# REPORTS

— OF THE —

# EXCHEQUER COURT

— OF —

# CANADA.

CHARLES MORSE, K.C.

EDITOR.

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OF THE

# EXCHEQUER COURT OF CANADA

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*Appointed 2nd March, 1908.*

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*Appointed 4th April, 1912.*

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IN THE MATTER OF THE PETITION OF RIGHT OF

DELIA HAMILTON.....SUPPLIANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

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Jan. 28.

*Government Railway—Breach of Regulations by engine-driver—Injury to passenger—Negligence—Section 20 (c) of R. S. 1906, chap. 140—Liability of Crown—Evidence.*

Where an engine-driver of a train on a government railway in the manner of moving his train at a station transgressed the regulations of the railway, and a passenger was injured in alighting from the train by reason of the wrongful conduct of the engine-driver, a case of negligence was established for which the Crown was liable under the provisions of sec. 20 of *The Exchequer Court Act*, R.S. 1906, c. 140.

2. The rule as to the preponderance of affirmative evidence over evidence of a merely negative character as laid down in *Lefeunteum v. Beaudoin* (28 S.C.R. 89), applied.

PETITION OF RIGHT for the recovery of damages against the Crown for personal injuries sustained by the suppliant on a Government railway.

The facts of the case are fully stated in the report of the learned Referee, L. A. Audette, K.C., Registrar of the Court [now one of the Judges of the Court.]

*A. Lemieux, K.C.*, appeared for the suppliant, and *A. Leblanc*, for the respondent, on the reference.

January 28th, 1911.

The learned Referee now filed the following report:—

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The suppliant brought her petition of right to recover the sum of $10,000 damages for the loss of her two legs, resulting from an accident while travelling on the Intercolonial Railway, a public work of the Dominion of Canada.

The Crown, by its plea, denies any liability and says that the accident occurred through her "own "negligence in trying to jump from a car before the "train came to a full stop at the station platform."

At about 7.40 on the morning of the 1st of August, 1904, the suppliant, a couple of months after having obtained her diploma as a trained nurse, started on the Intercolonial Railway from Montreal for Ste. Flavie, for the purpose of taking a holiday and seeing her father who resides at St. Gabriel.

Some time about 9 o'clock in the evening, about an hour late under the time-table then in force, Ste. Flavie station was duly called three times by one of the brakemen. The suppliant says she waited until the train was well stopped to get up from her seat, and at the same time the other travellers were also getting up. She is very sure the train was stopped when she got up.

On the arrival of the train at Ste. Flavie she was sitting on the first seat or bench near the western door of the down train, on the side next to the station, and after waiting as aforesaid till the train was well stopped she said she started to get out of the train, directing her steps towards the rear platform between the first class car and the pullman car. She was carrying in her hand a small satchel and lunch box and was holding on to the railing with the right hand. She was coming out by the rear steps of the first class car, and as she was placing her foot on the second degree of the steps she says the train gave a jerk

which made her fall. She contends (p. 8) the jerk was a violent one, because she says she endeavoured to hold on (garantir) to prevent herself from falling, but the jerk or shock carried her away notwithstanding. She slipped between the train and the platform of the station, and the front truck of the pullman car passed over her two legs, which were amputated a couple of hours afterwards, the amputation having been decided necessary to save her life.

She remained thirty-eight days at Ste. Flavie, when she returned to Les Sœurs de la Miséricorde, at Montreal, at whose hospital she had studied to become a trained nurse, and there she has since lived and been kept by charity, making herself useful by helping with the little binding the hospital does. She has ever since been kept by the nuns, fed and dressed, and true to their noble undertaking, the nuns, with their usual spirit of charity, say they are willing to keep her for nothing; but this has nothing to do with the merits of the case.

The suppliant had been ten months without walking when one of the doctors of the hospital gave her two artificial legs. The cost of such legs would run according to the evidence, from $300 to $500, and would have to be renewed from time to time. She says she is now and then obliged to use crutches, and further that she daily suffers from pains caused by the artificial legs.

The learned counsel for the suppliant contends that the accident resulted from the following acts of negligence of the officers of the railway while acting within the scope of their duties and employment, under sub-sec. (c) of sec. 20 of *The Exchequer Court Act*:—

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1. The bringing of the train to a stop and starting it again with a jerk a few moments after, without the order or signal of the conductor and before starting on its regular run.

2. The want of light at the place where the accident happened.

3. The defective construction of the station platform,—it being too low and too distant from a train on the track.

4. The negligent omission of the employees of the train, or any of them, from being near the steps of the car from which suppliant was alighting, with the object of helping and giving light with their lantern, as required from instructions from their superior officers.

Let us consider the first count or allegation of negligence. Twelve witnesses swear that after the train had arrived and stopped at Ste. Flavie, it moved again a few moments after for a distance of 25 to 30 feet, more or less, before starting on its regular run. Four witnesses swear the train stopped once for all and did not start again until it went on its regular run. Let us weigh the evidence pro and con.

The suppliant herself swears emphatically she was quite certain the train was stopped when she got up from her seat and walked to the back of the car to get out, and that it must have remained stopped certainly during several seconds (p. 14); but that it started with a jerk when she was on the step in the act of alighting.

Alfred Gagnon, the next witness, who was on the station platform at the arrival of the train, testifies that a few moments after the train had arrived and stopped, while he was standing opposite the first class car, the train gave a jerk and advanced for 15

or 20 feet (p. 151). He adds further that he is positive the train stopped a first time, and that it started again as above mentioned,—he noticed it. He further adds that he saw passengers getting off the train before the suppliant did, from the first class car on the eastern side, and not at the Pullman end. It is perhaps worth noticing here that this is contrary to what brakeman Boucher swears.

Etienne Beaupré, the yard-master of the Intercolonial Railway at Ste. Flavie, on duty 1st August, 1904 from 6 p.m. to 7 a.m. next day, is rather an intelligent and bright witness who gave well reasoned testimony. He says when the train arrived he was on the platform of the station and was on his way to meet the conductor of the Pullman, as his duty called for, to ascertain whether there were passengers for Metis, and if there were some he was to detach the Pullman. He says the train came in, stopped, stuck there, was stopped (p. 112). Passengers alighted at once and the train remained stopped perhaps half a minute. He, in the meantime, saw two or three passengers getting off from the same step by which the suppliant was coming out. When the train stopped the first time the front step of the first class car had gone by him 10 or 12 feet (p. 109), and when he saw the train was stopping, he walked in the western direction towards the Pullman.....and the train started headways. He says he found that rather peculiar, looked around, and was exactly opposite the rear step of the car when the suppliant fell, the train having advanced 30 to 35 feet, more or less. He then signalled the engine-driver with his lantern to stop the train. He saw the suppliant fall,—she first slipped under the train and the truck of the Pullman car passed over her two legs.

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Cyprien Thibault was on the train in question on the 1st August, 1904, on board the second class car, coming back to Ste. Flavie from Fall River, after five years absence, accompanied by his wife and two children. He says that after Ste. Flavie had been announced the train stopped, and he got off with his two satchels which he brought out and left on the platform of the station, and states that the train was then well stopped. He had walked out from the front step of the second-class car and noticed no brakeman there at the time. After having safely deposited his satchels on the platform he went back on board the train to get his wife who had remained on the train with her two children. Two or three passengers had alighted from the car ahead of him; he was following them (p. 132). When he went back on board the train, it moved with a jerk (p. 133) and his wife nearly fell, but held on to a bench. When he went off the train the second time he was not opposite his luggage, and he perceived the train had moved, and he found his satchels at about the middle of the car, adding that he presumed that would mean the train had advanced by about half a length of a car.

Leon Roy, a merchant of Ste. Flavie, was on the platform of the station on the evening of the accident, and saw the train arriving, then stop, and after having been stopped for hardly half a minute started headway again with a jerk and moved on for 25 to 30 feet. half the length of a car. It was at the time the train started again he saw both the suppliant and Dr. Lavoie fall. Two or three persons had come out of the train ahead of the suppliant (p. 141). He says he would have come out in the same manner as the suppliant did, because there was no reason to believe that the

train would thus start anew. He saw the train start, he was near the cars.

Joseph Roy, merchant, ex-mayor of Ste.-Flavie, testifies that he remembers the accident and was at the time on the sidewalk, at about 70 or 75 feet from the train, and ascertained that the train had arrived, stopped some time, and that it started again a few moments after.

Joseph Arseneault, farmer, of St. Damase, was on board the second-class car of the train in question on the day of the accident, with his wife, two children and his mother-in-law. He testifies the train arrived quietly at Ste. Flavie, it stopped, but after a minute to one minute and a half, it started again with a terrible shock, and the train then advanced about thirty feet.

Eusèbe Bourgoin, of Ste. Flavie, brakeman in the employ of the Intercolonial Railway for seven years, who, however, did not belong to the crew of the train in question, was at the station on the evening of the accident, and says the train arrived at the usual speed, stopped for about a minute, and then moved on for about half the length of a car, about 35 feet. The train did not start very suddenly, but enough to make a person who does not expect it lose her balance.

Miss Agleae Bourgoin, who resides at Ste. Flavie, was at the station on the evening of the accident, saw the train arriving, then stop for a minute, a few moments, and start again. She was on the platform of the station opposite the first-class car at about ten feet from the car, and the suppliant, when the train stopped, was on about the second step, when the train started with a shock which threw her (the suppliant) down, as well as Dr. Lavoie. She had also noticed two or three passengers getting off the first-class car during the first stop.

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Dr. Lavoie, of Ste. Flavie, was on board the train in question, and says that after the station had been called, the train stopped. When the train had thus stopped he got up from his seat with his three year old child in his arms. Just as soon as the train had stopped he took his child and started towards the western door of the car (p. 234). The train was stopped when he arrived on the platform of the car in the vestibule (p. 235). The suppliant was then going down; she was on the last step and in the act of placing her foot endeavouring to reach the side of the platform of the station, and he saw her disappearing under the car, without exactly realizing what was the matter, when the train was starting anew. He came down believing the train was stopped, and took care in placing his foot; he came straight down with the child in his arms, and in placing his foot on the platform of the station, turned upon himself, made a few steps backwards, and fell on his back. Then on getting up he ascertained the train was moving. If there had been no movement the suppliant would not have fallen. The train stopped as it came in, moved anew to stop again.

Joseph Gagné, of Ste. Flavie, an employee of the Intercolonial Railway, was on the platform of the station on the arrival of the train on the evening of the 1st August, 1904, and remembers the accident. The train arrived and stopped from one to two minutes (p. 263), and started again for 20 to 25 feet. It did not take a minute before the train started again (p. 270). He was about six feet from the suppliant when he fell and saw her fall when the train started anew to cover the distance of 20 to 25 feet. She fell as she was to place her foot on the platform of the station. She tried to put her foot on the platform and she put

it in the open space. The space is too large between the platform and the train.

This concluded the suppliant's evidence on this important point as to whether or not the train started anew after its arrival, for a distance of 20 to 25 feet, more or less. Let us now review the evidence of the defense on this point. Four witnesses testified upon the question.

Louis Levesque, of Ste. Flavie, carter and mail carrier, 63 years old, who was on the platform of the station opposite the second-class car, on the evening of the accident, gave very loose and intangible evidence. His testimony seems to have been given on the assumption that everything occurred as usual on the arrival of the train. His memory was somewhat at fault. He first states he heard of the accident after having received the mail bag (p. 348). Then he says he cannot swear whether there was any mail bag that evening (p. 351). Further on, at page 352, he says there was no mail bag on that train. The baggage man, however, swears he delivered two mail bags from that train (p. 360). This witness swears the train stopped once for all.

Léandre Chenard, the baggage man on board the train and belonging to the crew at the time of the accident, says that before arriving in front of the baggage room, the train slackened, then it came very near stopping, but it did not stop altogether according to his idea (p. 360). It jerked, simply a jerk from ahead, a little.

Eugène St. Pierre, the engine-driver of the train in question and who was in charge of the engine which is said to have caused the accident, testifies that on the evening in question he made only one stop, and that when he again moved it was to go on his regular

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course. Asked if what he has said—the accident having taken place six years ago—he has so said from personal recollection, or is it because he is in the habit of arriving in that manner, he answers:—"It is because I am in the habit of always doing the same work, but I am certain that I did not start anew."

"Q.—You do not remember specially that day?

A.—Not all (pas tout à la lettre) all exactly, you understand (p. 438)."

Napoléon Boucher, of St. David, one of the brakemen on board the train in question and the one who took out Dr. Lavoie's satchels by the front steps of the first-class car, says he had been 22 years brakeman at that date, and 28 years now. He testifies he got off the train only when it was stopped. His idea is that the train stopped but once (pp. 450, 460). He further says after having come out of the train, he waited on the station platform for passengers, but not one passenger got off on his side that night (p. 455) (although witness Gagnon swears he saw some passengers getting off from that place), so he went westwards to deliver his satchel to Dr. Lavoie, and it was then he heard of the accident, and after delivering his satchels he went to the station to notify the conductor. Huppé, the conductor, had just registered and was coming out of the station when I met him (p. 453). Huppé, says, however, that Boucher notified him before he registered and in the station (p. 306). Would not the attention of this witness appear to have been, on the arrival of the train, much involved with the delivery of Dr. Lavoie's baggage?

From the evidence above referred to, it appears that twelve witnesses heard on behalf of the suppliant, swear that the train moved a second time for a distance of 25 to 30 feet, more or less, after having stopped on its arrival

and before starting for good, and that it is in the course of this short move that the suppliant met with the accident while in the act of getting off the train. Four witnesses on behalf of the Crown swear to the contrary, and say the train stopped but once. The first witness is an old man 63 years old, a carter and mail carrier, who contradicts himself with respect to the mail bags on the evening in question, as already mentioned above, and is also contradicted by Chenard. His memory seems at fault, and he says by way of excuse that the accident has happened quite a while ago, and that since then he has been sick in the hospital for a month. On perusal of his evidence it will be found that his testimony is rather loose and unreliable. Then we have the three men of the crew who swear the train stopped but once, yet their evidence on that point is not as positive and satisfactory as it might be. In estimating the value of the evidence one must not lose sight of the rule of presumption that ordinarily a witness who testifies to an affirmative is to be credited in preference to one who testifies to a negative, *magis creditur duobus testibus affirmantibus quam mille negantibus*, because he who testifies to a negative may have forgotten a thing that did happen, but it is not possible to remember a thing that never existed (*Lefeunteum* v. *Beaudoin* (1). Then, the evidence of the crew, without casting any discredit upon them, whose interest is not only closely identified with that of the Crown, but is even larger because they may think their employment is perhaps at stake, ought not to prevail against the testimony of strangers who are disinterested witnesses and even against other employees of the Intercolonial Railway who were in a better position to verify the stop, because they were on the platform of

(1) 28 S.C.R. 89.

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the station. The crew's evidence is certainly that of interested persons, because upon them is thrown the blame for the accident. It will, moreover, obviously appear that it is easier for one standing on the platform of the station, which is stationary, to ascertain whether a train moves or is at a standstill, than for one on board of the train. Then one of the witnesses substantiates his evidence by a very important fact. He gets off the train at the first stop with his baggage, leaves this baggage on the platform of the station and starts back to the train to help his family out. While on board of the train at that time he says it started with a jerk, and when he comes out of the train he finds his baggage about the middle of the car, while it had been left opposite the steps. Can anything be more conclusive?

Then Beaupré, the yard-master of the Intercolonial Railway, ascertained the train had stopped, and is astonished to see it start again, and signals with his lantern to stop.

Moreover, if Conductor Huppé came out of the train the first time it stopped, as he says he did, and that the accident happened, as he says, while he was in the station, then one must necessarily presume that the train moved after he had left it, since the suppliant fell while the train was moving. Another reason also why the facts should be as related is that the conductor did not hear the cries of the suppliant when he passed at the distance of one car from the place of the accident when he went into the station, and that her cries were loud enough to be heard by Mrs. Roy, on the landing of her house, at a certain distance from the station.

In face of the overwhelming weight of the evidence, the undersigned must find, and he so finds, that the

suppliant met with her accident while the train was in motion for the 25 to 30 feet, more or less, mentioned above, and that the train after its arrival stopped, moved again without orders for this short distance, and stopped again before its final departure from Ste. Flavie, and that the engine-driver in moving his train in that manner transgressed the regulations and did so in contravention of the same, and was guilty of negligence from which the accident resulted and for which the Crown is liable under section 20 of the *Exchequer Court Act.*

With respect to the second, third and fourth points raised by the suppliant's learned counsel, namely, the want of light, the defective construction of the station platform, and thirdly the negligent omission of the employees of the train to be near the step, with their lantern, when the passengers were coming out of the train, the undersigned may say that it is unnecessary to pass upon these points in view of his finding on the more important point of the moving of the train in contravention of the following Regulations of the Railway, viz.:—

"178. He must not start his train until the bell be rung, and he receives the signal from the conductor; he must invariably start carefully, without jerking, and see that he has the whole of his train; he must run the train as nearly to time as possible, arriving at the station neither too late nor too soon. He must not shut off steam suddenly, so as to cause concussion of the cars, unless in case of danger."

"190. In bringing up his train the Driver must pay particular attention to the state of the weather and the condition of the rails, as well as to the length of the train, and these circumstances must have due weight in determining him when to shut

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off steam. Stations must not be entered so rapidly as to require a violent application of the brakes, or to render necessary the sounding of the signal whistle. He must report every instance of overshooting a station to the Superintendent."

In view of the following decision and opinion expressed in the case of *Harris* v. *The King* (1), viz:—

"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 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 the Department, that duty falls. If it is decided that certain special means

(9) 9 Ex. C.R. 208.

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,"

it would appear to the undersigned that the want of additional lights and the defective construction of the platform of the station are matters which are left to the Minister of Railways and the Crown's officers, whose duty it is to decide as to the same, and that it is not for the Court to say that the Minister or the officers were guilty of negligence because the facts show that there was actual want of light, accentuated on the occasion in question by the crowd standing between the lights and the train, and that under the evidence the station platform might be held to be somewhat defective. (See Sec. 39 of the *Government*

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*Railways Act.*) On the evening in question a concurrence of events which would go to show that there was something wrong or defective—too much distance between the train and platform in both height and space between the edge of the station platform and the car steps—three persons fell, the suppliant, Dr. Lavoie, and Arsenault's mother-in-law. This is what Arsenault says in this respect (p. 177):—

"Q.—Il n'est pas arrivé d'accident à votre belle-mère?

R.—En débarquant des chars la plate-forme est assez loin du step, si ce n'avait pas été que moi elle aurait enfilé, si le train avait fait seulement deux pas, j'ai mis mon enfant à terre, j'ai pris ma belle-mère par le bras.

Par M. le Régistraire.

Q.—Elle a tombé?

R.—Elle a tombé entre la plate-forme et le step du char. Quand on prend quinze à seize pouces partant du step à la plate-forme, une vieille personne et surtout quand il fait bien noir qu'il fait noir comme chez le loup, qu'on ne voit seulement pas un pas devant nous autres, une distance de même une vieille personne enfile, et moi j'étais bien plus jeune et j'ai été bien près d'enfiler, j'ai été obligé avec mon pied de tater, pour voir la plate-forme.

Q.—Vous ne pouviez pas la voir?

R.—Non, il faisait trop noir, on ne voyait pas un pied en avant de nous autres. Il n'y avait pas une lumière du tout où on a débarqué.

The second and third points upon which the learned counsel relied are thus disposed of. Coming to the fourth count, viz:—4. The negligent omission by the employees of the train, or of any of them, from being near the steps of the car from which the suppliant

came out, with the object of helping and giving light with the lantern, as required from instructions by their superior officers,—suffice it to say that in that respect that while a better distribution of the crew could have been made with the view of helping and lighting the passengers alighting from the train, the want of doing better could not amount to an act of negligence by itself whereby the Crown could be held liable, while it might perhaps be taken into consideration in a concurrence of acts of minor negligence which could be held to be the decisive cause of the accident.

Coming now to the question of quantum, the evidence establishes that while the suppliant had been the recipient of a diploma as a trained nurse a couple of months before the accident, she had never earned anything in that capacity. Trained nurses' fees range from $1.50, $2.00, 2.50 to $3.00 per day. It further results from the evidence, that since the accident the suppliant has attempted, during an epidemic of typhoid fever in Montreal, to help in the hospital, but was obliged to discontinue. Ever since the accident the suppliant has been looked after by the religious community called "Les Sœurs de la Miséricorde" at Montreal, entirely by charity. She has, however, made herself useful in working at the binding the community does for itself, but it is not such binding as could be considered of any commercial nature, being confined to the binding for the establishment only.

The suppliant's life is practically wrecked, her prospects blighted; she is deprived of her livelihood. She cannot, as stated by Dr. Fiset, practise as nurse,—a walk of life quite remunerative in our days. Dr. Fiset thought she could easily have earned yearly an income ranging from $500 to $900, and when pressed

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with questions as to her present state he admits she might make herself partially useful in a hospital, but adds that an accident of this kind is one of a nature which would tend to shorten one's life.

The suppliant claims $10,000. She owes $83.00 to Dr. Fiset for having performed the operation and paid her transportation back to Montreal. She owes the further sum of $80.00 to Dr. Lavoie who assisted Dr. Fiset in the operation. The medical charges, it may be said, *en passant*, are very moderate.

Now, in estimating the compensation to which the suppliant is entitled under all the circumstances, bearing in mind all the legal elements under which she is entitled to recover, some consideration should be given to the fact that while she may not be entirely prevented from earning, her chances of employment in competition with others are very much lessened, and her earning powers consequently almost rendered nil.

In assessing damages in a case of this kind, while it is impossible to arrive at any sum with mathematical accuracy, several elements must be taken into consideration, and one must strive to compensate the suppliant for her loss generally, to make good to her the pecuniary benefits she might reasonably have expected had she not met with the accident. In doing so one must take into account the age of the suppliant, who at the time of the accident was 26 years old, her state of health, her expectation of life, her employment, the income she was earning or had reason to expect to earn, and her prospects, not overlooking, on the other hand, the several contingencies to which every person in her walk of life is necessarily subjected, such as being out of employment to which in common with other persons she was

exposed, and her being also subject to illness. All these surrounding circumstances must be taken into account.

In the present case the suppliant was in her prime, in good health, with bright prospects ahead of her, in possession of a good diploma, covering even cases of obstetrics, thus commanding perhaps higher remuneration and enlarging thus the scope of her employment.

Under all the circumstances of this case, the undersigned is of opinion to allow the sum of Five thousand dollars ($5,000), together with the amount of the two doctors, bills, viz: Dr. Fiset's for $83.00 and Dr. Lavoie's for $80.00, making in all the sum of $5,163.00.*

Solicitor for the suppliant: *A. Lemieux.*

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

*EDITOR'S NOTE:—This report was confirmed by the Judge of the Exchequer Court (February 21st, 1911) on motion for judgment by the suppliant

*Judgment accordingly.*

NOVA SCOTIA ADMIRALTY DISTRICT.

1911
Nov. 21.

PETER JUDGE & SONS, PLAINTIFFS;

AND

THE SHIP *JOHN IRWIN*.

*Shipping—Water supplied for engines and crew—Words "Equipping a Ship"—"Necessaries"—Admiralty Courts Act, 1861, s. 4—Jurisdiction of Court.*

Water supplied to a ship for the use of her engines and crew is not "equipping a ship" within the meaning of s. 4 of the *Admiralty Courts Act, 1861*, which gives the Admiralty jurisdiction over any claim for the building, equipping or repair of any ship if at the time of the institution of the cause the ship or the proceeds thereof are under the arrest of the court.

The scope of the Act is to protect material men who build, equip or repair a ship as a ship, and to extend a limited lien to men who furnish necessaries in foreign ports, the latter term meaning anything necessarily supplied to the ship in the prosecution of her work.

THIS was an action brought by plaintiffs to recover the sum of $171.00 for water supplied to the ship *John Irwin* between December 31st, 1909, and April 26th, 1911, for the use of her engines and crew.

At the time of the institution of the action, the ship or the proceeds thereof were under the arrest of the Court, and plaintiffs' right to recover depended upon the question whether or not the supplying of water under these circumstances was "equipping a ship" within the meaning of s. 4 of the Admiralty Courts Act, 1861, so as to give the Court jurisdiction over the claim.

The cause was tried at Halifax, November 11th, 1911, before the Deputy Local Judge of the Nova Scotia Admiralty District.

Mr. *Bell*, K.C., and Mr. *Terrell* for plaintiffs.

Mr. *Mellish*, K.C., for defendant.

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v.
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Reasons for Judgment.

DRYSDALE, D. L. J. now (November 21st, 1911) delivered judgment.

The short point to be decided here is whether water supplied to a ship for the use of her engines and crew is equipping a ship within the meaning of sec. 4 of the Admiralty Courts Act, 1861, which gives the Admiralty jurisdiction over any claim for the building equipping or repairing of any ship if at the time of the institution of the cause the ship or proceeds thereof are under the arrest of the Court.

This 4th clause of the Act is immediately followed by sec. 5, which gives a lien under certain conditions only for necessaries supplied to any ship.

If the claim in this action is really one for necessaries supplied to the vessel it does not fall within sec. 5, and the claim if it can be considered in this court can only be supported under sec. 4, as coming within the meaning of equipping as mentioned in sec. 4.

I would think the scope of the Act is to protect material men who build, equip or repair a ship as a ship, and to extend a limited lien to men who furnish necessaries in foreign ports, the latter term meaning anything that is necessarily supplied to the ship in the prosecution of her work.

I do not think it can be successfully argued that the money advanced for sailors, or for the sugar or water in their tea, for the successful prosecution of a voyage can be considered equipping a ship as a ship within the meaning of sec. 4. There is a dearth of authority on the subject, but the decision of an American jurist on an American statute providing that vessels running on any navigable waters of the State shall be liable for all debts contracted by the owners in equipping such boats or vessels commends itself to my mind. There it was held that the statute did not mean such articles

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Reasons for Judgment.

as might be daily consumed and constantly replaced, but such as went towards the building, repairing, fitting or equipping of the vessel.

In my opinion sec. 4 contemplates such things as make up the ship as a machine ready for employment, and was not intended to cover expenses and necessaries daily consumed in the prosecution of a venture with the ship. In short that it was obviously intended to cover and protect material men who build, repair and equip a ship as a ship, and does not cover voyage necessaries that form no part of the equipment of the ship as a ship. Water for the engines or water for the crew, which is daily used and consumed, cannot, I think, be fairly construed as coming within the section, and in my opinion the action fails and must be dismissed.

*Judgment accordingly.*

Solicitor for Plaintiff: *J. Terrell.*

Solicitors for Ship: *McInnes, Mellish, Fulton and Kenny.*

NOVA SCOTIA ADMIRALTY DISTRICT.

1911
Dec. 9.

DIE DEUTSCHE AMERIKANISCHE PETROLEUM GESSELSCHAFT, OWNERS OF THE STEAMSHIP *ENERGIE*, ET AL... } PLAINTIFFS;

AND

THE STEAMSHIP *BERWINDMOOR* HER CARGO AND FREIGHT. }

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THE COMMERCIAL CABLE COMPANY, ET AL..... } PLAINTIFFS.

AND

THE STEAMSHIP *BERWINDMOOR* HER CARGO AND FREIGHT..... }

*Salvage—Meritorious Services—Remuneration—Towage—Salvage—Character of ship rendering service.*

The SS. *Berwindmoor* was picked up some 70 miles S. S. E. of Sable Island in a disabled condition, in consequence of having lost her rudder, by the SS. *Energie* on the morning of the 27th November and brought into the port of Halifax. The position in which the ship was found was a dangerous one at that time of year. During the operations heavy weather prevailed for the greater part of the time, in consequence of which the salving ship lost a number of lines, one of her anchor chains and anchor, had her windlass broken, and sustained other damage which necessitated detention and repairs at Halifax. The time consumed in the salving work and in the consequent repairs amounted to eleven and a half days.

*Held*, that the services rendered by the *Energie* were of a meritorious character and that the sum of $12,500 would be a reasonable allowance therefor, to be apportioned $10,500 to the owners of the ship and $2,000 to the officers and crew.

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Statement of Facts.

2. When the *Energie* with the *Berwindmoor* was with in thirteen miles of the mouth of Halifax Harbour, the weather at the time being fine and there being nothing to prevent the *Energie* completing her work without assistance, the SS. *Mackay-Bennett* was taken down by the agent of the owners of the *Berwindmoor*, and, by the directions of the agent, a line was put on board the disabled ship from the *Mackay-Bennett* and that ship assisted in the further work of getting the *Berwindmoor* into port.

*Held*, that, under the circumstances, the services rendered by the *Mackay-Bennett* could only be regarded as in the nature of towage—salvage, but that, having regard to the size, power and equipment of the ship, the ordinary rule in relation to remuneration for towage services should not apply.

THESE two actions claiming compensation for salvage services rendered in bringing the Steamship *Berwindmoor* into the port of Halifax were, by order of the Deputy Local Judge, consolidated and tried together at Halifax on the 6th day of December, 1911.

The facts are fully stated in the opinion of the learned Judge.

*Ritchie*, K.C., and *Robertson*, K.C., for the owners of the *Energie*.

*Mellish*, K.C., for the Commercial Cable Co., owners of the *Mackay-Bennett*.

*Harris*, K.C., and *Henry*, K.C., for the owners of the *Berwindmoor*.

DRYSDALE, D.L.J. now (December 9th, 1911) delivered judgment.

The *Energie* is a German steamer of 2,762 tons gross and 1,726 net, and whilst on a voyage from New York to Königsberg, Germany, laden with a cargo of oil she fell in with SS. *Berwindmoor* about 70 miles SSE. of Sable Island on the morning of Monday the 27th November last. The latter steamer was on a voyage to Philadelphia laden with iron ore, and when sighted by the *Energie* was in a disabled condition, calling for

assistance owing to a broken rudder. After exchanging signals the *Energie* offered her assistance and agreed to tow the *Berwindmoor* to Halifax, N.S.

For the purposes of this trial the values of the respective steamers, their cargo and freight was by agreement of parties fixed as follows:

| | | |
|---|---|---|
| The SS. *Energie* | $ | 102,000 |
| Her cargo | | 50,000 |
| Freight when earned by delivery of cargo at Königsberg | | 21,000 |
| Total | $ | 173,000 |
| The *Berwindmoor* | | 262,500 |
| Her cargo | | 35,296 |
| Freight when earned by delivery of cargo at Philadelphia | | 12,583 |
| Total | $ | 310,379 |

On the morning of Monday, the 27th November, the *Energie* at the request of the *Berwindmoor*, first made lines fast to the bow of the latter ship and attempted to tow her, but owing to the absence of a rudder this method of procedure had to be abandoned, and thereupon the lines from the *Energie* were made fast to the stern of the *Berwindmoor*, the latter using her own steam and being towed by the *Energie*. Two lines were made fast for this operation and the ships started for Halifax about 11 a.m. on the 27th. Progress was made until Tuesday, about 7.20 p.m., when one of the lines parted and thereafter until Wednesday, the 29th, one line only was used. Before this, however, to wit, early in the operation of making fast and starting, the *Energie* had her windlass broken and her bulkhead injured by the strain pulling out an anchor chain to which one line was fast. On Wednesday

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night the remaining line parted, and the boats drifted until Thursday morning when the *Energie* again made fast. Once more they parted the line and again shackled up about 11 a.m. on Thursday the 30th. At this time they were near the entrance to Halifax Harbour (about 13 miles from Chebucto Head) and ready to proceed when the agent of the *Berwindmoor's* owners with the SS. *Mackay-Bennett*, a cable ship, arrived and put a line over the bow of the *Berwindmoor* from the *Mackay-Bennett* and proceeded into Halifax Harbour, the *Mackay-Bennett* towing and the *Energie* steering as before.

The services of the *Energie* were salvage services and meritorious. The obvious danger of being adrift 70 miles off Sable Island at the time of the year needs no comment. The weather, though not particularly rough when the towing commenced, became worse. On the night of the 28th a line was parted, and it was deemed prudent to simply hold the vessel that night by one line without making progress. Rough weather again on the 29th parted the remaining line and lost the *Energie's* anchor chain. By drifting all that night they were about as far from the mouth of Halifax Harbour on Thursday the 30th as they were on Wednesday afternoon, but in a different direction. And with the then prevailing weather conditions I have no doubt, on Thursday, without the aid of a tug or the *Mackay-Bennett*, the *Energie* could have brought the *Berwindmoor* to safe anchorage in Halifax. The only question here is one of amount. The *Energie* was four days either steering or towing the *Berwindmoor*. That is to say, she made fast on Monday morning and started at 11 a.m. They anchored in Halifax Harbour on Thursday about 6.30 p.m. During all this time the *Energie* was rendering effective service—most of

the time steering, sometimes breaking away and again picking her up; or lying by and shackling up as soon as conditions permitted lines to be run. The *Energie* also suffered considerable damage during the operations. She lost one anchor chain, a wire hawser, and several manilla hawsers. The Port Warden has put a value on the chain and hawsers proven to be lost and fixes such loss at about $1,650. I accept this as approximately correct. Besides, the injury to her windlass and bulkhead necessitated repairs in this port to the extent of $1,251.74 The machinists' bills in this connection I am satisfied with as disbursements rendered necessary solely by injuries received in the act of assisting, and not by any fault or default of the *Energie's* officers.

Then the *Energie* was compelled to lay in this port for repairs six and a half days. I do not think she could have been despatched sooner, as I noticed, to expedite matters, the machinists worked on Sunday; and I find she had reasonable despatch. It would take her one day at least to regain her position to resume her voyage to Germany. Thus it will be seen the *Energie* was detained at and by reason of her services eleven and a half days. She had by reason of this deviation to take in extra coal at Halifax that cost $541, besides paying port charges, pilots, tugs, &c., in this port and the services of an agent here amounting to about $800. It will be seen that the owners of the *Energie* have on account of the aid rendered been obliged to disburse $4,242, or thereabouts, besides eleven and a half days delay of their ship and consequent loss with the daily outgo necessary to man and victual such a vessel.

Considering all the circumstances, the nature of the services, the value of the salved property, the danger

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Reasons for Judgment.

that undoubtedly existed at the time that the *Energie* fell in with the *Berwindmoor*, the hazardous undertaking and all the attendant circumstances I am of opinion that the sum of $12,500 is a reasonable allowance to the salvors—$10,500 to the ship and $2,000 to the officers and crew. I will apportion the $2,000 before decree on production of the list of officers and crew.

RE COMMERCIAL CABLE COMPANY'S CLAIM.

The action referred to in the above reasons for judgment and this one were by order consolidated and tried together.

I am of opinion no claim can be made for salvage services on account of the Wednesday trip to the *Berwindmoor* off the mouth of Halifax Harbour.

On Wednesday, the day previous to the day upon which the services claimed for were performed, the *Mackay-Bennett* upon receipt of a wireless message to the effect that the *Berwindmoor* was off the harbour in a disabled condition, went out to her assistance, but finding her in charge of the *Energie* and her services having been declined, returned to port.

When she went out on Thursday it was an assured arrangement that her line would be taken on board the *Berwindmoor* and that she should tow, or assist in towing, the vessel into the harbour. I do not think that at the time the *Mackay-Bennett* was taken out on Thursday by the agent of the owner of the *Berwindmoor* that the latter vessel could be reasonably said to be in danger. She was some thirteen miles off the mouth of the harbour, or that distance from Chebucto Head, in charge of the *Energie*. The weather was fine, and, no doubt owing to the delays on the way caused by the difficulties encountered by the *Energie* and

*Berwindmoor*, the owner was anxious to expedite the arrival. The *Mackay-Bennett* was taken under the circumstances just as a prudent or anxious owner would reasonably take a powerful tug to hasten the arrival. He assured the captain of the *Mackay-Bennett* that his line would be taken and he could tow to Halifax, and went out with that understanding. No agreement was made for the services. It is true the *Mackay-Bennett* assisted a disabled vessel. If it were not for this the services would be mere towage. As it is I think it may be said to be services in the way of towage, salvage. But the remuneration for what was to my mind little more than a certain towing engagement in fine weather is not the subject for any large allowance. Of course I must bear in mind that the *Mackay-Bennett* was a very powerful vessel, equipped as a cable ship with a crew of 83 men, and is not in any sense a tug-boat, and if an owner engages her services, even for towing, owing to her great strength and equipment, no ordinary tug fee scale would or should apply.

I regard the sum of $600 as reasonable compensation for the services rendered, $500 to the owners and $100 to the captain.

*Judgment in both cases accordingly.*

BETWEEN

1912
May 28.

FRUITATIVES, LIMITED. . . . . PLAINTIFF.

and

LA COMPAGNIE PHARMACEUTIQUE DE LACROIX ROUGE, LIMITÉE, . . . . . DEFENDANT.

*Trade-Mark—Infringement—Descriptive word—"Fruitatives" as applied to sale of laxative medicine.*

The word "Fruitatives", considered as the essential feature of a specific trade-mark applied to the sale of a laxative medicine and used on two sides of a four part label with the words "or Fruit Liver Tablets" printed thereunder, is not a mere descriptive word.

*The Bovril Trade-Mark*, (1896) 2 Ch. D. 600 referred to.

The distinction between the Canadian and present English trade-mark laws pointed out. *Re Hudson's Trade-Marks* (L. R. 32 Ch. D. 311); *Smith v. Fair* (14 O. R. 729); and *Provident Chemical Works v. Canadian Chemical Co.* (4 O. L. R. 549) referred to.

THIS was an action for the infringement of a trade-mark.

The facts of the case may be shortly stated as follows:—

1. The Plaintiff is an incorporated company with its head office in Ottawa, Ontario, and manufactures a proprietary medicine known as "Fruitatives".

2. On the 8th day of October, 1903, Amos Rogers, of Ottawa, applied to the Minister of Agriculture for the Dominion of Canada under the provisions of the Trade-Mark and Design Act for the registration of a new and original specific trade-mark to be applied to the sale of a medicine for human use, which had been designed by him and his application being granted, said specific trade-mark was duly registered in the

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FRUITATIVES v. LA COMPAGNIE PHBRMACEUTIQUE DE LA CROIX ROUGE.

Statement of Facts.

Trade Mark Register on the 8th day of October, A.D. 1903, and a certificate under the statute that the same had been so registered, issued to the said Rogers.

The said specific trade-mark consists of a four part label with the use of the word "Fruitatives" as a title, with a sub-title "Fruit Liver Tablets" and the colours and arrangement of certain designs of fruit.

After the incorporation of the plaintiff company, the said specific trade-mark was assigned to it by the said Amos Rogers.

The plaintiff manufactures and sells its said medicine for human use, known as "Fruitatives", prepared in the form of tablets enclosed in a round wooden box covered with a paper label, which box is itself enclosed in a rectangular paper carton covered by the four part label constituting the specific trade-mark hereinbefore referred to.

The said preparation of the plaintiff is well-known and the plaintiff has spent large sums of money in advertising it throughout Canada, and in acquiring a good-will for the business.

It has been the practice of the plaintiff to reproduce the carton covered with the said trade-mark in very many of its advertisements, and retail dealers throughout Canada have been in the habit of making window displays of the said cartons, so that the appearance of the said cartons had become familiar to the people of Canada.

Defendant company placed upon the market a medicine in tablet form similar to the tablets of the plaintiff in appearance, and also enclosed in a round wooden box with paper label similar to that of the plaintiff, it again being also enclosed in a rectangular carton covered with a four part lithographed label of

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Statement of Facts.

which the chief word is "Fruit-i-nol" with the word "Tablets" underneath and a sub-title "Fruit Liver Regulator," the said label being colored like the plaintiffs' label and having fruit designs upon it similar to those upon the plaintiff's label.

May 3rd, 1912,

The case came on for hearing at Ottawa before Mr. Justice Cassels.

*G. F. Henderson, K. C.*, for plaintiff;

*A. Lemieux, K. C.*, for defendant.

CASSELS, J. now (May 28th, 1912,) delivered judgment.

This was an action tried before me in which the plaintiff claims an injunction to restrain the defendants from infringing its trade-mark. It has to be borne in mind that the case of the plaintiff is confined to an action based upon its trade-mark which it claims is infringed. There is no case set up of "passing off".

The distinction between the two classes of cases is set out in *Standard Ideal Co.* v. *Standard Sanitary Mfg. Co.* (1)

This case also deals with the construction of the Canadian Trade-Marks Act (R. S. 1906, c. 71). If the trade-mark of the plaintiff is a valid trade-mark, I have no doubt whatever that the defendants have infringed. The registration by the plaintiff of his trade-mark bears date the 8th October, 1903. Over $300,000 has been spent in advertising, with the result that the plaintiff's sales have been very large. It is very evident from the testimony of Joseph Edmund Dubé, the president of the defendant company, coupled with a view of the defendant's boxes, that he deliberately set to work to try and obtain the benefit of the plaintiff's advertising and business. The remarks of

(1) [1911] A. C. 78.

Bowen, L. J., which are quoted by Burbidge, J. in *Melchers* v. *DeKuyper* (1) are pertinent.

I have considered the authorities cited by counsel and numerous others, and am pleased to have come to the conclusion that the plaintiff is not without remedy. I think the plaintiff's trade-mark is a valid one. It has to be taken in its entirety. In considering the later English authorities, care has to be exercised as the Canadian statute and the English statutes are not the same. The distinction is pointed out in *Smith v. Fair* (2). Also by Sir Charles Moss, C. J., in *Provident Chemical Works v. Canadian Chemical Co.* (3) An interesting case in England is re *Hudson's Trade-Marks* (4) where it was sought to register "Carbolic Acid Soap Powder." The application was a few days prior to the enactment of the Imperial Act of 1883 and was governed by the statute of 1875 (See Cotton, L. J. p. 320). It was held that the label was a good trade-mark under the statute of 1875, although it might not be so under the statute of 1883.

It is argued that the word "Fruitatives" is a mere descriptive word. I do not think so. In the *"Bovril" Trade-Mark* (5) the Court of Appeal upheld the trade-mark. The language of Lopes, L. J., in commenting on the effort of counsel to cut the word "Bovril" in two is pertinent to the present case. He observes (p. 608):—

"It is said that the word "Bovril" indicates that the substance in question was made from beef, for that the first syllable 'bov' relates to the animal from which beef comes—'Bos', 'bovis' and 'ox'. In my judgment you must look at the whole word, and not at part of it. The combination of that part of the word

(1) 6 Ex. C. R. at p. 101.
(2) 14 Ont R. 729.
(3) 4 O. L. R. at p. 549.
(4) L. R. 32 Ch. D. 311.
(5) (1896) 2 Ch. D. 600.

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with the rest of it may be such as to make the word in its totality meaningless and non-descriptive. That is the view I take of the word "Bovril" and I cannot think that, in 1886, when that was placed upon the register, it would have conveyed to the mind of an ordinary Englishman any idea involving any connection with 'bos' or 'bovis' or with 'beef'."

I would also refer to *In re Densham's Trade-Mark* (1).

Counsel for the plaintiff asked to amend by praying that the defendants' trade-mark "Fruit-I-Nol" be expunged from the register. This request I will not grant, but such refusal will be without prejudice to any further proceeding for that purpose if deemed necessary. See the judgment of Swinfen-Eady in *Coleman & Co. Ltd. v. Stephen Smith & Co. Ltd.*, (2) which case, it might be noted, is also instructive upon the point as to the "get up" used with a trade-mark.

The plaintiff is entitled to an injunction in the usual form, and an order that the defendant's cartons be destroyed. Counsel for plaintiffs abandoned at trial any claim for damages. The defendants must pay the plaintiff's cost of action, including the costs of the examination for discovery.

*Judgment accordingly.*

Solicitors for Plaintiff: *McCraken, Henderson, Greene and Herridge.*

Solicitors for Defendant: *A. Lemieux.*

EDITOR'S NOTE.—See the recent English case of Re *Applications of La Société Le Ferment* (28 T. L. R. 490) where the word *Lactobacilline* was allowed to be registered as a trade-mark in connection with a preparation partaking of the nature of sour milk.

(1) (1895) 2 Cd. D. 176.

(2) 27 T. L. R. 533.

IN THE MATTER OF THE PETITION OF THE

BUCYRUS COMPANY of South Milwaukee, in the State of Wisconsin, one of the United States of America, Manufacturers;

1912
June. 19.

AND

IN THE MATTER OF THE

TRADE-MARK "CANADIAN BUCYRUS" as applied to the sale of Steam Shovels and Wrecking Cranes.

*Trade-mark—Geographical name—Secondary meaning—Right to register.*

Over thirty years before petition filed, the petitioners' predecessors in title set up business in the town of Bucyrus in the State of Ohio, as iron founders and manufacturers. Subsequently the petitioners became incorporated in that State under the title of the Bucyrus Shovel and Dredge Company. In 1893 the petitioners took over the business, removed to South Milwaukee, in the State of Wisconsin, and became incorporated under the laws of Wisconsin as the "Bucyrus Steam Shovel and Dredge Company". From that time on they made a specialty of the manufacture of railway wrecking cranes, steam-shovels and railway pile-drivers, and appliances connected therewith. The articles, so manufactured were not protected by patents or trade-marks in the United States, but the word "Bucyrus" was applied to such articles either alone or in some combination, to distinguish the goods, and became well-known to the trade. In 1904 the respondent was appointed sole agent for Canada and Newfoundland for the manufacture and sale of the petitioners' goods, under a written agreement whereby the petitioners undertook to supply the respondents with blue prints, drawings and other sources of information concerning their goods, for the purpose of promoting the sale thereof in Canada and Newfoundland. The agency under said agreement was terminated in 1909. Thereafter the respondent proceeded to manufacture in Canada goods similar to those made by the petitioners with the designation "Canadian Bucyrus' attached to them, and in 1911 caused these words to be registered as a specific trade-mark at Ottawa.

*Held*, that the respondents' trade-mark was bad, and should be expunged from the register.

2. That the word "Bucyrus" had become identified with the goods manufactured by the petitioners and had so acquired a secondary meaning;

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*In re* BUCYRUS TRADE-MARK.

and that the petitioners were entitled to register in Canada the word "Bucyrus," as a specific trade-mark to be applied to the sale of goods manufactured by them.

Reasons for Judgment.

THIS was a petition praying that the entry of a certain specific trade-mark be expunged from the register of trade-marks, and that the petitioners be allowed to register a certain specific trade-mark.

The facts of the case are sufficiently stated in the head-note.

June 6, 1912.

The case came up for trial at Toronto before Mr. Justice Cassels.

*D. L. McCarthy, K.C.*, and *Britton Osler*, for the petitioners.

*J. K. Kerr, K.C.*, and *J. A. Paterson, K.C.*, for the respondents.

At the trial the learned Judge delivered the following oral judgment, directing the respondents' trade-mark to be expunged from the register:—

"I have not the slightest doubt that the respondent's trade-mark has not been properly registered. The evidence before me is that the petitioners have been manufacturing these articles for years, and their product has become known in the trade as that of the Bucyrus Company. The respondents were under an agreement with the Bucyrus Company, had entered into covenants with them, by which they were to have the sole right to manufacture and sell these articles in Canada. The word "Bucyrus" was put on each article, and that went on for years. It became known to the trade, and their product became known as the product of the Bucyrus Company in the States. That being so, how can the respondents come in, and, by prefixing a word, get a valid trade-

1912

*In re* BUCYRUS TRADE-MARK.

Reasons for Judgment.

mark? The result would mean this, that if the petitioners sent their articles into Canada, and called them "Bucyrus," a judge could restrain them from selling under the name under which they had been sold for years. It is not a passing-off case. The defendants are not guilty of any attempt to defraud. Circulars are issued marked "manufactured in Canada," and they are shown to be manufactured by the Canada Foundry Company, and most people would understand that they were manufactured by the Canada Foundry Company. Supposing that they advertised "Canadian Bucyrus," and did not use these particular words, they would simply run the risk of having a suit for passing-off; but they are not bound to use those words. The sole question is whether "Canadian Bucyrus" is capable of being a trade-mark after the word "Bucyrus" has been on the market for years.

I direct that the registration is to be expunged, and the trade-mark cancelled."

The question of the petitioners' right to register the word "Bucyrus" was reserved.

CASSELS, J. now (June 19th, 1912) delivered judgment on the question reserved.

This was a petition filed by the Bucyrus Company of South Milwaukee, asking to have a certain trade-mark consisting of the word "Canadian Bucyrus" registered by the Canada Foundry Company, Limited, expunged from the register of trade-marks. The Bucyrus Company also asked for an order that their trade-mark "Bucyrus," as applied to wrecking cranes, steam-shovels, and railway pile-drivers, together with appliances and devices for use therewith, should be registered.

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*In re* BUCYRUS TRADE-MARK.

Reasons for Judgment.

The case came on for trial before me in Toronto on the 6th June, 1912. At the close of the hearing in Toronto, I gave judgment ordering the trade-mark "Canadian Bucyrus" to be expunged. I gave my reasons for judgment orally at the trial. I reserved for further consideration the question of the right of the "Bucyrus Company" to register the word "Bucyrus" as a trade-mark. Since the trial I have considered the evidence and the various authorities, and I am of the opinion that the Bucyrus Company are entitled to register a specific trade-mark "Bucyrus" as applied to the articles mentioned. I think the word has become identified with the goods of their manufacture and has acquired a secondary meaning.

In a case lately decided by me, of the *Fruitatives, Limited* v. *La Compagnie Pharmaceutique de la Croix Rouge* (1). I had occasion to point out the care that had to be exercised in considering the English authorities. I do not wish to repeat what I there stated. It appears that "Bucyrus" is a small town in the State of Ohio, where the petitioners' predecessors in title originally started their business. Some years ago they moved to Milwaukee. The Canada Foundry Company rely upon the decision of the Privy Council, in the case of the *Grand Hotel Company* v. *Wilson*, (2) and contend that "Bucyrus" being a geographical name is not capable of registration as a valid trade-mark. This case, however, was not finally disposed of on the ground that the name was a geographical name. It was a case tried before the learned Chancellor of Ontario, who gave judgment for the plaintiffs.(3) This judgment was reversed by the Court of Appeal, Moss, C. J., dissenting and agreeing

(1) Reported *ante* p. 30. (2) (1904) A.C. 103.
(3) 2 O.L.R. 322.

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with the judgment of the Chancellor.(1) An appeal was taken to the Privy Council, and judgment was delivered affirming the Court of Appeal. It is necessary to consider the judgment. The judgment of their lordships was delivered by Lord Davey. He points out that the first fact to be noted is that the goods in question are not a manufactured article, or, in other words, the name which it is sought to protect is not the name for the appellants' make of goods, but, to put it most favourably for the appellants, designates water from particular springs belonging to them. The waters derive their virtues from the strata from which they spring, or through which they pass, before they reach the surface—that is to say, from the inherent properties of the soil itself in that particular locality.

Further on he states: "It is quite true that the same trade name may designate the goods of more than one person, but it is less easy to infer that a geographical description has acquired a secondary meaning when you find that it is used to designate the goods of two or more persons connected only by identity of geographical origin." (2)

In commenting upon the Stone Ale case (*Montgomery* v. *Thompson*, (3) His Lordship uses the following language: "Their Lordships are therefore of opinion that the appellants have not a right to the exclusive use which they claim of the word 'Caledonia' in connection with their waters. The Stone Ale case does not appear to them to have any bearing on the present case. That was a case of a manufactured article, etc."

(1) 5 O.L.R. 141.

(2) (1904) A.C. 110, 111.

(3) (1891) A.C. 217.

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I order that the petitioners be at liberty to register the word "Bucyrus" as a specific trade-mark to be applied to the articles mentioned.

I direct that the Canada Foundry Company, Limited, pay the costs of the petition and of these proceedings.

*Judgment accordingly.*

Solicitors for the Petitioners: *McCarthy, Osler, Hoskin & Harcourt.*

Solicitors for the Respondents: *Kerr, Davidson, Paterson & McFarlane.*

IN THE MATTER of the Petition of Right of

SARAH ANN CHARLTON.....SUPPLIANT; 1912 June 10.

AND

HIS MAJESTY THE KING.....RESPONDENT.

*Negligence—Government Railway—Injury to passenger—The Exchequer Court Act, R. S. 1906, c. 140, sec. 20—9-10 Edw. VII, c. 19—Weight of evidence.*

The acts of negligence contemplated by sec. 20 of *The Exchequer Court Act*, as amended by 9-10 Edw. VII, c. 19, are such as constitute the proximate or decisive cause of any accident in respect of which relief by way of damages is sought against the Crown.

2. *Held*, following *Lefeunteum* v. *Beaudoin* (28 S. C. R. 89), that in estimating the value of evidence a witness who testifies to an affirmative is to be credited in preference to one who testifies to a negative, because he who testifies to a negative may have forgotten a thing that did happen, but it is not possible to remember a thing that never existed.

PETITION OF RIGHT for damages alleged to have arisen out of the negligence of the Crown servants on the Intercolonial Railway of Canada.

The facts are stated in the reasons for judgment.

May 22nd, 1912.

The case was heard at St. John, N.B.

*L. A. Currey, K.C.*, and *E. T. C. Knowles*, for the suppliant; *E. H. McAlpine, K.C.*, for the defendant.

*Mr. Currey* contended that there was negligence established against the servants of the Crown, first, because while they advertised that the train would stop at Fernhill Cemetry Crossing, they had no proper accommodation there for the alighting of passengers; secondly, because they issued a ticket to the suppliant for a station beyond the place where they undertook

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to stop; thirdly, because they did not announce the arrival of the train at the crossing, nor give the suppliant an opportunity of alighting there; and, fourthly, because the confusion brought about by this state of affairs caused the suppliant to attempt to alight when she did. He cited *Ryan* v. *The King*, (1), *Robson* v. *Northeastern Ry. Co.* (2), *Keith* v. *Ottawa & New York Ry. Co.* (3).

Mr. *Knowles* followed for the suppliant.

Mr. *McAlpine* contended that the proximate cause of the accident was the negligent act of the suppliant in placing herself on the step of the car from which she was thrown by the motion of the train. Had she not been there she would not have been injured.

AUDETTE, J. now (June 10th, 1912) delivered judgment.

This is a petition of right brought by the suppliant to recover the sum of $10,000 for bodily injury, alleged to have been sustained by her through the negligence of the officers and servants of the Crown, by being violently thrown from the steps of the platform of a car, while travelling on a train of the Intercolonial Railway, a public work of Canada.

The Crown, by its pleas, denies the facts as alleged in the said petition of right and says, *inter alia*, that if the suppliant suffered any bodily injuries, they were caused by her negligent and improper conduct.

The suppliant, who is at present a widow of 61 years of age, acting on a "reading" notice (as distinguished from a "displaying" notice as mentioned by witness Jordan) which appeared in the local papers, to the effect that on Saturdays, suburban trains

(1) 11 Ex. C. R. 267. (2) L. R. 2 Q. B. D. 85.
(3) 2 Can. Ry. Cas. 26.

leaving St. John at 1.15 would stop at Fernhill Cemetery, and that returning trains would also stop *at the crossing*, proposed to a Miss Mabel Babington, then 15 years of age, to take her to Fernhill Cemetery. Her invitation being accepted they both started, on the 13th August, 1910, and went to the union station where Miss Babington, applying to the ticket office, asked the agent for two tickets to Fernhill Cemetery, and having paid for the same was given two tickets which, sometime after the accident were discovered by them to read from St. John to Coldbrook. Fernhill Cemetery is a mile and a half, and Coldbrook three miles, from St. John.

The Intercolonial Railway has not and does not issue tickets to Fernhill Cemetery. The ticket agent, F. E. Hannington, says there is no station at Fernhill Cemetery, it is only a crossing and the suburban trains stop there only on Saturdays for the convenience of and to oblige passengers. He further contends that when a purchaser asks for a ticket to Fernhill Cemetery he gives him a ticket to Coldbrook, telling him to ask the conductor to stop at Cemetery Crossing. On that point the suppliant says that the person selling the tickets at the station made no remarks, while Miss Babington says she asked him if the train stopped at Fernhill Cemetery, and the agent said yes, but did not say anything about asking or letting the conductor know.

After purchasing their tickets they both boarded the train leaving at 13.15 o'clock Miss Babington says they did not get on the rear car, there were three or four cars behind them. It was an excursion, the train was crowded, and two young men gave them their seat, while they (the young men) sat on the arm of the seat. They did not see the conductor on

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the train. No one came to take up their tickets, and they did not hear the conductor or brakesmen announcing Fernhill Cemetery, their destination.

On this question of announcing Cemetery Crossing on the train, the evidence is somewhat conflicting. Mrs. Worden says she did not notice any official announcing it. Mrs. Kelley says she does not remember if the officials did announce; and Mrs. Corbet says none of the officials announced. Brakesman Berryman says that when they left St. John, at the request of the conductor, he started collecting tickets at the rear of the train, and when they arrived at Cemetery Crossing he had got as far as half the second car from the rear, and that he had announced Cemetery Crossing in these two cars. Brakesman Cobham on leaving St. John stayed in the head car, near the engine, until they reached the switch, 1¼ miles from St. John. On arriving there he opened the switch, left the train pass, closed the switch and boarded the train at the far end of the last car and walked back to the front announcing Cemetery Crossing in al the cars.

Taking the rule of evidence to be that affirmative evidence must prevail over negative evidence, it should be found that Cemetery Crossing was announced, although, in the view this court takes of the case, it does not matter here—the accident did not occur because Cemetery Crossing had not been announced—but indeed, because of the last act before the accident, the reckless position assumed by the suppliant on a moving train. Under the evidence of the crew, it must be found the station had been announced. Without casting upon them any discredit, one must realize it is the evidence of interested witnesses, whose interest is closely identified with

that of the Crown, in fact in a larger degree because they may think their employment at stake. However, in estimating the value of evidence one must not lose sight of the rule of presumption that ordinarily a witness who testifies to an affirmative is to be credited in preference to one who testifies to a negative, *magis creditur duobus testibus affirmantibus quam mille negantibus*, because he who testifies to a negative may have forgotten a thing that did happen, but it is not possible to remember a thing that never existed (*Lefeunteum* v. *Beaudoin*, (1).

However, while the suppliant and Miss Babington were sitting quietly in their seat, one of the young men said it was Fernhill Cemetery. The train had then come to a stop, says the suppliant, and they both (herself and Miss Babington) walked from about the centre of the car toward the rear to get off.

Before they reached the rear of the car, the train was moving—it had started. Miss Babington jumped off and the suppliant sat on the last step, and said to Miss Babington who was opposite her, she would not jump. Then Miss Babington jumped back on the train, on the step of the adjoining car. The suppliant was asked by the court, if she were then holding the railings, and she said she did not remember whether she did or not, but she said *she was sitting on the last step*. She contends the train then gave a jerk and she was thrown off. Miss Babington says the train stopped before the suppliant fell, but she must be in error. After her fall the train was stopped. Some of the officials came to her, and she was cared for and left in charge of Miss Babington.

She says she fell at the place where she would have alighted, and at that time the train was moving a

(1) 28 S. C. R. 89.

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little, just as fast as she would walk. She says she fell when Miss Babington was back on the train, on the step of the adjoining car.

There is no platform, no contrivance for alighting at Cemetery Crossing; and L. R. Ross, the terminal agent of the Intercolonial Railway at St. John, says that the space between the last step of the cars and the ground at that place is 18 inches—varying between 18 and 22 inches. On this question of convenience for alighting, we have the evidence of three lady passengers,—one of them a pretty old person and another a matured and rather heavy person. Mrs. Worden says she had no trouble *or bother* getting out. Mrs. Corbet says she had no difficulty in alighting or getting back on the train,—they stepped on the ground. Mrs. Kelly says she got off the train without trouble,—it was as flat as the floor and it was not a long step getting off.

With respect to the time the train stopped at Cemetery Crossing, we have profuse evidence. A. C. L. Tapley, a newspaper reporter, who was on board, says the train made an ordinary stop the first time when he saw some ladies getting off. Mrs. Worden says the train stopped long enough to get off, she had ample time to get off. Five of us got off,—five ladies. She had not risen from her seat before the train stopped and had ample time to get off. Mrs. Corbet says she had ample time to get off. Mrs. Kelly says the train stopped long enough for any person who had her mind made up to get off. There was lots of time, ample time to get off,—time enough to get off for any person who had her mind made up to get off. She had no trouble either going or coming, although she had never been there by train before.

Brakesman Berryman says the train stopped a reasonable time, long enough at that place. Everything was done in the usual way. George W. Speer, the engine driver, says the train stopped at Cemetery Crossing the usual time,—possibly a minute—suppose the train stopped one minute the first time, ample time for passengers to get off.

Brakesman Cobham says the train stopped long enough to allow passengers to get off, two or three minutes (he does not seem to have a good idea of time). He helped three passengers off the train. After all the passengers were off he asked Brakesman Berryman if all was well behind, and on the latter announcing all right he,—the conductor being inside collecting tickets,—gave the order to go ahead. Berryman corroborates him on that point, and adds that he did not see anyone appearing on the platform or any one coming off. The conductor says before leaving he had been asked to stop at Cemetery Crossing and had given the order to stop.

Now, how and when did the suppliant fall? The suppliant herself says she fell only after Miss Babington had jumped back on to the train,—when she was still sitting on the last step. Witness Tapley, the reporter, already referred to, says that while he was standing with another reporter on the front platform of his car, he looked over the side and saw the suppliant falling off. At that time the train was practically in motion,—it had stopped and started again, and the train was in motion before she fell. Asked if the suppliant had jumped, he says he thinks, he imagines she had fallen, he saw her come head foremost.

The engine-driver, a man of 21 years experience who gave his evidence in a most quiet and creditable manner, says he had no sooner started after receiving the

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signal to do so, when he looked back and saw a young girl on the bank—she jumped on the train, and *right off* after the suppliant fell, when he immediately applied the emergency brakes on account of what he had seen. When he applied the emergency brakes the train had gone on about half the length of a car, and one could walk as fast as the train was then going, The suppliant fell and came off all in a heap. Brakeman Berryman says the train was barely moving when the emergency brakes were applied.

The last and only question to be now answered is, what was the proximate, the determining, the decisive cause of the accident?

It is now beyond doubt and established by the evidence that the suppliant got on the platform of the car and took her seat on the last step thereof while the train was in motion, and that she fell when it was in motion, almost immediately as young Miss Babington jumped back on to the steps of the adjoining car, as above stated. Miss Babington must be mistaken and in error when she says the train gave a jerk and the suppliant fell, as the overwhelmning weight of the evidence is the other way. If there was a jerk when the train left, that must have happened much before Miss Babington jumped back and therefore before the suppliant fell. The emergency brakes were only applied after the accident, when the engine-driver saw the suppliant fall. There must have been a jerk when the emergency brakes were applied, but that was after the accident. How then did the accident happen, how can it be explained?

The suppliant had certainly taken a most dangerous position when she went down and sat on the very last step with her feet hanging over and not far from the ground—a most dangerous and reckless position;

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indeed—at the sight of which a witness in the case, Mrs. Kelly, was perfectly horrified, and she told her companions, "look at that woman, she might be killed",—she turned her head away and said she did not want to see her fall off. There was no justification, under the circumstances, to take the position the suppliant took. If by inadvertence she let her destination go by, she could either get off at the next station, or call the attention of the conductor and ask him to stop the train and take her back, if possible, to Cemetery Crossing—but not do what she did.

The ordinary cautious and prudent persons had no difficulty in getting off and contend they were given ample time to do so. Should the railway authorities provide for extremely incautious, reckless and imprudent people? Here is a passenger, the suppliant in this case, going through the feat of sitting down on the last step of a car with her feet hanging almost to the ground while the train is moving,—a feat an ordinary train man with experience would hesitate to attempt, and one no passenger with any common sense would dare try.

Under all the circumstances, as brought out from the evidence, it would appear to the court that when young Miss Babington jumped back on the train the suppliant must have endeavoured to right herself,—to get on her feet and in doing so necessarily and obviously did place a foot on her skirts on the step, and in making the effort to get up, lost her balance and fell, as described, all in a heap, head foremost.

The Court must therefore find that the proximate, decisive and preponderant cause of the accident was the fact of the suppliant, on a moving train, assuming the reckless position she did. Much stress has been laid by suppliant's counsel on the case of *Ryan* v. *The*

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*King* (1), but on perusal of the case, the Court arrives at the conclusion that it does not apply to the present case. The suppliant here did not alight from a moving train. She fell off. She so fell not in the act of endeavouring to alight, because she absolutely refused to attempt to alight under the circumstances. Ample time was given to the suppliant to alight as established by the evidence. The Cemetery Crossing through inadvertence was let go by, and an endeavour or rush to alight was made too late and abandoned.

Instructive comments on the question of proximate cause of an accident will be found at page 154 in "Schuster's German Civil Law, 1907, reading as follows:

"149. Under English law the plaintiff's contribu-
"tory default affects the defendant's liability in the
"case of claims for damage done by unlawful acts;
"under the rules of the present German law the liability
"created by a contract or other act-in-the-law is
"affected in the same way by the contributory default
"of the other party as the liability for an unlawful
"act. Under German as well as under English law,
"the proof of the plaintiff's own default is revelant
"only for the purpose of showing that the defendant's
"default was not the 'decisive' or 'preponderant'
"(vorwiegend) cause of the damaging event, but while
"under English law the fact that the defendant's
"default was not the decisive cause deprives the plain-
"tiff of his entire claim to compensation (except in
"cases coming under Admiralty law) German law leaves
"it to judicial discretion to determine whether the
"defendant's liability to make compensation is en-
"tirely destroyed or merely reduced by contributory
"default on the part of the plaintiff,—B. G. B. 254

(1) 11 Ex. C. R. 267.

"(The expression 'decisive', which is used by Sir F. "Pollock (See Law of Torts, 7th edition p. 455) is "clearer than the expression 'proximate' generally "used in the English authorities.)"

The suppliant, under the circumstances of this case, is barred from recovering under the Roman rule of law respecting contributory negligence, which says that *Quod quis ex culpa sua damnum sentit, non intelligitur damnum sentire.* The suppliant's counsel contended there was negligence on behalf of the Crown because of the following reasons:

1. Because after advertising excursion to Cemetery Crossing the Intercolonial Railway authorities did not issue tickets reading for that place.

2. Because the conductor did not take up all the tickets before making his stop at Cemetery Crossing, after it had been advertised and the ticket agent stating they would stop.

3. Failing to announce the stop to the passengers.

4. For not stopping the train long enough to allow the passengers to alight.

5. For not having any platform, step or other contrivance at the Crossing, after advertising the train would stop there.

With respect to the three first counts, the Court must find they had nothing to do with the proximate cause of the accident. With respect to the second count, under the evidence, it must be obviously found the train was announced, although again it had nothing to do with the determining cause of the accident. With respect to the fourth count the court must find under the evidence there was ample time to get off. And with respect to the fifth count, again it had nothing to do with the determining cause of the accident.

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The acts of negligence contemplated by sec. 20 of *The Exchequer Court Act*, as amended by 9-10 Ed. VII Ch., 19, are only such as would be the proximate, determining and decisive cause of the accident.

There will be judgment that the suppliant is not entitled to any portion of the relief sought by the petition of right.

*Judgment accordingly.*

Solicitor for suppliant: *E. T. Knowles.*

Solicitor for respondant: *E. H. McAlpine.*

IN THE MATTER OF

THE FOSS LUMBER COMPANY,....CLAIMANTS; 1912 JUNE 1.

AND

HIS MAJESTY THE KING.....RESPONDENT.

*Customs law—Tariff item 504—Interpretation—Lumber sawn and faced—"Further manufactured."*

Tariff item 504 of 6-7 Edw. VII, c. 11 provides for the free entry into Canada of "planks, boards and other timber and lumber of wood, sawn, split or cut, and dressed on one side only, but not further manufactured".

*Held*, that lumber which, having been sawn and faced on one side, was afterwards sized by being put through machinery other than that by which the original sawing and facing were done, had been "further manufactured" within the meaning of the above item, and was not entitled to free entry.

THIS was a reference by the Minister of Customs of a claim for the refund of Customs duty paid, under protest, upon the importation of a carload of lumber from the United States into the City of Winnipeg.

The claim was referred to the Court under the provisions of *The Exchequer Court Act*, R.S., 1906, c. 140, s. 38. The amount of the duty paid was $77.00; the case involving an interpretation of tariff item No. 504 of Schedule A of 6-7 Edw. VII, c. 11.

June 1st 1912.

The case came on for hearing before Mr. Justice Cassels at Ottawa.

*W. D. Hogg, K.C.*, for the claimants;

*J. Travers Lewis, K.C.*, for the respondent.

*E. Lafleur, K.C., and G. H. Cowan, K.C.*, were heard (by leave of the court) on behalf of the British Columbia Lumber Company.

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Argument of Counsel.

Mr. *Hogg*:—The controversy, as your lordship will observe, is over a comparatively small amount, but the question involved is one of considerable importance affecting the importation of lumber into this country generally—and therefore becomes a large question. Now the lumber which was brought into this country, and samples of which we have here, I think upon the evidence is clearly planks or boards. The tariff item which we say applies is free item 504—"Planks or boards of wood sawn and dressed on one side, but not further manufactured".

I think it is beyond any question now, on the evidence of nine witnesses, that these planks or boards are sawn on three surfaces and dressed on one surface. That is unanimously proved by all the witnesses. Then, if that is the case, I submit to your lordship, as a proposition that the form in which the lumber is imported is the discriminating test for duty. This is supported by the case of *The Queen* v. *The J. C. Ayer Co.*, (1). That involved medicinal preparations, and what is decided there is that the form in which the materials were imported constitutes the discriminating test for the duty.

When the article is produced to the Collector of Customs its form is the discriminating test of whether it is dutiable or not. Following that up, your lordship will see that, while the Court here may get evidence from a number of people to say that something else was done, and that it was sawed five or six different times in the country of production, the test of the Customs Department must be, does the article when it is shown to the Collector come within the four corners of item 504 or not? I submit the Act must not only be applied uniformly, but also reasonably, in

(1) 1 Ex. C. R. 232.

the administration of the Department. Just think for a moment what would happen if the Collector of Customs had to hold an investigation like your lordship is holding here to-day—if he had to ascertain what was done to these particular things in the country of production—how could the Department be administered at all? In *Magann* v. *The Queen* (1) the question was with respect to certain oak lumber which had been offered at the Customs sawed into specific lengths, and apparently intended for a specific purpose. The argument there was, and one which prevailed, that it would be absolutely ridiculous if the Customs officer were obliged to consider the uses to which the lumber might be put, to enable him to decide if it were dutiable or not. To apply that test would be productive of such uncertainty that the Customs would never know when duty was applicable or not.

If the use to which the lumber is to be put is no test, then the condition of the article itself as produced to the customs for entry should be the discriminating test, and if the particular article fits the section of the statute, then it comes under that specific item of the tariff and no other.

What has happened here? Does the lumber as it is produced to this Court show any evidence of further manufacture than what we have had in evidence? Sawn on three surfaces and dressed on one side. Does it show anything further? The evidence shows that there was no further manufacture.

Let us go back to the sawmill and planing mill. What is attempted here is to show that because these planks have been sawn to a uniform width, and may be used for certain purposes even as they stand, therefore there is further manufacture. Supposing it is made

(1) 2 Ex. C. R. 64.

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so that it will fit railway cars, does the article show any further manufacture? What is there in the statute about one sawing or two sawings, or three sawings? One can easily understand that lumber coming from the rough saw of the mill, might be irregular, and for the purposes of commerce, for the purposes of saving weight in freight, it may go through several processes.

Supposing there were 100,000 feet of 12x12 in a yard, all dressed on two sides, if you like, in the United States, and that was sawed up in three or four different ways, for the purposes of fulfilling some requirements of this country—supposing that were the case,—what difference would it make so long as the article when it was produced at the customs, or produced here, showed that it was "sawn" only?

And with respect to the next item of the tariff, I submit that item 505 would not apply to this case, because that plainly contemplates some additional manufacture.

Now, I would submit, following out my theory, that the further manufacture which your lordship must find upon this lumber, and which the Customs must find upon this lumber, must be something other than sawing on three surfaces and dressed on one side.

[THE COURT:—Your whole point seemingly is this, that under this section which we are dealing with, the planks may be sawn as often as they like as long as they come into this country as planks?]

The statute says nothing about one sawing, or two sawings, or fourteen sawings. Having gone through all of these processes for the purpose of making it a merchantable commodity for the purpose of saving waste in freight, or for any other good commercial purpose, it does not matter whether it is sawn by hand or sawn by machinery—so long as it is "sawn" it is free in the tariff.

"Laws imposing duties on importations of goods are "intended for practical use and application by men "engaged in commerce, and hence it has become a "settled rule of interpretation of Customs statutes to "construe the language adopted by the legislature, and "particularly in the denomination of articles, according "to the commercial understanding at the time".
"*Elmes, Law of Customs*". (1)

That seems to me to be a perfectly reasonable proposition, and one which should be applied in all cases, if we are to have anything like uniformity of duties upon articles imported into this country.

Then, further, is there any ambiguity at all about the item in question? I think it a plain item—and if you are to ingraft something upon it, that is, to look at something which was done in the country of production other than what we see, then we are getting away from the plain words of the tariff. If there is any ambiguity in respect to it, then it seems to me there is a very proper statement of the law which should apply, at page 26 of *Elmes*, as follows "In cases of "serious ambiguity in the language of an Act, or in "cases of doubtful classification of articles, the con- "struction should be in favor of the importer, for duties "or taxes are never imposed on the citizen upon vague "or doubtful interpretation".

Now, *The Customs Act*, as your lordship will observe, (sub-section 2 of section 2) lays down a general rule, as to the interpretation of the *Customs Act*, and any other law which bears upon the Customs.

"All the expressions of this Act, or of any law relating "to the *Customs*, shall receive such fair and liberal "construction and interpretation as will best ensure "the protection of the revenue and the attainment of

(1) P. 22, sec. 49.

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"the purposes for which this Act or such law was made, "according to its true intent, meaning and spirit".

I do not think that this means anything more than Sir William Ritchie, C. J., said in *The Queen* v. *The J. C. Ayer Co.* (1) and I would submit that it is the proper interpretation. He says: "No doubt revenue laws are "to be construed as will most effectually accomplish "the intention of the legislature in passing them, which "simply is to secure the collection of the revenue. "But it is clear that the intention of the legislature, in "the imposition of duties, must be clearly expressed, "and, in cases of doubtful interpretation, the construc- "tion should be in favour of the importer."

Mr. *Lafleur*: I thank the court for the favour shown the British Columbia Lumber Company, by allowing them to intervene, and put their side before the court. The interest of the lumber people in this case far transcends the amount involved in it. This was brought as a test case, to determine a question of great importance which has been in abeyance for the last few months.

In respect to the question as to how the Collector proceeded, and how he came to make this lumber dutiable, I may say that the provisions of this statute have been in force since 1894; and there never has been any question about these articles being dutiable, because the device which has been invented has only been used about 18 months, and it is only recently this question has arisen. Before that, no attempt was made to avoid paying the duty—by means of sizing the lumber by this small buzz saw,—which was originally and cheaply done, by what the witnesses have called, the side-head or planer.

(1) 2 Ex. C. R. 232.

[Mr. *Hogg*.—Sawed sized lumber could be bought for many years].

No, I am informed not. It is the invention of a recent date, and that is how the case has arisen now. At any rate, your lordship is asked to settle that controversy whenever it began.

I am not quite able to appreciate the proposition which was laid down at the outset by counsel for claimants in his argument, and that is, that you must take the article in the condition in which it apparently is, in order to ascertain whether it is dutiable or not. Surely that is not the test? That may be the test to the Collector, for want of better knowledge. He may not have at hand the materials to enable him to ascertain what in reality is dutiable or not. Surely the proper test is, how many processes has the thing gone through before it is imported into this country? It is that fact which decides whether or not that article is dutiable; not its external appearance to the view of the Collector.

By section 43 of *The Customs Act*, it is enacted as follows:

"The Dominion Customs Appraisers and every one "of them and every person who acts as such appraiser "or the Collector of Customs, as the case may be, shall, "by all reasonable ways and means in his or their "power, ascertain, estimate and appraise the true and "fair market value (any invoice or affidavit thereto to "the contrary notwithstanding) of the goods at the "time of exportation and in the principal markets of "the country whence the same have been imported "into Canada, and the proper weights, measures or "other quantities, and the fair market value thereof, "as the case requires".

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I would like to make this observation, that it is now conceded on all hands by witnesses and counsel, that the sizing, if that be a further manufacture, is not and was not done in the sawmill. That is not the process which it goes through in any sawmill. That is conceded—my learned friend's admission covers that.

[THE COURT.—It might be done in another sawmill or adjacent building?]

It is a different piece of machinery that does it.

[THE COURT.—It is different from the sawmill?]

Yes, I address myself to the difficulty which exists in this case. Does the sawing, that is meant in item 504 of Schedule "A" of the Customs tariff, mean an original sawing, or any repeated number of sawings? Because the proposition that is laid down by my learned friend, Mr. Hogg, amounts to this, that you can take a sawn plank and then subject it to any quantity of further sawings, and the only restriction is that you cannot dress it on more than one side. You can, he says, do any quantity of manufacturing, by way of sawing, to that product; and you can do it not only with one kind of saw but with any number of different kinds of saws. Where will you stop?

Mr. *Lewis*.—I would point out at the outset, that these items in the tariff have been in use, and have been administered without difficulty for the past 18 years. A couple of years ago, in 1909, this type of wood was brought in, resulting in a controversy, which again has resulted in this test case. The items of the tariff have not been, by amendment or otherwise, interfered with for 18 years and upwards, and no attempt was made to evade or avoid the duty until the year 1909. Now the Crown, whom I represent, supports the action of the Department; and on the threshold it should be borne in mind that there has been a

decision by the officers of the Customs, under the sections of *The Customs Act*, imposing the duty—and with the result, that when you turn to section 264 of *The Customs Act*, the burden of proof is upon the suppliant—but even more, it is to be assumed under section 264 that the decision of the Customs is right. Not only *primâ facie* right, but the whole burden of proving to a demonstration before your lordship that this lumber is entitled to free entry is on the suppliants.

It was suggested, at the close of the suppliant's case, that I should move for a non-suit; but as it was desired to get all the evidence in before your lordship, that course was not taken. None the less I maintain that, when the suppliant's case closed, the suppliant had not made a case for bringing those exhibits within the free list under section 504. In that view, I would also quote from *Elmes on Customs Laws* (1). You will there find the same thing, in a suit of this nature, against a Collector of Customs, that the burden of proof is on the plaintiff holding the affirmative. That onus, I maintain, has not been discharged here. Primarily, only rough lumber, as it comes from the sawmill is to be free. We all understand what lumber from the sawmill is and means. It is a finished product itself when it leaves the sawmill. It has there to be treated on two sides and two edges, and treated with saws. It is a finished product, when it leaves the sawmill as planks and boards. The only further manufacture, designed or permitted by item 504, was the dressing of it on one side, and on one side only. That process has been stated in the evidence to be for two purposes; one, possibly, that the consumer got that much benefit from the smoothing of one surface, although it is stated that the consumer

(1) Sec. 744

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would much rather have the thicker plank than the surfaced plank; but, secondly, the real reason seems to be that this surfacing is done at the instance of the manufacturer, who desires to dress one side to reduce weight, because all freight charges are payable by weight and not by bulk, and it greatly lessens the freight charges by dressing the mill planks on one side. That is the only form of manufacture that is permissible. Section 504 of the tariff, on its face, was plainly intended to apply to unfinished products—unfinished so far as the market for sized dimension stuff is concerned, unless the consumer desired to buy rough lumber from a mill. But for any designated process, such as studding or joisting, it was never conceived for a moment that the product, coming from the United States, should be there manufactured for any specific purpose for which a sawmill did not complete it with its ordinary equipment.

Your lordship made an observation during the course of my learned friend's remarks, that in putting the product through the planer, the sizing was done. True this was not done with the little planer, what is called the side-head, but in this case with a saw, yet it is contended it was done during or in course of the same operation. The saw, being no part of the planer, is specially put on at the far end of the planer for the purpose of sizing up the lumber in question. The truth and fact is that what the statute contemplated was that the manufacturer should manufacture the rough lumber in the mill, and then, to smooth it, put it through a well known operation—a surfacer was mentioned in the evidence. It meant that it went through a planing machine, with upper rolls which held it down in place, and planed one surface of it only. There is none of the other devices in the surfacer for making

it uniform in width. But the American manufacturer has taken advantage of this country, in going further and discarding the use of the surfacer, and treating this lumber in a complicated planer, which not only surfaces it, but trims the edges and brings the rough lumber to dimension stuff, such as joists and studding.

We say, therefore, that the suppliant is doing two dutiable things straightening the edge, and reducing the plank to a standard size, in the factory, as distinguished from the sawmill.

If we look at the item of the statute itself, 504, the first observation I wish to make is that, in construing the statute, the ordinary canon of construction is to be observed, that full value and some meaning must be given to all the words.

[THE COURT.—What is the construction of item 503?]

That merely deals with rough lumber from the mill. A further concession was made to the manufacturers by allowing them to dress it on one side, and that is found in item 504. Item 503 is with respect to planks not further manufactured than sawn or split—that is free. When you come to the question of manufacture, item 504 is the first concession to the manufacturer, enabling him to put it through the surfacer and dress it on one side, but not to further manufacture it. Their value, and full meaning, ought to be given to those words *"but not further manufactured."*

The plank was a plank, and a finished plank, when it left the sawmill. They were entitled to dress it on one side. If Mr. *Hogg's* contention is correct, that he can saw it *ad libitum* after that, then you could make anything out of it. You can put it through a lathe and make newel posts, stair rails, or balusters out of it—and there is nothing left for the operation of those words, "but not further manufactured",—and you

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ignore and reject the concluding words of item 504, which under the ordinary canons of construction is not permissible.

[THE COURT.—What Mr. *Hogg* says there, is that they are not limited to ordinary deals or planks, but that they can cut them down to any size they like after the first sawing?]

This case is to be determined by the exhibits and the evidence touching them—and I have not conceived it my duty to consider the re-sawing of larger planks into smaller ones, but rather to take the evidence as we have it with regard to these particular shipments. Further considerations may come up in future cases.

Our plain contention is that this wood, as it was offered in Winnipeg for free entry, was ordered originally as sized lumber. It comes into Winnipeg as sized lumber, —and the argument of my learned friend, Mr. *Hogg*, is that the Collector of Customs can only determine whether that is properly entered by a view of the lumber as it is.

I do not want it to appear that there is any difficulty in administering the law, because the Customs authorities have as much power as a court in ascertaining the facts.

Lastly, I want to point out, as to this particular shipment, since the lumber left the mill as a finished product, there has been a change in its form. There has been an obvious change in the uses it can be put to, as finished studding or joists,—and when we find these changes have taken place, there has clearly been a further manufacture since it left the sawmill, beyond the dressing on one side which is alone permissible by the statute.

Mr. *Hogg*, in reply.—What is the point about the sizing? They say it must be the sawing of the saw-

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mill. Where is there anything in the tariff which says that the sawing must be the sawing of the sawmill?

Now, as a matter of fact, in order to dress the lumber, it has to be taken to another place and put through another process. In doing that what more do they make of it than planks? They smoothe one side and they still continue it a plank; and they cut it to a uniform size and width by what? By a saw—and therefore the sawing is sawing, no matter whether it is done with one kind of a saw or another kind of a saw.

My learned friend, Mr. *Lewis*, says that item 503 applies to the rough planks. I have no doubt it does. It is the rough plank, and you have the rough plank dealt with. It is the rough plank as it comes out of the mill. If we have a section which deals with the rough plank, then we have exhausted the tariff as to rough lumber coming from the mill. Then we come to another class of planks that are allowed to be dressed on one side—and I would like my learned friends to point out where there is anything in that which would prevent the planks from being reduced to a particular size, even if it is for a particular purpose.

I quite agree that you must dress it on one side, but, is there anything in 504 which prevents it being reduced to a uniform width by a saw?

And then as to the argument of my learned friend Mr. *Lewis*, that this operation which is called the sizing, has only been in operation for a short time, I don't know that there is any evidence of that sort. I understand that lumber of this kind, dressed on one side, has been imported for the last 15 years—dressed on one side and reduced to a size, that is, the edge taken off it and made to a uniform width.

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I agree that under section 264 of the Customs Act the burden of proof must be upon us. I submit to your lordship that I have satisfied the burden of proof in the evidence that has been given here.

CASSELS, J. now (June 12th, 1912) delivered judgment.

This was a reference under section 38 of chapter 140, Revised Statutes of 1906, whereunder the Minister of Customs referred the claim of the Foss Lumber Company against the above named respondent to the Exchequer Court of Canada for adjudication thereon.

The claimants filed their statement of claim to which the respondents filed their defence. The claim is to recover back the sum of seventy-seven dollars Customs dues, paid at Winnipeg, on certain lumber imported from the United States. The amount is small, but it is said that this is a test case involving a large amount.

The contention of the claimants is that the lumber in question was free from the payment of duties under tariff item 504 in Schedule "A" of the Customs tariff. This schedule is a schedule to the Customs Tariff Act of 1907, being chapter 11, 6 & 7 Edward VII.

Item 504 reads as follows:

"Planks, boards and other timber and lumber of wood, sawn, split or cut and dressed on one side only but not further manufactured."

The contention of the claimants is that the lumber in question was free from duty as the planks were sawn and dressed on one side only but not further manufactured. The Crown on the other hand contends that the carload of planks in question, after being sawn and dressed on one side only were further manufactured.

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At the trial certain admissions were filed. It was intended by the admissions to admit that all the lumber in the carload in question was according to these samples. It was admitted at the trial that the samples in question would be taken as samples of the carload.

The point of dispute is whether or not after the planks in question were sawn at the sawmill they could be further manufactured in the planing mill; and the claimants contend that if only saws were used, they came within the strict letter of this item 504, and were to be treated as not further manufactured.

I am of the opinion that the contention of the Crown is well founded, and that the planks in question have been further manufactured, and are not entitled to free admission under item 504. After being sawn in the mill the planks were dressed on one side, and with the aid of other contrivances were sized. The sizing was not done by the circular saws or gang saws in the mill, nor under the evidence is it possible to size them in the first sawing. The sizing has to be done with the aid of other machinery; and according to the evidence and the admission of counsel, there is no machinery in what is known as a sawmill proper which is capable of sizing the planks.

During the course of the evidence the following statement is made in the examination of James D. McCormack:

"Q.—In no equipment of any sawmill in your "experience, either in the United States or Canada, "is the sizing equipment machinery, such as you "spoke of, part of the equipment of the sawmill pro- "per? Or does it belong wholly to the planing mill?

"A.—Not a part of the sawmill at all; it belongs "wholly to the planing mill.

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"MR. LAFLEUR.—I am instructed there is not "such a thing as a sawmill with the sizing equipment.

"MR. HOGG.—I am quite prepared to admit that, "if it is important."

Mr. Robinson, who is the manager of the claimant company, states that he ordered the lumber in question as sized lumber. This order was given to the American firm from whom he purchased the planks in question, Schagler & Nettleton of Seattle.

It is clear from the evidence that the planks in question came in ready for use as joists or studding. It had been sold by the vendors for that very purpose. The onus is upon the claimants to show that the decision of the Customs Department was erroneous. They have given no evidence to contradict the evidence given on the part of the Crown. The case was very forcibly argued by Mr. Hogg on behalf of the claimants. His contention goes the length of claiming that any planks or boards might be completely manufactured for any use that the purchaser might desire, and that so long as nothing but saws were used, no matter where the saws were used, it comes within the strict letter of item 504, and that the planks have to be treated as planks sawn in the case in point upon one side and two edges, and dressed on the other side. This is not my view of the meaning of the tariff. I am not concerned with anything but the construction to be placed upon this tariff. As to the policy of such an item, that is not a matter with which I am concerned. I do not know why the concession was made allowing the planks to be dressed on one side only. Reference to item 503 is important.

It reads:

"Planks, boards, clapboards, laths, plain pickets 'and other timber or lumber of wood, not further

"manufactured than sawn or split, whether creosoted, "vulcanized, or treated by any other preserving "process, or not."

Section 504 permits the dressing on one side. It may be that there were two reasons for allowing this concession; first, to save the freight; and secondly, —for a great many purposes the boards dressed on one side could be utilized for building purposes. Any expert with an axe could size them so as to fit them for building purposes. I think the whole scope of the statute and the tariff is to prevent completely manufactured articles being entered free of duty. It would be straining the Act and the meaning of item 504 to construe it in the manner the claimants seek to have it construed in this particular case. I do not think the case of *Magann* v. *The Queen*, (1) covers this case. In that particular case, the Tariff Act provided that oak lumber sawn, but not shaped, planed or otherwise manufactured may be imported into Canada free of duty. The only question for decision before the Court in that case was whether or not the lumber in question had been shaped within the meaning of the Tariff Act. It was held it was not.

It was also very strongly pressed by Mr. *Hogg* that what should govern in deciding this case, is the condition and the form in which the lumber is produced to the Customs, and that forms the determining factor in applying any item of the Tariff. Apparently, according to his contention, no evidence should be receivable except the appearance of the wood, and he cites in support of his proposition the case of *The Queen* v. *The J. C. Ayer, Co.* (2), a decision of the late Sir W. J. Ritchie, C.J. I think this case has no application to the question before me. In that particular case,

(1) 2 Ex. C. R. 64. (2) 1 Ex. C. R. 232.

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as pointed out by the Chief Justice, there were various provisions in the Tariff Act, some of which permitted the ingredients to be entered separately on payment of certain duties. The Ayer Company imported these various items for years, paid full duty—and then it was subsequently contended that after having legally imported and paid the dues chargeable, because they chose in Canada to put them together and make a compound liable to higher duty if imported in that form, that fraud had been perpetrated, and that they were bound to pay the extra duties and the penalties. The Chief Justice's simile explains his view. Importation of wine in a cask subsequently bottled in Canada indicates what he meant. As pointed out, the Customs tariff provided a certain duty to be levied on the wine in the cask. There was a larger duty if the wine were imported in bottles. The man imported the wine in the cask, paid the duties, and then subsequently bottled it in Canada—and the Chief Justice in referring to the form in which the goods were entered, determined that if they came in under the item of the tariff, and the proper duties were paid under that item, it is of no consequence what was subsequently done with the goods in Canada.

Here in the case before me, the sole question is whether the planks in question after being sawn went through any other process of manufacture. This is a question of fact from the evidence. I think the action fails and should be dismissed with costs.

*Judgment accordingly.*

Solicitors for the claimants: *Hogg & Hogg.*

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

BETWEEN:

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

1912
June 28.

AND

ARTHUR S. KENDALL ..... DEFENDANT.

*Expropriation of land—Market value—Material in situ giving potential value to land—Basis of compensation.*

In assessing compensation for the expropriation of lands for the purposes of a public work, damages must be measured by the market value of the lands as a whole at the time of expropriation.

2. While certain material in the soil of the lands expropriated may largely increase the potential value of such lands, the Court will not go into abstract calculations with respect to the quantity of such material *in situ*, but will treat the lands as possessing a value that is entire and indivisible.

THIS was an information filed by the Attorney-General of Canada for the expropriation of certain lands required for harbour improvements at Sydney, N.S.

The facts are stated in the reasons for judgment.

May 29th, 1912.

The case was heard at Sydney, N.S.

*J. W. Maddin*, for the plaintiff, contended that the defendant was seeking compensation for the sand and gravel on a purely speculative basis, and one not supported by the facts. Not a pound of material had been taken out below the level of the water up to the present time; and the demand for it in the future is problematical in view of the difficulty of working the bar as compared with other pits in the neighborhood

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more easily got at. The case of *Burton v. The Queen* (1), is distinguishable from this case, because there the gravel-pit was the only one in the vicinity of Winnipeg and that fact gave it a distinctive value.

*G. A. R. Rowlings,* for the defendant, submitted that under the *Burton* case (*supra*) and *Vezina v. The Queen* (2) the defendant was entitled to full compensation for the property taken on the basis of a prospective use which would give the lands their highest value. The evidence shews that the whole of the sand and gravel can be taken out of the bar, and this prospective element of value is an extremely large one. The authorities shew that the prospective capabilities of property taken in expropriation proceedings are part of its market value. He cited *Macarthur v. The King* (3) *Buccleuch v. Metropolitan Board of Works* (4); *Re Wadham and the North Eastern Railway Co.* (5).

AUDETTE, J. now (June 28th, 1912), delivered judgment.

This is an information exhibited by the Attorney-General of Canada, whereby it appears, inter alia, that the Government of Canada has expropriated, under the provisions of *The Expropriation Act* (R.S., 1906, ch. 143) a certain lot or strip of land, situate, lying and being on the northern side of the South Bar, Sydney Harbour, in the County of Cape Breton, N.S., for the purposes of a public work of Canada, to wit: the harbour protection works at South Bar, Sydney Harbour, N.S.

The area expropriated is (22½) twenty-two and one-half acres, for which a plan and description have been deposited in the office of the Registrar of Deeds for the

(1) 1 Ex. C. R. 87.
(2) 2 Ex. C. R. 11.
(3) 8 Ex. C. R. 245.
(4) L. R. 5 H. L. 418.
(5) 14 Q. B. D. 747.

County of Cape Breton, on the 5th day of September, A.D. 1911.

The Crown by its information tenders the sum of $4,000.

The defendant, by his plea, avers that the amount tendered is grossly insufficient and inadequate, and claims the sum of $300,000 for the lands taken and for all damages resulting from the said expropriation.

It is now well established and settled that the Crown, by its prerogative and by law, is entitled to the foreshore on all of our Canadian coasts, unless and except so far as any subject can establish title to it by Crown grant before Confederation. The claim of the defendant's title to the sand and gravel bar in question in this case runs as far back as the 14th June, 1788, under a Crown lease or grant of George III. This grant is confirmed by an Act of the Legislature of Nova Scotia, passed in the year 1850, cap. 41, whereby lands held under Crown leases are declared to be held in fee simple. As will, therefore, be seen the Crown grant dates before Confederation, and the defendant's *auteurs* were in possession for over a century.

The defendant's title was admitted by the Crown's counsel at the opening of the trial.

The defendant purchased, on the 2nd July, 1888, one hundred and twenty-five acres for the sum of $240. The twenty-two and one-half acres expropriated herein are part and parcel of these one hundred and twenty-five acres which he then acquired for the sum of $240.

On behalf of the defendant were examined the following witnesses, viz.:—George J. Ross, Arthur S. Kendall, Duncan M. Campbell, Harry J. McCann, Clarence A. Lowe, Alfred Bouthillier, George E. Bool, William

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Rutledge, Hector F. McDougall, Thomas J. Brown and Thomas Cozzolino.

The first witness, G. J. Ross, of Sydney, a contractor, in the cement business for one year, says he knows the property in question for 30 years, and that the bar contains at least 12 to 14 feet of sand and gravel through the 22½ acres taken, and values the material *in situ* at forty cents a yard. There are other places in Cape Breton where such material can be had at some distance from Sydney; the bar is only four miles from Sydney, and the material is getting scarce while the demand is increasing. He contends that with modern appliances the material could be procured at the bar for ten cents a yard. Gravel costs in Sydney as much as $1.05 to $1.10 a ton, including freight. The witness prepared the plan filed as Exhibit "G", and he saw the boring of the holes indicated on the plan. He purchased some of that gravel at five cents a barrel from the owners, costing him twenty-five cents to transport it to Sydney. At twelve feet deep he estimates the total quantity at 530,000 cubic yards with 25,000 to 30,000 tons of large stones on some part which would have to be crushed. He used the material for plastering and concrete and says it is the best they can get,—contends that every storm brings in sand and gravel and looks upon it as practically inexhaustible. He values at from $400 to $500 the yearly revenue which could be derived from the kelp and seaweed. His company was organized in July last and they procured gravel from the Grand Narrows, where the gravel is loaded on the cars from the beach. He says he knows that last year, when things were not as prosperous as this year, the defendant's property could not be bought for $25,000 to $30,000 and adds he would quickly give $25,000 for the property,—it is

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worth a good deal more. He admits the bar is subject to attacks by gales from the ocean, and that it has been broken through at times; but that would not alter his figures. He admits that there are a number of places where sand and gravel can be had in Cape Breton but not so near Sydney as the South Bar.

Arthur S. Kendall, the defendant, testifies that in 1901-02 he took from 2,000 to 3,000 tons of gravel from the bar for which he received five cents a barrel,—which represents a little less than thirty-three cents a ton. In 1900 there was as much taken away that was not paid for. He says he had an idea to equip for working and using this sand and gravel, and that it would be a source of very good returns to him. Sand and gravel are worth about ninety-five cents a ton in Sydney. He says that the first two borings went down to 17 feet, but if measurement had been taken from the crest, it would have shown 22 feet. He contends he shipped in fifty-ton scows and made a profit of 40 cents a ton,—the cost being about 15 to 17 cents a ton to place it on the scow, and as much more for the tug, with 10 to 15 cents to put it ashore, together with 25 to 30 cents to distribute it in the city. He says that kelp is not much of a manure, and that used alone, without phosphate, it would hurt the land. There was not much last year, but some years he has seen as much as 20,000 tons. If he were in a position to use it, it would be worth from $400 to $500 a year. He says that his property was of very little use before the Steel works came here, and that it is becoming more and more valuable. He acknowledges having received the $4,000 tendered by the information, which is to be applied *pro tanto*, he says, on the amount he would recover. There are other places where sand and gravel can be had, but it is far away and not always of easy access.

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Duncan M. Campbell, the City Engineer at Sydney, under whom concrete works have been carried on, has seen the property in question during May last, when test pits or holes were bored in his presence, and contends that there is sand and gravel there not less than 12 to 14 feet deep, but the largest proportion is sand,—there is sand, gravel and stones. He values the material at fifty cents a ton, and says that is what they pay. Estimates the quantity for every foot in depth at 35,350 cubic yards, and the total quantity, at 15 feet deep, at 544,500 cubic yards. The contractors working for the city have used material coming from South Bar in concrete and sewer work, and it was found good and satisfactory. From the witness's printed annual report of the City of Sydney, for the year 1911, exhibited in court and noted in the evidence, it appears at page 97, that gravel was paid for by the city at the rate of 50 cents per ton, freight 38 cents per ton, and truckage at 36 cents per ton. The witness said he would not care to put a price upon the bar, and gave as his opinion that if the bar were wiped out, carried away, by a storm, it would be put back by nature.

Harry J. McCann, the purchasing agent of the Dominion Iron & Steel Company, says his company uses a deal of sand and gravel. In 1911 they used 35,000 tons at a cost of $29,770.15,—of this, 20,000 tons were procured from the Grand Narrows and 15,000 tons from Mira. He says the bar is 4 to 5 miles from Sydney, and that he would work it by suction in the good months,—Lingan bar was partly washed out two years ago,—a hole was washed through thirty feet wide, but now it does not show, it has all been filled up and is quite as good as before. There is in Sydney a good opening for one man dealing in gravel and sand as there would be about 100,000 tons used per year.

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Clarence A. Lowe, the Intercolonial Railway Agent at Sydney, under whose supervision come all the shipments to Sydney, produced as exhibits "H" and "I", two statements showing the shipments for 1910 and 1911. From Iona the charge is 45 cents a net ton, or 2½ cents per 100 lbs.

Alfred Bouthillier, of Sydney, who has an experience of 15 years in boring, was, last week, in charge with his partner Boyd, of the borings made at South Bar. He heard the statements as to depth made by the previous witnesses and says they are correct. He is satisfied there was sand and gravel as far down as they went.

George E. Bool, manager for building-contractor, says they used sand and gravel in their works last year to the extent of 600 cars, at 20 tons to the car. He has seen South Bar—he went over it once the day before his examination and all he saw on that beach is good. He says he has used very little of the sand and gravel coming from the bar; but has used some for plaster and found it very good. He values the bar at thirty cents a ton, as a commercial commodity. The material is getting scarcer,—the beaches are getting exhausted. He has, however, no idea what it would cost at Sydney; he would have to look into the matter before expressing an opinion.

William Rutledge, in the course of an experience of ten years, has handled a large quantity of sand and gravel and knows the property at South Bar. Some years ago had some holes bored there about seven feet deep, and found all sand. He did not notice any gravel in the particular locality where the test pits were made; but knows no better sand in around Sydney. The sand and gravel on the bar is good for masonry and cement purposes. He contracts for the Steel and Coal companies and shipped sand and gravel from Mira and

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Lingan. He reckons the requirements of .the Coal company is in the vicinity of 5,000 tons a year, and has no idea whether their requirements will increase or not. There is loose stone on the bar which could be used for cement, and the sand and gravel represents a value of 30 to 35 cents a ton on the ground to. the owner. The cost of transportation by water from the bar would be between 28 to 30 cents. With respect to the future market, he contends the banks are getting exhausted, and that would have the effect of increasing the cost of the sand. He says further that continuous dredging would affect the bar, but that, however, it fills as fast as any material is taken away. The bar was broken a couple of years ago and it has all made up.

Hector F. McDougall, contractor, chiefly engaged in shipping building material, sand and gravel, to Sydney, knows South Bar,—has gone over it, and says there would be no difficulty in handling two or three feet of the sand and gravel there. Taking an average of three feet deep a quantity he thinks could be easily worked—he values it at 52 to 30 cents a ton *in situ*, or in other words, 4,840 cubic yards in an acre, at a depth of three feet. He estimates there would be 7,260 tons in an acre, which at 25 cents, he value at $39,930.00; and at 30 cents at $47,916. The market price of sand now is 65 cents, and gravel 50 to 55 cents, both delivered on the cars. To work the bar below three feet, mechanical appliances would have to be resorted to, and he believes the nature of the bar would justify the expenditure,—as the gravel goes down deeper than it does on the Bras d'or lakes,—where clay is struck after taking the surface gravel washed upon it by the waves. He thinks by building small piers in batches, he could protect the bar against being washed away. There is sand and gravel at North Sydney, but there is no market there.

There would be the transportation that would make it expensive, and the distributing point is Sydney.

Thomas Brown, the General Superintendent of the Nova Scotia Steel Company, says his company use from 3,000 to 5,000 tons of sand and gravel a year. The quantity of sand and gravel has been more of less depleted on the beaches; but he entertains no fear of disappearance for a number of years, and is under the impression the demand will increase. He offered $10,000 to the Defendant for the whole of his property, the 125 acres, and the defendant refused it. He though the site would appeal to the company as a good site for a pier.

Thomas Cozzolino, says he was on the South Bar recently and that the breaches indicated on the plan are filled, but there is water in the centre,—he could walk around. He is a contractor and says he could make between $10,000 to $12,000 a year with the bar.

On behalf of the plaintiff, the following witnesses were examined, viz.: Donald M. Curry, John Burke, Thomas C. Harold, Charles M. O'Dell, and Ronald Gillis.

Donald M. Curry, the Municipal Clerk, says the defendant's property has been assessed during the last six or seven years at $650.

John Burke, the County Assessor for 1905 to 1912, says that the assessment on the defendant's property was made when he came in office, and he did not disturb it. It was assessed at the same value as the other farms in the neighbourhood. It was not assessed as sand and gravel property.

Thomas C. Harold, speaks of the manner in which lands taken for the Steel works were assessed, and is not cross-examined.

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Charles M. O'Dell, is a Civil Engineer who has been with the Dominion Coal Company, in the capacity of Resident Engineer, since 1893, with an interruption of three years,—and has been engaged in the purchase of land for the company during the last ten years. He has made, at the request of the company, a plan of the property in question (which is filed as exhibit No. 6). The survey for the plan was made in 1910. He has examined the bar for the Steel Company and he did not consider it worth exploiting on account of the difficulty of loading by lighters and reloading at the wharf and then on the cars, He thought this difficulty overcame any advantage it had, and found that they could get sand and gravel elsewhere in by cars much more conveniently. He valued the lands in question as a sand and gravel proposition at $3,000 to $4,000. He has experience in the purchase of land, and bought within the last four years, about 2,000 acres of land for the company. He bought a sand proposition, the McDonald property, within four miles of Louisburg,—36 miles from Sydney, at $100 an acre; however, it was not bought as such, but purely as part of the right-of-way for the railway. He made a contract to load on the cars at thirty cents, and then raised that to thirty-five cents. Did not make any estimate of the quantity of sand and gravel at South Bar. Two breaches are indicated on the plan, showing where the bar was broken by a storm—he does not know whether it has since filled in,—would be surprised if it did. He is President of the Silicate Brick Co., at North Sydney,—also referred to by witness McDougall. They have there 7 acres of sand above high water and 10 below. This is nearly directly across the harbour from the property under discussion.

Ronald Gillis, a contractor for over 40 years, has used a quantity of sand from the South Bar for plaster-

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ing. It is very fine, but very good. He has not used it for concrete to any extent—and everything he saw of it was too fine for concrete; but it would do well for brickwork.

This concluded the evidence.

The Court is of opinion that the property in question must be assessed at its market value in respect of the best uses to which it can be put by the owner, taking into consideration any prospective capabilities and any inherent value it may have. One must discard the idea of arriving at its value by measuring every yard of sand and gravel on the bar. What we are seeking in this case is the value in the market of the 22½ acres expropriated from the defendant, taking in consideration all that has just been mentioned. This property, comprising 125 acres belonging to the defendant, changed hands in 1878 and was bought for $200. Ten years after, on the 2nd July, 1888, the present defendant bought it for $240. Now, inasmuch as it had a price as a whole in 1878 and again in 1888, taking into consideration its prospective capabilities, it should also have a market value as a whole at the date of the expropriation, without one being obliged, in arriving at such value, to go into abstract calculations with respect to the quantity of material *in situ*. To pursue such a course would lead one to a fanciful valuation, if, indeed, it would not appear on its face, as preposterous and absurd. In endeavouring to estimate the market value of this property on such a basis, one would be confronted with many contingencies. For instance there is always that *alea*, more or less uncertain under the evidence, but it exists,—of having the whole bar either wiped out or partly washed away by a gale or storm from the ocean. Then the material taken from the bar is sold like all other public commo-

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dities, under a keen competition, and much more so in the present instance, as there are quantities of sand and gravel on the Bras d'Or lakes, which, perhaps, do not lie so close to Sydney, but which can be exploited much easier. Mr. O'Dell a witness of great experience, who examined the property for his company, did not, without taking any price into consideration, recommend the purchase of it, because of the difficulties of working it. The only way to work it is by water. Horses could hardly draw a reasonable load on the beach itself. Then why should an amount, arrived at by measuring every yard in the bar, be paid at one time? Admitting it could be sold,—it would take a number of years to sell it with heavy expenditure for getting it out and with profits coming in gradually and by very small amounts at a time. Then if it is to be worked by water with perfected appliances, if the undertaking is not properly managed—and that depends on the industry and capacity of a manager most of the time—the undertaking might go into insolvency instead of appearing so profitable, and would have to be abandoned. Furthermore, if it is to be worked by water, there is also the contingency of the elements to be reckoned with. Indeed, while the dredge, scows and tugs would be lying at the bar, a storm or gale from the ocean might wreck them all. Then there is the outlay of a capital which has to be taken into consideration in promoting such an undertaking.

The continuous working of the bar or excavating from it would also affect it and made it more liable to be wiped out and washed away by the storm. It is said it can be worked down from 12 to 14 feet—some even mentioned 30 feet—but there is no evidence that sand and gravel banks were ever worked in that

manner. It may also happen that the owner would never care, in view of the difficulties in working it, to engage capital in such a venturous undertaking as buying an expensive plant. The present owner worked it during 1901 and 1902 with scows and tug. If it were so profitable, why did he not do so for any length of time; and why did he abandon it? It appears from the evidence there are sand and gravel banks on the Bras d'Or lakes, and possibly new ones may be discovered and exploited in competition with the South Bar.

This Court is of opinion that this theory of measurement, while it must be taken into consideration to some extent in arriving at its valuation, is not to be accepted blindly and as the controlling element to be considered in arriving at a fair compensation. What we are seeking here is the market value of the 22½ acres as a whole.

The Supreme Court of Massachusetts, in the case of *Manning* v. *Lowell* (1), puts the case very clearly, viz.:—

" All of the evidence relating to the value of the sand " as merchandise might have been excluded in the " discretion of the presiding justice, as the question " in the case was the market value of the land, and " not the value of sand. *Providence & Worcester* " *Railroad* v. *Worcester*, 155 Mass. 35. As was said " in *Moulton* v. *Newburyport Water Co.* 137 Mass. " 163, 167, the value for special and possible purposes " is not the test; ' but the fair market value of the " land in view of all the purposes to which it was " naturally adapted.' "

(1) 173 Mass., 103.

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In *Moulton* v. *Newburyport Water Co., (supra)*, also decided by the Supreme Court of Massachusetts, will be found, following, viz.:—

"The damages must be measured by the market "value of the land at the time it was taken.....
"The petitioners were not entitled to swell the dam-"ages beyond the actual fair market value of the "land at the time, by any consideration of the chance "or possibility that, in the future, authority might "be acquired, by legislation or purchase, to carry "the water in pipes to neighbouring towns. Such "chance or probability must needs enter to some "extent into the market value itself; and, so far as "the market value might be enhanced thereby, the "petitioners were entitled to the full benefit of it. "If there were different customers who were ready "to give more for the land on account of this chance, "or if there were any other circumstances affecting "the price which it would bring upon a fair sale in "the market, these elements would necessarily be "considered by the jury, or by a witness, in forming "an opinion of the market value. Nevertheless, "the value for these special and possible purposes "is not the test, but the fair market value of the land "in view of all the purposes to which it was naturally "adapted. *Cobb* v. *Boston*, (1); *Lawrence* v. *Boston*, "(2); *Drury* v. *Midland Railroad*, (3)."

Defendant's counsel cites the case of *Burton* v. *The Queen*, (4) lays great stress upon it, and says that under that case he is entitled to recover all he is asking. But this case must be distinguished from the present one on two grounds—First, the Bird's Hill ballast pit there dealt with was situated but a few miles

(1) 112 Mass. 181.
(2) 119 Mass. 126.
(3) 127 Mass. 571, 581.
(4) 1 Ex. C.R., 87.

from Winnipeg, a very large and populous center. It contained only a limited quantity of gravel, and with the exception of the pit at Little Stoney Mountain, was the only gravel pit known and available in the neighbourhood. Secondly, and principally, because in the Burton case, the owner's land was not expropriated; but the government took a certain quantity of gravel, which had to be paid for on the basis of its market value. These facts sufficiently distinguish the Burton case from the present one to make it inapplicable.

The principle of valuation being now clearly established, there remains the question, what is the market value of the 22½ acres expropriated herein, taking into consideration the elements above mentioned with all of its prospective capabilities—the value of the seaweed, kelp, and the damage to the balance of the 100 acres held in unity therewith by the defendant, as indeed the balance of the property is materially affected by the taking away of the water front. Witness Brown said he offered $10,000 to the defendant for the 125 acres, which price was refused by him. It appeared to him (Brown) to be a good site for any pier the company might desire to build.

Under all the circumstances of the case, the Court is of the opinion that the sum of ten thousand dollars is a fair and liberal compensation to the defendant for the 22½ acres taken, and all damages whatsoever resulting from the said expropriation, including the kelp and the damage to the balance of the property held in unity therewith; to which should be addded ten per cent. for compulsory taking, making in all the sum of eleven thousand dollars as full compensation to the defendant

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The Court has some hesitation on the question of costs. In the case of *McLeod* v. *The Queen* (1) it was held that where the tender was not unreasonable and the claim very extravagant, the claimant was not entitled to costs, although the amount awarded exceeded somewhat the tender. The amount tendered by the Crown in the present case is not unreasonable—it is only found by the Court to be inadequate. The defendant by his plea first claimed the sum of $60,000 and then at the trial, on leave, amended and claimed the extravagant sum of $300,000 for a piece of land lying almost idle for a number of years for which he paid $240 in 1888, covering an additional area of a little over 100 acres. The theory of valuation pursued at the trial and the finding in the Burton case, must have upset the defendant's base of vision to lead him to ask for such an extravagant amount as $300,000. Should the reckless suitor be punished? Taking in consideration that this is an unusual case, and while the onus was on the defendant to prove the real market value of the land as a whole, that he failed to do so but adduced evidence which had to be considered in arriving at a conclusion, and further that the property was taken against his will—by compulsory taking—this Court is of opinion to allow costs.

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

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

2nd. The full compensation herein is fixed at the total sum of eleven thousand dollars, with interest. It appears from the evidence the defendant has already received the sum of four thousand dollars in satisfaction *pro tanto* of the compensation; he is now

(1) 2 Ex. C.R. 106.

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entitled to recover from the plaintiff the sum of seven thousand dollars with interest thereon from the 5th day of September, A.D. 1911, to the date hereof, and on $4,000 from the said 5th day of September, A.D. 1911, to the date of the payment of the said sum (which date may be established by affidavit hereafter), the whole in full satisfaction for the lands taken and the damages resulting from the expropriation, upon giving a good and sufficient title to the Crown, including a release of dower rights in the property, if any, and a release of the mortgage of $5,000 mentioned in the information herein. Failing by the defendant, to give the release of the said mortgage, the moneys will be paid to the mortgagee in satisfaction of the said mortgage and interest, and the defendant will then be entitled to be paid the balance, if any, after satisfying the said mortgage and interest.

3rd. There will be costs to the defendant, which are hereby fixed at the sum of two hundred dollars in all, including disbursements.

*Judgment accordingly.**

Solicitor for the plaintiff: *J. W. Maddin.*

Solicitor for the defendant: *G. A. R. Rowlings.*

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* EDITOR'S NOTE.—Affirmed, on appeal to the Supreme Court of Canada October 29th, 1912.

BETWEEN:

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Sept. 19.

THE IMPERIAL SUPPLY COMPANY, LIMITED. . . . . } PLAINTIFF.

AND

GRAND TRUNK RAILWAY COMPANY . . . . . } DEFENDANT.

*Patents for invention—Feed lubricators for railways—Infringement—Validity of patents—License—Estoppel.*

In an action for infringement of certain patents for invention, the defendant pleaded *inter alia* that the patents were invalid. By counter-claim the defendant alleged that the plaintiff was a trustee for the defendant in respect of the said patents, and sought a declaration of its right as trustee by the Court.

*Held*, that while the evidence did not support the counter-claim of the defendant, in any event the defendant could not, on the one hand, deny the validity of the patents, and, on the other, assert a right depending upon the patents being treated as valid and effective.

2. The patentees of the invention in question were employees of the defendant railway company, and had used the premises, machinery and tools, and had the benefit of the advice and assistance of the servants of the defendant, in perfecting their invention. After letters-patent for the invention had been obtained the defendant with the consent and asquiescence of the patentees used the said invention for the purposes of its railway. The patentees thereafter assigned the patents to the plaintiff.

*Held*, that while the facts disclosed that the patentees had given the defendant an irrevocable license to use the invention for its own railway, such license did not enable the defendant to manufacture the invention, or cause it to be manufactured, for use on other railways.

THIS was an action for damages for the infringment of Canadian Letters-Patent Nos. 98,330 and 129,053 for improvements in lubricators for the cylinders of steam-engines.

The case was before the Court on the question of the validity of a license from the patentees to the defendant

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company, and judgment was given thereon on the 14th February, 1912. [Reported 13 Ex. C. R. 507.] The question of infringement was tried on May 1st, 1912.

*T. C. Casgrain, K.C.*, and *G. S. Stairs* for the plaintiff: *E. Lafleur, K.C.*, and *A. E. Beckett* for the defendant.

Counsel for the plaintiff contended that the invention was wholly the result of the joint work and mental effort of Dalrymple and Burnside. The assistance that they got from the servants of the defendant company was slight, and not appreciable in the development of the essential features of the patented invention. The facts establish beyond all doubt that Darlymple and Burnside were entitled to the patents under the provisions of section 7 of *The Patent Act* (R. S. C., 1906, c. 69). They cited *The Queen v. La Force* (1); *Dollond's Patent* (2); *Cornish v. Keen* (3); *Plimpton v. Malcolmson* (4); *Ex p. Henry* (5); *Nicolas on Patents* (6).

As to the question of disclosure of the invention before obtaining the patents, the evidence is that beside the first one tested on an engine, six others were manufactured for trial on engines during the winter season. Under the circumstances, this was not a dedication of the invention to the public, but only a reasonable experimental use of it for the purpose of testing the merits of the invention.

As to the right of the defendant to assert the invalidity of the patents, apart from the question of whether the defendant was bound by the written license executed by the inventors, the whole use by the defendant of the invention is referable to the leave and

(1) 4 Ex. C. R. 14.
(2) 1 Webs. P. C. 43.
(3) 1 Webs. P. C. 508.
(4) L. R. 3 Ch. D. at p. 556.
(5) L. R. 8 Ch. 167.
(6) P. 27.

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license of the patentees. The defendant knew that Dalrymple and Burnside were taking out a patent, and there is positive evidence that it acquiesced in their action for that purpose. Moreover, it negotiated for larger privileges than the patentees were disposed to grant, but not obtaining them was content to go on and manufacture the invention for itself with the assent of the patentees. If the defendant had intended to contest the validity of the patent for any reason these negotiations would not have been carried on. It would have rested simply on its rights, and not have entered into any pourparlers with the patentees as to obtaining a license, either for the Grand Trunk or its allied lines.

The defence that the relation of master and servant subsisting between the defendant and the patentees rendered the patents invalid as regards the defendant cannot prevail. Such a relationship does not entitle the master to patent the invention. They cited *Frost on Patents* (1); *Wallace and Williamson on Patents* (2); *Heald's Patent* (3); *Saxby v. Gloucester Waggon Co.* (4); *In re Marshall* and *Naylor's Patent* (5).

Such cases as *Worthington Pumping Engine Co. v. Moore* (6), and *Bonathan v. Bowmanville Furniture Mfg. Co.* (7), are distinguishable on the facts from this case. The same is to be said as to the American cases of *Solomons v. United States* (8).

Counsel for the defendant contended that neither Dalrymple nor Burnside could be regarded as inventors of either of the patents in dispute. The evidence shewed that they merely seized upon suggestions

(1) 3rd ed. p. 14.
(2) P. 27.
(3) 8 R. P. C. 430.
(4) 50 L. J. Q B. 577.
(5) 17 R. P. C. 553.
(6) 20 R. P. C. 41.
(7) 31 U. C. Q. B. 413.
(8) 137 U. S. 342.

thrown out by Hudson and Lees, two of their fellow-workmen.

The evidence also shews that both patents were obtained by misrepresentation, inasmuch as neither patent was the joint invention of Dalymple and Burnside. This would be a ground for avoiding both patents.

There is no controversy as to the circumstances under which the new lubricator was ordered to be made. Mr. Robb and Mr. Maver had a conversation in the spring of 1905 as to the unsatisfactory character of the old type then in use, and they decided to endeavor to get up a lubricator of their own. Maver then gave instructions to Dalrymple and Burnside and the shop generally to get up an improved lubricator. The finished model was made in the Grand Trunk shops by its men, was tested, and placed on an engine. Six more were made and applied to other engines and used all winter. The modification subsequently introduced by substituting three tubes instead of one leading from the condenser was also made in the Grand Trunk shops by its men.

The question in this case upon the above state of facts is not whether the invention could be patented by the employer, or by its servants, but whether such servants, or any one of them who could be considered the true inventor, can hold a patent and enforce it against the employer for whose benefit they undertook to do that very work. They cited *Cyclopedia of Law and Procedure* (1); *Gill v. United States* (2); *Keyes v. Eureka Consolidated Mining Co.* (3); *Lane v. Locke* (4); *Solomons v. United States* (5); *Hapwood v. Hewitt* (6);

(1) Vol. 30, p. 880.
(2) 160 U. S. 426.
(3) 158 U. S. 150.
(4) 150 U. S. 193.
(5) 137 U. S. 342.
(6) 119 U. S. 226.

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*Blauvelt v. Interior Conduit &c. Co.* (1); *Whiting v. Graves* (2); *Bonathan v. Bowmanville Furniture Mfg Co.* (3); *Worthington Pumping Engine Co. v. Moore* (4).

Reasons for Judgment.

CASSELS, J. now (September 19, 1912) delivered judgment:

This case was tried before me in Montreal on the 1st May last. The evidence was heard, and at the request of counsel written arguments were subsequently handed in. I have since the trial perused and re-perused the evidence, and considered the various authorities cited by the different counsel in their able arguments.

On the previous trial on the 22nd May, 1911, the issue was whether the paper purporting to be a license and dated the 2nd June, 1906, was binding on the Grand Trunk Railway Company. I set out in detail in my reasons for judgment (5) dated the 14th February, 1912, the conclusion I arrived then at, holding that the document in question was not agreed to by the Grand Trunk Railway Company.

Had my opinion been the other way the case would have ended, as according to my view the Grand Trunk Railway Company would have been estopped from disputing the validity of the patents in question. I fully explained my view on the question of estoppel. I was dealing only with the question of estoppel based on the alleged license of 2nd June, 1906.

I did not consider, nor had I the evidence then before me to deal with, the question of estoppel by conduct or otherwise.

(1) 80 Fed. R. 906.
(2) 29 Fed. Cas. No. 17,577.
(3) 31 U. C. Q. B. 413.
(4) 19 T. L. R. 87.
(5) EDITOR'S NOTE.—Reported, 13 Ex. C. R. 507.

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The case is a difficult one and open to conflicting views.

I have come to the conclusion, from the reasons which follow, that the Grand Trunk Railway Company are estopped from impeaching the validity of the patents.

I have also come to the conclusion that if the defendants were at liberty to attack the validity of the patents, the evidence adduced before me is insufficient to support their defence. At the trial all the evidence as to whether or not the patentees Thomas Aikin Dalrymple and Robert Burnside, Jr., were the inventors and entitled to the patents was adduced, so that if the defence is open to the Grand Trunk Railway Company there has been a full trial on this question.

I think the patents as between the parties are valid.

I find, however, that the Grand Trunk Railway Company has an irrevocable license to make and use for themselves the patented inventions. This point is I think practically conceded by the plaintiffs.

I do not think the Grand Trunk Railway Company has any right to make and sell to others. I will deal with this question later on.

In a patent action pleadings and particulars have an important bearing on the questions at issue. Both by the rules of the Exchequer Court and the English practice the plaintiff is entitled to proceed to trial with full knowledge of the issues he is called upon to meet.

It becomes important therefore to consider the issues raised by the defence.

The first patent, No. 98330, was dated 3rd April, 1906, and the second, No. 129053, 1st November, 1910.

Since April, 1906, no claim has been put forward by the Grand Trunk Railway Company for avoiding the

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patents or that the plaintiff's assignors were trustees of the patents until the question was raised by their counterclaim. They were aware of the intended application for the patents to the patentees and assented to the issue to them.

The statement of claim was filed on the 25th November, 1910.

The plaintiffs are assignees through various assignments of the title of the patentees.

The first statement of defence is dated the 12th January, 1911 (filed on the 13th January, 1911). The fourth paragraph of this defence is as follows:

"The defendants further say that prior to and at "the time of the issue to the said Thomas Akin "Dalrymple and Robert Burnside, Junior, of the said "Canadian Letters-Patent, the said Dalrymple and "Burnside were in the service of the defendants; that "at that time the defendants were with the full "knowledge of the said Dalrymple and Burnside "lawfully manufacturing, using and dealing with a "device for lubricating the cylinders of steam engines; "that while so in the service of the defendants, and "at the suggestion and request of the defendants, the "said Dalrymple and Burnside devoted a considerable "portion of their time in an endeavour to perfect the "said device so being used and the improvements in "lubricators mentioned in the Statement of Claim "and said to be covered by the said Canadian Letters-"Patent, and for the time so spent were paid by the "defendants; that for such purpose and in developing "and perfecting such improvements said Dalrymple "and Burnside were permitted to use and did use the "premises, appliances, tools and materials of the defen-"dants, and acted under the direction of, consulted "with, and had the benefit of the advice and assist-

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"ance of officials of the defendants, competent to "give and render such, in consideration of all of which "it was understood and agreed that notwithstanding "the issue to the said Dalrymple and Burnside of the "said Letters-Patent, application for which was then "made, the defendants should have the right to "manufacture, use and dispose of, as they saw fit, the "improvements and alleged inventions covered by the "said applications and Letters-Patent; that in view of "the circumstances stated, the defendants submit that "notwithstanding the said Letters-Patent or any-"thing contained therein, or of any of the provisions "of the said document of June 2nd, 1906, they had and "have the full and absolute right to manufacture, use "and deal with the said improvements and inventions "mentioned in the Statement of Claim to the extent "which they have, and of which the plaintiffs complain "in this action; that the plaintiffs acquired their "alleged interest in the said Letters-Patent with the "full knowledge of the facts herein set forth, and of "and subject to the rights and privileges of the "defendants in, to, and in respect of the said device, "articles, appliances, improvements and alleged in-"ventions and by reason thereof are not entitled to "maintain this action against the defendants."

This defence sets up a specific contract between the patentees and the Grand Trunk Railway Company, whereby for the consideration mentioned the Grand Trunk Railway Company was, notwithstanding the issue of the patents, to have certain rights set out in this paragraph of defence.

The Grand Trunk Railway Company has failed to prove any such specific contract as alleged.

The defence impliedly concedes that as between Dalrymple and Burnside and the other employees of

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the Grand Trunk Railway Company, Dalrymple and Burnside were the inventors, having had the benefit of the advice and assistance of the officials of the Grand Trunk Railway Company.

The amended statement of defence was filed on the 5th June, 1911. This defence was filed after the first trial of the 22nd May, 1911.

Paragraph 4 of this defence, referring to patent 98330, is practically identical with paragraph 4 of the original defence.

Paragraph 5 of the amended defence is similar to paragraph 4 of the original defence quoted, except that it has reference to the later patent, 129053.

For the first time the claim that the patentees were trustees for the Grand Trunk Railway Company is set up in the counterclaim dated 5th June, 1911.

I confess I share with Buckley, J. the difficulty in understanding how a patentee can be a trustee for another of a patent which is void. The counterclaim is inconsistent with the defence that the patents are invalid. It savours of approbating and reprobating.

See *Richmond & Co., Ltd., v. Wrightson,* (1) where the learned judge finds that Wrightson was not the true and first inventor, but adopts the method of Mr. Justice Byrne of getting over the difficulty as reported in *Worthington Pumping Engine Co. v. Moore* (2).

On the 12th June, 1911, an order for particulars was granted requiring the defendants among other matters to give particulars of the 4th and 5th paragraphs of the amended statement of defence:—

"Particulars of the time, place and circumstances "of the alleged agreement by and under which the "defendants should have the rights claimed."

(1) 22 R. P. C. at p. 33. (2) 20 R. P. C. 41.

Particulars were furnished and the date of the alleged specific agreement is given as of the month of March, 1905.

These particulars were served on the 29th February, 1912, and repeated in further particulars of the 13th June, 1912.

As far back as June 1906 the defendants were aware that the patentees were negotiating a sale of the patents. See letter of Maver to Robb 4th June, 1906; also letters of 7th June, 1906, Robb to Maver; 12th June, 1906, Maver to Dalrymple; and 18th July, 1906, Dalrymple to Maver.

Then there is the claim for a license containing certain limited rights which the patentees declined to agree to.

Considering all the facts and circumstances referred to and the laches, even if the Grand Trunk Railway Company had a right to claim an assignment of the patents there would be, in my opinion, great difficulty in their way of obtaining a judgment declaring that the patentees were trustees of the patents for them.

I am of the opinion, however, that on the facts of this case, the relationship of trustee and *cestui que trust* did not exist.

The law concerning the rights of the master to patents obtained by the employee is intricate, and each case has to be decided upon the facts of the particular case.

In considering this case it has to be borne in mind that neither Robb nor Maver had any idea of how to obviate the defects in the lubricator then in use.

It is not the case of an employer suggesting the idea and employing a skilled mechanic to work out his idea. In this latter case it may be that a sale in advance would be implied and enforced on the issue of the

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patent, although the patent should probably issue to the employee (1).

The law as laid down in Heald's application by the Solicitor-General on an appeal from the Comptroller-General seems to be accepted as a correct statemen of the law.

In this case an application was made by Heald for a grant of a patent. The grant was opposed on the ground that the applicant had obtained the inventions from Keeler while in the company's employment. The Solicitor-General (Clarke) is reported in 8 R.P.C., at p. 430 as stating:—

"I look to the earlier matters in the month of May, "1889, when Mr. Heald was in the employment of the "company, and in a book which was a book of the "company and kept upon their premises was recording "work that he did for that company. In that book "he records not merely on the 20th May, but on other "days certain incidents connected with the production "of an improved lamp which was clearly required "because the old lamp had certain defects or short-"comings which several persons in the employment "of the company were trying to remedy, and there "is no doubt in my mind from that diary that it was "*as the servant of the company and in the desire to serve* "*the interests of that company* that Mr. Heald made "the improvements so far as he made them, in ques-"tion."

The Solicitor-General then proceeds:—

"But then I have to deal with the proposition that "an improvement made by a servant is the property "of his employer so as to entitle the employer to take "out a patent for it or to prevent the servant from "taking out a patent for it. I am not aware of any

1 See Thornton on Patents (1910) pp. 59-60.

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"authority which lays down that the invention of a "servant even made in the employer's time and with "the use of the employer's material and at the expense "of the employer thereof becomes the property of the "employer so as to prevent the person employed from "taking out a patent for it."

The statement at the end of the judgment (p. 431) as to the rights of Mr. Heald from the date of the issue of the patent is *obiter*, and not in accordance with what I consider the right of the Grand Trunk Railway Company to be under the circumstances of this case.

In the matter of *Marshall and Naylor's* Patent, Farwell, J. is reported as follows (1):—

"It is laid down in Mr. Frost's book: 'In the "absence of a special contract the invention of a "servant, even though made in the employer's time "and with the use of the employer's materials and at "the expense of the employer, does not become the "property of the employer so as to justify him in "opposing the grant of a patent for the invention to "the servant who is the proper patentee.'(2)

In the case of *Worthington Pumping Engine Co. v. Moore*, a decision of Byrne, J. (3), the facts were different. The case turned upon the peculiar relationship which existed between the agent and his employers. At p. 47, it is stated that the patents had been taken out without communication of his intention to do so to the plaintiff corporation. At p. 49, the learned judge states his reasons for granting relief. It is on the ground that the act of the patentee was a breach of his obligation under his contract.

(1) 17 R. P. C. p. 555.

(2) See also Cyclopedia of Law & Procedure, v. 30, p. 881; Fulton on Patents, 3rd ed. (1905) pp. 24 and 119; Nicholas on Patents (ed. 1904) pp. 26-27-41.

(3) 20 R. P.C. 41.

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In *Solomons v. United States* (1) Mr. Justice Brewer states the law as follows:—

"If one is employed to devise or perfect an instrument or a means for accomplishing a prescribed result he cannot after successfully accomplishing the work for which he was employed plead title thereto as against his employer. That which he has been employed and paid to accomplish becomes, when accomplished, the property of the employer. So also where one is in the employ of another in a certain line of work and devises an improved method or instrument for doing that work, and uses the property of his employer and the services of other employees to develop and put in practicable form his invention, and explicitly assents to the use by his employer of such invention, a jury or a judge trying the facts is warranted in finding that he has so far recognized the obligations of service flowing from his employment, and the benefits resulting from his use of the property and the assistance of the co-employes of his employer, as to have given to such employer an irrevocable license to use such invention."

This case was approved in *Gill v. United States* (2).

In *Bonathan v. Bowmanville Furniture Manufacturing Co.* (3) the judgment of Wilson, J. is instructive.

When this case was decided the statute in force was 32 and 33 Vic., cap. 11. Section 6 provided that the invention should not be in public use with the assent of the inventor *at the time of his application* for a patent.

The statute in force when the first patent was applied for was the R.S.C., 1886, chapter 61, sec. 7, which provides that the invention shall not be in public use for more than one year prior to the application for a patent. Chapter 69, sec. 7, of R.S., 1906, is similar.

(1) 137 U.S. 342. (2) 160 U. S. 426. (3) 31 U. C., Q. B. p. 413.

In the *Bonathan* case the patent would have been void as it was in public use prior to the application for a patent.

In the case before me the patentees explicitly assented to the use by the Grand Trunk Railway Company of the invention, and I find that they gave to the Grand Trunk Railway Company an irrevocable license to use the invention.

The contention of the counsel for the Grand Trunk Railway Company is that the license extends not merely to the use, but that the Grand Trunk Railway Company has also the right to manufacture, or procure to be manufactured, the invention for others.

I do not agree with this contention. It is no part of the business of the Grand Trunk Railway Company to manufacture and sell lubricators.

In *Hapgood v. Hewitt*, (1) it is stated that whatever right the employer had from the contract of employment was a naked license to make and sell the patented improvement as a part of its business. The court was dealing with the case of a company whose business it was to make and sell ploughs. These ploughs contained the improvements patented.

I think, having regard to all the facts of this case, and in view of the Grand Trunk Railway Company having continuously used the inventions under the irrevocable license referred to above, they are estopped from disputing the validity of the patents.

As I have stated the evidence as to whether or not the patentees were entitled to the patents is before me, and I proceed to deal with this question.

The defendants, as to the first patent, aver that one Hudson, an employee of the Grand Trunk Railway Company, was the first inventor, having conceived

(1) 119 U. S. 227.

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the idea in the fall of 1904. He alleges he had made a sketch which he shewed to one Jehu. I think this evidence too vague. It is improbable that Hudson would have kept this information to himself and not given the Grand Trunk Railway Company the benefit of his invention. At most according to Jehu, it was a rough sketch without any details. The time is left very indefinite. Jehu says he spoke to his father within a week of the interview. The father is living and could have been called but was not. Hudson's mother is still living and was present according to the witnesses at the interview with Jehu—she was not called.

According to Hudson, Burnside told him he had evolved some idea, but he (Hudson) said nothing of his invention. Clendenning, a pattern maker, got instructions from Ellis to prepare patterns. He states Burnside came to him first. He states that Burnside told him they were getting up a new lubricator and to work to the instructions of Hudson. Burnside was Hudson's foreman. Hudson had sworn that he got instructions from Robb to go ahead and build a lubricator according to the model he shewed him. Maver who was with Robb says he gave instructions to Dalrymple and Burnside. I accept the evidence of Dalrymple and Burnside. It would be unsafe to destroy a patent especially after such a length of time on evidence of the character adduced.

Then it is important in considering this evidence to bear in mind the allegation in the defence of the Grand Trunk Railway Company, set out in paragraph 4.

After the evidence of Hudson and others had been adduced, when application was made to amend the particulars by setting up that Lees was the inventor

of the invention set out in the latter patent of 1st November, 1910, the able counsel for the Grand Trunk Railway Company puts their case as follows:—

"We have had evidence already as to that modifi-"cation (referring to the 2nd patent) and I simply "wanted to show that Mr. Lees is the man who "suggested that modification. My position is that "these employees were all working with one common "object. They were all giving their suggestions and "ideas to devise a lubricator for the Grand Trunk "Railway. The bulk of these suggestions appear to "have been made by Hudson, Ellis and Lees."

This is hardly a claim that Hudson was a prior inventor.

I also think the evidence of Lees as to the second patent is insufficient to destroy the patent.

As to the conversation with Burnside referred to by Lees when recalled Pratt who was said to be present was not recalled.

In the argument a further claim was put forward to the effect that the second patent of 1910 was void by reason of the invention not being the joint invention of Dalrymple and Burnside, but the invention of Burnside only. In the particulars delivered no such claim is made. The only claim is that the invention was that of Lees. The original invention was the joint invention. It was not working as well as contemplated, and Burnside states he conceived the invention and consulted Dalrymple. They then perfected the invention and applied for and obtained the patent. The objection is a technical one. The later invention could not be used by the Grand Trunk Railway Company except in connection with the lubricator patented by the earlier patent of 1906. I do not think the objection should be given effect to,

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even if it were open to the Grand Trunk Railway Company to question the validity of the patent.

The plaintiffs are entitled to judgment for the usual injunction restraining the Grand Trunk Railway Company from making or selling to others the inventions in question.

The title of the plaintiffs was acquired on the 1st October, 1910.

I find no assignment to them of any damages prior to that date. The damages must be confined to the period subsequent to this date. A statement of lubricators sent to the Grand Trunk Pacific has been given but no dates. I should think the parties could agree as to the damages. If not there must be a reference to the Registrar.

The plaintiffs are entitled to the general costs of the action except as to the trial of the issue as to the validity of the agreement of 2nd June, 1906. The costs of this trial I think the defendants are entitled to. As the evidence given on this trial was used on the second trial, I fix the costs of the defendants at $200 to be set off *pro tanto* against the costs of the plaintiffs to be taxed in the usual way.

*Judgment accordingly.*

Solicitors for the defendants: *A. E. Beckett.*

Solicitors for the plaintiff: *Casgrain, Mitchell, McDougall and Creelman.*

(CHAMBERS)

*In re*

1912
August 1.

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY.

PLAINTIFF;

and

THE PÈRE MARQUETTE RAILROAD COMPANY.

DEFENDANT.

*Railway Company—Receiver—Application to settle Claims arising before Appointment of Receivers—Grounds for Refusing Application.*

THIS was an application, before Mr. Justice Audette in Chambers, for an order authorizing one of the Receivers of the defendant company to settle certain claims against the railway.

August 1, 1912. *Britton Osler* supported the application, on behalf of the defendant. No one appeared for the plaintiff.

AUDETTE, J. This is an application on behalf of the Receivers appointed herein for authority to settle and pay:—

1. Claims by injured employees, passengers and others, expenses incidental thereto, even though some parts thereof had been incurred more than six months before the appointment of the Receivers herein.

2. Bills due prior to the appointment of the said Receivers on contracts of the said Railroad Company for construction or repair work on bridges, buildings and other railroad property where the work is still in progress.

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3. Bills for witness fees, Court fees, lawyers' fees and other expenses in connection with the conduct of the legal department during said six months period.

4. Bills of newspapers for printing display advertisements of the Railroad company's service during said six months period.

5. Claims for personal injuries, injuries to live stock killed along the line of the railroad company, and for damage to property caused prior to the appointment of the Receivers, provided that in each such case the claim can be settled for an amount which in the judgment of the said Receivers is no greater than would be the expense of preparing and conducting a defence.

No such sweeping application can, indeed, be granted under the circumstances upon such scanty material as that filed in support of the application. An order of this kind would indeed vest the Receivers with such powers as would enable them to defeat the very spirit of the law where the property of a debtor is placed in sequestration in the hands of a Receiver to look after the interests of the creditors of the defendant.

By granting the prayer of the first clause, authority would be given to the Receivers to pay even prescribed claims,—claims extinguished by the statute of limitations.

With respect to the second clause no information is given to the Court whether the contracts in question involve large or small amounts.

With respect to counts 3, 4 and 5, suffice it to say that such claims cannot be paid and settled without giving the creditors an opportunity of showing cause and saying whether the judgment of the Receivers is good or bad.

All such claims as are mentioned in this application can only be paid upon submitting them to the Court

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upon their merits, and allowing the creditors to show cause. Following another course and giving the Receivers *carte blanche* would be defeating the principle of law obtaining in the present class of cases.

A similar order consecrating the same principle was made on the 16th February, 1906, by Mr. Justice Burbidge, in Horn v. Père Marquette Rd. Co. (*Vide* Audette's Exchequer Court Practice, 2nd Ed., p. 147).

The application is refused.

*Order accordingly.*

NOVA SCOTIA ADMIRALTY DISTRICT.

BETWEEN

1912
Nov. 1.

PICKFORD & BLACK, LIMITED, PLAINTIFFS.

AGAINST

THE STEAMSHIP "*LUX*".

*Shipping—Salvage—Practice—Joinder of Master and Crew of salving Ship as Co-Plaintiffs with Owners.*

In this case salvage remuneration was fixed in the sum of $4,500, and apportioned as follows:—$3,750 to the owners of the salving ship, $250 to the master and $500 to the crew; the master and crew being ordered to be joined as plaintiffs in the action so that they might have the benefit of the award and the question of their compensation be made *res judicata* by the action.

THIS was an action by the plaintiffs as owners of the steamship *Boston* for $12,000 for salvage services rendered by them to the steamship *Lux* from the 4th day of October to the 6th day of October, A.D., 1912.

The following statement of facts was agreed upon by counsel for the plaintiffs and defendant, respectively, and submitted to the Court:—

The steamship *Boston* left Turk's Island, West Indies, on the 28th day of September, 1912, loaded with a cargo of sugar and fruits, a part of the latter being perishable goods, bound for Halifax. The *Boston* had 10 passengers.

On Friday the 4th of October 1912, at 10.15 a.m. lat. 41·30 N. long. 64·12 W., the *Boston* sighted a steamer which was found to be the English tank steamer *Lux*, apparently disabled, being by the head, and a stage out over the stern. The *Bostou*

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proceeded close to her and asked what was the matter. They replied, "Rudder damaged". The *Boston* asked if they could be of assistance and the *Lux* replied that they were repairing the damage. Three other steamers were in sight when the *Boston* came alongside, one of which was the *Idaho*, a Wilson liner, and the other two were New York passenger liners. The *Lux* was in the line of steamers. The *Boston* then proceeded. Shortly afterwards the *Boston* noticed that the *Lux* had hoisted a signal asking if the *Boston* could tow them, to which the *Boston* agreed. The *Boston* steamed as close alongside as possible and two hawsers belonging to the *Lux* were run from her stern to the bow of the *Boston*. The boats of the *Lux* carried the hawsers to the *Boston*. The hawsers were made fast to the bitts of the *Boston*. These bitts were not constructed for the purpose of towing but were primarily intended for mooring the ship. One of the hawsers of the *Boston* was used the first day as a bridle and was afterwards carried away. As soon as they were fast, 1.30 p.m., the *Lux* started for Halifax, the *Boston* steering. Strong breeze and choppy sea. At 2.15 p.m. the hawser on the port side carried away, but they proceeded with only one hawser until 7.30 p.m., when, owing to increasing wind and sea, accompanied by rain the remaining hawser carried away. Owing to the darkness, rain and heavy sea, it was impossible to establish connection that night. The *Boston* laid by all night and on the 5th of October, daylight, the sea having moderated, the *Boston's* boat was launched to run another hawser which was finally accomplished and the towing resumed at 8 a.m.

October 6th, 3.30 a.m. sighted Sambro and slowed down. 9.15 a.m. took a pilot and proceeded up the harbour to Quarantine Ground where the *Lux* was

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Statement of Facts.

safely anchored at 10.45 a.m. The *Boston* arrived at Pickford and Black's wharf at 11.15 a.m.

On examination found one wire hawser broken and a piece lost, also a quantity of manilla rope and heaving lines used for lashings cut and destroyed. A piece of the main rail on the starboard side forward carried away and a hatch strong-back, which was used for a fender on the bow, damaged.

The bulwark forward on the starboard side was somewhat strained. To repair all the damage suffered by the *Boston* and to substitute new rope would cost about $250.00.

The tonnage of the *Boston* is 738 registered, gross 1,168.

That of the *Lux* is 2,621 gross and 1,634 net. The valuation of the *Lux* in her damaged condition is £18,468.

The value of the *Boston* is £15,000. Her cargo was valued at $20,030.00, freight at $2,192.47.

The distance towed is 200 miles and the *Boston* was engaged in the service forty-eight hours, of which thirty-four hours was actual towing.

*H. McInnes K.C.* for the plaintiffs.

The sole question is the amount to which the plaintiffs are entitled. The *Boston* was on her way from Turk's Island, West Indies to Halifax. Her value was about £15,000 or $75,000.00. She had a cargo of sugar and fruits and 10 passengers. The *Lux* was an English tank steamship and was then empty. Her value was about $90,000. The *Lux* rudder was out of order and the *Boston* acted as a rudder in steering her. She was in the track of steamer. The services rendered were more meritorious than towing. The control was in the *Lux* as she was ahead and proceeded under her own steam. Had the hawsers parted it is

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Argument of Counsel.

uncertain which might have been sunk. The weather was bad and stormy and we were subject to heavy risk.

The *Boston* being smaller than the *Lux* greatly helped and minimized the risk, lessening the jerking and straining in the heavy sea. Had the *Boston* been greatly injured heavy damage could have been awarded. The size of our ship was very important. A rudderless ship is always in danger and more so when in the track of other ships. The work was efficiently done. We had to pay out $250.00 for actual repairs. The amount awarded should be reasonable (1).

In estimating the value of salvage services, circumstances, among others, to be considered by the Court are, the degree of danger to which the vessel was exposed, and from which she was rescued by the salvors, the mode in which the services of the salvors were applied, and the risk incurred by the salvors in rendering the services (2)

Where no special risk has been incurred by the salvors, salvage reward is allotted upon a calculation

(1) He relied upon the following cases:—The *Glenfruin*, Pritch. Adm. D. 2032.; The *Sappho*, Pritch. Adm. D. 2031; The *Middleton*, Pritch. Adm. D. 2026; The *Grantully*, Pritch. Adm. D. 2025.; The *Miranda* Pritch. Adm. D. 2012; The *City of Brussels*, Pritch. Adm. D. 1998: The *Gorji*, Pritch. Adm. D. 1984; The *Isis*, Pritch. Adm. D. 1967; The *Ayrshire*, Pritch. Adm. D. 1965; The *Inchrhona*, Pritch. Adm. D. 1959; The *Lord O'Neil* Pritch. Adm. D. 1953; The *Osiris*, Pritch. Adm. D. 1950; The *Memphis*, Pritch. Adm. D. 1949; The *Glamis Castle*, Pritch. Adm. D. 1947; The *Sussex*, Pritch. Adm. D. 1942; The *Verona*, Pritch. Adm. D. 1941; The *Rhynland*, Pritch. Adm. D. 1935; The *City of Berlin*, Pritch. Adm. D. 1934; The *Republic*, Pritch. Adm. D. 1932; The *France*, Pritch. Adm. D. 1931; The *City of Richmond*, Pritch. Adm. D. 1925.

(2) The *Chetah*, 38 L.J. Ad. 1; L.R. 2 P.C. 205.

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Argument of Counsel.

of a fair remuneration for time and trouble to the owners of the salving vessel and to each hand engaged. (1)

In estimating the amount of a salvage remuneration the Court takes into consideration, first, the value of the property saved, and next the actual perils from which it has been saved. In considering the perils, the possibility of assistance being rendered to the vessel in peril must be taken to lessen the amount to be awarded. (2)

Reference is also directed to the case of the SS. *Lydia* against the SS. *Millwall* decided by Sir Samuel Evans in the Admiralty Division on October 18th 1912, not yet reported, but published in an English newspaper called *Fairplay*, Oct. 24th, 1902.

*W. A. Henry, K.C.*, for defendant.

It is less meritorious where the relieving steamer is a tow as in this case. Where the relieving steamer uses her own motive power it is more meritorious. The danger was nothing. The *Boston* could easily get out of the way in case of a breakdown.

The danger of running into the towed vessel is too remote.

Nothing indicates that the size of the *Boston* was the proper size for acting as a rudder for the *Lux*.

If there was no great strain on the *Lux* there was likewise none on the *Boston*, and vice versa.

There was no deviation nor delay to the salving steamer. She was bound to Halifax and arrived with very little, if any, delay.

We did the towing and thus saved the *Boston* her coal. A vessel which has steam is in less danger than without it.

(1) The *Otto Hermann*, 33 L.J. Ad. 189.

(2) The *Werra*, 56 L.J. Ad. 53; 12 P.D. 52; The *Edenmore* (1893) Prob. 79

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The *Lux* was in no danger as she was not drifting around. She only required to be steered while her rudder was being repaired. She was in the line of steamers and could be reported by wireless. She was not in a stormy sea as in the case of the *Millwall*. The *Boston* in consequence lost no time from Turk's Island to Halifax. The time occupied was forty-eight hours from the time she connected until arrival in Halifax. The distance was less than 200 miles. The amount allowed should be very little more than for tonnage.

In The *Gorji* (1) the amount allowed is less than asked here.

Mr. *McInnes* replied.

DRYSDALE, L. J., now (November 1st, 1912,) delivered judgment.

The services here are Admiralty salvage services, the only question in controversy being the amount the salvors should be awarded.

The value of the ship salved is about $90,000.00.

The *Lux* was in latitude 41. 30 North, longtitude 64. 12 West on October 4th last in distress with a damaged rudder. She was in the track of ships, but in such a condition that she sent up distress signals and called for aid. The plaintiffs' ship, the *Boston*, went to her assistance and either steered or staid by her for forty-eight hours until she was safely landed in Halifax. The services, I think, were somewhat difficult as the weather was such as to part the hawsers, and laying by all one night was necessary in the effort to bring the *Lux* in.

The value of the salving ship, her cargo and freight was about $96,000.00 and I must be guided as near as I can by the authorities in salvage awards.

(1) 2 Pitch. Adm. D. 1984.

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Taking all the circumstances into consideration and guided by the modern precedents, I am of opinion that fair and just salvage remuneration ought to be fixed at the sum of $4,500.00, to be apportioned as follows:—$3,750.00 to the owners of the *Boston* and $750.00 to the master and crew; of this $750.00 the sum of $250.00 is awarded the master and the other $500 to be divided between the other officers and crew according to their rating.

The master and crew are directed to be joined in the action in order that they may get the benefit of this award and to make the question as regard their award *res adjudicata*. I understood the parties in the hearing to consent to this joinder and to have the whole matter disposed of in this award.

*Judgment accordingly.*

IN THE MATTER OF THE PETITION OF RIGHT OF

JOHN RUDOLPHUS BOOTH..... SUPPLIANT;

1913
Feb 13.

AND

HIS MAJESTY THE KING..... RESPONDENT.

*Indian lands—License to cut timber—Contract for renewal of license—Regulations by the Governor in Council—Validity—R.S.C., 1886, chapter 43, sections 54 and 55—Construction.*

By section 54 of chapter 43, Revised Statutes of 1886 (*The Indian Act*) it is provided as follows: "The Superintendent-General or any officer or agent authorized by him to that effect, may grant licenses to cut trees on reserves and ungranted Indian lands at such rates and subject to such conditions, regulations and restrictions as are from time to time established by the Governor in Council, and such conditions, regulations and restrictions shall be adapted to the locality in which such reserves or lands are situate." Section 55 provides that no license shall be granted for a longer period than twelve months from the date thereof.

*Held*, that the Superintendent-General, or other officer authorized by him to that effect, had no power to grant a license for a longer period than twelve months from the date thereof.

2. That the Superintendent-General or other officer of the Crown, had no authority under the Act to make a contract either as embodied in the license, or *dehors* the same, binding the Crown to grant a renewal, or a new license from year to year.

3. That the conditions, regulations and restrictions referred to in section 54 of the Act [now sec. 73 of chap. 81, R. S., 1906] only refer to such conditions, regulations and restrictions as are applicable to the license limited by the statute to the period of twelve months, and would not extend to regulations which would contemplate, or attempt to provide for a renewal of the license to a period beyond the twelve months so limited by the statute.

4. That there is nothing in the Act compelling the Crown for all time to keep lands set apart as timber berths, if, in its discretion, it is considered advisable to sell the same in the interest of the Indians to whom it stands in the relation of trustee in respect of such lands.

*Contois v. Bonfield* (27 U. C. C. P. 84); *Muskoka Mill and Lumber v. McDermott* (21 O. A. R. 129); *Smylie v. The Queen* (31 O. R. 203); 27 O. A. R. 176); and *Bulmer v. The Queen* 3 Ex. C. R. 184; 23 S. C. R. 488, considered.

PETITION OF RIGHT to restrain the sale of certain Indian lands containing timber limits to which

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Argument of Counsel.

the suppliant asserts a claim, and for a declaration of certain rights enuring to the suppliant.

The facts are fully stated in the reasons for judgment.

January 16, 1913.

The case came on for hearing at Ottawa before Mr. Justice Cassels.

*G. F. Shepley*, K.C., and *A. C. Hill* for the suppliant ; *F. H. Crysler*, K.C., for the respondent.

Mr. *Shepley*, in support of the petition of right, presented the following argument:—

The action concerns the dealing of the Crown with a timber limit carved out of the Indian reserve on the north shore of Lake Nipissing. This was under license to Mr. Booth for a great many years, but as to which, in the year 1909, the Government declined to grant any further license—contrary, as we say, to the terms of the statutes and regulations—the conditions of the license theretofore existing having been fully complied with. The action is for the purpose of having the respective rights of the parties determined in that respect.

There is also a counter-claim.

The nature of the counter-claim is this: In the first license to us, which has been kept on foot by renewals having the force of fresh licenses from year to year until 1909, the suppliant was entitled or empowered to cut all the timber, to be not less than a certain diameter on the stump, nine inches, I think, upon the limit. What the Crown says is that from year to year timber which, in October 1891, was not yet of nine inches in diameter, having since become of nine inches in diameter has been improperly cut; the Crown seeking to confine the right to cut these to

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such trees as were in 1891 of the diameter of nine inches.

[THE COURT.—I only want to know what the contest is about. You claim damages if there is a breach of the contract?]

What I claim is a judgment upon the point, and I have always supposed that the Crown will respect a judgment of the Court although no formal order is issued. The limits were advertised for sale, and we want to stop that.

[THE COURT.—Your remedy would be damages. You could not get specific performance.]

Probably we could not get specific performance against the Crown, and I do not know that we are so much concerned with the damages if the Crown will let us go on and have our rights according to the statutes, as we construe them, and the license issued under them, and the regulations upon which they have been issued.

[THE COURT.—The Crown by their defence admit that they refused to renew. The only point there might be in the latter is this: I notice in the statement of defence, the Crown says in point of fact there was no pine timber on the limit.]

They say there is not much pine. I suppose this suit is probably some evidence that we do not agree with that, but I do not suppose your lordship will be troubled with that. There is no doubt pine enough to make it necessary or advisable for us to bring this suit and Mr. Booth is here; if it is thought necessary I will ask Mr. Booth whether there is any more timber or plenty of timber there yet, but I suppose my learned friend and I will take that for granted. We are not here to dispute about nothing.

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[THE COURT.—It is said that all the timber that was subject to the license has been cut and taken away.]

That is the point my learned friend wants to argue, that there was no right to the growth of the trees, that we were bound never to cut any tree that at the date of 1891 was not more than nine inches in diameter.

Mr. *Chrysler*.—In order that my learned friend may not be misled on the point as to whether there is pine timber there or not, of course I suppose there is some, but if the Crown has no discretion it does not matter; if Mr. Booth is entitled to a renewal of the license forever, of course it does not matter whether there is pine timber there or not. But if the right to renewal of the license is dependent upon the existence of pine timber, then a further question arises. I mean if it terminates by reason of the subject-matter of the license having ceased to exist, that is another event that is possible.

[THE COURT.—How do you propose to deal with it? Supposing in point of fact there was no more timber on the limit at all in 1909, then of course there was no value at all. Then how do you propose to deal with it if it comes down to the question of damages, in the alternative? I could not give a decree of specific performance against the Crown; I could only declare that Mr. Booth was entitled to the renewal, and if the Crown refused to grant a renewal, then it would be a question of reference as to the damages?

Mr. *Shepley*.—Quite so.

[THE COURT.—It would have to be adjusted in that way. But if the defence is intended to be pressed that in point of fact in 1909 there was no timber there at all, there was nothing to grant if that is the effect of that claim.]

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Mr. *Chrysler*.—I would not put it that high, my lord, because I understand there is pine timber there, but I am coming to the next stage, merely for the purpose of indicating what is in dispute between us. We do say and our view is that the limit, the property, has reached the point at which it is no longer reasonable to allow it to be the subject matter of a timber license; it is land that should be opened for settlement.

And if there is any timber on it, it is scattered and not in such quantities that it is reasonable to tie up one hundred and eight square miles of property from the use of the public.

[THE COURT.—The question of reasonableness is a matter that has no bearing if in point of fact there is a contract. But it might be very important if there is no pine timber on it, but you are willing to admit that there was in 1909 pine timber?]

Mr. *Chrysler*.—Some. The mass of it had been cut.

Mr. *Shepley*.—I want to be sure that I quite understand. It is probably sufficient for the purpose of this litigation if it is admitted that there was pine timber there which was merchantable and which would form a property to which if we are otherwise entitled it was desirable we should continue our title. But if my learned friend is going to say I have not proved that there was a lot of merchantable pine there I would call Mr. Booth and put an end to it, because if there is not any merchantable pine we would not have brought this litigation, if we did not think so.

[THE COURT.—As I understand, Mr. *Chrysler* says he is willing to admit that there is merchantable pine timber there, but that there is so little of it that it was reasonable for the Crown to break their contract, if there was a contract.]

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Mr. *Chrysler*.—Or to exercise its right to refuse any further renewal.

[THE COURT.—If they had that right.]

Mr. *Chrysler*.—It has some bearing perhaps upon the construction. You see, my lord, it is part of the argument that I will offer, whether you could give such a construction to the statute that it will mean that so long as one pine tree remained upon that limit the Crown is bound to renew.

Mr. *Chrysler*.—It is a question then of degree, and the question upon that is, who is to have the discretion? Is it in the discretion of Mr. Booth to go on as long as he thinks it profitable and demand a renewal, or has the Crown no discretion to say the time has arrived when this property should be thrown open for settlement notwithstanding the fact that there is a small quantity of scattered pine remaining on it.

We of course contend that the right of the Crown is absolute to refuse a renewal.

Mr. *Shepley*.—That is what I prefer to meet and discuss, rather than in this litigation to discuss the propriety of the ground upon which you acted.

[THE COURT.—I suppose it ought to be conceded, if it is the fact, that there is pine timber there which Mr. Booth would have cut had the license been renewed?]

Mr. *Chrysler*.—I think so.

Mr. *Shepley*.—Then I propose to refer to the legislation in force from time to time, and the regulations of the Department accompanying the legislation from time to time, calling attention at the proper moment to the legislation which was actually in force in 1891, when the first license was given, and to the regulations which were then in force and to the alterations which had been made from time to time since.

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Of course there was legislation existing earlier, but I do not think my learned friend will say we need go further back than I propose to go.

Mr. *Shepley*.—I am going back to the Act 43 Victoria, 1880.

In order to appreciate and understand that I refer then first to the Dominion Statute of 1880, which is 43 Victoria, chapter 28, an Act respecting Indians. And so as not to burden the record, I refer only to a few sections as indicating the policy of the legislature so far as the matters which we are discussing now are concerned. (Cites sections 40, 56, 57 and 58 of 43 Victoria, chapter 28.)

That is all I need to refer to at this moment. That statute was amended by 44 Victoria, chapter 17, being An Act to amend the Indian Act, 1880. And I refer there only to the first section, because I think it will become important in the argument: "The Governor in Council may make such provisions and regulations as may from time to time seem advisable for prohibiting or regulating the sale, barter, exchange or gift by any band or irregular band, in the North West Territories, the Province of Manitoba or the District of Keewatin," etc. Then, "All provisions and regulations made under this Act shall be published in the *Canada Gazette*." That requires publication, as I read it, of the regulations made under the Act, in the *Canada Gazette*.

Then I come next to the statutes of 1883, 46 Victoria, chapter 6.

That I refer to as indicating that the management of the Indian lands—a trust, of course, in the broad sense—is put by Parliament entirely into the hands of the Superintendent-General of Indian Affairs subject to the regulations which may be devised from time to time.

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Then I come to the revision of 1886, and I shall refer to two statutes in that with the purpose which I shall point out to your lordship when I come to the second. The Indian Act was consolidated as chapter 43 of R.S.C. 1886.

Practically, with some little modifications which are perhaps not important, they are recapitulations or consolidations of the provisions to which I have already referred.

Section 4, for instance, gives the Superintendent-General of Indian Affairs the control and managment of the lands and property of the Indians, in the fullest possible language. Then section 54 gives power to grant licenses subject to the conditions, regulations and restrictions established by the Governor in Council, and provides further, as the earlier statute did, that these conditions are to be adapted to the locality in which the reserves or lands are situated.

Then 55 limits the length of any license to a year, and repeats the provision as to any error in the license making it extend to lands which ought not to have been covered.

Then 56 as to the description of the trees and the kinds of trees to be in the license, and as to the title to the cut trees.

Then I pass to section 131 which requires that all the renewals made under this Act shall be published in the *Canada Gazette*.

So that I think we have now the legislation in the shape in which it was at the time of the granting of the first license which your lordship is asked to consider here.

[THE COURT.—Was there any change subsequently by legislation affecting the question at all?]

There are two amending statutes before the legislation of 1906, which I have here and which I want to call attention to because something may turn upon them. But first I would point out to your lordship, the order in council of 12th January, 1888 (See Dominion Statutes, 1888, page lxxxviii), in this are found the regulations containing provisions that license holders who comply with all the existing regulations shall be entitled to have their licenses renewed on application to the Superintendent-General of Indian Affairs, and the form of the license is given.

Then, the next statute I refer to is 57–8 Victoria, 1894, chapter 32, and the only section I refer to in that is section 12, which introduces a new provision which I think of considerable importance:—

"All regulations made by the Governor in Council under this Act shall be published in the *Canada Gazette* and shall be laid before both Houses of Parliament within the first fifteen days of the session next after the date thereof."

There for the first time we find the provision requiring the Government after the passing of an order in council fixing regulations for the disposal of the Indian Reserves, to lay the regulations before both Houses of Parliament.

That is one of the points on which I lay some stress. With regulations of the kind laid before Parliament, in the face of Parliament, Parliament has not only failed to check the regulation in any way or to dispose of it, but has let it pass by and has passed other legislation *in consimili casu*, referring distinctly to this very power of renewal. There is not only the absence of any want of approval on the part of Parliament of the regulations which have been established under the provisions of an Act of Parliament, and

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which were to be laid before Parliament, but there is also as I shall now proceed to point out, distinct legislation upon the subject of renewals recognizing the practice in legislation which is, as I have said, *in consimili casu.*

First I come to the consolidation of the *Indian Act.* in chapter 81 of the revision of 1906; and there I refer to section 4, as to the powers of the Superintendent-General, sections 73 and 74, as to the granting of licenses, and section 170, which makes the provision that all regulations made by the Governor in Council shall be published in the *Canada Gazette* and shall be laid before both Houses of Parliament within the first fifteen days of the session next after the date thereof.

Then the legislation *in consimili casu* your lordship will find in the *Dominion Lands Act.* Now let me point out the sections I am going to refer to in this Act. The *Dominion Lands Act* (R.S. 1906, c. 55) refers of course to the public domain which is not in the Indian Reserves, and deals with their management and control.

In section 170 we find that the Governor in Counci may from time to time, (*a*) "Order that leases of the right to cut timber on certain timber berths defined in the Order"—this is of course of the public lands other than Indian lands—"shall be offered at public auction, at an upset bonus fixed in the Order, and awarded to the person bidding, in each case, the highest bonus therefor, such bonus to be paid in cash at the time of sale;" (*b*). "Authorize the lease of the right to cut timber on any timber berth to any person who is the sole applicant for such lease, the bonus to be paid by such applicant to be fixed in the Order authorizing the lease to him, and to be paid in cash at the

time of its issue;" (*c*) "Authorize the Minister, when one or more persons apply for the right to cut timber upon the same berth, to invite tenders from the applicants or the public, and the lease shall be awarded to the person tendering the highest cash bonus therefor.' Then it is enacted by section 171:—"Leases of timber berths shall be for a term not exceeding one year; and the lessee of a timber berth shall not be held to have any claim whatever to a renewal of his lease unless such renewal is provided for in the Order in Council authorizing such lease, or embodied in the conditions of sale or tender, as the case may be, under which it was obtained."

I direct your lordship's attention to that.

[THE COURT.—But that statute does not apply to this land.]

No, my lord, it does not, but as I say it is a statute *in consimili casu*, recognizing regulations which have been in force from time to time and saying those regulations are not to apply to the public domain apart from Indian Reserves unless the right to renewal is expressly conferred by the order in council dealing with the lease itself. What right of renewal are they referring to? The right of renewal which has been from time immemorial exercised according to the regulations which Parliament has had before it from time to time.

The regulations of the 15th of September, 1888, were in force at the time of the granting of the first license to Mr. Booth.

[Mr. CHRYSLER.—Is there anything in the regulations that you referred to before, that is not repeated in these?]

I do not think so. I do not pretend to say that there is more in the former regulations than in these,

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but those regulations were included in the statutes with the caption that I pointed out and I do not find that the regulations of the 15th September, which I am about to refer to now, were included in the statutes as bound up; and I want to have whatever advantage I am entitled to from the fact that in accordance with custom Parliament took these regulations, and without saying anything to indicate a want of concurrence in them, actually published them in the very volume of the public statutes. (He refers to secs. 5, 11, 12, 31 and 32 of the Regulations concerning timber licenses on Indian Reserves, Statutes of Canada, 1888, vol. 1, p. lxxxviii.)

Then section 32 I think is of the utmost importance. "Limit holders in order to enable them to obtain advances necessary for their operations shall have a right to pledge their lease as security without a bonus becoming payable. Such pledge in order to effect the limit against the debtor shall require to be noted on the back of the license by an authorized officer of the Department of Indian Affairs. But if the party giving such pledge should fail to perform his obligations towards his creditors, the latter on establishing the fact to the satisfaction of the Superintendent-General of Indian Affairs may obtain the next renewal in his or their own name subject to the payment of the bonus, the transfer being then deemed complete." I would also refer to section 33:—"Transfers of timber berths are to be in writing, and if not found objectionable by the Department of Indian Affairs are to be valid from the date on which they may be deposited in the hands of the latter, but no transfer is to be accepted while the party transferring is in default for non-payment of dues on timber to the Crown."

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Now, taking section 32, what could be stronger—what could be more cogent—as indicating that the prime necessity, the essential quality, of all these transactions in one of the great assets of the people of the country is continuity of enjoyment in order that the most may be made, in the interest of the country, out of the public domain?

It is of the essence of the whole matter that when the Superintendent-General is empowered to make regulations governing these transactions, when he is empowered and required to make these regulations fit in with the locality and the necessities of the locality, he is not anywhere prevented from saying, when he grants a license to a man, if you keep this all in good order and perform all your conditions, at the end of your term we will give you another for another year. There is nothing prohibitive of that. All it says in the statute is that each license is to be for only a year.

The Superintendent-General is a trustee of these Indian lands. He is bound to make the very best of them in the interest of the Indians and the country. He is empowered to frame regulations, and he is directed to make those regulations fit in with the local conditions of the part he is dealing with. Then is he to be told you must only make your license for a year, at a time? And is he further to be told you must not only make your license for a year but you must never at the end of that year do anything with the man who at the time he took his license was necessarily, on the very frame of the regulations, conceived in the public interest, to have what I have ventured to call continuity of enjoyment?

The learned counsel then discussed the following cases:—

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*Attorney-General v. Contois* (1); *Contois v. Bonfield* (2); *Booth v. McIntyre* (3); *Foran v. McIntyre* (4); *McArthur v. Northern Pacific Junction Ry.* (5); *Bulmer v. The Queen* (6); *Muskoka Lumber Co. v. McDermott* (7); *McArthur v. The Queen* (8); *Shairp v. Lakefield Lumber Co.* (9); *Smylie v. The Queen* (10).

Mr. *Chrysler*.—Citing the case of *Power v. Griffin* (11), argued that the authority of the Superintendent-General was to be sought in section 73.

Of the statute (R. S. 1906, c. 81), authorizing the action of the Superintendent-General, who may, it is said, grant licenses to cut trees. That is all we have to do with. The remainder of the section refers to other matters, but it is the simplest language possible. "The Superintenent General or any Officer or agent authorized by him to that effect may grant licenses to cut trees."

Then two lines of section 74 are all that have any application to this case. "No license shall be so granted for a longer period than twelve months from the date thereof."

Now it is common ground, I suppose, and my learned friend will not dispute the fact that we must find the authority for the alienation of these lands in those four lines. There is nothing there about the sale of anything. There is nothing there about any contract with regard to public lands.

The direct power to alienate—I am using that word in its largest sense—is limited. The Superintendent-General may "grant licenses to cut trees." It does not

(1) (1878) 25 Gr. 346.
(2) (1876) 27 U. C. C. P. 84.
(3) (1880) 31 U. C. C. P. 183.
(4) (1889) 45 U. C. Q. B. 288.
(5) (1890) 17 O. A. R. 86.
(6) (1893) 23 S. C. R. 488.
(7) (1894) 21 O. A. R. 129.
(8) (1885) 10 Ont. R. 191. [657.
(9) (1890) 17 O.A.R. 322; 19 S.C.R.
(10) (1899) 31 O. R. 202; 27 O.A.R. 172
(11) 33 S. C. R. 39.

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say he may even sell the trees. He cannot sell the Indian lands under these sections. There are other sections which are applicable to that. He cannot contract with regard to the future sale of them. He can grant licenses, and that license is not to be granted for a longer period than twelve months, and, as my learned friend says, subject to the fact that he may make regulations.

Now we may look to the regulations and see if they in any way extend that. If they do I adopt the judgment of Mr. Justice Moss, the late Chief Justice of Ontario, as he was later, that the statute must govern. The important regulation is No. 5.

"License holders who shall have complied with all existing regulations shall be entitled to have their licenses renewed on application to the Superintendent-General of Indian affairs."

The Court will see in the cases that the earlier form—and the present construction is quite possibly that of the earlier form of the regulation, under the Upper Canada Act of 1849, which preceded these and upon which these regulations were framed—provided that the license holder, having complied with the existing regulations, should have the first right to renewal, as against all other applicants. That the construction placed on this by my learned friend should be given to it is I submit an extension which clearly puts it beyond the power intended to be conferred by the statute. That is to say, that the license holder shall be entitled in perpetuity from year to year to have the license renewed.

I put it in the opening of the case, in speaking of the evidence, if you analyze it does it mean that? Does it mean whether there is timber there or not? I am putting this to show your lordship that in reason there

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must be some limitation fixed. It is a license with regard to cutting trees. Does it terminate *ipso facto* when the last tree is cut? Upon the unqualified and unlimited language of section 5 of the regulations, no; renewal goes on for ever; he may for purposes of his own desire to keep that license renewed, and if he does there is no discretion in the Crown to refuse it, it must be renewed forever. But your lordship has suggested, and my learned friend suggests, that no one would want it renewed after he has cut the last stick of timber. Well, does it mean the last stick? Is there no limitation on that view? Is there no point where the Crown or the Department have discretion to refuse? Because the right of the license holder, he having removed a large proportion of the timber, amounts to his holding up a large tract of land because there is some pine left upon it, although in the public interest it is desirable that the tract should be opened for settlement.

With regard to the other question: arising under the counterclaim. I think that perhaps arises—and your lordship has expressed an opinion against me—arises in this way, if your lordship will look at the language of the license for a moment; because after all the question as to the power of the Crown to contract is one thing; the question as to the form of the contract which they actually make is another.

As to the counterclaim, I do not think we can give evidence that on a certain date in 1891 certain trees were cut of a diameter less than nine inches. Except from the diameter which will appear from the different stumps, the diameter of the trees cut in each year after that being, as to a certain proportion of them, so small that they must have been less than nine inches in 1891.

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If the renewals, which have been endorsed upon the license from year to year amount to a new license, and in order to comply with the true construction of the statute are to be construed as being a new license each year, then I would admit that a new license for instance, issued in 1907 or 1906, would carry with it the right to cut pine timber which in 1907 or 1906 was nine inches in diameter. (Cites per Moss, J., in the case of *Smylie v. The Queen*, (1). Upon the theory which I understand is the foundation of my learned friend's contention, that there was a contract in 1891 to grant a license for one year and further to renew that license from year to year indefinitely, then I say the true construction of that license means that the license in 1891 and all its renewals are licenses to cut timber which was nine inches in diameter in 1891 and no other timber. That is bound up with that contention. If our view of it is accepted, if there is a new license each year, then we would have no case on that counterclaim.

[THE COURT.—In other words, you say it was a grant in 1889 to cut specific trees which were then in existence of the diameter of nine inches, and if it is renewed from year to year it is a renewal of the old original contract which simply entitled them to cut that particular wood?]

Designated by that particular description, being timber then on the limit which was nine inches in diameter and upwards. The license itself, which was Exhibit No. 1, is in these terms:—"I do hereby give unto John R. Booth and his agents and workmen, full power and license to cut pine timber and saw logs from trees of not less than nine inches diameter at the stump. To hold and occupy

(1 27 O.A.R. 188.

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the location to the exclusion of all others from 5th October, 1891, to 30th April, 1892, and no longer."

[THE COURT.—Supposing there was a tree eight and three quarter inches at the date of the license and that during the currency of the license it attained nine inches, would you contend he was not entitled to cut that?]

No, I think not, my lord.

[THE COURT.—It would be the trees as they stood at the date of the license; he would not be entitled to the growth during the year?]

If we imply a contract such as your lordship has suggested, at the time the agreement for a license was made with the licensee, you have the right to cut for one year and to have a renewal of that license indefinitely until the timber was removed, then I submit into that contract must be read the condition that it applied to the timber described therein being timber, at the date of the contract, of nine inches in diameter and no less. Of course my contention is that there is no such contract and no authority to make such a contract.

Mr. *Shepley* in reply.—My learned friend attributes to me the theory that in order to succeed in my main case I have to contend that there was a license running down by renewals all the time. I adopt for the purpose of my argument entirely the language my learned friend adopts from the judgment of the late Chief Justice Moss in *Smylie v. The Queen* (1), that in view of the law every one of these renewals—I was going to say *ex proprio vigore* but really it should be *ex vigore statuti*—has the form and effect of a new license, so that I am contending just as my learned friend does that every one of these renewals was a complete license by itself and authorized by virtue of the statute. It was the thing that was authorized to be given. It

(1) 27 O.A.R. at p. 188.

does not make any difference what form it took; it was a new license for another year and it was a license which empowered Mr. Booth to cut all the timber which during that year was of nine inches in diameter. And my learned friend does not pretend that Mr. Booth ever did anything more than that; he does not pretend that Mr. Booth ever cut a tree which at the time of its cutting was less than nine inches. He says he cut some trees which at the time of the cutting were more than nine inches but in 1891 would not have been found to be nine inches in diameter. It is a fanciful case, based upon a theory which I entirely repudiate, that these renewals, were renewals merely. I say that these renewals ,by force of the statute, had the force and effect of substantive new licenses each for a year from the time it was granted.

CASSELS, J., now (February 1st, 1913) delivered judgment.

This was a Petition of Right on behalf of John Rudolphus Booth. The suppliant sets forth in his petition that on the 5th October, 1891, a license was issued to him by the Superintendent-General of Indian Affairs to cut timber on Indian lands. The license was issued pursuant to the authority of chapter 43, of the Revised Statutes of Canada and amendments thereto. The suppliant alleges that the said license, since the date thereof, had been renewed from year to year, the last renewal expiring on the 30th April, 1909. He then alleges that due application for a renewal of the said license for the year ending on the 30th April, 1910, had been applied for which application was refused by the Superintendent-General; and the suppliant further alleges that the said limits and the timber aforesaid had been advertised for sale by his authority.

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The prayer of the petition is that the said sale may be restrained, and that the suppliant may be declared to be entitled to the renewal of the said license and to a renewal from year to year thereafter.

The Crown in its defence denies the right of the suppliant, and alleges among other grounds of defence that the lands comprised in the timber limits affected were in fact required for purposes incompatible with the licenses in question. There are other defences set out, which on reference to the statement of defence will appear.

The license bearing date the 5th of October, 1891, purports to be signed by Mr. Vankoughnet, the deputy of the Superintendent-General of Indian Affairs. It purports to be made pursuant to the provisions of Chapter 43 of the Revised Statutes of Canada and amendments thereto; and it gives to J. R. Booth of the City of Ottawa, his agents and workmen, full power and license to cut pine timber and saw logs from trees of not less than nine inches diameter at the stump upon the location described upon the back hereof; and to hold and occupy the said location to the exclusion of all others except as hereinafter mentioned, from the 5th October, 1891 to the 30th April, 1892, and no longer.

The license provides, among other things, that the dues to which the timber cut under its authority are liable shall be paid as follows: namely, as set forth in the regulations for the disposal of timber on Indian lands and reserves established by order of His Excellency the Governor-General in Council, dated the 15th September, 1888.

The amount payable for ground rent is mentioned as the sum of $324—the renewal fees, $2—and it provided that the above named licentiate shall be bound before or when paying the ground rent and

renewal fee, *if the license is renewed*, to declare on oath whether he is still the bona fide proprietor of the limit hereby licensed, or whether he has sold or transferred it or any part of it, or for whom he may hold it.

A series of renewals, so-called, were granted down to the 4th January, 1909; and they are practically all to the same effect namely, "that the conditions "of the within license having been complied with the "same is hereby renewed." Subsequently, certain manufacturing conditions were imposed by order in council of the 19th April, 1901, and the renewals were made subject to the manufacturing conditions. There is no objection to this term subsequently imposed, in order to conform apparently to regulations which had been provided for by the Province of Ontario in regard to licenses granted by them of timber berths owned by the Province.

No question arises in regard to the form of renewals. I will deal with this subject later on when discussing the various authorities bearing on the case. In point of fact "renewals" was the wrong term. There is no authority in chapter 43, R.S., referred to, or in any of the subsequent statutes which provided for renewals of licenses. Each so-called annual renewal was a new and independent license by itself.

The right of the suppliant to maintain his petition must depend upon whether or not a contract has been entered into between the Crown and himself entitling him to such renewal.

The statute, chapter 43 of the Revised Statutes of Canada, 1886, provides in the interpretation clause, that the expression "Superintendent-General," means Superintendent-General of Indian Affairs; and the expression "Deputy Superintendent-General" means the Deputy Superintendent-General of Indian Affairs.

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It is provided by section 43 of this statute that the Minister of the Interior, or the head of any other Department appointed for that purpose by the Governor in Council, shall be the Superintendent-General of Indian Affairs, and shall as such have the control and management of the lands and property of the Indians in Canada.

It is also provided that there shall be a Department of the Civil Service of Canada, which shall be called the Department of Indian Affairs, over which the Superintendent-General shall preside.

It is provided by section 14 of said statute that all reservations for Indians or for any band of Indians, or held in trust for their benefit, shall be deemed to be reserved and held for the same purposes as they were held before the passing of the Act and shall be subject to the provisions of this Act.

Section 41 of the statute provides that all Indian lands which are reserves or portions of reserves, surrendered or to be surrendered to Her Majesty, shall be deemed to be held for the same purposes as before the passing of this Act, and shall be managed leased and sold as the Governor in Council directs, subject to the conditions of surrender and the provisions of this Act.

Chapter 81 of the Revised Statutes of Canada, 1906, is practically similar to chapter 43, Revised Statutes of Canada, 1886. Section 15 of said chapter 43 provides that the Superintendent-General may authorize surveys, plans, and reports to be made of any reservation for Indians, showing and distinguishing the improved lands, the forest and lands fit for settlement, and such other information as is required, and may authorize the whole or any portion of a reserve to be sub-divided into lots.

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Section 20 of chapter 81, of the Revised Statutes of Canada, 1906, is in similar terms.

By chapter 81, section 48 of the R. S., 1906, it is provided that except as in this part otherwise provided no reserve or portion of a reserve shall be sold, alienated or leased, until it has been released or surrendered to the Crown for the purposes of this part.

By section 54 of chapter 43 of the Revised Statutes of 1886 (*The Indian Act*), it is provided as follows: "The Superintendent-General, or any officer or agent authorized by him to that effect, *may* grant licenses to cut trees on reserves and ungranted Indian lands at such rates and subject to such conditions, regulations and restrictions as are from time to time established by the Governor in Council, and such conditions, regulations and restrictions shall be adapted to the locality in which such reserves or lands are situate."

Section 55 provides that no license shall be so granted for a longer period than 12 months from the date thereof.

Then follow subsequent provisions as to making returns, etc.

Section, 73 and 74, of Chap. 81Q. R. S. 1906, and the following sections, are in similar terms to the earlier statute of 1886.

It is obvious that the Superintendent General or other officer authorized by him to that effect had no power to grant a license for a longer period than twelve months from the date thereof.

It is equally obvious that the conditions, regulations and restrictions referred to in section 54 of chapter 43, R. S., 1886, and of section 73 of chapter 81 of the R. S. of 1906, could only refer to such conditions, regulations and restrictions as are applicable to the yearly license, and would not include any such regulations which

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contemplated a further renewal of the license to a period beyond the year referred to.

In point of fact the license of the 5th October, 1891, referred merely to the payment of the dues. It reads: "That the dues to which the timber cut under its "authority are liable shall be paid as follows, namely: "As set forth in the regulations for the disposal of "timber on Indian lands and reserves established by "order of His Excellency the Governor General in "Council, dated the 15th September, 1888."

I am of opinion that taking the license of the 5th October, 1891, by itself, and considering the authority conferred upon the Superintendent-General by section 54 of the earlier revision of the Revised Statutes, 1886, and section 73 of the later revision of 1906, there is no contract between the Crown and the suppliant which would entitle the suppliant to a judgment against the Crown as prayed for. The suppliant is therefore forced to rely upon the Indian land regulations and timber regulations adopted and established by orders of His Excellency the Governor General in Council on the 15th September, 1888, and to maintain his claim he must establish a contractual relation existing between the Crown and himself by reason of these regulations.

Section 2 of these regulations provides that the Superintendent-General of Indian Affairs, before granting any licenses for new timber berths in unsurveyed Indian reserves or lands, shall cause such berths to be surveyed; and the Superintendent-General of Indian Affairs may cause any reserve or other Indian lands to be sub-divided into as many timber berths as he may think proper. Then, there is a provision for sale by auction; and section 5 provides that license holders who shall have complied with all existing.

regulations shall be entitled to have their licenses renewed on application to the Superintendent-General of Indian Affairs.

Section 11 provides that all timber licenses are to expire on the 30th April next after the date thereof, and all renewals are to be applied for before the first of July following the expiration of the last preceding license. In default thereof the berth or berths shall be treated as, de facto, forfeited.

Section 12 provides that no renewal of any license shall be granted unless the limit covered thereby has been properly worked during the preceding season, or sufficient reason be given under oath and the same to be satisfactory to the Superintendent-General of Indian Affairs for the non-working of the limit; and unless or until the ground rent and all costs of survey and all dues to the Crown on timber, sawlogs or other lumber cut under and by virtue of any license other than the last preceding shall have been first paid.

Mr. Shepley, in his very able and lucid argument before me, rested his case in the main upon these regulations. His argument is shortly that while by the statute the Superintendent-General can only grant a license for a year, nevertheless the Crown might by valid contract bind itself to grant a renewal or a new license from year to year, practically in perpetuity. I am unable to agree with this contention. The lands in question are held in trust for the Indians. There are provisions referred to above which contemplate sales of Indian reserves by the Crown for the benefit of the Indians. I do not think the Crown was bound for all time to keep lands set apart as timber berths if in its discretion it was considered advisable in the interest of its *cestui que trustent* to sell these lands. In the present case it appears that a surrender was

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made with the view to enable the Crown to sell the limits in question. They were put up for sale by auction. There is nothing imputing want of good faith on the part of those representing the Crown, and I must assume that the Crown is dealing with the lands in question in a manner best calculated to promote the interest of those whom it represents.

Moreover, I have come to the conclusion that any regulation which would have the effect of tying up for practically all time the limits in question would if they are so construed be *ultra vires* as being contrary to the terms of the statute. The statute is that the Superintendent-General *may* grant licenses.

While I do not consider myself as bound to follow, with the exception of *Bulmer v. The Queen*, the various decisions which I shall refer to, they are the decisions of judges of very great eminence; and even if I held a view contrary to their views, I would be loth to set up my personal judgment as against their opinions, but would prefer to leave it to a higher court to place a different construction upon the statutes. I may say, however, that I agree with their conclusions.

The first case which is important is the case of *Contois v. Bonfield*, (1). This was an appeal from the judgment of the Court of Common Pleas. In this particular case a patent had been issued by mistake. It had been intended that the rights of the licensee to the timber should have been reserved to the licensee. The official of the Crown merely endorsed the reservation on the patent and it was held that this had no effect. An action was subsequently brought in the Chancery Division and tried by the late Chancellor Spragge in the suit of the *Attorney-General v. Contois*, (2).

(1) 27 U.C.C.P. 84. (2) 25 Gr. 346.

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*The Contois* case was decided under the Act respecting the sale and management of timber on public lands, chapter 23, of the Consolidated Statutes of Canada, 1859. That Act provided as follows: "The Commissioner of Crown lands or any officer or agent under "him authorized to that effect *may* grant licenses to "cut timber on the ungranted lands of the Crown at "such rates, and subject to such conditions, regulations "and restrictions as from time to time be established "by the Governor in Council, and of which notice "shall be given in the *Canada Gazette*." By subsection 2 it was enacted that no licenses shall be so granted for a longer period than 12 months from the date thereof. And then follow provisions very similar in terms to the provisions of the statutes governing this case.

The late Chief Justice Thomas Moss, in his judgment, is reported as follows (p. 88) :—

"The patent on its face grants the land absolutely "and unconditionally. It may, therefore, be said to "grant more than the subject matter of the treaty "between the Crown and the patentees. This excess "in the grant may be fairly taken to have been the "result of an improvident act of the official whose "duty it was to draw a proper patent, and we are not "prepared to hold that in such a case the Crown "cannot in Equity obtain the relief which under "analogous circumstances would be awarded to a "subject. But we rest our judgment upon the ground "that, even if the memorandum endorsed had been "embodied in the patent, the appellant would, for all "that is alleged, have been without defence to this "action. On that supposition the language of the "patent would have been that it was subject to the "rights, powers, and privileges of the defendant under

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"the existing license." . . . . . .

"It was suggested upon the argument that the "difficulty arising from want of privity was met by "the commissioner's renewal of the license for the "period of a year, and that this should be treated as a "*quasi* assignment by the Crown of any rights which "could have been enforced against the plaintiff at its "instance. The answer offered to this was that the "powers of the commissioner are prescribed and "regulated by statute; that an agreement for a renewal "of a license is something which the law has not "empowered him to make, and is indeed not within "the contemplation of the statute; and that he can "only give a right to cut timber upon ungranted "lands, and even that for no longer period than twelve "months."

"These positions are fully supported by the statute."

In the case of *The Muskoka Mill and Lumber Co. v. McDermott, et al* (1)—also a case in the Court of Appeal for Ontario—the following is the language of the court. Osler, J. states at page 132, as follows:

"The Act respecting timber on public lands expressly "enacts that no license to cut timber on the ungranted "lands of the Crown shall be so granted for a longer "period than twelve months."

And he proceeds to point out the terms and the rights conferred upon the licensee. Then he states:

"No language could more forcibly express the "limitation of the right of the holder to the period of "the license, as well as the limitation of the period "for which it may be granted, and the license itself "is expressed, as it ought to be, in accordance with the "requirements of the Act. It is needless to say that "no conditions, regulations or restrictions can be

(1) 21 O.A.R. 129

"established by the Lieutenant-Governor in Council "which are opposed to these requirements. * * "The legal right of the licensee, except as excepted by "the last clause of section 2 of the Act, ceased with "the expiration of each license, and I am not aware of "any equitable right to a renewal capable of being "enforced against the Crown. That is a matter which "rests with the Crown, which no doubt will act justly "in each particular case. But there is nothing so far "as I know, to prevent the Crown from withdrawing "any lot from a timber limit, and declining to renew "the license over such lot at the expiration of the "license year."

Then he refers to the language of the late Chief Justice Moss in the case of *Contois v. Bonfield,* which I have quoted. The late Chief Justice Hagarty concurred with the judgment of Mr. Justice Osler.

The next case of importance is *Smylie v. The Queen,* decided by the late Mr. Justice Street, (1). This decision was based upon the contract entered into between the parties. The contention in that case was that the subsequent orders in council which required the timber to be manufactured in Canada were not binding upon the licensee. The judgment of Mr. Justice Street proceeded upon the ground that by the original contract the rights of the licensee to a renewal were subject to such regulations as may *from time to time* be established. The licensee refused to accept a renewal of the license containing the regulations requiring him to comply with these subsequent regulations, and Mr. Justice Street dismissed the action, basing his judgment upon the ground that the licensee, if he took a renewal was compelled to take it subject to these regulations, and having refused to do so he was out of court.

(1) 31 O. R. 203.

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I rather gather from the judgment of Mr. Justice Street that his own opinion would more than likely have been in favour of the right to a renewal. This case was taken to the Court of Appeal in Ontario, (1) and while the reasons of the various Judges may have been *obiter dicta*, nevertheless their views are entitled to very great weight. Mr. Justice Osler refers to the regulations —and amongst others is one that licensed holders who have duly complied with all existing regulations, shall be entitled to a renewal of their licenses on complying with certain conditions. He states at page 177 as follows:

"In these regulations we find for the first time "language which might imply an intention to take "authority to sell the timber berths or limits themselves "instead of, as hitherto, selling the yearly license to "cut the timber thereon, and stress was laid on this "by the appellant as if he had thereby acquired some "larger title to the timber than the yearly license "would confer upon him. We cannot, however, "assume that the Lieutenant-Governor in Council "intended to do anything opposed to the statute, "which only authorises the Commissioner of Crown "Lands to grant licenses to cut timber on the lands— "licenses which by law must expire at the expiration "of twelve months from their date. Such a license "was, in my opinion, the only thing authorized and "intended by these regulations to be sold, however "large the sum paid at the sale, which can only be "regarded as a premium or bonus for the license, as "indeed the conditions of sale in each case expressly "describe it. It may be that under the power to make "'conditions, regulations and restrictions,' the Lieu- "tenant-Governor in Council had authority to provide,

(1) 27 O.A.R. 176

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"as these regulations purport to do, for renewing the "license on proper terms. It is not necessary to decide "that, although it does appear to be quite opposed to "the clear words of the Act, which seem to contemplate "that the Crown should be perfectly unfettered and "free to deal with the timber at the expiration of each "license year as it might think fit."

On page 181 he says:

"Considering, however, that every license is a new "and independent license."

Mr. Justice McLennan at page 182, refers to the various statutes, and he points out that "section 2 of "the statute declares that no license shall be so granted "for a longer period than twelve months from the "date thereof."

And he says:

"Now there is not, and there has never been, during "fifty years, any enactment in any way qualifying or "limiting that plain declaration of the Legislature, "that no license shall be for a longer term than twelve "months, and the law has been re-enacted during that "period three different times. How absolute the "intention of the Legislature was, and has been, in "thus limiting the duration of licenses, appears from "section 3, which defines the rights which the license "was intended to confer."

He proceeds (p. 183):—

"I think the Legislature could hardly have used "more clear, unambiguous, emphatic language to express "its intention, that there should be no license for a "longer period than twelve months, that at the end of "that time they should expire. * * They "have always been for a term not exceeding twelve "months, terminating on a day certain, which for "many years has been the 30th of April, and no longer.

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"Such is the language of the statute, and such is the "title which has been granted to and accepted by the "suppliants in pursuance thereof.

"They contend, however, that the clear language "of the Legislature and of the license issued in pur- "suance thereof, is to be qualified by the regulations, "particularly regulation 5, and by the practice of the "land department for many years of granting renewals "annually to the previous licensee. Regulation 5 "provides that license holders who have complied "with all existing regulations shall be entitled to have "their licenses renewed on application. * * "The question is whether these two regulations were "intended or can be held to weaken or qualify the "clear terms of the statute, and to confer a right not "expressed in the license itself, and I think it impossible "so to hold."

He then proceeds (p. 184):—

"I think, therefore, the intention of the regulations "is to comply with, and not to qualify, the statute. "But if the regulation is not in accordance with the "statute, if it assumes to confer a right of renewal, it "must give way to the statute, and can confer no right "beyond what the statute authorized the Land Com- "missioner to grant, and that is a license for a term "not exceeding twelve months. The regulations which "the Lieutenant-Governor in Council was authorized "to establish were in respect of licenses which were not "to exceed twelve months in duration. So far as they "go beyond that they cannot bind the Crown. I think "the regulations in question were ordained, merely "for the guidance of the officials of the land department, "and not for the purpose of conferring any contractual "or other right of renewal upon licensees, which they "could enforce against the Crown."

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The learned Judge came to the conclusion, as follows:

"I am, therefore, of the opinion that the suppliants "have no contractual or other right, as licensees, to "compel the Crown to renew their licenses."

The late Sir Charles Moss, at his death Chief Justice of the Court of Appeal, points out as follows (p. 189):

"These powers are prescribed and regulated by the "statute, and to it must recourse be had in every case "when it becomes necessary to ascertain what may "and what may not be done in regard to the public "timber. I fail to find in the statute any warrant for "the suppliants' contention. On the contrary, I "think it is made thereby very plain that the authority "to give or grant a right to any one to cut timber upon "the public lands of the Province for the purpose of "manufacturing it into logs, lumber, or square timber, "is limited to the grant of a license for a period of "twelve months from the date thereof.

"These enactments indicate an intention to retain "the entire right to and control over all timber not cut "during the term of a license, and over the grant of "licenses from year to year, and the power to withold "from the licensee of one year any claim whatever to "the issue to him of a license for the next or any future "year."

He further states (p. 190):

"The term 'renewal' seems to be applied to licenses "issued after the first. But in reality this is not an "accurate description. They are not in the nature "of a restoration or revival of a right. Each is a new "grant. It bears no necessary relation to the preceding "license."

In regard to this latter point, reference may be had to the case of *The Lakefield Lumber and Manufacturing*

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*Co. v. Shairp*, (1). Mr. Justice Gwynne in his judgment at page 671 states:

"As to the point that the license which issued on the "3rd May, 1888, was the same license as that issued "in all the years subsequent to and in the year 1873 "when the first appears to have been granted and "before the lot in question was sold, and that, therefore, "the license of 1888 covered the lot in question equally "as did that issued in 1883, and in prior years, it does "not seem to me to be necessary to make any observa-"tions further than that it cannot be entertained."

To the same effect in the Province of Quebec, in the case of *W. C. Edwards Co., Ltd., v. D'Halewyn*, (2)

The only other case that I have been referred to, and which has a bearing, is the case of *Bulmer v. The Queen*, reported in 3 Ex. C. R. at p. 184. At page 212, the late Judge of the Exchequer Court, Mr. Justice Burbidge, seems to have yielded to Mr. McCarthy's argument and read the word "may" as meaning the word "shall," and came to the conclusion there was a contract to renew. In that particular case it appeared subsequently that the Dominion had no right or title to the limits, the subject matter of the suit. The question therefore resolved itself into one of damages, the title not being in the Dominion, and the learned Judge proceeded to assess damages under the doctrine enunciated in *Bain v. Fothergill*, and allowed some $5,000 damages. This case was taken to the Supreme Court, and the judgment of that Court was pronounced by the late Chief Justice Strong, and is reported in 23 S. C. R. at p. 488. The court differed entirely from the view taken by the Judge in the court below. Apparently it declined to read the word "may" as "shall". And it is pointed out that by the words

(1) 19 S.C.R. p. 657 (2) 18 Q.B.K. p. 419

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of the statute the right conferred is discretionary. No valid cross appeal was taken so that the Supreme Court was unable to reduce the damages, and therefore dismissed the appeal. The case is important as showing that no contract had been entered into merely by the orders in council not acted upon by the granting of the license. The learned Chief Justice points out that the right of the suppliant must therefore depend upon the terms of the lease or license itself, and no contract was evidenced by the terms of the license.

One or two other cases were cited before me, as for instance *Booth v. McIntyre*, (1), *Foran v. McIntyre*, (2), and *McArthur v. The Northern and Pacific Junction Ry. Co.*, (3).

I have carefully read these various cases, but do not find that they assist in any way to a determination of this case.

I am of opinion for the reasons given that the suppliant has failed to prove a contract enforceable against the Crown.

The Petition is dismissed with costs.

*Judgment accordingly.*

Solicitors for the suppliant: *Christie, Greene, & Hill.*

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

(1) 31 U.C.C.P. p. 183 (2) 45 U.C.Q.B. p 283

(3) 17 O.A.R. p. 86

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

AND

THE CANADIAN PACIFIC RAILWAY COMPANY.....DEFENDANT.

*Principal and Agent—Customs—Power of Attorney under secs. 132 and 133 of R. S., 1906, c. 48—Fraud—Misappropriation of funds supplied to agent to pay customs duties—Action by Crown to obtain payment of duties—Onus of proof of payment.*

H. was appointed agent of the defendant company for the purpose of passing goods imported by the company into Canada through the customs at the port of Montreal. The power of attorney from the company to *H.* was the usual one furnished by the customs authorities and was framed in conformity with the provisions of sections 157 and 158, R.S., 1886, c. 32 [now secs. 132 and 133 of R.S., 1906, c. 48]. By this instrument *H.* was empowered "to transact all busi-"ness which we may have with the collector of the port of Montreal, or relating "to the Department of Customs of the said port, and to execute sign, seal and "deliver for us and in our name all bonds, entries and other instruments in "writing relating to any such business as aforesaid, hereby ratifying and con-"firming all that our said attorney and agent shall do in the behalf aforesaid."

*Held*, that under the provisions of the above instrument *H.* was empowered to do everything necessary to the effective passing of the goods through the customs. He could not only pay over the exact amount of duty collectible on any particular entry, but in case he had a cheque of the defendant larger in amount than the duty actually payable he had authority to receive for the defendant a refund, *i.e.*, the difference in change, from the customs authorities.

2. *H.* was guilty of fraud both upon the defendant and the Customs authorities in that after obtaining a cheque from his principal for the proper amount of duties payable upon an importation at a given date he would, in respect of some of the goods, fraudulently declare a smaller quantity of dutiable goods, or by sight entries would understate the value of the goods, and, in respect of some other goods, would fraudulently procure part of them to be passed as free, and so obtain a refund from the Customs authorities of the difference between the amount of the cheque payable to the Crown for the true duty and the amount actually payable on such fraudulent representations. In the result the duties were not paid on a large quantity of goods imported by the defendant company into Canada.

*Held*, that inasmuch as the defendant by choosing *H.* as its agent, and by entrusting him with authority which enabled him to perpetrate the frauds in

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question, it should answer for the loss arising upon such frauds rather than that the same should fall upon the plaintiff.

3. That the onus of proving that the duties upon the goods so passed through the Customs were paid was upon the defendant under the provisions of sec, 167 of the Customs Act, (R.S., 1886., c. 32, now sec. 264 of R.S., 1906, c. 48), and such proof not having been adduced, the plaintiff was entitled to judgment for the amount of the duties so remaining unpaid.

4. The principal is civilly liable for fraud committed by his agent while acting within the scope and the ordinary course of his employment whether the result is or is not for the benefit of the principal.

THIS was an information to recover the amount of certain customs duties alleged to be due and owing by the defendant company to the Crown.

The facts of the case are, briefly, as follows:—

One Hobbs was appointed agent of the defendant company for customs purposes, under a power of attorney in the usual form provided by the Customs authorities, in conformity with the provisions of R. S., 1886, c. 32, sec. 157 et seq. Armed with this authority Hobbs entered upon a career of fraud and deception whereby he succeeded in converting to his own use a large sum of moneys entrusted to him by the defendant company for the purpose of paying customs duties upon goods imported into Canada. Upon discovery of the frauds Hobbs was prosecuted, convicted and sentenced to the penitentiary. The Crown then sought payment of the duties which were payable on the goods improperly passed through the Customs by means of the fraud of Hobbs.

The plan adopted by Hobbs was simple in the extreme. As Customs agent for the defendant company he was in possession of the invoices which had to be entered from time to time; and as required he obtained cheques for the duties payable on the invoices from the treasurer of the defendant. As a rule, he had to obtain a cheque for each invoice. He apparently saw, that if by the production and payment of the

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duties on one invoice he could pass the goods covered by two invoices, and cancel the manifest for the goods covered by the two invoices, that he would be in possession of a cheque for which all apparent liability on the part of the defendant to the Crown had disappeared and which he could, therefore, turn to his profit." The manifest having been cancelled, the Crown no longer had any claim for duties on the goods so far as its records would show. So far as the records of the Crown would show, the claim would have disappeared.

That appears to have been seen by Hobbs—and as he was acting as customs attorney at this time for other importers, from whom he received remittances to pay duties, and as he found it possible to obtain refunds in cash, it is quite clear that it was a profitable system to him that he put in force.

His plan was, as the evidences shows, so far as the goods on Schedule "A" are concerned, to prepare an entry covering a definite number of packages, and purporting to cancel a definite manifest for those packages; and then to attach to the entry an invoice for the amount stated in the entry, as the value of the goods covered by the entry, but which in reality covered only a part of the goods contained in the packages entered, and to suppress the invoices for the balance of the goods. In that way he would have in his possession the cheques obtained from the defendant company for the duties payable on the other goods, and he could get these goods through without disclosing their existence in any way to the customs officers. The customs officers would be ignorant of any liability with respect to the duty on the goods, and it would be possible for him to use the cheques for his own profit.

In regard to Schedule "B," the method adopted by Hobbs was somewhat different. Under sections 29 et seq. of the Customs Act, if an importer wishes to enter goods, and he has not the invoice in his possession, he is permitted on making an affidavit to that effect that he has not the invoice, to make a sight entry declaring the value of the dutiable goods and on payment of the amount of duty according to that declaration, the goods may be obtained.

As regards the goods shown on Schedule "B," Hobbs apparently took advantage of the provisions of these sections and made affidavits that the invoices were not in the possession of the defendant, and so passed the goods on sight entries. As a matter of fact the affidavits were false, because it was proved that at the time the affidavits were made the invoices were in the possession of the defendant.

The sight entries understated the dutiable value of the goods. The representation made by Hobbs with respect to the value in those sight entries was apparently accepted by the officers of the customs as the value of the goods, they were apparently accepted after the representation he made in the entries—and as appears in the cash book the amount shown in the sight entries was the amount on which duty was collected. As a matter of fact Hobbs had obtained from the defendant a cheque for the duties payable on the real value, as shown by the invoices. He therefore had in his possession a very much larger amount than he had represented to be payable to the Crown—but he used it for some other purpose.

As regards the items on Schedule "C", the method adopted by Hobbs was again different. With regard to those goods, Hobbs did not conceal the fact of their importation or their value; but he concealed the

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fact that they were dutiable. It was a little variation. He represented that they were not subject to duties, and the entries show that they were passed as free goods. The entries are free entries, and they appear in the customs' cash book as free entries also.

The case having been referred to Mr. Justice Audette, for enquiry and report whilst he was Registrar of the Court, after his appointment to the Bench was continued before him in his judicial capacity under the provisions of Chapter 21 of the Statutes of Canada, 1912. (2 Geo. V, ch. 21.)

December 19th, 1912.

This case was argued at Ottawa.

*E. L. Newcombe*, K.C., and *A. Wainwright, K.C.*, for the plaintiff.

*E. Lafleur*, K.C., and J. J. *Creelman*, for the defendant.

Mr. *Wainwright*:—The issue between the parties in the present case is a vey simple and direct one. The defendant admits the importation of the goods; the importation of all goods shown in the three schedules. It admits their dutiable character and dutiable value, as alleged by the plaintiff; but it says that all of the duties payable on these goods were in fact paid —so that the issue between the parties is a very simple one. Were the duties in fact paid by the defendant as required by law? The defendant relies entirely upon the allegation that the duties were paid, as required by law—upon all the goods referred to in the three schedules—and whether payment was or was not made is the only question the court has to decide.

In dealing with that question, I wish at the outset to refer to a principle which I submit underlies the

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whole case, and that principle is, that it was for the defendant to establish that the duties payable on these goods had been properly paid as required by law, and that all the formalities required by law with respect to their passage through the Customs had been complied with. In other words, the onus of proof throughout was on the defendant. That principle is laid down in sec. 264 of the *Customs Act*. The rule is laid down in unmistakable terms. In all cases where a question arises whether the duties have been paid, or the formalities not complied with, the onus of proof is always on the importer to show that the duties were paid and that all the formalities complied with, and not on the Crown. It is true in the present case, the defendant attempted to make a distinction between a case where the goods imported are still in the possession of the Customs officers, and a case such as the present one where the goods are in fact in the possession of the importer; but I submit there is clearly no ground whatever for making a distinction of that kind. There is nothing in the law that would authorize it, and the Court cannot read it into the statutes. It would be particularly unreasonable and unfair to make a distinction of that kind, in the present case, where the importer was the carrier of the goods—where it was open to the importer to bring the goods in and take possession as it saw fit, and where it was impossible for the Crown to know anything about their importation except insofar as information was received from the defendant, the importer, and, at the same time, the carrier of the goods.

But apart from that, there is absolutely no warrant, I submit, for a distinction such as I have referred to being made. The object of the rule, which requires

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the importer to prove the payment of the duties required by law, is obviously to protect the Crown in its revenue; and even if in certain cases it may work a hardship on the importer of goods, that cannot be taken into consideration. The rule as laid down in the law must be strictly applied in all cases, and in this case as in any other. I submit, therefore, that throughout this case that rule must be applied,—and if any doubt arises, it must always be resolved in favour of the Crown, and in favour of the view that these duties have not been paid as required by law and are still due and owing to the Crown.

Although I rely upon that principle, I submit that in the present case, not only has the defendant failed to establish payment of the duties payable on the goods in question, but the Crown has in fact, although it was not obliged to do so, established the fact that the duties have not all been paid. Not only has the defendant completely failed to discharge the onus imposed upon it by law, but the plaintiff has in fact proved the contrary of the defendant's contention. And that is the question that I propose to discuss in the course of my argument. The only question the court has to consider, and the only question I have to deal with is, what proof was made of the payment of these duties by the defendant?

Before dealing with that question, it will be necessary for me to refer briefly to the evidence in order that what I am about to say with regard to the question of payment may be intelligible. I wish to refer to the evidence made in the case, particularly to the evidence with respect to the custom or practice followed at the Montreal Custom House during the period of the frauds in question here, and the custom followed by the defendant with respect to the payment of duties.

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The first point that impresses me is with respect to the way in which the Crown is notified of the importation of dutiable goods. It is quite clear that it is absolutely essential that there must be some way in which the Crown should be notified of the importation of dutiable goods, otherwise the Crown would obviously be exposed to fraud and consequently to loss.

The method adopted is the manifesting system, to which considerable reference was made in the course of the evidence. That was the means or principal means adopted of conveying to the customs officers the information, that dutiable goods—goods on which duties are payable to the Crown—have been brought into the country. As was shown in the course of the evidence, and it is a matter of law in the Customs Act, all goods coming into Canada by land or sea from abroad, must be manifested and the manifest must be filed at the proper port of entry with the Customs officers; and all carriers are under heavy bonds to see these provisions of the law are complied with.

These manifests give notice to the Customs officers that the goods have been brought into the country, and puts them on their guard with respect to the payment of duties—they are then on the watch to see the goods are properly passed and the duties paid. So far as the actual physical possession of the goods are concerned, the Crown may perhaps never have them. Where the importer is the carrier of the goods, it frequently happens the Crown never has the actual physical possession. There is no doubt that in the majority of instances, in the present case, the Crown never had the actual physical possession of the goods. Possession was taken of the goods by the defendant immediately on their arrival in Canada. However,

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the requirements of the law with respect to manifesting the goods are complied with, and entries are made by the importers, if the parties are strictly honest, even although the Crown never had the physical possession of the goods there would be no danger of loss. That was shown in the course of the evidence.

It was proved conclusively, that the representations in a particular entry as to the manifests which it was intended to cancel, and that the goods which the entry purported to cover, were the goods on a certain invoice produced with that entry, came from the importer.

[THE COURT:—They had to satisfy the landing waiter that they were goods of that nature ?]

Of that general nature. But those representations came entirely from the importer—and my point is that those representations by the importer were checked by the customs officers under the system prevailing during the period of this case, merely by the documents produced by the importer. It was a question of checking up the documents,—and no one officer of the customs saw all the documents. If for example the manifest clerk received an entry and landing warrant purporting to apply to a certain manifest, and apparently covering or entering the number of packages shown on that manifest, he accepted that representation made by the importer and cancelled the manifest—that ended the matter as far as he was concerned. He only was concerned with the number of packages covered by the manifest, and that the number of those packages corresponded with the representations made on the entry. Payment of duty on the other hand was made to the customs cashier, and he accepted, with respect to the amount of duty, the checking of the checking clerk who did not see the manifest,—who saw only the bill of entry

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and the invoices produced with it, and who checked the statement made in the entry by the manifest produced with it. If he found that these statements agreed, he would certify the entry,—the cashier would then accept the amount of duty shown to be payable, and would then certify the entry, and it could be taken to the manifest clerk who cancelled the manifest by it. All that the checking clerk who examined the invoices had to ascertain was that the documents tallied. That if an entry was made purporting to pass goods of a certain value, that an invoice had to be attached covering goods of that value—if he found that, he would be satisfied and would certify the entry. What I had in mind was that the whole system of checking was by documents, and if a dishonest importer falsified all of his documents in one particular so that they tallied, there was absolutely no way by which the fraud could be detected by the officers of the customs under the system followed at that time. That is the point I make now. The customs officers were absolutely dependent on the representations made by the importer, and were absolutely dependent on the honesty of the importers and the customs attorneys appointed by them.

And it may be said that the system was a defective one, but I submit there was no effective way in which fraud could be guarded against. There was only one way perhaps, and that would be by opening every package brought in and making an examination of the contents. That obviously is not practicable.

I doubt if any perfect method could be devised to guard against fraud. The system of course was one which made fraud possible, being purely one of checking by documents and there being no comparison by anybody of the documents with the goods themselves,

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as long as the documents tallied everybody appeared to have been perfectly satisfied.

Now the facilities that the system offered for fraudulent practices were seen and taken advantage of by Hobbs, the customs attorney of the defendant company.

The *Customs Act* prescribes the formalities that must be followed in making payment of duties, in very clear terms. Section 25 provides that a person entering any goods inward, must deliver to the Collector of Customs a bill of entry accompanied by an invoice giving certain particulars.

Section 26, provides that the quantity and value shall be stated in the bill of entry, and that it must be accompanied by the invoice.

Section 27 refers to the payment of the duty.

"Unless the goods are to be warehoused in the man-"ner by this Act provided, the importer shall, at the "time of entry pay down, or cause to be so paid, "all duties upon all goods entered inwards; and the "collector or other proper officer shall, immediately "thereupon, grant his warrant for the unlading of "such goods, and grant a permit for the conveyance "of such goods further into Canada, if so required "by the importer."

Section 32 refers again to the bill of entry and an invoice in proper form being produced by the importer.

I submit to the court in the first place, that an importer pretending to have paid his duties, must show that he has followed the procedure laid down in the Act. I submit it is not open to the importer who has brought into Canada dutiable goods, to say to the Crown: I have made no entry of those goods, I produced no invoice, I disregarded the Act; but a sufficient sum to cover the duties on the goods passed

from me into your possession and therefore these duties are paid. I submit that cannot be said unless every provision of the Customs Act is absolutely disregarded. And yet that would be the position in the present case if it can be held that there may have been payment of duties. Because, as I said a moment ago, it cannot be contended in this case that the goods were entered or declared or any invoices produced. All of the provisions of the *Customs Act* were violated.

If it is held that there might be evidence under those circumstances to show a payment of duties, it can only be because it is held there may be a payment of duty merely by the passing of money from the importer to the Crown: and without complying with the law, and I consider that would be a very dangerous principle to lay down. It would mean that the Crown would be absolutely exposed to frauds of all kinds.

I submit that in view of the terms of the law the court should hold in any event with respect to the failure to comply with the Act, that there could have been no payment of duties. Before passing from that point, I propose to refer to another one which is connected with it, and is also connected with other points in the case with which I will deal later, and that is this—it may be stated or suggested that the failure to comply with the requirements of the Act was due altogether to the dishonesty on the part of the defendant's customs attorney, and that the defendant cannot be held liable for it, for such failure. That was suggested several times by counsel for the defendant in the course of the present case. But I think that that suggestion is due altogether to a misapprehension of the exact situation of this case.

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It seems to me that it is quite clear that whatever the defendant's intention may have been, the failure of its customs agent to comply with the law, means that the defendant also failed to comply with the law. The contention advanced by the defendant of non-responsibility for the acts and omissions of their agent Hobbs, might possibly be maintained in a case where the defendant was being sued for penalties, and where the question might arise as to its responsibility for the acts and omissions of its agent, but there is no such question as that in the present case. Here it is a question whether they did something they were obliged to do. They were permitted to do it by an agent. They were permitted to appoint an agent to perform it. If the agent failed to perform it, it is not open to them to say they did perform it. It is a question whether something was done; if Hobbs did not do it, then the defendant did not do it. If Hobbs failed to comply with the requirements of the law with respect to the entry and declaration of these goods, then the defendant failed to do so. There is no getting away from that point of view. It may be that in certain cases a principal may claim exemption from responsibility for the agent's acts, but defendant certainly cannot claim the benefit of things not done by their agent, merely because they had instructed their agent to do them.

It might be arguable that an importer was not responsible for the criminal acts of his agent. That does not arise here. We say you had to enter your goods and pay your duties. You appointed an agent to do it, and he did not do it, therefore you did not do it. It was not done by him, therefore it was not done by you. Any act or duty in connection with the passing of these goods that was not done by Hobbs was

not done or performed by the defendant, and defendant cannot say now that it was.

I now go on to my second point. I submit that the evidence even if relevant and legal does not show a payment of duties but shows the contrary. As the Court knows, the defendant relies entirely upon the production of certain cheques corresponding in amounts, in the majority of cases, with the various amounts claimed in these proceedings. These cheques it has been admitted were used to buy drafts for the Receiver-General. The defendant relies for its proof of payment upon the production of these cheques. In its statement of defence reference was also made to certain vouchers and receipts. The defendant claimed that it held receipts and vouchers for the various amounts claimed in this action, but I think those vouchers and receipts may now be disregarded. There was no attempt made to prove them or identify them in any way. Mr. Langridge said that the vouchers and receipts attached to the cheques were pinned to them by him. He got the vouchers and cheques from the different records and pinned them together before producing them in court. And we also heard Meunier say that when the cheques were handed in there were no vouchers or receipts attached to them. We are left entirely with these cancelled cheques which the defendant relies upon as evidence of the payment of the various duties payable herein.

[THE COURT: There is no doubt the cheques were handed over the counter?]

Yes. It is quite obvious, however, that whatever became of the cheques they could not have been used in connection with the payment of any duties in this case. I say they were not so used; and I say they could

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not have been possibly so used. It does not matter what became of them.

The defendant urges that these cheques should be held to constitute payment of the duties in the present proceedings, because in drawing those cheques the defendant's officer who drew them had the intention that they should be used for the purpose of paying the duties. It is not necessary for me to point out that it makes no difference what performance or intention the defendant had in drawing those cheques,—that is absolutely immaterial to the present case. The only question is what were the cheques used for. So far as the cheques are concerned, the defendant had appointed Hobbs its agent for that purpose—he was entrusted with the duty of making and using those cheques at the Customs and delivering them—they were left in his hands to use them as he found necessary. And I might say at this point that it is quite clear that he used them as he saw fit. It is quite clear that although the defendant attempted to establish that a separate cheque had been drawn for each invoice,—the cheques handed to Hobbs were not used by him for the payment of the duties for which they were drawn.

It is quite clear from the evidence of Meunier that the cheques were used by Hobbs as he saw fit. He did not by any means use a particular cheque with the entry of the goods the duties of which it had been drawn to cover. As a matter of fact it would have been impossible for him to have done so in a great many cases. A great many cheques covered several invoices, of goods coming in at different times. It was not possible for Hobbs to use a cheque for the invoice for which it was drawn. And it was shown in one or two cases that goods were entered before

the cheque was drawn, so that it is quite clear that the cheques were not drawn for each invoice and earmarked to that extent,—that contention cannot be sustained. It may have been their intention that Hobbs should do that, but that is not material. It is not a question of intention, but what Hobbs actually did. He used them as he found necessary. Hobbs acted as Customs agent, for other importers with the knowledge of the defendant.

He did not always consider whether a C.P.R. cheque was being used for C.P.R. goods; and it is quite clear that that procedure on the part of Hobbs was not open to criticism by the customs officials, although it may be contended that it was. It was obviously none of Meunier's business what Hobbs did. Meunier was there for the purpose of collecting the proper amount of the duties on the entries put through. So long as he got that he was perfectly satisfied. These duties are supposed to be paid in cash, but as a matter of courtesy it was allowed to pay by accepted cheques—as long as Meunier received the proper amount it was none of his business. It was none of his business whether it was signed by the C.P.R., John Jones or anyone else, especially as it was customary for a carrier to act as Customs agent for the customer's goods—and in the present case, and in most of the other cases, they were made on C.P.R. forms. In any event I would have the right to go to the Customs with an accepted C.P.R. cheque and ask them to take it in payment of duties on my goods. And if the cashier criticized that course, he would be going outside of his duty. It would be none of his business. And that was the method followed by Hobbs in dealing with these cheques. It is quite clear that we are not brought anywhere by the produc-

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tion of a cheque drawn by the defendant to pay duties on certain goods. It does not create a presumption, it does not create an inference, of any kind as to the use made of that cheque. It is essential that evidence should be made that the cheque was actually used and accepted for the purposes for which it was drawn. But in view of the way that Hobbs mixed all the cheques up, the mere fact that it was drawn for a particular purpose does not create any presumption that it was used for that purpose.

[THE COURT:—I think the C.P.R. had the intention of paying.]

I am speaking now of the intention with which that cheque was handed over at the customs. We are not suing for penalties. They say certain cheques went to pay that debt. I say they did not pay that debt. They were not paid to us for that debt, and they were not received by us for that debt. There seems to be a certain amount of confusion owing to the use of the cheques.

Whatever they were received for they would not have been received for the duties in question herein. For the simple reason that one party had concealed the existence of the goods and the other party was not aware of the existence of any liability for the duties. Hobbs, who was the man charged with the making of the payment, suppressed entirely the fact that any liability existed, and in that way it would be absurd to contend that he intended to pay that liability, or that the customs cashier accepted it in payment. I say in the first place he did not have the intention of paying it; and if the customs cashier did not have the intention of receiving it, there could not have been any payment.

I submit that if an importer appoints an agent and gives him a cheque to pay duties, and that agent destroys any evidence of the existence of the liability for those duties, and goes to the customs house and gets the cash for the cheque, it is impossible for the importer later on to contend that that cheque went to pay the duties.

So far as the question of the responsibility of the Crown is concerned for any acts of Meunier, that point is so elementary that I do not propose to put in any authority on it, unless it is referred to by the counsel for the defendant. There is one authority, however, I would like to cite on the question of appropriation of these cheques, and that is the case of *Hendricks* vs. *Schmidt.* (1). The principle laid down in this case hardly needs authority, it seems to me to be a matter of common sense. It was held that to constitute a payment upon any particular consignment of goods, there must be an intent, both on the part of the importers and of the Collector, to apply the money to that consignment. And the Court said:—

"Granting that the plaintiffs had this intent in "drawing the cheque, no such intent was ever conveyed "to the Collector. Plaintiffs entrusted the cheque "to an employee with instructions to pay the duty "upon the 50 cases and thereby made him their "agent for that purpose. Exactly what he did with "the cheque does not appear, but it does clearly "appear that it was never made use of for that purpose; "that the Collector when he received it, was not "informed that it was not intended for duties upon "that importation; and that he in fact applied it "to a different importation. Under such circumstances, "there was obviously no such meeting of minds as

(1) 68 Fed. Rep. 425.

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"constituted an agreement on one part to pay the "duties and on the other part to receive the money "for that purpose."

That is a case in which the principle I have been endeavouring to support was given full application. That is a case which involved the same principle which is involved in the present case.

It seems to me, therefore quite clear, that not only has the defendant failed to establish that it has paid the duties claimed by the present action, but that the evidence shows that these duties have never been paid,—that the defendant relying as it does entirely upon these cheques as constituting evidence of the payment of the duties, was bound to prove that they were used by its agent for that purpose—but the evidence shows they were used and appropriated for a totally different purpose. I think it quite clear therefore that the defendant has failed to discharge the onus upon it of showing the payment of the duties, and that the Crown has in fact proved that the duties have never been paid, and I would submit, therefore, that the Crown is entitled to judgment for the amount claimed. The parties have agreed to submit the case on the items with regard to which evidence has been made on both sides; and with regard to those items, the defendant has failed to prove the payment of the duties.

In addition to the case I have already cited, I would cite the *Cliquot Champagne Case* (1), as follows:—

"Revenue laws are not penal laws in the sense that "requires them to be construed with great strictness "in favour of the defendant. They are rather to be "regarded as remedial in their character, and intended "to prevent fraud, suppress public wrong, and promote

(1) 3 Wall. 140.

"the public good. They should be so construed as "to carry out the intention of the legislature."

I have already referred to the section of the Act which sets up that the duties constitute a debt.

[THE COURT:—You are suing for a debt now?]

I should imagine that the wording of that section would mean, that even in the absence of special provision with respect to the onus of proof, the onus of proof would be on the importer. It is for the debtor to prove the payment—the onus is always on him.

MR. *Creelman* was then heard for the defendant:—Our whole defence rests upon that which we consider a proven fact, viz., that the duties have been paid; and we draw no distinction whatever as regards the various informalities.

It has been admitted by both parties in the consent that every cheque did reach the cashier, that every cheque was endorsed by the Collector of Customs, and that the proceeds of every cheque went to the credit of the Receiver-General.

Our point, to put it very briefly, is that Hobbs was our agent up to the point when he delivered the cheque, but that he was not our agent when he received the refunds.

If Meunier paid him over money improperly that is the Crown's loss. He should have been on his guard and been on inquiry in a case of that kind, much more so when Hobbs presented a cheque in favour of someone else's duties?

Meunier has admitted that there was both a written order and a verbal order issued by the Controller of Customs, Mr. White, ordering the cashiers not to make refunds on cheques in excess of fifty cents. Mr. White has gone into the box and has sworn that this rule was issued, that it was a written order. True

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enough the actual copy of the written order was never produced. I presume that Mr. White was unable to find it, but it is in evidence in many places that such an order was in existence, and Mr. White swears that Meunier must have known of it as he acted under it for many years. Meunier admits there was such an order, and says he does not remember to have refunded money to the agents of any other importers.

I wish to call the attention of the court to one fallacy in my learned friend's argument, that is that there can be no payment if there is no intention to pay, or that a person cannot receive payment unless he intends to receive it. It is extremely difficult to see the connection between the intention in the making of a payment or between the receipt and the intention to receive.

[THE COURT:—The question is not an academic one. It is simply a question of fact—were the duties actually paid?]

Mr. *Lafleur* followed for the defendant:—

There is no conflict of evidence. The question is, what is the inference to be drawn from the facts? The first observation I would like to make is this:—Assuming that there had been no refunds made by Meunier to Hobbs, could there be any doubt that this action should be dismissed? It is not contended that the Customs department was defrauded out of any other money except those that were refunded by Meunier to Hobbs—that is the amount of the shortage which totals up to some $70,000. Hobbs was not entrusted with money but with cheques. It was impossible for Hobbs to cash the cheques unless he forged the signature of the Collector of Customs. When it is endorsed and not until then is it in a position to be cashed. The first person who receives it,

and is in a position to cash it, is the Collector of Customs. What does he do, not only with all the C.P.R. cheques, but with all the cheques received at the custom house? He puts them into the Bank of Montreal and gets credit for them, and buys a draft on the Receiver-General with the money.

The Cashier passed the cheques on to the Collector of Customs.

Meunier does not say he cashed any particular cheque for any particular sum for Hobbs. He says that he refunded him the excess over the amount that was handed to him to pay the duty for a particular purpose. That is the evidence,—and that is the only inference that should be drawn from the facts. It is perfectly unreasonable to infer that the appropriation of the cheques—the use that was made of the cheques to pay other duties—was made by Hobbs to pay the duties for A, B and C, that was the act of Meunier. Hobbs gave cheques sufficient to pay the C.P.R. duties. All of the C.P.R. duties were represented by cheques which found their way into the hands of the Collector of Customs, and ultimately to the Receiver-General.

Under his power of attorney, Hobbs had not the power to receive any money from the Customs. His powers were limited.

[THE COURT:—There is no distinction as far as the scope of the agency goes.]

Surely we were not authorizing Hobbs to do anything beyond what his power of attorney gave him power to do.

Unless it is specifically mentioned he has not the power to do more than pay the duties. This contemplates our agent going and making entries, and paying for those entries in the way authorized—by cheques to

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order—that is the only authority ever given him. He was not even entrusted with money to pay, but only with cheques payable to order—and how can it be contended that that man had authority to receive money on our account from the Customs ?

[THE COURT:—He was your agent ?]

He was the agent for what purpose ?

[THE COURT:—For passing goods through the Customs.]

Does the passing of goods through the custom house involve any payment back to us?

[THE COURT:—But you gave him too much money in your cheques for the payment of the duty?]

We gave him the right amount on each and every occasion.

We gave him the cheques to order, and we gave him no money. We gave him no authority or anything that could be implied to receive moneys from the Customs for us. At the moment he put in the entry and cheque his authority ceased. He could make all proper entries and could make payment by our cheques; but could not receive moneys for us. (Cites *City Bank* vs *The Harbour Commissioners Montreal,*) (1)

That was a case of the plaintiff's paying-teller receiving a cheque from the defendant's messenger and by mistake gave him a sum in cash, which was asserted to have exceeded the sum of £25. The messenger gave the money he received to Browne, the defendants wharfinger, who paid it away to their labourers, without carefully counting it. Browne was charged by the defendants with the amount of the cheque, and accounted for that sum only; and it was proved that he kept a separate cash book for his department

(1) 1 L. C. J. 288.

of the defendant's business, for the balance shown by which he was liable to them. The only evidence connecting the defendants with the receipt of the money was the testimony of two of the bank clerks to the effect that they had represented the matter to the Hon. John Young, the President of the Board, and he had promised to have it looked "into". The testimony as to there having been any over payment was conflicting, but that question did not enter into the motives of the decision of the court. Mr. Justice Day delivered the judgment.

There it was the case of a man entrusted with a particular duty, just as in this case so far as the conveyance of money to the customs is concerned. Hobbs was a mere messenger, we never entrusted him with a cent. He was only a messenger insofar as to make entries and sign proper documents for passing the goods at the Customs. His authority with respect to money was absolutely limited by the giving of the cheque payable to order.

[THE COURT:—His power of attorney gives him full power. You may control his power by issuing the cheque to order, but you do not change his authority.]

Where is the authority in that power of attorney giving him authority to handle any money?

[THE COURT:—Does the authority prevent him from handling it? You could have given him the money as well as a cheque.]

The authority of an agent is derived from the document appointing him—and when that document is silent with respect to receiving payments on our account, you cannot infer it. The business itself did not involve it.

[THE COURT:—He has under that power of attorney all the necessary powers to pass the goods through

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Customs, and also the power to pay the duties. There is nothing in that which says you must give him a cheque payable to the order of the Collector—you could have given him money—and he could have gone there with money in his pocket, and he could have paid it and brought you back the change. There is nothing in conflict with that.]

He certainly could not recieve money under that power of attorney, because it is no part of that business.

[THE COURT:—He can do anything in connection with the passing of the goods.]

What does the passing of entries at the Customs involve? It involves signing the proper documents, and the payment of the proper duties. Not the receiving of moneys from the Customs. The powers under a power of attorney cannot be extended beyond its terms, or beyond the nature of the business stated in it—the nature of that business does not include the payment of any moneys to him.

It is so entirely disconnected with it, that the rule of the Custom House is, that all payments made for refunds shall be made by cheque. There is nothing in the business of the customs, in the passing of customs duties, that involves the payment of money back to the importer. It is all the other way. The business of the Customs involves the payment by the importer to the Customs, and I submit the moment this man received any money from Meunier that was the reception of money by an utter stranger—he was no more our agent for that purpose than a man in the street. Therefore the whole loss being due to the payment of refunds made by Meunier to Hobbs, the loss should remain where it happens to be at the time. We have paid all the duties called for, and the other import-

ers have paid the duties called for, upon the goods that came into this port—and the only amount that is missing is the amount that was refunded by Meunier to Hobbs; and I say that is a payment made by Meunier to an utter stranger, not our agent for that purpose.

(Cites *Erb* v. *The Great Western Railway Co. of Canada* (1), *Lloyd* v. *Grace Smith & Co.* (2)

So far as the evidence goes we never entrusted Hobbs with money. When we did not entrust him with money to make a payment, how can you infer he could be entrusted with money to be paid back. It is no part of this business that the customs agent should receive money for the principal; and the customs department as an internal rule makes it incumbent upon their officers that all money should be paid by cheque.

[MR. *Wainwright:* That is not the rule to-day.]

It was then. I cannot see how under that power of attorney Hobbs could assert the right to receive any money at all on account of the C.P.R.

[THE COURT: You go further and say either pay or receive?]

I go further, but I do not need to go that far. If it authorized him to make payments it would not authorize him to receive money.

The principle applicable to a power of attorney is not that the attorney can do anything but what he is prohibited from doing—the principle is that he can only do those things which by the instrument he is expressly or by implication authorized to do.

There was daily notice to the customs that this man was only a messenger carrying cheques there, so far as the handling of any money was concerned. You

(1) 5 S.C.R., 179. (2) 80 L.J.Q.B., 959.

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could not come to the conclusion that he was our agent for the reception of moneys from the customs.

[THE COURT:—He was the agent of the C.P.R. to pass these goods. He was the one who made those affidavits on behalf of the C.P.R. to pass the goods. He was more than a messenger.]

I said so far as the handling of any money was concerned, they were careful not to make him anything more than a messenger. I may have an agent to sell, and another who is my agent to buy. Saying that he is my agent is not illuminating. He is my agent with the power set out to be performed in that power of attorney. Does that power expressly or by implication make him my agent to receive money from the Customs?

If it does not by implication involve the reception of money's for the company then you cannot possibly say it is a part of his duty.

We have the articles of the Civil Code. By Art. 1703, "the mandate may be either special, for a "particular business, or general, for all of the affairs "of the mandator. When general it includes only "acts of administration."

Here it is not a general power to act for the C.P.R. in everything, it is only authority to do their customs business. That cannot possibly involve any claims the C.P.R. may have against the Customs.

If I am right in saying that this man Hobbs was not our agent to receive moneys, then the whole mischief having been caused by, and the whole loss having resulted from, these refunds, I submit that the action of the Crown cannot be maintained; because they have actually received all the moneys they were entitled to under all the entries that have been made.

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My learned friend Mr. Wainwright argued that there had been no payment because in order to constitute a payment of duties upon any particular consignment of goods, there must be an intent on the part of the importer to pay, and an intent on the part of the Collector to apply, the payment to that consignment. He cited the case of *Hendricks* v. *Schmidt* (1). That was a very different case from the present one. There it was the importer who was suing the government for conversion of the goods, because they retained them against him, alleging that he had not paid the particular duty on the goods. And the Court held there that instead of suing for the conversion of the goods, he should have sued for conversion of the cheque; but they admitted the principle that the Government must account for the cheque they misapplied, and it was only the case of an action wrongly taken. In that case Brown, J said;—

"It is quite clear that the plaintiffs mistook their "remedy, and, if they have any cause of action at all, "it is against the Collector for a conversion of the "cheque, and not for a conversion of the champagne."

(Cites Arts. 1701, 1704, 1720 C.C.)

The authorities are clear that when a mandatary exceeds his authority, the act is to be considered, insofar as the principal is concerned, as non-existent. As *Laurent* puts it, it is not merely a nullity, the act is absolutely non-existent.

MR. *Newcombe* was heard for the plaintiff, in reply:—
I will not detain your lordship very long. I think my learned friends have put their case very tersely, and have eliminated a great many things that are not here for discussion. The real position of the case is very plain. In the first place it is a Customs

(1) 68 Fed. Rep., 425.

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case. It is an action brought by the Crown to recover customs duties which have not been paid, and are, if not paid, admittedly a debt due by the defendant company to the Crown. My learned friends contend that they are paid, and that the evidence which they produce here establishes payment. Whether payment was made or not is to be determined. Apart from the question of payment, there is no doubt about the indebtedness. There is no doubt about this also, that Parliament in its provisions, as contained in the Customs Act, for the protection of the revenue, has devised a very elaborate scheme of legislation with respect to the collection of customs duties and the method of payment. Goods have to be imported in conformity with the statute. There have to be manifests, and entries, and landing warrants, and all sorts of things which are required by the statute—not as mere matters of form, but as matters of substance for the protection of the revenue—for the purpose of checking the importer, to see that he does not smuggle goods—for the purpose of checking the customs officer, to see that he does not fraudulently collude with the importer, and thereby defraud the revenue. It is common ground in this case, that all of these statutory requirements were set aside and disregarded in fact by the defendant company and that compliance with the statute would have made these frauds impossible; and it is part of the defendant's case here to contend that he escaped all obligation, although the duties are not in fact satisfied and none of these statutory requirements have been complied with, by reason of the facts in evidence here, which I do not propose to detain your lordship by quoting, as my learned friend, Mr. Wainwright, has gone into them to considerable extent in his opening. I submit it would

strike one as rather extraordinary if that could be the result, if these duties are paid without the country receiving any benefit—it would seem to be a most remarkable thing.

Now, the Act imposes certain obligations upon the importer, but it also enables the importer to do his business with the Customs through an agent, because by section 132, it is enacted:—

"Any act or thing done or performed by a duly "authorized agent shall be binding upon the person "by or on behalf of whom the same has been done or "performed as fully as if the act or thing had been "done or performed by the principal, but, whenever "any person makes application to an officer of the "customs to transact any business on behalf of any "other person, such officer may require the person "so applying to produce a written authority from "the person on whose behalf the application is made, "and in default of the production of such authority "may refuse to transact such business."

Now, the company availed themselves of that provision, and gave a written authority to this man Hobbs — who has got them into all the trouble — and this is the authority in the form prescribed by the Minister under the statute. It is the ordinary form and, as one would expect to find it, very broad in its terms.

"Know all men by these Presents that we have "appointed and do hereby appoint David Hobbs of "Montreal to be our true and lawful attorney and "agent for us and in our name, to transact all business "which we may have with the Collector of the Port "of Montreal or relating to the Department of Customs "of the said Port, and to execute, sign, seal and deliver "for us and in our name, all bonds, entries and other

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"instruments in writing relating to any such business "as aforesaid, hereby ratifying and confirming all "that our said attorney and agent shall do in the "behalf aforesaid. In witness whereof we have signed "these Presents, and sealed and delivered the same "as Act and Deeds at Montreal, in the said Dominion, "this eighth day of April, one thousand nine hundred "and three."

You will observe that it says "to transact all business "which we may have with the Collector of the Port "of Montreal." That is authority in the very broadest terms.

[THE COURT:—That is the way it strikes me.]

My learned friend, Mr. Lafleur, says that while Hobbs could transact all other business he couldn't take any change. If he pays too much, he cannot get the difference back.

It appears in the evidence that the custom of the C.P.R. was to issue cheques for the exact amount of the duties, as they understood them. They might have had a different system. They might have had a system, for instance, of issuing cheques in the nature of advances to Hobbs payable to the Collector; or they might have issued cheques in respect of a particular invoice which was in excess of the amount of the duties, and instead of correcting it they might have said to Hobbs get the change when you go down to the Collector's office.

According to my learned friend, he would have Meunier say to Hobbs, "I am very sorry I can't give you any change back, your power of attorney is not broad enough." Would it not be absurd for him to say that? Hobbs is to transact all business and enter into bonds and sign all entries, and generally

do all the business which the company have to do at the Customs.

Now, one thing they have to do, and that is to pay the duties—and Hobbs is charged with the paying of the duties, with appropriating the money which is given to him, or the cheque, or whatever it might be, when he goes to the Collector's office, and applying it to this that or the other invoice as the case may be. That surely is within the scope of his authority. And the refund when it is made is just as much a refund to the C.P.R. as if the C.P.R. had been a private individual importing these goods, and instead of having an agent had gone down there himself—as if an individual had gone down and put in his cheque and got his refund without any power of attorney. It is precisely the same. This happened in the execution of the business of the Company. And although the refunds were taken in view of the manipulation of the invoices and misappropriated, none the less they were refunds to the C.P.R. under the authority of the case recently decided, and to which we have referred. I would like to read a few passages from that case, because it is a decision of the ultimate authority and reviews the previous cases, reconciles and overrules some. It has crept into the text books generally that the principal is not responsible for the fraud or malicious or wilful act of his agent unless done for the benefit of the principal.

The case of *Lloyd* v. *Grace Smith & Co.* (1) clears up a great deal of misstatement which has crept in, not only into the text books, but into the mouths of some of the judges, with regard to the limitation of liability of the principal for the unauthorized and fraudulent act of his agent. So I think that is ample

(1) 1912 A. C., 712.

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authority, decisive authority, for my submission that these refunds were refunds to the C.P.R. although the C.P.R. never got the benefit of them by reason of the fraud of Hobbs.

Now, it is said that these duties are paid, and I would like to know when they were paid. I would like my learned friends to tell us when this obligation which the C.P.R. incurred to pay these duties—the moment they imported the goods into the country the Act makes the duty a debt—when it was they discharged that obligation? Was it when they wrote out the cheque for the amount and gave it to Hobbs? Surely it was still in their hands. He was not our agent in any sense. He was the agent of the company. So the mere writing out of this cheque and the giving of it to Hobbs with the true invoice did not constitute payment.

THE COURT:—I suppose they will go further and say when it was handed over.

Mr. NEWCOMBE:—Well, Hobbs brings it to the office of the Collector of Customs, and my learned friend says that he got a refund, but that he did not get a refund of C.P.R. money, that he got a refund of some one else's money, and therefore that you must hold that all of this money went to the Crown, and that the Crown got the benefit of it. But I say that if there was never any refund at all the duties were not paid in view of the fact that they never made any entry of the goods or appropriation for payment of the duties, and moreover we must look at the substance of the transaction—and what is the substance of it,? If he went down with a cheque for $500. to the Custom House, and gave it to the cashier and got $200 back, the substance of the transaction

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is that the Crown got $300 and Hobbs got $200, and there was no payment except to the extent of $300.

I have shown that the defendant company are responsible for what Hobbs did. Certainly they are bound by his acts—they must take the consequences of the failure to do what Hobbs omitted to do—and Hobbs no matter what his instructions were did not pay the duties on these goods; he never entered the goods or appropriated a penny towards the payment of the duties. If my learned friend says that we have these cheques in our hands, and that we are responsible for the moneys that were refunded to Hobbs, then I say we are responsible for them upon grounds that are not the subject of enquiry in this case at all. The question here is the simple question of payment. They owe us the money. They say they have paid it. We never received payment, they never made or appropriated any payment in respect of these items upon which we claim duties.

AUDETTE, J. now (January 22nd, 1913) delivered judgment.

This is an information exhibited by the Attorney-General of Canada, whereby, *inter alia*, it is sought to recover, from the defendant, certain Customs duties alleged to be payable upon goods imported by them at the Port of Montreal, between the month of January, 1904, and the month of November, 1905.

Set out in Schedule "A" to the information is a list of the goods alleged to have been imported into Canada by the defendant ,during the above mentioned period, without entry and without the payment of duties.

In Schedule "B" to the said information is a list of dutiable goods alleged to have been imported and

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entered, during the same period, under certain fraudulent "Sight Entries," accepted by the Customs authorities upon the false representation that the invoices for the said goods could not be produced, resulting in a case of undervaluation.

In Schedule "C" to the said information is a list of the goods alleged to have been imported by the defendant, during the same period, and entered free, under the false representation by the defendant's agent, that they were goods of "Canadian Origin," or goods imported for "Manufacturing Purposes."

The defendant, by its plea, admits, subject to certain modifications therein mentioned, the importation of the said goods mentioned in Schedules "A," "B" and "C." With respect to Schedule "A," defendant says it has imported and entered these goods and issued cheques to the order of the Collector of Customs, representing the true duty thereon. These cheques the defendant alleges were handed to its Customs Agent for payment, and that they have found their way into the hands of the Crown, having thereby discharged all liability on the part of the defendant. The defendant further denies any fraud and fraudulent representation with respect to Schedules "B" and "C." With its plea the defendant has also paid into court a certain amount to cover the duty on the bridge material, less the amount of the cheque already issued under circumstances which will be hereafter referred to.

The question of the claim under the bonds has been removed from controversy.

Evidence has been adduced on behalf of both parties with respect to the several transactions above mentioned. The defendant having, after some dis-

cussion, which is set out in the record of the proceedings, assumed the burden of proof.

Inasmuch as Schedule "A" was composed of a great number of items, evidence was restricted to a comparatively small number of them, sufficient to determine the question of liability involved in the case.

The parties at this stage of the case, realizing that there was spread on the record ample evidence to establish in a general way the various classes of fraud involved in the several items of Schedule "A," and that such evidence also adequately disclosed the method pursued by the defendant's Customs agent in his fraudulent dealing with the documents and cheques handed to him by the railway company, filed the following consent:—

"Inasmuch as the items of the schedule as to which "the evidence has been taken and completed are "thought to be sufficiently representative of the "remaining items so far as concerns any question "affecting liability, the case shall now proceed to "argument and final judgment, subject to appeal, "as to defendant's liability with respect to such items, "the items as to which proof has not been made to be "subsequently adjusted as between the parties upon "the principles of liability determined by the ultimate "judgment, with the right of further reference to "the court in case of difference, and judgment of the "court for the total amount, of the defendant's liabil-"ity as so adjusted or found."

With the commendable object of still further shortening the evidence, the following admission by and between the parties was filed:—

"The parties admit for the purposes of this case "only, under reserve of all objections as to the relev-

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"ancy of the facts submitted, that the defendant "issued to its agent, Hobbs, cheques payable to the "order of the Collector of Customs sufficient to cover "all the duties payable by the defendant during "the period covered by this action, except as to the "amounts which have been paid to plaintiff or into "Court by the defendant herein. These cheques were "used in the Bank of Montreal with moneys received "for Customs duties to buy drafts for the Receiver-"General representing the amounts of customs duties "actually received from day to day from all sources "according to the entries made at the Montreal Custom "House, but certain of the entries made by or on be-"half of defendant at Customs during said period, as "a result of manipulation and alteration of documents, "such as disclosed by the evidence of record, represented "the amounts payable for Customs duties by defend-"ant during said period to be less in the aggregate "than the total amount of the said cheques or of the "duties actually payable.

"The further testimony which might be adduced "before the referee if proceeded with would be similiar "in character to that which has already been given "as to the way in which the entries, cheques and goods "and the clearance of the goods were dealt with, "prepared, appropriated or effected."

While the facts of the case, as a whole, are manifold and complex, yet the law of the case falls wholly within the well settled domain of principal and agent. For a proper understanding of the material facts upon which a decision as to the liability of the defendant must be based, it will be well to examine with some detail the method of operation of the defendant's agent, Hobbs, in passing the goods in question through the Customs.

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The moment goods belonging to the defendants had arrived at the Port of Montreal, some of the defendant's employees would prepare the entries and all the necessary papers to pass the goods through the Customs, and make a cheque for the true amount of the duty payable thereon. When completed these documents and cheques were handed over to the Custom's agent, David Hobbs, to enable him to pass the goods through the Customs, pay the duties and secure the delivery of the goods by means of a landing warrant, in the usual and ordinary way.

It was not disputed at Bar that Hobbs was the customs officer of the defendant charged with passing the goods through the customs and paying the duties thereon.

His appointment was made under the provisions of Sections 157 and 158 of the Revised Statutes of 1886, Ch. 32 (now Sec. 132 and 133 of the R.S., 1906, 48) in force at the time of the importation in question in this case. These two sections read as follows:

"157. Whenever any person makes application "to an officer of the Customs to transact any business "on behalf of any other person, such officer may require "the person so applying to produce a written authority "from the person on whose behalf the application "is made, and in default of the production of such "authority, may refuse to transact such business; "and any act or thing done or performed by such "agent, shall be binding upon the person by or on "behalf of whom the same is done or performed, to "all intents and purposes, as fully as if the act or thing "had been done or performed by the principal."

"158. Any attorney and agent duly thereunto "authorized by a written instrument, which he shall "deliver to and leave with the collector, may, in

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"his said quality, validly make any entry, or execute "any bond or other instrument required by this "Act, and shall thereby bind his principal as effectually "as if such principal had himself made such entry "or executed such bond or other instrument, and may "take the oath hereby required of a consignee or agent "if he is cognizant of the facts therein averred; and "any instrument appointing such attorney and agent "shall be valid if it is in the form prescribed by the "Minister of Customs."

The power of attorney under which Hobbs acted all through these transactions is filed herein as Exhibit No. 1, and Robert S. White, the Collector of Customs of the Port of Montreal, testified at p. 48 of his evidence, that it is the ordinary power of attorney used in such cases, printed forms of which are kept in his office and supplied to importers.

The power of attorney reads as follows:

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10,000–7–1902.

DOMINION OF CANADA.

*Appointment of an Attorney or Agent.*

"Know all men by these presents that we have "appointed and do hereby appoint David Hobbs "of Montreal to be our true and lawful attorney and "agent for us and in our name, to transact all business "which we may have with the Collector of the port of "Montreal or relating to the Department of the Cus-"toms of the said port, and to execute, sign, seal and "deliver for us and in our name, all bonds, entries and "other instruments in writing relating to any such "business as aforesaid, hereby ratifying and confirming "all that our said attorney and agent shall do in the "behalf aforesaid.

"In witness whereof we have signed these presents "and sealed and delivered the same as.... Act and Deed "at Montreal in the said Dominion, this eighth day "of April, one thousand nine hundred and three.

"Signed and sealed in presence of

(Sgd.)"J. W. NICOLL, (Sgd.) JOHN CORBETT (L.S.)
"B. BARBER, *Foreign Freight Agent, for Canadian Pacific Ry.*"

Now Hobbs, when receiving these documents and cheques, would go to the Custom House and would, in some instances, deposit the cheques with the cashier before entering any goods. In some cases he deposited cheques to an amount covering as large a sum as $15,000. The cashier would keep a memo. of these cheques on separate lists or slips and hold them for safe keeping, not depositing them with his cash. In the meantime Hobbs, having in his possession several invoices, would alter them to suit his fraudulent purpose. For instance if he had three cars of machinery, with an invoice for each car representing $5,000— in all $15,000— he would alter the invoice for car No. 1, by showing that the machinery mentioned in the invoice for that car instead of being contained only in car No. 1, was contained in cars Nos., 1, 2 and 3, and would pass and enter the goods mentioned in the three cars as of the value contained in only one car, and a sum equal to that amount of the duties would be taken out of the total amount of cheques in the hands of the cashier to satisfy the duties apparently due thereon. Later on in the course of the day he would go to the cashier and ask him for cash, to be accounted for against the several cheques in his (the cashier's) possession,—*i.e.* the balance of the amount represented by the cheques; or, in other instances, he would ask for a sum of $200 or $300 as

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the case may be, which in both of these cases he would pocket and keep for himself.

Now Hobbs was also acting as Customs Agent for other commercial firms. He would at times pass and enter their goods, paying the duties thereon with some of the defendant's cheques in the hands of the cashier, as already mentioned, and retain for himself the amount of the duties handed to him by these commercial firms. Meunier even says that sometimes he would pay the defendant's customs duties with the cheques of some Toronto firms, and *vice versa*. (P. 353).

His fraudulent devices were numerous and complex. It is pertinent to mention in dealing with these other firms he was able to pocket money, without obtaining change from the Custom House cashier. He would simply retain the moneys paid over by them for the purpose of passing their goods through the Customs and use the defendant's cheques for paying the duties.

Therefore, of the amount of the company's cheques issued to pay the duties, it is obvious that the Crown only obtained and deposited to its credit the amount of the duties upon the goods actually entered. For the goods mentioned in the information, which were never declared or entered at the Custom House it is equally obvious it was impossible for any amount to be credited to the Crown in the absence of any entry. It was impossible to make a remittance to the Crown unless there was an entry to cover the remittance, and it cannot be maintained that the Crown received the full benefit of these cheques.

In the case of Schedule "B" Hobbs, availing himself of the provisions of Sec. 39, R.S., 1886, Ch. 32, would falsely represent that for want of the invoices, or for some other reasons, he had to pass the goods on a bill

of sight, he having authority to make, and making, the declaration required by the statute, whereby he would undervalue the goods and pay only part of the duty.

With respect to the items of Schedule "C" Hobbs, adopted a different method. Disclosing the nature of the goods, he would conceal the fact that they were dutiable. Take for instance the item representing fire-brick,—he would falsely represent that they were for manufacturing purposes and thus enter them free. The bridge material, he would represent as scrap iron and also enter it free.

At the request of the Court, Mr. Blair, a Customs Officer, heard as a witness in the present case, prepared a summary showing cases illustrating some of the methods adopted by Hobbs, as the defendant's Custom's attorney or agent. As this statement contains specific references to the evidence and exhibits, and conveys a clear idea of the frauds involved in the case, it was thought advisable to embody it herein. It reads as follows, viz:

"Summary showing representative cases illus-
"trating the methods adopted by the C.P.R. Cus-
"toms attorney, D. Hobbs.

"*Schedule "A" of Statement of Claim.*

"Iron fittings from the Gold Car Heat & Light Co.,
"New York, value $1,875.00, duty $562.50, copy of
"invoice dated December 31st, 1904, with Exhibit 44,
"Manifest No. 27499 covering this shipment was
"cancelled by Entry No. 17650A (Entry 17650A
"Exhibit 44). The warrant and entry by which
"these goods were passed and delivery of them obtained
"apparently covered the number of packages shown
"on the manifest, but neither the goods nor their
"value were mentioned or referred to in any way in

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"the warrant or entry nor was any invoice for them "annexed to the entry. Other invoices for other "goods from the same exporters really covered by "the entry, which invoices do not show the number "of the packages shipped, were apparently repres- "sented as referring to and covering the value of all "the goods contained in all the packages covered "by the manifest, cancelled by said entry 17650A, "thus enabling the importer to pass all these packages "and get possession of all the goods contained in them "without declaring or paying duty on all these goods."

"Hydraulic punch from the Niles-Bennett Pond "Co. of New York, value $2,900, duty $725. The "invoice produced at Customs with entry 114,773 "exhibit 77, purports to cover the value of the goods "contained in two cars numbered respectively 7,784 "and 52,065 covered by manifest 38,267, exhibit 78, "and 38,272, exhibit 76. These two manifests 38,267 "and 38,272 were cancelled by this entry 114,773 "which represents the total value of the goods contained "in these two cars to be $2,400. An invoice for this "amount viz., $2,400, was produced with the entry "and contains the two car numbers in question, so that "the documents as produced at Customs tallied."

"Exhibit UA, viz.—the duplicate original of this "invoice obtained from the defendant's records shows "that it in reality covered the contents of the car "only, viz., 7,784, and that car 52,065 must therefore "have been added to the duplicate produced at Cus- "toms with entry 114,773. By adding a car number "in this way it proved possible to cancel manifest "of car No. 52,065 as well as 7,784 and obtain delivery "of the goods contained in both cars upon the produc- "tion of an entry and invoice which in reality "described and stated the value of the goods contained

"in one car only. The contents of car 52,065 not "having been declared to the custom officers, they "were not aware that such goods had come in or that "any duties were payable upon them.

"Closets, from the Dayton Mfg. Co., Dayton, Ohio.

"Invoices for $483.00 at 30%=$144.90; $207.00 "at 30%=$62.10.

"Referring to the invoice as produced at Customs "with entry No. 122,450 (Exhibit 112) from the Dayton "Mfg. Co. dated March 28th, 1904, for $241.50, it "will be seen that it apparently calls for 31 packages, "the number entered.

"The duplicate original of this invoice exhibit "U. 19, shows the number of packages covered by it "to be in reality only 7 crates and 1 box, or eight "packages in all.

"Exhibit U. 17 and U. 18, the exhibits containing "the invoices not entered at Customs, viz.—two "invoices for $483.00 and $207.00 respectively call "for 23 packages.

"It will be seen that invoice from the Dayton Mfg. "Co. as produced at Customs by Hobbs with entry "122,450 has been altered by placing the figure 2 in "front of 7, making the reading 27 and by changing "the figure 1 into figure 4, making the reading 4 crates. "The total reading 31 instead of as originally 8, "enabling the C.P.R. agent to obtain delivery of the "23 packages covered by the two invoices for items "numbered 21 and 22 in claim, without declaring "the goods covered by them and without payment "of duty thereon.

"Lathe from the Niles-Bement Pond Co., value "$7,725, duty $1,931.25.

"Entry No. 9,303, exhibit 145, purports to cover "the value of the goods contained in two cars, viz.,

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"1,519 and 509 of a total represented value of $2,015.00. "An invoice is attached showing no marks and num- "bers, but purporting to cover machinery of a total "value of said amount, $2,015.00, so that the docu- "ments as produced at Customs tally.

"The duplicate original of the invoice for this item "No. 32 produced by defendants from its records, "viz., exhibit U. 26, shows that cars 1,519 and 509 "really contained this lathe and that its value was "$7,725.00. The duplicate original produced by defen- "dants from its records of the invoice produced at "Customs with entry 9,303 shows that there were "marks and numbers thereon and that the duplicate "produced at Customs had evidently been cut in "two and pasted together again with the result of "eliminating these. (Exhibit U. 27).

"It was thus possible to make the invoice produced "at Customs with entry 9,303 apparently cover any "number of cars or packages.

"Tarpaulins from J. H. Peck & Co., Wigan, G.B., "$719.00, duty $119.83.

"These goods were shipped on the SS. *Lake Mani- "toba* as appears from the original invoice, exhibit "152. They do not appear, however, on the ship's "manifest, exhibit 151, as required by law. No "entry was ever made for these goods nor any invoice "therefor ever produced at Customs. The cheque "alleged to have been issued for the duties on these "goods was used to pay duty on the goods of F. D. "Lawrence (see exhibits), for whom Hobbs acted as "Customs broker.

"As a result of the failure to place these goods in "the ship's manifest, the Customs officers had no "knowledge of their importation and it was thus

"possible to take possession of them without entry "or payment of any kind."

"Angle plates $1,155.00, duty $115.50
" " 1,162.00, " 116.20

$231.70.

"The above angle plates were shipped in cars 10,837 "and 11,352 (manifests filed as exhibits 11 and 12), "in November 1904, manifested as rails. A large "importation of rails on which no duty was payable "had been made at this time by the C. P. R. and these "angle bars were included as rails in a free entry "(exhibit 13, entry No. 3,816—entry No. 26,415). "The cheque for $231.70 alleged to have been drawn "to cover the duty on these angle plates was made "out at the rate of 10% instead of $8.00 per ton, "was not drawn until the 23rd of May, 1905, and was "deposited in the Bank of Montreal on July 8th, 1905. "This cheque was apparently cashed at the Custom "House by Hobbs, as no entries were passed by him "on the day that the cheque was entered on the "bordereau deposit slip.

"Couplers from the National Malleable Castings "Co. of Cleveland, Ohio, value $625.00 duty $187.50.

"The manifest, exhibit 175, shows 125 drawbars "loaded in car 61,340.

"Exhibit 176 shows 135 drawbars above transferred "to Unclaimed List and marked, i.e, Unclaimed Book. "Referring to the Unclaimed Book it will be seen "that 25 drawbars were entered on the 21st October, "1905, by Mr. Blenerhasset, entry No. 23623, exhibits "172–3–4. It will be seen by the invoice produced "with this entry that these 25 drawbars were loaded "on car 61340, the invoice being dated August 26th, "1905. Upon reference to exhibit 171 it will be seen

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"that an invoice in duplicate found in Hobb's desk "covered 100 other drawbars shipped in the same car "61340, the invoice being also dated August 26th, "1905. The cheque in question for $187.50 was drawn "by the C.P.R treasurer to pay the duty on this in voice. "No entry, however, was ever made and in consequence "the manifest still remains uncancelled. The cheque "for $187.50 was apparently used to pay the duty "on goods covered by entries included in exhibits "177 to 181.

"Bridge Material.

"Bridges removed by the C.P.R. from Maine to "Canada, dutiable at 35% in July, 1905, cheque "for $385,00 dated Sept. 4th, 1905, exhibit WI, "issued by C.P.R. treasurer to pay duty on this bridge "material as scrap iron at the duty of $1.00 per ton. "Exhibit 14 shows entry 13668A dated Sept. 5th, "1905, Canadian Pacific Railway with pro forma "invoice attached declaring goods to be scrap iron "and certificate also attached declaring goods to "be of Canadian origin entitling them to free entry. "Exhibit 14 also shows the warrant for the delivery "of 34 cars containing these goods."

"This cheque for $385.00 was applied on the 7th "Sept., 1975 in payment of the duty on the entries "shown in exhibits 168–169–170, covering other "goods for the C.P.R.

"Since the commencement of this action the defend- "ants admit the bridge material to be dutiable and have "paid duty at the rate of 35% on a valuation of $20.00 "per ton, less the amount of above noted cheque "for $385.00.

*Schedule "B" Sight Entries.*

"Marquetry from G. H Jones, New York, value "$3,069.00, duty $767.25.

"Bill of Sight entry No. 4290A dated November "3rd, 1904, stamped at Customs November 7th "1904 (exhibit 4) shows these goods to have been "passed by C.P.R Agent at a valuation of $300.00, "duty $75.00, and this is the amount debited the "C.P.R. on the entry in the cash book.

"It was shown on page 746 of the evidence that "the invoice for these goods was received by C.P.R. "on the first of November, and a cheque for $767.25 "handed to their Customs attorney to pay the duty. "Although the invoice was in possession of the "Company, it was represented that no invoice had "been received, and upon a declaration to that effect "being made by the C.P.R agent, permission was "obtained to make the sight entry, which was made "out at a false valuation. The cheque for $767.25 "was used the same day, November 7th, 1904, and "went to pay the duty on the several C.P.R. entries "shown in exhibits 192 to 199, among these being "an entry No. 4453 covering goods for Miss Hosmer, "duty $114.45.

*Schedule "C."*

"Fire brick from—Pennsylvania Fire Brick Co., "$104.00, Harbison Walker Refractories Co., 307.00, "Hall & Son, $376.00.

"Exhibit No. 8 shows entry 5381A dated November "10th, 1904, made by the C.P.R. agent, passing "above goods as free on the false representation "that they were for manufacturing purposes in Canada.

"Exhibit X4 shows a cheque drawn by John Corbett "dated November 14, 1904, for $159.54, which it "is alleged was intended to pay the duty on above fire "brick.

"It will be seen upon reference to exhibits 208 to "212 that the C.P.R. Agent made five entries on the

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"16th November, 1904, for other goods including "dutiable goods for M. & L. Benjamin and used this "cheque for $159.54 as part payment of the duty "thereon.

"It is clearly evident therefore that the C.P.R. "agent defrauded the Customs out of the duty on "above fire brick by making a free entry of same and "used the cheque to pay the duty on other goods."

*Schedule "A."*

"Shading and Heading Machine from the Ajax "Mfg. Co., Cleveland, Ohio, value $6,865.00 duty "$1,716.25.

"This machine apparently came in without manifest. "A cheque for $1,716.25 drawn by the C.P.R. treasurer "dated April 25th, 1904, alleged to have been issued to "cover the duties on these goods was applied on the "12th of May, 1904, in part payment of the duties on "entries shown in exhibits 107 to 111. Two of the "entries Nos. 131472 and 131473, covered goods for "W. F. Knowlton of Toronto for whom Hobbs acted "as Customs agent. Knowlton issued cheques to "pay duties and wharfage on the goods covered by "above entries. The cheques were for the sums of "$672.91 and $891.28. Upon reference to exhibit "216 it will be seen that one of these cheques, $891.28, "was used for payment of wharfage. Entry 131471 "covered goods for F. D. Lawrence for whom Hobbs "also acted as agent. The amount of duty on this "entry was $31.40. It would appear therefore that the "C.P.R. cheque for $1,716.25 went to pay Lawrence's "duties as well as the duties on part of Knowlton's "goods also duties on C.P.R. entries 131243 and "131244, these two latter entries amounting to $583.75.

The effect of this lucid statement of the transactions of Hobbs with his principals and the Customs autho-

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rities, is to brand the transactions with ineradicable fraud. On the other hand it is established beyond controversy that the Canadian Pacific Railway Company as a body never had the remotest idea of passing any of these goods through the Customs without paying the proper duties thereon,—there is no suggestion of a dishonouring or disparaging kind made against them. Hence the question of liability must be approached upon that basis. Upon that basis too it must be inferred, that the Crown by its information is not asking for any penalties. The Company, on the receipt of the invoices, prepared the necessary cheques for duty and handed them over to their agent for payment, but he managed to pocket part of the duties. There is no evidence that the defendant did, at any time, pay the duties otherwise than by cheque, but there was nothing in the law or in the power of attorney to prevent them paying in cash. However, the goods could not be passed without paying the duties, and Hobbs was specially authorized to pay the same.

What is the substantial result of all of these Customs transactions conducted by Hobbs? Is it not obvious that through Hobbs' false and fraudulent dealings, offences for which he was convicted and condemned to the penitentiary, the duties in question have not been paid to the Customs but found their way into that convict's pocket? The duties not having been paid, the indebtedness to the Crown remains unsatisfied.

The refunds to Hobbs are just as much refunds to the Company as if the Company had been a private individual importing goods, who, instead of paying an agent, had gone to the Customs personally and paid his money or cheque and received his refund without any power of attorney. And these refunds must be

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a matter of every day occurence at the Customs, as few persons making entries would present the exact sum payable, hence the necessity for a certain amount of change being handed back to them by the Customs people.

Under the circumstance, who is to bear the loss? That is the only question to be decided in the ultimate analysis of the case.

Let us first enquire what was Hobbs' authority under the power of attorney already referred to.

The trite maxim and rule of law for deciding whether a principal is civilly liable for the fraud of his agent is clearly laid down in such text-books as *Bowstead's Law of Agency* (1) and *Story on Agency*, (2). The principal is civilly liable for fraud committed by his agent while acting within the scope and the ordinary course of his employment whether the result is or is not for the benefit of the principal.

The same principle is recognized in the case recently decided by the House of Lords, in re *Lloyd* v. *Grace*, (B) (3) wherein Lord Macnaghten says:

"Lord Blackburn's view of the judgment in Bar-
"wick's case requires no explanation. It is clear
"enough. After referring to Barwick's case (L. R.
"2 Ex. 259) he expresses himself as follows (5 App.
"Cas. at p. 339): 'I may here observe that one point
"there decided was that, in the old forms of English
"pleading, the fraud of the agent was described as the
"fraud of the principal, though innocent. This, no
"doubt, was a very technical question;' and then
comes these important words: 'The substantial point
"decided was, as I think, that an innocent principal
"was civilly responsible for the fraud of his auth-

(1) (4th Ed.) 332-338. (2) (9th Ed.) s.s. 17, 18, 452 and 456.
(3) (1912) A.C. 735.

"orized agent, acting within his authority, to the same "extent as if it was his own fraud.'

"That, my Lords, I think is the true principle. It "is, I think, a mistake to qualify it by saying that it "only applies when the principal has profited by the "fraud. I think, too, that the expressions, 'acting "within his authority,' 'acting in the course of his "employment,' and the expression, 'acting within the "scope of his agency' (which Story uses), as applied "to an agent, speaking broadly, mean one and the "same thing. What is meant by these expressions "is not easy to define with exactitude. To the cir- "cumstances of a particular case one may be more "appropriate than the other. Whichever expression "is used it must be construed liberally. In the case "of Udell v. Atherton (7 H. & N., p. 180), Martin, B., "stated the question to be, 'Was his (the agent's) "situation such as to bring the representation he made "within the scope of his authority?' In those pas- "sages the true principle is, I think, to be found."

It is quite clear in this case that the defendant did not authorize the fraudulent acts in question, but solemnly appointed Hobbs as its agent, and it must be answerable for the manner in which the agent has conducted himself in doing the business which it entrusted him to perform. The agent was empowered to enter these goods through the Customs, and he did so, but in a fraudulent manner, which resulted in depriving the Dominion Exchequer of its duties which are still remaining unsatisfied. Can it be reasonably contended that because the cheques were handed by the principal to their agent to discharge the liability, that the Crown must lose the amount of the duties which, under the provisions of sec. 7 of R.S., 1886, Ch. 32, constitute a debt due to His

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Majesty? In the Revenue Case of Cliquot's Champagne (1) it was also held that:—

"Whatever is done by an agent, in reference to the "business in which he is at the time employed, and "within the scope of his authority, is said or done by "the principal, and may be proved as well in a criminal "as a civil case, in all respects, as if the principal were "the actor and the speaker."

On the other hand, can it be contended that the agent in passing the goods through the Customs—with or without fraud—would be acting beyond the scope of his power of attorney? The answer must obviously be in the negative. He was doing the "class of acts" for which he had a mandate.

Of course principals do not authorize their agents to act wrongfully, and consequently frauds are beyond the scope of the agent's authority in the narrowest sense of which the expression admits. But so narrow a sense would have the effect of enabling principals largely to avail themselves of the frauds of their agents, without suffering losses or incurring liabilities on account of them, and would be opposed as much to justice as to authority. A wider construction has been put upon the words. The best definition of it is found in Barwick v. *English Joint Stock Bank* (2) where it is stated that in all cases it may be said, as it was said here, that the principal had not authorized the act. It is true he had not authorized the particular act, but he has put the agent in his place to do that class of acts, and he must be answerable for the manner in which that agent has conducted himself in doing the business which it was the act of the principal to place him in. (3)

(1) 3 Wall., p. 115 (2) L.R. 2 Ex. 259.
(3) Lloyd v. Grace (1912) A.C. 733.

It will be observed that the power of attorney gave Hobbs power "to transact all business which we (the "defendants) may have with the Collector of the "Port of Montreal or relating to the Department of "Customs of the said Port, and to execute, sign, seal, "and deliver for us (the defendants), and in our name "all Bonds, *Entries* and other instruments in writing "relating to any such business as aforesaid." The language of this document is broad enough to cover all power and authority respecting the entry of the goods through the Customs. The power of the agent covered the power to pay and the power to receive moneys relating to the business in question. The relation of principal and agent for the purpose of passing goods through the Customs is recognized in the Customs Act, and the power of acting therein is in the form prescribed by the Act. Under the Interpretation Act, R.S., 1906, Ch. 1, Sec. 31, the word "Power" is defined as follows:—

"Whenever power is given to any person, officer or "functionary, to do or enforce the doing of any act "or thing, all such powers shall be understood to be "also given as are necessary to enable such persons, "officer or functionary to do or enforce the doing of "such act or thing."

Taking the matter at its worst, it has been proven and admitted by both sides that Meunier, the Cashier, had power to give change not exceeding the sum of fifty cents. Can it be contended that Hobbs had no power to take change to that amount or to any amount? The giving and taking of change must be a daily occurence at the Custom House.

In *Story on Agency*, the learned author considers the nature and extent of the authority which may be delegated to an agent. He observes:

(1) 9th Ed., secs. 17-18.

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"It is commonly divided into two sorts; (1) a "special agency; (2) a general agency. A special "agency properly exists when there is a delegation "of authority to do a single act; a general agency "properly exists where there is a delegation to do all "acts connected with a particular trade, business or "employment. Thus, a person, who is authorized "by his principal to execute a particular deed, or to "sign a particular contract, or to purchase a particular "parcel of merchandise, is a special agent. But a "person who is authorized by his principal to execute "all deeds, sign all contracts, or purchase all goods "required in a particular trade, business or employ- "ment, is a general agent in that trade, business or "employment.

"18. A person is sometimes (although perhaps not "with entire accuracy) called a general agent, who is "not appointed with powers so general, as those above "mentioned; but who has a general authority in "regard to a particular object or thing, as, for example, "to buy and sell a particular parcel of goods, or to "negotiate a particular note or bill; his agency not "being limited in the buying or selling such goods, "or negotiating such note or bill, to any particular "mode of doing it."

Does not the power of attorney in question in this case come within Judge Story's definition of a general agency as applied to a particular business? Hobbs was vested with general power and authority respecting anything to be done at the Customs for the entry of the defendant's goods.

Of course in doing what he did fraudulently the agent was not following the instructions of his principal, but he was doing acts within the course of his employment; and the authorities go as far as to say that

even if a specific prohibition of the very act had been made and that the agent had transgressed it, the principal must be held liable. (1) The case of *Collen* v. *Gardner* (2) is also authority for the principle, that where a general authority is given to an agent, this implies a right to do all subordinate acts incident to, and necessary for, the execution of that authority, and if notice be not given that the authority is specially limited, the principal is bound.

Hobbs committed frauds in carrying out one of the "class of acts" which he was employed by his principal to do; and the fact that the principal reaps no benefit from the agent's fraud has no effect on the principal's liability. The true principle is that the principal has put the agent in his stead and place and he is acting for him.

In *Story on Agency*, the learned author states, in s. 452:

"It is a general doctrine of law that the principal "is liable to third persons in a civil suit for frauds, "deceits, concealments, misrepresentations, torts, neg- "ligences, and other malfeasances or misfeasances "or omissions of duty, of his agent, *in the course of* "*his employment*, although the principal did not author- "ize, or justify, or participate, in or indeed know of "such misconduct, or even if he forbade the acts, or "disapproved of them."

And again in s. 456:

"But although the principal is thus liable for the torts "and negligences of his agent; yet we are to understand "the doctrine with its just limitations, that the tort "of negligence occurs in the course of the agency."

The defendant further contends that its agent had no power to receive money in change as he did, and

(1) Story on Agency, s. 452. (2) 21 Beavan's R. C., 540.

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that the Custom House cashier had only the power to give change up to the sum of fifty cents. We find in the Collector's (Mr. White's) evidence that there existed at no time departmental regulations forbidding the cashier from handing back the change; but that from January 1902 to 1907, he (Mr. White) had issued instructions in the Custom House at Montreal, forbidding the return of change over the counter in any amount exceeding fifty cents—any larger refund having to be made the following day by a cheque to the importer. That was a matter of internal administration in the Custom House and was subsequently reformed by the Department at Ottawa. There was no statutory power for it. The practice prevailing now since 1907, is to give over the counter whatever change is due. In view of these facts can it be seriously contended by the defendant that the frauds of their agent was assisted and facilitated by an officer of the Crown, namely the cashier of the Custom House, who was exceeding his power and authority in making refunds to Hobbs? The question was mooted at Bar that the Customs cashier was an accomplice in the frauds perpetrated by Hobbs, but the evidence failed to disclosed this fact, and as fraud is not to be presumed, it cannot be considered. The violation of this rule of internal administration in the Custom House would not amount to such a breach of duty as would give rise to any liability on the part of the Crown, particularly in view of the law of the prerogative that the Crown is not bound by the laches of it officers. And so far as the defendant is concerned, Hobbs had power to receive fifty cents in change, surely the scope of his power and authority would allow him also to receive one dollar, or any amount on behalf of the defendant. Then the refunds are really refunds made

to the defendant although the company never received any benefit from them by reason of the fraud of its agent. The money refunded was money that belonged to the Crown and taken from the Customs' till. The substantial result being that the amount of the accepted cheque, which eventually went to the credit of the Crown, was made equal to the amount of the duty due upon the goods actually declared, by reducing the amount of that cheque by the amount of the refund, made in actual cash, belonging to the Crown.

Let us suppose the company, instead of paying by accepted cheques, had given its agents bank notes, can it seriously be contended that, with the power of attorney above referred to, the agent had no power to receive any change? Had the agent given a bank note of $100 in payment of $50.75 of duties, could it be successfully contended that he had no power to receive the difference in change, *i.e.*, $49.25? Putting the question is to answer it. The agent had full power to transact and do "all business" respecting the entries at the Customs.

Hobbs was given all the necessary documents to pass and enter the company's goods through the Customs, including the accepted cheques to pay the duties, and it is with these documents that he approaches the Customs official. Thus he was entrusted by the defendant with full *indicia* of title enabling him so to act. The principal cannot be heard to say there is limit to the authority given. If the *indicia* of title are apparently co-extensive with the authority claimed there *is nothing to suggest any limit. Fry* vs. *Smellie* (1).

The Custom House cashier believed Hobbs' statement (and his evidence did not disclose any participa-

(1) (1912) 3 K.B. Div. 295.

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tion by him in these frauds) and he acted accordinly, returning balances of cheques on the faith of Hobbs' representations, treating and believing him as having full authority to deal with such moneys.

If the company has entrusted Hobbs with such *indicia* of title, enabling him to deal with these Customs entries, then it cannot be heard to say that there is a limit on the authority so given. (1) The Company is estopped from saying that while their agent had authority to pass the entries and to pay the duties, he had none to receive change if any there was. It is so estopped by representation as referred to in *Whitechurch* vs. *Cavanagh* (2) wherein Lord Macnaghten says that "is a very old head of equity." See also *Low* vs. *Bouverie*. (3)

Then this is a case arising in the Province of Quebec. What is the law of agency in that Province? We find the principles of the law of agency very clearly defined in the iron framework of the Civil Code of the Province, and the provisions pertinent to the questions arising herein are set out in the following Articles.

"Art. 1704. The mandatary can do nothing beyond "the authority given or implied by the mandate. He "may do all *acts which are incidental to such authority* "*and necessary for* the execution of the mandate."

"Art. 1715. The mandatary acting in the name of "the mandator and within the bounds of the mandate "is not personally liable to third persons with whom he "contracts. * * * * *

And again Art. 1727—"The *mandator* is bound in "favour of third persons for all the acts of his mandat- "ary, done in the execution and within the powers of "the mandate."

(1) Fry vs. Smellie (1912) 3 K.B. p. 295. (2) 1902 A.C. at p. 130.
(3) 1891 3 Ch. 82.

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The doctrine embodied in the above Articles of the Code was also recently reviewed by the House of Lords in *Lloyd* vs. *Grace, Smith & Co.* (1) That court expressed the opinion that the language of Mr. Justice Willes in *Barwick* vs. *English Joint Stock Bank* (2) had been misunderstood, and that that case was not an authority for the proposition that a master was not liable for the wrong of his servant or agent committed in the course of his service, if it were not committed for the master's benefit. They stated the true principle to be that a principal is liable for the act of his agent in the course of his employment, whether he is acting for the benefit of his principal or not. In this they dissented from the *dicta* of Lord Bowen in *British Mutual Banking Company* v. *Charnwood Forest Ry. Co.* (3) (4) and of Lord Davey in *Ruben* v. *Great Fingall Consolidated* (6).

This decision of the House of Lords in the case of *Lloyd* vs. *Grace, Smith & Co.* (ubi supra) affirms the view taken by Mr. Justice Quain of the decision in *Barwick* v. *London Joint Stock Bank* (ubi supra) in *Swift* vs. *Winterbottom*—(4) that is to say, provided that the agent's fraud is committed in carrying out one of the "class of acts" which his principal employs him to do, the principal is liable; and the fact that the principal reaps no benefit from the agent's fraud has no effect on the liability.

"The only difference in my opinion," says Lord Macnaghten, in *Lloyd* vs *Grace* (5) "between "the case where the principal receives the benefit of "the fraud, and the case where he does not, is that in

(1) 1912 A. C. 716.
(2) 16 L. T. Rep.; 41 L. R. 2 Ex. 259.
(3) 57 L. T. R. 833 18 Q. B. Div. 714.
(4) 28 L. T. R. 339; L. R. 8 Q. B. 244.
(5) 1912 A. C. 738.
(6) 95 L. T. Rep. 214; (1906) A. C. 439).

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"the latter case the principal is liable for the wrong "done to the person defrauded by his agent acting "within the scope of his agency; in the former case he "is liable on that ground and also on the ground that "by taking the benefit he has adopted the act of his "agent; he cannot approbate and reprobate."

The English law and the law of the Province of Quebec are practically identical upon the question of agency or mandate.

Is not also, in the result, the present case an instance of the application of the rule that when one of two innocent persons must suffer, the person who renders it possible for the wrong-doer to do the wrong, by reason of the trust he reposed in the wrong-doer, must suffer rather than the person who suffers from the agent having that opportunity. The person who, by trusting the agent, makes his fraud possible, is to suffer rather than the person who has no relation to the agent. See Lord Macnaghten's judgment in *Brocklesby* vs. *Temperance Permanent Building Society*, (1) and *Fry* vs. *Smellie* (ubi supra).

The Crown, relying on sec. 167, ch. 32, R. S., 1886, as amended by 51 Vic. C. 14, sec. 43, and 52 Vic. C. 14, sec. 13 (now sec. 264, R. S., 1906, ch. 48) contends rightly that the burden of proof that the proper duties payable upon the goods mentioned in the information have been paid and that all the requirements of the Customs Act with regard to the entry of these goods have been complied with and fulfilled—lies upon the defendant company whose duty it was to comply with and fulfil the same.

It is found for the purpose of this case, that the duties claimed upon the goods in question herein, with the exception of the payments made since the beginning

(1) 1895 A. C. 173.

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of the action, which will be adjusted after the question of liability has been finally determined, have not been paid or satisfied.

On this branch of the case it is contended, that it is not a question of agency, as to whether a principal directed his agent to do a given thing which the latter did not do; but the question is that the goods of the defendant were passed through the Customs without being entered or declared, and the defendant, whether it had an agent to do this class of work or not, is liable for the duties remaining actually unpaid upon the goods which were so fraudulently passed through the Customs. The onus is upon the defendant to show the duties were paid; failing to do so it is liable under the above mentioned Section 167.

The plaintiff cited in support of this contention the case of *Hendricks vs. Schmidt* (1) wherein the head note reads as follows:—

"In respect to a single consignment of goods covered "by a single entry, the lien of the government for "payment of the whole duties attaches to each and "every part thereof; and where the whole consign- "ment is warehoused under bond, and parts of it "are fraudulently withdrawn without payment of dut- "ies, the Collector is entitled to hold the remainder "until the duties on the entire consignment are paid, "and is not bound to surrender the same upon tender "of the amount of duties payable upon that part "alone.

"To constitute a payment of duties upon any "particular consignment of goods, there must be an "intent, both on the part of the importers and of the "collector, to apply the money to that consignment.

(1) 68 Fed. Rep. 425.

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"*Held*, therefore, that where a check was given by "the importers to an employee with directions to "pay the duties upon a particular consignment, but "he absconded with the same, and it afterwards came "into the hands of the Collector, and was applied "by him to the payment of duties upon a different "importation, this was not a payment of the duties "upon the former consignment."

The defendant cited, on the question of agency, the case of *Erb. vs G.W.Ry. Co.* (1); but this case must be distinguished from the present one, inasmuch as the fraud was comitted by a member of the firm benefiting by the fraud. This is what Ritchie, C. J. says at page 189 of that case:—

"I fail to see how such wilful fraud committed by "T. Brown & Co. through their partner Carruthers, "on plaintiffs, with whom they were dealing, can be "considered an act within Carruther's agency."

The defendants further cited the case of the City Bank vs. Harbour Commrs. of Montreal (2) but there is hardly any analogy between that case and the present one. However, as has already been said, the authorities upon this subject have been recently clearly and ably disentangled and reviewed up to the present date by the House of Lords, the highest tribunal in the kingdom, in the leading case of *Lloyd vs. Grace Smith & Co.* (ubi supra), and this court is bound to follow that case.

There will be judgment in favour of the plaintiff for the amount of the duties due upon the goods mentioned in the information herein, subject, however, to the payments made on account since the institution of the action. Failing to agree in the adjustment of the amount actually recoverable against the defendants,

(1) 5 S.C.R. 179. (2) 1 L.C.J. 288.

the parties will have leave to apply to the Court for further directions upon these matters. The whole with costs in favour of the plaintiff.

*Judgment accordingly.*

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

Solicitors for defendant : *A. R. Creelman.*

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Feb. 12.

BETWEEN

HIS MAJESTY THE KING, ON THE INFORMATION OF THE ATTORNEY-GENERAL OF CANADA,

PLAINTIFF;

AND

J. H. RACICOT,

DEFENDANT.

*The Customs Act, R.S. 1906, c. 48, sec. 264—Construction—Burden of Proof where goods are not shown to have been smuggled or clandestinely introduced into Canada.*

The provisions of section 264 of *The Customs Act* imposing the burden of proof as to payment of duties, and that all the requirements of the Act with regard to entry of the goods have been complied with and fulfilled, upon the person whose duty it was to comply with and fulfil the same, does not apply until the Crown has proved that the defendant charged with a breach of section 206 has actually smuggled or clandestinely introduced the goods in question into Canada. *The Queen* v. *J. C. Ayer Co.* (1 Ex. c. R. 232); and *Foss Lumber Co.* v. *The King* (47 S.C.R. 140) referred to.

THIS was information exhibited by His Majesty's Attorney-General for the Dominion of Canada seeking to recover certain duties payable on goods alleged to have been smuggled or clandestinely introduced into Canada.

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

January 27th, 1913.

The case came on for trial before Mr. Justice Audette at Montreal.

*F. W. Hibbard,* K.C., appeared for the plaintiff.

*F. J. Bissaillon,* K.C., appeared for the defendant.

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Reasons for Judgment.

AUDETTE, J. now (February 12th, 1913) delivered judgment.

This is an information exhibited by the Attorney-General of Canada, whereby it is alleged the defendant, who is a merchant carrying on business in the town of St. Johns, in the District of Iberville, P.Q., had during the years 1907, 1908 and 1909, smuggled into Canada, at a point near Rouses Point, goods and merchandise subject to duty. It is further alleged the goods have not been seized and forfeited, and the Crown, under section 206 of *The Customs Act*, asks for judgment against the defendant in the sum of $8,845.35.

The defendant at Bar denies all the plaintiff's allegations.

The Crown has adduced evidence showing that the goods in question have been purchased by the defendant from different jewellery manufacturers in the United States of America, with instruction to ship or express them to one Couture, at Rouses Point, in the State of New York, U.S. It is also proved, in most cases, that the goods have been paid for by Racicot.

On behalf of the defendant it was proved that the greater part of the goods in question had been bought in the name of the defendant, at the request of and for one Larivière, and the reason assigned for so doing is that where the goods are purchased by a merchant, they can be had at better prices, with, it is assumed, better trade discount. Larivière, who styled himself as "a jobber" during the period in question, testified the goods were bought for him, and that he peddled them through that part of the country, and he swears that in all such cases the goods were exclusively sold in the United States.

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Couture, Larivière and Racicot had all, at one time, lived at St. Johns and knew one another.

The Crown having established and proved the purchase of these goods in the United States, the payment for the same by the defendant, and traced them to Couture at Rouses Point, N.Y., claims that under section 264 of *The Customs Act*, that having done so, the burden of proof is upon the defendant to prove the goods were not brought into Canada.

Before assenting to the correctness of this contention, it is necessary to consider the provisions of section 264 with reference to the provisions of the interpretation clause of *The Customs Act*, as embodied in sub-section 2 of section 2, and certain decisions illustrative of the proper interpretation which should be placed upon section 264, by this Court. Sub-section 2 of section 2 (R.S. 1886, Ch. 32, Sec. 2, and R.S. 1906, Ch. 48) reads as follows:—

"All the expressions and provisions of this Act, " or of any law relating to the Customs, shall receive "such fair and liberal construction and interpretation "as will best ensure the protection of the revenue "and the attainment of the purpose for which this "Act or such law was made, according to the true "intent, meaning and spirit."

A similar enactment in *The Customs Act*, 1883, was considered by Sir William Ritchie, C.J., in The Queen v. J. C. Ayer Company (1) and he there came to the conclusion that notwithstanding the language of this interpretation clause, the intention of the Legislature in the imposition of duties must be clearly expressed, and in case of doubtful interpretation, the construction shall be in favour of the person charged with an infringement of the Act.

(1) 1 Ex. C.R. 232.

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In the recent case of *Foss Lumber Co.* v. *The King* (1), Sir Charles Fitzpatrick, C.J., adopts Sir William Ritchie's views as above expressed with the following observation :—

"To this I would add what Lord Taunton said, "when speaking of the 'Stamp Duty': The stamp "law is positivi juris. It imports nothing of principle "or reason, but depends entirely upon the language "of the legislature."

It was also held in the case of *Algoma Central Railway* v. *The King* (2) that a taxing Act is not to be construed differently from any other statute.

Approaching section 264 of *The Customs Act* in the light of the interpretation clause and the above decisions, one must necessarily come to the conclusion that the section applies only to a case where the Crown has proved the defendant "has smuggled or clandestinely introduced into Canada any goods subject to duty."

There is no proof whatsoever that the goods in question have been entered into Canada at any frontier port, or after crossing the frontier. Moreover, the charge against the defendant, by paragraph 77, and even by all previous paragraphs, is that the goods under section 206 of that Act, have been smuggled or clandestinely introduced into Canada. The plaintiff has utterly failed to prove such goods have been introduced into Canada.

The defendant has, by the evidence of Larivière disproved part of the plaintiff's case by adducing evidence that some such goods have been bought and sold in the United States, although paid for by Racicot.

However, in the view this Court takes of the case, this last mentioned evidence makes no difference,

(1) 47 S.C.R., p. 140. (2) 32 S.C.R. 277, and (1903) A.C. 478.

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as in both cases the Crown has failed to prove any smuggling or introduction of the goods into Canada.

The solution of the facts involved in this case would have been ever so much more satisfactorily arrived at, had Racicot and Couture been heard. Racicot could have corroborated Larivière, and both Racicot and Lariviere could, if they had cared, have induced Couture to give evidence, and thereby enabled us to know the part he took in the transaction. Furthermore, if there was nothing wrong, Couture could have had no objection to help Racicot dissipate the accusation against him.

Upon the facts viewed as a whole, it must be conceded that the conduct of the defendant might very well have given rise to suspicion in the mind of the Customs authorities; but in the absence of proof that the goods were brought into Canada mere suspicion will not justify the court to give effect to section 264, thus shifting the burden of the proof, and presume that the defendant has evaded the payment of duties and so infringed the provisions of the Act.

Under all the circumstances, this Court finds that the plaintiff has failed to prove the allegations of the information and the action is dismissed with costs.

*Judgment accordingly.*

Solicitor for Plaintiff : *F. W. Hibbard.*

Solicitor for Defendant : *Bisaillon & Brossard.*

IN THE MATTER OF THE PETITION OF RIGHT OF

DAME MARIE - ANNE LAPOINTE,

ET AL.,.....SUPPLIANTS; 1913 Feb. 4.

AND

HIS MAJESTY THE KING.....RESPONDENT.

*Government Railway—Negligence—Fatal injury to workman—Brakesmen—Defective coupling on car—Faute commune—Unskilled workman—Standard of prudence—Liability.*

T. was employed on the Intercolonial Railway as a brakesman. At the time of the accident whereby he lost his life he was one of the crew on a shunter-train working between different stations along the line of the Intercolonial Railway in the Province of Quebec. The coupling device of one of the cars in this train was defective in that the chain connecting the pin and the lever was broken and disconnected, so that the device would not act automatically. It is the practice of brakesmen to uncouple cars when the train is in motion by means of this automatic device. There are no rules or regulations of the road forbidding the work being done in this way. It was shown by the evidence that when the train left the last divisional point the railway authorities knew that the coupling on this particular car was defective. The deceased was not a permanent employee and had not acquired that skill in coupling and uncoupling cars that more experienced brakesmen have. His attention was called by one of his fellow-workmen to the fact that the coupling was defective, but notwithstanding this he undertook to uncouple the car while the train was in motion. Finding that he could not accomplish this with the defective device, he went between the cars and attempted to do the work of uncoupling with his hands. He fell between the cars and the wheels passed over him injuring him fatally.

*Held*, that the railway authorities were guilty of negligence in allowing the coupling device to be out of repair, but that T. had also been at fault in not waiting until the train had stopped before he attempted to make the coupling. Under such circumstances the doctrine of *faute commune* applied, as the case arose in in the Povince of Quebec.

(2) If an inexperienced workman knowing from observation of his skilled fellow-workmen that a particular piece of work is hazardous if done in the method pursued by them, undertakes to so perform it, while another and less dangerous method is open to him, he is not observing a proper standard of prudence and ought not to be held blameless if any accident results from his lack of care.

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Reasons for Judgment.

PETITION OF RIGHT for damages arising out of a fatal accident to a workman while engaged in shunting cars on the Intercolonial Railway in the Province of Quebec.

The facts are stated in the reasons for judgment.

January 13th, 1913.

The case now came on for hearing before the Honourable Mr. Justice Audette, at Rivière du Loup.

*E. Lapointe*, K.C. and *C. A. Stein*, K.C. for the suppliants. *E. H. Cimon*, for the respondent.

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

The petition of right herein is brought to recover, both by the consort of the late Adelard Tardif and by the minor children, issue of their marriage, the sum of $15,000. damages, for the death of the said Tardif, alleged to have resulted from the negligence, fault, imprudence and want of skill of the employees of the Crown, and the violation by them of the regulations and laws governing the operation of the Intercolonial Railway, a public work of Canada.

The respondent, by the statement of defence, avers, *inter alia*, that the death of Adelard Tardif if not purely accidental was occasioned by his own negligence and fault.

On the early morning of the 16th day of April, 1911, at about 2.35 A.M., the shunter-train, on board of which Tardif was employed as brakesman, reached St. François. The work to be performed by this shunter train consists in taking and leaving cars at the different stations along the line of the I.C.R. The work this train had to do, according to the orders,

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at that station, was to leave one car at St. François and take one, that was already there, to Montmagny. The train was travelling east.

From St. Valier to St. François the two brakesmen, Demeule and Tardif, were riding on the engine, and on arriving at St. François, Demeule alighted on the south side of the engine and Tardif on the north, at the point marked "A," on the diagram or plan filed herein as Respondent's Exhibit "A," and which will hereafter be called the plan. There are two sidings at St. François; the loading siding marked "B," and the Farmers' siding marked "C" on the plan.

On alighting Demeule turned the switch, at point "A," and Tardif went behind and uncoupled from the train the first car, which was to be left at St. François. Tardif entered the siding with the engine and that car attached thereto and went to point "B," whence the train backed to the Farmers' siding, marked "C," where there was a car for Montmagny. There were two cars on the Farmers' siding; the one required was the last and Demeule coupled them together, while Tardif coupled them to the engine. Then the train moved east, out of the Farmers' siding to the loading siding. Then Tardif closed the switch at the point "B," and the train with the three cars began backing on the loading siding, the car for Montmagny being the last,—on the west. The two brakesmen were then on the north of the loading siding. Demeule was at the frog, and as the train began backing he called out to Tardif that the lever was not working on the Montmagny car, but there is no evidence as to whether Tardif heard him or not. However, Tardif, seemingly having understood the warning, passed to the south, expecting perhaps that the lever on the south side would work. Neither lever did work. The chain joining the pin and the lever

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was broken—disconnected. Shortly afterwards Demeule heard a cry, Aie! Aie! before Tardif was opposite, and he saw Tardif fall just opposite him. He had probably slipped or was tripped by the wheel catching his heel and was killed. It was found afterwards that the heel of one of Tardif's boots was crushed appearing as if it had been caught by the flange of the wheel. Demeule says he saw him between the two cars with his left hand on the pin when he fell with his lamp. The moon gave some light and there was some wet snow falling. It was wet, but there was no snow on the track. The point marked "D" on the plan is where Tardif was picked up after the accident. When Demeule heard Tardif's cries he signalled with his lamp to stop the train. When Tardif was picked up he was lying on the north rail, one arm and one leg on each side of the rail, with his head to the south, and the coupling pin was about eight feet behind him. The body was found on the track and disentangled from the train.

Dr. Vezina, who examined Tardif's body after his death, says there was a fracture of the skull at the base, a fracture of the right arm, a bruise on the stomach, and the little finger was cut off. The fracture of the skull, in his opinion, was sufficient to have caused Tardif's death.

Now, the two cars in question had been taken from Chaudière on the 10th April, 1911, and left at St. François by Conductor Couture, who says he he did not examine or inspect them specially before leaving Chaudière; and the two brakesmen he had with him at the time, and who are now dead, made no mention to him about these cars.

The coupling of the car, No. 17567, which Tardif was trying to uncouple, was defective and out of order. While the car was properly equipped to be uncoupled

without going between the cars, as it had a lever on each side by means of which the coupling pin could be lifted, the chain connecting the pin and the lever was broken and disconnected—a link was broken. It also appears from the evidence that the chain had already been temporarily repaired with an open link, filed as Exhibit No. 8, which was found on the dead-timber of the car ahead. The proper link, however, for such a chain is like Exhibit No. 7, and not like Exhibit No. 8—but it had neither of them at the time of the accident, as it was disconnected. The coupling of the other car, No. 18876, which was on the Farmers' siding, was also defective. It had a connected chain, but the chain was placed underneath and the lever could not be worked, and here again the pin could be moved out outwards only with the hand.

It appears from the evidence that while it was dangerous to uncouple cars when the train is moving, it is, nevertheless, done most of the time. There are no Rules or Regulations in evidence forbidding the doing of it, and some of the witnesses say there are no instructions given to that effect, and that brakesmen do it daily. The usual practice is to uncouple them when the train is in motion, and witnesses go so far as to say that it is quite seldom that the train is stopped for doing so. One of the witnesses says there are regulations preventing coupling cars in motion; but the majority say there are none, and none are produced or to be found in the pamphlet of the Rules and Regulations in force, which are filed as Exhibit "B."

One reason given why the cars are uncoupled when the train is in motion, is that often if the brakesman waits until the train is stopped, he finds that the train is *taut* and that it is impossible to pull the pin out. The brakesman has then to signal the engineer

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to move the train, and that entails delay which they generally endeavour to avoid.

It would appear, in the result, that the two cars that were at St. François on the night in question were defective, and that under Rule 176, of Exhibit "B," conductors and drivers of trains are responsible for seeing that running gears on all cars are in perfect working order before starting from terminal stations; and under Rules 125 and 130, they have to see that the rules are observed by the employees, and that the brakesmen are attentive to their duties. Under Rule 149, conductors are to call the attention of the Repairer of Cars, or, in his absence, that of the Station-Master, to any repairs required or damage that may have been sustained by the cars, and, in the latter case, report the particulars to the Superintendent. These rules and regulations are made under the provisions of Section 49 of the *Government Railways Act* (1), and have, therefore, statutory force.

There was, therefore, negligence in allowing these two cars to leave Chaudière with defective couplings, and if the couplings had been broken at St. François when the cars were on the Farmers' siding, the Station-master should have been notified in compliance with the Rules and Regulations above cited.

Tardif, at the time of the accident, was acting in the ordinary discharge of his duty and was working in the usual manner and taking the usual risks taken by other brakesmen in such instances. He could have had the train stopped before uncoupling; but he was not a permanent employee and was probably ambitious to please those in charge and to perform his duties in as expeditious a manner as possible, like those having longer experience, with the object of obtaining promotion.

(1) R. S. 1906, c. 36.

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On his attention being called by Demeule to the fact that the lever was defective, he passed to the south, expecting perhaps, as Demeule said, that the lever on that side was in working order; but having started to uncouple whilst the train was in motion and finding that the lever on that side was also defective, he imprudently persisted in uncoupling. Had the lever been in order, he could have uncoupled without danger, without being obliged to go between the cars; but having started to uncouple and wishing probably to give satisfaction, he outstepped the ordinary line of prudence by going between the cars, and in attempting to make the uncoupling with his hands. In doing so he took a risk which ended fatally.

We have, then, to consider whether what he did was the act of a prudent man in the circumstances. The standard of prudence required of one engaged in the practice of any industrial occupation involving risk of bodily injury is necessarily different from that required of a man employed in a less hazardous occupation. While it is true that the character of a workman's duties determines the measure of care he should observe, on the other hand it is obvious that one skilled in the practice of a dangerous employment need not observe the same degree of prudence or caution that should mark the conduct of a novice in the art. If an inexperienced workman, knowing from observation of his skilled fellow-workmen that a particular piece of work is hazardous if done in the method pursued by them, undertakes to so perform it, while another and less dangerous method is open to him, he is not observing a proper standard of prudence and ought not to be held blameless if any accident results from his lack of care.

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Applying these considerations to the facts of the case before us, it must be conceded no accident would have occurred if Tardif had waited till the train had stopped; but it must also be said that had the coupling gears been effective and not out of repair he would have uncoupled his car without accident as it would not have been necessary for him to have gone between the cars. And there was no regulation preventing him from doing what other brakesmen were daily doing before his eyes in the majority of cases, for the reasons above mentioned, and, that is, to uncouple cars while the train was in motion. It is the method followed in the majority of cases by brakesmen. And is not the object of these levers to facilitate the uncoupling of cars while the train is moving, avoiding the necessity of going between the cars to perform the uncoupling?

Now some of the employees of the Crown, namely the conductor or train-driver, were negligent in allowing these cars to leave Chaudière with defective couplings. They should have seen to their being repaired. Or if the coupling had been broken at St. François the station-master should have been notified. There has been negligence by omission, and Tardif was imprudent in persisting to uncouple when he realized the coupling was defective, and he thus contributed to the accident. He took the unnecessary risk. There is therefore *faute commune*.

The present case has to be decided under this legal doctrine of *faute commune* obtaining in the Province of Quebec, and that is, where the employer and employee are both at fault, the damages are to be divided according to the degree of the fault contributed to the accident by each of them. *Price* vs. *Roy*, (1); *G.N.W.* vs.

(1) 29 S. C. R. 494.

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*Cyr*, (1); *Nichols ChemicalCo.* vs. *Lefebvre* (2); *Lamothe*, Accidents duTravail (3).

Counsel for the suppliant cited and relied upon the case of *Scott v. C.P.Ry.* (4), where a very similar state of facts presented itself, although the case was decided under the general Railway Act. However, while the facts are almost identical in the two cases, and in both cases negligence has been proven, in the former case the negligence consisted in the failure to comply with the requirements of section 264 of *The Railway Act*, R.S. 1906, ch. 37, and in the present case, which comes under section 20 of the *Exchequer Court Act*, the negligence lies in the failure to comply with the requirements of the Rules and Regulations made under the provisions of the *Government Railways Act*. The case of *Armstrong* v. *The King* (5) is also relied upon. In the *Armstrong* case the widow succeeded where in consequence of a broken switch, at a siding on the Intercolonial Railway, which failed to work properly, although the moving of the crank by the pointsman had the effect of changing the signal so as to indicate the line was properly set for an approaching train, an accident occured by which the locomotive engine was wrecked and the engine-driver killed. See also *Desrosier* vs. *The King* (6).

The present case comes within the provisions of section 20 of the *Exchequer Court Act*, as amended by 9-10 Ed. VII. ch. 19. The injury complained of occurred on a public work through the negligence of an employee of the Crown, to whom some duty was assigned and which he omitted to discharge, while acting within the scope of his duties and employment.

(1) Q. R., 18 K. B. 410.
(2) 42 S. C. R. 402.
(3) Nos. 156, 157, 159, 160, at pp. 86, 69 and 71.
(4) 19 Man. R. 165.
(5) 40 S.C.R. 229.
(6) 41 S.C.R. 71.

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The deceased Tardif was in his thirty-first year at the time of his death. At that time he was not permanently employed on the I.C.R., being only a spare man, who, however, had been employed consecutively for about fifteen days. Counsel for both parties admitted at the time of his death the deceased realized an average yearly salary of $800.

In assessing damages in a case of this kind, while it is impossible to arrive at any amount with mathematical accuracy, several elements must be taken into consideration and one must strive to compensate the suppliants for the pecuniary loss suffered to make good to them, as much as possible, the pecuniary benefits they might reasonably have expected from the continuation of the deceased's life, and which by his death they have lost. In doing so one must take into account the age of the deceased, his state of health, his expectation of life, his employment, the wages he was earning and his prospects; and, on the other hand, one is not to overlook that the deceased in such a case must, out of his earnings, have supported himself as well as his wife and children, and that there were contingencies other than death, such as illness and the being out of employment to which, in common with other men, he was exposed. Under all these surrounding circumstances, which must be taken into consideration, this court is of opinion to allow the suppliants the total sum of $2,400. Out of this amount the sum of $800 will go to the mother, and the sum of $400 to each of the four children. In arriving at this total amount of $2,400, the Court wishes to convey the idea that a much larger amount would have been allowed had the deceased not been guilty of contributory negligence, and had he not by his own fault contributed so materially to the accident.

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There will be judgment that the suppliants are entitled to recover the sum of $2,400. in the proportions above mentioned and with the costs.

*Judgment accordingly.*

Solicitor for Suppliant: *C. A. Stein*, K.C.

Solicitor for Respondent: *E. L. Newcombe*, K.C.

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Feb. 17.

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

AND

GEORGE CRUMB..... DEFENDANT.

*Public Land—Lease—Information to cancel—Improvidence—Knowledge of Crown officials of litigation respecting property in question.*

In proceedings on behalf of the Crown to annul and cancel a certain lease of Ordnance and Admiralty lands, it appeared that although there was information on their files respecting litigation at one time pending in the civil courts between the defendant's predecessor in title and other parties with respect to the property demised, the officials of the Department of the Interior issued the lease in question. It appeared, however, that at the time the lease was issued the Department was not aware of a judgment in one of the civil courts which decided adversely to the rights of the defendant's predecessor in title.

*Held*, under all the circumstances, that the lease was issued through inadvertence and improvidently and that the same should be cancelled.

2. The officers of the Crown should have satisfied themselves before issuing the lease that the litigation, of which there was knowledge in the Department, had first been disposed of in favour of the applicant.

THIS was an information exhibited by the Attorney-General of the Dominion of Canada seeking to have a lease of certain public lands annulled and cancelled.

The facts are fully stated in the reasons for judgment.

February 7th, 1913.

The case now came on for hearing before the Honourable Mr. Justice Audette at Toronto.

*W. D. Swayze*, for the plaintiff;

*W. M. German*, K.C., for the defendant.

AUDETTE, J., now (February 17th, 1913) delivered judgment.

This is an information exhibited by the Attorney-General of Canada, whereby it is sought to annul

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and cancel a certain indenture of lease, dated the 21st day of April, A.D. 1911, of certain Ordnance and Admiralty lands, in the Township of Sherbrooke, County of Haldimand, Province of Ontario, known as Lot No. 41, which, it is claimed, has been granted by inadvertence.

Many years ago, one Henry Ross squatted and built upon the lot in question. His children, who also continued in possession, conveyed to Ross's grandchildren Nettie White and George Little, whose mother (Ross's daughter) remarried one Wellington Thompson, who since his marriage with their mother occupied the premises in question. Shortly after the death of his wife (the mother of Nettie White and George Little) Thompson claimed title to the property, and both Nettie White and George Little took action in the High Court of Justice, Ontario, to have their rights determined.

This action was tried on the 25th day of May, 1905, and the judgment was not delivered until the 4th day of June, 1910, a little over five years after the hearing. An appeal was taken from that judgment, and the judgment on appeal confirming the same was delivered on the 30th January, 1911.

Under both of these judgments Thompson failed, and the title was determined in favour of Ross's grandchildren, Nettie White and George Little, as against the step-father.

In the interval between the trial and the judgment of the High Court, while the action was still pending and without waiting for the result of the case, Thompson sold the property to the present defendant George Crumb, on the 7th day of February, 1907, whereupon the latter took possession of the said lands, and the buildings and improvements thereon.

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When Thompson sold to Crumb, they both went together to Mr. Bradford, a lawyer who had defended Thompson in the above mentioned case and who knew all about it, and Thompson testifies that having asked Mr. Bradford if he could sell, the latter advised him he could "sell all right". Crumb, who was then present, heard the lawyer, and therefore knew all about the pending case. Thompson further adds he told Crumb that the judgment was not as yet given, that the question of his title to the property was to be decided in that lawsuit, and he was not sure how it was coming out. Thompson adds, he was buying my chances,—"that is the ins and outs of it". Crumb testifies that Mr. Bradford claimed that there had been some kind of a trial, and it had been settled in favour of Thompson, and Mr. Bradford thought "I would be safe in buying it",—he advised me to buy it and that I would be safe in buying it. Mr. Bradford was then instructed to prepare the deed, and it was signed the following day—Crumb paying $600.—namely, $500 cash, and $100 by a note which was afterwards paid. Crumb was well aware under what circumstances he was buying, and in no case could the maxim of *caveat emptor* better apply.

Crumb further testifies that after the pronouncement of the judgment on the 4th June, 1910, he asked Thompson to go with him to Mr. Bradford's office to sign the necessary papers to appeal from that judgment which had gone against him, and that an appeal should be put in.

Following the judgment of the appellate court and Crumb refusing to vacate the premises, Nettie White and George Little took an action for ejectment against Crumb, the present defendant, and the latter having been examined on Discovery, it was elicited that he

had, on the 21st April, 1911, obtained from the Crown a lease of the land in question.

This lease was obtained under the following circumstances:—Crumb went to Mr. German, his legal adviser, and asked him to make application on his behalf for that lease, without however at the time disclosing to Mr. German anything about the litigation in respect of the property, suppressing any information with respect to any trouble about the property. Thereupon Mr. German, on the 6th March, 1911, over a month after the delivery of the judgment of the appellate court determining the rights of the parties to the property in question, wrote to the Deputy Minister of the Interior, and, on behalf of Crumb, made application for a lease of the land in question, without disclosing anything about the litigation in question, which was unknown to him.

On receipt of this application, instructions were given, by the Deputy Minister of the Interior, to J. P. Dunn, a clerk in charge of the Ordnance and Admiralty lands of the Department of the Interior, to take the necessary steps to prepare the lease, as per a memo. to that effect in the fyle of the Department. In compliance with these instructions, the lease was duly passed on the 21st April, 1911, and delivered to Mr. German.

Now, Mr. Dunn, who was heard as a witness in this case, informed us that there was, at the time of the issuing of the lease, on record in the Department, a reference to this litigation in 1905. The former clerk in charge of that branch had made a report stating that some trouble or litigation had been in existence, or had taken place between Thompson and White and Little. Although Mr. Dunn said he had knowledge of what was on the fyle and in the report, on receiving instructions

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to prepare the lease, he did not look into it any further, assuming that since 1905 the matter had been adjusted and closed, and that there was no further trouble in connection with this, or any further litigation. Mr. Dunn further testified there is no written or verbal instruction given respecting a case of this kind in the Department; but where there is litigation pending with respect to the subjectmatter of a piece of land for which a lease is asked, the custom is that the Department does not undertake to issue any lease until the litigation is settled.

At the time the lease was issued the Department was not aware of the judgment in the case of *White and Little* v. *Thompson*, (1) this judgment having only been filed and deposited in the Department on the 30th November, 1911. On the receipt of the judgment in the Department Mr. Dunn says he made a report upon the same to the Deputy Minister of the Interior and the matter was referred to the law officers—hence the present action.

Under all the circumstances of the case, one cannot come to any other conclusion than that the lease was issued by inadvertence and in improvidence. *Attorney-General* v. *Contois*, (2) *Attorney-General* v. *Fonseca*, (3) The officers of the Crown should have satisfied themselves that the litigation, of which there was note and mention upon their own fyle, had been disposed of in favour of the applicant before issuing a lease for a piece of land which was the subject-matter of such litigation. The lease should be cancelled, and to cancel it gives no just cause of complaint to the defendant who bought this very property with his eyes open, well knowing of the pending litigation both when he bought from Thomp-

(1) 2 O. W. N., 667. 18 O. W. R., 478. (2) 25 Grant, 346.
(3) 17 S. C. R., 612.

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son and when he made his application for the lease. Had he not suppressed his knowledge of the determination of the litigation against his vendor when he made his application, this lease according to the custom of the Department as explained by witness Dunn (p. 7) would not have been issued and the present action avoided. If the lease has to be cancelled he has only himself to blame.

As the officers of the Crown acted in improvidence in issuing the lease, and as Crumb was at fault in not disclosing all the important circumstances of the litigation respecting the subject-matter of the lease when making his application for the same, justice will be done if no costs be allowed to either party.

Therefore there will be judgment annulling and cancelling the Crown's lease in question in this case, and without costs to either party.

*Judgment accordingly.*

Solicitor for the plaintiff: *W. D. Swayze.*

Solicitors for the defendant: *German & Morwood.*

IN THE MATTER OF THE PETITION OF RIGHT OF

1912
June 13.

THE GRESHAM BLANK BOOK COMPANY, of Brooklyn, in the State of New York, one of the United States of America.....SUPPLIANTS:

AND

HIS MAJESTY THE KING..... .RESPONDENT.

*Contract—Government Stationery Office—Recovery of value of goods sold and delivered and to be delivered—Executory contract—Breach—Construction of statute—The Public Printing and Stationery Act, R.S.C. (1906) chap. 80, sec. 24.*

Goods ordered for the Department of Public Printing and Stationery by the Superintendent of Stationery must be ordered in strict conformity with the first clause of sec. 24 of R.S.C. 1906, chap. 80, and all persons dealing with officers of the Crown must be taken to have knowledge of the statute governing such dealings.

Where goods are ordered contrary to the formalities of section 24 but which have been received by the proper officers of the Crown for the use and benefit of the Crown, the Crown, in the special circumstances, will be held liable as upon an implied contract.

PETITION OF RIGHT for the recovery of the sum of $6,047.08 for certain goods furnished and actually received, for goods shipped or in transit, and for breach of contract in dealings with the Department of Public Printing and Stationery at Ottawa.

The facts are stated in the reasons for judgment.

May 30th, 1912.

The case was heard at Ottawa.

*R. G. Code*, K.C., for the suppliants.

*W. D. Hogg*, K.C., for the respondent.

CASSELS, J., now (June 13th, 1912) delivered judgment.

This was a petition filed by the suppliants claiming the sum of $6,047.08 for certain books and stationery

furnished for the Department of Public Printing and Stationery at Ottawa. The Crown pleads section 24 of the statute respecting the Department of Public Printing and Stationery, being chapter 80 of the Revised Statutes, 1906. The first part of that section provides:—

"All purchases made by the Superintendent of Stationery as hereinbefore provided shall be so made upon requisition approved by the Minister or the King's Printer."

It is alleged by the Crown that the requisitions in question were not approved by either the Minister or the King's Printer, and therefore there is no contract binding on the Crown.

The Crown also filed a counter-claim in which it alleges that the suppliants entered into a conspiracy with one Frank Gouldthrite, at that time Superintendent of Stationery, to defraud the Crown, and it asks for a refund of certain sums alleged to have been overpaid to the Gresham Blank Book Company. There is no evidence before me sufficient to sustain this counter-claim. It is attempted to be shown by the evidence of one John Hyde that the Government overpaid the suppliant the amount which would practically be paid as customs dues; in other words, the contention of Mr. Hyde apparently is, that purchasing goods in New York would be more expensive than the purchasing of the same class of goods in Toronto, because in addition to the purchase price paid in New York there would be certain customs dues under the Customs Tariff Act which should be added to this price.

In the first place, there is no evidence that there is any machinery in Canada which could turn out the same class of goods as have been manufactured by the suppliant company. It could hardly be expected that

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goods sold in New York could be sold for a less price than similar goods manufactured and sold in Canada. For years past to the knowledge of the Minister and the King's Printer goods of a similar kind have been purchased from the United States; and even in the evidence before me, Mr. Murphy points out that he visited New York and different places in the United States to see the establishments which were manufacturing goods for them. When the Customs dues are referred to as being lost, it is manifest that if the Department paid the dues these dues would simply go into another branch of the administration — and there is no doubt whatever that this idea of Mr. Hyde's is an after-thought to try and show some gross overpayment to the suppliant for the goods which the suppliant company had been furnishing.

A considerable quantity of the goods sued for have been received by the Department and used by them. The evidence of Mr. Parmelee, the King's Printer, shows the course of dealing that has taken place in the past. He was appointed King's Printer on the 1st February, 1909. Referring to Gouldthrite, he states that he was the man in charge of the Stationery Department and gave all the orders; that the goods were bought on his requisitions. In answer to a question, Mr. Parmelee states as follows:

> "As a matter of Departmental practice all the standard supplies were bought in large quantities, usually by tender and contract, and were carried in stock. Then of course all the Departments need special things, and they were bought on his (Gouldthrite's) requisitions. We bought to the best advantage possible."

The following questions and answers show the course of dealing:—

"Q.—As King's Printer and in charge of this particular department, you knew all the years since your appointment took place that Gouldthrite was giving daily and weekly requisitions for these particular goods?

A.—Yes, for all kinds of goods.

Q.—You knew that?

A.—Yes.

Q.—And when the accounts would come in for these goods so ordered by Gouldthrite on his requisitions how were they paid?

A.—They were paid by the King's Printer's cheque and the account was signed by the Accountant. The Accountant signs first."

In reference to the uncompleted orders he is asked:

"Q.—You must have known there were orders in process of completion?

A.—Yes.

Q.—And that would be with respect to orders in the Petition of Right?

A.—Yes."

I have carefully considered the various authorities cited in the argument and also certain other authorities not cited. I am of opinion that as to all the goods received by the Department it should be held that they were so received upon requisitions approved by the King's Printer. There is nothing in the statute that requires the approval to be in writing, or even to be given at the time of making the requisition. is absolutely clear, I think, from the evidence of Mr. Parmelee, that, as to all the goods which were actually received into the Department, he knew that the requisitions had been made by Gouldthrite; and he subsequently approved of these requisitions and accepted the goods. I think the Crown is bound to pay for

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these goods. Even if all these facts were not present, it seems to me that, under the authorities, the Crown having received and used the goods is liable for their value. See *Wood* v. *The Queen* (1); *Bernardin* v. *The Municipality of North Dufferin* (2); *The Queen* v. *Henderson* (3); and *The Queen* v. *Woodburn* (4). In this latter case, while not deciding the point, the learned Judge who gave the judgment of the Supreme Court, states:—

> "We have not here to deal with an executed contract, with a claim for goods sold or for work done and materials supplied in respect to which other principles may be applicable. It may possibly be that the Crown, like an individual, receiving the benefit of work or goods, may, notwithstanding the statute, be bound to recoup the person from whom the benefit has been received." (5)

The case of *Young* v. *Leamington* (6) was strongly relied upon by Mr. Hogg, but it was based upon a statute entirely different from the one in question in this case.

I am therefore of opinion first, that it should be held that the goods which have been received by the Department, should be treated as having been received upon the requisition of the Superintendent, and approved of by the King's Printer; and secondly, that if it is necessary, the Crown should be liable as upon an implied contract.

As to goods not received, I am forced to the conclusion that the suppliants have no right to recover. I have to take the statute as it reads. The statute only authorizes the Superintendent to make purchases upon requisition approved by the Minister or the King's Printer.

(1) 7 S.C.R. 645.
(2) 19 S.C.R. 581.
(3) 28 S.C.R. 425.
(4) 29 S.C.R. 112.
(5) 29 S.C.R. 122.
(6) 8 A.C. 517

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The *Woodburn* case referred to shows that all persons dealing with officers of the Crown, must be taken to have knowledge of the statutes. Now, under this clause it seems to me that the Superintendent of Stationery would have no power to enter into contracts unless with the approval of either the Minister or the King's Printer. Evidence has been given before me both by Mr. Murphy and Mr. Parmelee that they never approved of these requisitions for goods not received. They are executory contracts, and in my opinion cannot be enforced, as they were not entered into as required by statute.

No doubt the parties can agree upon the amounts for which the suppliants should be paid under this judgment; if not, the matter can be spoken to. I think the suppliants are entitled to their costs of the action and of the counter-claim.

*Judgment accordingly.*

Solicitors for Suppliants: *Code & Burritt.*

Solicitor for Respondent: *J. R. Osborne.*

1913
March 10.

IN THE MATTER OF THE PETITION OF RIGHT OF

JOHN BREBNER.....SUPPLIANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

*Public Work—Injury to the person—Liability of Crown for negligence—Trap on Premises—Fellow-servant.*

The suppliant was employed by a contractor to deliver hay in a barn belonging to the Department of Militia and Defence at K. This barn was a public work of Canada, and the duty of receiving the hay there from the contractor was discharged by L, a servant of the Crown. The suppliant was invited by L. to go up into the loft to assist L. in storing the hay. There was a trap-door there, open at the time, the existence of which was not communicated by L. to the suppliant. The light from the front of the loft was cut off by the pile of hay on the left of the barn, and the rear where the suppliant was asked to assist in piling hay was dark. Whilst engaged in this work the suppliant fell through the trap, which was guarded only on the side opposite to that on which the suppliant was working.

1. That the suppliant was not on the premises as a mere licensee or volunteer, but on lawful business in which he and L. had a common interest.
2. That L. was guilty of negligence in not calling the attention of the suppliant to the existence of the trap, and that the Crown was liable for such negligence under the provisions of Section 20 of *The Exchequer Court* Act.
3. That the suppliant was not a fellow-servant of L., and was therefore entitled to recover for the negligence of the latter.

PETITION OF RIGHT for the recovery of the sum of $3,000 for alleged damages against the Crown for bodily injuries sustained by the suppliant in an accident whilst on public work of the Dominion of Canada.

The facts are stated in the reasons for judgment

February 11th, 1913.

The case was heard at Kingston, Ont.

*J. L. Whiting*, K.C., for the suppliant, argued that the facts shewed a clear case of negligence for which

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the Crown was liable under sec. 20 of *The Exchequer Court Act*. The *locus in quo* was a public work; the suppliant was invited to enter upon the premises by Love, who was a servant of the Crown; and it was through the negligence of the latter in leaving an unguarded trap-door open in a dark part of the building that the accident occurred. He cited *Beven on Negligence* (1); *Indermaur* v. *Dames* (2); and *Houghton* v. *Pilkington* (3).

*G. M. Macdonnell*, K.C., for the respondent, contended that the suppliant was warned of the existence of the trap-door by Love, and if the suppliant's deafness prevented him from hearing what Love said that was not the fault of Love.

Moreover, by accepting the work of assisting Love in stowing away the hay, the suppliant became a fellow-servant of the latter. The defence of common employment is open to the Crown in a case arising in the Province of Ontario. (*Ryder* v. *The King* (4).

The suppliant was a mere volunteer, and being injured in performing a mere voluntary service he cannot recover. (*Wright* v. *London and North Western Railway Co.* (5); *Degg* v. *Midland Railway Co.* (6); *Potter* v. *Faulkner* (7).

*Mr. Whiting*, in reply contended that it was established by the case of *Houghton* v. *Pilkington* (8) that where a person was on the defendant's premises by invitation for the common purpose of both parties, he could not be held to be a mere licensee or volunteer.

AUDETTE, J., now (March 10th, 1913) delivered judgment.

(1) 2nd Ed. pp. 450, 682.
(2) L. R. 2 C. P. 311.
(3) (1912) 3 K. B. 308.
(4) 9 Ex. C. R. 330; 36 S. C. R. 462.
(5) L. R. 1 Q. B. D. 252.
(6) 31 H. & N. 77.
(7) 1 B. & S. 800.
(8) (1912) 3 K. B. 308.

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The suppliant brought his petition of right to recover the sum of $3,000 for alleged damages suffered by him, resulting from the negligence of the officers or servants of the Crown, while acting within the scope of their duties and employment, when in the act of delivering, in the course of his delivery under contract, forage for the Active Militia, at the upper barn on Montreal Street, in the City of Kingston, a public work of the Dominion of Canada in the occupation of the said Militia.

It is alleged by the respondent that if the suppliant sustained any injuries they were either the result of his own negligence and want of care, or that they were caused by the negligence of a fellow-servant, and further generally denies all the suppliant's allegations.

The action arose under the following circumstances:

On the afternoon of the 11th of April, 1911, the suppliant was delivering, for contractor Donoghue, a number of loads of forage at the said upper barn,—a building under the control of the militia authorities, part of the barrack establishment and the property of the Dominion Government—when one Murray, who then was in the hayloft, came down, and Love, a private of the Army Service Corps, whose duty it was, as defined by the Officer Commanding, Major W. A. Simpson, to take delivery of the hay and distribute the same, asked for some one to come up and stow the hay—that he would not receive the hay if they did not come up and help. Then the suppliant who was engaged below in hooking the bales, went up from the load to the hayloft. The hay was being hoisted to the hayloft by means of a tackle, rope, and a horse. Love on behalf of the Crown was standing at the hayloft door receiving delivery of the bales and taking note of them. When the suppliant was up near Love, the suppliant says,

and in that he is corroborated by witness Simpson, that Love, who was giving all the orders, told him to take a bale from the door and run it around to the back. The right side of the hayloft is partitioned off, but the left is all open, and at that time there was hay piled up to nearly as far back as the third post,—indicated on plan Exhibit No. 2. The suppliant did as he was told. The hay piled on the left absolutely obstructed the light which was coming from the front of the building, making that part at the back very dark. Brebner stowed the bale at the end, where it was very dark, and having never seen the trap or heard of its existence, walked into it and fell through to the lower floor, where he received the injuries complained of.

The suppliant says, and in that he is again corroborated by witness Simpson, that Love never told him there was a trap at the back, or warned him of its existence, —and Love contends he did. For the purposes of this case, judging from the general manner in which the evidence of these three witnesses was given, this Court has no hesitation in finding that no warning or notice was given.

The contract under which the hay was delivered has not been produced, but a copy of a subsequent contract was filed as Exhibit "B" with the understanding that it would be similar. It is also in evidence that such contract, as was in contemplation of the contracting parties at the time of signing the contract, calls for the delivery of the hay in the hayloft. One of the witnesses goes as far as to say that he often delivered hay for 15 to 16 years, under contractor Donoghue, and that it was the custom to deliver the hay at the loft at the expense of the contractor or vendor. The fact also that Love was alone representing the Militia authorities, goes to show that the Crown expected the

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hay delivered at the loft, as Love alone could not do it, and that Love even went as far as saying he would not accept delivery if they did not come up in the hayloft to stow the hay in it. It appears Love's work on the occasion consisted in checking the bales, taking note thereof and sending the "block" down.

Love says the farmers usually did stow the hay up in the hayloft, that he had no other help but these men, and he directed where he wanted the hay placed.

It is obvious, from the circumstances above set forth, that Love was guilty of negligence in not closing the trap, and that failing to do so, the next best thing would have been for him to give warning of its existence.

This case comes within section 20 of *The Exchequer Court Act* (1); and so far we have a "public work" within the meaning of *The Public Works Act* (2), and other Acts in which such expression is defined—*Leprohon* v. *The Queen* (3). Then we have an officer of the Crown, acting within the scope of his duties, who is guilty of an act of negligence which is the determining cause of the accident.

The only question now remaining to be decided is whether Brebner, under the circumstances, was a "fellow-servant," or "licensee," or "mere licensee."

The legal doctrine applicable to this class of cases is stated by *Beven on Negligence* (4), in the following words:

"Where a person is on premises of others, with their "assent, engaged in a transaction of common interest "to both parties, the owners of the premises are "liable for the negligence of their servants in the "course of the transaction."

(1) R. S. C. 1906, Chap. 140, sec. Sub-sec. (c).
(2) R. S. 1906, C. 39, sec. 3, Sub-sec. (c).
(3) 4 Ex. C.R. 100.
(4) 3rd, Ed. p. 682.

The leading case of *Indermaur* v. *Dames* (1), cited and discussed in *Beven on Negligence* (2), seems to settle the question beyond doubt. Willes, J. (3), dealing first with the definition of a customer, arrives at the conclusion that the customer is a person who goes upon the premises on business which concerns the occupier, and upon his invitation expressed or implied. And with respect to such a visitor he further says, he considers as settled law that he, using reasonable care on his part for his own safety, is entitled to expect that the occupier shall on his part use reasonable care to prevent damage from unusual danger, which he knows or ought to know.

In the present case Love himself said it would be careless not to give warning. And here again it may be said, as in the case of *Smith* v. *Baker* (4), that the suppliant did not voluntarily undertake a dangerous employment with a knowledge of the risk. Love acting within the powers of superintendence and within the scope of his duties has been guilty of negligence in the manner above mentioned, and the Crown under the statute is liable therefor.

The suppliant was lawfully upon the respondent's property, with more than its assent, even at Love's request, engaged in a business in which both the suppliant and the respondent were interested. The trap in the hayloft, situate as it was in a dark portion of the loft at the back, was very dangerous, and Love, the Crown's servant, whose duty it was to have it closed, was derelict in his duty in leaving it open—or failing to shut it, he should have warned the suppliant. Under the circumstances, the Crown, the owner of the premises, is liable, under the *Exchequer Court Act*, for

(1) (1886) L. R. 1 C.P. 274.
(2) 3rd Ed. at p. 451.
(3) L. R. 1 C. P. 287.
(4) (1891) A. C. at p. 354.

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the negligence of its servant acting within the scope of his duties and employment in the course of the present transaction.

It would be idle to pursue this consideration any further, the authorities in support of the view taken by the Court are very numerous. When the suppliant is on the premises on lawful business in which both he and the respondent have an interest, and is injured, he should recover. *White* v. *France*, (1); *Lax* v. *Mayor and Corporation of Darlington*, (2) *Chapman* v. *Rothwell*, (3) and *Wilkinson* v. *Fairrie*, (4) *Beven*, (5); *Smith* v. *London and Saint Katharine Docks Co.*, (6) *Leprohon* v. *The Queen*, (7) *Cameron* v. *Nystrom*, (8) *Hatfield* v. *Saint John Gas Light Co.* (9).

The suppliant was not a fellow-servant and he is entitled to recover.

Coming to the question of damages. The evidence establishes that the suppliant was 65 years old at the time of the accident, which resulted in the fracture of the "neck" of the thigh bone, and a slight cut at the back of the head. He also hurt his back, more than his leg, he says, and loosened all of his artificial teeth. The doctor testifies that as the result of the accident the suppliant remains with the shortening of the injured leg by a little over one inch, and that he is unfit to carry on the work of his farm. He was an active man notwithstanding his years, at the date of of the accident, and he now looks older and cannot stand on his feet for any length of time. The suppliant accordingly, under the advice of the doctor, sold his farm and is living in the city, and has no other trade. He attends to his little garden, and the horse

(1) L. R. 2 C. P. D. 308.
(2) 5 Ex. D. pp. 28 and 31.
(3) (1858) El. Bl. & El. 168.
(4) (1862) 1 H. & C. 633.
(5) Op. cit. pp. 450, 451.
(6) L. R. 3 C. P. 326.
(7) 4 Ex. C. R. 113.
(8) (1893) A. C. 308.
(9) 32 N. B. R. 100; 23 S. C. R. 171.

and cow kept by him. He was making on his farm between $700 to $1,200 a year.

Now in assessing the compensation to which the suppliant is entitled under the circumstances, while it is impossible to arrive at any sum with mathematical accuracy, consideration must be given to his age, which at the time of the accident was 65, to the fact that he had to give up his avocation of farming, and that his chances of employment for earning his living, in competition with others, has been greatly lessened and that his earning powers are rendered very small, his state of health, his expectation of life, and the income he was earning; not overlooking, on the other hand, the several contingencies to which every person in his walk of life is necessarily subjected, such, among others, as being unable to work through illness and so forth.

Under the circumstances the Court is of the opinion to allow the sum of $800, together with the doctor's bill, amounting to the sum of $35.00, and the expenses at the hospital and for the ambulance, amounting to $39.50, making in all the sum of $874.50, which the suppliant is entitled to recover, with costs, in full compensation for the damages resulting from the accident in question.

*Judgment accordingly.*

Solicitor for the suppliant: *J. L. Whiting.*

Solicitor for the defendant: *Donald McIntyre.*

BETWEEN:

1913
April 5.

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

AND

N. L'HEUREUX.....DEFENDANT.

*Constitutional Law—Seizure of liquor in possession of Dominion officers under authority of Provincial Statute—Illegality—Notice of action—Prescription.*

1. The provisions of the *Quebec Liquor License Act*, (R. S. Que. (1909) Part 2, Sec. 14, Chap. 5, Title IV) are not binding upon the Crown in right of the Dominion of Canada. Hence, where a person enters a building of the Intercolonial Raiway of Canada and seizes and carries away therefrom certain liquors constituting freight consigned to third persons, he cannot justify such seizure and conversion by invoking the authority of the said Act.
2. Want of notice, under Art. 88 C.C.P. (P.Q.), in an action for damages against an officer, if not specially pleaded by the defendant, may be raised at the trial, and evidence then adduced showing that the requisite notice was in fact given.
3. The prescription arising under R.S.Q. (1909), Art. 3387 must be raised by his pleading if defendant relies upon it as a ground of defence.

THIS was an information filed by the Attorney-General of Canada for damages and the recovery of certain goods unlawfully seized by the defendant, a Quebec revenue officer, on the Intercolonial Railway, a public work of Canada.

The facts are stated in the reasons for judgment.

February 14th, 1913.

The case was heard at Ottawa.

*E. L. Newcombe, K. C.*, for the plaintiff, contended that the provincial statute (1), cannot be invoked to justify a seizure of goods in the hands of the Dominion

(1) R.S.Q. 1909, secs. 1097 and 1098.

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Argument of Counsel.

Crown while being carried on a government railway. Under the terms of the *British North America Act, 1867*, sec. 145, the Intercolonial Railway is one of the great public works of the Dominion, and is especially within the protection of the prerogative. Section 91 of the *British North America Act, 1867*, defines and delimits the legislative powers of the Dominion, and the first clause thereof declares that "*The Public Debt and Property*" of Canada is within the exclusive legislative authority of the Parliament of Canada. The station at Ste. Flavie is part of the Intercolonial railway. The intention of the provincial legistature not to bind the Crown is manifest in the fact that the Crown (i.e. the Crown in the right of the province,) is expecially exempt from the provisions of the Act. *A fortiori* the Dominion Crown ought to be held to be outside its provisions. In so far as provincial legislation confronts public property of Canada, it must be held not to apply. "*Property*" as mentioned in sec. 92 of the Act, clause 13, does not extend to property belonging to the Dominion, because that subject is wholly withdrawn from local jurisdiction. Any attempt on the part of the provincial legislatures to deal with it is *ultra vires*.

Where the Dominion Parliament and the local legislatures come into conflict, the legislation of the Dominion prevails. The local legislature has no paramount authority. In *Burrard Power Company Limited*, v. *The King* (1), proprietary rights of the Dominion Crown were upheld in preference to rights of property arising under the statutes of the Province of British Columbia. The province has no control over the Dominion Government in its capacity as carrier; and in the execution of the provisions of the *Quebec*

(1) (1911) A. C. 87.

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Argument of Counsel.

*Liquor License Act*, the province has no power to touch the property of Canada.

He relied upon Art. 9, C.C. (P.Q.) as to the immunity of the property where the seizure was made: Steamship *"Furnesia"* v. *Steamship "Scotia"* (1);

On the question of notice of action, C.C.P. (P.Q.), Art. 88, he maintained and that the plaintiff was clearly not obliged to give notice of action. (*Price* v. *Perceval* (2); R.S.Q. (1909) Sec. 3384 does not apply in an action against an Inland Revenue officer.

*A. Marchand*, for the defendant, submitted that the defendant was an authorized constable acting under the orders of the collector of provincial revenue for the District of Rimouski, and as such he was merely the arm of the government of Quebec, and was in the lawful performance of his statutory duties. The Intercolonial Railway is not a part of the Federal Government. It is merely a common carrier when engaged in the transmission of goods. When the Province of Quebec legislates on the subjects enumerated in section 92 of the *British North America Act*, 1867, it operates absolutely against any government. He cited, *Hodge* v. *The Queen* (3); *The Attorney-General of Manitoba* v. *The Manitoba Licence Holders' Association* (4). He maintained that the station agent was not part of the federal or executive government, and had no right to interfere with the course of justice. He should have facilitated the seizure of the goods in question.

But the decisive objection to maintaining this action, is that no notice was given to the officer whose acts are complained of, as required by Art. 88, C.P.C. (P.Q.), viz.:

(1) (1903) A.C. 501.
(2) Math. 1 R. J. R. 201.
(3) 9 A.C. 117 and 132.
(4) (1902) A.C. 73.

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"No public officer or other person fulfilling any public function or duty can be sued for damages by reason of any act done by him in the exercise of his functions, nor can any verdict or judgment be rendered against him, unless notice of such action has been given him at least one month before the issue of the writ of summons. Such notice must be in writing; it must specify the grounds of the action, and state the name of the plaintiff's attorney or agent, and indicate his office; and must be served upon him personally or at his domicile."

We did not raise this point by our plea, but we raise it now as we lawfully may.

Lastly, the action is prescribed under sections 3384 to 3387 of R.S.Q., 1909.

He referred to *Rex* v. *Meikleham* (1); *The Government Railways Act* (2); *The American and English Encyclopædia of Law* (3); *The Quebec License Act* (4).

Mr. *Newcombe* replied.

AUDETTE, J., now (April 5th, 1913) delivered judgment.

This matter came before the court under the provisions of Rule 126, (5) whereby both parties, by consent, submitted, before trial, the points of law raised by the pleadings on the record at the time of the argument. On the hearing of the argument, two technical questions, perhaps more of form than of substance, are met with. One is the question of want of notice to the defendant required under Article 88 of the Code of Procedure, P.Q., and the other the question of prescription or limitation arising under Article 3387, R.

(1) 11 Ont. L. R. 366.
(2) R.S.C. (1906) chap. 36, sec. 37, 1098.
(3) 2nd, Ed. Vol. 22, pp. 926 and 941.
(4) R.S.Q. (1909), secs. 1097 and (2).
(5) Audette: *Exchequer Court Pratice*, p. 450.

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S.Q. 1909. Neither of these questions is raised by the pleadings.

Is this court to pronounce upon those two preliminary and technical questions when they are not raised by the pleadings? The answer is that under Rule 126 the court must limit its consideration to such facts as appear by the pleadings.

As the case comes before me under the provisions of Rule 126, these two questions cannot now be considered. The question of want of notice is one which if not pleaded may, under the authority of *Léveillé* v. *Lévy* (1) and *Simard* v. *Tuttle* (2), be raised at the trial and evidence then adduced showing that notice was in fact given. Then, the question of limitation or prescription is not one coming within Articles 2267 and 2188, Civil Code, P.Q., and must therefore be pleaded; and to be so set up, the pleading will have to be amended. This question may be also brought up at the trial.

The three questions, (*a*) of want of notice, (*b*) prescription and (*c*) damages, if any, are questions which will therefore be dealt with at the trial, as they cannot be considered on the disposition of the points of law.

Here follows a summary of the pleadings:

The information exhibited by the Attorney-General of Canada alleges, *inter alia*, that the Crown owns and operates the Intercolonial Railway between Halifax and Montreal,—that the said railway is vested in the Crown, and is a public work of Canada.

It is further alleged that the Intercolonial Railway passes through or near the village of Ste. Flavie station, in the District of Rimouski, in the Province of Quebec, and on or about the 17th May, 1911, one Joseph N. Anctil, of Rivière du Loup, P.Q., shipped therefrom by the Intercolonial Railway one jar of

(1) 9 R. de J. 528 (2) 4 L.C. Rep. 193; 4 Math. R.J.R. 150..

liquor, said to be whisky, consigned to one Elzear Coté, together with two cases, said to contain bottled gin, consigned to J. N. Coté, both of Ste. Flavie aforesaid.

The information further alleges that the goods arrived at Ste. Flavie on the 19th May, 1911, when the defendant went to the Intercolonial Railway station at Ste. Flavie, and unlawfully, by force and arms, seized the box containing the jar of liquor, and the two boxes, said to contain bottles of gin, and stated his intention of holding the same and depriving His Majesty the King of the possession which he then lawfully had of the said goods. The defendant did not then remove the goods from the station.

It is further alleged that on the 19th May, 1911, one J. Ad. Thibault, of Fraserville, P.Q., shipped by the Intercolonial Railway two barrels, in the bill of lading said to contain ginger ale, consigned to François Damien, at Ste. Flavie, and arriving at their destination on or before the 23rd May, 1911,—when before any of the goods hereinbefore mentioned had been taken away by the parties to whom they were respectively consigned, and whilst the same were still in the lawful possession of His Majesty the King, the defendant came in again to the Ste. Flavie station, and demanded of J. Lavoie, the agent in charge of the railway station, possession of the jar of liquor and the two boxes of gin, which he had seized on the 19th of the same month, but which were still lying at the station in a locked room. The station agent refused to give up possession of the said goods or to open the doors of the room in which the same were deposited. The defendant thereupon by force and arms and using great violence, and to the great injury of the property of His Majesty, broke open the door of the room in

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which the goods were so deposited, and seized and took possession of the said jar of liquor and the two cases of gin.

The plaintiff further alleges that the defendant then demanded of the said J. Lavoie that he should open the door of the freight shed, adjoining the station, to enable the defendant to see what goods were deposited therein. The said J. Lavoie refused to open the door and the defendant by force and arms and with great violence, and to the injury of the property of His Majesty the King, broke open the doors of the freight shed and found therein the two barrels of liquor consigned to François Damien: and thereupon seized and took possession of the same and deprived His Majesty The King, in whose possession up to that time they lawfully were, of his property and possession in the same. The said defendant, moreover, then removed the whole of the said goods.

The Attorney-General therefore concludes asking that it may be declared:

(a) That the defendant unlawfully entered and broke and opened the premises of His Majesty the King in His property of the said Intercolonial Railway.

(b) That the defendant unlawfully seized and deprived His Majesty the King of the property and possession of the goods so seized and taken away by him.

(c) That the defendant may be ordered to pay to His Majesty damages for the injury done by him to the railway property.

(d) That the defendant may be ordered to give up and restore to His Majesty The King the goods so seized, with damages for the unlawful detention,

or, in the alternative, damages for the value and unlawful seizing and detention of the same.

(e) Such further or other damages as may be found due to His Majesty The King in respect of the said trespass and unlawful seizure and conversion of the said property.

The defendant by his plea avers among other things that the said boxes, jars, bottles and barrels or vessels containing intoxicating liquors were brought into the revenue district of Rimouski, P.Q., from another district of the same province, in sufficient quantity to warrant the presumption that they were so brought in for the purpose of sale, and were addressed to persons not licensed under the *Quebec License Act* (1) to sell intoxicating liquors;—

That the collector of provincial revenue and his officers had reason to suspect that the persons to whom said liquors were addressed were obtaining them for the purposes of sale;—

That the defendant was an officer and constable and deputy of the collector of provincial revenue, duly authorized by him, and was acting in that capacity and according to orders from the said collector:— ;

That the said goods so seized were taken, carried away, and placed in the care and possession of the collector of provincial revenue for the said district, and that he, acting under the authority of the law, had the right to proceed as he did;—

That the Ste. Flavie station is within the limits of a municipality where the sale of intoxicating liquors is prohibited, and that the defendant was authorized and acting in his official capacity as aforesaid, at the time of the said seizure, and that the station agent was duly informed thereof.

(1) R.S.Q. 1909, vol. 2, Sec. 14, Chap. 5, Title IV.

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As has been stated the questions of law raised by the pleadings were by consent of parties, argued before coming to trial, and for the purposes of the said argument the facts as alleged were admitted by and between counsel for the respective parties.

Now the only question to be at present decided is whether, all these proceedings taken, assuming under the said Quebec License Law, to be duly authorized and regular in an ordinary case against a subject, can be invoked to justify a seizure of goods in the hands of the Dominion Crown.

In other words, can a constable, under the circumstances above recited, break into the property vested in the Crown in the right of the Dominion and seize and take away the goods in question?

Now, the Intercolonial Railway is a public work of Canada and is vested in the Crown, in the right of the Dominion under Sections 55 and 80 of *The Government Railways Act* (1). As such it therefore enjoys all the prerogatives and immunity attaching to Crown property, as is very clearly shown in the case of the *S. S. "Scotia"* (2). The property of Canada, in the right of the Federal Crown, is exempt from provincial legislative jurisdiction, and the *Quebec License Act* by any forced construction of its provisions cannot be made to apply to it. See *Burrard Power Co. Ltd.*, v. *The King* (3). The Crown is not bound by any such statute. See *The Interpretation Acts*, (4).

It is, in effect, contended by counsel for the defendant that, when a train of the Intercolonial Railway is in motion through the Province of Quebec, for the purpose of Provincial jurisdiction in general, the status of such train as a piece of property is not to be complicated by

(1) R.S.C. (1906) Chap. 36.
(2) (1903) A.C. 501.
(3) (1911) A.C. 87.
(4) R.S.C. (1906) ch. I, sec. 16; R.S.Q. (1909) ch. I, sec. 14; C.C. (P.Q.), Art. 9.

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considerations of prerogatival immunity, but is to be accorded nothing more than the status of a train on any ordinary railway operating in such province. The weakness of the argument is radical, amounting as it does, to a denegation of the status given the Dominion property by the *B.N. America Act of 1867*. Under the provisions of Sub-Sec. 1 of Sec. 91 of the said Act, legislative control over public property of the Dominion is exclusively vested in the Parliament of Canada, while by the intendment of Section 145 thereof, the Intercolonial Railway is not merely to be treated (as in law and practice it has been treated) as a portion of the public property held by the Dominion Government, but conspicuously so, inasmuch as its construction was stipulated for as one of the fundamental conditions of Confederation.

Might not the refutation of the argument that the Crown be liable in such a case as the present one be also found, by analogy, in the fact that seizure by garnishment, which may be fairly said to be a cognate matter, cannot issue against moneys in the hands of the Crown?

Therefore, this Court declares that the provincial Crown officer, unlawfully broke into the premises of the Crown. The Court further declaring unlawful the seizure and conversion of the goods in question herein. The question of costs is reserved to be adjudicated upon at the trial.

*Judgment accordingly.*

Solicitor for the plaintiff: *E. L. Newcombe.*

Solicitor for the defendant: *A. Marchand.*

BETWEEN:

1913
May 21.

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

AND

SAMUEL A. FERRIE, ALLAN D. PICKEL, and JOSEPH A. FOLEY.DEFENDANTS.

*Expropriation—Compensation—Market value—High rentals depending upon ephemeral conditions—Affidavits of values accompanying transfer— Admissibility.*

In assessing compensation for lands taken for a public work, high rentals received from buildings in the neighborhood arising to a great extent from a general lack of such buildings in the community at the time of the expropriation does not afford a conclusive test of the real market value of the property.

2. Affidavits of values attached to transfers in the Registry Office are not admissible as establishing the facts sworn to in such affidavits, but are admissible for the purpose of confronting any witness before the Court who had made any of such affidavits.

THIS case arose upon an information exhibited by the Attorney-General of Canada, to have it declared that certain lands in the town of North Battleford, Sask., required for Dominion purposes, be vested in the Crown, and that compensation therefor should be ascertained.

The facts are stated in the reasons for judgment.

May 1st. 1913.

The case was heard at Battleford, Sask.

*Donald Keith*, for the plaintiff.

*A. M. Panton*, for the defendants.

CASSELS, J., now (May 21st, 1913) delivered judgment.

This is an information exhibited by the Attorney-General of Canada, to have it declared that certain

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lands in the town of North Battleford be vested in the Crown, and praying that the compensation therefor should be ascertained.

The land in question consists of a lot situate on the north-east corner of King Street and First Avenue, in the town of North Battleford. The date of the expropriation, and the period at which the compensation has to be ascertained is the 16th July, 1912.

The lot has a frontage on King Street of 65 feet, with a depth running along First Avenue of 120 feet. It contains altogether 7,800 square feet. The Crown offered for this lot the sum of $12,000 The defendants claim the sum of $39,000.

Dealing with it as the witnesses have dealt with it on the King Street frontage, $39,000 would mean $600 a foot frontage, and the claim put forward by the defendants is for five dollars per square foot. In my judgment the price asked is greatly in excess of its real value. I think the value is greatly inflated. I am aware of the rule that should govern the fixing of values. No doubt the market price of lands taken ought to be the *primâ facie* basis of valuation.

Let me describe North Battleford and its situation. At the time in question, the 16th July, 1912, it was a a town containing a population of about 4,500 people. On the first of May of this present year the population having increased beyond 5,000, it became a city, under the provisions of the enactments in force in Saskatchewan. According to the evidence, at the present time, May, 1913, the population is in the neighbourhood of 6,000 souls. It is a city situate on the north side of the Saskatchewan River. It is one of the cities or towns situate on the Canadian Northern Railway between Winnipeg and Edmonton. North Battleford is situate 572 miles west of Winnipeg, and about 250

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miles east of Edmonton. At a place called Warman, situate about 65 miles east of North Battleford, two branches of the Canadian Northern Railway run, one to Saskatoon in the south, situate about 65 miles south of Warman, and another to Prince Albert to the North at a distance also of about 65 miles from Warman. There is no railway other than the Canadian Northern which comes near North Battleford. As I have stated, North Battleford is situate on the north side of the Saskatchewan river. It is apparently a city of seven years growth. The town of Old Battleford is situate immediately south of North Battleford on the other bank of the Saskatchewan River, and I should judge in a direct line the distance between the two would be in the neighbourhood of two or three miles. Within the last three years the Government of Saskatchewan have erected a fine court house in Old Battleford; and they have also erected a Registry Office in the same town. Old Battleford is situate near the junction of the Battle River with the Saskatchewan. North Battleford and Old Battleford have been united by a bridge spanning the Saskatchewan River. As if to make the union of these two places difficult, this bridge is placed a considerable distance east of North Battleford necessitating a drive from six to seven miles to reach Old Battleford from the centre of North Battleford. North Battleford has no water power.

At the present time, May, 1913, according to the evidence of Mr. Dixon, who is Secretary-Treasurer of the City of North Battleford, the manufactories in North Battleford consist of a grist mill, and a planing mill. There is also a sash and door factory, a brickyard and a machine shop. There is a considerable number of towns situate along the route of the Canadian Northern Railway between Winnipeg and North Battle-

ford. There is a fine agricultural country to the north, west and east of North Battleford, the crops depending to a great extent upon the climatic conditions, and the revenue to be derived therefrom depending upon the ripening of the crops free from damage or frost, and also upon transportation facilities. As Mr. Dixon says, the future of North Battleford depends practically upon the agricultural outlook.

The city has very fine cement sidewalks. Neither King and First Avenue, nor, I think, any other of the streets are macadamised, asphalted or paved with blocks up to the present time. Some of the streets are lighted in a manner that would do credit to Sparks Street in the City of Ottawa. The hotel accommodation of North Battleford is of a poor class. There are but few buildings of any moment in the city, most of them are small.

I am asked to fix a value of five dollars a square foot on vacant property, no doubt well situated. With the knowledge that I have of the values of properties in well settled cities, such as Halifax, St. John, Quebec, Montreal, Ottawa, Toronto, Winnipeg, Calgary and Vancouver, it would do violence to my common sense if I am compelled to allow any such price as is asked in this particular case. There is no doubt evidence of large prices paid for lands on King Street. For instance, Montague A. Wood swears to having purchased Lot 13 situate on the corner of King Street and First Avenue, immediately opposite the property in question, for the sum of $36,000. This is a lot containing about 70 feet on King Street, with a depth of 85 feet on First Avenue, as against 65 feet on King Street and 120 feet on First Avenue, being the property in question.

According to the evidence of Joseph A. Foley, one of the defendants in this case, the property in question,

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namely, 65 feet on King Street with a depth of 120 feet, and including also the property on King Street immediately north of the property in question, marked on Plan Exhibit I, "Foley and Pickel," containing 35 feet frontage on King Street, was purchased in the spring of 1911 for the sum of $7,500.

Plan Number I, is the plan referred to in the evidence, and indicates the various properties adverted to by the witnesses.

In August of 1911, the property in question was offered by the defendants to Mr. Mollard, Inspector of Public Works for the Dominion of Canada, for the sum of $12,000. Between that period and the 16th July, 1912, there has been a large advance in the value of property.

In regard to the values of rentals received from one or two properties upon which buildings have been erected, I do not consider that evidence of much value. The large rentals received arise to a great extent from the absence of buildings in the City of North Battleford.

Certain copies of transfers from the Registry Office were produced by Mr. Keith, and the affidavits of values. I stated at the trial that I do not consider these as evidence with respect to the facts sworn to in the affidavits. They were admissible for the purpose of confronting any witness who had sworn to the affidavit.

I allow the defendants a sum which I consider extremely liberal, namely, twenty-four thousand dollars and interest from the 16th day of July, 1912, to the date of judgment, and their costs of action.

*Judgment accordingly.*

Solicitor for the plaintiff: *E. L. Newcombe.*

Solicitor for defendants: *A. M. Panton.*

BETWEEN:

HIS MAJESTY THE KING, ON THE INFORMATION OF THE ATTORNEY-GENERAL FOR THE DOMINION OF CANADA. PLAINTIFF;

1913
March 10.

AND

ALFRED OLIVIER FALARDEAU AND CONSTANT NAPOLÉON FALARDEAU..... DEFENDANTS.

*Expropriation—Water lots—Prospective value—Remoteness at date of expropriation—Jurisdiction to assess damages limited to area on plan and description filed.*

The Crown had expropriated for the purposes of the National Transcontinental Railway a discarded lumber cove near the City of Quebec, with all the buildings and wharves erected thereon. In the days of wooden ships, and when the lumber trade was flourishing at its best in Quebec, the property in question was worth a great deal. After that time the property had very much depreciated in value, but the defendants relied upon the prospective capabilities of the property for docking purposes when steamers in the St. Lawrence trade became too large to proceed up the river to the Port of Montreal.

*Held*, that such a rise in value of the property was too contingent and remote at the date of expropriation to be regarded as an element of the market value.

2. The court has no jurisdiction to entertain a claim for the value of property unless the same falls within the boundaries of the area expropriated as it actually appears on the plan and description deposited in the Registry Office.

THIS was an information filed by the Attorney-General for the Dominion of Canada for the expropriation of certain lands required for the construction of the National Transcontinental Railway, a public work of Canada.

The facts are stated in the reasons for judgment.

January 17th and February 18th, 1913.

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

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*E. J. Flynn*, K.C., and *J. E. Chapleau*, appeared for the plaintiff; and *E. Baillargeon*, for the defendants.

AUDETTE, J., now (March 10th, 1913), delivered judgment.

This is an information exhibited by the Attorney-General of Canada, whereby it appears, *inter alia*, that the Crown, under the authority of 3 Ed. VII. Ch. 71, expropriated certain lands, described in the amended information herein, for the purpose of the construction of the National Transcontinental Railway, a public work of Canada.

A plan and description of a strip of land, part of lot No. 260, representing an area of 148,540 square feet, (as established by witness Tremblay, although the area mentioned in the information is 328,552) were, on the 15th day of February, A.D. 1910, deposited with the Registrar of Deeds for the County of Quebec, P.Q. A second plan and description of the balance of the said lot No. 260, representing an additional area of 638,460 square feet, were also, on the 12th day of September, 1912, deposited with the said Registrar of Deeds,—and a further plan, with full description by metes and bounds of lot No. 260, which is all taken and expropriated by the Crown, were also on the 16th day of January, A.D. 1913, deposited with the said Registrar of Deeds. This last plan which was deposited with the object of correcting all previous erroneous descriptions, shows a total area of the land taken as 780,000 square feet; but by agreement, both parties admitting at the trial that the total area actually expropriated was 787,000 square feet, Mr. Tremblay, the Surveyor who signs the descriptions of the said lands on behalf of the National Transcontinental

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Railway, corrected the plan filed as Exhibit No. 3, in accordance with the last mentioned figures. The Registry should also be amended accordingly to avoid any future difficulties or complications.

Therefore under the amended information the Crown expropriated 787,000 square feet for which it offers the sum of $39,000.

The defendants, by their amended plea, aver that the amount of $39,000 tendered by the amended information, is insufficient and claim the sum of $217,261.97 with interest and costs.

The defendants are claiming the value of the two piers which are built in deep water opposite the property in question. The Crown by the present expropriation proceedings is only taking lot No. 260, as shown on plan filed herein as Exhibit No. 3,—the said lot lying between the letters A, B, C, D and E. Therefore, as the piers in question do not form part of the present expropriation and have not been expropriated, the Court has no jurisdiction to entertain a claim for the same in the present action.

Three hypothecs have been registered against the property: The first one on the 1st May, 1902, in favour of J. Brown, for $2,500; the second one on the 23rd April, 1910, in favor of J. H. Gignac, for $9,000, which was afterwards transferred to R. L. Ellis; the third hypothec was created on the 7th July, 1911, for $15,000 in favour of R. L. Ellis,—the latter, on the 11th December, 1912, transferring these two hypothecs for $9,000 and $15,000 respectively, in favour of the Bank of British North America.

It is admitted by both parties that the property is incumbered by these three hypothecs amounting to the total sum of $26,500 and that when paying the compensation money herein, the Crown will retain in

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its hands the sum of $30,000 to cover the capital and interest upon the said hypothecs, up to the time when it is shown by the defendants that the said hypothecs have been paid and cancelled upon the registry, in a manner that will give to the Crown a title free from all hypothecs and charges upon the said property.

The question of the defendant's title to the land in question has been discussed at the trial with the result that leave was given them to supplement the deeds on record at that time by establishing their title beyond 1894, and to show how the property passed out of the hands of the Crown. However, subsequently thereto, namely on the 6th of March, 1903, the parties filed a consent by which the defendants' title is admitted for the reasons therein mentioned.

On behalf of the defendants were heard the following witnesses, viz:—Constant N. Falardeau, Joseph Elzéar Poitras, Théodore Leclerc, Jean Baptiste Morisset, Eugène Trudel, Joseph H. Gignac, François X. Huot, Alphonse Auger, and Edmund T. Nesbitt.

The following is a summary of the testimony of each of the said witnesses:

*Constant N. Falardeau,* is one of the defendant firm, carrying on the business of coal and cord-wood upon the property in question, as an ancillary to their Quebec business where they have a wharf. The property in question was bought in 1894 for the sum of $1,000, including all the buildings, wharves and the Piers, and they have been in possession ever since.

There are two wharves upon the property and they are respectively marked "A" and "B" on the plan filed herein as Defendant's Exhibit "D". The wharf marked "B," is utilized for their coal business. Their business at Sillery consists in yearly handling between 1,700 to 1,800 tons of coal, and about 150 cords of

wood. He contends that the Quebec merchant charges about $1.50 per ton to deliver coal at either St. Foye or Sillery, while he can do it for between 65 to 70 cents, and he can deliver a cord of wood for seventy-five cents less than if it had to be drawn from Quebec. His coal, however, delivered at Sillery costs him two cents a ton more than delivered at Quebec. There is no difference with respect to the cord-wood either delivered at Quebec or Sillery. They also rent since five or six years at $35 a year the right to fish in front of their property, down to low-water mark, and this witness contends there is now no other place at Sillery where they can carry on their business. A coal merchant at Quebec, he contends, realizes a profit of fifty to seventy-five cents per ton of coal, and between $1.00 to $1.25 per cord of wood,—to which should be added his special profit due to cartage at Sillery. The witness being recalled said they did not use wharf "A," but used wharf "B," for their coal business. The forge was used by the fishermen,—the cottage was rented at $15.00 per month, and all the other buildings were used for the purposes of his business.

*Joseph Elzéar Poitras*, is the surveyor who made the plan filed herein as Exhibit "D," and proved it.

*Théodore Leclerc*, is an insurance agent dealing in real estate, who has had some experience in valuing property. He values the land in question at from 18 to 20 cents a square foot, exclusive of the buildings and wharves, on the basis of its real value to-day,—assuming it will be worth more later on when the large ocean steamers, too large to go to Montreal, will have to stop at Quebec. For the present value he takes in to consideration the different works under construction, such as the Quebec Bridge which will bring to Quebec the

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several railways coming to the south of Quebec on the Lévis side, as well as the Transcontinental which links the West to the East, a work in contemplation since 1903. The Quebec Bridge would give it the value he names. He does not know of any mutation of property in the vicinity, but contends that the prospective capabilities of the property come from the works under construction.

*Jean Baptiste Morisset,* is an insurance agent, who is acquainted with the value of property at Quebec, without making a specialty of this latter business. He contends that the property is especially well situated to have more than an ordinary value, and abstraction being made of the advantage derived from the Transcontinental,—taking the construction of the Quebec Bridge in consideration which is the construction which gives it its value,—he places an approximate value of twenty-five cents a square foot upon the property, exclusive of the buildings and wharves. He knows of no sale of property in the neighbourhood, but if the Quebec Bridge were not built it would decrease by three-fourths the value of the property. However, the property is in the Port of Quebec and is bound to benefit it by the development of the Port.

*Eugene Trudel* is a master carter who corroborates C. N. Falardeau's testimony respecting the cost of drawing coal and cord-wood.

*Joseph H. Gignac,* a contractor and manufacturer, as well as lumber merchant, at the head of a large industry at Quebec, who has had considerable works under construction, and who has lived at Sillery for a number of years, has studied architecture and is well up in making estimates for buildings, values the two wharves and the eight buildings upon the property, as follows, viz:—

| | |
|---|---|
| 1. He values the Forge at | $304.56 |
| 2. He values the scale-house at $256.88 and the machinery, $130.00 | 386.88 |
| 3. He values the office | 88.80 |
| 4. He values the two lodgings | 1,697.40 |
| 5. He values the small shed | 64.84 |
| 6. He values stable and lean-to at | 200.62 |
| 7. He values cottage | 3,472.40 |
| 8. He values large shed | 207.40 |
| 9. He values 554 feet of fence on the street side | 221.60 |
| 10. He values 548 feet of fence on the river side | 64.98 |
| 11. He values 132 feet of fence in lattice around the house and the garden | 39.60 |
| | $6,749.08 |

This witness has already built wharves, and taking the measurements made by Mr. Poitras, the surveyor already heard in this case, he values the wharf marked "A' on the Plan "D,"—the one closer to Quebec at ..... $20,089.31

He says that wharf is an open crib-work wharf,of pine, with the two top rows in a dilapidated state, which would have to be removed. The timber is of better quality than one can get in our day, although old. He values that wharf on a basis of $2.30 per cubic yard. He values the wharf marked "B" on the plan exhibit "D,"—that is the wharf further up the river,—at the sum of ..... 12,625.00

$32,714.31

He contends that the wharf "B" was repaired seven or eight years ago, and that it is in a good state of

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repair now. It is a full timbered wharf of pine, and he values it on a basis of $3.25 per cubic yard.

Coming to the question of the value of the land itself, he says that the property, Spencer Cove, situated about one arpent and a half outside of the city limits, and three-quarters of a mile from the "inhabited section," began to increase in value in 1903 and 1904, and values it in September 1912, and even sometime before, at fifteen cents a square foot. He considers that Spencer Cove is deeper than the Dobell property, the latter being, in his estimation, 25 to 30 per cent. less valuable. However, coming from Notre Dame de la Garde to Spencer Cove, all the properties are tumbling down and in a ruinous state; but property has increased in value since there was any question of the Quebec Bridge, the Transcontinental, the Canadian Northern and all the railways of the south shore crossing over to Quebec by the prospective bridge. He says that in September last, had he had ready money, he would have given $75,000 for the property, in consideration of its prospective capabilities. Further in his evidence, he, however, adds that in buying at that price, he would not have paid the value, because the property before long will be worth from $400,000. to $500,000. on account of it being the best part of the Port of Quebec, believing that the development of the harbour will be made towards Sillery. The witness further contends that, allowing an estimated valuation upon the buildings, there were sales made in the vicinity at 30 and 34 cents a foot,--the deeds for these sales are filed as exhibits "F" and "G". However, the evidence of Altheod Tremblay upon this subject somewhat confuses this valuation, the area not being clearly established.

*François X. Huot*, is the foreman at Gignac, Ltd., a carpenter with experience in making estimates in his particular branch, he values the buildings upon the property, as follows, viz:—

| | | |
|---|---|---|
| 1. The forge | | $270.00 |
| 2. The scale | $211.00 | |
| The machinery | 100.00 | 311.00 |
| 3. The office | | 96.00 |
| 4. The lodgings | | 1,887.00 |
| 5. The small shed | | 82.86 |
| 6. The stables | | 210.82 |
| 7. The cottage | | 3,540.00 |
| 8. The large shed | | 120.00 |
| 9. The fence on the highway side | | 166.20 |
| 10. The fence at the back | | 72.20 |
| 11. The fence of the garden | | 33.00 |
| | | $6,789.08 |

In arriving at this valuation, at the sum of $6,789.08, he says he assessed at the actual value, taking the deterioration into consideration.

He further values the house and the shed on the Auger property at $860.40, and on the Madden property at $586.48.

*Alphonse Auger*, 69 years of age, is a ship-carpenter, who has already built wharves. He says that wharf "A" is in a good state of repair with the exception of two or three of the top tiers. It was constructed of the best quality of timber, and it could be used to-day for the foundation of a wharf. He estimates that it would cost $3.50 a cubic yard, to build a new wharf like it, with the timber of the present day. This is crib-work wharf.

Respecting wharf "B" which is full timbered he estimates such cost at $3.75 a cubic yard.

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*Edmund T. Nesbitt*, a contractor, who has already built wharves, and who has general experience in buildings, arrives at the following valuation, viz:—

| | | |
|---|---|---|
| 1. The forge | | $304.56 |
| 2. The scale | $256.88 | |
| Machinery | 130.00 | 386.88 |
| 3. The office | | 88.80 |
| 4. The two lodgings | | 1,697.40 |
| 5. The small shed | | 64.80 |
| 6. The stables and lean-to | | 200.64 |
| 7. The cottage | | 3,472.40 |
| 8. The large shed | | 207.40 |
| | | $6,422.88 |

The witness did not value the fences, and placed a value of $20,089.31 on Wharf "A", (crib-wharf) on a basis of $2.30 a cubic yard, and on wharf "B" (full timber) the sum of $12,625.00 on a basis of $3.25 a cubic yard. Then he values the land in September, 1912, without taking in consideration the increased value given to it by the Transcontinental, at fifteen cents a square foot. He bases his valuation of this land upon its prospective capabilities consisting in the fact that the railway passes there, that the Quebec Bridge will draw there all the railways to get to deep water and the shipping of grain. Adding that if his anticipation is not realized that the land will be worth very little. Since the timber business has gone from Quebec, these lands for three-quarters of a mile from lot No. 260 towards Quebec, present an aspect of ruin and depreciation. However, of late years the defendants have been carrying on business upon these premises. With respect to the buildings, he says he would not like to say they could be sold for the price at which he has valued them. He is unable to give the

commercial market value of this property, otherwise than by adding up together all the above figures. He further contends that when all the works he has mentioned are established, the property will be worth two hundred, three hundred and five hundred per cent. more

This closes the defendants' evidence.

On behalf of the Crown the following witnesses were heard, viz:—

Edmund Giroux, Joseph de S. Bossé, James G. Scott, George E. Tanguay, Alfred C. Dobell and Altheod Tremblay.

*Edmund Giroux*, is an insurance agent, who since 1907 has been both arbitrator and expert witness in expropriation matters. He values the land at five cents a square foot, taking in consideration that the adjoining land was at the time under option at that price, and he considered that wharf "A" should be valued upon the basis of $1.62 per cubic yard, and wharf "B" upon the basis of $2.70 per cubic yard. He values the whole property at $62,000 allowing five cents per foot, the balance being for the buildings and the wharves. He considers the sum of $62,000 being the value of the property, if on the market as a whole. (Si l'ensemble de la propriété était mise sur le marché ). In arriving at this valuation, he takes into consideration the option at five cents a foot upon the adjoining property, the development of property since 1904 derived from the Quebec Bridge, the Terminal Railway, the perspective of the Transcontinental in a future more or less distant. Adding if Quebec is benefited by these works, the development will be from the water front,—and without taking into consideration the prospective value, he says the property was worth more in 1904 than in 1894. In the result the valuation

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of this property means that the 787,000 square feet, at five cents a foot is worth.....$ 39,350.00
and he allows for the wharves, buildings, etc. 22,650.00

Making the sum total of.....$ 62,000.00

*Joseph de S. Bossé,* testifies an option was obtained for the Dorchester Electric Co. from Mr. Ross, of the property immediately adjoining Falardeau's at $5\frac{66}{100}$ cents per square foot,—the total area being of 2,300,000 square feet with three or four wharves and an old house upon the premises. He believes negotiations began in 1910,—he saw Mr. Ross in 1911,—and the option at $130,000 was an open one without any delay mentioned therein. Although he thought they would have made a good bargain at that price, it was refused for two reasons. First, because Mr. Ross could not give title, with covenant of guaranty, for 832,292 feet, which were below low water-mark, extending out to the Harbour Commissioners' line shewn on plan Exhibit No. 3. And secondly, because the property was outside the city limits, and under our arrangement with the city we had to establish ourselves within the limit of the city.

*James G. Scott,* is a railway man of 30 years' experience who states he did value the property before but not to any great extent. He values the land at five cents a square foot,—and the whole property with the two piers, at.....$76,000.00
Deducting the value of the piers, which he assesses at.....14,174.00

there remains the sum of.....$61,826.00
representing the value of the whole property. He values the two wharves upon the same basis as the previous witness. In arriving at his valuation he took in consideration the Quebec Bridge, the Quebec Ter-

minal Railway, and the further fact that the property was presently operated by the defendants, but he did not take the Transcontinental in consideration and he believes that when the latter is in operation it will be worth more than what he values it at, and that something should be added therefor to his valuation.

*George E. Tanguay*, is an architect, who has had 30 years' experience in valuing real estate, having been both arbitrator and expert witness in such business. He values the two wharves under the same basis as the two previous witnesses,—allowing for wharf "A" the sum of.....$ 8,159.94
and for wharf "B"..... 9,814.00

$17,973.94

He values the land at five cents a square foot and the whole of the property expropriated at $62,234.00. He values the cottage at $2,583., finding 21,528 cubic feet, having taken such measurement from the surface of the soil outside, without going inside, down in the cellar, if there is a cellar. There is here some divergence as to the measurement taken by the witness and witness Gignac,—however, the witness has added ten per cent. to the value of the buildings, in arriving at his valuation. In arriving at his valuation he has taken into consideration the fact that a railway is to pass upon the property together with the Quebec Bridge, and the advantage derived from the Transcontinental, because he believes that without the latter he would not give more than half his valuation.

*Alfred C. Dobell*, is forty years old, and has been domiciled in Quebec all his life, and says that as long as he can remember, the timber trade has gradually decreased in that locality and the value of the land went down in the same ratio. Excepting the Falardeau

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property, there is not one going concern from Point-a-Pizeau down to the city; the houses have fallen down in ruins; and the booms have been taken away. Since 1904 the Quebec Bridge and the Quebec Terminal Railway have increased the value of the property,—otherwise it would be without any value. He sold to the Transcontinental, as part of his father's estate, a property of 703,474 feet, about three-quarters to one mile closer to the centre of the City than the Falardeau property, at twelve cents a foot, including the wharves and buildings, remaining owner of the small strip on the other side of the road. There were upon this property two long deep water wharves of 80 and 100 feet respectively,— and a third one not going to deep water,—together with three or four dwelling houses and four sheds,—and he adds that the houses and sheds were in good condition. This property is Cadastral No. 167 of Sillery, and now No. 2526 of Champlain Ward. He considers that the property, had longer and better wharves than the Falardeau property, and was closer to the City and was worth eight cents more per foot than the Falardeau property. He also sold to the Transcontinental the property next to their own, closer to the City—the Bassano property —for $45,000; but he says, had it not been for the Transcontinental he would never have had that price. It contained 231,120 feet, had two or three dwelling houses upon it and three large deep-water wharves, as explained by witness Tremblay. He contends that it is a better property than that of Falardeau, notwithstanding Falardeau's property is being exploited for his trade, and that his wharf is in a better condition. There are more wharves on the Bassano property than on Falardeau's and there was also a ship-yard upon the former property.

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*Altheod Tremblay*, who was recalled, gave measurements respecting the wharves, and the shores on the Bassano and Dobell properties, and with respect to the Auger and Dombroski properties already expropriated.

*Thomas H. McNeil*, is Secretary-Treasurer of Sillery and says that the municipal valuation of the property of Falardeau & Co. is $4,300.

This concludes the evidence.

This property must be assessed, as at the date of the expropriation, at its market value in respect of the best uses to which it can be put, taking in consideration any prospective capabilities or value it may obtain within the reasonably near future. Applying this reasoning to the present case, the first and after all the only question which must be answered is, what is the market value at the date of the expropriation, of this old discarded lumber cove, with all the buildings and wharves erected thereon, taking in consideration its prospective capabilities within a reasonably near future. Some of the witnesses have spoken of the prospective capabilities and have mentioned as going to increase the value of the Falardeau property, the prospect that there will be large docks upon the property to which will be moored large steamers which will be unable to go to Montreal. Suffice it to say that such matters are but contingencies and are too remote at the date of the expropriation to be made an element of compensation.

The property was bought as a whole in 1894 for the sum of $1,000,—this sum covering the land, the buildings and the wharves, and also the two piers. A first hypothec of $2,000 was however created upon the property in 1902,—a second one for $9,000 in 1910,—and a third one for $15,000 in 1911,—and

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they would go to show that the property had, at these respective dates, increased in value to something more than it was worth in 1894. It is well to say that in the days of wooden ships, and when the lumber trade was flourishing at its best in Quebec, this property commanded a high price, and was worth a good deal of money. Then in 1894 it had about gone down to its lowest level,—and at that period, for a number of years, there was hardly any market and no demand for this class of property in that neighbourhood. The market started to rise when the question of the Quebe, Bridge, the Terminal Railway and the Transcontinental was mooted.

However, inasmuch as this property had a price as a whole in 1894, taking into consideration its prospective capabilities and potentialities, it must also have a market value as a whole at the date of the expropriation without being tied down to the abstract calculations respecting the wharves and other buildings, which must however be given some consideration on arriving at a final valuation. To pursue such a course would necessarily lead one to fanciful valuations which would not give us the true state of the market. In arriving at the purchase price of 1894, it is obvious that this abstract mode of calculating at so many cubic yards of wharves, and so many cubic feet of buildings, at a given price, was not resorted to; because both the wharves and the buildings, at their abstract value as distinguished from their market value were worth ever so much more in 1894 than they were in 1912. These wharves and buildings were of great value,—had their full value, when they were built for the lumber trade,—but when that trade had disappeared their market value also practically disappeared,—subject to such secondary or subsidiary

uses as they could be put to. It is true that one of the wharves, after being repaired, had been used for the last few years in the small coal business carried on by the defendants as ancillary to their Quebec business; but its value, as well as that of the other wharf, cannot be arrived at by an enquiry into what new wharves built at the present time would cost. The real test is the market value of such wharves in the state of repair in which they actually were at the date of the expropriation and upon the property in question.

Now there can be no doubt, and it is well established by the evidence, that for three-quarters of a mile between the property in question and Quebec, the aspect which presents itself is but a state of desolation, the properties being abandoned, and the buildings have either fallen down or are falling in ruins. The buildings upon the present property are used to some purpose. We are told that the buildings, excepting the cottage which is rented and the forge which is used by the fishermen, are used for the purpose of the defendant's coal and cord-wood business; but here again we must not overlook the fact that these wharves and buildings were not all necessary for the defendants' business and that they can only have a relative value,—a value that must be taken into consideration in arriving at a valuation as a whole, of the property in question, with all the surrounding circumstances. A wharf built on a farm in the backwoods, or at a place where it is not needed, and which cannot be used for any reasonable business or purposes flowing from the property upon which it is erected, cannot have its abstract value—its market value might only be, the the value of what is left of good timber, after deducting the cost of labour to take it to pieces and draw it away. Is not the true view in such expropriation

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to take all the circumstances into consideration in arriving at a market value for the property as a whole? (*The King* v. *Kendall*, (1 ), confirmed on appeal to the Supreme Court of Canada (2 ); *Manning* v. *Lowell* ( 3); *Moulton* v. *Newburyport Water Co.* (4 .)

In the result, reducing the valuation of the witnesses into figures, it is found that Leclerc's valuation, at 19 cents a foot for the land—to which Gignac's valuation for the wharves and buildings is added, would give us the total sum of $188,493.39. Morisset's valuation under similar process,—he valuing the land at 25 cents,—would give a total of $236,213.39. Gignac's valuation, working out his own figures, would give $157,513.39 with Nesbitt following at $157,886.27. And for the Crown we have Giroux at $62,000.00, Scott at $61,826.00, to which should be added any benefit or advantage derived from the Transcontinental, at the date of the expropriation and Tanguay at $62,234.00. The Crown's valuation is practically a valuation at eight cents a foot, including the wharves and buildings. The Dobell property was sold at twelve cents a foot—the Bassano property was sold at a little over nineteen cents a foot, and in both cases including buildings and wharves which were in better condition,—and the wharves were, with one exception, deep-water wharves of much more value than those of the Falardeau property, and the properties being in the city limits and about three-quarters to one mile closer to the centre of the city. The Ross property, immediately adjoining Falardeau's property, was offered at $5\frac{2}{3}$ cents per foot, including three or four wharves and an old house.

The Crown's witnesses proceeded also upon a wrong basis in arriving at the valuation of the buildings

(1) 14 Ex. C. R. 81.
(2) Oct. 29th, 1912.
(3) 173 Mass. 103.
(4) 137 Mass. 163, 167.

and wharves for the reasons already mentioned, with the result, however, that their valuation is at eight cents a foot, inclusive of the buildings and wharves. The option upon the adjoining property, that is the Ross property at $5\frac{2}{3}$ cents, is said to have been taken into account in valuing the present property, but it seems to have been overlooked that these $5\frac{2}{3}$ cents included the land and the erections thereon.

On behalf of the defendants their best witness Gignac, who is a thorough business man, cannot get rid of the right view to be taken in such a valuation. Indeed when left to himself he comes out with the statement that in September, 1912, had he had ready money, he would have given $75,000 for the property in consideration of its prospective capabilities. On cross-examination, however, he is made to qualify the statement by adding that in buying at that price he would not have paid the value, because the property before long will be worth from $400,000 to $500,000 by reason of being in the best part of the Port of Quebec, believing that the development of the Harbour will be made towards Sillery. Is not the true result of the analysis of this statement, that the property in 1912 in the view of this witness was worth $75,000.00 because of such remote prospective capabilities, too distant, however, to be coupled with the true valuation, such as would at a distant period give it a much higher value?

The fallacy of the assessment of the wharves and buildings is too manifest to be dealt with any further.

If the Ross property had, at that time, a market value of $5\frac{2}{3}$ cents per foot, with all erections thereon, why should the Falardeau property immediately adjoining be worth more than six cents a foot, with its wharves and buildings? The assessment of the present

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property must be measured by its market value as a whole. And while certain wharves and buildings erected thereon do in a certain degree increase its potential value, the court cannot take as a decisive basis the abstract valuation of such buildings and wharves in arriving at a true valuation of the property as a whole, possessing a value which is entire and indivisible.

Taking all the circumstances into consideration, the condition of the property in the neighbourhood, and all the legal elements of compensation whatsoever involved in this case, the Court is of opinion that eight cents a foot for the land taken, inclusive of the value of the buildings and wharves, is a fair and most liberal compensation to the defendants for their property, including all damages whatsoever resulting from the expropriation; to which should be added ten per cent for compulsory taking viz:—

| | |
|---|---|
| 787,000 square feet at 8cts..... | $62,960·00 |
| Add 10 p.c..... | 6,296·00 |
| | $69,256.00 |

As this property was used by the defendants for the purposes of their trade it was to some extent a going concern

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

1st. The lands expropriated herein, with all erections thereon, are declared vested in the Crown from the date of the expropriation.

2nd. The defendants are entitled to recover from His Majesty the King, upon giving to the Crown a good and sufficient title, including a release of the mortgages amounting to $26,500 and interest upon the property—the sum of $69,256.00 with interest at five per centum

per annum, upon the sum of $13,071.52 from the 15th day of February, A.D. 1910, and upon the sum of $56,184.48 from the 12th day of September, A.D. 1912, to the date hereof. The whole in full satisfaction for the property so taken and all damages resulting from the said expropriation. Failing by the defendants to give the release of the said hypothecs, the moneys will be paid to the hypothecary creditors in satisfaction of the said hypothecs and interest, and the defendants will then be entitled to be paid the balance of the compensation money after satisfying the said hypothecs.

3rd. The registry must also be amended to comply with the statement and corrections made upon the plan of expropriation, in a manner that will show upon the registry that the whole of the property taken amounts to 787,000 square feet, and not the quantity now stated upon the said registry.

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

*Judgment accordingly.*

Solicitor for the plaintiff: *L. A. Cannon.*

Solicitors for the defendants: *Belleau, Belleau, Baillargeon, Belleau & Alleyn.*

BETWEEN:

1913
March 17.

THE CANADIAN RUBBER COMPANY OF MONTREAL, LIMITED ..... PLAINTIFF;

AND

THE COLUMBUS RUBBER COMPANY OF MONTREAL, LIMITED ..... DEFENDANT.

*Trade Mark—Infringement—Similarity of mark—Injunction—Damages.*

Plaintiff company was the duly registered owner of a general trade-mark consisting of an effigy of Jacques Cartier surrounded by the words "The Canadian Rubber Company of Montreal, Limited." The plaintiff, and its predecessor in title, had been for years large manufacturers of rubber footwear to which this mark was applied. It was established that so well-known was the mark in the trade that customers of merchants handling the plaintiff's goods in the Province of Quebec would ask for them by the name of the "Jacques Cartier," the "Canadian," or the "Sailor." In June 1912, the defendant company proceeded to manufacture and sell a class of rubber footwear stamped with the effigy of a sailor closely resembling that of Jacques Cartier in the plaintiff's trade mark, surrounded with the words, "Columbus Rubber Company of Montreal, Limited" in a scroll chiefly differing from the one used by the plaintiff in that it was rectangular in form while that of the plaintiff was round. Defendant's mark was not registered.

*Held*, that there was such a similarity between the defendant's mark and that of plaintiff as to be calculated to deceive the public into purchasing the defendant's goods for those of the plaintiff, and that the defendant should be enjoined from placing on the market and selling rubber footwear and goods bearing the mark as above described.

THIS was an action arising out of an alleged infringement of the plaintiff's trade-mark. Both an injunction and damages were asked for by the statement of claim.

The facts are stated in the reasons for judgment.

January 30th, 1913.

The case now came on for hearing before the Honourable Mr. Justice Audette at Montreal.

*T. Chase Casgrain*, K.C., and *G. S. Stairs*, for the plaintiff.

*A. Geoffrion*, K.C., for the defendant.

Mr. *Casgrain* presented the following argument:—

First of all let us consider the trade-mark which is registered. I wish to call the attention of the court to the resemblance between the two trade-marks, and also to the dissimilarity. Plaintiff company is the registered owner of a trade-mark; it has complied with the law; this trade-mark has belonged to us for a long period of years, since 1869. It is a distinctive mark in the trade, well known, and having a great value for the plaintiff, especially in the Province of Quebec.

It is important to consider the value that it has acquired up to this point of time, and to the high grade of rubbers covered by that registered mark. On the other hand you have the defendant here who did not register its trade-mark, and I submit that this is a point in our favour. I can draw the inference that if the Columbus Rubber Co. had gone to Ottawa to get this trade-mark registered, it would have failed on account of the similarity of the two trade-marks. They preferred to put this article upon the market and make it pass, as much as possible, for our popular rubber which has been known for a long while.

Take our trade-mark by itself. We have the "Jacques Cartier" rubber, which bears upon its trade-mark the figure of a man,—not only of a man but of a sailor—and your lordship will see he has a peculiar

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kind of cap on, which was in those days called a béret.

On the other hand you have the trade-mark of the defendant company. It also bears the effigy of a man —the effigy of a sailor-man,—the effigy of a man having a béret on his head. Then the bust in Exhibit 13 is of the same size as the bust in the trade-mark of the plaintiff company.

[THE COURT.—One of the witnesses spoke of a ladder being in the background.]

They are halliards. You have got to be pretty sharp to notice that, and I do not think that the ordinary man coming into a store to buy a pair of rubbers would notice that there are no halliards behind the effigy of Christopher Columbus.

Now what do the witnesses say, not only the witnesses for the plaintiff, but the witnesses for the defence, also. They say that the principal element in both trade-marks is the effigy of a man. I asked several of them this question: What would strike the the ordinary man who goes into your place to buy a pair of rubbers—what would be the principal thing that would strike him in these two trade-marks. And all of the witnesses for the plaintiff, and some of the witnesses for the defence, say that it is the effigy of a man.

Is it not strange that if there was no intent to deceive, if there was no intent to defraud the public, if there was no intent to pass off the Columbus rubber for the Jacques Cartier rubber, that the Columbus Rubber Company would have adopted not only the figure of a man, but of a sailor, an explorer, wearing an antique costume, with an antique cap on his head? Is it not strange that they should hit upon that effigy instead of some other trade-mark, which would have

been just as distinctive, if they were not intending to deceive the public, and which would have been just as good for their business, as the trade-mark they adopted.

Not only was Chouinard trying to deceive the ordinary retail customers of the plaintiff company, but he was trying to steal the jobbers and dealers from the company, and he knew if he adopted this word "Columbus" with the figure of Columbus, that he was taking a name which was well known to the dealers in rubbers, and in connection with the trade-mark could easily be mistaken.

My learned friend says that the word "Columbus" was not known to the ordinary purchaser. But here we have in this very room one of the boxes in which the Jacques Cartier rubbers are sold, which bears the name of "Columbus" upon it.

[THE COURT.—I do not know that it would appeal to the purchaser. He would not be shown the box?]

In a great many instances the rubbers are sent to the purchaser, in the box.

Here is another peculiar fact, another element which goes to show the intent to defraud, that Chouinard not only took our registered trade-mark but he took a well-known name which was used in connection with our trade-mark, the word "Columbus." All of this goes to show that his intent was to take from us the trade we earned for the quality we sold under the name of "Jacques Cartier."

It was an excellent rubber. It was a popular rubber. It had obtained a reputation as a first-class article, and fifty per cent. of the people who went into the stores asked for the "Jacques Cartier" rubbers.

Now, there is no doubt there are some dissimilarities in this trade-mark. The defendant company here, and Chouinard, know the law of trade-marks; and they

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know that if they are caught infringing a trade-mark that there is a penalty—that they may be sued in damages—therefore, they have steered as close to the line as possible. They have adopted our trade-mark with a certain number of dissimilarities. For instance the first thing they adopt is the effigy of a man—a sailor man—which I spoke of. Your lordship will notice we have a belt around the effigy of the man with the words Canadian Rubber Company in it.

[THE COURT.—A scroll?]

A scroll. And they have a scroll around their effigy also, containing the words "The Columbus Rubber Company of Montreal, Limited." And outside of that there is a little difference, that is the square marks above these lines. You take the general appearance, and what do you find? You find a man, and a round scroll in our device; and in the other you find a round scroll, and almost the very words we use. We say "The Canadian Rubber Company of Montreal". and they say "The Columbus Rubber Company of Montreal." Why do they say that? That is another indication that they want to infringe our trade-mark. They put on words which look as much as they can like ours.

The differences are small differences, they are not differences which will be noticed by the ordinary man who goes to buy the "Jacques Cartier" rubber. They will not be noticed by the man who buys one or two pairs of rubbers a year. Suppose I buy one or two pairs of rubbers a year, I want to buy the "Jacques Cartier". I go into a store and say I want a pair of "Jacques Cartier" rubbers, and the shop-keeper gives me a pair of the "Columbus" rubbers. What strikes me first is the figure of a man on the rubber. Does your lordship think I will look at the superscription?

I will not do so unless I suspect fraud or something illegal. Does your lordship think I will look to see whether there are halliards in the background? Or a difference between the caps? Or whether one man has his hand up to his face, or if he has his hand across his bosom? I am an ordinary man coming to a store once or twice a year to buy a pair of rubbers. I will see whether there is an effigy on the rubber. If there is an effigy on the rubber, I will come to the conclusion that it is a "Jacques Cartier" rubber, and I will buy it. Now, I think that is the test. It is not what the man who is an expert in the trade will do.

[THE COURT.—It is what the incautious, the unwary man will do.]

Yes. I say we have every element here in the make-up of this fraudulent trade-mark, to be able to say to the court that there was a desire and an intention on the part of the Columbus Rubber Co. to imitate our trade-mark, and to palm off their goods on the market for the goods of the Canadian Rubber Co. which had a good reputation, and had a great sale on the market.

I rely on the opinion of Burbidge, J., in *Boston Rubber Shoe Company* v. *Boston Rubber Co.* (1)—"The
" fraud that entitles the owner of the trade-mark
" to redress need not consist in an intention to
" deceive on the part of the defendant, but may
" consist in an actual deception, or in the creation
" of a probability of deception, independently of
" any fraudulent intention."

This dictum of Mr. Justice Burbidge is supported by all the authorities. I go further. I say that the fraudulent intention is manifest. With all the

(1) (1900) 7 Ex. C. R. 17

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surroundings, all the incidents, the make-up of the trade-mark, the words used, the general conformation of the whole thing, go to show that there was an intention to defraud. But the court did not go as far as that, and it said that proof of this intention is not absolutely necessary provided that there may be a probability of deception.

Cites *Upper Assam Tea Co.* v. *Herbert & Co.* (1); *Edwards* v. *Dennis;* (2); *Lambert* v. *Goodbody;* (3); *Paine* v. *Daniel & Sons' Breweries;* (4); *Seixo* v. *Provezende;* (5);

In several of these cases it was decided that the adoption of a single characteristic, or a distinctive particular from the plaintiff's mark, and its use alone, or with other matter, may well be an infringement of the entire mark.

Let me call attention to two leading cases in the Supreme Court of Canada, *Barsalou* v. *Darling*, (6) and *DeKuyper* v. *Van Dulken*, (7).

What the court said in the *Barsalou* case was this: What appealed to the eye was the head, and that the defendant by taking the head of a unicorn, which resembled the head of a horse, had fraudently imitated the registered trade-mark of the other party, and therefore he should be condemned. This is a judgment of the Supreme Court of Canada, in 1881, which has never been reversed—there being only one Judge dissenting—Henry, J. That case is very strong in our favour. If you compare that case with the present case what do you see? There is no head of a horse here, but there is the head of a man. There is the head or bust of a sailorman—and what would strike the eye in that case would be the horse's head, and in

(1) (1890) 7 R. P. C. 186.
(2) (1890 30 Ch. D. 454.
(3) (1902) 19 R. P. C. 377.
(4) (1893) 2 Ch. 567; 10 R. P. C. 71.
(5) (1886) 1 Ch. 192.
(6) (1882) 9 S. C. R. 677.
(7) (1895) 24 S. C. R. 114.

this case it would be the sailorman, the bust of the sailorman. The dissimilarities between the two trade-marks of Jacques Cartier and Columbus, are certainly not as great as those which existed between the two marks in *Barsalou* v. *Darling*.

In the *DeKuyper* case there were dissenting judgments of two judges, Taschereau and Gwynne, but they went much further than the other three judges who confirmed the judgment of the court. The two judges who dissented in the Supreme Court were of opinion that the label in the form of a heart in both cases formed a part of the trade-mark, and that the fact that the defendant put upon his bottles of gin a heart shaped label was an infringement of the trade-mark of DeKuyper although the heart shaped label had not been registered. These two judges said that is part of the whole device. What the court agreed upon was that there was a deception in the whole get-up.

Mr. *Stairs*, followed for the plaintiff, contending that the ultimate test of infringement is that the resemblance between two marks is so close that an incautious purchaser would be deceived. (*Johnstone* v. *Orr-Ewing* (1).

Mr. *Geoffrion*, for the defendant, argued that the word " Columbus " could not possibly be confounded with the word "Jacques Cartier" by the most incautious customer. The cases on the question are numerous, but there is no doubt about the principle which they all affirm, namely, that the resemblance must be such as would be likely to cause the one mark to be mistaken for the other, so that the goods of the defendant might be bought for those of the plaintiff. (*Cope* v. *Evans*,) (2). The distinction between the plaintiff's mark and that of the defendant in the

(1) (1882) 7 App. Cas. 219. (2) (1874) 18 Eq. 138; 30 L. T. 292.

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present case is manifest and clear. The *Barsalou* case (1) does not apply because in that case there was evidence of fraud, which is wholly missing here. So long as the defendant has no intention of stealing the plaintiff's trade and the similarity is not very close between the marks, even in England in passing off cases the courts will refuse an injunction. (*Payton & Co.* v. *Snelling, Lampard & Co.*) (2)

Mr. *Casgrain* replied.

AUDETTE, J., now (March 17th, 1913) delivered judgment.

This action was instituted for the purpose of enjoining the defendant from placing on the market and selling rubber footwear and rubber goods bearing a trade-mark in any way resembling the plaintiff's trade-mark, and for damages for such alleged infringement of the plaintiff's registered trade-mark.

The plaintiff company was incorporated in 1866, by a special Act of the old Province of Canada, 29 & 30 Vic. Ch. CXI under the name of "The Canadian Rubber Company of Montreal." Subsequently thereto, to wit, in 1905, it acquired, under Section 11 of Ch.15, 2 Ed. VII. a Dominion charter, and from that date on continued to do business under the name of "The Canadian Rubber Company of Montreal, Limited."

On the 3rd of December, 1869, the plaintiff acquired from the Canadian Rubber Company, by assignment, the rights to the general trade-mark, bearing the effigy of Jacques Cartier surrounded by the following words, "Canadian Rubber Company," which was applied to rubber shoes and other rubber goods manufactured by the said company.

(1) (882) 9 S.C.R. 677 (2) (1901) A, C. 108.

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On the 6th December, 1869, the plaintiff obtained the registration of the said trade-mark, in Trade-Mark Register, No. 1, folio 62.

On the 25th September, 1912, the plaintiff obtained from this Court, under the provisions of Sec. 43 of the Trade-Mark and Design Act, leave to add and alter its trade-mark by prefixing to the words "Canadian Rubber Company," the word "The", and adding thereto the words "of Montreal, Limited." The said addition and variation has been duly registered in the Department of Agriculture, and the amendments made accordingly on the 30th September, 1912.

Therefore from that date the plaintiff's registered trade-mark consists of the effigy of Jacques Cartier, surrounded by the following words "The Canadian Rubber Company of Montreal, Limited," and it is applied to the rubber shoes and may be applied to the other goods manufactured and sold by them, as shewn upon the two stamps attached to the Certificate of the Department of Agriculture, bearing date the 15th October, 1912, and filed herein as plaintiff's Exhibit No. 2.

The defendant's plea resolves itself into a general denial respecting the infringement complained of.

It is established beyond controversy by the evidence in this case, that the plaintiff's trade-mark is a very valuable one, that it has been in existence and used for a great number of years, that the plaintiff company were carrying on a large business, and that during several years their rubbers were the only rubbers on the market, with the exception of some American rubbers. Their rubbers are known by the name of "Jacques Cartier" among the French speaking population, and they are also known as the "Canadian" and the "Sailor" among the English speaking community.

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Now, Joseph Chouinard, who is the president and the general manager of the defendant, had been in the rubber business for a great number of years before his company began to manufacture in June, 1912; although it does not appear from the evidence that his goods were on the market before October or November of that year. Therefore he was perfectly acquainted with that trade, and obviously knew of the large business carried on by the plaintiff company and also of the good quality of the "Jacques Cartier" rubbers manufactured by them. How does he proceed to make the trade-mark of the defendant company? On this point we have no evidence, but the rational inference is manifest. He would appear to have taken the plaintiff's trade-mark as a model from start to finish, to have studied their price-list and their several marks. And consistently with the idea that he might imitate as closely as possible, without making a servile imitation, he starts by looking for the effigy of a man, who at the same time should be a sailor, and a sailor of historical fame if possible,—who should also wear an antique costume, with a *béret* or some such headwear, as was customary to wear in the centuries gone by, and also identical with the one worn in the Cartier effigy. Coupled with that also, he seeks a great discoverer, of historical fame, and he finally arrives at the conclusion to select Columbus. The choice was a happy and easy one, as after all it was also suggested to Mr. Chouinard from his knowledge that the plaintiff was also selling a rubber under the name of Columbus, a mark which was not however protected by registration. Then he required a name for his company, and a general get-up for his design. Well, by selecting "The Columbus Rubber Company of Montreal, Limited," he had only to strike off the

word "Canada" from the plaintiff's trade-mark and substitute therefor the word "Columbus." A happy hit, indeed! Having done so much, he probably realized he had come very close to the plaintiff's trade-mark, and that he had better make a change from the scroll of the plaintiff's mark which is round, to a square one, of rectangular shape, with a few ornamental deviations. Even on this rectangular scroll one is inclined to ask if he did not copy from the rubber "Royal," another rubber manufactured by the plaintiff, whereon the scroll is also more or less square and of a somewhat rectangular form. Therefore the conclusion must be that the defendant's trade-mark, which is not registered, has all the elements taken either from the actual registered trade-mark of the plaintiff or from some of their marks not protected by registration.

There were so many names and so many designs the defendant could have selected, and he was so well *au fait* with the rubber trade and the several marks on the market, that at first sight it seems there was no excuse for imitating so closely as he did the plaintiff's trade-mark, unless explained by his desire and this apparent view to appropriate, as much as possible, the benefit attached both to the good reputation as to quality of the plaintiff's goods covered by their trade-mark and to the large business carried on by them.

Now, what are the essential characteristics of a trade-mark, if not the general appearance of the mark as a whole, its get-up and all of its *ensemble*? As Sebastian puts it, the appeal is to the eye. What is that, at first sight, strikes the eye on looking at either trade-mark, if not the effigy of a man? So much so, indeed, as has already been said that a large proportion of the public call the plaintiff's trade-mark by what

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strikes their eye,—they call it the "Jacques Cartier." The very name of the effigy on the rubber. Others call it the "Sailor." Here again a term which would equally well apply to the defendant's trade-mark, and which applied to both is again suggested by the effigy.

There is a last and third name under which it is known among the English-speaking element and that is the word "Canadian." We have a witness, Paiment who sold the "Columbus" to persons asking for the 'Jacques Cartier" or the "Canadian," because he said, he could equally well tell his customers it was a "Canadian", as the "Columbus" and the "Jacques Cartier" were manufactured in Canada. And it is manifest to justify this assertion he could show on each trade-mark, they were both from Montreal, hence both "Canadians."

Now, what does the evidence disclose? It shows that the general outline of the two trade-marks are alike and that the ordinary incautious and unwary purchaser, who may buy two or three pairs of rubbers yearly, looks at the effigy. They do not buy from the name but from the portrait of Jacques Cartier. Such purchaser does not really know the name of the respective company. And a large majority of them know the "Jacques Cartier" mark and they ask for the "Jacques Cartier" rubber, or the "Sailor" or the "Canadian." Now when the two marks are not side by side, and that is the test, is it not obvious that one rubber could be sold for the other? On that point we have the evidence of McIver who went to two distinct shops in Montreal and asked for a "Jacques Cartier" rubber and was given a "Columbus". When asked if it was a "Jacques Cartier" the clerk answered in the affirmative. Then we have Paiment who says that in that part of

the city where he sells that three-quarters of the time the "Jacques Cartier" is asked for. He knows the Columbus since about November last, and says, that, according to him, about half of the purchasers could be deceived and he has himself, about ten times, sold a "Columbus" for a "Jacques Cartier" that were asked, when the "Jacques Cartier" stock was, in his estimation, getting low. He considers that what strikes one in the two trade-marks, is the effigy of the sailor.

It is also contended by witness McKechnie that it would be easy to sell a "Columbus" for a "Jacques Cartier" to an ordinary purchaser, because the word "Columbus" is also known to be one of the marks sold by the plaintiff company, although not protected by registration.

Witness Daoust is also of opinion that the public could mistake one mark for the other. It is the effigy of the man that strikes the eye.

Then Pilon, a witness heard on behalf of the defendant, says that the majority of the public ask for "Jacques Cartier," and that he does not know what would happen if one mark was tried to be passed off for the other.

The general trend of the evidence is to the effect that the "Jacques Cartier" is a well-known mark, selling well and very much asked for on the market, and that the principal element of the plaintiff's trade-mark is the effigy of the sailor. Leclerc, one of the defendant's witnesses admits having said the two trade-marks (*se ressemblent*) looked like one another.

In this case, as in the case of *Barsalou* v. *Darling*, (1) the appeal is to the eye. What appealed to the eye in the Barsalou case was the head—the head of the horse and the head of the unicorn—although somewhat

(1) 9 S.C.R. 681.

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dissimilar. In the present case what appeals to the eye is the effigy of the man. In both the plaintiff's and the defendant's trade-marks, it is a man, the bust of a man, a sailor, explorer, both of historical fame, wearing antique dress and cap, with great resemblance in the general get-up of the trade-mark. If there is infringement in the Barsalou case, *a fortiori*, the infringement must be found in the present case.

Now, as said by Sebastian (p. 151) (1), for the purpose of establishing an infringement it is not necessary that there has been the use of a mark in all respects corresponding with that which another person has acquired an exclusive right to use, it is sufficient to show that the resemblance is such as to be likely to make unwary purchasers suppose that they are purchasing the article sold by the party to whom the right to use the trade-mark belongs (2).

There can be no doubt that an unfair competition in trade is created by the use of the defendant's trade-mark, in violation of the rights of a rival trader in the same class of goods. Further, such a design or get-up applied on rubber tends to make it less clear, with an additional chance for confusing one mark with the other.

While the two marks are not identical, there is such a close imitation in the design and get-up of the defendant's mark that one readily realizes how easily the ordinary purchaser could be deceived and misled to buy the defendant's goods for that of the plaintiff's. With this strong probability of deception the plaintiff is obviously entitled to relief and to have his trade-mark duly protected as against a rival competitor in the same class of goods, who has no right directly or

(1) *Law of Trade-Marks:*, 5th. Ed.
(2) *See per* Lord Chelmsford in *Wotherspoon* v. *Currie*, L. R. 5 H. L. 508.

indirectly to appropriate to himself the benefit derived from a well known trade-mark having a good reputation, commanding a large business, and in existence for a great number of years, protected as it is by registration.

There will be judgment as follows, to wit:—

1. The defendant is declared to have infringed the plaintiff's trade-mark.

2. There will be ra reference to the Registrar of this Court to ascertain the damages suffered by the plaintiff in the premises; and it is ordered and adjudged that the defendant do pay to the plaintiff the amount of the damages when so ascertained.*

3. The defendant, its servants, agents, and employees are further enjoined from placing on the market and selling rubber footwear and rubber goods bearing its present trade-mark or any trade-mark in any way resembling the plaintiff's trade-mark mentioned in this case.

4. The plaintiff will have also the costs of the action, including the costs of the reference.

*Judgment accordingly.*

Solicitors for plaintiff: *Casgrain, Mitchell, McDougall & Creelman;*

Solicitors for defendant: *Geoffrion & Cusson.*

*EDITOR'S NOTE:—The Registrar proceeded with the reference so directed by the learned judge, and on the 4th day of June 1913, filed his report whereby he found for the plaintiff in the sum of $100 nominal damages. Judgment was subsequently entered against the defendant for such amount with the costs of the trial and reference.

IN THE MATTER OF THE PETITION OF THE

1913
March 4.

AUTOSALES GUM AND CHOCOLATE COMPANY, to expunge from the Trade-Mark Register, Number 23, Two Trade-Marks registered at folios Numbers, 5352 and 5353, respectively, in the name of THE FAULTLESS CHEMICAL COMPANY.

*Trade-Marks—Abandonment—Rectification—Non-user and no bonâ fide Intention to use—Expunging—Jurisdiction.*

The Exchequer Court has jurisdiction, on the application of any party aggrieved, to order the rectification of the register of trade-marks by expunging therefrom a mark that, through non-use or abandonment, remains improperly thereon to the embarrassment of trade.

THIS was a petition asking to expunge two trade-marks registered in the Department of Agriculture.

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

February 26th, 1913.

The case was heard at Ottawa.

*M. H. Ludwig*, K.C., for the petitioners;

*R. S. Smart*, for the Faultless Chemical Company.

CASSELS, J., now (March 4th, 1913) delivered judgment.

A petition was filed in the Exchequer Court on behalf of the Autosales Gum and Chocolate Company asking to expunge from the Trade-Mark Register Number 23, two trade-marks registered at folios, numbers 5352 and 5353, respectively, in the name of The Faultless Chemical Company.

The Faultless Chemical Company appeared and filed a statement of objections to the application of the petitioners.

The petitioners set out that on the 3rd July, 1895, the said Faultless Chemical Company caused to be registered at the City of Ottawa, in the Copyright and Trade-Mark branch:

"1. A Specific Trade-Mark to be applied to the "sale of Chewing Gum consisting of the word "Chips" "registered in the Trade-Mark Register Number 23, "Folio 5352.

"2. A specific Trade-Mark to be applied to the "sale of Chewing Gum, consisting of the words "The "Gum That's" combined with a circle line enclosing "the word "Round", registered in the Trade-Mark "Register Number 23, Folio 5353."

The allegation of the petitioner is that it is the successor and owner of the business formerly carried on by the Colgan Gum Company, a corporation incorporated under the laws of the State of Kentucky.

The petitioner alleges that as the successor of the said Colgan Gum Company, it carries on in the United States, Canada, and elsewhere, as a part of its business, the manufacture and sale of chewing gum, in the form of discs, which it advertises and describes by means of the words *"Violet Chips," "Mint Chips,"* and *"The Gum That's Round."*

The allegation in the 4th paragraph of the petition is that for a short period of time the said Faultless Chemical Company as a side line of its business carried on in the United States, but not in Canada, the manufacture and sale of chewing gum, but the said trade-marks were never used in connection with chewing gum in Canada by the said Faultless Chemical Company.

The allegation in the 5th paragraph of the petition is that in or about the year 1899, that part of the business of the Faultless Chemical Company which

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consisted in the manufacture and sale of chewing gum, was wholly discontinued, and that branch of its said business has never since been carried on by the said company, and the machinery which had been used by the said Faultless Chemical Company in the said chewing gum business, was sold and removed from the premises of the said company by the purchasers thereof.

Paragraph 6 alleges that since the said chewing gum business of the said Faultless Chemical Company was wholly discontinued as aforesaid, the said trade-marks have never been used by the said Faultless Chemical Company anywhere, but in fact have been entirely abandoned; and the petitioner prays that the said trade-marks may be expunged from the said Trade-Mark Register.

The Faultless Chemical Company filed a statement of objections to the petition. Among other objections the second is as follows:

"The registrations of the Trade-Marks referred to "in the Petition were not made without sufficient "cause, as required by Section 42 of the Trade-"Mark and Design Act to bring the matter within "the jurisdiction of this Court."

If there is no jurisdiction to entertain the petition on the facts set out, of course the petition would have to be dismissed. If on the other hand there is jurisdiction, witnesses on behalf of the petitioners and probably on behalf of The Faultless Chemical Company, would have to be brought from a distance at considerable expense for the trial of the petition.

Counsel for the petitioner, and counsel for the Faultless Chemical Company, appeared before me and asked that the question of jurisdiction should be argued and first determined as a matter of law.

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The case was argued before me on the 26th day of February, 1913.

Since the argument, I have considered the cases cited and am of opinion that it is expedient on the facts as stated that the register should be rectified by expunging these two trade-marks. It is unnecessary to mention that I am merely dealing with it as if all the facts in the petition were admitted to be true. The counsel for the petitioner rested his case mainly on the ground that subsequent to the registration of the trade-marks in question there was a complete abandonment, and that therefore the register should be rectified. Counsel, on the other hand, for The Faultless Chemical Company contended that if an entry had been made rightfully in the first instance there was no jurisdiction in this court to interfere with the registration.

I may point out that section 4 of the petition which I have quoted, goes somewhat beyond the allegation of proper registration, and the subsequent abandonment of the trade-marks. The effect of this allegation is that the trade-marks were never used in connection with chewing gum in Canada by the Faultless Chemical Company.

Section 23 of *The Exchequer Court Act*, enacts that:

"23. The Exchequer Court shall have jurisdiction "as well between subject and subject as otherwise,—

"(b) in all cases in which it is sought to impeach or "annul any patent of invention, or to have any entry "in any register of copyrights, trade-marks or indus- "trial designs made, expunged, varied or rectified."

Section 42, of Chapter 71, R.S. of Canada, 1906, the *Trade Mark and Design Act*, reads as follows:

"*Procedure as to Rectification and Alteration.*

"42. The Exchequer Court of Canada may, on the

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"information of the Attorney-General, or at the suit "of any person aggrieved by any omission, without "sufficient cause, to make any entry in the register "of trade-marks or in the register of industrial designs, "or by any entry made without sufficient cause "in any such register, make such order for making, "expunging or varying any entry in any such register "as the Court thinks fit; or the Court may refuse the application.

"2. In either case, the Court may make such order "with respect to the costs of the proceedings as the "Court thinks fit.

"3. The Court may in any proceedings under this "section, decide any question that it may be necessary "or expedient to decide for the rectification of any "such register."

This section is practically identical with section 90 of the English *Patents, Designs, and Trade Marks Act*, of 1883. The section is to be found in *Sebastian's* Law of Trade-Marks (1).

The case generally referred to is that of *J. Batt & Co.* (2) which came before Mr. Justice Romer.

That was a case in which an application was made to expunge certain trade-marks from the register. In that case an application was also made to have registered a trade-mark on behalf of the applicants.

In the case before me, the only application is an application to rectify the register by having the two trade-marks referred to expunged. There is no application on the part of the petitioner to have a trade-mark similar to the registered trade-marks registered by them. It is apparent, however, that the petitioner is aggrieved by permitting the entry of these trade-marks if they ought not properly to be on the register,

(1) 5th Ed., p. 630.

(2) (1898) 2 Ch. D. 432, 701; (1898) 15 R. P. C. 262.

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—it is certainly embarrassing to it to say the least, and in my opinion the petitioner is a party entitled to make the application.

In the *Batt* case the ground of the decision in the court below was that at the date of the registration there was no *bonâ fide* intention on the part of the firm to use the trade-marks. The *Batt* case was appealed (1).

The Court was composed of Lindley, M. R., and Chitty and Collins, L. JJ.

The Master of the Rolls in giving judgment (at page 441) puts a construction upon the statute as follows:

"It remains only to consider whether s. 90 of the "Act of 1883 (the rectification section) is applicable "to this case. We are of opinion that it is. The "applicants are parties aggrieved; for the trade-"mark they desire to have registered is kept off the "register by reason of the presence on it of the "marks of J. Batt & Co. The entry of these "marks is "*an entry made without sufficient cause* "*in the register.*" We are not disposed to put a "narrow construction on this expression, nor to read "it as if the word "*made*" were the all important "word, and as if the words "*made without sufficient* "*cause*" were "*made without sufficient cause at the* "*time of registration,*" so as to be confined to that "precise time. If any entry is at any time on the "register without sufficient cause, however it got "there, it ought in our opinion to be treated as "covered by the words of the section. The con-"tinuance there can answer no legitimate purpose; "its existence is purely baneful to trade, and in our "opinion in the case supposed the Court has power "to expunge or vary it."

(1) (1898) 2 Ch. D. 439; (1898) 15 Rep. Pat. Cas. 534.

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This case was taken on appeal to the House of Lords (1). The Earl of Halsbury, L.C., in giving judgment says (2):

"My Lords, whatever may be the ultimate decision "on the abstract proposition as to whether or not "there can be a keeping back for a long time of a "trade-mark which originally was *bonâ fide* intended "to be used, but which from accident or some other "cause has not been used, I purpose giving no "opinion upon it at present for this reason, that it "does not arise in this case."

The result is the statement approved of by the Judges in the Court of Appeal, Lindley, M. R., and Chitty and Collins, L.JJ., has not been disturbed (3).

While it may be that it was not necessary to place a construction upon section 90 of the Act of 1883, as set out in that part of the judgment which I have quoted, nevertheless it is needless to say that they are judgments of three well-known jurists which carry great weight. Moreover, there is a great deal to be said in favour of such a construction.

The third sub-section of section 42 provides that the court may decide any question that may be expedient to decide for the rectification of the register.

It seems to me that under the circumstances alleged in this petition, if the facts are substantiated, it is very inexpedient if people are permitted to retain upon the register of trade-marks, marks that are embarrassing and baneful to trade.

The case of *Re Smollens' Trade-Mark*, to which I was referred in the Weekly Notes of 3rd February, 1912, at page 35, is reported in full in 29 Rep. Pat. Cas. (4). I do not think that case furnishes any help in the case before me. It was an application made under *The*

(1) (1899) A. C. 428.
(2) Id., p. 429.
(3) (1898) 2 Ch. D. 439.
(4) At p. 158.

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*Trade-Marks Act*, 1905. The statute had been altered by amending the old section 90 of the statute of 1883, and by inserting the words "or by any entry wrongly remaining on the register," which placed the question of jurisdiction beyond doubt (1). Furthermore, the provisions of the English *Trade-Marks Act*, 1905, section 37, made the thing quite clear. There is no case in our courts that I know of which deals with the question.

As I have previously stated, no application has been made on the part of the petitioner to register these words as its own trade-mark.

It was conceded before me that notwithstanding the prior user of the trade-marks, if such trade-marks have been abandoned and not used by others for a period of years it would be no bar to the registration of the same words, assuming them to be the subject-matter of a trade-mark, by another. I do not wish to pass upon the question as to whether or not a trade-mark could not be registered if in point of fact the party applying for registration could show that notwithstanding the prior registration such trade-mark had been abandoned for such a length of time as to entitle the other to adopt it as his own and have it placed upon the register. It may be that if the owner of the registered trade-mark had in point of fact abandoned it, in any action brought by him to enforce such trade-mark a defence could be set up of abandonment; and it may be that such a case could be made on the application to register by the subsequent adopter of the trade-mark, assuming him to be entitled thereto. On this point, however, I pass no opinion as the case has not been argued before me. I think the legal

(1) See sec. 35 (1), *Trade Marks Act*, 1905.

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*In re* AUTOSALES GUM AND CHOCOLATE CO.

Reasons for Judgment.

objection must be overruled with costs of the application to the petitioner in any event.

*Judgment accordingly.*

Solicitors for the petitioners: *Ritchie, Ludwig and Ballantyne.*

Solicitors for the party objecting: *Fetherstonhaugh & Smart.*

BETWEEN:

FELT GAS COMPRESSING COMPANY AND A. J PARIS, JR.....PLAINTIFFS.

AND

WILLARD O. FELT, R. S. WALKER, Trustee, A. Park, Lucinda J. Bisnett, administratrix of C. L. Bisnett, deceased, who died on or about the 7th day of October, A.D. 1912; R. L. Brackin and J. B. Detwiler.....DEFENDANTS.

1913
April 10.

*Patents for Invention—Jurisdiction of Exchequer Court in Cases not falling within the Statutes—Rights of parties dependent upon Contract—Validity of Assignments.*

1. The Exchequer Court has no jurisdiction at common law in actions respecting patents of invention, and where any relief is sought in respect of such matters the jurisdiction of the Court to grant the same must be found in some statute.

2. The Court cannot entertain proceedings to obtain a declaration of the respective rights of parties *inter se* arising under assignments of a patent of invention; nor for a declaration that such assignments are invalid, and that the registration thereof should be vacated.

THIS was an action brought for the purpose of determining the respective rights of certain parties to patents of invention under special assignments. The defendants Brackin, Bisnett and Detwiler having denied the jurisdiction of the Court to determine the issues raised in the plaintiff's statement of claim, the case came on for hearing on points of law under Rule 161.

April 7th, 1913;

*Dr. J. Travers Lewis*, K.C., appeared for the plaintiffs; *M. G. Powell*, for the defendants A. Park, R. L. Brackin, and Lucinda J. Bisnett; and *J. E. Caldwell*, for defendants J. B. Detwiler, W. O. Felt and R. S. Walker.

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FELT GAS COMPRESSING CO. v. FELT.

Reasons for Judgment.

AUDETTE, J., now April 10th, 1913) delivered judgment.

This matter comes before the Court under the provisions of Rule 161 for the argument of the points of law, raised by the pleadings, respecting the jurisdiction of this Court to hear and determine the issues raised by the statement of claim herein.

It appears among other things, by the statement of claim filed herein, that:

"3. The said defendant Felt is the inventor of "certain new and useful improvements and processes "for compressing, purifying and drying air and other "gases.

"4. On or about the 16th day of September, 1907, "an agreement was made between the said defendant "Felt and one Charles P. Collins and others relating to "the said invention, and by which the said Felt agreed "to transfer to a Corporation to be formed, all patents "of the said invention in the United States and such as "might be taken out elsewhere, including any and all "improvements that he might discover within three "years from the said date.

"5. Pursuant to the said agreement the Plaintiff "Company was formed and incorporated, and became "entitled to the benefit of the said agreement, and "pursuant thereto the defendant Felt executed an "assignment, to the Plaintiff Company in the words "and figures following:

"ASSIGNMENT OF PATENT.

"Whereas I, Willard Oliver Felt, now residing at "Bradford, Pennsylvania, but formerly a resident of "the City, County and State of New York, did obtain "Letters Patent of the United States of America "for certain new and useful improvements in processes

"for compressing and purifying air and other gases, "which Letters Patent bear date the fifth day of "November, one thousand nine hundred and seven, "and numbered 869,966;

"And whereas by an instrument in writing I have "agreed for a valuable consideration to convey to the "Felt Gas Compressing Company of Bradford, Penn-"sylvania, a corporation organized and existing under "the laws of the State of Pennsylvania, the said in-"vention and all Letters Patent of the United States "and of all foreign countries which may be issued to me "on the said improvements.

"And whereas the said Felt Gas Compressing Com-"pany is desirous of acquiring the whole and every "interest therein.

"Now This Indenture Witnesseth that for and in "consideration of the sum of one dollar to me, the said "Willard Oliver Felt, in hand paid, the receipt of which "is hereby acknowledged, I have assigned, sold and set "over and do hereby assign, sell and set over unto the "said Felt Gas Compressing Company, its successors "and assigns, all the right, title and interest which I "have in the said invention as secured to me by said "Letters Patent of the United States; and, in con-"sideration aforesaid, I agree to make, execute and "acknowledge and deliver from time to time any and "all other further assignments in writing necessary, "useful or proper to vest in the said Felt Gas Com-"pressing Company, its successors and assigns, all "foreign patents in any and all foreign countries that "may be issued to me thereon, but without expense to "me. The same to be held and enjoyed by the said "Felt Gas Compressing Company, its successors and "assigns, for its own use and behoof, and for the use and "behoof of its legal representatives, to the full end of

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"the term for which said Letters Patent are granted, as "fully and entirely as the same would have been held "and enjoyed by me if this assignment and sale had "not been made.

"In Testimony Whereof I have hereunto set my "hand and affix my seal this sixteenth day of November "one thousand nine hundred and seven."

(Sgd.) "WILLARD OLIVER FELT.

(L. S.)

"Sealed and delivered in
"presence of

(Sgd.) "D. H. JACK.
"H. M. JACK."

"6. Thereafter the Plaintiff Company procured "Letters Patent to be issued to the defendant Felt by "the Commissioner of Patents under the Great Seal of "the Dominion of Canada, comprising the said inven- "tion, which said Patents are numbered respectively "112,044 and 126,144.

"7. The said Patents are and each of them is still in "force.

"8. By agreement bearing date the 18th day of "September, 1908, and made between the plaintiff "Paris and the defendant Felt, it was, amongst other "things, agreed that the said plaintiff Paris and the "said defendant Felt should be equally entitled to "receive the benefits of the said invention, and the said "agreement was duly recorded in the Canada Patent "Office on the 30th day of May, 1910, against the said "Patents numbered 112,044 and 126,144.

"9. The said last-mentioned Agreement was entered "into and is subject to the prior rights of the plaintiff "Company under the said Agreement of the 16th "September, 1907.

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"10. On or about the 26th day of January, 1910, "the defendant W. O. Felt assumed to assign to the "defendant R. S. Walker, Trustee, the said Letters "Patent numbered 112,044 and 126,144, and the said "assignment of Letters Patent numbered 112,044 was "registered in the Canada Patent Office on or about the "28th day of January, 1910, as number 58,784, and the "assignment of Letters Patent Number 126,144 was "registered in the Canada Patent Office on or about 5th "day of November, 1910, as number 61,411, and said "assignments still remain of record there.

"11. The said defendant Walker, in taking the said "assignment, took the same with full notice of the prior "rights of the plaintiffs to the said Letters Patent, and "also took the same solely as the agent and on behalf of "one F. W. Huestis and one Charles Q. Freeman, who "had also full knowledge of the plaintiffs' said rights.

"12. In or about the month of February, 1911, "Messrs. Stone, Gundy & Brackin, Solicitors, of "Chatham, Ontario, assumed to issue a writ out of the "County Court of the County of Kent against the said "defendant Walker as Trustee, claiming certain moneys "then alleged to be due by the said defendant Walker to "them, and thereafter the said Stone, Gundy & Brackin "assumed to enter up judgment in the said action "against the said defendant Walker, and to issue a writ "of execution thereon, under which the Sheriff of the "County of Kent assumed to seize and take in execution "the interests of the said defendant Walker in the said "Patents numbered 112,044 and 126,144, and by Deed "bearing date the 1st day of March, 1911, the said "Sheriff of the County of Kent, assumed to transfer the "interests of the said defendant Walker in the said "Patents and each of them to the defendant A. Park, "who caused the said writ in the said action of Stone,

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"Gundy & Brackin against the said Walker, and the "said Deed to be registered in the Canada Patent "Office against the said Patents, and the same now "remain of record as numbers 62,604 and 62,604½ in "the said Patent Office.

"13. The said defendant Walker is a citizen of the "United States of America, and never was a citizen of "or resident of the Dominion of Canada or of the "Province of Ontario, and he owed no allegiance or "obedience to the Province of Ontario, or to the Courts "thereof, and was never served with any process "in the said action, and had never appeared to any such "process, or otherwise submitted himself to the "jurisdiction of the said Court, and the said judgment "against him was pronounced against him without "jurisdiction and was and is a nullity.

"14. The said defendant Walker was not indebted "to the said Stone, Gundy & Brackin, and he had no "interest in the said Letters Patent or either of them "which was exigible under the said execution against "him, and the said alleged sale by the said Sheriff was "and is void and of no effect.

"15. Subsequently the defendant C. L. Bisnett "issued a writ against the said defendant Park, claiming "an interest in the said Patents and each of them, and "on the 27th day of July, 1911, caused the said writ to "be registered in the Canada Patent Office as number "63,977, and the same still remains of record there.

"16. On or about the 26th day of January, 1912, "the defendant Felt executed an assignment to the "Plaintiff Company of the said Patent number "112,044.

"17. The said assignments to the said defendant R. "S. Walker and to the defendants Park, Bisnett, "Brackin and Detwiler, as well as the said writs, form

"clouds upon the title of the plaintiffs to the said "Letters Patent, and the plaintiffs are therefore unable "to obtain the full benefit thereof or to deal therewith

"The Plaintiffs Claim:

"1. That it may be declared that they are or one "of them is entitled to the said Letters Patent "numbered 112,044 and 126,144, and that none of "the defendants have any title or interest therein.

"2. That it may be declared that the assign- "ments to the said defendants pass no interest in "the said Letters Patent as against the plaintiffs "or either of them.

"3. That the said assignments to the said de- "fendants may be declared to be clouds upon the "title of the plaintiffs to the said Letters Patent, "and that the registration thereof may be vacated.

"4. That the plaintiffs may be paid the costs "of this action.

"5. That the plaintiffs may have such further "and other relief as the nature of the case may "require."

The question now to be determined is whether the Exchequer Court of Canada has jurisdiction to adjudge upon the rights of the several parties herein.

It will appear from the perusal of the statement of claim that the question at issue consists in the determination of the rights of the parties to the patents mentioned herein under the contract and assignments above set forth. The action in substance resolves itself into one of contract from which would flow specific performance, damages and the removal of any cloud that might exist upon the title to the said patents of invention.

Proceeding by elimination it must be found that there is no enactment in the *Patent Act* under which

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this Court is given jurisdiction to hear and determine such a case as the present. It would be idle to cite here the several sections of the *Patent Act* under which this Court is given jurisdiction, suffice it to say that none of them cover or provide for a case of this kind.

Coming to the *Exchequer Court Act*, (1) it will be found that section 31, gives this court certain jurisdiction with respect to patents of invention, but it is obviously in relation to a different class of cases from the present one. Under section 23 of *The Exchequer Court Act* this court, by sub-sections (b) and (c) is given jurisdiction in cases of infringement and to impeach or annul a patent of invention. It is conceded the present case does not come within the scope of these two sub-sections.

Much stress is, however, laid upon sub-section (a) of section 23 of *The Exchequer Court Act*, and it is contended by plaintiffs that the words "in all cases of conflicting applications for any patent of invention" do give this court jurisdiction to hear the present case.

Doubt has been manifested with respect to the true meaning of these words. The enactment means certainly something, and it was placed upon the statute book with a remedial object in view. (See *Interpretation Act*, (2). From the perusal of the section it will be seen that it contemplates "conflicting applications" for any patent. There is no conflicting application for a patent in the present case. The jurisdiction given this court by sub-section (a) would appear to be concurrent to the remedy provided by section 20 of *The Patent Act* (3). When several parties make conflicting applications for any patent of invention, they can either proceed under section 20 of *The Patent Act*, or under sub-section (a) of section 23 of

(1) R.S.C. (1906) Chap. 140. (2) R.S.C. (1906) Chap. 1, Sec. 15.
(3) R.S.C. (1906) Chap. 69.

*The Exchequer Court Act.* That would be the meaning attaching to sub-section (a) of section 23,—because from its very wording the conflict there contemplated arises with respect to the application for a patent which has not yet been issued.

We are in this case beyond that stage. The patent has been duly issued, and there is no conflict alleged with respect to the patent in question. The only conflict which arises between the parties to the present suit is with respect to their respective rights under the contract recited in paragraph 5 of the statement of claim, and the several assignments alleged in the subsequent paragraphs.

Therefore this case, as already mentioned, resolves itself into a question of the rights of the parties under the contract and the assignments. The jurisdiction of this court is determined by statute; it has not any common law jurisdiction with respect to patents of invention. Failing to find any statute, or any section thereof, under which it could entertain the consideration of the issues raised by the pleadings, judgment must be entered declaring that this Court has no jurisdiction to hear the present case. (*Sharples* v. *National Mfg. Co. Ltd.*)(1) The defendants will have the costs of and incidental to the hearing and disposition of the questions of law.

*Judgment accordingly.*

Solicitors for plaintiffs: *Bicknell, Bain, Strathy & MacKelcan.*

Solicitors for defendant A. Park: *Kerr & Pritchard.*

Solicitors for defendant Lucinda J. Bisnett: *Gosnell & Shillington.*

(1) Audette's Exchequer Court Practice 2nd. Ed. p. 508; and 9 Ex. C.R. 460.

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Solicitors for defendant Charles L. Bisnett: *Harley & Sweet.*

Solicitor for defendant R. L. Brackin: *W. E. Gundy.*

Solicitor for defendant J. B. Detwiler: *A. E. Watts.*

BRITISH COLUMBIA ADMIRALTY DISTRICT.

BETWEEN:

McARTHUR AND OTHERS PLAINTIFFS.

1913
March 11.

AGAINST

THE SHIP "*JOHNSON*".

*Admiralty law—Misleading defence—Costs—Rule 132—Discretion.*

Although the plaintiff fails in his action, if the defence is so misleading as to invite unnecessary controversy and prolong the trial, the Court, exercising its discretion under rule 132, will make no order for costs in favour of successful defendant.

THIS was an action for seaman's wages tried by the Honourable Mr. Justice MARTIN, Local Judge in Admiralty for the British Columbia Admiralty District, at Victoria, on the 6th of March, 1913.

*D. S. Tait*, for plaintiff.

*Sydney Child*, for defendant.

MARTIN, L. J., now (11th March, 1913) delivered judgment.

This is an action for seaman's wages, the plaintiff McArthur claiming the sum of $150 for two months' wages as engineer on the gasoline launch *Johnson*, and the plaintiff McKenzie claiming $375 for five months' wages on the same vessel.

Owing to the unusual circumstances and the prior relationship of the plaintiff McKenzie with the vessel's owners as their guest, I have had not a little difficulty, on the largely conflicting evidence, in arriving at a conclusion as to the true state of the case; but I am finally of the opinion that the said plaintiff has failed to establish an express contract of hiring, or one

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McARTHUR v. JOHNSON.

Reasons for Judgment.

based upon *quantum meruit*. Apart from other things, it is particularly unfortunate for him in the circumstances that he should not even have made a request for his wages for the whole time of his employment. The inference to be drawn from such a strange omission was pressed by defendants' counsel, and is hard to overcome where the witnesses disagree. On the other hand, I am satisfied that he performed useful and valuable services to the owners over and above his board and lodging; and to such an extent that it was never contemplated by them that he should account for the various small sums of money that were given to him occasionally or for the bill of goods, amounting to $202.50, which he got from David Spencer, Limited, on the arrangement that they were to be charged to Mrs. Anderson. Therefore, the so-called counterclaim for $300 fails, even assuming that it is properly set up and that it is of such a nature that this Court could entertain it (1). The result of this plaintiff's action is that it must be dismissed, with costs, but as the defendants have set up a largely misleading defence against his claim, which almost invited further controversy, and did considerably prolong the trial, I exercise the discretion conferred upon me by Rule 132 and make no order for costs in their favour as against McKenzie.

With respect to the plaintiff McArthur, in view of the positive denials of both the defendants of any authority given to McKenzie to engage him, and of their version of the explanation given of his presence on the vessel, the evidence is not sufficient to support his claim, and it must be dismissed, with costs.

*Judgment accordingly.*

(1) *Bow, McLachlan & Co. v. Ship "Camosun"* (1909), A. C. 597.

BRITISH COLUMBIA ADMIRALTY DISTRICT.

BETWEEN :

CITY OF NEW WESTMINSTER....PLAINTIFF.

1913
Nov. 30.

AND

S. S. *MAAGEN*.....DEFENDANT.

*Shipping—Collision between vessel and bridge belonging to City—Negligence—Regulations—Right to damages where obstructions are placed across navigable waters—"Railway Bridge".*

Apart from any statutory regulations as to lights, those who place obstructions across navigable waters, even though lawfully authorized to do so, cannot complain if damage is done to their works by collision, brought about by the fact that a prudent navigator, proceeding with due care, was unable at a crucial moment, because of the absence of lights, to define his exact position in relation to such obstruction. *Bank* v. *"City of Seattle"* (1903), 10 B.C. 513, distinguished.

*Quaere:* Whether a bridge, not originally built for railway purposes, but over which rails were laid (it was not shown by whom) and used by a street railway company occasionally for construction purposes, is to be regarded as a "railway bridge" under the provisions of the Order in Council of 20th June, 1910 ( Stats. Canada, 1911, p. cxii)

ACTION for damages arising out of a collision between the defendant's ship and a bridge belonging to the plaintiff corporation. The facts appear in the reasons for judgment.

The case was tried at Vancouver, B.C., on September 10th and 11th, 1912, before the Honourable Mr. Justice Martin, Local Judge for the British Columbia District.

*W. G. McQuarrie*, for plaintiff;

*C. M. Woodworth*, for the Ship.

MARTIN, L. J., now (November 30th, 1912,) delivered judgment.

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CITY OF NEW WESTMINSTER v. STEAMSHIP MAAGEN.

Reasons for Judgment

This is an action for damages for injury done by the steamtug *Maagen* (65 feet long; 18 foot beam) with a scow 90 x 32 feet in tow, laden with gravel, to the plaintiff's bridge commonly known as the "North Arm Bridge" connecting Twelfth Street and Lulu Island, such injury being alleged to be due to the negligent and improper navigation of the *Maagen*.

The defences set up were (1) that the bridge was placed in an improper manner across the stream so that the span and openings were not in the centre of the channel; and (2) that the bridge was not properly lighted.

With respect to the first defence it is sufficient to say that no evidence to which any weight could be attached was submitted in support of it.

With respect to the second, reliance was placed by plaintiff's counsel on the order in council of 29th of June, 1910, (Stats. Canada, 1911, cxii) establishing "Regulations to govern draw or swing bridges over navigable waters other than railway bridges", and the point is taken that this is a railway bridge and therefore excepted from the regulation requiring certain lights to be exhibited as therein specified.

There were cited the following references on the difficult question as to what is meant by a "railway bridge" in this regulation, no definition of it being given (1). The evidence here does not show that this bridge was built for railway purposes, though there were rails laid across it which have been used occasionally by the B.C. Electric Railway in running gravel cars over it for construction purposes on their suburban line. No other railway company, electric or otherwise, is shown to have made use of it, nor

(1) B. C. Ry. Act, R.S.B.C. 194, sec. 28; Stroud's Jud. Dic. 2nd ed, vol. 3, p. 1648; *Toronto Railway v. Regina* (1896) A.C. 551; Cap. 28, secs. 6 and 21 Stat. Can. 1909 Dom. Ry. Act., cap. 37 R.S.C. secs. 230-4.

is there any evidence as to who put down the rails, or of their nature. On such evidence I should hesitate to say this was a railway bridge within the meaning of the regulations, but it is not necessary to decide the point from the view I take of the matter which is, shortly, that on the evidence before me, no negligent or improper navigation has been established. The evidence of the master of the *Maagen* on this point, which has not been displaced in essentials and which was reasonable and consistent, discloses nothing on which I can place my finger and say that in this or that respect he was guilty of negligence. The night was dark and he was and had been proceeding with due care and caution, but despite that he made a slight miscalculation, very pardonable in the circumstances, of his true distance from the north abutment and was carried across by the current to the main abutment with which the scow collided. The truth is, apart from all regulations, that if there had been a light at the north abutment he would have been able to approach closer to it with safety and the accident would have been avoided. Quite apart from any statutory regulations as to lights those who place obstructions across navigable waters, even though lawfully authorized to do so, cannot complain if in the carrying out of their powers damage is done to their works by the fact that a collision occurs owing to a prudent navigator, proceeding with due care, being unable at a crucial moment, because of the absence of lights, to define his exact position in relation to such obstruction. The case of *Bank Shipping Co. v "City of Seattle"* (1) is clearly distinguishable from this one, which is really a case of inevitable accident on the part of the master.

There will be judgment in favour of the defendant.

*Judgment accordingly.*

(1) (1903) 10 B.C.R. 513.

NOVA SCOTIA ADMIRALTY DISTRICT.

BETWEEN:

1913
February 12.

HAROLD BURKE, BERTIE O'HARA, FREDERICK W. FANNING, COLEMAN LATHAM, ROLAND O'HARA AND CECIL LANGLEY.....PLAINTIFFS;

AND

THE SHIP *VIPOND*..... DEFENDANT.

*Shipping—Action for Seamens' Wages—Jurisdiction—Joinder of Claims—Aggregate amounting to over $200.—Costs.*

Although the claims of a number of seamen for wages do not amount to the sum of $200 individually, yet, where the aggregate of such claims exceeds that sum, the claims may be joined and sued for in the Exchequer Court on its Admiralty side. *Beaton v. "Christine,"* 11 Ex. C.R. 167, approved. *Philips v. Hyland Railway Company* (1883), 8 A.C. 329, followed.

2. Held, further, that upon such joinder of the claims and judgment therefor, the plaintiffs were entitled to their costs.

ACTION for seamen's wages.

The plaintiffs as seamen on board the Ship *Vipond* claim the sum of five hundred dollars and fifty six cents for wages due to them as follows:—

To Harold Burke, cook, for wages from the 28th day of November, A.D., 1912 to the 31st day of January, A.D., 1913, $83.84.

To Bertie O'Hara, Engineer, for wages from the 28th day of November, A.D., 1912, to the 31st day of January, A.D., 1913, $116.48.

To Fred. W. Fanning, able seaman, for wages from the 29th day of November, A.D., 1912, to the 31st day of January, A.D., 1913, $72.56.

To Coleman Latham, able seaman, for wages from the 29th day of November, A.D., 1912 to the 31st day of January, A.D., 1913, $69.56.

To Roland O'Hara, able seaman, for wages due from the 29th day of November, A.D., 1912, to the 31st day of January, A.D., 1913, $82.56.

To Cecil Langley, able seaman, for wages from the 29th day of November, A.D., 1912, to the 31st day of January, A.D., 1913, $75.56 and for costs.

February 12th, 1913.

The action was tried before the Honourable Mr Justice Drysdale, Local Judge, at Halifax.

*C. J. Burchell*, K.C., and *J. L. Ralston* appeared for the plaintiffs; *James Terrell*, appeared for the Ship.

The evidence of the plaintiffs was that they were hired by Captain Fraser, who was in charge of the defendant Ship, that they went on fishing voyages in said Ship, that they were not on shares but on wages, that they served the time for which they charged, that they did not sign articles, and that they duly credited all sums received thereon, and that the amounts claimed were still due them. No evidence was given on behalf of the defendant.

It was admitted that the defendant Ship was owned by the Dominion Fisheries Company, that she was registered and was under 80 tons burthen.

Mr. *Terrell*, who appeared under protest, took objection to the jurisdiction of the Court, as the account due each seaman was under $200.00, and it was not shown that the owner of the Ship was in insolvent circumstances or the Ship was under arrest. Sec. 191 Cap. 113, R. S. of Canada.

The plaintiffs had an efficient remedy under sec. 187 of cap. 113 R.S., 1906, by going before magistrates and getting judgment without costs in a summary proceeding. *Phillips* v. *Highland Railway Company* (1).

(1) (1883) 8 A.C. 329.

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BURKE THE SHIP v. VIPOND.

Argument of Counsel.

Under section 15 of the order in council made by His Majesty King William IV under the authority of an Act of Parliament passed in the second year of his reign, a number not exceeding six seamen could join in an action for wages if the amount due exceeded £50, but this order in council has since been repealed, by *The Colonial Courts of Admiralty Act*, sec. 17.

Where there are articles signed they can sue together, but not where there are none as here.

The Judicature Act applies to the Admiralty Court in England but not to our Court here.

Howell at page 24, rule 29, deals with it. They do not here arise out of the same matter, nor are their interests of the same nature, but each plaintiff has a separate and distinct contract and claim.

Assuming this is a Vice-Admiralty Court the last Act in England does not apply. The *City of Petersburg* (2).

The plaintiffs should be deprived of their costs under sec. 192 of cap. 113 Revised Statutes, 1906.

Mr. *Ralston* for the plaintiffs:—

The *Petersburg* case was decided in 1865 and since then the statute has been changed, and the Act under which it was decided has been repealed. Rule 29 of the Rules and Practice at present in force gives this right of any one or more joining together and bringing the one action as plaintiffs. These rules are made in pursuance of the provisions of *The Colonial Courts of Admiralty Act*, 1890, and of *The Admiralty Act*, 1891.

The plaintiffs' interests are of the same nature and arise out of the same matter as required by Rule 29.

They all worked on the same ship, were employed in the same fishing venture, were hired by the same

(1) Howells 'Adm. Prac., 189. (2) Young's Adm. Dec. I.

captain and their employment terminated at the same time and place.

In *Phillips* v. *The Highland Railway Co.*, (1) the plaintiffs were held entitled to sue and were allowed their costs.

The case of *Beaton* v. *The Steam Yacht "Christine,"* (2) is similar to the present case. The law is fully discussed by Hodgins, L. J., there.

We had no ample remedy before a magistrate. We should not be expected to pay our own costs, if there is a Court of competent jurisdiction in which we can get both our debt and costs, as here.

DRYSDALE, Local Judge. It was objected here that as the individual claims of the seamen were under $200. the six plaintiffs could not join and sue in Admiralty, although the total amount of the joint claims is much in excess of $200.

I am clear this point is not well taken. I agree with the reasoning of Hodgins, L. J. in *Beaton* v. *The Christine* (2) on this point, and since the decision in *Phillips* v. *Hyland Railway Company* (1) in my view the point is not open.

It was urged that under section 192 of cap. 113 Revised Statutes of Canada, the plaintiffs should be deprived of costs, but I think not. If the plaintiffs have the right to join and secure the whole amount due them in this one proceeding, it cannot be said they had as effectual a remedy by complaint to a magistrate, to whom they must go singly in separate suits or proceedings.

(1) (1883) 8 A. C. 329.

(2) 11 Ex. C.R. 167.

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I find for plaintiffs for the respective amounts proved, and will settle the same before decree.

*Amount settled at $500.56 and costs; and decree in accordance therewith.*

NOVA SCOTIA ADMIRALTY DISTRICT.

BETWEEN

WILLIAM W. GRAHAM.....PLAINTIFF;

AND

1913
MARCH 24.

THE SHIP "*E. MAYFIELD*".....DEFENDANT.

*Shipping—River—Right of Navigation—Unreasonable use of such Right—Damages.*

A navigable river is a public highway, affording a right of passage to all His Majesty's subjects. This right, however, must be exercised in a reasonable manner, since each individual is entitled in common with every other person to its enjoyment. The enjoyment of it by one necessarily interferes to a certain extent with its exercise by another, but what constitutes reasonable use depends on the circumstances of each particular case.

ACTION for damages against a ship for loss arising from improper navigation.

The plaintiff's claim was as owner of the Ship *Stella Maud* for the sum of one thousand dollars against the Ship *E. Mayfield* for damages occasioned by the wrongful taking of the berth of the Ship *Stella Maud* by the said Ship *E. Mayfield* at Windsor, Nova Scotia, on the 17th day of December A.D., 1912, in consequence of which the *Stella Maud* fell over and became a total loss, and for costs.

The trial took place before the Honourable Mr. Justice Drysdale, Local Judge, at Halifax, N.S., on the 20th February, 1913.

*J. L. Ralston* and *V. B. Fullerton* for the plaintiff;

*H. Mellish*, K.C., for the defendant Ship.

The evidence for the plaintiff was that the plaintiff's vessel, the *Stella Maud*, and the defendant ship both loaded coal at Parrsboro, N.S., for F. W. Dimock at

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Windsor, N.S., both intended to discharge at Dimock's Wharf at the latter place, and it was agreed that which arrived at the latter wharf first would have the berth at the wharf. Both left Parrsboro about the same time, but the *Stella Maud* arrived at Windsor about six o'clock in the evening, about half an hour ahead of the *E. Mayfield*. When the *Stella Maud* arrived abreast of Dimock's wharf, she began to pay out her anchor but it did not take hold of the bottom quickly and whe went past the wharf striking the next wharf, Shand's, carrying away her jibboom. A four inch line was then put on the cleat on the face of Dimock's wharf and another smaller line was put to Shand's wharf. They then started to raise the anchor and haul her into Dimock's wharf and while doing so the *E. Mayfield* came up, being propelled by gasoline, and went into Dimock's wharf and took the berth. The plaintiff called to the captain of the *E. Mayfield* and told him that he had his line first on Dimock's wharf, but the latter ship did not give him the berth but remained there.

As the tide was then high and the wind blowing on the wharves, the *Stella Maud*, which had sails only, was compelled to take the berth at Shand's wharf. They were only able to get her into five feet of the wharf, and she was made fast there. The Captain made enquiries and learning that it was a mud bottom did not list his vessel on the wharf. The tide here has a fall of about twenty feet and when it is out there is only a small stream in the centre of the Avon River, the decline from the berth in front of the wharf being very steep.

When the tide fell the *Stella Maud* fell over into the centre of the river and became a total wreck.

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The defendant's evidence was that when the *E. Mayfield* arrived at Dimock's wharf, the plaintiffs' vessel was anchored at Shand's wharf. They also, when putting their lines on Dimock's wharf, searched with a lantern for lines from the *Stella Maud* to that wharf but could find none.

DRYSDALE, Local Judge, now (March 24th 1913) delivered judgment.

The action here is based on the navigation of the defendant ship in an unreasonable manner to the injury of the plaintiff's vessel, the *Stella Maud*, whilst both vessels were using the navigable river Avon.

It seems both vessels were coal laden and bound up said river, consigned to Dimock, a coal dealer at Windsor, in Hants County, and both were making for a wharf in the Port of Windsor known as Dimock's wharf. It is very clear that a navigable river is a public highway, navigable by all His Majesty's subjects in a reasonable manner and for a reasonable purpose. This right, however, must be exercised in a reasonable manner, since each person has a right with every other person to its enjoyment and the enjoyment of it by one necessarily to a certain extent interferes with its exercise by another, and what constitutes reasonable use depends on the circumstances of each particular case. The plaintiff's vessel it seems was sailing up the river and to the knowledge of those in charge of the defendant ship, bound for Dimock's wharf. The plaintiff's vessel was using sail only whilst defendant vessel had auxiliary power. The plaintiff's vessel was leading with the right of way and made for the wharf mentioned, where a safe berth at the end of the wharf was awaiting the first arrival. In trying to make the berth, the plaintiff failed to

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drop his anchor quite in time and brought up in front of the next wharf up river, known as Shand's wharf. The plaintiff then promptly took steps to warp his vessel the *Stella Maud* into Dimock's wharf, or rather into the berth arranged for vessels at the outer end of such wharf.

The charge against the defendant ship is that whilst plaintiff was in the act of docking his vessel or warping her into the berth mentioned, the defendant vessel, by the aid of its auxiliary power, unreasonably and improperly interfered with plaintiff's ship whilst in the act of docking, and by the aid of its said power slipped past the plaintiff's vessel into the berth that plaintiff had almost reached and into which by the aid of a line then already fastened to said Dimock's wharf, the plaintiff was actually in the act of taking; that by such a manoeuvre the defendant unreasonably and improperly crowded the plaintiff's vessel out of her intended berth and compelled her to remain in a dangerous place, where, owing to the ebbing of the tide, she suffered damage. After having given the extended notes in this case full consideration, I feel obliged to make the following findings:

The plaintiff with his vessel the *Stella Maud* was, to the knowledge of those navigating the defendant vessel, in the act of warping into the Dimock berth at the time the defendant vessel, by the aid of its auxiliary power, slipped by and took possession of the berth.

That when the defendant vessel and those in charge decided on and put into execution the manoeuvre that enabled the *E. Mayfield* to take the berth, the defendant vessel's master well knew he was preventing the plaintiff's vessel from completing a manoeuvre that would in a then very short time have given the *Stella Maud* the berth.

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I find that when the defendant vessel attempted its manoeuvre to take the berth the master of the *E. Mayfield* had full notice that the *Stella Maud*, by the aid of a bow line then fastened to Dimock's wharf, was in the act of docking at that wharf and that the act of taking the bed on the part of the *E. Mayfield* was deliberately performed for the purpose of first acquiring the berth, notwithstanding the first arrival of the *Stella Maud* in the immediate vicinity, and notwithstanding the fact that the *Stella Maud* was then engaged in warping or in endeavouring to warp in.

It was argued that the *Stella Maud* had grounded in front of Shand's wharf and could not be warped in as intended, but I have no doubt that in a short time, viz, at high tide, the warping in would have been completed had it not been for the act of the *E. Mayfield*.

I think I am obliged to hold under these findings that those in charge of the *E. Mayfield* were unreasonably exercising the right of navigation on the occasion in question, and to the prejudice and injury of the *Stella Maud*. I think also the injury suffered by the *Stella Maud* as a consequence of what I must regard as unreasonable navigation, was directly due to defendant's acts found above. It was urged that the injury suffered by the *Stella Maud* was caused by her own neglect of reasonable precautions at Shand's wharf, but I think the evidence does not establish this contention.

I will either assess the damages myself after hearing the parties, or adopt the usual way of assessing damages in this Court by a reference to the Registrar, assisted by two merchants, as counsel may desire.

*Judgment accordingly.*

BETWEEN:

1913
April 1.

FOWLER & WOLFE MANUFACTURING COMPANY AND THE DOMINION RADIATOR COMPANY, LIMITED.....PLAINTIFFS.

AND

THE GURNEY FOUNDRY COMPANY, LIMITED.....DEFENDANTS.

*Dismissal of action for want of prosecution—Rule 131 — Discretion o Judge—Terms upon which motion may be dismissed—Rule 325—Ethics of practice in the Court.*

1. The intendment of Rule 131 of the practice of the Court is to leave the dismissal of an action for want of prosecution to the discretion of the Judge; and if, upon the material before him, he thinks the interests of justice would be served by refusing the order on the terms of costs to the defendant in any event, it is open to him to make such a disposition of the motion
2. The ethics of practice in the Court, arising under the provisions of Rule 325, is that the rules should not be administered *strictissimi juris*, but that they should be so applied that no proceeding in the Court shall be defeated by any merely formal objection.

SUMMONS for an order to dismiss an action for want of prosecution.

The nature of the action, and the grounds upon which the application to dismiss was made, are stated in the reasons for judgment.

The application was heard by the Registrar in Chambers* on April 1st, 1913.

*A. F. May*, in support of the summons, *C. H. Maclaren, contra.*

The REGISTRAR delivered the following judgment:

This is an application on behalf of the defendants, under Rule 131, to dismiss the action for want of prosecution.

*Now the Honourable Mr. Justice Audette.

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The statement of claim, with the usual prayer in a case for the infringement of a patent of invention, was filed on the 22nd February, 1909. The statement in defence was filed on the 23rd June, 1909.

The summons praying for such dismissal of the action was taken out on the 15th March, 1912, and in support of the application there was read the affidavit of E. H. Gurney, the Vice-President of the defendant, who says, *inter alia*, that the last communication between the parties was during the month of October, 1909, about the time the last of the particulars were delivered by the defendants and that they had assumed, by reason of the long delay on the part of the plaintiffs, more than two years, that the action had been abandoned,—alleging further they would be prejudiced by the prosecution of the action because of the death of a person they intended to call as their witness, and because of another person who was to be a witness has since left their employ and is not subject to their control.

To the latter affidavit the plaintiffs reply by the affidavit of R. C. H. Cassels who states their firm had been instructed in the action by Mr. E. H. Hunter, Attorney at Law, of Philadelphia, who acted for the Fowler & Wolfe Mfg. Co., and that his firm had no direct communication with either of the parties. That the statement of claim, although filed on the 22nd February, 1909, was served only on the 13th May, 1909, owing to the fact that negotiations had been going on for a settlement of the matters in question in this action. He further states that subsequent to October, 1909, his firm was instructed that negotiations for a settlement of the matters in question had been re-opened through Mr. Wright, the President of the Dominion Radiator Company, Limited, and that no

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further steps were taken in the action. Early in February, 1912, Mr. Cassels' firm received instructions from Mr. Hunter to proceed and bring the action to trial, and that he accordingly saw Mr. Raymond, of the firm of the defendants' solicitors and informed him of it, asking if his clients were prepared to make certain admissions, failing which he would have to examine Mr. Gurney for discovery. Mr. Raymond stated that he would take the matter up with his clients without delay and would notify Mr. Cassels of of his position in the matter. On two, at least, other subsequent occasions, Mr. Cassels spoke to Mr. Raymond about the matter, and he was informed the matter had been taken up with his (Mr. Raymond's) clients, but that he had not yet received definite instructions. However, on the 16th March, 1912, Mr. Cassels received a letter from Mr Raymond advising him he intended moving to dismiss the action for want of prosecution, and on the same day he received from his Ottawa agents a copy of the summons calling upon the plaintiffs to show cause why an order should not be made.

To the affidavit setting forth the plaintiffs' view an affidavit of E. Gurney is filed stating that the negotiations mentioned in paragraph 5 of Mr. Cassels' affidavit were terminated by his letter of the 9th October, 1909.

There is also an affidavit of Mr. Raymond with respect to the letter he wrote to Mr. Cassels on the 15th March, 1912, on the day the summons was issued.

Upon the perusal of Rule 131, it will be seen that its object is not to lay down any fixed or binding rule upon the judge hearing such an application, but the whole matter is left to his judicial discretion.

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Were the action a vexatious one or for the recovery of a penalty, the discretion of the tribunal should be exercised against the plaintiffs.

The two most important reasons alleged by the defendants are that one of the persons they wished to hear as a witness has since died, and that another person has left their employ and is beyond their control. The disposition of an action for the infringement of a patent of invention as a rule, does not depend so much upon the evidence of the ordinary witness, as upon the opinion evidence of experts, and one expert has no more claim to the credence of the Court than another. With respect to the other witness, who is alleged to have left the defendants' employ, it would appear he would be in a much better position to speak from the very fact that he is under nobody's control and that he could give quite an untrammelled testimony

Can it be said that the defendants would be prejudiced by the delay in proceeding and in now proceeding with the action? This must be answered in the negative.

Were the action now dismissed, the plaintiff could turn around and institute another similar action, as the dismissal of the action under the present circumstances would not be a bar to subsequent proceedings in respect of the same matter.

The application resumes itself into one of costs. Shall it be the costs of the present application or the costs of an action discontinued at this stage? There is nothing more or less in it.

The practice in this Court has ever been to administer justice as between the parties, and not to defeat any proceedings on merely formal objections. (See Rule 325.)

On arriving at a conclusion on this application one cannot overlook the fact that were it not for the

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courteous intimation by the plaintiffs' solicitor that he was to proceed with the case, the defendants would not have been supplied with the weapons they are now using against him, and the plaintiffs could have had the trial proceed in a manner that would have barred the present application.

Upon the consideration of all the circumstances of the matter, the application for dismissal of this action for want of prosecution will be dismissed, but with costs to the defendants in any event.

Upon intimating that this order should be followed by one ordering the plaintiffs to speed the case and give notice of trial, the defendants' solicitors asked that no such order be made because of the temporary absence of Mr. Gurney from the country.

IN THE MATTER OF THE PETITION OF RIGHT OF

WILLIAM DOUGLAS MAY, et al.....SUPPLIANTS; 1913 June 2

AND

HIS MAJESTY THE KING.....RESPONDENT.

*Contract—Statutory Formalities—Non-compliance therewith—Quantum meruit—Constructive delivery and possession—Constructive approval.*

According to the true intent, meaning and spirit of section 24 of the *Public Printing and Stationery Act* (R.S.C. 1906, Chap. 80) such section is a precautionary measure to safeguard and protect the State. In the absence of a strict compliance with the formalities prescribed thereby it must be held that no legal contract can obtain between the Crown and a subject, and the only claim which can be entertained for the right of recovery of goods delivered would be that based not on an executed contract, but rather as upon a *quantum meruit*.

2. Specific approval by the Minister or the King's Printer of each requisition is essential under the statue.

3. The Crown will not be held to be constructively in possession of goods, nor will goods be held to be constructively delivered, or requisitions constructively made. upon an informal contract, because the Crown cannot be prejudiced by the unauthorized acts or laches of any of its officers.

PETITION OF RIGHT for the recovery of the sum of $25,921.91 for goods sold and delivered during 1910, to the Department of Public Printing and Stationery, one of Departments of the Government of the Dominion of Canada.

The facts are stated in the reasons for judgment.

May 22nd, 1913.

The case was heard at Ottawa.

*R. C. Smith*, K. C., and *W. G. Pugsley* for the suppliants contended that it was open to the Court to put such a construction upon the contract of the parties as would bring the contract within the requirements of the *Public Printing and Stationery Act*, (R. S. 1900.

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c. 80, sec. 24). The *Gresham* case (1) decides that the statute does not require any special form or manner of approval of requisitions by the King's Printer, and so we submit that such approval can be implied from the conduct of the parties in the present case. The price of the goods that have been received and accepted by the Crown is recoverable under the decision in the *Gresham* case.

With respect to the goods shipped from New York to the Government for which the Crown has held the bills of lading for three years and more, but refuses to accept the goods, we say that the Crown by retaining the bills of lading, by going to the Customs warehouse and opening the parcels and inspecting them, must be held to have taken possession and delivery of the goods. So long as the Crown holds the bills of lading we cannot not exercise any acts of ownership over the goods. They are in the possession of the Crown, and in justice and fair dealing we should be paid for them. They cited *Fisher* v. *Samuda* (2); *Couston* v. *Chapman* (3); *Grimoldby* v. *Wells* (4); *Hopkins* v. *Appleby* (5).

*W. D. Hogg, K.C.*, for the respondent, contended that it was clear that with respect to the goods which the Crown refused to accept there was no approval by the Minister or the King's Printer of the requisitions. That is a statutory condition precedent to the suppliants' right to recover the price of the goods. He relied on *Gresham* v. *The King* (6); *Henderson* v. *The Queen* (7).

AUDETTE, J., now (June 2nd, 1913) delivered judgment.

(1) *Ante* p. 236;
(2) (1808) 1. Camp. 190;
(3) (1872) 2 H. L. Sc. 250;
(4) (1875) L.R. 10 C.P. 391;
(5) (1816) 1 Stark. 477.
(6) *Ante* p. 236,
(7) (1897) 6 Ex. C.R. 39. 28 S.C.R. 425.

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This Petition of Right is brought, by the suppliants, to recover from the respondent the sum of $25,921.91, for in part a certain quantity of goods, wares and merchandise alleged to have been sold and delivered, between the 1st January and the 1st July, 1910, to the Department of Public Printing and Stationery, one of the Departments of the Government of the Dominion of Canada, at the instance and request of the said Department and for the prices then agreed upon.

The suppliants further allege that between the 1st January and 1st June, 1910, the respondent by special written orders requested them to furnish a certain other quantity of goods, wares and merchandise of a special quality for prices agreed upon; that the said goods were all manufactured and ready for shipment and delivery at the times ordered and agreed upon, but that the respondent refuses to accept or receive the said goods, although duly tendered by the suppliants.

The respondent at bar in substance denies the existence of any legal contract between the parties, relying on section 24 of the *Public Printing and Stationery Act* (1), which requires that all purchases made by the Superintendent of Stationery shall be so made upon requisition, approved by the Minister or the King's Printer.

All requisitions and orders made to the suppliants for the supply of the said goods were so made by the Superintendent of Stationery (Gouldthrite) without the approval of the Minister or the King's Printer.

It is, however, true the Superintendent had been in the habit, in direct contravention of the statute, of ordering goods without such approval during a long period previous to the time in question in this case.

(1) R. S. C. 1906, chap. 80.

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Mr. Parmelee, the King's Printer, who was heard as a witness in this case, says in that respect it had been the practice, down to three years ago, for the Superintendent to send these orders "*off his own bat.*"

However true it may be that the Superintendent had been for years in the habit of ordering goods "*off his own bat,*" and however forcible the appeal on that ground may be in the case at bar to one's sense of justice, to apply the rule which would govern at common law as between subject and subject, we are face to face with the statute, and a contract to be valid under the circumstances must be made in the manner provided by such statute.

The interpretation which should be given to the section in question is to be found in the very spirit of section 15 of *The Interpretation Act* (1), which says in substance that "every Act and every provision and enactment thereof, shall be deemed remedial, whether its immediate purport is to direct the doing of anything which Parliament deems to be for the public good, or to prevent or punish the doing of anything which it deems contrary to the public good; and shall accordingly receive such fair, large and liberal construction and interpretation as will best *ensure the attainment of the object of the Act* and of such provision or enactment, according to its true intent, meaning and spirit."

What, in the present case, is "the intent, meaning and spirit" of section 24 of *The Public Printing and Stationery Act,* if not a precautionary measure to safeguard and protect the State, representing the interest of the public at large, against any malversation of the officers of the Crown? The policy of the section is obviously not to leave the ordering of such goods in such magnitude to one officer alone,—the control being

(1) R. S. C. 1906, chap. 1.

given to two officers, one checking the other for greater security,—and the protection of the public moneys.

The suppliants are presumed to have known the law, and under the authority of *The Queen* v. *Woodburn* (1) they must be held to have known that Gouldthrite exceeded his authority and that they supplied the goods at their peril. The law requires the approval by either the Minister or the King's Printer, and no such approval appeared on the orders signed by the Superintendent. Would it not suggest itself to the mind of the ordinary prudent merchant dealing under such circumstances, to enquire whether the officer he was dealing with was vested with the proper authority to bind the Government?

It cannot be said that the King's Printer by his conduct in allowing the Superintendent to carry on the business as he did, and making the requisitions "*off his own bat*" made such requisitions, or orders any better. They were not legal, not being made with the proper statutory authority, and because such defect was in certain cases cured by the payment of the goods, it does not give a legal character to those outstanding.

The statute (2) requires the specific approval of each requisition. A general approval, or the giving to Gouldthrite the general authority to purchase without the approval of the Minister or the King's Printer, would amount to a delegation of power which cannot be given in face of the statute.

Therefore the incompetency of the Superintendent to enter into a valid contract on behalf of the Crown is obvious, and in view of the above mentioned section 24, the necessary conclusion which must be arrived at is that no contract existed in point of law.

We have in the present case goods distributed, under respondent's Exhibit "A," in five different classes, viz:

(1) 29 S.C.R. 122. (2) R. S. C. 1906, 80, sec. 24.

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1. Goods taken into stock, but not paid for.

2. Goods passed the Customs, but not taken into stock.

3. Goods not received at the Bureau and not passed through Customs.

4. Goods passed through Customs and returned to railway company.

5. Goods still in the hands of the suppliants, but ready to be shipped, and for which invoices and bills of lading have been sent to the Superintendent.

Under the decision of Mr. Justice Cassels, in the case of *The Gresham Blank Book Company* v. *The King*, (1) and the cases therein cited, both at trial and under a subsequent order, the suppliants are clearly entitled to recover the value of the goods mentioned in classes one, two and four. The Crown, in respect of these three classes, received the goods or assumed ownership thereof.

Coming to the goods mentioned in class No. 3, it is contended by the learned counsel for the suppliants that the goods in question were to be shipped f. o. b., New York, the freight to be paid at Ottawa and not by the suppliants; that the bills of lading for such goods were sent to the Government Stationery Department with the invoices in each case, and that as the bills of lading have remained in the hands of the Department all this time, the Crown thereby assumed complete possession of the goods. He further adds in support of this contention, that while the goods were at the railway station or warehouse, an officer of the Crown, with the special leave and permission of the Minister of Customs, opened the parcels, checked and counted the merchandise, and thereby took constructive possession of the same.

(1) *Ante*, p. 236.

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The fallacy of this argument lies *in limine*. Had there been a contract in existence, as alleged, under which the goods had been shipped, the situation would very likely be as he contends. But it must be found that in the present case that at no time there existed a valid contract, and that moreover the right of the suppliants to recover for the goods in classes 1, 2 and 4, under the authority of the *Gresham* case and the several well known cases cited in support of it, such as *Wood* v. *The Queen*,(1); *The Queen* v. *Henderson*(2); *The Queen* v. *Woodburn*, (3); and *Hall* v. *The Queen*, (4), is a right to recover based, not on an executed contract, because there is no contract extant, but as upon a *quantum meruit*, under the circumstances there stated, where the Crown received the goods among its stock and received full benefit thereof. As already intimated at the trial, the dumping of goods into a person's yard, followed by the transmission of the bills of lading, will not act as a constructive delivery of the goods, for which the owner of the yard would become liable, because the bills of lading found their way into the hands of the owner of the yard. No such doctrine would obtain as between subject and subject where there is no valid contract, and much less so as against the Crown, and in the present case the reason is too obvious. It would be taking a rather abnormal view of the matter to say that because the bills of lading are transmitted to an individual, the latter, without any legal request on his behalf to supply the goods, or any contract, would become vested with their ownership and liable therefor.

It is true the bills of lading found their way into the hands of the Department and remained there after the letter of the 20th June cancelling all of Gouldthrite's

(1) 7 S. C. R. 645.
(2) 28 S. C. R. 425.
(3) 29 S. C. R. 112.
(4) 3 Ex. C. R. 373.

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orders; but they were, so to speak, impounded and used for the purposes of the investigation which was being carried on by the Minister. Had these bills of lading been unduly retained by the officer of the Crown, that would not make it liable—such a holding would be subversive of the legal doctrine that the Crown cannot be prejudiced by the laches of any of its officers. The acts of its officers cannot estop it from invoking its paramount privilege, and relying on the fundamental fact of the want of existence of any legal contract (1).

We have it clearly spread upon the record by the evidence of both the Minister and the King's Printer, that neither of them did ever approve of any order or requisition for the goods in question in this action. The statute (Sec. 24) requires the approval of either of these gentlemen to make an order or requisition valid; failing to have such approval, the requisition or order must be held illegal, and of no effect, as a contract.

As far back as the year 1669, *Twisden, J.* in *Maleverer* v. *Redshaw*, (2) said:

"I have heard Lord Hobart say upon this occasion, "that because the statute would make sure work, and "not leave it to exposition what bonds should be taken "therefore it was added, "that bonds taken in any "other form should be void:" for, said he, 'the statute "'is like *a tyrant;* where he comes he makes all void; but "'the common law is like *a nursing father*, makes void "'only that part where the fault is, and preserves the "'rest.'"

Whatever might be the result, under the circumstances of this case, as between subject and subject at common law, we have here only the "*tyrant*," the statute, which cannot be overcome. The Crown is not liable for the goods mentioned in class number three.

(1) Robertson's *Civil Proceedings by and against the Crown and Departments of the Governmeut*, at p. 577.

(2) I Mod. 35.

Coming now to the fifth class, which is composed of goods the suppliants contend had been ordered, in the manner already mentioned and which were ready for shipment, but were retained in their possession under the direction and order of the telegram of the 20th June, 1910, followed by the King's Printer's letter of the 22nd, advising them that all orders from Gouldthrite were cancelled. It is contended by the suppliants' learned counsel that with respect to the mourning paper mentioned in this fifth class, it stands under particular circumstances and that the King's Printer did approve of this order.

On this branch of the case we have the evidence of the King's Printer who says that he never authorized Gouldthrite to order this mourning paper from New York, and that it was a surprise to him to find that orders had been given to New York, because they had never done that class of business in New York. After consulting with Gouldthrite with respect to this paper, he sent through Gouldthrite, a man to Toronto and Montreal about the mourning paper, and he adds, as far as my special instructions were concerned, regarding this paper, my instructions to him were limited to Montreal and Toronto. While the King's Printer was aware, from the certified accounts which were placed before him when he signed the cheques, that in the past goods had been bought from the suppliants, he had a right to believe Gouldthrite would carry out his instructions and he never knew as a fact that Gouldthrite had sent requisitions to New York for this paper, and therefore he never authorized it. The King's Printer who is head of this Department, takes his employee into his confidence, instructs him to do a given thing in a specific manner and the employee goes beyond the scope of these instructions. Is it possible,

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under the circumstances, to find an approval or a constructive approval beforehand of what the employee could do in the matter? The answer must be in the negative.

Here again, for the reasons already mentioned, it must be found there existed no legal contract and the suppliants must fail with respect to this fifth class.

It was contended on behalf of the Crown that the prices charged were excessive, and where the suppliants succeed such prices should be reduced. Under the testimony of the several witnesses heard on this branch of the case, it must be found that the overwhelming weight of the evidence is that the prices were just, fair, and reasonable, under the circumstances.

The counterclaim set up by the defence must be dismissed with costs for want of proof.

Therefore the suppliants are entitled to recover the value of the goods mentioned in the classes, one, two and four above mentioned, and at the prices charged for, with the costs of the action.

Leave is reserved to the parties to apply to the Court for further directions, if they fail to agree in the adjustment of the amount for which judgment should be entered.

*Judgment accordingly.*

Solicitors for the Suppliants: *Smith, Markey, Skinner, Pugsley & Hyde.*

Solicitor for the Respondent: *J. R. Osborne.*

In the Matter of the Appeal of WILLIAM LEONARD from a decision of the Commissioner of Patents refusing an application for a patent of invention.

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Oct. 7

*Patent of invention—Feeds for Grain, Ore and Mineral Separators—Appeal from decision of Commissioner under 3-4 Geo. V. c. 17—Grounds for refusal to grant patent.*

More than two years before the application for the patent in question on the appeal, the applicant had obtained Canadian letters-patent No. 110,156 for feeds for grain, ore and mineral separators. The specification of the former patent after declaring that the old method of separating materials such as gold and ore, cereals and seeds, by delivering them into a vertical spout from a connecting inclined spout and forcing a current of air upward through the vertical spout, was ineffective, disclosed the nature of his invention as follows:—

"I have found that by delivering the materials in a horizontal plane or directly across the vertical spout and therefore at right angles to the ascending air current, they are spread out in a thinner sheet so that the air current acts thereon more effectively, or in other words forces upward and separates the lighter material from the heavier in a more perfect manner than is practicable when the materials are discharged in a downward direction."

The substance of the invention claimed in the former patent was the delivering of the materials in a horizontal plane, or directly across the vertical spout, and therefore at right angles to the ascending current of air.

*Held*, (affirming the decision of the Commissioner) that by the specification to his former patent the applicant had disclosed the invention now claimed and the same must be taken to have been abandoned and dedicated to the public.

2. A former patent, while in force, operates as a bar to the application for a new patent, and the only remedy open to the applicant, if he is in a position to invoke it, is to apply for a reissue of the former patent.

*Barnett-McQueen Co.* v. *Canadian Stewart Co.* (13 Ex. C.R. 186) distinguished.

Observations on desirability of Commissioner being represented by counsel on appeals from his decisions refusing to grant patents.

APPEAL from a decision of the Commissioner of Patents refusing to grant a patent of invention.

The grounds of the appeal are stated in the reasons for judgment.

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The appeal now came on for hearing before the Honourable Mr. Justice Cassels at Ottawa.

*R. S. Smart* appeared for the appellant.

**Argument of Counsel.**

No one appeared for the Commissioner of Patents.

*Mr. Smart* submitted the following argument:—The patent is an apparatus for separating grain, comprising a blower to create an upward current, and an inclined chute down which the grain slides. The idea is to separate the seeds of the grain, in order to obtain the best grain for seeding purposes. For instance if the grain are all the same size, it will separate the heavier from the lighter; or if they were all of the same weight it will separate the larger from the smaller. The grain slides down this inclined chute, and is turned into a horizontal sheet by a current of air which is blowing—the density of the air being such that certain of the grains will fall down, and the others will be blown out. If they vary in size, the separation will be affected on account of the greater surface exposed to the blast.

The decision of the Deputy-Commissioner of Patents is in these words: "The patent is refused inasmuch as in the apparatus patented, which was granted more than two years before the date of the present application, the applicant disclosed the invention now claimed without any reservation. I am of the opinion that the invention now claimed must be considered to have been at the date of the present application abandoned and dedicated to the public, and that, consequently, the present application cannot be allowed."

[THE COURT.—What is the meaning of the limitation of two years you mentioned—what is its bearing?

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Argument of Counsel.

My position is that it has nothing to do with this case. There is no such limitation in *The Patent Act.*

[THE COURT.—Why not obtain a reissue, assuming it to be patentable?]

The reissue would not be for the same invention. One is an invention of an apparatus, and the other is an invention of a process. There must be some intention shown in the original patent to claim the invention, before you can claim it on a reissue. I think there might be two different positions. You might have two inventions but entirely disconnected, and in order to show the operation of one you would have to disclose both in the one patent. Our position is, if you did disclose both, and only claimed one, and made no statement with regard to the other, that you might come at a later date and obtain the other; but you could not patent the other on a reissue.

But we are not precluded from obtaining a new patent by anything that is disclosed in the specification to the former patent. Description of a process in an application for a machine patent does not constitute an abandonment or dedication to the public of such process so as to stop the inventor from obtaining a patent for the process. *Eastern Paper Bag Co.* v. *Standard Paper Bag Co.* (1); *Eastern Paper Bag Co.* v. *Nixon* (2); *Victor Talking Machine Co.* v. *American Gramophone Co.* (3).

Our law is different from the English law as well as the American law. In England publication of an application at once dedicates the invention to the public. In the United States publication for a period of over two years dedicates the invention to the public. Under section 7 of our Patent Act there is no ex-

(1) 30 Fed. Rep. 63. (2) 35 Fed. Rep. 752.
(3) 145 Fed. Rep. 350.

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clusion of inventions by reason of publication in a prior application; and section 7 (d) does not refer to that sort of publication. *Anderson Tire Co.* v. *American Dunlop Tire Co.* (1).

The difficulty as to obtaining a reissue is that it must be for the same invention as the original patent. *Auer Incandescent Light Mfg. Co.* v. *O'Brien* (2); *Parker & Whipple Co.* v. *Yale Clock Co.* (3); *Withrow* v. *Malcom* (4).

It has been decided in this Court that a former patentee has the same right as a stranger would have to obtain a patent for a particular means of doing something which is the subject of a general claim in the former patent. *Barnett-McQueen Co.* v. *Canadian Stewart Co.* (5); *Lombard* v. *Alexander* (6).

CASSELS, J., now (October 11th, 1913) delivered judgment.

This is an appeal from a decision of the Commissioner of Patents refusing to grant an application for a patent.

Chapter 69, Revised Statutes of Canada, 1906, section 19, reads as follows:

" Every applicant who has failed to obtain a patent " by reason of the objection of the Commissioner, as " aforesaid, may, at any time within six months after " notice thereof has been mailed, addressed to him or " his agent, appeal from the decision of the Com- " missioner to the Governor in Council."

Chapter 17, 3 & 4, Geo. 5th, assented to the 16th May, 1913, amended the Exchequer Court Act, as follows:

" 23A. Every applicant for a patent under the " Patent Act who has failed to obtain a patent by

(1) 5 Ex. C. R. 82.
(2) 5 Ex. C. R. 243.
(3) 123 U. S. 87.
(4) 6 O. R. 22.
(5) 13 Ex. C. R. 186.
(6) 8 E. L. R. 261.

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" reason of the objection of the Commissioner of " Patents as in the said Act provided may, at " any time within six months after notice thereof has " been mailed, by registered letter, addressed to him " or his agent, appeal from the decision of the said " Commissioner to the Exchequer Court.

" 2. The Exchequer Court shall have exclusive " jurisdiction to hear and determine any such appeal.

" 3. The Exchequer Court shall have exclusive " jurisdiction to hear and determine any now pending " appeals to the Governor in Council under section " 19 of the Patent Act, and the Governor in Council " shall transfer the said appeals and all documents " and proceedings relating thereto to the Exchequer " Court."

Previous to the passing of the last mentioned Act, the applicant for the patent, William Leonard, had appealed to the Governor in Council pursuant to the provisions of the Patent Act hereinbefore quoted.

The decision of the Commissioner of Patents was given on December 12th, 1911, and the appeal was filed on January 29th, 1912, and was pending before the Governor in Council at the time the statute extending the provisions of the Exchequer Court Act hereinbefore quoted was passed.

Shortly after the enactment of this statute orders of Court were made providing for a summary appeal to the Exchequer Court, and the papers in connection with the application were duly forwarded to this Court. Thereupon the notice of the appeal and that the same would be argued on the day named in the notice, was duly served upon the Commissioner.

Nobody representing the Commissioner appeared before me on the appeal; and I understand it to have been stated that it was not the intention of the

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Department to be represented on any appeals under this statute.

It seems to me that it is throwing too much responsibility on the Court, and that the better practice would be that the Commissioner should be represented in order to aid and assist the Judge who hears the appeal.

Counsel for an appellant, as a rule, will not be very apt to put forward the opposite view of the case to that which he is retained to argue on behalf of his client.

Since the argument I have gone carefully through the papers, and am of the opinion for the reasons that I am about to give, that the Commissioner was right in refusing a patent to the applicant.

Upon the 11th day of February, 1908, the applicant William Leonard, obtained apatent for an alleged new and useful improvement in feeds for grain, ore and mineral separators.

I wish it to be clearly understood that while on this application I assume this patent to be valid, I am in no way precluded, if the case were presented in litigation before the Court, from determining that the patent is invalid or valid, as the case may be. It is only for the purpose of this appeal that I accept it as a valid patent.

The claims of this patent are combination claims—a vertical air blast spout and an inclined grain spout connected with one side of the same, of the feed plate arranged wholly within the said grain spout etc.,

The only invention described in the patent is the delivering of the materials in a horizontal plane or directly across the vertical spout, and therefore at right angles to the ascending current.

Figure 3 to his patent, the patentee states in his specification, is a perspective view of the curved chute which particularly embodies his inventions. The object of this curved chute is in order that the material might be delivered in a horizontal plane or directly across the vertical spout and therefore at right angles to the ascending air current.

In his specification the patentee describes the manner in which this result is obtained.

The specification states as follows:—

"Heretofore, gold and ore, cereals, seeds and "various other materials requiring to be separated, "have been delivered into a vertical spout from a "connecting inclined spout whereby the materials "acquired a considerable momentum in a downward "direction and the grains or particles composing such "materials were held to a certain degree in close "contact and in consequence the current of air forced "upward through the vertical spout or chamber failed "to act on the materials in the most effective manner. "I have found that by delivering the materials in a "horizontal plane or directly across the vertical "spout and therefore at right angles to the ascending "air current, they are spread out in a thinner sheet "so that the air current acts thereon more effectively, "or in other words forces upwards and separates the "lighter materials from the heavier in a more perfect "manner than is practicable when the materials are "discharged in a downward direction."

This specification shows on its face the complete invention which the patentee was claiming. It also shows the whole process. It admits the state of the art from which there would be nothing new in the patentee's invention, except the delivery of the material in a horizontal plane. With this specification

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the patentee obtained his patent, dated as I have mentioned, on the 11th February, 1908. More than two years from the issue of his patent, namely upon the 18th May, 1910, the application was filed for the patent in question.

By the patent which was refused by the Commissioner, the patentee is seeking to obtain a method or process patent which would cover any device or contrivance which had the effect of delivering the material in a horizontal plane, thereby very much widening the claims of the previous patent. The Commissioner refused the application, his reasons being as follows:

" Inasmuch as in his apparatus patent, which was " granted more than two years before the date of the " present application, the applicant disclosed the " invention now claimed without any reservation, I " am of the opinion that the invention now claimed " must be considered to have been at the date of the " present application abandoned and dedicated to the " public; and that, consequently, the present appli- " cation cannot be allowed."

I think this decision is correct. In the case of *The Barnett-McQueen Company, Limited,* v. *The Canadian Stewart Company, Limited* (1); I had occasion to point out the objects of the claim.

In patent cases the decisions are so numerous that it is useless to cite them. I would just refer to two, one a judgment of the late Lord Justice Jessel, M.R., in the case of *Hinks & Son* v. *Safety Lighting Co.*, (2); where the view of that celebrated Judge is set out, as follows:

" I am anxious, as I believe every Judge is who knows anything of patent law, to support honest *bonâ*

(1) 13 Ex. C. R. 186 at p. 120. (2) 4 Ch. Div. 612.

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*fide* inventors who have actually invented something novel and useful, and to prevent their patents from being overturned on mere technical objections, or on mere cavillings with the language of their specification so as to deprive the inventor of the benefit of his invention. This is sometimes called a ' benevolent ' mode of construction. Perhaps this is not the best term to use, but it may be described as construing a specification fairly, with a judicial anxiety to support a really useful invention if it can be supported on a reasonable construction of the patent. Beyond that the ' benevolent ' mode of construction does not go. It never was intended to make use of ambiguous expressions with a view of protecting that which was not intended to be protected by the patentee, and which has not been claimed to be so protected by him whether or not it was an invention unknown to himself. It is for the patentee to tell the world that of which he claims a monopoly, to tell them, ' You may do everything but this; but this you must not do, this is my invention.'

" With the view of getting this into a narrow compass, it has long been the practice of patent agents to insert in specifications the distinct claim of what they say is comprised in the patent, meaning that nothing else is comprised, that everything else is thrown open to the public, or, to put it in other words, if a man has described in his specification a dozen new inventions of the most useful character, but has chosen to confine his claim to one, he has given to the public the other eleven, and he has no right to be protected as regards any one of the other eleven if he wishes to recall that gift which he has made by publishing the specification."

Then in the United States Supreme Court, the case

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of *Miller* v. *Brass Company* (1); is to the same effect. The head note is as follows;

" Where a specific device or combination is claimed, the non-claim of other devices or combinations apparent on the face of the specification is, in law, so far as the patentee is concerned, a dedication of them to the public and will be so enforced, unless he with all due diligence surrenders his patent for reissue, and proves that his omission to claim them arose wholly from inadvertance, accident or mistake." (2).

I, therefore, am of the opinion, that so long as the patent of the 11th February, 1908, is in force, it is a bar to the applicant obtaining the patent sought for.

The applicant for the patent is not without redress. Section 24 of *The Patent Act*, relating to reissue of patents, provides a remedy, and if entitled to a reissue the applicant can bring himself within the provisions of this section. His proper remedy would be to apply for a reissue of the patent.

It is quite clear by a long series of decisions, that the the words " by reason of insufficient description or specification " cover the claim in the patent as part of the specification.

It is also settled that the original patent may be perfectly good upon its face, but that nevertheless it may come within the terms of this provision and be held defective or inoperative by reason of insufficient description for specification, if it appears that the patentee had set out in the specification his invention but through mistake had not made a claim for it. Usually the invention granted by the original patent would not be broadened by the reissue, but in a clear case it would be, provided the applicant had brought himself within the provisions of the statute. The

(1) 104 U. S. 350.

(2) See also Frost on patents, 4 Ed. (1912) p. 336 for other authorities

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patentee by taking his patent, has dedicated, as I have pointed out, what he has not claimed for the benefit of the public, and he must get rid of this dedication by means of a reissue patent.

Mr. Smart, in his argument, referred to my judgment in the case of *The Barnett-McQueen Co., Ltd.* v. *Canadian Stewart Co., Ltd.* (1), where I say, at page 209, that "I agree with Mr. Anglin's view that, having regard to the dates, the patentee has the same right as a stranger would have to apply for and obtain a patent for a particular means of support, provided always that there was invention and subject-matter." But I was dealing with that particular case as I have stated in my reasons for judgment, *having regard to the dates*. The application for the second patent was filed on the 6th April, 1908. The first patent was granted on the 14th April, 1908. So that in that particular case there had clearly been no dedication to the public. Moreover, the application in that case was to procure a purely construction claim. I do not think that the *Barnett-McQueen* case affects the case before me.

The American statute upon which the American decisions are based, is identical in language, or nearly so, with our own statute. There are a long series of cases in the Supreme Court of the United States dealing with this question.

I quote at length from the judgment of Blatchford, J., in the case of *Wilson* v. *Coon* (2); as follows:

"It is contended for the defendants that the "reissue patent is void, because the original patent "was valid and operative, and because it contains new "matter and entirely changes the character of the "invention set forth in the original patent, and

(1) 13 Ex. C. R. 186.

(2) Vol. 19 Off. Gaz. U.S. at 482.

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" because the reissue patent was intended to cover " a different collar from that originally invented. " This reissue was granted under section 4916 of the " Revised Statutes, which provides as follows:

'Whenever any patent is inoperative or invalid by reason of a defective or insufficient specification or by reason of the patentee claiming as his own invention or discovery more than he had a right to claim as new, if the error has arisen by inadvertence, accident, or mistake, and without any fraudulent or deceptive intention, the Commissioner shall, on the surrender of such patent and the payment of the duty required by law, cause a new patent for the same invention, and in accordance with the corrected specification, to be issued . . . . . The specification and claim in every such case shall be subject to revision and restriction in the same manner as original applications are. Every patent so reissued together with the corrected specification, shall have the same effect and operation in law, on the trial of all actions for causes thereafter arising, as if the same had been originally filed in such corrected form; but no new matter shall be introduced into the specification, nor in case of a machine patent shall the model or drawings be amended, except each by the other; but when there is neither model nor drawing, amendments may be made upon proof satisfactory to the Commissioner that such new matter or amendment was a part of the original invention, and was omitted from the specification by inadvertence, accident, or mistake, as aforesaid.'

" This enactment is the same as section 53 of the Act of July 8, 1870, (16 U. S. Stats. at Large, 205). The word 'specification', when used separately from the word 'claims' in section 4916, means the entire paper

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referred to in section 4888—namely, the written description of the invention ' and of the manner and process of making, constructing, compounding, and using it,' and the claims made. The word 'specification,' meaning description and claims, is used in that sense in sections 4884, 4895, 4902, 4903, 4917, 4920 and 4922. In some cases, as in sections 4888 and 4916, the words ' specification and claim ' are used, and in section 4902 the word ' description ' and the word ' specification ' are used; but it is clear that the word ' specification,' when used without the word ' claim ' means description and claim. Therefore a reissue is allowed under section 4916, when the specification is defective or insufficient, in regard to either the description or the claim, or to both, to such an extent as to render the patent inoperative or invalid, if the error arose in the manner mentioned in the statute. In such case there may be a corrected specification—that is, one corrected in respect to description or claim, or both, and there may be a new patent in accordance therewith; but the new patent must be for the same invention. This does not mean that the claim in the reissue must be the same as the claim in the original. A patentee may, in the description and claim in his original patent, erroneously set forth as his idea of his invention something far short of his real invention, yet his real invention may be fully described and shown in the drawings and model. Such a case is a proper one for a reissue. A patent may be inoperative from a defective or insufficient description, because it fails to claim as much as was really invented, and yet the claim may be a valid claim, sustainable in law, and there may be a description valid and sufficient to support such claim. In one sense such patent is operative and is not inoperative,

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yet it is inoperative to extend or to claim the real invention, and the description may be defective or insufficient to support a claim to the real invention, although the drawings and model show the things in respect to which the defect or insufficiency of description exists, and show enough to warrant a new claim to the real invention."

I do not wish to be understood that I am in any way deciding that the applicant is entitled to a reissue, nor do I wish it to be considered that I am holding that he is not so entitled. That is a matter that rests entirely with the Commissioner at the present time.

The appeal is dismissed. As nobody appeared for the respondent, it is dismissed without costs.

*Order accordingly.*

Solicitors for the appellant: *Fetherstonhaugh & Smart.*

# IN THE

# EXCHEQUER COURT OF CANADA

## GENERAL RULES AND ORDERS

## (September 24th, 1913.)

# IN THE EXCHEQUER COURT OF CANADA

## General Rules and Orders.

In pursuance of section 87 of The Exchequer Court Act (R.S. 1906, c. 140) it is hereby ordered that the following General Rules and Orders shall be in force to regulate the practice and procedure in any appeal to the Exchequer Court from the decision of the Commissioner of Patents as provided in 3-4 George V., chapter 17, intituled "An Act to amend the Exchequer Court Act."

328. Any appeal to the Exchequer Court from a decision of the Commissioner of Patents objecting to grant a patent of invention shall be by way of rehearing, and shall be brought by notice of motion in a summary way, and no petition, case, or other formal proceeding except such notice of motion shall be necessary. The appellant may by notice of motion appeal from the whole or any part of any decision of the Commissioner, and the notice of motion shall state whether the whole or part only of such decision is complained of, and in the latter case shall specify such part. Such notice of motion on appeal may be in the form given in Schedule "A" to these Rules.

329. When any person intends to appeal from any decision of the Commissioner of Patents objecting to grant a patent of invention he shall within six months after he has received notice of such decision, as provided by 3-4 George V., c. 17, sec. 1, file a notice of motion in the office of the Registrar of the Court. A copy of the notice of motion shall also be served upon the Commissioner of Patents, and upon any party who may be affected by such appeal. The Exchequer Court or a Judge thereof, may direct service of the notice of motion upon any person who before the hearing of the appeal may appear to have an interest therein, and in the meantime may postpone or adjourn the hearing of the appeal upon such terms as may be thought fit, and may give such judgment and make such order as might have been given or made if the persons served with such notice had been originally parties thereto. Any notice of appeal may be amended at any time as the Exchequer Court, or a Judge, may think fit.

330. Where the appeal cannot be heard at the place and time mentioned in the notice of motion, at least seven days' notice of the time and place subsequently fixed for such hearing shall be given to the Commissioner of Patents, and to any party who may be affected by such appeal.

331. The Commissioner of Patents shall forthwith after the service upon him of the notice of motion by way of appeal transmit to the Registrar of the Exchequer Court all the papers, proceedings and evidence before him relating to the application for the patent in question.

332. On any such appeal the Exchequer Court shall consider and determine the same upon the documents and evidence before the Commissioner of Patents at the date of the decision complained of, and upon such additional evidence relating to the questions in controversy as it may in its discretion direct to be given.

333. The General Rules and Orders regulating the practice and procedure in suits before the Court shall, so far as applicable, prevail in proceedings on appeal from the Commissioner of Patents.

334. The costs of and incidental to all proceedings on such appeals shall be in the discretion of the Court or a Judge. The Court, or a Judge, may order a lump sum in lieu of taxed costs.

335. All appeals from the Commissioner of Patents pending before the Governor in Council at the time of the coming into force of 3-4 George V., c. 17, intituled "An Act to amend the Exchequer Court Act," in which the documents and proceedings relating thereto have been transfered to the Court by the Governor in Council, shall be heard *de novo*, and notice of motion shall be filed and served by the appellant in every such appeal in the same manner as if the appeal had been taken to the Court in the first instance.

Dated at Ottawa, this 24th day of September, 1913.

(Signed) W. G. P. CASSELS,
J. E. C.

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*Schedule "A."*

NOTICE OF MOTION ON APPEAL.

IN THE EXCHEQUER COURT OF CANADA.

ON APPEAL FROM THE COMMISSIONER OF PATENTS.

IN THE MATTER OF an Application for Letters Patent of invention for [stating briefly the nature of the invention.]

A. B. Appellant.

TAKE Notice that this Honourable Court will be moved on the day of or so soon thereafter as Counsel may be heard on behalf of the above named Appellant, that the decision of the Commissioner of Patents made on the day of refusing to grant a patent of invention to the said Appellant [or; *where part only of the decision is complained of:* so much of the decision of the Commissioner of Patents made on the day of as declares (here set out the part which is the subject of appeal)] be reversed, and such order for the relief of the Appellant be made herein as to this Honourable Court may seem just.

Dated at this day of 19 .

(Sgd.) A. B. Appellant, or
C. D.
14-4 Solicitor for Appellant.

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IN THE EXCHEQUER COURT OF CANADA.

GENERAL RULES AND ORDERS.

In pursuance of the provisions of The Colonial Courts of Admiralty Act, 1890, and of the Admiralty Act (R.S. 1906, c. 141) it is hereby ordered that Rules 166 and 168 of the General Rules and Orders regulating the Practice and Procedure in Admiralty Cases in the Exchequer Court of Canada be and the same are hereby rescinded and the following substituted therefor:—

RULE 166.

The party appealing from a judgment or order shall produce to the Registrar of the Exchequer Court the judgment or order or an office copy thereof, and shall

leave with him a copy of the notice of appeal to be filed, and such officer shall thereupon set down the appeal by entering the same in the proper list of appeals, and it shall come on to be heard according to its order in such list unless the Judge of the Exchequer Court shall otherwise direct but so as not to come into the paper for hearing before the day named in the notice of appeal.

The party appealing shall, not less than ten days before the day fixed for the hearing of the appeal, file a duly certified copy of the pleadings in the office of the Registrar of the Exchequer Court.

RULE 168.

When any question of fact is involved in an appeal, the evidence taken before the Local Judge in Admiralty, bearing on such question, shall not less than ten days before the day fixed for the hearing of the appeal, subject to any special order, be brought before the Exchequer Court as follows :—

(*a*) As to any evidence taken by affidavit, by the filing of printed copies of such of the affidavits as have been printed, and office copies of such of them as have not been printed ;

(*b*) As to any evidence given orally, by the filing of a copy of the Judge's notes, or such other materials as the Court may deem expedient.

Dated at Ottawa, 24th September, A.D. 1913.

(Signed) W. G. P. CASSELS,
J. E. C.

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## IN THE EXCHEQUER COURT OF CANADA.

GENERAL RULES AND ORDERS.

In pursuance of the provisions of section 87 of The Exchequer Court Act, (R. S. 1906, c. 140) it is hereby ordered that Rules 34, 35, 37 and 40 of the General Rules and Orders now in force regulating the practice and procedure in certain cases relating to Copyrights, Trade Marks and Industrial Designs be and the same are hereby rescinded, and the following substituted therefor :

RULE 34.

In the case of any proceeding for the registration of any copyright, trade mark or industrial design, a notice of the filing of the petition, giving the object of the application and stating that any person desiring to oppose it must, within fourteen days after the last insertion of the notice in the *Canada Gazette*, file a tatement of his objections with the Registrar of the Court and serve a copy thereof upon the petitioner, shall be published in four successive issues of the *Canada Gazette*. The notice of the filing of the petition in the case of any proceeding for the registration of any copyright, trade mark or industrial design, may be in the form published in Schedule "A" hereto. In the case of any proceeding to have any entry in any register of copyrights, trade marks or industrial designs, expunged, varied or rectified, it shall not be necessary to publish any notice of the filing of the petition.

RULE 35.

In the case of any proceeding for the registration of any copyright, trade mark or industrial design, a copy of the petition and notice above mentioned shall be

served upon the Minister of Agriculture and upon any person known to the petitioner to be interested and to be opposed to the application.

In the case of any proceeding to have any entry in any register of copyrights, trade marks or industrial designs expunged, varied or rectified, it shall not be necessary to serve a copy of the petition upon the Minister of Agriculture, and it shall suffice if such petition be served upon any person known to the petitioner to be interested in and to be opposed to the application.

RULE 37.

In the case of any proceeding for the registration of any copyright, trade mark or industrial design, if any person appears to oppose the application he shall, within fourteen days after the last publication of the said notice in the *Canada Gazette*, file with the Registrar and serve upon the petitioner a statement of his objections to the application.

RULE 40.

Notice of trial in any proceeding for the registration of any copyright, trade mark or industrial design, shall be given to the Minister of Agriculture and to the opposite party if the application to register be opposed. But in the case of any proceeding to have an entry in any register of copyrights, trade marks or industrial designs expunged, varied or rectified, notice of trial shall be given to the opposite party only.

Dated Ottawa, 24th September, A. D. 1913.

(Signed) W. G. P. CASSELS
J. E.

—

*Schedule "A."*

NOTICE.

IN THE EXCHEQUER COURT OF CANADA.

IN THE MATTER of the petition of A.B. of the City of { Manufacturer, or as the case may be }

and

IN THE MATTER of
The Trade Mark consisting of

NOTICE is hereby given that, on the day of 19 there was filed, in the Exchequer Court of Canada, a petition of A.B., of the City of etc., that a certain trade mark described in the said petition, as consisting of [here give description] be registered as a trade mark in the Register of Trade Marks in the Department of Agriculture at Ottawa.

Any person desiring to oppose the said petition must, within fourteen days after the last insertion of the present notice in the *Canada Gazette* (the date of the last insertion being the day of 19 ) file a statement of his objections with the Registrar of the Exchequer Court of Canada at Ottawa, and serve a copy thereof upon the petitioner or his solicitor.

Dated this day of 19 .

C. D. [Petitioner in person]
or E. F.
No. Street, Ottawa,
Solicitor for the petitioner.

HIS MAJESTY THE KING, on the information of the Attorney-General of Canada

PLAINTIFF;

AND

T. MEDLEY RICHARDS and GERTRUDE RICHARDS

DEFENDANTS.

1912
Oct. 10.

*Railway—Public Work—Injurious affection of property—Construction—Operation and Maintenance.*

In enacting that compensation be paid to persons whose lands are injuriously affected by the construction of a railway, Parliament must be taken to have contemplated not only such damages as result from the actual construction of the embankments, tracks and buildings of the railway, but also damages arising from the maintenance and operation of the railway when completed.

2. In assessing compensation for real property expropriated by the Crown primarily only such damages may be allowed as are referable to the land itself and not such as purely and simply affect the person or business of the owner; but where the whole of the owner's property upon which he has been carrying on business, is taken and the property has a special value for the purposes of his business, then its special value as a business site becomes an element in the market value of the land and must be considered in assessing the value.

THIS was an information filed by the Attorney-General of Canada seeking to have compensation assessed for the taking of certain lands for a public work, and for the injurious affection of other lands belonging to defendants.

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

The case was heard before the Honourable Mr. Justice Audette at Edmundston, N.B., on the 10th and 11th days of September, 1912.

*J. M. Stevens*, K.C., *T. J. Carter*, K.C. and *H. Lawson* for the plaintiffs;

*H. A. Powell*, K.C., for the defendants.

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THE KING v. RICHARDS.

Reasons for Judgment.

AUDETTE, J. now (October 10th, 1912) delivered judgment.

This is an information exhibited by the Attorney-General of Canada whereby it appears, *inter alia*, that the Commissioners of the National Transcontinental Railway have entered upon and taken for the use of His Majesty The King, in the construction of the Eastern Division of the said railway, certain land and real property, belonging to the defendants herein, and described in the information as two pieces or tracts of land, viz.: A.—containing seventy-one hundredths (.71) of an acre; and B.—containing one acre and fifty-seven hundredths (1.57) of an acre.

A plan and book of reference relating to the same were deposited of record on the 23rd July, A.D., 1907, in the office of the Registrar of Deeds for the County of Madawaska, N.B.; and a corrected plan and description of the said lands and real property were also deposited in the said registry on the 20th April, A.D., 1910.

At the opening of the trial, a discussion having taken place with respect to the actual area taken by the Crown, William C. McDonald, C.E., was examined by the plaintiff, and it having been made clear from his evidence that the area taken, under description B., mentioned in the information, was one acre and eight hundred and seven thousandths of an acre (1.807) (inclusive of that portion of the reserved road),—leave was given the Crown to accordingly amend the plan and description, and the information.

A further corrected plan and description were accordingly deposited in the said registry on the 30th September, A.D. 1912, and the information amended accordingly. The actual area taken is then the area

taken in description A.....0.71
In corrected description B.....1.807.

Making a total of.....2.517 acres.

It was admitted at the trial that a tender of $3,568, the amount offered by the information, had been made on the 6th October, 1910. This tender was for the area of 0.71 acres together with 1.57 acres. The Crown did not alter its tender in view of the larger area actually taken, alleging the same was, in its estimation, still large enough, and it remains at the same figures.

The defendants' title is admitted.

It is further admitted that possession of the lands was taken by the Crown in 1907.

The plaintiff, by the information, offers to pay the defendants the said sum of $3,568, in full satisfaction for the land taken and for the location, construction and *maintenance* of the said railway. The defendants, by their plea, declare that the amount tendered is wholly insufficient and inadequate and claim the sum of $20,000.

While at Edmundston, where the trial took place, the court, accompanied by counsel for both parties, had the advantage of viewing the locus in quo,—examining the land taken, what was left, and how close to defendants' property both railways are passing.

On behalf of the defendants, two witnesses were heard,—the defendant T. M. Richards and Beloni Nadeau.

*T. M. Richards* bought in 1891 the property upon which his store, dwelling, &c. are situate for $3,500 including the piece to the north of the Temiscouata Railway, upon which the Royal Bank is situate. The latter piece he sold to the Bank last year for $5,000, after having materially improved and repaired

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Reasons for Judgment.

the building which was there when he bought. He values the land left to him alongside of the Royal Bank at $1,000—a piece of land 60 feet by 100 feet. He built his store and the house in which he is now living 17 years ago. Before that time he was carrying on business on Main Street. It is admitted that the part of the land east of Ferry Street was bought for $280 in exchange for another piece of land for which $280 was mentioned in the deed (December 30th, 1896). It is further admitted that $3,500 was paid in 1891, for lot 320, including the Royal Bank property, and being all the land held by the defendants excepting 320A. He moved his business from Main street to the present place on Ferry Street, because it put him more in contact with the American people,—he thought the Ferry Road brought him considerable business from the St. John River. He contends that his business increased on Ferry Street; but since the running of the trains, for the last three years, it decreased. The business carried on by the defendant is that of general groceries, hardware, and catering generally to the farmers. He admits the construction of the road benefited the business and that the fact of making Edmundston a divisional point has given an increase in value to the property, followed by an increase in the municipal valuation.

The defendant claims he has suffered a loss in his business of $3,000 a year,—that his land is worth to him $25,000. Further on he values the land taken at $5,000. The increased risk by fire at $2,000,—his property is not insured. He insured it for one year only. Finally he values the land taken and damages at $12,000,—that is $5,000 for the land, and $7,000 for damages, including $2,000 for damages resulting from increased risk by fire. He is unable to name

anyone who does not now come to his store and deal with him since the building of the railway. He values the property left to him, as a business proposition, at $7,000 to $8,000.

*Beloni Nadeau*, the other witness heard on behalf of the defendants, testified that in 1909 he valued, for the Crown, the land taken and all damages at $6,000; and, if the defendants were obliged to go, leave the place and seek other premises, his valuation was $12,000. He valued all the lands, including that part upon which the buildings are erected at $5,000 and the damages at $1,000.

On *T. M. Richards*, the defendant, being recalled, he said that Mr. Sloat who, in 1909 was as well as the said Beloni Nadeau a government valuator, put a value of $5,000 for the lands and damages, when in company with one Michaud they all three came to his place. He says Mr. Sloat, in January last, when he was no longer a government valuator, repeated the same thing to him. Counsel for the Crown admitted at the trial that both Messrs. Sloat and Nadeau were acting as government valuators under the authority of the Commissioners of the National Transcontinental Railway.

The following witnesses were heard on behalf of the Crown—Joseph M. Martin, Levite Gagnon, and Dr. P. H. Laporte.

*Joseph M. Martin*, a farmer of Edmundston, calls the lands taken "intervale lands," and says the best purposes to which they can be put is farming; because it could not be built upon, as most of it is flooded in the Spring—and he values all the land taken at $1,000. He contends that while the Transcontinental Railway has decreased the value of what remains of the store-stand by $200 or $300, it has increased the

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defendants' other lands on the north of the Temiscouata Railway by 20 per cent. He says that land north of the Temiscouata Railway, about five acres, which he values at $4,000 is worth as much as the land where the store is. He values the remaining lands, where the store is at $500 and the buildings at $4,000 since the expropriation.

This witness is a municipal assessor at Edmundston and has occupied that office at three different times. He does not think that the fact of the defendants' property being now between the two railways would prevent him from going to the store,—but admits it might prevent some one. He says there are other business sites in the town which are better than the one now occupied by the defendant, and that there are a number of other general stores in the town. The Temiscouata Railway passes on the highway, at a level crossing and the Transcontinental passes over the same on an overhead crossing.

*Levite Gagnon*, the Sheriff, a resident of Edmundston for 20 years, who has been an alderman, engaged in fire insurance business—bought and sold land at that place, and says that previous to the building of the Transcontinental Railway, the freshets brought the water to the northern line of the Transcontinental Railway, and that the land taken was not fit for building purposes. He values the land taken at between $800 to $1,000 and the damages to the balance at $2,000. Contends that the lands to the north of the Temiscouata Railway have increased in value because of the Transcontinental Railway coming to Edmundston and making it a divisional point—and that his valuation of $2,000 should therefore be decreased by 25 per cent, as representing such increase, leaving it at $1,500. As a condition for getting the

Divisional Point, the Municipality had to install water works in the town, and supply the government shops with it; and because of the water works being installed the fire insurance rates have gone down since the building of the Transcontinental Railway. Prior to January 1912 the rates for stores were 2½ per cent,—since that date they have come down to 1½ per cent. For dwelling houses previous to January, 1912, the rates were $1.75,—since that date the ratio is $1.25. He says there are better business stands in Edmundston than Richards' place and contends that the business generally has been materially increased in the town by the building of the Transcontinental Railway, and especially by its being made a divisional point.

Dr. *Pio H. Laporte*, Mayor of Edmundston, who was alderman and assessor in previous years, has been a resident of the place for eleven years and has bought land there. He says that the municipal valuation at Edmundston is made on a basis of 80 per cent. of the market value for the land, and 35 per cent. for the dwellings. When assessor, in 1908, he valued the part of the defendants' property on the north of the Temiscouata Railway, and the part in green on plan exhibit No. 3 at $2,000. On St. Francis Street, where the Royal Bank Building is which Richards then owned, including the garden lot, he valued at $3,000,—the little building and shed at $250. The land where the store is, excepting the little building and shed, he valued at $1,000 and the buildings at $3,000. He says that property in Edmundston has increased in value because of the Transcontinental Railway.

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| | |
|---|---|
| He values the damage to the property at.. | $2,000 00 |
| The land on the east side of Ferry St. at | 300 00 |
| and the balance at..... | 700 00 |
| Making a total of..... | $3,000 00 |

He does not think that the building of the Transcontinental Railway will affect the driving to Mr. Richard's shop. This closes the evidence.

Dealing first with the question of loss of business, the Court has arrived at the conclusion that it is not an element calling for compensation, and that the defendant cannot recover upon that ground in the present case. The damages the defendant is entitled to recover are such as are inherent in the land itself, and not to the person or to the defendant's business (1).

The damages which he can recover are those which would go to decrease the market value of the land, taking into consideration its prospective capabilities and putting it to the best purposes the owner can apply it. The damages resulting from the expropriation are only those which refer to land or to some interest in the land, and do not include personal damages (2).

The only case where damages for loss of business could be allowed, would be where the whole of the defendant's land and property is taken and where a business site which is part of the value of the land is taken away,—forcing the owner to abandon a locus upon which he had established a business—as in the cases of *The King v. Rogers* (3); *McCooley v. City of Toronto* (4); and *The King v. Condon* (5). But in this latter class of cases it must be noticed that it is

(1) *Lefebvre v. The Queen*, 1 Ex. C. R. 121; *McPherson v. The Queen*, 1 Ex. C.R. 53.

(2) Browne & Allan. Law of Compensation, p. 284.

(3) 11 Ex. C.R. 132.

(4) 18 Ont. R. 416.

(5) 12 Ex. C.R. 1.

not damages of a personal nature that is allowed, but damages for the loss of a good business site, having its market value over and above the inherent value of the land itself, taking in consideration the special good purposes to which it can be put.

The damages for loss of business purely and simply are too remote and depend on the commercial ability and industry of the individual, are and not an element inherent to the land (1).

Moreover, in the present case the court must find that the statement prepared by the defendant to show decrease in his business, is not one prepared on a good business basis, and is one which would not be accepted by any Bank, and it would not be relied upon in any business transaction. It is further in evidence that business generally has increased in the present locality since the building of the Transcontinental Railway, and from the fact of its being made a divisional point of the railway—and this view must be accepted as the one naturally expected under the circumstances. It is perhaps also well to mention that the defendant left Main Street, about 17 years ago, to carry on business on Ferry Street, and he says he did so with the view of catering to the American trade. This trade would now be materially affected by the building of a railway on the American side of the River St. John, and which passes on the other side of the river where it has a station directly opposite the Ferry and Ferry Street. The construction of this railway would necessarily entail the settlement of business places near the station, thus retaining the American people on their side of the river. The defendant when on the stand was also unable to name any person who had discontinued to go to his shop since or on

(1) *Rex v. London Dock*, 5 Ad. & E. 163; *Ricket v. Metropolitan Ry.* 2 H.L. 175.

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account of the building of the Transcontinental Railway.

There is, however, no doubt that the building of the Transcontinental Railway has damaged the defendant's property, and that he should recover therefor.

There is another question of law raised by the Crown's counsel, which should also be disposed of before coming to the assessment. He contends, "the defendant is not entitled to damages resulting from the operation of the railway." In support of this view the learned counsel alleges that under sub-sec. (e) of sec., 3, chap., 39 R. S. C. 1886, the Minister is authorized to contract for the purchase of any land "or other property necessary for the *constructing*, "*maintenance* and *use* of the public work....", and to pay any damage "sustained by reason of anything "done under and by authority of the said Act." But, he says, in the present Expropriation Act, chap. 143, R. S. C. 1906, the above sub-section is wholly omitted, and the amount of compensation is limited by sections 15 and 22 to the value of the land and for damages occasioned thereto by the *construction* of the public work, and further that under section 50, of the latter Act, damages caused by the construction shall be off-set by the advantages derived from the *construction* and *operation*.

This court cannot agree with the learned counsel when he says that sub-sec. (e) of sec. 3 of R. S. C. 1886, has been wholly omitted in chapter 143, R. S. C. 1906. Indeed, sub-section (b) of section 3, chapter 143 R. S. C. 1906, gives the Minister authority to enter upon and take possession of any land, etc., necessary for the *use, construction, maintenance, &c.* of the public work. Therefore the words "*use, con-*

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*struction and maintenance*" appear still in the R. S. C., 1906. The necessary inference being, and it naturally arises from the law of eminent domain, that compensation is assessed for all damages sustained through the exercise of the statutory powers of constructing the railway.(1) Even if the Act did not contain substantial provision therefor, taken as a whole it would give the owner of the land which has been injuriously affected, by the operation of the railway or otherwise, a right to claim compensation.

The legislature when giving the proprietor the right to compensation for the land taken and for injurious affection, must have had in view the ultimate object aimed at, the works when completed and in operation, not abstractedly as a mere embankment, but in connection with its appropriate traffic and with ordinary incidents of a business undertaking.(2)

Then the tender by the information is in full satisfaction for the location, construction and *maintenance* of the said railway. Would not the word maintenance imply 'operating'? A railway after its construction would not, as a business proposition, be maintained if not operated. Sir Frederick Peel, in delivering judgment in *re The Portpatrick Ry. Co. v. The Caledonian Ry. Co.*(3) said: "In our decision we referred particularly to "the 4th and 5th articles of the agreement 1864, with the "view of showing how many different items we intended "in the word "maintenance" as we used it; and the "order therefore when it speaks of maintenance must "be deemed to refer, not only to the maintenance

(1) Cripps on Compensation, 5th Ed. pp. 134, 135, 206.

(2) Hammersmith Ry. Co. *v.* Brand, L. R. 4 H. L. 171, 187; Simkin *v.* London & N. W. Ry. Co., 21 Q. B. D. 453; Cowper-Essex *v.* Local Board 14 App. Cas. 153; Duke of Buccleuch's case, L. R. 5 H. L., 418; City of Glasgow U. Ry. Co. *v.* Hunter, L. R. 2 H. L. Sc. 78; The Straits of Canseau Marine Ry. *v.* The Queen, 2 Ex. C. R. 113; McLeod *v.* The Queen, 2 Ex. C. R. 106.

(3) 3 R. & C. Traf. Cas., 201.

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"of the permanent way, but also to the *management* "*and working of the line.*"

Therefore in assessing the damages herein consideration will be given to the operation of the railway and damages allowed therefor, and the law as laid down by the Supreme Court of Canada in the case of *Vezina v. The Queen*,(1) is considered as still obtaining and must be followed.

It will appear from the plan, Exhibit No. 3, that part of the defendant's property is built on the land owned by the Temiscouata Railway—it is built on part of the right of way of the said railway, and the track itself passes quite close to the defendant's property. Therefore the defendant was already suffering damages from an adjoining railway before the Transcontinental Railway was constructed, and while the question of increase of danger from fire followed by an increase in premiums for fire insurance is a legal element for compensation, it must be observed that in the present case it is in a large degree shared by the Temiscouata Railway which passes in such close proximity to the defendant's property. It is contended that if the Temiscouata Railway were to oust the defendant from that part built on the railway, he would have hardly any space left on the remaining land to move his buildings back; but the court finds, after viewing the premises and hearing the evidence of the Engineer, W. C. McDonald, that there is enough land left for the defendant to so move back his buildings but with perhaps a curtailment of ease in the enjoyment of the property. However, has it ever been contemplated by the defendant to do so since the expropriation by the Transcontinental Railway? He has since that date, namely in 1910,

(1) 17, S. C. R. 1.

put up two new buildings, a cow barn and a hencoop as indicated on the plan, Exhibit No. 3.

There is, however, obviously no doubt the defendant has suffered material damages from the expropriation. The railway embankment on Ferry Street runs as high as 16 feet, and at the other end, at the point where the land intervenes with the Temiscouata Railway, as high as 7½ feet. The water front and the view have been taken away, and he is left with rather a congested place within which to carry on his business; however, it is large enough for his purposes, but with less convenience.

The whole of the evidence may be summarized, by saying that while the defendant claims by his pleadings $20,000, under his evidence that claim is reduced down to between $10,000 and $12,000—and Beloni Nadeau, together with the other Government valuator, (Sloat) did respectively offer him $6,000 and $5,000 in 1909. It is unnecessary to decide how far an unaccepted tender could be considered, but in valuing a property it is always a starting point that one cannot overlook. Both Nadeau and Sloat, the government valuators, were not called by the Crown, and they had valued this property in 1909. One of the three witnesses heard by the Crown values the land taken at $1,000; and the other two witnesses value the land and damages at $3,000. The two pieces of land in question were, under the known circumstances, bought respectively in 1891 and 1896 for $3,500 and $280 making a total of $3,780, and buildings were subsequently erected on part of it.

The amount tendered by the information is $3,568, but by its amendment the Crown has taken almost an additional quarter of an acre (237–1000) and has not varied its tender. The Government's own valua-

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tors Nadeau and Sloat who valued properties for the plaintiff over a distance of 25 miles or more, now value respectively the land and damages here at $6,000 and $5,000. While these amounts appear high, one cannot forget they were made by men sent there by an interested party and that they had experience as valuators.

Now, taking all the circumstances into consideration, the court is of opinion that the defendant is entitled to recover for the land taken and for all past present and future damages, including the damages resulting from the operation of the railway, the sum of five thousand dollars.

There will be judgment as follows, viz.:—

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

2nd. The defendants are entitled to recover from His Majesty the King, the sum of five thousand dollars, with interest thereon from the 23rd day of July, A.D. 1907, to the date hereof, upon giving to the Crown a good and sufficient title, including a release of dower rights in the property, if any.

3rd. The defendants will have the costs of action, which are hereby fixed at the sum of two hundred dollars.

*Judgment accordingly.*

Solicitors for plaintiff: *Stevens & Lawson.*

Solicitors for defendants: *Powell & Harrison.*

1912
Nov. 4.

IN THE MATTER of the Petition of Right of

FRANK W. PICKELS ..... SUPPLIANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

*Public Work—Ice Piers to improve Navigation—Public Harbour—Works constructed on private property—Riparian Rights—Injurious affection—Compensation.*

The Dominion Government erected a series of ice piers upon a portion of the bed of the Annapolis River, in Nova Scotia, for the purpose of improving navigation. These piers were built in front of the suppliant's land and premises, acquired by provincial Crown grant since Confederation, which were actually used for ship-building purposes in a small way, and had a potential value for a large shipbuilding industry and cognate business. Pier No. 1 was built on a part of the foreshore between high and low water mark, belonging to the suppliant.

Held, that as the property upon which Pier No. 1 was built formed no part of a public harbour, and belonged to the suppliant, he was entitled under the provisions of sec 19 and sec. 20, sub-sec. (b), of The *Exchequer Court Act* to compensation for so much of his land as was taken.

2. That in so far as the riparian rights of the suppliant were injuriously affected by the construction of the piers in question, he was entitled to compensation therefor on the basis that such rights were peculiar to him and distinct from those held in common by him with the rest of the public.

PETITION OF RIGHT for damages for land taken by the Dominion Government for a public work, and for the injurious affection of other lands belonging to the suppliant.

The facts are stated in the reasons for judgment.

The case came on for hearing at Annapolis Royal, before The Honourable Mr. Justice Audette on the 26th September, 1912.

1912

PICKELS v. THE KING.

Argument of Counsel.

*T. S. Rogers*, K.C., for the suppliant, contended that the Court had undoubted jurisdiction, under the provisions of sec. 20 (b) of *The Exchequer Court Act*, to entertain a claim for injurious affection, such as put forward in this case. Jurisdiction is also given in such a case by *The Public Works Act* and by Section 35 of *The Expropriation Act*. The injury to the use of the property as a shipyard is established by the witnesses for the Crown; while the evidence as a whole shews that the prospective commercial capabilities of the property are rendered practically valueless by the existence of the ice piers in their present situation. He cited and relied on: *Lyon v. Fishmongers Case*(1); *The Queen v. Barry* (2); *Robinson v. The Queen* (3); *The Queen v. Moss* (4).

The measure of damages is the value of the lands having regard to their best practical adaptibility and the value with that purpose eliminated by reason of the construction of the work. He cited here *The King v. Rogers* (5); *McQuade v. The King* (6); *Ripley v. Great Northern Ry. Co.* (7); *In re Tynmouth Corporation* (8); *In re Bailey and Isle of Thanet Light Ry. Co.* (9)

The locus in quo is no part of a public harbour. Whatever argument could have been imposed upon the decision in *Holman v. Green* (10) prior to 1898 would be of no force since the judgment of the Privy Council in the *Fisheries Case* (11). The Crown in respect of Dominion Government has no proprietary rights in the bed of the Annapolis River.

(1) (1876) L. R. 1 A. C. 662.
(2) (1876) 2 Ex. C. R. 338.
(3) (1895) 4 Ex. C.R. 439; 25 S.C.R. 692.
(4) (1895) 5 Ex. C. R. 30; 26 S.C.R. 322.
(5) (1907) 11 Ex. C. R. 132.
(6) (1902) 7 Ex. C. R. 318.
(7) (1875) L. R. 10 Chan. 435.
(8) (1904) 89 L. T. 557.
(9) (1900) 1 Q. B. 722.
(10) (1881) 6 S. C. R. 707.
(11) (1898) A. C. 700.

*J. A. McLean, K.C.*, for the respondent, argued that the *Fisheries Case* relied on by the suppliant did not apply as the locus was part of a public harbour. Ships loaded and discharged cargo at wharves above the property of the suppliant. Their Lordships of the Privy Council in the *Fisheries Case* make this important observation as to the foreshore forming part of the harbour: "If for example, it had actually been used for harbour purposes, such as anchoring ships or landing goods, it would, no doubt, form part of the harbour."

The Crown has done that which is complained of by authority of an Act of Parliament, and no action for damages would lie at common law; and it is only when such an action would lie against the authority expropriating that compensation can be claimed under *The Expropriation Act*, and similar Acts. He cited *In re Stockport &c. Ry. Co.* (1); *Stebbing v. Metropolitan Board of Works* (2) *Caledonia Railway Co. v. Walker's Trustees* (3); *Attorney-General v. Metropolitan Ry. Co.* (4); *Hammersmith Ry. Co. v. Brand* (5); *City of Glasgow Union Ry. Co. v. Hunter* (6); *Hopkins v Great Northern Ry. Co.* (7); *Ricket v. Metropolitan Ry. Co.* (8); *Beckett v. Midland Ry. Co.* (9); *Reg. v. Vaughan* (10); *Bigg v. Corporation of London* (11).

AUDETTE, J. now (November 4, 1912) delivered judgment.

The suppliant brought this petition of right to recover from the respondent the sum of $20,000 as compensation for land taken and for damages to his

(1) (1864) 33 L. J. Q. B. 251.
(2) (1870) L. R. 6 Q. B.
(3) (1882) 7 A. C. 259.
(4) (1894) 1 Q. B. 384.
(5) (1869) L. R. 4 H. L. 171.
(6) (1870) L. R. 2 H. L. 78.
(7) (1877) 2 Q. B. D. 224.
(8) (1894) 70 L. T. 547.
(9) (1867) L. R. 3 C. P. 82.
(10) (1868) L. R. 4 C. P. 190.
(11) (1873) L. R. 15 Eq. 376.

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property, resulting from the erection of certain ice piers on and opposite his land and premises.

He alleges in his petition that he was, since the 12th December, 1908, the owner and occupier of a certain lot of land and premises situate in the town of Annapolis Royal, fronting upon the Annapolis river and including the shore between high and low water marks; that he has established and built a shipbuilding plant on the said premises, and carried on there the business of building ships; and further that when he acquired the land he contemplated constructing a wharf on a portion thereof, and using a portion as a lumber yard, shipping lumber therefrom over and from this wharf, and carrying on a general wharf and shipping business. The said lands, he alleges, by reason of their nature, situation and location, are only and solely, or chiefly, adapted and suitable as a site for a shipbuilding plant, lumber yard and wharf, and a business to be carried on in connection therewith.

He further states that between the 1st June, 1910 and the 31st December, 1910, a public work, within the meaning of *The Exchequer Court Act*, consisting of three ice piers, was constructed and erected by the Crown upon the bed and shore of the said Annapolis River in front of his land, fronting on the said river,—one of the piers being so constructed and erected upon his land between high and low water mark, and two others in front of and in close proximity to his land and premises.

And he further alleges that by reason of the construction of the said piers he has subsequently been unable to make use of his shipbuilding plant, or to build or launch vessels there; or to carry on business of a lumber yard, or shipping business, or to erect a wharf on his land which has become and is rendered

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wholly unsuitable for many purposes for which it would be adapted, and otherwise used, if the said piers had not been constructed, including the purposes of the various businesses already mentioned. He concludes by alleging that his land has become and is very injuriously affected and greatly reduced in value by reason of the construction of the piers.

The Crown, by its plea, denies that the suppliant has suffered any loss or damage, and adds if he has suffered any such loss or damage, no action lies in respect of the same as against the Crown. And the Attorney-General further says that, if any ice piers were constructed by the Crown, one of the said piers was already erected and the location of the others clearly indicated at the time the suppliant became the purchaser of the land mentioned in his petition of right and that the land occupied by the said piers had been so taken or expropriated by the Crown in the interest and for the improvement of navigation; and the suppliant's title, if any, was and is subject to the construction and maintenance upon the said land of the said ice piers. And the Attorney-General further says that the petition of right discloses no cause of action against the Crown.

The suppliant bought the property in question in this case on the 12th December, 1908, for the admitted sum of $1,050. The boundary of his property as appears by his deed, runs down to low water mark on the Annapolis River, and this boundary also appears on the Crown grant given, by the Nova Scotia Government, to his predecessor in title on the 1st March, 1873.

The suppliant claims that, as Pier No. 1 is built on the foreshore between high and low water mark; and as both his purchase deed and the provincial

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Crown grant (made, since Confederation, in the year 1873, to his predecessors in title) give him a fee simple in the said foreshore, he is entitled to compensation for the value of the land or locus upon which the said Pier No. 1 is erected. The suppliant's counsel, at the close of his case moved to amend the petition of right by claiming the value of this land,—undertaking, at the same time, that if the sum of $25 be paid for this parcel of land he would waive expropriation proceedings, convey the land and give title to the Crown for the same upon the said compensation money of $25 being paid over to the suppliant. In the view the Court takes of the petition of right as drawn, such amendment is unnecessary, as by the recital of the same, especially by paragraphs 3 and 6, the suppliant claims both for the value of this land and for damages. The prayer of the petition is very short and general, only asking that the suppliant "be paid $20,000 "or such other sum as to this Honourable Court shall seem just, with costs." The application for this amendment is refused as unnecessary under the circumstances, and the question as to whether or not the suppliant has good title in the said locus will be considered hereafter.

It is common ground at Bar and clearly established that Pier No. 1 has been erected between high and low water marks, to which suppliant's title extends and which is derived from a Crown grant of the Nova Scotia Provincial authorities since Confederation. It is contended by the Crown that the locus is in a "public harbour," and therefore the property of the Dominion Government under the B. N. A. Act, 1867.

What is a public harbour within the meaning of section 108 of the B. N. A. Act 1867? The defini-

tion, if definition it can be called as the definition must be clearer than the thing defined, is now to be found in the judgment of the Judicial Committee of the Privy Council, in the case now known as *The Fisheries Case* (1) from which the following excerpt is taken, viz.:—

"With regard to public harbours their Lordships "entertain no doubt that whatever is properly com- "prised in this term became vested in the Dominion "of Canada. The words of the enactment in the "3rd schedule are precise. It was contended on "behalf of the provinces that only those parts of "what might ordinarily fall within the term 'harbour' "on which public works had been executed became "vested in the Dominion, and that no part of the "bed of the sea did so.

"Their Lordships are unable to adopt this view. "The Supreme Court in arriving at the same con- "clusion, founded their opinion on a previous de- "cision in the same Court in the case of *Holman* v. "*Green* (6 Sup. Can. Rep. 707) where it was held "that the foreshore between high and low water mark "on the margin of the harbour became the property "of the Dominion as part of the harbour.

"Their Lordships think it extremely inconvenient "that a determination should be sought of the abstract "question, what falls within the description 'public "harbour?' They must decline to attempt an ex- "haustive definition of the term applicable to all "cases. To do so would, in their judgment, be likely "to prove misleading and dangerous. It must depend "to some extent, at all events, upon the circumstances "of each particular harbour, what forms a part of that "harbour. It is only possible to deal with definite

(1) (1898) A. C. p. 701.

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"issues which have been raised. It appears to have "been thought by the Supreme Court in the case of "*Holman v. Green* that if more than the public works "connected with the harbour passed under that word, "and if it included any part of the bed of the sea, "it followed that the foreshore between the high and "low water-mark, being also Crown property, like-"wise passed to the Dominion.

"Their Lordships are of opinion that it does not "follow that, because the foreshore on the margin "of a harbour is Crown property, it necessarily forms "part of the harbour. It may or may not do so, "according to circumstances. If, for example, it "had actually been used for harbour purposes, such "as anchoring ships or landing goods, it would, no "doubt, form part of the harbour; but there are other "cases in which, in their Lordships' opinion, it would "be equally clear that it did not form part of it."

From the perusal of the above, it will be found that if the suppliant's property was situate in a public harbour at the time of Confederation, it passed to the Dominion Government under the B. N. A. Act, 1867, and that the provincial Crown grant would therefore be *ultra vires*. Under the facts of the present case can it be found that the land in question formed part of a public harbour at Confederation? The question must be answered in the negative, and the Provincial Crown grant must stand, under the circumstances of this case, the evidence adduced being insufficient to rebut it. No reliable evidence to that effect has been adduced. Public moneys were expended at Annapolis by the Dominion Government since Confederation and subsequent to the date of the Pro-

vincial Grant, but that would not make it a public harbour at Confederation (1).

The Act to provide for the appointment of harbour Masters for certain Ports in the Provinces of Nova Scotia and New Brunswick (36 Vict. Ch. 9) was, in 1873, made applicable to the Port of Annapolis, by a proclamation which appears in the Canada Gazette, Vol. 8, p. 1107.

It is true Annapolis Royal, which was visited by De Monts as far back as 1604, is the oldest settlement on that part of the coast; but can it be said that there was then at Confederation a public harbour, extending from Digby Gut to Bridgetown, a point about 18 miles up the river from Annapolis, comprising both the Annapolis Basin and the river? It is true that there are four Government wharves erected since Confederation between the Narrows and Bridgetown; but the fact of any wharf being erected would not make the place a public harbour,—not any more than all the wharves on the coast from Belle Isle to Quebec would make that part of the St. Lawrence a public harbour. Some of the witnesses contended that Annapolis Harbour extended to the head of the narrows at the west end of French Basin,—others that the harbour ended at the Acadia Wharf.

From the nature of the narrows, the topography of the surroundings, and the facts in evidence in the present case, this court finds that if there is a public harbour proper at Annapolis, it does not extend any further east than to the western boundary of the suppliant's property, or to the eastern end of the Acadia Wharf property. Indeed, the river narrows down to a very small width opposite the suppliant's property with a rise and fall of tide of 27 feet in the Spring;

(1) See General Report of Minister of Public Works, from 30th June, 1867 to 1st July, 1882, p. 214.

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the current is very swift and strong, and the river is very deep, making it undesirable for anchoring,—although physically possible. There were no wharves before Confederation on either side of the river opposite the narrows, and this court fails to find from the evidence adduced any element that would tend to make the suppliant's property part of a public harbour, under the decision in the *Fisheries Case* above cited.

Coming to the question of injurious affection or damage to the suppliant's property, the court finds that if any damage is proved he is entitled to recover under sub-sec. (b) of sec. 20 of *The Exchequer Court Act*, which reads as follows: "Every claim against the "Crown for damage to property injuriously affected "by the construction of any public work"—There can be no doubt that the piers in question are public works, within the statutory definition—and the decisions of the courts. The suppliant would further be entitled to recover under section 19 of the same Act which gives the court jurisdiction where "the land of the subject is in the possession of the Crown".

Has the suppliant suffered any damages by the erection of these piers? Has his property decreased in value from the same? The suppliant tells us in his testimony that when he bought in December 1908, he contemplated using the property as a ship-yard, lumber-yard with a wharf, and also constructing a marine slip. He said he thought of expending $8,000 to $10,000 on the wharf and $35,000 on the marine slip.

Since the erection of the piers the suppliant launched two vessels of 600 and 300 tons respectively. The first vessel was launched successfully, and the second although a smaller one, being delayed in the launching, went off only at the ebb tide and, collided with one of

the piers and thereby suffered damage. It is contended by some experienced witnesses that a vessel should never be launched with the ebb tide, and the court inclines much in sharing that view. Indeed if a vessel launched with the ebb tide were going aground, it might be a serious matter to haul her off the ground with a falling tide. Then, at this very place, with the ebb tide, the vessel is taken down to the piers by the tide itself. However, it was contended and rightly so that with an eastern wind it would not be safe to launch a vessel there, as the wind would carry the vessel to the piers. The result of the evidence would go to show that while the use of this property as a ship-yard is still quite available and good, yet more care will have to be exercised in launching vessels, and that is the conclusion arrived at by the court.

It is also in evidence from the testimony of the witnesses adduced on both sides that the piers would interfere in docking vessels at a wharf constructed on the suppliant's property.

With respect to the marine slip, a deal of conflicting evidence has been adduced as to whether or not it would be advisable to build a marine slip on this property and as to whether there would be any justification in expending the sum of $35,000, named by suppliant, upon such works at Annapolis. The court has read the petition of right, with care, and has intentionally recited at the opening the several grounds upon which the suppliant rests his claim for damages; but has failed to find any mention of a marine slip in his petition of right. Forsooth, the suppliant alleges therein that "the said lands and premises "by reason of their nature, situation and location, "are *only* and *solely* or *chiefly* adapted and suitable "as a site for shipbuilding plant, lumber yard and

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"wharf, as aforesaid, and businesses to be carried on "in connection therewith." Was not the idea of this marine slip an afterthought coming to the suppliant's mind since the institution of this action? If so, in view of his evidence, it would only go to the weight of the evidence, because if a marine slip is a practicable and advisable business undertaking at Annapolis, it would perhaps form an element for consideration. However, in the view this court takes of the question of damages, it becomes in a certain degree unnecessary to consider this matter any further. It must, however, be said that the evidence goes to show that the piers would interfere with a marine slip, if one were constructed on the suppliant's property.

Indeed, under the *Fishmongers Case*, and the cases therein referred to, it clearly follows that a riparian owner enjoys rights, *ex jure naturae*, which are quite distinct from those held in common with the rest of the public. Besides the use of the water for domestic purposes, which in a case of salt water is however obviously less valuable, the riparian owner has over and above the rights enjoyed by the public, the right of access to and from the river from his property or wharves erected thereon. And if any piers have been erected on or about his property, that takes away, or at all events alters and abridges the riparian owner's right to the free and lawful application of his property to any business purposes he sees fit, and he is therefore entitled to compensation for this injurious affection. (1)

At all events, having found the Crown has taken the piece of land upon which Pier No. 1 is erected,

(1) *Fishmongers Case*, 1 App. Cas., 622; *Pion* v. *North Shore Ry. Co.*, 14 App. Cas. p. 612; *Bigouette* v. *North Shore Ry. Co.*, 17 S. C. R. p. 363; *Merritt* v. *City of Toronto*, 27 Ont. R. 1; *Ratte* v. *Booth et al*, 11 O. R. 494; 14 Ont. App. Rep. 419; 15 A. C. 188.

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the case comes within sec. 20, sub-sec. (b) and sec. 19 of *The Exchequer Court Act*; and as a parcel of land is taken would it not also follow that under *The Expropriation Act* damages should be paid for injurious affection to the balance of the property owned by the claimant? This property has been injuriously affected and the suppliant is entitled to recover both under the statutory law and the case law above cited.

Coming to the question of *quantum* of damages, we must bear in mind that the property was bought by the suppliant in December, 1908, for $1,050. The suppliant, and witness Whitman, contend it was sold at that price in view of the above mentioned prospective improvements which the suppliant was to put upon the property, thus increasing the value of the adjoining property which belonged to the vendor. But there is no such covenant in the deed of sale whereby the purchaser was to improve the property in any manner whatsoever. The suppliant paid the market value of the land at the time. George E. Corbett, an old resident of Annapolis, and a person well versed in commercial undertakings, thinks $1,050 in 1908 for this property was a pretty good price. Another witness Clarence W. Mills, says $1,050 in 1908, is "a fairly good price for the property." The suppliant himself at page 35 of his evidence would appear to admit as much. There is also the witness Edward F. Neville who placed a valuation of $1,500 in 1908. Further on in his evidence he named a high figure which he subsequently explained by saying that he named the amount in view of the business the suppliant proposed to start, and the money he was to expend upon the property—and he added he did not take into consideration whether the undertaking would pay.

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Witness Corbett bought a deep water property below the town, not quite half a mile from the Acadia Pier, on the Annapolis side, with about 1,200 to 1,300 feet frontage for which he paid between $700 and $730. About three years ago he also sold to the suppliant for $3,000, two wharves with a block of land on a front street, 40 feet on St. George Street, running back to the front wharf 90 feet or 100 feet. One wharf is 200 feet long by 30 feet wide,—with a large block between—the other wharf is 100 feet by 40 feet wide. It is true the wharves were not in good repair, but such a sale will give an idea of the value of the property at Annapolis. Then it was contended by the Crown and is shown by the evidence, that this question of building the piers on the river to retain the ice in the winter and give a clear port below the Narrows, was agitated as far back as 1902—that the matter was mentioned at a meeting of the Board of Trade, and witness Corbett went to Ottawa asking for it. Furthermore, tenders were asked in March 1908 for these works, and after the contract had been first accepted the contractors refused to proceed with the works and the contract was given to a second firm, and the works were finally begun in June, 1909. The demand for tenders was posted in the Annapolis post office. In view of these facts, counsel for the Crown contended, and not without reason, that the suppliant must have been aware of such project of building the piers at the place where they are today, at the time he bought in December 1908. The suppliant, a keen business man who would likely acquaint himself with anything of public interest in Annapolis, denies the knowledge at the time he purchased that the piers were to be erected where they now stand, although the natural inference would be the other way. The claim made

by the suppliant in his evidence runs as high as $25,000 with a close follower in the person of the vendor's brother, who acted as agent in the sale of this land. How could a bare piece of land bought in December 1908 for $1,050 be damaged to the extent of $20,000 or $25,000 in June 1909 (the time at which the erection of the piers was started) when no improvements were made upon the property and no preparation made for that purpose. Then the damages that are recoverable here are not damages in the nature of loss of business; the damages the suppliant is entitled to recover are damages that are inherent to the land and not to the person or to the suppliant's business (1).

The price paid for this property in December, 1908, appears to have been the fair market price at the time and the court is of opinion that under all the circumstances of the case, if the sum of five hundred dollars, inclusive of the twenty five dollars for the value of the land upon which Pier No. 1 has been erected, is paid the suppliant, he will be fairly and liberally compensated for both the land taken and for all damages whatsoever to his property resulting from the construction of the said ice piers.

Therefore, there will be judgment that the suppliant is entitled to recover from His Majesty The King, the sum of five hundred dollars, upon his conveying to the Crown the piece of land, between high and low water marks upon which Pier No. 1 is erected, and giving a release of any incumbrance whatsoever which may be upon the same, the whole in satisfaction for all damages past, present and future resulting from the erection of the said ice piers on and opposite the suppliant's property, with interest upon the said sum of

(1) See *The King v. Richards* ante, p. 365, and cases there cited.

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five hundred dollars, from the 15th day of June, 1909, and costs.

*Judgment accordingly.*

Solicitor for suppliant: *T. R. Robertson.*

Solicitor for respondent: *H. Ruggles.*

IN THE MATTER OF THE PETITION OF RIGHT OF

DAVID HARRISON.....SUPPLIANT;

1913
April 2

AND

HIS MAJESTY THE KING.....RESPONDENT.

*Negligence—Public Work—Ice on approach—Injury to the person—Liability.*

Suppliant sustained bodily injury by falling whilst walking on the footpath on one of the approaches to the Seigneur Street Bridge, over the Lachine Canal, in the City of Montreal. The place where he fell was under the care and control of the Dominion Government; and the Superintendent of the Canal and his assistants were charged with the duty of maintaining the footpath in question in good order. The accident happened at 11.30 o'clock of the night of the 6th of January, 1912, which date was a holiday. The footpath was in a slippery condition owing to ice, the weather at the time being very changeable. It was shown by a witness, whose specific employment it was to spread ashes over this footpath for the purpose of preventing accidents to pedestrians, tnat at four o'clock on the afternoon of the day before the accident he had spread ashes on the spot where the suppliant fell; and that, althougn it was a holiday, he visited the footpath at two o'clock on the afternoon of the accident, and found that the ashes were still there and that no more were required for safety.

*Held*, upon the facts, that as it was not shewn that the footpath in question had been allowed to remain an unreasonable time in an unsafe condition, no negligence was attributable to the Superintendent of the Canal or his assistants, and that the suppliant was not entitled to recover.

PETITION OF RIGHT for the recovery of damages against the Crown for personal injuries suffered by the suppliant on a public work.

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

March 31st, 1913.

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

*L. E. Curran*, for the suppliant, argued that the liability was governed by the law of Quebec.

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Argument of Counsel

Under Article 1053 of the Civil Code "Every person capable of discerning right from wrong is responsible for the damage caused by his fault to another." We maintain that through the negligence of the Crown, represented by its employees, this accident was caused and the suppliant has suffered damages.

It was the duty of the officers of the Crown to look after the sidewalk in question.

Now, to reason by analogy, what would be the obligation of the municipality in such a case? Take the by-laws of the city of Montreal, for instance.

By-law No. 92, sec. 1, sub-sec. 15, enacts:—

"Whenever during the winter season snow or ice shall accumulate on any of the sidewalks of the said City or any portion thereof, the person owning, occupying or having charge of the house, building or lot of ground, shall, after the ceasing to fall of any snow, whether by snowstorm, or from the roofs, if in the day-time within one hour, and if in the night-time before nine o'clock of the following morning, cause the same to be removed from such footpath or sidewalk, in such manner that the same shall present a flat and even surface and be uniform in level with the adjoining footpath or sidewalk, provided always that the ice or snow permanently left on any such sidewalk, and being hard and solid, shall not exceed six inches in depth."

The city of Montreal has control of the sidewalks, and they see that these obligations are discharged. So that, to reason by analogy the Dominion Government, is in the same position.

I refer to the case of *Leprohon* vs. *The Queen* (1).

In that case it was held that the Crown is under no legal duty or obligation to any one who goes to a post,

(1) 4 Ex. C. R. p. 100.

office building to post or get his letters, to repair, or keep in a reasonably safe condition, the walks and steps leading to such building. But here is a case where the public are invited to use the public walk. The Department, seeing that there is a large traffic at this point, placed a bridge there. There are two foot passenger bridges, one on the left and one on the right side. This is a direct invitation to the public to go across. The Department instead of properly supervising the sidewalk as they should have done, allowed ice and snow to accumulate.

The suppliant exercised ordinary care, and was in no way negligent. He maintains that there was negligence on the part of the employees of the Crown in not having this sidewalk properly looked after.

*J. T. Hackett*, for the respondent, contended that with regard to the spot where the man fell there was no proof that this is a public work. Conceding that the bridge is, there is no proof that the approach is. Nor is it in evidence that the maintenance of the approach to the bridge falls within the duties of the Department of Railways and Canals. The fact that a public servant, who, out of kindness or even out of a misconception of his duty in looking after it, does look after it, would not impose upon the Government or the Crown the responsibility for any non-compliance with the self-imposed obligation.

Counsel for the suppliant has put himself in some contradiction to well established authority in placing the Crown upon all fours with a municipal corporation. If there was any negligence it was not negligence by an officer of the Crown acting within the scope of his duties or employment, which alone would make the Crown liable. It has not been established that the maintenance of this particular

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work fell within the scope of any particular officer's instructions (1).

This last case lays down principles which have a very proper application to the suppliant's case.

The negligence, if any, in this case would be governed by *Leprohon* vs. *The Queen* (2).

Such cases as *Bonin* vs. *City of Montreal* (3) and *Gaffney* vs. *City of Montreal* (4) establish that the municipality is not liable if the slippery condition of the streets is produced by sudden climatic changes, and the municipal officers have not sufficient time to remedy the state of affairs.

AUDETTE, J. now (April 2nd, 1913) delivered judgment.

The suppliant brought his petition of right to recover the sum of $500 for injury sustained by him, on the 6th January, 1912, through a fall while walking on the footpath leading to the Seigneur Street bridge, over the Lachine Canal, in the city of Montreal.

At half past eleven o'clock on the evening of the 6th January, 1912, the suppliant was walking home from a grocery store where he had bought provisions. On his way home, before getting to the bridge, he met witness Lewis Gordon, and they walked together. Whilst crossing the bridge, and up to the moment of the accident, they were walking in single file, Gordon following the suppliant. When they arrived at the point marked B, on photograph filed as exhibit No. 1, the suppliant slipped and fell, striking his side on the beam separating the footpath from the road travelled by vehicles, breaking two of his ribs and resulting, he says, in severe nervous and physical shock to his general system.

(1) See *Olive* vs. *Town of Westmount*, Q. R. 16, C. S. 426; *Davies* vs. *The Queen*, 6 Ex. C. R. 344.

(2) 4 Ex. C. R. 100.

(3) Q. R. 15 S. C. 492.

(4) Q. R. 16 S. C. 260.

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Both witness Gordon and the suppliant contend that the spot in question was, at the time of the accident, icy and slippery. On this branch of the case both D. O'Brien, the Superintendent of the Canal, and witness Shannahan, a man whose business it was to maintain the sidewalk or footpath in good order, were heard. The Superintendent says that the bridge in question, including the approaches and the spot where suppliant fell, are under the control and care of the Government, and that his men see to them and it is within the scope of their duties to maintain them in good order. Witness Shannahan, whose specific duty it is to see to this walk says, that on the 5th January, 1912, (the day before the accident) on Friday afternoon, at four o'clock, he had spread ashes on the footpath, including the place where the suppliant fell. Moreover, on the 6th January,—which was Epiphany, a holiday in the Province of Quebec,— he went over the same path, including the place where the suppliant fell, at two o'clock in the afternoon, and found that ashes were still there and that it did not require any more,—it was in good condition and all right. There was no snow—it was not snowing but a high wind was then prevailing. It was a mild day on the Friday, but freezing, and it got very cold on the Saturday. Although witness Gordon says it was dark, Shannahan says the place where the suppliant fell is well lighted.

Now to succeed, the suppliant must bring the facts of his case within the provisions of section 20 of *The Exchequer Court Act* and that is, there must first be a public work; secondly, an officer of the Crown whose duty it was to do a given thing; and thirdly, that officer must have been guilty of negligence from which the accident resulted.

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It will be found for the purposes of this case that the bridge in question, including the approaches and the place where the suppliant fell, is a public work. It will also be found that Shannahan was an officer of the Crown whose duty it was to maintain the pathway in question in good condition, but the court is unable to find that he was in any manner guilty of negligence on the occasion in question.

Indeed, ashes had been spread at the very place on Friday at four o'clock,—on the day of the accident he visited the *locus in quo* at two o'clock in the afternoon and it was still in good condition, not requiring any more ashes. And as was said in the case of *Davies* v. *The Queen*(1) in this country where climatic changes are so sudden and numerous it is not possible always in winter to have the sidewalks in safe condition to walk on. Negligence in this respect, when it is actionable, consists in allowing them to remain an unreasonable time in an unsafe condition. Moreover there is a long catena of cases where it has been held that where a municipality has been duly notified of the unsafe condition of a walk, it should remedy it as soon as reasonably possible. And when this unsafe condition obtains in a travelled and central part of a city, the municipality is supposed to become aware of it sooner than if it were away from such central part,—the result being that a reasonable time is always allowed within which the defect can be remedied.

Counsel for the suppliant, in the course of his argument, cited section 1, sub. sec.15, of No. 92 of the By-Laws of the City of Montreal, which reads as follows, to wit:

"Whenever during the winter season snow or "ice shall accumulate on any of the sidewalks of

(1) 6 Ex. C. R. 344.

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"the said city or any portion thereof, the person "owning, occupying or having charge of the house "building or lot of ground, shall, after the ceasing "to fall of any snow, whether by snowstorm, or "from the roofs, if in the daytime within one hour, "and if in the night-time before nine o'clock of the "following morning, cause the same to be removed "from such footpath or sidewalk, in such manner "that the same shall present a flat and even surface "and be uniform in level with the adjoining foot-"path or sidewalk, provided always that the ice or "snow permanently left on any such sidewalk, and "being hard and solid shall not exceed six inches "in depth."

The sidewalk was in good order on the afternoon of the accident, no snow, or rain fell between the time of Shannahan's visit and the accident, and under the by-law of Montreal (assuming for the purpose of argument that it applied to the Crown in this case) if anything had gone wrong during the night, the officer is not supposed to be attending to the walk at night but only to have the walk attended to before nine o'clock in the morning. The walk was visited by Shannahan in the afternoon and the accident occurred at half past eleven at night. Under the evidence it cannot even be found that if the walk had, at any time been in a bad condition—a matter not clearly established—it had not been so during such a length of time as would under any circumstances make it actionable,—and moreover, everything that a prudent man would have done under the present circumstances has been done by the officer of the Crown whose duty it was to look after the footpaths. *Olive v. Town of Westmount*(1); *Gaffney v. City of Montreal*(2); and *Bonin v. City of Montreal* (3).

(1) Q. R. 16 S. C. 426. (2) Q. R. 16 S. C. 260. (3) Q. R. 15 S. C. 492.

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Reasons for Judgment

Now, it will be borne in mind that no evidence was adduced by the Crown, and that witness Shannahan, as well as all the witnesses heard in this case, are all suppliant's witnesses. And while the suppliant says the place was slippery, that very evidence is rebutted by the best possible evidence, namely by that of Shannahan, a witness who has reason to know the *locus in quo* better than anyone else.

The Crown can only be held liable in a case which falls within the statute. The burden of establishing negligence is upon the suppliant, and he having obviously failed to show any such negligence on behalf any officer of the Crown, the result of which would have caused the accident complained of, his action fails.

Might not the accident be explained by the fact that at the time it happened the suppliant was talking with his companion, perhaps with his head slightly turned as they were walking in single file, and so did not discover that at the end of the bridge the level changes and a slight slope begins? It may very well be that by this want of care in attending to his steps, while passing over a place which he admitted he recognized as covered with ice, the accident was wholly due.

In the result, however, the court finds that no negligence has been established and that the suppliant is not entitled to any portion of the relief sought by his petition of right. The Crown is entitled to recover the costs of the action.

*Judgment accordingly.*

Solicitor for the Suppliant: *L. E. Curran.*

Solicitor for the Respondent: *E. L. Newcombe.*

IN THE MATTER OF THE PETITION OF RIGHT OF

MOSES SCHAFFER.....SUPPLIANT;

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Dec. 7.

AND

HIS MAJESTY THE KING.....RESPONDENT.

*Negligence—Government Railway—Passenger—Failure to afford opportunity to alight at station platform—Passenger standing on lower step of car—Injury—Right to recover damages.*

Suppliant purchased from the Intercolonial Railway, on the 13th July, 1908, a ticket entitling him to travel as a passenger on that railway between the stations at B——, and M——, and return. On the return journey to B——, the train, consisting of fourteen passenger cars, instead of proceeding to the station platform and giving the passengers an opportunity to alight there, pulled up at a tank, before reaching the platform, for the purpose of watering the engines. While the train was at the tank, a period of from 10 to 13 minutes, the greater number of the passengers alighted; but the suppliant did not, expecting the train to pull up at the station platform. During this same interval the suppliant went out of the car in which he was being carried, and stood upon the lower step of the platform of the car preparatory to alighting at the station. With his left hand he was holding on to the rail of the car, his coat being on his right arm and his umbrella in his right hand. There was evidence that the platform of the car was crowded, and that suppliant could not have got back into the car had he so desired. At all events, he remained on the step of the car after the train moved away from the tank. Instead of stopping at the station platform, the conductor, apparently on the assumption that all the passengers for B——, had previously alighted, started the train and allowed it to pass the station platform at considerable speed. As the train was so passing the station the suppliant was by some means thrown from the step of the car to the ground between the station platform and the rail of the track, and was severely injured.

*Held*, that the suppliant was justified in assuming that the conductor would stop the train at the station, after leaving the tank, and that under the circumstances he was justified in remaining on the step where he was standing.

2. That the accident would not have happened had the conductor fulfilled his duty under the law and regulations, and stopped his train at the platform of the station.

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SCHAFFER v. THE KING.

Argument of Counsel.

PETITION OF RIGHT for the recovery of damages against the Crown for personal injuries sustained by the suppliant on the Intercolonial Railway.

The facts are stated in the reasons for judgment.

The case came on for hearing at St. John, N.B., on the 23rd and 27th days of April, 1911, and at Chatham, N.B., on the 14th and 20th days of May 1912. It was argued at Ottawa on the 28th day of November, 1912.

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

*R. A. Lawlor, K.C.*, for the respondent.

Counsel for the suppliant cited *Rose* v. *North Eastern Ry.*, (1), *Robson* v. *North Eastern Railway* (2), *Beven on Negligence* (3), *The Government Railways Act*, R.S.C., 1906, cap. 36.

For the respondent the following statutes and authorities were relied on: *Audette's Practice Exchequer Court* (4); *Martin* v. *The Queen* (5); *Gilchrist* v. *The Queen* (6); *Lavoie* v. *The Queen* (7); *Radley v. The London & North Western Railway* (8); *The Quebec Central Railway* v. *Lortie* (9); *Adams* v. *The Lancashire and Yorkshire Railway*(10); *Lewis* v. *London, Chatham, and Dover Railway* (11); *Cockle* v. *The London and South Eastern Railway* (12); *Siner* v. *The Great Western Railway* (13); *Edgar* v. *The Northern Railway* (14); *Robson* v. *North Eastern Railway* (15); *Bridges* v. *The Directors of the North London Railway* (16); 50-51 Vict. chap. 16, sec. 16 (c).

(1) 2 Ex. Div. 248.
(2) 2 Q. B. D. 85.
(3) 3rd Ed. pp. 133, 983, 984, 985.
(4) 2nd ed. pp. 77,78.
(5) 20 Can. S.C.R. 240.
(6) 2 Can. Ex. C.R. 300.
(7) 3 Can. Ex. C.R. 96.
(8) L.R. 1 A.C. 759.
(9) 22 Can. S.C.R. 336.
(10) L.R. 4 C.P. 739.
(11) (1873) L.R. 9 Q.B. 66.
(12) (1872) L.R. 7 C.P. 321.
(13) L.R. 4 Ex. 117.
(14) 4 Ont. Rep. 201.
(15) (1876) 2 Q.B. 85.
(16) L.R. 7 E. & I. App. 213.

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SCHAFFER v. THE KING.

Reasons for Judgment.

CASSELS, J., now (December 7th, 1912) delivered judgment.

This action came before me for trial at St. John, N.B., on the 23rd day of October, 1911. After a considerable number of witnesses were examined, an application was made to postpone the trial in order to procure the attendance of a necessary witness. No objection was raised to the adjournment, and by consent the balance of the evidence was taken before Mr. Justice Audette on the 14th May, 1912.

The facts of the case are peculiar. The allegation of the suppliant in his petition of right is, that on the 13th July, 1908, he purchased from the Intercolonial Railway a ticket entitling him to travel as a passenger on the said railway between the stations at Blackville and Marysville and return. The allegation is that on the return trip, the suppliant went out of the train, believing that the train in question had stopped at Blackville Station, but instead of stopping at the Blackville station, the train passed the station at a rapid rate, that the train increased its speed and gave a violent jerk causing the suppliant to be thrown from the train, and he claims damages for the injuries received by him by reason of such accident.

The defence denied that the suppliant was thrown from the train. The contention of the Crown apparently is, that the suppliant jumped from the car to the platform while the train was in motion, and that he was therefore guilty of contributory negligence, and not entitled to recover.

I have analysed the evidence with care. The facts are shortly as follows:—

The train in question left Blackville on the morning of the 13th July, and proceeded to Marysville, at which place an Orangemen's picnic was to be held.

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It returned in the evening, reaching Blackville somewhere about ten o'clock at night. It seems to have been a bright starlight night. The train was hauled by two engines. The length of the platform at the Blackville station is about 270 feet; and the width of the platform 8 feet 6 inches. A small portion of the platform nearest the tank has been constructed since the accident in question, but this addition only amounted to very few feet, and has not much bearing upon the matters in question before me.

The following distances may be of importance. The distance from the centre of the tank to the end of the platform, is 17 feet and 4 inches; from the centre of the tank to the station house door, it is 112 feet; from the rail to the edge of the platform, it is 3 feet and 6 inches; and from the top of the platform to the ground, it is 2 feet and 3 inches.

The suppliant was standing on the lower step of one of the cars. The distance of this lower step to the ground was 2 feet and 4 inches, being one inch higher than the top of the platform. The train in question consisted of 14 passenger cars.

As the train approached the Blackville station, it pulled up at the tank in order to water the engines, and was probably standing there for about from ten to thirteen minutes. The greater number of the passengers for Blackville alighted when the train stopped at the tank, taking their risk of injury by jumping from the lower step of the cars to the ground. Some of the passengers for Blackville remained on the cars expecting that the train would pull up at the station platform. The suppliant, apparently, was proceeding to the rear end of the car, thinking the train had stopped at Blackville. Owing to the large number of people in the car, he turned and proceeded

to the front end of the car. Before reaching the front end, the train moved ahead and stopped. This was apparently with the view to supplying the second engine with water. The front door of the car was open,—and when the plaintiff went out, he noticed that the train had not reached the platform but was still at the tank. He had descended to the lower step of the platform, and was holding on to the rail of the car with his left hand, his umbrella and coat being on his right arm and hand.

According to the suppliant he did not wish to take the risk of alighting. He states that there was considerable *débris* about, and I think he showed good judgment in not taking the risk.

He was standing upon the lower step, as I mentioned his left hand gripping the rail of the car. In cross-examination a question was put to the suppliant the answer to which might indicate that he had gone to the rear platform of the car in front of him. This is obviously a mistake, as there is no conflict of testimony as to his being on the step of the car out of which he had proceeded, and was holding on to the rail of that car. The question is put as follows:

"Q. You moved from the car you were in to the platform of the car ahead of you ?

"A. Yes."

He evidently understood the question as meaning that he moved to the front platform of the car. Had he moved to the car ahead of him, he could not have held on to the rail of the car with his left hand, and at the same time faced the station.

As to his position, there is no doubt, under the evidence, that the step was the lower step of the platform at the front of the car out of which he had passed for the purpose of getting off at Blackville.

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Several others followed the suppliant, among others being one Connors, who gives evidence, and it is apparent, that the platform of the car was crowded, and as the suppliant says, he could not go back to the car.

Moreover, the car was but a short distance from the platform of the station, and the suppliant no doubt believed that the train would pull up at the station. He stood there expecting the train to pull up at the platform where he would have alighted. To my mind the whole trouble has arisen from the conductor assuming there were no passengers for Blackville remaining on the train. He apparently chose to take it for granted, and instead of stopping the train at the platform of the station as he should have done, he started the train, passing the station at considerable speed, varying according to the views of various witnesses.

McConnell, who was the night watchman of the locomotives at Blackville, and probably qualified to judge, deposed that in his view, at the time of the accident, the train was going at the rate of from 12 to 15 miles an hour. Dunn, the station agent, thought it was going at the rate of from 8 to 10 miles an hour.

At about 300 feet east of the door of the station there is a curve upon the line. As the engine reached this curve, there would necessarily be given what one of the witnesses for the Crown calls an oscillation, and this oscillation with the quickening of the speed would, I have but little doubt cause a jerk, as it is called by some of the witnesses, which would probably cause the suppliant to lose his balance, the result being that he was thrown from the train and seriously injured.

There is some confusion as to which car the suppliant was in. Connors, who was standing immediately

behind the suppliant on the step of the platform of the car, thought they were on the fifth car from the rear. The conductor, Hoben, states that the suppliant was on the fourth car from the engine. The result was that the suppliant while endeavouring to save himself as far as possible was dragged some little distance, and no doubt struck the side of the platform and was precipitated between the platform and the rail, and found lying unconscious on the ground on his right side, his face towards the station and his back towards the rail. The consequence was that there was a severe spraining of the left wrist, a compound fracture of one of the bones a little above the ankle on the left leg, and a fracture of the sixth and seventh ribs on the left side.

The contention raised by the Crown is that the suppliant deliberately jumped from the moving train, and by reason of such action received the injuries in question. If the evidence disclosed that state of fact, I would be of the opinion that the suppliant could not succeed. It would have been his duty to have remained in the car, and bring an action for breach of contract if so advised.

I am of the opinion, however, that the suppliant did not jump from the car. Connors, the man who was immediately behind the suppliant, gives evidence. He sets out in his evidence the relative positions of Schaffer and himself. He also shows the difficulty of getting back. He is asked the question:

"Q. What about getting back into the car?

"A. You could not get back.

"Q. Why?—A. Because there was such a crowd "in the car, they were all crowding in the passage way.

"Q. And around the platform of the car too?

"A. Yes.

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"Q. And you stood there?—A. Yes.

"Q. And Moses Schaffer stood in front of you?

"A. Yes."

And he is asked:

"Q. Did you notice whether the car gave any "jerk?—A. Yes."

Then he goes on and describes the accident. He states that "Moses Schaffer fell and went down—and he went with the cars when he went." (Meaning, no doubt, that he was dragged slightly by the momentum.) "He fell face towards the platform and with "his back towards the car."

And he is asked:

"Q. Did you feel the jerk yourself?

"A. Yes. * * * * * * * I was standing "holding the outside rail of the step. When he, (Schaffer) went off, I jumped. I jumped on to the "platform."

He is asked on cross-examination:

"Q. When did you first know that anything "happened to Schaffer?

"A. When I saw him fall, I thought there must "be something happened.

"Q. You saw him fall?

"A. Yes. I was standing next to him when he "fell.

"Q. Do you swear he fell?

"A. I can say that he was jerked off." * * *

"Q. You swear you could see that, the train going "15 miles an hour?

"A. I will swear I was close enough to him to say he was jerked from the train."

Benjamin Walls, a lumber surveyor, was at Blackville station on the night of the accident. As the train passed the station, he states he was standing

near the station house door; that the train was running pretty fast, gradually getting faster as it went by. He was asked whether Schaffer was jumping off. He did not see him jump, but according to his evidence he could not be positive enough to say whether he jumped or was thrown.

George R. McConnell, a locomotive engineer, in the employ of the Intercolonial Railway, was at the time of the accident the night watchman of locomotives. He was standing close to the platform, and testified as follows:

He is asked to describe how he saw Schaffer fall. He states "As a man would naturally fall, he lost "his balance. He done his best to get his balance "back again, and was hanging on to the side of the car "and was trying to get his balance back again, and he "gave a pitch under the car. The momentum of the, "train or something pitched him under,—I dont "know what it was."

He is asked:

"Q. Did he jump off?

"A. No, he did not jump off. I had a lantern and "could see distinctly.

He describes the speed of the train as between 12 and 15 miles an hour,—"It was going pretty fast "down hill."

Further on in his evidence he states:

"Q. And you say he did not jump?

"A. No, sir, he did not jump.

"Q. When he came off what did he do?

"A. He would naturally try and get his balance "back.* * * * He was trying to get his feet "back again to save himself."

Miles Arbeau, a brakesman on the Intercolonial Railway, was a passenger on the train in question. He

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was asked if he saw the suppliant fall—and he is asked to describe how he saw him fall. His answer is, "I just saw him come off the train. He seemed to be "coming kind of head first. To the best of my "knowledge he was coming head first—not head first "but the body half falling, and he struck the platform, "and then glided ahead a little piece and then rolled "between the platform and the cars.

"Q. Did he appear to you like a man jumping or "falling off?

"A. He appeared to me like a man who was falling "off."

Again he says:

"I think that he looked like a man who was falling "off the way he came off the train."

Thomas Dunn, the station agent, a witness called by the defence, states that Schaffer was facing sqare towards the station building when his feet struck the platform. He is asked when he first saw Schaffer, and his answer is, "When he alighted on the platform. I "did not see him until then. He is asked "What "happened", and his answer is, "As soon as he struck "the platform he immediately went down between "the cars and the platform." He says, "He appeared "to be like a man who was falling and he could not "regain his footing and went down."

"Q. Did he look like a man who was jumping or "falling?—A. Falling I said."

He is giving his evidence under oath. He is confronted with a previous statement in a letter in which he had stated apparently, that Schaffer's manner of alighting would indicate he jumped. This seems to have been a letter procured from him by the respondent's claims agent.

The suppliant himself states that he did not jump.

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I think on the whole evidence there is no question but that Schaffer was thrown from the step of the car. I think, moreover, that the accident would not have happened had the conductor complied with the provisions of the statute, and stopped the train at the platform of the station. I think it was reasonable for the suppliant to believe that the train would stop, and he would not apprehend any danger from remaining in the position he was in, had the train merely pulled up to the station.

It is said there were 14 cars, averaging about 50 feet for each car, whereas the length of the platform was in the neighborhood of 260 feet, and that therefore all the cars could not have been stopped so as to enable the passengers to alight from each car at the station. I do not think this forms any justification. If, as the conductor states, Schaffer was on the fourth car from the engine, his car would have been abreast of the platform.

It has to be kept in mind in the consideration of the English authorities, that the cars in use on the Intercolonial Railway and other railways in this country, differ materially from the greater number of the cars used in England. If the train was so long that the cars could not all be brought up alongside of the platform, the passengers could easily pass from one car to the other until they reached a car from which they could alight. In one case *The Quebec Central Railway* v. *Lortie* (1) the Supreme Court reversed the judgments of the lower courts and dismissed the action.

The head note is:

"*Held*, reversing the judgments of the courts below, "that in the exercise of ordinary care, E. could have "safely gained the platform by passing through the

(1) 22 S. C. R. 336.

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"car forward and that the accident was wholly attri-"butable to his own default in alighting as he did and " therefore he could not recover."

Referring in that case to the manner in which he brought about the accident, Mr. Justice Gwynne states: "The accident is attributable wholly to the "Plaintiff's own default in alighting as he did. Every "man travelling by rail, in this country, must have "known that it was not the way he should have "alighted or by which there was any necessity for his "so alighting or was ever intended that he should "alight."

In my view, had the suppliant alighted at the tank and injured himself by reason of the distance between the step and the ground, he might probably have disentitled himself to recourse against the Crown, as the evidence would have then been presented.

The question of the effect of contributory negligence is succinctly stated in *Brenner* v. *The Toronto Railway Co.*, in the judgment of Mr. Justice Duff (1).

I have read all the cases referred to me by counsel, and a great many others. Most of them are referred to in the last edition of *Pollock on Torts* (2).

The conductor attempts to justify his conduct in not stopping by reason of the probability of accidents on account of the shortness of the platform. It is quite customary for all passenger trains to stop at the platform at Blackville. Dunn, the station master, so states. I think they were bound to stop when they had passengers who desired to alight. In point of fact the conductor must have assumed that there were no passengers. It appears in the evidence, that several passengers who had tickets for Blackville were carried beyond the station; and the train subsequently stopped

(1) 40 S. C. R. 556.

(2) 1912, 9th ed. p. 471 et seq.

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and let them off at a distance of about a mile and a half or thereabouts from the station, which distance the passengers had to walk.

On this train consisting of 14 passenger cars, there were two brakesmen and the conductor, in addition to the engine drivers and firemen. The conductor states that he gave instructions to the engine drivers not to stop at the platforms as far as possible, and that he also gave instructions to the two brakesmen to inform the passengers that the train would not stop at the Blackville station. Rock Allen, who was the brakesman at the rear of the train, contradicts the conductor on this point, and states that he never told the passengers that the train would not stop. He states in his evidence "We were supposed to stop at the "station platform, that is the only announcement I "had."

The suppliant was not told the train would not stop at the station platform.

Upon the whole case, I think the suppliant was justified in assuming that the conductor would stop the train, and I think, under the circumstances of the case, he was justified in remaining where he was. Each case has to be governed by the facts of the particular case. I can quite understand that in certain cases it might be considered culpable negligence for a passenger to stand on the lower step of the platform of a moving train. Such a case was that of the *Grand Trunk Railway Co., of Canada* v., *Barnett* (1).

It was contended that under the provisions of *The Government Railway Act*, chapter 36, section 44, Revised Statutes of Canada, 1906, the plaintiff could not recover.

That section reads as follows:

(1) (1911) A.C. 361.

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"44. No person who is injured while on the plat-"form of a car, or on any baggage, wood or freight "car, in violation of any printed regulations posted "up at the time in a conspicuous place inside of the "passenger cars then in the train, shall have any "claim in respect of the injury, if there was at the "time room inside of such passenger cars, sufficient "for the proper accommodation of the passengers."

I am not called upon to decide whether or not under the particular circumstances of this case, that section would have debarred the suppliant from recovering, as in point of fact there is no proof whatever of any printed regulations being posted up in a conspicuous place inside of the passenger cars then in the train. There was some evidence that they had been posted up in the station house.

The provisions of *The General Railway Act* differ from the *Government Railways Act*. Section 282 of *The General Railway Act*, chapter 37, of the Revised Statutes, reads as follows:

"282. No person injured while on the platform "of a car, or on any baggage, or freight car, in "violation of the printed regulations posted up at "the time, shall have any claim in respect of the "injury, if room inside of the passenger cars, suffi-"cient for the proper accommodation of the pass-"engers, was furnished at the time."

In connection therewith section 312 of the same Railway Act has to be considered as to the method of posting, it "shall be openly affixed, and kept affixed, "to a conspicuous part of every station belonging to "the company."

On the argument before me, the question was asked of counsel, that if judgment were in favour of the suppliant, what would they consider a reasonable

allowance? Counsel for the suppliant suggested $5,000 and counsel for the Crown suggested $2,000.

It does not appear from the evidence what the age of the suppliant was at the time of the accident in question. It is agreed, however, by both counsel on the argument, that his age was about fifty.

There is no doubt that the suppliant received severe injuries. I explained in the former part of my judgment the nature of his injuries. It seems he was in the hospital about six weeks.

According to the evidence of the suppliant he paid out at the hospital the sums of $72 and $49; to Doctor Loggie $100; to Doctor McManus $35; and moving to Chatham and back, $40; in all about $300.

Doctor McManus, who attended him at the time of the accident, was asked whether he considered the injuries will be permanent. His answer was, that

"in a sprain there is always an injury there. It is a "rare case that they ever grow out of any in my "experience—and as far as a fracture is concerned "there is permanent injury."

Doctor McManus had not seen the suppliant from the time of the accident. It was suggested by me that as the suppliant was in court, it would be easy to examine him, and find out whether permanent results had followed the accident. This was agreed to by counsel for both parties. Mr. Lawlor, K.C., for the Crown asked to have Dr. Emory, who was in court, examine the man at the same time. Dr. McManus was recalled after the examination, and states in answer to the question what the result is with regard to the injuries being permanent or otherwise, the following:

"The injuries are permanent. That is the result "of the diagnosis I made. Of course as far as the

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"dislocated wrist is concerned, there is a thickness "of the tendons there; and there is evidence of a "fracture in the tibia—but not so much on the "ribs."

Dr. Loggie, who had attended him in the hospital also examined him on the day of the trial. He is asked:

"—Now you have examined him here since, with "the other doctors to day?

"A. Yes.

"Q. And what would you say with regard to the "injuries being permanent or otherwise?

"A. I would say that the injuries to the wrist and "leg were permanent in a degree. They are not as "badly injured or as bad as they were first—they have "improved, but they are certainly not as good as they "were before they were hurt."

Dr. Emory who was present at the examination representing the Crown, was not called as a witness. I think it may be taken for granted that he did not disagree with his brother doctors.

I think a fair allowance would be the sum of twenty five hundred dollars, and three hundred dollars for his outlay. I direct judgment to be entered for this amount together with the costs of the action.

*Judgment accordingly.*

Solicitor for the suppliant: *G. H. Murray.*

Solicitor for the respondent: *W. C. Winslow.*

BETWEEN:

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

1913
Aug. 29.

AND

HALBERTRAM HECTOR BRADBURN AND JOHN TAYLOR WEBB..... } DEFENDANTS(1)

*Public Harbour—Navigable Waters—Water Lots—Set-Off—Increased value of remaining lands by reason of public work.*

Proceedings by the Crown for the expropriation of certain lands bordering on the Kaministiquia River at Fort William, Ont., were taken with a view to the widening of the channel of the river. In carrying out the works, a road-allowance which intervened between the lands taken and the water of the river was expropriated leaving the lands with a frontage on the river subsequently widened.

*Held*, that the advantage to the balance of the lands equalized any damage to the land owners over and above the amounts offered as compensation by the government.

(2) Water lots had been granted after Confederation in the river by the Province of Ontario. The question arose as to the compensation to be paid for these water lots.

*Held*, that the waters of the river were navigable waters within the statute (R.S. 1907, cap. 115) from bank to bank, and that these water lots could not be built upon by the owners thereof without the assent of the Dominion authorities.

(3) The contention was raised on the part of the Crown that the waters in question formed part of a public harbour as defined by the Confederation Act.

*Held*, that, upon the facts, they did not form part of such public harbour.

THIS was one of twelve informations exhibited by His Majesty's Attorney-General for Canada for the expropriation of certain lands required for improving navigation at Fort William, Ont.

EDITOR'S NOTE:—(1) There were some twelve cases in all arising out of expropriations for the same public purpose.

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The facts are fully stated in the reasons for judgment.

The cases were heard at Fort William on the 19th, 20th, 21st, 23rd, 24th, 25th, 26th, 27th and 28th days of January 1911, and at Winnipeg on the 9th and 10th days of May, 1913.

*W. A. Dowler*, K.C., *W. McBrady* and *W.S. Edwards* for the plaintiff.

*I. Pitblado*, K.C., *F. R. Morris* and *W. L. Morton* for the defendants.

CASSELS, J., now (August 29th, 1913) delivered judgment:

There were twelve cases tried before me, arising out of three or four expropriations on the part of the Government, of lands on what might be called the south bank of the Kaministiquia and the east bank of the Mission River. The course of the Kaministiquia is not directly east and west, but, for the sake of brevity, I refer to it as the south bank; it is, in other words, the right bank.

In 1906 the Government approved of a plan for the widening of the Kaministiquia River. The intention then was to widen this river, so as to have a channel of about 400 feet in width. The depth of the river was to be, according to this first plan, about 17½ to 18 feet. Between the Mission River and Thunder Bay on the east are situate two islands, known as islands numbers one and two. The McKellar River divides the islands one and two. The Mission River is the westerly boundary of island number two. In order to carry out the work, it became necessary to expropriate certain lands on islands one and two. The first informations were to have the compensation determined for these lands so expropriated. Later

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on I will have to deal with each case in order. At present I am merely giving an outline of the facts connected with the cases. In front of all the lands on the Kaministiquia River— and I may also say on the Mission River—there was a road allowance of 66 feet in width. This road allowance was between the lands of the different land owners and the rivers Kaministiquia and Mission. The lands of the various claimants were bounded by this road allowance. By the expropriation in question, the road allowance was taken by the Government for the purpose of their works, and thereby the various owners, who, up to that time, had no riparian rights, became owners of land fronting on the rivers. The intervention of the road allowance, prior to the expropriation thereof, prevented any of the owners who are claiming compensation from having any riparian rights. (1)

The first expropriation was on the 14th September, 1907, and this is the time at which the compensation to the various owners under the first expropriation has to be ascertained. Mr. Temple was the engineer in charge of the works under the first expropriation. He was succeeded on the 19th May, 1907 by Mr. Merrick.

On the 31st January, 1908 it was decided by the Government that the River Kaministiquia should be further widened so as to give a width to the river of 500 feet. It was also proposed to deepen the channel of the river, so as to give a depth of 25 feet. At the same time it was decided to widen and dredge the Mission River, so as to give a width to the river of 500 feet, with a depth of 25 feet. This latter river runs out of the Kaministiquia and empties into Thunder Bay about a little over two miles from where

(1) See *Giles* v. *Campbell*, (1876) 19 Gr, 226; *Cockburn* v. *Eager*, (1872) 24 Gr, 412.

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it flows from the Kaministiquia. Instructions were given Mr. Merrick, as I have stated, on the 21st January, 1908, and plans for the second enlargement were approved of by Order in Council in November of 1908. The effect of this further expropriation required the taking of additional lands from the various owners, and plans were fyled in pursuance of the Statute in most cases on the 12th May, 1909. The exact dates I will mention when I come to deal with the individual cases. The third expropriation relates to certain water lots, two on the Kaministiquia River, one owned by Rochon and the other owned by Dr. Hamilton. There was also a water lot on the Mission River owned by Dr. Hamilton. Apparently when the first expropriation took place, the engineer was not aware of the existence of these water lots. The date of the expropriation of the water lots in question is the 10th of September, 1908. The water lot on the Mission River was expropriated prior to the plan for the widening of the Mission River being approved, of, but, as Mr. Merrick states, he had no doubt that the plans for the widening of the Mission River would be approved, and, with a view to the carrying out of the work, when the plan was approved of, he caused a plan to be registered for the expropriation of the water lot on the Mission River.

A few facts of general application to all these cases may be mentioned. In 1905 the Grand Trunk Railway obtained a grant of 1,600 acres. These lands were bounded on the East by the Mission River, and on the north by the Kaministiquia River. In the evidence it was generally referred to as if the lands in question were acquired by the Grand Trunk Pacific; in point of fact, they were acquired by the Grand Trunk Railway. A spur line connects the

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main line of the Grand Trunk Pacific Railway with these lands on the Mission River. The object of acquiring the lands in question was in order that terminals of the Grand Trunk Pacific should be located on this 1600 acres of land. It was also desired that industries should be fostered in connection with these terminals, and at the present time, and at the time of the trial, several industrial buildings have been erected on this particular land. It is important to have this fact in mind for two reasons: first it was obvious—and it is so stated by some of the witnesses—that when the Grand Trunk located their terminals, the Mission River would have to be dredged, so as to permit of navigation for large steamers: secondly, it made it clear that the destination of islands numbers one and two was for industrial purposes. This fact, I think, is incontrovertible. In some of the evidence stress is laid on the fact that island properties one and two were suitable for first class residential purposes, and an attempted value is sought to be placed upon some of the lands, as if they should be treated in that light. The greater part of island number one was, at the time of the first expropriation, owned by the Canadian Pacific Railway Company. While I think portions of the lands on islands numbers one and two may be suited for residential purposes, it would necessarily be the back portions, and those only for residences such as workmen would inhabit. Anyone seeing Fort William, and looking at the islands in question, would be satisfied, without evidence, that the destination of the properties fronting on the Kaministiquia and also on the Mission River, is for industrial purposes, and I think the evidence in all the cases fully bears out this view. Another fact which has to be borne in mind is that on the 13th

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July, 1906, a statute was passed, 6 Edward VII, chapter 97, which was an Act to incorporate the Fort William Terminal Railway and Bridge Company. The object of this incorporation was to have a company formed for the purpose of connecting the north side of the Kaministiquia river with the islands, and also providing, not merely for the bridge, but for railway lines to serve the interests of the properties on the islands. This charter was extended on the 16th June, 1908, by virtue of chapter 109, 7 and 8, Edward VII. The charter in question was subsequently assigned to the Canadian Pacific Railway Company in March, 1908. It was strenuously argued before me that the location of the bridge was not known until May 10th, 1910, when the bridge in question was approved of by Governor in Council. This is not correct, however. According to the evidence of Dr. Hamilton, the location of the bridge was settled when the charter was sold, namely, in March, 1908. I am inclined to think that he is in error, and that the true date was December, 1908. It is quite true that the approval of the Governor in Council was only obtained on the 30th of May, 1910, but it was an approval of the location which had been previously agreed upon. The bridge in question is a very high bridge, being a roller lift bridge. The lower part of the bridge is for railway trains, the upper part for vehicles and passengers. It has a span of 125 feet in width in the centre, which forms the navigable channel at that spot. The Order in Council of the 30th May, 1910, provides that a further channel on the east shall be made so soon as it becomes necessary by the requirements of navigation. The ramp of the bridge on the Fort William side proper is thirty to one; the ramp on the island side is twenty

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to one. The location of the bridge is shown on plan exhibit number 9, in The King v. Bradburn and Webb, second expropriation. It is also shown in pencil on plan exhibit number two, fyled in the suit of The King v. Bradburn and Webb, first expropriation. I merely refer to the fact connected with this bridge as in the argument of counsel in the case, more particularly in Dr. Hamilton's cases, great stress was laid upon the effect on the values of property, of the probability of obtaining a connection between the islands and the other side of the Kaministiquia.

While it was not referred to in the evidence, it is apparent that the bridge cutting Dr. Hamilton's property in the way in which it must do when the ramp is extended, will interfere materially with the utilization of his property for manufacturing purposes. The whole of the Kaministiquia River on the north side has been built up by elevators, wharves, docks, &c., for a distance from the mouth of some miles. As the town of Fort William extends accommodation will be looked for on the south side of the river on islands one and two, and also on the Mission River on the east side.

As I have mentioned, these cases came before me at Fort William in January, 1911. It is admitted that while there was a road allowance round both islands one and two, this road allowance had never been used or been opened for traffic. During the progress of the trial, it appeared from the evidence of Mr. Merrick that while the Government contemplated the widening of the river for the purpose of improving the navigation, it was the intention to allow a slope extending out into the river for a distance of between thirty and forty feet at a grade of one and a half to one. While the getting rid of the road allowance, and giving to the land owners a frontage on the river,

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which could be utilized for dock and industrial purposes, was an undoubted advantage if Mr. Merrick's plan were adopted, it would be useless. What Mr. Merrick stated was that as soon as any of the land owners erected docks, there would be dredging done up to the docks. This was in no way binding upon the Crown, nor would it be a satisfactory way of dealing with the question. The Government are proposing an expenditure of over four million dollars for the improvement of the harbour, and for affording dock facilities to the lands fronting on the Kaministiquia and the Mission rivers. My suggestion that negotiations take place between the Government and the various land owners, has resulted in an agreement on the part of the Crown, which in my opinion, is of very great value to the owners, a portion of whose lands have been taken for the purposes of the work. This agreement has not yet, up to the date on which I am writing my reasons for judgment, 18th June, been put into formal shape, but will be before my judgment is handed out. The undertaking, as agreed to by counsel, is to the effect that each land owner is to have the right to erect docks and wharves upon the lands expropriated, so as to connect the lands which are left with the navigable channel of the river and that the Government will dredge so soon as docks are erected. Counsel for the Crown also undertook that the agreement would contain provision that if, in the future, the Government desires to further widen the river for navigation purposes, they will pay full compensation to the owners for the erections so to be made on lands which are vested in the Crown. The effect of this undertaking is in almost every case to greatly improve the remaining lands, left after the expropriation.

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Section 30 of the *Expropriation Act* reads as follows:—

"If the injury to any land or property alleged to be injuriously affected by the construction of any public work may be removed wholly, or in part, by any alteration in, or addition to, any such public work, or by the construction of any additional work, or by the abandonment of any portion of the land taken from the claimant, or by the grant to him of any land or easement, and if the crown by its pleadings or at the trial, or before judgment, undertakes to make such alteration, or addition, or to construct such additional work, or to abandon such portion of the land taken, or to grant such land or easement, the damages shall be assessed in view of such undertaking, and the Court shall declare that in addition to any damages awarded, the claimant is entitled to have such alteration or addition made, or such additional work constructed, or portion of land abandoned, or such grant made to him."

Section 50 of the *Exchequer Court Act* reads as follows:—

"The Court shall, in determining the compensation to be made to any person for land taken over, or injuriously affected by the construction of any public work, take into account and consideration, by way of set-off, any advantage or benefit, special or general, accrued or likely to accrue by the construction and operation of such public work, to such person in respect of any lands held by him, with the lands so taken or injuriously affected."

When I come to deal with the cases separately, I shall have to refer to this section, but I may state generally that in my opinion the effect of the work in question, coupled with the undertaking of the Crown, is to enhance enormously the remainder of

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the lands held by the various owners, with the lands taken. This does not apply to all the cases, but to nearly all. I will have to refer to the evidence as I go through the various cases. The Government, as a rule, have based their valuation on an acreage value of $1,000. In my opinion, having regard to the great increase to the balance of the lands, this, in most cases, is a fair amount, having regard to the changed situation since the trial by reason of the undertaking now given on the part of the Crown. The different sets of expropriations referred to were commenced, as I have pointed out, at different periods. The informations were fyled by different solicitors, and while the cases were argued together in Winnipeg on the 9th and 10th May, 1911, a great amount of labour has been caused by the manner in which they have been conducted. As I promised counsel at the time of the argument, I very carefully analyzed the evidence in the various cases, and will later on give the result of my analysis. Two questions have arisen, involving questions of law, which I will dispose of before entering into the details connected with each particular claimant. These arise out of the grants to Rochon and to Hamilton of the two water lots on the Kaministiquia river. The grants of these water lots were made by the province of Ontario in the year 1882. Subsequent to the trial at Fort William in the month of January 1911, the Crown applied for an amendment to their informations, setting up that at the time of Confederation that part of the Kaministiquia river and of the Mission river, in which the water lots were granted, was a public harbour, and that therefore no title passed to the grantees under and by virtue of the grants to them by the Crown, represented by the Province of Ontario. The amendment was allowed, and

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evidence was subsequently taken by consent of parties before Mr. Justice Audette, and such evidence is now before the Court. I am of opinion that the contention of the Crown is not well founded. I do not think it could be called a public harbour. The contention might be stronger as to that part of the Kaministiquia river upon which the Hudson Bay Company had erected a wharf prior to Confederation, and which had been utilized for loading and unloading merchandise But this is a point on the Kaministiquia river a considerable distance from the place in question. It is difficult to determine what is a public harbour. As I read the authorities, it is really a question of fact. The *B. N. A. Act*, sec. 108, provides that the Public Works and property of each province enumerated in the third schedule to that Act shall be the property of Canada. The third schedule is headed "Provincial Public Works and property to be the property of Canada," dars ection 2 of the third schedule mentions "Public Harbours." In Upper Canada, certainly as far back as 1859, there were private harbours as distinguished from public harbours. (1) The report of the *Fisheries* case before the Board of the Privy Council is in print, and contains a verbatim report of the argument of considerable value, as there was a running commentary by the judges on the various points being argued. In reference to a contention that might be raised, namely that the words "Public harbours" might be harbours as distinguished from private harbours, owned by private corporations, Lord Herschell pointed out(2) that such construction could not be placed on the Statute, for the evident reason that the *B.N.A. Act*, in the section referred to, is dealing with the property of the provinces, and the words public harbours

(1) See Con. Stat. of U. C. 1859, chap. 50.

(2) (1898) A. C. at p. 711.

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must mean something other than harbours. If it were intended that every harbour such as a haven was to pass, there would be no object in the use of the word "public." As I understand the case of *Holman* v. *Green*, decided by the Supreme Court in 1881, (1) it was admitted that the Harbour of Summerside was a public harbour, and Ritchie, C. J. pointed (2) out that it was also a port for ships where customable goods may be laden and unladen. The question decided in that case was that, assuming a harbour to be a public harbour, all the foreshore bordering on that harbour formed a part of the harbour. This was the decision of the Supreme Court. In dealing with this case of *Holman* v. *Green* in the *Fisheries* case, (3) Lord Herschell, who gave judgment on behalf of their lordships is reported as follows:—

"It was contended on behalf of the provinces that only those parts of what might ordinarily fall within the term 'harbour,' on which public works had been executed, became vested in the Dominion, and that no part of the bed of the sea did so. Their lordships are unable to adopt this view. The Supreme Court, in arriving at the same conclusion, founded their opinion on the previous decision in the same court in the case of *Holman* v. *Green* where it was held that the fore shore between high and low water on the margin of the harbour became the property of the Dominion as a part of the harbour. Their lordships think it extremely inconvenient that a determination should be sought of the abstract question what falls within the description 'public harbour.' They must decline to attempt an exhaustive definition of the term applicable to all cases. To do so would, in their judg-

(1) (1881) 6 S C. R. p. 707. (2) At p. 711.
(3) (1898) A. C. 711.

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ment, be likely to prove misleading and dangerous. It must depend to some extent, at all events, upon the circumstances of each particular harbour what forms a part of that harbour. It is only possible to deal with the definite issues which have been raised. It appears to have been thought by the Supreme Court, in the case of *Holman* v. *Green*, that if more than the public works connected with the harbour passed under that word, and if it included any part of the bed of the sea, it followed that the foreshore between the high and low water-mark, being also Crown property, likewise passed to the Dominion. Their lordships are of opinion that it does not follow that because the foreshore on the margin of a harbour is Crown property, it necessarily forms part of the harbour. It may or may not do so, according to circumstances. If, for example, it had actually been used for harbour purposes, such as anchoring ships or landing goods, it would no doubt form part of the harbour, but there are others cases in which, in their lordships' opinion, it would be equally clear that it did not form part of it."

That case, as I have mentioned, is dealing with an existing harbour, and the point dealt with by their lordships was whether the foreshore of an existing harbour formed a part of that harbour. There is not much to assist in arriving at an exact definition of what is a public harbour within the meaning of the statute. I take it, however, that the language quoted would indicate that in each case it becomes a question of fact. One point is made clear, that to be a public harbour, it is not necessary that public moneys should have been expended. I think what was intended is that whether it was a public harbour or not would depend to a great extent on the question of fact as to whether the particular harbour in question had been

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actually used for harbour purposes, such as anchoring ships or landing goods, etc. There are definitions of harbours, as for instance, in *Farnham on Waters and Water Rights*, at page 27 the definition of a harbour is given as "An indentation in a coast extending into the land in such a way as to afford protection to vessels against wind and storm upon the waters." It does not seem to me that such so-called harbours can be treated as public harbours within the meaning of the Confederation Act. There is also a distinction between a harbour and a port. If a port, it necessarily follows that it was also a harbour, the exact boundaries of such harbours being a question of fact. In the *Whitstable* case, (1) the question was whether it was a port. It was not a case of a harbour. *Coulson & Forbes on Waters* (2) shows the distinction between harbour and port. I also refer to *Macdonald* v. *Lake Simcoe Ice Company* (3). I am of opinion that the evidence in this particular case falls short of proving that at the time of Confederation those parts of the Kaministiquia and Mission rivers where the water lots in question had been granted were a public harbour.

A further question of considerable importance arises on the question of the value of the water lots. There is no evidence of any market value for these water lots. All the evidence given is simply speculative. There had been no sales of water lots; in fact, I think the three water lots in question are the only water lots granted. At the time of the expropriation in question there had been no erections on any of the water lots. In the case of the Rochon water lot at one time there had been an erection, but it subsequently got into disuse and was allowed to disappear.

(1) (1869) 4 E. & I. App., 266. (2) 3rd ed., p. 464.
(3) (1899) 26 O. A. R. 415.

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Then, moreover, in arriving at the values of these water lots, it has to be kept in mind that all round the islands there was a reservation for a highway; so that no question arises of any claim to any part of the bed of either of the rivers as a right by title, except such title as they may have acquired by the patents of these water lots. Two of the water lots, namely the Rochon lot and one of Dr. Hamilton's, are water lots granted on the Kaministiquia river. These water lots, as I have stated, were granted in the year 1882 by the Province of Ontario. No application for permission to make any erections had been made. I think it is beyond question that the Kaministiquia river was at the time of Confederation a navigable river. This has hardly been questioned. It is a deep river, although shallow at the mouth, which required larger vessels to unload into scows, in order to pass over shoal water at the mouth. So far back as 1886 the Dominion Government expended considerable sums of money in deepening the entrance of this river, so as to enable large vessels to enter to Fort William, and there can be no question that from that date onwards it was a navigable river.

In dealing with the question what is or is not a navigable river, it must be borne in mind that in the early years, from 1867 backwards, the craft that plied on these rivers was of different character from what they are at the present moment. At all events prior to the expropriations on the Kaministiquia, the Kaministiquia had certainly become a navigable water within the provisions of cap. 115 of the R. S. of 1906, to which I will refer later. The original statute was chapter 35 of 49 Victoria, 1886. In my view of the law the navigable waters extended from bank to bank and

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included the waters over the lands granted by the water lot patents.

The case of *Williams* v. *Wilcox*, (1) was decided in 1838. As far as I can find, the law there enunciated has been recognized as the correct exposition of the law. In that case the replication, at page 316, stated "that while the river Severn was and is a public "navigable river, yet the plaintiff alleged that the "said part of the river in and across which the said "weir, etc., had been erected was not part of the said "river other than and wholly distinct from the channel "of the same, in which the lieges, etc., had had navi- "gated and passed." Then they allege "that the "said part of the said river in and across which the "said weir, etc. had been so erected, etc., is not, and "the said several times when etc. was not a public com- "mon navigable river for all the lieges, etc. to navigate, "etc. on the said part of the said river". Rejoinder, "that the said part of the said river in and across "which the said weir, etc., had been so erected and "placed is, and at the said several times when, etc., "was part of said river Severn, etc". In delivering "the judgment of the court Lord Denman, at page 329, puts it in this way:—

"If the subject had, by common law, a right of "passage in the channel of the river paramount to "the power of the Crown, we cannot conceive such "right to have been originally other than a right "locally unlimited to pass in all and every part of "the channel."

Then he proceeds to state that "All these consider- "ations (referring to what precedes) make it an "almost irresistable conclusion that the paramount "right, if it existed at all, must have beeen a right

(1) (1838) 8 Ad. & El. 314.

"in every part of the space between the banks. It "cannot be disputed that the channel of a public "navigable river is a King's highway, and is properly "so described, and if the analogy between it and a "highway by land were complete, there could be no "doubt that the right would be such as we now lay "down, for the right of passage in the highway by "land extends over every part of it." (1)

I am referred to the decision of Chancellor Sir John Boyd, in the case of *Ratté* v. *Booth* (2). In considering that case, it must be borne in mind that the contest was between the person in actual occupation of a floating boat house, and a wrongdoer who was interfering with his enjoyment. The circumstances in that case and in the one before me are very different, but in that case, at p. 499, the Chancellor points out that even if the owner erect on the bed of the river some structure which is not at the time detrimental to the public right of way, but the by changing conditions of the stream, or other cause, it should subsequently turn out to be a nuisance, no lapse of time could legalize what he had done. I do not see that anything determined by the learned Chancellor differs from the law as laid down in *Williams* v. *Wilcox*, and the learned Chancellor himself refers to *Williams* v. *Wilcox* as a binding authority. Numbers of cases were referred to by counsel in their elaborate and able arguments. Most of them were cases between individuals. The *Warin* case referred to, (3) affirms the proposition that so long as the water lots in question were not built upon they remained open

(1) See also *Attorney-General* v. *Earl Lonsdale*, (1868) L. R. 7 Eq., 389, and *Attorney-General* v. *Terrell*, (1874) L. R., 9 Ch., 423, and the judgment of Sir George Jessel, M. R. at p. 425 in which he refers to the case of *Rex* v. *Russell*, 6 B. & C., 566, as, in his opinion, not being good law.

(2) (1886) 11 O. R. 491.

(3) (1885) 7 Ont. R. 707; (1885) 12 O.A.R. 327; 14 S.C.R. 232.

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for navigation. It is pointed out by Ritchie C. J., at 236, that the right of the owner of a water lot in that case to fill up the water lot was by virtue of "the combined effect of the Crown grant and the "subsequent legislation". In considering the effect of that case it is necessary to remember that the Crown was dealing with what was then part of the public harbour at Toronto. By an order in council passed in 1837 the boundaries of the City of Toronto were extended south to what was known as the old Windmill line. By subsequent legislation the boundary has been extended further south ( but that is not a matter that affects the decision in the *Warin* case). A patent was issued to the City, conveying to them certain water lots, including the water lot in question in the *Warin* case, with a reservation for public streets. The grant of the water lots was confirmed by statute.

I do not think the *Warin* case is similar to the case before me.

Having come to the conclusion that the Kaministiquia is a navigable river, and that the navigable waters of the river extend from bank to bank, I must proceed to ascertain the value of these various water lots, which I will do later on in referring to the particular cases. Strenuous arguments were adduced before me to the effect that the grantees of these water lots have the right, or had the right at the time of the expropriation, to erect wharves and buildings on them. I do not agree in this contention. To place any such obstruction would, in my opinion, create a nuisance. It is argued, however, that permission might have been obtained under the provisions of sec. 7, cap. 115, of the *Revised Statutes of Canada* and that such leave would probably have been granted, and that therefore, in valuing the water lots, the chance of obtaining

such license should be taken into account. The statute in force at the time of this grant was chapter 23 of the *Revised Statutes of Ontario*, 1887, section 47, which is a revision of the Act in force at the time of the grant of the water lots. It enacts:—

"It has been heretofore, and shall be hereafter, "lawful for the Lieutenant-Governor in Council to "authorize sales or appropriations of land covered "with water in the harbours, rivers, and other navi- "gable waters in Ontario, under such conditions as "it has been, or it may be deemed requisite to "impose, but not so as to interfere with the use of "any harbour, river or other navigable water."

As I have mentioned, at the time of the expropriation by the Crown, no erections had been placed on these water lots, and no license had been applied for or granted to erect any such works. What is to be ascertained is the market value of these water lots. If the hope of obtaining leave to place erections added to the market value this would be an element that would necessarily be taken into account. In the case before me, however, there is no evidence whatever of any market value. The values given are merely speculative, with the exception that in regard to the Hamilton water lots we have evidence that a certain sum was placed as their value at the time of the sale to Dr. Hamilton. I will refer to this when dealing specifically with the Hamilton case. It may be a question whether a hope of this kind is an element that should be taken into account. The decisions in this court and the Supreme Court follow the line of decisions under the English Land Clauses Act, except where varied by local statute. Such cases as *Reg.* v. *Liverpool and Manchester Railway Company*, (1) *Bird*

(1) (1836) 4 Ad. & El. 650.

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v. *Great Eastern Railway Company*, (1) *Rex.* v. *Commissioners of Nene Outfall*, (2) may be referred to as showing what is the meaning of land or interest in land or property under the English statute. This is a question not of much material importance in dealing with this case, as the Crown has by its amended informations offered what I consider an ample sum for any interest the owner of the water lots may have. I am referred to the case of *Cunard* v. *The King*, (3) as determining the question that such a hope should be taken into consideration. In the Supreme Court the judges seem to have assumed that I was of opinion the patent was void, under the decision in *Wood* v. *Esson.*(4) There is a justification for this conclusion from a paragraph in my reasons for judgment, but it was not my intention to so hold, nor did I consider the *Cunard* case with that idea in my mind. All I intended to decide was that it was void so far as enabling the grantee to construct wharves. In my reasons for judgment in that case, at page 416, I put it in this way:—

"As far as I am concerned, I am bound by the decision of the Supreme Court in *Wood* v. *Esson.*(4) The effect of that decision is that the Crown, for the Province, cannot grant a water lot extending into navigable waters, so as to enable the grantee to construct or erect any wharf or other obstruction that will interfere with navigation without legislative authority."

Subsequently I state: "It becomes necessary, therefore, to consider the case as if the present defendants had not acquired the right to erect any structure."

(1) (1865) 34 L.J.C.P. 366.
(2) (1829) 9 B. & C. 875.
(3) (1909) 12 Ex. R. 414; 43 S. C. R. p. 88.
(4) (1883) 9 S. C. R., 239.

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Under the *Expropriation Act*, section 26, the information exhibited on the part of the Crown must set out the sum of money the Crown is ready to pay. Where no amendment is made to the information, and counsel for the Crown renews the tender at the trial, I think I am bound to allow the amount offered. This was the case in *Cunard* v. *The King*.(1) The amount was certainly large enough to cover any claim such as the contingent one mentioned in that case. This view of it was taken by the judges of the Supreme Court. I do not read the reasons of the learned judges as intending to hold that such possibility of assent was to be valued, if, in point of fact, such a possibility did not really add to its market value. As I understand that judgment, it is in effect, merely saying to counsel that even if the contention were well founded, the owner was amply compensated. The case relied upon in the Supreme Court by counsel for the appellant and referred to in some of the reasons for judgment, *Lucas* v. *Chesterfield Gas and Water Board*, (2) is a case of a different character. In that case the owner of the property in question was absolutely entitled to the property that was being valued. There was no contingency dependent upon which his complete title had to be perfected. The whole question in that case was as to the value of the property which the land owner had, and in dealing with the value they were merely stating that, in determining the value arising from such adaptability, the tribunal would have regard to the contingent value arising from the possibility of the land coming into the market when required for the particular purpose. Vaughan Williams, J., at page 25 states:—

(1) (1909) 12 E. C. R. 414.

(2) (1909) 1 K. B. D. 16.

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"I agree with Bray, J. that the fact that no buyer for reservoir purposes could be found, except a buyer who has obtained parliamentary power, does not prevent the special value being marketable, both on the ground that is stated by Stephen, J. *in re Countess of Ossalinsky and Manchester Corporation,* in the passage quoted by Bray J., and also on the ground that the fact that the Board themselves might become possible purchasers, who would give a special price for the land, ought to be considered."

Again at page 27 the judge states:—

"Supposing the general value is only given, if this land was probably certain, within a reasonable time, to be used for certain purposes, which would give it a very much enhanced value, that is a matter for the arbitrator to take into consideration. I am clearly of opinion that it is, and that the arbitrator has rightly taken that matter into consideration." And so went the judgment in that particular case.

In the case before me of these two water lots, it is quite apparent that at and prior to the time the value was to be ascertained, no assent would have been given by the Dominion for the erection of any structures on these water lots. Prior to the expropriation, the Government had determined upon the widening of the river, and had prepared plans for that purpose. Fort William is a city of rapid and considerable growth and a large amount of shipping business is done there. It required better navigation facilities, and it is not reasonable to suppose that the consent would be granted, and so defeat the very scheme which they had on hand. I have come to the conclusion that while the patents conveyed these water lots to the grantees, it was a prerequisite before they could utilize them for the purpose of erecting obstructions that consent

should be acquired from the Dominion Government under the provisions of the Statute to which I have referred.

In regard to the Mission river, I have had considerable doubt as to whether the waters of the Mission river should be treated as navigable waters prior, at all events, to the expropriation. It is not a question of very much moment, having regard to the evidence of value and the offset which the Crown is entitled to by reason of the works being constructed. I think the Mission river could hardly be called a navigable river. Mr. Merrick in his evidence seems quite clear on this point. It was a winding, tortuous river, with a depth of about 8 feet in the channel, with only four feet at the mouth where it enters. There is no evidence whatever of its ever having been used.

Having set out the main questions of law and facts, I now proceed to take up in detail the various cases in the order in which they were tried before me, except that I shall deal with the two expropriations in regard to the same lands together. I may say that at the trial in some cases the evidence was given as to the first expropriation, and a lapse of several days would intervene between that evidence and the evidence affecting the same lands by the second expropriation. In nearly all the cases I may say that the values sought to be obtained by the land owners is grossly excessive. It is left to the region of conjecture and speculation. It has, however, to be said in favor of the various land owners that at the time the evidence was given the Crown had not given the undertaking which has since been given, and which makes a very material difference in the case.

So as to avoid repetition I may state that in all cases before me, the claimants are entitled to interest on

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the amounts awarded from the date of the expropriation to the date of judgment. I also think that they are entitled to their costs of the action, and in each case the undertaking given should be referred to in the judgment as required by the statute.

THE KING *v.* BRADBURN & WEBB.

The first expropriation was on the 14th September, 1907. What was taken was six one hundredths of an acre. The Crown offered $45 being at the rate of $1,000 per acre. The defendants claimed the sum of $180, or being at the rate of $3,000 an acre. John Taylor Webb, one of the witness, deposed that he purchased 33 acres, of which the six hundredths of an acre formed a part a part in 1906. He paid for the block $23,000, which would be equal to $750 an acre. He states in his evidence that he was holding the property for industrial purposes. He is asked:—"Q. Have you had any offers for it for that purpose ?

A. No, there has been some talk of offers, but it is simply people asking for options, and myself and my associates did not consider them as being bona fide, and we did not consider them.

Q. But in a manufacturing concern they wanted shipping facilities? A. Probably would.

Q. And immediate access to the navigable waters would be of great value? A. Apparently the question of access is an open one. I was not in a position to guarantee any water right to anyone.

Q. If that immediate access to the water were afforded to you, it would add greatly to the value? A. Naturally."

Referring to the shortening of his frontage by 145 feet, he is asked:—"Q. What effect in dollars and cents would the loss of that access of 145 feet have on the whole lot?

A. It would be very small."

Some of the witnesses, to whom I will refer later, notably Mr. Young, Mr. McKellar and Mr. Ruttan, intimate that a thousand dollars an acre would be ample, having regard to the increased value to the balance of the lands, owing to the works of the Government. Some of the witnesses placed the value of the lands at $3,000 an acre, the additional $2,000 being given by virtue of the enhancement owing to the Government works. They, therefore, treat the land, for the purpose of the expropriation, at $1,000 an acre, setting off the $2,000 against the value. Strictly speaking, the additional value given by these works would be the additional value to the whole lot, which would practically debar the owner of the land from getting any compensation at all. Bradburn, the co-defendant with Webb, is asked the following questions:—

"Q. The effect of your proximity to a navigable stream would add extra value to it? A. Yes, I guess so.

Q. And it was, as a manufacturing site, you thought it had this great value? A. Yes.

Q. You had to have the right to have the shipping facilities before the land would have the value which you had placed upon it? A. Yes."

He, in common with other witnesses, is placing values upon the land as such value was increased by the works in question. Mr. Young, the Mayor of Fort William, said: "I consider that the islands, perhaps, are more valuable for commercial purposes than for any others". He states further on in his examination, in reference to an interview he had with Mr. Temple about the values of properties which were being expropriated as follows:—

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Q. "Did you advise him (Temple) generally about the value of property in that locality? A. I think our conversation was more in the lines of the benefit or otherwise of the dredging or widening of the river, the straightening of the river.

Q. Did you put any specific value on property generally in that neighborhood? A. I think I said that the land was being improved by the fact of being dredged on a straight line, that a reasonable valuation for government purposes would be about one thousand dollars.

Q. You think you told him that if the frontage on the water were reduced to a straight line by dredging operations, it would increase its value?

A. The idea was the natural contour of the river was in such a shape that boats could not lie, or a dock could not be built on a straight line, that if the river were straightened to make it possible to have a straight dock, notwithstanding the value of the land where improvements were made of that nature, $1,000 an acre would be a fair price for the Government to pay.

THE COURT: That is if the river bank were straightened and the river dredged? A. Yes."

He states again:—

"Q. If offset gained, would leave it about $1,000 per acre? A. Yes.

THE COURT: Taking into account the straightening of the river and the dredging? A. Yes."

He was asked again:—

"Q. That you said is the fair price to pay for an acre? A. To pay for land in that neighbourhood; I won't deny it. I will state positively what I did say and what I meant. I said I thought, as I told you before, that the fair price for the Government to pay for land, notwithstanding its value, would be about $1,000

an acre, at that rate. I made that as plain as I could.

THE COURT: That means that, although the land might be of greater value, still taking as an offset the manifest advantages to the land owners by reason of the straightening of the harbour, that they should get about $1,000 an acre? A. I might say that at that time some land of my own further up the river was in question for expropriation, and, in a general way, all over the property, I thought if the Government paid that amount for it, including my own, that that would be a fair amount to pay, where they were making improvements to the land.

THE COURT: Q. You offset the benefit to the land that has been improved?

A. Yes."

I may say that I agree with Mr. Young, but think that if the Government insisted on it, as I have stated before, the offset to be taken into account would be the increased valuation to the whole block, and not merely the particular piece that was expropriated. The Government, however, have offered to pay the compensation at the rate of $1,000 an acre, and I think the sum offered is ample, having regard to their undertaking to which I have referred.

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The date of the expropriation is 12th May, 1909. Mr. Merrick gives evidence in regard to the plans to which I have already referred. The area of lands expropriated was 2.70 acres, and the Crown offers $2,700. In their defence to the second expropriation the defendants state in paragraph 3:—

"The said block of land, at the time of the depositing of such plan, possessed a valuable water or harbour

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frontage on the Kaministiqia River, and the said lands were suitable and in demand for docks, grain-storing and handling, terminal elevators, warehouses, large industries and other lake and rail terminal facilities, as well as being valuable for subdivision, and of great and increasing value."

It is needless to repeat what I have already referred to at perhaps too great length, that all this value was dependent upon their getting access to the river. Lumby, who was called as a witness, placed a value on the land on the 12th May, 1909, of $5,000 an acre. Mr. Lumby was in the real estate business. He states, in answer to questions, as follows:—

"Q. So that you think there is an additional value when you get to the Kaministiquia River? A. Yes.

Q. That is speculative, even now, fanciful: there is no use put to either place? A. All of our prices are speculative there.

Q. Even the prices you are giving here to-day are speculative? A. Yes, the prices at which you would get speculators to buy.

Q. The prices which you are suggesting are what you have put on the property and trying to get? A. Yes.

Q. You do not know if you could get them?

A. No, I am not a prophet".

Mr. Webb, in referring to the existence of the road allowance, puts it as follows:—

"THE COURT. Supposing that land is taken and the river is widened all along in front of your place: Assume that, is it not an advantage to you to get rid of the road allowance between you and the water? A. Providing I have rights to the water;

Q. But with your frontage right on the water, instead of this road allowance between you and the

water, for industrial purposes, is it not a better proposition? A. Yes, if I could get access to the water.

Q. I am talking for industrial purposes. For industrial purposes they bring your frontage to the water and you get some means of utilizing the frontage for dockage; you are better without the road allowance? A. Yes.

Q. Is that not a matter of common sense? A. Yes."

He is asked:—

"Q. You say as a fact that it is the industrial side of the future use of this property that appeals to you? A. Largely; that is why we keep it as it is."

He says:

"We must utilize it for something, if the Government will not enable us to utilize the water; we must utilize it for something.

Q. The proposition in your mind for the purpose of the property was from an industrial standpoint? A. Quite right.

Q. And its value lies in its possibility from an industrial standpoint? A. That is the way I size it up.

Q. And that is the value of the island proposition as a whole? A. The island proposition as a whole would be, I think, for industrial purposes."

He says in answer to a question:—

"I think there is a good deal of gambling about the entire west, and not only for the island, but in the City of Fort William as a general rule. I think you have had a finger in the pie, (referring to counsel cross-examining) and so have I. I have not lost much, but I do not know how it will be later on."

He is asked by me:—

"Q. You never thought of that island being dedicated for asylum purposes? A. No. I am afraid that would detract from the value of the property.

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Mr. Dowler. You are not suggesting that all engaged in this might want to go there? I do not know about the legal part, but I know some of the witnesses might:"

No doubt he is here referring to the inflated notions of some of the real estate men.

I think the amount offered by the Crown is a reasonable amount, having regard to the present circumstance stances, and I so award.

The next cases are

THE KING *v.* LA CORPORATION DU COLLEGE STE. MARIE À MONTREAL AND THE KING *v.* THOMAS P. KELLY.

These are lands owned by Thomas P. Kelly. The expropriation was the 6th August, 1906. The land taken was 2.83 acres. The Crown offered $2,122.50. The defendants claimed the modest sum of $25,000. It appears that Thomas P. Kelly purchased ten acres, of which the land expropriated formed a part, on the 15th October, 1896, for the sum of $14,240. He states that the value on the 15th October was about the same as the value on the 6th August, the date of the expropriation. His frontage before the expropriation was from 1,300 to 1,400 feet. He offers at the trial to take one-half of the $14,250. The price the College sold for was $13,500, the difference between that sum and the $14,250 is made up by a commission. This particular piece of land fronts on the Kaministiquia and the Mission, and is being taken for the purpose of a turning basin. There will be no difficulty in straightening the land, so as to give a larger frontage on the Kaministiquia. The second expropriation took place on the 12th May, 1909. By this second expropriation two parcels were taken, one containing 2.60 acres more or less and the other nineteen hundredths of an acre.

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The Crown offers for the 2.60 acres $2,600, and for the nineteen hundredths $95. The defendant claims a sum of $150,000. In the statement of defence in the second expropriation the third paragraph reads as follows:—

"The said block of land at the time of the depositing of such plan possessed valuable water or harbour frontage on the Kaministiquia River, and the said lands were suitable and in demand for docks, grain storing and handling, terminal elevators, warehouses large industries, and other lake and rail terminal facilities, as well as being valuable for subdivision, and of great and increasing value."

As I have pointed out, he goes on to claim the sum of $150,000. In the first expropriation he had based his claim to damages to a great extent by reason of its being ruined for dock purposes by reason of there being a turning basin in front of his land, and he calls Captain McAllister and others to support this view. On the 6th of August, 1906, this property that was left to him would be worth, according to his story, half of $14,250, a very large claim against the Crown being by reason of the loss practically of dockage frontage. Between that date and the 12th of May, 1909, this same property that was left, valued on the 6th May, 1906, at $7,125, has suddenly reached the value of $150,000, and that for the reasons stated in the first paragraph of the defence which I have quoted. The witnesses in this case also refer to the property as being destined for industrial purposes. William C. Lille, a real estate agent in Fort William, gave evidence of values, in which he attempts to put a very large sum as the value of the lands. He is asked:—

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"Q.—The whole of your valuation is based on the proposition that you are entitled to dock frontage? A.—Yes, for industrial purposes we are figuring. THE COURT.—You are figuring on getting the right to a dock frontage on the river? A. Yes, to a certain extent."

Peter McKellar, who was the owner of the property on the Kaministiquia River, was called as a witness. He sold on the 3rd September, 1909, the land off his frontage at the rate of $1,000 an acre, and he considered that a fair price on account of the conditions. He is asked:—

"What conditions? A. I refer to the great improvements that were being made for the benefit of the city.

Q. And the widening of the stream? A. I consider what we had left would be enhanced a great deal more in value than what we lost.

Q. You consider that the property you had left after the work was done was worth more than the property was worth in its original condition? A. Yes."

Mr. Ruttan, who had been engaged in the real estate business for a great many years, refers to prices paid for land. He is asked:—

"Q. What advantage, if any, would the land derive from the works.

THE COURT. Assuming the dredging took place.

A. Assuming the land taken to embrace the road allowance in front of the lot, and assuming that that taken by the Crown would result in their bringing the navigable water up to the water's edge of the property I was concerned in, I thought I would rather have my client accept any moderate compensation than to lose the advantage that in my opinion would

result to him from getting rid of the road allowance.

THE COURT. What is your idea of a moderate compensation.? A. I can tell you what I advised him.

Q. What is your opinion? A. I should think $500 an acre was an adequate compensation in his case.

THE COURT. Having regard to the improvement in the rest of his land by the dredging out and getting rid of the road allowance? A. Yes."

As I have before stated, I have no doubt whatever that the work done, coupled with the undertaking given by the Crown, will far more than counterbalance any loss which these claimants have suffered. I think that in both these cases, the sums offered by the Crown are sufficient.

I have pointed out in the other case that in allowing the offset, the witnesses practically do not allow, by way of offset, the increased value to the balance of the land not expropriated. They simply assume that the particular land expropriated is worth $3,000 an acre, but by reason of the benefit that it should be valued at the rate of one thousand dollars. The Crown has, however, treated it as the value of $1,000 an acre.

In each of these cases the judgment should go for the amounts offered by the Crown.

## THE KING *v.* HAMILTON.

There were two expropriations and two sets of pleadings in relation to the property owned by Dr. Hamilton. The properties front on the Kaministiquia river and also on the Mission river. The first expropriation was 10th September, 1908. This related to the two water lots, the one on the Kaministiquia and one on

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the Mission river. The acreage of the water lot on the Kaministiquia was .674 acres, and the acreage on the Mission river 1.755 acres. These water lots were granted, as I have pointed out, in the year 1882 by the Ontario Crown. The Crown offers for the two lots the sum of $1,367. The defendant by his defence claimed the sum of $25,000. As I before stated, an amendment was applied for on the part of the Crown, setting up that these water lots were granted in what was, at the time of Confederation, a harbour. This contention I have dealt with, and my opinion is adverse to the Crown. In answer to the amended statement of defence, the defendant amended the claim of $25,000 and asked the sum of $250,000 damages. This demand is simply preposterous, according to the view I take of the evidence. A land owner whose land is compulsorily taken is entitled to full compensation, but he is not entitled to more than what is just and I can see nothing gained by making such preposterous demands. Dr. Hamilton in his evidence at the trial relies upon the properties in question as being mainly valuable for first class residential sites. This I do not agree with. I have stated my reasons in a previous part of this judgment, and I think it was hardly argued by the counsel that such was the destination of the property in question.

Dealing first with the water lot on the Kaministiquia River, I have given very fully my views in regard to these water lots, and I do not propose to repeat what I have previously stated. In the amended information the Crown sets up that if it be found that the said lands be not vested in His Majesty as part of a public harbour, His Majesty is willing to pay the defendant, or whoever shall prove to be

entitled thereto, the sum of $1,376, in full satisfaction of the said lands and real property. This covers both the water lots on the Kaministiquia and on the Mission river. The expropriation was on the 10th September, 1908. As I have already pointed out, the plan for the widening of the Mission river was not approved of until after this date, but Mr. Merrick, the engineer, assuming that it would be approved, subsequently expropriated with a view to the Mission River work, The water lot on the Kaministiquia river was purchsed by Dr. Hamilton in April, 1903. He got an option on 70 acres at $350. per acre. It subsequently appeared that there was an additional five acres and the water lot for which the vendor asked $7,500. It ended in Dr. Hamilton purchasing the 75 acres and the water lot for the sum of $27,000 cash. This would be at the price of $360 an acre. The second expropriation took place on the 12th May, 1909. It embraced two parcels on the Kaministiquia river, one containing 4.31 acres, and the other .95 acres. There were six parcels on the Mission river; one parcel (3) containing .98 acres, parcel (4) 1.12 acres, parcel (5) .60 acres, parcel (6) .26 acres, parcel (7) 2.56 acres, parcel (8) 2.94 acres. The Crown offered for parcel (1), namely the 4.31 acres, the sum of $4,310, for parcel (2), the .95 acres, $950, for the Mission river properties, parcel (3) ·98 acres $490, parcel (4) 1·12 acres, $560, parcel (5), the ·60, $300, parcel (6), the ·26 acres $130, parcel (7) 2·56 acres, $1,280, and parcel (8), 2·94 acres, $1,474. The total amount offered by the Crown for the eight parcels is $9,490. I have before pointed out that at the time of these expropriations there was a road allowance intervening between the water and the lands in question

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In answer to the second expropriation, the defendant states, in his third paragraph, as follows:—

"The said blocks of land, at the time of the depositing of such plan (referring to the plan filed on the 13th May, 1909), possessed valuable water or harbour frontages on both the Kaministiquia and Mission rivers, and the said lands were suitable and in demand for docks, grain storing and handling, terminal elevators, warehouses, factories, and other lake and rail terminal facilities, as well as being valuable for subdivision, and of great and increasing value."

With this allegation, with the exception of their great increasing value, with which I am not at present dealing, I concur; but it is well to bear in mind the reason why these properties became of such value for dock and other purposes set out in the defence. It seems to be ignored by the claimants that what gave value to the properties were the works undertaken by the Government, and they ignore altogether the offset which the statute requires to be taken into account when dealing with their claims. As I have stated, at the time of the expropriation the Mission river was not a navigable river. The plan adopted by the Crown was to widen this river, so as to have a navigable river of 500 feet in width, with a depth of about 25 feet; also with the Kaministiquia river. The road allowance in front of these properties has been got rid of. The properties are placed with a river frontage, and the effect of the undertaking given by the Crown is, in my judgment, to add enormously to the value of the lands in question both on the Kaministiquia and the Mission rivers, and the increased value to the balance of the land would far more than offset any damage which has been occasioned by the expropriation. I have previously referred

to the bridge, which, according to the evidence of Dr. Hamilton, was located in March, 1908; no doubt, as argued, the erection of the bridge when completed must have a beneficial effect on the lands. It is a roller lift bridge. It is partly completed at the present time, June 20th, 1913, but it is not yet finally completed. I am not at all sure that the erection of this bridge will not have an injurious effect on the property of Dr. Hamilton, from an industrial standpoint. I have referred to the plans in the previous part of my judgment. In negotiating for the purchase of the five acres and the water lots, according to Mr. John McLaurin's evidence, the two water lots on the Kaministiquia river and on the Mission river were sold by him to Dr. Hamilton for the sum of $500, and the five acres for the sum of $4,500. In the conveyance the prices were not separated. According to Dr. Hamilton, it was a lump sum of $5,000 for the five acres and the two water lots. I think Mr. McLaurin's memory of the transaction is the better. The evidence of Dr. Hamilton would indicate that he had suffered a loss by reason of the road allowance being taken away and the water lot expropriated, of about $148,500. This, as I have stated, is in my opinion an absurd claim. He is asked in his evidence:—

"Q. Did you consider that you, as owner of the water lots, would have the right to make such use as you pleased of them? A. I did not suppose I could: I did not suppose I could use them for any purpose I wanted to.

Q. What would you use them for? A. For dock purposes.

Q. You thought you could build upon them? A. Yes.

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Q. You thought you could? A. Yes, docks such as are suitable for the locality.

Q. Without being molested in any way? A. Yes.

Q. You thought you had a perfect right to make such use of them as you saw fit? A. Yes.

Q. You did think you could build docks or wharves upon them? A. Yes.

Q. You do not know of any other sales of water lots near you in 1908? A. I do not think anybody round there has any."

Lumby, who is called as to values, places a value, but as he states, the values are purely speculative. He says in answer to a question:—

"Q. And if you could go 19 feet out, would that be of any value to you? A. It depends on what you could do with the 19 feet. You were saying you should not interfere with navigation in that 19 feet: it would be of no value, if you could not build a dock out in the 19 feet."

And this would be obvious to anyone, it seems to me. George Adair, also in the real estate, places a large value, but again purely speculative. He also points out the advantage gained by having the property fronting on the water. Having regard to all the circumstances which I have very fully dealt with, and the undertakings given by the Crown, I am of opinion that no injustice is done to Dr. Hamilton by coming to the conclusion that the offers made by the Crown, coupled with the undertaking, will fully compensate him, and I direct judgment to be entered in these two cases for these two amounts.

THE KING *v.* WALSH AND ROCHON.

On the 14th September, 1907, the Crown expropriated three parcels of land. The first two parcels were

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lands on island number one. The third parcel is on island number two. Parcels numbers one and two are the property of Rochon, subject to a mortgage. Parcel number three belongs to the estate, and Rochon has no interest in this third parcel. I will deal with parcels one and two separately from parcel three.

Parcel one is the water lot referred to previously as the Rochon water lot. It had a frontage on the Kaministiquia of 1066 feet, with a depth on the easterly side of 95 feet, and on the westerly side of 70 feet. The whole area is 1.46 acres. Parcel two has an area of 1.43 acres. The Crown offered for the three parcels the sum of $5,065. On the 12th May, 1909, a further portion of the land that was left with Rochon comprising 1.74 acres, was taken by the Crown and for this the Crown offered the sum of $1,740. The defendant Rochon claimed the sum of $25,000. In his defence to the second expropriation, referring to the damage occasioned to him by the second expropriation, he states as follows:—

"The defendant Rochon further says that the land mentioned in the said information is a portion of the lands so purchased by him as aforesaid, and of which he is the equitable owner, as aforesaid, and the defendant Rochon says that the said lands mentioned in the said agreement were and are valuable water front properties, and of great and increasing value, and at the time of the depositing of the plans set forth in the information, the said lands possessed a valuable water and harbour frontage on the Kaministiquia River and the said lands were suitable and in demand for docks, warehouses, terminal elevators, large industrial and other lake, rail and terminal facilities, as well as for other purposes, and were of great and increasing value, but by virtue of the expropriation by the Crown,

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the defendant, in addition to being deprived of a large part of the water or harbour frontage of the said lands, has suffered great loss or damage by reason of the fact that the said lands so owned by the defendant Rochon, and not expropriated, have been injuriously affected and made particularly of little use or value."

All that I have said in reference to the Hamilton cases is applicable to the Rochon cases, so far as the result of the first expropriation. The Crown counsel properly admitted on the argument of the case that Rochon was entitled to more consideration than the other claimants. This arises from the fact of the peculiar shape of Rochon's property. Originally the property comprised an area of four acres. According to Mr. Rochon's evidence, these four acres were purchased by him on the 25th May 1907, irrespective of the water lot, for the sum of $20,000. He apparently was of the opinion that he would be able to utilize the water lot for dock purposes. He says in his evidence in answer to the question:—

"Q. Had the frontage on the water anything to do, in your mind, when you bought the property? A. Altogether.

Q. You were buying as you thought, water frontage? A. I was buying water frontage.

Q. In your mind at that time, what possible use was there for this property? A. It could be used for a good many years for elevator purposes, dockage and warehouses.

Q. And were these in your mind at the time you bought? A. Yes.

Q. Would you have bought the property without the water lot? A. Not at all.

"Q. You would treat this property as having a frontage on the river of 1,066 feet? A. Yes.

Q. If your property had not gone in this triangular shape in the rear, but had gone square back, what do you say as to the valuation?

A. I do not think it makes much difference. I bought that property with the expectation of using the water front more than the back, but I took it for granted I could build on the water lot and get the allowance between."

After the first expropriation of the two lots Rochon was left with 778 feet of frontage in lieu of 1,066 feet that he previously had. He was very pleased with the water frontage, which, with the undertaking of the Government, would make a valuable property. Had the case rested with the first expropriation, having regard to what I have held in regard to the right to utilize the water lot, I would have been of the opinion that the damage would not be very much. In other words, the privileges granted to him would offset, to a great extent, the damage. The acreage, as I have pointed out, in the first expropriation was 1.43 acres. In the second expropriation the Crown expropriated 1.74 acres. This would leave Rochon, after the second expropriation, with eighty-three one hundredths of an acre. The four acres were peculiarly shaped. They practically were triangular in shape, with the base fronting on the river. Expropriating the 3.17 acres of the base of the triangle left him with a piece of property still triangular in shape, with very small depth, and it is on this account that the Crown counsel very properly thought that Rochon was entitled to consideration greater than the others. Counsel in his argument left it to me to say what I thought would be a fair compensation. After giving the matter a good deal of consideration, I think if Rochon were allowed for the 3.17 acres at the rate of $5,000 per

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acre, that being the price paid on the 14th September 1907, he would be fairly compenstead. This would make $15,850. For the water lot I would allow him an additional $1,000. I think in addition to that he would be entitled to 10 per cent. for compulsory expropriation, which would leave the whole claim $18,535. I have no doubt he will be able to make some use of the eighty-three one hundredths of an acre which is left to him, taking into account the undertaking given by the Crown. The interest of Rochon is subject to a mortgage, and in the judgment care must be taken to protect such interest.

In regard to parcel number three, owned by the estate of Walsh, it stands on a separate basis. The property is situated on island two. According to the statement in the information, the lands taken comprise two and six tenths acres. It is property situate on the Kaministiquia and McKellar rivers. There is no specific sum mentioned in the information as compensation for this particular parcel of land. The Crown in its information makes one offer for the three parcels, namely the two I have dealt with as belonging to Rochon, and this particular piece of two and six tenths acres. The total for the three parcels was $5,065. At the trial, on the opening of the case, when Mr. Merrick was called to give evidence, it was admitted that parcel three comprised 1.29 acres. Prior to the expropriation of the 14th September, 1907, the road allowance surrounding the property had a frontage on the Kaministiquia side of about 450 feet, and on the McKellar river side practically 700 feet. After the expropriation there were two pieces left on the Kaministiquia, one of 740 feet in length and the other 125 feet in length, and on the McKellar river there would be left 450 feet in length in lieu of the 700 feet

which they had on the river prior to the expropriation. It is conceded by everybody that the Kaministiquia frontage would be of much greater value than the McKellar river frontage.

Walsh, in giving his evidence, states as follows:—

"Q. You were injured in a special way by reason of the line of the exproriation not following a straight line across from the McKellar river. I am speaking of parcel number three. You claim you have a special grievance by reason of that line not being carried through as a straight line? A. Yes, I contended that at the time.

Q. And you contend so still? A. Yes.

Q. Is there any way you can put that into dollars and cents, the amount of that grievance, the injury that results from that not being carried in a straight line? A. I say I think the injury to that property would be whatever it would cost to put that on a straight line right through the McKellar river.

THE COURT: Supposing the Government made the straight line, and did the dredging, there would be the value of the land taken? A. Yes, and whatever the cost would be if I had to do it.

Q. Supposing that this is done, how much more valuable would that be on a straight line than it is now? How much more? A. Whatever it would cost, the difference.

THE COURT: You think the increase in value would be compensated by the work that was done? A. Yes." He is asked further as follows by me:—

"Q. As I understand your evidence now, supposing that line is straightened, and the excavation done along the straight line, would this property be benefitted by that, since the turning basin were kept there?

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Would it make any difference straightening it, if the turning basin were kept there? A. It would.

"Q. To what extent? A. I would have less frontage, but I would have it straighter."

Counsel for the crown then made the following offer:—

MR. DOWLER: I will make an offer, on behalf of the Crown, to straighten that out. I will make that as a binding offer.

MR. MORRIS: There would be an undertaking in the judgment?

MR. DOWLER: Yes.

THE COURT: The Crown is undertaking to take this line marked 505 feet?

MR. DOWLER: We practically fyle a new plan.

THE COURT: You undertake that?

MR. DOWLER: To dredge in accordance with that plan. I will put in a written undertaking, with the plan attached. I will file a written undertaking."

This undertaking is in addition to the general undertaking which is applicable to all the parcels. The result of this undertaking will be to leave the land with a frontage of 505 feet on the Kaministiquia. The block of land consisted of about 12 acres, of which the 1·29 acres, and the additional small portion that will be required in order to straighten the land formed a part. Walsh valued the land at between $3,000 and $4,000 an acre. He states that the property was worth before three to four thousand an acre, and it has that value from being on the Kaministiquia River. William McCall places the value at $3,000 an acre. He is asked this question:—

"Q. So that you are basing your valuation on this property on the theory that you would some day

have a chance of getting a dock outside of the road allowance? A. Yes.

Q. And be able to keep all your acreage? A. Yes

Q. So that your valuation at $3,000 an acre is based on that theory? A. Yes."

He is asked the following questions:—

"Q. Is it not a fact, bringing it down to a matter of common sense, that it is the development of Fort William for shipping purposes by dredging and deepening and widening the river that is bringing up all of this property into value? A. It is decidedly.

Q. That is what makes it? A. Yes.

Q. Is it not a fact that all of these large works coming in here and building up the city and making it a large shipping point, and the work done by the Government to bring about all that state of affairs that makes all of this dockage property valuable? A. Yes.

Q. That is the position? A. Yes."

Mr. McCall was a witness called by the owners of the land, and I think he fairly summarizes the situation in the question and answers which I have quoted. There can be no possibility of doubt that the increase of value to $3,000 an acre is owing to the works in question. Some point was sought to be made of the fact that there is a turning basin. It is stated that the effect of this turning basin would be to materially injure the lands for dockage purposes, and Captain McAllister was called in support of this theory. It is admitted that the river, at the place in question, is 710 feet in width from bank to bank: that is with the turning basin included. Captain McAllister, who gave evidence in regard to the danger, was basing his evidence on his knowledge of Owen Sound, where the turning basin was only 350 feet in width, and of

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course Captain McAllister had to admit that where the width was 710 feet it made all the difference.

I do not think the turning basin is going to injure the property for dockage purposes. All that I have said in regard to the previous cases applies to this particular case. I think that, having regard to the manifest benefit to the rest of the lands, if the estate is allowed, with regard to this parcel three, at the rate of $1,000 an acre, together with the two undertakings referred to, they will be fully indemnified.

The acreage can be ascertained when it is known what further quantity of land is taken for the purpose of straightening the land, according to the undertaking of the Crown counsel.

THE KING *v.* HORNE.

This is a property situate on island number two. The expropriation was on the 12th May, 1909. The area taken was 1·49 acres . The crown offers $1,490. The defendant claims $25,000. In the defence he states that the said block of land, at the time of the depositing of such plan, possessed a valuable water or harbour frontage on the Kaministiquia river, and the said land was suitable and in demand for docks grain storing and handling, terminal elevators, warehouses, large industries, and other lake and rail terminal facilities, as well as being valuable for subdivision and of great and increasing value. The block of land prior to the expropriation contained 11 acres. What is left after the expropriation is about 9½ acres. Prior to the expropriation he had a frontage on the Kaministiquia river of 317 feet. By reason of the straightening by virtue of the works undertaken by the Government, he is now left with a frontage of 527 feet. In his evidence he states:—

"Q. Having that increased frontage on the Kaministiquia river, does that give increased value to your acreage? A. Yes."

While by his defence he claims $25,000, in his evidence he puts it in this way:—

"Q. Then your claim is for the actual acreage taken at $5,000 an acre? A. Yes."

In his evidence Horne was asked:—

Q. Would not your increased frontage enable you to divide it up so as to get more manufacturing sites? A. Yes.

Q. In that way it would be an advantage? A. Yes.

THE COURT: It would occur to me if you had only a frontage of 317 feet, it would be limited, perhaps, to one manufacturing purpose, but if you increased that frontage to 527, you make this lot available for more than one industry, and in that way it would be a great advantage? A. Yes.

Q. Then by getting an increased frontage, you have an opportunity of perhaps selling it for two or three industries? A. Yes.

Q. But you had not with the narrow frontage 317 feet? A. Yes.

Q. You have a right to the dock here as you had before? A. Yes.

Q. You might have two boats or and two or three separate industries; is not that an additional benefit? A. Yes.

THE COURT: And then it all depends on your right to put your docks on the river; the dedication of that is for an industrial purpose? A. Yes.

Q. Namely because it is on the Kaministiquia river ? A. Yes.

Q. That is the destination of all of this island property? A. Yes, I think a lot of it will be used

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for that purpose. I thought at one time the island would be a first class residential property, but I think it will come down to a second class residential property, and gradually it will be eliminated from that for the small class of workmen's and mechanics' houses.

Q. That is the ultimate destination? A. Yes.

Q. In the working out of the ability to put docks on the river on the island side of it, is that of much consequence to the property owners? A. Yes.

Q. As a matter of general use of the shores of those islands for dock purposes, are they not made much more feasible by widening the channel to 500 feet to make better navigation? A. Yes."

It is needless to repeat what I have already dwelt upon in dealing with other cases. The benefit of of the works in regard to Horne is greater than to others in that he gets this increased frontage. I think, having regard to the undertaking, the offer of the Crown is ample, and I give judgment for that amount.

THE KING *v.* OAKLEY, LAVERTY *et al.*

The lands expropriated in this case are situate on island number one and they front on the Kaministiquia river. There are two parcels expropriated, one containing .93 acres, and the other .98 acres. They are to be seen on plan Exhibit No. 9 in the consolidated cases, marked "Enoch Brown." The Crown offers at the rate of $1,000 an acre, namely $930 for the first parcel and $980 for the second. The defendant claims the modest sum of $25,000. His defence puts it that the said block of land at the time of the depositing of such plan possessed a valuable water or harbour frontage on the Kaministiquia

river, and the said islands were suitable and in demand for docks, grain storing and handling, terminal elevators, warehouses, large industries and other lake and rail terminal facilities, as well as being valuable for subdivision, and of great and increasing value. Laverty, who is a real estate agent, purchased the block containing 18 acres on the 21st September, 1908. The purchase price was $20,000, or equal to $1,100 an acre. The road allowance had been taken by the first expropriation. Laverty states in his evidence that on the 12th May, 1909, they estimated the property as being of a value of $90,000, certainly a remarkable increase between September 21st, 1908, the date of his purchase, and the 12th May, 1909.

He is asked:—

"Q. Your property has a good depth? A. Yes, I guess it averaged about 1,200 feet.

Q. And you could stand this piece being expropriated off the front? A. Yes.

He states his claim in his evidence as follows:—

Q. What would it be worth per acre, taking it from the back? A. Just considering it as acreage?

Q. Yes. A. It was worth $3,000 an acre.

Q. Then your claim is .93 acres, plus the .98 acres, at $3,000 an acre? A. Yes.

Q. And no consequential damages? A. Yes.

Q. That is the whole claim? A. Yes.

Q. That makes a total of $5630? A. Yes."

I pointed out that in his defence the claim made was about $25,000. On cross-examination by Crown counsel he makes this important statement.

"Q. What did you mean by the $90,000: How did you arrive at that? A. In this way: taking it as acreage with water frontage, we considered it worth $5,000 an acre.

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Q. That is the whole 18 acres? A. Yes.

Q. That is to say, the water frontage adds to it a value of $2,000, an acre to the whole 18 acres? A. Yes.

THE COURT: You think that having the water front it would increase your value $2,000 an acre? A. Provided we had our water frontage.

Q. What do you mean by water frontage? To build on the river, or what? A. Yes, to build on the river.

THE COURT: You mean if you could build into the river it would be worth that? A. Yes.

Q. On the edge of your own property? A. Yes.

Q. You are talking of putting docks at the edge of your own property? A. Yes.

Q. And having it accessible to the river?

Q. And your opinion is that the added value to your whole 18 acres by reason of your being able to put the docks there would be $2,000 an acre? A. Yes.

Q. So that if you had not the right to put docks and could not get the right to put docks on the land as you bought it, you could not put your value up to $5,000 an acre, could you? A. If we could it would be worth $5,000 an acre.

Q. But if you could not put the docks there? A. It would be considered as acreage worth $3,000.

Q. It is worth $3,000 an acre, apart altogether from frontage? A. Yes, that is what I mean.

Q. But the frontage meant $2,000 an acre to the whole block to you? A. Yes.

Q. It would be of that much advantage to you to be absolutely certain that you would get a frontage available for you? A. Yes. I would consider it worth $5,000 an acre.

Q. You would consider it worth $2,000 an acre if you could get the frontage available to you for your use? A. $2,000 more."

I have quoted this portion of his evidence, as it exemplifies what I have previously stated, that the advantage gained by these land owners by reason of the works is not merely an advantage to the particular acreage expropriated, but to the whole block, and would, according to Mr. Laverty's statement, amount to about $36,000 on the whole block of 18 acres.

Cooper, another witness, puts it in this way:—

"Q. Does not the value of your water frontage depend on your ability to put docks there: that $2,000 you have added is for your supposed ability to put docks there? A. Yes.

Q. That is what it is added for? A. Yes."

I think, without repetition, that claimant is well compensated, under the circumstances of the case, and I award judgment for the amount offered by the Crown.

THE KING *v.* ROWAND AND THE KING *v.* TAIT.

The properties, parts of which were expropriated, front on the Mission river. They adjoin each other. The expropriation was on the 12th May, 1909. In the Rowand case the area of land taken was 1.07 acres. In the Tait case the area of land taken was .67 acres. In the Rowand case the tender of the Crown is $535. The defence in each case set up that the said block of land at the time of the depositing of such plan possessed a valuable water or harbour frontage on the Mission river, and the said lands were suitable and in demand for docks, grain storing and handling, terminal elevators, warehouses, large

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industries and other lake and rail terminal facilities, as well as being valuable for subdivision, and of great and increasing value.

Lille, who is a real estate agent, in giving his evidence stated that it was generally known that the Mission river would become dredged as far back as the year 1906. According to his view, as soon as the Grand Trunk Pacific located their terminals on the 1,600 acres of land purchased by them, it seems to have been taken for granted that sooner or later the Mission river would be made navigable. In point of fact, at the date of the expropriation in question, these lands belonging to Rowan and Tait were separated from the Mission river, by the road allowance to which I have referred, and the Mission River itself was not at that time a navigable river. By reason of the works of the Government the road allowance has been got rid of, the Mission river is to be dredged to a depth of 25 feet, and will have a width of 500 feet, and no doubt by reason of these works, the allegations in the defence which I have quoted will probably come true. It is apparent that the effect of these works will be to enormously add to the value of the balance of the land not expropriated by the Crown. It is needless to reiterate what I have repeated so often. I think, having regard to the undertaking, the sums offered by the Crown are ample, and I give judgment to Rowan for the sum of $535 and to Tait for $335.

I think I have dealt with all the cases which were tried before me. Except in the one case of Rochon, I have not added anything for what may be called compulsory taking, as I think the Crown has acted liberally in not exacting the full claim which it might

have set up for the increased value to the various lands arising by reason of the works.

*Judgments accordingly.*

Solicitor for the plaintiff: *W. McBrady.*

Solicitors for the defendants: *Morris & Babe.*

IN THE MATTER OF THE PETITION OF RIGHT OF

1913
Oct. 11.

ANNIE CONROD, WIDOW OF THOMAS CONROD, DECEASED, AND OTHERS . . . .SUPPLIANTS;

AND

HIS MAJESTY THE KING.....RESPONDENT

*Public Work—Government Railway—Negligence of Crown's Servant—Fellow-servant—Common employment—R.S.N.S. cap. 178, sec. 10—Interruption of Prescription.*

In the process of dismantling an old round-house on the Intercolonial Railway at Richmond Station, near Halifax, N.S., several gangs of labourers were employed at different kinds of work under several foremen. C. being primarily employed with a gang engaged in removing a portion of the track connected with the old round-house was lent by his foreman to the foreman of another gang engaged in setting up a crane on the railway property. Owing to the negligence of the foreman last mentioned in using a certain piece of machinery for the purpose, an accident occurred whereby C. was killed. In an action by the widow and minor children of the deceased,

*Held*, that the case having arisen in the province of Nova Scotia, and the negligence complained of being that of a fellow-servant of deceased, the Crown was entitled to raise the defence of common employment.

*Ryder* v. *The King* (9 Ex. C. R. 330;36 S. C. R. 462) discussed and followed.

2. The act of leaving a petition of right with the Secretary of State under the provisions of sec. 4 of *The Petition of Right Act* interrupts the prescription mentioned in sec. 10 of chapter 178, R.S.N.S., 1900.

PETITION OF RIGHT for damages arising out of the death of an employee of the Crown while working on the Intercolonial railway at Halifax, N.S.

The facts are stated in the reasons for judgment.

September 2nd, 1913.

The case came on for trial before the Honourable Mr. Justice Audette.

*J. J. Power*, K.C., for the suppliant;

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Argument of Counsel.

*T. S. Rogers*, K.C., and *T. F. Tobin*, for the respondent.

Mr. *Power*, K.C., argued as follows:—

In *The Queen* v. *Filion*, (1) it was held, affirming the decision of the Exchequer Court, that it was no answer to the petition to say that the injury was caused by a fellow-servant of the deceased.

[THE COURT.—That case was governed by the law of the Province of Quebec in which the doctrine of common employment has no place.]

The deceased was at the locus of the accident by invitation (2).

[THE COURT.—There is a long line of cases where the theory of "invitation" applies.]

The deceased was aware of all the risks and dangers of a common labourer, but there is no evidence that he knew that he was stepping into a place where he might be killed. He was not a volunteer, and he was not guilty of contributory negligence. He had a right to assume that what he was asked to do would not expose him to risk from any negligence of the foreman. *Davies* v. *Mann* (3); *Beven on Negligence* (4); *Broom's Common Law* (5.)

This case is governed by the case of *Miller* v. *The Grand Trunk* (6).

[THE COURT.—Do not forget that is a case also arising in the Province of Quebec.]

We say that it is the same in this province. *The King* v. *Armstrong* (7); *The King* v. *Desrosiers* (8).

[THE COURT.—It is not a common law action in the English provinces. It is under Art. 1056 of the Code in the province of Quebec.]

(1) (1894) 24 S. C. R. p. 482.
(2) Indermaur v. Dames (1867) 2 C. P. 311.
(3) (1842) 10 M. & W. 546.
(4) 2nd Ed. 1904, p. 469.
(5) (10th Ed. by Odgers) 860.
(6) (1906) App. Cas. 187.
(7) (1908) 40 S. C. R. 229 at p. 238.
(8) (1909) 41 S. C. R. 71.

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Argument of Counsel.

[Mr. *Rogers*.—It is an action given expressly to representatives and executors under Lord Campbell's Act in England. The claim for negligence through the deceased simply at common law did not survive, now it survives by statute. That is the law here.]

The plaintiffs are plaintiffs who are only suing as a class, in the name of the heirs and for their benefit. It is not a representative action. (1) *Seaward* v. *The Vera Cruz.*

[THE COURT.—Your contention is that if it falls within Lord Campbell's Act, the *Miller* case governs it?]—Yes. Lord Campbell's Act exists merely for the benefit of the widow and children; and so far as the damage in this action is concerned under the *Married Womens' Property Act* a creditor cannot touch a cent of the money.

[See *Gorton-Pew Fisheries Co.* v. *North Sydney Marine Ry. Co.*] (2).

Mr. *Rogers*, K.C., presented the following argument:—I was under the impression that Lord Campbell's Act did not confer a right of action as distinct from that which the deceased would have had if he survived. That has been my impression, and I am not satisfied yet without further consideration that such is not still law. *Read* v. *The Great Eastern Ry. Co.* (3) is a clear decision that Lord Campbell's Act did not give any new cause of action, but only substituted the right of the representative to sue in the place of the right which the deceased himself would have had if he had survived. (See also *Griffith* v. *Earl of Dudley* (4).

(1) (1884) 10 App. Cas. 59.
(2) (1910) 44 N. S. R. 493.
(3) (1868) L. R. 3 Q. B. 555.
(4) (1882) 9 Q. B. D. at p. 363.

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All the Quebec cases cited were brought under Art. 1056 of the Civil Code.

In the *Miller* case the court found there was nothing in the way of recompense or indemnity moving from the railway company itself. They were not even contributors. They were simply an insurance society, organized by the employees. But in this case the Intercolonial railway has contributed.

[THE COURT.—The *Grenier* case (1) was in your favour but it was overruled by the *Miller* case,—overruled to a certain extent.]

The *Grenier* case says that a contract of insurance by the Intercolonial Railway employees is not a notice or declaration within the meaning of the statute.

It is a recognized principle of our law now that a workman can contract with his employer to exonerate his employer, and such renunciation would be a renunciation under Lord Campbell's Act. Your lordship is bound by that part of the *Grenier* case which has not been overruled or dealt with by the Privy Council at all.

Because an accident happened there is no reason why there should be negligence. There can be danger and an accident consistent with the absence of negligence.

The point I am making is this, that the person who is responsible for negligence in this case, if there was any negligence, is a fellow-servant of the deceased, and therefore when the deceased undertook to help at this work it was a part of the contract with the employee that there should be no liability for injury or death. As a matter of fact they were all actually engaged in this work, both gangs of men.

(1) (1889) 30 S. C. R. 42.

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Argument of Counsel.

[THE COURT.—In the *Filion* case it was held they were fellow-servants, engaged in a general work common to them all.]

In this case they were laying the ground for new rails at Richmond. In the *Ryder* case, if my recollection is right, Nesbitt, J., goes further than I need go. (Cites *Robillard* v. *The King*) (1). In Nova Scotia we have a *Workmens' Compensation Act*, which does away with the defence of contributory negligence. They do not mention the Crown in that Act, but as it is a provincial enactment even if the Crown were mentioned it would mean the Crown in right of the province. But under the *Ryder* case there is no possible way by which the plaintiff can succeed in the absence of a Dominion statute naming the Crown, and depriving it of its right to plead common employment.

The question of common employment and what it means will be found in *Beven on Negligence* (2). The whole doctrine of common employment is dealt with there, and it is elementary law.

See also *Reugg's Workman's Compensation Act*, pp. 70, 162 and also at p. 232. He deals there with the maxim *Volenti non fit injuria.*

The case comes down to the three points for consideration; first the maxim *volenti non fit injuria*; secondly, the doctrine of common employment; and thirdly, the insurance release—whether it is good or bad.

[THE COURT.—Your plea of insurance might be a good plea to this action.]

We not only have the deceased's agreement prior to the insurance, but we have the subsequent release by the widow.

(1) (1908) 11 Ex. C. R. 271.

(2) 3rd Ed. Vol. I pp. 674 and 678.

That is our last plea, and it is a specific one. This is a receipt and discharge under seal. It is a document executed by the widow under seal. You must attack it by plea and get rid of it. Consideration is imported by the seal.

Mr. *Power*, K.C., in reply.—I will ask permission to amend the plea. The widow can scarcely read or write—and if there is going to be any effect made of that, it is over-reaching. I say further it was only a receipt for the insurance. This is a release without consideration. It is a mere insurance form. You cannot read any solemnity into it.

The *Armstrong* case (1) is authority for this proposition that payment of insurance will not discharge the Crown of its liability towards the deceased. We can set up that issue, and it can easily be tried as to whether the woman knew what she was signing. Whether she was over-reached. If that means a release of her action under Lord Campbell's Act, there is no consideration and I will ask leave to put a plea on the record, first, that there was no consideration for that agreement— and secondly, all necessary pleas to support it.

I should give evidence to support the pleas. I say these parties ought to be submitted to examination or cross-examination. The son and widow are here. And I suppose the Crown would have the right to call evidence.

[THE COURT.—This suggested opening of the case would mean another trial. The application is made after the case is closed. You have for some time had the whole thing before you.]

When they opened their case they said nothing about it, and they never put it forward until today, for the first time.

(1) (1908) 40 S. C. R. 229.

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Argument of Counsel.

[Mr. *Tobin*.—Mr. Power got an order for discovery in this case months ago, and I sent Mr. Power a copy of all of these documents in response. I think it was in April last.]

[THE COURT.—I am afraid I shall have to face the case as it stands.]

[Mr. *Rogers*.—Besides this, there was a contribution here by the Crown.]

I do not care whether there is a contribution or not. It is a personal action and the question of indemnity does not make any difference. I do not know that the mother has power to release the action. If she cannot release the childrens' claim she cannot release her own. The action cannot be severed. He cites *Armstrong's* case, (1); *Kimball* v. *Butler*, (2).

AUDETTE, J. now (October 11th, 1913) delivered judgment.

The suppliants, the wife and children of Thomas Conrod, the deceased, brought their petition of right to recover the sum of $10,000 as damages for the loss sustained by the death of the said Thomas Conrod, which happened while he was, with others, engaged in dismantling a crane.

The accident happened on the 11th September, 1911. James Cody, a carpenter employed at the I.C.R. repair shops, at Willow Park was sent to the old Round House at Richmond Station by his superior officer, to dismantle a crane of a special design, and place it on a car to be sent to the Willow Park shops. Currie and Baker were assigned as help to him. He then, with their help, erected sheer-legs or a tripod made of spruce scantling, 3 x 4 inches, fourteen feet long, with a spread of ten to twelve feet, and bolted

(1) (1908) 40 S.C.R. 238. (2) (1909) 45 C.L.J. 130.

at the top. To the top of the tripod was a chain to which was attached one of the two blocks. The tripod when completely erected was placed over the piece of casting to be lifted. It consisted of a long piece of casting between 5 to 6 feet long, and 10 to 12 inches on the sides, and weighing about 1,300 to 1,400 pounds. In the centre of this casting was a hollow into which was inserted a piece of iron, called by the witnesses, a pedestal of about 5 to 5½ feet.

The three men tried to lift the casting but were unable to do so—it was too heavy for them. Then Cody went over to Drysdale, the track-foreman, about 40 yards up the track and borrowed from him the assistance of four or five men, among whom was Thomas Conrod, the deceased. These men were placed at the rope to hoist and lower at Cody's command.

Cody remained with Currie at the casting, and ordered the men to hoist, and when the casting was hoisted out of the pedestal, to the full height of the latter, he, with Currie, pushed the casting off its centre of gravity to let it down alongside and outside of the pedestal. And as he gave orders to those at the rope to lower down, the whole tripod and casting went over and struck Conrod who had tripped on large stones which had been negligently left near the tripod, and was knocked down on his back with the casting on top of him. He only survived a few minutes.

The casting either caught, as it was being lowered down, on the side of the pedestal and canted over, so that with its weight off the centre of gravity and extending sideways, the tripod toppled over; or the casting may have been hoisted to the very top of the tripod, and when Cody and Currie were shoving it off of its centre of gravity, it caused the tripod to upset.

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Under the evidence, it must be found that the tripod was adequate to lift the casting plumb; but the moment the weight had to be shoved off its centre of gravity the tripod should have been guyed and this tribunal has no hesitation in finding on the question of fact, in favour of the suppliant, that there was negligence on behalf of the officer of the Crown, the foreman acting within the scope of his duties and employment on a public work, in not guying the tripod, or setting the legs solid to the ground, under the circumstances. The tripod was put up deliberately, the foreman was not pushed for time and there was negligence on his behalf is not using ordinary care and skill towards a person to whom he owed a duty of observing ordinary care and skill.

On the other hand there can be no doubt that the use of a tripod was the proper system to be used, and that the employees of the Crown had, at their disposal adequate materials to steady the tripod by guys or make the legs solid to the ground.

At the opening of the trial the attention of the suppliants counsel was by the Court called to the fact that on the face of the record the action did not appear to have been commenced within twelve months after the death of Conrod, as provided by section 10 of chapter 178, R.S.N.S. 1900. The accident having occurred on the 11th September, 1911, and the petition of right having been filed on the 30th October, 1912. Upon this point counsel satisfied the court by exhibiting a letter from the Department of the Secretary of State, bearing date the 29th August, 1912, acknowledging receipt of the petition of right. The leaving of a petition of right with the Secretary of State under

the provisions of Sec. 4, of *The Petition of Right Act* interrupts prescription. (1).

The Crown in bar to the present action, sets up the following pleas or defences, viz.:

1. There was no negligence.

That plea has already been disposed of.

2. If there was negligence, the accident was caused through the negligence of a fellow servant.

3. That the receipt, under seal, given by Annie Conrod, on the 25th September, 1911, for the sum of $250 in full satisfaction and discharge of all her claims and demands against the Insurance Association, and against His Majesty The King, His officers and servants, arising out of the death of her husband,—is a bar to the action.

4. That there was contributory negligence on behalf of the deceased, in stepping in the way.

As already said, the first plea has already been pronounced upon in favour of the suppliants.

Dealing now with the second plea: What is the doctrine of common employment? It is defined as follows, in Broom's *Common Law of England*, (2):

"The doctrine of 'common employment,' which was "enunciated in the case of *Priestly* v. *Fowler* (3) "still protects an employer from liability for "the negligence of his agents and workmen, "*if the action be brought at common law.* It may be "stated thus: Where the person injured and the person "who caused the injury are both workmen in the same "employment, even though they are in very different "grades of that employment and engaged in very

(1) Vinet v. The King, Audette's Ex. C. Prac. 2nd Ed. p. 183.

(2) 10 Ed. by Odgers, p. 860.

(3) 1837, 3 M. & W. 1.

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"different work, their common employer is not "responsible for the consequences of the injury." (1) This doctrine does not obtain under the laws of the Province of Quebec, and Sir Frederick Pollock, in his work on the *Law of Torts* (2) comments upon it as follows: "With its soundness we are not here concerned. "It was not only adopted by the House of Lords for "England, but forced by them upon the reluctant "Courts of Scotland to make the jurisprudence of the "two countries uniform. No such doctrine appears to "exist in the law of any other country in Europe."

Were it not for the decision of the Supreme Court of Canada, on appeal from this Court, in *Ryder* v. *The King*, (3) it might be open to enquiry as to whether or not under the provisions of Sec. 20 of *The Exchequer Court Act*, the defence of common employment is open to the Crown in a case of negligence falling within the ambit of that enactment. It is true that under the provisions of sec. 8 of *The Petition of Right Act*, the Crown, by its defence to a petition of right may raise "any legal or equitable defences which would have been available if the proceedings had been a suit or action in a competent court between subject and subject," but the *Petition of Right Act* is a general enactment affecting procedure only and was passed more than twenty years before *The Exchequer Court Act of 1887*, which creates a right of action in positive and unqualified terms against the Crown for certain acts of negligence on behalf of its officers or servants. In such a case might not a repeal of any repugnant clauses of the procedure statute arise by implication?

(1) See also *Beven on Negligence*, 3rd Ed. Vol. I. p. 664; *The Petrel*, 1893, Prob. 324; *Farwell v. Boston Railroad Corp.* 4 Met. 49, and *Bartonshill Coal Co.* v. *Reid*, 3 Macq. H. L. C. 266. *Filion* v. The *Queen*, 4 Ex. C. R. 144 and 24 S. C. R. p. 482.

(2) 8th Ed. p. 99.

(3) 9 Ex. C. R. 330; and 36 S. C. R. 462.

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But as before stated, the question is concluded in this Court by the case of *Ryder* v. *The King* (*supra*) and *Robillard* v. *The King*, (1) and the enquiry remains therefore solely an academic one.

The defence of common employment has been made out in this case, and upon that ground alone, without entering upon the discussion of the other defences raised by the Crown, the suppliants must fail and be declared not entitled to any relief sought by their petition of right.

It may here be added, however, that the deceased Thomas Conrod was not guilty of contributory negligence. He had nothing to do with the erection of the tripod— all his work consisted of was to attend to the rope and to hoist or lower the casting. He must be presumed to have known nothing of the danger that might result in shifting the casting off its centre of gravity,—he had really nothing to do with that part of the work. Then when he hears the shouting to take care, he sees his companions running away, and in the excitement of the moment he also runs away, but is tripped by stones negligently left close to the tripod and falls to be then crushed by the falling casting. It is obvious he did not contribute to the accident. He had nothing whatsoever to do with the determining, the proximate cause, of the accident. Furthermore, all these men were employees of the Intercolonial Railway,—they were all engaged in clearing this railway yard, at Richmond, and they were obviously all fellow-servants.

A great deal of stress was laid in the course of the argument of this case on the point as to whether or not the action resulting from Art. 1056 of C.C.L.C. was identical with the action resulting under Lord

(1) 11 Ex. C. R. 272.

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Campbell's Act. On this point suppliant's counsel, who was contending for the affirmative, cited the case of the *Vera Cruz* (1) decided in 1884. But all that it was necessary to decide in the *Vera Cruz* case was whether a certain action was *in rem* or *in personam*. Later on, however, in 1892, the point in question was clearly settled in the cases of *Robinson* v. *Canadian Pacific Railway* (2) and *Miller* v. *Grand Trunk Railway*. (3). See also *Griffiths* v. *Earl of Dudley*, (4).

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

*Judgment accordingly.**

Solicitor for the Suppliant: *J. J. Power.*

Solicitor for the Respondent: *T. F. Tobin.*

(1) (1884) 10 A. C. 59.
(2) (1892) A. C. 481.
(3) (1906) A. C. 191.
(4) 9 Q. B. D. 357, 363.

(*) EDITOR'S NOTE: Affirmed on Appeal to the Supreme Court of Canada, March 2nd, 1914.

IN THE MATTER OF THE PETITION OF RIGHT OF

BENJAMIN RIOUX.....SUPPLIANT; 1913 August 25.

AND

HIS MAJESTY THE KING.....RESPONDENT.

*Government railway—Fire—Government Railways Act, sec. 61, as amended by 9-10 Edw. VII. c. 24—"Modern and Efficient Appliances"—Presumption.*

While, under the provisions of sec. 61 of *The Government Railways Act* (as amended by 9-10 Edw. VII, c. 24) the facts may give rise to a presumption in favour of a person suffering damage by fire that such fire was caused by a locomotive although equipped with modern and efficient appliances, it does not amount to a conclusive presumption of law, so as to excuse the party seeking damages from proving that the fire was so caused.

PETITION OF RIGHT for damages for loss of property by fire alleged to have been caused by a locomotive on the Intercolonial Railway, in the province of Quebec.

The facts are stated in the reasons for judgment.

The case was heard before the Honourable Mr. Justice Audette at Fraserville, P.Q., on the 23rd day of June 1913.

*E. Lapointe*, K.C., and *A. Stein*, K.C., for the suppliant.

*J. Langlais*, for the respondent.

AUDETTE, J., now (August 25th, 1913) delivered judgment.

Le pétitionnaire en la présente instance réclame, par sa pétition de droit, la somme de $3,771.75 comme dommages résultant d'un incendie, en date du 8 mai 1911, qui a détruit sa grange et son étable, avec tous les instruments agricoles, produits de ferme, animaux

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et autres objets contenus dans les dites bâtisses. Il allègue en plus que l'incendie a été allumé par des flammes et étincelles provenant d'un engin du chemin de fer Intercolonial, lequel engin était attaché au convoi appelé «train No. 33», qui est passé à la dite date, vis-à-vis des dites bâtisses, vers sept heures et quarante-cinq minutes de l'avant-midi, et se dirigeant de l'est à l'ouest.

Le pétitionnaire allègue en plus que les dommages qu'il a subis sont dus à la faute du chemin de fer Intercolonial et des employés de celui-ci et que l'intimé doit en être tenu responsable. Il allègue aussi que la locomotive qui aurait mis le feu aux propriétés du pétitionnaire n'était pas munie de tous les protecteurs et appareils exigés par l'art et n'avait pas subi, avant d'être attachée au convoi en question, l'inspection voulue par la loi, les règlements et l'usage.

L'intimé par sa défense nie toutes et chacune des allégations de la présente pétition de droit.

Pour bien concevoir et se rendre parfaitement compte des allégués de la pétition de droit et de la preuve, il est nécessaire de référer au diagramme produit en cette cause comme Exhibit No. 1—L'incendie aurait originé, d'après le témoignage du pétitionnaire, à l'endroit marqué "A" sur le diagramme, vers 8.30 a.m. sans toutefois être certain de l'heure exacte. La grange en question et la voie du chemin de fer sont situées dans une *baisseure* et il y a une pente de chaque côté qui aurait, au dire de certains témoins, induit l'ingénieur à forcer sa machine pour la remonter et provoquer ainsi l'émission d'étincelles en grande quantité.

Le lundi, 8 mai 1911, jour de l'incendie, l'*Express maritime* qui monte, voyageant de l'est à l'ouest,—ne part que de Ste-Flavie et serait arrivé en temps à Trois-Pistoles. Le train en question aurait passé,

vis-à-vis la grange du pétitionnaire, peu de temps avant huit heures du matin et le pétitionnaire déclare avoir aperçu le feu pour la première fois vers les 8.30 a.m. Le point "A" en question, le coin nord-ouest de la grange, est à une distance de 312 pieds du rail sud.

Le fils du pétitionnaire qui était à la maison lors de l'incendie, est allé chercher du clou à la remise, qui fait partie de la grange et qui est située au nord, quatre à cinq minutes avant l'incendie.—Il est parti de la maison avec sa pipe et il fumait; mais, dit-il, à peu près dix pieds du chemin j'ai *oté* ma pipe. Il y avait des *pailleries* en avant et en arrière de la grange, tout était très sec, et il n'était tombé de pluie depuis plusieurs jours—au dire de quelques témoins depuis huit à neuf jours et peut-être plus.

Il faisait ce jour-là un grand vent et d'après le pétitionnaire «le vent n'était pas fixe—il variait—il ventait bien fort.» D'après le témoin Joseph Ouellet, il faisait une tourmente de vent et F. Ouellet nous dit que le vent tourbillonnait, qu'il ventait très fort et que le vent avait l'air de hâler du nord.

Sous les circonstances en question la seule preuve que nous avons qu'une locomotive du chemin de fer Intercolonial aurait pu mettre le feu à la grange en question, est le témoignage de huit des témoins de la demande qui se résume à dire qu'ils attribuent l'incendie au chemin de fer; mais, chose remarquable, aucun d'eux n'a vu ce matin-là l'express maritime qu'ils croient avoir ainsi causé l'incendie et qu'ils assurent avoir passé à l'heure ordinaire.

Par contre nous avons le témoignage d'un autre témoin du pétitionnaire, F. Gagnon, qui était contremaître sur la section en question lors de l'incendie et qui nous dit qu'il a vu monter l'express maritime ce matin-là,—dû à Trois-Pistoles à huit heures,—qu'il

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l'a regardé passer et a remarqué que l'engin ne travaillait presque pas. Le témoin était à ce moment à sept au huit poteaux à l'est de la gare, marquée "M" sur l'Exhibit No. 1. Après le passage de l'express, il est monté une certaine distance et y est resté entre une demie-heure à trois quarts d'heure lorsqu'il est redescendu une dizaine d'arpents en bas du lieu de l'incendie et n'a alors rien vu chez le pétitionnaire.—Une heure après le passage du train, vers neuf heures, il a aperçu la fumée de l'incendie et dans l'intervalle il n'avait passé aucun autre train.

De la part de la Couronne il est en preuve que l'express en question était composé de quatre à cinq chars et que le jour de l'incendie l'express était dû à 7.50 hrs a.m. et qu'il est arrivé en temps ce jour-là. Nous avons en plus une preuve directe que l'engin était en parfait ordre. L'ingénieur en charge ce jour-là nous dit que, vis-à-vis chez le pétitionnaire, c'est le plus bas de la pente et qu'à peu près un mille de là il y a une montée, mais pas assez forte pour faire travailler l'engin. Il ajoute que son engin était fermé lorsqu'il est passé chez Rioux et ne se rappelle pas avoir mis la vapeur pour cette pente qu'à un mille après avoir passé chez Rioux. Il est, dit-il, obligé d'appliquer les freins entre St-Cimon et Trois-Pistoles et ajoute que s'il eut fait travailler son engin dans ce parcours, il aurait soit sauté en dehors de la voie ou serait arrivé avant le temps.

Nous avons de plus en preuve que l'engin en question était muni du grillage *Standard netting*, voulu par la loi, et que ce grillage ou *netting* était en parfait ordre lors de l'incendie. A part d'autres inspections, il aurait été examiné le 9 mai, le lendemain de l'incendie, par le témoin Laperrière et trouvé en ordre, tel qu'attesté par l'entrée dans ses livres.

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En face de cette preuve, les savants avocats du pétitionnaire, demandent au tribunal de trouver l'intimé responsable en droit des dommages en question, alléguant qu'il y a une présomption légale, reconnue par le statut, que le feu aurait été mis par la locomotive du train en question.

En vertu de l'*Acte des Chemins de Fer du Gouvernement*, tel qu'amendé par 9-10 Ed. VII, ch. 24, sec. 61, il existe peut-être une présomption en faveur du pétitionnaire, mais cette présomption est à l'effet seulement que le feu peut être mis par une locomotive de chemin de fer même munie des appareils modernes et efficaces, mais ne va pas plus loin. L'onus probandi tombe donc sur le pétitionnaire de prouver que le feu a été mis par la locomotive. On ne peut donc dans l'espèce, faute de preuve, présumer que la locomotive de l'express en question aurait mis le feu. Il n'y a dans la présente cause aucune preuve de négligence et il est en preuve que l'engin en question était le jour de l'incendie en parfait ordre. En conséquence, l'action ne tombe pas dans la sphère de celles prévues par l'Acte 9-10 Ed. VII, ch. 24, et ne saurait non plus s'encadrer dans les cas prévus par la sec. 20 de l'*Acte de la Cour de l'Echiquier*, puisqu'il n'y a eu aucune négligence.

Que ressort-il des faits tels que plus haut récités? Personne n'a vu des étincelles émanant de la locomotive le jour de l'incendie lorsqu'elle est passée vis-à-vis de la propriété du pétitionnaire, située à 312 pieds du remblai du chemin de fer. Il est bien un autre fait bon de mentionner avant de terminer, et c'est que le fils du pétitionnaire nous dit que quatre à cinq minutes avant l'incendie il s'est rendu à la grange fumant sa pipe, jusqu'à une petite distance d'icelle. Qu'a-t-il fait de sa pipe lorsqu'il a cessé de fumer? En a-t-il secoué les cendres?

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La preuve est silencieuse à ce sujet.—Rien d'impossible que les cendres de sa pipe, emportées par un vent très fort qui tourbillonnait ce jour-là, soient allées tomber dans les *pailleries* à l'avant de la grange pour être entraînées à l'arrière ou ailleurs par ces tourbillons de vent dont parle un témoin et auraient été la cause de l'incendie.

La conjecture alternative entre la pipe et l'engin est aussi rationnelle l'une que l'autre, avec le fait en faveur de la pipe que cette dernière était de beaucoup plus près de la grange et que le temps de l'origine de l'incendie coïnciderait plus raisonnablement. Le vent et la sécheresse aidant, le feu, ce jour-là, s'allumerait très vite.

La cour, considérant la preuve et pour les raisons énoncées plus haut, déboute la présente action.

*Judgment accordingly.*

Solicitors for the suppliant: *Lapointe*, and *Stein*,

Solicitor for the respondent: *J. Langlais.*

HIS MAJESTY THE KING.....PLAINTIFF; 1913 June 26.

AND

THE NEW BRUNSWICK RAILWAY COMPANY AND THE GENERAL TRUST COMPANY.....DEFENDANTS.

*Expropriation—Railway—Timber Limits—Compensation—The Exchequer Court Act, sec. 50—Matters of Set-off as regards advantage and disadvantage.*

For the purposes of the National Transcontinental Railway a portion of certain lands in the Province of New Brunswick consisting of timber limits was expropriated. It was shewn that owing to the railway the remaining portion of the limits was enhanced in value by reason of the following facts:—The lumber could be taken from the limits at all seasons and in summer more expeditiously than by water; less capital was required in working the limits; the loss of logs incidental to the practice of driving was saved; if desired the logs could be shipped by rail to distant mills without being cut, while portable mills could be used on the limits; and lastly, lumbering supplies could be taken to the limits more cheaply by reason of the easier and quicker means of access provided by the railway.

*Held*, that in view of the provisions of sec. 50 of *The Exchequer Court Act* these advantages should be set-off against the damages to the owner of the limits arising from the interference by the railway with the logging roads and landings on the river front, the possible interference of the railway culvert with the work of driving in the spring, and the additional risks of fire arising from the operation of the railway.

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

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

June 17th, 1913.

The case came on for hearing before the Honourable Mr. Justice Audette at St. John, N.B.

*R. B. Hanson* and *J. E. Hartley* for the plaintiff;

*H. H. McLean*, K.C., and *F. R. Taylor*, K.C., for the defendants.

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Argument of Counsel.

Counsel for defendants contended that while the gravel pit on the limits had no market value until the railway came there, it was not taken until two years after the first expropriation of the limits had been made, and the defendants were therefore entitled to the enhanced value the pit had acquired between the years 1908 and 1910. (*Dodge* v. *The King* (1).)

The damage from the severance is assessable without reference to a crossing, because the Crown need not give one. (*Re Armstrong and James Bay Ry Co.* (2); *Vezina* v. *The Queen* (3).

Defendants are entitled to a substantial allowance for increased risk from fire. (*In re Stockport, &c. Ry. Co.* (4); *Masson* v. *Robertson et al* (5); *La Cie de Chemin de Fer de L'Atlantique au Nord-Ouest* v. *Prud'homme* (6); *La Cie du Chemin de Fer de L'Atlantique au Nord-Ouest* v. *Betournay* (7).

The driving facilities on the river are seriously impaired; and the effect of the railway culvert may prove disastrous in the spring.

Counsel for the plaintiff relied on *Caledonian Ry. Co.* v. *Walker's Trustees* (8); *Straits of Canso Marine Ry. Co.* v. *The Queen* (9); *McPherson* v. *the Queen* (10); *In re Ontario and Quebec Ry. Co. and Taylor* (11); *Pryce* v. *City of Toronto* (12); *James* v. *Ontario and Quebec Ry. Co.* (13).

AUDETTE, J., now (June 26th, 1913) delivered judgment.

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

(1) (1906) 38 S.C.R. 149
(2) (1906) 5 Can. Ry. Cas. 306
(3) (1889) 17 S.C.R. 1
(4) (1864) 33 L.J.Q.B. 251
(5) (1879) 44 U.C.Q.B. 323
(6) (1889) 18 R.L. 143
(7) (1891) 21 R.L. 190
(8) (1882) 7 A. C. 259
(9) (1889) 2 Ex. C. R. 113
(10) (1882) 1 Ex. C.R. 53
(11) (1884) 6 O.R. 338
(12) (1892) 20 O.A.R. 16
(13) (1886) 12 O. R. 624; 15 O. A. R. 1.

the Commissioners of the Transcontinental Railway have taken and expropriated, for the use of His Majesty the King, certain lands and real property required for the use, construction and maintenance of the said Transcontinental Railway.

The lands expropriated and described in the information are part of a timber limit owned by the defendant The New Brunswick Railway Company, and plans and descriptions of the said lands have been respectively deposited of record, in the offices of the Registrars of Deeds for the County of Carleton, N.B., on the 3rd day of September, A.D., 1910,—for the County of Victoria, N.B., on the 6th September, A.D., 1910,—and for the County of York, N.B., on the 7th September, A.D., 1910.

The defendant's title is admitted, and both parties are agreed that the compensation money be paid to the defendants.

It is admitted that the total area expropriated is of 619.09 acres.

Both parties further admitted that the Crown took possession of the lands in question on the 15th August, 1908.

The Crown by the information tenders the sum of $9,351.02 in satisfaction of the said lands and damages.

The defendants, by amendment at trial, claim the sum of $190,000. The particulars filed have not been adhered to, or proved, the defendants resting their claim on the evidence as adduced.

[His Lordship here reviewed the evidence.]

Dealing first with the question of the gravel pit, for which the sum of $20,000.00 is claimed by the amended information, it must be approached in the light of the admission made by both parties at the very threshold of the trial. Indeed, while the information

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alleges that the plans and descriptions were deposited in the Registry Office, during September, 1910, the parties at the opening admitted that the Crown had taken possession of the *lands in question on the 15th August, 1908*,—it is common ground at bar that the gravel had no commercial value as such before the coming of the railway; but the learned counsel for the defendants say that while the land for the railway track was taken possession of during August, 1908, it is in evidence that the Crown did not use or take possession of the gravel pit until the Spring of 1910, and that the value of the pit must be established at that date when the Crown had already taken possession of the right of way in 1908, thereby giving an enhanced value to the pit which it had acquired between 1908 and 1910. While the principle that the value of the land must be ascertained at the time of the expropriation is well settled, it would not do justice to the law to stretch its meaning to the extent asked for under the circumstances. It must receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act and of such provision or enactment, according to its true intent, meaning and spirit (*See The Interpretation Act*, R.S.C., 1906, ch. 1, Sec. 15, and *The Exchequer Court Act*, R.S.C. 1906, ch. 140, sec. 47). The common sense view to take of this matter is that there was in this case but one expropriation as shown by the set of plans and descriptions filed of record. Carrying to the extreme the doctrine propounded by the defendant, it might be said that because the taking possession in 1908 was started at one end, the far end had increased in value in the meantime on account of its prospective value. Or again, because the plans and descriptions were, during September, 1910, deposited at different dates, that each

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parcel of land should be assessed on a different basis, because the second and third parcel had acquired an additional prospective value in the meantime.

In view of all the facts in evidence it is only fair to conclude and for the Court to find that there was in this case but one expropriation of both the right of way and the ballast pit in question, and they must both be assessed as if expropriated at the same time.

A great deal has been said on the question of damages; and it is apparent to anyone that the building of the railway has seriously interfered with the logging roads and the landings, and that perhaps the culvert has to some extent interfered with the work of driving in the spring. There is also the additional risk of fire resulting from the operation of the railway. Much evidence has been adduced on this last head, and with all the plausibility which usually marks the evidence of experts; but it is impossible to adopt their view when it practically amounts to the opinion that the railway is a calamity to the country it crosses. Upon this question of risk of fire, while the risk ought not to be disregarded, it must not be overlooked that if the railway set fire the owner has his recourse against the railway under the provisions of the *Government Railways Act*, a remedy limited, it is true, but still a remedy which Parliament in its wisdom has seen fit to provide.

Conceding all these disadvantages, there are on the other hand great advantages to the timber limits resulting from the operation of the railway through that country, and under the statute the one must be set off against the other. There cannot be any doubt upon the broad fact that the railway facilitates the transport of pulp wood, hardwood, cedar ties. It takes the lumber from the limits in less time than by water, requires less capital, and gives quicker returns,

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and saves the loss of logs which necessarily happens in driving, and enables shipment to be made at all seasons during summer and winter. By the use of portable mills, which the overwhelming weight of the evidence favours, all of these advantages will be increased. The supplies are taken up in a cheaper manner, the access to and exit from the lands are easier. Even logs are shipped by rail to the American market and to the mills.

The advantages are so manifest and manifold that they seem at first sight more than offset the disadvantages already mentioned. In the result the timber limit is benefited by the railway, notwithstanding what may be said to the contrary.

It is needless to say that the value of the land must be arrived at by looking at the property as it stood at the time of the taking, and that to arrive at such value the modus operandi presented by witness Ritchie cannot be accepted. What we are seeking here is the value of the land as it stood, as a whole, at the time of the expropriation with standing timber, and to arrive at that value one is not to take each tree growing upon the right of way, calculate the board measure feet that could be made out of it and the profits derived from it when placed on the market. That manner of proceeding is erroneous and cannot be accepted. One might illustrate it here again as was illustrated by the Court at the trial, which, although somewhat crude, gave the true idea. If by accident, driving an automobile, a steer were killed,—the measure of damages would be the value of the steer as it stood on its four legs and not after it had passed through the hands of the butcher who had cut it up and retailed it by the pound.

On the question of value we have for the defendants Donald Fraser who values ten miles at $5.00 an acre, and the balance at $20.00 an acre. Witness Ritchie at $1,000.00 a mile, Archibald Fraser at $14.00 an acre, and witness Oakes at $12.50 to $17.00 per acre. This last witness informed us also that by compromise, against his view, they were allowed a little less than $5.00 an acre for land and damages on the Intercolonial Railway, which runs through the limits in question herein.

For the Crown we had witness Baird who values the land with the timber at $5.00 an acre; Rogers values some part as high as $15.00 an acre; Hanson at $16.00 an acre, without taking the fire element into consideration; and Anderson's highest figures for the same part were $12.00.

Taking all the circumstances into consideration, and all legal elements of compensation whatsoever involved in the case, the sum of $18.00 an acre for the land taken inclusive of all damages whatsoever, past, present and future, resulting from the said expropriation, including increased risk from fire, will be a fair, just and liberal compensation to the defendants, amounting to the total sum of $11,143.62, to which should be added 10% for compulsory taking.

Therefore there will be judgment as follows:

1st. The lands expropriated herein are declared vested in His Majesty the King from the date of the taking possession and expropriation.

2nd. The defendants, upon giving to the Crown a good and sufficient title, including a release of all mortgage or mortgages upon the property, are entitled to recover from His Majesty the King, the sum of $12,257.98, with interest thereon from the 15th day of August, A.D. 1908, to the date hereof. The whole

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in full satisfaction for the property so taken, and for all damages whatsoever resulting from the said expropriation.

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

*Judgment accordingly.*

Solicitors for the plaintiff: *Slipp & Hanson.*

Solicitors for the defendant: *Weldon & McLean.*

*In re*

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Oct. 23

GEBR NOELLE'S application for an Order to register the word *Albaloid* as a GENERAL TRADE MARK.

*Trade-mark and Design Act (R.S. 1906, ch. 21, secs. 4 (a) and (b)—Interpretation—General and Specific Trade-Marks—Definition.*

Under the language of sec. 4, sub-sec. (a) of the *Trade-Mark and Design Act* (R.S. 1906, ch. 71) a general trade-mark means a trade-mark used in connection with the various articles in which the proprietor deals in his trade, and may cover several classes of merchandise if the proprietor is trading in such several classes.

On the other hand, under sub-section (b), a specific trade-mark is limited to a class of merchandise of a particular description, so if the applicant deals in two different classes of merchandise he must apply for two specific trade-marks, one applicable to each class.

(2) While a general trade-mark covers all the classes of merchandise in which the applicant deals, and when registered prevents any subsequent registration of the same subject-matter as a general trade-mark, it would not confer an unlimited right to the mark the world over as against anyone carrying on an entirely different business who applies for a specific trade-mark consisting of the same mark as applied to goods of a different character not manufactured by the owner of the general trade-mark.

THIS was a petition for an order to register the word "Albaloid" as a general trade-mark in Canada, an application to the Minister of Agriculture to register the same having been refused.

The facts are stated in the reasons for judgment.

*W. L. Scott*, for the petitioner, contended that the two marks do not conflict, that is to say "Albaloid" and "Albolene." There is nothing in the Act limiting a general trade-mark to the registration by one party, that is to say, there may be two general trade-marks registered by two different people, provided they deal in different classes of goods.

He cited: *Batt* v. *Dunnet* (1), *In re Lake & Elliott's Trade-Mark* (2), *Somerville* v. *Schembri*, (3), *Singer*

(1) (1899) 16 R. P. C., 413. (2) (1903) 20 R.P.C. 605.
(3) (1887) 12 A. C. 457.

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Argument of Counsel.

*Manuf. Co.* v. *Wilson* (1), *Maxwell* v. *Hogg* (2), *Edwards* v. *Denis* (3).

*R. V. Sinclair*, K.C., for the Minister of Agriculture, submitted that the cases cited by counsel were all with respect to specific trade-marks. There is no such thing known under English statute law as a general trade-mark. Every trade-mark acquired under that law is a specific trade-mark. Parliament has declared that there may be two kinds of trade-marks in Canada, one specific and one general. It would be well to contrast the effect of section 16 with sub-section (a) of section 4, of the *Trade Mark and Design Act*. There was no such thing as a general trade-mark in Canada before the statute was passed, and the question is how far it has limited it. There have been no cases which dealt with the consideration of the section in the Canadian courts—and in none of the other countries is there such a thing as a general trade-mark. There is no help to be gained from any of the decisions cited. The definition of a general trade-mark means a trade-mark used in connection with the sale of various articles in which the proprietor deals in his trade, occupation, business or calling. But even under our statute, the proprietor does not obtain an absolutely general trade-mark *per se*, but it is limited to the class of business in which he is dealing.

CASSELS, J., now (October 23rd, 1913) delivered judgment.

This was a petition for an order to register the word "Albaloid" as a general trade-mark in the trade-mark register in the Department of Agriculture.

In the month of September, 1910, the petitioner applied to the Minister of Agriculture to have registered the word "Albaloid" as a general trade-mark.

(1) (1876) 2 Ch. D. 443. (2) (1867) 2 Ch. 314.
(3) (1885) 30 Ch. D. 454.

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This application was refused, the ground of the refusal being that as appears by the registry the word "Albolene" had been registered as a general trade-mark on the 31st day of May, 1893, by a firm carrying on business in New York of the name McKesson & Robbins.

It is not contended that the word "Albaloid" could be registered with the word "Albolene" previously registered as a general trade-mark, if the question merely depended on the register and without further evidence.

Under clause 11, sub-sec. (b) of the *Trade-Mark and Design Act,* the application was rightly rejected.

The minister or his deputy has no means of ascertaining except from the registry whether such trade-mark should or should not be registered. There is no power in the statute regulating trade-marks which enables the minister or his deputy to take evidence, and adjudicate on the facts and to determine whether, having regard to the particular circumstances of the case, such trade-mark should be registered or not.

On the hearing of this petition it is open to the court to receive evidence and adjudicate on the merits, having regard to the circumstances of the case.

The facts are shortly, as follows:—

McKesson & Robbins who registered as a general trade-mark the word "Albolene" on the 31st day of May, 1893, were carrying on and are still carrying on in the city of New York the general business of wholesale dealers in drugs, chemicals and druggist sundries of all kinds.

The applicants who reside in Germany have for a great number of years been exporting to Canada articles of their manufacture, being "forks and spoons made of Britannia metal," a class of merchandise entirely

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different from the classes of merchandise dealt in by the owners of the registered trade-mark "Albolene."

It would appear that the applicants have registered in England and elsewhere the word "Albaloid" as their trade-mark. It does not appear that this word has been registered in these countries as a general trade-mark, and I am not aware whether the statutes in these various countries contain the same provisions as in our statute, enabling the registration of a general trade-mark as distinguished from a specific trade-mark.

These foreign trade-marks are not produced. I gathered from Mr. Scott's careful argument that the clause of our statute permitting a registration of a general trade-mark is unique.

Under the Imperial *Trade-Marks Act, 1905*, sec. 8, it is provided that "A trade-mark must be registered in respect of particular goods or classes of goods."

Section 16 of the Canadian *Trade-Mark and Design Act* (R. S. 1906, ch. 71), provides that:—

"A general trade-mark once registered and destined to be the sign in trade of the proprietor thereof shall endure without limitation."

The definition of a trade-mark as given by Mr. Lowe, Deputy Minister of Agriculture, in the case of *Bush* v. *Hanson* (1) is that the essential element of a trade-mark is the "universality of right to its use, *i.e.*, the right to use it the world over as a representation of, or substitute for, the owner's signature."

Mr. Paul, in his work on Trade-Marks, (2) puts it in this way, "It has been well defined as one's commercial signature."

Mr. Scott argued before me that the same rules should be applied to a general trade-mark as those held to apply in the case of specific trade-marks.

(1) (1888) 2 Ex. C. R. 557. (2) Ed. 1903, p.5.

That if in the case of a specific trade-mark a mark already registered as a specific trade-mark can be taken by another and registered and used as a specific trade-mark for an entirely different class of merchandise, so in the case of a general trade-mark registered in connection with a general class of business another person can register and use the same general trade-mark in connection with an entirely different class of business.

There is no authority on the point and the question is one of considerable difficulty. My own view is that there is a distinction between the case of a general trade-mark and that of a specific trade-mark.

I am of opinion that once a general trade-mark has been registered for a particular word, the same word cannot be registered as a general trade-mark by any one else. If this were permitted it would lead to confusion. I think the second applicant is limited to an application for a specific trade-mark if otherwise entitled thereto.

The purpose and object of trade-mark legislation is stated by Vaughan Williams, L.J., in *Bowden Wire, Limited,* v. *Bowden Brake Co., Ltd.*, (1) as follows:—

"The whole object of registering trade-marks is this that in passing off cases it was found that a great deal of trouble and expense might be incurred in proving the identity or character of the goods which were passed off with the goods which the plaintiff said were the goods manufactured or sold—in this case manufactured by them. Then the *Trade Marks Act* was passed for the express purpose of making it easy to afford protection to traders at less expense and less trouble. The whole object is that by registering a trade-mark you should be able to represent to the public: 'You may rely upon it that all goods which

(1) (1913) 30 R.P.C. 590.

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bear this registered trade-mark are the goods manufactured or sold by me the registered proprietor of the mark.' "

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A few other cases bearing on the question, all of them relating practically to specific trade-marks as distinguished from what our statute permits as a general trade-mark, are as follows:—

In *Re Jelley, Son & Jones' Application*, (1) the judgment of Jessel, M. R., may be referred to.

In the case of the *Singer Manufacturing Co.* v. *Wilson*, (2) Jessel, M. R., discusses the question, as follows:—

"Therefore, what the Court has to satisfy itself of is, that there has been an essential portion of the trade-mark used to designate goods of a similar description. I say of a similar description, because there is no right in a trade-mark except to protect the manufacturer of the goods. If a seller of carriages invented this fanciful mark, this curious animal, and put it on carriages, that would not prevent a manufacturer of woolen goods from putting it as a trade-mark on woolen goods. As I said before, you must have regard, not merely to the mark, but to the nature of the goods upon which the mark is impressed."

In *Somerville* v. *Schembri* (3), Lord Watson states as follows:—

"Had it not been for the views expressed by the Court of Appeal in giving judgment, it would hardly have been necessary for their Lordships to observe that the acquisition of an exclusive right to a mark or name in connection with a particular article of commerce cannot entitle the owner of that right to prohibit the use by others of such mark or name in

(1) (1878) 51 L. J. Eq. 640. (2) (1876) 2 Ch. D. 434. at p. 443.
(3) (1887) 12 A. C. p. 457.

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connection with goods of a totally different character; and that such use by others can as little interfere with his acquisition of the right."

I will come now to the consideration of the Canadian *Trade-Mark and Design Act.* (R.S. 1906, ch. 71).

Section 4 of the statute is the interpretation clause. It provides as follows:—

"(a) In this part unless the context otherwise requires—'general trade-mark' means a trade-mark used in connection with the sale of various articles in which a proprietor deals in his trade, business, occupation or calling generally;

"(b) 'Specific trade-mark' means a trade-mark used in connection with the sale of a class of merchandise of a particular description.

The definition under (a) of general trade-mark means, I think, a trade-mark used in connection with the various articles in which the proprietor deals in his trade, and may cover several classes of merchandise if the proprietor is trading in these several classes.

A specific trade-mark is limited to a class of merchandise of a particular description, so if the applicant dealt in two different classes of merchandise he would have to apply under sub-sec. (b) for two specific trade-marks, one applicable to each class. The general trade-mark would, however, cover all the classes of merchandise in which the applicant deals. I do not think, however, that the general trade-mark would confer an unlimited right the world over as against those carrying on a business of an entirely different character.

The business of McKesson & Robbins is that of dealers in druggist supplies. If another trader manufactured steam engines, a business entirely dissimilar from that carried on by McKesson & Robbins, these latter people could not be possibly injured in any way by a specific trade-mark adopted and used by the other

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trader in connection with steam engines, although the word might be the same. The whole purport of the law of trade-marks is to prevent the passing off of goods of one as the goods of another whether intentional or not.

To come to the present case, I fail to see how the registration of "Albaloid" as a specific trade-mark as applicable to "forks and spoons of Britannia metal," could possibly enable the applicants to mislead the public into the belief that their goods were the goods of McKesson & Robbins. Moreover, while dealing with the question, it must be borne in mind that while the word "Albaloid" could not in my judgment be registered as a general trade-mark as long as the word "Albolene" stands on the registry, there is some dissimilarity between the two words.

On the whole I am of opinion that the applicants are not entitled to have registered the word "Albaloid" as a general trade-mark. I think, however, if limited to a specific trade-mark as applied to "forks and spoons of Britannia metal" it may be registered.

Mr. Scott on the argument before me declined to accept a specific trade-mark. This would not preclude his clients, if they think better of it. Nor do I wish it to be understood that they are entitled to the registration of this specific trade-mark. There may be other reasons known to the minister or his deputy which might disentitle the applicants to such registration. I am merely dealing with the case as if the only obstacle were a prior registration of the general trade-mark "Albolene."

I think the petitioner should pay the Minister's costs of the petition.

*Judgment accordingly.*

Solicitors for Petitioner: *Ewart, Scott, Maclaren & Kelly.*

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