REPORTS

OF THE

EXCHEQUER COURT

OF

CANADA

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1920

JUDGES

OF THE

Exchequer Court of Canada

During the period of these Reports:

THE HONOURABLE SIR WALTER G. P. CASSELS

Appointed 2nd. March, 1908.

THE HONOURABLE LOUIS ARTHUR AUDETTE

Appointed 4th. April, 1912.

LOCAL JUDGES IN ADMIRALTY OF THE EXCHEQUER COURT OF CANADA

The Honourable	Sir A. B. Routhier	Quebec District	
do.	F. S. Maclennan	do.	do.
do.	F. E. Hodgins	Toronto	do.
do.	Arthur Drysdale	N.S.	do.
do.	Sir J. D. Hazen, C.J.	N.B.	do.
do.	W. S. Stewart	P.E.I.	do.
do.	Archer Martin	B.C.	do.
do.	Charles D. Macaulay	Yukon Territory	do.

ATTORNEY-GENERAL FOR THE DOMINION OF CANADA

The Honourable Charles Joseph Doherty, K.C.

SOLICITOR-GENERAL FOR THE DOMINION OF CANADA

The Honourable Hugh Guthrie, K.C.

TABLE OF CONTENTS.

ERRATA.

To the foot note on page 48 should be added "two judges finding the 'Mont Blanc' alone at fault, and two finding the 'Imo' alone at fault, and one finding both equally at fault."

This judgment has been confirmed by the Privy Council, 51 D.L.R. 403.

P. 235, L. 4. The word "Council" should read "Counsel".

MEMORANDA

Judgments rendered by the Supreme Court of Canada, on appeal from this Court, in cases reported in this volume, but too late to be noted where reported:

1. Jacobsen vs. "Fort Morgan" S. S. (Vol. 19 p. 165) appeal dismissed—22nd December, 1919, 51 D.L.R. 149.

2. The King vs. Barrett. (Vol. 19 p. 175). Appeal dismissed—6th April, 1920.

3. Coy et al vs. S. S. "D. J. Purdy" (Vol. 19 p. 212). Appeal dismissed—6th April, 1920.

4. Halifax Shipyards vs. Montreal Dry Docks & S. S. "Westerian" (Vol. 19 p. 259).

Appeal dismissed with costs; judgment of this Court affirmed with modifications in wording of the formal judgment. The words "As may be reasonable and beneficial upon and to the Defendant ship" are struck out, and the following substituted therefor: "so far as the selling value of the Defendant ship was thereby increased."

5. Fraser vs. The "Aztec", Vol. 19, p 454.

This case was appealed from the Deputy Local Judge in Admiralty to the Exchequer Court, but, on application of plaintiff, defendant consenting, the case was remitted to the trial Judge for further evidence.

6. Jessie Mac", The Tug vs. The Tug "Sea Lion". p. 78.

Notice of Appeal to the Exchequer Court of Canada has been filed. Appeal still pending.

7. The Marconi Wireless Telegraph Company of Canada, Ltd., vs. Canadian Car & Foundry Company, Limited, et al, (Vol. 19, p. 311). Appeal to the Supreme Court of Canada dismissed 21st June, 1920.

IN THE EXCHEQUER COURT OF CANADA.

GENERAL ORDER.

In pursuance of the provisions of "The Colonial Courts of Admiralty Act, 1890", and of "The Admiralty Act, 1891" (Canada), it is ordered that the following rule of Court respecting fees and costs in the Exchequer Court of Canada in the exercise of its jurisdiction, powers and authority as a Court of Admiralty, shall be in force in the said Court:—

1. Part 2 of the appendix to the General Rules and Orders regulating the practice and procedure in Admiralty cases in the Exchequer Court of Canada, subdivision VIII, respecting the fees to be taken by Counsel, is hereby amended by adding thereto the following paragraph:—

These fees may be increased in the discretion of the Judge upon application to him therefor.

Dated at Ottawa, this 14th day of April, A.D. 1917.

W. G. P. CASSELS,
J. E. C.

43-4

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 item No. 68 of Schedule Z2 entitled: "Exchequer Court Tariff: Fees and charges to be allowed to Counsel, Attorneys and Solicitors in the taxation of costs between party and party" be expunged and the following substituted therefor:—

"68. Fee with brief on trial of issues or hearing, or on motion by way of appeal from Local Judge, to be settled by the Registrar, subject to appeal to a Judge in Chambers".

Dated at Ottawa, this 18th day of June, A.D., 1914.

W. G. P. CASSELS,
J. E. C.

IN THE EXCHEQUER COURT OF CANADA.

GENERAL RULES AND ORDERS.

In pursuance of section 87 of The Exchequer Court Act (R.S. 1906, c. 140) it is hereby ordered that the following Rules shall be in force in the Exchequer Court of Canada in respect of the matters therein mentioned:

336. The Court or a Judge shall have power at any stage of the proceedings in any cause or matter now

pending or hereafter instituted to direct the trial of any particular issue or issues therein upon oral evidence, prior to the trial of other issues in question in such cause or matter and to make all necessary orders and directions for the purposes of the trial of any issue or issues as may be so directed.

337. In any cause or matter now pending, or hereafter instituted, where the defendants are numerous, and where the rights of the defendants or of any class or classes of defendants in any particular substantially depend upon the same facts and where by reason of difficulty in effecting personal service upon the defendants, or for any other reason, it appears that in the due administration of justice such order should be made, the Court or a Judge shall have power upon the application of the plaintiff *ex parte*, (or upon such notice to any of the parties to the cause or matter as may have been directed) to order or direct that one or more of such defendants, or such other defendant or defendants as may be added as representing a class, shall defend the action so far as the questions of fact or law are directed to be tried on behalf or for the benefit of all defendants having similar interests, and that service of the Information or other proceeding upon such defendants so named shall be good and sufficient service thereof upon the other defendants, whether for the purpose of the cause or matter generally or for the purposes of the trial of such questions of fact or law, as may be directed:

Provided always that the rights of the defendants in any cause or matter in which such order may be made shall not be taken to be affected thereby so far as any other questions of law or fact in such cause or matter are concerned.

338. Judgment on the trial of any question ordered or directed in the manner provided by the next preceding rule, shall, if directed in such order, be binding on all the defendants in any cause or matter and their heirs and representatives, and in the event of death of any of the defendants before judgment being had on such trial no abatement of the action shall thereupon arise and it shall not be necessary to revive the cause or matter as against the heirs or personal representatives of such defendants.

Dated at Ottawa, 15th February, A.D. 1915.

W. G. P. CASSELS,
J. E. C.

75068

IN THE EXCHEQUER COURT OF CANADA.

General Rule and Order.

In pursuance of section 87 of the Exchequer Court Act (R.S., 1906, chap. 140) it is hereby ordered that Rule 236 of the General Rules and Orders

now in force regulating the practice and procedure in the Exchequer Court of Canada be and the same is hereby rescinded and the following substituted therefor:—

RULE 236.

Any party against whom judgment has been given or an order made, may apply to the Court or a Judge thereof for a stay of execution or other relief against such judgment or order, and the Court or Judge may grant such stay or relief upon such terms, if any, as may be deemed just.

Dated at Ottawa, this 16th day of February, A.D., 1917.

WALTER CASSELS,
J. E. C.

35-4
16134

IN THE EXCHEQUER COURT OF CANADA.

GENERAL RULE AND ORDER.

In pursuance of section 87 of the Exchequer Court Act (R.S. 1906, chap. 140) it is hereby ordered that Rule 200 of the General Rules and Orders now in force regulating the practice and procedure in the Exchequer Court of Canada be and the same is hereby rescinded, and the following substituted therefor:—

RULE 200.

1. The Registrar shall settle the minutes of any judgment or order pronounced by the Court. For this purpose, an appointment may be obtained from the Registrar by any party to the action; and the party obtaining the same shall serve a copy of such appointment together with a copy of the draft minutes of such judgment or order upon the opposite party or his solicitor, two clear days at least before the time fixed for settling such judgment or order. The Registrar shall satisfy himself that service of the minutes of such judgment or order and of the copy of the appointment has been duly effected.

2. Any order made by a Judge in Chambers shall be settled and signed by the Registrar, unless the Judge pronouncing such order directs that the same shall be signed by himself.

Dated at Ottawa, this 14th day of April, A.D. 1917.

W. G. P. CASSELS,
J. E. C.

43-4
19225

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 Rule 295 of the General Rules and Orders now in force regulating the taxation of costs between

party and party be and the same is hereby amended by adding the following clause to schedule Z2 thereof:

Owing to the increased cost of living and office expenses arising out of the abnormal conditions created by the war, it is ordered that, until further order, the fees, other than payments and disbursements shall be increased by twenty per cent. This increase shall apply to all bills untaxed at the date hereof.

Dated at Ottawa, this 18th day of November, A. D. 1918.

W. G. P. CASSELS,
J. E. C.

51338

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 ordered that Rule 313 of the General Rules and Orders be and the same is hereby amended by adding thereto the following clause:—

Until further order, in addition to the powers already vested in him, the Registrar is hereby assigned the following rights and duties and shall have power and authority to do the following acts and things:—

1. To make an order for substituted or other service as provided by Rule 72.
2. To make an order for substituted or other service on particular defendants as provided by Rules 73, 74 and 76.
3. To make any order for service as provided by Rule 78.
4. To approve of a bond or deposit of money as security within the provisions of Rule 79.
5. To make an order for service out of the jurisdiction as provided by Rule 81.
6. To make any order for service as provided by Rules 82 and 83.
7. To make an order extending the time for filing a defence or answer as provided by Rule 85.
8. To make an order granting leave to deliver a further defence as provided by Rule 103.
9. To make an order extending the time for filing and serving reply as provided by Rule 111.
10. To make an order granting leave to plead subsequent to reply as provided by Rule 112.
11. To make an order extending time for filing and service of pleading subsequent to reply as provided by Rule 113.
12. To make any order for the amendment of pleadings as provided by Rules 117, 120 and 121.
13. To make an order by consent of parties setting down points of law for hearing before the Court or a Judge as mentioned in Rule 126.

14. To make an order for examinations on discovery as provided by Rules 134, 135, 136 and 140.

15. To make an order for discovery of documents as provided by Rule 143.

16. To make an order for the production of documents for inspection as provided by Rule 146.

17. To make an order for inspection as provided by Rule 149.

18. To make an order for inspection upon affidavit as provided by Rule 150.

19. To make an order for leave to countermand notice of trial under Rule 169, provided that such order shall not deal with the question of costs which will be reserved for the Court or a Judge.

20. To make an order for deponent to be cross-examined on affidavit under Rule 183.

21. To make an order for examination of any person upon oath as provided by Rule 186.

22. To make an order for the renewal of writs of execution under Rule 230.

23. To make an order for the addition of parties as provided by Rule 254.

24. To make an order for adding or changing parties under Rule 256, or to discharge or vary same under Rules 258 and 259.

25. To make any order for leave to issue third party notice under Rule 262.

26. To make an order for security for costs under Rules 291 and 292.

27. To make an order for the amendment of writs under Rule 306.

28. To make an order under Rule 322 permitting the pleadings in any case to be filed or delivered during the vacations.

Any matter dealt with under the foregoing or any other rules, by the Registrar shall be subject to an appeal to a Judge in chambers by any party interested.

In case any matter shall appear to the Registrar to be proper for the decision of the Judge, the Registrar may refer the same to the Judge, who may either dispose of the matter or refer the same back to the Registrar with such directions as he may think fit.

Dated at Ottawa, this 1st day of December, A.D. 1919.

W. G. P. CASSELS,
J. E. C.

24-4

IN THE EXCHEQUER COURT OF CANADA.

General Rules and Orders.

In pursuance of the provisions contained in the 87th section of The Exchequer Court Act, and the acts amending the same, it is hereby ordered that the following rules in respect of the matters hereinafter mentioned shall be in force in the Exchequer Court of Canada:—

1. Rule 310 of the General Rules and Orders of the Exchequer Court of Canada is hereby amended by striking out the word "vacations" in the first line thereof and substituting therefor the words "long vacation"; and by striking out in the second line thereof the words and figures "from 11 in the forenoon to 12 o'clock noon," and substituting therefor the following words and figures; "from 10 in the forenoon to 12 o'clock noon."

2. And it is hereby further ordered that Rule 317 of the General Rules and Orders of the Exchequer Court of Canada, now in force, be, and the same is hereby rescinded and the following substituted therefor:—

Rule 317: There shall be a vacation at Christmas commencing on the 20th day of December and ending on the 7th day of January, during which time the Registrar's office shall be kept open during each juridical day, except Saturday, from 10 in the forenoon to 4 o'clock in the afternoon, and on Saturdays from 10 in the forenoon until 1 o'clock in the afternoon, and all officers and employees of the court are to be in attendance during these hours, subject, however, to the discretion of the Registrar to regulate such attendance during the said vacation.

Dated at Ottawa, this 18th day of December, 1919.

W. G. P. CASSELS,
J. E. C.

74168

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IN THE EXCHEQUER COURT OF CANADA.

General Rule and Order.

In pursuance of the provisions contained in the 87th section of The Exchequer Court Act, and the Acts amending the same, it is hereby ordered that Rule 15 of the General Rules and Orders of the Exchequer Court of Canada be, and the same is hereby amended by adding thereto the following clause:

2. In such an action the plaintiff must at the time of filing his statement of claim, file with the Registrar of the court either the original patent sued on or a certified copy thereof.

Dated at Ottawa, March 29th, A.D., 1920.

W. G. P. CASSELS,
J. E. C.

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A TABLE

OF THE

NAMES OF THE CASES REPORTED IN THIS VOLUME

CASES

DETERMINED BY THE

EXCHEQUER COURT OF CANADA.

QUEBEC ADMIRALTY DISTRICT.

1919
June 7.

PATRICK MULVEY,

PLAINTIFF;

v.

THE BARGE "NEOSHO,"

DEFENDANT.

Damages to seaman—"Damage done by any ship"—Admiralty Court Act, 1861, *sec. 7—Interpretation—Jurisdiction—Consent of parties—Acquiescence.*

The plaintiff, a seaman, brought an action *in rem* for damages against the barge "Neosho" for bodily injuries sustained by him in an accident alleged to have been occasioned by negligence for which the ship was liable.

Held, that the damage done was not *"by"* the barge, but *"on"* the barge, and is not such damage as gives plaintiff a remedy *in rem* within the meaning of sec. 7 of the *Admiralty Court Act,* 1861. The Court was therefore without jurisdiction in the matter.

2. In the absence of jurisdiction existing by law, the filing of an appearance and the giving of bail by defendant do not give jurisdiction to the Court in a proceeding *in rem.*

3. Jurisdiction is not a matter of procedure and cannot be derived from the consent of parties.

1919

MULVEY v. THE "NEOSHO."

Reasons for Judgment.

THIS is an action in damages brought by a seaman to recover $5,000 against the barge "Neosho" for bodily injuries sustained on May 2, 1919, owing to being tripped up on deck by reason of ropes negligently left thereon.

The case came before the Honourable Mr. Justice Maclennan on a motion to dismiss for want of jurisdiction.

The whole case turns upon the interpretation of the phrase giving jurisdiction to the Court, namely, "damages done by any ship".

The case was heard on June 7, 1919, and judgment was rendered on the same day, dismissing the action for want of jurisdiction.

R. S. Weir, K.C., for plaintiff.

W. B. Scott, K.C., and *Hon. Adrian K. Hugessen,* for defendant.

The facts are set forth in the judgment which follows:

MACLENNAN, J. (June 7, 1919) delivered judgment.

The plaintiff, a seaman, brings an action *in rem* for $5,000 damages against the barge "Neosho" for bodily injuries sustained by the fracture of his right forearm and bruises to his left knee and face, on May 2, 1919, owing to being tripped up in the middle deck by reason of ropes negligently left on the floor of the deck, which was dark; the barge was arrested and, upon bond given, was released.

1919

MULVEY v. THE "NEOSHO."

Reasons for Judgment.

The defendant has moved for order that the writ of summons be set aside and plaintiff's action dismissed with costs for want of jurisdiction on the part of this Court, on the ground that the plaintiff's claim is not a "claim for damage done by any ship" within the meaning of sec. 7 of the *Admiralty Court Act,* 1861. It is well settled by the jurisprudence that the Court has jurisdiction over any claim for damages to property or person done by any ship.

The defendant submitted that the claim sued on, particulars of which are endorsed on the writ, is not damage done by any ship. The barge "Neosho" was in the harbour of Montreal and plaintiff's injuries were sustained on board. The question here is whether the words of sec. 7 of the Act of 1861 "damage done by any ship" are applicable to the present case.

In the "*Vera Cruz*"[1], Brett, M.R., said:

"The section indeed seems to me to intend by the "words 'jurisdiction over any claim', to give a juris-"diction over any claim in the nature of an action "on the case for damage done by any ship, or, in "other words, over a case in which a ship was the "active cause, the damage being physically caused "by the ship. I do not say that damage need be "confined to damage to property, it may be damage "to person, as if a man were injured by the bow-"sprit of a ship. But the section does not apply to "a case when physical injury is not done by a "ship."

In the "*Theta*"[2], Mr. Justice Bruce said:

"Damage done by a ship is, I think, applicable "only to those cases where, in the words of the Mas-

[1] (1884), 9 P.D. 96 at 99.
[2] [1894] P. 280, at 284.

1919

MULVEY v. THE "NEOSHO."

Reasons for Judgment.

"ter of the Rolls in *The Vera Cruz,* the ship is the "'active cause' of the damage. The same idea was "expressed by Bowen, L.J., who said the damage "'done by a ship means damage done by those in "charge of a ship, with the ship as the noxious in-"strument.' In this case, to put it at the highest, "those in charge of the ship so placed a tarpaulin "over the hatchway as to make a trap into which "the plaintiff fell, whilst lawfully crossing the deck "of the ship to reach his own vessel. The ship can-"not be said to have been the active cause of the "damage. The damage was done on board the ship, "but was not, I think, within the meaning of the Act, "done by the ship. Therefore, I must allow the "motion with costs."

In *Currie v. McKnight,*[1] Lord Halsbury, L.C., said:

"The phrase that it must be the fault of the ship "itself is not a mere figurative expression, but it "imports, in my opinion, that the ship against "which a maritime lien for damages is claimed is "the instrument of mischief, and that in order to "establish the liability of the ship itself to the mari-"time lien claimed some act of navigation of the "ship itself should either mediately or immediately "be the cause of the damage."

In the *"Duart Castle"* case,[2] where an engineer, while working on a steamer, was injured by the breaking of a stop-valve and sued for damage, Mr. Justice McLeod held that the damage was done by the ship and that the Court had jurisdiction, but dismissed the action as the plaintiff did not produce reasonable evidence of negligence causing the acci-

[1] [1897] A.C. 97 at 101.
[2] (1899), 6 Can. Ex. 387.

dent. The learned judge clearly held that the Court had jurisdiction over the claim, as he came to the conclusion that the damage was done by the ship. In that case the stop-valve of the steam chest broke and plaintiff was scalded by the rush of steam.

In *Barber v. The "Nederland"*,[1] which was an action by plaintiff for damages for personal injuries sustained while working on a ship as a stevedore, such injuries being caused by the faulty construction of hatch coverings and beams supporting the same, Mr. Justice Martin allowed a motion made on behalf of the ship setting aside the proceedings for want of jurisdiction.

The nature of the claim forming the basis of plaintiff's action is substantially similar to the claims set up in the cases of the *"Theta," supra,* and the *"Nederland",* in both of which it was held the Court had no jurisdiction.

The plaintiff objects to the defendant's motion on the ground that it comes too late and that the defendant by having appeared and given bail submitted to the jurisdiction of the Court; the *Milwaukee* case.[2] The defendant appeared under protest and the application to give bail, in order to allow the barge to proceed on its voyage, was made under reserve and without prejudice to defendant's rights. The objections in the *Milwaukee* case were on mere matters of procedure. It was a case arising out of a collision in which the Court had inherent jurisdiction, and the objections were purely technical. In the present case the objection, if well founded, is absolute and goes to the jurisdiction of the Court; it is not a matter of procedure and cannot be affect-

[1] (1909), 12 Can. Ex. 252.
[2] (1907), 11 Can. Ex. 179.

1919

MULVEY v. THE "NEOSHO."

Reasons for Judgment.

ed by any proceedings already taken by the defendant. The Court cannot get jurisdiction by consent of the parties, as jurisdiction must arise from the subject matter of the claim. Dr. Lushington, in the *"Mary Anne"*,[1] said p. 335: "If at any time the "Court discover it has no jurisdiction, and the "facts show that the Court has no jurisdiction, "it cannot proceed further in the cause; the delay "of one or both parties cannot confer jurisdiction." The objection raised by defendant is not a mere technical objection which could be waived by appearance and giving bail, if under the statute there is absolute absence of jurisdiction; the *"Louisa"*,[2] the *"Eleonore"*,[3] *Richet v. The "Barbara Boscowitz"*.[4]

The application to dismiss by motion is in accordance with the practice in Admiralty matters. I am unable to distinguish this case from the *"Theta"* and the *"Nederland"*. The barge here was not the active cause or the noxious instrument of plaintiff's injuries. Damage done not "by" the barge, but "on" the barge is not such damage as gives plaintiff a remedy *in rem* such as he is seeking to exercise in this action. Plaintiff's action therefore fails for want of jurisdiction, and defendant's motion is granted, and the action is dismissed with costs.

Solicitor for plaintiff: *R. S. Weir*, K.C.

Solicitors for defendant: *Lafleur, MacDougall, Macfarlane & Barclay.*

[1] (1865), Br. and L. 334.
[2] (1863), Br. and L. 59.
[3] (1863), Br. and L. 185.
[4] (1894), 3 B.C.R. 445.

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

PLAINTIFF;

v.

JOHN M. KILBOURN,

DEFENDANT.

1919
May 26.

Expropriation—Riparian rights — Water-powers — Public work—7 Wm. IV., ch. 66—9 Vict., ch. 37, sec. 7—B. N. A. Act, sec. 108—Valuation of water-powers.

The River Trent, by a series of statutes, was appropriated by the Crown for the purpose of constructing the Trent Canal. At the time of Confederation the whole river from Rice Lake to the Bay of Quinte had become part of the canal system.

Held, that the river had, under the circumstances, become a public work of Canada and passed by sec. 108 of the *B. N. A. Act* to the Dominion at the time of Confederation.

2. That the title of defendant to lots on the river did not carry with it the *solum* or bed of the river, and therefore the defendant had no legal right to compel the dam erected above his lots on the river to be maintained by the Crown.

3. In estimating the value of a water-power the cost of exploiting the same must be considered. That being so, even if the river in question were not a public work no value as enuring to the defendant could be placed upon the water-power, as it would cost more to develop than the results to be attained would justify.

The King v. Grass, (1916), 18 Can. Ex. 177, referred to.

THIS was an information exhibited by the Attorney-General of Canada for the expropriation of certain lots in the town of Campbellford.

Mr. Johnston, K.C., for the plaintiff, contended that the River Trent was appropriated by the Crown

1919

THE KING. v. KILBOURN.

Argument of Counsel.

for the purpose of constructing the Trent Canal; that the statutes vested the whole river in Public Works Department and gave it the character of a public work. And by sec. 108, *B. N. A. Act,* it passed to the Dominion at the time of Confederation; and, moreover, this river had been declared by statute a navigable river in fact; that the rule of "*ad medium aquae a filae*" is not without exception; that assuming that the River Trent is non-tidal, then the title of a grantee of land bordering thereon runs to the middle thread of the river. But this is a presumption which is rebuttable and in this instance is rebutted by the exclusion of 44 acres from the grant, taken out of the 200 acres of the lot. He further contends that the defendant's title was subject to reservations contained in the original grant from the Crown, which original grant reserved the water, and that, therefore, Kilbourn had no right to the water so reserved; that the owners of the several lots between defendant and the dam further up the river had a right also to the use of the water, and that there was nothing to limit the amount of water or power they could take.

Mr. McKay, K.C., for defendant, contended that the statute 6 Wm. IV., ch. 29, only provides for certain expenditures, and the appointment of commissioners—and that there is nothing in all the Acts cited to vest the River Trent—except such lands as they actually took, and that the river was not a public work; these statutes give them authority to construct a canal, which was not limited to the line of the river; they could acquire and hold the boundary of the canal, but it vested in the Crown only what they actually took. He contended that defendant's lands were injuriously affected and that the water

1918

THE KING v. KILBOURN.

Argument of Counsel.

rights being part of the land shared therewith. He further contended his client was owner of the bed of the river opposite his property and had a right to maintain the dam in question, and had a right to excavate to continue the raceway to and onto his property, and in consequence was entitled to the water-power which could be obtained by such works.

Defendant cited the following authorities: *Lyon v. Fishmongers Co.*,[1] *North Shore R. Co. v. Pion*,[2] *Att'y.-Gen'l. of B. C. v. Att'y.-Gen'l. of Canada* (*Burrard Inlet* case),[3] *Embrey v. Owen*,[4] *Caldwell v. McLaren*,[5] *Lord v. Commissioners of Sydney*,[6] *Miner v. Gilmour*,[7] *Cedar Rapids Case & Lacoste*,[8] *Stockport Waterworks Co. v. Potter*,[9] *Wood v. Waud*,[10] *Durham R. Co. v. Walker*,[11] *Attrill v. Platt*,[12] *Bullen v. Denning*,[13] *Savill Bros. v. Bethell*.[14]

The facts are fully set forth in the reasons for judgment.

The case came on for hearing before the Honourable Mr. Justice Cassels, at Toronto, on January 20 and 21, 1919.

Strachan Johnston, K.C., and *G. A. Payne*, for plaintiff.

Robert McKay, K.C., and *W. H. Wright*, for defendant.

1 (1876), 1 App. Cas. 662 at 682.
2 (1889), 14 App. Cas. 612.
3 [1906] A.C. 552.
4 (1851), 6 Ex. 353, 155 E.R. 579.
5 (1884), 9 App. Cas. 392.
6 (1859), 12 Moore's P.C. 473, 14 E.R. 991.
7 (1858), 12 Moore's P.C. 156, 14 E.R. 861.
8 16 D.L.R. 168, [1914] A.C. 569.
9 (1864), 3 H. & C. 300, 159 E.R. 545.
10 (1849), 3 Ex. 748, 154 E.R. 1047.
11 (1841), 2 Q.B. 940, 114 E.R. 364.
12 (1884), 10 Can. S.C.R. 425, 481.
13 (1826), 5 B. & C. 842, 108 E.R. 313.
14 [1902] 2 Ch. 523 at 537, 538.

1919

THE KING v. KILBOURN.

Reasons for Judgment.

CASSELS, J. (May 26, 1919) delivered judgment.

An information exhibited on behalf of His Majesty, by the Attorney-General of Canada, plaintiff, and John M. Kilbourn, defendant, to have it declared that certain lands formerly the property of the defendant are vested in His Majesty, and to have the compensation ascertained.

The expropriation plan was registered on November 22, 1910.

The lands in question are said to comprise about thirty-six hundredths of an acre. These lands are situate in the town of Campbellford, and front upon the River Trent, which flows through the said town. The lands expropriated comprise part of lots 8, 9, 10, 11, 12, 13, 14, 15 and 16 in what is called the east factory block.

A point of contention at the trial was that lot 16, marked upon the plan designated "Cady's plan" as lots 16 and 17, and the description in the deed to Kilbourn would include as part of lot 16, this lot marked lot 17. The question as to whether or not lot 16 includes what is called lot 17 on Cady's plan is not of very great moment. Later on, however, as counsel in the course of the trial have dwelt on this particular question, I will deal with it.

The Crown has expropriated 17,613 square feet. The total area of all the lots in question is 30,527 square feet.

The defendant in his defence as originally filed, claimed the sum of $6,000 as compensation for the

portion of the lands expropriated and all damages. By the amendment he changed this amount, and now claims the sum of $20,000.

An interesting question is raised in this case which in my view is not of much moment. The defendant claims a large sum of money for loss of water-power which he claims he acquired as owner of the lots in question, and of which he alleges he has been deprived by the removal of a dam which penned back the waters of the River Trent, causing the waters to flow through the raceway referred to. In my view even if the contention of the defendant were well founded there is practically no value in these particular lots for power purposes. I am of opinion, however, that he acquired no title to the bed of the river or the waters of the river except as an ordinary riparian owner and had no right to have the dam maintained.

The River Trent, by a series of statutes, was appropriated by the Crown as part of the public works required for the Trent Canal. The canal starts from Rice Lake and enters into the Bay of Quinte at Trenton.

I am indebted to the present Mr. Justice Masten when at the bar for the information contained in his argument in the case of *The King v. Grass*.[1] I have referred to the various statutes and verified Mr. Justice Masten's citations.

By ch. 66 of 7 William IV., 1837, it is recited in sec. 1, "that it is highly important that a line of "communication should be formed between the "waters of the Bay of Quinte and Rice Lake, by "improving the navigation of the River Trent."

[1] 18 Can. Ex. 177 at 183.

1919

THE KING v. KILBOURN.

Reasons for Judgment.

Commissioners were appointed to carry out the provisions of that statute. I pass over the statute of 4 and 5 Vict., ch. 38, as it was repealed by a later statute, 9 Vict., ch. 37 (Canada), 1846. By this latter statute a commission was established to superintend, manage and control the public works of the province. By sec. 7 of this statute, the commissioners are given the "control and management of con-"structing, maintaining and repairing of canals, "harbours, roads or parts of roads, bridges, slides "and other public works and buildings now in pro-"gress or which have been or shall be constructed "or maintained at the public expense out of the pro-"vincial funds."

There are provisions enabling the commissioners to enter on property and make surveys, etc. Sec. 23 of this statute, which is of importance, provides, "that the several public works and buildings enum-"erated in the schedule to this Act, and all materials "and other things belonging thereto, or prepared "and obtained for the use of the same, shall be and "are hereby vested in the Crown, . . . and under "the control of the said commissioners for the pur-"poses of the Act."

Schedule "A" to this Act is headed "Public works vested in the Crown by this Act"; and then below is the heading, "Navigation, Canals and Slides," Included in this schedule is the "Rice Lake and the River Trent, from thence to its mouth, including the locks, dams and slides between those points."

This statute in consolidated in the Statutes of Canada (1859), ch. 28, and in the same language as the statute to which I have previously referred.

By the *Confederation Act*, sec. 108, the public works and property of each province enumerated in

the third schedule to this Act shall be the property of Canada. The third schedule to this Act states, "Provincial public works and property to be the "property of Canada." 1. "Canals with lands and "water-power connected therewith."

Counsel for the defendant in the case in question dealt at considerable length upon the point that opposite the lands in question owned by the defendant, the river was non-navigable in fact, and that the title of the defendant extended to the middle of the river.

After the best consideration I can give to the case I am of opinion that the whole of the River Trent, from Rice Lake to the Bay of Quinte, became part of the canal system. It was essential for the construction and maintenance of the canal that the River Trent should be vested in the Crown. It was declared to be a navigable river and became a public work of Canada, and in my opinion passed to the Dominion by the *Confederation Act*.

On August 25, 1852, the Crown granted to David Campbell, clergy reserve lot number 10, in the 6th concession of the Township of Seymour. This patent is the source of the title under which the defendant Kilbourn claims.

In the patent there is a reservation as follows: "Exclusive of the waters of the River Trent, which "are hereby reserved, together with free access to "the shores thereof for all vessels, boats and per-"sons."

The acreage of the lot granted to Campbell by the patent is 156 acres.

It is contended by Mr. Johnston, representing the Crown, that the lot 10 in question comprised 200

1919

THE KING v. KILBOURN.

Reasons for Judgment.

acres, and he refers to the evidence of Proctor to prove this fact.

Mr. James, a provincial land surveyor, measures the area of land covered by the river bed, and states that it comprises 44 acres of land. From this Mr. Johnston contends that the reservation in the patent of the waters of the Trent included the reservation of the bed of the River Trent. There is considerable force in this contention.

At the time of this grant, as I have mentioned, the River Trent became part of the canal system and was declared to be part of the public works of the old Province of Canada, and I have but little doubt that the object of reserving the waters of the River Trent was to prevent any misunderstanding as to title being granted which would prevent the Crown from perhaps diverting all of these waters for the purposes of the canal.

The case of *Kirchhoffer v. Stanbury*[1] was tried before the late Chancellor Spragge in the autumn of 1868. Judgment was delayed for the reasons stated by the learned chancellor in his reasons for judgment, until the year 1878. It was apparently not necessary for the learned chancellor to deal with this question. The suit in question was instituted to have a construction placed in the bed of the river removed. It was obvious, as the learned chancellor pointed out, that if those claiming under Major Campbell did not own the bed of the river the action would necessarily fail, and therefore the question did not arise. In his reasons for judgment, the learned chancellor refers to the effect of the grant. He puts it in this way, p. 416:

[1] 25 Gr. 413.

"The position of the plaintiffs is a peculiar one. "The patent to Major David Campbell, which is put "in by the plaintiffs, is of land in the Township of "Seymour, 'exclusive of the waters of the River "Trent, which are hereby reserved, together with "free access to the shores thereof for all vessels, "boats and persons.'"

The learned chancellor states: "Not a very accur- "ate mode of reservation. It would, however, prob- "ably operate though the *waters* only are reserved "as a reservation of the bed of the river."

It appears that a dam had been erected above the lands in question. There are several lots from 1 to 16, namely, 7 lots further up towards the dam than the lands owned by Kilbourn. Kilbourn's lots commences with lot 8. Raceways were provided for both on the east and on the west side of the river, and mills and other factories had been erected, power to which on the east side was furnished from the raceway situate between those lots and Mill Street.

The Hon. James Cockburn, Kirchhoffer and Robert Cockburn had apparently erected this dam without permission from the Crown, and being in doubt as to their right so to do, they applied to the Crown for a license to maintain this dam, and a license bearing date December 9, 1869, was given. (Exhibit No. 12). It recites the grant of a patent in the year 1852 of lot 10, in the sixth, to David Campbell—and recites as follows:

"And whereas, it is represented unto us that the "said lot of land extends across the River Trent "and includes lots on both sides thereof;

"And whereas, it is further represented unto us "that the said David Campbell subsequently con- "veyed the same to the Honourable James Cock-

1919

THE KING v. KILBOURN.

Reasons for Judgment.

"burn, Nesbitt Kirchhoffer, and Robert Cockburn, "Esquires, their heirs and assigns, and further "that the last mentioned parties have heretofore "constructed a dam for manufacturing purposes, "across the River Trent, at the intersection there- "by of the said lot of land, and they have applied "for a license from us to authorize them to main- "tain the said dam and the erections and construc- "tions thereto appertaining, etc.;

"And whereas, it is deemed advisable to grant "the license so applied for;

"Now know ye in consideration of the premises "we have given and granted, and do by these pres- "ents give and grant unto the said Honourable "James Cockburn, Nesbitt Kirchhoffer and Robert "Cockburn, Esquires, their heirs and assigns, full "power, leave, license and authority, to keep erect- "ed and maintained across the River Trent at the "Village of Campbellford, in the said Township of "Seymour, at the intersection of the said lot of land "by said river, the said dam heretofore constructed "and now being thereon, and all the works, erec- "tions, matters and things thereto belonging or "therewith enjoyed."

There is a proviso to the license "that no com- "pensation shall be claimed by the said the Honour- "able James Cockburn, Nesbitt Kirchhoffer, and "Robert Cockburn, Esquires, or either of them or "their heirs or assigns of, from or against us, our "heirs and successors, or any other person or per- "sons whomsoever *in respect* of the power, leave, "license and authority hereby granted, in case the "license hereby granted shall be at any time ter- "minated or revoked or be the subject of any legis- "lation as hereinbefore mentioned."

On August 24, 1911, the license was revoked. The revocation recites: "And whereas, the removal of the said dam has now become necessary for the proper navigation of the River Trent."

The plan expropriating the lots in question was registered on November 22, 1910. I do not think this affects the question, as whatever title the defendant, Kilbourn, had in the lots in question entitling him to have the dam maintained and to the water-power, was all subject to be revoked if the interests of the canal so required. The Crown did revoke the license and removed the dam. It is not for me to question the judgment of the officials of the Crown as to whether or not it was proper that the dam should be removed in the interest of navigation. At the time of the revocation the raceway had been excavated, as I have mentioned, as far as lot No. 8. It has never been excavated in front of or beyond lot No. 8.

Under the title through which the defendant claims, the defendant had a legal right to excavate and continue the raceway passing between his lots and Mill Street, if so advised. He had never done so, nor do I think he ever contemplated such a work. It would have cost a large amount of money, and if continued there would have been almost no horse-power available for his property. I will endeavour to show this later from the evidence.

On January 1, 1865, there was a deed of partition executed between the tenants in common, and amongst other things the water lots are referred to as the water lots referred to in the plan of George W. Ranney. Some of these water lots passed to one of the tenants in common, others to Kirchhoffer, and other water lots to the other tenants in common.

1919

THE KING v. KILBOURN.

Reasons for Judgment.

The defendant has proved his title to these water lots other than lot 17, as to which there is no dispute.

By the deed of partition of January 1, 1865, these water lots are described as the water lots shown on the plan of Ranney. This deed of partition also refers to other water lots apparently above the lots in question, which are referred to as shown on a plan by Cady. This plan of Cady apparently was prepared and registered on May 8, 1865, (Exhibit 10), subsequently to the deed of partition.

I am informed by counsel that Ranney's plan cannot be found. It is said that search has been made everywhere for it without any result, and the plan is not registered. It, therefore, leaves the question as to whether or not what is called lot 17 was included as part of lot 16 in doubt. It is not of much value, and very little turns upon it.

Now, as to the value of these nine lots for water-power purposes. It may be well to mention that Kilbourn purchased the nine lots in question in the year 1905 for the sum of $900, or $100 for each lot. He is a barrister of standing and a shrewd man of business, and on January 8, 1917, (See Exhibit "E") he writes a letter to the Minister of Railways, in which among other things he states that he is the owner of the lots, 8 to 16 inclusive, in the east factory block. "Possession has been taken of these lots by "your Department for canal purposes and the em- "bankment of the canal has been put upon all of "them, practically destroying the lots. I believe "the canal is now practically finished and presume "you will be in a position to make compensation for "the lots. I would be willing to accept $4,000 for "the property."

I refer to this letter to show first that to the knowledge of Kilbourn the portion of his lots expropriated had been taken for canal purposes. He admits in his evidence that when he bought he knew that the Crown was going to improve the navigation of the Trent. I also refer to it to show the great difference between his present demand for $20,000 and the sum he was willing to take on January 8, 1917.

Dealing first with the question of the value of this property for water-power purposes. Duncan William McLachlan was a witness examined by the Crown. He was division engineer for the Trent Canal at Campbellford, in the year 1910. I have mentioned before that from the dam to the commencement of Kilbourn's lots there are seven other properties taking or entitled to take water from the raceway, the raceway having been extended to lot 8, the commencement of Kilbourn's property.

Mr. McLachlan states as follows:

"Q. Before returning to the amount of power "that these users up the raceway took, I want you to "state how much horse-power, assuming the aver- "age flow of the river to be 1,253 cubic second feet, "there would be available for the total raceway? A. "There would be available 626 cubic feet per second. "(This would be on the east side. The other 626 on "the west side). Q. I was referring to the power "taken by Smith and Doxie in cubic second feet. "Mr. Kerry in his figures used horse-power? A. "Might I explain a question? Mr. Kerry quoted my "report in these matters—and I have gone back to "my original report and simply taken the equival- "ent amounts in water which appear in my original "report which were not given. Q. Your report

1919

THE KING v. KILBOURN.

Reasons for Judgment.

"states that Smith & Sons took 162 horse-power off "the raceway, what is the equivalent of that in cubic "second feet? A. I think it would be better to state "the actual measurement. The actual measurement "at the full gauge opening was 261 cubic feet per "second for Smith. Q. And Doxie? A. 48, making "309. Q. And Dixon? A. 26. Q. And Weston? A. "86 is the actual measurement. Q. And the Town of "Campbellford? A. 59. Q. That was a total of "580 cubic second feet? A. Exactly. Q. And the "available capacity in the raceway was 629 cubic "second feet? A. That is correct. Q. That would "leave how many cubic second feet? A. 46 feet per "second. Q. That would be the maximum that "would be available for Kilbourn, having regard "only to the actual user by those above? A. Cor-"rect."

To my mind it is absurd to believe that anyone would go to the expense necessary to construct the raceway and continue it in front of the defendant's lots for this amount of power. The raceway would have to be excavated out of rock.

I think, moreover, that the evidence of the witness for the defendant confirms this view. It must not be lost sight of either that the quantity of water fluctuates according to the seasons. During a portion of the year there would be very little water.

The defendant examined in support of his claim one John George Kerry. He is a civil engineer, and had a great deal to do with the water-powers in question. He bases his evidence upon the construction of a storage dam up the river, at a distance above the point in question of from 30 to 100 miles. He states that the conservation would be above the

navigable portion of the stream. "Briefly, I went "into that very carefully, and I figure that storage "to the extent of about 500,000 acre feet was neces- "sary to regulate the flow." His estimate is that the whole conservation should be carried out at the rate of $2 per acre foot, or at a total cost of approximately $1,000,000. He divides this cost among the different owners, and finds the amount chargeable to Kilbourn's property would be the sum of $6,000. He puts the cost to Kilbourn, the total cost, at from thirty-four-odd thousand dollars to twenty-six thousand dollars. He is asked:

"Q. Your general estimate is a wide thing. There "is a new dam and new works, and a lot of other "things. The point before me is what is the loss to "Kilbourn, his taking the property as it was. If "you take the old raceway as it stood in 1910, and "extended it past Kilbourn's property, what would "it cost? A. With that change the estimate would "be reduced to $26,000. Q. It would cost how much? "A. $26,000 to extend the raceway and put in the "turbines."

HIS LORDSHIP.—"So that Kilbourn before he could "utilize this property for manufacturing, he would "have to spend $26,000 on the property? A. Yes."

He states further on as follows: "Q. It would not "be possible for Kilbourn to develop any power in "connection with these lots except by virtue of a "dam far above Kilbourn's property? A. That is "correct. Q. On these lots themselves it is not pos- "sible to develop any power? A. No. Q. Now you "make an estimate of the cost of developing power "on Kilbourn's property, and that was based, you "said, on the possibility of certain conservation

1919

THE KING v. KILBOURN.

Reasons for Judgment.

"works being carried out. How far above Camp-"bellford would those conservation works be? A. "Roughly speaking, anywhere from 30 to 100 miles. "Q. And it is not possible, as far as you know, or it "would not have been possible in 1910, to regulate "in any practical manner the flow of the river with-"out going very far upstream? A. The proper "place to put the regulation works is far up "stream."

It seems to me that such an idea cannot enter into the consideration of the present case. I have pointed out that the River Trent has been taken for canal purposes. How is Kilbourn to get such a scheme as a conservation dam, as described by Kerry, carried into effect, and the expenditure of a large sum of money for a scheme which might turn out to be of no value?

I am, therefore, of opinion, for the reasons I have given in regard to the River Trent being a public work, and also for the reason that if not a public work, there is no value in the water-power, that this part of the case raised by the defendant fails.

The question is then raised that for building purposes the property is of large value. I have mentioned the fact that in 1905 the amount paid by Kilbourn was the sum of $900. The Crown has expropriated 17,613 square feet out of a total of 30,527 square feet. Kilbourn has received for a part of what was left after the expropriation of lots 12 and 13 for the cheese factory the sum of $700. He is also left with the balance of the other lots for what they are worth. For building purposes it is necessary to consider that in front of all of these lots, and between Mill Street and the property in question, is

the space of 20 feet laid out for the proposed extension of the raceway. The title to this raceway has not been vested in Kilbourn. It may be, however, that for practical purposes he would always have the right of access from Mill Street to the residences, if any, erected on these different lots. The lots themselves have a frontage of 50 feet, with a depth of from 60 feet to less, and it is apparent that a considerable portion of these lots in the freshets is overflowed. The evidence of the witnesses is, as usual, conflicting. There is evidence of sales of particular properties such as for the post-office site, etc., and it appears that erected on this property and also on other properties referred to in the evidence there were buildings of no value.

After analyzing the evidence carefully, I am of opinion that the sum tendered by the Crown of $1,200 is ample compensation, to include everything the defendant could reasonably hope to have obtained for the property, more particularly having regard to that portion of the property not expropriated.

Judgment will issue declaring that the tender of $1,200, with interest to date of tender, is ample to cover everything that the defendant can reasonably claim, including any allowance, if he be entitled to it, for compulsory expropriation. There will be no interest subsequent to the tender, and the defendant must pay the costs of the action.

Judgment accordingly.

Solicitor for plaintiff: *G. A. Payne.*

Solicitors for defendant: *Kilbourn & Kilbourn.*

1919
April 1.

PRINCE EDWARD ISLAND ADMIRALTY DISTRICT.

LE BLANC,

PLAINTIFF;

v.

THE "EMILIEN BURKE",

DEFENDANT.

Burden of proof—Regulations—Arts. 17, 21 *and* 27—*Duty in emergency—Preliminary act.*

Held, 1. Where two sailing vessels are meeting and it is the duty of one, under the rules, to avoid the other, but who fails to do so, it then becomes the duty of the other to so manœuvre as to avoid the consequences of such breach of the rules, if possible to do so by exercise of ordinary care and prudence.

2. That the precise point when such manœuvring should begin by the vessel with right of way cannot be arbitrarily fixed and some latitude must be allowed the master in determining this.

3. The burden of proof in such a case is on the offending vessel.

4. The object of a preliminary act is to obtain a statement, *recenti facto* of the circumstances, to prevent parties shaping their case to meet the one put forward by the other at trial.

That the following answer is entirely too vague and indefinite, to wit: "That the plaintiff, or those on board the 'Florrie V.', improperly neglected to take in due time proper measures for avoiding a collision with the 'Emilien Burke' and did not make any attempt to avoid same. She was not kept in her proper course, as required by law, and those on board the said vessel violated the rules and regulations as to her proper navigation."

THIS is an action *in rem* and counterclaim for damages due to a collision between two sailing vessels.

The facts are stated in the notes of the judge.

A. B. Warburton, K.C., and *D. E. Shaw,* for plaintiff.

G. Gaudet, K.C., and *J. M. Hynes,* for defendant.

STEWART, L.J.A. (April 1, 1919) delivered judgment.

This is an action *in rem* brought by the plaintiff, the master of the schooner "Florrie V", registered at Arichat, Cape Breton, of about 97 tons; against the "Emilien Burke", for damages done by a collision in the Bras d'Or Lakes, off Baddeck, Cape Breton, on November 8, 1918, somewhere about 2 o'clock in the afternoon. There is a counterclaim by the owner and master of the "Emilien Burke" for damages caused to her in the same collision.

The "Emilien Burke" is a schooner of about 90 tons. She had a crew, including Capt. Arsenault, of 4 men. At the time in question she was bound on a voyage from Sydney with a cargo of coal. The "Florrie V" was coming from Crapaud, in this Province, and proceeding to Sydney laden with turnips and potatoes. She also had a crew of 4. The weather at the time was clear and fine, with a moderate breeze.

It is very creditable to the parties to this suit that there is so little contradictory evidence. I was particularly struck with the frank and candid manner in which the captain of the "Emilien Burke" gave his testimony. He has been sailing the seas for 56 years and a master mariner for 43 years. He made no attempt to suppress or explain away anything that might tend to prejudice his case; he was, in short, a model witness, and if it were necessary

1919

LE BLANC v. THE "EMILIEN BURKE."

Reasons for Judgment.

for me to decide the determining factors of this case on a conflict of evidence I would find some difficulty in disbelieving the account given by Capt. Arsenault.

There is, however, a slight disagreement between the parties as to the direction of the wind and the movements of their respective vessels a short time before the collision.

Capt. Le Blanc's account of that afternoon's event is substantially as follows: The "Florrie V" an hour or two before the collision had left the Grand Narrows bridge and was proceeding in an east-north-easterly course accompanied by the schooners, the "Rosy M.B." and the "John Halifax", all three vessels sailing close-hauled to the wind, which was north-north-east. The "Florrie V" continued on this course until she opened up into Baddeck Bay, off Burnt Point. She then headed on an east by north course and kept on that tack until she reached Coffin Island. At Coffin Island she tacked and stood on a north-west by north course for about a half a mile. Shortly before this she saw the "Emilien Burke" about 5 miles distant, coming west in a west by south course, after proceeding for about half a mile on that tack the "Florrie V" tacked again and stood on an east by north course close-hauled to the wind. The "Emilien Burke" was then coming from an opposite direction running free in a course parallel with that of the "Florrie V", and if she had kept her course would have passed the "Florrie V" 300 yards off her starboard side. The "Emilien Burke" when nearly abreast his starboard bow changed her course towards the "Florrie V". At that time his mate was stationed on the lookout and his seaman was at the wheel. The captain himself paced the deck near the lookout, and when he saw the "Emil-

ien Burke" changing her course towards him he thought her captain wished to speak with him. He walked aft to give him an opportunity of doing so, as he would go by the stern. Noticing, however, that she was luffing up towards the "Florrie V" and coming nearer, he went to the forward part of the poop and sang out, "Keep away, you are going to run into us." At this he saw a man stand up forward of the main hatch and abaft of the foremast and run towards the wheel and turn it over to starboard, but it was then too late to avert the collision.

In this he is corroborated by his mate and the seaman who was at the wheel.

The mate of the "Rosy M.B.", the master and owner of the "John Halifax", and Lorenzo Poirier, master mariner and owner of several vessels, support the evidence of Capt. Le Blanc as to the direction of the wind, and as to the vessels sailing close-hauled to the wind. Lorenzo Poirier stated that he was at New Harris, about 9 miles from Port Bevis, that morning on his way to Sydney—that there is a narrow outlet from that lake—that he couldn't get out because of a head wind blowing north-north-east—that there were 5 or 6 vessels there, and all were compelled to remain inactive, not only that, but the following day, and that if the wind had been north-north-east, as claimed by the captain of the "Emilien Burke", it would have enabled him, with the tide running out, to have got out that day and to proceed on his intended voyage.

Several of these witnesses also corroborate Capt. Le Blanc's statement that the "Florrie V." and "Emilien Burke" were sailing on parallel courses. The mate of the "Rosy M. B." also stated that hear-

1919

LE BLANC v. THE "EMILIEN BURKE."

Reasons for Judgment.

ing a call on board the "Emilien Burke" he saw a man leave her wheel and go forward, where he remained for about 2 or 3 minutes. When this man was away from the wheel he saw the "Emilien Burke" changing her course in the direction of the "Florrie V."

Capt. Arsenault of the "Emilien Burke" admits that his course was west by south and that the "Florrie V." was proceeding in a course east by north. He also admits that he was running free. He, however, claims that the two vessels were approaching each other absolutely heads on and not on parallel lines. As to the direction of the wind, he said it was varying, puffing one way and another from north-north-west to north, that there was no east in it, and that it was fully north-north-west at the time of the collision. He further testified that the courses of both vessels were as stated until they were about half a mile apart, that he then hove his helm to port in order to send his vessel to windward so that he might pass the other vessel on her port side. That he wished to bring his vessel as close to the wind as possible on the starboard tack—that at the time he began to change his course, the "Florrie V". began to change hers by starboarding her helm —that when the "Florrie V" was a quarter of a mile from him he tied his wheel with the helm ported and went forward to give two of his men a hand to raise the foreboom to get it out of the socket—that he was away from the wheel 2 or 3 minutes and while forward his vessel drew more into the wind. While rendering the assistance referred to he saw the "Florrie V" curving ahead of him, and that when he returned to the wheel she was about 300 yards

off and that he then reversed his wheel, but it was too late to avoid the collision.

Thomas Gallant, the mate, supported to some extent the evidence of Capt. Arsenault. The wind, he said, was about north, and that the last change in the course of the "Emilien Burke" was made just before the collision. Thomas McGrath, the cook, was the only other witness produced by the defendant. He seemed to know very little about the case, except that he said the wind varied about two points each way off north-north-west.

Capt. Le Blanc and those of his crew who gave evidence denied having changed their course on the approach of the "Emilien Burke", but kept it right along until the happening of the collision.

There seems to me to be a preponderance of evidence that on the day of the collision the wind was about north-north-east.

The defendant in his preliminary act, to the question "What fault or default, if any, is attributed to the other ship?" gives this answer:

That the plaintiff or those on board the "Florrie V" improperly neglected to take in due time proper measures for avoiding a collision with the "Emilien Burke" and did not make any attempt to avoid same. She was not kept in her proper course as required by law and those on board the said vessel violated the rules and regulations as to her proper navigation.

This, it seems to me, is entirely too vague and indefinite. The object of the questions is to obtain a statement *recenti facto* of the circumstances from the parties and to prevent the defendant from shaping his case to meet the case put forward by the

1919

LE BLANC v. THE "EMILIEN BURKE."

Reasons for Judgment.

plaintiff. If answers like this were sufficient, the door would be open for the making out of almost any kind of a case. As neither party is allowed to depart from the case set up in his preliminary act, it can be readily seen how necessary it is that definite and precise answers should be given to the questions submitted. Besides the kind of answer given here might suggest inability to attribute any fault or default to the other side.

The regulations which it is material to consider in this case are articles 17, 21 and 27, which are as follows:

"Article 17. When two sailing vessels are approaching one another so as to involve risk of collision, one of them shall keep out of the way of the other, as follows, viz.:

(a) A vessel which is running free shall keep out of the way of a vessel which is close-hauled.

(c) When both are running free, with the wind on different sides, the vessel which has the wind on the port side shall keep out of the way of the other.

Article 21. Where by any of these rules one of two vessels is to keep out of the way, the other shall keep her course and speed.

Note.—When, in consequence of thick weather or other causes, such vessel finds herself so close that collision cannot be avoided by the action of the giving-way vessel alone, she also shall take such action as will best aid to avert collision.

Article 27. In obeying and construing these rules, due regard shall be had to all dangers of navigation and collision, and to any special circumstances which may render a departure from the above rules necessary in order to avoid immediate danger."

Let me assume for the present that the direction of the wind was north-north-east and that the vessels were approaching one another on parallel courses and not heads on. It is admitted that the course of the "Florrie V" was east by north and that of the "Emilien Burke" west by south. On this assumption the "Florrie V" would be sailing close-hauled to the wind and the "Emilien Burke" would be running free. But the latter did not only keep out of the way of the "Florrie V" as provision "a" of article 17 required her to do, but, in changing her course to starboard, in place of continuing as she was going, she brought herself in the way of the "Florrie V" in direct violation of the rule.

Take now the contention of the "Emilien Burke" and assume that the wind was north-north-west, and that both vessels were coming heads on on the respective courses admitted by both sides. In this assumption it is admitted that both vessels would be running free. It would have been the duty of the "Florrie V" with the wind on her port side to have kept out of the way of the "Emilien Burke" having the wind on her starboard side. But it would equally have been the duty of the "Emilien Burke" to have kept her course and speed. This, however, is what she did not do, but deliberately altered her course when the vessels were half a mile apart, by porting his helm, and this at the very time the "Florrie V", had begun to starboard his helm, the proper move to make in order to keep out of the way of the "Emilien Burke". So whether I take the evidence of the plaintiff or the defendant, the result is the same, Capt. Arsenault has been guilty of a violation of the rules.

1919

LE BLANC v. THE "EMILIEN BURKE."

Reasons for Judgment.

But it is necessary for me to consider the question whether the "Emilien Burke" being to blame, the "Florrie V" was not to blame also.

A contention was advanced by Mr. Gaudet with considerable emphasis that the "Florrie V" did nothing to avoid the collision, that the man at the wheel never attempted to change her course, although the two vessels were advancing in dangerous proximity to one another.

There is no doubt that the "Florrie V" was bound to comply with art. 21 and keep her course and speed until she found herself so close to the "Emilien Burke" that the collision could not be avoided by the action of the latter vessel alone. Then she should endeavour if possible to prevent disaster. The defence of contributory negligence is aways open to the defendant ship, although she herself may have been guilty of a breach of the regulations.

Sir Gorell Barnes in *The Parisian*,[1] deals with this point in a very common sense way. He said:

"It must always be a matter of some difficulty for "the master of a vessel which has to keep her course "and speed with regard to another vessel which has "to keep out of her way, to determine when the time "has arrived for him to take action, for if he act too "soon he may disconcert any action which the other "vessel may be about to take to avoid his vessel and "might be blamed for so doing and yet the time may "come at which he must take action. Therefore he "must keep his course and speed up to some point "and then act, but the precise point must necessarily "be difficult to determine and some little latitude

[1] [1907] A.C. 193 at 207.

"has to be allowed to the master in determining "this."

It was the duty of the plaintiff to have avoided the consequences of the defendant's breach if he could have done so by the exercise of ordinary care and prudence. But the burden of proof lies on the offending vessel.

Reverting to the fact of the wind being north-north-east and the duty of the vessel running free to keep out of the way of the vessel which is close-hauled, Capt. Le Blanc would have no reason to doubt that the "Emilien Burke" would observe the rules and keep out of his way. When he saw her changing her course and advancing in his direction, it was not an unreasonable supposition for him to entertain that her captain desired to speak to him as he came near. He would naturally up to the last moment rely upon the "Emilien Burke" observing the rules of navigation.

If the captain of the "Florrie V" knew that the "Emilien Burke" was by means of some compelling situation obliged to run into his vessel, he should have used all necessary and possible means to avoid it. There must indeed be special circumstances within the meaning of art. 27 and the note to art. 21 to justify a departure from art. 21. Without the existence of such it would be extremely risky and likely to involve the chance of being mulcted in damages for any vessel to take such a departure. A learned judge in dealing with this point said:

"But the principle embodied in this rule, though "a sound one, should be applied very cautiously and "only when the circumstances are clearly excep-"tional."

1919

LE BLANC v. THE "EMILIEN BURKE."

Reasons for Judgment.

No such circumstances existed or were attempted to be shewn to exist in this case. The unfortunate event happened in broad daylight when the weather was clear and fine, and there was ample sea room in which to sail and manoeuvre.

I have on a careful consideration of the whole case, come to the conclusion that no fault can be attributed to the "Florrie V" her master or crew, and that the "Emilien Burke" is alone to blame for the collision, and that she must be held liable for the damages that ensued.

These damages I will now assess, as follows:

For damage done to the sails, $140.52; for rope and block, $21.55; for repairing boat, $35; for plank and fittings for davits, $58; for 24 turned stanchions, $15.60; for towage done by the "Rosy M.B." $40; for help, $10; for costs of survey, $10; for damages done to hull, $229.33; total, $560; for which sum with costs I condemn the ship "Emilien Burke", her sails, apparel and equipment, and decree accordingly.

Order accordingly.

QUEBEC ADMIRALTY DISTRICT.

1918
Oct. 24.

*SINCENNES—McNAUGHTON LINE LTD.,

PLAINTIFF;

v.

ROBERT McCORMICK, OWNER OF BARGE "MIDDLESEX",

AND

THE UNION LUMBER COMPANY, LIMITED.,

REG. OWNER OF THE SCHOONER "ARTHUR",

DEFENDANTS.

Towage—Loss of tow—Responsibility—Privity of owner—Limitation of liability—Sections 921 and 922 of Canada Shipping Act, R.S.C. ch. 113.

In an action seeking a declaration of limitation of liability for negligence in the performance of a towing contract, the owner of the tugs in question established that his vessels had been inspected according to law and their machinery and equipment were in good condition at the time of the towage. It was, however, proved by defendants that a key-pin had fallen from the steering gear of one of the tugs and that there was some want of reasonable promptitude, foresight and seamanship on the part of the master and crew.

Held, that the dropping out of the key-pin from the steering gear was quite unforeseen and was not due to any neglect or want of supervision on the part of the plaintiff or their superintendent, and the accident having been due to the fault and negligence of the crews on board the tugs constituting the tow and having been caused without plaintiff's actual fault or privity, the plaintiff was entitled to an order limiting its liability.

* Both defendants appealed to the Supreme Court of Canada. Appeals were dismissed.

1918

SINCENNES-MCNAUGHTON LINE v. MCCORMICK AND UNION LUMBER CO.

Statement.

THIS is a case for limitation of liability.

The case was tried before the Honourable Mr. Justice Maclennan, Deputy Local Judge, at Montreal, on September 9, 1918.

The plaintiff by its statement of claim alleges that before and at the time of the grounding hereinafter stated, the plaintiff was the owner of the tug "Myra", registered at Montreal, and of the tug "Long Sault" registered at Sorel, P.Q., the defendant, Robert R. McCormick, was the registered owner of the barge "Middlesex", and the Union Lumber Company, Limited, was the registered owner of the schooner "Arthur". On the morning of August 13, 1917, the barge "Middlesex", schooner "Arthur" and the barge "Stuart H. Dunn", were descending the River St. Lawrence made fast abreast, in tow of the tug "Myra". When in the Rapide Plat, a short distance above Morrisburg, the steam steering gear of the said tug suddenly, and without warning, failed to operate, and the barge "Middlesex" and the schooner "Arthur" grounded in the shoal water on the south side of the channel. The barge "Dunn" struck the rocks, seriously damaging her hull, but did not ground, and subsequently succeeded in reaching the wharf at the foot of the Rapide Plat Canal. The barge "Middlesex" and the schooner "Arthur" with their cargoes, were subsequently salvaged. There was no loss of life or personal injury caused by reason of the said grounding.

At the time of the accident, the tug "Long Sault" was made fast alongside the tug "Myra", but was taking no part in the towing, and was not responsible for same.

1918

SINCENNES-MCNAUGHTON LINE v. MCCORMICK AND UNION LUMBER CO.

Statement.

On October 3, 1917, the defendant, Robert R. McCormick, as the owner of the barge "Middlesex", and the defendant, Union Lumber Company, Limited, as the owner of the schooner "Arthur", each instituted an action *in personam,* in this Court, against the plaintiff, claiming damages in respect to the said accident. Defendants herein alleged that plaintiff was the owner of the tugs mentioned, and that said vessels were, at the time, in tow of both of said tugs. These actions were tried together, and on the same evidence, on February 20, 1918, and following day; and, on April 5, 1918, judgment was rendered in both cases, condemning the present plaintiff personally, in the amounts to be found due to the defendants, Robert R. McCormick and the Union Lumber Company, Limited, and in costs.[1]

The plaintiff admits that the said grounding, and consequent loss and damage, was caused by the improper navigation of the tug "Myra"; but denies that the same was caused by any improper navigation of the tug "Long Sault"; said grounding and consequent loss and damage occurred without the actual fault or privity of the plaintiff; and further says that its liability should, consequently be limited to an aggregate amount not exceeding $38.92 for each ton of the gross tonnage of the tug "Myra", without deduction on account of engine room according to the provisions of the Act; and that the "Long Sault" should not be charged.

By their defence, the defendants deny most of the allegations of the plaintiff and specially assert that the "Long Sault" was assisting in the towing operations and should be condemned along with the "Myra"; they further say that the damage occurred

[1] (1918), 18 Can. Ex. 357, 45 D.L.R. 892.

1918

SINCENNES-MCNAUGHTON LINE v. MCCORMICK AND UNION LUMBER CO.

Reasons for Judgment.

through the actual fault and privity of the owners and further in substance say that the tiller was improper and was not equipped so as to be capable of being steered by hand; there was no alternative hand steering gear; not supplied with proper spare parts and the tiller was not provided with necessary relieving tackle; and also claim that the "Myra" was improperly manned being without the necessary chief engineer; and was not the suitable size for towing; that they fail to have the tugs in question periodically overhauled and that there was no one on board capable of dealing with emergency.

MACLENNAN, D.L.J. (October 24, 1918) delivered judgment.

On April 5, 1918, the present defendants obtained judgment in this Court against the present plaintiff for damages and costs arising out of the failure of the plaintiff to properly perform a towage contract, as a result of which a barge and schooner belonging to the present defendants went ashore on August 13, 1917, in the St. Lawrence River, near Morrisburg, Ontario.[1]

On the occasion in question the tow was in charge of the tugs "Myra" and "Long Sault", owned and operated by the present plaintiff. This action is taken for declaration of limitation of liability of the plaintiff upon the allegation that the accident happened by reason of improper navigation of the tugs without the plaintiff's actual fault or privity.

The defendants deny that the accident happened without plaintiff's actual fault and privity and allege that the tugs were unseaworthy in point of view of steering equipment and crew. On the occa-

[1] 18 Can. Ex. 357, 45 D.L.R. 392.

sion of the accident, the plaintiff's two tugs "Myra" and "Long Sault" were engaged in towing a barge belonging to the defendant McCormick, a schooner belonging to the defendant The Union Lumber Company, Limited, and another barge, when at a short distance above Morrisburg the steam steering gear of the tug "Myra" suddenly and without warning failed to operate owing to the dropping out of a key-pin on shaft of the steering apparatus in the wheel house. The tow lines from the three tows were all attached to the tug "Myra", and the tug "Long Sault" was lashed to the port side of the "Myra".

On the trial of the original actions, out of which present cause arises, the Court held that the accident was caused by the failure of the captain and pilot of the "Long Sault" to assist the tow by taking over the tow lines, and by the failure of the mate of the "Myra" to operate by hand the lever controlling the valves of the small engine which did the steering, and in the Reasons for Judgment the Court held that the grounding of the tow was caused by the want of reasonable promptitude, foresight and seamanship on the part of the master and crew of the two tugs when and after the dangerous situation arose. The owners of the tugs were in no way to blame for the fault and negligence of the two crews. The absence of the chief engineer of the "Myra" in no way contributed to the accident. The steering apparatus on the tug "Myra" at the commencement of the season had passed through the hands of Alphonse Desrochers, the foreman and shore superintendent of the company plaintiff at its shops at Sorel and on May 14, 1917, F. X. Hamelin, inspector of boilers and machinery for the Department of Marine and Fisheries, issued a certificate that the engine,

1918

SINCENNES-MCNAUGHTON LINE v. MCCORMICK AND UNION LUMBER CO.

Reasons for Judgment.

boiler and machinery of the tug were in conformity with the provisions of the *Canada Shipping Act*. The dropping out of the key-pin was quite unforeseen and was not due to any neglect or want of supervision on the part of the plaintiff's superintendent in charge of the equipment. The accident to the tows having been due to the fault and negligence of the crews on board the tugs and in charge of their navigation, the plaintiff is entitled to limit its liability. Both tugs were involved in the accident and their combined tonnage must be taken into account. The statutory limitation for the combined tonnage of the tugs "Myra" and "Long Sault" amounts to $5,516.90, and there will be judgment limiting the plaintiff's liability accordingly, and directing the plaintiff to pay into Court the said sum of $5,516.90, with interest thereon from the date of the accident on August 13, 1917. In accordance with the practice in cases of this kind the plaintiff will have to pay the costs of the two defendants.

The Registrar is also directed to give public notice of the deposit when made calling upon all parties having claims against the fund to file their claims with him.

Judgment accordingly.

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

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

NOVA SCOTIA ADMIRALTY DISTRICT.

1918
Dec. 2.

*HIS MAJESTY THE KING,

PLAINTIFF;

v.

THE SHIP "HARLEM" AND HER FREIGHT,

DEFENDANT.

Responsibility—Collision—Right of way—Regulations—Art. 19.

A collision occurred between the "Durley Chine," bound from Halifax to Norfolk, and the "Harlem," bound from New York to Bordeaux, at 1.19 a.m. on April 22, 1917, some 65 miles southeast of Ambrose Channel lightship, off New York harbour. It was starlight, though the night was dark, and a haze was on the horizon. Just before the collision, the course of the "Durley Chine" was s. 50° w. and that of the "Harlem," s. 52° e., or at right-angles to one another, with the "Harlem" on the starboard side of the "Durley Chine".

Art. 19 of the Rules to Prevent Collision at Sea provides that when vessels are crossing so as to involve risk of collision, the vessel which has the other on her starboard side shall keep out of the way of the other.

Held, that within the meaning of said rule, the "Harlem" was a crossing ship, carrying proper regulation lights, and that being so, the "Durley Chine" was obliged to keep out of her way.

This is an action brought by His Majesty the King in right of the Dominion, as owner of the ship "Durley Chine" claiming $150,000 from the ship "Harlem", for the loss of the "Durley Chine" following a collision with the defendant.

* Plaintiff appealed to Supreme Court, and the appeal was dismissed.

1918

THE KING v. THE "HARLEM."

Statement.

The defendant asserted a counter claim against the master and second officer being the practice when a ship belongs to the Crown.

By Nos. 12 and 14 of preliminary acts of plaintiffs it appears they claim among other things that: Having seen the "Harlem's" white light, and no side lights, about four points forward of starboard beam, the helm of "Durley Chine" was put hard-a-starboard and blew 2 short blasts of whistle. When the bow had swung to port about 4 points she stopped engines and immediately after reversed engines and when headway was off blew 2 long blasts of whistle. Then she saw the hull of "Harlem" low in water on starboard beam heading across bow of "Durley Chine" and the "Durley Chine" still falling off a little to port, blew 2 short blasts several times;—that the "Harlem" was a crossing ship within the meaning of art. 19, of the Regulations for Preventing Collisions at Sea, and, by art. 21 of said regulations, should have kept her course and speed; —that the "Harlem", being bound to keep her course and speed, improperly starboarded her helm when in sight of the "Durley Chine", thereby directing her course toward, instead of away from, the "Durley Chine"; that the "Harlem" should have stopped and reversed before the collision; that the "Harlem" was not carrying or showing proper lights according to art. 2 of said regulations. The mast head or white light, which was seen, was not of such a character as to be visible at a distance of at least five miles. The side lights were not burning, or, if burning, were defective, and were not of such a character as to be visible at a distance of at least 2 miles. The signals sounded on the whistle of the "Harlem" were not in accordance with the courses

taken by the "Harlem" and were misleading and deceptive. In particular she blew three short blasts several times when her engines were not going full speed astern. Having heard apparently forward of her beam, the fog signal of the "Durley Chine" whose position was not then ascertained, the "Harlem" did not stop her engines, nor navigate with caution, as prescribed by art. 16 of said regulations.

The defendant on the other hand claims that when the ships were so close that collision could not be avoided by the action of the "Durley Chine" alone, the helm of the "Harlem" was put hard aport and her engines full speed astern with the requisite signal of three short blasts. As this signal was unanswered by the "Durley Chine", it was twice repeated, before being answered and twice after; that the "Durley Chine" should have kept clear of the "Harlem" which had the right of way. The "Durley Chine" should have ported in time and passed astern of the "Harlem". The "Durley Chine" did not keep a good lookout and was going at an excessive speed, and did not alter her course to port as she should have done when it was known that the "Harlem" had her engines reversed. The "Durley Chine" did not, on approaching the "Harlem" slacken her speed or stop and reverse.

The case turns largely on the question of fact, as to whether or not the "Harlem" was carrying proper regulation lights. The respective position of the ships and their course do not seem to be seriously contested.

W. A. Henry, K.C., for plaintiff claimed that the "Durley Chine" was in ballast, bound from Halifax, Nova Scotia, to Norfolk, Virginia, for a load of coal.

1918

THE KING v. THE "HARLEM."

Argument of Counsel.

She passed Gay Head Buoy at 12.55 a.m. on April 21st, and took her departure for Winter Quarter lightship, the course being south fifty degrees, west, magnetic. That course was maintained until after the "Harlem" was sighted.

The "Harlem" was bound from New York to Bordeaux, loaded with munitions of which a substantial part consisted of explosives, including a large quantity of dynamite. She passed Ambrose lightship between 5.10 and 5.30 p.m. and for some time before the vessels came in sight of each other she was on a course south forty degrees, east, magnetic, or exactly at right angles to the course of the "Durley Chine."

The lights of each ship were seen on board of the other for several minutes before the collision, but, while those on the "Harlem" made out without difficulty the masthead and starboard lights of the "Durley Chine", those on the "Durley Chine" were able to see only a dim, white light on what proved to be the "Harlem". Those on the "Harlem" first saw the lights of the "Durley Chine" about 4 points on their port bow. The "dim, white light" when first seen by those on the "Durley Chine" bore about 4 points on their starboard bow. These are exactly the proper relative positions on ships approaching each other at right angles, if each is at the same distance from the point where the courses will cross.

The master of the "Durley Chine" not being able to determine the course of the "Harlem", stopped and reversed her engines to take her way off, and, to counteract the effect of reversing with a right-handed propeller, which swings the ship's head to starboard, put the helm hard-a-port. She was practically if not actually still in the water when the

collision took place. It was not until the "Harlem" was close alongside the "Durley Chine" that her course could be determined and then only because her hull could be made out. She was then nearly parallel to the "Durley Chine" and heading nearly in the same direction, but inclining to cross the bows of the "Durley Chine". Had the "Harlem" kept her then course the ships would have gone clear, but almost immediately after she was sighted she changed her course to port and bore rapidly down on the "Durley Chine", (which, with engines stopped, could do nothing to save herself) and cut into the side of the "Durley Chine" so deeply that she had to be abandoned by her crew very soon after, and she sank in the course of the next few hours.

It is claimed on behalf of the "Harlem" that she kept her course and speed until she saw that the "Durley Chine" was crossing her bows, when she reversed her engines and put her helm hard-a-port to avoid the collision or minimise its force.

These two stories are entirely inconsistent, and one or other of them must be knowingly false.

H. Mellish, K.C., for the defendant claimed that the captain of the "Durley Chine" had gone below at 11.15 of the 21st about two hours before the collision leaving the second officer, Granby, on the bridge. With him was one man only at the wheel, a lookout on the upper bridge and two standby men below. The second officer, it is said, called the captain shortly before 2 o'clock and when he came on the bridge he saw a white light "about 4 points forward of the beam, half ways between the bridge and the bow, on the starboard bow." The captain says he looked for and saw no side lights. He says he

1918

THE KING v. THE "HARLEM."

Reasons for Judgment.

put the helm of the ship hard-a-starboard and kept his ship on that helm until the collision. Shortly after (immediately) he rang her astern and took the way off her. The last course the "Durley Chine" was on previous to starboarding the helm was south fifty west magnetic, and her speed was about 9 knots, perhaps a little over. The "Harlem" had gone 69 miles from Ambrose Channel Light, when the "Durley Chine" was seen by the lookout and the second officer who was on the bridge about 2 or 2½ miles off and about 4 points on the port bow. The ship was steering south fifty-two east true so that the ships were on courses that would cut practically at right angles. The speed of the "Harlem" was about 7¼ knots, three quarter speed. It was a starlight night though dark and there was a haze close to the horizon. The case for the "Harlem" is that when the ships were so close that a collision could not be avoided by the action of the "Durley Chine" alone, although the "Harlem" was the holding on ship, she reversed her engines and went to starboard to assist the "Durley Chine" to keep clear. Notwithstanding this manoeuvre the ships collided. The "Durley Chine" after the collision went away on the starboard bow of the "Harlem" and sank about 5 or 5.30 in the morning.

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

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

DRYSDALE, J. (December 2, 1918) delivered judgment.

This action arises out of a collision between the defendant, ship "Harlem", and the Government boat named the "Durley Chine". The "Harlem"

1918

THE KING v. THE "HARLEM."

Reasons for Judgment.

was laden with munitions bound from New York to Bordeaux. The "Durley Chine" was on a voyage from Halifax to Norfolk. The collision was off New York and the "Durley Chine" was sunk.

The serious controversy here is as to the lights of the "Harlem". The "Harlem" had the right of way and the "Durley Chine" was bound to keep out of her way. The "Durley Chine" really makes her case on the allegation that the "Harlem" was not properly lighted, that is, was running under screened lights and without side lights showing. I find against this allegation: and I find that the "Harlem" before and at the time of the collision was carrying proper regulation lights. I believe the officer of the "Harlem" in this connection. I think the "Durley Chine" solely to blame for the collision. There was no reasonable excuse for such steamer not keeping out of the way of the "Harlem" as she was bound to do.

I find the "Durley Chine" solely to blame for the collision in question here and direct a decree accordingly.

Judgment accordingly.

1918
April 27.

NOVA SCOTIA ADMIRALTY DISTRICT.

*COMPAGNIE GENERALE TRANSATLANTIQUE,

PLAINTIFF;

v.

THE SHIP "IMO",

DEFENDANT.

Shipping—Responsibility—Gross negligence—Collision — Regulations —Art. 27.

The collision happened in Halifax harbour at 8.50 a.m., in broad daylight. The weather was perfect, there being no wind, and the ships could see each other several miles away.

The "Imo" was keeping as far as practicable to her side of the fairway or mid-channel and blew a signal of three blasts and reversed her engines when about a mile apart, having previously signalled she would keep to starboard; she then reduced speed and did not put on engines again before collision. When "Mont Blanc" blew a two-blast signal, indicating she was coming to port and would cross bow of the "Imo", the "Imo" reversed engines and gave a three-blast signal. The "Mont Blanc" was travelling at excessive speed and, starboarding her helm, attempted to cross the bows of the "Imo". She did not reverse engines nor drop anchor.

The collision happened within the waters of the "Imo", that is on the Halifax side of mid-channel, and after collision the "Mont Blanc" ran upon the Halifax shore, where the explosion took place.

Held, that the collision was wholly due to the last order of the "Mont Blanc" and to the gross negligence of her officers in attempting to cross the bows of the "Imo".

2. That the order could not be justified as an emergency order, in view of the respective positions of the ships.

THE plaintiff by its action claims the sum of $2,000,000 against the "Imo" for damages caused

* On appeal to the Supreme Court, judgment was rendered, allowing the appeal in part, and finding both ships equally at fault, Sir Louis Davies and Idington, J., dissenting.

them by collision in Halifax harbour in December, 1917, and the defendant by their counterclaim claim the same amount from plaintiff as damages occasioned by the same collision.

In the preliminary acts, filed by the plaintiff, it is claimed in substance that when the "Imo" was first seen the "Mont Blanc" blew one short blast to indicate that she was holding to the starboard side of the fairway and slowed her engines. After this signal had been answered by two short blasts from the "Imo" the "Mont Blanc" again gave one short blast which was again answered by two short blasts from the "Imo". The "Mont Blanc" stopped her engines to avoid what appeared to be otherwise an inevitable collision, blew two short blasts and starboarded her helm, bringing the ships in a safe position on opposite parallel courses. After this order was executed, the "Imo" was seen to swing to starboard. A collision was then inevitable whereupon the "Mont Blanc" reversed her engines full speed. The "Imo" was proceeding at too great a speed. The "Imo" was wrongfully coming down on her port side of the fairway or mid-channel. A good lookout was not kept on the "Imo". The "Imo" wrongfully directed her course to port, across that of the "Mont Blanc" and came in the "Mont Blanc's" water. The "Imo", when the ships were in a position to clear, wrongfully altered her course to starboard and attempted to cross the head of the "Mont Blanc", thus rendering a collision inevitable. The "Imo" was not navigated in accordance with the signals given to her.

The defendant in its preliminary acts claims in substance that the "Imo" was keeping as far as

1918

COMPAGNIE GENERALE TRANS-ATLANTIQUE v. THE "IMO."

Statement.

practicable to that side of the fairway or mid-channel which laid on her starboard side and blew a signal of three blasts and reversed her engines when ships were about one-half to three-quarters of a mile apart. "Imo's" speed was then reduced to about one mile per hour and engines were not put ahead again before collision, and "Imo" was kept under a port helm and signalled accordingly. When "Mont Blanc" blew a two-blast signal, indicating she was coming to port, and attempting to cross bows of "Imo", "Imo's" engines were immediately reversed and three-blast signals blown. The "Mont Blanc" was travelling at an excessive rate of speed; that she starboarded her helm thus coming to port and attempted to cross the bows of the "Imo" and in so doing committed a breach of the regulations and of good seamanship and caused the collision, and did not reverse her engines nor drop anchor as soon as they thought they heard a cross-signal from the "Imo" indicating, according to their understanding, although such in fact was not the case, that the "Imo" intended to come down the same side of the channel as that on which they were proceeding; that she did not keep as far as practicable to that side of the fairway or mid-channel which was on her starboard side as required by the International Regulations but crossed over to the other or Halifax side; that she did not give the proper whistle signals and did not navigate in accordance with her whistle signals; that she placed herself in the position of a crossing ship in relation to the "Imo", involving risk of collision, with the "Imo" on the starboard bow of the "Mont Blanc", and the "Mont Blanc" did not as required by art. 19 of the regulations keep out of the way of the "Imo". Further the

"Mont Blanc" attempted to cross the bows of the "Imo" in violation of art. 22, and also violated art. 23 in not reversing, and generally did not act with good judgment nor in a seamanlike manner.

Mr. McInnes, K.C., for the owner of the "Mont Blanc", claimed that the evidence established among other things that at 7.30 in the morning she started for Bedford Basin and undoubtedly kept on her proper side of the harbour, the starboard or right or Dartmouth side. She sighted the "Imo" coming down from the Basin proceeding to sea, at about 8.30 in the morning, and blew one blast to indicate that she was in her own waters and would keep, as the regulations required, the starboard or right side of the channel. The "Imo" had then come out of the Basin and shewed her starboard or right side to the "Mont Blanc", and was heading also to the Dartmouth shore. Her position when in full view of the "Mont Blanc" was in the waters of the Dartmouth side of the channel. The "Imo" blew two blasts immediately after the signal from the "Mont Blanc", which the "Mont Blanc" considered an answer to her first signal, and thus indicated to the "Mont Blanc" that she intended to keep to her own port side coming down or the Dartmouth side of the channel. This would be in violation of the International Rules. The "Mont Blanc" almost immediately answered by another one short blast to further advise the "Imo" she intended to maintain her proper course in the waters on her own starboard side. The "Imo" continued on the Dartmouth side of the channel; and it is at the point when the ships were about 400 metres apart that there is any substantial dispute about what occurred. The officers and pilot of the "Mont Blanc" say that the "Imo"

1918

COMPAGNIE GENERALE TRANS-ATLANTIQUE v. THE "IMO."

Argument of Counsel.

answered this second signal given by the "Mont Blanc" with two short blasts, thus reiterating the fact that she was to pass down the Dartmouth side of the channel, and there is other testimony to support their statements. As the "Imo" was coming fast on their side, if the "Mont Blanc's" officers tried to put their ship nearer the Dartmouth shore she must have gone aground, and there was nothing for them to do but to come to port and try to parallel the ships so that the "Imo" would pass on the right of the "Mont Blanc". This manoeuvre they executed as the only one to avoid a collision, giving at the same time the proper signal that they were going to port. It appears from the testimony that the captain and pilot were of one mind as to what was the proper action to take, and independently each of the other took steps to carry out the manoeuvre and placed the "Mont Blanc" in a position of safety. The "Imo" immediately thereafter swung sharply to her starboard, and though the "Mont Blanc" was then travelling slowly under reduced speed or reversed engines, the result was the stem of the "Imo" struck the starboard bow of the "Mont Blanc". The collision took place about the middle of the channel, probably a little nearer the Halifax side, though there is evidence it was on the Dartmouth side, shortly before 9 o'clock in the morning.

Mr. Burchell, K.C., for owners of the "Imo" claimed that the evidence established that the "Imo" left her anchorage on the western shore of Bedford Basin at about eight o'clock. Pilot Hayes was on the bridge in charge of the ship and with him were the captain and the wheelsman. The bridge was all open, not having a wheelhouse. There was a guard

ship anchored in the Basin near the entrance to the Narrows, and before the "Imo" could leave her anchorage it was necessary for the pilot to go on board the guardship and ascertain if permission had been granted for her to leave. Pilot Hayes went on board the guardship that morning between 7.30 and 8 o'clock on his way up to the "Imo" and was informed that everything was in order for the "Imo" to go to sea. When Pilot Hayes got on board the "Imo" it was then necessary for him to order the flags hoisted showing the number of the "Imo" in the commercial code, and this was done. Corresponding flags were then displayed on the guardship and the "Imo" would not have been allowed to pass the guardship unless these flags were flying on both the "Imo" and guardship. There was no wind that morning and the flags on the guardship were hanging limp and it was necessary for the "Imo" to pass close to the guardship to see the signals displayed by her.

There were seven or eight ships anchored in the Basin between the anchorage of the "Imo" and the entrance to the Narrows and the "Imo" had to pursue a zig-zag course through them, and necessarily her speed had to be slow.

When the "Imo" had passed the guardship, but was yet in the Basin, an American tramp steamer in charge of Pilot Renner was coming up the Narrows on the Halifax side, which for an up-going steamer was the wrong side of the channel. The "Imo" blew a one-blast signal to the American tramp to indicate that the "Imo" was directing her course to starboard and keeping the Halifax side of the Narrows, which was the proper side for the "Imo",

1918

COMPAGNIE GENERALE TRANS-ATLANTIQUE v. THE "IMO."

Argument of Counsel.

and that the "Imo" intended to pass the American tramp properly port to port. Pilot Renner on the American tramp, however, wanted to keep up the Halifax, or his port side of the Narrows, on which the American tramp was then although his proper side under the Narrow Channel Rule No. 25 was the Dartmouth or his starboard side of the Narrows. The American tramp, therefore, after receiving the one-blast signal from the "Imo", gave a cross signal of two blasts, indicating that the American tramp intended to keep the Halifax side. In order to avoid a probable collision if the "Imo" had kept on her intended and proper course, Pilot Hayes of the "Imo" was forced away from the Halifax side of the Narrows and was compelled to give, and accordingly gave an answering two-blast signal to the American tramp and the two ships passed starboard to starboard instead of port to port. Pilot Renner frankly admitted that it was entirely his fault that the vessels passed starboard to starboard, as, when the "Imo" blew the first one-blast signal, the American tramp, without difficulty, could have gone on the Dartmouth or proper side of the channel and passed the "Imo" port to port, and Pilot Renner was censured by the Court accordingly.

The American tramp was just above pier 9, close to the Halifax side, and the "Imo" was about 4 ship lengths away when the American tramp blew the improper two-blast signal, which was subsequently answered by a two-blast signal from the "Imo", and the two ships passed opposite the first point north of Tufts Cove shown on the chart and marked by Pilot Renner as point "T" on chart M.B.R.—4.

At the time the "Imo" was forced to give this two-blast signal to the American tramp the "Mont

Blanc" was then distant from the "Imo" at least one mile. When the American tramp was passing the "Imo", Pilot Renner called out to Pilot Hayes and informed him that there was another ship following behind, meaning the "Mont Blanc".

Just after the "Imo" got past the American tramp another ship appeared ahead of the "Imo" and also, like the American tramp, in the "Imo's" waters. This was the ocean going tug, "Stella Maris", towing two barges behind her and going up the Narrows to Bedford Basin on the Halifax side. The "Stella Maris" thus put herself on the wrong side of the channel in what would be the proper course of the "Imo" and in the "Imo's" waters, and his tug and unwieldy tow was a formidable obstacle to the "Imo".

The "Imo" therefore, after being crowded away from the Halifax shore by the American tramp steamer in the upper part of the Narrows above pier 9, and after having been forced to give a two-blast signal to the American tramp, was for the second time prevented from getting close to the Halifax shore by the "Stella Maris" and her two barges. After getting past the American tramp the "Imo" had to turn a bend in the channel at the upper end of pier 9 and being a large ship required considerable room. When the "Imo" was approaching the "Stella Maris" after getting around this bend keeping as close to the Halifax shore as she reasonably could, having in view the fact that the "Stella Maris" and her scows were in her waters, the "Imo" received a one-blast signal from the "Mont Blanc" which signified to her that the "Mont Blanc" intended to keep to starboard, which for the "Mont Blanc"

1918

COMPAGNIE GENERALE TRANS-ATLANTIQUE v. THE "IMO."

Argument of Counsel.

would be the Dartmouth shore. The "Mont Blanc" was then about opposite the dockyard, pretty well in the middle of the harbour, but a little on the Dartmouth side, and the "Imo" was at the upper part of pier 8 or opposite pier 9, and the two ships would be approximately ¾ of a mile apart. The "Imo" answered this signal with a one-blast signal to signify to the "Mont Blanc" that the "Imo" was also keeping to starboard which would be for the "Imo" the Halifax side of the channel. As soon as the "Imo" got opposite the "Stella Maris" the "Imo" blew a three-blast signal and reversed her engines. The intention of Pilot Hayes in giving this three-blast signal when opposite the "Stella Maris" and reversing at this time, when the "Mont Blanc" and "Imo" were so far apart, was no doubt, for a two-fold purpose, first, to arrest the attention of the "Mont Blanc", as even at that stage, the "Mont Blanc" was not keeping close in to the Dartmouth side as she should have been but was nearly in mid-channel, a little on the Dartmouth side, but angling across to the Halifax side and, secondly, to stop headway on the "Imo" and by reversing her engines to swing the "Imo's" bow to starboard so as to get around the stern of the barges of the "Stella Maris" and get closer to the Halifax side, the scows being then a little in advance of the "Imo's" bow, and the "Imo" herself being about opposite the tug. From this time when the ships were from one-half to three-quarters of a mile apart until the collision, the "Imo" was heading towards the Halifax side and the engines of the "Imo" were not again put ahead, but remained stopped until shortly before the collision, when they were reversed a second time. After this three-blast signal from the "Imo", the next

signal was a one-blast signal from the "Mont Blanc". This signal was quickly repeated by the "Mont Blanc", causing the witnesses to remark that they were getting excited on board the French ship. This was followed by another one-blast signal from the "Imo", and the course of the "Imo" was then to starboard, or to the Halifax side of the channel, in accordance with her signal. The two ships were then heading courses on which several experienced seafaring witnesses testified they would have properly passed in safety port to port, when in answer to the one-blast signal from the "Imo", the "Mont Blanc" blew the fatal two-blast signal and swung to port, under a starboard helm, to the Halifax side, throwing herself across the channel in front of the bows of the "Imo". Capt. Maclaine on hearing this cross signal immediately called out: "The Frenchman has given a cross signal, a collision cannot be averted."

The "Imo" immediately blew a three-blast signal, being the second three-blast signal given by her that morning, and reversed her engines full speed astern, but with the "Mont Blanc" throwing herself directly across the "Imo's" bows the collision was inevitable and could not be avoided.

The "Mont Blanc" all this time had kept forging ahead through the water. Her engines were admittedly not reversed according to some of the witnesses on board their ship until after the collision, or, according to others, certainly not more than 20 to 30 seconds before the collision.

It may be stated generally that the evidence of practically all the disinterested witnesses disclosed that the "Imo" was properly navigated and gave

1918

COMPAGNIE GENERALE TRANS-ATLANTIQUE v. THE "IMO."

Reasons for Judgment.

the proper signals and that the "Mont Blanc" was improperly navigated.

By consent the evidence adduced before the Wreck Commissioner's Court was filed to be used on the trial and only one new witness on behalf of the "Mont Blanc" was heard at the trial.

The case turned upon a question of fact. The evidence is contradictory on the main and essential facts, namely:

1st. What signals were given;

2nd. Course followed by the respective ships;

3rd. The actual place of collision.

The Honourable Mr. Justice Drysdale who presided at the trial, found as a fact that the collision took place on the Halifax side of the Narrows, which, by the rules of navigation at such place, is the side which the S.S. "Imo" was obliged to take, and that the collision was due to the gross negligence of the officers of the "Mont Blanc" in cutting across the bows of the "Imo", and that such action on their part was not justified under the rule 27, that it was an emergency order to avoid collision. He refused to believe the witness heard at the trial.

Tried before the Honourable Mr. Justice Drysdale at Halifax, N. S., April 1, 1918.

The trial Judge has not furnished any analysis of the evidence.

H. McInnes, K.C., for the "Mont Blanc".

C. J. Burchell, K.C., for the "Imo".

DRYSDALE, J. (April 27, 1918) delivered judgment.

The actions here are being tried together, viz., the Claim v. the 'Imo", now lying in the harbour,

1918

COMPAGNIE GENERALE TRANS-ATLANTIQUE v. THE "IMO."

Reasons for Judgment.

and the Counter-claim v. the "Mont Blanc". The circumstances attending the collision of these two ships were investigated before me, assisted by two of the best nautical assessors in Canada, and by common consent the evidence adduced on the investigation is to be considered the evidence in this case. The only attempt to vary the evidence in the investigation, is that of one Makinney called on the trial herein. As to Makinney's evidence I have only to say that he did not impress me as throwing any light on the situation. His manner was bad and his matter worse. In short, I did not believe him. Although he professed to be an eye-witness of the collision, I am convinced that he did not add any light to the controversy. He failed to convince me that he knew what he was talking about. Notwithstanding, he professes to be an eye-witness to the collision, I am quite sure he could not place the point or place of collision within one-half a mile of the actual place of occurrence. I think this man was a belated occurrence in the enquiry and came with a story, the result of instruction, and that on behalf of the French ship. I do not believe him.

As to fault or blame for the collision I am of the opinion that it lies wholly with the "Mont Blanc". Once you settle where the collision occurred and I think it is undoubted that it occurred on the Halifax side of mid-channel you find the impossibility of the story of Pilot Mackay. Even if you say mid-channel the story of the French ship is absurd. The fault to my mind clearly appears to have been the result of the last order of the "Mont Blanc" when being in her own waters on the Dartmouth side she took a starboard helm and reached for the Halifax wharves thus throwing herself

1918

COMPAGNIE GENERALE TRANS-ATLANTIQUE v. THE "IMO."

Reasons for Judgment.

across the bow of the outcoming ship" Imo". Why this order was given I know not but I feel sure it was gross negligence and in so thinking I am supported by the advice and opinion of both nautical assessors. The order for a starboard helm and to lay a course suddenly across the harbour was justified by the officers in charge of the "Mont Blanc" as an emergency order to prevent a collision but taking into consideration the then position of the two ships this claim will not bear investigation.

I find the "Mont Blanc" solely to blame for the collision. I refer the question of damages to the Registrar and two merchants.

Judgment accordingly.

TORONTO ADMIRALTY DISTRICT.

1917
March 1.

THE CANADIAN DREDGING CO. LTD.,
PLAINTIFFS;

v.

THE "MIKE CORRY",
"THE SHIP."

AND THREE OTHER CASES.

Salvage—Wages—Loss of earnings.

Held. 1. Where the wages of the crew of a ship which has been salved are paid by the salvors, a lien therefor attaches, and can be enforced against the salved ship.

2. No lien attaches in a case of attempted salvage where the services rendered produced no result, and contributed in no way to the subsequent saving of the boat.

Note.—On the first question decided above reference should now be made to a decision of Hill, J., in *"The Petone"*. [1917] P. 198, reported since judgment was given in this case.

THIS was an action brought by the plaintiffs against the ship "Mike Corry", a British vessel, registered in an Ontario port.

The claim was for salvage and also for the declaration of a lien on the ship for the sum of $215, advanced to the captain of the salved vessel to pay the crew's wages and discharge them from the said ship.

The claim of Kean & Milman against the said ship and heard at the same time, was for salvage, but included a claim for services which, as the evidence showed produced no result.

1917

THE CANADIAN DREDGING CO. v. THE "MIKE CORRY."

Reasons for Judgment.

The claim of Dan Sullivan against the said ship and heard at the same time was for salvage and use of tug but included, as the evidence disclosed, a claim for loss of fishing (his usual occupation) whilst engaged in the salving operation.

The claims of John R. Carr and Alice Carr were dismissed without costs, no one appearing for them at the hearing.

As appears in the reasons for judgment, portions of the claims were allowed at the conclusion of the hearing and judgment was reserved on certain points.

C. M. Garvey, for plaintiffs.

J. Grayson Smith, for Kean & Milman and Dan Sullivan.

No one for the ship.

HODGINS, L.J.A. (March 1, 1917) delivered judgment.

I gave judgment at the close of the case for the salvage services, as follows: The plaintiffs, $500, Kean & Milman, $60, and Dan Sullivan, $79, and I dismissed the action brought by Carrs without costs.

I reserved consideration on two points, (1) Whether the plaintiffs could enforce a maritime lien for $215, paid by them when the vessel was salved as and for the wages of the crew so that they might be discharged and sent home. (2) Whether Kean & Milman could recover an additional sum for services rendered on July 18, 1915, which produced no result and contributed in no way to the subsequent saving of the vessel.

1917

THE CANADIAN DREDGING CO. v. THE "MIKE CORRY."

Reasons for Judgment.

On the first point I think the plaintiffs can succeed. While their proper course was undoubtedly to apply to the Court, *The Cornelia Henrietta,*[1] yet that rule has been relaxed in a later case *The Tagus.*[2] In *Maclachlan on Shipping,* 5th ed., p. 258, it is said that "The lien becomes vested in a person who pays the wages on the credit of the ship." That was the case here.

On the second point I cannot allow any further amount. Success is an essential element in salvage.

I may add that in disallowing in the Sullivan claim any damages for loss of fishing, I am in accord with the decision of Mr. Justice Bargrave Deane in *The "Fairport",*[3] where it is expressly stated that when seamen render salvage services they abandon their ordinary occupation for the purpose of another occupation, which is salvage, and they cannot be paid for both.

The claim included in the Marshal's account for possession money $194 will be reduced to $1.25 per day.

Judgment will be entered in accordance with the above. The costs of the action of all three plaintiffs will come next after the Marshal's account, then the judgment of the three plaintiffs for salvage in proportion, unless the money in Court is sufficient to satisfy them in full. If there is any balance, it will be applied on the $215, that part of the plaintiff's judgment which does not represent salvage.

Judgment accordingly.

[1] (1866), L. R. 1 Adm. & Ecc. 51, 14 W. R. 502.
[2] [1903] P. 44.
[3] [1912] P. 168.

1914
Dec. 28.

TORONTO ADMIRALTY DISTRICT.

E. A. SIMPSON,

PLAINTIFF;

v.

THE DREDGE "KRUGER",

"THE SHIP".

Salvage—Mortgagee as salvor—Volunteers.

Held, 1. That the recovery of a sunken dredge, with its contents, constitutes a salvage service creating a maritime lien.

2. That where the mortgagee of the dredge employed others to perform the work of salving and is neither the owner nor charterer of the salving vessels, he cannot claim exemption from the rule that a salvor must be one personally engaged in the work done.

THIS was an action for salvage by the plaintiff against the ship "Kruger", a British vessel, registered in a Canadian port.

The owners did not defend but the plaintiffs, in another action against the same ship for salvage, were allowed to come in and dispute the claim and priority of the plaintiff in this action.

The hearing took place at Osgoode Hall, on December 19, 1914, and judgment was reserved.

G. S. Hodgson for plaintiff.

J. H. Fraser for General Construction Co.

No one for the ship or owners.

HODGINS, L.J.A. (December 28, 1914) delivered judgment.

The actual services rendered in this case are, as claimed, salvage services. The dredge "Kruger" was overturned and sunk in the western channel of Toronto Bay, and the boiler and pump were at the foot of Princess Street at the bottom of the bay. The dredge was righted, the boiler and pump recovered and placed on the dredge and the whole left in a situation of safety, ready for the work required to make the whole sufficient. In holding these to be salvage services I follow *The Gleniffer,*[1] and *The Catherine,*[2] the latter regarded as good law by the present Lord Justice Kennedy in his work on *Civil Salvage,* page 111, and by Mr. Jones in his *Law of Salvage,* page 15.

I heard counsel for the General Construction Company which had a judgment for a salvage lien on the ship in opposition to the plaintiff's claim, no one appearing for the owners. Counsel objected that as the plaintiff was mortgagee of the ship he could not claim salvage, citing *Maria Jane,*[3] a decision of Dr. Lushington.

That case turned on the point that Lilley, the owner of the salving ships, was charterer of the salved ship under a special charter, which in the opinion of the Court was practically a demise of the ship. He was also owner of its cargo. Dr. Lushington, under those circumstances, held that Lilley, being practically owner of both the ship and cargo saved could not himself claim salvage against his own property. The case does not carry the law fur-

[1] (1892), 3 Can. Ex. 57.
[2] (1848), 12 Jur. 682.
[3] (1850), 14 Jur. 857.

1914

SIMPSON v. THE "KRUGER."

Reasons for Judgment.

ther than it has always stood, and is only of value in its determination that that special charter was of such a nature as to invest the charterer practically with the character of the owner. The real difficulties in the plaintiff's way are his position as mortgagee, and the fact that the services claimed for were not performed by him.

The *Canada Shipping Act*,[1] provides that "when, "within the limits of Canada, any vessel is wrecked, "abandoned, stranded or in distress and services "are rendered by any person in assisting such vessel "or in saving any wreck, there shall be payable to "the salvor by the owner of such vessel or wreck, as "the case may be, a reasonable amount of salvage "including expenses properly incurred." The owners of the wreck here made no request for the services rendered in this case but do not appear nor contest the plaintiff's claim.

No authority in the plaintiff to bind the owners is shown. Hence, the salvage, if allowed, must depend on what is reasonable.

The word "owners" in a cognate statute, the *Imperial Merchants Shipping Act*,[2] has been held to include mortgagees in so far as it allowed them in to defend a salvage claim as parties interested, *The "Louisa"*.[3] And the mortgage interest may have to contribute as the mortgagees would have an interest in the property saved, *The Cargo ex Schiller*,[4] *Five Steel Barges*,[5] but as pointed out in *The Cargo ex Port Victor*,[6] that result does not invariably follow. Under the *Canada Shipping Act*, sec. 45, a mort-

1 (1906), R.S.C., ch. 113, sec. 759.
2 (1854), 17 and 18 Vict., ch. 104, s. 458.
3 (1863), Br. & L. 59.
4 (1877), 2 P.D. 145.
5 (1890), 15 P.D. 142.
6 [1901] P. 243.

gagee is not to be deemed as an owner except for the purposes of his mortgage. The position of a mortgagee employing a person to do the actual work of salvage and claiming against the ship does not appear to have been considered so far as I have been able to ascertain.

In the case of *The "Pickwick"*[1] and *Crouan* v. *Stanier*,[2] the status of underwriters (stated, arguendo, in the *Port Victor* case, *supra*, to be somewhat similar to that of mortgagees) was considered. In the *"Pickwick"* the claimants as insurers were awarded nothing but were allowed by the Court to recover the salvage to which the master and crew of the vessel, hired by them to do the service, would have been entitled and as asserting the latter's rights. But as pointed out in *Crouan* v. *Stanier*, *supra*, that was based upon the theory that the master and crew, if they recovered for the salvage actually performed, would have been bound under the terms of their charter party to hand over the amount thereof to the insurers.

In the case at bar two tugs were employed by Arnott (as appeared in the General Construction case) and if he were suing for salvage the same decree as was made in the *"Pickwick"* would be justified, provided the terms of hiring were such as obtained in that case. But the plaintiff here remained on shore and contracted with Arnott that he would do the work in consequence of which the latter then hired two tugs. There is, it seems to me, no justification for the extension to the plaintiff of the principle adverted to. His rights do not extend beyond Arnott under whose contract the latter was entitled

[1] (1852), 16 Jur. 669.
[2] [1904] 1 K.B. 87.

1914

SIMPSON v. THE "KRUGER."

Reasons for Judgment.

to do what he liked, provided he accomplished his undertaking and his obligation does not in any sense entitle the plaintiff to a maritime lien.

The plaintiff is not the owner of the salving vessels nor is he their charterer. The means of doing the work was left entirely to Arnott. The plaintiff, therefore, cannot claim to be within the exception to the rule that salvors must be those personally engaged in the work done.

I have not overlooked the fact that Arnott has assigned his claim to the plaintiff. But this was after the plaintiff had paid the contract price and discharged his obligation and therefore the assignment conveyed nothing and certainly could not convey the right to enforce a maritime lien, arising only on the principle already discussed.

But apart from the foregoing, the plaintiff being interested as mortgagee in the safety of the property was, therefore, not a volunteer (*Crouan* v. *Stanier, supra*), a character necessary to the maintenance of a claim for maritime salvage (*Kennedy on Civil Salvage* 63). I regret this result. But if the plaintiff has a mortgage which, according to the evidence is nearly equal to, if not now greater in amount than the present value of the dredge, any allowance to him against the owner's interest would be practically valueless.

The action will be dismissed, but without costs. The General Construction Company, who appeared, should get no costs as their claim would not, in my view, have been interfered with if the plaintiff had been held entitled to salvage. This judgment, based upon the maritime law of salvage, will not preclude

1914

SIMPSON v. THE "KRUGER."

Reasons for Judgment.

the plaintiff, as mortgagee, from making a claim hereafter, to add his payment to Arnott to his mortgagee debt, if he is so advised. If made it must be dealt with as an application to settle priorities, if the amount realized by sale warrants such a motion.

Action dismissed.

1919
March 8.

BRITISH COLUMBIA ADMIRALTY DISTRICT.

THE "ANDREW KELLY",

PLAINTIFF;

v.

THE "COMMODORE",

DEFENDANT.

Salvage—Definition of—Proof—"Official log"—Amendment to log—Merchant Shipping Act, art, 239 and following.

During a heavy easterly gale, the "Commodore", towing the barge "St. David", and bound from Valdez to Anyox, B.C., had her rudder carried away and two of her four propeller blades broken, and was rendered practically helpless. She was drifting and leaking fast and was flying distress signals. The plaintiff managed to make fast a line to the "Commodore" and after twice breaking away succeeded in towing defendant into safety.

Held, that the services rendered were skilful, considerable and meritorious, and, while not in a strict sense unusually hazardous, were in the nature of salvage services and not merely of the nature of towage.

Vermont Steamship Co. v. The Abby Palmer (1904), 8 Can. Ex. 446, and 9 Can. Ex. 1, referred to.

2. That the "log" kept in this case was an *"ordinary ship's log"* and not *"official"* within the meaning of sec. 239, *Merchant Shipping Act,* and statements therein will not be accepted in evidence *for* the ship, but may be used *against* it to correct a statement made at a subsequent time.

3. One year and four months after the accident, it is asked to add sheets of manuscript notes to the log, alleged to have been made by the master, but not proved to have been made at the time nor for the purposes of incorporation in the "log".

Held, that permission to so amend the "log" will be refused.

Bryce v. C.P.R. Co., (1907), 13 B.C.R. 96, (affirmed by P.C. 15 B.C.R. 510), referred to.

1919

THE "ANDREW KELLY" v. THE "COMMODORE."

Reasons for Judgment.

THIS is an action for salvage services rendered by the plaintiff trawler against the tug "Commodore".

The case was heard at Vancouver on March 4 and 5 before the Honourable Mr. Justice Martin, Local Judge in Admiralty.

The facts of the case are stated in the judgment hereinafter printed.

E. C. Mayers, for plaintiff.

E. P. Davis, K.C., for defendant.

MARTIN, L.J.A. (March 8, 1919) rendered judgment.

This is an action for salvage services rendered by the steam trawler "Andrew Kelly" (95 registered tons), to the tug "Commodore" (216 registered tons), in the North Pacific Ocean on the Alaskan coast off Yakutat Bay, in October, 1917. Briefly, it appears that the "Commodore" bound from Valdez to Anyox, B.C., having in tow the barge "St. David" laden with copper ore, while about 60 miles south west of Yakutat during a heavy easterly gale, had her rudder carried away and two of her four propeller blades broken about 4 o'clock a.m. on October 28, which rendered her practically helpless, and she continued to drift, leaking fast through a damaged stern post or stern bearings, and sending up and flying distress signals, with the leak increasing and the pumping gear damaged so that the hand pump had to be resorted to, till about noon of the 29th, when the "Andrew Kelly" came to her assistance and finally made fast about 2.15 and began to tow her to Yakutat, but she broke adrift in about half an hour. The "Kelly" made fast again and towed the "Commodore" and barge for about nine

1919

THE "ANDREW KELLY" v. THE "COMMODORE."

Reasons for Judgment.

hours at a speed of about 3 knots towards Cape Spencer, Cross Sound, in an east by south direction, which was the safest course in the existing heavy sea and wind, which had been moderating before 6 p.m. but increased thereafter, and by midnight the wind had hauled back to the eastward and was blowing a gale. Shortly after midnight, on October 30, the tug and barge again broke adrift owing to the tug's chain cable having parted. After some inevitable delay in picking up the fouled gear in the darkness, the trawler went after the tug, and picking up her search light, reached her about 4.30 o'clock on the 30th and stood by her till daylight (at which time the wind had dropped but the sea was still high) and after sending a life boat at the request of the tug, this letter, thrown into the boat in a tin can, was sent by her master to the master of the trawler:

"Dear Captain:—

"We are leaking badly, propeller and rudder "gone, our main discharge pipe broken and only "able to give very little assistance with our engines.

"Weather conditions very unfavourable; we "are scared to get a lee shore and have to abandon "the two ships, in our opinion we think it advisable "to abandon the barge, whilst you can get the crew "off and proceed to some safety with Commodore.

"After reading this please pass it on to the "barge captain, also state your opinion on this paper "and let Capt. Bistrom add his and bring the paper "back.

A. J. BJORNE".

The master of the trawler decided to make a final effort to tow both the tug and the barge, and made fast again about 8.30 but after towing about 25 minutes towards Yakutat, then distant about 30 miles,

they broke adrift again, so he decided it was impossible to tow both and sent a life boat to the barge and took the master and seven men off her in two trips and then made fast again to the tug for the fourth time about 2.30, and succeeded in towing her safely into Yakutat that same night about 9 o'clock, after having to heave-to outside owing to a heavy squall of snow which started about 5.30 off Ocean Cape.

Later the barge with her valuable cargo, worth about $370,000, was picked up by the tug "Daniel Kern" then in Yakutat, in moderate weather, but was lost for some strange reason in coming into Yakutat on a calm night. The twelve fishermen on the "Andrew Kelly" had refused to consent to look for the barge the next morning, October 31, no more lives being in danger; on the "Kelly" there were 24 souls all told. The injuries sustained by the "Commodore" were various and serious and were adjusted by the underwriters at $15,934.

The value of the "Commodore", exclusive of the barge, is agreed to be $75,000. A dispute arose as to the value of the "Andrew Kelly". I am of opinion that at the time of the salvage a fair valuation would be $100,000. She had also 40,000 lbs. of halibut on board, her full load being 160,000 lbs.

It is not, and could not be disputed on the facts that salvage services had not been rendered, but it was suggested that they were more in the nature of towage. I am unable, however, to take that view; they were, while not in the strict sense unusually hazardous, nevertheless skilful, considerable, and meritorious, and after a careful consideration of all the circumstances I fix the sum of $4,000 as my view of a just reward therefor.

1919

THE "ANDREW KELLY" v. THE "COMMODORE."

Reasons for Judgment.

It was truly submitted by the defendant's counsel that the services here were not of so dangerous or deserving a nature as those before me in the *Vermont Steamship Co.* v. *The "Abby Palmer,"*[1] wherein the leading authorities are cited, and in which the sum of $5,500 was ultimately awarded (after an appeal caused largely, I may say, by an oversight of counsel in omitting to put forward certain items of loss to the salving ship which were not in dispute) the salving ship and cargo valued at $350,000 having been placed in a hazardous position, yet they were of the nature indicated and the times are considerably more expensive, money, consequently, not having the same value; so I feel that if I have erred it has been on the safe side. Of course if the barge had been salved a large sum would have been well earned.

The award I apportion, in the exercise of my discretion, as follows, on the principles cited in *The Vancouver Tugboat Co.* v. *The "Prince Albert",*[2]

To the owners (¾ of total award).....	$3,000
To the master (1-3 of the balance)	334
To the pilot, the mate, and the chief engineer each $90	270
To the 2nd and 3rd engineers each $65....	130
To 3 firemen, 1 coal passer, 1 cook, 1 deckhand, and Robert W. Thompson, a fisherman, who went in the life boat and appeared as a witness, in all 7 men, each $38	266
	$4,000

A claim in writing has been put in signed by seven of the twelve fishermen (other than said Thompson)

[1] 8 Can. Ex. 446, 9 Can. Ex. 1.

[2] (1913), *Mayers Adm. Law* 543, and *Kennedy on Salvage* 2nd ed. (1907), 168 *et seq.*

who were not members of the crew, asking for $75 per man, not alleging any assistance in salving but simply that they were prevented from fishing for the time occupied in salving, but no one has come forward in support of it and I am left in the dark as to whether or not, during that more or less stormy period fishing could have been carried on at all, or to what extent. It does not appear that any of these claimants did in fact give any assistance in the salvage service, which passengers must do before their claims can be recognized. *The Coriolanus*,[1] and moreover they refused to go out to assist in the salvage of the barge as above noted though a large reward would have been reaped if successful, as was most probable. In the absence of any further facts being put forward on their behalf in the usual way (*Kennedy on Salvage, supra*), which would give these claims a meritorious complexion I do not feel warranted in taking action thereon.

There remains a question of evidence regarding the log. No "official log" in the proper sense of the word in the *Merchant Shipping Act*, sec. 239-243,[2] was kept but simply the "ordinary ship's log", sec. 239 (3);[3] which is not evidence for the ship for which it is kept but against it, though being "a statement made by the master at a time being contemporaneous with the event and therefore more likely to be correct it may be used for the purpose only of correcting a statement made at a subsequent time".—*The "Singapore"*[4]; Vide also the *"Henry Coxon"*.[5] *The "Earl of Dumfries"*,[6] and cases cited in *Marsden's*

[1] (1890), 15 P.D. 103.
[2] See 8 Enc. L.E. 90, 26 Hals. 82; *Marsden's Digest*, 850.
[3] *Maclachlan on Shipping*, 5th ed. (1911), 211.
[4] (1866), L.R. 1 P.C. 378.
[5] (1878), 3 P.D. 156.
[6] (1885), 10 P.D. 31.

1919

THE "ANDREW KELLY" v. THE "COMMODORE."

Reasons for Judgment.

Dig., supra. In the ship's log in question, entitled "Pilot House Log Book", kept by the master, the only entry relating to the salvage is as follows:

"Oct. 29th, 10 a.m. Sited (*sic*) tow.

"10.30 a.m. Sited tow boat with barge "St. David (*sic*) in tow with flag at her "foremast head for help.

"Oct. 31st, 2.45. Left Yakutat."

There is no blank space, between said dates, the entries following on thus omitting any reference to any occurrences between the sighting and leaving Yakutat. The plaintiff's counsel applies to have three sheets of manuscript notes, produced by the master in the witness box, admitted in evidence as part of the ship's log on the ground that they were notes made at the time by the officer on the ship who kept the log (here the highest officer, the master) and therefore ought to be incorporated with it.

In *Bryce* v. *C. P. R. Co.*[1]; affirmed by the Privy Council,[2] I had to deal with the case of changes in a rough or scrap log of a nature similar to the one in question, made at the time, but what I am now asked to do is to sanction changes, by way of addition, after a lapse of more than a year and four months. Apart from all other aspects of the matter on this ground alone I must refuse the application being of the opinion that it would be too dangerous to open such a door. The master has not even ventured to say that he made these notes at the time for the purpose and with the intention of adding them to the log at the earliest opportunity and the way in which the entry is made would discourage such a view of the matter, and this is not a case of rough notes having

[1] 13 B.C.R. 96.
[2] 15 B.C.R. 510.

1919

THE "ANDREW KELLY" v. THE "COMMODORE."

Reasons for Judgment.

been mislaid and the entry being left consequently incomplete. Apart, therefore, from other questions raised on the application of the Act and secs. 260, 263-4, I think the said notes cannot be admitted in evidence as part of the log, but only to refresh the witnesses' memory apart from the same.

Let judgment be entered in favour of the plaintiff for $4,000 and costs.

Judgment accordingly.

1919
March 8.

BRITISH COLUMBIA ADMIRALTY DISTRICT.

THE TUG "JESSIE MAC",

PLAINTIFF;

v.

THE TUG "SEA LION",

DEFENDANT.

Common harbour of refuge—Act of God—Responsibility—Burden of proof—Inevitable accident—Definition of—Negligence—Costs—Rule 132, *Admiralty Practice.*

Held, 1. That where the action of tide and currents is so contrary to experience, that it could not be reasonably anticipated or foreseen it is to be regarded as an "Act of God", and collision due to such is an "inevitable accident".

2. That "inevitable accident" is that which the party charged with damage could not possibly prevent by the exercise of all reasonable precautions which ordinary skill and prudence could suggest.

3. That where "inevitable accident" is pleaded the onus is primarily on the plaintiff to show that blame does attach to the vessel proceeded against, and a *primâ facie* case in this behalf must be established.

4. That, on an action being dismissed on the ground that the damage was due to inevitable accident, costs will follow the general rule, unless special circumstances exist requiring a departure therefrom.

The *"Marpesia"*, (1872), L.R. 4 P.C. 212, referred to.

THIS was an action for damage done to the tug "Jessie Mac" alleged to be owing to defendant tug having given her a foul berth in consequence of which she was forced upon the rock and suffered damage.

1919

THE "JESSIE MAC" v. THE "SEA LION."

Reasons for Judgment.

The case was heard before the Honourable Mr. Justice Martin, Local Judge in Admiralty, at Vancouver, on March 6 and 7, 1919, and judgment was rendered on March 8 reserving the question of costs for further argument. This was decided on May 8, 1919.

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

Hume B. Robinson, for the plaintiffs.

E. P. Davis, K.C., and *James H. Lawson,* for defendants.

MARTIN, LOC. J. (March 8, 1919) delivered judgment.

It appears, briefly, that owing to a strong westerly wind with resulting heavy swells, a number of tugs, about ten in all, with their tows of booms of logs were forced to take shelter in Trail Bay under the lee of Trail Island off Sechelt, at various times between March 30 and April 1, 1918, inclusive, which small bay, it is common ground, is the customary and proper place in that locality to seek refuge in, though it is only of a limited area of safety and unsafe in easterly winds with the exception, probably, of the inside shore position between the southwest point of the island and a well-known rock, which was taken by the plaintiff tug upon its arriving first in the bay, which position is sheltered, to a considerable extent at least, from all winds.

After it had made fast its boom of 9 swifters to the shore by three wire ropes, it took up its position outside its boom, attached thereto by two lines, and later three other small tugs of a similar size, with

1919

THE "JESSIE MAC" v. THE "SEA LION."

Reasons for Judgment.

booms, arrived at various times and took up outside positions in like manner, *viz.*, the "Chieftain", the "Stormer" and the "Vulcan" which last had a double boom and lay outside of it like the others.

This was the position when the "Sea Lion" a much larger tug, came in with a large triple boom on the early morning of March 31, and anchored at a spot about 1,000 feet from the rock which it is clear is the best and safest position for herself for a large tug to take, and up till the afternoon of the next day she lay with her boom out to sea towards the east and away from the "Jessie Mac" under the westerly wind, and I have no doubt that it was not considered an unsafe position by the masters of the other tugs, otherwise they would have warned the master of the "Sea Lion" as the master and pilot of the "British Trident" did in the *"Woburn Abbey"* case,[1] though this failure is, of course, not at all conclusive. But that afternoon, with the tide flooding and the wind dying down, the "Sea Lion's" boom swung round to the south-west till the end of it touched the shore inside the point which protected the "Jessie Mac" and lay there in a position of no danger on a rising tide, with the expectation that at the change of the tide it would float off with the ebb in the usual way. But, *contrary to expectation, and all experience in the case of a westerly wind,* the tide continued to set in towards the shore after the ebb, and at 9.30 the "Sea Lion's" anchor began to drag, which put her in a position of danger to herself and her boom, which, if it were not got off the shore, would be broken up by a change of wind to the east, and, therefore, she raised her anchor and, heading to the north of east, started to tow the boom off the

[1] (1869), 38 L. J. Adm. 28.

shore, using the shore end of the boom, (which being a triple one, was very stiff and would bend inappreciably) as a fulcrum in so doing.

This manoeuvre was, I am satisfied on the evidence, the most proper one to take in the circumstances, and if nothing had happened it would, it is clear, have been successfully carried out without any damage to the adjacent small tugs fastened to the shore. But in the course of it the inmost triple boom, which was made up of 2 sections of 9 and 6 swifters, broke its fastenings, leaving the inner section of 6 ashore, while the outer swung round and fouled the head of the "Chieftain's" boom, which in turn caused two of the 3 wire shore ropes of the "Jessie Mac" boom to break, whereupon it swung out and round and forced the "Jessie Mac" upon said rock and damaged her as aforesaid. The breaking of the boom was later found to have been caused by a weak chain in one corner and a weak ring in another; the boom, or its chain or gear, were not owned by the "Sea Lion" nor had she made up the boom, but was simply towing it.

The defences set up are that the anchorage taken up by the "Sea Lion" was not a foul one; that there was no negligence because the extraordinary inset of the ebb tide in a westerly wind could not have been foreseen, and that the breaking of the boom gear was an inevitable accident.

As to the first and second, I am of opinion that, having regard to the circumstances, the anchorage was not a foul one and the "Sea Lion" was entitled to take it. Though her boom could, in a straight line, reach those fastened to the shore, yet it was prevented from so doing in the inevitable course of swinging round with the tide, by the point, in ordin-

1919

THE "JESSIE MAC" v. THE "SEA LION."

Reasons for Judgment.

ary circumstances, and I am unable to find that her master failed to take any reasonable precaution which ordinary skill and prudence could suggest, founded on his intimate knowledge of the locality. He was entitled to rely upon the ordinary action of the tide and current. *The "Rhondda"*,[1] and as their Lordships of the Privy Council said in that case he "had no reason to anticipate" that the ordinary risk had been increased. This is not like the well-known case of *The "City of Peking"*,[2] wherein their Lordships held that the master should have kept in mind the "undoubted fact" known to mariners and to him, "that in certain states of the weather" the tide at Kowloon is "deflected out of its ordinary course", and "a cautious mariner, is, therefore, "bound always to keep in view the possibility of "these currents being met with". In the case at Bar, on the contrary, such a current as caused the boom to stay in-shore instead of floating off-shore, was unknown to anyone. See also *Lack* v. *Seward*.[3]

On the question of foul anchorage I have this observation to make, that in certain circumstances where the question of safety to a ship, including her tow, is involved she is justified in taking that degree of risk which the circumstances may justify, *e.g.*, the rigour of the elements may impose a common risk upon all who seek refuge in a common harbour—and constitute "a cause which (a ship) could not resist"; *The "Innisfail"*,[4] *The "William Lindsay"*,[5] *The "Maggie Armstrong"* v. *The "Blue Bell"*,[6] and see *The "Annot Lyle"*,[7] on the point of only one course open for safety. And in weighing these cir-

[1] (1883), 8 App. Cas. 549.
[2] (1889), 14 App. Cas. 40.
[3] (1829), 4 C. & P. 106.
[4] (1876), 3 Asp. M.C. 337.
[5] (1873), L.R. 5 P.C. 338.
[6] (1866), 14 L.T. 340.
[7] (1886), 6 Asp. M.C. 50.

cumstances there must be considered the facts that tugs with tows of booms are of an unwieldy nature and the booms are easily broken up by rough water and they cannot face a state of weather which would present no damage to ordinary vessels; and in a haven require a considerable amount of space for a clear anchorage which may not be available in time of danger when many vessels are forced to resort to it for as much shelter as may be possible, in which circumstances it comes down to a question of good seamanship, "*Bailey* v. *Cates*".[1] As to the handling of a tug with scow in a narrow channel, see *The "Charmer"* v. *The "Bermuda"*,[2] *The King* v. *The "Despatch"*,[3] and of *Paterson Timber Co.* v. *The "British Columbia"*.[4]

If, therefore, the anchorage was not, and I so hold, a foul one, then the case resolves itself into one of inevitable accident, and the onus is primarily upon the plaintiff when the defence is set up—*The "Marpesia"*;[5] and it is beyond question here that the damage was primarily caused by inevitable accident, which means, as their Lordships of the Privy Council therein say at p. 220, that:

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

This definition was adopted by the Court of Appeal in *The "Merchant Prince"*[6] and *The "Schwan"* v. *"The Albano"*.[7]

1 (1904), 11 B.C.R. 62, 63; 35 Can. S.C.R. 293.
2 (1910), 15 B.C.R. 506.
3 (1916), 16 Can. Ex. 319, 28 D.L.R. 42, 22 B.C.R. 496, 501.
4 (1913), 16 Can. Ex. 305, 11 D.L.R. 92, 18 B.C.R. 86.
5 L.R. 4 P.C. 212.
6 [1892] P. 179.
7 [1892] P. 419.

1919

THE "JESSIE MAC" v. THE "SEA LION."

Reasons for Judgment.

Now it was not even alleged that the breaking of the boom fastenings could be attributed to any want of care on the part of the defendant, and more than was the case in the breaking of the mooring band or the jamming of the windlass in the *"William Lindsay"*, *supra,* and therefore, it follows that the action cannot be sustained and must be dismissed.

It is not, therefore, strictly necessary to consider the counter charges of negligence brought against the plaintiff for tieing up four booms together with their tugs inside except the "Vulcan" but it obviously is an act which might require justification in certain circumstances, though here the damage was done by fouling the second boom, the "Chieftain's".

But I think it proper to remark upon the strange fact that there is no evidence showing exactly how the "Jessie Mac" got aground; no person off her was called to explain it; her master did not know as he was out working on the end of the fouled boom, trying to free it, and the mate was not accounted for; her master did not know where the mate was, according to his statement to the master of the "Sea Lion" and so far as the evidence shows, no watch was kept on her and no efforts made to take the necessary precautions to protect her after the danger from the fouled boom became apparent. This is a very unsatisfactory state of affairs and might seriously prejudice the plaintiff's right to recover in any event. See *The "Kepler"*;[1] *The "Scotia"*;[2] *The "Hornet"*.[3]

With respect to the costs, I shall allow them to be spoken to in the light of the practice respecting the

[1] (1875), 2 P.D. 40.
[2] (1890), 6 Asp. M.C. 541.
[3] [1892] P. 361.

1919

THE "JESSIE MAC" v. THE "SEA LION."

Reasons for Judgment.

same in cases of inevitable accident as set out in the *"Marpesia", supra,* wherein it is laid down at p. 221:

"Their Lordships, therefore, conceive that the "general rule of the Court of Admiralty is in these "cases to make no order as to costs, and that in "order to justify an exception to that rule it must "be shewn that the action was brought unreasonably "and without sufficient *primâ facie* grounds".

See also *The "Innisfail".*[1] How far this practice may be affected, if at all, by the later decisions in England under the *Judicature Act,* as noticed in *Williams and Bruce's Adm. Prac.* (1902), 95, I shall then consider.

* * * * *

The question of costs was subsequently disposed of after argument in a judgment handed down by Mr. Justice Martin, which is as follows:—

MARTIN, Loc. J. (May 8, 1919) delivered judgment.

In 1889 it was decided by the Court of Appeal in *"The Monkseaton",*[2] that, as under the *Judicature Act* the Court of Admiralty had become a division of the High Court of Justice, there should be a uniform practice in all the divisions of the Court on the subject of costs, and, therefore, the existing general rule, that in the absence of special circumstances costs follow the event, should be extended to cover cases of inevitable accident, where no special circumstances required a departure from said rule.

It is submitted by defendant's counsel, that such being the case the rule was introduced into this Court in common with other Colonial Courts of Admiralty

[1] 3 Asp. M.C. 337.
[2] (1889), 14 P.D. 51.

1919

THE "JESSIE MAC" v. THE "SEA LION."

Reasons for Judgment.

by sec. 2 of the *Colonial Courts of Admiralty Act*, 1890 Imp., passed on July 25, 1890, wherein it is enacted that: "The jurisdiction of a Colonial Court "of Admiralty shall, subject to the provisions of "this Act be over the like places, persons, matters "and things, as the admiralty jurisdiction of the "High Court in England and the Colonial Court of "Admiralty may exercise such jurisdiction in like "manner and to as full an extent as the High Court "in England and shall have the same regard as that "Court to international law and the comity of "nations".

Such submission would therefore appear to be correct and furthermore there is the general rule No. 132 of this Court promulgated and approved under sec. 25 of the *Canada Admiralty Act*, ch. 29 of 54-5 Vict. brought into force on October 2, 1891, as follows: "In general costs shall follow the result; but "the judge may in any case make such order as to "the costs as to him shall seem fit".

In my opinion, therefore, the rule as to costs is the same in this Court as it is in the admiralty division of the High Court in England, and so that costs here should follow the general rule because there are no special circumstances requiring a departure therefrom as I held, there were in *McArthur* v. *The "Johnson"*,[1] and as was held in England in *The "Batavier"*.[2]

Action dismissed with costs.

[1] (1913), 14 Can. Ex. 321, 9 D.L.R. 568.
[2] (1889), 15 P.D. 37.

1919

June 23.

TORONTO ADMIRALTY DISTRICT.

THE OWNERS, MASTER AND CREW OF THE STEAMER "KEYVIVE",

PLAINTIFFS;

v.

THE TUG "S. O. DIXON" AND THE BARGES "LOUISA" AND "IDLEWILD" AND THEIR CARGOES AND FREIGHT,

DEFENDANTS.

Salvage—Towage—Costs.

When about twenty miles out from Kingston the sole engineer on the tug "Dixon", towing two barges, fell overboard and was lost. He was the only one on board who knew anything about engines and the tug was, in consequence, without means of keeping up motive power. She was drifting and was in a position of actual or apprehended danger, and was signalling for help, when the "Keyvive", with some risks to herself, took them in tow and brought them to safety.

Held, 1, That the claim arising thereunder was one of salvage and not merely of towage.

2. That the act of plaintiff in claiming an excessive amount and having the ship arrested therefor was oppressive, and costs relative to the arrest and release on bail, and applications relative thereto, will not be allowed him.

THIS was an action for salvage by the plaintiffs against the ship "S. O. Dixon", and certain barges in tow, all of which were arrested with their cargoes and freight and afterwards released on bail.

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

The hearing took place at the City Hall, Toronto, on April 28, 1919, and was partially proceeded with, and was concluded on June 23, 1919, when Mr. Justice Hodgins, L.J.A., delivered the following judg-

1919

THE "KEYVIVE." v. THE "S. O. DIXON."

Reasons for Judgment

ment, determining the nature of the claim made, and reserving judgment as to the amount.

Francis King, for plaintiffs.

H. W. Shapley, for defendants.

MR. JUSTICE HODGINS, L.J.A. (June 23, 1919) delivered judgment.

The claim in this case is for salvage, which, as originally stated, was estimated at $50,000, but that amount, I am informed, was based upon erroneous information as to the value of the cargoes and was not asked after October 11, 1918. This date was before the statement of claim was filed. I presume however, that it had considerable bearing on the amount fixed for bail, but no argument has been addressed to me with regard to any unfair features in the fixing of the original amount of bail beyond the fact that it was based on a much larger sum than is now contended for.

This vessel "Keyvive" is a comparatively new steamer worth about one-half million dollars, possibly three-quarters of a million dollars, and was, during the year 1918, engaged in transporting coal from Lake Erie ports to Montreal; she is 1,044 tons registered tonnage, has triple expansion engines and was built in 1913. She carrier a crew of twenty-one men, a first and second mate, a chief and assistant engineer. On September 15, 1918, when she was upbound from Montreal, light, her master observed on the starboard bow the tug "Dixon" and the two barges "Louisa" and "Idlewild", which were in the position shown on the chart, 1, something like 20 miles away from Kingston and north of a line drawn from the main Duck light to the false Duck light. The "Keyvive" answered the signals of distress and at the request of the captain of the tug,

took the three vessels in tow and towed them into Kingston.

The case was argued by the defendants on the basis that it involved only a simple towage claim, and on the part of the plaintiffs that it was really a salvage claim and should be allowed for as such. The evidence shows that the situation of the three vessels, the tug and the 2 barges, which were drifting in Lake Ontario in the position I have mentioned, was brought about by the fact that the engineer of the tug had fallen overboard, and being the only one among all those on the vessels who knew anything about engines they were without any means of keeping up their motive power. Mr. Kerr says they pulled fires and couldn't start again without obtaining a new engineer. The "Louisa's" gas engine was also disabled, or rather useless, because the line of the "Dixon" had got entangled in her propeller, and altogether they were at a stand-still, the statement being made that they couldn't cut the rope, which had wound around the wheel of the "Louisa", on account of the wind at that time.

Now, these three vessels, the tug and the two barges, were on a commercial enterprise, the two barges carrying molasses, but the tug itself was not such a valuable vessel, apparently not being a lake tug. On the evidence she is worth about eight thousand dollars. The "Louisa" was apparently quite an old barge, a wooden barge. The "Idlewild" was an A1 iron boat. They were both loaded with molasses, and the value of the cargoes, as stated, amounts, on the "Idlewild", plus freight to Belleville, to $15,568.58, and on the "Louisa", including freight to Belleville, to $7,317.48, in all, nearly $23,000.

1919

THE "KEYVIVE." v. THE "S. O. DIXON."

Reasons for Judgment.

The situation on the morning of September 15, 1918, was not very serious when the vessels were sighted, the velocity of the wind, as given by the meteorological office, based on Kingston, was estimated, for the vicinity of Duck Island, at 8.00 a.m., southwest five miles, and at 10.00 a.m., southeast eight miles. The wind, however, was from a southerly direction, which would be the dangerous wind in that locality, and it was increasing, and did increase, as a matter of fact, through that day, so that at the Ducks at 5.00 p.m., it was blowing 17 miles southeast, and at 6.00 p.m., 24 miles southeast, and, from the meteorological office records, this appears to be the same velocity as occurred at Kingston at the same hour. It was suggested that it would be blowing harder there than in Kingston, but this was not shown on the meteorological chart.

The vessels were making, at the time they were sighted, distress signals. The tug whistled four times, which indicates that assistance is wanted; the "Idlewild" had a United States flag hoisted upside down, which is a distress signal, and signals were being made from the "Louisa" with tablecloths or bed blankets, all these being explained to me as distress signals.

Previous to the "Keyvive" coming up, and according to Daniel Ludwig, who was in charge of the entire fleet of the Sugar Products Company, which owns and controls the three vessels, another vessel had passed but had declined to answer their signals and tow them. This was between eight and half-past eight in the morning. I am rather impressed with the fact that under the conditions which then existed and in view of their previous request which had been declined, the persistence of the men on these three vessels in signalling for assistance is a very import-

ant fact in determining whether there was or was not any danger either present or impending.

It must be remembered that the barges had had a collision in Lake Ontario, and the cargo in one of the vessels was said to be fermenting. The cargoes were valuable, they were near their place of destination and being undoubtedly off shore, might, if allowed to drift on, and the weather became worse and the wind increased, be in a very considerable difficulty. It is quite true that the vessels could have anchored, but that in itself is not safety, and I cannot help thinking that those three vessels, which were completely helpless, with valuable cargoes and with a number of men on board, were in a position of danger at that time, an impending danger, and that their desire to be rescued was genuine. I think some importance should be attached to the fact that this vessel, the "Keyvive", was under a time contract, was earning a large amount of money, that it was up-bound for the purpose of getting its cargo and was not likely to turn aside to undertake the towing of these three vessels into harbor unless there had been in the mind of the captain an apprehension that these vessels were in danger. The fact that the vessels were where they were stated to be, and were anxious for help, notwithstanding the evidence given by the men on the defendants' side that they had a fine chance of drifting into excellent ground to anchor, would indicate that they were not at that time quite so sure about their being in safety as they now appear in the witness box to be. The "Louisa" had been damaged through the collision; some of the planks at the stem had started and it is not unreasonable to conclude that this was an element in making them prefer to be towed into the dock instead of having to spend the day and possibly the night at

1919

THE "KEYVIVE." v. THE "S. O. DIXON."

Reasons for Judgment.

anchor, with the wind increasing. There must be some weight given to the evidence that there was a danger of it growing worse, although I cannot accept the ideas of those who suggest that at that time it had become nearly a hurricane. However, I think that there was a chance of danger. There was no motive power at all; the anchoring which they say would have made them safe was not resorted to; they didn't wait to drift in to a position safe to anchor but preferred to call for assistance and if they had gone ashore one of the barges might have gone to pieces. Under all the circumstances this should be considered upon the basis of a salvage claim in the sense that there was danger, apprehended danger at all events which might be very real apprehended danger of these vessels and their crews and that the "Keyvive" undertook the work under the belief that they were in danger and at some risk to herself.

I agree with the argument that has been made that a vessel, of this size, 260 feet long, and with the engines at the stern, a steel vessel, having to undertake to gather up and tow in waters that were somewhat confined a tug and 2 barges, all of them unable to help themselves would mean fairly good seamanship and might very easily have resulted in an injury to the salving vessel.

I therefore, pronounce in favour of the plaintiffs that the claim is a proper salvage claim and they are entitled to recover upon that basis. As to the amount, I have heard argument upon that now and I shall have to consider it a little further and work it out more in detail before stating the exact amount, and I will in a day or two, I hope, be able to hand out the result to the litigants.

1919

THE "KEYVIVE." v. THE "S. O. DIXON."

Reasons for Judgment.

HODGINS, L.J.A. (June 25, 1919) delivered further judgment.

The amount of salvage remains to be fixed. The value of the vessels and cargoes involved are large while the actual services rendered proved comparatively easy of accomplishment and were carried out without accident. The danger to which the salved vessels and cargoes were exposed, though real, was largely an apprehended one and fortunately did not develop any evil consequences. The services were skilfully and smartly rendered without causing any damage to the salvors.

A claim is made that by reason of the operation the "Keyvive" was delayed, and being under contract to carry coal from Lake Erie ports, lost her turn into Cleveland and under the spout at Toledo. This delay, though not long, is carried into the account as showing why further delay caused by a break in the Soulanges Canal on October 14 should be charged up to the defendants. I am unable to follow out this chain of causation. It takes apparently only 4 or 5 days to make the trip and there are lay days in Montreal and Toledo to be explained before it is possible to prove that this deviation was the sole cause of the vessel being at the Soulanges Canal so as to be held up on October 14 by the break.

Mr. Waller, the defendants' marine superintendent admits that unless the trips planned, which were interrupted by the salvage operation had occurred exactly as intended and without incident or accident, their claim for delay cannot be sustained although he is very positive that nothing would or could have prevented the ship completing the trips on schedule time. To my mind the margin is too close to allow damages upon, as claimed, even if they were not too

1919

THE "KEYVIVE." v. THE "S. O. DIXON."

Reasons for Judgment.

remote, as I think they are. All I can allow is the value of the salvage, including the actual delay which it caused, coupled with a reasonable allowance for the actual dislocation of the schedule at a busy time of the year.

The plaintiff vessel was earning, net, about $200 per day under the five year contract. She could earn, it was said, much more if free from that. The fair value of the tug and of the two barges is, I think, $55,000, and the cargoes and freight $22,985. The value of the "Keyvive" is over half a million dollars.

The allowance which I think can fairly be made in this matter should not exceed $2,500. $200 should be apportioned to the master and $300 to the crew according to their ratings and the balance to the owners of the "Keyvive". The claim originally made was for $50,000 and vessels were arrested for that sum.

The demand was not modified until October 11, 1918, nearly a month afterwards.

I think the making of this claim and the arrest therefor, were oppressive, and while I give the plaintiffs the general costs of the action, these will not include therein any costs relative to the arrest and release on bail or any applications relative thereto.

Judgment will therefore be entered for the plaintiff for $2,500, off which $200 will be apportioned to the master and $300 to the crew, with costs of action except as above mentioned.

Judgment accordingly.

Solicitors for plaintiff: *King & Smythe.*

Solicitors for defendants: *Osler, Hoskin & Harcourt.*

IN THE EXCHEQUER COURT OF CANADA.

1919
August 29.

FREDERICK JOHN BEHARRIELL,
SUPPLIANT;

v.

HIS MAJESTY THE KING,
RESPONDENT.

Expropriation—Valuation of commercial enterprise.

Suppliant alleged that the sand and clay to be found on the property expropriated had special quality and merit for manufacture of high-class brick and brick-tile, and, that with the small quantity of land left to him after the expropriation of the property it was impossible to carry on his proposed enterprise.

The suppliant became owner of the property in 1912, paying $10.00 an acre; the Crown offered $30.00 an acre, and it was admitted that this amount was ample if there was no special merit in the clay. He never commercialized it, there has been no established business on the premises and the supposed profits are conjectural. The suppliant in sending material to experts for test did not deem it necessary to send clay, but sent sand *alone*. The land taken is but a small piece of the whole, the Crown having abandoned part of the land first expropriated and agreed to reconvey the part taken by the Canadian Northern, and moreover, the land is to a certain extent swamp land not suitable for the alleged purposes, and other clay is available in the vicinity.

Held.—That, in as much as there was no special or peculiar merit in the clay and sand found on the expropriated land, and furthermore that, as suppliant has suffered no injury to any feasible commercial undertaking, by reason of the amount of land taken or of the works constructed by respondent, there was no ground for increasing the amount of compensation tendered to suppliant by respondent.

PETITION OF RIGHT to recover the alleged value of land expropriated by the Crown and claiming special damages because of the valuable deposits of sand and clay on the property expropriated suitable for manufacture of very high class brick and analogous articles and also because the lands so taken were of such extent and so situate

1919

BEHARRIELL v. THE KING.

Reasons for Judgment.

with regard to the remainder that the lands were rendered of no value for the purposes for which the suppliant intended them.

The case was first tried at Toronto on January 15 and 16, 1917, but before judgment the Crown abandoned certain portions of the land previously expropriated and subsequently made application for new trial on the ground of surprise at the former trial, and because the abandonment entirely changed the nature of the action. This application was granted and a new trial was had on January 14, 15, 16, 17, 18, and April 29 and 30, 1919, before the Honourable Sir Walter Cassels at Toronto.

The respondent tendered $30 an acre before action, and in its defence renews the same.

At the opening, suppliant asked and was permitted to amend by reducing his claim to $100,000. A great deal of evidence was adduced, but the essential points in issue were 1st, whether the clay and sand in the property in question had any special or peculiar merit for the making of brick or brick-tile; and 2nd, whether the taking of the piece expropriated by the Crown prevented the suppliant from carrying on the enterprise or undertaking he alleged he intended to do.

The main facts are discussed in the reasons for judgment.

W. C. Mackay, K.C., and *W. R. Wadsworth,* K.C., for suppliant.

Hugh Guthrie, K.C., and *R. V. Sinclair,* K.C., for respondent.

CASSELS, J. (August 29, 1919) delivered judgment.

On March 24, 1916, Beharriell, the suppliant, filed a petition in which he claimed that on Septem-

1919

BEHARRIELL v. THE KING.

Reasons for Judgment.

ber 28, 1912, he entered into an agreement for the purchase of the westerly 50 acres of the east half of Lot No. 11, in the 14th concession of the Township of N. Orillia, and that on November 21, 1912, he obtained a conveyance of the said lands.

There is no dispute as to the title of the suppliant. It is conceded that when the suppliant became the owner of the said lands the line of railway of the Canadian Northern crossed the said 50 acres and was in operation as a railway.

The Canadian Northern Railway had expropriated 7.25 acres of the said 50 acres, and Beharriell's title to the 50 acres was less the property of the Canadian Northern, reducing the title of the suppliant to 42.75 acres instead of 50 acres as alleged.

The lands of the suppliant are at Washago about eleven miles from the Town of Orillia, and about 89 miles from Toronto.

The suppliant alleges that for the purpose of a Public Work of Canada, *viz.*, the Trent Canal, His Majesty on August 13, 1914, and by a further subsequent expropriation, expropriated about 24 1-10 acres of the 42.75 acres, the property of the suppliant, leaving him the owner of only about 18¾ acres.

The claim of the suppliant is that at the time he became the owner of the said lands there were situate thereon valuable deposits of sand and clay suitable for the manufacture of a very high class of brick-tile and analogous articles.

His claim is that the parts of his lands so taken are of such extent and so situate north with regard to the remainder thereof, and the remainder of his lands are so affected by the works and operations of the Trent Canal and the Canadian Northern Rail-

1919

BEHARRIELL v. THE KING.

Reasons for Judgment.

way Co., as to render the same of no value for the purposes of the suppliant.

The suppliant's claim is, that the value of the lands to him at the time they were expropriated was the sum of $300,000, and he claimed the sum of $300,000, as damages and compensation.

At the opening of the case at the trial Counsel for the suppliant asked for and obtained leave to amend by reducing his claim to the sum of $100,000.

The Crown offered and still offers the sum of $30 per acre as full compensation for the lands expropriated, and any damages, and Counsel for the suppliant admit that this amount is ample compensation if the claim for special damage is disallowed. The suppliant had paid $10 per acre for the lands.

The trial of the petition was before me at Toronto on January 15 and 16, 1917.

A considerable amount of evidence was adduced, and written arguments were to be furnished.

Subsequently, and prior to any arguments being filed the Crown pursuant to the provisions of the statute in that behalf abandoned certain portions of land previously expropriated.

It should be stated that owing to the construction of the Trent Canal it became necessary to divert the line of the Canadian Northern Railway, and for this purpose 3.73 additional acres of the property owned by the suppliant were expropriated by the Crown.

The effect of this abandonment by the Crown was to entirely change the nature of the claim put forward by the suppliant in his original pleadings and of the evidence adduced at the trial.

The Crown made an application for a new trial based on allegations of surprise at the former trial and other reasons, and after considering the facts

alleged and taking into consideration the complete change effected by the abandonment, an order was made granting the application for a new trial, the Crown paying the costs of the suppliant up to that date between solicitor and client.

After this abandonment the position of matters was as follows: Out of the 42.75 acres owned by the suppliant, 9.63 acres were expropriated for the area of the canal, and 3.73 acres for the new line of the Canadian Northern Railway, in all 13.36 acres of the 42.75 acres, leaving the suppliant 29.39 acres.

The Crown is the legal owner of the former right of way of the Canadian Northern Railway, and by the amended statement of defence, and also through counsel at the trial has offered to convey to the suppliant in fee simple that portion of the lands formerly owned by the Canadian Northern Railway containing 5.91 acres which added to the 29.39 acres of the suppliant, would increase his holding to 35.30 acres as against the 42.75 acres originally owned by the suppliant, or in other words reducing his ownership by 7.45 acres.

I may mention that the land taken for the canal is to a very great extent swamp land not suitable for the alleged purpose for which the suppliant alleges the lands were adapted, viz., brick, etc.

In the amended reply of the suppliant filed after the amended defence of the Crown, it is stated, as follows:

"5. In the process of the manufacture of brick "tile and analogous articles which the suppliant pro- "posed to carry on upon the said east half of said lot "eleven as alleged in the petition of right herein, the "sand and clay were to be used generally in the pro-

1919

BEHARRIELL v. THE KING.

Reasons for Judgment.

"portions of about 92 per centum of sand to about 8 "per centum of clay, and the deposits of these "materials on his said land were originally in nearly "these respective proportions.

"6. There was no other available deposit of clay "suitable for the suppliant's said purposes known to "exist in Ontario up to the time of the first exprop- "riation of the suppliant's said lands or since and "so much of the deposit of clay aforesaid to wit: "Area 90 per centum thereof was on lands still "retained by the respondents thus being lost to the "suppliant that this loss to the suppliant of his sup- "ply of clay makes it impossible to successfully "carry on the proposed enterprise.

"7. So great a quantity of the said deposit of "sand has been lost to the suppliant by reason of "the matters set out herein and in the petition of "right aforesaid that there is not sufficient thereof "remaining even after the said abandonment to "justify the expense of the construction of the works "which the suppliant proposed to place upon the "said lot as the engaging in the suppliant's pro- "posed enterprise."

I quote these paragraphs from the suppliant's amended reply as to my mind they are of considerable importance in considering the case presented by him. He has been represented through the case by very able counsel who has been indefatigable in the labour bestowed upon the conduct of the case and in the very exhaustive and able argument furnished to me. The allegations are made after an opportunity of considering the evidence adduced at the first trial.

At the first trial the case put forward was that the materials were suitable for the manufacture of face brick of a very high quality requiring 92 per centum of sand and 8 per centum of clay. On the second trial the manufacture of tiles was introduced, which would require about 80 per centum of clay.

The case came on before me at Toronto on January 14, 1919, and subsequent days, and subsequently additional evidence was adduced at Ottawa.

It was agreed by Counsel that all the evidence adduced at the first trial should be received as if given at the second trial.

This mass of evidence and the voluminous arguments of Counsel I have carefully considered and analyzed.

It is impossible for me to set out in detail these reasons and to pass comments on each exhibit produced.

It must be borne in mind that there has been no established business carried on upon the premises in question.

The evidence of supposed profits to be derived from the premises by the manufacture of brick, etc., is purely conjectural.

Evidence was tendered by the suppliant to show what the value of the property might be to him if he were able to manufacture the quantity of brick estimated, and of the quality claimed by him, and saleable f.o.b. at Washago at the enormous profit claimed.

It would not be difficult to procure numerous investors such as Eckhardt to advance large sums of money towards the formation of a company if they were guaranteed the large profit claimed.

1919

BEHARRIELL v. THE KING.

Reasons for Judgment.

In my opinion, however, after hearing all the evidence and again carefully considering the same the hopes of the petitioner are purely nebulous.

The Solicitor General in his argument refrained from accusing the petitioner of any intent to defraud. He charitably characterized the petitioner as being obsessed with his idea. This may be so. I refrain from expressing any more unfavourable view.

At the trial the petitioner claimed that there was a sufficient quantity of sand and clay upon the premises prior to the expropriation to enable him to produce from 245,000,000 to 250,000,000 bricks sufficient to carry on the enterprise for a period of 35 years.

His contention is that for a million bricks 4000 cubic feet of clay would be required. If this were so for 245,000,000 bricks there would be required 980,000 cubic feet of clay.

Dealing with the state of matters after the amended defence of the Crown, and the offer to convey the greater portion of the lands primarily occupied by the Canadian Northern Railway, there remains notwithstanding the allegation in the suppliant's amended reply more than a sufficient quantity of sand.

At the opening of the case *Mr. Mackay,* Counsel for the suppliant, stated as follows:

"The question which will arise now is this. The "Crown will say we have abandoned to you a large "part of the land on which are your materials. We "will say, you have abandoned to us sufficient sand "or almost sufficient for our purposes."

As to the clay, at the trial Beharriell states that he is left with only 300,000 cubic feet of clay.

Connor, a witness for the suppliant, places the clay available now at 20,000 cubic yards, equal to 540,000 cubic feet, instead of 300,000 cubic feet as stated by the suppliant, a supply sufficient for over 20 years.

Connolly, a witness for the suppliant, places the clay available at 580,000 cubic feet.

John S. McLeod places the available clay at 34,000 cubic yards of clay amounting to 918,000 cubic feet of clay.

I am of opinion that the evidence of Mr. Hice should be accepted. He is a gentleman of very high standing and of great experience, and his statement that there is no peculiar value in the particular clay from these premises is, I think, correct.

Beharriell, the suppliant, in his evidence at the first trial, was questioned as follows:

"HIS LORDSHIP—Did you send samples of the sand "to Toledo?—A. I did, sir.

"Q. Did you send samples of the sand alone?— "A. I made shipments of sand and clay.

"Q. Did you send shipments of sand alone?—A. "I may have done that. It is a long time ago. I "can scarcely remember that. I have some bills of "lading here.

"Q. I would like to know if you can remember "whether you sent these shipments of sand alone 'without the rock and clay or whether you always "sent samples of sand rock and clay together.—A. "I did not send clay, there was so little required but "I have sent sand alone."

1919

BEHARRIELL v. THE KING.

Reasons for Judgment.

If there were any peculiar merit in the clay as the suppliant contends, at the enormous profits he hopes to realize, he has enough clay to realize a fortune and if short could always supplement it.

Of sand he has abundance. In addition to the statement of Counsel to which I have referred, I quote from the suppliant's evidence:

"Q. Then you have an abundance of sand?—A. "A fair amount of sand.

"Q. More than you will ever use in a number of "lives to come?—A. You are quite right."

The contention of the suppliant that a mixture of sand of 92 per centum with clay of 8 per centum would form a commercial brick is absolutely disproved by the evidence.

There would be no bond without the admixture of other ingredients such as lime, etc.

This is demonstrated by the experiments of the suppliant himself.

On the whole case I am of opinion that the suppliant has failed entirely to prove that he has suffered any injury to any feasible commercial undertaking by him.

The offer of the Crown is ample.

The suppliant must pay the costs of the action subsequent to the filing of the amended defence of the Crown. These costs should not include any of the evidence or costs of the first trial.

The suppliant is entitled to a conveyance of the lands offered by the Crown.

The quantity of land expropriated can no doubt be arrived at by Counsel. *Judgment accordingly.*

Solicitor for plaintiff: *W. C. Mackay*, K. C.

Solictor for respondent: *F. G. Evans.*

BRITISH COLUMBIA ADMIRALTY DISTRICT.

1919
August 22.

PATTERSON, CHANDLER AND STEPHEN LIMITED,

PLAINTIFF;

v.

THE "SENATOR JANSEN,"

DEFENDANT.

Towage—Responsibility of tug—Negligence—Contributary negligence.

The tug "Senator Jansen", with a scow in tow, lashed diagonally to her port bow, was floating down Fraser River with the tide and while going through a drawbridge (85 feet in width) the scow struck a projecting boom stick, tearing off a stern plank. Scow and cargo were lost. The "Senator Jansen" was properly navigated.

Held.—That the master of the "Senator Jansen", being thoroughly familiar with the situation, and the set of the tides and currents, and knowing that these would inevitably bring his port side against the bridge, creating a dangerous, if not a necessarily fatal situation, was guilty of negligence in not lashing the tow to the starboard side and thus avoiding the possibility of accident.

2. Where, even if the scow in such a case had been wholly sound, the direct consequences of the accident could not have been avoided, the fact of the scow being unseaworthy, will not constitute contributary negligence on her part, and will not relieve the tug of any responsibility—for damage due to her own negligence.

THIS is an action by the plaintiffs, owners of the tow, to recover from the defendant the value of the scow and cargo, alleged to have been lost by reason of the negligence of the master and crew of the tug defendant; (1) because she was unskillfully navigated—and (2) because she took the risk of lashing the tow to her port side, when the other side would have offered no risks whatever.

The case was heard, at Vancouver, on June 21 and 22, 1919.

1919

PATTERSON, CHANDLER AND STEPHEN, LTD. v. THE "SENATOR JANSEN."

Reasons for Judgment.

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

W. E. Burns, and *H. B. Robinson,* for plaintiff.

C. B. Macneill, K.C., for defendant.

MARTIN, L. J. A. (August 22, 1919), delivered judgment.

In this action the plaintiff company sues to recover the value of a scow, $2,000, and the loss of certain granite blocks laden thereon, and the cost of salving other blocks from the bed of the Fraser River. The claim arises out of the fact that on July 9, 1918, about 6.30 p.m., the said scow, laden with 225 tons of granite blocks, was being taken by the stern wheel steam tug "Senator Jansen" (reg. tons 93.27; length 125 ft.; R. B. Tipping, Master), through the north passage of the drawbridge across the Fraser River, connecting the City of Westminster with Lulu Island, and in so doing the scow, (length 66 ft. 8 in., width 26 ft., depth 6-7 ft.) which was lashed diagonally across the port bow of the tug, struck a corner boom stick of the west approach to the drawbridge and one of her stern planks was knocked out, which caused her to quickly filll with water and take such a list that the cargo slid overboard and the scow was with some difficulty beached, and eventually became a total loss.

The said northern passage of the drawbridge is 85 ft. in width and there was formerly along the whole of the south side of it a permanent approach structure of piles with planks, along which tugs with scows would slide with the drift of the tide, which method of going through the passage in the state of tide in question, 2½ to 3 knots, is clearly

open to no objection and no fault could be found with that course in ordinary circumstances. It appears, however, that at some time in the month preceding the accident, the downstream, i.e., western portion of the said approach had been carried away and a temporary arrangement provided of four boom sticks and three groups of piles as shown, Ex. 10, which gives a fair representation of the situation. Of these boom sticks only two need be considered, one of them—the long sheer-boom marked "A" on Ex. 10 being 40 to 50 ft. long and running out to the pile marked "X" and a shorter one marked "B" fastened to the end of "A" and connecting at an angle with the second group of piles at the apex of the boom structure. This short corner boom "B" which the bridge-keeper described as being from 14 to 16 ft. long and about the thickness of a telephone pole, (though the defendant's witness, the tug-master, described it as heavier), projected out an appreciable distance beyond the line of sheer-boom "A", as well shown on Ex. 10, and the effect of this was that when the scow, after scraping along the sheer boom, came to the projecting corner boom, the end of it, (which the master of the tug described as being square) struck a stern plank (which I have reason to doubt was a sound one) in the scow at its spiked end and knocked it out, causing the scow to quickly fill as aforesaid.

Two grounds of complaint are set forward against the tug; the first being that she was badly navigated, but in the true sense of that expression I have no difficulty in finding that such was not the case, for no fault can be found in the matter in which she ap-

1919

PATTERSON, CHANDLER AND STEPHEN, LTD. v. THE "SENATOR JANSEN."

Reasons for Judgment.

proached the bridge or took advantage of the tide to stop her engines and drift through the passage, and in ordinary circumstances all would have gone well. But the second ground of complaint is that it was negligent, in the circumstances of the projecting corner boom stick and set of the tide thereupon, for the master to have gone through the passage with the scow on the port bow of the tug which was next to that corner boom which, it is submitted, obviously created a dangerous situation. It is clear from the evidence of the defence that at the season of the year, with freshets, tugs drifting as here with said tide would expect to hit the sheer-boom, and also that since the solid approach had been broken the tide sets more strongly towards and under the boom sticks; the tug's master says he knows the locality very well, having taken scows through it(the bridge) "a couple of hundred times," and he knew of the change since the damage to the approach "sometime before that" and, "weeks anyway" (as he expresses it), and the position of the temporary booms at the time as set out in Ex. 10, so he was, as he admits, "quite familiar" with the situation and the boom sticks, and their being fastened together by a five-eighths wire.

He thus describes the accident:—

"A. As I was passing through, the corner of the "scow hooked on to his boom stick that was stick-"ing out there.

"Q. Now which boom stick. Look at Exhibit 10, "that photograph, and state which boom stick?

"A. That there one.

"Q. That is the one marked B? A. Yes.

"Q. Well, what part of the scow? A. This point "there.

"Q. Yes. What part of the scow hit the end of "that boom stick? A. The side of her touched it and "went along it as she got to the stern of it, and she "pulled a plank out of the stern, to the boom stick "B. which did the damage.

"Q. Have you looked at it since? A. Yes.

"Q. What kind of end is there on it? A. Square "end, cut off square.

"Q. Cut off square? A. Yes.

"Q. It is not tapered like? A. No.

"Q. Like ordinary piles? A. No."

And again:—

"Q. This boom stick that is marked B always "stuck out like that, did it? A. Sometimes it did and "sometimes it didn't.

"Q. You knew that? A. Yes.

"So that you knew that sometimes—at some times "the end of the boom stick was sticking out like "that? A. Yes.

"Q. Sometimes not much, I suppose, all depending "upon the current? A. Depending upon the way "the current hit it.

"Q. Dependent on what? Speak up. A. Depend-"ing the way the current hit it.

"Q. It might change one way or the other? A. "Yes.

"Q. But at any rate you knew it was quite possible "and probable for that to be out like that? A. Yes."

And

"Q. You could see the boom stick perfectly plain "could you not? A. Yes.

"Q. You saw it? A. Yes sir.

1919

PATTERSON, CHANDLER AND STEPHEN, LTD. v. THE "SENATOR JANSEN."

Reasons for Judgment.

"Q. Saw how it projected out? A. Well, I couldn't "say that it just projected out then. The current "might have dragged it out.

"Q. Well, but you saw at the time? A. Yes.

"Q. How it projected out? A. Yes, it projected "out.

"Q. Did it not strike you at all that if you struck "it on edge it might do you some damage? A. Well, "it might have struck me that way, but I couldn't "very well help touching it.

"Q. You couldn't very well help touching it? A. "Not very well, no, the tide pulls that way.

"Q. And what happened, take this as the stern "board, what happened as I understand you is that "that boom stick B hit that just about there? A. "Yes sir.

"Q. Just where it was nailed on or spiked on to "the sides? A. Yes.

"Q. And the whole weight of the scow and its "cargo and that boat was centred or concentrated "at that point? A. Yes."

He thus describes the corner boom stick B:—

"Q. Yes, but that is a small pile,—a small boom "stick. A. I don't know it is so small, it is anywhere "between—

"Q. Well, the evidence is to that effect. A. Well, "I say it is anywhere between 16 and 22 inches.

"Q. In depth? A. Yes.

"Q. Do you swear to that? A. Yes.

"Q. Did you measure it? A. No, I never measur- "ed it, but I seen it was floating there, it was float- "ing 8 inches out of the water at that time, and "there would be over half of it in the water, that "would make it 16 inches, then you have got to al-

"low for what you lose—the balance that was in the "water, would be about 22 inches.

"Q. Well, the evidence here, by Gregory, I think "it was, that it was a small boom stick. A. Well—

"Q. About like a telephone pole? A. Yes, well a "telephone pole wouldn't hold nothing there.

"Q. Well, but that is the evidence. A. Yes, but I "seen—

"Q. And the only reason you would have for "denying that would be your inference. He has "sworn it. A. I have seen it, seen the end of it "where it was swung in, and I figured it was alto-"gether between 16 to 22 inches.

"Q. 16 to 22 inches? A. Yes.

"Q. Half of it is above the water? A. No, not half "of it is above the water.

"Q. Well, how much was above the water? A. "Well, it is just according to how much it was "waterlogged. It might have been three inches.

"Q. Well I mean at the time you saw it. A. Well, "about six inches."

And he admits that he knew of the opening between the ends of the two boom sticks and gives that as a reason why a fender could not have been used to protect the scow from contact with the projecting stick B. So it really comes to this, that from his own evidence the master of the tug knew of the set of the tide which would inevitably bring the scow against the corner of the boom stick obviously creating a situation of danger, because though he might be fortunate enough to slide by yet the probability of a contact between the end of it and the end of a plank in the scow could not prudently be left out of consideration, despite which he continued on his

1919

PATTERSON, CHANDLER AND STEPHEN, LTD. v. THE "SENATOR JANSEN."

Reasons for Judgment.

course thereby courting danger which might easily have been avoided by the simple expedient of lashing the scow to the other, starboard, side away from the boom where it would be in a perfectly safe position. I am quite unable to see, after a lengthy and careful consideration of the whole matter, how the master can be exonerated from a lack of that degree of negligence which should be used by a reasonably prudent man. I find it indeed, difficult to account for his conduct which, the more one considers the case, appears to be rash. A number of authorities were cited, all of which I have carefully examined, and many others, and these which are of most service are the federal decisions in similar cases in the United States, where the general circumstances of navigation of this class more closely approach those in our country than do those in England. I shall only refer to a few of them which are in point. Thus, in *The T. J. Schuyler v. The Isaac H. Tillyer*,[1] it is said, at p. 478:—

"While the tug did not stipulate for the absolute "safety of the schooner, yet she was bound to meet "such requirements of her service as would enable "her to render it with safety to the schooner. She "must know the depth of the water in the channel; "the obstructions which exist in it, the state of the "tides; the proper time of entering upon her ser- "vice; and, generally, all conditions which are es- "sential to the safe performance of her undertaking. "If she failed in any of these requirements, or in the "exercise of adequate skill or care, she is justly sub- "ject to an imputation of negligence. Was the tug "derelict in any of these respects? She might have

[1] (1889), 41 Fed. Rep. 477

"started when the tide was at a higher stage than it "was when she began her movement up the river, "and thus, with deeper water, have insured the saf- "ety of her tow. When she approached the pier of "the bridge she might and rightly ought to have kept "further away from it, for which there was ample "room, and thus have avoided the risk of collision "with it, or with the obstruction under the surface "of the water." And in the *Westerly*,[1] at p. 940, it "is said:

"The tug had the burden of excusing the failure in "performance of her undertaking to tow the canal "boat safely through a presumably safe and well- "marked channel: *Boston, Cape Cod, etc., Co. v. "Staples, etc., Co.*[2] It would be a sufficient excuse "if the grounding was in fact caused by an obstruc- "tion in the channel over which there was not water "enough for the canal boat, because her master "would have been justified in believing that no such "obstruction was to be found there, but it was for "the tug to show the existence of such an obstruc- "tion, and therefore to show that she had the canal "boat in the middle of the dredged channel when "she grounded, and not outside of it or on its edge."

And in the *Lake Drummond Canal Co. v. John L. Roper Lumber Co.*[3] a very similar case to this, respecting a vessel attached to a tug and passing along the side of a lock and a projecting snag, the Court said, at p. 799:

"It should be remembered, as we have stated, that "the captain of the tug saw, or could have seen, that

[1] (1918), 249 Fed. Rep. 938.
[2] (1917), 246 Fed. Rep. 549, 552, C. C. A.
[3] (1918), 252 Fed. Rep. 796.

1919

PATTERSON, CHANDLER AND STEPHEN, LTD. v. THE "SENATOR JANSEN."

Reasons for Judgment.

"the gate had not fully entered the recess prepared "for it, but that it was jutting out, so as to obstruct "the passage intended for vessels entering the lock. "With this projection staring him in the face, the "captain of the tug did not take the precaution to "stop his engines until after the barge had come in "violent contact with the gate."

And on the question of presumption, in the case of the *Allegheny*[1] it was said, at p. 8:

"This collision could not have occurred without "the fault of some one, and, the lighters being with- "out fault, it follows the fault is presumptively that "of the tug, which was in exclusive control, unless "she has shown the collision was the result of in- "evitable accident, or was caused by some agency "other than the tug or tow. The *W. G. Mason,*[2] and "cases there cited."

Applying the foregoing principles to the facts before me I can only come to the conclusion that a case of negligence has been established against the tug and therefore the plaintiff is entitled to judgment. From the evidence so far adduced on damages, the fair value of the scow would, I think, be $2,000, and the cost of the missing granite and of salving the balance could well be allowed at the sum claimed—$703.75, making a total of $2,703.75, and there is no reason why interest should not be charged from the date of damage at the legal rate, but bearing in mind that it is the established practice of this Court to refer questions of damage to the Registrar, assisted by merchants if necessary, I should be prepared to adopt that course if the defendants wish it, because,

[1] (1918), 252 Fed. Rep. 6.
[2] (1905), 142 Fed. Rep. 915, 74 C. C. A. 83.

1919

PATTERSON, CHANDLER AND STEPHEN, LTD. v. THE "SENATOR JANSEN."

Reasons for Judgment.

relying upon that practice, they may have wished to produce more evidence of the amount of loss than was given before me, although their counsel did not so state. They will be given, therefore, one week within which to apply for a reference if desired.

A question arose as to the unseaworthiness of the scow, but I am satisfied that she was in a fair condition to perform the work undertaken, though it is not strictly necessary to pass upon this point because even if she had been wholly sound the direct consequences of the knocked-off plank could not have been avoided.

Judgment accordingly.

1919
Sept. 20.

APPEAL FROM QUEBEC ADMIRALTY DISTRICT (MONTREAL).

BETWEEN

CANADIAN VICKERS COMPANY, LIMITED,
(PLAINTIFF) APPELLANT;

AND

THE SHIP "SUSQUEHANNA",
(DEFENDANT) RESPONDENT.

Admiralty law — Shipping — Quantum meruit — Overhead charges — Contractor's profits — Cost of construction — Witnesses — Credibility.

The plaintiffs were owners of marine construction works and ship yards and had large capital invested and had large contracts on hand from the Government for the construction of drifters and trawlers for war purposes. The work in question was accepted by the plaintiff only after pressing and urgent request from the defendant, whatever the cost might be, as emergency work and to oblige him, in order that the ship might get out of the river before the close of the navigation. Plaintiffs were obliged to take men off other work and went behind on Government contracts.

Held (varying judgment of the Local Judge in Admiralty) that under all the circumstances of the case, and considering the abnormal state of business and the advanced prices prevailing during the war, 90 per cent. of the cost of labour, as an overhead charge, plus 10 per cent. on the total cost as contractors' profits, were fair and reasonable items to be added to the actual cost of labour and materials, in arriving at the valuation of the work done by plaintiff.

2. That "Cost of Construction" includes, besides actual cost of labour and materials, an allowance for overhead expenses, and a profit on the capital employed in producing an article or doing a piece of work.

3. That where the trial Judge did not hear or see the witnesses, an appellant Court is as competent to appreciate the facts and estimate the credibility of the evidence as the Court of first instance.

APPEAL from the decision of the Honourable Mr. Justice Maclennan, L. J. A. at Montreal, Quebec Admiralty District.[1]

[1] Reported. 18 Can. Ex. C. R. 210, 44 D. L. R. 716.

1919

CANADIAN VICKERS, LTD. v. S.S. "SUSQUEHANNA."

The action *quantum meruit*, was taken by plaintiffs to recover from defendant the sum of $52,983.34 for work done in repairing the S.S. "Susquehanna." The defendant admitted its liability but claimed that the amount asked was excessive and that too much was charged for overhead expenses and offered the sum of $35,000 in full settlement.

On December 4, 1917, the case was referred to the Deputy District Registrar, who heard the witnesses and their counsel and on October 5, 1918, filed his report allowing plaintiffs' claim in full.

The case was then heard by the Honourable Mr. Justice Maclennan, at Montreal, on a motion of defendant to vary the report of the Deputy District Registrar, and on November 23, 1918, the said Judge delivered judgment declaring the offer and tender of $35,000 sufficient and condemning the defendant to pay this amount.

Appeal was then taken from this judgment to this Court sitting in appeal and the appeal was heard at Montreal before the Honourable Mr. Justice Audette, on May 20, 1919.

F. H. Markey, K.C. for appellant.

A. R. Holden, K.C. for respondent.

The facts are stated in the reasons for judgment of the Honourable Mr. Justice Audette.

AUDETTE, J. (September 20, 1919) delivered judgment.

This is an appeal from the judgment of the Deputy Local Judge of the Quebec Admiralty Dis-

1919

CANADIAN VICKERS, LTD. v. S.S. "SUSQUEHANNA."

Reasons for Judgment.

trict, sitting at Montreal, pronounced on November 23, 1918.

The facts concerning the case having already been set forth in the judgment below, it will be sufficient, for the understanding of the matter in controversy, to state briefly that the "Susquehanna," on account of her size, having been cut in two sections at Buffalo, N.Y., with the object of taking her down the St. Lawrence through the Canal, the owners of the vessel approached the plaintiff company, at Montreal, to repair and join her together.

The plaintiff company was at that time overloaded with work at their shipyard, and the negotiation for the repairs, leading to the present suit, originated in the following manner, there being no contract for the same. These negotiations were carried on by Mr. Auditore, on behalf of the vessel, and Mr. Miller on behalf of the company. The former was not heard as a witness, but Mr. Miller was, and I see no reason to question the reliability of his evidence, as was done below. Moreover, it must be said here that the learned trial Judge who pronounced below, was absolutely in no better position than I am to estimate the credibility of the evidence, because it was taken before the Registrar, and the learned Judge did not have the advantage of seeing the witnesses and in this way have an opportunity of determining the weight to be attached to the evidence by their demeanour while under his personal observation.

Now Mr. Miller says that, after the exchange of correspondence, Mr. Auditore, in July, 1917, came to his office and asked that the company should dock

1919

CANADIAN VICKERS, LTD. v. S.S. "SUSQUEHANNA."

Reasons for Judgment.

the two portions of his vessel, and he then quoted a price for joining the vessel together, but exclusive of all other work. He further stated that this could only be done provided the dock was not required for other important work, such as repairs to transports or repairs to ocean-going freighters, equivalent to freighters, practically ships over which the Government had control. Mr. Auditore understood this and brought his ship to Montreal, and when she arrived the dock was occupied by the S.S. "Singapore," a large ocean freighter. The consequence was he could not dock his vessel, and then Mr. Auditore said: "What can I do? Can you carry out "the other work, such as engine room repairs, and "deck repairs and miscellaneous work, such as he "had a list prepared. We declined. We not only "declined several times, but declined in writing. "(p. 7). We declined and I said we could not under-"take the work, owing to scarcity of men and so on. "Mr. Auditore begged us to do something for him "to get his ship out of *the river before the close of "navigation.* I then called up Quebec—the dry-"dock ,and endeavored to get them to undertake the "work and finally they succeeded, and the ship was "docked at Quebec to be joined together. . . . Be-"fore she left our works for Quebec, and before we "undertook any work on her at all Mr. Auditore met "me at the Grand Trunk Station in Montreal and we "met Mr. French, Chief Surveyor of Lloyds Regis-"ter in New York, and Mr. Auditore explained to Mr "French we had refused to do any work on the ship "on account of the scarcity of men, and Mr. French "said: 'Mr. Miller, look here, you have to do some-

1919

CANADIAN VICKERS, LTD. v. S.S. "SUSQUEHANNA."

Reasons for Judgment.

"thing to help him out. He has had one trouble "after another with this ship. Here he is in Mont- "real with every likelihood of his ship being frozen "up for the winter.' I told Mr. French I would look "into the matter and I told Mr. Auditore I would let "him know in a day or two what I could do, and the "result of all these *pourparlers* was the letter, Ex- "hibit P. 1, which reads as follows:

July 12, 1917.

"Frank Auditore, Esq.,
"Windsor Hotel,
"Montreal, Que.

"Dear Mr. Auditore:

"Mr. Cameron has been thoroughly through the "'Susquehanna' and finds it absolutely impossible, "in the incomplete state in which the various items "are, to figure a definite price. He estimates, and "judging by the description, I think he is correct, "that this work will cost in the vicinity of $35,000, "apart from joining together.

"We are prepared to quote you a firm price for "joining together of $22,000, including dock dues, "but not including any repairs to damage done in "coming through the canal.

"We would, however, much prefer that you take "the ship to New York for completion, as I am fully "confident that, notwithstanding the condition of the "yards in New York, you are more likely to get a "quicker job from your friend Mr. Todd than from "us, as we cannot possibly afford to draw a large "number of men off present work.

"We will be glad to let you know as soon as we "ascertain the extent of the damage to the 'Singa-"pore' when your ship can get on the dock.'

"I am sorry we cannot quote you a firm price, but "you will understand the conditions.

"Yours faithfully,

(Sgd.) B. L. MILLER."

Now this letter shows the works were accepted under pressure and to oblige the defendant, as the company could not possibly afford to draw a large number of men off present work, and lest too much importance is attached to these figures of $35,000, which were afterwards offered in settlement by the defendant, it is, in fairness, well to bear in mind that while that estimate is made with the qualification that "Mr. Cameron has been thoroughly through "the 'Susquehanna' and finds it absolutely impos-"sible, in the incomplete state in which the "various items are, to figure a definite price," and with the further hereinafter mentioned statement about the number of items covered at the time.

Mr. Miller at p. 104 of his evidence adds "that Mr. "Auditore, at that time, said: 'Mr. Miller, for good-"ness sake put your men on, and go on with the "work. I don't care what it costs, but get my ship "out of the river before the river freezes.'" The work was done and the ship taken down to Quebec to be put together.

Then at pp. 98 and 99, of the evidence, Mr. Miller says that when this estimate of $35,000 was made,

1919

CANADIAN VICKERS, LTD. v. S.S. "SUSQUEHANNA."

Reasons for Judgment.

as above mentioned, the list of the repairs only contained 65 items,—plus about 7 or 8 more on which work was not done—the actual numbers completed being sixty-five on the first list, to which in August were added 122 more items of repairs making this figure of $35,000, obviously inadequate.

Captain Barlow in the course of the work also signed three emergency orders (p. 220 and 221) for extras of the list on hand at the works.

The number of men employed on these repairs from July 9 to August 14, as shown in Exhibit R. 4, was 2 on the first day, increasing during the first week to 73, the second week to 200, the third week to the highest total, of 271, and subsequently dropping to 82 on the last day.

A number of men were taken off from some other important works in the yard, the construction of which involved $1,000,000, and as a result the plaintiffs went behind on their contracts for Drifters and Trawlers, and Mr. Miller further contends that every repair in the yard was interfered with by yielding to the defendant and accepting his work under pressure.

The only question now to be determined, the defendants having accepted and taken over the works, is what is the fair and reasonable value, the market value, so to speak of the said works *under the circumstances*. The defendant having accepted and taken over the works, stands in the position of a person who employs another to do work for him without any agreement as to his compensation, and in such a case the law implies a promise from the em-

ployer to the workman that he will pay him for his services as much as he may deserve or merit—*quantum meruit.*

What can be done in the absence of actual evidence of the fair cost and value of each item of work mentioned in this famous statement of these 65 plus 122 items? Under such circumstances nothing else is left but to take the figures given—which have not been controverted by any evidence, with respect to labour and material,—and consider whether the overhead and profit charges are right and fair. The defendants admit liability for the work done, and materials supplied, but contest the amount claimed.

The defendants have really thrown themselves at the mercy of the plaintiffs with the object of having their work done promptly to enable them to get out of the St. Lawrence before the freezing of the river, and carry on the profitable business of freighting during the war. And the plaintiffs would probably do that work in much less time than any other firm. No price being mentioned, the builder is entitled to the fair and reasonable value of his work, and the materials supplied.

"Such reasonable price must include payment for "skill, supervision and services of contractor him-"self." Hudson, 4th Ed. 476.

The amount claimed by the plaintiffs is the sum of $53,190.00, and the account rendered, filed as Exhibit p. 2, reads, as follows:

1919

CANADIAN VICKERS, LTD. v. S.S. "SUSQUEHANNA."

Reasons for Judgment.

"Naval Construction Works,
"Maisonneuve,
"Montreal, P. Q., Dec. 3, 1917.

"Mr. Frank Auditore,
"44 Sackett Street,
"Brooklyn, N.Y.,

"Bought of Canadian Vickers Limited.

"To joining together S.S. "Susquehanna" as per "statement attached:

"Material from stock	$5,517.57		
"Material purchased.	829.98	6,347.55	
"Handling charges 5 per cent.		317.88	6,665.43
"Labour		14,905.73	
"Overhead factor 90 per cent. on labour		13,415.16	
			28,320.89
			34,986.32
"Profit, etc.			16,554.89
			51,541.21
"Tug services as per copy invoices attached			2,000.00
"			$53,541.21

The items with respect to the material, handling charges and labour, while not admitted are not contested. The contestation centres on the two items

of overhead factor at 90 per cent. on labour and the rate of profit.

The defendant, as we have seen, was very anxious to get the work done as expeditiously as possible, with the object of using his vessel, the freight rates being then very high on account of the war—and on the other hand, the cost of ship building and repairs had again, on account of the war, increased to abnormal figures.

I think I may state that both parties will agree as to the principle that both overhead and profit charges are properly allowable in such a case as this; and that controversy arises only as to the respective rates of such charges. The percentage of overhead made in this case refers to works of the yard outside of the floating dock, and the shell shop operations. It is the percentage that overhead bears to productive labour. Having said so much it becomes unnecessary to go into the question of "overhead" beyond saying that "overhead" is part of the actual costs (Evd. p. 233). "Overhead" takes care of the general expenses of the business, not coming under the head of material and labour, but such expenses as cannot be charged up to any one job, and have to be apportioned over the whole business of the firm. So that "overhead," if properly ascertained, is just as much actual costs as the other items.

Mr. Fawcett, in his "*Manual on Political Economy,*"[1] lays down that: "The term 'cost of production,' includes not simply the cost of material and "the wages of labour, but also the ordinary profit "upon the capital employed in producing the particular commodity."

[1] 8th Edition, p. 351.

1919

CANADIAN VICKERS, LTD. v. S.S. "SUSQUEHANNA.

Reasons for Judgment.

After taking into consideration all the circumstances of the case, the abnormal state of the business during the war followed by advanced prices, and moreover weighing the conflicting evidence upon the subject—inclusive of the view cited from the authorities,—to the list of which I might add "Cost of Accounting," Nicholson & Rohrback,—I have come to the conclusion not to interfere with the overhead charge. It is of common and general knowledge that during the war the Government of Canada entered into contracts allowing over 90 per cent. on overhead charges, but with only 10 per cent. profit.

Coming to the question of profit, I must say I am entirely at variance with any conception that could, under the present circumstances, justify a profit of 47 3-10 per cent. as charged. What reason is there to depart from the usual rate of profit under contractual works, I fail to see. Some evidence upon this question is furnished by witnesses who have no idea, as appears upon the face of their testimony—of our Canadian climatic conditions, if it has any bearing upon the question.

"Although the average profits realized in dif-"ferent trades may greatly and permanently differ, "yet there is a certain rate of profit belonging to "each trade. Such a rate indicates a point of "equilibrium about which the average profits of the "trade may be considered to oscillate. And the "competition of capital is an agency which is ever "at work to restore the average rate of profit to the "position of equilibrium whenever disturbed from "it." Fawcett,—*Manual of Political Economy,* p. 349.

A good normal profit under the circumstances would be between 10 per cent. and 15 per cent., but in view of the large overhead charges allowed, I have come to the conclusion that 10 per cent. will reasonably and justly compensate the plaintiff.

The item of $2,000 for towage is a disbursement made by the plaintiff at the request of the defendant, and should be allowed in full.

The plaintiff is therefore entitled to recover from the defendant the sum of $40,484.95, arrived at in the following manner:

"Material from stock ..	$ 5,517.57	
"Material purchased	829.98	6,347.55
"Handling charges 5 per		
" cent. (Dubitante, but		
" de minimis)		317.88
"Labour	$14,905.73	
"Overhead factor 90 per		
" cent. on labour	13,415.16	28,320.89
"		$34,986.32
"10 per cent. profit		3,498.63
"		$38,484.95
"Tug services		2,000.00
"		$40,484.95

The appeal is allowed, with all costs.

Solicitors for plaintiff: *Markey, Skinner and Hyde.*

Solicitors for respondent: *Meredith, Holden, Hague, Shaughnessy and Heward.*

1919
August 21.

BRITISH COLUMBIA ADMIRALTY DISTRICT

CLAYOQUOT SOUND CANNING COMPANY, LIMITED, et al,

PLAINTIFFS;

v.

S.S. "PRINCESS ADELAIDE,"

DEFENDANT.

Towage—Apprehended risk of danger—Nature of services.

On October 13, 1918, in the afternoon, the *"Princess Adelaide"* ran aground on a reef on her trip from Vancouver to Victoria in a dense fog. There were on board 310 passengers besides mail and baggage. She was listing considerably to starboard with danger of sliding off and had wired for help, including the salvage steamer "Tees". There is always danger at this place of an unfavourable wind springing up. The "Iskum" with little danger to herself agreed to and did transfer all passengers, mail and baggage to a sister ship which had been called to the place of the accident.

Held.—1. That where there is apprehension of risk, or danger, to the ship, though no immediate risk or danger, the services voluntarily rendered such ship are in the nature of salvage services.

2. That though danger to the salving vessel is an ingredient of such services, it is not always necessarily present, and is not essential. *"The Andrew Kelly"* v. *"The Commodore"*, (1919), *p.* 70, ante referred to, (48 D. L. R. 213).

3. That the degree of danger to life and property of the salvors and the greater or lesser number of ingredients of salvage services found to be present are elements to be considered in arriving at the measure of compensation.

THIS is an action for salvage services rendered by plaintiffs' schooner "Iskum" to the defendant. The case was tried before the Honourable Mr. Justice Martin at Victoria, B.C., on June 25, 1919.

The facts of the case are stated in the reasons for judgment delivered by trial Judge.

H. Beckwith, K.C., for plaintiffs.

James E. McMullen, K.C., for defendant.

1919

CLAYOQUOT SOUND CANNING CO., LTD. v. S.S. "PRINCESS ADELAIDE."

Reasons for Judgment.

MARTIN, L. J. A., (August 21, 1919) delivered judgment.

This is an action for alleged salvage services rendered by the plaintiffs' auxiliary gasoline schooner "Iskum" (registered tons 42.44; length 68 ft., 6 inches) to the defendant ship "Princess Adelaide" (registered tons 1,910; length 290 ft.) on October 13, 1918, at the northern entrance to Active Pass, where the "Princess Adelaide" had run aground on a reef near the lighthouse at Georgina point in a dense fog. For the purpose of this case the fair value of the "Iskum" may be taken to be $17,000 and her cargo of salmon cans $1,130; and of the "Princess Adelaide," $360,000. The services rendered consisting in transferring 310 passengers and their baggage and 61 bags of mail from the "Princess Adelaide," when aground, to the steamer, "Princess Alice" during the fog. The "Iskum," like the "Adelaide," on her way from Vancouver to Victoria, sighted the "Adelaide" about 3.20 p.m. slightly on her port bow in the fog and went on into the Pass to determine her position and then returned to her in about half an hour, at which time it was arranged between the masters of the two vessels that the "Iskum" was to transfer the passengers, baggage and mail to the "Princess Alice," which had been summoned by the following wireless from the "Adelaide's" master to her owners at Victoria:

> "Ashore at Georgina Point at top of high "water, 12 feet of water on main reef amid- "ships. Fuel oil tank leaking. Send boat for "passengers."

and was expected to arrive in about a couple of

1919

CLAYOQUOT SOUND CANNING CO., LTD. v. S.S. "PRINCESS ADELAIDE."

Reasons for Judgment.

hours, depending upon the fog, and she did arrive about five o'clock, and anchored out in the channel about three cables from the "Adelaide." In the interval the "Iskum" had come alongside the "Adelaide" and was taking the baggage on board when the "Alice" arrived, and in the course of four trips between the two vessels she transferred all the passengers, baggage and mail as aforesaid, to the "Alice," and left for Victoria at 7.30 p.m. The "Iskum's" master, S. B. Wells, says that during the operation of transferring the baggage, which came first, he could see two vessels, but when it came to the passengers the fog was so thick that he could only see the vessels occasionally and never clearly, and in this he is confirmed by his mate, Larsen, while the master of the "Adelaide," R. B. Hunter, says that he saw the "Alice" during the whole of that time. I have no reason to believe there is here any intentional misstatement, but I think the difference in view may be explained from the very much greater height of the bridge of the "Adelaide," from which objects might be more clearly seen than from the lower elevation of the "Iskum."

The position and condition of the "Adelaide," and state of weather and tide, as they appeared to her master on the day of the "Iskum's" services may best be gathered from the following wireless messages he sent that day to her owners:—

1. "310 passengers. No small steamers. Will have "to transfer with boats large amounts of baggage. "When will Tees be up? Fuel all spoiled, only one

"tank, which won't last long. Weather calm, thick "fog. When will 'Alice' arrive?

"HUNTER."

(The Tees was a special salving steamer).

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2. "Schooner 'Iskum' arrived alongside. Will "take passengers and baggage to 'Alice.' Will "have to make three trips. Will take too long to go "to Mayne Island wharf. 'Alice' will be here in "about half an hour."

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3. "Star-side bow 30-feet sloping to 27-feet at "gangway door. Still shoaling to 14 feet at after "gangway doors. Forward end of dining-room 12 "feet deepening to 15 feet under steam. Port side "30 feet at stem shoaling to 20 feet at forward "gangway doors, gradually shoaling to 9 feet at "after gangway carrying 12 feet right aft, ship's "head S.S.W., lighthouse right abreast the stern."

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4. "No. 2 oil tank full of water. (Salt).
"No. 3 " " (port) full of water.
"No. 3 " " (starb) leaking slightly, able to use oil.
"No. 4 " " (port) full of water.
"No. 4 " " (starb) leaking slightly.
"No. 5 " " full of water, bilges dry, also tunnel."

At the time of the arrival of the "Iskum" arrangements were in progress to transfer the passengers to the Adelaide's boats by means of a special gangway and thence to the island shore within a distance of 100 ft., but these were discontinued. It would also have been possible, if nothing inter-

1919

CLAYOQUOT SOUND CANNING CO., LTD. v. S.S. "PRINCESS ADELAIDE."

Reasons for Judgment.

vened, caused by accident, weather, or atmosphere, to transfer by rowboats the passengers, baggage and mails to the "Alice," but it would have taken several hours (being at best a cumbrous process) not less than four, I am inclined to think, beginning at five p.m. and soon extending into darkness, whereas the "Iskum," which lay alongside from 3.30 to 5 p.m. when she made her first trip to the "Alice," had finished the transfer in time to leave for Victoria at 7.30 as aforesaid. I am clearly of the opinion that it would have been inexcusable in the circumstance if the master of the "Adelaide" had failed to avail himself of the first opportunity to transfer so large a number of passengers, because, as Dr. Lushington said in *The Thomas Fielden*[1], the paramount consideration is risk to human life, thus expressing it:—

Page 62. "Is it possible to contend for a moment "that the property was not in very great danger, "and that, to a certain extent, at a certain period, "there was risk to human life, and that to the ex- "tent of nineteen men at least? The time is of no "consequence. I have ever held the opinion that, "when once I can come to the conviction that human "life has been at stake, even for a short time, it is "the duty of the Court amply to reward the persons "concerned; and for obvious and plain reasons— "first, because from the necessity of the case, a very "great reward should be given wherever there has "been a sacrifice of human life; and, secondly, that "human life is above all other considerations, and "ought never to be exposed to unnecessary hazard "and risk. These are the principles."

1 (1862), 32 L. J. 61.

And the same learned Judge said in the same case, p. 62.

"Now, of course, according to ordinary principles, "all these matters are governed by general rules; "and it is utterly impossible to go minutely into "each individual case and each particular point; "and it never is a satisfactory investigation, take "what pains you will, for it always will be that which "Lord Stowell used to call it, a *rusticum judicum*."

And so for these reasons I shall refrain from examining further in unnecessary detail all the facts which it is necessary to consider which make up what Dr. Lushington called in the *Charlotte*:[1]

"The many and diverse ingredients of a salvage service," which will be found classified in Lord Justice Kennedy on Salvage, 2nd edition, p. 133, at the end of which classification that learned author says:—

"Where all or many of these elements are found "to exist, or some of them are found to exist in a "high degree, a large reward is given: where few "of them are found, or they are present only in a "low degree, the salvage remuneration awarded is "comparatively small."

In the article on Salvage,[2] written by Lord Justice Kennedy and others, it is said:—

"Salvage service in the present sense is that ser- "vice which saves or contributes to the ultimate "safety of a vessel, her apparel, cargo, or wreck, or "to the lives of persons belonging to a vessel when "in danger at sea, or in tidal waters, or on the shore "of the sea or tidal waters, provided that such ser-

[1] (1848), 3, Wm. Rob. 68.
[2] 26 Hals. (1914), p. 557.

1919

CLAYOQUOT SOUND CANNING CO., LTD. v. S.S. "PRINCESS ADELAIDE."

Reasons for Judgment.

"vice is rendered voluntarily and not in the per-"formance of any legal or official duty or merely in "the interests of self-preservation."

And in the said book of the same learned author, *Kennedy, on Salvage,* p. 18, it is said:—

"Two things at least are essential to the constitu-"tion of a salvage service. There must, in the first "place, be danger to the subject of the service. In "the second place, the undertaking of the service "must be a voluntary act on the part of the salvor."

The principal facts in favour of a salvage award "that stand out in the case at bar are:—The strand-ing of the steamer; her appreciable list to starboard, and in such a position that the apprehension, as it then appeared, of her sliding off to her own peril and that help of the "Iskum" could, though slight, not be wholly ignored; the existence of a fog; the large number of passengers; and the uncertainty of an unfavourable wind springing up at any time at that season of the year. It is admitted that the "Iskum" stood alongside and placed herself at the disposal of the "Adelaide" for the purpose of trans-ferring her passengers, baggage, and mails from 3.30 till 7.30 p.m., when that service was completed. Many cases were cited to me but none of them as is to be expected in these varying occurrences of the sea, is what might be termed close to the one at bar. On the general principle of salvage it was said in *The Phantom*[1] by Dr. Lushington, at p. 60:—

"I am of opinion that it is not necessary there "should be absolute danger in order to constitute "a salvage service; it is sufficient if there is a state

[1] (1866), 1, L. R. A. and E. 58.

"of difficulty, and reasonable apprehension. There "might be danger of further difficulty occurring, "and I think it is proved in this case, from the facts "to which I have adverted, that it was a matter of "importance for the vessel to be moved—that she "was, while she lay where she did, in reasonable ap- "prehension of danger, and that reasonable appre- "hension was fulfilled by the accident that oc- "curred."

And in *The Ella Constance*[1] Dr. Lushington also said, at p. 193:—

"It is a case in which there was no immediate "risk, no immediate danger, but there was a possible "contingency that serious consequences might have "ensued."

The subject has lately been considered by Mr. Justice Bucknill in the *Suevic*[2] wherein he says at p. 157:—

"Cases of life salvage alone are of rare occur- "rence in this Court, and therefore it is necessary "carefully to consider the principles upon which a "salvage award may be made in such a case as this. "I apprehend that it will be accurate to say that the "principle which lies at the bottom of life salvage is "that there must, in the first instance, be actual "danger to the persons whose lives have been salv- "ed, or the apprehension of danger, and that seems "to me to cover the whole ground. If there is no "danger, or anything like danger, there is nothing "to be saved from."

[1] (1864), 33, L. J. 191.
[2] [1908], P. 154.

1919

CLAYOQUOT SOUND CANNING CO., LTD. v. S.S. "PRINCESS ADELAIDE."

Reasons for Judgment.

And at p. 158:—

"Now, the weather being, as I find it to have "been, foggy or misty, so that the light could not be "seen, but only the loom of it in the water, and the "wind of force about six, as I find, with a ground "swell, these people very properly, as the master of "the *Suevic* thought, had to be landed with the "greatest expedition.

"If anything had happened and any life had been "lost through these people not being sent ashore as "quickly as possible, very severe and harsh things "would have been spoken of the master and of the "great company he serves, and one may be satisfied "that the master duly appreciated the position."

And at p. 159:—

"People are fond, sometimes, of using the word "danger" only, but there is a great difference be- "tween danger and risk of danger; and just as the "principle of salvage here applies to people on this "ship who were either in danger or risk of danger, "so a tug which is being navigated even by the most "skilful navigator would be, I find, either in danger "or risk of danger in going to the neighborhood in "which this ship was."

I find myself quite unable to say that there was not here that apprehension or risk of danger which constitutes salvage. The subject has been considered by me many times in this Court and a case which bears some relation to this one is the *Grand Trunk Pacific Coast S.S. Co. v. The "B.B."*,[1] wherein I held there was "an element of appreciable risk"; and see also my recent decision in *The "Andrew*

[1] (1914), 15 Can. Ex. C. R. 389, 17 D. L. R. 757, Mayers Adm. Law (1916), p. 544.

Kelly" v. The "Commodore."[1] Some stress was laid in argument upon the fact that the "Iskum" was not in danger, but while that is one of the "many and diverse ingredients" of salvage, yet it is not an essential thereof — of the *"Ellora"*;[2] *the "Altair"*[3] and the *"Toscana."*[4]

Viewing then the service here as salvage, I have to award the same and after full consideration of the circumstances I am of the opinion that the sum of $1,000 is the proper award to make, and in so doing I bear in mind what was said by the Admiralty Court in the *London Merchant.*[5]

"A great steam navigation company is peculiarly "bound to encourage salvage assistance; they owe "it to the public; they are particularly engaged in "carrying the passengers; they are large contract-"ors for carrying the mail."

Here it must be remembered, not only the passengers but their baggage, and the mail were transferred expeditiously to a place of safety, the baggage being so much that the mate of the "Iskum" says it was stacked up forward so high that he could not see over the bow from the wheelhouse. The apportionment of this award will be on the principle cited in the case of the *"Andrew Kelly," supra* and I shall give further directions in regard thereto when the Registrar is furnished with particulars of the complement of the "Iskum's" crew.

There will be judgment accordingly for the plaintiff for $1,000 and the costs follow the event.

Judgment accordingly.

[1] (1919), 19 Can. Ex. C. R. 70, 48 D. L. R. 213.
[2] (1862), Lush, 550.
[3] [1897], P. 105.
[4] [1905], P. 148.
[5] (1837), 3 Hagg. 394 at 400.

June 13.
1911

QUEBEC ADMIRALTY DISTRICT.

THE CANADIAN PACIFIC RAILWAY COMPANY,

PLAINTIFF;

v.

THE STEAMSHIP "KRONPRINZ OLAV,"

DEFENDANT.

AND

JOHAN BRYDE,

PLAINTIFF;

v.

THE STEAMSHIP "MONTCALM,"

DEFENDANT.

Damages—Collision—Regulations 19, 21, *and* 27 *International Rules of Road—Common Fault—Negligence.*

On September 24, 1910, at about 4 o'clock a.m. the "Kronprinz Olav" and the "Montcalm" came into collision in a narrow channel in the St. Lawrence River at a point some 50 miles below Quebec. The night was clear and the weather fine with a light northerly wind, and the vessels sighted each other when about 6 to 9 miles apart. Both ships carried all regulation lights.

The "Kronprinz Olav", outward bound, kept to her side of the channel for a time, but shortly before the collision she starboarded her helm and threw herself across the channel. She failed to give right of way to the "Montcalm" and placed herself across her bows, at the same time giving two blasts, for cross signal. The "Montcalm" was then to her starboard side and she (Kronprinz Olav) kept full speed ahead until the collision. She was struck on starboard side abaft the bridge. She took none of the precautions required by ordinary practice of seamen and did not have sufficient competent officers on duty and failed to stand by after collision.

The "Montcalm" was coming up the river with a young tide and when about 3 miles away gave a one-blast signal, indicating she would keep to her starboard side. For a short time she necessarily showed her green light, owing to a curve in the channel, but kept on her side until within 3 minutes of collision, when the other gave her second cross signal, she was skilfully navigated and all her move-

ments were proper, but she failed to reverse her engines in time and the collision was contributed to by her negligent navigation immediately prior to the accident, and the fact of her not reversing engines in due time. She reversed her engines about one minute and a half after the cross signal, and about same time before collision.

Held,—That as both vessels were guilty of negligence they were at fault, and both were equally responsible for the accident.

Reporter's Note.—There was an appeal and cross appeal to the Supreme Court of Canada which affirmed the judgment of Dunlop, J. The "Montcalm" appealed to the Privy Council and, on August 1, 1913, judgment was delivered, exonerating her from all blame, and reversing the judgment of the Supreme Court, and confirming the dissentient opinion of Sir Louis Davies in the said Supreme Court.

The judgment of the Privy Council is reported at 14 D. L. R. 46, but it is thought advisable to have it printed here to complete the report. (see post p. 156).

THE Canadian Pacific Railway Company, owners of the "Montcalm," took action against the "Kronprinz Olav" for damage to its ship, in collision with the latter, and the owners of the "Kronprinz Olav" also took action against the steamship "Montcalm" for damages it suffered in the same collision.

The actions were consolidated and tried as one on February 16 and 17, 1911.

F. E. Meredith, K.C., and *A. R. Holden,* K.C., for the steamship "Montcalm" and its owners.

H. Mellish, K.C., and *R. O. McMurtry,* K.C., for the steamship "Kronprinz Olav" and its owners.

The owners of the "Kronprinz Olav," in their pleadings, allege in substance as follows:

(1) That he has suffered damage by reason of a collision between his steamship the "Kronprinz Olav" and the defendant steamship "Montcalm," which was solely caused by the negligent navigation of the "Montcalm"; (2) that about 3.40 a.m. on September 24, 1910, the "Kronprinz Olav" was pro-

1911

CANADIAN PACIFIC R. CO. v. S.S. "KRONPRINZ OLAV."

JOHAN BRYDE v. S.S. "MONTCALM."

ceeding down the St. Lawrence River below the Stone Pillar light; the weather was fine, clear moonlight and wind light northerly; the tide about 1½ miles per hour flood. She was proceeding on a course north-east by compass—variation ¼ point west at a speed of 11½ knots, about midchannel, in the river, exhibiting the regulation masthead and side-lights for a steamer underway and keeping a good look-out; (3) under these circumstances those on board observed the mast head light and the green light of a steamship, which proved to be the "Montcalm" coming up the river diagonally 4 or 5 miles distant and a little on the port bow of the "Kronprinz Olav," whose course was thereupon changed half a point to starboard so as to bring her on the starboard side of the river channel: Notwithstanding this, the "Montcalm" continued showing her green light, and not exhibiting her red light for about 8 or 9 minutes, and crossed the bow of the "Kronprinz Olav" and came over to her own port side; to avoid an otherwise inevitable collision, the "Kronprinz Olav" then altered her course to port, indicating the same by two short blasts on her whistle at the same time, the "Montcalm" altered her course to starboard, without giving at the time any signal, and followed the "Kronprinz Olav" up under a port helm, and coming on at great speed, struck the "Kronprinz Olav" on her starboard side with the port side of the stern and port bow of the "Montcalm," thereby doing the "Kronprinz Olav" great damage; (4) the "Montcalm" improperly failed to keep to the starboard side of the midchannel and improperly failed to pass the "Kronprinz Olav" port side to port side; (5) the "Montcalm"

1911

CANADIAN PACIFIC R. CO. v. S.S. "KRONPRINZ OLAV."

JOHAN BRYDE v. S.S. "MONTCALM."

wrongfully crossed the bow of the "Kronprinz Olav"; (6) and thereafter wrongfully ported and came to starboard; (7) a good lookout was not kept on board the "Montcalm"; (8) and she wrongfully failed to indicate the change of her course to starboard by her whistle and (9) improperly failed to slacken her speed or stop or reverse her engines or to do so in due time; (10) the said collision was occasioned by or contributed to by the negligent navigation of the "Montcalm" and they claim (1) judgment against defendant and her bail for damages occasioned by reason of said collision and costs; (2) a reference to the Registrar assisted by merchants to assess the amount of said damages;

The owners of the "Montcalm" in their action in one case, and defence in the other, allege in substance, as follows:—

(1) That at about 3.55 o'clock a.m., on September 24, 1910, the steamship "Montcalm" of which plaintiff was and is owner, whilst on a voyage up the river St. Lawrence, was at about 50 miles below the City of Quebec; (2) she had her masthead light and optional additional white light, as well as her green and red starboard and port lights, all burning brightly, and a good lookout was being kept; (3) the wind at the time was a moderate north-west breeze and the weather was cloudy, but clear and fine, while the tide as at "young flood," running with the S.S. "Montcalm"; (4) she was proceeding up the winding river channel at about 11 knots, through the reach between the Upper Traverse Lighthouse and the Channel Patch Buoy, when she saw the white light of a vessel which turned out to be the "Kronprinz Olav" in the reach between the Stone Pillar

1911

CANADIAN PACIFIC R. CO. v. S.S. "KRONPRINZ OLAV."

JOHAN BRYDE v. S.S. "MONTCALM."

and the Channel Patch Buoy, which was apparently about 4 miles away and on her way down the river; and the red light also became visible soon after; (5) the lights of the "Kronprinz Olav" were first seen about a point on the "Montcalm's" starboard bow, as was to be expected owing to the bend in the river channel at the Channel Patch Buoy and the consequent angle between the directions of the respective courses of the two vessels as they approached that buoy on different sides; (6) as the two ships approached each other in their respective reaches of the river channel after their lights became visible to each other, the "Montcalm" necessarily showed her green light to the "Kronprinz Olav" and the latter her red light to the "Montcalm" owing to the nature of the winding channel in that part of the river. As soon as the "Montcalm" got far enough along her reach of the channel to enable her to show her red light to the "Kronprinz Olav," the "Montcalm" did so by porting her helm and at the same time gave one short blast on her whistle. This brought the "Kronprinz Olav's" red light about ¾ of a point on the "Montcalm's" port bow, as the two ships were getting nearer the Channel Patch Buoy from above and below respectively. The "Kronprinz Olav" had been continually showing her red light, but shortly after this her green light suddenly appeared to those on board the "Montcalm" and her red light was shut out at the same time; and then the "Kronprinz Olav" blew two short blasts on her whistle. The "Montcalm" then repeated her one-blast signal and her helm was put hard-a-port, but the "Kronprinz Olav" again answered by two blasts and kept her helm hard-a-starboard. The

"Montcalm" repeated her one-blast signal again, which was again answered by two blasts from the "Kronprinz Olav," which came right on, chasing the "Montcalm" out of the channel to the northward: the "Montcalm's" engines were at once put full speed astern, but the "Kronprinz Olav" came on at full speed across the "Montcalm's" bow and struck her a severe blow. The "Montcalm" then signalled by Morse lamp to see if the other ship needed assistance, but got no answer; and her master also hailed the "Kronprinz Olav" twice through the megaphone for the same purpose, but the latter went back to Quebec without answering; (7) the collision occurred some distance to the north of the Channel Patch Buoy, the starboard side of the "Kronprinz Olav" near the foremast striking the "Montcalm's stern, knocking it over from port to starboard and breaking the stem-bar; and the "Kronprinz Olav" then swung in and her starboard quarter injured the "Montcalm" amidships; (8) the "Kronprinz Olav" did not keep to her own side of the channel; (9) improperly cut across the "Montcalm's bows; (10) improperly starboarded her helm when the ships were getting nearer together; (11) did not follow the proper course in the river channel and ignored its requirements as the vessels were approaching each other; (12) improperly refused and neglected to give the "Montcalm" the right of way as the latter came up with the tide; (13) did not observe and obey the "Montcalm's" one-blast signal, but improperly replied with a cross signal of two blasts; (14) did not stop and reverse in sufficient time, or at all; (15) did not have due regard to the local conditions and to the special circumstances due

1911

CANADIAN PACIFIC R. CO. v. S.S. "KRONPRINZ OLAV."

JOHAN BRYDE v. S.S. "MONTCALM."

to the narrow, winding channel; (16) did not keep a proper lookout; (17) neglected the precautions required by the ordinary practice of seamen under the circumstances and disobeyed the International Rules of the Road applicable; (18) did not have sufficient or competent officers on duty; (19) nor sufficient or competent watch on duty; (20) that the collision and the damages and losses consequent thereon were occasioned by the negligent and improper navigation of those on board the "Kronprinz Olav"; and (21) plaintiff claims; (1) a declaration that it is entitled to the damage proceeded for; (2) the condemnation of the defendant and its bail in such damages and costs; (3) to have an account taken with the assistance of merchants and (4) such other or further relief as the nature of the case may require.

After referring to pleadings in both cases, the Hon. Mr. Justice Dunlop in his reasons as filed, gives the facts as follows:

Reasons for Judgment.

DUNLOP, D. L. J. A. (June 13, 1911), delivered judgment. (Recital of the pleadings is omitted).

"By Order of the Deputy Registrar of date November 28, 1910, in conformity with rule No. 156, the present two actions were joined for the purpose of proof and argument; that is to say, that one trial only was to be held upon the merits of the two actions, and that the proof so made should avail as proof in both cases to all items and purposes; and by consent of the parties it was agreed that all the evidence made before Captain Demers, Wreck Commissioner, upon the Government investigation into the cause of the collision that gave rise to the pres-

ent actions should be accepted by the Court and avail as evidence in the said Admiralty actions as fully and effectually in every way as though each and all of the said witnesses appeared and gave evidence for both of the parties to these actions but with the reservation that either or both of the parties to these actions shall have the right to make such additional evidence in the Admiralty trial by the same or other witnesses as they might hereafter deem expedient, as appears by the consent of record, dated at Montreal, November 25, 1910.

In case No. 268, the owner of the "Kronprinz Olav" claims $15,000 from the Canadian Pacific Railway Company for damages caused to the said "Kronprinz Olav," by the steamship "Montcalm," the property of the C. P. R. Co., while on the other hand in case No. 271, the C. P. R. Co. claims from the steamship "Kronprinz Olav," the sum of $25,000 as for damages alleged to be suffered by the "Montcalm," resulting from the collision in question.

The question at issue in the present case is as to whether the "Kronprinz Olav" or the "Montcalm" was liable for the damages resulting from the collision between the two steamships, which took place at or about 3.50 a.m. on September 24, 1910, when the "Kronprinz Olav" was proceeding down the River St. Lawrence below the Stone Pillar Light.

After a very careful examination of the very voluminous evidence and the able arguments submited by the counsel of the respective ships, in these two actions, I am of opinion that the question involved in these two actions narows itself down to the application of Rule 25 of the International Rules of the Road and Rules 19 and 21 read together. R. 27 must

1911

CANADIAN PACIFIC R. CO. v. S.S. "KRONPRINZ OLAV."

JOHAN BRYDE v. S.S. "MONTCALM."

Reasons for Judgment.

be read in conjunction practically with every one of the other rules. R. 25 is the narrow channel rule. R. 27 is the rule that requires every ship in obeying and construing these rules to have due regard to all the dangers of navigation and collision and to any special circumstances which might render a departure from the rules necessary in order to avoid immediate danger.

Rules 19 and 21 taken together are to the effect that a ship that has the other on her starboard side has the obligation of keeping out of the way of the other, and the other, under such circumstances, has to keep her course and speed. These appear to me to be the rules that are applicable to this case. The sailing instructions contained in the "St. Lawrence Pilot," issued by the English Admiralty, are of extreme importance, and a copy of this work has been filed in the present actions.

It must be remembered that the collision in question occurred in a narrow river channel and not in the open sea, and that the main thing, under such circumstances, is for each ship to obey R. 25 and keep her starboard side. Rule 25 reads as follows:

"In narrow channels, every steam vessel, "especially when it is safe and practicable, shall "keep to that side of the fairway or mid-channel "which lies on the starboard side of such vessel."

But of course if they have to round buoys and there is a certain amount of angle between the respective courses, and they are on the opposite sides of the buoys, the important thing is to keep their own side of the channel when passing the buoys. It makes no difference to the ship above the buoys whether the ship below them is on her starboard

side or port side. In these cases the evidence shows that the "Montcalm" was never on the wrong side of the fairway.

One of the members of the Wreck Commissioners' Court who heard the evidence, asked the pilot of the "Kronprinz Olav" whether he knew the course a ship would take coming from the upper Traverse to the Channel Patch Buoy. The pilot answered "yes," and added that it was "the same course as we took." Then a member of the Court said: "Why did you "not wait? Why did you starboard?" (as it is proved the "Kronprinz Olav" did). "Why did you not "wait then if you saw her green light on your star- "board bow at some point? Why did you not wait "and let her come round the buoy?" To these questions the pilot had no explanation to give.

As I said before, these cases have narrowed down practically to R. 25. There is no question of lights on either side, and I do not think there should be any question as to the lookout. The jurisprudence shows that where a ship is navigated wrongfully, then the question of the lookout is of great importance. It is proved that the pilot and officers on the bridge, and wheelsman and the master of the "Montcalm" all saw the "Kronprinz Olav" so clearly and knew so well what was happening, that no importance as regards the "Montcalm" should be attached to the evidence concerning the lookout, even if it were unfavorable, which it is not.

Reference on this point might be made to Marsden's *"Collisions at Sea,"* a well known authority p. 474, 6th ed., where we read:—

"In another case it was held that the absence of "a lookout on board a vessel will cause her to be held

1911

CANADIAN PACIFIC R. CO. v. S.S. "KRONPRINZ OLAV."

JOHAN BRYDE v. S.S. "MONTCALM."

Reasons for Judgment.

"in fault for a collision unless it is proved that the "other ship was seen as soon as it was possible to "see her and that the proper steps to avoid her were "taken as soon as it was possible to take them."

When the collision in question occurred, the weather was fine and clear, wind light northerly, the tide about 1½ miles per hour flood; and the important thing for the "Kronprinz Olav" was to remain on her own side of the channel. If she had done so and waited a moment or two, the accident, in my opinion, might have been avoided.

The evidence discloses that the "Montcalm" was bound for Montreal. Her master, when he turned in the night before the collision, had left instructions to be called at Cape Goose, some 15 miles below the scene of the collision. He was called at that point and went up on deck, as his evidence shows, and seeing that it was a fine, clear night, he said to the bridge officer: "I am going to lie down on the "settee. Let me know at once if you need me for any "reason." Then he went back to his chart room and laid down. The pilot and the bridge officer, Carver, were on the bridge with the wheelsman, Polkinghorn, and it is proved that until about the time they reached the Lower Traverse, they had been steering entirely by compass. From that point on, the pilot, as he explains in his deposition, instructed the wheelsman as to the leading lights, while he, the pilot, at the same time used the compass. Then between the Upper Traverse and the Channel Patch Buoy is Buoy No. 61, an unlighted buoy which I believe they did not see that night, and which indicates the southern limit of the channel at a point nearly half way between the Upper Traverse and

the Channel Patch Buoy. The evidence shows the course they took from the Upper Traverse to Buoy No. 61. At Buoy No. 61 they starboarded their helm a little, made a course somewhat more to port, which course they kept until they got the Algernon Rock Light above them up stream open to the south of the Channel Patch Buoy Light. It is here where the important part of the navigation commences. I think that the movements of the "Montcalm" had been proper from the time when the "Kronprinz Olav's" lights were first observed until the moment when the "Kronprinz Olav" sounded the two-blast signal for the second time.

The Court avails itself of the valuable service of Captain James J. Riley, a mariner of experience, holding a certificate of competency as master from the British Board of Trade, No. 82599, now engaged in important public service, namely, Superintendent of Pilots and Examiner of Masters and Mates and Directors of the Nautical College, and upon whose judgment and opinion I shall find it my duty to rely, as to whom I have submitted the following questions and whose answers are appended thereto, namely:—

"Q. Could the steamers "Kronprinz Olav" and "Montcalm" under the circumstances of this case, "as disclosed in the evidence, by the exercise of "reasonable care on the part of the officers navigat- "ing them, have avoided the collision in question in "this case?"

"A. Yes. From the evidence given in this case, it "does not appear that all possible precautions were "taken by the navigating officers and crew of "the 'Kronprinz Olav.' They had the right-of- "way (see Rule 25) and should have kept it and

1911

CANADIAN PACIFIC R. CO. v. S.S. "KRONPRINZ OLAV."

JOHAN BRYDE v. S.S. "MONTCALM."

Reasons for Judgment.

"signalled their intention to do so; but failed in "this matter. When fear of a collision seized the "navigating officers and crew of the 'Kronprinz "Olav,' they failed to observe R. 25 and to comply "with RR. 27 and 29 in a seaman-like manner, and "instead of slowing down, and reversing if neces- "sary, they kept at full speed up to the time of the "collision. They saw the masthead lights of "the 'Montcalm' in line at the time or a little after "the first order was given to starboard, and after "this, they gave two orders to starboard, the last "one being a hard-a-starboard. They then ran "athwart the bows of the steamer 'Montcalm.' (See art. 19, Rules of the Road).

The navigating officers and crew of the Steamer "Montcalm" failed to comply with RR. 27 and 29 with sufficient promptness. When the first cross signal was heard on board the "Montcalm" from the "Kronprinz Olav," and when first the green light was seen, the engines of the "Montcalm" should have been stopped and reversed at once; and the reversing signal should have been sounded.

I find certain material facts proved. Amongst others, that when the collision took place the night was clear and fine; that the vessels had seen each other when a distance of from 6 to 9 miles away; that for sometime before the collision, the "Kronprinz Olav" was keeping to her own side of the channel, and the "Montcalm" was under a little starboard helm to get Algernon Rock Light clear of the Channel Patch Buoy. The "Kronprinz Olav" starboarded her helm and threw herself across the bows of the "Montcalm" in this narrow channel, with the dangerous channel Patch close to her. The

"Montcalm" reversed and went full speed astern about a minute and a half before the collision, and the "Kronprinz Olav," which then had the "Montcalm" on her starboard side, continued at full speed ahead until the time of the collision, when the bow of the "Montcalm" struck the "Kronprinz Olav" abaft the bridge on the starboard side, causing considerable damage to both vessels.

The master of the "Montcalm" was on the deck of his vessel when she was some 15 miles from the scene of the collision and retired to his cabin, but was afterwards called when the officers on watch discovered that the "Kronprinz Olav" had altered her course and blown cross signals, and exhibited her green light. He was alarmed to find the masthead and green lights of the "Kronprinz Olav" in view; and on going on deck three minutes before the collision, he blew one blast to show that his ship's course was being directed to starboard, and in about a minute or two afterwards, put his engines full speed astern and succeeded in reducing the ship's speed ahead to about 9 knots at the time of the collision. The navigating officer and pilot of the "Montcalm" very plainly and clearly declare that before the "Kronprinz Olav" showed her green light, the two ships were red to red for an appreciable space of time.

The master of the "Montcalm" was on the bridge of his vessel with the navigating officer and pilot and wheelsman for about 3 minutes before the collision.

The master of the "Kronprinz Olav" was asleep in his bed and was called by his first officer about a minute before the collision took place. He had gone as far as his cabin door when he says he saw that the

1911

CANADIAN PACIFIC R. CO. v. S.S. "KRONPRINZ OLAV."

JOHAN BRYDE v. S.S. "MONTCALM."

Reasons for Judgment.

"Montcalm's" stem was about 40 or 50 feet away.

I think that the course steered by the "Montcalm" was a perfectly proper one in a narrow channel such as she was in; and this is corroborated by the statement of the pilot of the "Kronprinz Olav". I find also that the navigation of the "Montcalm" until shortly before the collision, was the usual navigation for a steamer coming up through the reach between the Traverse and the Channel Patch Buoy.

There is another uncontested fact, and that is that the "Kronprinz Olav" commenced by porting, knowing the channel was a narrow one and that the proper side for the "Kronprinz Olav" was the starboard side, and just about the time the masthead lights of the "Montcalm" came in line, showing she was straightening up to take her own side of the Channel Patch Buoy, the "Kronprinz Olav" starboarded. The chief officer of the "Kronprinz Olav" said that at the moment he saw the green light of the "Montcalm" and knew they had to pass port to port, he ported on that account, and after the green light of the "Montcalm" had got, as he thought, on his starboard bow, or perhaps a little ahead, which is more likely—at all events in some position where the "Montcalm" could port and take the next reach to go south of the Channel Patch Buoy the chief officer says he starboarded. This is an important fact. It does not seem to me to be of great importance whether the collision occurred due north of the Channel Patch Buoy, as contended by the witness of the "Montcalm", or due east of the said Buoy, as contended by the witnesses of the "Kronprinz Olav". The evidence shows that when the "Kronprinz Olav" starboarded, the steamships were at

least 3 miles apart. The speed of the "Montcalm" was about 12 knots and the tide was running young flood at the rate of about 1½ miles, which made her ordinary speed up to the time her engines were reversed about 13 knots. The master of the "Montcalm" went on the bridge about 3 minutes before the collision, and blew one whistle blast himself, and after so doing he ordered full speed astern about 1½ minutes before the collision. We will afterwards consider the effect of this manoeuvre.

The master of the "Montcalm" was on the bridge with his bridge officer, his pilot and his wheelsman. Hearing the second blast whistle, that is, the cross signal of the "Kronprinz Olav" and seeing the improper manoeuvre of the "Kronprinz Olav" in starboarding as she did, he blew one blast of the whistle to show that he was putting his helm aport and obeying the Rules of Navigation, and immediately after, owing to the manner in which the other ship was going, he put the "Montcalm" full speed astern. The "Kronprinz Olav" blew cross signals a second and third time and came on at full speed, and her chief officer, notwithstanding the speed at which the "Kronprinz Olav" was going, himself cast the anchor, a most extraordinary step to take under the circumstances of this case.

As I have said before, as to the navigation of the ships, I have consulted the nautical assessor, a gentleman of great experience and thoroughly conversant with that portion of the river and its surroundings where the accident occurred, and in his answers to the questions submitted to him, declares that both vessels were in fault for the collision in question for the reasons in his said answers given;

1911

CANADIAN PACIFIC R. CO. v. S.S. "KRONPRINZ OLAV."

JOHAN BRYDE v. S.S. "MONTCALM."

Reasons for Judgment.

and I concur in the opinion arrived at by him, after a most careful consideration of the documents and the voluminous evidence taken in these cases.

Therefore, in my opinion, the damages must be equally borne by both ships, both being in fault, each ship being liable for one half the damages suffered by the two ships.

I find that the "Kronprinz Olav", her owners, officers and crew were in fault (1) because she did not keep to her own side of the channel; (2) she improperly cut across the bow of the "Montcalm"; (3) she improperly starboarded her helm when the ships were coming nearer together; (4) she did not follow the proper course in the river channel, and ignored the requirements as to vessels that were approaching each other; (5) she improperly refused and neglected to give the right-of-way to the "Montcalm" as she came up with the tide; (6) she did not stop in sufficient time or at all, and she did not have due regard to the conditions and the special circumstances due to the narrow channel; (7) she neglected the precautions required by the ordinary practice of seamen under the circumstances and disobeyed the International Rules of the Road; (8) she did not have sufficient and competent officers on duty; (9) after the collision she was in fault in not standing by to ascertain the condition of the steamer "Montcalm" with which she had collided;

I also find that the "Montcalm", her officers and crew were also in fault because (1) she improperly failed to stop or reverse her engines in due time; (2) that said collision was contributed to by the negligent navigation of the "Montcalm" by her officers and crew immediately prior to the accident by

1911

CANADIAN PACIFIC R. CO. v. S.S. "KRONPRINZ OLAV."

JOHAN BRYDE v. S.S. "MONTCALM."

Reasons for Judgment.

their failure to have her engines reversed in due time, and the reversing signal should have been sounded.

I am consequently of opinion that both actions must be maintained only to the extent hereinafter mentioned, as I find that both ships were to blame; and I adjudge that the damages rising out of the said collision to the steamship "Kronprinz Olav" as well as to the steamship "Montcalm", shall be borne equally by the said two steamships, one-half by each vessel as provided by c. 113, s. 918 of the R. S. C., entitled "An Act Respecting Shipping in Canada" which reads: "918.—In any cause or pro-"ceeding for damages arising out of a collision be-"tween two vessels, or a vessel, and a raft, if both "vessels or both the vessel and the raft are found "to have been in fault, the rules in force in His "Majesty's High Court of Justice, in England, so "far as they are at variance with the rules in force "in the Courts of common law, shall prevail, and the "damages shall be borne equally by the two vessels, "or the vessel and the raft, one-half by each." R.S. 79, s. 7.

And condemn the said steamship "Montcalm", her owners and her bail given on her behalf to pay to the plaintiff, owner of the steamship "Kronprinz Olav" one-half of the damages arising out of the said collision and further doth condemn the plaintiff owner of the steamship "Kronprinz Olav" and the said steamship "Kronprinz Olav" and her bail given on her behalf to pay to the C. P. R. Co., owner of the steamship "Montcalm" one-half of the damages arising out of said collision; and I order that an account should be taken and refer the same to

1911

CANADIAN PACIFIC R. CO. v. S.S. "KRONPRINZ OLAV."

JOHAN BRYDE v. S.S. "MONTCALM."

Reasons for Judgment.

the Deputy Registrar, assisted by merchants, to report the amount due for both claims, and that all accounts and vouchers in support thereof shall be filed within 6 months; and I further order and adjudge that the parties to the present suit shall respectively bear their own costs of said action.

Judgment of the Lords of the Judicial Committee of the Privy Council on the consolidated Appeals of The *Canadian Pacific Railway Company v.* The Steamship *"Kronprinz Olav"*; and of the Steamship *"Montcalm" v. Johan Bryde,* from the Supreme Court of Canada.

Present at the hearing: LORD ATKINSON, LORD MERSEY, LORD MOULTON, LORD PARKER OF WADDINGTON.

Nautical Assessors: Rear-Admiral Robert N. Ommanney, C. B., Commander W. F. Caborne, C.B., R.N.R.

LORD MERSEY (August 1, 1913) delivered judgment of the Board:

These are appeals from a judgment of the Supreme Court of Canada affirming by a majority the judgment of the Deputy Local Judge in Admiralty at Montreal in two cross actions for damages by collision.

The collision happened on September 24, 1910, in the St. Lawrence River between two steamers named the "Kronprinz Olav" and the "Montcalm". Both vessels sustained damage and thereupon cross actions were commenced in which the owners of each vessel alleged that the other vessel was alone to blame. Before the trial took place a wreck inquiry was held in the course of which a large body of evidence was collected from the crews of both vessels. By agreement the notes of this evidence were used at the trial of the cross-actions, and they formed the only material before the learned judge. He saw none of the witnesses. The two cross-actions were tried as one, and in the result the learned judge (who was assisted by a nautical assessor) found both ships to blame.

There were then cross-appeals to the Supreme Court which were heard before the Chief Justice and four other judges. Three of these five judges confirmed the judgment of the judge of first instance. One judge was of opinion that the "Olav" was alone to blame, and another judge was of opinion that the "Montcalm" was alone to blame. The result was that both appeals were dismissed. The present appeal to this Board is brought by the owners of the "Montcalm" only. The owners of the "Olav" no longer contest their liability. Thus the only question for the determination of their Lordships is whether any blame attaches to the "Montcalm" in relation to the collision. Blame is imputed to her on one ground only, namely, that she was guilty of negligence in failing to reverse her engines in proper time before the collision.

This narrowing of the issues between the parties makes it unnecessary to deal with the facts at any great length. The material circumstances are as follows: At 4 a.m. on the morning of September 24, 1910, the "Montcalm", a screw steamer of 5,500 tons gross register, was proceeding up the St. Lawrence River. At the same time the "Kronprinz Olav", of 3,900 tons gross register, was proceeding down the river. The night was dark but clear, the wind light and the tide

flood of the force of 1½ knots. Both vessels entered a narrow channel in the river in which it was the duty of each to keep to the side of the fairway on her own starboard side. The "Olav" did not observe this rule, but negligently made for the "Montcalm's" side of the channel, cutting across the "Montcalm's" bows. A collision became imminent and thereupon the "Montcalm" reversed her engines but unfortunately not in time to avoid the collision.

It is said on the part of the "Olav" that those in charge of the "Montcalm" ought to have recognized sooner than they did the danger created by the bad navigation of the "Olav" and by a timely reversal of the "Montcalm's" engines ought to have averted it.

In considering this question it is necessary to bear in mind that the onus of proving the alleged negligence rests on the "Olav" and that it is an onus which can only be discharged by clear and plain evidence. Very little of the evidence adduced at the trial bore upon this question of the reversal of the "Montcalm's" engines; and an examination of what evidence there was fails to support the charge. The narrative of the collision covers only a few minutes of time and according to the finding of the trial judge the "Montcalm" reversed and went full speed astern about one minute and a half before the collision took place. That the risk of collision had not been realized and was not apparent before this time seems to be clear from the evidence of the "Olav's" navigating officer Toft-Dahl. This witness appears not to have been in fear of a collision until one minute before the event, for it was not until then that he called his captain on deck, and even after this the "Olav" kept her speed, and continued to keep it until the moment of the collision. It seems to their Lordships impossible to say in the face of this evidence that the captain of the "Montcalm" was negligent in not realizing before he did that the risk of collision was imminent; and even if he can be said to have miscalculated the time by some few seconds the very gross negligence in the navigation of the "Olav" was well calculated to confuse him and to cause the error. He was, moreover, fully justified in expecting that the "Olav" would realize the dangerous position into which she had brought herself and would try to remedy it by herself reversing.

It is worth while to examine shortly the grounds upon which the judges in the Courts below based their judgments in so far as they related to the alleged negligence of the "Montcalm". The trial judge expresses his opinion that the movements of the "Montcalm" had been proper from the time when the "Olav's" lights were first observed until the moment when the "Olav" sounded a two-blast signal for the second time. According to the evidence from the "Montcalm" (which there appears no reason to disregard) the engines were reversed almost at once after this signal. Yet the trial judge after expressing his opinion that there had been no negligence on the part of the "Montcalm" up to this point, seems then to have surrendered his judgment to the advice of the nautical assessor who sat with him and to have adopted and given effect to an expression of that gentleman's opinion that the "Montcalm" had failed to reverse with sufficient promptness. That the "Montcalm" did not reverse in time to avoid collision is, of course, true, but the learned judge seems to have thought that this bare fact was equivalent to proof of negligence. It was not so. It was consistent with proper care in the navigation of the ship, and in any event it fell very far short of proof of negligence. Turning then to the judgments of the learned judges

1911

CANADIAN PACIFIC R. CO. v. S.S. "KRONPRINZ OLAV."

JOHAN BRYDE v. S.S. "MONTCALM."

Reasons for Judgment.

in the Court of Appeal it will be found that the Chief Justice was not satisfied with the judgment of the Court of first instance and yet because of the imperfect evidence he felt himself unable to interfere with it. It can scarcely be said that this amounts to an expression of opinion that the "Montcalm" had been guilty of negligence. The next judge (Davies, J.) after an examination of the evidence came to the conclusion that no blame attached to the "Montcalm". The third judge (Idington, J.) made no reference to the question of the failure of the "Montcalm" to reverse earlier than she did. He appears to have been of opinion that the "Montcalm's" navigation was wrong from the first and he came to the conclusion that she was alone to blame. The advisers of the "Olav" do not seem to have concurred with this opinion for they had not the courage to attempt to support it at their Lordships' Bar. The fourth judge (Duff, J.) contents himself with saying that he concurs in the dismissal of both appeals. The last and fifth judge (Anglin, J.) mentions the allegation of negligence on the part of the "Montcalm" in not sooner reversing, and says that there was an implied duty on her part to reverse when the "Olav's" second signal was given. The answer, however, to this observation seems to be that in truth this was when she did reverse.

Neither in the evidence nor in the judgments in either Court below are their Lordships able to find satisfactory ground for saying that the "Montcalm" was guilty of any negligence whatever contributing to the disaster. They think that the right view of the matter was taken by Davies, J., and that accordingly these appeals ought to be allowed and with costs here and below. They will humbly advise His Majesty accordingly.

Solicitors for owner of "Montcalm" — Meredith, MacPherson, Hague & Holden.

Solicitors for owners of "Kronprinz Olav"—Brown, Montgomery & McMichael.

1918
Nov. 30.

NOVA SCOTIA ADMIRALTY DISTRICT.

THE SOUTHERN SALVAGE COMPANY, LTD.,
PLAINTIFF;

AND

THE SHIP "REGIN" AND FREIGHT,
DEFENDANT.

Collision—Rule 16 of Regulations for avoiding collisions at Sea.

At about 9 o'clock a.m. on June 15, 1917, a collision occurred at the entrance to Halifax Harbour between the ship "Deliverance" and the defendant ship "Regin" in a dense fog. The "Deliverance" was yoked up to the S.S. "Belaine" and was outward bound engaged in mine sweeping in the Harbour, and the "Regin" was coming in.

Held, that in as much as the "Deliverance" admittedly heard the fog signals of the "Regin" well forward of her beam and still kept on at her speed into the fog, she violated the provisions of Article 16 of the rules of the road and was at fault.

2. That such fault was the proximate cause of the collision and she was wholly to blame therefor.

THIS is an action taken by the owners of the "Deliverance" against the "Regin" for damages to the former alleged to be due to improper navigation of the "Regin" and to its negligence.

The plaintiffs in their Preliminary Act declare they took the following measures to avoid accident: The course of the "Regin" when first seen appeared as if she were attempting to cross the bows of the "Deliverance" and the engines of the "Deliverance" were ordered full speed astern. Immediately thereafter when it appeared that the "Regin" might pass astern, the engines were ordered full speed ahead. These orders were given in such quick succession

REPORTER'S NOTE.—Since going to print the judgment in the Supreme Court has been rendered allowing the appeal with costs to the extent of declaring the ships equally liable for the collision. No costs in court below.

1918

THE SOUTHERN SALVAGE CO., LTD. v. S.S. "REGIN."

that the speed of the "Deliverance" was not affected. The "Regin" on the other hand, violated Article 13 in that she neglected the international signals; the "Deliverance" was mine sweeping and carried the cones, flags, and balls, authorized by the regulations made in that regard; and Article 15 (e) in that she disregarded the signals of the "Deliverance" that she was unable to manoeuvre and ran into the "Deliverance" in foggy weather; and that she came up Halifax Harbour in foggy weather at a high rate of speed; and also Article 16, Article 19, Article 23, Article 28 in that changing her course to starboard she did not indicate by her whistle that she was so doing; and Article 29; and no lookout was maintained.

Defendant in its Preliminary Act at No. 12 says: in answer to question "The measures which were "taken, and when, to avoid the collision"; having heard, apparently forward of her beam, fog signals of several vessels, the positions of which were not ascertained, the engines were stopped. Shortly after the "Deliverance" was first seen through the fog, there being then danger of collision, not apparently avoidable by the action of the "Deliverance" alone, the engines were put full speed astern and the helm put hard aport. The signals prescribed by the Regulations were duly sounded at proper intervals on the steam whistle of the "Regin", to wit: prolonged blasts at intervals of not more than two minutes.

And at 14 says that "the 'Deliverance' was at "fault because (a) the 'Deliverance' and 'Regin' "were crossing ships within the meaning of article "19 of the Regulations for preventing collisions at "sea, and the 'Deliverance', having the 'Regin' on

"her own starboard side should have kept out of the "way of the 'Regin', should have avoided crossing "ahead of the 'Regin' and should have slackened "her speed or stopped and reversed.".

(b) "The 'Deliverance' being bound to keep out "of the way improperly starboarded her helm when "in sight of the 'Regin', thereby directing her course "across the bow of the 'Regin'."

The case came on for trial before the Honourable Mr. Justice Drysdale, at Halifax, on June 28, 1917, and November 8, 1917.

H. Mellish, K.C., for plaintiff.

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

The plaintiff alleged the occupation of "Deliverance" at the time; how mine sweeping is done; that the cable connecting the ships has the effect of turning the ship's head towards her companion ship. The object of this sweeping was to secure any mines planted by enemy mine layers.

That the "Deliverance" carried all signals required by the Admiralty to show the ship's occupation, and that she is not under command.

The defendant, they admit, gave the required fog signals, but they claim she maintained full speed of 8 or 9 knots and did not stop her engines when she heard the signals from the "Deliverance".

They moreover argue that the "Deliverance" being engaged in the special work of mine sweeping with consequent inability to manoeuvre, she had special privileges, and was not obliged to stop her engines.

Defendant alleges the general facts above given, and that the "Deliverance" was going at full speed and maintained the same until immediately before

1918

THE SOUTHERN SALVAGE CO., LTD. v. S.S. "REGIN."

Argument of Counsel.

collision. He claims that she violated articles 16, 19, 22 and 23. These articles are printed below for ready reference as well as 13, 15E.

They moreover allege that if the "Deliverance" had reduced speed earlier, the ships could have located each other in the fog and passed in safety; that defendant gave the fog signals, which were heard by the "Deliverance"; that she reduced speed, having stopped her engines five minutes before seeing the "Deliverance", and having reversed them three minutes before collision.

That the ships were crossing ships within the meaning of article 19 and it was the duty of the "Deliverance" to keep out of the way. Knowing that she was part of a cumbersome aggregation of apparatus occupying a front of 400 yards it was all the more incumbent upon her to navigate with exceeding caution, especially if, as it would appear was the case, it was desirable to keep vessels from passing over the wire. The officer on her bridge knows for twelve minutes that a steamship is ahead in the fog in such a position that if she is on the proper course up the Harbour, she is either dead ahead or she is going to cross his course at a fine angle, and that ordinary prudence, to say nothing of the Regulations, would dictate cautious navigation until the position and course of the approaching steamship are ascertained. That the "Deliverance" had the "Regin" on her own starboard side.

A collision being imminent unless the "Regin" took some action to prevent it, the "Regin" was not bound to keep her course and speed under article 21, but was justified (under the Note to that article) in the measures she took to avoid collision.

Finding that the "Deliverance" was going to port so as to cross her bows it is seen that if she keeps her course and speed, the "Regin" will cut into her about amidships, and not having room to go to starboard and clear her, the engines are reversed and the helm put hard-a-starboard to bring the courses more nearly parallel. This manoeuvre was frustrated by the "Deliverance" porting just before the collision.

It is not pretended that the marks carried by the "Deliverance" were authorized by the International Regulations, and no knowledge of them was brought home to the Master of the "Regin". No satisfactory authority for exibiting the marks was established. Some person, supposed to be a British Naval Instructor, gave what were apparently verbal instructions to some person unknown, who, presumably, passed them on by word of mouth to Captain Brannen. There is no pretence that these marks were notified to foreign Governments or that Norwegian ship masters, for instance, were bound to know them.

The Judge's reasons for judgment are very short, but he apparently found that the "Regin" stopped and reversed engines as stated by her and that the "Deliverance" notwithstanding that she admitted hearing the fog signals, did not slacken speed nor reverse her engines, and that she violated rule 16 of the rules of the Road to avoid collisions at sea and that this act was the proximate cause of the collision.

DRYSDALE, L.J.A. (November 30, 1918), delivered judgment:

In this case the Defendant Ship cut down and sank the "Deliverance", a mine sweeper, off Chebucto Head.

1918

THE SOUTHERN SALVAGE CO., LTD. v. S.S. "REGIN."

Reasons for Judgment.

The "Deliverance" was, at the time, yoked up to the "Belaine" mine sweeping, and was going out in a dense fog; the "Regin", a Norwegian steamer, was coming in.

I think the "Deliverance" admittedly heard the fog signals of the "Regin" apparently well forward of the beam of the "Deliverance", and when she so heard such signals should have stopped her engines. This she did not do, but kept on at her speed into the fog.

I am compelled to conclude that the "Deliverance" was in fault in directly violating article 16 of the Rules of the Road, and I also think that such violation was the proximate cause of the collision.

I find the "Deliverance" solely to blame for the collision and there will be a decree accordingly.

Judgment accordingly.

Solicitor for plaintiff: *W. H. Fulton,* K.C.

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

NOVA SCOTIA ADMIRALTY DISTRICT.

1919
March 29.

HANS JACOBSEN,

PLAINTIFF;

v.

THE SHIP "FORT MORGAN",

DEFENDANT.

Contract of Hire—Law of the Flag—Improper Discharge—Norwegian Maritime Code; Admiralty Act 1861, *Sec.* 10 *and sections* 9 *and* 12.

Held:—1. That section 10 of the Admiralty Court Act, 24 Vict. (Imp.) 1861, which extends the jurisdiction to "any claim by a seaman of any ship" permits the application by the court of the law of the Country of the litigants.

2. That a contract or engagement between a Norwegian owner and a Norwegian master, for services to be rendered on a Norwegian ship, registered in Norway, although verbally made in New York, U. S. A., is governed by the law of Norway.

3. That where a change in destination of a ship is made, the crew can legally refuse to continue on terms of existing contract.

4. That in such event, where the new terms asked are not accepted by the owner, members of the crew are entitled to legal notice before being discharged.

This case has been appealed to the Supreme Court of Canada, and is still pending.

THIS is an action by the master of S.S. "Fort Morgan" for back salary due at date of discharge and damages for wrongful dismissal.

The plaintiff claimed that he left New York in July, 1918, under orders from his owners to proceed to Halifax, N.S., and thence to the West Indies. At that time his remuneration was fixed at $343.75 per month. The vessel arrived in Halifax and offers of charters to the West Indies were made and declined. On August 8 the owners notified the plaintiff that

1919

HANS JACOBSEN v. S. S. "FORT MORGAN."

the vessel was to proceed to St. John's, Newfoundland, and there to load a cargo for Italy or Greece. The Master declined to go into the war zone unless his salary was raised to an amount greater than the wages of the Chief Engineer. The owners refused to give the Master what he asked, and sent a new Master and crew, upon whose arrival on August 24, the Master left the ship and returned to New York and rendered his account to the owners. And it is for the balance of his account, plus three months' wages and the cost of his return to Norway, that this action is brought.

The defendant claimed that the plaintiff was the Master of the ship "Fort Morgan" from January, 1918, to a date between August 15 and August 30, 1918. His contract was a verbal one made with Frederic Anderson, the ship's agent in New York.

In the latter part of July, 1918, the ship reached Halifax; and about August 6, 1918, plaintiff received a charter-party from Anderson in New York. This charter-party was from St. John's Newfoundland, to Italy or Greece with a cargo of fish. The crew except a sailor, two mates, the chief engineer and plaintiff refused to go. The master reported to Anderson that he wanted $450.00 but not less than the engineer. Anderson refused to pay $450,00, but however, he sent a schedule of wages shewing an increase to plaintiff for the transatlantic voyage.

Anderson offered the master $400.00. He had been receiving $343.75 per month; a new crew was put on the vessel as plaintiff refused to sail without $450.00 a month, and plaintiff left the boat.

Plaintiff is a Norwegian; and the defendant ship is registered at Grimstadt, Norway.

The case came on for hearing at Halifax on the days of 1919.

Mr. Perkins, counsel for plaintiff argued that:

(a) The plaintiff was wrongfully dismissed; and

(b) that the Norwegian Law should be applied in determining the Master's rights to recover, the engagement having been made by a Norwegian owner with a Norwegian Master for service on board a Norwegian ship, and the parties evidently intending that the contract should so be governed.

Primâ facie the law of the flag governs.

The extension of the application of foreign or municipal law may be attributed to The Admiralty Court Act 1861 (24 Vict. Cap. 10), Section 10 of which extends the jurisdiction of the Admiralty Court to "any claim by a seaman of any ship". That section 10 is intended to embrace the claim of a seaman of a foreign ship is evident from the use of the words "any British ship" in Sections 9 and 12.

If the Court has jurisdiction to entertain the claim of a seaman of a foreign ship, which may involve questions of right, as well as of remedy, it can hardly be contended that the Court may not apply the law by which the parties intended those questions to be determined.

The *lex fori* is in favor of plaintiff.

The plaintiff was engaged for a voyage to Halifax and thence to the West Indies; before the voyage was half performed his engagement was altered and he was ordered to the war zone.

That the proposed engagement was of a different character from the original arrangement may be inferred from the fact that all on board, including the Master and Chief Engineer, were offered a higher

1919

HANS JACOBSEN v. S. S. "FORT MORGAN."

Argument of Counsel.

wage to go into the war zone. The Master cannot be charged with a breach of contract in refusing to proceed on the new voyage and if he was not guilty of a breach of contract in so refusing it follows that the alteration in the engagement constituted a breach of contract by the defendant; and when the defendant sent a new Master it was tantamount to dismissing the plaintiff. As the Master was ready and willing to carry out the original engagement made by the defendant with him, such dismissal was without cause.

The discharge of the Master was also wrongful because it was in breach of the owner's agreement that the Master's wages should be more than those of any other member of the crew.

Another ground for holding that the Master's discharge was wrongful is to be found in the defendant's admission that the Master's engagement was a monthly one.

And the notice that another crew would be sent was given to the Master after August 16 and the Captain replacing him arrived on August 24, so that he had less than three weeks' notice.

English common law gives seamen improperly dismissed the same redress as does the Norwegian statutory law; and damages are given in the Admiralty Court for wrongful discharge.

English common law is also the same, as to the right to passage money in case of wrongful dismissal, as the Norwegian statutory law.

The Admiralty Court has always exercised a paternal jurisdiction in favor of seamen and it should weigh with the Court that if the plaintiff is refused redress here and driven to apply to his own Court

in Norway, he will lose the benefit of the lien which is given to him by the arrest in this action.

Mr. Butler, counsel for the defendant, argued:

(a) that plaintiff was not wrongfully dismissed,

(b) that the Court cannot enforce or give effect to a regulation or statute of Norway.

There was only one conversation between plaintiff and Anderson at which the terms of the contract were discussed.

Anderson and Jacobsen agree that the hiring was at so much a month and the engagement was therefore monthly.

The captain was aware that another crew was being sent. It is stated by Jacobsen in his evidence that Anderson paid the engineer $400,00 but the engineer Jacobsen refers to is the man who finally sailed and who came with the new crew after the Master's refusal to go for less than $450.00.

It is submitted that the Master, having left during the month is not entitled to any wages for the part of the month he worked.

It is suggested that the Master was to go to the West Indies on arrival at Halifax, but any such agreement was a *bare promise* on Anderson's part. It is evident Anderson did not know where the ship was going when she left New York for Halifax. The agents' offer to raise the wages on the voyage to Italy was gratuitous. From the nature of the employment, the fact that the defendant was a ship able to go anywhere, that the Master knew there was a war when he engaged, the Master was not justified in refusing to sail as other vessels did, but he was bound to finish his month and give reasonable notice to his employer. It was his own wrongful act that

1919

HANS JACOBSEN v. [S. S. "FORT MORGAN."

Argument of Counsel.

terminated the engagement and he cannot take advantage of it.

The law under which plaintiff claims to be entitled to recover is a Norwegian statute or regulation. There is no evidence that there is an action under Norwegian law analogous to the common law action of damages for wrongful dismissal; nor does the plaintiff pretend to claim damages for wrongful dismissal at common law. A great deal of stress is laid by plaintiff on the right of a foreign Master to recover damages for wrongful dismissal in an action founded on English law in the Admiralty Court where the breach occurs in the jurisdiction. Defendant does not deny this; but plaintiff's action is for compensation only under the Norwegian statute.

Municipal regulations or statutes of a foreign country are not enforced by English Courts. This is not such a matter as is incidental to the rights of parties under English law where foreign evidence (e.g., of the legality of a marriage ceremony) might be required; but it is an effort to directly enforce the foreign law and found the jurisdiction of the Court thereon.

The right to obtain the compensation defendant claims is acquired under Norwegian law not under Canadian law. If this regulation were part of the contract there might be another result.

There is no serious dispute on the facts which are contained in the above summary and in the following arguments. The Judge found that plaintiff was discharged without notice and that he would be entitled to compensation for such damage, and he referred the matter to the Registrar to fix the amount due.

The Sections of the Norwegian Maritime Code are printed herein and are as follows:—

"63. If a Master is dismissed on account of in-
"capability, fraud, or negligence or carelessness
"while in the service of the ship, he shall only be
"entitled to wages up to the time of his dismissal."

"The same rule shall apply if he is dismissed be-
"cause the voyage is given up, or not continued, or
"put off for a long time on account of war, blockade,
"embargo, prohibition of imports or exports, deten-
"tion by ice, or damage which unfits the ship for
"voyage."

"If the ship is wrecked, condemned, captured or
"condemned as a prize, or taken by pirates, the ser-
"vice of the Master, and, consequently, his right to
"further wages, shall cease. In the case of a casu-
"ality having occurred he must, however, remain on
"the spot until the affairs of the ship and the cargo
"have been settled, but he is entitled to reasonable
"compensation for the time thus passed."

"64. If a Master is dismissed on account of illness,
"or injuries, which incapacitate him from command-
"ing the ship, he shall be entitled to wages up to the
"date of his dismissal."

"If, during his service on board the ship, the Mas-
"ter has, through no fault of his own, contracted an
"illness, or been injured, the owners shall pay the
"expenses of his medical treatment and attendance
"also after his dismissal, but not for more than 4
"weeks after the date of his dismissal when such
"takes place in Norway, or at a place in a foreign
"country where, according to the agreement, he was
"to leave the ship, but until 12 weeks after the said
"date when the agreement is otherwise."

"65. When the Master is dismissed under any
"other circumstances than those referred to in 63

1919

HANS JACOBSEN v. S. S. "FORT MORGAN."

Argument of Counsel.

"and 64, he shall be entitled to the whole amount of "the wages for which he has stipulated. If not en- "gaged for any fixed term he shall receive, besides "his wages for the time during which he has served "on board, the following additional wages:

"For one month, if he is dismissed in a Norwegian "port at any other time than that when, according "to S. 62, he is himself entitled to leave the ship, or "in a Baltic or North Sea port;

"For two months when dismissed in any other "port in Europe, and

"For three months, when dismissed in a port out "of Europe; Mediterranean ports or ports on the "Black Sea and the Sea of Azov being, however, in "this respect, considered as European ports.

"The same rule shall apply when the Master "leaves on account of the ship having lost its right "to carry the Norwegian flag."

"66. When, in the case referred to in 65, the ser- "vice of the Master is terminated at any other place "than that agreed to or assumed by the terms of the "contract, he is entitled to demand compensation "from the owners for his travelling expenses, in- "cluding subsistence money, to the place at which "he was engaged if in Norway, but otherwise, to that "port to which the ship belongs. The same rule "shall apply when in the cases referred to in the "second section of 63, the Master is dismissed in a "foreign country, or left behind abroad on account "of illness, provided the owners are bound, accord- "ing to 64, to pay for his care and maintenance."

This law was proved by the testimony of the Norwegian Consul General of the United States, referring to a book containing the same.

1919

HANS JACOBSEN v. S. S. "FORT MORGAN."

Reasons for Judgment.

DRYSDALE, L.J.A. (No date), gave decision as follows:—

The plaintiff, master of defendant ship, came to Halifax with a view to a West India charter re a salary of $343.75 per month. After remaining here the owners chartered the ship for the war zone and offered the captain and crew an increase of wages provided they agreed to go to Italy. The plaintiff refused the wages and was discharged here without notice. Under the English law the plaintiff would be entitled to compensation for such damages.

The plaintiff is a Norwegian and the defendant ship is owned by a Norwegian and registered in Norway, and I think such compensation should be fixed by analogy to the Norwegian Maritime Code.

In the event of a discharge under the circumstances here, such code fixes the compensation at three months' salary and the price of transport to Norway. This the plaintiff is entitled to, and I refer the account to the Registrar to be made up on this basis.

DRYSDALE, L. J. A., (March 29, 1919), delivered final judgment as follows:—

On March 29, 1919, before the Honorable Mr. Justice Drysdale, Local Judge in Admiralty.

The Judge, having heard the parties and their counsel, pronounced in favor of the plaintiff's claim, and condemned the ship "Fort Morgan" and her owner and their bail in the amount to be found due to the plaintiff, and he ordered that an account should be taken and referred the same to the Registrar to report the amount due, and the Registrar having reported the sum of $1,888.85 to be

1919

HANS JACOBSEN v. S. S. "FORT MORGAN."

Reasons for Judgment.

due to the plaintiff, and the said report having been filed herein on March 9, 1919.

The Judge now in application of the plaintiff, pronounced in favor of the plaintiff's claim for the said sum of $1,888.85 and costs, including the costs of the reference, and condemned the ship and her owner and his bail in the said sum of $1,888.85 and the said costs to be taxed.

Judgment accordingly.

Solicitor for plaintiff: *W. H. Fulton, K.C.*

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

IN THE EXCHEQUER COURT OF CANADA.

1919
March 17.

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

PLAINTIFF;

AND

JOSEPH A. BARRETT, GEORGE T. BARRETT AND ERNEST M. BARRETT BY INFORMATION, AND ROBERT NICHOLAS SLATER AND SIR ARTHUR PERCY SHERWOOD, EXECUTORS OF THE ESTATE OF ESTHER SLATER BY ORDER OF THIS EXCHEQUER COURT.

DEFENDANTS.

Expropriation—Valuation of Right of Way—Common Lane—Damage and Depreciation due to severance.

Held: 1. That the *rights* of the owners of the "fee" in a piece of land between two properties, used as a lane way, and over which the neighbor has an absolute right of way, is in effect only a right of way, and no more valuable than the rights of the owner of the right of way, and will be valued as such.

2. (a) That the value to be paid for in expropriation is the value *to the owner* as it existed at the date of taking, and *not* the value *to the taker*.

(b) That the value to the owner consists in all advantages the land possesses, to be determined as at the time of taking.

3. Between the westerly line of the expropriated property, and the buildings on the land adjoining, which buildings and land are also the property of the defendants, there is a strip of land, 10 feet wide, left vacant.

Held, that in as much as, when the property comes into the market, the buildings, now very old, will have to be torn down, (if it is to be used in any practical manner) and the ten feet can be sold with the rest, no damage or depreciation is suffered by reason of the severance of the ten feet and of their being left vacant.

This case has been appealed to the Supreme Court and is still pending.

1919

THE KING v. BARRETT.

Statement.

THIS is an information exhibited by the Attorney-General of Canada for the expropriation of lands in the city of Ottawa, to be used as a site for the Public Building now known as the Hunter Building.

N. G. Larmonth, for plaintiff.

R. G. Code, K.C., for defendants.

The action came on for trial, at Ottawa, before the Honourable Sir Walter Cassels on February 4, 5 and 6, 1919.

On February 7, 1918, notice of expropriating certain properties in the City of Ottawa to become the site of a departmental building (now known as the Hunter Building) was registered in the Registry Office for the Registry Division of the City of Ottawa.

The property expropriated comprised Lots Nos. 11, 12 and 13 on the north side of Albert Street, Lot No. 11 and the westerly half of Lot No. 12 on the south side of Queen Street in the City of Ottawa.

The property in question in this appeal is a portion of Lot No. 11 on the north side of Albert Street, namely, the westerly twenty feet eleven and one-twenty-fourth inches. The easterly nine feet of the defendants' land was subject to a right of way in common to the respective owners of the land held by the defendants and the Loyal Orange Lodge, who were the owners of the remainder of said Lot No. 11. The fee in this nine-foot right of way was vested in the defendants subject to the rights of the Loyal Orange Lodge. On the defendants' land there was situate a house and this house was partly on the land of the defendants in question in this case, and partly on the adjoining Lot No. 10 on the north side of Albert Street, which was also owned by the de-

fendants. The dividing line between Lots Nos. 10 and 11 practically divided the house in question in half, approximately ten feet five inches of the house extending over on to said Lot No. 10. An Information on behalf of His Majesty The King was filed in the Exchequer Court of Canada on October 18, 1918, claiming that the lands of the defendants should be declared vested in His Majesty The King and the amount of compensation to be paid to the defendants declared by the said Exchequer Court of Canada. An application was made at the trial to add as parties the Executors of the Estate of Esther Slater, who held a mortgage on the property owned by the defendants. At a later date, namely, April 17, 1919, an Order was made by His Lordship, Mr. Justice Cassels, directing that Robert N. Slater and Sir A. Percy Sherwood, Executors of the Estate of Esther Slater, deceased, be added as defendants in this action.

The Court allowed the sum of $9,264.85 to wit:—

Full value of house	$2,500.00
Right of way, $100 per foot	900.00
Balance of lot, 11 feet 11 1-24 inches at $400 per foot	4,768.05
Allowance for damage to party wall	280.00
	$8,448.05
10 per cent. on $8,168.05	816.80
	$9,264.85

Plaintiff argued as to right of way that the defendants are the owners of the fee in the nine-foot right of way, being the easterly nine feet of the defendants' land, and the adjoining owners, the Loyal

1919

THE KING v. BARRETT.

Argument of Counsel.

Orange Lodge, have an absolute right of way with the defendants over the said easterly nine feet. This virtually makes the said right of way of no more value to the defendants than to the adjoining owners (The Loyal Orange Lodge).

That no evidence had been submitted on behalf of the defendants to show that the right of way in question had any connection whatever or served any purpose for the benefit of the adjoining Lot No. 10, owned by the defendants. Therefore the right of way can only be considered as being a benefit to the property of the Loyal Orange Lodge, and to the small portion of Lot 11 owned by the defendants.

The compensation due to Barretts for the right of way is the value to Barret as it existed at the date of the expropriation.

As regards the injurious affection to 10 feet 5 inches of land adjoining lands expropriated, no damage can result to the adjoining property owned by the Barretts. The Barretts are the owners of Lot No. 10, which was not expropriated by the Crown, and on Lot 10 stood what were formerly residences with an extension built out to the street line, and the whole place used as an automobile supply place. The Barretts were also the owners of the westerly twenty feet eleven and one-twenty-fourth inches of Lot No. 11 expropriated by the Crown immediately east of Lot No. 10, and as shown by the evidence, there was a house constructed on this portion of Lot 11 some distance back from the street and ten feet five inches of this house extended over on to Lot No. 10. The Crown expropriated Lot No. 11, with the result that the house, which was constructed on a portion of both lots, Nos. 10 and 11, would be

cut in half, and it is admitted that the Crown would have to pay the full value of this house. Lot No. 10 was not expropriated, and the buildings standing entirely upon that lot were not interfered with by the expropriation.

Defendants argued that, as to the lane way this easement and license gives no rights whatever to the owner or owners of the dominant tenement other than a right-of-way over the land for the purposes of access to such dominant tenement, together with such incidental rights as may be reasonably necessary, as entry to make repairs for the due enjoyment of the easement. This easement and license is by the grant restricted, leaving the owner of the servient tenement free to make all other possible uses of the land which, in the exercise thereof, do not interfere with the right of entry to the lands of the dominant tenement by the lane thus provided and it follows that defendants as owners of the fee simple could excavate a subway or cellar under the right-of-way and use the same for their purposes, and this being done, as it could readily be done, so as not to interfere with the free passage of the owners of the dominant tenement over the right-of-way, defendants would be acting within their rights and could not be enjoined.

Likewise, defendants could not be enjoined from building over the right-of-way, so long as the reasonable enjoyment thereof by the owners of the easement was undisturbed. Building contractors in these days of steel construction, it is submitted, would find little difficulty in bridging the 9 feet over the right-of-way and using the space above as a

1919

THE KING v. BARRETT.

Argument of Counsel.

portion of any structure erected on the adjoining lands of the defendants.

That weight should also be given the fact, as adduced in evidence, that defendants during all the years while the easement has been in existence paid all carrying charges, taxes, local improvements, etc., and as a consequence in the opinion of the witnesses the value as found should be in the proportion of $100.00 to the Orange Lodge and $300.00 to defendants.

Then as to damages for severance and injurious affection to 10' 5" left vacant by reason of the removal of the buildings. It is argued that the injury, by reason of this narrow strip left vacant, is very serious because it is too narrow to be useful for commercial purposes or any purpose.

That the building adjoining is permanent and suitable to the location for some years at least. The main and rear buildings were built when solidity of foundations and walls were features of construction, thus rendering the premises with the new erection in front extending towards the street line quite suitable for its present purposes as a shop and factory for automobile supplies and repairs thereto.

Five cases were tried together and therefore the reasons for judgment handed down affecting all cases is printed here as follows:

Reasons for Judgment.

CASSELS, J. (March 17, 1919) delivered judgment.

These five cases relating to properties expropriated on Queen Street, Albert Street and O'Connor Street in the City of Ottawa for the site of the new Government buildings erected on the premises, were tried before me on February 4, 1919, and subsequent days.

1919

THE KING v. BARRETT.

Reasons for Judgment.

In none of the cases had the Crown made a tender of any particular sum which they were willing to pay, but the matter was left to the Exchequer Court to arrive at the compensation which should be paid by the Government. I objected to this course of procedure. The Expropriation Act requires the Crown to state in the Information the sums of money which they were willing to pay to the owner whose land was being taken. Subsequently each Information was amended, stating the specific sum which the Crown was willing to pay in respect of the particular property in question.

At the opening of the cases I suggested that as most of the lands were in the same locality, and to a certain extent form part of the one block, that evidence applicable to all the cases should be taken, Counsel for the various parties being at liberty to cross-examine any particular witness, and then any evidence was solely applicable to one case should be taken separately in connection with that case. Counsel did not see their way to adopt my suggestion. However, later on as the evidence developed and the various Counsel thought that the evidence in the first case might assist their clients, they one and all came to my view, and it was eventually agreed that all the evidence taken in regard to any one of the five cases should be held so far as applicable as if given in each of the cases. This has had the result of shortening the trials. I propose to deal with each case separately.

Before, however, passing on each case separately I may say that it is difficult to arrive at a satisfactory conclusion by reason of the fact that since the beginning of the war in August, 1914, there have been

1919

THE KING v. BARRETT.

Reasons for Judgment.

no sales of land in this particular neighborhood which would form an accurate guide in arriving at a satisfactory conclusion. The experts, however, have given their views, and they are a class of experts upon whose testimony I think reliance can be placed, although there may be a difference of opinion as to their method of arriving at their ideas of value.

Nichols, in his valuable book on *Eminent Domain*, states as follows: Second Ed. Vol. 1, p. 663:

"The productive value of land, or the value of the "land to its owner based on the income he is able to "derive from his use of it is not the measure of "compensation and is not material except so far as "it throws light upon the market value. In other "words, what is sometimes called the value in use "is everywhere repudiated as the test."

In the cases before me, in many instances, the lands are valued at figures which, if the land is to be made available to realize a satisfactory return, the buildings thereon would have no market value, as clearly if the land were to be utilized these buildings would have to be torn down in order to give place to a building suitable to the site. This applies to some of the properties in question. At the same time, to some extent, the rentals received from the buildings are of value as assisting the owners in carrying the properties, such as the payment of taxes, etc. In most of the cases the value will be what might be termed a demolition value. It would be manifestly unfair to allow the owner of the land a price for the land which could only be obtained if the owner contemplated a demolition of the existing buildings and the erection of buildings suitable to the site from which a proper return could be made.

1919

THE KING v. BAERETT.

Reasons for Judgment.

Nichols (on page 694) puts it in this way:

"The cost of removing buildings upon land taken "for the public use is not allowed as an additional "element of damages, but as an effort to reduce the "damages. In the ordinary case the cost of removing the buildings is almost if not quite equal to the "value of the materials, and the owner is entitled to "recover the full value of the buildings. He is not, "however, entitled to have the buildings valued as "they stand on the land as separate items additional "to the market value of the land, nor on the other "hand, is the condemning party entitled to have the "buildings valued apart from the land, merely as for "purposes of removal. The proper measure is the "market value of the land with the buildings upon "it, and the owner therefore receives nothing for the "buildings unless they increase the market value of "the land. Accordingly, evidence of the structural "value of the buildings is not admissible as an independent test of value. When, however, it is shown "that the character of the buildings is well adapted "to the location, the structural cost of the buildings, "after making proper deductions for depreciation "by wear and tear, is a reasonable test of the "amount by which the buildings enhance the market "value of the property. As in other cases of determining market value, not only the character and "condition of the building, but also the uses to which "it might be put, are matters for consideration."

For these propositions, Nichols cites American authorities, and it seems to me that it is common sense. I mention these remarks, as when I come to deal with the particular cases they will be found to be in point.

1919

THE KING v. BARRETT.

Reasons for Judgment.

Nearly all the witnesses agree that in arriving at the question of value, it must be considered that it may take some considerable time, probably years, before the lands in question could be utilized by the erection of buildings suitable to the location to return revenue, and the parties to these actions must bear in mind that any allowance made to them for the premises expropriated is based upon a cash purchase. It is needless to remark that it is surprising how taxes and loss of interest for a year or two would deduct from the value.

Two of the properties in question, namely, in the Burns case and the Sutherland case, are properties situate on Queen Street in the City of Ottawa. They are between O'Connor and Bank Street, and on the south side of Queen Street. I will deal first with the case of *The King v. Burns.*

The special reasons given in this case follow:—

CASSELS J. (April 26, 1919) delivered judgment.

Judgment rendered April 26, 1919. Reasons for judgment to be attached to the reasons for judgment in the *King v. Burns et al.*

I held over the reasons for judgment in this case by reason of the fact that the property in question was mortgaged with other properties to Robert Nicholas Slater, and Sir Arthur Percy Sherwood, executors of the estate of Esther Slater. I thought the mortgagees should be parties defendant to these proceedings in respect to their mortgage interest.

Since the trial the mortgagees have agreed to be added as parties defendant and to be bound by all the proceedings in the action, including the evidence taken, to the same extent as if they had been origin-

1919

THE KING v. BARRETT.

Reasons for Judgment.

ally parties, and an order was made (a consent being filed on April 22 instant) adding them as parties.

No tender was made by the Crown, but at the trial they amended their petition by offering the sum of $8,600.

The land expropriated is property lying immediately west of the land expropriated from the Loyal Orange Lodge, whose property was expropriated. Altogether Barretts own the fee in eleven feet and eleven and one-twenty-fourth inches. In addition to that, they have the right to the lane on the east side of the property and on the west side of the Loyal Orange Lodge. While technically the fee in this lane is in the Barretts, it is held in trust for the property owned by the Loyal Orange Lodge. The Barretts and the Loyal Orange Lodge have equal rights in this lane.

I allowed to the Loyal Orange Lodge $100 for the nine feet. I think that $400 a foot for the eleven and eleven one-twenty-fourth inches would be full compensation for the value of the land expropriated. I think that if another $100 a foot for the nine feet is also allowed the Barretts, it would be full compensation for the value of their interest in this land.

In my opinion, the nine feet dedicated as a lane, having regard to the fact that it could not be built upon either by the owners of the property expropriated or by the owners of the property vested in the Loyal Orange Lodge, is not worth at the time of the expropriation more than $200 a foot, and if the Barretts get one-half and the Loyal Orange Lodge the other half, they are receiving full compensation.

On the property expropriated from the Barretts there is a very old house in a very bad state of re-

1919

THE KING v. BARRETT.

Reasons for Judgment.

pair. It would have to be torn down were the property to be utilized in order to bring in a return on the property to be utilized in order to bring in a return on the value of the land. While in one sense it should be valued on a demolition basis, nevertheless, rent was being received which helped to carry the property. A feature in conection with this house is the fact that it extends further westwardly on land not expropriated by the present proceedings. It is conceded by the Crown that by reason of the tearing down of a considerable portion of this house the balance is absolutely valueless and should be paid for. I think if the Barretts are allowed the sum mentioned by Fitzgerald of $2,500, they receive everything they could reasonably expect to receive.

Another question arises but not of very much moment. It is said that the removal of this house leaves exposed what would be a party wall between the house and the building owned by Barrett on the west. There seems to be a consensus of opinion among Counsel that a reasonable allowance should be made for protecting this wall. I think the sum of $280, mentioned by Christie, is not unreasonable.

It is conceded that between the westerly line of the expropriated property and the buildings adjoining, there will be a strip of land left vacant somewhere in the neighbourhood of 10 feet, and a claim was made for the depreciation of this ten feet. The property immediately adjoining is owned by the Barretts and when it comes into the market the buildings on that property will have to be torn down if it is to be used in any practical manner. I do not

think any sum should be allowed in respect of this piece of land.

In all there will be allowed the sum of $4,768.05 for the eleven feet and eleven and one-twenty-fourth inches; and additional sum of $900 for the interest of the Barretts in the lane in question; and the further sum of $2,500, the value of the house. These sums amount to the sum of $8,168.05—and to this amount ten per cent. should be added. The further sum of $280 should be added as mentioned above for the party wall.

On this amount of $9,264.85, interest should run from the date of the expropriation.

The defendants are entitled to the costs of this proceeding.

Judgment accordingly.

Solicitor for plaintiff: *N. G. Larmonth.*

Solicitors for defendants: *Code & Burritt.*

1919
Oct. 29.

IN THE EXCHEQUER COURT OF CANADA.

HIS MAJESTY THE KING,

PLAINTIFF;

v.

ALPHEDA FONTAINE AND OTHERS,

DEFENDANTS.

Expropriation—Prospective Value—Second Invasion—Elements of Damage—Benefits due to expropriation—Quantum of damages.

Held, That property used as a farm in proximity to a village, but with only a prospect that at some distant date, some parts might be sold as building lots, will be classed as farming lands, and be valued as such, and not as building lots; such prospect being too distant. *The King v. Trudel,* referred to.[1]

2. That in a case of second expropriation where the property has already adjusted itself to conditions created by the first invasion, the owner of property is entitled to other and different damages due to such second expropriation. *The King v. Lynch* p. poste. 198 *ante* referred to.

3. That where by second expropriation a railway takes a strip of land for a railway yard on each side of the right of way first taken, the extra inconvenience and delay due to longer crossing and to the more extensive use of the property as a yard, are elements of the damages to be allowed him.

4. That the benefits accruing to the remaining part of the property by the expropriation and the use to be made of the land taken, will be taken into consideration in fixing the quantum of damages due an owner.

[1] (1914), 49 Can. S. C. R. 501; 19 D. L. R. 270.

THIS is an information exhibited by the Attorney-General of Canada, alleging that the Crown has expropriated certain lands for the purposes of a Government Railway yard near Quebec city and praying to have same valued by this Court.

The trial came on before the Honorable Mr. Justice Audette at the city of Quebec, October 20, 21, 22 and 23, 1919.

C. V. Darveau, K.C., and *L. G. Belley,* K.C., for plaintiff.

A. Bernier, K.C., and *V. A. de Billy,* for defendants.

The facts are stated in the reasons for judgment of the Honorable Mr. Justice Audette, which are as follows:

AUDETTE, J. (October 29, 1919) delivered judgment.

This is an information exhibited by the Attorney-General of Canada whereby it appears that certain lands were taken and expropriated by the Crown, under the provisions of The Expropriation Act, R. S. C. 1906, C. 143 for the purposes of the Intercolonial Railway, a public work of Canada, by depositing, on 24th of August, 1915, a plan and description of the said lands, in the office of the Registrar of Deeds for the City of Levis, in the Province of Quebec.

The total area of land taken is (1.801) one, and eight hundred and one thousandths square arpents, for which the Crown offers for the land and for all damages resulting from the expropriation, the sum of $566 and the undertaking hereinafter mentioned. The defendants claim the sum of $2,450.00.

The title is admitted.

The lands expropriated form part of a farm, as stated in paragraphs 7 and 8 of the Statement of Defence, which was before the expropriation of August, 1916, crossed by the main line or track of

1919

THE KING v. ALPHEDA FONTAINE.

Reasons for Judgment.

the Intercolonial Railway, running across the farm, and upon which the owners had the usual farm crossing. However, for the purposes of establishing a railway yard at the *locus in quo,* the plaintiff, in August, 1916, by a second invasion, expropriated a strip of land on both sides of the right of way respectively, and adjoining the same, namely: on the South an area of (0.555) five hundred and fifty-five thousandths of an arpent, and on the North an area of (1.246) one and two hundred and forty-six thousandths arpents,—in all (1.801) one arpent, and eight hundred and one thousandths square arpents.

The Crown has given and filed an undertaking, reading as follows:

"Report of the Committee of the Privy Council "approved by His Excellency the Governor-General "on November 29th, 1918.

"The Committee of the Privy Council have had "before them a Report, dated 25th November, 1918, "from the Minister of Railways and Canals repre- "senting that by an Order in Council of February "27th, 1917, authority was given for the settlement "of a number of claims for lands expropriated for "the purposes of the Chaudiere Junction Yard of the "Canadian Government Railways on the basis of "an appraisement made of the parcels by the Right- "of-Way and Lease Agent of the Department of "Railways and Canals.

"By a further Order-in-Council of December 11th, "1917, it was explained that in estimating the "amounts of compensation to be paid to the several "proprietors, regard was had to the fact that by "reason of the expropriation they were deprived of "certain private crossings which had theretofore

"existed over the right of way of the Intercolonial "Railway and by which they had access to and from "the several portions of their respective farms; and "that in substitution for these crossings it was pro- "posed to provide a roadway along both sides of "the properties expropriated and to maintain a "private crossing at one end thereof, all as shown "upon an attached plan. To give effect to this ar- "rangement, the Attorney-General of Canada was "given authority to give each of the several pro- "prietors an undertaking in the following form or "to the like effect:

"The Attorney-General on behalf of His Majesty, "being thereunto duly authorized by Order-in- "Council of the 11th December, 1917, hereby under- "takes to grant to the defendant, his heirs, succes- "sors and assigns, a right of way on, over and upon "the two strips of land marked respectively 'Pro- "posed roadway' upon the plan attached hereto, to "and from the respective portions of his property "situate on either side of the Intercolonial Railway "Yard at Chaudiere Junction, by means of the "private crossing marked 'A' upon the plan, or "by the public road marked 'B' thereon (as the "case may be) and that His Majesty will, as may be "reasonably required, execute such conveyance or "assurance if any, as may be necessary in order to "give full effect to this consent or undertaking."

"That two additional parcels of land at this point "were, in August, 1916, expropriated for the "purpose of extending the railway yard, and the "Right-of-Way and Lease Agent of the Department "of Railways and Canals has furnished valuations "of the same, as follows:

1919

THE KING v. ALPHEDA FONTAINE.

Reasons for Judgment.

Owner	Area	Land value	Damages	Total Compensation
"Pierre Lambert ...	0.753	$150	$77.00	$277.00
"Abraham Couture .	0.653	130	76.40	206.40

"The Minister on the advice of the Acting "Deputy Minister of the Department of Railways "and Canals, recommends that authority be given "for tendering to these two claiments the amounts "above set out, with interest in each case at the rate "of 5 per cent. per annum from the date of ex- "propriation to the date of payment, and if accept- "ed, for payment of the same upon the receipt of "proper deeds of conveyance and release; failing "acceptance the cases to be referred to The Ex- "chequer Court of Canada for ajudication; in each "case, an undertaking to be given in the same form "or to the like effect as in the cases covered by the "above mentioned Orders-in-Council, in respect of "the proposed roadways referred to.

"The Committee concur in the foregoing recom- "mendation, and submit the same for approval.

"(Sgd.) RODOLPHE BOUDREAULT,
"Clerk of the Privy Council.

"The Honourable,
"The Minister of Railways
"and Canals."

"The Attorney-General on behalf of His Majesty "undertakes to maintain proposed roadways above "mentioned.

"(Sgd.) C. V. DARVEAU,
"Of Council for the Attorney-
"General of Canada."

1918

THE KING v. ALPHEDA FONTAINE.

Reasons for Judgment.

This undertaking is made with the object of giving a crossing to these farmers and thereby decrease in a measure the damages which obviously flow from the deprivation of a crossing to the southern part of their farms, the buildings being on the northern side thereof.

By the undertaking the Crown has made and will maintain a road, taken out of the lands expropriated and belonging to the plaintiff, running on the northern side parallel to the railway to the end of the railway-yard, where the defendants have a crossing, over three tracks, or six rails, and two gates to open and close at that place. Thence travelling from east to west on a parallel road on the south, similar to the road on the north, he comes to the gate opening on the southern part of his farm. The distance to travel for one trip is of a distance of eleven and two-thirds arpents in length. Therefore, for the round trip, going and coming, he has to travel about 23 arpents and open four gates, instead of two as formerly.

To this element of damage there is another one represented by the farmers as being very serious in that the shunting and the obstruction of cars at the crossing, occasions serious, numerous, and at times long delays in their numerous trips from the northern to the southern parts of the farm.

Some complaint has also been set up in respect of the embankment which has been raised and by the obstruction of the cars in the yard, which obstruct the view of the southern part of the farm from the northern part thereof. Mention has also been made that the surface waters flood the roadway on the northern side of the right of way, and at places

1919

THE KING v. ALPHEDA FONTAINE.

Reasons for Judgment.

spread on the southern part of the northern parcel of the farm; but, from actual observation, when viewing the premises and from the evidence, it is obvious that the farm ditches have not been kept and are not in good order, and maintained, and when these two parallel roads are maintained by the Crown, I would reckon the surface waters, which are not of any greater volume than before the 1916 expropriation, will be well taken care of, especially if the farmers themselves attend to their own boundary ditches.

Here follows a summary of the evidence.

On behalf of the owners, *Pierre Fontaine* valued the farm before the expropriation at $12,000, and since at $10,000. He, however, values the land taken at $500 an arpent or $900.50 for the land taken and the damages at $2,000.

Michel Lemieux values the land expropriated at the rate of $600 an arpent, or $1,080.60, and the damages at $2,000 or more, as he says.

E. Malouin, values the land taken at the rate of $700 or $1,360 for the 1.801 arpents and the damages at from $2,500 to $3,000.

J. E. Plante, values the land taken at $650 to $700, which at $675 would represent $1,215.67, and the damages at $2,500 to $3,000.

Edmond Cantin values the land taken at $1,000, and the damages at $2,000 to $2,500.

On behalf of the Crown *Edmond Giroux* values the land taken at $100 an arpent, or $180, and the damages at $464.10. *Alfred Couture,* at $150, for the land taken or $270.15 and the damages at $600. *J. A. Dumontier,* at the rate of $100 for the land taken or $180, and feels unable to place a valuation

upon the damages. *Louis Jobin* also places the value of the land taken at $180, and the damages at $500, and *Joseph G. Couture* estimates the land taken at $180, and the damages at $220.

Now these farms are composed of soil of an average quality, and the exploitation of the same is of an equal standard. It is contended on behalf of the defendants that as their lands are in the neighbourhood of Charny, which keeps developing towards the east, they will ultimately be sold as building lots. While there is a prospect that some parts or portions of these farms will at some distant date be sold as such, I am forced to find that they are actually in the class of farming lands, with the possibility and ever the probability of some portions being sold in building lots in the future,—but these lots, and especially on the Fontaine farm, will be first taken up as building lots on the extreme northern end thereof and that this prospective capability of the farms for building lots on the south is at too distant a future to class the farm as building lots. There is a large quantity of land available for building lots, if at all in demand, on the northern part of the farm for years to come before the south can be taken.

"While the prospective potentialities of the lands "should be taken into account, it is only the existing "value of such advantages at the date of the expro- "priation that falls to be determined. *The King v. Trudel.*[1]

[1] (1914), 49 Can. S. C. R. 501.

Then one must not overlook the important fact that this expropriation is in the nature of a second invasion. That is a railway was already running across the farm severing it in two, and that they had

1919

THE KING v. ALPHEDA FONTAINE.

Reasons for Judgment.

to cross a railway; but with only one track instead of a railway yard with three tracks for the Fontaine owners, who at the date of the present expropriation had to suffer all the inconvenience flowing from an ordinary expropriation.

The Crown having been asked by me, at trial, to give particulars of the amount of $566 offered by the information, Counsel at bar stated that the plaintiff was offering for the land taken at the rate of $200 or $360.20, and for the damages, $205.80, representing the total of $566.00.

The plaintiff might at any time have placed a second and a third track on their right of way, their property, under the first expropriation, without paying any further damages. Then the fact of the establishment of a large railway yard, from the increase in the labor employment, there will result a benefit to the community at large residing in that neighbourhood, by increasing the population of Charny and creating at a future date, a demand for building lots on the northern extremity of the farm and thus enhancing the value of this property.

Accompanied by Counsel I have had the advantage of viewing the *locus in quo* and the premises in question, and after weighing the evidence, oral and documentary, and taking all the circumstances into consideration, making a fair allowance for the delays occasioned in crossing, I have come to the conclusion to allow for the land taken $360.20, or at the rate of $200 an arpent, and for the damages the sum of $800, and to direct that judgment be entered, as follows, no allowance being made for compulsory taking, the amount allowed being already sufficient:

1919

THE KING v. ALPHÉDA FONTAINE.

Reasons for Judgment.

1st. The lands expropriated herein are declared vested in the Crown as of August 24th, 1916.

2nd. The compensation for the lands taken and for all damages, past, present and future, resulting from the present expropriation is hereby fixed at the sum of $1,160.20 with interest thereon from the 24th August, 1916, to the date hereof.

3rd. The defendants are entitled to the due performance and the execution of the works mentioned in the undertaking above recited.

4th. The defendants are also entitled upon giving to the Crown a good and sufficient title, free from all mortgages, hypothecs and incumbrances, to recover from and be paid by the plaintiff the said sum of $1,160.20, with interest as above mentioned.

5th. The defendants are also entitled to their costs.

Judgment accordingly.

Solicitors for plaintiff: *C. V. Darveau*, K.C.

Solicitors for defendant: *Bernier, Bernier and de Billy.*

1915
June 12.

IN THE EXCHEQUER COURT OF CANADA.

THE KING,

PLAINTIFF;

v.

MARGARET LYNCH,

DEFENDANT.

Expropriation—Second Invasion—Market Value—Potential Value—Compulsory Taking.

Held, That the owner of property over which one railway has already obtained a right of way is entitled to other and different damages from a second company expropriating land alongside the first, the property having already adjusted itself to the first invasion. (*Re Billings & Canadian Northern Ont. Ry. Co.*[1] referred to.)

2. That the owner of a property is entitled to get the market value of his land, estimated at the best use it can be put to, and taking all its prospective capabilities into consideration.

3. In valuing lands, subdivided into lots, situate in a small community, where a number of other subdivisions are on the market, the probability that the owner will have to wait years to sell, and then only receive the price in instalments, instead of as in expropriation, are matters to be considered.

4. That in case of compulsory taking, the usual ten per cent. is allowed.

[1] (1913), 15 D. L. R. 918; 16 Can. Ry. Cas. 375; 29 O. L. R. 608.

THIS is an information exhibited by the Attorney-General of Canada alleging that the Crown has expropriated certain lands for purposes of a Government Railway and praying to be declared owners and to have the same valued by this Court.

The trial came on before the Honorable Mr. Justice Audette at the city of Fredericton,, N.B., on June 10, 11 and 12, 1915.

R. B. Hanson, K.C., for plaintiff;

F. B. Carvell, K.C., for defendant.

1915

THE KING v. MARGARET LYNCH.

Reasons for Judgment.

Judgment was rendered from the Bench, and reasons of the Judge state the facts.

AUDETTE, J. (June 12, 1915), delivered judgment.

Were I to reserve this case for further consideration, I do not think I would be in a better position to appreciate it than I am now with all the facts present in my memory and vividly impressed upon my mind.

I have had the advantage, accompanied by Counsel, of viewing this property and while I realize it is a desirable property, I also realize that it does not come in that class of property in which a gentleman of means would invest a large sum of money to make a home for himself. One cannot cast away from his mind that before the present expropriation, on one side of the property there was already a railway in full operation and at the back part, there were large industrial buildings that one would not desire to have next to a desirable private dwelling in which to invest a large sum of money, perhaps in excess of its market value, with the object of making a home with grounds and nice surroundings.

The question of railway damages to-day with respect to these lands is only one of degree, as compared to the time before the present expropriation, when there was already a railway, and there is now another, but closer to the buildings.

We have had the advantage to hear, as witness, a lady residing in this house who told us that she had just noticed the vibration made by the C.P.R. trains before she had come to give her testimony, and that she had heard them in a very distinct manner.

1915

THE KING v. MARGARET LYNCH.

Reasons for Judgment.

This property is injuriously affected by the C.P.R. and it is injuriously affected by the new railway. The owner of property from whom one railway has already expropriated a right of way is entitled to other and different damages from a second company expropriating lands alongside the lands taken in the first expropriation; the property having already adjusted itself to the first invasion. Re *Billings & C. N. Ontario Ry. Co.*[1]

While I have to acknowledge that this property has a real and a high value, I cannot go to the extreme amounts that have been sworn to before me, and I may repeat here what I have already said in several cases. The owner of the property is entitled to get the market value of the land put to the best use it can be, taking all its prospective capabilities into consideration.

Approaching the consideration of the class of property within which it must be placed I may say that it was with some doubt at the opening, after hearing only part of the evidence, that I could feel justified in considering it as a property on the market subject to a subdivision. It has been approached in that manner by the Crown and it is certainly the best uses to which this property can eventually be put to. However, one must not overlook also, that in a small community like the present one of this locality, with already a number of sub-divisions on the market, this new one might practically glut the market and that it might take years before it could be sold. Placing it in this class of sub-divisions, I thought that the evidence of Mr. Mitchell was about

[1] (1913), 15 D. L. R. 918; 16 Can. Ry. Cas. 375; 29 O. L. R. 608.

right if worked upon that basis. He has divided the land into building lots, has put a fair value upon them and, if his figures are taken, the owner would realize in one day, the price of all these lands or lots as if they were sold at once without experiencing any delay, and without any expenditure of any kind in advertising and the like, for the purpose of getting their money by instalment or at different date. They would have at once the full use of the purchase price and they would have no taxes to pay. That mode, indeed, if fair, would also be most liberal.

I have figured out what this property, on such basis, should return and there is so little difference between Mr. Mitchell's figures at $8,638 and mine, that I have accepted them although slightly larger. As that property is taken against the will of the owner, it is compulsorily taken, and *I think it would be a proper case to add the usual* 10 *per cent. viz.,* $863.00, making in round figures the sum of $9,500 with interest from the date of the expropriation, namely August 4, 1913, with the accrued interest.

The whole compensation, capital and interest, would run up to over $10,400.00.

Therefore, I think judgment should be entered as follows:

1st. The lands expropriated herein are declared vested in the Crown as of the dates of the respective takings.

2nd. The compensation is fixed at the sum of $9,500.00 with interest thereon from August 4, 1913, to the date hereof. The defendant is entitled to re-

1915

THE KING v. MARGARET LYNCH.

Reasons for Judgment.

cover that amount upon giving a good and satisfactory title free from incumbrance.

3rd. The defendant is also entitled to his costs.

Judgment accordingly.

Solicitors for plaintiff: *Slipp and Hanson.*

Solicitors for defendant: *F. B. Carvell, K.C.*

IN THE EXCHEQUER COURT OF CANADA.

1919
Nov. 8.

PATRICK McCANN,

SUPPLIANT;

v.

HIS MAJESTY THE KING,

DEFENDANT.

Railways—Government Railway Act, fencing—Damages—Negligence —Evidence, weighing of—Proximate cause.

Held, That where a person approaching a level railway crossing, which he had frequently crossed before and the dangers of which were known to him, does so without proper caution and care, and is struck by an on coming train, his own actions being the sole and proximate cause of the accident, his claim for damages cannot be maintained.

2. That it does not become the duty of the Crown to fence, under sections 22 and 23 of the Government Railway Act, until asked to do so by adjoining proprietors. *Viger v. The King,* referred to.[1]

3. That inasmuch as one who testifies to a negative may have forgotten a thing that did happen, yet it is not possible to remember a thing that never existed. It being conceded that the witnesses are of equal credibility, the evidence of the one who testifies to an affirmative is to be accepted in preference to one who testifies to a negative. *Lefeunteum v. Beaudoin,* referred to.[2]

4. That in order to succeed in an action for damages against the Crown, under sub-section F, sec. 20, Exchequer Court Act, as amended by 9 & 10 Edw. VII., ch. 19, proof must be made that an officer or servant of the Crown has been guilty of negligence whilst acting within the scope of his duties, which negligence was the cause of the accident.

[1] (1908), 11 Can. Ex. C. R. 328.
[2] (1897), 28 Can. S. C. R. 89.

HIS is a case brought by a petition of right seeking to recover the sum of $3,550.00 for damages arising out of an accident on the Intercolonial Railway.

1919

McCANN v. THE KING.

Reasons for Judgment.

This trial came on for hearing, before the Hon. Mr. Justice Audette, at the City of St. John, N.B., on May 28 and 29, 1919.

G. H. V. Belyea, K.C., and *W. M. Ryan,* for suppliant.

Fred. R. Taylor, K.C., for respondent.

The material facts of the case are clearly dealt with in the reasons for judgment of the Honorable Mr. Justice Audette who rendered the judgment herein, and which follows:

AUDETTE, J. (November 8, 1919) delivered judgment.

The suppliant by his petition of right, seeks to recover the sum of $3,550.00, for damages arising out of an accident on the Intercolonial Railway, a public work of Canada.

On the 15th September, 1917, between the hours of 10.30 and 11.30 in the forenoon, of a fine bright day, the suppliant, who is a hack-driver in the City of St. John, N.B., was driving a closed coach, with glass windows back and front, on a return trip from the Catholic cemetery near St. John, with passengers who had attended a funeral there. He was himself sitting on the box six feet from the ground, and was travelling from east to west, on Brussels Street, in the City of St. John, N.B., which street is separated from the City Road by Haymarket Square, which is crossed by a spur or branch line of the Intercolonial Railway, as more particularly shown on plan, Exhibit No. 1.

At the time of the accident the suppliant had as passengers in his coach, Messrs. Hunt, Rolston, Massey and two boys; but unfortunately none of these were heard as witnesses.

The suppliant testified that on the day of the accident, he did not see the train travelling on Marsh Street, thence across the Square, and that he did not hear any ringing of the bell and sounding of the whistle. He swears that he saw the train for the first time when he was on the track at Brussels Street when his horses and front wheels were on the track, and that his attention was first attracted to the train by one of two men, who he says were on the top of the last box-car, and that one of them called to him "Look out Pat", and further that he did not see any flagman at the crossing. This train was working reversely, with fifteen cars behind the engine and one in front, and the suppliant's coach was struck on one of the hind wheels and smashed, when he and the passengers were injured. Hence the institution of the present action.

To succeed in such an action, the suppliant must bring his case within the provisions of sub-section (f) of sec. 20, of *The Exchequer Court Act*,[1] as amended by 9-10 Edw. VII., 1910, ch. 19. In other words there must be, 1st a public work, 2nd an officer or servant of the Crown who has been guilty of negligence while acting within the scope of his duties or employment; and, 3rd, the accident must result from such negligence.

The first requirement has been duly satisfied; but has there been any negligence on behalf of an officer or servant of the Crown as contemplated by the statute?

There is, indeed, conflicting evidence with respect to the flagman, the ringing of the bell and sounding of the whistle; but, such evidence must be approach-

[1] R. S. C., 1906, Ch. 140.

1919

McCANN v. THE KING.

Reasons for Judgment.

ed with due allowance for the difference between the mental habits of persons in taking cognizance of what is happening in their immediate vicinity, for instance one person may have apprehended perfectly a portion of the phenomena surrounding him at a given time and yet have been insensible to the rest. One witness may answer that he did not hear the bell and whistle of a locomotive although both were sounded and he was near enough to hear them both, the psychological reason being that his attention was engrossed in some other fact. In such a case the evidence of another witness who did see the flagman, hear the benn, etc., must be taken in preference to the negative evidence. Indeed, 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 negatibus;* 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. *Lefeuntcum v. Beaudoin.*[1]

The presence of a flagman is denied by the suppliant, and most of his witnesses, yet the policeman called on his behalf saw the flagman signalling on City Road and waving his hands. That is one step towards establishing the presence of a flagman, and that is amply corroborated by the crew of the train, and by one who was in Cogger's store, who saw him running ahead of the train, through Haymarket Square, and who even recognized Breen as such flagman. Witness Hunter says he actually saw Breen giving signals at both streets, and Breen him-

[1] (1897), 28 Can. S. C. R. 89.

self testifies to the same effect. Now the policeman says he did not see the flagman on Brussels Street, but he said that at that time there was a good deal of traffic, and therefore his attention must have been otherwise engaged.

The same thing may be said with respect to the bell and the whistle. Some of the witnesses for the suppliant heard the sounding of two long and two short blasts; but, that has been denied by the suppliant himself and some of his witnesses. It is now well known that the ringing of the bell is mostly always done automatically, and the crew testified to its being rung.

Now, coming to the evidence of the respondent, it is established by Flagman Breen, that on the day of the accident, he flagged City Road and that he also flagged Brussells Street. After explaining how he flagged at City Road, he said that he then ran through the square to Brussells Street, where he stopped McCann's coach which was then about a length east of the track, and that after stopping the coach he stopped two little children on the southern sidewalk. After protecting these children, he turned around and saw that McCann had disregarded his warning and was on the track, his horses about going over, when the train was coming pretty close to him.

Then coming to this part of the evidence respecting the words "Look out Pat", so often referred to in the evidence, and that the suppliant endeavoured to establish as coming from the lips of the man on the top of the last car, I must find that this was denied and cannot be otherwise explained than from the reasonable conjecture that it came from some of the occupants of the coach driven by the suppliant

1919

McCANN v. THE KING.

Reasons for Judgment.

who realizing the danger of their position called out to him to be careful, and being known to them, they called to him by his name.

The suppliant contends the respondent or his officers or servants were negligent in that:—1st. The crossing was not fenced; 2nd. That there being no fence at this level crossing, there was an obligation upon the Crown, under section 33, of *The Government Railway Act*,[1] to have an employee stationed at the intersection of the railroad with City Road and the extension on Brussels Street. 3rd. That notwithstanding section 34 of that Act, there was transgression of the rule as to speed in a thickly-peopled community. 4th. That there was no protection afforded by the presence of a man in rear of the car, when the train was moved reversely; and 5th. There were the omissions of sounding the whistle and ringing the bell at a crossing.

As to the first charge of negligence, I may say, following the decision in re *Viger v. The King*[2] that there being no evidence establishing that the Crown was ever asked to fence in the *locus in quo*, there is no duty cast upon it to fence under sections 22 or 23 of *The Government Railway Act*. In other words the statute does not in the present instance impose upon the Crown the duty of fencing such a place as a public square in the centre of a city.

With respect to the second charge of negligence, it will be sufficient to state that section 33 of the said Act, only contemplates the case of two railways intersecting one another, and is not at all apposite to the present state of affairs.

[1] R. S. C. 1906, C. 36.
[2] (1908), 11 Can. Ex. C. R. 328.

Coming to the third charge, I must find it answered by what has been said with respect to the first one, and that is, no fence being required there was no restriction as to speed. And further that under the evidence it cannot be found that the train was proceeding at an excessive speed.

Then the fourth objection is answered by the evidence of the suppliant, which placed two men on the rear car and that of the respondent which placed one. And it was further established that the man on the rear of the car applied the emergency brakes just as soon as he saw the suppliant on the track, and he contended that at that time McCann had his head turned towards the south.

The last charge is that of the failure to comply with the requirements of section 37 of *The Government Railway Act,* which says that: "The bell shall "be rung or the whistle sounded at the distance of "at least eighty rods from every place where the "railway crosses any highway, and shall be kept "ringing or be sounded at short intervals, until the "engine has crossed such highway."

This section provides for the ringing of the bell or the sounding of the whistle, but not for both. It is clearly in evidence on behalf of both parties that the whistles were sounded at one and at two separate intervals respectively, and it is further established by the respondent's evidence that the bell was ringing the whole time. This evidence that the bell was ringing the whole time can practically be given only by the crew, as given in the present case. Yet, if that evidence were challenged and if I were to conclude that the bell was not ringing at the time of the accident, a fact I cannot find under the evidence—I must also find that such fail-

1919

McCANN v. THE KING.

Reasons for Judgment.

ure was not the proximate cause of the accident, it was not the *injuria dans locum injuria.* Indeed the proximate cause of the accident is the want of caution and care in approaching the crossing by McCann, and his determination to take his chances in going over the crossing, after he had been ordered to stop, and while the flagman was attending to other members of the public for their protection.

Moreover, while there are imperative statutory duties cast upon a railway operated under legislative authority, there are also duties cast upon the public travelling over railway crossings. A person cannot with perfect immunity approach a railway crossing without a reasonable amount of caution—especially is that so, when that crossing is well known and has often been travelled over by the party complaining about it. This crossing is in no sense in the nature of a concealed trap. According to witness Murdock heard on behalf of the suppliant, there would be no difficulty for a person travelling east to west on Brussells Street, to see a train backing, travelling on the square.

Clearly, as it was said in the *B. C. Electric Railway Co. Ltd. v. Loach,*[1] if the suppliant had not got on the track,—whether or not we accept the evidence that he was warned off by the flagman, and that he did so with absolute disregard to warning, the question which suggests itself is did he approach it and did he get there with ordinary care and diligence on his own part, as it was incumbent upon him to do.

As stated in the *McAlpine* case,[2] "There is no rule "of law in England as that if a person about to cross "a line of railway looks both ways on the approach-

[1](1915), 23 D. L. R. 4; [1916] 1 A. C. 719.
[2] 13 D. L. R. 618; [1913] A. C. 845.

"ing track, he need not look again just before cross-"ing it." Yet I cannot dispel from my mind that the suppliant should have been more careful and diligent in approaching and taking the track. He knew that crossing, having often travelled over it, and under the circumstances, must it not be expected from a person exercising ordinary care and prudence to look before venturing upon the track? The greater the danger, the greater should be the care and prudence. By taking the track as he did he was the sole and proximate cause of the accident. The omission to do the things which he ought to have done, and his doing the things he should not have done, constitute the negligence which determined the accident. He was the victim of his own negligence and carelessness.[1]

Therefore, under the circumstances and under the evidence adduced, I am unable to find any negligence on behalf of an officer or servant of the Crown, acting within the scope of his duties to which, under the provisions of section 20, of *The Exchequer Court Act,* should be attributed the cause of the accident. The suppliant has failed to prove his case, and there will be judgment declaring that he is not entitled to any portion of the relief sought by the petition of right.

Solicitors for suppliant: *Wm. M. Ryan.*

Solicitor for respondents: *Fred. R. Taylor,* K.C.

[1] *Parent v. The King,* (1910), 13 Can. Ex. C. R. 93; *Brilliant v. The King,* (1914), 15 Can. Ex. C. R. 42; *Cantin v. The King,* (1915), 18 Can. Ex. C. R. 95; *Andreas v. The C. P. R.,* (1905), 37 Can. S. C. R. 1; *Morrison v. The Dominion Iron & Steel Co.,* (1911), 15 N.S.R. 466; and *Villeneuve v. C. P. R.,* (1902), 2 Can. Ry. Cas. 360.

1919
Nov. 8.

IN THE EXCHEQUER COURT OF CANADA.

APPEAL FROM NEW BRUNSWICK ADMIRALTY DISTRICT.

DAVID COY, CHESLEY W. McLEAN, AND HARRY C. TITUS, OWNERS OF THE SHIP "PREMIER",

(PLAINTIFFS) APPELLANTS;

v.

THE SHIP "D. J. PURDY",

(DEFENDANT) RESPONDENT.

Collision—Narrow channel—Evidence, weighing of—Crew on alert—Witnesses on shore—Preliminary Act, force of—Conflicting evidence—Liability in common fault. 4-5 Geo. 5, ch. 13, sec. 2, (Can).—Personal equation—Reasonable course.

A collision took place in a narrow channel, of the St. John River, between 800 and 1,000 feet in width, at mid-day, in clear weather.

The *"Premier"* was on her starboard side of the channel, when in answer to one blast signal from the *"Purdy"*, meaning that she would keep to her starboard side, the *"Premier"* answered one blast that she would keep to starboard, and the collision took place on the *"Premier"* side of the channel.

The *"Purdy"* was also for a time on her starboard side, and signalled she would so continue, but at a given moment without notice or reason she sheered across the channel towards the *"Premier"*, when the collision happened. The *"Purdy"* had only one man at the wheel, when it was admitted she was hard to steer, and two should have been on duty on the occasion in question.

Held (varying the judgment appealed from), that the *"Purdy"* was navigated improperly and contrary to the signals given by her and was guilty of negligence and solely to blame for the accident.

2. That the evidence of disinterested witnesses standing on the shore in such a position of advantage as to have a full and clear view of both ships and thus follow the courses and manoeuvres of the vessels, will be accepted in preference to that of a passenger in the saloon of one of the ships with a limited range of sight as to the course of the two colliding ships,—due allowance being made for personal equation.

3. That in the presence of conflicting evidence, the Court should examine into the probabilities of the matter and draw its own conclusion as to what would be the most reasonable courses. The "Mary Stewart"[1] and the "Ailsa"[2] referred to.

4. That where statements in the preliminary act contradict those made at trial, the former will generally be accepted as a formal admission, and binding on the one making it. The "Seacombe" referred to.[3]

5. That more credibility attaches to evidence of the crew that is on the alert. The "Dahlia" referred to.[4]

EDITOR'S NOTE.—The change in the measure of liability for damages where both ships are to blame for collision affected in England by 1-2 Geo. 5, ch. 57, secs. 1 & 9, and in Canada by 4-5 Geo. 5, ch. 13, sec. 2, whereby instead of the damages being equally divided the "liability to make good the damage or loss shall be in proportion to the degree in which each vessel is in fault," referred to.

[1] (1844), 2 Rob. 244.
[2] (1860), 2 Stuart's Adm. 38.
[3] (1912), P. 21.
[4] (1841), 1 Stuart's Adm. 242.

THIS is an appeal from a judgment of the Exchequer Court of Canada, New Brunswick Admiralty District.

The judgment in the lower Court was rendered by the Honorable Mr. Justice Hazen on April 22, 1919, declaring both ships at fault and equally responsible.

Here follows the reasons for judgment appealed from:

HAZEN, J. J. A. (April 22, 1919) delivered judgment.

The collision in question in this suit took place opposite Middle Hampstead in the St. John River, on the 5th October last, between twelve and one o'clock in the afternoon. It was about a mile and three-quarters higher up the river than Hampstead wharf, and in that part of the river which lies be-

1919

COY. MCLEAN & TITUS v. S.S. "D. J. PURDY"

Reasons for Judgment.

tween Long Island on the east and the main bank of the River St. John on the west. There was a light wind—in the language of the captain of the "Purdy" it was "a little mild breeze" and there was a current in the river of about two miles an "The day was clear.

"It is first necessary to ascertain from the evi- "dence and the position and courses of the vessels "prior to and at the time of the collision and how "the collision occurred. It was claimed on behalf "of the 'Premier' that after leaving Gerow's wharf "on the eastern side of the River St. John, it round- "ed Long Island, coming over to the Hampstead side "at first and then coming over in a slanting course "to the Long Island side, and then proceeding paral- "lel with Long Island and within a very short dis- "tance of its shore, up river; that when it first "sighted the 'Purdy' that ship had rounded what "is called the curve in the island and was coming "down river about midstream or further over to- "wards the Hampstead shore, and that when it was "within a few hundred yards of the 'Premier' it "turned suddenly to port and ran into the 'Premier', "striking it almost, though not quite at right angles "on the port side, about eight feet aft of midships, "injuring the 'Premier' to such an extent that it had "to be beached in order to prevent it sinking. Evi- "dence to this effect is given by the captain and "members of the crew of the 'Premier', by some "passengers who were on board, and by some wit- "nesses who saw what occurred from the shore about "half a mile away. As the river at the point where "the accident occurred is between nine hundred and "one thousand feet wide, these witnesses not only "viewed the disaster over the water, but over a con-

"siderable distance of land intervening between "the point where they stood and where the water "on the western side of the River St. John com- "menced, and while I do not in any way dispute "their *bonâ fides*, I am disposed to think that they "were not in as good a position to speak accurately " in regard to the accident or the distance of the " 'Premier' from Long Island or the position of the " 'Purdy' as would be those who were on the ves- "sels at the time when the accident occurred, and "that it would be an easy thing from their view- "point to be mistaken in regard to the matter.

"On the other hand the evidence on behalf of the " 'Purdy' is to the effect that the vessel rounded the "point of the island and came down river running "within a short distance of the Long Island shore "and parallel to it; that when the 'Premier' was "first sighted it was coming up river on the Hamp- "stead side of the midstream, and that it gradually "came across towards Long Island; that the 'Purdy' "continued its course down river, keeping to the port "side of midstream and close to Long Island, and "that if both vessels had kept their course they "would have passed one another without any acci- "dent occurring, but that as they approached the " 'Premier' kept coming over towards the Long "Island shore, and finally attempted to cross the "bows of the 'Purdy'. The 'Purdy's' engines were "reversed, but it struck the 'Premier' at the point 'that I have mentioned with the result as before "stated.

"As is the case in nearly all collision cases, the "evidence was of a very conflicting character, and "if there was only the verbal evidence of the wit- "nesses to be considered it would be a difficult mat-

1919

COY, MCLEAN & TITUS v. S.S. "D. J. PURDY"

Reasons for Judgment.

"ter to decide between them. Some of the evidence, "however, I think should be referred to. One of the "witnesses was Mr. Parker Glasier, who was travel- "ling on the 'Purdy' that day, and who has had an "experience of half a century in connection with "steamboating and freighting on the River St. John. "He states that he had his dinner on board the boat "about twelve o'clock, and that when he came out "of the dining saloon the 'Purdy' was quite close to "the island shore, that a returned soldier came out "at the same time with him, and they stood talking, "facing the Hampstead shore, and that after they "had been talking a short time the soldier asked him "what that was coming up river, and Mr. Glasier "said it was the 'Premier'. At this time the 'Pre- "mier' was between a quarter and a half mile below "the 'Purdy', and nearly midstream, while the "'Purdy' was quite close to the island shore and "keeping quite close to it. He judged that the boats "were between a quarter and a half mile apart when "he first sighted the 'Premier,' He went on with his "conversation with the soldier and did not see the "'Premier' again until the boats were right close "together; that the 'Premier' then changed her "course to starboard and ran towards the island "and across the bows of the 'Purdy', when the col- "lision occurred, although at that time the 'Purdy' "had reversed her engines and was backing. He "states that if the 'Premier' had continued on the "course that she was apparently on when he first "saw her, and the 'Purdy' had continued on the "course that she was on at that time, they would "have passed one another in safety. He swears "distinctly that the 'Purdy', which is 140 feet long,

"was not more than three lengths from the island "nor more than two lengths from the eel grass where "the deep water begins and that when the collision "occurred both boats were close to Long Island. "This evidence given by Mr. Glasier is confirmed by "the evidence of the officers on the boat, members "of the crew and other paassengers. It will be seen "therefore that there is very strong evidence in sup- "port of both contentions. The witnesses, however, "all agree that the angle of incidence at which the " 'Purdy' struck the 'Premier' was only a little less "than a right angle, and this is confirmed by a photo- "graph which is placed in evidence, and by the evi- "dence of Tichard Retallick, an experienced ship "carpenter who was called in to give evidence re- "garding the state of the 'Premier' after the col- "lision took place.

"The contention on the part of the 'Premier' is "that when the two boats were only a short distance "apart, the 'Premier' being nearer the island shore "and running up parallel to it, the 'Purdy' suddenly "turned, without any apparent reason for so doing "and ran directly over to the 'Premier'. If the " 'Premier' had not been there she would undoubt- "edly have run on the shore of the island. I can- "not see what possible reason there could be for "such action on the part of those who were in charge "of the 'Purdy', and fully expected to hear some "evidence to the effect that the steering gear and "machinery of the 'Purdy' was out of order on that "day. No such evidence, however, was offered, "though there was evidence from the mate of the " 'Purdy' to the effect that it was a hard boat to "stear in windy weather, and that was the only "evidence offered which in any way bore upon this

1919

COY. MCLEAN & TITUS v. S.S. "D. J. PURDY"

Reasons for Judgment.

"subject. The fact, however, that the blow from the "'Purdy' was delivered almost at right angles, had "an important bearing on the case. The evidence "of those on board the 'Premier' is to the effect that "the 'Purdy' and 'Premier' were only a few hun-"dred yards apart, when as they allege the 'Purdy' "changed its course and turned sharply to port. "Captain McLean in cross-examination stated that "when the 'Purdy' changed her course she was "about 200 yards from the 'Premier', that is, that "there were about 200 yards from the bow of the one "to the other on parallel courses, and that there were "about 200 yards latterally between the two, and "that if the 'Premier' had held on its course and the "'Purdy' had held on her course that where the col-"lision took place they would have passed with 200 "yards from port side to port side. In order, there-"fore, for the 'Purdy' to have turned to port and "run into the 'Premier' it would have had to make "a very sharp turn and from the evidence given I "do not believe it could have turned so quickly as "to have struck the 'Premier' in the way that it was "alleged to have done by the witnesses for the libel-"lant. In order to have inflicted the wound, the blow "being delivered almost at right angles, the "Purdy' "would have had to turn a quarter circle, and I can-"not make myself believe, in view of the evidence, "that she could possibly have done so in that space, "with the 'Premier' moving up river all the time. A "witness named Connor, who was called on behalf "of the 'Premier', states that the 'Purdy' was only "two hundred or two hundred and fifty yards above "the 'Premier' when she blew, and that she was "about one-third of the river out from Long Island,

1919

COY, MCLEAN & TITUS v. S.S. "D. J. PURDY"

Reasons for Judgment.

"or may be a little better, and other witnesses agree "to the same thing. The only evidence given as to "the possibility of the 'Purdy's' ability or inability "to turn in the space that I have mentioned so as to "inflict the blow on the 'Premier' if it was running "up the Long Island shore, was given by Captain "Day, who upon being asked the question as to the "distance in which the 'Purdy' could be turned at a "right angle from her course, said that it would take "nearly the width of the river there.

"In view of all the evidence, I have come to the "conclusion that if the 'Purdy' was coming down "river about midstream or a little nearer to the "Hampstead shore, and the 'Premier' was coming "up along the Long Island shore, that it would have "been a physical impossibility for the 'Purdy' when "within about two hundred yards of the 'Premier' "and being two hundred yards distant from her in "a lateral direction, to have turned so sharply to "port as to strike the 'Premier', the blow which she "received, and I find that the collision occurred "when the 'Purdy' was proceeding down river on "the port side of midstream, when the 'Premier' on "its way upstream attempted to cross the bows of "the 'Purdy' for the apparent purpose of getting "to the starboard or Long Island side of the river. "Although I have come to this conclusion, it by no "means determines the case, for there are other im- "portant matters connected with the rules and regu- "lations for the safety of vessels at sea which must "be considered before it can be settled that the "course pursued by either vessel was the proximate "cause of the collision.

"The first of these questions which I have to de- "cide is as to whether the St. John River at this

1919

COY, MCLEAN & TITUS v. S.S. "D. J. PURDY"

Reasons for Judgment.

"point is or is not a narrow channel. No definition "of a narrow channel had ever been attempted, and "I think it is largely a matter of common sense, and "is a question of fact that must be decided by the "Judge trying the case in which it arises, having "regard to the general tenor of decisions in other "courts. At this point the river was from nine "hundred to one thousand feet wide, the River St. "John being divided by Long Island into two chan-"nels, of which this was the western. I have con-"sidered the cases in which the question of narrow "channel has arisen, and find that the Detroit River "at Bar Point, *The Tecumseh* [1]; the harbor of Char-"lottetown, P.E.I., near Alshorn Point, *The Tiber* [2]; "the mouth of Charlottetown Harbor outside the "blockhouse, *The Heather Belle*[3]; the south channel "in Nanaimo Harbor, *The Cutch,*[4] the entrance "to Halifax Harbor, *The Parisian,*[5] and the "navigable channel in the harbor of Sydney, "were all held to be narrow channels. In some "of these cases the channel was wider and in some "narrower than at the point where the collision "occurred. In addition to the cases I have men-"tioned we have a case in New Brunswick of *The "General* (1844), (see Stockton's Vice-Admiralty "Reports, p. 86), in which it was decided by the late "Judge Waters that the St. John River at Swift "Point, which is a few miles above Indiantown, and "where the width of the river is about a quarter of a "mile, or considerable wider than the point where "the present collision occurred, was a narrow chan-

[1] (1905), 10 Can. Ex. C. R. 44 at p. 61.
[2] (1900), 6 Can. Ex. C. R. 402 at p. 407.
[3] (1892), 3 Can. Ex. C. R. 40 at p. 46.
[4] (1893), 3 Can. Ex. C. R. 362.
[5] [1907], A. C. 193.

1919

COY, MCLEAN & TITUS v. S.S. "D. J. PURDY"

Reasons for Judgment.

"nel. There is also the case of *The Tecumseh*,[1] in "which Mr. Justice Hodgins of the Ontario Bench, "held that the channel in question, being about eight "hundred feet wide must, he thought, be held to come "within the designation of narrow channels men- "tioned in Article 21, especially in view of the length "and tonnage of steamer sailing on the island water. "The length of the 'Purdy' was one hundred and "forty feet and that of the 'Premier' ninety-three "feet, the tonnage of the latter being one hundred "and ninety-one, and I have considered the size of "these vessels in coming to the conclusion which I "have. It was contended by the learned counsel for "the 'Purdy' that what was a narrow channel at "night might not be regarded as a narrow channel "during the day, and that the size of vessels which "were in the habit of traversing the water, and other "circumstances, must be taken into account. I have "given consideration to this argument, and while "there is some authority to the effect that a Judge "might well consider the size of vessels that traverse "the waters in question, I cannot possibly bring "myself to think that whether a channel is narrow "or not can possibly depend upon whether it is being "used by day or by night. If it is a narrow channel "at one time of the day in my opinion it is narrow "during the whole twenty-four hours. After giv- "ing full consideration to the cases that have been "decided on the subject, and to all the facts and "circumstances of the present case, I have come to "the conclusion that that part of the St. John River "where the accident occurred, which is from nine "hundred to one thousand feet in width—the deep

[1] 10 Can. Ex. C. R. 44 at p. 61.

1919

COY. MCLEAN & TITUS v. S.S. "D. J. PURDY"

Reasons for Judgment.

"water in which is probably about seven hundred "feet in width, is a narrow channel, and I so find. "Having come to that conclusion it is quite clear the "rules and regulations for the safety of ships at sea "will apply. Article 25 provides that in narrow "channels every steam vessel shall, when it is safe "and practicable, keep to that side of the fair-way "or channel which lies on the starboard side of such "vessel. On the day the collision occurred it was "perfectly safe and practicable for both vessels to "do so, and yet neither of them observed the rule. "If the 'Purdy' had kept to the starboard side of "the channel, the 'Premier', having regard to the "position in which it was when first seen from the "'Purdy' been on the starboard side of the fair-way "to the Long Island shore to have passed in safety, "and had the 'Premier' when first sighted by the "'Purdy' been on the starboard side of the fair way "or mid-channel, and kept on that course, the ves- "sels could have passed without collision. So far as "Rule 25 is concerned, both vessels were deliberate "transgressors of the law. Had both been on the "side where they should have been or had either "been on its proper side, I do not think the collision "would have occurred, and I am of opinion that in "thus violating the rule both vessels were at fault "and contributed to the disaster. It was urged that "the proximate cause of the collision was the action "of the 'Premier' in going too far to starboard after "the 'Purdy' was sighted, instead of proceeding up "on the port side. In view of the fact, however, that "the 'Purdy' was not following its proper course "and its being out of its course was a contributing "cause, I cannot accede to that view.

"Two other points were taken on behalf of the "'Premier' under the rules and regulations. One "was that there was a violation of Article 28, which "provides that when vessels are in sight of one an- "other, a steam vessel under way in taking any "course authorized by the rules, should indicate "that course by certain announcements on her "whistle, and that the only signal that was given "was by the 'Purdy', which gave one short whistle, "which is contended meant that it was directing its "course to starboard. The evidence with regard to "the short whistle was that it was given when the "vessels were almost in collision, and at the same "time the bells were given to the engine room for a "reversal of the engine. I am not deciding what this "short whistle meant for there is contention on that "point and evidence to the effect that on the St. "John River one short whistle is given when a "steamer is approaching a wharf or a snag in the "river, and is a direction to the engineer to stand by "his engine. I do not think it necessary to do so, as "the whistle was, in my opinion, under the evidence, "given too late to have any effect one way or the "other. Had a whistle been given by either vessel "at an earlier period the collision might have been "avoided.

"It was also claimed that the 'Purdy' did not have "a sufficient look-out. In my opinion this applies "to both vessels. There was very little evidence re- "garding the matter, and in my opinion had there "been an adequate look-out on either vessel the ac- "cident might have been avoided. Such a contention "it seems to me would apply with equal force to the "'Premier' as to the 'Purdy'. Having found that

1919

COY. MCLEAN & TITUS v. S.S. "D. J. PURDY"

Reasons for Judgment.

"both vessels were to blame by non-observance of "article 25 of the Regulations I give judgment in "accordance with the rule laid down in the *London "Steamship Owners' Insurance Company v. Gramp-"ian Steamship Company,*[1] for the libellant against "the 'Purdy' for one-half of the amount by "which the 'Premier's' damage exceeds the dam-"age to the 'Purdy,' and as no damage was claimed "by the 'Purdy', that will be one-half the damage "which the 'Premier' has incurred. No evidence "was given at the trial with regard to the amount of "damages, so I presume it will be agreed upon be-"tween the parties. If not, there will have to be a "further application in order to ascertain it."

The appeal herein came on for hearing before the Honorable Mr. Justice Audette, at St. John, N.B., on May 27, 1919.

Fred. R. Taylor, K.C., for appellant.

J. B. M. Baxter, K.C., for respondent.

The reasons handed down by the Court set forth the facts, as follows:

AUDETTE, J. (November 8, 1919) delivered judgment.

This is an appeal from the judgment of the Local Judge of the New Brunswick Admiralty District, pronounced on the 2nd April, 1918, in a collision case, wherein he found both vessels to blame and gave judgment and "pronounced in favour of the "plaintiffs claim for one-half damages and con-"deemed the ship 'D. J. Purdy' in the amount to

[1] (1890), 24 Q. B. D. 663.

"be found due to the plaintiffs for such half dam-"ages.

The action arises out of a collision which took place shortly after 12.30 o'clock, in the afternoon of the 5th October, 1918, between the S.S. "Premier", —(93 feet in length)—and the S.S. "Purdy", (145 feet in length) on the St. John River, N.B., between Central Hampstead and Long Island. The weather was good, not sunny, but with a clear atmosphere. There was a current of two miles an hour, and the wind was blowing about six miles an hour down river.

The collision occurred quite close to Long Island shore, where the "Premier" was beached within a minute or two after the accident.

The witnesses on behalf of the plaintiffs, and there is great unanimity between them, testify that on the day in question, the "Premier" having left St. John, at about eight o'clock in the morning, for Chipman and intermediate ports, stopped at Gerow's, on the eastern shore of the river, about opposite Spoon Island, and thence proceeded up river toward Long Island and taking the channel between that Island and Central Hampstead, cleared the southern end of the Island by passing and keeping her course very close to the Island, on the eastern side of the channel, with the object of avoiding the current in the centre, which had been at the time, increased by freshets. It is further contended that the "Premier" all through steadily kept her course close to the Island, on the eastern side of the river, which at that place is reckoned to be between 850 to 1,000 feet wide. The attention of those on board of her was especially attracted by the eel grass which grows on

1919

COY, MCLEAN & TITUS v. S.S. "D. J. PURDY"

Reasons for Judgment.

the shore of the Island, and being so close to the shore fear was by some entertained that the propeller might get entangled in this grass.

While thus keeping her course, the "Premier" contends that having seen the "Purdy" coming down,—almost mid-stream,—some witnesses placing her slightly to the west of the fair-way—at about 250 to 300 yards, she blew one short blast, which was immediately answered by one blast from the "Premier". The "Purdy" then suddenly changed her course, slashing across the river,—swung herself upon the "Premier", striking her abaft midship, practically at right angles, perhaps 40 degrees, and inflicted a jagged V shaped hole, of about 18 inches wide and running about four feet below the water line. The Captain of the "Premier" gave one bell to stop, and when the "Purdy" got clear and released the "Premier", the "Premier" was ordered ahead again, and was beached whilst there was still steerage on her, thus saving the passengers and the boat, while the "Purdy" backed right across the river.

Now, on behalf of the "Purdy", it is alleged and testified to, among others by her Captain, that when turning the bend she first saw the "Premier," the "Purdy" was about one-quarter of the way across from the Island side where the width of the river is about 900 feet; and, he asserts, the "Premier" was then, about opposite Hampstead, a little to the westward side of the fair-way, and that afterwards she seemed to come more to the middle, the "Purdy" keeping the same distance from the Island.

The Captain claims he held his course for some time after seeing the "Premier," intending to pass

to port. He does not think he did ever go as far as mid-stream, *but would not be positive about that.* When he saw the "Premier" holding her course he changed his own course to port, and shortly after that, he says, the "Premier" changed her course and tried to cross his bow, and at that time she was about two lengths from the "Purdy." He further contends he held the "Purdy's" course to port until she got to the left of the "Premier," and then steadied up. In the result it is contended the "Premier" travelled from west to east across the river, and threw herself across the "Purdy's" bow.

Therefore, it is common ground that the collision happened, that the "Purdy" struck the "Premier" slightly aft amidships as already mentioned, almost at right angles, and that the collision took place on the east side of the river, very close to Long Island. This latter fact being a very important element to consider in the endeavour to place the right interpretation upon the evidence,—the collision having taken place in the course the "Premier" should have followed and away from where we should expect the "Purdy."

The evidence adduced on behalf of both parties with respect to the course pursued is very conflicting. The "Premier" contends she always kept to starboard and close to the Island, and the "Purdy" practically contends the "Premier's" course previous to the collision was from the west of the fair-way towards the Island, while the "Purdy's" course was on a short distance from the Island and not on the western side of the fair-way or not in the midway.

1919

COY. MCLEAN & TITUS v. S.S. "D. J. PURDY"

Reasons for Judgment.

Let us endeavor to reconcile this conflicting evidence with the object of discerning the truth.

Approaching the evidence on the question of reliability, one must first admit that the five witnesses heard on behalf of the "Premier," who were standing on land, at Central Hampsted, were in the very best position to witness the manoeuvre of the two vessels. Not only could they see the vessels better, but this testimony is that of absolutely disinterested witnesses, neither influenced nor biased one way or the other, as witnesses and officers on board a vessel may be, and so often are. Indeed, as Wellman, on the "Art of Cross-Examination," so truly says that "one sees, perhaps the most marked in-"instances of partisanship in Admiralty cases "which arise out of a collision between two ships. "Almost invariably all the crew of one ship will "testify in unison against the opposing crew, and, "what is more significant, such passengers as hap-"pen to be on either ship will almost invariably be "found corroborating the stories of their respective "crews." I fear this is a weakness in the make-up of human nature, and while such a witness is not deliberately committing perjury, he is unconsciously prone to dilute or colour the evidence to suit a particular purpose by adding a bit here and suppressing one there, but this bit will make all the difference in the meaning.

I accept without hesitation the evidence of the four witnesses on land, not only because they are disinterested and corroborated but because they were in a better position to follow the courses and the manoeuvres of the vessels, and their unanimity is also very convincing.

A deal of this class of evidence adduced by the passengers on board is given not from actual observation of the course of the vessel, but by deduction from casual observation at a given moment.

One must also not overlook the personal equation resulting from being on board a moving body. It is next to impossible for one on a moving vessel, unless he is in a position which allows him to see her from stem to stern, and at the same time maintain a complete and commanding view of the shore, to follow the course or evolution in the manoeuvres of a vessel.

Moreover, in cases of collision, "where the evi-"dence on both sides is conflicting and nicely bal-"anced, the court will be guided by the probabilities "of the respective cases which are set up." "*The Mary Stewart,*"[1] "*The Ailsa.*"[2]

Let us pursue this search for finding what was the most reasonable course, the course most consonant with probability, that these vessels would have followed under ordinary circumstances.

What is the course that the "Premier" should have followed after leaving Gerow, if not the one substantiated by the unanimous evidence adduced in her behalf She leaves Gerow, takes the most direct course to clear the south end of Long Island, and keeps as close to the Island as is consistent with good seamanship, with the double object of keeping out of a current that would impede her speed and of shortening her course while keeping in good waters,—maintaining a direct course. Moreover,

[1] (1844), 2 Rob. 244.
[2] (1860), 2 Stuart's Adm. 38.

1919

COY. MCLEAN & TITUS v. S.S. "D. J. PURDY"

Reasons for Judgment.

travelling in a narrow channel, she keeps to the starboard side of the channel.

What is the most rational course for the "Purdy," after clearing the bend in the Island, if not to keep in the fair-way, near or to the west of it with the object of benefiting by the current and also, as she is travelling in a narrow channel, to keep to starboard?

However, there has been a false manoeuvre somewhere; but so far, the courses of the two vessels, up to the time the "Purdy" sheered to port, is absolutely the reasonable one, the one most probable and in accord with ordinary seamanship—the very one described by the four witnesses viewing the manoeuvres from the land, whose view I accept corroborated as it is by the balance of the plaintiff's evidence, although questioned by evidence to which I am unable to give credence.

A perusal of the defendant's evidence, conflicting as it is with the plaintiffs', will show conclusively that it is not only weak, but it is also wanting, excepting perhaps that of the Captain, in any statement resulting from personal observation consonant with that reliability from which one can deduce a satisfactory conclusion. Let us, as an example, examine the testimony of the old man Glassier,—a witness upon whose testimony the learned judge below seems to lay great stress, and rests his judgment in a large measure. That testimony has impressed itself upon my mind as earmarked with improbability from his manner of stating facts more from surmise and conjecture than from actual personal observation, leading me forcibly to adhere

to the view that the evidence of the shore-witnesses must in preference be accepted.

He *thinks* the position of the "Premier" is as he says, with respect to the east shore, when he does not see that shore from the place he is standing, in fact, he was mostly absorbed, as he admits, in the conversation he was carrying on with the returned soldier, and his evidence, for the most part, is no more than an offer of opinion as to what he thinks and not from personal observation. And here again the personal equation of a person standing in the saloon of the boat and looking exclusively to one side of the stream, would militate against its acceptance, in preference to the evidence of the shore witnesses corroborated in the manner hereinafter mentioned.

Then the nautical knowledge of this witness, who was travelling free on board the "Purdy," was most deplorably inadequate, and that ignorance seemed to have been shared by the "Purdy's" crew, as disclosed by the evidence.

Here follows an extract from the evidence of witness Glassier, viz: pps. 135, 136 and 137.

"Q. How is it that you figure you were below the "bend if you didn't take particular notice about "the houses?—A. Of course I only *think,* but I *think* "we were below the bend.

"Q. You say you think the 'Premier' was coming "up about amidstream, and you didn't keep looking "at her?—A. *No, sir.*

"Q. You were simply talking?—A. *Simply talking.*

"Q. Were not paying particular attention to the "shore or anything else—paying attention to this "conversation.—A. Yes, sir.

1919

COY. MCLEAN & TITUS v. S.S. "D. J. PURDY"

Reasons for Judgment.

"Q. Did you, after you saw the 'Premier,' notice "the shore particularly after the first time you saw "the 'Premier'—you say you were engaged in "conversation—after that did you pay any par- "ticular attention to the shore?—A. *I might have "casualy seen them* but not to recognize—to know "whose they were.

"Q. You were not paying any particular attention "to the shore after that at all?—A. No.

"Q. Then the next thing you noticed was that the "angle of the 'Premier' towards the 'Purdy' was "different from the angle that it had been when you "first saw them?—A. Yes.

"Q. You didn't notice the shore at all, but noticed "the angle that one bore to the other was different "from the angle when you first saw it. At first "when you saw the vessels they were going about in "parallel courses I think you said—or is that right? "—A. *Parallel courses?*

"Q. Would you say they were going in about "parallel courses when you first saw them?—A. I "would say so because I was standing here and the "way it *looked to me*—the way they were going—if "they had both kept on the courses they would have "passed.

"Q. You would not say they were crossing ships— "one was not heading across the bow of the other?— "A. No.

"Q. When you first saw them they were going in "about parallel courses or was one angling slightly "towards the other?—A. *I don't think so.*

"Q. You wouldn't say so—slightly or consider- ably?—A. When I first saw them—no I wouldn't "think so.

"Q. Afterwards when you saw them again it was "how long after you first saw them would you say? "—A. That would be quite a few minutes.

"Q. Who called your attention to them the second "time—what called your attention to them the sec- "ond time?—A. I don't know as anything in par- "ticular.

"Q. Anyway you saw them, and at the time you "noticed one was going in a course across the bows "of the other—is that right?—A. Yes.

"Q. You were not paying attention to the "'Premier" to see whether she continued her "course in between—you did not see the "Premier" "in between when you first saw her and the time "they were coming together?—A. *No,* from the time "I *first seen her the two boats* were right close to- "gether.

"Q. You do not know whether the "Premier" "changed her course or not?—A. *No.*

"Q. You do not know whether the "Purdy" "changed her course or not?—A. No.

"Q. You cannot say which boat changed her "course?—A. No.

"Q. One of the boats must have changed her "course so the two were not going parallel?—A. I "don't think the "Purdy" changed her course, be- "cause when I went forward and seen there was go- "ing to be a collision—I went forward and looked "toward the island—the "Purdy" was heading "right down—.

"Q. The' 'Purdy" was still heading down river? "—A. Yes.

1919

COY. MCLEAN & TITUS v. S.S. "D. J. PURDY"

Reasons for Judgment.

"Q. About how far was the "Purdy" from the "island at that time?—A. She might have been—do "you mean the island or the river bank?

"Q. I mean the island?—A. She would not be "three lengths from the island."

Is this testimony that can justify its acceptance in preference to the shore witnesses? I must find in the negative.

The evidence of witness Turner, heard on behalf of the defendant, is also very characteristic of this personal equation. He is on the forward deck,—he walks up and down, and ultimately says he could not say how the "Premier" got across their bow,—all he knows is she was there. And at page 177, he says that after the collision the "Purdy" backed, *working her stern out into the stream—away—from the island.*

Moreover on this question of the course of the "Purdy," the evidence on her behalf in that respect is not satisfactory, and the "Purdy's" own Preliminary Act gives it a straight denial.

As cited by Mr. E. C. Myers' *Admiralty Law and Practice,* p. 242: "The object of the preliminary act "is to obtain from the parties statements of the "facts at a time when they are fresh in their recol-"lection, *'The Frankland'*[1] and before either "party knows how his opponent shapes his case."

The memory of the witness or party must be taken to be more accurate when deposing to a recent occurrence, than when testified to after a certain length of time. And, as put by Lord Moulton in *The Seacombe,*[2] "A statement of fact in a "preliminary act is a formal admission binding the

[1] (1872), L. R. 3 A. & E. 511.
[2] (1912), P. 21.

"party making it, and can only be departed from "by special leave."

A number of authorities have also been submitted by plaintiff's Council upon this well-known point.

Coming to the question of the signals it is uncontroverted evidence that the "Purdy," before changing her course to port, indicated her course to starboard by the signal of one short blast, which under the Rules of the Road means "I am directing my course to starboard," and was in turn answered by the "Premier," with a one short blast also. Had the "Purdy" followed that course, as thus indicated, she would have gone towards Central Hampstead, toward the west, and as the collision admittedly took place on the east, close to the Island shore, the accident would have been avoided.

Had the "Purdy" desired to signal she was going to port, she had then to give two short blasts, which under the Rules of the Road mean, "I am directing "my course to port."

Now, I do find, as clearly testified to by the shore witnesses, that previous to the accident, the "Purdy" suddenly started across the river and collided as above mentioned. True that manoeuvre was very erratic and devoid of any seamanship; but here again we have evidence corroborating that evidence by explaining it. The evidence of the Mate, on this point, is all that may be desired by way of explanation. While the Mate was eating his dinner in the dining room, his attention having been directed to the proximity of the "Premier," rushed up to the pilot house to assist the Captain, because he says the "Purdy" is a hard boat to steer—"One man is

1919

COY, MCLEAN & TITUS v. S.S. "D. J. PURDY"

Reasons for Judgment.

"no good to steer at all in 'windy weather'." The evidence further shows, as follows:

"Q. You thought he (the Captain) needed another "man at the wheel. You went there as quickly as "you could?—A. Yes.

"Q. You thought that was a sort of a day when the "Captain needed some sort of help at the wheel?— "A. I did."

The explanation fills the needed gap. Everything is explained. The boat was hard to steer. She took a sheer, as clearly described by all the witnesses on behalf of the plaintiff, and more especially by those on the shore.

More credibility is to be attached to the crew that are on the alert, *The Dahlia*[1] and accepting again this as a guidance one will be more than astonished to hear that just previous to the accident,—almost when it was inevitable,—in the agony of the collision,—we see an officer on board the "Purdy," running to the engine room and giving orders to the engineer, ignoring the Captain, who is in full command of the vessel at the time. We also have a crew, from the Captain down, who are unacquainted with the Rules of the Road, and repeatedly admitting it, contending that one blast means an order to the engine room. In view of such poor nautical knowledge are we to be astonished at the lubberly seamanship displayed by the "Purdy"?

Moreover, if these vessels were travelling in a narrow channel,—a fact which seems to be accepted by both parties,—and as found by the learned trial judge,—each vessel under Article 25 had to keep to that side of the fair-way or mid-channel which lies

[1] 1 Stuart's Adm. 242.

1919

COY, MCLEAN & TITUS v. S.S. "D. J. PURDY."

Reasons for Judgment.

on the starboard side of such vessel—and if the evidence of the "Premier" is reliable it would seem the "Purdy" did keep that course until her steering gear would have seemed to become beyond control, yet the Captain of the "Purdy" and the witnesses heard on her behalf, insist in placing her on the Island side. However, from the reading of the evidence the view has impressed itself upon me that the Captain of the "Purdy" knew very little of the Rules of the Road, as admitted by himself.

Coming to the question raised by the judgment appealed from, in respect of the rule as to the division of the loss where both vessels are to blame, it will be sufficient to say that the old rule of division followed below has been changed in England by 1-2 Geo. 5, 1911, ch. 57, secs. 1 and 9, and in Canada by the Maritime Conventions Act, 1914, 4-5 Geo. 5, 1914, ch. 13, sec. 2, whereby it is now enacted, in lieu of the old "arbitrary rule," that the liability to "make good the damage or loss shall be in propor- "tion to the degree in which each vessel was in "fault,"—as provided by the Act.

Therefore there will be judgment in favour of the plaintiffs, allowing the appeal and dismissing the cross appeal, both with costs.

Solicitor for appellant: *Fred R. Taylor,* K.C.

Solicitor for respondent: *J. B. M. Baxter,* K.C.

1918
Oct. 28.

APPEAL FROM THE QUEBEC ADMIRALTY DISTRICT.

S. S. "CONISTON",

APPELLANT, (DEFENDANT);

v.

FRANK WALROD,

RESPONDENT, (PLAINTIFF).

Collision—Negligence—Tug and Tow—Currents—Rule 25—Narrow Channel—Lights on Barges.

A collision occurred at night, in a bend of a narrow channel on the St. Lawrence River. The night was dark, but with a clear atmosphere. The "Coniston" was going up stream on the port side of the channel, in ballast, at great speed, and though she sighted the tug some miles away, descending with the current, and recognized the tug had a tow, she neglected to stop or slacken below the bend to allow the tug, encumbered with tow, to pass clear; but on the contrary maintained her speed until very shortly before the collision. Moreover she failed, when it was safe and practicable to do so, to obey rule 25 of the Rules of the Road, providing that in a narrow channel, vessels shall keep to the starboard side of the fair-way, and decided to pass starboard to starboard.

When 1,000 feet away, and on her proper side of the channel, the tug gave one blast, indicating she would keep to starboard. The "Coniston" shortly after tried to right herself back to her proper side, but was too late and collided with the barges on the *tug's side of the channel.* When the collision seemed inevitable, the tug ported her helm to try and prevent collision but failed. The barges carried white lights but no green and red lights.

Held, upon the facts stated, (confirming the judgment appealed from), that the "Coniston" having placed herself in a false position, was therefore navigated improperly and without ordinary care and prudence and was solely at fault and to blame for the accident.

2. That, inasmuch as the collision occurred at the head of the tow, the length thereof and the absence of red and green lights on the barges cannot be said to have contributed to the collision.

1918

S. S. "CONISTON" v. FRANK WALROD

Reasons for Judgment.

3. That inasmuch as, under the Canadian jurisprudence, following the decision in Re S.S. "Storstad"[1]) which is different from the old English law, the plaintiff has to prove not only the breach of the rule, but also that it has caused or contributed to the collision, the absence of green and red lights on the tow and the length thereof having in no way contributed to the accident, the tug and tow cannot be held liable therefor.

4. Where two steamers going in opposite directions are likely to meet in a bend of a narrow channel, one hampered with a tow and descending with the current, it is the duty of the other, going against the stream, to give all consideration to the tug and that good and prudent seamanship requires her to slacken speed or stop, according to circumstances, until the tug has cleared.

5. That while it is quite true that vessels which are travelling in opposite directions green to green for some time should continue on their course to prevent becoming crossing vessels before they could come red to red, this would not apply where in a narrow channel they suddenly came green to green a few moments before the collision.

THIS is an appeal by the defendant from the judgment of the Deputy Local Judge in Admiralty, Quebec Admiralty District, Mr. Justice Maclennan[2] rendered on February 20, 1918, which judgment found the S.S. "Coniston" guilty of negligence and found that the collision was the result of the failure, by the "Coniston", to observe the provisions of article 25 of the Collision Regulations and also finding that there was no blame imputable to the plaintiff and ordering that the damages be assessed.*

The appeal was heard before the Honourable Mr. Justice Audette at the City of Montreal on May 20 and 21, 1919.

[1] (1915), 17 Can. Ex. C. R. 160; 40 D. L. R. 600.

[2] See (1918), 18 Can. Ex. C. R. 330; 45 D. L. R. 518.

*REPORTER'S NOTE:—In this case notice of intention to appeal to the Privy Council was given, and subsequently discontinued, and then notice of intention to appeal to Supreme Court was given and has now been abandoned.

1918

S. S. "CONISTON" v. FRANK WALROD

Reasons for Judgment.

A. W. Atwater, K.C. and *L. Beauregard,* for appellant.

Peers Davidson, K.C., for respondent.

AUDETTE, J. (October 28, 1918), delivered judgment.

This is an appeal from the judgment of the Deputy Local Judge of the Quebec Admiralty District, sitting at Montreal, and bearing date the 20th February, 1918, in a case of damages arising out of a collision which occurred at one of the curves in the narrow ship-channel of the River St. Lawrence, on Lake St. Peter, between Montreal and Three Rivers.

As already said, in such cases when sitting, as a single Judge, in an Admiralty appeal from the judgment of the trial Judge, while I might with some diffidence feel obliged to differ in matters of law and practice; yet as regards pure questions of fact, I ought not to interfere with the judgment below, unless being clearly satisfied in my own mind that the decision is clearly erroneous.[1]

The Picton case [2] is further authority for the proposition that when a disputed fact, involving nautical questions with respect to what action should have been taken immediately before the collision, is raised on appeal, that the decree of the Court below should not be reversed merely upon a question of testimony. Indeed, the hearing upon the appeal is but a re-hear-

[1] *The Queen v. Armour* (1899), 31 Can. S. C. R. 499; *Montreal Gas Co. v. St. Laurent* (1896), 26 Can. S. C. R. 176; *Weller v. McDonald-McMillan Co.* (1910), 43 Can. S. C. R. 85; *McGreevy v. The Queen* (1886), 14 Can. S. C. R. 735; *Arpin v. The Queen* (1886), 14 Can. S. C. R. 736; and Coutlee's Digest, S. C. Vol. 1, p. 93 *et seq.*

[2] (1879), 4 Can. S. C. R. 648.

1918

S. S. "CONISTON" v. FRANK WALROD

Reasons for Judgment.

ing of the case, and while there is no presumption that the judgment in the Court below is right, it cannot, however, be overlooked that the learned Judge of first instance has had an opportunity of hearing and seeing the witnesses and testing their credit by their demeanour under examination *Riekmann v. Thierry*.[3]

On the hearing of the appeal I had the advantage of the assistance, as Nautical Assessor, of Captain Demers, the Dominion Wreck Commissioner, a gentleman of large experience in nautical matters and whose opinion, I am pleased to say,—to use his own words,—coincides with mine.

Close on to midnight, on the 18th June, 1917, the steamer "Coniston", light, in water ballast, was steaming up Lake St. Peter, at full steam. She is a steel vessel of 337 feet in length, 47 feet beam, 2273 net tonnage, single screw, triple expansion, drawing light 8.6 forward, and 13.6 aft, as stated by Captain Hill. She is said to steer easily.

The weather was fine,—a splendid night, dark, but with clear atmosphere. The lights were plainly visible, and a slight south-south west breeze was blowing. According to Superintendent Weir, there was, at the time of the accident, in the *locus in quo* a current of about three miles an hour, which between Curves Numbers 1 and 2 tends to the south; and there was a breeze of 3 to 4 miles which would have absolutely no effect on loaded barges, as it would take a very strong breeze to have any effect upon them.

Pilot Mayrand, who was in charge of the bridge and of the navigation of the "Coniston", testifies

[3] (1896), 14 R. P. C. 105.

1918

S. S. "CONISTON" v. FRANK WALROD

Reasons for Judgment.

that his vessel on the night of the accident was drawing slightly over 14 feet, and that they were going up the river against the current, at a speed of 9 or 10 miles an hour. Trattles, the Chief Officer, says that when they first saw the tug "Virginia" and her tow, they were at about three or four miles distant and that, *of course,* he knew it was a tow, as he saw the several lights of the barges. The pilot says when he first saw the "Virginia's" green light with two mast lights, and the barges showing their lights, he also knew at once it was a tow, and he adds when he saw these lights he was in the fair-way of the channel.

The average width of the channel in the locality in question is about 450 feet.

This green light he saw appeared on his port side, —the "Virginia" being in the upper reach of the curve and the "Coniston" on the lower reach. The pilot says he was at about 1½ miles when for the first time he saw the "Virginia's" green light and kept up at full speed all along. After seeing the green light he proceeded for ¾ to 1 mile without changing his course, having all that time the "Virginia's" green light in sight. At 2,500 to 3,000 feet the "Coniston" blew two blasts, and the pilot says he advanced 700 or 800 feet before the "Virginia" in answer blew one blast, when, he says, (both vessels having continued to go ahead)—he was at about two lengths of his ship from the tug and still going full speed, his vessel being then (p. 68) more on the south than in the center of the channel,—at about 100 odd feet of the south line of the channel. The pilot further contents that the "Virginia" gave one blast immediately after showing her red light, when

they were at 800 to 900 feet apart and his vessel kept forging ahead full speed.

"The "Coniston" answered the "Virginia's" one blast by one blast when they were 400 to 500 feet apart and when, the pilot says, he realized the collision *was inevitable*. He then ordered his wheel hard-a-port, (he having a right hand propeller) slow, stop, and full speed astern, and the collision took place, not end on, but the "Coniston" struck with a slanting or glancing blow the barges that were then on her port side.

The "Coniston", however, omitted as required by art. 28, to indicate, by "three short blasts" her engines were going full speed astern.

The pilot said: "Q. Dans quelle partie avez vous "frappe avec votre batiment? A. Un peu en arriere "de la joue."

The tug's green light was at all times seen by the "Coniston" before the latter took the curve, and it was when she was out of or beyond this curve, No. 2, she first saw, as she should, the "Virginia's" red light. The "Virginia's" green light was narrowing on the "Coniston's" port bow, as the latter was travelling in this curve.

The collision took place at about 100 feet from buoy No. 85,L. which is at the head of the curve and on the right or starboard side of the channel going down the St. Lawrence. The collision occurred on the south of the fair-way, or on the right side of the channel going down the river.

After the collision the "Coniston" righted herself, went to starboard and proceeded ahead, without

1918

S. S. "CONISTON" v. FRANK WALROD

Reasons for Judgment.

more ado, and without ascertaining or enquiring if she could be of any help or assistance to the sinking or damaged barges.

Before leaving the "Coniston" on this question, it will be well to refer again to the Chief Officer Trattles' evidence with respect to the course followed by the "Coniston" immediately before the accident and regarding the place of the accident. This witness states that when the pilot ordered two blasts, the "Coniston" was in the middle of the channel, and immediately after giving these two blasts, the "Coniston" starboarded her helm a little, altering her head to port at the very outside half a point and then steadied. They continued heading a little to the south, and they kept at that at the command "steady". And then he adds when the tug blew one blast she was on our starboard side between two or three points, (pp. 36 and 37). This starboarding of the helm between the time the "Coniston" gave the two blasts and the collision is also corroborated by wheelsman Baay, pp. 41-43.

Having thus followed in a general manner the course of the "Coniston" while manoeuvring in the lower reach of Curve No. 2, as shown on the chart filed as Exhibit No. 1, let us now in a similar manner, follow the course pursued by the tug and her dead tow in the upper reach, between Curves No. 1 and No. 2.

The tug "Virginia" is 115 feet in length, about 24 feet beam and has a draught of 11½ feet. By means of a hawser of 200 to 250 feet in length she was towing sixteen canal barges, lashed two by two, with bridles attached to the two front barges—the suc-

ceeding tiers stood about 15 feet apart from the tier ahead. The first five rows, of ten barges, were under cargo, and the three last rows, of six, were light—unloaded. It was a dead tow, the barges being under the entire control of the tug, as they had no means of propelling themselves. The barges were of an average length of 100 feet, more or less.

The tug was displaying her red and green side lights and two white mast head lights indicating she had a tow.

The Captain of the "Virginia" says he sighted the white light of the "Coniston" at a distance of about a couple of miles.

The crew of the "Virginia" swear they did not hear the two blasts of the "Coniston", which the latter's crew swear they did give. The wind was blowing the sound in a different direction from which the "Virginia" stood at the time. The "Coniston" did not have a siren, but an ordinary whistle which might have been, at the time, filled with water from the steam, as she was going up full speed. However, there is not much turning upon this point.

Leaving buoy No. 97, after Curve No. 1, the current throws to the south of the channel and on that account it is said to be difficult to clear it, and the Captain of the "Virginia" says that, at that spot, he passed right in the middle of the channel, between the red buoy No. 100 and buoy No. 97, and the tug passed about 50 feet from the red buoy to counteract the current which was throwing them on No. 97. After passing there he came back to the centre of the channel. At that spot in going through this manoeuvre they actually describe a half circle. The more they go down the less effect has the current.

1918

S. S. "CONISTON" v. FRANK WALROD

Reasons for Judgment.

Half way between the two curves, the tow was absolutely straight, says the captain, and the current was shoving us to the south in a decreasing strength. Then, he says, when he saw the "Coniston" at buoy No. 91, he moved to the south (right). When the "Virginia" was opposite buoy No. 85, the captain says the "Coniston" was at about 1,000 feet, and he contends it was at that distance, when he was 50 feet away from buoy No. 85, tug and tow, all in a straight line parallel with the direction of channel, on the south side of the fair-way that he blew one blast.

Up to this time both vessels had been travelling *green* to *red,* that is the "Coniston" exhibiting her red and the tug her green, and looking over the chart on account of the course of the channel it could not have been otherwise, until one of the vessels got into or passed Curve No. 2.

The Captain of the "Virginia" contends that, when at about 1,000 feet from the other vessel, and 50 feet from buoy No. 85, and suddenly seeing the green light of the "Coniston", he blew one blast and went three points or more to starboard, and at that time he affirms the "Coniston" was on the south side of the channel.

The "Coniston" answered at once by one blast the one blast of the tug. Immediately after this blast the "Coniston" shutting her green showed her red light, when the "Coniston" and the "Virginia" became abreast about 250 feet below buoy No. 85, and passed one another, and when the "Coniston" came in collision with the barges, they were abreast of buoy No. 85 upon which the steamer shoved them,

damaging the buoy which passed underneath some of the barges.

As a result of the collision one barge was sunk, and the plaintiff's barges damaged.

After the collision the "Virginia" pulled in some of her hawser, went half speed, came up towards the barges to ascertain if there were any loss of life and to give help.

It is perhaps opportune at this juncture, to compare the conduct of the captain of the "Virginia" after the accident with the conduct of the captain of the "Coniston", who after the accident, steamed to starboard, cleared the barges that he had brought together in a tangle, and steamed up channel. The "Coniston" did not, contrary to her duty, stand by and assist all in her power the stricken vessels. And, as said by Todd & Whall, Practical Seamanship: "If it so happens that the stricken vessel can be kept "afloat, it is the duty of the other vessel to tow and "assist her into a place of safety. In all cases of "collision, one vessel must stand by the other as "long as necessary, and it is punishable by law if one "vessel forsakes the other, besides being cowardly "in the extreme.[1]"

Now, having gone so far let us ascertain the cause of the collision.

Having already found that the ship-channel at the place in question is a narrow channel, art. 25 of the International Rules of the Road must *prima facie* apply. This rule reads, as follows:

"Art. 25. In narrow channels every steam vessel "shall, when it is safe and practicable, keep to that

[1] See now upon this question The Canada Shipping Act, R. S. C. 1906, ch. 113, sec. 920, as amended by 4-5 Geo. V., 1914, ch. 13, sec. 5, sub-sec. 2.

1918

S. S. "CONISTON" v. FRANK WALROD

Reasons for Judgment.

"side of the fair-way or mid-channel which lies on "the starboard side of such vessel."

The "Coniston" from the very time she sighted the tug and tow either kept in the middle of the channel or to the left or port side of the same, contrary to and in violation of art. 25, which imperatively directed her to keep to the right or starboard side of the channel. Both vessels up to the time the "Coniston" was taking the Curve No. 2, when they were about 800 to 1,000 feet apart, were travelling red to green.

Moreover, assuming both vessels had kept their courses, it is only when the ascending vessel had turned into the upper reach moving to the south, that the descending vessel would normally see the red of the ascending vessel,—unless some unusual course followed by the ascending vessel could have disclosed her green. The ascending vessel should also see the green light of the descending vessel up to that point.

What are the reasons assigned by the "Coniston" for having departed from the imperative directions of art. 25, from the time she gave her two blasts? Why was she travelling on the wrong side of the channel at full speed at such a place, with a tug, impeded by her dead tow, coming down the channel with the current, on her proper course? Art. 29.

The wind prevailing on the night of the accident, as established by the evidence, was such as it would be wasting time to discuss its slight effect on the tow, especially its effect on the second tier of the loaded barges. The same may be said with respect to the current as having any bearing on the cause of the

accident, save, however, the fact that the tug, trammelled by her tow, was coming down with the current.

The pilot's excuse for having departed from the obligations prescribed by art. 25, as for keeping to the left of the channel instead of the right—(if it is to be taken seriously or as a last straw to which he holds in attempting to excuse his lubberly manoeuvring) is that when on the lower reach, some distance away, the tug and tow appeared to him to be on the north of the channel in the upper reach of Curve No. 2. Is it not evident that the "Coniston", the ascending vessel, looking across the curve would be quite unable to ascertain with any satisfactory degree of certitude whether the down vessel ("Virginia" and tow) was on the north more than the south of the fair-way,—inasmuch as he was not looking directly up the channel. At page 30 of his evidence the pilot also makes the double statement that he *did not and did* take the wind into consideration.

However, the pilot testifies he became quite anxious in his course between the time of the two blasts and the one blast. And he might well be; yet he still proceeded at full speed (à quelques pieds de la ligne sud du chenal) at a few feet from the southern line of the channel, well knowing, in good and prudent seamanship, the descending vessel, hampered with a tow, coming with the current, was entitled to consideration. Had he stopped below the curve,—had he slackened to slow, as good seamanship required of him under the circumstances, the accident would have been avoided. He was guilty of a most lubberly manoeuvre under the circumstances. See art. 29.

1918

S. S. "CONISTON" v. FRANK WALROD

Reasons for Judgment.

The "Coniston" departed from a course imperatively defined by art. 25, and still aggravated her error by proceeding at full speed,—in a curve, where navigation is necessarily intricate, in face of a tug and dead tow coming down with the current, at night and on her proper course, instead of either stopping, keeping her course to starboard or at least reducing her speed, which he only did when, as her pilot himself said, the collision had become inevitable, and made no allowance for the tug's encumbered condition.

I find that the "Coniston" placed herself, by a lubberly manoeuvre, in a false position, and that she is at fault for such manoeuvring, wanting in good seamanship, and displaying a glaring want of ordinary care and precaution.

I will cite here, although decided under the Great Lakes Rules, the case of *Bonham v. The "Honoreva"*,[1] which is enlightning upon the general principles.

We must not overlook that the tug and its dead tow were coming down on the right side of the channel, with the current and encumbered with her tow.

See the case of *The Montreal Transportation Co. Ltd. v. S.S. "Norwalk" et al*,[2] although decided under the Great Lakes Rules.

It was held, among other things, in the case of *Earl of Lonsdale*,[3] affirmed by the Judicial Committee of the Privy Council, that where a steamship was ascending the River St. Lawrence, and before entering a narrow and difficult channel, had observed a tug approaching with a tow of vessels behind her,

[1] (1916), 54 Can. S. C. R. 51; 32 D. L. R. 196.
[2] (1909), 37 Que. S. C. 97; 12 Can. Ex. C. R. 434.
[3] (1878), Cook's Adm. 153.

but did not stop or slacken speed—a collision taking place—, that the steamer was to blame, and that the fact of the tug not porting until immediately before the collision, did not amount to contributory negligence. See also *Tucker v. The Ship "Tecumseh"*.[4]

"A steamer with a ship in tow is in a different "situation from a steamer unincumbered". *The Independence*.[5]

And in the case of *"The Talabot"*,[1] it was held that, "When two steamships going in opposite directions, "in the Schelt, sighted one another, one above a point "and the other below it in the river, and if both kept "on they would meet at the point, that it was the "duty of the steamer navigating against the tide to "wait until the other steamer had passed clear."

And again in *"The Ezardian"*,[2]: "Although there "is no positive rule with regard to navigation of the "narrow deep-water channel in the neighbourhood "of Whitton gas float No. 3 in the Upper Humber, "the practice, based on good seamanship, requires "that those in charge of a steamship, proceeding "against the flood tide, should avoid meeting an- "other vessel at the gas float, and should, therefore, "wait until the vessel proceeding with the tide has "rounded the bend."

"And obedience to the rules of the road is not "exacted as strictly in the case of a tug and tow as "when a single vessel is concerned." *Ontario Gravel Freighting Co. v. Ships "A. L. Smith" and "Chinook."*[3].

[4] (1905), 10 Can. Ex. C. R. 44.
[5] (1861), 4 L. T. 563, see headnote; see also *Bonham v. The "Honoreva"*, 54 Can. S. C. R. 51; 32 D. L. R. 196.
[1] (1890), 6 Asp. M. C. 602.
[2] [1911] P. 92.
[3] (1914), 15 Can. Ex. C. R. 111; 22 D. L. R. 488.

1918

S. S. "CONISTON" v. FRANK WALROD

Reasons for Judgment.

Moreover, Lord Alverston, in the case of the *Kaiser Wilhelm der Grosse* [1] says, "I am disposed to "think that art. 25, in providing that a vessel shall "keep to its starboard side of the channel, lays down "a rule which is to be obeyed not merely by one "vessel as regards another; but, *so far as practic-* "*able,* absolutely and in all circumstances."[2] Indeed in no case more than the present, in face of this tug and dead tow, coming down with the current, at night and in a curve,—should this imperative duty have been adhered to—it being as art. 25 says, quite "safe and practicable" to adhere to the course and pass red to red.

In the case of "*The Clydach*"[3] wherein the facts disclosed a practice had originated in meeting green to green in passing through a narrow channel, which resulted in a collision with a vessel not aware of such practice, and that adhered to the rules of the road; —it was held to be a clear case, because it was a direct violation of art. 25. And Butt, J., in that case, says: "What was his duty under these circum- "stances? His imperature duty was to keep to the "starboard side of the channel. *There is only one* "*way in which he could excuse his departure from* "*following that course, i.e., by showing that under* "*the circumstances it was not safe and practicable,* "for him to obey the rule." There is no such evidence in the present case, quite to the contrary. See also "*The Leverington.*"[4]

The obligation of keeping to the proper side of a narrow channel, in the St. Lawrence, was again af-

[1] (1907), 76 L. J. Adm. 138 at P. 140.
[2] See also Smith, Rules of the Road, 222.
[3] (1884), 5 Asp. M. C. 336.
[4] (1886), 11 P. D. 117 and our Art. 19.

firmed in the case of *Turret S.S. Co. v. Jenks.*[1] As a result of the "Coniston" disregarding art. 25, she placed the tug and tow in considerable difficulty, while the tug had the right to expect that if the "Coniston" kept her proper course, she would keep clear. The tug proceeded, as she had a right to proceed, upon the fair belief that the "Coniston" was going to perform the proper manoeuvre as required by art. 25.

Again, the case of *Bryde v. S.S. "Montcalm"*[2] is further authority for the proposition that: "When "a ship commits a breach of the rule as to keeping "the proper side of narrow channel, but alleges "that a collision would not have occurred had the "other ship not been guilty of negligence in taking "steps which would have averted such collision, the "burden of proving such allegation is on the ship "primarily at fault and can only be discharged by "clear and plain evidence." And no such evidence exists in this case.

See also *Bonham v. The "Honoreva."*[3]

Considering that the two blasts were given at quite a distance with a whistle and not a siren, with the wind against it, and that the crew of the tug, a comparatively small vessel, were close to the engine and with the noise of the engine, of the exhaust, and the churning of the water, I find the two blasts of the "Coniston" if of any importance, were not heard by the "Virginia."

I further find as against the assertion of the pilot of the "Coniston" or any of her crew, that the tug

[1] C. R. (1907), A. C. 497.
[2] C. R. (1913), A. C. 472; 14 D. L. R. 46.
[3] 54 Can. S. C. R. 51; 32 D. L. R. 196.

1918

S. S. "CONISTON" v. FRANK WALROD

Reasons for Judgment.

and tow were on the upper reach on the north side of the fairway for some length of time immediately preceding the accident. And further, I must, on that fact, accept the evidence of the several members of the crew of the "Virginia" that they were on the south or starboard side of the fair-way, confirmed as it is by the very fact that the collision actually took place on the south side of the channel, near buoy No. 85, upon which most of the barges passed. The buoy was put out of commission, extinguished, damaged and afterwards repaired.

I further find that there was no justification for the "Coniston" to depart, under the circumstances, from the rule of the road, so well and clearly defined in art. 25, and that through her lubberly manoeuvre finding herself transgressing art. 25, and being out of her course, having abandoned the safe course prescribed by the rules, she had *at her own risk to right* herself back to her proper place in the channel. *The "Glengariff"*[1] *and Union S.S. Co. v. The "Wakena."*[2]

Now, on behalf of the "Coniston" it is contended and much stress is laid upon it, that when two vessels are green to green they are bound to continue that course. While it is quite true indeed that when two steamers are passing on opposite courses that each must hold her course so as to pass clear of each other green to green, that rule does not apply to a case like the one under consideration. That would apply to two vessels travelling in the open for some time green to green, thus preventing them from becoming crossing vessels before they could come red

[1] (1905), 10 Asp. M. C. 103; [1905] P. 106.
[2] (1917), 16 Can. Ex. C. R. 397; 35 D. L. R. 644, reversed on appeal, 37 D. L. R. 579.

to red. In the present case the vessels had been travelling for quite a while, until they were at 800 to 1,000 feet from one another, and when the 'Coniston'' had taken the curve, green to red, not green to green.

The pilot of the ''Coniston'' (p. 24) admits that before entering the curve he was still seeing the tug's green light, a green light that was expected to change to red in taking the contours of the curve. The 'Coniston'' showing her red light took the curve before the tug, and before the accident. It was when (p. 31) the ''Coniston'' was at the head of the curve that she saw the red light for the first time. All of this is consistent with the physical contours of the curve. Witness Lemay (p.83) contends that at all times the ''Coniston'' had plenty of space to pass to the north, and that the collision took place because she tried to do so too late and when she was close to the southern line of the channel, where she should not be.

Had both vessels kept to their proper courses, both had the right to expect to come red to red after the curve, and it is only the mismanagement and want of good seamanship of the ''Coniston'' that brought them for a moment green to green, when the one blast was given by the ''Virginia,'' that had no reason to expect a green, but was looking, in due course, for a red light.

The rule of green to green propounded at bar by Counsel for the appellant does not apply to a case of this kind.

A number of other charges are made by appellant.

1918

S. S. "CONISTON" v. FRANK WALROD

Reasons for Judgment.

The appellant charges there was negligence in the fact that the rudders of the barges were lashed and not used when towed. It is abundantly proven that it is absolutely and clearly impracticable to use the rudders in a case of this kind.

Todd & Whall, (*supra*) at p. 263, states: "Towing with two ropes or a *bridle,* there is no necessity "for any person to be on her, as she will require no "tendering. It is the towing with one rope that has "drowned many a good seaman."

In the present case there was a bridle, as admitted by Counsel, on the bow of each of the tow front barges of the first tier.

The appellant further charges that the tug should have had three white lights on her mast-head, instead of two. Furthermore, that the tug should have had a tow of only ten barges instead of sixteen—notwithstanding the obvious fact that the collision took place, in the present case, with the second tier of barges.

It is further contended that, under the Rules of the Road, each barge, besides her white light, should have carried a red and a green light. While the rule cited justifies this contention and that such course would necessarily produce great confusion and puzzle navigators and that it is in evidence—although not by any means overriding the rule—that these barges from time immemorial have never travelled, in a tow, otherwise than without such green and red lights; such departure, it is unhesitatingly found, did not in any manner whatsoever contribute to the accident. The pilot of the "Coniston" and some of her crew on the bridge, had ascer-

tained from quite a distance, that it was a tug and tow that were coming down in the upper reach. In the case of the *C.P.R. v. S.S. "Storstad"*[1] the late Mr. Justice Dunlop states:

"A manoeuvre is wrong if it creates a risk of "collision. The test, therefore, is whether this "manoeuvre created a risk of collision. A further "test is again if it did create a risk of collision, did "it contribute to the disaster in question? If a given "manoeuvre creates a risk of collision, it would be a "breach of the rule, and if it creates a risk of col- "lision which contributed to the collision or caused "it, then it would be a fault. As is well known, "there is a difference between the English law and "our law that used to exist and which has been very "recently abolished. All the English jurisprudence "is under the old law. In England, formerly, a "breach of the rules was presumed to have con- "tributed to the collision or caused it, unless the "contrary was proved. Whilst, in our law, the "plaintiff has to prove the breach of the rule, and "also that it caused or contributed to the collision."

Obviously all these charges, as above set forth, are foreign to the decision of the present case, inasmuch as they had absolutely nothing to do with the cause of the accident. In fact they did not, either directly or indirectly, contribute to the cause of the collision.

"To render a ship liable to be deemed in fault for "an infringement of the rules .... the infringement "must be one having some possible connection with "the collision in question; mere infringement, which "by no possibility could have anything to do with

[1] (1915), 17 Can. Ex. C. R. p. 160 at p. 170; 40 D. L. R. 600 at p. 607.

1918

S. S. "CONISTON" v. FRANK WALROD

Reasons for Judgment.

"the collision, will not render the ship liable." *The Fanny M. Carvill,*[1] *The Barque "Birgitte,*[2] *The "Englishman,"*[3] *The "Duke of Buccleuch."*[4]

The wrong and initial manoeuvre of the "Coniston" in departaing without good cause or reason from art 25., and wrongfully starboarding in a narrow channel, obviously created the risk which caused the accident and therefore she was at fault in so doing. She was the vessel that destroyed the safe position, as required by art. 25, and moreover, even at the critical time when, the collision became inevitable, she was still at full speed, showing no effort to check that speed only until after the accident had become inevitable. Art. 29.

It was quite *"safe and practical"* (art. 25.) for the "Coniston" to keep her course to the right.

The accident resulted from the departure, by the "Coniston," for no sound or good reason, or justification, from the imperative provisions of art. 25,—maintaining that lubberly course and at full speed up to the time the accident became inevitable,—the whole after having sighted for quite a while, and on the approach of a tug, encumbered by its dead tow, descending the current in due course, on her proper side of a narrow channel.

I find the "Coniston" was solely at fault and to blame for the accident and the appeal is dismissed with costs. *Judgment accordingly.*

Solicitors for appellant: *Atwater, Surveyer & Bond.*

Solicitors for respondent: *Davidson, Wainwright, Alexander & Elder.*

[1] (1875), 32 L. T. 646.
[2] (1904), 9 Can. Ex. C. R. 339.
[3] (1877), 3 P. D. 18.
[4] [1891] A. C. 310.

ON APPEAL FROM THE NOVA SCOTIA ADMIRALTY DISTRICT.

1919
November 25.

HALIFAX SHIPYARDS, LIMITED (Intervenors)

APPELLANTS;

AND

MONTREAL DRY-DOCKS AND SHIP REPAIRING COMPANY, LIMITED, a body corporate, et al,

PLAINTIFFS,

RESPONDENTS.

AGAINST

THE SHIP "WESTERIAN."

Admiralty law—Effect of arrest on repairs subsequent thereto—Beneficial repairs—Possessory lien—Priority.

The "Westerian" was formerly used on inland waters and having been purchased for ocean trade, had to be repaired and altered to fit it as a sea-going vessel. The respondent did certain repairs at Montreal and then at the ship agent's request, gave up possession, (thereby losing their shipwright's lien) and permitted her to be taken to Halifax where she went into appellants' dry-docks who completed the work. Whilst in the latter's possession, on the 17th January, 1919, she was arrested at the instance of respondents.

The Marshal saw the work going on but gave no order to the workmen to stop. He left no one in charge and there was no change in the actual possession. The work was continued in good faith and was finished on the 27th March following, the ship being subsequently sold for $80,000 and money deposited in Court. The repairs done subsequent to arrest were necessary and required to class her as an ocean going vessel and were performed in continuance of the contract.

**Held*,—Upon the facts stated, that the shipwright has a possessory lien for repairs done to a ship, and should be paid, *in priority*, not alone for such as were done to a ship, previous to her arrest, but also for such as were done after, and which are beneficial and necessary to and upon the ship.

*The appeal taken to the Supreme Court of Canada is still pending.

1919

HALIFAX SHIPYARDS, LTD. v. MONTREAL DRY-DOCKS AND SHIP REPAIRING CO.

Reasons for Judgment.

2. That in such a case a reference should be made to the registrar to ascertain the extent to which the repairs after arrest are beneficial.

THIS is an appeal from the judgment of Drysdale, J., Local Judge in Admiralty, Nova Scotia Admiralty District, which judgment is varied by this Court.

C. J. Burchell, K.C., for appellant;

J. B. Kenney, for the respondent.

The facts are fully stated in the reasons for judgment of the Honourable Sir Walter Cassels which are as follows:

CASSELS, J., now (25th November, 1919), delivered judgment.

Appeal on behalf of The Halifax Shipyards, Limited, Intervenors, from the judgment of the Local Judge in Admiralty for the Admiralty District of Nova Scotia, delivered on the 1st day of August, 1919.

The appeal was argued before me on the 28th day of October, 1919. *Mr. Burchell,* K.C., appeared for the appellant, and *Mr. Kenny* for the respondent.

On behalf of the appellants Mr. Burchell requested that he might have the right to furnish a memorandum of further authorities. This request was granted, he being directed to deliver to the respondents' solicitors a copy of any such memorandum.

I have been furnished with a memorandum by Mr. Burchell, and also a memorandum on behalf of the respondents.

The facts connected with the appeal are simple, and there is no serious conflict in connection with them.

The ship "Westerian" was sold by the Montreal Transportation Company to certain persons residing in Cuba. She was apparently a vessel plying in the inland waters. It was desired by the owners that the vessel should be repaired, and to a certain extent remodelled, to fit her for the ocean trade, and thereupon the owners in Cuba apparently turned over the work of reconstructing the vessel to N. E. McClelland & Company, who let the work to the Montreal Dry Docks Company, a company carrying on business in Montreal, and the work necessary to be done was carried on partially in Montreal. It is said that the Montreal Company performed work amounting to somewhere in the neighborhood of $50,000.

It appears that N. E. McClelland & Co., ascertaining that the work could not be completed in Montreal within such time as would enable the ship to get down the St. Lawrence before the river froze up, the plaintiffs, The Montreal Drydocks and Ship Repairing Company, Limited, permitted the vessel to be taken from their works thereby losing their shipwright's lien. She was taken to the City of Halifax to have the work that had to be performed completed; and, McClelland & Co., then made arrangements with the present appellant, The Halifax Shipyards, Limited, to complete the work. The vessel was thereupon delivered to the Halifax Shipyards, Limited, and remained in their possession until the works contracted to be performed were completed.

The action was brought in the Admiralty Court and the ship was arrested on the 17th January, 1919. At this time she was in the possession of The Halifax Shipyards, Limited, undergoing repairs.

1919

HALIFAX SHIPYARDS, LTD. v. MONTREAL DRY-DOCKS AND SHIP REPAIRING CO.

Reasons for Judgment.

It is important to bear in mind that at the time the warrant was served on the ship, namely the 17th January, 1919, the repairs required in order that the vessel could be classed for ocean going service, she having been previously classed for inland waters only, had not been completed. Although in point of fact the warrant was served on the ship on the 17th January, 1919—there was no change in the actual possession of the vessel—she was still left in the possession of The Halifax Shipyards, Limited, the Intervenors in the action. There was no notification given to them that they were not to proceed with the repairs, and The Halifax Shipyards, Limited, in perfect good faith continued to perform their contract. The work was finished on or about the 27th March, 1919. The repairs subsequent to the alleged seizure were repairs necessary, and were performed in continuance of the contract for the purpose of having the vessel classed for ocean going service. Had these repairs not been made the vessel could not have been so classed. It is claimed that these repairs amounted to the sum of about $15,000. The present appellants claim they are entitled to a shipwright's lien for this amount in addition to what has been allowed by the learned judge.

The Deputy Marshal, Malcolm H. Mitchell, states in the affidavit filed by him, that he "personally serv-"ed the writ and the warrant on the said 17th day "of January, 1919, in the usual way, being the first "writ and warrant served on the said ship." He states further, "nobody was left in charge of the "said ship by the Marshal during the time the said "ship was under arrest, but I spoke to the Captain "and told him the ship was under arrest and could

"not leave port without bonds being first provided.

"4. When I made the arrest the ship was under-"going repairs and I saw workmen employed in "making said repairs. I did not notify the said "workmen that the ship was under arrest or to stop "the making of said repairs, as I had no instruction "to do so.

"5. When the ship was arrested she was moored "to the 'Lake Manitoba' at the wharf of the Halifax "Shipyards, Limited, at the dry-dock, Halifax."

The learned Judge states as follows, in his reasons for judgment, dated August 1st, 1919:

"The only point remaining open in this case is "in connection with the taking of accounts. The "Shipyards Company intervening claim a posses-"sory lien. At the time of arrest, January 17th, "1919, the ship was in the possession of the Ship-"yards Company, undergoing repairs. The Com-"pany will be protected in respect of any work "done up to that time but they now assert a claim "for work done after the arrest. This cannot be "allowed. After January 17th the ship was in "charge of this Court, and no orders were ever "given for any work after arrest. I will see that "the possessory lien is protected but claims for "work done after the arrest cannot be allowed."

The appeal on behalf of The Halifax Shipyards, Limited, is from that part of the judgment which relates to the work done between the time of the arrest, January 17th, 1919, and the date of the completion of the repairs.

It was stated on the appeal by respondent's counsel that the learned judge did not intend to disallow these subsequent repairs, that all the learned judge

1919

HALIFAX SHIPYARDS, LTD. v. MONTREAL DRY-DOCKS AND SHIP REPAIRING CO.

Reasons for Judgment.

intended was that the privileged claim should be disallowed, and that for the balance of the work the Intervenors should rank *pari passu* with the other creditors. It was stated by Mr. Kenny that an application would be made to the learned judge to have his judgment so varied. However, no such variation has been made, nor do I think the learned judge intended that the order should be so varied. His reasons for judgment show that the claim was disallowed by reason of the fact that after January 17th, 1919, the ship was in charge of the court and no orders were ever given for any work after arrest. The formal judgment directs, as follows:

"The Judge ordered that the District Registrar "pay out of Court to the Intervenors or their "solicitor the value of the work and labour done "and materials furnished by the said Intervenors "upon and to the defendant ship on and before "the 17th day of January, 1919, to be found by the "District Registrar and merchants."

And in his own handwriting he adds:

"and that the Intervenors have priority therefor. "And the judge ordered that the claim of the "Intervenors for work done and materials furn-"ished after January 17th, 1919, be disallowed."

I listened carefully to the arguments of the learned counsel, and have considered the various authorities referred to by them upon the argument, and in their written memoranda.

With great respect for the learned judge who determined this case, and who has had a long experience in dealing with this class of case, I have come to the conclusion that he has erred in disallowing the lien for these subsequent repairs.

1919

HALIFAX SHIPYARDS, LTD. v. MONTREAL DRY-DOCKS AND SHIP REPAIRING CO.

Reasons for Judgment.

The vessel has been sold with these repairs and realized, it is stated, the sum of about $80,000. It seems to me very inequitable and unjust that this sum of money realized unquestionably in part by the enhanced value given to the vessel by reason of these subsequent repairs, should all enure to the benefit of those creditors who had no special lien upon the vessel, and that that portion of the price which the vessel brought by reason of these repairs so made by the Intervenors should not enure to their benefit. Apparently, the reason for the disallowance was that the repairs were continued subsequent to the alleged seizure, and were proceeded with without the order of the court.

There is but little doubt that had the court been applied to, directions would have been given to the Intervenors to continue the work provided by the contract, and no question as to the right of the ship-wrights to their lien would have been raised.

There seems to be no direct authority bearing upon the question. There are authorities, however, which seem to me to bear strongly upon the point before the court.

The "*Aline*"[1] Lushington, J., says:

> "Again, with regard to the case of the person "who has received the damage, is not his interest "benefited by the vessel being repaired and en- "abled to proceed to her port of destination? Is "he injured in the amount of his indemnity fund? "Not at all. His interest I have already stated, "is co-extensive with the rights possessed by the "owner of the vessel at the time when the damage "is done, and his claim is paramount to the extent

[1] (1839), 1 Wm. Rob. 111, at 119.

1919

HALIFAX SHIPYARDS, LTD. v. MONTREAL DRY-DOCKS AND SHIP REPAIRING CO.

Reasons for Judgment.

"of her value at that period. With respect to any "subsequent accretion in the value of the vessel "arising from repairs done after the period when "the damage was occasioned, his claim to partici- "pate in the benefit of such increase of value must "depend upon the consideration how that increase "arises and to whom it in equity belongs. Against "the owner who repairs his vessel at his own ex- "pense, the claim of the successful suitor would "extend to the full amount of his loss against the "ship and the subsequent repairs. Where, how- "ever, the repairs have been effected by a stranger "upon the security of a bond of bottomry, the case "is altogether different; and I cannot hold that "universally bonds so granted must give way to "prior claims of damage."

In the case of *The "Acacia,"*[1] Townsend, J., at p. 256, referring to the case of the vessel states as follows:

"The fact is, that in this case the vessel has "never left the possession of the Messrs. Harland "and Wolf, and is this moment fastened to their "quay; the marshal seems to have adopted their "possession; his possession is merely constructive "and technical, for the actual possession is still "with the defendants."

The facts in the case before me are very similar.

In *Williams v. Allsup,*[2] Erle, C. J., referring to the facts of that case at p. 426, states:

"Under these circumstances, the mortgagor did "that which was obviously for the advantage of "all parties interested; he puts her into the hands

[1] (1880), 4 Asp. (N.S.) 254.
[2] (1861), 10 C. B., (N.S.) 417.

"of the defendant to be repaired; and, according "to all ordinary usage, the defendant ought to "have a right of lien on the ship, so that those who "are interested in the ship, and who will be bene- "fited by the repairs, should not be allowed to take "her out of his hands without paying for them."

Then at page 427 the learned judge states, as follows:

"There, is, no doubt, some difficulty in the case. "But it is to be observed that the money expended "in repairs adds to the value of the ship; and, "looking to the rights and interests of the parties "generally, it cannot be doubted that it is much to "the advantage of the mortgagee that the mort- "gagor should be held to have power to confer a "right of lien on the ship for repairs necessary "to keep her seaworthy."

In *The "Gustaf,"* Lush. (1862), 506, Dr. Lushington, at page 507, states as follows:

"The present question, what claims shall be "allowed to take preference of the lien by common "law of the shipwright, who retains the ship in his "possession *until the Court of Admiralty lays its "hand upon it and orders it to be sold, is not with- "out difficulty.* I am not aware that before I oc- "cupied this chair, any such question ever arose. "Indeed, I may confidently say that none such "ever did arise, and consequently I have no "authority to resort to, beyond the proposition "which is subject to no doubt—that certain liens, "such as salvage and wages, attach to the ship.

"On consideration, I think that, save in cases "which may appear to have a paramount claim,

1919

HALIFAX SHIPYARDS, LTD. v. MONTREAL DRY-DOCKS AND SHIP REPAIRING CO.

Reasons for Judgment.

"the right of a shipwright—the common law lien "—*ought not to be infringed upon.*"

Then at page 508:

"I think it right to add, that the chief difficulty "I have experienced is in satisfying my own mind "that any claim at all could compete with the com- "mon law lien, which is, that the shipwright may "hold till paid, *or until possession is forcibly de-* "*manded by this Court.*"

In *The "St. Olaf,"*[1] Sir R. Phillimore states as follows, at page 361:

"Another objection, however, was taken, and it "was urged that at least in this case the value of "£1,037, though admitted to be that of the ship at "the time when she was arrested, is not the value "at which she ought now to be released, and for "this reason it appears that since the *lis* has been "pending in this matter, application was made "to the Court by the foreign owner of the *St. Olaf* "to be allowed to make certain repairs in his ves- "sel. Certain repairs were made, and I will take "it that these repairs were without the consent "of the opposite party. I am still very clearly of "opinion that they could not prejudice any right "which the owners of the *St. Olaf* possessed be- "fore they were made. I am clearly of that opin- "ion myself, because the right of the plaintiff who "proceeds against the *St. Olaf,* was to have the "value of the vessel at the time she was brought "into court, as far as the proceedings *in rem* are "concerned. His right was to have this *res* made "responsible for the damage inflicted upon his

[1] (1869), L. R. 2 A. & E. 360.

"ship, so far as the value of it extended, and the "repair of the vessel subsequent to the damage "for the purpose of preventing a deterioration of "the property could not in any way increase his "right or the obligation of the other party. It left "them, as I conceive, *in statu quo* in that respect."

These authorities indicate that the right of the plaintiff who seized the vessel is on the value of the vessel as at the date of the seizure, and not the value subsequently enhanced by the necessary work of the shipwright.

Analogous cases are to be found where a Receiver has been appointed of property and repairs have been made without the authority of the court. In these cases while *primâ facie* repairs are disallowed, the court directs a reference as to whether the repairs were reasonable.

In *Blunt v. Clitherow*,[1] the Master of the Rolls, Sir William Grant, points out that a considerable portion of the repairs was done previously to the appointment of the Receiver, and a reference was directed as to whether the repairs subsequently performed without the direction of the court were reasonable, and upon a favorable report the claim was allowed.

In *Tempest v. Ord*,[2] Lord Chancellor Eldon pointed out, that the usual course now is a reference to ascertain whether the repairs were beneficial and if so the claim is allowed,, notwithstanding that the order of the court had not been applied for.

I think the same course should have been followed by the learned local Judge.

[1] (1802), 6 Ves. 799.
[2] (1816), 2 Mer. 55.

1919

HALIFAX SHIPYARDS, LTD. v. MONTREAL DRY-DOCKS AND SHIP REPAIRING CO.

Reasons for Judgment.

The evidence is fairly voluminous as to the value of the work and the labour done between the 17th January, 1919, until the completion of the work, but if the parties cannot agree upon the amounts, I think the judgment of the learned Judge should be varied by ordering the District Registrar to pay out of court to the Intervenors or their solicitors the value of the work and labour done and materials furnished by the said Intervenors, as may be reasonable and beneficial upon and to the defendant ship subsequent to the 17th January, 1919, as well as what has been allowed up to the 17th January, 1919, and that the judgment should be so amended.

That portion of the Judge's order which directs the plaintiff to have the costs of this application to be taxed should be set aside, and in lieu thereof it is ordered that the Intervenors should have the costs of the application and of this appeal to be taxed and paid by the plaintiff. Subsequent costs of the reference to be reserved.

Judgment accordingly.

Solicitors for appellants: *McLean, Burchell, Ralston & Co.*

Solicitors for respondents: *McInnes, Jenks, Lovett & Co.*

IN THE EXCHEQUER COURT OF CANADA.

1919
November 24.

IN THE MATTER OF THE PETITION OF RIGHT OF

MARGARET HOWARD, JOHN W, STERLING AND JAMES CARSON, SURVIVING EXECUTORS OF THE LAST WILL AND TESTAMENT OF DONALD A. SMITH, BARON STRATHCONA AND MOUNT ROYAL, DECEASED.

SUPPLIANTS;

AND

HIS MAJESTY THE KING,

RESPONDENT,

AND

THE MUNICIPALITY OF THE COUNTY OF PICTOU,

THIRD PARTY.

Expropriation—Government Railway Act, 1881, *section* 18—*Vesting of property in the Crown—Title to land—Statute of Limitations —Disability—Absence from province—Gentleman's residence—Interest.*

Held,—Under the provisions of section 18 of the *Government Railway Act,* 1881, the land taken for the purpose of a railway became absolutely vested in the Crown, not only by the deposit of the plan and description in the registry office, but also by the actual possession assumed by the Crown.

2. That the title to the land does not become vested in the Crown by the mere survey of the land, as provided by section 5 of the *Government Railway Act.*

3. That legislation with respect to the limitation of actions is a matter of procedure and is therefore retroactive in its operation.

4. Article 33 of the *Exchequer Court Act* provides that laws relating to prescription, between subject and subject in force in any province shall apply to proceedings against the Crown, and the present claim coming under section 9, ch. 167 of R.S.N.S. 1900, is only

1919

HOWARD ET AL
v.
THE KING.

Reasons for Judgment.

prescribed by 20 years. Possession was taken by the Crown not later than November 28th, 1887, date on which the road was completed, but the owner was under disability, owing to his absence from the province, until the year 1909, date of his first visit to the province after the expropriation of the property. The petition was filed in 1916.

Held,—That, under the circumstances, the claim was not barred by the *Statute of Limitations.*

5. The fact that the land taken was part of a gentleman's country residence takes it out of the class of farm lands and gives it special value which is an element to be considered by the Court.

6. That where the expropriating party has done all that could reasonably be expected of it to settle for the land taken, and that the delay in prosecuting the recovery of the claim may justly have been construed as an abandonment of the same, interest will only be allowed from the date on which the Petition of Right was filed in Court.

THIS is a Petition of Right to recover the value of land taken by the Crown for the use of the Intercolonial Railway in the Province of Nova Scotia.

The case came on for trial before the Honourable Mr. Justice Audette at the City of Halifax, N.S., on the 9th, 10th and 11th days of June, 1919.

E. M. Macdonald, K.C., *L. A. Lovett,* K.C., and *J. W. Macdonald,* for suppliants.

J. McG. Stewart & *J. W. Mackay* for respondent.

R. T. MacIlreith, K.C., & *J. W. Ross,* K.C., for third party.

The facts are stated in the reasons for judgment handed down by the honourable Judge, which are printed below.

AUDETTE, J., now (24th November, 1919), delivered judgment.

This is a Petition of Right, whereby it is sought, on behalf of the heirs of the late Lord Strathcona, who departed this life, testate, on or about the 21st

January, 1914, to recover the sum of $10,000, as representing a claim for damages in respect of, and including the value of, the land taken for and in possession of the Crown and used as part of the Branch line of the Intercolonial Railway from Stellarton to Pictou, in the Province of Nova Scotia.

The question of title is admitted by the Crown, subject to the right to plead that the suppliants' title is barred by the *Statute of Limitations,* or in other words, that the property at the time of the taking by the Crown, belonged to Lord Strathcona, and that the Crown reserves its right to plead the *Statute of Limitations* for the compensation claimed in respect thereof.

The particulars of the claim are as follows:

(a) The value of the land taken in so far as the soil is concerned	$ 1,500.00
(b) Damages for severance	2,500.00
(c) Damages for destroying access to land fronting on the harbour of Pictou	2,000.00
(d) Damages for interfering with access to the harbour by road ...	1,000.00
(e) General depreciation to whole property as a result of the expropriation	3,000.00
	$10,000.00

It has been eventually admitted that the area actually taken by the Crown is 5.08 acres. This question of discrepancy as to the area, is explained by Mr. McKenzie's evidence. Under the first plan which was transmitted from Moncton to Pictou for

1919

HOWARD ET AL
v.
THE KING.

Reasons for Judgment.

registration, on the 6th June, 1886, but which was not registered, and which was filed as Exhibit "H" herein, it appeared that the Crown at first took 5.97 acres; but this was subsequently changed upon representation made by Lord Strathcona, to 5.08 acres, under another plan, which was in turn sent for registration on the 13th June, 1886, meeting with the same fate as to registration.

The Crown by its statement of defence admits having taken the land in question herein for "the right of way and the use" of the Government railway which was being constructed at the time by the Dominion Government, and further alleges the registration of a plan and description of these lands, but has failed to prove it. The defence further pleads the *Statute of Limitations* to which reference will be hereafter made.

As far back as the years 1884 or 1885, the citizens of Pictou started an agitation in favour of building a branch line of railway from Stellarton to Pictou, and a committee of five citizens was appointed. Mr. Fraser, who at one time was Chairman of the Committee, testified that he went to Ottawa making due representation to that effect. Free from all unnecessary details, in the result it was agreed between the Municipality of the County of Pictou and the Crown, that the latter would build the railway, if the County would provide for the right of way by paying the amount necessary to acquire the lands. In accordance thereto, the necessary resolutions were passed by the municipality giving it authority to do so, which authority was afterwards confirmed by *Acts of the Legislature of Nova Scotia,* viz., 49 Vict. ch. 106 and 52 Vict. ch. 84.

The County, as will appear from Exhibit "G", acquired the necessary land for the railway from the owners therein mentioned and settled with them, excepting, however, with Lord Strathcona, whose compensation of $350, fixed at the time but not accepted, appears on the last page of the list. A draft deed for such land and damages was forwarded to Lord Strathcona. By Exhibit "P", on the 27th November, 1886, he acknowledges the receipt of such deed, and he states he has "no recollection of any such ar-"rangement as to the amount of consideration "money for the land and property so taken," adding that upon proper crossings and fencing would greatly depend the price he would expect to receive. No settlement was ever arrived at, the matter of compensation having been left in suspense ever since.

The first survey was made in 1885—and Mr. Fraser says the first survey destroyed the Norway property. Upon representation being made by Lord Strathcona, a second and final survey was made, the plan whereof was completed by Mr. McKenzie on the 13th June, 1886, and transmitted from Moncton to Pictou for registration,, but no such registration was ever made.

The construction of the road started in 1886, when the first sod was turned on the 3rd June of that year. While the first surveys were made in 1885, the change in the same with respect to the present property was only made on the 13th June, 1886, and the work of construction was started east of the Norway property.

Now it is contended that since the plan and description were not deposited in the Registry Office that the land did not vest in the Crown, as provided

1919

HOWARD ET AL v. THE KING.

Reasons for Judgment.

by sec. 10, of *The Government Railway Act*, 1881. However, by sec. 2, of ch. 13 of 49 Vic., the Minister is given, with respect to the Pictou Town Branch, all the powers and authority vested in him by the *Government Railway Act*, 1881. By sec. 10, the lands taken are to be laid off by metes and bounds, and from both plan "H", and the evidence of witness McKenzie, that appears to have been done. Then the section proceeds and says that where "no proper deed or conveyance of these lands to the Crown is made", etc., etc., *or where for any other reasons the Minister shall deem it advisable*, a plan and description of such land shall be deposited in the Registry office, whereby such land shall become vested in the Crown. No plan and description were so deposited, probably the Minister did not deem it advisable to do so, and this court has no power to sit in review of such statutory discretion of the Minister.

However, by sec. 18 of the *Government Railway Act*, any claim in respect of the compensation for the property taken, *as respects the Crown*, is converted into a claim for compensation money, and is void as respects the land and property themselves, which shall, *by the fact of the taking possession* thereof, become and be absolutely vested in the Crown, subject always to the determination of the compensation to be paid and to the payment thereof when such conveyance agreement or award shall have been made.

Therefore, following the decision in the case of *The King v. The Royal Trust Co., of Canada*,[1] I find that under the provisions of sec. 18, of the *Government Railway Act*, 1881, the land taken for the

[1] (1908), 12 Can. Ex. C. R. 212.

purposes of the Branch of the Intercolonial Railway, became absolutely vested in the Crown at and from the time of possession being taken on its behalf. The case of *The Queen v. Clarke,*[1] cited at bar has been satisfactorily distinguished in the latter case, for the obvious reason that the owners therein had remained in possession.

Moreover, the court has additional specific jurisdiction to hear the present case, and the suppliants have the right to set up this claim, under the provisions of sec. 19 of the *Exchequer Court Act.* wherein it is *inter alia,* provided that it (the Court) "shall have exclusive original jurisdiction in all "cases in which *the land, goods, or money* of the subject are in the possession of the Crown." See upon this point *Clode on Petition of Right,*[2] and the numerous cases therein cited; *Robertson on Civil Proceedings,*[3] *Halsbury, The Laws of England.*[4]

Further, it must be found, following the decision in the case of *McQueen v. The Queen,*[5] that the title in the property did not become vested in the Crown by the mere survey of the land as provided by sec. 5 of the *Government Railway Act;* but, that it did so by the actual possession taken some time later, when the construction of the road was started and completed by November, 1887.

Coming now to the question of the *Statute of Limitations* set both at bar and by the pleadings, I will deal first with sec. 30 of the *Government Railway Act,* 1881. It appears from the evidence that the suppliants' land in question was first laid out by

[1] (1896), 5 Can. Ex. C. R. 64.
[2] pp. 68, 70.
[3] pp. 332-333.
[4] vol. 1, p. 18; vol. 10, pp. 26 & 27.
[5] (1887), 16 Can. S. C. R. 1, 28, 102, 103.

1919

HOWARD ET AL v. THE KING.

Reasons for Judgment.

metes and bounds by the second plan made on the 13th June, 1886, that the first sod was turned on the 3rd June, of that year, and that the construction was started east of the Norway property, and further that the road was completed by the 28th November, 1887. We have no evidence establishing at what actual date the possession of the land was taken. It is only established that the land in question must have been taken between the 13th June, 1886, and the 28th November, 1887. From Exhibit "P", it would appear that Lord Strathcona received for the first time, on the 27th November, 1886, an intimation that a draft deed had been prepared for the land required for the railway, and in answer to the same he wrote that the amount of consideration money he would expect to receive would depend, among other things, upon the several crossings being made safe and commodious. The answer, in respect of these crossings, practically comes only by way of the undertaking filed by the Crown on the 9th September, 1919,—the matter having remained in abeyance in the meantime with respect to the settlement of the claim.

The evidence establishes that the lands were taken between the 3rd June, 1886, and the 28th November, 1887. That the work of construction did not start at Norway. There is every reason to believe that the construction of the Branch was worked from Stellarton, where a railway was already in operation. In all probability the possession of the road was possibly taken in 1886, but also possibly in 1887, and possibly late in 1887. There is no such evidence, however, upon which I could name one day more than another between the dates above mentioned, with any certitude, and upon which may depend the

life or death of the claim. I conclude that the benefit of that incertitude should be given to the conjecture that the lands might have been taken possession of only one month or one month and a half before the operation—taking in consideration that in all probability its construction was worked to Pictou from the other end, from Stellarton.

Moreover, there is no definite date to anchor on, between the 13th June, 1886, and the 28th November, 1887,—the date of laying out the property taken by metes and bounds and the date when the line was opened for traffic—whereby one could say that possession was taken on a given day. All we know is that possession was taken between these two dates. In view of all this, it would be impossible to declare the limitation mentioned in sec. 30 of the *Government Railway Act,* of 1881, as binding, because the circumstances contemplated by that section do not apply to the special circumstances arising in the present instance. The County first deals direct with Lord Strathcona, and then on the 1st October, 1887, previous to the completion of the road, the *Exchequer Court Act* came into force, and under sec. 33 thereof, as above mentioned, it is enacted that the laws relating to prescription and the limitation of actions, shall be the law of the province; and further, by that very Act, the *Act respecting the Offical Arbitrators* is repealed and thereby the official arbitrators are abolished. In the light of these facts it would seem that sec. 30 of the Act, 1881, could not be made applicable—the arbitrators were then abolished, replaced by the court, and no necessity arose to file the claim with the department. Furthermore, the proviso at the end of section 30

1919

HOWARD ET AL v. THE KING.

Reasons for Judgment.

would also help to harmonize matters by suggesting the origin of sec. 33 of the *Exchequer Court Act,* which invokes the laws relating to limitation of actions in the Province as embodied in chapter 167 of the R.S.N.S., 1900.

Legislation with respect to the *Statute of Limitations,* is legislation dealing with procedure and is therefore retroactive.[1]

Moreover, if this claim, as hereinbefore mentioned is made at common law for land that finds its way into the hands of the Crown, under colour of eminent domain or expropriation, and is considered under the provisions of sec. 19, of the *Exchequer Court Act,* again the local law respecting the limitation of actions applies and again we are driven to chapter 167 of R.S.N.S., 1900.

As the question of disability resulting from the absence from the province arises with respect to Lord Strathcona, who never resided at Pictou, but who visited the place at some time, it is important to establish from the evidence the date at which he was at Pictou to properly adjudicate upon the question of prescription. Five witnesses testified upon this point:

Witness *Webster,* who was stationmaster at Pictou up to 1918, remembers that Lord Strathcona came to Pictou in 1909 by special train and left the same day. *E. M. Macdonald,* K.C., also testified that at no time did Lord Strathcona reside at Pictou, but that he came there in 1885, and was not there again until the 20th September, 1909, when he came by

[1] The *Idun* case, [1899] P. 236; *The Sydney & Cape B. Co. v. Harbour Commissioners of Montreal* (1916), 15 Can. Ex. C. R. 1; 20 D. L. R. 828, affirmed (1914), 20 D. L. R. 990, 49 Can. S. C. R. 627; and *The Royal Trust Co. v. The Baie des Chaleurs Ry. Co.* (1908), 13 Can. Ex. C. R. 9.

special train, arriving in the early morning and remaining at Pictou a couple of hours. He further says that Lord Strathcona was not at Pictou in 1886. Witness *R. A. Fraser* says he saw Lord Strathcona at Pictou previous to 1885, and in 1886 and 1909. He says Lord Strathcona was at Pictou on the 22nd May, 1886, previous to the turning of the first sod, and that he also saw him there in September, 1909. *Donald McLeod,* who was at one time working at Norway, under caretaker Gillis, says he saw Lord Strathcona three times at Norway, but he is unable to mention any date, once about 35 years ago (1919), the first time in August, the second time in the fall and the third time he was digging potatoes. Witness *Mary Campbell,* a daughter of Gillis the caretaker at Norway, who was married in 1892, says she remembers Lord Strathcona coming to Norway. She has no idea of the year,—about six years before she was married. It is impossible to build up anything with any satisfaction, upon the testimony of these two last witnesses. The most that can be found is that Lord Strathcona was in Pictou in 1885, on the 22nd May, 1886,—although the last date is challenged by witness Macdonald,—but it is absolutely established he was there in 1909.

The lands in question were taken between the 13th June, 1886, and the 28th November, 1887. Therefore, Lord Strathcona's visits in 1885 or in May, 1886, have no bearing upon this question of limitation, but he was unquestionably in Pictou in 1909.

It was held in *Ross v. The G. T. Ry. Co.*[1] that the right to compensation for land taken by a railway

[1] (1886), 10 O. R. 447.

1919

HOWARD ET AL v. THE KING.

Reasons for Judgment.

company is not barred short of twenty years, and that decision was followed in the case of *Essery v. The G. T. R. Co.*[1] See also *Roden v. City of Toronto.*[2] In the case of *The Cork & Bandon Ry. Co. v. Goode,*[3] an action of debt by a railway company against one of its members, for calls under the *statute,* it was held that a declaration in debt upon a *statute,* is a declaration upon a specialty, and if that were applied to the present case, the claim would fall, as a specialty, under sub. sec. (c) of sec. 2 of ch. 167, of R.S.N.S., 1900, and would be prescribed by 20 years, also subject to sec. 3 and following the same Act in respect of disability.

However, I find that the present claim comes under sec. 9 of that Act, and is subject to a limitation of 20 years, and that as Lord Strathcona was under disability resulting from his absence from the province, that if we add 10 years to the date of his visit, in 1909,—his first visit to the province after the expropriation of the property, that will take him to 1919. The Petition of Right was filed in the court on the 31st July, 1916,—(it is not disclosed when it was lodged with the Secretary of State in pursuance of sec. 4 of the *Petition of Right Act*)—therefore the claim is not barred by the *Statute of Limitations.*

Mention should perhaps be made that the suppliants relied upon the two letters of the Minister of Railways, filed as Exhibits 8 and 10, as interrupting the prescription, and that Counsel for the Third Party contended that the Crown could not proceed with the construction of the railway until the right of way was acquired. This last argument, although

[1] (1891), 21 O. R. 225.
[2] (1898), 25 A. R. (Ont.) 12.
[3] (1853), 13 C. B. 824.

plausible is not sound, because the agreement between the Crown and the Municipality was that the latter was only to provide for the right of way by paying the amount necessary to acquire the land, and the land owners had all been dealt with and paid with the exception of the present claimant. *De minimis non curat lex,*—This trifling difficulty was no reason to stop the construction of a railway for the welfare of a large community.

In the result the Crown took the suppliants' land and became liable therefor either under the *Railway Act,* 1881, or under sec. 19 of the *Exchequer Court Act.* The respondent took the land and the suppliants have a right to compensation. *De Keyser's Royal Hotel Co. v. The King,*[1] *Ross v. G. T. R.*[2] The suppliants' right to compensation is a statutory right and the respondent's liability is a statutory liability. This right and this liability still exist and nothing has happened to destroy them. It is even contended in some States of the American Commonwealth that a claim for compensation for land expropriated cannot be taken away by the *Statute of Limitations.*[3]

Coming to the question of the assessment of the amount of compensation it may be advisable, as a prelude, to state in a summary manner the result of the evidence adduced upon the value of the property in question, and the damages arising from the expropriation. On behalf of the suppliants, witness *Ellis,* speaking of values of to-day, values the property at $35,000 to $40,000, without the railway,—

[1] (1919), 35 T. L. R. 418.
[2] (1886), 10 O. R. 447.
[3] *Delaware, L. & W. R. Co. v. Burson,* (1869), 61 Penn, 369; *McClinton v. Pittsburg, Fort Wayne & Chicago R. Co.,* (1870), 66 Penn. 404.

1919

HOWARD ET AL v. THE KING.

Reasons for Judgment.

and with the railway at $17,000 to $22,000,—adding that his values are within two years, and he takes it that the land left by the railway on the water front is of no value and is no good. Then Senator *Casgrain* places a value of $25,000 upon the property before the coming of a railway, and $15,000 since,—valuing land and damages at $10,000. He also admits that the coming of the railway to Pictou is an advantage that would add to the value of property. Witness *E. M. Macdonald* contends the property has depreciated in value by one-third from the coming of the railway. On behalf of the Crown witness *Fraser* says that on the appraisal by their committee, they allowed $20 an acre for cultivated land, and $5 for woodland, and that as far as he was concerned he had nothing to do with the valuation of the suppliants' property. Senator *Tanner* contends that the assessment of the Norway property is above its value and that the sum of $350 is and has always been a sufficient sum for the value of the land including the severance, which does not amount to much. He would allow $50 an acre, that is $250 for the land and $100 for damages, in all $350. He says that in 1886 there was no demand for such property, and that there has been no increase in the value of real estate at Pictou in the last 30 years. Witness *Ives,* heard on behalf of the Third Party, says that the assessed value of lower price property, say $1,400, is pretty near actual value, and that the higher price property is very small because we have no people to buy. The assessment is as much as it would bring at auction, and Lord Strathcona's property is assessed at all it could bring. That the business conditions at Pictou in 1886 were no better than they are to-day.

A bank had failed there in 1883,—there was also the Campbell failure, and there were no industries there to employ people.

Suffice it to say on the question of values testified to, that the suppliants' evidence in that respect is so exaggerated and inflated, that it is beyond the pale of serious and earnest consideration especially if we consider the purchase price, the absence of fluctuation in the real estate market and the value placed by the estate itself upon the property for succession duty. He who wants to prove too much proves nothing. Moreover, these values are not values given as of the date of the expropriation. On the other hand, I am unable to share Senator Tanner's view with respect to the damages to the property. His estimate is too low. Has it been offered to make up the amount appraised by the County years ago?

Undoubtedly the suppliants' property is a very desirable country residence for a gentleman of means. As was very justly said by Sir Glenholme Falconbridge, C.B., K.B., in delivering judgment in appeal re *Ruddy v. Toronto Eastern R. W. Co.* [1] "It is not a "question of farm land to be valued at so much per "acre as such. Nature had provided an ideal site "for the particular purpose which the appellant had "in view, and which he was carrying out with great "judgment, viz., for a country residence of a man of "means and good taste. It appears in evidence, and "it is a self-evident proposition, that if it should "become necessary or desirable for the appellant to "sell the property, the existence of the railway, run-"ning where it does, would be a fatal objection in "the mind of the only class to which he could reason-"ably look to find a purchaser."

[1] (1915), 7 O. W. N. 796.

1919

HOWARD ET AL v. THE KING.

Reasons for Judgment.

While these observations, *mutatis mutandis*, are very apposite to the present case, it must not be overlooked that this judgment was reversed by the Judicial Committee of His Majesty's Privy Council[1] upon the misapprehension by the Court of Appeal of Ontario, that the two arbitrators who had made an award for $3,500, as against that of the dissenting arbitrator for $13,500, had proceeded upon a wrong principle in not taking into consideration the elements above referred to. Their Lordships of the Privy Council found that the majority award had duly considered the same and restored their finding. In the result this judgment establishes that such elements of compensation must be taken into consideration, but that they must not be used to unduly inflate the same.

This property of an area of 113 acres was bought in 1881 and 1882 (See Exhibits 1 and 2) for the total sum of $6,990. It was assessed in 1885 at $11,500, and from 1886 to 1895 at $15,000. It was appraised for the purpose of succession duty in 1914 at the sum of $10,000.

The taking of this land from the suppliants results in a severance of the property, with a small parcel of land on the river side. Adjoining thereto he procured, in 1902, long after the date at which we have to assess, from the local Government, a grant for a water lot; the value of such grant it is unnecessary to consider, but it is only mentioned to show what in futurity could be made of the piece severed. It appears from the evidence that two railway-crossings were, at some date, in the early period given to the suppliants; but they had not been maintained, and

[1] (1917), 33 D. L. R. 193.

while the remains at the time of the trial, were still perceptible, they were not of practical use. Therefore, the Crown, at trial, filed an undertaking, whereby it has undertaken to restore and maintain in good condition the two farm crossings indicated on a plan thereunto attached.

This undertaking has a very appreciable value, as was mentioned by Lord Strathcona in the correspondence of record and must be taken into consideration, as well as the advantage resulting from the construction of the railway, making Pictou ever so much more accessible,—in assessing the compensation. The value of this property must be arrived at from the standpoint of its value to the owner and not to the party taking it, and its market value must be ascertained looking at it from that view, realizing that that class of property is not in demand, it is the smaller class of property with reasonable rentals that is mainly in demand. For want of demand it is also well known that large properties of considerable value as far as the cost of construction and improvement are concerned realize as a rule but small prices.

Taking all the circumstances into consideration and duly weighing the evidence, I have come to the conclusion to allow for the land taken, the sum of fifty dollars an acre, making the sum of $254.00, an amount which under the evidence would appear in excess of what was allowed for farm lands, and for all damages resulting from such expropriation arising from the severance and all other legal elements of compensation at the sum of $500.00, making in all the sum of $754.00.

1919

HOWARD ET AL v. THE KING.

Reasons for Judgment.

Dealing with the question of interest it would appear to be out of the question under the circumstances to allow interest for a period running as far back as 1886 or 1887. The Municipality at the time of the taking of these lands, did all that was reasonable to be expected from them. They had the land appraised, and a deed prepared which was sent to Lord Strathcona for execution. He never executed it. His laches in doing so or in prosecuting his claim for such a long period, coupled perhaps with the general knowledge of the public-spirited character of Lord Strathcona, must with justification have led the Municipality to believe he had abandoned the idea of making a claim. However, it is unexpectedly revived at his death. *Vigilantibus non dormantibus equitas subvenit.* This delay in prosecuting the recovery of the claim, which may justly have been construed as an abandonment of the same, affords a reason for me to allow interest upon the compensation money only from the date of the institution of the present action, namely the 31st July, 1916, to the date hereof.

The suppliants will be entitled to their costs as against the Crown. No costs as between suppliants and the Third Party, who is not to be taken as a co-defendant, although the suppliants have filed written pleadings joining issue with the Third Party.

The Crown will be entitled to recover from the Third Party the amount recovered by the suppliants in capital, interest and costs, together with the costs on the Third Party issue.

Therefore there will be judgment, as follows: viz:

1st. The lands in question herein are declared vest-

ed in the Crown from the date of the taking possession thereof.

2nd. The compensation for the land taken and for all damages resulting from the expropriation is hereby fixed at the sum of $754 with interest thereon from the 31st July, 1916, to the date hereof.

3rd. The suppliants, upon giving to the Crown a good and satisfactory title, free from all mortgages or encumbrances whatsoever, are entitled to be paid by and recover from the respondent, the said sum of $754 with interest as above mentioned.

4th. The suppliants are further entitled to the performance and the due execution of the works mentioned in the undertaking above referred to.

5th. The suppliants are furthermore entitled to recover from and be paid by the respondent, the costs upon the issue with the Crown.

6th. This Court doth further order and adjudge that the Crown do recover from and be paid by and recouped from the Third Party the above mentioned sum of $754 with interest and costs, together with the costs on the issue as between the respondent and the Third Party, unless the Crown would, under the circumstances, elect to forego such last mentioned costs.

Judgment accordingly.

Solicitors for suppliants: *Macdonald, Ives & McGillivray.*

Solicitor for respondent: *John W. Ross.*

Solicitor for third party: *John W. Mackay.*

1917
February 23.

IN THE EXCHEQUER COURT OF CANADA.

BETWEEN

THE CITY SAFE DEPOSIT & AGENCY COMPANY, LIMITED,

PETITIONER;

AND

CENTRAL RAILWAY COMPANY.

Exchequer Court Act—Sections 26 and 27—Railway Act, section 142—Receiver, appointment of; Jurisdiction—Incidental proceedings:—

Held, that by section 26 of the *Exchequer Court Act* the Court is given jurisdiction to appoint a Receiver, as an incidental proceeding in an action, as an interim preservation of property, pending final disposition of the action for the sale or foreclosure, *but* that *it does not* confer a direct right of action limited merely to the appointment of a Receiver.

THIS is a Petition by the trustees to the bondholders of the Company praying *solely* for the appointment of a Receiver to the Central Railway Company, and without asking for the sale or foreclosure. The company was insolvent and had filed its Scheme of Arrangement as provided for by the Act, some time previous. The application was first heard on the 12th of January, 1917.

J. W. Cook, K.C., for petitioner.

W. D. Hogg, K.C., for the company.

On application of Mr. Hogg and after argument the matter was postponed to 23rd January.

Mr. Cook then stated he made his application through the trustees under the provisions of sections 26 and 27 of the *Exchequer Court Act* and section

1917

CITY SAFE DEPOSIT AND AGENCY CO. v. CENTRAL RAILWAY CO.

Argument of Counsel.

142 of the *Railway Act* and that he considered the petitioners the only and proper persons to apply and by law the only ones having the right to apply. irrespective of anything in deeds. He read from sec. 142 of the *Railway Act*. He also filed various trust deeds and read portions and stated that he based his application entirely on the admitted insolvency of the company.

Mr. Hogg argued that the Court had no jurisdiction to appoint a Receiver on this application and argued at length that moreover the petitioner had not complied with the provision of the trust deed as to steps to be taken before they could make this application. This part of the argument need not be given here as the judgment turns on the question of jurisdiction alone.

On the 29th January, 1917, the court ordered further argument and called counsels' attention to the following two points among others.

1. Has the Exchequer Court any jurisdiction other than that conferred by section 26?

2. Under section 26, is not the right confined to a first mortgage?

On February 9th, 1917, there was a re-hearing and a further hearing.

A. W. Atwater, K.C., *J. W. Cook,* K.C., for petitioner.

W. D. Hogg, K.C., for the company.

Several points were argued at this hearing, but only the substance of the argument as to jurisdiction will be reported here as that alone is considered in the judgment.

Mr. Atwater, K.C., argued *inter alia* that the court's jurisdiction under section 26, of the

1917

CITY SAFE DEPOSIT AND AGENCY CO. v. CENTRAL RAILWAY CO.

Argument of Counsel.

Exchequer Court Act was not confined solely to the case of the first mortgage (reads the section, etc.) and drew particular attention to sub-section 3 and submitted that this gave the court the fullest and most complete power to do all conservatory acts which it, in its discretion might think necessary, to conserve the rights of the different creditors, in any case where application is made for sale or foreclosure.

That foreclosure proceedings are not necessarily precedent to the application for a receivership. The true construction of the first two lines of sub-section 3 are disclosed when it says: "The Exchequer Court in any of the cases in this secton mentioned. . ." That means that in any of the cases, whether the applications made should be for sale or for foreclosure, the applications may be made for any of the conservatory measures indicated by sub-section 3. As I understand the English authorities, in a mortgage action the Courts have always taken it as being within their powers to appoint a receiver where they saw a necessity for it either before or after the inception of proceedings by way of foreclosure.

If the circumstances disclosed to the Court justify proceedings by way of foreclosure, then the Court may apply all the conservatory remedies necessary to protect the interest of the creditor. "I think your "Lordship must conclude that this is a proper ap- "plication and one which is contemplated by the Act, "that a receiver should be appointed even if actual "proceedings by way of foreclosure have not already "been taken. I might cite at once to your Lordship "certain authorities that your Lordship may desire

"to refer to. I refer your Lordship, to 21 Halsbury "Nos. 464-6 and 27 Encyclopaedia pp. 1627-8."

In 21 Halsbury, section 464, it will be found that where there has been a breach of the mortgagor's obligations, or when, without such actual breach, the security is in jeopardy, the mortgagee can obtain the appointment of a Receiver by the Court. Appointment of a Receiver is made either as a step in an action brought to enforce the security, or in an action having the appointment of a Receiver as its sole object. Then, there is the case of *Taylor v. Emerson.*[1] In 24 Halsbury, section 630, page 343, there is the following citation:

"In the case of companies carrying on undertak- "ings of a public nature, mortgagees and holders of "debenture stock may, in certain circumstances ap- "ply to two justices for the appointment of a re- "ceiver without commencing an action."

I refer also to a case which, I think, bears out the view I am endeavouring to express. That is the case of the *Central Ontario Railway v. The Trusts and Guarantee Company,* reported in Law Reports.[2] The point in discussion was as to whether a creditor, even a mortgage creditor had the right to sell the railway because it was contended that in the public interest the railway should not be sold. The Privy Council eventually determined that it could be, but all the Courts, including the Judicial Committee of the Privy Council, conceded the right of a creditor to a receivership. It was argued on behalf of the railway, as a matter of fact, that that was the ultimate remedy, that they had a right to the receivership.

[1] (1843), 4 Dr. & War. 117.
[2] [1905] A. C. 576.

1917

CITY SAFE DEPOSIT AND AGENCY CO. v. CENTRAL RAILWAY CO.

Argument of Counsel.

The point I am endeavouring to make in this matter is only that a receivership has always been recognized as the legitimate and proper remedy. It has never been questioned, and the Privy Council has treated the right to a receivership as being an inherent right, as the only remedy that the creditor could exercise if there was no remedy by sale. There was never any question in any of the courts, either here or in Great Britain, as to the rights of a creditor, particularly of a mortgage creditor to have a Receiver appointed of the property that was pledged to him in order that he might manage it for his beneficial interest.

Mr. Hogg: What we say is that under the first mortgage deed they have not put themselves in a position to apply for a receivership. They must come within the requirements of the deeds.

In the first place, they have not placed themselves in that position by a proper resolution and, secondly, there has been no notice given to the company up to this moment declaring the principal due upon the mortgage of 1914.

Mr. Hogg denied the right to a receivership under the circumstances.

The facts are stated in the reasons for judgment.

Reasons for Judgment.

CASSELS, J., now (February 23rd, 1917) delivered judgment, as follows:—

The Petition in this case was filed asking for the appointment of a Receiver for the railway. The prayer of the petition, is as follows:

"Wherefore your Petitioner humbly prays that "by judgment to be rendered on the present ap- "plication, the said F. Stuart Williamson be ap-

"pointed as Receiver for the said Central Railway "Company of Canada, and that he be authorized "to take possession of the said railway and of all "the railway stock, equipment and other acces- "sories thereof, the whole under the direction of "this Honourable Court, the said Williamson be- "ing authorized generally to do all that is necessary "for the proper working, maintenance and ad- "ministration of the railway, with power in the "name of the company to institute or defend any "suit or action on its behalf; the whole according "to law."

The petition alleges that two deeds of trust were executed, one bearing date the 17th July, 1911, the other on the 5th May, 1914. The allegation in the petition, is as follows:

"18. The company respondent has practically "ceased to do business: the interest on its issued "bonds is long in arrears; all construction work has "long since been abandoned, and the only tangible "assets consist of some ties and rails lying in the "open at McAlpine; shares of stock in certain sub- "sidiary companies, which are of little or no value; "certain wharf properties at Carillon and Ottawa "and a small steamer known as 'The Empress', the "title to which your petitioner believes is in reality "vested in one of the subsidiary companies afore- "said. The value of the whole of the said assets to "the best of your petitioner's knowledge and belief "does not exceed the sum of $100,000, against which "are claims, according to the statement of the re- "spondent itself, aggregating over $2,000,000."

In other words, according to the allegation in the petition the assets, if realized in full, would net to

1917

CITY SAFE DEPOSIT AND AGENCY CO. v. CENTRAL RAILWAY CO.

Reasons for Judgment.

the creditors about five cents on the dollar, from which would have to be deducted all costs connected with the realization of these assets.

On the application for Receiver, the case was fully argued in all of its aspects, and various points were raised on behalf of the defendants against the right of the petitioner to a Receiver. While I have considered all the questions raised, and the authorities cited, as I have come to the conclusion that I have no jurisdiction to grant the application, I think it better not to pronounce upon any of these questions, until such time if ever when the various points have to be passed upon.

The petition is confined merely to an application for the appointment of a Receiver. No other relief is asked, as a sale or foreclosure.

The jurisdiction of the Court is purely statutory. It is given by section 26 of the *Exchequer Court Act*. The court has jurisdiction to order and decree a sale in the manner indicated by sub-section (a), 1, 2 and 3, for foreclosure as indicated by sub-section (d).

Sub-section 3 of section 26 provides, as follows:

"The Exchequer Court, in any of the cases in "this section mentioned, shall have all the powers "for the appointment of a receiver either before or "after default, the interim preservation of the pro- "perty, etc."

I think it quite clear that the power to appoint the Receiver is intended for the interim preservation, pending the final disposition of the action for the sale or for foreclosure. It is what might be called an auxiliary or ancillary process with the object of preserving the property, pending the final de-

termination of the action; but, I do not think it ever was intended to confer a direct right of action limited merely to the appointment of a Receiver.

There have been several cases in the Exchequer Court where the sale of a railway has been ordered and a Receiver appointed. In every case, as far as I have ascertained there was always an action commenced by a statement of claim praying for the sale of the railway, and no case is there on the records of the Court, where the relief sought is confined merely to the appointment of a Receiver. The statute which I have referred to contemplates the appointment of somebody having powers greater than were given to the appointee commonly known as a Receiver. It applies to a Manager,—and there are also provisions authorizing the Receiver or Manager, under the direction of the Court, if necessary, to complete the railway. These provisions are in excess of the ordinary provisions which provided for the appointment of a Receiver alone.

In the earlier cases a Receiver appointed to a railway, could not interfere in any way with the management of the road. He simply received any surplus earnings there might be after payment of the working expenses. The courts were unwilling to take the management of the railway out of the hands of those entrusted to manage it under their acts of incorporation.

I have searched diligently through the various text-books and authorities, and I can find no case in which a Receiver has been appointed, except for the purpose of obtaining ancillary or auxiliary relief in the suit which has been instituted. I will deal

1917

CITY SAFE DEPOSIT AND AGENCY CO. v. CENTRAL RAILWAY CO.

Reasons for Judgment.

later with the case cited by Mr. Atwater for the contrary proposition. In *Kerr on Receivers,*[1] it is stated: "Except in certain statutory cases, and in "cases of lunacy, the Court has no jurisdiction to "appoint a receiver unless an action is pending."

And the case cited of *Salter v. Salter*[2] a decision of the court of Appeal in England is strong authority for that proposition. Reference may also be made to Daniel's Chancery Practice,[3] where there is a collection of authorities.

In the American courts the law is equally clear. In *Smith on Receivers,*[4] a valuable American authority, it is stated, as follows: "It is a pre-"requisite that there shall be at the time of making "application a suit actually pending." And at page 35, section 13, of the same author, similar language is used.

In *"High on the Law of Receivers"*[5] referred to by the respondent's counsel, it is stated, as follows:

"Suit must be actually pending; allegations must "be specific. Ordinarily, unless perhaps in the case "of infants or lunatics, a suit must be actually "pending to justify a Court of equity in appoint-"ing a receiver. And since the Court is without "jurisdiction to appoint a receiver before the bill "is filed, the fact that the bill is subsequently filed "and that the receiver gives bond does not impart "any validity to the order. And the suit which "must be actually pending must be one in which the

[1] 6th ed. by F. C. Watmough, (1912), p. 147, ch. 5.
[2] [1896] P. 291.
[3] 5th ed., vol. 2, p. 1502.
[4] (1897), p. 26, sec. 9.
[5] 4th ed., p. 24, sec. 17.

"main relief sought is independent of the receiver-"ship."

Cook on Corporations.[1]

"In regard to the procedure in appointing a re-"ceiver a Court of Equity, as already stated, has "no power to appoint a receiver except in a pend-"ing suit."

My construction of section 26 of the *Exchequer Court Act*, would lead me without the aid of these English and American authorities to the same conclusion. It seems to me an absurdity that the court should undertake through their officers the management and control of a railway for all time, or at all events for such a time as would elapse before the payment of the bonded debts of the company.

I am referred by Mr. Atwater for a contrary view to the Laws of England,[2] which state as follows:

"Where there has been a breach of the mort-"gagor's obligations, or where, without such "actual breach, the security is in jeopardy, the "mortgagee can obtain the appointment of a re-"ceiver by the Court. The appointment is made "with a view to preserve the property if it is in "danger, or by intercepting the income, to provide "a fund for payment of the mortgage; and it is "made either as a step in an action brought to en-"force the security, or in an action having the ap-"pointment of a receiver as its sole object."

For this proposition the only case cited is that of *Taylor v. Emerson.*[3] An analysis of that case does not bear out the broad proposition as stated. In that case the only remedy which the plaintiff could

[1] 7th ed., p. 335, sec. 863.
[2] Earl of Halsbury, Vol. 21, p. 261, sec. 464.
[3] (1843), 4 Dr. & War., 117.

1917

CITY SAFE DEPOSIT AND AGENCY CO. v. CENTRAL RAILWAY CO.

Reasons for Judgment.

be entitled to under the decisions of the Lord Chancellor, was the appointment of a receiver unless in fact another remedy was applied, namely, the removal of the trustee and substitution of a new trustee. In that case the plaintiffs filed their bill alleging that Porter the trustee appointed under the deeds referred to had not executed the same or gone into possession of the lands conveyed to him. They prayed that Emerson, who was the debtor, and who had conveyed the properties, might be ordered to convey to the plaintiffs or to a trustee for their use the said lands, and for a receiver. The plaintiffs in that case pressed that they were entitled as mortgagees. The Lord Chancellor in his written reasons for judgment points out, that this claim is not well founded. He held that on proper construction of the documents, the first trust to which the rents were to be applied was to pay the head rent,—the next was the premium on the policy of insurance. He says at page 123:

> "I think, therefore that the parties did not in-
> "tend that the amount of this debt should be
> "raised by a sale of the leaseholds; all that the
> "plaintiffs are entitled to is, that the trustee,
> "Porter, should enter into possession,"

or failing the trustee so entering and performing the duties cast upon him as a trustee,

> "the Receiver already appointed should be con-
> "tinued."

And he proceeds:

> "I shall direct the trusts of the deed to be car-
> "ried into execution, under the direction of the
> "court, and declare that the parties are not to be

1917

CITY SAFE DEPOSIT AND AGENCY CO. v. CENTRAL RAILWAY CO.

Reasons for Judgment.

"considered as mortgagees, or entitled to a sale."

The plaintiffs' only remedy in that case was to have the trustee Porter called upon to perform his duties. The only right which in any event the plaintiff was entitled to was that this trustee should receive the annual rents, pay the head rent, next the premiums, and then the balance of the rents to the plaintiff until his debt was wiped out. So while it is stated that a Receiver was appointed, in fact the Receiver merely took the place of the trustee to carry out the duties of the receipt of the rents and proper application thereof. I do not think this case has any application to the case in question.

I am of opinion that this present application should be refused. As I have stated, I think it wiser not to prejudice any of the parties in any future proceedings, by any views of mine unnecessary to the determination of the case. I think that under the circumstances of this case each party should bear their own costs.

The application is refused without costs to either party.

Judgment accordingly.

Solicitors for petitioners: *Cook & Magee.*

Solicitors for company: *Hogg & Hogg.*

1919
November 27.

IN THE EXCHEQUER COURT OF CANADA.

IN THE MATTER OF

THE GRAND TRUNK PACIFIC RAILWAY CO.

AND

THE HONOURABLE JOHN DOWSLEY REID, OF THE CITY OF OTTAWA, IN THE PROVINCE OF ONTARIO, RECEIVER, DULY APPOINTED TO SAID RAILWAY COMPANY.

AND

THE UNITED STATES STEEL PRODUCTS COMPANY,

PETITIONERS.

War Measures Act—Exchequer Court Act, section 26—Jurisdiction—Receiver—Permission to sue.

Held, that the Receiver herein having been appointed by an Order-in-Council, under the authority of the *War Measures Act,* 1914, confirmed by 9-10 Geo. V. ch. 22, and not under the provisions of the *Exchequer Court Act* sections 26 and following, is not an officer of the Court, and, therefore, the Court has no jurisdiction to entertain an application by a creditor for permission to sue such Receiver and Company.

THIS is an application for the permission to sue the Receiver appointed to the Grand Trunk Pacific Railway Co. by an Order-in-Council under the *War Measures Act.*

The application was made, in Chambers, before Mr. Justice Audette, on the 26th day November, 1919.

Mr. M. G. Powell for petitioners.

The facts are set forth in the reasons for judgment of the Honourable Mr. Justice Audette, which follow:

1919

GRAND TRUNK PACIFIC RAILWAY CO. v. UNITED STATES STEEL PRODUCTS CO.

Reasons for Judgment.

AUDETTE, J., in Chambers (November 27th, 1919) delivered judgment.

This is an application on behalf of the United States Steel Products Company praying that it may be authorized, permitted and empowered to institute and carry on before the proper tribunal an action against the Grand Trunk Pacific Railway Company and the Honourable John Dowsley Reid in his quality of Receiver thereto, or either or both of them, as may be necessary, to recover the sum of $9,297.00 with interest and costs.

Notice of this petition or application was duly served upon the solicitor of the Grand Trunk Pacific Railway and the Receiver, but no one appeared on their behalf on the hearing of the same.

The appointment of the Receiver in this case was not one made by the Court under the provisions of sections 26 and following of the *Exchequer Court Act* whereby the Receiver becomes an officer of the Court.

The Receiver was appointed by an Order-in-Council under the authority of the *War Measures Act*, 1914, confirmed by 9 & 10 Geo. V., ch. 22.

I fail to see that, under the circumstances, I have any jurisdiction to entertain the application and my order will be: That the Petitioner take nothing by his application.

Judgment accordingly.

Solicitors for petitioner: *Davidson, Wainwright Alexander & Elder.*

1919
November 29.

IN THE EXCHEQUER COURT OF CANADA.

IN THE MATTER OF THE PETITION OF RIGHT OF

ALEXANDER MAVOR,

SUPPLIANT,

AND

HIS MAJESTY THE KING,

RESPONDENT.

Exchequer Court Act, section 20—Damages—Officer or Servant of the Crown, meaning of—Discretion of Minister—Prescription—Interruption.

Held,—An action will not lie against the Crown represented by the Dominion Government for damages alleged to be due to improper condition of a portion of a highway which the Dominion Government had no statutory obligation to maintain.

2. That a Minister of the Crown is not an officer or servant of the Crown within the meaning of section 20 of the *Exchequer Court Act.*

3. That the Court will not review the decision of a Minister of the Crown in the exercise of his statutory discretion.

4. Where on its face a petition of right is prescribed the suppliant will be permitted to make proof of the date on which it was filed with the Secretary of State to establish that prescription was thereby interrupted.

Quære—Will the fact of the Crown represented by the Dominion Government having contracted and partly paid for the building of part of a highway and that such work was done under the supervision of one of its engineers make the highway, *quo-ad hoc,* a public work within the provision of section 20 of the *Exchequer Court Act?*

PETITION of Right to recover from the Crown damages alleged to be due to improper maintenance of the King Edward Highway, near the City of Montreal.

Tried before the Honourable Mr. Justice Audette at the City of Montreal, on the 20th day of November, 1919.

1919

MAYOR
v.
THE KING

Reasons for Judgment.

Mr. Surveyer and *Mr. Bond* for suppliant.
Mr. Sullivan for respondent.

The facts of the case are fully set forth in the reasons for judgment of the honourable Judge which follow:

AUDETTE, J., now (29th November, 1919) delivered judgment.

The suppliant, by his Petition of Right, seeks to recover the sum of $330.00 for alleged damages resulting from an accident he met with on the King Edward Highway, on his return trip in his automobile, a large special Maxwell, an old car, from La Prairie to the City of Montreal, on the 1st day of July, 1916.

To properly understand the facts of the case, it is important to refer to the plan filed herein as Exhibit "A" wherefrom it would appear, that at the time in question, the suppliant was travelling from south to north, from what is marked on the plan "plank road" which runs practically due south and north. Arrived at the point "A", the suppliant turned to the left, climbed the small hill, 1 in 5, that lies between A and D, when he contends that, at the point marked with a (X) cross, he encountered with the front right wheel, a boulder the size of his head. At the foot of this hill (or slope) he put on more gas, climbed to the top, but when he came to turn to the right at the point marked D, he contends he was unable to do so, his machine refusing to answer—she would not turn. He however succeeded in turning her and brought her at stand still at the point marked G, about a foot or a foot and a half from the edge of the embankment to the left. At that point, having stopped his machine, his steering gear being on the

1919

MAYOR
v.
THE KING.

Reasons for Judgment.

right, he leaned over to the left over two young girls of 12 and 18 years respectively who were to his left on the front seat and realized that there was between 18 and 12 inches to the edge of the embankment, where he contends the soil suddenly gave way under his left wheels and the machine toppled over down the small embankment.

It must be noted that in the course of his travel from the plank road to the place where the accident happened, from point A to G, that he was not travelling on his side of the road. He was indeed travelling on the left or the wrong side of the highway and very much so, if it is considered that his right wheel struck the alleged boulder at the point marked with a cross on the plan. However, in the view I take of the case it becomes unnecessary to comment upon this point.

It is well to note we have no direct evidence that the machine went wrong as a result of striking the boulder in question. Being asked if he could swear the boulder did damage her, he answers: "No more than the car would not turn after she struck it". It is all surmise and conjecture as to whether or not the machine went wrong from striking the boulder, or whether it went wrong from any other reasons. The boulder was not noticed by anybody else,—although some witnesses were questioned on that point. The piece of road from A to D is stoned or macadamized, stated as not too good but not too bad.

As a result of the accident a claim is made for the sum of $200 for damage to his car. The suppliant, being a mechanic, attended to these repairs himself personally, and the amount claimed is more in the nature of a guess than an actual expenditure for labour and material.

With respect to the doctor's bill, the evidence is very unsatisfactory. He says he generally pays about $20 to $30 a year for his doctor's bill and that came in as part of the usual doctor's bill and he charges $100. The cost of removal of the motor has been satisfactorily established at $30.

At the opening of the trial, I drew the attention of the parties that the case was on its face prescribed, the accident having occurred on the 1st July, 1916, and the Petition of Right being filed on the 16th July, 1917, one year and fifteen days after the accident. Having allowed the suppliant to establish by some evidence when the case was filed with the Secretary of State, under the Provisions of section 4 of the *Petition of Right Act,* R.S.C. 1906, ch. 142, evidence was supplied whereby it appears that the petition was left with the Secretary of State on the 6th June, 1916. Following the numerous decisions in this Court on that point, it is found that such lodging of the Petition of Right, with the Secretary of State, under the section above mentioned, interrupted the prescription from that date.

Approaching the question on its legal aspect, it is quite apparent that it is an action against the Crown sounding essentially in tort or damages, and that, apart from breach of contract and under statutory authority, such an action would not lie against the Crown.

The suppliant, to succeed, must bring his case within the ambit of section 20 of the *Exchequer Court Act* as I have already said in the case of *Hopwood v. The King*[1]. If he seeks to rest his case under sub-section "B" of section 20. . . . . I must

[1] (1917), 16 Can. Ex. C. R. 419, at 421. 39 D. L. R. 95 at 97.

1919

MAYOR v. THE KING.

Reasons for Judgment.

answer that contention by the decision in the Supreme Court of Canada in *Piggot v. The King*,[1] where His Lordship, the Chief Justice of Canada, says: "Paragraphs (a) and (b) of section 20 are dealing with questions of compensation not of damages.

"Compensation is the indemnity which the statute "provides to the owner of lands which are com- "pulsorily taken under, or injuriously affected by "the exercise of statutory powers."

Therefore it obviously follows that the present case does not come under sub-sections (a) and (b) of section 20.

Does the case come under sub-section (c) of section 20 repeatedly passed upon by this Court and the Supreme Court of Canada?

To bring the case within the provisions of subsection (c) of section 20, the injury to property must be: 1st. On a public work; 2nd. There must be some negligence of an officer or servant of the Crown acting within the scope of his duties or employment; 3rd. The injury must be the result of such negligence.

It is contended that because the Crown did expend some money for the building, under contract, of the King Edward Highway at the place in question and under the supervision of a Government engineer, that it has become a public work of Canada, relying upon the decision in the case of *Coleman v. The King*.[2] Without passing upon this point let us consider whether the second requirement has been complied with. I may say that there is not a tittle of

[1] (1916), 53 Can. S. C. R. 626; 32 D. L. R. 461.
[2] (1918), 18 Can. Ex. C. R. 263; 44 D. L. R. 675.

evidence upon the record establishing that there was any officer or servant of the Crown whose duties or employment involved the care or maintenance of the road in question. From this fact, it will necessarily follow that there was not any negligence of any officer or servant of the Crown acting within the scope of his duties whose negligence could have caused the accident.

There is no evidence on the record to show that the Crown was in any manner, under any obligation to maintain the road in question in good repairs and as was decided in the case of *McHugh v. The Queen* [1], in respect of a bridge built by and at the expense of the Dominion Government where there was no officer or servant of the Crown in charge of the same, that such duty could not be ascribed to the minister himself who is not an officer or servant of the Crown within the meaning of section 20 of the *Exchequer Court Act*. Moreover the Court has no jurisdiction to sit on appeal from exercise of any statutory discretion given to the minister. *Harris v. The King*[2]; *Municipality of Pictou v. Geldert* [3]; *Sanitary Commissioners of Gibraltar v. Orfila* [4].

In the result it is quite clear, that this action which is essentially one in tort or for damages, in the nature of *quasi delicto*, will not lie against the Crown at common law, and in the absence of any statute making the Crown liable in such a case, the action will not be maintained.

The suppliant has failed to bring the facts of this action within the provisions of section 20 of the *Ex-*

[1] (1900), 6 Can. Ex. C. R. 374.
[2] (1904), 9 Can. Ex. C. R. 206.
[3] [1893] A. C. 524.
[4] (1890), 15 App. Cas., 400.

1919

MAYOR
v.
THE KING.

Reasons for Judgment.

chequer Court Act. There is no evidence that the injury complained of in this case resulted from the negligence of any officer or servant of the Crown while acting within the scope of his duties or employment. The *onus probandi* was upon the suppliant and he has failed to discharge such obligation. He has not proven his case.

Therefore the suppliant is not entitled to any portion of the relief sought by his Petition of Right herein.

Judgment accordingly.

Solicitors for suppliant: *Atwater, Surveyer & Bond.*

Solicitor for respondent: *John A. Sullivan.*

IN THE EXCHEQUER COURT OF CANADA.

1919

December 9.

BETWEEN:

THE MARCONI WIRELESS TELEGRAPH COMPANY OF CANADA, LIMITED,

PLAINTIFF;

AND

CANADIAN CAR & FOUNDRY COMPANY LIMITED,

AND

EMIL J. SIMON,

DEFENDANTS.

Patent Act, section 53—Foreign vessels—Infringement—Interpretation of contract—Lien—Security.

Held,—That assuming that the apparent title to the vessels was given to the builders by the contract, as a guarantee for builder's lien, the ownership of the vessels, on final payment, followed by delivery, reverted to the employer, the true owner, from the beginning of the contract; and these ships being built and paid for by the French Republic and enrolled as units of the French navy were foreign vessels, and should receive the protection given them under the provisions of section 53 of the *Patent Act,* R. S. C. 1906, ch. 69.

2. In construing a contract, the Court will consider the spirit and true meaning of the language used, and apply the law thereto with an equal measure of liberality. Technical narrowness will be avoided in order that justice be not defeated.

The French Republic employed the defendant Company to build for them 12 war vessels known as mine sweepers, and when the same were 95% completed, the employer requested the builder to install a wireless apparatus on each of the ships. This apparatus was alleged by plaintiff to be an infringement of its patent. The machines were purchased by the French Republic in New York, and shipped to itself at Fort William, and the installation was directed and supervised by the Republic's naval officers. The Company only furnished the labour and the material to install it,—practically the same as would be required under plaintiff's first expired patent—and were never the owners of the apparatus, which at all time remained the property of the Republic of France.

Semble,—That in such a case, the act of the builder in so installing the machine was not an infringement of the patent within the meaning of the *Patent Act.*

1919

THE MARCONI WIRELESS TELEGRAPH CO. v. CANADIAN CAR AND FOUNDRY CO.

Reasons for Judgment.

THE action herein for alleged infringement was heard before the Honourable Mr. Justice Audette at the City of Montreal on the 14th day of October, 1919.

Mr. Eugene Lafleur, K.C., *and Mr. Sinclair* for plaintiff.

Mr. Wainwright for defendant, the Canadian Car & Foundry Company.

The facts are stated in the reasons for judgment of the honourable Judge which follow:

AUDETTE, J., (December 9th, 1919) delivered judgment.

The plaintiff brings this action, against the defendants, for an alleged infringement of the Canadian Patent No. 62,963, bearing date the 17th April, 1899, for Improvements in "Transmitting electrical Impulses and Signals and all apparatus therefor", and further of the Canadian Patent No. 74,799, bearing date the 18th February, 1902, for "Improvements in Apparatus for Wireless Apparatus".

These two patents, as said by witness *Cann,* are similar in that "they both radiate electric magnetic "waves and the difference consists in the method of "tuning. Patent No. 62,963 has the direct method "of excitation and consists of one circuit only; and "patent No. 74,799 consists of two circuits which are "tunable one to the other." Upon this it would appear that the patent is a narrow one, and one requiring careful examination in respect of its subject matter.

Patent No. 62,963 had already expired by lapse of time before the institution of the present action. Counsel at bar for the plaintiff abandoned all claims thereunder. It therefore follows that every claim mentioned in that patent now belongs to the public.

Under a previous judgment rendered herein the issues as between the plaintiff and the defendant Simon have been disposed of. The issues in the present controversy are only between the plaintiff and the Canadian Car & Foundry Company, Limited.

Under a contract or agreement, dated the 1st February, 1918, between the Republic of France and the said Canadian Car & Foundry Company, Limited, which for the purposes of brevity will hereafter be called "the Company", the Company agreed to build for the Republic of France twelve steel mine sweepers, complete and ready for sea. The Company built these vessels, at Fort William, Ontario, and agreed, *inter alia,* to deliver them, at the place of construction or at salt water, at their option, at least six days prior to the closing of the locks by ice, &c., &c. These vessels which were all delivered at Fort William were required for war purposes and were as such enrolled as part of the French navy.

This contract, which may be called the original contract, did not call or provide for the installation of wireless telegraph apparatus on board these war vessels. Witness *Atwood* states he could not say when the arrangement was made with respect to this installation, but it was made verbally between Mr. Park, Captain Denier and himself some time after the original contract had been in existence, and finally covered by the letter of the 25th November, 1918, Exhibit No. 8,—but this second contract was drawn after the apparatus had been installed. It is not in evidence at which date these war vessels were delivered to the Republic of France. Some had been delivered at this date of 25th November, 1918, but we have no evidence of the delivery of each vessel. The

1919

THE MARCONI WIRELESS TELEGRAPH CO. v. CANADIAN CAR AND FOUNDRY CO.

Reasons for Judgment.

apparatus was installed when 95% of the works had been done in the building of these vessels.

By this second contract, the Company was to install this wireless apparatus and supply labour and material for such installation. This labour and material would have practically been the same to install what is covered by patent No. 62,963 already lapsed and which invention belonged to the public at the time of this installation, and all the required material was bought in open market. Therefore there could not in any manner be an infringement in so doing.

The apparatus itself, or the cabinet, was the property of the French Republic for having bought it in New York. When this apparatus was thus its property, the French Republic shipped it to itself—under its own address care of the Company,—at Fort William, Ontario, where it was placed in the Company's warehouse, which under arrangement with the Canadian Government, was virtually a bonded warehouse.

In this letter of the 25th November, 1918, Exhibit No. 8, we find the following paragraph:—"Except "as hereby specifically modified, all terms, condi- "tions and provisions of the said contract shall re- "main unchanged and in full force and effect",—from which the plaintiff seeks support for the contention that the property of the apparatus became the property of the Company. I cannot accede to this contention because it is not in harmony with the facts. The apparatus was installed on the vessels when this contract, with such a clause, was completed and when some, if not all, of the vessels had been delivered and paid for.

The ownership of the apparatus was at all times in the French Republic who bought it, shipped it to Fort William, and had it installed under the direction and superintendence of officers of its own navy. How could the defendant Company be said to infringe any patent involved in this apparatus? At no time did they have control or ownership of it and none of their acts could amount to a user of the patent.

In Re *Vavasseur v. Krupp*[1] we find a very interesting judgment with some analogy to the present case, and where the facts and language used by the judges is quite apposite. The plaintiff in that case had brought an action against Krupp, of Essen, Germany, and its agent in England, and also the agents for the Government of Japan, claiming an injunction and damages for the infringement of the plaintiff's patent for making shells and other projectiles. These shells had been made in Essen, Germany, had been there bought for the Government of Japan, had been brought and landed in England to be put on board three Japanese ships of war which were being built there for the Government of Japan and to be used as ammunition for the guns of those vessels.

A preliminary injunction, without prejudice to any question, had been granted restraining the defendants, etc., forbidding the parting with, selling, or disposing of the shells. The Mikado of Japan and his Envoy Extraordinary were made parties to the suit, and moved to dissolve the injunction and to remove the shells in question the property of His Imperial Majesty. The application was granted

[1] (1878), L. R. 9 Ch. D. 351.

1919

THE MARCONI WIRELESS TELEGRAPH CO. v. CANADIAN CAR AND FOUNDRY CO.

Reasons for Judgment.

and that judgment was immediately taken to appeal. James, L. J., prefaced his finding by saying, at page 354: "I am of opinion that this attempt on the "part of the plaintiff to interfere with the right of "a foreign sovereign to deal with his public property "is *one of the boldest* I have ever heard of as made "in any Court in this country." And his reasons for judgment all through show that such an abuse of the help of the Court should not be encouraged. The patented shells were ordered to be handed over to the Japanese Government and on the merits the action was discontinued.[1] Likewise is not the present case tainted with an undue desire to overstretch the monopoly and privilege given a patentee under the old Statute of James I, as modified by subsequent legislation?

On the question of infringement in the present case, Counsel at bar contends, not without some colourable reason, that he has made a *primâ facie* case; but the evidence in that respect is so weak and so meagre that my common sense rebels in making a finding in that sense. We are not dealing with a pioneer patent, and in determining the question of infringement all the circumstances of the case must be regarded. The first patent No. 62,963 has given the public so much to work upon, and the evidence upon the merits of the second patent, as compared with the first, is so little convincing, as well as that which tends to show that the apparatus on the "Navarrine" at Montreal is an infringement on patent No. 74,799, that feeling as I do in the view I take of the case, I find it unnecessary to adjudicate finally upon that question. I will refrain from so doing. It is indeed impossible under the

[1] *Vavasseur v. Krupp*, (1880), 28 W. R. 366; L. R. 15 Ch. D. 474.

circumstances of the case to find that the Company did, as required by sec. 30 of the *Patent Act,* make, construct or put in practice the apparatus installed upon these war vessels, beyond the testing of the same by the naval officers of the French navy. Then the apparatus in question was the property of the French Republic and has always been, ever since it was purchased in New York. The defendant Company never had any control of the wireless apparatus.

Having said so much that takes us to the consideration of section 53 of the *Patent Act,* which reads, as follows:

"No patent shall extend to prevent the use of any "invention in any foreign ship or vessel, if such "invention is not so used for the manufacture of any "goods to be vended within or exported from "Canada."

It is beyond reasonable controversy and doubt that the Republic of France did construct these twelve war vessels in Canada and paid for them in the manner provided by the contract. However, with the obvious view of guaranteeing the payment to the builder, the following clause was inserted in the contract between the Republic of France and the Company, viz., Art. II,—par. 8—"Both parties "agree that the title of each vessel herein contracted "for shall be and *remain* in the builder until the full "purchase price for each vessel is paid in cash by "the purchaser, less any deduction agreed upon."

Armed with this protecting clause giving the builder a lien for his work and material, an arrangement having privity between the contracting parties, the plaintiff contends the vessel became thereunder the property of the defendant Company

1919

THE MARCONI WIRELESS TELEGRAPH CO. v. CANADIAN CAR AND FOUNDRY CO.

Reasons for Judgment.

and not of the Republic of France, and is not therefore protected by sec. 53.

Before coming to any conclusion it is well to mention also that under article 9 of the contract the Company was obliged to insure the vessels and that provision pursues and says: "Loss if any, shall be "made payable to the purchasers and the builders, "as their respective interests may appear. . . and if "said vessel and material on hand are not kept "fully insured as above specified, the buyers may "take out such insurance and the premium paid "therefor shall be deducted from the next payment "or payments due the builder hereunder." This provision further establishes by the contract itself the interest the Republic of France had in these war vessels, and it was indeed the true owner subject to the lien for payment. The ownership is not in the Company, but held by it for its lien. If for the sake of argument one might concede the apparent title to the vessels was in the builder, the ownership of the vessel, on making final payment, followed by delivery, reverted to the French Republic from the beginning of the contract.

To come to a proper conclusion under the circumstances, I must consider both the spirit of the law together with the spirit and the true meaning of the contract. It is the intention of the parties that must guide. In seeking any conclusion in the present case one must guard against taking the shadow for the substance. Contracts must not be construed with technical narrowness. Right and justice must not be defeated by mere technicalities considered *strictissimi juris*. A Court is entitled to look at the substance of the transaction.

These war vessels to all intents and purposes were built, to the knowledge and acquaintance of all concerned, by the Republic of France, for its navy. They were enrolled as units of the same for the purposes of the Great War, no registration being required for war vessels, and it would be pedantic for me to both ignore these facts and find accordingly. Under the circumstances I am unable to find, as asked by the plaintiff, that these vessels which were built and paid for by the Republic of France were not its property—even after paying 60% of their costs as the building progressed, or may be the whole purchase as in the case of the "Navarrine". The dates of the delivery of the other vessels are not disclosed.

I therefore find that the war vessels in question were under the circumstances foreign vessels coming within the ambit of the protection given under the provisions of sec. 53 of our *Patent Act*.

This legislation giving a foreign vessel this immunity has comparatively a modern origin, and it will be interesting to know its *raison d'etre*. This legislation, in derogation of a monopoly, as enacted by sec. 53 of our Act, dates back to the *English Patent Act* as amended in 15 and 16 Vict. 1852, (Imp.) ch. 83, as a result of the decision given in 1851, in the case of *Caldwell v. Vanvlissengen* et al[1] wherein a Dutch vessel coming into an English port, an injunction was granted against her for using on board an invention protected by an English patent.

From a perusal of the Hansard's Parliamentary Debates in the House of Lords and House of Com-

[1] (1851), 9 Hare, 415.

1919

THE MARCONI WIRELESS TELEGRAPH CO. v. CANADIAN CAR AND FOUNDRY CO.

Reasons for Judgment.

mons in England[1] it appears, in the discussion which then took place in the Imperial House of Commons, that if the law were to remain as it was it would greatly interfere with and hurt trade and commerce as between England and the other countries and with a view to abate such danger, the monopoly of the *Patent Law* was curtailed in a manner to protect foreign vessels. The legislation was promoted to foster trade and commerce and the present instance comes within that class since it will encourage foreign countries to take advantage of our natural resources and build some of their vessels in our country, protected as they will be by our sec. 53—with the Courts of the land seeing that it is duly enforced in its spirit as well as in its substance.

The action is dismissed with costs.

Solicitors for plaintiffs: *Greenshields, Greenshields, Languedoc & Parkins.*

Solicitors for defendant and The Canadian Car & Foundry Company: *Davidson, Wainwright. Alexander & Elder.*

[1] Pp. 1116, 1224, 1289, 1229.

IN THE EXCHEQUER COURT OF CANADA.

1919
December 13.

IN THE MATTER OF THE PETITION OF RIGHT OF

CHARLES LIVINGSTON,

SUPPLIANT;

AND

HIS MAJESTY THE KING,

RESPONDENT.

Petition of Right—Constitutional Law—Powers of Minister—Contract, ratification by Order-in-Council—R. S. C. 1906, *ch.* 24, *sections* 2*a*, 35, 41, 42.

The Minister of Militia entered into a contract with suppliant whereby he agreed that articles of military clothing required by cadets of Royal Military College including repairs should be exclusively obtained from suppliant, the prices therefor to be paid out of the public funds of Canada. The contract which was for a term of over four years, was never authorized or ratified by an Order-in-Council.

Held, that where a contract involving payments out of the public funds is made by a Minister of the Crown for a term of years without the authority of the Governor General in Council, and has never been approved by them, the Crown cannot be made responsible therefor on a petition of right.

2. The fact that the Regulations of the Royal Military College provided for a deposit, in moneys by Cadets, to pay for articles covered by this contract, which money was payable to the Receiver General of Canada did not have the effect of validating the contract so as to make it binding upon the Crown.

PETITION OF RIGHT to recover from the Crown damages for breach of contract made by a Minister of the Crown but without authorization or ratification by Order-in-Council.

The case was set down for hearing upon questions of law, but at the argument it was decided that the

1919

LIVINGSTON v. THE KING.

hearing should be treated as if it were trial of the action.

The case was tried at the City of Ottawa, before the Honourable Mr. Justice Sir Walter Cassels, on the 28th day of November, 1919.

Mr. Whiting, K.C. and *C. W. Livingston* for suppliant.

Mr. Plaxton for respondent.

The suppliant, in his Petition of Right in substance alleges that from 1898 to the date of the contract sued on he had always supplied the Royal Military College at Kingston from year to year with various articles of clothing and similar articles, without written contract. In 1911, after negotiations with the Department of Militia, a contract was signed. The contract is given at length in the Petition of Right and the principal sections thereof are reprinted here as follows:

"MEMORANDUM OF AGREEMENT made this 9th day of August, A.D., 1911,

BETWEEN

HIS MAJESTY THE KING, REPRESENTED BY THE HONOURABLE MINISTER OF MILITIA OF THE DOMINION OF CANADA,

OF THE FIRST PART,

AND

CHARLES LIVINGSTON, doing business in the City of Kingston, under the style of C. LIVINGSTON & BRO., MERCHANT TAILORS.

OF THE SECOND PART.

WITNESSETH, (1) The Party of the Second Part contracts and agrees with the Party of the

First Part to furnish the articles of clothing, and repair the clothing of the Cadets of The Royal Military College, as set out in the price list hereto annexed, dated February the first, 1911, at the several prices shown and contained in the said price list.

(2) The Party of the First Part agrees with the Party of the Second Part that the articles of military clothing required by the Cadets of the Royal Military College, including repairs as shown in the price list before mentioned, *the cost of same being payable from Public Funds,* shall be obtained from the Party of the Second Part exclusively.

*****

(5) It is agreed that the Commandant may annul this contract at any time, subject to the approval of the Honourable Minister of the Department of Militia and Defence, if the conditions of same are not complied with.

(6) This contract to be in force from the date of its approval until the 30th of June, 1915, and hereafter from year to year. It shall terminate at any 30th June after 1914, provided 6 months notice to that effect is given by either of the Parties hereto.

*****

(8) It is agreed that the prices in the price list, hereto annexed, shall be subject to yearly revision by the Honourable the Minister of Militia and Defence, the year in such cases to run from the 1st of July to the 30th of the following June; provided that such revision shall only be made upon the recommendation of the Commandant, and that the

1919

LIVINGSTON v. THE KING.

Party of the Second Part, shall have at least three months' notice in advance of the change of prices.

SIGNED, SEALED AND DELIVERED the day and year above mentioned.

(Sgd.) C. Livingston,
F. W. Borden."

They further allege that the contract was acted on in good faith by both parties until the 1st of April, 1912, when the Department of Militia purported to cancel the said contract by letter and without notice or just cause; and that the work was given to other contractors. All past work was paid for and that the said contract was binding upon the crown; and he sues for damages for breach of contract.

The Crown in its defence in substance, alleges that the agreement and contract in question, if made between suppliant and Minister of Militia and Defence as alleged, was not binding in law upon the Crown and that it should have been specifically authorized by an Order-in-Council, which was not done; that there was no appropriation of public moneys voted by Parliament and payable from public funds to meet the payments provided for in the contract and that any payments made to the contractor were paid and expended under the direction of the Commandant of the Royal Military College and out of moneys received from Cadets of said college under regulations covering the same and were not paid or payable out of public funds. They further state that the contract in question was not of a routine or departmental nature as would enable the Minister to fix liability upon the Crown.

1919

LIVINGSTON v. THE KING.

By their reply, the suppliant states that public moneys were annually voted for said contract by Parliament and refer to the Auditor General's reports and the public estimates; and that, even if the Minister of Militia had not inherent power to bind the Crown with respect to the contract in question, which is not admitted, the contract was ratified and approved of by Parliament by granting the moneys as aforesaid and by the fact that the suppliant was paid out of such grants and that the contract, to be binding, did not require the Order-in-Council.

The facts are stated in the reasons for judgment of the Honourable Mr. Justice Cassels which follows:

Reasons for Judgment.

Cassels, J., now this (13th December, 1919) delivered judgment.

A Petition of Right filed by one Charles Livingston in the City of Kingston, Merchant, claiming that on the 9th August, 1911, an agreement was entered into between His Majesty the King, represented by the Honourable, the Minister of Militia, of the first part, and the petitioner of the second part, whereby the party of the first part agreed with the party of the second part, that the articles of military clothing required by the cadets of the Royal Military College, including repairs, as shown in the price list before mentioned, the costs of the same being payable from public funds, shall be obtained from the party of the second part exclusively. The agreement is set out *in extenso* in the petition of right.

1919

LIVINGSTON v. THE KING.

Reasons for Judgment.

The agreement provided by section 6, is as follows:

"6. This contract to be in force from the date "of its approval until the 30th June, 1915, and "hereafter from year to year. It shall termin- "ate at any 30th June after 1914, provided six "months' notice to that effect is given by either "of the parties hereto."

The allegations in the petition are, that on the 1st April, 1912, the Department of Militia and Defence purported by a letter dated April 1st, 1912, to cancel the said contract without notice and without just cause.

The petitioner admits that all sums due him for work performed up to the cancellation of the contract have been paid, but he claims by his petition damages for breach of the contract.

By the 10th paragraph of his petition of right he alleges, as follows:

"10. That in addition to the damages claimed "in paragraph 9 hereof, the suppliant claims to "be entitled to damages which arise in the fol- "lowing manner: The suppliant had been ac- "customed to sell to the Cadets of the Royal "Military College many articles of clothing and "merchandise other than military supplies em- "braced in the contract in question, particular- "ly civilian clothes and furnishings at the end "of the college terms, as since April 1st, 1912, "the Cadets were not required to come into the "suppliant's store in connection with the pur- "chase of military supplies, a large part of this "trade has been lost as a direct result of

"the cancellation of the said contract. The "suppliant claims damages for such loss."

This claim on the hearing was abandoned.

The Crown filed a defence in which they claimed the contract was not binding, the contention being that it had not the approval of the Governor-in-Council, as required by law.

It was agreed between the parties that the questions of law involved should be argued, and the case was set down to be heard on the legal questions, and came on for argument on the 28th November, 1919.

On the opening of the case it was suggested by Counsel for both sides that in lieu of the points of law being argued, the hearing should be treated as if it were a trial of the action, it being agreed that no further evidence other than what appeared of record could be adduced; and it was also agreed that in the event of the Court being of opinion that the plaintiff was entitled to damages, the question of *quantum* of damages should be referred.

For the purpose of the trial it was also admitted that the agreement in question never received the approval of the Governor-in-Council.

After the best consideration that I have been able to give to the case, I am of opinion that the contention of the Crown is well founded. I do not think it was within the powers of the Minister to enter into a contract binding the Crown for a term of years without the approval of the Governor in Council.

I do not think the Regulations of the Royal Military College, Rules 14 to 22, affect the case. The funds referred to are payable to the Receiver Gen-

1919

LIVINGSTON v. THE KING.

Reasons for Judgment.

eral. The contract in question provides for the payment out of the public funds.

Reference may be had to the *Consolidated Revenue and Audit Act*[1], the *Act relating to the Royal Military College*[2], the *Militia Act*[3], and also *Jacques Cartier Bank v. The Queen*[4].

The petition is dismissed with costs.

Solicitor for suppliant: *C. W. Livingston.*

Solicitor for respondent: *T. J. Rigney.*

1 R. S. C., 1906, ch. 24, sections 2 (a), 35, 41 and 42.
2 R. S. C., 1906, ch. 43.
3 R. S. C., 1906, ch. 41.
4 (1895), 25 Can. S. C. R. 84, especially at page 88.

IN THE EXCHEQUER COURT OF CANADA.

1919
December 29.

BETWEEN

HIS MAJESTY THE KING,

PLAINTIFF;

AND

THE ONTARIO POWER COMPANY AND THE TORONTO POWER COMPANY,

DEFENDANTS.

Discovery, right to and scope of—Co-defendants—Adverse party—No waiver of right to refuse to answer by appearing—Exchequer Court Rule No. 154.

Under order from the Power Controller, the Toronto Power Company delivered a certain amount of electric power to the Ontario Power Company. The Toronto Power Co. subsequently assigned all its rights against the Ontario Power Company to plaintiff, who now, by its Information, as assignee of the Toronto Power Co., asks the Court to fix the amount due to the Toronto Power Co. and that the Ontario Power Co. be ordered to pay this amount.

The Toronto Power Co. filed defence but made no claim against the Ontario Power Co., its co-defendant. An appointment was taken out by the Ontario Power Co. to examine an officer of its co-defendant on discovery, the plaintiff not being notified.

The examination was begun without objection from either party and was continued until on a certain question being put, witness refused to answer.

Held, that, though any adverse party in a suit can be examined on discovery, yet such examination must be limited to the issues to be tried in the action as between the parties.[1]

2. That on the above stated facts, the Ontario Power Company had no right to examine its co-defendant herein on discovery, not being an adverse party, the right thereto being against the Crown only as the adverse party.

3. That a witness submitting himself to examination for discovery does not waive his right to object to answer questions on

[1] See Hamilton vs. Quaker Oats Co. 46 O. L. R. 309.—(Nov. 26th, 1919).

1919

THE KING
v.
THE ONTARIO POWER CO.
AND
THE TORONTO POWER CO.

Reasons for Judgment.

matter not open to the examining party, and he is not bound to answer all questions whether properly put or not.

Semble. That where a co-defendant is an adverse party, the right to discover would exist.

THIS case came on before the Honourable Mr. Justice Cassels, in Chambers, at Ottawa, on the 20th December, 1919, on application by the Ontario Power Co. to compel an officer of the Toronto Power Co. to answer certain questions put to him when on examination for discovery. The Crown was not notified that this examination was to take place.

Mr. C. S. MacInnes, K.C., and *Mr. Robinson,* for The Ontario Power Company.

Mr. McKay, K.C., for the Toronto Power Company.

The questions involved and those parts of the pleadings necessary to be referred to herein are stated in the reasons for judgment.

Cassels, J. (29th December, 1919) delivered judgment.

This is an application to compel the witness, Farley G. Clark, the Chief Engineer for the Toronto Power Company, to attend for examination at his own expense. The examination is intended as an examination for discovery.

The Information in this case is filed by His Majesty on the Information of the Attorney-General of Canada. The defendants are the Ontario Power Company, and the Toronto Power Company.

The Crown alleges certain claims made by the Toronto Power Company against the Ontario Power Company in respect of power furnished under the directions of the power controller. The seventh clause of the Information reads, as follows:

"7. By indenture made the 28th day of "March, 1919, the defendant, the Toronto "Power Company, Limited, assigned, trans- "ferred and set over unto His Majesty The "King and his successors in right of the Do- "minion of Canada any right or interest the "Toronto Power Company, Limited, may have "in or to any claim or claims, demand or de- "mands, against any and all person or persons, "firm or firms, corporation or corporations, in- "cluding the defendant, the Ontario Power "Company of Niagara Falls, in respect of the "matters in said Orders in Council referred to, "and the Attorney-General, in addition to any "other right of action which His Majesty may "have against the said defendant, the Ontario "Power Company of Niagara Falls, claims "against said Company as assignee as afore- "said."

I confess, as I have stated on two or three occasions, that with this allegation on the pleadings, it is difficult to see why the Toronto Power Company should be a party to the action. All their rights have passed to the Crown. However, it was arranged that the questions should all stand over to the trial of the action when the evidence would be forthcoming and the rights of all parties determined.

The Toronto Power Company filed a defence to the action. They make no claim whatever as against the Ontario Power Company. The sole action so far as the pleadings are concerned is an action between the Crown as assignees of the claim of the Power Company against the Ontario Power Company.

1919

THE KING v. THE ONTARIO POWER CO. AND THE TORONTO POWER CO.

Reasons for Judgment.

The Ontario Power Company issued a subpoena and notice calling upon the officer of the Toronto Power Company to submit to examination for discovery. Mr. Clark attended and was examined at considerable length, but when the questions which he refused to answer were put to him, on the advice of his Counsel he declined to answer as not being relevant to the issues raised between the defendants.

There is no question but that an adverse party can be examined under the rules of the court, but an examination for discovery must be limited to the issues to be tried in the action as between the parties.

The rule of the Exchequer Court, No. 154, reads as follows:

> "Any party may, at the trial of an action or "issue, use in evidence any part of the ex- "amination for the purposes of discovery of "the opposite party; but the Judge may look at "the whole of the examination, and if he is of "opinion that any other part is so connected "with the part to be used that the last mention- "ed part ought not to be used without such "other part, he may direct such other part to be "put in evidence.
>
> "Where any departmental or other officer of "the Crown, or an officer of the corporation has "been examined for the purposes of discovery, "the whole or any part of the examination may "be used as evidence by any party adverse in "interest to the Crown or corporation; and if "a part only be used, the Crown or corporation

"may put in and use the remainder of the ex-
"amination of the officer, or any part thereof,
"as evidence on the part of the Crown or of
"the corporation."

I may mention the Crown, the informant, in the action were not notified of the examination. How can this evidence be utilized at the trial as against the Crown who are the parties suing as assignees of the Power Company. Of what relevancy can it be as between the Ontario Power Company and the Toronto Power Co. at the trial? The Toronto Power Co. making no claim whatever as against the Ontario Power Company.

It is said that because the Toronto Power Company submitted their officer to examination they are estopped from raising this question. The argument is that where a defendant appears in an action, he is estopped from disputing the jurisdiction of the Court. In that case he attorns to the jurisdiction of the Court. It is an entirely different question to say that because he submits for examination for discovery that therefore when a question is asked not open to the examining party that because he has submitted to examination he is bound to answer all questions whether they are questions properly put or not.

I would refer to the late case of *Aktiengesellschaft Für Autogene Aluminium Schweissung v. London Aluminium Company Ltd.*[1] See the language of Swinfen Eady, M. R., at page 76. There, of

[1] [1919] 2 Ch. D. 67.

1919

THE KING
v.
THE ONTARIO POWER CO. AND THE TORONTO POWER CO.

Reasons for Judgment.

course, the examination was by interrogatory, but this can in no way affect the principle.

Solicitor for plaintiff: *Hugh Guthrie,* K.C.

Solicitors for Ontario Power Co.: *Kilmer, Irving & Davis.*

Solicitors for Toronto Power Co.: *McCarthy & McCarthy.*

IN THE MATTER OF THE PETITION OF RIGHT OF

1920

January 10.

WALTER GAUTHIER,

SUPPLIANT;

AND

HIS MAJESTY THE KING,

RESPONDENT.

Government Railway — Collision — Negligence — Passenger — Trespasser — The Exchequer Court Act, Sec. 20.

A heavy snow storm having occurred at B., a Government railway station, a work-train, consisting of an engine, snow-plow and flat car, was engaged for some three or four days in cleaning up the right of way in and about B. The plow was equipped with automatic brakes as well as hand brakes, all of which were in good order. During the time that the work-train was so engaged, it was duly inspected, and no defects found in the equipment. On the day of the accident in question while this train was on the siding to allow an accommodation train to pass, it was specially examined as to its condition, and found satisfactory. Some fifteen minutes after the accommodation train had departed from B., the work-train pulled out and followed the accommodation train. For some unexplained reason, while on a portion of the track it had passed over several times before that day without accident, the plow and flat-car became uncoupled on a steep grade, and ran away, crashing into the rear car of a passenger train at B. The suppliant, who had boarded the train at this station with a view to seeing a passenger, was injured by the collision. It appeared by inspection after the accident that the equipment on the plow as detached was in perfect order, that the brakes had operated and that the coupling was not broken or damaged; the coupling was open and the pin out, but the lever was in place.

Held, that as the cause of the accident was not shown, the parting of the train and consequent collision must be regarded as purely accidental and fortuitous, and not as attributable to the negligence of any employee of the railway; and, therefore, no action would lie against the Crown, under sec. 20 of the Exchequer Court Act for damages resulting from such collision.

Quaere: 1. If G. had received permission from the conductor to board the train for an assumed purpose which was not his real inducement to obtain such permission, could he, in the circumstances,

1920

GAUTHIER v. THE KING.

be regarded as a trespasser; and 2. Could the permission given him to board the train for a specific purpose, be construed as a tacit or implied permission to do so for any other purpose?

Reasons for Judgment.

PETITION OF RIGHT to recover from the Crown damages alleged to have been suffered by the suppliant in a collision on the Intercolonial Railway, a railway of the Government of Canada. The accident happened at Bic Station below Levis, by reason of a run-away plough colliding with the rear of the accommodation passenger train which suppliant had boarded to see his brother-in-law.

The case was tried before the Honourable Mr. Justice Audette at Rimouski on the 2nd and 3rd days of December, 1919.

P. E. Gagnon & Sasseville, for suppliant;

H. P. Garon, K.C., for respondent.

The facts are stated in the reasons for judgment filed by the Honourable Judge and printed below.

AUDETTE, J., now (this 10th January, 1920), delivered judgment.

Le Pétitionnaire, qui est boucher et commerçant d' animaux au Bic, se rendit le 23 février, 1917, à la gare pour y rencontrer son beau-frère qu'il attendait, avec des animaux, sur le train Accommodation. A l'arrivée du train, ne se contentant pas de demeurer sur le quai de la gare, il monta à bord du char a passagers, et pendant qu'il se trouvait ainsi à bord, une charrue à neige, détachée de son train, descendant sur la pente de la voie qui est de 2 à 2½% entre St. Fabien et le Bic, s'en vint frapper le char à passagers dans lequel il se trouvait. Gauthier fut alors projeté avec violence en dehors

du char, sur la neige, à côté de la voie, subissant plusieurs blessures et comme résultat de cet accident il réclame aujourd'hui par sa Pétition de Droit, tel qu'amendée au procès, des dommages au montant de $14,480.

A l'ouverture de la cause, m' état aperçu que l' accident était en date due 23 février, 1917, et que la pétition de droit était produite en cour le 16 mai, 1918, j'appelai l'attention des parties sur le fait que la cause à sa face paraissait prescrite. Sur représentation que la pétition avait été logée au Département du Sécrêtaire d'Etat, tel que pourvu par la section 4 de l'Acte de la Pétition de Droit, avant l'expiration de l'année, je permis d'en faire preuve subséquente et l'on procéda derechef avec le mérite de la cause. Cette preuve a maintenant été fournie et en conformité aux nombreuses décisions de cette cour à ce sujet, il est adjugé que le dépôt de la Pétition de Droit avec le Sécrétaire d'Etat, tel que pourvu par le Statut, a eu pour effet d'interrompre la prescription à partir de cette date.

Voici maintenant sous quelles circonstances spéciales l'accident est arrivé. Gauthier, recevant de son beau-frère la lettre exhibit No. 1, nous dit qu-il se rendit au préalable à la gare pour s'informer du chef de gare où les animaux qu'il attendait seraient déchargés; car le clos aux animaux était alors rempli de neige. Cependant sur ce point le chef de gare nous dit qu'il ne se rapelle pas avoir vu Gauthier à la gare à la date en question et qu'en hiver c'est l'habitude de décharger les animaux aux hangars à bagage, qu'on en avait déjà déchargés à cet endroit à cette saison. En outre si Gauthier était commerçant d'animaux, il est à présumer qu'il

1920

GAUTHIER v. THE KING.

Reasons for Judgment.

connaissait cette coutume et qu'il était superflu pour lui d'aller prendre cette information à ce sujet.

Gauthier nous dit que lorsque l'Accommodation est arrivé en gare, le conducteur est descendu du train. Ensuite un anglais est aussi descendu (à un autre endroit de son témoignage il nous dit que l'anglais n'est pas descendu, mais est demeuré sur une des marches de l'escalier du char) et il aurait demandé, en langue anglaise, s'il y avait des gens qui avaient des patates à vendre, qu'il en paierait $2. le minot. Puis il ajoute que le conducteur du train aurait répété la chose en largue française. Gauthier aurait alors demandé au conducteur si c'etait la personne qui entrait dans le train qui achetait ces patates et le conducteur lui aurait répondu; "Oui, s'il y en a qui aiment à le voir, allez le voir," et plus loin il ajoute que le conducteur aurait aussi dit: "Oui, s'il y en a qui veulent le voir, qu'ils entrent dans le train." Gauthier est alors monté à bord du train comme, dit-il, il attendait son beau-frère qui devait être là, pour lui dire ou descendre les animaux. Constatant que son beau-frère n'était pas dans le train, Gauthier lia conversation avec le commerçant de patates pour vendre des patates "et au bout de quelques minutes, dit-il, "cette charrue en question "est arrivée et je ne sais comment je suis parti de "là. Aprés, quand j'ai repris connaissance, j'étais sur un banc de neige, à côté de la voie du chemin de fer."

Sur cet autre point, relativement à l'annonce de la vente des patates, Gauthier est encore contredit par Achille Rioux, le conducteur, qui dit qu'il ne connaissait pas Gauthier à cette date, qu'il n'a jamais à sa connaissance rancontré Gauthier ce jour

là. Qu'il ne se rapelle pas que Gauthier lui ait alors parlé et il nie avoir dit en français que cet anglais voulait acheter des patates. Et il ajoute que lorsqu'il a laissé le train, que McKinnan, l'anglais, était dans le char et qu'aussitot descendu il (le conducteur) a crià "All on board". Et en réponse à d'autres questions il nie encore que Gauthier lui ait demandé si l'homme qui montait dans le char êtait l'acheteur de patates et il ajoute qu'il est capable de jurer qu'il n'a pas vu Gauthier ce jour là et que Gauthier ne lui a pas parlé. Henri Turcotte, le préposé aux bagages au Bic, entendu par le Petitionnaire, jure qu'il a vu Gauthier à la gare le jour de l'accident, mais qu'il n'a pas vu un homme qui offrait des patates à vendre. Le chef de gare, aussi entendu par le Petitionnaire, déclare ne pas avoir entendu le conducteur faire l'annonce pour la vente des patates.

Dans l'espèce comme l'action en dommages contre la Couronne n'existe que pour violation de contrat ou en vertu de statut, la présente action, pour réussir, doit nécessairement s'encadrer dans la section 20 de l'Acte de la Cour de l'Echiquier du Canada tel qu'amendée par 9-10 Ed. VII ch. 19, qui veut:

1. Un Travail Public;

2. Qu'il y ait eu négligence d'un employé ou serviteur de la Couronne, pendant qu'il agissait dans l'exercice de ses fonctions ou de son emploi, sur, dans ou près le terrain de construction, d'entretien ou de mise en service du chemin de fer Intercolonial;

3. Que l'accident soit le résultat de cette négligence.

1920

GAUTHIER v. THE KING.

Reasons for Judgment.

Or comme quelques jours avant l'accident il était tombée une grosse bordée de neige, une équipe d'employés de l' I. C. R. travaillait depuis 3 or 4 jours dans la Montagne du Bic pour y enlever la neige avec la même charrue. Ce travail se faisait, au moyen d'un engin et d'une charrue rotative, appelée au cours du procès Rotary Plough et comme le dit le temoin Fortier tout *avait bien été jusqu' alors et il n'y avait rien de défectueux.* A l'avant de cette charrue était un char plate-forme, appelé Butterfly, sur lequel il y avait des ailes pour enlever la neige. Or le jour de l'accident ce train de travail à l'heure du passage de l'Accommodation est revenu de l'endroit où il travaillait à la gare de St. Fabien, manoeuvre qu'il avait déjà faite deux ou trois fois dans la meme journée, s'est place sur la voie d'évitement des fermiers et 15 à 20 minutes après le passage de l'Accommodation à St. Fabien, s'est de nouveau mis en route pour retourner à l'endroit de son travail ainsi interrompu entre St. Fabien et le Bic. Il y a entre ces deux gares une distance de six milles et une pente très prononcée de 2. à 2½%. A environ 4 milles de St. Fabien, la charrue, ainsi que le char plate-forme Butterfly qui se trouvait à l'avant, se sont détachés de la locomotive, De part et d'autre on s'est de suite aperçu de la chose.

A bord de la charrue, outre les freins automatiques, qui se trouvaient appliqués du moment qui toute communication ou ralliement était interrompu et qui devenaient normalement effectifs, il y avait aussi les freins à main qui furent appliqués; mais sans succès, la charrue ayant déjà acquis son momentum, il fut impossible de la faire répondre

aux freins et elle continua à descendre vers la gare du Bic. A bord de la locomotive, de service avec la charrue, on s'aperçut aussi du départ de la charrue. Des signaux furent échangés et la locomotive partit après la charrue dans le but de la rejoindre et de la relier; mais le grand nombre de courbes l'empêcha de pouvoir effectuer le raccordement et la charrue continua jusqu'à la station du Bic où elle vint en collision avec l'arrière du train Accommodation stationné à la gare et détruisit le char à passagers, placé à l'arrière, et blessa les quelques passagers qui se trouvaient à bord, y compris le pétitionnaire.

A bord de la locomotive, aussitôt après s'être aperçu que la charrue était détachée, on arrêta le train pour fermer de suite l'air qui s'échappait comme résultat du défaut de raccordement entre les caoutchoucs des freins automatiques et c'est après cela que l'on partit en chasse après la charrue.

Cette charrue et ce train avaient donné bon service tous les jours auparavant et partie de la journeé de l' accident, ayant faif le même trajet, le jour même deux ou trois fois. Tous les témoins entendus relativement à l'état de la charrue, Vaillancourt, A. Côte, N. Côté, J. B. Laforest et Fortier, nous disent, sans la moindre hésitation et d'une manière convaincante (et les soins donnés a leur train sont en tout conformes à ce que nous savons tous d'une manière générale,) que la charrue, son accouplement et les freins de tout le train ont été régulièrement essayés et inspectés tous les jours et même plusieurs fois par jour. Qu'un examen spécial avait été fait le jour même lorsque le train était sur la voie d'évitement des fermiers. Puis pour confirmer le tout, après l'accident, sur examen de la

1920

GAUTHIER
v.
THE KING.

Reasons for Judgment.

charrue à la gare du Bic, l'on constata que les freins étaient dûment appliqués sur les roues de derrière, (celles de devant n'ayant pas été alors examinées mais les freins sont combinés ensemble) et que l'accouplement n'était aucunement brisé ou endommagé, l'accouplement était ouvert, la tige était sortie, mais le levier n'était pas levé.

On a offert moult conjectures et hypothèses, relativement à la cause de l'accident. On peut toujours donner libre cours à son imagination, mais personne n'a pu nous en donner la cause réelle ou l'expliquer. On a suggéré que la glace aurait pu s'introduire dans l'accouplement et en faire sortir la tige ou que la neige pourrait bien s'introduire entre le soulier et la roue, et qu'ainsi les freins ne pouvaient fonctionner effectivement; mais rien de cela n'a été constaté après l'accident, car la charrue a été trouvée en parfait ordre.

Après avoir fait une étude de la preuve il m'est impossible d'arriver à la conclusion que l'accident ait résulté de la négligence d'un employé du chemin de fer. Tous semblent avoir fait leur devoir et tout leur devoir et la cause de l'accident reste enveloppée dans les ténèbres.

Le poids de la preuve, l'onus probandi, repose sur le pétitionnaire et il a entièrement fait défaut de prouver négligence, tel que pourvu par la section 20 de l'Acte de la Cour de l'Echiquier. La cause de l'accident n'a pas éte démontrée prouvée. l'action n'entre pas dans le cadre prévu par la section 20 plus haut citée. *Colpitts v. The Queen ; Dubé v. The Queen*[2]*; Thibault v. Le Roi*[3]*; The Western Assurance Co. v. The King*[4].

[1] (1899), 6 Ex. C. R. 254.
[2] (1892), 3 Ex. C. R. 147.
[3] (1918), 17 Ex. C. R. 366, 41 D. L. R. 222.
[4] (1909), 12 Ex. C. R. 289.

Ce qui est arrivé était inattendu et résulte d'un cas fortuit. *Thompson v. Ashington Coal Co.*[1] Tel que j'ai déjà eu l'occasion de le dire dans la cause de *Thibault v. Le Roi* (ubi supra), "what happened "was fortuitous and unexpected. The event was un- "foreseen and unintended, and was an unlooked for "mishap or an untoward event which was not expec- "ted or designed". *Fenton v. Thorley Co.*[2]; *Higgins v. Campbell*[3]. "It was a personal injury by accident" In re *Briscoe v. Metropolitan St. Ry. Co.*[4] an accident is defined as: "such an unavoidable casualty "as occurs without anybody being to blame for it; "that is, without anybody being guilty of negligence "in doing or permitting to be done, or in omitting "to do, the particular things that caused such "casualty."

"If in the prosecution of a lawful act, an accident, "purely accidental arise, no action can be supported "for an injury, arising from such accident." *Davis v. Saunders.*[5]

Je conclus donc que le Pétitionnaire n'a pas prouvé sa cause, n'a pas prouvé la négligence d'un employé de la Couronne, tel que voulu par la section 20 de l'Acte de la Cour de l'Echiquier et que l'action doit être déboutée.

Cependant, arrivé à ce stade de la cause, je ne saurais terminer sans dire un mot au sujet de ce point qui fut la question principale au procès,—à savoir si Gauthier, monté à bord du train sous les circonstances que nous connaissons, était un transgresseur, un *trespasser*.

1 84 L. T. R. 412, 3 B. W. C. (o.s.) 21.
2 [1903] A. C. 443; 89 L. T. R. 314; 52 W. R. 81.
3 [1904] 1 K. B. 328.
4 (1909), 120 Southwestern Rep. 1162 at 1165.
5 (1770), 2 Chitty's R. 639.

1920

GAUTHIER v. THE KING.

Reasons for Judgment.

Si nous prenons la version de Gauthier relativement à ce qui se serait passé entre lui et le conducteur du train Accommodation, il est évident que Gauthier après avoir entendu le conducteur (fait toutefois nié par le conducteur) lui dire que le marchand de patates était celui qui montait dans le train (bien que le conducteur dans son témoignage nous dise que le marchand était resté à l'intérieur du char) et ajoutant: "Oui, s'il y en a qui veulent le voir, qu'ils entrent dans le train", qu'il aurait profité de cette permission spécifique pour voir ce marchand, pour l'étendre à celle de voir son beaut-frère. Ensuite après avoir relaté cette conversation, Gauthier nous dit qu'il est alors monté à bord du train, comme il attendait son beau-frère, qui devait être là, pour lui dire où descendre les animaux et que, constatant que son beau-frére n'était pas là, il a lié conversation avec ce commerçant de patates.

Analysant tous ces faits, il est bon de remarquer que généralement on attend les passagers sur le quai de la gare et l'on ne va pas les appréhender à l'intérieur du train. Surtout il est essentiel de remarquer que Gauthier n'est pas monté dans le train, en conformité de la prétendue permission donnée par le conducteur pour aller rencontrer le marchand, mais qu'il a profité de cette permission pour se donner un prétexte pour entrer dans le train pour servir ses propres fins qui étaient autres que celles de parler au marchand de patates. Il invoque aujourd'hui cette turpitude, légère si vous voulez, mais qui n'en est pas moins empreinte d'un manque de droiture pour justifier son entrée dans le train et bâtir une réclamation là-dessus. Il est monté sur ce train sous l'apparent prétexte de se conformer à la permission

spécifique donnée par le conducteur et pour rendre son histoire plus acceptable il ajoute que voyant que son beau-frère n'était pas là il a lié conversation avec le commerçant. Ce fait d'avoir ainsi par hasard causé avec ce commerçant, ressassé dans sa mémoire après l'accident, n'a-t-il pas donné lieu à cette histoire qui semble montée pour les fins de la cause?

Gauthier est monté à bord sous l'apparence plausible d'avoir la permission du conducteur, mais en réalité pour une autre fin que celle spécifiquement donnée. Celui qui demande équité et justice doit aussi agir avec équité et justice. Gauthier savait dans sa conscience qu'il manquait à une certaine droiture, qu'il transgressait les règles du *fair dealing* en profitant de cette permission pour servir ses propres fins. *Nullus commodum capere protest de injuria mea propria.*

Je ne désire pas exagérer ici l'importance de l'acte de Gauthier, ce sont cependant de ces nuances de probité et rectitude dont la plupart de nos bons cultivateurs de la province n'auraient pas voulu se prévaloir et qu'il est toujours dangereux de laisser filtrer dans la régie de nos actions. C'est aussi une nuance invoquée pour détruire la prétendue présomption qu'il ne pourrait pas être *trespasser* avec cette permission du conducteur d'entrer dans le train. Dans tous les cas en l'absence de négligence, l'intimé ne saurait être responsable d'un abus de cette permission découlant entièrement de sa générosité. Gauthier n'était pas un passager. Il n'existait aucun contrat entre lui et la Couronne avec considération pécuniaire. Il a jugé à propos de monter à bord sous les circonstances, et d'y demeurer prés de 15 minutes, de s'y attarder indûment pour gratifier ses propres fins. Ne devrait-il pas alors as-

1920

GAUTHIER v. THE KING.

Reasons for Judgment.

sumer tous les risques qui en résultent,—l'intimé par ses employés ne devant cependant lui causer intentionnellement aucun dommage quelconque. Tel qu'il ressort des causes de *Indermaure v. Dames*[1] et *Pritchard v. Peto*[2] la compagnie du chemin de fer était en devoir raisonnable de tenir son train, l'opération de sa compagnie, en bon ordre et de ne pas exposer le pétitionnaire à quelque danger caché dont elle connaissait l'existence ou aurait dû connaître, mais rien de plus. Comment pourrait-on aujourd'hui invoquer un acte de bienveillance, cette permission (si toutefois elle a été donnée) pour en faire la base d'une punition en dommages considérables?

Assumant pour les fins de l'hypothèse que le témoignage de Gauthier est en tout véridique, la question serait donc,—la cour ayant à la decider—si un *quondam* qui n'est pas passager, montant temporairement à bord d'un train à une gare, pour une fin autre que celle pour laquelle il avait eu une permission spécifique de ce faire du conducteur, devient un *trespasser* et si la compagnie du chemin de fer lui doit d'autres obligations ou devoir que ceux dus à un trespasser, et s'il se trouve alors sur le train à ses propres risques et péril? Si une permission spécifique lui donne passivement permission de monter à bord pour toute autre fin que celle reconnue?

En vue cependant des mes conclusions sur la considération de la cause sous l'aspect de la question de négligence, tel qu'enoncé plus haut, il deviendrait oisif de ma part de me prononcer sur cette dernière question.

[1] (1866), L. R. 1 C. P. 274; (1867), L. R. 2 C. P. 311.
[2] [1917] 2 K. B. 173.

1920

GAUTHIER v. THE KING.

Reasons for Judgment.

Herdman v. Maritime Coal Co.[1]; *Moffat v. Bateman*[2]; *Grand Trunk v. Anderson*[3]; *Leprohon v. The Queen*[4]; *Nightingale v. Union Colliery Co.*[5]

C'est pourquoi l'action est déboutée avec frais et dépens.

Judgment accordingly.

Solicitors for suppliant: *Gagnon, Sasseville & Gagnon.*

Solicitor for respondent: *Louis Taché.*

1 (1919), 49 D. L. R. 90.
2 (1869), L. R. 3 P. C. A. 115.
3 (1898), 28 Can. S. C. R. 541.
4 (1894), 4 Ex. C. R. 100 at p. 112 *et seq.*
5 (1903), Can. Ry. Cas. 47; (1904), 3 Can. Ry. Cas. 197.

1910
January 3.

IN THE EXCHEQUER COURT OF CANADA.

BETWEEN

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

PLAINTIFF;

AND

THE DOMINION OF CANADA GUARANTEE AND ACCIDENT INSURANCE COMPANY,

DEFENDANT.

Manitoba Grain Act (1900)—*Licensed Warehouses—Bonds by the same—Construction and Interpretation of—Extent of guarantee—Responsibility thereunder—When it terminates.*

The Dominion Government, through its Commissioner, having decided to give "X" a license to carry on the business of Public Country Warehouseman, for one year, beginning the 1st of September, 1906, pursuant to the provisions of the *Manitoba Grain Act* (1900), took from the defendant a surety bond to guarantee the faithful performance of "X" of all his duties under this Act. The bond was for one year, the duration of the license, and was, inter alia, to guarantee that "X" would "keep, store and deliver" the grain entrusted to him. At the termination of the above mentioned license a new license was granted for similar time, and a new bond from another company taken, on the same terms as the first mentioned.

There were no defaults or breaches of the law by "X" during the currency of the first license, but after 1st September, 1907, he made away with and failed to "deliver" certain grain, which he had received and stored, during the previous year. The proviso in the bond stated "that if the surety shall at any time give 3 calendar months notice . . . of its intention to put an end to the suretyship . . . . then this bond and all accruing responsibility on its part . . . . shall from and after the last day of such 3 calendar months . . . . cease and terminate in so far as concerns any acts or deeds of the Principal subsequent to such determination. . . ."

Held, that the license was a yearly license, and the security required by statute was for the faithful performance of the duties by the holder thereof, during such year only; and, this being so, notwithstanding that the breach herein was in reference to wheat received during the currency of the bond, the breach itself occurring

after such time, that it was not covered by the bond, and that the defendant could not be held responsible ,as surety, for the results of such breach.

Information filed by His Majesty's Attorney-General for the Dominion of Canada to recover from the defendants a certain sum alleged to be due by them as sureties under the *Manitoba Grain Act* of 1900, for the Wheat City Flour Mill Company.

The plaintiff, after alleging that the Company has given a bond in pursuance of the *Manitoba Grain Act,* 1900, and after reciting certain paragraphs therefrom which are given in the reasons for judgment of the Honourable Judge, printed below, and alleging that the Wheat City Flour Mill Company had received certain quantities of grain as licensee, alleged that all the wheat above referred to was delivered by the parties mentioned therein respectively to the Wheat City Flour Mill Company, Limited, in their elevator at Brandon, on the line of the railway of the Canadian Pacific, or, in the case of the track purchase by the Wheat City Flour Mills Co. Ltd., from the said Thomas Williams, the said two cars of wheat were delivered at Balcarres in the Province of Saskatchewan and that the Wheat City Flour Mills Co. Ltd. neglected and refused to "deliver" to said parties or any of them, the wheat referred to in the Information or to pay the value of the same or any portion thereof.

In the statement of defence the defendants denied the principal allegation of the Information and in paragraph 8 state:

"8. In the further alternative the defendant says "that between the 1st day of September, 1906, and "the 31st day of August, 1907, both days inclusive,

1910

THE KING v. DOMINION OF CANADA GUARANTEE AND ACCIDENT INS. CO.

Argument of Counsel.

"the Wheat City Flour Mills Company, Limited, "made no default, but did faithfully perform its "duties as a public warehouseman and did fully and "unreservedly comply with all laws in relation "thereto and when the alleged default, if any, oc- "curred (which the defendant denies), was carrying "on business under another and later license than "that referred to in paragraph 3 of the Information "issued under the Provisions of the said the *Mani- "toba Grain Act*, in respect of which later license a "bond to His Majesty the King as required by the "said Act and approved by the Commissioner had "been filed with the said Commissioner and the al- "leged default occurred, if at all, under such later "license and the defendant says it is not answerable "therefor."

The case was tried before the Honourable Mr. Justice Sir Walter Cassels at the City of Winnipeg, on the 3rd day of November, 1909.

A. B. Hudson, K.C. and *Mr. Marlatt,* for the Crown.

Mr. H. A. Robson, K.C. and *Mr. D. A. Stackpoole,* for defendant.

Mr. Hudson, argued, inter alia, that the operative part of the bond was in general terms. It did not limit it to any particular time; it was the duty of the principal to deliver the grain even after the expiration of the license year. That this bond was really a bond to secure the performance of obligations entered into during the continuance of the license year. *Wickens v. McMicken*[1], and 32 Encyc. of Law and Procedure, page 82 cited.

[1] (1888), 15 O. R. 408.

The illustration given there was where a bond to secure rent expires on a certain day the Surety on the bond is liable for rent earned on that day although not payable until afterwards.

Mr. Robson, in argument, cited sections 52 and 53 of the *Manitoba Grain Act,* 1900, and added that these articles constituted the contract that was authorized under this Act, between the warehouseman and the farmer, and that it was fair to argue that the obligation assumed by the Guaranty Company, or whoever the Surety may be, under this statute, was for the carrying out of that obligation and that the conditions which were assumed in the nature of the transaction by the producer, the bailor, must be complied with before the Surety could be liable. He must come within the Act and show that the obligation imposed upon the Surety by the Act had arisen in his favor. Then section 53 states the form of the receipt; that has been given for the purpose of showing what that contract is. Section 54 goes on (reads)

* * * * * *

The Company was not liable for the principal's common law liabilities, only liable under the obligations under the statute.

As the bond itself recites and as the declaration alleged the Company is being sued as guarantors under this Act.

He further claimed that the Company was in the same position as a surety for a servant and that it was the defaults that occur within the period for which their bond was given that they must account for, not the wheat that is received but the defaults that occur. Which was really taking just another view, or the same view, of section 54 just mentioned and applying it to another view of the case.

1910

THE KING v. DOMINION OF CANADA GUARANTEE AND ACCIDENT INS. CO.

Argument of Counsel.

They took another bond, immediately, to answer for the defaults of the next year. It was a matter of defaults. Under the statute a fair reading of it is, that it is the defaults that occur.

Mr. Stackpoole: The *Manitoba Grain Act* provides that at the end of each license year and before the warehouse commissioner issues a fresh license there shall be a return sent in by the elevator or warehouseman showing what is the amount of grain in store, that is, showing the obligations of the warehouseman to various parties who have stored grain and it is at the discretion of the Grain Commissioner then to fix the amount of security which will be required for the coming year for each elevator operated, up to the amount of $15,000 for each elevator. Now in the case of these particular bonds, in the case of the first bond at least and that is the principal one, there were four elevator licenses granted. That enabled the warehouse commissioner to take security up to the amount of $60,000 in bonds had he thought fit to do so but evidently, having the evidence before him of the amount of grain stored in the warehouse and the liabilities that might be incurred, he thought $18,000 was amply sufficient to cover it. Section 49 of the Act further provides that the bond to be taken by the warehouse commissioner shall be a condition for the faithful performance of his duties as a public warehouseman. Now the faithful performance of the duties is the delivery of the grain. There is no doubt about that and if he accepted fresh sureties for the performance of the duties of the warehouseman during that year I submit that we were relieved, there was somebody taken in our place, who assumed whatever obligations we might have had. That is,

1910

THE KING v. DOMINION OF CANADA GUARANTEE AND ACCIDENT INS. CO.

Argument of Counsel.

we take the stand that if we were liable at all after the completion of the license year (but we do not of course admit that) but even supposing your lordship should find that, we say that there have been other sureties taken for the faithful performance of the duties of the warehouseman and those sureties must be liable.

Mr. Hudson, in reply, stated that it was open to question whether the second bond would cover grain stored during the currency of the first license year. It says "Will keep, store and deliver grain". It might mean grain during that license year. It is fairly open to that construction. He cited *Canada West Farmers Mutual and Stock Insurance Co. v. Merritt*[1].

The parties made certain admissions and the facts necessary are stated in the reasons for judgment of the Honourable Mr. Justice Cassels, printed below.

Reasons for Judgment.

CASSELS, J. (January 3rd, 1910) delivered judgment.

The information was filed claiming against the defendants the payment of the sum of $57,500.00. The defendants by virtue of certain bonds became guarantors for the faithful performance of the duties of certain Licensed Warehouse Companies track buyers of grain and Public Country Warehousemen, licensed under the provisions of the *Manitoba Grain Act* to carry on the business of warehousemen, etc. The form of each bond is practically the same, and it will be unnecessary to refer to more than one.

The trial took place before me at Winnipeg on the 3rd November, 1909, *Mr. A. B. Hudson* and *Mr. Mar-*

[1] (1861), 20 U. C. Q. B. 444.

1910

THE KING v. DOMINION OF CANADA GUARANTEE AND ACCIDENT INS. CO.

Reasons for Judgment.

latt appeared for the Crown. *Mr. Robson,* K.C. and *Mr. Stackpoole* appeared for the defendants.

Both counsel for the plaintiff and the defendants made all reasonable admissions, and there is but little or no dispute as to the facts. Certain technical objections were raised by counsel for the defendants to the right of the plaintiff to recover, if otherwise entitled to recover under the terms of the bonds. I do not consider it necessary in the view I take of the case to consider these objections.

The principals for whose faithful performance of their duties the defendants became guarantors obtained a license to carry on the business of Public Country Warehousemen pursuant to the provisions of the *Manitoba Grain Act,* 1900.

Quoting from one of the bonds (the others are in the same terms):

"Whereas the Principal has applied for four ele-
"vator licenses under the hand and seal of Charles
"C. Castle, Warehouse Commissioner for the In-
"spection Division of Manitoba in Canada by which
"when issued the Principal will be authorized and
"empowered to carry on the business of Public
"Country Warehousemen at such place or places as
"are set forth in the schedule written on the back
"of this sheet which is made part of this bond, from
"the first day of September, 1906, to the 31st day of
"August, 1907, both days inclusive.

"And this bond is given in pursuance of the *Mani-*
"*toba Grain Act,* 1900."

The bond proceeds as follows:

"Now the condition of this obligation is such that
"if upon the granting of such license the Principal
"shall duly keep books and accounts, insure grain,

"issue and deliver receipts and tickets, keep, store "and deliver grain, render all accounts, inventories, "statements and returns prescribed by law, pay all "penalties which the Principal is or may become "liable to pay under the provisions of the said Act, "and of such other Act or Acts as may hereafter "be in this behalf enacted by the Parliament of "Canada, and shall well, truly, faithfully and un-"reservedly comply with all the enactments and re-"quirements of the said Act, or of any Act or Acts "as aforesaid, and of any Order in Council, depart-"mental or other regulation made by competent "authority according to their true intent and mean-"ing as well with regard to such books, accounts, "insurance, delivery or receipts and tickets and the "keeping, storing, delivering of grain, the render-"ing of accounts, inventories, statements, returns "and payment of penalties as to all other matters "and things whatsoever referred to or required of "the Principal by the said Act or Acts and Orders in "Council and regulations whatsoever, then this obli-"gation shall be void and of no effect, but otherwise "shall be and remain in full force and virtue.

"Provided always that if the Surety shall at any "time give three calendar months' notice in writing "to the Principal and to the Warehouse Commis-"sioner for the Inspection Division of Manitoba "aforesaid for the time being of its intention to put "an end to the Suretyship hereby entered into, then "this bond and all accruing responsibility on its "part, and of its funds and property shall from and "after the last day of such three calendar months "aforesaid, cease and terminate in so far as con-"cerns any acts or deeds of the Principal subsequent

1910

THE KING v. DOMINION OF CANADA GUARANTEE AND ACCIDENT INS. CO.

Reasons for Judgment.

"to such determination, remaining liable, however, "hereon, for all or any deeds, acts or defaults done "or committed by the Principal in his said business "of Public Country Warehouseman as aforesaid "from the date of this bond up to such determina-"tion."

On the expiration of the license a new license was granted pursuant to the terms of the statute licensing the warehousemen to carry on the business from the 1st day of September, 1907, to the 31st day of August, 1908, and a new bond was taken to secure the faithful performance of the duties of the warehousemen, the Surety, however, not being the present defendants, but the London Guarantee and Accident Company.

During the currency of the first license and between the 1st September, 1906, and the 31st August, 1907, certain grain was delivered to the licensed warehousemen by farmers referred to in the evidence. There was no breach by the Principal during the currency of this first license. Grain which had been received prior to 31st August, 1907, was subsequently and after the granting of the second license to carry on business from the 1st September, 1907, to 31st August, 1908, made away with by the warehousemen.

The point under consideration is whether the defendants under the terms of the bond hereinbefore recited are liable in respect of breaches occurring subsequent to 31st August, 1907.

It appears that the Surety in the second bond, the London Guarantee and Accident Company, have paid in full the amount of their liability and a *pro rata* proportion has been retained to meet the claims

in question. This fact does not appear to me to influence the question.

The Crown contends that the liability of the defendants continued in respect of all grain received by the warehousemen during the currency of the bond, notwithstanding there was no breach or default prior to the 1st September, 1907.

The defendants on the other hand contend that their liability ended on the 31st August, 1907, that their suretyship ended on this date and that they are not liable for subsequent defaults.

Since the argument of counsel at Winnipeg I have been furnished by counsel for both the plaintiff and defendants with authorities bearing on either view of the case. There is not much assistance to be derived in arriving at a conclusion from these authorities. The question depends in my view on the construction of the bond of suretyship, having regard to the surrounding circumstances, I will consider the authorities later.

Certain provisions of the *Manitoba Grain Act* have to be considered.

Section 7 provides as follows:—

"(a) to require all track buyers, and owners and "operators of elevators, warehouses and mills, and "all grain commission merchants to take out annual "licenses;

"(b) to fix the amount of bonds to be given by the "different owners and operators of elevators, mills "and flat warehouses, and by grain commission mer- "chants and track buyers;

"(c) to require the persons so licensed to keep "books in forms approved of by the Commissioner "or by the Governor in Council."

1910

THE KING v. DOMINION OF CANADA GUARANTEE AND ACCIDENT INS. CO.

Reasons for Judgment.

"COUNTRY ELEVATORS, FLAT WAREHOUSES AND LOADING PLATFORMS."

"45. All elevators and warehouses in which grain "is received, stored, shipped or handled, and which "are situated on the right of way of any railroad, "or on any siding or spur track connected therewith, "depot grounds, or any lands acquired or reserved "by any railroad company to be used in connection "with its line of railway, at any station or siding "other than at terminal points, are declared to be "public elevators or warehouses, and shall be under "the supervision and subject to the inspection of "the Commissioner, and shall, for the purpose of the "following sections of this Act, be known and desig- "nated as public country elevators or country ware- "houses. 63-64 Vic. c. 39, sec. 29.

"47. Unless the owner or lessee thereof shall have "first procured a license therefor from the Commis- "sioner it shall be unlawful to receive, ship, store or "handle any grain in any elevator or warehouse.

"2. A license shall be issued only upon written "application under oath or statutory declaration, "specifying:—

"(a) the location of the elevator or warehouse;

"(b) the name of the person owning and operating "the elevator or warehouse; and

"(c) the names of all the members of the firm, or "the names of all the officers of the corporation, "owning and operating the elevator or warehouse.

"3. The license shall expire on the thirty-first "day of August in each year, but while in force shall "confer upon the licensee full authority to operate "the warehouse or elevator in accordance with law "and the rules and regulations made under this Act.

"4. Every person receiving a license shall be held "to have agreed to the provisions of this Act and to "have agreed to comply therewith.

"5. The annual fee for such license shall be two "dollars, and all moneys received as such fees shall "be paid into the Manitoba Grain Inspection Fund. "63-64 Vic. c. 39, s. 30.

"49 The person receiving a license as herein pro- "vided, shall file with the Commissioner a bond to "His Majesty, with good and sufficient sureties, to "be approved by the Commissioner, in a penal sum "in the discretion of the Commissioner, of not less "than five thousand nor more than fifteen thousand "dollars, in the case of an elevator, and of not less "than five hundred nor more than five thousand dol- "lars, in the case of a flat warehouse, conditioned "for the faithful performance of his duties as a pub- "lic warehouseman and his full and unreserved com- "pliance with all laws in relation thereto; Provided "that when any person procures a license for more "than one elevator or flat warehouse, security may "be given by one or more bonds, in such amount or "amounts as the Commissioner may require, subject "to the approval of the Minister. 63-64 Vic. c. 39, "s. 31.

"51. The person operating any such country ele- "vator or country warehouse shall,—

"(a) receive the first six standard grades of wheat "established and described in Part II. of the In- "spection and Sale Act;

"(b) upon the request of any person delivering "grain for storage or shipment, receive such grain, "without discrimination as to persons, during rea- "sonable and proper business hours;

1910

THE KING v. DOMINION OF CANADA GUARANTEE AND ACCIDENT INS. CO.

Reasons for Judgment.

"(c) insure the grain so received against loss by "fire while in his elevator or warehouse; and

"(d) keep a true and correct account in writing, "in proper books, of all grain received, stored, and "shipped at such elevator or warehouse, stating, "except as hereinafter provided, the weight, grade, "and dockage for dirt or other cause, of each lot of "grain received in store, for sale, storage or ship- "ment. 63-64 Vic. c. 39, s. 34; 3 Edw. VII., c. 33, s. 8.

"(e) at the time of delivery of any grain at his "elevator or warehouse issue, in the form prescribed "by the schedule to this Act, to the person delivering "the grain either a cash purchase ticket, warehouse "storage receipt, or storage receipt for special "binned grain, dated the day the grain was received, "for each individual load, lot or parcel of grain de- "livered at such elevator or warehouse. 7-8 Edw. "VII., 1908, c. 45, s. 22.

"53. .....

"2. Such receipt shall also state upon its face "that the grain mentioned therein has been received "into store, and that upon the return of such receipt, "and upon payment or tender of payment of all law- "ful charges for receiving, storing, insuring, de- "livering or otherwise handling such grain, which "may accrue up to the time of the return of the re- "ceipt, the grain is deliverable to the person on "whose account it has been taken into store, or to "his order, either from the elevator or warehouse "where it was received for storage, or if either "party so desires, in quantities not less than car- "load lots, on track at any terminal elevator in the "inspection district of Manitoba, on the line of rail- "way upon which the receiving elevator or ware- "house is situate, or any line connecting therewith,

"so soon as the transportation company delivers "the same at such terminal, and the certificate of "grade and weight is returned. 63-64 Vic. c. 39, s. 34.

"70. When ordered by the Commissioner, any "person operating a public country elevator or "warehouse under this Act shall, immediately after "the end of each month in which the elevator or "warehouse shall have been operated, furnish in "writing to the Commissioner a return statement showing:

"(a) The amount of grain on hand in the elevator "at the commencement of such month, and the total "amount of warehouse receipts at that time out-"standing in respect of the said grain;

"(b) The total amount of warehouse receipts "issued during such month, the total amount of "warehouse receipts surrendered by the holders "thereof during such month, and the total amount of "warehouse receipts outstanding at the close of such "month;

"(c) The amount of grain received and stored in "the elevator or warehouse during such month."

Then follow other provisions for the purpose of ensuring complete returns.

Section 27 provides as follows:—

"Upon the return of any terminal warehouse re-"ceipt by the holder thereof, properly endorsed, and "the tender of all proper charges upon grain repre-"sented thereby, such grain shall be immediately de-"liverable to the holder of such receipt, and shall "be delivered within twenty-four hours after de-"mand has been made, and cars or vessels therefor "have been furnished for that purpose, and shall not "be subject to any further charges for storage:

1910

THE KING v. DOMINION OF CANADA GUARANTEE AND ACCIDENT INS. CO.

Reasons for Judgment.

"Provided that if it should happen that, in conse-
"quence of the cars or vessels not being furnished
"till after the expiration of twenty-four hours as
"aforesaid, a new storage term shall be entered
"upon, then the charge for storage shall neverthe-
"less be made, but only on a *pro rata* basis in respect
"of the time which shall have elapsed after the ex-
"piration of the twenty-four hours as aforesaid,
"and the time when the cars or vessels actually
"arrive. 63-64 Vic. c. 39, s. 22."

It seems to me that the license is merely a yearly license. The security required by the statute is merely for the faithful performance of the duties of the warehouseman during that year. On the renewal of the license the Commissioner arranges for new security. He can be guided in arriving at the amount to be fixed as such security by requiring the warehouseman to furnish particulars in the section quoted. Moreover, according to my view, the last clause of the bond sheds considerable light upon the construction to be placed on the bond. I repeat the clause:—

"Provided always that if the Surety shall at any
"time give three calendar months' notice in writing
"to the Principal and to the Warehouse Commis-
"sioner for the Inspection Division of Manitoba
"aforesaid for the time being of its intention to put
"an end to the Suretyship hereby entered into, then
"this bond, and all accruing responsibility on its
"part, and of its funds and property shall from and
"after the last day of such three calendar months
"aforesaid, cease and terminate in so far as con-
"cerns any acts or deeds of the Principal subsequent
"to such determination, remaining liable, however,

"hereon for all or any deeds, acts or defaults done "or committed by the Principal in his said business "of Public Country Warehouseman as aforesaid "from the date of this bond up to such determin- "ation."

It is a provision enabling the Surety during the currency of the bond to terminate their liability on giving three months' notice. The liability does not relieve "for any deeds, acts or defaults done or com- "mitted by the Principal in his said business of "Public Country Warehouseman as aforesaid from "the date of this bond up to such determination."

This provision is evidently one enabling the Surety to get rid of his liability prior to the expiration of the bond with the condition attached that it does not free them from liability previously incurred.

If the Surety fails to take advantage of this provision enabling him to curtail his liability during the currency of the bond, he remains liable until the expiration of the bond, namely, a year from 1st September, 1906; but I do not think the liability is carried on for an indefinite period.

The license is granted 1st September, 1906, for a year, and the guaranty executed the same date. Assume on October 1st the Surety gave three months' notice of their intention to terminate their liability. Their liability would cease on 1st January, except for defaults prior to that date. Suppose during November farmers had deposited grain and no default on the part of the warehouseman until February. The Surety would not be liable. Any liability would be that of the new Surety. It seems to me on the expiration of the license the same result follows. The new Surety, not the defendants, is liable.

1910

THE KING v. DOMINION OF CANADA GUARANTEE AND ACCIDENT INS. CO.

Reasons for Judgment.

The case of the *Canada West Farmers Mutual and Stock Insurance Co. v. Merritt*[1] does not assist the plaintiff; but if anything is adverse to his claim.

The cases cited by counsel of *Kitson v. Julian*[2]; *Hassell v. Long*[3]; *Peppin v. Cooper*[4]; *Lord Arlington v. Merricke*[5]; and *Bamford v. Iles*[6] are all referred to in the judgment of the late Mr. Justice Street in *Wickens v. McMeekin*[7], which is in favour of the contention of the defendants.

Leadley and others v. Evans[8] also favours the defendants' contention.

The case of *Niagara District Fruit Growers Stock Co. v. Stewart et al*[9] may also be referred to.

For the reasons given above I am of opinion that defendants are not liable, and the information is dismissed with costs.

Judgment accordingly.

Solicitors for plaintiff: *Hudson, Howell, Ormond & Marlatt.*

Solicitors for defendant: *Sharpe, Stackpoole & Elliott.*

[1] 20 U. C. Q. B. 444.
[2] (1885), 24 L. J. Q. B. 202, 4 El. & Bl. 854.
[3] (1814), 2 M. & S. 363.
[4] (1819), 2 B. & Ald. 431.
[5] 2 Wm. Saunders 813.
[6] (1849), 3 Exch. 380.
[7] 15 O. R. 408.
[8] (1824), 2 Bing. 32.
[9] (1896), 26 Can. S. C. R. 629.

IN THE EXCHEQUER COURT OF CANADA

1919

December 31.

BETWEEN

HIS MAJESTY THE KING,

PLAINTIFF;

AND.

GEORGE ROY,

DEFENDANT.

—AND—

IN THE MATTER OF THE PETITION OF RIGHT OF

GEORGE ROY,

SUPPLIANT;

AND.

HIS MAJESTY THE KING,

RESPONDENT.

Interpretation of contract—"Approximate" meaning of—"Garbage", meaning of—Right to read into a contract; Ambiguity in language—Estoppel.

Among the terms and conditions of a contract made by the Crown with R. for the sale and removal of "garbage, swill and kitchen refuse" from Camp Hughes there was the following clause: *"There will be approximately* 20,000 *men in camp". There were* 2,467,057 men in camp during the time it was in operation, viz., an average of over 15,814 daily. The contractor undertook to remove garbage, etc., *"during the period of the camp"* at a price of so much *per thousand men.* The number for a time fell below 20,000, due to men being sent unto farms and overseas. There was no guarantee as to the time camp would be kept open or as to quantity or quality of garbage.

Held, that the words "approximately 20,000 men" were merely words of estimate or expectation and contained no *warranty* as to the exact number of men; and there being moreover no guarantee as to duration of camp, or as to the quantity of garbage, no action would lie against the Crown for breach of contract by reason of

1919

THE KING v. ROY.

the number of men in camp being less than 20,000 daily during part of the time and for consequent loss of profits.

2. That as the contract was in writing and the language clear, the word "daily" could not be read into the language of the contract by any forced construction, so as to enlarge the obligation of the Crown, and the words "approximately 20,000 men" could not be read "approximately 20,000 men daily."

3. The words "garbage, swill and kitchen refuse", as used in the contract, covered all table waste, and all that comes as kitchen refuse including material of various kind and description coming from or being in daily use in the preparation and use of food, in either camp or kitchen.

4. Where the claimant complains that sales of fats, etc., were made by private soldiers and non-commissioned officers in violation of the provisions of his contract, so that the Crown did not obtain the money arising from such sales, and where it further appeared that he himself had made purchases of the same irregular character, it was held that he was estopped by his conduct from setting up a claim for loss of profits arising from such sales by third parties.

Where, however, moneys found their way into the hands of the Crown from the sales of such fats at Camp, notwithstanding the claimant's conduct, as above mentioned, the amount being small, the prospective profits on such sales to third parties were allowed to be set off against the claim of the Crown.

THE information herein was filed by His Majesty's Attorney-General for the Dominion of Canada to recover from the defendant, Roy, the sum of $1,737.59 the price of garbage, etc., removed and taken away by him from Camp Hughes, in Manitoba.

The defendant obtained permission to file and filed a Petition of Right against the Crown alleging a breach of contract by the Crown and making a counterclaim for the sum of $18,712.38, alleging that the Crown had undertaken to have, at least, 20,000 men in the camp, and as the number for a time had fallen below this figure, he had suffered damages and loss of profits by not receiving the amount of garbage which he should; and

20. That he had furnished, at the request of men

in camp, certain extra cans beyond the number fixed by the contract and should be paid therefor;

30. That he had not received all the garbage and refuse from the kitchen, inasmuch as some men in camp had sold, on the side, in violation of his alleged exclusive privilege to get the same.

The two cases were tried together at the City of Winnipeg on the 29th and 30th days of September, 1919.

Mr. A. E. Johnston, for plaintiff-respondent.

Mr. R. A. C. Manning, for defendant-suppliant.

The facts are fully stated in the reasons for judgment filed by the Honourable Mr. Justice Audette, printed below.

AUDETTE, J. (this 31st December, 1919), delivered judgment.

This is a rather peculiar controversy, both in respect to the subject-matter, which has to deal with garbage, swill, kitchen refuse and uncooked meat, fat, bacon rind, and also with respect to the abnormal claims made for consequential damages arising out of an alleged breach of contract in the nature of loss of profit.

These two cases have been tried together, at the request of all counsel at bar, for the obvious reason that they both result from the same contract, and it would appear that, but for the fact that the suppliant was of opinion he could not counterclaim as against the Crown without a *fiat,* his plea to the case instituted by information would have contained what his pleadings in both cases did actually contain.

In the course of the war just ended, which has shaken the world to its foundation, the Crown de-

1919

THE KING v. ROY.

Reasons for Judgment.

cided to establish a military camp at "Camp Hughes", in Manitoba, which lasted from the 1st June to the 3rd November, 1916.

Sometime before the opening of the camp, the military authorities decided to provide for the sale and the removal from the camp, of the "garbage, swill and kitchen refuse," together with the "uncooked meat, fat and bacon rind", and they accordingly called for tenders for the same.

The present contract was accordingly constituted and entered into in the following manner. The suppliant Roy, among others, tendered on the 5th May, 1916, for this contract on the departmental form reading as follows, viz:

"This tender should be mailed by registered "letter in time to be received at the District Of- "fice, Bulman Block, Winnipeg, on May 10th, by "or before 12 o'clock noon on the 10th day of May, "1916. It should be addressed to the *Assistant "Director of Supplies and Transport, Military "District No.* 10, *Winnipeg, Man., and the* "envelope should be marked *'Tender for the Re- "moval of Swill, Garbage, etc., at Camp Hughes.'*

"Tender for the removal of Swill, Garbage, "etc. (To be made in duplicate).

"Winnipeg, the 5th day of May, 1916.

"To the Assistant Director of Supplies and "Transport, Winnipeg, Man.

"Sir,

"..... the undersigned (here- "inafter called the contractor) hereby offer to "remove garbage and swill from Camp Hughes "during the period of the camp, beginning on or

"about the first of June, subject to the terms and "conditions hereinafter set forth, at the following "prices to be paid by me to the Department of "Militia and Defence:

"Garbage, Swill and Kitchen Refuse, at one "hundred dollars per 1,000 men.

"Uncooked meat, fat, bacon rind, etc., one and "one half cents per pound.

"This offer is made on the understanding that "it is to stand good for the period of thirty days, "commencing on the day of mailing it to your ad- "dress; and that your acceptance of the offer "and the official notification of the said accept- "ance, duly mailed to the contractor, shall bind "the contractor to the due performance of all the "said terms and conditions.

"Terms and conditions of the contract.

"1. Garbage cans will be provided by the con- "tractor, of a standard size and pattern eighteen "inches by eighteen inches, as required (ap- "proximately 6 per thousand men).

"2. All garbage will be removed in tank wag- "gons, to be provided by the contractor, the tank "waggons and garbage cans will be kept cleaned, "and tank waggons will be provided with a hose "for dumping. All tank waggons and garbage "cans must be kept securely covered.

"3. Tender for the removal of garbage and "swill must be made at a quotation per thousand "men. There will be approximately 20,000 men "in camp, and the Department reserves the right "to increase this number to 35,000 men.

1919

THE KING v. ROY.

Reasons for Judgment.

"4. This contract shall not be sub-let or trans-"ferred without the written permission of the "Camp Commandant.

"5. The Department may terminate this con-"tract at any time by giving one month's notice "to the contractor to that effect or immediately, "at any time, should the contractor become in-"solvent. In the event of repeated irregularities "by, and complaints against the contractor, the "Department may impose a penalty, not exceeed-"ing one hundred dollars ($100.00) or may "terminate the contract immediately.

"6. The Department reserves the right to re-"ject any or all of the tenders received. No "security deposit is required with this tender; "but, and when, any contract is made, the con-"tractor must furnish as security for the due per-"formance of the contract a certified cheque for "two hundred dollars ($200.00).

"(Signature of Contractor) George Roy.

"(Address) Elie, Man."

On the 18th May, 1916, the District Officer Commanding Military District, No. 10, sent to Roy a telegram in the words following:

"Authority granted to contract with you for "disposal of garbage and swill, kitchen refuse, "etc., Camp Hughes, provided you will pay high-"est price quoted, namely, one hundred ten dol-"lars per season per thousand men for garbage, "swill and kitchen refuse, and two and half cents "pound for uncooked meat, etc.

"D. O. C. 10."

And on the 19th May, 1916, the Assistant Director of Supplies and Transport, sent to Roy a telegram reading as follows, viz:

"Reference your tender remove garbage, swill "and kitchen refuse, Camp Hughes, stop. Con- "tract will be awarded you provided you pay one "hundred and ten dollars per season per thous- "and men for garbage, etc., and two and one half "cents per pound for uncooked meat. Stop. Wire "reply urgent.

"A. D. of S. & T., M. P. 10."

Then on the same day, namely on the 19th May, 1916, Roy replied to this last telegram by sending the following telegram to the Assistant Director of Supplies and Transport, viz:

"Contract accepted under terms and conditions "named in your wires of eighteenth and nine- "teenth instant.

"George Roy."

The acknowledgment of the two first telegrams and the confirmation of the last one were further made by Roy by his covering letter of the 23rd, which reads as follows:

"Elie, Man.,
"May 23rd, 1916.

"Col. H. N. Ruttan, D.O.C., M.D. 10.
"Winnipeg, Man.

"Dear Sir:—

"I beg to acknowledge receipt of the following "telegrams, namely:—

1919

THE KING v. ROY.

Reasons for Judgment.

"Winnipeg, Man., May 18th, 1916.

"George Roy,

"Elie, Man.

"Authority granted to contract with you for "disposal of garbage and swill, kitchen refuse, "etc., Camp Hughes, provided you will pay high- "est price quoted, namely one hundred ten dol- "lars per season per thousand men for garbage, "swill and kitchen refuse, and two and half cents "pound for uncooked meat, etc.

"D. O. C. 10."

"Winnipeg, Man., May 19th, 1916.

"George Roy,

"Elie.

"Reference your tender remove garbage, swill "and kitchen refuse, Camp Hughes. Stop. Con- "tract will be awarded you provided you pay one "hundred and ten dollars per season per thous- "and men for garbage, etc., and two and one half "cents per pound for uncooked meat. Stop. Wire "reply urgent.

" A. D. of S. & T. M. D. 10.

"I also beg to confirm telegram sent by me to "the A. D. of S. & T. M. D. 10, Winnipeg, on May "19th last as follows:

"Elie, Man., May 19th, 1916.

"A. D. of S. & T. M. D. 10.

"Winnipeg.

"Contract accepted under terms and conditions "named in your wires of eighteenth and nine- "teenth instant.

"George Roy.

"You might kindly let me have copies of "specifications as I have none in my possession.

"Yours truly,

"George Roy."

Having said so much it will be seen that the contract entered into is separable into two parts. One part deals with the "garbage, swill and kitchen refuse", and the other part with the "uncooked meat, fat and bacon rind." Each part will be dealt with separately.

Dealing first with the question of "garbage, swill and kitchen refuse", we find that the Crown, by its Information, seeks to recover, in the manner therein set forth, the amount due on the basis of $110 per 1,000 men, from the suppliant who has purchased, removed and taken the garbage, etc., in question from the said camp.

It is well to note the Information is quite silent with respect to the "uncooked meat, fat and bacon rind", and makes no claim therefor.

The parties having admitted, as shewn by Exhibit No. 7, and by the admission filed of record, that there were altogether in camp 2,467,059 men during June, July, August, September, October and November, 1916, the Crown then reduced its claim from $1,825.00 to $1,739.59.

This number of men of 2,467,059, spread over the 156 days, represented by the period of the above mentioned months, will give a daily average for that period of 15,814.48, which calculated on the basis of $110 for 1,000 men gives the said sum of $1,739.59, for which judgment is asked against defendant Roy.

Roy, in answer to this claim by the Crown, both by his defence in the case wherein the Crown is

1919

THE KING v. ROY.

Reasons for Judgment.

plaintiff and by his petition of right, sets up, as resulting from an alleged breach of the contract by the Crown, a counterclaim, as amended, for $18,712.38.

As a *first count,* he contends that as the number of men were, during August, September and October reduced below 20,000, the Crown is guilty of breach of the contract for which he should recover damages in the nature of loss of profits. Had the number of men been maintained at 20,000, he contends he would have had more garbage enabling him to feed more hogs and thereby make more profits.

By clause 3 of the tender it is, among other things, said that "tender for the removal of garbage and "swill must be made at a quotation per thousand "men. There will be approximately 20,000 men in "camp". The contention is that these words, "There will be approximately 20,000 men in camp" call for, at all times, a force of 20,000 in camp.

The contract does not say there will be approximately 20,000 in camp *daily.* The word "daily" is not there, and cannot be read into the language of the contract by any forced construction so as to enlarge the obligation of the Crown. Moreover, what is the meaning, under the circumstances, of these words, "approximately 20,000 men in camp"? From reference to dictionaries and from the meaning attached to the word in common parlance, "approximately" primarily means "nearly", "closely", but "not exactly"—nearly approaching this number, but not reaching it. Approximate truth is not the truth. Then the charges are called for by the contract at $110 per 1,000 men and not per 20,000.

It would appear that under the circumstances these words "approximately 20,000 men" are merely words of estimate or expectation and in no sense contain a warranty that there would be no less than 20,000 men, and in support of that view I would refer to the following cases bearing the justification of accepting that view, viz: *Gwillim v. Daniell*[1]; *McConnell v. Murphy*[2]; *F. W. Berk & Co., Ltd. v. International Explosives Co.*[3]; *In re An Arbitration between Harrison and Micks, Lambert & Co.*[4]; *Tancred, Arrol & Co. v. The Steel Company of Scotland*[5]; *Tebbitts Brothers v. Smith*[6]; *Brawley v. U. S.*[7]

Moreover, the number of men was thus reduced in the camp during the time in question to allow them to be sent upon the farms to work and help gathering the crops, and during time of war would not that step be approved as part of a policy for the purpose of securing public safety and the defence of the realm? *Lipton Ltd. v. Ford.*[8]

Moreover men were also continuously sent overseas from the camp, and while the camp lasted the length of time above mentioned, there was no guaranty as to how long it would last. It might have been broken up at any time and all the men sent to the front. Roy would have had no recourse.

Then there was no guaranty as to the quantity of garbage, etc., which might greatly vary—outside of being affected by the number of men—according to

[1] (1835), 2 Cr. M. & R. 61.
[2] (1873), 5 L. R. P. C. 203.
[3] (1901), 7 Com. Cas. 20.
[4] [1917] 1 K. B. 755.
[5] (1890), 15 App. Cas. 125.
[6] (1917), 33 T. L. R. 508.
[7] (1877), 96 U. S. Rep. Sup. Ct. 168.
[8] [1917] 2 K. B. 647.

1919

THE KING v. ROY.

Reasons for Judgment.

the diligence, care and economy exercised in the military kitchens.

Another complaint is that Roy supplied, at the request of some officers in camp, more cans than were called for by the contract. The obvious answer to this is that the question is to be determined by the terms of the contract, that is to say, "approximately 6 per 1,000 men". If some men in the camp asked for more cans than the contract called for, the Crown cannot be bound by their unauthorized acts. No claim can lie under the aspect of excess expenditure on capital account by Roy for trading in hogs. The contractor was not bound to supply more than the contract demanded, and if he did so it was entirely his own concern.

We now come to the much involved question of the meaning of the words "*garbage, swill and kitchen refuse*". Indeed Roy contends that besides getting a smaller quantity of such material from less than 20,000 men, which deprived him of feeding more hogs from which he would have derived profits, that the garbage, swill and kitchen refuse were of bad quality in that they were not free from rubbish, paper, bottles, glass, rags, boxes, sand and soap water, and that as a result 147 hogs died from feeding upon the same, that some hogs were choked with rags and others died from eating pieces of glass. He said he inspected most of them, but he had no veterinary to determine whether or not some of them or all might have died from other natural causes or diseases, as it is quite usual to lose a certain number of hogs through illness of some kind, especially on quantities reckoning on one or two thousand. Moreover the question of profit and loss is subjected to a

great many *alea*, and such damages as claimed are too remote.

However, the question to be determined is whether or not the garbage, swill, and kitchen refuse delivered at the camp were such as might, or should be, expected under the circumstances. A deal of evidence has been adduced upon the subject, and a deal of surmise and conjecture offered in respect of the same, together with the definition of such words to be found in dictionaries.

From the *New English Dictionary*, by *Murray & Bradley* and the *French Dictionary of Littre*, it would appear that the etymology of the word "garbage" is obscure, but may be traced to an old French word, used in Picardy, of "guerbe", "garbe", etc., which afterwards found its place under the word "garbage" in the English language. It is also suggested that its early origin may be traced to the latin word "garba",—a cock of hay, a fagot of wood, or any other bundle in the shape of a "gerbe". Littre opines it might be traced to the latin word *carpere*, to cut, to throw away.

The *Century Dictionary* defines "garbage": "Originally entrails of fowls, . . . offal, . . . *refuse*, "". . . . animal and vegetable matter from a kitchen "—Any worthless offensive matter."

New English Dictionary: "Refuse, that which is "cast aside as worthless; rubbish or worthless mat- "ter of any kind, the rejected or rubbish part of "anything. Refuse in general, filth, etc."

I find that these words "garbage, swill and kitchen refuse", as used in the contract would cover all the table waste and all that comes as kitchen refuse, including as we all know, material of various

1919

THE KING v. ROY.

Reasons for Judgment.

kind and description coming from or being in daily use in the preparation and use of food, either in a camp or in any kitchen. It cannot be expected that the material covered by these three words would call for clean matter, free and disengaged from all that is in daily use in a kitchen and that has to be got rid of, such as wrapping paper, cans, rags, bottles, etc.

There is clearly no undertaking on the part of the Crown to supply "garbage, swill and kitchen refuse" fit for feeding pigs, and no such obligation can be made a term of the contract enforceable against the Crown in the present case. If Roy wanted to use the material for that purpose, or for any other purpose, it was for him to serve it and use it to the best purpose he saw fit, and the Crown had nothing to do with that part, which was entirely in Roy's discretion. *Wilson v. Dunville.*[1]

I have come to the conclusion, in the action instituted by the Crown, by way of information, that there should be judgment, against Roy for the sum of $1,739.59, subject to the reduction hereinafter mentioned.

Uncooked meat, fat and bacon rind.

Coming now to the second branch of the case, dealing with the question of "uncooked meat, fat and bacon rind", I find from the evidence that Roy received delivery of a certain quantity of such material and paid therefore the sum of $80.00. However, he claims he was entitled to a deal more and that some of such material was sold in camp, in violation of his contract which gave him, he claims,

[1] (1879), 4 L. R. Ir. 249.

exclusive right to purchase the same. Such sales made in camp he contends were made by the men and sold to the highest bidder, the proceeds thereof in most cases not finding their way into the hands of the Crown. It is further in evidence that Roy, or some of his agents and employees, did resort to this means of buying such material in that manner, in direct violation of the contract. By this mischievous dealing he directly deprived the Crown, a party to his contract, of the benefit of such sales and he is therefore estopped from benefiting by his wrongful act.

Whoever seeks equity must do equity. Roy, or those acting for him, knew of the impropriety of such dealings. It was known to them it was wrong, and it was so admitted in the evidence. By so buying on the side, so to speak, it was to Roy's knowledge that he was transgressing the rules of fair dealing, the common rules of right and wrong, contrary to the terms of the contract whereby he was under the obligation to pay to the Crown for such material, and he is now estopped from setting up anything which is the result of such dealings. No man can take advantage of his own wrong. *Nullus commodum capere potest de injuria sua propria.*

Besides receiving $80.00 for uncooked meat, etc., from Roy, and there is evidence Roy did not make any other payments in that respect to the Crown, it has been established that the sum of $49.19 has found its way into the hands of the Crown as proceeds from sales; but the evidence does not disclose or show by whom such payments were made, the moneys were turned in to the military superintend-

1919

THE KING v. ROY.

Reasons for Judgment.

ing clerk, whose duty it was to receive all money for the Crown.

These sales, the proceeds of which amounted to $49.19, were made in apparent violation of the contract and the Crown received the benefit thereof and it would be but fair and equitable, in adjusting the accounts between the contracting parties, that Roy should be credited with the profits he would have derived from that quantity sold to outsiders and from which the crown benefited. It is questionable whether Roy should be entitled to the same in view of what has been said in respect of his conduct when buying in camp from the men such material, however, the matter is a small one and perhaps strict law ought not to be invoked against him.

Taking into consideration the number of pounds these $49.19 represent, the contract price, the market price at the time, the shrinkage in manufacturing and the labour, I roughly estimate that Roy would have realized on these three sales about the net sum of $15.96, for which he should be given credit as against the said sum of $1,739.59, reducing that amount to $1,723.63.

Coming to the question of costs and bearing in mind that these two cases have been tried together, for the reasons above mentioned, on arriving at my conclusion on the question of costs, I will treat the two cases as one and will allow the Crown its costs on the action instituted by Information with the result that no costs will be allowed either party in the action instituted by Petition of Right. Furthermore, as the Crown has not been successful in all the details of the cases, I will, considering that view, exercise the judicial discretion provided by

1919

THE KING
v.
ROY.

Reasons for Judgment.

Rule 290, and in lieu of full taxed costs I will fix and lump the same at the total of $200.

Therefore, disposing of the two cases, there will be judgment ordering and adjudging that the Crown recover from the said George Roy, defendant in one case and suppliant in the other, the sum of $1,723.63, with the costs as fixed at the sum of $200. In the result the action No. 3213 is maintained with costs, and the other action by Petition of Right, No. 3253, subject to what has already been said, is dismissed each party paying his own costs.

Solicitor for the Crown: *A. E. Johnston.*

Solicitor for Geo. Roy: *Robert A. C. Manning.*

1920
January 9.

IN THE MATTER OF

"THE CONSOLIDATED ORDERS RESPECTING TRADING WITH THE ENEMY, 1916".

AND

IN THE MATTER OF THE PETITION OF

THE RIGHT HONOURABLE ARTHUR L. SIFTON.

Secretary of State for Canada for a vesting order, thereunder.

Alien enemy—Will—Bequest——Consolidated Orders, 1916, (*P. C.* 1023) *section* 23 *and* 28—*Vesting order—Minister of Finance—Custodian of alien estates.*

H. domiciled in the Province of Quebec, by her will, executed in due form, bequeathed $10,000 to F, "a German and an alien enemy domiciled and residing in Germany" at her decease, which occurred in England on the 10th January, 1919.

The Under-Secretary of State, having filed a petition setting out the above facts and further alleging that he was charged with the greater part of the administration of the Consolidated Orders respecting Trading with the Enemy, 1916, and acting in that capacity, was of opinion that it was expedient for the purpose of said Consolidated Orders that a vesting order in the terms hereinafter mentioned should be made by the Court, applied for an order vesting the said legacy in the custodian of alien estates.

Held, upon hearing read the said petition and affidavits verifying the facts above set out, and upon reading the said Consolidated Orders, 1916 (P. C. 1023), that an order should be made vesting the amount of said legacy in the Minister of Finance and Receiver General for Canada as the custodian of alien estates, under the said Consolidated Orders, and authorizing him, on receipt of said sum to give a complete and final release and discharge to the executors under the will.

2. No costs of the application were allowed.

PETITION by the Secretary of State asking for an order that a certain legacy left to an alien enemy should not be paid to him, but be vested in the Min-

ister of Finance and Receiver General of Canada as custodian, under the above mentioned Consolidated Orders.

The Petition in substance alleges that one Anna Rebecca Gale, in her lifetime of the City of Montreal, widow of the late Thomas Sterry Hunt in his lifetime of the same place, died in England on January 10th, 1919, leaving a last will and testament executed in Montreal, in notarial form, whereby, *inter alia,* she bequeathed the sum of $10,000 to one Baron Gisbert von Friesen, of South Germany; that the executors are authorized to act beyond a year and a day; that the said legatee is still domiciled in Germany, is of German nationality and an alien enemy; and that he, the petitioner, desires in the public interest that the said legacy be not paid to the legatee, but be vested in and taken over under said Consolidated Orders, 1916 (P. C. 1023).

In support of this application was filed a certified copy of the will and the affidavit of Edward Archbald, an executor, verifying the facts contained in the petition and the affidavit of the Under-Secretary of State also verifying the facts and stating that, as such he is charged, under the direction of the Secretary of State of Canada with the greater part of the administration of the Consolidated Orders aforesaid, and that, in his opinion it is expedient for the purpose of said orders that the legacy should be vested in a custodian and that he should be empowered to give discharge to the executors of the estate upon payment to him.

The petitioner based his application on section 23 of the said Consolidated Orders (P.C. 1023), which

1920

RE CONSOLIDATED ORDERS AND SIFTON.

Reasons for Judgment.

provides who is the custodian under said Orders and section 28 (1) which reads as follows:

"28 (1) Any Superior Court of Record within "Canada or any Judge thereof may . . . . on the "application . . . . of any department of the Gov-"ernment of Canada, by order vest in the Custodian "any such real or personal property as aforesaid, "if the Court or the Judge is satisfied that such vest-"ing is expedient for the purpose of these orders "and regulations, etc."

The application was made to the Honourable Mr. Justice Audette, in Chambers, on the 9th day of January, 1920.

W. P. J. O'Meara, for petitioner.

Per Curiam. Upon hearing the said petition and affidavits verifying the facts above set out, and upon reading the said Consolidated Orders, 1916 (P.C. 1023), an order should be made vesting the amount of said legacy in the Minister of Finance and Receiver General of Canada as the custodian of alien estates, under the said Consolidated Orders, and authorizing him, on receipt of said sum to give a complete and final release and discharge to the executors under the will.

There should be no costs of the application.

1920
Feb. 21.

IN THE EXCHEQUER COURT OF CANADA.

BETWEEN

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

PLAINTIFF;

AND

LONDON GUARANTEE AND ACCIDENT COMPANY LIMITED, AND JOSEPH GORBOVITSKY,

DEFENDANTS.

Canada Grain Act—Country elevators—Track buyer—Bonds, interpretation thereof—Interpretation of Statute—Penalty or liquidated damages.

G. having applied for a license (subsequently granted) to operate a country elevator under the *Canada Grain Act,* 2 Geo. V., 1912, ch 27, the Company defendant gave a bond in favour of plaintiff for the due and faithful compliance by G. of all enactments and requirements of the said Act and to secure the payment of any penalties to which he might become liable under the Act.

G. at the time of delivery to him of certain grain at the warehouse, and in compliance with section 157 of the Act, issued a *warehouse storage receipt* for the same. No *cash purchase ticket* and no storage receipt for special binned grain were ever issued. Subsequently, in some cases about one or two months after the issue of the storage certificate, G. bought this grain from the owners paying part cash, but made default in paying the balances and having so failed to pay, the Company defendant was sued as surety on the bond to recover the amounts so due.

Held, that G. by giving the warehouse storage receipt at the time of delivery of the grain to him had discharged all statutory duties as such licensee and had complied with the requirements of the Statute, and the purchase of the grain by him subsequently, not being done under the license, but in the exercise of his common law right, the bond in question did not cover such purchases, and was not such an act for the faithful performance of which the surety could be held liable on the bond.

2. That there being nothing in the Act prohibiting the operator of a country elevator from buying grain, (as in the case with the operator of a terminal elevator), to insert this inhibition in the statute by implication, would not be construing the Act of Parlia-

1920

THE KING v. LONDON GUARANTEE AND ACCIDENT CO.

ment, but would be altering it and enlarging the provisions which the Legislature had thought fit to make.

3. A track buyer, being by sub-sec. 2 of sec. 219 and sec. 2, sub-sec. "S" of the Act, 2 Geo. V., 1912, ch. 27, defined as one who buys in *car lots on track,* his act in purchasing grain which is not *in car lots on track,* but in a terminal elevator or other elevator or warehouse is not one within the scope of his license as such, and therefore the bond does not cover such a transaction.

4. That in as much as, mutuality of mistake cannot enable the parties to change the nature of a transaction, more particularly when it affects the rights of third parties, the fact that both vendor and purchaser believed that the grain was *on track* at the time of sale, would not justify the Court in treating it as such. *Non fatetur qui errat.*

5. That the fact that the sum in a bond is described as a penalty or as liquidated damages, is not conclusive;

The question of whether the sum mentioned in a bond is to be considered as a penalty or as liquidated damages in any given case is one of construction for the Court alone.

6. Where a bond was given for the due performance of statutory duties, of various kinds and importance, some of a *certain* nature and amount, some of *uncertain* nature and amount, and only one large amount is mentioned in the bond, the bond cannot be but a penalty bond, because as the amount mentioned in the bond cannot be regarded as liquidated damages in respect of some of the stipulations, it ought not to be so regarded in respect of the others.

AN Information, exhibited by the Attorney-General of Canada, seeking to recover from the defendant Company under the bonds furnished by them under the *Canada Grain Act.*

The facts are stated in the reasons for judgment.

The case was tried at Winnipeg on the 14th day of January, 1920, and was submitted upon the Admissions filed, no witnesses being produced.

Mr. E. L. Taylor, K.C., for plaintiff.

Mr. J. B. Coyne, K.C., and *R. K. Elliott* for defendant—The London Guarantee and Accident Company.

1920

THE KING v. LONDON GUARANTEE AND ACCIDENT CO.

Reasons for Judgment.

AUDETTE, J., now (21st February, 1920) delivered judgment.

This is an Information, exhibited by the Attorney-General of Canada, whereby it is sought to recover the full amount of three bonds given, under the *Canada Grain Act*, 2 Geo. V., 1912, ch. 27, in the circumstances hereinafter mentioned.

The plaintiff has already, on the 16th November, 1919, obtained judgment by default against the defendant Joseph Gorbovitsky, for the full amount of the bonds, namely the sum of $19,200, and costs.

Therefore, the issue in the present controversy is limited exclusively as between the plaintiff and the defendant the London Guarantee and Accident Company, Limited, hereinafter, for brevity, called "the insurance company".

No oral evidence was offered at trial, but by consent of both parties, the case was submitted upon the Admissions then filed, and which are too voluminous to be here set out in full.

It is averred and admitted by the pleadings that Gorbovitsky on the 17th August, 1916, made an application to the Board of Grain Commissioners of Canada in compliance with section 153 of the *Canada Grain Act*, for a license to operate for the crop of 1916-1917, a *country* elevator at *Edenwold*, Saskatchewan, and in compliance with section 155, gave the bond required thereby through the above-mentioned defendant insurance company in the sum of $6,600, and a license was issued as requested.

And in a like manner Gorbovitsky, on the 9th August, 1916, made a similar application to operate a *country* elevator at Zehner, Saskatchewan,

1920

THE KING v. LONDON GUARANTEE AND ACCIDENT CO.

Reasons for Judgment.

gave the required bond of $6,600, and a similar license was issued to him.

Then on or about the 28th July, 1916, the defendant Gorbovitsky made an application to the Board of Grain Commissioners for a license to operate, for the crop of 1916-1917, as a *track buyer* of grain, and in compliance with section 218, gave the required bond in the sum of $6,000, and a license as such issued to him on the 1st September, 1916.

Three cardinal questions arise in the present case: 1st. Whether the Crown, if entitled to recover under the bonds, should recover the full amount thereof, or only the amount of loss actually shown.

2nd. Whether, under the provisions of sections 157 and 180, in the case where the operator of a country elevator, *at the time of delivery of any grain* thereat, has issued a warehouse storage receipt, is bound when about a month or two after such delivery when purchasing such grain, still in his elevator, to give therefor a *cash purchase ticket,* or whether at that date he had discharged all statutory duties as such licensee to run a country elevator and is at large on his common law rights and can buy like any other individual not under such license?

3rd. What constitutes a track buyer under the Statute?

Dealing first with the question of the two bonds respecting the operation of the two country elevators, it must be said both the bonds and the licenses issued thereunder are absolutely identical, and that all that is said in relation to one applies respectively to the other.

This bond is what is termed (Halsbury, vol. 3 p. 80 par. 160) a double or conditional bond, in that it con-

sists of two parts: first, the obligation and secondly the condition, which parts read as follows:

Form B. 315
No. 439

"Country Elevator

"Know all men by these presents that we, Joseph "Gorbovitsky, of Regina, in the Dominion of Can- "ada, and Province of Saskatchewan, hereinafter "called the principal and the London Guarantee and "Accident Company, Limited, of London, England, "hereinafter called the Surety, are respectively held "and firmly bound unto Our Sovereign Lord the "King, his heirs and successors, in the respective "penal sums following, that is to say: The Principal "in the sum of Sixty-six hundred dollars of lawful "money of Canada, and the Surety in the sum of "Sixty-six hundred dollars of like lawful money to "be paid to Our Sovereign Lord the King, His heirs "and successors, for which said payment well and "faithfully to be made we severally and not jointly "or each for the other, bind ourselves and our re- "spective heirs, executors, administrators, success- "ors and assigns firmly by these presents, sealed "with our respective seals, dated the first day of "September, in the year of our Lord one thousand "nine hundred and sixteen, and in the 7th year of "His Majesty's reign.

"Whereas the Principal has applied for one coun- "try elevator license under the hand and seal of the "Board of Grain Commissioners for Canada, by "which, when issued, the Principal will be authorized "and empowered to carry on the business of a coun- "try warehouseman at such place or places as are

1920

THE KING v. LONDON GUARANTEE AND ACCIDENT CO.

Reasons for Judgment.

"set forth in the Schedule written on the back of this "sheet which is made a part of this Bond, from the "first day of September, 1916, to the thirty-first day "of August, 1917, both days inclusive.

"And this bond is given in pursuance of the *Can-"ada Grain Act,* and amendments thereto.

"Now the condition of this obligation is such that "if upon the granting of such license the Principal "shall duly keep books and accounts, insure grain, "issue and deliver receipts and tickets, keep, store "and deliver grain, render all accounts, inventories. "statements and returns prescribed by law, pay all "penalties which the Principal is or may become li-"able to pay under the provisions of the said Act, "and of such other Act or Acts as may hereafter be "in this behalf enacted by the Parliament of Can-"ada, and shall well, truly, faithfully and unreserv-"edly comply with all the enactments and require-"ments of the said Act, or of any Act or Acts, as "aforesaid, and of any Order-in-Council, depart-"mental or other regulation made by competent au-"thority according to their true intent and meaning "as well with regard to such books, accounts, insur-"ance, delivery of receipts and tickets and the keep-"ing, storing, delivering of grain, the rendering of "accounts, inventories, statements, returns and pay-"ment of penalties as to all other matters and things "whatsoever referred to or required of the Prin-"cipal by the said Act or Acts and Orders-in-Coun-"cil and regulations whatsoever, then this obligation "shall be void and of no effect, but otherwise shall "be and remain in full force and virtue."

Then a license was issued in the following terms:

"The Department of Trade and Commerce

Form B. 322

" Western Inspection Division.

"License No. 892.

"License to operate a country elevator or ware-"house.

"To whom it may concern:

"Application having been made as required by the "Statute herein cited Joseph Gorbovitsky, of Re-"gina, Saskatchewan, are hereby licensed to operate "a country elevator at Edenwold, Sask., as described "in the said application, he having filed the neces-"sary bonds, and paid the License Fee of Five Dol-"lars under the provisions of the *Canada Grain Act,* "and amendments thereto, on the following condi-"tions:

"1st. This License shall expire on the thirty-first "day of August, 1917.

"2nd. If any elevator or warehouse is operated in "violation or in disregard of the Law, the Li-"cense shall, upon due proof thereof after pro-"per hearing, and notice to the Licensee, be re-"voked by the Board.

"Issued at Fort William, Ont., this 2nd day of "September, 1916.

"C. BIRKETT,

(SEAL) "Secretary, Board of Grain Commissioners

"This License is not transferable."

As a prelude to answering the first question it must be found whether or not the sum mentioned in the bond to be paid, on a breach, is a penalty or liquidated damages, and on this distinction between

1920

THE KING v. LONDON GUARANTEE AND ACCIDENT CO.

Reasons for Judgment.

liquidated damages and penalty reference should be had to Halsbury, vol. 3, page 96, and vol. 10, page 328, et seq.

Both the bond and the Act (sec. 155) make use of the adjective *penal* in qualifying the sum mentioned in the bond. However, as laid down by 3 Halsbury, page 96, par. 198: "The fact that the sum is des-"cribed as a penalty or as liquidated damages is not "conclusive. Indeed it is almost immaterial." and also at page 329, par. 605, vol. 10: "(2) But though "the parties themselves call the sum to be paid liqui-"dated damages, and even if they go so far as to "state in the contract that it is not a penalty, this "will not prevent the court in a proper case from "holding that it is in fact a penalty." And "(1) "Where the parties themselves call the sum made "payable a penalty; the *onus* lies on those who seek "to show that it is liquidated damages to show that "such was the intention."

There is in this case no such evidence. And again as said in Halsbury "whether the sum is a penalty or "liquidated damages in any given case is a question "of construction for the judge alone."

Having disposed of the effect of the word "*penal*" used in the description of the bond, it is now of importance to find the rule to decide as to whether or not the bond is in the nature of a penalty or liquidated damages. See Halsbury, vol. 3, p. 96:

"(2) Where the condition depends upon the per-"formance of one act or the happening of one event "only, and the sum in which the obligor is bound is "not largely in excess of the possible damages which "may be sustained by the breach, it is *primâ facie* "liquidated damages.

"(3) Where the amount of the damages sustained "by breach of the condition must necessarily be "small in proportion to the sum in which the obligor "is bound, the sum is a penalty.

"(4) Where the condition is for the performance "of several acts, or happening of several events, "some of which are of serious and others of trifling "or less serious importance, the sum in the obliga-"tory part of the bond is a penalty." See also Hals. vol. 10, pp. 330 et seq.

Approaching in that light the consideration of the bond in question, it is quite manifest that the conditions of the bond consist in the performance of many acts, of which some may be of great, while others are of trifling importance. If, for instance, the warehouseman had been condemned, upon summary conviction, to pay the sum of $10 or $25 as provided by some of the sections (secs. 236 to 245) of the Act, it could not be contended—especially when the bond itself provides specifically for the payment of "all "penalties which the Principal is or may become lia-"ble to pay under the provisions of the said Act"—that he should in addition thereto or in satisfaction of the said sum of $10 or $25, as the case may be, for the breach of which he was condemned under summary conviction, pay the total amount of the bond. It must be consonant with the loss suffered.

The defendants under the bond are liable for all the penalties determined upon summary conviction, and any loss sustained, by the breach of any of the conditions therein mentioned, and not for the full amount of the bond in the case of a breach of trifling importance.

1920

THE KING v. LONDON GUARANTEE AND ACCIDENT CO.

Reasons for Judgment.

The bond was given by the obligor, with the Principal, to the obligee for the due performance of the statutory duties attaching to the warehouseman of a country elevator, and these duties being of various kinds and importance, some of a *certain* nature and amount, some of *uncertain* nature and amount, and only one large amount is mentioned in the bond, the bond cannot be but a penalty bond, because as the amount mentioned in the bond cannot be regarded as liquidated damages in respect of some of the stipulations, it ought not to be so regarded in respect of the others.

Therefore the bond is a penalty bond. In a case of a breach of trifling importance, only the actual loss is recoverable, and not the full amount of the bond. The liability will be the loss in respect of the breach, which must not be *extended* beyond its legal operation.[1]

That brings us to the second question submitted.

In all of the thirteen cases coming under this head, and mentioned in the Admissions above referred to, in compliance with sec. 157 of the *Canada Grain Act, at the time of the delivery* of the grain, at the country elevator, the warehouseman issued a *warehouse storage receipt* for the same. In no case was there either a *"cash purchase ticket"* or a storage receipt for special binned grain issued at such time. Therefore the question, which was discussed at trial, with respect to the redeeming a "cash purchase ticket" as provided by sec. 160, does not arise.

1 Pollard v. Porter, et al. (1855), 69 Mass. (3 Gray) 312; U. S. v. Gurney et al., (1808), 4 Cranch's R. 332; Pond v. Merrifield, (1853), 66 Mass. (Cush.) 181; Mure v. Wilyes, (1810), Pyke's R. 61; Patterson v. Farran, (1811), 2 R. J. R. (Que.) 180; Kemble v. Farren, (1829), 6 Bing., 141.

A brief summary of these cases may be given, as follows:

Kennedy—Delivery of grain in January and February, 1917, storage receipt did not show *gross weight, grade* and dockage. Sold in May following to Gorbovitsky, and received a cheque, which was afterwards dishonoured, in payment of unpaid balance claimed herein.

J. W. Hubick—Delivery in February, 1917, No *gross* weight and dockage shown on storage receipt. Sold in July following for which he received a cheque, which was afterwards dishonoured, in payment of unpaid balance claimed herein.

C. Hubick—Delivery in November, 1916. Storage certificate did not *show gross* weight or dockage. Received a cheque, which was afterwards dishonoured, in payment of unpaid balance claimed herein.

Wilson—Delivery in November, 1916. Storage certificate did not show gross weight, dockage or grade. Gorbovitsky paid $1,681 on account of $1,957, and told him he could not give a cheque at that time for the balance which is still unpaid and for which claim is made herein.

Redgrave—Delivery of grain in March, 1917. Storage receipt does not show gross weight, dockage, or grade. Grain sold to Gorbovitsky in June following for $655.20, upon which he paid $544, and said he could not then give him cheque for unpaid balance which is herein claimed.

Bennett—Delivery in March, 1917. Storage certificate does not disclose gross weight, dockage or grade. Sold in May following for $1,179.75, upon which $1,074 were paid, leaving an unpaid balance for which claim is made herein.

1920

THE KING v. LONDON GUARANTEE AND ACCIDENT CO.

Reasons for Judgment.

Boulding—Delivery in April and May, 1917. Sold at end of May or beginning of June for $2,774.60, upon which $1,100 was paid, and was told at time of sale a cheque could not be given, and it was agreed the unpaid balance claimed herein, was to be remitted at some subsequent date.

Gelhorne—Delivery in November and December, 1916, and May, 1917. Sold in June, 1917, for $2,795.37, upon which he received $1,000, leaving a balance of $1,795.37, which was to be paid in two or three weeks, and a cheque, which was afterwards dishonoured, was given in July for the unpaid balance claimed herein.

Hoffman—Delivery during May, 1917. Sold on the 30th May, and a cheque which was afterwards dishonoured issued for unpaid balance claimed herein.

Tiefenbach—Delivery during May, 1917. Sold on 26th May, and was given a cheque which was afterwards dishonoured, in payment of the purchase price claimed herein.

Moss—Delivery prior to June, 1917. Sold on 20th June, 1917, and received a cheque, which was afterwards dishonoured, for small unpaid balance claimed herein.

Mang—Delivery during February and March, 1917. Sold about 23rd May, 1917, and received cheque for unpaid balance when told to keep cheque for a little while, that there was no money to pay the cheque, but that funds were expected shortly. The cheque was subsequently dishonoured and this unpaid balance is claimed herein.

Frombach—Delivery during March and April, 1917. Sold sometime in May and received a cheque,

which was afterwards dishonoured, in payment of unpaid balance claimed herein.

It has already been said that a *warehouse storage receipt* was in every case issued at the time of the delivery.

One must also bear in mind it was stated, in the course of the argument of Mr. Taylor, that there was no question arising about the grade, "that it was admitted, they all knew it.

Then there remains this small charge that in some cases the storage receipt did not disclose the gross weight and the dockage. While that is recited in the admission, it does not appear that any of the claimants quarrelled with the quantity of dockage, and their claim is made without any complaint in that respect—they impliedly admit the correctness of the same, and no loss or damage was suffered thereby. Moreover, that would appear to be *de minimis,* especially when the statutory *forms* were used and when you have the net weight in each storage certificate—and there are cases when there would be no dockage. No evidence has been adduced that there should be dockage in the cases where complaint is made, the evidence being silent on that question.

I must find, under the circumstances and the evidence, that the defendant Gorbovitsky in all of those thirteen transactions, complied with the requirements of the statute, issuing at the time of the delivery, as provided by 2 Geo. V. 1912, ch. 27, sec. 157, a warehouse storage certificate.

There is no inhibition placed by the statute upon the operator, of a country warehouse whereby, after having issued such storage certificate in compliance with sec. 157, to prevent him from buying, as is the case of the operator of a terminal elevator whereby

1920

THE KING v. LONDON GUARANTEE AND ACCIDENT CO.

Reasons for Judgment.

the latter is specifically forbidden to do so by sec. 123 of the Act.

It is quite plain, without indeed any shade of ambiguity, that no restriction exists in respect of buying or selling grain after its delivery, under the provisions of sections 157 and 160, and it would be making a material addition to the statute to place such a construction upon these two sections. To insert this inhibition in the statute by implication, would not be construing the Act of Parliament, but it would be altering it and enlarging the provisions which the Legislature had thought fit to make with respect to the subject matter.[1]

"If the words of the statute are in themselves pre-"cise and unambiguous, then no more can be neces-"sary than to expound those words in their natural "and ordinary sense."[2]

From the very significant fact, that the operator of a terminal elevator, which is indeed very different from a country elevator, is prevented by the Act itself from buying or selling grain, and that the Act is quite silent in that respect when dealing with the country elevator, it is quite obvious, under the maxim of *"Expressio unius est exclusio alterius"* that the Legislature had never the intention of placing a restriction upon the operation of a country elevator in that respect.

An ordinary grain dealer, outside of elevator operators, track-buyers, and commission merchants, who have special duties assigned to them under the Act, does not require a license or to be bonded to carry on his business.

[1] Beal, Rules of Interpretation, 2nd ed. 335.

[2] The Sussex Peerage case, (1844), 11 Cl. & F. 85, 143.

The operator of a country elevator after discharging his statutory duties, as above mentioned, has always his common law rights subsisting to buy or sell, provided such rights are not in derogation of any of the provisions of the statute. Nothing short of legislation could take away these common law rights.

Therefore, I find that the bonds in question do not cover any of the purchases or sales above mentioned.

Coming now to the third question submitted in respect of the track operator, it will be convenient to set out in a summary manner the facts arising in that connection.

On or about the 28th July, 1916, the defendant Gorbovitsky made an application to the Board of Grain Commissioners, for a license to operate for the crop year of 1916-1917, under the provisions of section 218, of the Act, as a *track-buyer* of grain, and entered into a bond of $6,000; whereupon, on the 1st September, 1916, a license was issued to him to carry on the business as such track-buyer, the whole as more fully set forth in paragraphs 8, 9 and 10 of the Information.

Now it might be casually said that the bond given by the track-buyer is very different from that given by the operator of a country elevator. The track-buyer gives security for the payment of the purchase money, while the operator of a country elevator gives security in the main to carry on his business in the manner mentioned by the statute, and the farmer receives no help from such a bond when he sells to the operator of the country elevator at any time after the delivery of his grain.

1920

THE KING v. LONDON GUARANTEE AND ACCIDENT CO.

Reasons for Judgment.

The main, and in the result the only, question to be decided under this head is whether, in the case submitted, the grain in question was bought by a *track-buyer in car lots on track.*

In the month of April, 1917, A. W. Vanstone, who is the owner and operator of a grain elevator and flour mill in Regina, loaded two carloads of wheat from his elevator in cars Numbers 28,266 and 505,-865, which cars were respectively unloaded into terminal elevators at Duluth and Superior on April 23rd and May 1st, and terminal warehouse receipts were issued therefor.

Vanstone sold these two carloads of wheat to Gorbovitsky on May 5th and May 9th respectively for the total price of $6,234.32, and received $6,000 on account and a cheque of $234.32 for the balance which still remains unpaid.

Now, under the evidence, which is part of the admission filed, Vanstone says that at the time of the sale of these two cars he "imagined the wheat was "not unloaded, that it would be on the track, but "he is not sure of that. He did not know that himself," and Gorbovitsky, in his testimony, supports and corroborates Vanstone's evidence, and adds he did not know whether these cars had been out-turned at Duluth when the sale took place.

It is well not to overlook that Vanstone who was the operator of a flour mill and the operator of an elevator who would be presumed to know all his rights under the *Grain Act,* did not ask from Gorbovitsky at the time of this sale, for the statutory "track-buyer's purchase note," and the inference would be he did not himself treat the transaction as that of a track purchase.

1920

THE KING v. LONDON GUARANTEE AND ACCIDENT CO.

Reasons for Judgment.

Upon this evidence, however, the Crown claims (and the insurance company contends to the contrary) that Gorbovitsky and Vanstone believed the grain was on the track at the time of the sale and that it should be treated as such.

I am unable to accede to this contention, since the sale was actually made at a time when the wheat was not in *car lots on track;* but actually turned into terminal elevators. Moreover, mutuality of mistake cannot enable the parties to change the nature of the transaction and much more so where it would affect the rights of third parties. *Non fatetur qui errat.*

Then during the month of May, Vanstone also sold to Gorbovitsky, besides the two above mentioned cars, a carload of feed wheat which was then in his elevator at Regina, and which he subsequently loaded in car No. 55,586, and for which Gorbovitsky gave his cheque.

These three cheques, as well as a draft for the same amount which was duly accepted by Gorbovitsky, were dishonoured, and these unpaid amounts are claimed herein.

This sale of wheat feed was made of grain actually in the elevator and not in *car lots on track.*

Now, we must find, what, under the statutes constitutes a "track-buyer". The sections of the Act which specifically deal with a track-buyer are sections 218, 219, 220 and subsection (s) of section 2.

This subsection (s), which is part of the interpretation section of the Act, defines a track-buyer, as follows: "(s) 'track-buyer' means any person, firm or company who buys grain in car lots on track". And subsection (2) of section 219, as a prelude to defining the duties of a track-buyer, states as a

1920

THE KING v. LONDON GUARANTEE AND ACCIDENT CO.

Reasons for Judgment.

condition precedent "Every person *who buys grain on track in car lots.*"

Maxwell, on Statutes, 5th ed. at page 4, et seq., lays down the rule of interpretation for a case like the present: "The grammatical and ordinary sense "of the words is to be adhered to . . . . When the "language is not only plain but admits of but one "meaning, the task of interpretation can hardly be "said to arise," etc.

We have quite a long *catena* of decisions upon this preposition "on", as found in section 20 of the *Exchequer Court Act,* both by this Court and the Supreme Court of Canada. In re *Chamberlin v. The King,*[1] it was held that the words "on a public work" in sec. 20 of the *Exchequer Court Act,* R .S. C. 1906. ch. 140, "are descriptive of the locality, and to make "the Crown liable etc., ... such property must be "situated *on* the work when injured." His Lordship, Sir Louis Davies, at page 353, says: "With the policy "of Parliament we have nothing to do. Our duty "is simply to construe the language used, and if "that construction does not fully carry out the intention of Parliament, and if a wider and broader "jurisdiction is desired to be given the Exchequer "Court the Act can easily be amended." This decision has been endorsed and followed by the Supreme Court of Canada in several other cases.[2]

Accepting this method and manner of construction it must be found that the purchases in question, to come within the statute, must be made of "*grain in car lots on track*". In no one of the three cases

[1] (1909), 42 Can. S. C. R. 350.

[2] Paul v. The King, (1906), 38 Can. S. C. R. 126; The Hamburg American Packet Co. v. The King, (1902), 33 Can. S. C. R. 252; Olmstead v. The King, (1916), 30 D. L. R. 345, 53 Can. S. C. R. 450; Arsenault v. The King (1916), 16 Can. Ex. C. R. 271, 278, 32, D. L. D. 622, 625, and other cases.

under consideration did the track-buyer buy grain *on* track. On one occasion the grain of the two cars had already been discharged in terminal elevators, and in the last case the grain was in Vanstone's elevator at the time of the sale.

Therefore, the sale of these three cars of grain does not amount to the case of a track-buyer buying grain in car lots *on* track, as defined by the statute, and further does not come within the bond in question.

Here again it may be said, as was said with the thirteen other cases, that a track-buyer after discharging his statutory duties, when *buying grain in car lots on track,* retains his common law rights, provided such rights are not in derogation of any of the statutory provisions.

Following the above mentioned decisions in respect of the words *on* a public work, I must find that the purchase in question was not of grain *in car lots on track,* and therefore that the purchase in question does not come within the ambit of the statute.

I have answered these three questions against the contentions of the Crown, although in the view I have ultimately taken of the case, it had become unnecessary to answer the first question.

Much as I feel like protecting the farmer who accepted these worthless cheques in good faith, the statute does not allow me to extend the relief sought. If Parliament intended to protect cases like those in question, legislation can be resorted to, if the legislator see fit to do so.

The action is dismissed with costs.

Solicitor for plaintiff: *E. L. Taylor,* K.C.

Solicitors for the London Guarantee and Accident Company, Limited: *Coyne, McVicar & Martin.*

1920
March 5.

IN THE EXCHEQUER COURT OF CANADA.

IN THE MATTER OF THE PETITION OF RIGHT OF

GRANT, SMITH & COMPANY, AND McDONNELL LIMITED,

SUPPLIANTS;

AND

HIS MAJESTY THE KING,

RESPONDENT.

Contract, Interpretation of — Evidence — Collusion — Progress — Estimates.

Suppliants contracted with the Crown for the building of two wharves and certain excavations at Victoria, B.C. They were to receive $9.10 per cubic yard for rock excavation and 52 cents for earth; and a certain sum per yard for filling. The Crown had soundings taken and test borings made; and maps showing the result of these measurements were filed. The contractor was to be paid rock prices for everything excepting material which could be removed with a dredge, which latter was to be classified as earth. The volume of all excavated material to be paid for, was that occupied by the material before its removal, to be determined by measurements taken before and after.

The total excavation is not questioned, but suppliants ask to be paid for some 19,000 cubic yards more of rock than the Crown's estimates show, and which the Crown says was material which should be classified as "earth."

Suppliants claim the material could not be dredged but had to be drilled and blasted; nevertheless their own records show that the drill went through it at a rate of between 100 and 336 feet per hour, which could not have been done in hard material; and an analysis of their records shows that as soon as they reached what the Crown admits was rock the rate of penetration falls to between 13 and 21 feet per hour which is a corroboration of the Crown's evidence and plans filed. The Crown also produced samples of material taken from the bottom and sides of the cut, which suppliants claim could not be blasted, yet they admit that some 6,000 yards of material was blasted which would be "earth."

Moreover, there were 51 men on the dredge and drill and not one was brought as a witness to establish the kind of material

excavated, and no evidence of the nature of the material taken out by dredge, was adduced.

Suppliants filed the "progress estimates" subject to objection, but the man who made them was not called, and by the Order-in-Council the Court is to determine the classification notwithstanding the findings or certificates of the engineer.

Held. On the facts stated, that the progress estimates did not in themselves make proof of their contents, and were not admissible in evidence unless the person who made them was called as witness; and that the material in question was not rock but earth within the meaning of the contract, and the estimates of the Crown were sufficient, and that part of suppliant's claim for the surplus should be dismissed.

2. That there was collusion between the resident engineer and the contractors and an attempted fraud was intended by him and the representatives of the contractors and that the estimates being certified by the resident engineer should be set aside.

3. Where the contract and specifications provide for the payment of a stated sum to the contractor for excavation and a stated sum for filling, and where the filling done was back filling and required no extra handling and was nearer than discharging into the open sea, such work will be considered as part of the excavating and removing operation and will not be deemed filling within the terms of the contract, and nothing will be allowed therefor.

PETITION OF RIGHT filed on behalf of the suppliants claiming against the Crown the sum of $292,-110 for rock excavation, and the sum of $14,703 for earth excavation.

The suppliants also claim the further sum of $27,-169.20 for filling the said works.

The facts are stated in the reasons for judgment.

The case was tried before the Hon. Mr. Justice Cassels, at Ottawa on the 17th, 18th, 19th and 20th days of June, 1919, and later on the 4th, 5th, 6th, 9th and 10th days of February, 1920.

Mr. Lafleur, K.C., and *R. A. Pringle,* K.C., for suppliants.

1920

GRANT, SMITH & CO. v. THE KING.

Reasons for Judgment.

Mr. Tilley, K.C., *Mr. Carter*, K.C., of Department of Public Works, and *F. E. Newcombe* for the Crown.

CASSELS, J., now (this 5th March, 1920) delivered judgment.

A petition of right filed on behalf of Grant Smith & Company, and McDonnell Limited, claiming against the Crown the sum of $292,110, for rock excavation, and the sum of $14,703 for earth excavation.

The suppliants also claim the further sum of $27,169.20 for material deposited as filling in the said works.

The case came on for trial at Ottawa on the 17th June, 1919, and continued during the 18th, 19th and 20th June. A considerable amount of evidence was taken, and on the 20th June, at the request of counsel for the suppliants the trial was adjourned to some day to be agreed upon by the parties.

The trial was resumed on the 4th February, 1920, and occupied the 4th, 5th, 6th, 9th and 10th days of that month. I mention the dates for the reason that before the adjournment of the June sittings, Mr. Davy had been examined, and the suppliants were fully aware of the line of defence proffered by the Crown, and in a position if they were able to do so, to have fortified their case by the production of whatever evidence could be procured. In view of Mr. Tilley's argument as to the failure of the suppliants to call Mr. Maclachlan, and some of the 51 men who were employed on the drill scows, this fact becomes important.

The contract in question was a contract entered into on the 9th March, 1914, between the suppliants of the one part, and His Majesty the King, repre-

sented by the Minister of Public Works of Canada, of the other part. It is a contract for the construction of two wharves at Victoria, and consisted among other works of excavation in earth and rock to a depth of 35 feet at low water over the slips at each side of the wharves, and to a depth of 36 feet over the area covered by the cribs. The contractors were to be paid 52 cents per cubic yard for earth excavation measured in place, and $9.10 per cubic yard for rock excavation measured in place.

Grant Smith & Company, the present suppliants, assigned this contract to one C. E. McDonald, on the 23rd April, 1915. By this assignment, C. E. McDonald was to be paid the sum of $7.00 per cubic yard for rock excavation to be drilled and blasted under the original contract entered into on the 9th March, 1914.

It would appear that C. E. McDonald was not in a position to do the work, and he sublet the drilling contract to McFee, Henry & McDonald, Limited, by a contract which bears date the 13th July, 1915. Under the contract McFee, Henry & McDonald were to receive for the rock excavation measured in place the sum of $4.00 per cubic yard.

The sub-contractors, who may be styled for the purpose of these reasons, the "drilling contractors" proceeded with the work, and claimed to be paid for 40,000 cubic yards of rock excavation.

The resident engineer, J. S. Maclachlan, allowed the drilling contractors a quantity amounting to 32,175 cubic yards of rock excavation, which would have yielded the contractors $9.10 per cubic yard. The Crown admitted that they were entitled to 13,060 yards. The suppliants claim in addition 19,040 yards. There is no contest between the parties as

1920

GRANT, SMITH & CO. v. THE KING.

Reasons for Judgment.

to the quantities of excavation. It is conceded that the total amounted to about 32,175 cubic yards. The suppliants on the one hand claim that the whole of this 32,175 cubic yards should be classified as rock excavation. The Crown contends that of the 32,175 yards of excavated material, only the 13,060 yards should be classified as rock excavation, and that the balance of 19,115 yards should be classified as earth. The difference is large as for the earth excavation, the contract only allowed 52 cents per cubic yard, whereas the rock excavation is to be paid for at the rate of $9.10 per cubic yard. I will deal later with the terms of the contract.

Under the terms of the contract the chief engineer was the sole judge, and had the Crown insisted upon their legal rights, Mr. St. Laurent's final adjudication would have been conclusive.

The question was dealt with at great length before the Public Accounts Committee of the House of Commons, in the year 1916. Subsequently an Order-in-Council was passed, bearing date the 19th September, 1918.

I am dealing only with the major claim in regard to this question of classification. There is a further claim which has to be dealt with later and which is provided for by a subsequent Order-in-Council, to which I will refer.

This Order-in-Council of the 19th September, 1918, recites the contract of the 9th March, 1914, and states: "that a conflict of opinion has arisen between "the Contractors, Grant Smith and Company and "McDonnell, Limited, and the engineer in respect of "the classification of material dredged and removed "by the contractors, the interpretation of the con- "tract and the specifications and the amount due by

"His Majesty to the contractors under the said con-
"tract, the contractors claiming that they are en-
"titled to be paid for a much larger quantity of rock
"excavation measured in place than the engineer has
"certified to in the final estimate;

"That the contractors allege that a large quantity
"of hard material has been drilled, blasted and exca-
"vated by them and that under the specifications and
"contract, this material should be classed as rock to
"be paid for at $9.10 per cubic yard and not as
"earth to be paid for at 52 cents per cubic yard.

The Order-in-Council recites, "the contractors
"further allege that, relying upon the progress re-
"turns of J. S. Maclachlan, resident engineer, the
"progress certificates of the engineer and the receipt
"of progress payments calculated on the said certifi-
"cates, they have paid to their sub-contractors large
"sums of money, and that the engineer has modified
"and varied the quantities of rock excavation men-
"tioned in said certificates; that the quantity of ma-
"terial in dispute as to classification approximates
"19,000 cubic yards."

The Order-in-Council further recites "that the
"contractors have submitted their claim in writing
"a copy of which is annexed to this report, and the
"Minister considers that the said claim may reason-
"ably be referred to the Exchequer Court of Canada
"for determination, subject to such modification of
"the contract or any of the provisions thereof as
"may be necessary to enable the Court to determine
"the proper classification of the excavated material
"certified by the engineer notwithstanding the find-
"ings or certificates of the engineer determining the
"quality or classification of the material excavated."

The Order-in-Council further recites: "The Min-

1920

GRANT, SMITH & CO. v. THE KING.

Reasons for Judgment.

"ister strongly recommends that in the event of a "Petition of Right being preferred and of a fiat be- "ing granted on the petition, authority be granted "for the waiving of the provisions of the contract "and specifications which would or might bar any "of the claims aforesaid, insofar, and insofar only, "as they would prevent a consideration of any such "claim on its merits aside from such provisions.

"The Minister, considering that the said claim "may reasonably be referred to the Exchequer Court "of Canada for determination, subject to such modi- "fication of the contract or any of the provisions "thereof as may be necessary to enable the Court "to determine the proper classification of the exca- "vated material certified by the engineer, notwith- "standing the findings or certificates of the engineer "determining the quality or classification of the ma- "terial excavated, recommends that he be authorized "for the purposes of the said reference to consent to "such modification of the contract as aforesaid.

"The Committee concur in the foregoing recom- "mendation, and submit the same for approval."

A question has arisen and was strongly urged before me by Mr. Lafleur, that under this reference and the petition of right, the suppliants have the right to put in as evidence and to rely upon the progress estimates furnished from time to time by the resident engineer, J. S. Maclachlan. I was of the opinion at the trial, and still adhere to the same view, that these certificates are not admissible in evidence as findings in favour of the suppliants. If the suppliant sought to rely upon statements made by the resident engineer Maclachlan, he should have been called as a witness. On the argument, Mr. Lafleur stated that

they had considered this question, and the view they had taken of the case was that if he were to be called, he should have been called by the Crown. I do not agree with this. It was for the suppliants if they could prove their case, to have proved it in the regular way.

At page 13 of the evidence as transcribed, evidence of statements of Maclachlan was tendered by Mr. Lafleur, Counsel for the Suppliants, and their reception as evidence was objected to by the Solicitor-General who states: "When these Orders-in-Council were "passed, my understanding of the matter was, that "anything that Mr. Maclachlan, the resident engi- "neer, had done, or said or written, or any certifi- "cates he had given, was to be excluded from the "consideration of the case."

"HIS LORDSHIP—What you say is that the whole "question is irrespective of what the engineer did, as "to the quantity (meaning classification).

"*The Solicitor-General*—Yes.

"HIS LORDSHIP—Is there any objection to it going "in subject to objection. I can see the force of your "point. You say the provisions of the contract have "been waived and it comes solely to the question "what the amounts were. The resident engineer's "certificate would not be evidence.

"*Mr. Lafleur*—I only want to fix on the date (re- "ferring to the letter that was tendered).

"HIS LORDSHIP—You could not utilize it for the "purpose of proving quantities.

"*Mr. Lafleur*—No. I only want to fix a date."

It was quite evident that at that time counsel took the same view as I had formed.

1920

GRANT, SMITH & Co. v. THE KING.

Reasons for Judgment.

Further on, after I had been complaining of the difficulty of dealing with the case, the following took place. It was during the examination of Mr. Mallory, at page 146 of the transcribed evidence.

Mr. Pringle states: "We are in a position to show, "I think with fair accuracy, the exact quantity of "hard material and rock removed out of the total "quantity of which there is no dispute of 60,000 "yards.

"HIS LORDSHIP—The engineers are not here.

"*Mr. Pringle*—The reason it reached you was be- "cause of the difference of opinion between the chief "engineer and Mr. St. Laurent. Everybody is wiped "out—you are the sole judge."

Mr. Pringle was counsel for the suppliants in the long investigation before the Public Accounts Committee, and was also one of the counsel in the present case. I think he graphically puts the case in a nutshell, in the language I have quoted; and, his view and mine coincide on the question of the admissibility of these estimates of the resident engineer being utilized as evidence of the classification, in the absence of the engineer to give evidence supporting them. They might just as well adduce evidence of statements made by the resident engineer Maclachlan.

I have dealt with this question, as some stress was laid upon it at the trial, at the same time, in the view I take of the case, I do not think it an important question. The conclusion I have arrived at is that the resident engineer was in collusion with the contractors, and that anything he certified should be set aside. It is impossible, after a thorough consideration of the evidence to come to any other con-

clusion, than that an attempted fraud was intended by the resident engineer and those representing the contractors. I regret to have to use such strong language, but will give my reasons in detail for coming to that conclusion.

The parties interested in obtaining as large a claim as possible are first the resident engineer, J. S. Maclachlan. The present suppliants were represented by J. B. Maclachlan, a brother of J. S. Maclachlan. C. E. McDonald was represented by Gordon Mallory; and the drilling contractors were represented by one Wooley, a member of the firm of drilling contractors, and a witness in the case before me. C. E. McDonald is dead.

It is important in dealing with the case to refer to some clauses of the contract. Clause 23 of the specifications reads as follows:

23. *Excavation*—The materials to be excavated, "consist of earth and rock which shall be removed "separately by two operations of ordinary dredging "and blasting. All the earth overlaying the rock "must be removed first; any quantity of earth which "is supposed to be sand and clay that may be remov-"ed at the same time as the rock, shall be paid as "earth. Over the crib sites, the rock excavation "shall be carried to a depth of 36 feet below datum; "in the slips on each side of the wharf, a depth of 35 "feet shall be obtained. Wherever no rock is found "for the crib sites at elevation 36.0, the dredging "will be carried down to elevation 36.0, or lower if "found necessary, and rubble stone will be deposited "and levelled as a foundation for the cribs. All ma-"terials overlaying the rock that can be removed "with a dredge shall be considered as earth.

1926

GRANT, SMITH & CO. v. THE KING.

Reasons for Judgment.

"The volume of all excavated material for which "the Contractor will be paid, will be that occupied "by the material before its removal and will be de- "termined by measurements taken before and after "its removal. Cross sections will be taken over the "surface of the rock and these measurements will de- "termine the classification of materials.

"Any excavation performed deeper than one foot "below the prescribed grade shall not be paid for."

Clause 56 of the contract, reads as follows:

"56. This contract is made and entered into by the "contractor and His Majesty on the distinct under- "standing that the contractor has, before execution, "investigated and satisfied himself of every- "thing and of every condition affecting the "works to be executed and the labour and ma- "terial to be provided, and that the execution of this "contract by the contractor is founded and based "upon his own examination, knowledge, information "and judgment, and not upon any statement, repre- "sentation, or information made or given by, or "upon any information derived from any quanti- "ties, dimensions, tests, specifications, plans, maps "or profiles made, given or furnished by His Ma- "jesty or any of His officers, employees or agents; "and that any such statements, representation or "information, if so made, given or furnished, was "made given or furnished merely for the general "information of bidders and is not in anywise war- "ranted or guaranteed by or on behalf of His Ma- "jesty; and that no extra allowance will be made to "the contractor by, and the contractor will make no "claim against, His Majesty for any loss or damage "sustained in consequence of, or by reason of any

"such statement, representation or information be-
"ing incorrect or inaccurate, or on account of unfore-
"seen difficulties of any kind."

The schedule is to be found in clause 36 of the contract. The approximate quantities for rock excavation measured in place is stated in the schedule to be 4,300 cubic yards. This was a mistake arising from the fact that only 75 feet was estimated in lieu of 150 feet width of east and west slips, but the difference is not material.

The contract is entered into based upon the engineer's estimates. Mr. Davy, who was the engineer in the employment of the government gives his evidence, and produces maps showing the original soundings and the test borings. There has been no successful attempt to question the accuracy of Mr. Davy's work, and on the contrary, as I will point out, he is fully confirmed by the various witnesses. I will refer later to the evidence of Mr. St. George.

I have referred to section 23 of the specifications where it is provided that the volume of all excavated material for which the contractor would be paid, will be that occupied by the material before its removal, and will be determined by measurements taken before and after its removal. Cross sections will be taken over the surface of the rock, and these measurements will determine the classification of materials.

There is no evidence before me showing the nature of the material that was taken out by the dredge, nothing from which one can arrive at the class of material. There is evidence, however, which to my mind is almost conclusive, taken from the drill records of the drilling contractors themselves, and it is obvious unless one has to abandon all common sense,

1926

GRANT, SMITH & CO. v. THE KING.

Reasons for Judgment.

that if we take those drill records and consider the speed with which the drilling took place, it would be impossible that they should be drilling through material that could not be easily dredged. All the drill records are produced. They have all been carefully analyzed, and there is no dispute as to them. The manner in which they were taken as described by the witnesses, is as follows:

The moment the drill struck harder material, the whistle sounded and the depth below low water was taken. As soon as the drill reached the 35 or 36 feet, as required by the contract, the extent of the penetration of the drill was calculated and this amount was treated and classified as rock, thus bringing up the total. Wooley in his evidence states, as follows:

"Q. Now, if your drill records show you are going "15 to 20 feet an hour, it looks as if they were going "through soft material? A. I would call that rather "soft, yes.

"Q. And if they are going more than 15 or 20 feet "an hour? A. They are going through still softer "material.

"Q. When you can get to material that you can go "through 100 feet an hour? A. It is hardly rock.

"Q. And 250 feet an hour? A. That is earth."

Again:

"Q. I am talking of a dredge like the 'Ajax' or the " 'Puget Sound'. When you get to material that you "can go through at the rate of 40 or 50 feet an hour, "I expect them to scoop it up? A. No, I would not "say they could or could not.

"Q. My information is that any first class dredge "will take that up? A. How did you get that infor- "mation?

"Q. From an engineer. You will hear him before "the trial is over. That would be approximately "right? A. Approximately, I would say so."

In order to bolster up his contention, Wooley asserts that there was a weight of four tons resting on the drill, which would practically force it to penetrate. It would penetrate anything of compacted material.

Belcore also states that there was a weight on the drill of four and a half tons. Both Wooley and Belcore must have known that this weight did not rest upon the drill. The weight referred to was a weight on the drilling apparatus, but was not allowed to rest on the drill rods. This is shown by Donaldson's evidence, and by other evidence, and it is manifest from what the witnesses state that had that weight rested on a drill from 30 to 50 feet in length it would have buckled. I think both of these witnesses made these statements with a view as far as possible to try and explain away the indisputable evidence against them furnished by their own drill records.

The computations are given by Mr. Davy in his evidence, and also by Holgate. Mr. St. George, in his evidence, tabulates the rate of speed. He refers to a plan, Exhibit "A, B", which shows the rate of speed of penetration over all the sections.

For instance referring to the speed of penetration, taking section 37, it appears that the rate per hour was 96 feet, 117 feet, 36 feet, 154 feet, 295 feet, 162 feet, 147 feet, 151 feet, 190 feet, 215 feet, 186 feet, 103 feet, 103 feet, and then when it gets into what is material that ought to have been drilled it drops to 17 feet, 21 feet, 18 feet, 13 feet, 13 feet, and so on it goes through each of the sections.

1920

GRANT, SMITH & CO. v. THE KING.

Reasons for Judgment.

Taking up section 38, we find 191 feet, 153 feet, 232 feet, 235 feet, 152 feet, 347 feet, and so forth.

Then taking section 39, we find 158 feet, 199 feet, 230 feet, 290 feet, 312 feet, and 336 feet, and so with the other sections.

This evidence has not been in any way met by the suppliants, and there is but one possible conclusion to be deduced from it, namely, that Mr. Davy's original soundings and measurements are practically correct.

Mr. St. George points out what is a very significant fact, that if Davy's original soundings are taken, it will appear that if this material through which it is said the drill penetrated at these rapid rates per hour are treated as earth, they practically correspond with Davy's original soundings prepared with care for the letting of the contract.

Now these facts were all brought to the notice of the counsel for the suppliants at the early trial in June. There has been no attempt made to refute them, and, I think there is great force in Mr. Tilley's contention that considering there were 51, at least, employees on the drill and the dredge, some one or other of them could have been brought down to corroborate the petitioners' claim. None of them have been examined.

There is nothing to proceed on except these original soundings and borings of Mr. Davy, and the evidence derived from the drill records. In addition to all of this, samples have been produced after the excavation was finished. They are taken from the bottom of the excavations; and from the sides of the excavations, and they all corroborate the soundings and borings of Mr. Davy.

The evidence of Mr. Valiquet is not of any force in my judgment, when it appears how his report came to be made. He evidently assumed at that time that the resident engineer was honest and accepted his statements. Mr. St. Laurent's evidence as to his examinations are convincing. I do not see anything inconsistent between his statements at the trial and his report.

Considerable comment is made upon the impossibility of using dynamite in material of that class. The witnesses refer to it by the term powder. In point of fact it is the same thing, but they mean dynamite.

If fraud was intended, it was easy to get rid of a certain amount of dynamite, where the object is to obtain $9.10 instead of 52 cents a yard. Mr. Wooley admits that they drilled and blasted, at all events, about 6,000 yards that should have been classified as earth. He puts it in this way:

"We did drill and blast approximately 42,000 "yards out of a total of 60,000 yards, that was in "the areas to be excavated. And my own best judg- "ment being on the work from day to day, leads me "to the opinion that there was ten or fifteen thou- "sand, not to exceed 15% of the material should "properly be classified as earth. That is, roughly "about 15%—that is about 6,000 yards."

He states further on, at page 35, as follows: "I "think I stated a few moments ago that there was a "quantity of 6,000 cubic yards in my best judgment "that was drilled and blasted through, but on which "we were not entitled to rock prices but should have "been classified as earth."

If they could drill and blast 6,000 cubic yards of material which should have been classified as earth, I

1920

GRANT, SMITH & Co. v. THE KING.

Reasons for Judgment.

do not see why they could not have been able to drill and blast in a similar manner the balance.

Mr. Wooley's evidence as to how he arrived at his estimate before tendering for the drilling work, is of a very loose character. He made no tests, but drew his conclusions from the plans which had been prepared and which he saw in the government office. He went to the shore apparently and took a bird's eye view of the situation, and made a few tests along the shore from a rowboat. He did not attempt to make any classification, and he also states that he had nothing to do with the making up of the estimates.

The other witnesses called for the suppliants hardly afford them much comfort. For instance, Irvine, who was called, was one of the inspectors. He points out that there was no classification in any work returned by him. He says: "I had nothing to do with the classification itself. That was a matter for the engineer."

"HIS LORDSHIP—But there is nothing on record so "far as your returns go, which would show—from "which a classification could be made? A. No.

"*Mr. Lafleur*—Q. You were acting for a time as "assistant engineer, and I suppose as such you were "doing some classification? A. No, I did not classify.

"Q. You did not classify? A. That was a matter "for the resident engineer?

"Q. Do you know on what he based himself for "making the classification? A. No.

Smith, an inspector called for the suppliants, puts it:

"Q. And you were satisfied when you took the ele- "vation of the hard material or rock? A. I was not "satisfied.

"Q. Why did you make your return as to the cor-"rectness of elevation of rock? A. By instruction of "the engineer, Mr. Bolitho, and by Mr. Maclachlan.

"HIS LORDSHIP—You said you were not satisfied? "A. He asked me was I satisfied that the drill was "on solid rock.

"Q. Or hard material? A. I was not satisfied.

"HIS LORDSHIP—But you returned according to "that? A. No, I returned according to my instruc-"tions."

And he explains how he went to Maclachlan to explain to him why he was dissatisfied, and he got his orders.

Jones, another inspector, refers to the manner in which the work was done. Referring to the question put to him, that they were blasting stuff that need not be blasted, he says: "Of course I kept my mouth shut."

"Q. In your opinion were they drilling and blast-"ing where there was no necessity for it? A. They "were.

"Q. And to what extent? A. To a considerable extent, etc."

These are witnesses called on behalf of the suppliants. There is considerable evidence to show that in point of fact during a portion of the work, a drill preceded the dredge.

It is useless for me to go further into details. It would practically mean a repetition of nearly all the evidence adduced at the trial.

The importance of the case, and the length of time that was occupied, has occasioned me to perhaps give more detailed reasons than I otherwise would have done. As I said before I do not think any reliance can be placed upon the progress estimates furnished by the resident engineer.

1920

GRANT, SMITH & Co. v. THE KING.

Reasons for Judgment.

I think the allowance made by Mr. St. Laurent of 13,060 cubic yards for rock excavation is ample and liberal, and I so find.

If figures have to be arrived at in order to ascertain what amount in dollars and cents on these findings should be allowed, counsel can agree among themselves.

The other claim is a claim made for back filling deposited in the cribs. That has been referred to in a similar manner by the Order-in-Council of the 29th November, 1918, and the claim made for this filling is for the sum of $27,169.20 for material deposited as filling for the works.

At the trial I was under the impression that this filling was filling for the cribs, and that it required extra handling in order to get the material from the scow into the cribs. I find, however, I was mistaken.

The filling in question is back filling and required no extra handling, the scow merely entering the place where the filling was to be deposited, and discharging the material from the scow in precisely the same manner in which it would have been discharged into the open sea had the material been taken to the sea.

The fact that the contractor was allowed to deposit this filling where he did, saved the contractor from taking it further away, and I think Mr. St. Laurent's view under these circumstances is correct, and that nothing can be allowed on this item.

The suppliants must pay the costs of the action.

Solicitors for Suppliants: *Pringle, Thompson, Burgess & Côté.*

Solicitor for the Crown: *The Hon. Hugh Guthrie,* K. C., Solicitor-General.

IN THE EXCHEQUER COURT OF CANADA

1920

March 15.

IN THE MATTER OF THE PETITION OF RIGHT OF

PIERRE EDOUARD EMILE BÉLANGER,

NOTARY, OF THE CITY OF QUEBEC,

SUPPLIANT;

AND

HIS MAJESTY, THE KING,

RESPONDENT.

Expropriation—Title to land—Alienation of Public Domain—Power of King of France under French regime—Compensation—Inflated value.

The original title to the land in question dates back to the 10th March, 1626, under the hand of the Duc de Vantadour, on behalf of the King of France, which was subsequently revoked under an Edict of the King of France with all previous concessions, with the object of transferring such titles to La Compagnie de la Nouvelle France. This Company, however, on January 15th, 1637, conveyed the same lands, to the suppliant's representatives, which conveyance was on the 12th January, 1652, confirmed by a title by M. de Lauzon, then Governor of New France; and finally these primordial three grants were further confirmed on May 12th, 1678, by Louis XIV., King of France, granting total *amortissement* of the said land.

This title was attacked on the ground that it was beyond the right of a King of France to alienate the public domain under the *Ordonnance de Moulins* of February, 1566.

Held, That the power to alienate at that time, when the laws of the Princes were supreme, resided in the King of France who could in derogation of the said *Ordonnance de Moulins* thus alienate the public domain.

2. While the sale of property in the immediate neighborhood of the property expropriated is cogent evidence of the market value thereof, yet if such neighboring property has changed hands under special circumstances and at prices that are not established as market prices, such transfer of property cannot be taken as a criterion of the value of the property.

3. Where the value placed upon a property by certain witnesses is inflated in view of the uses to which it can be applied, but only upon the expenditure of very large sums of money which

1920

BELANGER v. THE KING.

would make it unprofitable and impracticable as a commercial proposition, such valuation is not a proper basis of the market value of the property.

PETITION of Right to recover compensation from the Crown for certain lands taken on the shores of the St. Charles River near the City of Quebec.

The facts are stated in the reasons for judgment.

The case was tried at Quebec, on the 23rd, 24th, 25th and 26th days of February, 1920.

A. Marchand, K.C., and *Gordon Hyde,* K.C., for suppliant.

E. Lafleur, K.C., *E. Belleau,* K.C., and *W. B. Scott* for respondent.

Reasons for Judgment.

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

This matter now comes before the Court by way of a new trial under the hereinafter-mentioned circumstances and much I have said in my reasons for judgment touching the first trial has to be repeated here.

The suppliant, by his petition of right, and his reply to the amended statement in defence of the Crown, seeks to recover the sum of $800,085.65 (the same amount being still claimed even after the abandonment) as compensation for injurious affection to the land abandoned and returned to him since last trial, as well as for the value of certain lands expropriated from him by the Crown, on the 13th January, 1913, for the purposes of a public work of Canada, namely for the construction, maintenance and repair of the Harbour of Quebec, and the improvement of navigation in the River St. Charles, at Quebec.

This Court has already, on the 28th June, 1917, pronounced judgment in this case upon the pleadings as they originally stood[1] and that judgment having been appealed to the Supreme Court of Canada, that Court, on the 4th February, 1919, without expressing any opinion upon the merits of the case, ordered a new trial which has now come before this Court and upon which the present judgment is rendered.

Following the judgment of the Supreme Court of Canada ordering a new trial, the Crown, in pursuance of sec. 23 of the *Expropriation Act,* R.S.C. 1906, ch. 143, filed, on the 22nd March, 1919, in the Registry Office, a declaration whereby it abandoned 1,418,310 sq. ft. of the 1,863,599 sq. ft. of lot 560 expropriated in 1913, whereby these 1,418,310 sq. feet became revested in the said suppliant from that date.

As a result of such abandonment the Crown still expropriates, from the front of this lot 560—1,083 feet on a depth of 340 feet on the east and 500 feet on the west, thus taking in all from lot 560, 455,289 sq. feet, as shown on plan, Exhibit No. 1.

Furthermore the respondent also filed at trial, the following undertaking, with respect to the 445,289 sq. feet expropriated from lot 560, to wit:—

"UNDERTAKING ON BEHALF OF THE CROWN."

"The Attorney General of Canada, on behalf of "His Majesty, in the right of the Dominion of Can-"ada, being thereunto duly authorized by Order-"in-Council of the 18th February, 1920, undertakes "and consents that so far as concerns any matters "under the control of the Dominion Government the "suppliant and his successors in title may, without

[1](1917), 17 Can. Ex. C. R. 333, 42 D. L. R. 138.

1920

BELANGER v. THE KING.

Reasons for Judgment.

"further assurance or consent on behalf of His "Majesty, enjoy the same rights of access to and "egress from the portion of the property described "as No. 560 on the official cadastre of the Parish "of St. Roch North in the County of Quebec East, "Province of Quebec, referred to in the notice of "abandonment signed by the Honourable Frank B. "Carvel, on the 21st day of March, 1919, and col- "oured red on the plan annexed to the said aban- "donment, over the southerly boundary thereof, as "he previously had over the southerly boundary "of his property as it existed at the date of the "expropriation; and that the suppliant shall hence- "forth have the same right to erect and maintain "structures or works on the southerly boundary of "the portion of said lot so abandoned as he formerly "had to erect and maintain such structures or works "upon the former boundary along low water mark, "subject always to the provisions of the *Navigable "Waters Protection Act.*"

In the result the lands taken herein are composed of two different lots, to wit:—Of part of lot 513, containing an area of..... 295,652 sq. ft.
the same as at the first trial, whereas by the original expropriation the whole of lot 560, containing an area of..... 1,863,599 sq. ft.
had been expropriated, the Crown had since abandoned and returned to the suppliant..... 1,418,310 sq. ft.

Thus leaving a balance of..... 445,289 sq. ft. 445,289 sq. ft.

Making the total area expropriated at this date..... 740,941 sq. ft.

for which the suppliant is still claiming the sum of $800,085.65 including a claim of damages for injurious affection to the part returned and revested in the suppliant.

The Crown denies the suppliant's title and makes no offer by its statement in defence; but declares that, if the suppliant proves title, a reasonable sum, ascertained under the provisions of *The Expropriation Act,* should be paid him for the value of the land taken and for damages, if any.

On this question of title, I cannot do better than embody herein what I have said in my judgment of the 28th June, 1917, that is to say:—

The original titles of concession of the lands in question go back to one of the first French regimes of our Colony.

The first title consists in letters-patent issued on the 10th March, 1626, by Henri de Levy, Duc de Vantadour, Lieutenant General de sa Majesté le Roi de France au Gouvernement de Languedoc, Vice-Roy de la Nouvelle France, whereby the following piece of land, called Seigneurie de Nôtre Dame des Anges, was granted to the Jesuits, viz.: "La quantité "de quatre lieues de terre tirant vers les montagnes "de l'ouest ou environ, scittuées partye sur la riv- "ière St. Charles, partye sur le grand fleuve St. "Laurent, d'une part bornées de la rivière nommée "Ste. Marie, qui se décharge dans le susdit grand "fleuve de St. Laurent, et de l'autre part, en montant "la rivière St. Charles, du second ruisseau qui est "au dessus de la petite rivière dite communement "Lairet, lesquels ruisseaux et la dite petite rivière

1920

BELANGER v. THE KING.

Reasons for Judgment.

"Lairet se perdent dans la dite rivière St. Charles,: "item nous leur avons donné et donnons comme une "pointe de terre avec tous les bois et *prairies* et "*toutes autres autres choses* contenues dans la dite "pointe scittuée, vis-à-vis de la dite rivière Lairet, "de l'autre coste de la rivière St. Charles, montant "vers les Pères Recoletz d'un coste et de l'autre "coste descendant dans le grand fleuve."

Subsequently thereto, by an *Edit* of the King of France, all concessions made were revoked with the object of transferring all such titles in La Compagnie de la Nouvelle-France. On the 15th January 1637, however, La Compagnie de la Nouvelle-France granted to the Jesuits the lands above described, confirming thereby the first grant of the Duc de Vantadour, including *"les bois, prez, lacs, etc."*

In compliance with an *ordonnance* of the 12th January, 1652, with respect to *"la confection d'un papier terrier contenant le dénombrement des "terres mouvantes, tant en fief qu'en roture,"*— Monsieur de Lauzon, conseillor ordinaire du Roi en ses conseils d'Etat et privé, Gouverneur et Lieutenant-Génèral pour Sa Majeste en la Nouvelle-France, étendue du fleuve St. Laurent, did, on the 17th January, 1652, again grant and confirm the previous grants of the lands in question, "mesme "les prez que la mer couvre et découvre a chaque "marée."

Then under a Royal *Edit et Ordonnance,* being an Arrêt du Conseil d'Etat du Roi, bearing date, at St. Germain-en Laye, the 12th May, 1678, the King of France, Louis XIV, granted total *amortissement* of the lands referred to in the above grants, with the object of removing any doubt as to the title granted

the Jesuits by the Duc de Vantadour, la Compagnie de la Nouvelle-France and le Sieur de Lauzon. This deed of *amortissement,* which was registered at Quebec, on the last day of October, 1679, also mentions in the description of the lands, *"les pres que la mer "couvre et découvre a chaque marée."*

It has been contended that all of these grants did not divest the Crown of its ownership in these foreshores and beds of navigable rivers which form part of the public domain, and which cannot be alienated; resting for this contention upon l'Ordonnance de Moulins, of February, 1566, by Charles IX, which is to be found in the Recueuil d'Edits et Ordonnances Royaux, by Neron and Girard, at p. 1099, whereby it is forbidden to alienate the public domain, except under the circumstances therein mentioned, but the present case does not come within such exception.

There can be no doubt that this doctrine has been the basis and foundation of the old public law in France. It was supported by the authors, and maintained by the courts down to the time of the Revolution, when the law governing the public domain was subjected to material modification. However, the old doctrine was followed by the Code Napoleon, art. 538, which afterward found its way in our art. 400, C.C.P. This law, however, was necessarily subject to easy modifications under the unlimited powers possessed by the King.

Then it must be said that a number of *Edits et Ordonnances* passed subsequent to the Ordonnance de Moulins were cited, whereby part of the public domain was allowed to be sold and alienated, and in some of these, the grant goes so far as to say that it thereby derogates to that effect, as much as need be,

1920

BELANGER v. THE KING.

Reasons for Judgment.

from all the laws, *ordonnances et coutumes* to the contrary.

And this right to alienate part of the public domain, by the King of France, has always been recognized by the Courts of France even subsequent to the *Edit* de Moulins.[1]

Authorities have also been found to the effect that this right has been recognized in France since the Revolution.[2]

And after the cession many laws were passed in Canada recognizing the validity of the grants made before 1760.[3]

After the Revolution, the authors assert that all these concessions became null under the provision of a law of l'Assemblée Nationale Constituante of 1789, which abolished all these grants. These grants were then abolished by a new law, because they were considered good legal grants, until such new law would decide to the contrary. But all French legislation of 1789, in fact all legislation since 1760, when Canada passed under the British flag, has no effect in Canada, not any more than the Code Napoleon has.

It is indeed, a somewhat strange position for the Crown to-day to take in denying the power of the King of France at the time the grant was made. No one, says Mr. Mignault, (now Mr. Justice Mignault)[4] would dream of contesting the original title of concessions, and it is the ancientness of these titles which dispensed them from registration.

[1] Merlin, Questions de droit—vol. 7, Vo. Rivage de la mer. Edits et Ordonnances, vol. 3, p. 122. Pièces et documents relatifs à la Tenure Seigneuriale, vol. 2, p. 126, 128—p. 567.

[2] Sirey (Periodique) 1841, 1 p. 260—Dalloz, vo. Domaine Public, 29,30—Dalloz vo. Organization Maritime, 751.

[3] 47 Geo. III., ch. 12; 4 Geo. IV., ch. 18; 7 Geo. IV., ch. 11.

[4] Droit Civil Canadien, vol. 9, p. 195.

However, to properly appreciate the grant in question and more especially the last one, which covers them all, and is under the signature and seal of the great King Louis XIV, one must go back to that heroic period. It was the period of great and autocratic politics, when justice in its mundane quality resided in the acts of the Prince; when there was no other justice than the Prince's justice. The King, at that time was all power. He could one day legislate by such *Edit and Ordonnance* as he saw fit, and the following day he could at his pleasure, derogate therefrom by another piece of arbitrary legislation. He was the source and foundation of power; and, indeed well he knew he was possessed of this absolute power, when the famous words, said to have fallen from his lips, were pronounced by him, "*L'Etat, c'est moi.*" He did then mark, as if with the engraver's tool, upon the table of the laws of France, the very character of his power. The monarchy existing in France in the 17th century was a royal monarchy and not a seignorial monarchy—and the monarchs wielded sovereign power, independent of *les Etats de la nation.*[1]

Even if the will of the King of France, either by special Grant or by General *Edits,* did clash with the *Edits* of his predecessors on the throne, there was no way to reproach him from a legal standpoint, whilst he might perhaps be criticized from a political view. The King was the sovereign master of the Kingdom in an absolute and unlimited monarchy. Parliament during his reign even became nothing but a court of justice losing its right of *remonstrance.*

[1] Furgole 10.

1920

BELANGER v. THE KING.

Reasons for Judgment.

The Seignorial Courts created under 18 Vic. ch. 3, whose great weight and authority, to which an almost authoritative sanction has been given by statute, commanding also the highest respect by reason by the composition of the tribunal, have passed upon the very point in question, recognizing the validity of the seignorial titles from the King of France. Answering the 27th question submitted to them, that Court answered it, as follows; to wit:—

"3. Quant aux droits des Seigneurs sur les grèves "des fleuves et rivières navigables; dans ceux de "ces fleuves et rivières qui étaient sujets au flux et "reflux de la mer, ces droits, sur l'espace couvert "et découvert par les marées, resultaient d'un octroi "exprès dans leurs titres: et, sans un tel octroi, "s'étendaient jusqu'a la ligne de haute marée seule-"ment.

"4. Les seigneurs avaient le droit de percevoir "des profits des lods et ventes sur les mutations des "grèves situées entre haute et basse marée sur le "fleuve St. Laurent, ou dans les autres rivières nav-"igables, lors qu'ayant droit à ces grèves par leurs "titres, ainsi qu'il a été dit, ils les avaient concedées, "et ce, dans les mêmes cas, ou ces profits seraient "accrus sur d'autres ventes."[1]

Then the *Act of Commutation* granted to the suppliant or his predecessors in title, together with the receipts for the rents and seignorial dues or of their commuted capital, have recognized his right of ownership and made his title incommutable.[2]

These lands which had been granted to the Jesuits and which still belonged to the Jesuits in 1800 were then confiscated by the British Crown.

[1] See Seignorial Court Decisions, p. 69a.

[2] See 3 Geo. IV., (1822), (Imp.) ch. 119 secs. 31 and 32; 8 Vic. (1844), ch. 42; and R. S. Q. 1909, arts. 7277, 7278, 7282.

Then in 1838 the administration of the Jesuits' Estate was confided to Commissioner Stewart; but this Commissioner had nothing to do with the lands which had already left the hands of the Jesuits.

Moreover, the Jesuits' Estates, under art. 1587, of the R.S.Q. 1909, have been declared to be in the control of the Department of Lands and Forests. Therefore the original title has been recognized, and all grants, deeds, and titles given by the Department, or those acting under it, must be considered good and valid.

See also Journals of the Legislative Assembly, 1823-24, Appendix "Y".

Commissioner Stewart has granted and sold some of the land from the Jesuits' Estate to the Hotel Dieu, who in turn sold to the suppliant or his predessor in title.

I hereby find, following the decision of the Seignorial Court, and for the reasons above mentioned, that the original grant from Louis XIV, as well as the other three primordial grants, constitute a good title with full force and effect. And I further find that all titles, deeds or grants made by Commissioner Stewart, who was invested with full power, are also good and effective titles, and more especially after the Crown has taken the rents and revenues derived from such grants, waiving thereby the formality of the deed.[1]

Then, with the object of removing all doubts, the Statute of 6 Geo. V, ch. 17 passed by the Legislature of Quebec, in 1916, with retroactive effect, has positively declared that the Crown has the right and power to alienate the beds and banks of navigable rivers and lakes, the bed of the sea, the sea-shore

[1] *Peterson v. The Queen,* (1889), 2 Can. Ex. C. R. 67.

1920

BELANGER
v.
THE KING.

Reasons for Judgment.

and land reclaimed from the sea, comprised within the said territory and forming part of the public domain.[1] This Act removes all doubt, if any could exist, and makes it clear that all previous grants, whatever may have been the system of Government, are good and have full force and effect.

Only a few words need be said with respect to the contention that these lands formed part of the Harbour of Quebec, and thus became vested in His Majesty, as representing the Dominion of Canada. By sec. 2 of 22 Vict., 1858, ch. 32, an Act to provide for the improvement and management of the Harbour of Quebec, the lands forming part of the Jesuits' Estate are excluded from the harbour. By the same Act, the right of all the riparian proprietors are further duly saved and recognized. See also 62-63 Vict., 1899, ch. 34, sec. 6, sub-sec. (a) to sub-sec. 2 thereof, whereby acquired rights are saved and acknowledged. Therefore the lands in question do not form part of the Harbour of Quebec.

Having disposed of the two great objections raised against the suppliant's title, it becomes unnecessary to enter here into the long catena of title-deeds under which the suppliant claims. It will be sufficient to find the suppliant has proven his title, and is entitled to recover the value of the land expropriated from him.

COMPENSATION

Coming now to the question of compensation, a summary review of the evidence on the question of value and damages becomes of interest.

On behalf of the suppliant the following witnesses were heard upon these questions of value and dam-

[1] See also *Commrs. Havre Quebec v. Turgeon and Atty.-Gen. P.Q.*, decided the 24th June, 1910.—Unreported.

ages: C. E. Taschereau, Joseph Collier, Dr. M. J. Mooney, Octave Bedard and Eugene Lamontagne.

C. E. Taschereau—This witness, a notary public practising in Quebec, prefaces his valuation by citing a number of sales on *terra firma*, at Hedleyville or Limoilou, at figures ranging from 64 cents to $2.27; but of small building lots varying in size from 40 and 30 feet by 60 feet which bear no relation to be compared with lots 513 and 560. He also cited sales of vacant beach lots, on the north side of the River St. Charles, from 1910 to 1915, at figures ranging from 24 cents, 38 cents, 50 cents to $1.25 and on the Quebec side as high as $1.94 and relied on the sale to the Government of lot 514, at 23 cents, in June, 1914. Then after stating that lot 513 might be used for private residences, shops and warehouses and 560 for ship building and maritime purposes, and that both lots, which were not utilized in 1913, were both covered by water in monthly high tides, he placed a value on lot 513 at 35 cents—equal to $103,478.20, and upon lot 560 at 30 cents, and added 10 cents a foot on the abandoned part of 560, because of the taking of the front part, the invasion by construction on the piece taken and the sluiceway as well as from the closing of access at the back by the corporation of the city;—the total of his valuation amounting to $251,248.00.

Joseph Collier says that lots 513, 514 and 560 are of about the same value and that in 1913 wharves could be built on 513 and 560. He values lot 513, the front part, for a depth of 300 feet at 60 cents and the back at 30 cents, making for that lot $143,685. And coming to lot 560, adhering now to his former valuation for the whole lot, he placed a value of 45 cents upon the front part for a depth of

1920

BELANGER v. THE KING.

Reasons for Judgment.

300 feet; and for the balance at the back at 25 cents. However, he added that since the Crown now only had a part, at the front, of lot 560, he placed a value of 60 cents upon such part and considered that the balance thereof which is worth 25 cents and which is now abandoned and returned is thereby damaged or depreciated by 50%, that is 12½ cents a foot.

In the result he explains that if lot 560 were all expropriated that he would allow

324,900 ft. @ .45—$146,205.00
and 1,538,699 ft. @ .25— 384,677.50

and that the amount payable should be $530,882.50

Then since the Crown only takes a portion of 560, he now values it as follows:

450,000	(but the right amount should be 455,289, giving $267,173.40) @ .60	$270,000
and 12½ cents as depreciation on the balance of 1,413,599 (which should be in exact figures 1,418,310 @ 12½—$177,288.75, making in all $444,462.15)		176,699
		$446.699

If this mode of arriving at such valuation is analysed it will be seen that although, when valuing the whole lot, the witness allows 45 cents a foot for a depth of 300, and that the Crown actually retain of that lot a depth from the front on the east side of 340 feet and on the western side a depth of 500 it becomes difficult, if possible, to reconcile such valuation, considering that when the Crown would take the whole lot 560, according to him, it would have to pay $530,882.50 for the 1,863,559 feet, while it

would still have to pay, according to his own figures $446,699 for this lot 560, after having returned 1,413,559 ft. (or to be accurate 1,418,310), that is when the Crown retains less than a quarter of the whole lot. This reasoning is obviously difficult to reconcile with sound logic.

In addition to this fantastic price, he says that before the property can be used, $50,000 might be expended for wharves and $25,000 for filling, bringing the whole amount between half a million and $600,000 that would have to be expended upon this lot before it could be in a fit state of development, remaining however, without deep water wharves.

Dr. Malcolm J. Mooney says that lots 513, 514 and 560 are all of the same value and he values lot 513 at 30 to 40 cents a foot and lot 560 at 30 cents and contends that by the abandonment the balance of lot 560 is depreciated by 50%, and in arriving at that conclusion he assumes that the access by water has been taken away, contending further that before 1913 these two lots might be utilized for industrial purposes, by river or railway, for instance as Pulp or Paper Mill sites, and that a revetement wall at a cost of $8.00 or $9.00 a foot and filling at $5.00 to $6.00 a foot would have to be done; but in the result without deep water wharves. He valued the whole of lot 560 at.....$559,079.70
and lot 513 at..... 88,695.00

In all.....$647,774.70

Octave Bedard, barber, owner of the Chateau Frontenac stand, who as land agent has sold lots at Limoilou for $1,500,000 with the experience of two transactions in beach lots, values the beach lots on

1920

BELANGER v. THE KING.

Reasons for Judgment.

the River St. Charles, from 1910 to 1912 (about equal value in 1913) at 40 cents to 50 cents, from lot 514, going up to Drouin Bridge. Adding that near Ste. Anne Bridge lots are worth less.

Eugene Lamontagne values beach lots, in 1913, at 80 cents to $1.00, on River St. Charles, west of Ste. Anne Bridge. The lots immediately to the East of that Bridge would be cheaper. He could not see much difference between lots 513, 514 and 560. He values lot 513 and 560 at 30 cents to 35 cents and contends it would be a paying proposition to purchase at half a million dollars and further incur the necessary expenses to improve and develop the lots.

On behalf of the Crown, the following witnesses were heard upon the question of the value of the land and on the cost of development of these lots: Albert Forward, Edward A. Evans, Athol Tremblay, Sir William Price and Alfred Gravel.

Albert Forward, was the chief engineer of Messrs. Quinlan and Robertson, who were the contractors with the Government for the works on the St. Charles River. As a result of these works being abandoned in June, 1917, Quinlan and Robertson's plant became idle, so they entered into a contract with the Imperial Munition Board to build four vessels on lot 513 which involved the expense of $9,000 for 3 ways, $2,800 for a wooden wall and 58,000 yards of filling at 50 cents—$29,000, in all an expense of $40,800, having the advantage of having a dredge at that place and being allowed to take the material from the river.

This witness says that lot 560 is too low a site to be used in its present state for any purposes. It

would have to be raised at the cost of a crib work and filling amounting to $236,935

together with the filling of the lot, 620,000 yards at 50 cents, provided the material could be taken from the river 310,000

In all $546,935

Lot 513 would require a concrete wall of 800 feet, at the cost of $100 a foot ..... $ 80,000
and the filling 95,000 yards @ 50 cents..... 47,500

$127,500

Edward A. Evans, civil engineer. He was in charge of the building of the Ste. Anne Bridge on the River St. Charles and he says in the site of the bridge he encountered a depth of 60 feet of quick-sand. He would not advise the building of wharves on lot 560, when there are so many better available lots for that purpose. However, to make a wharf for small vessels on 560 it would cost....$355,552
Filling outside of the wharf 252,889

$608,441

Not a practical commercial proposition.

He says that lot 560 was sold in 1888 for $5,000, or ¼ cent a foot and that such price was really less than the value of the wharf and crib on the property then. These wharves were sold in 1891 to McLaughlin. The property has not, to his knowledge, been used since 1889.

He would prefer the Turgeon-Dussault lots (582a and 583) to 560 because the foundation of the latter

1920

BELANGER v. THE KING.

Reasons for Judgment.

is on rock, is firmer ground. He said 582a and 583 were paid ½ a cent a foot. And he adds that no sane man would spend $608,441 to fit 560 for building lots.

Lot 513 not so costly to develop. In 1913, on the front and west it would require a retaining wall.

The crib work would cost	$ 9,600
Filling	38,750
	$48,350

Not practical for commercial purposes. Filling with garbage, as suggested, not advisable if to be used for industrial purpose. Abandonment has no detrimental effect on balance of lot 560.

Athol Tremblay, is a surveyor who was chief land agent for the Transcontinental from 1909 to 1912. He says that lot 560 cannot be utilized without being filled, and with a protection wall. Contends that lot 560 has no more value than lots 582a and 583, the Dussault-Turgeon lots, which were sold at 3-5 of 3-4 of a cent, or about half a cent as shown by Exhibit No. 9 and at ¾ of a cent in 1912, as shown by Exhibit No. 10.

He values lot 560 at $15,000 to $20,000. The sum of $15,000 would represent about ¾ of a cent, and $20,000 slightly more than one cent a foot. He does not consider that lot 560 should be used for building lots, when there are so many lots in the neighbourhood. It is not useful for commercial purposes because the filling would be too costly.

He values lot 513 at 5 cents a foot—$14,782.60. He considers that lots 440 etc., mentioned by witnesses Taschereau higher up the river and says that the

perspective of the Government work on the St. Charles River had the effect of creating a fever of speculation in the neighbourhood.

He considers that the abandonment in no way can depreciate the balance of 560, especially is it so with the undertaking filed by the Crown.

Sir William Price, who is the president of Price Brothers Ltd., was Chairman of the Quebec Harbour Commission for 1912 or 1913 to 1915 and as such has intimate knowledge of the harbour. He considers lot 560 of very small value for commercial purposes, because it could not be so used without filling and building wharves which would be too costly. No private company would undertake it. No deep water wharves available there. The Quebec Harbour Board purchased in March, 1913, a much more valuable property at Indian Cove, including large wharves, at 2 cents a foot, as appears by Exhibit No. 13. He considers there is not much difference in value between lot 560 and the Turgeon-Dussault lots 582a and 583.

He values lot 560 at ½ a cent a foot and lot 513 at 2 cents a foot.

Alfred Gravel, Managing Director of the Gravel Mills, at Levis, who has been one of the Harbour Commissioners since 1912, states that lot 560 is prohibitive, no good, for commercial purpose in view of the necessarily large expenditure it would require before it could be used. He was on the Harbour Commission when they bought (Exhibit 13) the Indian Cove property at 2 cents a foot, including a wharf of 1800 feet in length, which is open all winter, and with deep water accommodation. Contends the Turgeon-Dussault lots are of about same value as 560.

1920

BELANGER v. THE KING.

Reasons for Judgment.

He values lot 560 at ½ cent a foot and lot 513 at 2 to 3 cents a foot. He does not consider that the abandonment, coupled with the undertaking, has had a detrimental effect on lot 560.

The lands in question herein were purchased by the suppliant between 1900 and 1910 for the sum of $18,165.32 and were practically yielding no revenue save the small amount shewn in Exhibit No. 7. These lots lie in the estuary of the River St. Charles and were in 1913 nothing but a stretch of muddy soil over sand, the land being entirely covered with water at monthly high tide, the property having been idle for years and years.

These properties cannot be used in the state in which they are. To be made useful they would have to be filled and protected by wharves or crib works, at a cost, according to witness Forward, in respect of lot 560 of $546,935 and with respect to lot 513, of $127,500, and according to witness Evans with respect to lot 560, at a cost of $608,441 and lot 513 at a cost of $48,350, yet in face of such statement some so called expert witnesses came and swore it would pay to fill and develop these lots at such tremendous costs to make of them either building lots or industrial sites. These wharves would not even be deep water wharves, but would have access to deep water only to the height of the water brought in by the tide. No sane man would expend such sums on these lots to use them for such purposes when better lands are available all around under normal and reasonable conditions.

It is true there is evidence that several beach lots changed hands at rather high figures, between Ste. Anne and Dorchester bridges where the land is

somewhat more valuable than below Ste. Anne bridge; but, as was said, at the time these lots changed hands, a hectic inflation in prices prevailed in that locality in view of the prospective works to be undertaken by the Crown.

It is true lot 514 which lies between lots 513 and 560, was purchased by the Crown at 23 cents in June, 1914; but under such special circumstances that will take that transaction out of the ordinary course of business and prevent using such a price as a criterion to determine the value of the lots in question. Indeed, as appears clearly, both by the deed itself (Exhibit 78) and from the testimony of witness Lefebvre, it having become known that lot 514 was required by the Crown, speculators took hold of it, option after option, to the number of five, linking into one another, and even under fictitious names were executed with the object of inflating the price of the lot. The very evening the first option was obtained at 23 cents a second one was out for 50 cents a foot. The Crown, through its officers, having been made aware of what was going on, and anxious to stop the property from passing into the hands of such speculators, went over to the owners, bought the property in face of this skein of options and undertook, by the deed itself, to indemnify the owners against any trouble which might be met or coming from the parties to whom they had consented these options. Visionary wealth at the expense of the Crown was in that transaction seen at a distance but not realized. However, the Crown's hand was forced and the property had to be bought at that high figure.

1920

BELANGER v. THE KING.

Reasons for Judgment.

These lots 513 and 560 were of very little value to the owner. And it is now settled law that in assessing compensation for property taken under compulsory powers it is not proper to consider as part of the market value to the owner, such value as land taken may have to the party expropriating when viewed as an integral part of the proposed work or undertaking. But the proper basis for compensation is the amount for which such land could have been sold, had the present scheme carried on by the Crown not been in evidence, but with the possibility that the Crown or some company or person might obtain those powers and carry on the scheme. And in the present instance, who, outside of the Crown, could undertake such colossal works? *The Cedar Rapids Co. v. Lacoste*[1]; *Sydney v. North Eastern Ry. Co.*[2]

The scheme must be eliminated, notwithstanding works had been started, subject however, to what has just been said. *Fraser v. City of Fraserville.*[3]

When Parliament gives compulsory powers and provides that compensation shall be made to the person from whom property is taken, for the loss he sustains, it is intended he shall be compensated to the extent of his loss; and his loss shall be tested by what was the value of the property to him, not by what will be its value to the party acquiring it. *Stebbing v. Metropolitan Board of Works.*[4]

The policy and object of the *Expropriation Act* is to enable the Court to compensate the owner but not to penalize or oppress the expropriating party. The Court must guard against fostering speculation

1 16 D. L. R. 168, [1914] A. C. 569.
2 [1914] 3 K.B. 629.
3 34 D. L. R. 211, [1917] A. C. 187.
4 (1870), L. R. 6 Q. B. 37.

in expropriation matters, and must not encourage the making of extravagant claims and more especially must not be carried away by subtle arguments of real estate speculators or so called expert witnesses and thus render the execution of public works impossible or prohibitive. While the owner must be amply compensated in that he is no poorer after the expropriation, there is no reason to charge the public exchequer with exorbitant compensation built upon imaginary or speculative basis.

The properties that offer the closest relation and similarity with lot 560 and are most apposite are certainly, what has been called during trial the Turgeon-Dussault properties, lots 582a and 583, composed in part of *terra firma* and in part of a beach lot to the extent of 67 arpents and which was sold in 1909 at about half a cent a foot and in 1912 at about three-quarters of a cent. Then there is also that fine property with wharves and building with deep water wharves at Indian Cove, bought at 2 cents a foot by the Quebec Harbour Commissioners.

At the original trial there was no oral evidence that could justify the Court to allow a valuation at less than 10 cents a foot, for the land taken, while at this new trial the Court is absolutely untrammelled in that respect, having evidence ranging from 60 cents down to ½ a cent a foot.

Coming to the question of abandonment, I find, under the conflicting evidence in that respect, that with the undertaking filed by the Crown, and as above recited in full, that the returned piece or parcel of property is clearly not injured and has not been depreciated in value by such abandonment and its consequences. It is with some reluctance I have,

1920

BELANGER v. THE KING.

Reasons for Judgment.

under the evidence, to come to such conclusion because there would be ample justification for thinking that part of 560 would have been benefited by the public works in question, for reasons too obvious. Among others, there will be a deep water channel coming up from the St. Lawrence to the guide pier; moreover under the undertaking the Crown cannot build on that part of 560 which it retains thus placing the present front of 560 in a better position than it was before the expropriation. Can it be assumed that when such opinion was expressed by some of the witnesses it was predicated by the idea that the advantages might be offset by the disadvantages?

We have the advantage in this case, to be guided to a certain extent, as a determining element by the sales of lots 582a and 583, and the Indian Cove property, which applied with some flexibility, taking into consideration, as much as is known of the circumstances of the sales coupled in relation to 560 which is closer inshore than 582a and 583, become very cogent evidence and afford a very good test in arriving at a fair compensation herein. *Dodge v. The King;*[1] *Re Fitzpatrick* and *Town of New Liskeard.*[2]

The suppliant endeavors to hold the Crown liable for the closing of the streets by the municipality on the northern part of lot 560 which is abandoned and returned to him. But away back in 1911, as will appear by Exhibit 6, the Municipality of the City of Quebec openly manifested its intention of closing those streets, as will appear by the Resolution of the Council whereby it entered into contractual obligation with the C.N.Ry. for doing so. That

1 (1906), 38 Can. S.C.R. 149.
2 (1909), 13 O. W. R. 806.

was long before the date of the expropriation. Then after the C. N. Ry. had complied with its part of the agreement, the City of Quebec, on the 12th November, 1915, passed a by-law closing the streets from that date in compliance with its resolution of 1911. The Crown is in no way liable in that respect, there is no privity between the Crown and suppliant in that respect. If the suppliant has any claim against anyone in respect of the closing of the streets, it will obviously be against those who did it. *Bell v. Corporation of Quebec.*[1]

Taking into account and consideration the fact of such abandonment or revesting of part of lot 560, in connection with all the other circumstances of the case, in estimating or assessing the amount of compensation to be paid to the suppliant, I have come to the conclusion to allow 5 cents a foot for lot 513 ..... $14,782.60

and for lot 560, the front only being taken the most valuable part, I will allow 2 cents 8,905.78

Making in all the sum of $23,688.38

with interest thereon from the 13th January, 1913, to the date hereof. Between the years 1900 and 1910 the suppliant bought these two lots composed of over two million feet of land for $18,000 and he is now getting $23,688.38 and interest for 740,941 feet thereof.

Therefore, there will be judgment as follows, to wit:

1. The lands expropriated herein are declared vested in the Crown as of the 13th January, 1913.

[1] (1879), 5 App. Cas. 84.

1920

BELANGER v. THE KING.

Reasons for Judgment.

2. The compensation for the land so taken and for all damages whatsoever, if any, resulting from the expropriation and all circumstances flowing therefrom, is hereby fixed at the sum of $23,688.38, with interest thereon from the 13th January, 1913, to the date hereof.

3. The suppliant is entitled to recover the said sum of $23,688.38, with interest as above mentioned, upon giving to the Crown a good and satisfactory title free from all hypothecs, mortgages, ground rents and all encumbrances whatsoever. Failing the suppliant to discharge the ground rents, the capital of the same may be discharged by the Crown out of the compensation moneys and the balance thereof paid over to the suppliant.

4. The suppliant is further entitled to recover all costs occasioned by the expropriation.

1920

March 8.

IN THE MATTER OF THE PETITION OF

UNITED CIGAR STORES, LIMITED, OF THE CITY OF TORONTO, IN THE PROVINCE OF ONTARIO, MANUFACTURERS, (PROVINCIAL),

PETITIONER;

AND

UNITED CIGAR STORES LIMITED (DOMINION), ADDED PETITIONER (BY ORDER OF THE COURT);

AND

GEORGE MITCHELL MILLER,

OBJECTING PARTY,

AND

UNITED CIGAR STORES OF WINNIPEG, ADDED OBJECTING PARTY (BY ORDER OF THE COURT).

Trade-marks—Registration—Trade name, passing off.

The petitioner sought to have the words "United Cigar Stores" registered as a trade-mark, and to have the same words registered in the name of the objecting party expunged. These words constituted the trading name of the petitioner and most of the trade-marks claimed by it were for particular brands of cigars. Moreover by ch. 129, 3 Geo. V., 1913, (Man.), a company was incorporated by the name of "United Cigar Stores" and the statute provides, inter alia, "that the Company may procure itself to be registered in any "Province of the Dominion of Canada and exercise its powers in "such Provinces". The petitioner claimed that the obtaining of the charter was a fraud on its rights.

Held, on the facts stated, that the petitioner was not entitled to have the words "United Cigar Stores" registered as a trade-mark.

Quære. Would the mere fact of a company having a corporate name similar to petitioner be a bar to any action that might be brought against it for passing off its goods as the goods of petitioner?

1920

UNITED CIGAR STORES v. MILLER.

Reasons for Judgment.

THIS is a petition asking to have a certain trade-mark claimed by petitioner registered and a certain trade-mark already registered expunged from the registry.

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

The case was tried before the Honourable Sir Walter Cassels at Ottawa, on the 25th and 26th days of November, 1919.

Wallace Nesbitt, K.C., for petitioner;

Russel Smart, and *J. Lorne McDougall* for objecting party.

CASSELS, J. now (March 8th, 1920) delivered judgment.

The petition in this case asks that the entry in the Registry of Trade-marks, stated to be No. 45, folio 11011, for the words "United Cigar Stores" be expunged from the registry.

The petitioners also ask that the trade-mark be registered in their name for "United Cigar Stores."

They also ask that a specific trade-mark consisting of a shield whereon a red background there is displayed a representation of a Union Jack Flag and underneath in white letters upon the said red background the words "United Cigar Stores" be registered.

The case came on for trial before me—certain objections having been filed on behalf of one George Mitchell Miller.

After considerable evidence was adduced, Mr. Smart, who acted as counsel for the contestants,

asked leave to add as co-contestants an additional defendant, the party appearing as contestants not being the proper parties. No objection was raised on the part of the petitioners represented by Mr. Nesbitt, K.C., and as no harm could arise, the application of Mr. Smart to add these parties is allowed.

It later appears that the petitioners are not the proper parties to make the application. It would appear that the Ontario Company, the United Cigar Stores, Limited, have assigned all their rights including their right to the trade-mark in question, to a company incorporated by the Dominion under a similar name, namely the United Cigar Stores Limited. The contestants raise no objection to this company being added as co-petitioners, and as no harm can be occasioned to anyone, the advertisement being correct and in the name of the United Cigar Stores, Limited, I see no reason why this Dominion Company should not be added as co-petitioners.

The judgment should not issue until the additional contestants and the additional petitioners are duly added.

Mr. Smart after considerable evidence was adduced, consented to the trade-mark registered by his clients being expunged. I think he was well advised in the course he adopted, as it would be impossible to allow this trade-mark to remain upon the registry, and an order to this effect will issue.

No objection has been raised to the registration of the specific trade-mark by the petitioners, which I have previously referred to, and an order may go in the usual form allowing the petitioners to register the specific trade-mark.

1920

UNITED CIGAR STORES v. MILLER.

Reasons for Judgment.

I cannot allow the petitioners to register as a trade-mark the words "United Cigar Stores". There are a great many objections to such registration. It is really the trading name of the company, and the evidence would indicate that most of the trade-marks which are claimed by the petitioners are for particular brands of cigars. An additional reason is that by a statute of Manitoba, assented to on the 15th February, 1913, a company is incorporated by the name of United Cigar Stores. (Ch. 129, 3 Geo. V., 1913).

The 26th section of this statute provides: "The "head office of the company shall be in the City of "Winnipeg, in the Province of Manitoba, and the "company may procure itself to be registered in any "Province of the Dominion of Canada, and exercise "its powers in such Provinces."

It is argued by Mr. Nesbitt that the obtaining of this charter is a fraud on the rights of his client.

As I pointed out, the Exchequer Court has no jurisdiction in passing off cases, nor can I assume that there was an impropriety in the obtaining of this Act of the Manitoba Legislature. Any remedy to get rid of this charter will have to be taken in a different form of action. The mere fact of the company having a corporate name may not be a bar to any action that might be brought if this company were passing off their goods as the goods of the petitioners. On this question I refrain from giving any opinion, as the matter is not one before me. I refer Counsel, however, to the case of the *Boston Rubber Shoe Co., v. The Boston Rubber Co., of Montreal,*[1] and also

[1] (1902), 32 Can. S. C. R. 315.

to a late case along the same lines, in the Court of Appeal in England, *Ewing v. Buttercup Margarine Co., Ltd.*[1]

As the success of the application is about equally divided, there will be no costs to either party.

Solicitors for petitioner: *McCarthy, Osler, Hoskin & Harcourt.*

Solicitors for objecting party: *Fetherstonhaugh & Smart.*

[1] [1917] 2 Ch. 1.

1920
March 16.

IN THE EXCHEQUER COURT OF CANADA

QUEBEC ADMIRALTY DISTRICT.

WILLIAM FRASER,

PLAINTIFF;

AND

S. S. "AZTEC",

DEFENDANT.

Shipping—Collision—Rules of Canal—Canada Shipping Act, Sec. 916—*Evidence—Burden of proof—Presumption.*

On the 15th August, 1919, at 3.14 p.m. the ship "Aztec" arrived at lock 17 in Cornwall Canal, and after the western gate had been opened, entered the lock, making fast to the north wall. The gates were then closed and after the water was partly let out of the lock, water which should have been held back, came in at the upper gates of the lock, by reason of two of the valves having been improperly and negligently left open. This formed an eddy in the lock causing a heavy pressure backward on the ship. The crew let out 6 inches on the bow rope, to try and save it, but the bow line broke and the vessel began to go astern and backed into and broke the rear gates, letting in a rush of water from above which violently threw the steamer against the east gates carrying them away. The water running away left plaintiff's barge and dredge, which were moored at the head of the lock, stranded, causing certain injury to them in respect of which damages are now claimed.

The Steamer "Aztec" was fastened to the north wall of the lock by two ropes, a 5 inch rope leading from the bow and a 7-8 inch wire cable astern, which was sufficient, under ordinary circumstances. Rule 27 requires 2 astern, 1 in bow and 1 abreast but neither the second astern, nor the extra line abreast would have prevented the accident. The crew did everything that could be reasonably expected of them in the emergency. The engines never moved till after the collision. Rule 30 puts all vessels in canals under the control of the superintendent as regards mooring and fastening, and he was satisfied in this case.

Held, on the facts stated, that the accident in question was not due to any negligence of the defendant or to the non-observance of the rules by him, but was entirely due to the gross negligence of the lockmen in leaving two of the valves of the upper gate open, for whose acts defendant was not responsible.

2. In as much as, the presumption of fault provided by section 916 of the *Canadian Shipping Act* R. S. C., 1906, ch. 113, does not arise unless it is proved that the collision was occasioned by the non-observance of the rules; and in as much as the non-observance of the rules does not by itself create such presumption, the burden of proof is upon plaintiff to prove that such non-observance contributed to the accident, and further affirmatively to prove that his loss was caused by the negligence of defendant or some one for whose acts he is responsible.

THIS is an action *in rem* for damages caused to the plaintiff's barge and dredge in the Cornwall Canal.

The facts are stated in the reasons for judgment.

The case was tried before the Honorable Mr. Justice Maclennan, Deputy Local Judge in Admiralty in Montreal, assisted by Captain J. O. Grey and Captain Olivier Patenaude, nautical assessors on the 3rd, 4th and 5th days of March, 1920.

Aubrey H. Elder, counsel for plaintiff;

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

MACLENNAN, D. L. J. A. now, (this 16th March, 1920), delivered judgment.

This is an action *in rem* for damages and arose out out of an accident which occurred in the afternoon of 15th August, 1919, in Lock No. 17 in the Cornwall Canal.

The plaintiff's case is that his tow barge "Sand King" and his sand dredge "Champion" were lying afloat and moored to the north bank of the Cornwall Canal above Lock No. 17 when the Steamship "Aztec" entered the lock from the west, and after the western gates were closed the steamship backed, carried away the western gates, then moved forward

1920

FRASER
v.
S.S. "AZTEC."

Reasons for Judgment.

and carried away the eastern gates of the lock, with the result that the water above the lock ran away and the barge and the dredge became stranded and sustained damage. Plaintiff alleges there was no proper outlook kept on the "Aztec"; that those on board improperly neglected to take in due time proper measures for avoiding the carrying away of the lock gates; that she was not properly under control and that the damages and losses consequent thereon were occasioned by the neglect and improper navigation of those on board.

The defendant's case is that, if plaintiff's barge and dredge were injured, it was not due to any fault or negligence of the defendant or those in charge thereof; that while the defendant vessel was being locked through the canal, in the usual and proper manner in so far as the defendant is concerned, the water in the lock was suddenly disturbed and moved in such a manner as to cause her to strike the gates in spite of all that could be done by those in charge to prevent it; that the movement and disturbance of the water in the lock were due to the improper condition of the lock gates and equipment, or the improper manipulation and control thereof by the persons in charge or to both these causes, or to other causes, of which the defendant is ignorant and for which it is in no way responsible, and that the striking of the lock gates by the defendant vessel and any results thereof were due to forces or causes beyond her control or those in charge thereof.

The steamer "Aztec", having a length of 180 feet, a beam of 33 feet 3 inches and 13 feet 9 inches moulded depth, registered tonnage of 834 gross and

653 net, and having on board 1,007 tons of coal with a crew of 16 all told, arrived down at Lock No. 17 in the Cornwall Canal at 3.14 p.m. on 15th August, 1919. The lock was in charge of lockman Albert Durocher, assisted by lockman Joseph H. McDonald. Durocher was on the south side of the lock, McDonald on the north, and after the western or upper gates of the lock had been opened the "Aztec" entered the lock, which is 270 feet long and 45 feet wide, and made fast to the north wall with two lines, one a five inch manilla rope leading ahead attached to a post on the north wall of the lock the other end being attached to the capstan, and the other a 7-8 inch wire steel cable leading astern attached to a snub or post on the north wall, the other end being in a machine called a compressor which with the capstan were on the upper deck of the ship forward and between the pilot house and the stem. After the steamer had thus been made fast, the lockman closed the western gates by means of the electrically driven machinery provided for that purpose. Near the bottom of each gate there are two pairs of cast iron valves 2½ feet by 4 feet which are opened and closed by means of a rod attached to their upper edge and the other end of the rod being connected with a bevel toothed gear on the top of the gate, and this gear is connected with the electric power. To open the valves the rod is forced downward and to close them it is pulled up. This machinery is put in motion by a lever on the top of the gate. Each rod and gear opens and closes one pair of valves. The bottom of the valves are within 12 inches of the bottom of the gates and are 27 or 28 feet under water.

1920

FRASER
v.
S.S. "AZTEC."

Reasons for Judgment.

Durocher and McDonald were the two men in charge of the canal equipment and it is important to examine carefully their account of what they did from the time the "Aztec" entered the lock until she collided with the gates. Durocher swore that after he closed the north gate and McDonald closed the south gate, he closed one valve in the south gate, he cannot say if it was the heel valve or the miter valve, and that McDonald closed one valve in the north gate, that they then waited until a steamer going down had got clear of Lock No. 15, the next lock below, 800 feet away, when he, Durocher, started up the other valve by pushing a lever, and McDonald started the remaining valve on his side and Durocher then started walking down to the other end of the lock, and when he got down a piece he says he turned around and saw that the valves were up and that McDonald put up his hand as a signal that they were closed. Durocher thereupon opened all the valves in the gates at the lower end of the lock and the water ran out of the lock into the reach below until it had gone down about 13 feet of the total drop of 14 feet to the level of the lower reach, when unexpectedly he saw the bow line of the "Aztec" break and the steamer began to go astern and, although the Captain was not in sight, Durocher says he yelled to the Captain to go ahead and told Heppell, another lockman standing near him, to go to the other end of the lock. Durocher does not state why he gave this order to Heppell, but the latter says that Durocher's order was: "Va donc voir aux valves en haut, voir si elles sont ouvertes", that is to say, "go to the upper valves and see if they are open".

The steamer was then moving astern, it had been tied up 15 feet from the upper or western gates of the lock and when it had gone astern 15 feet it collided with the gates letting in a rush of water from the upper reach of the canal, one mile in length, into Lock No. 17, which violently threw the steamer against the eastern gates and carried them away.

I will now refer to McDonald's evidence, as his version of what occurred up to the time of the collision. He was on duty with Durocher and was on the north wall of the canal when the steamer came into the lock and he states that two lines were put out and attached to the snubbing posts on the north side of the lock. His examination then continues as follows by counsel for plaintiff:

Q. After the two lines which you have mentioned, the compressor line, and the bow line, were attached to the snubbing posts, what were your movements? A. Closed the gates.

Q. What gates? A. The upper gates.

Q. The upper gates of what lock? A. Lock 17.

Q. Which gate did you close? A. I closed the south gate.

Q. That would be the gate on the opposite side from where you were? A. Yes.

Q. What did you do next? A. When the other lock was ready, we let the water out, and put up the valves.

Q. You are referring to the valves of what gate now? A. The upper gate.

1920

FRASER v. S.S. "AZTEC."

Reasons for Judgment.

Q. How many valves are there in the upper gates? A. Four chambers. Eight valves.

Q. In the upper gates? A. Yes, I believe so.

Q. Just think it over, and tell us if that is correct. How many valves are there in each gate? A. There are supposed to be four in each one.

Q. Two pairs in each gate. A. Yes.

Q. Did you close the valves in the north gate?

Mr. Holden—This is a question of fact, and I submit my learned friend should ask the witness what he did.

BY THE COURT—Q. What did you do? A. I closed the valves.

Q. Which valves? A. In the upper gate.

Q. There are two gates in the upper end of the lock? A. Yes.

Q. In which gate were the valves you closed? A. I generally close them on the north side first.

Q. But, on that day? A. We were waiting for the lock at 15.

Q. Can you tell us what you did at the upper end of Lock 17? A. We closed one valve on each gate.

Q. Just tell us what you did yourself. A. I helped to close them.

By *Mr. Hackett,* continuing: Q. Then, what did you do after helping to close the valves? A. I was walking down to the lower gates.

Q. And what happened? Tell us the story. A. The line separated, going down.

Q. Which line? A. The bow line, and the boat started to go back.

Q. And, then what happened? A. She went into the gates.

Q. Into which gates? A. I should judge about the centre of the upper gate.

This is his evidence on examination in chief as a witness for plaintiff as to what was done at the upper gates up to the time of the collision, and if his evidence in that connection is true only two of the four valves in the upper gates were closed and two of the valves were left open. In cross-examination McDonald swears that after he and Durocher had closed the upper gates they each closed one valve; that Durocher then went to the lower gates and as soon as Durocher started to open the valves in the lower gates, he, McDonald, started to close the remaining two valves in the upper gates; that there were no signals exchanged between him and Durocher after he had closed the valves in the upper gates and that having closed the remaining two valves in the upper gates he locked them and then started to walk down the north bank of the lock in the direction of the lower gates and that when he arrived at a point abreast the midships of the steamer he saw the bow line leading ahead break, he turned around and started to walk back in the direction of the upper gates, but before he arrived there the steamer collided with the gates, the water came through and carried the steamer forward through the lower gates. It will be observed that it is only in cross-examination that McDonald states the remaining two valves in the upper gates had been closed, and his evidence in that connection differs in detail from the story told by Durocher. According to Durocher, he started the machinery to close one of the remaining two

1920

FRASER
v.
S.S. "AZTEC."

Reasons for Judgment.

valves, McDonald at the same time starting the other and that both these valves were closed before Durocher reached the lower gates. McDonald's evidence is that he closed the remaining two valves himself, that Durocher had nothing to do with the closing of them and that they were only closed by him after Durocher had arrived at the lower gates and had started to open the four valves of the lower gates. Durocher swore that McDonald signalled to him that the valves in the upper gates were closed, McDonald is emphatic in saying that no signal was given by him to Durocher.

I will now refer to the evidence of the members of the crew of the "Aztec". Captain John Gooderich, of Ogdensburg, N.Y., who has held a Master's certificate for 25 or 26 years, was in command and as he approached and entered the lock was on the upper bridge on the roof of the pilot house. His mate, also the holder of first class pilot's papers, with three other men, the wheelman, the watchman and a deck hand were on the forecastle deck attending to the lines. Two lines were put out, a five inch manilla head line leading forward from the capstan, and a seven-eighth inch wire steel cable leading aft; this cable was attached to the compressor near the capstan on the upper deck which was several feet above the top of the lock wall where the lines were attached to the snubbing posts. As the water was let out of the lock and the steamer gradually came down with the water the slack on the bow line leading ahead was taken in by the watchman and the deck hand. When the steamer had been lowered down pretty nearly ready to go out, the master came down from the bridge to the forecastle deck and went to his room there, and very

shortly thereafter heavy pressure was noticed on the head line, which was let out about six inches and then held, when it suddenly broke and the steamer went astern and collided with one of the upper gates in about one minute's time. The mate, upon the parting of the head line which broke between the capstan and the ship's rail, attempted to get out another line forward, but was unable to do so before the steamer struck the upper gates. The evidence of the master and the mate is that they tied up the steamer to the wall of the lock in the usual way, both as to the number of lines used and the manner in which they were made fast. The master, the first assistant engineer, the mate, the watchman, the wheelman and the deck hand were all examined at the trial. The steamer's witnesses testified that the force which threw the steamer astern with sufficient force to break the bow line could only have been from the engines or from the water in the lock. It was proved that the engines were not moved from the time the steamer tied up till after the collision. None of the witnesses on board the steamer testified that they saw any commotion in the water. They were attending to their lines on the port side of the steamer next the lock and were not in a position to observe the water, but they all attributed the sudden strain on the head line to the effect of the water, and the deck hand Allison swore that he heard the noise of the water which was stirred up and in confusion. He said: "J'ai entendu le bruit de l'eau qui brouillait comme ça". . . (il cherchait à imiter le bruit de l'eau).

Some light is thrown on the value of the evidence of the lockmen by reference to their actions after the accident. McDonald says that it was the duty

1920

FRASER v. S.S. "AZTEC."

Reasons for Judgment.

of Durocher, the senior man in charge of the lock, to make a written report of the accident to the lockmaster.

Durocher was asked:

"Q. As lockman in charge at the time when an "accident occurs, to whom do you send a report of "the accident? A. To the office.

"Q. What office? A. The Canal Office, right "across from the lock, right between the two locks.

"Q. Is that Mr. Sargent's office? A. Mr. Sar-"gent's office.

"Q. Did you report this accident? A. Mr. Mc-"Donald did, I was on the other side. I could not "get over, I was on an island then."

Durocher swore he made no written report to anyone, that he was not asked or supposed to make any written report and that the only entries he made were in the sheet containing the names of the vessels passing through the lock giving time of arrival and departure, and an entry in a private memorandum book for his own information. The entry on the vessel report shows the time of arrival as 3.14 p.m., time of departure 4.15 p.m., and under the heading "Remarks" he made the following entry: "Aztec of Buffalo, Steamer Aztec bow line broke and she went back into the west gates and put them out and then she came down with the water and took the east gates out." The entry in his private note book reads: "Friday, August 15, 1919, Steamer Aztec carried away 4 gates at Lock 17, 4.15 p.m. Navigation resumed Saturday evening August 16, 1919, 8 p.m."

Durocher says that "Mr. Lally, the superintendent, was right there two minutes after the accident

happened. He asked me all about it and I told him". And on the second day of the trial, when asked if he told Mr. Lally anything about the accident, his answer was: "Of course, he told me what had happened, I just told him she had gone through the gates, just as I explained it to the Court". And when again re-called for further cross-examination, he testified as follows:

"Q. Did you see Mr. Lally on August 15th, after "the accident happened? A. Yes, he came right "down.

"Q. How long after? A. It could not be more "than 10 or 15 minutes, I do not suppose.

"Q. Did you have any conversation with Mr. "Lally. A. Well, he just asked me how it was done, "I cannot just exactly remember what was said."

The evidence with reference to the machinery and appliances for opening and closing the valves is very unsatisfactory. It must be remembered that the valves are entirely under water and out of sight and Durocher swore that when the rod was up the valve is supposed to be closed unless something has gone wrong down below which would uncouple or break. He also swore that the worm gear at the top of the rod is about six inches longer than it should be and that they must be careful not to jam it down too far and break the knuckle where the rod connects with the valves. When the gates were taken out of the canal, about three days after the accident, all the valves in the upper gates were missing with the exception of possibly small pieces of some of the lugs hanging to the bottom of the valve rods. Of course no one could say when they broke or whether the breakage was caused by the rod

1920

FRASER
v.
S.S. "AZTEC."

Reasons for Judgment.

having been jammed down too far or by the impact of the collision.

Another portion of Durocher's evidence is open to the construction that there was something wrong with the upper gates, that they were not mates and were to be changed on the following day. These gates certainly were old, had been in use for a very long time and the appliance for opening and closing the valves required very careful handling.

To enable a plaintiff in a collision action to recover damages, he must prove affirmatively that his loss was caused by the negligence of the defendant or of some person for whose acts he is liable. He must make out that the party against whom he complains was in the wrong and that the loss is to be attributed to the negligence of the opposite party. In this case the question is: "Who is responsible for the "Aztec" colliding with the lock gates?" The plaintiff has endeavoured to establish that the steamer was insufficiently and negligently made fast to the lock wall and improperly and negligently handled after the bow line broke and that the canal equipment—the gates and valves—were properly handled by the lockmen.

This accident happened in Canadian waters and plaintiff very properly cited the *Canadian Shipping Act*, R. S. C., 1906, ch. 113, and the Rules and Regulations for the guidance and observance of those using and operating the canals of the Dominion of Canada made under said Act.

Canal rule 27 provides:

"Every vessel of more than 200 tons shall be pro-
"vided with four good and sufficient lines or haw-
"sers, two leading astern, one leading ahead and

"one abreast line, which lines when locking, shall "be made fast to the snubbing posts on the bank of "the canal and lock and each rope shall be attended "by one of the boat's crew to check the speed of the "vessel while entering the lock to prevent it from "striking against the gates or other parts of the "lock, and to keep it in proper position while the "lock is being filled or emptied".

Canal rule 30 provides:

"All vessels in the canals, basins and approaches "shall be under the control of the superintending "engineer or superintendent as regards their posi-"tion, mooring, fastening, etc."

Section 916 of the *Canada Shipping Act* reads as follows:

"If, in any case of collision, it appears to the "court before which the case is tried, that such "collision was occasioned by the non-observance of "any such regulations, the vessel or raft by which "such regulations have been violated shall be deem-"ed to be in fault, unless it can be shown to the "satisfaction of the court that the circumstances of "the case rendered a departure from the said regu-"lations necessary".

The steamer when tied up in the lock did not have four lines as required by rule 27, and the presumption of fault provided by section 916 of the *Canada Shipping Act* would not arise unless the collision was occasioned by the non-observance of the rule. The burden was upon plaintiff to prove that the non-observance of the rule contributed to the accident, as non-observance of the rule by itself created no presumption, and the common law applied, and plaintiff had to prove the cause of the collision.

1920

FRASER v. S.S. "AZTEC."

Reasons for Judgment.

See *The Ship "Cuba" v. McMillan;*[1] *The Steamship "Rosalind" v. The Steamship Senlac Co.;*[2] *Harbour Commissioners of Montreal v. The Ship "Albert M. Marshall";*[3] *Montreal Transportation Co. v. "The Norwalk".*[4]

In this case the "Aztec" was made fast in the lock by one line leading ahead and one astern, it had no abreast line. A second line leading astern would have been of no use whatever when the bow line leading ahead broke. Plaintiff's counsel submitted that if the ship had had the abreast line out, the accident would have been avoided and the burden of the proof of that was clearly upon plaintiff.

The evidence shows that the "Aztec" was tied up in the usual manner, that two lines, one ahead and one aft was the usual practice. Under Canal rule 30, all vessels in the canal are under the control of the superintendent as regards their moorings and fastening. In this case the superintendent was represented by Durocher, the lockman in charge of the lock. Durocher was satisfied with the manner in which the steamer was made fast; he accepted the two lines before he proceeded to close the upper gates. The function of the abreast line is to hold the vessel close up to the wall of the lock and not to lead forward, as was suggested by the canal superintendent. The pressure which broke the head line would also have carried the abreast line away, as the strain upon it would have been much greater than the strain which broke the head line, as by the

[1] (1896), 26 Can. S. C. R. 651.

[2] (1908), 41 Can. S. C. R. 54 confirmed in Privy Council C. R. [1909] A. C. 441.

[3] (1908), 12 Can. Ex. C. R. 178-183.

[4] (1909), 12 Can. Ex. C. R. 434.

time the strain would have come on the abreast line the steamer would have moved astern some distance under way in its backward movement. I have come to the conclusion that the abreast line would not have saved the situation, I am advised by my Assessors, that the two lines making the "Aztec" fast to the north wall of the lock were sufficient under ordinary circumstances to hold her in proper position while the lock was being emptied to enable the lower gates to be opened and allow her to pass out of the lock, and that when the "Aztec" was suddenly driven astern, the engines not moving, with sufficient force to break the line leading ahead, the absence of an abreast line did not contribute to the collision. I therefore come to the conclusion that the non-observance of Canal rule 27, regarding the number of lines to be used in making the vessel fast in the lock, did not contribute to the accident in any manner whatsoever.

Before the head line broke the master had left the bridge and when the line gave way the mate attempted unsuccessfully to get another line out. I am advised by my Assessors, that it was in accordance with the ordinary practice of seamen for the master to have come down from the bridge on the roof of the pilot house while the water was being let out of the lock and was more than half way down to the level of the reach below, and that as soon as the engines stopped it would have been proper for the master to have left the bridge, and further, that when the head line broke the mate could not by the exercise of reasonable skill and seamanship get out another line forward which would have prevented the collision. The pressure and strain which broke the head line when the steamer was almost ready

1920

FRASER v. S.S. "AZTEC."

Reasons for Judgment.

to go out of the lock came on suddenly, unexpectedly and without any warning to the master and crew who did everything that could have been reasonably expected in the emergency, and I exonerate them from all blame.

The evidence in this case shows that water which should have been held back came in at the upper gates of the lock from one of two causes: either one or more of the valves broke, or they were not closed. The deck hand Allison on the steamer heard the noise of the water in confusion. Durocher admitted that if a valve had been left open the water coming through "would draw a boat"; and McDonald admitted that if anything went wrong with the valves or the upper gate equipment, the pressure of thirteen feet difference in level would make a tremendous commotion in the water. I have asked my Assessors the following question:

"If for any reason one or more of the valves "in the upper gates of the lock were not closed "while the valves in the lower gates were open and "the lock was being emptied, would the water com- "ing into the lock through the upper gates have any "effect on the ship, and if so, would such effect be- "come more pronounced as the water in the lock "approached the level of the reach below?"

Their answer is:

"The water coming into the lock would increase "in power as the lock was emptied on account of "the increasing head above the upper gates and the "water in the lock getting nearer the level of the "reach below, and would strike against the lower "gates, form an eddy and cause heavy pressure "backward on the ship".

The commotion occurred and the boat was drawn back. We have the result which the two lockmen say would be produced if one of the valves in the upper gates had been left open, if the lockmen had been alert and vigilant they would have observed something had gone wrong. They are very much to blame for their carelessness, as they should have seen what was happening and should have averted the accident. I have not come to the conclusion that the valves were broken, although on the evidence there is ground for grave suspicion that something had gone wrong with the canal equipment.

There are many contradictions between Durocher and McDonald. They have not all been referred to. Durocher had been there for nine years and McDonald seven years, and neither of them could inform the Court how many snubbing posts were on the lock bank at Lock No. 17, where they performed their daily duties. Durocher swore that it would not take more than two or three minutes to close a valve; McDonald put it at from five to eight minutes. Neither of these witnesses were satisfactory. McDonald's demeanor in the box was distinctly unfavorable to his credibility; Durocher appeared unwilling to speak of many things with which he should have been conversant, and he admitted that he had been warned by one of his superior officers not to speak about the case or give any information until he was called in Court. When the head line of the steamer broke and she started to go astern, Durocher's first and only order to his fellow lockman Heppell, who was standing near him close to the lower gate, was to go to the upper gates and see if the valves were open. Why give that order if it were true that he, Durocher, had started the ma-

1920

FRASER
v.
S.S. "AZTEC."

Reasons for Judgment.

chinery to close one of the two remaining valves at the upper gates a few minutes before, and if he had seen McDonald at the same instant set the machinery in motion to close the other valve, and he had received a signal from McDonald that everything had been closed. If he had closed one himself and had seen McDonald close the other, he would have known they had been closed and would not have sent Heppell to see if they were open. When Heppell started for the upper gates the steamer was already going astern, gaining speed and momentum every instant, and considering his age, it is improbable that he arrived before the collision. He was a member of the lock gang, there are contradictions in his evidence, he appeared anxious to support his companions' statements, and I cannot accept his evidence that the valves were closed. McDonald when called as a witness on behalf of plaintiff in his examination in chief, clearly stated that after having closed the upper gates he closed one valve, Durocher closed one valve, and he, McDonald, started to walk down towards the other gate and when he had gone about one hundred feet the head line broke and the steamer went right back into the upper gates. If that evidence is true, two of the valves in the upper gates had not been closed. they were left open and it was through them that the water came into the lock which caused the commotion and the back eddy which threw the steamer astern, broke the head line and caused the collision. Taking into account the demeanor of McDonald and Durocher while under examination, the contradictions and inconsistencies in their testimony and their interest in clearing themselves, I have come

1920

FRASER v. S.S. "AZTEC."

Reasons for Judgment.

to the conclusion that the portions of their evidence wherein they swore that the remaining two valves in the upper gates were closed, is an invention to cover upon their own negligence. I find that two of the valves in the upper gates were improperly and negligently left open, with the result that the water which came through there caused a commotion in the lock and a back eddy which broke the head line and drove the steamer against the upper gates.

The accident was caused by the gross negligence of the lockmen. The "Aztec" and its crew are not to blame. Plaintiff's action fails, and there will be judgment dismissing it with costs.

Judgment accordingly.

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

Solicitors for SS. "Aztec": *Messrs. Meredith, Holden, Hague, Shaughnessy & Heward.*

1917
April 25.

IN THE EXCHEQUER COURT OF CANADA

IN THE MATTER OF THE PETITION OF

UNITED STATES STEEL PRODUCTS COMPANY,

PETITIONER;

AND

THE PITTSBURG PERFECT FENCE COMPANY,

RESPONDENT.

Trade-Mark and Design Act, R.S.C. 1906, ch. 71—Proprietor—Rights of—Agent to have his principal's mark registered in his name—Amendment.

Where, upon an application being made to the Court, for an order directing the Registrar of Trade-Marks to register a certain trade-mark, it appears that the applicant is not the proprietor of the trade-mark, but only his selling agent, such application will be refused; the Trade-Mark and Design Act providing for registration in the name of the proprietor only.

2. In as much as notice of such an application must be advertised in the Canada Official Gazette, with a view to calling any one in who has any objection, an application to amend the Petition by adding the proprietors of the Trade-Mark as Petitioners, after all advertisements have been given, cannot be granted.

REPORTER'S NOTE.—*Subsequently,* The American Sheet and Tin Plate Co. applied, and was given the right to register the Trade-Mark. See (1918), 18 Can. Ex. C. R. 254, 44 D. L. R. 731.)

This is an action by petitioner as selling agents of the American Sheet & Tin Plate Company to have the trade-mark of the latter, described below, registered in Canada in Petitioner's name.

By his statement of claim petitioner alleges, *inter alia*:—

1. That your Petitioner has been engaged in Canada for some time past in the sale of steel sheets

and plates as manufactured by the American Sheet & Tin Plate Company for which latter company your Petitioner has an exclusive selling agency in Canada and all countries other than the United States of America.

2. That the steel sheets and plates sold by your Petitioner throughout Canada and elsewhere are of high quality and your Petitioner has a high reputation in the trade for the good quality of these goods, which have been sold by it for some time bearing the following mark, to wit: . . . . . which said mark has acquired a special significance as being representative of steel sheets and plates containing a certain percentage of copper and *sold by your Petitioner* as aforesaid.

And he prays: —(a) That the said specific trade-mark consisting . . . . . as applied to the sale of steel sheets and plates, be registered *in favour of your petitioner* in the Trade-Mark Register in the Department of Agriculture of Canada at Ottawa, in accordance with the provisions of the Trade-Mark and Design Act.—R.S.C. 1906, ch. 71.

The other paragraphs refer to objections to register made by the Department, because of the existence of a similar mark in the name of Henry Disston & Sons, and as the case turned on another point, it is not necessary to the understanding of the case, to give these at length.

The Pittsburg Perfect Fence Co. filed objections but, for the same reason that certain paragraphs of the Petition are not printed here, their objections need not be printed either.

1917

UNITED STATES STEEL PRODUCTS CO. v. PITTSBURG PERFECT FENCE CO.

Statement.

The case came on for trial before the Honourable Sir Walter Cassels, J.E.C., for the first time at Ottawa on the 9th March, 1917.

Mr. Powell and *Mr. Elder* for petitioner;

Mr. Chrysler, K.C., and *Geo. McLaurin,* for objecting party.

From the pleadings and the remarks of Counsel, it became apparent that the petitioners were only the selling agents of the American Sheet & Tin Plate Co., and that they were asking for the registration of a trade-mark in petitioner's name to be used in connection with goods manufactured by the American Sheet and Tin Plate Co.

His Lordship, in the course of the remarks cited paragraph 1 of the petition (given above) and added:

"Now on the face of your petition you are noth-"ing but agents for this other company, and you "are their agents for selling their goods. You get "the goods from them and sell them for them. Are "they not the parties who are entitled to the trade-"mark? Is an agent entitled to get a trade-mark "for the goods of his principal, from whom he buys "and for whom he sells?

"Have you any law that shows that an agent who "is selling goods for a principal, is entitled to reg-"ister for himself a trade-mark in connection with "such goods?

"Supposing your agency terminates, you have "built up a large trade with the articles made by "this company, would you have a right to go on and "utilize that trade-mark as against them?

"A company in Toronto got the right to manufac- "ture articles made by the Bucyrus Co., and sub- "sequently the contract was terminated, and the "company in Toronto registered the trade-mark " 'Bucyrus,' and went on and did business on their "own account. This registration was set aside. Now "here you do not profess to be anything more than "an agent. What will happen if the agency termi- "nates? Could you utilize it? Could you enter into "another business of the same character in "fraud of your principals? I am calling "your attention to it before we get through. The "essence of the contract is to give credit to the "manufacturer. I never heard of an agent who "deals in one class of goods as agent getting a trade- "mark for the goods which are manufactured by his "principal, and only sold by him as agent. There "may be authority, but I would like to know where "it is.

"The goods are put on the Canadian market for "ten years, and receive a valuable reputation—it "becomes a very valuable asset—and are the Ameri- "can company, terminating its agency, to lose the "benefit of that trade?"

The *Bucyrus*[1] case referred to.

Mr. Powell argued that the connection between the American Sheet and Tin Plate Co. was most intimate, that Petitioners were really principals. They were exclusive sellings agents for this company. He admitted they could not make use of this mark with regard to any other goods.

Mr. Chrysler: "It is the American Sheet and Tin

[1] (1912), 14 Can. Ex. C. R. 35, 8 D. L. R. 920. 47 Can. S. C. R. 484, 10 D. L. R. 513.

1917

UNITED STATES STEEL PRODUCTS CO. v. PITTSBURG PERFECT FENCE CO.

Argument of Counsel.

"Plate Company's trade mark that is used on the "metal sheets sold by petitioners."

At this juncture, after examining one witness, Mr. Powell suggested that it would save consideration on the point raised by the court, if leave were granted to amend or to add parties.

HIS LORDSHIP: "The trouble is this. You cannot "get your trade mark without advertisement—and "the notice is given with a view of calling anyone in "who has any objection. There might be objections "to your principals getting it." Sebastian on Trade-Marks, 5th Edition, page 639, referred to.

Witness *Sullivan,* sales manager of the Steel Department admitted that the trade-mark was registered in the United States.

HIS LORDSHIP: "The petition refers to all coun-"tries except the United States, and paragraph 12 "of the Petitioners' answer to statement of objec-"tions, is as follows:

" 'That for some years past your Petitioner and " 'the Respondent have been using, in the United " 'States of America, their respective marks in " 'question herein in connection with the sale of " 'their respective goods and products in that coun-" 'try and no confusion or conflict of interest has " 'resulted therefrom.'

"*Witness*: That refers to the American Sheet and "Tin Plate Co.," and later he adds: "I quite appre-"ciate the inconsistency."

At p. 45 of the evidence he says:

"Q. The United States Steel Products Co., are "they selling agents for any other of the subsidiary

"companies?—A. The United States Steel Corpor-
"ation are selling agents for all of the subsidiary
"companies that manufacture.

"Q. The United States Steel Corporation Com-
"pany is not an agent for the American Sheet and
"Tin Plate Company, but it is the selling agent for
"the United States Steel Products Co.?—A. Prac-
"tically.

"Q. How many companies are included in that
"organization?—A. Some 40 or 50 all told, but they
"are not all manufacturing companies. We are
"selling agents for about ten manufacturing com-
"panies in the steel corporation.

"Q. Do any of the others use the Keystone trade-
"mark for any of their products? A. So far as I
"know not any.

"Q. Then the American Sheet & Tin Plate Co. is
"not a new company?—A. No.

"Q. How long is it since it was incorporated?—A.
"About 15 years.

"Q. That goes back to 1902?—A. Yes.

"Q. But they were manufacturing up to 1911, you
"say, this particular product. You were not manu-
"facturing before 1911. Were they manufacturing
"before that, tin plate among other things?

"His Lordship: Supposing The American Sheet
"& Tin Plate Co. were adverse to this company, you
"could not possibly get a trade-mark. Supposing
"the Products Co. were independent and adverse to
"the American Sheet & Tin Plate Co., how could
"the Products Co. come here and get a trade-mark
"when they manufacture it in the United States
"and export it to Canada? It is a question whether

1917

UNITED STATES STEEL PRODUCTS CO. v. PITTSBURG PERFECT FENCE CO.

Argument of Counsel.

"the trade-mark in the United States was used in "this country. Supposing it had been used in the "United States, and the goods had been exported "into Canada and sold in Canada? You could never "get a trade-mark adverse to them."

The case was argued on the 25th April, 1917.

Mr. Powell: The effect of the cases goes to show that where there is no conflict of interest and where the application is made with the authority and consent of the principal, there is no objection to it and nothing illegal about it and that when the relationship of the principal and agent terminates, the principal can make an application to the court and have their names substituted for the name of the agent. The English statute makes advertising a *prerequisite* of all registration. The purpose of advertising any proceedings of this kind under our Act serves the same purpose.

A person can register under the Canadian Act without advertising. The cases of *Re The Australian Wine Company Limited*[1] and *Ex parte Lawrence Bros., Re Marler's Trade Mark,*[2] are referred to.

He did not contend that they had an interest in the trade-mark independently or adverse to the American Sheet & Tin Plate Company.

He further argued that if it was found that the trade-mark could not be registered in their name as agents, that then it was open to the court to substitute the American Sheet & Tin Plate Co. to the petitioners on the register.

[1] 1885 (61 L T.) 427 (note).
[2] (1878), 44 L. T. 98 (note).

1917

UNITED STATES STEEL PRODUCTS CO. v. PITTSBURG PERFECT FENCE CO.

Argument of Counsel.

Mr. Elder: "The right of the agent to make the application appears to have been dealt with under the English Act.[1] See *Burroughs, Wellcome and Co's Trade-Mark.*"[2]

He further concurred in the argument of Mr. Powell that the principal might petition to have the register rectified if at any time the relationship of principal and agent should terminate.

And they moved to amend their application by adding the proprietors of the trade-mark as petitioners.

Mr. Chrysler, K.C., was not called upon.

Reasons for Judgment.

Judgment was rendered on same day.

Per Curiam.—The Court has to deal with the trade-mark law, and it is here asked that a trade-mark, of which somebody else is the proprietor, be registered in the name of the petitioner. The moment the agency ceased the right of the agent to use that trade-mark would terminate.

The petitioners also ask to amend, by adding the proprietor as petitioner. This cannot be done without advertising. When an application to register is made, advertisement has to be published. The statute is specific.

In this case the petitioners are not the proprietors at all, and part of the trade-mark is in the name of their principal.

In a case in England a gentleman registered a trade-mark in his own name, whereas under a contract he should have registered it in the name of his principal, and the court expunged the registration

[1] (1883) 46-47 Vict., Ch. 57.
[2] (1886), 32 Ch. D., 213.

1917

UNITED STATES STEEL PRODUCTS CO. v. PITTSBURG PERFECT FENCE CO.

Reasons for Judgment.

—but, when they came to make an application to register it by inserting the name of the proper owner, the judges held they could not do that in the face of the statute on account of the advertising. This is what Lord Justice Cotton said in *Re Riviere Trade-Mark*:[1] "In my opinion, whatever might be "the result of the application to strike the name of "the French firm off the register, the other "application ought not to be granted. With-"out saying that it is impossible to grant such "an application as this in any case where one person "is improperly on the register, and another person "who is entitled to the trade mark wishes to be put "on, yet, as a rule (and I do not know a case where "there would be an exception), when any one applies "in the first instance to be publicly registered as the "proprietor of a trade-mark, the requirements of the "Act and rules as to issuing advertisements and "otherwise ought to be complied with. For there "may be cases—and I can imagine them—where, al-"though the person applying to strike a name off the "register may be entitled to say, as against the per-"son on the register, that he is improperly regis-"tered as owner of the trade mark, yet, there may "be persons, not present at the litigation who have "a right, as against the applicant, to rectify the "register, and to say that such applicant is not him-"self entitled to be there so as to prevent such third "person from using the mark, I have thought it "right to express my opinion on that part of the "case at once."

Lindley. L. J., added at page 239: "If the appli-"cant had succeeded in making out a case to remove

[1] (1885), 53 L. T. (N.S.) 237 at 238.

"the name of Riviere and Co., I do not think they "would have been entitled to have themselves regis- "tered in respect of this mark. I think Mr. Stir- "ling's observation is conclusive, that they could not "have registered anew in respect of this old mark "without advertising and taking the other steps "required by the Act and rules. I say that on be- "half of the public." The same view was independently taken by Fry, L. J.

The effect of that was, the man who put the trade mark on register, did so in breach of the contract with his principal—and the principal not only moved to expunge the trade-mark, but asked to be put on the trade-mark register himself. See also Sebastian on Trade-Marks, 5th Ed., p. 639.

It seems to me that the parties who are applying here for the registry of the trade mark are not within the statute, because they are not proprietors.

Our statute clearly says that it must be the proprietor who applies. The applicants might be dismissed as agents to-morrow and supposing the trade-mark was registered in their name what would happen? Could the principal come along and ask to have it assigned?

I cannot grant the amendment in the face of the decisions of the Court of Appeal and I think the petition must be dismissed on the ground that you are not proprietor. The wrong person is applying and I cannot, by amendment allow the right person to be added without going through new proceedings.

At most it could only be registered in their names *as agents* and only during the term of their agency and no provision is made for such registration.

1917

UNITED STATES STEEL PRODUCTS CO. v. PITTSBURG PERFECT FENCE CO.

Reasons for Judgment.

You cannot under the Trade-Mark Act get something that does not belong to you.

The case of *Re Riviere Trade-Mark*[1] is cited, where a party applied in the name of another applicant without that applicant taking the steps pointed out by the Statute.

The application is therefore dismissed with costs.

Solicitors for Petitioners: *Davidson, Wainwright, Alexander & Elder.*

Solicitors for Objecting Party: *McLaurin & Millar.*

[1] 53 L. T. (N.S.) 237.

1915

December 10.

IN THE EXCHEQUER COURT OF CANADA

IN THE MATTER OF PETITION OF RIGHT OF

JOHN PIGGOT & SON,

SUPPLIANTS;

AND

HIS MAJESTY THE KING,

RESPONDENT.

Crown—Negligence—Tort—Injury to "property on public works"—Jurisdiction—R. S. C. 1906, *c.* 140 *sec.* 20 *s. s.* (*b. and c.*) *Costs—Amendment.*

1. Except where so provided by statute, the Crown is not liable for wrongs committed by its servants. Section 20, S.S. (c) of the *Exchequer Court Act* (R.S.C. 1906, c. 140) imposes such liability when the injury is to a person or property on any public work and results from the negligence of any officer or servant of the Crown. When the thing injured is not on any public work, no liability exists, even though it arose out of operations connected with such work.[1]

2. The present action being for damages alleged to be due to the acts of officers and servants of the Crown by the explosion of dynamite on an adjoining property does not come within the scope of sec. 20 (b) of the said Act which gives jurisdiction to this Court "to hear and determine every claim against the Crown for damage to property 'injuriously affected' by the construction of any public work."

3. Where the pleadings raise a question of law, which, if decided in favour of the party raising it would dispose of the case, without going to trial and he fails to apply to have it so decided, the Court will exercise its discretion as to costs and direct the payment of a fixed sum in lieu of taxed costs, such sum to be based on what the taxed costs would be, had the case been disposed of on such argument before trial.

Semble (a) In as much as a Petition of Right cannot be filed without the fiat of the Crown being first obtained, the Court will not allow same to be amended by setting up a new and substantive right of action without the permission of the Crown being first obtained therefor.

REPORTER'S NOTE.—[1] Since the cause of action in this case arose and since the decision of the case, Section 20, S. S. "C". of the Exchequer Court Act, was amended. (See 7-8 Geo. V. ch. 23. S. 2.)

1915

PIGGOT v. THE KING.

Statement of Facts.

PETITION OF RIGHT taken to recover, from the Crown, damages caused to the dock and piling ground of the suppliants, and alleged to be due to the works of the crown's servants and officers, when constructing a large dock on adjoining property, and to the explosion of dynamite thereon.

The suppliants were the owners of certain dock and piling ground near Windsor, on the Detroit River, Province of Ontario.

In the course of the Fall of 1912, the respondent was constructing a dock in the immediate vicinity of the property of the suppliants. During the late Fall dynamite was used to blow away the crib work which had been placed along the river bed, near the property of the suppliants. In the following Spring, when the suppliants placed their cargoes upon this dock, it collapsed and a considerable quantity of the lumber floated away and was lost. Suppliants alleged that the damage was due to the operations carried on by the government in the construction of their dock and by undermining suppliants' dock, and the Petition of Right was taken to recover from the Crown for the damages so alleged to have been suffered.

Suppliants by their Petition of Right, paragraph 2 allege: "That the said Petitioners are the owners of lots numbers one and two in Block 'A' in the City of Windsor according to plan No. 76, together with the water lots lying in front thereof, and for the purposes of their said manufacturing business constructed upon the said lots and water lots a large dock of about 200 feet frontage and about 50 feet in width reaching to the channel bank of the Detroit River, and used said dock and grounds for the pur-

1915

PIGGOT v. THE KING.

Statement of Facts.

pose of discharging their lumber and other material from the boats carrying the same, and also for the purpose of carrying reserved stock."

Paragraph No. 3. "That in or about the month of July last past the Government of the Dominion of Canada was proceeding to construct a large public dock about 100 feet east of the said lands and premises of the petitioners and in the course of the construction of the said dock used large quantities of dynamite for blasting purposes and so negligently carried on blasting operations in connection with the said work as to so injure the crib work and other sub-structure of the said dock that the same collapsed, seriously damaging the said dock and projecting into the river a large quantity of valuable lumber, a considerable portion of which was entirely lost."

The operations of the Crown were not on any part of the property of suppliants and no part of suppliants' property was taken by the Crown.

The case came on for trial before the Honourable Sir Walter Cassels at London, Ont., on Friday, December 10th, 1915.

Mr. Rodd for suppliants;

Mr. Meredith, K.C., and *Mr. Fleming*, K.C., for respondent.

Argument of Counsel.

Mr. Rodd argued that the facts of this case gave jurisdiction to the court, both under sub-section C and sub-section B of section 20 of the *Exchequer Court Act*. That the property where the public work was going on was adjoining suppliants; that the damage to suppliants' property was due to the explosion of dynamite on the public work; that the court should read into the article, after the word

1915

PIGGOT v. THE KING.

Argument of Counsel.

"on" the words "or near." That the case also fell under sub-section B of section 20 of the *Exchequer Court Act*. "Every claim against the Crown for damage to property 'injuriously affected' by the construction of any public work." That it was not only where lands were taken by the Crown or expropriated by it that this article came into operation. That the present case was analogous to the case where a man digs on his property and takes away the lateral support of his neighbour's wall. He does not intend to do wrong, but wrong is done; that the case of *Chamberlin v. The King*[1] could be distinguished from this case; and that there was no limitation, to section 20 (b), as a *sine qua non;* that any part of the property of the suppliants must have been taken before it can be said to be injuriously affected. This is not the interpretation to be placed on the language of the statute.

He claimed also the right to amend his petition, in as much as the fiat, having been granted, was in effect a submission by the Crown that the damages should be assessed by the Court and was an admission that suppliants had a right of action. The granting of a "fiat" by the Crown was in effect a declaration by it that it was quite content, if we had been injured, to have the matter adjusted. They in substance, say "you may try that out in Court."

The Court was of opinion there was no jurisdiction in the matter, and, an adjournment was granted to permit suppliants' counsel to consider the advisability of discontinuing before going further. After adjournment, Mr. Rodd stated that he was asking the Court to read into section 3 of his petition what could be established in evidence, and asked the Court

[1] (1909), 42 Can. S.C.R. 850.

to consider whether or not the words "on a public work" may not be interpreted to mean so near the public work as to be injured by something which is done upon the public work.

Counsel for the Crown were not called on, and judgment was rendered from the Bench.

Per Curiam. (December 10th, 1915.)

The cause of action is contained in paragraph 3 of the Petition (printed above). It is an action of tort pure and simple, and no action for tort lies against the Crown, except when so provided by Statute.

Section 20, subsection (c) of the *Exchequer Court Act,* (R.S.C. 1906, c. 140) reads as follows:

"The Exchequer Court shall have exclusive orig-"inal jurisdiction to hear and determine: (c) Every "claim against the Crown arising out of any death "or injury to the person or to property on any pub-"lic work."

In the case of *Chamberlin v. The King*[1] the Chief "Justice of the Supreme Court says at p. 353: "In a "long series of decisions this Court has held that the "phrase 'on a public work' in section 20 sub-section C of the *Exchequer Court Act* must be read, to bor-"row the language of Mr. Justice Duff, in *The King* "*v. Lefrançois,*[2] 'as descriptive of the locality in "which the death or injury (that is injury to pro-"perty) giving rise to the claim in question occurs,' "and that to succeed the suppliant must come within "the strict words of the statute. In this case the pro-"perty destroyed by fire, previous to and at the time "of its destruction, was upon the land of the sup-

[1] (1909), 42 Can. S.C.R. 350.
[2] (1908), 40 Can. S.C.R. 481.

1915

PIGGOT v. THE KING.

Reasons for Judgment.

"pliant, some distance from the right of way of the "Intercolonial Railway and was not property on a "public work. As to the objection that this question "was not raised in the Court below, I refer to *Mc-"Kelvey v. LeRoi Mining Company.*[1] If questions "of law raised here for the first time appear upon "the record we cannot refuse to decide them where "no evidence could have been brought to affect them "had they been taken at the trial. The point was "taken by the pleadings if not urged at the argument "below."

Sir Louis Davies says: (p. 352)

"This was an action brought in the Exchequer "Court on a claim for damages arising out of the "destruction of the property of the suppliants "claimed to have been caused by sparks from the "smoke stack of an Intercolonial Railway engine.

"The property destroyed was previous to and at "the time of its destruction upon the land of the "suppliant some distance from the right of way of "the railway and was not property on a public work.

"The learned Judge, Mr. Justice Cassels, who de-"livered the judgment of the Court of Exchequer, "had not heard the witnesses, who had given their "testimony before the late Judge Burbidge.

"The suppliants were desirous to avoid the ex-"pense of a rehearing and with the assent of the "respondent the case was fully argued before Mr. "Justice Cassels on the evidence taken before Mr. "Justice Burbidge.

"The learned Judge found as a fair conclusion "to be drawn from the evidence that the fire orig-"inated from a spark or sparks emitted from the "engine, but he was unable to find that it was caused

[1] (1902), 32 Can. S. C. R. 664.

"through any defect in the engine for the existence "of which and the failure to remedy which the "Crown could be held liable for the losses claimed. "On this appeal the jurisdiction of the Court of Ex- "chequer over the claim in question was challenged "and denied by Mr. Chrysler, his contention being "that such jurisdiction was limited to claims against "the Crown arising out of injuries to the person or "property on a public work, and did not extend to "injuries happening away from a public work, al- "though caused by the operations of the Crown's "officers or servants. The cases in which the ques- "tion has already come before this Court for con- "sideration were all referred to.

"We are all of the opinion that the point has al- "ready been expressly determined by this Court, "particularly in the case of *Paul v. The King*[1]. In "that case the majority of the Court held after the "fullest consideration that clause (c) of the 16th "section"—that is the same as this is—"of the *Ex- "chequer Court Act,* which alone could be invoked "as conferring jurisdiction, only did so in the case "of claims arising out of any death or injury to the "person or property *on any public work* resulting "from the negligence of any officer or servant of the "Crown while acting within the scope of his duties, "claims for injuries not within these words of the "section and occurring not on, but away from, a "public work, although arising out of operations "wheresoever carried on, were held not to be within "the jurisdiction conferred by the section.

"With the policy of Parliament we have nothing "to do. Our duty is simply to construe the language "used, and if that construction does not fully carry

[1] (1906), 38 Can. S.C.R. 126.

1915

PIGGOT v. THE KING.

Reasons for Judgment.

"out the intention of Parliament, and if a wider and "broader jurisdiction is desired to be given the Ex- "chequer Court, the Act can easily be amended.

"Under these circumstances we must, without ex- "pressing any opinion upon the conclusions of fact "reached by the learned Judge, dismiss this appeal "with costs."

That seems to be absolutely the same as this case.

After this case the Statute was amended, but they confined it to the Intercolonial and the Prince Edward Island Railway, they did not extend it, and it just rests where it was when the *Chamberlin* case was decided so far as this particular case is concerned, and in the *Chamberlin* case they make no distinction between injury to persons and injury to property.

Mr. Rodd: The evidence would show in this case, that in 1912 these blasting operations were carried on in the month of October. I have told your lordship how the cribwork extended along the whole front.

HIS LORDSHIP: Yes, I understand.

Mr. Rodd: The dock then was finished. Before they had completed their work they had reached a point some twenty or thirty feet from suppliants' dock from which there were some cribwork timbers still sticking up. Then in the early part of 1913 the Government proceeded to construct another building between the dock which had been constructed and the suppliants' dock, coming within four feet of our property, and in the doing of that work pulled out or blasted or took away or in some manner wrenched away the timbers connected with our cribwork which still extended beyond our dock itself. So

that after having completed all of their work they had taken away from the cribwork which had supported our dock that which was necessary to hold it up.

HIS LORDSHIP: There is no allegation of that in the Petition and the Court will not allow a Petition of Right to be amended by setting up a new and substantive right of action. By so doing, after the fiat has been granted, it would be really arrogating to itself what is the right of the Minister and it would be interfering with his jurisdiction. Any technical amendments in furtherance of the main claim have always been allowed, but I have no power to allow such amendment as this to be made, and therefore suppliant is bound by allegations contained in clause 3 which is the whole cause of action.

Mr. Rodd: We will show their property was injuriously affected, and that if their action was entirely one of tort, such as to come within the *Chamberlin* case, that then the granting of the fiat would be absolute nonsense.

HIS LORDSHIP: Fiats, in a way, are not nonsense. True the Crown, at Ottawa, has always proceeded on a liberal basis in granting fiats. The policy in Ottawa is like the policy in England, if a person thinks he is aggrieved and wants to come into Court they do not withhold a fiat. In many cases where fiats have been granted the Statute of Limitations was pleaded.

Suppliants then submit their claim is under subsection (b) of section 20 as well.

This reads as follows: "Every claim against the Crown for damage to property injuriously affected by the construction of any public work."

This section does not apply.

1915

PIGGOT v. THE KING.

Reasons for Judgment.

The words "injuriously affected" mean injuriously affected by reason of the construction of any public work. That is to say the construction of the work either takes a piece of the land or affects the land. A man's lands may be injuriously affected by the construction of a public work and he would be entitled to damages. That is to say, suppose your right of access is cut off. The Crown is expropriating something from you, it is taking something that belongs to you. It does not actually take a piece of your property. Supposing the Crown in the performance of a public work steps in and takes a little corner of your property, that lets in a claim for damages to your property, and also lets in a claim of a personal character, that is, it lets in a claim for loss of business profits, and so on. On the other hand, if the Crown does not take any portion of your land you may still have a remedy as far as injury to your land is concerned, but you do not get the other. It is always the taking away of something, taking away your right of way, raising the road in front of your property so as to affect your land.

The action will be dismissed.

As to costs, if when the application was made to fix date of trial, the pleadings had been put before the Court it would have been ordered that the question of jurisdiction raised thereby should be argued before going to the expense of trial.

As the Crown sat back and failed to apply to have this question of law disposed of, the Court will exercise its discretion as to costs, and will only allow a lump sum of $100.00 in lieu of taxed costs being prac-

tically the amount they could have had taxed, on an action dismissed after hearing argument on questions of law.

Judgment accordingly.

Solicitors for suppliant: *Rodd, Wigle* and *McHugh.*

Solicitors for respondent: *T. G. Meredith,* K.C.

INDEX

27, the Company defendant gave a bond in favour of plaintiff for the due and faithful compliance by G. of all enactments and requirements of the said Act and to secure the payment of any penalties to which he might become liable under the Act. G. at the time of delivery to him of certain grain at the warehouse, and in compliance with section 157 of the Act, issued a *warehouse storage receipt for the same.* No *cash purchase ticket* and no storage receipt for special binned grain were ever issued. Subsequently, in some cases about one or two months after the issue of the storage certificate, G. bought this grain from the owners paying part cash, but made default in paying the balances and having so failed to pay, the Company defendant was sued as surety on the bond to recover the amounts so due. *Held*, that G. by giving the warehouse storage receipt at the time of delivery of the grain to him had discharged all statutory duties as such licensee and had complied with the requirements of the Statute, and the purchase of the grain by him subsequently, not being done under the license, but in the exercise of his common law right, the bond in question did not cover such purchases, and was not such an act for the faithful performance of which the surety could be held liable on the bond. 2. That there being nothing in the Act prohibiting the operator of a country elevator from buying grain, (as in the case with the operator of a terminal elevator), to insert this inhibition in the statute by implication, would not be construing the Act of Parliament, but would be altering it and enlarging the provisions which the Legislature had thought fit to make. 3. A track buyer, being by sub-sec. 2 or sec. 219 and sec. 2, sub-sec. "S" of the Act, 2 Geo. V. 1912, ch. 27, defined as one who buys in *car lots on track*, his act in purchasing grain which is not *in car lots on track*, but in a terminal elevator or other elevator or warehouse is not one within the scope of his license as such, and therefore the bond does not cover such a transaction. 4. That in as much as, mutuality of mistake cannot enable the parties to change the nature of a transaction, more particularly when it affects the rights of third parties, the fact that both vendor and purchaser believed that the grain was *on track* at the time of sale, would not justify the Court in treating it as such. *Non fatetur qui errat.* 5. That the fact that the sum in a bond is described as a penalty or as liquidated damages, is not conclusive; The question of whether the sum mentioned in a bond is to be considered as a penalty or as liquidated damages in any given case is one of construction for the Court alone. 6. Where a bond was given for the due performance of statutory duties, of various kinds and importance, some of a *certain* nature and amount, some of *uncertain* nature and amount, and only one large amount is mentioned in the bond, the bond cannot be but a penalty bond, because as the amount mentioned in the bond cannot be regarded as liquidated damages in respect of some of the stipulations it ought not to be so regarded in respect of the others. THE KING *v.* LONDON GUARANTEE AND ACCIDENT COMPANY LIMITED, AND JOSEPH GORBOVITSKY.....385

COLLISION

See GOVERNMENT RAILWAY.
" SHIPPING.
" EVIDENCE

Right of way—Regulations—Art. 19—Responsibility. A collision occurred between the "Durley Chine," bound from Halifax to Norfolk, and the "Harlem," bound from New York to Bordeaux, at 1.19 a.m. on April 22, 1917, some 65 miles southeast of Ambrose Channel lightship, off New York harbour. It was starlight, though the night was dark, and a haze was on the horizon. Just before the collision, the course of the "Durley Chine" was s. 50° w. and that of the "Harlem," s. 52° e., or at right-angles to one another, with the "Harlem" on the starboard side of the "Durley Chine." Art. 19 of the Rules to Prevent Collision at Sea provides that when vessels are crossing so as to involve risk of collision, the vessel which has the other on her starboard side shall keep out of the way of the other. *Held*, that within the meaning of said rule, the "Harlem," was a crossing ship, carrying proper regulation lights, and that being so, the "Durley Chine" was obliged to keep out of her way.
Appeal to Can. Sup. Ct. dismissed, 52 D. L. R .—, 59 Can. S. C. R. 653. HIS MAJESTY THE KING *v.* THE SHIP "HARLEM" AND HER FREIGHT....41

2. *Responsibility—Gross negligence—Collision—Regulations—Art. 27.* The collision happened in Halifax harbour at 8.50 a.m., in broad daylight. The weather was perfect, there being no wind, and the ships could see each other several miles away. The "Imo" was keeping as far as practicable to her side of the fairway or mid-channel and blew a signal of three blasts and reversed her engines when about a mile apart, having previously signalled she would keep to starboard; she then reduced speed and did not put on engines again before collision. When "Mont Blanc" blew a two-blast signal, indicating she was coming to port and would cross bow of the "Imo," the "Imo" reversed engines and gave a three-blast signal. The "Mont Blanc" was travelling at excessive speed and, starboarding her helm, attempted to cross the bows of the "Imo." She did not reverse engines nor drop anchor. The collision happened within the waters of the "Imo," that is on the Halifax side of mid-channel, and after collision the "Mont Blanc" ran upon the Halifax shore, where the explosion took place. *Held*, that the collision was wholly due to the last order of the "Mont Blanc" and to the gross negligence of her officers in attempting to cross the bows of the "Imo." 2. That the order could not be justified as an emergency order, in view of the respective positions of the ships.
On appeal to the Supreme Court, judgment was rendered, allowing the appeal in part, and finding both ships equally at fault, Sir Louis Davies and Idington, J., dissenting, 59 Can. S. C. R. 644 COMPAGNIE GENERALE TRANSATLANTIQUE *v.* THE SHIP "IMO".....48

3. *Act of God—Responsibility—Burden of proof—Inevitable accident—Definition of—Negligence—Costs—Rule 132, Admiralty Practice. Held*, 1. That where the action of tide and currents is so contrary to experience, that it could not be reasonably anticipated or foreseen it is to be regarded as an "Act of God," and collision due to such is an "inevitable accident." 2. That "inevitable accident" is that which the party charged with damage could not possibly prevent by the exercise of all reasonable precautions which ordinary skill and prudence could suggest. 3. That where "inevitable accident" is pleaded the onus is primarily on the plaintiff to show that blame does attach to the vessel proceeded against, and a *prima facie* case in this behalf must be established. 4. That, on an action being dismissed on the ground that the damage was due to inevitable accident, costs will follow the general rule, unless special circumstances exist requiring a departure therefrom. The *"Marpesia,"* (1872), L.R. 4 P.C. 212, referred to. THE TUG "JESSIE MAC" *v.* THE TUG "SEA LION".....78

4. *Regulations 19, 21, and 27 International Rules of Road—Common Fault—Negligence—Damages.* On September 24, 1910, at about 4 o'clock a.m. the "Kronprinz Olav" and the "Montcalm" came into collision in a narrow channel in the St. Lawrence River at a point

COLLUSION

See CONTRACTS.

CONSTITUTIONAL LAW

CONTRACTS

See PATENTS.

Of hire—Law of the Flag—Improper Discharge —Norwegian Maritime Code; Admiralty Act 1861, Sec. 10 and sections 9 and 12. Held:—1. That section 10 of the Admiralty Court Act, 24 Vict. (Imp.) 1861, which extends the jurisdiction to "any claim by a seaman of any ship" permits the application by the court of the law of the Country of the litigants. 2. That a contract or engagement between a Norwegian owner and a Norwegian master, for services to be rendered on a Norwegian ship, registered in Norway, although verbally made in New York, U. S. A., is governed by the law of Norway. 3. That where a change in destination of a ship is made, the crew can legally refuse to continue on terms of existing contract. 4. That in such event, where the new terms asked are not accepted by the owner, members of the crew are entitled to legal notice before being discharged. This case has been affirmed by the Supreme Court of Canada, 51 D. L. R. 149. HANS JACOBSEN, *v.* THE SHIP "FORT MORGAN".....165

2. *"Approximate" meaning of—"Garbage," meaning of—Right to read into a contract; Ambiguity in language—Estoppel.* Among the terms and conditions of a contract made by the Crown with R. for the sale and removal of "garbage, swill and kitchen refuse" from Camp Hughes there was the following clause: *"There will be approximately* 20,000 *men in camp."* *There were* 2,467,057 men in camp during the time it was in operation, viz., an average of over 15,814 daily. The contractor undertook to remove garbage, etc., *"during the period of the camp"* at price of so much *per thousand men.* The number for a time fell below 20,000, due to men being sent unto farms and overseas. There was no guarantee as to the time camp would be kept open or as to quantity or quality of garbage. *Held*, that the words "approximately 20,000 men" were merely words of estimate or expectation and contained no *warranty* as to the exact number of men; and there being moreover no guarantee as to duration of camp, or as to the quantity of garbage, no action would lie against the Crown for breach of contract by reason of the number of men in camp being less than 20,000 daily during part of the time and for consequent loss of profits. 2. That as the contract was in writing and the language clear, the word "daily" could not be read into the language of the contract by any forced construction, so as to enlarge the obligation of the Crown, and the words "approximately 20,000 men" could not be read "approximately 20,000 men daily." 3. The words "garbage, swill and kitchen refuse," as used in the contract, covered all table waste, and all that comes as kitchen refuse including material of various kind and description coming from or being in daily use in the preparation and use of food, in either camp or kitchen. 4. Where the claimant complains that sales of fats, etc., were made by private soldiers and non-commissioned officers in violation of the provisions of his contract, so that the Crown did not obtain the money arising from such sales, and where it further appeared that he himself had made purchases of the same irregular character, it was held that he was estopped by his conduct from setting up a claim for loss of profits arising from such sales by third parties. Where, however, moneys found their way into the hands of the Crown from the sales of such fats at Camp, notwithstanding the claimant's conduct, as above mentioned, the amount being small, the prospective profits on such sales to third parties were allowed to be set off against the claim of the Crown. THE KING *v.* GEORGE ROY, AND GEORGE ROY *v.* HIS MAJESTY THE KING.....365

3. *Evidence — Collusion — Progress estimates.* Suppliants contracted with the Crown for the building of two wharves and certain excavations at Victoria, B.C. They were to receive $9.10 per cubic yard for rock excavation and 52 cents for earth; and a certain sum per yard for filling. The Crown had soundings taken and test borings made; and maps showing the result of these measurements were filed. The contractor was to be paid rock prices for everything excepting material which could be removed with a dredge, which later was to be classified as earth. The volume of all excavated material to be paid for, was that occupied by the material before its removal, to be determined by measurements taken before and after. The total excavation is not questioned, but suppliants ask to be paid for some 19,000 cubic yards more of rock that the Crown's estimates show, and which the Crown says was material which should be classified as "earth." Suppliants claim the material could not be dredged but had to be drilled and blasted; nevertheless their own records show that the drill went through it at a rate of between 100 and 336 feet per hour, which could not have been done in hard material; and an analysis of their records shows that as soon as they reached what the Crown admits was rock the rate of penetration falls to between 13 and 21 feet per hour which is a corroboration of the Crown's evidence and plans filed. The Crown also produced samples of material taken from the bottom and sides of the cut, which suppliants claim could not be blasted, yet they admit that some 6,000 yards of material was blasted which would be "earth." Moreover, there were 51 men on the dredge and drill and not one was brought as a witness to establish the kind of material excavated, and no evidence of the nature of the material taken out by dredge, was adduced. Suppliants filed the "progress estimates" subject to objection, but the man who made them was not called, and by the Order-in-Council the Court is to determine the classification notwithstanding the findings or certificates of the engineer. *Held*, on the facts stated, that the progress estimates did not in themselves make proof of their contents, and were not admissible in evidence unless the person who made them was called as witness; and that the material in question was not rock but earth within the meaning of the contract, and the estimates of the Crown were sufficient, and that part of suppliant's claim for the surplus should be dismissed. 2. That there was collusion between the resident engineer and the contractors and an attempted fraud was intended by him and the representatives of the contractors and that the estimates being certified by the resident engineer should be set aside. 3. Where the contract and specifications provide for the payment of a stated sum to the contractor for excavation and a stated sum for filling, and where the filling done was back filling and required no extra handling and was nearer than discharging into the open sea, such work will be considered as part of the excavating and removing operation and will not be deemed filling within the terms of the contract, and nothing will be allowed therefor. GRANT, SMITH & COMPANY, AND MCDONNELL LIMITED *v.* THE KING.....404

COST OF CONSTRUCTION

See ADMIRALTY.

COUNTRY ELEVATORS

See CANADA GRAIN ACT.

CREDIBILITY

See WITNESSES.

CROWN

Negligence—Tort—Injury to "property on public works"—Jurisdiction—R.S.C. 1906 c. 140 sec. 20 (b.) & (c.)—Cost—Amendment. 1. Except where so provided by statute, the Crown is not liable for wrongs committed by its servants. Section 20, sub-sec. (c) of the *Exchequer Court Act* (R.S.C. 1906, c. 140) imposes such liability when the injury is to a person or property on any public work and results from the negligence of any officer or servant of the Crown. When the thing injured is not on any public work, no liability exists, even though it arose out of operations connected with such work.[1] 2. The present action being for damages alleged to be due to the acts of officers and servants of the Crown by the explosion of dynamite on an adjoining property does not come within the scope of sec. 20 (b) of the said Act which gives jurisdiction to this Court "to hear and determine every claim against the Crown for damage to property 'injuriously affected by the construction of any public work." 3. Where the pleadings raise a question of law, which, if decided in favour of the party raising it would dispose of the case, without going to trial and he fails to apply to have it so decided, the Court will exercise its discretion as to costs and direct the payment of a fixed sum in lieu of taxed costs, such sum to be based on what the taxed costs would be, had the case been disposed of on such argument before trial. *Semble* (a) In as much as a Petition of Right cannot be filed without the fiat of the Crown being first obtained, the Court will not allow same to be amended by setting up a new and substantive right of action without the permission of the Crown being first obtained therefor. *Reporter's Note.*—[1]Since the cause of action in this case arose and since the decision of the case, Section 20, sub-sec. (c.) of the Exchequer Court Act, was amended. (See 7-8 Geo. V. ch. 23, S. 2) In the Matter of Petition of Right of JOHN PIGGOT & SON AND HIS MAJESTY THE KING.....485

DAMAGES

See ADMIRALTY.
" COLLISIONS.
" EXPROPRIATIONS.
" PUBLIC LANDS.

DISCOVERY

Right to and scope of—Co-defendants—Adverse party—No waiver of right to refuse to answer by appearing—Exchequer Court Rule No. 154. Under order from the Power Controller, the Toronto Power Company delivered a certain amount of electric power to the Ontario Power Company. The Toronto Power Co. subsequently assigned all its rights against the Ontario Power Co. to plaintiff, who now, by its Information, as assignee of the Toronto Power Co., asks the Court to fix the amount due to the Toronto Power Co. and that the Ontario Power Co. be ordered to pay this amount. The Toronto Power Co. filed defence but made no claim against the Ontario Power Co., its co-defendant. An appointment was taken out by the Ontario Power Co. to examine an officer of its co-defendant on discovery, the plaintiff not being notified. The examination was begun without objection from either party and was continued until on a certain question being put, witness refused to answer. *Held*, that, though any adverse party in a suit can be examined on discovery, yet such examination must be limited to the issues to be tried in the action as between the parties. See *Hamilton v. Quaker Oats Co.* 46 O. L.R. 309 (Nov. 26, 1919). 2. That on the above stated facts, the Ontario Power Company had no right to examine its co-defendant herein on discovery, not being an adverse party, the right thereto being against the Crown only as the adverse party. 3. That a witness submitting himself to examination for discovery does not waive his right to object to answer questions on matter not open to the examining party, and he is not bound to answer all questions whether properly put or not. *Semble*. That where a co-defendant is an adverse party, the right to discover would exist. THE KING *v.* THE ONTARIO POWER COMPANY AND THE TORONTO POWER COMPANY.....329

EMINENT DOMAIN

See EXPROPRIATION.

ESTOPPEL

See CONTRACTS.

EVIDENCE

See COLLISION.
" SHIPPING
See CONTRACTS.

Burden of Proof—Regulations—Arts. 17, 21 and 27—Duty in emergency—Preliminary act. Held, 1. Where two sailing vessels are meeting and it is the duty of one, under the rules, to avoid the other, but who fails to do so, it then becomes the duty of the other to so manœuvre as to avoid the consequences of such breach of the rules, if possible to do so by exercise of ordinary care and prudence. 2. That the precise point when such manœuvring should begin by the vessel with right of way cannot be arbitrarily fixed and some latitude must be allowed the master in determining this. 3. The burden of proof in such a case is on the offending vessel. 4. The object of a preliminary act is to obtain a statement, *recenti facto* of the circumstances, to prevent parties shaping their case to meet the one put forward by the other at trial. That the following answer is entirely too vague and indefinite, to wit: "That the plaintiff, or those on board the 'Florrie V.', improperly neglected to take in due time proper measures for avoiding a collision with the 'Emilien Burke' and did not make any attempt to avoid same. She was not kept in her proper course, as required by law, and those on board the said vessel violated the rules and regulations as to her proper navigation." LE BLANC *v.* THE "EMILIEN BURKE".....24

2. *Narrow channel—Evidence, weighing of—Crew on alert—Witnesses on shore—Preliminary Act force of—Conflicting evidence—Liability in common fault. 4-5 Geo. 5, ch. 18, sec. 2, (Can).—Personal equation—Reasonable course.* A collision took place in a narrow channel, of the St. John River, between 800 and 1,000 feet in width, at mid-day, in clear weather. The "*Premier*" was on her starboard side of the channel, when in answer to one blast signal from the "*Purdy*", meaning that she would keep to her starboard side, the "*Premier*" answered one blast that she would keep to starboard, and the collision took place on the "*Premier*" side of the channel. The "*Purdy*" was also for a time on her starboard side, and signalled she would so continue, but at a given moment without notice or reason she sheered across the channel towards the "*Premier*," when the collision happened. The "*Purdy*" had only one man at the wheel, when it was admitted she was hard to steer, and two should have been on duty on the occasion in question. *Held* (varying the judgment appealed from), that the "*Purdy*" was navigated improperly and contrary to the signals given by her and was guilty of negligence and solely to blame for the accident. 2. That the evidence of disinterested witnesses standing on the shore in such a position of advantage as to have a full and clear view of both ships and thus follow the courses and manoeuvres of the vessels, will be accepted in preference to that of a passenger in the saloon of one of the ships with

4. *Prospective value—Second invasion—Elements of damage—Benefits due to expropriation—Quantum of damages. Held,* That property used as a farm in proximity to a village, but with only a prospect that at some distant date, some parts might be sold as building lots, will be classed as farming lands, and be valued as such, and not as building lots; such prospect being too distant. *The King v. Trudel,* (1914), 49 Can. S. C. R. 501; 19 D. L. R. 270, referred to. 2. That in a case of second expropriation where the property has already adjusted itself to conditions created by the first invasion, the owner of property is entitled to other and different damages due to such second expropriation. *The King v. Lynch* 19 Can. Ex. C. R. 198 referred to. 3. That where by second expropriation a railway takes a strip of land for a railway yard on each side of the right of way first taken, the extra inconvenience and delay due to longer crossing and to the more extensive use of the property as a yard, are elements of the damages to be allowed him. 4. That the benefits accruing to the remaining part of the property by the expropriation and the use to be made of the land taken, will be taken into consideration in fixing the quantum of damages due an owner. His Majesty the King *v.* Alphéda Fontaine and Others.....188

5. *Second invasion—Market value—Potential value—Compulsory taking. Held,* that the owner of property over which one railway has already obtained a right of way is entitled to other and different damages from a second company expropriating land alongside the first, the property having already adjusted itself to the first invasion. (*Re Billings & Canadian Northern Ont. Ry. Co.* (1913), 15 D. L. R. 918; 16 Can. Ry. Cas. 375; 29 O. L. R. 608, referred to). 2. That the owner of a property is entitled to get the market value of his land, estimated at the best use it can be put to, and taking all its prospective capabilities into consideration. 3. In valuing lands, subdivided into lots, situate in a small community, where a number of other subdivisions are on the market, the probability that the owner will have to wait years to sell, and then only receive the price in instalments, instead of as in expropriation, are matters to be considered. 4. That in case of compulsory taking, the usual ten per cent. is allowed. The King *v.* Margaret Lynch...198

6. *Government Railway Act, 1881, section 18—Vesting of property in the Crown—Title to land—Statute of Limitations—Disability—Absence from province—Gentleman's residence—Interest. Held,* under the provisions of section 18 of the *Government Railway Act,* 1881, the land taken for the purpose of a railway became absolutely vested in the Crown, not only by the deposit of the plan and description in the registry office, but also by the actual possession assumed by the Crown. 2. That the title to the land does not become vested in the Crown by the mere survey of the land, as provided by section 5 of the *Government Railway Act.* 3. That legislation with respect to the limitation of actions is a matter of procedure and is therefore retroactive in its operation. 4. Article 33 of the *Exchequer Court Act* provides that laws relating to prescription, between subject and subject in force in any province shall apply to proceedings against the Crown and the present claim coming under section 9, ch. 167 of R.S.N.S. 1900, is only prescribed by 20 years. Possession was taken by the Crown not later than November 28th, 1887, date on which the road was completed, but the owner was under disability, owing to his absence from the province, until the year 1909, date of his first visit to the province after the expropriation of the property. The petition was filed in 1916. *Held,*—That, under the circumstances, the claim was not barred by the *Statute of Limitations.* 5. The fact that the land taken was part of a gentleman's country residence takes it out of the class of farm lands and gives it special value which is an element to be considered by the Court. 6. That where the expropriating party has done all that could reasonably be expected of it to settle for the land taken, and that the delay in prosecuting the recovery of the claim may justly have been construed as an abandonment of the same, interest will only be allowed from the date on which the Petition of Right was filed in Court. Margaret Howard, John W. Sterling and James Carson *v.* The King.....271

7. *Title to land—Alienation of public domain—Power of King of France under French regime—Compensation—Inflated value.* The original title to the land in question dates back to the 10th March, 1626, under the hand of the Duc de Vantadour, on behalf of the King of France, which was subsequently revoked under an Edict of the King of France with all previous concessions with the object of transferring such titles to La Compagnie de la Nouvelle France. This Company, however, on January 15th, 1637, conveyed the same lands to the suppliant's representatives, which conveyance was on the 12th January, 1652, confirmed by a title by M. de Lauzon, then Governor of New France; and finally these primordial three grants were further confirmed on May 12th, 1678, by Louis XIV., King of France granting total *amortissement* of the said land. This title was attacked on the ground that it was beyond the right of a King of France to alienate the public domain under the *Ordonnance de Moulins* of February, 1566. *Held,* That the power to alienate at that time, when the laws of the Princes were supreme, resided in the King of France who could in derogation of the said *Ordonnance de Moulins* thus alienate the public domain. 2. While the sale of property in the immediate neighborhood of the property expropriated is cogent evidence of the market value thereof, yet if such neighboring property has changed hands under special circumstances and at prices that are not established as market-prices such transfer of property cannot be taken as a criterion of the value of the property. 3. Where the value placed upon a property by certain witnesses is inflated in view of the uses to which it can be applied, but only upon the expenditure of very large sums of money which would make it unprofitable and impracticable as a commercial proposition, such valuation is not a proper basis of the market value of the property. Pierre Edouard Emile Belanger *v.* The King....423

GOVERNMENT RAILWAY

Collision — Negligence — Passenger — Trespasser —The Exchequer Court Act, Sec. 20. A heavy snow storm having occurred at B., a Government railway station, a work-train, consisting of an engine, snow-plow and flat car, was engaged for some three or four days in cleaning up the right of way in and about B. The plow was equipped with automatic brakes as well as hand brakes all of which were in good order. During the time that the work-train was so engaged, it was duly inspected, and no defects found in the equipment. On the day of the accident in question while this train was on the siding to allow an accommodation train to pass, it was specially examined as to its condition, and found satisfactory. Some fifteen minutes after the accommodation train had departed from B., the work-train pulled out and followed the accommodation train. For some unexplained reason, while on a portion of the track it had passed over several times before that day without accident, the plow and flat car became uncoupled on a steep grade, and ran away, crashing into the rear car of a passenger train at B. The suppliant, who had boarded the train at this station with a view to seeing a