REPORTS

— OF THE —

EXCHEQUER COURT

— OF —

CANADA.

CHARLES MORSE, D.C.L., BARRISTER-AT-LAW.

REPORTER.

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JUDGE

OF THE

EXCHEQUER COURT OF CANADA.

THE HONOURABLE GEO. W. BURBIDGE.

Appointed on the 1st day of October, 1887

LOCAL JUDGES IN ADMIRALTY OF THE EXCHEQUER COURT OF CANADA

During the period of these Reports :

The Honourable	A. B. ROUTHIER, - - - - -	Quebec	District.
do	JAMES McDONALD, C.J.S.C. - -	N. S.	do
do	EZEKIEL McLEOD, - - - -	N. B.	do
do	WILLIAM W. SULLIVAN, C.J.S.C.	P. E. I.	do
do	Archer Martin - - - - -	B. C.	do
do	JAMES CRAIG, J.T.C. -	Yukon Territory	District.
	His Honour THOMAS HODGINS, K.C.	Toronto	do

ATTORNEY-GENERAL FOR THE DOMINION OF CANADA

During the period of these Reports :

THE HONOURABLE CHARLES FITZPATRICK, K.C.

SOLICITOR-GENERAL FOR THE DOMINION OF CANADA:

THE HONOURABLE RODOLPHE LEMIEUX, K.C.

ERRATUM.

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CASES

DETERMINED BY THE

EXCHEQUER COURT OF CANADA.

ON APPEAL FROM THE BRITISH COLUMBIA ADMIRALTY DISTRICT.

Between

THE VERMONT STEAMSHIP CO. (Limited). (PLAINTIFFS)..... } APPELLANTS ;

1904
May 25.

AND

THE SHIP "*ABBY PALMER*" (DEFENDANT) ..... } RESPONDENT.

Appeal in Salvage action—General Rules 159 *&* 162*—Exchequer Practice—Remission of case to Local Judge to take further evidence.*

Under the provisions of Rules 159 & 162 of the General Rules and Orders regulating the practice and procedure in Admiralty cases in the Exchequer Court of Canada, the court, in entertaining an appeal from a Local Judge in Admiralty in a salvage case, may direct that further evidence be taken before the Local Judge in order to dispose of an issue raised on the appeal. In such a case the appeal is by way of rehearing.

APPEAL from a judgment of the Local Judge in Admiralty for the District of British Columbia in a salvage action.

The appellants asked that the amount of salvage awarded be increased.

The facts of the case are stated in the judgment of the Local Judge (1).

(1) NOTE :—Reported in 8 Ex. C. R. 446.

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Argument of Counsel.

April 27th, 1904.

The appeal now came on for hearing at Ottawa.

Dr. J. Travers Lewis, for the appellants, contended that the salvage services were performed under circumstances involving great risk to the ship belonging to the appellants. There was a high sea running at the time, a gale was blowing and the rescued vessel was drifting upon a dangerous lee shore. Besides this the appellants' ship was delayed ten days in prosecuting her voyage by reason of the services rendered the respondent ship. The award of the learned trial judge is only 6 per cent. of the value of the *res*. It should be increased here. He cited *Williams & Bruce's Admiralty Practice* (1); The *Accomac* (2); *Kennedy on Civil Salvage* (3); The *August Korff* (4); The *City of Berlin* (5); *Roscoe's Admiralty Practice* (6); The *Glenduror* (7); The *Clifton* (8); The *William Beckford* (9); The *Industry* (10); The *Ella Constance* (11); The *True Blue* (12); The *Messenger* (13).

C. Robinson, K. C., for the respondent, argued that in such a case a court of appeal must be persuaded that the award is unjust to the salvors before it is warranted by the cases to interfere with the award. (He cited *Green* v. *Bailey* (The *Neptune*) (14); *Gann* v. *Brun* (The *Clarisse*) (15). The salving ship had no right to waste ten days in giving evidence, and charge the delay to the respondent. The appellants could have proceeded on their voyage with small interruption. The award is fair under all the circumstances.

(1) 2nd. ed. pp. 152, 153, 184.
(2) [1891] P. 349.
(3) p. 139.
(4) [1903] P. 166.
(5) 3 Asp. M. C. N. S. 491.
(6) 3rd. ed. p. 117.
(7) L. R. 3 P. C. 589.
(8) 3 Hagg. Adm. 117.
(9) 3 C. Rob. 355.
(10) 3 Hagg. Adm. 203.
(11) 33 L. J. Adm. 191.
(12) L. R. 1 P. C. 250.
(13) Swab. 191.
(14) 12 Moo. P. C. 346.
(15) 12 Moo. P. C. 340.

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Reasons for Judgment.

D. M. Eberts, K.C., followed for the respondent, citing the *Amérique* (1); The *Glengyle* (2); The *Auguste Legembre* (3); The *Inchmaree* (4); The *Janet Court* (5); The *Hestia* (6); The *Edenmore* (7); The *Rialto* (8); The *Mark Lane* (9); The *Monarch* (10); The *Werra* (11); The *Laertes* (12); The *Lancaster* (13); The *Kenmure Castle* (14); The *Cleopatra* (15); The *Glenduror* (16); The *I. C. Potter* (17); The *Chetah* (18); The *Scindia* (19). He contended that in view of the awards in these cases, varying from 2½ per cent. of the value of the *res* to 40 per cent., that the salvage awarded to the appellants was a fair and proper amount, excluding the claim for ten days delay in prosecuting the voyage, which in no way could be charged to the respondent.

Dr. Lewis replied.

THE JUDGE OF THE EXCHEQUER COURT now (May 25th, 1904) delivered judgment.

The appellants contend that the amount of salvage allowed in this case by the learned Judge of the British Columbia Admiralty District is not sufficient in view of the services rendered and the expenses incurred and losses sustained in rendering such services. Otherwise no complaint is made in respect of the judgment appealed against, as it is favourable to the appellants.

The value of the steamship "Vermont" by which the salvage service in question in this case was rendered is said to be two hundred thousand dollars, and

(1) L. R. 6 P. C. 468.
(2) [1898] P. 97.
(3) [1902] P. 123.
(4) [1899] P. 111.
(5) [1897] P. 59.
(6) [1895] P. 193.
(7) [1893] P. 79.
(8) [1891] P. 175.
(9) [1890] P. 135.
(10) 12 P. D. 5.
(11) 12 P. D. 52.
(12) 12 P. D. 187.
(13) 8 P. D. 65.
(14) 7 P. D. 47.
(15) 3 P. D. 145.
(16) L. R. 3 P. C. 589.
(17) L. R. 3 A. & E. 292.
(18) L. R. 2 P. C. 205.
(19) L. R. 1 P. C. 241.

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the value of her cargo at the time the service was performed was one hundred and fifty thousand dollars. The value of the salved property was found to be twenty eight thousand dollars, and the amount of salvage awarded was four thousand two hundred dollars.

Reasons for Judgment.

The main ground on which it is argued that this amount is inadequate is that it is not more than sufficient to cover the actual outlay of the salving ship during the interruption of her voyage, and the losses incurred in rendering the services for which salvage is claimed; and that it does not afford any sufficient reward for such services. In support of this the appellants rely upon the evidence of Captain Haynes of the steamship "Vermont" that his voyage was interrupted for ten days; that the daily expense of the "Vermont" is about one hundred pounds; that in rendering the service he lost a wire rope hawser valued at one hundred pounds and that he had to purchase additional coal of the value of five hundred and thirty six dollars. If that is to be accepted as an accurate statement of the expenses and losses incurred by the "Vermont," then it does appear to me that the amount of salvage awarded is not sufficient. But in answer to that contention counsel for the respondent argue that there was no occasion for so long an interruption of the salving ship's voyage; and that Captain Hayne's evidence ought not to be accepted as an accurate statement of the expenses and losses incurred by the "Vermont".

The question thus raised is one that cannot, it seems to me, be satisfactorily disposed of without taking further evidence. The appeal comes before the court by way of rehearing and the court has power to direct such further evidence to be taken (General Rules 159 and 162). But to take it here would be more incon-

venient and more expensive than to take it at Victoria where persons of experience in such matters could, no doubt, without difficulty, be found to give evidence on the question of what would under the circumstances have been a reasonable interruption of the *Vermont's* voyage, and what her expenses and losses were during such interruption.

The appeal will be allowed, and the award of salvage, so far as respects the amount of it, set aside, and the matter remitted to the learned Judge of the British Columbia Admiralty District to take such further evidence as may be offered on the question mentioned, and to award such an amount of salvage as in view of all the circumstances he thinks to be just.

The question of the costs of the appeal will be reserved until after the award has been made.

*Judgment accordingly.**

Solicitors for appellants: *Bodwell & Lawson.*

Solicitors for respondent: *Robertson & Robertson.*

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*REPORTER'S NOTE:—Upon a further hearing of the case in pursuance of the above direction, the learned trial judge increased the amount of salvage first found by him by the sum of $1,300, making in all a salvage award of $5,500. The costs of such rehearing were made costs in the cause.

Upon application to the JUDGE OF THE EXCHEQUER COURT under the above reserve as to the costs of the appeal, such costs were allowed to the appellants. The costs of printing the case on appeal to the Exchequer Court from the judgment of the local judge were ordered to be included in the costs of appeal so allowed to the appellants.

THE NOVA SCOTIA ADMIRALTY DISTRICT.

1904
March 22.

PICKFORD & BLACK STEAMSHIP CO., (LIMITED)..... } PLAINTIFFS;

AGAINST

THE SCHOONER "*FOSTER RICE.*"

Shipping—Salvage services—Mail steamer—Sailing ship.

In this case salvage services were rendered a distressed sailing ship on the high seas by a mail steamer. At the time the latter performed the salvage services she was valued at $100,000, and besides passengers and mails, she carried a cargo estimated to be worth $7,000. The time occupied in the performance of such services was about two and one half days, the weather being fine and no risk or danger threatening the steamer except some chance of collision with her tow through a narrow channel of some thirteen miles in length. On account of the delay occasioned by the services the steamer was obliged to consume additional coal to the value of $360 in making up her schedule time on the voyage. The sailing ship was in a position of peril when sighted by the steamer, having been dismasted and at the time drifting broadside at the mercy of the seas. Her cargo was worth $13,727.23, and her freight, as per bill of lading, $1,332.26. The value of the salved ship when taken into port in her damaged condition was placed at $2,290. The amount of salvage in respect of cargo and freight was settled before action brought.

Held, that the sum of $400 was a fair salvage award in respect of the ship alone.

THIS was an action for salvage services.

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

January 7th, 1904.

The case was heard before the Local Judge for the Nova Scotia Admiralty District at Halifax, N.S.

W. B. A. Ritchie, K.C. and *T. R. Robertson* for the plaintiffs.

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

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Reasons for Judgment.

McDONALD, (C.J.) L.J. now (March 22nd, 1904), delivered judgment.

This is an action for salvage services rendered by the steamship *Ocamo* to the sailing vessel *Foster Rice*.

On the morning of the 29th of July, 1903, the *Ocamo*, then on a voyage from Halifax to Bermuda and other West Indian ports, sighted the *Foster Rice*, then nearly in her track and distant about 350 miles from Bermuda and about the same distance from the coast of Nova Scotia. The *Ocamo* is a freight and passenger steamer plying regularly on the route upon which she was at that time sailing. She is a ship of 1,900 tons gross register, and of the value of $100,000. At the time referred to she carried a cargo of the value of $45,000 and 14 passengers besides His Majesty's mails.

Her freight was valued at $7,000. Her crew numbered 35.

The *Foster Rice* is a two masted schooner. At the time she was picked up by the *Ocamo* she was on a voyage from Arroya, Porto Rico, to St. John, N.B., laden with a cargo of molasses. The net cash value of the cargo at St. John, N.B., was $13,727.32, the freight as per bill of lading $1,332.26, the value of the vessel at Bermuda, where she was taken by the *Ocamo*, as hereinafter detailed, was, in her then damaged condition, £450 or about $2,290. Her value when repaired was about $7,000.

Five days before the *Foster Rice* was spoken by the *Ocamo* she encountered a hurricane and was very much damaged by its force. The masts were carried away, the foremast completely, and the mainmast to within about 30 or 35 feet of the deck. What was left of the mainmast was sprung about 6 feet from the deck and thereby weakened. When the foremast was

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Reasons for Judgment.

carried away its step broke out eight planks of the deck, and over the hole so made planks had been laid and nailed down, while over the planks again canvas had been stretched and fastened. The jib-boom was carried away with all attached. After the gale had subsided, tackles were put to the stump of the main-mast to hold it in place and stays were fastened to the remains of the mast for the purpose of putting such sails on as could be set. These jury sails were not of very much use, as the evidence shows she could sail no closer to the wind than 8 points—practically a broadside course, and that, during the time that elapsed before the arrival of the *Ocamo* she had made practically no headway at all. On the contrary she was drifting gradually to the eastward under the compulsion of the currents. The wind was at that time light. The *Foster Rice* was on the lookout for one of the steamships of the Pickford & Black line in order to obtain assistance, and excepting from this line of boats they did not know where assistance was to come from. After the hurricane no vessel was sighted before the *Ocamo*.

There was no doubt but that the *Foster Rice* was, at the time the *Ocamo* spoke her, in a position of much peril. Had another hurricane struck her, and according to the evidence that might have happened at any time, in her then disabled condition there cannot be much question that she would not have been able to weather it out, and day by day she was drifting along from the regular course of steamers and therefore into greater danger still. For five days before she was taken in tow she was practically helpless and at the mercy of the sea.

She was taken in tow early on the morning of the 29th July, the sea at that time being smooth and the weather fine. This condition of wind and sea con-

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tinued practically throughout the time salvage services were rendered. No special or unusual difficulty or danger was incurred throughout the performance of the services. The hawser was fastened without trouble and the same hawser lasted until the vessels arrived at Hamilton, Bermuda, on the morning of 31st July, having anchored during the night of the 30th so that entrance could be made to the harbour at Hamilton through the tortuous channel from St. George's to that place by daylight, as is customary with all vessels. Care had to be taken at this time that the hawser should not foul the propeller of the *Ocamo* and to avoid this, as well as the risk of collision, the *Ocamo* was kept moving throughout the night. There appears also to have been some risk of collision and of the hawser fouling during the passage through the channel from St. George's to Hamilton, a distance of 13 miles.

Owing to services rendered to the *Foster Rice* the *Ocamo* was behind time at Bermuda about 24 hours; at St. Lucia, her next port, about six hours and at Barbados she arrived practically on time. This time was made up by an extra expenditure of coal amounting to 60 tons, valued at $360, and by the necessarily extra work of the officers and crew. The hawser used in the towing operations was of little use afterwards.

In considering the amount of the salvage awarded it must be remembered that the *Foster Rice*, owing to her disabled condition, at that time of year and in that latitude, was in great danger. There was no danger of her immediate loss, but there was danger that, if she had been left to her own resources, she would have become a total loss. The ship, cargo and freight of the total value of about $17,349, was undoubtedly placed in safety by the salvors and they should be adequately recompensed. The weather,

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Reasons for Judgment.

during the time the services were rendered was favourable, but it might well have been otherwise. It must also be remembered that the salving vessel is a passenger and mail carrying steamship, and that delay in landing passengers and mails at their destination in the usual time might be attended with risk to the owners. It is said that some extra strain was put upon her machinery, but this I think is a small matter and scarcely worth consideration. The total value of the *Ocamo* for freight and cargo was $152,000.

Before this action was brought the amount of salvage in respect of freight and cargo was settled by private arrangement. There is, therefore, only to be considered the salvage in respect of the salved vessel, and that I fix at $400 to be apportioned as follows:

To the ship	$200 00
" captain.	25 00
" engineer.	20 00
" firemen.....	20 00
" crew acording to their rating.....	135 00

For which amount there will be a decree, with costs.

*Judgment accordingly.**

Solicitor for plaintiff: *H. C. Borden.*

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

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(1) REPORTER'S NOTE.—On appeal to the Judge of the Exchequer Court, this judgment was affirmed and the appeal dismissed with costs (June 6th, 1904).

NEW BRUNSWICK ADMIRALTY DISTRICT.

Between

JOSEPH F. MICHADO.....PLAINTIFF; 1904 Nov. 25.

AND

THE SHIP "HATTIE & LOTTIE," MANUEL VIEIRA AND JOAS Z. DA SYLVA..... } DEFENDANTS.

Shipping—Foreign vessel—Interference with rights acquired under foreign judgment—Comity of Courts—Account between co-owners.

The ship which was the subject of the proceedings herein was registered in an American port and owned by American citizens resident in the United States. The defendant S. advanced to the then captain of the ship at Brava, Cape de Verde Islands, the sum of $1,400 for necessaries, and took from the captain and V., a part-owner, what purported to be a bottomry bond, and a further instrument, purporting to be a charter-party, as security for such advance. By the last mentioned instrument the control and possession of the ship was handed over to S. until the profits of the employment of the ship repaid the loan. S. thereupon took over the ship and brought her to the United States port, where she was arrested at the suit of R. for an amount due him for necessaries supplied to the ship on a previous voyage. By the judgment of a competent court in the United States the rights of S., under the instrument mentioned, were held to give him priority over the claim of R. and he was confirmed in his possession of the ship. The plaintiff herein was the owner of 17/64 shares of the ship and had notice of the American suit between S. and R., and subsequently took part in some negotiations for the settlement of the claims of both. By instituting proceedings on the Admiralty side of the Exchequer Court the plaintiff sought to obtain possession of the vessel while in a Canadian port, together with certain relief against the defendant V.

Held, that as by the proceedings taken in this court the plaintiff sought to derogate from rights obtained by one of the parties under the judgment of a competent court in the United States, the action should be dismissed. *Castrique* v. *Imrie* (L. R. 4 H. L. 414) referred to.

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Semble: In so far as the action sought to obtain an account between the parties who were co-owners, the court would have directed an account if it had been shown that S. had received from the earnings of the vessel sufficient to repay him the amount of his loan.

Statement of Facts.

THIS was an action for possession of a ship and an account between co-owners.

The plaintiff, as owner of 17/64 shares of the ship *Hattie and Lottie*, of the port of New Bedford, in the State of Massachusetts, United States of America, and on behalf of other owners, namely: Frank Magellan, owner of 9/64 shares: Antonio J. Olivera, owner of 8/64 shares of said ship or vessel, claimed possession of the said ship against Manuel F. Vieira, owner of 17/64 shares of the same ship and against Joas Z. da Sylva, the master of said vessel; and the plaintiff asked to have an account taken and for costs. The ship was an American ship and the litigating parties were American citizens. In April, 1902, the vessel was at Brava, Cape de Verde Islands, and being in need of funds, the then master, John F. Pina and Manuel F. Vieira, a part owner and at the time employed on the said vessel, borrowed the sum of $1,400 from the said Joas Z. da Sylva and gave as security for the repayment of the said money a writing claimed to be a bottomry bond which said writing is in the words and figures follows:—

"Know all men by these presents: That we, Manuel F. Vieira, part owner of the American schooner *Hattie and Lottie*, of New Bedford, Mass., United States of America, and John F. Pina, of Providence, master of the said *Hattie and Lottie*, of the burden of ninety-six tons or thereabouts, now lying in the port of Furna, in the Island of Brava, are held and firmly bound unto Joas Zurich da Sylva in the sum of one thousand and four hundred dollars, lawful money of the United States of America, to be paid to the said Joas Zurich

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da Sylva; for which payment well and truly to be made we bind ourselves and also the said vessel, her tackle, apparel and furniture, firmly by these presents. Sealed with our seal at Brava, Cape Verde Islands, this twenty-fourth day of April, in the year of of our Lord one thousand nine hundred. Whereas the above bounden Manuel F. Vieira and John F. Pina have been obliged to take up and borrow and have received of the said Joas Zurich da Sylva, for the use of the said vessel and for the purpose of fitting the same for the sea, the sum of one thousand and four hundred dollars, lawful money of the United States of America, which sum is to be and remain as a lien and bottomry on said vessel, her tackle, apparel and furniture."

"In consideration whereof, all risks of the sea, rivers enemies, fires, pirates, &c., are to be on account of the said *Hattie and Lottie*. And for the better security of the said sum the owner and master, do by these presents, hypothecate and sign over to the said Joas Zurich da Sylva, the said vessel, her tackle, apparel aud furniture.

"And it is hereby declared that the said vessel *Hattie and Lottie* is thus hypothecated and assigned over for the security of the money so borrowed and taken up as aforesaid, and shall be delivered for no other use or purpose whatever, until this bond is first paid as hereby agreed. Now the condition of this obligation is such that if the above bounden Manuel F. Vieira and John F. Pina shall well and truly pay, or cause to be paid, unto the said Joas Zurich da Sylva the just and full sum of one thousand and four hundred dollars lawful money as aforesaid being the sum borrowed; and also at or before the expiration of the time of payment which will be, when the said vessel earns the said amount at the rate of what it will be agreed on

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the charter of party between the owner and Joas Zurich da Sylva, as freighter."

"It is also understood and agreed that the said vessel shall be in charge of the freighter until the whole amount of the bottomry bond is paid. The master has to-day delivered the said vessel to the freighter. Joas Zurich da Sylva, therefore, holds no responsibility hereafter, on accounts to be settled."

"Signed, sealed in presence of witness and United States Consul Agent on the date and year aforesaid.

Sgd JOAS ZURICH DA SYLVA,
" JOHN F. PINA,
" MANUEL F. VIEIRA.

In addition to the above instrument the said parties entered into another agreement as further security for the repayment of the said loan of $1,400 whereby it was stipulated that the said da Sylva, the lender, should have immediate possession of the said vessel and should continue to hold and manage the same until the indebtness to him was paid out of the profits of the ship's earnings. The said writing is as follows:

"We, the undersigned, Manuel de Freitas Vieira, single, of lawful age, proprietor, resident of New Bedford in the United States of America, of one part and of the other part Joas Zurich da Sylva, married, of lawful age, proprietor, resident in the Island of Sal, and both parties at present in this Island, in the presence of witnesses undersigned, the party of the first part, one of the owners of the American schooner *Hattie and Lottie* now anchored in this port of Sal, Rey of the Island of Boa Vista of Cape Verde, freights (charters) to the second party Joas Zurich de Sylva the said schooner for the sum of thirty mil reis ($30) for each month clear of wages, grub bills and port charges, all of which will be paid by the said freighter (charterer) Joas Zurich da Sylva."

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"1st. Any and all repairs which the said schooner may need such as painting bottom, blocks, sails or any other damage or repairs, small or great, for the preservation of said vessel and guarantee shall be on account of the said vessel."

"2nd. Said vessel shall be held by the charterer, according to the bottomry bond made in the presence of the U.S. Consular Agent at Brava until the sum of $1,400 is paid, or this sum is fully paid and satisfied by the freight under this charter."

"3rd. In case said charterer shall come to terms for the sale of said vessel with the owner, then the sum agreed upon shall be paid at sight at Cape Verde, or by bill of exchange at four months anywhere away from Cape Verde."

"As we have above agreed to sign this, in the presence of witnesses Jose Lino Evora and Antonio Jose de Souza Carvalho, both married, merchants and residents in this port of Sal Key, Boa Vista, May 6, 1902.

(Sgd) MANUEL F. VIEIRA,
" JOAS ZURICH DA SYLVA,
" JOSE LINO EVORA,
" ANTONIO J. SOUZA CARVALHO.

The said da Sylva, under the terms of the said writings, entered into possession of the vessel and brought her to the United States. While there the vessel was arrested at Providence, R.I., at the instance of a Mr. Rodgers, for a claim for necessaries supplied the ship on her previous voyage. da Sylva employed Mr. Healy, an attorney of that place, to take proceedings to protect his interests, contending that he as a holder of a Bottomry Bond had priority over the claim of a material man for necessaries.

On the 27th day of August, A. D. 1902, the District Court of the district of Rhode Island gave judgment

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Statement of Facts.

in favour of da Sylva. The following is the decree of the court:—

"It is now ordered, adjudged and decreed that the said schooner *Hattie and Lottie*, her boats, tackle and furniture be delivered to the libellant, Joas Z. Sylva, the charterer under the charter party in said libel, and that the respondent Antonio M. Rodgers pay to the said libellant his costs as taxed by the clerk at the sum of $48.07."

The vessel under this decree was then handed over to da Sylva who brought her to Saint John, N B., under a charter to load lumber for the Azores when she was arrested in this suit.

November 18th, 19th and 24th, 1902.

The case was heard before the Local Judge for the New Brunswick Admiralty District.

Dr. A. A. Stockton, K.C., and *John Kerr, K.C.* for plaintiff. There is no evidence of any such necessity to take up money at Brava, as to justify bottomry; absolute necessity must be shown by the lender (4 *Am. and Eng. Ency. of Law*) (1). The writing is not a bottomry bond. There is no maritime risk, and the payment is not dependent on the safe arrival of ship at any destination; no voyage is specified during which the risk is to continue. The master cannot hypothecate the vessel except upon condition that the lender shall bear the risk of the voyage, as that the bond is at his risk; the payment must depend upon the safe arrival of the vessel. (The *Virgin* (2); The *Gaetano-Maria* (3); *The Julia Blake* (4); *Stainbank* v. *Fenning* (5); *Stainbank* v. *Shepard* (6); *Henry's Admiralty Practice* (7). The master had no right, even with consent of a part owner,

(1) 2 ed. p. 741 and cases cited.
(2) 8 Pet. at p. 554.
(3) L. R. 7 P. D. 137.
(4) 107 U. S. 418.
(5) 11 C. B. 51.
(6) 13 C. B. 418.
(7) P. 147.

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Argument of Counsel.

to hand over possession and control of the ship to da Sylva, as was attempted under the alleged charter, without the consent of the other part owners. The decree of the foreign court is not binding on this court, as it does not disclose the grounds upon which it was granted. The sentence of a foreign court of Admiralty is not conclusive as to the grounds of condemnation unless it be explicitly stated in the decree what the ground is. (*Dalgleish* v. *Hodgson* (1). The record must show the grounds of the decree. (*Bigelow on Estoppel* (2); *Hobbs* v. *Henning* (3). No grounds are shown upon the decree in this case, and it does not appears upon what grounds the decree was founded. The defendant, da Sylva, surely cannot hold the vessel indefinitely, because a foreign court gave him possession against the claim of a material man for necessaries. The case of *Castrique* v. *Imrie* (4) is not opposed to plaintiff's contention. There, a sale of the vessel was ordered and under it the title to the property passed to the purchaser, who, as a third party, was protected by the process of the court. Furthermore the plaintiff is entitled to an account. The defendant da Sylva only claims to hold the vessel for advances. A correct account might show that the whole debt was paid, The vessel, therefore, on that ground should be detained until the account is taken, or, if allowed to go, security should be given for her safe return.

C. J. Coster for the defendants. The case of *Castrique* v. *Imrie* is relied upon by the defendants as conclusive in their favour. The parties are all American citizens and the vessel under arrest is also of American registry. The dispute between Rodgers and the defendant da Sylva was one in which the right to the

(1) 7 Bing 495.
(2) 2 ed. 157.
(3) 17 C. B. N. S. p. 823.
(4) L. R. 4 H. L. 414.

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possession was involved. This court cannot disregard the decree of the District Court of Rhode Island. That court is one possessing Admiralty jurisdiction. It had full authority over the persons in that case and after a lengthened hearing has decided that da Sylva is entitled to the possession of the vessel. In the case already cited it was admitted that the French court through misapphrension had decided contrary to English law, and had rendered a decree contrary to what it would otherwise have been if the court had clearly understood the rights of the parties under the English law. The vessel was sold under that decree of the French court, and the title of purchaser was preferred to that of a mortgagee. The defendants, therefore, claim that this court by the comity of nations will not disregard the decision of the American court in this case, but will order the arrest to be discharged and the vessel delivered over to the defendant da Sylva. The court in Rhode Island must have considered the writing between the parties a bottomry bond, and this court will not differ from that conclusion.

Dr. Stockton, *K.C.*, replied.

MCLEOD, L. J. now (November 25th, 1902) delivered judgment.

The facts of this case are practically as follows :—

The defendant da Sylva advanced to the then captain of the vessel, at Brava, the sum of $1,400 (fourteen hundred dollars), and took from the captain what is claimed to be a bottomry bond. This writing is also signed by one of the part-owners who was at the time on board the vessel. As further security for the repayment of the loan, Pina, the then captain, and the part-owner then on board, signed another document called a charter party, whereby the possession and control of the vessel were handed over to da Sylva

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until the profits arising from her employment repaid the loan. The vessel, then in charge of the defendant da Sylva, arrived at Providence, Rhode Island, and while there, proceedings where taken against the vessel by a Mr. Rodgers for an amount due him for necessaries supplied for a previous voyage, and in that suit the vessel was arrested. The defendant da Sylva employed Mr. Healy, an attorney-at-law, residing at Providence, R.I., to protect his interests, and to contest the claim of Mr. Rodgers, on the ground that his claim, founded on bottomry, took priority over any claim for necessaries. Mr. Healy accordingly instituted proceedings, on behalf of da Sylva, in the District Court for the district of Rhode Island. As is well known, the District Courts of the United States exercise Admiralty jurisdiction. The result of the litigation was in favour of da Sylva, one of the defendants in this cause, and his claim, under the alleged bottomry bond and charter party, was given priority over the suit of Mr. Rodgers for necessaries, and by the decree of the court, the vessel was given into possession of da Sylva. From the evidence of Mr. Healy, it appears, that the plaintiff in this cause, and the other part-owners acting with him, had knowledge of the litigation between the competing claims of Rodgers and da Sylva in Rhode Island, and while they were not parties to the suit, yet they took part in some negotiations looking to the settlement of all claims against the vessel. The application in this suit is practically to undo what was done by the court in Providence, and I do not think I can do that. If the plaintiff in this cause said that since the decree of the American court, the defendant da Sylva had received from the earnings of the vessel sufficient to repay him the amount of his loan, I might then act, and order the account to be taken on that ground. But it is not pretended that since that decree, any amount has been paid, and in fact it is not denied that some

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amount is still due the defendant. The contention is that his claim is not correct; the general account, however, was given to the plaintiff at Providence, and the only witness examined here for him, saw the account and how it was made up on board the ship, and he does not deny that Mr. Healy also showed it to him. Under these circumstances I do not think I can interfere to undo what was done in the court at Providence, although that court may have taken a course which I would not have taken. In the case of *Castrique* v. *Imrie* (1), cited by counsel on both sides, the Lord Chancellor, in delivering judgment, admits that the French court wrongly construed the English law; but that, under the circumstances, our court would not interfere with the judgment of the foreign court. And in the same way, I do not think I should interfere with the judgment of the District Court of Rhode Island, more especially as all the parties are American citizens, resident in the United States, and the vessel is of American register. The case is one peculiarly for the American court. I do not think I would have a right to say to a foreign court, "notwithstanding all that has taken place, you have decided wrongly, and you should not have made the decree you did." If the plaintiff said: "It is true the defendant, da Sylva, was given possession of the vessel by that decree, and has since had possession, and the earnings thereof, and these earnings are sufficient to pay the amount of the indebtedness" it might be different. I might then order an account to be taken, but that state of facts does not exist, and under all the circumstances I must decline to interfere. The action will, therefore, be dismissed with costs.

Judgment accordingly.

Solicitor for plaintiff: *John Kerr.*

Solicitor for defendants: *C. J. Coster.*

(1) L. R. 4 H. L. 414.

IN THE MATTER of the Petition of Right of

JOSEPH BARTHOLOMEW ROBERT....SUPPLIANT; 1904

Oct. 17.

AND

HIS MAJESTY THE KING.....RESPONDENT.

Claim for possession of head-gates and waters of canal—Public work—Interruption of possession—Water-power—Public and private rights—Estoppel by admission of Crown's officer—Departmental report.

The suppliant's predecessor in title, the Seignior of Beauharnois, early in the last century had constructed a canal or feeder, with head-gates and appurtenances, through his own land for the purpose of conveying water from the River St. Lawrence to the River St. Louis, and so increase certain water-powers belonging to the seigniory. Later in the century, when the Beauharnois Canal was constructed by the Government of the Province of Canada, certain works near the head of that canal had the effect of raising the water along the shores of Hungry Bay, in Lake St. Francis, and flooding a considerable portion of the seigniory of Beauharnois. To overcome this the Government built a dyke through Hungry Bay, which crossed the feeder and had a flume with three sluice-gates at its entrance into the St. Louis river. The gates that the seignior had used up to that time were removed, and the three sluice-gates mentioned were constructed as part of the public work. It was not disputed that this dyke was part of the property of the province, and passed to the Dominion of Canada in 1867; but down to the year 1882 the seignior and his grantees remained in possession of the feeder and head-gates. In that year, however, a sum of $10,000 was voted by Parliament for the improvement of the River St. Louis, and a sum of $5,000 in each of the two years following. In connection with the work so provided for, the Crown took possession of the feeder, deepened and improved it, built a bridge over it, and took out and re-built the head-gates. It was not quite clear whether these works were undertaken by the Dominion Goverment at the request of the farmers who owned adjacent lands or of the mill owners, or at the request of both. It was clear, however, that none of the mill owners, of whom the suppli-

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ant was one, objected in any way to what was done. But after the work was completed, the Crown's officers continued in possession of both the feeder and the head-gates, and the suppliant complained to the Minister of Public Works that he was prevented, along with other mill owners, from exercising the control of the feeder and head-gates to which they were as such owners entitled. The result of this complaint was that the control and possession of the feeder and head-gates were handed over to the suppliant who retained possession until 1892, when the Government resumed possession against the will and consent of the suppliant, who gave up the keys of the gates without waiving any of his rights. Prior to the time when the Goverment in 1892 took possession of the feeder, the suppliant had acquired the rights therein of all the mill owners interested excepting one, the rights of the latter being acquired afterwards in the same year.

Held, that as the suppliant's *auteurs* were not in possession of the feeder and head-gates at the time of the deed of conveyance, they could not give him possession thereof as against the Crown; and that as the right of control and regulation of the head-gates had been in the Crown from the time the dyke was built, such right was not lost by the Crown ceasing to exercise it for the period above mentioned.

2. The suppliant while enjoying the right to have these works so regulated and controlled as to give him all the water he was entitled to, consistent with other public or private interest therein, had not the paramount or exclusive control and regulation of them, which, by the necessities of the case, were vested in the Crown.

3. The Crown is not estopped by any statement of facts or by any conclusions or opinions stated in any departmental report by any of its officers or servants.

PETITION OF RIGHT for the recovery of property in the hands of the Crown, and alleged to belong to the suppliant.

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

The trial of the case was begun at Montreal on the 8th October, 1902, and was continued on the following dates: June 23rd, 1903; September 2nd, 1903; October 27th, 1903; November 12th, 13th and 14th, 1903; December 10th and 11th, 1903.

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The case was now argued at Ottawa.

C. J. Fleet, K.C. for the suppliant.

The *Solicitor-General* (Honourable *R. Lemieux, K. C.*); *D. A. Lafortune, K.C.* and *L. J. Papineau, K.C.* for the respondent.

Mr. Fleet opened for the suppliant:

The petition in this case alleges that the suppliant is the owner of the feeder, in what is properly called the Seigniory of Beauharnois. The title to this feeder comes entirely from the seignior. The suppliant sets up his title as being founded on a deed from the late seignior, the Hon. Edward Ellice, in 1896, and asks for possession of the feeder, alleging that the Government had taken possession of the same and refuses to surrender it to him. Following on the defence, the suppliant made a motion asking the Crown to detail and specify the irregularities and informalities in the suppliant's deed, and to set up in detail the title under which the Government claims. Following on this motion the Government filed an admission. That refers to paragraph number 5 of the statement of defence which alleges that the Government owns the water, and that it therefore is owner of the feeder. Now, upon the issues raised under this admission and under the petition of right and the defence, we came before the court, and certain witnesses were examined on behalf of the suppliant, the Crown calling no witnesses at all. The witness W. H. Robert, speaks very fully about the question of the suppliant's ownership of the feeder. He said that his father was the owner and proprietor for many years, and in opposition to that we have the Government appearing, so Mr. Robert says, only in 1880, with a claim to be the owner of the feeder. Then we have the deed of

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1896, and I may say here that this deed is nothing more than confirmatory of the title that had been in Mr. Robert before the year 1896, and it was only taken to cover what were regarded as certain defects in the title, which were not substantial. After argument on this point Mr Lafortune, for the Crown, raised the point that had not been raised in the pleadings, viz.: that the deed of 1896 was the purchase of a litigious right, and consequently vested no right, and the Government declared its option of paying Mr. Robert one hundred dollars. Furthermore it was contended that the Crown was in possession in 1896, when the deed was given to Mr. Robert. Now, I say that this issue was not raised in any shape or form by the original pleadings, and I urge that the point should not be allowed to be raised in view of the admission of the Crown. I maintain that the admission establishes that the only defence was that relied on in that admission. But your lordship will remember that the court suggested that Mr. Robert set up his antecedent title, and further suggested that this might be done by affidavit; but I wish distinctly to say that there is nothing spread upon the record to show that this suggestion was made by your lordship or that the Crown raised this new point. When the court met again Mr. Robert produced an affidavit setting up his antecedent title, which my learned friend objected to because there was no opportunity of cross-examination upon the affidavit. The Crown also then asked for permission to file an amended plea, and your lordship granted that permission. This amended plea was admitted upon the record and the suppliant filed an amended claim, and certain documents. Then, by permission of your lordship, the affidavit was withdrawn, and is not in the record. Now, this practically constitutes the issue which is for your lordship's

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consideration. But I might have stated before closing my narrative of the facts that at the time my learned friend put in his plea he also put in certain exhibits— the judgment of the Hon. Edward Ellice, and the specifications of this dyke. That is their title to the property. The only officer of the Government who was examined was Mr. Pariseau. Mr. Pariseau thinks that this judgment which was filed completes the title of the Government to the property, and is the only title which he knows by which the Government holds any rights in the property. Now this dyke was constructed early in the "fifties" of last century. After the canal was built it was found that there had been an engineering error committed by which there was insufficient water in the canal, and to cure this defect it was necessary to build a side dam out in the centre of the river to conduct more water into the canal. Now, while more water was conducted into the canal, at the same time the effect was to raise the water along Hungry Bay, and to cause considerable damage. Such being the case the Government proceeded, about 1856, to build this dyke which ran from Knight's Point a number of miles up the river, and bordered upon Hungry Bay. Now, as a result of these damages an action was begun by the Hon. Edward Ellice for damages, and a judgment was entered up on the claim by certain arbitrators appointed under the provisions of the 9th Vict. c. 37. The verdict of these arbitrators was subsequently awarded and judgment in the Court of Queen's Bench was entered thereon for the sum of $50,000 in favour of the Hon. Edward Ellice. Now that is the judgment filed in this case; and looking at that judgment your lordship will see that it is based entirely on the statute 9th Vict. c. 37. This statute appointed certain commissioners of public works.

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[BY THE COURT:—I think the provisions of our present *Public Works Act* are based upon that statute.]

9th Victoria, chapter 37 is practically an expropriation Act. The powers of the commissioners are very expressly laid down, and, although, as a matter of law it would not seem to be necessary to make any such restriction expressly, their powers are expressed to be only those conferred by the Act. They have the supervision and direction of public works in course of construction, or those not yet taken over from contractors at the time of the passing of the Act. Then they are given power to acquire property for the Government for public works either by amicable arrangement with the proprietors or else by expropriation proceedings. In connection with any claim for damages arising out of any public work, they had power to award the amount of damages, and the finding of the arbitrators was made an order of court, and that is the way in which this judgment was arrived at. But it will be seen that the judgment in no way deals with the question of property at all, that is, so far as the property in this case is concerned. What it does refer to is an island out in the St. Lawrence, on which the fly dam was built. This claim of Ellice was not for land, except for Grande Ile taken for the dam; the burden of the judgment is an award to Ellice for $50,000 in connection with damages suffered by him from the waters of the Beauharnois Canal. There is nothing in this judgment to identify the land upon which the feeder is built in any shape or form. The feeder is not mentioned, and there is nothing to show that the land upon which the feeder is built is connected with the damages awarded against the Crown. Now, I think, we may assume that the Government paid $50,000 to the Hon. Edward Ellice for the damages sustained up to that time, and in order to protect them-

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selves and him from future damage they built this dyke.

[BY THE COURT:—Is there anything to show when the dyke was constructed?]

What I was about to say is that the $50,000 were paid under this judgment for damages sustained by the Hon. Edward Ellice, and beyond that there is nothing more in the judgment so far as the issue between the parties in this case is concerned. And then, we are to assume that the Government having been condemned to pay $50,000, took steps to protect themselves against any future claim by reason of any damages which Ellice might suffer.

[BY THE COURT:—These claims were paid once for all under the statute, I think?]

Your lordship is to take this judgment just as you find it. Your lordship is not permitted to go back and presume what object or intention the Government had in the matter. We are confined to the record here, and so far as the record shows they paid the Hon. Edward Ellice $50,000 for the damages he sustained, and then they built the dyke to protect themselves from future claims for damages.

[BY THE COURT:—Is there anything in the judgment to show that the award was for past damages only?]

I admit that the dyke was built to prevent future damages. On referring to the specifications for the dyke your lordship will see that it must go without contradiction that the Hon. Edward Ellice was the owner of the whole seigniory of Beauharnois, and was the owner of these head-gates at the time of the construction of the dyke. At the time the Government built the dyke the feeder was in the possession of the Hon. Edward Ellice, and the object of the feeder and head-gates was to add water to the River St. Louis, to supply power to the mills at Beauharnois.

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[BY THE COURT:—This feeder enabled them to provide a water-power by drawing water from the St. Lawrence to the River St. Louis?]

Yes. But I wish to say to your lordship that you will not in any shape or form find in the judgment any reference to the feeder, and yet the feeder were a very important thing to the seignior. The feeder was built for the purpose of increasing the water-power at Beauharnois. There was no water-power at Beauharnois independently of this feeder, and you have to keep this fact in mind. Without the feeder Mr. Robert would be deprived of the whole control of the water. The feeder and the head-gates exist for the purposes of water-power at Beauharnois, and the water power cannot exist without the feeder and head-gates. So you see how important they were for the proprietor at the time the Government took possession of the head-gates. Your lordship will remember that the witness Pariseau, in answer to a question by your lordship as to whether the head-gates formed part of the dyke or the feeder, said that they formed part of the feeder and not of the dyke. When the Government obtained land for the dyke they found the feeder was in possession of Mr. Ellice, as it had been for fifty years before, serving water-power to Beauharnois. After they had paid the $50,000 to Mr. Ellice they took steps to protect themselves against future damages, and in their own specifications they provide for the erection of gates, and on their own showing these gates were of incalculable value to the seignior. And in order to protect him they take care to specify that he should be provided with gates equally as good. Taking the specifications and the judgment together it will be seen that the award under this judgment does not touch the feeder or head-gates; and this point of view is strengthened when we remember

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that Mr. Pariseau says that the head-gates are part of the feeder and not of the dyke. Now I say that it would not be proper for the court to presume any arrangement between the seignior and the Government whereby the seignior would in any way lose control of these gates. On the contrary there is a presumption of law against the owner losing his property and we must have an intention on the part of the Government unequivocally shown before we can say that it was their intention to take possession of the head-gates. It was not difficult for them to have acquired them had they so wished. Under the statute I have referred to, the Crown could have expropriated them or acquired them by amicable arrangement with the owner. But if it had been the intention of the seignior to let them go and submit to arbitration, that fact would have appeared by some documentary evidence. If the Government came in and built any works on the land of the suppliant's *auteur* it would acquire title to them as owner *du fonds*. Of course if the seignior stood by and let another put works upon his land, it might give the other person a right to payment, but the right of property is in the seignior, in the proprietor of the soil. Now, I think it will be admitted that the seignior was the owner of the feeder at the time the Government took possession. And I think it will equally be admitted that in 1880, when the Government took possession of the feeder, that Mr. Robert was the owner. Under Quebec law a man is presumed to hold as proprietor unless the contrary is proved; and a man is entitled to add to his holding the title by holding of his *auteurs*. Then, joining Mr. Robert's possession to the possession of the seignior, we find that Mr. Robert has been in possession for some seventy years. I think the right date to fix as the period when the Government came into possession

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is the year 1882. (Arts. 2193, 2194, 2196, 2199 C. C. L. C.) On the evidence of Mr. William Robert there is no question that his father was in possession up to 1882, and these articles apply. As to the right to add the possession of one's *auteur* in order to complete prescription, see Art. 2200 C. C. L. C.

The Crown is alleging that the whole purpose which the Government then had in view in building this dyke would have been defeated unless they had control of the head-gates; but the facts are that they built the dyke in such a way that flooding would not take place on the property of the seignior. It is in evidence here that all the property covered by the plans for this public work, plans which were then before the Crown, was property belonging to the seignior, that as a whole belonged at the time to the Hon. Edward Ellice. The Goverment of the day provides that the head-gates built by them should be equal to those already there, and the whole object of the public work was to prevent damages being suffered by the Hon. Edward Ellice, and nobody else.

[BY THE COURT:—But may it not have been the intention of the Government to retain control of the gates; but because that would be a matter of expense, and no one except Mr. Ellice was at the time interested, the Government allowed him to continue in control of such gates?

The only person the Government was dealing with was the Hon. Edward Ellice. He was the party in possession of the lands affected. And I would like to call the court's attention to this point that, as a matter of law, there was at this time a Watercourse Act whereby the Government regulated the positions of persons damaged by watercourses, and placed the damages directly on the owner of the watercourse.

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(See *Consolidated Statutes* L.C., c. 51, entitled *An Act respecting the improvement of Watercourses*, sec. 1.)

[BY THE COURT:—I do not understand that this feeder was a watercourse? Would the Act apply here?]

It gives the right to build dykes and dams, and unless the penalty which was provided by the Act was paid the works causing the damage might have been demolished. That is the position the seignior stood in as to the head-gates; and that is the way the Government found it and that is the way they left it. Now, for a moment, I wish to call your lordship's attention to a position taken by my learned friends in this case, namely, that the antecedent titles could not be set up. The Hon. Edward Ellice sold from time to time certain rights in the water-power. In other words, he provided a certain amount of water-power for various parties, leaving the residue in his own hands. The amount disposed of to these parties was determined by so may "runs of stone," and he gave them certain servitudes, and certain liabilities as to the up keep and maintenance of the head-gates. The water-power was continuous and could not be separated. The suppliant gathered up these rights from time to time, and in 1871 the Hon. Edward Ellice sold out to the suppliant the balance of his seigniorial rights. That being the case, Mr. Robert from 1871 stood absolutely in the rights of the seignior with reference to this property. Everything by way of obligation or privilege in the feeder, whatever property was destined in the feeder, was destined in Mr. Robert. I have said that there was an obligation attaching to each holder of water privileges with regard to the up keep of the of the head-gates. This would be inconsistent with the right of the Government to the possession of the head-gates. Mr. Robert acted as owner, kept up the

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head-gates, and assessed upon the other owners their share of the maintenance of the head-gates. Prior to 1871 he had acquired from the other parties their rights, and in that year he got all the seignior's rights; and from that minute he exercised all the privileges, and was bound by all the obligations, of the owner of the head-gates. Mr. W. H. Robert says that nobody else has exercised the rights of ownership, or claimed any title, except the Government. With reference to the recent work that has been said to have been done by the Government upon the feeder, the witnesses on behalf of the Government say that certain employees of the Government did work there, but they do not say that they were paid by the Government, and it is in evidence that these men were actually in the employ and payment of Mr. Robert himself. There was a succession of guardians of these gates who were the employees of the seignior and afterwards of Mr. Robert. These witnesses constantly speak of the guardianship of the feeder being farmers in the employ of the seignior, right down to the time of Mr. Robert becoming possessed of all the rights in the feeder. The holding of the farm was part of the remuneration for looking after the feeder. The Government have brought no witnesses from the Department in this matter; they did not produce the superintendent of the Canal; they did not produce anyone who might be supposed to have a knowledge of the matter. We asked them to produce receipts, etc., and we got nothing from them. It was only in 1882 that the Government came upon the scene for the first time. But the Government gave up possession to Mr. Robert in the year 1888, and Mr, Robert remained in possession down to 1896. I have no doubt it will be contended that the acts of the Government officers will not bind the Government; that

the acts of the officers are not the acts of the Government *per se*. But if they were the owners—if the Government owned the head-gates and feeder—how do they explain the fact that they gave into Mr. Robert's possession the keys for four years? As to the reports, the evidence of Mr. William Robert explaining them is objected to, and his evidence taken subject to objection. We find in the report of Mr. Perley, C.E. a corroboration of the statements of W. Robert, McMartin and others. This statement by Mr. Perley, a Government officer, is confirmed by Mr. W. Robert and by the notice of one of the engineers to Leduc, who was guardian at one time, and who afterwards became an employee of Mr. Robert.

[BY THE COURT:—When did the Crown expend money on it?]

In the year 1882 the Crown appears on the scene for the purpose of spending money. Mr. Robert all through has taken the position that the property is his.

[BY THE COURT:—During the time this money was being spent by the Government?]

Yes. At the time Mr. Curran represented them, there is a protest by Mr. Robert as to the surrender of the keys.

[*By the Solicitor General*:—Mr. Curran was not acting for the Crown.]

No; and more than that, under our law the presumption of ownership is always in favour of the *status quo*. The mere fact that the Government having built on the land of the seignior gave them thereby no rights unless there was an agreement as to the *fonds*. As to the dyke I hear that the Government officers claim that they have acquired a prescriptive right; but be that as it may, Mr. Robert is in title from the time he took possession, and the reports of the officers of the Government show that he was in possession.

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[BY THE COURT:—What about the Public Works Accounts, do they not show the expenditure of the monies for the Government ?]

I recognize fully the difficulties with reference to this matter. Your lordship has suggested that the effect of what was done under *The Public Works Act* was to vest the property in the Crown, by the spending of money on it for repairs. But I say that as the record stands there is no jot or tittle of evidence to show that the Government has spent money on the property claimed by the suppliant.

[BY THE COURT:—Is there not some evidence on the record of some money having been spent ?]

There is the fact that the Government worked there, but there is no evidence that money was spent. I call your lordship's attention to the fact as it appears in the admission filed. I submit that the admission has all the force in the record as if there had been no amendment after it was made (Art. 1245 C.C. L.C.) This deals with the question of judicial admissions and their effect between the parties. There is a judicial admission filed in this case. These admissions rest the Goverment's case on the title and ownership in the water (Art. 1583 C.C. L.C). This deals with the question of the alleged rights of the Crown.

I submit that the rights acquired by Mr. Robert in virtue of the deed of 1896 are in no sense litigious rights. There is no question of right as between the seignior and Mr. Robert at the time of the deed. There is nothing which constituted a question between them, and under the circumstances Mr. Robert was justified in getting all the rights which his *auteur* could give him. We may also be perfectly sure that there was no dispute between the Government and the seignior. All these facts being so, it is in no sense a conveyance of litigious rights. The Government

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appears in 1882, and continues in possession until 1888. The court has suggested that it would be well to examine the law in force at the time, which so far as I can see would be *The Public Works Act* of 1867, which would govern and control the rights of parties (1). Bearing in mind that the Government appeared in 1882 and disappeared in 1888, then after 1888 it ceases to be a public work for any purpose. The Government then handed over to us the keys and recognized us as the owner. I refer to the report of Mr. Perley, where he declares that there was an abandonment to us. And it must further be remembered that after the Government resumed possession in 1896 the protest of Mr. Robert is spread out on this record. All through the record it will be found that Mr. Robert takes issue with the Government as to the right of possession. More than that, even before the Government gave us possession Mr. Robert was making a protest. Before the surrender of possession to us Mr. Robert was insisting that he was entitled to the head-gates. As to the spending of the money upon the feeder, it was an expenditure made for the farmers, and not for the seignior or Mr. Robert. The necessity for the expenditure was the result of the farmers digging out the soil for ditches, and the silt filtered down to the dam and caused the water to flow back, so it was worse than before.

This is, I think, all that is necessary in the facts of the case to direct your lordship's attention to.

The Solicitor General:—I appear at this late stage of this case, as my learned friends Messrs. Lafortune and Papineau were agents for the Department in the matter. As they are familiar with the facts they will present them more fully to your lordship.

(1) Sections 2 and 10.

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Now as the question of the admissions by the Government of what is called the suppliant's title to the property in question here, your lordship will see that the reports present only the views, or the opinions, of these special officers. What they say amounts to nothing more than an opinion, and it cannot bind the Crown. Nor can they be taken as admissions of Mr. Robert's title. As to the two formidable arguments which your lordship has suggested as to the Crown's rights to this feeder, and as to the position the Crown occupies in this property, I cannot add to them with any benefit to the Crown. The suppliant in his petition has based his rights on a certain deed passed in 1896. Again, counsel for the suppliant has said that Mr. Lafortune, acting for the Department, has made certain admissions of great importance to the suppliant's case. Mr. Lafortune made these admissions at a time when he could make them without prejudicing the rights of the Crown, because at that time the suppliant had not registered his titles. Without registration he could not dispute the title of the Crown.

[*Mr. Fleet*:—It was only the copy served on the sollcitors for the Crown that was defective. The deed itself was registered before.]

[BY THE COURT:—The argument, as I understand it, is that the admissions must be read in view of the state of the pleadings when the admissions were made. They relate to the position of the cause at that time.]

The Solicitor General:—Certainly.

[BY THE COURT:—But the suppliant has been allowed to go back and show an earlier title.]

Yes, he does pretend that he had an earlier title; but the title upon which is based this petition of right was acquired by Mr. Robert solely from the Hon. Edward Ellice. He acquired this for the sum of

twenty pounds. Then we have it that he acquired all the rights he claims to exercise over this feeder for twenty pounds. Now this deed under which he claims, in Quebec law, is the conveyance of a litigious right, and that being so, the suppliant is entitled to receive from the Crown only the amount which he paid his *auteur* for it, that is the sum of twenty pounds which he paid to the estate of the Hon. Edward Ellice. (Arts. 1582, 1583 and 1584 C.C.L.C.) It was under these articles that Mr. Lafortune made the admissions he did, knowing that the suppliant could not obtain from the estate of Ellice any more rights than they, as his *auteurs*, had in the property. Counsel for the suppliant said that Mr. Robert was in possession in 1882, but it appears by the evidence which is before your lordship that since the time the dyke or embankment was built the Crown has practically held control of the head-gates. The Crown has paid persons as its agents, residing near the head-gates to open or close the gates. Since the time they were built by the Government Mr. Robert, or some other person, has been occasionally allowed to have control, under the Government, of the head-gates ; but during all that time the Crown has not made any abandonment of its rights. It has simply employed some third persons to look after the head-gates for it. This is clear from the evidence. The Crown since the time the dyke was built has had the practical control of the head-gates and in order to placate the owners of water privileges the Crown gave the keys to Mr. Robert ; but this was in no sense a permanent surrender of the Crown's rights. Mr. Ellice was the seignior of Beauharnois when the Government built the Beauharnois Canal. An error having been committed by the engineer in the construction of the Canal, they had to build a dam between two islands in order to give a larger

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quantity of water in the canal, and the building of this dam caused some flooding on the shores of the seigniory. That being so, the Hon. Edward Ellice took action under 9th Vict., c. 37, for damages suffered by him at that time. An award was made, and that award went before the Superior Court. The Crown paid $50,000 under that award as damages for the flooding. Now, there has been some doubt cast upon the particular property affected by this judgment, or mentioned in it. But upon the facts of this case it is shown that the flooding did not take place on Grande Ile, but in the village of Catherinesville. The Government paid the $50,000 and then built the dyke. Would it be equitable then for Mr. Robert, who is *au droit* of Mr. Ellice, many years after the full receipt was given by the suppliant's *auteur* and no protest was filed, the dyke being in existence at the time the award was paid, would it be equitable for Mr. Robert to be allowed to dispute the title of the Crown at this day? Clearly, neither Mr. Ellice nor his heirs have any claim to the head-gates. Surely it could not be contended that the Crown deepened or widened the feeder merely to please Mr. Ellice or his heirs, or Mr. Robert, who succeeded them. To say that the expenditure of money was for this purpose is preposterous. Counsel for the suppliant contends that clause 10 of the *The Public Works Act*, 1867 applies, but reading carefully the clause and the exceptions he refers to, I say that the suppliant is not within the exceptions. The interpretation he seeks to put upon this clause cannot be substantiated, so far as his client is concerned. One Simmons at a certain time claimed the feeder as his own property; therefore in his long chain of titles the suppliant has not been able to establish possession which has been uninterrupted. On the contrary it has been interrupted, and has been equi-

vocal. I ask has there been any lease or sale of the head-gates by the Crown to Mr. Robert or to his *auteur*? I claim that there has not been.

My learned friend has cited several articles of the *Civil Code* under the title of "Prescription." But there are certain elementary principles which cannot be ignored by the court. One of these principles is the fundamental one that there is no prescription against the Crown, and neither Mr. Robert nor his *auteur* could prescribe against the Crown. Mr. Ellice being the seignior, was entitled to certain rights, as proprietor *du fonds*, but that does not give him any right to the improvements which were not done to improve the property of the seigniory. More than that the seigniorial rights were abolished by statute and his *censitaires* could redeem, and so it was not only for the seignior but for the *censitaires* that these improvements were made, and the titles filed by the Crown show that they had been redeemed. The rights which the seigniors lost under the statute were the rights in non-navigable waters, and if it were shown that such a right belonged to the seignior it became vested in the Crown by the abolition of the seigniorial rights. By reading the answer to the added plea filed by Mr. Lafortune I find that there was a lease of the water lots, but the suppliant got this lease subsequent to the filing of the petition of right, therefore it should not be considered at all in this case.

Mr. Papineau followed for the respondent, explaining to the court the position of the farmers of the district with respect to the feeder. Since the dyke was built the property has always been regarded as Government property. There is a highway passing along the feeder. This highway has been used by the public as the front road to the farms along the feeder, the feeder going from Lake St. Francis to the St. Louis

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River. Under the contract of 1854 the feeder was required to be twelve feet wide. It was built as part of the Government works, and the suppliant now claims a part of the dyke itself. Furthermore the lot claimed by the suppliant in his petition of right would not give him possession of the head-gates because they are on another and a distinct lot. The suppliant claims lot No. 341 on the cadastre, while the head-gates and part of the dyke claimed are within lot No 340. The plans show that this dyke is a separate property from the feeder.

Mr. Lafortune followed for the respondent. In connection with the last objection raised by Mr. Papineau as to the location of the head-gates on the lot claimed, I refer to paragraph 5 of the amended defence. The burden of proving the allegation as to the location of the head-gates was upon the suppliant. It was necessary for him to show that the head-gates are on the lot that he claims. It was not for us to prove his case, and he was not taken by surprise by the issue raised as to this point.

Since 1882 the Government has refused to admit that the suppliant was the owner of this part of the land claimed, and so he got the deed of 1896 for the purpose, as he says, of suing the Government. He got this deed purposely to sue the Government, and if this is not a litigious right, I do not know what a litigious right is. It was to enable him to bring this suit. The only deed he alleges is the deed of the 3rd of August, 1896, and it was not to correct any error in the preceding deeds. He did not get permission to add to his title until after the evidence was taken and the argument commenced. I had given my admission under the first plea, and then it was correct, because he had no right against the Crown with a deed absolutely null. In that view of the case I made

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the admission, and I do not regret it now; but after the pleas were amended, and the position of the parties was changed, he says: "Now I will hold you to your admissions." I submit this is impossible.

The suppliant has not produced a single deed to show that the property in question was bought by him. He filed deeds showing that the seignior had sold to certain parties and they had conveyed their rights to Mr. Robert, but they could give him no more rights than he had himself, and so we come down to the fact that he claims under the deed of the 3rd of August, 1896. The Government knew that he claimed his title under the deed of 1896, and they knew that his title was no good. The date of registration is the date of transfer. When Robert got his petition of right granted he was not the proprietor of the land, because he registered his deed after that, and the registration could not be given a retroactive effect.

There is nothing in the titles filed showing that he had bought the land mentioned in the deed of 1896.

As to the judgment rendered in 1854, it was then and there agreed between the parties that the dyke should be built—that must be presumed. It must be presumed, because the seignior was residing near the dyke and he was aware of what was going on, and so I say that it is right that we should assume that he had agreed that the Government should take the land.

The damages were paid once for all, and after that the dyke was constructed and approved by everyone. The suppliant knows that the Government has spent thousands of dollars upon the improvements there. He stood by and allowed the Government to spend thousands of dollars, and he never pretended that he was the owner. Without that dyke the feeder would be worthless. The suppliant has admitted that. Then I say that since 1854 we have had possession of this

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property. Now counsel for the suppliant says that if we had been owner then it would have been impossible for us to give the keys over to Mr. Robert; but I say that the argument works both ways, and I say to him how does it come that you give us back the keys if you are the owner? Mr. Robert recognized the right of the Government by surrendering the keys to the Government. Since 1884 several bridges were built across the feeder at certain points by the farmers. There was no protest from Mr. Robert. If he were the owner, would he not have objected to this? The bridges there connected with the public road. Can we imagine that Mr. Robert would see the fences along the feeder and not order them down if he owned the property?

[BY THE COURT:—Is there any land there that is useful for any purpose not connected with the feeder?]

[*Mr. Fleet*:—No, there is not. The land there is only useful as accessory to the feeder.]

We are both agreed as to that. Mr. Robert has acquiesced in the Government works and cannot claim the land on which they are situated. The works were there to protect the Government, so that it would not be exposed to future damages. They were to be controlled by the Government. If Mr. Robert gets possession of the feeder he may close the water from the other millers. He has no public interest in it, and therefore the head-gates should be in the hands of the Government. We object to Robert being declared sole and only proprietor of the feeder. Counsel for suppliant said that the object of the feeder was to serve the mills at Beauharnois. That is correct.

[BY THE COURT:—I understand that the Crown intends to assert its right to the ownership of the head-gates and feeder in perpetuity.]

[*The Solicitor General*:—Yes.]

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[BY THE COURT:—Could not all questions then be settled by expropriation proceedings?]

[*Mr. Fleet*:—I ask for judgment on the case as it is now presented to the court.]

[*The Solicitor General*:—There is no question that the Government intend taking the feeder and the gates, and I think that the suggestion made by your lordship would be acceptable to the Crown.]

[*Mr. Fleet*:—I want to force the Crown's hand in this matter, and I would ask your lordship to give judgment as soon as possible, because the position of affairs is simply unbearable.]

[*The Solicitor General*:—For my own part I may say that I helped my learned friend to get his petition of right, because I thought the suppliant had no good rights in the land, and the matter might as well be determined by the courts. This was before I became Solicitor General.]

[BY THE COURT:—Even suppose my judgment went as you contend it should, Mr. Fleet, the Crown could by appropriate proceedings retain its possession.]

Mr. Lafortune:—As to the official reports by the Government officers, they are not binding on the Government. No one is presumed to renounce his rights, and more particularly the Crown. The Crown is in possession for everyone. I have the right to give my property to anyone I please, but the Crown holds its property for the public. The Crown cannot give away the public interests. Therefore I submit that extrajudicial declarations made by officials are not binding on the Crown. My learned friend says that Mr. Robert would have nothing if the feeder were taken away from him for the money he has spent in the feeder; but Mr. Robert might have a claim against the Government for whatever he had spent if he were not liable to keep up the head-gates. The Govern-

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ment is the proprietor of the feeder and if the Government were to close the gates it would do so with respect to the interests of everyone; it would not respect Mr. Robert any more than any other member of the public.

Counsel for the suppliant contends that the property, being once in the possession of Mr. Robert, it must be regarded as his when the Government gave him possession and the keys for a limited period. True, it was for a time in the Government's hands and for three or four years in Robert's hands; but what does it amount to, this intermediate possession, for the purpose of showing who is the real owner? I might hand you the keys of my property and ask you to go and take possession for me, but that would not mean that you were to consider yourself as owner. The mere taking of the keys was nothing in itself. Robert was to have possession under the Government to use the head-gates for the purposes for which the Government maintained them. Then again, there is another fact, the Government put a dredge into the feeder. Mr. Robert never objected to the dredge being there. No one can force me to keep my individual property in repair, and the Government would not have attempted to force Mr Robert if it were his private property; but this was not private property, and the Government made these repairs for the protection of the public. Up to 1882 the Government had possession. From that date down to the time Mr. Robert got the keys the Government was in possession. The feeder was intended to be for the advantage of the mill owners. If Mr. Robert were declared sole proprietor, the mill owners would be disappointed. Then my learned friend says that Mr. Robert bought certain rights. Well these rights do not advance him against the Government. Mr. W. Robert's verbal testimony

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of proprietorship is ineffectual. It must be founded on a deed. As to Mr. Robert's contributing to the keeping up of the head-gates, keeping them in repair, he was working in common with others for the general good of those interested. The expense was borne in common by the proprietors interested for years.

Mr. Robert brings his own book of entries to prove his case against the Crown. That is no proof; he cannot make evidence against us in that way. It was easy for Mr. Robert to bring witnesses to prove that he was reputed to be the proprietor. But the fact is that it was regarded as Government property. Can we sever the possession of the feeder from the possession of the dyke? If you close the one the other is useless. The head-gates are no good without the feeder, and the feeder is no good without the water. (He cites the case of *Meloche* v. *Déguire* (1). This case bears upon the question of the sale of litigious rights. It is against public policy to allow such right to be assigned. He also refers to the case of *Phillips* v. *Baxter* (2).

Mr. Fleet, in reply: The Government paid the $50,000 as compensation for damages; they did not pay it for any land expropriated. The Crown continued to recognize the seigniorial rights after the payment of this money.

It is the rear end of the farm that abuts on the feeder and a certain number of farmers have removed their fences, and taken in this property, and it is only since 1882 that the Government appears on the scene.

With regard to the various parties interested in this particular feeder your lordship knows that the water-power at Beauharnois was the object for which the feeder was built. Now Ellice owned the water-power at Beauharnois, and he built the feeder to increase the water-power. The president of the Dominion Woollen

(1) 34 S. C. R. 24. (2) 23 S. C. R. 317.

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Mills says that their water-power and Mr. Robert's water-power, and an additional ten horse-power, are the only rights affected, and the owner of the ten horse-power is not complaining. As to the ten horse-power they get their power after Mr. Robert gets his, and the Dominion Woollen Mills get their power from Mr. Ellice. Ellice got title to the Bourgier property, and that is between where the feeder strikes the St. Louis River and Beauharnois. I state this as an incontestable fact.

The court has simply to do with what is on the record. The suppliant wishes to be out of the agony of these proceedings, and obtain a judgment on the record as it stands.

THE JUDGE OF THE EXCHEQUER COURT now (October 17, 1904) delivered judgment.

The suppliant, alleging that he is the owner and proprietor of a certain feeder or canal in Catherinestown, in the Seigniory and District of Beauharnois, constructed by the late Edward Ellice, in his life-time the seignior of Beauharnois, for the purpose of conveying water from the River St. Lawrence to the River St. Louis, together with about half an arpent of land in depth on the easterly side and one arpent in depth on the westerly side of the said canal along its whole length, together with the head-gates and other gates, works or lands in connection therewith, and that the Crown's agents and servants have unlawfully entered into possession of the property mentioned, and more particularly of such head-gates and other gates connected therewith,—asks that judgment be rendered declaring him to be the sole owner and proprietor of the said feeder, the lands attached thereto, and more particularly of the said head-gates and other gates, and alone entitled to the possession, control and dispo-

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sition of the same; and that His Majesty be declared to be without any right or title therein.

During the progress of the proceedings the respondent had leave to amend the statement in defence. The terms of the amendment were, I think, mentioned and discussed when the motion to amend was made, but no formal amendment appears to have been filed with the Registrar.

The substance of the defence, however, is that the suppliant is not the sole proprietor of the feeder or canal, and of the head-gates, lands and works connected therewith, and entitled to the exclusive possession thereof; but that the Crown is entitled to such possession. The main controversy in the case turns upon the right to the possession of the head-gates by which the admission of water from Lake St. Francis to the feeder is controlled. It is conceded that the feeder and the lands that have been set apart and reserved as appurtenant thereto are not of any considerable value or importance, except as they afford the means of conducting the water so admitted from lake St. Francis to the River St. Louis, upon which are situated the mills that are in part dependent upon such water for the power that they use. While the head-gates mentioned are from the standpoint of one interested in the transmission of water from Lake St. Francis to the River St. Louis the means of admitting and controlling such water, and so, from that point of view, a part of such feeder, they are also a part of a dyke extending for some miles from Knights' Point westerly to a point near the boundary line between the seigniory of Beauharnois and the township of Godmanchester; and by means of which the waters of the lake are held back and kept from overflowing and flooding the adjacent lands. This dyke, as will be seen later, is a public work of Canada, and from that point of view the head-

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gates in question constitute a part of a public work. They serve in fact a double purpose, and this incident has, I think, given occasion for the present controversy. But before referring to the course of events that has led up to it, some reference ought perhaps to be made to the provisions of the statutes that have from time to time been in force in the late Province of Canada, and in the Dominion of Canada, respecting public works.

By the Act of the late Province of Canada, 9th Victoria, chapter 37, provision was made for the appointment of Commissioners of Public Works, who were given certain prescribed powers with respect to the construction of the public works of the Province, and the acquisition of lands required for such purpose. Provision was also made for the appointment of Arbitrators, to whom the Governor in Council might refer for their decision (among other claims) any unsettled claim or claims for property taken, or for alleged direct or consequent damages to property arising from the construction or connected with the execution of any public work in any part of the Province. By the provisions of the twenty-third section of the Act cited, and of the schedule thereto, the following, among other public works, were declared to be vested in the Crown, namely :—"All such portions of "the Saint Lawrence navigation, from Kingston to the "Port of Montreal, as have been or shall be improved "at the expense of the Province," and at the conclusion of the enumeration of a number of public works was added in general terms :—"And all other canals "locks, dams, slides, bridges, roads or other public "work of a like nature, constructed or to be constructed "repaired or improved at the expense of the Province." These descriptions cover and include the improvements made and the public works constructed at Lake St. Francis. The provisions mentioned, or similar pro-

visions, are to be found in later statutes of the Province of Canada relating to public works (22 Vict. c. 3, ss. 10 and 37, and schedule "A"; C.S.C. Chapter 28, ss. 10 and 37, and schedule, "A.")

By *The British North America Act*, 1867, s. 108, and the third schedule to that Act, the following, among other Provincial Public Works, became the property of Canada:—namely, "Canals, with lands and water-power connected therewith," and "Rivers and Lake improvements." Then in the tenth section of the Act, passed in the first session of the first Parliament of Canada, 31st Victoria, Chapter 12, entitled *An Act respecting the Public Works of Canada*, we have a general description of the public works which are thereby declared to be vested in the Crown, and to be under the control and management of the Minister of Public Works. In this description, with some exceptions that need not at present be noted, are included: "the "canals, locks, dams, hydraulic works, harbours, piers "and other works for improving the navigation of "any water.....and all other property heretofore "acquired, constructed, repaired, maintained or im-"proved at the expense either of the late province of "Canada, or of New Brunswick or Nova Scotia, and "also the works and properties acquired or to be "acquired, constructed or to be constructed, repaired "or improved at the expense of Canada."

In 1872 an Act was passed "to remove doubts under" *The Public Works Act* 1867 (1), by which it was provided that "every canal, lock, dam, hydraulic work, harbour, "pier, public building, or other work or property of "the nature of any of those mentioned in the tenth "section of the Act cited (2); acquired or to be ac-"quired, constructed or to be constructed, extended, "enlarged, repaired or improved, at the expense of the

(1) 35 Vict., c. 24, s. 1. (2) 31 Vict., c. 12.

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"Dominion of Canada, or for the acquisition, construc-"tion, repairing, extending, enlarging or improving of "which any public money has been or shall hereafter "be voted and appropriated by Parliament, and every "work required for any such purpose is and shall be "a public work under the control and management of "the Minister of Public Works" The section concludes with a proviso that the Act shall not apply to any work for which money is appropriated as a subsidy only. Similar provisions occur in the chapters of *The Revised Statutes of Canada* respecting Public Works, the Expropriation of Lands and the Official Arbitrators (1); and are to be found in *The Expropriation Act* now in force (2). Before concluding this general reference to the statutes relating to the public works of Canada, it may be observed that the tenth section of the Act last cited, following in that respect the Act thereby repealed (3), provides that a plan and description of any land at any time in the occupation or possession of Her Majesty and used for the purpose of any public work may be deposited at any time in the manner provided in the Act and with the effect of vesting the property in the Crown, saving always the lawful claims to compensation of any person interested therein. And whenever the Crown desires or intends to acquire or retain a limited estate or interest only in property, that may be done by indicating such intention in appropriate words written or printed upon the plan and description so to be filed (4). These powers if exercised would enable the Crown, whatever the result of the present litigation may be, to retain its possession of the property in question here, without of necessity interfering with the suppliant's rights to the

(1) R.S.C., c. 36, ss. 2, (c) and 7; c. 39, s. 2 (d) and 5; c. 40 s. 1 (c).

(2) 52 Vict. c. 13 s. 2 (d).

(3) R.S.C., c. 37, s. 5 (4).

(4) 3 Edw. VII., c. 22, s. 1.

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use of the water supplied by the feeder mentioned. But these powers have not been exercised, and the questions in issue come up for decision as though no such powers existed or were vested in the Crown.

The canal or feeder, for the recovery of which, with its headgates and lands appurtenant, the petition is filed, was constructed early in the last century by the then seignior of Beauharnois through his own lands; and for the purpose, as has been stated, of increasing certain water-powers on the River St. Louis. And from that time to the present he and his grantees have continued to use the water supplied by the feeder for the purpose mentioned. That the feeder, with its gates and appurtenances, was originally the private property of the seignior, there is no question. Later in the century, when the Beauharnois Canal came to be constructed by the Government of the Province of Canada, it happened that certain works, constructed at or near the head of the canal to increase the depth of water therein, had the effect of raising the water along the shores of Hungry Bay, on Lake St. Francis, and thereby caused a considerable portion of the seigniory of Beauharnois to be overflowed. To overcome this difficulty a dyke was constructed by the Province from Knights' Point through Hungry Bay to the township of Godmanchester. The contract for the construction of this dyke bears date of the first day of March 1855 (Exhibit B). The dyke was, as will be seen by reference to the specification attached to the contract (Exhibit A), a substantial work, "fourteen feet wide at the top and "raised two feet above the guard lock coping, except "where otherwise described, with side ditches gene-"rally and culverts at certain places connecting with "off-take drains leading either to Marcheterre's culvert, "the feeder, or main trunk of the River St. Louis." The land to be occupied by the dyke was to be cleared

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for at least eighty feet in width, that is to say, forty feet on each side of the centre line. This dyke crossed the feeder and it was provided that at the entrance thereof to the River St. Louis a flume should be constructed twelve feet wide on the clear; and that at the upper side of this flume there should be three sluice-gates to be constructed and to work in the manner described in the specification. The gates that the seignior had up to that time used were removed, and the sluice-gates mentioned were then constructed as part of the public work.

These transactions took place a long time ago, and naturally the evidence of what occurred between the Commissioner of Public Works of the time and the then seignior, with respect to the flooding of the latter's lands and the construction of this dyke, is meagre and incomplete. It is clear, however, that it was built on what prior thereto were the seignior's lands; and there can, I think, be no doubt that it was constructed to mitigate or diminish the damages that he suffered. No formal conveyance or surrender from the seignior to the Crown of the lands on which the dyke is built has been produced; but that title was acquired by the Crown in some way, by surrender, or dedication, or prescription, is not in dispute. This dyke was no doubt the property of the late Province of Canada; and since the union of the provinces in 1867 it has been the property of the Dominion of Canada.

It also appears that all the damages the seignior suffered by the flooding of his land and otherwise were not obviated by the construction of this dyke; for we find that in 1859 he was prosecuting a claim for such damages before the arbitrators appointed under the Act 9th Victoria, chapter 37, to which reference has been made. The arbitrators, by their award in that proceeding, made on the 4th of June, 1859, "having

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"considered the advantages as well as the disadvan-
"tages of the Public Works in question as respects the
"land or real estate of the said claimant, through which
"the said works pass and to which they are contig-
"uous," found "that any disadvantage or damage
"arising to the claimant from the said Public Works
"was fully compensated by the advantages accrued or
"likely to accrue from the said works," and in consequence awarded him nothing. On appeal to the Superior Court of Lower Canada that award was set aside and judgment entered for the claimant for £8575-0-0 currency, and for his costs. A further appeal being prosecuted to the Court of Queen's Bench, the judgment of the Superior Court was affirmed, and interest thereon allowed. The judgment of the Superior Court was rendered in 1861, and that of the Queen's Bench in 1866. In May, 1868, the Bank of Montreal, as attorney for the person then entitled thereto, was paid by the Receiver General of Canada the sum of $56,185.75 in full of the said judgment, interest and costs.

After the construction of the dyke the seignior remained in possession of the feeder; and in disposing from time to time of mill properties on the St. Louis River, of which he was the owner, he granted to the purchasers a right to the use of the water supplied by the feeder, with a corresponding obligation on the part of the grantees to contribute proportionally to the expense of keeping the feeder in repair. In December, 1866, certain mill owners, lessees and others interested in the water-powers on the River St. Louis, at a meeting held in the seigniory office at Beauharnois, formed themselves into an association "for the purpose of
"making all necessary works, and keeping the said
"river St. Louis and Feeder between the River St.
"Lawrence and River St. Louis clear of all obstruc-

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"tion, making all necessary repairs and alterations "to dams, gates, etc. in connection with the said "River St. Louis and Feeder or small canal; also "to have all obstructions removed from opposite "the mouth or upper end of the Feeder whether "caused by ice or any other material". The question as to whether the man who was at this time, and for a number of years afterwards, in charge of the head-gates of the feeder was appointed and paid by the mill owners, is in dispute. That he was paid by the mill owners for services rendered in this connection has been satisfactorily proved. There is no evidence that he was paid anything by the Crown; and no satisfactory evidence that he was appointed by it. And I think the fair conclusion to be arrived at is, that after the construction of the dyke and down to the year 1882 or 1883, the seignior and his grantees remained in possession not only of the feeder but of the head-gates in question. In the year 1883 a sum of ten thousand dollars was appropriated by Parliament for the improvement of the River St. Louis, and a sum of five thousand dollars in each of the two years following. There is no reference in the appropriation Acts of these years to the feeder itself; but in connection with the work then provided for the Crown took possession of the feeder, deepened and improved it, constructed a bridge over it, and took out and rebuilt the head-gates. In a report made by the late Mr. Henry F. Perley, then Chief Engineer of Public Works, under date of April 13th, 1888, with reference to a complaint made by Alex. Clark and others that their lands were flooded by water from the feeder, Mr. Perley stated that the work mentioned was undertaken by the Department of Public Works at the request of the mill owners at Beauharnois; while in a letter from the suppliant to the Minister of Public Works, dated at

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Beauharnois the 20th of February, 1888, it is stated that the work of deepening the feeder was undertaken by the Government at the request of the farmers who owned lands along the River St. Louis. And from another letter or report of Mr. Perley's, under date of the 28th of September, 1888, it may, I think, be inferred that both the mill owners and the farmers interested were asking to have the work done. It is perhaps not a matter of great importance at whose instance the work was undertaken, or upon what grounds the Minister of Public Works was led to the conclusion that the work was one on which the public money of Canada could with propriety be expended. The money was voted and expended and the work executed. So far what was done met, I think, with the approval of both the farmers and the mill owners interested; at least there is nothing to show that anyone objected to what the Minister or Public Works then did. But after the work was completed, the Crown's officers continued in possession of both the feeder and the head-gates. This was not satisfactory to the suppliant, who was one of the mill owners. In his letter to the Minister of the 20th of February, 1888, already referred to, he complained that the Government instead of leaving the works, once the same were finished, without any right assumed control of the feeder and of the head-gates thereto, and prevented him and others exercising the control of the feeder to which they were as owners entitled; and that the Government, by the action of its employees entrusted with the control and management of the gates at the head of the canal, had seriously interfered with the feeder and assumed to regulate the supply of water, without any regard to the mill owners, and to their great loss and damage. And he asked that the Government would recognize his rights, and so use any they might

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claim upon the River St. Louis and feeder as not to interfere with the acquired rights of himself and others acquiring from him, and that they should have the control of the supply of water necessary for the prosecution of their business; that is, that they should have the exclusive possession and control of the head-gates of the feeder. The suppliant's application at that time to the Minister of Public Works was successful. Later in that year, (about the end of October or the beginning of November) the Minister dispensed with the services of the person who, under him, was in charge of the head-gates, and handed over the control and possession thereof to the suppliant, who retained possession until the year 1892. In February of that year the Government resumed its possession of the feeder and the control of the head-gates, and has since retained such possession and control. This was done against the will and consent of the suppliant who gave up the keys of the gates for the purpose of avoiding difficulties, and without waiving any of his rights.

The rights in the feeder which the suppliant and other mill owners had up to this time acquired were, as has been observed, acquired in connection with certain mill properties on the River St Louis, and consisted of a right to the use of the water supplied by the feeder with a corresponding obligation to contribute to the expense of its maintenance and repair. The property in the feeder remained in the grantor, who created servitudes therein in favour of the respective grantees of such mill properties, reserving to himself the right to call upon them for contribution to such expense. In 1871, Mr. Edward Ellice, in whom the property in the feeder and the lands appurtenant thereto then was, abandoned in favour of the suppliant and transferred to him all rights he might

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have to make or call upon any of the proprietors of the water-powers at Beauharnois to make repairs to the dam or canal in connection with such water-powers; but without being in any way responsible for any expenses, damages or trouble that the latter might incur in using or enforcing any such rights; and he also transferred to the latter, his heirs and assigns, all rights that he might have to improve the feeder, so as to bring more water into it, which water if brought in by the suppliant, or his representatives, should, it was agreed, belong to him and them. When the Crown took possession of the feeder to deepen it, the mill owners interested in the supply of water therefrom appear to have been the suppliant and two other persons named, respectively, Viau and Browning. The latter's rights therein were acquired by the suppliant in 1884, while the work of deepening was going on, and Viau's rights in April, 1892, after the Government had taken possession of the feeder for the second time. On the 31st of August, 1896, Mr. Edward Ellice's legal representatives, in consideration of the sum of twenty pounds sterling, and a covenant to indemnify them against any claims arising out of or connected with the feeder, its construction, conservation, maintenance, repair and use, but without any warranty of any kind or description, or any liability to refund the purchase money, or any part thereof under any circumstances whatever, conveyed to the suppliant the feeder, with the lands, head-gates and other works appertaining thereto, and subrogated him to all their rights therein. As Edward Ellice's representatives were not, in 1896, in possession of the feeder they could not of course give the suppliant possession thereof, and to obtain that possession, and more especially to obtain control of the head-gates, he brings this petition, and he rests his right to maintain it upon the

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deed or conveyance of August 31st. 1896, referred to, and upon the possession that he and other mill owners entitled to use the water supplied by the feeder had for the purpose of keeping it in repair; and upon the action of the Minister of Public Works in giving up possession to him in 1888. This action was taken upon advice given upon a statement or report of the facts made by Mr. Perley, the Chief Engineer of the Department. As the suppliant relies very strongly upon this report, and upon another report made by Mr. Perley earlier in the same year, to both of which reference has already been made, it seems proper even at the risk of some repetition to give the reports in full.

On the 13th of April, 1888, Mr. Perley wrote as follows to the Secretary of the Department of Public Works :—

"OTTAWA, 13th April, 1888.

"SIR,—With reference to the complaint made by Alex. Clarke and others (see Nos. 85818 and 86294) that their lands along the 'feeder' between the St. Lawrence at Valleyfield and the River St. Louis are flooded by water from the feeder, I have to state that this 'feeder' was opened over eighty years ago by the seigneur of the property for the purpose of supplementing the supply of water to his mills on the St. Louis, and that he opened the feeder through his own property, and for purposes in connection therewith, reserved on the western side a strip of land an arpent in width and on the eastern side half an arpent in width for the whole length of the feeder, a distance of about four miles.

"This 'feeder' was opened through what is known as a cariboo bog or swamp.

"Some years ago a request was made by the mill owners at Beauharnois to have their water supplemented by increasing the dimensions of the feeder, and this work was undertaken by the Department.

"Before a commencement was made, an enquiry was instituted as to the ownership of the 'feeder' and the reservation, which it was found remained with the seigneur, who had left the country, and so far as the Department could learn without having made any provision relative to the 'feeder.'

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"The Department had the reservation laid out by metes and bounds and proper boundary marks placed, and when the work of deepening was commenced, the swamp on either side was unsettled.

"As soon as it was found that the deepening was draining the bog and rendering it fit for habitation it was taken up and houses were built, and the land placed under cultivation.

"For the purposes of drainage the occupants of the different lots themselves opened drains without leave or permission across the reservation on either side of the 'feeder,' and the damage which they complained of, viz., the flooding of the lands, is simply due to the fact that the water when high in the 'feeder' flows up these drains, and it is in my opinion from no fault or act of the Department that this flooding takes place. The occupants of farms on either side of the feeder have trespassed on the feeder reservation, have opened drains through it without permission, and the simplest plan for them to avoid being flooded is that they shall fill their drains up again, for I cannot see that it is the duty of the Government to provide a remedy.

I am, sir,

A. GOBEIL, Esq.,
Secretary,
Department Public Works.

Your obedient servant,
(Sgd.) HENRY F. PERLEY,
Chief Engineer."

And then on the 29th of September, 1888, in reply to a request by the Minister of Justice to be advised as to the facts of Mr. Robert's case, he wrote as follows:—

OTTAWA, 29th September, 1888.

"SIR,—The Minister of Justice asks, in file No. 91366, to be advised of the facts of the case in connection with the draft agreement submitted by J. B. Robert about certain water privileges on the River St. Louis, Quebec.

"So far as this Department is concerned the following are the facts:—

"Some years ago a complaint was made that a very large quantity of land, situate at the head of the St. Louis, was flooded each spring, and it was asked that steps be taken to remedy the evil, and the cause was stated to be a dam across the river owned by one Symons. Pending the negotiations for the removal of this dam, a scheme for the establishment of manufactories at Beauharnois, at the mouth of the St. Louis, was propounded, and, with the view of increasing the volume of water in the river to meet the wants of the new industries, the question of enlarging the cut or channel which carried the water of the St. Lawrence into the St. Louis, thus supplementing the flow of that river, was considered.

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"On enquiring as to the origin of this channel, locally known as the "feeder," it was ascertained that over 80 years ago the seigneur of that time found that the St. Louis did not furnish water enough to operate the banal mill, and at his own expense and through his own property, opened the "feeder," with its mouth at Hungry Bay in the St. Lawrence, to the westward of the village of Valleyfield, and placed gates for the purpose of regulating the supply of water, and cutting it off entirely when required. He also for the purposes of the "feeder" reserved a strip of land on each side thereof, of an arpent, and half an arpent in width respectively.

"As the years passed by the banal mill fell out of use, privileges to erect and operate mills on the St. Louis were obtained by others from the seigneur, and then followed the departure of the seigneur himself and all his rights and privileges; and at the time the enquiry was made by the department, it was found that the head-gates on the feeder and the regulation of the supply of water through it were controlled by persons in Beauharnois, and that other persons objected to such control.

"It having been decided to enlarge the "feeder," and nothing certain as to the ownership thereof having transpired, except that it and the reserve were vested in the seigneur, the Department had the reserve marked out and placed boundary posts, took possession on behalf of the owner, whoever he or they might be, and not on behalf of the Crown—which has not any right, title or interest in the property in question—and proceeded to, and did, deepen and widen the feeder over its whole length of four miles, and reconstructed the head-gates; and exercised a control over their movement until Mr. Robert preferred his claim and produced his title thereto, when the whole was surrendered to him; the department having exercised supervision, in the interests of all parties concerned, only so long as the owner—supposed to be the seigneur, who did not appear, until Mr. Robert claimed the property, when that supervision was abandoned, to be assumed by Mr. Robert.

"The only interest the Crown has in or on the River St. Louis is in the site of the seigneur's dam, which cannot be rebuilt, and such general interest as it may possess in a right to deepen the bed of the river for the purpose of increasing its carrying capacity, the carrying capacity of the "feeder" having been quadrupled.

I am, Sir,

A. GOBEIL, Esq.,
Secretary,
Department Public Works.

Your obedient servant,

(Sgd.) HENRY F. PERLEY,
Chief Engineer."

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For the Crown it is contended that it is not bound by Mr. Perley's statement of the facts, nor by his conclusions or opinions; and that it is not concluded by the fact that in consequence thereof the possession of the feeder and head-gates was given up to the suppliant. With that contention I agree.

The question to be decided is whether the suppliant is now entitled to the possession that he claims; that is to the exclusive possession of the feeder, and the exclusive control of the head-gates. Unless one is prepared to go that far the petition, I think, fails. That the suppliant has important rights in the feeder and the water thereby supplied to his mills cannot be doubted. These rights have been recognized by the Crown in the most formal manner possible. If when the dyke that has been mentioned was built the seignior had no right to take and use, as he was taking and using, the water from Lake St. Francis, the Crown need not in constructing the dyke have made any provision for continuing the supply of water. But his right was not disputed and appropriate means were taken not to interfere with that right, any further at least than the necessities of the case demanded. And from that time to this whatever disputes or differences may from time to time have occured with respect to the amount of water supplied by the feeder, the right of the seignior and his grantees to the water has never in fact been called in question. But it is one thing to have a right to the water and another thing to have the right to control the gates by which it is admitted to the feeder. That the seignior had such a right with respect to the head-gates of the feeder as they existed before the dyke was built must, I think, be conceded. But after the construction of the dyke the question assumed a different aspect. The seignior and his grantees still had a right to the use of the water; but the Crown

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was entitled to see that the object for which the dyke was constructed was not defeated, that the head-gates were not so used as to flood the lands for the protection of which the dyke was built. It had a right, too, it seems to me, to see that these gates were not so used as to lower the head of water that had been created for the Beauharnois Canal. The Crown pleads that it is the proprietor of the water of Lake St. Francis, and for that reason entitled to control the gates and feeder in question. If the case turned upon that contention, there might be some difficulty in supporting it. But in so far as the Crown has, by the construction of the works connected with the Beauharnois Canal, raised the level of the lake it is undoubtedly interested in seeing that that level is maintained. There has, so far as appears, never been any complaint on that score. It is in another direction that a conflict of interest appears to have arisen. As long as the seignior owned the lands protected by the dyke he could well be left in exclusive control of the feeder and head gates. If he let in water enough to flood his lands that was his own business. But when the lands fell into the hands of other persons, and the mill owners exercised the right of regulating the supply of water, a conflict of interest arose. As the Crown had built the dyke and was maintaining it, the farmers naturally looked to it for indemnity when their lands were flooded by the water that was permitted to pass through the gates in the dyke. And unless the Crown has the control of these gates it cannot, it seems to me, make sure that the dyke serves the purpose for which it was built. Having by the construction of certain dams or works connected with the Beauharnois Canal raised the level of the waters of Lake St. Francis, so that the lands adjacent were flooded, and then having constructed a dyke to hold

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back such water and prevent such flooding, and being under an obligation to maintain this dyke as a public work, the Crown is, I think, entitled to the possession and control of every part of the dyke, including the gates by means of which the waters of the lake are admitted to the feeder. That right of control and regulation the Crown had from the time the dyke was built, and I do not think it lost the right by not at all times exercising it. On the other hand the suppliant has, it seems to me, a right to have these gates so regulated and controlled as to give to him all the water he is entitled to, consistent with other public or private interests concerned. But if there is any question of the right to the paramount or exclusive control and regulation of these gates, then I should think such control and regulation were by the necessities of the case vested in the Crown. Nor do I see any difficulty in giving effect to that view, or that it would of necessity entail any hardship on the suppliant. In the construction of the public works of Canada, a great many water-powers have been developed and rights in these have in a great many cases been granted to divers persons. But the right to control the gates or other means used to regulate the supply of water always, so far as I know, remains in the Crown. It is true that the suppliant here is not claiming under any grant or lease from the Crown; his rights exist independently of any such grant or lease; but I do not see that he would have any greater difficulty in enforcing his rights, if they were denied to him, than if he held under a Crown grant or lease. The exclusive possession and control of these head-gates are not necessary, it seems to me, to the enjoyment of the rights that the suppliant has in the feeder. Such possession and control may, I think, be taken to be a necessary incident to the ownership and maintenance of the dyke by the Crown. But

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it is not necessary to go that far. The petition fails in that respect unless the suppliant is entitled to the exclusive control of the gates ; and I do not see how some control of these gates which the Crown has built and rebuilt, and which constitute a part of a public work, as well as a part of the feeder, can properly be denied to it.

What has been stated refers to the head-gates, not to the feeder. The former are, and the latter is not, part of the dyke. Possibly by what was done when the dyke was built the Crown acquired a right to discharge into the feeder the off-take ditches that were then provided for, but that did not make the feeder a part of the public work. The Crown's right to the possession it has of the feeder depends, it seems to me, on the fact that, without any objection, on the part of anyone, possibly with the consent of all parties interested therein, it took possession of the feeder and expended public money on it in deepening and improving it in connection with the River St. Louis improvements. That brought it within the terms of the statutes respecting public works that have been referred to, and I do not well see how the person who at the time owned the feeder, or those who were then interested in it, can now be heard to say that it is not a public work. And if it is to be taken or deemed to be a public work, or part of a public work, then it is clear that the suppliant, whatever other rights he may have in it, is not entitled to the exclusive possession thereof.

That question, however, as has been stated, is one of minor importance. The suppliant frankly admits that the possession of the feeder, without the control of the head-gates, would be of no considerable advantage to him.

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Then there is another ground of defence set up. In February, 1892, when the Crown, the second time, took possession of the feeder, the suppliant was not entitled to the exclusive possession of it even upon his own showing. And that of course was true also in 1882, when the Crown first took possession, as well as in 1888, when the possession was handed over to him. He was not at any time during the periods mentioned the owner of the property, the title to which remained in Edward Ellice during his lifetime, subject to the servitudes referred to, and after his death went to his legal representatives. It was not until April, 1892, that the suppliant got a grant of Viau's interests (to which reference has been made) in the water-power and feeder, and the conveyance from Edward Ellice's representatives to him of the feeder itself was not made until 1896. For the respondent it is argued that the rights which he acquired under the deed last mentioned are litigious rights and within the provisions of Articles 1582 and 1583 of the Civil Code of Lower Canada, and the Crown offers to pay the suppliant the price and incidental expenses of the purchase of such rights, with interest on the price. That the rights sold in 1896 by Edward Ellice's legal representatives to the suppliant were litigious does not, I think, admit of any doubt. The only use that the latter has ever made of them, or could expect to make of them, was to support the present petition. But it is perhaps not so clear or well settled that the Articles relied upon apply to such a case as this

On the main issue, however, the question as to the suppliant's right to the exclusive possession of the head-gates to the feeder, my view is against him on the grounds that I have stated and upon which I rest my judgment. With respect to the possession of the feeder itself, except that portion of it which is within

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the limits of the dyke or public work mentioned, I have not been able to see what public interest of Canada is served by retaining possession of it, or why it might not without any injury to any such public interest be handed over to the suppliant. But that is not the question here, or a matter for the consideration of the court. The question to be decided is whether the suppliant is entitled to the exclusive possession of this feeder, and to a declaration that he is so entitled, and under all the circumstances of the case I have not been able to come to the conclusion that he is so entitled.

The judgment and declaration of the court will be that the suppliant is not entitled to the relief prayed for, and against any costs to which the respondent may be entitled will be set off the costs incident to the motion made to amend the statement in defence and of such amendment.

Judgment accordingly.

Solicitors for the suppliant: *Fleet, Falconer, Cook & McMaster.*

Solicitor for the respondent: *D. A. Lafortune.*

QUEBEC ADMIRALTY DISTRICT.

THE RICHELIEU & ONTARIO NAVIGATION COMPANY..... } PLAINTIFFS;

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Nov. 19.

AGAINST

THE STEAMSHIP "*CAPE BRETON*" AND OWNERS..... } DEFENDANTS.

Shipping—Collision—Look-out—Evidence—Special rule contrary to general rule—Approaching ships—Uncertainty as to course—Damages.

A pilot in charge of the ship, or the man at the wheel, is not a proper look-out within the meaning of Art. 29 of the Rules for Preventing Collisions of 1897, made under the provisions of R. S. C. c. 79 intituled *An Act Respecting the Navigation of Canadian Waters.* The look-out should have nothing else to do than to scan the horizon and report. The place on the ship where he is stationed need not necessarily be the bows, but it should be the best place on the ship for the purpose.

2. Where there is no proper look-out the burden of proof is on the delinquent vessel to show that such fault did not contribute to the collision.

3. In finding upon conflicting evidence, the court will give more weight to the affirmative testimony of those who swear to having seen a given thing than to the merely negative testimony of those who swear that they did not see it.

4. Where a ship undertakes to follow a course, authorized by usage and special rule, in entering a port, but which to another ship approaching her may appear to be an unusual course and contrary to the general rule, it is the duty of the former to signal her course to the latter, and if she fails to do so the latter has a right to presume that the former will pursue the general rule.

5. Where there is danger of collision between two vessels, and they both obstinately follow out to the letter the rules regulating their respective courses when there is no such danger, in the event of a collision occurring by reason of their adherence to such rules, both vessels are at fault under Rule 27, which provides that in following general rules due regard must be had to all dangers of navigation and collision, and to any special circumstances which may render a departure from the general rule necessary.

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6. Where two steam vessels are approaching each other and each is uncertain and perplexed as to the course of the other, it is the duty of both to slacken speed, reverse and completety stop until their respective courses may be ascertained.

ACTION for damages for collision between two steamships in the St. Lawrence River.

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

September 7th, 8th, 9th, 12th, 13th, 14th, 15th, 16th, 17th, 19th, 20th, 21st and 24th.

A. R. Angers, K.C., *C. Pentland, K.C.*, and *A. H. Cook, K.C.* for the plaintiffs.

F. Meredith, K.C., *A. Geoffrion, K.C.* and *R. E. Harris, K.C.* (of the Nova Scotia Bar) for the defendants.

Mr. *Pentland*, for the plaintiffs, having stated the facts as alleged in the several pleadings for the plaintiffs and defendants, said that the first question raised by the defendants was that the plaintiffs had not an efficient or competent look-out. It could be admitted that the plaintiff ship had no man especially on the look-out at the time, but that would not be a fault under the circumstances of this case. The cases that hold it necessary for the look-out to be stationed in the bows of the vessel were decided when ships were constructed on an entirely different plan from that prevailing to-day. In most of these cases which will be relied on by our opponents the ships involved were sailing ships, so that it was impossible to keep an efficient look-out on board of them unless the man was placed right up on the forecastle head. The officer of the watch was not walking up and down on such ships as he is on these river steamers on top of the hurricane deck; but was away aft, and between him and the forecastle head, on which the look-out was

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stationed, there were two or more heavy masts with all their rigging and sails, which made it utterly impossible for the officer of the watch to see anything beyond the main-mast. Looking at the model of the *Canada*, the court will see that the men stationed in the wheelhouse on the upper deck have a perfect view not only ahead but on both sides of them, and for the matter of that, behind them. So the position of the look-out is not necessarily confined to the bows to-day, and so long as the officer of the watch is possessed of all the facts and information which can be given him by the look-out, then the purposes of the look-out are entirely answered. Our men saw a light on the *Cape Breton*, but it was only one light and they took it to be that of a vessel at anchor. Both the man at the wheel and Latour saw this light, studied it, and came to the conclusion that it was an anchor light. They proceeded then accordingly, following the course which they had followed for years past, and within a very short time of this accident they hear the *Cape Breton's* whistle off the starboard side of their ship, and the collision occurs.

One point deserves particular notice just here. The master of the *Cape Breton* undertakes to say in his evidence that he felt he had no responsibility at all that night, that he had nothing at all to do with the navigation of the ship, that he left it entirely in the hands of his pilot, yet the very first thing he did was to interfere with his pilot. The pilot ordered full speed in a certain direction, and the captain immediately took the telegraph and reduced it to half speed. Moreover, it was the captain's duty to see that the lights were burning (1).

As to the facts of the *Cape Breton's* lights being properly exhibited, the defendants' case depends on the

(1) The *Rob Roy*, 3 W. Rob., 190.

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evidence of interested witnesses; while our theory that the green light was never put up at all and that the red light was only exhibited at the last moment is supported by the evidence of several disinterested persons, and the mate's log on board of the *Cape Breton*. There is an entry in this log as to the lights having been placed in position at 7.30 p.m., when the ship left Montreal; but there is no entry of the lights having been so placed when they left Sorel. Lafleur, the master of a schooner coming up the river that night, an outside witness, who was steering his vessel at the time and keeping his eye on the *Cape Breton*, swears positively that she had no lights, and that if she had he would have seen them. They carried no regulation lights as required by the order in council to be found bound up with the Dominion Statutes of 1896-7, p. 81. They try to establish that they carried Board of Trade lights, but the Board of Trade regulations are of no force as against this order in council. (*Moore's New Rules of the Road* (1); *Todd & Whall's Practical Seamanship* (2). Again, why were not these lights produced, and the plaintiffs given an opportunity of examining them? The defendants undertake to shew that there were tests of these identical lights made at Quebec, but we had no opportunity of being present at such tests. Furthermore, the men who made the tests tell us that they placed themselves thirty feet from the bow, and that owing to the bluff shape of the ship's bow they could not see them. Is it not possible that owing to their position and the build of the ship, and the use of light towers, they could not be seen three hundred feet or double that distance? *Todd & Whall's Practical Seamanship* (*supra*) says: "It is advisable to have the lights and fog-signals in such good order and condition that they

(1) 3rd ed. p 13. (2) p. 158.

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can if necessary be shown in a court of law with every chance of proving their efficiency in every way". On this question of lights, therefore, we have the testimony of several disinterested and outside witnesses, the absence of any entry in the ship's log of the lights having been placed in position, and we have the fact that the lights were not produced, and the further fact that in any event they were not regulation lights; such being the case the defendants must answer for the consequences of their negligence. Plaintiffs submit further that the *Canada*, in entering the port of Sorel on this occasion, was following the usual course taken by steamers of her class, and particularly the O. & R. Navigation Company's boats. It is a custom established by the usage of fifty years. All the navigators on the St. Lawrence are familiar with the style of navigation of the O. & R. Navigation Company's boats, and the course taken by the *Canada* was the usual and customary route followed ever since the buoys have been placed there.

Art. 33 of the Rules for Preventing Collisions provides that "unless it is otherwise directed by the Harbour Commissioners of Montreal, ships and vessels entering or leaving the harbour of Sorel shall take the port side, anything in the preceding articles to the contrary notwithstanding." Now the first question that arises under this regulation is: What is the harbour of Sorel? There is no definition of this harbour fixed by law. Therefore, it is reasonable to say that its limits are, so far as may be, coterminous with those of the town of Sorel. By the Quebec statute, 52 Vict. c. 80, sec. 22, "the City of Sorel comprises all that territory forming part of the County of Richelieu, bounded in front by the Richelieu River, in the rear by a line running parallel to the east side of the Royal Square in the said city, to a perpendicular distance of

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one hundred chains on the north of the river St. Lawrence, on the south by a line parallel to the south side of the Royal Square aforesaid, and thence to a distance of one hundred and twenty chains." That will carry the eastern limits of the town of Sorel to within 2,000 feet of where the *Canada* is lying at the time of these proceedings. Now, is it reasonable to pretend for a single moment that in order to comply with the law, as laid down by Art. 33 of the above rules of the road, that you have to keep on the starboard side up to the time you are right abreast of the Richelieu river and then to cross the St. Lawrence at right angles to go up the Richelieu river? Is it not more sensible and reasonable that the steamers should cross on the other side at some distance down the river and take a diagonal course for the Richelieu or the harbour of Sorel, as these boats have done, and all other river boats have done, for years past? Another fact showing that the harbour of Sorel extends beyond the *locus in quo* is that the harbour-master at Sorel is authorized to collect, and does collect, harbour dues from vessels loading down at Ile à Pierre, which he remits to the Government, at Ottawa. The harbour-master at Sorel would not be allowed to collect these dues from ships, if he had not a right to do so. If I am right on this point, we were not only entering the harbour but were actually in the harbour, and were following a course in compliance with Art. 33 of the Rules of the Road, above quoted. The *Perim* (1).

But the defendant ship was wrong in taking the course she did. She saw our vessel coming up for some three or four miles, and watched her as she approached. Now the defendants either adopted a course authorized by law or they did not. When the *Cape Breton* saw us coming up from Ile de Grâce,

(1) Cited in *Marsden on Collisions*, 4th ed. p. 442.

showing all our lights, it was her business to have signified her course by blasts of the whistle. She left us under the impression that she was a ship at anchor, and we acted accordingly. They failed to comply with Art. 28 as to signals. When they were going full speed astern, they should have indicated the fact by three short blasts, instead of which they only gave one.

Even if we were at fault in being on the wrong side of the channel, that did not excuse the defendants from taking all proper precautions against a collision. (The *Germany* (1); The *Martha Sophia* (2). The defendant ship, on the evidence, was in doubt as to where we were going; then, in such case, she should have stopped. (The *Konig Willem I.* (3); *Moore's New Rules of the Road* (4)). Again, the evidence shows the manœuvres executed by the *Cape Breton* immediately before the collision contributed to it. (*Hamburg Packet Co.* v. *Deroschers* (The *Westphalia*) (5); *Todd & Whall's Practical Seamanship* (6).

A protest should have been made and filed by the master of the *Cape Breton*; and he should have entered the fact of the collision in his official log. The fact is he did not keep an official log at all within the meaning of section 108, of chapter 74, R. S. C. Sec. 109 of that statute requires an entry of any collision and the circumstances to be made in the log of a Canadian foreign sea-going ship. The *Cape Breton* is a "foreign sea-going ship" within the meaning of this section, because she occasionally goes to Newfoundland, a place out of Canada. The *Electric* (7) and *Emma* (8); the *Uskmoor* (9); the *Mourne* (10).

(1) 2 Stu. Adm. 158.
(2) *Ibid.* 14.
(3) [1903] P. 114.
(4) 3d. ed. p. 51.
(5) 8 Ex. C. R. 263.
(6) p. 281.
(7) 1 Stu. 333.
(8) 2 W. Rob. at p. 316.
(9) [1902] P. 250.
(10) [1901] P. 68.

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The *Canada* was justified in adopting the manœuvres she did in the agony of collision. The *Benares* (1); *Abbott on Shipping* (2).

Mr. *Angers*, followed for the plaintiffs.—Si le *Cape Breton*, qui a laissé Montréal la veille de l'accident, a cru devoir par prudence arrêter à Sorel, trouvant qu'il faisait trop noir pour continuer son voyage, il a certainement manqué de bon jugement et fait une erreur en laissant Sorel quand la nuit était encore aussi obscure qu'au moment où il a mouillé.

Hamelin constate qu'avant de se mettre en route, avant de tourner son navire, il a aperçu, à quatre milles à l'est de lui, un bateau montrant une lumière blanche et des lumières d'un salon brillamment illuminé et qu'il a compris que c'était un des bateaux de la demanderesse. A ce moment il avait ordonné à l'engin du *Cape Breton* d'aller de l'avant et ensuite un peu vers le sud. Il arrête ensuite l'engin, va un peu de reculons, tourne son navire et se met en ligne pour descendre sur le côté sud du *ship channel*. Du moment qu'il a été tourné, qu'il a changé sa course, il devait, en vertu du règlement n° 28, en donner signal au bateau qu'il avait vu. Que fait-il ? Il attend que les bateaux soient à trente secondes l'un de l'autre pour donner son premier signal. Dès le départ donc, le *Cape Breton* a violé la règle n° 28.

Maintenant le *Cape Breton* est encore en défaut en se mettant en route sans avoir ses lumières réglementaires, rouge et verte, et n'ayant qu'une lumière blanche à son mât. Ceci est clairement prouve par des témoins en dehors des deux bateaux ; je veux parler de Joubert, Généreux, Lazare Lafleur et Lacouture, dont les témoignages à ce ce sujet sont corroborés par nombres d'autres témoins. Quand Lacouture se rend à l'endroit du sinistre, à bord de son yacht, mû

(1) 9 P. D. 16. (2) ed. p. 948.

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par la gazoline, il constate qu'il faisait encore noir, très noir même, et sur ce point Tremblay le corrobore.

Un point d'une extrême importance c'est qu'en consultant le *log* du *Cape Breton* on constate, qu'en laissant Montréal, il prend soin de mentionner qu'à sept heures et trente il met ses lumières rouge, verte et blanche. Il prend aussi le soin de vous dire quand il les éteint. On constate encore par le *log* qu'en laissant Québec, pour descendre vers le Bic, à sept heures et demie du soir, on a mis les lumières réglementaires. N'est-il pas étrange que partant au milieu de la nuit de Sorel, le *log* n'ait pas constaté la même chose? S'il y avait obligation de constater le fait en partant de Montréal et de Québec, la même obligation existait en partant de Sorel. Eh bien, le *log* est silencieux à ce sujet.

En se mettant en marche à Sorel on descend la lumière de l'arrière—on avait deux lumières d'abord, une dans le matereau qui se trouve à l'arrière du bâtiment,—on la descend. Il y avait une boîte pour la recevoir avec des côtés qui évasent. La met-on dans la boîte? Non on l'éteint. Pourquoi? Ah! le jour était trop proche, il n'y avait pas nécessité de la mettre. N'est-il pas naturel qu'on arrive à la même conclusion: que le jour était trop proche, qu'il fallait ménager l'huile un peu, que le jour était trop proche pour mettre la lumière verte et la lumière rouge.

Certains témoins de la défense prétendent avoir constaté que les lumières étaient allumées, parce qu'ils en avaient vu le reflet sur les épontilles des garde-fous. Eh bien! il est impossible qu'il y ait aucun reflet de ces deux lampes de droite et de gauche sur les épontilles qui supportent le garde-fou; car ces lumières sont abritées par un paravant. Je désire aussi attirer l'attention de la cour sur le fait que le capitaine Reid et le pilote Hamelin ne disent pas avoir vu les

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lumières réglementaires en position. Le capitaine nous dit qu'il s'est enquis si les lumières étaient placées. Hamelin de son côté nous dit qu'il n'a pas constaté si les lumières réglementaires étaient en place et pour excuse il nous dit que ce n'est pas son affaire. En arrivant à bord d'un navire, le pilote licencié en devient le maître, en a le contrôle et sur lui tombe la responsabilité de la navigation du bâtiment, et il est plus qu'étrange qu'il interprête ainsi ses attributions.

Passons maintenant à la preuve faite de la part de l'équipage du *Canada*. Bouillet et Latour nous disent qu'au moment où le *Canada* était entre les deux bouées noires. ils n'ont vu qu'une lumière blanche à bord du *Cape Breton*, ce qui leur faisait croire que c'était un bâtiment à l'ancre une pointe à tribord du *Canada*. Le capitaine St-Louis immédiatement après la collision sort sur le pont et constate lui aussi qu'il n'y a qu'une lumière blanche et qu'il n'y a pas de verte. Au moment où le *Canada* était entre les deux bouées noires, il montrait sa lumière blanche et sa verte au bâtiment que l'on croyait à l'ancre. Passé la bouée d'en haut, le *Canada* se dirige sur la Pointe aux Pins. C'est la course habituelle que ces bâtiments d'un faible tirant d'eau suivent depuis un nombre d'années considérables. Arrivé à cet endroit, on fait la course pour entrer à Sorel en laissant le chenal des grands navires.

Il serait peut-être bon d'expliquer ici ce que l'on doit comprendre lorsque Bouillet et Latour nous donnent les différentes courses du compas. Pour gouverner en rivières entre Québec et Montréal la nuit, on se sert des amarques et des lumières et non du compas. Le chenal est trop étroit, les détours sont trop fréquents, les courses ne sont pas assez longues pour que l'on puisse se servir du compas comme prescri-

vant la course que l'on doit suivre : on ne se sert du compas que pour vérifier que le timonier ne laisse pas devier un bâtiment d'un côté ou de l'autre.

Lorsque le *Canada* est arrivé à mille ou douze cents pieds en haut de la bouée noire, le *Cape Breton* a donné un premier coup de sifflet, à quoi le *Canada* a répondu immédiatement par deux coups. Il n'y avait de visible à ce moment sur le *Cape Breton* qu'une lumière blanche et le *Canada* exhibait une lumière blanche et une lumière verte. De cet instant à la collision il s'est écoulé trente secondes. Eh bien, six à huit secondes avant que le *Cape Breton* frappât le *Canada* à angle droit, une lumière blanche et une lumière rouge sont apparues. Il semble assez logique de conclure que ce n'est qu'alors seulement qu'on a glissé en place la lumière rouge et qu'on n'a pas eu le temps de mettre la verte.

Aussitôt que les lumières blanche et rouge sont apparues au *Canada*, l'ordre a été donné de mettre la barre toute à tribord,—*hard-a-starboard*, et je soumets que c'était le meilleur commandement qui pût sous les circonstances être donné pour diminuer la violence du choc. L'effet de la collision sur le *Canada* a été de le faire tourner au nord et cela aurait rapproché le *Canada* d'une cinquantaine de pieds de la ligne centrale du chenal. Au moment de l'abordage, le *Canada* était à cinq cent trente-cinq pieds du *ship channel*, et la course suivie par le *Cape Breton* à ce moment-là était *South East by South quarter South*, il traversait donc la rivière et il s'en allait sur le côté du sud. Et cette conclusion est tirée de la bouche même du témoin Hamelin et cette preuve le met quatre pointes en dehors de sa route, puisqu'il nous dit que sur son *port helm* il a devié d'abord de trois pointes et que sur son *hard a port* il a devié d'une pointe additionnelle. Si le *Cape Breton* n'avait pas

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changé sa direction de l'ouest à l'est, il n'aurait pas traversé la rivière et il ne serait pas venu en collision et serait passé à plusieurs centaines de pieds du *Canada*. S'il avait mis sa barre à *starboard* au lieu de la mettre à *port*, il serait passé à sept cents pieds du *Canada*, et s'il avait gardé sa course, il serait passé à au moins cinq cents pieds ou cinq cent trente pieds du *Canada*.

La Règle 21 se lit comme suit : " Lorsque, d'après " les règles qui précèdent, l'un des deux navires doit " s'écarter de la route de l'autre, celui-ci poursuivra sa " route sans ralentir sa vitesse." Le *Cape Breton* a violé cette règle. Le *Canada* est un bâtiment à faible tirant d'eau, sept à huit pieds, et le *Cape Breton* est un steamship océanique auquel est reservé le grand chenal et c'est le *Canada* qui devait se mettre hors de son chemin et c'est ce qui a été fait lorsque le *Canada* a pris la batture, lorsqu'il est arrivé à la bouée noire d'en haut. Le *Cape Breton* au lieu de continuer sa route, rabat sur nous et met sa barre à *port* dans l'espoir, comme le dit Hamelin, de retrouver la lumière rouge du Canada. C'est parce qu'il voyait la lumière blanche et lumière verte du *Canada* qu'il mettait sa barre à *port*. Et je dis que c'est un acte criminel de la part d'un pilote, ou d'un navigateur quelconque, de mettre sa barre à *port* quand il voit une lumière blanche et une lumière verte. C'est là aussi l'opinion exprimée par le capitaine Salmon à un témoin qui énonçait la même idée.

Il n'était pas nécessaire d'avoir une vigie sur le pont de promenade de l'avant du *Canada*, car la vigie que la demanderesse place dans la chambre à roue est certainement là dans une position plus avantageuse pour surveiller l'horizon et Bouillet faisait la vigie lors de l'accident, pendant que le troisième pilote conduisait le bâtiment. Dans les grands transatlati-

ques, la vigie est hissée dans un panier à la moitié de la hauteur du mât. Le *Canada* aurait-il eu une vigie à l'avant de son pont de promenade, l'accident n'aurait certainement pas été évité davantage en vue de la manœuvre du *Cape Breton*.

Il est d'usage à l'Amirauté de produire comme témoin tout l'équipage de service au moment de l'accident. Pourquoi donc MacAuley, qui était sur le *forecastle* à l'avant du bâtiment, n'a pas été produit? Est-il un témoin récalcitrant qui ne veut pas jurer que les lumières étaient en place ?

Je prétends que McArthur devait nécessairement être à tribord lorsqu'il dit avoir vu le *Cape Breton* s'en venant sur le *Canada*.

Je dois mettre la cour en garde contre le plan Howard, qui d'abord n'est pas admissible devant une cour d'Amirauté et qui aussi part d'un faux principe, puisqu'il nous dit que le compas du *Canada* variait d'une demi-pointe. La base étant fausse, tout l'échafaudage tourne à néant. La partie adverse semble confondre la goélette de Lafleur avec une autre goélette qui était à l'ancre à l'arrière du *Cape Breton* et qui, comme il ne ventait pas, avait gardé ses violes hautes tout en étant à l'ancre et c'est ce qui explique leur critique du témoignage de Lazare Lafleur.

Je désire attirer l'attention de la cour sur la manière dont l'enquête a été tenue devant le capitaine Salmon, puisque partie de cette enquête a été produite ici de consentement. On y a continuellement posé des questions suggestives, *leading questions*, aux témoins du *Cape Breton*; tandis qu'on a pris à partie les témoins du *Canada* qui étaient là sans protection, car la Compagnie Richelieu n'assistait pas comme partie en cause à cette enquête.

La présente cause est en tout semblable à celle de la *Marie-Anne* contre le *Westphalia*. Dans les deux causes,

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le pilote fait *port* sur une lumière verte recherchant la lumière rouge.

L'article 33 des règlements reconnait que Sorel a un port ou havre, puisqu'il dit : " A moins qu'il ne soit " autrement ordonné par les Commissaires du Havre de " Montréal, les navires, les bâtiments entrant dans le " port de Sorel ou en sortant doivent naviguer à babord " nonobstant tout article ci-dessus à ce contraire ". Voici la loi qui déclare Sorel un port, et la raison qui veut que l'on navigue à babord nous est donnée par Howden, l'ingénieur du Gouvernement et aussi par un autre témoin de grande expérience. C'est afin de ne pas venir en contact avec les bâtiments qui sont ancrés sur le mouillage de Sorel, afin que les bâtiments qui laissent le mouillage ne se rencontrent pas de l'avant avec les bâtiments qui montent.

M. Geoffrion, analysant la preuve et limitant sa plaidoirie à traiter les questions de fait, prétend, *inter alia*, que la position relative des deux vaisseaux, à partir d'assez longtemps avant les deux premiers coups de sifflet, était rouge à rouge à venir jusqu'après le premier coup de sifflet.

Le *Canada*, arrivé à mi-chemin entre les deux bouées noires, a changé sa course de ¾ de pointe vers le sud, et si l'on prend la distance entre les deux bateaux à ce moment, on verra que cela concorde pratiquement avec le moment ou le *flash* ou le reflet de la lumière verte du *Cape Bretom* a dû apparaître. A ce moment, le *Canada*, c'est notre prétention, montant graduellement un peu vers le nord, était passé de notre droite à notre gauche, —jusque là les deux versions s'accordent quant à la course du *Canada*.

Alors jusque là, la lumière rouge du *Canada* était passée graduellement de notre droite à notre gauche. Le bateau avait changé sa direction. Une fois rendu à notre gauche il nous avait caché sa verte, continuant

à nous montrer sa rouge. Il est évident que dans le commencement, lorsque nous voyions la lumière rouge du *Canada* à notre droite, nous lui montrions notre verte, et comme il traversait notre course, dès que nous avons vu sa lumière rouge de l'autre côté, à notre gauche, il aurait dû, d'après nos prétentions, voir notre lumière rouge. Je pars donc de ce dernier point, à partir du moment où étant passé à notre gauche, il montait rouge à rouge et je dis que c'est là vraie position depuis ce moment jusqu'après le premier coup de sifflet.

Voici où la preuve devient contradictoire. Sur ce point nous avons notre pilote, notre premier officier et notre vigie qui disent qu'ils voyaient la rouge du *Canada* un petit peu, quelque peu sur leur *port bow*. Corroborant ces trois témoins, nous avons le témoignage désintéressé de MacArthur.

Le *Cape Breton* ne voyait pas la lumière verte du *Canada* avant le premier coup de sifflet. Rendu aux deux coups de sifflet le *Cape Breton* était passé à droite du *Canada*. Hamelin dit qu'alors il ne voyait plus que la verte. Le *Canada* tournait sur lui-même et c'était le résultat naturel.

Les témoignages de Blanchet, Dauphinais et des deux Guévremont n'entrent pas en considération, parce qu'ils n'ont regardé qu'après le dernier coup de sifflet du *Cape Breton*, en réponse aux deux coups de sifflet du *Canada*. Quant à Lacouture, il nous avoue candidement qu'à venir jusqu'à vingt-quatre heures avant son examen ici, il était prêt à jurer qu'il n'y avait ni lumière rouge ni verte et cela ne démontre-t-il pas clairement qu'on ne saurait attacher trop d'importance à son opinion ? Son témoignage d'ailleurs établit qu'il n'a pas vu les lumières, parce qu'il n'était pas en position de les voir et ceci est corroboré par le fait qu'il n'a pas vu la lumière rouge lorsqu'elle y était et la raison qu'il

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donne pour ne pas l'avoir vue, n'est pas une bonne raison. Quant au capitaine St-Louis, il était dans sa cabine lors du premier coup de sifflet et n'a rien vu à ce moment. Nous avons lâché le premier coup de sifflet au moment ou le *Canada* nous montrait ses deux lumières. Le capitaine n'est sorti qu'au moment où les deux coups de sifflet étaient lâchés.

Contre toute cette preuve en notre faveur nous n'avons que les témoignages de Bouillet et Latour,—les deux témoins les plus intéressés à nous contredire.

Maintenant traçant sur notre plan la course donnée par Bouillet, on constatera que la variation que j'ai donnée coïncide à peu près avec son témoignage et c'est aussi la conclusion où en est arrivé Howard, après avoir étudié le témoignage de Bouillet.

De ce plan il résulte que si Bouillet ne se trompe pas quant à son point de départ aux deux premières bouées, le témoignage de Hamelin est corroboré sur la question de la lumière rouge; c'est elle qu'il a dû voir à partir de mi-chemin entre les deux bouées noires, à venir au temps où le premier coup de sifflet a été donné. La collision a pu nonobstant cela se produire plus au sud, car il est évident que le *Canada* a dû changer de plus de trois quarts de pointe entre le premie. coup de sifflet et la collision. De plus je tiens à faire remarquer que ce plan démontre une contradiction absolue entre le commencement et la fin de la course donnée par Bouillet. La course ne pouvait être affectée par le vent, car il ne ventait pas; elle ne pouvait être que fort légèrement affectée par le courant qui est pratiquement parallèle à la course du bâtiment.

Cela m'amène à la question des lumières. Nous avions notre lumière verte; mais je soumets que la question de savoir si nous l'avions ou ne l'avions pas devient absolument sans importance si nous étions tout le temps rouge à rouge. En effet, il n'y a aucune

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preuve au dossier, si ce n'est toutefois Bouillet, allant à dire que nous ayions montré ou que nous aurions dû montrer notre lumière verte en aucun temps. Par conséquent cette question de la lumière verte est sans importance.

Les témoignages des trois personnes qui étaient sur terre, Mathieu, Généreux et Joubert sont sans importance et ne résistent pas à une saine critique et ne doivent pas être pris en considération. Il y a aussi le témoin Lacouture, mais il est si incertain dans son témoignage, qu'on ne doit pas s'y arrêter. Viennent ensuite les deux Lafleur, et la cour en lisant la preuve viendra facilement à la conclusion que seule la version de notre Lafleur est raisonnable. Cependant, comme les deux témoins se contredisent sur des question vitales, leurs témoignages se détruisent et s'annullent.

Il n'y a sur la question de la lumière rouge aucune preuve concluante de la part des gens placés à l'intérieur ; car, après tout, ils ne font que dire qu'ils auraient dû voir les lumières si elles y avaient été. Quant à la lumière verte, la question est sans importance.

Il y a bien Latour et Bouillet, mais le témoignage du premier est si sérieusement compromis par ses contradictions entre sa première déposition et celle qu'il nous donne maintenant et le témoignage du second est tellement intéressé, qu'en face d'une preuve certaine, peu ou point d'importance et de poids ne sauraient leur être donnés.

Il faut remarquer qu'à partir de plusieurs secondes —au moins vingt-cinq secondes, prenant la version la plus favorable à nos adversaires—avant la collision le pilote du *Canada* voyait notre lumière rouge. Or quand le pilote voyait la lumière rouge et non la verte, les gens placés dans le *gangway* ne pouvaient voir que la lumière rouge et non la verte. Par conséquent, lorsque

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Dauphinais vient nous dire qu'il croit que s'il avait vu une lumière, cela aurait été la verte, il se trompe.

Si nous avons raison sur la course relative des bateaux et sur la question de rouge à rouge, les autres points sont bien secondaires. Je n'ai plus que quelques mots à ajouter sur la question du chenal et cela comprendra l'exposé de la preuve que j'ai l'intention de faire.

Lors du premier cri, le bateau n'était qu'à deux cents pieds du milieu du chenal. même en supposant qu'il aurait passé à soixante pieds de la bouée noire. Or, s'il a passé à plus de soixante pieds, comme je le crois, nous serions encore plus près du milieu du chenal. La théorie de Bouillet est que nous aurions dérivé vers le nord, ou en d'autres termes, que la collision aurait eu lieu plus loin du centre du chenal que nous le prétendons. La théorie de Bouillet et de St-Louis est que, après avoir traversé vers le nord, le *Canada*, en vertu de la vitesse acquise, est allé plus loin vers le nord et que par conséquent la collision a eu lieu plus loin du centre du chenal, plus au sud que l'endroit où se trouve l'épave du *Canada* aujourd'hui. Cette théorie n'est pas admissible. Le *Cape Breton* qui est un vaisseau excessivement lourd se trouvait de travers. Peut-on prétendre que le *Canada* pouvait dériver vers le nord en montant ce bateau de travers, supposant qu'en vertu de sa première vitesse acquise, (atténuée toutefois par le coup de la collision) il aurait eu suffisamment de force pour le faire? Le *Cape Breton* aurait agi sur lui comme un gouvernail et l'aurait fait descendre le fleuve. La différence du tirant d'eau de chaque vaisseau n'est pas considérable; l'un tire six pieds six pouces et l'autre onze pieds six pouces. Ils sont à peu près du même tonnage. Il n'y a pas de règle qui mette en faute un bateau tirant onze pieds six

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pouces s'il va à plus que cent cinquante pieds du centre du chênal et là où il y a plus de vingt pieds d'eau.

J'arrive maintenant à la question du havre et je désire faire remarquer à la cour qu'un havre ne peut être créé que par un statut ou un arrêté en conseil seulement et ni l'un ni l'autre n'existe relativement à Sorel. Un havre peut, il est vrai, exister naturellement; mais dans ce cas il a les limites que la nature lui a données, et personne ne peut prétendre sérieusement que les limites naturelles du havre de Sorel s'étendent jusqu'à neuf milles en bas de Sorel ou au lac St-Pierre et qu'elles remontent, comme Proulx semble le dire, à trois milles en haut de Sorel. Ce ne sont pas là les limites naturelles et il n'y a ni statut ni arrêté en conseil délimitant ce havre. A l'endroit où les bateaux se sont rencontrés ils devaient passer rouge à rouge. Ils n'étaient pas dans le havre de Sorel. Bouillet lui-même admet qu'il aurait à cet endroit passé rouge à rouge. Or s'il était dans le havre de Sorel il aurait dû passer vert à vert. Aucun navigateur ne prétendra qu'à cet endroit on passe vert à vert. Ce que Bouillet dit c'est que s'il n'y a pas de bateau en vue ou si le bateau est tellement loin qu'il n'a pas de danger, on coupe droit sur Sorel.

Mes savants adversaires ont émis la proposition, et ils ont cité des autorités à cet effet, que même lorsqu'un bateau est en faute, si l'autre bateau peut faire quelque chose pour éviter la collision et ne le fait pas, il est en faute de ne pas le faire. Je crois donc avoir démontré jusqu'à l'évidence que Bouillet, d'après son propre témoignage et sans avoir recours à un seul de nos témoins, aurait pu éviter l'accident aisément en renversant lorsqu'il a entendu le premier coup de sifflet, puisqu'il nous dit qu'il pouvait arrêter le *Canada* dans trois longeurs, c'est-à-dire 775 pieds.

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Maintenant je prétends, d'après le témoignage de Bouillet lui-même, que ce soit trente, trente-cinq, quarante ou soixante secondes qui se sont écoulées entre le premier coup de sifflet et la collision, que si le *Canada* avait continué sa course et avait mis sa roue *hard-a-port* pour aller du côté où la loi l'obligeait d'aller,—étant donné que Bouillet admet qu'il peut changer sa course de quatre pointes dans quarante secondes et de huit pointes dans quatre-vingts secondes, il nous aurait évité par une distance considérable.

Nous avons donc démontré que si le pilote du *Canada* eût fait l'une ou l'autre des deux choses que la loi l'obligeait de faire,—c'est-à-dire soit renverser ou mettre sa roue *hard-a-port* lorsqu'il a entendu le premier coup de sifflet, la collision aurait été évitée. Je conclus donc en disant que le *Canada* est clairement en défaut.

Mr. *Meredith*, for the defendants, contended that if the court were to find in favour of the plaintiffs, it would first have to come to the conclusion that the number of men on the *Cape Breton*, seven witnesses at least, were absolute perjurers; whilst if the court should come to the conclusion that the *Canada* was at fault, the whole matter can be reconciled, because the evidence adduced by the plaintiffs is purely negative evidence. We had the evidence of only one man for the plaintiffs who swore absolutely that we were exhibiting no light. I refer to Latour, and your lordship will remember that he was cross-examined on that point, and he finally gave way and admitted that he had stated differently before the Court of Enquiry in Montreal, admitted that the point that he attempted to make at the present trial, that he had looked and satisfied himself that there was no green light on the

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Cape Breton, was a point he had not mentioned before the Court of Enquiry in Montreal.

Now, dealing with the whole record, the court will satisfy itself that the defendants have adhered to the line of defence set out in their preliminary act, in their defence, and in their counter-claim. There has been no attempt to amend our pleadings contrary to the statements contained in our preliminary act. Our defence has been clear and consistent throughout. Our case depends upon the following facts clearly established in evidence. Our ship, the *Cape Breton*, was on her way down from Montreal. Orders were given to weigh anchor at two o'clock in the morning. Before the anchor was weighed, the mate states he told the man who had charge of the lamps to get them ready. The latter says he received such instruction or order, and that after the anchor was weighed, the lamps were put into their respective towers; and I direct the attention of the court to the fact that the green light was put in first. This man further states, as is very natural, that after he put the lamps in their respective towers, he looked to see if they were burning, and satisfied himself that they were. Now, the *Cape Breton* had been anchored opposite Sorel, roughly speaking between the church and the wharf, slightly to the south of the centre of the channel. When the anchor was weighed and the ship started, both the pilot and the captain of the ship were on the bridge. The ship was pointed up stream because the current is down, and they start to manœuvre the ship. The helm is starboarded to bring her in a little to the south, and the ship goes up the river a short distance and finally gets about across the stream, and then reverses full speed astern. Just at that juncture, Lafleur's schooner comes into view, on the *Cape Breton's* stern quarter. When we got the ship's head

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down the river, and started to go full speed ahead down stream, we were about opposite the point where we anchored, that is between the church and the wharf. Then we had only one course to steer up to the time of the collision, and we did not change our course. If there had been no accident, we would have had a straight course down the river. At 2.25 a.m., according to the pilot, we were going full speed south of the centre of the channel. Our pilot says that his mark was to have Ile de Grâce light slightly on his port bow, and the bluff of Pointe aux Pins on his starboard quarter. That was our course down the river. According to our log we were going full speed ahead until 2.35 a.m. There is a difference of two minutes between the pilot's watch and the engineer's clock; but we will accept the engineer's time and say that for eight minutes we were going full speed ahead on a straight course, in a position for anybody coming in the opposite direction to see us, always assuming of course that we had our lights exhibited. How, then, could a ship coming up the river fail to see us if she had a proper look-out? At 2.35 a.m. our log shows the signal "stop, and reverse full speed astern." All this time we had our regulation lights burning, and a proper and efficient look-out. There can be no possible dispute about our look-out, who was an able seaman; and as to the lights, we have the evidence of our captain, our pilot, our mate, our look-out and three others on board the *Cape Breton* that our lights were ordered to be put up before the ship started, and that they were so put up and were burning at the time of the collision. But what about the *Canada*? It is not a question of an inefficient look-out on board of that vessel, but of no look-out at all. The pilot was at the wheel, the captain was in his cabin counting tickets

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the first mate was in bed, the second mate was rolling barrels below. That was their complement of officers.

Furthermore, we charge that the *Canada* is responsible for the collision in that she did not keep to that side of the fair-way or mid-channel lying on her starboard side, but was improperly on the other side of the mid-channel or fair-way. Now, it is admitted by counsel for the plaintiffs that they passed sixty feet to the north of the second black buoy, and, according to their own evidence, the channel is only 300 feet wide there, so that they were on the wrong side—the south side—of the fair-way at that buoy. (*The Turret Age* v. *Lloyd S. Porter* (1). The case cited decides that the river between Montreal and Quebec is a "narrow channel" within the meaning of the regulations.

We further charge that the *Canada* improperly starboarded her helm instead of porting it, and that she attempted to cross our bows. Bouillet, the pilot of the *Canada*, admits that he starboarded; and he claimed, elsewhere in his evidence, that he could turn eight points in eighty seconds. Now, if when he heard our first whistle he had put his helm hard-a-port, as our signal called for, and his vessel can turn four points in forty seconds, this case would not have come before the courts, there would have been no collision. Bouillet's evidence makes it perfectly clear that if he had stopped or reversed, or even if he had ported instead of starboarding when he heard our first whistle, or even after that, there would have been no collision.

In the next place, in order to put themselves on the right side of the channel, the plaintiffs contend that the harbour of Sorel extends down as far as Ile à Pierre, two miles below Ile de Grâce light. Their whole argument on that head is based on the fact

(1) Unreported.

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that the harbour-master collects dues down as far as that. That, I submit, is no criterion of the harbour limits. Sorel is a natural harbour, and has not been defined by statute. But counsel for plaintiffs further say that even if the harbour of Sorel does not extend as far as they claim it does, and conceding that they were on the wrong side of the channel, it is the custom to go on that side of the channel at that point. But a custom will not override the law, and I submit that the plaintiffs have not shown the existence of any such custom.

The argument that because the *Canada* throws a lot of light we must have known that she was a "mail boat" of the R. & O. Navigation Company, and that she must stop at Sorel, requires no answer from the defendants.

Mr. Harris, followed for the defendants, arguing that the question of the lights was the chief point in issue, and that the defendant ship had her lights burning is established by the evidence of seven witnesses. Unless their evidence is rejected, unless the court is prepared to regard each and every one of these witnesses as a deliberate perjurer, then the question of the lights must be determined in our favour. Possibly it will be suggested by counsel for the plaintiffs that all these men were mistaken; but I say the circumstances negative any possibility of mistake. More than that, there is not a single witness upon the other side whose evidence cannot be reconciled with the facts as our witnesses testify to them. Some of their witnesses, when pressed, would not swear positively that there were no lights—all they would say was "we did not see them." While others were admittedly in such a position that they could not have seen the lights if they had been burning. Referring more particularly to Latour's evidence, he swears that

he went and looked at the green light after he got on the *Cape Breton*. I do not think it is of any very great importance whether Latour saw the green light after the collision, or whether he went and looked or not. If the green light had been out all the way through from beginning to end it would not have affected the collision, because our red light was the only light of importance, being the light which all along, from beginning to end, was exposed to the view of the other ship. But if any witness is to be disbelieved it is the witness Latour, for two reasons, first, because he made a statement before the Court of Enquiry in Montreal diametrically opposed to the statement he has made before this court; and, secondly, when it comes to a question of finding one man or seven men guilty of perjury, by all the rules of evidence the court must say the one man is wrong and not the seven. Again, the positive evidence of the man whose duty it was to put up the lights and who declares: "I put those lights up; I saw them there, and they *were* there," must have greater weight than the negative evidence of those who simply say they never saw them. (The *Martha Sophia*) (1).

Therefore, it is with perfect confidence that we ask the court to find that the lights of the *Cape Breton* were burning, and burning from the moment, or almost from the moment, that the ship left her anchorage.

Again, Mr. Pentland, for the plaintiffs, contended that the absence of an entry in the *Cape Breton's* log that the lights were put up on the morning of the 12th, when the collision occurred, went to established that they were not put up. But the learned counsel's logic will not hold, because if the fact that there is no entry in the log proves anything it proves too much for his case, for he has to admit that there is also no entry

(1) 2 Stu. Adm. 14.

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that the lights were extinguished on the evening of the 11th. Therefore, I say that he has proved that the lights were burning all the way from Montreal until the time of the collision, if he has proved anything. But the omission from the log-book means nothing beyond the neglect to enter it; while, on the other hand, it certainly goes to show that the log-book was not prepared for the purposes of this case. The lights would have been the first thing the people on the *Cape Breton* would have thought of if they had been trying to harmonize the log-book with their defence.

Again, Mr. Pentland contends that we did not prove our lights to have been according to the regulations. Now, the court will see that in their statement of claim they attack our lights: we say our lights were all right. On whom is the burden of proving that the lights were bad? Is it on us, or on the plaintiffs who are attacking the lights? However, we did produce evidence to show that our lights were proper and according to the regulations. We had the inspector's certificate under *The Steamboat Inspection Act*, and that certificate covered the equipment of the ship in respect of lights. (1).

Mr. Pentland further contended that it was necessary for us to produce the lights in court, citing *Todd and Whall's Practical Seamanship* (2) for that purpose. All that *Todd and Whall's* book is authority for in this connection is that its authors suggest that it is "advisable to have the lights and fog-signals in such good order and condition that they can, *if necessary*, be shown in a court of law." Counsel for the plaintiffs knew that we kept this ship here for a week, so that they could go and see the lights if they wished to do so, but they never asked to have them brought into court, although

(1) *The Steamboat Inspection Act.* R. S. C. c. 78, sec. 2 (e)

(2) p. 158.

now, after the ship is away down the St. Lawrence, they ask "why were those lights not brought into court?"

I wish to lay down a proposition of law with regard to this question of lights, and it is this: In a collision case where you have a dispute as to the lights and their bearings, the lack of a proper look-out has very great weight against the vessel deficient in that respect. (The *Rabboni* (1).

Upon the question of look-out we have the requirements amply satisfied on board of the *Cape Breton*. The proper place for a look-out is on the forecastle head of the ship; 2ndly the look-out must be a man who has no other duties to perform. The *Canada* failed to comply with either of these requirements. (*Marsden on Collisions* (2); *Spencer on Collisions* (3); the *Diana* (4); the *Glannibanta* (5); *Lowndes on Collisions* (6); *Ward* v. *The Ogdensburg* (7); the *Ottawa* (8); the *New York* v. *Rea* (9); *Hazlett* v. *Conrad* (10); the *Northern Indiana* (11); the *Parkersburg* (12); the *Young America* (13).)

In the next place if we had our lights burning, and there is no doubt upon the evidence that we had, the plaintiffs were negligent in not seeing them. (*Marsden on Collisions* (14); *Spencer on Collisions* (15).)

The absence of a competent look-out casts the burden upon the vessel in fault of showing that such fact did not contribute to the collision. (The *Young America*, *supra*; The *Poole* v. *Washington* (16); *Spencer on Collisions* (17); the *Rebecca* (18).)

(1) 53 Fed. Rep. 952.
(2) 4th ed. pp. 539, 542.
(3) pp. 316, 318.
(4) 1 W. Rob. 131.
(5) 1 P. D. 283.
(6) p. 68.
(7) 5 McLean 622.
(8) 3 Wall. 268.
(9) 18 How. 223.
(10) Fed. Cas. No. 6288.
(11) Fed. Cas. No. 10,320.
(12) Fed Cas. 10,753.
(13) Fed. Cas. No. 18,178.
(14) 4th ed. p. 542.
(15) pp. 93, 94, 95 and 321.
(16) Fed. Cas. Nos. 11,271.
(17) p. 324.
(18) 1 Blatch. and H. 347.

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Art. 29 of the Regulations says: "Nothing in these rules shall exonerate any vessel, or the owner, or master, or crew thereof, from the consequences of any neglect to carry lights or signals, or of any neglect to keep a proper look-out, or of the neglect of any precaution which may be required by the ordinary practice of seaman or by the special circumstances of the case." *Jones* v. *St. Nicholas* (1); the *Samuel Dillaway* (2).)

The *Canada* infringed Art. 25 of the Regulations by not keeping to that side of the fair-way which lay on her starboard side, when it was "safe and practicable" for her to do so. Under Art 27 "safe and practicable" must be construed to mean that unless dangers of navigation or collision, or some other special circumstances prevent, the direction as to keeping to the starboard side must be adhered to. All presumptions are against a ship on the wrong side of the fair-way. (*Marsden on Collisions* (3); 25 *Am. and Eng. Ency.* (4); *Spencer on Collisions* (5); the *City of New York* (6); the *Mexico* (7).

As to the "custom," relating to the method of entering the port of Sorel, relied on by the plaintiffs, as an excuse for their breach of the regulations, such custom must be universal to make it binding. Plaintiffs have not shown the "custom" to be such. Nor does the evidence show it was uniform; on the contrary it shows that there were divers ways of going in. Again, the *Canada* on this occasion was taking an unusual course in face of the "custom" they seek to set up. And lastly, and as an insuperable objection, no custom that is contrary to statute law can

(1) 49 Fed. Rep. 671.
(2) 98 Fed. Rep. 138.
(3) 4th ed. p. 513.
(4) 2nd ed. p. 992.
(5) p. 222.
(6) 147 U.S. 72.
(7) 84 Fed. Rep. 504.

have any binding force or validity whatever. (*Marsden on Collisions* (1); the *Friends* (2); the *Duke of Sussex* (3); *The Occidental, &c. SS. Company* v. *Smith* (4); *Spencer on Collisions* (5).

Mr. Howden, a witness called by the plaintiffs to define the harbour of Sorel, said that the harbour included the territory where the wharves are. We are content with that definition for the purposes of this case. But it remains to be said that until a harbour is created by proclamation or by statute, its boundaries are to be held to be its natural boundaries. It is not a harbour under *The Harbour Masters Act* (6), secs. 3 and 4, unless it is declared to be a port by proclamation. (See also c. 47 of the statutes of 1894.) Moreover, in the Montreal Harbour Commissioners' regulations, the River Richelieu is treated throughout as being the harbour of Sorel. That meets my theory exactly. Therefore, I would submit that neither the custom nor the contention of my learned friends as to the harbour give them any right to navigate on the port side of the river.

The plaintiffs further contend that the channel is where the water is deepest; but in answer to that I say that the "narrow channel" rule (Art. 25) is the same as the English rule, and that has been held to apply to the Straits of Messina and to Sidney Harbour. The *Cuba* v. *McMillan* (7). The whole water, from shore to shore, in these cases has been held to be a "narrow channel;" and so in the River St Lawrence, the rule applies wherever there is water for a vessel to navigate. This very point was in issue in the case of the *Turret Age* v. *The Lloyd S. Porter.* (*Supra*).

(1) 4th ed. pp. 385, 512.
(2) 4 Moo. P.C. 314.
(3) 1 W. Rob. 274.
(4) 74 Fed. Rep. 261.
(5) p. 44.
(6) R. S. C. c. 86.
(7) 26 S. C. R. 651.

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and the Lord Chancellor said, in delivering the judgment of the Privy Council: "Their lordships will not stay for a moment to consider the question who was in, or who was out, of the channel."

Then we have these facts established, namely that the plaintiffs had no proper look-out, no certificated officer in charge of the ship, no licensed pilot, and the ship was on the wrong side of the channel.

The burden of proof is on the plaintiffs to establish a case of negligence against us. (*Kay on Shipping* (1); The *City of London* (2); *Spencer on Collisions* (3). We have proved from their own witnesses that if they had ported instead of starboarding they would have gone clear. (The *Victory* and the *Plymothian* (4). In the case last cited the facts are closely in point with this, although three blasts were given in the agony of collision there, and we only gave one; but we say that three blasts would not have been of any use at the moment of the collision in this case.

Mr. Pentland contended that when we saw their vessel coming up the channel the lights indicated that the ships were crossing. I submit we were not bound to take the slightest notice of their ship so long as she was coming up the channel below Ile de Grâce light; because it was evident to us that when she got up to Ile de Grâce light she would turn around and shape her course up the channel, and when she did that, that then for the first time the rule of the road came into force, and our position after the two ships straightened out was "red to red." The position of the ships was never "end to end." (The *Cuba* v. *McMillan* (5); The *James McKenzie* (6); The *Otto* and *Thorsa* (7).

(1) 2nd ed. p. 512, sec. 629.
(2) Swab. 300.
(3) p. 203.
(4) 168 U. S. 410.
(5) 26 S. C. R. 651.
(6) 2 Stu. Adm. 87.
(7) [1894] A. C. 116.

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When the *Cape Breton* saw the two side lights of the *Canada*, the former did right when she blew one blast and ported her helm, so as to go further over to the starboard side of the channel. She had a right to suppose that the *Canada* would obey the rules and port her helm. (The *Arabian* and the *Alma* (1); The *Thingvalla* (2); *Marsden on Collisions* (3); The *Bywell Castle* (4).

The *Cape Breton* was not a foreign sea-going ship but a Canadian home trading ship within the meaning of R. S. C. c. 74, sec. 2, sub-sec (*e*). On this particular voyage she was bound from Montreal to Sydney, N.S., and from the time navigation had opened that spring she had been exclusively engaged in plying between those ports. So she was a home trading ship, and did not require to carry an official log.

As to the necessity for a protest, we say that this is a collision case and not a salvage case, and so we were not bound to make a protest. *Conklings' United States Admiralty Law*. (5).

Mr. *Cook*, for the plaintiffs, replied. The question of the position of the look-out only involves the place of best advantage for observation. It is immaterial if that position is not the same on different ships. We discontinued the practice of having look-outs in the bows of the R. & O. Navigation Company's boats, because the wheel-house is a better place for observation. There is a more especial reason for doing without a look-out in the bows of a steamer on the St. Lawrence under present conditions of navigation there. The river is being crowded with lights, fixed lights, up and down the channel for the guidance

(1) 2 Stu. Adm. 72.
(2) 42 Fed. Rep. 331.
(3) 4th ed. p. 467.
(4) 4 P. D. 219.
(5) p. 345.

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of mariners. In addition to these there are the shore lights, the lights on dredges, which are difficult to discern from those of other vessels, and then you have the lights of all the craft, big and small, which you meet between Quebec and Montreal. Now put a man as look-out in the bows of the *Canada*, and what would the result be? He would be continually calling out: "Light ahead!"—red light, green light, white light on the port bow, on the starboard bow, and so it would confuse the man in charge of the vessel more than it would do him any good. We, therefore, found it better to entrust the duties of look-out to the pilot, who is thoroughly conversant with the fixed lights along the river and can distinguish them from the lights of ships navigating the river.

The real point with regard to the look-out is, did the absence of such a man in the bows of the *Canada* contribute to the collision? If it did not, the point as to the look-out may be dismissed from the consideration of the case. In the case of the *Westphalia* (*Hamburg Packet Co.* v. *Desroches*) (1) this court held that the absence of a look-out on the schooner did not contribute to the collision, because those on board of her saw the *Westphalia*.

As to the question of the lights of the *Cape Breton*, the evidence shows that not one of the officers or crew did what was the right thing to do in the face of this collision, viz., go and examine the red and green light so as to be able to swear that these lights were actually burning at the time of the collision.

As to the point made against us that we had no certificated officers in charge of our vessel, the point amounts to nothing unless it contributed to the collision, and I submit that it had nothing to do with it whatever.

(1) 8 Ex. C. R. 263.

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The question of vital importance is to determine when it was that those on board the *Cape Breton* saw the *Canada's* green light, indicating that she was a crossing vessel. Now the witnesses for the defence say they saw "the flash of a green light." Your lordship knows how hard it is to see a green light a mile off, it is the poorest of the three lights in point of visibility, and yet there are seven witnesses for the defence who are able to say that they saw "the flash of a green light." The evidence sustains the conclusion that, when these people saw this green light on the *Canada* she was not more than three quarters of a mile distant from them. Then the vessels approached each other, showing "red to red." On a further approach, at about a quarter of a mile off the *Canada* exhibited three lights. What did that show? It shewed a change of course. The "flash of the green" was being carried out, and the ship was now steadying on that change of course. The *Canada* became a crossing ship. Then came the blast of the whistle, the shutting out of the red light, and the exhibition of the green light. Then what was done on the *Cape Breton?* They ported their helm—ported to a green light—a wrong manœuvre, right away! Not only did they port to a green light, but they reversed their engines with a right-handed propeller, which caused their vessel to spin round like a top—another wrong move, never thinking it advisable when they first saw the three lights to stop and see whether our vessel was not going across their bows, and possibly into Sorel — never thinking of their duty to stop and reverse until the last minute. Every manœuvre that they took on the supposition that the *Canada* was a crossing vessel—as she was—was wrong from the start. And the *Cape Breton* attempts to justify these manœuvres on the ground that they were taken *in*

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extremis. But to justify any departure from the rules because of immediate danger, there must be clear proof that an adherence would have caused such danger, and that the step taken was the right step. (*Marsden on Collisions* (1).

Upon these considerations, and the other points urged by counsel leading for the plaintiffs, judgment ought to go for the plaintiffs in this action.

ROUTHIER, C. J. (L. J.) now (November 19, 1904), delivered judgment :—

Cette cause est d'une importance absolument exceptionnelle, non seulement à raison du montant en litige et des autres procès qui en seront probablement la suite, mais encore, et surtout, à cause des pertes de vie résultant de la collision entre les deux steamers, le *Canada* et le *Cape Breton*

Elle est aussi du plus haut intérêt à cause des questions nombreuses et compliquées que les éminents avocats des deux parties, dont quatre pour les demandeurs et quatre pour les défendeurs, ont soulevées et débattues avec beaucoup de science et d'habileté. De part et d'autre, rien ne parait avoir été négligé pour faire triompher ce que chacun a cru être le droit et la justice.

Malheureusement, les questions de fait sont une grande source d'embarras dans cette cause, à raison des nombreux témoignages entendus, et de la preuve étonnamment contradictoire qu'ils produisent. Plusieurs des témoins semblent croire que c'est leur devoir de jurer le contraire de ce qu'ont affirmé les témoins de la partie adverse et qu'ils ne sont appelés en cour que pour cela.

Le fait brutal qui est la cause du procès est celui-ci : dans la nuit du onze au douze juin dernier, vers les

(1) 4th ed. p. 491.

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deux heures et demie du matin, le douze, le *Canada* et le *Cape Breton* se sont rencontrés sur le fleuve Saint-Laurent, près de Sorel, et quoiqu'ils prétendent tous deux avoir fait leur possible pour ne pas se heurter, ils se sont entrechoqués avec une telle violence que le *Canada* a été enfoncé et a sombré, entrainant cinq pertes de vie.

Qui est en faute? Quelles ont été les causes éloignées et prochaines de cette déplorable collision? C'est mon devoir de les rechercher, et j'espère qu'on me fera l'honneur de croire que j'en comprends la lourde responsabilité. Heureusement que je n'ai pas à juger en dernier ressort et qu'il y aura des recours contre les erreurs que je pourrai commettre dans le jugement que je vais rendre.

La première faute reprochée au *Canada* est celle-ci : pas de vigie (no look-out). Nous avons sur ce point une règle impérative : c'est la règle 29 qui dit ceci :

"Nothing in these rules shall exonerate any vessel, "or the owner, or master, or crew thereof, from the "consequence of any neglect to carry lights or signals, "or of any neglect to keep a proper look-out, or of the "neglect of any precaution which may be required by "the ordinary practice of seamen, or by the special "circumstances of the case."

La loi et la jurisprudence l'exigent : tout vaisseau est tenu d'avoir une vigie.

Aussi la Compagnie du Richelieu ne nie pas cette obligation, mais elle dit : en fait, le *Canada* avait sa vigie, c'était le pilote Bouillet, et cette vigie était placée dans le meilleur endroit pour bien voir.

C'est possible ; mais est-ce une pratique sage et prudente et conforme à la loi que le pilote, ou l'homme de roue, soit en même temps vigie? Les auteurs et les précédents condamnent cette pratique et je crois qu'ils ont raison. La vigie ne devrait pas

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avoir autre chose à faire qu'à regarder et à faire rapport.

Voici ce que dit *Marsden on Collisions* (1) en parlant des vigies :

" They should not be engaged upon any other duty ; " and they should be stationed in the bows, or in that " part of the ship from which other vessels can best " be seen."

Et il ajoute ceci :

" In another case it was held that the absence of a " look-out on board a vessel will cause her to be held " in fault for a collision, unless it is proved that the " other ship was seen as soon as it was possible to " see her, and that the proper steps to avoid her were " taken, and as soon as it was possible to take " them." (2).

Spencer on Collisions (3) dit :

" A proper look-out means not merely some one on " deck who can see approaching danger if his atten- " tion is directed to it, but some one in a favorable " position to observe, whose *especial* and *sole business* " it is to watch and see that the vessel has an unob- " structed course, and who is in such direct com- " munication with the helmsman and officers in " command, that prompt report may be made of the " presence of danger of any sort."

" It has been repeatedly held that the master of a " vessel is not a proper look-out."

" Having the general care of the ship, he cannot " give that entire and undivided attention to the " duties of a look-out required of one in that impor- " tant position."

Conséquemment ni le pilote, ni l'homme à la roue ne sont des vigies strictement légales. Le pilote a

(1) 4 ed. p. 539.

(2) *Ibid*, p. 542.

(3) Sec. 173, p. 317.

bien d'autres choses à regarder : Il a à examiner, à observer les phares qui sont sur sa route, les bouées, les marques de terre ; il doit étudier le compas, les cartes ; il doit chercher les courants, les courses à suivre, donner des ordres, des signaux, s'il en est besoin ; tandis qu'une vigie ne devrait avoir autre chose à faire qu'à regarder, qu'à observer l'horizon et à signaler les causes de danger. Or le pilote, encore une fois, est absorbé par d'autres soins ; par les raisons qu'il peut y avoir de changer de direction, par le calcul des distances et du temps requis pour les manœuvres etc., etc.

On objecte que la vigie, placée tout à fait à l'avant, serait trop base et ne servirait de rien et je le crois, d'après la construction du *Canada* et de bien d'autres navires qui sont du même genre ; eh bien, alors, qu'on la place ailleurs ; qu'on la place à côté du pilote si l'on veut, mais qu'il y en ait une, et une qui n'ait pas autre chose à faire. Voilà, je crois, l'essentiel.

On a cité sur ce point certaines causes, et entr'autres la cause du *Turret Age*, décidée par le Conseil Privé, mais j'en parlerai plus loin.

Il y a dans cette cause-ci même un incident qui prouve justement que le pilote n'est pas une vigie suffisante et je crois qu'il suffira pour s'en convaincre de référer à la page 32 du témoignage de Bouillet, qui se trouve dans le premier volume de la preuve des demandeurs, à la page 94.

On voit là en effet qu'à un moment donné, et juste au moment le plus critique, au moment où le *Cape Breton* a donné le premier coup de sifflet, Bouillet n'est pas à son poste de vigie. On lui demande :

" Q. Par conséquent vous n'étiez pas en avant quand vous avez entendu le premier cri?

" R. J'étais parti pour aller en arrière de la roue.

" Q. Vous étiez parti dans cette direction là?

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" R. Oui.

" Q. Vous n'étiez pas encore rendu en arrière ?

" R. Non je n'étais pas encore rendu en arrière.

" Q. Vous êtes allé jusqu'en arrière ?

" R. Pardon, lorsque j'ai entendu le cri je suis revenu en dedans de la roue. Je n'ai pas été m'habiller. Lorsque j'ai entendu crier je suis revenu entre les deux roues.

" Q. Vous alliez en arrière de la roue pour vous habiller ?

" R. Oui."

Voici un pilote qui est en même temps vigie, et à un moment donné, justement au moment le plus critique, au moment où les deux vaisseaux sont assez près l'un de l'autre et assez en danger de collision pour que le *Cape Breton* jette un cri (je démontrerai plus loin qu'il l'a jeté trop tard son cri). A ce moment là, la vigie s'absente pour aller s'habiller, pour aller prendre la place de l'homme à la roue. Ce fait à lui seul démontre combien il est important qu'il y ait une personne qui ne s'occupe pas d'autre chose que de faire la vigie.

Enfin après l'imputation faite en cette cause par la demande que le *Cape Breton* n'avait pas de lumières verte ni rouge, on comprend encore mieux que l'absence d'une vigie spéciale et bien placée à bord du *Canada* a été regrettable. Car si cette vigie eut été là, elle eut peut-être vu les lumières que Bouillet et Latour n'ont pas vues. Cela eut peut-être pu modifier la course du *Canada* et enfin nous aurions aujourd'hui son témoignage; aujourd'hui nous pourrions entendre cette vigie qui pourrait nous dire : J'étais là, je n'avais pas autre chose à faire qu'à regarder, j'avais une lunette, j'ai vu venir le *Cape Breton* et je l'ai regardé tout le temps et il n'avait pas de lumière verte ni de lumière rouge. Ce témoignage, on le comprend, aurait beaucoup plus de poids que le témoignage du pilote

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Bouillet et de Latour qui, eux, avaient autre chose à faire. Voilà pour la doctrine légale sur cette question.

Maintenant cette faute a-t-elle été cause de cette collision dont il est question dans cette action, ou, du moins, y a-t-elle contribué ? Si elle n'y a pas contribué, elle ne peut pas servir de base à une condamnation, malgré que ce soit une faute.

Sur ce point surgit encore la question de droit et si l'on refère à *Marsden on Collisions* (1), voici ce qu'on y lit :

" If the absence of look-out clearly had nothing to " do with the collision, it will not be deemed to be a " fault contributing to the collision."

Et il cite quatre précédents dans ce sens.

Spencer de son côté, à la section 176, (2) dit ceci :

" A look-out is but one of many other equally pru- " dent requirements to guard against danger, and " where his absence does not in any way contribute " to the collision, where it could not have been guarded " against by a look-out, no liability can be charged for " such omission ; but it is only where a look-out would " have been of no service in guarding against collision " that his absence is excusable.....

Mais il n'en est pas moins vrai que :

" The absence of a look-out is *primâ facie* evidence " that the collision was the result of such omission. " The fact being shown that there was no proper look- " out in performance of his duties, the burden of proof " is upon the delinquent vessel to show that such ab- " sence did not contribute to the result."

Voilà pour la doctrine légale sur cette question et je l'ai soutenue dans la cause du *Westphalia* qui avait frappé une goélette qui n'avait pas de vigie. Mais la question des faits dans cette cause-ci n'est pas la même que dans la cause du *Westphalia* sur ce point ; car la preuve

(1). 4ème ed. p. 539. (2) p. 323.

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établissait dans cette dernière cause du *Westphalia* que les officiers à bord de la goélette avaient très bien vu les lumières du *Westphalia*, tandis que dans la présente cause les officiers du *Canada* jurent n'avoir pas vu les lumières du *Cape Breton*, la lumière verte et la rouge, et la demande soutient même qu'il n'y en avait pas. L'effet de l'absence de vigie à bord du *Canada* prend dès lors une beaucoup plus grande importance. Car à l'accusation portée par la demande contre le *Cape Breton* qu'il n'avait pas de lumières verte et rouge, les défendeurs répondent : Le *Canada* n'a pas vu nos lumières parce qu'il n'avait pas de vigie. Cette réponse n'est pas sans gravité, car on se demande si la vigie n'aurait pas mieux vu que Bouillet et Latour ; et si elle avait vu la lumière rouge du *Cape Breton* par exemple, quand le *Canada* est arrivé au nord de la dernière bouée noire, peut-être qu'alors Bouillet n'eût pas changé sa course et pris la direction de Sorel, comme il l'a fait ; il aurait dit, je présume, comme un homme prudent : Voici un steamer qui approche et qui me montre sa lumière rouge, je vais le rencontrer rouge à rouge, et ensuite je prendrai ma course sur Sorel.

Naturellement nous ne savons pas si une vigie particulière, préoccupée d'aucun soin aurait mieux vu que Latour et Bouillet, mais c'est possible ; et puisque la loi impose cette obligation d'une vigie *pour bien voir*, n'avons-nous pas le droit de dire à la demande : "Vous n'avez *pas bien vu* et vous ne pouviez *pas bien voir*, parce que vous n'aviez pas de vigie."

Il y a donc là une faute du *Canada* et nous ne pouvons pas facilement affirmer, dans les circonstances prouvées, que cette faute n'a contribué en rien à la manœuvre subséquente du vaisseau et au résultat final.

On dira sans doute qu'il n'y a là que des hypothèses ; qu'en tous cas l'absence de vigie n'a pu être qu'une

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cause éloignée de l'accident, et qu'il faudrait alors appliquer la maxime de droit : " *Causa proxima non remota spectatur.*"

Mais le doute n'existe que sur les conséquences de la faute ; et c'était au *Canada* à prouver que cette faute n'a entrainé aucune conséquence fâcheuse. La jurisprudence a été sévère là dessus, et il a été souvent décidé que s'il est prouvé qu'un vaisseau a ses lumières réglementaires, il y a négligence dans l'autre vaisseau *s'il ne les a pas vues.*

Je citerai là-dessus *Spencer on Collisions* (1). Je citerai aussi *Marsden on Collisions* (2).

Voyons maintenant quelle est la première faute reprochée au *Cape Breton.*

La demande soutient que ce vaisseau est parti de son ancrage à Sorel et a navigué jusqu'à la collision sans lumières rouge ni verte. Les témoins qui soutiennent cette prétention sont : Lazare Lafleur, capitaine de la goélette " W. Patry", qui a vu partir le *Cape Breton* de son ancrage à Sorel sans lumières. Son témoignage, qui m'avait frappé beaucoup lorsque je l'ai entendu, parce qu'il m'avait l'air d'un témoin absolument désintéressé et très honnête, est contredit cependant par son frère Rémi, qui était à bord de la même goélette et qui dit, non pas qu'il a vu les lumières, mais ceci : " Dans " la situation où se trouvait le *Cape Breton,* dans la " position qu'il occupait vis-à-vis de nous, nous n'avons " pas pu voir, nous ne pouvions pas voir les lumières " du *Cape Breton* et nous ne pouvions pas savoir par " conséquent s'il y avait une lumière verte et une " rouge." J'avoue que si j'avais à choisir entre ces deux témoignages, je prendrais plutôt celui de Lazare Lafleur, parce qu'il m'a paru beaucoup plus intelligent et qu'il rend un bien meilleur compte de sa manière

(1) Secs. 321, 93, 94, 95 et notes, pp. 323 et 324. (2) Page 50 et aux pages 542 et ainsi que 539.

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de voir ; mais je n'en suis pas là. Remarquons bien qu'il ne s'agit que du départ de Sorel. C'est au moment où le *Cape Breton* tournait simplement, il avait levé l'ancre et il tournait pour prendre sa course, il pouvait très bien arriver qu'il n'eût pas encore ses lumières alors, et que les lumières aient été placées un peu plus tard pendant que le vaisseau faisait son tour pour prendre sa course vers Québec.

Joubert et Mathieu, deux autres témoins de la demande, se trouvaient sur le quai de Sorel. Ils ont vu aussi virer le *Cape Breton* et ils jurent qu'ils n'ont pas vu de lumières.

Eh bien, ici encore, j'ai à faire la même observation Le bateau n'avait pas encore pris sa course, il était seulement en devoir de la prendre. Il pouvait n'avoir pas de lumières dans le moment et en avoir plus tard. Monsieur Lacouture, un autre témoin de la demande, est, lui, un homme de Sorel. Il est parti en yacht pour aller à l'endroit de l'accident aussitôt après la collision. Il nous dit qu'il est arrivé près, ou du moins à quelques centaines de pieds du *Cape Breton*, et il a abordé à bord du *Canada*, et il nous dit qu'alors, en approchant du *Cape Breton*, il n'a pas pu voir la lumière verte et qu'il aurait dû la voir si elle y avait été.

Dans ce moment la collision était arrivée. Il peut très bien se faire que la lumière fût allumée jusqu'au moment de la collision et qu'elle ait été éteinte alors, ou immédiatement après. Cela était assez longtemps après la collision puisque Lacouture a eu connaissance de la collision à Sorel, et qu'il a été obligé de prendre un yacht pour aller à l'endroit de la collision.

Enfin il y a les témoins Bouillet et Latour. Ce sont les deux principaux témoins de la part de la demande sur ce point. L'un était le pilote et l'autre était l'homme de roue. Ils étaient tous deux là, et Bouillet faisait la vigie, comme je l'ai dit. Tous les deux jurent

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qu'ils n'ont pas vu pendant longtemps ni lumière verte, ni lumière rouge; ils ont vu seulement la lumière rouge à un moment qu'ils indiquent, mais quand il était déjà trop tard.

Ils n'ont pas vu la lumière verte évidemment avec la course suivie par le *Cape Breton*. Suivant eux, la lumière rouge n'aurait été mise en place qu'au dernier moment, c'est-à-dire environ trente secondes avant la collision ; mais enfin ce n'est là qu'une conjecture. Dans tous les cas ils ne l'ont pas vue avant ça, jurent-ils.

Eh bien contre cette preuve de la part de la demande qu'avons-nous? Nous avons le témoignage de McDonald qui était à bord du *Cape Breton* et qui jure qu'il a vu les lumières; McArthur qui a vu la lumière rouge après la collision ; seulement je dois dire de suite que ce témoignage de McArthur n'a pas, à mon avis, une grande valeur. Il y a plusieurs contradictions dans son témoignage avec ce qu'il a déclaré au Colonel Henshaw qui était à bord. Sur d'autres points il n'a pas paru très sûr de ce qu'il avait vu, aussi je n'en tiens pas beaucoup compte. Mais il y a le témoignage de Toffin qui était à bord du *Cape Breton* et qui a vu les lumières. Il y a aussi le témoignage de Bromley, qui était le *look-out* ou la vigie sur le *Cape Breton* et qui a vu les lumières. Il y a le témoignage de Harwood qui les a allumées et qui les a posées aussitôt que le bateau s'est mis en mouvement pour descendre; et il y a McNeil qui jure qu'il les a vues aussi.

Comme on voit, nous avons là six témoins. Retranchons McArthur, si l'on veut, il reste cinq témoins dans tous les cas qui ont vu les lumières et dont un les a posées et les a allumées, contre les autres témoins de la demande qui ne les ont pas vues. Ces derniers ont pu dire la vérité quoique les lumières fussent à leur place, parce qu'ils ont pu être empêchés de les

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voir ou n'y pas porter attention dans le moment et ne parler ensuite que par souvenir. Mais les autres, les témoins de la défense, se sont parjurés si vraiment il n'y avait pas de lumières.

Or, je ne serais pas justifiable, au point de vue juridique et de la saine doctrine, de rejeter ces témoignages positifs pour accepter des témoignages négatifs, c'est-à-dire des témoignages de gens qui disent qu'ils n'ont pas vu contre des témoins qui ont vu. Naturellement, quand il s'agit de l'existence même d'un fait, il faut ajouter plus de foi aux témoins qui jurent avoir vu qu'à ceux qui jurent ne pas avoir vu. Donc, je dois croire que le *Cape Breton* avait ses lumières verte et rouge, et ce n'est pas sous ce rapport que je pourrais déclarer le *Cape Breton* en faute.

Pour trouver les vraies fautes commises et les vraies causes de la collision il faut chercher ailleurs. Il faut étudier la course suivie par les deux steamers et leur manœuvres.

D'un côté, nous avons le *Canada* qui montait le fleuve et qui s'en allait à Sorel ; de l'autre côté, le *Cape Breton* qui avait passé une partie de la nuit à l'ancre, au large de Sorel, et qui ayant levé l'ancre, descendait le fleuve en route pour Québec vers les deux heures et vingt-cinq du matin ; environ dix minutes plus tard, à deux heures et trente-cinq, les deux vaisseaux se rencontraient et la collision avait lieu.

Le *Canada*, ayant sombré en quelques minutes, est resté là pendant plusieurs semaines comme pour marquer l'endroit précis de la catastrophe. Des plans et des cartes filés dans cette cause reproduisent cette partie du fleuve St. Laurent où la collision a eu lieu, la localisent exactement et nous montrent la topographie des environs. On y voit indiqués et désignés : les rivages du fleuve, le chenal des navires et sa ligne

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centrale, les bouées et les phares, la profondeur de l'eau, les îles et quelques autres détails topographiques. Nous pouvons ainsi suivre aussi exactement qu'il est possible, approximativement sans doute, la course respective des deux vaisseaux.

Celle du *Canada* nous est indiquée par le pilote Bouillet et par Latour qui était à la roue. Ces deux témoins, et surtout Bouillet, nous indiquent la course du Canada avec une précision de détails, de mesures et de chiffres qui démontrent leur bonne foi beaucoup plus que leur habileté comme témoins, car les témoins habiles ne s'ingénient pas à fournir aux adversaires les moyens de les contredire.

C'est ainsi que Bouillet nous dit qu'en partant de la bouée rouge 136 L., il a pris la course *West quarter North* sur son compas ; qu'il a gardé sa course jusqu'à mi-distance entre les deux bouées noires 139 L. et 140 L., qu'il s'est dirigé alors à *West half South* et qu'il a passé à trois cent soixante pieds au nord de la première bouée noire 139 L., qu'il a passé à soixante pieds au nord de la deuxième bouée 141 L., et qu'il a pris alors la course *West by South quarter South* et ainsi de suite.

Naturellement la défense a amené comme témoin un ingénieur qui, armé d'un compas, a fait des calculs savants pour démontrer que les indications des courses et les chiffres de Bouillet ne pouvaient pas être exacts d'après le vrai nord, ni d'après le nord magnétique, ni même d'après le compas de Bouillet.

En même temps, la défense s'est efforcée d'établir par ce même travail que le *Cape Breton* n'a pu voir la lumière verte du *Canada* que dans les dernières secondes qui ont précédé la collision, et que dès lors il a été justifiable de toujours incliner à *starboard* comme il est prouvé qu'il a fait, c'est-à-dire sur la droite.

Tout le travail du témoin Howard peut être exact au point de vue scientifique, mais il repose sur des don-

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nées incertaines, et la moindre erreur dans le point de départ produit des différences énormes dans le résultat obtenu. Il n'est pas nécessaire d'être savant pour comprendre cela.

Il y a variation entre le compas du *Canada* et le vrai nord et le nord magnétique, et cette variation Bouillet ne la connait pas, il admet qu'il ne la connait pas, il l'indique à peu près mais il dit qu'il ne connait pas ça.

Les distances qu'il nous indique ne peuvent être qu'approximatives de leur nature même. On ne peut pas croire que Bouillet puisse nous indiquer exactement qu'il a passé, dans la nuit, à soixante pieds juste de la bouée 141 L, et à trois cent soixante pieds au nord de la première bouée noire. Ces distances sont évidemment approximatives. Elles sont précieuses toutefois, et sans les prendre à la rigueur elles nous éclairent assez exactement, je crois, sur la course du *Canada*.

La course du *Cape Breton* est moins clairement indiquée par les témoins de la défense.

Le pilote Hamelin ne se livre pas comme Bouillet, et j'aurai l'occasion de montrer à quel point il est réticent et refuse de donner les renseignements qu'on lui demande. Il ne se sert pas de compas, et la course qu'il a suivie reste un peu dans le vague. Mais enfin il appert qu'après avoir tourné vers le nord, il a pris sa course en descendant à partir du centre du *ship channel*, inclinant un peu vers le sud à *starboard*, mais se dirigeant sur la lumière de l'Ile de Grâce et se proposant de passer au nord de la deuxième bouée noire.

Comment, avec cette direction, le *Cape Breton* s'est-il trouvé au moment de la collision à plusieurs centaines de pieds au sud du chenal, et au sud aussi de la bouée noire 141 L., au nord de laquelle il se proposait de passer ?

Evidemment cela ne peut s'expliquer que par des changements de course non justifiés et des manœuvres qui ont dû être erronées.

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Entrons maintenant dans l'examen plus détaillé de ces courses du *Canada* et du *Cape Breton* et voyons quelles fautes commises de part et d'autre les ont conduits à la collision. Je dis d'abord que quand les deux vaisseaux se sont aperçus de loin, et qu'ils ont constaté qu'ils se rapprochaient, le *Cape Breton* avait droit de penser qu'ils allaient se rencontrer suivant la règle 18, c'est-à-dire chacun tenant la droite, lumière rouge à lumière rouge. Voilà cette règle 18, elle se lit comme suit :

" When two steam-vessels are meeting end on, or " nearly end on, so as to involve risk of collision, each " shall alter her course to starboard, so that each may " pass on the port side of the other."

Eh bien, le *Cape Breton* se fiait évidemment sur cette règle, et dès lors il avait droit de suivre la droite du chenal, c'est-à-dire le sud, en vertu de la règle 25 qui dit :

" In narrow channels every steam-vessel shall, when " it is safe and practicable, keep to that side of the fair- " way or mid-channel which lies on the starboard side " of such vessel." C'est simple et conforme à la loi.

Du côté du *Canada*, la question de la direction à prendre devenait au contraire complexe. Il s'en allait à Sorel, lui, et les lumières du port de Sorel étaient déjà visibles à l'horizon de son côté gauche. Deux routes différentes lui étaient ouvertes par conséquent pour rencontrer le *Cape Breton*, et en tenant compte de la pratique généralement suivie par lui il a pu croire qu'il avait à choisir entre deux règles contradictoires ; La règle 18 qui lui disait comme au *Cape Breton* : " Rencontrez à votre droite ", et la règle 33 applicable au havre de Sorel qui lui disait : " Rencontrez à votre gauche."

La règle 33 dit ceci :

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"Unless it is otherwise directed by the Harbour "Commissioners of Montreal, ships and vessels entering "or leaving the Harbour of Sorel, shall take the port "side, anything in the preceding articles to the con- "trary notwithstanding."

La première de ces courses, c'est-à-dire suivant la règle 18, était bien, à mon avis, la plus sûre: car c'est la règle générale, la règle connue de tous les marins et un grand nombre même n'en connaissent pas d'autres en fait de rencontres. J'en ai eu la preuve dans beaucoup de causes qui sont venues devant moi.

En la suivant, la rencontre eût lieu en parfaite sécurité et sans allonger dans une mesure appréciable la course vers Sorel.

Mais le *Canada* avait l'habitude, comme les autres bateaux de la Compagnie demanderesse, de prendre la direction du havre de Sorel immédiatement après avoir dépassé la dernière bouée noire, et même quelquefois entre les deux bouées noires, de manière à suivre la tangente au lieu d'une ligne plus ou moins angulaire, et les marins en charge de ce vaisseau ne songèrent pas à s'écarter de cette habitude et de cette pratique.

Evidemment il ne leur vint pas à l'esprit :

1° Que cette pratique n'était peut-être pas connue de tous les marins, et en second lieu que le vaisseau à rencontrer pouvait ne pas connaître le *Canada*, et ne pas savoir qu'il allait à Sorel, et enfin que le quai de Sorel était encore à deux milles de distance, et que l'étendue de ce havre n'est déterminée par aucune loi, malheureusement, et n'a aucune mesure, ni bornes connues, et que la règle 33 n'était peut-être pas applicable à cette partie du fleuve où ils se trouvaient alors et où la rencontre allait avoir lieu.

Aucun doute de ce genre ne parait avoir traversé leur esprit cependant, et lorsqu'ils eurent dépassé la

dernière bouée noire ils changèrent leur course, inclinant vers le sud, appliquant dès lors la règle 33, et se préparant à rencontrer à gauche le steamer qui s'en venait vers eux.

Avec une parfaite sécurité, semble-t-il, ils se disaient probablement: Les officiers de ce steamer qui vient à notre rencontre doivent savoir qui nous sommes, et où nous allons, et ils doivent connaître comme nous la règle 33 du havre de Sorel. Mais c'était trop présumer des connaissances et des renseignements que possédaient les officiers du *Cape Breton*, et c'était prendre pour incontestable leur prétention qu'à partir de cet endroit, et dès qu'ils sortaient du *ship channel*, ils entraient dans le havre de Sorel, ce qui n'est pas absolument certain. C'était vouloir imposer à l'autre vaisseau une pratique locale et non universelle. Sans doute on peut dire : Ce n'était pas seulement une pratique et un usage, c'était la règle 33 et même quant à l'usage, il est juste d'en tenir compte. Ainsi, si l'on refère à *Marsden on Collisions* (1), on lit ceci :

"But though the regulations are the paramount rules "of navigation, yet, where the usage of the place and "the business and courses of particular vessels are "obvious and well known, no seaman has a right to "neglect the knowledge he has of the propable move- "ments of other ships with reference to such usage."

Spencer on Collisions (2), dit ceci :

"Where well known usage has sanctioned a parti- "cular method of navigating local wa ers, it is com- "petent for the court to admit evidence of such usage ; "and if it be proved that the matter is regulated by "general usage, the court may in its discretion hold "the vessel to conform to such usage."

Différent d'un principe général, l'usage est d'une application exceptionnelle à la discrétion de la cour

(1) p. 374. (2) p. 44, sec. 22.

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qui est obligée de peser les circonstances et de tenir compte de l'usage.

Eh bien, je dis ceci : Dans cette situation et en pesant toutes les circonstances de la preuve, je crois que c'était l'obligation des officiers du *Canada* de signaler au *Cape Breton* leur intention de rencontrer à gauche au lieu de rencontrer à droite.

C'est un principe général. Si un steamer suit une course qui peut paraître extraordinaire aux autres steamers, quoiqu'elle soit justifiée par des raisons spéciales, il le fait à ses risques et périls, et s'il veut que les autres steamers en soient informés, il doit leur signaler ses intentions, car les autres ont le droit de présumer que sa course sera conforme aux règles ordinaires. Il y a lieu dans ce cas d'appliquer la règle 28, car les deux vaisseaux suivaient une course qu'ils croyaient autorisée par les règles. La règle 28 dit ceci :

"When vessels are in sight of one another, a steam-"vessel under way, in taking any course authorized or "required by these Rules, shall indicate that course by "the following signals on her whistle or siren, viz :

"One short blast to mean : "I am directing my "course to starboard."

"Two short blasts to mean : "I am directing my "course to port."

"Three short blasts to mean : "My engines are going "full speed astern."

Je dis que le *Canada* en pareil cas aurait dû donner deux coups de sifflet pour dire : "Je m'en vais à *port side*, et non pas à *starboard*."

Quand deux steamers s'aperçoivent mutuellement allant en sens inverse, à la rencontre l'un de l'autre et qu'il y a quelques doutes sur la direction de l'un d'eux, la régle 28 devient obligatoire et ils doivent se donner mutuellement des signaux, par coups de sifflet, pour se

signaler quand il en est encore temps et non pas attendre qu'il soit trop tard. Dans la présente cause les deux steamers sont en faute sous ce rapport. Dès que le *Cape Breton* a vu faire au *Canada* un changement de course, un mouvement, qui a montré tout à coup sa lumière verte pour un instant (ceci est prouvé par les officiers du *Cape Breton*), il aurait dû comprendre que le *Canada* se dirigeait vers le sud, ou tout au moins que sa course était incertaine ; et il aurait dû dès lors donner un coup de sifflet. De même, le *Canada* qui se préparait à faire la rencontre autrement que ne le veut la régle 18 devait en informer le *Cape Breton* par deux coups de sifflet. Le *Canada* y était d'autant plus obligé qu'il suivait une course qui lui était familière, mais qui ne l'était pas au *Cape Breton* et dont le *Cape Breton* pouvait ignorer la raison.

Je dis donc que dans ces circonstances et pour éviter la collision qu'ils auraient dû prévoir, les deux steamers auraient dû échanger des coups de sifflet pour se renseigner mutuellement sur leur course respective, et qu'ils ne devaient pas attendre qu'il fût trop tard, comme a fait le *Cape Breton*.

Il y avait encore d'autres manœuvres que les circonstances leur demandaient pour éviter la collision et que je leur reproche d'avoir négligées. Je cite à cet effet, *Spencer on Collisions*, (1) section 26 intitulée : " When lights are doubtful " et qui dit ce qui suit :

" Keeping a steamer under way at full speed when " there is any uncertainty as to the meaning of the " lights carried by another vessel is negligence *per se*."

L'auteur cite quatre précédents au soutien de cette doctrine. A la page 193, section 80, il ajoute :

" Under the Rules, the obligation to reduce speed " arises whenever there is any uncertainty as to a " vessel's own position, or the movements, or course of

(1) page 93.

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" an approaching vessel sufficiently near at hand to " render her a menace to the other's safety."

" Where uncertainty of position or of course is cou- " pled with dangerous proximity, both vessels should " reverse and come to a stop until all uncertainty as to " each other's situation is determined."

En note, cinq précédents sont cités pour appuyer cette doctrine.

Faisons l'application de ces deux règles de conduite, qui sont basées sur la raison et sur la jurisprudence, aux faits prouvés de part et d'autre en cette cause et nous devrons, je crois, en conclure que ni le *Canada* ni le *Cape Breton* ne se sont conformés à ces règles.

Les officiers du *Canada* d'abord prétendent que jusqu'à la dernière minute le *Cape Breton* ne leur a montré ni lumière rouge, ni lumière verte.

Jusqu'au premier coup de sifflet du *Cape Breton* ils jurent n'avoir vu que sa lumière blanche, ce qui n'aurait pas suffi pour les renseigner sur la course de ce steamer.

Si cela est vrai, ils devaient être alors dans une grande incertitude sur la signification de cette lumière blanche, qui était en mouvement tout de même, et qui se rapprochait d'eux, et sur la course qu'elle suivait ; et le danger du rapprochement s'ajoutait à cette incertitude.

Que devaient-ils faire alors ? Les auteurs et la jurisprudence répondent : Ils devaient d'abord ralentir de vitesse, puis renverser la machine et arrêter complètement jusqu'à ce que l'incertitude eût cessé. Or, ils n'ont fait ni une chose ni l'autre. Donc ils sont en faute.

Le *Cape Breton* a-t-il mieux agi ? Ses officiers nous disent qu'il descendait le fleuve à toute vitesse (full speed). Ils ont aperçu dès le départ de Sorel la lumière blanche du mât et les lumières du salon du *Canada*.

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Ils ne savaient pas que c'était le *Canada*, disent-ils, mais ils ont vu la lumière d'un steamer qui montait. Il était encore à quatre milles alors. Puis, ils ont vu sa lumière rouge et ils ont mis la barre à *port* pour rencontrer à droite. Ce n'est pas cela que je leur reproche, c'était correct. Ainsi, la lumière rouge du *Canada* indiquait qu'il se dirigeait vers le nord pour rencontrer à droite, et le *Cape Breton* se dirigeait vers le sud.

Mais une chose qui aurait dû surprendre les officiers du *Cape Breton*, c'est que tout en montrant sa lumière rouge, le *Canada* restait toujours presque en ligne avec le *Cape Breton* qui pourtant tenait sa barre à *port* et inclinait vers *starboard*.

Tout à coup le *Canada* montra sa lumière verte. Ce ne fut qu'un reflet, disent McNeil et Hamelin, qui ne dura pas longtemps. J'ai là dessus des doutes sérieux, et il y a bien des raisons de croire que de ce moment là le *Cape Breton* a dû voir les trois lumières, et ne voir ensuite que la verte quand le *Canada* eût changé sa course après la deuxième bouée noire.

Quoi qu'il en soit, l'apparition soudaine de cette lumière verte et le fait que le *Canada* se rapprochait du sud, au lieu de s'éloigner au nord, suffisaient à donner aux officiers du *Cape Breton* des doutes sérieux sur la signification de ce reflet vert et sur la course véritable du *Canada*.

Mais ces doutes sont-ils une simple hypothèse ou bien ont-ils existé dans l'esprit des officiers McNeil et Hamelin ? Je dis : Oui, ces doutes ont existé. J'en trouve la preuve dans leurs témoignages et je la trouve aussi dans le *log book* où est consignée cette incertitude. Il suffit de voir là-dessus la citation du *log book* dans le témoignage du capitaine Reid (à la page 86). Voici ce qu'on y lit :

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"A few minutes before the collision the *Canada's* mast-
"head and port side light were showing at about one
"point or about one and a quarter off our port bow.
"The pilot finding the *Canada* was closing on him,
"ported and kept to starboard. A little latter on the
"pilot asked me : "What does he mean ? I am keep-
"ing to starboard and he is closing in on me". Then
"the pilot ported and blew one blast of the whistle.
"The *Canada* answered by blowing two blasts. The
"wheel was put hard-a-port, the pilot again blew one
"blast and ordered the engines stopped and full speed
"astern." Voilà ce que l'on trouve dans le *log book.*

Comme on le voit, le pilote remarquait que la lumière du *Canada* était toujours à une pointe ou une pointe et quart dans le *port bow*, malgré que le *Cape Breton* allait à toute vitesse à *starboard.* Il avait beau pousser sa barre à *port*, le *Canada* était toujours presque nez à nez avec lui (*closing in on him*). Qu'est-ce que cela signifie, dit-il enfin aux autres officiers, que fait donc ce steamer ? Je vais toujours plus à *starboard* et il me poursuit.

Donc Hamelin était dans l'incertitude. Il ne comprenait plus les intentions du *Canada*, la signification du reflet de la lumière verte et la course que le *Canada* suivait.

Dans cet état d'incertitude, il devait : 1o. Ralentir sa course ; 2o. renverser ses machines, et arrêter complètement jusqu'à ce qu'il pût comprendre quelle course suivait le *Canada.* Il n'a fait ni l'une ni l'autre de ces deux choses et il a commis la même faute que le *Canada.* Il y a plus, et cela devait encore augmenter les incertitudes du pilote Hamelin ; c'est le fait qu'il se trouvait alors à quelques centaines de pieds en dehors du chenal, au sud, qu'il s'écartait conséquemment de la course généralement suivie par les steamers et de celle qu'il s'était proposé lui-même de suivre en partant de Sorel,

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puisqu'il voulait passer au nord de la bouée noire, comme je l'ai dit plus haut, et que si le *Canada* s'obstinait à lui barrer la route, lui-même apportait la même obstination à se mettre en travers du *Canada*. Une pareille course des deux steamers vers le sud, en dehors du chenal, devait lui paraître au moins étrange et accroître son incertitude. Le *Canada* pouvait dire au moins: "Moi je suis ici, parce que je m'en vais à Sorel." Mais lui, le *Cape Breton*, qui descendait à Québec, pourquoi était-il sorti du grand chenal et pourquoi s'acharnait-il à vouloir passer au sud du *Canada* quand sa course ordinaire vers Québec était au nord et libre?

Pourquoi? C'est que le *Cape Breton* persistait à suivre la règle 18 et à forcer le *Canada* à s'y conformer, de même que le Canada s'obstinait à suivre la règle 33 et sa pratique habituelle et prétendait les imposer au *Cape Breton*.

Cette persistance à se conformer à certaines règles sans tenir compte de la situation des autres steamers et de leur course, au risque de produire une collision, est coupable.

Et c'est pourquoi *Marsden on Collision* (1) en parlant de cette règle 18 dit:

" Its indiscriminate application has been a fruitful " source of collision."

C'est pourquoi *Spencer on Collisions* (2) dit de son côté:

" That a vessel may be placed in a situation where " to follow the letter of the law would invite rather " than prevent collision."

Le *Cape Breton* et le *Canada* ont tous les deux voulu suivre obstinément, le premier la règle 18 et le second la règle 33, à la lettre, et ils ont causé un désastre.

(1) p. 461. (2) Sec. 55, p. 146.

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En agissant ainsi, ils ont transgressé la règle 27 qui dit expressément :

" In obeying and construing these Rules, due regard " shall be had to all dangers of navigation and collision, and to any special circumstances which may " render a departure from the above Rules necessary " in order to avoid immediate danger."

Je dis encore qu'ils ont aussi transgressé : le *Canada*, les règles 19 et 22, et le *Cape Breton*, la règle 21.

Voici ce que disent ces règles. La règle 22 d'abord, applicable au *Canada* et transgressée par lui, suivant moi, et la règle 19 :

" When two steam-vessels are crossing, so as to " involve risk of collision, the vessel which has the " other on her own starboard side shall keep out of the " way of the other."

Et la règle 22 ajoute :

" Every vessel which is directed by these Rules to " keep out of the way of another vessel shall, if the " circumstances of the case admit, avoid crossing ahead " of the other."

Voilà les deux règles applicables au *Canada*, parce qu'en réalité la direction qu'il prenait le conduisait à travers la course que suivait le *Cape Breton*.

Maintenant voici ce que dit la règle 21 applicable au *Cape Breton* :

" Where by any of these Rules one of two vessels is " to keep out of the way, the other shall keep her " course and speed."

Or, au lieu de garder sa course le *Cape Breton* poussait sa barre toujours plus à *port* et inclinait de plus en plus à *starboard* de manière à barrer la route au *Canada*.

Voir aussi là dessus *Marsden on Collisions* (1) au sujet des circonstances spéciales, mentionnées dans la règle

(1) 4th ed. p. 532.

22 que je viens de citer, qui permettent de s'écarter de cette règle et de passer en avant d'un vaisseau au lieu de passer en arrière:

"So, where a ship required by the regulations to keep "out of the way is unable to do so, it is the duty of "the other not to keep her course, but herself to keep "out of the way."

Ici "to keep out of the way" veut dire passer en arrière et non pas en avant. Cela dépend des circonstances naturellement. Ici, la circonstance spéciale pour le *Canada* était sa destination à Sorel et l'application qu'il voulait faire de la règle 33, et la pratique, suivie par lui et par les autres steamers de la Compagnie, qui lui disait de passer à gauche, et conséquemment en avant du *Cape Breton* dans le moment en question. De son côté, le *Cape Breton*, en vertu de la règle 21, devait tenir sa course, c'est-à-dire ne pas l'altérer ni la changer.

Mais le *Cape Breton* l'a modifiée. Il a incliné à *starboard* en mettant de nouveau sa barre à *port*, comme il nous l'a dit, se mettant ainsi plus en travers de la course du *Canada* et lui rendant l'évitement presqu'impossible. Le *Canada* avait droit de compter que le *Cape Breton* ne changerait pas de course et pourrait ainsi passer à sa droite (à lui, le *Canada*) c'est-à-dire du côté ouest. Par ce changement de direction, le *Cape Breton* a trompé le *Canada* et il a commis une faute contre la règle 21.

Cette dernière direction donnée au *Cape Breton* avait toujours pour but et pour objet, comme la manœuvre précédente, de forcer le *Canada* à le rencontrer rouge à rouge et de l'empêcher de passer devant lui. Quand il vit que le *Canada* continuait à courir vers le sud et à vouloir le rencontrer verte à verte, il donna son premier coup de sifflet qui signifiait: "Je veux vous rencontrer rouge à rouge." Le *Canada*, qui ne montrait

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plus alors que sa lumière verte, répondit par deux coups de sifflet qui voulaient dire : " Rencontrons-nous plutôt verte à verte."

Mais le *Cape Breton* voulut avoir le dernier mot et faire triompher à tout prix la course qu'il avait décidé de suivre jusqu'au bout, sur celle que suivait le *Canada*. Il voulait pour ainsi dire couper court à la course de ce dernier, et il fit alors une manœuvre que j'appellerais un crime, si je pouvais croire un instant que les officiers du *Cape Breton* en ont prévu le résultat ; mais que je me contenterai de qualifier (parce que je crois encore à leur bonne foi) la faute comme la plus grave qui a été commise dans cette malheureuse rencontre et qui a été la cause immédiate et directe de la collision.

Le *Cape Breton* répliqua aux deux coups de sifflet du *Canada* par un dernier coup de sifflet, un seul comme pour dire aux officiers du *Canada* : " Vous ne passerez pas à ma droite, je vais vous barrer la route."

Et en même temps Hamelin commanda : *Hard-a-port and full speed astern.*

A ce moment là, nous dit Hamelin lui-même, à la page 13 de son témoignage : " Le *Canada* avait fait disparaître sa lumière rouge et ne montrait plus que sa verte ", c'est-à-dire qu'il présentait son flanc droit au *Cape Breton.*

Il est facile de se représenter la position des deux vaisseaux à ce moment. Le *Canada* ne montre plus que sa lumière verte, présentant son flanc droit au *Cape Breton.*

Bouillet, le pilote du *Canada*, avait mis sa roue *hard-a-starboard* pour incliner encore plus à gauche, plus au sud, et éviter le choc du *Cape Breton* qui, en s'inclinant lui aussi vers le sud et en poussant sa roue à *port*, devenait de plus en plus menaçant. " Notre direction, dit Bouillet, après cette dernière manœuvre de *hard-a-*

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starboard accompagnée de deux coups de sifflet devait être *West South West.*"

Quelle était alors exactement la direction du *Cape Breton* d'après le compas? Hamelin ne peut pas nous le dire, car il ne tient aucun compte du compas. (Il nous dit qu'il ne gouverne pas d'après le compas.) Mais d'après la course suivie et en tenant compte du fait que le *Cape Breton* voulait toujours montrer sa lumière rouge et tenait sa roue à *port*, on peut présumer que sa direction devait être *East by South.*

Si donc, il eut alors mis sa barre *hard-a-starboard* et arrêté ses machines, ses engins, il eut pu, je crois, rencontrer verte à verte, sans heurter le *Canada.*

Mais au lieu de tenter au moins cette manœuvre ou toute autre qui aurait pu l'éloigner du côté gauche ou ouest, il a fait exactement le mouvement qui devait le lancer presque à angle droit sur le flanc droit que le *Canada* lui montrait.

En mettant sa roue *hard-a-port* et en commandant "*full speed astern,*" le *Cape Breton*, avec son *right handed propeller*, devait tourner très vite à droite, prendre la direction sud-est et frapper le *Canada* presque à angle droit.

Comme le disent *Todd and Wall, Practical Seamanship* (1

"If you want to cant your ship's *head* quickly to "*starboard*, put the helm hard-a-port and go full speed "astern."

C'est justement le mouvement qu'à fait le *Cape Breton* et c'est la direction contraire qu'il devait prendre.

Se jeter le nez sur le flanc du *Canada*, c'est ce que le *Cape Breton* a fait.

Voici ce que disent *Todd and Whall* (2):

"If the vessel is crossing your bows to starboard, "stop the engines instanter, but mind (if you have a

(1) p. 264. (2) p. 281.

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"right-handed propeller), do not put the engines full "speed astern. If you do, you will take away her only "chance to slip clear, and you will have made a colli- "sion inevitable."

Or le *Cape Breton* a fait précisément ce que Todd and Wall recommandent si instamment de ne pas faire. J'ai pensé d'abord que Hamelin n'avait pas prévu le mouvement rapide du *Cape Breton* à droite comme résultat de sa dernière manœuvre; mais au contraire, il nous dit aux pages 14 et 15 de son témoignage que c'est ainsi que son bateau tourne le plus rapidement à *starboard* Il dit: C'est le mouvement que je fais lorsque je veux que mon bateau tourne rapidement à *starboard*, c'était se jeter sur le *Canada.*

Mais alors, dira-t-on, comment expliquer sa conduite? Je me la suis expliquée en écoutant avec attention et en relisant avec soin son témoignage. Hamelin est l'homme qui ne connait qu'une seule règle, la règle 18, et qui a résolu de la suivre advienne que pourra; il méprise la règle 27 et je crois qu'il serait bien étonné de lire ce que dit *Marsden* (1) *on Collisions:*

"The duty is to avoid collision by observing the "rules, primarily; by departing from them, if necessa- "ry, to avoid danger."

"Not only is departure from the rule of the road "excused by art. 27, where the rule cannot be obeyed "without collision, but a literal observance of the re- "gulations cannot be set up as a defence where the "collision might have been avoided by ordinary care."

Hamelin est donc, suivant moi, le type du Normand, entêté, obstiné, qui s'est mis en tête une idée fixe, et qui a poursuivi l'application de cette idée fixe jusqu'à ce qu'elle ait causé une catastrophe; qui naturellement persiste ensuite à ne pas reconnaître sa faute; qui refuse de répondre aux questions qu'on lui pose de

(1) p. 527.

peur de s'incriminer; et qui, enfin, tantôt admet l'idée fixe qu'il avait en tête (quand il est poussé au pied du mur), et tantôt la nie, quand il croit qu'on veut la lui imputer à crime.

Est-ce l'appréciation qu'il est juste de faire de son témoignage? J'en vais citer de longues pages pour qu'on en juge, on y verra que son idée fixe était de rencontrer le *Canada* rouge à rouge, qu'il a persisté à l'exécuter jusqu'au bout, c'est-à-dire jusqu'à la collision, et une fois devant la justice, obligé de rendre compte de ses actes, il a cru que le meilleur moyen de s'exonérer était d'être récalcitrant, de refuser de répondre ou de répondre à un grand nombre de questions: "Je ne me rappelle pas", ou "Je ne sais pas."

Quelques pages de son témoignage sont vraiment caractéristiques. Je cite le volume trois de la défence aux pages 127 et suivantes. On va voir quelle est la manière de répondre de ce témoin:

Q. Vous savez à peu près vers quelle heure ils arrivent à Sorel?

R. Non, monsieur.

Q. A peu près?

R. A peu près, oui. Quand tout va bien, entre deux et trois heures, c'est lorsque tout va bien, mais il y a des fois .....Après ça il y a la marée et différentes choses à calculer, ce n'est pas une affaire régulière.

Q. Quand il y a de la brume ou qu'ils sont retardés ou que la marée est contre eux, ils vont un peu moins vite; mais dans les temps ordinaires, en dehors de la brume, n'est-il pas vrai qu'ils touchent à Sorel entre deux et trois heures du matin?

R. Je ne le sais pas.

Q. Vous jurez ça que vous ne le savez pas?

R. Oui, je jure que je ne le sais pas.

Q. Les avez-vous jamais rencontrés dans la rivière?

R. Je les ai rencontrés, mais je n'ai jamais été là pour prendre le temps qu'ils arrivaient.

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Q. Avez-vous jamais été à Sorel à bord de ces bateaux là?

R. Oui.

Q En montant et en descendant?

R Oui.

Q. Vous savez qu'ils rentrent à Sorel pendant la nuit?

R. Je sais qu'ils rentrent à Sorel lorsqu'ils sont rendus à Sorel.

Q. C'est pendant la nuit?

R. .....

Q. Ce n'est pas le jour?

R. Je les ai vu rentrer en plein jour des fois.

Q. Les avez-vous jamais vus rentrer la nuit?

R. Je ne les ai pas.....

Q. Vous ne vous en rappelez pas?

R. Je me rappelle, oui, d'en avoir rencontré aux alentours de Sorel, mais je ne les ai pas vus accoster le quai.

Q. Combien de fois les avez-vous vus rentrer le jour ces bateaux-là?

R. Je me rappelle toujours d'une fois.

Q. Laquelle?

R. Je ne me rappelle pas laquelle.

Q. (Par la Cour) La nuit vous ne les avez pas vus?

R. La nuit je ne les ai pas vus. J'en ai toujours vu aux alentours de Sorel, mais je ne les ai pas vus pour dire.....ça dépend quelle est la réponse qu'il faudrait donner là dessus, j'en ai vu arriver au quai le soir, quand j'étais à Sorel, j'en ai vu arriver au quai.

Q. Vers quelle heure était-ce ça?

R. Je ne sais pas.

Q. A peu près?

R. Je ne me rappelle pas.

Q. C'était la nuit?

R. C'était le soir.

Q. C'était la nuit ?

R. C'était la nuit naturellement.

Q. Etait-ce après minuit ?

R. C'était avant minuit.

Q. Alors c'était un bateau qui descendait ?

R. Oui.

Q. Avez-vous vu des bateaux qui montaient à Sorel ?

R. J'ai monté à bord d'un bateau qui montait. J'étais à bord.

Q. Vers quelle heure est-ce qu'ils touchent à Sorel ?

R. Je ne sais pas à quelle heure ils touchent à Sorel ?

Q. Vous jurez ça ?

R. Je jure ça, oui.

Q. Alors vous ne savez pas quelle est la route qu'ils suivent lorsqu'ils arrivent à Sorel ?

R. Je sais quelle route ils ont suivie lorsque je les ai vus.

Q. Comment le savez-vous si vous ne les avez pas vus ?

R. Je les ai vus venir.

Q. (Par la Cour) On vous demande si vous les avez rencontrés le soir et vous dites que non ?

Q. Vous me demandez pour rentrer à Sorel. Je comprends que rentrer c'est rendu au quai.

Q. Au large vous les avez vus ?

R. Oui.

Q. Vers quelle heure ?

R. A différentes heures. Je les ai vus depuis deux heures, trois heures, quatre heures, cinq heures.

Q. Quand les avez-vous vus à cinq heures du matin ?

R. Quand je naviguais à bord de mon vaisseau.

Q. Combien y a-t-il d'années de ça ?

R. Il y six ans que je navigue comme pilote, c'est peut-être avant cela, dans tous les cas.....

Q. Quand les avez-vous vus rentrer à quatre heures du matin ?

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R. C'était peut-être l'année dernière, peut-être avant, je ne me rappelle pas.

Q. Dans quel temps de l'année était-ce ? Etait-ce l'automne ?

R. Je ne me rappelle pas, je pense que c'est dans l'automne.

Q. Combien de fois les avez-vous vus comme ça ?

R. Je ne m'en rappelle pas.

Q. Vous n'êtes pas capable de dire ?

R. Non.

Q. Une fois ?

R. Peut-être une fois, peut-être deux ou trois fois, je ne me rappelle pas,

Q. Peut-être vingt fois ?

R. Je ne me rappelle pas.

Q. Vous n'êtes pas capable de dire ?

R. Non.

Q. Maintenant vous savez que c'est vers ces heures là toujours qu'ils entrent là ?

R. Je ne sais pas.

Q. Avant que vous ayiez été tourné dans le chenal avez-vous vu les lumières du *Canada* ?

R. Oui, monsieur.

Q. Vous les avez vues ?

R. Oui.

Q. Combien de temps avant d'être tournés ?

R. Je ne sais pas.

Q. A peu près ?

R. Je ne sais pas.

Q. Vous ne pourriez pas fixer de temps ?

R. Je ne pourrais pas fixer de temps parce que je n'ai pas tenu de temps, je ne sais pas le temps.

Q. C'est parce que vous n'avez pas regardé spécialement à votre montre que vous ne voulez pas le dire ?

R. Je regarde spécialement à ma montre lorsque c'est le temps.

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Q. Est-ce pour ça que vous ne voulez pas jurer combien de temps c'est, avant que vous ayez été tourné, que vous avez vu les lumières du *Canada*? Est-ce parce que vous n'avez pas regardé à votre montre?

R. Je n'ai pas regardé à ma montre.

Q. Et c'est pour ça que vous ne voulez pas jurer?

R. Oui.

Q. Etes-vous capable de dire à peu près?

R. Non.

Q. Combien de temps avez-vous mis à tourner?

R. Je ne sais pas.

Q. A peu près?

R. A peu près un quart d'heure, douze ou treize minutes peut-être.

Q. Avez-vous regardé à votre montre?

R. Je le sais, parce qu'il m'ont réveillé à deux heures.

Q. Vous nous dites bien combien c'a pris de temps à tourner?

R. Oui.

Q. Quoique vous n'ayez pas regardé à votre montre?

R. Non.

Q. Et vous n'êtes pas capable de nous dire combien de temps avant que vous ayiez été tourné, vous avez vu cette lumière en bas qui était sur le *Canada*?

R. Je vous ai dit qu'à propos du temps, je ne peux pas dire.

Q. Vous ne voulez pas le dire?

R. Non.

Q. Vous avez été examiné comme témoin, n'est-ce pas, devant le Commissaire à l'enquête du Gouvernement?

R. Oui, monsieur.

Q. Vous aviez un avocat qui vous représentait à cette enquête-là?

R. Oui, monsieur.

Q. Vous avez été examiné par Monsieur Salmon?

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R. Oui, monsieur.

Q. Vous avez été examiné aussi par Monsieur Meredith ?

R. Oui, monsieur.

Q. Vous avez été examiné par Monsieur Géoffrion ?

R. Oui, monsieur.

Q. Et vous avez été examiné par votre propre avocat, l'honorable Monsieur Gouin ?

R. Par mon propre avocat.....oui, je pense qu'il m'a posé quelques questions.

Q. N'est-il pas vrai que vous avez déclaré (page 94) devant Monsieur Salmon que vous aviez vu les lumières du *Canada* une vingtaine de minutes avant que vous vous soyez mis en course ?

R. Une vingtaine de minutes ? Oui ça se peut que j'aie dit cela, mais je ne dois pas avoir dit.....J'ai dit à peu près, ça doit être à peu près ça.

Q. (Lisant) " Peut-être une vingtaine de minutes, " le temps au juste, je ne sais pas. C'est à peu près " seulement que je donne ". C'est ça que je vous demande moi aussi, à peu près ?

R. .....

Q. Pourquoi ne me répondez-vous pas comme vous avez répondu à Monsieur Salmon, à peu près, c'est ça que je vous demande moi aussi de me dire à peu près combien de temps ?

R. Sur l'à peu près, je considère que lorsqu'on est sous serment, je ne peux pas le dire.

Q. Vous étiez sous serment cette fois-là aussi ?

R. Il a insisté pour me le faire dire. J'ai dit que c'était à peu près. Vous pouvez prendre ça si vous voulez.....je ne peux pas dire le temps.

Q. Vous l'avez dit cependant ?

R. Je l'ai dit à peu près. Prenez-le à peu près si vous voulez le prendre.

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Q. Ca ne sert à rien de vous mettre de mauvaise humeur, vous allez vous mettre dans votre tort ?

R. Je ne peux pas dire, je ne peux pas jurer une chose ....

R. Tenez-vous tranquille, je vous interroge poliment, n'est-ce pas ?

R. Oui, et moi je vous réponds poliment.

Q. Pas toujours. Dites-vous à présent que ça peut être une vingtaine de minutes à peu près que vous aviez vu les lumières du *Canada* quand vous étiez à tourner ?

R. Ca peut être ça et ça peut être moins, je ne sais pas. Peut-être que c'est ça, peut-être que c'est moins, je ne sais pas le temps, je ne peux pas dire.

Q. Vous ne le savez pas du tout ?

R. Non, je ne peux pas le dire.

Q. Est-ce que vous ne pouvez pas dire à peu près aujourd'hui, comme vous l'avez dit à peu près à Monsieur Salmon ?

R. Non, je ne peux pas vous le dire, c'est comme je vous ai dit, si vous voulez prendre vingt minutes.....

Q. Ce n'est pas moi qui veut prendre, c'est vous qui devez parler ?

R. C'est tout ce que j'ai à dire, je ne peux pas dire autre chose que ça.

Q. Quoi ?

R. Je n'ai pas d'idée de ça sur le temps, ça peut être vingt minutes, ça peut être moins, je ne le sais pas, je n'ai pas d'idée de ça.

Q. Est-ce que quand vous avez répondu à Monsieur Salmon vous n'aviez pas d'idée ?

R. Je n'avais pas d'idée, je l'ai dit aussi, c'est seulement sur son insistance, il a insisté—y a-t-il vingt minutes, y a-t-il dix-huit minutes, y a-t-il seize minutes, est-ce qu'il n'y aurait pas vingt minutes—j'ai dit : Il y a peut-être vingt minutes, il y a peut-être moins.

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Q. Vous dites la même chose aujourd'hui ?

R. Puisque vous le voulez.

Q. Non, ce n'est pas moi, il faut que ce soit vous qui répondiez ?

R. C'est tout ce que j'ai à répondre.

Q. Dites la même chose aujourd'hui que ça peut être vingt minutes ?

R. Je dis que ça peut être vingt minutes et ça peut être moins, je ne sais pas.

Q. Maintenant reprenons où vous en étiez ? Vous vous êtes mis en course dans le chenal du côté sud du centre du chenal ?

R. Du côté sud du centre du chenal.

Q. Quelles lumières avez-vous vues qui montaient à ce moment-là ?

R. Quand je me suis mis en course ?

Q. Oui.

R. J'ai vu une lumière blanche et une lumière rouge.

Q. Vous avez vu une lumière blanche et une lumière rouge ?

R. Oui.

Q. Combien de temps avez-vous vu cette lumière rouge et cette lumière blanche-là ?

R. A propos de temps, comme je le disais betôt, je ne le sais pas.

Q. L'avez-vous vue longtemps ou peu de temps ?

R. Je l'ai vue un peu, quelque temps, je ne peux pas dire, je n'ai pas d'idée.

Q. Vous n'êtes pas capable de dire le temps ?

R. Non.

Q. Dites-nous à peu près combien de temps ?

R. A peu près combien de temps.....je vous dis que sur le temps..... devant le capitaine Salmon comme devant tous les autres, je n'ai pas voulu donner le temps, je n'ai pas d'idée de ça.

Q. Pourquoi ne voulez-vous pas le donner ?

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R. Parce que j'ai toujours dit que je n'ai pas tenu le temps dans ma main dans le temps. Lorsqu'on part notre vaisseau, on a assez de notre ouvrage à faire sans avoir notre montre pour regarder le temps, je regarde le temps lorsque c'est pour partir d'un point et ensuite quand c'est pour continuer ma course, on ne peut pas avoir le temps dans notre main à la minute, il faudrait être comme pour les trottes de chevaux.

Q. Qu'est-ce qui est arrivé après ça? Après que vous avez vu cette lumière blanche et la lumière rouge ?

R. Après que j'ai vu la lumière blanche et la rouge ?

Q. Oui.

R. Ce qui est arrivé après que j'ai vu la lumière..... il n'est rien arrivé

Q. Il n'est rien arrivé ?

R. Non, on descendait et cette lumière rouge et cette lumière blanche montaient.

Q. Combien de temps l'avez-vous vue cette lumière-là ?

R. Quelle lumière ?

Q. La lumière blanche et la lumière rouge que vous avez vues ?

R. La lumière blanche et la lumière rouge, comme je vous l'ai dit, je l'ai vue.....je ne sais pas encore combien de temps.

Q. N'est-il pas vrai que vous l'avez dit devant le capitaine Salmon (page 96) "Je l'ai vue trois ou quatre minutes peut-être"—encore à propos du temps—"je ne peux pas dire au juste mais c'est dans quelques minutes, je l'ai vu trois ou quatre minutes peut-être." Avez-vous dit ça ?

R. Oui.

Q. Ça peut être trois ou quatre minutes alors que vous l'avez vue ?

R. Ça peut être ça et ça peut être moins, je ne sais pas.

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Q. Est-ce que vous l'avez perdue de vue cette lumière rouge là ensuite ?

R. Je l'ai perdue de vue, oui Monsieur.

Q. Quand vous l'avez perdue de vue, comment avez-vous mis votre barre, votre roue à bord de votre navire ?

R. Quand je l'ai perdue de vue, j'ai mis ma roue *hard-a-port.*

Q. *Hard-a-port.*

R. Oui.

Q. C'était pour passer au sud du bâtiment qui montait ?

R. Ce n'était pas.....moi j'ai pensé autrement que ça. J'ai pensé que c'était pour éviter la collision. On était en collision dans le temps en arrivant.....

Q. Vous dites que vous étiez en collision ?

R. En arrivant.

Q. Vous n'aviez pas encore sifflé, mon ami ?

R. Vous ne me l'avez pas demandé, mon ami.

Q Vous n'aviez pas encore sifflé dans le temps ?

R. J'avais sifflé dans le temps. Vous ne me l'avez pas demandé.

Q. Je vous ai demandé ce que vous aviez fait ?

R. Vous m'avez demandé quand j'ai perdu la lumière rouge.

Q. Avant ça je vous ai demandé qu'est-ce que vous aviez fait à bord de votre vaisseau ?

R. J'ai dit que je n'avais rien fait—jusqu'à temps que vous viendriez me demander la question.

Q. Après avoir perdu la lumière rouge vous avez mis votre roue *hard-a-port* ?

R. *Hard-a-port,* oui, et j'ai renversé, j'ai donné l'ordre de renverser.

Q. Est-ce que vous n'aviez pas sifflé avant ça ?

R. J'avais sifflé, oui.

Q. Quand aviez-vous sifflé ?

R. J'ai sifflé pour commencer, je crois, un coup de criard lorsqu'il m'a montré ses trois lumières à la fois.

Q. Lorsque vous avez vu ses trois lumières, vous avez donné un coup de sifflet?

R. Oui, monsieur.

Q. Qu'avez-vous fait à votre roue?

R. J'ai mis ma roue un peu à *port*.

Q. Et puis vous avez perdu ses trois lumières pour ne plus voir que la verte, n'est-ce pas?

Q. Oui monsieur, pour voir la blanche et la verte.

Q. Et lorsque vous avez eu la verte et la blanche en vue, vous avez mis votre roue *hard-a-port*?

R. J'ai mis ma roue *hard-a-port, full speed astern.*

Q. Avant ça, quand vous aviez mis votre roue à *port*, c'était pour passer au sud du vaisseau qui montait?

R. Non.

Q. Pourquoi l'avez-vous mise comme ça?

R. C'était pour lui donner un peu de chance, un peu plus de chance.

Q. Est-ce que vous n'aviez pas l'intention de rencontrer ce bateau là rouge à rouge?

R. Oui, monsieur.

Q. Vous aviez l'intention de le rencontrer rouge à rouge?

R. Oui, monsieur.

Q. Et c'est pour ça que vous avez mis votre barre à *port*?

R. Ah non, ce n'est pas dans le but de le rencontrer rouge à rouge, puisque quand il a oté sa rouge, il a traversé devant moi. Dans ce temps là, j'ai mis ma roue *hard-a-port, full-speed astern*, c'était pour éviter la collision. Je voyais qu'on venait en collision dans le temps.

Q. Vous n'avez cru que vous pouviez venir en collision qu'au moment ou vous avez sifflé pour la seconde fois?

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R. Non, j'ai cru qu'on viendrait en collision du moment qu'il m'a crié deux coups de criard et qu'il m'a retiré sa lumière rouge.

Q. N'est-il pas vrai que vous n'avez arrêté votre engin et mis votre roue *hard-a-port* que quand vous avez donné votre second coup de sifflet?

R. Non, monsieur.....bien c'est en même temps, ça se trouvait en même temps, j'ai donné le second coup de sifflet, tout s'est fait ensemble, *hard-a-port*, donné le coup de sifflet et *full speed astern*?

Q. Ce n'est pas au premier coup de sifflet que vous avez arrêté votre engin, si j'ai bien remarqué vous avez dit que c'est au second coup de sifflet?

R. .....

Q. Ce n'est qu'au premier coup que vous avez arrêté votre engin?

R. Non, je n'ai pas dit ça.

Q. Au premier coup vous avez mis votre barre..... ?

R. Un peu à *port*.

Q. Votre intention en mettant votre roue à *port* était de passer au sud de lui?

R. C'était pour lui donner un peu de chance.

Q. Et passer rouge à rouge?

R. Oui.

Q. C'est ça que vous désiriez faire passer rouge à rouge?

R. Ce que je désirais faire, oui, c'était de passer rouge à rouge.

Q. Vous désiriez passer rouge à rouge, c'est-à-dire au sud du bâtiment qui montait?

R. Ce n'était pas ça, je désirais tenir ma course. Lorsque j'ai vu qu'il me montrait ses trois lumières, j'ai pensé qu'il avait peut-être une *sheer* sur nous, je ne savais pas, c'était pour lui donner un peu plus de chance. J'ai mis ma roue à *port* et j'ai crié un coup de sifflet pour attirer son attention.

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Q. En mettant votre roue à *port* votre bâtiment inclinait vers le sud ?

R. En mettant ma roue a *port* mon bâtiment inclinait vers le sud.

Q. A-t-il obéi à sa barre tout le temps—sur votre roue à *port* ?

R. Oui, il a obéi.

Q. En mettant *hard-a-port*, il a toujours tourné vers le sud ?

R. Il a commencé—comme de raison, ça pren dun peu de temps—on met notre roue à *port*, on dit que le vaisseau répond, mais ça ne répond pas comme si c'était avec le doigt. Il a commencé à répondre à sa roue tranquillement.

Q. Du moment que vous avez mis la barre à *port* il a commencé à répondre à la roue tranquillement ?

R. Oui, tranquillement.

Q. Et puis il a continué sur cette course là en se dirigeant vers le sud, sur cette barre à *port* il a toujours incliné vers le sud ?

R. Oui, il a continué comme de raison à incliner vers le sud, comme de raison.

Q. Vous incliniez vers le sud dans ce temps-là, vous, c'était pour passer rouge à rouge, au sud du bâtiment qui montait ?

R. Ce n'était pas pour passer.....C'était pour passer rouge à rouge, mais c'était pour l'éviter.

Q. Mais vous désiriez passer rouge à rouge, n'est-ce pas ?

R. Je désirais ne pas venir en collision.

Q. Mais comment désiriez-vous rencontrer, vous désiriez vous rencontrer rouge à rouge ?

R. Je ne comprends pas ce que vous voulez dire, toujours avec ce désirage de rouge à rouge. Je descendais sur ma course et lui montait sur sa course. Il m'a ôté sa lumière rouge tout à coup et il a traversé devant

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moi. Naturellement pour l'éviter, j'ai mis ma roue à *port* et j'ai donné un coup de criard pour attirer son attention afin qu'il ne traverse pas devant nous autres.

Q. Votre coup de criard avait pour effet de lui dire que vous alliez au sud.

R. Un coup de criard avait pour effet d'attirer son attention et en même temps lui dire que je dirigeais ma course sur *starboard.*

Q. Vers le sud?

R. Je dirigeais ma course sur *starboard.*

Q. Ceci avait l'effet de vous faire rencontrer, si possible, rouge à rouge?

R. Ceci avait l'effet de nous faire rencontrer rouge à rouge si possible.

Q. C'est ce que vous désiriez faire, n'est-ce pas?

R. Je désirais faire quoi?

Q. Vous rencontrer rouge à rouge?

R. Ce que je désirais faire?

Q. Oui.

R. Je désirais m'en revenir à Québec.

Q. Ce n'est pas la question, ne faites donc pas....?

R. Comment "ne faites donc pas", je ne comprends pas?

Q. Ne faites pas de faux fuyants?

R. Je n'en fais aucun, je désirais suivre ma course.

Q. Aviez-vous l'intention de passer verte à verte ou rouge à rouge?

R. J'avais l'intention de suivre ma course, de se rencontrer rouge à rouge comme on s'était appointé tout le temps.

Q. C'était là votre intention?

R. Oui.

Je crois qu'il y en a assez de cette citation pour faire comprendre quelle espèce de témoin est ce Hamelin, combien il est récalcitrant et réticent lorsqu'il croit qu'une réponse peut le compromettre et lorsqu'il voit

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que la course qu'il a suivie a produit la collision. Naturellement il essaie de le nier et il se retranche derrière cette prétention générale: Je voulais suivre ma course.

Dira-t-on que j'attache trop d'importance au témoignage de Hamelin? Mais non, car c'est lui qui avait la direction et la responsabilité du *Cape Breton* à lui seul. Le capitaine n'était pas là; il lui avait abandonné son vaisseau, il nous l'a dit, il avait abandonné entièrement la direction du vaisseau à Hamelin.

Le capitaine était dans sa chambre lorsque la collision s'est produite. Hamelin était seul responsable du vaisseau et, par conséquent, on comprend combien son témoignage est important dans cette cause et combien il est nécessaire de l'apprécier et de tâcher de découvrir où est la vérité et où sont le mensonge et l'erreur.

Il me reste maintenant à examiner un précédent cité par la défense. C'est la cause: *The Turret Steamship Company* vs. *Jenks & al.* jugée par le Conseil Privé en mars 1901, comme ayant une grande ressemblance avec celle-ci.

L'exposé des faits dans le jugement du Conseil Privé est tel qu'on ne saurait mettre en doute les doctrines qu'on y voit sanctionnées.

Le *Turret Age* remontait le fleuve St-Laurent et le *Lloyd S. Porter* le descendait. C'était la nuit. Le *Turret Age* suivait le côté nord du chenal, ce qui était conforme à la règle applicable aux *narrow channels*. Il avait une vigie régulière et un pilote qui dirigeait la course.

Le *Lloyd S. Porter* suivait aussi le côté nord du chenal, ce qui était contre la règle. Il n'avait pas de vigie, ou plutôt il avait un homme de roue qui cumulait les fonctions de pilote et de vigie, qui n'était sur le pont que quinze minutes avant la collision et qui n'a-

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vait reçu aucune autre direction que d'éviter une certaine bouée.

C'est dans ces conditions que les deux vaisseaux se rencontrèrent. Naturellement le *Turret Age*, qui était où il devait être, avait droit de croire que le *Lloyd S. Porter* se rangerait au sud, suivant la règle, c'est-à-dire mettrait sa barre à *port*. Il n'y avait pour ce dernier aucune raison, aucun prétexte pour faire autrement.

Cependant, soudainement, sans avertissement ni signal, le *Lloyd S. Porter* mit sa barre à *starboard*, se jettant ainsi en travers du *Turret Age*. Il était trop tard pour ce dernier de faire aucune manœuvre qui put empêcher la collision et la collision eut lieu. Il est évident que le *Lloyd S. Porter* devait être condamné.

Voyons maintenant combien les faits de la présente cause sont différents.

Le *Canada* remonte le St.-Laurent et le *Cape Breton* le descend.

En partant de l'Ile de Grâce, le *Canada* suit le côté nord chenal, et le *Cape Breton* en partant de Sorel suit le côté sud. Tous les deux se conforment à la règle. Arrivé à la seconde bouée noire (141 L.), le *Canada* change sa course et traverse le chenal dans la direction sud. Il s'écarte ainsi de la règle 25. Mais pourquoi ? Est-ce sans aucune raison, ni motif, comme a fait le *Lloyd S. Porter* ?

Non, c'est qu'à cet endroit là, il croit avoir le droit et même le devoir de suivre la règle 33. Les lumières des quais de Sorel sont à deux milles devant lui. C'est sa destination. C'est là qu'il doit arrêter toutes les nuits, soit en montant, soit en descendant, le fleuve et la course qu'il vient de prendre est celle qu'il a coutume de suivre et que les autres bateaux de la même compagnie suivent toujours. C'est la voie la plus directe, la plus courte et la moins dangereuse, parce qu'elle est

en dehors du chenal où passent tous les steamers océaniques.

On dit: Cette pratique ou cette coutume ne peut prévaloir contre une règle—la règle 25—mais elle est conforme à une autre règle, la règle 33. Si donc le *Canada* s'écarte de la règle 25, c'est parce qu'à cet endroit une autre règle, la règle 33, s'impose à la course qu'il doit suivre.

On voit quelle différence radicale il y a entre le cas du *Lloyd S. Porter* et celui du *Canada* en ce qui concerne la règle suivie par ce dernier et les raisons qu'il invoque pour se justifier.

Mais en ce qui concerne la vigie, je suis d'avis que la décision du Conseil Privé s'applique parfaitement à la présente cause et rencontre d'ailleurs entièrement mon opinion, que la pratique adoptée par la Compagnie du Richelieu de confier les fonctions de vigie au pilote est condamnable.

La demande a aussi invoqué un précédent qu'elle a dit avoir beaucoup de ressemblance avec cette cause-ci. C'est mon propre jugement contre le *Westphalia* rapporté au 8ème volume des Exchequer Reports, page 263.

Il y a certainement des ressemblances entre les deux causes. mais il y a aussi des différences notables.

J'ai déjà montré la différence entre les deux causes au sujet de la vigie. Mais la ressemblance frappante est l'obstination, l'entêtement du pilote du *Westphalia* et du pilote du *Cape Breton* à vouloir rencontrer à *starboard* et à ne pas reconnaître d'autres règles que les règles 18 et 25. Cette ressemblance est très remarquable dans les deux cas. Le pilote du *Westphalia* et le pilote du *Cape Breton* voulaient absolument n'obéir qu'à ces deux règles et ils n'ont voulu tenir compte de rien en dehors de ça.

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Dans les deux cas aussi, le dernier ordre donné par les pilotes *full speed astern* a été fatal.

Par suite de ce mouvement, l'action du gouvernail dans le cas du *Westphalia*, et l'action du *right-handed propeller* du *Cape Breton*, ont été la cause finale de la collision. A bord du *Westphalia* cette manœuvre a produit un effet différent à cause du gouvernail et c'est l'explication du jugement que j'ai rendu dans la cause du *Westphalia*. Ici c'est l'action du *right handed propeller* qui a produit un revirement à droite du *Cape Breton* et qui l'a jeté sur le flanc du *Canada*.

Depuis que cette cause m'a été soumise, un jugement a été rendu dans une enquête instituée à Montréal par le Gouvernement. Il est peut-être utile de faire quelques observations à ce sujet, quoique je n'y sois pas obligé. Je le ferai pour l'information des parties et en même temps pour l'information des marins. Je ne dirai que quelques mots là-dessus. Voici les observations très succintes que j'ai à faire :

1o. Je dis d'abord que l'enquête faite devant moi est bien différente de celle faite devant le capitaine Salmon et ses collègues et la cause présente un tout autre aspect.

Les avocats sont plus capables que tous les autres de se rendre compte qu'en effet les deux causes ont présenté des aspects bien différents devant moi et devant le capitaine Salmon et ses collègues.

2o. En second lieu, le capitaine Salmon paraît n'avoir tenu compte que de la règle 25 et n'avoir vu conséquemment qu'une face de la cause.

Je crois avoir montré l'autre face et avoir trouvé bien d'autres règles applicables à cette cause.

3o. Enfin le capitaine Salmon et ses collègues paraissent n'avoir aucune confiance en le pilote Bouillet, parce qu'il n'est pas licencié et c'est un de leurs griefs contre le *Canada*. Ce pilote m'a paru à moi honnête et

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intelligent; naturellement il y a des erreurs dans son témoignage et il y a des contradictions; mais on sait que les témoins qui ne se contredisent jamais sont très rares. Enfin ce témoin m'a paru connaître aussi bien son métier que la plupart des autres pilotes. Il n'est pas licencié, c'est vrai; mais la loi ne prescrit pas aux vaisseaux de n'employer que des pilotes licenciés; et tant que ceux-ci n'auront pas mieux prouvé leur habileté et leurs connaissances nautiques qu'ils ne l'ont fait jusqu'à présent, il n'est pas probable que la loi soit changée.

La conclusion qui s'impose après ce long argument, c'est qu'il y a eu des fautes commises par les deux steamers et que, tous deux étant responsables de la collision, les dommages qui en résultent doivent être divisés et payés par égales parts entre eux, suivant la jurisprudence générale et la loi.

C'est le jugement que je prononce et j'adjuge en même temps que chaque partie payera ses frais.

Judgment accordingly.

Solicitors for plaintiffs: *Archer, Perron and Taschereau.*

Solicitors for defendants: *Campbell, Meredith, Macpherson and Hague.*

BRITISH COLUMBIA ADMIRALTY DISTRICT.

1903
July 30.

THE BANK SHIPPING COMPANY.....PLAINTIFFS;

AGAINST

THE STEAMSHIP "*CITY OF SEATTLE.*"

Collision—Negligence — Application of Regulations — Ship at Wharf— Lights—Fog-Signals.

Articles 11 and 15 (*d*) of the Imperial Collision Regulations of 1897, do not apply to the case of a ship made fast to a lawful wharf in a harbour.

Held, on the facts, that a vessel which ran into another so moored was guilty of negligence.

ACTION for damages for collision.

The case is reported chiefly on the point of the applicability of the Collision Regulations to vessels moored to a wharf.

The steamship *City of Seattle*, in a fog, about 4.30 a.m. on March 16th, 1903, ran into the barque *Bankleigh* which, while discharging cargo, was moored to Evans, Coleman & Evans' wharf in Vancouver Harbour, with her starboard side to the west side of the wharf, and with her stem a few feet, and her bowsprit over 20 feet, beyond the end of the wharf. The witnesses differed as to the exact distance that her stem projected beyond the wharf, but that fact was immaterial as will be seen from the judgment.

The position of the wharf was defined by three fixed and well-known lights known as the "wharf lights"; two of these lights were red, one at the N. W. corner of the northerly extension of the wharf and the other nearer the shore on the west side at the projecting corner of the original wharf, and the third was a green

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Statement of Facts.

one at the N. E. corner. The wharf was in a lawful position as regards navigation in Vancouver Harbour, *i.e.*, within the wharf-head line as fixed by-order in council of February 28th, 1903. She displayed two white lights—ordinary ship lanterns—one forward on the fore-topmast stay, and one aft on the port quarter at the round of the stern; she sounded no bell, but had a watchman on duty who hailed the *City of Seattle* as soon as he saw her approaching close to the *Bankleigh*. There was a very slight southerly wind and the weather was misty, with fog lifting and thickening at irregular intervals from about 2 a.m. The *City of Seattle* had usually docked at Evans, Coleman & Evans' wharf for some seven years, and was at that wharf that night close to the *Bankleigh* till 11.30 p.m, loading freight, when she went to the Canadian Pacific Ry. Co's wharf, some 500 yards distant to the west for some freight and in returning from that wharf, in endeavouring to make her way out of the harbour on a supposed N.E. course, she ran into the *Bankleigh* and with her stem struck her on the port side near the mizzen hatch, inflicting considerable damage.

In explanation of this occurrence the defendant sets up that it was occasioned by a thick fog settling down within three minutes after the *Seattle* left the C. P. R. wharf, and that she proceeded thereafter under slow and half-speed bells till the *Bankleigh* loomed up suddenly through the fog, and that thereupon the engines were immediately reversed, but too late to avoid a collision. The reason assigned for being out of her course was that she had during the fog been caught in an unusual tide-current, and the defence of inevitable accident was consequently set up. Negligence was attributed to the *Bankleigh* because of (1) insufficient look-out; (2) insufficient lights; (3) no fog-bell.

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July 29th and 30th, 1903.

Trial at Vancouver before Mr. Justice Martin, Local Judge of the British Columbia Admiralty District. *E. P. Davis, K.C.* and *D. G. Marshall* for the plaintiffs.

Argument of Counsel.

The *City of Seattle* ran down our barque when she was moored to a wharf in a lawful position; she was thus for purposes of navigation part of a fixed and permanent object, and not in any way a vessel "at anchor" in the sense that term is used in articles 11 and 15 (*d*); those provisions do not apply to her, and it was not necessary for her to have had lights in the exact position therein specified or to sound a fog-bell. If all the ships so moored in the harbour were to ring bells it would not only not aid but disturb and mislead mariners, who would assume the sound and lights came from vessels at anchor in the fair-way. On the face of it, the *City of Seattle* has been guilty of gross negligence and the reason why no case can be cited on the exact point is that this is the first time a ship, which had so run down another, ever thought seriously of defending such bad seamanship. The case is determinable on the same principle as a ship running down a wharf or break-water. (*The Uhla* (1); *Roscoe's Admiralty Practice* (2).) Here the onus has been thrown upon the defendant ship and there must be a full explanation of what the alleged invitable accident was. *The Merchant Prince* (3); *Roscoe's Admiralty Practice* (4). She should have dropped her anchor when the fog came on; *City of Pekin* (5). As to the evidence, it shows that so far as this harbour was concerned the knowledge of the captain of the *City of*

(1) 19 L. T. N. S. 89; 2 Ad. & Ecc. at p. 29.
(2) 3rd ed. 205.
(3) [1892] P. 179; 7 M. L. C. N. S. 208.
(4) 163, 168, 172.
(5) 58 L. J. P. C. 64; 6 M. L. C. N. S. 396.

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Argument of Counsel.

Seattle was defective, and he was not a mariner of ordinary skill or competency. As to the alleged unusual tide-current, there is no evidence that it was other than normal at that stage of the tide and time of the year. The *City of Seattle* could not have been on a N E. course, and the accident in all probability arose from her failing to distinguish between the two red lights on the wharf and picking up the inner one instead of the outer.

J. A. Russell and *B. P. Wintermute* for the *City of Seattle*.

This is a case of inevitable accident and everything was done on the *City of Seattle* that was possible to avoid the accident, and all due skill and care used in navigation. The evidence shows that the collision was attributable to the fog settling down upon that ship almost immediately after she left the C. P. R. wharf, and while in that fog she was carried by a strong current into the *Bankleigh*. I rely upon the cases of *The Virgil* (1); *The Marpesia* (2); *The William Lindsay* (3); *The Westphalia* (4); *The Buckhurst* (5); and *The Industrie* (6). The *Bankleigh* should have exhibited the lights of a ship aground in a channel quite apart from the regulations. Even if she was moored to a dock, she should have rung her bell at intervals as her position was tantamount to a ship at anchor under article 15 (*d*).

[*Per Curiam*. When a ship is tied up at her lawful wharf, in a harbour, is she not in a position somewhat analogous to that of a man in bed in his own house, that is, she is "at home" and entitled to assume she is in a place of safety? Are not the four states of a vessel contemplated by the regulations thus set out in

(1) 2 W. Rob. 201.
(2) L. R. 4 P. C. 212.
(3) L. R. 5 P. C. 338.
(4) 24 L.T. 75.
(5) 6. P. D. 152.
(6) L. R. 3 Ad. & Ec. 303.

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the preliminary article, viz.: (1) under way; (2) at anchor; (3) made fast to shore, and (4) aground? As to the meaning of "under way" or "at anchor," see *The Dunelm* (1), and *The Romance* (2). In what way did the position of the *Bankleigh* resemble that of a vessel "at anchor" under Articles 11 and 15 (*d*), or "a vessel aground in or near a fair-way" under Article 11? The two lights she did show were, apart from the regulations, sufficient in the circumstances.]

I admit that I have no case which is like the present, but the *Bankleigh* was in a position analogous to that of a ship at anchor, and should have given the fog-signals customary under such circumstances. She was in the fair-way practically, for her stern and bowsprit projected beyond the wharf. Though she had two lights out as was necessary when over 150 feet in length, yet her stern light was admittedly too low down.

Per Curiam: There is no reason why judgment should be deferred in this matter. It is the practice of this Admiralty Court that cases should be decided as speedily as possible.

In the first place, it is necessary to dispose of the question as to whether or not the Collision Regulations, or Sea Rules as they are often called, apply to the ship *Bankleigh*, and if she is to be condemned for a breach thereof. Now, there is no ground at all for finding that the ship in any way infringed those regulations. I have no hesitation at all in deciding that point in her favour. Her position there was tantamount to that set out by the preliminary act, that is to say, being "fast to the shore;" and she was not a ship "at anchor" or "under way" within the proper meaning of those terms as understood by seafaring men. Neither of those nautical expressions applies to the

(1) 9 P. D. 164. (2) [1901] P. 15.

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situation of the ship at that time. She was moored to, and discharging her cargo at, that wharf in a position of safety and entitled to assume that she was safe and the two lights she showed were a sufficient warning to competent mariners. In regard to the point taken that her bow-sprit projected some twenty feet beyond the north end of the wharf, nothing turns on that. I must assume, there being no evidence to the contrary, that the wharf as constructed conformed to the official regulations in that behalf; and she was, I say, properly berthed there; and though her bow-sprit did project some considerable distance, and part of her stem for a small number of feet beyond, or a few inches, as you may take the evidence, it does not concern the present question, and I do not propose to go into it, because the damage did not arise in this case from the fact that she projected, but from the fact that she was struck aft of amidships towards her mizzen hatch, the consequence being that the point of collision was 153 feet, from the north end of the wharf.

Then, in the second place, as to the facts. The principle upon which this case is decided in regard to inevitable accident, which is really what the defence is here, is so well laid down in the case of *The Merchant Prince* (1) that it seems unnecessary to refer to it again, counsel having already cited the parts which are peculiarly appropriate to this case.

The facts that the *Bankleigh* was in the position I have referred to and that she was run down, as aforesaid, establish such a *primâ facie* case of negligence against the defendant ship that the rule of law set out in the case of *The Merchant Prince* 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

(1) [1892] P. D. 179.

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Reasons for Judgment.

of the accident, and that, though exercising ordinary care and caution and maritime skill, the result of that accident was inevitable. That is the principle which seems to apply to such a case as the present, and the fact that counsel on both sides have been unable to discover any case like it shows what a very unusual state of facts this is. The *primâ facie* case established against the defendant ship is of an exceptionally strong nature. I find that the defence has failed to sustain the plea of inevitable accident, and I find that there was bad seamanship in the way the *City of Seattle* was handled, and there is no valid excuse for the collision which occurred. It seems to me, on his own admission, that the captain of the *City of Seattle* has shown himself to be—for the purpose of this harbour at least—not a competent mariner, and it would have been well for him to have taken some other precautions, in the light of the unsettled state of the weather to which he referred, than those he did; either, as suggested by one of the pilots, stayed at the wharf until the weather cleared, or certainly, when he found he was liable to run into a bank of fog, have had his anchor ready beforehand, or by reversing his engines so as to bring his bow further to the north. It is very difficult to believe his statement in regard to the state of the tide; but even if it were setting in that way, in the face of what the pilots say, that would not under the circumstances, in my opinion, exonerate him for not having taken the precautions to which I have alluded. Every case must be judged by its circumstances. Here we have a steamer, having left Evans' wharf a few hours before where it knew a ship was lying in a certain position, going to a neighbouring wharf only 500 yards away—and here I may remark the captain made a very considerable mistake in the distance, the difference between 500 and 800

yards—and having landed at that wharf, purporting to return near the first wharf. One would think he would take such precautions, under such circumstances known to him, which would have prevented an accident like the present. Evidently the captain also did not understand the tides of Vancouver harbour, which, as Mr. Russell very truly says, are peculiar, but at the same time it must not be overlooked that there was not a particle of evidence to show that on that particular night there was anything exceptional in the state of the tide. Therefore, the inference I am asked to draw, that there was something very peculiar, cannot be drawn.

I believe that the real explanation of the accident is the mistake about the light of which the mate and the captain gave evidence. The captain proceeded on the assumption that there was only one red light on the wharf, that he only saw one, and he must have picked up the wrong one. It seems to me that is the real explanation of what otherwise seems to be inexplicable.

It is unnecessary to add any more. I formally find all relevent issues of fact in favour of the plaintiffs, and those of law are likewise determined. There will be a reference to the Registrar and two merchants to assess the damages.

Judgment for plaintiffs, with costs.

Solicitors for the plaintiffs: *Davis, Marshall & Macneill.*

Solicitors for the defendant ship: *Russell & Russell.*

BETWEEN

1904
April 5.

THE INDIANA MANUFACTURING COMPANY..... } PLAINTIFFS;

AND

HARRY WARD SMITH, MARTIN FRANKLIN SMITH, BRUCE SMITH, MARTIN SMITH AND JAMES HAMILTON AND ARCHIBALD SMITH..... } DEFENDANTS.

Patent for invention—Infringement—Assignor and assignee—Estoppel—Fair construction.

Where the original owner of a patent had assigned the same, and was subsequently proceeded against by the assignee for the infringement of the patent so assigned, the former was held to be estopped from denying the validity of the patent but, inasmuch as he was in no worse position than any independent member of the public who admitted the validity of the patent, he was allowed to show that on a fair construction of the patent he had not infringed.

THIS was an action for the infringment of a patent for invention.

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

January 26th 1904.

The case was tried at Hamilton, Ont.

February 22nd, 1904.

The case was now argued at Ottawa.

W. D. Hogg, K.C., for the plaintiffs;

C. A. Masten for the defendant H. W. Smith.

J. P. Stanton for the defendants Martin F. Smith, Bruce Smith and Martin Smith.

W. H. Hogg, K.C., for the plaintiffs, contended that the defendants were estopped from setting up the

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Argument of Counsel.

invalidity of the patent because the plaintiffs deduced their title from the defendants. A vendor cannot attack the title of his vendee under a grant. (*Oldham* v. *Langmead* (1); *Chambers* v. *Critchley* (2); *Whiting* v. *Tuttle* (3); *Frost on Patents* (4).

On the merits of the case the facts show very clearly that the "chaff-board", claimed in paragraph No. 5 of the claim of the plaintiffs' patent, has been infringed. Not only the "chaff-board" but the "fan" and the "hopper" have also been infringed. Parts of our claim, such as the hopper and fan and the "fan-housing," have been directly infringed by the defendants. The invention shown in plaintiffs' claim as to a "chaff-board" is absolutely a new thing. It produces, almost automatically, a desired result in a pneumatic stacker. The defendants cannot evade their infringement by showing that they use a piece of canvass instead of a board to effect the same purpose. The mere change of one material for another is not sufficient to enable them to escape the charge of infringement. A mechanical equivalent is an infringement under such circumstances as exist in this case. If you have a mere colourable device it is not a "mechanical equivalent" but is simply an infringement.

The plaintiffs' invention consists of two distinct combinations: 1st, the interior arrangement which makes a complete pneumatic stacker; and, 2ndly the combination described in our claim No. 7, including the "fan-housing," the "discharge-pipe," the "collapsible elbow" and the "sleeving." The pith and marrow of the invention under claim No. 7 is in the fact that we have a movable stack; so far as the defendants use a device by which the discharge-pipe of the stacker is made easily movable they are infringing

(1) 1 Web. P. C. 291.
(2) 33 Beav. 37.
(3) 17 Grant 454.
(4) 2nd ed., pp. 354, 355.

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Argument of Counsel.

our invention covered by claim No. 7. If the collapsible elbow and sleeve constitute an invention, they have been infringed here by the defendants.

C. A. Masten, for the defendant H. A. Smith, contended that while the defendant for whom he appeared might be technically estopped from denying the validity of the patent, such estoppel would be limited to the identical thing covered by the assignment under which the plaintiffs made title to the patent. The position of the defendants here is very little different from that which any independent member of the public who admitted the validity of the patent would occupy, and it is open to them to show that on a fair construction of the patent they have not infringed.

The plaintiffs' patent is not a primary one, and therefore the doctrine of equivalents does not apply with the same strictures as if it were. (*Walker on Patents* (1).)

As to claim No. 5 in plaintiffs' patent, defendants' device of a piece of canvas instead of a board was used at the time of the assignment. It would not operate successfully in the plaintiffs' device; more than this it serves the purpose better. The canvas stops the draft from the separator, while the board does not discharge the desired function in substantially the same way. (*Cropper* v. *Smith* (2); *Franklin Hocking & Co. Limited* v. *Franklin Hocking* (3); *Western Telephone Const. Co.* v. *Stromberg* (4); *Martin & Hill Cash-Carrier* v. *Martin* (5); *Babcock* v. *Clarkson* (6); *Smith* v. *Ridgely* (7); *Brown* v *Jackson* (8); *Consolidated Car Heating Co* v. *Came* (9).)

(1) 3rd ed. secs. 354, 359, 362.
(2) 26 Ch. D. 700; 10 App. Cas. 249.
(3) 6 Cutl. R. P. C. 69.
(4) 66 Fed. Rep. 550.
(5) 67 Fed. Rep. 787.
(6) 63 Fed. Rep. 607.
(7) 103 Fed. Rep. 877.
(8) 3 Wheat. 449.
(9) 19 T. L. R. 692.

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THE INDIANA MANUFACTURING CO. v. SMITH.

Reasons for Judgment.

J. P. Stanton followed for the defendants *Martin F. Smith*, *Bruce Smith* and *Martin Smith*, citing *Rowcliffe* v. *Morris* (1); *Graham* v. *Earl* (2); *Sykes* v. *Howarth* (3); *Walker on Patents* (4).

W. D. Hogg, *K.C.*, replied citing *Edmunds on Patents* (5).

THE JUDGE OF THE EXCHEQUER COURT now (April 5th, 1904) delivered judgment.

The action is brought for the infringement, by the defendants, of letters-patent numbered 73416 for alleged new and useful improvements in pneumatic straw stackers, issued on the 15th of October, 1901, to the defendants Harry Ward Smith and Martin Franklin Smith. The latter assigned his interest in the patent to the former, who afterwards, and before this action was brought, assigned to the plaintiffs. Before the hearing, the plaintiffs discontinued the action as against James Hamilton and Archibald Smith, and nothing has been shown to connect Bruce Smith and Martin Smith with any infringement of the plaintiffs' patent; and the action as against them will be dismissed with costs.

The pneumatic straw stackers alleged to be an infringement of the patent in question here was constructed by Harry Ward Smith, Martin Franklin Smith being employed as a workman in their construction, but having no other interest therein. He has no objection, so far as he is concerned, to the injunction asked for being granted; but asks that he may have his costs, or at least that costs should not be given against him.

Mr. Masten, for the defendant Harry Ward Smit ,

(1) 3 Cutl. R. P. C. 17.
(2) 92 Fed. Rep. 155.
(3) 12 Ch. D. 826.
(4) 3rd ed. p. 302, n. 5.
(5) 2nd ed. p. 340.

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admitted on the hearing that the latter was estopped from denying the validity of the patent, but alleged that he was entitled to adduce evidence to show the state of the art in order that the claims made in the specification should receive a proper construction; and evidence of that character and for that purpose was admitted.

It is conceded that the defendants cannot as against the plaintiffs set up in this action or show that the alleged invention was not new or useful, or that there was no invention, or that they were not the first or true inventors. Neither can they attack the specification for insufficiency or otherwise; but it is contended that, conceding the validity of the patent, they are otherwise in a position that does not differ materially from that which any independent member of the public who admitted the validity of the patent would occupy; and that it is open to them to show that on a fair construction of the patent they have not infringed. I think the cases on which Mr. Masten relied support that view, and I accept it as a fair though somewhat general statement of the law on that subject.

Then with respect to infringement, it seems to me, and I find, that the pneumatic straw stackers made by the defendant Harry Ward Smith are infringements of the patent in question in respect of the element or feature described in the 5th claim as a chaff board. I do not doubt that the chaffing apron, as he called it, and which he now uses to perform the office or function that the chaff board as described in the patent performed, does its work better than the chaff board did; and it is clear, of course, that it differs from it in some particulars. But the object aimed at and attained in each case is the same. The principle is also the same, and there is not, it seems to me, sufficient difference in the means used to attain that object to enable one to

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say that there is no infringement. The chaffing apron may be, and no doubt is, an improvement on the chaff board; but it is, I think, an improvement that the defendant Harry Ward Smith is not entitled to use without the plaintiffs' consent.

With respect to the other matters discussed, the discharge pipe, the sectional telescopic elbow with means for adjusting the same and the circular track or turntable, the patent relied upon is, it appears to me, good only for the particular mode of construction described therein, and the defendant having used a different form of construction in the straw stackers complained of, has not infringed the patent.

A question having arisen on the argument as to the plaintiffs' status and their right under the laws of the Province of Ontario to maintain this action, that objection was abandoned; the plaintiffs at the same time abandoning any claim for damages in respect of the pneumatic straw stackers that had been made or sold by the defendant Harry Ward Smith before this action was brought.

There will be judgment for the plaintiffs against the defendants Harry Ward Smith and Martin Franklin Smith, and an order for an injunction against both of them, and the plaintiffs are, I think, also entitled to costs as against them.

Judgment accordingly.

Solicitors for the plaintiffs: *Hogg & Magee.*

Solicitor for the defendants: *F. B. Featherstonhaugh.*

NEW BRUNSWICK ADMIRALTY DISTRICT.

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April 11.

WILLIAM L. LOVITT.....PLAINTIFF;

AGAINST

THE SHIP "*CALVIN AUSTIN.*"

Shipping—Collision in foreign waters—Application of foreign rules—"Safe and practicable"—"Narrow channel."

Where a collision occurs in American inland waters and action is brought in this court for damages, the court will apply the rule of the road as it obtains under the *American Sailing Rules* for the purpose of determining the question of liability for the collision.

2. Article 25 of the American rules provides that "in narrow channels every steam-vessel shall, when it is safe and practicable, keep to that side of the fare-way or mid-channel which lies on the starboard side of such vessel."

Held, that the words "safe and practicable" must be taken to imply that the vessel is only obliged to take this course when she can do so without danger of collision.

3. A harbour containing wharves and anchorage for ships on either side, and where ships and steam-tugs are continually plying back and forth, is not a "narrow channel" within the meaning of Article 25 of the above rules and the provisions of that article do not apply to cases of collision there.

ACTION for damages for collision.

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

January 4th, 1904.

The case was now argued, upon evidence taken at a previous date, before Mr. Justice McLeod, Local Judge for the New Brunswick Admiralty District.

H. H. McLean, K.C. (and *Dodge* of the Massachusetts' Bar) for the plaintiff;

Dr. Stockton, K.C. (and *Carver* of the Massachusetts' Bar) for the defendants.

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McLEOD, L. J. now (April 11th, 1904) delivered judgment.

This is an action brought by William L. Lovitt, owner of the British barque *Reform*, against the steamer *Calvin Austin* for damages caused by a collision which occurred in what is known as the Boston Inner Harbour.

The *Calvin Austin* is an American steamer of about twenty-eight hundred tons register.

The barque *Reform* is a steel vessel, British register, of about 545 tons; and was just terminating a voyage from Rosario via Buenos Ayres to Boston, with a cargo of wool and hide clippings when the collision occurred.

The steamer *Calvin Austin* is a passenger steamer running between the ports of Boston and St. John and at the time of the collision she was just leaving Boston for St. John. The collision happened in the Boston Inner Harbour, on the 30th of July, 1903, at about 15 minutes past 12 o'clock in the day. The dock which the *Calvin Austin* used in Boston is known as the Commercial Dock, and is on the south side of the harbour. On the 30th of July she left her dock a few minutes after 12 o'clock noon. Twelve o'clock is her time for sailing, but she was a few minutes late leaving that day. The pilot, Captain Mitchell, says she came out of her dock and when she left the dock—that is when she was clear of the dock—it was 10 minutes past 12 o'clock. Shortly before she left the dock, but just as she was preparing to leave, a five masted schooner, the *Van Allens Boughton*, in tow of the tug *J. S. Chandler*, passed down the harbour. The length of hawser between the tug and the schooner was about 75 fathoms. Shortly afterwards, and immediately before she, in fact, left her dock, a fishing schooner, in tow of the tug *William J. Williams*, came out of her dock just below the Commercial Dock on the same side

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of the harbour—a dock known as the T. Dock—and proceeded down the harbour. The length of hawser between the tug and the fishing schooner was about 40 or 50 fathoms. There were vessels anchored on both sides of the harbour, that is on both the north and south sides of the harbour or channel. The day was fine and clear, but there was a strong southwest or west southwest wind blowing. The *Van Allens Boughton*, in tow of the tug *Chandler*, was going down about the centre of the harbour or channel, or possibly a little to the southern or starboard side going out. The fishing schooner, in tow of the tug *William J. Williams*, was following the *Van Allens Boughton* down a little on her starboard side. When the *Calvin Austin* came out of her dock she came clear out free from the dock, some of witnesses say a length and a half or two lengths—one witness gives a shorter distance—but at all events when she got clear of the dock her helm was put hard aport. She took a southeast course, which would take her down the harbour; and from the evidence I conclude when she came on her course she was rather on the port side of the *Van Allens Boughton*.

The *Calvin Austin*, when she took her course of southeast, was going faster than the *Van Allens Boughton* or the fishing schooner. She was probably three lengths behind the *Van Allens Boughton*, and, so far as I can gather from the evidence, was just commencing to pass the fishing schooner, but was some two or three hundred feet from her port side. Captain Pike, in answer to the question: "Will you tell me the best estimate "you can give as to how near you passed that schooner "and fisherman when you came down that port side," says: "I should say two or three hundred feet;" and the same opinion is expressed by other witnesses. Among the vessels anchored on the north side of the harbour was a barque, the *Davie P. Davis*, that

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appeared to be anchored a little outside the line of vessels, so that her bow projected somewhat farther out of the harbour than the other vessels. When the *Calvin Austin* was straightened on her course she gave a signal of two whistles. Captain Pike says they were given to the tug *William J. Williams*, having the fishing schooner in tow. At the time those whistles were given, the *Calvin Austin* had commenced to pass the fishing schooner, one of the witnesses said she had in fact passed the schooner. John Nicholson, second pilot of the *Calvin Austin*, says, in answer to questions, as follows: —

"Q. When those two blasts were blown did you have the fisherman, that is to say, the boat towing ahead of you, portward or abaft?

"A. She was abaft of us.

"Q. At the time you blew the two blasts?

"A. Yes.

"Q. So that when you had undertaken to pass that vessel, you were overtaking, without signalling, until you had got her abaft your beam?

"A. No, sir; she was not abaft the beam.

"Q. I thought you said she was?

"A. Not when we gave the signals.

"Q. Where was the schooner herself when you gave the two blasts?

"A. She was forward of the beam.

"Q. How much forward of the beam?

"A. Not a great deal forward of the beam.

"Q. You had already entered on the process of passing her on the port side before you gave any signal at all?

"A. No, sir; she did not alter her course at all—the fisherman.

"Q. I am asking you about the signal and not about the course? At the time you blew the two blast

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signal the fisherman was abreast of your starboard bow. Is not that a fact?

"A. Abreast of the starboard bow.

"Q. Was that blast of two whistles the first blast blown after the long blast, which I have called the inspector's blast, when you came out of the dock?

"A. Yes.

And Alonzo N. Carter, the captain of the *Van Allens Boughton*, says in answer to the question as follows:—

"Q. Where was she when she blew those first two whistles with reference to the fisherman?

"A. I think she was ahead of the fisherman. She was between us and the fisherman, and the fisherman between her and the South Boston Docks.

"Q. On her starboard side?

"A. More on her starboard quarter—more aft abeam.

"Q. She had already passed the fisherman when she blew those two whistles?

"A. I think she was by the fisherman; that is, I think, her stem was by the fisherman and her tow.

"[Court:—When she blew the first two whistles?]

"A. Yes.

"Q. Did you hear any answer from the *Pallas* to the signals of the two whistles blown on the *Calvin Austin*?

"A. Yes, sir.

And from all the evidence she was, at all events, passing the schooner when the whistles were given and was some two hundred feet on her port side and about two lengths or two lengths and a half behind the *Van Allens Boughton*. The whistles were answered by the *William J. Williams* towing the fishing schooner, by the *J. S. Chandler* towing the *Van Allens Boughton*, and the *Pallas* towing the *Reform*. Capt. Pike says he heard the answer of the *William J. Williams*, but did not hear the other two. A few minutes after this

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signal was given, and Capt. Pike says after he had passed the tug of the fishing schooner and without any further signal being given, the helm of the *Calvin Austin* was put hard aport and she crossed the stem of the *Van Allens Boughton* and attempted to pass her on her starboard side, and as she came on her starboard quarter of the *Van Allens Boughton* she met the *Reform*, in tow of the tug *Pallas*, coming up on that side and ran into her about midship, striking her about a foot abaft the forerigging, breaking a number of her plates and doing a good deal of damage.

The pilot of the *Calvin Austin* says she left the wharf at ten minutes past twelve, that is when she swung clear of the wharf it was ten minutes past twelve and the collision occurred 15 minutes past twelve, five minutes later.

The *Reform* was coming into Boston that day, and some distance outside of the Boston light she took the tug *Pallas*, and shortly after the pilot came on board and took charge. The tug first took her in tow on a hawser about one hundred feet long and they proceeded thus to the Boston light, passing through what is called the Narrows at the entrance of the harbour, past Castle Island, until they came about to what is called Burnham's Channel Buoy. There they stopped and took in the hawser and the tug dropped down alongside the barque and made fast on her port side. The wharf she was going to is what is known as the Cunard Wharf, on the north side of the harbour, or nearly opposite the Commercial Wharf, and the captain of the tug says he went on the port side as it would be handier to put her into her wharf on that side. She would lie with her starboard to the wharf. As they were taking in the hawser, the tug *J. S. Chandler*, with the *Van Allens Boughton* in tow, was coming down the harbour or channel, and she gave two whistles to the

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Pallas, indicating that she wished to pass starboard to starboard. This was answered by the *Pallas* consenting. She then was made fast alongside the barque, and they proceeded up the harbour on the south or port side, at about 2 or 2½ knots an hour. Just after the tug was made fast alongside of the *Reform*, the first two whistles of the *Calvin Austin* were heard and were answered by the *Pallas* consenting to meet starboard to starboard. Those aboard the *Pallas* saying they supposed the signal was intended for them. The *Reform* in tow of the *Pallas* proceeded up the south side of the harbour or channel, and when she was passing the *Van Allens Boughton*, the *Calvin Austin* came across the stern of the *Van Allens Boughton* and the collision occurred. The *Calvin Austin*, as she came on the starboard quarter of the *Van Allens Boughton* and saw the *Reform*, again gave two whistles, put her helm hard to port and her engines full speed astern; the *Pallas* answered with two whistles. The helm of the *Reform* was put hard to port and the engines of the *Pallas* full speed astern, but the vessels came together and the damage occurred as stated.

Some discussion arose as to whether the case should be governed entirely by the American Sailing Rules. The collision occurred in what is known as the Boston Inner Harbour in American inland waters. The *Calvin Austin* is an American registered steamer; the barque *Reform* is a British ship. There is no evidence as to the nationality of the *Van Allens Boughton* or the fishing schooner. But I think I must take it that the three tugs that were towing these three vessels were American tugs. They were carrying on their regular business of towing vessels in and out of Boston harbour. The rules governing the sailing and signalling in these waters have been proved before me, and I must take it that these vessels in these inland waters

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are governed by them and subject to them. *The Halley* (1) was cited. I think that case is an authority to enquire into the sailing rules and signals to be given in order to ascertain whether there has been negligence or not. At page 203 it is said: "It is true "that in many cases the courts of England inquire "into and act upon the law of foreign countries, as in "the case of a contract entered into in a foreign country, "where by express reference or necessary implication "the foreign law is incorporated with the contract; and "proof and consideration of the foreign law, therefore, "becomes necessary to the construction of the contract "itself. And as in the case of a collision on an ordinary "road in a foreign country, where the rule of the road "in force at the place of collision may be a necessary "ingredient in the determination of the questions by "whose fault or negligence the alleged foul was com-"mitted." Here I think it is necessary to enquire into the signals required to be given in these waters, and the rules of sailing, in order to determine by whose fault or negligence the collision occurred. The rules were proven and the principal ones referred to and applying to inland waters are the following. They are called inland rules

Art. 18. Rule I.—"When steam-vessels are ap-"proaching each other head and head, that is, end on, "or nearly so, it shall be the duty of each to pass on the "port side of the other; and either vessel shall give, as "a signal of her intention, one short and distinct blast of "her whistle, and thereupon such vessels shall pass on "the port side of each other. But if the courses of such "vessels are so far on the starboard of each other as not "to be considered as meeting head and head, either "vessel shall immediately give two short and distinct "blasts of her whistle, which the other vessel shall

(1) L. R. 2 P. C. 193.

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"answer promptly by two similar blasts of her whistle, "and they shall pass on the starboard side of each "other."

Rule VIII.—"When steam-vessels are running in "the same direction, and the vessel which is astern "shall desire to pass on the right or starboard hand of "the vessel ahead, she shall give one short blast of the "steam-whistle, as a signal of such desire, and if the "vessel ahead answers with one blast, she shall put "her helm to port; or if she shall desire to pass on the "left or port side of the vessel ahead, she shall give two "short blasts of the steam-whistle as a signal of such "desire, and if the vessel ahead answers, she shall put "her helm to starboard; or if the vessel ahead does not "think it safe for the vessel astern to attempt to pass at "that point, she shall immediately signify the same by "giving several short and rapid blasts of the steam-"whistle, not less than four, and under no circum-"stances shall the vessel astern attempt to pass the "vessel ahead until such time as they have reached the "point where it can be safely done, when said vessel "ahead shall signify her willingness by blowing the "proper signal. The vessel ahead shall in no case "attempt to cross the bow or crowd upon the course "of the passing vessel."

"Art. 25.—In narrow channels every steam-vessel "shall, when it is safe and practicable, keep to that "side of the fair-way or mid-channel which lies on the "starboard side of such vessel."

The question to be determined is whether the collision is the result of inevitable accident or whether it is the result of negligence and mismanagement of one or both of the vessels. I have gone over the evidence very fully and closely, and have examined the authorities carefully, and, dealing first with the *Calvin Austin*, I have come to the conclusion that she must

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be charged with negligence. We have the fact that she came out of her dock a little after twelve at noon; the pilot says that it was ten minutes past twelve when he straightened out on his course southeast. The day was fine and clear. There was a strong southwest or west southwest wind blowing which would tend somewhat to keep her to the north side of the channel. The captain and his officers had a full view of the harbour and of the shipping in it. They knew there were vessels anchored along down on each side, on both the north and south sides They knew the *Van Allens Boughton*, in tow of the tug *J. S. Chandler*, was going down near the centre of the harbour or the channel just ahead of them. She had passed their dock just before they came out. So soon as they came out of the dock and turned on their course, they saw the fishing schooner in tow of the *William J. Williams* on their starboard side, and when the *Calvin Austin* passed her she was some two or three hundred feet from her. The captain and at least two of his officers saw at the entrance of the harbour a vessel which proved to be the *Reform* The captain says he could see her masts, but did not know whether she was at anchor or what she was doing. The two officers who saw her said they saw her moving up the harbour when the *Calvin Austin* straightened out on her course. The captain says he was in the pilot house at the first window, looking out. The windows were all down. The first pilot was alongside of him at the port side, looking out of the window. The second pilot was standing alongside of the man at the wheel. The man at the wheel was standing on the starboard side of the steamer. These men all had an opportunity to see what vessels were in the harbour and evidently did see them

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As to the *Reform*, Capt. Pike says, in his direct examination, in answer to questions as follows :—

"Q. Prior to that had you seen the vessels at anchor down below on the starboard side or south side of the channel?

"A. Yes.

"Q. And you had seen the masts of the *Reform*?

"A. Yes. Just seen them just as we were coming from the wharf.

"Q. When you saw the masts of the *Reform* how was she located with reference to vessels at anchor?

"A. She was more out in the channel.

"Q. When you saw her masts where did you think she was?

"A. Well I didn't know. I could only see her masts, and didn't know whether she was at anchor or what she was doing"

It is true on cross-examination he says that he didn't mean to say that he saw her when he first came out of the dock, but that it was later, and when he was about a length from the *Van Allens Boughton*. But having carefully considered all his evidence, it seems to me that he certainly saw her in time to have taken more precautions than he did to prevent the collision.

Frank L. Brooks, the quartermaster, in his cross-examination, says in answer to questions :—

"Q. When was the first that you noticed of the barquantine *Reform*?

"A. I noticed her on our starboard bow, a little mite on our starboard bow.

"Q. When?

"A. I think it was when I was told—well, just after we left the dock a little while.

"Q. Just after you left the dock?

"A. Yes.

"Q. What was she doing then?

"A. Appeared to me to be coming up the harbour on the south side of the channel.

"Q. You had no difficulty in seeing her?

"A. No, I saw her. sir."

"Q. There are nothing to obstruct your view of her —just after you left the dock you saw her?

"A. No, sir; I saw her.

"Q. Did you see at that time that she was in charge of a tow-boat?

"A. No, sir; I didn't.

"Q. Did you notice she had no sails on her?

"A. I did.

"Q. And you would assume she must have had a tow-boat with her?

"A. I didn't know whether she was at anchor or in tow.

"Q. Did you call any body else's attention to her?

"A. I didn't.

"Q. And you say you were standing in your place on the starboard side of the wheel?

"A. Yes, sir.

"Q. Did you take any notice of her after that until you were actually going into her?

"A I saw she was still proceeding up the harbour on the south side of the harbour.

"Q. Did you see her constantly?

"A. Not all the time—no.

"Q Every now and then you would look up and see her. Did you notice her on the way down as many as five times?

"A. I don't know.

"Q Do you suppose you noticed her three times after you first saw her before the collision?

"A. Probably might have noticed her twice.

"Q After this first observation, which you say you had of her just as you were coming out of the dock.

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can you state what the next definite recollection is that you have of observing her at all?

"A. Well, I saw her steadily coming along on the south side of the channel?

["Court:—If she was coming along, how was she coming, under sail or in tow?]

"A. After I first saw her I noticed shortly after a tug's smokestack on her port quarter.

"Q. Was there any tug ahead when you first saw her?

"A No, sir."

John Nicholson, the second pilot, after saying that he saw vessels anchored on the north side of the harbour, says in answer to questions:—

"Q. Did you notice anything on the south side of the channel coming up?

"A. Yes, sir, there were vessels at anchor on the south side, barges and coal barges?

"Q. More than one?

"A. Yes, sir.

"Q. Different kinds of vessels?

"A. Yes, a barquantine, three masted schooners, coal barges.

"Q. Did you notice the *Reform*, the vessel that afterwards collided with you?

"A. Yes.

"Q. What did you notice with regard to her?

"A. I noticed her spars.

"Q. Where did she appear to be?

"A. She was ahead of the five masted schooner towing up.

["Court:—Do you mean ahead, nearer into the harbour?]

"A. She was further down the harbour.

"Q. On the south side you say there were barges at anchor?

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"A. Yes.

"Q. At the time you noticed her did you observe whether she was in tow or not?

"A. No, sir.

"Q. What could you see of her?

"A. I could only see the spars the time I seen her first.

"Q. How was she bearing with reference to the vessels at anchor on the south side of the channel?

"A. She was a little on the port bow going down the harbour.

In his cross-examination he says he could not see that she was not a vessel at anchor, but her spars were heading substantially up and down the harbour and were not tailing with the wind. I refer thus fully to this evidence, because I think it and other parts of the evidence show not only that the officers on board the *Calvin Austin* had an opportunity to see the *Reform* when they first straightened out in their course, but that they did in fact see her. Now with all these vessels moving in the harbour it was important that due care and caution should be exercised both as regards speed and the signals to be given, if it was desired by those in charge of the *Calvin Austin* to pass any of them in order to get more quickly to sea. As to the speed, Capt. Pike says it was not over six or seven knots an hour. Other witnesses say that it was higher. One witness says it was eight knots, and another witness says it was nine or ten knots. Looking at all the evidence, and bearing in mind that according to the record kept, the collision occurred just five minutes after the *Calvin Austin* straightened out on her course, and taking the distance she travelled from the wharf to the place of collision, she must have been going at a speed of not less than eight or nine knots an hour, rather more if anything than less. She passed

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the tug *William J. Williams* and her tow. And the captain of the *William J. Williams* says he was going six miles an hour, and overtook the *Van Allens Boughton*, which was going a little faster than the *William J. Williams*. I think this speed with these vessels in front was too great. She was going so fast, and was gaining on the *Van Allens Boughton* so much, that even in that short time she had to slow down for a few minutes, and when her first signal was given she was already passing the fishing schooner. The schooner was on her starboard side some two or three hundred feet from her. Capt. Carter says she was as far down as the tug *William J. Williams;* but at all events when that signal was given she was certainly passing or had passed the tow of the tug *William J. Williams*,and was making no change in her course whatever. She was about two lengths, or two lengths and a half, from the *Van Allens Boughton* going in the same direction, but at a greater rate of speed. The captain says this signal was given to the *William J. Williams*, but he was not in the position he should have been to signal the *William J. Williams*, he was already passing her and her tow, and he was about where he should signal the *Van Allens Boughton* and her tug, if he desired to pass her. Dr. Stockton, in his very able argument, said with great strength that it was not necessary to give the signal before attempting to pass the tow, it was sufficient if he gave it before attempting to pass the tug itself. I cannot accede to that proposition. For the purpose of the regulations for preventing collisions, the tug and tow are treated as one ship. In *Marsden on Collisions* (1), it is said "When one ship is in tow "of another, the two ships are for some purposes by "intendment of law regarded as one, the command or "governing power being with the tow and the motive

(1) 4th ed. p. 198.

"power with the tug. Thus for the purpose of the "regulations for preventing collision, the tug and her "tow are treated as one ship and that a steaming or "sailing ship according as the towing ship is under "steam or not." And see the *American and Syria* (1); the same being held in the American cases. *The New York etc. Co.* vs. *The Philadelphia, &c., Nav. Co.* (2) The object of the signal is that the overtaking vessel shall ascertain from the vessel in front whether it is safe and practicable for her to pass; and that the vessel in front may take the necessary precautions for safety, if she gives her permission to pass, and it is manifest that this object will be defeated if the overtaking vessel may commence to pass and pass down by the side of the two before giving any signal. No English case directly deciding this point was cited before me, and I have found none. The English rules, however, do not require an answering signal to be given, while the American rules do. I may refer, however, to *Robinson* vs. *The Detroit Steam Navigation Co.* (3). In that case the *Mackinaw* was overtaking the *Majestic*, the tug *Washburn* was alongside the *Majestic*, but the *Makinaw* did not see her, and she commenced to pass the *Majestic* before giving the signal. She did give the signal, but it was given after she had just commenced to pass the *Majestic*. The tug just then let go from the *Majestic*, to go ashore, and was run into by the *Mackinaw*. The latter was held in fault for not having given the signal before attempting to pass the *Majestic*. The tug was also held to blame, but because she was undermanned. The court in giving judgment (at p. 888) said in reference to the *Mackinaw*: "The "captain had had from the time he made out the

(1) L. R. 6 P. C. 127 and 132. (2) 22 Howard 464.
(3) 73 Fed. Rep. at p. 888.

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"*Majestic* and her course the clearly formed inten-
"tion to pass on this starboard hand. It certainly
"became his duty to signal this intention when, in
"so short a time, he must carry it into effect. Su-
"pervisors Rule No. 8 would be useless, indeed, if it
"applied only to an overtaking vessel when her bow
"was lapping the stern of the overtaken vessel The
"purpose of the signal is to solve the doubt in the mind
"of each pilot or master as to the course of the other
"vessel; before the vessels are so near each other that the
"doubt may be dangerous. It is to make certain to each
"master the proper course of his own vessel." I entirely agree with that. The object of the rule is safety, that is the vessel overtaking must ascertain in time whether it is safe to attempt to pass the vessel in front. As I have said, the signal was given when the *Calvin Austin* was about where she should give the signal, if she intended to pass the *Van Allens Boughton* and her tug on their port side. The signal was answered and consented to by the *Chandler*, the tug of the *Van Allens Boughton*, which supposed then that the *Calvin Austin* desired to pass on her port side. It was answered and consented to by the *Pallas*, coming up with the *Reform*, supposing that she desired to meet starboard to starboard. These whistles the captain of the *Calvin Austin* and officers say they did not hear. This, I think, is extraordinary. They were heard by the captain of the *William J. Williams*, being not far from the *Calvin Austin*. They were heard by Captain Saxon, who was in his small boat in the harbour, and not in nearly so good a position for hearing as those on board the *Calvin Austin*. They were heard by Captain Carter, who was on the *Van Allens Boughton*, and by a Mr. Habberley, a passenger, who was standing on the stern of the *Van Allens Boughton*, and from the way the wind was blowing at the time it was calculated to carry the sound

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towards the *Calvin Austin*. When the *Calvin Austin* straightened out on her course she was slightly on the port quarter of the *Van Allens Boughton*, and it looked as though she intended to go down on the port side. Captain Allen, of the *Van Allens Boughton*, says from the appearance he thought she might possibly go down on the port side, but he thought if she did she was taking a good many chances of being at close quarters owing to the vessels and barges anchored on the north side, particularly this *Davie P. Davis* that was anchored a little further out than the other vessels, though at least one of the witnesses says there was room to go down on that side. I think, however, most of the evidence is that it would not have been safe at that time. Captain Pike says he never intended to go down on the *Van Allens Boughton's* port side, yet from the way the *Calvin Austin* was manœuvred one would be disposed to think that when they came out of the dock, with an evident desire to get to sea quickly, the intention was to pass the *Van Allens Boughton* on her port side; but when the *Davie P. Davis* was seen standing out in the harbour, that intention was quickly abandoned, and she was turned to starboard; and this view is strengthened by the fact that she gave the signal of two whistles at the time she did, and gave no signal at all when she put her helm to port and attempted to go down on the starboard side. However, having given the signal of two whistles when she did, I think she is bound by it; and if those on board did not hear an answer assenting, she should have waited. It only meant slowing the engines down and going a little slower. Captain Pike says he always intended to go down on the south side. That was his course. Now if that was his intention from the first it was his duty to have given the signal of one whistle; if his desire was to pass the *Van Allens Boughton* on her

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port side, he had plenty of time to do it. He did give the signal of two whistles when he was in fact in the act of passing the tug *William J. Williams* and her tow, they being then two or three hundred feet from his starboard side and the *Van Allens Boughton* just in front of him, but he gave no signal that he wished to pass the *Van Allens Boughton* on her port side, and no explanation and no reason for this omission has been given. The *Van Allens Boughton* was going down about the middle of the channel, and it was not charged at all that she was wrong; and yet it was as much her duty to go on the south side of the channel or harbour as it was the duty of the *Calvin Austin*. This, of course, does not alter the rule, but the course of vessels and the mode of using these waters may have some bearing on the question whether rule 25 applies to Boston Inner Harbour. Almost immediately after the signal of two whistles was given, and as I have said without giving any signal at all, the helm of the *Calvin Austin* was ported, and she attempted to pass the *Van Allens Boughton* on the starboard side. Under rule 8 a signal of one whistle should have been given, and the rule says:—"Under no circumstances shall the vessel astern "attempt to pass the vessel ahead until such time as "they have reached a point where it can be safely done, "when said vessel shall signify her willingness by "blowing the proper signals." No attention whatever was paid to this rule when they attempted to pass on the starboard side.

After they had passed the fisherman, Captain Pike says, in answer to questions:

"Q. Then what did you do with your helm?

"A. We went right down a southeast course until we got pretty well down to the five-master going out, and as we got within about once the length of the *Calvin Austin* from the five-master, and were just about

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to swing over a point, heading southeast, and were going to port our wheel, and I looked over the five-master and saw this—

" Q. Did you give any order to the man at the wheel before you saw?

" A. Just as we were porting the wheel we saw this over the—

" Q. Did you give the order to port?

" A. Yes. The first pilot gave the order to port.

" Q. After that order was given was there any order to steady given?

" A. Yes. Steady, was given.

" Q. What change, if any, was made in her course?

" A. One point. She was headed southeast by south.

" Q. After you had steadied on that course where were you with reference to the *Van Allens Boughton*?

" A. Just coming on her starboard quarter.

When they came out on the starboard quarter of the *Van Allens Boughton* the *Reform*, in tow of the *Pallas*, was coming up, and Captain Pike says a collision was imminent. He then blew two whistles which were answered by the *Pallas*, put his helm hard aport and engines full speed astern. The effect of putting the engines full speed astern was to render the helm useless, and she did not obey it but swung to port. A good deal of evidence was given, and discussion had, whether she had stopped at the time of the collision; but without going through the evidence I think the result of it is that her way through the water had not stopped. She struck the *Reform* about amidships, and did the damage complained of. I think putting the engines full speed astern was an improper manœuvre at the time, as it prevented the helm from operating. She might, if that had not been done, answered her helm and gone down the starboard side of the *Reform* without damage, as some of the witnesses say there

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was room for her to go between the *Van Allens Boughton* and the *Reform*,—though other witnesses say there was not room, and the collision at that time was inevitable. I am not able to say which is right. Putting the engines full speed astern was, however, I think from the evidence a wrong manœuvre, and might have contributed somewhat to the collision. It was urged and strongly urged, by the counsel for the *Calvin Austin*, that even if it was a wrong step it was done when they were, so to speak, in the agony of collision, and was, therefore, excusable, citing *The Bywell Castle* (1). And that is true if she were put in that position through the fault of the *Reform*, but if she was in that position through her own fault, then she was not excusable. See *Marsden on Collisions*, (2) and cases cited and the *Elizabeth Jones* (3). Dr. Stockton claims that it was the fault of the *Reform*, through being on the wrong side of the channel or harbour, and I will discuss that later. Having gone into the evidence fully and carefully, I have come to the conclusion that the *Calvin Austin* was going at too great a rate of speed in the place she was and under the circumstances; that the *Van Allens Boughton* and her tug had a right to understand from her first signal of two whistles that she desired to pass on her port side and the *Pallas* and *Reform* to understand that she desired to meet starboard to starboard; and she had no right to pass or attempt to pass the *Van Allens Boughton* on the starboard side without signalling and getting leave, and that she is in fault. The next question to be considered is whether or not the *Reform* is also in fault.

It is claimed on behalf of the *Calvin Austin* that the *Reform* was in fault. The principal claim against her is that she violated Rule 25 in taking the port side of

(1) L. R. 4 P. D. 219. (2) 4th ed. p. 5.
(3) 112 U.S., 514 at p. 526.

the channel or harbour instead of the starboard side. It is also said that she did not put her engines astern so soon as she should.

Dealing with the first question. The plaintiffs contend in the first instance that Rule 25 does not apply to the place where the collision occurred; that that was the harbour known as the Boston Inner Harbour. They say, secondly, if it did apply, they showed sufficient reasons for taking the port side. Dealing with the first proposition as to whether the rule applies or not, a number of cases were cited by the defendant. Discussions have been had at different times as to what is a narrow channel. *Marsden on Collisions*, second edition, referring to the English rules, which are similar to rule 25, says: (p. 406.) "There is considerable "difficulty in defining a narrow channel within Art. 21. "The entrance to the Straits of Messina was held by the "Privy Council to be a narrow channel within Art. 21," citing *Rhondda* (1), which case was cited in argument. In that case the court held that the Strait of Messina was a narrow channel. In giving judgment, at page 552, it is said "their Lordships do not propose to define "what is a narrow channel or to lay down what par- "ticular width or length would constitute it. It is suf- "ficient to say that they are of opinion that this is a "narrow channel within the meaning of Art. 21 of the "regulations for preventing collisions at sea." The *Santanderino* (2) was also cited. The case holds that where the collision there occurred was in a narrow channel. It is called in the judgment a roadstead of Sydney harbour within the Canadian rule, which is similar to this. But neither case decides that the rule does apply to a ship that is in a harbour. The case of the *Devonian* (3) was cited, and it more

(1) 8 App. Cas. 549. (2) 3 Ex. C. R. 378.
(3) 110 Fed. Rep. 588.

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nearly applies to the present case. The collision occurred very nearly where this collision occurred, but further down and near what is called the narrows, they held there that the ship, where she was at the time, was in a channel. A harbour is defined in the *Century Dictionary* to be "A port "or haven for ships. A sheltered recess in the coast "line of a sea, gulf, bay or lake, most frequently at "the mouth of a river, and harbours are formed arti- "ficially in whole or in part." This collision occurred in what is known as Boston Inner Harbour, where ships are anchored, and they were anchored on each side of it at the time this collision occurred. Indeed, there are wharves on both sides where the collision occurred. So that, it seems to me, to fill all the conditions of a harbour. Then, if it is a harbour I cannot think that the rule applies. No case has been cited to me, and I find no case, where the rule is applied in a harbour; and indeed, I think it would be somewhat difficult to apply it, because vessels or tugs are continually plying back and forth, and it seems to me they must be governed in their meeting or passing by signals that are given. Furthermore, in this case, it is somewhat significant that the *Van Allens Boughton*, in tow of the tug, was proceeding down about the centre of the channel or harbour. There was no complaint or suggestion made that she was in an improper position. Indeed, I rather gathered from the evidence that it was the natural way for her to go down out of the harbour, and the *Calvin Austin*, when she was first seen by those on board the *Reform*, appeared to be following down almost on her wake, a little, if anything, on her port side. I, therefore, think that the rule itself would not apply in this case; but assuming that it does apply, the question following is: Was the *Reform* justified in coming up on the southern

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side? She came up as far as the Burnham's Channel buoy. The tug that was then towing her dropped down and made fast to her port side. The captain of the tug says that, as the wind was blowing on that day, he feared if he went on the other side he would be driven on the ships anchored there. There were ships at anchor on what is called Bird Island Flats, practically opposite Burnham's Channel buoy. It is claimed that she should have shortened her hawser before she did; but a number of witnesses were examined and practically all of them said on that day it would have been dangerous to attempt to shorten it below those buoys. And then, as to taking the southern side, Captain Merritt, the pilot of the *Reform*, Captain Kemp, of the tug *Pallas* towing the *Reform*, McCarthy, who was the mate of the *Reform*, all say that it was dangerous, as the wind was blowing that day, to have attempted to go up on the northern or starboard side. Captain Anderson, who was the master of the steam-tug *Chandler*, and who signalled the *Reform* to pass starboard to starboard, says: "At the "time, the wind was blowing southwest 16 or 17 miles "an hour, and I knew if I had gone to the other side of "him it would have made it bad for him on account "of vessels being anchored to leeward, near Bird "Island Flats. He would have gone to leeward of "me and consequently been liable to foul with them; "going ahead six or seven miles an hour, it would "have been a bad chance for him. The consequence "was I gave him two whistles hand he answered "two whistles," Captain Kenney, the captain of the tugboat *William J. Williams*, also says that under the conditions of that day the course the *Pallas* and the *Reform* took was right. Captain Carter, who was captain of the *Van Allens Boughton*, and a man with a good deal of experience, also agrees that the

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course she took was right. The rule is: "When it is "safe or practicable she shall keep to that side of the "fair-way ormid-channel, which lies on the starboard "of the vessel." Sec. 419, sub-sec. 3 of *The Merchant Shipping Act*, 1894, and cases decided under it, were cited. That subsec. provides that if the damage occurs by the non-observance by any ship of any of the collision regulations, the damage shall be deemed to have been occasioned by the wilful default of the person in charge of the deck of the ship at the time, unless it is shown to the satisfaction of the court that the circumstances of the case made a departure from the regulations necessary. I think that statute would not apply to this rule. I will assume, however, that practically the same meaning would be given to this rule that is given to a similar English rule; but whether it is safe and practicable, I think, must depend on the evidence given. Now, safe and practicable, I think, must mean when she can do it without danger; and when I have the evidence of all these practical men, who are themselves used to going in and out of the harbour, and in the habit of towing vessels in and out, and they say that on that day it was not safe for her to have taken the port or northern side of the channel, I think I cannot say that it was. There is this in addition that just before the pilot dropped down alongside of the *Reform* she received the signal from the *J. S. Chandler* of two whistles, indicating her desire to meet her starboard to starboard; and just as she dropped down the *Calvin Austin* was seen apparently coming down in the wake of the *Van Allens Boughton*, and the two whistles were given by the *Calvin Austin*, which the *Pallas* took to mean that the *Calvin Austin* desired to meet in the same way, and answered accordingly. If the captain of the *Pallas* had a right to so understand these whistles then, although it was wrong, the *Calvin Austin*

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cannot be heard to complain. In *Marsden on Collisions* (1) it is said : "So where a ship is hailed from another to take a particular course and she obeys the hail, the other ship cannot be heard to say that the course was wrong, although in fact it caused the collision and was in violation of the regulations," and see cases there cited. So that under all these circumstances I think I cannot say the *Reform* was wrong in proceeding up on the side she did. As I have already said, she was seen by at least two of the officers of the *Calvin Austin* as she was going up, and long enough before the happening of the collision for steps to be taken to prevent it, or at all events to show the *Calvin Austin* that it was not safe to attempt to pass the *Van Allens Boughton* on her starboard side at the time they did. I gather from all the evidence that the *Reform* was proceeding at the rate of about two and a half, or not more than three, knots an hour. When the *Calvin Austin* came on the starboard side of the *Van Allens Boughton* and gave the second signal, the collision was imminent. The signal was answered by the *Pallas*, and almost immediately the engine of the *Pallas* was put astern. It is said that it was not done as quickly as it should have been done, but it seems to me under the circumstances that steps were taken as quickly as it was perceived that it was necessary to do so ; and in any event even if it can be said that it would have been better if it had been done more quickly, it comes within the rule laid down in the *Bywell Castle*, (2) because the fault was in the *Calvin Austin* taking the course she did to pass down by the starboard of the *Van Allens Boughton* without giving the proper signal. It was strongly urged that as the *Reform* was on the port or south side of the channel that must be taken to have contributed to the accident. I think, considering the

(1) 3rd ed. p. 6. (2) L. R. 4 P. D. 219.

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case properly, it is not right to say that that did contribute to the accident. It is true, if she had not been there the *Calvin Austin* would not have run into her; but if the *Calvin Austin* had followed her first signal, or given the proper signal before she changed her course to go down on the starboard side of the *Van Allens Boughton*, all parties would have known what course she wished to take and the collision could have been avoided. In *Cayzer, Irvine & Co.* vs. *Carron Co.* (1), which was a case of collision between the steamship *Clan Sinclair*, owned by the plaintiffs, and the steamship *Margaret*, owned by the defendant, it was claimed that the *Clan Sinclair* had broken Rule 23 of the Thames Rules, the Court of Appeal held that she, having transgressed the rule, was in fault as well as the *Margaret*. The House of Lords reversed this decision on the ground that even assuming (but without deciding) that the construction put by the Court of Appeal upon rule 23 was correct, and that the *Clan Sinclair* had trangressed the rule, yet such transgression was not the cause of the collision; that ordinary care on the part of the *Margaret* would have enabled her to avoid the collision, and she was alone to blame. In giving judgment Lord Blackburn says, p. 883:— "Then it is said that the collision was owing to the *Clan Sinclair* being where it was. Undoubtedly in one sense that is so. If the *Clan Sinclair* had been some hundred yards higher up the river the fact which made it a matter of rashness for the *Margaret* to run where it did run would not have existed: but that is not sufficient ground for saying that the fact that the *Clan Sinclair* being there was the cause of the accident. The *Clan Sinclair* would not have been there at the time when it was there, if it had not been that that vessel did not case and wait so soon, perhaps,

(1) 9 App. Cases, 873.

as it ought to have done, but that was not the cause of the accident; but that the *Margaret*, knowing where the *Clan Sinclair* was, attempted to pass between it and the *Zephyr*, when there was not sufficient room."

Now, that seems to me to apply exactly to this case. The cause of the accident was that the *Calvin Austin*, knowing that the *Reform* was coming up on the south side of the channel without giving any signal whatever and violating Rule 18 entirely, suddenly, and, as I said, without notice to the *Van Allens Boughton* that was in front of her, ported her helm and attempted to pass down on the starboard side of the *Van Allens Boughton*, although previously to that at least two of the officers of the *Calvin Austin* had seen the *Reform* coming upon that side. That, I think, was the cause of the collision.

I have not discussed the question as to the want of look-outs on both the *Reform* and the *Calvin Austin*, which was argued before me; because I think, under all the circumstances, the day being clear and fine there was sufficient look-out for the vessels to see each other. It does appear that those on board the *Calvin Austin* saw the *Reform* just after they came out and got straightened on her course. It also appears that those on board the *Reform* saw the *Calvin Austin* when they were down by Burnham's Channel Buoy, and heard her signal them; which to them indicated that she proposed to pass the *Van Allens Boughton* on her port side, and meet the *Reform* and *Pallas* starboard to starboard.

There was also some contention that the vessels were crossing vessels, but I think that contention could not be sustained. The *Calvin Austin* was going out of the harbour and the *Reform* coming in. The case was very fully and ably argued by counsel on both sides, and I had the pleasure of hearing able arguments by

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Mr. Carver and Mr. Dodge, two leading members of the Massachussetts Bar. After giving the evidence and the argument full and careful consideration, I come to the conclusion that the *Calvin Austin* is alone to blame, and the judgment will be therefore that she be condemned in damages and costs. No evidence as to the amount of damages was given, and there will be, if necessary, a reference to ascertain the amount of such damages.

Solicitor for the plaintiff: *H. F. Puddington.*

Solicitor for the defendant: *John Kerr.*

Judgment accordingly.

IN THE MATTER of the Petition of Right of

JOSEPH GAGNON.....SUPPLIANT ; 1904 May 25.

AND

HIS MAJESTY THE KING.....RESPONDENT.

Public Work—Injury to property—Barge wintering in Lachine Canal—Lowering level of water—Omission to notify owner—Negligence —50-51 Vict., ch. 16, s. 16 (c).

In the autumn of 1900, the suppliant placed his barge for winter-quarters at a place in the Lachine Canal which he had before used for a similar purpose. The practice is now changed, but up to and including the year 1900 it was sufficient for any owner of a barge, without asking leave or notifying anyone on behalf of the Crown, to leave his barge in the canal, and, during the winter, some officer of the Canals Department would take the name of the barge, measure it, make up an account based on the tonnage for such use of the canal, and in the spring collect the amount thereof from the owner of the barge before she was permitted to leave the canal, the whole in conformity with the provisions of Art. 32 of the Tariff of Tolls framed by the department and issued in the year 1895. Some time after the suppliant had so placed his barge in the canal, M., the Superintending Engineer, for the province of Quebec, of the Canals Department, wrote officially to O., the Superintendent of the Lachine Canal, directing him to have the water lowered on certain dates during the winter to facilitate certain work then being done, by the Grand Trunk Railway Company on their swing-bridge at St. Henri. M. also gave a verbal order to O. to comply with the usual practice of notifying the owners of barges wintering in the canal before lowering the water on any occasion. In pursuance of such verbal order, O. directed one of the employees of the canal to notify the barge owners whenever the level of the water was to be lowered. This employee failed to notify the suppliant before the water was lowered on a certain date, and his barge was so injured by the lowering of the water that she became a total loss.

Held, confirming the report of the Registrar, that as the canal was a public work a case of negligence was established for which the Crown was liable under the provisions of section 16 (c) of *The Exchequer Court Act*, 50-51 Vict. ch. 16.

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PETITION OF RIGHT for damages arising from an accident to a barge belonging to the suppliant while wintering in the Lachine Canal.

The facts of the case are stated in the Registrar's report.

January 25th, 1904.

The case was referred to the Registrar for enquiry and report.

March 26th 1904.

The Registrar filed his report, which, for a better understanding of the case, is printed in full below.

The Registrar's report was as follows:—

"Whereas by an order made in this cause on the 25th day of January, A.D. 1904, it was ordered that the matters in question herein be referred to Louis Arthur Audette, Registrar of the Exchequer Court of Canada, for enquiry and report, under the provisions of section 26 of *The Exchequer Court Act*, the rules of court and amendments thereto in respect of the same.

"And whereas the reference was proceeded with, at Montreal, before the undersigned, on the 2nd day of March, A.D. 1904, in presence of C. Archer, K.C., of counsel for the suppliant, and A. Delisle, Esq., as counsel for the respondent, upon hearing read the pleadings and upon hearing the evidence adduced on behalf of the suppliant, none being offered by the respondent, and upon hearing what was alleged by counsel aforesaid, the undersigned hereby submits as follows:

"The suppliant brings his petition of right to recover compensation for damages to his barge, the *Balmoral*, 104·4 feet in length by 23·2 feet in width, while wintering during the season of 1900-01 in the Lachine Canal, such damages being suffered through

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the officers of the Crown lowering the waters thereof without notifying her proprietor beforehand of such step.

"The suppliant, in the fall of 1900, took his barge, in the usual and customary manner, to a place in the Lachine Canal where she had already wintered during the two previous seasons. He had also previously wintered his barge in the Lachine Canal for quite a number of seasons. Up to the season of 1900-01 it was sufficient for any proprietor, without asking leave or notifying anyone, to leave his barge in the canal, and during the winter time some officer of the Canals Department would go around, take the names of the barges then wintering in the canal, measure them, make up an account based upon the tonnage, and in the spring collect the amount thereof from the proprietor of the barge before she was permitted to leave the canal; the whole in conformity with the provisions of Art. 32 of the tariff confirmed by order in council filed of record as exhibit No. 3. However, since the season in question, beginning with the season 1901-02, the practice has been changed, and in December, 1901, Mr. Marceau, the superintending engineer of the canal, sent the suppliant a letter stating that in future the department would not assume any responsibility in connection with the wintering of vessels in the Lachine Canal during the coming season, and should any damage be done to any vessels wintering in said canal through the lowering of water, no claim would be recognized or allowed by the Government. The practice has changed from the date of this letter, and this does not affect the case in so far as the practice up to that date was different according to the evidence.

"On Friday, the 28th of December, 1900, Ernest Marceau, the Superintending Engineer of the Depart-

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ment of Canals for the Province of Quebec, and the head officer of the Lachine Canal, at Montreal, wrote officially to Denis O'Brien, the overseer or superintendent of the Lachine Canal, ordering him to have the water in the canal lowered on the following Sunday and every Sunday following until further instructed, in order to facilitate the work then being done by the Grand Trunk Railway Company at their St. Henri Swing-Bridge.

"Such instructions or orders are, according to the evidence of L. A. Lesage, the Secretary, at Montreal, of the Department of Canals for the province of Quebec, within the scope of Mr. Marceau's duties. The same witness says he believes orders were given Mr. O'Brien verbally, by Mr. Marceau, to notify the proprietors in 1900-01, before lowering the water in the canal. He says the proprietors should have been notified, and it was Mr. O'Brien's duty to notify the proprietors or have them notified.

"Mr. O'Brien, the superintendent of the Lachine Canal in 1900-01, admits in his evidence having received the letter of the 28th December, 1900, and says that since that date the water was lowered every Sunday in that season until the 15th March. He further tells us he himself also received from Mr. Marceau, his superior officer, the customary verbal order of always taking the precaution to notify everybody when lowering the water, in fact not only the barge owners, but the mill owners and everybody else concerned in using the water. Whereupon Superintendant O'Brien, previous to drawing off the water in December 1900, commanded one of his employees, named Matthew Fitzpatrick, to notify weekly, every Saturday, until further orders, the proprietors of the barges which were on that level of the Lachine Canal affected by such change of level.

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" However, on cross-examination O'Brien states that his instructions to Fitzpatrick were to notify the people at the barges. The following is part of his evidence in this respect :—

" My instructions were, that he was to notify the people at the barges that the water was to be drawn off."

By the Registrar :

" Q. At the barge ? "

" A. At the barge."

By the Registrar :

" Q. Well, in the winter there was nobody at the barge ? "

" A. Some were, and some were not."

By the Registrar :

" Q. What were your instructions when there was nobody at the barge ? "

"A. No instructions outside of that was concerned."

By the Registrar :

" Q. You limited your instructions, to Fitzpatrick, to notify only such people who were on board the barges, and if there were nobody on board the barges, what was he to do?"

" A. Well, if he could not see anybody to notify, I suppose there would be no notification, as far as I can see."

" Witness O'Brien states also, that there were only four barges lying in the canal affected by the withdrawal of water. So it would have been an easy matter to notify them all. He also finds that the notice to withdraw the water in the first instance was rather short. He said so to Mr. Marceau, saying the notice was too short and it was certainly taking people by the throat. However, that would not apply to the notice for the second Saturday, when he had a full week before him to give a reason-

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able notice, and in the second week it appears from Fitzpatrick's evidence that the barge was not as yet damaged; so there was ample time to give reasonable notice the second time.

"Further on in his evidence, he says he has no doubt the proprietors of the barges should know when the water is to be lowered, and admits he does not know if there was anybody living on board the barges as far as he himself knows. He often passed there and has never seen anybody on board.

"Then we have the evidence of Matthew Fitzpatrick who was in the employ of the Government in 1900-01, and who was directed by his superior officer Denis O'Brien, the Superintendent of the Canal, to notify the proprietors of the barges as above mentioned. He states that if there is nobody on board the barge they do not notify them.

"He further states he did not notify the proprietor of the barge *Balmoral*, but on the first occasion he saw a man on the bow of the barge, asked him in English if he was in charge of the barge, received an answer in French in the affirmative and told him then of the lowering of the water. He says he saw the same man on the following Saturday when he went again to notify, but the man did not appear to him as living on board. He appeared to him not to be much interested in what he told him and he adds if he had had more time he would have tried to find the proprietor. However, if that could have been anything like a reasonable excuse for the first time, how about the other numerous notifications, and especially the second one? He also had time on the first lowering of the water.

"On the third Saturday there was nobody on board the barge according to Fitzpatrick."

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"The suppliant swears he was never notified that the water was to be lowered during the winter of 1900-01. The former Superintendent, Mr. Conway, always notified them on such occasions. Had he been notified he says he would have cut the ice around his barge, as is done in the spring when he is notified. He was informed of the damages to his barge by the end of January, when Leroux and Mondion, two witnesses heard on the reference, told him. The barge was a total loss and he had no means to repair her, and accordingly has been working as a laborer ever since. He tells us also there was nobody in charge of the barge during the winter of 1900-01. There was never, on any occasion, anybody on board in charge of his barge after having been placed in her winter-quarters. The several barge owners heard as witnesses corroborate this evidence in stating that no one lives on board the barges in the winter and no man is placed on board in charge.

"Tavernier, the foreman at Cantin's dockyard, which is about 150 feet from where the barge *Balmoral* was wintering, says he never saw anybody on board, except children who were playing in the barge, and he even sent them away on some occasions. In winter there has never been anybody on board these barges for the 28 years he has been at Cantin's.

"The suppliant was well known at the canal. Giroux, the collector, had known him for 22 years; and they had no trouble to find his residence at St. Henri, where he resided for over 40 years in the same house, when they collected the dues for their wintering the barge in the canal. On previous occasions when they lowered the water they used to send some body to his house to let him know. On this point the suppliant is corroborated by a number of barge owners.

"There is the further question as to whether or not

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there exists a contract between the Government and the proprietor of the barge, especially when the monies for the rent are paid. Gagnon places his barge in the canal under the authority of the order in council above mentioned; the Crown levies the rent against the barge, and Giroux, the assistant collector, tells us the barges are not allowed to leave the canal in the spring only until after the dues have been satisfied. These dues were even collected for the year of the accident, as appears by Exhibit No. 2. The question would then arise as to whether or not the Crown is answerable for the damages resulting from the breach of the duty or obligation arising from their contract, but it is not necessary for me to decide this point under the present circumstances. *Henderson* v. *The Queen* (1); *Johnson* v. *The King* (2).

" The suppliant claims, *inter alia*, the sum of $400.00 as representing the loss sustained from not having his barge during the summer following the accident. Such damages are too remote and indirect and when the value of the barge is allowed no more can reasonably be recovered. The interest which will be allowed on the amount representing the value of the barge from the time the Petition of Right was left with the Secretary of State, will cover all reasonable damages of the class referred to in the claim for $400.

" If through negligence A. kills a horse and pays the value thereof to the owner, surely the latter would not recover in addition the earnings of the horse for the following year. Stating the proposition is answering it in the negative.

" Under the circumstances, the undersigned finds: (1) That the Lachine Canal, as admitted on the reference, is a public work and the property of the Dominion of Canada. (2) That Superintendant O'Brien was

(1) 6 Ex. C. R. 39. (2) 8 Ex. C. R. 368.

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guilty of negligence in giving instructions to notify the proprietor of the barge at the barge only. That a proper notice should have been given to the proprietor personally. (3) That Fitzpatrick was also guilty of negligence in giving the notice in such an unreasonable manner, specially when he knew that it had been customary to give notice in the past under such circumstances, and after his own admissions that proper notice should have been given.

"Therefore, the undersigned has the honour humbly to report that the respondent is liable under the circumstances for the damage to the suppliant's barge *Balmoral* as resulting, under the provisions of sec. 16 (c.) of *The Exchequer Court Act*, from the negligence of the servants or officers of the Crown while acting within the scope of their duties or employment, and this damage will be fixed at the sum of $1,200, which the suppliant is entitled to recover from His Majesty the King, with interest thereon from the 25th day of November A. D. 1901, being the date upon which the Petition of Right was left with the Secretary of State, as appears by Exhibit No. 8 herein. The suppliant will also be entitled to his costs.

"In witness whereof the undersigned has set his hand, at Ottawa, the 26th day of March A. D. 1904.

"(Sgd) L. A. AUDETTE,
"*Registrar.*"

"April 19th, 1904."

The argument of a motion by suppliant for judgment on the Registrar's report, and of a counter motion by way of appeal therefrom, on behalf of the respondent, now proceeded at Ottawa.

C. Archer, K.C., for the suppliant;

A. Delisle for the respondent.

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Argument of Counsel.

Mr. *Archer* formally moved for judgment on the Registrar's report.

Mr. *Delisle*, in opposing this motion, stated that the Crown had no fault to find with the amount of damages reported by the learned Registrar, but took exception in law to the liability of the Crown in such a case. He contended that there was no negligence by any officer or servant of the Crown while acting within the scope of his duty or employment on a public work. If there was any responsibility it rested upon the Grand Trunk Railway Company for whom the canal was unwatered. The canal was not unwatered for the purposes of the Crown, and the engineer in charge was not acting within the scope of his duties when he gave orders to have the canal unwatered for the railway company.

Again, the suppliant had notice of the fact that the canal was to be unwatered. The man, Fitzpatrick, who was instructed by Mr. O'Brien to notify the suppliant, went to his barge and notified the man in charge of the barge that he should take steps to protect the barge from any danger arising from the unwatering. It is true that Fitzpatrick did not really know whether the man on the barge was in charge of her but he was justified in thinking so. The suppliant, however, denies that this man was in charge of the barge.

It the court comes to the conclusion that Mr. Marceau, the engineer in charge of the canal, was acting within the scope of his duty in unwatering the canal, then we say that he did all that he could to notify the suppliant, and that the suppliant was guilty of contributory negligence in not protecting his barge.

Mr. *Archer*, in opposing the motion by way of appeal,contended that under Rules 19 & 20 the respondent should have given notice of appeal, and, having

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failed to do that, could not go into the merits of the appeal.

[*By the Court*:—Under the circumstances I shall allow the argument to proceed as if notice of appeal had been given.]

Reasons for Judgment.

On the merits of the case we are entitled to judgment. Mr. Marceau was the proper officer of the Crown to order the unwatering, and it was owing to the negligence of officers under him, in failing to notify the suppliant of the unwatering of the canal, that the accident happened. The barge was properly in the canal, and it is clear from the evidence that the suppliant was not notified before the unwatering took place on the occasion when the barge was damaged. It is a clear case of damage arising through negligence on a public work.

Mr. *Delisle* replied.

THE JUDGE OF THE EXCHEQUER COURT now (May 25th, 1904), delivered judgment.

In this case there is no doubt that the injury to the suppliant's barge happened on a public work; and it is, I think, clear that it was occasioned by the negligence of the Crown's officers and servants; and that they were at the time acting within the scope of their duties or employment. The case falls, it seems to me, within the statute, and there will be judgment for the suppliant in accordance with the report of the Registrar of the court.

Judgment accordingly.

Solicitors for the suppliant: *Archer & Perron.*

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

BETWEEN

1904
May 13.

THE KING ON THE INFORMATION OF THE ATTORNEY-GENERAL FOR THE DOMINION OF CANADA..... } PLAINTIFF;

AND

KILGOUR SHIVES AND JOHN H. MOORES..... } DEFENDANTS.

Expropriation—Public work—Damages—Reference back to Referees under Rule 19.

Upon an appeal from the report of special referees, on the ground that the amount of damages reported by them was excessive, and it appearing to the court that the matter was one in which it was expedient that there should be a reference back to the referees under the 19th rule of court of the 12th December, 1889, an order was made therefor, in which the following directions were given to the referees:

1. To find what in September, 1902, was the value of the wharf, land and premises taken by the Crown as mentioned in the information. In finding that value the referees were directed to exclude from their consideration the value of the same to the Crown, in the way of saving expense in the construction of the public work, or otherwise, and to determine its value at that time to the owner, or any other person, for any purpose to which in the ordinary course of events it could be put. In finding that value the referees were also directed to take into account the condition, situation, and prospects of the property taken; but that such value should be one that the property had at the time it was taken, and not one that the referees might think that it might have at some future time by reason of its condition, situation or prospects.

2. With regard to the remainder of the property, of which that taken formed part, the referees were directed to find the amount of damages, if any, that had been occasioned to the portion not expropriated by the taking of the part mentioned, and the construction of the public work. The referees were further directed that if the construction of the public work benefited and increased the value of the portion of the property not expropriated, that was to be taken into account and set off against the damages occasioned by the severance.

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THESE were two motions, made under the provisions of the nineteenth rule of court of 12th December, 1899, one by way of appeal from the report of special referees appointed herein, the other to confirm such report.

May 26th, 1903.

Upon motion of counsel for suppliants, counsel for respondent consenting, an order was made referring this case to Messieurs George McLeod, William H. Thorne and George McKean, all of St. John, N.B., for the purpose of enquiry and report as special referees under the rules of this court.

January 6th, 1904.

The special referees now made their report, finding that "the defendant Shives is entitled to be allowed thirty-five thousand dollars as conpensation in full by reason of the expropriation by the Crown of his wharf, wharf property and land, and for all damages occasioned to other lands and to his access as riparian proprietor to the river, or in any other way occasioned by the taking of said wharf, lands and property."

February 27th, 1904.

The motions came on for hearing at Ottawa.

H. F. McClatchey, for the motion by way of appeal from the referees' report, argued that the valuation placed upon the property by the referees was excessive, and not warranted by the evidence. It is the market value of the property at the time it was taken, not its value at a forced sale, but at a fair public sale, that should govern the case. (Cites 10 *Am. & Eng. Ency. of Law* (1); *Stebbing* v. *Metropolitan Board of Works*; (2) *Paint* v. *The Queen* (3). The evidence shows that

(1) 2nd ed. pp. 1151 et seq.
(2) L. R. 6 Q. B. 37.
(3) 2 Ex. C. R. 149.

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Argument of Counsel.

although the town of Campbellton is a growing one, the revenue of this property is not increasing but remains stationary. The prospective capabilities of the property were not evident at the time of the expropriation so far as milling purposes are concerned; and the wharf could not be used by steamers but only by sailing vessels. The suppliant Shives could not lay a large vessel at this wharf without trespassing upon the government property. Yet the referees considered the use of the wharf for ships as a feature in their valuation. The whole carrying trade is now going to be done by steamers, sailing vessels are going out of use. The property is not enhanced in value by reason of any prospective use of the wharf for sailing vessels.

The suppliants have no title to the wharf. It is on government property. They have not had undisputed possession of it for sixty years. (Cites *Humphreys* v. *Helmes* (1); *Eagles* v. *Merritt* (2); *Brown* v. *Reed* (3).

W. Pugsley, K. C., contra, contended that there had been user by the suppliant Shives and his predecessors of the Crown property for wharf purposes for over sixty years. At any rate the title in the soil would not be in the Crown in right of the Dominion, but in right of the Province of New Brunswick; the *locus in quo* was not a public harbour within the meaning of *The British North America Act*. Moreover, the Ferguson estate was paid a rental for this wharf by the Intercolonial Railway. The referees find that it has been in the uninterrupted possession of the suppliant and his predecessors for over sixty years.

The suppliant would be intitled to "side-wharfage" from the Government, although he would have to pay for it. The Government would have to depend upon

(1) 5 Allen N.B. 59.
(2) 2 Allen N. B. 550.
(3) 2 Pugs. 206.

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Mr. Shives for the same privilege; and, besides, in order to get access to the Government property you have to go over that of Mr. Shives.

Mr. Pugsley also moved for judgment on the referees' report.

THE JUDGE OF THE EXCHEQUER COURT now (May 13th 1904) delivered judgment.

This matter now comes before the court on motion on behalf of the defendants for judgment upon the report of the special referees appointed herein, and by way of appeal on behalf of the plaintiff against that report.

By their report the special referees have expressed their opinion that the defendants are entitled to be allowed thirty-five thousand dollars, as compensation in full by reason of the expropriation by the Crown of a certain wharf, wharf property and land, belonging to the defendant Kilgour Shives, and subject to a mortgage in favour of the other defendant John H. Moores, and for all damages occasioned to other lands of the defendant Shives, and to his access as riparian proprietor to the River Restigouche, or in any other way occasioned by the taking of said wharf, lands and property.

By the nineteenth rule of court, of the 12th of December, 1899, it is provided that on an appeal from the report of referees the court may confirm, vary or reverse the findings of the report and direct judgment to be entered accordingly, or refer the matter back to the referees for further consideration and report. In this case it seems to me expedient to adopt the course last mentioned.

The proceedings in this case and the report will therefore be referred back to the special referees for further consideration and report, that the value of the property taken and the damages mentioned may be

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separately assessed, and that answers may be given to the following questions:

1. What in September, 1902, was the value of the wharf, land and premises taken by the Crown as mentioned in the information herein?

2. In finding that value the special referees will exclude from their consideration the value of the same to the Crown, in the way of saving expense in the construction of the public work or otherwise, and determine its value at that time to the owner, or any other person, for any purpose to which in the ordinary course of events it could be put.

3. In finding that value the special referees should take into account the condition, situation and prospects of the property taken, but such value should be one that the property had at the time it was taken and not one that the special referees may think that it might have at some future time, by reason of its condition, situation or prospects.

4. Then with regard to the remainder of the property, of which that taken formed part, what is the amount of damages, if any, that has been occasioned to the portion not expropriated by the taking of the part mentioned, and the construction of the public work?

5. If the construction of the public work benefits and increases the value of the portion of the property not expropriated, that is to be taken into account and set off against the damages occasioned by the severance.

Order accordingly. (*)

*REPORTER'S NOTE.—Conformably to this order the special referees filed a supplementary report, in which they declared that they found that the value of the wharf, land and premises at the time of the expropriation was thirty-four thousand five hundred dollars, excluding from such valuation the consideration of any value such property might have to the Crown in the way of saving expense in the construction of the public work or otherwise, and basing such valuation wholly on the value of the property at the time of the expropriation to the owner, or any other person, for any purpose to which in the ordi-

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nary course of events it could be put, also excluding from such valuation any consideration of future value the property might have in the estimation of the special referees by reason of its condition, situation or prospects.

The special referees also found that the damages to the remaining portion of the suppliant Shives' property arising from the severance and the construction of the public work, amounted to five hundred dollars. They also found that the construction of the public work did not benefit or increase the value of the portion of the property not expropriated, and, therefore, there was nothing to set off against the damages occasioned by the severance.

On the 8th June, 1904, counsel for the respective parties filed an agreement that the case might be disposed of by the court on the return of the supplementary report, without further argument.

On the 9th June, 1904, the supplementary report of the special referees was confirmed by the JUDGE OF THE EXCHEQUER COURT. The following memorandum of judgment being filed with the Registrar :—

"There will be a declaration that the property mentioned in the information is vested in the Crown."

"With reference to the amount of compensation, there will be judgment for the defendants for thirty-five thousand dollars in accordance with the reports of the special referees filed herein. Of these defendants one is mortgagor and the other mortgagee of the property in question. The amount of the compensation money may be distributed in accordance with the interests of the parties entitled to the property in question, or the whole amount may be paid to the defendant Kilgour Shives, the mortgagor, upon his obtaining and delivering to the Crown a satisfactory acquittance from any person having any interest in the property."

"The defendants are entitled to their costs."

Judgment accordingly.

IN THE MATTER of the Petition of Right of

1904

June. 13.

ELIZA HARRIS.....SUPPLIANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

Railway—Public work—Death arising from negligence—Defective engine—Dangerous crossing—Undue speed—"Train of cars"—The Government Railways Act (R. S. C. c. 38) sec. 29—Discretion of minister or subordinate officer as to precautionary measures against accident.

The husband of the suppliant was killed by being struck by the tender of an engine while he was on a level crossing over the Intercolonial Railway tracks, in the City of Halifax. The evidence showed that the crossing was a dangerous one, and that no special provision had been made for the protection of the public. Immediately before the deceased attempted to cross the tracks, a train of cars had been backed, or shunted, over this crossing in a direction opposite to that from which the engine and tender by which he was killed was coming. The engine used in shunting this train was leaking steam. The atmosphere was at the time heavy, and the steam and smoke from the engine did not lift quickly but remained for some time near the ground. The result was that the shunting engine left a cloud of steam and smoke that was carried over toward the track on which the engine and tender were running, and obscured them from the view of anyone who approached the crossing from the direction in which the deceased approached it. The train that was being shunted and the engine and tender by which the accident was caused passed each other a little to the south of the crossing. The train and shunting engine being clear of the crossing the deceased attempted to cross, and when he had reached the track on which the engine and tender were being backed, the latter emerged from the cloud of steam and smoke and were upon him before he had time to get out of the way. At the time of the accident the engine and tender were being backed at the rate of six miles an hour.

Held, that the accident was attributable to the negligence of officers and servants of the Crown employed on the railway both in using a defective engine, as above described, and in maintaining too high a rate of speed under the circumstances.

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2. An engine and tender do not constitute a "train of cars" within the meaning of sec. 29 of "The Government Railways Act" (R. S. C. c. 38).

Hollinger v. *Canadian Pacific Railway Company* (21 Ont. R. 705) not followed.

2. Where the Minister of Railways, or the Crown's officer under him whose duty it is to decide as to the matter, comes, in his discretion, to the conclusion not to employ a watchman or to set up gates at any level crossing over the Intercolonial Railway, it is not for the court to say that the minister or the officer was guilty of negligence because the facts show that the crossing in question was a very dangerous one.

PETITION OF RIGHT for damages for injury to the person arising out of an accident at a crossing on the Intercolonial Railway, at Halifax, N.S.

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

May 5th, 1904.

The case was now argued at Halifax, N.S.

W. B. A. Ritchie, K.C. and *R. Harris, K.C.*, for the suppliant, contended that there was negligence both in respect of the defective engine used by the officers and servants of the railway, and in going over the crossing at too high a rate of speed consistent with safety, while there were no special measures taken to warn the public of danger. The fact of the shunting engine leaking steam at and near the crossing was the chief cause of the accident.

The engine and tender constituted a "train of cars" under sec. 29 of *The Government Railways Act*, R. S. C. c. 38. That section enacts that whenever any train of cars is moving reversely in any city, town or village, the locomotive being in the rear, a person shall be stationed on the last car of the train to warn persons using the crossing. (*Hollinger* v. *Canadian Pacific Railway Co.* (1).

(1) 21 Ont. R. 705.

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Reasons for Judgment.

H. Mellish, K.C., for the respondent, contended that the deceased was guilty of contributory negligence in not heeding the statutory warnings given by the men on the shunting engine. He cited *Heaney* v. *Long Island Railroad Co.* (1); *Debbins* v. *Old Colony Railroad Co.* (2); *Fletcher* v. *Fitchburg Railroad Co* (3); 3 *Rapalje & Mack's Railway Digest* (4).

THE JUDGE OF THE EXCHEQUER COURT now (June 13th, 1904) delivered judgment.

The suppliant, the widow of the late James H. Harris, of Halifax, and the administratrix of his estate, brings her petition claiming the sum of ten thousand dollars as damages sustained by her through the death of her husband, which was caused by his being struck by the tender of an engine while he was crossing the Intercolonial Railway tracks, at the Green Street crossing, in the city of Halifax.

It is alleged, among other things, that the death of the deceased was caused by the unskilfulness, negligence and carelessness of the servants and agents of His Majesty.

And first, it is said that the accident would not have happened had there been gates or a watchman at the Green Street crossing referred to, and that His Majesty's officers and servants in charge of the Intercolonial Railway were guilty of negligence in not maintaining either a watchman or gates at that crossing. That view I am not able to adopt. There can be no doubt that the crossing was a dangerous one; and that it would have been prudent to keep, as at times had been done, a watchman at this place to warn persons using the crossing, or to have set up gates there to prevent them from using it while engines or trains

(1) 112 N. Y. 122.
(2) 154 Mass. 402.
(3) 149 Mass. 127.
(4) Pp. 570, 607.

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were passing over it. But that, I think, was a matter for the decision of the Minister of Railways and of the officers to whom he entrusted the duty and responsibility of exercising in that respect the powers vested in him. There is always some danger at every crossing; but it is not possible in the conditions existing in this country to have a watchman or gates at every crossing of the Intercolonial Railway. The duty then of deciding as to whether any special means, and, if any, what means shall be taken to protect any particular crossing of the railway must rest with the Minister of Railways, or the officer upon whom, in the administration of the affairs of his Department, that duty falls. If it is decided that certain special means shall be taken to protect the public at any particular crossing, and some officer or employee is charged with the duty of carrying out the decision, and negligently fails to do so, and in consequence an accident happens, then, I think, we would have a case in which the Crown would be liable. But where the Minister, or the Crown's officer under him whose duty it is to decide as to the matter, comes in his discretion to the conclusion not to employ a watchman or to set up gates at any crossing, it is not, I think, for the court to say that the Minister or the officer was guilty of negligence because the facts show that the crossing was a very dangerous one; and that it would have been an act of ordinary prudence to provide, for the public using the crossing, some such protection. At the same time, if, as was the case here, the crossing is one where those who use it are exposed to great and more than ordinary danger, then, in the absence of the special means of protection referred to, greater and more than ordinary care should be taken by those responsible for the running of trains and engines over such crossing.

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The deceased was struck and killed by the tender of an engine backing out from the Halifax Station to the roundhouse at Richmond. The engine was at the time in charge of the driver who had the assistance of a fireman and of no one else. The driver was at his post in the cab of the engine and was keeping a proper look-out. The fireman was on the apron between the engine and the tender and was keeping a look-out on his side of the engine, his opportunities for observation being on the whole better than they would have been had he been in the cab of the engine. The bell of the engine was ringing. And the rate of speed at which the engine was being backed is estimated to have been about six miles an hour.

In this connection it is contended for the suppliant: first, that there should have been some one stationed at the rear of the tender to give warning and prevent accidents, and that there was negligence on the part of some officer or servant of the Crown in not seeing that that was done; and secondly, that the rate of speed was greater than under the circumstances was prudent.

It is one of the regulations for the operation of the Intercolonial Railway that between Halifax and Richmond engines and trains must be run slowly, a good look-out must be kept, and the bell must be kept ringing. It is also a rule or instruction for the running of trains on this railway that always, when backing a train, there must be a man specially stationed on the rear part of it to give warning and prevent accidents. And that rule corresponds with the provisions of the twenty-ninth section of *The Government Railways Act*, (1) by which it is enacted that whenever any train of cars is moving reversely in any city, town or village, the locomotive being in the rear, a person shall be

(1) R. S. C. c. 38.

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stationed on the last car in the train, who shall warn persons standing on, or crossing, the track of such railway of the approach of such train. Now as to this rule and provision the question at once arises as to whether or not an engine and tender constitute a "train" or a "train of cars." The contention of the suppliant that they do is supported by the opinion of the court in *Hollinger* v. *The Canadian Pacific Railway Co.* (2), and the opinion of the learned Judges who decided that case is entitled to the greatest consideration. But I have not been able to come to the same conclusion. So far as appears from the evidence in this case, and so far as I am aware, an engine and tender is not, in the running of trains, treated as a train or train of cars. An engine and tender without cars attached are, in practice, left to the control and management of the engine-driver, assisted by his fireman. Whenever cars are attached so as to constitute a train, other men are employed, of whom one of the witnesses speaks as "the crew," and by one of whom the duty pointed out in the rule and provision mentioned is performed. Then everyone who has observed these things will, I suppose, have noticed that a tender has no platform or place at the rear on which anyone could with convenience stand. In general there is, I think, a timber (part of the lower framework of the tender) on which one could stand by holding on to the box above. But it would be a place of some danger, and I do not think it could have been the intention of the regulation to always put one man in danger for the purpose of warning some other person of a possible danger. Of course if there were no coal in the tender, any one who was in the cab of the engine could walk to the rear of the tender and take up there a position for observation and warning. But that

(2) 21 Ont. R. 705.

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would be an exceptional case, and the regulation was not made for exceptional cases. The engine-driver must of course remain at his post. To do anything else would be to fail in his duty. It is the duty of the fireman, when not otherwise engaged, to keep a look-out. But for that purpose he has his place in the cab. There can, however, be no objection to his taking up, as the fireman in this case did, a position equally as good, for maintaining a look-out, as that provided for him. But I do not think he is bound, when the engine is backing, to clamber over his coal and stand or sit down on it at the rear of the tender. That is not, so far as I know, the practice; and I do not think it was the intention of the rule or provision referred to that he should do anything of the kind In my view neither the engine-driver nor the fireman failed in any way in their duty in respect of the matter now under consideration. But it is contended that the engine-driver should have asked for, or some one should have sent him, a third man to stand on the rear of the tender when the engine was backing out to Richmond. For the reasons that I have mentioned I am not able to support and give effect to that contention. But again it does seem clear that the fact that when an engine and tender are being backed, the view of the engine-driver and fireman directly to the rear of the tender is to some extent obscured by it, imposes upon them the duty and necessity of taking all the greater care and precautions to prevent accidents.

Before dealing with the question of the rate of speed at which the engine and tender were moving at the time of the accident, it will be convenient to refer to another matter in which it is very clear there was negligence, and which in some measure, I think, contributed to the accident that caused the death of the suppliant's husband. Immediately before he attempted

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to cross the railway tracks, a train of cars had been backed or shunted over this crossing in a direction opposite to that from which the engine and tender by which he was killed was coming. The engine used in shunting this train was admittedly defective and was leaking steam. The atmosphere was at the time heavy, and the steam and smoke from the engines did not lift quickly, but remained for some time near the ground. The result was that the shunting engine left a cloud of steam and smoke that was carried over toward the track on which the engine and tender were running, and obscured them from the view of anyone who approached the crossing from the direction in which the deceased approached it. The train that was being shunted, and the engine and tender by which the accident was caused, passed each other a little to the south of the crossing. The train and shunting engine being clear of the crossing, the deceased attempted to cross, and when he had reached the track, on which the engine and tender were being backed, the latter emerged from the cloud of steam and smoke and were upon him before he had time to get out of the way. That, it seems to me, is the way the accident happened, and I have no doubt that the use of this defective engine for shunting trains, at and over this crossing, was one of the things that contributed to the accident resulting in the death of the deceased. In that way and to that extent, his death resulted from the negligence of the officers and servants of the Crown, whose duty it was to see that no such engine was used for that purpose.

Then with reference to the rate of speed at which the engine-driver was backing the engine and tender, it does not seem to me that such rate of speed was of itself excessive, or such as to fix the engine-driver with negligence. Under ordinary circumstances it might,

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I think, be safe and reasonable to back an engine and tender at the rate of six miles an hour. But under the circumstances here, prudence and ordinary care demanded, I think, that a lower rate of speed should be maintained The engine-driver was approaching a dangerous crossing over which a good many people passed and at which no special provision had been made for the protection of the public; and the engine and tender were being enveloped to a considerable extent in the steam and smoke from a train that was being shunted from an opposite direction. All the circumstances called for great care and a very moderate rate of speed. The conditions which the shunting engine had created and the rate of speed at which the engine was being backed combined to occasion the accident, and for that the Crown's officers and servants were, I think, responsible.

It is contended, however, that the deceased was guilty of contributory negligence, and that for that reason such suppliant is not entitled to maintain her petition. My finding on that issue of fact is to the contrary of such contention. The circumstances, it seems to me, were such that a very careful and alert person might have met with the accident. There is no reason to think that the deceased was careless or inattentive. The approaching engine and tender were no doubt obscured from his view by the steam and smoke discharged from the shunting engine. And then with respect to the warning that was at the time being given by the ringing of the backing engine's bell, there is no reason, I think, to suppose that he negligently failed to hear or heed the warning. It is possible, I think, that he heard the bell; but not seeing the engine, attributed the noise to the bell of the shunting engine which was at that time, or had immediately before, been ringing. Anyone might, I think, make

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such a mistake as that, and without laying himself open to the charge of contributory negligence.

I assess the damages at five thousand five hundred dollars, for which sum there will be judgment for the suppliant, with costs to be taxed.

Reasons for Judgment.

Judgment accordingly.

Solicitor for suppliant: *W. A. Henry.*

Solicitor for the respondent: *H. Mellish.*

IN THE MATTER of the Petition of Right of

1904
Nov. 7.

THEODORE BOUCHARD.....SUPPLIANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

The Customs Act—Infraction—Smuggling—Preventive Officer—Salary—Share of condemnation money.

The suppliant had been empowered to act as a preventive officer of Customs by the Chief Inspector of the Department of Customs. The appointment was verbal, but a short-hand writer's note of what took place between the Chief Inspector and the suppliant, at the time of the latter's appointment, showed the following stipulation to have been made and agreed to as regards the suppliant's remuneration: "Your remuneration will be the usual share alloted to seizing officers; and if you have informers, an award to your informers and you must depend wholly upon these seizures." Certain regulations in force at the time provided that, in case of condemnation and sale of goods or chattels seized for smuggling, certain allowances or shares of the net proceeds of the sale should be awarded to the seizing officers and informers respectively,

Held, that where the Minister of Customs had not awarded any allowance or share to the suppliant in the matter of a certain seizure and sale for smuggling, the court could not interfere with the Minister's discretion.

PETITION OF RIGHT for the recovery of money from the Crown alleged to be due for services rendered the Department of Customs.

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

May 26th, 27th and June 21st, 1904.

The case was heard at Quebec.

C. De Cuise, K.C., for the suppliant, contended that the suppliant was regularly appointed as a seizing officer by a competent officer of the Customs Department. The mere fact that no fixed salary was provided

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did not affect the suppliant's right to exercise all the powers of a seizing officer. The facts amount to a contract on the part of the Crown to pay the suppliant the share due a seizing officer under the statute.

R. Roy, K. C., and *P. Corriveau*, for the respondent, argued that the suppliant's right to recover anything depended upon the award of the Controller of Customs, and no such award had been made.

THE JUDGE OF THE EXCHEQUER COURT now (November 7th, 1904) delivered judgment.

The suppliant brings his petition to recover the sum of one thousand one hundred and sixty six dollars and eight cents ($1166.08) which he alleges that he, as seizing officer and informer, is entitled to out of the proceeds of the sale, for an infraction of the Customs laws, of a certain schooner called the *Florida*, and of her cargo.

By the Customs Regulations respecting seizures, forfeitures and penalties, it is, among other things, provided that except as otherwise specially awarded not more than one-fourth of the gross proceeds of any seizure, fine, forfeiture or penalty shall be awarded to the seizing officer or officers, and not more than one fourth of said proceeds shall be awarded to the informer or informers, or for information in any case. It is also provided that the net proceeds of the sales of all seizures and forfeitures and the whole amount of all fines or penalties shall be paid to the Receiver General, and that a separate and distinct account of the moneys arising therefrom shall be kept in the books of the Customs Department, and provision is made for the payment to any officer or informer entitled to participate in the proceeds of such sales of the proportion allotted to him, according to a prescribed scale.

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Where, as in the present case, the goods or chattels have been condemned and sold according to law, an allowance of not more than one third of the net proceeds shall (it is provided) be awarded to the seizing officer or officers, and not more than one third of such net proceeds to the informer or informers, if any; and in case of seizures made without information, and which have resulted from special vigilance on the part of an officer, the informer's share, or a proportion thereof, may be awarded to such officer at the discretion of the Minister of Customs.

The suppliant was appointed a preventive officer of Customs on the 23rd of June, 1895, by Chief Inspector McMichael. A short-hand writer's note of what took place between the suppliant and the Chief Inspector at the time of the appointment has been preserved and a copy of it is in evidence. From this it appears that the Chief Inspector understood that the suppliant, Captain Bouchard, had made a proposition to the Department of Customs to act for the Department either by giving information to officers of Customs at Quebec and other points, or to the captain of the *Constance*, or to act as a seizing officer. This having been stated to the suppliant he replied that he would like to be allowed to seize in every place on the St. Lawrence. Mr. McMichael then asked Captain Bouchard whether, if he were given authority to make seizures, he would be willing to do so without salary; whether he would furnish his own boat and all other appliances at his own expense, accepting for his services such portion of seizure moneys as might be awarded to him. To this the suppliant replied that he thought he would have a remuneration and enough money to pay others to give him help to make the seizures; that he had not any money. After discussing the matter further

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the Chief Inspector made this proposition to the suppliant:

"If you wish to act as an officer, without salary, "and without your expenses being paid I will autho- "rize you to so act; and your remuneration will be the "usual share allotted to seizing officer or officers; and "if you have informers, an award to your informers; and "you must depend wholly upon these seizures for your "remuneration." That offer Captain Bouchard accepted.

In September of that year the suppliant having learned that the schooner *Florida* was taking on a cargo of liquors at St. Pierre Miquelon, for the purpose of smuggling the same into Canada, went to St. Pierre and took passage on board the schooner on her return voyage. He alleges that when the *Florida* was opposite Cape North, on the coast of Cape Breton and in Canadian waters, he seized her and her cargo and headed the vessel for the port of Quebec. Subsequently, on or about the 19th of October, when off Seven Islands, the schooner met the revenue cutter *Constance* whose officers boarded her and seized the vessel and cargo. The suppliant protested and claimed that the seizure was his, and subsequently forwarded a report of his seizure to the Chief Inspector. The latter appears to have come to the conclusion that the suppliant had not been acting in good faith, and did not make any recommendation in his favour in respect to the distribution of the proceeds of the sale of the *Florida* and her cargo. The seizure was treated as having been made by the *Constance* and the seizing officers; and informer's shares of such proceeds, amounting to $1,166.08, were paid to the master of that vessel, and nothing was paid to the suppliant. He claims that he has not been treated fairly and that

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he, and not Captain May, should have been paid the sum mentioned.

By the pleadings an issue of fact is raised as to whether or not the suppliant was in the matters mentioned acting in good faith as a Customs officer. On that issue I do not find it necessary to express any opinion. Assuming in the suppliant's favour that there was no collusion between him and the owners of the cargo, it cannot, I think, be justly said that at the time the *Constance* met the *Florida* the seizure which the suppliant claims to have made was complete or effective. As it happened it was completed and made effective by the action of the *Constance*. That raised a case in which the claim of a number of persons connected, in one way or the other, with the seizure had to be considered and determined by the Minister of Customs. But no one of such persons would have a claim enforceable in a court of law until the Minister had made an award in his favour. That, I think, is the result in any case arising under the regulations referred to. The regulations provided that in a case such as this an allowance shall be made to the seizing officer and to the informer of not more than a prescribed amount. It may possibly be less, and where there are a number of claimants the amount is to be distributed. But who is to decide and to distribute, to "award" and to "allot", to use words occurring in the regulations? Not the court; but the Minister of Customs.*

* REPORTER'S NOTE.—The following is the provision of the Customs regulations more particularly referred to by the learned judge:—In case of seizure of goods or chattels which have been condemned and sold according to law, an allowance of not more than one-third of the net proceeds of each shall be awarded to the seizing officer or officers, and not more than one-third of said net proceeds to the informer or informers, if any. In case of seizures made without information, and which have resulted from special vigilance on the part of an officer, the informer's share, or a proportion thereof, may be awarded to such officer at the discretion of the Minister of Customs." See the Regulations made under order in council of 8th June, 1892, (Memo. 558B).

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It may be (though no opinion is expressed as to that) that the suppliant was in this matter entitled to greater consideration than he received at the hands of the Controller of Customs, in whom at the time the power and authority of the Minister of Customs was vested; but that was a question for his decision. No action would of course lie against the Crown because the Controller of Customs did not, in the exercise of his discretion, make an award in favour of the suppliant; and in the absence of such an award the suppliant has not, it seems to me, any claim that can be enforced in this court. If any action is to be taken in the direction of reviewing or reconsidering the decision to which the Controller of Customs came to in this matter, such action should, I think, in the first instance at least, be taken by the Minister of Customs.

The judgment of the court is that the suppliant is not, as a matter of law, entitled to any portion of the relief sought by his petition.

Judgment accordingly.

Solicitors for the suppliant: *DeGuise & Languedoc.*

Solicitor for the respondent: *Philéas Corriveau.*

IN THE MATTER of the Petition of Right of

1904
Nov. 14.

EBENEZER WHEATLEY.....SUPPLIANT;

AND

HIS MAJESTY THE KING. .....RESPONDENT.

Government Railway—Carriage of Goods—Breach of contract—Damages—Negligence.

The suppliant sought to recover a sum of $886.38 alleged to have been lost by him on a shipment of sheep undertaken to be carried by the Crown from Charlottetown, P.E.I. to Boston, U.S.A. The loss was occasioned by the sheep not arriving in Boston before the sailing of a steam-ship thence for England on which space had been engaged for them; and the cause of such failure was lack of room to forward them on a steam-boat by which connections are made between the Summerside terminus of the P.E.I. Railway and Pointe du Chêne, N.B., a point on the Intercolonial Railway. The suppliant alleged that before the shipment was made the freight agent of the P.E. Island Railway, at Charlottetown, represented to him that if the sheep were shipped at Charlottetown on a certain date, which was done, they would arrive in Boston on time.

Held, that even if the suppliant had proved, which he failed to do, that this representation had been made, it would have been inconsistent with the terms of the way-bill and contrary to the regulations of the Prince Edward Island Railway, and therefore in excess of the freight agent's authority.

2. That the evidence did not disclose negligence on the part of any officer or servant of the Crown within the meaning of section 16 (c) of *The Exchequer Court Act.*

PETITION OF RIGHT for damages for a breach of contract to carry goods on a Government railway.

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

July 26th, 1904.

The case was tried at Charlottetown, P.E.I.

W. A. Weeks, for the suppliant, contended that there was a contract by the Crown to carry the sheep from

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Argument of Counsel.

Charlottetown to Boston, to be delivered within a given time at the side of the steam-ship *Michigan*, for transportation to Liverpool, G.B. Owing to the negligence of the Crown's servants, the sheep were not delivered before the steam-ship sailed from Boston, and the suppliant sustained loss. The Crown is clearly liable. *Sutton* v. *Ciceri* (1); *Taylor* v. *Great Northern Railway Co.* (2); *Simons* v. *Great Western Railway Co.* (3); *Beal* v. *South Devon Railway Co.* (4); *Ashendon* v. *London & Brighton Railway Co.* (5); *Manchester, Sheffield, &c., Railway Co.* v. *Brown* (6); *Dickson* v. *Great Northern Railway Co.* (7); *McManus* v. *Lancashire and Yorkshire Railway Co.* (8); *Watson* v. *Little* (9); *Rooth* v. *North Eastern Railway Co.* (10); *Nottebohn* v. *Richter* (11).

The contract of carriage was not affected by the condition exempting the railway from negligence on the back of the way-bill, because such a condition would be unreasonable under the circumstances of this case. In any event, however, the phrase "damage for detention or delay" means detention and delay not caused by negligence.

F. L. Hazard, K.C., for the respondent, said that the Crown's case was clear, and he would not offer any argument.

THE JUDGE OF THE EXCHEQUER COURT now (November 14th, 1904), delivered judgment.

The petition is brought to recover the sum of $886.38 alleged to have to have been lost on a shipment of sheep from Charlottown to Boston, thence by steam-

(1) 15 App. Cas. 144.
(2) L. R. 1 C. P. at p. 388.
(3) 18 C. B. 805
(4) 5 H. & N. 875.
(5) 5 Ex. Div. 190.
(6) 8 App. Cas. 703.
(7) 18 Q. B. D. 176.
(8) 4 H. & N. 327.
(9) 5 H. & N. at p. 477.
(10) L. R. 2 Ex. 173.
(11) 18 Q. B. D. 63

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ship to Liverpool. The loss was occasioned by the sheep not arriving at Boston in time to be shipped by the steam-ship on which space had been engaged for them. The suppliant had arranged to ship the sheep from Boston by the steam-ship *Michigan*, which sailed from that port on the 17th of November, 1900. Before engaging space for the sheep on the *Michigan*, the suppliant had made enquiries, of the freight agent, at Charlottown, of the Prince Edward Island Railway, as to the latest time at which the sheep could be shipped at Charlottown to catch the steam-ship sailing on the 17th of November, to which, according to the suppliant's testimony, Mr. McDonald, the agent, after making enquiries answered that if the sheep were shipped on Monday, the 12th of November, by the railway they would be delivered at Boston on the evening of the 15th or the morning of the 16th. Mr. McDonald denies having told the suppliant that if he shipped his sheep on Monday, the 12th of November, they would arrive in Boston on the 16th of that month. But he admits that he made the necessary enquiries by telegraph, and having received an answer that the sheep would have to cross from Summerside to Pointe du Chêne on Tuesday (the 13th) to reach Boston on Friday (the 16th) he informed the suppliant to that effect. The suppliant also affirms, and Mr. McDonald denies, that the latter on this occasion mentioned, represented to the former that all arrangements had been made whereby if the sheep were shipped at Charlottetown on Monday the 12th of November they would be at Boston on the night of the 15th, or morning of the 16th, of that month.

The sheep were shipped at Charlottetown on the 12th. It was intended that the cars in which they were loaded should be attached to a train that left Charlottetown for Summerside at twenty minutes after three o'clock of that day; but, owing to some

delay which the suppliant says was caused by the action of the railway authorities, and for which the latter say the suppliant was responsible, the cars were not sent out by that train but by a later one leaving between five and six o'clock. But nothing turns on this as the sheep arrived at Summerside in time to be shipped on Tuesday the 13th of November, if there had been room for them on the steam-ship with which, at that port, the Prince Edward Island Railway makes connections for Pointe du Chêne. As it turned out there was no space on the steam-ship available for this shipment of sheep. Consequently they were delayed a day, and other delays occurring afterwards, the *Michigan* had sailed before the sheep arrived at Boston.

There are only two grounds on which this petition could be maintained. First on the ground upon which the suppliant most strongly relies that the Crown through its officers undertook to deliver the sheep at Boston not later than the 16th of November; and, secondly, that the loss or injury complained of resulted from the negligence of an officer or servant of the Crown while acting within the scope of his duties or employment within the meaning of clause (*c*) of the 16th section of *The Exchequer Court Act.*

As to the first ground, I do not think that Mr. McDonald, the freight agent, made any such bargain or contract as that which it is attempted to set up in this case, and it is clear that if he had attempted to do so, he would have exceeded his authority as freight agent. Such an undertaking or contract would have been inconsistent with the terms of the way-bill that was signed, and the regulations by which the carriage of freight on the Prince Edward Railway is governed (1), and wholly beyond the authority of the agent to make.

(1) See, among others, the 3rd and 15th clauses of the general conditions of carriage on the Prince Edward Island Railway.

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Reasons for Judgment.

Then, as to the other ground, it does not seem to me that there was any negligence to bring the case within the statute referred to. It was argued that McDonald should, under the circumstances, have secured space for the sheep on the steam-ship on the 13th of November; but I do not see that he as freight agent at Charlottetown, and an officer of the Crown, owed any such duty to the suppliant.

The judgment is that the suppliant is not entitled to any portion of the relief prayed for in his petition.

Judgment accordingly.

Solicitor for the suppliant: *W. A. Weeks.*

Solicitor for the respondent: *F. L. Hazard.*

IN THE MATTER of the Petition of Right of

JOHN B. McLELLAN..... SUPPLIANT; 1905

AND Jany. 12.

HIS MAJESTY THE KING.....RESPONDENT.

Contract for sale of railway ties—Delivery—Inspection—Payment—Purchase by Crown from vendee in default—Title.

In January, 1894, the suppliant agreed with M., acting for the B. & N. S. C. Company, to supply the company with railway ties. The number of the ties was not fixed, but the suppliant was to get out as many as he could, to place them along the line of the Intercolonial Railway, and to be paid for them as soon as they were inspected by the company. The ties were not to be removed from where suppliant placed them until they were paid for. During the season of 1894, the suppliant got out a number of ties, which were piled alongside the Intercolonial Railway, and inspected; those accepted being marked with a dot of paint and the letters "B. & S.", and thereafter paid for by the company. In 1895 the suppliant made a second agreement with M. to get out another lot of ties for the company upon the same terms and conditions. Under this agreement the suppliant got out ties and placed them along the Intercolonial Railway where the former ties were piled, but the lots were not mixed. The second lot was inspected and marked with the dot of paint, but the letters "B. & S." were not put on them. The suppliant demanded payment for them from the company, but was not paid. In November, 1896, the company sold both lots of ties to the Crown for the use of the Intercolonial Railway, and was paid for them; and in May or June, 1897, the Intercolonial Railway authorities removed all the ties.

Held, that the B. & N. S. C. Company had not at the time when they professed to sell the second lot of ties to the Crown any right to sell them, and the Crown did not thereby acquire a good title to the ties. That being so, the suppliant was entitled to have the possession of the ties restored to him, or to recover their value from the Crown.

PETITION OF RIGHT for the recovery of the possession of goods in the hands of the Crown, or their value.

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

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McLELLAN v. THE KING.

Argument of Counsel.

April 30th, 1904.

The hearing was commenced at Port Hawkesbury, N. S., and adjourned to Halifax.

May 6th, 1904.

Hearing resumed at Halifax. It was agreed between counsel that their respective arguments would be submitted to the court in writing.

D. McLennan and *J. A. Chisholm*, for the suppliant.

The suppliant is entitled to the return of the ties by the Crown or to the recovery of their value in money. *Tobin* v. *The Queen* (1); *Feather* v. *The Queen* (2); *Clode on Petition of Right* (3); *Audette's Practice* (4); *Merchants Bank of Canada* v. *The Queen* (5).

There was no contractual relation between the suppliant and the Crown. The agreement for supplying the ties was made between the suppliant and an agent of the Boston & Nova Scotia Coal Company.

Payment to the suppliant was necessary before the property in the ties passed to the company. The ties are in the hands of the Crown in derogation of the suppliant's right to take possession. A petition of right will be sustained under such circumstances (6); *Tempest* v. *Fitzgerald* (7); *Bloxam* v. *Sanders* (8); *Anson on Contracts* (9); *Grice* v. *Richardson* (10).

There was no delivery to the company. The ties were placed on the property of a third party. *Christie* v. *Burnett* (11); *Smith* v. *Hobson* (12); *Smith* v. *Hamilton* (13); *Whitwell* v. *Vincent* (14); *Tyler* v. *Freeman* (15); *Whitney* v. *Eaton* (16); *Farlow* v. *Ellis* (17); *Adams* v.

(1) 16 C. B. N. S. at pp. 357, 358.
(2) 6 B. & S. at p. 295.
(3) Pp. 87, 89.
(4) P. 74.
(5) 1 Ex. C. R. 1.
(6) 24 Am. & Eng. Ency. of Law, 1095.
(7) 3 B. & Ald. 680.
(8) 4 B. & C. 941.
(9) 10th ed. p. 316.
(10) 3 App. Cas. 319.
(11) 10 Ont. R. 609.
(12) 16 U. C. Q. B. 368.
(13) 29 U. C. Q. B. 394.
(14) 4 Pick. 449.
(15) 3 Cush. 261.
(16) 15 Gray 225.
(17) 15 Gray 229.

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Argument of Counsel.

O'Connor (1); *Armour* v. *Pecker* (2); *Saloman* v. *Hathaway* (3); *Michigan Central Railroad Co.* v. *Phillips* (4); *Wabash Elevator Co.* v. *First National Bank* (5); *Leonard* v. *Davis* (6); *Turner* v. *Moore* (7); *Bush* v. *Bender* (8); *Benjamin on Sales* (9).

H. Mellish, K.C., for the respondent:

The sale of the ties to the company was complete. Everything to pass the property under the contract was done, viz., the fixing of the price, delivery and acceptance. The English rule is that the title passes when the contract is made and the goods appropriated to the contract, even if there be no delivery. *Sweeting* v. *Turner* (10).

The goods were out of the suppliant's possession before the respondent took them.

There is no evidence of any agreement between the suppliant and the company that the former should retain either the property in, or possession of, the ties until payment.

The company had *primâ facie* title in the goods and the suppliant is estopped from making any claim against the innocent purchaser. The suppliant must show his title by a written agreement accompanied by affidavit and duly registered under the *Bills of Sale Act* (11), otherwise an agreement as to a lien for the price is void as against a subsequent purchaser.

In reply, counsel for the suppliant urged that there was no delivery of the ties in a sense of a transfer of possession or of title. *Sweeting* v. *Turner* (*supra*), does not apply.

(1) 100 Mass. 515.
(2) 123 Mass. 143.
(3) 126 Mass. 482.
(4) 60 Ill. 190.
(5) 23 Ohio 311.
(6) 66 U. S. 476.
(7) 58 Vt. 455.
(8) 113 Pa. 94
(9) Sec. 320, 343.
(10) L. R. 7 Q. B. 310.
(11) R. S. N. S. 5th Ser. cap. 92, sec. 3.

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The suppliant's evidence shows that he was to retain possession until payment.

The Nova Scotia *Bills of Sales Act* does not apply to the facts of this case. Moreover, there is no estoppel pleaded, or any plea with respect to compliance with the *Bills of Sale Act*, and these must be specially pleaded.

THE JUDGE OF THE EXCHEQUER COURT now (January 12th, 1905), delivered judgment.

The petition is brought to recover from the respondent 5,732 railway ties or sleepers that came into the possession of the Crown under circumstances to which reference will be made, or to recover the value of such railway ties. According to his evidence, the suppliant, in January, 1894, agreed with John McKeen, of Mabou, acting for the Boston and Nova Scotia Coal Company, to make and get out a quantity of railway ties for that company. The number of the ties to be made was not stated; the suppliant was to get out as many as he could; the ties were to be placed along the line of the Intercolonial Railway, in Cape Breton, and were to be paid for as soon as they were inspected and before they were removed from the place where they were placed by the suppliant. During the season of 1894 the suppliant got out a number of ties and placed them on the line of the railway where they were inspected, and those that were accepted were marked with a dot or spot of paint and with the letters "B. & S," that were used by the company. These ties were paid for by the company and are not in question here. In the spring of 1895, the suppliant made a second agreement with John McKeen, acting for the said company, to get out another lot of ties upon the same terms and conditions as those mentioned in respect of the first lot. They were to be paid for as soon as they

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were placed on the line of railway and inspected, and with reference to the possesion of the ties, or control over them, the understanding, according to the suppliant, was that he was to get his money before the ties were removed from the place where he put them. During the season the suppliant got out 5,732 ties (those now in question), and placed them along the line of the railway at the places where the former lots were piled. The two lots were, however, piled separately and were not mixed with each other. The second lot of ties were inspected for the company, and those that passed inspection were marked with a dot or spot of paint as in the case of the first lot, but the letters "B. & S." were not put on them. In both cases the ties that were rejected were marked with a cross. The suppliant demanded payment from the company for the second lot of ties, but was never paid for them. Both lots remained upon the line of the railway until the autumn of 1896 when the suppliant was informed that they had been inspected by the Government inspector. He wrote at once to Mr. McKeen, but beyond that he did not do anything except speak to the track-master of the railway at that place, who told him the vouchers had been sent in. As a matter of fact the Boston and Nova Scotia Coal Company had in November, 1896, sold to the Crown for the use of the Intercolonial Railway all the ties mentioned, as well those that were made in 1895 as those that were gotten out in 1894, and had on the fourth and ninth of that month been paid in full therefor by the Intercolonial Railway authorities. The receipt for the money paid to the company on the 9th of November is signed by Mr. J. Fraser, the president, and A. C. Ross, the secretary-treasurer, of The Boston and Nova Scotia Coal Company, and that of the 4th of November by A. C. Ross, the secretary-treasurer. On the 2nd

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of January, 1897, Mr. McKeen, in reply to a letter from the suppliant of the 29th of December, 1896, stated that he had nothing to do with the sale of the ties to the Government, which sale had been made by Ross and Fraser; and that he had not heard "what payments were made nor what ties were taken"; but that he would write to Ross and let the suppliant know. On the 6th of January, 1897, the suppliant wrote the following letter to the Minister of Railways and Canals:—

"KINGSVILLE, C.B., Jan. 6th, 1897.

"Hon. Mr. Blair,

"Minister of Railways and Canals,

"Ottawa

"SIR,—I have made 5,762 ties for the Boston & N. "Scotia Coal Co. in 1895, delivered them on the "I.C.R. between McIntyre's Lake station and River "Dennis station, and never received one cent for "them, and I am now informed the I.C.R. has taken "them over from the B. & N. S. Coal Co. I hope you "will please keep my money, or if paid to the com- "pany, that you will help me to get my money. I "am a poor man and cannot afford to lose this amount. "I am enclosing you a bill for the amount. Trusting "to hear from you soon,

"I am, sir,

"Your obedient servant,

"(Sgd.) J. B. McLELLAN."

"KINGSVILLE, C.B., 189 .

"The Department of Railways and Canals

"In a/c, with J. B. McLellan.

"Jan. 6th, 1897.

"To 5,672 15c.....$862.30.

"KINGSVILLE, INVERNESS Co.,

"Jan, 6th, 1897."

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The company is said to have been insolvent, and nothing, so far as appears, came of this letter. In March following the suppliant wrote again to Mr. McKeen, with whom, as has been stated, the verbal contract for getting out the ties had been made. The following is Mr. McKeen's answer:

"MABOU, March 11, 1897.

"J. B. McLellan, Esq.

"DEAR SIR,—I have your letter of the 4th inst. I "have been laid up unable to reply to it the last few "days.

"I was sure you had come to an understanding "with Ross about those ties, as I have heard nothing "from Ross since I wrote him asking him to commu- "nicate with you in the matter. It appears to me "that your position is a good one if the Government "take the ties. You would have both the Govern- "ment and Ross & Fraser responsible for them.

"I think your best plan is to let the Government "take the ties. You would be perfectly safe in get- "ting your pay from either the Government or from "Ross & Fraser.

"If Ross sold the ties Fraser must be equally re- "sponsible with him, and he is a good man to collect "from.

"I speak thus of Fraser because he was president of "the company and must have had a hand in the "transaction.

"I wish you would let me know what Ross says in "the matter.

"Yours truly,

"(Sgd.) JOHN MCKEEN."

In May or June, 1897, the Intercolonial Railway authorities removed all the ties. The suppliant says that when he heard that was being done he told the section foreman in charge of the loading not to load

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any ties marked with red paint only, as these were his; but as to that the latter says that the suppliant was not at any time present while he was loading the ties, but that he was not there during all the time the loading was going on.

The first question to be answered in this case is whether or not the suppliant's account of what the agreement between him and John McKeen was ought to be accepted. Mr. McKeen is dead, and we have only the suppliant's testimony as to what the bargain was. That suggests, of course, that the testimony should be received with caution. The difficulty on that point is not, however, as great as it otherwise might be, as Mr. McKeen's letter of March 11th, 1897, which has been given in full, is, it seems to me, more consistent with the view that the ties at the time belonged to the suppliant than with any other view of the case. One ought, I think, to be careful not to make too much of Mr. McKeen's letter. On the one hand, he was, as was well known, a good business man, of more than average intelligence, if one may with propriety refer to that—a man who knew very well that the suppliant would have no legal claim against the Crown for the ties if at the time of the sale they belonged to the company and not to the suppliant. On the other hand, he desired, no doubt, to see the suppliant paid for the ties, and in any case he was disposed, I think, to give the suppliant all the encouragement that the circumstances of the case admitted of. The suppliant's letter to the Minister of Railways and Canals, of January 6th, 1897, which also has been given in full, presents perhaps greater difficulties. It is true that he encloses therewith an account for the ties made out in his own name against the Railway Department, but in his letter he states that he made the ties for the company and

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delivered them on the Intercolonial Railway. That he now explains by saying that what he meant by the expression "delivered" was that he had placed the ties where he had agreed to place them. It will have been observed that the ties had been bought for the Intercolonial Railway and the price had been paid some two months before this letter was written, so that, if there should be any question as to that, no one was in any way misled or prejudiced by the terms in which the letter was expressed.

With regard to the ties being placed or piled along the line of the Intercolonial Railway, on its property, it is argued for the respondent that, when the suppliant did that, he parted with the possession of the ties, and that they were thereafter in the possession of the railway for the company, to which they were in that way delivered. I should be inclined to agree with that view if there had been any delivery of the ties to the Intercolonial Railway to be carried or any delivery in any proper sense of the term. But the act of piling ties along the line of the Intercolonial Railway, such as happened in this case, without any direction to the railway authorities, or any agreement or arrangement with them, did not, it seems to me, constitute a delivery of such ties to the railway, any more than the placing or piling of ties upon a highway would constitute a delivery thereof to the Crown or the authority in whom the highway might be vested. There is nothing in that incident, it seems to me, which makes either for or against the suppliant's contention that the right of property in the ties and the right to the possession thereof remained in him.

It is also contended for the respondent that such an agreement as that which the suppliant states was made, namely, that the ties were to be paid for on

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inspection and were not to be removed until paid for, that is, that they did not become the property of the company or at least that the company was not entitled to take possession of them until they were paid for, could not be supported except by compliance with the provisions of *The Bills of Sales Act* then in force in Nova Scotia (1). The provision relied upon is contained in the third section of the statute, and has reference, so far as is material to this case, to agreements for the sale of goods or chattels accompanied by an immediate delivery and followed by an actual and continued change of possession, whereby it is agreed that a lien thereon for the price or value thereof or any portion thereof shall remain in the bargainer. But in this case, if the suppliant's testimony is to be accepted, there was neither delivery of the ties to the company nor any change of possession, and it is only in that view of the case that the petition can be sustained.

The conclusion to which I have come is that the Boston and Nova Scotia Coal Company had not at the time, when they professed to sell the ties in question to the Intercolonial Railway, any right to sell them and that the Crown did not thereby acquire a good title to the ties. In that view of the case the suppliant is entitled to have the possession of the ties r etored to him ,and, that not being now possible, he is entitled to recover their value. He claims that they were worth twenty cents a piece when the Intercolonial Railway authorities took possession of them, but in the account that he sent to the Minister of Railways and Canals he put the value at fifteen cents for each tie, and I take that to have been a fair price.

The number of ties for which the suppliant makes his claim in the petition is, as has been seen, 5,732.

(1) R.S.N.S., 5th Series, ch. 92, s. 3.

For the value of that number at the rate of fifteen cents per tie, amounting in all to $859.80, there will be judgment for the suppliant, with costs.

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Judgment accordingly.

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Solicitor for the suppliant: *J. A. Chisholm.*

Solicitor for the respondent: *H. Mellish.*

QUEBEC ADMIRALTY DISTRICT.

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Dec. 22.

GAGNON v. SS. *SAVOY.*

DION v. SS. *POLINO.*

Maritime law—Seaman's wages—Jurisdiction of court to hear claim for wages under $200—The Admiralty Act, 1891—R. S. C. c. 74, s. 56—Foreign ship—Costs.

Subject to the exceptions mentioned in sec. 56 of *The Seamen's Act* (R. S. C. c. 74), the Exchequer Court, on its Admiralty side, has no jurisdiction to entertain a claim for seamen's wages under the amount of $200, earned on a ship registered in Canada.

The Ship *W. J. Aikens* (7 Ex. C. R. 7) decided under similar provisions in sec. 34, chapter 75, R. S. C., not followed.

2. A general law may be impliedly repealed by a subsequent special law, in *pari materiâ*, if such special law is in conflict with the former, but the converse is not the case; therefore *The Admiralty Act, 1891*, being a general law, and enacting general provisions as to jurisdiction, does not repeal by implication the special provisions of section 56, chapter 74, of *The Revised Statutes of Canada*, limiting the jurisdiction of this court in proceedings for seamen's wages.

3. Subject to the exceptions mentioned in sec. 165 of *The Merchants Shipping Act, 1894*, this court has no jurisdiction to entertain a claim for seaman's wages for an amount below $200 earned on a ship registered in England.

4. Costs in these actions were refused the defendants because exception to the jurisdiction to entertain the claim sued for was not taken *in limine litis.*

THESE were two actions for seaman's wages, the amount of the claim, in each case, being below the sum of two hundred dollars.

The SS. *Savoy* was a British ship, registered in London, G.B. The plaintiff Gagnon sued for a sum of $14, as seaman's wages earned on board of her.

The SS. *Polino* was a ship registered in Quebec. The plaintiff Dion sued for a sum under $200 claimed to be due him for seaman's wages.

December, 21st, 1904.

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The cases came on to be heard before the Local Judge of the Quebec Admiralty District.

C. A. Pentland, K. C. for the plaintiffs;

G. F. Gibsone for the ships.

Reasons for Judgment.

ROUTHIER, C. J. (L. J.) now (December 22th 1904) delivered judgment.

Dans ces deux causes il s'agit d'une question de juridiction. Ni dans l'une ni dans l'autre le défendeur n'a plaidé par écrit à la juridiction, d'après ce que je comprends, mais il a pris objection seulement au moment où on allait procéder à l'enquête.

Dans ces questions de juridiction *ratione materiæ* on peut toujours invoquer cette objection même au mérite. Le défaut de le faire plus tôt n'affecte que la question de frais.

Cette question de juridiction, chose assez singulière, se présente pour la première fois devant moi, et cependant il y a déjà eu un certain nombre d'actions pour des petits montants qui ont été prises devant cette cour et qui ont été jugées, la question de juridiction n'ayant jamais été soulevée.

Maintenant, il s'agit de savoir, puisque la question est soulevée, si vraiment la cour d'Amirauté a juridiction en pareille matière, c'est-à-dire dans une action dont le montant n'est seulement que de quelques piastres.

Il n'est pas douteux que l'action existe devant les tribunaux de juridiction sommaire. La loi donne expressément la juridiction à ces tribunaux pour juger de pareilles causes. Ainsi, la section 164 de l'*Acte de la Marine Marchande*, 1894, dit expressément:

" Un matelot ou apprenti au service en mer, ou une personne dûment autorisée pour lui, pourra, aussitôt

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que des gages à lui dus deviendront payables, n'excédant pas cinquante louis, poursuivre pour le recouvrement d'icelui devant une cour de juridiction sommaire en ou près de l'endroit où son service s'est terminé, ou auquel il a été congédié, ou auquel se trouve ou réside toute personne contre laquelle la réclamation est faite, et tout ordre fait par la cour dans la matière sera définitif."

Mais la section 165 ajoute :

" Aucune poursuite pour le recouvrement des gages n'excédant pas cinquante louis ne sera instituée par ou pour aucun matelot ou apprenti au service en mer dans aucune cour supérieure d'archives dans les domaines de Sa Majesté, ni comme procédure en Amirauté dans aucune cour ayant juridiction d'Amirauté dans ces domaines, à moins :

" (i) que le propriétaire du navire ne soit déclaré banqueroutier ; et

" (ii) que le navire ne soit sous saisie ou vendu par l'autorité d'aucune cour comme susdit ; ou

" (iii) que la cour de juridiction sommaire agissant en vertu de l'autorité du présent acte, renvoie la réclamation à une telle cour ; ou

" (iv) que ni le propriétaire ni le capitaine du navire ne se trouve ou ne réside à vingt milles de l'endroit où le matelot ou apprenti est congédié ou mis à terre."

A part ces quatre exceptions le législateur fait une véritable prohibition, et dit qu'aucune poursuite pour recouvrement de gages ne sera intentée devant la Cour d'Amirauté, à moins que le montant n'excède deux cents piastres ($200.00).

Comme on le voit, c'est une loi expresse et impérative, en même temps que prohibitive. Non seulement c'est une loi expresse et impérative, mais il faut bien tenir compte de ce caractère de la loi, c'est une loi *spéciale*. Ce n'est pas une loi d'ordre général, c'est une loi

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spéciale concernant le mode de recouvrement des gages des matelots et applicable seulement à cette matière là, et voici l'argument que j'en déduis : Il est de principe et de doctrine incontestée qu'une loi spéciale ne peut pas être abrogée tacitement par une loi générale—tandis qu'une loi générale peut être abrogée tacitement par une loi spéciale, si la loi spéciale est incompatible avec la loi générale antérieure.

Ces principes sont bien établis dans Demolombe et dans tous les auteurs qui traitent de cette matière de l'interprétation des lois.

Je cite Demolombe, Vol. I, Nos 126, 127 et 128. Je traite cette question de l'abrogation tacite des lois, parce qu'on m'a cité un précédent auquel je vais référer dans un instant—une cause décidée à Toronto—dans laquelle il a été jugé précisément qu'une loi générale postérieure avait abrogé tacitement une loi spéciale antérieure—chose que je ne crois pas fondée—mais la question ne se présente en réalité ici que dans une des deux causes, celle du S S *Polino*.

Voici ce que dit Demolombe :

" L'abrogation est tacite, lorsque les dispositions de " la loi nouvelle sont incompatibles avec les disposi- " tions de la loi antérieure.

" Mais alors l'abrogation ne résultant que de la con- " trariété entre les deux lois, il ne faut la reconnaître " qu'à l'égard de celles des dispositions de la loi an- " cienne, qui se trouvent inconciliables avec les dispo- " sitions nouvelles (1).

" Ce mode d'abrogation implicite soulève souvent " des difficultés ; et c'est surtout dans certaines matières " spéciales, régies par des lois successivement promul-

(1) L. 28, ff. de Legibus ; comp. Cass., 24 avril 1809, la Régie de l'Enregistr., Sirey. 1809, I, 222 ; Cass., 20 oct. 1809, le Proc. génér. des Ardennes, Sirey, 1810, I, 303 ; Montpellier 21 novembre 1829, Coulougnon, Dev., 1830, II, 88).

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" guées à des époques différentes, qu'il a jeté parfois " beaucoup d'incertitude et de complications.

" En principe, la loi générale n'est pas présumée " vouloir déroger à la loi spéciale ; et l'abrogation " tacite n'a pas lieu dans ce cas, à moins que l'intention " contraire du législateur ne résulte suffisamment de " la loi elle-même. (1)

" Lorsque la loi ancienne et la loi nouvelle statuent " sur la même matière, et que la loi nouvelle ne repro- " duit pas une disposition particulière de la loi " ancienne, sans pourtant prononcer d'abrogation ex- " presse, on est néanmoins autorisé à dire que cette " disposition particulière est abrogée. (2)

" En effet, si le législateur, qui ne prononce pas " l'abrogation formelle, ne doit pas, en général, être " présumé vouloir empêcher, comme on l'a dit, la " *fusion* des deux lois, il en est autrement, lorsque la " loi nouvelle crée, sur la même matière, un système " entier et complet, plus ou moins différent de celui " de la loi ancienne. Il ne serait pas sage alors, sui- " vant la remarque de M. Mérilhou, d'altérer l'écono- " mie et l'unité de cette loi nouvelle, en y mêlant les " dispositions, peut-être hétérogènes, de la loi ancienne, " qu'elle a remplacée. (3)

Voici maintenant ce qui a été décidé dans cette cause de Toronto qui est rapportée au 4ême Vol. des Reports de la Cour de l'Echiquier, page 7 :

" Held, that *The Admiralty Act*, 1891, conferred upon " the Exchequer Court all the jurisdiction possessed " by the High Court, Admiralty Division, in England

(1) Comp. Merlin, Répert. t. VII, p. 557 ; Cass., 24 avril 1821, Clément, Sirey, 1822, I, 27 ; Cass., 8 août 1822, Perigeas, Sirey, 1823, I, 130 ; Cass., 14 juillet 1826, Grand-Jean, Sirey, 1827, I, 104 ; Cass., 8 février 1840, Mahieu, Dev., 1840, I, 281.)

(2) Cass., 8 février 1840, Mahieu, Dev., 1840, I, 281 ; Av. du Cons. d'Etat, du 8 févr. 1812.)

(3) Encyclop. du droit, Vo Abrogation.

"as it stood on the 25th July, 1890, the date of the "passing of *The Colonial Courts of Admiralty Act*, "1890, and that the Admiralty Court in Canada could "now try any claim for seamen's wages, including "claims below $200.00; and that s. 34 of R. S. C. c. 75 "was repealed by implication (not having been ex- "pressly preserved) to the extent, at any rate, that it "curtailed the jurisdiction of the Admiralty Court to "entertain claims for seamen's wages below $200.00 "in amount."

M. le Juge McDougall se trouvait donc en face d'une loi spéciale, qui était la section 34 du chap. 75 des Statuts refondus du Canada, qui enlève la juridiction à la Cour d'Amirauté; mais subséquemment à cette loi, qui remonte à 1873, je crois, il mettait en regard la loi de 1891, *The Admiralty Act*, qui a donné une juridiction générale à la Cour d'Amirauté, et il en concluait que cette loi de juridiction générale se trouvait avoir abrogé tacitement la loi spéciale de 1873.

Je ne crois pas devoir me conformer à cette décision pour la raison que j'ai donnée, savoir que *la loi spéciale* de 1873 concernant le recouvrement des gages des matelots ne peut pas avoir été tacitement abrogée par *la loi générale de* 1891 de "*The Admiralty Act*."

La loi applicable au SS. *Polino* est la section 56 du chap. 74 des Statuts Refondus du Canada. Elle est de même date que la section 34 du chap. 75 et dans les mêmes termes; et comme je suis d'avis que cette loi d'un caractère *spéciale* n'a pu être tacitement abrogée par l'Admiralty Act de 1891, il s'en suit que la Cour d'Amirauté n'a pas de juridiction dans la réclamation de quelques piastres contre le *Polino*, steamer enregistré à Québec.

Quant à la réclamation de quatorze piastres ($14.00) contre le steamer *Savoy*, qui est enregistré à Londres, le défaut de juridiction est encore plus évident. Car

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je dois lui appliquer la section 165 de l'*Acte de la Marine Marchande*, qui est de 1894, et conséquemment postérieur à l'Admiralty Act qui est de 1891.

Pour ces raisons, les deux actions doivent être renvoyées, mais sans frais, parce que l'objection à la juridiction n'a pas été prise *in limine litis*.

Judgment accordingly.

Solicitors for plaintiffs : *Caron, Pentland, Stuart & Brodie.*

Solicitors for SS. *Savoy : Gibsone & Dobell.*

Solicitor for SS. *Polino : M. A. Lemieux.*

IN THE MATTER of the Petition of Right of

WILLIAM PAUL, JR.....SUPPLIANT; 1904 Nov. 7.

AND

HIS MAJESTY THE KING.....RESPONDENT.

Shipping—Collision—King's ship—Negligence—Liability—Public Work.

Where a collision occurs between a ship belonging to a subject and one belonging to the King, the King's ship is not liable to arrest for damages; and, in the absence of statutory provision therefor, no action will lie against the King for the negligence of his officers or servants on board of the ship.

2. In this case the steamship *Préfontaine*, belonging to the suppliant, was damaged in a collision with a loaded scow which was fastened to the starboard side of the steam tug *Champlain*, and which the latter was towing from the dredge *Lady Minto* then working in the Contrecœur Channel of the River St. Lawrence. The dredge, steam-tug and scow were the property of His Majesty:—

Held, that the facts did not disclose a case of negligence by the officers or servants of the Crown on a public work for which the Crown would be liable under clause (*c*) of section 16 of *The Exchequer Court Act*, 50-51 Vict. ch. 16.

PETITION OF RIGHT for damages arising out of a collision in the river St. Lawrence.

The facts of the case are stated in the report of the Registrar, acting as Referee.

October 27th, 1903.

The case came on for hearing at Montreal, and was referred to the Registrar for the purpose of enquiry and report.

March 12th, 1904.

The Registrar filed his report, which was as follows:—

"Whereas this action came on for trial, at the City of Montreal, P.Q., on the 27th day of October, A.D., 1903,

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and by an order of this court then made, it was ordered that it be referred to Louis Arthur Audette, Registrar of the Exchequer Court of Canada, to take evidence and report on the questions of fact, reserving the argument upon the questions of law to take place before this court, as well as any dispute as to facts;"

"And whereas the reference was proceeded with, at Montreal, before the undersigned, on the 27th, 28th and 29th days of October, and on the 10th and 11th days of November A. D., 1903, in presence of the Honourable L. Gouin, K.C., Attorney-General for the Province of Quebec and R. Lemieux, Esq., K.C., both of counsel for the suppliant; and J. L. Decarie, Esq. and A. Decary, Esq., of counsel for His Majesty the King, when evidence was adduced by both parties, respectively, whereupon and upon hearing the same, and what was alleged by counsel aforesaid, the undersigned, on the 31st day of December, A.D. 1903, made a preliminary report, and the matter therein mentioned having come on before this court, at Montreal, on the 22nd day of January, A.D. 1904, in presence of counsel for both parties, and upon hearing what was by them alleged, the matter, upon motion on behalf of the suppliant, was referred back for report to the undersigned, who now begs humbly to submit as follows:—

The suppliant presents and files his petition of right to recover damages for injuries sustained by his steamer, the *Préfontaine*, in a collision with the Government steam-tug, the *Champlain*. The collision took place in the River St. Lawrence, in the ship channel, the property of the Dominion Government (p. 4), between Montreal and Quebec, at the place commonly known as the Contrecœur Channel, where, on the night in question, the Government dredge *Lady Minto* was working, after having been placed in the said channel

by the proper authority acting in behalf of the respondent (p. 2) (*).

The *Préfontaine*, a steam barge, drawing 15 feet under cargo (p. 18), propelled by twin screws, duly registered at the port of Montreal, and appearing by its certificate of registry of May, 1903, (exhibit No. 14), to be 202 feet in length, but only 141·6 feet in length at the time of the accident in question herein, as appears by exhibit No. 9, in charge of Captain William Paul, sr., left Montreal at six o'clock in the evening on the 6th day of October, 1902, destined for Quebec, and stopping at other ports on her way thereto.

Sailing down the River St. Lawrence with the current at her usual speed of 15 knots an hour, having all her regulation lights, she reached Vercheres light, at the point marked "A" on the plan, exhibit No. 3, filed of record herein, at a little after 8 o'clock. The night was dark; there was no moon, and the vessel was travelling exclusively on the beacon lights, keeping as much as possible to the centre of the channel, on the alignment of the land lights. She followed the Vercheres lights from "A" to "B," where she described a curve to the north in order to remain within the channel, and, seeing the dredge a little to the south of the centre of the channel, she directed her course to the point marked "D" between the dredge, the *Lady Minto*, and the south bank of the channel, touching, as she passed, the black buoy shewn at that point, bearing in mind to remain some distance from the dredge on account of her two chains. The evidence also discloses that the current in the Contrecœur channel throws to the south and is of two to two and one-half miles an hour (p. 292). The dredge was about 60 feet from the south of the centre of the

*. REPORTER'S NOTE.—This and subsequent like references in this report relate to the evidence, which is not printed here.

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channel. When the *Préfontaine* left the Vercheres lights to take the Contrecœur lights her momentum pushed her to the south, and the current also bore her in that direction. Then she had to right herself, and by that time she was near the ware and could not pass to the north of the *Minto* (pp. 74, 103, 169, 201).

Pursuing her course from point "D" the *Préfontaine* pointed a little to the north, with the idea of falling into the centre of the channel by aligning the lights as soon as she would have passed the dredge. It was when passing the dredge, her stern being still opposite it, a distance of about 1,200 to 1,500 feet from the point "E," where Toupin, the pilot at the wheel at the time, places the tug, that the latter says he for the first time saw a red light and two white lights, which afterwards turned out to be those of the Government tug, the *Champlain* (p. 144). No green light could be seen, and the conclusion arrived at was that the tug was in position for crossing the channel at almost right angles. She appeared to Toupin as being stationary and to the south, outside of the channel, and in that he is corroborated by respondent's witness. E. Perrault, on board the tug at the time of the accident (pp. 398, 403, 408, 411, 144, 171). Other witnesses contend the tug was in the channel but on the south side thereof and close to the south bank. At that time the *Préfontaine* heard one blast from the tug, which she did not answer, because the tug was out of her course, appearing then out of the channel (pp. 26 and 141), and the captain says they thought it was an exchange of signals between the tug and the dredge. In that sense he is corroborated by respondent's witness Perrault (p. 406) as to that being a possible occurrence. Hamelin, the head pilot, says he did not hear the first blast (pp. 187, 295). They pursued their course, and the tug blew another blast, and

the *Préfontaine* then answered it with two blasts. The one blast from the tug was asking the *Préfontaine* to pass to the right or south, and the two blasts from the *Préfontaine* meant she was keeping (p. 26) her course to the north with the object of getting into the alignment of her lights, the only way to be guided at night. The captain says he was in the channel, and he took the tug to be then outside the channel and stationary. Had he then tried to pass to the right of the *Champlain* it would have taken him away from his lights and necessarily outside of the channel.

Let us now follow the different movements of the tug up to this time:—The tug *Champlain*, ninety feet in length, was acting as tender to the dredge *Lady Minto*, (p. 5). When not required she would lay tied to a scow which is used as a wharf on the south bank of the channel, at the place marked on plan Exhibit No. 3 *Chaland quai*, about 150 to 200 feet lower down than the dredge, and at about 50 feet outside the south bank of the channel (pp. 448, 449).

Labrecque, the night captain of the *Champlain*, says (p. 450), that at about 8.05 P.M., on the night of the accident, he was called by the dredge blowing one blast to go and change the scow. He left the wharf in question with an empty scow and on his way to the dredge, as was his habit, he looked to see if there were any vessels coming down or going up the river, and as he was reaching the dredge he saw one vessel coming down in the Vercheres lights. He gave the dredge the empty scow and let his tug drift down to the stern of the dredge, where he tied the loaded scow on to his starboard side to take her to dump her contents on the north bank of the channel. He gave his order to let go the ropes that were tying them to the dredge and to wait as there was a vessel coming down; that they had not time to cross before she would pass

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(p. 451). Then they waited and the *Préfontaine* passed in front of the dredge. By waiting the witness means that he did not put the tug under steam. He waited, he said, expecting that the *Préfontaine* would pass to the north of the dredge. All that time the tug was drifting down with the current, which, as has already been said, at that place drifts towards the south bank.

When the *Préfontaine* was opposite the south corner of the dredge, the *Champlain* blew one blast for the right, but received no answer. Labrecque says he then rang giving orders for the machinery headways and blew one blast a second time, with the idea of going north and making the *Préfontaine* pass to the south. To this last blast the *Préfontaine* answered by two blasts, as already mentioned, meaning she retained her course to the north, because as Toupin says (p. 141) the tug was on the south bank. During that time the *Préfontaine* was going towards the centre of the channel with the object of aligning her lights, and the tug was keeping advancing across the channel in front and towards the *Préfontaine*. Hamelin, the first pilot, who was in the wheel-house at the time, addressing Toupin the second pilot who was at the wheel then said, speaking of the tug:—"She is always advancing, I believe we will not clear her as it is going; we must clear her;" whereupon Toupin rang the bell giving orders to the engineer to stop the left screw in order to turn and go about to the north. The *Préfontaine* went to the left as quickly as possible to avoid the collision, because she saw the *Champlain* coming upon them as the latter was coming across the channel (pp. 129, 142). The collision then took place and the *Préfontaine* struck the northern corner of the scow which, without any light thereon, was overlapping the tug by 25 to 30 feet.

The *Champlain*, we are told, reversed her engine a moment before the collision. Brook, a sailor on board the *Champlain* and on the scow at the time in question, a witness heard by the respondent, says it was long after the two blasts were given by the *Préfontaine* that the tug reversed her engine (p. 387). At the time of the collision he heard some one from the *Préfontaine* screaming to the tug "Are you reversing"? and at that time the tug was just reversing and the two vessels were then very close to each other (p. 389). The undersigned finds that the tug, with a heavy laden scow tied to her side, had not likely, under the circumstances, stopped her forward impetus before the collision took place (pp. 442).

The respondent's witness Euclide Perrault, a sailor on board the tug at the time of the accident, says (pp. 397, 399) that when the tug reversed her engine, the scow which was to her right and overlapping by 25 to 30 feet sheered or swung (decanté) to the left and the *Préfontaine* hooked her. Indeed, while the *Préfontaine* at the time of the agony of the accident was turning to the left to avoid the collision, the tug on the contrary was coming with an impetus headways and turned, by her manœuvre, the scow right into the *Préfontaine*. The scow having no light on board, (art. 5) could not, on a dark night, as the one in question, be reasonably expected to be seen by the *Préfontaine*. The witness thinks if the scow had not been overlapping there would have been no accident.

After the collision Labrecque took his scow to the south bank and dumped it there. Why had he not followed that course from the time he left the dredge, and more especially when he saw the *Préfontaine* coming down on the south side of the channel? Had he done so, there would have been no collision.

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The first question to discuss is perhaps to know, if under the evidence, the *Préfontaine* was justifiable to pass to the south of the dredge, to keep her course, blowing two blasts in answer to the one blast of the tug.

Indeed, a question upon which a deal of evidence has been adduced is as to whether or not the *Préfontaine* was manœuvred with skill and seamanship in passing to the south of the dredge under the circumstances. Perhaps more stress than necessary was laid upon this point by the defence. There is no reason why the *Préfontaine* should not go down on the south side of the dredge, and the *Champlain* cannot to-day make facts to meet an adversary case by saying that a great number of ships passed to the north.

All the expert witnesses heard by the suppliant, when that question was put to them, answered that they would have followed the same course as that followed by the *Préfontaine*. N. Perreault (p. 102), C. Auger, pilot, went as far as to say that for a vessel coming down at night it was not prudent to pass on the north of the dredge, (pp. 282, 283). Even Cadeaux, the captain of the tug answered to the same effect (p. 67).

True the pilot of the Richelieu boats, one of the respondents witnesses, said he always passed to the north of the dredge, but his vessels only draw 8 or 9 feet (p. 543) while the *Préfontaine* draws 15 feet. In day time the question could not have arisen as there is always a red flag placed upon the dredge on the side they wish the vessels to pass. At night there is nothing to direct the vessels except the beacon lights (p. 291).

The *Préfontaine* passed to the south of the dredge, and looking at plan, Exhibit No. 3, it would appear to have been but the natural course to follow at night on leaving the Verchères lights, when a vessel has neces-

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sarily to keep close to her lights. Indeed, arrived at point "B" she sees the dredge at point "C" and at point "G" (pp. 336, 290), about 300 feet ahead of the dredge, she also sees a scow with a light thereon holding the ware of the dredge. Had she attempted to go to the north, looking from point "B", "G" was in her way.

Moreover, there exists no law of navigation, of which the undersigned is aware, which could bind or direct the *Préfontaine* to pass either to the north or the south of the dredge. Both ways were quite good. She passed to the right of the dredge, as if meeting another ship. Could the *Préfontaine* go more to the south when she was called upon to do so by the *Champlain*? In day time she might perhaps have done it, but at night it would have been imprudent to get away from her lights, as the moment she left them she could not know where she was going. It is in evidence that there was enough water outside the channel to allow of her to do so; but in view of the fact that she was aware there were, on the south bank, at that place, buoys at every 250 feet, indicating the side of the channel, one buoy at each chain of the dredge, as shewn upon the plan, a scow used as a wharf and a barge loaded with coal (p. 491), it would certainly have been very imprudent for her to leave the channel and get away from her beacon lights, where at night these lights are the only means by which she could steer her course. The tug herself on previous occasions got caught in the ropes of one of these buoys, although she was daily travelling among them (pp. 88, 355).

Then should the *Préfontaine* have answered the first blast of the *Champlain*, and to the second blast should she have acquiesced and passed to the south?

This last question is partly answered by what has just been said. Pilot C. Auger goes further and says

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that, by seeing the red light and the two white lights he would have thought it was the Government tug and he would not have changed his course (p. 283), and he would have paid no attention to her; it is the habit, because these tugs which ply around the dredge are always supposed to keep outside of the channel and to keep it clear (p. 294). In this he is corroborated by Mr. J. Howden, Superintendent of Dredging in the St. Lawrence for the Dominion Government, who says (p. 7) the general instructions in running these works is to leave the channel as clear of obstructions as possible. When he is asked when vessels are coming up or going down the channel the tugs are not to cross from one side of the channel to the other he answers: No, certainly not; because the channel is so wide, there is 450 feet for the dredged channel, which is the navigation channel, and there is over 1,000 feet on one side and 500 feet on the other side, making a very large space for the tugs within which to move at that place.

Then among the officers on board the *Préfontaine* some contend they did not hear the first blast and others say they took it as a signal between the tug and the dredge. It is in evidence that the dredge and the tugs sometimes exchange signals with one another (pp. 355, 374), and on that occasion on which the tug was caught in the ropes she called the attention of the dredge by blowing one blast, to which the dredge answered by only one blast (p. 355).

Cadieux, the captain of the tug, blames his night captain for the accident. He says he was not competent, had no license and no certificate to act as captain, had not enough nautical knowledge, and he would never have selected him for such a position. He blamed him for having left the dredge when he saw the *Prefontaine* coming down. He should not have

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left the dredge only until after the *Préfontaine* had passed. That is what they ordinarily do. It was assuming a risk to start when he saw the *Préfontaine* coming. Had he been in charge he said he would not have left the dredge, and had he left it, and had he found himself at the point "E" seeing the *Préfontaine* coming down, he would not have tried to cross the channel. It was not prudent to cross; he would not have done so. Boulé, heard by the respondent, said he would have waited at the dredge until the *Prefontaine* had passed (p. 552).

One of the respondent's witnesses thought both vessels should have stopped after the *Préfontaine* blew two blasts. But that would not have prevented the collision. Its results might only have been more serious, because the *Préfontaine*, going down with the current at the speed of (p. 480) 15 knots an hour, would have retained her impetus for a long distance, and, the current helping, could not have been stopped within that space, and the collision, instead of being between the scow and the *Préfontaine*, would have probably been between the latter and the tug, with perhaps fatal results for the crew of the tug. It seems that the *Préfontaine* by stopping her left screw and turning to the left has performed the proper seamanship manœuvre. The results also might have been quite different had there been a light at the bow of the scow, which it was quite impossible for the *Préfontaine* to see.

Now the *Champlain* is certainly, under the circumstances, chargeable with want of ordinary prudence, skill and seamanship. She should not have left the dredge until the *Préfontaine* had passed her; she should not have moved headways after blowing one blast for the second time. She should have waited at least until the down vessel had passed (p. 284). Had she waited

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for an answer before steaming ahead, probably the accident would not have taken place. She should have known the *Préfontaine* would hardly pay any heed to her demand according to the expert evidence on record, and further because she was not coming up stream, she was not a meeting ship, she was crossing the channel. Had she steamed backwards when the *Prefontaine* blew the two blasts, again no accident would have happened.

What can have been the advantage gained, with the view of avoiding a collision, by letting the tug and scow drift after leaving the *Minto* to a point on the south bank,—if not outside of the channel,—when at the critical moment, when the *Préfontaine* is at between 1,200 to 1,500 feet from the tug, for the latter to blow a blast interfering with the course of the *Préfontaine*? And with much more wonder one is prompted to ask what justification can there be for the tug to blow that blast, go under steam and forge ahead, crossing the channel at almost right angles in front of the on-coming *Préfontaine*, before having received answer from her as to whether she intended to continue or alter her course. The tug knowing she was a crossing vessel travelling from point "E" to "F" on the plan, the *Prfontaine* had the right of way, she should have at least waited until the *Préfontaine* had answered before ordering the engine ahead. The night captain even admits that he knew when a vessel was coming down he was not to try and cross (p. 468). By this unskilful manœuvre she came and placed herself in front of the *Préfontaine*, a going down vessel and more especially in the Contrecœur channel, in a place where navigation is intricate, and in respect of which the Corporation of the Harbour Commissioners of Montreal have passed and made special by-laws. Indeed, by-law No. 77 distinguishes vessels drawing eight feet of water or less from those

drawing more water, because it says specifically that such vessels as first-mentioned, except in cases of accident, or stress of weather, or force of current, are not to use the deep water channel at the portion through which the Contrecœur channel passes. This place is identified by witness at page 284 of the evidence.

Section 81 also directs that "All up-coming vessels, "on each occasion, before meeting downward bound "vessels at sharp turns, narrow passages, or where the "navigation is intricate, shall stop, and, if necessary, "come to a position of safety below the point of danger, "and there remain until the channel is clear." And these directions apply to the "black and white buoys on the upper part of the Contrecœur channel".

Then Art. 18 of section 2, chap. 79, R.S.C, *An Act respecting the Navigation of Canadian Waters*, enacts that it is only when each of the two steam-vessels are meeting end on, or nearly end on to the other, and they are to pass one another on the port side, *and this applies by night to cases in which each vessel is in such a position as to see both the side lights of the other. Further this rule does not apply by night to cases where a red light without a green light is seen ahead.*

The tug never exhibited her green light; the *Préfontaine* saw her red and white lights only. That is proved beyond controversy.

Then Art. 22 directs that "every vessel which is "directed by these Rules to keep out of the way of "another vessel, shall, if the circumstances of the case "admit, avoid crossing ahead of the other;" and Art. 23 provides that "every steam-vessel which is directed "by these Rules to keep out of the way of another "vessel, shall, on approaching her, if necessary, slacken her speed, or stop or reverse".

While the above rules of navigation are very clear, the *Champlain* has ignored them all entirely, and seems

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to have done exactly the contrary to what they direct She lets herself drift in the deep water channel and waits there until the *Préfontaine* is approaching her at a distance of about 1,200 to 1,500 feet and then steams ahead across her way, giving her a signal to go to the right, notwithstanding she is not end on. (Art. 18).

The tug being crossing ahead of a steam-vessel was guilty of a very unskilful manœuvre in attempting, as stated, under the circumstances, to cross ahead of the *Préfontaine*. The breach by the *Champlain* of the statutory rule that a crossing vessel has to give way to the one going up or down the river is the proximate cause of the accident.

There is on the one side positive evidence that the *Champlain* was the cause of the accident, while on the other side there is only conjecture alleged by the respondent.

Under the circumstances of the case the undersigned has come to the conclusion that the collision was occasioned by the non-observance by the *Champlain* of the rules above cited, and that she is clearly chargeable with want of ordinary prudence, skill and seamanship, and that she is in fault.

The suppliant claims as follows for the damages arising out of the collision, viz:—

(*a.*) Cost of repairs to the *Préfontaine*.....	$ 5,230 00
(*b.*) Loss of 15 trips between Montreal and Quebec and profit, as well upon freight as upon passengers, at the rate of $650 per trip	9,750 00
(*c.*) For damages suffered by the line of steamers through the opposition made by other lines, resulting from the	

discontinuance of the service of the *Préfontaine* (loss of customers).....	3,000 00
In all.....	$17,980 00

The suppliant was formerly proprietor of a steam vessel called the *Victoria*, which is valued at $8,500.00, and he gave her in exchange for the *Préfontaine*, upon which there were mortgages to the amount of 87,500 and which he assumed (p. 253). This is the way he became proprietor of the *Préfontaine*. However, under Exhibit No. 10, a certificate under Notary Desy's hand, it appears that the *Victoria* was sold by him at that time for $6,000.

Before the accident, the *Préfontaine* had what they called a roundish or a rounded bow and the vessel was of double planking. Such a bow has to be of hard wood, and it takes, it appears, a deal of work and time to turn the wood into such a shape. So before starting the repairs they decided to rebuilt the bow in a pointed shape, lengthening it thus by 25 feet or more. They also decided to lengthen the stern by 22 to 25 feet. The vessel appears under the Bill of Sale dated January 1900, filed as Exhibit No. 9, to be 141.6 feet in length, while in the Register of May 1903, she appears of 202 feet in length, the necessary conclusion being that at the time the repairs were made she was lengthened by the difference, viz. 60.4 feet.

When the repairs were going on, no separate account of the work done upon the bow and upon the stern was kept, and in this respect the suppliant is decidedly at fault. He was quite aware then of his intention of making a claim against the respondent for the repairs occasioned by the collision. The keeping of such an account would have shown on his behalf a distinct intention of getting just what he was entitled to. The

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evidence as to the amount actually spent, with respect to the bow only, is unsatisfactory, indefinite and vague; and while large sums of money are mentioned by some witnesses as being expended, the undersigned cannot reckon with some of them when they say, contrary to other evidence in that behalf, that the lengthening of the vessel at the bow by so many feet has cost no more than if the repairs had been made to it retaining its old and former shape.

For the repairs to the bow occasioned by the collision the sum of $3,000.00 will be allowed, and having in view that the vessel originally cost between $6,000 and $7,000, the amount seems even large..... $3,000 00

Then with respect to consequential loss occasioned under clause (b), the undersigned will allow twelve trips, which would bring the suppliant to the 18th day of November, being a very fair average as to the yearly closing of navigation between Montreal and Quebec.

It is in evidence that the average of gross moneys collected on each trip in 1901, when one trip per week was being made and thus necessarily allowing accumulation of freight was $684.31, but only $650.00 is claimed; while the average in 1902, when two trips a week were being made, was $583.00

(p. 159). The latter would be the better criterion

However while $583 could have been the gross amount collected on each voyage, provided everything went on satisfactorily, in assessing such damages consideration must also be given to the ordinary contingencies a vessel of that kind is necessarily subjected to; such as accidents, which might vary the return in a very large measure. Had indeed the *Préfontaine* been running to the end of the season, a time of the year always less favourable to the navigation, she might have been the victim of a number of accidents, as too often happens to ships, as well through *vis major*, the Act of God or otherwise. And would the cargo or freight and passengers have also been always plentiful? In view of these elements of uncertainty the average of gross receipts per voyage will be fixed at $530.00 (*Grenier* v. The *Queen*, 6 Ex. C. R. 304.)

Twelve trips allowed at $530.00 per trip. $6,360.00

from which should be deducted the amount representing the quantity of

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coal which would have been used during these twelve trips, allowing however a certain quantity consumed for pumping the vessel at Sorel.

Deducting also expenses for wharfage where the payment was made upon a percentage.

Deducting also charges for light, lubricating oil, etc. etc., (The *Normanton*, 3 Q. L. R. 303). In all the sum of..... $1,200 00

—— — $5,160 00

Then with respect to the wages paid to the sailors and the men at the several wharves, the evidence of the suppliant is to the effect that the full wages were paid them, because they were engaged for the full season of navigation, and at so much per month.

Now in endeavouring to arrive at a just compensation one must bear in mind that we are not here seeking a penal retribution. What we have to find is the real damage and loss to the suppliant, compensate that

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and the real justice and honest policy will be satisfied. (The *Elizabeth*, 2 Dod. Ad.R. 403; The *Normanton*, 3 Q.L.R. 303; The *City of London*, 1 Wm., Rob. 92).

The evidence of the suppliant that he has continued to pay his men after the collision is not satisfactory, unless it is shewn until what date he has paid them, and whether he paid more than a month's wages from the 6th of October, 1902, to the end of that season. He should also have produced at the same time the articles of agreement with his men. However, leave will hereby be given him to do so at any time before or on moving for judgment if he sees fit. Only one month is hereby allowed from the 6th of October to the 6th

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of November, 1902, inclusive, deducting herefrom that portion of wages between the 6th November and the time of the last trip allowed as above, viz. the sum of..... $340 00

$4,820 00

Then there is the sum of $400.00 which has been paid to the suppliant by the Western Assurance Co. in satisfaction of all damages resulting from the collision in question herein (p. 630). In this respect the undersigned cannot follow the argument of suppliant's counsel, who contended at the hearing that this amount should not be deducted, and that if it were to be so deducted, at least it should be after deducting therefrom the amount of the premium. But in answer one must bear in mind that had there been no collision the suppliant would have paid his premium just the same and he should not be made better off at the expense of the respondent

Under the circumstances the amount

of $400 will be deducted	$400 00	
	$4,420 00	

(*Grenier* v. *The Queen*, 6 Ex. C. R. at p. 303).

With respect to the damages asked under clause (c) of the claim of the petition of right herein for loss of customers, etc., it is found these damages are too remote, not capable of precise calculation, not ascertainable by the application of any rule of law, and accordingly not recoverable (*Gibbon* v. *The Queen*, 6 Ex. C. R. 430; *Paradis* v. *The Queen*, 1 Ex. C. R. 191; *McPherson* v. *The Queen*, 1 Ex. C. R. 65; *The Clarence* 7 Notes of Cases, 582; *Gingras* v. *Desilets*, Coutlee's Dig. 65.		
This will leave the total sum of.	$4,420 00	4,420 00
which added to the amount allowed for repairs will make the total sum of.....		$7,420 00

Therefore, the undersigned, has the honour humbly to report that, under the circumstances of the case as above mentioned, the collision was occasioned by the non-observance by the tug *Champlain* of the rules of navigation aforesaid, and that she is chargeable with want of ordinary prudence, skill and seamanship and in fault. Further, that the suppliant is entitled to recover from His Majesty the King, as damages arising from such collision, the sum of $7,420 and costs.

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Argument of Counsel.

In witness whereof, the undersigned has hereunto set his hand at Ottawa, this 12th day of March, A.D., 1904.

(Sgd.) L. A. AUDETTE,
Registrar and Referee.

June 29th, 1904.

The argument of motions to confirm the report of the Registrar, and by way of appeal from such report, was now heard at Ottawa.

L. Gouin, K. C., for the suppliant, moved that the report of the Registrar be confirmed.

J. L. Decarie, for the respondent, contended that the Registrar's report finding negligence for which the Crown was liable was not in accordance with the evidence, and ought to be set aside. He argued that the *Préfontaine* was wholly to blame by going out of the line of lights indicating a safe channel for ships. The statement of claim in the suppliant's petition is defective because it does not set up a case of negligence, giving the court jurisdiction within the terms of sec. 16 (*c*) of *The Exchequer Court Act.* It is not charged that the accident happened on a public work. (*Hamburg American Packet Co.* v. *The King* (1) *Larose* v. *The Queen* (2) *City of Quebec* v. *The Queen* (3) *The Queen* v. *McLeod* (4) *The Queen* v. *McFarlane.* (5)

The *Préfontaine* is wholly to blame for the collision. The tug *Champlain* was where she had a right to be. (*Heminger* v. *The Ship Porter* (6) *Cuba* v. *McMillan* (7). The tug gave the proper signal as to the course she would take. *Robertson V. Wigle The St. Magnus* (8).

L. Gouin, K. C., replied, contending that the one blast given by the tug was interpreted by those on board of the *Préfontaine* as a signal between the tug

(1) 7 Ex. C. R. 150.
(2) 6 Ex. C. R. 425.
(3) 24 S. C. R. 420.
(4) 8 S. C. R. 1.
(5) 7 S. C. R. 216.
(6) 6 Ex. C. R. 154.
(7) 26 S. C. R. 651.
(8) 16 S. C. R. 720.

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and the dredge. The tug had no business to obstruct the channel and those on board of her were thus proximately liable for the accident. The Registrar has found for us on the facts, and his report ought not to be interfered with.

As to the question of jurisdiction, the facts show negligence on the part of the Crown's servants, and the suppliant asks for damages for the collision in his petition. It is not necessary to set out the exact words of the statute in framing the petition in such a case. The petition states grounds sufficient to entitle the suppliant to the relief sought, if they have been proved. The Registrar finds that the suppliant has made out a case.

THE JUDGE OF THE EXCHEQUER COURT now (November 7th, 1904) delivered judgment.

The petition is brought to recover damages sustained by the steamship *Préfontaine* in a collision with a loaded scow which was fastened to the starboard side of the steam-tug *Champlain*, and which the latter was towing from the dredge *Lady Minto* then working in the Contrecœur channel of the River St. Lawrence. The dredge, steam-tug and scow were the property of His Majesty.

The questions of fact in issue having been referred to the Registrar of the court for enquiry and report, he has found that the *Préfontaine* was not to blame for the collision, and that the *Champlain* was at fault in a number of particulars mentioned in his report.

I do not propose to discuss the findings of fact, for, in the view I take of the case, the petition cannot be maintained, even assuming that all such findings are to be accepted as correct. I wish, however, to intimate that it does not seem to me that the learned Registrar gave sufficient consideration to the sixth paragraph of

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the statement of defence, in which it is alleged that the steamer *Préfontaine* had the tug *Champlain* on her own starboard side before the collision, and it was the duty of the *Préfontaine* to keep out of the way of the *Champlain* which she negligently failed to do, and so caused the collision complained of. That defence is based upon Article 19 of the regulations for preventing collisions in Canadian waters, by which it is provided that when two steam-vessels are crossing so as to involve risk of collision, the vessel which has the other on her own starboard side shall keep out of the way of the other. Then by Article 21 it is provided that where by any of these rules one of two vessels is to keep out of the way of the other, the other shall keep her course and speed. By Article 22 it is provided that every vessel which is directed by these rules to keep out of the way of another vessel shall, if the circumstances of the case admit, avoid crossing ahead of the other; and by Article 23 it is further provided that every steam-vessel which is directed by these rules to keep out of the way of another vessel, shall, on approaching her, if necessary, slacken her speed or stop or reverse. It seems clear that before the collision these two vessels were crossing so as to involve risk of collision, and that at this time the *Préfontaine* had the *Champlain* on her own starboard side, and that she failed to take any of the precautions mentioned in the rules cited. So if the case turned upon a question of negligence there would, it seems to me, be some considerable difficulty in coming to the conclusion that the *Préfontaine* was not in fault in the particulars mentioned, whatever conclusion one might come to in respect of other matters dealt with in the report.

But assuming that the *Préfontaine* was not in any way to blame for the collision and that it was occasioned wholly by the fault and negligence of those in charge

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of the *Champlain*, what is the result? On what ground is the Crown to be held liable for damages resulting from such negligence.

First, if the matter be considered from the standpoint of a collision between a subject's ship and a ship belonging to the King, it is well settled law that in such a case the King's ship is not liable to arrest and that no action will lie against the King for the negligence of his officers or servants on board of the ship. There are, it is true, cases in which proceedings having been instituted in the Admiralty Court for damages occasioned by collision with a King's ship, the Lords of the Admiralty have directed an appearance to be entered by the Proctor for the Admiralty, and that having been done the case has proceeded to judgment. But that was a voluntary submission on their part to the jurisdiction of the court, and such cases do not in any way affect the general rule or principle that the King is not legally liable to answer for the negligence of his officers or servants, and that a petition of right will not lie for damages resulting from such negligence. The *Mentor* (1), the *Lord Hobart* (2), the *Athol* (3), the *Volcano* (4), the *Birkenhead* (5), the *Swallow* (6), the *Inflexible* (7), the *Siren* (8), the *Fidelity* (9).

The exceptions to that rule or principle are in Canada to be looked for in the Acts of the Parliament of Canada. Apart from statute there is no liability.

That brings us to the enquiry as to whether or not this case is within the provisions of clause (*c*) of the 16th section of *The Exchequer Court Act*, which provides, among other things, that the court shall have exclusive original jurisdiction to hear and determine

(1) 1 C. Rob, 179.
(2) 2 Dod. 100.
(3) 1 Wm. Rob. 374.
(4) 2 Wm. Rob. 337.
(5) 3 Wm. Rob. 75.
(6) 1 Swab, 30.
(7) 1 Swab. 32.
(8) 7 Wall. 152.
(9) 16 Blatch. 569.

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any claim against the Crown arising out of any injury to property on a public work resulting from the negligence of any officer or servant of the Crown while acting within the scope of his duties or employment.

The dredge *Lady Minto* was at the time working in the Contrecoeur channel of the St. Lawrence River. That she was engaged in a public work must, I think, be conceded. And the steam-tug *Champlain* was assisting in that work by removing the loaded scows, towing them to the place where the excavated material was being wasted; and bringing back the empty scows. But when absent from the dredge, as was the case here, the steam-tug was not, it seems to me, on a public work. Whether she could be said to be on a public work when she was alongside of, or attached to, the dredge, is a question that need not be decided or considered in this case. At the time the collision occurred she was at some considerable distance from the dredge. I have never thought that a too literal or narrow meaning should be given to the words "*On any public work*" in the provision cited. I have been inclined to the view that it is sufficient to bring a case within the statute if the injury was occasioned by something done on the public work. But that is not this case. The injury here did not occur on a public work; neither was it occasioned by anything done on the public work. It is a case of collision happening between a vessel and the tow attached to another vessel, both of which were navigating a public river. The fact that the steam-tug was at the time employed in assisting with the work that the dredge was doing does not appear to me to be material, or to create any liability that would not otherwise arise. If in such a case a proceeding were instituted on the Admiralty side of this court, and the Minister of Justice, on being informed thereof, should cause an appearance to be

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entered and should voluntarily submit the matter to the judgment of the court, the case would come on for decision in conformity with the rules in force in Admiralty proceedings, and damages, if awarded, would be assessed in accordance with such rules. There is, no doubt, precedent for such a proceeding as that, though probably in such a case the court would act rather as an arbitrator than as a court; for if there is in fact no jurisdiction to determine the case it is difficult to see how such jurisdiction could be given by consent of parties.

The judgment of the court will be that in this proceeding the suppliant is not entitled to any portion of the relief prayed for in his petition.

Judgment accordingly.

Solicitors for the suppliant: *Gouin & Brassard.*

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

REPORTER'S NOTE:—The following authorities illustrate the position of the Crown in relation to Admiralty proceedings in salvage cases for services rendered to a Government ship:—Williams & Bruce Adm. Prac. 3rd ed. p. 179, citing *The Marquis of Huntley*, 3 Hagg. 246; *The Lulan*, Mitchell's Maritime Register, 1883, p. 209; *The Comus*, cited in the *Prins Frederick*, 2 Dods. 464; *The Lord Hobart*, 2 Dods. 100; *The Athol*, 1 Wm. Rob. 374; *The Volcano*, 3 No. of Cas. 210; *Lipson* v. *Harrison*, 22 L. T. 83; *Wadsworth* v. *The Queen of Spain*, 17 Q. B. 171, 196; *The Parlement Belge*, L. R. 5 P. D. 197; *The Schooner Exchange*, 7 Cranch 116; *The Thomas A. Scott*, 10 L. T. N. S. 726; *Briggs* v. *Light Boat Upper Cedar Point*, 11 Allen 157; *Couette* v. *The Queen*, 3 Ex. C. R. 82; *Young* v. *The Scotia* (1903) A. C. 501.

IN THE MATTER of the Petition of Right of

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June. 12.

THE NICHOLLS CHEMICAL COMPANY OF CANADA, LIMITED..... } SUPPLIANTS;

AND

HIS MAJESTY THE KING..... .....RESPONDENT.

Liability of Crown as common carrier—Loss of acid in tank-car during transportation—Contract—Negligence—Liability of Crown—Costs.

The Crown is not, in regard to liability for loss of goods carried, in every respect in the position of an ordinary common carrier. The latter is in the position of an insurer of goods, and any special contract made is in general in mitigation of its common law obligation and liability. The Crown, on the other hand, is not liable at common law, and a petition will not lie against it for the loss of goods carried on its railway except under a contract or where the case falls within the statute, under which it is in certain cases liable for the negligence of its servants (50-51 Vict., ch. 16, s. 16), and in either case the burden is on the suppliant to make out his case.

2. By an arrangement between the consignee of the acid in question and the Intercolonial Railway freight charges on goods carried by the latter were paid at stated times each month, and in case anything was found wrong a refund was made to the consignee. In the present case the consignee paid the freight on the acid amounting to $135.00, no refund being made by the Crown. This amount was paid to the consignee by the suppliant, and it claimed recovery of the same from the Crown in its petition of right. The evidence showed that by the arrangement above mentioned the freight was not payable on the transportation of the tank-car, but on the acid contained in the car, at the rate of 27 cents per 100 pounds of acid.

Held, that the Crown was only entitled to the freight on the number of pounds delivered to the consignee at Sydney, and that the balance of the amount paid by the consignee should be repaid to the suppliant with interest

3. That as the suppliant, while succeeding as to part of the amount claimed, had failed on the main issue in controversy, each party should bear its own costs.

PETITION OF RIGHT for the recovery of damages against the Crown for the loss of goods carried on a government railway.

The facts are stated in the reasons for judgment.

November 5th, 1904.

The case was now heard at Montreal.

P. Davidson, for the suppliant, contended that the respondent's servants were guilty of negligence from two points of view in the case. They were negligent in relation to the breaking of the discharge pipe of the tank-car; they were also negligent in not notifying the suppliant, or its agents, when they first discovered the leakage.

The fair inference is that having received the tank-car in good condition at St. John, N. B., they were guilty of negligence in their carriage or handling of the car. The accident happened through some person's negligence—*res ipsa loquitur*. *Beven on Negligence* (1).

Again, if the Crown's servants were not responsible for the breaking of the discharge-pipe, they were negligent in not preventing the loss. 5 Am. & Eng Ency. Law (2); *Canadian Pacific Railway Company* v. *Blain* (3). No proper means were taken after discovery of the leak to prevent further loss to the suppliant. *Taff Vale Ry Co.* v. *Giles* (4); *Great Northern Ry Co.* v. *Swaffield* (5); 9 *American Century Digest* (6); *Beck* v. *Evans* (7); *Beal* v. *South Devon Ry* (8).

The suppliant should have been notified by wire of the state of affairs as soon as leakage was discovered. *Dominion Bank* v. *Ewing* (9).

The suppliant is entitled in any event to a return of the money paid for freight. There must be a delivery to perfect the right to freight. *Angell on Carriers* (10);

(1) 2nd ed. vol. 1, p. 132.
(2) 2nd ed. pp. 242, 243 and cases there cited.
(3) 34 S. C. R. 74; 3 Can. Ry Cas. 143.
(4) 2 E. & B. 823.
(5) L. R. 9 Ex. 132.
(6) Sec. 537.
(7) 16 East 244.
(8) 3 H. & C. 337.
(9) 35 S. C. R. 133.
(10) pp. 269, 362.

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Macnamara on Carriers (1); 5 *Am. & Eng. Ency. of Law* (2).

H. Mellish, K. C., for the respondent, contended that the freight had been earned, paid for, and the money could not be recovered back. Fifty per cent. of it had been paid over to the Canadian Pacific Railway.

There was no contract of carriage between the Crown and the suppliant, nor between the Crown and the Canadian Pacific Railway Company. *Mytton* v. *Midland Ry Co*; (3) *Wood on Railways.* (4)

There was no negligence by the officers or servants of the Crown. They did what they could to stop the leak when discovered. The real cause of the loss was a latent defect in the valve or discharge-pipe; a defect which could not have been discovered by an exterior examination of the car.

Mr. Davidson, in reply, contended that the Crown by accepting the freight recognized the contract of carriage, and from the time the car came into the possession of the Intercolonial Railway a contractual relation existed between the suppliant and the Crown.

THE JUDGE OF THE EXCHEQUER COURT now (January 12th, 1905), delivered judgment.

The petition is brought to recover damages for the loss of a quantity of sulphuric acid shipped by the suppliant in a tank-car from Lennoxville, in the Province of Quebec, and consigned to the Dominion Iron and Steel Company, Limited, at Sydney, in the Province of Nova Scotia. The shipping-bill was issued by the agent of the Canadian Pacific Railway Company; and from Saint John, in the Province of New Brunswick, to Sydney, the point of destination, the car was transferred over the Intercolonial Railway.

(1) p. 94.
(2) p. 405.
(3) 28 L. J. Ex. 385.
(4) 2nd ed. vol. 3, p. 1926.

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The car belonged to the suppliant, and was one of a number used by it in carrying on its business. To it was attached a discharge-pipe by means of which the acid is drawn off when the car reaches its destination. That is the office of the pipe. If it is in good order and closed the acid contained in the tank will not run away, but it is not relied upon to retain the acid in the tank. That is done by a safety-valve fitted at the bottom of the tank and held securely in place, or intended to be, by a rod connecting with the dome of the tank. As long as the valve is in good condition and properly secured the acid will be retained in the tank, even if the discharge-pipe is open. The tank-car, in which the acid in question here was contained, was received by the Intercolonial Railway at Saint John in good condition, that is so far as its condition could be ascertained by any examination of it that could be made; but such an examination would not show whether the safety-valve was in place or not.

When the freight train, to which this tank-car was attached, was near West River station, about twenty-one miles east of Truro, the conductor of the train noticed that something was wrong with the discharge-pipe, that it was cracked or broken and that the acid was running away. Taking waste he tried to stop the leak, but the acid set fire to the waste and he could do nothing. He then telegraphed to Mr. Fraser, the car Inspector at Stellarton, and proceeded with his train to that place, where he arrived, according to his evidence, about six or seven o'clock in the evening. Mr. Fraser says that the pipe was not at that time leaking very much,—the acid "was dropping." After discovering the crack in the pipe he found, that by springing the pipe a little to one side the leak could be stopped; and this he did and fastened the pipe in this position with a rope. His examination he says took place between nine

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and ten o'clock, and after dark. The train then proceeded to New Glasgow, where the condition of this car was brought to the attention of Mr. Yorkton C. Campbell, the District Superintendent of the Intercolonial Railway of Sydney, Truro and Oxford Districts. Mr. Campbell says that the substance they had to deal with being what it was, there was nothing they could do except to get the car to its destination as soon as possible. He estimated the leakage at about a gallon an hour; and he thought the loss between New Glasgow and Sydney would be between ten and fifteen gallons. So he telegraphed to the Strait of Canso to transfer the car at once and to arrange for the train to be ready on the other side to take it through to Sydney. This was done, with the result that, some forty miles east of Point Tupper, matters became so bad that the pipe was broken off completely and had to be plugged up as best the conductor and his crew could do it. When the car arrived at Sydney only a few gallons of acid were left in the tank.

By its petition the company suppliant alleges, in the first place, that the Intercolonial Railway, having received the car and its contents at Saint John, New Brunswick, in good order and condition, undertook and agreed with the suppliant to deliver the car and its contents for and on account of the suppliant in like good order and condition at its destination, at Sydney, Nova Scotia. And, in the second place, it is alleged that the loss of the acid was due to the negligence of the respondent's servants and employees acting within the scope of their duties, who, having ascertained that the car was leaking, neglected and failed to take proper and reasonable means to arrest the leakage, as they should have done; or to notify either the consignor or consignee of said leak to enable either of these to at once arrest the leak and save the acid.

For the Crown both the contract and the alleged negligence are denied.

The only contract the suppliant has proved is that which is evidenced by the shipping-bill issued by the agent of the Canadian Pacific Railway Company; by the terms of which the company was not to be liable for leakage of any kind or loss of liquids arising from any cause whatever; and this provision, with others, was to apply to every carrier to whom the goods might be delivered for carriage as fully as to the company. Whether this provision is large enough in its terms to protect the company from a loss of liquids due to the negligence of its servants, or if so, whether in the present state of the decisions such a defence would be open to it or to the respondent, need not be inquired into here. The Crown does not rely upon any such defence. Its position is that there was no contract between the suppliant and it, and it does not seek to take advantage of this clause of the contract between the suppliant and the Canadian Pacific Railway Company. Such a provision would, however, in any event protect the company from loss arising from any cause other than from its own negligence or that of its servants, and it is immaterial in that aspect of it whether the case be regarded as one of contract or one of tort. In neither case could the suppliant recover from the Crown without showing that the loss resulted from the negligence of an officer or servant of the Crown while acting within the scope of his duties or employment.

Now with regard to negligence, I think it is reasonable to conclude that the discharge-pipe mentioned was broken by coming in contact with some obstruction. But there is nothing to show that that happened through the negligence of any officer or servant of the Crown. This pipe was placed below the platform of

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the car where it was more or less liable to come in contact with an obstruction upon the way. In the more modern form of such cars, the discharge-pipe is placed above the platform where it is much less exposed. Ordinarily of course there should be nothing upon or near the track or way with which a pipe situated as this one was would come in contact; but that might happen by accident, or by the act of some person not in the employ of the Intercolonial Railway, as well as through the negligence of some servant of the railway; and, in the two cases first mentioned, the officers and servants of the railway would not be negligent unless they failed to discover and remove the obstruction within a reasonable time. The fact that a pipe, situated as this one was, was found to be cracked or broken without anything to show how that happened is not, it seems to me, sufficient to sustain the suppliant's petition. The Crown is not in regard to liability for loss of goods carried in every respect in the position of an ordinary common carrier. The latter is in the position of an insurer of such goods, and any special contract made is in general in mitigation of its common law obligation and liability. The Crown on the other hand is not liable at common law, and a petition will not lie against it for the loss of goods carried on its railway except under a contract, or where the case falls within the statute under which it is in certain cases liable for the negligence of its servants (50-51 Vict., c. 16, s. 16), and in either case the burden is on the suppliant to make out his case.

It has been observed that the breaking of the discharge-pipe would not have resulted in the loss of the acid if the safety-valve had been in position and in good order. The suppliant's contention as to that is that the safety-valve was in good condition; that it had been placed in proper position and secured before

the car left its place of business, and that it had been dislodged, probably on the occasion when the discharge-pipe was broken. It is also part of its case that this displacement of the safety-valve took place without the safety-valve being broken or injured. But that does not seem to me at all probable. If it were in good repair and properly fitted and secured, I do not well see how it could be dislodged without being broken, and we may, I think, dismiss that view of the matter. But if it had been broken as well as dislodged evidence ought to be available to show that fact, and there is none. The car was returned to the suppliant, and if this safety-valve had been broken the fact would no doubt have been discovered. So we may, I think, dismiss that view of the case also. The only other view open is that the witness who says that the safety-valve was in good repair, and that he fitted it into its place and secured it in that position before the acid was shipped, is mistaken. I have no doubt that he thought, and still thinks, that he did what he says he did; but it is much more probable that he is mistaken as to that, than that the safety-valve could have been displaced without breaking or injuring it. There is of course no means now of ascertaining what the actual fact was; but the probability is that the safety-valve was not in proper position when the acid was shipped, and if that were the fact the company suppliant was, to that extent at least, responsible for the condition of affairs with which the servants of the Intercolonial Railway had to deal when the leak was discovered.

Now with regard to the means taken to prevent or minimize the loss of the acid, and the allegations that there was negligence in not taking proper means to that end, it is said in the first place that by removing the dome of the tank car the safety-valve could have

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been placed in its proper position. That of course is on the assumption that the safety-valve was in good order. But no one of those into whose charge this car passed would know that. If they had understood the construction of the car they would have had a right, in the first instance, to conclude that the leakage would be confined to the small quantity of acid that happened to be in the discharge-pipe; but afterwards when they found that the leakage continued, the natural conclusion would be that the safety-valve was broken or out of order. If they had understood the construction of the car they might, it seems, have removed the dome of the car to see if the safety-valve was broken or injured, or only displaced; but no one of them seems at the time to have been aware of the construction of the car, and I do not think that their ignorance in that respect is to be imputed to them as negligence. Then it is said that some one should have communicated with the consignor or consignee by telegraph to inform them, or one of them, of the state of affairs. That is an observation that would apply to Mr. Campbell, the District Superintendent at New Glasgow, if to any one. He admits that he could have done that; but adds that it would have been useless as far as the car was concerned. It was, of course, out of the question for him to hold the train while he communicated by telegraph with the consignor or consignee. He either had to hold the car at New Glasgow, and let the train proceed, or he had to hurry the car to its destination. At first I was inclined to think that Mr. Campbell had acted imprudently in allowing this car to proceed further than New Glasgow, without taking steps to have this leak stopped if that were possible; and in case he found that to be impossible that he ought then to have adopted some means to save the acid. But when one

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comes to consider what it was he had to deal with, and the improbability of there being at New Glasgow any suitable vessel to hold the acid in case the leak could not be stopped, it is not at all clear that he did not exercise a reasonable judgment in deciding to send this car to its destination as quickly as possible. No doubt the course he adopted turned out badly; but it is not certain that any other course which he might reasonably be expected to adopt would have turned out better; and if I am right in thinking that it is probable that the car in which the acid was carried was sent out without the safety-valve being placed and secured in its proper position, the suppliant must in the disposition of the case be taken to have contributed towards creating the emergency with which he had to deal. Under all the circumstances, I do not think that the facts of the case would justify a finding that Mr. Campbell was guilty of negligence in respect of the goods in question; and with regard to all the other servants of the Intercolonial Railway into whose charge the car passed, after the leak was discovered, there is no ground for imputing negligence to any of them. Each did, I think, the best he could under the circumstances in which he found himself.

By an arrangement between the Dominion Iron and Steel Company, the consignee of the acid in question, and the Intercolonial Railway, freight charges on goods consigned to the company were paid at stated times each month, and in case anything was found wrong a refund was made to the company. In the present case the consignee paid the freight on the acid, amounting to one hundred and thirty-five dollars, with a number of other items amounting in all to something over two thousand five hundred dollars; but no refund has been received from the railway. The amount was repaid to the company by the suppliant, and now forms part of

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its claim against the respondent. This matter was not much discussed, but it appears that the freight was not payable on the transportation of the tank-car, which, as has been noticed, was the property of the suppliant, and which was delivered at Sydney to its consignee; but it was payable, so far as I can make out the fact from the evidence before me, on the acid contained in the car, at the rate of twenty-seven cents for each hundred pounds of acid. The sum of one hundred and thirty-five dollars mentioned represents the freight at the rate mentioned on 50,000 pounds of acid at which the contents of the car seem to have been estimated, the actual quantity being, it appears, something more than that. Of the quantity shipped some eighty gallons only were delivered to the consignee. The weight of the acid delivered is said to be 1,440 pounds, and the freight on that would amount to $3.89. The balance of the $135 00 paid for freight ought, it seems to me, to be repaid to the suppliant, with interest from November 28th, 1902, the date on which the petition was left with the Secretary of State.

There will be judgment for the suppliants for one hundred and forty-five dollars and four cents. With respect to costs, the suppliant while succeeding as to part of the amount claimed, has failed on the main issue in controversy. But instead of attempting to apportion the costs it will, I think, be fair (certainly it will be more convenient and less expensive) to leave each party to bear its own costs.

Judgment accordingly.

Solicitor for the suppliant: *Peers Davidson.*

Solicitor for the respondent: *H. Mellish.*

IN THE MATTER of

THE ATLANTIC AND LAKE SUPERIOR RAILWAY COMPANY.

1905
Jan'y 18.

Scheme of arrangement—Motion to restrain pending action—Grounds for refusal.

In proceedings taken to confirm a scheme of arrangement, filed by a railway company under the provisions of sec. 285 of *The Railway Act*, 1903, an application was made, on behalf of the railway company, for an order to restrain further proceedings in an action against such company begun in the Superior Court for the District of Montreal, by certain creditors, before the filing of the scheme of arrangement but which had not proceeded to judgment:

Held, that as there were real and substantial issues to be tried out between the parties in the action pending in the Superior Court, the same ought to be allowed to proceed pending the maturing of the scheme of arrangement. *In re Cambrian Railway Company's Scheme.* (L. R. 3 Ch. App. 280 n. 1) referred to.

MOTION to restrain proceedings in another court pending the maturity of a scheme of arrangement filed under the provisions of sec. 285 of *The Railway Act*, 1903.

January 18th, 1905.

The argument of the motion was now heard at Ottawa.

F. S. Maclennan, K.C., in support of the motion, contended that, pending the maturity of the scheme of arrangement herein, all proceedings against the company in other courts should be restrained. It is a principle established by the English cases decided under the provisions of *The Railway Companies Act*, 1867, from which section 285 of the Dominion Railway Act of 1903 is taken, that a company, having filed a scheme of arrangement with its creditors, should not

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be harrassed by litigation pending its confirmation. *In re Cambrian Railway Company* (1), *In re Potteries &c. Ry. Co.* (2), *In re Devon and Somerset Railway* (3).

The action we seek to restrain is against the company, in the Superior Court of Montreal, and is by the pledgees of certain bonds and interest coupons issued by the company. This action was brought in August, 1904, but has not yet been tried. The defence to this action sets up, among other things, that the plaintiffs, as pledgees of the said bonds and coupons, have no right to sue the company for the payment of the said securities under the laws of England, which govern the case. It was also set up by the defence that the bonds in question are subject to a mortgage and deed of trust for the bondholders, and that the trustees were not parties to the action. On the 21st December, 1904, the trustees for the bondholders intervened in the action, asking for judgment against the company for $380,480.80, with interest, and subsequently the plaintiffs presented a motion in the Superior Court to have certain of the bonds, which had been transferred by them, registered in the names of the transferees in the company's books. The object of this motion is to enable the transferees to appear and vote at meetings of the company. The scheme of arrangement makes provision for the cancellation of these bonds and seeks to effect a reasonable arrangement with the creditors of the company. We submit, under the circumstances, no further proceedings ought to be allowed in this action until the scheme of arrangement, filed in the Exchequer Court, is confirmed under the provisions of *The Railway Act*, 1903. (*Devas* v. *East and West India Dock Co.* (4).

(1) L. R. 3 Ch. App., 278, at p. 296.
(2) L. R. 6 Eq., 610, at p. 614.
(3) L. R. 5 Ch. App., 67, at p. 71.
(4) 61 L. T. N. S., 217.

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T. C. Casgrain, K.C., contra, contended that the English cases cited did not apply, because the constitution of the courts here was not only dissimilar to those of England, but they exercised an entirely distinct and separate jurisdiction. Moreover, the Exchequer Court was not asked to interfere by restraining the execution of a judgment of a provincial court. Until a judgment was sought to be enforced against the property of the company, this court should hesitate to interfere with the proceedings of another court in the exercise of its jurisdiction. He cited *The Railway Act*, 1903, sec. 285, subsecs. 2 and 4.

The action now pending in the Superior Court was begun in August last, and the scheme of arrangement was not filed in this court until December last. The motion to register the bonds transferred in the names of the transferees is still pending, but clearly the transferees have a right to the registration of the bonds as transferred so that the transferees may pursue all the benefits which such registration will give them.

In such a case as this there is no precedent in the English courts to show that the Exchequer Court should grant this motion and restrain the proceedings pending in the Superior Court.

Mr. *Maclennan* replied.

Per Curiam: This does not appear to me to be a case in which the court should exercise the power, given by statute (*The Railway Act*, 1903, s. 285, ss. 2), to restrain action against a railway company that has filed a scheme of arrangement. There is really something to be tried out in the action which the company seeks to restrain and, in such a case, it would appear to be the safe course to allow the matters in controversy to proceed to a hearing or trial. (Per Sir W. Page Wood, V. C. *In re Cambrian Railway Company's Scheme* (1).

(1) L. R. 3 Ch. Ap. 280 Note (1).

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When it is considered that althcugh the Act contemplates a scheme of arrangement between a company, unable to meet its engagements with its creditors, and such creditors, there is no provision whereby any creditor may be bound by such scheme unless he actually assents thereto, it would seem that a creditor's right of proceeding with his action ought not to be interfered with except on very strong grounds. An execution, attachment or other process against the Company's property by which the Company's undertaking may be destroyed, or put in jeopardy, is another matter and as to these the Act provides that no such process shall be available without the leave of the court. But I do not see why an action such as that which the court is here asked to restrain and in which there are real and substantial issues to be tried out between the parties should not be allowed to proceed pending the maturing of the scheme of arrangement.

The application will be refused.

Order accordingly.

IN THE MATTER of the Petition of Right of

MAHLON FORD BEACH.....SUPPLIANT; 1905

Feby. 15.

AND

HIS MAJESTY THE KING.....RESPONDENT.

Lease of water-power—Stoppage of power on improvement of canal—Damages—New lease—Waiver—Surrender—Measure of damages—Loss of profit—Dissipation of business.

The suppliant was the owner of a flour-mill at Iroquois, Ont., which was built upon a portion of the Galops Canal reserve, and, prior to December 12th, 1898, was operated by water-power taken from the surplus water of the canal. The site upon which the mill was built, as well as the water-power sufficient to drive four runs of ordinary mill stones, equal to a ten horse-power for each run, were held by the suppliant under a lease from the Crown. On that date the canal was unwatered to facilitate the construction of certain works that were being carried out, by the Government of Canada, for its enlargement and improvement. At that time it was not intended that the stoppage of the supply of such surplus water to the mill should be permanent, but temporary only. Subsequently, however, certain changes in the work were made which resulted in such supply being permanently discontinued. These changes were made by the Crown, at the request of the suppliant, and others, for the purpose of developing the water-power, of which the suppliant expected to obtain a lease on favourable terms. If the suppliant had obtained a lease of considerable power, as he had hoped to get, he would have been willing to release all claim for damage arising from the loss of the forty horse-power supply of water he had under his first lease; but in the end the Minister of Railways and Canals was not able to lease the suppliant as much power as he had expected, and in accepting the lease of a smaller quantity of power it was agreed between the latter and the Department that his rights under the earlier lease should not be affected by the grant of the new one.

Held, that the suppliant was entitled to recover compensation for the loss of power to which he was entitled under the earlier lease.

2. The court did not include in such compensation any claim for loss of profits or for dissipation of business, because, on the one hand, in its inception the stoppage of water was lawful and within the lease, and there was no ground upon which such claim could be allowed

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except that founded upon a change in the works that was made in part at the instance of the suppliant and to meet his views, and wholly with his acquiescence and consent; while on the other hand he had at all times a well founded claim either to have the power granted by the former lease restored to him, or to be paid a just compensation for the loss of it.

3. It was provided in the first lease that the suppliant would have no claim for damages in the event of a temporary stoppage of the water for the purpose, *inter alia*, of improving or altering the canal. Upon the question whether the stoppage of the water supply for the period of two and one half years, being the time actually necessary for the execution of the works for enlarging and improving the canal, would have been a temporary stoppage within the meaning of the first lease.

Held, that having regard to the subject-matter of the lease, any stoppage of the supply of surplus water actually necessary for the repair, improvement or alteration of the canal, in the public interest, and to meet the requirement of the trade of the country, would be temporary within the meaning of the provision above referred to, although it might last for several years.

4. Upon the question as to whether the acceptance by the suppliant of the lease of 1901 worked a surrender of the grant of surplus water made by the former lease,

Held, that as there was nothing within the two leases which would go to affect the validity of either of them, and there was no inconsistency between them, the two leases should stand.

5. That the damages herein should be measured by the cost of supplying and using for the operation of the mill forty horse-power furnished in some other way than by the water supply in question.

PETITION OF RIGHT for damages for breach of covenant in a lease.

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

October 5th, 6th, 19th and 20th, 1904.

The case was heard at Ottawa.

G. F. Shepley, K.C. and *I. Hilliard* for the suppliant;

F. H. Chrysler, K. C. and *N. G. Larmonth* for the respondent.

Mr. Shepley, for the suppliant, contended with regard to the power of the Minister of Railways and Canals that the first lease only enabled the minister to

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cause a temporary stoppage of the water supply demised. The provision in the lease mentioned does not extend to the permanent stoppage and deprivation of the water by the minister such as actually took place upon the evidence. The Crown, therefore, cannot avail itself of this provision in the lease to minimize the damage. This provision must be construed strictly, because it professes to take away the right of the lessee to a continuous and uninterrupted use of the water. Again, the stoppage did not occur by reason of the repair, improvement or alteration in the canal; but, by reason of the building of an entirely new canal, and destruction *pro tanto* of the old. The court must apply this clause in the lease to precisely the thing contemplated by it, before the suppliant can be penalized by taking away a right of action which has accrued.

In the next place it is contended on behalf of the Crown that the taking of a second lease by the suppliant operated in law as a surrender of the earlier lease, and that such earlier lease being gone, no right of action in respect of a breach of it can be maintained.

Then I come to the next point. Counsel for respondent contends that the effect of taking the second lease is to operate in law as a surrender of the earlier lease, and that the earlier lease being gone, no right of action in respect of a breach of it can be maintained.

Now, I take issue, both as a matter of law and as a matter of fact with my learned friend. What is the fact in respect to that? In the first place it is quite manifest that at the time the second lease was taken, the subject-matter of that lease was something absolutely and entirely distinct from the subject-matter of the first lease. The subject-matter of the first lease was the land upon which the mill is situated and the power to run the mill. The subject-matter of the second

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lease was an entirely distinct and separate parcel of land, together with the right to take 200 surplus horse-power from the water at the weir not for the purpose of running the mill, or being a substitute for the 40 horse-power, but for commercial purposes. In the second place it is perfectly manifest upon this evidence and upon the documents that all claims in respect of the first lease were kept on foot at the time the second was negotiated, and the second does not profess to put an end to the first ; nor does it upon its face bear any possibility of such a construction,

Now, when you understand that Mr. Maclennan was in charge of these negotiations on behalf of the suppliant at the time they culminated in the lease, and when you hear what Mr. Maclennan says, that this very matter was made the subject of discussion between himself and Mr. Ruel, the Law Clerk of the Department, that upon their coming to an agreement by which all rights under the first lease were to be preserved, and by which the first lease was to be left on foot and unaffected, they went to Mr. Schreiber, who was the executive head of the Department, and that he confirmed the agreement, and then you take up the lease and find it does not profess to operate as a surrender, I say I am at issue with my learned friend upon the question of fact. I say the evidence here is not competent to establish the proposition as a matter of fact which this defence urges. But, the defence is also bad as a matter of law. Let me emphasize the difference between the two leases. As I pointed out to your lordship the land is different, the power is different, the purposes for which it was to be used are different, the first lease is a perpetually renewable one ; the later one is subject only to two renewals for two further terms of 21 years, and therefore can only operate at most for 63 years. The earlier lease was a

lease which was not forfeitable except for default of the lessee. The second lease is forfeitable at the option of the Crown, without any default upon the part of the lessee. All these differences between the subject-matter of the first, and the subject-matter of the second lease emphasize the point which I am going to make, that the second cannot be treated in law as operating as a surrender of the first. (Cites *Woodfall on Landlord and Tenant* (1).

Then let us come to the plea of estoppel, or what is virtually a plea of estoppel, and let us examine that plea, because I have ventured without intending any disrespect at all to the pleader, to speak of this as a "limping estoppel." Your lordship is familiar with the essentials of an estoppel, and we will see that they are not even alleged here. (Quotes from the statement of defence).

Now, let us examine the facts, having regard to the pleadings. Mr. Douglas was the engineer who made the report upon which this work was constructed long before Mr. Beach could have had any possible connection with the matter. Mr. Douglas recommended the construction of this weir to the Department, of which he was an officer at precisely, or practically, the same point at which it was subsequently erected. How can it be said that the Department, or Mr. Douglas reporting to the Department, could have been influenced in the slightest degree as a question of policy in the management of the Department, by any representations that Mr. Beach had made, if he had made any? But, is there any evidence that Mr. Beach did anything of the kind? My learned friend points to some action of the municipal council of which Mr Beach is said to have been a member during the year. For anything we hear, Mr. Beach may have opposed it. There is not anything here showing Mr. Beach's individual action

(1) 17th ed. pp. 334, 335.

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even as an individual member of the council. It is perfectly true, and to that extent my learned friend is entitled to comment upon his evidence, that once the idea of building the weir at this point was an idea which had become the policy of the Department, Mr. Beach was most anxious, as a commercial matter, that he should be able to make arrangements with the Crown by which he would secure the valuable power right in connection with the weir; and from the beginning to the end of the negotiations that is what Mr. Beach was anxious to accomplish. He did not in the end accomplish it, or anything like it; but that is an entirely different thing from inducing the Government to alter its policy to bring the weir to where it was erected for the purpose of altering the supply to the mill. Thus we find the plea is not proved.

Now the central proposition which I present for your consideration as regards the measure of damages in this case is this: That so long as Mr. Beach properly refrained from ameliorating his condition by the construction of permanent works, his measure of damages is the loss of his profits in the business of milling carried on by him at this mill, and as soon as it became—I will not use the word "proper" here—as soon as it became *obligatory* upon him to take measures in his own relief, the right to profits, as such, ceases, and he is entitled to recover what it will cost him by way of capital outlay, and by way of increased annual expenditure in the future, as the balance of his compensation for the wrong which has been done to him.

I have read the correspondence in this case so as to get a chronological historical account of what was going on. Your lorship sees the position from the beginning practically was this: Mr. Beach was negotiating for the water-power with a view to making it commercially valuable, not alone with a view, or even

principally with the view, of getting power for the operation of his mill; that, incidentally, he would have got no doubt from the company which he was to form. What was his position? Was he bound—because you must go that far, he must be bound as a matter of law, notwithstanding this inexpensive way, comparatively, of minimizing the damages which the Government were bound to pay him—was he bound to put up permanent plant?

Addressing myself to this point just for a moment, and not intending to repeat anything I have said, if this were a case where I was seeking to apply the principles which I am seeking to apply to this case, to small figures, I do not suppose there would be any dispute about the proposition. If Mr. Beach's profits were a matter of a couple of hundred dollars a year, and if he had lost them by this breach of contract, I suppose nobody would say or think of saying that they were not properly recoverable. It is because the figures are large that every effort—I do not say at all improperly—is made to get away from the application of the plain principles of law.

Mr. Hilliard followed for the suppliant.

Clause 8 of the new lease is one in which the additional or surplus water is given over and above the 200 horse-power, and by reading that closely one can easily see that the 40 horse-power was excepted from and out of the grant of the 200 horse-power. Let us take clause 8. There are the words, "now under lease." That was drafted before it was signed. At the time this was signed these words were there.

Now, what was the power "now under lease," when that was drafted. There were the Edwardsburg power, the Iroquois horse-power and the 40 horse-power that Mr. Beach had in the lease which was given in 1853 and renewed in 1871.

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Then it was "now under lease on the Galops Canal." Then it says "additional." Additional to what? Additional to what was now under lease, and what was now being granted. That to my mind makes the thing perfectly clear that the party who drafted this had in his mind what was in that memorandum of March, 1901, that it was not to include the 40 horse-power. He uses apt words to express exactly what the parties had come together and were at one about. And, it was then to be the balance of the term in the present lease. So that I contend that in the contract, in the actual writing of the contract itself, the 40 horse-power was excepted out of the contract just in the same way that the Edwardsburg power was excepted out of it, or that the village of Iroquois power was excepted out of it.

The new lease, as I call it, of 1901, does not say: "We give you 200 horse-power after the Edwardsburg Company gets theirs, or after the Iroquois Company gets theirs, or after you get your 40 horse-power" It does not make it subsidiary, or subject to what has been granted; but under this clause these other three were assumed to have been given, and this was given alongside of it. Then anything additional that he gets under his option has to be after all this other is provided for, which would include the 40 horse-power.

Then in addition to the differences that my learned colleague dealt with between the two leases, there is this further difference. Under the lease of 1871 it was provided that his structures, his erections and fixtures and so on, were to be paid for under the arbitration clause; and he would be fully indemnified with the addition of 10 per cent. Under this lease, the lease he was accepting in 1901, he does not get any of these allowances. All he has to do is to move his fixtures away, which would be merely scrap.

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Would it be consistent that a man would allow as favourable a lease as that of 1871 to become merged or surrendered in one of the character of the new lease?

Mr. Chrysler, for the respondent: In the first place it seems to me convenient to say that I regard the situation of the parties after the lease of the 26th August, 1901, as quite different from the position which they occupied before. That is the date of the second lease. And I think it will be convenient to begin there, although that is not in time the beginning of the history. There is a question of the position of the parties after the lease, and its application to the question of the permanent damage, if any; and in the interval between the 12th December, 1898, and the giving of that lease, there are two answers which are to be made to the claim of the suppliant. The first is the clause in the lease referring to the temporary stoppage, which I shall argue shortly, and the other is the larger answer, which may not perhaps amount to a complete estoppel, preventing the suppliant from obtaining damages at all. If it does not amount to that, it perhaps is very strong, if not complete, evidence in reply to his claim for damages, showing that he was a consenting party to all that was done, and is not in a position to claim damages for that which was done with his consent. That perhaps is not estoppel, but goes to the question of damage. It may be considered in both views.

With regard then to the effect of the second lease, as I understand the question, the principle upon which an estoppel by operation of law works is something by which the person against whom the estoppel operates has released, or conveyed some interest which he might have conveyed otherwise by deed. The *Statute of Frauds* refers to the subject, and says that a lease

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otherwise than by operation of law shall be by deed or note in writing.

[*Mr. Shepley*: You mean a surrender?]

Yes. So that so long ago as the *Statute of Frauds* the phrase had a meaning, and its meaning was that the conduct of the parties, whatever it might be, was something that was equivalent to a deed.

Now I am applying that, for the moment, to the question of the separability of the right to obtain water from the lease of the land. I say that the principle of the operation of surrender is quite as applicable to an easement in land as for a surrender of a portion of the land itself, because it was quite possible for Mr. Beach to release to the Crown by deed the right which he had of having delivered to him a portion of the surplus water for the use of his mill, and retain the lease of the land and the mill; and if that can be done by release, it is a thing which may also be the subject-matter, if the facts are applicable, of a surrender by operation of law.

I may not be able to find an exact case in which that has happened. That is to say, I have not at this moment a reference to any case in which the surrender of an easement, without the surrender of the principal thing to which it belonged, by operation of law, has been held to be possible; but there are numerous analogous cases - take for instance the case of a subsequent lease of premises, a part of which coinciding with the premises in an existing lease, and it was held to be a surrender by operation of law of so much of the original lease as covered premises coincident with those in the new lease.

[*Mr. Shepley*: Supposing there is a total rent reserved for the whole?]

I do not think it matters whether the terms are the same in the two leases. The second lease may be for

a shorter term than the first, it does not matter. This is the principle upon which it rests, and which governs the whole law upon the subject, namely, the person who by accepting a lease has admitted the authority of the lessor to make that lease thereby surrenders everything under a previously existing lease of which he has taken the second grant or demise; because he cannot be permitted to say that the lessor had not authority to make what is contained in the second lease. This principle appears to have been for the first time distinctly called in question in the judgment of the Court of Exchequer in *Lyon* v. *Reid*, (1).

Now, in our case one needs to examine the leases. In the first place it is not power that is granted or leased. There is in each case a lease of some particular parcel of real estate. Then there is a lease of a certain measured amount of surplus water to be delivered from the Galops Canal. I point to the plan. In the first place my learned friend says it is a new canal. I say it is not a new canal. It is part of the identical canal from which the old surplus water was to be delivered. It is true there is a change in the dimensions of the canal. The canal has been widened. A new lock has been constructed outside of the old lock, and for some distance, perhaps 12 or 15 hundred feet, there is a point of land between the prism of the old canal, and the prism of the new canal; but above that point the two are brought together, the prism is one, the old branch of the old canal is on the north side just where it was, and on the south side it has been carried farther out. The new lease is for surplus water from the Galops canal, with certain alterations which the Government have made in it. That is the thing which is the subject-matter of the lease in both cases, certain surplus water of the Galops canal.

(1) 13 M. & W. 305.

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Now, the difference as to quantity is this. In the first place it was granted to Mr. Beach and his predecessors in title under the old lease, 40 horse-power out of a large quantity. Under the second lease there is granted to him 200 horse-power, being all that there is of surplus water at the point in question. Now, I am not at all disturbed by the evidence as to the quantity that might be delivered there. I go to the terms of the lease itself to ascertain what Mr. Beach got under his second lease, and for that purpose one requires to examine the terms of the lease. Now, the whole lease has to be read, and with the lease has to be read the general terms and conditions which are annexed to it, and which are declared to be part of it; and we have also to look at the plans.

There is one clause of the lease I wish to mention. The clause as to temporary stoppage. The question is what is meant by "temporary stoppage." I do not know that the term temporary stoppage has any limited meaning. Here is a lease that is perpetual, it runs for a thousand years, or a great many more. Could we say that two or three years is not temporary in relation to that period of time? I do not think the word "temporary" can be construed in that way. It has reference to surrounding conditions. We look to see what is meant by the context, and it is "temporary stoppage" of the flow or supply of surplus water.

There is no great hardship in it if you look at the facts. From 1853 to 1901, for 48 years, the suppliant and his predecessors in title had enjoyed this water-power at what your lordship calls, and what upon the evidence of these millers is said to be, a nominal rental. In the whole of these 53 years, so far as appears, this is the first disturbance that has taken place by reason of alterations being required to be made in the canal. The character of the alterations are here. In the very

nature of them they are extensive, and so far as Mr. Beach's complaint is expressed in this letter, that it was unnecessary, or that unnecessary trouble was given to him, I do not think that can be sustained upon the facts. Mr. Carman, I think, told us they commenced the work, in January, 1899, of building a dam. The work was commenced within less than a month from the time the water was let out of the canal. The suppliant said the water was taken off without warning. I produce the notice served upon him in September. Mr. Beach himself was not put to any disavantage so far as this correspondence discloses. He adopted two methods of coping with the difficulty. In the first place he installed his steam-engine, and he at once set about considering the other question of providing electrical machinery for his mill. The letter with regard to that is, I think, in February of 1899. He has not himself established in any way and no witness has said, that the water was allowed to be out of the canal while the work was suspended.

It was never intended to give him 200 horse-power and to continue to give him the 40 horse-power; but I do not see, short of that, where one can fix a point where it ceased to be temporary, unless you take the progress of the construction. At some point of time, we commenced building and completed that weir; and that probably may be taken as the exact point where it was determined that the water would not be supplied to him in the old way at the old place; but there is this difficulty about that—if my contention is right as to the scope of the second lease—at the time they gave him all the available power at the weir, it was still open to them to give him a pipe or conduit for the 40 horse-power, and in that view it would be

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only a temporary stoppage up to the time of the second lease.

I say the suppliant never asked the Government to give back his power in the old way at the old place If he did there is no evidence of it. Now, why not? My learned friend says that he was very badly treated, and that so much time was wasted in giving him this lease it prevented him from taking steps to protect himself. I appeal to the correspondence and ask your lordship to say that a great part of the delay which took place is his own fault. He ultimately got a lease which he accepted. If he did not like it he need not have taken it. He did take it. The best evidence that it was satisfactory to him is that he took it. He cannot come here now and say "I wanted more and did not get it, and I am very badly treated because I did not get it." He did get ultimately a lease, and he spent the interval practically between the letting out of the water and the date of that lease in forwarding plans, suggesting alterations, in asking for the whole width of the power to be granted to him.

I have only this additional observation, namely, that the delay was not the delay of the Crown; the work was going on. There was no delay there that we know of. The delay was in getting th · lease.

It seems to me incredible, if Mr. Beach was suffering this enormous loss in profit, of which evidence has been given, that he did not keep his mill going. If he was going to lose a business that was of such value to him, it seems difficult to explain why, when he was keeping it going in a measure by the use of that steam-engine from April, 1899, un il some time in the summer of 1900, why he took it away and carried i. to some other mill. It was easy enough to replace, or easy enough to supply the other mill with a machine.

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On the question of estoppel see 2 *Smith's Leading Cases* (1).

Mr. *Shepley*, in rely: The pivotal point of my learned friend's argument upon the effect of the second lease is, if I understand him correctly, that the subject-matter of the second lease is the same as the subject-matter of the first; that is, that the 200 horse-power is all the available horse-power that can be got at that weir, and that therefore there can be no co-existence of that lease with the former lease of 40 horse-power. I am quite unable to follow my learned friend on the last point. I do not know any rule of law which says there is to be a surrender by operation of law because the landlord does something wrongly which destroys your enjoyment of the leased premises. The question is what is the effect of the lease which you have taken. If you take a lease of the same property for a different term, as my learned friend puts it—because there are cases that go that far—if you take a lease of a portion of the same property for a different term, you, as to that portion of the first or the whole, as the case may be, surrender it by operation of law; but that must depend, wholly, or partially, upon the subject-matter of the lease. And if this second lease does not profess to determine, and there is no evidence that the minister has ever determined it, that the 200 horse-power is all that is available, is all that there is there, then there is an end, I venture to think, of my learned friend's contention. Now, this is what the second lease says, and grammatically it does not bear the construction that my learned friend is placing upon it. It says, 'together with the right of drawing from out of the canal 200 horse-power of the surplus waters flowing through." That does not say that 200 is all. On the contrary, the language used would negative that idea; and when

(1) 10th ed., p. 813.

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my learned friend turned to Mr. Douglas' report, in which Mr. Douglas says 200 is all that is available there, how can that have any bearing upon the construction of the lease itself? It is perfectly manifest from what Mr. Holgate says that Mr. Douglas did say that he was entirely in error about it; and there is no evidence that the minister has adopted that and fixed, as no doubt he might do, upon that as the sole surplus, because the regulation permits him to do that. Then Mr. Douglas himself admitted in the witness box there was an erroneous calculation as to the area of entrance, as he says (and his whole report is based upon that) that it is 96 square feet only. Mr. Holgate has shown, and the plans show, and he himself admits, it is over 200. It does not seem to me, however, that we can at all argue the effect of the second lease by seeing what Mr. Douglas reported or did not report prior to this work being taken up.

Mr. *Hilliard*, by permission, cites *Smeed* v. *Foord* (1), *Hydraulic Engineering Company* v. *McHaie* (2).

THE JUDGE OF THE EXCHEQUER COURT now (February 15, 1905) delivered judgment.

The suppliant is the owner of a flour-mill at Iroquois, in the County of Dundas and Province of Ontario. It is built upon a portion of the Galops Canal reserve, and, prior to December 12th, 1898, it was operated by water-power taken from the surplus water of the canal. On that date the canal was unwatered to facilitate the construction of certain works that were being carried out by the Government of Canada for its enlargement and improvement. At that time it was not intended that the stoppage of the supply of such surplus water to this mill should be permanent, but temporary only. Subsequently, how-

(1) 28 L. J. C., 178. (2) 4 Q. B. D., 670.

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ever, certain changes in the work were made which resulted in such supply being permanently discontinued. For damages which he suffered from being deprived of this water, the suppliant on the 23rd of March, 1904, filed his petition of right and thereby asked that it may be declared that he has "suffered "damages in the premises of at least $93,381.12, being "the net profits of the said mill from 12th of December, "1898, to the present time, and the taxes and insurance "aforesaid: $20,751.36 for the dissipation and destruc-"tion of his said business; and that he is entitled to "damages at the rate of $20,751.36, and the taxes and "insurance yearly until the said surplus water is "furnished to his mill by the Government, and that "he is entitled to recover the same from the respon-"dent." When the case was opened it appeared to be common ground that the question to be determined was the measure of damages, the suppliant's right to succeed as to something not being denied. Afterwards, however, an amendment of the statement of defence was allowed by which a surrender to the Crown of the right to such surplus water by the suppliant's acceptance of a new lease thereof was set up; and it was also alleged that the changes in the work mentioned, which resulted in the discontinuance of such supply, were made at his solicitation, and that he was not entitled to damages for such discontinuance. There was also during the progress of the trial some change of position in the presentation of the suppliant's claim. The proposition as to the measure of damages, which in his argument Mr. Shepley presented for consideration, was stated by him in this way: "So long as the suppliant properly "refrained from ameliorating his condition by the "construction of permanent works his measure of "damage is the loss of his profits in the business of

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"milling carried on by him at this mill. As soon as "it became obligatory upon him to take measures in "his own relief, the right to profits as such ceased and "he is entitled to recover what it would cost him by "way of capital outlay, and by way of increased "annual expenditure in the future, as the balance of "his compensation for the wrong that has been done "him". But no amendment of the petition was asked for. Without objection, however, evidence had been adduced to show what the cost of supplying the mill in some other way with the necessary power, and of operating it, would be. And in the end it was agreed that if the suppliant were found entitled to damages they should be assessed once for all, and be an end of the litigation between the parties in respect of the matters in controversy. Whatever amendment of the petition of right is necessary to enable that to be done ought under the circumstances to be made.

The Galops Canal is a public work of Canada, being one of the canals constructed and maintained to improve the navigation of the River St. Lawrence. The demise of the portion of the canal reserve on which the mill was situated, with a right to use surplus water from the canal, was first made in 1853. The lease was renewed in 1871 and was assigned to the suppliant in 1883. The lease of 1871 was made for a term of twenty-one years, renewable in perpetuity for like terms, subject at the termination of each term to a revision of the yearly rent. With the lands demised was granted the use and enjoyment of so much of the surplus water of the canal as should be sufficient to drive and propel, by means of the most approved description of wheel, four runs of ordinary mill stones, equal to a ten horse-power for each run. Water was supplied from the canal at a point above what was known as Lock No. 25, and was carried to

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the mill by a flume or race-way constructed by the lessee at his own expense. Surplus water was water not required for the maintenance and operation of the canal as a water-way for vessels. The free and uninterrupted navigation of the canal, and the use of sufficient water for that purpose, was the first object to be attained. The use of such water for developing power was a secondary use and applied only to the surplus water; and the lease shows that it was in the contemplation of the parties thereto that the latter use might at times be interrupted. Among other things, it was therein provided as follows (the provision being found in the second proviso or condition):

"In the event of the temporary stoppage of the flow "or supply of surplus water, or a portion thereof, "hereby leased, by reason of the same being required "for the navigation of the said canal, or by reason of "repairs, improvements or alterations being by the "said Minister or his successors in office, or his officers "in that behalf, deemed necessary or desirable to be "made to the same, or for the purpose of preventing "damage to the said canal, by means of extreme high "water or by frost or ice, or any other uncontrollable "cause or accident, no abatement of rent shall be "claimed or allowed, nor shall the said lessees, their "heirs, executors, administrators or assigns, have or "pretend to have any right to any compensation what-"ever on account of the injury or damage that such "stoppage of the flow or supply of surplus water may "occasion, save and except only in the event of the "total stoppage of the said flow or supply of surplus "water for and during an uninterrupted period of six "calendar months during the usual navigation season, "in which case the said lessees, their heirs, executors, "administrators and assigns shall be allowed and "obtain in full compensation for the same, and for any

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"loss or damage that they may thereby sustain, an "abatement of six calendar months' rent accruing for "any and every such period of continuous interruption "in the flow or supply of surplus water hereby leased "as aforesaid."

The value of the suppliant's mill, with its equipment, may be taken to have been about fifty thousand dollars; and it is shown that he was carrying on there a large and prosperous business, the annual profits of which are estimated at sums ranging from ten thousand dollars to twenty thousand dollars and upwards.

The work of enlarging and improving the canal was commenced in April, 1897. It formed part of a larger work, undertaken in pursuance of a general policy, to provide better means of transportation by deepening and enlarging the canals by which obstructions to the navigation of the St. Lawrence River are overcome. The work done at the Galops Canal was considerable and required a number of years for its execution. The plans for this work provided for the making of a new channel adjacent to the old canal, at the point at which the waters of the canal were discharged into the river, and for some distance west thereof Across the old channel at the lower end of the basin above Lock No. 25 a regulating weir was to be constructed. When the work was completed the part of the old basin and channel above such weir would become a basin only, and the part below the weir a race-way. The channel would no longer be a water-way for vessels. But it continued to form part of the canal, the basin being connected with the new channel. Provision was made for supplying the suppliant's mill with water in the manner and at the place where it had formerly been supplied. There was no intention at the time to construct any work, or to do anything that would in any way interfere with the suppliant's rights under the

lease of 1871. It would be necessary to stop the supply of water for a time during the construction of the work. But that was provided for by the lease. When the weir was completed, and water let into the basin above it, the surplus water would be available for operating the mill, and was to be supplied in the old way and in accordance with the terms of the lease. If the works had been carried out as designed the questions now in issue would never have arisen, the present controversy having its origin in the changes that were made during the progress of the work. Instead of constructing the weir above the old lock No. 25 at the lower end of the basin, in which case surplus water could be supplied to the mill at the head of the mill flume, it was constructed across the basin at a point some two hundred feet or more further west, that is, further up the basin and away from the head of the flume, and no provision was made for supplying water to the mill. It is important to see how that came to be done.

Sometime prior to the 21st of February, 1898, and probably in that year, a petition from the Municipal Council of the village of Iroquois urging the development of water-power at the lower entrance to the Galops Canal was presented to the Minister of Railways and Canals. The petition cannot now be found, and all that appears as to its contents is derived from the report of Mr. Douglas, the hydraulic engineer of the Department, to whom it was referred, and from his evidence. He says it was "a general sort of petition for the "benefit of the village and developing electricity and "power at the village; a general petition for the devel- "opment of power". The suppliant was at the time a member of the village council. He has not been asked, and he has not stated, whether he voted for or signed the petition. Later we find him deeply inter-

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ested in the project, and there can, I think, be no doubt, that he was then supporting it. If not, it is probable that he would have told us so. Mr. Douglas' report, made on the 5th of March, 1898, is in evidence. With regard to the amount of power that might be made available at the weir across the basin above the old Lock No. 25, he and Mr. Holgate, a witness called by the suppliant, differ. But nothing turns on that difference. The question was one for the decision of the Minister, and he has decided it. It is not from that point of view that reference is made to the report; but because it gives better than anything else in evidence a clear view of how matters then stood. Instead of attempting to state briefly the substance of the report, or to give extracts from it, a copy of the report in full is appended*, with a copy also of the plan or tracing that accompanied it. The latter also will be found to be an aid to a good understanding of the facts of the case.

By referring to the report it will be seen that Mr. Douglas suggested two ways in which some additional power might become available. By adopting one of the methods suggested there would have been no interference with the supply of water to the flume of the suppliant's mill. By the other method, which was more favourable for the development of power, no provision was made for such supply; and he mentioned as an objection to it that if that plan were adopted "the department would render itself "liable for damages to the flour-mill as it would "require to be propelled by electricity generated at "the dam, or some other method, necessitating expen-"sive changes in machinery." In the end a plan was

* REPORTER'S NOTE:—See *post*, p. 328.

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adopted and the work constructed in a manner that did not in this respect differ materially from that which Mr. Douglas had pointed out would involve the question of damages to the suppliant's mill; but when the decision to adopt that plan or method was actually come to does not appear. Mr. Rubidge, the superintending engineer of the canal is dead; and the Chief Engineer was not called as a witness. Mr. Rhéaume, who was on the work at Iroquois until May, 1898, says that nothing had been decided upon at that date. He first heard the matter mentioned in the course of that summer, and the negotiations were in progress to his knowledge until the spring of 1899; but so far as what was decided upon he had no details, and he did not know at what date those in charge of the construction of the canal determined to depart from the original intention. His evidence that the negotiations were in progress until the spring of 1899 is supported by the correspondence in evidence. On the 8th of February, 1899, the suppliant wrote to Mr. Rubidge as follows:

"I expected at this date to be in a position to say "what shape would suit us best in the way of getting "our power from the new canal. I beg to ask for a "little more time. I find that the electric plant is "the right thing but expensive, and to make it a profit-"able investment would require to install a plant that "would use all the power that can be had; and may "therefore require all the space possible to spare. I "will do my best to get into shape and let you hear "from me again in a few days."

Then there is a letter of the 28th of the same month from Mr. Blair, the Minister of Railways and Canals, to the suppliant in these terms:

"Having reference to your application for an exten-"sion of your present water privilege on the old canal

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"at Iroquois, my suggestion is that you should see "Mr. Rubidge and go over the matter carefully with "him. It will be agreeable to me that he should dis- "cuss the matter with you; and he might in the light "of the facts and such opinions as he can express, "prepare your proposed plans in such a way as will "meet with approval at headquarters."

And that letter is followed by one of the 2nd of March, 1899, from the suppliant to Mr. Rubidge in which he writes:

"Enclosed find copy of letter received from the "Hon. A. G. Blair, Minister of Railways and Canals, "by which you will understand his wishes in the 'matter of my water-power here. I learned by tele- "phone that my consulting mill-wright is absent, but 'have written him to let me know as soon as he "returns. I will endeavour to lose no time in having "it attended to."

There is no occasion at present to follow this correspondence and negotiation further. At the time when these letters were written the water was out of the Galops Canal, and the work on the temporary dam that was constructed across the old canal basin, to keep the works below unwatered during their construction had been commenced. But this temporary dam was equally necessary whichever method was adopted. Up to this time nothing had been done on the ground which would stand in the way of the original plans being carried out. And so far as appears that condition of things continued down to the 26th of June, 1899, when work was commenced on the masonry of the weir across the basin of the old canal. No doubt plans showing the changes proposed had in the meantime been prepared. The correspondence shows that, but no step that was irrevocable had been taken, and all the time the suppliant was carrying on his negotiation

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and seeking to obtain a lease of the power to be developed at this weir. His formal application therefor, and for a lease of the portion of the reserve adjacent to the weir, was made on the 24th of March, 1899. No doubt the fact is, as Mr. Shepley pointed out, that he was negotiating for a water-power with the view to making it commercially valuable, not alone with the view, or even principally with the view, of getting power in another form for the operation of his mill. So far as power for his mill was concerned there was nothing to be gained and something to be lost by the proposed change. But he was looking at the larger, or what appeared at the time to be the larger, interest. Mr. William Kennedy and some other engineers whom he had consulted had, he tells us, estimated the power that could be developed at the weir mentioned at 3,000 horse-power, while the estimate of the Government engineer at the Iroquois office was, he says, from 1,200 to 1,500 horse-power. He expected, and it seems on good grounds, that the lease of the power that could be so developed there, with the exception of a small quantity, some 20 horse-power that was needed for the village waterworks, would be given to him. And even as to the power for the waterworks, his proposal, made later, was that all the available power should be leased to him, and that he would furnish the village with what power it required at cost. As the holder of a lease of surplus water at Lock No. 25 on the old canal, he had no doubt a first claim to consideration. That seems to have been taken for granted on all sides. What he was at the time looking forward to and promoting was the development of a large power that could be used to generate electricity, and of which he expected to be given the lease upon favourable terms. If that could be obtained he was willing that the supply of water direct to his mill should be discontinued permanently;

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and he was ready to forego or release any claim to damages that he might have. He could operate his mill by electricity, and was willing to bear the greater expense involved, expecting to recoup himself out of the gains to be made under the lease that he expected to get. He knew that the development of power in the manner proposed involved the destruction of the power to which he was entitled under the lease of 1871. There is no doubt about that. Not that it would have been impossible in some way to carry water from the weir to the mill, but that the plan or method proposed made no provision therefor, and he expected and intended to operate the mill by electricity to be generated at the weir and transmitted to his mill. That was the standpoint from which the suppliant, on his side, carried on the negotiation. It is more difficult to see what it was that led the Minister or those who advised him to the conclusion that it was worth while to make the change proposed. Mr. Rubidge, the superintending engineer, as already stated, is dead, and if there is anyone else who knew why it was done he has not been called. In the amendment to the statement in defence it is alleged that in conseqence of the representations and requests of the suppliant, as to the advantage to the suppliant and others which would be derived from the development of a large water-power from the surplus water of said canal, the respondent constructed the said weir and expended thereon, and upon works connected therewith, large sums of money which the respondent would not have required to expend for the purpose of continuing the supply of surplus water to the suppliant's mill under the terms and conditions of the lease of the 16th of December, 1871. I understand that in part to be an allegation that the works as constructed cost a large sum of money, more than they would have cost if they

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had been constructed as originally designed. That may be true, but the fact has not been proved, at least by direct evidence. Plans of the work as designed and as executed are in evidence, and a person skilled in such matters might perhaps from a comparison of the plans form some conclusion as to the relative cost of the two ways of doing the work. I do not know whether he could or not, but I am not able to do so; and there is nothing to assist me. There is no reason, however, to think that there was any saving of expense or any avantage gained in respect of the use of the canal as a water-way. And so far as any additional revenue to be derived from the letting of power was concerned, the gain was inconsiderable from the point of view of the resposnible advisers of the Minister as to the quantity that could be safely leased. The suppliant, speaking of one of his conversations with Mr. Rubidge during the summer of 1899, quotes the latter as making the observation that they were building a canal, they were not building a water-power. That appears to be a just observation, and one that reflected, no doubt, the attitude of those who were responsible for the work. How comes it then that the change was made? Whose interests were to be served? There can, I think, be only one answer. No doubt the change was made to meet the wishes of the suppliant and others residing at Iroquois, and the interest of the suppliant in the matter was, it seems to me, greater than that of any other person. That is the conclusion to which, upon the evidence as a whole, I have come; and I have also come to the conclusion that the final decision to make the change was come to after the 8th of February, the date of the suppliant's letter to Mr. Rubidge, the contents of which have been given, and before the 26th of June of that year when the construction of the weir was commenced; and that during

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this period the suppliant had the question as to whether any change would be made largely in his own hands. This, as has been seen, is what he stated in that letter:— "I expected at this date to be in a position to say what "shape would suit us best in the way of getting our "water-power from the new canal". The expression "our water-power" is perhaps equivocal and may refer either to the power that he was entitled to under the lease of 1871, or to that for which he afterwards made application, though it is difficult to see how the word "our" could with propriety be used with reference to the latter. But the following clause points, it seems to me, in only one direction: "I beg to ask for "a little more time. I find the electric plant is the "right thing but expensive, and to make it a profitable "investment would require to install a plant that "would use all the power that can be had, and may "therefore require all the space possible to spare." What was the question to be decided, and who was to decide it? Clearly the suppliant was to decide it, and the question was as to whether or not it was advisable to put up an electric plant. But that in effect was the object to be attained by the change that had been proposed. That is what the suppliant and others were asking for. The weir was to be constructed to develop power to generate electricity. That, from the first, had been the proposal made to the Minister. If it were not worth while going on with that project there was no occasion for any change in the work as originally designed. The project was not abandoned. The weir was constructed and in the end, after a great deal of negotiation and delay, the suppliant obtained a lease of the power there developed. The application for the lease was made, as has been seen, on the 24th March, 1899; the lease was executed on the 29th of August, 1901. The principal difficulty was as to the

quantity of surplus water available. Those who advised the Minister adhered to the view expressed by Mr. Douglas in his report that no more than 200 horse-power were available. The suppliant pressed for a grant of a much larger quantity. The Minister decided against leasing more than two hundred horse-power. Not being able to get what he wanted, the suppliant took what he could get. By the lease a portion of the canal reserve adjacent to the weir was demised to him and he was given the use of 200 horse-power of the surplus water of the canal. And it was also provided that if during the term of the lease the Minister should be satisfied that any more water was available, the lessee should have a first option of obtaining it at the rate charged for that granted. The lease of 1871 was renewable in perpetuity. The lease of August, 1901, provided for a term of twenty-one years, with two renewals for like terms, making in all sixty-three years; any further renewal being left to the "option of the Governor in Council". By the earlier lease the rent reserved was one hundred and forty dollars a year, being at the rate of three dollars and one half per horse-power for the 40 horse-power granted. The suppliant had hoped to get the new lease for the same total rent. The amount charged was however two dollars per horse-power, making the rent reserved four hundred dollars a year, with a proportionate increase in case additional power were granted to him. The rate per horse-power was less, the total rent more. The suppliant was not satisfied with the result. That was natural enough. He had entered on the negotiation and had continued it in the expectation that the Government would develop a considerable power and give him a lease of it on favourable terms. On his part he was ready, if that were done, to release any claim to damages that

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he might have. In a memorandum of requests from the suppliant to the Minister, the following request occurs: "That my lease be renewed on the "old basis, giving me the eight openings now instead "of four as understood by the old lease, price being "$140.00 per annum as before, thereby allowing me the "difference in power and larger premises in lieu of "damages now sustained and expense of connecting "our mill with new power which will necessitate a "large expenditure before mill can be operated by "water-power." By the expression "water-power" the suppliant meant water-power converted into electricity and transmitted to his mill. This memorandum has no date. It was, it appears, sent or delivered to the Minister in December, 1899. In a letter from the suppliant to the Minister, of March 26th, 1900, we get the answer that was made to this request: "I "am anxious", the suppliant wrote "to get my water-"power lease arranged at once in the best way "possible. I understand through Mr. Carruthers, of "Prescott, that you do not consider it advisable to "give me this power free in lieu of the damages "sustained by me, but that you are willing to give me "a favourable lease on the same basis as my old lease. "This I am willing to accept." He was not willing, however, to accept the lease in lieu of damages. In a memorandum respecting this lease, referred to as "Mr. "Schreiber's offer" of October 31st, 1900, there occurs, among others, this item: "1—Lease to cover 200 H.P., "which includes the 40 H.P., covered by old lease." The suppliant, in March, 1901, on a memorandum in amendment of the offer, puts that item in this way: "1. Lease to cover 200 H.P., rights under old lease not "to be affected." The conclusion of that particular negotiation is to be found in the evidence of Mr. D. B. Maclennan, who at the time was acting for the sup-

pliant. The following is an extract therefrom: "A "question in regard to the former lease arose on the 5th "June." (1901.) "It had arisen in the Department "before; but on the 5th of June it arose between Mr. "Ruel and myself. Under the former lease which "was given to Mr. Beach in 1871, and for a term of "21 years renewable perpetually, subject to the usual "terms for termination, a question in regard to that "lease arose in this way: Mr. Beach claimed that his "power under the first lease had been taken away, "and that he suffered very serious loss. On the 5th "of June, Mr. Ruel insisted that all questions under "the lease should be decided before the new lease was "granted. I objected to that very strongly. I said "we would never do it at all; that the old lease must "stand on its own foundation; and that Mr. Beach "was very anxious to get this new lease through as "soon as possible; he was in a great hurry about it; "and that if his application were allowed to stand "over until after everything was settled under the "old lease that it might delay him for months; and "we discussed the matter a while; and at last Mr. "Ruel said he would accede to my request that the old "lease should stand; that the new lease should be "given as a lease for a water-power and should not "interfere in any way with the old lease, or the "rights or remedies which Mr. Beach had under the "old lease. We then went to Mr. Schreiber and "repeated to him the discussion Mr. Ruel and I had, "and he assented to that. He assented to the grant-"ing of the new lease for 200 horse-power which was "to be exclusive of the 40 horse-power of the old lease; "that the rights and remedies of Mr. Beach under the "old lease should not be affected by the granting of "the new one." Mr. Schreiber was the Deputy Minister and Chief Engineer of the Department; Mr. Ruel

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was at the time the Law Clerk of the Department. The evidence was admitted subject to the objection that the Crown was not bound by what they assented to.

With reference to the unwatering of the canal, the suppliant contends that it was not necessary to let the water out of the canal as early as December, 1898, when that was done; that the unwatering might have been deferred for another year, in which case his damages would have been so much the less. And in one of his letters to the acting Minister of Railways and Canals he states that he is satisfied that this was done because it was of some advantage to a holder of water-power at Cardinal. The imputation that the canal was unwatered when it was with any unworthy motive need not be taken seriously. If there are any reasonable grounds, as I think there are, for concluding that the unwatering was at the time necessary for the construction of works then about to be undertaken, that is an end of the matter. The suppliant bases his contention that the unwatering at the time was unnecessary on admissions made by the Minister and on what the contractors had told him. I pass over the latter, as the contractors were not called as witnesses, and the respondent is not bound by anything that took place between them and the suppliant. The Minister was not called, and the suppliant is entitled to the benefit of the evidence with respect to such admissions. But notwithstanding that the Minister has not been called to deny or explain what he is alleged to have stated to the suppliant in the presence of another witness, Mr. Redmond, namely, that the unwatering was unnecessary, that he, the Minister, had no knowledge of it, and that there was no occasion to have it done for another year, there is, I think, some mistake or misapprehension about the matter. The letter from Mr. Rubidge to the suppliant informing him that the

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canal would be unwatered during the winter of 1898-99 and asking him to govern himself accordingly, is dated the 24th of September, 1898. The decision to unwater the canal must have been come to before that date. In November following the municipal council of Iroquois and the suppliant, through Mr. Carruthers, of Prescott, applied to the Minister to have the unwatering deferred, giving reasons therefor. This application was not granted. The water of the canal was let out on the 12th of December, 1898. If the Minister did not know anything about it there must, I should think, be some good reason, such as absence from the Department, in which case some other Minister or the Deputy Minister would be acting for him. It appears, however, that the work of making one of the two temporary dams that were necessary for the unwatering of the weir and other works in the old basin was commenced on the 6th of January, 1899, and completed on the 20th April following. Then the new Lock, No. 25, was first used on the 12th of May, 1899. I infer from that that the water had at that date been let into the canal, enabling the new channel to be used, but that the temporary dams referred to kept the works between the dams in the old channel free of water. The masonry work on the weir was commenced on the 26th of June, 1899, and finished on the 20th of November following. It would be unreasonable in the face of these facts to come to the conclusion that the unwatering of the canal in December, 1898, was unnecessary. The water was not let into the basin adjacent to the weir until May, 1901. That is, these works remained unwatered for about two years and five months, and during that time it would not have been possible to supply the suppliant's mill with the surplus water to which he was entitled, even if provision had been made therefor. Whether this

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stoppage of the supply would have been longer or shorter if no change had been made in the works does not appear. In the absence of any evidence to the contrary, I assume that there would in each case have been about the same delay in letting the water into the basin adjacent to the weir. On the 29th of May, 1901, the water in this basin was at a level that made it available for developing power. Before that date and while the works were unwatered the foundations of a power-house had been constructed for the suppliant, and at that time it was understood that he was to have a lease of part of the surplus water, though some of the details were settled later. The lease, as has been seen, was not executed until August 29th following ; but the delay was caused by negotiations between the parties and the necessity of getting the authority of council to the granting of the lease, and then to some changes that were subsequently agreed upon.

Coming now to the means taken by the suppliant to protect his own interests during the time that his mill would be without water, it will be observed that he had ample notice that the supply would be stopped during the winter of 1898-99. The notice was given in September, 1898. The changes in the work that have been so frequently mentioned had been discussed, but no decision had been come to at that time. There is no reasonable doubt that the stoppage of the water supply was, when it occurred, intended to be temporary only and not permanent. It was reasonable for the suppliant to come to that conclusion ; but he also had reason to know, and I think he knew, that such stoppage was likely to continue for a considerable time. Under these circumstances and considering the extensive business he was doing, and the large profits which he was making, it was to be expected that he

would, as a prudent business man, take proper and sufficient means to protect his business in the meantime. In the spring of 1899, at a cost of between fifteen hundred and two thousand dollars, he set up temporarily at his mill, a steam-engine by which he operated the rolling mill. That was only part of the business. The power was not made available for running the stones which were used for the custom business. There was some difficulty in making the connections, and it was not thought worth while to go to the expense of overcoming this difficulty. The engine was used until January, 1901, when it was taken out and removed to another mill, for which it had been intended, and where he had occasion then to use it. Since that time the mill has been idle. The lease of August 29th, 1901, was assigned to the St. Lawrence River Electric Company in which the suppliant is a shareholder, but the power thereby granted had not, when this case was heard, been utilized.

If there had been no demise from the Crown to the suppliant of the land on which the mill stood, or grant of the power by which it was operated, the rights of the parties, respectively, would have to be determined by reference to *The Expropriation Act* (52 Vict. c. 13). Under that Act, the Crown had a right, by filing a plan and description, to take the whole or any portion of the suppliant's property for the purpose of the work in question. Under the lease, by a provision that has not been acted on, it had the power to determine the lease and take the whole of the property, but not to take a part. Under the Act, and without filing any plan or description it could interfere with or destroy a right appurtenant to the property, such as a right to a supply of surplus water. Under the lease it had a right to stop such supply temporarily but not

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permanently. Under the Act, the Crown might have made provision for delivering the water to which the suppliant was entitled in some other way. A similar authority was given by the lease. In respect of anything done under the lease there was no right to damages or compensation other than that provided by the lease. In respect of anything done in the exercise of powers given by *The Expropriation Act*, the amount of the compensation, if not agreed upon, would be determined in this court. Those things which the Crown did, and which were within the terms of the lease and the powers therein reserved to it, ought, it seems to me, to be attributed to the exercise of such powers; and whatever was in excess thereof should be attributed to the exercise of the authority given by the statute. In the present case, however, it will make no difference whether such excess be so regarded and dealt with or be taken to constitute a breach of a covenant or condition of the lease, except in respect of the question of interest. If the claim be regarded only as one arising out of a contract in writing no interest can be allowed on the amount of damages awarded (50-51 Vict. c. 16, s. 33), whereas interest may be allowed on compensation money awarded for land or property taken or injuriously affected (*The Expropriation Act*, s. 29; 63-64 Vict., c. 22, s. 1).

The first question that has to be disposed of is the contention of the suppliant that, what was done in this case by the Crown was not an improvement or alteration of the Galops Canal within the meaning of the clause of the lease which has been cited. The ground upon which that contention is supported is that at Lock No. 25, and for some distance west thereof, a new channel was made. But that does not appear to me to be material, or to affect the case in any way. I do

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not see any reason to doubt that what was done was an alteration and improvement of the canal.

Then there is a second question. Whether the the stoppage of the water supply for the execution of the works as originally designed would have been a temporary stoppage, within the meaning of the lease, if such stoppage had continued for a period of about two years and a half, that time being actually necessary for the execution of such works? Having regard to the subject-matter of the lease, that is a supply of surplus water from a canal forming part of a great system of navigation and constituting in part the means whereby a large part of the commerce of the country is carried on; and to the fact that the lease was renewable in perpetuity, my view is, that any stoppage of the supply of surplus water actually necessary for the repair, improvement or alteration of the canal, in the public interest, and to meet the requirement of the trade of the country would be temporary within the meaning of the clause cited, although it might last for several years. A lease such as that in question affording a cheap and convenient power for operating a mill at a small cost is of great value. The amount of rent charged is little more than nominal. But against that must be put the consideration that an accident, or the public interest, may make it necessary to stop the supply of water for a time. That is a contingency to which the lessee's business was exposed and against which he had to protect himself. The Minister was, I think, intitled in the present case to exercise the right of stoppage given in the lease, and I have no doubt that, when it was exercised, such stoppage was intended to be temporary only.

We come now to a third question; one arising upon the amendment to the statement in defence. Did the acceptance by the suppliant of the lease of August

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29th, 1901, work a surrender of the grant of surplus water made by the lease of 1871? By the latter the lesses acquired a right to the use and enjoyment of so much of the surplus water of the canal as should be sufficient to drive and propel four runs of ordinary mill-stones equal to ten horse-power for each run. By the latter the lessee acquired a right of drawing and taking from the canal two hundred horse-power of the water of the canal not required for navigation or any other purpose of the canal, with an option on any additional power that the Minister might decide to be available over and above the quantity then under lease. The surplus water of the canal was a variable quantity, and there is nothing, it seems to me, within the four corners of the two leases which would go to affect the validity of either of them. Having regard only to the terms of the two leases there is, I think, no inconsistency between them. Both may stand. It is only when we go outside of the leases that there is any doubt about that in the present case. There being no inconsistency in the two leases themselves there is no occasion to consider what the result would be if there had been; whether the earlier grant of surplus water from the canal would have been surrendered by operation of law, as in the case of a demise from one subject to another; or whether both demises being from the Crown the second would not have been void there being no recital therein of the first (1).

But going outside of the lease it is very clear, it seems to me, that it was not in the contemplation of either party that the supply of surplus water granted

(1) See Comyn's Digest, Tit. Surrender in Law, 1 (1), 1 (2), vol. 7, pp. 386 and 387; Bacon's Tit. Leases, S. (2), (3), vol. 5, pp. 665, 667; Chitty's Prerog., p. 293; *Brook* v. *Goring*, 4 Croke, Car. 1, 197; *Wing* v. *Harris*, 1 Croke, Eliz., 231; *Lyon* v. *Reed*, 13 M. & W., 285; *Carnarvon* v. *Villebois*, 13 M. & W., 313; *Holme* v. *Brunskill*, L. R. 3 Q. B. D., 495; and *Baynton* v. *Morgan*, L. R. 22 Q. B. D., 74.

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by the earlier lease would ever be restored and continued to the suppliant. No doubt he would have surrendered it and released all claims to damages if he had been given a lease of the larger power on favourable terms. But he did not get that, and the new lease was accepted with a reservation, not expressed in the lease, but agreed to between those who represented the parties, that the suppliant's rights and remedies under the old lease should not be interfered with.

What, then, were the rights and remedies under the old lease that were not to be interfered with? The right, it seems to me, to recover compensation for the loss of power to which he was entitled under that lease. But I would not include in such compensation any damages such as those the suppliant claims for loss of profits or for the dissipation of his business. The Minister had a right to stop the supply of water for a time. In its inception the stoppage was lawful and within the lease, and if, because of the change that was made, such stoppage was continued for a longer time or occasioned greater damage than otherwise would have been the case, the suppliant has no good ground of complaint. The change was made in part at his instance and to meet his views and wholly with his acquiescence and consent, and the same considerations would apply to any loss of profits in business occurring after the power was available to generate electricity, and before it could in fact be utilized. But when we come to the other part of the claim as stated by Mr. Shepley—the claim to compensation for the actual loss of the power—I am of opinion that it should be allowed.

There is, it seems to me, a distinction to be made between the claim for damages for the loss of this power and the claim for the loss of profits. On the

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one hand there is no ground for the latter except such as is founded on the change in the works that was made at the instance of the suppliant and others On the other hand he at all times had a well founded claim either to have the power granted by the lease of 1871 restored to him, or to be paid a just compensation for the loss of it. No doubt it was in his contemplation, and probably in that of the Minister and his officers, that such compensation would be given by the granting of a new lease. But the parties were never of one mind as to that, and the question was an open one when the new lease was executed and was then reserved. I think it is still open and undetermined.

With regard to the damages, I think, they should be measured by the cost of supplying and using for the operation of the mill forty horse-power furnished in some other way; and that, it seems to me, would be the measure of the damages whether the case were regarded as one in which the suppliant's property was injuriously affected or one in which the suppliant had a right of action for the breach of a covenant to supply the water in accordance with the lease. As I have already stated it makes no difference in this case from which standpoint the question of damages is looked at.

I do not pretend to think that such damages can in any case be measured with any great precision or exactness. There is always room for considerable difference of opinion. But taking all the circumstances of the case into consideration, the change that was made from the first design of the work in question, the way that change came to be made, the object aimed at in making it, and the giving of a new lease of power to the suppliant for the purpose of manufacturing and selling electric power, the fair way to ascertain the damages would be, it seems to me, to

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take the cost of developing in that way two hundred horse-power and add thereto a reasonable profit and then see at what annual cost the suppliant's mill might in that way be supplied with forty horse-power for the purpose of operating it. Then there should also be added an allowance sufficient to indemnify the suppliant for the cost of making any necessary changes in the machinery at his mill, and to cover the increased annual cost of operating the mill by electricity instead of by water-power. From the best consideration I have been able to give to the matter I have come to the conclusion that a sum of twenty thousand dollars ($20,000.00) paid to the suppliant in May, 1901, when the water in the basin above the weir was available for developing power, would have been a full indemnity and compensation for all damages to which he is in anyway entitled in the premises.

There will be judgment for the suppliant for that amount, with interest thereon at the rate of five per centum per annum from the 29th day of May, 1901.

With respect to the claim set up in the petition of right the suppliant fails and the respondent succeeds. But in another aspect of the case the latter fails and the former succeeds. There will at present be no order as to costs; but either party may apply for a direction in that respect. If neither party applies, each will bear his own costs.

Judgment accordingly.

Solicitor for suppliant: *J. Hilliard.*

Solicitors for the respondent: *Chrysler & Bethune.*

REPORTER'S NOTE:—On the 27th February, 1905, the suppliant applied for a direction that he be allowed to tax the costs of the action. The court thereupon disposed of the question of costs as follows:—The suppliant to have the costs of the issue as to the surrender of the lease of 1871; the Crown to have the costs of the issue as to the suppliant's right to damages for the loss of profits or dissipation of business consequent upon the stoppage of the water supply.

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IROQUOIS WATER POWER.

REPORT OF R. C. DOUGLAS, 5TH MARCH, 1898.

COLLINGWOOD SCHREIBER, Esq., C.M.G.,
Deputy Minister and Chief Engineer,
Department of Railways and Canals,
Ottawa.

OTTAWA, March 5th, 1898.

DEAR SIR,—Agreeable to your letter of instruction of the 21st ultimo, enclosing a petition of the Municipal Council of the Village of Iroquois, which urges a development of water-power at the lower entrance of the Galops Canal, I beg leave to submit the following report :—

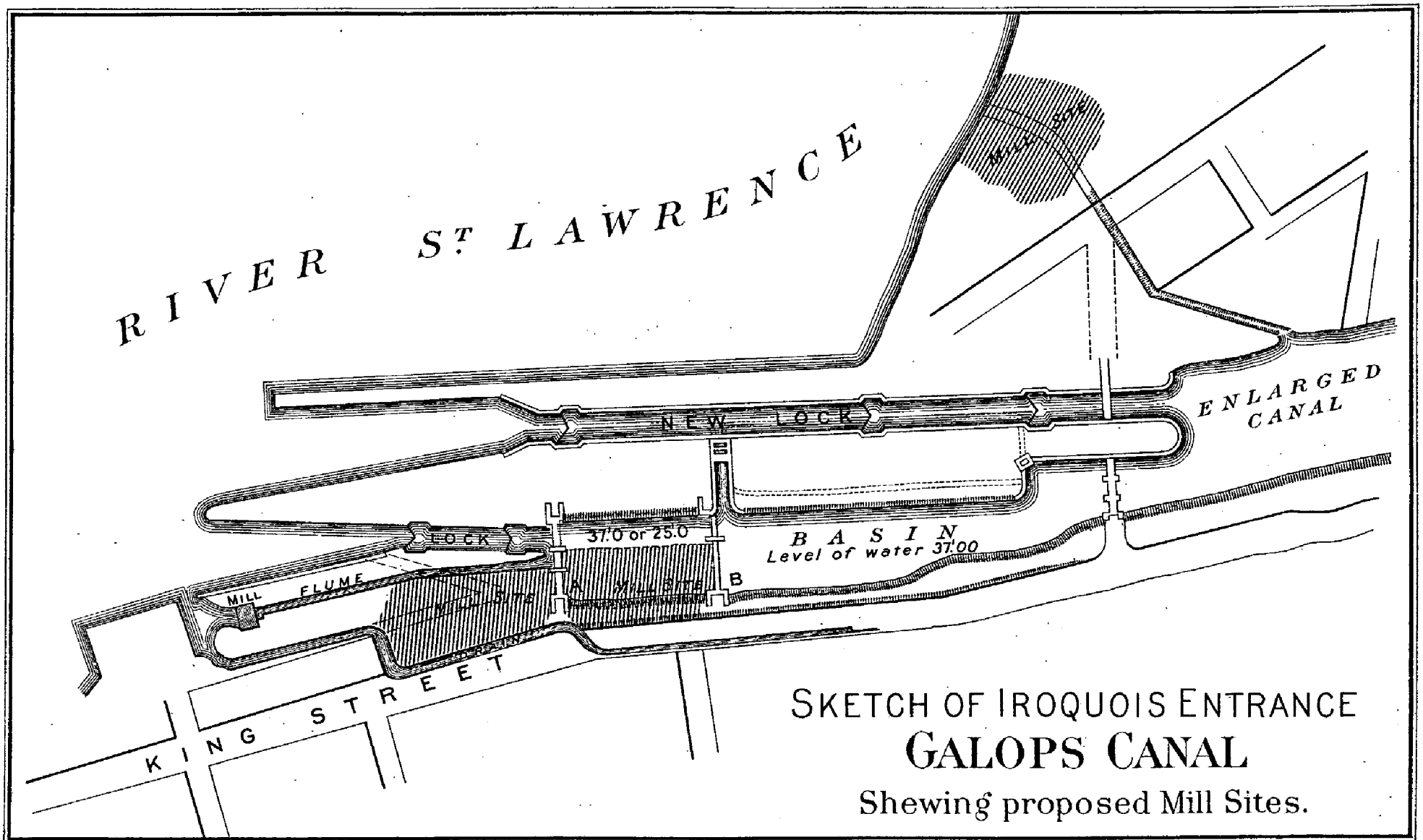
Under present conditions water-power is developed at Cardinal and Iroquois by a head or fall produced by the lift of a lock at each village. Through the project of enlargement of the canal, now in course of construction, the lock at Cardinal is given up; the summit level is to be extended to the lower end of canal; the lift of the two locks to be combined in one, creating at Iroquois a water-power double in extent for a similar quantity, or flow of water, to that now existent.

At Cardinal there is, under a perpetual grant and lease to the Edwardsburg Starch Company, the authority to draw from the canal, for power, a flow of 400 cubic feet of water per second. The water now passing through the flumes of that company is discharged into the present Iroquois level and might be utilized for power; when the canal enlargement is completed this flow of water will be discharged into the River St. Lawrence. It will, therefore, not be available for power at Iroquois; a loss to the village and in revenue to the Department, as the 200 H.P. so discharged would amount to 400 H.P. if available for lease.

Power, to an extent similar to that developed at the locks upon the Lachine Canal, might be created at Iroquois, if the area of sluice-ways, supplying the canal with water at its head, were of larger dimensions. At the head of the Lachine canal the combined area, of apertures in the supply weirs, is 504 square feet; at the Galops Canal, this area is only some 96 square feet. The large area of the former was rendered necessary by the lessees using more water than leased.

The supply of water for the Galops Canal is, as upon the other canals of the St. Lawrence River, variable and governed by its fluctuations in level. After deducting from the flow of water in the canal, the quantity wasted in lockage and leakage it would not be judicious, under present conditions, to lease for water-power more than 600 cubic feet of water per second. As stated previously 400 cubic feet per second of this flow has been already leased, and not available at Iroquois when the enlargement of the canal has been completed, which only permits of some 200 cubic feet per second or 200 H.P. being developed there.

With this limited amount of power permissable it is unnecessary to discuss any large scheme for the development of power. If the Department



SKETCH OF IROQUOIS ENTRANCE

GALOPS CANAL

Shewing proposed Mill Sites.

had assurance that the revenue could be adequately increased additional means of supply could, as in other canals, be provided.

The water-power heretofore leased at Iroquois amounted to 140 H. P.; on account of the enlargement 100 H.P., through purchase, have reverted to the Crown and the latter is under covenant to supply 40 H.P. not disturbed by the project of enlargement. There is therefore, if developed, 160 H.P. available for lease.

Reference to the appended sketch is asked. The present plan of enlargement shows two weirs, one at the head and the other at the foot of the Iroquois basin, it is proposed to maintain its level as at present, some 6 feet below the future summit level.

By abandoning the proposed weir at the head of basin and constructing a weir and dam at the lower end, at either sites A. or B. [Sketch], and raising the banks of the basin a water-power could be created which would utilize the proposed increased head; the old canal and lock becoming the tail-race.

There would be required a weir for regulating the canal of much smaller dimensions than proposed, as the sluice-ways would have double the head and discharge. There would not be required the long filling culvert, the lock being filled directly from the basin. The masonry wall along the south side of basin could be dispensed with.

At the head of old lock (at A.) a dam could be erected, in which at the south end would be the regulating weir; following a weir for supplying at the present level the mill flume of the flouring-mill; then in the dam steel pipes and head gates for the supply of water to any mill which might be constructed below. The tail-race would flow into the present drain enlarged, or pass under the mill flume into river.

A dam and weir above (at B.) would be more favourable for the development of power; this site would afford a better tail-race and in the event of a larger water supply the capability of greatly increasing the power. At this location there is the objection, that the Department would render itself liable for damages to the flour-mill, as it would then require to be propelled by electricity generated at the dam, or some other method, necessitating expensive changes in machinery.

Upon the south site (at C.) water could be drawn from the canal at a distance, direction and amount which would not interfere with vessels leaving the lock. There are available mill sites and the opportunity of creating an extensive power if, as previously remarked, the quantity of water was available.

From the plan and inspection of locality it would appear for the limited power that can be utilized the dam at the head of the old lock would be less expensive, especially if damages to the flour-mill are considered.

Mr. Rubidge might be requested to give an opinion as to the feasibility and cost of these developments of power.

I am, sir,

Your obedient servant,

(Sgd.) ROBERT C. DOUGLAS,

Hydraulic Engineer.

IN THE MATTER of the Petition of Right of

1905
Feb. 27.

EMMA RYDER.....SUPPLIANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

Public work—Injury to the person—Negligence—Doctrine of common employment in Manitoba—Liability of Crown.

The effect of clause (*c*) section 16 of *The Exchequer Court Act* is not to extend the Crown's liability so as to enable any one to impute negligence to the Crown itself, or to make it liable in any case in which a subject under like circumstances would not be liable.

2. In the Province of Manitoba the Dominion Government is not liable for any injury to one of its servants arising from the negligence of a fellow-servant. *Filion* v. *The Queen* (24 Can. S. C. R. 482) referred to.

3. With respect to the liability of the Dominion Government in cases involving the doctrine of common employment, nothing short of an Act of Parliament of Canada can alter the law of Manitoba as it stood on that subject on the 15th July, 1870.

Semble: The Workmen's Compensation for Injuries Act, R. S. Man. c. 178, does not apply to the Crown, the Crown not being mentioned therein.

PETITION OF RIGHT for damages for injury causing the death of the suppliant's son alleged to have been occasioned by the negligence of a servant of the Crown.

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

F. Heap, for the suppliant, contended that the case was one of negligence by an officer or servant of the Crown while acting within the scope of his duty or employment. (50-51 Vict. c. 16, s. 16 (c)). The accident took place upon property under the control of the Minister of Public Works (1); *Brady* v. *The King* (2); *McKay's Sons* v. *King* (3).

The duty of the Crown to take care is not different from that of the subject. Greater care is necessary

(1) See R. S. C. c. 36, clause 2. (2) 2 Ex. C. R. 273.
(3) 6 Ex. C. R. 1.

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when the work is attended with extraordinary risk. (*Minton-Stenhouse on Accidents to Workmen* (1).

The accident itself bespeaks negligence. *Res ipsa loquitur*. (*Minton-Stenhouse on Accidents to Workman* (2); *Brown* v. *Leclerc* (3); *Webster* v. *Foley* (4); *Branigan* v. *Robinson* (5)).

If the Manitoba *Workmen's Compensation for Injuries Act* applies, we are in a still better position.

N. Howell, K.C., (with whom was *Mathers*) for the respondent

The Crown is not liable at common law. The Manitoba *Workmen's Compensation for Injuries Act* does not apply, the Crown not being a "person" within the meaning of the Act. *The Exchequer Court Act*, 50-51 Vict. c. 16, does not widen the liability of the Crown to the extent of precluding it from invoking the doctrine of common employment.

But there was no negligence in the method employed to launch the vessel. The cause of the accident was a defect in one of the lines used in launching the boat; a defect which it was not negligence on the part of those in charge not to have noticed. (*Jones* v. *Grand Trunk Railway Co.* (6); *Blackmore* v. *Toronto Street Ry. Co.* (7).

But if there was negligence at all, it was negligence of a fellow-servant for which the Crown in right of the Dominion is not responsible in cases arising in Manitoba.

The *locus* of the accident was not a public work. (*Filion* v. *The Queen* (8); *Hamburg American Packet Co.* v. *The King* (9).

Mr. Heap replied.

(1) 2nd ed. pp. 12, 13.
(2) 2nd ed. pp. 6, 18.
(3) 22 S. C. R. 53.
(4) 21 S. C. R. 580.
(5) [1892] 1 Q. B. 344.
(6) 45 U. C. R. 193.
(7) 38 U. C. R. 172.
(8) 4 Ex. C. R. 134; 24 S. C. R. 482.
(9) 7 Ex. C. R. at pp. 177, 178.

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THE JUDGE OF THE EXCHEQUER COURT now (February 27th, 1905) delivered judgment.

The suppliant, as administratrix of the estate and effects of her son William Edward Ryder, brought her petition to recover damages for the loss sustained by his death, which happened while he and others were engaged in launching the Dominion steam-tug *Sir Hector* at or near Selkirk, in the Province of Manitoba. By an amendment that was applied for and granted at the hearing, the petition is prosecuted as well for the benefit of the brothers and sisters of the deceased as for the suppliant herself. The deceased was at the time of his death in the employ of the Crown, and it is alleged that his death was caused by the negligence of one Robert Francis Sweet, who was also in the employ of the Crown, and who at the time of the accident was in charge of the launching of the steam-tug.*

The statement in defence raises no issue in fact or in law. By it the suppliant is left to make such proof of her case as she may be enabled to do, and the Crown claims such interest in the premises as it may appear to have and submits itself to the judgment of the court. At the hearing, however, counsel for the Crown set up a number of defences, and asked leave to make any amendment necessary to raise the issues thereby presented. That amendment ought, I think, to be granted. Briefly, these defences were :—

1. That the accident did not occur on a public work ;

2. That it was not caused by negligence ;

3. That the negligence complained of (if any) was that of a fellow-servant of the deceased and the Crown is not liable therefor ;

* REPORTER'S NOTE.—The immediate cause of the accident was the breaking of a two-inch rope which was used as a bow-line in launching the tug. The evidence showed that this rope was new, and that those who used it did not know it was defective.

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4. That *The Workmen's Compensation for Injuries Act* (R. S. Man. c. 178) does not apply to this case. I shall have occasion to deal with the 3rd and 4th defences only.

The jurisdiction of the court in a matter of this kind is defined by clause (c) of the 16th section of *The Exchequer Court* (50-51 Vict., c. 16) by which it is, among other things, provided that the Exchequer Court shall have original jurisdiction to hear and determine every claim against the Crown arising out of any death or injury to the person or to property on any public work resulting from the negligence of any officer or servant of the Crown while acting within the scope of his duties or employment. Prior to the passing of the Act mentioned a petition of right would not lie for such a claim or cause of action. The only remedy the subject had in such a case was by a proceeding before the Official Arbitrators, who had been given jurisdiction in the premises by the Act of the Parliament of Canada 33rd Victoria, chapter 23. In the earlier cases arising after the passing of *The Exchequer Court Act* of 1887, it was contended that the clause cited had reference to the remedy only and did not in any way affect or alter the Crown's liability in such cases. (1) But that contention did not prevail; and there have been a number of cases in which petitions of right have been upheld where the suppliant claimed damages in respect of a tort. (2) It has never been thought, however, that the clause cited so extended the Crown's liability as to enable anyone to impute negligence to the Crown itself, or to make it liable in any case in which a subject under like circumstances would not

(1) See The Henrich Björn, 11 A. C. 270.

(2) See the City of Quebec v. The Queen, 24 S. C. R. 420; and Filion v. The Queen, 4 Ex. C. R. 134; 24 S. C. R. 482.

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be liable. There may indeed be cases in which the Crown is not liable although a subject or a company would under like circumstances be liable.

In this case, as in *Filion's case* (1), the negligence complained of was that of a fellow-servant of the deceased. In the latter case that was held not to be a good defence, as the case was governed by the law of the Province of Quebec in which the doctrine of common employment has no place. The law of the Province of Manitoba on that subject is to be found in the law of England as it stood on the 15th of July, 1870, (2) and in *The Workmen's Compensation for Injuries Act* (3). By the law of England as it stood at the date mentioned, a master was liable to his workmen for his own personal negligence, as where he failed to provide proper appliances for doing his work, or adopted or sanctioned a defective system of doing it (4); but he was not liable to his workmen for injuries resulting from the negligence of a fellow-servant or workman. But personal negligence cannot be imputed to the Crown, and if in the execution of its works improper appliances are provided, or a defective system of doing the work is adopted, whereby one of its servants is injured, that in general will be found to be the act of a fellow employee or servant; and that would afford the Crown a good defence to the action.

Since 1870 several Acts have been passed by the Parliament of the United Kingdon by which the law on this subject in England has been altered :—*The Employees Liability Act*, 1880 viz., *The Workmen's Compensation Act*, 1897; and *The Workmen's Compensa-*

(1) 4 Ex.C.R. 134; 24 S.C.R. 420.

(2) 51 Vict. (D) c. 33, s. 1; 38 Vict. (M.) c. 12, s. 1; C. S. M. c. 31 s. 4; 48 Vict. (M.) c. 15, s. 7; R. S. M. (1891) c. 36. s. 9; R. S. M. (1902) c. 40, s. 23.

(3) R. S. M. (1902) c. 178; 56 Vict. (M.) c. 39; 58 & 59 Vict. (M.) c. 48; 61 Vict. (M.) c. 51.

(4) Smith v. Baker, (1891) A. C. 325; Grant v. The Acadia Coal Co. 32 S. C. R. 427.

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tion Act 1900. In 1893 the Legislature of the Province of Manitoba passed *The Workmen's Compensation for Injuries Act* of that Province. This Act was amended in 1895, and also in 1898, and its provisions, with such amendments, now constitute chapter 178 of *The Revised Statutes of Manitoba*. By the 8th section of *The Worksmen's Compensation Act* 1897, to which reference has been made, it is provided that the Act shall not apply to persons in the naval or military service of the Crown, but otherwise shall apply to any employment by or under the Crown to which the Act would apply if the employer were a private person. In the Manitoba Statute the Crown is not mentioned; and if the question were raised it is probable that it would be held that the Crown, as represented by the Government of that Province, is not bound thereby. But however that may be it is clear, I think, that with respect to the liability in such cases of the Crown, as represented by the Government of Canada, nothing short of an Act of the Parliament of Canada can alter the law of Manitoba as it stood on that subject on the 15th of July, 1870.

It may seem anomalous that an employee of the Government of Canada who is injured by the negligence of his fellow-servant in the Province of Quebec may maintain a petition against the Crown for the injuries he receives; or in case death results from such injuries his representatives or those dependent on him may maintain their petition, while in a province in which the law of England prevails no petition will lie against the Crown under the same or like circumstances. But there are many anomalies in the law, and it is the office of the legislature, not of the court, to remove them.

In the present case for the reasons that the negligence complained of was that of a fellow-servant of the

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deceased, and that *The Workmen's Compensation for Injuries Act* of the Province of Manitoba does not apply, I am of opinion that the petition cannot be maintained. The suppliant is not in law entitled to any part of the compensation that she seeks to recover, and in that respect she has nothing, I think, to look to except the grace and benevolence of the Crown.

There will be no costs to either party.

Judgment accordingly.

Solicitors for suppliant : *Heap & Heap.*

Solicitors for respondent: *Howell, Mathers & Howell.*

IN THE MATTER of

THE GREAT NORTHERN RAILWAY COMPANY OF CANADA.

1905
March 13.

Scheme of Arrangement—The Railway Act, 1903, *secs.* 285, 286—*Application to confirm Scheme—Enrollment where no objections made.*

MOTION to confirm a scheme of arrangement, between The Great Northern Railway Company of Canada and its creditors, filed in the Exchequer Court under the provisions of section 285 of *The Railway Act*, 1903.

March 6th, 1905.

C. J. R. Bethune, in support of the motion, read the scheme of arrangement; the petition of a majority of the shareholders of the company, praying that the scheme of arrangement be confirmed by order of court; the affidavit of one of the vice-presidents of the company averring that the declaration of the company in its scheme of arrangement that the company was unable to meet its engagements with its creditors was true; the affidavit of a director of the company that the company would be able to carry out the scheme of arrangement if so confirmed; and the certificate of the Deputy Registrar of the court that assents in writing of over three-fourths in value of the bondholders of the company, as required by the provisions of section 286 of *The Railway Act*, 1903, had been filed. He asked that upon these documents, all being filed of record, an order pass confirming the scheme and directing that the same be enrolled forthwith.

C. S. Campbell, K.C., appeared to watch the motion for certain unsecured creditors of the company, but offered no objection to the order being granted. He

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Argument of Counsel and Judgment.

however asked for an adjournment of the hearing of the motion, in order to confer with counsel for the company with a view to having a more specific undertaking to pay unsecured creditors filed by the company than that contained in the scheme of arrangement.

The motion was adjourned for this purpose.

March 13th, 1905.

Mr. *Bethune* appeared in support of the motion.

Mr. *J. F. Orde* appeared, under instructions from Mr. *Campbell K.C.*, and stated that while no undertaking such as Mr. *Campbell* had asked for would be filed by the company, no objection would be made to the order going as prayed.

Per Curiam: The motion will be granted. The scheme of arrangement will be confirmed, and, as there is no objection, the same will be enrolled by the Registrar forthwith.

Order accordingly.

APPEAL FROM NOVA SCOTIA ADMIRALTY DISTRICT.

THE BARQUE "BIRGITTE," HER CARGO AND FREIGHT (DEFENDANT) } APPELLANT; 1904 June 6.

AND

LAMBERT FORWARD (PLANTIFF)...RESPONDENT;

AND

THE BARQUE "BIRGITTE," HER CARGO AND FREIGHT (DEFENDANT) } APPELLANT;

AND

R. MOULTON (PLAINTIFF).....RESPONDENT,

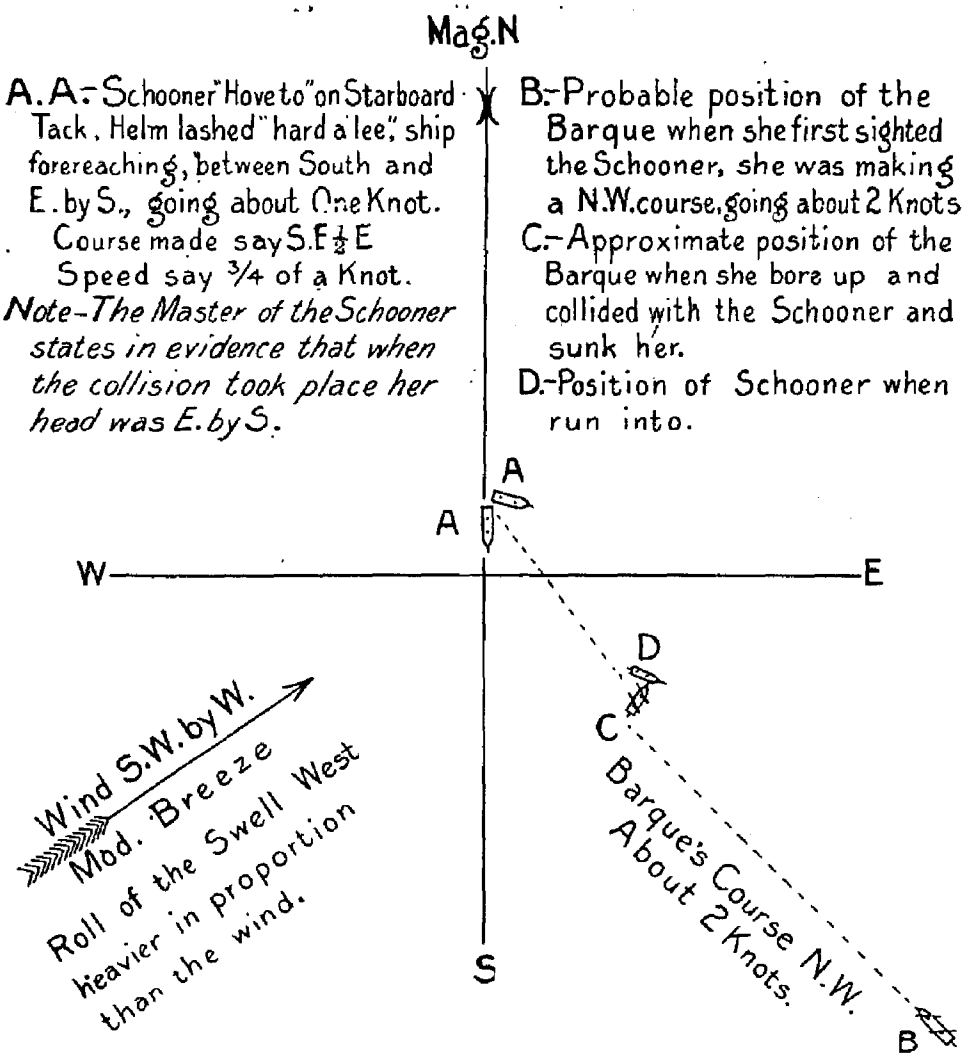
Shipping—Collision—Breach of regulations—Minor breach not contributing to collision—Liability.

If a collision upon the high seas has been brought about by a ship neglecting to follow her course as prescribed by the Regulations for preventing Collisions at Sea, the other ship will not be held equally at fault because of a contravention of a statutory regulation where such contravention could not by any possibility have contributed to the collision.

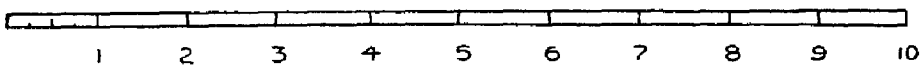
2. A vessel "hove-to" with her helm lashed is not obliged to carry the lights mentioned in Article 4 of such Regulations, as she is not "a vessel which from any accident is not under command."

ACTIONS for damages for collision on the high seas.

The facts of the case are stated in the reasons for judgment on appeal. For a better understanding of the relative positions of the two vessels in and about the time of collision a sketch, prepared by Captain Bloomfield Douglas, R. N. R., who acted as nautical assessor in the court below, is here given.



SCALE. 20 CABLES LENGTHS.



Bloomfield Douglas
R.N.R

Halifax
1st Oct 2 1903

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Judgment of Local Judge.

The reasons for judgment of the learned trial judge (MACDONALD, (C.J.) L.J., 9th Decr. 1903) follow:—

This is an action to recover damages for loss sustained by collision at sea, which the plaintiff alleges was caused by the negligence and default of the defendant ship, her master and crew.

The schooner *Georgina*, owned and commanded on on this voyage by her owner Capt. Forward, was on a voyage from Borgeo, Newfoundland, to Halifax, with a small quantity of fish. The collision took place about ten miles south of Country Harbour Ledges, on the south eastern coast of Nova Scotia, on the 31st July, 1903, and about 12.30 a.m. The wind was S.W. by W. and blowing about a six mile breeze. There was thick fog with mist. The sea was choppy and rough, and the *Georgina* in consequence lay to during the night. At the time of the collision the *Georgina* was lying-to under foresail and small jumbo to keep her steady and making little or no headway. One witness says about one mile an hour. The movements and position of the two vessels at the time of the collision are fully stated in the evidence.

The only question for determination is, which of the two vessels was to blame for the collision, or were both to blame and after giving the best consideration in my power to the evidence adduced, I have arrived at the conclusion that the defendant barque *Birgitte* was solely to blame. As this is largely, if not altogether, a question of seamanship, I was glad to have on the trial the assistance and advice of Captain Bloomfield Douglas, R.N.R., as Assessor; and he concurs in the opinion at which I have arrived. There will, therefore, be judgment for the plaintiff with costs. The damages will be referred to the registrar and merchants for assessment and the usual decree will be entered for the damages so ascertained and costs.

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Opinion of Nautical Assessor.

The opinion of the nautical assessor at the trial was as follows:

After having carefully considered the evidence given in the Vice Admiralty Court in the cases relating to the collision between the two vessels in question on the night of the 31st July last, off the coast of this Province, and having heard the addresses to the court by the counsel for the parties concerned,

I am of opinion that the master and owners of the Norwegian barque *Birgitte* are in default; that the collision with and the sinking of the British schooner *Georgina* were caused by the master of the barque *Birgitte* not continuing his course to the N. W. when the schooner *Georgina's* green light was well open on the barque's starboard bow.

(Signed) BLOOMFIELD DOUGLAS,
R. N. R.,
Nautical Assessor.

February 19th, 1904.

H. Mellish, K.C., for the appellant, contended that in the worst aspect of the case for the appellant the court must hold that both vessels were at fault, and, as a matter of law, neither is liable to the other. But the primary cause of the collision was the negligence of the respondent in keeping his vessel's helm lashed and the vessel lying-to. In this way she was constantly "coming up" in the wind, and then "falling off," so that her lights would be constantly changing. Then she carried no fog-horn to be sounded in foggy weather as required by the regulations. (*The Love Bird* (1)

The case cited goes further in excusing the appellants from liability than is necessary. In that case the ship had a proper fog-horn, and it was heard

(1) 6 P. D. 80.

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before the collision. Here no such horn was heard. The respondent's ship was guilty of a breach of a statutory requirement in not having or sounding a proper horn, and the appellant is excused from responsibility for the collision. Moreover, the respondent's ship in the position of lying-to could not put upon us the duty of avoiding her as if she was lying at anchor. A vessel may not carry the lights of a sailing ship if she is not pursuing a steady course but is veering about. Our men say they first saw a white light, and then a green light and the result was confusing to them. Then the respondent vessel was in a helpless condition with her rudder-head lashed, and could not do anything to avoid the collision when it was imminent. She had no right to throw all the burden of keeping clear upon us.

J. A. McKinnon, for the respondent, contended that as to the objection in the appellant's preliminary act it could not be raised now. The finding of the learned trial judge is that the *Birgitte* was wholly to blame, and that is as good as a finding that the absence of a fog-horn did not contribute to the collision. The facts, moreover, show that even if we had used a fog-horn it would not have averted the collision. It was the duty of the *Birgitte* to keep out of our way. A ship hove-to is entitled to her rights. (*Marsden on Collisions* (1). There is no more lee-way made in lying-to than in sailing.

Again, the *Birgitte* was clear when she opened up to those on board the *Georgina*, and the latter rightfully decided to keep her course; but the barque put her helm up, and that was the first moment when collision became imminent.

As to the case of the *Love Bird*, that was the first case decided after the old rule was made as to equality

(1) 4th ed. pp. 447, 450, 453.

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of fault, and it is absurdly severe upon a minor fault not contributing to the collision. The proper interpretation of the rule is found in the *Duke of Buccleugh* (1), where it was held that if an infringement of the regulations could not possibly have caused the accident, the ship guilty of such infringement should not be held to blame. See also the same case in the House of Lords (2).

Under the rules, the *Birgitte* should have kept out of our way (the *Winstanley* (3); the *Argo* (4); *Fanny M. Carvell* (5); *Fire Queen* (6).

H. Mellish, K.C., replied, citing *Howell's Admiralty Practice* (7); *Stockton's Admiralty Digest* (8); *Marsden on Collisions* (9).

THE JUDGE OF THE EXCHEQUER COURT now (June 6th, 1904,) delivered judgment.

This is an appeal from the judgment of the learned Judge of the Nova Scotia Admiralty District whereby, in an action for damages by collision, he pronounced in favour of the respondent's claim for the loss of his schooner the *Georgina* and condemned the ship *Birgitte*, her cargo and freight and their bail in an amount to be found due, and costs.

The learned judge came to the conclusion that the officer in command of the *Birgitte* was solely to blame, in which view he was supported by the opinion of Captain Bloomfield Douglas, R.N.R., who acted as nautical assessor. The latter states that in his opinion the master and owners of the Norwegian barque *Birgitte* were in default, and that the collision with, and the sinking of, the British schooner *Georgina*

(1) 15 P. D. 86.
(2) [1891] A. C. 310.
(3) 8 Asp. M. L. C. 170.
(4) 82 L. T. N. S. 602.
(5) 13 App. Cas. 455, (note.)
(6) 12 P. D. 147.
(7) P. 249.
(8) P. 199.
(9) Pp. 472, 555.

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were caused by the master of the barque *Birgitte* not continuing his course to the north-west when the schooner *Georgina's* green light was well open on the barque's starboard bow. The sketch accompanying Captain Douglas' opinion shows the position of the two vessels immediately before the collision, and the manner in which according to his view it occurred (1).

On the appeal it was contended that the *Birgitte* was not in any way at fault; but that ground, in view of the finding of the learned judge, was not strongly pressed. But it was urged that the *Georgina* was also in fault, and that the judgment appealed from was in that respect wrong. And this contention was placed upon three grounds.

First, it was said that the *Georgina's* helm being at the time lashed she was out of command and should have carried the light provided by Article 4 of the Regulations for preventing Collisions at Sea. But that Article refers to vessels that from accident are not under command, which is not this case, and it seems to be settled that a vessel "hove to", as the *Georgina* at the time was, is under way and must carry the lights mentioned in Articles 5 and 2 of the Regulations. With these Articles the *Georgina* complied and no fault can, I think, in that respect be attributed to her (2).

Then, in the second place, it is said that the *Georgina* was in fault in that she was not provided with a mechanical fog-horn as prescribed in Article 15 of the regulations; and in the third place it was contended that the conditions under which the *Georgina* was sailing contributed to the accident. Being "hove to"

(1) *Supra*, p. 340.

(2) REPORTER'S NOTE.—Upon the point as to whether a ship "hove-to" with helm lashed is a ship "under way," see *The Pennsylvania*, 23 L. T. N. S. 55 at p. 56; and the report of a case by other parties against the same ship in the Supreme Court of the United States in 19 Wall. 125, at p. 135.

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with her helm lashed hard down she was continually "coming to" and "falling off" the wind; and while she in that way kept her general course there was within the limits of south and east by south a constant changing of course, and a corresponding change in the position of her lights, which, it was argued, contributed to, if it did not actually cause, the collision.

As it was clear that the *Georgina* was not provided with such a fog-horn as the regulations called for, and that in this respect there was on her part a contravention of such Regulations, and as the collision occurred beyond the limits of Canadian waters, it was necessary, before the judgment appealed from could be given or affirmed, to come to the conclusion that the fact that the *Georgina* was not provided with a mechanical fog-horn not only did not, but could not, by any possibility have contributed to the collision. (The *Cuba* (1); the *Westphalia* (2); *Marsden's Laws of Collisions at Sea* (3). On that question, as well as on the third contention mentioned, there was no direct finding by the learned judge whose judgment was appealed from, or expression of opinion by the nautical assessor whose assistance he had. It was, I think, to be inferred that on both points the views of the learned judge and of the assessor were favourable to the respondent; but for greater certainty, and because the questions were in the main questions of seamanship, I directed the case to be re-argued at the sittings of the court lately held at Halifax where I had the advantage of being assisted by Captain Thomas Douglas, as nautical assessor, both parties agreeing in my asking him so to assist me. He agreed with Captain Bloomfield Douglas' opinion already referred to, and on the other questions mentioned was of the opinion that the

(1) 26 S. C. R. at p. 661. (2) 8 Ex. C. R. 263.
(3) 4th ed. 49.

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fact that the *Georgina* was not provided with a mechanical fog-horn could not, under the circumstances by any possibility, have contributed to the collision; and that the fact of the *Georgina* being at the time "hove to" with helm lashed did not contribute to the accident.

With that view I fully agree. At the time when immediately before the collision the *Birgitte's* course was changed, the *Georgina's* green light was "well open" on the barque's starboard bow, and the safe and proper thing for her to have done was to keep her course. By changing her course at that time she caused the collision; and the fact that the *Georgina* had no mechanical fog-horn, or that she was "hove to" with her helm lashed, had nothing to do with the collision occurring at the time and in the manner in which it occurred.

The appeal will be dismissed with costs.

Judgment accordingly.

Solicitor for the appellant: *W. H. Fulton.*

Solicitor for the respondent: *H. Mellish.*

NOVA SCOTIA ADMIRALTY BISTRICT.

1904
June 29.

HIS MAJESTY THE KING .....PLAINTIFF;

AND

THE SHIP "SAMOSET" AND HER CARGO..... } DEFENDANT.

American fishing vessel—Canadian territorial waters—Unlawful fishing.

The method of catching fish has no bearing upon a violation of the provisions of R. S. C. c. 94. The fact of taking fish without a license in the territorial waters of Canada constitutes the offence.

Semble: That coming into the territorial waters of Canada to cure fish caught outside the limits of such waters will subject the offending vessel to forfeiture.

ACTION for the condemnation and forfeiture of a United States vessel for illegal fishing in Canadian waters.

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

The case was tried at Halifax, before the Honourable James McDonald, Local Judge of the Nova Scotia Admiralty District, on January 6th and 7th, 1904.

A. G. Morrison and *R. T. MacIlreith* for plaintiff;

W. B. A. Ritchie, K.C. and *S. H. Foster* (of the Boston Bar) for the defendant.

MACDONALD (C.J.) L.J. now (June 29th, 1904,) delivered judgement

This is a proceeding by the Attorney-General of Canada, in the Admiralty District of the Court of Exchequer of Canada, to obtain a decree of forfeiture against the schooner *Samoset*, a vessel belonging to a citizen of the United States of America, and her cargo,

arrested on a charge of violating the laws of Canada in relation to fishing by foreign vessels in the territorial waters of the Dominion.

The statement of claim filed by the Attorney-General charges that the said vessel and her crew on various occasions, contrary to the laws of Canada, engaged in fishing and catching and curing fish, and curing and taking fish within the territorial waters of Canada and along the coasts thereof; and more particularly that on the 25th day of August, A.D. 1904, the said vessel and crew were engaged in fishing and catching fish and did catch fish in the neighbourhood of Flint Island, on the coast of Cape Breton, within three miles of the coast and bays of Cape Breton aforesaid, and in the territorial waters of Canada, and by such illegal fishing and catching fish, the said vessel and cargo became liable to forfeiture.

The crew at the time laid in the statement of claim was composed of the master, one Joseph Sampson, and seven or eight men, several of whom were examined at the trial. One of the charges principally relied upon by the Crown was that the *Samoset*, on the 25th of August aforesaid, while at anchor within a short distance of Flint Island and within three miles of the coast adjacent, engaged in fishing with hook and line or hand line fishing as distinguished from gill-net fishing and in curing the fish thus caught. This charge, if satisfactorily proved, would render unnecessary the consideration of any other charge of illegal conduct on the part of this vessel and her crew. It was claimed by the owner and master of the *Samoset* that she was fitted out only for a voyage of gill-net fishing. It was admitted, however, that the vessel was furnished with hooks and lines and other necessaries for hand-line fishing which could be used by the crew if they thought fit to do so, and that at least on one occasion

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Reasons for Judgment.

these hooks and lines were so used and fish caught with them, but not in the locality of Flint Island or Cape Breton. On the morning of the 25th August a number of vessels, including several from the United States, were anchored or drifting in the vicinity of Flint Island, some of them a short distance from the *Samoset*. Several persons from these vessels were called as witnesses by the Crown, and if they are to be believed, proved beyond all doubt that several of the crew of the *Samoset* were not only fishing but had, in the presence of these witnesses, hauled the fish out of the water and thrown them into barrels or other receptacles to be cured in the ordinary course of the business.

The owner and some of the crew of the *Samoset* were examined as witnesses and the former testified that the vessel was fitted out for gill-net fishing only and that he was not cognizant of any supplies for hand-line fishing having been put on board. It was of course immaterial how the fish were caught if the evidence that they fished within the line be accepted as true; and the attempt to show that there had been no hand-line supplies on the vessel could only be an attempt to contradict those who swore that they saw fish caught with those hand-lines. Several of the crew of the schooner were called to testify that none of the crew of the schooner had, to *their knowledge*, fished with hand-lines in the places and on the occasions testified to by the witnesses for the Crown.

A perusal of the evidence will show, I think, some diffidence or hesitation on the part of these people to deny absolutely that there was no such hand-line fishing as was testified to by the witnesses for the Crown. Still their evidence does practically amount to denial of what was testified to by the other party, and creates the difficulty that always meets a judge

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when it becomes his duty to analyze and determine the relative value of contradictory statements, and I admit that I have been in this case pressed with that difficulty. After giving the whole testimony the best consideration in my power, including the probable effect of personal interest upon the minds of the witnesses for the defence, I have arrived at the conclusion that the strong weight of evidence is in favour of the Crown, and that a decree forfeiting the vessel and cargo should pass.

Apart from the question just disposed of, Mr. Morrison, on the part of the Crown, urged that forfeiture has been incurred by the *Samoset* by reason of the admitted fact that, while within the territorial waters, fish were cured and salted, which had been caught the night before, although it was not proved that the fish so cured had been caught in forbidden waters. This nice question I am pleased to know it is not necessary for me to decide now, but it would appear from the observations of the late Sir W. Young, when presiding in the Vice Admiralty Court of the Province in 1871, that he held the opinion that coming into the territorial waters to cure fish caught outside of the line would subject the ship to forfeiture.

There will be the usual decree for the condemnation of the vessel and cargo and the disposition of the proceeds

Judgment accordingly.

Solicitor for plaintiff: *R. T. MacIlreith.*

Solicitor for defendant: *Henry C. Borden.*

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Jany. 12.

IN THE MATTER OF THE PETITION OF RIGHT OF

JOSEPH VINET, OF STE. ANNE DE LA PÉRADE, DISTRICT OF THREE RIVERS, LABOURER ..... SUPPLIANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

Public work—Injury to the person—Negligence—Aggravation of injury by unskilful treatment—Damages.

Where a person who is injured through the negligence of a servant of the Crown on a public work voluntarily submits himself to unprofessional medical treatment, proper skilled treatment being available, and the natural results of the injury are aggravated by such unskilled or improper treatment, he is entitled to such damages as would, with proper treatment, have resulted from the injury, but not to damages resulting from the improper treatment he subjected himself to.

PETITION OF RIGHT for damages for injury to the person alleged to have arisen from the negligence of servants of the Crown on a public work.

The facts of the case are set out in the report of the Registrar, to whom the case was referred by the court for enquiry and report.

The report of the learned referee was as follows:

" WHEREAS by an order made herein on the 5th day of April, A.D. 1904, by the Honourable Mr. Justice Burbidge, the matters in question herein were referred to L. A. Audette, Registrar of this Court, for enquiry and report under the provisions of section 26 of *The Exchequer Court Act.*

" AND WHEREAS, the reference herein was proceeded with, at the City of Three Rivers, on the 12th day of April, A.D. 1904, in presence of A. Delisle, Esq., of counsel for the suppliant, and R. S. Cook, Esq., of counsel for His Majesty the King, when evidence was adduced

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by both parties respectively, whereupon and upon hearing the same and what was alleged by counsel aforesaid, the undersigned humbly begs to submit as follows :—

"The suppliant's evidence herein was only filed on the 7th day of October instant, hence the delay in making this finding."

"The suppliant brings his petition of right to recover damages, as admitted by paragraph one of the statement in defence, for bodily injuries sustained by him while working, in the employ of the Federal Government, with other men on a kind of a boat called (arrache-pierre) stone-lifter, for the purpose of extracting and removing stones and boulders from the bottom of the Manigonce Rapids, on the St. Maurice River, in the District of Three Rivers, Province of Quebec, with the object of improving the navigation in the St. Maurice River."

"The works in question were being done under the superintendence of F. X. T. Berlinguet, the engineer in charge of the Public Works Department and resident engineer for the District of Three Rivers."

"This stone-lifter (arrache-pierre), a photograph of which is filed of record as Suppliant's Exhibit No. 3, is about 45 feet long and composed of two boats united together by a platform, forming a well in the centre through which the stones and boulders are lifted and extracted by means of a crane placed above the well. At each of the four corners there is a big post, also called anchor, about 30 feet long and nine inches in diameter, which is lowered to the bottom by means of a winch with cranks, when a stone is located, in order to make the boat solid and find a kind of resting base. These posts are really acting as legs to a table, as Mr. Berlinguet puts it."

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Statement of Facts.

"These posts run up and down in a wooden box and are held in position by a cog-wheel. There are two catches, one to hold it up, the other to hold it down, as the case may be. Besides these catches, at about 3½ to 4 feet from the deck, there is also what is called a "safety-pin" which goes through the box and the post transversely for greater security and to prevent it from moving."

"Now it is proved beyond doubt, as admitted anyhow by paragraph 7 of the defence, and no one questions this point, that orders and instructions were repeatedly given by the proper authority to the men working on board this boat,—and each man called as a witness knew of this order,—to never pull out or take off this safety-pin without having three or four men on the cranks or handles of the winch, because it was recognized by everyone as a very dangerous piece of work. That notwithstanding such imperative orders, one man, Tousignant by name, who had been foreman the year before, was acting then as foreman in the absence of the regular foreman, and who was recognized by the men as a kind of sub-foreman retaining a certain amount of authority with the men even when foreman Crete was present, gave orders to remove the safety-pin without having three or four men at the cranks. It is also in evidence that he gave orders to the men when the foreman was present, and they would obey him without any hesitation."

"On the 27th of October, 1902, between the hours of 8.15 and 8.30 a.m., while the boat was proceeding from the shore to the channel, one of the men felt a stone with a pole and called out he had. Crete, the foreman, was at the time in the stern at the tiller. Tousignant was at the bow with Vinet and Gendron standing near one of the posts, and he told Gendron to pull out the safety-pin. Thereupon the suppliant said there

was no hurry. Gendron then left the side of the winch on which he was standing and went over to the other side and said to Tousignant, there is no hurry. Tousignant then said, pull it out, it will be so much done. Then Gendron, although quite aware of the orders given never to take off this pin without there being three or four men at the cranks, pulled out the pin without any warning, and the post went down, the crank revolving with great force and rapidity striking the suppliant first on the arm and three times on the leg, throwing him to the deck with a broken thigh and the hip opened. The suppliant stated at the beginning of his evidence that his arm had been dislocated, but that was afterwards corrected; no injury was done to his arm."

"The suppliant says he has been unable to work ever since the accident; that his leg tires him. He was offered to act as watchman on board this very boat or stone-lifter, but refused to do so, declaring himself unable to perform the duties incumbent upon such work."

"It was contended by the Crown that this refusal was made because the suppliant had been advised it would hurt this case if he resumed working before it was decided. He however denied that."

"It appears from the conformation of the machinery of this stone-lifter that the post has to be lifted with the crank to allow one to take the catch off; but on this occasion everyone wondered that Gendron could take off the safety-pin alone, and much more that the post went down after taking out the safety-pin. Some of the witnesses contend that it is quite a mystery to them how the post could go down, and many are the conjectures made to explain how it did go down."

"Be it as it may the undersigned has no hesitation in finding that under the circumstances the accident

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happened on a public work, and that it resulted from the negligence of both Tousignant and Gendron while acting withing the scope of their duties or employment."

"There was negligence if the catch was not on, because it should have been. There was negligence in taking off the safety-pin without there being three or four men on the cranks or handles as called for by the repeated orders given to that effect. There was additional negligence in Gendron taking off the safety-pin without looking to see if the catch was on, and in not giving warning. The direct and immediate cause of the accident was the taking off of that safety-pin under the known circumstances. *Filion* v. *The Queen*, (1); *The Queen* v. *Grenier* (2); *Asbestos Co.* v. *Durand* (3)."

"By paragraph 9 of the statement in defence the Crown pleads, *inter alia*, that the accident occurred more than a year before the filing in this court of the petition of right herein, and that the suppliant's claim is therefore prescribed under the law of the Province of Quebec."

"It is true, indeed, that an action for bodily injuries is prescribed by one year under Art. 2262 C.C.L.C., but in this case while the accident happened on the 27th of October, 1902, the petition of right appears, by the date affixed upon the original, to have been left with the Secretary of State on the 16th of October, 1903, in compliance with section 4 of *The Petition of Right Act*, and filed in this court on the 23rd of December, 1903. The undersigned finds that the leaving of the Petition of Right with the Secretary of State within the year has created a civil interruption of the prescription (4)."

(1) 4 Ex. C. R. 134; 24 S.C.R. 482.
(2) 30 S.C.R. 42.
(3) 30 S.C.R. 285.
(4) Art. 2224, C.C.L.C.

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"Now, the suppliant claims $10,000.00 for all damages arising from such accident. *Allan* v. *Pratt* (1); Ency. Laws of England, Vol. 4, *Verbo*, Personal Injuries, 101; *Perrault* v *Henault* (2); *Belanger* v. *Riopel* (3)."

"He was earning $30 a month and his board at the time of the accident; had already worked for other various wages, with however the necessary idle days which a man in his walk of life must expect. He still walks with a cane and his injured leg is shorter than the other. Nevertheless Dr. Lambert says that provided it is not necessary for Vinet to use his leg with strength he can perform the duties of watchman. Dr. Marcotte, who attended Vinet during his illness, has no doubt he could act as watchman. Mr. Berlinguet, the government engineer, swears he is still ready to give him a position as watchman. The suppliant was 52 years of age at the time of the accident, a married man, father of four children; three are married, and one grown up son 19 years old still living at home and earning. This son nursed him at night during his illness."

"After the accident Vinet was not treated by a licensed practitioner for the fracture of his limb, but called in a bone-setter (rebouteur), or quack doctor. However, after the latter had attended him for the fracture of the limb, he was treated by a physician for paralysis of the bladder and the rectum, but his broken limb was not attended to by a duly licensed physician,—a very unfortunate feature of the result of the accident."

"While the trial was being proceeded with, on application of counsel for the Crown, the suppliant's limbs were examined in a private room by Dr. Napoleon Lambert, a duly licensed practitioner, who was after-

(1) 15 R.L. 291; M.L.R. 3 Q.B. at p. 11.
(2) 31 L.C.J. 287.
(3) M.L.R. 3 S.C. 258.

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wards heard as a witness, and informed us, first, that there was nothing at all the matter with the suppliant's arm. Secondly, that then Vinet appeared to have suffered from a fracture of the femur at the middle of the right leg, and this fracture is now cured. Thirdly, there appears also to have been probably a fracture of the neck of the femur, that is to say, at the articulation between the hip bone and the head of the thigh bone. This articulation is not cured. The position of the two bony parts is not cured, and that is why the articulation moves (mobile) and is a false articulation instead of being a real one. The articulation should have been better placed. Then he goes on telling us that Vinet walked too soon after the accident; that the two bony parts have not been replaced in the right position nor maintained in position with the necessary appliances, etc. Then counsel for the Crown, in re-examination, asked if the fracture had been reset as it should have been could Vinet have been as well as formerly? And the Doctor answers: Well, I cannot promise it to-day, but had it been done at the time of the accident, after three or four months of treatment he should have been as formerly, as before."

"Now, it was obviously the duty of Vinet after the accident to take proper care of himself, and not to aggravate the result of the accident by gross ignorance and negligence. That there is no contributory negligence with respect to the cause of the accident and the accident itself, there can be no doubt. But there is clearly contributory negligence with respect to the result of the accident, which the suppliant could have mitigated by calling a duly licensed practitioner. Living as he is in a populated centre where the services of a skilful and learned surgeon or physician were available, it was for Vinet an act of gross ignorance and negligence to call in a bone-setter (rebouteur) or

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quack doctor practising without any license; and by doing so he has obviously aggravated the result of the accident and perhaps hurt himself permanently, unless he still tries the services of a competent surgeon, as Dr. Lambert tells us."

"While the suppliant is entitled to recover a certain amount for the compensation of the damages arising from such bodily injuries, a substantial element to be considered in fixing the same will be that he has aggravated by his gross and unpardonable ignorance and negligence the result of the accident. The damages claimed by the suppliant are just as much, if not more, the result of improper treatment after the accident, than from the accident itself."

"WHEREFORE the undersigned has the honour humbly to report that, under the circumstances of the case as above mentioned, he finds the suppliant entitled to recover from His Majesty the King the sum of four hundred dollars ($400.00), and costs of an action above $400.00."

"IN WITNESS WHEREOF, the undersigned has hereunto set his hand at Ottawa, this 15th day of October, A.D., 1904."

(Sgd.) L. A. AUDETTE,
Registrar & Referee.

November 16th, 1904.

The case came before the court on motion by the suppliant by way of appeal from the referee's report, and on a counter-motion by the respondent for judgment upon such report.

W. H. Barry, for the suppliant, contended that the learned referee had erred in diminishing the damages established by the suppliants' evidence because of the alleged unskilful treatment he had submitted himself to Neither the facts nor the authorities applicable to

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the case justified such a deduction. The damages sustained by the suppliant were the natural result of the injury, and were not augmented by improper treatment. It is customary in the district where the suppliant resides to resort to the bone-setters in cases of accident; and the evidence does not establish that the suppliant would not have suffered his permanent injuries if he had been treated by a regularly qualified medical practitioner at the time of the accident.

F. H. Gisborne, for the respondent, argued that the learned referee was right in taking into account the negligence of the suppliant in aggravating the natural and ordinary results of the injury he received. The proximate cause of his permanent injury was the lack of skilled treatment. *Beven on Negligence* (1); *York* v. *Canada Atlantic SS. Coy.* (2).

January 12th, 1905

Per Curiam: The motion by way of appeal from the referee's report will be dismissed, and the report confirmed.

Judgment accordingly.

Solicitor for the suppliant: *A. Delisle.*

Solicitor for the respondent: *R. S. Cooke.*

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(1) 2nd ed. p. 115. (2) 22 S.C.R. 167.

QUEBEC ADMIRALTY DISTRICT

MORTON DOWN & COMPANY, LIMITED ..... PLAINTIFFS.

1905
March 24.

AGAINST

S.S. "LAKE SIMCOE," AND OWNERS... DEFENDANTS.

Security for costs — Admiralty Rule 228 — English practice—Application made by defendant after plaintiff files particulars of claim.

Under the provisions of Rule 228 of the General Rules and Orders regulating the practice and procedure in Admiralty Cases in the Exchequer Court of Canada applying the English practice to cases not provided for by such rules, an order for security for costs may be granted in Admiralty proceedings on motion of the defendant after the plaintiff has filed particulars of his statement of claim.

THIS was an action *in rem* taken against the SS. *Lake Simcoe.*

The action was upon a claim for $3,718.14 being a balance of cash supplied for necessaries, repairs, and other disbursements to the ship SS. *Lake Simcoe* at the Port of Montreal, on the 26th day of July, and the 5th day of August, 1904, and for costs.

The action was instituted on the 26th September, 1904, and accompanying the writ was a warrant issued for the arrest of the ship SS. *Lake Simcoe.* The writ and warrant were duly executed on the date of issue and were returned into court and filed by Mr. W. S. Walker, Deputy District Registrar of the court, on the 27th September.

The owners of the *Lake Simcoe* gave bail for the amount, and the ship was then released. The bail was given on the 29th September, and the release took place on the 5th October.

On the 12th December, the *Lake Simcoe* and the owners thereof, the defendants in the action, gave

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notice of application to the court that they would move for an order directing the plaintiffs to file pleadings herein and file a statement of particulars of claim within a week from the date of the order setting out the causes and grounds of action, and the nature of their claim. This application was granted, and as the plaintiffs failed to furnish the necessary particulars within the time allowed by the order, the defendants made a motion to have the action dismissed.

The motion came on for hearing before the Local Judge in Admiralty for the district of Quebec.

The plaintiffs made application to file their written statement of claim. The court gave defendants the costs of the motion, but allowed the statement of claim to be filed On the 6th March, the defendants made a further motion for particulars of the statement of claim. This motion was also granted, and on the 21st March, the plaintiffs filed particulars of their statement of claim. Immediately after the said particulars had been filed, the defendant moved the court asking that the plaintiffs be ordered to give security for the payment of the costs in the action.

March 24th, 1900.

The motion for security for costs was now argued.

C. A. Duclos, K.C., for the plaintiffs, opposed the motion on the ground that the defendants were beyond the legal delays to file such a motion, and that it should have heen made within three days after their appearance had been filed, arguing that the procedure to be followed in cases before the Admiralty court arising in the district of Quebec must be governed by the provisions of the Code of Civil Procedure for Lower Canada. He cited Article 164 of the Code of Procedure in support of his argument.

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Claude Hickson for defendants, cited the General Rules and Orders regulating the practice and procedure in Admiralty cases in the Exchequer Court of Canada.

He argued that in those rules and orders no provision was made for the application for security for costs, or the filing of a power of attorney. He cited Admiralty Rule No. 228, in which it is provided that in all cases not specially dealt with in the practice and procedure in the Admiralty cases in the Exchequer Court of Canada, the procedure for the time being in force in respect to Admiralty proceedings in the High Court of Justice in England is to be followed, and argued that under the English procedure, an application for security for costs may be made at any time during the proceedings.

He cited *Roscoe's Admiralty Practice* (1); and Order 65, Rule 6, and 6a. of the High Court of Admiralty, which provides that it is within the discretion of the Judge or Court to grant an application for security for costs at any time during the proceedings.

Mr. *Duclos* replied.

Per Curiam:—The plaintiffs will give security for costs within thirty days from the date hereof to the amount of $5000.00; costs of motion to follow the event.

Order accordingly.

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(1) 3rd ed., part 4.

IN THE MATTER OF THE PETITION OF RIGHT OF

1905
April 22.

CHARLES BERKLEY POWELL.....SUPPLIANT;

AND

HIS MAJESTY THE KING..... .....RESPONDENT.

Public officer—Assignment of salary—Public policy—Librarian of Parliament—Auditor-General—Right of, to bind Crown.

The provisions respecting the assignments of choses in action found in R. S. O., c. 51, s. 58, ss. 5 and 6 are not binding upon the Crown as represented by the Government of Canada.

2. On grounds of public policy the salary of a public officer is not assignable by him.

3. Neither the Librarian of Parliament nor the Auditor-General of Canada has power to bind the Crown by acknowledging explicitly or implicitly an assignment of salary by an officer or clerk employed in the Library of Parliament.

DEMURRER to a petition of right for the recovery of a claim against the Crown for moneys alleged to be due to a public officer, and by him assigned to the suppliant.

A. H. Todd, a clerk in the Library of Parliament, was joined with His Majesty the King as a respondent in the petition of right.

The instrument set out in the pleadings, and alleged to be an assignment of salary by Mr. Todd, was as follows:—

"I, Alfred Hamlyn Todd, of the Library of Parliament, hereby appoint the Union Bank of Canada my lawful attorney to receive from the Receiver General of the Dominion of Canada, or other person authorized to pay the same, all such sum or sums of money as are now due or may hereafter become due, and payable to me by the Government of the Dominion of Canada, and to give a receipt or receipts

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"for the same, hereby revoking and cancelling all "powers of attorney at any time heretofore made by "me for the same or any like purpose."

"Witness my hand at Ottawa this 11th day of "October, one thousand eight hundred and ninty-"four."

"(Sgd.) A. HAMLYN TODD"

"Executed in presence of

"(Sgd.) MARTIN J. GRIFFIN,
Parliamentary Librarian."

The suppliant further alleged that this power of attorney was accepted on behalf of His Majesty the King by the Librarian of Parliament and the Auditor-General of Canada, the properly authorized officers in that behalf, on or about the 10th day of October, 1894, as appears by the following letter:—

LIBRARY OF PARLIAMENT,
OTTAWA, October 10th, 1894.

"DEAR MR. POWELL,—At Todd's request I write "you a note to say that by an agreement made with "the Auditor-General in regular official form, Todd's "monthly cheque will hereafter be made payable to "the Molson's Bank as a security for the business "arrangement made for him by yourself with the "bank.

"I am, etc.,
"Very faithfully yours,
"(Sgd.) MARTIN J. GRIFFIN."

The suppliant further alleged in substance as follows:—

That in pursuance of the said agreement the monthly pay cheques of the said Todd were made payable to the Union Bank of Canada until on or about the 15th day of May, 1896, when there was due under the said agreement the sum of $1,812.18. On the said date the

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suppliant, at the request of the said Todd, entered into another agreement in writing whereby he agreed to advance an additional sum to Todd, sufficient to make the whole amount due on that date the sum of $2,000. By the terms of the said agreement dated the said 15th day of May, 1896, it was agreed that repayment should be made in the same way and credited in the same manner as provided in the said agreement of the 2nd day of March, 1894.

From and after the said 15th day of May, 1896, until the 8th day of August, 1899, the monthly pay cheques due to Todd from the Dominion Government were made payable to the Union Bank. On the said date, however, by arrangement between Todd and the suppliant, and approved of by the Librarian of Parliament, the said power of attorney was replaced by a new power of attorney making all the said moneys payable to the Molsons' Bank, instead of the Union Bank, and from the said 8th day of August, 1899, until the 14th day of March, 1900, the said monthly pay cheques due to the said Todd were made payable to the said Bank as aforesaid, and the sum of $40.00 per month applied each month in liquidation of the claim of the suppliant.

The suppliant advanced to Todd the further sums of $700.00 and $300.00 on the 15th day of January, 1899, and the 15th day of June, 1899, respectively, the said sums to be repaid in the same manner as the sums previously mentioned.

Both of said powers of attorney given by Todd to the said banks were on the regular official form, were approved of by, and were to the knowledge of, the said Librarian of Parliament and the Auditor-General of Canada, and the other officials authorized and empowered to deal therewith on behalf of His Majesty the King, given for good and valuable consideration,

and were, therefore, irrevocable by the said Todd and constituted with the said agreement an absolute assignment of the whole or a portion of the salary of the said Todd.

The suppliant notified the Librarian of Parliament and the other proper officers of the Crown; and the Crown, through its said officers, were at all times well aware that the said amounts had been advanced and that the whole or part thereof remained due and unpaid on the 15th day of March, 1900.

On or about the 15th day of March, 1900, the said Todd notified the Librarian of Parliament that he revoked the power of attorney and thereupon and thereafter the said power of attorney was wrongfully and negligently treated by the said Librarian and other officers of the Crown and by the Crown as being null and void, and all the monthly pay cheques becoming due to the said Todd since that time have been wrongfully and negligently paid to the said Todd and have not been made payable to the Molson's Bank, as required by the said power of attorney.

The Attorney-General of Canada demurred to the sufficiency of the allegation in the suppliants' petition as establishing a claim in law against the Crown.

April 21st, 1904.

The demurrer came on for argument.

E. L. Newcombe, K.C., in support of the demurrer, argued that it was not competent to the suppliant to join a subject with the King as a party respondent in a proceeding by petition of right. Todd is the debtor, and as between Todd and Powell the court has no jurisdiction. Moreover Todd has not appeared to the action. There is no statute authorizing such a proceeding being taken, and there is no contract between Powell, the creditor of Todd, and the Crown.

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The Parliamentary Librarian or the Auditor-General has no authority to bind the Crown; they are both statutory officers and not authorized by the Executive to act for the Crown in such a case.

The assignment is invalid and ineffectual. The Treasury Board regulations will not recognize assignments which purport to be irrevocable. A mere possibility of obtaining money cannot be assigned between subject and subject. The rule at common law is that there cannot be an assignment of a debt not *in esse*. (*Williams on Personal Property*, (1); *Snell on Equity* (2)

It needs a statute to empower the assignee of a chose in action to sue in his own name for the recovery of the debt; this is the rule that prevails between subject and subject, and *a fortiori* the assignee of a claim against the Crown would have no right to sue for it in his own name. There is no Dominion legislation authorizing such a proceeding, and even if the Ontario enactments in this behalf applied to the Crown in right of the Province, of course it could not be contended for a moment that they applied to the Crown in the right of Canada. Therefore, I deny the proposition that a debt due by the Crown may be validly assigned.

[THE COURT: There is a dictum to the contrary of your view by Strong J. in *The Queen* v. *Smith & Ripley* (3).]

That is so; but I imagine that such opinion, expressd *obiter*, as it was, would not weigh against considered authority upon the point. (*Story's Equity Jurisprudence* (4); *Smith's Manual of Equity* (5); *Snell's Equity* (6); *Collyer* v. *Isaacs* (7); *Bacon's Maxims* (8).

(1) 15th ed. p. 91.
(2) 13th ed. p. 66.
(3) 10 S. C. R. at p. 66.
(4) Sec. 1040 a.
(5) 14th ed. 293.
(6) 13th ed. 76.
(7) 19 Ch. D. at p 351.
(8) Works, vol. iii., p. 237.

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It is against public policy that the salary of a public officer should be assigned. (*Throop's Public Officers* (1); *Arbuckle* v. *Cowtan.* (2); *Blackett* v. *United States* (3).

J. Lorne McDougall, contra, argued that modern authority justified the joinder of the subject with the King as respondents in a proceeding by petition of right. (*Kirk* v. *The Queen* (4); *Kinlock* v. *The Queen* (5).

At this stage of the case, by consent of parties, the court granted an order to strike out the name of A. H. Todd as party respondent to the petition of right. Leave was given to the suppliant to amend the petition as against the Crown; the costs of the demurrer *quoad hoc* to be costs to the Crown in any event. Further argument of the demurrer was adjourned *sine die.*

January 9th, 1904.

The petition of right having been amended the argument of the whole demurrer was now resumed.

E. L. Newcombe, K.C., in support of demurrer;

J. Lorne McDougall, contra.

Mr. Newcombe: The petition as amended is substantially open to the same objections in law as it was before. There is no contract with the Crown shewn on the face of the pleadings, and there is no statute allowing a suit to be brought against the Crown upon the facts alleged. On grounds of public policy the Crown cannot be expected to seek out the assignees of claims; its creditors and payees are those it sees fit to primarily and openly do business with. It is upon this principle that garnishee process does not lie against the Crown. It is a question of convenience in the

(1) Pp. 52, 53.
(2) 3 B. & P. 328.
(3) 7 Metc. 338, 339.
(4) L. R. 14 Eq. 558.
(5) W. N. 1882, p. 164; s. c. W. N. 1884, p. 80.

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administration of public business. Such being the case the petition will not lie here. (*Feather* v. *The Queen* (1).

If the suppliant cannot recover upon a claim as of contract, then he must rely upon tort. He does allege that the Crown negligently and wrongfully disregarded the power of attorney. But my answer to that is that there is no statute making the Crown liable for negligence in such a case.

There is no contract between Todd, the original creditor, and the Crown. He is a mere appointee of the Crown, removable at pleasure. He has no prospective interest in any salary which may be attached to his office. So there being no debt, there can be no assignment of it. (*Story's Equity Jurisprudence* (2); *American and English Encyclopedia of Law* (3); *Benjamin on Sales* (4).

The power of attorney is not an assignment in law. It is revocable, and was, in fact, revoked. If it were to be said that Todd had no right to revoke his power of attorney, it would follow as a corollary that the Government once having acted on this instrument must continue him in office until the suppliant's claim was paid. This is plainly an untenable argument. It means tying the hands of the Government in exercising its pleasure to dispense with the services of its employees

Mr. McDougall here intimated that he was not ready to continue the argument now, and asked for an adjournment, which was granted.

January 12th, 1904.

F. H. Gisborne in support of demurrer;

(1) 6 B. & S. 257.
(2) 13th Am. ed. p. 349.
(3) 2nd ed. vol. 24, pp. 1023, 1024, 1042, 1045.
(4) 4th ed. 85.

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J. Lorne McDougall, contra.

The argument of the demurrer was resumed.

Mr. McDougall contended that Todd was not a civil servant, but an officer of Parliament appointed under the provisions of R. S C., c. 15. Sec. 7 of that Act shows that the officers and servants of the Library of Parliament, although appointed by the Governor in Council, are not Crown officers in the ordinary sense, because their salaries are especially provided for.

[THE COURT: They are paid out of the moneys voted by Parliament for civil service salaries. Parliament does not specifically appropriate money to pay them.]

[*Mr. Gisborne* explains that the officers of the Library of Parliament stand on the same footing as other branches of the civil service in respect of the fund out of which salaries are paid.]

Even admitting that Todd is under the control of the Governor in Council in respect of his office, that does not dispose of the matter because the Governor in Council, by an order, has expressly sanctioned the practice of assigning salaries.

[THE COURT: You have not set up that order in your pleadings.]

But the Crown is estopped from denying the particular assignment in issue here because its officers have acted on the assignment.

[THE COURT: They did until it was revoked, and you do not complain of anything done before its revocation.]

No; but the power of attorney assigns "all moneys hereinafter to become due." Under that provision it was their duty to see that the future moneys were paid over to the assignee. When the Governor in Council passed the general order (1) it was tantamount

(1) REPORTER'S NOTE.—See Regulations of Treasury Board of 1st Feby., 1870, respecting the mode of acquittal of warrants for the payment of money by the Government of Canada.

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to saying that they waived the common law defence that the Crown is not bound by assignments.

[THE COURT: But is this not merely a provision enabling a creditor of the Crown to appoint an agent to receive money? If what is contemplated is merely a power of attorney, and the instrument contained no representation on the part of the Crown as to irrevocability, the Crown would not become in any way liable on revocation of the power.]

The instrument set out in the pleadings is a power of attorney coupled with an interest, and as such is irrevocable. *American and English Encyclopedia of Law.* (1.)

That a claim against the Crown is assignable is established in *The Queen* v. *Smith and Ripley* (2).

Mr. Gisborne pointed out that the Auditor-General was not a party to the assignment, and had no authority to act for the Crown in such a matter.

THE JUDGE OF THE EXCHEQUER COURT now (April 22nd, 1905), delivered judgment.

The petition is brought upon an alleged assignment to the suppliant by Mr. Alfred Hamlyn Todd, a clerk employed by the respondent in the Library of Parliament, at Ottawa, of his salary as such clerk; and upon the action of the Librarian of Parliament and of the Auditor-General in respect of such assignment. The assignment relied upon consists of an agreement made between Mr. Todd and the suppliant and a power of attorney given by Mr. Todd to the Union Bank of Canada to secure the repayment of advances made by the suppliant to Todd. By the former it was agreed that Todd's monthly pay cheque of $147.00 was to be made payable to the said bank, and that the bank was, out of the proceeds thereof, to pay $40.00 to the credit

(1) 2nd ed. vol. 1, "Agency," p. 1218. (2) 10 S. C. R. at p. 66.

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of the suppliant and the balance to the credit of Todd. The power of attorney to the Union Bank of Canada was subsequently replaced by one to the Molsons' Bank. It appointed the bank Todd's lawful attorney to receive from the Receiver General of Canada, or other person authorized to pay the same, all such sum or sums of money as were then due or might thereafter become due and payable to him by the Government of Canada and to give a receipt or receipts for the same. It is also alleged that this power of attorney, which is stated to be in the regular official form, was accepted, and that it and the said agreement were approved of on behalf of the respondent by the Librarian of Parliament and the Auditor-General of Canada, the properly authorized officers in that behalf; that the power of attorney was under the circumstances irrevocable and constituted with the said agreement an absolute assignment of the whole or a portion of the salary of the said Todd; that subsequently Todd notified the Librarian of Parliament that he revoked the said power of attorney, and thereupon and thereafter the said power of attorney was wrongfully and negligently treated by the said Librarian and other officers of the Crown, and by the Crown, as being null and void; and all the monthly pay cheques becoming due to the said Todd since that time have been wrongfully and negligently paid to the said Todd and have not been made payable to the Molson's Bank as required by the said power of attorney. To the petition there is a demurrer, and it will be convenient in the first place to consider the objections stated in the eleventh and twelfth grounds thereof, which are as follows:—

"11. A claim, demand or chose in action against "the Crown cannot be assigned so as to give the "assignee any cause of action against the Crown "by Petition of Right or otherwise.

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"12. The assignment of the emoluments of a "public office thereafter to accrue, and whether "consisting of a salary or fees or other official profits, "is void on the ground that it is contrary to public "policy".

The public officer, whose salary is alleged to have been assigned to the suppliant, was, as will have been observed, a clerk employed by the Crown in the Library of Parliament at Ottawa, and as the transaction upon which the petition is founded took place at that city, the question that is raised by the eleventh ground of demurrer, stated in general terms is, whether an assignment of a claim against the Government of Canada, made in the Province of Ontario, gives the assignee a right to bring his petition therefor in his own name; or in other words, whether the Crown, as represented by that Government is bound by the statutes that have from time to time been passed by the Legislature of that Province, to enable the assignee of a *chose in action* to bring an action thereon in his own name. By the Act of that Legislature 35 Vict. c. 12, entitled *An Act to make debts and choses in action assignable at law*, the assignee of a *chose in action* was given a right to sue thereon in his own name (1). By the Act 60th Victoria, c. 15, s. 5, the law of Ontario on this subject was assimilated to that of England under the Judicature Act, 1873, 36 & 37 Vict., c. 66, s. 25 (6), and is now to be found in *The Judicature Act* of Ontario, R.S.O. c. 51, s. 58, ss. (5) and (6). There is, I think, no reason to think that these statutes were or are binding upon the Crown; but even if it were conceded that the Crown, as represented by the Government of the Province of Ontario, was bound thereby, I should be of opinion that the Crown as represented

(1) See also R.S.O. (1877) c. 116, ss. 6 and 7; and R.S.O. (1887) c. 122 ss. 6 and 7).

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by the Government of Canada is not bound. The only legislature in Canada that would have power in that respect to bind the Crown, as represented by the Dominion Government, would, it seems to me, be the Parliament of Canada.

Then with reference to the twelfth ground of demurrer, it is, I think, well settled, that on grounds of public policy the salary of a public officer is not assignable by him (1).

That being the case, it becomes necessary to consider whether what is alleged in respect of the action of the Librarian of Parliament and the Auditor-General in any way alters the position of the Crown, or makes it liable to the suppliant. But before proceeding to that aspect of the matter it may be observed in passing that the power of attorney is on the face of it revocable, and that it is made to the bank and not to the suppliant. It was made for the latter's benefit, but the bank and not the suppliant is the assignee, so far as the transaction rests upon the power of attorney.

With reference to the other question, the strongest way of stating it for the suppliant would be that the Librarian of Parliament and the Auditor-General of Canada had for the Crown agreed with the suppliant that Todd's monthly pay cheque should be made payable to the bank. I do not suggest that what is alleged amounts to that; but if it does not, clearly the Crown is not liable. If, however, that is the construction to be put upon the petition, then it seems to me to be equally clear that neither the Librarian of Parliament nor the Auditor-General had any authority or power to bind the Crown by any such agreement; and if they made it and failed to see it carried out, whether

(1) *Flarty* v. *Odlum*, 3 T. R. 681; *Palmer* v. *Bate*, 6 Moo. 28; *Wells* v. *Foster*, 8 M. & W. 149 and *Arbuthnot* v. *Norton*, 5 Moo. P. C. 231. *Lidderdale* v. *Montrose*, 4 T. R. 248; *Arbuckle* v. *Cowtan*, 3 B. & P. 328;

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wrongfully or negligently, as alleged or otherwise, no petition of right would lie against the Crown for their default or negligence.

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There will be judgment for the Crown upon the demurrer to the petition.

Judgment accordingly.

Solicitors for suppliant: *Latchford, McDougall & Daly.*

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

Between

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

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April 25.

AND

GEORGE WASHINGTON LOVEJOY AND WILLIAM HENRY LOVEJOY, CARRYING ON BUSINESS AS CO-PARTNERS UNDER THE NAME, STYLE AND FIRM OF "DOMINION DENTAL MANUFACTURING COMPANY"..... DEFENDANTS.

Smuggling—Penalties—The Customs Act, secs. 192, 236, 246—Averments in information—Sufficiency of—Demurrer—Prescription—Jurisdiction.

In an information for smuggling, laid under the provisions of sec. 192 of *The Customs Act*, it is a sufficient averment to allege that "the defendants in order to defraud the revenue of Canada did evade the payment of the duties upon said dutiable goods imported by them into Canada; and did fraudulently import such goods into Canada without due entry inwards of such goods at the Custom house." It is not necessary to charge the defendant with all the offences mentioned in such section; and the information is good in law if it sets out any one of the offences mentioned in the said section.

2. In such an information where it is sought to recover, in addition to the value of the goods smuggled, a sum equal to the value of the goods, it is necessary to allege that the goods were "not found". The offender is only liable to forfeit twice the value of the goods, when the goods are not found but their value has been ascertained.

3. The penalty "not exceeding two hundred dollars and not less than fifty dollars," mentioned in sec. 192 of *The Customs Act* as recoverable before "two justices of the peace or any other magistrate having the powers of two justices of the peace", cannot be sued for in the Exchequer Court of Canada. (*Barraclough* v. *Brown* [1897] A.C. 615 referred to.)

4. While a claim for penalties in respect of goods smuggled more than three years before the filing of the information would be prescribed under sec. 240 of *The Customs Act*, where the goods have been seized by a Customs Officer, such seizure is to be deemed a commencement of the proceeding within the meaning of sec. 236.

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Argument of Counsel.

INFORMATION for the recovery of penalties by the Crown for an infraction of *The Customs Act*.

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

February 20th 1905.

D. Macmaster, K.C., in support of the demurrer, contended that it was necessary to set out in the information that the defendants "clandestinely" introduced the goods in question into Canada. The character of the offence in the language of the statute creating it should be set out. (Cites sec. 192 of *The Customs Act*, R. S. C. c. 32; *Bullivant* v. *Attorney-General for Victoria* (1); *Cochran* v. *United States* (2). The defendants must be apprised in the pleadings of the character of the wrong-doing charged against them.

Again, it should have been averred in the information that the goods were "not found." The plaintiff cannot ask for the value of the goods where the goods are found. The Crown is not entitled to the value of the goods and their forfeiture at the same time. The information is bad in so far as it makes this cumulative claim.

Furthermore this court has no jurisdiction for the recovery of penalties to the amount of $77. That sum should be sued for before two justices of the peace.

Under the practice of Quebec these objections are properly taken by way of demurrer, and not treated as grounds for a motion to strike out part of the information as in the English practice.

R. Taschereau, contra. The goods were not found; only a formal seizure was made. It was only upon an examination of the defendants' books that an evasion of *The Customs Act* became apparent.

(1) [1901] A. C. 196. (2) 157 U.S. 286.

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The Solicitor-General for Canada (the *Honourable R. Lemieux, K. C.*,) argued that under sec. 197 of *The Customs Act* it was open for the Crown to sue for the forfeiture of the goods and the treble value thereof as a penalty.

Again, under sec. 228 it is not necessary to set out with particularity the nature of the evasion of the Act.

This section says: "It shall be sufficient to state the penalty or forfeiture incurred, and the Act or section under which it is alleged to have been incurred, without further particulars."

The Exchequer Court has jurisdiction under sec. 22 of *The Customs Act* in respect of the penalties and forfeitures set out in the information. Cites *Bouvier's Law Dictionary*, "Penalty", (1).

THE JUDGE OF THE EXCHEQUER COURT now (April 25th, 1905,) delivered judgment.

The case comes before the court upon an inscription in law against certain allegations contained in the information filed herein (2).

By the first and second paragraphs of the information it is in substance, among other things, alleged that between the months of June, 1899. and March, 1902, inclusive, the defendants imported into Canada goods subject to duties to the value of $6,524.20. By the third paragraph a claim is made for the duties payable thereon, as to which there is no question at present, and then the fourth paragraph follows in these terms:—

"4. The defendant in order to defraud the revenue "of Canada did evade the payment of the duties upon "said dutiable goods imported by them into Canada, "and did fraudulently import such goods into Canada,

(1) Rawle's ed. p. 644.

(2) The Code of Civil Procedure of the Province of Lower Canada, Art. 191 et seq; Audette's Exchequer Court Practice, page 217, Rule 1.

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" without due entry inwards of such goods at the Cus-
" tom-house. The value of the said goods has been
" ascertained and amounts to the sum of $6,524.20,
" whereby the defendants forfeited to His Majesty the
" value of said goods. And in addition thereto a sum
" equal to the value of such goods, and further became
" liable to 385 penalties of two hundred dollars each
" amounting in the aggregate to $77,000.00 and to im-
" prisonment for a term not exceeding one year in res-
" pect of each importation. The said forfeitures and
" penalties are incurred under section 192 of *the Cus-*
" *toms Act.*"

By section 192 of *The Customs Act* it is provided that if any one smuggles or clandestinely introduces into Canada any goods subject to duty, or makes out, or passes, or attempts to pass through the Custom-house any false, forged or fraudulent invoice, or in any way attempts to defraud the revenue by evading payment of the duty, or of any part of the duty on any goods, such goods, if found, may be seized and forfeited; or if not found, but the value thereof has been ascertained, the person so offending shall forfeit the value thereof as so ascertained; and every such person, his aiders and abettors shall in addition to any other penalty to which he and they are subject for each offence forfeit a sum equal to the value of such goods, which sum may be recovered in any court of competent jurisdiction; and shall further be liable on summary conviction before two justices of the peace, or any other magistrate having the powers of two justices of the peace, to a penalty not exceeding two hundred dollars and not less than fifty dollars, or to imprisonment for a term not exceeding one year and not less than one month, or to both fine and imprisonment.

A number of objections are taken to the sufficiency of the fourth paragraph of the information. They are

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contained in clauses (a), (b), (c), (d) and (e) of the first paragraph of the inscription in law. The objections stated in clauses (a) and (b) are that it is not alleged that the defendants smuggled or clandestinely introduced into Canada the goods therein mentioned; or that they passed or attempted to pass through the Custom-house any false, forged or fraudulent invoice, or in any way attempted to defraud the revenue by evading the payment of duty; and that the way in which the defendants defrauded the revenue, or attempted to defraud the revenue is not specified. It is clear of course that it is not necessary for the Attorney-General to charge the defendants with all the offences mentioned in the section of the Act cited It is sufficient if one offence against the same is set out. What is alleged is that the defendants in order to defraud the revenue of Canada did evade the payment of the duties upon said dutiable goods imported by them into Canada; and did fraudently import such goods into Canada without due entry inwards of such goods at the Custom-house. That, it seems to me, is a good and sufficient allegation that the defendants attempted in the way mentioned to defraud the revenue by evading the payment of duty on such goods. These objections, in my opinion, cannot be supported.

The objection to the sufficiency of the paragraph of the information mentioned set up in clause (*c*) is that it is not stated that the goods so alleged to have been fraudulently imported were "not found," and the defendants are not liable to forfeit a sum equal to the value of the goods except upon the happening of that contingency. That objection, so far as it goes to the particular penalty, is, I think, good. If the goods are found they may be seized and forfeited, and the offender in addition forfeits a sum equal to the value of such

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goods. If they are not found, but their value is ascertained, he forfeits the value thereof as ascertained; and in addition a sum equal to such value; that is, he forfeits twice the value of the goods as ascertained. But that happens only where the goods are not found but the value thereof is ascertained. In the other case the goods may be seized and forfeited, but the offender in addition forfeits the value of the goods only.

Then in clause (*d*) and (*e*) further objections to the fourth paragraph of the information are stated, of which it will be necessary to consider that only which is set up in clause (*d*) and which is that the Crown cannot recover and enforce in this court penalties to which the offender, if liable, is liable only on summary conviction before two justices of the peace or before a magistrate having the powers of two justices of the peace. That objection also appears to me to be good. It is clear, I think, that these penalties cannot be recovered or enforced in this court upon an information filed by the Attorney-General. The case of *Barraclough* v. *Brown* (1) arose upon a statute which gave the undertakers of the rivers Aire and Calder a right to recover, in a court of summary jurisdiction, certain expenses incurred in removing vessels sunk in the waters mentioned in the statute. Such expenses having been incurred an action was brought therefor in the High Court of Justice, and the case went to the House of Lords; and it was there held that the action would not lie, and that as the High Court had no jurisdiction no declaration ought to be made as to the rights of the parties. Lord Herschell in giving reasons in that case for his opinion said: "The respond-" ents were under no liability to pay these expenses at " common law. The liability, if it exists, is created " by the enactment I have quoted. No words are to

(1) [1897] A. C. 615.

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" be found in the enactment constituting the expenses " incurred a debt due from the owners of the vessel. " The only right conferred is to recover such expenses " from the owner of such vessel in a court of summary " jurisdiction. I do not think the appellant can claim " to recover by virtue of the statute; and at the same " time insist upon doing so by means other than those " prescribed by the statute which alone confers the " right." So in this case the defendants, if liable to the penalties in question, are liable only upon summary conviction before two justices of the peace, or before a magistrate having the powers of two justices of the peace. There is no common law liability; and nothing in the statute constituting such penalties a debt. The question that has arisen in a number of cases as to whether an indictment will lie for the contravention of a statute in respect of which a particular remedy is given or proceeding prescribed by the statute, has been decided upon somewhat analogous grounds (1); *R.* v. *Buck* (2); *R.* v. *Jones* (3); *R.* v. *Wright* (4); *R.* v. *Robinson* (5); *R.* v. *Harris* (6); *R.* v. *Buchanan* (7); *R.* v. *Mason* (8); *R.* v. *Bennett* (9).

In the 5th paragraph of the information a schedule of the goods imported by the defendants, with the value of the goods, the dates when the goods were imported, and the duties payable thereon, is given. Some of these importations took place more than three years before the filing of the information, and as to these it is objected that any claim for such penalties would be prescribed under section 240 of *The Customs Act*, and that, I think, would be so, except as to any goods that were seized, in which case the seizure by

(1) 2 Hale's P.C. 171.
(2) 2 Str. 679.
(3) 2 Str. 1146.
(4) 1 Burr. 543.
(5) 2 Burr. 805.
(6) 4 T. R. 205.
(7) 8 Q. B. 883.
(8) 17 U. C. C. P. 534.
(9) 21 U. C. C. P. 235.

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the officer is to be deemed to be a commencement of the proceeding. (section 236.)

Objections similar to those that have been considered with reference to the fourth paragraph of the information are raised with respect to the 6th, 7th and 8th paragraphs thereof, and may, I think, be disposed of, without discussing them further. In my opinion the objection set up in clause (a) of the 3rd paragraph of the inscription in law cannot be sustained, while the objections stated in clauses (b) and (c) of that paragraph are good. The objection to the 9th paragraph of the information has already been disposed of in considering the objections to the 4th paragraph. The objections that have been sustained do not constitute an answer to the causes of action set up. They go only to the question of the amount of the penalties recoverable and not to the right of the Crown to maintain the information upon the facts set out.

With reference to the objection taken that twice the value of goods cannot be recovered except in the case mentioned, of the goods not being found, an application on behalf of the plaintiff was made at the hearing of the inscription in law for leave to amend the information by adding an allegation to that effect; and that application will be granted and leave given. If such an amendment is made it will also be necessary to amend the allegation in the 9th paragraph of the information to the effect that the goods were seized. If they were not found they could not be seized. If they were seized they must first have been found. It may, of course, be true that some of the goods were found and seized and that some of them were not found. And if that is the case the amendment may be so made as to set out the actual facts.

Then with regard to the other objections that have been sustained the following portions of the information will be rejected and struck out, that is to say:—

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(1.) In the 4th paragraph the following allegation:—"And further became liable to 385 penalties of "two hundred dollars each amounting in the aggre- "gate to $77,000, and to imprisonment for a term not "exceeding one year in respect of each importation."

(2.) In the 6th paragraph, the following allegation:—"And further became liable to penalties of two "hundred dollars each and to imprisonment for a term "not exceeding one year."

(3.) In the 7th paragraph the following allegation:—"And further the defendants have become "liable to 385 penalties of two hundred dollars each "and to imprisonment in respect of three hundred and "eighty five different offences for a term in each case "not exceeding one year and not less than one month."

(4.) In the 8th paragraph the following allegation:—"And further the defendants have become "liable to 385 penalties of two hundred dollars each "and to imprisonment with respect to 385 different "offences for a term in each case not exceeding one "year and not less than one month;" and

(5.) In the 9th paragraph the clauses lettered (*d.*) and (*f.*)

Nothing will be struck out of the fifth paragraph of the information. The allegations therein contained are relevant and material. Even if some portion of the penalties alleged to have been incurred in respect of the importations therein referred to has been prescribed, the duties payable thereon constitute a debt due to His Majesty (*The Customs Act*, s. 7) and are not prescribed.

The costs of this hearing and of any amendment made in pursuance of the leave given will be costs to the defendants in any event.

Judgment accordingly.

1905
March 27.

IN THE MATTER OF THE BAIE DES CHALEURS RAILWAY COMPANY'S SCHEME OF ARRANGEMENT WITH ITS CREDITORS.

Insolvent railway—The Railway Act, 1903, sec. 285—Unsecured creditor not assenting to scheme of arrangement—Opposition to scheme by another railway whose rights were sought to be affected thereby—Confirmation of scheme where creditors of same class receive unequal treatment.

An unsecured creditor who does not assent to a scheme of arrangement filed under section 285 of *The Railway Act*, 1903, is not bound thereby.

2. It is however a good objection to such scheme that it purports in terms to discharge the claim of such creditor.

3. By a scheme of arrangement, between an insolvent railway company and its creditors, it was proposed to cancel certain outstanding bonds and to issue new debentures in lieu thereof against property that was at the time in the possession of the trustees for the bondholders of another railway company. Part of such new debentures were to be issued upon the insolvent company acquiring the control of certain claims, bonds and liens against the railway; and part upon a good title to the railway being secured and vested in the trustees for the new debenture holders. The railway company, the trustees for whom bondholders were in possession of the railway objected to the scheme of arrangement. Its rights therein had not been determined or foreclosed.

Held, that the railway company was entitled to be heard in opposition to the scheme, and that the latter was open to objection in so far as it purported to give authority to issue a part of the new debentures upon acquiring the control of such claims, bonds and liens, and without any proceedings to foreclose or acquire the rights of such railway company in the railway.

4. No scheme of arrangement under *The Railway Act, 1903*, ought to be confirmed if it appears or is shown that all creditors of the same class are not to receive equal treatment.

APPLICATION by the directors of the Baie des Chaleurs Railway Company for the confirmation of a scheme of arrangement with its creditors, filed in this court in pursuance of section 285 of *The Railway Act*, 1903.

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The facts upon which the application was based are set out in the reasons for judgment.

March 11th, 1905.

Argument of Counsel.

The argument of the motion to confirm the scheme of arrangement was now proceeded with at Montreal.

The parties entitled to be heard on the motion were represented by counsel as follows:—

W. D. Hogg, K.C., for the Baie des Chaleurs Railway Company; *T. C. Casgrain, K.C.*, and *A. C. Casgrain*, for Galindez Bros., Andrew Haes, A. Campbell, Brown & Wells, the trustees for the Bondholders of the Atlantic and Lake Superior Railway Company, and the Royal Trust Company of Montreal; *F. S. Maclennan, K.C.*, and *J. J. Meagher*, for the Atlantic and Lake Superior Railway Company, Charles N. Armstrong, and Hon. J. R. Thibeaudeau; *N. K. Laflamme*, for Charles Veilleux; *E. N. Armstrong* for himself, and J. Riopel, and Estate Nash; *C. A. Barnard* for J. Beattie; *H. Trudel* for F. D. Shallow; *J. L. Perron, K.C.*, for J. A. Thivierge.

W. D. Hogg, K.C. and *T. C. Casgrain, K.C.*, in support of the motion, argued that so far as the objections of the Atlantic & Lake Superior Railway Company to the scheme were concerned they ought not to be heard because that company had no *locus standi* in the matter. The property of the Baie des Chaleurs Railway Company did not pass to that company, because the Act under which the transfer of the railroad purported to be made was not complied with, and no Parliamentary sanction for the transfer was or could be set up. The property of the company could not be sold or transferred simply by a resolution of the Board

Although the Atlantic & Lake Superior Railway Company have possession of the eighty miles of railway in question, they are not the owners. By this scheme of arrangement we seek to obtain possession, and are

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Argument of Counsel.

entitled to it, as the transfer to the Atlantic & Lake Superior Railway Company was incomplete and illegal.

As to the unsecured creditors who do not assent to the scheme, there is no valid reason why the scheme should not be confirmed by reason of their objection. They are not bound by it in any event when they decline to assent to it. *In re East & West India Dock Co.* (1); *In re West Cork Railway Co.* (2); *In re Cambrian Rys.* (3); *In re Potteries, Shrewsbury and North Wales Ry. Co.* (4); *In re Bristol and North Somerset Ry. Co.* (5); *Stevens* v. *Mid Hants Ry. Co.* (6); *Stevens* v. *Cork and Kinsale Junction Ry. Co.* (7); *In re Somerset and Dorset Ry Co.* (8); *In re East and West Junction Railway Co.*(9).

So long as a scheme of arrangement is reasonable it ought to be confirmed so as to bind those assenting to it. The bondholders feel that this scheme is the best possible arrangement in the interest of the railway and the creditors.

The bondholders have a title to the bonds against the world, having acquired them for value and in good faith. *Colebrooke on Collateral Securities* (10); *Jones on Pledges* (11); *American & English Ency. of Law* (12); *Cook on Corporations* (13); *Ritchie* v. *Burke* (14); *In re Olathe Silver Mining Co.* (15); *West Cumberland Iron & Steel Co.* v. *Winnipeg & Hudson's Bay Ry. Co.*

F.S. Maclennan, K.C. and *E. Armstrong*, for the Atlantic & Lake Superior Railway Company, *contra*, contended that the Baie des Chaleurs railway had

(1) 44 Ch. D. 38.
(2) Ir. R. 7 Eq. 96.
(3) 3 Ch. App. 278.
(4) 5 Ch. App. 67.
(5) L.R. 6 Eq. 448.
(6) 8 Ch. App. 1064.
(7) Ir. R. 6 Eq. 604.
(8) 21 L. T. 656.
(9) L. R. 8 Eq. 87.
(10) 2nd ed. p. 72 sec. 43.
(11) 2nd ed. pp. 89, 95.
(12) 2nd ed. vol. 22 p. 896.
(13) 5th ed. vol. 3 sec. 763, pp. 1984 *et seq.*
(14) 109 Fed. Rep. at pp. 16 and 20.
(15) 27 Ch. D. 278.
(16) 6 Man. R. 388.

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become the property of the Atlantic & Lake Superior Railway Company by deed of sale in 1894, and that all the rights and property of the former, including its bonds, passed to the latter company under such deed. Furthermore, the latter company was put in possession of the former company's railway in 1895, and has retained possession ever since. The Atlantic & Lake Superior Railway Company was confirmed in its possession by 1 Edw. VII., c. 48, and authorized to operate and maintain it. Therefore, the Baie des Chaleurs Railway Company is not entitled to a confirmation by this court of a scheme of arrangement providing, among other things, for a resumption of possession of the railway by such company.

There have been no proper proceedings taken by the Baie des Chaleurs Railway Company for a revocation of the sale. (C.C.L.C. Arts. 1478, 1980, 1981.)

Under such circumstances, the scheme of arrangement is a nullity, and ought not to be confirmed by the court. (In re *Letterkenny Ry. Co.* (1); in re *Empire Mining Co.* (2); in re *Alabama &c. Railway Co.* (3); in re *English &c. Chartered Bank* (4).

As to Galindez Bros., and their right to be heard on this motion, the pledgees of bonds are not the owners and have no *locus standi* here. There was no sale to them of the bonds, but they were only deposited with them as collateral security. *Addison on Contracts*, (5); *Jones on Pledges* (6); *Paget on Banking* (7); *Jerome* v. *McCarter* (8); *Union Cattle Co.* v. *International Trust Co.* (9); *Colebrooke on Collateral Security* (10); *West Cumberland Iron and Steel Co.* v. *Winnipeg and Hudson's Bay Ry. Co.* (11); 26 *Am. & Eng. Ency of Law* (12).

(1) Ir. R. 4 Eq. 538.
(2) L. R. 44 Ch. D. 402.
(3) [1891] 1 Ch. 213.
(4) [1893] 3 Ch. 385.
(5) 10th ed. pp. 752, 761, 762.
(6) 2nd ed. secs. 304, 603, 716.
(7) p. 273.
(8) 94 U.S. 734.
(9) 149 Mass. 492, 501.
(10) 2nd ed. secs. 93, 103.
(11) 6 Man. Rep. 388.
(12) 2nd ed. p 903.

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Galindez Bros. not being registered as holders of the stock of the railway company, but being merely pledgees, could not vote upon the stock. *Jones on Pledges*, (1); 26 *Am. and Eng. Ency. of Law*, (2); *Helliwell on Stockholders* (3).

Mr. Hogg, replied.

THE JUDGE OF THE EXCHEQUER COURT now (March 27th, 1905,) delivered judgment.

This is an application by the directors of the Baie des Chaleurs Railway Company for the confirmation of a scheme of arrangement with its creditors, filed in this court in pursuance of section 285 of *The Railway Act*, 1903.

The company was incorporated in the year 1882 by an Act of the Legislature of Quebec, 45 Vict. c. 53, with power to build and operate a railway from some point on the Intercolonial Railway in the vicinity of the Restigouche River to New Carlisle, or Paspebiac Bay, with the right of continuing the line to Gaspé Basin. The Act of Incorporation was amended in 1886 (49-50 Vict. c. 80). On the 2nd of January, 1889, the company issued first mortgage five per centum coupon bonds to the extent of four hundred and nine thousand four hundred pounds sterling, on which no interest has ever been paid. It is said that the whole of these bonds are now in circulation, and constitute a liability of the company; but that with only trifling exceptions they are held as security for certain claims and advances.

By an Act of the Parliament of Canada, 54-55 Vict. c. 97, the Baie des Chaleurs Railway was declared to be a work for the general advantage of Canada; and it was also declared that thereafter the company

(1) 2nd ed. secs. 441, 442, 443. (2) 2nd ed. p. 1006.
(3) Secs. 219, 367.

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Reasons for Judgment.

should be subject to the legislative authority of the Parliament of Canada. These declarations were followed by a number of provisions in respect to the company and its undertaking. On the 16th of April, 1894, the Baie des Chaleurs Railway Company having completed the railway from Metapedia to Caplin, a distance of about eighty miles, sold the railway and its appurtenances to the Atlantic and Lake Superior Railway Company, upon the terms set out in schedule "A" to the Act of the Parliament of Canada, 57-58 Vict. c. 63, by which, among other things, such agreement was confirmed. This agreement was to be "null and void and of no effect" if certain payments in cash, bonds and shares therein mentioned were not made within six months from the date of the agreement. Notwithstanding that such payments were not made within the time mentioned, or afterwards, the Baie des Chaleurs Railway Company put the Atlantic and Lake Superior Railway Company in possession of the railway and its appurtenances, and did what it could to enable the latter company to retain such possession. The Atlantic and Lake Superior Railway Company conveyed its property including its rights and interests in the Baie des Chaleurs Railway, to trustees to secure its bondholders, and the trustees took possession of the railway, and were by an Act of the Parliament of Canada, 1 Edward VII., c. 48, authorized to operate it, to repair and renew the road-bed and bridges between Metapedia and Caplin, and to complete the railway from Caplin to Paspebiac, the cost of such repairs, renewals and completion to constitute liens upon the railway as therein mentioned. In the preamble to the Act last cited, it is stated that certain questions were then pending concerning the rights of the Baie des Chaleurs Railway Company and of its creditors and bondholders respecting the railway from

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Metapedia to Caplin, and concerning the rights of the Atlantic and Lake Superior Railway Company and its creditors and bondholders respecting the railway (including the above mentioned railway) from Metapedia to Paspebiac. And some at least, if not all of these questions, are still pending and undetermined.

The scheme of arrangement before the court is prefaced by a statement in explanation of its provisions. The scheme itself is divided into two parts intended however to operate as a whole. The first part of the scheme of arrangement purports to be made between the Baie des Chaleurs Railway Company of the first part and the holders of £409,400 0s. 0d. of first mortgage five per cent. coupon bonds of the said company, of the second part. These bonds amount approximately to two million dollars, with a large amount of interest accrued, and it is proposed to cancel them and to issue in lieu thereof five hundred thousand dollars of four per cent. first debentures; and one million dollars of five per cent. second debentures. On the face of matters that looks like a considerable reduction of the bonded debt of the company. But as has been stated, the outstanding bonds are in the main held as security for claims against or advances made to one or other of the two companies mentioned, or to persons interested therein. But these claims and advances do not amount to anything like the face value of such bonds.

Of the new debentures it is proposed to issue two hundred thousand dollars of first debentures and five hundred thousand of second debentures whenever the company, by acquisition or otherwise, is entitled to make use for its own purposes of all the rights appertaining to the claims against the trustees for the bondholders of the Atlantic and Lake Superior Railway Company which are now held by Messrs. Galindez Brothers, of London, and to the bonds of the said com-

pany also held by the said Galindez Brothers subject to an equity of redemption therein referred to. (See clauses 8 and 9 of the scheme of arrangement.)

Then it is proposed to make a further issue of two hundred thousand dollars of first debentures and two hundred thousand dollars of second debentures upon the surrender or conveyance to the Royal Trust Company (the trustees named in the scheme of arrangement) or to other trustees appointed in their place, of the privileged liens upon the first eighty miles of the railway from Metapedia towards Paspebiac, now held by the trustees of the Atlantic and Lake Superior bondholders and by the estate of Henry McFarlane & Son. (Clause 10.)

A further issue of one hundred thousand dollars second debentures is to be made upon a clear title, without charge or encumbrance, to at least the first eighty miles of the railway being properly conveyed to the trustees in trust for the debenture holders. (Clause 11.)

And it is proposed to issue the balance of one hundred thousand dollars of first debentures and of two hundred thousand dollars of the second debentures upon a clear title, without charge or encumbrance, to the hundred miles of railway now built from Metapedia to Paspebiac being properly conveyed to the trustees in trust for the debenture holders (Clause 12.)

Of the total issue of one million five hundred thousand dollars of debentures it is proposed to give the present bondholders first debentures to the amount of six and two thirds per centum of the face value of the bonds now held by them; and twenty per centum of such face value in second debentures. The scheme of arrangement does not make it clear as to what is to be done with the balance of the new debentures; but I infer that they are to be used to get in the liens men-

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tioned and to obtain a clear title to the railway and its appurtenances.

The second part of the scheme of arrangement purports to be made between the Baie des Chaleurs Railway Company of the first part, and the unsecured creditors holding claims against the company, of the second part. By the sixth paragraph it is provided that upon the confirmation of the scheme of arrangement the directors of the company, by resolution of the board, shall issue a sufficient number of fully paid preference shares to allot to each creditor an amount equal to one half of the claim of such creditor calculated in the manner thereinafter set out. By the second paragraph of the scheme it is provided as follows:—"The "claims of the creditors are hereby discharged and "shall no longer be binding upon the company either "as to principal or as to interest"

The confirmation of the scheme of arrangement is opposed by a number of creditors,—some holding security and others unsecured. It is also opposed by the Atlantic and Lake Superior Railway Company and by a number of the creditors of that company.

For the unsecured creditors it is objected that the scheme of arrangement purports to discharge the claims of unsecured creditors who do not assent thereto and who are unwilling to accept the preference shares offered. In reply to that objection it is argued that the scheme must be read in connection with the statute under which it is filed; that when confirmed it will be binding, and have the effect of an Act of Parliament, against and in favour of the company and those persons only who assent thereto or are bound thereby (*The Railway Act*, 1903, s. 287, ss. 4); and ordinary creditors who do not assent are not bound by the provisions of the scheme. I agree that ordinary creditors who do not assent to a scheme of arrangement

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between an insolvent railway company and its creditors are not bound thereby. That appears to be well settled. It does not follow, however, that their rights may not in some way be affected or prejudiced by provisions in the scheme that become binding on the company. And the weight of judicial opinion appears to me to be that a scheme which purports, as this does, to discharge the claims of creditors, whether they assent or not, ought not to be confirmed. Such a provision is no doubt in excess of the powers given by the statute. But that in itself is an objection to the scheme of which any non-assenting creditor may take advantage (1).

Then with regard to the opposition of the Atlantic and Lake Superior Railway Company and of certain of its creditors, it seems to me that they are persons who under the Act are entitled to be heard (see s. 287, ss. 3). The Baie des Chaleurs Railway Company are not at present in possession of any part of the railway or property against which it is proposed to issue new debentures. The railway is, as has been stated, in the possession of and is being operated by the trustees of the bondholders of the Atlantic and Lake Superior Railway Company, and the rights of the company therein have not been foreclosed. So far as the scheme makes provision, as it does, for the issue of debentures upon the security of such property after a clear title thereto, without charge or incumbrance, has been properly conveyed to the trustees mentioned in the scheme, there is probably no objection to the scheme. The rights of the company will have to be foreclosed or acquired in

(1) See in re *Cambrian Railways Company's Scheme.* L. R. 3, Ch. App. 278; In re *Bristol and North Somerset Railway Company.* L.R. 6 Eq. 448; *In re East and West Junction Railway Company.* L. R. 8 Eq. 87; In re *The Somerset and Dorset Railway Company*, 21 L. T. N.S. 656; In re *West Cork Railway Company*, Ir.R. 7 Eq. 96; *Stevens* v. *The Mid-Hants Railway Company;* L.R. 8 Ch. App. 1064; and In re *East and West India Dock Company*, 44 Ch. Div. 38.

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some legal way before that event can happen. But the scheme goes further than this. By the 8th, 9th and 10th clauses of that part of the scheme of arrangement, which is made between the company and the holders of outstanding bonds, it is proposed, as has been seen, to issue a portion of the new debentures upon the company acquiring control of certain claims and bonds therein mentioned; and to issue another portion of such new debentures upon the conveyance to the trustees mentioned in the scheme of certain privileged liens upon the railway. In that way it might happen that a large part of the new debentures would be issued, and become a charge upon the railway and its appurtenances before the rights of the Atlantic and Lake Superior Railway Company therein had either been acquired or foreclosed. And that it seems to me is a very reasonable and strong objection from the standpoint of the latter company and of its creditors.

There is no doubt some question as to what the true position of the latter company in respect of the property is, and possibly the affairs of both companies are so involved, and the mortgages and liens upon the property so considerable, that any right or interest, which the Atlantic and Lake Superior Railway Company has in the property, may in the end realize very little, if anything, for the company or its creditors. But these are questions that should be left to be determined in the usual way and by the ordinary processes of law. And nothing should be done in this proceeding to prejudicially affect any such rights as the Atlantic and Lake Superior Railway Company has in this railway and its appurtenances.

These are two only of a number of objections urged against the confirmation of the scheme of arrangement. It is also objected that the special general meeting of the company, at which the assent of the

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ordinary shareholders to the scheme of arrangement was given, was irregular, and that certain shareholders were improperly prevented from voting at such meeting; also that those who held the outstanding bonds of the company, as security for claims and advances as mentioned, are not holders of such bonds within the meaning of section 286 of *The Railway Act*, 1903, and are not entitled to assent to the scheme without reference to or against the wishes of other persons having an equity or interest in such bonds. I do not find it necessary to deal with these objections, or to express any opinion as to their weight or sufficiency. There is however one matter to which perhaps some reference should be made. Messrs. Galindez Brothers, who have been mentioned, have a very large sum of money invested in the undertaking in question, and are the chief promoters of the present scheme of arrangement. Mr. Archibald Campbell is a creditor of the company for a sum stated at $269,111 against which he holds bonds to the amount of £10.100, 0s. 0d. sterling. By an agreement made on the 10th of December, 1904, between Mr. J. D. Galindez, acting for his firm, and Mr. Campbell, the former undertook to give the latter $20,000 nominal of first debentures and $25,000 nominal of second debentures upon the basis of an issue of $500,000 nominal of first debentures and $1,000,000 nominal of second debentures. The understanding was to hold good whether the present scheme of arrangement went through or not. Mr. Campbell was to get the above number of bonds out of any solution upon the general line of the scheme and whenever Mr. Galindez got his debentures. In consideration of the foregoing Mr. Campbell undertook to give his assent both as to his bonds and as to his unsecured claims, as and whenever necessary or required to forward the scheme of arrangement then

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before the court, or any other. Mr. Campbell also agreed to discharge Mr. C. N. Armstrong and the Honourable J. R. Thibaudeau from any claim he had against them in connection with the Baie des Chaleurs Railway Company. By this agreement Mr. Campbell is, with reference to that part of his claim that is unsecured, put in a position differing from that occupied by other unsecured creditors. Whether or not that position is also better than theirs depends upon the value to be attached to the claims that he has agreed to discharge. But it is a part of the agreement that Mr. Campbell, in consideration of the bonds to be given to him, was to assent to the scheme. He is to get something more than the other unsecured creditors are to get; and as part, at least, of the consideration therefor he undertakes to give his assent to the scheme. That, it seems to me, constitutes an objection of the gravest character to any order to confirm the scheme. No scheme of arrangement under the Act ought to be confirmed where it appears or is shown that all creditors of the same class are not to receive equal treatment.

The application to confirm the scheme of arrangement in question here will be dismissed, but without costs. There is no fund out of which such costs can be paid. An order for costs against the company will, I understand, be of no advantage to those who have opposed the petition; and the case is not one in which the petitioners, the directors of the insolvent company, should be ordered to pay the costs.

Judgment accordingly.

Between

THE CHAMBERLIN METAL WEATHER STRIP COMPANY OF DETROIT; AND THE CHAMBERLIN METAL WEATHER STRIP COMPANY, (LIMITED). ... } PLAINTIFFS;

1905
May 8.

AND

WILLIAM PEACE, AND THE PEACE METAL WEATHER STRIP COMPANY ..... } DEFENDANTS.

Canadian Patent No. 74,708—Infringement—Metal weather strips—Prior American Patent—Narrow construction.

The defendants had manufactured a form of metallic weather strip in Canada very much nearer to that shown and described in an American patent of a date prior to the Canadian patent, owned by the plaintiffs, than it was to any of the forms shown and described in the plaintiffs' patent.

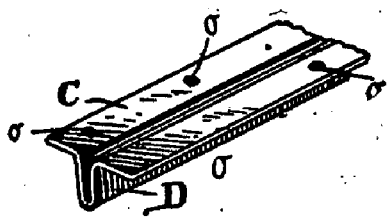
Held, that if the plaintiffs' patent was good, it was good only for the particular forms of weather strips shown and described therein; and that upon the facts proved the defendants had not infringed.

THIS was an action for the alleged infringement of a patent for invention.

The facts of the case are stated in the reasons for judgment, but for a clearer understanding of the forms of the conflicting devices the following diagrams have been made:

Figure A is a perspective detail view of a portion of the Sims improved metallic weather strip.

FIG. A.



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CHAMBERLIN METAL WEATHER STRIP CO. OF DETROIT v. PEACE METAL WEATHER STRIP CO.

Statement of Facts.

The following drawings are copied from the tracing attached to the patent sued upon, the several figures being thus described in the specification :—

Figure B is a transverse section through a portion of a frame and sash, showing the improved weather strip in position. Fig. C is a sectional detail view on an enlarged scale, showing the form of strip shown in Fig. B. Figs. D, E and F are views similar to Fig. C, illustrating modifications in the form of the strips.

FIG. B.

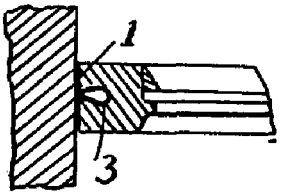


FIG. C.

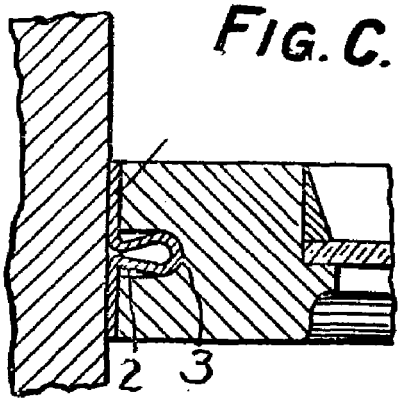


FIG. D.

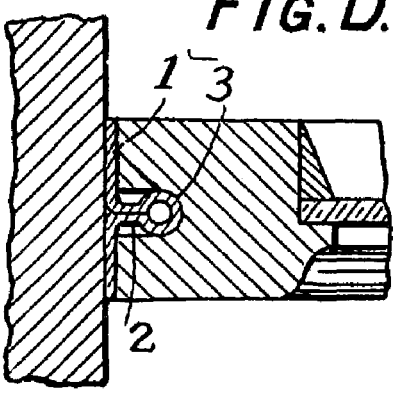


FIG. E.

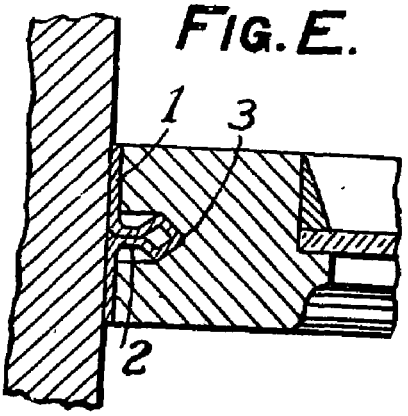
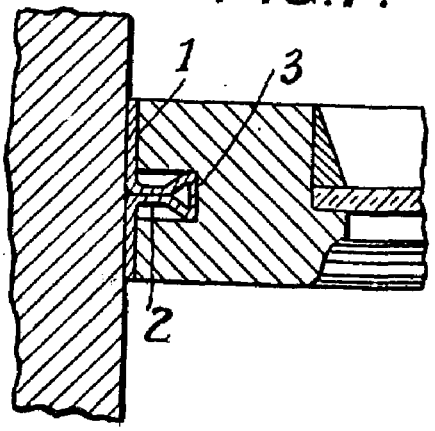
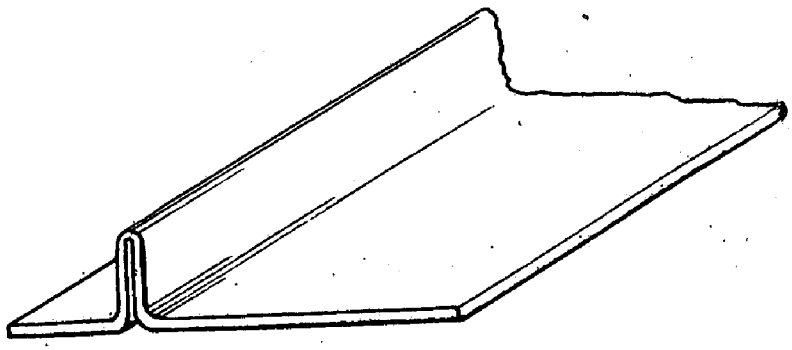


FIG. F.



The following is a tracing of a section of the metallic weather trip used by the defendants :—

FIG. G.



February 21st 1905.

The case was heard at Toronto.

J. G. Ridout, for the plaintiff, contended that the American cases requiring great particularity of descrip. tion in the claims do not apply to cases arising under the Canadian Patent Act. The American Patent Act of 1836 was like ours, but in 1870 this Act was repealed and provision was made for the specifications and claims as two distinct things. Cites *Toronto Auer Light Co.* v. *Colling* (1).

G. Lynch Staunton, K.C. and *J. Chisholm* for the defendants argued that if the plaintiff's patent was to be upheld at all, it could only be good for the precise device claimed. The defendants had not infringed that device. *Gadd* v. *Mayor of Manchester* (2).

THE JUDGE OF THE EXCHEQUER COURT (now May 8th, 1905,) delivered judgment.

The action is brought to restrain an alleged infringement of letters patent No. 74,708 for alleged new and

(1) 31 Ont. R. at p. 28. (2) 9 T. L. R. 42.

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useful improvements in weather strips and guides for windows, which were granted, on the 4th of February, 1902, to Hugh Edward Kenny and subsequently assigned to the plaintiffs. The invention claimed relates, as stated in the specification, to certain improvements in weather strips of the class or kind in which a thin bead or rib of metal is secured to the window frames and projects into a groove in the sash. It is claimed that as previously constructed the groove was made of such a width relative to the thickness of the bead or rib that the side walls of the groove would bear against the rib to form a tight joint; and in damp weather the wood of the sash would swell, causing the rib to be gripped laterally by the walls of the groove, thereby rendering it difficult to raise and lower the sash. The object of the invention, as explained in the specification, was to so construct the rib and groove that ample bearing spaces to effect a tight joint would be formed along the edge of the ribs and sides closely adjacent thereto and the bottom of the groove, while the side walls of the groove would not bear against the rib, thereby avoiding any gripping of the ribs by the sash. There is nothing new in this alleged invention, except the particular forms of the beads shown, and as to that the claim made is for a metal weather strip consisting of a base and a rib, formed integral with each other, said rib being formed with a bead or enlargement along its edge substantially as set forth; and then the drawing shows five different forms of weather strips, or modifications of the general form described. A form of metallic weather strip previously in use is shown in Exhibit "A," being a copy of a patent issued in 1890, from the United States patent office to one Albert Clinton Sims. It consisted of a flat base and a longitudinally raised part or rib at right angles to the flat base; or a flat strip of suitable metal bent or

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doubled longitudinally to form a raised rib at right angles to the flat base.

It is, I think, doubtful whether the forms of weather strips shown in the Kenny patent are really improvements upon the form shown in the Sims patent; whether there is in fact either invention or utility to support the patent in question here. But I do not rest my judgment on that aspect of the case, or express any opinion in respect thereof. If, however, the patent is good, it is good only for the particular forms of weather strips shown and described therein; and those which the defendants have been using, as illustrated by the exhibits on file in this case, are very much nearer the form shown and described in the Sims patent than they are to any of the forms shown or described in the Kenny patent. I think it was open to the defendants to use in Canada the form of weather strip that they have been using, and of which the plaintiffs complain, and that they have not infringed the patent on which the action is brought.

There will be judgment for the defendants, with costs.

Judgment accordingly.

Solicitor for the plaintiffs: *J. G. Ridout.*

Solicitors for the defendants: *Chisholm & Logie.*

BRITISH COLUMBIA ADMIRALTY DISTRICT.

1905
June 20.

COPE v. S. S. RAVEN AND MAYHEW.

Jurisdiction—Action in rem—Arrest of ship—Action between co-owners for account.

This Court has as large a jurisdiction as the High Court of Admiralty, and therefore in an action between the co-owners of a ship for an account, the ship may be arrested.

MOTION by the defendant Mayhew, joint co-owner of a ship which had been arrested in an action *in rem* at the suit of the plaintiff, the other joint co-owner, to set aside the warrant of arrest and release the ship therefrom.

The motion was argued, at Vancouver, before the Local Judge for the British Columbia Admiralty District, on June 7th and 17th, 1905.

Sir Charles Hibbert Tupper, K.C., in support of the motion:

In substance the points submitted on behalf of the defendant show that there is no authority for proceeding *in rem* under section 8 of 24 Vic. Chapter 10, which provides that the High Court shall have jurisdiction to decide all questions arising between co-owners or any of them touching the ownership, possession or earnings of any ship registered in England and Wales and to settle all accounts in relation thereto between the parties.

This section does not constitute a maritime lien and, therefore, does not give the right to proceed *in rem*. *The Pieve Superieure* (1).

By section 35 of the above Act, however, it was particularly provided in the case of the High Court of Admiralty as follows:—

(1) 43 L. J. Adm. 20.

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Argument of Counsel.

"The jurisdiction conferred by this Act on the High Court of Admiralty may be exercised either by proceedings *in rem* or by proceedings *in personam*," and unless the plaintiff can show that this section applies to the colonial courts, it is clear that no action lies *in rem* for an account between co-owners.

This action is brought to have an account taken of the earnings of the steamship *Raven*.

The defendant, Mayhew, submits that section 35 deals in terms only with the practice and procedure in the High Court of Amiralty and that the legislation in England, in 1890, and in Canada, in 1891, conferred jurisdiction on the colonial courts of admiralty and left to the local authorities complete discretion as to the practice and procedure.

The Colonial Courts of Admiralty Act 1890, and our *Admiralty Act*, 1891, provide for the exercise of the jurisdiction conferred.

Our rule 2 is as follows:—"Actions shall be of two kinds. Actions *in rem* and actions *in personam*."

The notes to this rule in *Howell's Admiralty Prac.* (1) show that the action *in rem* is confined to the cases of a maritime lien, or to cases as to which jurisdiction *in rem* has been conferred by statute.

The cases relied on by the plaintiff are all referable to that provision in the English Act with respect to the procedure in the High Court of Admiralty and, therefore, it is submitted, they have no application to the procedure prescribed under the Acts and Rules in dealing with the practice in this court.

It is clear from the case of *Hall* v. *The Ship Seaward* (2), that, as late as 1893, there had been no pretention that under the *jurisdictional* provisions of the English Act, now transferred to the colonial courts, one

(1) P. 13.

(2) 3 Ex. C. R. 268.

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Argument of Counsel.

co-owner could either proceed against the ship or arrest the ship in an action for an account.

Inspection of that report will show that the plaintiffs, part owners of the ship, sued the defendants, as part owners, and it was not pretended in the argument that there was either a maritime lien or a right to arrest. The sole question was as to jurisdiction and that is not now disputed.

In the edition of 1902 of *Williams & Bruce*, at page 323 note (k), it is said :—

"An action *in personam* is also usually entitled in the same way as an action *in rem*, deriving its title from the ship or other property in relation to which the claim is made."

The English cases mentioned in plaintiff's memorandum as authority for proceeding *in rem* are all based on the 35th section of the *Admiralty Courts Act*, 1861.

The narrow point then is, does this section apply to Canadian courts?

The plaintiff bases his contention on :

(1.) Sub-section 2 of section 2 of the *Colonial Courts of Admiralty Act*, 1890.

(2.) And our *Admiralty Act*, 1891, sections 3 and 4.

The defendant's submission is that the sections mentioned deal only with the jurisdiction ; and jurisdiction in this case is admitted.

These empowering sections certainly enabled our court to prescribe *procedure* in the same manner as the High Court, and also to re-enact in our rules the provision in question, viz : Section 35 of the Act of 1861.

This was, however, not done. On the contrary rule 2 simply distinguishes the kind of actions which may be brought. The action *in rem* is, therefore, confined under the rules of maritime law to the case of a maritime lien and in the action *in personam* is for all other cases, as this, where jurisdiction is given to our courts.

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Argument of Counsel.

The plaintiff next invokes rule 37 (d).

This has reference to an action *in rem* (rule 35) where the action is for the "possession" and the words "employment or earnings" should be read, "employment and earnings," incidental relief in the case of an action for possession which is essentially *in rem*. These are the words of the English rules prior to the Act of 1861, when it is admitted there was no jurisdiction in an action for account simply, as this action is.

It is submitted there is nothing in the point made by the plaintiff that an action *in rem* lies under section 5 of the Imperial Act and that this has been recognized in our court.

Section 5 of the Imperial Act does not require section 35 of that Act to give a remedy *in rem*. It is obvious by section 5 and cases referred to that, as the jurisdiction; in the case of a claim for necessaries only applies where the owner is non-resident in the jurisdiction, the remedy *in rem* is the sole means of enforcing the jurisdiction; whereas by section 8, in connection with the case at issue, jurisdiction is given "on all questions arising between the co-owners." Here it is clear the jurisdiction could only be exercised *in personam* and consequently section 35 of that Act has been applied in England and Wales to authorize proceedings *in rem*, though the same authorities have shown that no maritime lien is constituted.

The two Exchequer court cases cited by the plaintiff in his last memorandum do not carry the principles further.

As to the case of the *Rochester and Pittsburgh Coal and Iron Co.*, v. The Ship *The Garden City*, the plaintiff refers to the report of this case before McDougal L.J. The case, however, went before the Judge of the Exchequer Court on appeal (1) and examination of his

(1) 7 Ex. C. R. 94.

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judgment shows that the action *in rem* lies in the case of necessaries supplied under the section above, namely, section 5, wholly irrespective of section 35.

Section 4 of our Act as relied on by plaintiff deals with jurisdiction and not with procedure, except as to the last part thereof which deals with rights and remedies; but a careful reading of this section shows that that portion dealing with rights and remedies is referable only to the *Colonial Courts of Admiralty Act*, 1890, and consequently does not carry the question further than is submitted in the first portion of this memorandum on behalf of the defendant herein.

B. P. Wintemute, contra:

The defendant has admitted that the *Admiralty Courts Act of* 1861 is in force in Canada with the exception of section 35; that our court has jurisdiction *in personam* in actions of account between co-owners; that the Court of Admiralty in England has jurisdiction *in rem* by arrest of the ship in actions of this kind.

This action is brought under section 8 of that Imperial Act which defendant admits is in force in Canada.

Section 35 of the *Admiralty Courts Act* 1861 provides that the jurisdiction of the High Court of Admiralty may be exercised either by proceedings *in rem* or *in personam*

The Colonial Courts of Admiralty Act, 1890 confers jurisdiction on colonial courts.

Sub-section 2 of section 2 provides that a Colonial Court of Admiralty may exercise such jurisdiction in like manner and to as full an extent as the High Court in England; the word exercise being used in this section in the same sense as in section 35 of the *Admiralty Courts Act*, 1861.

It is submitted that section 2 of the *Colonial Courts of Admiralty Act* makes both sections 8 and 35 of the *Aamiralty Courts Act*, 1861 apply to colonial courts.

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By section 3 of our Admiralty Act it is declared that the Exchequer Court of Canada shall *have* and *exercise* all the jurisdiction, powers and authority conferred by the *Colonial Courts of Admiralty Act.* This, it is submitted, brings into force in Canada not only section 8 but section 35 of the Imperial Act.

Section 4 of our Act provides that all persons shall have all rights and remedies in all matters, including proceedings *in rem* and *in personam*, arising out of or in connection with shipping as may be had and enforced in any court of Admiralty under the *Colonial Courts of Admiralty Act.*

This, it is submitted, virtually re-enacts section 35 of the *Admiralty Act*, 1861 and empowers our courts to entertain an action *in rem* for an account between co-owners.

Our rules provide for actions *in rem* and *in personam.*

Where an action *in rem* is brought, a warrant for the arrest of the ship may issue, rule 35.

By our rule 37 (d) it is clearly shown that in an action between co-owners relating to earnings of a ship, it is contemplated that a warrant may issue for arrest of the ship. This rule is in words almost identical with the words of section 8 of the Imperial Act and, the plaintiff submits, was intended to apply to proceedings under said section 8.

The English cases clearly show that although no maritime lien exists, there is the same authority for bringing actions *in rem* under sections 4, 5 and 6 of the Admiralty Act, 1861, as under section 8 thereof; sections 4, 5 and 6 requiring section 35 to give a remedy *in rem* as much as section 8 does. (*The Idas* (1); *The Two Ellens* (2); *The Pieve Superiore* (3); *The Cella* (4.) *Coorty* v *The S.S. Colwell* (5).

(1) Br. & L. 65.
(2) L. R. 4 P. C. 161.
(3) L. R. 5 P. C. 482. P. D. 82.
(4) 13 P. D. 82.
(5) 6 Ex. C. R. 196.

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This was an action *in rem* for necessaries under section 5 of the Imperial Act. It was decided that the court had jurisdiction *in rem* notwithstanding that a maritime lien did not exist, and motions to set aside the warrant and writ of summons were dismissed.

The Rochester and Pittsburg Coal and Iron Co. v. *The ship The Garden City* (1).

This was also an action under section 5 of the Act. It was held that the court had jurisdiction to entertain an action *in rem* although no maritime lien existed.

The plaintiff submits that as our courts have jurisdiction to entertain an action *in rem* under section 5 of the Admiralty Act 1861, they have the same jurisdiction to entertain an action *in rem* for an account under section 8 of the Act, there being no maritime lien in either case.

Rule 4, referring to Form 2, (How. *Adm. Prac.*) (2) provides for the title of an action *in rem*, which is altogether different from the title of an action *in personam* (see Form 3), and it is submitted that the case of *Hall* v. *The Ship Seaward* (3) was, as shown by the title in the report, an action *in rem*, and consequently a direct authority in the plaintiff's favour.

Jurisdiction *in rem* under sections 5 and 8 having been conferred on the court by the same statutory authority, it is submitted that the cases relied on by the plaintiff are in point and apply to the procedure in our Admiralty Court.

MARTIN, L. J. now (June 20th, 1905,) delivered judgment.

While agreeing with the defendant's counsel that there is no decision on the point raised on this application, yet in view of the clear language of the various

(1) 7 Ex. C. R. 34. (2) 3 Ex. C. R. 268.
(3) Pp. 15, 97.

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statutes under consideration I experience no difficulty in coming to a conclusion thereon.

It is admitted that the joint effect of sections 8 and 35 of the *Admiralty Courts Act*, 1861, is to confer upon the High Court of Admiralty jurisdiction *in rem* in an action for an account between co-owners. But it is submitted that the like jurisdiction is not conferred upon this court by the *Colonial Courts of Admiralty Act*, 1890, section 2, subsec. 2, and *The Admiralty Act*, 1891, sections 3 and 4.

The said subsec. 2 provides that a Colonial Court of Admiralty may exercise admiralty "jurisdiction in like manner and to as full an extent as the High Court in England," and the said jurisdiction "may be exercised either by proceedings *in rem* or by proceedings *in personam*."—Sec. 35.

I am unable to take the view that anything more than the said Acts was necessary to confer jurisdiction upon this court in the premises, and even assuming, as is contended, that rule 37 (d) carries the case no further, it was unnecessary, in my opinion, to provide for by rule that procedure which was authorized by the statute conferring jurisdiction. Furthermore, and in any event, rule 228 declares that, "in all cases not provided for by these rules, the practice for the time being in force in respect to Admiralty proceedings in the High Court of Justice in England shall be followed." I point out that though the words are "and earnings," in section 8, yet they are "or earnings" in rule 37 (d), and must be so construed.

As was said by the learned judge of the High Court of Admiralty in a decision on the earliest Act in question, other "reasons might be given in support of this construction, but I need not look for motives when the words of the act are plain" (1).

(1) *The Idas* Br. & Lush. 65.

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Suffice it to say that I can find nothing in the said acts or rules which indicates that it was the intention that this court should have less jurisdiction than the High Court of Admiralty. The motion will be dismissed, with costs to the plaintiff in any event.

Judgment accordingly.

IN THE MATTER OF THE ATLANTIC AND LAKE SUPERIOR RAILWAY COMPANY'S SCHEME OF ARRANGEMENT WITH ITS CREDITORS,

THE HONOURABLE J. R. THIBAUDEAU AND OTHERS... } PETITIONERS;

1905
June 12.

AND

GALINDEZ BROS., AND OTHERS... OBJECTING PARTIES.

Railway—Scheme of Arrangement—The Railway Act, 1903 sec. 285—Petitioners not in possession of railway—Application to confirm.

Where the petitioners for the confirmation of a scheme of arrangement, filed under the provisions of *The Railway Act*, 1903, sec. 285, are not in possession of the railway which they seek to mortgage as security for the issue of new bonds, the application to confirm will be refused.

THIS was a petition for the confirmation of a scheme of arrangement between the Atlantic and Lake Superior Railway Company and its Creditors, filed under the provisions of section 285 of *The Railway Act*, 1903.

The facts of the case are shortly these:—

The Company was incorporated by Act 56 Victoria, Chap. 59; said Act being amended by 57-58 Victoria, Chap. 63. Under the authority of the former Act, certain agreements were entered into with other railway companies, which agreements were confirmed by the last mentioned Act—57-58 Victoria, Chap. 63.

Owing to the failure by the Dominion Government to carry out an alleged contract with the company to guarantee its bonds, the company claimed that it was unable to carry out its agreements with other railway companies and its creditors.

The company was largely in debt for extensions of its line since 1895 and for repairs and improvements;

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and by its scheme of arrangement admitted its inability to meet its financial engagements.

Furthermore, owing to prior liens on purchased properties not having been removed by the vendors, the company was unable to secure a clear title to such properties upon which they otherwise might have made a new issue of bonds for the purpose of meeting the general liabilities of the company. The company owed about $500,000 on the purchase of other railway lines; and the sum of $750,000 to other creditors.

The directors of the company by their scheme of arrangement proposed to create an issue of $1,500,000.00 in bonds of which $750,000.00 would be 4 per cent. first debentures, and $750,000.00 5 per cent. second debentures constituting a first and second mortgage, respectively, and to create a fully paid share capital of $1,500,000.00 in 15,000 shares of $100.00 each. Furthermore, by the scheme the vendors of the different railway properties sold to the company were to be paid the balances due them in full in debentures and to receive a bonus in shares as follows:—50 per cent. in first mortgage debentures, 50 per cent. in second mortgage debentures and a bonus of 50 per cent. in paid up shares. All the bonds of the company held as collateral security were to be returned to the company and cancelled; and finally, the unsecured creditors of the company were to be paid the full amount of their claims in second mortgage debentures, the shareholders of the company to receive one share of the issue for every three share of the former issue.

Objections to the scheme were filed by the trustees for the bondholders of the company, who were in possession of the company's railway; by the pledgees of certain bonds of the company; by the representatives of the insolvent estate of one of the unpaid contractors

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for the construction of the company's railway, and by certain other creditors of the company.

June 12th and July 18th and 19th, 1905.

The petition to confirm the scheme of arrangement was now heard at Montreal.

The parties entitled to be heard upon the petition were represented by counsel as follows:

F. S. Maclennan, K.C. and *J. J. Meagher*, in support of the petition; *T. C. Casgrain, K.C.* for the Trustees of the Bondholders of the Company and for Brown & Wells, creditors of the company; *N. K. Laflamme* for Charles Veilleux, a creditor of the company.

Mr. Maclennan, after putting in certain documentary and oral evidence in support of the petition, proceeded to argue the case. He contended, in substance, that the provisions of section 285 of *The Railway Act*, 1903, contemplated just such a case as the present. The court should take into consideration the present state of the railway, the territory through which it was constructed, its usefulness to the public, and the wishes of the shareholders. The resolution endorsing the scheme of arrangement was passed by a meeting of the company at which ninety per centum of the shareholders were represented. The firm of Galindez Bros., opposing the confirmation of the scheme, by their treatment of the company are responsible for the present financial inability of the company to meet its engagements. They are only in the possession of certain of the company's bonds as collateral security for money loaned, and should, therefore, not be heard in opposition to the scheme. Furthermore, they are not in a position to give or withhold their consent as bondholders, but may oppose the scheme only in the status of secured creditors. *In re The Irish North Western Railway Co's. scheme* (1).

(1) Ir. R. 3 Eq. 190.

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The scheme is in the interest of all the creditors.

Mr. Casgrain was not called upon.

Per Curiam :—I think I ought not to do anything to dispossess the trustees who are now acting under parliamentary authority. If anything is to be done, it will have to be done by agreement between the parties interested or through the courts of the province. I would be glad to help to arrive at a joint settlement between the parties. The present petitioners have not the possession of the railway in respect of which they wish to issue bonds.

The application will be refused, but without costs. If any of the parties wish to go to appeal my reasons for judgment will be put in writing.

Judgment accordingly.

IN THE MATTER OF THE PETITION OF RIGHT OF

JOSEPH HENRY, CHARLES M. HERCHMER, JOHN W. McDOUGALL, CHARLES W. SALT AND JOHN CHECOCK, CHIEFS AND COUNCILLORS OF THE MISSISSAUGAS OF THE CREDIT, ON BEHALF OF THEMSELVES AND ALL OTHERS THE SAID MISSISSAUGAS OF THE CREDIT, AND THE SAID MISSISSAUGAS OF THE CREDIT..... SUPPLIANTS;

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May 8.

AND

HIS MAJESTY THE KING.....RESPONDENT.

Indians—Mississauga Band—Claim for restitution of moneys to trust fund—The Exchequer Court Act, sec. 16 (d)—Declarations of right—Discretion of Superintendent General—Jurisdiction to interfere—Crown as trustee—Effect of treaties.

A claim against the Crown based upon the 111th section of *The British North America Act*, 1867, and upon Acts of the Legislature of the Province of Canada and of the Parliament of Canada, is a claim "arising under any law of Canada" within the meaning of clause (d) of section 16 of *The Exchequer Court Act*. *Yule* v. *The Queen* (6 Ex. C. R. 123; 30 S.C.R. 35) referred to.

2. Where the court has no jurisdiction to grant relief in an action, it has no authority to make a declaration binding the rights of the parties. This rule should be strictly followed in all cases where the jurisdiction of the court depends upon statute and not upon common law. *Barraclough* v. *Brown*, ([1897] A.C. 623) referred to.

3. It does not follow that because the Crown is a trustee the court has jurisdiction to enforce the trust or to make any declaration as to the rights of the parties interested. That authority if it exists must be found in the statutes which give the court jurisdiction. The real question in any such case is not that the Crown may or may not be a trustee; but whether the court has any jurisdiction with respect to the execution of the trust.

4. While under the provisions of certain treaties and of certain statutes of the Legislature of the Province of Canada and of the Parliament of Canada, the Crown stands in the position of trustee for the Indians

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in respect of certain lands and moneys, such position is not that of an ordinary trustee. The Crown does not personally execute the trust; the Superintendent General of Indians Affairs having, under the Governor in Council, the management and control of such lands and moneys. For the manner in which the affairs of the Indians is administered the Dominion Government and the Superintendent General are responsible to Parliament, and Parliament alone has authority to review the decision arrived at or the action taken by them. In all such cases the court has no jurisdiction to review their discretion. Then there is this further difference between the Crown as a trustee and an ordinary trustee, viz: that the Crown is not bound by estoppels, and no laches can be imputed to it; neither does it answer for the negligence of its officers.

5 Under the Treaty of February 28th, 1820, there is nothing to prevent the Crown from making provision for the maintenance of the Mississauga band of Indians out of any capital moneys arising from the sale or leasing or other disposition of surrendered lands.

6. Under Treaty No. 19, made on the 28th October, 1818, the Crown's obligation is to pay the Mississaugas of the Credit a fixed annuity of $2,090. So far as this Treaty is concerned the Crown is not a trustee but a debtor; and the right of the Indians to such annuity cannot be impaired by any departmental adjustment of the Indian funds to which the Indians themselves are not parties.

PETITION OF RIGHT for an order declaring the suppliants entitled to a certain sum of money alleged to be witheld from them by the Crown.

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

September 9th, 1902.

J. Magee, K.C., A. G. Chisholm and *R. V. Sinclair* for the suppliants;

E. L. Newcombe, K.C., for the respondent.

Mr. Magee argued that as upon the face of the legislation respecting the Indians, both before and after the Union, the Crown stands in the relation of trustee in respect of their lands and moneys, the ordinary liabilities attaching to the position of trustee apply. Not only the deeds and the statutes, but also the order in council of 1861 treats the moneys which are

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held in trust for the Indians upon the same basis as other trusts administered by the Government, and instead of being held in the usual way that trust funds are held between subject and subject, they are treated as an investment, money lent to the Crown, which the Crown owes to the *cestuis que trustent*, and upon which the interest is paid to them. Then it was and is the duty of the Crown to keep a proper and correct account of the trust funds in accordance with the terms of the trust. If mistakes in accounting are made then the Crown and not the Indians must bear the loss if there is any loss sustained.

Now, upon the facts in evidence here, some $30,000 were taken over by the Receiver General at the time of the Union which were supposed to belong to the credit of these Indians.

They did not know the origin of this fund, but it was supposed to belong to the Indians and the Government took it over and placed it to the credit of the Indians. That being so, the money being already in the Consolidated Revenue Fund, the Government having received it, it was merely transferring it from the one fund to the other.

If it was put in the Consolidated Revenue Fund by mistake, if they had the right to take it from the Indians and put it in the Revenue Fund, they ought to have the right to take it from the Revenue Fund and give it to the Indians if there was a mistake made. An order in council was passed authorizing the money to be placed to the credit of the Indians, who had been claiming a balance due them.

Now, assuming that that money had been paid out to the Indians the trustees would not have been entitled, I think, to get it back. Where money is paid upon a compromise, after a claim made and after deliberation and after enquiry, and the mistake is then

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made, a mistake originally made by the man who makes the payment, the authorities I think will bear me out in saying that it could not be recovered back, had it been paid. Here, of course, it had not been paid out to the Indians, but was debited back to the fund. It was the interest which was paid, which it was the Crown's duty to pay under the Act of 1860, under which the Indian Department was taken charge of by the authority of the Provincial Parliament, 23 Victoria, chapter 171, which provides that the Governor in Council shall direct the investments and how they are to be made, and take charge of the investments. Now, these investments under the orders in council were to be treated in the same way as others, and interest was to be credited. It was therefore not a matter of grace by which the Crown allowed the interest, but it was a matter of duty and contract, the contract originally in the trust, the duty afterwards imposed by Act of Parliament and orders in council which had been passed. So that this money which was placed to their credit as income really belonged to the Indians, if they were entitled to the money upon which the interest accumulated. It is paid out to them, distributed for the purpose of being spent by them. They are induced to believe that it is money which they are at liberty to throw into the sea if they wish. But very early after the money had been credited, the Dominion were notified that the matter was not recognized by the Ontario Government. In placing it among the claims which they had against the Ontario Government, the Dominion were not in reality acting as trustees of the Indians. They had done their duty by the Indians, as they supposed, in placing the money to their credit. In trying to make the claim upon the Province they were trying to recoup themselves of the fund they had already dis-

posed of, and the Superintendent General strongly believed that the payment was right; and, as the evidence is, they refused to make the correction when the difficulties which might arise were pointed out to them. They go on making these payments after the Auditor-General had called their attention to the difficulties, and had refused to give his consent to the credit of the $68,000, and during all that time they never said a word to the Indians that the matter was in any way in dispute between the Dominion and them, or that there was any danger whatever in their expending the moneys which were sent to them from year to year. In 1884 they informed the Indians very promptly after the order in council was passed and after the credit was made that it had been made, and soon after that, as is evident from the correspondence, the Ontario Government repudiated the matter. But the Indians had no idea that there was any question about it, or that there was any dispute between the Province and the Dominion in regard to it. They heard nothing of the arbitration that was going on until after their payments were stopped, and their capital was gone. During all these ten years this trustee allows the *cestuis que trustent* to believe that they are in receipt of these moneys as income, to believe their capital was not being impaired, and to prejudice themselves in the very worst way. We have evidence that this capital which was at the credit of the Indians largely consists of capitalization of their annuities. If we leave that out of the capital at their credit, some $84,000, there would be precious little left of all the money received for the lands of the Indians; and it was an exceedingly fortunate thing that there was anything left at all; but the amount of the capitalization of the annuities, which one might say is only a figurative capital after all, because it

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only represents the value of the perpetuity forever of the annuity. The actuarial value of an annuity in perpetuity is the amount which would produce it at a certain rate of interest; so that in that sense the capital is there, but I mean to say there was never a sum received by the Indians to represent that capital. It was an exceedingly fortunate thing that by the debt of $29,000 that the whole of the moneys placed in trust in their hands was not used up. Then the Indians, finding that the Government are asserting that the $29,000 would be wiped out and the $68,000 principal would be wiped out, they naturally take an interest in the arbitration proceedings which are going on, and they ask to be represented; but those arbitration proceedings are not any proceedings in which they had any right to be there. They were there by the courtesy of the Government and the arbitrators, but they had no standing. It was not an arbitration between them and anybody; it was between two governmental bodies.

[THE COURT: Is not the question very simply this? If a man is trustee and overpays interest by mistake, and funds are coming in from time to time, has he a right to rectify that mistake and recoup himself from the funds?]

Yes, I think that is practically the question, my lord. And for authority in support of the view that the trustee cannot so recoup himself, I would refer to *Skyring* v. *Greenwood* (1). In *Addison on Contracts* (2) The principle is laid down that if trustees or agents represent that they have funds in their hands belonging to the parties for whom they act, and they draw out the money and spend it as their own, the trustees or agents cannot recover back the money; nor can they retain other moneys in their hands by way of indem-

(1) 4 B. & C. 290. (2) 9 ed. p. 431.

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nity. Again the law raises no implied promise to return in respect of money had and received where the rights of the receiver of the money had been prejudiced by the mistake, and it would be inequitable to compel him to refund the amount. (*Watson* v. *Marston* (1); *Deutsche Bank* v. *Beriro & Co.* (2); *The Queen* v. *The Treasury Board* (3): *Brisbane* v. *Dacres* (4).

Mr. Newcombe: In the first place, my lord, I think the position is clear that if these plaintiffs are entitled to recover anything, it must be by reason of a mere technical rule of law, which they, of course, if such a rule exist, are entitled to invoke in their favour. It is not a case of any hardship; no injustice has been done; and the petitioners have been given a fiat because they have alleged that in the circumstances as they exist here there is a legal obligation on the part of the Crown, enforcible by petition of right, to restore these payments which have been made to them.

It is the same hardship a son suffers where the father has dissipated the estate. Those who succeed the present members of the band will become entitled by petition of right as descendants of the present band; and it may be that this money that has been paid over to them has been spent, or it may have been invested. I do not know what they did with it. If they got it and squandered it, there may be so much less for those who come after them; but there is no right in those descendants, or those who may have become descendants, there is no right vested in them which they can assert here in a proceeding of this kind. We might consider, just as that point has been suggested, the position of the case under the pleadings. "The Petition of Right of Joseph Henry, Charles Herch-"mer," and several others who are named, Chiefs in

(1) 4 DeG. M. & G. 230.
(2) 73 L. T. N. S. 669.
(3) 16 Q. B. at p. 362.
(4) 5 Taun. 143.

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"Council of the Mississaugas of the Credit," etc. (Reads from Petition of Right.) The proceeding is not taken in the name of members of the band, who, as shown by the evidence here, were parties to these payments and received and are holding the benefit of the payments which have been made. It seems to me that they have no right to come in here in any representative capacity and say that they want to do this for the members of the band who are going to succeed. It is only the members of the band insofar as they are represented here on the pleadings, the individual members of the band, who can be recognized as parties before the court, and the question is whether they have the rights which they claim to have. The basis of their action, as I understand it, must be this: that there is somewhere evidence of the creation of a fund in respect of which the Crown has undertaken by an obligation which can be enforced to hold that fund for the benefit of these individual Indians, and invest it at interest and pay the interest over to them by way of annuity. If that is not generally the nature of their case, I confess I do not understand what sort of a claim they have. Taking it in that way there is nothing proved here. There is no treaty. They speak of a treaty, they speak of a deed, of a surrender and other general expressions of that kind, but when you come to get down to it there is nothing here establishing any fund, constituting any declaration of trust, or imposing otherwise the obligation of a trustee upon the Crown. It is clear that the Indians had nothing to start with; they had no right or interest of any kind which was known to the law. It is true reserves had been set apart for the Indians by the grace of the Crown, but the Indian has no right or enforcible interest in that reserve. He has a right to hold the reserve during the pleasure of the Crown, and that is all. That plea-

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sure may be revoked at any time, and he acquires no right of action because he is dispossessed of property which he has been in the habit of occupying. That was the original position, and the position which they may have with regard to money which the Crown, at some stage in the history of the country, determines to hold for the benefit of the Indians is not any larger than the interest which they have in any reserve, in any piece of land. It has not been explained here where the money came from that they claim that the Crown holds, and it is very likely—in fact it rather appears—that the Crown does not actually hold any money at all, but that they have adopted the policy of paying amounts by way of annuities equivalent to what would be earned by the investment of certain moneys at six per cent., or five per cent., or three and a half per cent., as the case may be. But then when you take this sum of $29,000 which is in question, there is nothing whatever to connect that with any particular transaction respecting any fund.

What I submit on this part of the case is that there is no evidence here, and in fact there is no obligation existing, to limit the payment out of these funds to interest. The whole matter is committed to the discretion of the Crown. It depends originally upon the grace of the Crown, and the Crown has taken a large discretion to deal with the funds, as it sees fit, for the benefit of the Indians, and when you have a question whether a payment was a judicious and proper payment to make, I submit that is not a question to be reviewed by the court after the Crown has passed upon it. There is nothing about interest in this trust at all. There is no trust for us to pay the interest, but it is out of the proceeds or sale or other disposition of the land to make such provision for the maintenance and religious instruction of the people of the Missis-

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sauga Nation of Indians, etc. Under the express words of that declaration, the natural thing to do would be to pay the principal, and I would not have thought that the Government would have undertaken to bind itself in early times with regard to how these trust funds for the benefit of the Indians were to be administered. They were a people in more or less transient stage, in a stage of progress perhaps, and the Government saw fit to adopt a certain policy of protecting them, recognizing an interest in the way of an Indian title, giving them reserves, selling these reserves and taking the money for the benefit of the Indians; but it would have been very bad policy probably for them to have undertaken to define exactly how that money was to be applied. They said, no doubt, "We will hold these moneys the same as you have held your lands of which they are the proceeds; they are to be held for the benefit of the Indians, to be administered as a matter of discretion upon the part of the Crown."

[THE COURT: Was there in any of these treaties an undertaking to pay a given sum each year?]

Mr. Magee: Yes. In the treaty of 1818 there was an agreement to pay $2,090.

[THE COURT: Assuming the Crown is a trustee, and the trust may be enforced—I am not discussing that—but in respect of that they would be entitled to have that sum paid every year; and if there is a capital sum out of which it is paid, it ought to be kept good.]

Mr. Magee: The annuities were capitalized?

Mr. Newcombe: We have always paid the $2,090, and are still willing to do it; but this has no connection with the present case.

I think our position would stand any amount of investigation with regard to a claim of this character.

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These payments were made to the Indians, and your lordship asked whether, assuming a trustee had paid too much interest, he could withhold that out of subsequent interest in dealing with his *cestui que trust*. My learned friend cited a good many cases, but I do not think he cited any that would require your lordship to hold that that could not be done. It would seem to be a reasonable thing to do where there is no wrong doing alleged as against the trustee. *Ex parte Ogle* (1). The trustee was allowed to do this in a case which my learned friend cited himself, *Daniel* v. *Sinclair* (2). This is a case binding directly on the court, and it seems to me to cover the point. But the King cannot be a trustee under the authorities at all; so that it is not perhaps necessary to look into the liability of an ordinary trustee. (*Bacon's Abridgement*, "Prerogative.") (3).

Then, following my argument that a petition of right will not lie in such a case as this, I say there is no precedent for it. There are cases where the Crown has collected money from foreign Governments and they have sued the Government, attempting to make the Crown account as a trustee, but they have always failed; and there is no case of a petition of right having been allowed to prevail where they were attempting to hold the Crown as a trustee. It is not within the class of cases in which petition of right will lie as stated in *Feather* v. *The Queen* (4).

My learned friend has referred to some statutes with regard to the application of Indian funds, authorizing payments to be made. Those statutes are not to be construed, I submit, as creating any trust or imposing any obligations upon the Crown, but merely as statutes relating to the administration.

(1) L. R. 8 Ch. 711.
(2) 6 App. Cas. 181.
(3) Vol. 8, p. 82.
(4) 6 B. & S. 257.

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[THE COURT: If there was a claim arising in favour of the Indians under any one of those statutes, then of course the court would have jurisdiction and a declaration might be made.]

Reference has been made to sections 69 and 70 of *The Indian Act*, but those are merely administrative directions as regards certain funds which the Government has in its hands appropriated to certain purposes, and they would be construed subject to the rule, I think, laid down by Lord Hobart in *Hobart's Reports* (1), where it says there are also statutes which "were made to put things in ordinary form and to ease a sovereign of labour, but not to deprive him of power" which cannot be said to bind the King. I do not think those statutes can be construed in any way as implying a charge upon the Crown. The Crown is not to be bound either by contract or statute unless it is expressly and clearly bound, and the most that they can say is that these statutes would be unnecessary if the Crown had perfect liberty to appiy these moneys in any way it saw fit.

Mr. Magee replied, citing *Penn* v. *Lord Baltimore* (2); *Rustomjee* v. *The Queen* (3); *Kinloch* v. *The Queen* (4); *Clode on Petition of Right* (5).

Dec. 5th, 1902.

An order was made directing a further hearing on the question of the origin of the fund in controversy in this action.

February 15th, 1905.

The case was re-opened for the purpose above mentioned.

A. G. Chisholm and *R. V. Sinclair* for the suppliants; *E. L. Newcombe, K.C.*, for the respondent.

(1) At p. 146.
(2) 1 Ves. 453.
(3) L. R. 2 Q. B. 69.
(4) W. N., 1882, 164; W. N., 1884, 80.
(5) Pp. 78, 102, 141.

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THE JUDGE OF THE EXCHEQUER COURT now (May 8th, 1905,) delivered judgment.

The petition is brought to secure a declaration that a sum of $29,161.17 and interest thereon should be repaid or restored to certain funds that the Crown holds in trust for the Mississaugas of the Credit, a band of Indians residing on their Reserve, in the Counties of Brant and Haldimand, in the Province of Ontario, or for such further or other relief as the nature of the case may require.

By the 111th section of *The British North America Act*, 1867, it was provided that Canada should be liable for the debts and liabilities of each province existing at the Union. Among the liabilities of the late Province of Canada, for which the Dominion of Canada thereby became liable, were certain obligations in relation to the Mississaugas of the Credit. By an agreement or treaty made on the 28th day of October, 1818, between His Majesty the King and certain chiefs of the said nation of Indians, His Majesty, in consideration of the surrender of certain lands therein mentioned, promised to pay to the said nation of Indians the sum of five hundred and twenty-two pounds ten shillings in goods at the Montreal price (1). And by an indenture made on the 28th day of February, 1820, the Mississauga nation of Indians surrendered to His Majesty a parcel or tract of land therein described upon the trust and to the intent that His Majesty, His heirs, successors and assigns might out of the proceeds of the profits of the said lands and premises arising from the sale or leasing, or such other disposition of the same or any part thereof as to His Majesty, His heirs and successors might seem meet, make provision for the maintenance and religious instruction of the people of the Missis-

(1) Indian Treaties and Surrenders, No. 19, vol. 1, pp. 47 and 48.

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sauga nation of Indians and their posterity, according to His Majesty's gracious intention (2).

In 1860 the moneys that the Crown had realized from the sales of these lands, and which were then invested and bore interest at the rate of six per centum per annum, amounted to fourteen thousand one hundred and seventy-five pounds currency. And by an order in council of the 16th of January, 1861, passed, I infer, in pursuance of the 8th section of the Act 23rd Victoria, chapter 151, to which further reference will be made, the Receiver General was authorized to assume these investments, among others, on account of the Province, and to place the amount to the credit of the Mississaugas in the books of account of the Province, there to bear interest at the rate of six per centum per annum. It appears from the evidence that between the date last mentioned and the Union of the Provinces in 1867, further collections were made on account of the lands so surrendered by the Mississaugas amounting to the sum of $8,080.97. So that immediately before the Union the obligation or liability of the Province of Canada to the Mississaugas of the Credit was as follows:

First, to pay them the annuity of five hundred and twenty-two pounds, ten shillings, currency, or two thousand and ninety dollars, mentioned in the agreement of the 28th of October, 1818. Secondly, to hold for them at interest at the rate of six per centum per annum the sum of fourteen thousand one hundred and seventy-five pounds currency, or fifty-six thousand seven hundred dollars that had been put to their credit in the public accounts of the Province; and thirdly, to hold for them, at the current rate of interest, the further sum of eight thousand and eighty dollars and ninety-seven cents that has been mentioned.

(2) Indian Treaties and Surrenders, No. 22, vol. 1, pp. 50-53

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These liabilities formed part of the public debt of the Province, and in the settlement of the matter between the Dominion and the Provinces of Ontario and Quebec the annuity was capitalized at the rate of five per centum, that is, at a sum of forty-one thousand eight hundred dollars, and the provinces were debited and the Dominion credited in the Province of Canada accounts with the three sums mentioned, namely, $56,700; $41,800; and $8,080.97. Thereafter, in the Dominion books of account there was to the credit of this band of Indians the said sum of $56,700 bearing interest at six per centum per annum, the said sum of $41,800 bearing interest at five per centum per annum, and the said sum of $,8080.97 with such additions thereto as arose from further collections on account of the sales of the lands of the Mississaugas, on which interest, at a rate which varied from time to time, was allowed. Between the Union and the 31st of December, 1882, the rate allowed was five per centum; and from that date to June 30th, 1892, four per centum per annum. It was then reduced to three and one-half per centum; and on the 1st of January, 1898, it was further reduced to three per centum per annum On the 1st of July, 1883, there stood to the credit of the Mississaugas, in the public accounts of the Dominion, a capital sum of $119,638.17, consisting of the said sums of $56,700, and $41,800, and a balance of $21,138.17, which sums were then bearing interest at the rates respectively of six, five and four per centum per annum. That, I understand, was the amount of the capital moneys of the Mississaugas of the Credit on that date, as shown not only by the books kept at the Department of Indian Affairs, but also by the books of account of the Audit Office and of the Department of Finance.

In 1883 the Mississaugas put forward a claim to have a considerable additional sum placed to their credit,

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the claim being based upon a report, made in 1858, by the Special Commissioners who were appointed for the purpose of investigating Indian matters in the Province of Canada. The claim was taken up and considered by the Superintendent General of Indian Affairs, and enquiries made at the Crown Lands Department of Ontario, with the result that he came to the conclusion that the claim was well founded; and that the Mississaugas of the Credit were entitled to have a further sum of $68,672.01 placed to their credit in the public accounts of the Dominion. And on a report from him an order in council was passed on the 30th of June, 1884, giving authority for the transfer of the amount mentioned from the Consolidated Revenue Fund "to the credit of the Indian "Fund, with a view to the Mississauga band receiving "the benefit thereof and of which they had so long "been improperly deprived." The Mississaugas were informed of the passing of this order in council and a copy of it was sent to the Indian agent at their Reserve. On the 29th of August following the Department of Indian Affairs requested the Auditor-General to cause an entry warrant to be passed debiting the Consolidated Revenue Fund and crediting the Indian Trust Fund with the amount of $68,672.01 being, as stated, proceeds ot sales of lands at one time the property of the Mississaugas of the Credit, together with interest to the 30th December, 1883, as set forth in the order in council of the 30th of June, 1884. It was also stated in the communication that the amount mentioned had been placed to the credit of Indian Funds in the Department of Indian Affairs for the fiscal year ending the 30th of June. There was no Parliamentary authority for debiting the Consolidated Revenue Fund with this amount, and it does not appear that the Auditor-General took any action in respect of the matter beyond asking to

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be furnished with the statement and papers relating thereto. On the 7th of October following, on a memorandum from the Superintendent General of Indian Affairs, dated the 8th of September, 1884, another order in council was passed whereby that of the 30th of June, 1884, was amended by giving authority to include the said amount of $68,672.01 amongst the items of account to be considered in the settlement between the Treasurers of Ontario and Quebec, respectively, and the Dominion of Canada, instead of charging the same to the Consolidated Revenue Fund. This claim, if good, was one against which the Provinces of Ontario and Quebec, as representing the Province of Canada, would have had to indemnify the Dominion. But these Provinces refused to recognize the claim, and on further search and enquiry being made certain old documents were discovered that showed the claim not to be well founded. In the meantime the Indian Department had from year to year credited the Mississaugas with the interest on the sum of $68,672.01 and had used or distributed the income for their benefit; while the Audit Office and the Department of Finance had only allowed interest on the actual balances at their credit, with the result that there was an annually increasing difference between the books of account of the Indian Department, on the one hand, and those of the Audit Office and Department of Finance, on the other; and in consequence an impairment increasing from year to year of the capital funds of the Band was shown in the books of the Audit Office and of the Department of Finance. By a minute of the Treasury Board of the 12th of May, 1893, after reciting that the Board had had under consideration a report from the Auditor-General with regard to the difference between the books of the Department of Indian Affairs and those of

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the Audit Office and of the Finance Department, caused by the Indian Department taking credit for an amount of $68,672.01 under authority of an order in council, dated 30th June, 1884; that this difference had continued to increase on account of the interest compounding from year to year, so that on June 30th, 1892, the total difference due to this cause was $93,982.53; and that the amount in question had never been collected by the Dominion but formed one of the unsettled and disputed accounts between the late Province of Canada and the Dominion,—it was directed that until the final settlement of the Provincial accounts the original entry made by the Indian Department be reversed and that steps be taken to make good, if possible, the over-expenditure of interest. Then on the 26th of October, 1894, an order in council was passed giving authority to charge the capital account of the Mississaugas of the Credit on the 30th June, 1894, until such time as the claim of the Indians was finally decided, with the amount of interest, $29,161,19, on the sum of $68,672.01 credited to the capital account of the Band under the order in council of the 30th of June, 1884, and distributed among the Indians under the authority of such order in council. The minute of the Treasury Board and order in council referred to had reference to the accounts of the Mississaugas as kept in the books of the Department of Indian Affairs; and not to such accounts as shown by the books of the Audit Office and of the Department of Finance, in which by reason of the payments made to and for this Band of Indians there had been, as stated, an annually increasing impairment of their capital funds. It will be observed that in the minute of the Treasury Board cited the difference between the amounts shown to the credit of the Mississaugas in the books of the

different departments is stated to have increased on account of the interest compounding from year to year. The reason given is not altogether accurate or adequate. But as it was the practice of the Crown to allow the Indians interest on any balance standing to their credit in current account, as well as interest on their capital moneys, it came very much to the same thing; but the difference was in fact due in the first place to the Indian Department crediting, and the Audit Office and Department of Finance refusing to credit, the Mississaugas with interest on the sum of $68,672.01 mentioned; and in the second place, to the Department of Indian Affairs crediting the Indians with interest (not allowed by the other two departments) on capital moneys that had already been paid out to and for these Indians. Of the sum of $29,-161.17, at which the difference stood, after debiting in the books of the Indian Department the capital sum of $68,672.01 that had been credited in the mistaken view that the Indians were entitled thereto, an amount of $23,777.68 represented interest credited by the Department of Indian Affairs on the capital sum mentioned; and the balance of $5,383.49 represented the aggregate of credits for interest allowed by the latter department on the amounts by which from time to time the balances of capital moneys exceeded in their books the balances as shown in the books of the Audit Office and Department of Finance. For the same reason the order in council of the 26th of October, 1894, does not express the true position of the matter when the sum of $29,161.17 is referred to as interest on the amount of $68,672.01. It is also to be observed, as has been noticed, that the authority given to charge the sum of $29,161.17 to the capital account of the Band had reference only to the account as it appeared in the books of the Indian Department, and there the

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entry was in substance and in fact one of adjustment only, and not a substantial charge on the funds occurring at that time. The capital moneys against which this sum was then charged had long before been paid out to or for the Mississaugas. With regard to these moneys the Crown, through the several departments of the Government mentioned, stood in more than one relation It was the office of the Audit Department (whether alone or in connection with the Department of Finance, is perhaps not quite clear) to determine from year to year what amount of interest was due, and should be credited to this Band of Indians. Any interest credited by the Indian Department in excess of the amount so allowed was credited without due authority; and if there had been nothing except income that the latter department was entitled to disburse, the difference could never have arisen as the payments made would not have been honoured by the Audit Office after the balance at current account had been exhausted. But the Indian Department was from year to year collecting and expending moneys for these Indians on capital account as well. The Superintendent General of Indian Affairs, or the Governor in Council, determined what amounts might from time to time be paid out for the Indians on capital account. To illustrate this matter by the accounts in evidence it will be seen therefrom that in addition to the two sums of $56,700 and $41,800 there was, as has been mentioned, to the credit of the Mississaugas on capital account on the first of July, 1883, the sum of $21,-138.17. Between that date and the year 1894 the department collected on their account, from sales of the lands, sums amounting in the aggregate to $7,035.76. But it also from year to year made expenditures from capital account, which, including a loan of $6,000, amounted to more than $13,000; and this altogether

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apart from any question as to the amount of $29,161.17 now in issue here. As the Department of Indian Affairs had capital moneys at the credit of the Indians which it was entitled to disburse on their account, the Audit Office had no check. When the annual expenditure by the Indian Department on account of the Indians exceeded the amount of their income, or the amount to their credit on current account, the payments fell upon and were charged by the Audit Office and the Department of Finance to capital moneys at the credit of the Band. So it happened that of the moneys annually distributed for the maintenance of these Indians between the years 1884 and 1894, which the Department of Indian Affairs intended to pay out of income, and which the Indians received and used as being income, a part each year was in fact taken from, and constituted an impairment of, the capital funds. Against this impairment of the capital moneys of the Band the suppliants for themselves and the Band now seek relief.

First, with regard to the parties to the action, it will be seen that the petition is brought by certain chiefs and councillors of the Mississaugas of the Credit, for themselves and other members of that Band of Indians. That, according to the practice of the court, is the proper course to follow where, as in this case, there are a considerable number of persons having the same interest in the cause or matter; and with respect to the incident that the suppliants are Indians it is only necessary to refer to the statute which gives them the right to sue for debts due to them, or in respect of any tort or wrong inflicted upon them; or to compel the performance of obligations contracted with them (1).

Then with regard to the nature of the relief sought by the petition, it is obvious, that any judgment to be

(1) R. S. C. c. 43, s. 79.

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entered must take the form of a declaration of the rights of the parties. But that does not of itself constitute an objection to the proceedings, for it is in accordance with the procedure prescribed by the twelfth section of *The Petition of Right Act*, whereby it is provided that the judgment on every petition of right shall be that the suppliant is not entitled to any portion, or that he is entitled to the whole or to some specified portion, of the relief sought by his petition, or to such other relief and upon such terms and conditions, if any, as are just (1). At the same time the fact that the judgment in such cases takes the form of a declaration does not in any way enlarge the authority of the court, or give it jurisdiction in any case in which it would not otherwise have jurisdiction. Where a court has no jurisdiction to give relief in an action it has no authority to make a declaration binding the rights of the parties. *Barraclough* v. *Brown* (2). And that rule should be strictly followed in all cases where the jurisdiction of the court depends upon statute and not upon the common law. If the statute does not give jurisdiction no declaration can be made, and no judgment given.

Then with regard to the moneys arising from the sale of the lands surrendered by the Mississaugas of of the Credit, it is clear, I think, that the Crown holds them in trust for that band of Indians. By the terms of the surrender of the 28th of February, 1820, to which reference has been made, the lands were to be held upon the trust therein mentioned. By the second section of the Act of the Legislature of the Province of Canada, 23rd Victoria, chapter 151, respecting the management of Indian lands and property, it was provided that all lands reserved for the Indians, or for any tribe or band of Indians, or held in trust for their

(1) R. S. C. c. 136, s. 12. (2) [1897] A. C. 623.

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benefit, should be deemed to be reserved and held for the same purposes as before the passing of the Act, but subject to its provisions. By the third section of the Act it was further provided that all moneys or securities of any kind applicable to the support or benefit of the Indians, or any tribe or band of Indians, and all moneys accrued or thereafter to accrue from the sale of any lands reserved or held in trust as aforesaid, should, subject to the provisions of the Act, be applicable to the same purposes, and be dealt with in the same manner as they might have been applied to, or dealt with, before the passing of the Act. And by the eighth section of the Act it was provided that the Governor in Council might, subject to the provisions of the Act, direct how, and in what manner, and by whom, the moneys arising from sales of Indian lands should be invested from time to time, and how the payments to which the Indians might be entitled should be made, and should provide for the general management of such lands, money and property, and what percentage or proportion thereof should be set apart from time to time to cover the cost of and attendant upon such management under the provisions of the Act, and for the construction and repair of roads passing through such lands and by way of contribution to schools frequented by such Indians. In the distribution of legislative powers under *The British North America Act*, 1867, the Parliament of Canada was given authority to make laws for the peace, order and good government of Canada in relation, among other things, to "Indians and lands reserved for the Indians" (s. 91, (24) and in the statutes of the Dominion relating to that subject the provisions mentioned have from time to time, with some

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alterations and additions, been re-enacted (1). There are a number of other provisions of the Acts relating to the Indians and Indian Lands in which reference is made to lands or moneys being held by the Crown in trust for the Indians or to their use (2). But it does not follow that because the Crown is a trustee for the Indians in respect of such lands or moneys, that the court has jurisdiction to enforce the trust, or to make any declaration as to the rights of the parties. That authority, if it exist, must be found in the statutes which give the court jurisdiction. There are a number of authorities and cases in which the question as to whether the Crown may be a trustee has been considered (3), and there has been some difference of opinion on the subject. But the real question in any such case is not, it seems to me, whether the Crown may or may not be a trustee, but whether the court has any jurisdiction in respect of the execution of the trust. Where the jurisdiction to grant the relief sought is expressly given by statute, no difficulty arises in respect of either question. That was the position of matters in the case of *The Canada Central Railway Cy.* v. *The Queen* (4). There the company was entitled, under an Act of the legislature, to the lands in respect of which a declaration of its rights was sought, and the court had been given authority by the legislature to declare in such a case that the

(1) 31 Vict. c. 42, ss. 6, 7 and 11; 39 Vict. c. 18, ss. 4, 29, 58 and 59: 43 Vict. c. 28, ss. 15, 40, 69 and 70; R. S. C. c. 43, ss. 14, 41, 69 and 70; 58-59 Vict. c. 35, s. 2; and 61 Vict. c. 34, s. 6.

(2) C. S. C. c. 9, s. 10; 29-30 Vict. c. 20; 39 Vict. c. 18, s. 65; 43 Vict. c. 28, ss. 33 and 76; R. S. C. c. 43, ss. 37 and 77; 51 Vict. c. 22, s. 13.

(3) Bacon's Abridg. Prerogative, E. 1, vol. 8, p. 82; Lewin on Trusts, 11th Ed., pp. 2, 7 and 29; *Penn* v. *Lord Baltimore*, 1 Ves. Sen. 452; *Canada Central Railway Co.* v. *The Queen*, 20 Grant, 289, 293; *Rustomjee* v. *The Queen* L. R. 2 Q. B. D. 74; *McQueen* v. *The Queen*, 16 S. C. R. 1, *per* Gwynne J. at page 58, and *per* Taschereau J. at page 117, and *The Canadian Pacific Railway Co.* v. *The Municipality of Cornwallis*, 7 Man. R. 1, *per* Killam J. at pages 21 to 23.

(4) 20 Grant, 289, 293.

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company was so entitled. With respect to the matters in controversy in this case any jurisdiction that the court has is derived from the provisions of the fifteenth and sixteenth sections of *The Exchequer Court Act* (1). By the fifteenth section of the Act it is provided that the court shall have exclusive original jurisdiction in all cases in which demand is made or relief sought in respect of any matter which might in England be the subject of a suit or action against the Crown, and for greater certainty, but not so as to restrict the generality of the foregoing terms, it shall have exclusive original jurisdiction in all cases in which the land, goods or money of the subject are in the possession of the Crown, or in which the claim arises out of a contract entered into by or on behalf of the Crown. Now, so far as it is sought to maintain this petition upon the ground only that the Crown is a trustee for the Indians, it is conceded that there has been no case in England in which any relief has been given against the Crown as a trustee, and the general provision with which the section begins may, I think, be passed over without further consideration But it is contended that the case is one in which the money of the suppliants is in the possession of the Crown, and that the court has on that ground the jurisdiction that is invoked in support of the petition. With that contention I am not able to agree. It seems very clear that relief is not sought in respect of moneys now in the possession of the Crown, but in respect of moneys which have been paid over to the Indians and which are no longer in the possession of the Crown, but which it is alleged ought now to be in the possession of the Crown. If the subject's money is in the possession of the Crown the court has undoubted jurisdiction to declare that he is entitled thereto, and the

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

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amount so awarded to him is payable out of any unappropriated moneys forming part of the Consolidated Revenue Fund of Canada (1). But that provision is not applicable to the present case where the suppliants seek to have a sum of money transferred from the Consolidated Revenue Fund to the Indian Trust Fund. It was suggested in argument that the sum of $29,161.17, in question in this case, had gone into the former fund when it was charged to the latter. But that is not the case, and even if it were, I do not see how the amount could now be taken out of the Consolidated Revenue Fund and restored to the Indian Trust Fund, without the authority of Parliament.

With respect, however, to the provision of the section that gives the court jurisdiction in any case in which the claim arises out of a contract entered into by or on behalf of the Crown, it seems to me that the court has jurisdiction so far as the claim set up is supported by the agreement or treaty, or by the surrender, to which reference has been made. Then by clause (*d*) of the sixteenth section of the Act (2) the court is given exclusive jurisdiction to hear and determine every claim against the Crown arising under any law of Canada. That provision was considered in the case of *Yule* v. *The Queen* (3), in which it was held that a debt or liability of the late Province of Canada, arising under an Act of the Legislature of that Province for which debt or liability the Dominion of Canada became liable under the 111th section of *The British North America Act*, 1867, was a claim arising under a law of Canada. So here, I think, that in so far as the present claim rests upon that section and upon the Acts of the Legislature of the Province of

(1) 50-51 Vict. c. 16, s. 47. (2) 50-51 Vict. c. 16.
(3) 6 Ex. C. R. 123; 30 S. C. R. 35.

Canada, and of the Parliament of Canada, it is a claim arising under a law of Canada, and to that extent within the jurisdiction of the court.

The Crown, however, does not in respect of Indian lands and moneys stand in the position of an ordinary trustee. In the first place the Crown does not personally execute the trust. Its administration thereof is vested in a department of Government, over which a Minister of the Crown responsible to Parliament presides. That has been the position of Indian affairs since the year 1860, when by virtue of the Act 23rd Victoria, chapter 151, s. 1, the Commissioner of Crown Lands became the Chief Superintendent of Indian Affairs. After the Union, the Secretary of State was Superintendent General of Indian Affairs from 1868 to 1873 (1), and since the latter year the office has been held by the Minister of the Interior (2). Subject to the terms and conditions of the several agreements or treaties with the Indians, or of the surrenders from them, and to the provisions of the statutes from time to time in force respecting Indians and Indian Lands, the Superintendent General of Indian Affairs has, under the Governor in Council, the management and control of Indian lands, property and funds (3).

For the manner in which the affairs of the Indians are administered the Government of the Dominion and the Superintendent General are at all times responsible to Parliament; and whenever in respect of such matters any power, authority or discretion is vested in and exercised by the Governor in Council, or in the Superintendent General of Indian Affairs, Parliament alone has the authority to review the decision come to or the action taken. In all such cases the court has

(1) 31 Vict. c. 42, s. 5.
(2) 36 Vict. c. 4, s. 3; 46 Vict. c. 6, s. 1; and R. S. C. c. 43, s. 4.
(3) 31 Vict. c. 42, s. 5; 36 Vict. c. 4, s. 3; 39 Vict. c. 18, ss. 2 and 29; 43 Vict. c. 28, s. 40; 46 Vict. c. 6, s. 1; and R. S. C. c. 43, ss. 4 and 41.

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no jurisdiction. Then there is this further difference between the Crown as a trustee and an ordinary trustee; the Crown is not bound by estoppels; and no laches can be imputed to it; neither is there any reason why it should suffer from the negligence of its officers. (*Chitty's Prerogatives of the Crown* (1). In short it adds nothing to the argument to state that the Crown is a trustee Where it is a trustee the court has no jurisdiction to impose any obligation upon it, or to declare that any such obligation exists, unless the statute gives jurisdiction, and where the statute gives jurisdiction it is immaterial whether in the particular case the Crown is held to be a trustee or not.

With regard then to the moneys in question in this case, there is no occasion at present to make any further reference to the sum of $56,700 for which since 1860 the Crown has been a debtor to the Mississaugas of the Credit. That amount stands to their credit today, and the interest thereon has been credited to them from year to year. The balance of other capital moneys arising from the sales of their lands, collected before and since the Union, has been exhausted. Part of this has been expended in payments that it is conceded are proper charges against capital moneys, and part has been distributed to the Mississaugas for their maintenance and support. So far as appears there was no intention on the part of the Superintendent General of Indian Affairs to pay any part of their capital moneys to the Band for their maintenance. The general policy of the department has been against doing that. But in the present case, through error or mistake, that, as has been seen, has happened. Was such a distribution contrary to any contract or law of Canada, so as to raise a claim in favour of the Indians over which the court would have jurisdiction? That question I

(1) Pp. 379-381.

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answer in the negative. The contract between the Crown and the Indians in respect of these moneys is to be found in the Indenture of Treaty of February 28th, 1820; and there is, I think, nothing therein to prevent the Crown from making provision for their maintenance out of any of the moneys arising from the sale or leasing or other disposition of the surrendered lands. And no statute has been cited, and I know of none, prior at least to July, 1894, that would make any such distribution of capital moneys unlawful. In the year last mentioned, by the Act 57-58 Victoria, chapter 32, section 11, a number of sections were added to *The Indian Act*, by one of which (s. 139) the Governor in Council was authorized, with the consent of a Band, to make certain specified expenditures out of any capital moneys standing to the credit of the Band. In terms that is an enabling enactment, but its effect possibly is to limit the authority and discretion which otherwise the Governor in Council and the Superintendent General of Indian Affairs would have had in respect of such expenditures. But I express no opinion as to that. The question does not arise in this case, as the capital moneys in question had been distributed to the Mississaugas before that provision was enacted.

With regard to the Crown's obligation under Treaty No. 19, made on the 28th day of October, 1818, to which reference has been made more than once, the case stands, it seems to me, on a different footing. There the Crown's obligation was to pay to the Mississaugas of the Credit a fixed annuity of two thousand and ninety dollars. In respect of that obligation which, by virtue of *The British North America Act*, 1867, now rests on the Crown, as represented by the Government of Canada, the Crown is not a trustee, but a debtor; and the obligation is not to pay to the Indians the

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revenue arising from any sum of money, but to pay a fixed and definite sum annually. The capitalization of the Indian annuities was no doubt a convenient arrangement to adopt in settling the accounts between the Dominion of Canada and the Provinces of Ontario and Quebec, as representing the old Province of Canada, and no doubt it is also convenient in keeping the books of account of the Dominion to credit the Indian Trust Funds with the amount of such capitalization. But that does not affect the right of the Indians in any way. They were not parties to the arrangement. And in the present case it makes no difference in my opinion whether the capital fund that represents the principal of the annuity in question stands at ten thousand or at one hundred thousand dollars. What the Mississaugas are entitled to in that respect is an annual payment, or credit in current account of the sum of two thousand and ninety dollars, —neither more nor less. And as their right thereto rests upon the treaty or contract between the Crown and them, and upon *The British North America Act*, 1867, the court has, I think, jurisdiction so to declare.

The fiscal year 1889-1890 was the last year in which the Mississaugas were credited with the full amount of this annuity. Since that time something less than the full amount has been credited in each year, while the full amount should in my opinion have been credited. To that extent the suppliants and those for whom the petition is brought are, I think, entitled to relief. Whether any such relief will work out to the advantage of the Indians or not, is another question. I do not go into that matter. The office of the court is to define, as best it may, the legal rights and relations of the parties. All other matters arising out of the case are for the consideration of those upon whom rests the responsibility of advising the Crown, and of inviting the action and

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co-operation of Parliament, if it is found that such action is advisable.

There will be judgment for the suppliants, and a declaration that the Mississaugas of the Credit have been and are entitled to be paid or credited each year with the full amount of the annuity of two thousand and ninety dollars, payable under the agreement or treaty No. 19 dated the 28th day of October, 1818, and that they are in that respect and to that extent entitled to relief.

Judgment accordingly,

Solicitor for the suppliants: *A. G. Chisholm,*

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

1905
May 8.

In the Matter of the Petition of Right of

WILLIAM ROBINSON.....SUPPLIANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

Intercolonial railway—Contract for services—Conditional increase of salary—Impossibility of performance of condition—Promises by Crown's officers—Liability.

H., while General Traffic Manager of the Intercolonial Railway, offered to secure the appointment of R. to a position in H's department of the railway at a salary of $2,000 per annum. R. refused that amount, but signified his willingness to accept $2,400. H., after obtaining the permission of the Minister of Railways to offer R. $2,100 per annum wrote to him: "I would be prepared to alter the terms of my letter to read $2,100, with the assurance that should you, as I feel confident you can, develop the traffic on your division to my satisfaction, your salary should be increased to $2,400 on the 1st January, 1899." R. accepted the appointment upon these terms, and entered upon the duties of his office on 1st January, 1898. In the following autumn H. resigned his position on the railway. Shortly after, namely in September, 1898, the department offered to appoint R. as General Travelling Freight Agent of the Railway, with headquarters at Toronto; and R. accepted the new office on the assurance contained in a letter from W., the then General Freight Agent of the railway, that "there is to be no change in the salary of the present position and the one in the West." R. entered upon his new duties on the 10th of October, 1898, and discharged the same until April 1903, when his services were dispensed with. He had never been paid a salary during his employment by the Department of Railways of more than $2,100 per annum, and after his retirement he filed a petition of right claiming a balance of salary due him at the rate of $2,400 from the 1st January, 1899, basing such claim upon H's letter of the 16th December, 1898, and W's letter mentioned.

Held, that even if the assurance of increase of salary contained in such letter was more than an engagement or liability in honour, the contingency upon the happening of which the salary was to be increased had never in fact arisen. Before the time arrived when it could happen two things had occurred to prevent it, neither of which was in the contemplation of the parties when the appointment was made. H. had

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resigned his position, and was no longer in the position to say whether R. had, or had not developed the traffic to his satisfaction; and secondly, R. had ceased to hold the office in respect of which the increase of salary had been promised, and had accepted another office in connection with the traffic department of the railway.

2. The fair meaning of W's promise that there would be no change in the salary on R's acceptance of his new office in the traffic department was that R. would be paid the same amount of salary in the new position as that which he was then receiving, namely, $2,100.

3. That W. not having been shown to have had any authority to bind the Crown by a promise to give any such increase of salary, no such authority was to be implied from the fact that he was at the time the General Freight Agent of the Railway, and as such R's immediate superior officer.

PETITION OF RIGHT for balance of salary alleged to be due to the suppliant in respect of an office sometime held by him on the Intercolonial Railway.

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

March 18th, 1905.

G. Bell, for the suppliant, contended that there was a definite contract made out upon the evidence whereby the Crown undertook to pay the suppliant a salary of $2,400 per annum from the first January, 1899. The appointment was made by the Minister of Railways, and there was no necessity to have an order in council authorizing such appointment. Under sec. 3 of R.S.C., c 38 anything done by some one authorized by the Minister is to be treated as having been done by the Minister himself. The Minister authorized the appointment of the suppliant at a salary of $2,400. The Minister has the charge and management of all government railways under sec. 6 of R.S C., c. 37; and may make appointments for the purpose of carrying on the business of the railway without an order in council therefor. The Minister, after having had communication of Mr. Harris' letter offering the suppliant $2,100, per annum with the promise of an increase to $2,400

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in January, 1899, expressly ratifies one part of it and does not dissent from the remainder.

Again, it is not an executory contract; the claim is for services performed for the Crown and of which the Crown has had the benefit. In such a case in fairness and equity the Crown must pay the salary. *Hall* v. *The Queen*, (1).

F. H. Chrysler, K.C., for the respondent, contended that the only excess over the amount of $2,000 per annum which the suppliant was entitled to was $100; and he had been paid at the rate of $2,100. The Minister did not agree, nor authorize any one to agree, to pay the suppliant $2,400 per annum. Clearly there is no contract to bind the Crown for the higher amount.

Secondly, there is no analogy between the case where the Crown has taken the benefit of work and labor and materials supplied but not paid for, (*Hall* v. *The Queen* (2); *The Queen* v. *Henderson* (3)) and this case where there is a definite salary mentioned and paid to the suppliant and the court has not to concern itself with a *quantum meruit*.

Finally, the suppliant's whole course of conduct while in the employ of the railway is inconsistent with the claim he put forward after his retirement. He accepted a new position after Mr. Harris had left without putting forward any right to be paid $2,400 per annum; and, furthermore, he accepted and received a salary of $2,100 per annum.

Mr. Bell replied.

THE JUDGE OF THE EXCHEQUER COURT now (May 8th, 1905,) delivered judgment.

The petition in this case is brought to recover the sum of one thousand two hundred and eighty seven

(1) 3 Ex. C.R. 373.

(2) 3 Ex. C.R. 373.

(3) 28 S. C. R. 425.

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dollars and fifty cents alleged to be due to the suppliant as a balance of his salary as General Travelling Freight Agent of the Intercolonial Railway, with headquarters at Toronto. While occupying that position he was paid a salary of two thousand one hundred dollars per year, and he claims that under the circumstances, to be referred to, he was entitled to be paid a salary of two thousand four hundred dollars.

On the 20th of November, 1897, the Minister of Railways and Canals being "desirous of reorganizing the "Traffic Staff of the Intercolonial Railway with a view "of securing increased efficiency in the service" offered Mr. A. H. Harris, of Montreal, then an officer in the employ of the Grand Trunk Railway Company, the position of General Traffic Manager of the Intercolonial Railway upon the terms, among others, that Mr. Harris, as General Traffic Manager, should "be permitted to "exercise as much authority and have as much control "over rates, fares and arrangements respecting traffic "matters, and over the selection and government of "his staff in the traffic department of the railway as "is usual and customary in large railway corporations". There is nothing to show what the usual and customary authority and control of a general traffic manager of a large railway corporation is in respect of the selection and government of his staff; but from the fact that Mr. Harris, before making the contract on which the suppliant relies, asked and obtained the Minister's consent to offer the salary agreed upon, I infer that neither the Minister nor Mr. Harris understood such authority and control to include the power to make appointments to his staff and to fix the amount of salaries without reference to the Minister in whom by statute was vested the management, charge and direction of the railway. Mr. Harris, having accepted the appointment offered to him, wrote to the suppliant on

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the 7th of December, 1897, stating that he had been "intrusted by the Dominion Government with the re-"organization on a commercial basis of the traffic "department of its several lines of railway and that "he could offer him an official appointment if he felt "inclined to entertain the proposition". The suppliant was at the time general travelling freight agent of the Grand Trunk Railway Company for the States of Michigan, Indiana and Ohio, with residence at the city of Detroit. He had been in the employ of the company for some twenty-five years, having occupied for ten years the position he was then in He was in receipt of a salary of one thousand eight hundred dollars per year, with good prospects of promotion. Upon receipt of Mr. Harris' letter he obtained leave of absence and went to Montreal where the matter was discussed between them. Mr. Harris offered him the position of division freight agent on the Intercolonial Railway, with headquarters at Saint John, N.B. at a salary of two thousand dollars per year. Nothing was then concluded and the matter was left in abeyance until the suppliant's return to Detroit. On the 11th of December, Mr. Harris renewed the offer by letter, stating that the suppliant's salary would be two thousand dollars per annum, to be increased from time to time should the development of business on the division under his charge, in Mr. Harris' judgment, warrant recognition, and assuming that his duties were efficiently performed that the appointment was guaranteed for a period of five years and to be continued thereafter on such terms as might be mutually agreed upon. To that offer the suppliant answered that he would not accept the position for less than two thousand four hundred dollars per year. Thereupon Mr. Harris sent to the Minister a copy of the letter of the 11th of December to the suppliant and the latter's reply thereto.

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In the letter dated the 13th of December, accompanying these enclosures, Mr. Harris wrote to the Minister that he thought the suppliant might be induced to accept the appointment if the salary were made two thousand one hundred dollars a year, with a guarantee that if he increased the business to their satisfaction at the end of twelve months it would be made two thousand four hundred dollars; and he asked the Minister to answer by telegram "if he might go the extra $100.00". In answer the Minister on the 16th of December sent a telegram stating that he was willing that Mr. Harris should offer the suppliant the extra one hundred dollars. Then on the same day Mr. Harris again wrote to the suppliant. Referring in his letter to that of the 11th of December, and the suppliant's reply, he made the following offer:—

"I would be prepared to alter the terms of my letter "to read $2,100, with the assurance that should you, "as I feel confident you can, develop the traffic on "your division to my satisfaction, your salary should "be increased to $2,400 on the 1st January, 1899." It will be observed that what Mr. Harris proposed to the Minister, and for which he may, I think, be taken to have had the Minister's implied authority, was that the increase of the suppliant's salary was to depend upon his increasing the business to their satisfaction, while the assurance given was that the increase would be given if the suppliant developed the traffic on his division to his, Harris', satisfaction. But I do not do more than refer to the difference in the terms used in the two communications, as I do not find it necessary to go into the question of Mr. Harris' authority to bind the Crown by the offer which he made to the suppliant. On the 18th of December the suppliant accepted Mr. Harris' offer as altered by his letter of the 16th. On the 23rd of that month Mr. Harris informed

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the Minister of the suppliant's acceptance; and on the 1st of January, 1898, he entered on the performance of the duties of his office. The policy that had been outlined when Mr. Harris accepted the position of general traffic manager of the Intercolonial Railway was to put the railway on a commercial or paying basis. That involved the withdrawal of certain concessions in rates, weights and otherwise that those who used the railway had theretofore been accustomed to. The policy proposed is said to have been distasteful to the people of the Lower Provinces, and Mr. Harris had either to admit that it was all wrong and go back to the old style and remain in the service of the Government operating the traffic department under old methods, or he had to retire from the service. He elected to do the latter and resigned his position. That happened in August or September of 1898.

On the 28th of September of that year Mr. J. J. Wallace, the general freight agent of the Intercolonial Railway wrote to the suppliant advising him that it had been decided to appoint him general travelling freight agent of the Intercolonial Railway, with headquarters at Toronto. On the 30th of that month the suppliant acknowledged the receipt of Mr. Wallace's communication, and expressed regret that he was asked to take a position of lower importance than the one he then filled. Then follows this statement:—"I presume, however, that the new arrange-"ment is not to alter in any way my present contract "with the Government which you perhaps remember "is for five years at a fixed rate of remuneration;" and he concluded his letter by stating that he would be glad to hear from Mr. Wallace in regard to the matters mentioned in his letter, and to be advised if his understanding of the contract with the Govern-

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ment was that held by the department. In Mr. Wallace's reply, dated the 1st of October, 1898, the following sentence occurs :—"There is to be no change "in the salary of the present position and the one in the West." The suppliant took legal advice, and came to the conclusion that the promise that had been made to increase, in the contingency mentioned, his salary as division freight agent, would apply to the new position or appointment of general travelling freight agent, and he accepted the position. He entered on the duties of his office on the 10th of October, 1898, and remained in that position until April, 1903, when upon a reorganization of the traffic staff of the Intercolonial Railway, his services were dispensed with. On the 20th of January, 1900, he addressed a letter to Mr. Pottinger, the general manager of the Intercolonial Railway, which omitting the formal parts, was as follows:—

"DEAR SIR,—I take the liberty of submitting the "enclosed comparative statement of tonnage forwarded "from this territory for the year ending September "30th, 1899, (the expiration of my first year in Toronto) "in which you will observe there is an increase of "12,107 tons over the corresponding period 1898, "which I think you will admit is a creditable show-"ing, more especially, as we had to contend with the "St. John merchants' boycott, which operated against "us to a considerable extent. My object in submit-"ting this statement is to call your attention to the "terms under which I accepted service with this rail-"way, which has been evidently overlooked, but as "you may not be familiar with the conditions of this "contract I give below an extract from the late "general traffic manager's letter dated December "16th, 1897.

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" *Extract.*

" I would be prepared to alter the terms of my letter " to read $2,100.00 with the assurance that should you, " as I feel confident you can, develop the traffic on " your division to my satisfaction your salary should " be increased to $2,400.00 on the 1st January, 1899."

" You will see from the above that I am entitled to " an increase in salary to $2,400.00 from 1st January, " 1899, and my reason for not making application " before was on account of not having in my posses- " sion a complete record of my work in the lower pro- " vinces. I have now, however, sufficient data show- " ing an exceedingly large increase during the short " time I was division freight agent, consequently I " feel that I have been unfairly treated, as I accepted " the appointment in good faith, and with the as- " surance that the promises made would be carried " out, instead of which my title of division freight " agent was withdrawn, and I was compelled to ac- " cept a subordinate position. As this has been detri- " mental to my record I trust you will see that my " title is restored and salary increased in accordance " with the agreement."

Mr. Pottinger, on the 23rd of the same month, acknowledged receipt of this communication, and stated that he would have the matter looked into. Nothing further was done; and the suppliant did not renew his claim until after he had in September, 1902, been informed that in view of the re-organisation of the Intercolonial railway, referred to, it had been decided to dispense with his services as general travelling freight agent of the railway. The suppliant's work was perfectly satisfactory to Mr. Harris during the time that the latter was general traffic manager of the Intercolonial railway, and there is nothing to suggest that his services were at any time performed in a way

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that would not commend them to the favourable consideration of his superior officers, and of the Minister.

Now, in the first place, it seems to me that the promise to increase his salary, on which the suppliant relies to support his petition, is one that is sometimes spoken of as an engagement or liability in honour, not in contract; one in which a confidence is reposed in the honour and good faith of the person making the assurance and which does not result in a contract enforceable in a court of law. (*Taylor* v. *Brewer* (1); *Roberts* v. *Smith* (2). But if the assurance given in this case should be thought to be more than that, then there is the difficulty that the contingency upon the happening of which the salary was to be increased has never in fact arisen. Before the time arrived when it could happen, two things had occurred to prevent it, neither of which was in the contemplation of the parties when the appointment was made. First, Mr. Harris had resigned his position as general traffic manager of the Intercolonial Railway, and was no longer in a position to say whether the suppliant had or had not developed the traffic on his division to the satisfaction of the former; and secondly, the suppliant had ceased to hold the office in respect of which the increase of salary had been promised, and had accepted another office in connection with the traffic department of the railway.

The suppliant meets the first difficulty with the contention that as the Crown accepted Mr. Harris' resignation of his office, thereby rendering the condition on which the increase depended incapable of performance, the promise to pay the increase in salary became absolute, and was no longer dependent on any condition; and for that contention he relies upon *Isbester* v. *The Queen* (3) decided by Mr.

(1) 1 M. & S. 290.
(2) 4 H. & N. 315.
(3) 7 S. C. R. 696.

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Justice Fournier, sitting in this court. But that case is not, I think, applicable to the present case, and the learned judge's views are, it seems to me, expressed in terms that make against and not for the contention mentioned. In that case it was objected that the suppliant was not entitled to recover the amount for which his petition was brought, because he had not obtained the certificate of the chief engineer of the Intercolonial Railway, as provided by the 18th section of the Act 31st Victoria, chapter 13; but it was held that the certificate was not necessary as the effect of a later statute (37 Victoria, chapter 15) was to abolish the office of chief engineer of the Intercolonial Railway, and to repeal so much of the former Act as was inconsistent with the latter, by which all the powers and authorities of the commissioners for the construction and management of the railway were vested in the Minister of Public Works. As the condition relied upon as an answer to the suppliant's claim in that case was contained in the repealed statute and not in the contract made with the commissioners, it was held not to defeat the claim. "The 18th section of 31 Vic., "ch. 13, which necessitates the certificate was not" the learned judge says "embodied as in other contracts "in the agreement with the suppliant as a condition "precedent imposed upon the contractor. Had the "suppliant signed an agreement in which this provi-"sion was inserted, as it was generally in all the "contracts passed by the commissioners, he would no "doubt have been bound by it." In such a case, as in this, the petition could not be sustained unless the event occurred, on the happening of which alone the suppliant's right of action depended. (*Moffatt* v. *Laurie* (1).

(1) 15 C. B. 583.

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Then with regard to the second difficulty mentioned, the suppliant contends that the effect of the letters that passed between Mr. Wallace and himself was to make the promise to increase his salary applicable to the office of general travelling freight agent of the Intercolonial Railway, that he accepted in October, 1898. But that contention cannot, it seems to me, be sustained. Mr. Wallace promised that there would be no change in his salary; but the fair meaning of that was, I think, that the suppliant would be paid the same amount of salary in the new position as that which he was then receiving. I do not think that Mr. Wallace intended to promise more than that, or that the correspondence, fairly construed, means more than that. But if it does, then the further difficulty arises, that Mr. Wallace has not been shown to have had any authority to bind the Crown by a promise to give any such increase of salary, and none is, I think, to be implied from the fact that he was at the time the general freight agent of the Intercolonial Railway, and as such, the suppliant's immediate superior officer.

The question of Mr. Harris' authority to bind the Crown by any such promise, made under the circumstances to which reference has been made, is also raised; but in the view I have taken of the case there is no occasion to consider that question.

There will be judgment for the Respondent.

Judgment accordingly.

Solicitor for the suppliant: *George Bell.*

Solicitors for the respondent: *Chrysler & Bethune.*

Between

1905
May 8t

P. M. SHARPLES AND HERBERT McCORNACK ..... } PLAINTIFFS;

AND

THE NATIONAL MANUFACTURING COMPANY, LIMITED ..... } DEFENDANTS.

Canadian Patent No. 78,151 for steadying device in cream separators—Improvement on old device — Narrow construction—Application for writ of sequestration to enforce compliance with judgment.

The invention in question consisted in the substitution of an improved device for one formerly in use as part of a machine, (in this case a tubular cream separator).

Held that the patent must be given a narrow construction and be limited to a device substantially in the form described in the patent and specification.

[In this case the plaintiffs after judgment applied for a writ of sequestration to enforce compliance with injunction restraining further infringement by the defendants of the patent in question. The writ was refused.]

THIS was an action claiming an injunction and damages from the defendants for an alleged infringement of Canadian patent No. 78,151 for an improved steadying device to be used in centrifugal machines.

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

March 16th, 1905.

The case was heard at Ottawa.

C. H. Masten, for the plaintiffs, contended that the issue of anticipation must be found for the plaintiffs. As soon as the steadying device was perfected the patent was applied for in Canada. The "iron drag" was not an anticipation, and the "brass drag" was patented as soon as it was found to fulfil its function

as a frictional steadying device for use in cream separators. By this device the tendency of the suspended bowl of the separator to wobble when the machine is run at high speed is reduced to a minimum. The spring instead of a weight to overcome inertia, together with the lateral movement in a horizontal plane of the socket in which the spindle is inserted, constitutes the essence of the plaintiff's invention. The defendants' drag is the same in purpose and construction. We were the first to use a spring to create friction for the purpose of overcoming inertia in the construction of cream separators, and our patent should be protected.

We have not contravened section 37 of *The Patent Act* either in respect of non-manufacture or improper importation. The price of $35 demanded for our patented invention was reasonable under the circumstances in evidence. (*Anderson Tire Company* v. *American Dunlop Tire Company* (1); *Hambly* v. *Wilson* (2); *Power* v. *Griffin* (3).

W. White, K.C., (with whom was *F. B. Fethers-tonhaugh* and *G. Delahaye*) for the defendants, argued that there was a clear anticipation of the "brass drag" device in the "iron drag" that is now the property of the public. The top bearing claimed in plaintiff's patent is not only found in the "iron drag" but is frequently used in centrifugal machines. The American patents issued to Klots, and Morrison, and produced in evidence, also anticipated the plaintiff's patented device. The "iron drag" is as much within the specification of the plaintiff's patent as the "brass drag."

Again, spring devices were in use for the purpose of producing friction before the plaintiffs' patent. The Morrison patent in evidence shows them.

(1) 2 Ex. C. R. 576. (2) 5 Ex. C. R. 82.
(3) 7 Ex. C. R. 363; 33 S. C. R. 39.

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The plaintiffs have not manufactured all the parts of the combination patented by them; they only make the lower bearing. All the parts must be manufactured to comply with the terms of sec. 37 of *The Patent Act.* The plaintiffs' test book shows that they manufactured the lower bearing after the time allowed by law for experimental user, and so it became public property.

The refusal of the plaintiffs to sell the patented invention at a reasonable price is fatal to the patent.

Mr. Masten replied

THE JUDGE OF THE EXCHEQUER COURT now (May 8th, 1905,) delivered judgment.

The action is brought to restrain the defendants from infringing Letters Patent, numbered 78,151, granted on the 11th day of November, 1902, "for alleged new and useful improvements in shaft mounting for centrifugal machines, &c." and for an account and damages for infringement thereof.

The invention, as described in the specification, relates to improvements in the mounting of rotary machinery of high velocity; and particularly of centrifugal machines having rapidly rotated drums, in which to subject material loosely carried therein to the centrifugal action developed by rapid rotation. In this class of machinery, to use the language employed in the specification, peculiar nicety of adjustment of the supporting mechanism to particular conditions is required in order to secure satisfactory operation; extraordinary speed of rotation being combined with a varying weight of mobile matter; the slightest shifting of which, or the development otherwise of any undue influence, tending to more or less seriously interfere with the proper operation of the machine. The object of the invention, as stated in the specifica-

tion, is to so construct and arrange the rotary shaft or drum and its bearings as to provide for an automatic adjustment of the same to correspond with or correct any variations of the mechanical axis, from the natural axis of rotation; and to this end the invention consists, it is alleged, first, in certain improvements in the supporting bearing whereby the axis of the shaft may be shifted under stress, though constantly tending to return to normal; secondly, in providing a flexible spindle adapted to readily bend under stress developed during rotation, so as to permit the rotating mass to adjust itself to the natural axis of rotation when said axis does not coincide with the normal mechanical axis of the shaft; thirdly, in providing a non-rebounding frictional steadying device adapted to limit and stop any swaying movement of the drum or shaft; and lastly, in the combination of these several features to effect jointly the corrections called for by the disturbing forces occurring during rotation. There are eleven claims made by the inventor, of which the plaintiffs in this action rely upon the first, second, third, fourth, fifth and ninth. The latter claim, which for the purposes of this case, may be taken as including the others, is made in these terms:—

"The combination with a shaft and a suspension bearing therefor, of a non-rebounding laterally movable friction steadying device arranged to contact with the depending portion thereof when the latter is swayed from the normal axis of rotation."

So far the language is general and relates to centrifugal machines of all kinds. But the invention was made in experimenting with cream separators, and the only use to which it has as yet been put is in the manufacture of such separators, the different elements or features described and shown in the drawing attached to the specification, constituting both sepa-

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rately and in combination parts of a complete cream separator. It is in that aspect of the case only that the invention comes under consideration in this case.

No attempt has been made to sustain the first or second features of which the invention is said to consist. The issues have been confined to the third feature, the frictional steadying device, and to the latter in combination with the other features described. Prior to the invention now in question the plaintiff, P. M. Sharples, had manufactured and sold cream separators, in which all the elements or features now claimed appeared, including "a frictional steadying device adapted to limit and stop any swaying movement of the drum or shaft;" and these were arranged, or combined, if that term is preferred, in the same way as the corresponding parts in the present invention are arranged or combined. In the steadying device or drag first used the result obtained was due to the inertia and weight of the drag moving upon a horizontal plane. In the improved form of the device, its weight was so reduced as to be a matter of no consequence, while a spring was used to give the necessary frictional resistance. There is some question as to whether the former was also a "non-rebounding frictional steadying device"; but it seems to me that it was, the difference being only one of degree; but yet a difference in degree so great that a very much better result is obtained. For the earlier improvements made by the plaintiffs in cream separators no patent was taken out in Canada within the time limited therefor; so that when the application was made in Canada for the present patent the public here had a right and were free to make and use tubular cream separators in which all the elements or features or parts described in the present patent existed and were arranged or combined in the same way. What

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was at the time new, and not open to the public was the improved form of the steadying device, which is spoken of in the evidence as the brass drag. Now with regard to the issues as to novelty, subject matter and utility, it is immaterial whether the invention is taken to consist, in the improved form, of this steadying device, or of the latter in combination with the other elements or features described. In either view of the matter these issues should, I think, on the evidence in this case, be found for the plaintiffs, and I so find.

Then, there are allegations that the patent in question is void, and should be so declared:—

1. For failure to manufacture the invention in accordance with the statute;

2. For the importation of the invention contrary to to the statute;

3. For refusal to sell it to the defendants, on request, at a reasonable price.

With regard to these questions it is a matter of some importance to come to a conclusion as to what the invention covered by the patent really was. It is clear of course that it was not a cream separator, of which the improved steadying device, either alone, or in combination with the supported shaft or drum, formed part. And then, with regard to the alleged combination of the steadying device with the tubular drum having a suspension bearing, there is nothing new except the particular form of the steadying device, and all the rest is old both as to form and arrangement. And whether the steadying device is considered as itself a part of the separator or machine, or as a feature of a combination that formed a part of such separator or machine, the invention consisted, it seems to me, in the substitution of one steadying device for another, and that the patent, if it is to be

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sustained, must be given a narrow construction and be limited to the use of a steadying device substantially in the form described. In the present action no attack is made upon the validity of the patent on the ground that more is claimed than the inventor was entitled to claim, and nothing stands in the way of holding it good in respect of the improvement mentioned. And if it be limited to that there are no grounds for declaring it void either for importation contrary to the statute or for failure to manufacture it in Canada, in accordance with the statute.

But not only must an inventor, or his assignees, after the lapse of the period prescribed by the statute, carry on in Canada the manufacture of the invention patented, he must also do this in a manner that any person desiring to use it may obtain it or cause it to be made for him at a reasonable price. (*The Patent Act*, s. 37 (*a*)). When the time had arrived for the plaintiff Sharples to manufacture the invention in Canada, the defendants, who are also manufacturers of cream separators, applied to his agents to have the invention made for them at a reasonable price for use in their business, and there was correspondence and negotiation on the subject. What the defendants wished to purchase were the brass drags or steadying devices. All the other parts of a tubular cream separator were free to the public, and to them as a part of that public, and it was also open to them to use the same in connection with a steadying device, provided the latter was not an infringement of the device covered by the plaintiffs' patent. The negotiation, however, was carried on in general terms, the defendants asking for the article covered by the patent and the plaintiffs naming a price for that article. In the conclusion the plaintiff Sharples, through his solicitor, offered on receiving an order with a satisfactory guar-

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antee of payment, to cause to be made for the defendants the patented invention as shown in the drawings and specification (excepting the supporting frame and the feed tube) at the price, on an order for one hundred and twenty, of thirty-five dollars a piece. The price did not suit the defendants and nothing more came of the negotiation or offer. Now, in the view I have taken of this case, what the plaintiff Sharples offered to furnish, and for which a price was named, included a good deal more than the invention for which the patent can be sustained. At the same time it was, I think, reasonable for him to take the view at the time that the patent covered what he offered to sell at the price named. And I am not prepared to say that the price asked for the parts of a tubular cream separator shown in the drawings attached to the patent (excluding the frame and feed tube) was, under the circumstances, an unreasonable price, especially as there was nothing very definite as to the size of machine for which the parts were needed; and that being so, I do not think the case is one in which the patent should be declared void for failure to sell for a reasonable price, there being a *bonâ fide* controversy, not free from doubt or difficulty, as to what the thing was that the patentee was bound to manufacture and furnish.

Then with regard to the issue as to infringement, it is conceded that the second steadying device or drag that the defendants used, which is shown and illustrated by Exhibit No. 14, was an infringement of the plaintiffs' device, if as to that the patent is, as I think it is, sustainable. With regard to the form of a steadying device exemplified by Exhibit No. 17, which may be briefly described as a ball moving in a socket, I have seen no reason to change the conclusion that I formed at the hearing that it is not an infringement. With respect to the form of a steadying device or drag

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shown and illustrated by Exhibit No. 16, and now in use by the defendants, I am of opinion that in that form, and constructed as that is, it is an infringement. It is argued that it is merely the reverse of No. 17, being a socket moving over the surface of a ball. But an actual test of No. 16 will show that the contact ring into which the hollow spindle is inserted is so constructed as to have under pressure a lateral movement bodily in what approaches a horizontal plane, and substantially in the same way and manner as the device mentioned in the plaintiffs' patent may be moved. And otherwise the two devices are very similar. It is said that this is due to the faulty construction of the particular device. That matter cannot at present be determined. The facts will no doubt be brought out on the reference that will be directed. So far as those in use are so constructed as to have under pressure a lateral movement bodily in what is substantially a horizontal plane, instead of a movement about an imaginary or fixed point as in the case illustrated by Exhibit No. 17, they will be taken to be infringements of the plaintiffs' device.

There will be judgment for the plaintiffs; and an injunction to restrain the defendants from infringing the plaintiffs patent No. 78,151, as herein construed; also a reference to the registrar of the court to ascertain the damages. The plaintiffs are also entitled to their costs.

Judgment accordingly.

Solicitors for plaintiffs: *Masten, Starr & Spence.*

Solicitors for defendants: *Delahaye & Reeves.*

On the 10th day of July, 1905, the plaintiffs moved for an order directing a writ of sequestration to issue

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against the defendant company for an alleged contempt of court in continuing to infringe the plaintiffs' patent after the order for an injunction restraining such infringement had been entered.

C. H. Masten in support of the motion;

G. Delahaye, contra.

Reasons for Judgment.

On the 4th day of October, 1905, THE JUDGE OF THE EXCHEQUER COURT dismissed the motion for sequestration, with costs. The learned judge filed the following reasons for his judgment upon such motion.

This is an application for an order of sequestration against the defendant company for an alleged contempt in disobeying an injunction granted on the 8th day of May last, whereby the company was restrained from infringing a certain patent of the plaintiffs for useful improvements in shaft mounting for centrifugal machines; or in the alternative for an order that a writ of attachment should issue against certain officers of the company for such contempt.

The plaintiffs and the defendant company are manufacturers of tubular cream separators, the former in the United States of America, the latter in Canada. The company in establishing its business in Canada has followed very closely in the plaintiffs' footsteps and makes in Canada cream separators that do not differ in any material respect, other than that to which reference will be made, from those manufactured in the United States by the plaintiff Sharples. So far as the art has as yet proceeded, it is necessary in making a tubular cream separator to have a steadying device or drag adapted to limit and stop any swaying movement of the drum or shaft of the separator. For the first steadying device or drag of that kind used by the plaintiffs in making tubular cream separators they did not take out any patent in Canada, and it became in Canada public property. Later they obtained in Canada a patent that was held in this court to protect an improved form of such device; and an injunction was granted restraining the defendant company from infringing the patent in that respect.

On the trial of the action three forms of such steadying devices or drags that the defendant company had made and used were exhibited, and marked respectively No. 14, No. 16 and No. 17. All bore a close resemblance to that made by the plaintiff Sharples under the patent then in question. It was conceded that No. 14 constituted an infringement, if the patent were good and covered the device or drag made by Sharples. It was held that No. 17 was not an infringement, and with respect to No. 16 it was held that when constructed as the one before the court was, it did infringe, the test applied being whether the contact ring in which the hollow spindle was inserted was so constructed as to have under pressure a lateral bodily movement in what approached a horizontal plane, and substantially in the same way and manner as the device mentioned in the plaintiffs' patent moved under like pressure.

The present application is made

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upon two grounds :—First, on the ground that since the order for the injunction the defendant company has sold separators containing steadying devices or drags identical with those that were held to be infringements of the plaintiffs' device ; and secondly, that the company has since the hearing and judgment adapted another form of such device or drag that is, it is argued, an infringement of the plaintiffs' patent, and within the terms of the injunction order mentioned.

With regard to the first ground mentioned, I do not think that any sale has been so brought home to the company or to any of its officers as to justify the conclusion that there was any wilful disobedience of the order of the court. The plaintiffs will not in that behalf be without a proper remedy, and for the rest the case is not one which calls for the exercise of the authority of the court to punish for contempt.

Then with regard to the new steadying device or drag used by the defendant company there is, as there was in the cases illustrated by Exhibits No. 14, No. 16 and No. 17 referred to, a very close resemblance in appearance between it and that made by the plaintiff Sharples under his Canadian patent. The same object is obtained in much the same way. But that is in this case no objection, for the same might be said of the first steadying device or drag used by the plaintiffs, which is now free to the public. The improvement in the device covered by the plaintiffs' patent lies in the use of a spring to create the necessary friction, instead of relying for that purpose on the weight of the drag ; and if that is to exclude anyone from using a spring for any purpose in constructing such a drag or device, then I should think that the defendant's present device is an infringement of the plaintiffs'. But I have not been able to come to that conclusion. If I had I should have held that the drag illustrated by Exhibit No. 17 was also an infringement. In view of the well known use of springs for like and similar purposes it does not appear to me that the defendant company, in making such a drag or device, is precluded from using a spring. An examination of the device now under consideration will show that the contact ring in which the hollow spindle of the drum or shaft is inserted has not under pressure a lateral movement bodily in a horizontal plane as the plaintiffs' device has. It is capable of a lateral movement, not in a horizontal plane, but about an imaginary fixed point. The spring no doubt restrains that movement or rotation to some extent by increasing the friction between the contact ring and that which encloses it, but the spring has another office which is directly opposed to the object aimed at in the plaintiffs' device. As the contact ring in the defendant's drag is moved the spring is compressed on one side and extended on the other, and in that way the spring, according to its strength, operates or tends to cause the contact ring to return to the position from which it was moved. To that extent the defendant's is a "rebounding" device, not a "non-rebounding" device, as the plaintiffs' is. If the plaintiffs' device covered by their patent had been the first to be used I should not have thought that the differences I have pointed out were material. I should have had no hesitation in holding both the device illustrated by Exhibit No. 17 and that now in question to be infringements of the patent. But it was not, as has been seen, the first to be used, and it is necessary to give the patent a narrow construction if it is to be upheld at all. The plaintiffs by not obtaining in Canada a

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patent for the device first used by them gave or dedicated all that was involved in, or incident to it, to the Canadian public, and what they have given, and the public has thereby acquired, the defendant company is free to use. The plaintiffs cannot now detract from their gift by obtaining a patent for an improved form of such device. The patent is good only for the particular form of device described in the patent. And it is no just reproach to the defendant company that it follows in the plaintiffs' footsteps, as long as it does not invade their rights. It is in that way that manufactures increase and commerce grows. It is open to the defendant to adopt any modification of the device first used that does not infringe the particular form or improvement covered by the plaintiffs' patent. In my view the device now used by the defendant company, and complained of on this application, is not an infringement of that patent.

The application is refused, and with costs.

IN THE MATTER OF THE PETITION OF RIGHT OF

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Oct. 4.

THOMAS FINIGAN,.....SUPPLIANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

Public work—Negligence—Freight elevator— Use of by employees—City by-law—Liability of Crown.

The suppliant, an employee of the Post Office in the city of Montreal, was injured by falling from a lift to the floor of the basement. The lift was used for the transfer of mail bags and matter with those in charge of them from one floor to another in the Post Office building. It was proved that the lift was constructed in the usual and customary manner of freight elevators; but the suppliant contended that as the lift was allowed to be used by certain employees in going from one floor to another it should have been provided with guards or something to prevent anyone from falling from it, as the suppliant did while passing from the first floor to the basement.

Held, that such user by the employees did not constitute the lift a passenger elevator and impose a duty upon those in charge of it to see that it was better protected than it was.

2. In any event the suppliant was not using the lift as a passenger at the time of the accident, but to transfer mail matter of which he was then in charge.

3. The by-law of the City of Montreal respecting freight and passenger elevators passed on the 4th February, 1901, did not affect the liability of the Crown in this case. The lift in question was built in 1897, before the enactment of such by-law, and was situated in the Post Office at Montreal, which building constitutes part of the public property of the Dominion, and so was within the exclusive legislative authority of the Parliament of Canada.

PETITION OF RIGHT for damages for an injury to the person alleged to have been caused by negligence on a public work.

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

H. N. Chauvin, for the suppliant:

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Argument of Counsel.

The case is governed by the law of Quebec, which holds the master responsible for injury done to his employee if the injury might have been prevented by the exercise of reasonable care. *Durand* v. *The Asbestos and Asbestic Company* (1); In *McCarthy* v. *The Thomas Davidson Mfg. Company* (2) it was laid down that there is a tacit or implied contract between the employer and employee, by which the former guarantees the safety of the latter during the performance of his work. See also *St. Arnaud* v. *Gibson* (3); *Archbald* v. *Yelle* (4).

There was nothing to prevent the elevator well being enclosed on the ground floor. On the other hand, an arm might have been placed at the back and front of the platform which would not have interfered with the working of the elevator.

This was used as a passenger elevator to the knowledge of those in charge. The Crown is liable in such a case.

Even if the suppliant were guilty of contributory negligence, the Crown would not be released from liability under the law of Quebec. *Price* v. *Roy* (5).

S. P. Leet, for the respondent, argued that there was no negligence, and the suppliant had not succeeded in bringing his case within *The Exchequer Court Act*, sec. 16 (c).

The question of the liability of the Crown in such a case is a matter of public law and not civil law. The suppliant undertook the risk, and while the maxim *volenti non fit injuria* is not a part of the civil law of Quebec it applies to this case as being part of the public law of England which must be administered in this court until changed by legislative enactment.

(1) Q. R. 19 S. C. 39; 30 S.C.R. 285.
(2) Q. R. 18 S. C. 272.
(3) Q. R. 13 S. C. 22.
(4) Q. R. 6 Q. B. 334.
(5) 29 S.C.R. 494.

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City of Quebec v. *The Queen* (1); *Wyman* v. *The Steamship "Duart Castle"* (2); *Grenier* v. *The Queen* (3); *Burke* v. *Witherbee* (4).

Reasons for Judgment.

Mr. Chauvin replied.

THE JUDGE OF THE EXCHEQUER COURT now (October 4th, 1905), delivered judgment.

The petition is brought to recover damages for injuries sustained by the suppliant in falling from a lift used in the Post Office, at the City of Montreal. The accident happened on the 16th of February, 1904, between the hours of one and two in the morning. At that time the suppliant was using the lift to descend to the basement of the Post Office to receive the incoming mails, which were late in arriving. In descending from the first floor of the building to the basement he in some way lost his balance, fell from the platform of the lift to the floor, and was severely injured. The lift is used for the transfer of mail bags and matter with those in charge of the same. It was not a lift for passengers, and the Minister of Public Works and the Postmaster General had given instructions that no one should be allowed on it except those entitled to use it.

The lift itself is enclosed or protected on two sides only. It is open both at the front and the back. From the first floor upwards the space in which it runs is enclosed. From the first floor to the basement it is not so enclosed. On the occasion when the accident happened the suppliant at first had hold of a stay, which is shown in one of the exhibits. He let go of this stay to speak to another person, when his foot slipped and he lost his balance, falling, as has been stated, from the lift to the floor of the basement.

(1) 24 S.C.R. 420.
(2) 6 Ex. C.R. 387.
(3) 6 Ex. C.R. 276.
(4) 98 N. Y. App. 562.

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The petition cannot be sustained unless the case falls within the provisions of clause (*c*) of the 16th section of *The Exchequer Court Act* (1). In that respect it matters not whether such an accident occurs in the Province of Quebec or elsewhere in Canada. The law as to that is the same throughout the Dominion. The clause referred to provides that the court shall have exclusive original jurisdiction to hear and determine "every claim against the Crown "arising out of any death or injury to the person or "to property on any public work, resulting from the "negligence of any officer or servant of the Crown "while acting within the scope of his duties or em-"ployment."

The suppliant made no complaint of the manner in which the lift was operated. His complaint is that the lift should have been provided with guards or something to prevent anyone using it from falling from it while passing between the basement and first floor; or that the lift should have been enclosed between these floors in the manner in which it was above the first floor. There is some evidence as to the danger of persons employed in the basement being struck by the lift when descending, but that is not relevant in the present case, which turns upon the issue as to whether or not some officer or servant of the Crown was guilty of negligence in not providing the protection mentioned. As to that it is alleged that the Minister of Public Works, and Mr. John T. Murphy, the superintendent of elevators in the Post Office at Montreal, were guilty of negligence.

The present lift was put in by contractors in the year 1897. The superintendent who had charge of the installation of the lift says it was constructed as other freight elevators were constructed in the usual

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

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and customary manner, and the weight of evidence is in the same direction.

The issue as to the alleged negligence of the Minister of Public Works and of Mr. Murphy, the superintendent of elevators in the Post Office at Montreal, ought, it seems to me, to be found for the respondent. That being the case, it is not necessary to discuss the question sometimes raised as to whether or not a Minister of the Crown is an officer or servant of the Crown within the meaning of the statute. (See *McHugh* v. *The Queen* (1); *The Hamburg American Packet Co.* v. *The King* (2).

Some stress was in argument laid upon the fact that the instructions of the Minister of Public Works, and of the Postmaster General, that no one should be allowed upon this lift except those entitled to use it, were not at all times followed; and that at times certain employees were permitted to use it in going from one floor of the building to another. It was contended that this made the lift a passenger elevator, and raised a duty on the part of those in charge of it to see that it was better protected than it was. With that contention I do not agree; and in any event the suppliant was not using the lift as a passenger, but to transfer mail matter, of which he was then in charge.

The suppliant also relied upon a by-law of the City of Montreal passed on the 4th of February, 1901, respecting freight and passenger elevators and dumb waiters. The object of the by-law was to protect, as far as possible from fire, buildings in which such elevators and waiters were placed. The by-law has, I think, no bearing on the present case. The lift here was built in 1897, before it was passed, and is situated in the Post Office at Montreal, which building constitutes part of the public property of the Dominion, and

(1) 6 Ex. C. R. 381. (2) 7 Ex. C. R. 179.

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so is within the exclusive legislative authority of the Parliament of Canada. (*The British North America Act*, 1867, (s. 91) (1).

The suppliant is not, it seems to me, entitled to any portion of the relief sought by his petition.

Reasons for Judgment.

Judgment accordingly.

Solicitors for suppliant: *Atwater, Duclos & Chauvin.*

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

IN THE MATTER OF THE PETITION OF RIGHT OF

1905
Oct. 4.

THE BRITISH & FOREIGN MARINE INSURANCE COMPANY AND JOHN CONLON AND THOMAS CONLON ..... } SUPPLIANTS;

AND

HIS MAJESTY THE KING.....RESPONDENT.

Public work—Collision with entrance pier to canal—Negligence in construction—Liability of Crown.

One of the entrance piers to a Government canal was so constructed that a substructure of masonry rested on crib-work. The base of the pier was set back three feet from the edge of the crib-work, which left a step or projection under water between the masonry and the side of the crib-work. It was necessary for vessels to enter the canal with great care, at this point, owing to the eddies and currents that existed there. The proper course, however, for vessels to steer was marked by buoys. A vessel on entering the canal touched another pier than the one in question, and then, taking a sheer and getting out of control, swung over and came in collision with this pier.

Held, that upon the facts proved the accident was caused by the vessel being caught in a current or eddy and so carried against the pier.

2. That as there was no negligence by any officer or servant of the Crown as to the location and the method of construction of this pier, the Crown was not liable for damages arising out of the collision.

PETITION OF RIGHT for damages arising from injury to property on a public work.

The facts are stated in the reasons for judgment.

June 7th, 1905.

W. M. German, K.C., for the suppliants, contended that it was owing to the imperfect construction of the entrance pier upon which the ship struck that the accident occurred. Had the crib-work not extended under water three feet in front of the superstructure

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the ship would not have collided with it. The Government engineers admit that the work is dangerous to navigation as it stands, and this fact shows that it was negligently constructed. The ship was properly navigated but was carried by the current against the pier. The crown is liable for damages.

E. L. Newcombe, K.C. There is no evidence that the construction of the pier was faulty. The engineer who built it, now deceased, built it according to the best of his judgment, and was not negligent in its construction. There is evidence that vessels not only struck this pier but that they struck the north pier also. The whole cause of the trouble was the eddies or currents there, which forced the ship against the pier. The pilot was not misled by anything done by the servants of the Crown, his ship simply got beyond his control. The Crown by this work made navigation at this dangerous point easier and safer. The pier was built according to the engineer's plans, and there is no case against the Crown founded on negligence.

Mr. German replied.

THE JUDGE OF THE EXCHEQUER COURT now (October 4th, 1905) delivered judgment.

The petition is brought to recover damages for injuries to the steamship *Erin* and her cargo occasioned by coming in collision with one of the entrance piers of Farran's Point Canal. This canal is a public work of Canada, and the claim is made under clause (*c*) of the 16th section of *The Exchequer Court Act* (1), which provides that the court shall have exclusive original jurisdiction to hear and determine every claim against the Crown arising out of any death or injury to the person or to property on any public work, resulting

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

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Reasons for Judgment.

from the negligence of any officer or servant of the Crown while acting within the scope of his duties or employment.

The entrance to Farran's Point Canal is at times a matter of difficulty owing to the currents and eddies that exist there, and it is necessary for vessels to make the entrance with great care. On the occasion of the accident to the *Erin*, which happened on the 22nd of August, 1903, the vessel first touched the north pier, and then taking a sheer and getting out of control swung over and came in collision with the south entrance pier. It is alleged for those in charge of the *Erin* that this happened without any fault on their part, or on the part of the vessel, and I take that to be the fact, although there can, I think, be no doubt that by the exercise of greater skill and care than was exercised on this occasion, the vessel might have made the entrance in safety. That is being done daily, although it is also true that a number of accidents have occurred at this place. But taking the view of those who were in charge of the *Erin* the accident was occasioned by the vessel being caught in the current or eddy and carried against the pier. That was the cause of the accident, and with respect to that no negligence is attributed or attributable to any officer or servant of the Crown. The alleged negligence of which the suppliants complain has to do with the extent of the injuries that resulted from the collision, and not with the collision itself, or the causes that led to its happening. The pier, upon the substructure of which the *Erin* struck, is built of masonry resting on crib-work. The top of the crib-work is ordinarily two feet under water, though it has at times when the water was low been a few inches above water. As long as it is under water the crib-work is not subject to decay; and it will last, it is said, as long as the masonry that rests upon

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it. That is the reason and occasion for having the upper part of the crib work below instead of above the level of the water. Then in the form of construction adopted in building this pier, the base of the pier was set back three feet from the edge or side of the crib-work. That left a step or projection under water between the masonry and the side of the crib-work, and it was upon this projection that the *Erin* struck. The engineers who were examined differed somewhat as to whether or not this was a proper form of construction for such a pier. But the better view, I think, was that the base of the wall should not be built flush with the side of the crib-work, but that it should be set back a foot or two according to the circumstances of each case. That, it seems, is a reasonable precaution to take having regard to the strength and durability of the work as a whole. Whether having adopted that form of construction something more ought to have been done to lessen the extent of injuries which a vessel in collision with the pier would be likely to receive is another question to which reference will be made later. But with the form of construction adopted in building this pier it is obvious that in any case of collision with it the vessel is likely to receive greater injury, and the public work less injury, than would probably occur if the base of the masonry or concrete wall were built flush with the side or edge of the crib-work The crib-work, and not the wall built upon it, will in general receive the blow, and in that way the wall is protected. On the other hand the vessel strikes below and not above her water line, and is more likely to be injured, and in case of injury is exposed to greater damages than where the wall and crib-work are flush with each other.

The entrance pier in question was constructed under the direction of the late Mr. Rubidge in accordance

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with plans prepared by him, and the suppliants contend that in adopting for this pier the form of construction mentioned he was guilty of such negligence as entitled the suppliants to recover damages under the statute to which reference has been made. With that conclusion I am not able to agree. Mr. Rubidge had had great experience in work of this kind, and while it appears that his views were adopted and carried out, it is a matter of common knowledge that as Superintending Engineer of the work, he was under the direction of the Chief Engineer and of the Minister of the Department of Railways and Canals, who must, I think, be taken to have shared with him the responsibility of adopting the form of construction now complained of. That would not, perhaps, relieve Mr. Rubidge of the charge of negligence, if there really were any negligence in the matter, but it suggests caution on the part of one who is not an engineer in coming to a conclusion that a mode of construction adopted in building a public work which must have met with the approval of more than one engineer of great experience and skill was a negligent and improper mode of construction. A similar mode of constructing piers has been adopted at other places on some of the Canadian canals and elsewhere, and without, so far as appears, giving any occasion for complaint on the part of those who use the canals. The real difficulty at Farran's Point is the existence of the currents and eddies that are found there. But there is no reason to believe that the nature and extent of these currents could have been foreseen when the plans for the work there were made. After their existence was noticed steps were taken to buoy the course that vessels making the entrance should follow, and what was possible in that way has been done to make such entrance safe. It is thought by Mr. Rhéaume, who is

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now in charge of the work, that something might be done to get rid of the currents that are found so troublesome, but the work necessary for that cannot, it appears, be done without the consent of the Government of the United States; and the matter is in abeyance.

The evidence of Mr. Marceau and others suggests that in the meantime something might be done to lessen the probability of injury or the extent of the injury in case of collision by placing wale pieces on the face of the masonry flush with the outside of the crib-work. It is however a question for the Minister of the Department and the Government to decide as to whether any such precautionary measures should be taken or not. The absence of such means for minimizing the injury to which a vessel coming in contact with the pier is liable, does not, it seems to me, make the Crown liable for damages sustained by the vessel. There is no common law liability on the part of the Crown. It is liable only in the cases mentioned in the statute that has been cited.

There will be judgment for the respondent and a declaration that the suppliants are not entitled to any portion of the relief sought by their petition.

Judgment accordingly.

Solicitors for suppliant: *German & Pettit.*

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

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ACCOUNT—*Action in rem—Arrest of ship—Action between co-owners for account.*] This court has as large a jurisdiction as the High Court of Admiralty, and therefore in an action between the co-owners of a ship for an account, the ship may be arrested. COPE *v.* SS. RAVEN — — — — — — 404

ACTION

See ACCOUNT.
" APPEAL.
" PRACTICE.

ADMIRALTY APPEAL

See APPEAL.

APPEAL—*Appeal in salvage action—Exchequer Rules* 159 *&* 162*—Further evidence.*] Under the provisions of Rules 159 & 162 of the General Rules and Orders regulating the practice and procedure in Admiralty cases in the Exchequer Court of Canada, the court, in entertaining an appeal from a Local Judge in Admiralty in a salvage case, may direct that further evidence be taken before the Local Judge in order to dispose of the issue raised on the appeal. In such a case the appeal is by way of rehearing. VERMONT STEAMSHIP CO. *v.* THE SHIP ABBEY PALMER — — — 1

See PRACTICE.

ARRANGEMENT, SCHEME OF

See RAILWAYS.

CANAL—*Right to possession of head-gates and waters of canal* — — — — 21

See PUBLIC WORK 2.

COLLISION

See SHIPPING 4, 5, 8 and 9.

COMMON CARRIER—*Government railway—Carriage of goods—Breach of contract—Damages—Negligence.*] The suppliant sought to recover a sum of $886.38 alleged to have been lost by him on a shipment of sheep undertaken to be carried by the Crown from Charlottetown, P.E.I., to Boston, U.S.A. The loss was occasioned by the sheep not arriving in Boston before the sailing of a steamship thence for England on which space had been

COMMON CARRIER—*Continued.*

engaged for them; and the cause of such failure was the lack of room to forward them on a steamboat by which connections are made between the Summerside terminus of the P.E.I. Railway and Pointe du Chêne, N.B., a point on the Intercolonial Railway. The suppliant alleged that before the shipment was made the freight agent of the P. E. Island Railway, at Charlottetown, represented to him that if the sheep were shipped at Charlottetown on a certain date, which was done, they would arrive in Boston on time. *Held*, that even if the suppliant had proved, which he failed to do, that this representation had been made, it would have been inconsistent with the terms of the way-bill and contrary to the regulations of the Prince Edward Island Railway, and therefore in excess of the freight agent's authority. 2. That the evidence did not disclose negligence on the part of any officer or servant of the Crown within the meaning of section 16 (c) of *The Exchequer Court Act.* WHEATLEY *v.* THE KING — — — — — — — 222

2 —— *Liability of Crown as common carrier — Loss of acid in tank-car during transportation — Contract — Negligence — Liability of Crown — Costs.*] The Crown is not, in regard to liability for loss of goods carried, in every respect in the position of an ordinary common carrier. The latter is in the position of an insurer of goods, and any special contract made is in general in mitigation of its common law obligation and liability. The Crown, on the other hand, is not liable at common law, and a petition will not lie against it for the loss of goods carried on its railway except under a contract or where the case falls within the statute, under which it is in certain cases liable for the negligence of its servants (50-51 Vict. ch. 16, s. 16), and in either case the burden is on the suppliant to make out his case. 2. By an arrangement between the consignee of the acid in question and the Intercolonial Railway freight charges on goods carried by the latter were paid at stated times each month, and in case anything was found wrong a refund was made to the consignee. In the present case the consignee paid the freight on the acid amounting to $135, no refund being made by

COMMON CARRIER—*Continued.*

the Crown. This amount was paid to the consignee by the suppliant, and it claimed recovery of the same from the Crown in its petition of right. The evidence showed that by the arrangement above mentioned the freight was not payable on the transportation of the tank-car, but on the acid contained in the car, at the rate of 27 cents per 100 pounds of acid. *Held*, that the Crown was only entitled to the freight on the number of pounds delivered to the consignee at Sydney, and that the balance of the amount paid by the consignee should be repaid to the suppliant with interest. 3. That as the suppliant, while succeeding as to part of the amount claimed, had failed on the main issue in controversy, each party should bear its own costs. NICHOLLS CHEMICAL CO. *v.* THE KING — — — — — — — 272

COMMON EMPLOYMENT — *Public work —Injury to the person—Negligence—Doctrine of common employment in Manitoba– Liability of Crown.*] The effect of clause (c) section 16 of *The Exchequer Court Act* is not to extend the Crown's liability so as to enable any one to impute negligence to the Crown itself, or to make it liable in any case in which a subject under like circumstances would not be liable. 2. In the Province of Manitoba the Dominion Government is not liable for any injury to one of its servants arising from the negligence of a fellow-servant. *Filion* v. *The Queen* (24 Can. S. C. R. 482) referred to. 3. With respect to the liability of the Dominion Government in cases involving the doctrine of common employment, nothing short of an Act of Parliament of Canada can alter the law of Manitoba as it stood on that subject on the 15th July, 1870. *Semble: The Workmen's Compensation for Injuries Act*, R. S. Man. c. 178, does not apply to the Crown, the Crown not being mentioned therein. RYDER *v.* THE KING — — 330

COSTS—*Costs where suppliant succeeds as to part of claim.*] That as the suppliant, while succeeding as to part of the amount claimed, had failed on the main issue in controversy, each party should bear its own costs. NICHOLLS CHEMICAL CO. *v.* THE KING — — 272

2——*Costs—Seaman's wages—Jurisdiction not excepted to in limine litis.*] Costs were refused the defendants because exception to the jurisdiction to entertain the claim sued for was not taken *in limine litis*. GAGNON *v.* SS. SAVOY: DION *v.* SS. POLINO — — — 238

3——*Security for costs—Admiralty Rule 228— English practice—Application made by defendant after plaintiff files particulars of claim.*] Under the provisions of Rule 228 of the General Rules and Orders regulating the practice and procedure in Admiralty Cases in the Exchequer

COSTS—*Continued.*

Court of Canada applying the English practice to cases not provided for by such rule, an order for security for costs may be granted in Admiralty proceedings on motion of the defendant after the plaintiff has filed particulars of his statement of claim. MORTON DOWN & CO. *v.* SS. LAKE SIMCOE — — — — 361

CONFLICT OF LAWS—*Shipping—Foreign vessel—Interference with rights acquired under foreign judgment—Comity of Courts—Account between co-owners.*] The ship which was the subject of the proceedings herein was registered in an American port and owned by American citizens resident in the United States. The defendant S. advanced to the then captain of the ship at Brava, Cape de Verde Islands, the sum of $1,400 for necessaries, and took from the captain and V., a part-owner, what purported to be a bottomry bond, and a further instrument, purporting to be a charter-party, as security for such advance. By the last mentioned instrument the control and possession of the ship were handed over to S. until the profits of the employment of the ship repaid the loan. S. thereupon took over the ship and brought her to a United States port, where she was arrested at the suit of R. for an amount due him for necessaries supplied to the ship on a previous voyage. By the judgment of a competent court in the United States the rights of S., under the instruments mentioned, were held to give him priority over the claim of R. and he was confirmed in his possession of the ship. The plaintiff herein was the owner of 17/64 shares of the ship and had notice of the American suit between S. and R., and subsequently took part in some negotiations for the settlement of the claims of both. By instituting proceedings on the Admiralty side of the Exchequer Court the plaintiff sought to obtain possession of the vessel while in a Canadian port, together with certain relief against the defendant V. *Held*, that as by the proceedings taken in this court the plaintiff sought to derogate from rights obtained by one of the parties under the judgment of a competent court in the United States, the action should be dismissed. *Castrique* v. *Imrie* (L. R. 4 H. L. 414) referred to. *Semble:* In so far as the action sought to obtain an account between the parties who were co-owners, the court would have directed an account if it had been shown that S. had received from the earnings of the vessel sufficient to repay him the amount of his loan. MICHADO *v.* THE SHIP HATTIE & LOTTIE — — — — 11

CONTRACT — *Intercolonial railway — Contract for services—Conditional increase of salary —Impossibility of performance of condition— Promises by Crown's officers—Liability.*] H.,

CONTRACT—*Continued.*

while General Traffic Manager of the Intercolonial Railway, offered to secure the appointment of R. to a position in H's department of the railway at a salary of $2,000 per annum. R. refused that amount, but signified his willingness to accept $2,400. H., after obtaining the permission of the Minister of Railways to offer R. $2,100 per annum wrote to him: "I would be prepared to alter the terms of my letter to read $2,100, with the assurance that should you, as I feel confident you can, develop the traffic on your division to my satisfaction, your salary should be increased to $2,400 on the 1st January, 1899." R. accepted the appointment upon these terms, and entered upon the duties of his office on 1st January, 1898. In the following autumn H. resigned his position on the railway. Shortly after, namely, in September, 1898, the department offered to appoint R. as General Travelling Freight Agent of the railway, with headquarters at Toronto; and R. accepted the new office on the assurance contained in a letter from W., the then General Freight Agent of the railway, that "there is to be no change in the salary of the present position and the one in the West." R. entered upon his new duties on the 10th of October, 1898, and discharged the same until April 1903, when his services were dispensed with. He had never been paid a salary during his employment by the Department of Railways of more than $2,100 per annum, and after his retirement he filed a petition of right claiming a balance of salary due him at the rate of $2,400 from the 1st January, 1899, basing such claim upon H's letter of the 16th December, 1898, and W's letter mentioned. *Held*, that even if the assurance of increase of salary contained in such letter was more than an engagement or liability in honour, the contingency upon the happening of which the salary was to be increased had never in fact arisen. Before the time arrived when it could happen two things had occurred to prevent it, neither of which was in the contemplation of the parties when the appointment was made. H. had resigned his position, and was no longer in the position to say whether R. had, or had not developed the traffic to his satisfaction; and secondly, R. had ceased to hold the office in respect of which the increase of salary had been promised, and had accepted another office in connection with the traffic department of the railway. 2. The fair meaning of W's promise that there would be no change in the salary on R's acceptance of his new office in the traffic department was that R. would be paid the same amount of salary in the new position as that which he was then receiving, namely, $2,100. 3. That W. not having been shown to have had any authority to bind the Crown by a promise to give any such increase of salary, no such authority was to be implied from the fact that he was at the time the General Freight Agent of the railway, and as such R's immediate superior officer. ROBINSON *v.* THE KING - **448**

See SALE OF GOODS.

COURTS—*Comity of courts.*

See CONFLICT OF LAWS.

CROWN—*Crown as trustee—Enforcing trust—Indian treaties.*] A claim against the Crown based upon the 111th section of *The British North America Act*, 1867, and upon Acts of the Legislature of the Province of Canada and of the Parliament of Canada, is a claim "arising under any law of Canada" within the meaning of clause (d) of section 16 of *The Exchequer Court Act*. *Yule* v. *The Queen* (6 Ex. C. R. 123; 30 S. C. R. 35) referred to. 2. It does not follow that because the Crown is a trustee the court has jurisdiction to enforce the trust or to make any declaration as to the rights of the parties interested. That authority if it exists must be found in the statutes which give the court jurisdiction. The real question in any such case is not that the Crown may or may not be a trustee; but whether the court has any jurisdiction with respect to the execution of the trust. 3. While under the provisions of certain treaties and of certain statutes of the Legislature of the Province of Canada and of the Parliament of Canada, the Crown stands in the position of trustee for the Indians in respect of certain lands and moneys, such position is not that of an ordinary trustee. The Crown does not personally execute the trust; the Superintendent General of Indian Affairs having, under the Governor in Council, the management and control of such lands and moneys. For the manner in which the affairs of the Indians is administered the Dominion Government and the Superintendent General are responsible to Parliament, and Parliament alone has authority to review the decision arrived at or the action taken by them. In all such cases the court has no jurisdiction to review their discretion. Then there is this further difference between the Crown as a trustee and an ordinary trustee, viz: that the Crown is not bound by estoppels, and no laches can be imputed to it; neither does it answer for the negligence of its officers. 4. Under the Treaty of February 28th, 1820, there is nothing to prevent the Crown from making provision for the maintenance of the Mississauga band of Indians out of any capital moneys arising from the sale or leasing or other disposition of surrendered lands. 6. Under Treaty No. 19, made on the 28th October, 1818, the Crown's obligation is to pay the Missisaugas of the Credit a fixed annuity of $2,090. So far as this Treaty is concerned the Crown is not a

CROWN—*Continued.*

trustee but a debtor; and the right of the Indians to such annuity cannot be impaired by any departmental adjustment of the Indian funds to which the Indians themselves are not parties. HENRY *v.* THE KING— — 417

2——*Collision with King's ship*— — 245

See GOVERNMENT RAILWAY.

" PUBLIC WORKS.

" SHIPPING.

CROWN'S OFFICER—*Estoppel by acts of Crown's officer* — — — — 21

See ESTOPPEL.

2——*Assignment of salary* — — 364

See PUBLIC OFFICER.

CUSTOMS—*Infringement of The Customs Act.* — — — — —

See REVENUE.

ESTOPPEL—*Claim for possession of headgates and waters of canal—Public work—Interruption of possession—Water-power—Public and private rights—Estoppel by admission of Crown's officer—Departmental report* — — 21

See PUBLIC WORK, 1.

2——*Patent for invention—Infringement—Assignor and assignee—Estoppel—Fair construction.*] Where the original owner of a patent had assigned the same, and was subsequently proceeded against by the assignee for the infringement of the patent so assigned, the former was held to be estopped from denying the validity of the patent, but, inasmuch as he was in no worse position than any independent member of the public who admitted the validity of the patent, he was allowed to show that on a fair construction of the patent he had not infringed. INDIANA MANUFACTURING CO. *v.* SMITH — — — — — 154

FELLOW-SERVANT—*Public work—Injury to the person—Negligence—Doctrine of common employment in Manitoba—Liability of Crown.*] The effect of clause (c), section 16 of *The Exchequer Court Act* is not to extend the Crown's liability so as to enable any one to impute negligence to the Crown itself, or to make it liable in any case in which a subject under like circumstances would not be liable. 2. In the Province of Manitoba the Dominion Government is not liable for any injury to one of its servants arising from the negligence of a fellow-servant. *Filion* v. *The Queen* (24 Can. S. C. R. 482) referred to. 3. With respect to the liability of the Dominion Government in cases involving the doctrine of common employment, nothing short of an Act of Parliament of Canada can alter the law of Manitoba as it stood on that subject on the 15th July, 1870. *Semble: The Workmen's Compensation for Injuries Act*, R. S. Man. c. 178, does not apply to the Crown, the Crown not being mentioned therein. RYDER *v.* THE KING. — — 330

FISHING—*American fishing vessel—Canadian territorial waters — Unlawful fishing.*] The method of catching fish has no bearing upon a violation of the provisions of R. S. C. c. 94. The fact of taking fish without a license in the territorial waters of Canada constitutes the offence. *Semble:* That coming into the territorial waters of Canada to cure fish caught outside the limits of such waters will subject the offending vessel to forfeiture. THE KING *v.* THE SHIP SAMOSET — — — 348

FOREIGN JUDGMENT—*Comity of courts—Interference with rights acquired under foreign judgment* — — — — — 11

See CONFLICT OF LAWS.

GOVERNMENT RAILWAY—*Death arising from negligence — Defective engine—Dangerous crossing—Undue speed—" Train of cars"—The Government Railways Act (R. S. C. c. 38) sec. 29—Discretion of minister or subordinate officer as to precautionary measures against accident.*] The husband of the suppliant was killed by being struck by the tender of an engine while he was on a level crossing over the Intercolonial Railway tracks, in the City of Halifax. The evidence showed that the crossing was a dangerous one, and that no special provision had been made for the protection of the public. Immediately before the deceased attempted to cross the tracks, a train of cars had been backed, or shunted, over this crossing in a direction opposite to that from which the engine and tender by which he was killed was coming. The engine used in shunting this train was leaking steam. The atmosphere was at the time heavy, and the steam and smoke from the engine did not lift quickly but remained for some time near the ground. The result was that the shunting engine left a cloud of steam and smoke that was carried over toward the track on which the engine and tender were running, and obscured them from the view of anyone who approached the crossing from the direction in which the deceased approached it. The train that was being shunted and the engine and tender by which the accident was caused passed each other a little to the south of the crossing. The train and shunting engine being clear of the crossing the deceased attempted to cross, and when he had reached the track on which the engine and tender were being backed, the latter emerged from the cloud of steam and smoke and were upon him

GOVERNMENT RAILWAY—*Continued.*

before he had time to get out of the way. At the time of the accident the engine and tender were being backed at the rate of six miles an hour. *Held*, that the accident was attributable to the negligence of officers and servants of the Crown employed on the railway both in using a defective engine, as above described, and in maintaining too high a rate of speed under the circumstances. 2. An engine and tender do not constitute a "train of cars" within the meaning of sec. 29 of "The Government Railways Act" (R. S. C. c. 38). *Hollinger* v. *Canadian Pacific Railway Company* (21 Ont. R. 705) not followed. 3. Where the Minister of Railways, or the Crown's officer under him whose duty it is to decide as to the matter, comes, in his discretion, to the conclusion not to employ a watchman or to set up gates at any level crossing over the Intercolonial Railway, it is not for the court to say that the minister or the officer was guilty of negligence because the facts show that the crossing in question was a very dangerous one. HARRIS *v.* THE KING—**206**

2——*Carriage of goods—Breach of contract—Damages—Negligence.*] The suppliant sought to recover a sum of $886.38 alleged to have been lost by him on a shipment of sheep undertaken to be carried by the Crown from Charlottetown, P.E.I. to Boston, U.S.A. The loss was occasioned by the sheep not arriving in Boston before the sailing of a steamship thence for England on which space had been engaged for them; and the cause of such failure was lack of room to forward them on a steamboat by which connections are made between the Summerside terminus of the P. E. I. Railway and Pointe du Chêne, N.B., a point on the Intercolonial Railway. The suppliant alleged that before the shipment was made the freight agent of the P. E. Island Railway, at Charlottetown, represented to him that if the sheep were shipped at Charlottetown on a certain date, which was done, they would arrive in Boston on time. *Held*, that even if the suppliant had proved, which he failed to do, that this representation had been made, it would have been inconsistent with the terms of the way-bill and contrary to the regulations of the Prince Edward Island Railway, and therefore in excess of the freight agent's authority. 2. That the evidence did not disclose negligence on the part of any officer or servant of the Crown within the meaning of section 16 (c) of *The Exchequer Court Act*. WHEATLEY *v.* THE KING — — — — **222**

3——*Contract for sale of railway ties—Delivery—Inspection—Payment—Purchase by Crown from vendee in default—Title.*] In January, 1894, the suppliant agreed with M., acting for the B. & N. S. C. Company, to supply the company with railway ties. The number of the ties was not fixed, but the suppliant was to get out as many as he could, to place them along the line of the Intercolonial Railway, and to be paid for them as soon as they were inspected by the company. The ties were not to be removed from where suppliant placed them until they were paid for. During the season of 1894, the suppliant got out a number of ties, which were piled alongside the Intercolonial Railway, and inspected: those accepted being marked with a dot of paint and the letters "B. & S.", and thereafter paid for by the company. In 1895 the suppliant made a second agreement with M. to get out another lot of ties for the company upon the same terms and conditions. Under this agreement the suppliant got out ties and placed them along the Intercolonial Railway where the former ties were piled, but the lots were not mixed. The second lot was inspected and marked with the dot of paint, but the letters "B. & S." were not put on them. The suppliant demanded payment for them from the company, but was not paid. In November, 1896, the company sold both lots of ties to the Crown for the use of the Intercolonial Railway, and was paid for them; and in May or June, 1897, the Intercolonial Railway authorities removed all the ties. *Held*, that the B. & N. S. C. Company had not at the time when they professed to sell the second lot of ties to the Crown any right to sell them, and the Crown did not thereby acquire a good title to the ties. That being so, the suppliant was entitled to have the possession of the ties restored to him, or to recover their value from the Crown. MCLELLAN *v.* THE KING — — — — — — **227**

4——*Liability of Crown as common carrier—Loss of acid in tank-car during transportation—Contract—Negligence—Liability of Crown—Costs.*] The Crown is not, in regard to liability for loss of goods carried, in every respect in the position of an ordinary common carrier. The latter is in the position of an insurer of goods, and any special contract made is in general in mitigation of its common law obligation and liability. The Crown, on the other hand, is not liable at common law, and a petition will not lie against it for the loss of goods carried on its railway except under a contract or where the case falls within the statute, under which it is in certain cases liable for the negligence of its servants (50-51 Vict. ch. 16, s. 16), and in either case the burden is on the suppliant to make out his case. 2. By an arrangement between the consignee of the acid in question and the Intercolonial Railway freight charges on goods carried by the latter were paid at stated times each month, and in case anything was found wrong a refund was made to the con-

GOVERNMENT RAILWAY—*Continued.*

signee. In the present case the consignee paid the freight on the acid amounting to $135, no refund being made by the Crown. This amount was paid to the consignee by the suppliant, and it claimed recovery of the same from the Crown in its petition of right. The evidence showed that by the arrangement above mentioned the freight was not payable on the transportation of the tank-car, but on the acid contained in the car, at the rate of 27 cents per 100 pounds of acid. *Held*, that the Crown was only entitled to the freight on the number of pounds delivered to the consignee at Sydney, and that the balance of the amount paid by the consignee should be repaid to the suppliant with interest. 3. That as the suppliant, while succeeding as to part of the amount claimed, had failed on the main issue in controversy, each party should bear its own costs. NICHOLLS CHEMICAL CO. *v.* THE KING. — — 272

5——*Intercolonial Railway—Contract for service—Conditional increase of salary—Impossibility of performance of condition — Promises by Crown's officers—Liability.*] H., while General Traffic Manager of the Intercolonial Railway, offered to secure the appointment of R. to a position in H's department of the railway at a salary of $2,000 per annum. R. refused that amount, but signified his willingness to accept $2,400. H., after obtaining the permission of the Minister of Railways to offer R. $2,100 per annum, wrote to him: "I would be prepared to alter the terms of my letter to read $2,100, with the assurance that should you, as I feel confident you can, develop the traffic on your division to my satisfaction, your salary should be increased to $2,400 on the 1st January, 1899." R. accepted the appointment upon these terms, and entered upon the duties of his office on 1st January, 1898. In the following autumn H. resigned his position on the railway. Shortly after, namely, in September, 1898, the department offered to appoint R as General Travelling Freight Agent of the railway, with headquarters at Toronto; and R. accepted the new office on the assurance contained in a letter from W., the then General Freight Agent of the railway, that "there is to be no change in the salary of the present position and the one in the West." R. entered upon his new duties on the 10th of October, 1898, and discharged the same until April, 1903, when his services were dispensed with. He had never been paid a salary during his employment by the Department of Railways of more than $2,100 per annum, and after his retirement he filed a petition of right claiming a balance of salary due him at the rate of $2,400 from the 1st January, 1899, basing such claim upon H's letter of the 16th December, 1898, and W's letter mentioned. *Held*, that even if the assurance of

GOVERNMENT RAILWAY—*Continued.*

increase of salary contained in such letter was more than an engagement or liability in honour, the contingency upon the happening of which the salary was to be increased had never in fact arisen. Before the time arrived when it could happen two things had occurred to prevent it, neither of which was in the contemplation of the parties when the appointment was made. H. had resigned his position, and was no longer in the position to say whether R. had, or had not developed the traffic to his satisfaction; and secondly, R. had ceased to hold the office in respect of which the increase of salary had been promised, and had accepted another office in connection with the traffic department of the railway. 2. The fair meaning of W's promise that there would be no change in the salary on R's acceptance of his new office in the traffic department was that R. would be paid the same amount of salary in the new position as that which he was then receiving, namely, $2,100. 3. That W. not having been shown to have had any authority to bind the Crown by a promise to give any such increase of salary, no such authority was to be implied from the fact that he was at the time the General Freight Agent of the Railway, and as such R's immediate superior officer. ROBINSON *v.* THE KING — — — — — — — 448

INDIANS — *Indians — Mississauga Band — Claim for restitution of moneys to trust fund—The Exchequer Court Act, sec. 16 (d)—Declarations of right—Discretion of Superintendent General — Jurisdiction to interfere—Crown as trustee—Effect of treaties.*] A claim against the Crown based upon the 111th section of *The British North America Act*, 1867, and upon Acts of the Legislature of the Province of Canada and of the Parliament of Canada, is a claim "arising under any law of Canada" within the meaning of clause (d) of section 16 of *The Exchequer Court Act*. *Yule* v. *The Queen* (6 Ex. C. R. 123; 30 S.C.R. 35) referred to. 2. Where the court has no jurisdiction to grant relief in an action, it has no authority to make a declaration binding the rights of the parties. This rule should be strictly followed in all cases where the jurisdiction of the court depends upon statute and not upon common law. *Barraclough* v. *Brown*, ([1897] A.C. 623) referred to. 3. It does not follow that because the Crown is a trustee the court has jurisdiction to enforce the trust or to make any declaration as to the rights of the parties interested. That authority if it exists must be found in the statutes which give the court jurisdiction. The real question in any such case is not that the Crown may or may not be a trustee; but whether the court has any jurisdiction with respect to the execution of the trust. 4. While under the provisions of certain

INDIANS —*Continued.*

treaties and of certain statutes of the Legislature of the Province of Canada and of the Parliament of Canada, the Crown stands in the position of trustee for the Indians in respect of certain lands and moneys, such position is not that of an ordinary trustee. The Crown does not personally execute the trust; the Superintendent General of Indians Affairs having, under the Governor in Council, the management and control of such lands and moneys. For the manner in which the affairs of the Indians is administered the Dominion Government and the Superintendent General are responsible to Parliament, and Parliament alone has authority to review the decision arrived at or the action taken by them. In all such cases the court has no jurisdiction to review their discretion. Then there is this further difference between the Crown as a trustee and an ordinary trustee, viz: that the Crown is not bound by estoppels, and no laches can be imputed to it; neither does it answer for the negligence of its officers. 5. Under the Treaty of February 28th, 1820, there is nothing to prevent the Crown from making provision for the maintenance of the Mississauga band of Indians out of any capital moneys arising from the sale or leasing or other disposition of surrendered lands. 6. Under Treaty No. 19, made on the 28th October, 1818, the Crown's obligation is to pay the Mississaugas of the Credit a fixed annuity of $2,090. So far as this Treaty is concerned the Crown is not a trustee but a debtor; and the right of the Indians to such annuity cannot be impaired by any departmental adjustment of the Indian funds to which the Indians themselves are not parties. HENRY *et al v.* THE KING — — — 417

JURISDICTION — *Maritime law—Seaman's wages—Jurisdiction of court to hear claim for wages under $200—The Admiralty Act.* 1891—*R. S. C. c. 74, s. 56 — Foreign ship — Costs.*] Subject to the exceptions mentioned in sec. 56 of *The Seamen's Act* (R. S. C. c. 74), the Exchequer Court, on its Admiralty side, has no jurisdiction to entertain a claim for seamen's wages under the amount of $200, earned on a ship registered in Canada. The Ship *W. J. Aikens* (7 Ex. C. R. 7) decided under similar provisions in sec 34, chapter 75, R. S. C., not followed. 3. Subject to the exceptions mentioned in sec. 165 of *The Merchants Shipping Act*, 1894, this court has no jurisdiction to entertain a claim for seaman's wages for an amount below $200 earned on a ship registered in England. GAGNON *v.* SS. *Savoy*, DION *v.* SS. *Polino* — — — — 238

2——*Action in rem — Arrest of ship—Action between co-owners for account.*] This court has as large a jurisdiction as the High Court of Admiralty, and therefore in an action between the co-owners of a ship for an account, the ship may be arrested. COPE *v.* SS. *Raven.* — 404

3——*Declaration of right where no jurisdiction to grant relief — Crown as trustee—Enforcing trust.*] Where the court has no jurisdiction to grant relief in an action, it has no authority to make a declaration binding the rights of the parties. This rule should be strictly followed in all cases where the jurisdiction of the court depends upon statute and not upon common law. *Barraclough* v. *Brown* ([1897] A.C. 623) referred to. It does not follow that because the Crown is a trustee the court has jurisdiction to enforce the trust or to make any declaration as to the rights of the parties interested. That authority if it exists must be found in the statutes which give the court jurisdiction. The real question in any such case is not that the Crown may or may not be a trustee; but whether the court has any jurisdiction with respect to the execution of the trust. HENRY *et al. v.* THE KING — — — 417

KING'S SHIP—*Collision with King's ship*— — — — — — — 245

See SHIPPING, 8.

LEASE

See LESSOR AND LESSEE.

LESSOR AND LESSEE

1——*Lease of water-power—Stoppage of power on improvement of canal—Damages—New lease —Waiver—Surrender—Measure of damages—Loss of profit—Dissipation of business.*] The suppliant was the owner of a flour-mill at Iroquois, Ont., which was built upon a portion of the Galops Canal reserve, and, prior to December 12th, 1898, was operated by water-power taken from the surplus water of the canal. The site upon which the mill was built, as well as the water-power sufficient to drive four runs of ordinary mill stones, equal to a ten horse-power for each run; were held by the suppliant under a lease from the Crown. On that date the canal was unwatered to facilitate the construction of certain works that were being carried out, by the Government of Canada, for its enlargement and improvement. At the time it was not intended that the stoppage of the supply of such surplus water to the mill should be permanent, but temporary only. Subsequently, however, certain changes in the work were made which resulted in such supply being permanently discontinued. These changes were made by the Crown, at the request of the suppliant, and others, for the purpose of developing the water-power, of

LESSOR AND LESSEE—*Continued.*

which the suppliant expected to obtain a lease on favourable terms. If the suppliant had obtained a lease of considerable power, as he had hoped to get, he would have been willing to release all claim for damage arising from the loss of the forty horse-power supply of water he had under his first lease; but in the end the Minister of Railways and Canals was not able to lease the suppliant as much power as he had expected, and in accepting the lease of a smaller quantity of power it was agreed between the latter and the Department that his rights under the earlier lease should not be affected by the grant of the new one. *Held*, that the suppliant was entitled to recover compensation for the loss of power to which he was entitled under the earlier lease. 2. The court did not include in such compensation any claim for loss of profits or for dissipation of business, because, on the one hand, in its inception the stoppage of water was lawful and within the lease, and there was no ground upon which such claim could be allowed except that founded upon a change in the works that was made in part at the instance of the suppliant and to meet his views, and wholly with his acquiescence and consent; while on the other hand he had at all times a well founded claim either to have the power granted by the former lease restored to him, or to be paid a just compensation for the loss of it. 3. It was provided in the first lease that the suppliant would have no claim for damages in the event of a temporary stoppage of the water for the purpose, *inter alia*, of improving or altering the canal. Upon the question whether the stoppage of the water supply for the period of two and one-half years, being the time actually necessary for the execution of the works for enlarging and improving the canal, would have been a temporary stoppage within the meaning of the first lease. *Held*, that having regard to the subject-matter of the lease, any stoppage of the supply of surplus water actually necessary for the repair, improvement or alteration of the canal, in the public interest, and to meet the requirement of the trade of the country, would be temporary within the meaning of the provision above referred to, although it might last for several years. 4. Upon the question as to whether the acceptance by the suppliant of the lease of 1901 worked a surrender of the grant of surplus water made by the former lease. *Held*, that as there was nothing within the two leases which would go to affect the validity of either of them, and their was no inconsistency between them, the two leases should stand. 5. That the damages herein should be measured by the cost of supplying and using for the operation of the mill forty horse-power furnished in some other way than by the water supply in question. Beach *v.* The King — — 287

MINISTER — *Discretion of Minister of the Crown* — — — — — 206

See Government Railway, 1.

2——*Discretion of Minister of the Crown* - 216

See Revenue.

NEGLIGENCE — *Injury to property—Barge wintering in Lachine Canal—Lowering level of water—Omission to notify owner—Negligence—50-51 Vict., ch. 16, s. 16 (c).*] In the autumn of 1900 the suppliant placed his barge for winter-quarters at a place in the Lachine Canal which he had before used for a similar purpose. The practice is now changed, but up to and including the year 1900 it was sufficient for any owner of a barge, without asking leave or notifying anyone on behalf of the Crown, to leave his barge in the canal, and, during the winter some officer of the Canals Department would take the name of the barge, measure it, make up an account based on the tonnage for such use of the canal, and in the spring collect the amount thereof from the owner of the barge before she was permitted to leave the canal, the whole in conformity with the provisions of Art. 32 of the Tariff of Tolls framed by the department and issued in the year 1895. Some time after the suppliant had so placed his barge in the canal, M., the Superintending Engineer, for the province of Quebec, of the Canals Department, wrote officially to O., the Superintendent of the Lachine Canal, directing him to have the water lowered on certain dates during the winter to facilitate certain work then being done, by the Grand Trunk Railway Company, on their swing-bridge at St. Henri. M. also gave a verbal order to O. to comply with the usual practice of notifying the owners of barges wintering in the canal before lowering the water on any occasion. In pursuance of such verbal order, O. directed one of the employees of the canal to notify the barge owners whenever the level of the water was to be lowered. This employee failed to notify the suppliant before the water was lowered on a certain date, and his barge was so injured by the lowering of the water that she became a total loss. *Held*, confirming the report of the Registrar, that as the canal was a public work a case of negligence was established for which the Crown was liable under the provisions of section 16 (*c*) of *The Exchequer Court Act*, 50-51, Vict. ch. 16. Gagnon *v.* The King — 189

2——*Railway — Public work — Death arising from negligence—Defective engine—Dangerous crossing—Undue speed—"Train of cars"—The Government Railway Act (R. S. C. c. 38) sec. 29—Discretion of minister or subordinate officer as to precautionary measures against accident.*] The husband of the suppliant was killed by being struck by the tender of an engine while

NEGLIGENCE—*Continued.*

he was on a level crossing over the Intercolonial Railway tracks, in the City of Halifax. The evidence showed that the crossing was a dangerous one, and that no special provision had been made for the protection of the public. Immediately before the deceased attempted to cross the tracks, a train of cars had been backed, or shunted, over this crossing in a direction opposite to that from which the engine and tender by which he was killed was coming. The engine used in shunting this train was leaking steam. The atmosphere was at the time heavy, and the steam and smoke from the engine did not lift quickly but remained for some time near the ground. The result was that the shunting engine left a cloud of steam and smoke that was carried over toward the track on which the engine and tender were running, and obscured them from the view of any one who approached the crossing from the direction in which the deceased approached it. The train that was being shunted and the engine and tender by which the accident was caused passed each other a little to the south of the crossing. The train and shunting engine being clear of the crossing the deceased attempted to cross, and when he had reached the track on which the engine and tender were being backed, the latter emerged from the cloud of steam and smoke and were upon him before he had time to get out of the way. At the time of the accident the engine and tender were being backed at the rate of six miles an hour. *Held*, that the accident was attributable to the negligence of officers and servants of the Crown employed on the railway both in using a defective engine, as above described, and in maintaining too high a rate of speed under the circumstances. 2. An engine and tender do not constitute a "train of cars" within the meaning of sec. 29 of "The Government Railway Act" (R. S. C. c. 38). *Hollinger* v. *Canadian Pacific Railway Company* (21 Ont. R. 705) not followed. 2. Where the Minister of Railways, or the Crown's officer under him whose duty it is to decide as to the matter, comes, in his discretion, to the conclusion not to employ a watchman or to set up gates at any level crossing over the Intercolonial Railway, it is not for the court to say that the minister or the officer was guilty of negligence because the facts show that the crossing in question was a very dangerous one. HARRIS *v.* THE KING — — — 206

3——*Shipping—Collision—King's ship—Negligence—Liability—Public work.*] Where a collision occurs between a ship belonging to a subject and one belonging to the King, the King's ship is not liable to arrest for damages; and, in the absence of statutory provision therefor, no action will lie against the King for the negligence of his officers or servants on board of the ship. 2. In this case the steamship *Préfontaine*, belonging to the suppliant, was damaged in a collision with a loaded scow which was fastened to the starboard side of the steam tug *Champlain*, and which the latter was towing from the dredge *Lady Minto* then working in the Contrecœur Channel of the River St. Lawrence. The dredge, steam tug and scow were the property of His Majesty:—*Held*, that the facts did not disclose a case of negligence by the officers or servants of the Crown on a public work for which the Crown would be liable under clause (c) of section 16 of *The Exchequer Court Act*, 50-51 Vict, ch. 16. PAUL *v.* THE KING — — — — — 245

4——*Public work—Injury to the person—Negligence — Doctrine of common employment in Manitoba.—Liability of Crown.*] The effect of clause (c) section 16 *of The Exchequer Court Act* is not to extend the Crown's liability so as to enable any one to impute negligence to the Crown itself, or to make it liable in any case in which a subject under like circumstances would not be liable. 2. In the Province of Manitoba the Dominion Government is not liable for any injury to one of its servants arising from the negligence of a fellow-servant. *Filion* v. *The Queen* (24 Can. S. C. R. 482) referred to. 3. With respect to the liability of the Dominion Government in cases involving the doctrine of common employment, nothing short of an Act of Parliament of Canada can alter the law of Manitoba as it stood on that subject on the 15th July, 1870. *Semble*: *The Workmen's Compensation for Injuries Act*, R. S. Man. c. 178, does not apply to the Crown, the Crown not being mentioned therein. RYDER *v.* THE KING — — — — 330

5——*Public work—Injury to the person—Negligence—Aggravation of injury by unskilful treatment—Damages.*] Where a person who is injured through the negligence of a servant of the Crown on a public work voluntarily submits himself to unprofessional medical treatment, proper skilled treatment being available, and the natural results of the injury are aggravated by such unskilled or improper treatment, he is entitled to such damages as would, with proper treatment, have resulted from the injury, but not to damages resulting from improper treatment he subjected himself to. VINET *v.* THE KING — — — 352

PATENT FOR INVENTION — *Infringement—Assignor and assignee—Estoppel—Fair construction.*] Where the original owner of a patent had assigned the same, and was subsequently proceeded against by the assignee for the infringement of the patent so assigned, the

PATENT FOR INVENTION—*Continued.*

former was held to be estopped from denying the validity of the patent but, inasmuch as he was in no worse position than any independent member of the public who admitted the validity of the patent, he was allowed to show that on a fair construction of the patent he had not infringed. INDIANA MANUFACTURING CO. *v.* SMITH — — — — — 154

2——*Canadian Patent No.* 74,708—*Infringement—Metal weather strips—Prior American Patent — Narrow construction.*] The defendants had manufactured a form of metallic weather strip in Canada very much nearer to that shown and described in an American patent of a date prior to the Canadian patent, owned by the plaintiffs, than it was in any of the forms shown and described in the plaintiffs' patent. *Held*, that if the plaintiffs' patent was good, it was good only for the particular forms of weather strips shown and described therein; and that upon the facts proved the defendants had not infringed. CHAMBERLIN METAL WEATHER STRIP CO. *v.* PEACE *et al.* — 399

3——*Canadian Patent No.* 78151 *for steadying device in cream separators—Improvement on old device—Narrow construction — Application for writ of sequestration to enforce compliance with judgment.*] The invention in question consisted in the substitution of an improved device for one formerly in use as part of a machine, (in this case a tubular cream separator). *Held* that the patent must be given a narrow construction and be limited to a device substantially in the form described in the patent and specification. [In this case the plaintiffs after judgment applied for a writ of sequestration to enforce compliance with injunction restraining further infringement by the defendants of the patent in question. The writ was refused.] SHARPLES *v.* NATIONAL MFG. CO. — — 460

PRACTICE — *Appeal in Salvage action — General Rules* 159 *&* 162—*Exchequer Practice —Remission of case to Local Judge to take further evidence.*] Under the provisions of Rules 159 & 162 of the General Rules and Orders regulating the practice and procedure in Admiralty cases in the Exchequer Court of Canada, the court, in entertaining an appeal from a Local Judge in Admiralty in a salvage case, may direct that further evidence be taken before the Local Judge in order to dispose of an issue raised on the appeal. In such a case the appeal is by way of rehearing. VERMONT STEAMSHIP COMPANY *v.* THE SHIP *Abbey Palmer* — — — — 1

2——*Public work—Damages — Reference back to Referees under Rule* 19.] Upon an appeal from the report of special referees, on the ground that the amount of damages reported by them was excessive, and it appearing to the court that the matter was one in which it was expedient that there should be a reference back to the referees under the 19th rule of court of the 12th December, 1889, an order was made therefor, in which the following directions were given to the referees: 1. To find what in September, 1902, was the value of the wharf, land and premises taken by the Crown as mentioned in the information. In finding that value the referees were directed to exclude from their consideration the value of the same to the Crown, in the way of saving expense in the construction of the public work, or otherwise, and to determine its value at that time to the owner, or any other person, for any purpose to which in the ordinary course of events it could be put. In finding that value the referees were also directed to take into account the condition, situation, and prospects of the property taken; but that such value should be one that the property had at the time it was taken, and not one that the referees might think that it might have at some future time by reason of its condition, situation or prospects. 2. With regard to the remainder of the property, of which that taken formed part, the referees were directed to find the amount of damages, if any, that had been occasioned to the portion not expropriated by the taking of the part mentioned, and the construction of the public work. The referees were further directed that if the construction of the public work benefited and increased the value of the portion of the property not expropriated, that was to be taken into account and set off against the damages occasioned by the severance. THE KING *v.* SHIVES — — 200

2——*Action in rem — Arrest of ship — Action between Co-owners for account.*] This Court has as large a jurisdiction as the High Court of Admiralty, and therefore in an action between the co-owners of a ship for an account, the ship may be arrested. COPE *v.* SS. *Raven* — 404

3——*Declaration of right where no jurisdiction in Court to grant relief—Enforcing trust against the Crown jurisdiction* — — — 417

See JURISDICTION, 3.

PUBLIC OFFICER—*Assignment of salary—Public policy—Librarian of Parliament—Auditor-General—Right of, to bind Crown.*] The provisions respecting the assignments of choses in action found in R. S. O., c. 51, s. 58, ss. 5 and 6 are not binding upon the Crown as represented by the Government of Canada. 2. On grounds of public policy the salary of a public officer is not assignable by him. 3. Neither the Librarian of Parliament nor the Auditor-General of Canada has power to bind the

PUBLIC OFFICER—*Continued.*

Crown by acknowledging explicitly or implicitly an assignment of salary by an officer or clerk employed in the Library of Parliament. POWELL *v.* THE KING — — 364

2——*Promises by Crown's officer—Estoppel*—448
See CONTRACT.

PUBLIC WORK — *Claim for possession of head-gates and waters of canal—Public work—Interruption of possession—Water power—Public and private rights—Estoppel by admission of Crown's officer—Departmental report.*] The suppliant's predecessor in title, the Seignior of Beauharnois, early in the last century, had constructed a canal or feeder, with head-gates and appurtenances, through his own land for the purpose of conveying water from the River St. Lawrence to the River St. Louis, and so increase certain water powers belonging to the seigniory. Later in the century, when the Beauharnois Canal was constructed by the Government of the Province of Canada, certain works near the head of that canal had the effect of raising the water along the shores of Hungry Bay, in Lake St. Francis, and flooding a considerable portion of the seigniory of Beauharnois. To overcome this the Government built a dyke through Hungry Bay, which crossed the feeder and had a flume with three sluice-gates at its entrance into the St. Louis river. The gates that the Seiguior had used up to that time were removed, and the three sluice-gates mentioned were constructed as part of the public work. It was not disputed that this dyke was part of the property of the province, and passed to the Dominion of Canada in 1867; but down to the year 1882 the Seignior and his grantees remained in possession of the feeder and head-gates. In that year, however, a sum of $10,000 was voted by Parliament for the improvement of the River St. Louis, and a sum of $5,000 in each of the two years following. In connection with the work so provided for, the Crown took possession of the feeder, deepened and improved it, built a bridge over it, and took out and re-built the head-gates. It was not quite clear whether these works were undertaken by the Dominion Government at the request of the farmers who owned adjacent lands or of the mill owners, or at the request of both. It was clear, however, that none of the mill owners, of whom the suppliant was one, objected in any way to what was done But after the work was completed, the Crown's officers continued in possession of both the feeder and the head-gates, and the suppliant complained to the Minister of Public Works that he was prevented, along with other mill owners, from exercising the control of the feeder and head-gates to which they were as such owners entitled. The result of this com-

PUBLIC WORK—*Continued.*

plaint was that the control and possession of the feeder and head-gates were handed over to the suppliant who retained possession until 1892, when the Government resumed possession against the will and consent of the suppliant, who gave up the keys of the gates without waiving any of his rights. Prior to the time when the Government in 1892 took possession of the feeder, the suppliant had acquired the rights therein of all the mill owners interested excepting one, the rights of the latter being acquired afterwards in the same year. *Held*, that as the suppliant's *auteurs* were not in possession of the feeder and head-gates at the time of the deed of conveyance, they could not give him possession thereof as against the Crown; and that as the right of control and regulation of the head-gates had been in the Crown from the time the dyke was built, such right was not lost by the Crown ceasing to exercise it for the period above mentioned. 2. The suppliant while enjoying the right to have these works so regulated and controlled as to give him all the water he was entitled to, consistent with other public or private interest therein, had not the paramount or exclusive control and regulation of them, which, by the necessities of the case, were vested in the Crown. 3. The Crown is not estopped by any statement of facts or by any conclusions or opinions stated in any departmental report by any of its officers or servants. ROBERT *v.* THE KING — — — — — 21

2——*Injury to property—Barge wintering in Lachine Canal—Lowering level of water—Omission to notify owner—Negligence*—50-51 *Vict. ch.* 16, *s.* 16 (*c*)]. In the autumn of 1900, the suppliant placed his barge for winter quarters at a place in the Lachine Canal which he had before used for a similar purpose. The practice is now changed, but up to and including the year 1900 it was sufficient for any owner of a barge, without asking leave or notifying anyone on behalf of the Crown, to leave his barge in the canal, and, during the winter, some officer of the Canals Department would take the name of the barge, measure it, make up an account based on the tonnage for such use of the canal, and in the spring collect the amount thereof from the owner of the barge before she was permitted to leave the canal, the whole in conformity with theprovisions of Art. 32 of the Tariff of Tolls framed by the department and issued in the year 1895. Some time after the suppliant had so placed his barge in the canal, M, the Superintending Engineer, for the Province of Quebec, of the Canals Department, wrote officially to O., the Superintendent of the Lachine Canal, directing him to have the water lowered on certain dates during the winter to facilitate certain

PUBLIC WORK—*Continued.*

work then being done by the Grand Trunk Railway Company, on their swing bridge at St. Henri. M. also gave a verbal order to O. to comply with the usual practice of notifying the owners of barges wintering in the canal before lowering the water on any occasion. In pursuance of such verbal order, O. directed one of the employees of the canal to notify the barge owners whenever the level of the water was to be lowered. The employee failed to notify the suppliant before the water was lowered on a certain date, and his barge was so injured by the lowering of the water that she became a total loss. *Held*, confirming the report of the Registrar, that as the canal was a public work a case of negligence was established for which the Crown was liable under the provisions of section 16 (c) of *The Exchequer Court Act*, 50-51 Vict. ch. 16. Gagnon *v.* The King — 189

3——*Public work—Damages—Reference back to Referees under Rule* 19.] Upon an appeal from the report of special referees, on the ground that the amount of damages reported by them was excessive, and it appearing to the court that the matter was one in which it was expedient that there should be a reference back to the referees under the 19th rule of court of the 12th December, 1889, an order was made therefor, in which the following directions were given to the referees: 1. To find what in September, 1902, was the value of the wharf, land and premises taken by the Crown as mentioned in the information. In finding that value the referees were directed to exclude from their consideration the value of the same to the Crown, in the way of saving expense in the construction of the public work, or otherwise, and so determine its value at that time to the owner, or any other person, for any purpose to which in the ordinary course of events it could be put. In finding that value the referees were also directed to take into account the condition, situation, and prospects of the property taken; but that such value should be one that the property had at the time it was taken, and not one that the referees might think that it might have at some future time by reason of its condition, situation or prospects. 2. With regard to the remainder of the property, of which that taken formed part, the referees were directed to find the amount of damages, if any, that had been occasioned to the portion not expropriated by the taking of the part mentioned, and the construction of the public work. The referees were further directed that if the construction of the public work benefited and increased the value of the portion of the property not expropriated, that was to be taken into account and set off against the damages occasioned by the severance. The King *v.* Shives — — — — 200

PUBLIC WORK—*Continued.*

4——*Shipping—Collision—King's ship—Public work* — — — — — 245

See Negligence, 3.

" Shipping, 8.

5——*Injury to the person—Negligence—Common employment* — — — — 330

See Common Employment.

RAILWAYS — *Scheme of arrangement — Motion to restrain pending action—Grounds for refusal.*] In proceedings taken to confirm a scheme of arrangement, filed by a railway company under the provisions of sec. 285 of *The Railway Act*, 1903, an application was made, on behalf of the railway company, for an order to restrain further proceedings in an action against such company begun in the Superior Court for the District of Montreal, by certain creditors, before the filing of the scheme of arrangement, but which had not proceeded to judgment. *Held*, that as there were real and substantial issues to be tried out between the parties in the action pending in the Superior Court, the same ought to be allowed to proceed pending the maturing of the scheme of arrangement. *In re Cambrian Railway Company's Scheme.* (L. R. 3 Ch. App. 280 n. 1) referred to. *In re* Atlantic and Lake Superior Railway Company — — — — 283

2——*Insolvent railway—The Railway Act*, 1903, *sec.* 285—*Unsecured creditor not assenting to scheme of arrangement—Opposition to scheme by another railway whose rights were sought to be affected thereby — Confirmation of scheme where creditors of same class receive unequal treatment.*] An unsecured creditor who does not assent to a scheme of arrangement filed under section 285 of *The Railway Act*, 1903, is not bound thereby. 2. It is however a good objection to such scheme that it purports in terms to discharge the claim of such creditor. 3. By a scheme of arrangement, between an insolvent railway company and its creditors, it was proposed to cancel certain outstanding bonds and to issue new debentures in lieu thereof against property that was at the time in the possession of the trustees for the bondholders of another railway company. Part of such new debentures were to be issued upon the insolvent company acquiring the control of certain claims, bonds and liens against the railway; and part upon a good title to the railway being secured and vested in the trustees for the new debenture holders. The railway company, the trustees for whom bondholders were in possession of the railway objected to the scheme of arrangement. Its rights therein had not been determined or foreclosed. *Held*, that the railway company were entitled to be heard in opposition to the scheme, and that the

RAILWAYS—*Continued.*

latter was open to objection in so far as it purported to give authority to issue a part of the new debentures upon acquiring the control of such claims, bonds and liens, and without any proceedings to foreclose or acquire the rights of such railway company in the railway. 4. No scheme of arrangement under *The Railway Act*, 1903, ought to be confirmed if it appears or is shown that all creditors of the same class are not to receive equal treatment. *In re* The Baie Des Chaleurs Railway Company—386

3——*Railway—Scheme of Arrangement—The Railway Act*, 1903, *sec.* 285—*Petitioners not in possession of railway—Application to confirm.*] Where the petitioners for the confirmation of a scheme of arrangement, filed under the provisions of *The Railway Act*, 1903, sec. 285, are not in possession of the railway which they seek to mortgage as security for the issue of new bonds, the application to confirm will be refused. *In re* Atlantic and Lake Superior Railway Company — — — 413

4——*Scheme of arrangement—The Railway Act*, 1903, *secs.* 285, 286—*Application to confirm scheme—Enrolment where no objections made.*] *In re* Great Northern Railway Company of Canada — — — — 337

See Government Railways.

REVENUE—*The Customs Act—Infraction—Smuggling—Preventive Officer—Salary—Share of condemnation money.*] The suppliant had been empowered to act as a preventive officer of Customs by the Chief Inspector of the Department of Customs. The appointment was verbal, but a short-hand writer's note of what took place between the Chief Inspector and the suppliant, at the time of the latter's appointment, showed the following stipulation to have been made and agreed to as regards the suppliant's remuneration: "Your remuneration will be the usual share alloted to seizing officers; and if you have informers, an award to your informers and you must depend wholly upon these seizures." Certain regulations in force at the time provided that, in case of condemnation of goods or chattels seized for smuggling, certain allowances or shares of the net proceeds of the sale should be awarded to the seizing officers and informers respectively. *Held*, that where the Minister of Customs had not awarded any allowance or share to the suppliant in the matter of a certain seizure and sale for smuggling, the court could not interfere with the Minister's discretion. Bouchard *v.* King — — — — — 216

2——*Smuggling—Penalties—The Customs Act, secs. 192, 236, 246—Averments in information—Sufficiency of—Demurrer—Prescription—Jurisdiction.*] In an information for smuggling, laid

REVENUE—*Continued.*

under the provisions of sec. 192 of *The Customs Act*, it is a sufficient averment to allege that "the defendants in order to defraud the revenue of Canada did evade the payment of the duties upon said dutiable goods imported by them into Canada; and did fraudulently import such goods into Canada without due entry inwards of such goods at the Customs house." It is not necessary to charge the defendant with all the offences mentioned in such section; and the information is good in law if it sets out any one of the offences mentioned in the said section. 2. In such an information where it is sought to recover, in addition to the value of the goods smuggled, a sum equal to the value of the goods, it is necessary to allege that the goods were "not found." The offender is only liable to forfeit twice the value of the goods when the goods are not found but their value has been ascertained. 3. The penalty "not exceeding two hundred dollars and not less than fifty dollars," mentioned in sec. 192 of *The Customs Act* as recoverable before "two justices of the peace or any other magistrate having the powers of two justices of the peace," cannot be sued for in the Exchequer Court of Canada. (*Barraclough* v. *Brown* [1897] A.C. 615 referred to.) 4. While a claim for penalties in respect of goods smuggled more than three years before the filing of the information would be prescribed under sec. 240 of *The Customs Act*, where the goods have been seized by a Customs Officer, such seizure is to be deemed a commencement of the proceeding within the meaning of sec. 236. The King *v.* Lovejoy — — — — — 377

SALARY—*Assignment of Salary of Public Officer* — — — — 364

See Public Officer.

SALE OF GOODS—*Contract for sale of railway ties—Delivery—Inspection—Payment—Purchase by Crown from vendee in default—Title.*] In January, 1894, the suppliant agreed with M. acting for the B. & N. S. C. Company, to supply the company with railway ties. The number of the ties was not fixed, but the suppliant was to get out as many as he could, to place them along the line of the Intercolonial Railway, and to be paid for them as soon as they were inspected by the company. The ties were not to be removed from where suppliant placed them until they were paid for. During the season of 1894, the suppliant got out a number of ties, which were piled alongside the Intercolonial Railway, and inspected; those accepted being marked with a dot of paint and the letters "B. & S.," and thereafter paid for by the company. In 1895 the suppliant made a second agreement with M. to get out another lot of ties for the same terms and conditions.

SALE OF GOODS—*Continued.*

Under this agreement the suppliant got out ties and placed them along the Intercolonial Railway where the former ties were piled, but the lots were not mixed. The second lot was inspected and marked with the dot of paint, but the letters "B. & S." were not put on them. The suppliant demanded payment for them from the company, but was not paid. In November, 1896, the company sold both lots of ties to the Crown for the use of the Intercolonial Railway, and was paid for them; and in May or June, 1897, the Intercolonial Railway authorities removed all the ties.—*Held*, that the B. & N. S. C. Company had not at the time when they professed to sell the second lot of ties to the Crown any right to sell them, and the Crown did not thereby acquire a good title to the ties. That being so, the suppliant was entitled to have the possession of the ties restored to him, or to recover their value from the Crown. McLellan *v.* The King — — — — 227

SALVAGE—*Appeal in salvage action* — 1
See Appeal.

SCHEME OF ARRANGEMENT
See Railways.

SEAMEN'S WAGES—*Maritime law—Seaman's wages—Jurisdiction of court to hear claim for wages under* $200—*The Admiralty Act*, 1891—*R. S. C. c. 74, s. 56—Foreign ship—Costs* — — — — — 238
See Shipping, 7.

SHIPPING—*Appeal in Salvage action—General Rules* 159 *&* 162—*Exchequer Practice—Remission of case to Local Judge to take further evidence.*] Under the provisions of Rules 159 & 162 of the General Rules and Orders regulating the practice and procedure in Admiralty cases in the Exchequer Court of Canada, the court, in entertaining an appeal from a Local Judge in Admiralty in a salvage case, may direct that further evidence be taken before the Local Judge in order to dispose of an issue raised on the appeal. In such a case the appeal is by way of rehearing. Vermont Steamship Company *v.* The Ship *Abbey Palmer* — 1

2——*Salvage services—Mail steamer—Sailing ship.*] In this case salvage services were rendered a distressed sailing ship on the high seas by a mail steamer. At the time the latter performed the salvage services she was valued at $100,000, and besides passengers and mails, she carried a cargo estimated to be worth $7,000. The time occupied in the performance of such services was about two and one half days, the weather being fine and no risk or danger threatening the steamer except some chance of collision with her tow through a narrow channel

SHIPPING—*Continued.*

of some thirteen miles in length. On account of the delay occasioned by the services the steamer was obliged to consume additional coal to the value of $360 in making up her schedule time on the voyage. The sailing ship was in a position of peril when sighted by the steamer, having been dismasted and at the time drifting broadside at the mercy of the seas. Her cargo was worth $13,727.23, and her freight, as per bill of lading, $1,332.26. The value of the salved ship when taken into port in her damaged condition was placed at $2,290. The amount of salvage in respect of cargo and freight was settled before action brought. *Held*, that the sum of $400 was a fair salvage award in respect of the ship alone. Pickford and Black Steamship Co. *v.* Schooner *Foster Rice* — 6

3——*Foreign vessel—Interference with rights acquired under foreign judgment—Comity of Courts—Account between co-owners.*] The ship which was the subject of the proceedings herein was registered in an American port and owned by American citizens resident in the United States. The defendant S. advanced to the then captain of the ship at Brava, Cape de Verde Islands, the sum of $1,400 for necessaries, and took from the captain and V., a part-owner, what purported to be a bottomry bond, and a further instrument purporting to be a charter-party, as security for such advance. By the last-mentioned instrument the control and possession of the ship were handed over to S. until the profits of the employment of the ship repaid the loan. S. thereupon took over the ship and brought her to a United States port, where she was arrested at the suit of R. for an amount due him for necessaries supplied to the ship on a previous voyage. By the judgment of a competent court in the United States the rights of S., under the instruments mentioned, were held to give him priority over the claim of R. and he was confirmed in his possession of the ship. The plaintiff herein was the owner of 17/64 shares of the ship and had notice of the American suit between S. and R., and subsequently took part in some negotiations for the settlement of the claims of both. By instituting proceedings on the Admiralty side of the Exchequer Court the plaintiff sought to obtain possession of the vessel while in a Canadian port, together with certain relief against the defendant V. *Held*, that as by the proceedings taken in this court the plaintiff sought to derogate from rights obtained by one of the parties under the judgment of a competent court in the United States, the action should be dismissed. *Castrique* v. *Imrie* (L. R. 4 H. L. 414) referred to. *Semble:* In so far as the action sought to obtain an account between the parties who were co-owners, the court would have directed an account if it had been shown that

SHIPPING—*Continued.*

S. had received from the earnings of the vessel sufficient to repay him the amount of his loan. Michado *v.* The Ship *Hattie and Lottie* — 11

4——*Collision — Look-out — Evidence — Special rule contrary to general rule — Approaching ships—Uncertainty as to course—Damages*] A pilot in charge of the ship, or the man at the wheel, is not a proper look-out within the meaning of Art. 29 of the Rules for Preventing Collisions of 1897, made under the provisions of R. S. C. c. 79 intituled *An Act Respecting the Navigation of Canadian Waters.* The look-out should have nothing else to do than to scan the horizon and report. The place on the ship where he is stationed need not necessarily be the bows, but it should be the best place on the ship for the purpose. 2. Where there is no proper look-out the burden of proof is on the delinquent vessel to show that such fault did not contribute to the collision. 3. In finding upon conflicting evidence, the court will give more weight to the affirmative testimony of those who swear to having seen a given thing than to the merely negative testimony of those who swear that they did not see it. 4. Where a ship undertakes to follow a course, authorized by usage and special rule, in entering a port, but which to another ship approaching her may appear to be an unusual course and contrary to the general rule, it is the duty of the former to signal her course to the latter, and if she fails to do so the latter has a right to presume that the former will pursue the general rule. 5. Where there is danger of collision between two vessels, and they both obstinately follow out to the letter the rules regulating their respective courses when there is no such danger, in the event of a collision occurring by reason of their adherence to such rules, both vessels are at fault under Rule 27, which provides that in following general rules due regard must be had to all dangers of navigation and collision, and to any special circumstances which may render a departure from the general rule necessary. 6. Where two steam-vessels are approaching each other and each is uncertain and perplexed as to the course of the other, it is the duty of both to slacken speed, reverse and completely stop until their respective courses may be ascertained. Richelieu & Ontario Navigation Co. *v.* The SS. *Cape Breton* — — — — — 67

5——*Collision — Negligence — Application of Regulations — Ship at Wharf — Lights — Fog-Signals.*] Articles 11 and 15 (*d*) of the Imperial Collision Regulations of 1897 do not apply to the case of a ship made fast to a lawful wharf in a harbour. *Held*, on the facts, that a vessel which ran into another so moored was guilty of negligence. Bank Shipping Co. *v.* The *City of Seattle* — — — 146

6——*Shipping—Collision in foreign waters—Application of foreign rules—"Safe and practicable"—"Narrow channel."*] When a collision occurs in American inland waters and action is brought in this court for damages, the court will apply the rule of the road as it obtains under the *American Sailing Rules* for the purpose of determining the question of liability for the collision. 2. Article 25 of the American rules provides that "in narrow channels every steam vessel shall, when it is safe and practicable, keep to that side of the fair-way or mid-channel which lies on the starboard side of such vessel."—*Held*, that the words "safe and practicable" must be taken to imply that the vessel is only obliged to take this course when she can do so without danger of collision. 3. A harbour containing wharves and anchorage for ships on either side, and when ships and steam-tugs are continually plying back and forth, is not a "narrow channel" within the meaning of Article 25 of the above rules and the provisions of that article do not apply to cases of collision there. Lovitt *v.* The Calvin Austin — — — — — — 160

7——*Maritime law—Seamen's wages — Jurisdiction of court to hear claim for wages under $200—The Admiralty Act*, 1891—*R. S. C. c. 74, s. 56—Foreign ship—Costs.*] Subject to the exceptions mentioned in sec. 56 of *The Seamen's Act* (R. S. C. c. 74), the Exchequer Court, on its Admiralty side, has no jurisdiction to entertain a claim for seamen's wages under the amount of $200, earned on a ship registered in Canada. The ship *W. J. Aikens* (7 Ex. C. R. 7) decided under similar provisions in sec. 34, chapter 75, R. S. C., not followed. 2. A general law may be impliedly repealed by a subsequent special law, *in pari materiâ*, if such special law is in conflict with the former, but the converse is not the case; therefore *The Admiralty Act*, 1891, being a general law, and enacting general provisions as to jurisdiction, does not repeal by implication the special provisions of section 56, chapter 74, of *The Revised Statutes of Canada*, limiting the jurisdiction of this court in proceedings for seamen's wages. 3. Subject to the exceptions mentioned in sec. 165 of *The Merchants Shipping Act*, 1894, this court has no jurisdiction to entertain a claim for seamen's wages for an amount below $200 earned on a ship registered in England. 4. Costs in these actions were refused the defendants because exception to the jurisdiction to entertain the claim sued for was not taken *in limine litis.* Gagnon *v.* SS. *Savoy*; Dion *v.* SS. *Polino* — — — — 238

SHIPPING—*Continued.*

8——*Collision — King's ship—Negligence—Liability—Public work.*] Where a collision occurs between a ship belonging to a subject and one belonging to the King, the King's ship is not liable to arrest for damages; and in the absence of statutory provision therefor, no action will lie against the King for the negligence of his officers or servants on board of the ship. 2. In this case the steamship *Préfontaine*, belonging to the suppliant, was damaged in a collision with a loaded scow which was fastened to the starboard side of the steam tug *Champlain*, and which the latter was towing from the dredge *Lady Minto* then working in the Contrecœur Channel of the River St. Lawrence. The dredge, steam tug and scow were the property of Her Majesty:—*Held*, that the facts did not disclose a case of negligence by the officers or servants of the Crown on a public work for which the Crown would be liable under clause (c) of section 16 of *The Exchequer Court Act*, 50-51 Vict. ch. 16. Paul *v.* The King — — — — 245

9——*Collision—Breach of regulations—Minor breach not contributing to collision—Liability.*] If a collision upon the high seas has been brought about by a ship neglecting to follow her course as prescribed by the Regulations for preventing Collisions at Sea, the other ship will not be held equally at fault because of a contravention of a statutory regulation where such contravention could not by any possibility have contributed to the collision. 2. A vessel "hove to" with her helm lashed is not obliged to carry the lights mentioned in Article 4 of such Regulations, as she is not "a vessel which from any accident is not under command." Birgitte *v.* Forward, *et al.* — — 339

10——*Action in rem—Arrest of ship—Action between Co-owners for account* — — 404

See Jurisdiction.

SMUGGLING

See Revenue.

SPEED—*Undue speed of train* — 206

See Government Railway, 1.

STATUTES, CONSTRUCTION OF—A general law may be impliedly repealed by a subsequent special law, *in pari materiâ*, if such special law is in conflict with the former, but the converse is not the case; therefore *The Admiralty Act, 1891*, being a general law, and enacting general provisions as to jurisdiction, does not repeal by implication the provisions of section 56, chapter 74, of *The Revised Statutes of Canada*, limiting the jurisdiction of this court in proceedings for seamen's wages. Gagnon *v.* SS. *Savoy*; Dion *v.* SS. *Polino* — — — — — 238

STATUTES, CONSTRUCTION OF—*Con.*

2——*Public work—Injury to the person—Negligence—Doctrine of common employment in Manitoba — Liability of Crown.*] The effect of clause (c) section 16 of *The Exchequer Court Act* is not to extend the Crown's liability so as enable any one to impute negligence to the Crown itself, or to make it liable in any case in which a subject under like circumstances would not be liable. 2. In the Province of Manitoba the Dominion Government is not liable for any injury to one of its servants arising from the negligence of a fellow servant. *Filion* v. *The Queen* (24 Can. S. C. R. 482) referred to. 3. With respect to the liability of the Dominion Government in cases involving the doctrine of common employment, nothing short of an Act of Parliament of Canada can alter the law of Manitoba as it stood on that subject on the 15th July, 1870. *Semble*: *The Workmen's Compensation for Injuries Act*, R. S. Man. c. 178, does not apply to the Crown, the Crown not being mentioned therein. Ryder *v.* The King 330

3——*B.N.A. Act, 1867, sec. 111.—The Exchequer Court Act, sec. 16 (d) claim arising under any law of Canada.*]—A claim against the Crown based upon the 111th section of *The British North America Act*, 1867, and upon Acts of the Legislature of the Province of Canada and of the Parliament of Canada, is a claim "arising under any law of Canada" within the meaning of clause (d) of Section 16 of *The Exchequer Court Act*. *Yule* v. *The Queen* (6 Ex. C. R. 123; 30 S.C.R. 35) referred to. Henry *et al v.* The King — 417

SURRENDER

See Lessor and Lessee.

TERRITORIAL WATERS — *Canadian Waters—Fishing by American Vessel* — 348

See Fishing.

TREATIES

See Indians.

TRUSTEE—*Crown as trustee—Enforcement of trust—Indian treaties.*] It does not follow that because the Crown is a trustee the court has jurisdiction to enforce the trust or to make any declaration as to the rights of the parties interested. That authority if it exists must be found in the statutes which give the court jurisdiction. The real question in any such case is not that the Crown may or may not be a trustee; but whether the court has any jurisdiction with respect to the execution of the trust. 2. While under the provisions of certain treaties and of certain statutes of the Legislature of the Province of Canada and of the Parliament of Canada, the Crown stands in the position of trustee for the Indians in respect of

RUSTEE—*Continued.*

ertain lands and moneys, such position is not nat of an ordinary trustee. The Crown does ot personally execute the trust; the Superintendent General of Indians affairs having, nder the Governor in Council, the management and control of such lands and moneys. or the manner in which the affairs of the ndians is administered the Dominion Government and the Superintendent General are responsible to Parliament, and Parliament alone as authority to review the decision arrived at r the action taken by them. In all such cases ne court has no jurisdiction to review their iscretion. Then there is this further difference between the Crown as a trustee and an rdinary trustee, viz: that the Crown is not ound by estoppels, and no laches can be imuted to it; neither does it answer for the egligence of its officers. 3. Under the Treaty of 'ebruary 28th, 1820, there is nothing to prevent the Crown from making provision for the naintenance of the Mississauga band of Indians ut of any capital moneys arising from the sale r leasing or other disposition of surrendered nds. 4. Under Treaty No. 19, made on the 8th October, 1818, the Crown's obligation is o pay the Mississaugas of the Credit a fixed nnuity of $2,090. So far as this Treaty is conerned the Crown is not a trustee but a debtor; nd the right of the Indians to such an annuity

TRUSTEE—*Continued.*

cannot be impaired by any departmental adjustment of the Indian funds to which the Indians themselves are not parties. Henry *et al v.* The King — — — — — 417

VENDOR AND VENDEE

See Sale of Goods.

WAIVER—*Lease of water power—Stoppage of former — Damages — Waiver—Surrender of lease* — — — — — 287

See Lessor and Lessee.

WATER POWER—*Public and private rights in* — — — — — — 21

See Lessor and Lessee.

" Public Work 1.

WORDS AND TERMS—" Narrow Channel "]—Lovitt *v.* The Calvin Austin — 160

2——" Safe and Practicable "]—Lovitt *v.* The Calvin Austin — — — 160

3——" Train of Cars "]—Harris *v.* The King — — — — — 206

WORKMENS' COMPENSATION ACT

See Common Employment.