other public purposes" appear on the one plan in the *shaded space*, and on the other in the road allowance plainly shown and marked thereon. All of this information is supplied by the Department of Indian Affairs, at Ottawa. The only conclusion to arrive at is that the 132 feet do not form part of the reserve, and that the fee or beneficial interest in these two chains is in the province, for the reasons hereinafter mentioned.

On behalf of the plaintiff it is contended that the plan (No. 70) of the reserve which is in the hands of the Ontario Government, and which forms part of the departmental records, does not show the reservation, and the witness who produced it testified that it had been filed with their department in January, 1890, and that no such reservation of 132 feet appear upon the plan. However, by the letter (Exhibit "W") of Mr. Hardy, the then Commissioner of Crown Lands for Ontario, written to the Deputy Minister of Indian Affairs on the 22nd May, 1889, it appears that while asking for tracings of the plans of the Indian reserves in the district of Rainy river, he stated: "it will be sufficient for our purpose if only the outside measurements and courses are put on." And there are some notes and writing on Exhibit No. 70, which do not appear on either exhibits "V" and "21," and vice versa.

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This does not in any manner conflict with the records at Ottawa, in the Department of Indian Affairs. The plan, as requested, was sent to the Ontario government, but it was not as complete as the plan of record at Ottawa, where in addition thereto was also to be found, as would be expected, a description of the reserve. At the trial, I asked for the production, if available, of the field notes of surveyor Caddy, who prepared these plans in 1876; they have not been forthcoming, but after all they are not needed for adjudicating upon the case.

Then, briefly stated, freed from a welter of details and facts which when properly analysed resolve themselves into a small compass, we have the agreement between E. W. Backus and the Ontario government, bearing date the 9th January, 1905, and the assignment of his rights thereby secured to the defendant company, coupled with the act of the Ontario legislature (1906) Ch. 132, 6 Ed. VII, together with the act of the parliament of Canada, 4-5 Ed. VII, ch. 139, whereby the defendants acquired their franchises, the right to erect a dam, to flood the Ontario lands, to interfere with a navigable river, etc.—all of which is so well known to all parties, that I will dispense with mentioning more than the source of such rights.

The defendants in 1906 acquired from the province of Ontario certain land together with leave to construct their dam, and also the right to flood any land that was the property of Ontario to the bench mark of 497.

The defendants further acquired from the Dominion the right under 4-5 Ed. VII, ch. 139, to develop the water power in question, provided that no work authorized by that act, be *commenced* until the plans thereof

be first submitted and approved by the Governor in Council. The plans were duly submitted and approved before commencing the works, but subsequently thereto some alterations and changes were made, which, under the evidence were approved verbally by the Minister as provided, I would think, by the order in council of the 19th September, 1905 (Exhibit No. 13). However, the matter is here mentioned, because great stress was laid upon the point by the plaintiff to the effect that the works as constructed were not properly authorized, and that the defendants were therefore trespassers. I dismiss this contention, and it would appear also to be *de minimus* in a case like the present one. In the result it means that these changes and alterations were of an essential benefit to the works and had been approved of by the Minister,—and the plans of these works as a whole had been authorized and approved by order in council before being commenced. The sluices as built were constructed with a capacity to discharge more than in the state of nature. See *Montreal St. Railway* vs. *Normandin*. (1)

Now, the Dominion Government had full power to accept the surrender on behalf of the Crown from the Indians by the North West Angle Treaty, and as a result of such surrender the title to the lands, coming within the Ontario boundaries, passed to that province under the provisions of sec. 109, of the British North America Act, 1867 (2).

(1) 33 T.L.R. 174.

(2) *St. Chatherine's Milling and Lumber Co.* vs. *the Queen*, 14 A.C. 46; and *Attorney General P.Q.* vs. *Attorney General, Dominion*, 37 T. L.R. 125; *Ontario Mining Co.* vs. *Province of Ontario*, (1910) A.C. 637; *the King* vs. *Bonhomme*, 16 Ex. C.R. 437, confirmed on appeal to the Supreme Court of Canada.

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Having found so much, it results that no part of such lands ever passed to the Dominion before 1915, and that from the day of the surrender to 1915, when the Act 5 Geo. V, ch. 12, was passed by the legislature, the entire beneficial interest in these lands was in the province. Therefore, it follows that when by the Act of 1915 (5 Geo. V, ch. 12) the province assented to the reserves and transferred them to the Dominion, by what may be termed a statutory deed, the Dominion acquired them subject to the statutory rights, conveyance, etc., that had been previously granted to the defendants, as set forth in the Ontario statute of 1906 (6 Ed. VII, ch. 132) which adopted the agreement between the province and the defendants, or their predecessors in title, giving them the right to build their works and dam, to flood the Ontario lands to the bench mark of 497, the height of the crest of the dam, etc. Moreover, under the provisions of sections 2 and 4 of this Act, 5 Geo. V, ch. 12, the lands and privileges granted the defendants would appear to be specifically eliminated from what is transferred to the Dominion by that Act. It may also be observed that by this 1915 Act, modifications have been made to the agreement of 1894. The Dominion, however, has no interest outside the reserve proper, and the reserve is 132 feet from the water's edge.

Having found that the Dominion had no beneficial interest in these lands up to the passing of the Act of 1915, and that the lands for the reserves were by that Act transferred to the Dominion subject to the rights, powers and privileges acquired by the defendants prior to that date; having further found, that "the two chains in depth along the shore of Rainy Lake and bank of Rainy river" did not pass to the Domin-

ion, but that the beneficial interest in the same is in the province, it remains to be ascertained if the plaintiff suffered any damage, and to what extent.

The scope of the action has been at trial entirely changed from what appears under the written pleadings. The plaintiff is not entitled to any damage resulting from the maintenance of the water to the bench mark 497, and it is impossible under the evidence adduced to assess, at this stage, with any satisfaction, the damages which might have been suffered in 1916 when this bench mark of 497 had been exceeded. In the extraordinary flood of 1916, qualified by Crown witness Smallian as a flood not likely to happen again, the waters rose to 509.06, although the waters had risen very high in 1896, as shown by Exhibit No. 30. Whereas it has been established that under the state of nature they would have risen to 499.65. This rise, however, should be decreased by six inches as it was increased by these six inches through the booms and the jam at the bridge between the 14th and the 27th May, 1916.

For the damages occasioned in 1916 (which were maintained for the best part of the year) between the actual flooding and the flooding that would have obtained in a state of nature, and above the 132 feet along the water front, the plaintiff is entitled to recover. I am unable to charge the defendants with negligence in taking care of this enormous volume of water in 1916, including the accumulation in the upper lakes used partly as reservoirs, when 95 per cent thereof was successfully handled before the state of nature was exceeded. It is easy to be wise after the event and say if this or that means had been resorted to, the flood would or might have been decreased.

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However, under the evidence it is impossible to find negligence. A man of ordinary prudence could not have foreseen the extent of the flood of 1916, as testified to by Crown witness Smallian.

The case has been especially well argued, and with the argument and the information already spread upon the record, it is perhaps possible to form a fair idea of the damages of 1916, although not with any great precision.

What is the damage? The damage to the trees has been caused by the raising of the water to 497. It must be found that the flood of 1916 did not of itself affect the trees that were then cut or otherwise. As I have already stated it is impossible, at this stage, under the new state of facts which arose only at the time of the argument and when the evidence was on the record, to arrive at any satisfactory conclusion with respect to the assessment of the damages; but I have come to the conclusion on this subject of damages, to adopt the following course, assuming that the Indians claiming herein are beyond the 132 feet and the 499 bench mark. From the general evidence, the perusal of plans "G" and "H" and other plans dealing with the same matter, and bearing in mind the evidence of witness Walker, who testified respecting the revenue derived from the Park, it clearly appears what territory would suffer at the two respective bench marks above mentioned—and considering that the flood of 1916 lasted somewhat longer on account of the dam, than it would in a state of nature, which could not be called *damnum fatale* (1). I am willing to name as compensation and in satisfaction of these damages, which are not of a permanent nature, the sum of five hundred dollars. The parties herein to signify

(1) *Corp. of Greenock* vs. . *Caledonian Ry. Co.* (1917) A.C. 556.

by a written document to be filed of record, within fifteen days from the date hereof, if they accept this figure in satisfaction of the said damages. Failing the parties to accept this assessment, there will be a reference to the registrar of this court, for enquiry and report upon the question.

Subject to the right of the parties to elect to accept either a reference or the lump sum above mentioned, I wish to offer the following observations. The reference would be expensive, and the amount recoverable thereunder would very likely be less than its costs, so I embark upon the assumption that the parties would suffer less from an assessment under the present impossibility of accurate ascertainment than from having recourse to a reference. Indeed, according to the testimony of the Indian agent, Mr. Wright, and another witness who spoke upon the question of damages in 1916, it would seem that Pither's Point would not have suffered any appreciable damage from flooding under the circumstances—although the plaintiff might be entitled to recover damage for the deprivation of the use of flooded lands used as a park or otherwise, and even to nominal damages in respect of the same for flooding the plaintiff's land between the two bench marks above mentioned, being an invasion of the plaintiff's right to full and undisturbed possession. The material damage, if any, suffered would be with respect to the Indians; but if the Indians squatted within the 132 feet from the water's edge, they squatted upon provincial lands and not upon the reserve, and if the damages suffered by them is beyond the 499 bench mark, they cannot recover. They cannot recover as such squatters, under the decision of *Smith* vs. *Ontario & Minnesota Water Power Co.* (1).

(1) 44 O.L.R. 43.

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Upon the question of costs, as the success of the parties upon the result of the case is practically divided, I find that there should be no costs allowed as between the respective parties as well upon the trial, as upon the adjournment and the reopening of the case.

Solicitor for plaintiff: *J. W. Bain.*

Solicitor for defendants: *Arthur* D. *George.*

BETWEEN

1921
January 8.

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

AND

MAX LITHWICK.....DEFENDANT.

AND

WILLIAM ALANSEN COLE, ASSIGNEE TO THE DEFENDANT'S INSOLVENT ESTATE..... } ADDED DEFENDANT.

Dominion Income Tax—Judgment against Defendant who had assigned under provincial Act for benefit of creditors—Priority of Dominion Crown—Constitutional Law.

Held: That the Crown, in right of the Dominion of Canada, was entitled to be paid the amount of a judgment for income tax under 10-11 Geo. V. ch. 49, obtained by it against a debtor who has made an assignment under the Ontario Assignments and Preferences Act (R.S.O. 1914, ch. 134) in priority to all other creditors of the same class.

The Queen v. Bank of Nova Scotia, 11 S.C.R. 1 and Liquidator of Maritime Bank v. Receiver General of New Brunswick (1892) A.C. 437, referred to.

2. That any provision in a Provincial Act relating to assignments for the benefit of creditors cannot, *ex proprio vigore*, take away any privilege or priority of the Crown as a creditor in right of the Dominion.

Gauthier v. The King, 56 S.C.R. 176, at 194, referred to.

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THE KING v. MAX LITHWICK AND WILLIAM ALANSEN COLE.

INFORMATION exhibited by the Attorney-General of Canada to recover from the defendant the sum of $760.66 representing the amount of Income War Tax due by him for the year 1917 and praying that the said amount be paid by priority.

Reasons for Judgment.

Audette J.

January 5th, 1921.

Case was heard before the Honourable Mr. Justice Audette at Ottawa.

C. P. Plaxton and *R. B. Law* for plaintiff.

W. L. Scott for defendants.

The facts are stated in the reasons for judgment.

AUDETTE J. now (January 8, 1921) delivered judgment.

This is an amended information exhibited by the Attorney-General of Canada to recover from the above defendant, by priority, the sum of $760.66 as representing the amount of Income War Tax due by him for the year 1917.

The defendant, although duly served with the original information has made default in filing any statement in defence but appeared by counsel on the issues raised by the amended information, at the hearing on the 5th instant.

The Assignee was added as defendant herein and from his affidavit, to which is attached a copy of the resolution authorizing him to contest the Crown's claim to priority, it now appears that the creditors are duly represented in the present proceedings.

The amount for which judgment is asked is not contested, the only controversy arising herein is as to whether the amount of Income tax due by defendant is to be paid in full in priority to all other creditors of equal degree who are herein represented by assignee Cole (sec. 9).

As stated by Lord Watson, at p. 441, in re *The Liquidators of the Maritime Bank of Canada* vs. *Receiver General of New Brunswick* (1):—"The Supreme Court of Canada had previously ruled, in *Reg* vs. *Bank of Nova Scotia* (2), that the Crown, as a simple contract creditor for public moneys of the Dominion deposited with a provincial Court, is entitled to priority over other creditors of equal degree, The decision appears to their Lordships to be in strict accordance with constitutional law."

Unless this priority to which the prerogative attaches in favour of the Crown has been taken away by competent statutory authority, I must find it is still good law. Much more so indeed, where it is not only in connection with an ordinary chirographic claim, but in respect of a claim for taxes—income taxes.

I am unable to follow the contention asserted at bar on behalf of the assignee that the Assignment and Preferences Act (R.S.O. 1914, ch. 134) established that all creditors must be collocated *pari passu* or on a basis of equality, and that the assignment by the insolvent takes away any priority any claim might have had.

In the first place this Ontario act could not, *ex proprio vigore*, take away or abridge any privilege of the Crown in the right of the Dominion. The distribution is made under a provincial statute that cannot affect the rights of the Federal Crown. *Gau-*

(1) [1892] A.C. 437. (2) 11 S.C.R. 1

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Reasons for Judgment.

Audette J.

thier v. *the King* (1) per Anglin J. Then the argument, on behalf of the assignee, seems to confuse an assignment in the nature of a conveyance with the assignment contemplated by the act, which is for the express benefit of the creditors,—the act itself, by sec. 5, recognizing privileges.

What might have given rise to the contention offered on behalf of the assignee in refusing the priority sought by these proceedings is the decision of the Courts of Ontario in *Clarkson* v. *the Attorney-General of Canada* (2); but the authority of that decision has now been impaired by the decision of His Majesty's Committee of the Privy Council in re *New South Wales Taxation Commissioners* v. *Palmer* (3), wherein it is said:—

"The attention of their Lordships was called to the case of *In re Baynes*, (4) which has already been mentioned, and a case in *Ontario, Clarkson* v. *Attorney-General of Canada*, (2) in both of which the right of the Crown to preferential payment out of assets being administered in bankruptcy was denied. Their Lordships have carefully considered those cases. With every respect to the courts by which they were decided, their Lordships cannot help thinking that in both cases the learned judges have not sufficiently kept distinct the two prerogatives which formed separate grounds of decision in *In re Henley & Co.* (5). The judgments are devoted in a great measure to a consideration of the prerogative under which the Crown was entitled to peculiar remedies against the debtor and his property, and of the law and the authorities bearing upon it. The principle upon which that prerogative depends is not to be confounded with the principle invoked in the present case. The prerogative, the

(1) 56 S.C.R. 176, at 194.
(2) 15 Ont. R. 632; 16 Ont. A.R. 202.
(3)]1907] A.C. 185.
(4) 9 Queens land. L. J. 33 at 44.
(5) 9 Ch. D. 469.

benefit of which the Crown is now claiming, depends, as explained by Macdonald C. B. in *the King* v. *Wells* (1), upon a principle 'perfectly distinct * * * and far more general determining a preference in favour of the Crown in all cases and touching all rights of what kind soever where the Crown's and the subject's right concur and so come into competition.'"

In *Attorney-General for N.S. Wales* v. *Curator of Interstate Estates* (2), it was held that the Insurance Act therein mentioned did not bind the Crown which was entitled to be paid by virtue of its prerogative in priority to all other creditors of the deceased.

The case of *Sykes* v. *Soper* (3), was also mentioned at bar but has no importance here in view of the above decision in the *Palmer* case.

The decision in *re Henly & Co.* (4), above referred to, decided that when a company is being wound up the Crown has a right to payment in full of a debt due from the company for property tax before commencement of the winding up, in priority to the other creditors—See also *In re Oriental Bank Corporation* (5)

Then *In re Laycock* (6), also decided that sec. 33 of the Bankruptcy Act 1914, which after giving statutory priority to certain Crown and other debts in the distribution of a bankrupt's or deceased insolvent's property, provides that subject thereto all debts shall be paid *pari passu*, does not apply to the private administration of a deceased insolvent's estate out of Court, and therefore does not affect the *common law* priority of any Crown debt in such a case.

In re Galvin (7), it was held that the Crown was entitled to priority in respect of legacy duties.

(1) 16 East, 278.
(2) [1907] A.C. 519.
(3) 29 Ont. L.R. 193.
(4) L.R. 9 Ch. Div. 469.
(5) L.R. 28, Ch. D. 643.
(6)]1919] 1 Ch. 241.
(7) [1897] Ir.R., 1 Ch. D. 520.

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Reasons for Judgment

Audette J.

A number of authorities in support of this view will also be found in Robertson, On Civil Proceedings, p. 164 et seq.

The Canadian Income War Tax, 10-11 Geo. V, ch. 49, sec. 10, sub-sec. 9, further provides that in cases wherein assignees, etc., are administering and distributing estates etc.: "they * * * shall pay any tax and surtax and penalties assessed and levied with respect thereto *before making any distribution of the said property, business or estate.*" The Act thereby recognizes and preserves the priority, if the tax has to be paid before distribution is made.

Moreover statutes made for the benefit of the Crown must be beneficially construed, Hals. 27, p. 166 n.

Income Tax owing to the Crown has priority over all other insecured debts. Hals. p. 879 et seq.; Vol. 2, p. 217.

The rule of law formulated in the maxim Quando *jus domini et subditi concurrunt, jus regis praeferri debet*, cited by Strong J. *in re The Queen* v. *Bank of Nova Scotia* (1), and approved of in the case of *Liquidators Maritime Bank* v. *Receiver General N.B.* (2) has still full force and effect and must be followed.

Therefore there will be judgment condemning the defendant Lithwick to pay, as prayed, the sum of $760.66 with interest and costs, and ordering the added defendant Cole, in his capacity of assignee, as aforesaid to pay the same to the plaintiff in full priority to all creditors of equal degree of the said defendant Lithwick.

Judgment accordingly.

Solicitors for plaintiff: *C. F. Elliott.*

Solicitor for defendants: *Ewart, Scott, Kelly & Kelly.*

(1) 11 S.C.R. 1, at 15. (2) [1892] A.C. 437.

QUEBEC ADMIRALTY DISTRICT

1921

No. 506

January 12.

ARMAND MARCHAND.....PLAINTIFF;

VS.

THE SHIP *SAMUEL MARSHALL*..DEFENDANT,

AND

THREE OTHER CASES BEARING

NOS. 507, 509 AND 516.

Shipping and Seamen—Minors' right to sue for wages—Lex fori—Admiralty Courts—Canada Shipping Act—Interpretation of Seaman's Contract—Benefit of the doubt—Bonus.

M. and others, minors under the age of 21 and over 14, were engaged in the province of Quebec, to serve on board the *S.S.M.* plying between the Great Lakes and Father Pt., and sued in the province of Quebec, before the Exchequer Court of Canada, in Admiralty, for wages and bonus due them.

Held: That whatever relates to the remedy to be enforced should be determined by the *lex fori*, and as the remedy of the plaintiff had been invoked in the province of Quebec, by the law of which province a minor over 14 may sue in his own name to recover wages due him, plaintiff had the status and capacity to sue before this Court.

Don vs. *Lippman* 5 C. & F. Rep. pp. 1 and 13. *The Milford;* Swabey 362. *The Tagus* 72 L.J. Adm. 4; referred to.

2. That where it is established that seamen were to be paid a bonus of $10.00 a month, *at the end of the season*, and where the ship was arrested before the close of navigation, and the owners failed to obtain her release, such failure on their part was in effect a consent that she be laid up from that date, and the season's operations were then ended, and the seamen became entitled to their wages and bonus. *The Malta* 2 Hagg. Adm. 158, and *Viners Abridgment, Verbo.* "*Mariners* p. 235 referred to.

5. It is the immemorial and benevolent practice of the Court, that, where there is any doubt as to the meaning of the contract of hire, the seaman should get the benefit thereof; and in such a case the contract should be interpreted against the owner and in favor of the seaman.

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v.
THE SHIP SAMUEL MARSHALL AND THREE OTHER CASES BEARING NOS. 507, 509 AND 516.

Reasons for Judgment.

Maclennan D.L.J.

AN ACTION for wages by various seamen who were minors under the age of 21, on board the ship *Samuel Marshall.*

The owners of the ship moved to have the action dismissed on the ground that the plaintiffs being minors had no right to sue before the Admiralty Court.

December, 11th, 18th, 1920.

Argument on the questions of law raised by the plaintiff was heard before the Honourable Mr. Justice Maclennan at Montreal.

Harold Walker, counsel for plaintiff Marchand.

T. M. Tansey, counsel for defendant.

The facts and the questions of law raised are stated in the reasons for judgment.

MACLENNAN, D. L. J. A. now (January 21, 1921,) delivered judgment.

These are all actions for wages and some questions arise which are common to all of the four cases. The plaintiffs Marchand, Leblanc and Lehouillier were seamen aboard the ship *Samuel Marshall*, and the plaintiff Trepanier was the assistant cook. Leblanc and Trepanier signed the articles of engagement dated at Sorel, May 7th, 1920, to serve on board the ship between Montreal and the Great Lakes and on the river St. Lawrence as far as Father Point for a period not to exceed eight months, the ship to be used as freight boat. The articles contained an agreement that fifteen days notice must be given before leaving the vessel and "in case of the ship being laid up, the crew to be paid without extra wages." Under the

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heading of "Particulars of Engagement" there is a column headed "Amount of wages per week of calendar month," in which it is mentioned the monthly wages of each member of the crew who signed the articles, and there is also another column headed "Bonus at the end of the season," but no amount is entered in the latter column opposite the names of the crew.

Each of the above plaintiffs is a minor, and the owners of the ship at the trial objected to each action on the ground that the plaintiff being a minor was incompetent to sue for his wages. This is the first question to be decided and it applies to the four cases. Counsel for defendant submitted that the Exchequer Court in Admiralty administered the Maritime Law of England in like manner as if the cause of action were being tried and disposed of in the English Court of Admiralty and that by the English Maritime Law a minor seaman under the age of 21 years could not sue in his own name but through a curator or guardian; *MacLachlan, Merchant Shipping* (5th Ed.) 263 and *Albert Crosby* (1). Counsel for plaintiff relies upon article 304 of the Civil Code of Lower Canada, which provides that a minor of 14 years of age may alone bring action to recover his wages.

The question to be decided here is what law applies. These plaintiffs were all engaged in the province of Quebec and the actions were entered in this province. Article 6 of the Civil Code provides that an inhabitant of Lower Canada is governed by its laws respecting the status and capacity of persons, and C.C. 304 gives a minor 14 years of age a right of action to recover his wages. Many years ago the House of Lords, in *Don*

(1) Lush. 44.

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vs. *Lippmann* (1), laid down the rule, that whatever relates to the remedy to be enforced must be determined by the *lex fori*, the law of the country to the tribunals of which the appeal is made. This rule was followed by Dr. Lushington in *The Milford* (2), and by Phillimore J. in *The Tagus* (3). In *The Minerva* (4), Lord Stowell at p. 358 said: "Seamen are the favorites of the law . . . . . and placed particularly under its protection." In view of these authorities I came to the conclusion that the remedy of the plaintiffs being invoked in the province of Quebec must be governed by the prosivions of the law of this province which gives a minor a right of action to recover his wages. Had these plaintiffs taken proceedings before a Judge of the Sessions of the Peace or Police Magistrate, as they were entitled to do under the Canada Shipping Act, the objection to their actions on the ground that they were minors could not have been raised. In my opinion, this objection should not prevail in the Admiralty Court, and I therefore hold that the plaintiffs had the capacity and status which justify them in entering their actions in this Court.

Another question of importance relates to the right of the plaintiffs to claim a bonus. It is established by the evidence that each member of the crew, with the exception of the captain who had a special agreement in that connection, was to be paid a bonus of $10.00 per month at the end of the season. This bonus was in reality part of the wages of the crew and they all received a bonus for the previous season and, in my opinion, the plaintiffs established their right to receive

(1) (5) C. & F. Reports, 1 and 13.
(2) Swabey 362.
(3) 72 L. J. Adm. 4.
(4) 1 Hagg. 347.

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such bonus; *The Elmville* (1). The defendant submitted that the end of the season had not arrived when these actions were instituted. This ship had been engaged during the season of 1920 in carrying coal from Lake Erie ports to the port of Montreal and arrived in Montreal on its last trip down on Sunday, 14th November, at 10 a.m., with a cargo of coal aboard, which was discharged on the following day. On November 16th a cargo of liquor consigned to Windsor, Ontario, was placed aboard the ship, but was removed by seizure in revendication against the owners on 17th November. On the latter date the ship was arrested by one McCullough on a claim for wages. The owners did not take any steps to secure the ships' release from that seizure, but very improperly, on the 18th November, induced the Master to leave the port of Montreal for Cornwall, Ontario. The Marshall of the Court who had arrested the ship and was in custody thereof having obtained information of the attempt to remove the ship from this jurisdiction, succeeded in stopping her at the Soulanges Canal and compelled her to return to Montreal. In the meantime further arrests were made of the ship at the instance of divers members of the crew. As the owners did nothing to obtain the ship's release from the arrest by McCullough, the further employment of the ship became impossible. The season's operations were ended and the crew became entitled to their wages and bonus. The articles expressly provided, that in case the ship is laid up the crew is to be paid without extra wages. This clearly contemplated the termination of the operations before the close of the season of navigation

(1) 73 L. J. Adm. 120.

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and when the owners failed to obtain the ship's release from arrest they in fact consented to her being laid up from that date; *Viner's Abridgement* (1); *The Malta* (2), Maclachlan (5th Ed.), Merchant Shipping, 247. It has been an immemorial and benevolent practice of the Court, if there is any doubt about a contract, to give the seamen the benefit of it; *The Nonpareil* (3); *Roscoe's Ad. Practice,* (4th Ed.) *251.*

Armand Marchand joined the ship in September; his wages were $65.00 per month and he claims $20.00 for two months bonus. He was paid wages to the end of October and I find that he is entitled to $41.17 being wages from 1st to 19th November, 1920, at $65.00 per month, and a further sum of $20.00 being two months bonus, in all $61.17 for which there will be judgment in his favour against the ship with costs.

Florence Trepanier was the second cook on the ship; her wages were $45.00 per month with a bonus of $10.00 per month, and she had served on the ship during the whole season. She has proved her claim of $28.50 for the first nineteen days in November and $70.00 being seven months bonus, in all $98.50, for which amount there will be judgment in her favour against the ship and costs.

Paul Leblanc had served during the whole season; his wages were $75.00 with a bonus of $10.00 per month. He made a claim of $5.00 for some extra services but this item is not proved or allowed. He has established his right to $47.50 being wages from 1st to 19th November, 1920, and $70.00 bonus, forming a total of $117.50 for which there will be judgment in his favour against the ship with costs.

(1) Verbo Mariners, p. 235. (2) 2 Hagg. 158.
(3) Br. & L. 355.

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Xavier Lehouillier began on 1st August, 1920, and was paid to the end of October; his wages were $65.00 per month and he has proved his claim for wages from 1st to 22nd November, $47.67, and his right to a bonus for four months, $40.00, forming a total of $87.67, for which amount there will be judgment in his favour against the ship with costs.

Judgment accordingly.

Solicitors for plaintiffs: *Heneker, Chauvin, Walker & Stewart.*

Solicitors for defendant: *Solon Elisoph.*

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January 21.

IN THE MATTER OF THE PETITION OF RIGHT OF THE WOLFE COMPANY } SUPPLIANT;

AND

HIS MAJESTY THE KING..... RESPONDENT.

Exchequer Court Act—Sect. 20—"Public Work"—Definition—Burden of Proof—Interpretation of Statutes.

Held: That in the absence of any definition of a "public work" in the Exchequer Court Act, the phrase as used in section 20 thereof must be construed in its plain and literal meaning, and its construction should not be governed by any definition of the phrase in any Act of the Parliament of Canada, the intendment of which was to limit the meaning of the phrase to the operation of the particular Act.

2. The phrase "public work" appearing in the Public Works Act and in the Expropriation Act should not be construed to include a building occupied under the circumstances peculiar to this case, namely: A building, the basement and first floor of which were used and rented for a recruiting station by the Department of Militia and Defence, either under the War Measures Act or the Militia Act, and solely under its control, with the right to vacate at any time upon giving 14 days notice, and over which the Public Works Department had no control.

3. That the fact that a fire takes place is not of itself evidence of negligence, its occurrence being quite consistent with due care having been taken; there must be some affirmative evidence of negligence, or of some fact from which a proper inference may be drawn.

4. That the burden of proof being upon it and the suppliant having failed to show that the fire was the result of negligence on the part of some officer or servant of the Crown while acting within the scope of his duties or employment the petition could not be entertained.

Semble: That while the phrase "Public Work" as used in the Public Works Act and the Expropriation Act, means property vested in and belonging to Canada, yet all classes of property belonging to Canada are not necessarily public works.

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PETITION OF RIGHT seeking to recover sum of $23,245.85 representing value of stock in trade destroyed by a fire which started in a building occupied by the Crown and communicated to the building where their stock was contained.

December 22nd, 1920.

Case was heard before the Honourable Mr. Justice Audette, at Ottawa.

A. E. Fripp, K.C., for suppliant.

W. D. Hogg, K.C., for respondent.

The points of law involved and the facts are stated in the reasons for judgment.

AUDETTE J. now (January 5, 1921,) delivered judgment.

The suppliant, by its petition of right, seeks to recover the sum of $23,245.85, as representing the value of his stock-in-trade destroyed by fire, on the 13th December, 1917, under the following circumstances:

On the 5th March, 1916, the Department of Militia and Defence rented, from Messrs. A. E. Rea & Company, the Arcade building, at 194 Sparks Street, as a Recruiting Station for soldiers, at $200 a month, with the right to vacate at any time upon giving 14 days notice. There was no formal lease with covenants subscribed between the parties. The contract between the parties, such as it is, is evidenced by Exhibits 1 and 4. While the building was so occupied it was destroyed by fire on the night of the 12th to 13th December, 1917, as well as the adjoining building to the west which was occupied under tenancy by the

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suppliant who was carrying on therein the business of milliner and furrier. It now sues for the value of his stock-in-trade then destroyed and which it estimates at the sum of $23,245.85.

It is well to note, however, that by Exhibit No. 1, Messrs. A. E. Rea Company, Limited, offered to rent for $200 a month, the premises which the Recruiting Station *then occupied*, and that is the *ground floor and the basement*, and further that only these two stories were so occupied. The upper stories would not appear to have been covered by such offer and were not in the mind of the owner.

The question of the *quantum* of damages, is by agreement of all concerned, left over until the question of liability has been determined.

The action in its very essence is grounded on negligence and sounds in tort. In such a case there is no liability on the part of the Crown, unless it is made so liable by statute. To succeed the suppliant must therefore bring his case within the ambit of section 20 of the Exchequer Court Act, as amended, in 1917, by 7-8 Geo. V, ch. 23, whereby sub-sec. (c) of said section now reads as follows:

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

In approaching the consideration of the case, and in view of a long series of decisions upon the statute as it stood before the amendment, it is well to bear in mind the amendment of sub-sec. (c) above mentioned, which came into force on the 29th August, 1917; and further, that the injury to this property resulting from the fire took place on the 13th December, 1917.

A number of decisions upon the former state of the law, establishing the rule that to create liability the injury had to be sustained *on* the public work, are not now applicable.

Moreover, under the decision in *Piggot* v. *the King* (1) which is a case decided under the law as it existed prior to 1917, it was established that such a claim as the present could not be sustained under paragraphs (a) and (b) of sec. 20. It was decided there that these two paragraphs dealt with the question of compensation and not damages, and that "compensation," as stated by His Lordship, the Chief Justice of Canada, "is the indemnity which the statute provides to the owner of lands which are compulsorily taken under, or injuriously affected by, the exercise of statutory powers."

Does the case come under sub-sec. (c) of section 20, as amended in 1917?

To bring this case within the provisions of sub-section (c), as amended in 1917, the injury to property must result from *the negligence of any officer or servant of the Crown* while acting within the scope of his duties or employment upon any public work. In other words the three following requirements are necessary: 1st, a public work; (2nd) negligence of the Crown officer thereon; (3rd) and the injury must be the result of such negligence.

Now it is contended at bar, on behalf of the suppliant, that the Arcade building was a *public work* while rented and occupied by the Crown as a Recruiting Station for soldiers, and that the officers in charge were guilty of negligence in, *inter alia*, building small beaver board partitions and in placing stoves, called Quebec heaters, close to the same, and furthermore in not keeping a watchman or caretaker over night in the building.

(1) 19 Ex. C.R. 485; 53 S.C.R. 626.

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The first question to answer is whether or not this Recruiting Station, under the circumstances, was a "public work" of the Dominion of Canada.

There is no description or definition of a "public work" in the Exchequer Court Act which provides for the liability above mentioned under this amended section 20.

On behalf of the suppliant it is then contended that for the determination of what is a "public work," reference should be had to the Public Works Act, (ch. 39, R.S.C. 1906) sub-sec. (c) of sec. 3 thereof, which reads as follows: "(c) 'public work' or 'public works' means and includes any work or property under the *control of the Minister.*" This section, however, must be read conjointly with sections 9 and 10 of this Act. Section 9 especially qualifies and determines what is to be under the control and management of the Minister by stating: "The Minister shall have the management, charge and direction of the following properties *belonging* to Canada, etc." That is, he is to have the control of properties belonging to Canada. That is as a condition precedent the property must belong to Canada.

Then section 10, sub-sec. (c) enacts that: "Nothing in the last preceding Section shall be deemed to confer upon the minister the management, charge or direction of such public works as are *by or under the authority of this Act or any other Act of the Parliament of Canada, placed under the control and management of any other Minister of or Department.*"

Now, it has been established by the evidence that the Arcade building used as a Recruiting Station in 1917, was not at any time, under the control and superintendence of the Public Works Department

which had nothing whatever to do with it, and that the Department of Militia and Defence, acting either under the War Measures Act, 1914, or under section 8 of the Militia Act (R.S.C., ch. 41) had full control over it.

Therefore, it results that the Public Works Act becomes and is of no help for the determination of the question as to whether these premises were or were not a "public work" within the meaning of the Exchequer Court Act.

Subsection (d) of sec. 2 of the Expropriation Act (ch. 143, R.S.C., 1906) enacts the following definition of a public work, viz.:

"(d) 'public work' or 'public works' means and includes the dams, hydraulic works, hydraulic privileges, harbours, wharfs, piers, docks and works for improving the navigation of any water, the light-houses and beacons, the slides, dams, piers, booms and other works for facilitating the transmission of timber, the roads and bridges, the public buildings, the telegraph lines, Government railways, canals, locks, dry-docks, fortifications and other works of defence, and all other property, which now belong to Canada, and also the works and properties acquired, constructed, extended, enlarged, repaired or improved at the expense of Canada, or for the acquisition, construction, repairing, extending, enlarging, or improving of which any public moneys are voted and appropriated by Parliament, and every work required for any such purpose, but not any work for which money is appropriated as a subsidy only."

This definition, however, again applies to the Expropriation Act, and the question now before the Court is not one involving the doctrine of eminent domain.

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Whether these descriptions, minute and wide in their scope, can be applied to the present case is one not without controversy. However, it would seem to primarily result from this that a "public work" of Canada, would be a property vested in and belonging to Canada. The jurisprudence upon this point has been quite extensive, and I desire now to cite the most apposite decisions upon the question.

In the case of *The City of Quebec* v. *The Queen* (1), a case that had to deal with injury to persons under sec. 20 (then sec. 16) of the Exchequer Court Act, it was held that the rock, or land upon which the citadel was constructed, although owned by the Crown, was not a "public work." Taschereau J., there said: "The rock upon which the citadel of Quebec rests is not, in my opinion, *a public work or work at all within the meaning of the statute.*"

Burbidge J., in *Macdonald* v. *the King* (2), adopted that view and citing the language above mentioned, says: "The rock on which the citadel of Quebec rests, is not a public work, or a work at all within the meaning of the statute, though it was undoubtedly at the time *public property* vested in the Crown in the right of the Dominion, and he adds (p. 398): "The fact that certain property is vested in the Crown in the right of the Dominion *is not*, it appears, conclusive of the question as to whether such property is a public work or not within the meaning of the statute. It constitutes, however, in each case an important consideration and a matter always to be borne in mind."

Then at page 399: "The fact is that there is no ground for any contention that the place where the accident happened was a *public work* within the mean-

(1) 24 S.C.R. 420, at 448. (2) 10 Ex. C.R. 394, at 397.

ing of the statute because public money had been there expended, etc. In that respect it is not so strong a case as that of the *Hamburg American Packet Company* v. *the King* (1), where it was held that the channel of the river St. Lawrence, near Cap à la Roche, between Montreal and Quebec was not a 'public work,'—after spending money in widening and deepening it, and notwithstanding that sub-sec. (a) of sec. 9 of the Public Works Act places under the control of the Minister "works for improving the navigation of any water."

In *Laroše* v. *the King* (2) Taschereau J., at p. 208 says: "The property occupied by this range has been *leased* by the Government from one D.... under authority of an order in council..... The Judge of the Exchequer Court dismissed the action upon the ground that the rifle range *was not a public work* within the meaning of that term as used in the Exchequer Court Act."

In *Brown* v. *the Queen* (3) Burbidge J. held that a fish-way in a mill dam constructed by and at the expense of the Crown, was not a *public work* within the meaning of the Exchequer Court Act.

In the case of *Paul* v. *the King* (4) it was held that a Government steam-tug and a scow, its tow, working in conjunction with a Government dredge, and which caused a collision, while engaged in improving the ship channel of the St. Lawrence, *was not a public work.* Yet it must not be overlooked that sec. 9 of the Public Works Act (ch. 39, R.S.C., 1906) read with sub-sec. (c) of sec. 3 thereof, places under the control of the Minister bringing them under the class defined by sec. 3, "vessels, dredges, scows, tools, implements, and machinery for the improvement of navigation..... and works for improving the navigation of any water."

(1) 7 Ex. C.R. 150 and 33 S.C.R. 252.
(2) 6 Ex. C.R. 425 and 31 S. C.R. 206.
(3) 3 Ex. C.R. 79.
(4) 38 S.C.R. 126.

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Sir Louis Davies, J. (now Chief Justice) (1) commenting upon this expression "public work," in the *Paul case* (*ubi supra*) said, at p. 131: "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 Burbidge, 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.

"But even if we could find reasons to justify such a distinction, which I frankly say I cannot.....I think a careful and reasonable construction of the clause 16 (now 20) (c) must lead to the conclusion that the public works mentioned in it....are *public works* of some definite area, as distinct from those operations undertaken by the Government for the improvement of navigation or analogous purposes, not confined to any definite area of physical work or structure."

(1) Also cited in Coleman *vs.* The King, 18 Ex. C.R. 263, at p. 268.

In *Montgomery* v. *the King* (1) following the views expressed by the judges of the Supreme Court of Canada in the case of *Paul* v. *the King* (*ubi supra*) it was held that a dredge belonging to the Dominion Government is not a "public work" within the meaning of section 20 of the Exchequer Court Act.

In the recent case of *La Compagnie Generale d'Entreprises Publiques* v. *the King* (2) Anglin J., speaking of sec. 20 of the Exchequer Court Act, said: "It does not seem to me to involve any undue straining of the language of the statute to hold that it covers a claim for injury to property so employed. 'Public work' may, and I think should, be read as meaning not merely some building or other erection or structure *belonging to the public*, but any operation undertaken by or on behalf of the Government in constructing, repairing or maintaining public property."

In *Courteau* v. *the King* (3) it was held that an injury suffered while taking a Crown vessel on launch-ways owned and operated by a company on *land leased* from the Crown is not an injury happening on "a public work" of Canada,—although the vessel was being hauled at the cost of the Government and upon the latter making all the necessary repairs to the launch-ways for that purpose.

The case of *the King* v. *Lafrancois* (4), was cited at bar by the suppliant, but that case has no application because it deals with the Intercolonial Railway which has been made and declared "a public work of Canada" by a special statute (5).

(1) 15 Ex. C.R. 374.
(2) 57 S.C.R. 532.
(3) 17 Ex. C.R. 352.
(4) 40 S.C.R. 431.
(5) R.S.C. 1906, ch. 36, sec. 55.

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Therefore, in the light of the statutes and the long series of decisions above referred to, I have come to the conclusion that it would be doing violence both to the English language and to common sense to hold that the Arcade building was a public work of Canada, while the basement and ground floor thereof were occupied by the Militia Department as a Recruiting Station for soldiers under an agreement to vacate at any time upon giving 14 days' notice. It was neither in law or fact a public work. To avoid a *reductio ad absurdum* it must be found that it was at no time the intendment or intention of the Parliament of Canada, in enacting the statutes above referred to, any more to make a public work of this building under the circumstances of the case, than it was to make of a pick or shovel belonging to the Crown a public work, because the word "tools" is comprised in the nomenclature to be found in section 9 of the Public Works Act (R.S.C. 1906, ch. 39) which, as I have already said, must be read conjointly with sec. 3, of the same Act. Finding otherwise would be for the court to overlook and disregard the true intent, meaning and spirit (Interpretation Act R.S.C., ch. 1, sec. 15) of the legislation enacted by Parliament.

The words "public work" mentioned in sec. 20 of the Exchequer Court Act must be taken to be used as verily contemplating a public work in truth and in reality, and not that which is mentioned in the Public Works Act or in the Expropriation Act for the purposes of each Act. Moreover, each definition given in these two Acts is prefaced by the words "In this Act, unless the context otherwise requires," that is to say it is limited to each Act. Indeed for the purposes of each Act that definition is obviously acceptable, because it is used, so to speak, as a key to what comes

within the ambit or provision of each Act. However, it does not follow that it can be accepted as a general definition in all cases. It is not because a desk and chair belong to and are used in the Department of Public Works that it must therefore be construed as a public work, any more than the same furniture, the property of the Department of Militia, can be called military works, military engines.

The Crown's liability cannot be enlarged except by express words or necessary implication—*City of Quebec* v. *the Queen* (1)—and all properties belonging to the Crown are not necessarily public works. (Idem. 24, S.C.R. 448).

While desirous of doing justice between the parties, I see no reason to condemn the Crown because it is the Crown and thereby mulct His Majesty's liege subjects with large damages.

Why should we depart from the general and plain meaning of these specific words "public work," which are of a common and dominant feature, to endeavour, for the convenience of a case, to extend to them a meaning which, to every one, would appear so strained as to amount to an absurdity on its very face.

Where a statutory definition is found in an Act and that it is said to apply to that Act, it is well to remember that it is not a legal definition forming part of the law of Medes and Persians and that whenever such defined words are met outside of that Act, it does not necessarily carry the meaning assigned to it by that special statute.

Moreover, as above mentioned, the trend of decisions in our courts upon these very words suggests a decision more in harmony with such a view.

(1) 2 Ex. C.R. 270.

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Having found that the Arcade building was not a public work of Canada, it might be thought unnecessary to go into the question of negligence. However, for the better understanding of the case, as a whole, it is considered advisable to pass also upon that question.

The Militia Department, at the time of the fire, occupied the ground floor and the basement of the Arcade building, which, entering from Sparks street, presented a large door in the centre and two large display windows on each side.

On coming in at the front from Sparks street, there was an open space of about 40 feet, followed by several rooms partitioned off. Then, as described by Major Woodside, from about the centre of the building, travelling south towards Queen street, we enter upon the rear portion of the building, occupied by the medical men, which was partitioned in small stalls between 6 by 8 feet, and 8 and 8 feet, with a table and stove in some of them.

The place was heated by stoves called Quebec heaters. Witness Woodside testified there were six or seven stoves, and witness Sewell said nine or more. There was a central fire or furnace in the building, but, for one reason or another, it was not being used—it was not in good repair, said witness Woodside.

The southeast corner of the building, on Queen street, deserves some special mention, in view of the testimony of the chief of the fire brigade, the fire inspector, and witness Sewell. On entering the building from Queen street, there is also a door in the centre and display windows on each side, and on coming inside there was a hallway, and to the right hand side a beaver board partition with a door in it leading into one of these small rooms, with beaver board partitions on the north and the west. The main wall of the building formed the eastern side of

that room and the window the southern end. In that room, with two sides of beaver board, as above described, there was a large "Quebec heater which stood near the partition against the window,—about one foot away from the partition," as stated by witness Sewell, and two feet as said by witness Latimer.

Major Woodside, who was in charge and command of the building at the time of the fire, says the "Stoves were placed too close to the partition to suit me." However, he was in charge and adds he did *everything in his power to avoid any danger*. He contends that notwithstanding he was in charge that he did not place the stoves in the building, that he did not interfere with the Medical Board's work, who laid them out to suit themselves. While he said he did not interfere with the medical gentlemen, he did not let them do as they liked. *He had stoves moved when they were placed too close to partitions*, and asked the contractor to place metal behind. Witness Sewell said he knew of two stoves around which there was tin to protect the partition.

Major Woodside thought the place was a fire trap and complained about it twice to the officer in charge of the district, at Kingston, once to the Public Works Department, and once to the Inspector of Fires at Ottawa. And he adds, he received no answer from Kingston, and is it to be wondered at. Surely, he was himself in charge—he was the better judge as to whether or not these stoves were not in a proper place, and the Kingston people would not probably, and rightly so, be pestered with such petty questions which should come within the absolute scope of the officer in charge. If he had the courage of his opinion, he should have attended to it himself. Too much seems to have been made of these details.

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Now, as many as 200 men or soldiers were passed by the doctors some days, and although smoking was not legally allowed, says witness Woodside, these men were smoking cigarettes, and this is an important point to be borne in mind.

Coming to the question of the engagment of the caretaker Sewell, which was made by Major Woodside, the Major contends that Sewell's duties were to attend to the firing of the stoves, and that he was to remain in and guard the building at night. On the other hand Sewell contends that he did not accept the occupation of watchman, but that his duties, as assigned to him by Major Woodside, were to look after the heaters, clean the offices at night when the doctors were through with their work and nothing else; but that he was not to stay there over night. That at the time of his engagement nothing was said about his staying over night.

On the night of the fire, after clearing up and attending to the stoves he left for his home somewhere around midnight, and says that nothing was then different from any other night.

Constable Coombs, who was on duty on Sparks street, noticed the fire somewhere around 3.40 to 3.45 in the morning of the 13th, when he found the front part of the ground floor of the Arcade building on Queen street was on fire and he gave the alarm. At that time no other building on Queen street was on fire, and he did not go to Sparks street at the time.

Constable Feeny, who was on duty on Bank street, noticed the fire also at about 3.45 a.m. on the 13th and says that when he arrived the fire was flaming out of the ground floor windows on Queen street,—the bottom story, as he puts it, was on fire—and about a quarter of an hour afterwards the fire had spread on each side of the building on Queen street.

We also had the evidence of Chief Graham, who testified he reached the place about three minutes after the alarm had been given, and on arrival found that the Arcade building alone was on fire, and that the fire had then reached the fourth story of the building.

Then he went to Sparks street and ascertained the fire was still only in the Arcade, and that afterwards the Wolfe and Powers Building, on the western side of the Arcade, took fire from behind.

The Chief offers as his opinion and belief that the fire originated on Queen street, on the southeast corner of the building, but adds he does not know the origin of the fire. It is his surmise.

Witness Latimer, the fire inspector, was heard, and he testified he had been in the building four days before the fire, and described the condition of the building and found fault, among other things, with the basement of the building where there was rubbish, cotton and show cases,—but there was no fire and no stove in the basement. His surmise of the fire, sharing the Chief's view, is that the fire originated in the southeast corner of the building on Queen street on account of the stove being too close to the window sill,—only two feet—but a stove *per se* is not defective, and there is no evidence that any of these stoves were defective.

However, the Inspector further testified that after the fire was over, the floor where that stove stood, in the southeast corner, was not burnt,—"that part of the floor was all right and the woodwork around there was there still. The woodwork, excepting a piece of the ledge of the window, was intact."

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Now, under these circumstances, and with the above evidence can it be found that the fire resulted from the negligence of any officer or servant of the Crown while acting within the scope of his duties or employment upon the premises.

Would it be reasonable to jump at a conclusion based upon the mere conjecture of the Chief of the fire brigade and the inspector, and find that the stove in the southeast corner of the building, on Queen street, did set the fire, when it was placed at two feet distance from the partition and that when after the fire is over the floor and the woodwork around the stove is still intact, with only a small portion of the ledge of the window being burnt.

Asking the question is answering it.

Had Sewell been in the building on that night, would the fire have been avoided? The answer again can only amount to a mere conjecture. He might and he might not. Fire in a number of cases occur every day in buildings where there are caretakers or watchmen, and even in homes where whole families sleep. He might perhaps or perhaps not have headed the constable in giving the alarm.

The fact that the fire took place is not of itself evidence of negligence, because its occurrence is quite consistent with due care having been taken. To find negligence under the circumstances, there must be some affirmative evidence of negligence, or of some fact from which a forcible inference of negligence may be drawn. The conjecture or surmise built upon in this case are too aleatory and uncertain.

We are told that as many as 200 men were passed in a day by the doctors, and that smoking was not stopped. There is as much possibility or probability

that the fire might have originated from a stub of a cigar, or from a cigarette thrown somewhere in a corner, as is customary especially with an irresponsible class of young men, and that the fire had started even in day-time and was smouldering for quite a while before spreading out. That possibility or probability is just as fair an inference as the other conjecture that the fire would have originated from stoves that had been there for months and had given perfect and entire satisfaction.

Or again the fire might have originated from the wiring for the electric light or otherwise. There is no knowing. It was an accidental fire and no one knows how it started.

The burden of proving negligence was upon the suppliant who has failed to do so.

Under the circumstances I am unable to find negligence as required by the statute.

There will be judgment finding that the suppliant is not entitled to the relief sought by his Petition of Right.

Judgment accordingly.

Solicitors for suppliant: *Fripp & McGee.*

Solicitors for respondent: *Hogg & Hogg.*

1920
Nov. 27.

Reasons for Judgment.

Hodgins, L.J.A.

TORONTO ADMIRALTY DISTRICT.

BETWEEN

JAMES J. QUINN.....PLAINTIFF;

AND

THE SHIP *VOLUNTEER*.....DEFENDANT.

Seaman's Wages—Profits—Agreement to accept share of profits for services.

Where a seaman holding a master's certificate, agrees to accept a share of the season's profits earned by a ship in return for his services as master, he cannot, in the event of the venture not being successful, or before its conclusion, make a claim for payment of wages for navigating the ship.

THIS was an action for wages as master against the ship *Volunteer*.

November 20th, 1920.

The case was heard before Honourable Wm. Justice Hodgins, L.J.A., at Toronto.

T. Louis Monahan, counsel for plaintiff.

F. H. Barlow, counsel for defendant.

The facts are stated in the reasons for judgment.

HODGINS, L. J. A. now (November 27th, 1920) delivered judgment.

Action by plaintiff, holding a master's certificate, for wages as master from 15th April, 1920, to 11th June, 1920, for 58 days at $5.00 per day, less $42.00 on account, leaving a balance of $248.00.

The plaintiff sues for wages, while at the trial he swore that he had made no arrangement with the

owner of the ship and had never asked him for wages until he got off the ship in June, when he asked for $3.00 per day as wages and not $5.00 for which he now sues.

It appears the vessel in question is a stone hooker which Hartrick, the owner, bought in September, 1919, for $800, and decided to outfit her during the winter and sail her during the summer. The vessel was outfitted during the spring of 1920 by both plaintiff and Hartrick, and on 22nd May, 1920, she went on her first voyage bringing back gravel which she discharged at the dock in Toronto on the 4th of June, 1920. On the 11th of June the plaintiff assisted in taking the ship to dry dock which she hit in getting in. Both parties got very hot over it and plaintiff left after the vessel got into dock and on the next day claimed $3.00 wages from the 15th April.

According to the plaintiff's account, although Hartrick offered him during the winter of 1919 a half interest in the boat if he helped him next season, plaintiff did not intend to go with him and denies any discussion during March or at any time about the terms on which he says he assisted Hartrick. Nothing was done to the ship during the winter although plaintiff shovelled snow off her several times.

On 15th April the plaintiff and Hartrick commenced the outfitting which lasted to the 22nd of May, during which time Hartrick paid for plaintiff's meals.

Hartrick's account is that plaintiff agreed to work for him and to sail the vessel for him on the basis of one-third to Hartrick, one-third for expenses and one-third to the plaintiff; to be paid out of the profits made by the boat during the summer and he denies having offered the plaintiff a half interest in the vessel. He also says that the plaintiff agreed in March to work on shares.

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QUINN v. THE SHIP VOLUNTEER.

Reasons for Judgment.

Hodgins, L.J.A.

Apart from some question as to the advantage derived by Hartrick when plaintiff worked the case must turn, I think, on the interview on the boat on her return with the gravel which is deposed to by Hartrick and his wife whose account of the matter I accept. The plaintiff was not willing to go further than denying it and to say that it did not take place as far as he remembered. That conversation, according to Hatrick, is that he offered the plaintiff when he received the money for the gravel, $97.50, to pay him one-third, but the plaintiff demanded one-half, which Hartrick agreed to, provided the expenses were first deducted. These expenses consisted of a grocery bill for provisions for the voyage incurred by the plaintiff and he admits that he suggested payment of that and accompanied Hartrick to the shop where it was paid. Prior to going to the grocer Mrs. Hartrick had been asked to figure up the division, which she did, showing $38.83 as the plaintiff's share. This the plaintiff refused to take, asking for one-half share in the boat as well, which Hartrick declined. On the following day the plaintiff accepted $38.33 which he contends was only paid on account, although he did not say so to Hartrick. Shortly after that payment he left the vessel in a huff, thus abandoning all chance of being paid for his work before the ship was in service.

The conclusion I have come to from the whole case is that the plaintiff agreed to do that work and to sail the vessel for one-third of the net earnings of the vessel during the summer of 1920; that he abandoned the ship and refused to carry out that arrangement on the 11th June, 1920, and that his claim for wages entirely fails.

The action will be dismissed with costs.

Judgment accordingly.

TORONTO ADMIRALTY DISTRICT.

1921
January 26.

BETWEEN

WHITE & COMPANY, LIMITED..PLAINTIFF;

AND

THE SHIP *IONIA*.....DEFENDANT.

Exchequer Court in Admiralty—Bankruptcy Act—Mortgage—Rights of secured creditors.

Held: That an assignment under the Bankruptcy Act does not interfere with or lessen the rights of a secured creditor to enforce or retain his security.

2. That inasmuch as the assignment itself only vests the property of the debtor in the assignee subject to the rights of secured creditors it can only affect what the debtor owns, namely, the equity of redemption in the property.

3. That such an assignment did not prevent the holder of a mortgage upon a vessel from enforcing his security before the Exchequer Court in Admiralty, and that a motion by the assignee to set aside the writ of summons and warrant of arrest issued in said court by the mortgagee against the ship for its condemnation in the amount of the mortgage therein and interest should be dismissed with costs, which costs should be added to the mortgage debt.

4. That in the premises the only right of the assignee under the bankruptcy Act is to defend the action and that he could not otherwise interfere therein.

Quaere: Does the fact that creditor fails to file an affidavit under section 46 of the Bankruptcy Act valuing his security deprive him of the right to participate in any dividend?

MOTION in Chambers to set aside the service of the Writ of Summons and Warrant of Arrest issued by a mortgagee to condemn a ship in the amount of their mortgage thereon and interest.

January 17th, 1921.

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WHITE & COMPANY LIMITED. v. THE SHIP IONIA.

Reasons for Judgment.

Hodgins, L.J.A.

Motion argued in chambers before the Honourable Mr. Justice Hodgins.

A. D. MacKenzie for the authorized assignee under the Bankruptcy Act.

G. M. Willoughby for plaintiffs.

The facts are stated in the reasons for judgment.

HODGINS, L. J. A. now (January 26, 1921) delivered judgment.

Motion by assignee to set aside the service of the writ and warrant of arrest and to stay proceedings in this action, brought by mortgagees to enforce their mortgage by sale of the ship.

The assignment was made on 11th November, 1920, the writ herein was sued out on the 23rd December, 1920, and served on the ship and on the assignee on the 28th December, 1920, and the 5th January, 1921, respectively. The ship was arrested on 28th December, 1920, by warrant issued in this action and is now in the custody of the marshall of the Exchequer Court.

The plaintiffs filed with the assignee on the 23rd November, 1920, an affidavit of claim which stated the security held but did not value it pursuant to section 46 of the Bankruptcy Act and no proceeding to enable or compel the assignee to elect to take or refuse the security has been had. The affidavit is not in compliance with the Act and does not effect any change in the positions of the plaintiffs or of the assignee. It is simply a careless and useless proceeding.

The provisions of the Bankruptcy Act respecting secured creditors are definite and precise. By making an authorized assignment the assignor commits an act of bankruptcy, enabling his creditors to seek a receiving order but the assignment in itself does not appear to make the assignor a bankrupt under the Act. Under section 2, s.s. (q) he is "an insolvent assignor whose debts provable under this Act exceed $500.00." See also s.s. (t). By section 4, s.s. 6, the Court can refuse to make a receiving order and may allow the estate to be administered under the assignment. The bankruptcy of a debtor commences only on the service of a petition on which a receiving order is made, section 4, s.s. 10.

Under section 6, s.s. 1, when a receiving order is made the trustee is constituted receiver of the bankrupt's property but it is expressly provided that "this section shall not affect the power of any secured creditor to realize or otherwise deal with his security in the same manner as he would have been entitled to realize or deal with it if this section had not been passed."

Under Section 10, the effect of an authorized assignment is stated to be "Subject to the right of secured creditors" and by section 11 such an assignment takes precedence over attachments or debts and the attachments, executions or other process against the property. But as the assignment itself only vests the property subject to the rights of secured creditors it can only affect what the debtor owned, namely, the equity of redemption in the property. (See section 46, s.s. 6, and the Merchants Shipping Act, R.S.C., c. 113, s. 45.)

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WHITE & COMPANY LIMITED v. THE SHIP IONIA.

Reasons for Judgment.

Hodging, L.J.A.

The combined effect of sections 6 and 10 is to declare that the bankruptcy proceedings do not interfere with, or lessen the rights of a secured creditor (defined in section 2, s.s. (gg) as a person holding a mortgage hypothec, pledge, charge, lien or privilege on or against the property of the debtor) to enforce or retain his security unaffected by bankruptcy proceedings. It is a question, however, whether he is not bound by section 46 to file an affidavit valuing that security, at the risk of losing the right to participate in any dividend (s.s. 10).

The assignee has, in my judgment, at the present time, no right to interfere in this action, otherwise than by defending it, if he so desires. I extend the time for his appearance to the writ for one week, and dismiss his motion with costs to be taxed, and added to the mortgage debt.

Judgment accordingly.

NEW BRUNSWICK ADMIRALTY DISTRICT.

1921
January 19.

ELIAS LOUPIDES AND OLGA LOUPIDES..... } PLAINTIFF;

VS.

THE SCHOONER *CALIMERIS*..... DEFENDANT.

Shipping and seamen—Action In Rem—Assault on seaman by Master—Jurisdiction—Viaticum.

Held: That no maritime lien attaches in the case of an assault by the Captain, on a seaman, on board ship; and that the action *in rem* did not lie against the vessel to recover damages due to such assault.

2. That although the master of a ship may take all reasonable means to preserve discipline, where, to enforce an order given by him, he unnecessarily lays hands on a member of the crew (a woman) he is technically guilty of an assault on her; and, if the action had been properly before this court, notwithstanding the absence of all proof of actual damage, the court would have allowed $10.00 as exemplary damages.

3. That in the case of an English vessel, the ship's articles are conclusive as to the amount of wages. *Thompson* v. *Nelson*, 1913, 2 K.B.D. 523, referred to.

4. Where the seaman is not wrongfully dismissed, but on the contrary leaves of his own free will and for his own accommodation, before the termination of the voyage, the court should not allow him anything by way of viaticum to enable him to return to his home port.

REPORTER'S NOTE:—Although dismissing plaintiff's claim for assault on the ground that the action did not lie, the judge discussed whether there was or was not an assault, so that in the event of an appeal being taken from his judgment, and it being held that such an action did lie before this court for assault, it would not be necessary to send the case back for a new trial.

ACTION *in rem* by the male plaintiff to recover $220.13, wages due as cook, and $625.70 for wrongful dismissal before the termination of the voyage, and by female plaintiff, for $151.55 wages, $48.66 for wrongful

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Argument of Counsel.

dismissal, and $1,000.00 for assault upon her by the captain, on the ship. Both also claim viaticum, having engaged for the return voyage to Cardiff (Greece) and having been dismissed at a Canadian port.

January, 1921.

The case was heard before the Honourable Mr. Justice Sir Douglass Hazen, L.J.A., at St. John, N.B.

D. Mullin K.C. for the plaintiff.

F. R. Taylor K.C. for the defendant.

TAYLOR K.C.—There seem to be four claims made by the plaintiff: First, for wages of both plaintiffs; second, damages for wrongful dismissal; third, for a viaticum; fourth, damages for an assault. As to the fourth claim, it is submitted that there is no jurisdiction *in rem* for an assault by the captain. The Admiralty Court Act 1861, Sec. 7, *The Teddington* (1), *The Theta* (2), *The Nederland* (3). Furthermore, as the assault occurred in Morocco, the plaintiff must show that under the laws of Morocco, such cause of action would lie there, the foreign law being a question of fact to be shown by the plaintiff. The *M. Moxham* (4). The claim for wages is very largely a question of fact. *Thompson* v. *H. & W. Nelson, Limited* (5), holds that the ship's articles are conclusive as to wages. If therefore, this were an English ship, and Mrs. Loupides were on the articles at five shillings a month, she could not receive more than the amount stated in the articles, notwithstanding an agreement to pay her more for work as a stewardess. It is submitted that in this case the law of the flag, that of

(1) Stockton 45.
(2) [1894] P. 280.
(3) 12 Ex. C.R. 252.
(4) 1 P.D. 107.
(5) [1913] 2 K.B. 523.

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Greece, is applicable. An English seaman engaged on a voyage to end in the United Kingdom, as this was, must wait until he gets to the United Kingdom unless regularly discharged. 26 Halsbury 53, Merchants Shipping Act, 1906, s. 30. It may be open to question if this applies to foreign seamen. There is no viaticum; the voyage was at an end; they were voluntarily discharged. *The Raffaellucia* (1).

D. Mullin K.C.—The ship is liable *in rem* for the assault. *The Sarah* (2). The very title indicates it was an action *in rem*, and the decree was for 70 pounds. In the case of *The Teddington*, (3) the damage was done by the ship. *The Enrique* (4), *The Maggie M.* (5). The ship is liable for all the acts of the master in the discharge of his duty, and there cannot be any distinction made between an act which he does wilfully in the discharge of his duty and negligence for which the ship unquestionably has been held liable. The Court: If the master of the ship should steal some valuable article belonging to a passenger, is the ship responsible? Yes. It is *per se* as master that he renders the ship liable. No duty devolves on the plaintiffs to produce the laws of Greece. If there was to be any intervention on the part of the Greek authorities, it should have been by the Consul General taking some step to protest. He was notified and no protest was entered. As to the contention that the action for assault would only be maintainable if it were so under the laws of the country in which it took place, the assault took place under the Greek flag on board the vessel, and the law of Morocco has no bearing on it at all. *The Nina* (6), *The Leon XIII*, (7).

(1) 37 L.T. 365.
(2) 1 Stuart 89.
(3) Stockton 45.
(4) Stockton 157.
(5) Stockton 185.
(6) 37 L.J. Adm. 17.
(7) 8 P.D. 121.

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Reasons for Judgment.

Hazen, L.J.A.

The facts are stated in the reasons for judgment.

HAZEN, L. J. A. now (January 19th, 1921) delivered judgment:—

This was an action *in rem*, brought by Elias Loupides and Olga Loupides, his wife, against the five masted schooner *Calimeris*, a Greek ship registered under the Greek flag. The plaintiff Elias Loupides claimed a balance for wages due him as cook, and a further amount for damages for wrongful dismissal before the termination of his voyage; and the plaintiff Olga Loupides claimed a sum due her as wages as assistant cook and a further sum for damages for wrongful dismissal before the termination of her voyage, and she also claimed damages for assault and battery, alleged to have been committed by the captain of the schooner, George Nicolaris, on her on board the said schooner on the voyage, while she was assistant cook; and both plaintiffs claim a sum of money by way of viaticum to enable them to return to their home in Cardiff.

First of all I will deal with the question of assault, which it was alleged was committed while the schooner was in the harbour at Rebat, in Morocco. In this connection the defendant has raised the point that an action *in rem*, against a vessel for assault committed by the captain is not warranted by any statute or decision, and that the Court has no jurisdiction in such a matter. Mr. Roscoe in his work on Admiralty Practice says:—

"The jurisdiction of the Admiralty over actions of damages is at the present day based partly upon its original jurisdiction and partly on the modern statutes.

Under the seventh section of the Act of 1861 it has been held that it includes all injuries done by ships to ships or by ships to things other than ships, or by other objects to ships, wherever the damage is done. The jurisdiction of the High Court of Admiralty was extended by the Imperial Statute passed in the year 1861, and the seventh section of that Act indicated that the Court should have jurisdiction over any claims for damage done by any ship. The jurisdiction of the Vice Admiralty Court was also extended by the Imperial Act of 1863, which among other clauses contained a provision in its tenth section similar to the above, viz., that these Courts shall have jurisdiction over "claims for damages done by any ship." The object of the two statutes of 1861 and 1863 was to extend the jurisdiction of the respective Courts, and the decisions of the High Court in construing the meaning of the seventh section of the Act of 1861 are as pointed out by Judge Watters in the case of the *Teddington* (1), very applicable and may be safely followed in considering that portion of section 10 of the Act of 1863 relating to this Court. In the case of the *Theta* (2), the facts were that the plaintiff issued a writ *in rem* and arrested a vessel claiming damages for personal injuries sustained through falling down in the hold of that vessel, owing to the hatchway being covered with a tarpaulin at the time he was crossing to his own ship, which was moored outside of the first mentioned vessel in the Regent's Canal Dock, but it was held by Bruce J. that the action must be dismissed, for though the word damage included personal injury the damage was not "done by any ship within the meaning of the Act." The learned judge said:—

(1) Stockton P. 45. (2) 1894. P.D. 280.

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"I cannot think that the present case falls within the provisions of the Act of Parliament (1861). Damage done by a ship is I think applicable only to those cases where, in the words of the Master of the Rolls in the *Vera Cruz*, 9, P.D. 96, at p. 99, the ship was the active cause of the damage. The same idea was expressed by Bowen L.J. who said the damage done by a ship means damage done by those in charge of a ship with the ship as the noxious instrument."

The case of the *Nederland* (1), was an action by the plaintiff for damages for personal injury sustained while working on a foreign ship as stewardess, such injuries being sustained by faulty construction of hatch covers and beams supporting the same, and Mr. Justice Martin, Local Judge in Admiralty for the province of British Columbia allowed a motion to set aside the proceedings, on the ground as I understand it, that the ship must be the active cause of the damage. In that case counsel for the plaintiff relied on the case of *Wyman* vs. *Dewart Castle* (2), in which the judgment was given by the late Judge of this Court Sir Ezekiel McLeod. I do not think, however, that it in any way conflicts with the authority of the *Theta*. In that case a valve spoken of as a stop valve, broke on board the ship and caused injury to the plaintiff. On the morning of the accident the stop valve was closed, and a valve called a butterfly valve was also closed. After the accident, however, the butterfly valve was found open but was not broken, and witnesses on behalf of the defendant said that if it had been closed it could not have been forced open, that it would break first, while the plaintiff claimed that it was forced open by the rush of the steam and he was thereby injured, and that that was an injury that was

(1) 12 Ex. C.R. 252. (2) 6 Ex. C.R. 387.

caused by the ship itself. While the suit was dismissed I understand the learned judge to have held that the valve being part of the machinery of the ship it was the active cause of the injury, and that the damage was done by the ship, and that it could not make any difference in what way the ship did the damage or what part of the ship did the damage. The suit, however, was dismissed on other grounds, and it seems to me is really an authority in favour of the defendant's contention on the point which I am now considering.

The learned counsel for the plaintiffs cited three cases in support of his contention that an action *in rem* for assault would lie. The first case was that of the *Sarah* (1), but an examination of this case shows that it was not an action *in rem*, but an action for damages brought by the steward of the vessel against the master for various assaults during the voyage of the ship. The second case to which he called my attention was the *Enrique*. In that case a foreign steamship while in the harbour of St. John, New Brunswick, loading a cargo of deals, bought and received on board a quantity of coals for the use of the ship. The coals were purchased to be delivered in the bunkers of the steamer, and the coal merchant employed a third party to put the coals on board. The steam power to hoist the coals on board was furnished by the *Enrique*. The plaintiff was employed by the third party to put the coals on board, and as so employed was injured by the breaking of the hoisting rope. It was held that an action could not be maintained against the steamer, that the Court had no jurisdiction and that the Vice Admiralty Courts Act, 1863, section 10, did not confer authority to entertain such an action.

(1) 1 Stewart's Vice Adm. Cases, 89.

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Reasons for Judgment.

HAZEN, L.J.A.

It is true that the learned judge based his judgment to some extent on the case of the *Robert Pow* (1), and in a subsequent case, that of the *Maggie M.*, decided two years afterwards, the same learned judge (Watters), stated that the case of the *Robert Pow* did not appear to have been followed by any subsequent case, but he held that the Court had jurisdiction to entertain a suit in the case where a tug-boat was engaged by the charterers of a vessel to tow through the falls at the mouth of the river, beneath the suspension bridge which spans the falls at the point where the river flows into the harbour, and the tug having waited to take another vessel in tow, together with the vessel first mentioned, was too late on the tide, and in coming under the bridge the top-mast of the *Enrique* came into collision with the bridge and was damaged.

I can find no authority that would lead me to the conclusion that I should go so far as to decide that a maritime lien attaches in the case of an assault on board of a ship by the captain. To do so I would have to decide that such an assault was damage done by the ship, or that the ship was the active cause of the damage. In the present instance that cannot be said to have been the case. I therefore decide that the claim for assault must fail on this ground. It may be well, however, that I should consider the matter and make a finding on the question on the merits, so that in the event of an appeal being taken from my judgment and it being held that on the point just considered that I have come to a wrong conclusion it will not be necessary to send the case back for a new trial. There were many witnesses called by both plaintiff and defendant in respect to this branch

(1) 1 B.R. & Rush, 99.

of the claim. The evidence of Mrs. Loupides is to the effect that when the vessel was lying in the harbour at Rebat she was working in the galley with her husband. Some trouble occurred, and the captain who had previously sent word to her to go in and do the work of the toilets instead of the galley, came in where she was working and without her knowing anything about it or having any idea with regard to it, struck her on the left side with his fist. That he then turned her around and pulled her outside of the door—to use her own words "laid me down outside the door." Asked if she was on her feet when the captain left her, she says "When the captain left I fell down, and then my husband pick me up." That after that she had violent pain inside and at night, but continued working until she got to St. John, though the pain was worse every day. After getting to St. John she remained on the vessel for eleven days working about as usual, and then went to the hospital, remaining there for sixteen days. She stated positively that she continued working up to the day the vessel got to St. John, and after coming to St. John every day but one before going to the hospital. Her statement with regard to the assault is confirmed to a certain extent by her husband, who says that he saw the captain strike her in the galley in the afternoon. That the captain came in the galley and hit his wife from the back, and then dragged her out and left her on the deck, and that she was lying down when he left her, and that he went over and lifted her up. The only other witness called by the plaintiff was Elias Glissis, who was a sailor on the *Calimeris* at the time, who says he saw the captain in the door of the galley, and he saw him pulling Mrs. Loupides outside from the galley. That he took her out and

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left her on the deck and got away from her. This was all he saw but he says that when the captain left Mrs. Loupides she was standing up on her feet and remained standing, thus contradicting both Mrs. Loupides and her husband in one somewhat important respect.

The defendant stated in most positive terms that he did not hit Mrs. Loupides; that he was summoned to the galley by the steward; that he went forward to the galley and told Mrs. Loupides she had no business there in the way of the cook and the steward, and said "You had better get out of the way the time they are getting the grub along because you are always in the way." In reply she said to him "I am helping my husband," to which he replied she had better go to her room. She said "No, I won't come out." He said "You had better come out—I will make you come out because I am the captain of the ship and when I say anything to you you must do it for you have no business here." He then put his hand on her to pull her out, taking hold of her by the wrist, but he alleges that as soon as he put his hand on her she came out without any force, complaining a little and saying something of which he took no notice. He absolutely denies having struck her or having knocked her down, or that she was lying on the deck. In cross-examination he stated that he did not go into the galley but went in the door of the galley and remained out on the deck close to the door all the time, and that Mrs. Loupides was in the kitchen not far from the door; that he reached in and took hold of her and grabbed her by the hand, but that he did not pull her out for when he put his hand on her she came out without making any fuss.

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Nicolas Dimitriades, a witness called for the defendant, says he saw the disturbance that took place, and he contradicts the captain in one important particular. He states that the steward went out and called the captain to go over and take Mrs. Loupides out of the galley, as she was creating a disturbance there, and when the Captain came and told her to get out of the galley and she did not pay any attention to him, he took her by the hands and just as she got outside of the door Mr. Loupides came out with a knife and then he got hold of his wife. He swears that the captain did not hit Mrs. Loupides, but in cross-examination stated that the captain went inside the galley and did not stay outside or just at the kitchen door as he alleged in his own evidence. He supports the statement of the captain, Nicolaris, that he spoke to Mrs. Loupides and told her to go to her room, and emphatically states that the captain could not have struck her because he was there at or close to the galley when the captain came and saw what took place. The other witnesses called were Michael Casedas, the steward, who states that the captain stayed outside the kitchen door and did not go in, and simply took Mrs. Loupides out by the hand, and that she pulled back a little and then went out. John Cotrogos, whose evidence is not of very much value, as he was 150 feet away from where the occurrence took place, and George Gogas, who swears that he saw the alleged attack by the captain on Mrs. Loupides at Rebat, and that he did not strike her, though he was not in a position to see what happened inside the door of the galley. His statement agrees with the captain's as to his not going into the galley, however, and he says that he simply stayed outside the door and told her to come out, and when she did

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not do so the captain got angry and pulled her from the hand, taking her out gently, however. He subsequently stated that he was not very angry, and that the captain did not use any force to pull her out on the deck.

It will be seen therefore, that there is a great deal of conflict of evidence, but having heard the witnesses and noted their demeanour on the stand I have come to the conclusion that the weight of evidence is against the contention of the plaintiffs that the captain struck Mrs. Loupides a blow on the left side. I have come to the conclusion, however, taking the evidence of the captain and that of his own witnesses, that there was an assault, more or less of a technical character, as it was not necessary for the captain to take Mrs. Loupides by the arm and pull her out on the deck. According to the evidence of the witnesses, after he put his hand upon her she came out quietly and without making very much opposition, and I cannot think that it was necessary for him in order to make her obey his order and come out on the deck, to place his hand upon her and to pull her towards him in the way in which he did. That she received a blow on the side such as she described is I think negatived not only by the evidence of a number of witnesses but also from the fact that she continued to work about the ship as she had done previously for a number of weeks, or until the vessel arrived in St. John, and that she remained on the ship for eleven days after the ship arrived in St. John, working, as her husband has said, every day but one before going to the hospital. There is no evidence of an independent character to show that her going to the hospital was in consequence of the blow she received on board the vessel, although it would have been an easy matter to have

summoned some of the doctors or other officials of the hospital to have given evidence in regard to this. I do not think it would have been possible for her, had she received such a blow as she said the captain gave her to have continued working for so long a period of time. There is nothing to show that there was any expense incurred in consequence of the assault, and the statement that after she was pulled out by the captain she was left lying on the deck is contradicted by one of the witnesses who was called on her behalf. I have come to the conclusion, therefore, that an assault was committed, but that it was a very slight one. It was not of an aggravated character, and there is nothing but her own unsupported evidence to show that she suffered at all in consequence of it. I would therefore have found damages against the captain for ten dollars for assault, had the action been one *in personam*, and I decide that that is the amount of damage which should be awarded the female plaintiff in the event of its being held that an action *in rem* will lie against the ship and that I am in error in deciding otherwise. I have not lost sight of the fact that a master may, apart from the power conferred upon him by statute, take all reasonable means to preserve discipline in his ship, and that he is given power under the Criminal Code to do so. I do not think, however, there was any necessity in this case for his laying hands on the defendant at all, and that is the reason why I find that the assault was proved as I have stated.

[His Lordship here discusses the evidence touching upon the question of wages to the female plaintiff, and accepts the version of the captain, that she was only on the ship as a favor to her, and to keep her husband, and was put on the ship's articles solely because of the

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provision forbidding the carrying of passengers on such ships. This is not printed here as being entirely a finding on the facts.]

In the course of his remarks on this point, His Lordship says "We therefore have her statement to the effect that she shipped with an understanding that she was to receive five pounds a month, and the captain's explanation that he took her solely to oblige her husband, and the further fact that she is entered on the ship's articles at five shillings a month, a fact about which if she was an English ship there would, I think be no question, because it has been held that the ship's articles are conclusive as to wages. (See *Thompson* vs. *Nelson*, 1913, 2 K.B.D. p. 523.) There is this difference, however, that the articles were not signed by Mrs. Loupides. Under the system that prevails on a Greek ship, as sworn to by the captain and other witnesses, the captain makes out on a slip of paper the agreement of each man hired, and takes it to the consul and the consul then fills in the articles in his own handwriting and they are not signed by the crew. Mrs. Loupides did not sign any slip which was taken to the Consul, and I think under the circumstances of the case, especially as this is a Greek ship registered under the Greek flag, I had better deal with the case upon its merits."

[His Lordship then discusses the evidence as to whether the plaintiffs were wrongfully dismissed, and therefore entitled to damage or whether, on the facts, they were not simply discharged at their request and with their approval, and upon the male plaintiff furnishing a substitute, and arrives at the conclusion] "That they were not wrongfully dismissed, but left the ship of their own free will, and that their action for wrongful dismissal cannot be maintained."

His Lordship then continues:—

"For the same reason the claim so far as money by way of viaticum is concerned to enable them to return to their home in Cardiff must also fail."

"It was stated by counsel that there never had been any unwillingness to pay Mrs. Loupides five shillings a month from the time when she joined the vessel at Swansea until she left it to go to the hospital in St. John, or to pay to Loupides the £3 that had been deducted from his wages during the few days that he was unable to cook in consequence of sea-sickness. I find therefore that they are entitled to these amounts, and there will be no costs of this trial."

"In view of the conclusion which I have come to as above, I have not considered it necessary to determine the point raised by the learned counsel for the ship to the effect that as the assault occurred in Rebat, within the exclusive jurisdiction of Morocco no action can be brought in this court against the ship, unless the plaintiff first shows affirmatively that under the laws of Morocco such action would lie in that state, the foreign law being a question of fact to be shown by the plaintiff.

"I only mention it now so that in case of an appeal it will be clear that the point was taken in this court."

Judgment accordingly.

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February 17.

THE CITY SAFE DEPOSIT AND AGENCY COMPANY, LTD.....PLAINTIFF;

VS.

THE CENTRAL RAILWAY COMPANY OF CANADA.....DEFENDANT;

AND

CHARLES N. ARMSTRONG.....CLAIMANT;

AND

THE SAID PLAINTIFF.....CONTESTANT.

Railways—Receiver—Manager's salary—Rights to privilege and priority therefor—"Working Expenditure"—Effect of Receivership on salary of manager—Resolution of Board—Interpretation.

Held: 1. That where by resolution of a Company the yearly salary of one of its officers is fixed, and it is further provided that "the said salary is to be paid from time to time as the Board direct," such salary, though fixed, does not become payable or exigible until the Board so direct.

2. That while the Court will not interfere with the domestic affairs of a company so long as the company does not impair the funds necessary to meet the creditors' claims, it will refuse priority and privilege to the claim of the manager of a Railway for the payment of $10,000 a year salary for managing a railway that is not a going concern, has no railway to operate and has no revenue.

That such salary was not, under the circumstances of this case, "working expenditure" as defined by the Railway Act.

3. That where a receiver has been appointed to a railway company the person formerly acting as manager of said company cannot claim salary as such since the said appointment, as against the assets or fund in the receiver's hands, the management of the company being then in the receiver's hands.

REPORTER'S NOTE:—The Appeal from the Report of the Referee herein (post p. 354) was dismissed.

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THIS was an appeal from the report of the Registrar of the Court, (Charles Morse, K.C.,) acting as Referee.

January 11th, 12th, 13th and 14th, 1921.

Appeal now heard before the Honourable Mr. Justice Audette, at Ottawa.

John W. Cook K.C. for plaintiff contesting.

E. W. Westover, for claimant.

The facts are stated in the Report of the Referee (post: p. 354 et. seq.) and the reasons for judgment.

AUDETTE, J., now (February 21st, 1921) delivered judgment.

The claimant contends the defendant company is indebted to him in the sum of $109,947.41, being, he alleges, "the balance due him under a settlement of June 29th, 1912, of $50,000, for services and expenditures to October 18th, 1911, with interest from that date to be added, $45,000, and for salary and travelling expenses and disbursements to September, 1919, as per statement following:—

1. Balance of account on June 30th, 1913, as per ledger.....	$ 42,315.55
2. Salary, June 30th, 1913, to December 31st, 1917, 4½ years at $10,000 per annum.....	45,000.00
"3. Services January 1st, 1918, to September 1st, 1919—20 months at $250 per month.....	5,000.00

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"4. Expense accounts:

"October 18th, 1911, to December 31st, 1911	657.97
"January 1st, 1912, to October 28th, 1912	2,514 50
"November 1st, 1912, to December 31st, 1912	752.85
"January 1st, 1913, to June 30th, 1913	1,140.13
"July 1st, 1913, to October 18th, 1913	1,056.78
"October 18th, 1913, to December 31st, 1915	2,545.04
"January 1st, 1916, to August 2nd, 1917	4,852.04
"August 2nd, 1917, to February 26th, 1918	1,399.44
"February 26th, 1918, to April 30th, 1918	400.20
"May 1st, 1918, to March 15th, 1919.	1,178.96
"March 15th, 1919, to September 1st, 1919	1,133.95
	$ 109,947.41

"5. I have a further claim against the company defendant in connection with disbursements made in England for the company and for the expenses of the London office, and in connection with the scheme of arrangement, etc., but I am unable to make up this claim until I can go to England and get the necessary information. For the same reason I cannot at present make up the account in connection with the sale of rails, ties, etc., at Vankleek Hill.

"6. I hold $75,000 of first mortgage bonds of the Central Railway Company of Canada as security for the balance of $45,000 under the settlement of 29th June, 1912.

"7. This claim is privileged and has priority over other claims."

The claimant, in the course of the proceedings before the referee, varied somewhat the amount of his claim, but not materially. This variation, however, in the view I take of the case is of no moment or importance.

Approaching the consideration of this claim in seriatim order, the first item presented reads as follows:—

1st. *Balance of account on June 30th, as per ledger*.....$ 42,315.55

This last amount is the balance of the $50,000 above referred to, which is claimed under a resolution of the executive committee of the defendant company, bearing date the 27th June, 1912, (Exhibit No. 6), and which reads as follows:—

"Resolved: That the amount of compensation to be allowed to C. N. Armstrong for his services to the company up to October, 1911, and for the balance due him for disbursements made by him on behalf of the company, after deducting any sums already paid to him, be and it is hereby fixed at fifty thousand dollars, and that the said sum be paid to C. N. Armstrong out of the first monies which the company shall receive, which can be applied to said payment, and that pending said payment the sum of seventy-five thousand dollars in first mortgage bonds of the company shall be given to C. N. Armstrong as collateral security for said payment, it being understood and agreed that the Bellevue property at Carillon is to be transferred and made over to C. N. Armstrong in further consideration of the payment of ten thousand dollars.

"Mr. Raphael dissented.

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"Resolved: That in accordance with the terms of settlement with C. N. Armstrong the property at Carillon, formerly belonging to the Ottawa River Navigation Company, and known as the Bellevue property, as fully described in the deed of transfer from Charles F. H. Forbes to the Ottawa River Navigation Company, 6th August, 1873, be transferred, made over and assigned to C. N. Armstrong, in consideration of the payment of the sum of ten thousand dollars, to be payable in ten annual instalments of one thousand dollars each, with interest. The wharf and all land necessary for the right-of-way for the railway to be reserved by the company.

Mr. Raphael dissented."

Whether the $75,000 in first mortgage bonds of the company were ever given to Mr. Armstrong as collateral security for the payment of the $50,000, or whether the said arrangement has ever been carried out or not, has not been proved. The claimant has totally failed to establish by any evidence whether or not the company has handed him these bonds, and finally and especially the claimant has not filed these bonds in support of his claim, through which he claims privilege and priority.

The claim of privilege and priority of this balance of $42,315.55, attaching to the bonds in question fails for want of evidence. There is not a tittle of evidence in support of such allegation or contention, and the claim for privilege and priority is therefore disallowed.

2nd item—*Salary, June 30th, 1913, to 31st December, 1917, 4½ years at $10,000 per annum*.....$ 45,000

This item is founded upon (Exhibit 4) a resolution passed at a meeting of the directors of the company, held on the 19th September, 1912, and reads as follows:—

"Resolved: That the salary of C. N. Armstrong as managing director be the sum of ten thousand dollars per annum to be computed from the 18th October, 1911, *the said salary to be paid from time to time as the board direct.*"

While it is quite regular to appoint executive officers to a company in course of formation, such as president, vice-president, secretary and board of directors, it is quite another matter to appoint a manager, at a salary of $10,000 a year, to a railway company that is not a going concern, that has no railway to operate.

There is no justification to allow a salary of $10,000 a year to such manager, as against bona fide creditors of the company. How could it be reasonably contended that $10,000 be paid to the manager of a non-existent railway out of the capital—because it has no revenue—in preference to creditors? Stating the case, is answering it.

But there is more. The resolution of the 19th September, 1912, fixes the salary, but, undoubtedly having in mind there was then no occasion to pay such salary at once, it also provides that *"the said salary is to be paid from time to time as the board direct."* That is to say, the salary, whilst fixed, is not now payable, but is only so, when the board will direct.

There is no evidence adduced showing that any resolution was ever passed directing the payment of such salary. And it is what should be expected. A captain is not appointed to manoeuvre a vessel, with a salary to date from the time the keel is laid on the ways of the shipyard. His salary will be paid when the vessel is constructed and afloat. It is the same for a railway. A manager can reasonably be appointed only when the railway is in existence.

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A court will not interfere with the domestic affairs of a company, provided the company does not impair the necessary funds to meet the creditors' claims; but a claim like the present one cannot be allowed with privilege and priority. It cannot under the circumstances be placed in the class of working expenditures as defined by the Railway Act.

The claim for priority is disallowed.

Item No. 3. *Services—January 1st, 1918, to September, 1919. 20 months at $250 per month*.....$ 5,000.00

Suffice it to say that this is a claim for salary as manager since the appointment of the receiver, in whose hands the management of the company's business is now placed.

The claim was not insisted upon on the appeal, and was, by counsel at bar, practically withdrawn.

This item is disallowed.

Item No. 4—*This is an item for the claimant's expenses from 18th October, 1911, to 1st September, 1919,* composed of several amounts.

All items since the appointment of the receiver must obviously be disallowed for the reasons above mentioned

Then, with respect to the balance, to the other amounts of the item, I find that there has been no vouchers filed, no resolution of the company recognizing such expenditure,—in other words, beyond the claimant's statement, that these amounts represented, in a conservative degree his expenses,—there is no evidence proving the same.

However, there is more. The claimant stated in his evidence (p. 263) that he has already received $4,458.35 on account of travelling expenses for seven

years and the total sum of $24,569 (p. 264) on account of salary and expenses. Furthermore, witness Midgley, a chartered accountant engaged by the claimant and the company to make an examination and report on the affairs of the defendant company, to open the necessary books and furnish a report concerning the financial position of the company, states in his evidence, that "Giving Armstrong credit for everything he would be able to establish, he would be indebted to the company for a considerable amount . . . . I have no doubt that it is a very large sum of money. Do not think the company owes Armstrong a single cent. I would say, if everything was in, it is my opinion he would be indebted to the company, in a very considerable sum of money."

The claimant has also received $3,067 for some property of the defendant company, sold about the time the rails were also sold, and has never accounted to the company for the same. That previous to the entries in the books of the company by witness Blagg, —who said he made the same,—did such posting refusing to accept any responsibility in respect of the same, "as he did not know whether it was right or wrong," a very large amount was standing against the claimant.

If the claimant has any meritorious claim with respect to this item,—which he has failed to establish by evidence,—the amount thereof will be set off, as against what he owes the company.

This item cannot, under any of the circumstances of the case, be allowed with privilege and priority as claimed under the head of working expenditure.

This item will be disallowed.

Therefore, there will be judgment dismissing with costs the appeal from the referee's report, and directing

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that judgment be entered dismissing with costs the claim of C. N. Armstrong for any priority and privilege in respect of the above statement of claim.

Judgment accordingly.

The report of the Referee follows:

This was a claim for one hundred and nine thousand nine hundred and forty-seven dollars and forty-one cents ($109,947.41) as remuneration for certain services alleged to have been rendered to, and certain expenditure alleged to have been incurred on behalf of, the defendant railway company in this action. The claim was filed on the 9th September, 1919, and was contested by the plaintiff company. The hearing of the contestation took place in Montreal on the 17th December, 1919, and at Ottawa on the 23rd December, 1919. Mr. J. W. Cook, K.C., and Mr. A. Magee appeared for the plaintiff contesting, and Mr. Armstrong appeared in person. On the 10th May, 1920, the claim was reopened to allow Senator Domville to contest it.

I approach the task of preparing my finding on this claim with some diffidence—not because I am not confident as to how it should be determined on the facts, but because the facts themselves are of such a character that to stir them up does not tend to sweeten the atmosphere of business ethics in this country.

I have said that the claim was for a certain sum, but that needs to be qualified by the statement that certainty was lost as soon as the hearing of the contestation began. A perusal of the evidence *passim* will show that the claim never became static in amount before the undersigned. At the very outset of his evidence Mr. Armstrong, no doubt unintentionally, throws a veil of uncertainty and obscurity over his claim. I quote from pp. 227 and 228, Proceedings on Reference:

"When does the claim begin? A. In the books of the company it dates back as far as October 18th, 1911, and it is continued in the books of the company up till 1st March, 1919. It then showed a balance to my credit of $57,940.21.

"Q. That appears in the books? A. I cannot accept that account as correct, but I am taking it at that amount. On checking over the account last night, I found two errors in connection with the travelling expenses. In one case my wife had accompanied me on the passage across the Atlantic, and in charging the amount the two passages were charged $271.

"Q. You correct that? A. Yes. One-half should not have been charged. I had frequent passages, and in another account my passage across had not been charged, so that it makes a difference of about $85, which should have been credited to the company. That amount would have to come off.

"Q. Off that balance of $57,940.21? A. Well, out of the total claim of $109,000. The total claim is $109,947.41.

"Q. What is the amount to be deducted? A. $79.85. There is an overcharge of $175.85, and an undercharge of $85, so that $79.85 should be credited to the company. There are in the company's books a number of charges made against me.

"Q. $109,857.56 is your net claim before me? A. Yes. There are a number of items charged against me in that account of the company which I have not given credit for. One or two of them are correct, and one or two of them I would want some information about before giving credit for them, and that information I can only get from the books of the company. There is one large item charged on the 15th September, 1913. It is 'To W. Owens $14,926.09.'

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"Q. What do you say ought to be done with that? A. Apparently this is a payment which Mr. Owens claimed he had paid to me and wished the company to assume. I think that amount is correct.

"Q. Then that should be deducted? A. I think so, but I would like to see if there was a resolution at that time.

"Q. You might reserve all these mistakes to the end of the case, and tell me what the net claim before me is? A. The net claim is, of course, as I have sworn to here, but these different amounts altogether would come to $19,817.

"Q. To be deducted from your claim? A. Yes, if they are correct. Two of them, one item of $55.17 and another of $500 are correct.

"Q. I will ask you to file a statement showing the difference between the claim as sworn to and the exact amount you contend is due? A. Yes, that will be quite satisfactory."

Mr. Armstrong did not furnish me with a formal amended statement of claim in writing; but he did put in certain exhibits having a corrective bearing (e.g. Ex. No. 18) on his original statement, which unfortunately did nothing but add to its uncertainty as a whole.

Now, in view of these facts and bearing in mind that Mr. Armstrong, during the period for which he claims, was a director of the railway company (for the whole time he was managing director and for certain periods was vice-president and president) and as such stood in a fiduciary relation to the company and its creditors (See per Lindley, L.J. in re *Lands Allotment Company* (1), his remark that "the claim is a very simple one," serves to reinforce the point of the French epigram: "Les affaires? C'est bien simple: c'est l'argent des autres."

(1) [1894] 1 Ch. 616 at p. 632.

"A president and managing director is not only the executive and confidential agent of the company, he is also a trustee for the company's money and property." See *Rogers Hardware Co.* v. *Rogers* (1), citing *Great Eastern R. Co.* v. *Turner* (2), *Gluckstein* v. *Barnes* (3).

It will be useful at this stage to state briefly the history of the railway company and Mr. Armstrong's connection with it. The company was organized in 1903 to build a railway from Montreal to Grenville, P.Q., being incorporated by 3 Edw. VII (Dom.) c. 172, under the name of the Ottawa River Railway Company. By an amending Act, 4 Edw. VII, c. 112, it was authorized to extend its line from Grenville to Ottawa. By 4-5 Edw. VII, c. 79, the name was changed to the Central Railway Company of Canada and authority was given to extend its line from Ottawa to a point on Georgian Bay at or near Midland, and to construct certain branch lines. Thus it will be seen that the company had valuable charter privileges which with honest and efficient management might have been turned into great profit for the shareholders. Senator Domville, in giving evidence on his own claim before the undersigned, did not hesitate to characterize the company as "conceived in sin and born in iniquity." I pointed out this serious indictment to Mr. Armstrong, as will appear from the following extract from the evidence: (D. p. 190). "Q. Although you were not responsible for the conception of this company in sin, you had something to do with ushering it into the world in some way? A. Yes, I was a sort of midwife."

(1) [1913] 10 D.L.R. 541.
(2) [1872] L.R. 8 Ch. 149.
(3) [1900] A. C. 240.

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The first event of importance after the formation of the company was the borrowing of 20,000 pounds in London, one-half of which was applied on account of the purchase of fifty miles of an existing railway, a purchase which was capriciously abandoned and the money so paid forfeited to the vendor (See Mr. Hogg's evidence in the Domville claim, pp. 101, 102). That was the beginning of a long history of wasteful and incompetent management of the affairs of the company. It was not until 1911 that the company succeeded in launching its first bond issue. On the 18th October, 1911, Mr. Armstrong was appointed managing director and vice-president of the company. (Ex. No. 3 on Ref.; and see Proc. on Ref. pp. 227, 228 and 374.) The road was never in operation because it was never physically completed. The company was never a "going concern." On May 3rd, 1916, the company filed a scheme of arrangement with its creditors, which was never confirmed by the court, but was dismissed by an order of December 6th, 1917. In the month of June, 1917, Mr. Armstrong purporting to act on behalf of the company, proceeded to sell certain steel rails to the Government of Canada, without the authority of the trustee for the bondholders, although such rails were covered by the trust deed of May 5th, 1914. Mr. Hogg, the solicitor of the company, had advised Mr. Armstrong that the consent of the trustee for the bondholders was necessary before the rails were sold (Ex. R.). The amount received from the government on the sale of the rails was $93,170.49. On or about the same time (Proc. on Ref., p. 258) there was certain other property sold to one St. Denis upon which Mr. Armstrong realized $2,652. (Ex. No. 16). Certain plant and material belonging to the company,

but mortgaged to the bondholders under the said trust deed, were also sold by Mr. Armstrong to the Royal Agricultural School, a moribund if not insolvent institution of which he was president (Proc. on Ref. p. 257) for the sum of $415. The purchase price of the rails was paid into the Exchequer Court of Canada by the Government on the 22nd January, 1918, there being a proceeding then before the court wherein the trustee for the bondholders asked for a sale of the railway and the appointment of a receiver of the road until the sale became effective. Mr. Armstrong never paid the moneys he received from the sales above mentioned into court. He never paid the moneys over to the company, alleging as a reason that the company owed him. (Proc. on Ref., p. 255). He did not credit them in his statement of claim filed, but he is willing to do so now. (Proc. on Ref. p. 257).

Mr. Armstrong became president of the railway company in 1917. On the 6th December of that year, Mr. F. Stuart Williamson was duly appointed interim receiver, and his appointment was made permanent by the order of this honourable court on the 9th October, 1918. By the terms of the last-mentioned order, the undersigned was appointed referee for the purpose of making enquiry and report as to the amount and nature of the claims of creditors against the said railway company.

In response to a public advertisement calling upon creditors of the defendant company to file their claims before the undersigned, Mr. Armstrong filed the claim which is now before me for consideration, and it was contested by the plaintiff company as hereinbefore mentioned.

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Mr. Armstrong's claim is one for salary, travelling expenses and disbursements as managing director of the defendant company, down at least to his assumption of the position of president of the company in 1917. The administration of the affairs of the company was irregular from the start, for although it appears (Proc. on Ref., p. 228 and Ex. No. 3) that he was appointed vice-president and managing director on the 18th October, 1911, it seems that he had been working in some capacity for the company before that. Furthermore although Mr. Armstrong was appointed to the above-mentioned offices in October, 1911, he was not authorized to be paid any salary or remuneration until 19th September, 1912. On that date (Ex. No. 4) it was resolved at a meeting of directors "that the salary of C. N. Armstrong, as managing director, be the sum of ten thousand dollars per annum, to be computed from the 18th October, 1911, the said salary to be paid *from time to time* as the board directs." Now it must be borne in mind when considering this resolution that the company was not at the time a "going concern." Is was not proved before me by Mr. Armstrong that this meeting was regularly called or that a quorum was present apart from Mr. Armstrong himself. (*In re Greymouth Point Elizabeth Ry., etc.* (1); *In re North Eastern Ins. Co., Ltd.* (2); *In re Webster Loose Leaf Filing Co.* (3). Having verified Exhibit No. 4 by reference to the original I find that there were five directors only present of whom Mr. C. N. Armstrong was one. Now by referring to the by-laws of the defendant company which were put in in the Domville claim as Ex. E, and made part of the evidence in the con-

(1) [1904] 1 Ch. D. 32. (2) [1919] 1. Ch. D. 198.
(3) [1917] 240 Fed. Rep. 779.

testation of the present claim, it will be found that the Board of Directors must consist of nine, of whom a majority shall form a quorum. There was then no quorum present at the meeting in question if we exclude Mr. Armstrong. Under such circumstances there could be no valid by-law or resolution passed by the Board. See per Rose J. in *Cook* v. *Hinds* (1); per Street J. in *Birney* v. *Toronto Milk Co.* (2); Mulvey *Dom. Comp. Law*, p. 370; *Enright* v. *Heckscher* (3). But even if it were conceded that this meeting of directors was in every respect regular and valid, there are two features of it that require consideration in relation to the sufficiency of proof of Mr. Armstrong's rights under it. In the first place he has not satisfied me that the salary was paid "from time to time as the board directs." On the contrary he seems to have paid himself whenever he got hold of the company's funds. For instance, I have already pointed out that in connection with the sale by him of property and plant at McAlpine in the summer of 1917, he received on his own admission over $3,000 in cash (Ex. No. 16 and Proc. on Ref., p. 255). When asked by Mr. Cook why he had not paid it over to the company, his answer was: "Because I had a claim against the company, and a heavy one, *and I took what I could get out of that for myself.*" To make this clear the undersigned asked him: "For arrears of salary and disbursements made on behalf of the company?" His answer was "Yes." (Proc. on Ref. 255). He also cashed certain coupons of bonds in his possession. (Proc. on Ref., p. 446).

(1) [1918] 42 O.L.R. 273, at p. 306. (2) [1902] 5 O.L.R. 1, at p. 6.
(3) 240 Fed. Rep. 863.

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The other feature that requires proof from Mr. Armstrong is that the resolution of directors of the 19th September, 1912 (Ex. No. 4) was approved by a resolution of the shareholders duly convened. For authority setting forth the requirement of the law that to constitute the valid payment of salary to a director of a company there must be a resolution of the shareholders, I need go no further than the clear statement of the principle by the learned referee (now the Honourable Mr. Justice Audette) in *Minister of Railways* v. *Quebec Southern Ry. Co.* (1); affirmed by Cassels, J., 12 Ex. C.R. at pp. 58, 59, and by the Supreme Court of Canada, 15th February, 1910.

It should not be overlooked that the action of the Board of Directors in settling the remuneration to be paid to Mr. Armstrong for his services was forestalled by the Executive Committee of the company in a meeting of that body held on the 27th June, 1912, Mr. Armstrong himself being in the chair. Ex. No. 6 is a certified copy of the Minutes of the said meeting of this Committee. Among others it sets out the following resolution:—

"RESOLVED: That the amount of compensation to be allowed to C. N. Armstrong for his services to the company up to October, 1911, and for the balance due him for disbursements made by him on behalf of the company, after deducting any sums already paid to him, be and it is hereby fixed at fifty thousand dollars, and that the said sum be paid to C. N. Armstrong out of the first moneys which the company shall receive, which can be applied to said payment, and that pending said payment the sum of seventy-five thousand dollars in first mortgage bonds of the company shall

(1) [1908] 12 Ex. C.R. 11, at pp. 14, 15 and 16.

be given to C. N. Armstrong as collateral security for said payment, it being understood and agreed that the Bellevue property at Carillon is to be transferred and made over to C. N. Armstrong in further consideration of the payment of ten thousand dollars.

Mr. Raphael dissented."

"RESOLVED: That in accordance with the terms of settlement with C. N. Armstrong the property at Carillon, formerly belonging to the Ottawa River Navigation Company, and known as the Bellevue property, as fully described in the deed of transfer from Charles F. H. Forbes to the Ottawa River Navigation Company, 6th August, 1873, be transferred, made over and assigned to C. N. Armstrong, in consideration of the payment of the sum of ten thousand dollars, to be payable in ten annual instalments of one thousand dollars each, with interest. The wharf and all land necessary for the right of way for the railway to be reserved by the company.

Mr. Raphael dissented."

The company not being a "going concern" no such undertaking could be validly made by or on behalf of the directors. (See per Lindley L.J. *in re George Newman & Co.* (1); *Burland* v. *Earle* (2); Mitchell on *Can. Com. Corp.*, p. 1040. See also my reasons in the Domville claim.) It may be remarked in passing that as a result of this benevolent action of the Executive Committee towards Mr. Armstrong, Senator Campbell resigned from the Board of Directors. (See Ex. M.) His letter is quoted in full later on. Now the Executive Committee is, as Mr. Cook graphically put it in

(1) [1895] 1 Ch. D. 674, at p. 686. (2) [1902] A.C. 83 at p. 93.

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his argument, "a sort of cabinet of the directors," Mr. Armstrong in this instance being one of them. Notwithstanding provision being made for it in the by-laws (sec. 34) this committee lacked the authority of the board of directors so far as administering the affairs of the company is concerned. Mulvey, *Dominion Company Law*, p. 26 says: "The affairs of the company are managed by the board, and all powers given to the company by the charter are exercised by the directors subject to the restrictions provided by the Act. * * * The duties of the directors having the nature of those of a trustee may not be delegated. *It is illegal to appoint an executive committee* to perform the duties imposed by the Act upon the directors." So much for the Executive Committee, and its handsome treatment of Mr. Armstrong. In this connection it is interesting to refer to by-law No. 42 of the defendant company (see Ex. E in Domville claim) which enacts that the office of director shall become vacant "if he accepts any other office of profit under the company, and is or becomes interested directly or indirectly in any contract with the company." This throws an important light upon the facts hereinafter stated.

Returning to Ex. No. 4, Mr. Armstrong attempts to put the generosity of the board of directors as therein expressed on a sure foundation by a document (Ex. C) purporting to be minutes of an adjourned meeting of shareholders of the Central Railway Company of Canada, held on the 30th September, 1912. It is also worthy of mention that Mr. Armstrong was one of the *four* shareholders present, and that he did not omit to bring many proxies with him. The first resolution reads: "Resolved: That the minutes of all meetings of the directors and executive committee held since the last annual meeting of the shareholders

be and the same are hereby approved and confirmed." The last resolution, too, is not unmindful of Mr. Armstrong, as it reads: "Resolved: That the sale and transfer of the Bellevue property at Carillon to C. N. Armstrong be and the same is hereby approved and confirmed." Now, it may be that the maxim "*Expressio unius est exclusio alterius*" should be applied here, as there is a specific sanction of one only of the benefits conferred upon Mr. Armstrong by the directors in Ex. No. 4; but on the other hand it is well to seek authority as to the sufficiency of the first resolution for the purpose of approving the action of the directors in giving Mr. Armstrong a salary of $10,000 per annum. It is a blanket resolution, indefinite in its terms, and giving no assurance that the shareholders (with the obvious exception of Mr. Armstrong) had their minds directed to the fact that they were dealing with the managing director's salary. I asked Mr. Armstrong (Proc. on Ref., p. 260), whether the minutes of meetings of directors prior to that date were read at this meeting of the shareholders, and he could not say that they were. There is nothing to show on the face of Exhibit "C" that they were. Now it is to be noted that Ex. "C" shows the meeting was an adjourned one. There was an annual meeting called (Proc. on Ref., pp. 456, 457) for September 3, 1912, and it was adjourned to September 30. There is nothing before me to show that it was not postponed by the directors without the shareholders convening, which would be invalid. (Mulvey: *Dom. Company Law*, p. 47.) But apart from that the meeting would seem to have been incompetent to ratify Mr. Armstrong's salary, because that item would not come within the ordinary agenda of an annual meeting, and it was not

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proved before me that there was any notice to shareholders, as required by sec. 3 of the by-laws of the company, setting out specifically the proposed business. See per Fry J. in *Hutton* v *West Cork Ry. Co.* (1):—"The notice should set out specifically the proposed business. It is not necessary that a by-law proposed to be approved, or a resolution, should be set out *in extenso*. But it is necessary that the gist of it should be given. * * * Only such business as is referred to in the notice may be transacted, and every shareholder is entitled to notice."

. . . Again, "A meeting may be adjourned. But only such business as the meeting itself was called to decide may be considered at the adjourned meeting, unless a further notice is duly given for the consideration of other business." Mulvey, op. cit. pp. 46, 47; *Birney* v. *Toronto Milk Co.* (2). Mitchell's *Canadian Commercial Corporations* at p. 1031, says: "The general rule is that unless authorized by the charter, or by the company's regulations or memorandum of association, *or by the shareholders at a properly convened meeting*, directors have no right to be paid for their services, and cannot pay themselves or each other, or make presents to themselves, out of the company's assets." And see the judgment of Kelly J. in *McDougall, et al.* vs. *Black Lake Asbestos & Chrome Co. Limited, et al.* (3) Kelly J. says: "Of transactions intended to be dealt with but not covered by a general notice of an annual meeting, special notice should be given. * * * The notice must contain sufficient statement of the facts which are to be considered by the corporation at the proposed meeting.

(1) [1883] 23 Ch. D. 654 at p. 659. (2) [1903] 5 O. L. R. 1.
(3) (1920) 47 O.L.R. 328

"There was here a special reason why the attention of the shareholders should have been drawn to the nature of the business intended to be transacted at the meeting, viz., *the proposal for payment of moneys to the president of the company personally.* Where a contract is to be submitted to a meeting for confirmation, and the directors of the company are interested therein, it has been held that the notice convening the meeting should give particulars as to that interest" (pp. 333,334). See Mitchell, op. cit., at p. 1031:—"The shareholders in general meeting assembled may vote remuneration to the directors for past services, *but the company must be a going concern.* Remuneration for past services of directors cannot be voted at an ordinary general meeting unless special notice be given of the intention to propose such a resolution."

It is obvious that these last observations obtain as well against the resolution affecting the Carillon property in Exhibit No. 4 as against the so-called blanket resolution.

It is under these corporate acts of the company, over which the shadow of Mr. Armstrong's dominance looms largely, that he asserts his right to be paid the major portion of his claim, i.e., for salary or remuneration from October, 1911, down to January, 1918. Let me say here that if my finding in disallowing this whole claim as against the fund in the receiver's hands had to depend on the invalidity of these resolutions voting him salary or remuneration, I would have little difficulty in holding them invalid. The law does not favour methods by which company directors can make easy money at the expense of shareholders and creditors. On the other hand, even conceding for the sake of argument, that the aforesaid resolutions of the executive committee and the directors were

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regular in all respects, and that there was a proper ratification of them by the shareholders, I would have to reject this claim in its entirety because the facts of the case conclusively show that instead of the company owing Mr. Armstrong anything, Mr. Armstrong owes the company a very considerable sum of money which he ought, both in good conscience and as a matter of law, to repay to the company. All this will appear later on.

To return to the items of his statement of claim. The claim for salary down to December 31, 1913, depends for its validity upon the impugned acts of the directors and shareholders of the company embodied in Exhibits "4," "6" and "C" respectively; I shall not labour the case further as to those documents.

Mr. Armstrong's claim for remuneration from January, 1918, to September, 1919, "twenty months at $250 per month," resolves itself purely into a question of *quantum meruit*. At p. 291, Proc. on Ref., Mr. Cook questions Mr. Armstrong, as follows: "Q. Now we come to services from the 1st of January, 1918, to the 1st September, 1919, 20 months at $250 per month. What services did you render to the company during that period, remembering that Mr. Williamson was appointed on the 6th of December, 1917? A. Mr. Williamson was appointed receiver, but that in no way did away with the company, nor the necessity for the company protecting itself and the creditors and shareholders.

"Q. And so you charge $250 a month for exercising supervision over its affairs? A. And I would not do it again for four times that amount. I have lost more than four times the amount by being tied down to the company instead of attending to my own business. I consider that that is a very, very small charge to make—very small. My whole time has been taken up.

"Q. I suppose you claim as a *quantum meruit*, the value of services? A. Yes.

"Q. What do you consider you have accomplished for the company during that period? A. I made several trips to the other side during that time, one particular reason being the claims against Wills & Son, and I may say it is an outrage that that claim was not pressed. We had a perfectly good claim for damages there for hundreds of thousands of dollars. Unfortunately the solicitor for Wills was the solicitor for the receiver."

After Mr. Armstrong's attempts to justify his charge of $250 per month since the receiver was appointed (and it is to be noted that he values his services at the same figure as the receiver's compensation was provisionally fixed at) by reciting services for the company, some of them works of supererogation and most of them unauthorized by any mandate of the directors,—on pp. 293, 294 of Proc. on Ref., we have the following answers by him to questions by Mr. Cook.

"Q. On the 6th December, 1917, the Exchequer Court saw fit to appoint a receiver to manage this company? A. Yes.

"Q. How can you charge for services of this character in view of the fact that the court saw fit to take the management of the concern out of your hands and place it in the hands of a receiver? A. No, they did not take it out of our hands at all; the company remains intact—

"Q. Its property and assets are in the hands of the court—? A. But the assets were neglected by the receiver and the company had a right to try and collect everything that is due to it.

"The Registrar—That is a reflection on the court."

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Now, as we have seen, Mr. Armstrong bases this part of his claim on a *quantum meruit*. The authorities show that he must fail on that head.

Mitchell, *Canadian Commercial Corporations*, p. 1031, says: "Directors are not to be considered as servants of the company, and as such entitled to remuneration for their labour according to its value, and cannot, therefore, recover on a *quantum meruit*." (And see *Brown & Green Ltd.* v. *Hays* (1).

"In the absence of a provision of the charter or of a special contract, a director is not entitled to compensation. See *Ogden* v. *Murray* (2). There is no implied promise to pay such an officer either for regular or extra services; to subject the corporation to liability it must be shown that the services were rendered under such circumstances as to raise a fair presumption that the parties intended and understood they were to be paid for." See *Pew* v. *Bank* (3), followed in *Fitzgerald and M. Const. Co.* v. *Fitzgerald* (4); per Rose J. in *Cook* v. *Hinds* (5). And see my reasons in Domville claim.

Beyond all this it is quite certain that nothing Mr. Armstrong did since the appointment of the receiver enured to the benefit of the creditors by protecting or augmenting the fund now in the receiver's hands for the liquidation of the company's obligations.

Dealing next with the question of the company's liability for Mr. Armstrong's "expense accounts" from October, 1911, to the date of the appointment of the receiver, the claimant is forced to rely on the resolution of the executive committee of 8th October, 1913. As that resolution was never ratified by any

(1) [1920] 36 T.L.R. 330.
(2) 39 N.Y. 202.
(3) 130 Mass., 391.
(4) 137 U.S. 98.
(5) [1918] 42 O.L.R. at pp. 304, 305.

valid meeting of the shareholders, I would refer to what I have already said about the executive committee and its lack of authority to bind the company. But even this last resolution of the executive committee was not complied with by Mr. Armstrong as he did not, so far as the proof before me shows, *render monthly expense accounts to the company as required by that resolution;* and, moreover, the resolution does not purport to be retroactive, while Mr. Armstrong carries his expense accounts back to October 18, 1911.

On the other hand, if Mr. Armstrong seeks to ignore this resolution and recover expenses and disbursements on an implied contract, he cannot do so, as I have shown in considering the question of *quantum meruit* above. Nor can he recover anything for expenses for his voluntary peregrinations since the appointment of a receiver. His whole claim for expenses, etc., amounts to something over $17,000; and as he has presented neither vouchers nor any admission of liability for them by the company I must disallow them all.

I have already stated that even if Mr. Armstrong's claim for remuneration for his services were buttressed by a proper ratification of the shareholders and in every way responded to the formal requirements of the law, yet upon the facts he is not entitled to recover anything. Before I proceed to establish this by citations from the evidence, I think it proper to show how Mr. Armstrong's conduct as managing director of the company,—occupying as such the position of a trustee for the company, and, after its declaration of insolvency, a trustee both for the company and its creditors—disentitles him to the consideration of the court when he seeks a right of priority over the bondholders, which, although expressly given by statute, yet has its foundation in equity. In Mitchell's

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Canadian Commercial Corporations, p. 1058, we have the following propositions of law laid down:—"The common law liability of directors in respect of misfeasance is contained in sec. 123 of the Dominion Winding-up Act, which creates no new liability. Thus a director is liable to the company where he 'has misapplied or retained in his own hands, or become liable or accountable for, any moneys of the company, or been guilty of any misfeasance or breach of trust in relation to the company,' and must repay or make compensation to the company for the loss." And at page 1060: "There are certain broad general rules governing the conduct of directors. They must act in good faith and exercise reasonable care in the discharge of their duties. They must not allow their private interests to conflict with the duty they owe to the company. The courts cannot lay down any precise rules, but must deal with each particular case on its own merits." And at p. 1061: "The law of Quebec does not differ from the English decisions in respect of directors' responsibility, for these decisions are based, not upon any special rule of English law, but upon the broadest considerations of the nature of the position and the exigencies of business."

Accepting this as a correct statement of the law, how does Mr. Armstrong stand in relation to it?

In the first place bearing in mind the provisions of sec. 6 of Art. 4 of the Trust Deed of 1914, if not officially responsible as managing director for the irregular way in which the books of the company were kept, he actively contributed to their unreliability. The late Mr. J. D. Wells, who was secretary of the company, when testifying in support of his own claim (Proc. on Ref., pp. 49, 50) spoke as follows:—

"A. The entries that were made there were very irregular and not made by my book-keeper.

"Q. Is it not a fact that the books were under your charge as secretary of the company since the year 1912? A. No, they were not. They were not in my charge half the time.

"Q. In whose charge were they? A. Well, different parties.

"Q. Whom do you mean by different parties? A. Well, Mr. Armstrong, for one, had charge of them for a while, not as book-keeper. *He had them in his care.*

"Q. At all events, you allowed them out of your possession? A. They were not in my possession. I never allowed them out of my possession, because they never were handed over to me practically or theoretically."

And see the receiver's evidence in the plaintiff company's claim (Proc. on Ref., p. 177).

Now, Mr. Armstrong, as I have before indicated, complains of the irregularity of the books, but it is noteworthy that most if not all of the irregularities enure to the benefit of Mr. Armstrong, rather than to that of the unfortunate people who have lost money in this enterprise. At p. 263, Proc. on Ref., Mr. Armstrong admits that he had never rendered at any time to the company, a complete statement of his account, although he was handling a very large amount of the negotiable securities of the company. The books could not be regular without such an account appearing therein. But, the evidence shows yet more clearly Mr. Armstrong's intimate connection with the books and accounts of the company. He had pre-

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pared a balance sheet of the company's affairs, which drew forth the following letter (Ex. L) from Mr. A. K. Fisk, of the firm of A. K. Fisk & Co., consulting accountants and auditors of Montreal, who had been engaged to audit the books of the company. I quote the letter *in extenso* in fairness to all parties concerned.

"Montreal, May 9, 1912.

"C. N. Armstrong, Esq.,
London, Eng.

"Dear Mr. Armstrong:

"I was surprised to see from your cable of this morning that you wished me to sign the balance sheet that you had prepared to December 31, of your company's affairs. You will remember when we discussed this matter before, that I told you it would be impossible for me to sign any balance sheet of the company in its present condition.

"I am quite clear in my own mind that your viewpoint and mine are not going to agree with regard to this company's affairs; and after investigating, as I have had to in the course of my audit up to date, the past history of your company, I have come to the conclusion that I cannot see my way to sign any balance sheet prepared by the company which throws into construction of the railway the expenditure incurred prior to the last issue of bonds. Again, the allotment of the capital stock of the company prior to that bond issue is to my mind very open to question as to its legality, and I have decided not to take the responsibility of passing the corresponding assets to these stock issues as shown in the books, as construction assets.

"Turning to the more recent transactions of the company, there seems to have been a considerable amount of looseness in the handling of funds, which to my mind should have been rigidly placed to the credit of the company's own bank account and chequed under authority of directors' resolution. Instead of this, I find the funds received from the trustees, etc., to have been sometimes handled by individuals apparently in trust, and chequed out at their pleasure. In one notable case there was a specific amount taken care of by two of the officials of the company which was to have been applied for a specific purpose, but cheques were immediately drawn in favour of one of these gentlemen operating the account, as payments on account of services rendered, although I am not aware of any particular resolution having been passed entitling this gentleman to any specific sum, nor have I seen an account such as an auditor could pass for such services as a bona fide voucher.

"Again, I have already raised an objection to the personnel of the office staff. It is quite impossible under modern conditions to give a satisfactory audit in an office where there appears to be no organization. My connection with Mr. Langlois has been very unsatisfactory, also with Mr. Raphael, and it further is quite obvious that your secretary-treasurership should be in the hands of a railway man of modern views and up-to-date methods.

"I see by a resolution of directors that I was instructed to open up a new set of books. This was no doubt following a suggestion made by myself to that effect, but the difficulty lies in the fact that the past records of the company cannot be verified sufficiently to entitle them being brought into the new books as correct assets and liabilities, and the only

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medicine that I can see that would meet this point would be by a return to the treasury of the capital stock issued prior to the new bond issue, and to wipe out corresponding assets to that effect. I do not assume for a moment that this will meet with your concurrence, and I have therefore decided to withdraw from the audit without asking for any fees for my services to date, in order that it will leave you with an entirely free hand to make a fresh appointment. I value your personal friendship far more highly than I do any fees that I might be able to earn from the audit of this company's affairs.

"I enclose copy of a letter that I have addressed to the president and directors, resigning from my position under to-day's date, and I hope you will appreciate the motives that have led to my resignation and that this will make no difference whatever to our personal friendship.

"I will return all papers in my hands to Mr. Wells without delay, and would suggest that you consider this letter as confidential between us.

"Yours sincerely,

"A. K. Fisk.

"Enclos."

A few months after this intrepid protest against the extraordinary system of book-keeping that marked Mr. Armstrong's regime as managing director of the company, we have a further criticism of his methods. Referring to the action of the executive committee on the 27th June, 1912, in giving Mr. Armstrong $50,000 and the Bellevue property at Carillon, the late Honourable Archibald Campbell, Senator, writes the following letter to Mr. Armstrong on the 5th August, 1912 (Ex. M.).

"Toronto, Aug. 5, 1912.

"C. N. Armstrong, Esq.,

"Winchester House,

"Old Broad St., London, E.C.

"Dear Mr. Armstrong:

"I have your favour of the 25th ult., and in reply I cannot see what there was in my letter to Sir Frank Crisp and the other persons named to give you such a shock. It was simply a notice to them that I had resigned my position as director and president of the company and that I would not be responsible for what had been done, or which might be done in the future, 'only that and nothing more.'

"It is quite true I sent my resignation some days before the 21st June, but at your earnest request I went to Montreal and attended a meeting on the 21st of June so as to form a quorum, but at the close of the meeting I formally resigned, although you requested me to let my resignation stand over until the annual meeting, but I positively refused to do so, and you promised before you left you would have a meeting of the directors and formally accept my resignation and elect a new president, whom you thought would be Mr. Smith. But instead of that you left without having a meeting of the directors, but called a meeting of the executive instead and had them pass a resolution to convey to you the Bellevue farm and voting you $50,000 for your services, and in the meantime handing you over $74,000 of the company's bonds as security for the $50,000. This action of the executive seemed to me so outrageous and so

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unjustifiable that I felt in justice to myself I should make known the fact that I was no longer an officer of the company, and not responsible for its actions, more especially as I learned you had made no mention in London of my having resigned but were still using my name as president. Under the circumstances, I think I was perfectly justified in sending the formal notice I did.

"Had I known at the time that a notice of my resignation appeared in the Montreal 'Herald' I would have simply mailed them a marked copy of the paper instead of writing a formal notice. I resent your statement that 'I took special pains to wreck the company.' I did nothing of the kind as you may well know. Had I wanted to wreck the company I think a simple statement from me as to how the company's money and bonds had been disposed of would have had that effect. I give you full credit for your energy and ability in promoting this railway for some years, but I remember that this was only one of the different enterprises you had on hand and which engaged your time and ability, and I cannot forget that you have through one source or another drawn considerable sums of money and have also received a good round lot of bonds of the company, and it seemed to me you ought to have been satisfied until *there was a Central Railway*. At present it only exists on paper, and although a start has been made in building it you must not forget that there are many rivers to cross and obstructions to remove before trains are running on the road.

"Yours truly,

"Arch. Campbell."

This letter constitutes an interesting aid to the interpretation of Ex. No. 20, which purports to be a copy "of the minutes of a meeting of directors held on June 21st, 1912." Mr. Armstrong sets much store by Ex. No. 20, saying (Proc. on Ref., p. 400): "It is only fair to myself that the opinion of the directors who knew what I had done should be put on record." It is true that the document is milder in its references to Mr. Armstrong than Senator Campbell's letter, but it will be noted that the minutes set out in Ex. No. 20 are signed by Senator Owens, who was not present at the meeting. However, they manage to record the fact that Senator Campbell was not impressed with the "equity of Mr. Armstrong's claim against the company." But the causes of Senator Campbell's resignation of the presidency and retirement from the board are euphemistically stated as compared with the terms of the Senator's letter to Mr. Armstrong (Ex. M), which is a document later in date and, from what I have learned of the methods of the directors, impresses me as a much safer record of Senator Campbell's reasons for severing his connection with the company.

There are other documents (such as Ex. No. 6 in the Domville claim) to show that the company was not always in accord with Mr. Armstrong, although generally there is too much compliance with his methods apparent upon the proceedings of the directors to render his colleagues on the board free from criticism. Exhibit "D" is a certified copy of an adjourned annual meeting of shareholders on October 13th, 1914, whereby it appears that Mr. Armstrong had tendered his resignation as managing director. The meeting resolved that "Mr. Armstrong be informed that his resignation

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cannot be accepted until he renders his account, reports on the administration of the affairs of the company, and returns to the company the company's bonds in his possession as shown in the auditor's statement." Mr. Armstrong (Proc. on Ref., p. 266) says that this meeting of shareholders was composed of "a little clique that did not represent the shareholders at all." The auditor referred to here is Mr. Midgely who had previous to this date filed a report (Ex. "N"), which led up to the action of the shareholders at this time. When examined as to the account demanded by the shareholders in Exhibit "D," Mr. Armstrong said that he did not render an account in accordance with this resolution, because "there was no account to render." Later on, explaining this, he says:—"I said there were no accounts to render, because they had already been rendered." Now the fact is that he had at that time only rendered a statement of his bond transactions, not of his general account with the company. (Proc. on Ref., pp. 264, 266, 267.)

Turning now to Mr. Midgely's connection with the case, it is well to state that Mr. Midgely was employed by the directors of the company to examine and audit the books so that a financial statement could be made. This was after Mr. Fisk had declined to go on with his audit. (Ex. "L."). Mr. Midgely filed two reports (Ex. "N" and Ex. "O"), which contain certain statements concerning Mr. Armstrong's dealings with the bonds of the company, as well as his "lack of proper vouchers for payments made," which caused Mr. Armstrong to stigmatize them as false. "He was employed by the company to make a report, and he made a false report." "His report is false and proved to be false." (Proc. on Ref., p. 268). And yet on

the very same page of the proceedings he states that "I was the very one who recommended him;" and on p. 291, in speaking of errors in his statement of claim, he says: "I may be wrong on some of the items. I am quite willing to be corrected by Mr. Midgely if there is anything wrong," and on p. 286, "I believe Mr. Midgely and I could settle it in half an hour." Mr. Midgely's character being thus restored out of Mr. Armstrong's own mouth, let us hear what Mr. Midgely says in Ex. "O," p. 3. "It is impossible to adjust Mr. Armstrong's account under present conditions." "Debit balance per ledger, $289,713.57." "This account is obviously of such an important and urgent character that no time should be lost in dealing effectively with same."

Now, Mr. Midgely, in his effort to systematize the books of the company, prepared a statement of Mr. Armstrong's account. (Ex. "X" and pp. 269, 270, Proc. on Ref.). And this is the pivot upon which one of the most extraordinary episodes in the strange history of this company revolves. In this statement of account Mr. Midgely charged Mr. Armstrong with bonds to the amount of $229,999.50. When, however, the company was preparing its scheme of arrangement in 1916 (Proc. on Ref., p. 262) Mr. Armstrong evidently thought it inexpedient to have his account stand in this awkward light, and we find Mr. Blagg, the accountant of the Ottawa River Navigation Company, brought in to amend the account as it was framed by Mr. Midgely as the authorized auditor of the company. (Proc. on Ref. p. 271). Mr. Blagg transmuted, by a process no more subtle than the bold stroke of a pen, the debit entry of $229,999.50 into a credit entry of

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the same amount (Ex. No. 1). Thus the bond indebtedness that Mr. Midgely found against Mr. Armstrong was wiped out. This was in February, 1916. Now Mr. Armstrong asserted that this was done under the authority of the directors (Proc. on Ref., p. 271); but there was no resolution to that effect produced. (Proc. on Ref., pp. 322, 395). On the other hand it was shown that the instructions were given to Mr. Blagg by Senator Owens and Mr. Armstrong himself. This will appear from the extracts from Mr. Blagg's testimony which I subjoin. Senator Owens is dead, and no good purpose would be served by discussing his motive in departing so strangely from his duty as a trustee towards the insolvent company and its creditors; but Mr. Armstrong is here to bear the consequences of his conduct. It seems that Mr. Carmichael, another director, was also present when Mr. Blagg carried out the behests of Owens and Armstrong; but just what part was played by Carmichael is not quite clear. Exhibit "Q," embodying the written instructions given to Mr. Blagg by Mr. Armstrong, is as follows:

"Credit C. N. Armstrong,

Charged wrongly.

"Sept. 15-13, coupon interest.....	$ 10,692.00
"Oct. 31-13, bonds, £3,175.....	15,430.53
"No. 4 coupon.....	1,041.86
"Bonds.....	229,999.50
	$ 257,163.89"

Let me quote Mr. Blagg's story of the transaction from pp. 409 et seq. of Proc. on Ref.

Examined by Mr. Cook.

"Q. Will you please look at the journal of the Central Railway Company of Canada, at pages 70 and 71, and say whether any entries appear in that journal made by you? A. They are all my entries.

"Q. Will you also look at the ledger account of Mr. C. N. Armstrong, being number 73, and state whether any entries appear in that account made by you? A. Yes from here down.

"Q. The entries in that account from the entry which is headed 27th June, 1914, down to the end of the account were all your entries? A. Yes.

"Q. And they were all made in February, 1916? A. Yes, at one time anyway.

"Q. So that, although the entries bear different dates they were all written in February, 1916?

"A. Yes, I suppose within a day or two.

"Q. Under whose instructions did you make those various entries to which you are now referring? A. Senator Owens.

"Q. Did you receive any instructions from Mr. Armstrong in connection with these entries? A. *Well, Mr. Armstrong gave me the statement that I wrote in here.*

"Q. So that the actual entries were made on a statement furnished you by Mr. Armstrong? A. Yes.

"Q. Will you look at the statement filed as Exhibit "Q" and state whether that was the statement? A. I have the word here 'ent.'—

"Q. Was that the statement handed you by Mr. Armstrong. A. I presume it was.

"Q. And the letters 'ent' are in your writing? A. Yes, and the figures.

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"Q. Meaning that those figures were entered and the total of the figures is in your handwriting? A. Yes.

"Q. By that memorandum Exhibit 'Q' you were crediting Mr. Armstrong's account with the sum of $257,163.89? A. Yes.

"Q. You were writing that into his ledger account from your journal entries? A. Yes.

"Q. And where did you get your authority to place that sum of $257,163.89 to the credit of Mr. Armstrong in the journal and in his ledger account? A. I got no other authority except through Senator Owens and Mr. Armstrong and Mr. Carmichael, and they asked me to do the posting, and I said I would accept no responsibility, as I did not know whether it was right or wrong.

"Q. You said you would accept no responsibility? A. Yes.

"Q. As a matter of fact, you do not pretend to say whether the entries which you made are correct, or the reverse? A. I could not say.

"Q. You merely entered them because you were instructed to do so? A. Yes.

x x x x

"Q. I would like to ask you, Mr. Blagg, if you wrote up the account headed 'Contractors, St. Agathe Branch, Suspense Account,' and being account number 79 in the ledger? A. These two items, February 12th, 1916, are in my handwriting.

"Q. They were entered by you? A. Yes.

"Q. The first giving a credit to the account of $59,501.80 and the second giving a debit to the account of $6,813.33? A. Yes. (Exhibit "P").

"Q. Under whose instructions did you make those entries? A. The same parties.

"Cross-examined by Mr. Armstrong:

"Q. You stated that you had instructions from Senator Owens and that Mr. Carmichael and Mr. Armstrong were also present. You have not stated whether Mr. Wells was there or not? A. Yes, Mr. Wells was there.

"Q. Mr. Wells had charge of the books and produced the books for you? A. He did.

"Q. And helped you to work out the items? A. No. I do not think he helped me. I do not remember Mr. Wells helping me at all. He gave me their old cash book written in pencil.

"Q. He gave you any explanations you required to make the entries? A. No, I do not think he knew anything about it. I do not remember asking Mr. Wells anything.

"Q. Was not Mr. Wells there the whole time? A. He was there. I do not remember Mr. Wells saying anything in that way.

"Q. You have been shown a little memorandum 'Q.' Will you swear this was not given to you by Mr. Wells? A. I could not say.

"Q. It is very important. A. I do not remember Mr. Wells giving me anything. I think that must have been given to me by you.

"Q. You have stated that you thought so? A. I am not going to swear who gave me that, but I think it was you. I know Mr. Wells did not hand me anything.

"Q. *It is in my writing, and the question is whether I prepared it for you or for Mr. Wells?* A. Yes, I am pretty sure you gave me that, and Mr. Owens gave me another, but it is so long ago I cannot swear.

"Q. You will not swear it was not handed to you by Mr. Wells? A. It might possibly have been, but I thought it was you.

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"Q. Do you know this handwriting? A. That is my own handwriting. *That was evidently given me by you.* (Exhibit 21.)

"Q. These are part of the same figures of Exhibit 'Q,' and these are figures taken in your own handwriting. Where did you get those figures? A. I must have got those instructions from you.

"Q. It is not a question of instructions. I am asking you where you got those figures? A. *I will say from you. No one else would give me that. I could not get them out of my head.*

"Q. You said Mr. Owens was there and Mr. Wells. You had a good deal of discussion with Mr. Carmichael while you were preparing this? A. Yes.

"Q. And he took an active part in the matter? A. He did.

"Q. In fact you thought he took too active a part? A. I told you and Senator Owens that I would not be responsible for any of these entries, because I did not know anything about them. *They might all be true or they might be concocted, but I would write them in and accept no responsibility.*"

I shall supplement Mr. Blagg's evidence with the following excerpts from Mr. Midgely's oral testimony, at pages 423, 424.

"By Mr. Cook:

"Q. Had you anything to do with the entries that were made by Mr. Blagg in February, 1916, and following? A. No, I had absolutely nothing.

"Q. I see that these entries of Mr. Blagg have apparently the effect of almost entirely reversing the entries which you had previously made; is that correct? A. Well, one entry, the $229,999.52 reversed the largest item in the account.

"Q. What was that item? A. For the bonds which had been charged to Mr. Armstrong under the authority of the various resolutions, and in accordance with my report. A further explanation might be found in the Journal, page 65. Here is an entry charging Mr. Armstrong—and this is in my writing—so that the most important item in Mr. Armstrong's account was in my own writing; that is, the foundation of it was in my own writing; $229,999.52 for bonds, the value of £60,825 taken by him, less £3,175 and £10,325 already charged, as per his letter of December 10th, 1913.

"The Registrar: That will be filed as Exhibit "X."

At p. 425:

"But your making charges did not depend on the interpretation of any written document? A. No, but it remained for Mr. Armstrong to justify his having taken the bonds. I found that Mr. Armstrong had the bonds; consequently, I charged him very properly with having the bonds.

"Q. He said the reason was found in the interpretation you placed on the contract? A. No, the reason I charged him with the bonds was that I found he had *received the bonds and he admitted that.*

"By Mr. Cook:

"Q. He admitted that he had the £60,250 of bonds? A. Absolutely, but so far as the credit to which Mr. Armstrong was entitled, I did not pretend to interpret what credit he should have, and my understanding was that Mr. Armstrong was later to bring to me a full statement of his account. I was to go into it with him, but I never saw it.

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At page 428:

"Q. Will you please turn to Mr. C. N. Armstrong's account number 73, Exhibit "T," and state how much the credit made by Mr. Blagg in February, 1916, amounts to? A. Well, the total credits—do you want them on that particular day? Because he has made several credits. He has made about a dozen. Do you want them all?

"Q. I only want the total of them, in account number 73. A. $304,881.77.

"By the Registrar:

"Q. What does that represent? A. That represents the total of the credits entered into this account of Mr. Armstrong by Mr. Blagg.

"By Mr. Cook:

"Q. Is there anything, in your opinion as an expert accountant, that justifies those credit entries? A. Well, I should certainly have hesitated to make them myself, *because I do not think they are justified.*

"Q. Have you been able to find any resolutions of the board of directors of this company, or of the executive committee, that would justify such credit entries in this account? A. I have not seen any.

At page 439:

"By Mr. Armstrong:

"Q. You have made a statement under oath that you do not believe that I am entitled to sufficient credit to make up the amount of the debit, and that, instead of me being a creditor of the company, I am a debtor. I ask you on what you base that statement, and I ask you whether the credit here, which is passed by resolution of the board of £11,725 should not have been credited, and cancelled the charge which you

made of those bonds against me? A. I should have to make very sure, Mr. Armstrong, for this reason: the condition of the accounts as I found them at the time I went into them, and all the circumstances in connection with the company, which caused me a tremendous amount of worry, and in which I endeavoured to do you full justice, would certainly lead me to make most careful examination and investigation *before I would pass any amount to your credit.*

"Q. You are not aware of the amount of work that had been done on that road? A. I never saw any engineers' certificates, never, and that would be my authority for passing a credit to your account.

"By the Registrar:

"Q. Did you ever make any search for the certificates? A. I had access to all the papers, and examined every scrap at one time or another up to the time of making my report.

"Q. You never saw anything which would justify you making a credit to Mr. Armstrong? A. No, except the Allen contract. No doubt he was entitled to some credit in connection with that, but it was never determined to my satisfaction. I never could get down to what he should be credited with, and I mentioned that in my report. It was of a very vague and nebulous character to my mind."

I doubt if this deliberate tampering with the books of the company by Blagg at the instance of Armstrong, and in his interest, has any parallel in the history of corporations in Canada.

Now to show that the minds of the directors in February, 1916, were not disposed to settle Armstrong's account in the summary way he himself did it through

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the instrumentality of Blagg, we have the following appearing in the minutes of the meeting of the directors on the 12th of that month:—

"Mr. C. N. Armstrong's account as submitted by the auditor was considered and held over until a further statement of expenditures in London now on the way was supplied." (Ex. "P").

I have discussed Mr. Armstrong's conduct at great length, because to my mind not only has it a very important bearing on his right to recover remuneration for his services, but it is in the public interest to know just how the affairs of this unfortunate company have been conducted by its managing director. Lord Cairns, in his luminous judgment in *Gardner* v. *London Chatham & Dover Ry. Co.* (1), described a railway company as a "fruit bearing tree," but thought that under the English statute law as it applied to the case the debenture-holders, while entitled to the fruit of the tree, could not proceed to the length of cutting it down. In view of the facts of this case, and especially recalling the reference to "wrecking" in Senator Campbell's letter (Ex. "M") it would seem that Mr. Armstrong has been able to do here what Lord Cairns would not admit to be within the power of debenture-holders in England. But I am free to say that in view of his own conduct as established in evidence in these proceedings, and again having especial reference to Senator Campbell's letter, Mr. Armstrong's pretext for claiming remuneration at $250 per month after the year 1917, namely, that "the assets were neglected by the receiver, and the company had a right to try and collect everything that is due to it" (Proc. on Ref., p. 204) is a masterly adventure in cynicism.

(1) [1866] 2 Ch. App. 201 at p. 217.

But I am not obliged to rest my finding against Mr. Armstrong's right to rank in priority on the fund in the receiver's hands on the ground of his maladministration as managing director or vice-president of the affairs of this company. I prefer to place my finding on the evidence which shows that the company is not as a matter of cold fact indebted to him at the present time. Not only has Mr. Armstrong failed to prove his right to recover any portion of his claim against the company, but quite apart from the fact that the resolutions of the executive committee and the board of directors granting him remuneration were not properly ratified by the shareholders, and the evidence given by Mr. Midgely on behalf of the plaintiff contesting, I cannot find that Mr. Armstrong has established by satisfactory proof that he is entitled to any definite amount as against the company. I must find as a fact that he had no proper authority from the shareholders under which to make a claim for salary, travelling expenses or disbursements between the 18th October, 1911, and the 31st December, 1917. I must also find that he has proved no legal claim to remuneration for services rendered between the 1st January, 1918, and 1st September, 1919, or for expenses incurred between those dates. This disposes of his whole claim.

I wish to support my finding as above stated by referring to Exhibit "P" which has an especial bearing on his claim as asserted after the 12th February, 1916. This exhibit embodies a resolution, *inter alia*, that "all officials of the company be notified that their services are no longer required and that no person be employed in future unless he gives an undertaking to hold the directors free from any personal obligation

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to pay any salary or wages to him." Now the question at once arises is a managing director an "official" or an officer of the company? Sec. 78 (d) of the Dominion Companies Act (R.S. 1906, c. 79) enacts: "The directors shall, from time to time elect from among themselves a president and if they see fit, a vice-president of the company; and may also appoint all other *officers* thereof." In *Hutton* v. *West Cork Ry. Co.* (1), Cotton J. L. uses this language:—"Then comes the question as to the directors. I was not quite satisfied that the vote for compensation to the *officials, etc.*" Per Baggallay, L. J. (p. 680):—"It may be said, and I think very properly said, that until such time as a general meeting has fixed the amount of remuneration of the directors or of the treasurer or secretary, *or any other officer*, the person so indicated has not any right to demand his remuneration." Then we have the explicit statement by Mr. Mitchell in his *Canadian Commercial Corporations*, p. 1112: "A managing director is an officer." Finally sec. 42 of the by-laws of the defendant company treats a director as the holder of an "office," which may be vacated by the director accepting "any other office or profit."

So that Ex. "P" has an important bearing on Mr. Armstrong's right to recover salary or remuneration between the 12th February, 1916, and 1st September, 1919, a period involving a large portion of his claim. Without relying on the language of Ex. "P" to exclude the items of his claim on and after the 12th February, 1916, I wish to refer to it as one of the obstacles which Mr. Armstrong has to surmount before he has discharged the burden of proof that rests upon him.

(1) [1883] 23 Ch. Div. 654, at p. 666.

Another fact in evidence, which negatives Mr. Armstrong's contention that the documentary evidence establishes acquiescence by the directors in his claim for a large amount of money due him, is embodied in Exhibit "G," being a certified copy of the minutes of a meeting of directors on 4th July, 1913. (Mr. Armstrong being present and concurring in the action of the Board so far as the evidence shows). These minutes concern proceedings on *saisie arrêt* in the suit of *Nash* v. *C. N. Armstrong*, and declare, *inter alia*:—

"That the Central Railway Company of Canada has an open account with the defendant C. N. Armstrong, but does not admit that any amount is due by the company to the said C. N. Armstrong."

Mr. Armstrong did not attempt to say that this minute does not correctly describe the situation between himself and the company on the 4th July, 1913; but he ventures to treat the corporate act of the board lightly, and says:

"They did not want to be called upon to pay out any money; that is a good way to get out of it." (Proc. on Ref., p. 277). In this connection (Proc. on Ref., p. 278) Mr. Armstrong makes a statement which goes to strengthen the contention of the plaintiff contesting that there never was at any time after the year 1912 a specific acknowledgment by the company of any amount due him. The following evidence refers to his account as mentioned in Ex. "G:"

"Q. You were present at that meeting? A. Well, I asked you that question. I do not know. Yes, I was present at that meeting.

"Q. You do not remember anything about it? A. No, I do not.

"Q. Did you take any objection to that entry being made? A. There is no objection recorded.

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"By the Registrar:

"Q. Is it a mere scrap of paper? A. Well, there is nothing to it. They simply say they cannot admit anything until the account is made up.

"By Mr. Cook:

"Q. And the account never has been made up? A. Well, it is before the court now.

"Q. But it was never made up to the company? A. No, I was away most of the time in England, and no object in making up an account if you could not get any money out of them."

Mr. Armstrong has not been able to adduce affirmative evidence of a credible character to establish his claim. We have seen how far the proof which he was tendered on his own behalf fails to support it. I have already quoted from certain evidence of Mr. Midgely, the accountant, who was called in by the company to prepare a reliable financial statement for it, the effect of which in a general way displaces any right of Mr. Armstrong to recover against the company. I will conclude my enquiry by quoting some explicit statements by Mr. Midgely, upon which I shall rest my finding that Mr. Armstrong has failed to establish any claim against the company.

Before doing so I wish to point out that before I closed the hearing Mr. Armstrong filed an informal statement in typewriting and pencil (Ex. No. 18) reducing his claim to $105,729.08. But throughout the hearing, as I have stated, the exact amount he claimed was very much in doubt.

I quote first from Mr. Midgely's direct examination by Mr. Cook on pp. 432, 433, Proc. on Ref.

"Q. Will you please state what, in your opinion, according to the books of the company, should be the debit balance standing against Mr. Armstrong to-day in dealing with the books.

"The Registrar: The amount which you stated before?

"A. The amount would be the same as my report, $298,713.57, which Mr. Armstrong might be entitled to reduce under the Allen contract or by any engineer's certificate he could produce for the St. Agathe branch contract.

"The Registrar: "Mr. Armstrong claims $109,000 odd, less a possible reduction of $3,000. If I so decide, and you find that upon the books of the company he should be debited with $298,713.57, less any other credits he might possibly establish—?

"Witness: "Yes, absolutely. I think I mentioned that he might be allowed certain credits for expenses, and I suggested that a committee be appointed to go into that, but it would be up to Mr. Armstrong to establish the credits he is entitled to.

"By the Registrar:

"Q. But, giving him credit for everything he would be able to establish, he would be indebted to the company in a considerable sum? A. He would in my opinion.

By Mr. Cook:

"Q. You have no doubt about that? A. I have no doubt that it is a very large sum of money, and I do not see how Mr. Armstrong could justify such a large amount.

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Report of the Referee.

"Q. So that the net result of your evidence is that, instead of the company owing Mr. Armstrong, Mr. Armstrong is heavily indebted to the company? A. I do not think the company owes Mr. Armstrong a single cent.

"By the Registrar:

"Q. That is, even admitting his claim as filed before me as being correct and a substantial one in law; that is that $105,000 that I have mentioned that his claim amounts to? A. In my opinion there is nothing due to Mr. Armstrong by the company. I would say if everything was in, it is my opinion he would be indebted to the company.

"Q. In a very considerable sum? A. I think in a very *considerable sum of money.*"

In cross-examination by Mr. Armstrong at pp. 447, 448.

"By Mr. Armstrong:

"Q. From what you have seen since, are you prepared to modify the statement you made earlier that I owed the company a large amount of money instead of the company owing me? A. I give it as my opinion that if everything was in the accounts pro and con the company would not owe you a dollar.

"Q. And on what do you base that? A. By my knowledge of what I found at the time.

"Q. Up to the time you made your report in January, 1914? A. Yes.

"Q. And you do not know what has taken place since? A. I am not cognizant of those resolutions first hand that you refer to, but in order to give a further opinion about it I should have to know all the circumstances leading up to this.

"By the Registrar:

"Q. You have not seen anything to cause you to depart from the statement you made, which has been brought out on cross-examination? A. No, I take this position: Mr. Armstrong had an opportunity to come to me to settle this account; it was an account that caused me a tremendous amount of worry. I was anxious to settle it, and to render justice to himself and the company. It was never done. I had no information to enable me to come to the conclusion that Mr. Armstrong was entitled to all those amounts he was credited with, and to my knowledge I do not think he was entitled to such heavy credits."

It remains to be stated that on the hearing of the contestation of the claim of Senator Domville (viz., on the 10th of May, 1920) I allowed the contestation of this claim to be reopened for the purpose of permitting certain evidence to be adduced by Senator Domville as a contesting party herein. Such evidence will be found in the proceedings in the Domville claim, and it will serve no useful purpose to summarize it here.

In conclusion the undersigned has the honour to report that

(a) The claim of C. N. Armstrong against the defendant company for the sum of $109,947.41, as filed herein on the 9th September, 1919, is not entitled to be paid out of the fund in the receiver's hands in priority to the claim of the trustee for the bondholders.

(b) That the defendant company does not owe the said C. N. Armstrong the sum of $109,947.41 or any other sum of money.

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The undersigned, therefore, begs further to report that in his opinion the claim of the said C. N. Armstrong, filed herein as aforesaid, should be dismissed by this honourable court, and that the costs of and incidental to the contestation of the claim before the undersigned should be ordered to be paid to the plaintiff contesting by the said C. N. Armstrong.

BRITISH COLUMBIA ADMIRALTY DISTRICT.

BETWEEN

1917
Sept. 21.

THE CANADIAN PACIFIC RAILWAY COMPANY..... } PLAINTIFF;

VS.

STEAMSHIP *BELRIDGE*..... DEFENDANT.

Shipping—Collision—Excessive speed in snow-storm—Article 16, Sea Regulations—The Maritime Conventions Act, (4-5 Geo. V Ch. 13)—*Default of two vessels—Division of damages.*

Held: A ship is not entitled to run through fog and snow at a speed which is safe for herself but immoderate and dangerous for others. *Pallen* vs. *The Iroquois* ([1913] 18 B.C. 76; 23 W.L.R. 778.), followed.

2. In apportioning damages resulting from a collision between two ships, where the evidence does not establish that a clear preponderance of culpability rests upon one ship, the division of damages should be half and half. *The Peter Benoit* ([1915] 13 Asp. M.C. 203; 85 L.J. Adm., p. 12.), followed.

ACTION by the plaintiff, as owner of the steamship *Empress of Japan* for $30,000 damages, against the steamship *Belridge* occasioned by a collision which took place off Trial Island, near Vancouver Island, B.C., on the 31st January, 1917.

June 19th, 20th and 22nd, 1917, case tried before the Honourable Mr. Justice Martin, L.J.A., at Vancouver, B.C.

J. E. McMullen, for plaintiff.

E. C. Myers, for defendant.

The facts are stated in the reasons for judgment.

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Reasons for Judgment.

Martin L.J.A.

MARTIN L. J. A., now (21st September, 1917, delivered judgment.

On January 31st, 1917, about half-past four (Victoria time) in the afternoon, the British twin-screw steamship *Empress of Japan* (W. Dixon Hopcraft, Master), length 455 feet, gross tonnage 5,940, collided with the Norwegian steamship *Belridge* (Nels Olsen, Master), length 450 feet, gross tonnage 7,020, in the Strait of Juan de Fuca, between Trial and Discovery Islands, the *Empress of Japan* being inward bound for Vancouver pursuing a course from Trial Island to round Discovery Island, and the *Belridge* outward bound pursuing a course from Discovery Island to round Trial Island, which are about three miles and six cables apart. The tide was at slack and the state of the weather, according to the preliminary act filed by the *Belridge*, was "heavy snow-storm, very thick," with a varying north-westerly wind about 20-25 miles, and according to the *Japan*, a "snow-squall," with a "northerly moderate wind;" the latter vessel admits she was going at a speed of twelve knots and her best speed, her pilot says, was 16¼, while the former alleges, erroneously, I find, that her speed was only "about three or four knots." The *Japan* alleges she first saw the *Belridge* "about half a mile distant ahead," and the *Belridge* first saw the *Japan* "two to three ship lengths about one point on the port bow." The ships came together about amidships on their port sides and both sustained damage.

For some time before as well as at the time of collision both vessels had been sounding fog signals, as had also the lighthouse at Trial and Discovery Islands.

So far as the *Japan* is concerned the case is very simple. She was on her own shewing clearly violating article 16 by not going at a "moderate speed" in the snow-storm (which speed was maintained till the Belridge came in sight) within the principles fully considered by me in *The Tartar* vs. *The Charmer* (1907), Mayers' Admiralty Law and Practice, p. 536; and *Pallen* vs. *The Iroquois* (1) to which I refer, and also to *The Counsellor* (2). In the second case the contention that a ship is entitled to run through fog or snow at a speed which is safe for herself but immoderate and dangerous for others is disposed of.

Then as to the *Belridge*. She, after passing Discovery Island, continued to go, I find, through the snow-storm at a speed of upwards of eleven knots, but upon hearing a ship's fog signal to the southwest, apparently forward of her beam in the direction of Trial Island, reduced her speed to half, making at the least six knots, and shortly thereafter upon hearing the same whistle repeated almost ahead changed her course one point to the westward, but did not for three or four minutes after half speed reduce to "slow," not till after she had heard two more whistles from what she then knew was the *Japan*, and after going "slow" for two or three minutes sighted the *Japan*, and put her helm hard aport and engine full speed astern, but too late to avert the impact. This is putting the matter in as favourable light as possible for the *Belridge*, based on admissions of her pilot and officers, and yet it clearly shews that she also violated article 16 in two respects, not going at a moderate speed at eleven knots, and not having stopped her engines and navigated with caution when she heard

(1) (1913), 18 B.C. 76; 23 W.L.R. 778

(2) (1913), P. 70; 82 L. J., Adm. 72.

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the signal of another vessel, apparently forward of her beam, whose position was not ascertained. No satisfactory reason was given for her failure to comply with the requirements of the article, and at the very least I cannot understand why she did not reduce her speed to "slow" earlier than she did, especially in that frequented locality. Her case, therefore, is also covered by the two authorities already cited. I have only to add that it seems an unaccountable thing that none of the witnesses for the *Japan* will admit that he heard any fog signal from the *Belridge* though the independent witness H. J. Austin, who was waiting for her in his launch off Brotchie Ledge and saw the *Japan* pass him, says, and I believe him, that he heard her signals for some considerable time, nearly an hour, approaching from about Ten Mile Point, passing Discovery and Trial Islands on her course past the Ledge, about three miles from Trial Island.

It remains, then, to consider the application of the Maritime Conventions Act, 1914, Can. Stats. 1914, Cap. 13, Sec. 2, which came into force on July 1st of that year: Canada Gazette, 6th June, 1914. The relevant portions of the section follow:

"Where, by the fault of two or more vessels, damage or loss is caused to one or more of those vessels, to their cargoes or freight, or to any property on board, the liability to make good the damage or loss shall be in proportion to the degree in which each vessel was in fault:

"Provided that—

"(a) if, having regard to all the circumstances of the case, it is not possible to establish different degrees of fault, the liability shall be apportioned equally; and

"(b) nothing in this section shall operate so as to render any vessel liable for any loss or damage to which her fault has not contributed; and . . . ."

This is the first time, I may say, that I have found it necessary to consider the effect of this section, but it has been considered several times in England, beginning with *The Rosalia* (1) where the degree of liability was apportioned at 60 and 40 per cent; *The Bravo* (2) at four-fifths and one-fifth; *The Counsellor* (3) at two-thirds and one-third; *The Cairnbahn* (4) equally apportioned; *The Llanelly* (5) and *The Umona* (6) at three-fourths and one-fourth; *The Ancona* (7) at two-thirds and one-third; *The Kaiser Wilhelm II.* (8) equally apportioned; and *The Peter Benoit* (9) equally apportioned. There is a discussion of the question in this last and leading case, in the House of Lords, and it is there laid down, p. 207, by Lord Atkinson that where "the evidence does not establish that a clear preponderance of culpability rests upon one ship, the division of the damages should be half and half."

How the apportionment should be arrived at is thus viewed by Lord Sumner, p. 208:

"The conclusion that it is possible to establish different degrees of fault must be a conclusion proved by evidence, judicially arrived at, and sufficiently made out. Conjecture will not do; a general leaning in favour of one ship rather than of the other will not

(1) (1912), P. 109; 81 L.J., Adm. 79; 12 Asp. M.C. 166.
(2) (1912), 12 Asp. M.C. 311; 29 T.L.R. 122; 108 L.T. 430.
(3) (1913), P. 70; 82 L.J., Adm. 72.
(4) (1913), 12 Asp. M.C. 455; 83 L.J., Adm. 11; 110 L.T. 230.
(5) (1913), 83 L.J., Adm. 37; 110 L.T. 269; 12 Asp. M.C. 485, (1914), P. 40.
(6) 1914), P. 141; 83 L.J., Adm. 106; 111 L.T. 415; 12 Asp. M.C. 527.
(7) (1915), P. 200; 84 L.J. Adm. 183.
(8) (1915), 31 T.L.R., 615; 85 L.J. Adm. 26.
(9) (1915), 13 Asp. M.C. 203; 85 L.J. Adm. 12.

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do: sympathy for one of the wrongdoers, too indefinite to be supported by a reasoned judgment, will not do. The question is not answered by deciding who was the first wrongdoer, nor even of necessity who was the last. The Act says, 'having regard to all the circumstances of the case.' Attention must be paid not only to the actual time of the collision and the manoeuvres of the ships when about to collide, but to their prior movements and opportunities, their acts, and omissions. Matters which are only introductory, even though they preceded the collision by a short time, are not really circumstances of the case but only its antecedents, and they should not directly affect the result. As Pickford, L.J., observes: 'The liability to make good the damage or loss shall be in proportion to the degree in which each vessel was in fault.' That must be in fault as regards the collision. If she was in fault in other ways, which had no effect on the collision, that is not a matter to be taken into consideration."

I feel that I should say in this case, as Lord Atkinson said in that (p. 207):

"There is not, in my opinion, any such preponderance proved in this case. Both vessels were to blame; and, in my view, the evidence leaves it very uncertain which was most to blame."

There will be a reference to the registrar, with merchants, if necessary, to assess the damage. As both ships are to blame, each will bear her own costs, in accordance with the rule laid down in *The Bravo case, supra.*

Let judgment be entered accordingly.

Judgment accordingly.

BETWEEN

1921
February 28.

THE BILLINGS AND SPENCER COMPANY, OF HARTFORD, CONNECTICUT, U.S..... } PETITIONERS;

AND

CANADIAN BILLINGS AND SPENCER, LIMITED, AND CANADIAN FOUNDRIES AND FORGINGS, LIMITED.

OBJECTING PARTIES.

Trade-Mark—Petition to expunge—Effect of misrepresentation in application for Trade-Mark.

Held: In the interests of trade, public order, and the purity of the Register of Trade-marks, the Court will exercise its discretion by ordering the removal from the register of any entry made thereon under misrepresentation and "without sufficient cause."

2. Where a trade-mark is registered upon the statement of the applicants that they verily believe the same to be theirs "on account of having been the first to make use of the same," such statement being a misrepresentation of fact the court should order that such trade-mark be expunged.

Quaere? Will the fact that a trade-mark has been simultaneously used by two persons, each having knowledge of the user by the other, amount to a dedication of the mark to the public?

THIS WAS A PETITION for an Order expunging trade-mark registered by the objecting party from the Canadian Register of Trade-marks.

January 7th, 8th, and 10th, 1921.

The matter was now heard before the Honourable Mr. Justice Audette at Ottawa.

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v.
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Russel S. Smart and *J. L. McDougall* for petitioners.

A. W. Anglin K.C. and *J. A. Hutchison* for Objecting Parties.

The facts are stated in the reasons for judgment.

AUDETTE J. now (28th February, 1921) delivered judgment.

This is an application, by the petitioners, to expunge from the Canadian Register of Trade-marks the above mentioned specific trade-mark, as applied to the manufacture and sale of machinery, tools and forgings, and registered in Canada, on the 27th February, 1907. This court is given jurisdiction over such matters both under section 23 of the Exchequer Court Act, and under section 42 of the Trade-mark and Design Act.

It appears from the evidence that the petitioners for many years prior to the date of such registration—for a period extending as far back as 1871—were the proprietors of this mark, and made use of it throughout Canada and the United States, in respect of the class of goods above mentioned. They had a large business connection in Canada, and their goods had acquired a large and valuable repute.

In the view I take of the case, based as it is upon the terms of the statute, it will be sufficient without more to say that, notwithstanding the negotiations which took place between the officers of the companies, so far as the evidence before me discloses, there was no formal embodiment in writing of any sale or assignment of the trade-mark along with the good will.

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The registration of the trade mark was duly made, in February, 1907, upon an application which reads as follows:—

"To the Minister of Agriculture,

"(Trade Mark and Copyright Branch)

Ottawa, Ont.

"We, Canadian Billings & Spencer, Limited, a company incorporated under the Ontario Companies Act, with head office at the town of Brockville, in the county of Leeds, and province of Ontario, hereby furnish a duplicate copy of a specific trade-mark to be applied to the sale of machinery, tools and forgings in accordance with sections 4 and 9 of "The Trade Mark and Design Act" *which we verily believe is ours on account of having been first to make use of same.*"

"The said specific trade-mark consists of an equilateral triangle with a large letter 'B' inside of same and we hereby request the said specific trade mark to be registered in accordance with the law.

"We forward herewith the fee of $25.00 in accordance with section 10 of the said act.

"In testimony whereof we have caused our manager and treasurer (being the duly authorized officers for the purpose) to sign in the presence of the two undersigned witnesses at the place and date hereunder mentioned, and to attach our corporate seal hereto.

"Dated at Brockville this 7th day of February, 1907.

"Witnesses (Sgd.) R. Bowie,
Treas.

"(Sgd.) W. S. Buell,

'(Sgd.) J. H. Botsford. (Sgd.) J. Gill Gardner,
Mgr."

(Seal).

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It will be noticed that the application is made upon the representation by the company that they "verily believe (the trade-mark) is ours on account of having been *first* to make use of same."

In support of their application they also filed a letter reading as follows:

"Hartford, Conn., Jan. 29th, 1907.

"To the Minister of Agriculture,
Ottawa, Canada.

Trade-mark

Dear Sir:—

"This is to advise you that we have no objection to the Canadian Billings & Spencer, Limited, registering in Canada the trade-mark used by this company in our business, and as shown by the above letter head.

Yours respectfully,

"The Billings & Spencer Company,
"F.C. Billings, V.P. and Supt.

"Patent and Copyright Office,
"(Copyright and Trade Mark Branch)

"Ottawa, Canada, this 6th day of
January, A.D. 1921.

"Attested,

"Geo. F. O'Halloran,
"Commissioner of Patents.

This document does not bear the seal of the company, and the vice-president and superintendent who signs it, does not show any authority of the company by resolution to F. C. Billings to make this waiver of objection to the defendant company's registration of the mark in dispute. This officer, assuming to represent the American company, was also receiving

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as a bonus, a number of shares in the Canadian company. This placed him in the equivocal position of having to decide between his duty and his interest. This document is no more formal than any letter which an officer of the company might have written to a customer relating to the sale or purchase of goods manufactured by the company.

The rights and powers exercisable by the executive officers and servants of a company would appear to end where the exclusive rights and powers of the company, as a corporate body, begin which are only exercisable by by-laws and resolution.

The officers of a company may extend their bounty and benevolence only to the extent authorized by the nature of their mandate as such officers; they cannot bind the company by anything done in excess of their express or reasonably implied powers. They cannot bind the company by their personal act in a matter where the company, as a corporate body, can alone speak—that is to say, by by-laws and resolutions. In this view it would be idle to contend that an officer of a company,—(a vice-president in the present case)—could *ex mero motu* and without a resolution and a document of transfer under the seal of the company sell the company's trade-mark and good will.

However, it is not necessary, in respect of the letter of consent, exhibit "B," to do more than repeat what witness Ritchie—heard on behalf of the objecting parties,—said at the trial, that he would have registered the trade-mark without that letter. The letter was not necessary since the applicants asserted "the trade-mark was theirs on account of having been first to make use of same." That last allegation was in compliance with the requirements of the law. The letter had nothing to do with the registration.

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The Canadian Trade-mark Act does not contain a definition of trade-marks capable of registration, but provides by sec. 11, that the registration of a trade-mark may be refused if the so-called trade-mark does not contain the essentials necessary to constitute a trade-mark properly speaking (1). This same sec. 11 further provides, that the applicant should be undoubtedly entitled to the exclusive use of the trade-mark (2).

Sec. 13 of the Act provides that the applicant may have his trade-mark registered upon forwarding a declaration that it "was not in use to his knowledge by any other person than himself at the time of his adoption thereof."

Then sec. 42 (R.S.C. 1906, Ch. 71) provides, among other things, for expunging, at the suit of any aggrieved person, the entry of any trade-mark, on the register, *without sufficient cause.*

It was alleged at bar that the petitioners were not persons aggrieved. With that view I cannot agree. The petitioners had been using their trade-mark both in Canada and the United States for a great many years, to distinguish their goods; and if such registration is allowed to stand the Canadian Company would be the ostensible owners of the mark with the right to the exclusive use of the same. Surely the petitioners under such circumstances would be "persons aggrieved." That is the conclusion at which I have arrived, and I think my conclusion is in conformity with the following decisions of *Baker* v. *Rawson* (3), the *Autosales Gum & Chocolate Company* (4), and *Batt & Co's Trade-mark* (5).

(1) The Standard Ideal Co. vs. The Standard Sanitary Manufacturing Co., C.R. (1911) A.C. 259.
(2) Rogers' Trade Mark. 12 R.P.C. 149; and Bush Manufacturing Co., 2 Ex. C.R. 557.
(3) 8 R.P.C. 89, at 98.
(4) 14 Ex. C.R. 302.
(5) [1898] 2 Ch. D. 432.

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Now, whatever may be said upon numerous other questions raised at bar, I have come to the conclusion that when the Canadian Billings and Spencer Co., Limited, filed their application for registration, they were guilty of making a misrepresentation of fact when they stated to the Minister of Agriculture that "they verily believed that the mark was their own on account of having been first to make use of same." It is inconceivable that one knew better than they did that such a statement was untrue, because they were in the most intimate relations with the petitioners during the considerable period that the mark had been used both in Canada and the Unted States by the petitioners (1). The very document with which they accompanied their application (Ex. B) is cogent proof of this.

They obtained the registration of this trade-mark through false statements and misrepresentation. Their conduct in doing so was most reprehensible and all arguments at bar invoking equity cannot avail, because he who seeks equity must come into court with clean hands.

Whatever might have been the demerits of the applicants, the court in a matter of this kind where the interests of trade, public order, and the purity of the register of trade-marks are concerned, should always exercise its discretion to order the removal from the register of the entry made "without sufficient cause." (2).

(1) *Smith* v. *Fair*, 14 Ont. R. 729.

(2) *The Canada Foundry Co.* v. *The Bucyrus Co.*, 14 Ex. C.R. 35; 47 S.C.R. 484; *The Leather Cloth Co.*, 11 H.L.C. 523; *Baker* v. *Rawson*, 8 R.P.C. 89; *The Appollinaris Co.*, 8 R.P.C. 137, at 160, 161 and 163, *Kerly's Law of Trade Mark*, 318, 320; *Sebastian* 236, 403, 520, 600.

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Having come to the conclusion that the discretion of the court should be exercised in the manner above set forth which gives effect to the statutory requirement of ownership as an indispensable condition of the right to register, it becomes unnecessary to labour many questions raised at bar, and such as to whether or not the fact of this mark having been used in Canada by both parties, to their respective knowledge, did not thereby dedicate the trade-mark to the public (1).

There will be judgment ordering to expunge from the Canadian Register the trade-mark in question registered by the Canadian Billings & Spencer Co., Limited, on the 27th February, 1907, under No. 48, folio 11715,—the whole with costs.

Judgment accordingly.

(1) 5 Official Gazette, U.S. 337-338.

HIS MAJESTY THE KING, PLAINTIFF,

1921
March 10.

AND

THE HUDSON'S BAY COMPANY AND OTHERS, DEFENDANTS.

Expropriation—Property and civil rights—Provincial Statutes—Land Registering Act, B.C., sec. 104—Expropriation Act, secs. 25, 26—B.N.A. Act, sec. 92—Taxes.

Held. 1. Property and civil rights being matters within the exclusive powers of the provincial legislature, the Exchequer Court of Canada in ascertaining the estate or interest of persons claiming compensation for property expropriated by the Dominion Crown will have regard to the laws affecting such estate and interest in the province where the property is situated.

2. Certain land expropriated by the Dominion Crown was leased for a period of 5 years under an instrument not registered as required by section 104 of the Land Registering Act, B.C.

Held: That the unregistered lease did not vest any estate or interest in the lessee within the meaning of sections 25 and 26 of the Expropriation Act, R.S.C. 1906, c. 143, and that the lessee was not entitled to compensation in respect of the expropriation.

3. Defendants sought to recover from the Crown an amount paid by them for municipal taxes on the property after the expropriation.

Held: That such a claim did not come within the scope of the present Information, and that the Court therefore had no jurisdiction to entertain the claim thereunder.

INFORMATION exhibited by Attorney-General for Canada to have it declared that certain properties expropriated at Esquimalt, B.C., for dry dock, were vested in the Crown and to have the value thereof fixed by the Court.

January 24th, 25th, 26th and 27th, 1921.

Case now heard before the Honourable Mr. Justice Audette at Victoria, B.C.

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THE KING v. THE HUDSON'S BAY COMPANY AND OTHERS

Reasons for Judgment.

Audette J.

H. W. R. Moore for plaintiff.

H. W. Robertson and *H. G. Lawson* for defendants Hudson Bay Co. and trustees for the Puget Sound Agricultural Company.

E. Miller for the Alunite Mining and Products Co.

The facts are stated in the reasons for judgment.

AUDETTE J. now (this 10th March, 1921) delivered judgment.

This is an information, exhibited by the Attorney-General of Canada, whereby it appears, *inter alia*, that certain lands, belonging to two of the defendants, were, under the provisions of the Expropriation Act, taken and expropriated for the purposes of a public work of Canada, namely, a dry dock, at Esquimalt, B.C., by depositing on the 4th February, 1920, a plan and description of such lands, in the office of the Registrar General of Titles at the city of Victoria, B.C.

Three parcels of land were so expropriated and they are respectively described in the information under the head of firstly, secondly and thirdly.

The lands first and secondly described belonged at the date of the expropriation to the defendant, the Puget Sound Agricultural Company, represented herein by trustees, and the lands thirdly described belonged to the Hudson's Bay Company.

The Crown, by the information, offers to pay the defendants, or whomsoever shall prove to be entitled thereto, the sum of $2,000 per acre for the said lands and real property and damages, if any, resulting from

the expropriation. At the opening of the case, the plaintiff also produced in evidence exhibits 3, 4, 5 and 6, thereby establishing that the above-mentioned amount had been tendered the defendants before the institution of the action and had been refused.

The Puget Sound Agricultural Company, by the amended statement of defence, claims compensation at the rate of $5,000 per acre, together with the sum of $870.71, being the proportion of the taxes from the 4th February, 1920, to the 31st December, 1920, paid by them and assessed against their lands by the corporation of the township of Esquimalt previous to the filing of the information.

The Hudson's Bay Company, by the amended statement of defence, claims compensation at the rate of $5,000 per acre, together with $382.71 paid as taxes under the same conditions and circumstances mentioned in the previous paragraph.

There is the further claim of the Alunite Mining and Products Company, Limited, as lessees of the lands owned by the Hudson's Bay Company. This claim will be hereafter dealt with by itself.

The only question in controversy between the plaintiff and the two first defendants, proprietors of the lands taken, is one of the *quantum* of compensation to be paid under the circumstances of the case.

(His Lordship here cites from the evidence as to value and continues.)

Having thus analysed the evidence adduced on both sides, I am now confronted by the task of finding the proper mean between the divergent valuations of the witnesses for the plaintiffs and the defendants. The court has to steer a safe course between Sylla and Charybdis—between the optimist and the pessimist in values.

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The owners, after the expropriation, should be neither richer nor poorer than before. It is intended they should be compensated to the extent of their loss, and that loss should be tested by what was the value of the property to them, and not by what will be its value to the expropriating party.

This property in Esquimalt Harbour, is situate between the railway and the water, the difference in level between them being somewhere about 67 feet, and is of a rocky, rugged, surface, the topography or configuration of the same being very uneven, with the exception of two or three acres, on the west.

As residential property, it has many disadvantages, in that the land is so uneven, and that there is no road leading to the western and central pieces, and that to build such a road a very large amount of money would have to be expended besides the cost of survey for subdivision, and the building of an aqueduct. Moreover, it being immediately in the neighbourhood of an Indian Reserve, would, for such a purpose, make it very undesirable. With respect to that class of property, we have evidence on behalf of the owners that in 1920 there was no demand, no market for an unimproved residential property. The neighbourhood of a noisy ship-yard, with oil and other dirty substance spreading on the beach—as was realized on the day of the visit to the premises, would also add to the disadvantage for residential purposes.

Approaching the property as an industrial site, its configuration must also be taken into consideration and more especially the very large amount of money that would have to be expended before making it available for such purposes. The amounts are so large, that a prospective purchaser—excepting the

Crown putting up a public work—would hesitate before purchasing—in fact a business man would in preference choose some other water front if he really required a spur and a levelled area, and would not readily purchase.

I have had the advantage, accompanied by counsel for all parties, of viewing the premises in question, and after considering the evidence it appears to me inconceivable that the lands in question could be assessed at this blanket value of $5,000—if one stops to consider the almost prohibitive expenditure that would be required to make it available for industrial purposes—the residential purposes being considered the less advantageous use of the two, under the circumstances. The expenditure is so great to place the property in a state of development for either residential or industrial purposes, that it goes to the market value of the land itself.

But there is more in this case. The two parcels of lands, east and west, belonging to the Puget Sound Agricultural Company, although partly water front, as above mentioned, do not carry with it the right to erect a wharf—a right that can only be obtained from the Crown who is now expropriating. Not having this right, as stated by witnesses heard on behalf of the owners, that makes a great deal of difference in arriving at the market value of the land. The parcel of land held by the Hudson's Bay Company has a pre-confederation right to erect a wharf of 100 feet in length—by a narrow width, as shown upon the ground. That of itself makes this piece of land more valuable than the other two.

There is no evidence that the eastern and western parcels ever earned any revenues. The central piece never brought large revenues—the lease in force at

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the time of the expropriation constitutes the best revenue it ever yielded and this is on account of the spacious building erected thereon.

The Crown has tendered and also offered, by the information, $2,000 an acre for the three parcels of land, in full satisfaction for the same, the real property and all damages, if any, resulting from the expropriation.

While I have come to the conclusion to accept these $2,000 an acre for the land taken, as an ample and fair compensation under the circumstances, I cannot apply that quantum to all three pieces. The eastern piece is of irregular shape, besides its irregular surface, terminating in a pointed or jib lot, tending to decrease its value—with 1·02 acres not water front and 1·07 acres adjoining water only at high tide. The western lot has a road of access, and comes within the general description given above. For these two pieces of land together, as belonging to the same proprietor, I accept as ample compensation this offer of $2,000—although part of the western piece can hardly have that value.

But, if the eastern and western parcels are worth $2,000 an acre, as tendered and offered by the Crown, the central parcel with a large and substantial building and the right to build a wharf 100 feet long, is obviously worth more than $2,000 an acre. Accepting that basis I will fix a value of $2,000 an acre for the lands owned by the Puget Sound Agricultural Company, and $2,500 for the lands owned by the Hudson's Bay Company, together with the sum of $12,000 for the substantial stone warehouse thereon erected.

The cost on the issue between the Crown and the Puget Sound Agricultural Company will be in favour of the Crown, and the costs on the issue between the Crown and the Hudson's Bay Company, will be in favour of the latter.

Coming now to the claim made by the defendants in respect of the taxes for 1920, and which I find were improvidently paid—when a general remittance was made in respect of all lands held by them in that municipality, I have obviously come to the conclusion that such a claim cannot come within the scope of the present action. It is a distinct and separate claim over which the court, under the present information, has no jurisdiction, but which must be the subject matter of a separate action brought against the Crown after obtaining a *fiat*. The Crown is not amenable to taxes. (See Section 125 B.N.A. Act).

TENANCY.

There is further to be considered in the case the claim of the Alunite Mining and Products Company, Limited, which company at the date of expropriation were lessees of the lands owned by the Hudson's Bay Company, above referred to, and upon which there was a large building and a small delapidated wharf of one hundred feet in length.

On the 2nd July, 1919, the Hudson's Bay Company leased to the Alunite Company, the warehouse and lands above referred to for the term of five years, at the annual rental of $720 during the first year of the term; $1,080 during the second year; $1,200 during the third year of the term; and $1,500 during the fourth and the fifth years of the term—such yearly rentals to be payable by equal half yearly payments in advance on the 2nd July and 2nd January, in each year.

The lessees had no right to sub-let or assign the lease. They were, however, allowed to make such repairs, as mentioned in the deed, to the warehouse in question, towards which expense the lessors contributed to the amount of $500.

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During the summer of 1919, the lessees started to work at the repairs, when shortly afterwards they became aware the Crown was going to expropriate and no work was done after Christmas of that year—the full repairs being not quite completed at that date. The lessees contemplated extending the wharf another one hundred feet, provided leave could be obtained from the Crown, and they looked upon the site as favourable for the development of their business, such as alleged in the lease, considering the facilities, as expressed by witness Baird, for a spur line.

The plaintiff having expropriated on the 4th February, 1920, they looked around for another site, and although the evidence discloses that there were water front properties available in Esquimalt Harbour and around Victoria, they contend they could not be suited and went to Vancouver, where they entered into a lease of a property for 21 years, renewable up to 63 years, and erected a building upon these new demised premises. They did not order machinery until they were settled at Vancouver, as they had not the money to pay for it, says witness Baird.

Under the circumstances, the lessees, by their statement in defence claim the sum of $63,900.00. The Crown did not tender or offer any compensation.

Coming to the question of the *quantum* of such compensation, one must realize that, as Nichols, on Eminent Domain, p. 714, says: "To fix the market value of an unexpired term is no simple matter. Leases commonly are not assignable without the consent of the landlord, and so infrequently sold, and vary so much in length of term, rent reserved and other particulars as well as the character of the property, that it is almost impossible to apply the customary tests of market value to a leasehold interest."

However, we have in this case the great advantage of having to deal with a lessee who is not carrying on his business—who does not operate shops and has not a going concern; but who at the very inception of his lease becomes aware that the property is to be expropriated for public purposes. He becomes aware of it within a month or two after signing his lease, although the expropriation only takes place on the 4th February, 1920—the lease bearing date the 2nd July, 1919.

The lessee cannot claim expected profits, but he can be allowed the reasonable expenses of seeking new locations, the loss of time, the cost of moving, the refund of repairs, and all such expenditure incidental to such cancellation of the lease, and the loss occasioned thereby. They had the right to remain in undisturbed possession to the end of the term.

In this case, apart from the amount paid for rent, for improvements and repairs, moving, etc., there was no direct evidence to show what was the value of this unexpired period of the lease.

Before arriving at any conclusion upon the amount of the compensation, I cannot refrain from saying that it is almost inconceivable that a company could most improvidently install expensive machinery, contemplates enlarging the small wharf in question, and building a spur at a most prohibitive price, etc., with a lease for the short life of five years. This is especially true, when it is considered that one of the executive officers of the company admitted they did not order the machinery before they were installed at Vancouver, because they had not the money to pay for it—and when another witness stated in his examination, in January, 1921, that they expected to be in operation within two years. That would bring them to 1923 and the lease would expire in 1924. Decidedly

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the company is better off with a lease for a life of practically 63 years. Under those circumstances with a long lease there would seem to be some justification to expend, the amount stated, on the undertaking of such works. The Vancouver lease is decidedly a better commercial proposition.

Taking all the circumstances into consideration and going over the bill of particulars, which has been explained by evidence at trial, I would have come to the conclusion to allow the Alunite Mining and Products Company Limited, the sum of $1,800.00 with interest and costs, but for the provincial law standing in my way.

Counsel at bar, for the plaintiff, sets up that the lessees have no legal right to recover, no right of action, because their lease was not registered as required by sec. 104 of the Land Registering Act of British Columbia, ch. 127 of R.S.B.C. 1911, and which reads as follows:—

"104. No instrument executed and taking effect after the thirtieth day of June, 1905, and no instrument executed before the first day of July, 1905, to take effect after the said thirtieth day of June, 1905, purporting to transfer, charge, deal with, or affect land or any estate or interest therein (except a leasehold interest in possession for a term not exceeding three years), shall pass any estate or interest, either at law or in equity, in such land until the same shall be registered in compliance with the provisions of this Act; but such instrument shall confer on the person benefited thereby, and on those claiming through or under him, whether by descent, purchase, or otherwise, the right to apply to have the same registered. The provisions of this section shall not apply to assignments of judgments. 1906, c. 23, s. 74, 1908, c. 29, s. 6."

The liability of the Crown in the present controversy, is to be determined by the laws of the province where the cause of action arose (1). *The King* v. *Desrosiers* (2) *The King* v. *Armstrong*, (3).

But for the provincial statute, the lessees would have come under secs. 25 and 26 of the Expropriation Act and would have been entitled to compensation. Be that as it may, I must give effect to the Provincial Statute and find that, under the circumstances, the lessees' claim must be dismissed. Taking, however, into consideration, the hardship of the lessees' situation I will allow no costs to either party.

Therefore, there will be judgment, as follows:—

1st. The lands and property expropriated herein are declared vested in the Crown as of the date of the expropriation, the 4th February, 1920.

2nd. The compensation for the land and property taken and for all damages whatsoever, if any, resulting from the expropriation, is hereby fixed at the total sum of $47,110.00 with interest from the 4th February, 1920, to the date hereof, and payable in the manner and proportion and only upon the sums hereinafter mentioned.

3rd. The defendant the Hudson's Bay Company are entitled to recover from the plaintiff the sum of $12,450.00 for the lands, and $12,000 for the warehouse, with interest as above mentioned, upon their giving to the Crown a good and satisfactory title free from all charges, mortgages or incumbrances whatsoever.

4th. The defendants, Russell Stephenson, Leonard Daneham, Cunliffe and Robert Molesworth Kinderly, trustees for the Puget Sound Agricultural Company,

(1) B.N.A. Act, sec. 92, subsec. 13.
(2) 41 S.C.R. 78.
(3) 40 S.C.R., 229, at 248.

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are entitled to recover the sum of $22,660.00 *without interest* (see sec. 31, Expropriation Act), upon giving to the Crown a good and satisfactory title free from all charges, mortgages and incumbrances whatsoever.

5th. The claim of the Alunite Mining and Products Company, Limited, is hereby dismissed; but under the circumstances without costs.

6th. The plaintiffs are entitled to costs on the issues as between them and the Puget Sound Agricultural Company.

7th. The defendants the Hudson's Bay Company are entitled to costs as against the plaintiff.

Judgment Accordingly.

Solicitor for plaintiff: *H. W. Moore.*

Solicitor for defendants Hudson Bay Co. & Puget Sound Agricultural Co.: *Bodwell & Lawson.*

Solicitors for defendants Alunite Mining and Products Co.: *Mackay & Miller.*

THE CITY SAFE DEPOSIT AND AGENCY CO., LTD..... PLAINTIFF;

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March 14.

VS.

THE CENTRAL RAILWAY COMPANY OF CANADA..... DEFENDANT;

AND

W. D. HOGG..... CLAIMANT;

AND

THE CITY SAFE DEPOSIT AND AGENCY CO., LTD..... CONTESTING.

Railways—Receivership—Solicitor's fees—Priority—"Working expenditure"—Road never in operation—R.S.C. 1906, *c.* 37, *sec.* 2, *sub.-sec.* 34 (*g.*).

The defendant company was incorporated in 1903 for the purpose of constructing and operating a railway within the provinces of Quebec and Ontario. The railway was never physically completed and consequently never in operation; and in 1917 it was placed in the hands of a receiver appointed by the Court at the instance of the trustee for the bondholders of the company.

The claimant, amongst other creditors, filed his claim against the company. The same was contested before the Registrar acting as referee. The claim consisted of an amount representing the balance of an account for solicitor's fees and disbursements in respect of services rendered to the defendant company before the appointment of the receiver, and embraced such items as the preparation and promotion of private acts of parliament, attendances in England in connection with the floating of bond issues, preparing trust and mortgage deeds, drafting agreements for the construction of the railway, and generally attending to all legal matters pertaining to the business and affairs of the company. For a portion of this time the claimant was a director of the company, but his retainer as solicitor was not adverse to its interests.

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Statement.

Held (by the Referee): That notwithstanding that the company was not in operation and never had a revenue account the claim should be regarded as "working expenditure" within the meaning of sec. 2, sub-sec. 34 (g) of the Railway Act, R.S.C. 1906, c. 37; and as such was entitled to be paid in priority to the claim of bondholders under a trust deed.

REPORTER'S NOTE.—No appeal was taken, and the report was formally confirmed by the court.

The claim was for the balance due for services rendered to and disbursements made for the defendant during several years, amounting to $6,085.65; and praying that the claim be declared privileged as "working expenditure" and be paid as such out of the fund in court.

The railway in question was never completed, and became insolvent. A receiver was appointed; and as certain moneys belonging to the company had been paid into court the Registrar of the Court, Charles Morse, K.C., was appointed Referee to enquire into and report upon this along with other claims filed by the creditors of the company.

December 15th, 1919.

The contestation of this claim by the plaintiff was now heard before the Referee, at Montreal.

W. D. Hogg, K.C., appeared in person.

J. W. Cook, K.C., and *A. Magee*, for plaintiff contesting.

11th November, 1920.

The Referee's report was now filed, and no appeal was taken from said report in so far as the claim in question was concerned.

14th March, 1921.

The claimant now moved to confirm the report as regards his claim and for judgment accordingly.

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Report of the Referee.

The motion was heard by the Honourable Mr. Justice Audette, at Ottawa, and judgment rendered the same day confirming the report of the Referee, as prayed.

The report of the Referee is as follows:—

This is a claim for solicitor's fees and disbursements. The claimant acted as solicitor to the defendant company from the year 1905 to the end of the year 1917. Upon examination of his claim it will be seen that it consists of fees and expenses arising out of his retainer as solicitor for a portion only of the period mentioned. The services rendered and moneys paid out of pocket relate to a variety of matters, none of which however can properly be said to fall outside the ambit of a railway solicitor's employment or practice in Canada. They embrace the drafting of private Acts of Parliament relating to the company, and attending upon both Houses in connection with the passage of the same; attendances in England in looking after the bond issues; preparing mortgage trust deeds for securing bond issues; drawing agreements relating to the construction of the railway; generally attending to all legal matters pertaining to the business and affairs of the company; and advising the company and its officers in relation thereto. For a portion of this time Mr. Hogg was a director of the company; but his retainer as solicitor was not adverse to its interests. *Re Mimico Sewer Pipe &c., Co.* (1); *Pneumatic Gas Co.* v. *Berry* (2); *Denman* v. *Clover Bar Coal Co.* (3). The company does not contest his claim, but the plaintiff does.

(1) [1895] 26 O.R. 289. (2) 113 U.S. 322.
(3) [1912] 7 D.L.R. 96.

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Mr. Hogg's fees and expenses were settled and paid in full by the company up to the month of August 1911; and since that date, while he has never had a settlement in full, he has been paid certain sums from time to time on account. At the request of the company, on the 1st May, 1914, Mr. Hogg prepared a statement of his account showing that there was a balance due claimant at that date of $4,895.09 after giving credit for the sum of $415 paid to him, and that amount was admitted by the company as due the claimant, and entered in the books of the company as a liability. Since the last mentioned date the claimant has rendered professional services and paid out moneys in connection with the business of the company amounting to the sum of $1,275.56. On account thereof he was paid certain sums, between the 16th day of February and the 25th day of September, 1917, amounting in the whole to $85. By adding the sum of $4,895.09, admitted as due on 1st May, 1914, to the above-mentioned sum of $1,275.56 and deducting from the total the sum of $85 we have the sum of $6,085.65, the amount claimed herein.

The claim was filed, in pursuance of my advertisement calling upon creditors to file claims, on 8th April, 1919.

[The Referee here discusses certain facts not essential to be stated.]

We now come to the real controversy between the parties to the contestation, namely, the question whether Mr. Hogg's claim is entitled to rank as "working expenditure" under the provisions of section 138 of "The Railway Act," read in the light of the interpretation embodied in sec. 2, sub-sec. 34 of the Act.

It is well to mention here as a matter of legislative history that "legal expenses" were first made part of "working expenditure" by sec. 2 (x) of 51 Vict., c. 29 (1888). Before 1st February, 1904, when the Act 3 Edw. VII, c. 58, came into force "working expenditure" was a prior charge, next to penalties, only on the rents and revenues of the company. But by the last mentioned Act, this priority was extended to affect the property and assets as well as the rents and revenues of the company. The last mentioned Act was carried into chapter 37, R.S.C. 1906.

Section 138, thereof, in part, reads as follows: "The company may secure such securities by a mortgage deed creating such mortgages, charges and encumbrances upon the whole of such property, assets, rents and revenues of the company, present or future, or both, as are described therein: Provided that such property, assets, rents and revenues shall be subject, in the first instance, to the payment of any penalty then or thereafter imposed upon the company for non-compliance with the requirements of this Act, and next, to the payment of the working expenditure of the railway."

Sec. 2, sub-sec. 34 reads as follows:

"(34) 'Working expenditure' means and includes

(*a*) all expenses of maintenance of the railway.

(*b*) all such tolls, rents or annual sums as are paid in respect of the hire of rolling stock let to the company, or in respect of property leased to or held by the company, apart from the rent of any leased line.

(*c*) all rent charges or interest on the purchase money of lands belonging to the company, purchased but not paid for, or not fully paid for.

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(*d*) all expenses of or incidental to the working of the railway and the traffic thereon, including all necessary repairs and supplies to rolling stock while on the lines of another company.

(*e*) all rates, taxes, insurance and compensation for accidents or losses.

(*f*) all salaries and wages of persons employed in and about the working of the railway and traffic.

(*g*) all office and management expenses, including directors' fees, and agency, legal and other like expenses.

(*h*) all costs and expenses of and incidental to the compliance by the company with any order of the Board under this act, and

(*i*) generally, all such charges, if any, not hereinbefore otherwise specified, as, in all cases of English railway companies, are usually carried to the debit of revenue as distinguished from capital account."

Both of the above quoted enactments were amended by 9-10 Geo. V, c. 68, but not so as to affect the questions arising on the proceedings before me.

As there does not appear to have been any penalty imposed upon the company under this section the payment of the "working expenditure" of the railway will take priority over any other of the claims filed under and by virtue of the reference to the undersigned. * * * * * * * *

Coming now to a determination of the question as to whether Mr. Hogg's claim should be ranked or classified as "working expenditure," it is well to note that light is to be had on this question from the American decisions rather than from the English. This is very clearly pointed out in a dictum by Strong J. in *Wallbridge* v. *Farwell* (1).

(1) 18 Can. S.C.R. 1 at p. 4.

"What I desire to explain, however, is this. In assenting to the judgment of the court dismissing these appeals I do not by any means intend to preclude myself in future, should the question be raised in proper form and in an appropriate case, from considering whether the principle which is now universally recognized in the United States as to the applicability of current earnings to current expenses, incurred either whilst or before railway property comes under the control of the court by being placed at the instance of mortgagees in the hands of a receiver, in preference to mortgage creditors whose security has priority of date over the obligation thus incurred for working expenses, should be adopted by our courts. This doctrine is now firmly settled in the United States, where railway mortgages exactly resemble those in use with us, and which do not at all resemble the securities of debenture holders under the English system of securities for borrowed capital; and the practice referred to is so pregnant with justice, good faith and equity that there may be found strong reasons for applying it here when the question arises." Mr. Abbott, at pp. 134, 135 of his work on Railway Law does not hesitate to disagree with Strong J. as to the desirability of applying the American rule to the construction of the Canadian Act of 1888, which made working expenditure a first charge on "rents and revenues" only. He says:—"It seems to the author that the mortgagee is entitled to presume that the income of the company has been properly applied; and it would seem hardly just when he comes to realize his security that he should find it largely impaired by overdue and outstanding debts, taking precedence of his claim on the ground that they were incurred for the 'working expenditure' of the railway; and these

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words in the Act would seem to include only the expenditure necessary to work and carry on the railway, and not past due debts; the author would, therefore, prefer the doctrine laid down in *Gooderham* v. *Toronto & Nipissing Ry. Co.* (1), notwithstanding the very broad language used by the (now Chief Justice of the Supreme Court) in the dictum above cited."

Mr. Jacobs in his work on Railway Law (pp. 191-5) comments at large on the *Wallbridge case* (*supra*). He finds the equitable doctrine prevailing in the United States, referred to by Strong J. in the *Wallbridge case*, adequately expressed in Baldwin's *American Railroad Law* (2). But he points out that this American doctrine was disapproved [in an expression of opinion merely] by Killam J. in *Allan* v. *Manitoba, etc., Ry. Co.* (3). On the whole Mr. Jacobs' observations favour Strong J's. view of the policy of applying the American doctrine. At p. 194 of his work he says:— "If a retrospective construction is put upon the words 'working expenditure' as occurring in sections 138 and 141 of this Act, then we have the American doctrine in its entirety, with the added advantage that we have in section 2 (34), a very ample definition of what constitutes 'working expenditure' * * * From the very nature of some of the items set forth in section (2) 34, the lien for working expenditure must be retrospective to the appointment of a receiver."

The difference between the English doctrine, or principle, and that prevailing in the United States may be usefully demonstrated by taking a single item from Mr. Hogg's claim and finding how it is

(1) 8 Ont. App. 685. (2) [1904] p. 555 et seq.
(3) 10 Man. 143. at p. 149.

treated by the courts of the two countries. One of the items of the claim is for "preparing bill for Parliament to confirm transfers and for other purposes, attendances at House of Commons and Senate in connection with same," etc. Now, Stirling J., *In re Mersey Railway Co.* (1), refused an application for authority to be given to the receiver to pay out of a fund in court the expense of the promotion of a bill in parliament to empower a railway to work its trains by electricity, because he did not think that the expense of promoting such a bill could be regarded as "working expenditure" under The Railway Companies Act, 1867, 30-31 Vict. (Imp.) c. 127, sec. 4. On the other hand, in *Bayliss* v. *L. M. & B. Ry. Co.* (2), we have a judge of one of the Circuit Courts of the United States (Drummond J.) instancing the services of an attorney in drawing up a bill for the legislature concerning the business of a railroad as properly coming within the term "labour" as applied to the operation of the road.

Now, as the Railway Act, R.S. 1906, c. 37, sec. 2, sub.-sec. 34, expressly makes "legal and other like expenses" part of the "working expenditure" of a railway, there is no need to look for outside aid to determine it to be such; but as Mr. Cook contended that the legal expenses mentioned in the Act were referable only to *railways in operation*, I think it well to refer to such authorities as I have encountered in considering the effect of this contention.

Before doing this, however, I wish to observe that as the test of the priority accorded to claims of this nature is whether the services rendered have benefited the property mortgaged and so improved the security of the mortgagees (See Domat, Les Lois Civiles &c.

(1) [1895] 72 L.T.N.S. 535. (2) 9 Biss. C.C. 90.

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tit. 1—Sec. V., Art. XXV.; Beach on Receivers, 2nd ed., by Alderson, sec. 391; also Minister of Railwals *vs.* Quebec Southern Ry. before Referee,—final report—25 May. 1908. p. 3), it would seem that legal services rendered in conserving the charter of the company and in settling the formalities of its bond issue would respond in the fullest way to this test. As already pointed out, Mr. Jacobs in his work on the Railway Act thinks that some of the items in sec. 2, sub-sec. (34) contemplate claims accruing before the appointment of the receiver, and he instances the rent of lands transferred to the railway as one of them. Literally *rent* is no more a part of working expenditure than fees payable for legal services of the character above mentioned.

"Operating expenses" as found in the American cases is a phrase tantamount to that of "working expenditure" as used in our Railway Act, for the verb "operate" is derived from the latin "operari," meaning "to work." Wood on *Railroads*, (ed. 1894), vol. 3, p. 1990 et seq., says: "The 'operating expenses' include all taxes, the wages of all employees, officers and agents employed in operating the road, etc. They include also the payment of the annual salary of an attorney which falls due within a short time prior to the receivership. The services of an attorney are very properly considered necessary to the proper protection and administration of the affairs of the company." In *Gurney* v. *Atlantic and G. W. Ry. Co.* (1), there was:—"An order appointing a receiver of a railroad company directed him, among other things, to pay debts 'owing to the labourers and employees' of the company 'for labour and services actually done in connection with that company's railways.' *Held*

(1) 58 N. Y. 358.

that it included a claim of counsel for professional services rendered by him on employment of the company in litigations relating to the railway, its interests and business." In High on *Receivers* 4th ed., p. 531 et seq., it is stated: "As regards claims for construction prior to receivership, when mortgages securing bonds of the company are executed upon its unfinished road, which show upon their face that the work of construction shall be carried to completion, and that the mortgage lien shall attach to the road as completed, the new road thus constructed after the execution of the mortgages may be regarded as a 'useful improvement' for the purpose of determining the right of creditors for such construction to priority over bondholders. If the road passes into the hands of a receiver before payment for such construction is made, and if the receiver's net income from operation is diverted to payment of interest upon the mortgage bonds and to permanent betterments of the property, priority may be allowed for such construction as against the bondholders. Upon similar grounds claims for labour in construction, operation and maintenance, which are entitled to liens under the laws of the State, may be allowed priority, although incurred more than six months before the receivership." The case of *Bayliss* v. *L. M. & B. Ry. Co.*, (1), already cited, is also useful in this connection. Drummond J. (at p. 94) says:—"Take the case for example of the services performed by counsel in obtaining the right of way on land for depots and other purposes. That may also fairly come within this class of service. It is said that it is part of the construction of the road. That is true in one sense, but it may also be a part of the operation of the road. After a road has its roadbed

(1) 9 Biss. C.C. 90.

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made, its iron down, and has run cars over it, it is not a finished road. There are always more or less things to be done besides, in order to make the road complete, and to enable the company to operate it successfully. It may be said this is a nice distinction, but one, I think, it is indispensable we should make in a case of this kind, and we must, for the purpose of doing equity, give to some extent a liberal construction to the language the court used on this occasion; and, it seems to me, under this view of the case, the labour performed by counsel may be just as important, indeed more important, than the labour performed by the ordinary labourer, or by the brakeman, engineer or fireman."

Mr. Hogg's claim is wholly anterior in its origin to the appointment of the receiver in this case. Nothing is charged for services or disbursements after the interim appointment of the receiver in December, 1917. That necessitates a consideration of the point as to whether arrears of working expenditure are exigible under the provisions of the Railway Act. On this point we have some assistance from an English case decided by Kay J. in 1890, under sec. 4 of the Railway Companies Act. After holding that when a receiver of the undertaking of a railway company has been appointed in pursuance of the above section, the moneys received by him must first be applied by him in providing for the working expenses, Kay J., *In re Eastern and Midlands Ry. Co.* (1), says:— "Then it is said that there are certain arrears of these instalment payments, and that although it might be right to make current payments, it is not right to pay the arrears. But the answer is a very simple one. Are arrears of working expenses not 'working

(1) [1890] 45 Ch. D. 367, at p. 386

expenses?' They are not the less 'working expenses' because they are arrears. 'Working expenses' does not mean, necessarily, current payments; and if arrears are not paid, as I understand, the owners of the rolling stock have power to retake possession of it. Therefore, there is just as much reason for paying arrears as there is for paying the current payments." As a creditor having a first charge or lien upon an insolvent railway may, under sec. 26 of the Exchequer Court Act, obtain an order for the sale of the railway or its rolling stock, etc., this gives the above quoted observations of Kay J. an important bearing on the case in hand.

The current of authority in the United States as to claims for working expenditure incurred before the appointment of a receiver is in accord with the English case last referred to. The leading case is that of *Fosdick* v. *Schall* (1), where Waite, C.J. (at p. 254) says:—"It often happens that, in the course of the administration of the cause, the court is called upon to take income which would otherwise be applied to the payment of old debts for current expenses, and use it to make permanent improvements on the fixed property, or to buy additional equipment. In this way the value of the mortgaged property is not unfrequently materially increased. It is not to be supposed that any such use of the income will be directed by the court without giving the parties in interest an opportunity to be heard against it. Generally, as we know both from observation and experience, all such orders are made at the request of the parties or with their consent. Under such circumstances, it is easy to see that there may sometimes be a

(1) 99 U.S. 235.

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propriety in paying back to the income from the proceeds of the sale what is thus again diverted from the current debt fund in order to increase the value of the property sold. The same may sometimes be true in respect to expenditures before the receivership. No fixed and inflexible rule can be laid down for the government of the courts in all cases. Each case will necessarily have its own peculiarities, which must to a greater or less extent influence the Chancellor when he comes to act. The power rests upon the fact, that in the administration of the affairs of the company the mortgage creditors have got possession of that which in equity belonged to the whole or a part of the general creditors. Whatever is done therefore, must be with a view to a restoration by the mortgage creditors of that which they have thus inequitably obtained." In the case of *Turner* v. *Indianapolis B. & W. Ry. Co.* (1), Drummond J. discusses the reasons for the preference extended to overdue working expenditure, holding that such preference is not based upon the theory that working expenditure is a lien on the road but inheres in the equitable jurisdiction of the court to protect the claims of those who have enhanced the value of the property by their services, etc. At p. 320 he says:— "The experience of the court which, it may be said, has been obtained by the management for many years of immense amounts of this kind of property, has satisfied it that practically it would be well nigh impossible, looking at things as they actually exist, to operate the roads by receivers without some allowance for claims of the character mentioned, existing at the time of their appointment."

(1) 8 Biss. 315.

In some jurisdictions in the United States the courts limit the period for preference or priority to attach to six months antecedent to the appointment of the receiver. But the weight of authority is against this limitation. In *Northern Pacific* v. *Lamont* (1), Caldwell J. delivering the judgment of the Circuit Court of Appeals for the 8th Circuit, said (p. 24):—"A preferential debt is not barred though contracted more than six months before the appointment of a receiver. As to such debts there is no arbitrary 'six months' rule, as has been often decided." This opinion is supported by the case of *Hale* v. *Frost* (2), where the Supreme Court of the United States gave priority to a claim for materials furnished three years before the appointment of the receiver; and by the case of *Burnham* v. *Bowen* (3), where the same tribunal gave preference to a debt for coal supplied some eleven months before the receiver was appointed. (See 30 Am. L. Rev. at p. 168 for a full discussion of this subject).

Of course this principle does not extend to according preference or priority to working expenditure prescribed by any statute of limitations. This is very succinctly put in Beach on *Receivers*, sec. 392:—"Just as long as the debt may be, or could have been enforced against the company, it should be considered as retaining its preferential character and entitled to the privilege of preferential debts. Such time is that prescribed by the statute of limitations, which alone should, and reasonably can, bar preferential debts."

In the case of *The Minister of Railways and Canals for the Dominion of Canada* v. *The Quebec Southern Railway Company, et al*, the Registrar of this court

(1) 69 Fed. Rep. 23. (2) 99 U.S. 389.
(3) 111 U. S. 776.

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(now the Honourable Mr. Justice Audette), sitting as referee, allowed a claim of Messrs. Greenshields, Greenshields & Heneker for legal services as working expenditure, the same having accrued before the appointment of a receiver therein. He also allowed in the same way a claim of Messrs. W. de M. and H. M. Marler for legal services as notaries accrued before the receivership. These rulings have not been published in the official reports of the court. However, we have a similar decision in a claim for legal expenses by the Registrar, sitting as referee, in the case of *The Royal Trust Company* v. *The Atlantic and Lake Superior Railway Co.*, which is reported in 13 Ex. C. R. 42, at p. 50.

Following these precedents, which it is to be noted are in harmony with the American decisions, the finding upon the contestation of Mr. Hogg's claim for the sum of $6,085.65 must be that it is entitled to be collocated as a privileged claim for "working expenditure," and, as such, authorized to be paid out of the fund in the hands of the receiver in priority to the claim of the trustee for the bondholders.

Judgment accordingly.

BRITISH COLUMBIA ADMIRALTY DISTRICT.

1917
Sept. 20.

BETWEEN

THE CLEEVE.....PLAINTIFF;

AND

THE PRINCE RUPERT.....DEFENDANT.

Shipping—Collision in harbour—Neglect to keep proper look-out—Failure to keep course and speed—Article 21, Sea Regulations.

Held: That the making of a landing along the water-front of a busy harbour is a manoeuvre which ought to be accompanied by full precautions, the first of which is an adequate look-out.

Bryce v. *Canadian Pacific Ry. Co.* (1907) 13 B.C.96; 6 W.L. R. 53; (1907) 15 B.C. 510, pp. 512-3; referred to and applied.

2. That a serious burden is imposed upon a vessel if she fails to "keep her course and speed" as required by article 21 of the Sea Regulations, and she lays herself open to attack by the "give-way" vessel by departing from the directions of the article and must be prepared to justify the departure by the proper execution of nautical manoeurves, such as in dropping a pilot, or approaching a landing or drawing up to an anchorage, or to lessen the consequences of collision, to save life or otherwise.

S.S. Albano v. *Allan Line Steamship Company, Limited,* (1907), A.C. 193; 76 L.J., P.C. 33, at p. 40, followed.

ACTION for damages by collision.

20th and 21st of June, 1917.

The case was heard before the Honourable Mr. Justice Martin, L.J.A., at Vancouver.

C. M. Woodworth, for plaintiff.

C. B. Macneill K.C., for defendant.

The facts are stated in the reasons for judgment.

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Reasons for Judgment. Martin L.J.A.

MARTIN, L. J. A. now this (20th September, 1917), delivered judgment.

This action arises out of a collision in Vancouver harbour on December 28th last, at about 3.45 p.m. when the high-powered steamship *Prince Rupert* (Duncan McKenzie, master), 320 feet in length, gross tonnage 3,379, registered 1,626, speed 18 knots, collided with the steam tug *Cleeve* (Wm. N. Coughlin, master), length 58 feet 6 inches, beam 15 feet, and caused considerable damage, her stern cutting into the *Cleeve's* port side about amidships. Both vessels had entered the Narrows, the *Cleeve* in advance, and passed Brockton Point and Burnaby Shoal, having the last behind them, with the *Cleeve* inside of it, the intention of the *Prince Rupert* being to make her landing at her owner's dock, the Grand Trunk Pacific, and that of the *Cleeve* to make the Hastings Saw Mill wharf, a short distance beyond said dock. It will thus be seen that their intentions, if carried out, having regard to the short distance to be travelled, would sooner or later result in converging and intersecting courses, dependent upon the rate of the speed of the respective vessels. The evidence is in certain important respects contradictory, but after an unusually careful consideration of it (necessitated by the fact that there is here the strange occurrence of a collision in broad daylight on a clear, calm day in a harbour) I find as a fact that the *Cleeve's* straight course was kept at a speed of about six knots from Burnaby Shoal towards her said destination and that it was not varied till "in the agony of an impending collision." At one time the *Prince Rupert* was admittedly as regards the *Cleeve,* an overtaking vessel, up to, at least, when abeam of Burnaby Shoal at 3.37 p.m., and after she, the *Prince Rupert* changed her

course, after passing said shoal to S. 50° E., and later to S. 25° E., to make a landing at said dock, she became a crossing, if not still an overtaking vessel, and in either case bound under articles 19, 22, or 24 to keep out of the way of the *Cleeve* which she had, I find, on her starboard side, and in such case there was under article 21 the correlative duty cast upon the *Cleeve* to "keep her course and speed," which duty I find she discharged. I am unable to take the view that the stopping of the *Prince Rupert's* engines and her slowing down on encountering the North Vancouver ferry changed her character as regards the *Cleeve* or lessened her obligations; it seems to me that relying on the fact that she was at half-speed, going six to eight knots after passing the shoal, she either thought she could afford to ignore the *Cleeve* and would have time to make her landing before the *Cleeve*'s course intersected, or else she dismissed the *Cleeve* entirely from her mind on the erroneous and improper assumption that she was only going as far as the Canadian Pacific Railway Company's Australian wharf, a long way short of the Grand Trunk Pacific dock, or up Coal Harbour, which latter view is sufficiently supported by the evidence of her first mate, Roderick McKenzie. From either point of view this, in the circumstances, was a "neglect to keep a proper look-out" as required by the "good seamanship" (article 29), and it was not taking proper "precautions" to speculate upon and miscalculate the speed of the *Cleeve*, especially in ignorance of her destination. These misapprehensions as to speed and relative conditions lead to serious consequences as pointed out by the Lord Chancellor in *The Olympic* and H.M.S.

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Hawke (1). In my opinion the making of the landing along the waterfront of a busy and important harbour is a manoeuvre which ought to be accompanied by full precautions, the first of which is an adequate look-out. I draw attention to my observations upon the "proper precaution" of keeping "a general look-out" in Vancouver Narrows in *Bryce* v. *Canadian Pacific Ry. Co.* (2), which view was affirmed by their Lordships of the Privy Council, as reported in 15 B.C. 510, at pp. 512-3; 13 Ex. C.R. 394, wherein their Lordships said of the master of the *Chehalis:*

"The real cause of this unfortunate collision was that there was no adequate look-out on board the *Chehalis*. It seems almost incomprehensible that he should not have noticed her (the *Princess Victoria*) even before she rounded, and as she was rounding the (Brockton) Point, unless he never looked anywhere except straight ahead of his vessel."

These observations are, in my opinion, very appropriate to the circumstances of the case at bar, and I also refer to those in *Cadwell* v. the ship *C. F. Bielman* (3). I think that the attention of the *Prince Rupert* was, after passing the shoal, so engrossed upon the ferry that she became "strangely oblivious of the presence of the *Cleeve*," to adopt the language of their Lordships of the Privy Council in S.S. *Albano* v. *Allan Line Steamship Company, Limited* (4).

So far as the *Cleeve* is concerned, while her master had been aware for some little time of the presence and approach of the *Prince Rupert*, yet it was his duty

(1) [1913] 83 L.J., Adm. p. 113; [1914], 12 Asp. M.C. 580; 112 L.T. 49; [1915] A.C. 385.

(2) [1907] 13 B.C. 96, at p. 101; 6 W.L.R. 53.

(3) [1906], 10 Ex. C.R. 155.

(4) [1907], A. C. 193; 76 L.J., P.C. 33 at p. 34; 96 L.T. 335; 10 Asp. M.C. 365.

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to obey article 21 and "keep his course and speed," and he was justified, in his position, in assuming that the *Prince Rupert* would conform to article 19 and keep out of his way, and he properly persisted in this line of conduct till the *Prince Rupert* was upon him, when "in the agony of impending collision" he tried ineffectually to escape from it by going astern and putting his helm to starboard, and though it was too late, yet no blame clearly can be attached to him for the failure of these final efforts.

It was suggested that the *Cleeve* might have avoided the accident if she had earlier altered her helm, but the cases shew that it imposes a serious burden upon a vessel if she fails to conform to article 21, and she lays herself open to attack by the "give-way" vessel by departing from its directions and must be prepared to justify that departure by the proper execution of nautical manoeuvres, such as in dropping a pilot, or approaching a landing, or drawing up to an anchorage, or to lessen the consequences of collision—to save life or otherwise. See the late cases of the *Fancy* (1); and *The Echo* (2), on the point; and also those of *The Velocity* (3); Steamship *Arranmore* v. *Rudolph* (4); S.S. *Albano* v. *Allan Line Steamship Company, Limited,* supra; *The Roanoke* (5), and the *Olympic* and H.S.M. *Hawke,* supra.

In the S.S. *Albano* case, supra, their Lordships said, p. 40:

(1) [1916], 86 L.J., Adm. p. 38;]1917] P. 13.
(2) [1917], P. 132; 86 L.J., Adm. p. 121.
(3) [1869], 39 L.J. Adm. 20; L.R. 3 P.C. 44; 6 Moore, P.C. (N.S.) 263.
(4) [1906], 38 S.C.R. 176.
(5) [1908] P. 231; 77 L.J., Adm. p. 115; 99 L.T. 78.

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"It must always be a matter of some difficulty for the master of a vessel which has to keep her course and speed with regard to another vessel which has to keep out of her way, to determine when the time has arrived for him to take action, for if he act too soon he may disconcert any action which the other vessel may be about to take to avoid his vessel, and might be blamed for so doing, and yet the time may come at which he must take action. Therefore he must keep his course and speed up to some point, and then act, but the precise point must necessarily be difficult to determine, and some little latitude has to be allowed to the master in determining this."

Applying this language to the case at bar, I determine that the master of the *Cleeve* kept his course and speed up to a proper point and that the accident is solely attributable to the negligence of the *Prince Rupert* in failing to comply with the articles above cited.

The prior judgments of this court in The *Cutch* (1); and *Smith* v. *Empress of Japan* (2), confirm in general the conclusions I have arrived at.

Therefore let judgment be entered in favour of the plaintiff with costs, and if necessary there will be a reference to the registrar, with merchants, to assess the damages.

Judgment accordingly.

(1) [1893], 2 B.C. 357; 3 Ex. C.R. 362.

(2) [1901], 8 B.C. 122; 7 Ex. C.R. 143.

BRITISH COLUMBIA ADMIRALTY DISTRICT.

1917

December 22.

THE CLEEVE.....PLAINTIFF;

VS.

THE PRINCE RUPERT.....DEFENDANT.

Shipping—Collision—Damages.

The master and engineer of the *Cleeve* spent 3 days before the Wreck Commissioner's Court of Investigation, held under the provisions of the Shipping Act, to investigate this collision in all its aspects, and claimed $105.00 for time lost by the vessel whilst they were so engaged—as well as a sum of $157.50 for solicitor's and counsel's charges for attendance at rehearing thereof ordered by the Minister of Marine. The registrar refused to allow these items in assessing the damages, and motion was made to the court to vary his report.

Held: That the above items of damages were too remote, and were not the direct consequence of the collision, and that the Report of the registrar should be confirmed.

MOTION to vary report of the registrar, fixing and assessing the damages.

December 22, 1917.

Motion now heard by the Honourable Mr. Justice Martin at Vancouver.

C. M. Woolworth, for the motion.

F. W. Tiffin, contra.

The facts are stated in the reasons for judgment.

MARTIN L. J. A. now (December 22nd, 1917), delivered judgment.

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THE CLEEVE THE v. PRINCE RUPERT.

Reasons for Judgment.

Martin L.J.A.

This is a motion to vary the report of the registrar on the assessment of damages arising out of a collision of these vessels wherein the *Prince Rupert* was adjudged liable for the whole damage. The registrar disallowed two items of damage, the first being a charge of $105 for three days at $35 per day, during which the plaintiff tug was laid up while her master and engineer had to go to Victoria in January last to attend the wreck Commissioners' Court of Investigation held under the Shipping Act, (ch. 113, R.S.C. 1906), to investigate the collision in all its aspects, including the conduct of the ship's officers involved, and fix the responsibility therefor upon said officers. The second item is a charge of $157.50 being solicitor's and counsel's charges in connection with the subsequent rehearing of the investigation which was ordered by the Minister of Marine under sec. 806, and upon which the said officers of the plaintiff's ship were represented by counsel.

With respect to the first item, it is submitted that as the vessel was a small one with only a crew of three men all told, it was impossible to get officers to run her for a short period of three days, and yet that delay and loss of profit were inevitably occasioned by her officers having to attend said court at Victoria (being summoned on five days' notice) which was a *direct consequence* of the collision, which should be recovered against the defaulting ship. I am of opinion, however, that it cannot properly be so regarded, because whatever else may be said of the matter, it was the duty of the master, at least (and presumably the engineer) to attend said court of investigation as a personal matter to explain and, if necessary, defend his own reputation and conduct which might lay him open to the grave penalty of cancellation or suspension of

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his certificate. That court has power by sec. 794 to "make such order as it thinks fit respecting the costs of such investigation," but has not seen fit to do so. While it may, in the circumstances, be a hardship that the delay has caused the laying-up of this small tug, yet if I sanctioned such a charge the same principle would have to be applied to the case of a big ship chartered for a daily great sum with a large complement of officers and crew, which would clearly be going too far. I think therefore, in the absence of any authority in his favour, that the applicant can get nothing on this item and must resort to the expenses for witnesses and costs as provided by the Shipping Act.

The same reasoning applies also to the second item, which is likewise disallowed.

It follows that the report of the registrar is confirmed at $1,650.51 and the motion to vary it dismissed with costs.

Judgment accordingly.

1921

March 19.

ON APPEAL FROM THE QUEBEC ADMIRALTY DISTRICT.

WILLIAM FRASER. (PLAINTIFF)...APPELLANT;

AND

S.S. *AZTEC* (DEFENDANT).....RESPONDENT.

Shipping—Exchequer Court in Admiralty—Appeal—Questions of fact—Advisability of a Court of Appeal to interfere on facts.

Held, (affirming the judgment appealed from) that where the local judge in admiralty has seen and heard the witnesses and was assisted by two assessors, the Exchequer Court of Canada sitting as a Court of Appeal from the judgment of the said judge should not interfere with the decision of the judge of first instance as regards pure questions of fact, unless he is firmly of the opinion that such decision is clearly erroneous.

APPEAL from the Deputy Local Judge, Quebec Admiralty District, in action *in rem* for damages.

March 10th, 1921.

Appeal heard before the Honourable Mr. Justice Audette at Ottawa.

R. A. Pringle K.C. for appellant.

A. R. Holden K.C. for respondent.

The facts are stated in the reasons for judgment.

AUDETTE J. now (this 19th March, 1921) delivered judgment.

NOTE.—The judgment appealed from and which is affirmed is reported in 19 Ex. C.R. 454 and 20 Ex. C. R. 29.

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FRASER
v.
S.S. AZTEC.

Reasons for Judgment.

Audette J.

This is an appeal from the Deputy Local Judge of the Quebec Admiralty District, sitting at Montreal, with assessors, in an action *in rem* for damages arising out of an accident which occurred, in day time, on the 15th August, 1919, in lock No. 17 of the Cornwall canal.

The details of the accident are clearly set out in the reasons for judgment of the learned trial judge and I am therefore relieved from the necessity of repeating them here on appeal. The case, in the result, resolves itself into a very small compass.

After reading the evidence, it is impossible to find that the respondent ship had anything to do with the cause of the accident, which was absolutely beyond its control. The surging astern, the sudden disturbance of the water and the unexpected current occurring in the lock, which caused the accident, were all foreign to the doings of the respondent. Had there been an additional line at the stern and a "breast-line," it would not be unreasonable to entertain the view that they—like the bow-line—would have snapped or been pulled out like the steel cable, as found by the trial judge under the special advice of his assessors, acting in the same capacity as the Elder Brethren do in England. Had there been two lines at the stern, it is self-evident they would have been of no use, since the sudden current originating in the lock, took the vessel immediately to the west or astern, the water surging in that direction. Had there been a breast-line, it is manifest that having to withstand the tremendous strain of the loaded craft, it would also have broken like the manilla hauser or been pulled out like the steel cable. There was no false or wrong manoeuvre on behalf of the *Aztec*, while moored at the pier or bank of the canal. There was no want of care or skill exhibited on her part.

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FRASER v. S.S. AZTEC.

Reasons for Judgment.

Audette J.

Sitting as a single judge, in an Admiralty Appeal from the judgment of a judge of first instance assisted by two assessors, while I might, with diffidence, feel obliged to differ in matter of law and practice, yet as regards pure questions of fact, I would not be disposed to interfere with the judge below, unless I came to the conclusion that it was clearly erroneous.

Indeed, as said by Lord Langdale, in *Ward* vs. *Painter* (1): "A solemn decision of a competent judge is by no means to be disregarded, and I ought not to overrule without being clearly satisfied in my own mind that the decision is erroneous." See also *The Queen* vs. *Armour* (2); *Montreal Gas Co.* vs. *St. Laurent* (3); *Weller* vs. *McDonald-McMullen Co.* (4); *McGreevy* vs. *The Queen* (5); *Arpin* vs. *The Queen* (6).

The Supreme Court of Canada held that when a disputed fact involving nautical questions (as the one raised in this case) with respect to what action should have been taken immediately before the accident, is raised on appeal, the decree of the court below should not be reversed merely upon a balance of testimony. *The Picton* (7).

Moreover, it cannot be overlooked that the learned trial judge has had an opportunity of hearing and seeing the witnesses and testing their credit by their demeanour under examination. *Riekman* vs. *Thierry* (8). And in the present case, there is more—there is a finding by the trial judge disregarding the testimony of some of the witnesses whom he disbelieved. *Dominion Trust Co.* vs. *New York Life Ins. Co.* (9).

(1) [1839] 2 Beav. 85.
(2) 31 S.C.R. 499.
(3) 26 S.C.R. 176.
(4) 43 S.C.R. 85.
(5) 14 S.C.R. 735.
(6) 14 S.C.R. 736. Coutlee's Digest S.C.R., p. 93 et seq.
(7) 4 S.C.R. 648.
(8) 14 R.P.C. 105.
(9) [1919] A.C. 254.

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FRASER v. S.S. AZTEC.

Reasons for Judgment.

Audette J.

Apart from the controversy raised on appeal there is ample evidence for the court below to arrive on this question of fact at the conclusion above referred to and to justify the decree, and in such a case the appellate tribunal ought not to interfere.

The appeal will be dismissed with costs.

Judgement accordingly.

Solicitors for appellant: *Davidson, Wainwright, Elder & Hackett.*

Solicitors for respondent: *Meredith, Holden, Hague, Shaughnessy & Co.*

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March 19.

WILLIAM EGERTON HODGINS.....SUPPLIANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

Pensions—Interpretation of Statutes—Militia Act—Orders in Council—Discretion of Minister.

In August, 1917, H., then in receipt of yearly salary of $4,000, was retired, but, instead of taking the six months' leave, by an order-in-council passed on 3rd September, 1917, he was appointed on the Overseas Demobilization Committee "for a period of six months pending retirement" at the yearly salary of $6,000, this order further declaring that "at the expiration of his six months' tenure of appointment * * * * would be entitled to pension in accordance with the Militia Pension Act, 1902." On the 9th January, 1918, under the direction of the Minister of Militia the Pension Board fixed H's. pension at $4,200, on the basis of $6,000 salary, this being subsequently approved of and affirmed by the Treasury Board and the Governor in Council.

Between the 3rd September, aforesaid, and the date of his actual retirement, in March, 1918, namely, on the 29th November, 1917, two orders-in-council were passed providing field and ration allowances for officers of the permanent force, amounting, as regards officers of H's. rank, to $1.75 a day over and above the consolidated rate of pay and allowances. By his petition H. claimed that his pension should be based on a salary of $6,000 plus these allowances.

Held: That, applying to the orders-in-council in question, the statutory rule that a general act is not to be construed to repeal a previous particular act unless there is some express reference therein to such previous legislation, or unless they are necessarily inconsistent, the general orders-in-council of the 29th November, 1917, did not affect the special and particular order of the 3rd September, 1917, which stands by itself as representing the true position between the parties.

2. Section 42 of the Militia Act provides that a retiring officer "shall be entitled to pension, etc., not exceeding 1-50 of the pay and allowance of his rank or permanent appointment."

Quaere? Does the word "shall" in said section come within the class of cases in which the authority given thereby is coupled with the legal duty to exercise such authority, creating a discretion that must be exercised; furthermore, the Minister and Pension Board having exercised this discretion by fixing the amount of the pension, and their decision having been approved and affirmed by the Governor in Council, has the court any jurisdiction to sit on appeal or review from the exercise of such discretion?

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PETITION OF RIGHT to have it declared that the amount upon which pension was based was not the proper figure and that the pension should be increased.

March 10th, 1921.

The case now heard before the Honourable Mr. Justice Audette at Ottawa.

W. D. Hogg K.C. for suppliant.

R. V. Sinclair K.C. and H. H. Ellis for respondent.

The facts are stated in the reasons for judgment.

AUDETTE J. now (this 19th March, 1921) delivered judgment.

This is a Petition of Right whereby it is claimed, by the suppliant, who is a retired Major-General of the Canadian Militia Force, receiving a yearly pension of $4,200,—that his pension instead of being $4,200, should be $4,647.00, under the circumstances hereinafter set forth.

In August, 1917, the suppliant having served 36 years, his retirement from the force was decided upon and he agreed and undertook to so retire. He was officer commanding District No. 1, when in January, 1915, he was detailed to Ottawa to perform the duties of Acting Adjutant General,—still retaining the command of that district while it was administered by Lt.-Col. Shannon, and from the first of January, 1915, up to the 7th September, 1917, the suppliant was receiving an annual salary of $4,000,—made up, as shown by the pay-list, filed as exhibit A, of pay of $2,900, together with $1,100 for consolidated allowances.

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When in August the question of his retirement had been passed upon and decided, instead of taking his six months' leave and remaining idle, he declared his willingness to forego the leave and do some work. (See exhibit No. 8). Then by the order-in-council of the 3rd September, 1917, passed upon the recommendation of the Minister, made on the 30th August 1917, the suppliant was specifically "appointed as the representative of the Militia Department, on the Overseas Demobilization Committee, *for a period of six months, pending retirement, at the consolidated rates of pay and allowances of $6,000 per annum * * * (the consolidated rates of $6,000 per annum being equal to the pay and allowances of the chief of the general staff, and both inspector-generals in Canada).*" And in the 4th paragraph of this order-in-council it is further declared that "At the expiration of his six months tenure of appointment,—this officer having reached the age limit—will be entitled to pension, in accordance with the Militia Pension Act of 1902."

On the 9th January, 1918, under the order of the Minister of Militia and Defence, the Pensions and Claims Board assembled for the purpose of reporting as to the pension due to Major-General W. E. Hodgins, who was to be retired from the service in March, 1918 (See exhibit No. 2). And the board fixed his pension at $4,200 upon the basis of pay at $4,600 and allowances at $1,400. This finding was subsequently—namely, during January, 1918—approved by the treasury board and the Governor General in Council.

Now, subsequent to the passing of the order-in-council of the 3rd September, 1917, appointing the suppliant to this service in England at a fixed salary, specially created for him as said by the Deputy Minister in his evidence, and prior to his retirement in

March, 1918, two orders-in-council were passed on the 29th November, 1917, whereby officers of the permanent force of the same rank as the suppliant, were, in addition to their consolidated rates of pay and allowances, allowed field allowance at the rate of $1.50 per diem and also to a ration allowance of 50 cents per diem (less 25 cents already included in allowances) making in all $1.75,— and the suppliant claims that such allowances should have been added to the said sum of $6,000 as the proper amount upon which his pension should have been based. Furthermore, that such additional allowances amount to the yearly sum of $638 and that his pension should have been calculated on $6,638 instead of $6,000 with the result that the pension instead of being $4,200 should be $4,647.00.

Hence the present controversy.

The well-established rule of law for the construction of statutes embodied in the maxim of *generalia specialibus non derogant*, clearly applies here—"A general statute does not abrogate an earlier special one by mere implication; the law does not allow an interpretation that would have the effect of revoking or altering, by the construction of general words, any particular statute when the words may have their proper operation without it." This principle was applied to the construction of by-laws of a Municipality in the case of *The City of Vancouver* vs. *Bailey* (1).

And Maxwell, 2nd Ed., p. 213, upon the same question expresses the following opinion: "Having already given its attention to the particular subject, and provided for it, the legislature is reasonably presumed not to intend to alter that special provision

(1) 25 S.C.R. 62, 67.

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by a subsequent general enactment, unless that intention is manifested in explicit language, or there be something which shows that the attention of the legislature had been turned to the special Act, and that the general one was intended to embrace the special cases within the previous one, or something in the nature of the general one making it unlikely that an exception was intended as regards the special Act. The general statute is read as silently excluding from its operation the cases which have been provided for by the special one."

In *Gagnon* vs. *S.S. Savoy* (1), it was further held that: "A general law may be impliedly repealed by a subsequent special law, in *pari materia*, if such special law is in conflict with the former, but the converse is not the case." That is *generalia specialibus non derogant*—but *gerenalibus specialia derogant*.

As said in Broom's Legal Maxims (p. 20) "when there are general words in a later date capable of reasonable application without being extended to subjects specially dealt with by earlier legislation, then, in the absence of an indication of a particular intention to that effect, the presumption is that the general words were not intended to repeal the earlier and special legislation."—Per Lord Selborne. *Seward* vs. *Vera Cruz* (2), citing *Hawkins* vs. *Gathercole* (3). "The law will not allow the exposition to revoke or alter by construction of general words any particular statute, when the words may have their proper operation without it," *Lyn* vs. *Wyn*, Bridgeman's Judgment 122, 127 (4).

(1) 9 Ex. C.R. 238.
(2) 10 A.C. 59, at 68.
(3) 6 D. M. & G. 1.
(4) *Cited in* L.R. 3 C.P. 421; 6 C.P. 135, 1 Ex. D. 78.

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We also find In re Smith's Estate (1), the following rule of construction that "where there is an Act of Parliament which deals in a special way with a particular subject-matter, and that is followed by a general Act of Parliament which deals in a general way with the subject-matter of the previous legislation, the court ought not to hold that general words in such a general act of Parliament effect a repeal of the prior and special legislation unless it can find some reference in the general act to the prior and special legislation, or unless effect cannot be given to the provisions of the general Act without holding that there was such a repeal."

The same principle was adopted in the case of *Thorpe* vs. *Adams* (2) where it is held that: "The general principle to be applied to the construction of Acts of Parliament is that a general Act is not to be construed to repeal a previous *particular* Act, unless there is some express reference to the previous legislation on the subject, or unless the two Acts are necessarily inconsistent."

This rule of construction is of such wide acceptance in the courts that it is unnecessary to multiply authorities to the same effect.

Having adopted this rule of construction, I must find that the general orders-in-council of the 29th November, 1917, do not affect the special and particular order-in-council of the 3rd September, 1917, which stands by itself, as representing the true position between the parties. The Petition of Right fails on that ground without more. Accepting this view, I am relieved from labouring many questions raised at bar; however, it is but right to state that I have not witheld consideration from any point relevant to the case and stressed by counsel.

(1) 35 Ch. D. 589, at 595. (2) L.R. 6 C.P. 125.

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Let me refer to some of them. Sec. 4 of the Military Pension Act provides that a retiring officer "shall be entitled to a pension * * * not exceeding 1-50 of the pay and allowances of his rank or *permanent* appointment." Was not the suppliant's salary the sum of $4,000 a year on his permanent appointment?—and was not the salary he was receiving at the time of his retirement a *temporary* salary limited for this period of six months, following the time his retirement had been decided? If the temporary and higher salary has been used as a basis for the calculation of the pension, it follows the suppliant has been handsomely treated.

On the other hand, if this special order-in-council of the 3rd September, 1917, is to be cast aside and ignored, then the suppliant has to fall back upon his rank and *permanent appointment* before that date at a salary of $4,000, whereby the pension would be much lower.

Does the word "shall" in section 42, so much relied upon at trial, come within the class of cases in which the authority given thereby is coupled with the legal duty to exercise such authority,—especially when the words immediately following are, "not exceeding 1-50"—in other words creating a discretion that must be exercised. Conceding this, then the answer is such discretion has been exercised by the Minister and the Pension Board, and approved and confirmed by an order in council. Has the court under such circumstances any jurisdiction to sit on appeal or in review from the exercise of such discretion? Does not the fixing of the amount of the pension rest primarily and finally in the discretion of the executive authority? It would seem so on the authorities, see *Matton* vs. *The Queen* (1); *The King* vs. *Halifax Graving Dock Co., Ltd.*, (2) and cases therein cited.

(1) 5 Ex. C.R. 401, at 407. (2) 20 Ex. C.R. 45.

There are a number of decisions given in England upon similar cases, but again I may repeat in the view I take of the case it is unnecessary to ascertain whether these decisions are given upon a similar state of law as in Canada. The nature of the engagement of a soldier or officer has been reviewed in the case of *Leaman* vs. *The King* (1). The following authorities may also be referred to: *Gibson* vs. *East India* (2); In *re Tuffnell* (3); Robertson, Civil Proceedings (4); *Dunn* vs. *The Queen* (5); *Mitchell* vs. *The Queen* (6); *Balderson* vs. *The Queen* (7); *Cooper* vs. *The Queen* (8); *Gould* vs. *Stuart* (9); *De Dohse* vs. *The Queen* (10); *Yorke* vs. *The King* (11).

There will be judgment declaring that the suppliant is not entitled to the relief sought by his Petition of Right.

Judgment accordingly.

Solicitors for suppliant: *Hogg and Hogg.*

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

(1) 36 T.L.R. 835.
(2) 5 Bing. N.S. 262.
(3) 3 Ch. D. 164 at 167.
(4) p.p. 611, 359, 35, 643.
(5) [1896] 1 Q.B.D. 116.
(6) 6 T.L.R. 181; [1896] 1 Q.B.D. 121.
(7) 28 S.C.R. 261.
(8) 14 Ch. D. 311, at 314.
(9) [1896] A.C. 575.
(10) Times, 24 Nov. 1886.
(11) 21 T..L.R. 220.

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March 14.

IN THE MATTER OF THE PETITION OF RIGHT OF FAIDA LEVASSEUR... SUPPLIANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

Railways—Negligence—Latent Defect.

A platform had been made consisting of two rails placed transversally from the track towards the fence of the right of way, and across these 37 rails had been stacked.

Whilst L. was standing on this platform, awaiting the train on which rails were to be loaded, one of the rails placed transversally as above mentioned broke, with the result that the pile of rails slipped to the centre at the break, and L's. hand was caught between the rails, by reason of which he lost part of three fingers.

The platform was constructed according the usual custom and was strong enough under normal conditions and barring some defect in the rail, to carry the load upon it, and more.

Held: On the facts, that the breaking was accidental and the result of latent defect, or flaw in the rail; and that the defect being latent, the use of the rail in the manner indicated did not constitute want of care or negligence, on the part of any employee of the Crown whilst acting within the scope of his employment.

PETITION OF RIGHT to recover $5,000 for damages as result of an accident whilst in the employ of the Intercolonial Railway.

March 3rd, 1921.

Case now heard before the Honourable Mr. Justice Audette, at Quebec.

Napoléon Laliberté, for suppliant.

C. V. Darveau, for respondent.

The facts are stated in the reasons for judgment.

AUDETTE J. now (this 14th March, 1921), delivered judgment.

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Audette J.

This is a Petition of Right whereby it is sought by the suppliant, to recover the sum of $5,000 for damages, he alleges, he suffered as the result of an accident met with while in the employ of the Intercolonial Railway, a public work of Canada.

On the 22nd November, 1917, the suppliant, as a temporary employee of the railway, formed part of an extra gang of men, under foreman Chappedelaine, engaged in the general repairs or work on the railway.

Travelling on a working train, these men arrived at a certain place to load some rails piled on the side of the track. They alighted from their cars upon a platform formed by these rails and the train moved on to place opposite the rails the car upon which they were to be loaded.

While the train was being moved, the men, between 26 or 28 in number, remained on this kind of platform.

The platform was made up by placing two transversal rails running from the railway track towards the fence of the right of way. On the railway embankment, the end of the rail was placed and rested upon a tie and on the side of the fence, across the ditch, there were six ties adjusted in the manner mentioned by witness Masse upon which the other end of the rail rested. Then there were 37 rails placed upon these two transversal rails. A rail is 5 inches wide at the heel.

While the men were standing on the platform, one of the transversal rails broke, with the result that the rails, at that end, slipped to the centre,—at the break—and piled on top of one another, with the result that the suppliant's right hand was caught under some of the rails and injured thereby. He lost 1 1-3 phalange of the thumb, 2 phalanges of the index and one phalange of the major.

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Now it is satisfactorily established by the evidence that this pile or platform was made in the usual manner and that the rail, barring some defect, was strong enough to carry these men with even a larger quantity of rails.

No action sounding in tort will lie against the Crown, unless it is made liable therefor by statute. To succeed in the present action, the suppliant must bring his case within the ambit of sec. 20 of the Exchequer Court Act and he can only succeed, as thereby provided, when the accident is the result of the negligence of an officer or servant of the Crown while acting within the scope of his duties and employment. It is a law of exception.

This platform or pile of rails being made, as above mentioned, in the usual manner and it being established by uncontroverted evidence, that under normal conditions, the rail would not have broken under the weight submitted on the day of the accident, but for some defect; it must be found that the breaking was accidental or the result of a latent defect, or flaw in the cast, want of cohesion in the manufactured steel. The defect was hidden and inherent to the matter and could not be seen. To use the rail in the manner it has been used does not indicate any want of care or negligence in the circumstances in question.

The *onus* of establishing negligence is upon the suppliant and he has failed to do so. The accident remains unexplained. The case is not within the statute and the action fails. *Colpitts* v. *The Queen* (1); *Dube* v. *The Queen* (2).

What happened was fortuitous and unexpected. *Thompson* v. *Ashington Coal Co.* (3). The event was unforeseen and unintended, or was "an unlooked-for

(1) 6 Ex. C.R. 254. (2) 3 Ex. C.R. 147.
(3) 84 L.T.R. 412; 3 B.W.C. Cas. (O.S.) 21.

mishap or an untoward event which was not expected or designed." *Fenton* v. *Thorley* Co. (1); *Higgins* v. *Campbell* (2). It was a personal injury by accident. In *Briscoe* v. *Metropolitan St. Ry. Co.* (3) an accident is defined as "such an unavoidable casualty as occurs without anybody being to blame for it; that is, without anybody being guilty of negligence in doing or permitting to be done, or in omitting to do, the particular things that caused such casualty."

Witness Chappedelaine, heard by the suppliant, explains the accident by hazarding the conjecture that the broken rail must have been defective, from the fact that the other rail did not break, and that it happens often that there is a flaw in the rail; but that such flaw is not easy to be seen. After examining the rail at the break, he says that the rust was not evenly spread over the break,—there was a part that was darker. At first sight, he adds the defect could not be detected. Witness Patry, also heard on behalf of the suppliant, testifies that there was no means of seeing if the rail was dangerous. Then witness Massé, heard on behalf of the Crown, testifies that he examined the rail in question before using it, without however turning it over, looking underneath, and contends that if there had been a break or a split (cassure ou felure) he would have seen it; but adds that when the rail is dry, one can slip or overlook it; and that neither himself nor any one else could have detected any flaw or defect before the accident.

The want of discovering such a defect or flaw, under the circumstances of the evidence, after exercising reasonable care and skill cannot amount to negligence. *Branniger* v. *Harrington* (4).

(1) [1903] A.C. 443; 89 L.T.R. 314; 52 W.R. 31.
(2) [1904] 1 K.B. 328.
(3) 120 Southwestern Rep. 1162 at 1165.
(4) 37 T.L.R. 349.

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Reasonable care has been used in the selection of the rail and the defect being latent and not capable of detection, as established by the evidence adduced on behalf of the suppliant, the break does not amount to negligence.

As already stated, to succeed in the present case, the suppliant must show affirmatively that there was negligence, the burden of proof was upon him and he has failed to do so and the action cannot be maintained,—unfortunate as the result might be. *Dube* v. *The Queen* (1).

The suppliant was a temporary employee of the railway and as a condition precedent to working upon the railway had become insured by the Association and Insurance of the Railway Employees. He had received the booklet, Ex. E, whereby, by one of its clauses, terms or conditions, the railway, in consideration of its financial contribution, is declared relieved from all claim for compensation in respect to injuries or death of the insured. However, in the view I take of the case, having found that no negligence has been proved, it becomes unnecessary to pass upon the question of insurance. *Conrad* v. *The King* (2); *Gingras* v. *The King* (3); *Gagnon* v. *The King* (4); *Thompson* v. *The King* (5).

There will be judgment declaring that the suppliant is not entitled to any portion of the relief sought by his Petition of Right.

Judgment accordingly.

(1) 3 Ex. C.R. 147.
(2) 49 S.C.R. 577, at 580.
(3) 18 Ex. C.R. 248.
(4) 17 Ex. C.R. 301.
(5) 20 Ex. C.R. 467.

IN THE MATTER OF THE PETITION OF RIGHT OF JOHN JAMES THOMPSON..... SUPPLIANT; 1921 March 14.

AND

HIS MAJESTY THE KING..... RESPONDENT.

Railways—Employees—Relief and Insurance Association—Contract of Employment—Public Policy—Estoppel.

T. was a *temporary* employee of the Transcontinental Railway and as such a member of the Employees Relief and Insurance Association. By written agreement with the Association, he acknowledged having received copy of the rules of the association and agreed, as one of the terms and conditions of his employment, to comply with and be bound thereby. Each member had to contribute to the fund, and the Railway Department also contributed a certain sum annually, in consideration of which, by the rules, it was "relieved of all claims for compensation for injury or death of any member."

T. was injured in shunting operations, and subsequently received two cheques from the Association, payable out of the fund towards which the Crown contributed, and which he cashed. The cheques were handed to him because of his membership in the Association, and a daily or monthly deduction was duly made, to his knowledge, from his wages.

Held: That such an agreement was part of his contract of employment, was valid and binding upon him, and was not against public policy; and was a complete answer and bar to an action against the Crown for injury sustained by him whilst employed as aforesaid, and that suppliant was estopped from setting up any claim inconsistent with the rules and regulations of the Association. *Conrod* v. *The King* (1), followed, and *Saindon* v. *The King* (2), and *Miller* v. *The Grand Trunk* (3), distinguished. The last two dealing with the case of a *permanent* employee, and this case with a *temporary* employee

(1) 49 S.C.R. 577. (2) 15 Ex. C.R. 305.
(3) [1906] A.C. 187.

PETITION OF RIGHT to recover $10,500 damages alleged to have been suffered whilst employed on the Transcontinental Railway.

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Reasons for Judgment.

Audette J.

March 2nd, 1921.

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

F. Savard for suppliant.

Auguste Sirois for respondent.

The facts are stated in the reasons for judgment.

AUDETTE J. now (March 14th, 1921), delivered judgment.

This is a Petition of Right whereby it is sought, by the suppliant, to recover the sum of $10,500 as damages, he alleges, he suffered as the result of an accident he met with, in the railway yard, at Parent, on the Transcontinental railway, a public work of Canada.

Counsel at bar for the suppliant, having become informed from the evidence adduced, that the Crown had paid all hospital and medical charges in respect of the suppliant's accident and injuries, abandoned his claim for $500 made in respect of the same by paragraph 15 of the Petition of Right.

The suppliant met with an accident late in the evening of the 16th February, 1918, when engaged, as brakeman, in the making up of a train called *Snow Plow Extra,* in the railway yard, at Parent, in the course of necessary shunting therefor. After leaving the switch and while backing, tender foremost, he was standing at the side, on the rear end of the tender—one foot on the sill and the other on the step, holding on with his right hand, facing the direction in which they were travelling and with his back turned to the engine, carrying his lamp in the left hand. After leaving the switch, he gave the signal to the engineer to back towards the two cars they intended to remove, to

allow them to get at their van and, when at about 5 car lengths from these two cars, he gave the signal to stop. He contends he looked back to ascertain if the engineer was getting the signal, but he could not see him. Then, being at about 20 feet distance from him, he hailed him (yelled), but received no reply. The tender and engine collided with the two cars, the suppliant was thrown from where he stood and suffered injuries both to his head and his right arm, for which he now sues. These injuries consisted of his right arm being injured, without being broken.

The accident happened on the 17th February, 1918, and the Petition of Right, in compliance with sec. 4 of the Petition of Right Act, appears, from the departmental stamp affixed thereon, to have been left with the Secretary of State, on the 30th April, 1919; that is more than one year after the accident and would therefore appear on its face to be prescribed. It was filed in the court on the 9th May, 1919.

Under sec. 33 of the Exchequer Court Act the laws respecting prescription and the limitation of actions in force in the province of Quebec must apply in a case of this kind.

Under Art. 2211 of the Civil Code of the province of Quebec, the Crown may avail itself of prescription and the manner in which the subject may interrupt prescription is by means of a petition of right,—apart from the cases in which the law gives another remedy.

Under Art. 2262 of the Civil Code the right of action for bodily injuries is prescribed by one year and Art. 2267 further enacts that in such case the debt is absolutely extinguished, and that no action can be maintained after the delay for prescription has expired. See also Art. 2188 and *The Queen* v. *Martin* (1).

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

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Reasons for Judgment.

Audette J.

The injury complained of in this case having been received more than a year before the lodging of the petition of right with the Secretary of State, the right of action is absolutely prescribed and extinguished.

Moreover, there is the further question of the insurance. I may say in a summary manner, that the suppliant was a temporary employee at the time of the accident; that he signed exhibit A and received the booklet exhibit C, whereby by Art. 115 thereof the railway in consideration of its financial contribution is relieved from all claims for compensation in respect to injuries or death of the insured.

The suppliant received two cheques, cashed them and kept the proceeds thereof. These cheques were handed to him because of his being a member of the Association and a daily or monthly deduction was duly made, to his knowledge, from his wages, towards the insurance,—"he is now estopped from setting up any claim inconsistent with the rules and regulations of the association and therefore precluded from maintaining this action"—Per Chief Justice of Canada in *re Conrod* v. *The King* (1).

Having said so much, it becomes unnecessary to express any opinion as to whether or not the suppliant's claim could have been sustained on the ground of negligence. It is unfortunate and greatly to be regretted that we did not have the advantage of hearing Marcotte, the engineer, as he might have thrown more light upon the circumstances of the accident. The agreement (exhibit A) entered into by the suppliant, whereby he became a member of the insurance society and consented to be bound by its rules, was a part of a contract of service which it

(1) 49 S.C.R. 580.

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was competent for him to enter into. And this contract is an answer and a bar to this action, for the restrictive rules are such as an insurance society might reasonably make for the protection of their funds, and the contract as a whole was to a large extent for the benefit of the suppliant and binding upon him. *Clement* v. *London South-Western Ry. Co.* (1).

Such contract of service is perfectly valid and is not against public policy. *Griffiths* v. *Earl of Dudley* (2), and in the absence of any legislation to the contrary,—as with respect to the Quebec Workmen's Compensation Act (3), any arrangement made before or after the accident would seem perfectly valid. Sachet, Legislation sur les Accidents du Travail, Vol. 2, pp. 209 et seq.

The present case is in no way affected by the decision in the case *Saindon* v. *The King* (4), and *Miller* v. *Grand Trunk* (5), because in those two cases the question at issue was with respect to a *permanent* employee where the moneys and compensation due him, under the rules and regulations of the insurance company, were not taken from the funds toward which the Government or the Crown were contributing. It is otherwise in the case of a *temporary* employee, and I regret to come to the conclusion, following the decision in *Conrod* v. *The King* (6), that the suppliant's claim is absolutely barred by the condition of his engagement with the I.C. Ry.

See *Gingras* v. *The King* (7); *Gagnon* v. *The King* (8).

(1) L.R. 2 Q.B.D. 482.
(2) L.R. 9 Q.B.D. 357.
(3) 9 Edw. VII, c. 66, s. 19; Art. 7339, R.S.Q. 1909.
(4) 15 Ex. C.R. 305.
(5) [1906] A.C. 187.
(6) 49 Can. S.C.R. 577.
(7) 18 Ex. C.R. 248.
(8) 17 Ex. C.R. 301.

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Reasons for Judgment.

Audette J.

There will be judgment declaring that the suppliant is not entitled to any portion of the relief sought by his petition of right.

Judgment accordingly.

Solicitors for suppliant: *Rog. Langlois, Godbout & Rochette.*

Solicitors for respondent: *Belleau et Sirois.*

IN THE MATTER OF THE PETITION OF RIGHT OF JOSEPH LAJOIE..... SUPPLIANT.

1921
March 10.

AND

HIS MAJESTY THE KING..... RESPONDENT.

Railways—Trespasser—Acceptance of risk—Act of employee contrary to express instructions.

After his day's work was over, between 6 and 7 o'clock, in the evening, and when he was absolute master of his time and leisure, L., an employee, notwithstanding that he had been forbidden to do so by his foreman, took a hand car for the purpose of going on the railway track to procure coal for his sleeping van. Coal could have been obtained for overnight from an adjoining van. When running on track with the car, he was struck by a train running on schedule time, and killed.

Held: That under the circumstances, L. was in the position of a trespasser, *ab initio*, upon the right of way.

2. That moreover, such employee after his day's work was over, not then acting within the scope of his employment, but on the contrary acting in contravention of specific instructions given to him by his foreman, having entered upon a railway track, where trains ran, with full knowledge of the risk he was taking, must be held to have accepted such risk.

PETITION OF RIGHT to recover $2,000 for the death of his son which occurred whilst in the employ of the Canadian National Railways.

February 23rd, 1921.

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

G. Ringuet, for suppliant.

John A. Sullivan, for respondent.

The facts are stated in the reasons for judgment.

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Reasons for Judgment.

Audette J.

AUDETTE J. now (this 10th March, 1921) delivered judgment.

The suppliant, by his Petition of Right, seeks to recover the sum of $2,000, being the damages, he alleges, he suffered from the death of his son, resulting from an accident on the Canadian National Railways, a public work of Canada.

Lajoie, the son, who was 19 years old(hereafter called Lajoie, as distinguished from Lajoie, the father and suppliant) on the 26th November, 1918, formed part of an *extra* gang of men working upon the right of way of the said railroad.

The gang of men in question were under the superintendence and direction of foreman Chappedelaine, and their working hours were from 6.30 a.m., to 5.30 p.m. The railway was supplying them with 5 or 6 vans or box-cars in which they lived. That is one car was used for their tools and equipment, 3 or 4 cars were used for dormitories, and one car was used both as a kitchen and dining room. The men fed themselves at their own expense, the cook bought the food, and they clubbed together and each of them paid his share of such expenses at every week end.

After the day's work the men could at their will sleep in these cars or at their homes, or at any other place, provided they would report on time for work. The man sleeping in the car was paid the same wages as the man who would not. The car, under the circumstances, became a residence, a dwelling or habitation (1).

These vans were lighted by stationary oil lamps and heated with coal.

(1) *Rex* v. *Gulen*, (1917) 39 O.L.R. 539; *Corriveau v The King*, 18 Ex C.R. 275.

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On the 26th November, 1918, between 6 and 7 o'clock in the evening (as stated by witness Bernaquay) after his day's work, and after taking his evening meal, Lajoie went to foreman Chappedelaine and asked his leave to take a hand-car to go and get coal and oil. Foreman Chappedelaine refused him such leave or permission, stating that it was too dark to go and get coal, adding he would send for some next day, in day-time.

There was still some little coal left in Lajoie's van, but he stated he did not have enough for the night; but as Chappedelaine said, in such a case, coal could be borrowed and taken from another van,—there was no necessity to go any distance for coal.

After refusing Lajoie the permission to take the hand-car, Chappedelaine, all dressed up, threw himself on his bed, as was customary for him to do after his day's work and meal. His attention being attracted by some noise on the track, he got up and came to the door of his van and distinguished a hand-car already leaving easterly in the dark.

Lajoie, notwithstanding foreman Chappedelaine's refusal to give him permission to take the hand-car, took it out and secured three companions, among whom were Bernaquay and Plante, who testified at trial. He also procured an ordinary hand-lamp, with white light,—but not the kind of lamps daily used by railway employees.

The night was dark and cold, with a slight wind.

This hand-car was operated by these four men with the ordinary handle. Lajoie and Lepaille, had their back turned to the front or rather towards the direction

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in which they were travelling and Bernaquay and Plante faced them. After leaving Blake on their errand towards Carmel, just after leaving a curve and after getting on a straight stretch, and going up grade, the hand-car was struck by a mixed train, that is a freight and passenger train, running on the usual time-table, and as a result of such accident Lajoie was killed. Hence the present action by the father on behalf of his son.

Now, Lajoie was on this hand-car against the orders of his foreman or employer. Hand-cars are not allowed out at night except under very special circumstances, and whenever they are taken out there must be a foreman in charge,—and at night they must, under the regulations, carry a red light and signals for protection,—and the men operating them should at times stop and listen.

It is true they had that white light, from an ordinary hand-lamp, which was probably obstructed by the men working upon the handles, and the closeness of the light to these men would justify hazarding the inference that they were thereby blinded and prevented from seeing any distance. Moreover, when they were struck, they had just left a curve and therefore were not in a position to see and notice or to be noticed and seen from any distance. They were working their car on an up-grade and as some witness said, the noise of the hand-car was considerable.

Witness Bernaquay, on examination in chief, said he did not see any light on the coming train, and on cross-examination he said he saw something like an engine. Then he added, he jumped when he saw the engine, and adds Lajoie could not see it.

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The suppliant lays great stress on his allegation that the engine which struck the hand-car had no head-light. In support of such allegation, he called four witnesses: Witnesses Bernaquay and Plante who were on the hand-car, said they did not see any light on the front of the engine. However, the collision occurred just as they had left the curve and had not much time or opportunity of taking their bearings before being struck. Their own light would prevent them from seeing any distance.

Then comes the evidence of Charles Jacques, an hotel-keeper, at St. Cyrille, who says his hotel is situate at 25 to 30 feet from the railway track, and that at 5 o'clock on the day of the accident, *a train* stopped for about 15 minutes at St. Cyrille, and he noticed the engine had no light in front, no "big light upon the engine which projects ahead." Joseph Laroche, the other witness, who was in the hotel with the previous witness says there was no light in front of the train; but he adds, that on leaving the crew placed, on the front of the engine, a white light, in the centre, but at about the height of the coupling device.

As against the suppliant's evidence, on the question of head-light, there is on behalf of the respondent the following evidence. Witness Chappedelaine testified he noticed a head-light on the train at the usual place when it passed near their vans, but adds he could not say what kind of light. There was even enough light to allow him to take the number of the engine. Conductor St. Pierre says that as the electric light was out of order, there was a hand-lamp in the head-light, inside the magnifying glass. He further says he saw the hand-lamp in place and burning when

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they arrived at St. Leonard. Stoker Boucher, says that the engineer was looking out on his side of the cab, and he was looking out on the other side. They saw no light on the track, and never noticed the accident until after their arrival at St. Leonard, when boards and debris were found entangled on the front of the engine. He further testified he himself placed the lamp in question in the head-light space of the engine at Drummondville, because the dynamo was out of order. Their light could be seen at a pretty fair distance, and at every station they stopped he ascertained the head light was burning. Brakeman Arcand also testified there was a hand-lamp in the head-light's space of the engine, and contends that the light could be seen at a distance of 3 to 4 miles. When he got off at St. Leonard, the light was burning, and Brakeman Lebrun also testified they had a lamp in the head-light that night.

As against the positive evidence of these five witnesses on behalf of the respondent, in respect of the head-light,—a question not material in the view I take of the case,—there is the evidence of two persons who were on the hand-car who testified *they did not see* any light on the engine,—as above explained, together with the evidence of the two persons in the hotel at St. Cyrille, who saw a train there around five o'clock and one of them said there was no big light in front of the engine, which projects ahead,—and the other said they placed a hand-lamp in front. *Magis creditur duobus testibus affirmantibus quam mille negantibus*, because he who testifies to a negative may have forgotten a thing that did happen, but it is not possible to remember a thing that never existed. That train was seen at St. Cyrille around 5 o'clock, and the accident occurred between 6 and 7

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o'clock and there is a distance of not quite four miles,— (as ascertained from the time-table) between St. Cyrille and Carmel. That train was not even identified as having been the train which collided with the hand-car.

Under the circumstances, I unhesitatingly find the engine carried an oil hand-lamp in the space inside the magnifying glass of the usual head light of the engine and such light was sufficient to comply with the railway regulations.

Now, I must also find that when Lajoie was out on this hand-car, without leave, after 5.30 o'clock in the evening, his day's work was over, and he was then absolute master of his time and leisure and therefore was not acting within the scope of his employment (1), he was not doing work arising out or in course of his employment.

When Lajoie was killed, he was not acting in the course of his day's work. After his daily work was over, Lajoie was not working for his employer. He chose to live in the van to avoid expenses, and he did so of his own volition, and to serve his personal advantage (2).

By the employer forbidding an employee to do a certain thing it makes it an act which is not incidental to his employment, and takes the employee outside the sphere of his employment, so as to disentitle him to recover (3).

Lajoie was on the railway track, on the hand-car, not only without leave but in face of a refusal by his superior officer to allow him to do so and without

(1) *Philbin* v. *Hayes*, 34 T.L.R. 403; *Corriveau* v. *The King*, 18 Ex. C.R. 275.

(2) *Limpus* v. *London General Omnibus Co.*, 1 H. & C., 526, 543.

(3) *A.G. Moore & Co.* v. *Fife Coal* Co., 37 T.L.R. 198.

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taking the usual necessary precautions in handling the hand-car. He was therefore in the position of a trespasser *ab initio*, having deliberately contravened the instructions of his superior officer. "When entry, authority, or license is given to anyone by the law, and he doth abuse it, he shall be a trespasser *ab initio*." (1).

Furthermore, knowing as he did the risk he took in entering upon a track used by trains, he must be held to be *volens* in respect of the risk confronting him and which he accepted.

Lajoie had no right to go upon the railway in the hand-car, as he did (2). There was no duty infringed on behalf of the railway, and Lajoie by his wrongful act cannot impose any new duty upon the same (3).

The following observation from Sington's Law of Negligence, is quite apposite:

"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 trespasser; but there is a duty owed to all the world not to do something unlawful, or inhumanely 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 happen-

(1) Pollock, Law of Torts, 11 Ed. 399-400. See also Beven, on Negligence, 13 Ed. 430, 935. *G.T.R.* v. *Barnett* (1911) A. C. 361, at 370; *C.P.R.* v. *Henrich*, 48 S.C. R. 557.

(2) *Walsh* v. *International Bridge and Terminal Co.*, 44 Ont. L.R. 117.

(3) *Degg* v. *Midland R. Co.* 1 H. & N. 773, at 782. See also the Rule of the Roman law in the Institutes 4,3, 5, under the Lex Aquilia.

ing, 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 notwithstanding that he was a trespasser, circumstances were present which made the trespass immaterial." (1).

The proximate and determining cause of the accident was the conduct of Lajoie in venturing upon the track, at night, in a hand-car, against the will of his superior officer and in violation of the regulations above mentioned and he is therefore responsible for the determining cause of the accident and the doctrine of *faute commune*, mentioned at bar, does not apply. He was the victim of his own negligence and reckless conduct.

No action sounding in tort will lie against the Crown, unless it is made liable therefor by statute. To succeed in the present case, the suppliant must bring his case within the ambit of sec. 20 of the Exchequer Court Act and he can only succeed where the accident is the result of negligence on behalf of an officer of the Crown acting within the scope of his duties and employment. It is a law of exception. I find there is not a tittle of evidence in respect of actual negligence. The only duty owed to Lajoie by the railway was not to run him down knowingly and recklessly. *Maritime Coal Ry. Co.* v. *Herdman* (2).

Having found as above set forth, it becomes unnecessary to pass upon the question of insurance raised at bar.

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

(2) 59 S.C.R. 127.

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There will be judgment declaring that the suppliant is not entitled to any part of the relief sought by his petition of right.

Judgment accordingly.

Solicitors for suppliant: *Garceau & Ringuet.*

Solicitor for respondent: *John A. Sullivan.*

TORONTO ADMIRALTY DISTRICT.

1921
February 14.

POINT ANNE QUARRIES, LIMITED ..... PLAINTIFF;

AGAINST

THE SHIP *M. F. WHALEN* ..... DEFENDANT.

Examination for Discovery—Interrogatories—Reading Evidence at trial—Rules of High Court of Justice—Discretion of judge.

Held, that while an examination for discovery may be ordered by the judge as a matter of convenience, in place of the delivery of Interrogatories, especially where the opposite party is in ignorance of the facts, although no special provision is made in the Admiralty Rules regarding it, such examination cannot be read as evidence at the trial. Rules 102 to 109 provide for cases where an examination may be so read at the trial but this is only permitted when the witnesses cannot attend the trial.

MOTION for an order permitting the plaintiff to read at the trial portions of the evidence of the master of the defendant ship, which was taken on his examination for discovery.

February 11th, 1921.

Motion now heard before the Honourable Mr. Justice Hodgins, in chambers, at Toronto.

C. S. Jarvis for plaintiff.

A. E. Knox for defendant.

The facts are stated in the reasons for judgment.

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POINT ANNE QUARRIES, LIMITED. v. THE SHIP M. F. WHALEN.

Reasons for Judgment.

Hodgins L.J.A.

HODGINS, L. J. A. now (14th February, 1921) delivered judgment.

Motion by plaintiff to read in evidence at the trial portions of the examination for discovery of the master of the defendant ship, one Malette, taken in this action before the local registrar of the Exchequer Court.

It appears that Mallette will be present at the trial.

The examination in question was allowed in place of interrogatories as, while there is no provision in the Canadian Admiralty Rules for such an examination, it is a convenient practice and less cumbersome than formal interrogatories, especially when the plaintiffs are in the dark as to the actual occurrences when the tow is said to have been injured. See *Isle of Cyprus* (1).

But the examination so had cannot be used at the trial unless the rules are wide enough to allow that to be done.

Canadian Admiralty rule 70 provides for an affidavit of discovery relating to documents, but rules 68 and 69 make discovery of material facts to depend on the delivery of and the answers to interrogatories. Oral examinations are permitted under rules 102 to 109. These however are limited to cases where the witness cannot conveniently attend the trial, in which case his evidence thus taken, may be read at the trial.

No order under these last mentioned rules was made and such an order is a necessary preliminary, if what is sworn to on such an examination is to become evidence at the trial.

(1) [1890] 15 P. D. 134.

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POINT ANNE QUARRIES, LIMITED. v. THE SHIP M. F. WHALEN.

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Hodgins L.J.A.

It was urged that Rule 228, which made the practice "for the time being in force in respect to Admiralty proceedings in the High Court of Justice" applicable in all cases not provided for by the Canadian rules, would permit what is now asked. I do not think so. The rules as to evidence which govern the proceedings in English admiralty actions are found in Roscoe's Admiralty Practice, 3rd Edition, pp. 354 et seq. It is true they contain more detailed provisions than our rules do, but they are founded as to this particular instance, upon the discretion of the judge in dispensing with the attendance of a witness at the trial, and so come to the same thing in the end as our own rules.

It is particularly necessary in Admiralty cases that the witnesses should appear personally before the judge whenever possible. Here the witness in question will be present and the motion to read part of this examination is not within the rules nor based on necessity or inconvenience. It will therefore be dismissed with costs to the defendants in any event.

Judgment Accordingly.

TORONTO ADMIRALTY DISTRICT.

1921
March 11.

THE IMPERIAL TRUSTS COMPANY OF CANADA..... PLAINTIFF;

AND

THE SHIP *LEQUESNOY* AND THE NOVA SCOTIA TRANSPORTATION COMPANY, LIMITED..... DEFENDANT.

Shipping and seamen—Jurisdiction—Mortgage on ship—Rights of mortgagee—Order for sale—Sale of ship when not in custody of court—Possession—Duty of mortgagee.

Held, that the court having by statute jurisdiction over the claim of a registered mortgagee whether or not the ship is within the power of the court by arrest, should, give such remedy as will enable the mortgagee to effectually realise his claim.

Therefore, where the plaintiffs, mortgagees, under a bond mortgage applied for an order for sale of the defendant ship, although at the time of application out of the jurisdiction, an order for sale was granted.

As possession ought to be given, plaintiffs should, before the date of sale, pay all claims against the defendant ship having priority over their claim.

Reporter's Note:—See *Finnigan* v. *SS. Northwest* (20 Ex. C.R., 180.

MOTION on behalf of a mortgagee of the defendant ship for an order for the sale of the said ship now lying in a port in England.

March 7th, 1921.

Motion now heard before the Honourable Mr. Justice Hodgins at Toronto.

A. C. McMaster for plaintiffs.

No one appeared for the defendants.

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THE IMPERIAL TRUSTS CO. OF CANADA, v. THE SHIP LEQUESNOY AND THE NOVA SCOTIA TRANSPORTATION COMPANY, LIMITED.

Reasons for Judgment.

Hodgins L.J.A.

The facts are stated in the reasons for judgment.

HODGINS, L. J. A. now (11th March, 1921) delivered judgment.

I reserved judgment to determine whether an order for sale of the above named ship should be made. The ship is said to be in the port of West Hartlepool in England and the plaintiffs have paid or are in process of paying all claims upon her which have priority over their mortgage deed. They desire to sell her in Canada or the United States and to have leave to bid at the sale.

The writ claims possession and sale and has been duly served on the defendant company who are the mortgagors.

This demand of possession is an act equivalent to taking possession in the case of a mortgagee. *Gardner* v. *Cazenove* (1); *Willis* v. *Palmer* (2); *Rusden* v. *Pope* (3).

The plaintiffs' mortgage is made by the owner of the whole 64 shares in the ship and covers the ship etc. It is duly recorded in the proper registry here in Toronto. Under the Imperial Statute, 24 Vic., c. 10, jurisdiction is given to the High Court of Admiralty over any claim in respect of a mortgage duly registered according to the provisions of the Merchants Shipping Act (1894) whether the ship or the proceeds thereof be under arrest of the said court or not. The Exchequer Court in Canada exercises these powers by virtue of R.S.C. 1906, c. 141, a reproduction of the Imperial Admiralty Act, 1891, and amending Acts. *Cope* v. Ship *Raven* (4).

(1) 1 H. & N. 423, 435.
(2) 7 C.B.N.S. 340, 358.
(3) [1868] L.R. 3; Ex. 269.
(4) [1905] 9 Ex. C. R. 404.

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THE IMPERIAL TRUSTS CO. OF CANADA v. THE SHIP LEQUESNOY AND THE NOVA SCOTIA TRANSPORTATION COMPANY, LIMITED.

Reasons for Judgment.

Hodgins L.J.A.

If the court has jurisdiction over the claim of a mortgagee when the ship is not under arrest, it seems to follow that the remedies to be given must be those enabling the mortgagee to effectually realise his claim. One of these remedies is set forth in Sec. 35 of the Merchant Shipping Act, 1894, as follows: "Every registered mortgagee shall have power absolutely to dispose of the ship or share in respect of which he is registered and to give effectual receipts for the purchase money." Where there are more than one mortgage, a subsequent mortgagee must apply to the Court to order a sale, unless he has the consent of every prior mortgagee. And where the Court, under Section 29 of that Act, has power to order a sale, "under the preceding sections, *or otherwise*," "it shall vest in some person the right to transfer the ship" and that transfer is to be as effectual as if it were made by the registered owner.

I can see no reason why, in pursuance of the statutory power giving jurisdiction in mortgage cases, notwithstanding that the ship is not within the power of the court by arrest, the plaintiffs should not have the right and power to sell the ship and why the Court should not so order. The order will name a person pursuant to Section 29, already quoted, to make the transfer, which can then be recorded in the registry here, after the sale has been had and that will be effectual to vest the title in the purchaser.

The sale of the ship will naturally carry with it the right of possession and the plaintiffs will have to see that, before the sale actually takes place, they are in a position to deliver actual possession to the purchaser. The advertisement for the sale should state that the vendors will arrange for the delivery of the ship at a

named port or at some convenient place to be announced at or before the sale. It would be well before proceeding to sell, that the plaintiffs should satisfy themselves that no complications can arise by reason of the engagements or charters made by the mortgagors before the notice that they required possession was given or the writ served. As to this see the following cases:— *Collins* v. *Lamport* (1); *Johnson* v. *Royal Mail* (2); *The Fanchon* (3); *The Cella* (4); *The Celtic King* (5); *The Heather Bell* (6): *Law Guarantee & Trust Society v Russian Bank for Foreign Trade* (7).

The order for sale may go, and the sale will be under the supervision of the marshall of the court or some one authorized by him if the vessel is to be sold outside this jurisdiction. The plaintiffs may have leave to bid.

Judgment Accordingly.

REPORTER'S NOTE.—The formal decree in this case is printed below as a useful precedent.

"This action coming on for trial on Saturday the fifth day of March, 1921, at a special sittings of this Honourable Court, held at Toronto, in the presence of counsel for the plaintiff, no one appearing for the Nova Scotia Transportation Company, Limited, although duly served, pursuant to the order herein bearing date the second day of March, 1921, upon reading the proceedings in this action, the affidavit of John Arthur Withrow, manager of the plaintiff company, proving the amount of the claim herein, the

(1) [1865] 34 L.J., Ch. 196.
(2) [1867] L.R. 3 C.P. 38.
(3) [1880] 5 P.D. 173.
(4) [1888] 13 P.D. 82.
(5) [1894], P.D. 175.
(6) [1901] P.D. 272.
(7) [1905] 1 K.B. 815.

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THE IMPERIAL TRUSTS CO. OF CANADA v. THE SHIP LEQUESNOY AND THE NOVA SCOTIA TRANPORTATION COMPANY, LIMITED.

Decree.

Hodgins L.J.A.

affidavit of Mae Ross, filed, and upon hearing what was alleged by counsel for the plaintiff and judgment having been reserved to this day.

1. This court doth order and adjudge that the sum of $267,957.51 is due to the plaintiff in respect of its claim, together with the costs of this action, to be taxed.

2. This court doth further order and adjudge that the ship *Le Quesnoy*, be and is hereby condemned in the said sum of $267,957.51, with costs, as aforesaid, and doth order that a commission of appraisement and sale of the said ship, do issue to the Marshal of this court, or to such other person as may be authorized by such Marshal, and that the said sale shall be subject to a reserve bid to be fixed by this court and to such conditions of sale as shall be settled by this court.

3. And this court doth further order and adjudge that, for the purpose of carrying the sale directed by this judgment into execution that the right to transfer the sixty-four shares of the said ship *Le Quesnoy* in the shipping register for the port of Toronto, be and is hereby vested in the Marshal of this court, and such Marshal shall upon a sale of the said ship approved of by this court, be entitled to transfer the said sixty-four shares of the said ship *Le Quesnoy*, in the same manner and to the same extent as if he were the registered owner thereof, and the registrar of shipping for the port of Toronto, shall obey the requisition of the said marshal so named, approved by this court in respect of any such transfer, to the same extent as if the said marshal were the registered owner.

4. And this court doth further order and adjudge that the plaintiff, and any bond holder whose bond is secured under the hereinafter mentioned mortgage

shall be at liberty to bid at the sale of the said ship *Le Quesnoy*, or any adjournment thereof, as directed by the judgment herein, and that the conditions of sale may contain a provision whereby any purchaser of the said ship for the purpose of making settlement or payment for the property purchased, shall be entitled to turn in any bonds secured under the mortgage to the plaintiff bearing date 1st November, 1918, and any matured and unpaid coupons thereby secured, in order that there may be credited thereon the sums payable out of the net proceeds of such sale to the holder of such bonds and coupons, as his ratable share of such net proceeds, after allowing for the proportion of the total purchase price required to pay the costs and expenses of the sale or otherwise, and the purchaser shall be credited on account of the purchase price of the property purchased with the sums payable out of such net proceeds on the bonds and coupons so turned in.

5. And this court doth further order and adjudge that the plaintiff be at liberty to pay any claims against the said ship *Le Quesnoy*, which may have priority over the said bond mortgage herein, and that upon such payment the plaintiff be and is hereby authorized to add such payments to their mortgage debt, with liberty to apply to add the same to the amount of the judgment herein. In case of any such payment the plaintiffs shall notwithstanding the addition of the amount or amounts to the mortgage debt, or to this judgment if ordered, be entitled to be subrogated to the right of the person or corporation, so paid off.

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Decree.

6. And this court doth further order and adjudge that upon the sale of the said ship *Le Quesnoy*, the purchaser thereof shall pay his purchase money to the said marshal, who shall forthwith pay the same into court, to remain there until further order of this court.

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ARCHITECTS — *Petition of Right — Plans and Specifications — Quantun meruit — Interest — Architect's Tariff.* D. was engaged in 1913 as supervising architect to take charge of the preparation of drawings and specifications for a Post Office, at Maisonneuve, and was to be paid for such services at the rate of 5% on the actual cost of the building. The plans and drawings were started and from time to time modified at the request of the Crown, after consultation with the Post Office officials; but on account of the war, or some other reason, not disclosed on the facts, the Crown did not start or proceed with the work. D. by his petition filed in October, 1919, asked to be paid for his services.—*Held*, that although D. was not entitled to claim to be paid under articles 11 or 14 of the Architects' Tariff, his plans not being complete, nevertheless, as the plans and estimates had been ordered and accepted by the officers of the Crown, the Crown must be taken to have ratified what, in that respect, its officers had done; and D. was entitled to recover the value of his services under a *quantum meruit*. DUFRESNE *v.* THE KING... **215**

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CONTRACTS

1——*Petition of Right—War Measures Act — Contracts, essentials of — Effect of expropriation.* On the 15th January, 1918, an Order in Council was passed stating *inter alia*, that owing to the importance of Halifax as a naval base, authority should be given under the War Measures Act, to proceed with the repairing and reconstruction of the suppliants' dock which had been seriously

damaged by the explosion of a munition ship, on condition, 1st, that the company contribute the sum of $111,000.00 towards the cost thereof; 2nd, that the balance be defrayed from the war appropriation; 3rd, the final decision as to the exact nature and extent of repair, reconstruction, etc., be under the inspection, supervision, and control of the representative of the Minister of Public Works. On the 20th of May another Order in Council was passed rescinding the above and suspending the work on the dock, the preamble thereof showing, *inter alia*, that arrangements with the company in regard to sub-letting contracts, did not prove satisfactory to the Minister and the work was taken over by the Department, and had proceeded to the extent that vessels were capable of being received and repaired. A further Order in Council was passed on the 27th May authorizing the expropriation of the said dock, in which the former Orders in Council were referred to, and it is stated, *inter alia*, that the progress made in reconstruction by the Company had not been satisfactory, and owing to the urgency of this work being completed, it was necessary that the Crown should expropriate. The correspondence shows that the suppliants wished the Crown to accept the proceeds of the insurance as their contribution to the reconstruction, when collected and whatever was collected, whereas the Crown, adhering to the terms of Orders in Council, insisted on the amount being paid, regardless of whether policies were collected or not.—*Held*, on the facts, that the parties were never in accord as to the suppliants' suggestion regarding the insurance moneys and that therefore there never existed any contract under which the suppliants could recover.—2. That when the Crown came to the help of suppliants in the present instance, it was under no legal obligation to do so, and what it has done is referable to its grace and bounty and does not constitute an acknowledgment of any right of action or does not amount to an act that might imply any contract upon which an action would lie. THE HALIFAX GRAVING DOCK COMPANY, LIMITED, *v.* THE KING..... **67**

2——*Breach — Damages — Public Work.*] On the 22nd August, 1911, S. entered into a contract "for supplying

crushed stone required for macadamizing a portion of the road along the west side of Chambly Canal," to be completed on or before October 15th, 1911. Before the 18th of September, the engineer in charge had repeatedly notified S. that he was not delivering enough stone to allow the work to be performed in time. On that date, he called in another contractor to help complete the necessary deliveries, and, notwithstanding that the date for completion of contract was extended a month, and S. delivered all he could, the work was only just able to be completed that season. No quantities were stipulated in the contract and no exclusive right to supply stone was given to S. and all that S. delivered or offered to deliver was accepted.—*Held*, that, upon the facts, the Crown had committed no breach of the contract, and that S. had suffered no damage for which the Crown was liable.—2. Where a party has by his own act or default put it out of his power to fulfil his contract, the other party may at once treat this as a breach of contract without waiting for the time of performance or completion to arrive. BRAULT *v.* THE KING..... **101**

3——*Petition of Right—Damages—Tort—Reasonable Delay—Tender.*] In July, 1916, the Crown called for tenders for the construction of a Drill Hall in Calgary, Alta., such tenders to be received not later than August the 8th. On the 4th of August, suppliants mailed their tender from Calgary, and on the 12th September, they were advised their tender had been accepted and that the contract would be sent shortly for execution. On the 15th they were advised that the contract, etc., was being expressed, and on the 19th the letter was received by suppliants; but the plans, etc., did not arrive for several days, not later than the 29th, when it was signed. At the trial suppliants stated they had no objection to the delays in staking, and no proof was offered as to delay in giving possession. The action was taken for damages due to delays above mentioned.—*Held:* That as the acts of the Crown complained of could not be considered as amounting to a breach of contract; and as the present action was one sounding in tort for which no action lies against the Crown, apart from special statutory authority, suppliants' action could not be

CONTRACTS—*Concluded.*

entertained.—*Semble:* That owing to the abnormal conditions prevailing during the war and the unavoidable delays in communication due to the parties being over 2,000 miles apart, the delays in accepting the tender, advising thereof and sending the contract for signature. were not unreasonable or oppressive. CREELMAN *et al v.* THE KING..... **198**

4——*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* v. *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. DOMINION IRON AND STEEL CO., LIMITED, *et al, v.* THE KING..... **245**

AND *See* RAILWAYS.
PETITION OF RIGHT.

COMPENSATION
See EXPROPRIATION.

COSTS
See SHIPPING AND SEAMEN.

COURTS
See SHIPPING AND SEAMEN.

CROWN. *Grace and Bounty of*
See CONTRACTS.
See ALSO ARCHITECTS.
INCOME TAX.
NEGLIGENCE.
RAILWAYS.

CUSTODIAN OF ENEMY PROPERTY
See ENEMY PROPERTY.
TRADE-MARKS.

DAMAGES
See EXPROPRIATION.
CONTRACTS.
CROWN.
RAILWAYS.
SHIPPING AND SEAMEN.

DELAY
See CONTRACT.

DISCOVERY
See SHIPPING AND SEAMEN.

DOMINION LANDS
See INDIAN RESERVES.

EASEMENT
See JURISDICTION.

ENEMY PROPERTY — *Custodian of—Treaty of Versailles, 28th June, 1919—Articles 296-297—"Debts"—Jurisdiction—10 Geo. V, ch. 14.*] W. and N. were British-born women, who at birth had no other nationality, and who acquired German nationality only by their marriage, the former in July, 1898, and the latter in July, 1910. Their property, rights and interests in Canada were vested in the defendant by virtue of the Treaty of Peace (Germany) Order, 1920. Under this Treaty and an Order in Council in that behalf passed, they applied to have it declared that their said property, rights and interests did not come within the provisions of Article 296 of Treaty of Peace, that they be relinquished, etc.]—*Held:* That juris-

ENEMY PROPERTY—*Concluded.*

diction to entertain such an application, and to make the declaration asked for was conferred on the Exchequer Court by 10 Geo. V, chap. 14.—2. That money on deposit in banks or with a loan and saving company; bonds of commercial and industrial companies and shares of the capital stock thereof or of banks, or of mortgage corporations; money in the hands of trust companies for investment, and moneys invested under their guaranteed trust investment receipts; money loaned and secured by mortgages on real estate in Canada; money loaned to a company upon a receipt, subject to call on 3 months' notice; could not be classed as "debts" within the meaning of Article 296 of the Treaty of Peace signed at Versailles on the 28th June, 1919, between the Allied and Associated Powers and Germany, and may be relinquished to the plaintiff. WIEHMAYER *v.* THE SECRETARY OF STATE OF CANADA AND NEITZKE *v.* THE SECRETARY OF STATE OF CANADA. **219**

EQUITABLE JURISDICTION

See SHIPPING AND SEAMEN.

ERROR

See CONTRACTS.
REFERENCE BY MINISTER.

EXCHEQUER COURT

See JURISDICTION.
RAILWAYS.
SHIPPING AND SEAMEN.

EXPERT EVIDENCE

See SHIPPING AND SEAMEN.

EVIDENCE

See EXPROPRIATION.
SHIPPING AND SEAMEN.

EXPROPRIATION

1——*Leasehold — Damages due to abandonment — Mitigation of damages—Burden of Proof.*] On the 14th of October, 1918, the Crown expropriated a certain leasehold term of 18 months for the purpose of temporary military barracks in Regina, and offered to pay $1,200 a month, plus taxes, insurance, light and heat for the same. Subsequently, on the 31st of October, 1919, it filed an abandonment of the leasehold in question in the Land Titles office.—*Held:* That the offer of the

EXPROPRIATION—*Continued.*

Crown, $1,200 per month for the time up to date of abandonment was sufficient; but in as much as by the abandonment the Crown practically took the position of one repudiating a contract, the lessors would also be entitled to damages resulting from the loss of rent from date of cancellation to end of term, either by reason of such repudiation of contract, or under the provisions of sub-sec. 4 of sec. 23 of the Exchequer Court Act.—2. That the burden of proof, in respect of the mitigation of the damages flowing from the abandonment by the Crown in expropriation proceedings is upon the Crown. THE KING *v.* BROWN, *et al*, AND BY ORDER OF REVIVOR, THE KING *v.* THE SAID JAMES W. BROWN AND THE NATIONAL TRUST COMPANY, LIMITED **30**

2 —— *War Measures Act — Expropriation Act—Effect of Order in Council amending same — Depreciation — Compensation — Statutory Discretion of Ministsr.*] By Order in Council of 27th May, 1918, the Minister was authorized to offer defendants for their graving dock, as it stood, the sum of $1,100,000.00 and upon offer being refused, he was authorized "pursuant to the powers conferred by the War Measures Act, 1914, and all other powers vested in your Excellency in Council" to take possession thereof and to expropriate the same, and have compensation fixed by the Court. By another Order in Council, the Expropriation Act was, during the war, enlarged and amended under the provisions of the War Measures Act permitting the expropriation of personal property "as fully and effectually to all intents and purposes, as if the same were specified as included in the definition of land under the said act." The lands herein were taken and expropriated by the Crown under the authority of the Expropriation Act for reasons arising out of the war, and pursuant to the powers conferred by the War Measures Act.—*Held:* That it is abundantly clear on the face of Order in Council enlarging and amending the Expropriation Act that the Governor in Council only intended to augment the powers of the Crown in respect of taking property for public purposes during the war, under the War Measures Act, and had no intention to abridge any of the powers of the Crown under the Expro-

EXPROPRIATION—*Continued.*

priation Act.—2. Where, in an Order in Council authorizing the expropriation of property by the Crown, reference is made to the statute (War Measures Act) in pursuance of which the same purports to be made, and where the authority to act under said statute is questionable, but the same property could unquestionably be expropriated and taken under the general Expropriation Act, the court may treat the proceedings as taken under the latter act, notwithstanding the said reference in the Order in Council; especially, as in this case, the Minister had, in the exercise of his statutory discretion, decided to so expropriate and all the requirements of the latter act had been complied with. *Attorney-General* v. *De Keyser's Royal Hotel, Ltd.*, (1920) 36 T.L.R. 600 referred to.—3. The Minister, under the statute, is the judge of the necessity or propriety for the taking over of the property and the Court has no jurisdiction to sit on appeal from such decision.—4. That in assessing the compensation for property of a commercial or industrial company, due consideration must be given to the history of the company from its origin, such as how organized, its capital, how applied and financed, the business carried on, and actual profits, and in the present case (a dock) its age and state of repairs, and, while one must also examine the component parts of the dock, the good will of the industry as a going concern, the compensation must be arrived at upon its commercial market value as a whole at the date of the expropriation, without being obliged, in arriving at such value, to go into abstract calculations with respect to each component part, but taking all of them as a whole after having weighed and conconsidered each of them. THE KING *v.* THE HALIFAX GRAVING DOCK COMPANY, LIMITED 44

3——*Value of farm for subdivision purposes—Market value—Probabilities of sale in village lots.*]—*Held:* The value of a farm for subdivision must be tested by the law of supply and demand; and where it does not appear that even had the property been subdivided, and on the market at the date of expropriation, it could have been all sold in lots within a reasonable time; and, moreover, where there is a large amount of property in the neighbourhood available for subdivision and more suitable than the property expropriated, the court will value the property on the basis of farm land and not as village or town lots, notwithstanding that industrial enterprises in the vicinity had developed the locality. THE KING *v.* MURRAY *et al* 107

4——*Cemetery property — Owner's title—Value to Owner—Not commercial property.*] The property expropriated was part of a cemetery consisting of sand and gravel and was absolutely vested in trustees "for cemetery purposes in connection with the congregation and . . . . shall be used solely for such cemetery and for no other purpose whatsoever."—*Held:* that the defendants were entitled to fair compensation to the extent of their loss, which loss is to be tested by what was the value to them at the date of the expropriation. That in view of the restriction upon their use of the property as a cemetery, the property was out of the market for commercial purposes. That consequently, its value could not be estimated on the basis of its sand and gravel deposits, but as a cemetery only. THE KING *v.* LACK, *et al*, THE TRUSTEES OF MIDDLETON CHURCH, MIDDLE MUSQUODOBOIT, COUNTY OF HALIFAX 113

5 —— *Defendant's title — Severance — Use by sufferance—Compensation.*]—*Held*, that where, by a previous expropriation, L's property was severed by the right of way of the Canadian Pacific Railway crossing it, and where L's use of a culvert under their tracks as a passage from one parcel of land to the other was only by sufferance and without legal right or title, the fact that the expropriation takes land on each side of the said right of way and thus closes the access to the culvert, is not a severance of the property for which L. would be entitled to compensation, and nothing will be allowed for same in fixing the compensation under expropriation proceedings. THE KING *v.* LOONAN, *et al* 131

6 —— *Special adaptability — Compulsory taking.*] The property expropriated consisted of two lots of land one on which was a large bakery, and the other a vacant lot. The bakery was built on a slope, allowing of a high basement on the river side adjoining a siding of the railway,

EXPROPRIATION—*Continued.*

over which carloads of flour required for the bakery could be and were brought to their very doors, thus saving them haulage of freight.—*Held:* The special suitability of the property for the business there carried on by the owner, and the savings and additional profits derived thereby, are elements in assessing the compensation to be paid by the crown for a property expropriated. And, where there is such special suitability in a property, as compared to other neighbouring properties not so well situated for their own purposes, such property is of a special and higher value to the owners than the surrounding properties, and the court will allow them an additional amount over and above what was allowed for other properties in the neighbourhood, it being the value to the owner which must be taken into consideration.—2. Where an owner remains on the property after expropriation, and makes repairs to the buildings, and puts up temporary structures, he must assume the responsibility of such a course and its consequences, and nothing will be allowed him therefor.—3. Where the owners, owing to special adaptability of the property to the business expropriated would obviously care to retain it, 10% will be allowed for compulsory taking thereof; but nothing will be allowed for compulsory taking of a vacant lot which was unimproved and from which no revenue was derived. THE KING *v.* LYNCH'S, LIMITED, *et al*..... **158**

7 —— *Property and civil rights — Provincial Statutes — Land Registering Act, B.C., sec.* 104 — *Expropriation Act, secs.* 25, 26—*B.N.A. Act, sec.* 92—*Taxes. Held:* 1. Property and civil rights being matters within the exclusive powers of the provincial legislature, the Exchequer Court of Canada in ascertaining the estate or interest of persons claiming compensation for property expropriated by the Dominion Crown will have regard to the laws affecting such estate and interest in the province where the property is situated.—2. Certain land expropriated by the Dominion Crown was leased for a period of 5 years under an instrument not registered as required by section 104 of the Land Registering Act, B.C.—*Held:* That the unregistered lease did not vest any estate or interest in the lessee within the meaning of sections 25 and 26 of the Expropriation Act, R.S.C. 1906, c. 143, and that the lessee was not entitled to compensation in respect of the expropriation.—3. Defendants sought to recover from the Crown an amount paid by them for municipal taxes on the property after the expropriation.—*Held:* That such a claim did not come within the scope of the present Information, and that the Court therefore had no jurisdiction to entertain the claim thereunder. THE KING *v.* THE HUDSON'S BAY COMPANY AND OTHERS..... **413**

AND *See* JURISDICTION.

FOUL BERTH

See SHIPPING AND SEAMEN.

GOVERNMENT RAILWAYS

See RAILWAYS.

INCOME TAX — *Dominion Income Tax—Judgment against Defendant who had assigned under Provincial Act for benefit of creditors—Priority of Dominion Crown—Constitutional Law.*]—*Held:* That the Crown, in right of the Dominion of Canada, was entitled to be paid the amount of a judgment for income tax under 10-11 Geo. V, ch. 49, obtained by it against a debtor who has made an assignment under the Ontario Assignments and Preferences Act (R.S.O. 1914, ch. 134) in priority to all other creditors of the same class. *The Queen* v. *Bank of Nova Scotia*, 11 S.C.R. 1, and *Liquidator of Maritime Bank* v. *Receiver General of New Brunswick* (1892) A.C. 437, referred to.—2. That any provision in a Provincial Act relating to assignments for the benefit of creditors cannot, *ex proprio vigore*, take away any privilege or priority of the Crown as a creditor in right of the Dominion. *Gauthier* v. *The King*, 56 S. C.R. 176, at 194, referred to. THE KING *v.* LITHWICK AND COLE, ASSIGNEE.. **293**

INDIAN RESERVES. — *Indian Lands, surrender of, to Dominion—Powers thereof to accept—Indian Reserves—Transfer by Province to Dominion—Provincial Lands—B.N.A. Act,* 1867—5 *Geo. V, ch.* 12—6 *Ed. VII, ch.* 132 *(Ont.)*]—*Held:* That upon a proper construction of the North West Angle Treaty (1873), the Dominion Government had full power under such treaty to accept the surrender on behalf of the Crown from the Indians, and as the result of such surrender the title to or

INDIAN RESERVES—*Concluded.*

beneficial interest in the lands so surrendered, within the Ontario boundaries, passed to the province under the provisions of section 109 of the B.N.A. Act, 1867, and that the entire beneficial interest therein was in the province until the conveyance of a part for Indian Reserves, by the province to the Dominion by the Act of the legislature of the province in 1915.—2. That when the province assented to the "Reserves" being made and transferred them to the Dominion (5 Geo. V, ch. 12), the Dominion acquired them subject to the statutory rights, and that the lands and privileges so granted were specifically eliminated from what was transferred to the Dominion, including among other things, the right granted to defendants to flood the land up to bench mark, 497.—3. That, by reason of a reserve for roads, etc., along the shores of Rainy Lake and River being contained in the description of the Indian Reserves so surrendered by the province to the Dominion as aforesaid, the land so reserved, did not form part of the Indian Reserves, and the beneficial interest therein remained in the province.—4. That, therefore, in view of all the facts, plaintiff could not recover for injury due to the flooding of any of said lands previous to the Act of 1915 aforesaid; but that, in 1916 (after the conveyance of the Indian Reserves to the Dominion) in view of the defendants having accumulated large quantities of water in the upper lakes and reservoirs, plaintiff could recover damages occasioned by the flooding of the land between bench mark 499 (in the state of nature) and bench mark 500. THE KING *v.* THE ONTARIO & MINNESOTA POWER COMPANY, LIMITED **279**

INJURIOUS AFFECTION

See JURISDICTION.

INTEREST

See ARCHITECTS.
CONTRACTS.

INTERNATIONAL LAW

See SHIPPING AND SEAMEN.

INTERPRETATION

of Statutes: See CONTRACTS.
PATENTS:
TRADE MARKS.

INTERPRETATION—*Concluded.*

ENEMY PROPERTY.
JURISDICTION.
PENSIONS.

of Contracts: See SHIPPING AND SEAMEN.

JURISDICTION

1——*Exchequer Court — Injurious affection — Tort — Expropriation of Easement.*] Y. by his petition alleged that respondent constructed a dam at the south end of Lake Temiskaming which was operated by the Department of Public Works for the Dominion of Canada and which raised the level of the water in the lake, flooding part of Y'S. land, and injuriously affecting his property. No part of his property, which is some 80 miles from the dam, was taken, nor was any easement to flood expropriated. It is not alleged the flooding was the result of the negligence of any officer or servant of the Crown.—*Held:* That sub-sections (A) and (B) of section 20 of the Exchequer Court Act must be read together, as they deal with questions of compensation, and not damages, i.e., the indemnity recoverable by owners for lands compulsorily taken, or injuriously affected by expropriation. The Crown, in this case, not having expropriated any part of suppliant's property or any easement to flood the same, the case did not come within the ambit of said section and the court had no jurisdiction to entertain the claim under the Expropriation Act or any other provision of law.—2. That the action being for the recovery of damages to land, sounded in tort, and apart from special statutory authority no such action will lie against the Crown. YATES *v.* THE KING **175**

2——*Exchequer Court Act—Sec. 20—"Public Work"—Definition—Burden—of Proof—Interpretation of Statutes.*]—*Held:* That in the absence of any definition of a "public work" in the Exchequer Court Act, the phrase as used in section 20 thereof must be construed in its plain and literal meaning, and its construction should not be governed by any definition of the phrase in any Act of the Parliament of Canada, the intendment of which was to limit the meaning of the phrase to the operation of the particular Act.—2. The phrase "public work" appearing in the Public Works Act and in the Expropriation Act should not be construed to

JURISDICTION—*Concluded.*

include a building occupied under the circumstances peculiar to this case, namely: A building, the basement and first floor of which were used and rented for a recruiting station by the Department of Militia and Defence, either under the War Measures Act or the Militia Act, and solely under its control, with the right to vacate at any time upon giving 14 days' notice, and over which the Public Works Department had no control.—3. That the fact that a fire takes place is not of itself evidence of negligence, its occurrence being quite consistent with due care having been taken; there must be some affirmative evidence of negligence, or of some fact from which a proper inference may be drawn.—4. That the burden of proof being upon it and the suppliant having failed to show that the fire was the result of negligence on the part of some officer or servant of the Crown while acting within the scope of his duties or employment the petition could not be entertained.—*Semble:* That while the phrase "Public Work" as used in the Public Works Act and the Expropriation Act, means property vested in and belonging to Canada, yet all classes of property belonging to Canada are not necessarily public works. WOLFE COMPANY *v.* THE KING..... **306**

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ENEMY PROPERTY.

LANDS

See INDIAN RESERVES.

LATENT DEFECT

See RAILWAYS.

LEX FORI

See SHIPPING AND SEAMEN.

MARKET VALUE

See EXPROPRIATION.

MINISTER, STATUTORY DISCRETION OF

See EXPROPRIATION

MARITIME LIEN

See SHIPPING AND SEAMEN.

MERCHANT SHIPPING ACT

See SHIPPING AND SEAMEN.

MILITIA ACT

See PENSIONS.

MINORS RIGHT TO SUE

See SHIPPING AND SEAMEN.

MISREPRESENTATION

See TRADE-MARKS.

MORTGAGE

See SHIPPING AND SEAMEN.

NEGLIGENCE

1——*Petition of Right—Public Work—Grain elevator.*] B. was familiar with all machinery connected with grain elevators and the loading and unloading of grain, and on the occasion in question had been sent to one of the shovels (leg No. 2) to instruct a novice how to work it. This man worked the first shovel full without difficulty, but on the second trial it stopped, when B. gave it a jerk which started it. He was then standing with his face towards the platform and on turning round to return to work the rope or bight of the rope coiled around his leg and drew him to the iron block crushing his leg badly. No accident had ever occurred in connection with this machinery which had been in full operation for a very long time. The machinery was inspected every morning and this particular shovel or leg had been inspected five minutes before the accident, and found in every way satisfactory; and no complaint had ever been made by suppliant in this regard.—*Held:* On the facts, that the accident was due to suppliant placing himself in the position he was in at the time of the accident, and that he was a victim of his own negligence and carelessness. BILLARD *v.* THE KING..... **165**

2——*Petition of Right—Public Work.*] F. was a porter in the Post Office at Halifax, and as such it was his duty to attend to incoming mail bags, some of which were pushed through a chute in the hall, to the basement. There was a door to the chute, and when open, as in this instance, a chain was across the opening as a warning, which was visible from the hall. It was also his duty to look after the strings by which the bags were tied, and he had frequently seen these strings break in the past, and knew they were at times defective. On the occasion in question, F. took hold of a bag, containing 27 or 28 empty bags, by the small string above referred to, giving it a powerful pull towards the chute, the

NEGLIGENCE—*Concluded.*

string broke and he was thrown heavily against the chain protecting the opening, which gave way at one end, and he fell to the basement, injuring himself. It was not proved that the chain attachments were in a dangerous condition, but on the contrary, it was established that even if the attachments had been in perfect order, they could not have prevented the accident.—*Held:* On the facts, that there was no negligence on the part of any officer or servant of the Crown, and that the accident was entirely the result of suppliant's careless and imprudent conduct. FLEMING *v.* THE KING.....**169**

AND *See* SHIPPING AND SEAMEN.
RAILWAYS.

NAUTICAL ASSESSORS

See SHIPPING AND SEAMEN.

NEGLIGENCE

See RAILWAYS.

ORDERS IN COUNCIL

See EXPROPRIATION.
CONTRACT.

PATENTS OF INVENTION—*International Law — Canadian Patent Act, secs. 7 and 8; 10 Geo. V, ch. 30—Order in Council, 14th April, 1920 —Treaty of Versailles — International Convention of 1883.—Convention of 1900 and of 1911.*] Petitioners, citizens of the United States of America, a nation allied and associated with His Majesty in the war, filed on the 30th June, 1920, a petition for a patent in Canada. On the 1st August, 1914, when war was declared, the invention had not been in public use or on sale with consent of the inventor for more than one year previous to that date. The words "par un tiers" which are to be found in Article IV of the International Convention of 1883, were omitted from the said Article in the Convention of 1900. In the Washington Convention of 1911, ratified by Great Britain in 1913, the words "by a third person" were carried into the English translation, although in the French version, the words "par un tiers" are again omitted.—*Held:* That the French version must be regarded as the official embodiment of the treaty; and in that view, where any difference of construction arises between the French text and that

PATENTS OF INVENTION—*Concluded*

of the English translation, the language of the former must prevail.—2. That section 83 of the Order in Council of the 14th April, 1920, passed under authority of 10 Geo. V, ch. 30, not only affects section 8 of the Patent Act by declaring in effect that, in computing the delay for filing application for a patent, referred to therein, the time between the 1st August, 1914, and the 11th July, 1920, should not be taken into account, but also section 7, by abrogating the provisions thereof for the same period. The words "rights of priority" in said section 83 of the Order in Council mean that the status of the applicant should not be lost by any act of omission or commission, if the right claimed had not expired on said 1st August, 1914, the said period being eliminated from the consideration of whether or not the year referred to in article 7 had elapsed. LOCOMOTIVE STOKER CORPORATION *v.* THE COMMISSIONER OF PATENTS..... **191**

PENSION—*Interpretation of Statutes—Militia Act—Orders in Council—Discretion of Minister.*] In August, 1917, H., then in receipt of yearly salary of $4,000, was retired, but, instead of taking the six months' leave, by an order-in-council passed on 3rd September, 1917, he was appointed on the Overseas Demobilization Committee "for a period of six months pending retirement" at the yearly salary of $6,000, this order further declaring that "at the expiration of his six months' tenure of appointment . . . . .would be entitled to pension in accordance with the Militia Pension Act, 1902." On the 9th January, 1918, under the direction of the Minister of Militia the Pension Board fixed H's. pension at $4,200, on the basis of $6,000 salary, this being subsequently approved of and affirmed by the Treasury Board and the Governor in Council. Between the 3rd September, aforesaid, and the date of his actual retirement, in March, 1918, namely, on the 29th November, 1917, two orders-in-council were passed providing field and ration allowances for officers of the permanent force, amounting, as regards officers of H's. rank, to $1.75 a day over and above the consolidated rate of pay and alllwances. By his petition H. claimed that his pension should be based on a salary of $6,000 plus these allowances, *Held:* That, applying to the orders-in-

PENSION—*Concluded.*

council in question, the statutory rule that a general act is not to be construed to repeal a previous particular act unless there is some express reference therein to such previous legislation, or unless they are necessarily inconsistent, the general orders-in-council of the 29th November, 1917, did not affect the special and particular order of the 3rd September 1917, which stands by itself as representing the true position between the parties.—2. Section 42 of the Militia Act provides that a retiring officer "shall be entitled to pension, etc., not exceeding 1-50 of the pay and allowance of his rank or permanent appointment." *Quaere.* Does the word "shall" in said section come within the class of cases in which the authority given thereby is coupled with the legal duty to exercise such authority, creating a discretion that must be exercised; furthermore, the Minister and Pension Board having exercised this discretion by fixing the amount of the pension, and their decision having been approved and affirmed by the Governor in Council, has the court any jurisdiction to sit on appeal or review from the exercise of such discretion? WILLIAM EGERTON HODGINS *v.* THE KING.... **454**

PETITION OF RIGHT

See ARCHITECTS.
CROWN.
CONTRACTS.
NEGLIGENCE.
RAILWAYS.

PLANS AND SPECIFICATIONS

See ARCHITECTS.

PRACTICE

See SHIPPING AND SEAMEN.
Nos. 2, 3, 6, 17 and 18.

PRIVILEGE AND PRIORITY

See INCOME TAX.
RAILWAYS.

PROPERTY AND CIVIL RIGHTS

See EXPROPRIATION.

PROVINCIAL LANDS

See INDIAN RESERVES.

PUBLIC LANDS

See INDIAN RESERVES.

PUBLIC WORK

See CONTRACTS.
JURISDICTION.
NEGLIGENCE.

QUANTUM OF DAMAGES

See RAILWAYS.

QUANTUM MEURIT

See ARCHITECTS.
RAILWAYS.
SHIPPING AND SEAMAN.

RAILWAYS

1——*Railway Act*, 9-10 *Geo. V, ch.* 68, *s.* 49—*Board of Railway Commissioners, Orders of—Exchequer Court—Sequestration—Service of Order—Rule* 70 *Exchequer Court Rules—Drastic Process.—Held:*— Where an order of the Board of Railway Commissioners has been made an order of this Court under section 49 of the Railway Act, the Judge of the Court has no power to modify, vary, review or supplement the same.—2. Before a writ of Sequestration can issue in proceedings in contempt for disobedience of an order of the Board of Railway Commissioners which has been made an order of this Court, it should appear that the disobedience of the same has been wilful and intentional.—3. Where any such order authorizes one railway to operate its trains across the tracks of another, and where the train which is refused a crossing is not a train of the said company (in the present case it consisted of an engine and crew of the Harbour Commissioners of Montreal drawing cars of another company) such refusal cannot be said to be a refusal to comply with the above mentioned order so as to render them liable to contempt.—4. The Order for a Writ of Sequestration against a corporation will only be granted when the requirements of the practice have been strictly observed. THE POINTE AUX TREMBLES TERMINAL RAILWAY *v.* THE CANADIAN NORTHERN QUEBEC RAILWAY CO. AND THE CANADIAN NATIONAL RAILWAYS; AND IN THE MATTER OF AN APPLICATION OF THE POINTE AUX TREMBLES TERMINAL RAILWAY *v.* THE CANADIAN NORTHERN QUEBEC RAILWAY CO., AND THE CANADIAN NATIONAL RAILWAYS..... **15**

RAILWAYS—*Continued.*

2——*Breach of Statutory duty—Responsibility—Quantum of Damages—Res ipsa loquitur.*]—*Held:* That where there was no witness of the accident, but in going over the crossing one of the crew of the locomotive felt the pilot scraping over something, and going back, found an umbrella with ribs broken and near thereto, about four feet from the crossing, the body of the deceased on the track, one arm and one leg on the outside of the rails and the body between the rails, a few feet from the crossing, towards which he was seen going, just a moment before, with an umbrella; and having apparently been struck at the crossing and dragged; and, moreover, where the witnesses heard at trial took it for granted that he had been so killed by the said locomotive, the court, considering the probabilities and drawing necessary inference from the circumstances related in evidence, will find the deceased was killed at the crossing by the locomotive. (*Res ipsa loquitur*).—2. The crew of the locomotive, having failed to display either a head-light or two white lights on the rear of the engine, in breach of their statutory duties, and moreover having neglected to place a man on each side of the tender with a light, to warn people, which omissions were the proximate cause of the accident, the respondent will be held responsible for damages due to the death of a man so killed at a crossing.—3. That the life of a man of 78 years of age, who had retired 29 years before, but still attended to chores about the house, administered, his home and land, attended to the garden and made all carpenters' and plumbers' repairs in the house, was not without real value to his family; and as according to mortality tables, the victim had an expectation of life of from 5 to 7 years more, the Court declared suppliant entitled to recover the sum of $2,000. ANDERSON *v.* THE KING 22

3——*Responsibility — Damage to one using property without permission of company—Licensee—Negligence.*] S. had three carloads of potatoes near the freight-shed at Mont-Joli, which by agreement with railway company he was to keep heated. To reach this car, S. could take a good travelled road or could take a short cut through the busy railway yard. The latter was used by

RAILWAYS—*Continued.*

the public, but without the permission of the railway company. S. on the 16th November, 1917, at 8.15 p.m. elected to take this short cut to his car. The night was dark and having missed his way, he fell into a viaduct and was injured.—*Held*, that the proximate and direct cause of the accident was want of prudence on the part of the suppliant in venturing on a dark night, through a busy railway yard to his car, instead of using a good travelled road, free from any such dangers, as he was confronted with in using the tracks.—2. Where a licensee, for his own benefit, is upon the premises of a railway, without objection from it, such railway company cannot be said to be under the legal duty to guard such licensee against the obvious risks and dangers attending his crossing or walking through a railway yard at night. He must under such circumstances, take care of himself in using the premises as he finds them at the time he made his contract for transportation, and is not entitled to be protected from obvious conditions upon the property in their ordinary state. LOISELLE *v.* THE KING 93

4——*Common carrier—Negligence—Section 20—Exchequer Court Act—Quantum.*] On the 30th September, 1919, L. shipped a carload of potatoes from St. Charles, 200 miles from Montreal, by the I.C.R., consigned to one Gustave Brossard, Viger Station, Montreal. When the railway agent was preparing the bill of lading, L. placed a slip of paper on his desk giving the weight of potatoes and number of the car, and, by error, the agent, entered the weight of potatoes on the bill of lading for the car number, which L. on receiving put into his pocket without looking at it. By reason of this error the car was not found in Montreal till the 15th or 16th of October, when L. was notified, but notice was not received by B. until the 20th, due to the wrong name being placed on the notice. In fact, the car never reached its real destination, as indicated in the bill of lading. B. then refused delivery, the price of potatoes having in the meantime gone down, and, without notice to L. the potatoes were sold, and after deducting demurrage, the balance was tendered to L. in settlement. Both L. and B. had made repeated enquiries for the car.—

RAILWAYS—*Continued.*

Held: On the facts, that the car did not reach Montreal in reasonable time, that the railway employees were guilty of negligence in the performance of their duty, and that L. should recover the damages suffered by reason of the delay in transportation.—2. That the Crown is entitled to the benefit of the provision in the bill of lading that "the amount of any loss or damage for which the carrier is liable shall be computed on the basis of the value of the goods at the place and time of shipment under the bill of lading," and the court assessed the damage on the basis of the value at the time and place of shipment.—3. That as the petitioner alleged that he suffered damages "par la faute, negligence et imprevoyance" of the employees of the railway, the case came within the operation of section 20 of the Exchequer Court Act and the Crown was liable thereunder, and without reference to any liability as a common carrier.—*Quaere:* Can the Crown now be said to be a common carrier, notwithstanding the decisions in the cases of *McLeod* v. *the Queen* (1), *MacFarlane* v. *the Queen* (2), *Lavoie* v. *the Queen* (3), (1) 8 S.C.R. 1, (2) 7 S.C.R. 216; (3) 3 Ex.C.R. 96. LECLERC *v.* THE KING **236**

5—*Receiver — Manager's salary — Rights to privilege and priority therefor— "Working Expenditure"—Effect of Receivership on salary of manager—Resolution of Board—Interpretation.*]—*Held:* 1. That where by resolution of a Company the yearly salary of one of its officers is fixed, and it is further provided that "the said salary is to be paid from time to time as the Board direct," such salary, though fixed, does not become payable or exigible until the Board so direct.—2. That while the Court will not interfere with the domestic affairs of a company so long as the company does not impair the funds necessary to meet the creditors' claims, it will refuse priority and privilege to the claim of the manager of a railway for the payment of $10,000 a year salary for managing a railway that is not a going concern, has no railway to operate and has no revenue. That such salary was not, under the circumstances of this case, "working expenditure" as defined by the Railway Act.—3. That where a receiver has been appointed to a railway company the person formerly acting as manager of said company cannot claim

RAILWAYS—*Continued.*

salary as such since the said appointment, as against the assets or fund in the receiver's hands, the management of the company being then in the receiver's hands. THE CITY SAFE DEPOSIT AND AGENCY COMPANY, LTD, *v.* THE CENTRAL RAILWAY COMPANY OF CANADA, AND CHARLES N. ARMSTRONG, AND THE SAID PLAINTIFF **346**

6—*Receivership—Solicitors' fees—Priority— "Working expenditure"—Road never in operation—R.S.C.* 1906, *c.* 37, *sec.* 2, *sub.-sec.* 34 (*g.*).] The defendant company was incorporated in 1903 for the purpose of constructing and operating a railway within the provinces of Quebec and Ontario. The railway was never physically completed and consequently never in operation; and in 1917 it was placed in the hands of a receiver appointed by the Court at the instance of the trustee for the bondholders of the company. The claimant, amongst other creditors, filed his claim against the company. The same was contested before the Registrar acting as referee. The claim consisted of an amount representing the balance of an account for solicitor's fees and disbursements in respect of services rendered to the defendant company before the appointment of the receiver, and embraced such items as the preparation and promotion of private acts of parliament, attendances in England in connection with the floating of bond issues, preparing trust and mortgage deeds, drafting agreements for the construction of the railway, and generally attending to all legal matters pertaining to the business and affairs of the company. For a portion of this time the claimant was a director of the company, but his retainer as solicitor was not adverse to its interests.—*Held* (by the Referee): That notwithstanding that the company was not in operation and never had a revenue account the claim should be regarded as "working expenditure" within the meaning of sec. 2, sub-sec. 34 (g) of the Railway Act, R.S.C. 1906, c. 37; and as such was entitled to be paid in priority to the claim of bondholders under a trust deed. Reporter's Note:— No appeal was taken and the report was formally confirmed by the Court. CITY SAFE DEPOSIT AND AGENCY COY., LTD., *v.* THE CENTRAL RAILWAY COMPANY OF CANADA AND W. D. HOGG **425**

RAILWAYS—*Continued.*

7 —— *Negligence — Latent Defect.*] A platform had been made consisting of two rails placed transversally from the track towards the fence of the right of way, and across these 37 rails had been stacked. Whilst L. was standing on this platform, awaiting the train on which rails were to be loaded, one of the rails placed transversally as above mentioned broke, with the result that the pile of rails slipped to the centre at the break, and L's. hand was caught between the rails, by reason of which he lost part of three fingers. The platform was constructed according to the usual custom and was strong enough under normal conditions and barring some defect in the rail, to carry the load upon it, and more.—*Held:* On the facts, that the breaking was accidental and the result of latent defect, or flaw in the rail; and that the defect being latent, the use of the rail in the manner indicated did not constitute want of care or negligence, on the part of any employee of the Crown whilst acting within the scope of his employment. FAIDA LEVASSEUR *v.* THE KING..... **462**

8——*Employees — Relief and Insurance Association — Contract of Employment—Public Policy—Estoppel.*] T. was a *temporary* employee of the Transcontinental Railway and as such a member of the Employees Relief and Insurance Association. By written agreement with the Association, he acknowledged having received copy of the rules of the association and agreed as one of the terms and conditions of his employment, to comply with and be bound thereby. Each member had to contribute to the fund, and the Railway Department also contributed a certain sum annually, in consideration of which, by the rules, it was "relieved of all claims for compensation for injury or death of any member." T. was injured in shunting operations, and subsequently received two cheques from the Association, payable out of the fund towards which the Crown contributed, and which he cashed. The cheques were handed to him because of his membership in the Association, and a daily or monthly deduction was duly made, to his knowledge, from his wages.—*Held*: That such an agreement was part of his contract of employment, was valid and binding upon him, and was not against public policy; and was a complete answer and bar to an action

RAILWAYS—*Concluded.*

against the Crown for injury sustained by him whilst employed as aforesaid, and that suppliant was estopped from setting up any claim inconsistent with the rules and regulations of the Association. *Conrod* v. *the King* (49 S.C.R. 577.) followed, and *Saindon* v. *the King* (15 Ex. C.R. 305), and *Miller* v. *the Grand Trunk* (1906 A.C. 187), distinguished. The last two dealing with the case of a *permanent* employee, and this case with a *temporary* employee. JOHN JAMES THOMPSON *v.* THE KING..... **467**

9——*Trespasser—Acceptance of risk—Act of employee contrary to express instructions.*] After his day's work was over, between 6 and 7 o'clock in the evening, and when he was absolute master of his time and leisure, L., an employee, notwithstanding that he had been forbidden to do so by his foreman, took a hand car for the purpose of going on the railway track to procure coal for his sleeping van. Coal could have been obtained for overnight from an adjoining van. When running on track with the car, he was struck by a train running on schedule time, and killed.—*Held:* That under the circumstances, L. was in the position of a trespasser, *ab initio*, upon the right of way.—2. That moreover, such employee after his day's work was over, not then acting within the scope of his employment, but on the contrary acting in contravention of specific instructions given to him by his foreman, having entered upon a railway track, where trains ran, with full knowledge of the risk he was taking, must be held to have accepted such risk. JOSEPH LAJOIE *v.* THE KING..... **473**

RECEIVER

See RAILWAYS.

RELIEF AND INSURANCE ASSOCIATION

See RAILWAYS.

RESPONSIBILITY

See RAILWAYS.

REFERENCE BY MINISTER

See CONTRACTS.

REVENUE

See INCOME TAXES.

SEQUESTRATION

See RAILWAYS.

SEVERANCE

See EXPROPRIATION.

SHIPPING AND SEAMEN

1——*Collision — "Inevitable Accident"— Burden of Proof—Act of God.*] During the night between the 14th and 15th November, 1918, the plaintiff's steam barge the *A.T.* and defendant's schooner *B.S.M.* were moored on the lee side of Fox River wharf, on the Gaspe coast, lying stern to stern, the former near the shore, and latter between her and the outer end of the wharf. The schooner had been moored in the usual way, ordinary care and caution in this regard being observed. Towards evening, there being indications of bad weather ahead, the master borrowed a half-inch cable and two large manila hawsers, which were put out as "springs," making in all five hawsers, with the anchor leading forward and four lines leading aft. These additional moorings were more than sufficient under ordinary circumstances to have held her. She was a vessel of only 99 tons, with an anchor weighing 1,200 lbs., and having a chain suitable for a 250 ton ship. The breaking strain of the larger lines (1 forward and 1 aft) was about 20 tons each, and the smaller 10 tons each. There was another hawser and a second anchor on board, and as the wind increased the master attempted to make fast the hawser to the wharf but was unable to do so, and it was impracticable to make effective use of the anchor, when the lines broke. About 2 a.m. in the course of a severe storm, a tidal wave swept over the wharf and vessel, tore the latter from her moorings and she began to drift astern colliding with plaintiff's barge causing her some injury. When the forward moorings parted, she dragged her anchor, and it being impossible to put to sea, the master let go the anchor allowing the vessel to drift ashore, in the hope of saving the crew.—*Held*, on the facts, that the master had taken all the precautions that a man of ordinary prudence and skill exercising reasonable foresight would have taken, and the owners cannot be held responsible for the damage resulting from the collision.—2. Where a vessel collides with another lying at anchor, the burden of proof is on defendant to show

SHIPPING AND SEAMEN—*Continued.*

that it was due to inevitable accident.—3. To constitute inevitable accident, it is necessary that the occurrence take place in such a manner as not to have been capable of being prevented by ordinary caution, prudence and maritime skill. Utmost caution, or extraordinary skill need not be shown, but it is sufficient if such is reasonable and as is usual in similar cases.—4. In such a case as the present, not only must the defence prove that the breaking of the moorings was due to the irresistible force of the wind and waves, but also that all ordinary care, caution and maritime skill was exercised in mooring the vessel and in the handling thereof. TREMBLAY *et al, v.* HYMAN *et al*..... **1**

2——*Action for necessaries — Jurisdiction—Effect of entry in register—Admissibility of evidence to contradict.*—24 *Vict., ch.* 10, *s.* 5; 53-54 *Vict., ch.* 27; (Imp.) *R.S.C.* (1906) *ch.* 141.] The S.S. *Comox* was registered at the Port of Vancouver, B.C., and was owned by the H.S. Company, having its head office at the same port. While she was at the port of New Westminster, B.C., plaintiff supplied her with necessaries such as material and labour to refit her, and not being paid, action was taken in Vancouver to recover price thereof. The said H. S. Company was practically one Captain Woodside who was domiciled in San Francisco, U.S.A., being the owner of 995 shares of a total of 1,000 shares, capital stock of said Company.—*Held*, that notwithstanding the S.S. *Comox* was registered in Vancouver, her home port was really San Francisco where the true owner thereof was domiciled; that she was a foreign vessel and that the court had jurisdiction in the matter under section 5, ch. 10, 24 Vict., and 53-54 Vict., ch. 27, sec. 3 (Imp.).—2. That evidence may be admitted to contradict entry in the ship's register to show the true owner and home port of the vessel. Haley *et al, v.* S.S. *Comox*..... **86**

3 —— *Admiralty Law — Nautical Assessors — Expert evidence — Practice.*] The case was appealed to the Exchequer Court from the decision of the Deputy Local Judge in Admiralty. On the application of plaintiff to have further witnesses heard, defendant consenting, the judgment was set aside and the case was sent back before the Deputy Local

SHIPPING AND SEAMEN—*Continued.*

Judge in Admiralty to allow plaintiff to put in such evidence as he desired and as might be legal. On the re-hearing before a Judge, assisted by a Nautical Assessor, photographs were filed to show the action of the water in the lock, but no steamer was in the lock at the time and they do not show what would have been the result had the *Aztec* or a similar steamer been in the lock.—*Held:* That the evidence of experiments with water in the lock without any steamer being in it is of the nature of expert evidence, and as the Court had the assistance of a Nautical Assessor to advise upon any matters requiring nautical or other professional knowledge such expert evidence is inadmissible. "The Universe" (1) referred to.—2. That the new evidence, so far as it is expert evidence, being inadmissible, and being advised by the Nautical Assessor that the mooring of the steamer was sufficient, there was nothing in the evidence to make the court change its former judgment (2). (1) 10 Can. Ex. E.R. 305; (2) See 19 Can. Ex. C.R. 454. WILLIAM FRASER *v.* S.S. *Aztec.* **39**

4 —— *Admiralty Law — Foul berth — Inevitable accident — Common harbour of refuge — Negligence.*] A number of tugs with their tow, including the tug *J.M.*, had sought shelter in Trail Bay off the B.C. coast, recognized as a proper harbour of refuge. The *J.M.* being first in, was tied to the shore in a safe position; three other tugs with their tow subsequently came in and tied alongside of her. At 2 a.m. the next day the *Sea Lion* and tow also sought shelter in the same bay, and anchored some distance out, but not far enough to allow her tow to swing clear of these boats and the shore. At 3 p.m. on the day of the accident the *Sea Lion* and her tow swung towards the Island with the tide and wind, and the tail end of the boom caught on the shore. At 9.30 p.m. the *Sea Lion* realizing she was dragging anchor, attempted by pulling at right angles to get her tow off the land, using the stern of the boom as a fulcrum. In so doing the boom parted and swung towards the tugs tied at the shore fouling the boom of the 2nd from the shore, breaking the eastern and centre shore wires fastening the *J.M's.* boom to the shore, shoving the rafts and tugs to the west, and landing the *J.M.* on a rock and foundering her.—

SHIPPING AND SEAMEN—*Continued.*

Held, (reversing the judgment appealed from) that there being ample space from which to select a safe anchorage, the act of the captain of the *Sea Lion* in electing to anchor where he did and in not allowing sufficient space between the *Sea Lion* and her tow and the other vessels on the shore to permit of his tow having a good, clear, swing-berth, showed a want of ordinary maritime skill and ordinary prudence and care and constituted his anchorage a foul berth.—2. That having taken a foul berth endangering other crafts, the *Sea Lion* was in fault and liable.—3. That a manoeuvre is *prima facie* wrong if it creates a risk of collision; but the best test is that when it creates such a risk and eventually actually contributes to the accident, it then becomes a fault.—4. That a vessel not under way but fastened to the shore and moored in a position of safety, and exhibiting proper lights, is entitled to assume she is as safe as moored at a wharf or pier. THE *Jessie Mac* AND OWNERS, *v.* THE *Sea Lion* AND OWNERS **137**

5 —— *Exchequer Court, Admiralty jurisdiction of—Damages—Breach of Contract—* 53-54 *Vict., Ch.* 27 (*Imp.*); 54-55 *Vict., Ch.* 29 (*Dom.*); 1-2 *Geo. V, Ch.* 41.] Plaintiffs were stevedores and had entered into a contract with the owners of the ship defendant to load the vessel on its arrival at the port of Montreal. The captain of the ship refused to allow them to load the vessel in accordance with their said contract, and thereupon the ship was arrested on a claim for damages arising out of breach of said contract.—*Held*, that as the Admiralty jurisdiction of the Court is derivable from the Colonial Courts of Admiralty Act, 1890 (53-54 Vict., ch. 27 Imp.) and the Admiralty Act, 1891 (54-55 Vict., ch. 29, Dom.) such jurisdiction is no greater than the Admiralty jurisdiction of the High Court of England.—2. That upon the facts the Court had no jurisdiction to entertain the present action. WOLFE *et al v.* S.S. *Clearpool* **153**

6 —— *Jurisdiction — Action on mortgage— Registration according to Merchant Shipping Act—Amendment—Costs.*] Action *in rem*, to recover balance due on a Deed of Mortgage, executed at Buffalo and registered there according to the law and

regulations of the state of New York. The ship was arrested and subsequently released on bail. After other proceedings had in the cause, defendant moved for an Order to set aside the writ of summons, etc., for want of jurisdiction. On the hearing F. moved to amend, which amendment was in substance an allegation that defendant undertook to have the ship placed under Canadian Register and to mortgage the ship, which he failed to do. The ship was not under arrest or seizure at the time of the institution of this action.—*Held:* On the facts, that in as much as the Admiralty Court possessed no original jurisdiction over mortgages of ships, and that by the Admiralty Court Act, 1840 (3-4 Vict., ch. 65, Imp.) the Court was only given jurisdiction in respect to mortgages, when the ship or proceeds thereof were under arrest by process from that court; and that later by Admiralty Court Act, 1861 (24 Vict., ch. 10, Imp.) the High Court of Admiralty was given jurisdiction over claims in respect of any mortgage duly registered according to the provisions of the Merchant Shipping Act, 1854, whether the ship or proceeds thereof were under arrest of the Court or not, the Court is without jurisdiction to entertain the present claim.—2. In as much as by his proposed amendment, the plaintiff endeavours to add a claim for damages for breach of contract to grant a mortgage, which claim could not be entertained by the court, the plaintiff will not be allowed such an amendment.—3. That where defendant could have made his motion at an earlier stage and thus saved the parties useless proceedings and expense, he will only be allowed the costs of action up to the time he could have so moved. FINNIGAN *v.* S.S. *Northwest*..... **180**

7 —— *Jurisdiction — Building and Equipping — Maritime Lien — Admiralty Court Act*, 1861.] Plaintiff claimed $1,562.99 for work done and materials furnished for the S.S. *St. Louis* while at Amos, P.Q. The vessel was arrested, and J. F. H., of Amos, aforesaid, who had an interest therein under an agreement to purchase, filed an appearance under reserve. The vessel was registered at the Port of Montreal, and at the date of institution of the action the registered owner was J. F. S., of Smith's Falls, Ont. The vessel was not under arrest of the

court at the time of the institution of the cause.—*Held:* On the facts, that the court had no jurisdiction to entertain the claim made herein. —2. A claim for the supply of necessaries to a ship does not constitute a maritime lien thereon. (The *Two Ellens*, 4 P.C. 161 (at p. 166) referred to. LA CIE DES BOIS DU NORD *v.* S.S. *St. Louis*..... **232**

8 —— *Equitable jurisdiction of the Admiralty Court—Sale of vessel by sheriff—Vigilantibus et non dormientibus jura subveniunt.*] M. obtained judgment for wages, etc., against the S.S. *American*, the owners having made default to appear. But D. & Co., the owners of the cargo, intervened. The vessel was duly seized and advertised for sale. On the application of the owners of the ship, the sale was adjourned for two days, and on the expiration of this delay the vessel was duly sold at auction by the sheriff on Saturday, the 18th September, 1920, and purchased by D. & Co., who made the necessary deposit. Money had been wired by the appellant to discharge plaintiff's claim, but arrived too late to stop the sale. D. & Co. tendered the balance of price on the following Monday, which was refused on account of an application to the Deputy Local Judge to set aside the sale, and to redeem the vessel. D. & Co., on purchasing the vessel, made arrangements for repairs thereto, and at the time the said application was originally made, they were negotiating for the sale thereof. The vessel is now on the high seas, and it did not appear whether she had been sold. The D.L.J. refused the application and from his decision the present appeal was taken. The claim is based on equity alone.—*Held:* (Affirming the judgment appealed from) that while the Admiralty Court exercises an unquestionable equitable jurisdiction, inasmuch as the appellant had failed to show a superior equity to those arising in favour of the purchasers, the order below should not be interfered with. MCBRIDE *et al*, *v.* THE STEAMSHIP *American* AND JOHN S. DARRELL COMPANY; INTERVENORS.. **274**

9——*Minors' right to sue for wages—Lex fori—Admiralty Courts—Canada Shipping Act — Interpretation of Seaman's Contract—Benefit of the doubt—Bonus.*] M. and others, minors under the age of 21 and over 14, were engaged in the province

SHIPPING AND SEAMEN—*Continued.*

of Quebec, to serve on board the *S.S.M.* plying between the Great Lakes and Father Pt., and sued in the province of Quebec, before the Exchequer Court of Canada, in Admiralty, for wages and bonus due them.—*Held*: That whatever relates to the remedy to be enforced should be determined by the *lex fori*, and as the remedy of the plaintiff had been invoked in the province of Quebec, by the law of which province a minor over 14 may sue in his own name to recover wages due him, plaintiff had the status and capacity to sue before this Court. *Don* v. *Lippman*, 5 C. & F. Rep. pp. 1 and 13. The *Milford*; Swabey 362. The *Taqus*, 72 L.J. Adm. 4; referred to.—2. That where it is established that seamen were to be paid a bonus of $10.00 a month, *at the end of the season*, and where the ship was arrested before the close of navigation, and the owners failed to obtain her release, such failure on their part was in effect a consent that she be laid up from that date, and the season's operations were then ended, and the seamen became entitled to their wages and bonus. The *Malta*, 2 Hagg. Adm. 158, and *Viners Abridgement*, *Verbo.* "*Mariners*, p. 235 referred to. 3. It is the immemorial and benevolent practice of the Court, that, where there is any doubt as to the meaning of the contract of hire, the seaman should get the benefit thereof; and in such a case the contract should be interpreted against the owner and in favour of the seaman. MARCHAND *v.* THE SHIP *Samuel Marshall*..... **299**

10——*Seaman's wages — Profits —Agreement to accept share of profits for services.*] Where a seaman holding a master's certificate, agrees to accept a share of the season's profits earned by a ship in return for his services as master, he cannot, in the event of the venture not being successful, or before its conclusion, make a claim for payment of wages for navigating the ship. QUINN *v.* THE SHIP *Volunteer*..... **324**

11 —— *Exchequer Court in Admiralty—Bankruptcy Act — Mortgage — Rights of secured creditors.*]—*Held:* That an assignment under the Bankruptcy Act does not interfere with or lessen the rights of a ecured creditor to enforce or retain his security.—2. That inasmuch as the assignment itself only vests the property of the debtor in the assignee subject to the rights of secured creditors it can only affect what the debtor owns, namely, the equity of redemption in the property.—3. That such an assignment did not prevent the holder of a mortgage upon a vessel from enforcing his security before the Exchequer Court in Admiralty, and that a motion by the assignee to set aside the writ of summons and warrant of arrest issued in said court by the mortgagee against the ship for its condemnation in the amount of the mortgage therein and interest should be dismissed with costs, which costs should be added to the mortgage debt.—4. That in the premises the only right of the assignee under the bankruptcy Act is to defend the action and that he could not otherwise interfere therein.—*Quaere*: Does the fact that creditor fails to file an affidavit under section 46 of the Bankruptcy Act valuing his security deprive him of the right to participate in any dividend? WHITE & COMPANY, LIMITED, *v.* THE SHIP *Ionia*..... **327**

12——*Action In Rem—Assault on seaman by Master — Jurisdiction — Viaticum.*]—*Held*: That no maritime lien attaches in the case of an assault by the Captain, on a seaman, on board ship; and that the action *in rem* did not lie against the vessel to recover damages due to such assault.—2. That although the master of a ship may take all reasonable means to preserve discipline, where, to enforce an order given by him, he unnecessarily lays hands on a member of the crew (a woman) he is technically guilty of an assault on her; and, if the action had been properly before this court, notwithstanding the absence of all proof of actual damage, the court would have allowed $10.00 as exemplary damages.—3. That in the case of an English vessel, the ship's articles are conclusive as to the amount of wages. *Thompson* v. *Nelson*, 1913, 2 K.B.D. 523, referred to.—4. Where the seaman is not wrongfully dismissed, but on the contrary leaves of his own free will and for his own accommodation, before the termination of the voyage, the court should not allow him anything by way of viaticum to enable him to return to his home port. Reporter's

SHIPPING AND SEAMEN—*Continued.*

Note:—Although dismissing plaintiff's claim for assault on the ground that the action did not lie, the judge discussed whether there was or was not an assault, so that in the event of an appeal being taken from his judgment, and it being held that such an action did lie before this court for assault, it would not be necessary to send the case back for a new trial. LOUPIDES *et al v.* THE SCH. *Calimeris* **331**

13——*Collision—Excessive speed in snowstorm—Article* 16, *Sea Regulations—The Maritime Conventions Act,* (4-5 Geo. V, Ch. 13)—*Default of two vessels—Division of damages.*]—*Held:* A ship is not entitled to run through fog and snow at a speed which is safe for herself but immoderate and dangerous for others. *Pallen* v. *The Iroquois* ([1913] 18 B.C. 76; 23 W. L.R. 778.), followed.—2. In apportioning damages resulting from a collision between two ships, where the evidence does not establish that a clear preponderance of culpability rests upon one ship, the division of damages should be half and half. The *Peter Benoit* ([1915] 13 Asp. M.C. 203; 85 L.J. Adm., p. 12), followed. THE CANADIAN PACIFIC RAILWAY COMPANY *v.* STEAMSHIP *Belridge* **399**

14——*Collision in harbour—Neglect to keep proper look-out—Failure to keep course and speed—Article* 21, *Sea Regulations.*]—*Held:* That the making of a landing along the water-front of a busy harbour is a manoeuvre which ought to be accompanied by full precautions, the first of which is an adequate look-out. *Bryce* v. *Canadian Pacific Ry. Co.* (1907) 13 B.C. 96; 6 W. L. R. 53; (1907), 15 B. C. 510, referred to and applied. 2. That a serious burden is imposed upon a vessel if she fails to "keep her course and speed" as required by article 21 of the Sea Regulations, and she lays herself open to attack by the "give-way" vessel by departing from the directions of the article and must be prepared to justify the departure by the proper execution of nautical manoeuvres, such as in dropping a pilot, or approaching a landing or drawing up to an anchorage, or to lessen the consequences of collision, to save life or otherwise. *S.S. Albano* v. *Allan Line Steamship Company, Limited,* (1907), A.C. 193; 76 L.J., P.C. 33, at p. 40, followed. THE *Cleeve v.* THE *Prince Rupert*..... **441**

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15 —— *Collision — Damages.*] The master and engineer of the *Cleeve* spent 3 days before the Wreck Commissioner's Court of Investigation, held under the provisions of the Shipping Act, to investigate this collision in all its aspects, and claimed $105.00 for time lost by the vessel whilst they were so engaged—as well as a sum of $157.50 for solicitor's and counsel's charges for attendance at rehearing thereof ordered by the Minister of Marine. The registrar refused to allow these items in assessing the damages, and motion was made to the court to vary his report. *Held:* That the above items of damages were too remote, and were not the direct consequence of the collision, and that the Report of the registrar should be confirmed. THE *Cleeve v.* THE *Prince Rupert*..... **447**

16——*Exchequer Court in Admiralty—Appeal—Questions of fact—Advisability of a Court of Appeal to interfere on facts.*]—*Held,* (affirming the judgment appealed from) that where the local judge in admiralty has seen and heard the witnesses and was assisted by two assessors, the Exchequer Court of Canada sitting as a Court of Appeal from the judgment of the said judge should not interfere with the decision of the judge of first instance as regards pure questions of fact, unless he is firmly of the opinion that such decision is clearly erroneous. WILLIAM FRASER *v.* S.S. *Aztec*..... **450**

17——*Examination for Discovery—Interrogatories—Reading Evidence at trial—Rules of High Court of Justice—Discretion of judge.*]—*Held,* that while an examination for discovery may be ordered by the judge as a matter of convenience, in place of the delivery of Interrogatories, especially where the opposite party is in ignorance of the facts, although no special provision is made in the Admiralty Rules regarding it, such examination cannot be read as evidence at the trial. Rules 102 to 109 provide for cases where an examination may be so read at the trial but this is only permitted when the witnesses cannot attend the trial. POINT ANNE QUARRIES, LIMITED, *v.* THE SHIP *M. F. Whalen*..... **483**

18 —— *Jurisdiction — Mortgage on ship—Rights of mortgagee—Order for sale — Sale of ship when not in custody of court—Possession—Duty of mortgagee].* *Held,* that

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the court having by statute jurisdiction over the claim of a registered mortgagee whether or not the ship is within the power of the court by arrest, should give such remedy as will enable the mortgagee to effectually realise his claim. Therefore, where the plaintiffs, mortgagees, under a bond mortgage applied for an order for sale of the defendant ship, although at the time of application out of the jurisdiction, an order for sale was granted. As possession ought to be given, plaintiffs should, before the date of sale, pay all claims against the defendant ship having priority over their claim. THE IMPERIAL TRUSTS COMPANY OF CANADA *v.* THE SHIP *Lequesnoy* AND THE NOVA SCOTIA TRANSPORTATION COMPANY, LIMITED. **486**

SOLICITORS' FEES

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SPECIAL ADAPTABILITY

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TITLE

See EXPROPRIATION.

TORT

See CONTRACTS.
JURISDICTION.
NEGLIGENCE

TRADE-MARKS

1 —— *Names — Registration thereof.*] Petitioners had manufactured biscuits, cake, puddings and infants' foods for a great number of years, and had adopted and used the word or name "Christie" as a trade-mark on labels and in advertising to denote and distinguish their goods. The word "Christie" had been used alone, not associated with the word "biscuits" or other words and had acquired a distinctive meaning.—*Held*, On the facts stated (following the decision

TRADE-MARKS—*Continued.*

of the Supreme Court, in the case of *Horlick Malted Milk*, that the word "Christie" should be registered as a specific trade-mark to be used in connection with the manufacture and sale of biscuits, cake, puddings and infants' foods. *In re* CHRISTIE BROWN CO., LIMITED..... **119**

2 —— *Title thereto — Custodian of Alien Property — Friendly Nation — War Measures Act.*] B, and Co. were a German firm, operating in Germany but had branches of their business, under different names, in England and the United States. The trade-marks in question were registered in their name both in England and in Canada. When England declared war, in 1914, the trade-marks registered there were avoided, and the British branch of business sold by the Custodian of Alien Property, and while the conditions of sale did not provide for the sale of the goodwill, it was subsequently inserted in the deed of sale. When the U.S. entered the war,—the American business of B, and Co. who were owners of the Canadian trade-marks, was taken over by the American Alien Property Custodian, and later the stock and all assets of this company including the Canadian trade-marks, were by him sold to American citizens, who, with other shareholders, now constitute the plaintiff company.—*Held*, that by the sale of the American Alien Property Custodian to the plaintiff of all the assets of the German company aforesaid, the Canadian trade-marks in question passed to them and became their property.—2. Although the title was obtained by the plaintiff during the war, it was derived from the Government of a friendly nation, allied with Canada in the war, which purged it of any taint of German ownership, and was not adversely affected by anything contained in the Canadian War Measures Act, 1914, or any of the Orders in Council made thereunder.—3. That there being no privity of contract between those who purchased from the English Custodian and the defendants and moreover, as defendants cannot invoke *jus tertii* they have failed to prove any title to the trade-marks in question. THE BAUER CHEMICAL COMPANT, INC., *v.* SANATOGEN COMPANY OF CANADA, LIMITED, *et al.* **123**

TRADE-MARKS—*Continued.*

3 —— *Company's name — Secondary meaning — Advertisement.*] Petitioners were incorporated in October, 1915. Since then they have done a large business in motor cars, and have used a trade-mark consisting of a round circle in the centre of which are the words "Gray Dort," the border of the said Trade-Mark bearing the words "Own a" at the top, and the words "You will like it," at the bottom.—*Held:* That, had the petitioners used as their trade-mark the words "Gray Dort" alone, their five years user would have entitled them to have had the same registered as a trade-mark, and, in view of that, the fact of their using additional words as above mentioned, in connection therewith, should not have the effect of vitiating their right to register, and that the trade-mark as described and used should be registered. H. G. Burford & Company's trade-mark "Burford" (1919) Ch. D. 28, referred to. *In re* GRAY DORTS MOTORS, LIMITED..... **186**

4——*Trade-Mark — Geographical name— Secondary signification — Registration.*]— *Held:* That a geographical name is not ordinarily the subject of a trade-mark and is not *per se* registerable; but when by long user thereof the name has acquired a secondary signification in derogation of its primary geographical meaning and has become the trade designation of a manufactured article, such a name may be registered. *In re* PACIFIC LIME COMPANY, LIMITED (TRADE-MARK). **207**

5 —— *Petition to expunge — Effect of misrepresentation in application for Trade-Mark.*]—*Held:* In the interests of trade, public order, and the purity of the Register of Trade-marks, the Court will exercise its discretion by ordering the removal from the register of any entry made thereon under misrepresentation and "without sufficient cause."—2. Where a trade-mark is registered upon the statement of the applicants that they verily believe the same to be theirs "on account of having been the first to make use of the same," such statement being a misrepresentation of fact the court should order that such trade-mark be expunged. *Quaere*: Will the fact that a trade-mark has been simultaneously used by two persons, each having knowledge of the user by the other, amount to a dedication of the mark to the public? THE

TRADE-MARKS—*Concluded.*

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USE BY SUFFERANCE

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